

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

NSD 1720 of 2008

BETWEEN: ALLPHONES RETAIL PTY LIMITED (ACN 008 169 090)
Applicant

AND: AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION
Respondent

JUDGE: FOSTER J

DATE: 28 AUGUST 2009

PLACE: SYDNEY

REASONS FOR JUDGMENT

INTRODUCTION

1 In these proceedings the applicant (**Allphones**) seeks an order for preliminary discovery against the respondent (**the ACCC**). Allphones claims that order because it wishes to obtain the full name, address and position with the ACCC, of the employee or official of the ACCC who provided a copy of a Written Submission prepared on behalf of the ACCC to two firms of solicitors and possibly to other persons in the circumstances set out more fully later in these reasons. Allphones argues that, by providing that document to those persons, the ACCC official who did so (**the relevant ACCC official**) contravened s 155AAA(1) of the *Trade Practices Act 1974* (Cth) (**the Act**) and also breached an equitable duty of confidence said to have been owed by to Allphones by that official. Allphones informed me that it intended to sue the relevant ACCC official and the ACCC itself for damages or compensation arising from such breaches.

2 The ACCC has declined to disclose the identity of the relevant ACCC official or any other information concerning that official.

3 The precise order sought by Allphones is an order that:

... the respondent make discovery to the applicant of all documents that are or have been in the possession of the respondent relating to the description or identity of any person or persons who have provided or disclosed to any of:

- (a) Birch Partners;
- (b) Chew + Matthews; or
- (c) any franchisee who is a party to a franchise agreement with the applicant,

a copy of the document entitled "Applicant's Submissions in Support of Motion for Interlocutory Injunctions" dated 9 October 2008 ("Confidential Document") or the information recorded in any of paragraphs 6, 13, 14, 15 and 37 of the Confidential Document.

Birch Partners and Chew + Matthews are the two firms of solicitors to which the submission was sent.

4 The order sought by Allphones is sought pursuant to O 15A r 3 of the *Federal Court Rules*. That rule relates to *identity discovery* as distinct from *cause of action discovery* (as to which see O 15A r 6 of the *Federal Court Rules*).

THE RELEVANT FACTS

5 On 3 October 2008, the ACCC commenced proceedings NSD 1567 of 2008 in this Court against Allphones. On that day, the ACCC made an *ex parte* application for the abridgement of the time for service of its Application and of a Notice of Motion filed on that day. The ACCC also sought an urgent listing of the application for interim injunctive relief contained in its originating process. This interlocutory application was designed to ensure that Allphones dealt with its franchisees in certain upcoming dispute resolution negotiations and mediation in a way which was not misleading or deceptive and upon terms which allowed those franchisees a reasonable time for reflection in the event that some settlement agreement as between them and Allphones were reached. The gravamen of the complaint being agitated by the ACCC in proceedings NSD 1567 of 2008 as at 3 October 2008 was that Allphones was making statements to its franchisees concerning those franchisees' entitlements to certain bonuses which, in the opinion of the ACCC, were misleading.

6 For present purposes, it is not necessary to traverse in detail the claims which were made by the ACCC on 3 October 2008 in proceedings NSD 1567 of 2008.

7 On 3 October 2008, I made orders for the abridgement of the time for service of the ACCC's Application and for the return of that Application and the Notice of Motion to which

I have referred. Those orders provided that the proceedings were to be returned before me on 9 October 2008 at which time the ACCC's application for interim relief was to have been dealt with.

8 Proceedings NSD 1567 of 2008 were listed at 10.15 am before me on 9 October 2008. No contested hearing took place on that occasion. Allphones offered to the Court, and the Court accepted, certain undertakings which addressed the matters which had been of concern to the ACCC when the proceedings were commenced. The proffering of these undertakings rendered a contested hearing unnecessary.

9 Subsequently, in November 2008, in proceedings NSD 1567 of 2008, the ACCC made a further application for interim injunctive relief. The ACCC brought this second application for interlocutory relief in order to address further concerns which it had in relation to the conduct of Allphones in connection with its ongoing negotiations with its franchisees. On 19 January 2009, I delivered judgment in respect of that application (*Australian Competition and Consumer Commission v Allphones Retail Pty Ltd (No 2)* (2009) 253 ALR 324). This second interlocutory application is not presently relevant.

10 At 8.53 am on 9 October 2008, shortly before proceedings NSD 1567 of 2008 were called on before me on that day, the solicitors for the ACCC sent by way of email to my Associate and, at the same time, to the solicitor for Allphones, a document styled *Applicant's Submissions in Support of Motion for Interlocutory Injunctions* dated 9 October 2008 (**the ACCC's Written Submission**). Plainly, this document was intended to be referred to and relied upon by the ACCC at the interlocutory hearing in those proceedings fixed for that day. At the time when the ACCC's Written Submission was sent, the ACCC's application for interlocutory relief had not been resolved and the ACCC was entitled to assume that that application would proceed at 10.15 am as scheduled. Because the ACCC's claim for interlocutory relief was ultimately resolved on 9 October 2008 on a basis satisfactory to the parties and to the Court, no reference was made to the ACCC's Written Submission in open Court on 9 October 2008 nor was it relied upon by the ACCC on that occasion. I had not previously directed that a written submission be lodged. I did not grant leave to the ACCC to file in Court the ACCC's Written Submission on that occasion, nor was I asked to do so. However, on the same day, the ACCC's Written Submission was marked by my Associate as

having been filed in Chambers so that a formal record of the date when the document was received would be made in the Court file. It is the practice of the Court to record the receipt by the Court of a written submission by noting that such a document has been "filed".

11 A written submission may be filed over the counter at the Registry, in Court (with the leave of the presiding judge) or in Chambers. The ACCC's Written Submission in the present case was marked as "Filed in Chambers" on 9 October 2008. No prior leave had been granted to the ACCC to forward that document to my Chambers.

