The Dawson Bill - second or third time lucky?

With the government controlling the Senate from July 1, the controversial Dawson Bill will in all likelihood become law. As a result, it will change the trade practices landscape, as DAVE PODDAR and FERGUS SMITH explain.

On 17 February 2005, the Federal Government put important changes to Australian competition laws back on the agenda when the “Dawson Bill” (the Trade Practices Legislation Amendment Bill (No.1) 2005) was re-introduced to Parliament.

Although there are some contentious elements to the Bill, given that the Federal Government will obtain control of the Senate in July, it is anticipated that even if the Federal Government does not obtain multi-party support, the Bill will be passed by Parliament before the end of 2005.

The Bill, which incorporates many of the recommendations of the Dawson Committee Inquiry’s January 2003 report (“Dawson Review”), lapsed as a result of the federal election in October 2004.

The Bill is part of the Federal Government’s broader competition law reform agenda including its response to the Dawson Review and the 2003 Senate inquiry into the effectiveness of the Trade Practices Act (“TPA”) in protecting small business.

Key changes
The key changes to Australian competition law in the Bill include:
(a) Penalties
• increased monetary penalties for contraventions of the TPA for companies to the greater of $10 million, or three times the gain from the contravention, or where the gain cannot be readily ascertained, 10% of the turnover of the body corporate and its interconnected bodies corporate; and
• the additional threat of disqualification from managing a corporation for individuals.
(b) Mergers
• introduction of a voluntary formal merger clearance system (in addition to the existing informal system);
• merger authorisations are to be made directly to the Australian Competition Tribunal (“Tribunal”);
• the aggregate size of a dual listed company is to be considered in assessing market power, and intra-party transactions within a dual listed company will be treated the same as related party transactions within a group of companies; and
• new prohibition on establishing dual listed companies that substantially lessen competition.
(c) Collective bargaining
• a new notification process for small business to collectively bargain with big business, replacing the existing authorisation process. Importantly, the Bill allows an element of collective boycott. The Federal Government has included a prohibition on the process being used by trade unions.
(d) Joint ventures
• new exceptions to the strict prohibition on exclusionary provisions and price fixing for the actions of joint ventures – if such actions do not substantially lessen competition.
(e) Enforcement and production of documents
• new requirement for the Australian Competition & Consumer Commission (“ACCC”) to obtain a warrant before entering premises and
exercising search and seizure powers; 
• new pecuniary penalties for giving false or misleading information to the ACCC or the Tribunal; and
(f) third line forcing
• third line forcing will now only be prohibited if it substantially lessens competition.

Increased penalties
The Bill proposes that penalties be increased for contraventions of Part IV of the TPA as a means of deterring corporations and individuals from engaging in anti-competitive conduct.

From the current maximum penalty for corporations of $10 million per contravention, the Bill proposes an increase to the greater of:
(g) $10 million; and
(h) three times the benefit obtained from the contravention by the corporation (and any related body corporate); or
(i) if that benefit cannot be determined by the court – 10% of the “annual turnover” of the corporation during the previous 12 months.

The “annual turnover” is the total value of all Australian supplies of a corporation, and its related bodies corporate. For Australia’s largest companies, the maximum penalty for TPA contraventions will be in the billions of dollars range.

The Bill also creates additional powers of the court to disqualify a person from managing a corporation for any period the court considers appropriate.

The previous Bill proposed that companies be prohibited from indemnifying officers, employees and agents against pecuniary penalties imposed under Part IV of the TPA and legal costs in relation to unsuccessfully defending against such penalties. The new Bill represents a softening of the Federal Government’s stance. The indemnification restriction remains but it only applies to “officers” of a company (not employees and agents).

Merger clearance - improved options
The existing system allows potential merger parties to obtain an informal clearance from the ACCC. This system has no legislative basis and provides no statutory immunity from legal action (from the ACCC or third parties). While the informal system is generally considered to be working well, it has no avenue of appeal, and was criticised in the Dawson Review for lacking transparency and set timeframes.

Although perhaps more broadly focused on complying with the International Competition Network Recommended Practices, the ACCC took on board these comments and recently revised its approach to informal merger clearances (Guidelines for informal merger reviews, October 2004 (“Revised Merger Guidelines”), introducing more definitive timeframes and greater transparency of ACCC decisions.

