The Senate

Economics Legislation Committee

Provisions of the Trade Practices Legislation Amendment Bill (No. 1) 2005

March 2005

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CHAPTER 1

TRADE PRACTICES LEGISLATION AMENDMENT BILL (NO. 1) 2005

Introduction

1.1 The Trade Practices Legislation Amendment Bill (No. 1) 2005 was introduced into the House of Representatives on 17 February 2005 by the Parliamentary Secretary to the Treasurer, the Hon. Chris Pearce, MP. The bill was passed by the House on 10 March 2005.

1.2 On 9 March 2005, on the recommendation of the Senate Selection of Bills Committee, the Senate referred the provisions of the bill to the Economics Legislation Committee for inquiry and report by 15 March 2005.

Background to the bill

1.3 In his second reading speech, the Parliamentary Secretary to the Treasurer described the bill as the government's response to the recommendations of the Dawson Review[1] and commented that:

> The overall theme of the Dawson review is that the competition provisions should protect the competitive process, rather than particular competitors. The government strongly supports this view of the act, and has accepted the vast majority of the Dawson review recommendations.[2]

1.4 The bill contains 12 schedules dealing with a range of matters. The supporting document attached to the Selection of Bills Committee's report referred to the merger authorisation amendments in Schedule 1 of the bill as warranting further investigation.

1.5 Matters raised during the Economics Legislation Committee's inquiry into the bill also concerned the collective bargaining provisions in Schedule 3 and the third-line forcing and exclusive dealing provisions in Schedule 7.

1.6 The Committee examines the provisions in these three schedules in this report.

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1 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003 at http://tpareview.treasury.gov.au/content/report.asp.

2 *House Hansard*, 17 February 2005, p. 9.

Conduct of the inquiry

1.7 The Committee held a public hearing on Monday, 14 March 2005 at which representatives from the Department of the Treasury (Treasury) and the Australian Competition and Consumer Commission (ACCC) gave evidence.

1.8 The Committee received one submission[3] and this is tabled with this report together with the transcript of the Committee's hearing and documents presented to the Committee at the hearing.

1.9 The Committee thanks Treasury, the ACCC and others for their participation in the inquiry.

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3 *Submission* 1 (CFMEU). A copy of this submission is at Appendix 2 of this report.

CHAPTER 2

SCHEDULE 1—MERGER CLEARANCES AND AUTHORISATIONS

Introduction

2.1 Subsection 50(1) of the *Trade Practices Act 1974* (TPA) provides that:

> 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.[1]

2.2 In practice, section 50 is aimed at mergers that have potential anti-competitive effects.

2.3 Under current provisions, corporations proposing to acquire shares or assets in another body corporate in circumstances likely to invoke the prohibition against mergers have two options available to them if they want some protection from the section 50 prohibition. They can approach the Australian Competition and Consumer Commission (ACCC) for an informal clearance or otherwise seek a formal authorisation. Either option will provide some protection against the section 50 prohibition.

2.4 Under the informal arrangements, the ACCC approves the proposed merger if it considers it would not have the effect, or likely effect, of substantially lessening competition (the competition test). The ACCC may attach conditions to informal approvals and does so particularly where they are considered necessary to counter any possible anti-competitive effects of the proposed merger.[2] Although an ACCC approval protects the applicant corporation from a section 50 challenge by the ACCC, it offers no protection against court challenges by third parties.

2.5 On 18 October 2004, the ACCC implemented '*Guideline for Informal Merger Review*' which supplements existing merger assessment guidelines. The new guideline applies to non-confidential merger approval applications. It adopts eight guiding principles for best practice merger review as set out in the International Competition

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1 Subsection 50(2) of the TPA prohibits a 'person' from acquiring shares or assets of a corporation subject to the competition test.

2 Under section 87B of the Act, the ACCC may require an undertaking 'in connection with a matter in relation to which the Commission has a power or function' under the Act.

Network[3] guidelines which, among other things, promote greater transparency and accountability in merger reviews. Under the ACCC's new guideline, information on non-confidential merger proposals is published on the ACCC's web site. The guideline also provides an outline of issues which the ACCC considers when assessing informal applications.

2.6 Where a proposed merger is unlikely to pass the competition test used in informal approval applications, a corporation may apply for ACCC authorisation. The test applicable for authorisations is whether, given that the merger may substantially lessen competition in a market, the benefit to the public would be such that the merger should be permitted.