12 At the hearing of these proceedings, Allphones submitted that, in pars 6, 13, 14, 15 and 37 of the ACCC's Written Submission, the authors of the document set out certain information which was contained in, or derived from, several monthly management accounts prepared by Allphones in respect of the period from 1 March 2004 to 6 December 2007 (**the Management Accounts**). This submission is correct, at least in respect of some of the paragraphs referred to. Allphones also contended that the Management Accounts and certain other workbooks are confidential internal business records of Allphones and that the information contained in them is confidential to Allphones. Allphones contended that I should find that the only way in which officials of the ACCC might have gained access to this information was by inspecting documents produced to the ACCC by Allphones under compulsion pursuant to a notice served upon Allphones by the ACCC on or about 6 December 2007 pursuant to the provisions of s 155 of the Act (**the s 155 Notice**). On the evidence before me, I am prepared to make that finding.

13 In the ACCC's Written Submission, Counsel for the ACCC made reference to several paragraphs in an affidavit filed in support of the ACCC's initial interlocutory application and to several documents exhibited to that affidavit. Some of those paragraphs and documents contain material which is of a financial character and which has plainly been derived from financial material furnished to the ACCC by Allphones in response to the s 155 Notice.

14 I shall return briefly to the circumstances in which these documents were produced to the ACCC by Allphones later in these reasons.

15 On 15 October 2008, Allphones became aware that a copy of the ACCC's Written Submission had been provided to two firms of solicitors, Birch Partners and

Chew + Matthews, who, at that time, were both acting for various disaffected Allphones' franchisees. It also seemed to Allphones that the document had been given by the relevant ACCC official directly to certain Allphones franchisees. There is no evidence before me that supports this contention. The most likely explanation for the fact that some franchisees came to have possession of a copy of the document is that they obtained their copy from one or other of Birch Partners or Chew + Matthews or from another franchisee who, in turn, had obtained his copy from one or other of those firms of solicitors.

16 On 24 October 2008, Allphones restored proceedings NSD 1567 of 2008 to my list with a view to seeking confidentiality orders in respect of the contents of the ACCC's Written Submission and in respect of certain other documents. After some brief argument, no confidentiality orders were made on that day and the matter was adjourned in order to enable the parties to attempt to reach some satisfactory accommodation on the question of confidentiality. Allphones did not, at that time, seek relief based upon any equitable duty of confidence or any other substantive right. Its claim was confined to a claim based upon O 46 r 6 of the *Federal Court Rules*.

17 On 28 October 2008, I made the following orders in Chambers:

Pursuant to and for the purposes only of O 46 r 6, **THE COURT ORDERS THAT:**

1. The document entitled "Applicant's Submissions in Support of Motion for Interlocutory Injunctions" which was sent by email to the Associate to the Honourable Justice Foster on 9 October 2008 is confidential.
2. The document described in par 1 of these Orders shall not be made available to or inspected by any person who is not a party to these proceedings without the prior leave of a Judge.
3. The following documents filed in the proceedings must not be made available to or inspected by any person who is not a party to these proceedings without the prior leave of a Judge:
 - (a) Affidavit of Gregory Dy sworn on 3 October 2008 and the documents contained in Exhibits "GD-1" to "GD-8" thereto;
 - (b) Affidavit of Richard John Flitcroft comprising 17 paragraphs sworn on 3 October 2008 and the documents contained in Exhibit "RJF-1" thereto;
 - (c) Supplementary affidavit of Richard John Flitcroft comprising four paragraphs and the documents contained in Exhibit "RJF-2" thereto.
 - (d) Affidavit of Andrew James Sharpe sworn on 9 October 2008 and the documents annexed thereto and marked with the letters "AJS-1" to "AJS-5";

- (e) Affidavit of Geoffrey Quentin Taperell sworn on 24 October 2008 and the documents contained in Exhibit "GQT-1" thereto; and
 - (f) Any subpoenas issued by the Court and any documents produced in answer to such subpoenas.
4. The costs of and incidental to the respondent's Notice of Motion filed on 24 October 2008 be costs in the cause.

18 On 31 October 2008, Allphones commenced these proceedings (NSD 1720 of 2008).

19 It is important to refer briefly to certain additional background facts and
circumstances.

20 In 2006, Hoy Mobile Pty Limited (**Hoy Mobile**) commenced proceedings in this
Court against Allphones. Those proceedings (**the Hoy Mobile proceedings**) were heard in
February and March 2008 by Rares J. His Honour delivered reasons for judgment on 30 May
2008 (*Hoy Mobile Pty Limited v Allphones Retail Pty Ltd (No 2)* (2008) ATPR 42-240).
Allphones appealed from that judgment. On appeal, Allphones was partly successful
(*Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd* [2009] FCAFC 85).

21 Hoy Mobile had been a franchisee of Allphones for approximately four years prior to
the commencement of the Hoy Mobile proceedings.

22 In the Hoy Mobile proceedings, Hoy Mobile had claimed an entitlement to a larger
share of various commissions, bonuses and other moneys which had been paid or allowed to
Allphones by certain suppliers to it than the share which Hoy Mobile had, in fact, been paid
by Allphones.

23 On 25 March 2008, the ACCC commenced proceedings against Allphones, Matthew
Donnellan, Ian Harkin and Anthony Baker in this Court (NSD 408 of 2008) (**the main
ACCC proceedings**). The individuals named as respondents in those proceedings are or
were employees and directors of Allphones at various times over the period with which the
main ACCC proceedings deal. The Statement of Claim in the main ACCC proceedings is
lengthy. There are many allegations made in the Statement of Claim concerning Allphones'
dealings with its franchisees and its management of the Allphones business of which the
franchisees are an integral part.

24 In the main ACCC proceedings, the ACCC makes complaint about a large number of events and actions for which Allphones is alleged to have been responsible and contends that the respondents to those proceedings have contravened ss 51AC, 51AD, 52 and 59 of the Act in the operation of the Allphones franchise system.

25 On or about 6 December 2007, that is to say, after the commencement of the Hoy Mobile proceedings but before the ACCC had commenced any proceedings of its own, the ACCC served the s 155 Notice upon Allphones. As I have already mentioned, that Notice required production to the ACCC of the Management Accounts and of certain other documents. In response to that Notice, Allphones produced to the ACCC under cover of a letter dated 13 December 2007, the Management Accounts from 2005 to December 2007 and the audited Financial Statements of Allphones for 2004. In the covering letter and in an earlier email, Allphones asserted to the ACCC that the Management Accounts were incorrect. It provided various explanations in support of this assertion. When producing documents and records to the ACCC in response to the s 155 Notice, Allphones did not expressly assert that the materials which it provided were confidential.

