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## Trade Practices Legislation Amendment Bill 2004

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# Trade Practices Legislation Amendment Bill 2004

**Date Introduced:** 24 June 2004

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** The items in Schedule 1 to 9 commence on a day to be fixed by Proclamation, except that items 23 and 24 do not commence at all if item 10 of Schedule 1 to the *Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004* commences before the Proclamation, and items 18 and 19 of Schedule 9 commence the later of:

- the Proclamation referred to above and
- the commencement of Part 3 of Schedule 4 to the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004,

but do not commence at all if Part 3 of that Act does not commence. Schedules 10 and 11 commence the day after the Act receives Royal Assent. Schedule 12 (a technical amendment) commences 1 March 2004.

## Purpose

The main purpose of the Bill is to amend the *Trade Practices Act 1974* (the Act) consistent with the government's response to the 'Review of the competition provisions of the *Trade Practices Act*'<sup>1</sup> (the Dawson Review).

## Background

On 9 May 2002 Treasurer Peter Costello announced that, pursuant to the Government's policy commitment made during the 2001 federal election, Sir Daryl Dawson, together with Jillian Segal and Curt Rendall, had been appointed to a Committee of Inquiry into the competition provisions of the Trade Practices Act 1974, and their administration.<sup>2</sup> The Treasurer cited, as the need for the inquiry, public debate about various provisions of the Act, and particularly 'the mergers regime, the misuse of market power provision and the authorisation process'.<sup>3</sup> The terms of reference, according to the Treasurer:

enable the Inquiry to consider whether the Act provides sufficient recognition for globalisation factors and the ability of Australian companies to compete globally. At the same time, the review will consider whether the Act is sufficiently flexible to respond to the transitional needs of certain industries, and specifically those in rural

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and regional Australia. The review will also consider whether the Act provides an appropriate balance of power between small and large businesses.<sup>4</sup>

The Dawson Review reported on 31 January 2003. The report contained several recommendations which form the basis of this Bill.

## Mergers

The term ‘merger’ denotes a ‘combination of two or more firms or corporations, usually such that one is absorbed into the structure of the other(s) and loses its separate identity’.<sup>5</sup> The Act does not anywhere refer to mergers as such, rather, the Act provides that a corporation must not *acquire* shares in a body corporate, or any other assets, where such acquisitions would have the effect, or likely effect, of substantially lessening competition in a market.<sup>6</sup>

The regulation and administration of mergers present some peculiar difficulties. According to the Australian Competition and Consumer Commission (the Commission), the primary purpose of the Act in this regard is to ‘promote the economic policy which underpins the restrictive trade practices provisions by ensuring that parties cannot avoid restrictions on anti-competitive behaviour through merger.’<sup>7</sup> Mergers can, however, promote economic efficiency in a variety of ways. Inefficient and unprofitable businesses, for instance, might benefit from being acquired by more efficient corporations with more effective managers and in that way add value to the economy. The difficulty is in locating the balance between these competing considerations. That is the more problematic because effective merger activity often requires swift action and decisiveness – and these are hindered by time consuming and sometimes uncertain legal and administrative processes. It was in this context that the Government asked the Dawson Review to consider whether the provisions of the Act:

- inappropriately impede the ability of Australian industry to compete locally and internationally
- provide an appropriate balance of power between competing businesses, and in particular businesses competing or dealing with businesses that have larger market concentration or power, and
- promote competitive trading which benefits consumers in terms of services and price.<sup>8</sup>

## The current merger clearance and authorisation process

A practice has developed whereby corporations proposing to acquire shares or assets in circumstances where there is a question as to whether the acquisition would or be likely to substantially lessen competition, usually approach the Commission informally, for its views on the proposed acquisition. In such cases the Commission consults with third

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parties potentially affected by the merger and considers whether there is likely to be a substantial lessening of competition in the market as a result of the proposed acquisition. The Commission may approve the proposed acquisition with or without undertakings made by the proposed acquirer pursuant to section 87B of the Act. If it approves an acquisition, it remains possible for a third party to take action in the Federal Court seeking remedies for breach of the merger provisions.

A second option for those proposing mergers is to seek authorisation. Where acquisitions of shares or assets *would* substantially lessen competition in a market, or be likely to have that effect, it is possible, nevertheless, for the Commission to grant an authorisation for the acquisition.<sup>9</sup> The Commission must not grant authorisation in such cases unless satisfied that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.<sup>10</sup> A person dissatisfied by a determination of the Commission in relation to an authorisation may apply to the Australian Competition Tribunal (the Tribunal) for a review.<sup>11</sup>

The result is that a corporation proposing to acquire shares or assets in circumstances where there is a question as to whether the acquisition would or be likely to substantially lessen competition currently has three options: to proceed without approaching the Commission and run the risk of action in the Federal Court by the Commission or a third party; to approach the Commission for informal approval; and, where there would be a substantial lessening of competition, to apply to the Commission for an authorisation on the ground that the public benefit warrants the conclusion that the acquisition should be allowed to take place.

### **Position of significant interest groups**

#### Australian Competition and Consumer Commission

The Commission is, in respect of the merger aspects of the Act, in favour of the status quo. This is because the Commission is ‘unaware of any compelling arguments supporting a major overhaul of the current arrangements.’<sup>12</sup> The Commission does, however, express its receptivity to ‘any constructive suggestions for improvements to its processes in the administration of s. 50’.<sup>13</sup> Graeme Samuel, current chairman of the Commission, argues that the existing informal process coupled with a ‘safety valve’ available by way of appeal to the Federal Court, works well and that the formal process proposed by the Dawson Review could endanger the process.<sup>14</sup> The intention appears to be, however, to retain the existing informal process alongside the formal, so that those applying for clearance may choose their preferred mode of application.

#### National champions

A variety of submissions for substantial changes to the merger provisions of the Trade Practices Act were made to the Dawson Committee. According to one point of view, in a

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relatively small economy such as Australia's, large firms need to be easily able to merge so that they can grow to a size necessary to enable them to compete in international markets. This has become known as the 'national champions' argument. One of the proponents of the national champions argument is the Business Council of Australia. The Council is concerned that 'over-rigorous controls may deny firms in small, fragmented economies the economies of scale and scope needed to successfully compete and grow in increasingly global markets'.<sup>15</sup> The Commission responds to the national champions debate by referring to studies that conclude that vigorous domestic competition is a better generator of internationally competitive firms. In a review of the situation in Japan, Sakariko and Porter concluded that Japanese competitiveness was 'associated with home market competition, not collusion, cartels, or government intervention that stabilises it'.<sup>16</sup> In another study by Porter, he found 'few "national champions", or firms with virtually unrivalled domestic positions, that were internationally competitive. Instead, most were uncompetitive though often heavily subsidised and protected'.<sup>17</sup>

#### Public benefits test for clearances

The Business Council, in submissions to the Dawson Inquiry, proposed that section 50 of the Act be amended so as to allow the Commission to consider, at the informal approval stage, not only whether the proposed acquisition would or be likely to substantially lessen competition, but also the question of whether the acquisition should nevertheless be allowed because the public benefit outweighs the lessening of competition. This would not change the substantial effect of the Act, because acquisitions can already be authorised on the basis of public benefit, but presently there are two separate processes—one for clearance under section 50 (where the question is whether the acquisition would substantially lessen competition) and another for authorisation (where the question is whether the public benefit outweighs the lessening of competition). The Business Council proposal is to allow both of those matters to be considered simultaneously. The proposal would also require that efficiency gains be taken into account in considering whether a proposed acquisition is likely to lead to a substantial lessening of competition. According to the Council, the existing processes do not provide 'a commercially realistic opportunity for merger proponents to argue the broader public benefit or efficiency merits of their proposals'.<sup>18</sup>

The concern expressed by the Business Council comes about as a result of what it sees as a cumbersome, expensive, time consuming, and uncertain process for authorisation under the existing provisions. If the Commission considers a proposed acquisition under the current provisions, and opposes it, then, unless it wishes to risk legal action against it, the proponent of the acquisition must apply to the Commission for authorisation on the grounds of public benefit. The Commission's decision can then be appealed by interested parties, to the Tribunal, which can then take some time to decide the matter.

