

# PRIVATE ENFORCEMENT OF COMPETITION LAW IN AUSTRALIA — INCHING FORWARDS?

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*The recently concluded independent review of Australian competition policy, law and institutions led by Professor Ian Harper examined proposals in relation to private enforcement of the competition rules. That private actions for damages were even on the review agenda is a positive development in an area that has long escaped the attention of policymakers and enforcement leaders in this country. However, the Harper recommendations for private enforcement-related reforms are sparse and, in general terms, the Harper Panel's treatment of the topic fails to grapple with many of the major challenges facing private litigants — especially small businesses and consumers. This article is a critical analysis of the Harper Panel's consideration of private competition law enforcement. It explains the significant impediments hampering private litigation in this field, critically analyses the Harper Panel's examination of the issues, and compares the approaches that have been taken in overseas jurisdictions — Europe particularly. It concludes that in the absence of a more concerted effort to confront and overcome the obstacles, the potential of private enforcement to compensate for past harm and deter future harm from anti-competitive conduct is likely to remain largely untapped.*

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## I INTRODUCTION

Australia lags behind other major jurisdictions, the United States and Europe particularly, in promoting the private enforcement of competition law. This is so despite statutory provision for private actions since the *Trade Practices Act 1974* (Cth) ('TPA') — now the *Competition and Consumer Act 2010* (Cth) ('CCA')<sup>1</sup> — took effect in 1975 and the availability of a general class action scheme under the *Federal Court of Australia Act 1976* (Cth) ('FCAA') since 1992.<sup>2</sup>

In Australia, competition law enforcement has been dominated by the Australian Competition and Consumer Commission ('ACCC'). Proceedings brought by the ACCC in respect of breaches of the competition provisions of the CCA have substantially outnumbered proceedings by private parties<sup>3</sup> — there have been only five class actions (representing 1.5 per cent of all class actions brought between 1992 and 2014)<sup>4</sup> — and law reform efforts to

<sup>1</sup> See CCA s 82.

<sup>2</sup> This scheme is provided for in pt IVA of the FCAA.

<sup>3</sup> A review of the Australian Trade Practices Reporter series (renamed the Australian Competition and Consumer Law Reporter in 2011) identified 106 proceedings involving alleged contraventions of the competition provisions of the TPA and CCA over the period 2000–14 (inclusive). Of these, only 28 (approximately 26 per cent) were brought by private applicants (this figure does not include proceedings that were settled; and nor, of course, does it include instances in which 'compensation' was negotiated without the need to bring proceedings). Cf Independent Committee of Inquiry into National Competition Policy, *National Competition Policy* (1993) 335 ('Hilmer Report'), where the Hilmer Report predicted that the competition rules would be enforced by private actions in 'most cases'.

<sup>4</sup> Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: Third Report — Class Action Facts and Figures — Five Years Later' (Research Report, Australian Research Council, November 2014) 10–11. According to Morabito's study, between 1992 and 2014 approximately 18.2 per cent of the 329 class actions brought under pt IVA of the FCAA were product liability cases followed by industrial and workplace claims (15.5 per cent) whilst investor cases constituted 14.2 per cent of all class actions: at 10. Since 2003, there has been a marked increase in shareholder claims (22.1 per cent), as well as a growing number of claims relating to impugned investment advice (24.1 per cent) and consumer protection (13.4 per

bolster detection and deterrence have focused primarily on a model of public enforcement.<sup>5</sup>

At the same time, high-profile suits brought by the ACCC in recent years have been followed by private proceedings, four of which have been class actions.<sup>6</sup> This in turn has produced debate about the need for more private enforcement of Australian competition law, the challenges facing private litigants (small businesses and consumers in particular) and hurdles to such litigation that are erected or exacerbated by the public enforcement system. In large part this debate has been led by academics and practitioners.<sup>7</sup> Govern-

cent): at 10–12. More recent reports indicate that the number of class actions, and total associated payouts by settlement, are continuing to rise; however, this general trend is not reflected in the area of alleged breaches of the competition provisions of the CCA: see King & Wood Mallesons, 'The Review: Class Actions in Australia — 2014/2015' (Report, 2015) 6.

<sup>5</sup> In recent years such efforts have seen a significant increase in the maxima applicable to corporate penalties (pursuant to the *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth) sch 9 pt 1) and the introduction of cartel offences attracting a maximum jail sentence of 10 years for individual defendants (pursuant to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) s 17).

<sup>6</sup> These actions related to cartels in the cardboard packaging, rubber chemical and air cargo industries and have been settled. In relation to cardboard packaging: *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] ATPR ¶42-361; in relation to rubber chemicals: *Wright Rubber Products Pty Ltd v Bayer AG [No 3]* [2011] FCA 1172 (20 October 2011); in relation to air cargo: *De Brett Seafood Pty Ltd v Qantas Airways Ltd [No 7]* [2015] FCA 979 (8 October 2015). There have been only two other class actions relating to anti-competitive (cartel) conduct. The first, *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* (Unreported, Federal Court of Australia, Drummond J, 9 July 1997), was discontinued as a class action proceeding by court order. The second, *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, related to animal vitamins, and settlement was approved on 27 October 2006. For other private suits that have fuelled the private enforcement debate in Australia in recent years see *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137; *Norcast Sárl v Bradken Ltd [No 2]* (2013) 219 FCR 14.

<sup>7</sup> See, eg, Caron Beaton-Wells and Kathryn Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35 *University of New South Wales Law Journal* 648, 649 n 6. See also Sarah Lynch, 'The Case for Increased Private Enforcement of Cartel Laws in Australia' (2011) 39 *Australian Business Law Review* 385; Kate Watts and Tova Gordon, 'Cartel Class Actions: Recent Developments in Australia' (2010) 18 *Trade Practices Law Journal* 81; Brooke Dellavedova, Peta Stevenson and Laura Guttuso, 'Private Enforcement in Australia' [2014] (3) *International Civil Redress Bulletin* 2; Laura Guttuso, 'A View of the Macrocosm of International Cartel Enforcement: How the Boomerang of Cross-Border Disclosure Springs Back to Its Domestic Context' (2015) 43 *Australian Business Law Review* 27.

ment has shown muted interest,<sup>8</sup> and, in contrast to the leadership of its overseas counterparts (in Europe especially), the ACCC has been passive in the debate generally. Until very recently, it has also been resistant to any specific pro-private litigation measures that it has interpreted as threatening the efficacy of its enforcement program.<sup>9</sup>

<sup>8</sup> In 2010 the author held a roundtable of stakeholders at the University of Melbourne with the aim of thrashing out tensions between public and private modes of enforcement: Melbourne Law School, Competition Law & Economics Network, *Roundtable — Private Enforcement* (15 November 2010) The University of Melbourne <<https://apps.law.unimelb.edu.au/cfen/activities-and-media/roundtable-private-enforcement>>. Treasury and ACCC officials attended the roundtable. Subsequently in 2012 the Treasury convened a meeting of members of the Law Council of Australia (including the author) and the ACCC to discuss several aspects of private competition law enforcement, at which a representative of the Attorney-General's Department was also present. Several reform proposals were discussed; however, no follow-up action ensued.

<sup>9</sup> See ACCC, 'Compliance and Enforcement Policy' (Policy Document, February 2015) ('Compliance and Enforcement Policy'). Aside from the general statement of aims in its Compliance and Enforcement Policy, and in stark contrast to the statements made by authorities in the United States and Europe, ACCC representatives have made few public statements of policy in relation to matters of private enforcement. The subject of private enforcement is notable by its conspicuous absence from speeches by the current chairman, Rod Sims. In several speeches by former ACCC chairman, Graeme Samuel AC, a positive, albeit qualified, perspective was offered. The ACCC was said to see 'private proceedings as a legitimate and valuable avenue of redress' while also likely to 'act as a further deterrent' to cartel activity: Beaton-Wells and Tomasic, above n 7, 670–1, quoting Graeme Samuel, 'The ACCC Approach to the Detection, Investigation & Prosecution of Cartels' (Speech delivered at the Economics Society of Australia Detection of Cartels Symposium, Sydney, 28 September 2005) 21–2. However, in a different address two years later, 'competing demands' and 'tension' between ACCC enforcement and private litigation were emphasised. In particular, the potential for private follow-on litigation to discourage use of the ACCC's immunity policy was highlighted, as was the prospect of ACCC investigations (and its ability to persuade parties to cooperate generally) being undermined by requests for information from private litigants. It was made clear that in resolving these tensions, ACCC enforcement would always be given first priority. It was stated by the chairman that the ACCC would not wish to 'hinder private action against cartels': Beaton-Wells and Tomasic, above n 7, 670–1, quoting Graeme Samuel, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007) 2. However, there has been at least one instance in which it is publicly known that the ACCC sought to withhold assistance from a private litigant, refusing access to proofs of evidence it had prepared in connection with its civil penalty proceeding. The refusal attracted strong judicial criticism: *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137, 146 [32], 150 [46]–[47] (Gordon J). For a summary and discussion generally of the ACCC's record of resistance to private enforcement and inaction on compensation for victims of anti-competitive conduct to date, see Caron Beaton-Wells, 'Substance and Process in Competition Law and En-

This is surprising given that the ACCC generally prides itself on tracking closely and emulating, if not leading, international best practice in its enforcement activity. Further, in its Compliance and Enforcement Policy, it identifies one of its primary aims as being to ‘where possible ... undo the harm caused by the contravening conduct (for example, by corrective advertising or securing redress for consumers and businesses adversely affected)’.<sup>10</sup> Yet the ACCC takes almost no action to secure compensation on behalf of victims of anti-competitive conduct (despite having significant powers to do so)<sup>11</sup> and its own enforcement efforts produce results (largely in the form of pecuniary penalties) that arguably have weak deterrent effects.<sup>12</sup>

In the United States, by comparison, private actions have been seen as an essential complement to enforcement action by public authorities since the inception of competition (antitrust) laws in that jurisdiction in the late 19<sup>th</sup> century.<sup>13</sup> As the United States Supreme Court saw it, ‘the purposes of the

forcement: Why We Should Care if It’s Not Fair’, in Paul Nihoul and Tadeusz Skoczny (eds), *Procedural Fairness in Competition Proceedings* (Edward Elgar, 2015) 3.

<sup>10</sup> Compliance and Enforcement Policy, above n 9, 2.

<sup>11</sup> CCA s 87(1B); see also below n 34.

<sup>12</sup> See Beaton-Wells and Tomasic, above n 7, 657–73; Greg Houston, ‘The Public Interest in Private Enforcement’ (Paper presented at the Competition Law Conference, Sydney, 30 May 2015) 8–9.

<sup>13</sup> There is some disagreement amongst scholars as to the original intent of the United States lawmakers in 1890 in including a private right of action in the *Sherman Act*, 15 USC §§ 1–7 (2012) (*‘Sherman Act’*): see, eg, Harry First, ‘Lost in Conversation: The Compensatory Function of Antitrust Law’ (Working Paper No 10-14, New York University School of Law, April 2010) 5–16, which argued ‘that the original rationale was to ensure that the *Sherman Act* provided an effective remedy to compensate victims of antitrust violations’: Beaton-Wells and Tomasic, above n 7, 651 n 12. Cf William H Page, ‘Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury’ (1980) 47 *University of Chicago Law Review* 467, for a discussion of the legislative history as supporting a deterrence rationale. However, it is generally accepted that by the time of the passage of the *Clayton Act*, 15 USC §§ 12–27, 29 USC §§ 52–3 (2012) (*‘Clayton Act’*), the private right of action was seen as a crucial counter-balance to weak government enforcement in the early years of United States antitrust law: see Hannah L Buxbaum, ‘Private Enforcement of Competition Law in the United States — Of Optimal Deterrence and Social Costs’ in Jürgen Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer Law International, 2007) 41, 44. Private actions were treated by legislators as important to deterrence, as much as to compensation. By the 1960s, in the face of ongoing limitations on government resources and low public penalties, private litigants had been elevated by the United States Supreme Court and commentators to the status of ‘private attorneys general’: *Perma Life Mufflers Inc v International Parts Corp*, 392 US 134, 147 (Fortas J) (1968); and providing ‘a significant supplement to the limited resources avail-

antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws'.<sup>14</sup> Early and sustained recognition by the government and judiciary of the vital role played by private plaintiffs in promoting both the deterrent and compensatory functions of enforcement generated an environment conducive to private actions.<sup>15</sup> This is especially so in respect of class actions which are seen as playing an important role in the context of antitrust enforcement.<sup>16</sup> The results of this official recognition and support for private antitrust enforcement in the United States speak for themselves. Approximately 90 per cent of antitrust cases brought in the United States are initiated by private litigants,<sup>17</sup> and studies relating to litigation outcomes in international cartel cases in North America show that private settlements represent roughly 2.6 times the penalties levied by public authorities.<sup>18</sup>

ble to the Department of Justice for enforcing the antitrust laws and deterring violations': *Reiter v Sonotone Corp*, 442 US 330, 344 (Burger CJ) (1979).

<sup>14</sup> *Perma Life Mufflers Inc v International Parts Corp*, 392 US 134, 139 (Black J) (1968). See also *Fortner Enterprises Inc v United States Steel Corp*, 394 US 495, 502 (Black J) (1969); *Zenith Radio Corp v Hazeltine Research Inc*, 395 US 100, 130–1 (White J) (1969); *Pfizer Inc v India*, 434 US 308, 315 (Stewart J) (1978).

<sup>15</sup> Factors promoting private actions in the United States include the availability of treble damages; recoverability of attorneys' fees and in some circumstances, pre-judgment interest; the class action mechanism which allows plaintiffs to sue on behalf of both themselves and similarly situated absent plaintiffs (particularly its opt-out nature); the existence of an aggressive and experienced plaintiffs' Bar, and rules developed by Congress, state legislatures and the courts that favour plaintiffs, including a generous system of discovery, provision for joint and several liability, bars on claims for contribution as between defendants and limits on the right of claim reduction when one or more defendants settle: see generally Eric McCarthy et al, 'Litigation Culture versus Enforcement Culture: A Comparison of US and EU Plaintiff Recovery Actions in Antitrust Cases' in Global Competition Review, *The Antitrust Review of the Americas 2007* (2007) 38; Kevin J L O'Connor et al, 'Interaction of Public and Private Enforcement' in Albert A Foer and Randy M Stutz (eds), *Private Enforcement of Antitrust Law in the United States: A Handbook* (Edward Elgar, 2012) 280, 284.

<sup>16</sup> See generally Tiana Leia Russell, 'Exporting Class Actions to the European Union' (2010) 28 *Boston University International Law Journal* 141, 158–64.

<sup>17</sup> Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013) 362; Herbert J Hovenkamp, 'Quantification of Harm in Private Antitrust Actions in the United States' (Research Paper, University of Iowa, 9 February 2011) 1.

<sup>18</sup> John M Connor, 'Private Recoveries in International Cartel Cases Worldwide: What Do the Data Show?' (Working Paper No 12-03, The American Antitrust Institute, 15 October 2012) 9. In 40 of the largest private antitrust cases that ended between 1990 and 2007 in the United States, the defendants were paid in the vicinity of US\$23 billion in settlements (in 2010 dol-

In Europe, progress in promoting private enforcement has been slower owing to substantial legal and procedural impediments,<sup>19</sup> but in recent years it has been concerted. As in the United States, advancement of private enforcement has been led largely by public institutions — the European Commission ('EC') and national competition authorities in particular. The EC has been active since at least 2005 in examining ways in which to promote private actions — primarily as a way of facilitating compensation for victims while also recognising, as a secondary benefit, the potential of such actions to complement the deterrence-driven strategy of the public authorities, thereby bolstering overall the effectiveness of the European competition rules.<sup>20</sup>

lars): Robert H Lande and Joshua P Davis, 'Comparative Deterrence from Private Enforcement and Criminal Enforcement of the US Antitrust Laws' [2011] *Brigham Young University Law Review* 315, 368–77. This was said to have 'resulted in approximately three times the deterrence of the [US]\$7.737 billion in deterrence produced by every criminal case brought by the [Department of Justice] during this same period in 2010 dollars': at 338–9. This comparison is not just to Department of Justice actions involving these 40 private cases; the Department of Justice total is for every cartel sanction secured by the division between 1990 and 2007: at 339. See also Robert H Lande and Joshua P Davis, 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 *University of San Francisco Law Review* 879, 884, 895–7.

<sup>19</sup> These impediments include: the lack of any class action mechanism in most European states; the absence of provision for pre-trial discovery (ordering the production of documents is a judicial function in a civil law system); costs rules under which the loser pays; the availability of single line damages only; and more fundamentally, the fact that Europeans traditionally have lacked an antitrust litigation culture: see Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (Comparative Report, Ashurst, 31 August 2004).