26 On 24 January 2008, after further requests made of Allphones by the ACCC, Allphones furnished to the ACCC certain workbooks referable to the Management Accounts. Confidentiality was not claimed in respect of these materials at the time when they were produced.

27 On 29 August 2008, pursuant to the Franchising Code of Conduct contained in the Act, Allphones sent a Notice of Dispute to approximately 90 of its franchisees (**the Notice of Dispute**). The sending of the Notice of Dispute commenced a dispute resolution process in accordance with the provisions of the Franchising Code of Conduct and the agreements pursuant to which those franchisees were conducting Allphones' business. Two of the issues which that Notice sought to resolve related to bonus payments which Allphones received from telecommunications carriers and to other payments it received from handset and equipment suppliers. The issue which had been thrown up by the Hoy Mobile proceedings and the main ACCC proceedings and which was sought to be dealt with by the Notice of Dispute in relation to these matters was whether Allphones was obliged to share with its franchisees a larger slice of the total of these bonuses and payments than it had already shared

with those franchisees. The Notice of Dispute was sent after Rares J had delivered judgment in the Hoy Mobile proceedings and after the ACCC had commenced the main ACCC proceedings. By sending the Notice of Dispute and embarking upon the dispute resolution process initiated by the sending of that Notice, Allphones was seeking to overcome the problems created for it by those two sets of proceedings.

28 In late September and early October 2008, the solicitors for Allphones provided to the solicitors for the ACCC various documents which were then being sent to Allphones' franchisees for the purposes of resolving the issues adumbrated in the Notice of Dispute. It was the sending of these documents, and the alleged misleading nature of them, which provoked the application for interlocutory relief which the ACCC brought on 3 October 2008.

29 On 14 October 2008, Mr Birch of Birch Partners made a formal request of the ACCC for a copy of the ACCC's Written Submission. Later, on the same day, the relevant ACCC official provided a copy of that submission to Birch Partners and to Chew + Matthews. Before complying with Mr Birch's request, the relevant ACCC official sought legal advice. His or her attention was drawn to the fact that a member of the public might inspect "a written submission" at the Registry (O 46 r 6 of the *Federal Court Rules*). There is no direct evidence suggesting that the ACCC also provided a copy of that submission directly to franchisees. There is evidence that some franchisees either had the document or were privy to its contents—at least to those parts which concerned the financial information which Allphones claims is confidential.

30 On or about 15 October 2008, Allphones became aware that the ACCC had sent its Written Submission to Birch Partners and to Chew + Matthews. At that time, both of those firms of solicitors were acting for disaffected Allphones franchisees who were by then engaged in the dispute resolution process initiated by the Notice of Dispute.

31 By letter dated 16 October 2008, the solicitors for Allphones sent a letter of demand to the solicitors for the ACCC. In that letter, Allphones' solicitors asserted that one or more officials of the ACCC had breached or had been involved in a breach of s 155AAA of the Act. In that letter, after pointing out that the Management Accounts were not correct, the solicitors for Allphones said:

As the ACCC is also well aware, Allphones and the franchisees to whom Chew+Matthews and Birch Partners have sent their emails are engaged in a process of dispute resolution as prescribed by the franchise agreements and the Franchising Code. Allphones will be sending to franchisees relevant financial information about payments received from carriers and suppliers. That information will also be the subject of a report by BDO Kendall which will be sent to the franchisees.

The dissemination of inaccurate information drawn from Management Accounts, particularly when it is done before Allphones has circulated more reliable information, is clearly calculated to prejudice the prospects of successful dispute resolution in accordance with the prescribed process. It is bound to confuse and mislead.

Our client requires the ACCC to undertake that:

- 1 The ACCC will not disclose to any persons other than to Allphones and its advisers any "protected information" of Allphones except as permitted by section 155AAA.
- 2 The ACCC will immediately write to Chew+Matthews and Birch Partners explaining that:
 - 2.1 information in the ACCC's submission that relies on information obtained under section 155 should not have been disclosed to them or to their clients;
 - 2.2 in assessing information in the ACCC's submission based on Allphones' Management Accounts, it is necessary to take into account Allphones' position previously stated to the ACCC that the Management Accounts from 2005 to July 2007 "are incorrect and as such will provide a false and misleading account of the company's position and inaccurate information on how the company conducted its business".

Allphones reserves its rights to claim compensation for any loss or damage it may suffer as a result of any prejudice to the dispute resolution process resulting from the actions of the ACCC and "Commission officials" referred to in this letter.

This is a matter of great urgency and importance to Allphones as our client will be progressing with the dispute resolution with franchisees as soon as possible. Would you please respond to this letter by 12 noon tomorrow, 17 October 2008.

32 In mid-October 2008, in communications to franchisees, Birch Partners was making much of the large discrepancy between the total figure for rebates and bonuses disclosed in the ACCC's Written Submission and the total figure asserted by Allphones as being the correct figure for those rebates and bonuses.

33 By letter dated 21 October 2008, the solicitors for Allphones again asserted that ACCC officials had breached s 155AAA of the Act and requested that the ACCC provide to them details of the identity of the official or officials who had disseminated the ACCC's Written Submission.

34 The ACCC refused that request.

35 In the face of that refusal, these proceedings were commenced on 31 October 2008.

ALLPHONES' SUBMISSIONS

36 Allphones contended before me that it has suffered damage and will continue to suffer damage and that it has been unable to negotiate with its franchisees on a fair and proper footing because the ACCC has made available copies of the ACCC's Written Submission to solicitors acting for disaffected franchisees and also directly to disaffected franchisees. It was submitted on behalf of Allphones that this conduct has placed Allphones in a difficult negotiating position because the ACCC's Written Submission contains assertions by the ACCC to the effect that a significantly larger sum of money is at stake in the dispute between Allphones and its franchisees than Allphones contends is truly at stake. Allphones submitted that its prospects of resolving its disputes with its franchisees have been impaired or cruelled by the ACCC putting into the ring inflated figures which will inevitably form the basis of the franchisees' claimed entitlements to a further share of bonuses and other supplier payments.

