Dear Review Committee

I am a legal practitioner in Melbourne. I make the following submissions. They relate in the main to amending Part VI of the Act for offences under Part IV.

1. Sections 82 or 87 of the TPA should be amended to allow for the remedies of account of profits or unjust enrichment. This would allow a disgorgement of profits not dependant on proving actual or likely damage.

The rationale behind such an amendment is to overcome the present requirement that the damages that can be awarded via s82/s87 need to relate to actual damage suffered or likely to be suffered. Such an amendment would address the following injustices:

First, plaintiffs may have actually only suffered a small loss but the defendant, by their or its actions, has reaped profits in excess of the damage. Particularly in relation to offences under Part IV of the Act, the remedies available ought not be restricted to actual damage suffered. Anti-competitive behaviour should be punished. Allowing claims for an account of profits/unjust enrichment would achieve this more readily than requiring proof of actual damage which can be difficult to establish. I note in this regard that the Sherman Act in the U.S. punishes anti-competitive behaviour by awarding treble damages. While I do not necessarily advocate this, those who breach the provisions of Pt IV should at least be required to disgorge those profits.

Secondly, in cases where the anti-competitive behaviour is widespread, so that the damage is spread across a large class of persons, many plaintiffs loss may be so small that they do not recover it, or, due to the fact it is a small part of a larger product, the loss may be difficult to calculate. In either case the damage is unrecovered. Applying the present damages regime under the Act, such loss would remain a windfall gain for the defendant. Again, it would seem appropriate to make those who manipulate the market, collude to manipu;ate the market and generally engage in anti-competitive conduct in nreach of the Act should not benefit from such activities simply because a plaintiff does not, or cannot, claim its damage. These profits shuld be disgorged. An example of a case where there are many layers of claimant whose loss it will be difficult to determine is the current case before Justice Merkel concerning the international conspiracy to fix the price of vitamins. See Bray v F.Hoffman-La Roche & Ors [2002] FCA 243. The difficulty in such a case is that vitamins are sold at various levels and in different stages of formulation so that the end- consumer may bear some of the loss, as may the distributor, formulator and wholsesaler. Proving loss, for say, the end consumer will be very difficult. The loss may be tiny for each consumer, but adding those losses up Australia wide could produce a sum in the millions. Why should the companies in breach of the Act retain those sums? The answer is that they shouldn't.

Money surplus of damage claimed could be distributed in a number of ways: on cy-pres basis to those claimants who did come forward; to peak bodies representative of the affected class of persons; to consolidated revenue for use in a field related to the class of claimants.

2. Section 82 (2) of the Act should be amended to allow for an extension of the limitation period in cases of concealed fraud or where it would be unconscionable to allow a defendant to rely on the limitation period.

Section 82 provides for a 3 or 6yr limitation perod depending on when the cause of action accrued. There is no exception stated in the sub-section for cases where the:

1. Conduct complained of is fraudulent and has of itself prevented discovery of the conduct; or

2. The conduct itself is not fraudulent, but the defendant has frudulently concealed the conduct so that the limitation period has expired.

There is a real doubt as to whether the doctrines of concealed fraud/unconscientious assertion of a legal right apply to the limitation provision contained in the Act. See a copy of the draft an article I have prepared for the ATPLB wich is due to be published next week.

Amending the limitation period to allow these doctrines to be pleaded would be an absolutely fundamental and simple change to the Act which would be both just and justifiable.

Kind regards

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CARTELS and TIME LIMITS UNDER THE TRADE PRACTICES ACT – Has time run out on the Limitation Defence?

A CARTELS AND TIME LIMITS – UNHAPPY BEDFELLOWS.

1 Anti-competitive cartels involving multi-national corporations have been reported with increasing frequency in recent years1. These cartels can cover periods of up to a decade2. They are often shrouded in secrecy with participants either careful not to keep records or vigilant in destroying them3. Because of their secretive nature once a cartel is uncovered a number of difficulties can arise in bringing proceedings against the participants. Firstly, it can be difficult to uncover enough concrete evidence to directly implicate all the participants4. Secondly, the time in which to bring proceedings can have either run, or largely run. It is the time limits issue that will be the focus of this article.

2 Cartels in Australia will almost invariably involve contraventions of s45 and s46 of the *Trade Practices Act.* The relevant limitation period for recovery of damages is contained in s82(2) of that Act. Until recently, it has been three years, however, the Act has recently been amended to allow for damages for six years5.