<sup>20</sup> Following *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 ('*Regulation 1/2003*'), the EC issued a Green Paper on private competition law actions in 2005, a White Paper in 2008, and a Draft Guidance Paper in 2011 for public consultation on collective redress: EC, 'Damages Actions for Breach of the EC Antitrust Rules' (Green Paper No COM(2005) 672 Final, 19 December 2005); EC, 'Damages Actions for Breach of the EC Antitrust Rules' (White Paper No COM(2008) 165 Final, 2 April 2008); EC, 'Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (Draft Guidance Paper, June 2011). In 2013, the EC issued a draft directive on competition law damages and published a communication and a recommendation recommending that all member states have a national system of collective redress based on common European principles: EC, 'Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union' (Proposal No COM(2013) 404 Final, 11 June 2013); EC, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a European Hori-

On 26 November 2014, the European Parliament and the Council of Ministers formally adopted an EC proposal dealing with a range of procedural and evidential rules affecting private damages actions in competition cases ('*European Directive*').<sup>21</sup> At the national level, governments and competition authorities in several member states have also been active over the past five years in taking steps to foster increased private litigation in aid of competition law enforcement.<sup>22</sup> While there has been traditionally, and remains, wariness in Europe about the promotion of class actions,<sup>23</sup> a recent and notable development has been the enactment of the *Consumer Rights Act 2015*

zontal Framework for Collective Redress' (Communication No COM(2013) 401 Final, 11 June 2013); *Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law* [2013] OJ L 201/60.

<sup>21</sup> *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union* [2014] OJ L 349/1. The *European Directive* was signed into law on 26 November 2014, adopting in large part the proposals set out in EC, 'Proposal for a Directive of the European Parliament and of the Council', above n 20.

<sup>22</sup> This has been the case in the United Kingdom particularly: see, eg, Office of Fair Trading, 'Private Actions in Competition Law: Effective Redress for Consumers and Business' (Discussion Paper No OFT916resp, November 2007); Department for Business Innovation & Skills, 'Private Actions in Competition Law: A Consultation on Options for Reform' (Consultation Paper, 24 April 2012); Department for Business Innovation & Skills, 'Private Actions in Competition Law: A Consultation on Options for Reform' (Government Response, 29 January 2013). In Italy, the Netherlands, France and Belgium, statutory schemes for competition law class actions have recently been introduced. In Italy: *Codice del Consumo 2005* [Consumer Code 2005] (Italy) art 140-bis; Alberto Martinazzi, 'Developments in Private Enforcement of Italian Antitrust Law: The Introduction of "Class Action" Legislation' [2010] (1) *Competition Policy International Antitrust Journal* 1, 2; in the Netherlands: *Burgerlijk Wetboek* [Civil Code] (Netherlands) art 305a; in France: *Loi n° 2014-344 du 17 mars 2014 relative à la consommation* [Law No 2014-344 of 17 March 2014] (France) JO, 18 March 2014, art 1; in Belgium: *Loi du 28 mars 2014 portant insertion d'un titre 2 'De l'action en réparation collective' au livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique* [Act to Insert Title 2 'Legal Action for Collective Reparation' in Book XVII 'Special Court Procedures' of the Code of Economic Law and Pertaining to the Insertion of the Definitions Specific to Book XVII in Book I of the Code of Economic Law] (Belgium); in Spain: see the *Ley N° 15/2007, de 3 de julio, de Defensa de la Competencia* [Competition Law 15/2007 of 3 July 2007] (Spain), which paved the way for a private enforcement of national and European Union antitrust rules: see Ignacio Sancho Gargallo, 'Private Enforcement of EU and National Competition Law' [2009] (1) *In Dret* 2, 2.

<sup>23</sup> See Russell, above n 16, 164–9.



(UK) c 15 which establishes a range of measures intended to promote collective actions.<sup>24</sup> Across Europe, this combination of policy leadership and practical initiatives has started to bear fruit. As one commentator has observed, as at 2009, there were only 18 ongoing damages claims across Europe; by 2015, that number had increased to 59 and, owing largely to the *European Directive*, there is said to be a 'bright future ahead'.<sup>25</sup>

The year 2015 could be seen as a watershed year for private competition law enforcement in Australia. In a wideranging review of competition policy, law and institutions commissioned by the conservative government, an independent panel chaired by Professor Ian Harper ('Harper Panel') included private enforcement in its deliberations.<sup>26</sup> While by no means an exhaustive treatment of the topic, the panel examined several issues relevant to private actions and made three recommendations for reform directed at reducing the hurdles facing private litigants.<sup>27</sup> Two of these recommendations were accepted unconditionally by the government and the third was accepted in

<sup>24</sup> *Consumer Rights Act 2015* (UK) c 15, s 81 seeks to facilitate private enforcement actions in the United Kingdom — by small to medium size enterprises and individual consumers in particular — by providing for opt-out collective actions and collective settlements, and also to promote access to justice more generally by establishing a voluntary redress scheme. The Act has been described by the consumer group 'Which?' as 'the biggest shake up in consumer rights law in a generation': Which?, *Regulation: Consumer Rights Act 2015* <<http://www.which.co.uk/consumer-rights/regulation/consumer-rights-act>>.

<sup>25</sup> Damien Geradin, 'Collective Redress for Antitrust Damages in the European Union: Is This a Reality Now?' (2015) 22 *George Mason Law Review* 1079, 1079. This is not to say that there are not those who are more sceptical about the value and prospects of private enforcement flourishing in Europe. See, eg, Wouter P J Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition* 473; Christopher Hodges, 'Competition Enforcement, Regulation and Civil Justice: What Is the Case?' (2006) 43 *Common Market Law Review* 1381; Christopher J S Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) 34 *World Competition* 383, 389–93; Ariel Ezrachi and Maria Ioannidou, 'Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation' (2012) 3 *Journal of European Competition Law & Practice* 536.

<sup>26</sup> See Competition Policy Review Panel, *Competition Policy Review: Issues Paper* (April 2014) 41 ('Issues Paper'); Competition Policy Review Panel, *Competition Policy Review: Draft Report* (September 2014) 254–9 ('Draft Report'); Competition Policy Review Panel, *Competition Policy Review: Final Report* (March 2015) 407–18 ('Harper Review').

<sup>27</sup> Harper Review, above n 26, 417–18. In relation to removal of the requirement of ministerial consent for private actions in connection with extraterritorial conduct: at recommendation 26; in relation to extension of s 83 of the CCA to apply to admissions of fact: at recommendation 41; and in relation to avenues for providing small businesses with greater access to remedies: at recommendation 53.

principle.<sup>28</sup> More generally, the Harper Panel prefaced its discussion on private actions with the recognition that '[p]rivate enforcement of competition laws is an important right'<sup>29</sup> and acknowledged that there are 'significant barriers' facing private actions — actions by small business especially.<sup>30</sup> Flavoured by this acknowledgement, the Harper Panel's approach reflected an overriding concern to tackle 'regulatory and practical impediments to exercising this right'.<sup>31</sup> Its interest in the topic thus appears to have been largely with the compensatory benefits of private litigation, and less so with its potential to strengthen deterrence, as a complement to public enforcement action.<sup>32</sup> In this respect, the Harper Panel's approach aligns more closely with European than United States attitudes towards the role and value of private enforcement.

Perhaps even more significantly, the ACCC's submission to the Harper Panel's Draft Report marks an arguably substantial shift in position by the ACCC in relation to private enforcement — from passive (and at times active) resistance to overt endorsement. The ACCC's submission opened with the statement:

The ACCC recognises that private enforcement can be a significant complement to public enforcement in building compliance and deterring anti-competitive conduct. Effective deterrence occurs where sanctions, having regard to the likelihood of detection and conviction, outweigh the gains associated with a contravention. The threat of increased 'sanctions' in the form of damages payouts resulting from private litigation can play a vital role in a firm's consideration of the costs and benefits of engaging in anti-competitive conduct.<sup>33</sup>

<sup>28</sup> Australian Government, *Australian Government Response to the Competition Policy Review* (24 November 2015) 22 (recommendation 26), 32 (recommendation 41), 40 (recommendation 53).

<sup>29</sup> Harper Review, above n 26, 416.

<sup>30</sup> *Ibid* 407.

<sup>31</sup> *Ibid* 416.

<sup>32</sup> The Harper Panel also made no mention of the significant contribution that private cases make to the development of legal doctrine: see generally Beaton-Wells and Tomasic, above n 7, 678–81.

<sup>33</sup> ACCC, Submission to Competition Policy Review Panel, *Competition Policy Review*, 26 November 2014, 79.

In terms of specific proposals, the ACCC supported reforms that it had previously opposed (on the grounds of perceived threats to its own enforcement practices) and also called for the introduction of provisions that would give it capacity to seek redress for victims of competition law breaches, similar to the power currently available under the Australian Consumer Law.<sup>34</sup> Several other submissions were also supportive of a more conducive climate for private actions to enforce Australia's competition rules, including the contribution by the Competition and Consumer Committee of the Law Council of Australia ('LCA').<sup>35</sup>

In a study of the politics of policymaking and law reform, it may be worth contemplating the factors that have contributed to the reaching of this apparent milestone in the official endorsement of private competition law enforcement in Australia. However, this article is not the occasion for such contemplation.<sup>36</sup> The aims of this article are therefore to review the major

<sup>34</sup> Ibid 79–80. See below Part IV(A). Since 2001 the ACCC has had power to bring representative proceedings under the CCA, seeking compensation on behalf of persons who have suffered loss as a result of a pt IV contravention: CCA s 87(1B). The ACCC can also bring an action under pt IVA of the FCAA. The power under s 87(1B) has never been used by the ACCC in respect of a contravention of the competition provisions. It has been used in respect of contraventions of the fair trading and consumer provisions: see, eg, *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512. However, in its 2007 submission to the Productivity Commission inquiry into consumer policy, the ACCC sought broader powers enabling it to seek redress for consumers in such matters — specifically to seek compensation-related orders against a contravening firm in proceedings to which consumers are not parties: ACCC, Submission No 80 to Productivity Commission, *Review of Australia's Consumer Policy Framework*, June 2007, 100–4. Those powers were granted in 2010: *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth) sch 2 pt 4, inserting TPA ss 87AAA–87AAB; see also CCA sch 2 s 239. It is extremely disappointing that the Harper Panel did not address the ACCC's constructive submission that it should have the same powers in respect of alleged breaches of the competition provisions. Its failure to do so is difficult to reconcile with the Harper Panel's consideration of avenues by which small business can attain greater access to justice and its call for the ACCC to place greater priority on responding to small business complaints about alleged anti-competitive conduct: Harper Review, above n 26, 409–12, 416–17.

<sup>35</sup> LCA, Submission to Competition Policy Review Panel, *Competition Policy Review*, 27 June 2014, 87–90. See also Caron Beaton-Wells and Brent Fisse, Submission to Competition Policy Review Panel, *Competition Policy Review*, 10 June 2014, 29–31; Spier Consulting — Legal, Submission to Competition Policy Review Panel, *Competition Policy Review*, June 2014, 20–1.

<sup>36</sup> Some obvious factors suggest themselves. One is the increased activity in support of private enforcement internationally (in Europe especially) and growing recognition, by the ACCC in particular, that Australia is out of step with these developments. Another is the focus in the

impediments to a heightened level of private competition law enforcement, as they currently exist in Australia, and to analyse the extent to which implementation of the Harper Panel's recommendations would address them. The challenges facing private litigants (in the context of class actions in particular) are not unique to Australia and raise issues that have been examined in-depth overseas. Thus, the analysis draws substantially on comparisons with the approach taken in the *European Directive* to such issues, while also highlighting, as relevant, comparisons with the approaches taken in the United States and Canada.

Discussion of the key issues relevant to promotion of increased private litigation in this field is structured in this article as follows.<sup>37</sup> Part II deals with limitation periods. Part III examines issues of jurisdictional nexus and extraterritoriality. Part IV is concerned with proof and allocation of liability. Part V tackles proof and quantification of loss. In Part VI this article concludes by appraising whether implementation of the Harper Panel's recommendations would herald significant progress in facilitating increased private enforcement of Australian competition law or whether, owing to the qualifications on and gaps in those recommendations, the potential of private actions is likely to continue to remain largely untapped.

## II LIMITATION PERIODS

In Australia, the limitation period relevant to private damages actions allows for actions to be commenced 'at any time within 6 years after the day on

Harper Review on the position of small business generally and, particularly in the enforcement context, concerns championed by the Minister for Small Business, within whose portfolio the Harper Review falls, relating to the disadvantages of such firms in enforcing their rights. See the Harper Panel's discussion of the cost of litigation and access to justice: Harper Review, above n 26, 409–12; see also recommendation 53 ('Small business access to remedies'): at 417. This article does not canvas access to justice issues since its focus is primarily on private enforcement by way of court proceedings, whereas the Harper Review's discussion of the topic focuses largely on complaints and alternative dispute resolution mechanisms.

<sup>37</sup> This article is not intended to debate the relative merits and demerits of private actions in the content of competition law. Nor is this article intended to canvas the rationale for, or benefits of, class actions specifically or to provide an exhaustive account of the challenges facing litigants in this setting. The value of private enforcement is a premise underpinning the discussion of the topic by the Harper Panel, and indeed is acknowledged explicitly in relevant submissions. There is a voluminous literature on these matters. See above n 7 which provides a selective sample of that literature, as relevant in the Australian context.

which the cause of action that relates to the conduct accrued'.<sup>38</sup> It is uncertain as to whether this occurs at the time of purchase of the relevant goods or services, or at the time when the cartel's activities are discovered. In one case the Federal Court accepted as arguable that loss or damage is only suffered when the anti-competitive conduct in question comes to light.<sup>39</sup> However, this is a long way from a settled position on the issue.<sup>40</sup> The issue of limitation periods was not canvassed by the Harper Panel. In contrast, the challenges raised by limitation periods for private plaintiffs in cartel cases have been addressed by the EC.

In its White Paper on private damages actions, the EC recognised that the suspension of limitation periods or having longer limitation periods play an important role in guaranteeing that damages claims can be brought effectively, especially in the case of follow-on actions. It stated:

While limitation periods play an important role in providing *legal certainty*, they can also be a considerable *obstacle* to recovery of damages, both in stand-alone and follow-on cases.

As regards the *commencement of limitation periods*, victims can face practical difficulties in the event of a continuous or repeated infringement or when they cannot reasonably have been aware of the infringement. The latter occurs frequently in relation to the most serious and harmful competition law in-

<sup>38</sup> CCA s 82(2). Where a party to proceedings for an injunction (which has no time limit) seeks compensation ancillary to that injunction, there is no limitation period: See *Energex Ltd v Alstom Australia Ltd* [2004] ATPR (Digest) ¶46-251, 54 273-4 [179]-[180], 54 283 [236]-[238] (Weinberg J); *Energex Ltd v Alstom Australia Ltd* (2005) 225 ALR 504, 520-3 [51]-[63] (French, Hely and Merkel JJ) ('*Energex*'). This applies whether or not the court grants the injunction.

<sup>39</sup> *Energex Ltd v Alstom Australia Ltd* [2004] ATPR (Digest) ¶46-251, 54 273 [179] (Weinberg J); *Energex* 520-3 [51]-[63] (French, Hely and Merkel JJ).

<sup>40</sup> In the *Energex* cases, both the Court at first instance and the Full Court on appeal acknowledged that, in other contexts, various equitable principles and specific statutory provisions encompassed this kind of 'discovery rule'. The critical issue for the Courts was whether the terms of s 82 were amenable to an interpretation that harm is not, in fact, 'suffered' until conduct comes to light, such as where the value of a business is misrepresented at the time of sale but losses only accrue after the expected trading volume does not eventuate. Noting that in cases involving contraventions of pt V of the CCA, s 82 had been so interpreted, the Full Court expressly noted that its observations did not 'involve the expression of any concluded view about the operation of s 82 in cases involving contraventions of Pt IV', and also noted that there is 'considerable room for the development of the law in that context': *Energex* 523 [61] (French, Hely and Merkel JJ).

fringements, such as cartels, which often remain covert both during and after their lifespan.<sup>41</sup>

In recognition of these challenges, the *European Directive* stipulates a minimum limitation period of five years;<sup>42</sup> however, it also stipulates that a limitation period only starts to run when the victim knows or can reasonably be expected to know four cumulative material circumstances:

- 1 the identity of the infringer;
- 2 the behaviour;
- 3 the fact that the behaviour constitutes an infringement; and
- 4 the fact that the infringement caused harm to him or her.<sup>43</sup>

If the infringement is repeated or continuous (as is often the case with cartel conduct),<sup>44</sup> time will not start until the infringement ceases. If an investigation is started by a national competition authority or the EC, the time period is suspended until at least one year after the investigation comes to an end.<sup>45</sup>

In addition, to facilitate settlements, the *European Directive* provides for suspension of limitation periods for bringing actions for damages as long as the infringing undertaking and the injured party are engaged in consensual dispute resolution,<sup>46</sup> as well as the suspension of pending proceedings for the duration of consensual dispute resolution.<sup>47</sup> In Australia, the limitation period

<sup>41</sup> EC, 'Damages Actions for Breach of the EC Antitrust Rules' (White Paper No COM(2008) 165 Final, 2 April 2008) [2.7] (emphasis in original).

