

**ADMINISTRATIVE APPEALS TRIBUNAL**

**GENERAL ADMINISTRATIVE DIVISION**

**SYDNEY REGISTRY**

**No. 2725 of 2007**

**Brent Fisse**

Applicant

**Department of Treasury**

Respondent

**STATEMENT OF FACTS AND CONTENTIONS OF THE APPLICANT**

**Part I. Facts**

- 1 With the exception of paragraphs 4 to 6 and the additional relevant facts set out at paragraph 3, the Applicant takes no issue with and relies on Part 1 of the Statement of Facts and Contentions of the Respondent.

***Provided to Cabinet***

- 2 In relation to paragraphs 4 to 6, **[REDACTED FOR CONFIDENTIALITY]**
- 3 In paragraph 5 the Respondent states that the Working Party "submitted its report in 2004". The Applicant, however, asserts that the Working Party Report was submitted to the Treasurer and not to Cabinet.

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### ***Additional relevant facts***

4 The Applicant also relies on the following facts:

- (a) The purpose of the Working Party was to consider whether appropriate criminal offences for cartel behaviour should be introduced into Commonwealth law including “*determining an appropriate definition for any proposed offence, and a workable method of combining a clear and certain leniency policy within the criminal regime*”. The Working Party was expected to report to the Treasurer by the end of 2003.<sup>1</sup>
- (b) The public were invited to make submissions or provide additional material to the Working Party.<sup>2</sup>
- (c) On 27 April 2007 the Applicant was provided by the Treasury with a redacted copy of the Working Party Report. Of the 71 page Report, 67 pages were redacted. The 4 pages of text provided to the Applicant set out the terms of reference of the Working Party, which were already in the public domain.<sup>3</sup>
- (d) On 7 June 2007, the Applicant was provided by the Treasury with a further 13 pages of the Working Party Report in relation to “purely factual” material.
- (e) On 19 October 2007, the Administrative Appeals Tribunal directed the Respondent to lodge and serve any Conclusive Certificate in relation to the Report by 9 November 2007.
- (f) On 5 November 2007, the Secretary of Treasury determined it was not appropriate to issue a Conclusive Certificate at that time. The Treasury also stated that further sections of the Working Party Report (relating to purely factual material) would be released.<sup>4</sup>
- (g) To date this material has not been released and the Respondent has refused to grant to the Applicant access to the remainder of the Working Party Report.

## **Part II. Contentions of the Applicant**

### ***Exemption under s 34(1)(c)***

5 The Respondent contends that the “Executive Summary” to the Working Party Report is exempt for release under section 34(1)(c) of the *Freedom of Information Act* 1982 (Cth).

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<sup>1</sup> See Press Release of the Treasurer dated 3 October 2003 titled “Working Party to Examine Criminal Sanctions for Cartel Behaviour”.

<sup>2</sup> See Press Release of the Treasurer dated 3 October 2003 titled “Working Party to Examine Criminal Sanctions for Cartel Behaviour”.

<sup>3</sup> See [3] of the Respondent’s Statement of Facts and Contentions for the constitution of the Working Party.

<sup>4</sup> See also [13] of the Respondent’s Statement of Facts and Contentions.

- 6 Section 34(1)(c) provides that a document is exempt if it is a “*copy of, or of a part of, or contains an extract from, a document referred to in [section 34(1)] (a) or (b)*”. Accordingly, the Executive Summary will only be exempt if it is properly characterised as part of or contains an extract from a document which:
- (a) has been submitted to the Cabinet for its consideration, or is proposed by a Minister to be so submitted, *and* was a document brought into existence *for the purpose of* submission for consideration by the Cabinet (section 34(1)(a)); or
  - (b) is an official record of Cabinet (section 34(1)(b)).
- 7 The Applicant considers that the Respondent has misconstrued section 34(1)(c) of the FOI Act. As set out above, section 34(1)(c) of the Act requires that the document (in this case, the Working Party Report) fulfil the requirements of either section 34(1)(a) or 34(1)(b). Section 34(1)(c) then provides that any copy of or extract from that document is *also* exempt. In other words, if the Tribunal is satisfied that the Working Party Report was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, and that the Working Party Report was also brought into existence *for the purpose of submission* for consideration by the Cabinet, the Tribunal is required only to ask itself if the Executive Summary is an extract from or copy of that document. If it is an extract or copy from that Document, it is exempt.
- 8 What the Respondent instead asks the Tribunal to do is to make a finding that the Executive Summary is exempt because (as a copy or extract) it was presented to the Cabinet. This is inconsistent with the wording of the legislation. That element of the test clearly applies to the *document itself* and not to the extract or the copy. The Respondent makes no assertion that the Working Party Report itself was either submitted to Cabinet or that it was proposed by a Minister to be so submitted. For this reason, the Applicant’s arguments in relation to section 36(1)(c) must fail.
- 9 In addition the Applicant disputes that the Working Party Report (or the Executive Summary)<sup>5</sup> was created for the purpose of submission for consideration by the Cabinet. It is the Applicant’s case that the Working Party Report was actually prepared to enable the *Treasurer* to make recommendations to the Cabinet in relation to the proposed cartel offence.
- 10 Whether a document has been prepared for submission to Cabinet is to be ascertained at the time the document was created, not at the time of the hearing.<sup>6</sup> The Working Party Report submitted its report to the Treasurer in 2004.<sup>7</sup> On 2 February 2005, the Department of Treasury released a press release and gave no indication that the press release or the Working