2.7 Once the ACCC issues an authorisation, the applicant corporation is protected against ACCC action under section 50. However, it is not protected against third party challenges. The TPA provides for a review on the merits of the ACCC's determination in the Australian Competition Tribunal (the Tribunal).[4]

2.8 A third party seeking to challenge the legal validity of the ACCC's determinations made under informal approval or authorisation processes may initiate proceedings in the Federal Court.

The provisions in Schedule 1

2.9 The provisions in Schedule 1 of the bill will not change the tests regarding mergers but will give corporations two additional means by which they might qualify for immunity against the prohibition in section 50 of the TPA:

(a) merger clearances; and

(b) merger authorisations.

2.10 Schedule 1 will not preclude recourse to the existing informal approval process.

Merger clearances

2.11 The Explanatory Memorandum says of the merger clearance provisions:

> The Dawson review found that the Commission's current informal system is relatively speedy and inexpensive—the voluntary nature of the process minimises the possibility of unduly delaying mergers that are unlikely to be in breach of section 50. The Dawson review considered that the weaknesses of the system are evident in the absence of an effective mechanism for review and the absence of reasons for the Commission's decisions.

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3 The ICN was set up to formulate best practice guidelines for competition law enforcement. It has over 80 member countries including Australia.

4 The applicant corporation may also apply to the Tribunal for a review on the merits of the ACCC's decision.

> [Schedule 1] creates a voluntary formal mergers process that will operate in parallel with the existing informal system, retaining the advantages of the informal system, and overcoming some of its disadvantages.[5]

2.12 More specifically, the provisions regarding merger clearances will:

- provide for the ACCC to grant a clearance to a person to acquire shares in the capital of a body corporate and to acquire assets of another person, provided that the ACCC is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition;
- allow the ACCC to grant a clearance subject to conditions;
- protect an acquisition from legal challenge by the ACCC or third parties under section 50 of the TPA but only if all requirements of the clearance are observed;
- require the ACCC to make a determination on a clearance application by the end of 40 business days from the time when application was made to the ACCC (although there is provision for this time limit to be extended with the applicant's consent);
- deem the ACCC to have refused to grant a clearance if it has not made a determination within the statutory time limit;
- allow the ACCC, when considering a merger clearance application, to consult with whatever persons it considers appropriate;
- require the ACCC to advise the applicant in writing of its determination on a merger clearance application and its reasons for the determination;
- give applicants—but not third parties—disputing an ACCC clearance determination the right of review by the Tribunal on the merits of the ACCC's determination.

Matters of interest

2.13 The provisions of the bill are based on the Trade Practices Legislation Amendment Bill 2004 which lapsed as a result of the 2004 election. According to the Parliamentary Library's review of the 2004 bill, several submissions to the Dawson Review proposed that a wider public benefits/efficiency test should apply not only to authorisations but also to the ACCC's assessment of informal approvals.[6]

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5 Trade Practices Legislation Amendment Bill (No. 1) 2005, Explanatory Memorandum, the Parliament of the Commonwealth of Australia, House of Representatives, p. 22, paras. 5.48-5.49.

6 Parliamentary Library Bills Digest No. 23, 2004-05, *Trade Practices Legislation Amendment Bill 2004.*

2.14 The Dawson Review considered a broader test would only add complexity to informal reviews and thus impede their swiftness. The clearance procedure recommended by the Dawson Review and adopted in the bill consequently does not change the test in section 50.

Merger authorisations

2.15 The Explanatory Memorandum says of the bill's merger authorisation provisions:

> The Dawson Review identified that dissatisfaction with the merger authorisation process is largely attributed to concerns about the time taken by the Commission to reach a decision and the risk of third party intervention by way of appeal to the Tribunal. These factors were considered, by the Dawson Review, to make the merger authorisation process commercially unrealistic for many merger proposals. The merger authorisation process will be made more attractive to business through these amendments by making it more timely and reducing the uncertainty involved.
>
> …[Schedule 1] removes the power of the Commission to assess merger authorisation applications and creates a new process whereby the Tribunal will have the power to directly assess merger authorisation applications. [Schedule 1] provides that applications should be considered by the Tribunal within a statutory time limit and that there be no merits review of decisions made by the Tribunal. Third party interests will be considered as part of the Tribunal's assessment rather than through an appeal process.[7]

2.16 The merger authorisation test has not changed except that it is the Tribunal—not the ACCC—which makes the determination in the first instance regarding whether the acquisition would result, or would be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

2.17 Other features of the provisions are that:

- a merger authorisation will only give an acquisition immunity from section 50 if all conditions of the authorisation are met;
- the Tribunal must notify the ACCC within three business days of receiving an authorisation application and provide it with a copy of the application;
- the Tribunal must publish the authorisation application and invite submissions regarding the application;
- the Tribunal may consult with whatever persons it considers appropriate when considering an authorisation application;

7 Trade Practices Legislation Amendment Bill (No. 1) 2005, Explanatory Memorandum, the Parliament of the Commonwealth of Australia, House of Representatives, p. 2, paras. 1.6-1.7.