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1 Recent world attention has focussed on the worldwide vitamins cartel conducted, inter alia, by F.Hoffman-La Roche, Aventis SA and BASF AG. Other cartels in the past decade include; citric acid, graphite electrodes, cartonboard, cement, amino acids, seamless steel tubes and polyproplyene. See the E.C. Media Release IP/01/1625, 21/11/01 which lists the 10 largest cartels by fine per case.

2 The vitamins cartel appears to have operated, at least in respect of Vitamins A & E from 1990 – 1999.

3 The Swiss Competition Authorities Report for 2000 detailing the cartel's effect and operation in Switzerland noted that "Also, no document note or agenda relating to these meetings (six or three monthly meetings between the cartel participants) were kept by the parties". Para A8 of the Report. The report is available in Swiss, French and German at www.wettbewerbskommission.ch/site/g/praxis/rpw.Par.0005.Pic1.pdf. A Translation is available from the author.

4 This issue, among others, has been at the centre of a number of Motions before Justice Merkel dealing with whether the foreign parent companies should be party to the Australian class action seeking recovery for the operation of the vitamins cartel in Australia - Bray v F.Hoffman-La Roche & Ors, VG 359 of 1999.

5 Amending Act 63 of 2001, s3.

3 Irrespective of which limitation period applies, if a cartel has been running for say ten years, then, at least four, and possibly seven, years in which the cartel has been running (for instance the Vitamins cartel6), may be unrecoverable if the strict limitation period contained within the *Trade Practices Act* is adhered to. Or, perhaps, as in the Multigroup litigation7, proceedings against the cartel were not instituted until the limitation period had already, on the respondents' view, expired.

4 Either way, the time limitation for s82 damages within the *Trade Practices Act* potentially operates to exclude recovery for either a significant portion of the cartel or potentially the whole cartel. However, the Multigroup litigation is shedding new light on the recovery of damages beyond the limits prescribed by s82 of the *Trade Practices Act* through the possible award of s87 damages.

5 This article will focus on the Multigroup litigation and explore the issues arising out of that case, in particular how s87 relief might be granted without any limitation as to time and to what extent the doctrines of concealed fraud and unconscientious assertion of a legal right can affect limitation periods and the grant of s87 relief.

B The background to Multigroup – Is the claim for damages time barred?

6 The Multigroup litigation8 concerns a claim by Multigroup Distribution Services Pty Ltd against Mayne Nickless Limited, TNT Australia Pty Ltd, Ansett Transport Industries (Operations) Pty Ltd and J. McPhee & Son (Australia) Ltd (the Transport Group) for alleged anti competitive conduct in the period 1987-1990. It is alleged that the Transport Group contravened s45 of the *Trade Practices Act* and, inter alia, took advantage of their market power for the purpose of eliminating or damaging Multigroup in the transport industry.

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6 Bray v F.Hoffman-La Roche & Ors, VG 359 of 1999. The matter is before Justice Merkel in the Federal Court.

7 *Multigroup Distribution Services* v *TNT Australia Pty Ltd & Ors* (unreported, 12 March 2001, Federal Court, [2001] FCA 226) ("the First Instance decision") and *Mayne Nickless v Multigroup Distribution Services P/L & Ors* (unreported, 19 November 2001, Full Federal Court, [2001] FCA 1620) ("the Full Court decision"). See also fn 9 below.

8 The case is ongoing – NG 786 of 1995. A trial on liability has been scheduled to commence in February 2002 and is expected to last many months.

7 The claim was instituted in 1995 following a successful prosecution by the ACCC against the first three companies of the Transport Group for almost identical breaches of the *Trade Practices Act*.9

8 The Transport Group pleaded in its defence, inter alia, that Multigroup's claim for damages under s82 was time barred by virtue of s82(2) and s87 (ICA). Multigroup first filed proceedings in 1995, remembering that the alleged contravening conduct took place between 1987 – 1990. Multigroup initially sought, inter alia, damages under s82. However, in 1997 it added a claim for injunctive relief. Multigroup asserted that s87(1), including any claim for damages under that sub-section, when coupled with a claim for injunctive relief under s80, is not subject to any limit as to time. As a result, it contended, it was able to maintain its claim for damages. The Transport Group cavilled with that contention and the issue was put to Justice Gyles as a preliminary issue of law.

