



**ADMINISTRATIVE APPEALS TRIBUNAL
OR
SMALL TAXATION CLAIMS TRIBUNAL**

APPLICATION FOR REVIEW OF DECISION

This form can be used to lodge an application to the Commonwealth Administrative Appeals Tribunal (AAT) or to the Small Taxation Claims Tribunal (STCT). Please read the attached information sheet before filling out this form.

APPLICANT

Title: Mr Ms Mrs Miss Other

Full name

First name: Brent Last name: Fisse

Gender

Male Female

Date of birth

Telephone (business)

Telephone (home)

Your address

Lexpert Publications Pty Ltd
70 Paddington Street
Paddington NSW 2021

Your representative's name, address and telephone number (if you have one)

(If you have a representative, please put their name (with firm or company name, if any), address and telephone number in this box.)

Kate Harrison
Gilbert + Tobin
2 Park Street Sydney 2000
Ph 02 9263 4015

Interpreter

Do you require the assistance of an Interpreter? Yes No

If yes, for which language?

Disability

If you have a disability and need assistance, please indicate whether:

Visual Hearing Wheelchair user

Other, please specify

DECISION

You do not have to answer this question if you can attach a copy of the decision. If you don't have a copy, please describe the decision briefly:
A copy of the decisions are attached.

Date the decision was made

7 June 2007 and 8 June 2007

Decision reference

Please refer to the attached Information for Applicants sheet
ER2007/02047; C2007/712

Date you received notice of the decision

11 June 2007 and 13 June 2007

Who made the decision, if known:

Department or other body:
Department of Treasury and the Australian Competition and Consumer Commission
Address: Treasury: Langton Crescent, Parkes ACT 2600
ACCC: PO Box 1199 Dickson ACT 2602

REASONS FOR APPLICATION

What are your reasons for seeking review of this decision? Please read the Information for Applicants sheet.
Please see attached

SMALL TAXATION CLAIMS TRIBUNAL (STCT) MATTERS

(only answer this question if you want a tax decision reviewed in the STCT)

Please read the Information for Applicants sheet for details about the STCT and the Taxation Appeals Division of the AAT before you answer.
Is the amount of tax in dispute less than \$5,000? Yes No
If yes, and you want your application dealt with in the STCT, please state the amount of tax in dispute.
\$.....
If the amount of tax in dispute is over \$5,000, or you do not state the amount of tax in dispute, your application will be dealt with in the Taxation Appeals Division of the AAT.

Signature

W B Jones

Date

26 June 2008



ADMINISTRATIVE APPEALS TRIBUNAL OR SMALL TAXATION CLAIMS TRIBUNAL

INFORMATION FOR APPLICANTS

ABOUT THE APPLICATION FORM

The form has two sides. The first side asks for personal information. The second side asks for information about the decision that you want reviewed. Please fill in both sides. The AAT needs this information to process your application.

If there is not enough space in a box on the form for the information asked for, write it on a separate piece of paper and staple it to the form. Write in the box "see attached". If you have to do this more than once, use headings to show which question is being answered.

Representative

You can be represented by any person you choose. If you tell us that you have a representative and you give us your representative's address, the AAT will send letters and documents about your case to your representative, instead of to you.

Interpreters and disability assistance

If you need an interpreter, the AAT will arrange for a qualified interpreter to assist you. If you have a disability, the AAT will try to make appropriate arrangements for you.

Decision

If you can, attach a copy of the decision you want the AAT to review to this form. If you can't, briefly describe the decision in the box provided. For example: "Decision of Comcare to terminate weekly payments of compensation". It is important that you include the decision reference number.

Decision reference

You will usually find a reference number on the copy of the decision you want the AAT to review. If you write this number on your application form, the relevant decision can be identified quickly. This is particularly important in tax matters.

Who made the decision

If you can't attach a copy of the decision you want the AAT to review, you need to tell us the name of the department that made the decision. You also need to tell us the address of the office of that department where the decision was made.

Reasons for application

It is important that you tell us why you want the decision reviewed. For example, you may think the decision is wrong and a different decision should be made. You must answer this question before the AAT can accept your application.

Tax matters

Tax matters are dealt with by the Taxation Appeals Division of the AAT and the Small Taxation Claims Tribunal. The STCT is designed to deal quickly with matters where the amount of tax in dispute is under \$5,000. If you do not complete the section of the application form headed "Small Taxation Claims Tribunal", or if you state an amount of tax in dispute over \$5,000, then your application will be dealt with in the Taxation Appeals Division of the AAT.

STCT

You can only choose to have your application heard in the STCT if the amount of tax in dispute is under \$5,000. If you complete the section of the application form headed "Small Taxation Claims Tribunal", and you state that the amount of tax in dispute is under \$5,000, then your application will be dealt with as an STCT application.

In the STCT, applications are dealt with quickly and informally. There is an application fee which is not refundable even if the application is resolved in your favour.

If you choose the STCT, then unless you obtain a section 35 confidentiality order (see "Privacy" below), the information used at your hearing becomes public.

Taxation Appeals Division

The higher application fee applies in the Taxation Appeals Division. This fee is refunded in full if the application is resolved in your favour. Any request you make for confidentiality is granted automatically.