- the ACCC must provide information and other assistance to the Tribunal as the Tribunal requires;
- the Tribunal must make a determination on an application within three months of an application being given to the Tribunal, but this time limit can be extended by another three months if the Tribunal considers that the complexity or other special circumstances warrant this;
- if the Tribunal does not make a determination within the statutory time period, it will be deemed to have refused to grant the authorisation;
- the Tribunal may grant an authorisation subject to conditions which may include requirements that certain undertakings are given to the ACCC under section 87B; and
- there is no right of review on the merits from the Tribunal's determination.

Matters of interest

2.18 At the Committee's hearing, representatives from the ACCC discussed the changes to be introduced by the bill. They indicated that there is no guarantee that the informal process will remain in place once a formal process is adopted. They emphasised, however, that they would use every effort to maintain the informal process. The ACCC advised that it was working with the Tribunal to determine their respective roles in relation to merger authorisations.[8]

2.19 The Committee invited the President of the Australian Competition Tribunal, Justice Goldberg, to respond to comments made in evidence by Mr Graeme Samuel of the ACCC concerning the roles of the ACCC and the Australian Competition Tribunal. Justice Goldberg's response is included in this report at Appendix 1.

2.20 With regard to the new division of responsibility between the Tribunal and the ACCC for merger and non-merger authorisations respectively, the ACCC suggested there could be practical difficulties, particularly when an applicant was seeking authorisations under sections 45 and 50. The ACCC said that in instances such as these and where the parties agreed, the ACCC had been able to adopt a streamlined non-merger authorisation approach to consider the issues. The ACCC questioned whether it was appropriate to split processes dealing with public benefit issues.

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8 The Department of the Treasury tabled a memorandum, dated 10 March 2005, from the President of the Tribunal regarding this matter. A copy of this memorandum is tabled with this report.

CHAPTER 3

SCHEDULE 3—COLLECTIVE BARGAINING

Introduction

3.1 The *Trade Practices Act 1974* (TPA) places significant constraints on the extent to which a corporation may engage in collective bargaining.

3.2 Section 45 prohibits a corporation from making a contract or arrangement, or arriving at an understanding that contains an exclusionary provision or has the purpose, or would have or be likely to have the effect, of substantially lessening competition. Under section 45A, price-fixing arrangements are deemed to have the purpose, or effect or likely effect, of substantially lessening competition and thus contravene the prohibition in section 45.[1]

3.3 Section 51(2)(a) allows trade unions to engage in collective bargaining regarding remuneration, conditions of employment, hours of work or working conditions of employees.

3.4 The ACCC may authorise collective bargaining under sections 88 and 90 where it is satisfied that the public benefit of the bargaining arrangement will outweigh any potential anti-competitive effect.

3.5 The Dawson Review considered that collective bargaining by small businesses could have a pro-competitive effect and said in this regard that:

> In some industries a number of competing small businesses must bargain with big business. Individually, the small businesses may lack bargaining power and so may seek to join together and bargain collectively, thereby exercising a degree of countervailing power to that of big business. Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.[2]

3.6 The Review recommended that a more streamlined, faster and simpler notification process should be available to small businesses to enable them to engage in collective bargaining with big businesses where this would generate a public

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1 A limited exception is made in section 45A for joint ventures and joint buying groups although the competition test in section 45 still applies.

2 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 115 at http://tpareview.treasury.gov.au/content/report.asp.

benefit. The proposed process, modelled on Section 93 notifications for exclusive dealing, has been adopted by Schedule 3.[3]

The provisions in Schedule 3

3.7 Schedule 3 will enable a corporation that has, or proposes to engage in, collective bargaining to file a notice with the ACCC setting out particulars of its conduct. Provided the ACCC does not object, the applicant will be protected from the collective bargaining prohibitions in the Act for three years upon the expiry of 14 days (or such longer period as is prescribed in the regulations[4]) from the notification date.

