Risk of Disclosure of Immunity Applicant Confidential Information and Documents –
the position in Australia
Ayman Guirguis

Cartel conduct has been subject to potential criminal sanctions in Australia since July 2009.¹ The possibility of criminal prosecutions by the Australian regulator, the Australian Competition and Consumer Commission (ACCC), of corporations and individuals engaging in "cartel conduct" in Australia, has brought into sharp focus the benefits of being "first-in" and seeking immunity from prosecution for such conduct.

Increasingly, one of the factors that a potential immunity applicant needs to weigh up when taking such a step, is the cost of private class action claims for damages, be they in Australia or, in the context of international cartels, both in Australia and overseas (and in particular in the US).

While it is ultimately unlikely to be the determining factor/deterrent to an entity seeking immunity, the risk of private class actions has led to the issue of access by third parties to information and documents in the possession of the ACCC becoming a high priority concern for immunity applicants, whether such documents were created by the ACCC itself or provided to the ACCC by the immunity applicant as part of the immunity process.

In order to encourage immunity applicants to engage with the ACCC:

- the ACCC has published an "Immunity Policy for Cartel Conduct" (Immunity Policy) and "Immunity Policy Interpretation Guidelines"² (Immunity Interpretation Guidelines) which confirm that the ACCC will accommodate immunity applicant concerns by way of, at least, a part paperless process. In addition, the Immunity Interpretation Guidelines and acknowledge that the ACCC will, subject to specific limited exceptions, not share confidential information with third parties and will "use its best endeavours to protect any confidential information provided by applicants for immunity."³
- the ACCC and the criminal prosecutor, the Commonwealth Director of Public Prosecutions (CDPP) have entered into a "Memorandum of Understanding …regarding Serious Cartel Conduct" under which the CDPP has agreed to amend the "Prosecution Policy of the Commonwealth" (in Annexure B to that Policy) such that the CDPP, when exercising its discretion to grant immunity (to an immunity applicant), will do so based on the criteria in the ACCC's Immunity Policy for Cartel Conduct.⁴

¹ Until July 2009, there were only civil remedies available to the regulator, the Australian Competition and Consumer Commission (ACCC), when it was seeking to prosecute corporations and individuals for conduct such as price fixing, boycotts and other collusive conduct.

² Available at http://www.accc.gov.au/content/index.phtml/itemId/879795

³ Paragraph 64, Immunity Interpretation Guidelines.

⁴ The Memorandum of Understanding …regarding Serious Cartel Conduct, is available at: http://www.accc.gov.au/content/item.phtml?itemId=1011117&nodeId=e5ae7320461207c05675767466cc0c6c19&fn=Memorandum%20of%20understanding%20%20between%20CDPP%20and%20ACCC.pdf; The Prosecution Policy of the Commonwealth is available at http://www.cdp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf
Risk of Disclosure of Immunity Applicant Confidential Information and Documents – the position in Australia

since July 2009, provisions were inserted into the Competition and Consumer Act (at the time the Trade Practices Act) (CCA) to protect information defined as "protected information" and "protected cartel information" from access by third parties.

However, a number of recent decisions by the Federal Court of Australia have cast doubt on the ability of the ACCC and immunity applicant to protect the confidentiality in the documents/deny access to third parties – and certainly have confirmed that the protections in respect of such confidential information are not absolute.

This paper discusses:

- the requirements under the current Australian immunity regime for an immunity applicant to provide information to the ACCC;
- the statutory provisions added to the CCA providing for limitation of disclosure to third parties of "protected information" and "protected cartel information";
- the recent judgments of the Federal Court of Australia that shifted the balance toward disclosure and "early" disclosure of such information to third party litigants; and
- the implications of the recent judgments, in light of the statutory protections.

INFORMATION REQUIREMENTS UNDER AUSTRALIA'S CARTEL CONDUCT IMMUNITY REGIME

The Immunity Policy provides that a corporation (or an individual) may apply to the ACCC for immunity from potential civil action (and through the ACCC to the CDPP for immunity from criminal prosecution) in respect of cartel conduct to which the corporation was a party.

Cartel conduct amounts to certain conduct by parties that are, or would otherwise be, in competition with each other, namely:

- price fixing; or
- restricting outputs in the production and supply chain; or
- allocating customers, suppliers or territories; or
- bid-rigging.

The ACCC seeks to accommodate concerns of immunity applicants about disclosure to third parties by accepting oral applications/proffers for immunity. In such circumstances however, ACCC staff create their own record of the information provided to the ACCC orally.

