



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT

-- Australia --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Overview

1. In civil enforcement proceedings in Australia, a judge is required to determine whether a person has acted illegally based on evidence presented in open court. Confidentiality is balanced against the need for the respondent to see the case against it, and the interests of justice are paramount. Where information is confidential – however relevant to the defence of the respondent – arrangements can be made by the Federal Court of Australia (the Court) to ensure confidentiality is protected. Such claims however are rigorously tested.

2. Evidence obtained in an investigation by Australia's competition regulator, the Australian Competition and Consumer Commission (ACCC), is made available to the respondent in legal proceedings brought by the ACCC. Information may however be withheld from a respondent on public interest grounds.

3. This paper addresses the treatment of confidential information in the context of civil enforcement proceedings and does not consider disclosure requirements in respect of criminal proceedings.

2. Information disclosure in civil pecuniary proceedings

4. In the Australian legal system, the party bringing the proceedings (i.e. the applicant) bears the onus of proof and the respondent has the right to see and defend the case against it.

5. Procedural rules ensure that the allegations are set out with sufficient clarity for the respondent to know, and therefore defend, the case against it.¹ For example, the applicant in the proceedings must particularise allegations in a written statement of claim. Further, it may be required by the Court to provide further and better particulars of the matters referred to in its pleadings.

6. The 'discovery' process ensures that a respondent is not surprised by the case for the regulator/applicant at the time of the court hearing. The Court may require discovery of any document directly relevant to any issue raised on the pleadings (known as 'general discovery') or, more commonly, order discovery based on *categories* agreed as relevant by the parties. Orders for discovery may be made to both the regulator and respondent.

7. By requiring the provision of a statement of claim (as well as a response to any defence which may be filed) and discovery of relevant documents, the court process allows the respondent to see both the broader context in which proceedings are brought and the specific details of the case. Not only do these processes assist parties to prepare their defence, but from time to time may facilitate early settlement.

8. In addition to the court based discovery process, respondents to ACCC pecuniary penalty proceedings have a right under Australia's competition and fair trading law, the *Trade Practices Act 1974* (the Act), to request disclosure of documents obtained by the ACCC which tend to establish their case.² The ACCC may however refuse to disclose documents containing 'protected cartel information', that is, information given to it in confidence in relation to a breach or potential breach of the cartel prohibitions.³ The issue of protected cartel information is further discussed below.

¹ *Federal Court Rules*. Please note that all the legislative instruments referred to in this paper are accessible via <http://www.comlaw.gov.au/>.

² *Trade Practices Act 1974*, section 157.

³ *Trade Practices Act 1974*, subsection 157(1A).

2.1 *Privilege*

9. The Australian legal system recognises client legal privilege as a fundamental right. Neither the respondent nor the applicant is required to produce legally privileged material in response to a discovery order, or a subpoena, however they may need to disclose the *fact that such advice exists* if the content of the advice would otherwise respond to the discovery order or subpoena. That right exists for both natural persons and corporations.

10. Natural persons may also decline to give discovery if the provision of documents could expose that person to a pecuniary penalty or criminal sanction. It is reasonably common for natural person respondents not to provide discovery to the ACCC in pecuniary penalty proceedings for this reason.

3. *Confidentiality*

11. Confidentiality may be claimed during the investigation and litigation phase. A general overview is provided in relation to both stages.

3.1 *Prior to the court hearing*

12. Competition law cases generally draw upon information and documents provided by suppliers, customers and competitors of the respondent. While sensitive deliberations on the circumstances relating to supply or acquisition may be relevant to the Court in assessing alleged anti-competitive conduct, public disclosure of such information may cause damage or distress to the person providing the information.

13. Confidentiality regimes are frequently employed by parties to antitrust litigation and, to a lesser extent, by witnesses to ensure that sensitive information is only disclosed to persons who need to know. Such persons may include the respondent, lawyers or investigative staff of the regulator. Express undertakings to the Court, the entity providing the information or both as to confidentiality provide the basis for such arrangements.

