

THE ROLE OF DAMAGES IN REGULATING HORIZONTAL PRICE-FIXING: COMPARING THE SITUATION IN THE UNITED STATES, EUROPE AND AUSTRALIA

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[There is a general consensus that hard-core cartels do considerable economic harm and must to be suppressed. As a result, there is broad agreement that the primary goal of any suite of anti-cartel sanctions should be deterrence. While most countries recognise the need to impose significant fines on cartel participants, there is considerable uncertainty about many aspects of an effective anti-cartel regime, including the role of private actions for damages. Private damages actions have been an integral part of US antitrust law for many years, but they have been of little or marginal importance elsewhere. To date, this has included Australia, although there are signs that this situation may change. This article considers the role of private damages in an effective scheme of cartel regulation. It examines the position in the US and in Europe to determine whether their experiences have any lessons for Australia.]

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I INTRODUCTION

It is now widely accepted that the more blatant or naked forms of anti-competitive collusion between competitors are a significant economic problem and should be suppressed.¹ Such collusive activities are often referred to as ‘hard-core’ cartels, and include price-fixing, output restrictions, market-sharing and bid-rigging.² Broadly speaking, collusion of this type increases producer welfare (the welfare of the cartel members) at the expense of both consumer welfare and aggregate welfare.³ According to a 2003 report of the Organisation for Economic Co-operation and Development (‘OECD’):

Cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises price above the competitive level and reduces output. Consumers (which include businesses and governments) choose either not to pay the higher price for some or all of the cartelised product that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects harm efficiency in a market economy.⁴

¹ See, eg, *Report (2002) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WTO Doc WT/WGTCP/6, 17–23 (2002); *Report (2003) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WTO Doc WT/WGTCP/7, 11–21 (2003). See also Council, OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, C(98)35/FINAL (1998); Terry Winslow, ‘Hard Core Cartels’ (2000) 2 *OECD Journal of Competition Law and Policy* 7; OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003); OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes* (2002).

² See OECD, *Recommendation of the Council*, above n 1, Recommendation I(A)(2)(a). See also the cartel provisions in United Nations Conference on Trade and Development, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, Recommendation D(3)(b), UN Doc TD/RBP/CONF/10/Rev.2 (1980). These principles were recently reaffirmed: see United Nations Conference on Trade and Development, *Review of All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UN Doc TD/RBP/CONF.5/15 (2000). See also International Competition Network, *Cartel Working Group Mandate* (2004) <<http://www.internationalcompetitionnetwork.org/media/archive0611/cartelworkplan2004.pdf>>.

³ See William M Landes, ‘Optimal Sanctions for Antitrust Violations’ (1983) 50 *University of Chicago Law Review* 652, 653–4.

⁴ OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 1, 8.

Cartels affect many industries at both the international and domestic level.⁵ While it is extremely difficult to measure the harm done by cartels, recent research has indicated that the harm may be greater than previously thought — it has been estimated that the harm done by international cartels amounts to billions of dollars annually.⁶ The most comprehensive analysis of the effect of cartels was done by John M Connor and Robert H Lande,⁷ who investigated the price overcharges caused by international and US domestic cartels and found that:

the median cartel overcharge for all types of cartels over all time periods has been 25%: 17–19% for domestic cartels, and 30–33% for international cartels.

For most types of cartels there have been modest downtrends in cartel mark-ups over time. In particular, it should be emphasized that since 1990 the average overcharges of discovered cartels fell to 17–18% for domestic cartels, and to 25% for international cartels.⁸

From this Connor and Lande concluded: ‘Since the post-1990 era has been the period with by far the highest level of fines imposed, these downtrends are consistent with the theory of optimal deterrence’.⁹

Indeed, there is growing international recognition that general deterrence should be the object of cartel regulation,¹⁰ and that the notion of optimal deterrence forms an appropriate working base for achieving that object.¹¹ The theory of optimal deterrence holds that the sanctions or penalties imposed on cartel participants must be equal to the cartel’s expected ‘net harm to others’ (being the cost to society) multiplied by the probability of detection and proof of

⁵ Margaret Levenstein and Valerie Y Suslow, ‘Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy’ (2004) 71 *Antitrust Law Journal* 801, 806:

Cartel activity has occurred in a variety of industries — from commodities like cement and citric acid to specialized services like fine arts auctions and wastewater treatment facility construction. Chemical products top the list with thirteen different cartels. The next largest product category is transportation (seven cartels in our sample), followed by steel (four), carbon and graphite products (three), plastics and paper (two each), and several miscellaneous goods and services.

On the factors that determine the success of a cartel, see George J Stigler, ‘A Theory of Oligopoly’ (1964) 72 *Journal of Political Economy* 44.

⁶ Competition Committee, OECD, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, DAF/COMP(2002) 7, 9 (2002). See also OECD, *Fighting Hard Core Cartels*, above n 1, 72.

⁷ See John M Connor and Robert H Lande, ‘How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines’ (Working Paper, American Antitrust Institute, 2005) <<http://ssrn.com/abstract=787907>>. See also John M Connor, ‘Price-Fixing Overcharges: Legal and Economic Evidence’ (Staff Paper No 04-17, Purdue University, 2005) <<http://ssrn.com/abstract=787924>>; Levenstein and Suslow, above n 5; John M Connor and Yuliya Bolotova, ‘Cartel Overcharges: Survey and Meta-Analysis’ (Paper presented at the workshop on ‘The Economics of Collusion’, University of Amsterdam, 10 March 2005) <<http://ssrn.com/abstract=788884>>.

⁸ Connor and Lande, above n 7, 78–80.

⁹ *Ibid* 80–1.

¹⁰ See, eg, Competition Committee, above n 6, 3. The aim of *general* deterrence is to deter firms from engaging in unlawful cartel activities; *specific* deterrence is designed to convince offenders not to reoffend: see, eg, *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) 22 ATPR ¶41-763, 40 986 (Goldberg J).

¹¹ See, eg, Competition Committee, above n 6, 3.

the infringement.¹² The theory, however, is not to be applied rigidly. Deterrence is not the only goal of regulation;¹³ the relevant actors do not always respond in the ‘rational’ manner described by the theory; and many states consider it important to impose some responsibility on individuals. For example, the Antitrust Division of the US Department of Justice (‘DoJ’) is convinced that an adequate regime of cartel deterrence requires individual penalties, including jail, as well as corporate penalties.¹⁴

This article considers the role that damages play in an effective scheme of cartel regulation. First, the article briefly considers the requirements of an effective anti-cartel regime. Particular attention is paid to the issue of sanctions and the possible role of damages in the overall scheme. Second, the article examines actions for damages for cartel breaches in the US, Europe and Australia, in order to determine whether the US or European experience have any lessons for Australia. Third, the article examines the connection between damages and leniency programmes — a key evidence-gathering tool that must not be jeopardised by damages actions.

II THE REQUIREMENTS OF AN EFFECTIVE ANTI-CARTEL REGIME

Effective cartel regulation requires:

- a commitment to enforcement;
- investigatory techniques that ensure a reasonable probability of detection; and
- sanctions, based on the principle of deterrence, that, when considered in conjunction with the probability of detection, make the cartel uneconomic or

¹² See Landes, above n 3, 678. Landes based his work on the theories of Gary Becker: see Gary Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 *Journal of Political Economy* 169. See Robert H Lande, ‘Why Antitrust Damage Levels Should Be Raised’ (2004) 16 *Loyola Consumer Law Review* 329, 334–5; Connor and Lande, above n 7, 6–12. See also Karen Yeung, ‘Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective’ (1999) 23 *Melbourne University Law Review* 440; David K Round, ‘Consumer Protection: At the Mercy of the Market for Damages’ (2003) 10 *Competition & Consumer Law Journal* 231.

¹³ For a discussion of the principles and practicalities underlying the fixing of penalties in competition cases, including a critique of optimal deterrence, see *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 2]* (2002) 190 ALR 169, 174–6 (Finkelstein J). Finkelstein J gives five reasons why optimal deterrence is inadequate or inappropriate: at 175–6. Regarding issues relevant to the assessment of penalty, his Honour earlier said in *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41-815, 42 938:

Of course, it is correct that an appropriate penalty must take into account mitigating circumstances such as remorse, the expression of remorse before discovery of the contravention, co-operation with the Commission, a plea of guilty, the financial capacity to pay the penalty, the parity principle, and the totality principle.

¹⁴ Indeed, US officials have argued that jail sentences are the best deterrent of all sanctions: see Scott D Hammond, Antitrust Division, DoJ, United States, *Status Report: An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program* (2004) 2 <<http://www.usdoj.gov/atr/public/guidelines/202531.pdf>>. See also Evidence to United States Sentencing Commission, Washington, DC, 12 April 2005, 1–2 (Scott D Hammond, Deputy Assistant Attorney-General, Antitrust Division, DoJ) <<http://www.usdoj.gov/atr/public/testimony/209071.pdf>>. Cf Richard Posner, *Antitrust Law* (2nd ed, 2001) 270–1, arguing that imprisonment is not an effective sanction.

unattractive. This may include corporate and individual fines and jail sentences, as well as private damages.¹⁵

A Commitment to Enforcement

The evidence strongly suggests that there is a growing global commitment to eradicating private hard-core cartels. In 1993, the Antitrust Division of the US DoJ announced that it would make attacking private international cartels an enforcement priority.¹⁶ This move was prompted by commercial globalisation as more and more private cartels took on an international character. Concurrently, the European Commission adopted a similar attitude to private international cartels. Through direct contacts and through forums such as the OECD, the United Nations Conference on Trade and Development ('UNCTAD'), the World Trade Organization ('WTO'), and the International Competition Network ('ICN'), the US DoJ and the European Commission sought to convince other countries — including industrialised nations, such as Japan, which had traditionally been tolerant of cartels¹⁷ — that the prevention of hard-core cartels was in the collective interest. The scale of the abuses uncovered by the US in a few high profile cases — the citric acid case, the lysine case, the graphite electrodes case, and particularly the vitamins case¹⁸ — convinced many states that cartels have the capacity to do significant damage and that it was necessary to tackle the problem as a matter of priority.¹⁹

In Australia, this commitment is reflected in the behaviour of the Australian Competition and Consumer Commission ('ACCC'). The ACCC has vigorously pursued hard-core cartels.²⁰ A commitment to facilitating private enforcement has been less evident, although this is probably due to the high cost of bringing

¹⁵ See Landes, above n 3, 675–7, who recognises a role for damages in optimal enforcement.

¹⁶ See International Competition Policy Advisory Committee to the Attorney-General and Assistant Attorney-General for Antitrust, *Final Report* (2000) 166.

¹⁷ OECD, *Regulatory Reform in Japan: The Role of Competition Policy in Regulatory Reform* (1999) 7–8. On the history of the *Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade 1947* (Japan) ('*Antimonopoly Act*'), see generally Alex Y Seita and Jiro Tamura, 'The Historical Background of Japan's Antimonopoly Law' [1994] *University of Illinois Law Review* 115. Enforcement increased during the 1970s but fell away again during the 1980s. Following pressure from the US and later the EU, enforcement picked up again in the 1990s, although the commitment remained lukewarm: see OECD at 8–9. In April 2005, Japan introduced important amendments to its *Antimonopoly Act*. These amendments strengthen Japan's competition law enforcement by increasing penalties for cartels, introducing a leniency programme and revising the administrative powers and procedures of the Japan Fair Trade Commission ('JFTC'): see JFTC, 'The Bill To Amend the *Antimonopoly Act* Approved' (Press Release, 20 April 2005). See also Kazuhiko Takeshima, 'Recent Developments in Antimonopoly Law in Japan' (Paper presented at the International Competition Enforcement Conference, Tokyo, 20–21 April 2005) <<http://www.jftc.go.jp/e-page/policyupdates/speeches/050420takeshima.pdf>>. Mr Takeshima is Chairman of the JFTC.

¹⁸ See, eg, Levenstein and Suslow, above n 5; Winslow, above n 1, 17–18; OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 1, 7.

¹⁹ See Council, *Recommendation of the Council*, above n 1, 2.

²⁰ See, eg, Graeme Samuel, 'Key Developments in Antitrust Regulation in Australia' (Paper presented at the Second Antitrust Spring Conference, Sydney, 28–29 April 2006) 9–12, available at ACCC, *Speeches* <<http://www.accc.gov.au/content/index.phtml/itemId/8973>>.

private actions.²¹ The incidence of private enforcement may change with the growing use of class actions.²²

B Investigatory Techniques

Private cartels tend to be secretive — an inevitable result of their widespread condemnation. The fact that cartel participants go to extraordinary lengths to keep their activities secret makes detection difficult. Therefore, the techniques available to expose cartels are a key aspect of any successful anti-cartel regime. Investigatory techniques used by regulatory authorities include:

- surprise raids on suspected cartel members;
- the seizure or copying of evidence;
- ‘drop-in’ compulsory interviews; and
- phone taps and electronic eavesdropping.²³

Investigatory techniques have improved markedly with the introduction of leniency programmes to complement the evidence-gathering powers of regulatory authorities. Broadly speaking, leniency programmes work by providing immunity from public action to the first cartel member to report the existence of a cartel to the relevant competition authority.

Leniency programmes have been successful in the US,²⁴ in the European Union,²⁵ and more recently in Japan.²⁶ They are also beginning to have some

²¹ Section 80 of the *Trade Practices Act 1974* (Cth) (*‘TPA’*) provides for injunctions, s 82 provides for damages and s 87 provides for ancillary relief including damages. On the reasons for the lack of private enforcement, see Stephen Corones, ‘Proof of Damages in Private Competition Law Actions’ (2002) 76 *Australian Law Journal* 374, 374. See also Rhonda L Smith, ‘Further to Round on Penalties, Damages and Part IV of the *TPA*’ (2003) 11 *Competition & Consumer Law Journal* 97, 100–2.

²² Class actions have been initiated against the vitamins cartels and more recently against Amcor Ltd and its related companies in relation to packaging: see Amcor Ltd, ‘Class Action’ (Press Release, 12 April 2006). The vitamins case was settled out of court for \$30.5 million: Michael Davis, ‘Big Vitamin Firms To Pay \$30m for Gouging’, *The Australian* (Sydney), 18 July 2006, 5.

²³ See OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 1, 23–7, discussing the tools required to make an anti-cartel enforcement policy effective.

²⁴ The US amnesty and leniency programmes have undoubtedly aided the pursuit of both domestic and international cartels: International Competition Policy Advisory Committee, above n 16, 177–80. See also Gary R Spratling, ‘Making Companies an Offer They Shouldn’t Refuse: The Antitrust Division’s Corporate Leniency Policy — An Update’ (Speech delivered at the Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust, Washington, DC, 16 February 1999). See Raymond Krauze and John Mulcahy, ‘Antitrust Violations’ (2003) 40 *American Criminal Law Review* 241, 270–1; Simon J Evenett, Margaret C Levenstein and Valerie Y Suslow, ‘International Cartel Enforcement: Lessons from the 1990s’ (2001) 24 *World Economy* 1221, 1238. Domestic applications for leniency jumped from one per year under the old scheme to one per month under the revised programme: see OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 1, 21. For details of US cartel prosecutions during the 1990s: see International Competition Policy Advisory Committee, above n 16, 163–200. See also Robert E Litan and Carl Shapiro, ‘Antitrust Policy during the Clinton Administration’ (Paper presented at the Conference on American Economic Policy in the 1990s, Center for Business and Government, John F Kennedy School of Government, Harvard University, 27–30 June 2001) 3–4 <<http://faculty.haas.berkeley.edu/shapiro/antitrust.pdf>>.

