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TRADE PRACTICES AMENDMENT (CARTEL CONDUCT AND OTHER MEASURES) BILL 2008 - EXPOSURE DRAFT

SUBMISSION OF MAURICE BLACKBURN PTY LTD

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Introduction – Focus of Submission

1. This submission is made in response to the request by the Competition and Consumer Policy Division of The Treasury for submissions on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 exposure draft (“**Exposure Draft**”).
2. Maurice Blackburn Pty Ltd welcomes the opportunity to make a submission. Maurice Blackburn is a plaintiff law firm with the largest class actions practice in Australia, acting primarily on behalf of the victims of cartel conduct, sharemarket misconduct and faulty products. We also have large practices in commercial litigation, Workcover litigation, transport accident litigation, medical negligence litigation, superannuation claims, asbestos litigation and industrial law.
3. This submission focuses on the proposed amendments relating to Protected Cartel Information (“**PCI**”), contained in sections 157, 157B, 157C and 157D. In addition, we make a brief comment on the question of dishonesty as the fault element for the proposed criminal offences contained in the Exposure Draft.
4. Having regard to our position as the leading plaintiff law firm in class actions on behalf of the victims of cartel conduct, Maurice Blackburn is well placed to comment on the likely consequences of the proposed amendments relating to PCI for victims of cartel conduct in private enforcement proceedings issued against cartel members.
5. As we closely monitor cartel investigations, prosecutions and class actions in other jurisdictions, we are in a position to compare the proposed amendments in the Exposure Draft to legislation and practice for antitrust / anti-competitive conduct in the regimes of other jurisdictions.
6. Also, as a leading plaintiff law firm in class actions on behalf of shareholders, we are in a position to compare the treatment of information given to the Australian Securities and Investments Commission (“**ASIC**”) under the regulatory regimes that govern prosecutions issued by ASIC.

Summary

7. The proposed PCI scheme places substantial restrictions on the ability of cartel victims in private litigation to obtain production or disclosure of information in the possession of the Commission which will be relevant, and in all likelihood probative of the very conduct upon which their claims for loss and damage are founded.
8. Having regard to the public interest in not interfering with or prejudicing the fair trials of cartel victims’ proceedings, and the public interest in facilitating private litigation in which cartel victims seek compensation for the harm done to them, the barriers to such actions imposed by the PCI scheme are inappropriate.
9. Moreover, the ‘protections’ contained in the PCI scheme are unnecessary. The courts have well-established principles for balancing competing public interests to decide

whether information should be produced or disclosed. The PCI scheme serves only to fetter the court's discretion, and prevents it from considering all relevant interests.

10. The rationale for the PCI scheme is illusory. It does not provide the substantial incentive to voluntary disclosure that the proposed legislation presumes. Under the proposed legislation, the overwhelming incentive for voluntary disclosure comes from immunity from criminal penalties, and the certainty of avoiding the now substantial civil penalties. Having regard to the power of a court or tribunal to grant leave for production or disclosure of information under section 157B, a person giving information to the Commission does so already being aware that there is a possibility that the information will be disclosed to others.
11. The PCI scheme works against the objectives of the *Trade Practices Act*. It impedes the ability of cartel victims to pursue rights provided to them under sections 82 and 87.
12. If the PCI scheme is to have any operation, it should operate only until the completion of Commission investigations, so that production or disclosure of information will not prejudice those investigations. A limit should be placed on the duration of operation of the scheme, so that its 'on-going' investigations cannot be used as a permanent bar to production or disclosure. (However, the courts are well able to take account of the public interest in not causing prejudice to Commission investigations in determining applications for production or disclosure under existing procedures.)
13. With respect to the inclusion of dishonesty as the fault element for the proposed criminal offences, we consider that the ambiguous and subjective element of dishonesty would rarely if ever be made out according to the standard of "beyond reasonable doubt", which is required for criminal convictions. This would render the proposed criminal sanctions as largely ineffective. Dishonesty should be left as a factor to be considered in sentencing.