PRIVACY

AAT and STCT conferences and mediations are held in private. Anything said or done at a conference or mediation is confidential.

AAT and STCT hearings are usually held in public, and any information which is given or used at a public hearing will become public information. The decision of the Tribunal in your application, including any written reasons for the decision, will also be made available to the public. There are two exceptions to this:

1. You may make a request under section 35 of the AAT Act for an order that some, or all, information in your case be confidential and/or that any hearing be held in private. The Tribunal can only grant your request if it is satisfied that there is a good reason to do so.

2. In some cases, the legislation under which the decision was made may require that the information be kept confidential and that any hearing be in private.

If you want more information about your privacy when dealing with the AAT, please ring your local AAT office.

FEES

In most cases, there is no fee for an application to the AAT. In some applications, however, a fee must be paid when you lodge your application. If the application is resolved in your favour, this fee will be refunded.

If you choose to have your application heard in the STCT, there is a lower fee. This fee will not be refunded even if the application is resolved in your favour.

If your application is one where you must pay a fee, you may not have to pay if you can show that you can't afford it. There are other circumstances where you are automatically excused from paying any fee. An AAT staff member will be able to explain these to you.

Please ring your local AAT office to obtain the current fees.



If you need more information please ring your local AAT office on:

1300 366 700

Residents of the Northern Territory will be connected to Brisbane for the cost of a local call

If you are hearing impaired the AAT has a free-call **TTY service** available on:

1800 650 662



The addresses of the AAT offices are:-

Postal Address

District Registrar
GPO Box 9955
in your Capital City
(except for residents of the
Northern Territory who
should write to Brisbane)

Adelaide

District Registrar
11 Floor
Chesser House
91 Grenfell Street
ADELAIDE SA 5000
Fax: (08) 8201 0610

Brisbane

District Registrar
Level 4
Commonwealth Law Courts
Cnr Nth Quay & Tank St
BRISBANE QLD 4000
Fax: (07) 3361 3001

Canberra

District Registrar
Level 4
Canberra House
40 Marcus Clarke St
CANBERRA ACT 2601
Fax: (02) 6243 4600

Hobart

District Registrar
Commonwealth Law
Courts
39-41 Davey St
HOBART TAS 7000
Fax: (03) 6232 1701

Melbourne

District Registrar
Level 16
Southgate, HWT Tower
40 City Rd
SOUTHBANK VIC 3006
Fax: (03) 9282 8480

Perth

District Registrar
Level 5
111 St Georges Terrace
Perth WA 6000
Fax: (08) 9327 7299

Sydney

District Registrar
Level 7
City Centre Tower
55 Market St
SYDNEY NSW 2000
Fax: (02) 9283 4881

Application for review of Decisions

ER2007/02047; C2007/712

Administrative Appeals Tribunal

- 1 This is an application to the Tribunal for review of:
 - (a) a decision made by the Australian Competition and Consumer Commission (**ACCC**) on 8 June 2007, to deny access to the following documents, identified by the ACCC, as a report titled the "*Original Supplementary to the Dawson Review Committee*" dated 2002; and a report titled the "*Supplementary Submission to the Dawson Review Committee*" dated 15 November 2002 (**ACCC Decision**); and
 - (b) a decision made by the Department of Treasury (**Treasury**) on 7 June 2007, to deny access to the complete document, without redactions, identified by Treasury as a report titled "*Working Party on Criminal Penalties for Cartel Behaviour*" dated 2004 (**Treasury Decision**).

Background

- 2 On 13 March 2007, Gilbert + Tobin made requests pursuant to the *Freedom of Information Act* 1982 (Cth), on behalf of Lexpert Publications and Mr Brent Fisse, to the ACCC and the Treasury in the following terms (**FOI Application**):

"1. All submissions prepared by the Australian Competition and Consumer Commission (ACCC) and provided to either the Dawson Committee or the Department of Treasury that fall within the description of a "later submission" as referred to on page 155 of the Dawson Committee's Report dated January 2003 titled "Review of the Competition Provisions of the Trade Practices Act" (Dawson Committee's Report)...

2. All documents comprising or constituting reports prepared by the working party referred to in the press release from the Treasury dated 2 February 2005 (working party) and provided to either the Dawson Committee or the Department of Treasury..."

- 3 On 22 March 2007, Gilbert + Tobin were notified by Treasury that the first part of the request had been transferred to the ACCC under section 16(1)(b) of the FOI Act. On 21 March 2007, Gilbert + Tobin were also notified by the ACCC that the second part of the request had been transferred to Treasury, pursuant to that same section.

ACCC Decision

Original response

- 4 On 30 April 2007, Gilbert + Tobin were notified by the ACCC that the ACCC had discovered six documents within the scope of the FOI Application, that it had granted access to one document, but that it had refused access to five documents in reliance on various provisions of the FOI Act including section 36 (internal working documents) and section 43(1)(c)(ii) (prejudice future supply of information).
- 5 On 3 May 2007, the ACCC provided Gilbert + Tobin with a copy of the document to which access was granted. This document consisted of correspondence between the ACCC and the Dawson Committee in relation to alleged anti-competitive conduct between Rockhampton

Obstetricians and the ACCC's attitude to rosters between doctors. This document was wholly irrelevant to the documents requested in the FOI Application. Our client paid a total of \$522.00 to the ACCC in processing charges in order to gain access to that irrelevant document.

