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24 August 2007

By mail | 6 pages

Justin Davidson
Australian Government Solicitor
50 Blackall Street
Barton ACT 2600

Dear Mr Davidson

AAT Application 2007/2752 and 2007/2819:
Submissions in relation to the issue of a conclusive certificate

1 We refer to your letter dated 10 August 2007.

2 As your client is aware, on 27 April 2007, Gilbert + Tobin were provided by the Treasury pursuant to an FOI Application with a 68 page document titled "Working Party on Criminal Penalties for Cartel Behaviour" dated 2004 (**Working Party Report**), 65 pages of which were redacted (the three unredacted pages consisted of the public terms of reference).

3 On 7 June 2007, the Treasury released to our client a further 13 pages of the Working Party Report, which your client claims contained purely factual material in accordance with section 36(5) of the FOI Act.

4 Our client lodged an application for review with the AAT, in relation to this decision, on 26 June 2007. Prior to that application, and up until the first conference at the AAT, your client had not made mention of any consideration which was being given to the issuing of a conclusive certificate under the FOI Act.

5 Your letter of 10 August 2007 now states that the Secretary to the Department of the Treasury is considering issuing a conclusive certificate pursuant to section 36(3) of the FOI Act (**Conclusive Certificate**) over some or all of the exempted parts of the Working Party Report. Your letter invited our client to make submissions relevant to the Secretary's consideration of this matter before making a decision. These submissions are set out below.

Background

6 In April 2003, the Government announced its "in principle" acceptance of the recommendation by the Committee of Inquiry for the Review of the *Trade Practices Act, Review of the Competition Provisions of the Trade Practices Act* (2003) (**the Dawson Review**) that criminal offences for cartel behaviour be introduced into Commonwealth law.

7 The Dawson Review recommended that criminal sanctions be introduced for serious cartel conduct, subject to solutions being found to problems identified before it, including the

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development of a satisfactory definition of serious cartel behaviour and the implementing of an effective leniency or immunity policy in the Australian context (Recommendation 10.1). The other issues stated by the Dawson Review to require further consideration by a working party included the extent to which section 155 of the *Trade Practices Act* 1976 (Cth) (**TPA**) would apply in the context of criminal investigations and the need for rules to manage or limit the use of concurrent criminal and civil proceedings.

8 In October 2003, the Treasurer publicly announced the terms of reference of a working party (**Working Party**) to consider:

> *"the matters...that should be resolved before criminal sanctions can be introduced. These include[ed] determining an appropriate definition for any proposed offence, and a workable method of combining a clear and certain leniency policy within the criminal regime."*

9 It was said that the Working Party would report to the Treasury by the end of 2003. However, the unredacted findings and recommendations of that Working Party have never been published or released

10 On 2 February 2005, the Treasurer publicly announced that the Australian Government would amend the *Trade Practices Act 1974* (Cth) to introduce criminal penalties for serious cartel conduct.

11 The Treasury papers for the 2006 Commonwealth Budget stated that the criminal cartel provisions were to be introduced into Parliament during the 2006 winter sittings. This did not occur.

12 The amending legislation containing these provisions (*The Trade Practices Amendment (Cartel Conduct and Other Measures Bill and the Federal Court Amendment (Criminal Jurisdiction) Bill)* is now listed on the Prime Minister and Cabinet Department's website as legislation "proposed for introduction in the 2007 spring sittings".

Conclusive Certificate

13 Your client claims that parts of the Working Party Report are exempt from disclosure under section 36 of the FOI Act. A document is exempt under section 36 of the FOI Act if its disclosure would:

(a) disclose matter in the nature of or relating to opinion, advice, recommendation, consultation or deliberation occurring as part of the deliberate processes involved in the functions of an agency, a Minister or government (section 36(1)(a)); and

(b) disclosure would be contrary to the public interest (section 36(1)(b)).

14 Section 36(3) of the FOI Act provides that where the Minister is satisfied, in relation to a document, that it is an internal working document pursuant to section 36(1)(a), and that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that effect which establishes "conclusively that the disclosure of that document would be contrary to the public interest".

15 We do not accept that the Working Party Report is an internal working document pursuant to the definition in section 36(1)(a) of the FOI Act. In addition, for the reasons set out below, we do not consider the disclosure of the Working Party Report to be contrary to the public interest or that a Conclusive Certificate is appropriate in these circumstances.

