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

SUPPLEMENTARY SUBMISSION OF MAURICE BLACKBURN PTY LTD

12 March 2008

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Introduction – Purpose of this Supplementary Submission

1. On 4 March 2008, Maurice Blackburn filed a submission 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. That submission focuses on the proposed amendments relating to Protected Cartel Information (“**PCI**”), and compares the PCI scheme with the court’s well established principles for identifying and balancing the competing public interests for and against disclosure or production of information.
3. Since the filing of our submission, two new court decisions have been handed down in which the courts have considered claims by the Australian Competition and Consumer Commission and by the State of Victoria for public interest immunity from disclosure of information. Both of these decisions further validate the primary arguments adopted in our submission: that the ‘protections’ contained in the PCI scheme are unnecessary, and work against a proper assessment of public interest immunity. The courts have well-established principles for identifying and balancing competing public interests to decide whether information should be produced or disclosed. The PCI scheme serves only to prevent a court or tribunal from considering all relevant public interests, and limits a court or tribunal to a consideration of prescribed interests that weigh heavily in favour of withholding disclosure.
4. The careful consideration in these new decisions of public interest immunity and the discussion of how public interest immunity should be applied and balanced make these decisions appropriate for consideration by Treasury when reviewing the proposed PCI scheme legislation, and worthy of a supplementary submission.

Summary

5. *Korean Airlines v ACCC* and *State of Victoria v Brazel* highlight that any proper assessment of a claim for public interest immunity requires consideration of *all* public interests in the making or withholding of disclosure, not a shortlist of factors slanted towards ‘protection’ of information.¹
6. The Courts in these two cases, and even the ACCC, agree that proper assessment of public interest immunity includes having regard to the purpose for which disclosure is sought, and the context of the litigation in which the information is to be adduced, matters which are absent from the exclusive list of considerations under the PCI scheme.²

¹ *Korean Airlines Co Ltd v Australian Competition and Consumer Commission* [2008] FCA 265 at [63]; *State of Victoria v Gregory John Brazel* [2008] VSCA 37 at [23]-[26].

² [2008] FCA 265 at [63]; [2008] VSCA 37 at [47].

7. In *State of Victoria v Brazel*, the Victorian Court of Appeal set out the threshold test for public interest immunity – ‘demonstrable necessity’, and unless that threshold is passed, no question of balancing arises.³ The PCI scheme discards the threshold test, and embarks on an artificial ‘balancing’ of limited considerations.
8. By reason of its limited considerations, the PCI scheme is not a test of whether immunity from disclosure is in the *public* interest.
9. The Court in *Brazel* emphasized that the limits of public interest immunity must continue to be very strictly drawn.⁴ By providing the ACCC with complete discretion to determine whether information is PCI, discover or produce information, and by preventing courts or tribunals from consideration of all relevant public interests, the PCI scheme dismantles the limits.

Korean Airlines Co Ltd v Australian Competition and Consumer Commission [2008] FCA 265, 7 March 2008

10. During the course of an application by Korean Airlines (“KAL”) heard before His Honour Justice Jacobson in the Federal Court of Australia, in which KAL challenged the validity of a section 155 notice⁵ issued to it by the Australian Competition and Consumer Commission (“ACCC”), a dispute arose between the parties about the production of documents sought by KAL from the ACCC under a notice to produce.
11. KAL argued that the ACCC had issued the section 155 notice for an improper purpose, and sought production from the ACCC of documents which may support its argument, including:
 - a) Australian Government Solicitor’s outline of considerations relating to the ACCC’s proposed settlement strategy; and
 - b) a table of market share and proposed penalties for various airlines.
12. The ACCC opposed production, claiming that certain redacted portions of the documents were subject to a claim of legal professional privilege, and one portion was subject to a claim for public interest immunity.
13. In regard to the first document, Justice Jacobson upheld that the ACCC’s claim for legal professional privilege, on the grounds that it had been produced by legal practitioners for the dominant purpose of providing legal advice.
14. In regard to the ACCC’s claim for public interest immunity over the second document, Justice Jacobson set out the test, as follows:⁶

*The existence of public interest immunity is to be determined by balancing two competing aspects of public interest. First, whether harm would be done to the public interest by production of the document; second, whether the administration of justice would be impaired if the document were withheld. **The balancing exercise can only be undertaken when both aspects of the public interest require consideration.** [Emphasis added]*

15. In addition, the ACCC and KAL agreed that Justice Jacobson should

³ [2008] VSCA 37 at [24]-[26].

⁴ [2008] VSCA 37 at [24].

⁵ Section 155 of the *Trade Practices Act 1974* (“TPA”) – the ACCC issued a notice to KAL under section 155 requiring it to provide information relating to matters that may constitute a contravention of the TPA.

⁶ [2008] FCA 265 at [63]; [2008] VSCA 37 at [47].