Ultimately however, in order for a corporation (or an individual) to be eligible for "conditional immunity" under the Immunity Policy, the corporation needs to satisfy the conditions in paragraph 8 of the Immunity Policy (and for an individual paragraph 17 of the Immunity Policy), including relevantly sub-paragraph (vii), which requires the provision of "full disclosure and cooperation to the ACCC" (the equivalent provision for an individual is paragraph 17 (vi)).

---

5 Section 44ZZRD Competition and Consumer Act and paragraph 10 Immunity Interpretation Guidelines
6 See section 2.8, paragraphs 57-59 of the Immunity Interpretation Guidelines.
7 Where a corporation seeks immunity, an individual that is a current or former director, officer or employee of the corporation, who is explicitly named by the corporation, can get the benefit of "derivative corporate immunity" if the individual is also prepared, inter alia, to provide full disclosure and cooperation to the ACCC – paragraphs 13-15 of the Immunity Policy.
Risk of Disclosure of Immunity Applicant Confidential Information and Documents – the position in Australia

The requirement to provide full disclosure and cooperation is expanded upon in the Immunity Interpretation Guidelines. In particular, it requires the immunity applicant to:

- provide full details of all known facts relating to the cartel;
- provide to the ACCC promptly and at the applicant’s own expense, all evidence and information in its possession or available to it, wherever located, regarding the cartel conduct for the duration of the investigation and any subsequent court proceedings;
- be available, or make relevant corporate directors, officers and employees available, upon the request of the ACCC and in a timely fashion to respond to queries and attend interviews;
- use its best effort to secure and promote the ongoing, full and truthful cooperation of all current and former directors, officers and employees for the duration of the investigation and any subsequent court proceedings, including:
  (i) encouraging such persons to provide the ACCC with any information that may be relevant to the cartel conduct;
  (ii) facilitating such persons appearing for interviews or testimony in connection with the cartel conduct, as the ACCC may require at the times and places designated by the ACCC.\(^8\)

Accordingly, the immunity process inevitably involves a considerable amount of information and documents being provided to the ACCC (and the CDPP) and/or being created by the ACCC as part of the immunity process and its investigatory process as well as the litigious process/prosecution by the ACCC/CDPP.

STATUTORY PROTECTION OF INFORMATION PROVIDED TO THE ACCC

General protection of information provided in confidence to the ACCC

The CCA prevents an ACCC official from disclosing "protected information", which includes information that is given in confidence to the ACCC and relates to a matter under a core statutory provision (including the prohibitions on cartel conduct), except in limited circumstances such as where required by law or in performing duties or functions as an ACCC official\(^9\).

The CCA permits the ACCC to disclose protected information to specified agencies (including a foreign government body, including competition law regulators and local regulators) where the Chairman of the ACCC is satisfied that the information will enable or assist that agency to perform any of the functions or powers of the agency \(^10\). This power is sufficiently broad to allow the ACCC to share information with overseas competition authorities without the consent of the immunity applicant.

This power also envisages the possibility of the ACCC seeking the consent of the immunity applicant to disclose the protected information to third parties.\(^11\) It is the practice of the ACCC not to share confidential information provided by the immunity applicant, or the identity of the applicant, with third parties including regulators in other jurisdictions without the consent of the applicant.\(^12\) However, it is also the practice of the ACCC to seek a "substantive waiver" from the immunity applicant if necessary.

\(^8\) See section 3.2, paragraphs 77-80 of the Immunity Interpretation Guidelines for all of the requirements of "full disclosure and co-operation."

\(^9\) Section 155AAA (1) of the CCA

\(^10\) Section 155AAA (12) of the CCA

\(^11\) Section 155AAA (15) of the CCA

\(^12\) The ACCC expressly sets out this practice in paragraph 63 of the Immunity Interpretation Guidelines.
applicant in order that it then shares such protected information with overseas competition law regulators.

The ACCC otherwise expressly states that it "will use its best endeavours to protect any confidential information provided by the applicants for immunity." \(^{13}\)

**Specific powers of the ACCC relating to disclosure of “protected cartel information”**

In addition to the above general statutory protection, the CCA was amended in July 2009 to enhance the protection afforded to "protected cartel information", being information given to the ACCC in confidence which relates to a breach, or possible breach, of the prohibitions on cartel conduct. These protections are in addition to the existing exemptions and immunities which may operate under the general law to protect such information from disclosure, which are referred to as part of the analysis of the recent court decisions). \(^{14}\)

The meaning of "protected cartel information" is wide enough to cover the information provided by the immunity applicant envisaged by the Immunity Policy above or by another enforcement agency (or any other source), provided that it is given to the ACCC in confidence.

