

ADMINISTRATIVE APPEALS TRIBUNAL

GENERAL ADMINISTRATIVE DIVISION

SYDNEY REGISTRY

No. 2725 of 2007

Brent Fisse

Applicant

Department of Treasury

Respondent

AFFIDAVIT

On 12 February 2008, I, Warren Brent Fisse, of 70 Paddington Street, Paddington NSW 2021, solemnly and sincerely swear:

- 1 I am the first Applicant in this matter. I am the managing director and a shareholder of Lexpert Publications Pty Ltd, ABN 76 003 686 459, the second Applicant in this matter. The application is made jointly by the first and second Applicants ("**Applicants**").
- 2 I am a solicitor in NSW and the holder of a current practising certificate. My practice is an incorporated legal practice. Lexpert Publications Pty Ltd is the corporation licensed under the NSW incorporated legal practice scheme.
- 3 I have practised extensively in the area of trade practices and competition law since 1993 when I joined Gilbert + Tobin, Lawyers, Sydney, as a consultant. I was a partner at Gilbert + Tobin from 1995-2003 and special counsel from 2003-2004 before I retired from the firm. Since retiring from Gilbert + Tobin I have run an advisory practice specialising in trade practices and competition law.
- 4 I am a member of the Law Society of New South Wales, a member of the Law Council of Australia's Trade Practices Committee, and a member of the Antitrust Section of the American Bar Association.

Filed on behalf of the Applicant by:

GILBERT + TOBIN

Lawyers

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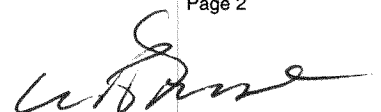
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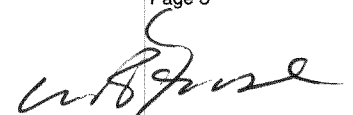
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- 5 I have assisted law reform agencies, in particular: the South Australian Penal Methods Reform Committee 1973-1974 (consultant); the Australian Law Reform Commission - Powers of Criminal Investigation 1974 (consultant), Compliance with the Trade Practices Act 1994 (Commissioner, part-time), and Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation 2002 (member, Advisory Committee); and the New South Wales Law Reform Commission (part-time Commissioner 1990-1997). I acted as a consultant to the Attorney-General's Department in 1974-1975 (Federal Criminal Code project), and as a member of the Australian Standards drafting committee for AS 3806 Compliance Programs in 1997-1998 and 2005-2006.
- 6 I have an active interest in current developments in competition law and policy. I regularly attend the American Bar Association Section of Antitrust Law Spring Meeting, the Law Council of Australia's Trade Practices Workshop, and the University of South Australia CRMA trade practices conference. I attended the recent American Bar Association International Cartel Workshop in San Francisco (31 January – 1 February 2008).
- 7 I have an extensive background of teaching and research in Australian and US universities. I was a member of the Faculty of Law, University of Adelaide, from 1964-1985, and a Professor of Law at the University of Sydney from 1985-1995. I have held several visiting positions in US universities: Bicentennial Fellow in Criminal Law at the University of Pennsylvania, 1968-1969, Visiting Research Professor, University of Delaware, 1981-1982, and Mitchell Distinguished Visiting Professor, Trinity University, San Antonio, 1983. Since retiring from Gilbert + Tobin I have taken up several part-time positions at Australian universities. I am an Associate of the Parsons Centre at the University of Sydney Faculty of Law, a Senior Fellow of the Melbourne Law School at the University of Melbourne and an Adjunct Professor of Law at Latrobe University in Victoria. The areas of my teaching and research activities from 1964 to 1995 were primarily criminal law and corporate regulation. During my period of full-time practice from 1995 to 2004 my research activities focussed on trade practices and competition law and telecommunications regulation. Since 2004, my research activities have focussed on trade practices and competition law. I am teaching a post graduate course, Cartels and Competition Law, at the University of Melbourne in August 2008. I am teaching another post-graduate course, Current Issues in Australian Competition Law, at Latrobe University in February 2009.
- 8 My publications include:
- (a) *Securities Regulation in Australia and New Zealand* (OUP, 1st ed 1994, co-ed with G Walker, LBC; 2nd ed 1999, co-ed with G Walker and I Ramsay);
 - (b) Fisse and Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993);