²⁵ The European Commission introduced a leniency programme in 1996: see *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases* [1996] OJ C 207/04. However, following concerns that the policy was unclear and unpredictable, it was significantly over-

effect in Australia. For example, the ACCC recently commenced proceedings against Visy Industries for alleged involvement in an unlawful cartel in the packaging industry.²⁷ The matter came to the notice of the ACCC because of an application by Amcor Ltd for amnesty under the ACCC's immunity policy for cartel conduct.²⁸

C Sanctions and Remedies

1 Fines

An effective enforcement programme requires an appropriate suite of sanctions and remedies in order to act as a general deterrent. Advanced detection techniques will not deter if conspirators view the rewards of cartelisation as likely to outweigh the costs. Even the best detection methods are unlikely to catch all cartels and are, in any event, a serious drain on the public purse. Therefore, many cartels are likely to go undetected.²⁹ This is why leniency programmes are so

hauled in 2002 to make it more similar to that of the US: see Frank R Schoneveld, 'Cartel Sanctions and International Competition Policy: Cross-Border Cooperation and Appropriate Forums for Cooperation' (2003) 26 *World Competition* 433, 455. See *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* [2002] OJ C 45/03, 3, setting out the justification for adopting a new leniency policy. The US DoJ regards clarity and predictability (which is sometimes referred to under the rubric of 'transparency') as one of the three cornerstones to a successful amnesty programme: see Scott D Hammond, 'Cornerstones of an Effective Leniency Program' (Speech delivered at the ICN Workshop on Leniency Programs, Sydney, 22–23 November 2004). Differences between the US and European Community programmes still exist. The US programme provides complete immunity only to the first informant — subsequent informants may still enter into plea agreements and receive fine reductions but cannot obtain full immunity. Similarly, the European Community programme provides complete immunity to the first informant, and lesser preferential treatment such as a reduction in fines to subsequent informants who cooperate. Many European states now operate a leniency programme. Crucially, as a matter of terminology, 'leniency programme' is understood to mean full immunity in the US whereas in Europe, it encompasses both full immunity and lesser forms of preferential treatment.

²⁶ See above n 17. In its first 11 months of operation, 60 leniency applications were made: see Donald C Klawiter and J Clayton Everett, 'The Legacy of *Stolt-Nielsen*: A New Approach to the Corporate Leniency Program?' (2006) 6(2) *The Antitrust Source* 5 <<http://www.abanet.org/antitrust/at-source/06/12/Dec06-Klawiter12=19f.pdf>>.

²⁷ ACCC, 'Proceedings Instituted against Visy Group, Senior Executives for Alleged Cartel in the Corrugated Fibreboard Container Market' (Press Release, 21 December 2005).

²⁸ *Ibid.* Australia, which had an informal policy dating back to 1998, introduced a formal leniency policy in 2003. For details of the leniency policy, see ACCC, *Leniency Policy for Cartel Conduct* (2003). The policy was replaced in 2005 by ACCC, *ACCC Immunity Policy for Cartel Conduct* (2005). See also ACCC, *ACCC Immunity Policy: Interpretation Guidelines* (2005). On the ACCC and leniency, see generally Graeme Samuel, 'Cartels, Criminal Penalties and the Leniency Policy' (Speech delivered at the International Competition Enforcement Conference, Tokyo, 20–21 April 2005).

²⁹ It has been estimated that only about 13–17 per cent of cartels in the US are detected: see Peter G Bryant and E Woodrow Eckard, 'Price Fixing: The Probability of Getting Caught' (1991) 73 *Review of Economics and Statistics* 531, 535. Since this study was undertaken, the DoJ has amended its amnesty programme to make it more attractive: see DoJ, United States, 'Antitrust Chief Announces Two Policy Changes at American Bar Association Conference' (Press Release, 10 August 1993); DoJ, United States, 'Antitrust Chief Announces Leniency Policy for Individuals' (Press Release, 10 August 1994). See also the discussion in International Competition Policy Advisory Committee, above n 16, 177–9. The policies are available on the DoJ's Antitrust Division website: DoJ, United States, *Corporate Leniency Policy* (1993) <<http://www.usdoj.gov/atr/public/guidelines/0091.pdf>>; DoJ, United States, *Leniency Policy for Individuals* (1994) <<http://www.usdoj.gov/atr/public/guidelines/0092.pdf>>.

important: relatively cheap to operate, they are likely to uncover cartels that would otherwise have remained secret.

Leniency programmes rely on incentives — the ‘whistleblower’ must be given sufficient incentive to break cartel unity in such a way that the regulator can take action against other cartel members. The incentive is immunity, but the force of the incentive depends very much on the ‘detriment’ the conspirator avoids by applying for immunity first.³⁰ Thus, an effective system of sanctions should be based on deterrence rather than on notions of retributive punishment or compensation. There is almost universal support amongst industrialised nations for this proposition. This is not to say that punishment and compensation are irrelevant aspects of an anti-cartel system, but simply that the underlying goal should be deterrence.³¹

While there is no single theory of what constitutes an effective deterrence regime, there is support for the proposition that an effective deterrent ‘is one that promises, on average, to take away at the minimum the financial gains that otherwise accrue to the cartel members.’³² This is calculated by multiplying the expected cartel gains by the probability of detection.³³ The most common view is that an appropriate sanction would involve a penalty of two or three times the expected gain.³⁴ As any precise calculation is impossible in practice (because it is not known what percentage of cartels are detected and because it is extremely difficult to calculate the cartel gain), most states have adopted, or are in the process of adopting, some form of reasonable proxy measure.

The most common strategy, though by no means the only one, is to base cartel fines on a percentage of turnover.³⁵ The measure of turnover, however, varies from jurisdiction to jurisdiction. For example, the EU imposes fines of up to 10

³⁰ See Competition Committee, above n 6, 12. See also ICN Working Group on Cartels, ‘Building Blocks for Effective Anti-Cartel Regimes’ (Paper presented at the ICN Fourth Annual Conference, Bonn, 6–8 June 2005) 53. This was the major reason for the Committee of Inquiry on the Review of the *Trade Practices Act*’s (‘Dawson Committee’) recommendation that ‘serious’ cartel conduct in Australia should be criminalised: see Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 161.

³¹ It should be noted that the deterrence theory is not universally accepted. Michael L Denger, for example, has argued that cartel participants do not perform a cost-benefit analysis before engaging in cartel activity: Michael L Denger, ‘Too Little or Too Much’ (Summary of proceedings of the roundtable conference at the American Bar Association Antitrust Remedies Forum, Washington, DC, 2 April 2003). If that is the case, then detection becomes more important and the level of sanctions less important. Cf Julie Clarke, ‘Criminal Penalties for Contraventions of Part IV of the *Trade Practices Act*’ (2005) 10 *Deakin Law Review* 141, 148. It should also be noted that a proper regime of sanctions should avoid both under-deterrence and over-deterrence. Under-deterrence occurs where firms decide it is in their interests to collude in a hard-core cartel despite the risks of detection and the expected imposition of sanctions. Over-deterrence occurs where the risks of detection and the level of sanctions are so great that firms abandon even those cartels that are welfare-increasing. In general, the current concern in relation to international cartels is under-deterrence rather than over-deterrence.

³² ICN Working Group on Cartels, above n 30, 74.

³³ *Ibid* 53–4; see above n 12 and accompanying text. This analysis traces back to the work done by Landes: see Landes, above n 3. See also Lande, ‘Why Antitrust Damage Levels Should Be Raised’, above n 12, 334–5.

³⁴ Competition Committee, above n 6, 17.

³⁵ See ICN Working Group on Cartels, above n 30, 59.

per cent of a cartel member's worldwide turnover.³⁶ New Zealand bases the maximum fine on 10 per cent of the annual national turnover of the firm and all of its interconnected bodies corporate (if any).³⁷ Australia has recently amended the *TPA* so that the maximum fine shall be the greatest of: (i) \$10 000 000; or (ii) if the court can determine the value of any benefit obtained directly or indirectly by the firm and its related entities and that benefit is reasonably attributable to the infringing cartel conduct — three times the value of that benefit; or (iii) if the court cannot determine the value of the benefit — ten per cent of the annual turnover of the firm in the 12 months leading up to the infringement.³⁸ Japan imposes a maximum financial penalty (referred to as a 'surcharge') of 10 per cent of the firm's sales of the product affected by the restraint. This measure is likely to produce fines significantly less than those applicable in other states because it is restricted to the line of commerce affected by the cartel.

In serious cartel cases, the US DoJ invariably prosecutes cartel members under the criminal provisions of US antitrust law.³⁹ US law allows for fines of up to US\$100 million⁴⁰ or twice the gross gain or gross loss suffered.⁴¹ The courts have invariably used the latter formula for international cartels because, until 2004, the maximum fine was only US\$10 million.⁴² The US sentencing guidelines permit that, in cases of price-fixing cartels, the fine shall be calculated on the basis of 20 per cent of the volume of the affected commerce.⁴³ This is used as an approximation because of the difficulty of assessing losses. Due to the availability of this alternative basis for calculating fines, Hoffman-La Roche agreed to a fine of US\$500 million as punishment for its role in the vitamins cartel, which remains the largest single fine imposed by US courts.

³⁶ *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty* [2003] OJ L 1/1, art 23(2) ('*Modernisation Regulation*'). See also Competition Committee, above n 6, 10.

³⁷ *Commerce Act 1986* (NZ) s 80(2B). Section 80(2B) provides that the maximum fine shall be the greater of NZ\$10 million or three times any commercial gain or 10 per cent of turnover.

³⁸ *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth) sch 9 pt 1 item 4(1A)(b).

³⁹ See Donald I Baker, 'The Use of Criminal Law Remedies To Deter and Punish Cartels and Bid-Rigging' (2001) 69 *George Washington Law Review* 693, who charts the evolution of criminal sanctions in antitrust cartel cases from 1890–2001.

⁴⁰ 15 USC §§ 1–3 (2000 & Supp IV, 2004).

⁴¹ The alternative scheme for calculating the fine derives from 18 USC § 3571(d) (2000 & Supp IV, 2004), which provides that:

If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

⁴² The amount was increased from US\$10 million to US\$100 million in 2004: see *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub L No 108-237, § 215, 118 Stat 665, 668.

⁴³ United States Sentencing Commission, *Guidelines Manual* (2005) § 2R1.1(d)(1). The *Guidelines Manual* was regarded as mandatory until the Supreme Court ruled in *United States v Booker*, 543 US 220 (2005) that it was to be treated as advisory: see Scott D Hammond, 'AntiTrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants' (Speech delivered at the American Bar Association, Section of Antitrust Law, Spring Meeting, Washington, DC, 30 March 2005).

2 Upper Restrictions on Optimal Fines

Some commentators have estimated that, in practice, the level of fines is considerably below the optimal level. However, even if the optimal level of fine were determinable, there are a number of reasons why regulators may choose not to impose it. The main objection would be that a system of fines is not efficient or effective if it results in a reduction in competition. For example, an OECD report commented:

Whether or not it is legally possible to impose an optimal organisational fine and practically possible to calculate it in a given case, actually imposing it might present problems. The optimal fine could simply be too large for the entity to bear, causing bankruptcy and possible exit from the market, which itself could diminish competition.⁴⁴

Thus, an inefficient result could be produced if the fines are so large that the firm is driven into bankruptcy *and* this bankruptcy is responsible for a substantially more concentrated market. One form of anti-competitive conduct — the cartel — is replaced by a concentrated market structure that enables the powerful firm(s) to undertake anti-competitive unilateral conduct. While this outcome is unlikely, it is certainly possible. For example, after the significant fines imposed on the auction house, Sotheby's, following the discovery of its international cartel arrangements with its competitor, Christie's, Sotheby's suffered significant financial strain.⁴⁵ If this had caused Sotheby's to exit the market, Christie's, which had escaped fines by applying for immunity under the US and European Community ('EC') leniency programmes, would have been left as the dominant player (Sotheby's being its only close competitor).⁴⁶ A similar situation will eventuate if cartel members are driven to merge as a result of anti-cartel laws.⁴⁷

There are other objections to imposing fines of the magnitude required to optimise deterrence. Bankruptcy is not just a competition matter. It carries social and economic costs that many communities are not prepared to pay. For example, bankruptcy imposes a cost on the innocent shareholders, staff and creditors of the bankrupt.⁴⁸ Therefore, there is a strong case for making fines fit the circumstances of the individual firm's ability to pay.

Finally, while deterrence may be the fundamental object of cartel sanctions, it cannot be pursued at the total sacrifice of other elements of justice. Thus, in

⁴⁴ OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead*, above n 1, 28. See also Wouter P J Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117, 138–41, who estimates that the minimum level of fine to deter cartels optimally would be in the order of 150 per cent of the annual turnover of the products concerned — a figure which he argues is impossibly high.

⁴⁵ Sotheby's agreed to pay US\$45 million in the US: see DoJ, United States, 'Sotheby's and Former Top Executive Agree To Plead Guilty to Price Fixing on Commissions Charged to Sellers at Auctions' (Press Release, 5 October 2000) 1. In the EU, Sotheby's was fined €20.4 million (six per cent of its worldwide turnover): see European Commission, 'Commission Rules against Collusive Behaviour of Christie's and Sotheby's' (Press Release, 30 October 2002).

⁴⁶ See discussion in Schoneveld, above n 25, 448.

⁴⁷ *Ibid* 453; Levenstein and Suslow, above n 5, 825–6, citing the joint ventures that followed the demise of the seamless steel tubes cartel.

⁴⁸ Clarke, above n 31, 150.

determining the level of fine to be imposed, justice normally demands some element of proportionality.⁴⁹

3 Custodial Sentences

Fines are not the only possible sanction. The US DoJ is convinced that a proper level of deterrence requires jail sentences for individuals.⁵⁰ Imprisonment is also possible in the United Kingdom,⁵¹ France⁵² and Japan,⁵³ although in Japan there is a great reluctance to impose criminal fines, let alone jail sentences.⁵⁴ Australia is leaning towards jail sentences but continues to have problems sorting out the details.⁵⁵ The Dawson Committee recommended jail sentences for the more egregious forms of cartel activity, subject to a proper definition of such cartels being determined.⁵⁶ The Australian Government has accepted this recommendation.⁵⁷ If passed as proposed, the new criminal cartel offence will expose individuals to a maximum prison sentence of five years and a maximum fine of A\$220 000.⁵⁸ So far, however, no Bill has been presented to Parliament.⁵⁹

However, not all states favour the criminalisation of individual involvement in cartels, particularly if it involves imposing custodial sentences for individuals. There are a variety of reasons for this. First, it is argued that cartel conduct is insufficiently reprehensible to justify its criminalisation; in particular, the conduct does not warrant penal servitude.⁶⁰ Not all states have adopted the US ethic that price-fixing is akin to theft.⁶¹ Second, criminal sanctions, especially prison sentences, can be an expensive form of punishment.⁶² In particular, this is likely to deter developing states. Third, the protective procedures that normally

⁴⁹ See Wils, 'Is Criminalization of EU Competition Law the Answer?', above n 44, 20–2; Julie Clarke and Mirko Bagaric, 'The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act' (2003) 31 *Australian Business Law Review* 192, 202–3.

⁵⁰ The Antitrust Division has long supported the belief that the best and surest way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences: see Hammond, *Status Report*, above n 14, 2. See also Secretariat to the Competition Committee, OECD, *Cartels: Sanctions against Individuals*, DAF/COMP(2004) 39, 105, 111 (2005); Baker, 'The Use of Criminal Law Remedies To Deter and Punish Cartels and Bid-Rigging', above n 39, 698–9; Evidence to United States Sentencing Commission, Washington, DC, 12 April 2005, 1–2 (Scott D Hammond, Deputy Assistant Attorney-General, Antitrust Division, DoJ).

⁵¹ *Enterprise Act 2002* (UK) c 40, s 190, which provides for jail sentences of up to five years for cartel offences.

⁵² *Code de Commerce* art L 420-6 (France). See Didier Theophile, 'France' in Majorie Holmes and Lesley Davey (eds), *A Practical Guide to National Competition Rules across Europe* (2004) 113, 127.

⁵³ *Antimonopoly Act* ch XI.

⁵⁴ OECD, 'Competition Law and Policy in Japan' (September 2004) *Policy Brief* 2.

⁵⁵ See Dawson Committee, above n 30, 153–7, 161–2. See also Secretariat to the Competition Committee, above n 50, 106.

⁵⁶ See Dawson Committee, above n 30, 164.