The table below summarises the circumstances in which the ACCC may refuse to disclose protected cartel information or produce a document containing protected information, the exceptions to these powers of refusal, and the criteria which must be taken into consideration by the relevant decision maker.

<table>
<thead>
<tr>
<th>Type of request for disclosure</th>
<th>Criteria for exercise of power</th>
</tr>
</thead>
</table>
| **Request for documents under s157 of the CCA**  
The ACCC may refuse a request for documents under s157(1) of the CCA if the request relates to a document containing protected cartel information. (Section 157(1) allows certain persons, including a person who is subject to civil penalty proceedings by the ACCC, to obtain copies of all documents the ACCC has in connection with the matter which tend to establish the person's case, other than documents prepared by an officer of the ACCC or one of its professional advisers). | In exercising this power of refusal, the ACCC must have regard to the following:  
(a) the fact that the protected cartel information was given to the Commission in confidence;  
(b) Australia’s relations with other countries;  
(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;  
(d) in a case where the protected cartel information was given by an informant:  
(ii) 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;  
(e) the legitimate interests of the corporation which, or the person who, made the request under subsection (1);  
(f) such other matters (if any) as the Commission considers relevant. |

\(^{13}\) Paragraph 64 of the Immunity Interpretation Guidelines.  
\(^{14}\) Explanatory Memorandum to the *Trade Practices Amendment (Cartel conduct and other measures) Bill 2008*, paragraph 7.13.
## Risk of Disclosure of Immunity Applicant Confidential Information and Documents – the position in Australia

<table>
<thead>
<tr>
<th>Type of request for disclosure</th>
<th>Criteria for exercise of power</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Disclosure to a court or tribunal (section 157B)</strong>&lt;br&gt;The ACCC is not required to produce to a court or tribunal a document containing protected cartel information, or to disclose protected cartel information to a court or tribunal, except by leave of the court or tribunal.&lt;br&gt;However, the ACCC may (ie, has the power to) produce such documents or information to a court or tribunal.&lt;br&gt;If such documents or information are disclosed in relation to particular proceedings, the document or information must not be adduced in other proceedings except:&lt;br&gt;(a) in accordance with relevant leave of the court or tribunal granted in the other proceedings; or&lt;br&gt;(b) as a result of a relevant exercise of power by the ACCC’s exercise of power in the other proceedings.</td>
<td>No criteria is specified where the ACCC refuses to produce documents or information in these circumstances. However, where a court or tribunal grants leave (ie, requires the ACCC) to disclose protected cartel information, or the ACCC decides to exercise its power to disclose protected cartel information, those bodies must have regard to the following matters and not any other matters:&lt;br&gt;(a) the fact that the protected cartel information was given to the Commission in confidence;&lt;br&gt;(b) Australia’s relations with other countries;&lt;br&gt;(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;&lt;br&gt;(d) in a case where the protected cartel information was given by an informant:&lt;br&gt;(i) the protection or safety of the informant or of persons associated with the informant; and&lt;br&gt;(ii) 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;&lt;br&gt;(e) in the case of a court—the interests of the administration of justice;&lt;br&gt;(f) in the case of a tribunal—the interests of securing the effective performance of the tribunal’s functions.</td>
</tr>
<tr>
<td><strong>Discovery in certain circumstances (section 157C)</strong>&lt;br&gt;Discovery where ACCC not a party&lt;br&gt;The ACCC, in connection with proceedings before a court (in Australia) to which it is not a party, is not required to make discovery (however described), or produce, to a person a document containing protected cartel information.&lt;br&gt;However, the ACCC may give that person a copy of a document containing protected cartel information.</td>
<td>No criteria is specified where the ACCC refuses to make discovery in these circumstances. However, where the ACCC exercises it power to provide a person with a copy of document containing protected cartel information, it must have regard to the following matters and not any other matters:&lt;br&gt;(a) the fact that the protected cartel information was given to the Commission in confidence;&lt;br&gt;(b) Australia’s relations with other countries;&lt;br&gt;(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;&lt;br&gt;(d) in a case where the protected cartel information was given by an informant:&lt;br&gt;(i) the protection or safety of the informant or of persons associated with the informant; and&lt;br&gt;(ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, or the disclosure of</td>
</tr>
</tbody>
</table>

15 That is, in accordance with leave from a court or tribunal, or where the ACCC exercises its power to produce such documents or information.
Risk of Disclosure of Immunity Applicant Confidential Information and Documents – the position in Australia