<sup>42</sup> *European Directive* [2014] OJ L 349/1, art 10(3). Member states are still free to apply longer periods.

<sup>43</sup> *Ibid* art 10(2).

<sup>44</sup> See the discussion of the development of a 'single' or 'complex and continuous' infringement in European Union competition law as a way of reflecting the realities of cartel evolution and operation and in turn as a way of overcoming limitations issues: David Bailey, 'Single, Overall Agreement in EU Competition Law' (2010) 47 *Common Market Law Review* 473; Julian Joshua, 'Single Continuous Infringement of Article 81 EC: Has the Commission Stretched the Concept beyond the Limit of Its Logic?' (2009) 5 *European Competition Journal* 451.

<sup>45</sup> *European Directive* [2014] OJ L 349/1, art 10(4).

<sup>46</sup> *Ibid* art 18(1).

<sup>47</sup> *Ibid* art 18(2).

for the claims of group members is suspended upon commencement of a representative proceeding.<sup>48</sup>

Given the uncertainty surrounding the operation of the limitation period and the far less generous provision made for suspensions than those contained in the *European Directive*, plaintiffs in cartel cases in Australia may be well advised to initiate cases as quickly as possible. This urgency can only exacerbate the difficulty of commencing proceedings in respect of conduct that is complex and covert, and increase the likelihood of protracted pleading disputes and amendments with attendant risk and expense. The basic pleading principle, which entitles respondents to be appraised from the outset of the case to be met, presents unique challenges for the representative party and group members in cartel matters. This is because cartels usually involve concealed conduct, and private litigants lack recourse to the investigative powers and immunity incentives employed by competition authorities that would facilitate the collection of information necessary to construct an unchallengeable pleading.<sup>49</sup>

<sup>48</sup> FCAA s 33ZE(1). Furthermore, '[t]he limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim': at s 33ZE(2).

<sup>49</sup> See *Cameron v Qantas Airways Ltd* [1993] ATPR ¶41-251, 41 370 (Beaumont J). Issues relating to pleading of a relevant market or markets have proven particularly troublesome for private applicants in Australia: see generally Daniel Clarry, 'Contemporary Approaches to Market Definition: Taking Account of International Markets in Australian Competition Law' (2009) 37 *Australian Business Law Review* 143. 'Markets' for the purposes of the CCA are defined in s 4E as markets 'in Australia' and this has given rise to argument concerning market definition in cases involving international cartels, the air cargo cartel in *De Brett Seafood Pty Ltd v Qantas Airways Ltd [No 7]* [2015] FCA 979 (8 October 2015) being a case in point. Under the per se prohibition on price-fixing that existed in Australia prior to July 2009, it was necessary for the plaintiff to establish that the relevant parties to the agreement or understanding were 'in competition' with each other, and for this purpose, that they were operating in the same market in Australia. A recent Federal Court decision has highlighted the absurdity that can result from requiring proof of a market in order to establish a per se contravention: *Australian Competition and Consumer Commission v Air New Zealand Ltd* (2014) 319 ALR 388, 393 [20] (Perram J). In this case, it was found that in the absence of evidence of supply-side substitution, Perram J could only consider demand-side substitution. The evidence was that demand-side substitution occurred at the point of origin, outside Australia (this was where the range of airlines available to be selected was limited by the fact that each needed to have a presence at the place where possession was taken of the cargo: at 456 [319]). Accordingly there was no market in Australia and no contravention, despite his Honour's finding that collusion had occurred, and his view that 'prices may well have been affected in Australia by the conduct': at 393 [20]. Cf *Commerce Commission v Air New*

A representative proceeding commenced pursuant to pt IVA of the *FCAA* attracts the ordinary rules of pleading,<sup>50</sup> and a defective pleading is liable to be struck out. Respondents to representative proceedings are entitled to — and often do — apply to partially or wholly remove the pleading, alleging, for example, that the group member definition lacks certainty and is embarrassing,<sup>51</sup> that the claims of group members lack the requisite commonality,<sup>52</sup> or that the representative party has failed to plead material facts sufficient to give rise to a cause of action.<sup>53</sup> These types of challenges have plagued Australian class actions — cartel class actions in particular — leading courts to describe respondent tactics as ‘litigation by attrition’,<sup>54</sup> and to observe a ‘disturbing trend’ in interlocutory challenges ‘that is ... best brought to an end’.<sup>55</sup>

*Zealand Ltd* (2011) 9 NZBLC ¶103-318. The Australian per se prohibition was amended in 2009 and omitted the requirement of establishing a ‘market’. The question whether the ‘market’ requirement should be reinstated in the per se cartel prohibitions of the *CCA* was considered in the Harper Review. The Harper Panel decided against reinstatement but recommended that, for the purposes of retaining a nexus between the impugned conduct and Australia, the cartel prohibitions ‘should apply to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia’: Harper Review, above n 26, 361–2, 365, 367 (recommendation 27).

<sup>50</sup> *FCAA* s 33ZG(b) specifically preserves the court’s powers in relation to a proceeding in which no reasonable cause of action is disclosed or that is oppressive, vexatious, frivolous or an abuse of the process of the court. There is an additional requirement to demonstrate that the number, connectivity and commonality requirements for commencement of a representative proceeding have been satisfied: at s 33H(1).

<sup>51</sup> The early group member definition in a class action relating to vitamins, for example, was criticised for being too broad and unwieldy: *Bray v F Hoffman-La Roche Ltd* [2003] ATPR ¶41-906, 46 505–6 [12]–[13] (Merkel J). The group member definition was similarly criticised in a class action relating to rubber chemicals: *Wright Rubber Products Pty Ltd v Bayer AG* [2008] ATPR ¶42-258, 49 622–4 [8]–[17] (Tracey J).

<sup>52</sup> See *FCAA* s 33C which requires that the claims made in the class action give rise to a substantial common issue of law or fact.

<sup>53</sup> See *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] ATPR ¶41-691, 42 831 [34] (Drummond J), citing *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Co Ltd* [No 4] [1985] 1 Qd R 127, 133 (McPherson J).

<sup>54</sup> *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] ATPR ¶41-691, 42 829 [22] (Drummond J).

<sup>55</sup> *Bright v Femcare Ltd* (2002) 195 ALR 574, 607 [160] (Finkelstein J). But see Stuart Clark and Christina Harris, ‘The Push To Reform Class Action Procedure in Australia: Evolution or Revolution?’ (2008) 32 *Melbourne University Law Review* 775, 798–801.



## III JURISDICTION AND EXTRATERRITORIALITY

Cartels are often global in scope and conducted by multinational corporations.<sup>56</sup> This poses challenges for plaintiffs relating to jurisdiction.<sup>57</sup> Such challenges arise in ACCC proceedings as much as in private proceedings. However, they are accentuated for private plaintiffs as a result of particular provisions in the CCA relating to ministerial consent.

Section 5(1) confers limited extraterritorial operation by applying certain parts of the Act to conduct which occurs outside Australia where the party engaging in the conduct is an Australian citizen, a person ordinarily resident in Australia, an Australian incorporated entity or a foreign body corporate carrying on business in Australia. The effect of that provision is that, in respect of contravening conduct that occurs overseas, a foreign corporation will only be subject to Australian competition law if it carries on business in Australia.<sup>58</sup> The concept of 'carrying on business' has given rise to a host of technical threshold issues and, in general terms, the courts have taken a narrow approach to its interpretation.<sup>59</sup> In contrast, both United States and European competition laws are able to capture overseas conduct to the extent that it has a direct adverse effect on domestic markets or trade.<sup>60</sup>

The Harper Panel has recommended the removal of the residence, incorporation and 'carrying on business' requirements, taking the position that a sufficient jurisdictional condition is that the conduct relates to trade or

<sup>56</sup> See, eg, *De Brett Seafood Pty Ltd v Qantas Airways Ltd* [No 7] [2015] FCA 979 (8 October 2015); *Wright Rubber Products Pty Ltd v Bayer AG* [No 3] [2011] FCA 1172 (20 October 2011); *Australian Competition and Consumer Commission v Bridgestone Corporation* (2010) 186 FCR 214; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* [No 2] (2006) 236 ALR 322. All involved global cartels.

<sup>57</sup> Broader issues of international comity, conflict between jurisdictions, and problems with service of process, collecting evidence and enforcing judgments abroad also arise. These issues are not the subject of this article. Some of them are canvassed in Ian B Stewart, 'Extraterritorial Application of Pt IV of the *Competition and Consumer Act*' (2014) 42 *Australian Business Law Review* 90.

<sup>58</sup> The Commonwealth has power to make laws with respect to trading or financial corporations formed within the limits of the Commonwealth and foreign corporations: *Australian Constitution* s 51(xx). There is no additional requirement that foreign corporations have any particular connection with Australia: *New South Wales v Commonwealth* (2006) 229 CLR 1.

<sup>59</sup> See, eg, *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 14–23 [45]–[82] (Merkel J). See generally Stewart, above n 57.

<sup>60</sup> See generally Laura Guttuso, 'Private Enforcement in Australia: Comparison (to the EU and the US) and Comment' [2014] (3) *International Civil Redress Bulletin* 2, 7–10.

commerce as defined in the CCA, that is, trade or commerce within Australia or between Australia and places outside Australia.<sup>61</sup> This recommendation does not appear to face substantial opposition and should alleviate some of the jurisdictional burden facing private applicants in cases involving foreign corporations.<sup>62</sup> Given this, it is disappointing that the government has indicated it is not prepared to support the recommendation ‘at this time’; however, it has stated that it ‘will consider how best to effectively capture conduct that harms competition in an Australian market, taking account of international law and policy considerations.’<sup>63</sup>

Section 5(3) requires that in the case of private damages claims under s 82, the consent of the relevant Minister is required before conduct occurring outside Australia can be relied on at a hearing. This provision appears to mean that proceedings may be instituted before obtaining the consent of the Minister, but consent must be obtained before an applicant may rely on extraterritorial conduct at a hearing in the proceeding.<sup>64</sup> Section 5(4) requires that in the case of an application for other remedial orders under s 87 (for instance, declaring contracts void, orders for specific performance and orders for compensation), consent of the Minister is required before a person can make the application, that is, before instituting proceedings. Under s 5(5), the Minister is obliged to give consent unless, in the Minister’s opinion, the

<sup>61</sup> Harper Review, above n 26, 412–14, 418 (recommendation 26).

<sup>62</sup> The recommendation has been supported by the ACCC: ACCC, Submission to Competition Policy Review Panel, *Competition Policy Review*, 29 May 2015, 4; and by the LCA: LCA, Submission to Australian Competition Policy Review Panel, *Competition Policy Review*, 20 November 2014, 7–8. However, the LCA has qualified its support, expressing concern about the potential breadth of the proposed connection between overseas conduct and the application of the CCA. As it has observed, ‘[o]verseas conduct may be “related” to trade or commerce without affecting either it or welfare in Australia’: LCA, Submission to Competition Policy Review Panel, *Competition Policy Review*, 26 May 2015, 6. Cf the *Sherman Act* which excludes conduct involving trade or commerce with foreign nations unless there is a ‘direct, substantial, and reasonably foreseeable effect’ on domestic trade or commerce: at § 6a. A similar approach is taken in the proposed cartel-related amendments to the *Commerce Act 1986* (NZ), which restrict the cartel conduct prohibitions to conduct affecting the supply or acquisition of goods or services in New Zealand: Commerce (Cartels and Other Matters) Amendment Bill 2014 (NZ) pt 1 cl 7 s 30A(1).

<sup>63</sup> Australian Government, *Australian Government Response to the Competition Policy Review* (24 November 2015) 22.

<sup>64</sup> Maurice Blackburn Lawyers, ‘Position Paper’ (Paper presented at Roundtable — Private Enforcement of Competition Law, The University of Melbourne, 12 November 2010) 11–12. See also above n 8.

conduct in question was required or specifically authorised by the law of the country in which it was engaged, and in the Minister's opinion, the giving of consent is not in the national interest.

The effect of these provisions is that, even where a sufficient territorial nexus with foreign conduct can be established under s 5(1), a private applicant may not seek a remedy for a contravention of the CCA by conduct outside Australia without consent of the Minister. In relation to s 87 applications, this means that the Minister must make a decision that is critical to the interests of the parties (and possibly thousands of class action group members) on complex questions of fact and foreign law, before proceedings are instituted and before all the facts, circumstances, allegations and defences are known.

The provisions of s 5 appear to have been justified originally on the grounds of 'international comity': the principle that states should ordinarily refrain from purporting to regulate conduct outside their own borders, and should only do so where a sufficient territorial nexus with the parties or matter exists.<sup>65</sup> However, it is now commonplace for global cartels to cause loss and damage around the world, including in Australia, and as the Harper Panel pointed out, the consent requirements in s 5 are out of step with the proliferation of competition laws internationally and the approach taken in

<sup>65</sup> The ministerial consent provisions were introduced by the *Trade Practices Revision Act 1986* (Cth), at a time when there was concern over the extraterritorial reach of some competition laws. See the second reading speech for the Trade Practices Revision Bill 1986 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 1986, 1627 (Lionel Bowen). The concern originated out of litigation commenced years earlier in the United States by Westinghouse in respect of an overseas uranium cartel. Australian uranium producers became defendants to the United States litigation: for a summary of the litigation arising from the uranium cartel, and the political responses to the litigation, see Deborah Senz and Hilary Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2 *Melbourne Journal of International Law* 69, 88–97. This resulted in the Australian government enacting legislation to prevent the enforcement of the United States judgments in Australia: see *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979* (Cth), subsequently incorporated into the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth). As noted in the Harper Review, above n 26, 414:

at that time, many other jurisdictions, particularly developing countries, did not have competition laws. As a result, there was potential for diplomatic issues to arise if proceedings were brought in Australia for contravention of Australia's competition laws in respect of overseas conduct that was authorised or permitted by the laws of the jurisdiction in which the conduct occurred.

comparable overseas countries. Since the introduction of the consent provisions, it explained:

many countries have enacted competition laws. Further, a greater uniformity has emerged concerning the extra-territorial reach of competition laws in comparable jurisdictions. In general, competition laws of comparable jurisdictions apply to overseas conduct if the conduct has a direct effect on domestic markets or trade. In comparable overseas jurisdictions, such as the US, Canada, UK, EU, and New Zealand, there is no requirement to seek governmental consent in order to take proceedings in respect of contravening conduct that occurs overseas ...<sup>66</sup>

The Harper Panel is clearly correct. Considerations of international comity no longer warrant the consent provisions in s 5. Indeed, given the spread of anti-cartel laws around the world, and the significant steps being taken by competition authorities to cooperate in investigations and enforcement relating to cross-border cartels,<sup>67</sup> there is a strong argument that comity considerations dictate holding global cartel participants liable for the consequences of their conduct wherever they are situated. Far from promoting international comity, the current provisions of s 5 have the reverse effect, by providing an effective safe haven for much global cartel conduct.

The Harper Panel acknowledged that the consent requirements pose ‘a material hurdle for private plaintiffs,’ and can substantially add to the time and expense involved in private proceedings, particularly given the possibility that a respondent may seek judicial review of a ministerial decision relating to consent.<sup>68</sup> It recommended that the requirements be repealed and of the handful of submitters that addressed the point, there was general support for

<sup>66</sup> Harper Review, above n 26, 414–15 (citations omitted).

<sup>67</sup> See Frederic Jenny, ‘International Cooperation on Competition: Myth, Reality and Perspective’ (Paper presented at the Conference on Global Antitrust Law and Policy, University of Minnesota Law School, 20–1 September 2002).