3.8 Specific requirements of notification are that:

- a corporation must have made, or proposes to make, an initial contract with another person or persons (the contracting parties) about the supply or acquisition of goods or services to or from one other person (the target); and
- the corporation reasonably expects to make one or more contracts with the target and reasonably expects the cumulative price for the contract or contracts not to exceed $3,000,000 (or such other amount as is prescribed in the regulations) in any 12 month period.

3.9 The bill provides that 'the regulations may prescribe different amounts in relation to different industries'.[5] The Hon. Chris Pearce MP, Parliamentary Secretary to the Treasurer, said of this provision that:

> The Government considers there would be a range of businesses suitable for a higher limit. These could include motor vehicle dealers, petrol station owners and some agricultural businesses. The Minister for Small Business and Tourism is developing proposals for the government's consideration in respect of these regulations.[6]

3.10 Notification does not cover the contracting parties for transactions involving more than one target:

> If parties wish to seek immunity for a variety of similar arrangements with a variety of targets, the authorisation process with its longer time frame is the appropriate process.[7]

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3 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 121 at http://tpareview.treasury.gov.au/content/report.asp.

4 The government proposes to set a 28-day period by regulation with a further assessment at the end of 12 months.

5 Proposed subsection 93AB(4).

6 Second Reading Speech, *House Hansard*, 17 February 2005, p. 9.

7 Trade Practices Legislation Amendment Bill (No. 1) 2005, Explanatory Memorandum, the Parliament of the Commonwealth of Australia, House of Representatives, p. 60, para. 5.268.

3.11 The bill provides for a third party, such as an industry body, to give notice on behalf of the small businesses contracting with the target.[8] The Explanatory Memorandum says in this regard that:

> This might be relevant, for example, to rural producers who may wish to bargain through the structure provided by a single industry body.[9]

3.12 However, the bill expressly provides that a notice is not a valid notice if given on behalf of a corporation by 'a trade union; an officer of a trade union; or a person acting on the direction of a trade union'.[10]

3.13 The ACCC may issue an objection notice to a notification at any time but must follow certain procedural requirements. To succeed with an objection, the onus is on the ACCC to establish that the collective bargaining arrangement does not, or is unlikely to, generate a public benefit or, alternatively, that the public benefit will not outweigh the detriment arising from the arrangement.[11]

Matters of interest

3.14 At the Committee's hearing, questions were raised about the extent to which Treasury had consulted on the bill. Treasury representatives advised that the original bill had been through formal consultation processes with the States and Territories under the relevant COAG agreement. Treasury also advised that the States and Territories had been notified of minor amendments inserted in the bill in the form reintroduced following the lapse of the original bill because of the 2004 election. No objections had been received. There had also been some consultation with the ACCC and the Law Council of Australia.

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8 Proposed subsection 93AB(7).

9 Trade Practices Legislation Amendment Bill (No. 1) 2005, Explanatory Memorandum, the Parliament of the Commonwealth of Australia, House of Representatives, p. 60, para. 5.268.

10 Proposed subsection 93AB(9).

11 For guidelines on the ACCC's approach, see 'Authorising and notifying collective bargaining'. at http://www.commission.gov.au/content/index.phtml/itemId/522935/fromItemId/314462.

CHAPTER 4

SCHEDULE 7—THIRD LINE FORCING

Introduction

4.1 ‘Third line forcing’ is the practice of offering for sale one good or service, or a discount on a good or service, on condition that another good or service is purchased from a third person. A financial institution, for example, may offer a loan at a discounted interest rate on condition that the borrower purchase insurance from a nominated supplier.

4.2 Unlike exclusive dealing which is only prohibited under the Act[1] if it has the purpose, or has or is likely to have the effect, of substantially lessening competition, third line forcing is prohibited per se.[2] The ACCC may, however, grant an authorisation to a party or parties to engage in conduct that would otherwise be a breach of the third line forcing provisions.[3] The ACCC may not grant such an authorisation unless satisfied that there are or are likely to be such benefits to the public that the authorisation should be given.[4]

4.3 There is also a notification process through which a corporation may gain protection from ACCC enforcement action 14 days after notifying the ACCC of third line forcing that it is engaging in or proposes to engage in. The ACCC may object to the conduct where it takes the view that there is no discernible public benefit that would justify the conduct. In such an instance, the notification would be withdrawn and the prohibition reinstated.[5]

4.4 The Dawson Review noted that the ACCC opposes very few of the hundreds of third line forcing notifications it receives annually.[6]

4.5 The Review did not consider that third line forcing would inevitably have anti-competitive effects and saw benefits and pro-competitive outcomes 'where efficiencies in production make it cheaper to produce and sell two or more products in

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1 Section 47 of the Act.