<table>
<thead>
<tr>
<th>Type of request for disclosure</th>
<th>Criteria for exercise of power</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documents not to be adduced in other proceedings</td>
<td></td>
</tr>
<tr>
<td>If a copy of a document is given to a party (or prospective party) as a result the exercise the ACCC’s power as set out above, it must not be adduced in other proceedings before the court, another court, or a tribunal, except:</td>
<td></td>
</tr>
<tr>
<td>(a) in accordance with relevant leave of the court or tribunal granted in the other proceedings; or</td>
<td></td>
</tr>
<tr>
<td>(b) as a result of a relevant exercise of power by the ACCC in the other proceedings.</td>
<td></td>
</tr>
<tr>
<td>protected cartel information, may discourage informants from giving protected cartel information in the future;</td>
<td></td>
</tr>
<tr>
<td>(e) the interests of the administration of justice.</td>
<td></td>
</tr>
</tbody>
</table>

The protection provided to immunity applicants by the powers and rights of the ACCC set out in the table is not absolute, as:

- the Court or Tribunal has the power to give leave (ie, require) the ACCC to produce a document containing protected cartel information, or to disclose protected cartel information, having regards to specified criteria set out in second row of the table;
- the ACCC may itself decide to produce a document containing protected cartel information, or to disclose protected cartel information, having regards to specified criteria set out in the table; and
- it only strictly relates to information on conduct that amounts to a breach of the cartel provisions that existed after July 2009 (ie, when the specific cartel provisions to which the protection relates were enacted).

There has been no judicial consideration of the ACCC’s powers relating to protected cartel information since the provisions were enacted. However, as set out below, in cases prior to these protections being included in the CCA, the ACCC has vigorously contested (with mixed success) the disclosure of information provided to it in confidence during cartel investigations and proceedings, particularly having regard to the importance of not discouraging immunity applicants from giving the ACCC information in the future.

The ACCC has clearly stated that it will continue to take a similar approach to the exercise of its power in relation to protected cartel information. In particular, it is likely to:

- continue to take the "best endeavours" approach to protecting the confidential information provided by immunity applicants as set out in the Immunity Interpretation Guidelines, where the information pertained to conduct prior to July 2009, and refuse to supply such information to third parties without being compelled to do so – as it has done to date. It may even seek to argue that information concerning conduct that occurred prior to July 2009 can still be considered to be protected cartel information under the CCA, in circumstances where the cartel continued to be given effect to after July 2009. This issue has not yet been considered by a court.
- seek to test the breadth of the new statutory protections against disclosure – as it has already sought to do so in the most recent decision discussed below, namely ACCC v Prysmian Cavi E Sistemi Energia S.R.L. [2011] FCA 938 (Prysmian case).16

16 As referred to in paragraph 271 of the judgment of Lander J.
OTHER WAYS THAT THE ACCC MAY POTENTIALLY PROTECT INFORMATION PROVIDED BY AN IMMUNITY APPLICANT

There is no special privilege at general law which protects information provided by an immunity applicant to the ACCC. In order for the ACCC to prevent the disclosure of information at general law, it must fall within one of the recognised exemptions for disclosure, such as legal professional privilege or public interest immunity. There is also a threshold question of whether the person requesting access to a particular document can establish a legitimate basis to do so. These issues are considered below.

Legal professional privilege

Documents brought into existence by the ACCC for the dominant purpose of:

- obtaining legal advice; or
- use in reasonably anticipated legal proceedings,

can be the subject of a claim for legal professional privilege by the ACCC, and immune from disclosure. Whether legal professional privilege applies is determined on a document by document basis.

In proceedings brought by the ACCC against Visy concerning cartel conduct it engaged in with Amcor (immunity applicant) in the Australian cardboard box industry, the ACCC successfully claimed legal professional privilege over several categories of documents created less than one month after it had been approached by the immunity applicant in 19 November 2004.\(^{17}\)

The judge accepted evidence from the General Counsel of the ACCC and a Director of Compliance in the Enforcement Division of the ACCC that litigation had been reasonably anticipated by 15 December 2004, even though the Commissioners did not reach an in-principle decision to commence legal proceedings until almost a year later on 28 November 2005. The judge concluded that any investigation which was carried out after that 15 December 2004 was for the purpose of those legal proceedings and the relevant categories of documents were protected by legal professional privilege.

Accordingly, once the ACCC reaches a position where it reasonably anticipates commencing cartel proceedings, information provided by the immunity applicant Information contained in documents brought into existence by the ACCC for the dominant purpose of use in those proceedings will be protected by legal professional privilege, and will not be required to be disclosed.

However, documents created by the ACCC prior to the time when it reasonably anticipates commencing legal proceedings (eg, notes taken by an ACCC case officer of meetings with an immunity applicant or witness early in the investigation), will only be protected by legal professional privilege if they were brought into existence for the dominant purpose of obtaining legal advice, and not some other purpose.