⁵⁷ See Peter Costello, Treasurer, 'Criminal Penalties for Serious Cartel Behaviour' (Press Release, 7 February 2005) <<http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp>>.

⁵⁸ *Ibid.*

⁵⁹ See generally Clarke, above n 31, 144–7.

⁶⁰ Secretariat to the Competition Committee, above n 50, 21.

⁶¹ See Wils, 'Is Criminalization of EU Competition Law the Answer?', above n 44, 124.

⁶² Secretariat to the Competition Committee, above n 50, 21.

accompany the criminal law process (such as a more rigorous burden of proof and the right against self-incrimination) may hinder enforcement.⁶³ This may be compounded by other factors, such as difficulties in persuading prosecutors and judges that cartel offences involve a sufficient degree of criminality.⁶⁴ In many states, while non-criminal fines are assessed and imposed by the competition agency, criminal prosecutions must first be approved by an independent prosecutor before going to court. Fourth, if the definition of 'cartel' is not clearly restricted to so-called 'hard-core' cartels, there is a danger of over-deterrence.⁶⁵ Individuals, fearful of prison sentences, might respond by avoiding joint venture operations that have a positive effect on social welfare.⁶⁶

4 *Private Damages*

Another possible form of sanction is to expose cartel members to the threat of private damages. Private enforcement of competition law, including the imposition of damages, has its critics, particularly in Europe.⁶⁷ The essence of the criticism is that competition law is public law and that private enforcement is an inefficient, costly and unproven way of achieving the public policy goal of deterring anti-competitive activity.⁶⁸ In reality, however, such criticism is often a comment on the way in which private enforcement has developed in the US.⁶⁹ Overall, there seems to be a reasonably strong conviction that competition law, especially cartel law, needs effective private enforcement. The real issue, then, is what a regime of private enforcement should look like.

III PRIVATE DAMAGES FOR CARTEL ACTIVITIES

Private actions for damages are an integral part of US antitrust law. Elsewhere, however, damages suits have played only a marginal role, and in some important jurisdictions, notably the EC, almost no role at all. There are various reasons for this paucity of private actions. First, some states see competition regulation as an exercise of national economic policy and, therefore, inherently and exclusively governmental. Second, even where damages are available, the forensic complexities and consequent high cost of private enforcement deter many potential

⁶³ Ibid 21–2.

⁶⁴ Ibid 22.

⁶⁵ Ibid 23.

⁶⁶ On the requirements for building a criminal enforcement programme for competition law, see William E Kovacic, 'The Modern Evolution of US Competition Policy Enforcement Norms' (2003) 71 *Antitrust Law Journal* 377, 417–18.

⁶⁷ See, eg, Wouter P J Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition* 473.

⁶⁸ Ibid. Not surprisingly, European business organisations tend to be hostile to the suggestion of broadening and strengthening European private enforcement: see, eg, European Justice Forum, *Response to the European Commission's Green Paper* (2006) <http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/043.pdf>; European Chemical Industry Council, *The Comments of the Chemical Industry on the Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules* (2006) <http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/022.pdf>.

⁶⁹ See Justice R S French, 'Private Litigation in Aid of Competition Law Enforcement' (Paper presented at the Second Antitrust Spring Conference, Sydney, 28–29 April 2006) 3, where a number of the criticisms of private enforcement are discussed.

plaintiffs.⁷⁰ Finally, there are systemic reasons that go beyond competition regulation. Indeed, an OECD survey on private antitrust remedies concluded:

The country survey did not generate data on the frequency or number of private suits in the responding countries, but it seems that in most countries other than the United States where private suits are permitted the number of such suits is not large. ... Some of the other reasons for the relative infrequency of private suits under competition laws lie outside the realm of competition law itself, and have to do with national traditions and legal institutions relating to private litigation.⁷¹

After outlining the problem, this Part of the article will compare damages regimes in the US, Europe and Australia.

A Outlining the Problem

Providing damages for unlawful cartel activities raises difficult issues of causation and calculation.⁷² A brief overview of a hypothetical price-fixing conspiracy demonstrates some of the issues. Assume that manufacturers of a vital component in the production of widgets, a leading consumer good, enter into an unlawful agreement to fix the prices at which they will supply the component. Widget manufacturers are forced to pay the higher prices. At least some of the higher prices are passed on to consumers in the form of higher widget prices. However, the higher prices mean that demand drops.⁷³ Therefore, manufacturers sell less than they might otherwise have done. The widget manufacturers have suffered some loss, the exact calculation of which depends on the interplay between the price increase of the component, the price increase of the widget and the decrease in demand. The widget manufacturers may also have made other business choices on the basis of the higher component price. These choices may also have impacted adversely on profitability. Whatever the claim, in each case the widget manufacturer must normally establish not only its loss, but also the causal connection between its loss and the unlawful conduct.

Retailers may also suffer losses. Where the retailer is a dedicated seller of widgets, similar difficult, yet manageable, issues of causation and calculation arise. However, where the retailer's sales involve a range of products (not just widgets) the causation and calculation issues become very complex.

Consumers have also suffered losses. Those consumers who purchased widgets at the higher price have paid more than they would have if the price-fixing agreement had not existed. Of course, like the widget manufacturers, widget consumers have to establish the causal link between the impugned agreement and the higher price. For most consumer purchases the cost of doing so would almost certainly exceed the compensation injured consumers would receive, unless they pursue a class action.

⁷⁰ See, eg, Smith, above n 21, 100–1.

⁷¹ Joint Group on Trade and Competition, OECD, *Remedies Available to Private Parties under Competition Laws*, COM/DAFFE/CLP/TD(2000)24/FINAL, 6 (2000).

⁷² For a discussion on the issue of damages in the Queensland ready-mixed concrete price-fixing case, see Smith, above n 21, 103–8.

⁷³ Assuming for present purposes that the demand curve is not completely inelastic.

Another group of consumers have also suffered a loss. These are consumers who would have bought a widget at the lower price, but refrain from doing so at the higher price. The money that they would have spent on the widget is directed to their next preference. In economic terms they have suffered a welfare loss. The problem for the court is whether competition regimes ought to recognise this form of loss (assuming that causation could be established). In general terms the loss appears quite indirect. Furthermore, calculation of the loss will be extremely difficult. However, welfare losses of this nature are the very reason that most competition regimes exist.

B *Private Damages in the US*

Section 4 of the US *Clayton Act*⁷⁴ provides that plaintiffs injured by an anti-trust violation may recover mandatory treble damages plus attorneys' fees and costs.⁷⁵ The result is that private actions have always played an extremely important part in US antitrust enforcement, a situation that is unlikely to change.⁷⁶ Given this important role, US antitrust law has developed some unique rules relating to private damages actions, a number of which will be discussed in detail below.

1 *Treble Damages*

The rationales behind treble damages are mixed.⁷⁷ First and foremost, § 4 is a remedial provision,⁷⁸ whose primary function is to compensate those injured by antitrust conduct. Unless the plaintiff can establish a causal link between the injury (the loss claimed) and the antitrust violation (or an anti-competitive act

⁷⁴ 15 USC §§ 12–27 (2000 & Supp IV, 2004).

⁷⁵ 15 USC § 15(a) (2000 & Supp IV, 2004). For a thorough review of US antitrust law remedies, in particular, a detailed discussion of treble damages in the US, see especially Edward Cavanagh, 'Antitrust Remedies Revisited' (2005) 84 *Oregon Law Review* 147, 169–80. See also Spencer Weber Waller, 'The Incoherence of Punishment in Antitrust' (2003) 78 *Chicago-Kent Law Review* 207, 209–11 for a brief overview of the remedial structure of US antitrust law. Congress recently created an exception to treble damages for firms that are granted immunity under the US leniency programme: *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub L No 108-237, § 213, 118 Stat 665, 667. See below n 268 and accompanying text.

⁷⁶ It has been estimated that about 10 per cent of US antitrust cases are brought by the government and that 90 per cent are private actions: see Donnadh Woods, 'Private Enforcement of Antitrust Rules — Modernization of the EU Rules and the Road Ahead' (2004) 16 *Loyola Consumer Law Review* 431, 435 fn 11. Included in the 90 per cent, however, are many cases brought by state governmental authorities seeking compensation under the *parens patriae* provisions contained in 15 USC § 15c (2000 & Supp IV, 2004).

⁷⁷ See generally Cavanagh, 'Antitrust Remedies Revisited', above n 75, 169–72. See also Waller, above n 75, 211–16, who argues that the rationales for treble damages are 'blurry and conflicting'. There are those who argue that after taking into account such factors as lack of pre-judgment interest, the time value of money, failure to account for societal welfare losses or umbrella effects, litigation costs, and tax effects, treble damages are merely compensatory: see Robert H Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 *Ohio State Law Journal* 115, 118–19.

⁷⁸ See *Brunswick Corporation v Pueblo Bowl-O-Mat Inc*, 429 US 477, 485–6 (Marshall J) (1977) (citations omitted): 'It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.' See also *Illinois Brick Co v Illinois*, 431 US 720, 746 (White J) (1977) ('*Illinois Brick*').

that it enables) the plaintiff has no cognisable loss under § 4.⁷⁹ However, it is clear that § 4, as it has developed, isn't an ideal model for compensation — some injured parties are overcompensated (direct purchasers) and others are under-compensated (indirect purchasers).⁸⁰ The main reason for this is that the object in mandating treble damages goes beyond compensation.

The second key function of § 4 is deterrence.⁸¹ Despite the staggering increases in US public penalties in the last 30 years,⁸² US antitrust authorities still regard the fear of private treble damages as a strong and essential deterrent against cartel activity.⁸³ Treble damages can, however, also produce perverse incentive effects. The possibility of treble damages reduces incentives for purchasers to take all reasonable steps to protect themselves and to minimise their losses. This is not socially optimal.⁸⁴ However, this point should not be overstated. Given the covert nature of private hard-core cartels, even diligent purchasers have few opportunities to discover the truth.

Third, by encouraging private actions, treble damages shift some of the administrative burden of antitrust enforcement from government to the private sector.⁸⁵ The lure of treble damages exposes cartels that might otherwise have gone undetected due to a lack of public funds. In this sense, treble damages represent a key element in the enforcement of antitrust laws.⁸⁶ Section 4 further reinforces this by providing that plaintiffs may recover attorneys' fees and costs, thereby overcoming the normal rule that the parties bear their own costs.

Fourth, treble damages serve a punitive function.⁸⁷ Punitive damages, a common feature of US tort law, are not available for antitrust breaches. To some extent, therefore, treble damages stand in for punitive damages. This function, however, should not be over-emphasised. Unlike punitive damages in tort, antitrust treble damages make no distinction between one antitrust violation and

⁷⁹ See *Brunswick Corporation v Pueblo Bowl-O-Mat Inc*, 429 US 477, 489 (Marshall J) (1977) (citations omitted):

Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations ... would be likely to cause.'

⁸⁰ See below Part III(B)(3)(c)–(d).

⁸¹ See, eg, *Perma Life Mufflers Inc v International Parts Corporation*, 392 US 134 (1968), where the Supreme Court held that the doctrine of *in pari delicto* is not a defence to an antitrust action.

⁸² One commentator estimates the overall increase in criminal corporate penalties over the past 30 years at 2000 per cent: see Denger, above n 31, 3.

⁸³ See Secretariat to the Competition Committee, above n 50, 111.

⁸⁴ See Round, above n 12, 249.

⁸⁵ Thus, a party is not denied a treble damages action even though their claim would be barred at common law, for example, under the *in pari delicto* doctrine: see *Perma Life Mufflers Inc v International Parts Corporation*, 392 US 134 (1968). See also *Simpson v Union Oil Co of California*, 377 US 13 (1964).

⁸⁶ See also *Brunswick Corporation v Pueblo Bowl-O-Mat Inc*, 429 US 477, 486 (Marshall J) (1977).

⁸⁷ *Ibid.* See Donald I Baker, 'Revisiting History — What Have We Learned about Private Antitrust Enforcement That We Would Recommend to Others?' (2004) 16 *Loyola Consumer Law Review* 379, 382.

another.⁸⁸ Treble damages are, therefore, an indiscriminate instrument of punishment lacking proportionality.⁸⁹

Finally, it has been argued that treble damages serve to ensure that all the defendant's ill-gotten gains are disgorged.⁹⁰

2 Extraterritorial Jurisdiction: *The Empagran Case*

Private enforcement in the US is important not only for US residents injured by domestic or international price-fixing cartels, but also for non-US parties. The use of US courts by foreign cartel victims seeking compensation was an expanding industry until somewhat curtailed by the decision of the US Supreme Court in *F Hoffman-La Roche Ltd v Empagran SA*.⁹¹

This case arose out of a worldwide cartel to fix the price of certain vitamins. A number of buyers of vitamins — both US domestic and foreign — commenced proceedings in the US for treble damages against the cartel members for breaches of US antitrust law. *F Hoffman-La Roche Ltd* and the other defendants filed a motion to dismiss the claims of the *foreign* plaintiffs on the basis of a lack of subject matter jurisdiction. According to the defendants, US antitrust law did not provide a cause of action in damages to foreign plaintiffs injured outside the US by activities occurring outside the US and not involving US firms.

As the cartel conduct in *Empagran* had a direct, substantial and reasonably foreseeable effect on US commerce, it came within the jurisdiction of the US courts.⁹² Thus, the US DoJ was successful in bringing criminal proceedings against the cartel members.⁹³ US domestic buyers who had been injured by the adverse effects on US commerce also clearly had a claim for damages against the cartel participants. The *foreign* buyers, however, were in a different position. They had not suffered their injuries in the US. The only connection between their injuries and the US was that the cartel conduct that had caused their injuries had also caused damage to US commerce and to some US buyers.

At issue in *Empagran* was the meaning of the *Foreign Trade Antitrust Improvements Act of 1982* ('*FTAILA*').⁹⁴ The *FTAILA* provides that antitrust conduct

⁸⁸ Treble damages are no longer available against a firm to whom amnesty has been granted under the amnesty programme. However, the reason for 'detrebling' damages in these cases is to preserve incentives to seek an amnesty, not to recognise a lower level of culpability.

⁸⁹ Waller, above n 75, calls it an 'incoherent' system for this reason.

⁹⁰ Cavanagh, 'Antitrust Remedies Revisited', above n 75, 171–2.

⁹¹ 542 US 155 (2004) ('*Empagran*').

⁹² *United States v Aluminum Co of America*, 148 F 2d 416 (2nd Cir, 1945) ('*Alcoa*'). The '*Alcoa* effects' doctrine has been applied or accepted in numerous US cases since 1945: see, eg, *United States v General Electric Co*, 82 F Supp 753 (D NJ, 1949); *United States v Imperial Chemical Industries Ltd*, 100 F Supp 504 (D NY, 1951); *Continental Ore Co v Union Carbide & Carbon Corporation*, 370 US 690 (1962); *United States v Watchmakers of Switzerland Information Center*, 1963 Trade Cas P 70 600 (SD NY, 1963); *Timberlane Lumber Co v Bank of America*, 549 F 2d 597 (9th Cir, 1976); *Mannington Mills v Congoleum Corporation*, 595 F 2d 1287 (3rd Cir, 1979); *Re Uranium Antitrust Litigation*; *Westinghouse Electric Corporation v Rio Algom Ltd*, 617 F 2d 1248 (7th Cir, 1980); *Matsushita Electric Industrial Co Ltd v Zenith Radio Corporation*, 475 US 574, 582 (Powell J) (1986); *Hartford Fire Insurance Co v California*, 509 US 764, 796 (Souter J) (1993).

⁹³ See DoJ, United States, 'F Hoffmann-La Roche and BASF Agree To Pay Record Criminal Fines for Participating in International Vitamin Cartel' (Press Release, 20 May 1999).