A similar proposal to that of the Business Council was put forward by the Law Council of Australia (the Law Council). The Law Council considered that, subject to acceptance of its

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recommendation for the establishment of an independent review tribunal to review the Commission's merger clearance decisions:

a "public benefits" qualification for mergers should be incorporated directly into s50 to supplement the current authorisation process. Public benefits, including increased exports, increased substitution of domestic products with foreign goods, increased international competitiveness of Australian industry and efficiency gains, could then be considered in the informal clearance process, used in relation to all mergers considered by the Commission since 1999, and also by the review panel if necessary.<sup>19</sup>

As discussed below, the Dawson Review rejected these proposals and hence they are not included in the Bill.

#### 'Creeping' acquisitions

Concern has been expressed in some quarters about whether the existing merger provisions adequately provide for circumstances in which companies substantially lessen competition not by single large acquisitions but by incremental smaller acquisitions over a period of time. The Australian Democrats submitted to the Dawson Inquiry that:

To accompany good existing powers restraining anti-competitive mergers and acquisitions, the Commission needs powers to address existing dominant monopolies, including an undue concentration of market power achieved by small 'creeping' acquisitions. The Commission or the Courts should be given a power to order divestiture where an ownership situation has the effect of materially limiting or substantially lessening competition.<sup>20</sup>

In a similar vein, the Australian Labor Party has expressed the intention to introduce new provisions to 'combat creeping and cumulative acquisitions.'<sup>21</sup> The Dawson Committee made no specific recommendation in relation to this issue, but the matter was revisited recently by the Senate Economics References Committee. The Committee considered that:

creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. The clear consensus of evidence before the Committee supported this view, and no substantial arguments were raised to oppose it. Current merger law does not effectively address this issue. Section 50 of the Act should be strengthened to take account of the cumulative effects of acquisitions which over time may substantially lessen competition.<sup>22</sup>

The problem is, however, a difficult one, as acknowledged by former Commission Chairman, Professor Allan Fels. In giving evidence to the Economics References Committee, Professor Fels said:

no-one would want to disguise the difficulties of dealing with creeping acquisitions. The issue comes up most often in regard to big acquisitions of retail stores one by one. It is more the case that, while we feel uneasy about this part of the Act, we have

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not been able to come up with a proposal that would in our view solve our concerns. When a big retailer, say, is going to buy a very large number of outlets at a given time, if they bunch them all together it is possible for us to look at them as a whole and say, 'This could substantially lessen competition.' But most often acquisitions are made in small parcels or one at a time, so each case as you look at it does not seem to amount to a substantial lessening of competition. It has to be a substantial lessening of competition in a market.<sup>23</sup>

The Economics References Committee also recommended that the Act be amended to allow for divestiture in cases of creeping acquisitions.<sup>24</sup> Government members of the Committee expressed disagreement with these recommendations, arguing that the existing provisions of the Act, especially section 50, were adequate to deal with the problem.<sup>25</sup>

### **Dawson Committee recommendations**

#### **Public benefits test for clearances**

The Dawson Review rejected the proposals to broaden the test at the first or clearance stage because of what it saw as 'important practical difficulties' that would arise.<sup>26</sup> To introduce an efficiency test at the clearance stage would, according to the review, 'require more extensive economic analysis to be undertaken by the Commission', taking more time and requiring access to more information.<sup>27</sup> Those circumstances, the review concluded, would be likely to extend the time taken for the clearance process, impeding the swiftness of the current process.<sup>28</sup> The Review considered that:

If a broader efficiency test were to be introduced into section 50, there would need to be a more structured approach to its application than that offered by a clearance process. Such an approach is offered by the authorisation process and, in the course of that process, efficiencies may be considered in the context of public benefit.<sup>29</sup>

Another concern regarding the proposal to broaden section 50 is that expressed by the Australian Consumers' Association—that, to take into account the 'public benefit' of a merger at the informal clearance level would take the question out of the public view and hence reduce public accountability in the decision making process.<sup>30</sup>

#### **Provision of reasons for Commission decisions on clearances**

The Dawson Committee considered that the informal merger clearance option would be improved and the potential for error reduced, if the Commission were required to provide adequate reasons for its decisions relating to mergers. The Committee thought that this would allow a better understanding of the decisions and reduce uncertainty about the way in which the process operates.<sup>31</sup> The Government agreed with the Committee<sup>32</sup> and accordingly the Bill contains a provision requiring written reasons to be given by the Commission.<sup>33</sup>

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### New formal clearance process

In other recommendations with which the Government agreed, the Dawson Committee outlined a re-structuring of the processes by which acquisitions may be approved or authorised. Firstly, the Committee considered that a formal clearance process should be established alongside the existing informal process. The Committee thought these to be essential features of such a new process:

- the Commission could grant a *binding* clearance on the basis that the acquisition did not contravene section 50 of the Trade Practices Act
- the information required for applications should be sufficient for the Commission to make a reasoned assessment yet not be onerous for applicants
- the Commission should be required to decide applications within 40 days, and
- only applicants (not third parties) should have the right to a review of the Commission's decision on the merits, by the Tribunal. Applications for such review should be made within 14 days of the Commission's decision and should be decided upon by the Tribunal within 30 days.<sup>34</sup>

One issue that arises out of this is whether it is equitable that the right of review on the merits is open only to those applying for merger clearance. Other parties that might be affected—competitors in the same market, for example—will have no right to a review on the merits.

### Authorisations

Secondly, the Committee considered that applications for authorisation of acquisitions—that is, authorisations for acquisitions which are anti-competitive but should be allowed in the public interest—should be made directly to the Tribunal and not firstly to the Commission as is the present requirement. The Committee considered that the features of this process should be:

- applications should be considered within 3 months
- there should be no review on the merits of the Tribunal's decision, and
- the Tribunal should have the power to remit applications to the Commission if it considers that the application requires a decision solely on competition issues under section 50 rather than a decision on public benefit.<sup>35</sup>

Professor Allan Fels, former chairman of the Commission, has criticised the proposals to allow applications for authorisation to go directly to the Tribunal, and to have no right of appeal from the Tribunal.<sup>36</sup> Professor Fels points out that, unlike the Commission, the

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Tribunal is not an investigative body, and hence mechanical difficulties arise regarding the role the Commission is to play. That role is to be a very broad one under the Bill, which provides that, for the purposes of determining applications for authorisation, the Tribunal may require the Commission to give such information, make such reports and provide any other assistance the Tribunal requires.<sup>37</sup> The Tribunal is, according to Professor Fels, an unfriendly forum for the consumer and small business, usually knee deep in lawyers.<sup>38</sup> Fels thinks that the proposal to allow no appeal from the Tribunal is undesirable. It should be noted, however, that the proposal is to allow no appeal *on the merits*, there is no prohibition on judicial review. The effect is that Tribunal decisions may still be challenged in the courts on the grounds that they are legally flawed.

These recommendations have been broadly followed in the drafting of the Bill. Details of the proposals can be found in the Main Provisions section below.