Request for internal review

- 6 On 9 May 2007, Gilbert + Tobin requested an internal review of the ACCC's decision to refuse access to the other five documents it had determined were within the scope of the request, pursuant to section 54 of the FOI Act.

Response on internal review

- 7 On 8 June 2007 Gilbert + Tobin were informed that the scope of the internal review request had been clarified to include only two documents titled "*Original Supplementary to the Dawson Review Committee*", dated 2002, and "*Supplementary Submission to the Dawson Review Committee*" dated 15 November 2002 (the **ACCC Documents**).
- 8 In relation to the "*Original Supplementary to the Dawson Review Committee*", dated 2002, the original decision of the ACCC was varied, but access was refused in reliance on section 22 (deletion of irrelevant material) and section 36 (internal working document) of the FOI Act. No reasons were provided as to why or how the original decision was varied. In relation to the "*Supplementary Submission to the Dawson Review Committee*" dated 15 November 2002, the original decision of the ACCC was affirmed. The ACCC claimed that the release of this document would also be contrary to the public interest.
- 9 Whilst the ACCC apologised for the "misunderstanding in relation to the scope" of our initial request, the ACCC made no offer to refund part or all of the \$522.00 that our client had paid to the ACCC in processing charges in order to gain access to this document.

Treasury Decision

Original response

- 10 On 12 April 2007, Gilbert + Tobin were notified by Treasury that it had identified one document within the scope of the FOI Application, titled "*Working Party on Criminal Penalties for Cartel Behaviour*", dated 2004, (**Working Party Report**) and that it would be released in part in accordance with section 22 of the FOI Act.
- 11 On 27 April 2007, Gilbert + Tobin were provided by Treasury with a 68 page report, 65 pages of which were redacted. The three pages which were provided consisted of the Working Party's "Terms of Reference", which had been made public in October 2003. The Treasury refused access to the remaining 65 pages claiming that those pages were exempt pursuant to section 36 of the FOI Act. Our client, therefore, had paid a total of \$350.36 in processing charges to receive three pages of that document, which were already in the public domain.

Request for internal review

- 12 On 9 May 2007, Gilbert + Tobin requested an internal review of the Treasury's decision to refuse access to the complete Working Party Report, pursuant to section 54 of the FOI Act.

Response on internal review

- 13 On 7 June 2007 Gilbert + Tobin were informed that the original decision of the Treasury had been affirmed in part pursuant to section 36 of the FOI Act. However, Gilbert + Tobin were also informed that the Treasury had decided to release sections of the Working Party Report that it considered to contain purely factual material in accordance with section 36(5) of the FOI Act. The Treasury released, in part, a further 13 pages of the Working Party Report.

14 This leaves 52 pages of the Working Party Report to which access continues to be denied.

Grounds of review

15 A document is exempt under section 36 of the FOI Act if disclosure would:

- (a) disclose matter in the nature of or relating to opinion, advice, recommendation, consultation or deliberation occurring as part of the deliberative 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)).

16 Neither the ACCC Documents or the Working Party Report can be correctly characterised as “internal working documents” as set out in section 36(1)(a) of the FOI Act, or if so, their disclosure would not be contrary to the public interest (section 36(1)(b)).

Relief Sought

17 The Applicant seeks a decision from the Tribunal setting the ACCC and Treasury Decisions aside and substituting a decision that:

- (i) in relation to the ACCC Decision, the ACCC Documents are not exempt within the meaning of the FOI Act and that the Applicant is to be granted access to them in their entirety; and
- (ii) in relation to the Treasury Decision, that the Working Party Report is not exempt within the meaning of the FOI Act and that the Applicant is to be granted access to that Report in its entirety.

* * *

ENTERED
19 JUN 2007



**Australian
Competition &
Consumer
Commission**

Our ref: C2007/712
Contact Officer: Chiara Main
Contact phone: 02 6243 1244
Contact fax: 02 6243 1210
Email: foi@accc.gov.au

PO Box 1199
Dickson ACT 2602
470 Northbourne Ave
Dickson ACT 2602
ph (02) 6243 1111
fax (02) 6243 1199
www.accc.gov.au

8 June 2007

Gilbert + Tobin
Attention: Kate Harrison
Partner
GPO Box 3810
Sydney NSW 2001

Dear Ms Harrison

Request for Internal Review under the *Freedom of Information Act 1982* (Cth)

I refer to your letter dated 9 May 2007 received at the Commission today, in which you request an internal review of the decision made on 3 May 2007 under the *Freedom of Information Act 1982*. The decision related to your FOI request for access to

All submissions prepared by the Australian Competition and Consumer Commission (ACCC) and provided to either the Dawson Committee or the Department of the Treasury that fall within the description of a "later submission" as referred to on page 155 of the Dawson Committee's Report dated January 2003 titled "Review of the Competition Provisions of the Trade Practices Act" (Dawson Committee's Report).