<sup>68</sup> Harper Review, above n 26, 415–16 (citations omitted). This is exemplified by the experience in a class action relating to air cargo. There was an 18 month ancillary dispute regarding the Minister’s consent in circumstances where each of the respondents had a locally incorporated agent and was clearly carrying on business in Australia, and the alleged conduct concerned a global cartel that had already been the subject of regulatory and private action in several other jurisdictions and Australia. The procedural history relating to ministerial consent is contained in *Cathay Pacific Airways Ltd v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* (2010) 186 FCR 168, 171–8 [11]–[38] (Goldberg J).

this measure.<sup>69</sup> The government has accepted this recommendation and a Bill has been introduced to give effect to it.<sup>70</sup>

#### IV PROOF AND ALLOCATION OF LIABILITY

Cartel actions almost always involve multiple respondents and, as previously observed, increasingly they involve respondents situated all over the world. There are three particular issues confronting private litigants in respect of the proof and allocation of liability as between multiple respondents: first, reliance on findings in preceding public enforcement decisions or proceedings; secondly, access to information; and thirdly, joint and several liability, and contribution.

##### *A Reliance on Findings in Prior Public Enforcement Proceedings*

In Australia, the legislature intended that follow-on actions by private applicants be facilitated by public enforcement action. That intention is conveyed in s 83 of the CCA, which provides that findings of fact made against a respondent in earlier proceedings are prima facie evidence of those facts in later proceedings for damages or compensation orders.<sup>71</sup> However, there have been few cases in which s 83 has operated in the manner evidently intended by the legislature.<sup>72</sup> This is due in large part to the process under the

<sup>69</sup> See, eg, Caron Beaton-Wells and Brent Fisse, Submission to Competition Policy Review Panel, *Competition Policy Review*, 10 June 2014, 30; LCA, Submission to Competition Policy Review Panel, *Competition Policy Review*, 24 November 2014, 7; Spier Consulting — Legal, Submission to Competition Policy Review Panel, *Competition Policy Review*, June 2014, 9. Cf Philip Clarke, Submission to Competition Policy Review Panel, *Competition Policy Review*, September 2014, 2.

<sup>70</sup> Australian Government, *Australian Government Response to the Competition Policy Review* (24 November 2015) 22; Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 (Cth).

<sup>71</sup> See also CCA s 79B which evinces a legislative intention to prioritise compensation over penalties; see below Part V(C).

<sup>72</sup> Cf *ACCC v Tasmanian Salmonid Growers Association Ltd* [2003] ATPR ¶41-954, where the respondents consented to findings being made for the purposes of TPA s 83, the equivalent of CCA s 83; *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509, 510 (Lockhart J) in which a private litigant was able to invoke TPA s 83 in proof of its resale price maintenance case.

ACCC Immunity Policy for cartel conduct,<sup>73</sup> whereby the ACCC and respondent settle proceedings, generally by way of an agreed statement of facts and consent orders (including orders for jointly recommended penalties) that are presented to the court for its endorsement.<sup>74</sup>

While there have been a few instances in which orders have been made that findings of fact in prior proceedings are findings for the purposes of s 83,<sup>75</sup> uncertainty has emerged as to whether this course is open in settled proceedings given the possible interpretation of ‘findings of fact’ in s 83 as requiring findings based on evidence, as distinct from findings based on admissions.<sup>76</sup> Conceivably as a result of this uncertainty (although conceivably also for other reasons), the ACCC has refrained from seeking s 83 findings in competition cases in recent years.<sup>77</sup> Nor has it sought to have the uncertain-

<sup>73</sup> ACCC, ‘ACCC Immunity and Cooperation Policy for Cartel Conduct’ (Policy Document, September 2014) (‘ACCC Immunity Policy’). The provisions of the 2002 policy document (ACCC, ‘Cooperation Policy for Enforcement Matters’ (Policy Document July 2002) insofar as they apply to cartel matters, have been subsumed into the ACCC Immunity Policy.

<sup>74</sup> The majority of cartel cases have been resolved in this way and in most instances, judicial approval for the proposed orders, including penalties, is given: see generally Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 394–8 [10.2.2.1]. Between 1 January 2010 and early 2015, 69 per cent of civil penalty cases involved agreements with all or a significant number of respondents as to relief, including penalties that were jointly recommended to the court (a practice which has been confirmed by the High Court in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113), commented on in Houston, above n 12, 6–7.

<sup>75</sup> See *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* [2001] ATPR ¶41-809; *Australian Competition & Consumer Commission v Colgate-Palmolive Pty Ltd* [2002] ATPR ¶41-880; *ACCC v Tasmanian Salmonid Growers Association Ltd* [2003] ATPR ¶41-954.

<sup>76</sup> See *ACCC v Monza Imports Pty Ltd* [2001] ATPR ¶41-843, 43 440 [20]–[26] (Carr J); *Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 (17 October 2001) [20]–[25] (Carr J); *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* [No 2] (2002) 190 ALR 169, 183–4 [51] (Finkelstein J); *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [No 3] (2005) 215 ALR 301, 323 [116]–[118] (Goldberg J); *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665, 691–2 [105]–[107] (Kiefel J). See also Beaton-Wells and Tomasic, above n 7, 668–9.

<sup>77</sup> Section 83 orders were not sought, for example, in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd* [No 3] (2007) 244 ALR 673; *Australian Competition and Consumer Commission v Vanderfield Pty Ltd* [2009] FCA 1535 (3 November 2009); *Australian Competition and Consumer Commission v April International Marketing Services*

ty resolved through appeal in those cases in which its application for s 83 orders has been denied.<sup>78</sup>

Moreover, in the agreed statement of facts, respondents may be able to avoid or diminish responsibility for loss or damage caused by the conduct in question, with a view to minimising exposure in follow-on damages suits. Statements of fact are almost routinely stated to be ‘for the purpose of the proceeding’ only. In one such case, the ACCC was explicit in stating in its penalty submissions that it did not allege that the cartel ‘had any negative financial impact on or caused loss to’ contract customers.<sup>79</sup> This disavowal by the ACCC of an allegation of loss is clearly traceable to its settlement negotiations with Visy in relation to its civil penalty suit, and was responsive to Visy’s concerns about follow-on damages actions.<sup>80</sup> As a result, cartel participants that have settled with the ACCC and paid significant penalties are in a position to deny both liability as well as allegations of loss and damage, unhampered by uncomfortable admissions made in ACCC proceedings, and requiring claimants to prove both of these elements of their cause of action at significant risk and expense.<sup>81</sup>

By contrast, in Europe, a decision of the EC relating to proceedings under arts 101 or 102 of the *Treaty on the Functioning of the European Union* (‘FEU’)<sup>82</sup> has a probative effect in subsequent actions for damages, and a national court cannot take a decision counter to such EC decisions.<sup>83</sup> The *European Directive* extends this by giving similar effect to final infringement decisions of national competition authorities, recognising that:

*Australia Pty Ltd [No 8]* (2011) 277 ALR 446 and have not been sought in the series of proceedings brought by the ACCC in respect of an air cargo cartel: *Beaton-Wells and Tomasic*, above n 7, 669 n 124.

<sup>78</sup> *Beaton-Wells and Tomasic*, above n 7, 669.

<sup>79</sup> ‘Agreed Statement of Facts between the Applicant and the First to Sixth Respondents’, filed in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd*, No VID 1650/2005, 12 October 2007, 87 [374].

<sup>80</sup> As became evident in *Australian Competition and Consumer Commission v Pratt [No 3]* (2009) 175 FCR 558, 584 [35] (Ryan J).

<sup>81</sup> See below Part V for discussion of issues relating to proof and quantification of loss.

<sup>82</sup> *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2012] OJ C 326/47 (entered into force 1 November 1993).

<sup>83</sup> *Europese Gemeenschap v Otis NV* (C-199/11) [2012] ECR I-0000, I-0009 [50]–[51]; *Regulation 1/2003* [2003] OJ L 1/1 art 16(1).

To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 [of the *FEU*], to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 ... in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages.<sup>84</sup>

In the United States, § 5 of the *Clayton Act* provides for final judgments or decrees to the effect that a defendant has violated the antitrust laws to be prima facie evidence against the defendant in any subsequent proceeding. This extends to consent judgments or decrees where testimony has been taken for the purposes of the judgment or decree. The non-application of the provision to consent judgments or decrees before testimony has been taken to have been expressly designed 'to induce prompt capitulation [by defendants to the public authorities] by withdrawing the threat of treble-damage suits based on favorable government judgments in cases where the defendant consents at an early stage of trial'.<sup>85</sup>

The reluctance in Australia to allow for findings made by consent in prior proceedings to have probative effect in follow-on suits has been explained largely by concerns that it would discourage respondents from settling and thereby inhibit the ACCC from resolving allegations in an efficient and certain fashion. This has been a concern of the ACCC in particular.<sup>86</sup> However, there is a good case for treating the argument against extension of s 83 on such grounds as more theoretical than real. First, it is not a concern borne out by experience in the United States or Europe.<sup>87</sup> Secondly, the incentives for settling with the ACCC are powerful. Lengthy, expensive and distracting

<sup>84</sup> *European Directive* [2014] OJ L 349/1, Preamble para 34.

<sup>85</sup> Comment, 'Section 5 of the *Clayton Act* — Consent Decrees and the Statute of Limitations' (1955) 22 *University of Chicago Law Review* 514, 521–2. The comment cites *Homewood Theatre Inc v Loew's Inc*, 110 F Supp 398, 409–10 [5]–[6] (Nordbye CJ) (D Minn, 1952): 'The purpose of the provision which exempts the application of Section 16, Title 15 U.S.C.A, to consent decrees entered "before any testimony has been taken" is to induce defendants "in actions of that type to submit to prompt capitulation"', quoting *De Luxe Theatre Corp v Balaban & Katz Corp*, 95 F Supp 983, 986 (Campbell J) (ND Ill, 1951).

<sup>86</sup> ACCC, Submission to Competition Policy Review Panel, *Competition Policy Review*, 26 November 2014, 80.

<sup>87</sup> Admittedly, the lack of private litigation in the European Union to date weakens this comparison, as does the considerable incentives to settle in the United States (treble damages especially). See above n 19.



investigations and proceedings may be avoided and substantial discounts on potentially significant corporate penalties are on offer through the settlement process.<sup>88</sup> Moreover, it is evidently possible in settlement negotiations to avoid having individuals joined as respondents to the proceedings.<sup>89</sup> Thirdly, there are avenues available for the use of prior admissions by plaintiffs in follow-on suits, quite apart from s 83 (albeit such avenues are yet to be judicially tested).<sup>90</sup>

The Harper Panel reviewed the debate relating to s 83 and concluded that the provision should be extended to admissions of fact.<sup>91</sup> It agreed that the distinction between findings of fact and admissions of fact for the purposes of s 83 is 'somewhat artificial'.<sup>92</sup> As it pointed out:

Most contested hearings involve a mixture of factual admissions (often made in pleadings) and factual findings to resolve the dispute. It is difficult to separate the factual admissions and findings. Further, there is a real possibility that admissions of fact made by a respondent company in a proceeding brought by the ACCC would be admissible against that company in a follow-on proceeding

<sup>88</sup> The negotiation of such discounts is aided by the highly flexible, non-transparent and unstructured approach taken by the ACCC when determining the appropriate quantum of penalties in individual cases. For a critique of this approach and comparisons with the approach taken in other jurisdictions, see Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 74, 433–46.

<sup>89</sup> See *ibid* 192–4.

<sup>90</sup> For example it is arguable that a follow-on claimant can rely on admissions made in a respondent's defence in the ACCC proceeding and by a respondent's counsel on its behalf on the penalty hearing of the ACCC proceeding or in public statements (as statements against interest made by a duly authorised agent: *R v Delgado-Guerra* [2002] 2 Qd R 384, 394 [37] (Thomas JA)); and further that, invoking the doctrine of estoppel, a respondent should not be permitted to re-agitate matters admitted in the ACCC proceeding and so attack the prior verdict: *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 69–70 [16]–[18] (Finkelstein J). It is also arguable that under various provisions of the *Evidence Act 1995* (Cth), and the *FCAA* and related rules, a claimant may tender portions of transcripts of ACCC examinations and voluntary interviews containing admissions, and that the court is empowered to and should force admissions under its case management powers. Further, in a cartel case, once it is (otherwise) established, the acts of one party in furtherance of common purpose are admissible against other parties to the conspiracy: *R v Associated Northern Collieries* (1911) 14 CLR 387, 399–402 (Isaacs J).

<sup>91</sup> Harper Review, above n 26, 407–9, 417 (recommendation 41).

<sup>92</sup> *Ibid* 408.

under section 81 of the *Evidence Act 1995* in any event, thereby rendering the perceived distinction under section 83 irrelevant.<sup>93</sup>

The Harper Panel also expressed doubt as to whether extending s 83 to factual admissions ‘would materially alter the assessment by a respondent whether or not to settle an ACCC proceeding,’ and opined:

The decision to resolve an ACCC matter by admissions is a significant one that would usually subject the respondent company to a financial sanction and adverse publicity. Having taken that decision, it is unlikely that the respondent company would subsequently contest the admitted facts in a follow-on proceeding.<sup>94</sup>

Finally, the Harper Panel noted that even if the respondent wished to preserve the right to contest previously admitted facts in a subsequent private proceeding, the proposed extension of s 83 would not prevent it from doing so. This is because s 83 merely makes the admitted fact *prima facie* evidence of that fact in the follow-on proceeding. The respondent thus ‘remains free, should it so choose, to adduce evidence in the follow-on proceeding contrary to the admitted fact’.<sup>95</sup> Furthermore, the Harper Panel noted that

admissions of fact in an ACCC proceeding will rarely, if ever, address the question of loss and damage suffered by market participants as a result of the contravening conduct. Accordingly, a plaintiff in a follow-on proceeding would need to prove loss and damage against the respondent company in order to recover compensation.<sup>96</sup>

This is itself an invidious task.<sup>97</sup>

The Harper Panel’s proposed amendment of s 83 received a mixed response, with submissions both for and against the proposal.<sup>98</sup> However,

<sup>93</sup> Ibid (citations omitted).

<sup>94</sup> Ibid. See also *Australian Competition and Consumer Commission v Pratt [No 3]* (2009) 175 FCR 558.

<sup>95</sup> Harper Review, above n 26, 408–9.

<sup>96</sup> Ibid 409.

<sup>97</sup> See below Part V.

<sup>98</sup> For submissions in favour of amendment, see, eg, Caron Beaton-Wells and Brent Fisse, Submission to Competition Policy Review Panel, *Competition Policy Review*, 10 June 2014, 30; Choice, Submission to Competition Policy Review Panel, *Competition Policy Review*, 17 November 2014, 29–30; Consumer Action Law Centre, Submission to Competition Policy

significantly, despite initial opposition, the ACCC changed its position in favour of the amendment in its submission in response to the Harper Review. The ACCC's submission in relation to the Harper Panel's Draft Report based its opposition to extension of s 83 on concerns that the amendment would inhibit parties from cooperating or cooperating fully with the ACCC, with the result that more matters would have to be litigated or litigated more extensively with attendant consequences for the limited enforcement resources of the agency.<sup>99</sup> However, in its submission in response to the Harper Review, the ACCC recanted, stating that the Harper Panel's recommendation 'should facilitate greater access to justice, particularly for businesses who have been impacted by anti-competitive conduct'.<sup>100</sup> The turnaround in position was explained by the ACCC's general manager of competition enforcement, in a subsequent speech:

Having further considered the final [Harper Panel] recommendation the ACCC supports the recommendation. While it may impact on cooperating parties who are not immunity applicants we expect the recommendation will be unlikely to have any impact on the rights or incentives of immunity applicants. This is because immunity applicants do not make admissions of

Review Panel, *Competition Policy Review*, 17 November 2014, 18; Master Grocers Australia and Liquor Retailers Australia, Submission to Competition Policy Review Panel, *Competition Policy Review*, 4 December 2014, 25; National Seniors Australia, Submission to Competition Policy Review Panel, *Competition Policy Review*, November 2014, 15; Retail Guild of Australia, Submission to Competition Policy Review Panel, *Competition Policy Review*, 24 November 2014, 7; Spier Consulting — Legal, Submission to Competition Policy Review Panel, *Competition Policy Review*, June 2014, 20–1; David Wright, Submission to Competition Policy Review Panel, *Competition Policy Review*, 4 December 2014, 8. For submissions opposing amendment, see, eg, Arnold Bloch Leibler, Submission to Competition Policy Review Panel, *Competition Policy Review*, 17 November 2014, 8; Business Council of Australia, Submission to Competition Policy Review Panel, *Competition Policy Review*, November 2014, 22; Minter Ellison, Submission to Competition Policy Review Panel, *Competition Policy Review*, November 2014, 7; Queensland Law Society, Submission to Competition Policy Review Panel, *Competition Policy Review*, 12 November 2014, 7–8.

<sup>99</sup> ACCC, Submission to Competition Policy Review Panel, *Competition Policy Review*, 26 November 2014, 80.