9 Justice Gyles at first instance upheld Multigroup's contention and held that s87(1) was not time limited.10

10 Mayne Nickless sought leave to appeal to the Full Court on the issue of s87(1) not being time limited.11

11 In summary, the finding that no limitation period applies for orders under s87(1) was upheld by the Full Court. The decision is important for a number of reasons.

12 Firstly, it confirms that s87 (1) relief, where coupled with a claim for primary relief under Part VI of the TPA which itself has no limit as to time, is also not subject to any limitation as to time.

13 Secondly, it suggests that concealed fraud/unconscientious assertion of a legal right may be available to counter a pleaded time limit for s82 damages by either making the limitation period unavailable or being sufficient grounds to exercise the discretion to grant s87(1) relief.12

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9 *Trade Practices Commission* v *TNT Australia Pty Ltd & Ors* (1995) ATPR 41-375.

10 He also held that an account of profits was not available as relief under s87(1).

11 The account of profits finding was not sought to be challenged on appeal.

12 The case also contains a useful summary of the criteria which need to be satisfied where leave to appeal is required from an interlocutory judgment. The Full Court rejected the test that the first instance decision need necessarily be "attended with…doubt" if the decision involved "resolution of an important legal issue in the case" (Full Court - para 33).

14 Both findings are obviously important for the future conduct of cases involving secret cartels where there are time limit issues. I turn now to consider the Full Court's findings in more detail.

C S87(1) – NO RESTRICTION AS TO TIME

15 Justice Gyles held at first instance that:

> *In my opinion, it follows from the decision of the High Court in Sent13 that as there is no time provision in relation to the commencement of proceedings pursuant to s80, then there is no time provision in relation to the grant of relief pursuant to s87(1) in a proceeding brought pursuant to s80.*14

16 The Full Court agreed with Justice Gyles. It held that s87(1), unlike s87(1A), which is a stand alone provision with specified limitation periods under s87 (1CA), had no time limitation specified in relation to the exercise of powers under it.

> *That is because the subsection provides for ancillary relief. In an action in which it is invoked the only relevant time limitations are those which affect the proceedings, under some other provision of Pt VI, in which orders under s87(1) are sought.* 15

17 The Full Court seems to be suggesting that, where your primary relief is without any limit as to time, so will your ancillary relief follow suit in this regard. This is particularly important for cases where the damage occurs beyond the previous three year limitation imposed by s82. Of course, s82 has now been amended and allows for a 6 year recovery period. (The Full Court's interpretation would also allow recovery beyond 6 years.)

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13 *Sent v Jet Corporation of Australia Pty Ltd* (1986) 160 CLR 540.

14 *Multigroup Distribution Services* v *TNT Australia Pty Ltd & Ors* (unreported, 12 March 2001, Federal Court, [2001] FCA 226, para 31).

15 *Mayne Nickless v Multigroup Distribution Services P/L & Ors* (unreported, 19 November 2001, Full Federal Court, [2001] FCA 1620, para 53).

18 There is some tension between the First Instance decision and the Full Court decision about whether the ancillary relief will be without limit only if the primary relief sought also contains no limitation period, such as injunctive relief under s80. This was certainly the view of Gyles J at first instance.16 Following this logic through, Justice Gyles seemed to think that if a claim for damages under s82 was made, further damages relief under s87(1) beyond the damages limitation period in s82(2) would not be allowable.17 His Honour seemed to think that the damages would be limited in time to what was recoverable under the primary relief provision.

19 However, the Full Court seems to take the reach of s87(1) further, suggesting that damages (or any relief for that matter) beyond that prescribed by a limitation period in the primary relief provision can be awarded through s87(1).

> *If the time limitation under s 82(2) is not pleaded or is waived, or if the respondent is estopped from raising it, then a finding of contravention may be made and damages awarded under s 82. Such other orders as may be open under s 87 can also be made. That possibility is open as the time limitation imposed by s 82(2) does not in terms operate as a jurisdictional limitation but rather as a procedural bar. The cause of action under s 82 is defined in s 82(1).*

Further:

> *It may be true to say that the absence of any time limitation under s87 itself, in relation to claims for damages under s87(1), renders the time limit imposed by s82(2) too easily avoidable. It may also be said that this construction detracts from the logical consistency of Pt VI. So much may be accepted but does not provide a basis for writing into s87(1) words that are not there.* 18

20 It must also be borne in mind that s87(1) relief is discretionary. It cannot be assumed that damages beyond the s82(2) limitation period will be granted. The Court will need to be directed to conduct that favours an exercise of the discretion. Delay in bringing a claim will probably be insufficient. (See the discussion at D below.)