Effect of Protected Cartel Information Scheme

14. The PCI scheme is set out in sections 157, 157B, 157C and 157D. Below we analyse relevant sections in terms of their likely effect upon victims of cartel conduct who wish to issue private proceedings, and seek disclosure of information in the possession of the Australian Competition and Consumer Commission ("**the Commission**").
15. PCI is defined in subsection 157B(7) as information that was given to the Commission in confidence, and relates to a breach, or possible breach of section 44ZZRF, 44ZZRG, 44ZZRJ or 44ZZRK. Victims of cartel conduct will need to rely on contraventions of these same provisions to found their claims for loss and damage in private litigation. In the circumstances, information given to the Commission which relates to breaches or possible breaches of these sections will not only be directly relevant to victims' claims, but may also contain the very information necessary to establish contraventions of the offences and liability in the victims' private litigation.
16. In *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited (No 3)*¹ Heerey J observed that: "*Of its nature, cartel behaviour is likely to occur in secret and between parties who seek mutual benefit*". It is axiomatic that price-fixing will not be as easily evinced from the corporate records available on discovery as with other causes of actions. Obtaining evidence can often be uniquely difficult for victims, because attempts have frequently been made by the respondents to conceal their cartel conduct. In particular, much may be undocumented. For these reasons witness

¹ [2007] FCA 1617.

statements and other material compiled by the Commission may be critical to the success of private enforcement action.

17. Having regard to the above, any restrictions which are placed on victims' ability to obtain disclosure of documents containing PCI from the Commission will have a substantial and possibly fatal effect on victims' capacity to recover the loss and damage caused to them by cartel conduct.

Section 157C

18. On our interpretation of section 157C, where the Commission receives a request for discovery or for production of documents from:

- a) a party to proceedings, and the Commission is not a party to those proceedings; or
- b) from a party considering instituting proceedings,

where the documents sought contain PCI, the Commission cannot be required to make discovery or produce documents to the party.

19. The Commission may make a decision to provide a copy of such documents, but in making the decision must have regard to an exhaustive list of considerations which weigh against discovery or production if the Commission considers that doing so may discourage immunity seekers, disrupt investigations or discourage or jeopardise the safety of an informant. The Commission must not have regard to any matters beyond the exhaustive list, which critically, fails to give any weight to the purpose for which the documents are sought.
20. In our view, section 157C sets an extremely high threshold for the exercise of discretion by the Commission to make discovery or production of PCI. As noted above, the exhaustive list of considerations to which the Commission must have regard – even if it is inclined to consider a request for discovery or production – weighs against doing so. In the circumstances that the Commission cannot be required to make discovery or produce documents containing PCI, it is also possible that the Commission cannot be required to give reasons for its decision. The scheme in section 157C not only prescribes a confined list of factors to consider when classifying documents as PCI, but it removes any transparency in the Commission's role in deciding on that classification.
21. Further, the proposed protection of PCI is not simply from production of the documents, but also from the entire process of discovery.
22. In particular, the discovery process involves, firstly, identification and description of documents accompanied by any claim of privilege. Secondly, it involves the production for inspection of the documents which are not privileged. That first stage facilitates the transparent and just determination of disputes over claims of privilege before any production is made, including legal professional privilege and public policy privilege. However, the scheme provides in subsection 157C(2)(c) that the Commission need not "...make discovery (however described)...", and thus the Commission is not even obliged to undergo the first step of discovery, being the identification of the documents and articulation of any claim for privilege so as to enable an aggrieved party to test that claim. In other words, pursuant to section 157C the Commission is not even required to disclose that it *holds* any information that it has classified as PCI, let alone produce it.
23. We submit that, at the very least, as subsection 157C(2)(d) provides that the Commission need not "*produce*" PCI, the preceding subsection, seeking to prevent the Commission

from making discovery, should be deleted because it removes from legitimate scrutiny the Commission's powers to apply a PCI classification. Instead, in response to a request for discovery of documents, the Commission should claim an objection from production or inspection of information it has classified as PCI, as it would for documents for which it may claim privilege.

24. In addition, any power to withhold access to information should not prevent access to entire documents. Rather, the Commission should discover and produce documents which contain relevant information, but redact those parts over which PCI is claimed.

Section 157B

25. Under section 157B, the Commission, or a Commission official cannot be required to produce to a court or tribunal a document containing PCI or disclose PCI to a court or tribunal, except with leave of the court or tribunal.
26. We interpret this to mean that, except with leave of the court or tribunal, the Commission (or a Commission official) cannot be required:
- a) to produce documents containing PCI under a Notice to Produce;
 - b) to produce documents and/or give evidence containing PCI under a subpoena; and
 - c) to make disclosure or give evidence containing PCI in the proceedings.

It is not clear whether section 157B means that a party must first obtain leave of the court or tribunal to serve a Notice to Produce or subpoena, or if after service the Commission (or Commission official) objects to production, 'leave' must be obtained to compel production. (Under Order 27A of the Federal Court Rules, leave is already required to issue a subpoena.)