Disclosure of the Working Party Report would promote public debate

16 Disclosure of a document is not contrary to the public interest if disclosure would make the public better informed and promote the discussion of public affairs.[1]

17 The new cartel offence will constitute a significant change in Australian 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. We note that draft exposure bills are commonly released by the Government prior to substantive changes in the law and that the ACCC routinely releases drafts of its guidelines and policies for public comment prior to finalisation.[2] Further, the need for either a draft bill or a detailed white paper was identified by leading practitioners in trade practices law as early as 2002.[3] No such document, however, has been released in relation to the proposed cartel offence and related provisions.

18 The Working Party Report is the only known Government document which considers in detail the important issues set out in paragraph 17 above. It was the Working Party which considered those issues when they were not resolved by the Dawson Committee. Accordingly, whilst the issues surrounding the proposed cartel offence have been debated in Australia, that debate has been hampered and limited because the findings of the Working Party set up specifically by the Government to deal with important issues (such as issues of the design of the offence, the leniency policy to be introduced, enforcement powers and the concurrent operation of criminal and civil actions) have 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.

19 The Treasurer's press release of 2 February 2005 is an inadequate substitute for the Working Party Report as it does not set out the detail of the proposals for amendments to the *Trade Practices Act* 1974 (Cth).

20 A timely release of the complete Working Party Report prior to the introduction of these amendments would address these issues and enable informed public debate about these amendments, from interested persons or organisations including businesses, judges, competition lawyers, media commentators, research scholars and professional and industry associations. It would contribute to adequate debate on a matter of public concern.[4] Indeed such debate may well assist the Department as it proceeds with the legislation and will help to ensure that all important issues are debated in an informed environment as that legislation progresses through the parliamentary process. We fail to see how this can be considered contrary to the public interest.

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[1] *Commonwealth of Australia v John Fairfax & Sons Limited (*1980) 147 CLR 39.

[2] We refer you to the current review of criminal and civil sanctions in corporate law which provides a stark contrast to the lack of public consultation in the context of the proposed cartel offence. See http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1182.

[3] We refer to the paper delivered by Mr Michael Corrigan during the 2002 Trace Practices & Consumer Law Conference titled "Criminal Sanctions for Part IV and ACCC Leniency Policy". Mr Corrigan stated that *"If the Government is to seriously entertain Professor Fels' suggestions, these issues need very detailed consideration. Certainly, some kind of detailed white paper and draft legislation needs to be prepared and widely circulated before one could evaluate the merits of any such proposals"* (p 11).

[4] *Easdown v Director of Public Prosecutions* (unreported, Supreme Court of Victoria, 21 October 1987).

The subject matter of the Working Party Report is not sensitive or highly confidential

21 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. Without attempting to be exhaustive, we have attached a small selection of press releases for this purpose at **Appendix A**. We also refer to the speeches given by Phillip Ruddock and Graeme Samuel at the IBA 2nd Antitrust Spring Conference in Sydney on 28 April 2006.[5]

22 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 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 raised by the proposed cartel offence. The Australian Government adopted that recommendation by setting up the Working Party.

23 However, unlike the Australian Government, the UK Government then released the report of the UK working party report as well as a detailed white paper which both provided essential background for public consideration well before the introduction of the *Enterprise Bill* (which made provision for a cartel offence and related powers) into the House of Commons on 26 March 2002 and Royal Assent on 7 November 2002.[6] We see 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 comparable nature with no adverse consequences to the public interest.

24 We also consider that 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.[7] 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 as to the reasoning behind the design and application of the proposed cartel offence and related enforcement powers.

25 If, contrary to what is set out above in paragraphs 21 to 24, the Working Party Report does contain any genuinely secret material the disclosure of which would seriously and adversely affect the public (such as the disclosure of investigative processes in train against suspected previous criminal behaviour) then of course that material may be redacted by the Treasury. But to suggest that almost the entire document falls into that category would be to deny that the Report addresses the issues that the Treasurer has publicly announced as being the Working Party's terms of reference.

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[5] Ruddock, Keynote Address, IBA 2nd Anti Trust Spring Conference, Friday 28 April 2006; Samuel, "Key Developments in Antitrust Regulation in Australia", IBA 2nd Anti Trust Spring Conference, Friday 28 April 2006.