<sup>100</sup> ACCC, Submission to Treasury, *Competition Policy Review*, 29 May 2015, 20.

fact in proceedings taken by the ACCC or the [Commonwealth Director of Public Prosecutions].<sup>101</sup>

The ACCC's revision of its position on s 83 is welcome. This is particularly so as the utility of admissions for the purposes of s 83 will depend on the nature and scope of the admissions made by respondents in negotiations with the ACCC. It is to be anticipated that respondents will now be even more determined to negotiate as narrow and innocuous admissions as possible. Hopefully, given its public position of support for an extended version of s 83 as a means of bolstering private enforcement, the ACCC will resist any such 'engineering' of admissions on which it settles with respondents.<sup>102</sup> The ACCC's support was also likely to have been influential in persuading the government to adopt the Harper Panel's recommendation on the issue.<sup>103</sup> That said, arguably the recommendation does not go far enough. Even if amended as recommended by the Harper Panel, s 83 (as the Harper Panel pointed out) would only elevate admissions of fact to prima facie evidence of such facts. Arguably, admissions should be taken as conclusive evidence of the facts admitted. This would be consistent with the approach taken under the *Corporations Act 2001* (Cth).<sup>104</sup> Conclusive evidence provisions are not unusual in regulatory legislation and have not attracted controversy.<sup>105</sup> The provisions in the *Corporations Act 2001* (Cth) do not appear to have been the

<sup>101</sup> Marcus Bezzi, 'Balancing Public and Private Interests — The ACCC Perspective on the Harper Committee Reforms' (Paper presented at the Competition Law Conference, Sydney, 30 May 2015) 10.

<sup>102</sup> At least one plaintiff lawyer seems optimistic that the ACCC will provide a counterbalance to respondent attempts to restrict admissions and 'ensure that the policy objective of assisting private litigants is fulfilled': Rebecca Gilsenan, 'Will the Harper Review Recommendations Revive Private Enforcement of Cartel Prohibitions in Australia?' (Paper presented at the Competition Law Conference, Sydney, 30 May 2015) 7.

<sup>103</sup> Australian Government, *Australian Government Response to the Competition Policy Review* (24 November 2015) 32.

<sup>104</sup> *Corporations Act 2001* (Cth) ss 1317E–1317F have the effect that a declaration of contravention of a civil penalty provision is 'conclusive evidence' of the contravention and the facts giving rise to it for the purposes of subsequent proceedings. This operates to facilitate proof in litigation brought by parties subsequently to proceedings brought by the Australian Securities and Investments Commission and is therefore analogous to s 83 in its intention.

<sup>105</sup> Such provisions generally relate to certificates or other documents being conclusive evidence of a fact with legal significance, such as a debt, tax assessment or title to land. This is distinct from provisions deeming facts found in one proceeding to be conclusive evidence in another proceeding: see, eg, *Transfer of Land Act 1958* (Vic) s 41.

subject of critical commentary or contest in court proceedings in which they have been considered.<sup>106</sup>

### B Access to Information

For private litigants, obtaining the information necessary to plead and then prove their claims in relation to a cartel is another major challenge. A disciplined cartel will leave little or no direct documentary evidence because it will have been destroyed, or participants will have avoided creating such evidence at all.<sup>107</sup> Current or former employees of alleged cartel participants are potentially a rich source of information but usually are reluctant to assist private litigants. Even where a cooperative witness comes forward, he or she is likely to be subject to strict obligations of confidence that significantly restrict the ability of the lawyer for the victims in taking a witness statement in the proceeding, and also may limit the usefulness of any evidence the witness can provide.<sup>108</sup> Standard executive employment agreements contain strict confidentiality clauses, which although intended to protect trade secrets and the like, operate to protect the company in relation to its misconduct. There is limited scope in Australia to take deposition evidence from witnesses.

In the absence of evidence from participants or other witnesses, proof of the existence and operation of a cartel will have to rest on circumstantial evidence, such as communication evidence (for example, records of telephone conversations between competitors, or of meetings), or economic evidence,

<sup>106</sup> See, eg, *Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 682, 687–8 [18] (Bryson J); *Australian Securities and Investments Commission v Rich* (2004) 50 ACSR 500, 514 [67] (White J); *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487, 501 [47] (Finkelstein J).

<sup>107</sup> One of the most notorious examples of the lengths to which cartel participants will go to conceal their conduct is a cartel in relation to marine hoses in which the parties used a range of covert tactics, including code names and a third party consultant to facilitate their arrangements: *Australian Competition and Consumer Commission v Bridgestone Corporation* (2010) 186 FCR 214. ‘The cartel members took measures to avoid detection, including assuming code names, avoiding email communication and minimising other forms of traceable communications. They imposed penalties on members who violated the arrangement’: at 216 [3] (Finkelstein J).

<sup>108</sup> See, eg, *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, where a whistleblower was held to be in breach of their obligations of confidence by making a witness statement: at 512–30 [170]–[235] (Campbell J).

such as evidence of parallel pricing. That evidence can be very difficult for lawyers representing private plaintiffs to obtain. Private litigants do not have the coercive investigative powers of the ACCC; nor can they offer the incentives available under the ACCC's immunity, leniency and settlement policies to encourage cooperation by respondents.<sup>109</sup> Private litigants rely significantly therefore on discovery. Discovery in large matters, particularly involving cartel conduct, is often complex, heavily contested, expensive and time-consuming.<sup>110</sup>

Given these difficulties, it would be of substantial assistance to private litigants to have access to information collected by the ACCC. As in many other jurisdictions, including Europe, the question of whether private claimants should have access to information on file with the ACCC, and particularly information provided by immunity recipients, has been the subject of debate in Australia in recent years.<sup>111</sup> Consistent with the approach taken by competition authorities around the world, and reflected in the *European Directive*,<sup>112</sup> the ACCC has adopted a highly restrictive position on disclosure of information to private claimants. The justification for this position in Australia, as elsewhere, is that such disclosure would threaten the efficacy of the ACCC Immunity Policy and, depending on the timing of

<sup>109</sup> On the difficulties that private claimants face in incentivising respondents to settle, see below Part IV(C).

<sup>110</sup> For example, there were five separate proceedings relating to discovery in the cardboard packaging case. In *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2009] FCA 60 (6 February 2009) [7], Tamberlin J noted: 'The evidence discloses that there has been substantial discovery to date. For example, Visy has discovered 15 572 documents. Of these, 4730 are financial documents or reports and 2973 are classified as spreadsheets, tables and lists'. At [8], Tamberlin J also outlined the scale of the discovery involved in the proceeding:

A single customer of Visy Board can have multiple accounts ... In paragraphs 22–28 of [Visy solicitor, Mr Zwier's] affidavit he spells out further details of the database and points to the extremely large volume of documents arising from the fact that at any given time between 1 January 1998 and 1 May 2005 Visy had between approximately 5000 and 7000 different customers from time to time. The Visy respondents had created a list of all product lines sold in each calendar year over a six year period which, if printed, would amount to over 22 400 pages relating to CFP sales price and production data at customer and product level.

<sup>111</sup> Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 74, 407–14.

<sup>112</sup> See generally Laura Guttuso, 'The Enduring Question of Access to Leniency Materials in Private Proceedings: One Draft Directive and Several Court Rulings' (2014) 7 *Global Competition Litigation Review* 10.

disclosure, could jeopardise current or future investigations or breach obligations of confidentiality.<sup>113</sup>

The legitimacy of the ACCC's concerns has been questioned judicially. In *Cadbury Schweppes Pty Ltd v Amcor Ltd*,<sup>114</sup> the ACCC sought unsuccessfully to resist an order to produce to Cadbury — for the purposes of its damages action against the price-fixers, Amcor and Visy — proofs of evidence from employees of Amcor (the successful immunity applicant) prepared for the purposes of the ACCC's penalty proceeding against Visy. In response to the ACCC's argument that disclosure would jeopardise its immunity program, Gordon J expressed the view that the 'real concern' of the ACCC was that potential immunity applicants would be deterred from cooperation not by the disclosure of information but by the effects of such disclosure, that is, by the heightened prospects of damages exposure. Her Honour continued:

In my view, the confidentiality and free-rider arguments ostensibly advanced here by the ACCC are, at best, a proxy for that concern, and at worst a smokescreen obscuring it. To be fair, the appropriate total level of private civil liability (that is, penalties plus damages) an actor should face for cartel conduct is a valid issue, and one which was long ago recognised by authorities and commentators in the United States in the context of cooperation and leniency ... But to acknowledge the ACCC's concern is not to approve of its proposed method for resolving that concern.<sup>115</sup>

The concerns of the ACCC were addressed by the legislature in 2009.<sup>116</sup> However, the approach underpinning the 2009 amendments appears to favour protection of the ACCC Immunity Policy over the encouragement of private actions. The 2009 amendments made to the CCA established a scheme relating to 'protected cartel information' ('PCI').<sup>117</sup> The scheme invests substantial discretion in the ACCC to determine whether to grant access to

<sup>113</sup> See, eg, Samuel, 'The ACCC Approach', above n 9, 22; Samuel, 'The Relationship between Private and Public Enforcement', above n 9, 5–7.

<sup>114</sup> (2008) 246 ALR 137.

<sup>115</sup> *Ibid* 150 [46]–[47] (citations omitted).

<sup>116</sup> *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) sch 1 items 113–16.

<sup>117</sup> PCI is defined as information that was given to the ACCC in confidence and relates to a breach or possible breach of the cartel offences or the cartel civil penalty prohibitions: CCA ss 157B(7), 157C(7).

PCI to a court or tribunal, or to a person engaged in or considering court proceedings, based on a finite set of factors, none of which directly refers to the interests of private claimants.<sup>118</sup> Controversially, the scheme displaces the common law doctrine relating to public interest immunity privilege (under which the competing interests of the public enforcement system and private rights to compensation are weighed and balanced)<sup>119</sup> and limits the availability and scope of judicial review of ACCC decisions not to provide disclosure under the scheme.<sup>120</sup>

On its face, the relevant provisions of the *European Directive* may appear harsher than those that apply in Australia in that, while there is at least a theoretical discretion in the ACCC to disclose, the *European Directive* provides absolute and indefinite protection for leniency statements and settlement submissions. Such documents cannot be the subject of a court disclosure order and nor are they admissible as evidence in damages proceedings.<sup>121</sup> In practice, however, given the attitude of the ACCC towards disclosure, private litigants in Australia could be said to face, in effect, the same bar on accessibility to such documents as would apply in the European context under the *European Directive*.

<sup>118</sup> CCA ss 157B(5), 157C(5). The factors are: the fact that the PCI was given to the ACCC in confidence; Australia's relations with other countries; the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation; in a case where the PCI was given by an informant: the protection or safety of the informant or of persons associated with the informant and the fact that the production of a document containing PCI, or the disclosure of PCI, may discourage informants from giving PCI in the future; in the case of production or disclosure to a court — the interests of the administration of justice; and in the case of production or disclosure to a tribunal — the interests of securing the effective performance of the tribunal's functions.

<sup>119</sup> See, eg, *Korean Air Lines Co Ltd v Australian Competition and Consumer Commission* [2008] ATPR ¶42-232, 49 171-2 [62]–[69] in which Jacobson J upheld the ACCC's claim to public interest immunity privilege in response to a notice to produce internal documents relevant to its decision-making with respect to a settlement with Korean Airlines over allegations of price-fixing of air cargo freight charges. Jacobson J accepted the ACCC's evidence that disclosure entailed a 'serious risk of adversely affecting the Commission's ongoing investigation into conduct suspected to have been carried out by the applicant and other carriers, and thereby impeding the Commission's fulfilment of its statutory functions in the public interest': at 49 172 [66].

<sup>120</sup> For a summary of criticisms made of the PCI scheme, see Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 74, 410–15 [10.3.2].

<sup>121</sup> *European Directive* [2014] OJ L 349/1, arts 6(6), 7(1).



Moreover, ameliorating the harshness of the *European Directive's* position on leniency statements and settlement submissions, there is only temporary protection for information that was prepared specifically by the accused for the purpose of the administrative proceedings before a competition authority or which was drawn up by a competition authority in the course of its administrative proceedings. Such documents could include a party's responses to requests for information or an authority's statement of objections. Disclosure of these types of documents can be ordered by a national court after the competition authority has closed its proceedings or taken a decision and may be used as admissible evidence in damages proceedings once that period has expired.<sup>122</sup>

Whether or not disclosure of such documents is ordered is to be determined presumably in accordance with the general disclosure scheme outlined in the *European Directive*, pursuant to which disclosure orders are to be made in accordance with principles relating to relevance, necessity, scope and proportionality.<sup>123</sup> By contrast, in Australia, these documents have been carved out from ordinary discovery rules and made subject to the restrictive PCI scheme.

Given the significance of access to information for private enforcement, it is surprising and unfortunate that the Harper Panel neglected this topic altogether. The Harper Panel endorsed the existence and operation of the ACCC Immunity Policy.<sup>124</sup> However, it made no reference in that context to the question of whether private claimants should have access to information generated in the immunity process and there is no reference to the PCI scheme in the Panel's Issues Paper, Draft Report or the final report. The Harper Review presented a valuable opportunity to review the scheme to ascertain whether it has struck the right balance between the competing interests involved in public and private enforcement and, in particular, whether consideration should be given to including the interests of private

<sup>122</sup> Ibid arts 6(5), 7(2).

<sup>123</sup> Ibid art 5.

<sup>124</sup> Harper Review, above n 26, 366–7. The Harper Panel discussed the issue of bar orders in this context but omitted any reference to questions of access to information: see below Part IV(C).

claimants as a relevant factor in the exercise of ACCC and judicial discretion in relation to the disclosure of PCI. This was an opportunity missed.<sup>125</sup>

### *C Joint and Several Liability and Contribution Rules*

The spectre of joint and several liability and contribution amongst respondents makes it extremely difficult in Australia to settle a class action involving multiple defendants, unless settlement is reached with all defendants. The problem is acute in cartel actions which, by their nature, involve multiple parties. The result is that all parties, even those that might prefer to resolve any alleged liability promptly, are put to the expense of lengthy and complex proceedings.<sup>126</sup> A further consequence is that private claimants are unassisted by information that they might otherwise be able to obtain from a settling respondent in aid of their claims against non-settling respondents.

There has been scant judicial consideration of whether the liability of cartel participants under the CCA is several, or joint and several. Given the policy considerations underlying the competition provisions of the CCA, and having regard to the similarity with conspiracy to commit the tort of deceit which gives rise to joint and several liability, liability under the price-fixing provi-

<sup>125</sup> Such a review was called for in Caron Beaton-Wells and Brent Fisse, Submission to Competition Policy Review Panel, *Competition Policy Review*, 10 June 2014, 30. The PCI scheme was not referred to in any of the ACCC submissions. Cf Bezzi, above n 101, 14:

The ACCC considers that the protected cartel information scheme appropriately balances the interests of private parties seeking to progress litigation against the public interest in encouraging immunity applicants to come forward and enabling the ACCC to maintain a well-regarded immunity program which allows it to detect and take action to punish cartels.

<sup>126</sup> According to a comprehensive empirical study published in December 2009, the average duration of all resolved class action proceedings was 698 days: Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: First Report — Class Action Facts and Figures' (Research Report, Australian Research Council, December 2009) 20. This is comparable with the average length of an 'ordinary' commercial proceeding in the Federal Court. During the five year period from 1 July 2007 to 30 June 2012, 94 per cent of cases were completed within 18 months (about 547 days): Federal Court of Australia, *Annual Report 2011–12* (14 September 2012) 16, 133. However, a substantially different picture emerges with respect to the duration of cartel class actions. The four settled cartel class actions to date took an average of 2165 days from the date of filing to the date of the settlement approval order: Caron Beaton-Wells, Brooke Dellavedova and Lee Taylor, 'Private Antitrust Enforcement in Australia — Untapped Potential' in Mel Marquis and Giorgio Monti (eds), *Shaping Private Antitrust Enforcement in Europe* (Hart Publishing, forthcoming).

sions may well be joint and several.<sup>127</sup> If this is the case, it means that in the event of a finding that there has been a breach of the cartel prohibitions, each of the respondents would be liable for the whole loss of the applicant and group members arising from the contravening conduct.

Rights of contribution in respect of liabilities arising under the CCA may fall to be determined according to the statutory contribution regimes of the various states.<sup>128</sup> The provisions of the *Wrongs Act 1958* (Vic), for example, permit claims for contribution by a non-settling respondent against a settling respondent (although any settlement payment made by the settling respondent is likely to be taken into account so that the latter's continuing exposure is likely to be confined to the balance of the share of the total loss which the trial court adjudges to have been the responsibility of the settling respondent).<sup>129</sup>

There are differences between the position taken by the *European Directive* to joint and several liability and contribution, and the position that appears to pertain in Australia in relation to these rules. As in the case of the access to information provisions, these differences reflect a concerted effort on the part of the EC to balance the potentially competing interests of the public enforcement system (particularly as it relates to preserving the effectiveness of immunity policies) and those of private claimants.