For example, if an ACCC case officer has been specifically instructed to record certain information given orally by the immunity applicant for the dominant purpose of allowing a lawyer to provide legal advice to the ACCC as to whether the conduct referred to amounts to cartel conduct, the

\(^{17}\) These included communications between the General Counsel of the ACCC and the lawyers of potential witnesses (Category A), and various types of documents relating to communications with witnesses and drafts of those witnesses’ statements (Categories B through I), which the court noted “would ordinarily be expected to be created if legal proceedings were anticipated”. See ACCC v Visy (No 2) 239 ALR 762, upheld on appeal in Visy v ACCC 161 FCR 122.
Risk of Disclosure of Immunity Applicant Confidential Information and Documents – the position in Australia

jurisdiction of the CCA having regard to the conduct referred to, and/or the prospects of a cartel prosecution, legal professional privilege may apply. However, where notes of information provided by the immunity applicant are created by an ACCC officer for some other reason (eg, for the purpose of taking a record of the statement in performance of that officer’s duties, namely the investigation of conduct that may amount to cartel conduct), there is a real risk that the information will not be protected by legal professional privilege.

Similarly, the business documents created by the immunity applicant in the ordinary course (that evidence entry into and/or giving effect to the cartel) and provided to the ACCC as part of seeking conditional immunity/the ongoing obligation to provide full disclosure and cooperation, will not attract legal professional privilege (only those copies of such documents brought into existence for the dominant purpose of obtaining legal advice will have the protection of legal professional privilege).

In addition, legal professional privilege cannot be maintained if relevant information is prepared for the purpose of providing it to an opposing party in legal proceedings. For example, later in the cartel proceedings brought by the ACCC against Visy referred to above, finalised witness proofs of evidence prepared by the ACCC summarising statements made to ACCC investigators were, at the direction of the court, filed and served on Visy. The ACCC was unsuccessful in preventing Cadbury Schweppes, a third party private damages claimant, from gaining access to the witness proofs of evidence held by Visy. The Full Court of the Federal Court held that, as the statements had been disclosed to Visy, no litigation privilege could attach to the copies held by Visy (see also the rejection of public interest immunity in relation to these documents by the judge at first instance referred to below).18

However, the Full Court of the Federal Court did acknowledge that the purpose of creating the finalised version of the proofs of evidence (ie, to notify the respondent what the ACCC intended to disclose to it and the court in any event) was different from the purpose of preparing draft proofs of evidence to be used by counsel, which would be privileged in the normal course of events. In particular, a party has the discretion to decide which evidence (if any) is to be adduced on that party’s behalf, and until that decision is made, proofs of potential witnesses (or other documents assembled for the purposes of the litigation), remain privileged from production.

Public interest immunity

The ACCC has on a number of occasions sought to claim public interest immunity from disclosing particular documents created or obtained in cartel investigations or proceedings. The existence of public interest immunity is determined by balancing two competing aspects of the public interest:

- first, whether harm would be done to the public interest by production of the document; and
- second, whether the administration of justice would be impaired if the documents were withheld.

The ACCC has had success in the past relying on public interest immunity to prevent the disclosure of information in cartel related proceedings. However in 2 recent instances the ACCC has failed to prevent the disclosure of information based on this claim in a signal that the court is shifting its position toward disclosure. However, the judgments also suggest that the

18 Visy v ACCC 161 FCR 122.
success or failure of such a claim will depend upon the circumstances of the case and the competing public interests to be weighed.

In *Korean Airlines v ACCC*, the ACCC was successful in preventing a suspected participant in the international air cargo fuel surcharge cartel from accessing certain ACCC documents, in the context of challenging an information request made by the ACCC to that party under its compulsory information gathering powers.\(^{19}\) The judge accepted the ACCC’s argument that disclosure of the information would be contrary to the public interest, on the basis that it may adversely affect the ACCC’s continuing investigation into the suspected cartel conduct, and, where information had been disclosed to the ACCC on a confidential basis, the ACCC’s ability to investigate unrelated cartel activity.\(^{20}\)

In contrast, the ACCC was unsuccessful in preventing disclosure of certain documents on public interest immunity grounds to a third party private litigant in relation to the Australian cardboard box cartel in *Cadbury Schweppes v Amcor (Cadbury)*.\(^{21}\) As set out above, the documents included finalised witness proofs of evidence summarising statements made to ACCC investigators, which had been filed and served by the ACCC on the respondent to cartel proceedings brought by the ACCC, pursuant to a court order. The trial judge concluded that the ACCC had failed to establish a public interest, where there was no evidence that the independent witnesses either sought or could have reasonably expected that the information they provided to the ACCC would remain confidential, or that those witnesses (or others) would be dissuaded from coming forward without such confidentiality.\(^{22}\)