21 Nevertheless, the Full Court seems to be suggesting that s87(1), whilst limited to providing ancillary relief dependant on a claim for primary relief in Part VI, may apply without time limit, notwithstanding any limitation periods expressed to apply to the claim for primary relief. Again, the Court would need to be convinced as to why it should exercise its discretion to grant relief under s87(1) beyond that set out in the primary relief section.

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16 See First instance decision paras 30 – 32. Therefore, if possible and for safety's sake, injunctive relief, which has no time limit, should be pleaded as a base upon which s87(1) unlimited damages can be sought.

17 First Instance decision - para 30.

18 Full Court decision – para 54 and 56.

D Exercising the Discretion to award s87 relief: Is there a case for Concealed Fraud/Unconscientious assertion of a legal right?

22 The Full Court has raised the possibility that damages beyond the time limit expressed in s82(2) might be awarded. It states that:

> "*If the time limitation under s 82(2) is not pleaded or is waived, or if the respondent is estopped from raising it, then a finding of contravention may be made and damages awarded under s 82. Such other orders as may be open under s 87 can also be made… It follows that the time limitation under s 82 does not exclude the possibility of orders being made under s 87(1) in a proceeding commenced after the expiration of three years from the date when the cause of action occurred. It may be that the time limitation is not pleaded or for one reason or another cannot successfully be invoked."* (my emphasis)19

23 The Full Court appears to be envisaging two possible methods of awarding damages outside the expressed time limit here. First, that damages could be awarded under s82 without time limit in a situation where the limitation period, for whatever reason, cannot be pleaded. Secondly, that for the same reason that the limitation period was prevented from being pleaded, an order could be made for damages under s87(1). It is suggested that what the Full Court is referring to, when it says, *or if the respondent is estopped from raising it* and *or for one reason or another cannot successfully be invoked*, is a situation of concealed fraud or an unconscientious assertion of a legal right which has resulted in time barring a claim for damage.

24 The Full Court seems to be suggesting that instances of concealed fraud or an unconscientious assertion of a legal right will be circumstances which might either, prevent the limitation period from being pleaded or, be sufficient to justify the Court's exercise of the discretion to under s87 (1) so as to allow damages (or presumably any remedy in Part VI) beyond the limitation period set out within the primary relief provision.

25 The Full Court's seeming acceptance of these doctrines is important as an earlier decision of the Full Court of the Federal Court in *State of Western Australia* v. *Wardley Australia* (Wardley) (1991) 30 FCR 245, purportedly applying the High Court in *Crown* v *McNeil* (1923) 31 CLR 76 (McNeil), rejected these doctrines as applying to the limitation period contained in s82(2). It is to these cases I now turn.

E Concealed fraud and Unconscientious assertion of a legal right – What has gone before.

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19 Ibid, para 54-55.

CONCEALED FRAUD

26 The Full Court in *Wardley* dealt with the doctrines of fraudulent concealment and unconscientious assertion of a legal right in relation to the pleaded defence that the statute of limitations would apply to a new plea which would otherwise be statute barred.

26.1 The argument was summarised by the Full Court as, effectively, a submission that it would be unfair to the plaintiffs if the three year limitation period referred to in Section 82(2) of the TPA expired before the plaintiff, who had suffered loss or damage by reason of contravention of the TPA, appreciated or should reasonably have appreciated the existence of the facts giving rise to the cause of action. It was submitted that the expression in Section 82(2) *"... within three years after the date on which the cause of action accrued..."* should be construed so as to exclude any period during which the contravention in question effectively precluded the institution of the action. Reliance was placed, by analogy, upon the reasoning of Deane J in *Hawkins v. Clayton* (which is discussed below).