[6] 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 Criminalisation of Cartels in the UK* (OFT 365, 2001).

[7] *Re Lianos v Department of Social Security* (1985) 7 ALD 475.

Refusal to disclose is contrary to the Government's public commitment to consultation

26 The Government's refusal to release the Working Party Report is contrary to the Government's commitment to consultation in relation to business regulation. That policy is partly as follows:

> *"The Australian Government has made a commitment to improving mechanisms for consultation with business and supporting appropriate consultation with all relevant stakeholders. Consultation ensures that both those affected by the regulation and the regulator have a good understanding of what the problem is, alternative options to solve the problem, possible administrative mechanisms, possible compliance mechanisms and associated benefits, costs and risks. <u>Lack of consultation can lead to regulation that is inappropriate to the circumstances, costly to comply with and poorly adhered to</u>* [emphasis added]." [8]

27 The failure to release the Working Party Report could conceivably lead to regulation which is inappropriate as well as poorly understood and adhered to. Plainly, that would not be in the public interest.

"Exceptional circumstances" do not exist

28 Paragraph 1.7.3 of the Exemptions Memorandum, prepared by the Attorney-General's Department states that:

> *"the issuance of a conclusive certificate is appropriate only in **exceptional circumstances**, as it represents the claiming and acceptance of responsibility at the highest levels of government* [emphasis added]".

29 It is clear, for the reasons set out above, that the "exceptional circumstances" envisaged by section 36(3) of the FOI Act are not present in this case.

30 Moreover, if any such exceptional circumstances had been present, they would have been apparent prior to our client filing an application with the AAT for review of the decision denying access. The Secretary could have issued a conclusive certificate at the time when our client's FOI Application was made, but did not. Rather our client was only made aware that a Conclusive Certificate was being considered by your letter dated 10 August 2007, approximately four months after submissions were provided to the Department on internal review. We consider it contrary to the objects set out in section 3 of the FOI Act for a Department to refuse access to a document pursuant to both an FOI Application and an internal review, and then issue a Conclusive Certificate only at the point when an application to the AAT is made, those objects being "*to extend as far as possible the right of the Australian community to access to information in the possession of the Government of Australia*" (s. 3 of the FOI Act). To issue a Conclusive Certificate in this case would be a misuse of the Secretary's power and an improper application of the requirements of section 36(3) of the FOI Act.

31 We accept that release of the Working Party's Report may not be the Government's preferred course of action. Depending on the extent to which the Working Party's views have been taken up, release may even be embarrassing to the Government. However it is difficult to imagine any grounds on which the release of the document could be "harmful" to the public interest or contrary to the public interest. Disclosure of the Report would promote public debate, which is

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[8] See http://www.obpr.gov.au/consultation.html.

clearly in the public interest, and complete the picture of what is already known about these matters.[9]

32 For the reasons set out above, we consider that the disclosure of the Working Party Report would not be contrary to the public interest and the power in section 36(3) to issue a Conclusive Certificate is not applicable and/or should not be exercised in this case.

Next steps

33 We request that you inform us of the Secretary's decision as soon as it is made.

34 We also remind your client that if the Secretary chooses to issue a Conclusive Certificate, notwithstanding the reasons set out in these submissions, it has a statutory obligation to identify the parts of that document containing the matter and give notice of the grounds of public interest upon which the decision is based (section 36(7) of the FOI Act).

35 Our client also requests that detailed reasons for any decision to issue a conclusive certificate be provided. Our client is entitled to any such reasons pursuant to section 13 of the ADJR Act.[10]

Yours faithfully
Gilbert + Tobin

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[9] *Easdown v Director of Public Prosecutions* (unreported Supreme Court of Victoria decision, 21 October 1987).
[10] *Shergold v Tanner* (2002) 209 CLR 126.

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Tougher cartel laws slated

Matthew Drummond

The federal government aims to introduce into parliament this spring laws that make cartels a criminal offence, helping to take some of the heat out of petrol pricing before the election.

If passed, the tougher cartel laws will come more than four years after criminal penalties were first recommended by the government's Dawson review into competition laws, and 2½ years after Treasurer Peter Costello said he would adopt the reform.

Bills enacting the penalties are listed on a schedule for sittings that resume next week.