As per your letter of 9 May 2007, the scope of your internal review request has been clarified to include only 2 documents (originally numbered 1 and 6) from the original decision. We apologise for any misunderstanding in relation to the scope of the initial request. For convenience, I have adopted the same numbering system as that used by the original decision maker.

Review decision

In my capacity as an authorised reviewing officer of the Commission, I am authorised in compliance with section 23(1) of the Act to conduct any reviews of decisions of the kind referred to in paragraphs (a) and (b) of sub-section 54(1) and to make a fresh decision.



I have examined the two documents described above, to which access was denied in the initial decision.

Attachment A is a schedule giving my review decisions. An explanation of my reasons is set out in Attachment B, and your review rights are set out in Attachment C.

In making my decision I have had regard to information provided to me by Commission officers as to the nature and content of the relevant documents and to the submissions made in your letter of 9 May 2007.

Where I have affirmed the original decision to deny access, I have also considered the possibility of granting part access pursuant to s.22 of the Act.

Yours sincerely



Rose Webb
General Manager
Enforcement and Coordination Branch

Internal Review - 6 June 2007
Schedule of documents

Doc No	Author	Addressee	Date	Description	No of folios	Access	Internal Review	Findings, Reasons and Brief Description
1	ACCC		..2002	Original Supplementary to the Dawson Review Committee	218	Refused	Decision varied - Refused	s.22 - Deletion of irrelevant material s.36 - Internal working documents
		Trade Practices Act Review						
6	ACCC		15.11.2002	Supplementary Submission to the Dawson Review Committee	4	Refused	Decision affirmed	s.36 - Internal working documents
		Trade Practices Act Review						

ATTACHMENT B

FINDINGS ON MATERIAL QUESTIONS OF FACT

1. s.22 Deletion of exempt or irrelevant material

Document : 1

Document 1 is a bundle of supplementary submissions to the Dawson Committee. I find that the only material in the bundle that is relevant to the request is 12 pages entitled 'Introduction of Criminal Sanctions' and 13 pages entitled 'Criminal Penalty Regime – Opinion'. I believe that the remaining material (which consists of submissions on other issues considered by the Dawson Committee unrelated to the criminalisation of the cartel conduct) would be reasonably regarded as irrelevant to the request for the purposes of section 22 of the FOI Act.

2. s.36 Internal working documents

Documents : 1 (relevant part) and 6

Disclosure of the documents would release material that includes an opinion, advice or recommendation in the Commission's possession, or consultation or deliberation that has taken place, in the course of the deliberative processes involved in the functions of the Commonwealth Government. The submissions analyse and synthesise information and opinions obtained by staff of the Commission to make confidential submissions to the Dawson Committee. I believe that the public interest requires that the Commission be able to synthesise and analyse information without the opinions expressed being the subject of public scrutiny. I have considered the competing public interest in disclosure and am satisfied that release would be contrary to the public interest.

ATTACHMENT C

INFORMATION ON RIGHTS OF REVIEW - ON INTERNAL REVIEW

1. ADMINISTRATIVE APPEALS TRIBUNAL

You have the right to apply to the Administrative Appeals Tribunal for a review of this decision within 60 days of the date when notice of this decision is given to you.

The Tribunal is a completely independent review body with the power to make a fresh decision. Your application should be accompanied by a filing fee of \$606, unless you are granted legal aid or you come within an exempt category of persons (check with the Tribunal registry in your State). The Registrar or Deputy Registrar may waive the fee on the ground that its payment would impose financial hardship on you. The fee may be refunded where you are successful. The Tribunal cannot award costs either in your favour or against you, although it may in some circumstances recommend payment by the Attorney-General of some or all of your costs.

The address of the Tribunal is:

District Registrar
Administrative Appeals Tribunal
Level 7, City Centre Building
55 Market Street
Sydney NSW 2000
[GPO Box 9955, Sydney NSW 2001]
Tel: (02) 9391 2400
Fax: (02) 9283 4881

2. COMPLAINT TO THE OMBUDSMAN

Pursuant to section 57 of the Act, you may request the Ombudsman to investigate action taken by the Commission in relation to your Freedom of Information request. There is no fee for making a complaint. The Ombudsman will consider your complaint and, if appropriate, conduct an investigation into it. Any investigation will be completely independent.

You may complain to the Ombudsman either orally or in writing. Such a request for investigation should be addressed to:

The Commonwealth Ombudsman
Level 7, North Wing, Sydney Central
477 Pitt Street
Sydney NSW 2000
(PO Box K825, Haymarket NSW 1240)
Tel: (02) 9218 3000
Fax: (02) 9211 4402

You cannot seek concurrent review by the Administrative Appeals Tribunal and Ombudsman of the same decision. The time limit on applications for review by the AAT is suspended while the Ombudsman is investigating the same matter.



Australian Government

The Treasury

7 June, 2007

File: ER2007/02047

Ms Kate Harrison
Gilbert & Tobin Lawyers
GPO Box 3810
SYDNEY NSW 2001

Dear Ms Harrison

INTERNAL REVIEW NOTICE OF DECISION UNDER SECTION 26 OF THE *FREEDOM OF INFORMATION ACT 1982*

I refer to your letter of 9 May 2007 requesting that Treasury undertake internal review of its initial decision of 12 April 2007 not to release documents under the *Freedom of Information Act 1982* (the Act).