- (c) Laws of Australia, Title 9, *Criminal Law - General Principles* (LBC, 1993) (editor, author of 3 chapters));
- (d) Fisse, Fraser and Coss (eds), *The Money Trail: Money Laundering, Cash Transactions Reporting and Confiscation of Proceeds of Crime* (Law Book Co, 1992);
- (e) *Howard's Criminal Law* (5th ed by Fisse, Law Book Co, 1990);
- (f) Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983);
- (g) "The Australian Cartel Criminalisation Proposals: An Overview and Critique" (2007) 4 *Competition LR* 51;
- (h) "The Cartel Offence: Dishonesty?" (2007) 35 *ABLR* 235;
- (i) "The Dawson Review: Enforcement and Penalties" (2003) 9 *UNSWLJ Forum* 54;
- (j) Fisse & Simpson, "Compelled to Compete: Assessing Market Power in Regulated Industries" (1995) 3 *Competition & Consumer LJ* 113;
- (k) "The Attribution of Criminal Liability to Corporations" (1991) 13 *Sydney Law Review* 277;
- (l) "Recent Developments in Corporate Criminal Law and Liability to Civil Monetary Penalties" (1990) 13 *Univ of NSW LJ* 1
- (m) "Corporate Compliance Systems: The Trade Practices Act and Beyond" (1989) 17 *Australian Business Law Review* 356;
- (n) Fisse & Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" (1988) 11 *Sydney Law Review* 468;
- (o) "Entrapment as a Defence" (1988) 12 *Criminal Law Journal* 367;
- (p) "Covert Facilitation and Crime: Restoring Balance to the Entrapment Debate" (1987) 43 *Journal of Social Issues* 5 (with J Braithwaite and G Geis)
- (q) "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California LR* 1141;
- (r) "Community Service as a Sanction against Corporations" [1982] *Wisconsin LR* 970;
- (s) "The Social Policy of Corporate Criminal Responsibility" (1978) 6 *Adel LR* 361;
- (t) "Probability and the Proudman v Dayman Defence of Reasonable Mistaken Belief" (1974) 9 *Melb Univ LR* 477;

- (u) "Responsibility, Prevention and Corporate Crime" (1973) 5 NZ Univ LR 250;
- (v) "The Use of Publicity as a Criminal Sanction Against Business Corporations" (1971) 8 Melb Univ LR 107;
- (w) "Consumer Protection and Corporate Criminal Responsibility - a Critique of Tesco Supermarkets Ltd v Natrass" (1971) 4 Adel LR 113;
- (x) "Vicarious Responsibility in Regulatory Offences" (1970) 44 Australian LJ 601
- (y) "The Elimination of Vicarious Responsibility in Regulatory Offences" (1968) 42 Australian LJ 199, 250;
- (z) "Vicarious Responsibility for the Conduct of Independent Contractors" [1968] Crim LR 537, 605;
- (aa) "The Delegation Principle" (1968) 10 Crim LQ 417;
- (bb) "Complicity in Regulatory Offences" (1968) 6 Melb Univ L R 278;
- (cc) "The Distinction between Primary and Vicarious Corporate Criminal Liability" 41 Australian LJ 203 (1967).

9 Annexed to this Affidavit and marked "**WBF1**" are copies of the articles that are described at paragraph 8(g) and (h).

Freedom of Information Application to the Treasury

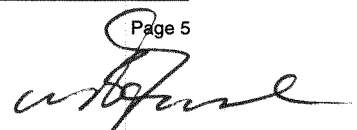
10 On 13 March 2007 Gilbert + Tobin made an application to the Treasury on behalf of the Applicants for a copy of the report of the Working Party established in October 2003 by the former Treasurer, Mr Peter Costello, for the purpose of considering certain issues relating to the recommendation in principle by the Dawson Committee that serious cartel conduct be subject to criminal liability. Annexed to this Affidavit and marked "**WBF2**" is a copy of the press release dated 3 October 2003. The material in the Report that has been released to the Applicants to date is factual. It does not include any substantive discussion of the questions considered by the Working Party. Annexed to this Affidavit and marked "**WBF3**" is a copy of the Working Party Report which has been released to me to date.