27. Just as for section 157C, under section 157B the Commission (or Commission official) *may* produce or disclose PCI to the court or tribunal, but in making the decision must have regard to the same exhaustive list of considerations which weigh against production or disclosure.
28. It is not at all clear how section 157B will operate. First, it would seem that any application for leave to issue a Notice to Produce or subpoena could not be determined *ex parte*, because in any leave application neither the applicant nor the court will know whether information held by the Commission is classified as PCI until the Commission makes the claim.
29. Second, having regard to the preceding paragraph, we presume that the Commission cannot be in a position to exercise its discretion to voluntarily produce or disclose PCI to a court or tribunal under section 157B until after a court or tribunal has refused leave to an applicant. Then, in the circumstances that the court or tribunal will have made a decision to refuse leave after having regard to the exhaustive list of considerations, we consider that it is highly unlikely that the Commission would then come to a different conclusion by reference to the same list of considerations, knowing that it cannot be compelled to produce the information.
30. In the circumstances, if the drafters of the legislation consider that section 157B provides the Commission with discretion to voluntarily produce or disclose PCI, either before or after, and not contingent upon the outcome of a leave application, we consider that it is highly unlikely that the legislation will actually operate in that way.

31. In our view of the proposed legislation, whether the Commission will be required to produce documents containing PCI or disclose PCI to a court or tribunal rests on the court or tribunal in an application for leave balancing the consideration of “the interests of the administration of justice” (or in the case of a tribunal, “the interests of securing the effective performance of the tribunal’s functions”) against all of the other considerations on the exhaustive list, which in our view weigh against production or disclosure.
32. In addition, under the definition contained in section 157B, PCI means information relating to a breach or possible breach of the criminal and civil penalty provisions for cartel conduct which was given to the Commission *in confidence*. It appears from the definition that the information need not be of a confidential nature, but merely given to the Commission in confidence, ie on condition that it will not be revealed. Having regard to the power of a court or tribunal under section 157B to grant leave for production or disclosure, the Commission cannot receive information on condition that it will not be revealed. In the circumstances, cartel participants who provide information to the Commission must already be aware that there is a possibility that such information will be disclosed. In our view, the PCI scheme will not provide the kind of incentives for voluntary disclosure that underpins the proposed legislation.

Comparison with other regulatory practices

33. In other regimes, legislation facilitates the court’s proven role in determining when a regulator should disclose or withhold information. Importantly, the court’s consideration in such decisions is not constrained to biased and exhaustive factors, as the proposed sections 157B and 157C set out to do.
34. With respect to ASIC, subsection 25(1) of the *Australian Securities and Investment Commission Act 2001* states:
- “ASIC may give a copy of a written record of the examination, or such a copy together with a copy of any related book, to a person’s lawyer if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related.”*
35. This allows the regulator to release the information without formal court process, but does not remove the Court’s ultimate power to release documents, or restrict the factors it may consider when considering the competing considerations involved in an application of the public policy immunity.
36. Indeed the ideal functioning of that scheme was recently demonstrated in *P Dawson Nominees Pty Ltd v Multiplex Limited*.² The applicant in a shareholder class action asked ASIC to provide, pursuant to subsection 25(1), transcripts of interviews which it had obtained in the course of an investigation. ASIC referred the request to the interviewed persons, but did not make a decision. The applicant then served a subpoena upon ASIC, and ASIC objected to the production of documents on the grounds of public policy immunity. In fact, ASIC sought orders from Goldberg J maintaining the confidentiality (including from the applicant) of its evidence in opposition to the applicant’s subpoena, including that the Court’s hearing of ASIC’s opposition take place *ex parte* and *in camera*. ASIC submitted that conducting the dispute more transparently would result in the disclosure of information which could defeat the public interest which ASIC was seeking to protect, such that any ultimate upholding of that public interest immunity would become useless. Goldberg J proceeded on the *ex parte*, *in camera* basis proposed by ASIC

² [2007] FCA 1659.

