

PRIVATE ENFORCEMENT OF COMPETITION LAW: TIME FOR AN AUSTRALIAN DEBATE

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I INTRODUCTION

The role of private actions in enforcing competition law has been the subject of longstanding debate in the United States ('US') and, increasingly over the last five to 10 years, in the European Union ('EU').¹ In Australia, by comparison, the debate to date has been limited.² Despite statutory provision for private actions since the enactment of the *Trade Practices Act 1974* (Cth) ('TPA') (now the *Competition and Consumer Act 2010* (Cth) ('CCA')), public enforcement by the Australian Competition and Consumer Commission ('ACCC') has dominated. Proceedings brought by the ACCC in respect of breaches of the competition provisions of the CCA have far outnumbered proceedings by private parties³ and law reform efforts to bolster detection and sanctions have focussed exclusively

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¹ See below Part II and surrounding text.

² Cf the handful of articles on the topic over the past 20 years: Maureen Brunt, 'The Role of Private Actions in Australian Restrictive Trade Practices Enforcement' (1990) 17 *Melbourne University Law Review* 582; David K Round, 'Consumer Protection: At the Mercy of the Market for Damages' (2003) 10 *Competition & Consumer Law Journal* 231; Rhonda L Smith, 'Further to Round on Penalties, Damages and Pt IV of the TPA' (2003) 11 *Competition & Consumer Law Journal* 97; Stephen Corones, 'Proof of Damages in Private Competition Law Actions' (2002) 76 *Australian Law Journal* 374; Brendan Sweeney, 'The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the Situation in the US, Europe and Australia' (2006) 30 *Melbourne University Law Review* 837; Ian Wylie, 'Cartel Compensation – A Consumer Perspective' (2011) 39 *Australian Business Law Review* 177; Sarah Lynch, 'The Case for Increased Private Enforcement of Cartel Laws in Australia' (2011) 39 *Australian Business Law Review* 385.

³ A review of the Australian Trade Practices Reporter series (renamed the Australian Competition and Consumer Law Reporter in 2011) identified 86 proceedings involving alleged contraventions of the competition provisions of the TPA/CCA over the period 2000–11 (inclusive). Of these, only 27 (approximately 31 per cent) were brought by private applicants. This figure does not include proceedings that were settled: see, eg, *Energex Ltd v Alstrom Australia Ltd* (2005) 225 ALR 504 and nor, of course, does it include instances in which 'compensation' was negotiated without the need to bring proceedings.

on a model of public enforcement.⁴ At the same time, high-profile suits brought by the ACCC in recent years have spurred a series of follow-on proceedings by private litigants.⁵ This in turn has produced debate about the hurdles facing such litigants and controversy, in particular, where such hurdles have been seen to be erected or exacerbated by the public enforcement system.⁶

Assessing the benefits and costs of private litigation to enforce public laws such as the CCA must ultimately be an empirical question.⁷ However, there are difficulties with empirical measurement and, outside of the US,⁸ there is

4 Most recently (and arguably most dramatically), such efforts saw the introduction of cartel offences attracting a maximum jail sentence of 10 years for individual defendants: see *Trade Practices (Cartel Conduct and Other Measures) Amendment Act 2009* (Cth).

5 These actions relate to the Visy/Amcort cardboard packaging cartel (see *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd* (Federal Court of Australia Proceeding No VID1650/2005)) and *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137 ('*Cadbury*'); the air cargo surcharge cartel (*De Brett Seafood Pty Ltd v Qantas Airways Ltd* (formerly *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd*) (Federal Court of Australia Proceeding No VID12/2007)); and a rubber cartel (*Wright Rubber Products Pty Ltd v Bayer AG* (Federal Court of Australia Proceeding No VID882/2007)). Each of these actions has been settled after many years of hard-fought litigation.

6 See, eg, Caron Beaton-Wells, 'Forks in the Road: Challenges Facing the ACCC's Immunity Policy for Cartel Conduct: Part 1' (2008) 16 *Competition & Consumer Law Journal* 71; 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); Ben Slade and Richard Ryan, 'Representative Proceedings in Competition Law' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009); Brooke Dellavedova and Rebecca Gilsenan, 'Challenges in Cartel Class Actions' (2009) 32 *University of New South Wales Law Journal* 1001; Hank Spier, 'A "Mature" *Trade Practices Act* Needs Some Fine Tuning in Some Core Areas' (2009) 17 *Trade Practices Law Journal* 287; Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 405–19 [10.3], 517–27 [11.5]; Ian Wylie, 'When Too Much Power is Barely Enough – s 155 of the *Trade Practices Act* and Noblesse Oblige' (2009) 16 *Competition & Consumer Law Journal* 314, 316, 340–1; Wylie, 'Cartel Compensation – A Consumer Perspective', above n 2. A roundtable of stakeholders was held at the University of Melbourne in November 2010, with the aim of thrashing out tensions between private and public modes of enforcement: see Melbourne Law School, Competition Law & Economics Network, *Roundtable – Private Enforcement* (7 April 2011) <<http://www.clen.law.unimelb.edu.au/go/news-and-events/roundtable-private-enforcement>>.

7 Ilya R Segal and Michael D Whinston, 'Public vs. Private Enforcement of Antitrust Law: A Survey' (Working Paper No 335, John M Olin Program in Law and Economics, Stanford Law School, December 2006) 12, 14.