*follow the course adopted in Hudson v Branir Pty Limited (2005) 148 NTR 1 by **having regard to the context of evidence proposed to be adduced at the final hearing so as to be able to determine the context in which the dispute over the Notice to Produce arises.** [Emphasis added]*

16. In assessing the weight to be given to the public interest in disclosure, Justice Jacobson considered whether the documents sought had a 'legitimate forensic purpose' in the litigation in which they would be disclosed. Justice Jacobson determined that the documents go to questions raised in the Statement of Issues in the proceeding, and thus there was a legitimate forensic purpose in disclosure.⁷
17. Accordingly, Justice Jacobson held that the ACCC's claim for public interest immunity over the second document was made out.
18. In our view, this decision further supports our earlier submission that:
 - a) left to identify and balance all competing public interests, courts or tribunals reach appropriate decisions in favour of public interest immunity. It is neither necessary nor appropriate to tilt the balance in favour of immunity by limiting the considerations to which a court or tribunal may have regard under section 157B of the proposed legislation;
 - b) balancing of competing interests can only be properly achieved where the court or tribunal is free to consider all relevant interests;
 - c) to properly consider both the harm which would be done to the public interest by disclosure and the impairment to the administration of justice by withholding disclosure, the court or tribunal must be free to consider the context in which the information is to be disclosed (eg the nature of the proceedings in which it is to be disclosed); and
 - d) section 157C inappropriately permits the ACCC to withhold from discovery and keep secret documents in its possession. All documents should be included in lists for discovery. As evidenced in this decision, where the ACCC has a claim for privilege or public interest immunity over part only of a document, the document should be discovered, with redaction of parts over which the privilege or immunity is claimed.
19. The ACCC's submissions in these proceedings suggest that it agrees with us that in deciding questions of public interest immunity, a court must consider the context in which the information is to be adduced. As noted in our submission, under sections 157B of the proposed legislation, the exclusive list of considerations to which a court or tribunal may have regard in deciding whether to grant leave for disclosure of information critically excludes the purpose for which the documents are sought, and the context of the proceedings in which they are proposed to be adduced. If cartel victims are denied access to information which is relevant to their private enforcement proceedings, this will almost inevitably constitute a substantial interference with a fair trial.
20. As a bare minimum, a court or tribunal should be permitted to consider the purpose for which information is sought, and the context of the proceedings in which it is proposed to be adduced as part of its consideration of the interests of administration of justice.

⁷ [2008] FCA 265 at [38]-[48].

State of Victoria v Gregory John Brazel [2008] VSCA 37, 7 March 2008

21. The respondent, Gregory Brazel, who was attacked by other prisoners while being held in the high-security Acacia Unit at Barwon Prison, issued a claim for negligence against the State of Victoria. The County Court of Victoria ordered the State to produce for Mr Brazel certain documents containing information in respect of which the State has claimed public interest immunity, but upheld the State's claim in respect of other documents. The State appealed that decision to the Victorian Court of Appeal.

22. In a combined judgment of Maxwell P, Buchanan and Vincent JJA, the Victorian Court of Appeal stated that *"the limits of PII [public interest immunity] must continue to be very strictly drawn. The immunity should be given no greater scope than is demonstrably necessary."*⁸

23. The Court set out a test of 'demonstrable necessity' for public interest immunity, as follows:

*Is the information for which public interest immunity is claimed "of such sensitivity, and its disclosure would therefore cause such injury to the public interest, that information of that type should be treated as capable of attracting PII. Unless that threshold is passed, no question of balancing arises."*⁹

24. By contrast, the PCI scheme discards the threshold test of demonstrable necessity, and requires a court or tribunal to 'balance' considerations which in our view are already weighted against disclosure.

25. As in *KAL v ACCC* discussed above, the Victorian Court of Appeal stressed that

*Axiomatically, the decision on any PII claim depends upon the circumstances in which the claim is made. Everything turns on the character of the particular information in issue and the nature of the particular litigation (or administrative investigation) in which the occasion for disclosure of the information arises.*¹⁰

26. As noted above, the PCI scheme precludes direct consideration of the character of the information and the nature of the litigation in which it may be disclosed. In the circumstances, the PCI scheme is not a test of whether immunity from disclosure is in the public interest.

27. Further, the Victorian Court of Appeal noted that *"a decision to uphold, or reject, a claim of public interest immunity is not an exercise of discretion."*¹¹ Whether any claim for public interest immunity exists at all is a matter of demonstrable necessity, assessed according to a subjective test, not arbitrary discretion. Yet, the proposed section 157C provides the ACCC with complete discretion to refuse to discover or produce information, with no apparent safeguard of oversight or review.

28. Finally, the Victorian Court of Appeal referred to Stephen J's view, expressed in the High Court in *Sankey v Whitlam*¹² that the character of those proceedings (a private prosecution of former ministers for conspiracy)

⁸ [2008] VSCA 37 at [24].

⁹ [2008] VSCA 37 at [25].

¹⁰ [2008] VSCA 37 at [47].

¹¹ [2008] VSCA 37 at [38].

¹² (1978) 142 CLR 1, at 56.

must raise doubts about the reasons customarily given as justifying a claim to Crown privilege for classes of documents, being the reasons in fact relied upon in this case. Those reasons, the need to safeguard the proper functioning of the executive arm of government and of the public service, seem curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges.

29. In our view, there is a strong parallel which raises doubts about the appropriateness of the PCI scheme, which provides the ACCC with 'protections' from disclosure of information, but defeats the purpose of the *Trade Practices Act* (which the ACCC administers), by substantially interfering with cartel victims' capacity to obtain remedies for breaches of the Act.