## Collective bargaining

According to the Commission, collective bargaining:

[R]efers to an arrangement whereby multiple competitors in an industry come together, either directly or through the appointment of a representative to negotiate on their behalf, to negotiate the terms and conditions of supply with another, usually larger, business.<sup>39</sup>

Under the current regime, collective bargaining is not permitted unless it is authorised by the Commission. Crucial to the authorisation process is the net public benefit test,<sup>40</sup> allowing the Commission to authorise conduct that otherwise would breach the Act. Where collective bargaining is authorised, the applicants receive a broad immunity from any challenge brought against them on the basis that their conduct would constitute anti-competitive behaviour.

## The Dawson recommendations

As the authorisation process is very thorough and time consuming, the Dawson Committee recommended introducing a procedure akin to the notification process already available under the Act for exclusive dealing. However, the Dawson Committee made it clear that this notification process should exist as an alternative to the currently available authorisation process.<sup>41</sup> The individual recommendations made by the Dawson Committee were as follows:

### Recommendations

7.1 – A notification process should be introduced, along the lines of the process contained in section 93 of the Act, for collective bargaining by small businesses (including co-operatives that meet the definition of small business) dealing with large business.

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7.2 – A transaction value approach should be adopted to provide a definition of small business. Initially the amount of transactions should be set at \$3 million but be variable by the Minister by regulation.

7.3 – A period of 14 days should be required to elapse before a notification takes effect.

7.4 – Provision should be made for third parties to make a collective bargaining notification on behalf of a group of small businesses.<sup>42</sup>

### Reactions to the proposed changes

Even before the proposed changes were announced, Professor Evan Jones noted in February 2004 that:

Collective bargaining with powerful market players deserves entrenchment in the Act as a legitimate competitive (rather than anti-competitive) procedure.<sup>43</sup>

After the introduction of the Bill, the proposed changes to the Act generally received a positive reception in the print media. It was noted that the proposed changes were one of the highest priorities on the ‘wish list’ of small business and that the reform was ‘worthwhile [because it included] enhanced powers for small business to collectively negotiate with the big companies.’<sup>44</sup>

The Commission is rather cautious about the proposed amendments. One commentator reported that the Commission ‘[R]ecently warned that collective bargaining can give small businesses as much power as unions...’<sup>45</sup>

The Labor Party generally supports the collective bargaining changes. In a [joint policy statement](#), the Leader of the Opposition, Mark Latham and Gavan O’Connor, Shadow Minister for Agriculture and Fisheries, stated that the Labor Party:

[W]ill give dairy farmers more clout in the marketplace by strengthening the Trade Practices Act in key areas, including: Support for collective bargaining – improving the market power of dairy farmers.<sup>46</sup>

The *Australian Financial Review* reported a similar push by senior party ministers of the National Party.

### Joint ventures: exclusionary and price fixing provisions

The Bill proposes amendments that will allow joint ventures, in certain circumstances, to contravene the exclusionary and price fixing provisions under the Act.

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## Exclusionary provisions

A provision in a contract, arrangement or understanding that, for example, limits or restricts the supply or acquisition of goods or services, is considered to be an exclusionary provision under section 4D of the Act. The making of, or giving effect to, such a provision is prohibited *per se* under section 45 of the Act because such conduct is considered to be:

[D]etrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.<sup>47</sup>

The Dawson Committee noted, however, that the prohibitions of exclusionary provisions under the Act have such a broad application that ‘co-operative arrangements that may not have a detrimental impact on competition’<sup>48</sup> still contravene the Act. Accordingly, it was recommended that:

8.1 – The Act should be amended so that it is a defence in proceedings based upon the prohibition of an exclusionary provision to prove that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition.

8.2 – The Act should also be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates, to a competitor or competitors, actual or potential, of one or more of the parties to the exclusionary provision.

However, the Government considers it to be inappropriate to introduce a broad defence to exclusionary provisions as suggested by the Dawson Committee. The Government noted in the [Explanatory Memorandum](#) that it:

[N]ow considers that the recommended defence would be too broad as it would prevent unambiguously anti-competitive conduct from being prohibited *per se* in appropriate cases.<sup>49</sup>

As a result, the Government limited the defence to joint ventures as defined in section 4J of the Act. The [Explanatory Memorandum](#) provides several examples of joint ventures that potentially would be able to benefit from this amendment, including:

[J]oint ventures directed to research and development, the production of goods, the supply of services and marketing. The section 4J definition of joint ventures will also encompass other arrangements, for example, the enforcement by clubs of the rules of a professional sporting competition.<sup>50</sup>

## Price fixing provisions

A contract, arrangement or understanding that aims, for example, at fixing, agreeing or controlling a price is considered to be a price fixing provision which is always deemed to be anti-competitive under section 45A of the Act. Under subsection 45A(2), joint ventures are, under certain circumstances, exempted from the application of this deeming provision.

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Indeed, the Dawson Committee observed that joint ventures can be pro-competitive arrangements between two or more entities and that the benefits that can be derived from a joint venture may outweigh the detrimental effects it may have on competition.<sup>51</sup> Accordingly, the Dawson Committee recommended that:

9.1 – The Act should be amended by substituting for the current exemption from section 45A(1) provided by section 45A(2), a provision that section 45A(1) does not apply to a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition.

Following this recommendation, the Government proposes amendments that will make it a defence to an action under section 45A if a joint venture can prove that the ‘conduct in question did not have the purpose, effect or likely effect of substantially lessening the competition’.<sup>52</sup>

### Third line forcing

‘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. An example is where a financial institution lends money only on condition that the lender purchases an insurance policy from a particular insurer.<sup>53</sup> Third line forcing is currently prohibited by the Act.<sup>54</sup> The Commission 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.<sup>55</sup> The Commission cannot grant such an authorisation unless satisfied that there are or are likely to be benefits to the public justifying the grant.<sup>56</sup>

There is also a notification process, through which a corporation may gain some protection for its conduct by notifying the Commission of third line forcing that it is engaging in or proposes to engage in. The Commission may object to the conduct where it takes the view that there is no discernible public benefit that would justify the conduct. Where the Commission does not object the corporation’s conduct is not subject to action for breach of the third line forcing prohibition.<sup>57</sup>

In 1976, the Swanson Committee said that third line forcing was considered in virtually all cases to have an anti-competitive effect.<sup>58</sup> According to the Dawson Committee, however, ‘third line forcing may be beneficial and pro-competitive where efficiencies in production make it cheaper to produce and sell two or more products in combination’.<sup>59</sup> Third line forcing is anti-competitive, says the Committee, ‘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’.<sup>60</sup> The Committee recommended that, consistent with the other exclusive dealing provisions in the Act, third line forcing be

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made subject to a substantial lessening of competition test. That approach has been adopted in the Bill.

## Dual Listed Companies

Dual listed companies have been described by the Reserve Bank of Australia (Reserve Bank) as effectively being mergers between two companies in which the companies agree to combine their operations and cash flows, but retain separate shareholder registries and identities<sup>61</sup> so that there are two corporations, one listed on a domestic exchange and the other listed on a foreign exchange.