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<sup>5</sup> The Applicant is also of the view that this part of the test is properly to be applied to the “Working Party Report” and not extracts to that Report as set out in paragraph 8 above.

<sup>6</sup> *Re Hudson and Department of the Premier, Economic and Trade Development*.

Party Report referred to in the press release had been created for the purpose of submission to Cabinet. This is consistent with the Department of Treasury's press release in October 2003 in relation to the establishment of the Working Party, which stated: "*the Working Party is expected to report to the Treasurer by the end of 2003*".<sup>8</sup> [REDACTED FOR CONFIDENTIALITY]

- 11 [REDACTED FOR CONFIDENTIALITY]. The Applicant contends therefore that the Executive Summary was not put to Cabinet "for its consideration" but only for its information. Accordingly the Applicant contends that neither the Working Party Report nor the Executive Summary is exempt pursuant to section 34 of the Act.<sup>9</sup>
- 12 A document is not exempt merely because it has some connection with Cabinet, or because it has some Cabinet "aroma" about it.<sup>10</sup> The Applicant contends that this is the Respondent's case at its highest.

### Exemption under section 36

- 13 When assessing where the public interest lies, it is necessary to weigh the public interest in citizens being informed of the processes of government on the one hand against the public interest in the proper workings of government on the other.<sup>11</sup>

### Factors in favour of disclosure

- 14 The Respondent sets out three factors which it states are relevant in relation to the public interest in "favour of disclosure". Whilst the Applicant agrees that those general points are relevant and should be taken into account by the Tribunal, the Applicant also argues that the following factors are relevant:
- (a) The new cartel offence will constitute a significant change in Australian trade practices law and clearly warrants public scrutiny. However, the Government has failed to release any substantive document (such as a white paper; public discussion paper or draft exposure bill) which canvasses important issues such as the definition of the offence, the leniency policy to be introduced, enforcement powers and the concurrent operation of criminal and civil actions). Nor has there been an Australian Law Reform Commission inquiry into the matter.<sup>12</sup>

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<sup>7</sup> Paragraph [5] of the Respondent's Statement of Facts and Contentions.

<sup>8</sup> Press release by the Treasurer No 86 dated October 2003 titled "Working Party to Examine Criminal Sanctions for Cartel Behaviour".

<sup>9</sup> *Ryan v Department of Infrastructure* [2004] VCAT 2346, para [36] and [37].

<sup>10</sup> *Ryan v Department of Infrastructure* [2004] VCAT 2346, para [33].

<sup>11</sup> *Sankey v Whitlam* (1978) 142 CLR 1; 21 ALR 505; *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52;

<sup>12</sup> Draft exposure bills are commonly released by the Government prior to substantive changes in the law and the ACCC routinely releases drafts of its guidelines and policies for public comment prior to finalisation. For example the current review of criminal and civil sanctions in corporations law which provide a stark contrast to the lack of public consultation in the context of the proposed cartel offence (<http://treasury.gov.au/contentitem.asp?Navid=037&ContentID=1182>).