11 The application for access to the Working Party Report was made by the Applicants because the Report was believed to contain information highly relevant to understanding and assessing the former Government's proposals to introduce criminal liability for serious cartel conduct. The former Treasurer publicly announced his intention to criminalise serious cartel conduct and to amend the Trade Practices Act accordingly but did not release any public information about the proposals other than a press release dated 2 February 2005 ("**Press Release**"). The Working




Party Report is referred to in the Press Release but has never been made publicly available. The Press Release is a document of 13 pages. Annexed to this Affidavit and marked "WBF4" is a copy of the Press Release dated 2 February 2005.

- 12 The Press Release raises many questions about the nature and scope of the former Government's proposals for criminalising serious cartel conduct. I have reviewed those questions in a paper, "The Australian Cartel Criminalisation Proposals: An Overview and Critique" (2007) 4 Competition LR 51. This paper appears at "WBF1". This paper canvasses:
- (a) the difficulties that would arise under the proposal to make dishonesty an element of the Australian cartel offence;
 - (b) the uncertain significance of the proposed requirement of 'an intention to obtain a gain';
 - (c) the need to define the mental element of the cartel offence more narrowly than the mental element of the existing civil penalty prohibitions under the Trade Practices Act against price fixing and exclusionary provisions;
 - (d) the uncertainty surrounding the definition of the element of agreement proposed for the cartel offence;
 - (e) the questionable \$1 million value of affected commerce threshold proposed as a limit on the exercise of discretion to bring prosecutions for a cartel offence;
 - (f) the uncertainty surrounding the principle of corporate criminal responsibility applicable to the proposed cartel offence;
 - (g) questions about the scope and definition of the defences and exemptions applicable to the proposed cartel offence;
 - (h) questions of sentencing options and maximum penalties, and the inter-relationship between proceeds of crime legislation and money-laundering offences and the provisions for criminalising cartel conduct; and
 - (i) other questions, including the challenge of defining the cartel offence in terms that can readily be communicated to a jury, the need for a 'one-stop' process for handling applications by defendants for immunity from both criminal prosecution and enforcement action for civil penalties, and whether powers of telecommunications interception should be available.



The very limited extent to which the content of the Working Party Report has been released to date

13 The parts of the Working Party Report released to date are limited to factual material and do not include any of the material discussion that the Report may contain about major questions of law and policy arising from the proposed criminalisation of serious cartel conduct. For example, the parts of the Report released to date do not discuss the following major questions:

- the arguments for and against the inclusion of dishonesty as an element of a cartel offence (see Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 ABLR 235. This paper appears at "**WBF1**";
- the reasons underlying the proposed requirement of 'an intention to obtain a gain';
- the possible options open for defining the mental element of the cartel offence and the relative strengths and weaknesses of those options;
- the possible options open for defining the element of agreement proposed for the cartel offence and the relative strengths and weaknesses of those options;
- the origin of, and the difficulties that may arise from, the \$1 million value of affected commerce threshold proposed as a limit on the exercise of discretion to bring a prosecution for a cartel offence, and the possibility of alternative or additional approaches (eg, a higher threshold; a threshold proportioned to the size of the relevant market; a minimum volume of affected commerce threshold as a definitional element of the cartel offence);
- the possible principles of corporate criminal responsibility that could be adopted in relation to the proposed cartel offence and the relative strengths and weaknesses of those possible principles;
- the possible options open as regards the scope and definition of defences and exemptions applicable to the proposed cartel offence;
- the desirability or otherwise of a 10 year maximum jail term for a cartel offence in Australia given that the maximum jail term for a breach of section 1 of the Sherman Act (US) was increased in 2004 from 3 years to 10 years (under the *Antitrust Criminal Penalty Enhancement and Reform Act* of 2003, enacted on 2 June 2004; the increased maximum jail term applies to conduct on or after 22 June 2004);
- the need or otherwise for the cartel offence to be punishable by a higher maximum fine than the maximum amount of monetary penalties for breach of civil penalty prohibitions against cartel conduct;