The Bill introduces an optional formal merger clearance system which is intended to operate in parallel with the informal clearance system. The formal system will have the following characteristics:

(j) timing – decisions to be made by the ACCC within 40 business days, subject to agreed extensions. However, the application is deemed refused if no decision is made within that period (as extended);
(k) test to be applied – the test will remain unchanged – the ACCC must be satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition;
(l) reasons for decision – the ACCC is required to give reasons for its decision;
(m) merger clearance register – applications must be published on the ACCC website and a register must be kept recording all relevant documents in respect of a clearance (subject to confidentiality requests);
(n) appeal rights – ACCC decisions may be appealed to the Tribunal – to be decided within 30 business days (subject to a discretionary 60 business day extension period); and
(o) immunity – a cleared merger has statutory immunity under the TPA.

Direct merger authorisation by the Tribunal
The TPA currently allows parties to apply to the ACCC for a merger authorisation where the public benefits of a merger outweigh any public anti-competitive detriment (with ACCC decisions subject to Tribunal appeal). The Dawson Committee found the current system’s timeframes were not commercially realistic and that it would be preferable for merger applications to be lodged directly with the Tribunal.

This was on the basis that it is slightly incongruous for the ACCC to consider a merger on an informal basis as often occurs, and then consider it again as part of an authorisation process (in light of public benefits). The Bill adopts the Dawson Review recommendations by allowing applicants to apply for authorisation directly to the Tribunal.

The Tribunal’s authorisation system will have the following characteristics:
(a) timing – authorisations are to be granted within three months (subject to a discretionary three month extension period). However, the application is deemed refused if no decision is made within that period (as extended);
(b) test to be applied – the Tribunal must be 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 occur;
(c) reasons for decision – the Tribunal is required to give reasons for its decision;
(d) merger authorisation register – applications must be published on the ACCC website and a register must be kept recording all relevant documents in respect of an authorisation (subject to confidentiality requests);
(e) appeal rights – merits review is not available for Tribunal authorisation decisions, although appeals as to errors of law may be made to the Federal Court; and
(f) immunity – an authorised merger has statutory immunity under the TPA.

Merger analysis - practical commercial upside
The merger amendments must be considered against the ACCC’s Revised Merger Guidelines which have operated well since their introduction in October 2004. However, for “complex” matters (where the ACCC may release a “Statement of Issues” outlining significant concerns which, if
not overcome, could lead to the transaction being opposed) the new formal merger system provides a valuable forum to have such matters considered.

This is not “gaming” the ACCC or forum shopping as the ACCC fears. Throughout the world where formal notification processes exist, regulators encourage early and confidential discussions about the draft application and the key issues that arise in a merger. Such responsible corporate conduct (rather than “regulatory gaming”) will highlight the best process at an early stage, without using the ACCC’s or the parties’ resources unnecessarily.

Leaving aside the unusual situation that arose in AGL v ACCC, the key issue in almost all merger review regimes is the timeliness of a contested merger process. The new formal merger regime and appeal rights to the Tribunal provides an opportunity for a timely review. Accordingly, the proposed changes to merger regulation should result in:

- more commercially realistic timeframes for resolving merger competition issues;
- more certainty for merger applicants where currently there are limited practical options if the ACCC decides to oppose an informal clearance application; and
- additional transparency of ACCC decision making which will assist in preliminary merger competition analysis.

However, a potential downside exists in the new system for proposed corporate actions that involve both merger and non-merger TPA issues. Currently, the ACCC would consider an application for authorisation of such actions concurrently. Under the new system a company may be forced to make separate applications: to the ACCC for the non-merger issues and to the Tribunal for the merger issues. This of course raises issues, but as a practical matter it will largely depend on the nature of the transaction. For example, if it is primarily a merger, then that process will be used.

An issue has also arisen as to the potential for the informal merger clearance system to wither away if the ACCC starts to push merger clearances into the formal system in response to regulatory gaming.

If this occurs, as it has in New Zealand, the current quick and cost-effective clearance system for simple mergers may suffer. It is hoped that the informal system will remain viable as both the ACCC and merger parties see benefits in the current system. If the ACCC begins to push parties into the formal system, it should be remembered that there is no mandatory filing requirement in Australia and therefore merger parties may choose simply not to lodge any notification with the ACCC.

**Merger strategy**

Assuming the informal merger clearance system remains active, merger parties will benefit from the increased range of options for considering mergers. This is not something solely for “big business”: the ability to consider mergers in a transparent and expeditious manner assists the functioning of efficient equity markets. However, the new parallel process means that greater analysis will be required to ensure the most appropriate process is chosen.

Figure 1 demonstrates the proposed alternatives. The core analysis in choosing between these options relates to the delicate balance between complex and non-complex mergers.

The important difference between an “authorisation” and a “clearance” is the test applied. A clearance is focused toward whether a merger will substantially lessen competition, whereas an authorisation focuses on the public benefits.