- (b) The Working Party Report is the only known Government document which considers in detail the issues concerning the new cartel offence including the design of the offence; the leniency policy to be introduced, enforcement powers and the concurrent operation of criminal and civil penalties. It was the Working Party which was called upon to consider those issues when they were not resolved by the Dawson Committee. Accordingly, debate in Australia has been hampered and limited because the findings of the Working Party (set up specifically by the Government to deal with those issues) has never been made public. The refusal to publish the Working Party Report, a document of central public significance, has therefore impeded informed public debate on this issue.
- (c) The timely release of the complete Working Party Report, prior to the introduction of legislation for the criminalisation of serious cartel conduct, would address these issues and enable informed public debate from interested persons or organisations including: businesses; judges; competition lawyers; media commentators; research scholars; and professional and industry associations. It would facilitate and contribute to informed debate on a matter of public concern.<sup>13</sup> Such debate may also assist the Treasury as it proceeds with the legislation and help to ensure that all important issues are debated and resolved on an informed basis.
- (d) Refusal to disclose the Working Party Report is contrary to the Government's commitment to consultation in relation to business regulation.<sup>14</sup> The failure to release the Working Party Report could lead to regulation that is inappropriate and, given the lack of notice and transparency, antithetical to securing business support and co-operation.
- (e) Issues concerning the proposed cartel offence are currently in the public arena and are of direct concern to business, members of the judiciary, media commentators and trade practices lawyers and scholars.<sup>15</sup> The recent case of *ACCC v Visy Industry Holdings Pty Limited* (No 3) [2007] FCA 1617 is a prominent example. In ordering the payment of \$36 million in penalties against Visy Group, Richard Pratt and others, Heerey J stated that:

*"On 2 February 2005 the Treasurer...announced acceptance of the recommendations of the Dawson Committee and stated that the Government would amend the Trade Practices Act to provide for a term of five years imprisonment, as well as increases in other penalties. The Treasurer noted "dishonesty goes to the heart of serious cartel conduct..." Although, as already*

<sup>13</sup> *Easdown v Director of Public Prosecutions* (unreported, Supreme Court of Victoria, 21 October 1987).

<sup>14</sup> See <http://www.obpr.gov.au/consultation.html>.

<sup>15</sup> See Fisse "The Cartel Offence: Dishonesty?" (2007) 35 ABLR 235; Fisse "The Australian Cartel Criminalisation Proposals: An Overview and Critique" (2007) 4 Competition Law Review 51; Press releases will be provided to the Tribunal prior to the hearing.

*mentioned, the Act was amended last year to raise corporate penalties, the Government hasn't yet got around to introducing criminalisation".*

- (f) Further, the Treasurer's Press Release dated 2 February 2005 stated in unequivocal terms that dishonesty *is* an appropriate element of the proposed cartel offence. However, in *ACCC v Australian Abalone Pty Ltd* [2007] FCA 1834, Weinberg J agreed with an article written by the Applicant that dishonesty should not be an element of the proposed cartel offence. Justice Weinberg noted (at [128]:

*"I interpolate that in the event that 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...has made dishonesty an element of a cartel offence, and perhaps for good reason".*

- (g) There have also been comments in the media that the Commonwealth DPP supports this or a similar view in relation to dishonesty. Whilst the Working Party Report remains secret, the public are unaware as to the analysis undertaken by the very body set up to consider and resolve such issues. The views recently expressed by Weinberg J and Heerey J also confirm that questions concerning the elements of the proposed cartel offence are live issues and of significant public importance.
- (h) The subject matter of the Working Party's Report is clearly not sensitive or highly confidential, for reasons such as security concerns. The public is already aware of the role of the Working Party, as well as the topics that it was asked to consider, because the terms of reference are public. Those terms of reference suggest that the issues considered by the Working Party are matters of public policy and assessment with respect to inclusion of new offences and enforcement powers in the area of competition law, and not matters which go to issues of Commonwealth security or the release of governmental secrets. Indeed, the relevant issues are in the public domain.<sup>16</sup>
- (i) The Dawson Review referred with approval, at p 157, to the use of a working party in the UK to consider a range of particular issues raised by the Government's decision in principle to introduce a cartel offence in that jurisdiction and then observed that "*a similar, focused implementation exercise should be undertaken here.*" The process adopted by the UK Government, therefore, was put forward by the Dawson Committee as a suitable model as to how the Australian government should deal with the issues

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<sup>16</sup>Ruddock, Keynote Address, IBA 2<sup>nd</sup> Anti Trust Spring Conference, Friday 28 April 2006; Samuel, "Key Developments in Antitrust Regulation in Australia", IBA 2<sup>nd</sup> Anti Trust Spring Conference, Friday 28 April 2006. Press releases will be provided to the Tribunal prior to the hearing.

raised by the proposed cartel offence. The Australian Government adopted that recommendation by setting up the Working Party. However, unlike the Australian Government, the UK Government released the report of the UK working party report as well as a detailed white paper which both provided essential background for public consideration; this material was made publicly available well before the introduction of the *Enterprise Bill*.<sup>17</sup> The Applicant sees no reasonable basis for “heightened secrecy” or sensitivity concerning the Working Party Report in Australia, in circumstances where the UK Government considered it appropriate to release a document of a very similar nature in order to facilitate and inform public debate.