In reaching this conclusion, the judge made the following statements concerning a claim for public interest immunity in the context of private damages actions for cartel conduct:

- “… a cartel participant contemplating a confession to the authorities knows… that his statements will be used by the authorities to prosecute the other party or partiers. As such, the ACCC’s claim that a party like [immunity applicant] can have a reasonable expectation of confidentiality with respect to statements made to investigators is devoid of substance. And without such a reasonable expectation, the ACCC’s contention that non-disclosure of the documents is required to protect the public interest cannot stand”; and

- even if production of the documents had been barred, the follow-on damages claimant would be free to undertake its own investigation and “… there is at least an equal, if not more compelling, public interest in allowing private litigants to rely on the output of regulatory investigations, which are undertaken by public regulators at least in part on their behalf”.

While these statements are made in the context of the particular circumstances of that case, that context/factual position is quite common in circumstances where an immunity/leniency applicant approaches the regulator.

---

\(^{19}\) The documents included “Detailed information… concerning the settlement regime proposed by staff for approval by the Enforcement Committee of the Commission which staff proposed would be raised with the suspected cartel participants (including the applicant)”: see *Korean Airlines v ACCC* [2008] ATPR 42-232.

\(^{20}\) The ACCC referred to difficulties of cartel investigation, the possibility of other suspected participants drawing inferences from the material and the willingness of other parties to supply material voluntarily to the ACCC.

\(^{21}\) *Cadbury Schweppes v Amcor* [2008] ATPR 42-218

\(^{22}\) The trial judge also concluded that legal professional privilege did not apply to these documents, which was upheld by the Full Court of the Federal Court on appeal in ACCC v *Cadbury Schweppes* 174 FCR 547. The trial judge’s conclusion on public interest immunity was not in issue on appeal.
The approach taken in Cadbury was affirmed, and expanded upon, most recently in the Prysmian case\(^{23}\), in which a decision was handed down in August 2011.

The principal action by the ACCC alleged conduct that amounted to cartel conduct in contravention of section 45 of the then Trade Practices Act against three international suppliers of land-based and submarine electrical cables and accessories.

One of the cartel participants made an application for immunity and provided information to the ACCC on a confidential basis. “Mr A” (a non-Australian resident but an employee of the immunity applicant) was an informant to the ACCC and provided information to the ACCC again on the basis that the information was being provided on a confidential basis. Mr A understood that the ACCC would take steps to protect its privileged records and made it known to the ACCC that he was concerned about the risk of overseas prosecution.

The relevant Prysmian case and judgment concerned an application for disclosure of the information in documents provided to the ACCC by the immunity applicant, and Mr A.

The respondents sought, for the purpose of challenging whether the ACCC had a prima facie case to commence proceedings:

- disclosure of confidential documents provided by the immunity applicant to the ACCC;
- the identity of Mr A;
- all documents produced to the ACCC regarding the alleged cartel;
- all documents in the ACCC’s possession regarding the immunity application; and
- all communications between the ACCC and the immunity applicant.

The ACCC acknowledged that such information may eventually need be disclosed to the respondents to allow them to properly prepare for trial. However, the ACCC opposed the disclosure at such an early stage in proceedings (two of the three respondents had not yet submitted to the jurisdiction of the Court), arguing that unrestricted disclosure was unnecessary as the threshold for determining whether the ACCC had a prima facie case to commence proceedings was not high. In particular, the ACCC opposed the disclosure arguing:

- public interest immunity;
- that it would prejudice the administration of justice; and
- that the applicant’s request for documents was an abuse of the court's processes (having no legitimate purpose and was "fishing" and was too broad and would result in the ACCC incurring considerable expense.

The ACCC argued that public interest immunity ought to apply in this case, as disclosure:

- would be likely to deter future informants from assisting and cooperating with the ACCC for fear of retribution or other negative ramifications flowing from the disclosure of their identity or information they have provided to the ACCC;
- would challenge the viability and integrity of the ACCC’s Immunity Policy which has been developed because cartels usually involve secrecy and deception, and cartel conduct is difficult to detect; and
- would be likely to cause Mr A substantial harm by virtue of his reputation in the industry and potential future prosecution in other jurisdictions.

\(^{23}\) ACCC v Prysmian Cavi E Sistemi Energia S.R.L. [2011] FCA 938
The judge rejected the ACCC’s claim for public interest immunity, ordering disclosure of the information to the respondents. The judge acknowledged that its finding may undermine the ACCC’s immunity policy and the willingness of informants to assist the ACCC, but concluded that these considerations were outweighed by the fact that the information was necessary to allow the respondents to properly test the ACCC’s prima facie case.