⁹⁴ 15 USC § 6a (2000 & Supp IV, 2004).

arising in the course of foreign trade is actionable in the US if the trade has a direct, substantial and reasonably foreseeable effect on US trade or commerce *and* if the effect would give rise to ‘a claim’ under the *Sherman Act*.⁹⁵ The effect of the words ‘a claim’ is ambiguous. Did ‘a claim’ mean that the plaintiffs had to have a claim under the *Sherman Act*, or was it sufficient that someone (not necessarily the plaintiffs) had a claim under the Act? Various US Circuits disagreed about whether this provision should be interpreted broadly — which would provide the foreign plaintiffs with a cause of action — or narrowly.⁹⁶ The District of Columbia Circuit in *Empagran SA v F Hoffman-LaRoche Ltd* preferred the broad approach.⁹⁷ The defendants appealed.

The Supreme Court allowed the defendants’ appeal. The Court stressed the need in a highly interdependent commercial world to interpret ambiguous statutes in a manner that avoided unreasonable interference with the sovereign authority of other nations:

No one denies that America’s antitrust laws, when applied to foreign conduct, can interfere with a foreign nation’s ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused. ...

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim*? Like the former case, application of those laws creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. ... Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?⁹⁸

3 US Rules That Affect the Plaintiff’s Right to, and the Quantum of, Damages

Assuming, then, that a US court has subject matter jurisdiction, there are a number of other antitrust rules that affect a plaintiff’s right to bring a treble damages action and the measurement of those damages.⁹⁹

⁹⁵ 15 USC §§ 1–7 (2000 & Supp IV, 2004).

⁹⁶ In *Den Norske Stats Oljeselskap AS v HeereMac VOF*, 241 F 3d 420 (5th Cir, 2001); cert denied 535 US 1012 (2002), the Fifth Circuit (by majority) denied that foreign plaintiffs had an action for foreign harm suffered as a result of conduct occurring beyond US territory. In contrast, the Second Circuit preferred to cast the jurisdictional net broadly: see *Kruman v Christie’s International plc*, 284 F 3d 384 (2nd Cir, 2002). See also *Re Microsoft Corporation Antitrust Litigation*, 127 F Supp 2d 702 (D Md, 2001) where the court accepted subject matter jurisdiction but dismissed the matter for lack of standing. See also Note, ‘A Most Private Remedy: Foreign Party Suits and the US Antitrust Laws’ (2001) 114 *Harvard Law Review* 2122.

⁹⁷ 315 F 3d 338, 350 (Edwards J) (DC Cir, 2003).

⁹⁸ *Empagran*, 542 US 155, 165 (Breyer J) (2004) (emphasis in original) (citations omitted).

⁹⁹ Some of these rules are referred to as ‘rules of standing’. However, that expression is not used consistently in antitrust jurisprudence: see Phillip E Areeda, Herbert Hovenkamp and Roger D

(a) Loss or Damage Suffered Must Be an Antitrust Injury

Damages are only available where the injury suffered is an antitrust injury.¹⁰⁰ This means that the injury must be ‘of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.’¹⁰¹ Where the claim arises out of a price-fixing cartel, the damage will normally be the loss flowing from the overcharge inflicted on buyers by the cartel. Super-competitive pricing is a prime concern of antitrust law. Therefore, in horizontal price-fixing cases the injury is clearly of a type that antitrust laws were designed to check.

(b) Causation or Injury-in-Fact

The damage or loss claimed must be caused in fact by the antitrust breach.¹⁰² The antitrust breach need not be the only cause, but it must be a ‘material’ cause.¹⁰³ It must contribute significantly to the plaintiff’s injury. According to Phillip E Areeda, Herbert Hovenkamp and Roger D Blair, in practice, plaintiffs must prove:

- 1 that there has been a violation of antitrust law;
- 2 that the violation has a tendency to injure; and
- 3 that the plaintiff has suffered injury of that nature.

It is then up to the defendant to establish that there were other causes of the plaintiff’s injury. At all times, however, the burden of convincing the court — normally a jury — remains with the plaintiff.¹⁰⁴

This is essentially a rule of remoteness, although it also involves issues relating to ‘the propriety of allowing a specific party to sue for treble damages’.¹⁰⁵ Under this rule, standing is denied to plaintiffs whose injuries are wholly derivative, for example, shareholders, creditors, employees and even more remotely, taxpayers.¹⁰⁶

(c) The Rejection of the ‘Passing-On’ Defence

In *Hanover Shoe Inc v United Shoe Machine Corporation*, the defendant refused to sell its shoe-making machinery to the plaintiff, Hanover Shoe Inc (‘Hanover’).¹⁰⁷ Instead, Hanover was forced to lease the machinery. Hanover claimed that this amounted to unlawful monopolisation within the meaning of

Blair, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2nd ed, 2000) vol II, 295.

¹⁰⁰ *Brunswick Corporation v Pueblo Bowl-O-Mat Inc*, 429 US 477 (1977).

¹⁰¹ *Ibid* 489 (Marshall J).

¹⁰² *Atlantic Richfield Co v USA Petroleum Co*, 495 US 328, 340 (Brennan J) (1990).

¹⁰³ *Zenith Radio Corporation v Hazeltine Research Inc*, 395 US 100, 114 fn 9 (White J) (1969). See also Areeda, Hovenkamp and Blair, above n 99, 317.

¹⁰⁴ See Areeda, Hovenkamp and Blair, above n 99, 318.

¹⁰⁵ Stephen J Horvath III, ‘Standing of the Terminated Employee under Section 4 of the *Clayton Act*’ (1983) 25 *William and Mary Law Review* 341, 350. See *Associated General Contractors of California v California State Council of Carpenters*, 459 US 519, 542 (Stevens J) (1983).

¹⁰⁶ See Areeda, Hovenkamp and Blair, above n 99, 327. See also Horvath, above n 105.

¹⁰⁷ 392 US 481 (1968) (‘*Hanover Shoe*’).

§ 2 of the *Sherman Act*.¹⁰⁸ Hanover sought damages being ‘the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing during the relevant period to sell those machines.’¹⁰⁹ The monopolisation claim was upheld. On the issue of damages, United Shoe Machine Corporation (‘United’) argued that Hanover had suffered ‘no legally cognizable injury’.¹¹⁰ The US Supreme Court summed up United’s argument as follows:

United claims ... that Hanover suffered no legally cognizable injury, contending that the illegal overcharge during the damage period was reflected in the price charged for shoes sold by Hanover to its customers and that Hanover, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing.¹¹¹

The Court held that, except in very limited circumstances, the defendant in an antitrust suit cannot argue that the plaintiff has not suffered losses because it has ‘passed on’ any overcharges to its customers.¹¹² The Court rested its decision on two considerations: first, the forensic difficulties of establishing the amount of the pass-on; and second, the very real possibility that treble damages actions would be less effective because the ultimate sufferers, the individual consumers of single pairs of shoes, ‘would have only a tiny stake in a lawsuit and little interest in attempting a class action.’¹¹³

Any analysis of *Hanover Shoe* immediately raises the question whether defendants are also liable for treble damages to indirect purchasers, given that those defendants generally cannot argue a passing-on defence against direct purchasers. This issue came before the Supreme Court in *Illinois Brick*, a case which, unlike *Hanover Shoe*, involved a price-fixing conspiracy.¹¹⁴

¹⁰⁸ 15 USC § 2 (2000 & Supp IV, 2004).

¹⁰⁹ *Hanover Shoe*, 392 US 481, 484 (White J) (1968).

¹¹⁰ *Ibid* 487 (White J).

¹¹¹ *Ibid* 487–8 (White J).

¹¹² *Ibid* 494 (White J). The Court found support for this position in previous antitrust treble damages cases and in transportation cases that raised an analogous situation: at 489–90 (White J). For example, the Court cited its opinion in *Southern Pacific Co v Darnell-Taenzer Lumber Co*, 245 US 531 (1918), a case involving a claim by shippers that a railroad company had exacted an unreasonably high rate for reparations due to it. The Court refused the railroad company’s defence that, even if the reparations were unreasonably high, the shippers had suffered no loss because they had passed the overcharge on to their customers. See Edward D Cavanagh, ‘*Illinois Brick*: A Look Back and a Look Ahead’ (2004) 17 *Loyola Consumer Law Review* 1. The Court in *Hanover Shoe*, however, did not completely shut the door on the passing-on defence. The Court indicated at least two examples where it might apply: at 494 (White J).

¹¹³ *Hanover Shoe*, 392 US 481, 494 (White J) (1968). See also *Illinois Brick*, 431 US 720, 725–6 (White J) (1977).

¹¹⁴ 431 US 720 (1977). *Illinois Brick* was decided just one year after state Attorneys-General were given the power to bring *parens patriae* actions on behalf of their natural consumers: see *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, Pub L No 94-435, 90 Stat 1383. The decision in *Illinois Brick* effectively emasculated the *parens patriae* action: see Cavanagh, ‘Antitrust Remedies Revisited’, above n 75, 154.

(d) *The Indirect Purchaser Rule*

(i) Illinois Brick

Illinois Brick Co manufactured concrete blocks. The bricks were sold to masonry contractors, who competed to supply the bricks to general construction contractors. The general construction contractors competed to win construction tenders for building projects for customers such as the State of Illinois and local government entities such as housing authorities and school districts. The State of Illinois and the local authorities alleged that Illinois Brick Co, in concert with other concrete block manufacturers, had fixed the price of concrete blocks and that as a result, the plaintiffs had paid over US\$3 million more than they would have paid if the price-fixing conspiracy had not existed.

A majority of the US Supreme Court held that only direct purchasers from an unlawful cartel had standing to sue for treble damages.¹¹⁵ In the opinion of the majority, there was no justification for treating defendants and plaintiffs differently when it came to passing-on. If defendants could not argue a passing-on defence, then indirect purchasers should not be able to claim damages.¹¹⁶ The issue, therefore, was whether *Hanover Shoe* should continue to apply.¹¹⁷ In the majority's opinion, it should. Consequently, indirect purchasers in the US have no standing to sue for damages for antitrust breaches under federal antitrust law.¹¹⁸

In coming to this decision, the majority was concerned about the distinct possibility that defendants would be exposed to a serious risk of multiple liability and double recovery (which, if the plaintiffs were granted a right to treble damages, would theoretically amount to six times the actual loss).¹¹⁹ Otherwise, the considerations that led the majority to adopt this position were essentially the same as those which had motivated the Court in *Hanover Shoe*. First, the majority was concerned about the cost and complexity of tracing losses through multiple purchasers in a distribution chain:

Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.¹²⁰

¹¹⁵ *Illinois Brick*, 431 US 720 (1977).

¹¹⁶ *Ibid* 729–36 (White J).

¹¹⁷ *Ibid* 736 (White J).

¹¹⁸ The only exceptions are those cases which fall into the very limited range of situations described as exceptions to the rule in *Hanover Shoe*: see *ibid* 743–5 (White J). Indirect purchasers, however, do have standing to seek injunctive relief under federal antitrust law: see *McCarthy v Recordex Service Inc*, 80 F 3d 842, 856 (Garth J) (3rd Cir, 1996) ('*McCarthy*'); *Cargill Inc v Monfort of Colorado Inc*, 479 US 104, 111 fn 6 (Brennan J) (1986). Although indirect purchasers may seek injunctive relief, they must show: '(1) threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust violation.': *McCarthy* at 856 (Garth J).

¹¹⁹ *Illinois Brick*, 431 US 720, 730–1 (White J) (1977).

¹²⁰ *Ibid* 737 (White J).

Second, the Court was concerned not to reduce incentives for direct purchasers to sue. The majority explained:

The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.¹²¹

(ii) *In the Aftermath of Illinois Brick*

The decision in *Illinois Brick* has been widely criticised.¹²² Forty-seven states and the US DoJ filed amicus briefs opposing the rule ultimately adopted by the Court.¹²³ A number of US states and the District of Columbia responded by introducing laws (known as '*Illinois Brick* repealer statutes') to ensure that the decision did not apply to antitrust suits in their respective state courts.¹²⁴ Despite the apparent resulting clash between federal and state law, the Supreme Court in *California v ARC America Corporation* upheld the state legislation.¹²⁵ The result is that both direct and indirect purchasers from an unlawful cartel can sue for treble damages in state courts. This may theoretically result in damages greater than six times the actual losses suffered — the very fear that prompted the decision in *Illinois Brick*.

¹²¹ Ibid 745 (White J).

¹²² See, eg, Areeda, Hovenkamp and Blair, above n 99, 359–60, 378–83, criticising both *Hanover Shoe* and *Illinois Brick* on grounds of statutory interpretation and general damages principles; Robert G Harris and Lawrence A Sullivan, 'Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis' (1979) 128 *University of Pennsylvania Law Review* 269, 354; Baker, 'Revisiting History', above n 87, 391. See also Joseph P Bauer, 'The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing' (2001) 62 *University of Pittsburgh Law Review* 437. Of course, *Illinois Brick* also has its supporters: see, eg, William M Landes and Richard A Posner, 'The Economics of Passing On: A Reply to Harris and Sullivan' (1980) 128 *University of Pennsylvania Law Review* 1274. Cf Roger D Blair and Jeffrey L Harrison, 'Reexamining the Role of *Illinois Brick* in Modern Antitrust Standing Analysis' (1999) 68 *George Washington Law Review* 1, arguing that while *Illinois Brick* was necessary at the time, it is now obsolete.

¹²³ The briefs are available on Westlaw. See also Adam Thimmesch, 'Beyond Treble Damages: *Hanover Shoe* and Direct Purchaser Suits after *Comes v Microsoft Corporation*' (2005) 90 *Iowa Law Review* 1649, 1661.

¹²⁴ See Cavanagh, '*Illinois Brick*: A Look Back and a Look Ahead', above n 112, 2. See generally Jonathan T Tomlin and Dale J Giali, 'Federalism and the Indirect Purchaser Mess' (2002) 11 *George Mason Law Review* 157, 159–61 discussing the federalism issues involved in *Illinois Brick* and the state responses.

¹²⁵ 490 US 93 (1989) ('*California v ARC*').

The position post-*California v ARC* is worse than if *Illinois Brick* had never been decided,¹²⁶ since some plaintiffs have no option but to bring their case in the state courts. Where the plaintiffs were spread out across various states, the result was a proliferation of largely identical suits with no possibility of enforced consolidation. This resulted in simultaneous actions in the Federal Court (where consolidation does occur) and in a variety of state courts. For example, some members of the vitamins cartel faced criminal and civil actions in the Federal Court and a host of civil damages suits by indirect purchasers in at least 22 different US state courts.¹²⁷ The problem was exacerbated by differences between state procedural rules, for example, the varying rules applying to class actions.¹²⁸

Therefore, despite the efforts of the Supreme Court in *Illinois Brick* to simplify antitrust procedures, the diversity of jurisdictions makes the conduct of antitrust civil cases both complex and costly. For example, trying to coordinate settlement negotiations is extremely complex when so many jurisdictions are involved. A former Assistant Attorney-General in charge of the Antitrust Division described the US situation as follows:

in the United States, we have a much more complicated mess to unwind in the wake of *Illinois Brick* and *ARC America*. We face a world of complexity and uncertainty in which opportunism abounds, judicial efficiency is minimized, and some victims go uncompensated while other plaintiffs, and their attorneys, collect windfalls. Meanwhile, defendants can be subjected to not only multiple recoveries for the same wrong, but also all the costs and uncertainty of litigating the same wrong in different courthouses under different state laws and procedures.¹²⁹

A consistent approach to remedies is needed. However, commentators differ on the appropriate approach. Some advocate elimination of state-based antitrust

¹²⁶ See Areeda, Hovenkamp and Blair, above n 99, 360.

¹²⁷ See Cavanagh, '*Illinois Brick*: A Look Back and a Look Ahead', above n 112, 30. For a brief description of the bewildering variety of court cases generated in the US and elsewhere by the vitamins cartel, see Waller, above n 75, 221–5.

¹²⁸ Class actions are potentially of great importance to competition enforcement because of the large number of persons that may be affected by anti-competitive conduct: see generally Joseph P Bauer, 'Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?' (2004) 16 *Loyola Consumer Law Review* 303, 311. State Attorneys-General may bring a treble damages action as *parens patriae* for injuries to their state's natural citizens: 15 USC § 15c (2000 & Supp IV, 2004).