37. Ultimately however, Goldberg J rejected ASIC's claim that the transcripts were protected from production by public interest immunity privilege.
38. By acceding to ASIC's request and considering the application *ex parte in camera*, but then rejecting the claim for public policy, the Court demonstrated that it is well equipped to properly balance and assess the important and competing considerations involved in an assessment of public interest immunity. Upon reaching its decision the Court further demonstrated its awareness of the balance required between public policy, the rights of individual litigants and the desire for transparency in the judicial process. It did so by publishing its reasons in a confidential appendix which could remain confidential even in the event of an appeal, thereby avoiding a risk of disclosure which would render any such appeal nugatory. An appeal is in fact pending.
39. The case also demonstrates that regulators can, at times, be overzealous about claiming public policy immunity and that the Court's broad supervisory role should not be restricted in the way proposed by the PCI scheme.
40. An example of an overzealous claim of public policy immunity by a regulator - in fact by the Commission - can be seen in discussion below about the very recent decision of Gordon J in *Cadbury Schweppes v Amcor*.³ In that case, Gordon J concluded that the "*confidentiality and free-rider arguments ostensibly advanced by the ACCC [in support of its opposition to disclosure of witness statements] are, at best, a proxy for that concern [exposure of information-givers to private damages actions] and at worst a smokescreen obscuring it*".
41. We are not aware of provisions with respect to documents acquired by state or federal police which prescribe as restrictive and one-sided considerations as those set out in sections 157B and 157C. In our experience, access to those documents and protection of the long-term objectives of state and federal police are adequately provided for through the Court's adjudication of claims of public policy privilege.

Practice in other jurisdictions where cartel conduct is criminalized

Position in Canada

42. The Canadian Competition Bureau released an "Information Bulletin on the Communication Of Confidential Information under the *Competition Act*".⁴ This Bulletin sets out the approach of the Bureau with respect to the communication and use of confidential information obtained in the course of the administration or enforcement of their *Competition Act*, including their position pertaining to private actions for damages. The relevant paragraphs are as follows:

7.6.1 Under section 36 of the Act, private parties can commence legal action to recover damages incurred as a result of conduct contrary to Part VI of the Act or the failure of any person to comply with an order of the Competition Tribunal or another court under the Act. Persons contemplating actions under section 36 may believe that the Bureau possesses information, such as information obtained as a result of the use of formal investigative powers, that could be relevant to their claims. However, it is important to note that section 36 does not provide a general right of access to records in the Bureau's possession or control.

7.6.2 To preserve the independence necessary to carry out the Bureau's mandate effectively and to protect the integrity of the Bureau's investigative process and the confidentiality of

³ [2008] FCA 88.

⁴ Information Bulletin on the Communication Of Confidential Information under the *Competition Act* (Canada) 7.6.1 –7.6.3

information in its possession, the Bureau will not voluntarily provide information to persons contemplating or initiating a section 36 action.

7.6.3 If served with a subpoena, the Bureau will inform the information provider and oppose subpoenas for production of information if compliance with them would potentially interfere with an ongoing examination or inquiry, or otherwise adversely affect the administration or enforcement of the Act. If the Bureau's opposition is unsuccessful, it will seek protective court orders to maintain the confidentiality of the information in question.

43. We submit that this position, which is somewhat akin to the position currently in Australia, is desirable because it makes it clear that:
- a) the documents will not be disclosed by the authority voluntarily;
 - b) any request for documents will be considered by reference to whether production would undermine enforcement of the Act;
 - c) any claim for non-disclosure on the grounds of confidentiality is to be determined by the court;
 - d) the court's discretion to continue to weigh the competing public interest factors relating to disclosure or non-disclosure is maintained without introducing an exhaustive list of factors which the court must consider and which weigh against the applicant.

Position in the United States

44. Under Rule 26 of the Federal Rules of Civil Procedure, a party to civil proceedings may apply for discovery from any party or non-party of all documents which are relevant to any claim or defence. In determining such applications, it appears that relevance to the claim or defence takes precedence over claims for confidentiality.
45. Also, there is a statutory requirement that documents be produced to plaintiffs in civil proceedings should the immunity applicant wish to be immune from treble damages in those proceedings. In the US, courts are permitted to triple the amount of the actual/compensatory damages to be awarded to a prevailing plaintiff in antitrust cases. Section 213 of the United States Department of Justice's leniency statute⁵ sets out a limitation on recovery in civil proceedings from whistleblowers subject to their cooperation, apart from their criminal immunity granted by the Department of Justice. In any civil action alleging a violation of section 1 or 3 of the Sherman Act based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the cooperation requirements set out below shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation. Effectively, in exchange for its cooperation with claimants, the immunity applicant is not made liable for treble damages.
46. Cooperation with civil plaintiffs includes:
- (1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

⁵ The Antitrust Criminal Penalty Enhancement And Reform Act (2004) 15 USC 1 Note, Public Law 108-237— June 22, 2004, 118 Stat. 667

- (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and
- (3)(A) in the case of a cooperating individual—
- (i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and
 - (ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or
- (B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).