In accordance with section 54 of the Act I have undertaken a review of the decision made by Mr French which was provided to you on 12 April 2007.

In undertaking this review I have considered:

- the terms of your request;
- the relevant provisions of the Act;
- the documents identified at issue in this matter;
- the original decision letter of 12 April 2007;
- copies of the documents released to your; and
- the various decisions of the Administrative Appeals Tribunal and the Federal Court of Australia concerning the application of the Act.

Authorisation

In accordance with section 26 of the Act, I, as the authorised decision maker under section 23 of the Act, have set out below, the decision and the reasons for my decision in regard to your request.

- In exercising my authority I am aware that the object of the Act (at section 3) is to make available to the public, information about the operations of departments, and create a general right of access to information in documentary form in the possession of Ministers and departments. I am also aware that section 11 of the Act, while providing a legally enforceable right to obtain access to documents in accordance with the Act, allows such access to exempt documents and official documents of a Minister.

Decision

Upon careful review of the documents, I have decided to affirm in part the decision made by Mr French in relation to the disclosure of the Working Party report. I affirm that the exemption claimed in Mr French's decision letter dated 12 April 2007 applies to the sections of the report that I have decided not to release. However, upon review I have decided to release those sections of the report that I consider to contain purely factual material in accordance with section 36(5) of the Act.

I attach a revised Schedule of the sections of the report that are exempt under the FOI Act.

Discussion

In reaching my decision, I considered the application of the following provisions of the FOI Act:

- section 22, concerning deletion of exempt matter or irrelevant material; and
- section 36, concerning internal working documents.

Deletion of exempt matter or irrelevant material

Section 22 of the Act provides for the deletion of information to enable the release of documents that would otherwise be exempt documents or disclose information that is irrelevant to the FOI request.

This provision was relied upon to delete information from the report, and to enable the release of those non-exempt parts of the report that were relevant to your request.

Exemption claimed

While I have decided to withhold documents, in whole or part, I have done so in accordance with the provisions of the Act. In particular, I have relied on section 36 (internal working documents). Details of my decision are set out below:

Internal Working Documents

Section 36(1) of the FOI Act provides for a document to be an exempt document if it is a document the disclosure of which:

- (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and
- (b) would be contrary to the public interest.

I note that your request for review emphasises that exemption is only appropriate under section 36 if the harm that disclosure may cause to the public interest or business of government outweighs the countervailing benefit to the public of disclosure. In reaching my decision, I have considered the likely harm which may be caused by disclosure and the countervailing public benefit of disclosure.

Disclosure of the entire Working Party report

Your letter requests an internal review of the refusal to release the entire Working Party report.

Upon careful consideration of the contents of the Working Party report, I consider that the document contains material that if released, would disclose matters in the nature of, or relating to, opinions, advice and recommendations prepared for the purpose of the deliberative processes involved in the functions of the Government. The Working Party was established by the Government for the purpose of considering a workable definition of a proposed criminal cartel offence, and an appropriate method of combining a clear and certain leniency policy with the criminal regime. The document contains opinions, advice and recommendations relating to consideration of these issues. The Working Party was part of a whole of government analysis of the issues. Ultimately the issues that were debated by the Working Party were referred to Cabinet for consideration, and may also be seen as a part of the deliberative processes of the Government in this light. In other words, disclosure of the report in its entirety would reveal advice prepared for the Government regarding a workable definition of cartel behaviour, the framing of a criminal offence, and the operation of a leniency policy for cartel conduct.

I am also required to consider whether disclosure of the document would be contrary to the public interest. There is a public interest in understanding the reasons for Government decisions. There is also a public interest in ensuring the public has access to information in the possession of Government, subject to protecting essential public and private interests. However, in this case the disclosure of the document would undermine the important convention that the deliberations of Cabinet be kept confidential. This convention is fundamental to the proper functioning of the parliamentary process. I also strongly consider that disclosure of the report would have the effect of reducing the likelihood that such a written report would be produced by officials in the future, which would deprive the Government of the sort of deliberative analysis contained in the report. As discussed, ultimately the matters deliberated in this report were provided to Cabinet. It is the nature of the work of working parties whose participants are drawn from multiple agencies that it will be subject to review, constructive criticism and revision. The effect of this is that the working party report may not reflect the government's final position. This disjuncture may in my view discourage working parties from generating ideas and options that may not ultimately be approved if the participants believe, through the release of this document, that their deliberations will be publicly accessible. Finally, the reasons for the Government's decision to criminalise serious cartel conduct are clearly enunciated in the Treasurer's press release dated 2 February 2005. Disclosure of the report would not add to the public's understanding of the Government's decision in a significant enough manner to justify the potential to breach cabinet confidentiality and to inhibit cooperative policy-making processes.

Partial release of sections of the report

Section 36(5) of the FOI Act states that the exemption does not apply to a document by reason only of purely factual material contained in the document.

Having reviewed the decision, I consider that some sections of the report can be released on the ground that they contain purely factual material that do not reveal the deliberative processes of the Government in considering the appropriate development of the criminal cartel policy legislation and policy.