¹²⁹ Baker, 'Revisiting History', above n 87, 393. See also Lande, 'Why Antitrust Damage Levels Should Be Raised', above n 12, 329–30, describing the current antitrust damages system as a confusing, inefficient patchwork. Lande concludes that '[t]he current system is so illogical that it is easy to ridicule — indeed, no rational person ever would have designed it from scratch in its current form': at 329–30. Cf Bauer, 'Reflections on the Manifold Means of Enforcing the Antitrust Laws', above n 128, 327, who claims that 'on balance, the system that has evolved after more than a century of the antitrust laws probably yields about the right amount and distribution of antitrust enforcement.' Bauer, however, disagrees with the antitrust injury standing rules of *Illinois Brick*: see Bauer, 'The Stealth Assault on Antitrust Enforcement', above n 122. For another view claiming that the problems associated with modern antitrust enforcement are overstated, see Evidence to the Antitrust Modernization Commission, Federal Trade Commission Conference Center, Washington, DC, 27 June 2005 (H Laddie Montague Jr) <http://www.ftc.gov/commission_hearings/pdf/Montague.pdf>.

law.¹³⁰ Others view *Illinois Brick* as the major obstacle to a more coherent, effective and efficient system.¹³¹ Some would prefer to eliminate treble damages, or even private compensation, altogether.¹³² The most widespread view, however, is that while treble damages are not ideal, they are better than the alternatives so far suggested.¹³³

The recent enactment of the *Class Action Fairness Act of 2005* ('CAFA') is likely to alleviate some of the inefficiencies associated with procedural diversity.¹³⁴ One of the aims of CAFA is to reduce the incidence of multiple federal and state actions by moving many indirect purchaser cases, at least for pre-trial purposes, into a single federal forum.¹³⁵ This will ease some of the inefficiencies involved in private enforcement, for example, duplicated discovery.

CAFA also brings many class actions under federal rules.¹³⁶ Owing to more stringent federal standards for class actions, this may make it more difficult for indirect purchasers to obtain certification particularly in relation to proof of injury.¹³⁷ Nevertheless, although the Federal Court will be the forum court, it will still have to apply the relevant state's substantive law. This means that CAFA does not preclude indirect purchasers from claiming.

4 Measuring Damages

The plaintiff is only entitled to the losses caused by the unlawful conduct. The guiding principle is the 'but for' test: the plaintiff should recover the difference between its actual situation and the situation it would have been in but for the antitrust violation.¹³⁸ In determining the amount of the plaintiff's loss it is sufficient that 'the evidence show the extent of the damages as a matter of just

¹³⁰ See, eg, Richard A Posner, 'Antitrust in the New Economy' (2001) 68 *Antitrust Law Journal* 925, 940–2. However, due to US constitutional limitations, without state-based antitrust laws anti-competitive activities that occurred *intrastate* would go unremedied. All federal systems are likely to have such problems, although the problem becomes much more acute in a large economy like the US.

¹³¹ See, eg, Bauer, 'Reflections on the Manifold Means of Enforcing the Antitrust Laws', above n 128, 324.

¹³² See, eg, K Elzinga and W Breit, *The Antitrust Penalties: A Study in Law and Economics* (1976) 66.

¹³³ See Cavanagh, 'Antitrust Remedies Revisited', above n 75, 172–80.

¹³⁴ 28 USC §§ 1332, 1453, 1711–15 (2000 & Supp IV, 2004). CAFA (1) expands federal diversity jurisdiction over interstate class actions, including expanded removal powers and limitations on remand; (2) establishes mandatory notice procedures requiring the mailing of notice and related settlement documents to the 'appropriate' federal and state officials for review; and (3) limits attorneys' fee awards in coupon class action settlements.

¹³⁵ The Supreme Court ruled in *Lexecon Inc v Milberg Weiss Bershad Hynes & Lerach*, 523 US 26 (1998) that the Federal Court to which proceedings had been transferred for pre-trial matters pursuant to the *Rules of Procedure of the Judicial Panel for Multidistrict Litigation*, 28 USC § 1407 (2000) did not have power to assign a transferred case to itself for trial. CAFA does not address this situation. This means that class action cases may have to return to state courts for trial.

¹³⁶ The court is required to apply federal procedural rules where a case has been removed to the Federal Court: see *Hanna v Plummer*, 380 US 460 (1965).

¹³⁷ See, eg, Peter Sullivan, 'Private Litigation of Antitrust Claims: The Perspective from the United States' (Paper presented at the Second Antitrust Spring Conference, Sydney, 28–29 April 2006).

¹³⁸ The tort approach to measuring damages is the most common: see Areeda, Hovenkamp and Blair, above n 99, 489.

and reasonable inference'.¹³⁹ However, mere speculation is not permitted.¹⁴⁰ In horizontal price-fixing cases, two types of losses have been accepted. The first and more accurate measure of the plaintiff's loss is lost profits.¹⁴¹ The second and much more popular measure is the amount of the overcharge.¹⁴² The 'lost profits' method more accurately measures the damages *sustained* by the plaintiff as required by § 4 of the *Clayton Act*.¹⁴³ The 'overcharge' method may result in damages greater or less than the profits lost depending on the circumstances, but the more common outcome is larger damages.¹⁴⁴

The difficulty with the lost profits approach is establishing what position the plaintiff would have been in had the price-fixing not occurred. Economic conditions change constantly and it is difficult to disentangle outcomes that result from the unlawful price-fixing and outcomes that result from other causes. At times, US courts have used a proxy for this type of measurement, permitting the plaintiff to establish its likely hypothetical position in the absence of price-fixing by drawing a comparison with another business that is substantially similar. This is called the 'yardstick' approach.¹⁴⁵

The overcharge approach to measuring damages in price-fixing cases is simpler because it requires a comparison between the price actually paid and the price that would have been paid but for the violation. The simplicity, however, is relative. There remain evidentiary difficulties in establishing what the market price would have been without the unlawful price-fixing. Areeda, Hovenkamp and Blair described some of these difficulties:

The actual pre-conspiracy price might have continued, but not if costs or other supply or demand circumstances had changed, as they undoubtedly do over a conspiracy period of any significant duration. If prices generally, or if prices of goods in the same category as the defendants', have been rising, the pre-conspiracy price would presumably have risen as well. Indeed, defendants can be expected to claim that the pre-conspiracy price was 'unduly depressed' relative to similar goods and that it would, absent the conspiracy, have increased more than the rate of inflation for all similar products. By contrast, the pre-conspiracy price might have been abnormally high; or, absent the conspiracy, increasing capacity, productivity gains, improving substitutes, or other changes in supply or demand circumstances might have forced the price below

¹³⁹ *Story Parchment Co v Paterson Parchment Paper Co*, 282 US 555, 562 (Sutherland J) (1931). See Areeda, Hovenkamp and Blair, above n 99, 480.

¹⁴⁰ Areeda, Hovenkamp and Blair, above n 99, 481.

¹⁴¹ *Ibid* 521–2; Round, above n 12, 250–1.

¹⁴² See Areeda, Hovenkamp and Blair, above n 99, 522; Cavanagh, 'Antitrust Remedies Revisited', above n 75, 169–70. The overcharge method, which is now specifically provided for in 15 USC § 15d (2000 & Supp IV, 2004), was implicitly endorsed by the Supreme Court in *Chattanooga Foundry & Pipe Works v City of Atlanta*, 203 US 390, 396–7 (Holmes J) (1906). That case, however, was somewhat out of the ordinary as the plaintiff was a not-for-profit organisation. This made the 'lost profits' method of assessing damages inappropriate.

¹⁴³ 15 USC § 15 (2000 & Supp IV, 2004).

¹⁴⁴ See Areeda, Hovenkamp and Blair, above n 99, 522. But see Cavanagh, 'Antitrust Remedies Revisited', above n 75, 169–70, who argues that the overcharge measure of damages understates the losses suffered by victims because it fails to account for (1) lost opportunity costs; (2) losses caused when plaintiff firms are diverted from their core business activities by the need to prosecute the antitrust case; and (3) deadweight loss to society resulting from horizontal conspiracies. Cavanagh sees these factors as an argument for treble damages.

¹⁴⁵ See, eg, Areeda, Hovenkamp and Blair, above n 99, 483.

its pre-conspiracy level. Similar difficulties attend backward projections from the post-conspiracy price, plus the possibility that the latter was influenced upward by the habits, calculations, or other spillovers from the terminated conspiracy.¹⁴⁶

5 Conclusion

The US rules on private damages discussed above have developed within the unique framework of US antitrust law. Many of these rules are highly contentious. There are few, if any, US commentators who would unreservedly recommend the US system as a start-up model. In fact, despite the availability of private enforcement for 100 years, the rules relating to antitrust damages must be regarded as an issue in the development phase. All aspects of antitrust law and enforcement, including treble damages, the passing-on defence, the indirect purchaser rule and class actions are currently the subject of review by the Antitrust Modernization Commission.¹⁴⁷

C Private Damages in Europe

Unlike in the US, damages claims have played almost no part in EC competition law.¹⁴⁸ The main reason for this is that there is no provision under EC law for bringing a damages claim using EU institutions. Therefore, any action for damages must utilise the procedures provided by the national law of the Member States. To date, however, there have been very few such actions.¹⁴⁹ The 2004 *Ashurst Report* commissioned by the European Commission concluded: 'The picture that emerges from the present study on damages for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment.'¹⁵⁰

This situation may change for a number of reasons which are discussed below.

1 Reasons Facilitating an Increase in Damages Claims in EU Member States

In the first place, the European Commission views private enforcement as an essential part of the way forward for European competition law. In April 2004, the then European Commissioner for Competition Policy, Mario Monti, explained that it was necessary to encourage greater private enforcement because

¹⁴⁶ Ibid 340.

¹⁴⁷ The Antitrust Modernization Commission was created pursuant to the *Antitrust Modernization Commission Act of 2002*, Pub L No 107-273, 116 Stat 1856. Its role is to inquire into most aspects of antitrust law and to make such recommendations for legislative and administrative actions as the Commission deems necessary. See Antitrust Modernization Commission <<http://www.amc.gov/index.html>>.

¹⁴⁸ See Wouter P J Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (2002) 14, claiming that damages awards in the EU are statistically insignificant.

¹⁴⁹ In the US, the ratio of private antitrust cases to public cases is generally estimated to be about 9:1. Although figures for the EU are very imprecise, the ratio is probably something like 1:21: see Woods, 'Private Enforcement of Antitrust Rules', above n 76, 435 fn 11. A recent report commissioned by the European Commission commented that damages had only been awarded in 28 cases in the EU for anti-competitive conduct: see Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Ashurst, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report* (2004) 1 ('*Ashurst Report*') <http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf>.

¹⁵⁰ Waelbroeck, Slater and Even-Shoshan, above n 149, 1.

of its deterrent effect and because it would improve the efficiency of EC competition rules.¹⁵¹ The encouragement of private actions is also supported by the current Commissioner for Competition Policy, Neelie Kroes.¹⁵²

Indeed, the European Commission recently released a green paper for discussion.¹⁵³ According to European Commission representative Donnadh Woods, the European Commission's purpose in releasing the *Green Paper* is:

to make the right to claim damages for breach of Community competition law more effective. By publishing the Green Paper, the Commission wants to foster an open debate about the issue of private enforcement of EC competition law and about damages actions in particular.¹⁵⁴

Second, in *Courage Ltd v Crehan*¹⁵⁵ the European Court of Justice ruled that national courts must provide a remedy in damages for breaches of arts 81 or 82 (formerly arts 85 and 86) of the *Consolidated Version of the Treaty Establishing the European Community*.¹⁵⁶ Although EC law recognises the principle of procedural autonomy,¹⁵⁷ Member States must also abide by the principle of effectiveness. This means that domestic laws must ensure that rights provided by EC law are given real and effective local protection.¹⁵⁸ Thus, a Member State cannot refuse to provide a private right of damages for breaches of European competition law.

The European Court of Justice in *Courage* was motivated not only by a need to provide compensation, but also by a desire to ensure that EC competition law enforcement was more effective. The Court held:

the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view,

¹⁵¹ Mario Monti, 'Proactive Competition Policy and the Role of the Consumer' (Speech delivered on European Competition Day, Dublin Castle, Dublin, 29 April 2004).

¹⁵² See Neelie Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe' (Speech delivered at the Harvard Club, New York, 22 September 2005). See also Neelie Kroes, 'More Private Antitrust Enforcement through Better Access to Damages: An Invitation for an Open Debate' (Speech delivered at the Conference on Private Enforcement in EC Competition Law: The Green Paper on Damages Actions, Brussels, 9 March 2006).

¹⁵³ European Commission, *Green Paper: Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 Final (2005) ('*Green Paper*'); see also European Commission, *Commission Staff Working Paper: Annex to the Green Paper 'Damages Actions for Breach of the EC Antitrust Rules'*, SEC(2005) 1732 (2005). For comments on the *Green Paper*, see Europa, *Comments on the Green Paper on Damages Actions for Breach of the EC Antitrust Rules* <http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html>.

¹⁵⁴ Donnadh Woods, 'The European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules' (Presentation made at the Second Antitrust Spring Conference, Sydney, 28–29 April 2006) [slide 7] (copy on file with author).

¹⁵⁵ (C-453/99) [2001] ECR I-6297 ('*Courage*').

¹⁵⁶ Opened for signature 26 February 2001, [2002] OJ C 325/33 (entered into force 1 February 2003) ('*EC Treaty*').

¹⁵⁷ See *Rewe-Zentralfinanz eG & Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (C-33/76) [1976] ECR 1989.

¹⁵⁸ Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases and Materials* (2nd ed, 2004) 1204.

actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.¹⁵⁹

Therefore, it seems that, as in the US, deterrence and effective administration are relevant to the issue of damages. However, at this stage, it has not been determined how these matters will affect the practical operation of damages claims in the EU. This is one of the major issues addressed in the *Green Paper*.¹⁶⁰

Finally, in 2003, the EC introduced its modernisation programme, which is principally concerned with the administration of competition law in the EU.¹⁶¹ While substantively arts 81–2 of the *EC Treaty* remain the cornerstone of EC competition law,¹⁶² national competition agencies and national courts will take on a greater role in enforcing European competition law.¹⁶³ Ideally, the modernisation programme, by inter alia abolishing the notification system, will free up the European Commission to undertake the larger cartel and merger investigations.¹⁶⁴ As firms adjust to the use of national legal structures to enforce competition law, those persons claiming to have been injured by anti-competitive conduct will be encouraged to pursue private actions. Given the almost complete lack of private claims in the EU, this represents a major cultural change for European corporations and consumers.

2 Obstacles to Private Claims in EU Member States

Whether the changes in the EU will result in a significant increase in private actions remains to be seen.¹⁶⁵ There are still many differences between the

¹⁵⁹ *Courage* (C-453/99) [2001] ECR I-6297, 6323. See also European Commission, *Green Paper*, above n 153; Edward P Henneberry, 'The Passing-On Defense and Standing for Indirect Purchasers, Representative Organizations and Other Groups' (Paper presented at the Conference on Private Enforcement in EC Competition Law: The Green Paper on Damages Actions, Brussels, 9 March 2006).

¹⁶⁰ European Commission, *Green Paper*, above n 153, 3–4.

¹⁶¹ *Modernisation Regulation* [2003] OJ L 1/1. On modernisation, see Wouter P J Wils, *Principles of European Antitrust Enforcement* (2005).

¹⁶² Articles 81 and 82 of the *EC Treaty* prohibit certain anti-competitive arrangements and abuses of dominance. The exemption procedure previously applying under art 81 has been replaced. Conduct is prohibited if it is caught by art 81 and does not satisfy the conditions in art 81(3); it is not prohibited if it does satisfy the conditions in art 81(3). See *Modernisation Regulation* [2003] OJ L 1/1, art 1.