47. The US Court also considers the timeliness of the leniency applicant's initial cooperation with the claimant in making the determination concerning satisfactory cooperation described above.
48. Section 214 however provides a necessary caveat by stating that "nothing in this subtitle shall be construed to affect the rights of the Antitrust Division [of the US Department of Justice] to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement; create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement; or, affect, in any way, the joint and several liability of any party to a civil action described in section 213(a), other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this title."
49. The position in the US usefully illustrates that the point of any protective regime should be to avoid interference with a specific investigation or decision, not simply to assist defendants to avoid the consequences of their alleged conduct.

Substantive arguments against the PCI scheme

50. We consider that for the following substantive reasons, the PCI scheme in its current draft form is inappropriate.
51. The object of the *Trade Practices Act* is to enhance the welfare of Australians through the promotion of competition.⁶ Specifically, Part IV of the *Trade Practices Act* contains provisions which proscribe and regulate anti-competitive agreements and conduct (eg prohibitions against price-fixing) and which are aimed at procuring and maintaining competition in trade and commerce. Sections 82 and 87 give a right to a person who has suffered loss or damage arising from a contravention under Part IV to claim compensation. The PCI scheme has the potential to seriously impede the ability of such

⁶ *Boral Besser Masonry Ltd v ACCC* [2003] HCA 5; (2003) 77 ALJR 623; 195 ALR 606; ATPR 41-915 per Gaudron, Gummow and Hayne JJ.

a person to access their rights under these provisions. For this reason, the proposed changes work against the clear objectives of the Act.

52. If jail terms for certain cartel conduct are introduced in Australia, the overwhelming incentive for cartel participants to voluntarily disclose information will be to obtain immunity from criminal prosecution. The fear of exposure to third party claims will no longer be the key factor in the decision to voluntarily disclose information. In a new system where potential jail terms apply, the suggestion by some that without protection of the proposed new PCI provisions prospective whistleblowers will be discouraged from coming forward because they fear third party actions is, in our submission, wholly misconceived.
53. The civil penalties which may be imposed under the proposed legislation are substantially increased, and may now rival or exceed damages in private litigation. In our view, the incentive to avoid civil penalties through voluntary disclosure will at least balance against withholding disclosure for fear of private litigation.
54. The proposed provisions in relation to PCI protect other co-conspirators from liability in civil damages actions, not just the whistleblower, which again is contrary to the objectives of Part IV of the *Trade Practices Act*.
55. The proposed PCI protections are at odds with other provisions of the *Trade Practices Act* that require the Court to give preference to victims of cartel conduct when it considers it appropriate to award both financial penalties and compensation – see section 79B of the *Trade Practices Act*.
56. Under immunity policies, cartel informers are not protected from subsequent civil actions. In many cases, the withholding of documents under the proposed new PCI provisions will merely serve to increase the cost and delay of any civil action. Cartel victims will be forced to agitate complex and time consuming motions to the courts in efforts to obtain those documents.
57. Recently in the Federal Court of Australia, Heerey J in *P Dawson Nominees Pty Ltd v Multiplex Limited*⁷ recognised that access to documents held by a corporate regulator (ASIC) for parties in a private shareholder group action would help all parties to narrow the issues, assist in resolving discovery questions and therefore, advance the efficient judicial administration of the proceeding. These same reasons weigh against placing restrictions on access to the Commission's documents for parties to cartel private actions.
58. Most Commission prosecutions lead to settlements (agreements as to an appropriate civil penalty). An agreed statement of facts given to the court as part of a settlement may not in all cases be considered as a finding of fact by the court under section 83 of the *Trade Practices Act*. It is unlikely that a victim of cartel conduct can rely on such an agreed statement of facts, not being findings of the court, to establish facts in a follow on private litigation. Having regard to the high standard of pleadings required in Australia, without information received by the Commission, civil claimants may not have sufficient information available to them to issue proceedings, despite those cartel participants having admitted to engaging in cartel conduct either in Australia or abroad.
59. The proposed protection of PCI is not simply from production of documents, but also from the entire process of discovery. The scheme in section 157C not only prescribes a misconceived list of factors to consider when classifying documents as PCI, but it

⁷ [2007] FCA 1044, (12 July 2007).

removes any transparency in the Commission's role in deciding on that classification. As noted above, it is possible that the Commission cannot be required to give reasons for its decision.