37 Allphones' submissions in support of the discovery order which it claims were developed in detail as follows:

- (a) The correct principles to be applied in the present application are:
 - (i) First, the applicant must show that, after having made reasonable inquiries, it is unable to ascertain the description of a person sufficiently for the purpose of commencing a proceeding against that person.
 - (ii) Second, the applicant must show that 'some person' has or is likely to have knowledge of facts, or the possession of documents, tending to assist in identifying the prospective respondent.
 - (iii) Third, the applicant is not required to demonstrate the existence of a prima facie case against the prospective respondent. However, relief of this kind is nevertheless unavailable to a person who intends to commence 'merely speculative proceedings'. This criterion requires the applicant to demonstrate a reasonable objective basis for the proposed claim (*Hooper v Kirella Pty Ltd*

(1999) 96 FCR 1; *Glencore International AG v Selwyn Mines Ltd* (2005) 223 ALR 238 at [16], [91], [96], [105]).

- (iv) Fourth, an applicant under a rule in the form of O 15A r 3 of the *Federal Court Rules* must show that the order sought is necessary in the interests of justice. That is, the applicant must show that “the making of the order is necessary to provide him with an effective remedy in respect of the actionable wrong of which he complains”.
- (b) Allphones intends to sue the ACCC itself and the official who passed on the ACCC’s Written Submission to Birch Partners and to Chew + Matthews for:
 - (i) Breach of statutory duty. The alleged breach is a breach of s 155AAA(1) of the Act; and
 - (ii) Breach of an equitable duty of confidence said to be owed by both the ACCC and the relevant ACCC official to Allphones in respect of Allphones’ confidential information (especially its confidential financial information).
- (c) Objectively speaking, there is a reasonable basis for each of the foreshadowed causes of action. The ACCC knows the identity of the relevant ACCC official and has declined to reveal that identity. The disclosure of the identity of that person is in the interests of justice because it is necessary in order to provide Allphones with an effective remedy for the actionable wrongs of which it complains.

THE ACCC’S SUBMISSIONS

38 The ACCC did not argue that the relevant principles were other than those encapsulated in *Hooper v Kirella Pty Ltd* 96 FCR 1 at [31]–[34] (pp 10–11). The ACCC also referred me to *Rush v Commissioner of Police* (2006) 150 FCR 165 at [3]–[7] (pp 168–170). The ACCC resisted Allphones’ application on two broad grounds, namely:

- (a) The proposed proceedings are merely speculative; and
- (b) In any event, Allphones has not been able to demonstrate that the proposed proceedings against the relevant ACCC official (as distinct from and in addition to proceedings against the ACCC itself) are necessary in the interests of justice.

39 The ACCC submitted that neither of the causes of action intended to be relied upon by Allphones in the proceedings which it intends to bring was arguable and that its foreshadowed claims for relief were purely speculative.

40 As far as the cause of action for breach of statutory duty is concerned, the ACCC submitted that:

- (a) On 14 October 2008, when the ACCC's Written Submission was sent to Birch Partners and to Chew + Matthews, both the document and the *protected information* (Allphones' confidential financial information) were publicly available;
- (b) The ACCC's Written Submission was publicly available at that time because, pursuant to O 46 r 6(1) and O 46 r 6(2)(g) of the *Federal Court Rules*, any person might have inspected that document at that time on request and without the leave of the Court;
- (c) Those rules operated in respect of the ACCC's Written Submission because it is a "written submission" within the meaning of O 46 r 6(2)(g) of the *Federal Court Rules*; and
- (d) Pursuant to s 155AAA(16), an ACCC official may disclose protected information if it is already publicly available. It does not matter that the document was not referred to in open Court nor used in support of a contested application. Nor does it matter that it was not used at all.

41 The ACCC also submitted that the s 155AAA(1) duty did not prevent disclosure of the kind made here because the disclosure was made when the relevant ACCC official was performing duties or functions as an ACCC official (see s 155AAA(1)(a)).

42 As to the case based upon an equitable duty of confidence, the ACCC submitted that:

- (a) No right in equity is created by s 155AAA. Breach of s 155AAA creates only public law remedies;
- (b) *Protected information* will not always necessarily be confidential; and
- (c) The Act restricts but does not prevent disclosure. Some disclosure is permitted by s 155AAA.

43 The ACCC also submitted that the foreshadowed claims for relief were speculative. It said that, at this stage, it is impossible to tell whether Allphones has suffered or will suffer any loss as a result of the alleged contraventions. Damages are therefore speculative. There is no threat of further disclosure and some measure of protection is in place as a result of the orders which I made on 28 October 2008. Therefore, an injunction would not be granted. It was also submitted that a declaration would not be made because the making of a declaration would serve no purpose.

44 Finally, the ACCC submitted that the interests of justice would not be served by allowing Allphones to sue the relevant ACCC official. Allphones has an effective remedy (if it has any remedy) against the ACCC itself. There is no legitimate purpose to be served in proceedings being brought against one of the ACCC's officials. In any event, the ACCC submitted that the claim against its official was hopeless.

CONSIDERATION AND DECISION

45 Order 15A r 3 of the *Federal Court Rules* is in the following terms:

3 Discovery to identify a respondent

- (1) Where an applicant, having made reasonable inquiries, is unable to ascertain the description of a person sufficiently for the purpose of commencing a proceeding in the Court against that person (in this rule called *the person concerned*) and it appears that some person has or is likely to have knowledge of facts, or has or is likely to have or has had or is likely to have had possession of any document or thing, tending to assist in such ascertainment, the Court may make an order under subrule (2).
- (2) The Court may order that the person, and in the case of a corporation, the corporation by an appropriate officer, shall:
 - (a) attend before the Court to be examined in relation to the description of the person concerned;
 - (b) make discovery to the applicant of all documents which are or have been in the person's or its possession relating to the description of the person concerned.
- (3) Where the Court makes an order under paragraph (2) (a), it may:
 - (a) order that the person or corporation against whom or which the order is made shall produce to the Court on the examination any document or thing in the person's or its possession relating to the description of the person concerned;
 - (b) direct that the examination be held before a Registrar.

46 *Description*, when used in O 15A r 3(1), is defined in O 15A r 1 in the following way:

description includes the name, and (as applicable) the place of residence, registered office, place of business, occupation and sex of the person against whom the applicant desires to bring a proceeding, and also whether that person is an individual or a corporation.