Under the *European Directive*, the immunity recipient's liability, as well as its contribution owed to co-infringers under joint and several liability, is limited to the harm it caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect suppliers.<sup>130</sup> Where a cartel has caused harm only to others than the customers or suppliers of the infringing undertakings, the immunity recipient is responsible only for its share of the

<sup>127</sup> See Wayne Courtney, 'Problems with the New Regime of Proportionate Liability for Misleading or Deceptive Conduct' (2005) 32 *University of Western Australia Law Review* 164.

<sup>128</sup> The CCA does not provide a right for one contravenor to pursue another for contribution and nor does it provide for proportionate liability; apportionment is available in claims for damages under sch 1 s 236, but not for compensatory orders under sch 1 ss 237–8. There is no broadly applicable contribution regime under any other federal statute. This means that such matters fall to be determined in accordance with, or pursuant to, equity, common law or state statutory regimes. Equity is arguably unavailable to a proven contravenor, and common law has generally given way to equity. In effect, this means that state statutory contribution regimes need to be considered.

<sup>129</sup> *Wrongs Act 1958* (Vic) s 23B.

<sup>130</sup> *European Directive* [2014] OJ L 349/1, arts 11(2), 11(4). Article 11(2) will not apply where the immunity recipient has led the infringement or has previously infringed competition law: at art 11(3).

harm caused by the cartel.<sup>131</sup> How that share is determined (for example, based on turnover, market share or role in the cartel) is left to the discretion of the member states, as long as the principles of effectiveness and equivalence are respected.<sup>132</sup>

The reason given for the position taken on immunity recipient liability in the *European Directive* is that, as immunity recipients are less likely to appeal an infringement decision, this decision often becomes final for them earlier than for other members of the same cartel and hence might make immunity recipients the primary targets of damages actions.<sup>133</sup> Thus the driving concern behind the approach of the *European Directive* is again to protect the effectiveness of immunity policies.<sup>134</sup> However, another practical benefit of the approach taken on the rules on joint and several liability and contribution (at least as far as private enforcement is concerned) is that settlement with immunity recipients may be easier for private claimants to negotiate. In turn, as a result of the cooperation of the immunity defendant, it may be easier for the private claimant to settle with other defendants and in general to resolve the dispute in a more timely and less expensive fashion than would otherwise be possible. These advantages are not available to private plaintiffs in Australia.

In addition, the *European Directive* contains several provisions directed specifically at facilitating settlements. These include reduction of the settling injured party's claim by the settling infringer's share of harm. For the remainder of the claim, the settling infringer could only be required to pay damages if the non-settling co-infringers were unable to fully compensate the injured

<sup>131</sup> However, the limitation on the immunity recipient's liability is not absolute. The immunity recipient remains fully liable as a last resort debtor if the injured parties are unable to obtain full compensation from the other infringers: *ibid* art 11(4). To guarantee the *effet utile* of this exception, member states have to make sure that injured parties can still claim compensation from the immunity recipient at the time they have become aware that they cannot obtain full compensation from the co-participants in the cartel.

<sup>132</sup> *Ibid* Preamble para 37, art 4.

<sup>133</sup> EC, 'Proposal for a Directive of the European Parliament and of the Council', above n 20, 16 [4.3.3]. The *European Directive* does not contain a similar or a corresponding article to the provision listed in the proposal above. However, arts 11(5)–(6) limit the immunity recipient's liability, as well as its contribution owed to co-infringers under joint and several liability, to the harm it caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect suppliers.

<sup>134</sup> See Laura Guttuso, 'I'm an Immunity Applicant, Get Me Out of Here: Joint and Several Liability Revisited' (2014) 7 *Global Competition Litigation Review* 94.

party.<sup>135</sup> Furthermore, damages paid through consensual settlements are to be taken into account when determining the contribution that a settling infringer needs to pay following a subsequent order to pay damages.<sup>136</sup> In this context, ‘contribution’ refers to the situation where the settling infringer was not a defendant in the action for damages, but is asked by co-infringers who were ordered to pay damages to contribute under the rules of joint and several liability. Such provisions create a more favourable climate for the efficient and fair resolution of private claims than exists in Australia, while at the same time protecting the strengths of the public enforcement system.

The Harper Panel did not consider issues relating to joint and several liability and contribution in its discussion of private enforcement. However, in its relatively brief comments relating to the ACCC Immunity Policy, the Harper Panel did make passing reference to the question of ‘whether the outcome of an immunity application has an impact on the liability of the immunity applicant to compensate cartel victims’.<sup>137</sup> It noted in this regard that there had been submissions calling for the introduction of bar orders, as exist in Canada, the effect of which is to block non-settling respondents from claiming contribution from a settling respondent, thus providing an incentive for a respondent to provide assistance to the private action, in exchange for reduced damages liability.<sup>138</sup> In the leading Canadian case on such orders, *Ontario New Home Warranty Program v Chevron Chemical Co*,<sup>139</sup> the Court’s source of power was said to be ss 12 and 13 of the *Class Proceedings Act*, SO 1992, c 6 (‘*Class Proceedings Act*’).

Section 12 of the *Class Proceedings Act* provides as follows:

The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

<sup>135</sup> *European Directive* [2014] OJ L 349/1, art 19(3).

<sup>136</sup> *Ibid* art 19(4).

<sup>137</sup> Harper Review, above n 26, 366.

<sup>138</sup> *Ibid*, citing LCA, Submission to Competition Policy Review Panel, *Competition Policy Review*, 27 June 2014, 56; Caron Beaton-Wells and Brent Fisse, Submission to Competition Policy Review Panel, *Competition Policy Review*, 10 June 2014, 31.

<sup>139</sup> (2000) 46 OR (3<sup>rd</sup>) 130, 141 [40] (Winkler J).

Section 13 provides:

The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

While an analogy may be drawn between s 12 of the *Class Proceedings Act* and s 33ZF of the *FCAA*, which provides that ‘the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding’, it does not appear that s 13 of the *Class Proceedings Act* has any equivalent in the *FCAA*. Jurisprudence in this area is as yet undeveloped in Australia. However, inserting a provision akin to s 13 into the *FCAA* would facilitate the making of bar orders. In addition to supporting the objective of deterrence, through incentivising disclosure of cartel conduct, the introduction of bar orders would be consistent with the overarching purpose provisions of the *FCAA*, and with the policy objective which favours the compromise of proceedings.

In response to the submissions made in support of bar orders, the Harper Panel concluded as follows:

Bar orders have advantages and disadvantages. On the one hand, they may increase the incentive for cartel participants to disclose cartel conduct, thereby bringing the cartel to an end. On the other hand, bar orders prevent those who have been harmed by cartel conduct from recovering compensation from the immunity applicant, although they may still be able to recover compensation from other cartel participants who have not received immunity.

The Panel considers there is no evidence showing that current arrangements are failing to achieve their objective of bringing about the deterrence and disclosure of cartel conduct. Accordingly, the Panel does not recommend introducing bar orders.<sup>140</sup>

This is an insipid response to a proposal that merits serious consideration.<sup>141</sup> Moreover, the Harper Panel’s failure to address the broader question of the

<sup>140</sup> Harper Review, above n 26, 366.

<sup>141</sup> It also ignores the growing evidence casting doubt on the effectiveness of immunity policies in deterring cartel conduct, and the ambiguous evidence, at best, of their effectiveness as tools in detection. For a summary of the large body of empirical economic studies on these questions, see Catarina Marvão and Giancarlo Spagnolo, ‘What Do We Know about the

lack of incentives (indeed considerable disincentives) facing respondents that wish to settle with private claimants in Australia is most unfortunate. It is an area in which policymakers and legislators in Europe and Canada have taken active measures in support of private claimants while at the same time protecting, if not enhancing, immunity policies. Action along these lines has also been taken in the United States.

In the United States, pursuant to the *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, immunity applicants can reduce their exposure to civil liability significantly if they provide ‘satisfactory cooperation’ to civil plaintiffs.<sup>142</sup> First, only single damages are allowed against the cooperating immunity applicant or defendant. This de-trebling provision lowers the expected cost of future damages claims significantly. Secondly, the Act limits the federal and state liability of an immunity applicant to the damages attributable to the commerce of the applicant in the goods and services affected by the violation. As under the *European Directive*, the effect of this provision is to spare an immunity applicant from the doctrine of joint and several liability under which each corporate cartel member is potentially liable for the full amount of a plaintiff’s damages irrespective of the cartel member’s share in the affected commerce.<sup>143</sup>

These overseas approaches demonstrate that there are ways of incentivising respondents to cooperate with private claimants as a means of offsetting the otherwise substantial hurdles that such claimants face in mounting credible actions that are not prohibitively risky and expensive, while at the same time strengthening immunity policies. A similar approach could be taken in

Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence’ in Caron Beaton-Wells and Christopher Tran (eds), *Anti-cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015) 57. For an assessment of the effectiveness of the ACCC Immunity Policy on achieving these and other ends, see Caron Y Beaton-Wells, ‘Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study’ (2014) 2 *Journal of Antitrust Enforcement* 126.

<sup>142</sup> *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub L No 108-237, § 213(b), 118 Stat 661, 666–7 (2004). The position in the United States usefully illustrates that the point of any protective regime should be to avoid interference with a specific investigation or decision, not simply to assist defendants to avoid the consequences of their alleged conduct.

<sup>143</sup> *Ibid* §§ 213(a), 214(3). See also *Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act*, Pub L No 111-190, 124 Stat 1276 (2010); Antitrust Modernization Commission, ‘Antitrust Modernization Commission: Report and Recommendations’ (April 2007) 251–5.

Australia by granting successful applicants immunity from damages. This would represent a considerable incentive to prospective applicants given that the size of damages payouts is evidently far greater than the penalties imposed in ACCC proceedings. For example, the total penalties in *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* were \$26 million compared with total damages of \$30.5 million.<sup>144</sup> The total penalties in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 3]* were \$38 million<sup>145</sup> compared with damages paid to Cadbury reported at \$235 million<sup>146</sup> and damages paid to the members of the class action reported at \$95 million.<sup>147</sup>

If the successful applicant for immunity could avoid damages, the incentive to apply for immunity would be substantially increased. However, any such reform would need to be implemented in such a way that those who were harmed by the activity of the cartel could still claim damages. This is critical given the purpose of the CCA,<sup>148</sup> the statutory requirement to give preference to compensation where penalties and compensation are sought in a single proceeding,<sup>149</sup> and the general deterrent effect of private damages claims.<sup>150</sup>

<sup>144</sup> (2006) 236 ALR 322, 327–8 [16]–[17] (Jessup J).

<sup>145</sup> (2007) 244 ALR 673, 727 [333] (Heerey J).

<sup>146</sup> Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 74, 523, who note that the terms of this settlement were confidential so it is not possible to verify the figure.

<sup>147</sup> *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] ATPR ¶42-361, 43 962 [9] (Jacobson J).

<sup>148</sup> Australian Law Reform Commission, 'Compliance with the *Trade Practices Act 1974*' (Report No 68, 1994) [7.1]: 'The Commission considers that enabling persons who have suffered loss or damage as a result of a contravention of the [TPA] to be compensated for that loss is perhaps the most important objective of action to enforce the Act'.

<sup>149</sup> CCA s 79B, inserted following a recommendation made by the Australian Law Reform Commission in 1994: *ibid* [7.4].

<sup>150</sup> Private enforcement of statutory protections, through mechanisms like class actions, is now an accepted part of the regulatory landscape. The deterrent effect of, for example, class actions in the regulatory context is well recognised by Australian regulators and courts: see, eg, ABC Radio National, '\$30.5m Settlement in Price Fixing Lawsuit', *PM*, 17 July 2006 (Graeme Samuel) <<http://www.abc.net.au/pm/content/2006/s1688765.htm>>, where the former ACCC chairman stated that the \$30.5 million award was a 'lesson to those that are involved in cartels'. He further stated

there is now a potential three pronged approach that will occur for dealing with people involved in cartels and cartel conspiracies. First of all there will be action by the ACCC and we will either seek financial penalties or, once legislation is passed by Parliament,



If successful immunity applicants are to avoid claims for damages, the CCA would need to empower the ACCC to grant immunity from proceedings (or the Commonwealth Director of Public Prosecutions from prosecution) and further, to provide that a grant of immunity from liability carried with it a grant of immunity from paying damages. Compensation for victims of the cartel could be retained through a version of the current s 82 which enables those who have suffered loss to recover against any person involved in the contravention. That is, the remaining members of the cartel would be liable for all damage caused by the cartel on the basis of joint and several liability.

Although a significant benefit of this change would be that it would increase the costs of engaging in and hence presumably assist in deterring cartel activity, it is important to safeguard the rights of those harmed by the cartel to be compensated. Section 79B reflects legislative recognition of the importance of safeguarding these rights. It instructs the court that, in the event of a defendant not having sufficient resources to pay both a pecuniary penalty and compensation, preference has to be given to the payment of compensation. It appears that s 79B has application only where penalties and compensation are sought in the same proceeding. However, the general underlying principle, namely that a penalty should not be set at a level that undermines the capacity for a contravenor to pay compensation, remains sound.

For this reason, any amendment to grant immunity would need to be confined to the immunity applicant (and not extended, for example, to other parties that seek to cooperate) lest entire cartels be granted immunity from paying damages. Further, the portion of damages for which the immunity applicant would otherwise have been liable would need to be shifted to the remaining participants, rather than excised.

Granting successful applicants immunity from damages may well increase the extent to which those harmed by cartels are able to be compensated. This is so for two reasons. The first is that, by increasing the incentive for members of a cartel to apply for immunity, the percentage of cartels that are prosecuted

we'll be seeking to put executives in jail. And, in addition to that, as Maurice Blackburn have demonstrated by their action, they also will be pursuing as will other lawyers and other plaintiffs will be seeking and obtaining damages.

In *Kirby v Centro Properties Ltd*, a shareholder class action, Finkelstein J stated that '[i]t is often said that these actions promote investor confidence in the integrity of the securities market. They enable investors to recover past losses caused by the wrongful conduct of companies and deter future securities laws violations': (2008) 253 ALR 65, 67 [8]. See also *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 124 [54] (Finkelstein J).

and victims compensated may increase. Secondly, the change may remove a significant disincentive to the cartel participants providing information to the ACCC. This would be further enhanced by making the civil damages immunity contingent on the cartel participants providing all contemporaneous documents given to the ACCC to a representative party or other plaintiff.

## V PROOF AND QUANTIFICATION OF LOSS

The private right of action to recover damages and to seek other remedial orders, including for compensation, is clearly set out in ss 82 and 87 of the CCA. While it is clear that there *is* a right of action, plaintiffs seeking damages for contraventions of the cartel provisions of the CCA nevertheless face considerable uncertainty as to how to exercise that right. Damages claims in competition law cases are well-recognised as inherently complex, and for plaintiffs in Australia, that complexity is compounded by a lack of case law applying s 82 to cartel conduct.<sup>151</sup> The absence of judicial guidance and resultant uncertainty — particularly when coupled with Australia's adverse costs regime — makes bringing such claims a challenging, even daunting, proposition.<sup>152</sup> As opposed to the clear policy statements in the *European*

<sup>151</sup> See S G Corones, *Competition Law in Australia* (Thomson Reuters, 5<sup>th</sup> ed, 2010) 887–8 [18.75]; Brooke Dellavedova and Rebecca Gilsean, 'Challenges in Cartel Class Actions' (2009) 15(2) *University of New South Wales Law Journal Forum* 75, 80. The operation of s 87(1) is similarly undeveloped in competition cases. In *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, which involved other contraventions of the CCA, several judges addressed the relationship between ss 82 and 87 noting (a) that s 87 is supplemental to s 82 and cannot be used to constrain or diminish a claimant's right to full recovery pursuant to that section: at 145–6 [117] (McHugh J), 179–80 [220] (Callinan J); (b) that courts have broad discretion and flexibility in making orders pursuant to s 87: at 143 [108] (McHugh J); and (c) that 's 87 is concerned not only with cases where loss or damage *has been* suffered but also with cases where it is likely that it *will be*': at 125 [45] (Gaudron, Gummow and Hayne JJ) (emphasis in original).