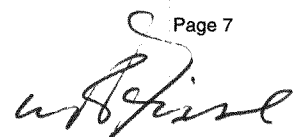


- the inter-relationships between provisions dealing with cartel criminalisation and provisions dealing with money-laundering and proceeds of crime under the *Criminal Code* (Cth) and *Proceeds of Crime Act 2002* (Cth) respectively, and how those inter-relationships are to be managed;
- the challenge of defining a cartel offence in terms that can be communicated readily and effectively to a jury;
- whether or not it is possible or desirable for the ACCC and the Commonwealth DPP to adopt a common set of criteria and a single process for determining applications for immunity or leniency;
- whether or not powers of interception of telecommunications should be available for the investigation of cartel offences;
- the need or otherwise for rules to safeguard the interests of accused where civil as well as criminal proceedings are brought, whether concurrently or sequentially;
- whether or not jury trials should be conducted exclusively in the Federal Court under Commonwealth law or conducted in State and Territorial Supreme Courts under State and Territorial laws.

The limited extent to which the Discussion Paper, the Exposure Draft Bill and the Draft ACCC-DPP MOU inform public debate and the continuing importance of the Working Party Report to further policy formulation.

The Discussion Paper

- 14 The exposure draft materials ("**Exposure Draft Materials**") released by Treasury on 11 January 2008 for the purposes of public consultation include a discussion paper ("**Discussion Paper**") and an explanatory abstract ("**Explanatory Abstract**"). The Discussion Paper is a document of 7 pages. The Explanatory Abstract is a document of one page. The Exposure Draft Materials appear at Annexures **KH1** to **KH4** of the Affidavit of Kim Nicole Hansen dated 25 January 2008 and affirmed in these proceedings.
- 15 The Discussion Paper does not discuss these major questions:
- the necessity or otherwise for the proposed requirement of 'an intention to obtain a gain' or the intended operation of that requirement;
 - the possible options open for defining the mental element of the cartel offence and the relative strengths and weaknesses of those options;

- the possible options open for defining the element of agreement proposed for the cartel offence and the relative strengths and weaknesses of those options;
- the origin of and the difficulties that may arise from the \$1 million value of affected commerce threshold proposed as a limit on the exercise of discretion to bring a prosecution for a cartel offence, and the possibility of alternative or additional approaches including adopting a minimum volume of affected commerce threshold as a definitional element of the cartel offence;
- the possible principles of corporate criminal responsibility that could be adopted for cartel offences and the relative strengths and weaknesses of those possible principles;
- the possible options open as regards the scope and definition of the defences and exemptions applicable to the cartel offence;
- the desirability or otherwise of a 10 year maximum jail term given that the maximum jail term for a breach of section 1 of the *Sherman Act* (US) was increased in 2004 from 3 years to 10 years;
- the need or otherwise for the cartel offence to be punishable by a higher maximum fine than the maximum amount of monetary penalties for breach of civil penalty prohibitions against cartel conduct;
- the inter-relationships between provisions dealing with cartel criminalisation and provisions dealing with money-laundering and proceeds of crime under the *Proceeds of Crime Act 2002* (Cth);
- the challenge of defining a cartel offence in terms that can be communicated readily and effectively to a jury;
- whether or not it is possible or desirable for the ACCC and the Commonwealth DPP to adopt a common set of criteria and a single process for determining applications for immunity or leniency;
- the need or otherwise for rules to safeguard the interests of accused where civil as well as criminal proceedings are brought, whether concurrently or sequentially;
- whether or not jury trials should be conducted exclusively in the Federal Court under Commonwealth law or conducted in State and Territorial Supreme Courts under State and Territorial laws.