The judge found that the risk of prosecution of informants like Mr A in other jurisdictions is not a matter the Court should consider when determining where the public interest lies. The judge rejected an attempt by the ACCC to restrict access to the information to the respondents’ external Australian lawyers, noting that because the public interest favoured disclosure to assist the respondents prepare their case, this would necessarily involve conducting internal investigation and consulting with foreign lawyers.

For similar reasons, the judge also held that an order to prevent disclosure under section 50 of the Federal Court Act (which empowers the Court to make an order at any time restricting the publication of particular evidence or party/witness in order to prevent prejudice to the administration of justice), was not appropriate in this case. The judge stated that:

- *he considered that "such an order was in no way necessary...to prevent prejudice to the administration of justice by this Court"*24 *in circumstances where the public interest favours disclosure;*

- *"It is difficult to think, where the Court has reached a conclusion that the weighing of competing public interests in relation to public interest immunity and the public interest in ensuring a fair trial falls in favour of the party against whom the proceedings have been brought, that there is some residual power left in the Court to make an Order under s50, because it is necessary for the purpose of preventing prejudice to the administration of justice."*25 (this issue is referred to further below); and

- *"There is an air of artificiality about considering an application for an order under s50 absent a successful claim for public interest immunity".*26

In respect of the applicants’ request for documents (by way of various Notices to Produce the subject documents) despite the ACCC’s arguments that the requests for documents constituted “fishing” and were oppressive, the judge refused to set aside the applications, stating that the respondent:

- is entitled to know what material was relied on to support the ACCC’s cartel allegations and to test the strength of those allegations in its application challenging the ACCC’s commencement of proceedings; and

- is also entitled to seek documents that relate to the application for immunity and derivative immunity to explore the circumstances in which this information and assistance was provided in order to determine whether there are any significant issues that would affect the ACCC’s prospects of success.

The judge also rejected the ACCC’s submission that the Notices are oppressive and unduly burdensome, given the relevance of the documents to the application and did not otherwise excuse the ACCC from compliance with the Notices to Produce.

As set out above, the CCA was amended in July 2009 to provide that the ACCC is not required to produce or disclose "protected cartel information" (ie, information given to the ACCC in confidence that relates to a breach, or possible breach, of the prohibitions on cartel conduct), without the leave of the Court. In deciding whether to grant such leave, the Court must only have regard to specific matters27, which are again set out below for ease of reference:

(a) the fact that the protected cartel information was given to the ACCC in confidence;
(b) Australia's relations with other countries;
(c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;
(d) in a case where the protected cartel information was given by an informant;
   (i) the protection or safety of the informant or of persons associated with the informant; and
   (ii) 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;
(e) in the case of a court—the interests of the administration of justice;
(f) in the case of a tribunal—the interests of securing the effective performance of the tribunal's functions.

As these provisions were introduced subsequent to alleged cartel conduct and the commencement of the Prysmian proceedings, they were not relevant to the case and the judgment offers little insight into their likely future operation. In particular, the judge appears to have had regard to factors (a), (d) and (e) (and possibly (c), at least insofar as it related to national/domestic efforts relating to investigation s of cartel conduct) in requiring disclosure, he did not do so in the context of the provision as a whole, and it is possible that immunity applicants may receive added protection from the new provisions.

Interestingly, the statutory provisions merely set out the matters to which the ACCC/Court/Tribunal must have regard, without reference to whether each criterion is to have equal weight or whether, as occurred in Prysmian and Cadbury, the interests of the administration of justice, which in any event takes account of a number of the criteria has primacy.

It is also unclear as to whether information concerning conduct that occurred prior to July 2009 can be considered to be protected cartel information under the CCA, in circumstances where the cartel continued to be given effect to after July 2009, and cartel proceedings were not commenced until after 2009. On the one hand, the judge in Prysmian held that the protected cartel provisions were irrelevant because they were “introduced after this proceeding was started, and, as the ACCC conceded, [do] not apply to these proceedings” (emphasis added). On the other hand, the ACCC conceded that the protected cartel provisions did not apply in this case "because the conduct the subject of the proceedings pre-dated the commencement of that section" (emphasis added).

**The implied undertaking – an added protection**

Even in circumstances a third party could obtain access to documents through the use of court processes as set out above, there is a restriction to the use that may be made of those documents due to a substantive obligation known as the "the implied undertaking".