60. As discussed in paragraph 32 above, the PCI scheme cannot provide the kind of incentives for voluntary disclosure that underpins the proposed legislation because cartel participants will be aware that there is a possibility that any information provided to the Commission may ultimately be disclosed.

Policy Considerations

61. As matters presently stand, public policy immunity and legal professional privilege are alive and capable of being relied upon by the Commission to avoid disclosure where doing so jeopardises its functions in a way which is disproportionate to the benefit from the disclosure of the documents. But, appropriately, the final application of public policy is left to courts and is, as set out in this submission, satisfactorily being exercised.
62. However, the proposed legislation seeks to effectively redefine the way in which the public policy immunity is applied by restricting to a consideration of the seven limited factors set out in subsections 157B(5) and 157C(5). Those factors fail to provide a fair balance to, amongst others, the legitimate interests of parties pursuing private enforcement. For example, they exclude specific consideration of the purpose for which the PCI is to be used upon any disclosure, and the force and probative value of the PCI in that purpose. Thus, the factors would work an obvious injustice by preventing the Commission's disclosure of PCI which has the remotest conceivable risk of effecting - in a most insignificant way - Australia's relations with other countries (subsection 157B(2)(b)), even if that PCI would be of enormous utility to a proceeding in which victims of price-fixing seek to recover their losses from the cartel participants.
63. This is contrary to the principals routinely applied, in our view appropriately, in the common law tests of public policy immunity. In *ACCC v Visy*,⁸ Heerey J held that even assuming the confidentiality of the documents obtained by the ACCC, in deciding whether the Commission should disclose documents to Visy the centrality of the documents to the litigation outweighed any confidentiality. Also recently, in *Cadbury Schweppes v Amcor*⁹ Gordon J found that the "...ACCC's contention that non-disclosure of the documents is required to protect the public interest cannot stand" and said:

[25] A court will not order the production of a document if disclosure of the document would be injurious to the public interest: Alister v The Queen [1983] HCA 45; (1984) 154 CLR 404; Sankey v Whitlam [1978] HCA 43; (1978) 142 CLR 1. The court must undertake a balancing test, considering "whether the public interest which requires that [a] document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence": Sankey [1978] HCA 43; (1978) 142 CLR 1 at 38-39. As this formulation of the test makes clear, the onus is on the party seeking to prevent disclosure of a document.

[26] This onus has been described by Lindgren J as a "heavy burden" requiring the proponent of immunity to "establish a 'real' rather than merely 'some' or 'any' detriment to the public interest from disclosure" of the documents: Somerville v ASC (1995) 60 FCR 319 at 354. If the proponent cannot establish any such interest as a threshold matter, then the balancing test never arises, and the immunity claim will fail at the outset: As the High Court said in Alister v The Queen [1983] HCA 45; (1983) 154 CLR 404 at 412, "the balancing

⁸ (2006) ATPR 42-102.

⁹ [2008] FCA 88.

exercise ... can only be taken when it appears that both aspects of the public interest do require consideration" (Emphasis added).

64. Of primary relevance, in view of the effect of the proposed PCI provisions in substantially eroding access to information held by the Commission for victims of cartels, Gordon J observed that:

- (a) *"First, there is at least an equal, if not more compelling, public interest in allowing private litigants to rely on the output of regulatory investigations, which are undertaken by public regulators at least in part on their behalf. The ACCC should be "motivated by a desire to do its duty, both towards the public and towards individual investors" (ACCC v Michigan Group Pty Ltd [2002] FCA 1439 at [22]). It is not motivated by corporate profit motives or competitive concerns. Indeed, the ACCC often justifies requests for findings of fact, declarations, and injunctions that may be of little or no importance in the matter before the court on the grounds that they will be useful to follow-on private litigants: ACCC v Michigan Group Pty Ltd [2002] FCA 1439 at [24]; ACCC v Dataline.Net.Au Pty Ltd (2006) 236 ALR 665 at [105]-[107] (discussing s 83 of the Trade Practices Act 1974 (Cth), which outlines the circumstances in which findings made in penalty proceedings under s 77 may be used as prima facie evidence in damages proceedings brought under s 82)." (paragraph 32); and*
- (b) *"...ACCC's attempt to use common law privilege doctrine to protect cooperators when they are faced with private suits for damages, albeit partially successful here, appears to me to be misguided" (paragraphs 46 and 47).*

Public Interest in Facilitating Private Litigation

65. In addition to the interests of administration of justice in not interfering with or prejudicing cartel victims' proceedings, we consider that there is public interest in facilitating private litigation for cartel conduct.