26.2 As a preliminary point, the Court noted that:

> *"In our view, before ruling on such a submission, it would be proper for the Court to have before it both a defence relying upon Section 82(2) and a reply seeking to meet that defence on this ground. Without a solid footing in the pleading, the treatment of the argument becomes an exercise in the hypothetical."* 20

26.3 The second argument put by the plaintiff sought to rebut the decision of Davies J in *Fenech v. Sterling* (1983) 79 FLR 244, who held that the principle that, in an action based on fraud, time does not run while the injured person remains ignorant of the fraud, was inapplicable to Section 82(2). Davies J in *Fenech* said, in obiter, referring to *Crown v. McNeil*:

> *"Section 82(2) states in specific terms the period within which a proceeding to which it applies may be brought. Section 82(2) is not a general limitation enactment, it is a provision dealing specifically with a cause of action which the statute created. Section 82(2) makes no such exemption for a cause of action based on fraud or deceit as is made in Section 55 of the Limitation Act 1969 (New South Wales) or Section 27 of the Limitation of Actions Act 1958*

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20 *Wardley*, (1991) 30 FCR 245, 269.

(Vic). It is clear in its terms and I think it must be given effect."21

26.4 The State of Western Australia challenged that conclusion.

The Full Court commented that:

> *"If, as we have indicated, Section 82(2) is a condition of the remedy given by Section 82 and may be waived by the Respondent, then there is no reason in principle why, on equitable grounds, whether founded in estoppel or fraud or otherwise, the Defendant cannot be obliged to waive reliance upon the condition. But what is put forward is a particular equitable doctrine.*
>
> *It is necessary to keep in mind the nature of the equitable jurisdiction as to concealed fraud. The doctrine applies in two main classes of cases, first, when the action in one alleging fraud is an element in the cause of action (in which case, time does not run until discovery of the fraud) and, secondly, where the cause of action is one which does not involve fraud but the existence of the cause of action is fraudulently concealed by the defendant (in which case, time does not run until both discovery of the concealment and ascertainment of the existence of the cause of action). The matter is fully explained by the judgments in the New South Wales Court of Appeal in Metacel Pty Ltd v. Ralph Symonds Ltd [1969] 2 NSWR 201.*
>
> *The equitable doctrine of concealed fraud does not operate to prevent a defendant to a purely legal claim, not being a claim also cognisable in the concurrent jurisdiction of an equity court, from pleading the statute of limitations."*(my emphasis) 22

26.5 Later, the Court commented:

> *"... the question for us is whether there is room for the application of this particular equitable doctrine to defeat reliance upon a limitation provision contained within the statute conferring the cause of action. The equitable doctrine is expressed in terms of claims arising under the general law, whether they might be characterised as legal or equitable. It is not couched in terms which extend to claims created purely by statute. In such cases, the statute has to be given its full effect, including any engrafted time limitation of whatever character. That, in our view, is what follows from the decision of the High Court in Crown v. McNeil.*

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21 (1983) 79 FLR 244, 262.

22 Op Cit, *Wardley*, (1991) 30 FCR 245, 269.

But that may not be the end of the matter. In our view, as we have indicated, Section 82 of the Act provides for the three year period as a condition of the remedy, and that condition is something which may be waived by the respondent. Accordingly, whether by equitable estoppel or other sufficient equitable grounds, it may be that the respondent cannot be heard to deny that the condition has been waived. Hence, the notion of unconscientious reliance upon a legal right, referred to by Deane J in Muschinski v. Dodds (1985) 160 CLR 583, 619-20, and in Hawkins v. Clayton (at 590), and by Deane and Dawson JJ in Stern v. McArthur. So also may the various strands of the reasoning in the judgments in Commonwealth v. Verwayen. But, in our view, the result contended for by the State cannot be reached simply by incorporation of the very specific doctrine as to concealed fraud. The question is one that will fall for consideration only in terms of pleaded facts." (my emphasis) 23

26.6 The High Court considered an appeal from the Full Court's decision in *Wardley Australia Limited v. Western Australia* (1992) 175 CLR 514. The High Court did not specifically deal with the issue of concealed fraud and unconscientious assertion of a legal right. However, the majority (Mason CJ, Dawson, Gaudron and McHugh JJ) commented that:

"When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which infers upon the plaintiff, but, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of `loss or damage'. And that is just as well, in many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events." (my emphasis) 24

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23 Ibid, 270.

24 *Wardley Australia Limited v. Western Australia* (1992) 175 CLR 514.