A spokeswoman for the Treasurer said the legislation would be introduced once changes to predatory pricing laws, now in the House of Representatives, cleared the Senate.

University of NSW associate professor Frank Zumbo said undoubtedly there was "a link between the angst and anger about petrol prices and the realisation that the Australian Competition and Consumer Commission needs a strong deterrent".

The proposed laws create an offence allowing the ACCC to refer "serious" cartels for criminal prosecution.

To prove the offence, a jury will need to be satisfied beyond reasonable doubt that the cartel arrangement was dishonest, according to the standards of reasonable people, and that the accused knew it was dishonest.

"One wonders whether it will have success on a criminal standard."

A team from the ACCC's 250-odd investigators has already spent 18 months in training on criminal investigations.

ACCC chairman Graeme Samuel, who has been frustrated by the delay in passing the laws, said yesterday criminal penalties were vital to stop cartels.

"The deterrent of financial penalties always enables cartel participants to weigh up deterrence of financial penalties against the millions that can be gained from a cartel," he said.

"So it becomes a cost-benefit assessment, whereas if you have criminal penalties, the cost-benefit swings the other way because you can't put a value on five years in jail."

The maximum penalty for a cartel now is the greater of three times the benefit of the cartel, 10 per cent of company revenue or a $10 million penalty. Criminally, individuals will face up to five years' jail and $220,000 fine.

Mallesons Stephen Jaques special counsel Kathleen Harris said working in the criminal sphere would be a big change for the ACCC.

The ACCC immunity policy for whistleblowers would need to be amended as the prosecutor, rather than the ACCC, would need to make offers of immunity.

The criminal standard of proof beyond reasonable doubt would also test the ACCC, following its loss of a cartel prosecution, despite the lower civil standard, against Geelong petrol retailers.

"Given that recent loss, one wonders whether they are going to have much success on a criminal standard," she said.

$9.2m punishment for air-con cartel

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Matthew Drummond

A group of Perth air-conditioning service providers who formed a cartel has been punished with $9.2 million in penalties by the Federal Court.

The penalties will be shared by 11 companies and 18 company directors and senior employees who met to discuss ways to fix prices and rig bids in competitive tenders. The individuals involved face penalties ranging from $3500 to $70,000.

The Australian Competition and Consumer Commission alleged $129 million worth of tenders were affected, with office towers, shopping centres, schools and hospitals across Perth all unwittingly having their competitive tenders affected. Customers caught by the cartel, which ran in various forms from 1992 until 2003, include AMP and the CSIRO.

ACCC chairman Graeme Samuel yesterday used the penalty decision to warn other companies to steer clear of illegal collusive arrangements.

"It is a clear message that anyone involved in a cartel will be liable for a substantial pecuniary penalty," he said.

"The consequences of participating in a cartel will be even more serious when the government amends the Trade Practices Act to criminalise hard-core cartel behaviour and provide for individuals to be jailed."

The ACCC has eight cartel prosecutions in the courts, with another 36 under investigation.

The parties in the air-conditioning cartel all admitted their involvement and co-operated with the ACCC.

The successful prosecution follows the commission's defeat in a cartel case against a group of petrol retailers in Geelong. That case was thrown out in May. Yesterday, lawyers for the petrol retailers made submissions on how much the ACCC should compensate them for their legal costs.

"The ACCC alleged $129 million worth of tenders were affected."

In the Perth case the judge, Robert Nicholson, found that weekly meetings of the Air Conditioning and Mechanical Contractors Association of WA were covertly used to discuss coming tenders and then agree on who would submit the winning price. The "designated tenderer" would then tell other cartel members the "cover price" that they were to bid.

"When formulating the cover prices, the designated tenderer was able to ensure that its own price was both the lowest and gave it a 'reasonable profit margin' for the job," the judge said.

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REGULATORS

Funding to fight cartels 'inadequate'

David Crowe

The government's new funding to combat price-fixing cartels would not be enough to fight tough cases through the courts and could discourage public prosecutors from tackling big companies, legal experts warned yesterday.

The assessment highlights a key weakness in the budget's $350 million in funding for business regulators, though lawyers generally praised the new measures as a "terrific" boost in resources.

Only $4.4 million will go to the Commonwealth Director of Public Prosecutions to fund its criminal proceeding against cartel members, a sum that trade practices lawyers yesterday said was inadequate.