27 Section 157B (2) of the CCA
Several cases have affirmed the principle that:  

\[\text{Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.}\]

Following *Prysmian*, it is clear that the implied undertaking applies even to parties that have not submitted to the jurisdiction of the court in question. Unless a particular document was read in open court, a person seeking to use information to which the implied undertaking applied would need to seek an order of the court authorising the relevant use.

**THE NEED FOR A LEGITIMATE BASIS TO REQUEST SUCH INFORMATION AND DOCUMENTS**

Irrespective of any rights of the ACCC to deny access to particular documents (eg, under a statutory power or other right such as legal professional privilege or public interest immunity), any person requesting access to a particular document must first establish a legitimate basis to do so (eg, under rules relating to general discovery or subpoenas, or other rights such as under s157 of the CCA, described above).

For example, under Federal Court rules of discovery, a party must make discovery of "any document directly relevant to any issue raised on the pleadings". In *Visy v ACCC*, the Full Court of the Federal Court upheld the decision of the trial judge to reject an application by Visy (the respondent in the cartel proceedings), for production by discovery of the following documents by the ACCC:

1. documents relating to the terms of any leniency and/or immunity arrangements between the ACCC on the one hand and certain companies, and past or present employees of [immunity applicant] on the other;
2. documents relating to the ACCC's decision to grant leniency and/or immunity to any of those persons; and
3. documents provided by [immunity applicant] entities and past or present [immunity applicant] employees in support of any application to the ACCC for leniency and/or immunity.

On the facts of that case, the Court held that there was nothing raised on the pleadings which could allow it to be said that those documents related to a fact in issue, since they related "only to the question of some unknown witnesses' credit (at least at the time the application was heard...)". The Court held that the credit of witnesses who were unknown at the time of the application, who may or may not be called in the trial, was not a matter raised on the pleading and, for that reason, none of the documents were discoverable.

---


30 See Federal Court Rules 2011 (Cth) Rule 20.03.

31 See Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited [2008] FCA 319.

32 ACCC v Visy (No 2) 239 ALR 762, upheld on appeal in *Visy v ACCC* 161 FCR 122.
Accordingly, depending on the particular facts of the case, it may not be necessary for the ACCC to rely on specific powers to deny access to a document, where the applicant cannot point to a legitimate basis for requesting the document.

**IMPLICATIONS OF THE RECENT JUDGMENTS HAVING REGARD TO THE NEW STATUTORY PROTECTIONS FOR CARTEL INFORMATION**

There are a number of key messages that can be distilled from the policies, judgments and statutory changes above.

The ongoing positive for those considering making an application to the ACCC for immunity is the steadfast approach by the ACCC to maintaining the integrity of its immunity/leniency regime. Accordingly:

- the ACCC will continue with the approach set out in its Immunity Interpretation Guidelines and its submissions to the Court, namely that it will use its best endeavours to protect any confidential information provided to it by an immunity applicant.

- the ACCC (even where the documents are not subject to section 157 or 157B of the CCA) will therefore not provide such information and documents to third parties without being compelled to do so.

- even though the CCA provides the ACCC the ability to provide such information and documents to other competition regulators, its policy is to seek the consent of the immunity applicant (by way of a waiver – which it does so as a matter of course) prior to providing such material to third party regulators.

From a negative perspective, the recent judgments that preceded the enactment of the statutory protections to cartel information, clearly reflect a shift toward a preparedness to disclose information and documents to third party litigants, even at an early stage in the ACCC's subsequent enforcement proceedings or third party private actions, where there is a legitimate basis to request such documents.

The decisions makes it clear that an argument suggesting that it is in the public interest to protect an informant from prosecution in other jurisdictions is unlikely to be accepted. Therefore, the issue/strategies associated with disclosure of information and documents in Australia and the likelihood that such disclosure may prejudice the position in other jurisdictions where the competition regulators may be operating on different timelines is a live issue.

Australia's legislators have recognised the above risks (even in advance of the recent judgments) and have sought to introduce specific statutory protection of such information, setting out specific matters to which the ACCC and the Court must have regard to (and no other) when disclosing such "protected cartel information".

The ACCC has a view that these statutory cartel protection provisions 'must have some work to do' – and that they will provide greater protection to immunity applicants in future proceedings. It has clearly signaled that it will seek to utilise the protections as the basis for non-disclosure until compelled to do so.

The practical risk is that, in judgments to date, the Court has considered a number of the factors in section 157B of the CCA and nevertheless provided disclosure to the applicants in the proceedings. Time will tell whether the Court will take a different view in the context of deciding on all of the factors/statutory formula in that section – as the legislators had intended.

ayman.guirguis@corrs.com.au
Tel +61 2 9210 6965
Mob +61 419 259 188