In addition, some sections of the report are sourced from publicly available information and do not contain assessments by officials, draw conclusions, or make recommendations. Accordingly, I have released these sections of the report.

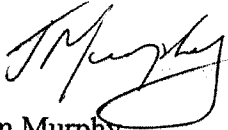
Therefore, I consider that the pages of the report detailed in the revised Schedule (attached) should only be exempt in part.

I therefore vary the decision of Mr French in relation to material in the report which I consider to be purely factual in nature but affirm Mr French's decision in relation to the rest of the report, which I consider to be exempt under section 36.

Rights of Review

In accordance with section 26(1) of the Act, enclosed immediately following is a statement setting out your rights of review under the Act.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Murphy', written in a cursive style.

Jim Murphy
Executive Director
Markets Group

Encs

DEPARTMENT OF TREASURY

Schedule of documents

Doc No	Author	Addressee	Date	Description	No of pages	Release in Full	Exempt in Part	Exempt in Full	Not relevant
1	Working party on criminal penalties for cartel behaviour	Treasurer	2004	Report of the Working Party on criminal penalties for cartel behaviour	71	No	Release in part pp 10, 11, 16, 25, 26, 32, 40, 41, 42, 44, 48, 50, 51 (S.36)	No	N/A

RIGHTS OF REVIEW — INTERNAL REVIEW

INFORMATION ON RIGHTS OF REVIEW

1. ADMINISTRATIVE APPEALS TRIBUNAL

Pursuant to sub-section 55(1) of the Freedom of Information Act, you may apply to the Administrative Appeals Tribunal for a review of this decision within 60 days of the date upon which notice of this decision is given to you. The address of the Tribunal is:

District Registrar
Administrative Appeals Tribunal
4th Floor, Canberra House
40 Marcus Clarke Street
CANBERRA ACT 2601

Phone: (02) 6243 4611

The Administrative Appeals Tribunal has a help desk from where you can obtain assistance. Your application should be accompanied by an application fee (\$639) which may be refunded in some instances and may be waived where payment would result in financial hardship to you. Further information is available from the Tribunal.

2. COMPLAINTS TO THE OMBUDSMAN

Pursuant to section 57 of the Act, you may request the Ombudsman to investigate action taken by this Department in relation to your Freedom of Information request.

Such a request for investigation should be addressed to:

The Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Phone: (02) 6271 0111

There is no particular form required to make a request to the Ombudsman. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to your request should be investigated.

An applicant cannot seek concurrent review by the Administrative Appeals Tribunal and Ombudsman of the same decision. The time limit on applications for review by the AAT is suspended while the Ombudsman is investigating the same matter.

The OECD defines hard core cartel conduct as anticompetitive agreements, concerted practices or arrangements where competitors fix prices, tender collusively, restrict output or establish quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce. This definition does not include activities permitted or authorised by law, including efficiency enhancing arrangements, such as those that reduce costs or enhance output.¹

This description of serious cartel conduct potentially captures a range of activities.

In Australia, price fixing is the only serious cartel conduct, as defined by the OECD, that is specifically prohibited by the Trade Practices Act. Section 45A prohibits a contract, arrangement or understanding between competitors to fix, control or maintain prices, or discounts, allowances, rebates or credit. The other activities listed by the OECD would fall under the general prohibition on exclusionary provisions (as defined in section 4D of the Trade Practices Act) and contracts, arrangements or understandings that substantially lessen competition, in section 45 of the Trade Practices Act.

International and Australian evidence

While studies have contributed to the understanding by governments and regulators of the effects worldwide of cartels, the impact of cartels on markets and the broader economy remains difficult to quantify. Such a calculation would require a comparison of the actual market situation under a cartel to that which would exist in a hypothetical competitive market. This analysis is seldom done by competition law enforcers because of its difficulty. Furthermore, it is not required for a successful litigation. Proxies have been developed such as looking at price mark up, but even this calculation can be difficult.²

An OECD survey of member countries found that the total commerce affected³ by cartels in 16 cases exceeded US\$55 billion.⁴ The survey also showed that there are significant variations in a cartel's impact on the price mark-up, and in some cases it is as much as 50 per cent or more.⁵ The OECD is of the view that these cases represent a fraction of cartel activity.

1 OECD Council (1998) *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, adopted by the Council at its 921st session on 25 March 1998 and reprinted in OECD (2002) *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Publications, Paris, p106.

2 OECD (2003) *Hard Core Cartels, Recent Progress and Challenges Ahead*, OECD Publications, Paris, p9.

3 Total revenues in a product line affected by a cartel.

4 Note 2, p9.

5 OECD (2002) *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Publications, Paris, p72.

Hence the OECD has recommended Member countries ensure their laws adequately prohibit cartels and provide for effective sanctions, enforcement procedures and investigative tools with which to combat it.⁶ The OECD also has been active in trying to enhance public understanding of the harm associated with cartels.

Cartel activity is both international and domestic. Some international cartels (including those colluding in lysine, vitamins and graphite electrodes) have received significant press. According to the OECD survey, the number of reported international cartels is relatively small, but the amount of commerce affected disproportionately large. While most reported cartels are domestic, they too can cause significant economic harm.