14. Additionally, the law imposes certain obligations upon a party receiving documents subject to compulsory court processes. The party will be subject to an implied undertaking not to make the contents public, communicate the contents to a non-party to the litigation, or to use the material for purposes unrelated to the proceedings.⁴ Generally this undertaking will expire if the contents of the document are disclosed in open court.⁵

3.2 *During the court hearing*

15. The Australian legal system is shaped by the principle of open justice. In accordance with this principle, evidence is presented in open court, reasons for judgment are published and claims for confidentiality need to be solidly grounded.

16. The Court may restrict or prohibit the publication of information about witnesses and evidence to prevent prejudice to the administration of justice.⁶ A confidentiality order can potentially forbid or restrict the publication of particular evidence, or the name of a party or witness.

⁴ *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2008] FCA 391.

⁵ See for example *Federal Court Rules*, Order 15, Rule 18.

⁶ *Federal Court of Australia Act 1976*, section 50.

17. In practice, confidentiality orders generally do not restrict access to evidence by parties to litigation.⁷ Rather they operate to restrict access by third parties to the confidential material.

3.3 *Protected cartel information*

18. Australia considers that an effective immunity policy is integral to the detection, deterrence and prosecution of cartels.⁸ The Parliament of Australia recognised that whistleblowers/informants would be more willing to provide information about cartel conduct to the ACCC if the protection afforded to that material was enhanced. Accordingly, the Act provides an enhanced degree of protection for information given in confidence to the ACCC relating to a breach or potential breach of the cartel prohibitions.⁹

19. Broadly, the ACCC is not required to disclose protected cartel information but may do so on the basis of the public interest considerations set out in the Act. For example, the ACCC may disclose protected cartel information to the Court after weighing the following public interest factors:¹⁰

- the fact that the protected cartel information was given to the ACCC in confidence
- Australia's relations with other countries
- the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation
- in a case where the protected cartel information was given by an informant:
 - the protection or safety of the informant or of persons associated with the informant, and
 - the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future, and
- the interests of the administration of justice.

20. Further, the Court may require the ACCC to release protected cartel information after weighing the public interest factors above. A refusal by the Court to order the release of protected cartel information may be relevant to whether proceedings are stayed.¹¹

21. If protected cartel information is disclosed to the Court there are limitations on the use of the material in other proceedings. For example, information provided to the ACCC by a foreign regulator which is used by the ACCC as evidence in one case, cannot be used as evidence in private proceedings without either the leave of the Court or agreement of the ACCC. In deciding whether to release evidence

⁷ Noting that material may be accessible on a need to know basis rather than to all persons working for a party to litigation.

⁸ Under the ACCC's Immunity Policy for Cartel Conduct (July 2009), the first person who confesses their involvement in a cartel and who is not the clear leader in the cartel will be eligible for immunity.

⁹ *Trade Practices Act 1974*, sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK.

¹⁰ *Trade Practices Act 1974*, section 157B.

¹¹ *Trade Practices Act 1974*, section 157D.

for this purpose, the Court and the ACCC would need to have regard to the public interest considerations set out above.

3.4 Penalties for wrongly disclosing information

22. As noted above, confidentiality obligations may be owed to the Court, a witness and/or a party to proceedings. In such circumstances, wrongful disclosure of confidential information could be viewed as a contempt of court and subject to criminal sanctions. Where the obligation is between individuals only, contractual remedies apply.

23. In addition, various legal obligations are placed upon the ACCC officials not to disclose information received in the course of their employment where the information was received in confidence. Inappropriate disclosure of such information may result in administrative or criminal sanction.

4. Conclusion

24. Australian law balances the ability of witnesses to give information to the ACCC in confidence with the respondent's right to see and meet the case against it. This assists the ACCC to obtain the information it needs to conduct – and for the Court to adjudicate – civil enforcement proceedings while affording procedural fairness to respondents.