2 Subsections 47(6) and (7) of the Act.

3 Subsection 88(8) of the Act.

4 Subsection 90(8) of the Act.

5 Section 93 of the Act.

6 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 129 at http://tpareview.treasury.gov.au/content/report.asp.

combination'.[7] The Review also referred to 'shopper docket' arrangements such as those between supermarkets and petrol outlets which enabled consumers to buy petrol at a discount. These arrangements were seen as 'not necessarily anti-competitive'.[8]

4.6 Third line forcing was considered to have anti-competitive effects 'where corporations are able to exploit their market power in one market to distort an unrelated market, perhaps facilitating anti-competitive price discrimination or barriers to entry'.[9] The Review provided the following example:

> …the ACCC removed the immunity sought through notification by a retirement country club that proposed to sell retirement units subject to a condition that purchasers, on resale of their units, engage a real estate agent nominated by the club. The ACCC determined that there was insufficient public benefit to justify removing the choice of real estate agent from a vendor in a competitive real estate market.[10]

4.7 The Review concluded that the current per se prohibition of third line forcing was not necessarily in consumers' interests or anti-competitive. It recommended the repeal of the per se prohibition and its substitution with a prohibition based on a substantial lessening of competition test.[11]

4.8 Additionally, the Review recommended that related companies should be treated as a single entity for the purposes of section 47. In this regard, it commented that:

> Concern was also expressed [in submissions] that the prohibition of third line forcing is anomalous in that it applies where the third person (the supplier of the forced product) is a corporation related to the initial supplier of the goods or services, but does not apply where the initial supplier and the supplier of the forced product are the one corporate entity. It was

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7 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 128 at http://tpareview.treasury.gov.au/content/report.asp.

8 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, pp. 128-9 at http://tpareview.treasury.gov.au/content/report.asp.

9 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, pp 128-9 at http://tpareview.treasury.gov.au/content/report.asp.

10 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 129 at http://tpareview.treasury.gov.au/content/report.asp.

11 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 131 at http://tpareview.treasury.gov.au/content/report.asp.

submitted that, consistently with other provisions of Part IV, related corporations should be treated as one business unit.[12]

The provisions in Schedule 7

4.9 The bill implements both recommendations of the Dawson Review.

4.10 The per se prohibition of third line forcing will be removed and the conduct subject to a competition test before it constitutes a breach of the Act. The bill will also treat related corporations as a single entity.

Matters of interest

4.11 At the Committee's hearing, the ACCC indicated that third line forcing covered a very wide range of conduct which could be beneficial for consumers or pernicious in its effect on competition and the public interest. The ACCC indicated that enforcement would be more difficult with the removal of the per se prohibition.

Australian Competition Tribunal – response to ACCC comments

4.12 The Committee invited the President of the Australian Competition Tribunal, Justice Goldberg, to respond to comments made in evidence by Mr Graeme Samuel of the ACCC concerning the roles of the ACCC and the Australian Competition Tribunal. Justice Goldberg's response is included in this report at Appendix A.

Recommendation 1

4.13 **The Committee recommends that the Trade Practices Legislation Amendment Bill (No. 1) 2005 be passed.**

Senator George Brandis
Chair

12 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 125 at http://tpareview.treasury.gov.au/content/report.asp.

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.[1]

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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1 *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.[2]

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.[3]

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.

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

AUSTRALIAN DEMOCRATS

MINORITY REPORT

The Australian Democrats have repeatedly indicated our strong concerns that the *Trade Practices Act 1974* has some weaknesses and deficiencies, particularly in the protection of small business from unfair competition.

We have an unease that some aspects of the Trade Practices Legislation Amendment Bill (No. 1) 2005 will not improve the operation of the Trade Practices Act in ensuring fair competition within the Australian economy. We will introduce appropriate amendments and deal with the Bill when it is before the Senate.

Senator Andrew Murray
Australian Democrats Senator for Western Australia

AUSTRALIAN COMPETITION TRIBUNAL

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15 March 2005

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Senator George Brandis
Chair
Senate Economics Legislation Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Brandis

RE: REFERENCE: TRADE PRACTICES LEGISLATION AMENDMENT BILL (No 1) 2005

I have had the opportunity of reading today a proof copy of the Hansard transcript of evidence before the Senate Economics Legislation Committee yesterday, 14 March 2005.