16 The Discussion Paper seeks views upon several questions relating to the element of dishonesty in the cartel offences set out in the Exposure Draft Bill. However, the discussion is limited and highly selective:

- the questions upon which views are sought are not accompanied by any statement or assessment of the different positions that have been taken or may be taken on those questions;
 - the Discussion Paper does not identify all the objections to dishonesty as an element of a cartel offence that have been raised (see Fisse, “The Cartel Offence: Dishonesty” (2007) 35 ABLR 235 at “**WBF1**” to this Affidavit) nor does it indicate whether or not the ACCC and the DPP support the inclusion of dishonesty as an element of the new cartel offences;
 - the Discussion Paper contends that there is “international precedent” for including dishonesty as an element of a cartel offence without also making it clear that such an approach is highly unusual: dishonesty is an element of a cartel offence only in the UK and fraud is an element of a cartel offence only in France (where the offences are tried summarily, usually by a panel of three judges) and neither dishonesty nor fraud is an element of the cartel offences adopted in the overwhelming majority of jurisdictions, including the USA,, Canada, Ireland, Germany, Japan and Korea, where serious cartel conduct has been criminalised.
- 17 The Discussion Paper seeks comments on the question of whether or not the power to intercept telecommunications should be available as a means of investigation of cartel offences. However, the Discussion Paper does not discuss the use made of telecommunications interception in the USA (see Racanelli M, “Bugs in the Boardroom?” (2006) (January) ABA Antitrust Source 1). Nor does the Discussion Paper discuss the lessons that emerge from the experience of the US Department of Justice.
- 18 The Explanatory Abstract does not add any material information on the questions I have discussed in paragraphs 15-17 above.

The Exposure Draft Bill

- 19 The exposure draft legislation included in the Exposure Draft Materials is in the form of a draft bill (“Exposure Draft Bill”). The Exposure Draft Bill is not accompanied by a commentary explaining the reasons for the particular provisions in the Draft Bill.
- 20 The Exposure Draft Bill raises many questions of law and policy. The answers to many of those questions are far from self-evident. Significant questions the answers to which are far from self-evident include the following:
- Is the Exposure Draft Bill based on a systematic assessment of the ways in which criminal and civil prohibitions can be differentiated? None of the Exposure Draft Materials articulate the framework that has been adopted when drafting the Exposure Draft Bill.

The discussion of this question in the Discussion Paper is too brief and simplistic to be informative.

- Why has the per se civil penalty prohibition against exclusionary provisions under section 45 not been narrowed? By contrast, the civil penalty prohibition against price fixing is more narrowly defined under the Exposure Draft Bill than under section 45A(1) of the *Trade Practices Act 1974* (Cth).
- Why has no attempt been made to exclude from the new cartel offence situations where, as in the in the case brought by the ACCC against the National Australia Bank in 2000 in the credit card interchange fee matter, A and B enter into a contract, arrangement or understanding (“CAU”) for the supply of services in an upstream market where they do not compete with each other and a provision of the CAU has the likely effect of controlling the price of goods or services in a downstream market where they do compete? Contrast the Supplementary Submission of the ACCC to the Dawson Committee at p 7.
- The fault elements that apply to the new cartel offences (sections 44ZZRF and 44ZZRG of the Exposure Draft Bill) are complex and are likely to confuse juries. What, if any, options have been considered for avoiding such complexity and simplifying jury directions as far as possible?
- Why is vicarious criminal responsibility imposed on individual defendants (section 84(3) of the Exposure Draft Bill)?
- Why have the Criminal Code principles of corporate criminal responsibility (under Part 2.5 of the Code) been excluded (see section 6AA(2) under the Exposure Draft Bill)?
- Why is there no joint venture defence to the new cartel offences? See section 44ZZRO (1) under the Exposure Draft Bill. Contrast sections 76C and 76D of the Trade Practices Act and the Press Release (at Annexure “WBF4”) where it is stated that:

“Further amendments to the Trade Practices Act will flow from the Dawson Review recommendations relating to joint ventures and the report of the Intellectual Property and Competition Review Committee. These amendments may permit certain types of conduct where it does not substantially lessen competition.