26.7 In *Crown v. McNeil* (1923) 31 CLR 76 (*McNeil*), a claim was brought under s33 of the *Crown Suit Act.* That section set out in prescriptive terms what actions could be brought under the Act, they being claims for breach of contract only. Section 37 of the Act then limited the bringing of actions under s33:

> *"No person shall be entitled to prosecute or enforce any claim or demand under this part of this Act unless the petition setting forth the leave sought is filed within twelve months after the claim or demand has arisen."*25

Many of the breaches of s33 complained of fell outside the 12 month limitation period. The plaintiff asserted that the breaches of the Act by the Government were actively concealed by Government officers.

26.8 Dixon KC (as he was then) argued on behalf of the respondents that concealed fraud was an answer to Section 37. However, the Court disagreed. The Court held:

> *"It was suggested ..., in the case of concealed fraud, … . the cause of action only arose or accrued upon the date of the discovery of the fraud or upon the date when the fraud, with reasonable diligence, might have been discovered. If the fraud is the cause of action, then the argument is useless ..., for such a cause of action is not within the ambit of the Section."*

26.9 And further that:

> *"... fraudulent conduct on the part of the servants of the Crown, which prevented a person who has contracted with the Crown from knowing that the Crown has committed a breach of the contract does not extend the time for filing a petition in respect of the breach of contract beyond twelve months after the breach complained of took place"*. 26

26.10 As the Court in *Wardley* held, *McNeil* is authority which precludes relying on the doctrine of concealed fraud for limitation provisions which encompass claims created purely by statute.

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25 *Crown v. McNeil* (1923) 31 CLR 76.

26 Ibid, 96.

26.11 However, Alex Bruce, in a convenient exegesis of the law on this topic, has concluded that following *McNeil* is inappropriate when considering s82(2). 27

26.12 He makes the point that s82(2) is a limitation provision which is a condition of the remedy, not an element of the remedy, unlike that in *McNeil*. Therefore, as the right is not extinguished upon expiration of the limitation period but must be pleaded, so should equitable considerations be involved in considering that plea.

26.13 He revisits many of the cases in Australia upon which a rejection of the doctrine of concealed fraud are based and notes that the rejection of it in part was due to the perception that it sought to extend limitation periods. Bruce suggests that the better way of examining the doctrine is not that it extends limitation periods. Rather it operates independently of the Statue of Limitations. As he says:

> *"The equity which arises from the fraudulent concealment, operates independently of the Statute of Limitation. A court, in recognising the equity does not therefore attempt to remove or lower a bar expressly contained in the statute, a fear expressed by Isaacs in McNeil. Rather, the analysis requires a consideration of whether it would be inequitable to allow a defendant to rely on the legal right to plead the time for contained in the statute."* 28

Bruce then notes that this hypothesis is not inconsistent with the Full Court's decision in *Wardley* which, while holding *McNeil* did operate to preclude the doctrine of concealed fraud vis-à-vis s82(2), it did not rule out applying "equitable estoppel or other…equitable grounds…Hence the notion of unconscientious reliance upon a legal right".

It is to this "doctrine" we now turn. Though, in reality, it is no more than concealed fraud by another name.

Unconscientious Assertion of a Legal Right

26.14 It may be that while concealed fraud, per se, cannot be used to raise an equity which would prevent the Statute of Limitations being pleaded. However, perhaps the doctrine of unconscientious assertion of a legal right, can be raised as a barrier to the defence of the pleaded limitation period?

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27 Bruce, Alex; 'Legal Formalism and the Trade Practices Act – A case of Concealed Fraud?' (1998) 72 ALJ 216.

28 Ibid, 226.

26.15 This leads us to examine those cases mentioned by the Full Court (in *Wardley* at 26.5 above) which examine the "doctrine" of unconscientious assertion of a legal right.

26.16 The first of these cases is *Muschinski v Dodds* (1985) 160 CLR 583. Muschinski and Dodds were an unmarried couple who purchased land together as tenants in common. M, the woman, contributed the whole of the purchase price. D, the man, undertook to renovate a cottage on the land and to build a further building on the property. His promise was his consideration for receiving a tenancy in common. M and D separated before D fulfilled any of his promise.