47 Although Allphones knows that it was an ACCC official who sent a copy of the ACCC's Written Submission to Birch Partners and to Chew + Matthews, it does not know most of the other facts which are covered by the definition of *description*. By its solicitors' letter dated 21 October 2008 sent to the solicitors for the ACCC, it has, in my view, made reasonable inquiries directed to ascertaining those matters. It should not be expected to canvass Birch Partners, Chew + Matthews or franchisees with whom it is in dispute.

48 Accordingly, the requirements of subrule (1) of O 15A r 3 have been satisfied and the Court's discretion is open to be exercised.

49 The principles upon which that discretion will be exercised were explained by a Full Court of this Court in *Hooper v Kirella Pty Ltd* 96 FCR 1 at [31]–[34] (pp 10–11) as follows:

Order 15A r 3

31 An applicant for relief under O 15A, r 3 must show that, after having made reasonable inquiries, he or she is unable to ascertain the description of a person sufficiently for the purpose of commencing a proceeding against that person. Order 15A, r 3 plainly contemplates that the applicant needs to ascertain the identity of the relevant person in order to institute a proceeding in the Court against him or her.

32 Secondly, the applicant must show that "some person" has or is likely to have knowledge of facts, or the possession of documents, tending to assist in identifying the prospective respondent. The rule is therefore available even if relief is sought against a person who is in no way implicated in the wrongful conduct of which the applicant complains. In other words, relief is available against a "mere witness" or bystander: *Stewart v Miller* [1979] 2 NSWLR 128 (Sheppard J), at 135 (a decision on the New South Wales rule). To this extent, the rule differs from the equitable bill of discovery.

33 Thirdly, the applicant is not required to demonstrate the existence of a prima facie case against the prospective respondent: *Levis v McDonald* at 41, 44; *Stewart v Miller* at 139-140. Nonetheless, the power conferred by O 15A, r 3 is not to be used in favour of a person who intends to commence "merely speculative proceedings": *Stewart v Miller* at 140; *Levis v McDonald* at 44. A material factor in the exercise of the Court's discretion is the prospect of the applicant succeeding in proceedings against the person he or she wishes to sue: *Exley v Wyong Shire Council* (unreported, Supreme Court, NSW, Master Allen, 10 December 1976); noted *Ritchie's Supreme Court Procedure* (NSW) par [13,004].

34 Fourthly, the High Court has emphasised that an applicant under a rule in the form of O 15A, r 3 must show that the order sought is necessary in the interests of justice. That is, the applicant must show that: “the making of the order is necessary to provide him with an effective remedy in respect of the actionable wrong of which he complains.” *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 357. These observations emphasise the link between identity discovery and the applicant’s complaint that he or she has suffered from an actionable wrong.

50 In the present case, the debate between the parties has been directed to principles 3 and 4 (as to which see [33] and [34] in *Hooper v Kirella Pty Ltd* 96 FCR 1 extracted above).

51 See also *Monsanto Company v Syngenta Seeds Pty Ltd* [2006] FCA 228 at [8]–[11] (per Finkelstein J) where his Honour described the criterion in relation to prospects as “... a claim that is worth investigating ...”. At [9], he also said that “... in most cases an applicant for identity discovery must show some prospect of success in its proposed action”.

52 In *Wyeth v Secretary, Department of Health and Ageing* (2009) 255 ALR 352 at [24]–[29] (pp 355–356) Jacobson J described the test as being “... along the same lines as that which applies to a claim for interlocutory injunctive relief”. His Honour went on to say that consideration of that test was connected to the identification of the interests of justice.

53 In *Rush v Commissioner of Police* (2006) 150 FCR 165 at [3]–[7] (pp 168–170), Finn J said:

3 Order 15A, rr 3 and 6 of the *Federal Court Rules 1979* (Cth) provide respectively for what is colloquially known as “identity discovery” and “information discovery”: see generally *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1. I am empowered by our Rules to order identity discovery where (i) an applicant, having made reasonable inquiries, is unable to ascertain the description of a person sufficiently for the purpose of commencing a proceeding in this Court against that person; and (ii) it appears that some other person has, has had, or is likely to have knowledge of facts or possession of any document tending to assist in ascertaining who that person is.

4 Information discovery in contrast is discovery against the very person against whom relief may be sought. It is tightly circumscribed in the requirements to be met before discovery may be ordered. These are that:

- (a) there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court from a person whose description has been ascertained;

- (b) after making all reasonable inquiries, the applicant has not sufficient information to enable a decision to be made whether to commence a proceeding in the Court to obtain that relief; and
- (c) there is reasonable cause to believe that that person has or is likely to have or has had or is likely to have had possession of any document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist in making the decision.

5 Common to both species of discovery is a prospective proceeding which may be commenced in this Court. Inherent in this possibility are the requirements that the proceeding will be (a) within federal jurisdiction and (b) in respect of a cause of action known to law which is not purely speculative in character and which is not devoid of prospects. There is no difficulty in this matter in relation to the former of these requirements, some at least of the prospective causes of action being said to arise under Commonwealth legislation: see *Judiciary Act 1903* Cth, s 39B(1A)(c). It is the latter requirement, which requires the identification of a possible cause of action (in this case a legal wrong done to the applicants), that is problematic.

6 It is unnecessary for me to refer in detail to the growing body of case law on preliminary discovery. It is sufficient for present purposes to refer to the following. The O 15A, r 3 power to order identity discovery is not to be used in favour of a person who intends to commence merely speculative proceedings. A material factor in the exercise of the Court's discretion is the prospect of the applicant succeeding in proceedings against the person wished to be sued: *Hooper v Kirella* at [33]. Information discovery under O 15A, r 6 is significantly limited by the conditions imposed in subparas (a), (b) and (c) of that rule. Subpara (a) requires that there be reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court. While the threshold test under this subrule may be set at quite a low level: see *Gull Petroleum (WA) Ltd v Tah Land Pty Ltd* [2001] FCA 1531 at [59]; the test for determining whether the applicant has a reasonable cause to have the requisite belief is an objective one: see *Hooper v Kirella* at [39]. Though it is not necessary to demonstrate a prima facie case, it is not enough merely to assert that there is, or is the mere possibility of, a case against the prospective respondent: *Hooper v Kirella* at [39]. Importantly, as Hely J observed in *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147 at [26]:

- (d) belief requires more than mere assertion and more than suspicion or conjecture. Belief is an inclination of the mind towards assenting to, rather than rejecting a proposition. Thus it is not sufficient to point to a mere possibility. The evidence must incline the mind towards the matter or fact in question. If there is no reasonable cause to believe that one of the necessary elements of a potential cause of action exists, that would dispose of the application insofar as it is based on that cause of action: *John Holland Services Pty Ltd v Terranora Group Management Pty Ltd* [2004] FCA 679; BC200403021 at [13], [14], [17] and [73].