According to the OECD, domestic and international cartels tend to share the common characteristics of high concentration in the relevant market, homogeneous products and existence of an industry trade association that provided cover to the cartel meetings and facilitated their agreement in other ways.⁷

6 Note 1.

7 Note 2, p.10.

Defining serious cartel conduct

In 1998, the OECD recommended member countries ensure that their competition laws halted and deterred hard core cartels.⁸ The OECD defined serious cartel conduct as a concerted anticompetitive agreement, practice or arrangement by competitors to fix prices, rig bids, restrict output or establish quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.

For civil contraventions, the Trade Practices Act already prohibits conduct in the OECD's definition. However, only price fixing is set out explicitly, in section 45A. Exclusionary provisions (as defined in section 4D) are prohibited per se, and case law has defined the scope of exclusionary provisions to capture bid rigging, output restrictions, and sharing and dividing markets.

⁸ Note 1, p106.

The OECD specifically excludes activities permitted or authorised by law, including efficiency enhancing arrangements, such as those that reduce costs or enhance output, from its definition of serious cartel behaviour.²⁰

Section 51 of the Trade Practices Act currently exempts a range of conduct from constituting a contravention of the restrictive trade practices provisions in Part IV of the Act. These exemptions include:

- conduct specifically authorised by a Commonwealth or State law, including under a licence made under such a law (subsections 51(1) and 51(1A));
- contracts or arrangements designed to meet prescribed standards (such as those of Standards Australia) (subsection 51(2));
- arrangements between individual partners within a partnership, except those involving corporations (subsection 51(2));
- any provision of a contract, arrangement or understanding relating exclusively to the export of goods from Australia, or the supply of services outside Australia, if particulars such as the method of fixing, controlling or maintaining

²⁰ Note 1.

prices, are given to the ACCC within 14 days of the contract being made (subsection 51(2));

- conduct related to certain intellectual property rights (subsection 51(3)); and
- conduct related to consumer boycotts (subsection 51(2A)).

The Act also does not apply to the non-business activities of the Commonwealth, states and territories (sections 2(A), 2(B) and 2(C)) and certain local government activities (section 2(D)).

There are also a range of exemptions from the per se prohibition on price fixing in section 45A of the Trade Practices Act, and an exemption for conduct between related entities in subsection 45(8).

The DPP is authorised by statute to give two types of undertakings. Section 9(6) of the Director of Public Prosecutions Act empowers the Director to give an undertaking that any evidence the person gives and anything derived from that evidence will not be used against the person in civil or criminal proceedings. Section 9(6D) empowers the Director to give a person an undertaking that they will not be prosecuted for a specified Commonwealth offence or in relation to specified conduct that may constitute a Commonwealth offence.

The Prosecution Policy sets out the principles on the manner in which that discretion will be exercised. Under the Prosecution Policy, immunity to secure testimony before the courts is a matter of last resort. Paragraph 5.6 of the Prosecution Policy provides that the exercise of the discretion is conditional on several factors, including that the evidence be essential to ensuring a conviction and not be available elsewhere, and the person in question be significantly less culpable than the accused. The Prosecution Policy also provides guidance on the use of charge-bargaining but does not allow charges to be laid to provide scope to bargain.

The Dawson Review recommended section 155(2) of the Trade Practices Act be amended to require the ACCC to seek a warrant from a Federal Court judge or magistrate, and this would provide the ACCC with the power to search for and seize information. At the reporting date, the Dawson amendments had not been implemented.

Secondly, evidence obtained by search warrant under section 3E of the Crimes Act would not be admissible in civil proceedings.³² Section 3E requires that the warrant state the offence to which the warrant relates. The search powers under a Crimes Act warrant only apply to Commonwealth criminal offences, not to civil contraventions.

³² See *Williams v Keelty* (2001) 184 ALR 411, at 456-458.
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Entry and search powers are generally for investigating specific offences and monitoring compliance with legislative requirements. These powers may take different forms and rely on different procedures for their efficacy. The Australian Government's general policy position is that the requirement to enter and search should be handled through owner consent or a judicially-issued warrant.

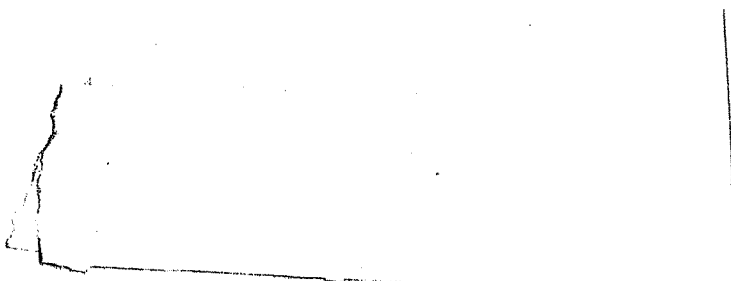
Part 1AA of the Crimes Act contains search warrant provisions for police to seek search warrants, and defines the outer limits of the powers and minimum safeguards and obligations that should apply to federal search warrant regimes in other contexts. The AFP executes warrants with assistance as required from other investigative agencies.