The Reserve Bank has noted that there are several ways in which a dual listed company may be established. One form of dual listed company involves the two companies transferring their assets to one or more jointly owned subsidiary holding companies. The holding company then passes dividends back to the main companies who then distribute the dividends to their shareholders. Another form of dual listed company arrangement involves a contractual arrangement to share the cash flows of each other's assets.<sup>62</sup>

There are three dual listed companies in Australia; Rio Tinto Limited (formed in 1995), BHP Billiton Limited (formed in 2001) and Brambles Industries Limited (formed in 2001). The dual listing for these companies is between the Australian Stock Exchange and the London Stock Exchange. These companies are set up contractually to share cash flows from each others assets.<sup>63</sup>

Currently, dual listed companies are not expressly dealt with under the Act. The Dawson Review noted that dual listed companies are not regarded as a single economic entity for the purposes of section 45 of the Act.<sup>64</sup> Hence an agreement entered into by the two companies to form and run a dual listed company may be in breach of section 45.<sup>65</sup> This may present barriers to forming a dual listed company. The Dawson Review also noted that transactions between the different legal entities in a dual listed company are 'analogous to transactions between related bodies corporate in a corporate group'.<sup>66</sup> Currently related bodies corporate are exempt from section 45 and 47 (other than the third line forcing provisions) of the Act.<sup>67</sup> Given the similarities between dual listed companies and related bodies corporate, the Dawson Review recommended that intra-party transactions between dual listed companies should be treated in the same way under the Act as related party transactions within a corporate group.

The Government accepted the Dawson Review's recommendations in relation to dual listed companies<sup>68</sup> and these changes are implemented in **schedule 6** of the Bill.

As stated above, currently there are only three dual listed companies in Australia and so it would appear that these changes will have, at this stage, a limited impact.

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## Australian Competition and Consumer Commission's enforcement powers

### Section 155 and search and seizure powers

#### Subsection 155(1)

Currently, the Commission has broad sweeping investigatory powers under section 155 of the Act.<sup>69</sup> Subsection 155(1) gives the Commission power to issue a notice requiring a person to furnish information, produce documents or appear before the Commission to give evidence. The Commission may only use the power set out in this sub-section where the Commission, Chairperson or Deputy Chairperson has reason to believe that the person named in the notice is capable of assisting the Commission in its investigations into a matter that may be a contravention of the Act. It is an offence if the person refuses or fails to comply with the notice.<sup>70</sup>

#### Subsection 155(2)

Subsection 155(2) also gives the Commission power to authorise a member of staff to enter premises, inspect documents and make copies or take extracts of those documents where there is a suspected contravention of the Act. The Commission does not need to obtain a search warrant under subsection 155(2), however, it may only use this power if it has reason to believe that the person who possesses or controls the documents may have contravened the Act. It is an offence if the occupier or person in charge of the premises does not provide the authorised officer with reasonable facilities and assistance in the exercise of their powers under subsection 155(2).<sup>71</sup>

The Commission has stated that it uses the power in sub-section 155(2) in only limited circumstances. According to the Dawson Review the Commission states that they will only use subsection 155(2) where it believes that documents may be destroyed, where documents are held over a number of sites and it is necessary to act simultaneously or where there has been a failure to comply with a voluntary request or a section 155(1) notice.<sup>72</sup>

The Dawson Review examined the frequency of use of section 155(2) of the Act. In 1998-99, no authorities were given under subsection 155(2). In 2001-2002, eight authorities were given under subsection 155(2). In total, the Commission has used its powers under subsection 155(2) on only 16 occasions.<sup>73</sup>

Despite the apparently limited use of subsection 155(2), there are concerns about the operation of the provision. The Dawson Review noted that there is no independent assessment of the Commission's use of the provision.<sup>74</sup> Whilst there is no suggestion that the Commission has in any way abused this power, the Dawson Review noted that the provision as it currently stands, does provide scope for criticism, in particular that it could be used by the Commission unreasonably and without impartiality.<sup>75</sup>

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Subsection 155(2) is also in conflict with principles set out in the Government's document; *A guide to framing Commonwealth offences, civil penalties and enforcement powers* (the Guide).<sup>76</sup> In relation to entry, search and seizure the Guide stated that legislation should only authorise entry to premises under warrant or by consent or in a limited range of other circumstances such as where it is a condition of a licence.

Following a consideration of the issues regarding the use of section 155, the Dawson Review made a number of recommendations including the following:

13.3 Section 155(2) of the Act, which provides for the Commission to enter premises and inspect documents, should be amended to:

13.3.1 require the Commission to seek a warrant from a Federal Court Judge or Magistrate for the exercise of these powers: and

13.3.2 provide the Commission with the power to search for and seize information....

### Legal professional privilege

In civil and criminal cases, confidential communications passing between a client and their legal adviser are not required to be given in evidence or disclosed by the client, and without the clients consent, must not be given in evidence or disclosed by the legal adviser if the communication related to the giving of legal advice or was in regard to litigation taking place or being contemplated by the client.<sup>77</sup> The Dawson Review examined the use of legal professional privilege in relation to section 155 of the Act. It recommended that legal professional privilege should be specifically preserved under the Act so that the Commission does not have power under section 155 to compel the production of documents and the provision of information covered by legal professional privilege.<sup>78</sup> This is in accordance with the High Court's decision in *ACCC v Daniels Corporation International*.<sup>79</sup>

The Government accepted the Dawson Review's recommendations regarding changes to Commission enforcement provisions and these changes are implemented in **schedule 8** of the Bill.<sup>80</sup>

## Penalties

### Civil penalties

The Bill proposes to increase the penalties that apply when there has been a contravention of Part IV of the Act. Currently the Act provides that in relation to a corporation, the maximum penalty that can be imposed is \$10 million for each act or omission that breaches Part IV of the Act.<sup>81</sup> In relation to individuals, the Act provides that the

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maximum penalty that may be imposed is \$500 000 for each act or omission in breach of the Act.<sup>82</sup>

The Dawson Review noted that other jurisdictions enable Courts to deter illegal behaviour by imposing maximum penalties on corporations that are either a multiple of the gain from the prohibited conduct or a proportion of the corporation's turnover. The Dawson Review recommended that:

The maximum pecuniary penalty for corporations be raised to be the greater of \$10 million or three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the turnover of the body corporate and all of its interconnected bodies corporate.<sup>83</sup>

The proposal to increase the penalty regime for contraventions of Part IV of the Act has not been criticised in the media.

The Government accepted the Dawson Review recommendation and it is implemented in **part 1, schedule 9** of the Bill.

The Dawson Review considered that criminal penalties should also be imposed for a contravention of Part IV of the Act, however it considered that further work needed to be done before making recommendations on this matter.

### **Disqualification from managing a corporation**

The Dawson Review considered that a further way of deterring contraventions of Part IV would be to give a court the power to exclude an individual implicated in a contravention from being a director of a corporation or being involved in its management.<sup>84</sup> The Government accepted the Dawson Review recommendation which is implemented in **part 2, schedule 9** of the Bill.

### **Indemnities**

The Dawson Review recommended that corporations be prohibited from indemnifying, directly or indirectly, officers, employees or agents against the imposition of a pecuniary penalty upon an officer, employee or agent.

The Government accepted the Dawson Review's recommendations regarding changes to indemnity arrangements and implements this recommendation in **part 3 of schedule 9** of the Bill. In addition to the Dawson recommendation, the Bill also amends the Act to provide that a body corporate cannot indemnify officers, employees or agents for their legal costs.<sup>85</sup>

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The Business Law Section of the Law Council of Australia has expressed opposition to the proposed indemnity amendments and suggests that indemnity provisions similar to those contained within section 199A of the *Corporations Act 2001* would be more preferable.<sup>86</sup>

The Bill provides that a body corporate is not permitted to indemnify a person for a civil penalty imposed on that person in their capacity as an officer, employee or agent of the body corporate, for a contravention of Part IV of the Act. The Business Law Section argues that the provision does not distinguish between senior company employees (such as company directors) and junior employees, nor does it consider the circumstances surrounding the contravention, that is, whether the contravention was serious or whether it was in good faith. The provision does not achieve the best compliance outcome by failing to distinguish between the different forms of contravention.