66. There has been recent recognition by international courts and competition regulators that private enforcement of competition laws through damages actions has an important role to play in creating and sustaining a competitive economy.¹⁰ In its decision in *Courage v Crehan*,¹¹ the European Court of Justice accepted that:

... the existence of such a right [to claim damages] strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the Community.

67. Concomitantly, there is a discernable international trend *towards* facilitating greater access to evidence gathered by competition regulators. For example, the Commission of the European Communities (the body responsible for public enforcement of European Community antitrust rules) has recently initiated a law reform process aimed at promoting private damages claims for breaches of antitrust laws. The Commission recognises that one of the biggest obstacles to the private enforcement of antitrust laws is a lack of access by private litigants to relevant evidence gathered in the course of regulatory investigations, and considers addressing this perceived problem to be a priority.¹²

¹⁰ Commission of the European Communities, *Green Paper – Damages actions for breach of the EC antitrust rules*, /*COM/2005/0672 final */ , at page 2.

¹¹ Case C-453/99.

¹² Commission of the European Communities, above n 10, at pages 2 - 3.

68. In the Australian context, in *Cadbury Schweppes v Amcor*¹³ Gordon J spoke of a “public interest in allowing private litigants to rely on the output of regulatory investigations”. Under the exhaustive list of considerations contained in sections 157B and 157C, that interest cannot be taken into account, by the Commission, a court or tribunal. As noted above, in the absence of a full consideration of all competing policy interests, there is a real risk of production and disclosure decisions which work against the public interest.
69. Under subsection 87(1B) of the *Trade Practices Act*, the Commission has power to bring actions for damages on behalf of cartel victims who suffer loss caused by contraventions of the Act, but must obtain their consent in writing before bringing such an application. (This prevents the Commission from bringing actions on behalf of a class which includes members who are not identified when the application is issued, which is typically the case in a class action.) In practice, the Commission rarely seeks damages on behalf of persons who have suffered loss caused by contraventions of the *Trade Practices Act*.¹⁴ On the other hand, the Commission recognises the role in enforcing the anti-competitive provisions of the *Trade Practices Act* which private litigation plays.
70. Therefore, cartel victims have no option but to bring their own proceedings in order to recover loss and damage for breach of the *Trade Practices Act*. In the circumstances that an object of the *Trade Practices Act* is to compensate victims for contraventions, but victims are usually left to their own devices to obtain compensation, it stands to reason that there is a strong public interest in facilitating private litigation, and in the Commission making available information which assists their claims.

The Court’s role in balancing competing interests

71. In *Sankey v Whitlam*,¹⁵ the High Court considered whether to order the Commonwealth to produce certain documents. The Commonwealth had opposed production, claiming crown privilege, i.e. that production would be prejudicial to the public interest. Gibbs ACJ stated at [37]:

The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in Conway v. Rimmer (1968) AC, at p 940, as follows:

“There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.”

It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence.

72. In our view, by limiting the considerations to which a court may have regard in deciding whether to grant leave, the proposed legislation prevents the court from balancing all

¹³ [2008] FCA 88, at [32].

¹⁴ As far as we are aware, the largest number of persons on behalf of whom the Commission has applied for damages is a group of 26, in *ACCC v Chats House Investments* (1996) 71 FCR 250.

¹⁵ (1978) 142 CLR 1.

competing interests, and tips the balance in favour of not granting leave. The legislation effectively requires the decision to be made on the executive's terms.

73. In our view, there is a real risk that the limited considerations that a court or tribunal is permitted to take into account in deciding whether to grant leave sways the balance against leave. Our grave concern is that where a victim of cartel conduct is denied access to information which may determine the liability of respondents, this will almost inevitably constitute a substantial interference with a fair trial.
74. We agree with the learned comments of Brent Fisse and Caron Beaton-Wells (*Criminalising Serious Cartel Conduct: Issues of Law and Policy. A critique of the Exposure Draft Bill, Draft ACCC-CDPP MOU and Discussion Paper. Introducing criminal penalties for serious cartel conduct in Australia*, 18 February 2008) that:
- “... whether in practice a proper balance between the various competing interests affected by the PCI scheme is reached will depend in large part on the way in which the ACCC exercises its substantial discretion in connection with the voluntary release of information and approach taken by the Court in determining whether information should be released in cases in which the ACCC decides not to do so voluntarily.”*
75. In view of the significant risk of regulator's discretion suffering from a miscarriage, it would be contrary to justice to both empower the regulator to make opaque decisions classifying documents as PCI and to simultaneously confine the Court's powers to properly balance the multitude of competing factors which should be considered in determining a claim of public policy privilege.
76. Having regard to authorities including *Sankey v Whitlam*, it is evident that the courts have well-established principles for balancing competing public interests to determine whether to order production and disclosure of documents. Moreover, the courts are able to take into account new interests as they develop. In our view, the PCI scheme unnecessarily replaces a balanced court process with an inferior, limited and biased statutory regime.
77. In its 1985 inquiry into the law of evidence,¹⁶ the Australian Law Reform Commission considered that there were no serious inadequacies in the Commonwealth approach to public interest immunity, and recommended as little interference as possible with the supervisory role of courts to provide for balancing “the nature of the injury which the nation or public service is likely to suffer and the evidentiary value and importance of the documents in a particular litigation.