Legitimate joint ventures and intellectual property arrangements will not be penalised under the cartel offence and will only be penalised under the revised per se civil prohibitions where they substantially lessen competition.”

- Why is there no power to intercept telecommunications under the Exposure Draft Bill? Contrast the availability and usage of telecommunications interception in the USA.

- Why is there no equivalent of the exemption under section 45(6) of the Trade Practices Act in the Exposure Draft Bill? The new cartel offences and new civil penalty prohibitions under the Exposure Draft Bill are not subject to the exemption of exclusive dealing conduct from per se prohibition (eg in the many situations where A agrees to supply B on specified price and non-price terms and where A and B are competitors in a downstream market). This is a radical change in the law for which no explanation is given in the Exposure Draft Materials.
- Why are the new cartel offences not triable exclusively by the Federal Court? In jury trials for the new cartel offences in States and Territories s 80 of the Constitution will not apply and majority verdicts and the right to elect summary trial will apply in many of these jurisdictions. Should accused who are tried for the new cartel offences be subject to such vagaries? And why are jury trials in the Federal Court dependent on later amending legislation to the Federal Court Act (see section 163(6) of the Exposure Draft Bill)? Contrast Black, "The Introduction of Juries to the Federal Court of Australia" (2007) 90 Reform 14, the discussion in which suggests that Black CJ envisaged that the cartel offences proposed by the former Treasurer would be tried exclusively in the Federal Court. See also the apparent assumption in the Dawson Committee Report that cartel offences would be tried in the Federal Court (at p 153).

The Draft ACCC-DPP MOU

- 21 The draft Memorandum of Understanding between the Australian Competition and Consumer Commission and the Commonwealth Director of Public Prosecutions ("**Draft ACCC-DPP MOU**") released by the Treasury on 11 January 2008 is a document of 5 pages. The Draft ACCC-DPP MOU appears to be a preliminary draft or a work in progress.
- 22 The Draft ACCC-DPP MOU does not deal with these important questions:
- Should there be a seamless "one-stop" avenue for making applications for immunity? According to the draft MOU, the ACCC and the DPP will each apply their own criteria for granting immunity. No indication is given as to how the apparent conflict between the two sets of criteria will be resolved (if indeed they are to be resolved). Contrast the immunity process developed and applied by the US Department of Justice, which is the only enforcement agency that considers and determines applications for immunity in the USA and does so under a single set of criteria.
 - What is the origin of, and what possible difficulties that may arise from, the \$1 million value of affected commerce threshold proposed as a limit on the exercise of discretion to bring a prosecution from a cartel offence? Are there any alternative or additional approaches that warrant consideration?

- No guidance is given as to circumstances if any where the DPP will seek to invoke the provisions of the *Proceeds of Crime Act 2002* (Cth) in situations where accused are charged with a cartel offence, or are convicted and sentenced for a cartel offence, and where the offence (alleged or proven) is potentially subject also to the application the remedy and offence provisions of the *Proceeds of Crime Act*.

The resulting need for access to the Working Party Report

- 23 The Working Party Report is likely to contain a discussion relevant to the questions of law and policy identified in paragraphs 13, 15-17, 20 and 22 above.
- 24 The Working Party Report is likely to contain a discussion relevant to the questions of law and policy identified in paragraphs 13, 15-17, 20 and 22 above.
- 25 The parts of the Working Party Report that have been released to date (Annexure "WBF3") are limited to factual material and do not set out the views of the Working Party on any question of law or policy. See paragraph 10 above.
- 26 The questions of law and policy identified in paragraphs 13, 15-17, 20 and 22 above are centrally relevant to: (a) the public assessment of the Press Release, the Discussion Paper, the Exposure Draft Bill and the Draft ACCC-DPP MOU; and (b) the further policy formulation that will determine the nature of the amendments to be made to the Trade Practices Act to introduce offences for serious cartel conduct.
- 27 The Exposure Draft Materials released by the Treasury on 11 January 2008 were accompanied by an Explanatory Abstract. The Explanatory Abstract states that:

"The discussion paper also seeks input on two specific issues:

- *how to distinguish the criminal prohibitions from the civil prohibitions; and*
- *whether telephone interception warrants should be available in relation to the new criminal cartel offences.*

Attachment A to the discussion paper is an exposure draft of the Bill which is released for public comment. The exposure draft has not yet been finalised by the Government for introduction into Parliament, and is released for consultation purposes only. As a consequence, it is merely a guide as to how the proposed legislation to criminalise cartel conduct may operate. The Bill may be amended as a result of consultation. ...

Stakeholders are invited to submit comments on either of the two specific issues outlined above or any other matter related to the initiatives contained in the Bill."

28 It is clear from this statement in the Explanatory Abstract that public submissions are being sought to assist further policy formulation. Similarly, the Minister of Competition Policy's media statement on 11 January 2008 states that:

"These are important public interest issues, and I encourage all stakeholders to put forward their views."

Copies of the legislation and discussion paper can be obtained from the Treasury website: www.treasury.gov.au. The Bill has not been finalised by the Government, and is released for consultation purposes only. The Bill may be amended following consultation."

29 The issues raised by the Exposure Draft Bill are the subject of much public debate and interest. Annexed to this Affidavit and marked "WBF5" is a selection of newspaper articles concerning the criminalisation of serious cartel behaviour.

Uncertain position of the ACCC and the consequential relevance of the Working Party Report

30 On 13 March 2007 Gilbert + Tobin made an application to the Treasury on behalf of me and Lexpert Publications for access to various documents including certain supplementary submissions made by the Australian Competition and Consumer Commission ("ACCC") to the Dawson Committee in 2002. This part of the application was referred to the ACCC as a separate application and the issues in those proceedings have been resolved. The supplementary submissions sought were made available on 4 October 2007. The documents released comprise the Supplementary Paper of 6 September 2002, an opinion of Bret Walker SC dated 10 September 2002, and a Supplementary Confidential Paper provided by the ACCC to the Dawson Committee on 12 November 2002.

31 The supplementary submissions released by the ACCC discuss various questions about the design and operation of a cartel offence in Australia, including the question of whether or not dishonesty should be an element of the offence. The discussion of the question of dishonesty in those supplementary submissions indicates vacillation on the part of the ACCC on that question.

- In the Supplementary Paper (Attachment 1), the ACCC recommended that dishonesty be an element of the cartel offence. This departed from the position of the ACCC in its main submission to the Dawson Committee earlier (Submission to the Trade Practices Act Review (June 2002) at pp 45-46). The Supplementary Paper states (at p 6) that making dishonesty an element of the cartel offence is consistent with the view expressed by Bret Walker SC. However, as is apparent from the opinion that Mr Walker provided to the Commission (see Attachment 2), Mr Walker expressly advised against including dishonesty as an element of the offence (see paragraphs 32-33 of the opinion).

- The Supplementary Confidential Paper (Attachment 3) sets out an alternative to relying on the concept of dishonesty as a basis for distinguishing criminal cartel conduct from cartel conduct subject to civil monetary penalties and remedies. The approach recommended is to require that the accused knew that the conduct breached or was likely to breach cartel laws. No justification is given by the ACCC for creating an exception to the general principle of criminal responsibility that ignorance or mistake of law is no excuse. No attempt is made to consider and apply the general fault principles of the Criminal Code (Cth), including the principle that ignorance or mistake of law is no excuse (see section 9.3(1) of the Criminal Code). The Commission's recommendation was rejected by the Dawson Committee (Report at 156).

32 The views of the ACCC, as reconsidered in light of the Dawson Committee Report, are likely to be discussed in the Working Party Report. The views of the ACCC on the question of whether or not dishonesty should be an element of the proposed cartel offences are important to public debate and the formulation of policy in relation to the Exposure Draft Bill.



SWORN at Sydney in NSW

Before me:



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Solicitor

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