The Business Law Section of the Law Council suggests that guidance on a more workable model may be gained from section 199A of the *Corporations Act 2001*. Section 199A only prohibits the indemnification of a person in the role of an ‘officer or auditor’ of the company. It is also noteworthy that persons will only be liable for a civil penalty under the *Corporations Act 2001* if there has been a serious contravention of the relevant provisions.

Under the Bill, a body corporate will not be permitted to pay for the legal costs that officers, employees or agents of the company incur in defending or resisting the Part IV proceedings giving rise to their liability. The Business Law Section of the Law Council argues that there is no good policy reason to deny assistance for legal costs, specifically when conduct has been undertaken in good faith. It argues that this is particularly the case where employees may lack the financial capacity to defend themselves and which is very relevant in section 46 and section 47 cases which commonly involve large scale and expensive litigation. The Business Law Section suggests that guidance on a more appropriate provision can be gained by referring to section 199A of the *Corporations Act 2001*. It also suggests that if indemnities of legal costs are to be prohibited as proposed, then, as in section 199A of the *Corporations Act 2001*, a footnote should be added to the Act noting that loans can be made to employees against legal costs without infringing the prohibition.

## Main Provisions

### Schedule 1 – Merger clearances and authorisations

**Items 1 and 2** repeal the old, and insert a new, definition of ‘authorisation’ into section 4 to reflect the fact that the Tribunal and not the Commission will now have responsibility for authorisation decisions.

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**Item 3** inserts a definition of ‘clearance’ into section 4, reflecting the new informal procedure whereby clearance can be granted by the Commission or, on review, by the Tribunal.

**Item 7** adds to section 37 a requirement that the Tribunal be constituted by different members when considering applications for authorisation on the one hand and applications for review of merger clearance decisions on the other.

**Items 9 and 10** add notes to section 50 clarifying that the subsections will not be breached where clearances or authorisations are granted.

**Item 17** inserts into the Act section 80AC which provides for the granting, on application by the Commission, of injunctions to prevent mergers where a clearance or an authorisation has been granted on the basis on false information.

**Item 18** inserts section 81A which provides for divestiture in cases where mergers proceeded pursuant to clearances or authorisations granted on the basis of false information.

**Item 20** inserts a new subparagraph (1A) into section 87B which allows the Commission to accept a written undertaking for the purpose of merger clearances and authorisations.

**Item 21** repeals the existing, and inserts a new, heading to Part VII of the Act. In effect, the new title is the same as the old but for the inclusion of the term ‘clearances’ in the new.

**Item 25** repeals the existing, and inserts a new, subsection 88(9), effectively removing the jurisdiction of the Commission to grant authorisations for mergers under section 50.

**Item 27** inserts at the end of Part VII a Division III headed ‘Merger clearances and authorisations’. The new division gives effect to the merger and clearance regime recommended by the Dawson Committee. The Bill summarises the effect of the merger clearance provisions as follows:

- the Commission grants them [**proposed section 95AC**];
- it must make its decision whether to grant within 40 business days (which can be extended if the applicant agrees), and if it doesn’t, the application is taken to be refused [**proposed section 95AO**];
- it cannot grant the clearance unless it is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in a market [**proposed section 95AN**];

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- if it refuses to grant a clearance, or grants a clearance subject to conditions, then the person who applied for the clearance may apply to the Tribunal under Division 3 of Part IX for review of the Commission's decision [**proposed section 111**].

The Bill summarises the effect of the merger authorisation process as:

- the Tribunal grants them [**proposed section 95AT**];
- it must make its decision whether to grant within 3 months (which can be extended to 6 months in special circumstances), and if it doesn't, the application is taken to be refused [**proposed section 95AZI**];
- it cannot grant the authorisation unless it is satisfied that the acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place [**proposed section 95AZH**].

**Subdivision D** contains a prohibition on providing false or misleading information to the Commission or Tribunal.

**Items 28 to 36** amend Part IX to separate the process of review by the Tribunal of Commission decisions on merger clearances from the process for review on other Commission decisions. The new process for review of Commission decisions on merger clearances is set out in Division 3 to be added to Part IX. Under Division 3 a person dissatisfied with a Commission decision on a merger clearance may apply within a time to be determined by regulation to the Tribunal for a review. The Tribunal must make the decision within 30 days of receiving the application unless it determines that, by reason of complexity or other special circumstance, the matter cannot be properly dealt with during that time, in which case the time is extended by 60 days.

**Item 41** inserts section 157A which is a disclosure provision, essentially requiring the Tribunal to provide a corporation applying for authorisation, copies of all relevant documents in the Tribunal's possession.

## Schedule 2—Non-merger authorisations

**Items 1 to 14** provide for a number of essentially procedural amendments to the provisions of the Act relating to authorisations other than merger authorisations.

## Schedule 3—Collective Bargaining

**Schedule 3** of the Bill provides for the introduction of the notification process for collective bargaining as currently available for exclusive dealing.

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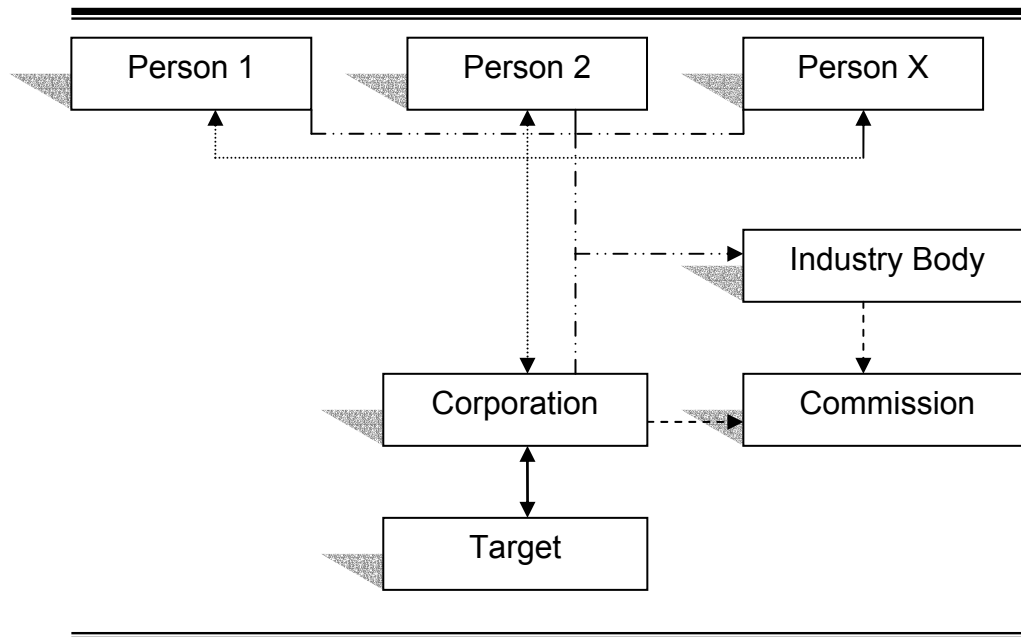
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**The collective bargaining notice (proposed section 93AB)**

**Item 9** introduces **proposed Subdivision B–Collective bargaining** into the Act. Central to the notification process for collective bargaining will be **proposed section 93AB**. According to this provision, a corporation intending to enter into, or give effect to, a collective bargaining arrangement which potentially breaches section 45(2)(a) or (b) of the Act, may give the Commission a collective bargaining notice (‘notice’) pursuant to proposed **subsection 93AB(1)**. Such a notice must include the particulars of the arrangements.