Intention of Dishonestly Obtaining a Benefit

78. There are two proposed criminal offences in the Exposure Draft. A corporation commits an offence if it:
- a) makes a contract or arrangement, or arrives at an understanding, which contains a cartel provision (s. 44ZZRF); or
 - b) gives effect to a cartel provision contained in a contract, arrangement or understanding (s. 44ZZRG),
- with the intention of dishonestly obtaining a benefit.

¹⁶ Australian Law Reform Commission, Evidence, ALRC 26 (interim) Vol 1, (1985) [864 – 866].

79. The Exposure Draft contains parallel civil penalty provisions in sections 44ZZRJ and 44ZZRK, which differ from the criminal offences in that they do not require that the prohibited conduct be engaged in with the intention of dishonestly obtaining a benefit.

80. In our view, the inclusion of a requirement of dishonesty in the fault element:

- a) to be determined according to the standards of ordinary people; and
- b) requiring that the defendant knew that the conduct was dishonest according to the standards of ordinary people,

constitutes a subjective standard which:

- c) is so imprecise and transitory that it may be incapable of proper definition by a court or tribunal;
- d) imports a notion of moral ambiguity in judging the conduct of the defendant, which is in stark contrast to wrongfulness which ought to be ascribed to the conduct of price fixing; and
- e) may allow defendants to avoid liability merely because of a misguided notion of the morality of their own conduct or the prevailing standards of 'ordinary' people.

81. Dishonesty, as an element in the conduct of the criminal offences, is a matter that a court may take into account under sentencing guidelines in each of the state and the federal jurisdictions.

82. In the recent case of *Australian Competition & Consumer Commission v Australian Abalone Pty Ltd*¹⁷ Weinberg J imposed penalties for cartel conduct. It was common ground that the breaches of the *Trade Practices Act* were inadvertent, and “*that in entering into and giving effect to this arrangement, the respondents believed that what they were doing was lawful. They had no idea that they were engaged in price-fixing of a kind specifically prohibited by s 45 of the TPA.*” The Court recorded that it was “*the respondents’ claim, accepted by the ACCC, that they did not act dishonestly and had no idea that they were contravening that section*” (emphasis added).

83. Yet the contravention was, quite properly, penalized by the Court. Weinberg J considered the absence of dishonesty and intention to engage in illegal activity when he imposed penalties at the very lower end of the range available. He noted:

128:...I interpolate that in the event such conduct is criminalised in Australia, problems may arise in formulating a cartel offence in terms that would be comprehensible to ordinary jurors. Section 45 is complex enough. The idea, which has been mooted, of simply adding the notion of "dishonesty" to what is already a daunting provision may be counterproductive. As Fisse notes, no country other than the United Kingdom (the Enterprise Act 2002 (UK)) has made dishonesty an element of a cartel offence, and perhaps for good reason.

129: It ought to be possible to define serious cartel conduct in relatively simple terms.
(emphasis added)

84. In the circumstances of that case, the inclusion of any element of dishonesty would have meant that the cartel conduct, which was in fact admitted by the respondents and serious enough to attract a combined penalty of \$927,500, could not attract criminal penalties.

¹⁷ [2007] FCA 1834.

85. In our view, the ambiguous and subjective element of dishonesty would rarely if ever be made out according to the standard of “beyond reasonable doubt”, which is required for criminal convictions. This would render the proposed criminal sanctions as largely ineffective.
86. We consider that the fault element necessary for a cartel offence need be no more than the intention to enter a contract, arrangement or understanding. It is difficult to understand what is to be gained by adding concepts such as dishonesty to the elements of the offence. Rather, dishonesty should be left as a factor to be considered in sentencing.