Freehills partner and former Trade Practices Commission head Bob Baxt said the amount was too little to fund major cartel prosecutions.

And Blake Dawson Waldron partner Stephen Ridgeway said court cases would require deep pockets if the government went ahead and made cartel membership a criminal offence.

It would be doubtful if $4.4 million's sufficient to pursue one serious case.

"If we have criminal sanctions the cases will be even more hard-fought," he said.

"It would be doubtful if $4.4 million's sufficient to pursue one serious case."

The Australian Competition and Consumer Commission received $33.6 million over four years to investigate cartels, a measure that some interpreted as a sign that the regulator's most important cartel case, against Dick Pratt's Visy Industries, is turning out to be more expensive than planned.

Labor competition spokesman Joel Fitzgibbon said ACCC chairman Graeme Samuel should not have his hands tied due to insufficient funding.

The biggest beneficiary of the funding increase, the Australian Securities and Investments Commission, is preparing to increase its surveillance of the financial markets and take advantage of a new funding reserve for court action.

ASIC chairman Jeff Lucy said the commission would be able to draw on up to $30 million each year to pay for court action, ending an arrangement that forced it to go to the government for one-off funding for matters such as HIH and One.Tel.

Mr Lucy said it was too early to tell whether the funds would be enough to cover big court actions like its insider trading allegations against Citigroup.

"Clearly any matter that you take on, such as [Citigroup], does have the potential to be very thirsty for legal resources, and what the government sought to do was put us in a position where we know we can take on those sorts of matters with the full comfort of being adequately resourced," he said.

The leader of the recovery and insolvency group at Clayton Utz, Karen O'Flynn, said the resources were a terrific boost for ASIC.

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THE REGULATORS

$350 million to target cheats

David Crowe

Business regulators will receive more than $350 million over four years to crack down on fraud, price-fixing and insider trading, as well as increase oversight of industry sectors such as energy.

The Australian Securities and Investments Commission is the biggest winner from the measures, which address the mounting criticism of the agency for failing to act on major corporate failures over the past two years.

Funding will also go to the Australian Competition and Consumer Commission to investigate cartels and the Australian Energy Regulator will gain $74.8 million to oversee the national electricity market.

ASIC will receive $234.6 million of the extra funding, including more cash to prosecute its actions in court and prevent its targets using drawn-out legal debate to "price out" the commission.

ASIC will use some of the funding to extend its investigation of market trading beyond equities and futures to include non-exchange-based trading. It will use electronic surveillance tools to "develop its presence" in the investigation of bond markets, hedge funds and contracts for difference.

Photo: PETER RAE

ASIC's enforcement activities will also receive a big boost after criticism that it acted too slowly and too feebly against failed property group Westpoint, investment spruiker Henry Kaye and former Telstra director Steve Vizard.

Treasury said the commission would receive $30 million to fund its enforcement, partly to help prevent high-profile defendants from outspending it in court. Treasury said ASIC's core systems were under pressure from increasing demands from the public, requiring spending of $14.2 million on information technology over four years.

Regulators will secure $33.6 million to step up their campaign against price-fixing by industry cartels, now the subject of a landmark court action against Dick Pratt's Visy Industries.

Although most of the cartel funding will go to the ACCC, an important component will support the commonwealth Director of Public Prosecutions so that it can seek criminal penalties for cartel organisers.

ACCC chairman Graeme Samuel (pictured) and his prosecution team have been in discussions with the DPP over the past year to reach an agreement on how to investigate cartels, including the vexed issue of offering immunity to those who inform on others.

The cartel funding will be used to create a dedicated ACCC cartel unit, and another $4.4 million will fund the DPP's prosecutions over four years.

The Federal Court will receive $3.9 million to hear cartel court cases, and the Federal Magistrates Court will receive $14.6 million to support its wider responsibilities in trade practices, corporate insolvency and consumer protection.

But the budget's cartel measures lack one important ingredient – the legal powers needed to launch criminal proceedings.

Treasurer Peter Costello announced in February 2005 that he would introduce legislation to impose tougher fines against cartel members and enable criminal prosecutions of individual executives.

But the changes have yet to be presented to parliament because they are part of a package of trade practices bills that was derailed last year when Nationals senator Barnaby Joyce crossed the floor to amend one of Mr Costello's measures.