7 While O 15, r 6 expressly contemplates "fishing", it equally requires that each of the limiting conditions prescribed in subparas (a), (b) and (c) must be established. Preliminary discovery cannot itself be used to remedy

deficiencies in the satisfaction of the conditions themselves: *Airservices Australia v Transfield Pty Ltd* (1999) 92 FCR 200 at [5].

54 The Full Court's judgment in *Hooper v Kirella Pty Ltd* 96 FCR 1 is binding upon me. I think that what is required is more than a claim worth investigating. In my judgment, what is required is a claim that is within the jurisdiction of this Court and which is not so near to being hopeless as would reasonably and properly justify the claim being described as "merely speculative". The foreshadowed claim must have some prospect of succeeding. Success in this context requires a cause of action known to the law and a real (as opposed to fanciful) prospect that some remedy might be granted. If the foreshadowed proceedings would almost certainly be susceptible to an order for dismissal pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth), then preliminary discovery would ordinarily not be ordered. This is the flavour of the remarks of Jacobson J in *Wyeth* 255 ALR 352 at [24]–[29].

55 A judge called upon to decide whether an order for preliminary discovery should be made must consider whether the applicant will be left without an effective remedy if an order is not made (*John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 357). Although the judge is not called upon to decide the foreshadowed proceedings in order to determine the discovery question, he or she is required to consider whether the foreshadowed claims are devoid of prospects. This may require the judge to form a conclusion as to whether or not a particular defence might well succeed on the materials before him or her (*John Fairfax & Sons Ltd v Cojuangco* 165 CLR 346 at 357).

56 In the present case, the two matters which must be considered are:

- (a) Has Allphones established that the proposed proceedings are not merely speculative in the sense in which that expression is used in the authorities; and
- (b) Has Allphones satisfied me that it is in the interests of justice that preliminary identity discovery be ordered.

57 The two questions are related.

58 As to the question posed in [56(a)] above, Allphones relies upon two potential causes of action as against the relevant ACCC official. These are:

- (a) The tort of breach of statutory duty; and
- (b) The equitable right of action for breach of the equitable duty of confidence.

59 The statutory duty alleged to have been breached is that which is contained in s 155AAA(1) of the Act. That subsection is in the following terms:

155AAA Protection of certain information

- (1) A Commission official must not disclose any protected information to any person except:
 - (a) when the Commission official is performing duties or functions as a Commission official; or
 - (b) when the Commission official or the Commission is required or permitted by:
 - (i) this Act or any other law of the Commonwealth; or
 - (ii) a prescribed law of a State or internal Territory;to disclose the information.

60 The duty itself is circumscribed by the exceptions contained in subpars (a) and (b) of s 155AAA(1). That is to say, there is no duty not to disclose any protected information to any person if the circumstances in either subpar (a) or subpar (b) are in play.

61 *Commission official* is defined so as to include staff of the ACCC and consultants engaged by the ACCC (see s 155AAA(21)). In the present case, the relevant ACCC official is a member of the staff of the ACCC.

62 There are other exceptions provided for in s 155AAA to the prohibition on disclosure contained in subsection (1). The only additional exception relied upon by the ACCC in the present case is the exception provided for in subsection (16) which is in the following terms:

Disclosure of publicly available information

- (16) A Commission official may disclose protected information if it is already publicly available.

63 For the purposes of s 155AAA, *protected information* means:

protected information means:

- (a) information that:
 - (i) was given in confidence to the Commission; and

- (ii) relates to a matter arising under a core statutory provision; or
- (b) information that:
 - (i) was obtained by the Commission under Part XID or section 155; and
 - (ii) relates to a matter arising under a core statutory provision; or
- (c) information that:
 - (i) was obtained by the Commission under section 151AU, 152AU, 152BT, 152BZ, 152CBB or 152CBH or rules in force under section 151BU; and
 - (ii) relates to a matter arising under Part XIB or XIC; or
- (d) information that was obtained by the Commission under section 118C, 118G, 118NE or 118NI of the *Radiocommunications Act 1992*; or
- (e) information that:
 - (i) was given in confidence to the Commission by a foreign government body; and
 - (ii) relates to a matter arising under a provision of a law of a foreign country or of a part of a foreign country; or
- (f) information that:
 - (i) was obtained by the Commission under section 155; and
 - (ii) relates to a designated water matter within the meaning of that section.

For the purposes of this definition, it is immaterial whether the information was given to or obtained by the Commission before, at or after the commencement of this section.

64 The financial information disclosed in the ACCC's Written Submission to which I have referred at [12] and [13] above was obtained by the ACCC under s 155 of the Act and relates to a matter arising under a core statutory provision. That financial information is *protected information* for the purposes of s 155AAA.

65 Therefore, unless the terms of subsection (1)(a), (1)(b) or (16) of s 155AAA are satisfied in the present case, there will be a reasonable basis for thinking that the relevant ACCC official has contravened s 155AAA(1) of the Act.