<sup>152</sup> The 'costs follow the event' rule generally means that the losing party needs to pay not only its own legal costs but also a significant proportion of its opponent's costs. In the class action context, however, s 43(1A) of the FCAA expressly confers upon class members qualified immunity from adverse cost awards. This means that, in many circumstances, it would not be financially rational for aspiring class representatives to institute class actions, unless they are able to shift to others the liability for: (a) the fees and disbursements of the class representative's lawyers; (b) any costs awarded to the defendants in the event of a loss for the class; and (c) any security for costs orders granted to the defendants. Frequently, plaintiff solicitors in Australia have funded class actions on a 'no win, no fee' basis, though there are restrictions on conditional fees for lawyers. Commercial litigation funding has become more common in

*Directive*, which appear designed to clarify the contours of private enforcement, Australian plaintiffs seeking damages are left to chart their own course through uncharted waters.

The key areas of doctrinal uncertainty are familiar concepts with which other jurisdictions have grappled and, at least to some extent, crafted either judicial (as, for example, in the United States) or legislative and policy responses (as reflected in the *European Directive*). These concepts are: first, causation of loss; secondly, the availability and structure of a ‘pass-on’ defence; and thirdly, methods of quantifying damages.

### A Causation of Loss

Both ss 82 and 87 of the *CCA* provide that loss or damage must have been suffered (or is likely to be suffered) ‘by conduct of another person’. Courts have held that use of the word ‘by’ in s 82 ‘clearly expresses the notion of causation without defining or elucidating it’ and, therefore, it has been said, ‘s 82(1) should be understood as taking up the common law practical or common-sense concept of causation’.<sup>153</sup>

But while it may be clear that the phrase ‘by conduct of another person’ imports the notion of causation into s 82 (and presumably also s 87),<sup>154</sup> it is not clear how causation principles might apply in a class action alleging cartel conduct, and that lack of clarity acts as a powerful disincentive to victims of

recent years, with reimbursement of between 20 per cent and 40 per cent of the compensation class members are entitled to receive from the litigation: See Michael Legg et al, ‘The Rise and Regulation of Litigation Funding in Australia’ (2011) 38 *Northern Kentucky Law Review* 625; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, 417 [77] (Stone J); *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 119 [32] (Finkelstein J); Vince Morabito, ‘Class Actions Instituted Only for the Benefit of the Clients of the Class Representative’s Solicitors’ (2007) 29 *Sydney Law Review* 5.

<sup>153</sup> *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ), quoted in *Henville v Walker* (2001) 206 CLR 459, 489 [95] (McHugh J); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 531–2 [106] (Gummow J). The cases concerned equivalent *TPA* provisions. See also *Norcast Sarl v Bradken Ltd [No 2]* (2013) 219 FCR 14, 95 [326] (Gordon J):

[t]he use of the words “because of”, as with the use of the word “by” in s 82 of the [*TPA*], should be understood to import the traditional notion of causation as a question of fact to be determined by reference to commonsense and experience into which policy considerations and value judgments necessarily enter.

<sup>154</sup> *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 127 [54] (Gaudron, Gummow and Hayne JJ).

price-fixing and similar anti-competitive conduct in exercising their right to seek compensation. The problem is threefold. First, the cartel conduct must have caused *some* harm, typically in the form of prices for goods or services that were higher than the prices that would have obtained in the absence of the cartel conduct. Secondly, the lead applicants may need to demonstrate that they suffered such harm. Thirdly, although no court has so held, respondents in class actions are likely to argue that it is necessary to show that all members of the class suffered the same kind of anti-competitive harm.

The case law addressing causation in relation to a contravention of the competition provisions is extremely limited. The issue has been canvassed only in the context of interlocutory proceedings that offer little insight as to how causation might be litigated to judgment.<sup>155</sup> However, there is a body of jurisprudence relating to causation in the context of damages claims for contraventions of the misleading and deceptive conduct provisions of the CCA. This case law provides some general principles that might provide some guidance in future competition law cases.

First, the misleading and deceptive conduct cases evince the principle of flexibility in interpreting the CCA so as to further the overarching purpose of the legislation, which is to ‘enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.<sup>156</sup> Secondly, and relatedly, the courts have also emphasised that, while it may be useful to draw on analogies to common law or equitable principles, the statutory damages and other relief available in ss 82 and 87 are not constrained by any limitations that might apply at common law or equity or by familiar common law tests such as ‘but for’ causation.<sup>157</sup> Thirdly, courts have been mindful of the need to avoid frustrating the purposes of the CCA

<sup>155</sup> See *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* [1997] ATPR ¶41-585; *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* (1998) 157 ALR 135. More recently, see *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166, 176 [32], 177 [36]–[37], 181–2 [61] (Tracey J).

<sup>156</sup> CCA s 2. The High Court has emphasised this principle on a number of occasions, including with direct reference to the causation requirement: see, eg, *Henville v Walker* (2001) 206 CLR 459, 489 [96] where in the course of his discussion of TPA s 82 and causation, McHugh J emphasised that ‘the objects of the Act indicate that a court should strive to apply s 82 in a way that promotes competition and fair trading and protects consumers’.

<sup>157</sup> *Henville v Walker* (2001) 206 CLR 459, 489 [96] (McHugh J). See also *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 510 [38], 512–13 [42] (McHugh, Hayne and Callinan JJ), 535 [116] (Gummow J).

by imposing on plaintiffs an unduly strict burden of proof, particularly in circumstances where a defendant's contravention may not be the sole cause of loss or damage.<sup>158</sup>

It is difficult to predict how these principles might be applied to causation analysis in cases involving cartel conduct, but the potential does exist. Proven conduct involving, for example, price-fixing of certain products at certain times, coupled with showing that the conduct had a market-wide impact on prices, might support a rebuttable presumption of the necessary causal connection for plaintiffs and group members purchasing those products during the relevant period — leaving it to respondents to come forward with evidence as to why that presumption should not apply specifically to the applicant or certain group members. At this stage, however, that argument awaits the intrepid plaintiff prepared to take his or her case to judgment.

The situation could not be more different in the European Union. The *European Directive* provides that 'neither the burden nor the standard of proof required for the quantification of harm [should render] the exercise of the right to damages practically impossible or excessively difficult'.<sup>159</sup> The national courts should also have the power 'to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available'.<sup>160</sup> In order to remedy the information asymmetry and the difficulty of quantifying harm, the *European Directive* provides that cartel infringements are presumed to cause harm, although the infringer should have the right to rebut that presumption.<sup>161</sup>

<sup>158</sup> See *Henville v Walker* (2001) 206 CLR 459, 482 [68] (McHugh J). In those circumstances, a plaintiff need only establish on the balance of probabilities that a defendant's contravention materially contributed to *some* loss or damage to satisfy the causation requirement of *TPA* s 82, whereupon it falls to the defendant to establish whether some component of that loss or damage should be attributed to acts or events other than the contravention: at 483 [70].

<sup>159</sup> *European Directive* [2014] OJ L 349/1, art 17(1).

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid* art 17(2).

### B *Pass-on*

Related in many ways to causation, the status of the pass-on (or pass-through) defence in Australia is equally uncertain.<sup>162</sup> The issue is well-known in most jurisdictions, and it arises at two main levels. The first is where purchases of the affected product or service are multi-tiered: the direct purchaser purchases the product or service from the contravening party and then resells it to indirect purchasers, either in a substantially similar or identical form (such as telecommunications or transportation services, or in a wholesale–retail context) or with substantial transformation, that is, where the product in question is one of a number of components of a new product or service. The second is where the affected product or service is not resold to indirect purchasers but rather forms part of an overall cost structure that direct purchasers must seek to recover through sales of their own products or services.

Analysing pass-on in any given context is an intensely factual inquiry, and the range of potential considerations is almost limitless. Not unexpectedly, therefore, it is difficult to articulate a stable analytical framework that might have general application across a range of factual scenarios. In the interests of remoteness, pragmatism and policy, the United States Supreme Court ‘solved’ the pass-on problem in *Hanover Shoe Inc v United Shoe Machinery Corp* (*Hanover Shoe*)<sup>163</sup> and *Illinois Brick Co v Illinois* (*Illinois Brick*)<sup>164</sup> by generally rejecting pass-on as a defence available to antitrust defendants (to preclude their avoiding liability on the basis that injury is not proven) and barring suits by indirect purchasers (to guard against defendants being exposed to duplicative damages). But the *Hanover Shoe* and *Illinois Brick* doctrine rests on an openly acknowledged policy decision to sacrifice precision in determining exactly who has been harmed in the interests of

<sup>162</sup> See generally Matthew Eglezos, ‘Recovering Cartel Damages: The Passing-On Defence under the *Trade Practices Act*’ (2010) 38 *Australian Business Law Review* 174, 186–95; Watts and Gordon, above n 7, 92–3; Brendan Sweeney, ‘The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the Situation in the United States, Europe and Australia’ (2006) 30 *Melbourne University Law Review* 837, 871–2.

<sup>163</sup> 392 US 481 (1968).

<sup>164</sup> 431 US 720 (1977).

ensuring that violations of antitrust laws do not go unpunished, and it is not without its critics.<sup>165</sup>

While the position in federal courts in the United States has the appeal of being a bright line rule that is easily followed, ensures redress for at least some victims of cartel conduct and eliminates some of the issues that make antitrust litigation so lengthy, complex and costly, it is unlikely to be adopted in Australia, at least not without significant qualification. As made clear in *Marks v GIO Australia Holdings Ltd*,<sup>166</sup> Australia has an ‘actual damages’ regime under which neither treble damages nor punitive damages are available under ss 82 or 87 of the CCA.<sup>167</sup> The legal fictions accepted in *Hanover Shoe* and *Illinois Brick* — that purchasers are *always* harmed in the full amount of any overcharge and that any harm to indirect purchasers is too attenuated or remote to quantify — would seem inconsistent with the current Australian regime.<sup>168</sup>

In Australia, few cases have confronted pass-on, and those that have confronted it (albeit cursorily), only confirm that the position in this country is indeterminate. In *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (*‘Auskay’*),<sup>169</sup> Tracey J canvassed some of the complex implications of pass-on, indicating that it was at least conceivable that purchasers of products or services at supra-competitive prices might ultimately have suffered no harm because they were able to pass those overcharges in full to downstream customers.<sup>170</sup> The air cargo services at issue in *Auskay* typically involved two tiers of purchasers: freight forwarders who purchased air cargo services directly from the respondent airlines; and importers and exporters who purchased those services (along with additional services) from the freight forwarders, and thus ‘indirectly’ in relation to the airlines. But Tracey J ultimately expressed no conclusion as to whether pass-on would be available as a defence:

<sup>165</sup> See, eg, Robert G Harris and Lawrence A Sullivan, ‘Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis’ (1979) 128 *University of Pennsylvania Law Review* 269; see also Barak D Richman and Christopher R Murray, ‘Rebuilding *Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule’ (2007) 81 *Southern California Law Review* 69.

<sup>166</sup> (1998) 196 CLR 494.

<sup>167</sup> *Ibid* 531–2 [107] (Gummow J).

<sup>168</sup> Sweeney, above n 162, 871–2.

<sup>169</sup> (2008) 251 ALR 166.

<sup>170</sup> *Ibid* 177–8 [39].

It has yet to be determined authoritatively whether a respondent who is facing a loss and damages claim under s 82 has a defence if it is shown that the applicant has passed on to customers or clients all additional costs occasioned by the implementation of an agreement made in contravention of a provision of the Act.<sup>171</sup>

Given the interlocutory nature of the *Auskay* decision, the Court was not required to consider any of the issues that might arise if the defence were available, most particularly which party would have the burden of showing that the applicant (or group members) did in fact pass on overcharges.<sup>172</sup> In an earlier case, *Queensland v Pioneer Concrete (Qld) Pty Ltd* ('*Pioneer Concrete*'),<sup>173</sup> the State of Queensland was in the somewhat unusual position of itself being both a direct purchaser of pre-mixed concrete and an indirect purchaser where the concrete was first purchased by a construction firm for use on a project commissioned by the State. As in *Auskay*, however, the full implications of pass-on were not explored in any detail as the issue only arose at an interlocutory stage and ultimately the proceeding was discontinued. Drummond J concluded only that the failure to differentiate between the two kinds of purchase was problematic as a matter of pleading, and he directed the applicant to address the issue in an amended statement of claim.<sup>174</sup>

The approaches taken at interlocutory stages in *Auskay* and *Pioneer Concrete*, while reaching no conclusions as to either the pass-on defence or indirect purchaser standing, do evince some receptiveness to requiring that plaintiffs address pass-on, at least as between direct and indirect purchasers of the product or service that is the subject of an anti-competitive agreement, which would only be necessary if the defence were available in some fashion.

<sup>171</sup> Ibid 178 [41]. Tracey J further noted that the same is true as to whether indirect purchasers have standing to sue for damages: at 178–9 [42]–[43].

<sup>172</sup> Tracey J did, however, note that the High Court had previously held that the pass-on defence was unavailable to the respondent where the remedy sought was restitution rather than damages, regardless of whether the plaintiff had passed on excessive workers' compensation premiums it had paid: *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75 (Mason CJ), 90–1 (Brennan J). It is an open question whether the broad discretion granted to courts under s 87 of the CCA would encompass restitution as a remedy. Given that the applicant in *Auskay* did not seek restitutionary relief, Tracey J considered it neither necessary nor desirable that he reach a conclusion: *Auskay* (2008) 251 ALR 166, 178–9 [43].

<sup>173</sup> [1999] ATPR ¶41-691.

<sup>174</sup> Ibid 42 827 [11], 42 830–1 [21]–[31].



But neither case provides any guidance as to how applicants might address the issue at the pleading stage; which party bears the burden of proof of showing that overcharges were (or were not) passed on, and to what extent; or whether the application of the defence might differ between situations involving direct and indirect purchasers, as opposed to purchasers and their downstream customers, where the overcharged product or service is part of an overall cost structure.

With respect to indirect purchasers and the pass-on defence — both its availability and application — the EC's position is both clear and practical. Indirect purchasers have standing, the defence is available, and the burden of proof lies with the contravening party to establish and quantify pass-on.<sup>175</sup> Similarly, with respect to quantifying harm, the *European Directive* establishes a rebuttable presumption that a proven cartel has caused harm<sup>176</sup> and enshrines the principle that the burden of proof in quantifying harm must not render 'the exercise of the [injured party's] right to damages practically impossible or excessively difficult'.<sup>177</sup> Thus, even though quantification of harm — apart from the rebuttable presumption included in the *European Directive* — is ultimately a matter for national rules and procedures, the EC has made clear that such rules and procedures 'must, however, be in line with the principles of equivalence and of effectiveness', particularly the dictates relating to the level and burden of proof.<sup>178</sup>

### C Quantification of Damages

As with causation, the quantification of damages arising from cartel conduct is fraught with complexity. Essentially, a plaintiff seeking damages must prove what *did* happen in relation to conduct but what *did not* happen in relation to damages. The latter exercise is necessarily hypothetical: the plaintiff must construct a model of a 'but for' world in which prices were not affected by

<sup>175</sup> *European Directive* [2014] OJ L 349/1, arts 13–14. See also EC, 'Proposal for a Directive of the European Parliament and of the Council', above n 20, 17–18 [4.4]. In addition, the *European Directive* also recognises the possibility that loss and damage arising from cartel conduct may extend to lost profits resulting from reduced economic activity or 'output effects': at 17 [4.4].

<sup>176</sup> *European Directive* [2014] OJ L 349/1, art 17(2).

<sup>177</sup> *Ibid* art 17(1).

<sup>178</sup> EC, 'Proposal for a Directive of the European Parliament and of the Council', above n 20, 18 [4.5].

cartel conduct, and then compare those ‘but for’ prices to actual prices to measure the amount by which actual prices exceeded hypothetical competitive prices — the ‘overcharge’.<sup>179</sup> The critical issues are first, what methodologies might be acceptable for advancing the hypothesis, and secondly, the degree of precision and certainty with which damages must be quantified.