¹⁶³ Article 6 of the *Modernisation Regulation* [2003] OJ L 1/1 provides that: 'National courts shall have the power to apply Articles 81 and 82 of the Treaty'. Article 1 provides that conduct that infringes arts 81 or 82 of the *EC Treaty* is prohibited without any prior decision to that effect. This overcomes the previous requirement that the European Commission had to rule on conduct before national courts could proceed. Somewhat confusingly, EC competition law will continue to operate alongside national competition law. A proposal that national competition law should be abolished in favour of the EC rules was rejected: see Julian Joshua, 'Competition Law Enforcement: Criminalisation, Cartels, Leniency and Class Actions — A Look into the Future' (12 October 2004) *Competition Law Insight* 3.

¹⁶⁴ The notification system operated to give effect to art 81(3) which provides that an exemption may be given to conduct that satisfies the requirements set out in that provision.

¹⁶⁵ Donncaadh Woods, Ailsa Sinclair and David Ashton, 'Private Enforcement of Community Competition Law: Modernisation and the Road Ahead' (2004) 2 *EC Competition Policy Newsletter* 31, 33–5, discussing 'some obstacles to private enforcement'.

operation of antitrust law in the US and the new competition structure in Europe.¹⁶⁶

First, European states generally do not provide for class actions as that expression is understood in the US.¹⁶⁷ Class actions have played a major role in the enforcement of US antitrust law and account for about 20 per cent of all private actions.¹⁶⁸ In fact, their impact is much greater than this figure suggests because of the sheer size of the claims.¹⁶⁹

Second, European states do not have the same pre-trial discovery rules that aid plaintiffs in the US.¹⁷⁰ In civil law jurisdictions, ordering the production of documents is a judicial function; there is no ‘discovery’ in the common law sense.¹⁷¹ In the civil law states the judge can only order production of documents that are specifically identified.¹⁷² This completely rules out the type of ‘exploratory’ search that characterises US discovery. Even in the common law states, such as the UK and Ireland, discovery rules are considerably more restricted than in the US.¹⁷³ Additionally, the courts of EU Member States are generally not able to rely on public enforcement decisions — for example, by the European Commission — as prima facie proof of infringement.¹⁷⁴ In contrast, US plaintiffs can rely on the provisions of § 5(a) of the *Clayton Act*.¹⁷⁵

Third, European states have different rules governing legal costs. In the US, the antitrust rule is that a successful plaintiff may claim costs but otherwise the

¹⁶⁶ See generally Woods, ‘Private Enforcement of Antitrust Rules’, above n 76, who explores some of these differences.

¹⁶⁷ See Waelbroeck, Slater and Even-Shoshan, above n 149, 2. The UK, for example, makes provision for a form of class action. Under the modernisation programme, this is available for the enforcement of arts 81 and 82 in UK courts.

¹⁶⁸ Clifford A Jones, ‘The Growth of Private Rights of Action Outside the US: Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market’ (2004) 16 *Loyola Consumer Law Review* 409, 427.

¹⁶⁹ *Ibid.*

¹⁷⁰ See generally Waelbroeck, Slater and Even-Shoshan, above n 149, 61–5; Jones, ‘The Growth of Private Rights of Action Outside the US’, above n 168, 428–9.

¹⁷¹ See, eg, David J Gerber, ‘Comparing Procedural Systems: Toward an Analytical Framework’ in James A R Nafziger and Symeon C Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren* (2002) 665, 668–9, arguing that, in respect of rules relating to the acquisition of data, the ‘[d]ifferences between the US and most, if not all, civil law countries are particularly significant.’

¹⁷² See Waelbroeck, Slater and Even-Shoshan, above n 149, 63.

¹⁷³ In *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, 622, Viscount Dilhorne described the difference between US and English discovery as ‘the difference between the obtaining of evidence in the strict sense and the obtaining of information which might lead to the obtaining of evidence.’ See also the comparative comments of Lord Diplock in *British Airways v Laker Airways* [1985] AC 58, 78. The broad nature of US discovery procedures was also the subject of discussion in *Radio Corporation of America v Rauland* [1956] 1 QB 618 and by the House of Lords in *British Airways v Laker Airways* [1985] AC 58.

¹⁷⁴ See Kroes, ‘More Private Antitrust Enforcement through Better Access to Damages’, above n 152.

¹⁷⁵ *Clayton Act*, 15 USC § 16(a) (2000 & Supp IV, 2004), provides that a prior judgment against a defendant in an action brought by the US Government is admissible as prima facie evidence of the matters actually and necessarily decided against the defendant in subsequent private antitrust suits. This would probably include an agreed statement of facts where the defendant pleaded guilty. Plaintiffs may also rely on the doctrine of collateral estoppel: see Areeda, Hovenkamp and Blair, above n 99, 203–4.

parties pay their own costs. In Europe, the general rule is that the loser pays.¹⁷⁶ The US system promotes a more speculative plaintiff.¹⁷⁷

Fourth, European states do not provide for treble damages,¹⁷⁸ the availability of which is often referred to as one of the prime drivers of private antitrust actions in the US. If this is true, then the lack of treble damages is likely to constrain the growth of private actions in the EU and elsewhere. However, the true impact of treble damages in comparison to damages awarded elsewhere may be overstated. Lande, for example, has argued that the expression 'treble damages' is an exaggeration because once all factors are taken into account, treble damages normally amount to less than actual damages.¹⁷⁹ These factors include a lack of pre-judgment interest in antitrust suits, the time value of money, the failure to account for societal welfare losses or umbrella effects, litigation costs and tax effects.¹⁸⁰ Thus, the availability of treble damages does not necessarily mean that US plaintiffs will receive three times the sum that they would receive in a similar matter in the EU. For example, although the method of calculation varies between EU Member States, most jurisdictions, unlike the US, recognise pre-judgment interest as a component of damages. As a result, the difference between US treble damages and single damages is probably less significant than appears at first glance.¹⁸¹

Finally, Europeans have not yet developed the culture of antitrust litigation that exists in the US,¹⁸² although this may change with the influence of US managers in multinationals and easier access to private actions. However, some view such a change to a litigation culture as a major evil to be avoided. Due to a lack of cases, many European domestic courts do not have much experience in dealing with competition law issues. Even European competition lawyers have

¹⁷⁶ See Waelbroeck, Slater and Even-Shoshan, above n 149, 116.

¹⁷⁷ But see Jones, 'The Growth of Private Rights of Action Outside the US', above n 168, 429, arguing that costs do not play a decisive role in determining the level of private enforcement.

¹⁷⁸ Although, the provision of *double* damages was discussed in the European Commission, *Green Paper*, above n 153, 7. See also Jones, 'The Growth of Private Rights of Action Outside the US', above n 168, 422, arguing that while treble damages is unlikely, 'the development of substantial enhancements is not out of the question'.

¹⁷⁹ Lande, 'Are Antitrust "Treble" Damages Really Single Damages?', above n 77; Lande, 'Why Antitrust Damage Levels Should Be Raised', above n 12.

¹⁸⁰ Lande, 'Why Antitrust Damage Levels Should Be Raised', above n 12, 337–43. Pre-judgment interest is only available where the defendant has acted in a culpable manner to delay proceedings: 15 USC § 15a (2000 & Supp IV, 2004). Indeed, Lande maintains that even after accounting for criminal fines, defendants never pay an amount equal to threefold damages: at 340. Lande concludes that rather than dispensing with treble damages, the amount, if anything, should be raised if optimal deterrence is the goal. Of course, optimal deterrence is not generally the goal of damages, even in the US; the primary goal is normally compensation. See above Part III(B)(1) for discussion on the rationales for treble damages.

¹⁸¹ See Jones, 'The Growth of Private Rights of Action Outside the US', above n 168, 422–7, citing studies from the US including one by Lande. Jones also cited a study by V Sarris, in which Sarris claimed that the award in *Hanover Shoe* amounted to only 23 cents in the dollar (when compared with the figure for actual compensation) due to the lack of pre-judgment interest: see V Sarris, *The Efficiency of Private Antitrust Enforcement: The 'Illinois Brick' Decision* (1984), cited in Jones at 422 fn 71. Jones models some examples which indicate that EC damages, depending on the circumstances, could actually be significantly greater than those available in the US: at 424–7.

¹⁸² See Wils, *Optimal Enforcement*, above n 148, 14, 21, 43–4, claiming that antitrust law has only 'modest standing' in European culture.

little experience in dealing with the quantification issues associated with damages claims. No EU Member State has definitively settled, and very few have even considered, complex issues such as passing-on, the indirect purchaser or what constitutes compensatable ‘competition injury’.¹⁸³ These uncertainties add considerably to the risk of private litigation.

3 *The Future of Private Damages in Europe*

Since *Courage*,¹⁸⁴ it is clear that private damages are available in Europe for breaches of European competition law. All EU Member States must provide damages for conduct that breaches arts 81–2 of the *EC Treaty*. The modernisation programme was designed in part to facilitate private enforcement.¹⁸⁵ Some of the EU Member States also offer damages for violations of their domestic competition laws. It is probably too early to speculate on the effects of *Courage* in promoting more private enforcement, although, if anything, it seems that the reaction has been disappointing from the European Commission’s point of view.¹⁸⁶

Although Member States must provide damages for violations of arts 81–2, procedural matters are left to individual Member States. Therefore, issues such as discovery, standing, class actions, causation, the passing-on defence and the measurement of damages and interest remain the province of the individual state.¹⁸⁷ At this stage it is not clear what position each state will adopt on some of these issues. In large part, the position chosen may depend on the nature of the issue. For example, quintessentially competition-based issues such as the passing-on defence and standing for indirect purchasers can be treated as *sui generis*.¹⁸⁸ Thus, Germany has recently amended its *Gesetz gegen Wettbewerbsbeschränkungen 1958* — the *Act against Restraints on Competition 1958* (‘ARC’) — and now specifically excludes the passing-on defence, although it has not adopted the indirect purchaser rule.¹⁸⁹ This means that any person injured by an anti-competitive act done in breach of arts 81 or 82 of the *EC Treaty* or of the provisions of the *ARC* has an action for damages.¹⁹⁰ The measure of each

¹⁸³ The English Court of Appeal dealt with some of these issues in *Crehan v Inntrepreneur Pub Co CPC* [2004] EWCA Civ 637 (Unreported, Peter Gibson, Tuckey and Lord Nourse LLJ, 21 May 2004).

¹⁸⁴ (C-453/99) (2001) ECR I-6297.

¹⁸⁵ See above nn 161–4 and accompanying text.

¹⁸⁶ The data is equivocal. Clifford Chance LLP, ‘Private Anti-Trust Remedies: An Update’ (October–December 2005) 1 *PLC Cross-Border Quarterly* 35 argues that there is no evidence of any significant increase in private damages cases. Cf Tony Woodgate and Jane Jellis, ‘EU Private Antitrust Litigation’ in Global Competition Review (eds), *The European Antitrust Review: A Global Competition Review Special Report* (7th ed, 2006) 53. However, even Woodgate and Jellis conclude that the number of actions ‘could hardly be heralded as an opening of the flood-gates’: at 53.

¹⁸⁷ See Woods, ‘Private Enforcement of Antitrust Rules’, above n 76, who discusses these procedural issues and concludes that there is a great deal of variety within the European states. See also Waelbroeck, Slater and Even-Shoshan, above n 149.

¹⁸⁸ Clifford A Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (1999) 193–8, arguing against the adoption of a US-style indirect purchaser rule.

¹⁸⁹ *ARC* § 33, amended by the seventh amendment to the *ARC* in 2005.

¹⁹⁰ See Clifford Chance LLP, above n 186. Alison Jones and Daniel Beard argue that the *Illinois Brick* indirect purchaser rule is inconsistent with the decision in *Courage*: see Alison Jones and

plaintiff's damages will not be diluted by evidence based on passing-on. To some extent this reduces the significance of not providing multiple damages.

On other issues, the approach is determined by more general principles of law and justice rather than by competition rules. Thus, for example, discovery and other evidentiary rules, class actions, causation doctrines and the availability of punitive or exemplary damages depend on legal systems as a whole, and consequently, are harder to adapt to accommodate more effective competition enforcement.¹⁹¹

In the case of cartels (other than strictly domestic cartels), the development of private damages could very well result in forum shopping.¹⁹² The English decision in *Provimi Ltd v Roche Products Ltd*¹⁹³ supports this possibility. In that case, the High Court of Justice accepted that non-English based plaintiffs had standing to bring a damages claim against members of the vitamins cartel for breach of art 81 of the *EC Treaty* in the Court. It has been speculated that the plaintiff's reasons for preferring an English court to a German, French or Swiss court could have centred on England's wide discovery rules (including discovery of documents adverse to the defendants) and adversarial court procedures (particularly the ability to cross-examine witnesses).¹⁹⁴ The English judicial system may also be more attractive because of its specialist competition tribunal, the Competition Appeal Tribunal ('CAT').¹⁹⁵ Where the European Commission or the UK Office of Fair Trading ('OFT') have established an infringement of EC or UK competition rules, third parties injured by the infringing conduct may bring a damages action in the CAT. The decisions of the European Commission and the OFT are binding on the CAT,¹⁹⁶ and CAT decisions are enforceable in the High Court.¹⁹⁷

Additionally or alternatively, the development of private damages may result in a multiplicity of actions similar to the federal-state actions in the US for the same conduct.¹⁹⁸ The nature of international cartels is such that, under the rules governing jurisdiction between EU Member States, more than one European state will almost certainly have jurisdiction. Under *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, the defendant may be sued in either its place of domicile or, at the election of the claimant, in the place where the harmful event occurred.¹⁹⁹ This could be either:

Daniel Beard, 'Co-Contractors, Damages and Article 81: The ECJ Finally Speaks' (2002) 23 *European Competition Law Review* 246.

¹⁹¹ See, eg, *Mouvement des Entreprises de France, MEDEF's Response to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules* (2006) <http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/027_en.pdf>.

¹⁹² See Woodgate and Jellis, above n 186.

¹⁹³ [2003] 2 All ER (Comm) 683 ('*Provimi*').

¹⁹⁴ See Woodgate and Jellis, above n 186.

¹⁹⁵ CAT was created by the *Enterprise Act 2002* (UK) c 40, s 12(a).

¹⁹⁶ *Enterprise Act 2002* (UK) c 40, s 47A(9).

¹⁹⁷ *Enterprise Act 2002* (UK) c 40, sch 4.

¹⁹⁸ See above nn 122–5 and accompanying text.

¹⁹⁹ [2001] OJ L 12/1, arts 2(1), 5(3). A new proposal is currently being discussed in both the European Parliament and the European Council: see European Commission, *Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual*

- 1 the place where the event causing the harm occurred; or
- 2 the place where the harm was experienced.

The issues of forum shopping and multiplicity of actions suggest that European states must find some way of allocating jurisdiction and consolidating actions.²⁰⁰ This will not be easy to achieve, but the alternative seems to be a less than efficient system of competition administration.

It should be noted that the whole issue of damages actions for competition law breaches, including the issue of the applicable jurisdiction, is currently the subject of review by the European Commission.²⁰¹

D Private Damages in Australia

Private damages for breaches of Australian competition law have been available since the introduction of the *TPA* in 1974. However, there have been few decided cases on the issue of damages and none have involved a horizontal price-fixing conspiracy.²⁰² Nevertheless, although there have been no successful horizontal price-fixing judgments, a number of claims have been lodged²⁰³ and, very recently, the vitamins class action was settled.²⁰⁴

1 The Australian Legislative Scheme

One clear difference between Australian competition law and the competition law of the US and the EU is that Australia has a more unified system.

The substantive provisions prohibiting anti-competitive conduct are found in Part IV of the *TPA*. Section 45(2)(b)(i) prohibits a corporation from giving effect

Obligations ('Rome II'), COM(2006) 83 final (2006). See also *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, opened for signature 16 September 1988, 1659 UNTS 202, art 5(3) (entered into force 1 January 1992) ('*Lugano Convention*') which covers non-EU European states. In *Provimi* [2003] 2 All ER (Comm) 683, the High Court of Justice gave a broad interpretation to these conventions. Aikens J accepted that UK courts had jurisdiction to hear a case where the anti-competitive conduct occurred outside the UK (but inside a convention country) and the injury was sustained outside the UK by a non-UK person.