66 Subsection (1)(b) does not assist the ACCC. However, subsections (1)(a) and (16) are relevant.

67 As to subsection (1)(a), on the material before me, the disclosure in the present case took place in circumstances described in that subsection. This complexion on those

circumstances is unlikely to change. The communications by the relevant ACCC official with the two firms of solicitors on 14 October 2008 were undertaken in the following context:

- (a) Litigation between the ACCC and Allphones had commenced (Proceedings NSD 408 and NSD 1567 of 2008);
- (b) Proceedings NSD 1567 of 2008 specifically concerned the way in which Allphones was dealing with its franchisees in relation to the negotiations and mediation contemplated by the Notice of Dispute;
- (c) The ACCC had sought interlocutory relief on 3 October 2008 and on 9 October 2008 and that application had been resolved by Allphones giving appropriate undertakings to the Court. Those undertakings obliged Allphones to keep the ACCC informed of the progress of Allphones' negotiations with its franchisees;
- (d) The two firms of solicitors to whom the ACCC's Written Submission had been sent had a very real and legitimate interest in knowing what the ACCC considered to be the true quantum of the various rebates, bonuses and payments which Allphones was seeking to retain through the mechanisms initiated by its Notice of Dispute;
- (e) The relevant official sent the document only after advice was sought and obtained from the solicitors who were representing the ACCC that he or she might do so; and
- (f) The relevant official did so in his or her capacity as a staff member of the ACCC genuinely and reasonably believing that it was legitimate, lawful and appropriate for him or her to do so in the circumstances as part of his or her duties and functions as such a staff member.

68 Section 155 empowers the ACCC to collect information and documents under compulsion for the purposes of its investigative function. In order properly and adequately to investigate a suspected contravention of the Act, it must be able to use information and documents which it gathers in this way. The legitimate use of such information and documents may involve disclosing the information or the contents of the documents to third persons. It is this legitimate use of protected information which is intended to be covered by s 155AAA(1)(a).

69 There is sufficient evidentiary material before me to enable me to be satisfied that, when the relevant ACCC official sent the ACCC's Written Submission to Birch Partners and

to Chew + Matthews, he or she was "... performing duties or functions as a Commission official". He or she was not acting on a frolic of his or her own. He or she almost certainly believed that the persons to whom the document was sent had a right to inspect it at the Registry. The persons to whom it was sent had a very real interest in the contents of the document and in both sets of proceedings brought by the ACCC against Allphones.

70 This is a case where it is difficult to see the evidentiary matrix altering much if at all were the substantive issue to be litigated. The position is analogous to the circumstances under discussion in the passages from *John Fairfax & Sons Ltd v Cojuangco* 165 CLR 346 to which I have referred at [55] above.

71 Further, I think that the ACCC's Written Submission is a "written submission" within the meaning of O 46 r 6(2)(g) of the *Federal Court Rules* and that, for that reason, it was already "publicly available" within the meaning of s 155AAA(16) of the Act by 14 October 2008.

72 Allphones submitted that the document was not a written submission because:

- (a) it had not been directed to be filed;
- (b) it was not the subject of any leave allowing it to be filed;
- (c) it was not, in fact, filed; and
- (d) it was not utilised in open Court or referred to in open Court.

73 As I have already noted, the document was stamped as "Filed in Chambers" on 9 October 2008. In that sense, it was filed. It was thereby made part of the Court's file and part of the records of the Court.

74 The points raised by Allphones and noted in [72] above lack merit. The real question is: In substance, is the ACCC's Written Submission a written submission? I think the answer to that question is clearly "yes". It purports to be a written submission. It contains submissions and arguments of fact and law directed to the interlocutory application with which it deals. It is easily identifiable as a written record of submissions. It is signed by both Senior and Junior Counsel who were then appearing for the ACCC.

75 The character of a document such as a written submission is to be judged as a matter of substance. It does not depend on any of the matters relied upon by Allphones noted at [72] above.

76 It was submitted on behalf of the ACCC that there was no sense in the proposition advanced on behalf of Allphones to the effect that the document could not be a “written submission” within the meaning of O 46 r 6(2)(g) of the *Federal Court Rules* unless it was referred to in open Court. It was said that that rule could only be given practical operation if Registry staff can determine quickly by looking at the document whether it is a written submission. To require that persons called upon to decide that question also verify whether the document has been referred to in open Court is unworkable.

77 In the end, the substantive questions are:

- (a) Is the document, of its nature, a written submission?; and
- (b) If so, has it been accepted by the Court as part of the Court’s official record (whether that be by filing, lodgement or some other means)?

78 In the present case, the ACCC’s Written Submission was accepted by the Court on 9 October 2008. It so happens that, technically, it was also “filed”. But that is not the critical factor. The document was received and retained by the Court. It was not returned or destroyed. It was placed in the Court file (as it should have been). By the end of the day on 9 October 2008, it was a “written submission” within the meaning of O 46 r 6(2)(g) of the *Federal Court Rules*.

79 Once the document became part of the Court file, it was open to any person to inspect it. This remained the position until 28 October 2008 when I restricted access to it. For these reasons, the document was publicly available as at 14 October 2008 when it was sent to Birch Partners and to Chew + Matthews.

80 Allphones’ case based upon s 155AAA will almost certainly fail. That case is speculative.

81 Even if Allphones could establish a contravention of s 155AAA(1) of the Act by the relevant official in the circumstances of this case, there are significant obstacles standing in the way of Allphones should it seek to bring an action to vindicate its alleged private rights based upon the official's public duty embodied in s 155AAA of the Act. A great deal of argument was addressed to this question. However, because of the conclusion which I have reached as to Allphones' prospects of proving a contravention of s 155AAA(1), I do not need to decide whether such a private right in the hands of a citizen (Allphones) is available in the present case.

82 In order for such a private right to exist, the relevant legislation must be found to reflect a legislative intention to create a private right for breach (*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424–425). The question is one of construction of the statute. As submitted by Allphones, it is the statute that creates the right and the common law that supplies the remedy (*Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 52).

83 It is by no means clear or beyond argument that the Act creates a private right in Allphones to sue for damages and other relief in the event that an ACCC official discloses information in breach of s 155AAA. There is much to be said for the view that no such right is created (see, in particular, the observations of McHugh and Gummow JJ in *Byrne* 185 CLR 410 at 458).

84 As to the question posed in [56(b)] above (the cause of action based upon the breach of the equitable duty of confidence), the following matters are relevant:

- (a) The classic definition of the equitable duty of confidence is found in *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475. At that part of his reasons, Swinfen Eady LJ said:

The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. Injunctions have been granted to give effectual relief, that is not only to restrain the disclosure of confidential information, but to prevent copies being made of any record of that information, and, if copies have already been made, to restrain them from being further copied, and to restrain persons into whose possession that confidential information has come from themselves in turn divulging or propagating it.