In Australia, as with causation and the pass-on defence, no action for damages arising from a cartel has proceeded to judgment, and so both issues remain undetermined. In the United States, where there is a vastly more developed body of case law, at least two orthodox methodologies have emerged for the purposes of quantifying antitrust damages: the ‘before-during-after’ method and the ‘yardstick’ method. The first method involves comparing prices for the affected product or service in ‘benchmark’ periods before and after the period during which the cartel is said to have operated with those that are obtained during that period. The second, typically employed where the first is considered infeasible, involves identifying a different product or service that can be expected to exhibit similar price characteristics to the affected product or service. In both methods, the comparative prices are usually then subjected to econometric analysis designed to control for other factors that might have contributed to differences in price between actual prices and benchmark or yardstick prices.<sup>180</sup>

No Australian court has yet made any assessment as to whether such methodologies — and particularly the use of econometric analysis — should be accepted in competition cases. Applicants seeking discovery in aid of quantifying damages have indicated their intention to submit expert reports that employ such methodologies as evidence of loss and damage. In a class action relating to a cartel in the cardboard packaging industry, *Jarra Creek*

<sup>179</sup> It remains unclear whether a purchaser’s ‘loss and damage’ is measured as the raw amount of the overcharge or by lost profits consequent to having paid a higher price. While ‘lost profits’ is commonly used in commercial litigation, courts in the United States have recognised that in the context of antitrust litigation, a more appropriate measure may be raw difference between ‘but for’ and actual prices. See generally American Bar Association, *Proving Antitrust Damages: Legal and Economic Issues* (American Bar Association, 2<sup>nd</sup> ed, 2010) chs 3, 7. Either measure, however, first requires quantifying the hypothetical ‘but for’ price that would have been obtained in a competitive environment, which is the primary issue specific to antitrust damages as opposed to damages more generally.

<sup>180</sup> For a more thorough overview of statistical methods used in antitrust cases, see generally *ibid* ch 6. See also John M Connor, ‘Forensic Economics: An Introduction with Special Emphasis on Price Fixing’ (2007) 4 *Journal of Competition Law and Economics* 31.

*Central Packing Shed Pty Ltd v Amcor Ltd*,<sup>181</sup> the only price-fixing class action to date in which evidence quantifying loss has been submitted (although the case did not proceed to trial), the discovery application was contested.<sup>182</sup> In making the discovery orders sought by the applicants, the Court took into account evidence from the applicants' expert that, having reviewed the materials discovered to date, he needed further information to complete his econometric analysis.<sup>183</sup> Although such orders are not a determination as to whether econometric analysis would be an appropriate methodology for quantifying loss, the Court's orders do suggest some willingness to admit econometric analysis as evidence of the quantification of damages in cartel cases under the CCA.

As to the degree of precision with which damages must be quantified, in the absence of cases specific to cartel conduct, plaintiffs in Australia seeking damages would necessarily have to rely on case law, establishing in other contexts, that the complexity of proving damages and a certain degree of imprecision should not constitute a barrier to recovery.<sup>184</sup> In particular, cartel plaintiffs may be assisted by judicial acceptance in other contexts of a degree of estimation in damages claims where there is an asymmetry of information between plaintiffs and defendants and where plaintiffs necessarily are precluded from adducing precise evidence as to damages as a result.<sup>185</sup>

<sup>181</sup> [2011] ATPR ¶42-361.

<sup>182</sup> *Ibid* 43 962 [7]–[8], 43 964–5 [40]–[52] (Jacobson J).

<sup>183</sup> See *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2009] FCA 60 (6 February 2009) [14] (Tamberlin J).

<sup>184</sup> See, eg, *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 57 ALR 167, 183 (Sheppard, Morling and Wilcox JJ): 'If the court finds damage has occurred it must do its best to quantify the loss even if a degree of speculation and guess work is involved'.

<sup>185</sup> See, eg, *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257, in which the High Court reinstated a damages award made by the trial judge that used the defendant's *estimated* rather than actual costs as a starting point for quantifying damages based in part on 'due allowance ... for the fact that the calculation of damages was necessarily based on information that was primarily within the knowledge of [the defendant], and involved matters of estimation as well as calculation': at 259 [6] (Gleeson CJ, McHugh and Kirby JJ). The High Court further noted that, while a plaintiff bears the burden of proving the amount of loss it has sustained, it is required to prove that amount only 'with as much precision as the subject matter reasonably permitted': at 266 [37] (Hayne J). Information regarding the defendant's actual costs (which were said to be grounds for reducing or eliminating damages) was not reasonably available to the plaintiff and, therefore, the use of the defendant's estimated costs was sufficiently precise and reliable. Cartel cases typically involve similar circumstances where transactional and costs data internal to the defendant are not made

Recognising the complexity of quantifying harm, the EC's non-binding guidance and the accompanying 'practical guide' essentially endorses the existing orthodox methods of quantifying damages in antitrust cases.<sup>186</sup> Causation or 'causality' is not directly addressed in the *European Directive*, but rather recognised as a matter for national courts.<sup>187</sup> But, as with methods of quantifying harm, the *European Directive* mandates that national rules on causation 'must observe the principles of effectiveness and equivalence' and may 'not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the [FEU]'.<sup>188</sup> Arguably, these same principles can be teased out of dicta in the Australian case law in contexts not involving contraventions of the cartel provisions of the CCA. However, making new law is an uncertain and hazardous undertaking.

The Harper Panel included a brief section on proving loss or damage in private cases in the Harper Review.<sup>189</sup> However, its examination of the issue was incomplete and superficial. It did not address issues of causation or pass-on. Nor did it examine the challenges associated with quantification of loss. Rather, it simply touched on the question as to whether the CCA should be amended to include a power to seek cy pres orders. Such orders are used in the administration of estates or trusts where the original bequest or trust fails for some reason.<sup>190</sup> In such circumstances the court may order a cy pres scheme to direct the application of funds towards a similar objective as the original gift or trust.

In the context of competition law breaches, it was submitted to the Panel that such orders might be used when it can be shown that the contravening

available to plaintiffs (or no longer exist). In such cases, where data are unavailable despite a plaintiff's reasonable efforts, the fact that it is necessary to use estimates in quantification should not be grounds to argue that the plaintiff has failed to prove the amount of damages.

<sup>186</sup> *Communication from the Commission on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* [2013] OJ C 167/19, 21 [10]–[16]. See also EC, 'Proposal for a Directive of the European Parliament and of the Council', above n 20, 18 [4.5].

<sup>187</sup> *European Directive* [2014] OJ L 349/1, Preamble para 11; EC, 'Proposal for a Directive of the European Parliament and of the Council', above n 20, 17–18 [4.4].

<sup>188</sup> *European Directive* [2014] OJ L 349/1, Preamble para 11.

<sup>189</sup> Harper Review, above n 26, 415–16.

<sup>190</sup> Jonathan Garton, 'Justifying the Cy-pres Doctrine' (2007) 21 *Trust Law International* 134, 134–5.

conduct has caused some quantifiable detriment but it is not possible to identify the persons damaged by the conduct.<sup>191</sup> It was proposed that the court would order an amount of compensation be paid into a trust fund to be spent in a manner directed by the court.

However, the Harper Panel gave this proposal short shrift, noting it had been previously considered in the *Review of the Competition Provisions of the Trade Practices Act* ('Dawson Review')<sup>192</sup> and that, for the reason given for its rejection in that review, it should again be rejected.<sup>193</sup> The Dawson Review rejected the idea on the grounds that having such a power 'would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance'.<sup>194</sup> This is an unsatisfactory response to an otherwise meritorious proposal.

Cy pres orders are a feature of antitrust class actions in the United States<sup>195</sup> and Canada.<sup>196</sup> They have been called for previously by experts commenting on competition law cartel class actions,<sup>197</sup> and in several states there have been recommendations that cy pres remedies be adopted for the purposes of class actions generally.<sup>198</sup>

<sup>191</sup> Consumer Action Law Centre, Submission to Competition Policy Review Panel, *Competition Policy Review*, 17 November 2014, 18–19: 'We think cy-pres remedies are particularly appropriate in cartel cases where it can be difficult to gather proof of individual loss.'

<sup>192</sup> Sir Daryl Dawson, Jillian Segal and Curt Rendall, Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (January 2003).

<sup>193</sup> Harper Review, above n 26, 416.

<sup>194</sup> Dawson Review, above n 192, 163.

<sup>195</sup> Albert A Foer and Roberto Amore, 'Cy Pres as an Antitrust Remedy' (Working Paper No 05-09, American Antitrust Institute, 27 October 2005); Albert A Foer, 'Enhancing Competition through the Cy Pres Remedy: Suggested Best Practices' (2010) 24(2) *Antitrust* 86.

<sup>196</sup> Peter Cashman and Ross Abbs, 'Problems and Prospects for Victims of Cartels: The Strengths and Limitations of Representative and Class Action Proceedings' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009) 21–2.

<sup>197</sup> See, eg, *ibid* 20–2; I S Wylie, 'Cartel Compensation — A Consumer Perspective' (2011) 39 *Australian Business Law Review* 177, 182.

<sup>198</sup> See, eg, Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) ch 8. The New South Wales Parliament proposed the introduction of cy pres remedies in Supreme Court representative proceedings: Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010 (NSW) cl 178(5). However Parliament then heeded calls by large corporate law firms and the State's law society by removing them from the Bill: Alex Boxsell, 'Cy-pres Remedies Dumped from Bill', *Australian Financial Review*

In class actions, there are two distinct situations in which a plaintiff may wish to invoke cy pres remedies: first, to deal with the undistributed remainder of an award, in circumstances where it is inappropriate that such remainder revert to the defendant; and secondly, to deal with a situation in which it is impossible, impracticable or otherwise inappropriate to distribute direct compensation to individuals who have suffered loss or damage from unlawful conduct, but where it is possible to calculate aggregate damages for the group.

Currently, under s 33M of the *FCAA*, a class action may be stayed or discontinued as a class action if the costs of identifying group members and distributing damages to them are excessive, compared to the amount of damages. In practice this means that class actions will often not be possible for end consumers. In a class action relating to an animal vitamins cartel these considerations led to amendment of the group to exclude end consumers who had not spent over a certain threshold on animal vitamins.<sup>199</sup> Class actions in the cardboard packaging and air cargo industries have also involved similar purchase amount restrictions.<sup>200</sup> In practice this means cartel class actions are run for business victims rather than individuals.<sup>201</sup>

There are many instances when the use of a class action procedure to distribute small damages to group members is unavailable because any distribution of damages is uneconomical:

Certain trade practices violations, though flagrant, may have dispersed and de minimis effects that present barriers to consumer action. A horizontal price fix that results in an incremental \$2 rise in the price of a consumer good over a 12 month period is unlikely to warrant any individual cause. However,

(online), 3 December 2010 <<http://www.afr.com/business/legal/cypres-remedies-dumped-from-bill-20101202-j55xf>>.

<sup>199</sup> *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* [No 2] (2006) 236 ALR 322, 324 [5], 331 [26] (Jessup J).

<sup>200</sup> *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2006] FCA 1802 (21 December 2006) [6] (Tamberlin J); *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airway Ltd* [2010] FCA 1302 (30 November 2010) [2] (Tracey J).

<sup>201</sup> *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* [No 2] (2006) 236 ALR 322, 323–4 [4], 331 [26] (Jessup J); *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] ATPR ¶42-361, 43 971 [123]–[124] (Jacobson J).

across a wide class, nugatory individual effects may aggregate to a significant total abuse.<sup>202</sup>

A representative proceeding in respect of such losses would be vulnerable to a strike out application under s 33N on the basis that a group proceeding would not provide an efficient and effective means of dealing with the claims of group members, or that it is otherwise inappropriate that the claims be pursued by means of a group proceeding.<sup>203</sup>

Given these considerations the introduction of a *cy pres* remedy for the purposes of cartel class actions warrants serious consideration. Providing such a remedy would have at least four distinct benefits. First, it would serve deterrence because, an amount of damages having been determined, the unclaimed or un-distributable funds do not return to the respondent. Secondly, the respondent is not unjustly enriched in the event that claims are not asserted by all potential plaintiffs. Thirdly, as the funds may be used to promote competition generally or dissuade the kinds of conduct that constitute breaches of the competition rules or will benefit society in general (for example, through funding of community education or research programs), class members who did not assert a claim are indirectly benefited. Finally, the remedy promotes access to justice — ironically, a key focus of the Harper Review in other contexts.<sup>204</sup>

## VI CONCLUSION

It was observed recently by a leading plaintiff lawyer that ‘[a]t a time when steps are being taken in other parts of the world to strengthen, increase and simplify private enforcement, in Australia it has dwindled to the point of virtual extinction’.<sup>205</sup> At the time of writing, no cartel class actions are under way and none has been commenced in the last eight years. This does not reflect a decrease in the prevalence of cartel conduct plaguing the Australian

<sup>202</sup> Australian Consumer Association, Submission to Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, July 2002, annex I, 1.

<sup>203</sup> FCAA ss 33N(1)(c)–(d).

<sup>204</sup> See generally Harper Review, above n 26, 409–12.

<sup>205</sup> Gilsenan, above n 102, 1 (citations omitted).

economy. Since 2007 (when the last cartel class action was instigated),<sup>206</sup> the ACCC has commenced and, in many instances, concluded a large number of cases across a wide range of sectors,<sup>207</sup> and it has stated that it has ‘around a dozen in depth cartel investigations under way’.<sup>208</sup> There is also no sign of an upward trend in private actions by individual plaintiffs in respect of any type of anti-competitive conduct.

Thus it is timely to ask: are the Harper Review recommendations in relation to private enforcement, assuming they are accepted and implemented, likely to be sufficient ‘to revive an endangered species’?<sup>209</sup>

The acknowledgements by the Harper Panel and, perhaps even more so the ACCC, of the legitimacy and value of private enforcement, serving both compensatory and deterrence functions, represent a substantial step forward in generating a more receptive environment for, and dialogue about, private actions in Australia. That said, on the whole, the Harper Panel’s treatment of the issue was cursory and its recommendations only scrape the surface in unearthing, let alone overcoming, the significant number of major impediments to an effective and sustainable level of private litigation for breach of the competition rules.

The Harper Panel made two substantive recommendations for change to the law, both of which were accepted by the government. The recommendations were aimed at alleviating the impediments created by a narrow interpre-

<sup>206</sup> See *Cathay Pacific Airways Ltd v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* (2010) 186 FCR 168.

<sup>207</sup> See, eg, *ACCC v OmniBlend Australia Pty Ltd* [2015] ATPR ¶42-509; *Australian Competition and Consumer Commission v Yazaki Corporation [No 2]* [2015] FCA 1304 (24 November 2015); *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd* [2014] ATPR ¶42-485; *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* [2014] ATPR ¶42-484; *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* (Proceeding No VID 725/2014, Federal Court of Australia, commenced 3 December 2014); *Australian Competition and Consumer Commission v Koyo Australia Pty Ltd* [2013] ATPR ¶42-459; *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL [No 5]* [2013] ATPR ¶42-435; *Australian Competition and Consumer Commission v Flight Centre Ltd [No 2]* (2013) 307 ALR 209; *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd [No 2]* [2011] ATPR ¶42-376; *Australian Competition and Consumer Commission v Bridgestone Corporation* (2010) 186 FCR 214; *Australian Competition & Consumer Commission v Colgate-Palmolive Pty Ltd* [2002] ATPR ¶41-880.

<sup>208</sup> Rod Sims, ‘Priorities 2015’ (Speech delivered at the Conference of the Committee for Economic Development of Australia, Sydney, 19 February 2015).

<sup>209</sup> Gilsenan, above n 102, 2.



tation of s 83 (excluding admissions of fact) and the ministerial consent requirements in s 5. Arguably, reform to relieve private litigants of the burdens created by these provisions is long overdue. Given this, the government is to be commended for acting promptly to introduce a Bill amending s 5.<sup>210</sup> It has stated that exposure draft legislation will be developed in consultation with the states and territories to address amendment of s 83.<sup>211</sup>

Those recommendations aside, the Harper Panel failed to address, or address in any meaningful way, questions relating to: commencement of the limitation period; access to information and particularly information in the hands of the ACCC; the allocation of liability between multiple respondents; causation of loss; pass-on; and damages quantification.

Despite a statutory right to damages for 40 years and a class action regime that should be an ideal mechanism for seeking collective redress, the uncertain state of the law with respect to these fundamental issues, and the lack of countermeasures — for example, to facilitate cooperation and settlement by immunity applicants — impose powerful disincentives to action in which redress would be sought. Consequently, few cases have been brought and none have proceeded to a point at which any of these issues are determined. The uncertainty is thus compounded, the disincentives reinforced and the potential of private enforcement to compensate for past harm and deter future harm remains largely untapped.

The issues are no less complex elsewhere and present similar obstacles to private enforcement as exist in Australia. However, rather than leave potential plaintiffs to their own devices (and, in many instances, limited resources) in overcoming such obstacles, authorities in other jurisdictions have formulated policies and passed laws to address the issues and provide a level of certainty that should facilitate the development of effective private enforcement. In Australia, further concerted policy and legislative leadership in this field is warranted. Without such leadership, it might be optimistic to conclude that private enforcement of competition law in this country is even inching forwards.

<sup>210</sup> Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 (Cth).

<sup>211</sup> Australian Government, *Australian Government Response to the Competition Policy Review* (24 November 2015) 32.