An informal clearance is the best alternative for less complex matters that have a low risk of ACCC objection. An informal clearance is quick (as little as 7-14 days for simple matters, although 6-8 weeks for more complex matters) and relatively confidential as the relevant documents are not public. However, an informal clearance provides no legislative immunity and the merger is still open to challenge from the ACCC and third parties.

A formal clearance would be appropriate for more complex matters where the risk of ACCC objection is higher, or where there are third parties who may be willing to contest the

**FIGURE 1 MERGER CLEARANCE/AUTHORISATION OPTIONS**
merger. A formal clearance is quicker (approx 40 business days) than an authorisation and will be a feasible option where there are sufficiently strong arguments to demonstrate that there will be no substantial lessening of competition as a result of the merger. An unsuccessful formal clearance application may be appealed to the Tribunal – for the more complex and borderline mergers this is an important advantage over the informal system.

Authorisation is the slowest of the three alternatives and should be considered where the arguments against a substantial lessening of competition are borderline, but significant public benefits would result from the merger that outweigh any anti-competitive detriments.

Collective bargaining
The Bill proposes a new notification process for collective bargaining arrangements of small businesses. The existing system requires such arrangements to be authorised by the ACCC, something which small businesses have complained is an expensive and time-consuming process. The proposed changes acknowledge that such arrangements may generate significant public benefits and should not be discouraged by overly cumbersome regulatory requirements.

The proposed system requires mandatory ACCC notification of small-business collective bargaining arrangements. In the absence of ACCC objection within the proposed 14 day time period, the arrangements will receive immunity for a period of three years. The ACCC will issue an objection notice if the arrangements are unlikely to generate public benefits, or if those benefits will not outweigh the anti-competitive detriment.

The notification system will apply to transactions not exceeding $3 million in any 12 month period. The new system for collective bargaining notifications may well be problematic and the ACCC’s handling of such notifications will need to be balanced.

Dual listed companies
The Bill proposes that the aggregate size of dual listed companies be considered in assessing market power. A positive element of the changes is that where a dual listed company does not offend the substantial lessening of competition test, the intra-party transactions within a dual listed company will be treated the same as related party transactions within a group of companies.

An addition to the new Bill is the proposed prohibition on establishing a dual listed company which substantially lessens competition, subject to ACCC authorisation.

New joint venture exception for exclusionary provisions and price fixing
Currently under the TPA, exclusionary provisions and price fixing are strictly prohibited. The Bill seeks to ameliorate the strict prohibition by introducing an exception for activities which:
(a) are carried out for the purposes of a joint venture (given these provisions may inadvertently apply to joint ventures which are otherwise efficiency enhancing); and
(b) do not have the purpose, effect or likely effect, of substantially lessening competition.

In a practical sense, the proposed changes will, to an extent, ease the regulatory burden by removing the necessity for ACCC authorisation for joint ventures that contain exclusionary or price fixing provisions. Business will have the flexibility to assess the risks using a “substantial lessening of competition” analysis and proceed with or without ACCC authorisation. However, the new provisions only provide a defence to the strict prohibition – a company has the burden of proof to show no substantial lessening of competition has arisen as a result of the action.

Enforcement - warrant required for ACCC search and inspection
The Dawson Review described the existing safeguards on the exercise of the ACCC’s search and inspection powers as inadequate. The Bill seeks to address this concern by requiring that the ACCC obtain a warrant before entering premises and exercising search powers.

Further changes in the pipeline
As an initiative separate from the Dawson Bill, the Federal Government recently announced the introduction of criminal sanctions for serious cartel conduct. It is proposed that serious cartel conduct be defined as the making of, or giving effect to, an agreement between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids with the intention of dishonestly obtaining a gain from customers and suppliers.

Penalties for individuals involved in criminal cartel conduct will be up to five years imprisonment and fines of up to $220,000 and for corporations a fine the greater of $10 million or three times the gain from the cartel, or where the value cannot be determined, 10% of annual turnover.

It is expected that the proposed amendments will be put before Parliament later in the year.

Misuse of market power
In response to the 2003 Senate inquiry into the effectiveness of the TPA in protecting small business, the Federal Government is proposing various changes to the prohibition of the misuse of market power under the TPA (Section 46).

The proposed amendments include:
(a) predatory pricing – the court may consider below cost pricing and a corporation’s prospects or expectation of recoupment as a relevant factor when assessing the misuse of market power;
(b) leveraging market power – a corporation which has a substantial degree of market power in one market will be prohibited from leveraging that power in another market; and
(c) arrangements with others – when considering a corporation’s degree of market power, the court may take into account any market power that results from arrangements with others.

These proposals will also be put before Parliament later in the year.

Conclusion
The Dawson Bill reflects sensible improvements in Australian competition law. It is now the time to focus on establishing processes to ensure these changes work most effectively for the Australian economy.