Schematically, **proposed section 93AB** operates as follows:

**Operation of proposed section 93AB**



Initial contract ( <b>subsection 93AB(2)</b> )	.....
Contract with target ( <b>subsection 93AB(3)</b> )	_____
Third party notice ( <b>subsection 93AB(7)</b> )	- - - - -
Collective bargaining notice ( <b>subsection 93AB(1) or (7)</b> )	- - - - -

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The three prerequisites (proposed subsections 93AB(2) to (4))

Before a corporation may give a notice under **proposed section 93AB**, it must fulfil three prerequisites. Essentially, a corporation must:

1. have entered, or propose to enter, into an initial contract with one or more persons (**proposed subsection 93AB(2)**)

The corporation can enter into such initial contracts with persons as defined in section 22 of the *Acts Interpretation Act 1901*. This definition is broad and includes bodies corporate and individuals and

2. reasonably expect to make one or more contracts with one target (**proposed subsection 93AB(3)**)

Under this proposed subsection, a notice may only relate to contractual relations with one target at any time. Where it is envisaged to contract with multiple targets, individual notices in relation to each target are required. This limitation is also reflected in **proposed subsections 93AB(7)**, which will be dealt with further below.

3. reasonably expect not to enter into a contract or contracts exceeding an annual transaction value of \$3 million (**proposed subsection 93AB(4)**)

The annual transaction value of \$3 million reflects Recommendation 7.2 of the Dawson Committee. To provide flexibility to this threshold, the **proposed subsection 93AB(4)** provides that regulations will prescribe different amounts for different industries. The Minister for Small Business and Tourism, the Hon. Mr Joe Hockey explained that this would be necessary, for example, for those industries that are high in turnovers but low in profit margins. He stated that:

What is included in the legislation [...] is a provision to, by regulation, exempt certain businesses and provide their own caps. For example, petrol stations have high turnover and low profit. Their turnover obviously may well exceed \$3 million per annum. For example, if it is an independent petrol station that is distributing Caltex petroleum their turnover may be \$15 million or \$30 million per annum. I will be consulting widely with small business groups to identify those that are in that position so that the true meaning of the provisions of collective bargaining are kept to in the form of new regulations.<sup>87</sup>

Whilst the use of regulations adds flexibility, it also means that the issue of which threshold will be applicable to each industry is in the realm of the executive, subject only to limited scrutiny by Parliament.<sup>88</sup> It seems to be at least conceivable that the threshold could be modified to accommodate the needs of medium or large businesses to the extent that the intent of the provision, the strengthening of small business, is ultimately compromised. Note also in this regard that the notice procedure is in fact

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open to any, including medium and large, businesses as long as the transaction volume remains under the respective threshold.

#### The timing requirement

The timing of the reasonable expectation referred to in **proposed subsections 93AB(3) and (4)** is dealt with under **proposed subsection 93AB(5)**. It provides that a corporation is required to be able to demonstrate this reasonable expectation:

- at the time of giving the collective bargaining notice (**proposed paragraph 93AB(5)(a)**) and
- where an initial contract has been entered into pursuant to **proposed subsection 93AB(2)** – at the time the contract has been made (**proposed paragraph 93AB(5)(b)**).

#### Third party notice: the role of industry bodies

Under **proposed subsection 93AB(7)**, a third party such as an industry body will be able to give a notice on behalf of parties to the initial contract. The [Explanatory Memorandum](#) noted that this ‘might be relevant, for example, to rural producers who may wish to bargain through the structure provided by a single industry body.’<sup>89</sup> This provision equates to Recommendation 7.4 of the Dawson Committee, however, it is limited to the extent that the industry body may only give such notice where the parties to the initial contract would have been able to give the notice on their own behalf.

#### Further relevant proposed provisions

The notification process will exist parallel to the authorisation process. To avoid that parties to an unsuccessful authorisation application will subsequently be able to utilise the notification process, **proposed subsection 93AB(8)** stipulates that a corporation may not give a notice where an application for an authorisation was unsuccessful and the Commission’s determination became effective against the applicant.

A notice that does not conform with the form requirements set out in **proposed subsection 93AB(6)** will be deemed to be an invalid notice under **proposed subsection 93AB(9)**. After receiving such notice, the Commission will be under the obligation to inform the person who gave that notice, informing the notifier of the invalidity and the reasons why the notice did not comply with the form requirements within 5 days.

#### **When a collective bargaining notice comes into force and ceases to be in force (proposed section 93AD)**

The Bill expressly stipulates the circumstances in which a notice will enter into force, will not enter into force and ceases to be in force.

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The notice comes into force (proposed subsection 93AD(1))

The notice given to the Commission will come into force either:

- fourteen days, or such longer period as prescribed in the regulations, after the corporation gave a notice to the Commission (**proposed paragraph 93AD(1)(a)**).

The fourteen day period corresponds with recommendation 7.3 of the Dawson Committee. However, the government decided to allow for more flexibility and proposed to be able to provide for longer periods to be stipulated in the regulations. The [Explanatory Memorandum](#) foreshadows that:

It is proposed that the period referred to in subsection 93AD(1) be set by regulation at 28 days. It is envisaged that this will give the Commission sufficient time to consider notification applications in the initial stages of the amendment, but the time period will be monitored and reviewed after 12 months with a preference for 14 days.<sup>90</sup>

- with the making of a decision not to issue an objection notice.

Where the Commission has issued a conference notice in reply to a notice within the period specified in **proposed paragraph 93AD(1)(a)**, but subsequently decides not to issue an objection notice, the notice comes into force with this decision (**proposed paragraph 93AD(1)(b)**). The issues conference and objection notice are dealt with further below.

It has been noted that the Commission may not have the opportunity to:

[P]lay an proactive role in shaping the nature of the authorised conduct. For example, the authorisation process allows the Commission to spell out the conduct allowed, and to impose conditions to protect competition.

It is not clear that the Commission will be able to play this role in the new process, and it is given no express power to impose conditions on notifications. This may result in the formation of more expansive and effective collective bargaining groups.<sup>91</sup>

Indeed, **proposed paragraph 93AD(1)** would provide that the notice will come into force automatically after the expiry of a certain period of time or a specific decision made by the Commission. In addition, the proposed amendments lack a provision empowering the Commission, for example, to impose conditions in relation to the notice.

The proposed scheme is black and white: either the proposed conduct is unobjectionable and the notice comes into force or the Commission will issue an objection notice, bringing the proposed arrangement to a grinding halt. In light of this, it may be preferable for some parties to seek approval under the authorisation scheme which is more flexible because it allows the Commission to impose conditions.

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The notice does not come into force (proposed subsection 93AD(2))

**Proposed subsection 93AD(2)** stipulates two situations in which a notice will not come into force:

- the notice is withdrawn, or taken to be withdrawn before it would come into force under **proposed subsection 93AD(1)**.

The withdrawal of notices is regulated in **proposed section 93AE**, distinguishing between the corporation's withdrawal and a deemed withdrawal. The latter occurs where prior, or subsequent, to giving the notice a corporation made an application for authorisation. Where this application was either successful or dismissed, and the dismissal became effective against the applicant, the notice is taken to be withdrawn.

- the Commission gives the corporation a conference notice pursuant to **proposed subsection 93AC(4)** and subsequently gives the corporation an objection notice pursuant to **proposed subsection 93AC(1)** or **(2)**. The issues conference and objection notice are dealt with further below.

The notice ceases to be in force (proposed subsection 93AD(3))

**Proposed subsection 93AD(3)** stipulates three separate circumstances in which a notice may cease to be in force including either of the following:

- the notice was withdrawn, or is taken to have been withdrawn, **proposed paragraph 93AD(3)(a)**

The reader is referred to the explanations above in relation to the provision dealing with the withdrawal of notices, **proposed section 93AE**.