- (j) Any sensitivity or genuine secrecy which may have existed in the subject matter of the Working Party Report, which was drafted and submitted to the Department three years ago, must have diminished substantially during that time particularly given that there has been a change of Government.<sup>18</sup> The public has very little if anything to gain from the refusal to release this Report. However, the public has much to gain from its release which may provide important explanations about the design and application of the proposed cartel offence and related enforcement powers.

## **The Respondent’s Countervailing Factors**

### ***Convention of Cabinet confidentiality***

- 15 At paragraph [23.1] of its Statement of Facts and Contentions, the Respondent asserts that disclosure of the Working Party Report would breach the convention of Cabinet confidentiality. **[REDACTED FOR CONFIDENTIALITY]** Nor was it “considered” by Cabinet. Nor was it or the Executive Summary created for the purpose of submission to Cabinet for its consideration. Accordingly disclosure of the document would not breach the convention of Cabinet confidentiality.
- 16 It is clear that no deliberations of Cabinet would be disclosed. What would be disclosed are the reported results of the deliberations of the Working Party. The fact that Cabinet then went on to consider an Executive Summary of the Working Party Report does not disclose the deliberations of Cabinet. It would not be possible to identify which parts of the Working Party Report were discussed by Cabinet or the nature of those discussions.
- 17 The remaining arguments raised by the Respondent fall into the broad categories, namely (a) disclosure would compromise confidentiality, and (b) the release of the Working Party Report would mislead the public.

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<sup>17</sup>The UK working party report was preceded by the publication of the White Paper, *A World Class Competition Regime*, by the Department of Trade and Industry (with strong support from HM Treasury) in July 2001. The UK working party report was published in November 2001. See Office of Fair Trading, *Proposed Criminalization of Cartels in the UK* (OFT 365, 2001).

<sup>18</sup> *Re Lianos v Department of Social Security* (1985) 7 ALD 475.

### **Compromise confidentiality?**

- 18 At paragraph [23.3] of its Statement of Facts and Contentions, the Respondent asserts that disclosure of the Working Party Report would “*tend to inhibit frank and objective contributions in similar future working party arrangements*”.
- 19 Endorsing the reasoning in *Sankey v Whitlam*, the AAT has consistently rejected the possible want of candour and frankness as a consideration weighing against disclosure unless concrete evidence to support it can be adduced.<sup>19</sup>
- 20 At paragraph [23.2] of its Statement of Facts and Contentions, the Respondent also asserts that disclosure of the Working Party Report would undermine “direct, free and confidential communication” between Ministers and members of the Minister’s office on issues which are under active consideration at the highest levels of Government.
- 21 Arguments in relation to confidentiality may have a role to play when the Tribunal is considering a document which does not contain final views and/or is not self-contained. In such circumstances, it may not be in the public interest to release such documents as the release could hinder future communications between Minister and members of that Minister’s office (although we note that the Working Party was not in fact made up of the Treasurer’s staff).
- 22 However this concern is misplaced when the Tribunal is considering a final and considered report (of 70 pages in length) which is clearly self-contained. The Applicant has not sought access to documents setting out frank discussions that occurred within the Working Party and which did not have the benefit of analysis and consideration. The Applicant also contends that it must have been in the minds of the members of the Working Party, at the time of writing the Report, that it was likely to be or could be released to the public. In these circumstances, particularly where the Working Party invited public submissions and additional material,<sup>20</sup> it is unlikely that the release of the Report would undermine direct, free and confidential communications between Ministers and members of that Minister’s office.
- 23 The Applicant also considers that this case is clearly distinguishable from those cases where relevant communications have been between people at the “highest levels of administration”.<sup>21</sup> The Working Party was not made up of persons at the “highest levels of administration” but rather of officials from the Treasury; the Attorney General’s Department; the ACCC and the

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<sup>19</sup> (1978) 142 CLR 1; 21 ALR 505; *Re Downie and Dept of Territories* (1985) 8 ALD 496 at 504; *Re Waterford and Treasurer* (No 2) (1985) 8 ALN N37; *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257; *Re Murtagh and FCT* (1984) 6 ALD 112 at 124; *Re Fewster and Dept of Prime Minister and Cabinet* (1986) 11 ALN N266; *Re VXF and HREOC* (1989) 17 ALD 491; *Re Kamminga and Australian National University* (1992) 26 ALD 585; *Re Cleary and Dept of Treasury* (1993) 31 ALD 214.