26.17 M asserted sole ownership of the property. D relied on his beneficial interest as tenant in common.

26.18 The majority, Gibbs CJ, Mason and Deane JJ, held that the parties held their respective legal interest as tenants in common upon trust, after payment of any joint debts incurred upon improvement of the property, to repay to each her or his contribution and as to the residue for them both in equal shares; by Gibbs CJ [on different grounds]; and by Mason and Deane JJ because it was unconscionable after the failure of the joint venture between the parties for the man to assert his legal entitlement without recognising the woman's payment.

26.19 Justice Deane, after surveying the authorities on constructive trusts29, was not able to impose a constructive trust based on injustice, unfairness or unjust enrichment. He therefore turned to consider whether there was any narrower basis upon which M could claim to be entitled to relief by way of constructive trust in the circumstances of the case.

26.20 His Honour then analysed the equitable rules which apply to partnerships and joint ventures and concluded that:

> *"the prima facie rules entitling a fixed term partner to a proportionate refund….and a contractual joint venturer to a proportionate repayment….are properly to be seen as instances of a more general principle of equity….like most of the traditional doctrines of equity, it operates upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances*

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29 *Muschinski v Dodds* (1985) 160 CLR 583, 612-617.

*where the particular assertion or exercise of it would constitute unconscionable conduct."*30

26.21 Justice Deane went on to say:

> *[the circumstances giving rise to the operation of the principle]….can be more precisely defined by saying that the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or attain the benefit of the relevant property to the extent that it would be unconscionable for him to do so….31*

26.22 Justice Deane was able to find unconscionable behaviour in circumstances where neither party was at fault for the breakdown in the "joint venture". The unconscionability arose in the circumstances where the contribution by one party was significantly greater than the other, and still the party whose contribution was the lesser asserted his legal right for an equal share.

26.23 In *Muschinski*, it was the actual assertion of the right, which had been created on one pretext, and then asserted without reference to that pretext, which resulted in the unconscionability and was therefore estopped.

In a secret cartel, the analogous conduct is the assertion of a limitation period by a cartel participant, in the situation where it is only through the conduct of the cartel participant that the limitation period can be asserted, that renders its assertion unconscionable. This is especially so when one considers the reason limitation periods usually apply – to prevent plaintiffs sitting on their hands and letting actions go stale.

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30 Ibid, 619.

31 Ibid, 620.

26.24 In *Hawkins v. Clayton* (1988) 164 CLR 539*,* Justice Deane again considered the notion of unconscionability, though this time in the context of an expired limitation period.

26.25 T made a will in 1970 appointing H her executor. T died in 1975. T's will was left with her solicitors. The solicitors made no effort to locate it until 1981, over six years after T's death. At that time the main asset under the will, a home, had fallen into disuse and disrepair. H, who was also a residuary beneficiary was granted probate and sued the solicitors for the loss flowing from allowing the main asset to fall into disrepair.

The majority, Brennan, Deane and Gaudron JJ held that:

26.25.1 The solicitors were under a duty to take reasonable steps to find H and inform him of the will; were in breach of that duty and were liable in damages for the loss flowing from the delay in H taking possession of the estate.

26.25.2 Per Brennan and Gaudron JJ; that the action was not statute barred as the cause of action did not accrue until the executor assumed office in 1981.

26.25.3 Per Deane J; that the action was not statute barred on the ground that the cause of action did not accrue until the expiration of the period in which the wrongful act itself effectively precluded the bringing of proceedings.

26.26 In discussing the issue of when time runs for the purpose of s14(1) of the LAA, Deane J suggested the question was not "when was damage sustained", but "when the cause of action first accrued to the plaintiff or to a person through whom he claims".32

26.27 In an interesting analogy with a cartel, Deane J discussed the nature of the duty of the care owed by the Firm and noted that, arguably, it was a continuing one right up until the Firm took some positive steps to locate H. Deane J continued:

> *"In these circumstances, there is something to be said for the view that a distinct cause of action accrued each time new damage was incurred by reason of the continuing breach of duty. It is,*

32 *Hawkins v. Clayton* (1988) 164 CLR 539, 588.

however, unnecessary to pursue these problems involved in the Firm's defence based on the Limitation Act. There is a more general answer to that defence. Its basis is to be found in the circumstance that, in the present case, the negligent failure of the Firm to inform H of the existence and contents of the testatrix's last will not only caused the damage which was sustained by him in the capacity of executor of the testatrix's estate but also effectively concealed from him, for so long as he remained unaware of the contents of the will, the existence of the cause of action in negligence against the Firm.