Currently the entry and search powers of the ACCC under section 155(2) of the Trade Practices Act, and those conferred on the AFP under the Crimes Act differ significantly. In contrast to section 155(2) of the Trade Practices Act where entry to premises may only be authorised for the purpose of examining relevant documents in the possession or control of the person suspected of the contravention, the AFP may execute a Crimes Act search warrant to search for and seize evidential material in the possession or control of any person.

While the current section 155(2) power is limited to inspecting, copying or taking extracts from documents, the Crimes Act search warrant allows seizure of any type of evidential material specified in the warrant. A Crimes Act search warrant authorises forced entry, while section 155(2) of the Trade Practices Act does not. In addition, the exercise of the section 155(2) power is to be authorised by a member of the ACCC, while only a magistrate may issue a search warrant under the Crimes Act.

As previously noted, the section 155(2) powers are proposed to be changed to implement the Dawson Review recommendation that search and seizure powers be available to the ACCC where a warrant is issued.

Hence in investigating a criminal cartel offence the ACCC can use section 155(2) of the Trade Practices Act, or can seek to have the AFP use a Crimes Act warrant. If the Dawson amendments are implemented, as noted above, the ACCC may prefer to use these powers to avoid the difficulties in using evidence gathered under a Crimes Act



warrant. In both cases an independent party must issue the warrant and this provides safeguards.

Mutual Assistance

Countries use mutual assistance to provide and obtain formal government-to-government assistance in criminal investigations and prosecutions, and to realise the proceeds of crime. Mutual assistance is a reciprocal process; countries assist on the understanding that they will receive assistance in return when the need arises.

It is required where, for example, Australia asks another country to:

- exercise coercive powers (for example, apply for and execute search warrants or take evidence from a witness before a court);
- obtain material in admissible form; or
- register foreign orders to prevent the dissipation of proceeds of crime.

The *Mutual Assistance in Criminal Matters Act 1987* governs requests, and under this Act, Australia could request or receive a request from any country for a proceeding or investigation for a criminal offence in any jurisdiction in Australia.

Table 2.4.1: Penalties for other relevant offences in Australian law

Offence	Max years in prison	Max fine for a person (\$)	Max fine for a corporation (\$)	Reference
Theft	10	13,200	66,000	s131.1 Criminal Code
Obtaining a financial advantage by deception	10	13,200	66,000	s134.2 Criminal Code
Conspiracy to defraud	10	13,200	66,000	s135.4 Criminal Code
Corruption	10	13,200	66,000	s135 Criminal Code
Insider trading	5	220,000	1,100,000	s1043A Corporations Act
Market manipulation	5	22,000	110,000	s1041A Corporations Act
Market rigging	5	22,000	110,000	s1041B Corporations Act
False or misleading statements to induce dealing	5	22,000	110,000	s1041E Corporations Act

Nine OECD countries prescribe maximum terms of imprisonment, ranging from two to six years for competition offences, and Table 2.4.2 shows the penalties for some comparable offences in other jurisdictions.

Table 2.4.2: Penalties for comparable offences in other jurisdictions

Jurisdiction	Max years in prison	Max fine for a person	Max fine for a corporation	Reference
United States	5	US\$0.4m (\$0.6m) or twice the gross gain or loss	US\$10m (\$15m) or twice the gross gain or loss	s1 and s2 of the Sherman Act and the Criminal Infringements Act
Canada	5	Can\$10m (\$10m)	Can\$10m (\$10m)	s45 of the Competition Act
United Kingdom	5	Unlimited	Not applicable	s190 of the Enterprise Act
Ireland	5	€4m (\$7m) or 10 per cent of the turnover	€4m (\$7m) or 10 per cent of the turnover	s8 of the Competition Act

Recovery action under the Proceeds of Crime Act can be either conviction or civil based.

For example, under section 49 of the Proceeds of Crime Act, if a court is satisfied on the balance of probabilities that some or all of the property or assets of a person is, or is suspected to be, proceeds³⁶ of one or more Commonwealth indictable offences (such as a criminal cartel offence), and the property has been restrained for at least six months, the court can order the property be forfeited to the Commonwealth, upon application by the DPP. It is not necessary for the court making the order to find the person committed a specific offence – rather, the order can be based on a finding that an indictable offence (not specified) has been committed.

Alternatively, under section 47 of the Proceeds of Crime Act, if a court is satisfied on the balance of probabilities that a person has engaged in conduct constituting a serious offence under the Act (criminal cartel conduct may fall within that definition), then the court may order forfeiture of any property owned by or under the control of the person where it has been restrained for at least six months. The court does not need to consider whether the property was the proceeds of the offence. A defendant can prevent forfeiture by showing the relevant property is not the proceeds of unlawful activity.

The Proceeds of Crime Act also enables civil based pecuniary penalty orders to be made against a person. Where a court is satisfied that a person has committed a serious

³⁶ Property is proceeds of an offence if it is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence (section 329 of the *Proceeds of Crime Act 2002*).

offence³⁷ it must, on application by the DPP, order the person pay a pecuniary penalty order equivalent to the benefit derived from committing the offence. The Act provides presumptions to assist the court in calculating the benefit. For example, where an offender's net property increased in value during the period of the offending, the amount of the increase is presumed to be a benefit derived from the commission of the offence.

³⁷ This will be where a conviction has been recorded, or the court has established this on the balance of probabilities.