²⁰⁰ See, eg, European Commission, *Green Paper*, above n 153, 10–11. See also Henneberry, above n 159, 12.

²⁰¹ See European Commission, *Green Paper*, above n 153; European Commission, *Commission Staff Working Paper*, above n 153. Jurisdiction in torts cases is also the subject of an European Commission proposal: see European Commission, *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ('Rome II')*, COM(2003) 427 final (2003).

²⁰² For a discussion on the reasons for this, see Corones, above n 21, 374; Smith, above n 21, 100–2; Round, above n 12, 253. The decided damages cases have involved resale price maintenance, exclusive dealing and abuse of market power: see *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509 and the appeal in *Simpson Ltd v Hubbards Pty Ltd* (1982) 44 ALR 695; *Parrys Department Store (WA) Pty Ltd v Simpson Ltd* (1983) 5 ATPR ¶40-393; *Cool & Sons Pty Ltd v O'Brien Glass Industries Ltd* (1981) 40 ALR 88; affd (1983) 48 ALR 625; *Taprobane Tours WA Pty Ltd v Singapore Airlines Ltd* (1990) 95 ALR 405; revd (1991) 33 FCR 158. For a discussion on these cases, see Corones at 385–7. For an economist's perspective on some of these cases, see Round at 253–8.

²⁰³ *City of the Gold Coast v Pioneer Concrete (Old) Pty Ltd* (1998) 157 ALR 135; *Queensland v Pioneer Concrete (Old) Pty Ltd* (1999) 21 ATPR ¶41-691; *Energex Ltd v Alstom Australia Ltd* (2004) 24 ATPR(Digest) ¶46-251; *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1. The most recent claim is against Amcor Ltd: see Amcor Ltd, above n 22, 1.

²⁰⁴ See Davis, above n 22.

to a contract, arrangement or understanding that has the purpose or effect of substantially lessening competition.²⁰⁵ Section 45A(1) deems competition to have been substantially lessened where a contract, arrangement or understanding is between firms at least two of whom are in competition, and the purpose or effect of the contract, arrangement or understanding is to fix, maintain or control the price of a product. In other words, the contract, arrangement or understanding is deemed to be in breach of s 45(2)(b)(ii).

Sanctions and remedial provisions are found in Part VI of the *TPA*. According to s 82, a person who suffers loss or damages by conduct done in contravention of a provision of Part IV of the *TPA* — including s 45(2)(b)(ii) — is entitled to recover the amount of the loss or damage.

Pursuant to s 87(1), if

the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person ... in contravention of a provision of Part IV, ... the Court may ... make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention ... if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

This includes an order ‘directing the person who engaged in the conduct ... to pay to the person who suffered the loss or damage the amount of the loss or damage’.²⁰⁶

For constitutional reasons the *TPA* is largely expressed to apply to trading, financial and foreign corporations.²⁰⁷ However, the *TPA* is given extended application by the operation of ss 5–6.²⁰⁸ Despite this extended application there are some commercial enterprises that are not covered by the anti-competitive provisions contained in Part IV of the *TPA*. These commercial enterprises, however, are subject to state laws,²⁰⁹ which replicate the competition provisions of the *TPA* except that, instead of being limited to corporations, they apply to ‘persons’ — this covers all commercial entities. The state laws are specifically made subject to Commonwealth administrative law.²¹⁰ Exclusive administrative authority is vested in the ACCC.²¹¹ The intention is to create a uniform system of competition law in Australia.²¹²

²⁰⁵ Section 45(2)(a)(ii) prohibits *making* contracts, arrangements or understandings that have the purpose or likely effect of substantially lessening competition. However, the mere making of such agreements is not likely to lead to compensatable losses.

²⁰⁶ *TPA* s 87(2)(d).

²⁰⁷ *TPA* s 4. Section 51(xx) of the *Australian Constitution* enables the Commonwealth to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

²⁰⁸ Section 5 extends the provisions of pt IV to certain extraterritorial conduct. Section 6 extends pt IV to the activities of persons engaged in constitutional trade and commerce.

²⁰⁹ See, eg, *Competition Policy Reform (New South Wales) Act 1995* (NSW).

²¹⁰ See, eg, *Competition Policy Reform (New South Wales) Act 1995* (NSW) s 30.

²¹¹ See, eg, *Competition Policy Reform (New South Wales) Act 1995* (NSW) ss 32–3.

²¹² *TPA* s 150B. See also *Competition Policy Reform (New South Wales) Act 1995* (NSW) s 18: ‘The object of this Part is to help ensure that the Competition Codes of the participating jurisdictions are administered on a uniform basis, in the same way as if those Codes constituted a single law of the Commonwealth.’ Complete uniformity, however, is not possible because of the constitu-

Uniformity means that Australia does not have to face the problems of sovereignty and diversity that confront Europe, nor the federal–state problems that continue to beset US antitrust enforcement.²¹³ Although these problems generally relate to procedural rather than substantive matters, they can have significant effects on the efficacy and efficiency of competition law enforcement. A relevant example is class actions. Class actions are important, especially where indirect purchasers (including consumers) are permitted to claim damages. In the US and Europe, a multitude of rules govern the availability and application of class actions. In Australia, uniform rules apply for the purposes of actions under the *TPA*.²¹⁴

2 Causation, Passing-On and the Indirect Purchaser

As noted above, under s 82, a person who suffers loss or damages by conduct contravening a provision of Part IV is entitled to recover the amount of the loss or damage suffered. Under s 87 the applicant can claim for loss or damage suffered by conduct of another person which contravenes a provision of Part IV. What, then, do these sections mean for causation, passing-on, and the indirect purchaser?

(a) Causation

Under both ss 82 and 87, the onus is on the applicant to establish the necessary causal connection between the unlawful conduct and the loss. Clearly, in the case of a price-fixing cartel, the loss or damage must be that which results from the unlawful price-fixing. Loss or damage which does not result from such conduct is not compensatable.

The unlawful conduct need not be the only cause, but it must be an operative cause in the sense of having materially contributed to the loss or damage.²¹⁵ Sections 82 and 87 do not import notions of proportionate liability.²¹⁶ Thus,

tional lacunae and the High Court's decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. In that case, the High Court held that ch III of the *Australian Constitution* contained an implied prohibition against the vesting of state judicial power in Commonwealth courts. This means that there are certain cases that must be heard in state courts. This is unlikely to affect the application of the substantive provisions of the *TPA*. The real importance might lie in the use of state procedural rules which are not consistent with the federal rules.

²¹³ For discussion of the US situation, see above nn 122–5 and accompanying text. For discussion of the European situation, see above n 187 and accompanying text.

²¹⁴ The class action provisions are found in pt IVA of the *Federal Court of Australia Act 1976* (Cth). On class actions, see generally Vince Morabito, 'An Australian Perspective on Class Action Settlements' (2006) 69 *Modern Law Review* 347. It should be noted that representative proceedings are available under each state's supreme court rules. These rules, although similar, are not identical: see *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 ALR 58, 67 (Gummow, Hayne and Crennan JJ). On representative proceedings in the states, see generally Damian Grave and Ken Adams, *Class Actions in Australia* (2005) app 8. If state representative proceedings are used for competition actions, Australia may be subjected to some of the problems experienced in the US and Europe.

²¹⁵ *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *Henville v Walker* (2001) 206 CLR 459. See generally the cases cited in Ray Steinwall, *Annotated Trade Practices Act* (2006) 484–5. See also Gail Pearson, 'The Pregnant Preposition and the Definite and Indefinite Article: Sections 82 and 87 of the *TPA* and Damages for the Whole or the Part of the Loss' (2003) 11 *Competition & Consumer Law Journal* 163, 163.

²¹⁶ *Henville v Walker* (2001) 206 CLR 459, 505 (McHugh J), 507 (Gummow J), 509 (Hayne J); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 117 (Gleeson CJ), 130 (Gaudron, Gummow and Hayne JJ), 132 (McHugh J).

damage which results from concurrent causes, one of which is the unlawful act, may be claimable in full.²¹⁷ In *Henville v Walker*, a majority of the High Court held that carelessness on the applicant's part did not warrant apportioning the damages, provided that the defendant's conduct was at least a cause of the loss.²¹⁸

Apportionment can occur, however, where the circumstances are such that it is possible to conclude that a discrete (identifiable) part of the claimed loss was not caused by the unlawful conduct.²¹⁹ Where a cause other than the unlawful act is a supervening cause in the sense that it breaks the causal nexus between the unlawful act and the loss or damage, the applicant will not be entitled to compensation for the loss or damage.²²⁰

(b) *Passing-On*

Does passing-on apply in Australia? As previously discussed, a defence of passing-on was specifically rejected by the US Supreme Court in *Hanover Shoe*.²²¹ The position in EU Member States is unclear, although it has been argued that a passing-on defence may undermine the Member States' obligation to comply with the EU principle of effectiveness.²²² In keeping with this suggestion, Germany has recently adopted the US position.²²³

In Australia, it is doubtful that the *Hanover Shoe* approach to passing-on has any application. Sections 82 and 87 require the applicant to establish the loss or damage it has suffered. The loss or damage claimed must arise as a result of the contravention; it must be caused by the contravention.²²⁴ In contrast, the whole purpose of the *Hanover Shoe* approach to passing-on is to enable the direct purchaser plaintiff to claim all loss or damage suffered as a result of the cartel, whether suffered by the plaintiff or not. There is no precedent for basing an

²¹⁷ See *Henville v Walker* (2001) 206 CLR 459; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109. Part VIA of the *TPA* now contains provisions enabling the courts to apportion losses. These provisions, however, only apply to losses caused by conduct in breach of s 52. The applicant may be under some obligation to mitigate its losses, although it is not clear how this operates in practice: see *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 413–15 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509, a case involving damages for resale price maintenance, where the duty to mitigate was accepted in principle although it had no application on the facts of the case.

²¹⁸ (2001) 206 CLR 459, 505 (McHugh J), 507 (Gummow J), 509 (Hayne J). Only Kirby J in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 160–1, suggested a more narrow interpretation. His Honour suggested that *Henville v Walker* stood for nothing more than the proposition that the 'claimant's own conduct in under-estimating the cost of a development', whilst a sound basis for a reduction in damages, did not constitute 'an intervening act ... that snapped the chain of causation' and thereby reduced the damages to zero.

²¹⁹ See *Henville v Walker* (2001) 206 CLR 459, 474 (McHugh J), 507 (Gummow J), 510 (Hayne J). See also *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 119–20 (Gleeson CJ), 130 (Gaudron, Gummow and Hayne JJ), 137 (McHugh J), 177–8 (Callinan J).

²²⁰ See, eg, *Henville v Walker* (2001) 206 CLR 459, 493 (McHugh J), 507 (Gummow J), 510 (Hayne J).

²²¹ 392 US 481 (1968). See above Part III(B)(3)(c).

²²² See Jones and Beard, above n 190, 254–5.

²²³ See above n 189 and accompanying text.

²²⁴ *Marks v GIO Australia Ltd* (1998) 196 CLR 494.

award under ss 82 or 87 on anything but principles of compensation.²²⁵ There is no scope for awarding an account of profits (a windfall gain to the applicant)²²⁶ or exemplary damages.²²⁷ Although most of the jurisprudence informing s 82 has been in respect of misleading or deceptive conduct, there is no reason to believe that the courts will or should deviate from the principles already developed.²²⁸

The purpose of allowing applicants to seek damages under ss 82 and 87 for breaches of Part IV may include a deterrence goal. However, this does not mean that in calculating damages under those sections a court is entitled to have regard to matters that are non-compensatory. In particular, there is no precedent for permitting an applicant to be awarded windfall gains, which is the very essence of the US passing-on rule.

(c) *The Indirect Purchaser*

As the law stands there is no room for applying the indirect purchaser rule in Australia. Sections 82 and 87 make it clear that a person injured by conduct in contravention of Part IV of the *TPA* has an action. Thus, if indirect purchasers can establish injury and the necessary causal connection between the injury and the unlawful conduct, they have an action. There is simply no legislative scope for the kind of judicial policymaking that *Hanover Shoe* and *Illinois Brick* represent. Although US antitrust law is statutory, the broad nature of the *Sherman Act*²²⁹ and the clear judicial need to confine its scope has meant that US courts have played a role in antitrust development that is similar to the judiciary's role in the process of common law development. The same cannot be said of the remedial aspects of Australian competition law.²³⁰

Therefore, if the indirect purchaser rule is to be introduced in Australia, it must be by legislative change. The question then arises, should the indirect purchaser rule be introduced to Australian competition law by Parliament? The arguments are largely against such a development. It should be recalled that the rule is controversial in the US. Indeed, as noted above, many US states have acted to ensure that *Illinois Brick* has no effect under state antitrust law.²³¹ Further, the reasons upon which the Supreme Court relied in *Illinois Brick*, even assuming

²²⁵ Ibid 501 (Gaudron J). See also *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* (2001) 109 FCR 528, 546 (Gyles J).

²²⁶ *Marks v GIO Australia Ltd* (1998) 196 CLR 494, 501 (Gaudron J).

²²⁷ *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251, 262 (French J); *Marks v GIO Australia Ltd* (1998) 196 CLR 494, 501 (Gaudron J); *Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453, 481 (Wilcox J).

²²⁸ See *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 115–16 (Gleeson CJ), 125 (Gaudron, Gummow and Hayne JJ), where it was made clear that in construing ss 82 and 87, their Honours were mindful of the fact that those provisions applied to conduct that extended well beyond misleading and deceptive conduct.

²²⁹ 15 USC §§ 1–7 (2000 & Supp IV, 2004).

²³⁰ Australian courts have been given considerable room to interpret the ambit of some of the substantive provisions under pt IV. However, this is because those provisions rely on broad notions such as arrangement or understanding, substantial lessening of competition, substantial degree of market power and taking advantage of power.

²³¹ See above n 124 and accompanying text.

that those reasons were compelling in the US context,²³² do not have the same cogency in Australia for a number of reasons.

First, as just discussed, there is no Australian passing-on rule similar to *Hanover Shoe*. Second, while the costs and complexities of tracing overcharges through a chain of distributors and consumers are relevant to a damages claim in Australia, this is the kind of enquiry which courts are used to. It is suggested that if this is the only justification for a US indirect purchaser rule, it is not sufficient. Third, in Australia there are no treble, punitive or exemplary damages under *TPA* ss 82 or 87.²³³ Thus, there is no danger of the kind of multiple liability that concerned the US Supreme Court.²³⁴ Fourth, the Supreme Court in *Illinois Brick* was also motivated by a reluctance to reduce incentives for direct purchasers to sue antitrust violators for damages. There is some force in this argument — the more that anti-competitive harm is dispersed across a range of victims, direct and indirect, the less incentive any given victim has to bring an action. Although this hurdle may be partially overcome by class actions, it must be noted that class actions are difficult to mount successfully.²³⁵ While many countries have reached the conclusion that private enforcement is necessary to ensure an effective competition regime, there are other ways to protect incentives. Public sanctions — including increased fines and jail sentences — are a better way of achieving this than handing a windfall gain to some victims while depriving others of their right to compensation.

3 Measuring Damages

Under ss 82 and 87, the applicant is entitled to recover *the amount* of the loss or damage. In economic terms the victim ‘should be compensated to the extent that it is indifferent between the amount of damages and the value to it of its lost opportunities to make a profit’.²³⁶

How is the amount to be assessed? There is nothing in ss 82 or 87 to suggest that loss or damage must be assessed according to common law or equitable principles.²³⁷ In *Marks v GIO Australia Ltd*, a case involving damages for misleading or deceptive conduct, the High Court held that in determining the amount of damages it was necessary to compare the applicant’s actual position with the position in which the applicant would have been but for the breach.²³⁸ This is similar to the tort approach to calculating damages. Indeed, in practice,

²³² See above Part III(B)(3)(d).

²³³ Treble damages, however, were available under legislation which preceded the *TPA*: see *Australian Industries Preservation Act 1906* (Cth) s 11.