These observations were cited with evident approval by Mason J in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50;

- (b) In the present case, the information was not improperly or surreptitiously obtained. It is contended that it was imparted in confidence in circumstances where it ought not to be divulged;
- (c) The question of whether an equitable duty arises in the present case is not straightforward. The relevant information was contained in documents which were produced pursuant to compulsory powers invoked by the ACCC and in circumstances where it is at least arguable that the only source of any duty of confidence is s 155AAA itself. Although the use of documents and information obtained compulsorily in this way is constrained by s 155AAA and perhaps may be constrained by other general law principles, it is difficult to see how a party in the position of Allphones could sensibly expect that the information would be kept confidential and not disclosed even for legitimate purposes associated with the due performance by the ACCC of its statutory functions. It may be thought that this is particularly so in circumstances where Allphones made no express claim for confidentiality when the documents were produced. In *Cadbury Schweppes Pty Ltd v Amcor Limited* (2008) 246 ALR 137, [2008] ATPR 42-218, Gordon J, in the context of considering claims that documents ought not to be disclosed on public interest immunity grounds, said (at [30]):

The theoretical merit of the ACCC's confidentiality contentions is even more deficient. A cartel claim, by definition, involves collusion between two or more actors. In the same way that it is both inevitable and self-evident that the statements of a cooperating criminal conspirator will be used against (ie, disclosed to) the non-cooperating conspirators, it must be taken for granted that a cartel participant contemplating a confession to the authorities knows, or should know, that his statements will be used by the authorities to prosecute the other party or parties. As such, the ACCC's claim that a party like Amcor 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

- (d) The definition of *protected information* seems to me to contemplate a dichotomy between information that is given (voluntarily) in confidence to the ACCC, on the one

hand, and information that was obtained by the ACCC (compulsorily) pursuant to a s 155 Notice, on the other hand. In the latter case, the section seems to contemplate that there is no room for any equitable duty of confidence to arise.

85 As presently advised, I doubt that any equitable duty of confidence was imposed upon the ACCC when Allphones produced documents to it pursuant to the s 155 Notice. The relevant ACCC official could only be liable if such a duty were imposed upon the ACCC. No claim of confidentiality was made at the time when the documents were produced. The circumstances of their production are not such as to suggest that some duty of confidence should be imposed. The existence of such a duty is inconsistent with the statutory obligation imposed upon the ACCC to investigate and litigate, where appropriate, contraventions of the Act. It seems to me that the Parliament recognised the need for some protection of information and documents furnished to the ACCC pursuant to s 155 of the Act when it enacted s 155AAA. However, the protections to be found in s 155AAA are limited and are intended not to restrict the ACCC unduly or inappropriately in the way that it goes about legitimately performing its statutory duties and functions. I think that the only protection for such information is that which is afforded by s 155AAA.

86 For the above reasons, in my judgment, the foreshadowed proceedings by Allphones are next to hopeless. They are speculative in the sense in which that expression is used in the authorities. The cause of action for breach of statutory duty is virtually hopeless and the cause of action based upon some equitable duty of confidence is in the same category.

87 Even if Allphones could overcome the difficulties which I have discussed at [67]–[86] above, the Court would be very unlikely to make a declaration or grant any injunctive relief. Since 28 October 2008, orders preventing inspection in the Registry of the ACCC's Written Submission have been in place. Further, there is no present threat by the ACCC to make further disclosure of the contents of the document. A declaration would serve no useful purpose.

88 As far as damages are concerned, it seems to me that the foreshadowed claims are entirely speculative. Allphones has had ample opportunity since 15 October 2008 to put its case to its franchisees and to the ACCC as to the correct position concerning the disputed rebates, commissions and bonuses. If its advocacy is sound and based upon accurate

information, it should be able to persuade its protagonists of the correctness of its position. If it cannot correct the so-called misinformation, that will most likely be because the franchisees and the ACCC do not accept the correctness of the Allphones position. The lost opportunity to take advantage of or mislead its franchisees is not something for which the law will provide recompense. For these reasons, I am of the view that Allphones would almost certainly be unable to prove any quantifiable loss in the proceedings which it has foreshadowed.

89 The prospects of Allphones succeeding in either or both of the foreshadowed causes of action against the ACCC official who sent the ACCC's submission to Birch Partners and Chew + Matthews is an important and material factor to be considered in the exercise of the Court's discretion whether or not to order the preliminary discovery sought by Allphones.

90 In any event, I do not think that the interests of justice would be served by the making of the order which Allphones seeks.

91 There is no suggestion in the present proceedings that the relevant ACCC official was motivated by malice or otherwise took the action which he or she did other than in the honest belief that it was an appropriate thing to do. The litigation between the ACCC and Allphones is substantial litigation. Allphones has a great deal at stake both in terms of money and reputation. Furthermore, as I have mentioned at [27] above, Allphones is attempting to resolve its differences with its franchisees through a process of negotiation and mediation. That process is especially directed to the question of whether or not the franchisees are entitled to a larger slice of the rebates and bonuses pie. A consideration of the interests of justice involves more than the question of whether or not the order is necessary to provide to the applicant an effective remedy in respect of the actionable wrong of which he or she complains. The Court should be slow to allow its processes to be used as the means by which one party seeks to gain a strategic advantage over another unless that result is a necessary incident of the legitimate deployment of those processes. In the present case, Allphones has not persuaded me that the claims which it says it wishes to make warrant the intervention of the Court by the making of a preliminary discovery order.

92 In my judgment, in the end, if there is any actionable wrong involved in the present case which might conceivably give rise to a remedy, the most effective remedy will be a

remedy against the ACCC itself. It is not necessary for Allphones to achieve that which it legitimately desires to achieve to proceed against an individual ACCC official.

93 For these reasons, I propose to dismiss the application with costs.

I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster.

Associate: *36*

Dated: 28 August 2009

Counsel for the Applicant: Mr SD Robb QC with Mr MA Jones

Solicitor for the Applicant: DLA Phillips Fox

Counsel for the Respondent: Mr SJ Rushton SC with Mr JC Giles

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 18 December 2008

Date of Judgment: 28 August 2009