- the Commission gives an objection notice in relation to the notice, **proposed paragraph 93AD(3)(b)**

Where the Commission gives an objection notice, the notice ceases to be in force on the 31<sup>st</sup> day after the 'relevant day' as specified in **proposed subsection 93AD(4)**, or on a later day if so specified by the Commission. The issue objection notice is dealt with further below.

- at the end of a three year period, beginning with the day the notice was given **proposed paragraph 93AD(3)(a)**

**Proposed paragraph 93AD(3)(a)** stipulates the actual life span of a successful notice which passed without objection and came into force, for example by virtue of **proposed paragraph 93AD(1)(a)**. The Dawson Committee expressly agreed with a maximum life span of three years as submitted by the Commission.<sup>92</sup> There is no

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provision in the Bill that would enable the corporation to apply for the notice's extension; rather it will have to give a fresh notice, triggering the procedure proposed under the Bill anew.

### **The objection notice (proposed section 93AC)**

By making an objection notice, the Commission can prevent a notice from coming into force.

Saying no: the objection notice (proposed subsections 93AC(1) and (2))

Where the Commission holds the opinion that the notice should not come into force to immunise the proposed violation of the Act, the Commission has the power to give an objection notice under **proposed section 93AC**. The Bill contemplates two situations in which an objection notice may be given:

- in relation to per se provisions – exclusionary conduct as prescribed in subparagraphs 45(2)(a)(i) or (b)(i) of the Act or contracts containing price fixing provisions pursuant to subsection 45A(1) of the Act and
- in relation to competition provisions – substantially lessening competition as prescribed in subparagraphs 45(2)(a)(ii) or (b)(ii) and (ii) of the Act.

For both circumstances, the Bill proposes to introduce the 'net public benefit test', according to which the Commission must be satisfied that the likely benefit of the violation of the per se or competition provisions outweighs the benefit, if any, to the public. In anticipation, the Commission has released an issues paper outlining its approach in relation to assessing these arrangements.<sup>93</sup>

Further provisions relevant to the objection notice

Prior to making the decision whether or not to issue an objection notice, the Commission is required to make further reasonable and appropriate investigations (**proposed subsections 93AC(3)**).

The Commission is further required to comply with the conference requirement set forth in section 93A of the Act (**proposed subsections 93AC(4)**). This provision establishes a procedure pursuant to which the Commission must afford the corporation the opportunity to attend a conference to discuss an objection notice. The Commission is only allowed to proceed to issue a final objection notice if it has complied with the requirements of section 93A of the Act. **Items 11 to 13** of the Bill make the necessary amendments to section 93A of the Act.

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To afford the corporation the requisite procedural fairness, the Commission is further required to provide reasons for their decision in form of a written statement when giving an objection notice (**proposed subsections 93AC(3)**).

### Further amendments proposed in Schedule 3

**Items 14 to 18** of the Bill propose to create a new **Subdivision D—Register of Notifications** and to make amendments to the already existing register provisions. Under the new scheme, the Commission would be required to enter notices, including those that have been withdrawn, in a register.

**Items 19 to 21** of the Bill propose to make relevant changes to the review process set forth under the Act.

### Schedule 4—Defence in relation to exclusionary provisions

**Item 1** of **Schedule 4** of the Bill proposes to introduce a defence to proceedings relating to exclusionary provisions. A conduct or arrangement amounting to a exclusionary provision would remain a contravention of the Act, however, a joint venture would be able to avoid the resulting legal consequences if it can prove under the **proposed section 76C**, that on the balance of probabilities its conduct or arrangements do not, or are not likely to, have the effect of substantially lessening competition.

### Schedule 5—Defence in relation to price fixing provisions

Replacing the current defence available to joint ventures under section 45A(2) of the Act, joint ventures will be able to invoke a defence under **proposed section 76D** in relation to violations of the anti-price fixing provisions under the Act. The defence is modelled after the defence discussed under Schedule 4 above.

### Schedule 6—Dual Listed Companies

**Schedule 6** of the Bill implements the Dawson Review's recommendations regarding dual listed companies.

**Item 1** of schedule 6 defines a dual listed company arrangement by referring to section 125-60 of the *Income Tax Assessment Act 1997*.

**Item 2** of schedule 6 amends section 4A of the Act to deem dual listed companies as bodies corporate related to each other. Subsection 45(8) and 47(12) excludes bodies corporate that are related to each other from the operation of section 45 and 47 respectively. As a result of the deeming amendment in **item 2**, dual listed companies will not be regulated by either section 45 or 47 of the Act.

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Dual listed companies will still be subject to a general competition test (**proposed section 49**). Under this proposed section, where a dual listed arrangement has or is likely to have the effect of substantially lessening competition it will not be permitted under the Act, unless it has been authorised under section 88. **Item 8** amends the authorisation provisions of the Act to so that the Commission will have power to authorise a dual listed company under section 88 of the Act.

This provision was not recommended by the Dawson Review, however, it has been included to address the concern that the formation of dual listed company arrangements could potentially be unregulated by the competition provisions in the Act. The Dawson Review correctly points out the formation of dual listed companies may not be regulated by section 50 of the Act as there may not be an acquisition of shares or assets. If dual listed companies are removed from the reach of section 45 and 47, their formation arrangements may be anti-competitive in nature yet not subject to regulation. The proposed section 49 of the Act is designed to ensure that the formation of dual listed companies is still therefore subject to competition tests.

### Schedule 7—Third line forcing and exclusive dealing

**Items 1 to 28** make various technical amendments that give effect to the government's intention to make the third line forcing provisions subject to a lessening of competition test, as outlined in the 'Background' section above.

**Items 29 & 30** amend sections 46 and 47 so as to make a corporation and its related bodies corporate a single entity for the purposes of those sections. That is, it will no longer be a breach of the sections to supply goods or services on condition that a good or service is also purchased from another party if that other party is a body corporate related to the initial supplier.

### Schedule 8—Australian Competition and Consumer Commission's enforcement powers

#### Search and seizure

**Item 4** of the Bill inserts a new Part XIX – Search and Seizure, into the Act. The Bill proposes that entry to premises can either be by way of consent (**proposed division 3**) or by warrant (**proposed division 4**).

The Bill sets out provisions governing appointment and method of identifying persons given the power to enter premises. The Bill provides that staff member must have suitable qualifications and experience to properly exercise their search and seizure powers (**proposed section 154B**) and that the inspector must carry an identity card at all times when carrying out his or her functions as an inspector (**proposed section 154C**). It is interesting that the Bill uses the words 'An inspector must carry', rather than 'display' the

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identity card. It would seem that the requirement to display the card would be more appropriate.

### Entering with consent

The Bill, in **proposed section 154D** provides that the inspector may only enter premises if the Commission, Chairperson or Deputy Chairperson has reasonable grounds for suspecting that there may be evidential material on the premises and the inspector has obtained the consent of the occupier of the premises.

The Bill in **proposed section 154E** sets out the inspectors' powers in relation to premises. The inspector may search the premises, make copies of evidential material, remove evidential material if they have the consent of the occupier and secure the evidential material, pending being able to obtain a search warrant.

### Search Warrants

**Proposed Division 4 of Schedule 8** of the Bill sets out the search warrant arrangements.

A search warrant is to be obtained from a magistrate ex parte. The magistrate can issue the warrant if the magistrate is satisfied that there are reasonable grounds for suspecting that there is evidence on the premises or there may be evidence on the premises within the next 72 hours (**proposed section 154X**).