To assist the Committee in its inquiry, I would like to make the following observations.

The Australian Competition and Consumer Commission ("the Commission") will have a critical and substantive role in relation to the merger authorisation jurisdiction proposed for the Tribunal in the bill. It will be for the Commission to consider, evaluate and report on the material filed with the Tribunal in support of an application for merger authorisation. It is anticipated there will be a preliminary report by the Commission to the Tribunal at an early stage after the application for authorisation is filed in relation to the material filed in support of the application. It is also anticipated that if further material is filed by the applicant the Commission will have the opportunity to file any material in response which it considers appropriate for consideration by the Tribunal. The Commission will also have the opportunity to file submissions in relation to the relevant facts and applicable law and will also have the opportunity to call witnesses and cross-examine any witnesses called in support of the application.

The proposed merger authorisation procedure will not work unless the Commission undertakes all these activities. The Tribunal does not have the staff or resources necessary to undertake the

research, the collection of evidence and any inquiries required as a result of a merger application being made.

It is not correct to say (at page 14) that "there is no obligation on the part of the tribunal to consider or to entertain any of the material put by the ACCC to the tribunal". Any material put by the Commission to the Tribunal, indeed, any material put by any party appearing before the Tribunal must be considered or entertained by the Tribunal in the sense that it must look at it. The Tribunal may after such consideration and examination of the material accept the material or it may reject it, or it may seek further information in relation to it. However, the Tribunal cannot turn a blind eye to the fact that a party or the Commission wishes to put material before it.

It is true that the processes for the merger authorisation jurisdiction have yet to be established. Nevertheless, whatever those processes may be does not diminish the fact that the Commission will have a significant and important role to play in the placing of material before the Tribunal and the critical analysis of material before the Tribunal.

It is no part of the process or procedure of the Tribunal to curtail, either severely or otherwise, the role of the Commission before the Tribunal. In any given case the Tribunal may not accept a submission from the Commission but that is a matter common to any tribunal or court.

The point was made yesterday by the Commission to the Committee (at page 16) that:

> *"But I suppose the crucial issue which the chairman is flagging is that we will no longer be making a decision on the basis of the material we gather. ... I think the issue is fundamentally that, as I say, under the bill, we are no longer a decision maker with the Tribunal reviewing our decision and the material we use to reach that decision".*

Under the present scheme, the Tribunal is the final decision-maker. Under the proposed scheme the Tribunal continues to be the final decision-maker. There is essentially no difference in the ultimate process. If, as occurs under the present scheme, the Commission decides not to grant an authorisation in respect of a merger, an application can be made to the Tribunal to "review" the Commission's decision. In other words, the Tribunal is the decision-maker.

Under the proposed scheme, if the Commission opposes a merger and the merger is pursued, the Tribunal will deal with the application for authorisation in a similar way to the way in which it presently deals with a refusal to grant an authorisation by the Commission.

Yours sincerely

ALAN H GOLDBERG
<u>President</u>

cc: Mr Peter Hallahan
Secretary to the Senate Economics Legislation Committee

APPENDIX 2

SUBMISSIONS RECEIVED

Submission Number	Submittor
1	Construction Forestry Mining Energy Union (CFMEU)

APPENDIX 3

PUBLIC HEARINGS AND WITNESSES

Monday, 14 March 2005 – Canberra

ANTICH, Mr Robert, General Manager, Policy and Liaison Branch
Australian Competition and Consumer Commission

CASSIDY, Mr Brian, Chief Executive Officer
Australian Competition and Consumer Commission

CONTI, Ms Marie, Analyst, Competition and Consumer Division
Department of the Treasury

DOLMAN, Ms Marianne, Analyst, Competition and Consumer Division
Department of the Treasury

GREGSON, Mr Scott Peter, Acting General Manager, Adjudication Branch
Australian Competition and Consumer Commission

GRIMWADE, Mr Timothy Paul, General Manager, Mergers and Asset Sales Branch
Australian Competition and Consumer Commission

JOHNSTON, Mr Gary, Manager, Competition Policy Framework Unit
Competition and Consumer Policy Division
Department of the Treasury

LYON, Mr Christopher Graeme, Analyst, Competition Policy Framework Unit
Competition and Consumer Policy Division
Department of the Treasury

PATCH, Mrs Sandra Louise, Specialist Adviser, Competition Policy Framework Unit,
Competition and Consumer Policy Division
Department of the Treasury

SAMUEL, Mr Graeme, Chairman
Australian Competition and Consumer Commission