²³⁴ See above n 119 and accompanying text.

²³⁵ See generally Morabito, above n 214. Class actions are clearly important for the operation of s 82 but a full discussion of the issue is beyond the scope of this paper. For further discussion, see generally Bernard Murphy and Camille Cameron, ‘Access to Justice and the Evolution of Class Action Litigation in Australia’ (2006) 30 *Melbourne University Law Review* 399.

²³⁶ See Round, above n 12, 248.

²³⁷ *Marks v GIO Australia Ltd* (1998) 196 CLR 494, 503–4 (Gaudron J), 510 (McHugh, Hayne and Callinan JJ), 528–9 (Gummow J), 549–50 (Kirby J).

²³⁸ *Ibid* 503–4 (Gaudron J), 510 (McHugh, Hayne and Callinan JJ), 528–9 (Gummow J), 549–50 (Kirby J).

courts — although not required to use it — regularly adopt the tort approach when assessing damages for misleading or deceptive conduct.

For example, in *Hubbards Pty Ltd v Simpson Ltd*,²³⁹ Lockhart J found the tort approach a useful analogue when assessing damages for resale price maintenance:

the correct way to consider the assessment of damages in this case is to compare the position in which Hubbards might have been expected to be if the contravention of s 48 had not occurred with the position it was in as a result of the contravention.²⁴⁰

As with damages under contract and tort, the applicant is probably under an obligation to mitigate its losses.²⁴¹ However, the possibility of mitigation depends on awareness of the contravening conduct. In the case of price-fixing cartels, this means that the obligation to mitigate only arises after the cartel is revealed. Generally, therefore, mitigation is not likely to be a significant issue in price-fixing cases.

The principles of measurement are easier to state than to apply in practice. As described previously, in the US there are at least two ways of measuring the applicant's loss in horizontal price-fixing cases.²⁴² The first method is to calculate the applicant's lost profits flowing from the unlawful collusion.²⁴³ The second and more popular — though to economists, less satisfactory — method is to calculate the amount of the overcharge: that is, the difference between the price actually paid by the buyer and the price that would have been paid but for the collusion (adjusted to account for the amount of the higher price that the buyer was able to pass on to its buyers).²⁴⁴

Calculating the overcharge is the more popular method in the US for two reasons. First, it is forensically simpler.²⁴⁵ The main problem is determining

²³⁹ (1982) 41 ALR 509.

²⁴⁰ *Ibid* 517–18. Lockhart J found support for his approach in two US cases: *Eastern Fireproofing Co Inc v United States Gypsum Co*, 1970 Trade Cas P 73 342 (DC Mass, 1970); *Locklin v Day-Glo Color Corp*, 429 F 2d 873 (1970). See also *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1983) 48 ALR 625, 637 (Fox J).

²⁴¹ *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 413–15 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509, where the duty to mitigate was accepted in principle though it had no application on the facts of the case. On the theoretical importance of mitigation, see generally William B Tye and Stephen H Kalos, 'Antitrust Damages from Lost Opportunities' (1996) 41 *Antitrust Bulletin* 637.

²⁴² See above Part III(B)(4).

²⁴³ Round, above n 12, 250.

²⁴⁴ *Ibid*, where Round sums up the measurement problem as follows:

should a plaintiff be compensated by multiplying the volume of its purchases during the period in which prices were fixed by the amount of the price-fix — that is, by the difference between the collusive price and the competitive price, after allowing for the firm's ability to pass on the higher prices (this method does not really measure the true damages), or should compensation be determined by the consequential damages caused by the breach, namely a loss of profits? The first method is relatively easy to undertake; but the second, which looks at the economic consequences, is the theoretically more relevant of the two for determining the quantum of damages. However, it needs to filter out the impact of other changing factors on profits, and it can be attacked in many ways in adversarial proceedings.

²⁴⁵ *Ibid*.

what the ‘but for’ price would have been.²⁴⁶ The lost profits method is more complex because it requires the court to analyse the impact of all factors that affect profits, not just the supply price.²⁴⁷ These factors can be quite extensive and their effect in the applicant’s final profit can be difficult to assess.²⁴⁸ This is particularly true where the unlawful conduct occurred some time ago and over an extended period.²⁴⁹ It is the nature of price-fixing cartels that both these factors are likely to apply. Indeed, cartels often operate for a considerable period of time before being exposed.²⁵⁰ Second, the overcharge method is more popular because it often results in a greater measure of loss for the applicant buyer than the lost profits method.²⁵¹

Do ss 82 or 87 permit Australian courts to choose between the two methods of calculation? In the US, the overcharge method is specifically endorsed by statute.²⁵² This is not the case in Australia. Australian courts must apply the approach that is most likely to produce a measurement of the actual loss or damage suffered by the applicant. Adopting tort terminology, this means putting the applicant in the position in which they would have been if the contravention had not occurred.²⁵³ This is effectively the lost profits approach.

Lost profits may be measured *ex ante* or *ex post*.²⁵⁴ The *ex ante* method measures the opportunity lost by the circumstances prevailing as at the time of the contravention. The *ex post* or ‘hindsight’ method measures the opportunity lost by the circumstances prevailing as at the time of trial. Although most economists lean in theory towards the *ex ante* approach, the difficulties involved are enormous.²⁵⁵ The *ex post* approach is more likely to be adopted by the courts, particularly in price-fixing cases.²⁵⁶

²⁴⁶ See Areeda, Hovenkamp and Blair, above n 99, 480–1.

²⁴⁷ Round, above n 12, 250.

²⁴⁸ Areeda, Hovenkamp and Blair, above n 99, 502.

²⁴⁹ Round, above n 12, 251.

²⁵⁰ See *Energex Ltd v Alstom Australia Ltd* (2005) 225 ALR 504 (*‘Energex’*), where it was alleged that the cartel dated back to 1982 and was only discovered in the 1990s. This characteristic of cartels has given rise to considerable discussion about limitation periods. Section 82(2) provides that an action under s 82 ‘may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued’. The period was originally three years, but was amended in 2001 by the *Trade Practices Amendment Act [No 1] 2001* (Cth). The critical issue for the purposes of s 82(2) is to determine when the cause of action accrued. As most cases have involved misleading or deceptive conduct, it is natural to seek answers from those cases. Indeed, there are obvious similarities between misleading or deceptive conduct and cartel activities. Both involve an element that may be described as ‘covering up’ the truth. In both cases the applicant is unaware that they may have an action until the truth is revealed. Nevertheless, despite these similarities, the Full Court of the Federal Court in *Energex* warned against simple reliance on misleading or deceptive conduct cases. According to the Court, ‘[t]he problems of applying s 82 to contraventions of Pt IV are not simply resolved by consideration of cases relating to its application in the context of Pt V’: at 523 (French, Hely and Merkel JJ).

²⁵¹ Areeda, Hovenkamp and Blair, above n 99, 522. As Round, above n 12, 250–1, demonstrates, the overcharge method, however, does not always result in a greater measure of loss for the applicant buyer.

²⁵² See above n 142 and accompanying text.

²⁵³ See, eg, Round, above n 12, 251.

²⁵⁴ For a description of these two methods, see generally Tye and Kalos, above n 241, 657–64.

²⁵⁵ See Round, above n 12, 252–3.

²⁵⁶ *Ibid* 252.

Rhonda L Smith has examined some of the problems of measuring damages in a price-fixing case by looking at the Queensland ready-mixed concrete case.²⁵⁷ It is clear that the problems extend well beyond simply estimating the likely price in the absence of the contravening conduct — a difficult task in itself. Other factors relevant to the enquiry which require calculation include:

- identification of the beginning and end of the cartel;²⁵⁸
- the quantity of product affected by the unlawful conduct, as not all products purchased during the cartel period may have been affected by the contravening conduct;²⁵⁹
- where the cartel extended over a period of time, any changes to the product, market structure (for example, new entrants), cost of inputs and regulatory conditions;
- the extent to which the cartel price affected demand; and
- the extent to which the plaintiff has passed on the higher prices to its buyers.

Lost profits could include losses other than those directly related to the overcharge, for instance, the value of any provable lost commercial opportunity.²⁶⁰ In the case of a retailer, it could also include lost sales on products other than the product which is subject to price-fixing.²⁶¹

These problems expand enormously if the applicant is an indirect purchaser. For example, indirect purchasers will have to establish not only the fact and amount of any overcharge to the direct purchaser, but also that the overcharge, or some portion of it, was passed on to the indirect purchaser.²⁶²

IV THE RELATIONSHIP BETWEEN DAMAGES AND THE VIABILITY OF LENIENCY PROGRAMMES

Damages actions are only one part of an overall scheme of competition law enforcement. Therefore, the interaction between damages and other elements of an enforcement regime is important. In particular, the relationship between damages and leniency programmes needs to be understood. Being offered leniency does not make the cartel participant immune from a claim for private damages in the US.²⁶³ Therefore, the possibility of a damages claim affects the

²⁵⁷ See Smith, above n 21, 103–8.

²⁵⁸ See generally Areeda, Hovenkamp and Blair, above n 99, 534.

²⁵⁹ See Smith, above n 21, 106. For example, the cartel may have been subject to occasions of cheating by one or more of the participants.

²⁶⁰ The High Court has recognised that the loss of a commercial opportunity may have a present value and therefore be compensatable: see *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 355–6 (Mason CJ, Dawson, Toohey and Gaudron JJ).

²⁶¹ See *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509, 518 (Lockhart J).

²⁶² *City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* (1998) 157 ALR 135.

²⁶³ For example, in 2003, Mitsui, a Japanese company, 'was held liable by a jury in the District of Columbia for \$147 million in treble damages as a result of a cartel that its US subsidiary had exposed to the government and received amnesty': Baker, 'Revisiting History', above n 87, 401, who observes how treble damages can undermine an immunity programme. Amcor Ltd recently discovered how private damages can undermine an immunity programme in Australia: see *Amcor Ltd*, above n 22.

cost-benefit calculus upon which leniency programmes are built. If applying for leniency exposes the cartel participant to a damages claim (particularly a treble damages claim as in the US), the participant may calculate that the costs of seeking leniency (loss of cartel profits plus exposure to damages claim) outweigh the benefits (immunity from a fine).

Consequently, the possibility of damages — particularly treble damages — may actually reduce incentives for firms to avail themselves of a leniency programme. For this reason, the US DoJ has argued that jail sentences for executives are a necessary part of any anti-cartel regulatory regime. Purely from the perspective of optimising incentives, jail sentences make sense in a system that allows for treble damages, excludes the defence of ‘passing-on’ and provides for a costs regime that favours plaintiffs.²⁶⁴ However, many countries object to jail sentences for cartel offences. Consequently, the US treble damages regime has the capacity to upset the incentives for firms to use leniency programmes in countries other than the US. Given that leniency programmes have been the main driver in exposing most of the large, international cartels that have come to light so far,²⁶⁵ private damages may actually retard both domestic and international anti-cartel enforcement.

To counter the deterrent effect of US treble damages claims on the use of leniency programmes, the European Commission adopted a policy of permitting applications for its leniency programme to be made orally.²⁶⁶ It was hoped that in this way applicants for EC leniency would be protected against US discovery rules in the event of a damages suit in the US. However, because the European Commission includes evidence taken from a leniency application in its statement of objections and decision, material supplied as a part of a leniency application is probably still discoverable in the US.²⁶⁷

The US has also acted to address this problem. In order to preserve incentives for cartel members to utilise the leniency programme, the US Congress recently ‘detrubled’ the damages to be awarded against a defendant to a private plaintiff if the defendant is granted amnesty and provides ‘satisfactory cooperation’ to the plaintiff in its efforts to recover damages from the other cartel members.²⁶⁸ The defendant is also relieved of joint and several liability.

V CONCLUSION

There is widespread recognition that hard-core cartels do considerable economic harm and should be eliminated. However, this is not easy, as cartels by

²⁶⁴ Under US civil rules each party normally bears its own costs. However, a successful plaintiff in an antitrust action is entitled to have its costs paid by the defendant: 15 USC § 15(a) (2000 & Supp IV, 2004). A successful defendant, on the other hand, does not have this right.

²⁶⁵ See Krauze and Mulcahy, above n 24, 270–1.

²⁶⁶ See Bertus Van Barlingen, ‘The European Commission’s 2002 Leniency Notice after One Year of Operation’ (2003) 2 *EC Competition Policy Newsletter* 16, 19–20. Australia has now included a similar provision in its leniency policy: see ACCC, *Interpretation Guidelines*, above n 28, 5.

²⁶⁷ The significance of this has diminished slightly since the US Supreme Court decision in *Empagran*, 542 US 155 (2004). See above Part III(B)(2).

²⁶⁸ *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub L No 108-237, § 213, 118 Stat 665, 667. See R Hewitt Pate, ‘International Anti-Cartel Enforcement’ (Speech delivered at the 2004 ICN Cartels Workshop, Sydney, 21 November 2004).

their very nature are secretive. Therefore, an effective anti-cartel regime depends on a combination of sound investigatory tools and appropriate sanctions and remedies. In this way, the disincentives to cartelise are optimised.

The US has always considered private damages actions to be a vital part of an effective regime of sanctions and remedies. The US Congress and the US courts have developed a range of rules that affect a private damages claim, including, inter alia, treble damages, the indirect purchaser rule and the rejection of a 'passing-on' defence. Nevertheless, despite the US's long experience with damages claims, many of these issues remain controversial.

The European Commission has adopted a similar attitude to private damages, but due to a variety of reasons — not the least of which is that the *EC Treaty* makes no provision for private damages actions in European courts — damages actions in Europe have been few in number. However, this appears to be changing. In *Courage*, the European Court of Justice ruled that national courts must provide a remedy in damages for breaches of arts 81–2 of the *EC Treaty*.²⁶⁹ The European Commission is currently conducting an inquiry into the whole issue of damages actions.²⁷⁰

In Australia, the *TPA* provides for damages for breaches of Part IV. To date, however, there have been very few decisions on the issue of damages and none for horizontal price-fixing. To a large extent, this is explained by the complexities (and costs) that attend establishing a claim for damages for price-fixing.

The availability of class actions seems to be driving an increased interest in damages in Australia. Hard-core cartels are an obvious target because of the size of the harm they can inflict and the relative simplicity of establishing a breach of the per se provisions of the *TPA*.²⁷¹ Although establishing causation will always be a complex task, the nature of the class action, together with the availability of litigation funding, provides sufficient incentives to make an action for damages attractive. Indeed, the complexity and often substantial costs of litigating the causation issue works in favour of plaintiffs by pushing defendants to settle rather than run the risk of an uncertain award, coupled with the certainty of large costs.

This may be a satisfactory outcome when viewed from a compensatory perspective. Indeed, at first glance, it also seems to increase the disincentives to engage in cartel conduct; this has always been the prime reason in the US for treble damages. However, cartel enforcement is a complicated affair and the alignment of incentives is not straightforward. The secrecy that surrounds the formation of most cartels means that leniency programmes have become the major weapon in the arsenal of the competition authority. While increased exposure to claims for damages may theoretically enhance disincentives to

²⁶⁹ (C-453/99) [2001] ECR I-6297.

²⁷⁰ See above n 201 and accompanying text.

²⁷¹ There is very little, if any, economic analysis required to prove a horizontal price-fixing agreement or an agreement that contains an exclusionary provision. In the US, Justice Ginsburg, Chief Judge of the Court of Appeals for the District of Columbia Circuit, has observed that there is a very positive relationship between an offence being per se unlawful and the level of private litigation: Justice Douglas H Ginsburg, 'Comparing Antitrust Enforcement in the United States and Europe' (2005) 1 *Journal of Competition Law and Economics* 427, 437–8.

cartelise, it will also reduce incentives to apply for leniency. This may produce the perverse result that cartel harm actually increases. This has driven recent changes in the US where damages have now been detrebled for successful amnesty applicants. Care must be taken in Australia to ensure that in the process of improving competition for cartel victims, the whole anti-cartel apparatus is not actually weakened. This is essentially an empirical exercise that time will resolve. There are no easy answers to be had from overseas.