The Bill states that the warrant must contain minimum information including:

- Description of the premises to which the warrant relates
- The kind of material that is to be searched for under the warrant
- The name of the inspector responsible for executing the warrant
- Whether the warrant may be executed at any time of the day or night
- The day on which the warrant ceases to have effect (**proposed section 154X**).

These requirements are designed to place parameters around the use of the warrant.

The Bill also provides that an inspector may apply to a magistrate by telephone, fax or other electronic means, for a search warrant in urgent situations (**proposed section 154Y**).

When applying for the warrant, the inspector must not make a statement that the inspector knows to be false or misleading. Making of a false or misleading statement in these circumstances is an offence punishable by a maximum of two years imprisonment (**proposed section 154Z**).

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Once a search warrant has been issued, the inspector is then referred to as the executing officer. The executing officer is vested with the power to enter premises and search the premises for the kind of evidential material specified in the warrant (**proposed paragraphs 154G(a) and (b)**). If the evidence is found the executing officer may seize it, or make copies of evidence (**proposed paragraphs 154G(b) and (c)**). The executing officer may operate electronic equipment or take equipment and material onto the premises to assist in the search (**proposed paragraphs 154G(d) and (e)**).

The Bill, in **proposed section 154L** gives the executing officer and officers assisting the executing officer the power to use force in executing the search warrant.

The Bill also sets out the procedures that the executing officer must follow when using the search warrant. In particular, the executing officer must announce that he or she is authorised to enter the premises (unless this would frustrate the search) and give persons on the premises the opportunity to allow entry onto the premises (**proposed section 154M**).

The occupier of the premises must provide the executing officer and assisting officers with all reasonable facilities and assistance. Failure to do so is an offence with a maximum penalty of 30 penalty units (**proposed section 154Q**).

A person at the premises is required to answer questions or produce evidence to which the warrant relates. Failure to do so is an offence with a maximum penalty of 30 penalty units. The person cannot refuse to answer the questions on the grounds that they may incriminate themselves (**proposed section 154R**), but the production of evidence may only be used.

In relation to seized goods, the executing officer or officer assisting must provide a receipt for the goods seized (**proposed section 154U**). The goods may not be seized for more than sixty days unless they have been granted an extension of time under **proposed section 154V** or legal proceedings have been commenced before the end of the sixty days.

The search and seizure provisions in the new Part XIX are largely in accordance with the Entry, Search and Seizure requirements set out in the Commonwealth's *A guide to framing Commonwealth offences, civil penalties and enforcement powers*.

**Item 7 of Schedule 8** repeals the current subsection 155(2).

### **Legal professional privilege**

**Item 18 and 19** of the Bill implements the Dawson Review's recommendation regarding legal professional privilege so that a person is not required to produce a document under section 155 of the Act that would disclose information that is subject to legal professional privilege.

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## Schedule 9—Penalties

**Item 4 – 7 of schedule 9** amends the Act to incorporate the new civil penalty arrangements.

**Proposed Part 2 of schedule 9** of the Bill provides that a Court may disqualify a person from managing a corporation where the Court is satisfied that the person has contravened, attempted to contravene or been involved in a contravention of Part IV and the Court considers that the disqualification is justified (**item 20**). Consequential amendments are made to Part 2D.56 of the Corporations Act which deals with disqualification from managing corporations.

**Proposed Part 3 of schedule 9** of the Bill amends the Act so that a company is not able to indemnify their officers whose conduct has found to breach Part IV of the Act.

## Schedule 10—Local government bodies

This schedule provides for the repeal of section 2D of the Act and inserts **section 2BA**. Section 2D was introduced into the Act as part of the introduction of the National Competition Policy.<sup>94</sup> It exempts from the operation of Part IV of the Act, transactions involving only persons acting for the same local government body and decisions relating to licenses issued by local government bodies. A review of the section was undertaken by the Productivity Commission pursuant to the legislation review process under the National Competition Policy agreements. The Commission reported that:

In the Commission's view, a provision directly limiting the application of Part IV to the business activities of local governments should be inserted into the Act. A direct provision would:

—remove any uncertainty as to the application of Part IV to local government. This would reduce the risk of a local government body's legitimate regulatory decisions being challenged under Part IV and the associated costs of defending such decisions;

—be consistent with the original intention of the NCP reforms to extend Part IV to all business activities irrespective of their ownership; and

—define the application of Part IV to local government in a manner similar to that of the other tiers of government.

Under this approach, section 2D should be repealed, as both exemptions would be redundant.<sup>95</sup>

**Item 1** inserts **section 2BA** into the Act, which provides that Part IV applies in relation to a local government body only to the extent that it carries on a business, either directly or by an incorporated company in which it has a controlling interest.

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**Item 5** repeals section 2D.

## Schedule 11—Functions and powers under Competition Code

**Item 2** repeals section 150F and replaces it with a new **section 150F, and 150FA and 150FB**. These amendments seek to address issues arising in *R v Hughes*.<sup>96</sup> The High Court there held that:

for the Commonwealth to impose on an officer or instrumentality of the Commonwealth powers coupled with duties adversely to affect the rights of individuals, where no such power is directly conferred on that officer or instrumentality by the Constitution itself, requires a law of the Commonwealth supported by an appropriate head of power.<sup>97</sup>

According to the author of the Explanatory Memorandum:

The amendments to section 150F will ensure the States and Territories can confer duties on the Commission and the Tribunal pursuant to the Competition Code, in a way that is constitutionally valid (that is, the Commonwealth law will impose the duty on Commonwealth bodies and officers, as opposed to the Commonwealth law merely consenting to a State or Territory law).

## Concluding Comments

### Mergers and misuse of market power

As the Bill seeks mainly to implement the recommendations of the Dawson Review, it is silent on matters untouched by the Review. For example, The Dawson Review recommended no change, for instance, to the provisions of section 46—misuse of market power—of the Act. The Economics References Committee, however, took a different view and the government has since indicated an intention to make changes to section 46 based partly on that Committee's recommendations. It appears that such changes will be the subject of another Bill.

This Bill does substantially restructure the procedures for merger clearances and authorisations. One aspect of the new arrangements that warrants scrutiny is the proposal not to allow third parties access to the merits review process in relation to decision of the Commission on merger clearances. This means that, whilst the corporation applying for a merger would have the right to review by the Tribunal of a refusal, another corporation in the same industry that may be affected by the merger would have no right to review on the merits.

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## Collective Bargaining

Whilst the amendments aim to protect small business, the use of a threshold alone will not prevent medium or even large businesses from utilising collective bargaining for their purposes unless the Commission sets out clear internal guidelines, for example in relation to the size of the corporation intended to be covered by the provisions. This may become an even stronger concern where the transaction value is increased by regulation to accommodate the needs of certain larger businesses. Such increase would be subject only to limited scrutiny by Parliament, and has the potential to erode the purpose of the entire measure.

In respect of the notification process, the Commission will have either the option to let the notice pass or to object to the notification, preventing it from entering into force. There is no mechanism under the proposed scheme that would enable the Commission, for example, to impose conditions.

## Penalties

The Business Law Section of the Law Council of Australia argues that the provisions regarding the indemnification of officers, employees or agents of the body corporate are problematic. The provision states that a body corporate cannot indemnify officers, employees or agents against:

- the imposition of a pecuniary penalty upon an officer, employee or agent or
- legal costs incurred in defending the legal proceedings giving rise to the liability.

This provision may have harsh consequences upon employees who have acted in good faith and yet have contravened the Act. It is not in step with the indemnity provisions in the *Corporations Act 2001* that seems to more fairly deal with parties who have contravened that legislation.

## Endnotes

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