It is inevitable that a Statute of Limitation will, on occasion, lead to injustice in the special circumstances of particular cases. Such injustice, when it occurs, is an unavoidable cost of the benefits involved in ensuring that plaintiffs act promptly and that defendants are not subjected to the litigation of stale claims. The present case falls, however, in an anomalous category where the applicability of a limitation provision such as s14(1) would invariably involve prima facie hardship and injustice and where any compensating public benefit, apart from protecting the courts from being required to determine issues of distant fact, is absent. If a wrongful action or breach of duty by one person not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is doubly injured. There can be no acceptable or even sensible justification of a law which provides that to sustain the second injury will preclude recovery of damages for the first. It would, e.g., be a travesty of justice and common sense if the law provided that a cause of action lay for damages for false imprisonment but then went on to provide that that cause of action would be lost if the false imprisonment continued for six years after the cause of action first accrued. Likewise, it would be a travesty of justice and common sense if the law imposed a duty upon a solicitor to take positive steps to inform a third person of the contents of a document of which the solicitor was alone aware and then provided that any cause of action against the solicitor for damage caused by a negligent failure to perform that duty would be lost if the negligence continued for six years. It is arguable that the notion of unconscionable reliance upon the provisions of a Statute of Limitations which provides the foundation of the long-established equitable jurisdiction to grant relief in a case of concealment of a cause of action until after the limitation period has expired (c/f. S55(1) of the Limitation Act) should, by analogy, be extended to cover cases such as these where the wrongful act at the one time inflicts the injury and, while its effect remains, precludes the bringing of action for damages. It seems to me, however, that the preferable approach is to recognize that it could not have been the legislative intent that the effect of provisions such as s14(1) of the Limitation Act should be that a cause of

> *action for a wrongful act should be barred by lapse of time during a period in which the wrongful act itself effectively precluded the bringing of proceedings. On that approach, the reference in s14(1) of the Act to the cause of action first accruing should be construed as excluding any period during which the wrongful act itself effectively precluded the institution of proceedings."* (my emphasis) 33.

26.28 Justice Deane's argument about the inherent contradiction in allowing a limitation period to be a defence to an action where the action itself concealed its own existence thereby rendering that act immune from prosecution is particularly apposite to the secret cartel scenario. Cartels, as mentioned at the outset, are shadowy secretive creatures. They operate covertly and can remain undetected until the limitation period has on its face run. To then allow the cartel participants, in effect, immunity from prosecution is, as Justice Deane put it, to doubly injure those affected by the cartel. There is no public benefit whatsoever in upholding a limitation period which may only serve to protect the wrongdoer.

26.29 Justice Deane's judgment in *Hawkins v. Clayton* therefore supports a possible extension of the limitation period on two grounds:

26.29.1 That it would be unconscionable on the part of the wrongdoer to assert a limitation period when the wrongdoer's own actions ensured it expired; or

26.29.2 The limitation period should be construed as excluding any period for which the wrongful act itself effectively precluded the bringing of proceedings.

26.30 Justice Deane's formulation was canvassed in *Hetherington v Mirvac* (unreported, 1999 NSWSC 444 (12 May 1999)) without, it would seem, attracting too much support. Wood CJ traversed the authorities and seemed to suggest that Deane J's proposition had not been accepted as a general one. Certainly there does not appear to be any case which has adopted the principle outright.

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33 Ibid, 589.

26.31 The lack of any real support for the notion expressed by Justice Deane makes the Full Court's seeming acceptance of these principles in *Multigroup* so important. Either of the arguments formulated at 26.28, when coupled with the Full Court's seeming acceptance of them, would enable recovery, in a secret cartel context where time had run, back until the first instance of the cartel's operation.

F Conclusion

23 If cartels are to be adequately enforced and the victims of them compensated it is imperative that recovery of damages be allowed for the full period of the cartel. Limitation periods must not be allowed by the Courts to be used by cartel participants to escape their liabilities. The Full Court in *Multigroup* has flagged two methods by which this can be done; suspending the limitation period in s82 via an estoppel or awarding s87(1) damages where coupled with a claim for primary relief under Part VI . It is hoped that the Courts in future cases will adopt the methods suggested by the Full Court to award damages where time limit issues on recovery arise.