<sup>20</sup> Press release by the Treasurer dated October 2003 titled “Working Party to Examine Criminal Sanctions for Cartel Behaviour”.

<sup>21</sup> *Re Toohey and Dept of Prime Minister and Cabinet* (1985) 9 ALN N94; *Re Burns and Australian National University* (No 2) (1985) 7 ALD 425 at 439–40; *Re Mann and ATO* (1985) 7 ALD 698.



Commonwealth DPP.<sup>22</sup> In such a case, it is most unlikely that the release of the Working Party Report will undermine direct, free and confidential communications between Ministers and members of the Minister's office.

- 24 The Applicant reiterates that it is seeking the release *only* of the final Working Party Report. It is not seeking drafts of that report; minutes of meetings of the Working Party; correspondence between officials in relation to that Report; or correspondence with Ministers in relation to that Report. The Applicant fails to see how, in all the circumstances of this matter, the release of one final and considered report in relation to issues of such public significance, would be contrary to the public interest.

### ***Confuse the public?***

- 25 At paragraph [23.4] of its Statement of Facts and Contentions, the Respondent argues that, as the Government's policy position on a criminal offence for serious cartel conduct is now in the public domain, disclosure of the Working Party Report may lead to "*speculation about possible future reforms which are not Government policy*" and that such speculation will confuse the public. In *Re Dillon and Dept of the Treasury (No 1)* the Tribunal determined that for such an argument to be successful, there must be a real likelihood, supported by evidence, that disclosure would result in a misconstruction.<sup>23</sup>
- 26 The Applicant asserts again that the Working Party Report is a final and self-contained report submitted to the Treasurer in relation to the proposed cartel offence. In such circumstances, the Applicant considers that the Respondent's argument has no substance. It should also be noted that the Senate Committee on Constitutional and Legal Affairs in 1986 recommended that this factor not be given weight in decisions on the public interest since it implies that the Australian community lacks the sophistication to distinguish between a proposal canvassed as an option and a proposal actually adopted. There is no reason to believe that the Australian community lacks the capacity to consider and assess recommendations made in the Working Party Report in light of any discussion of possible options in the Report. The Respondent's contention to the contrary appears to be contrived and the Applicant questions the good faith of the Respondent in raising it. It is difficult to reconcile the Respondent's contention with the policy of the Australian Government Solicitor requiring it to be a model litigant.
- 27 Another important consideration is that there is a new Federal Government and that the proposals of the previous government on the criminalisation of cartel conduct are under active

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<sup>22</sup> Press release by the Treasurer dated October 2003 titled "Working Party to Examine Criminal Sanctions for Cartel Behaviour".

<sup>23</sup> (1986) 10 ALD 366; 10 ALN N251. In *Re Waterford and Treasurer* (No 2) (1985) 8 ALN N37 at N41, the AAT set down a number of factors relevant to a determination that disclosure may provoke premature and ill-informed discussion and criticism. These included whether the document assumes an understanding of the subject matter by an audience familiar with the issues rather than by the general public; whether and to what extent the material is outdated; and whether there has been publication of the matter in other forms: see also *Re Downie and Dept of Territories* (1985) 8 ALD 496; *Re Sunderland and Dept of Defence* (1986) 11 ALD 258; *Re McCarthy and Australian Telecommunications Commission* (1987) 13 ALD 1; *Re Prosser and Australian Telecommunications Corp* (1989) 17 ALD 389; *Re Cleary and Dept of Treasury* (1993) 31 ALD 214.

reconsideration by the new Government. The new Government has indicated that it intends to depart from the proposals set out in the Treasurer's press release of 2 February 2005 in several significant respects (see AFR, 5 December 2007, p 1). In this changed environment, the only apparent risk of public confusion is the risk that the public will be denied access to the views expressed by the Working Party on various possible options that are to be reconsidered by the Government. .

- 28 It must be demonstrated by the agency that the disclosure of a particular document is "contrary to the public interest". This formulation places the onus primarily on the Respondent to show why the Working Party Report should not be disclosed. This onus has not been discharged.

Date: 5 December 2007

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