8 See 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; 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. Cf the critique in Gregory J Werden, Scott D Hammond, and Belinda A Barnett, 'Deterrence and Detection of Cartels: Using All the Tools and Sanctions' (2011) 56 *Antitrust Bulletin* 207, 227–33 and the response by Lande and Davis in Robert H Lande and Joshua P Davis, 'The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammond & Barnett' (Research Paper, University of San Francisco, 6 August 2012) <<http://ssrn.com/abstract=2127762>>.

generally a paucity of data to which such measurement could be applied.⁹ Moreover an empirical approach begs the question – benefits and costs in relation to what? Approaching the assessment task in another way, some commentators have urged consideration of the objectives or functions of competition law enforcement generally, followed by an inquiry as to how public and private actions might advance those objectives or functions in a theoretical and/or a practical sense.¹⁰ This approach has the merit of acknowledging that '[p]rivate enforcement cannot be treated as an isolated issue because it is an integral part of the system as a whole and has to be seen in its interaction with public cartel law enforcement.'¹¹

This article aims to inform Australian debate concerning the role of private enforcement of competition law in three ways. First, in Part II, there is a review of the experience in the US and EU to date, to explain the role or roles conceived for private enforcement in those jurisdictions. The emphasis given to private actions has been somewhat different in the US from that foreshadowed in the recent EU reform process. Nevertheless, in both jurisdictions, the focus has been primarily on the contribution that private enforcement is able or should legitimately make to the objectives of deterrence and/or compensation. Secondly, Part III of the article considers the extent to which the ACCC pursues and has been or can be effective in achieving the enforcement objectives of deterrence and compensation. Finally, in Part IV of the article, it is argued that the objectives of enforcement should be formulated more broadly than deterrence and compensation to encompass prevention, corrective justice and the development of legal doctrine. From this vantage point, it is argued that private

9 Notable exceptions include Barry J Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000–2005' (2008) 29 *European Competition Law Review* 96; Sebastian Peyser, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany' (Working Paper No 10–12, Centre for Competition Policy, University of East Anglia, 1 July 2010) <<http://ssrn.com/abstract=1672695>>; and most recently, John Connor, 'Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?' (Working Paper No 12-03, American Antitrust Institute, 15 October 2012).

10 The objectives referred to are the objectives of enforcement, as distinct from the objectives of the law itself. The latter might encompass the promotion of competition, the production of efficiencies, the enhancement of consumer welfare and the like, whereas the former concern the means by which those legal/economic objectives are achieved. For an approach that emphasises enforcement objectives see, eg, Assimakis P Komninos, 'Relationship between Public and Private Enforcement: *Quod Dei Deo, Quod Caesaris Caesaris*' (Paper presented at 16th Annual EU Competition Law and Policy Workshop, Florence, 23 June 2011) <<http://ssrn.com/abstract=1870723>>; Wouter P J Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition: Law & Economics Review* 3; Wouter P J Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition: Law & Economics Review* 473; Christopher Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) 34 *World Competition: Law & Economics Review* 383.

11 See International Competition Network, Cartels Working Group, Subgroup 1 – General Framework, *Interaction of Public and Private Enforcement of Cartel Cases* (Report to the ICN Annual Conference, Moscow, May 2007) 2 ('*ICN Report*'). See to similar effect, *Private Remedies: Policy Roundtables*, OECD Doc DAF/COMP(2006)34 (11 January 2008) (Report for the Directorate for Financial and Enterprise Affairs: Competition Committee) 11 ('*OECD Private Remedies Report*').

litigation has the potential to make a significant contribution to the enforcement of competition law in Australia. Part V briefly concludes.

II ENFORCEMENT OBJECTIVES – US AND EU PERSPECTIVES

There is some disagreement amongst scholars as to the original intent of the US lawmakers in including a private right of action in the *Sherman Act* in 1890.¹² However, it is generally accepted that by the time of the passage of the *Clayton Act* in 1914, the private right of action was seen as a crucial counter-balance to weak government enforcement in the early years of US antitrust law.¹³ Private actions were treated by legislators as important to deterrence, as much as to compensation.¹⁴ By the 1960s, in the face of ongoing limitations on government resources and low public penalties, private litigants had been elevated by the Supreme Court and commentators to the status of ‘private attorneys general’,¹⁵ providing ‘a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.’¹⁶ As the Supreme Court saw it, ‘the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behaviour in violation of the antitrust laws.’¹⁷

This vision of private actions as a mechanism for deterrence is said to have been realised in practice. It has been estimated that about 90 per cent of US antitrust cases are brought by private litigants¹⁸ and the threat of civil damages exposure in private cases is today generally regarded as an equal if not more powerful deterrent than criminal prosecution in the US. There are two categories of such cases: on the one hand, there are suits between large competitors, comparable to ordinary business tort cases (albeit, as indicated below, with the right to treble damages and the recovery of attorney’s fees) and on the other hand, there are treble damage claims from direct and indirect purchasers who are

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- 12 See, eg, Harry First, ‘Lost in Conversation: The Compensatory Function of Antitrust Law’ (New York University Law and Economics Working Paper No 10–14, April 2010) 5–16, arguing that the original rationale was to ensure that the *Sherman Act* provided an effective remedy to compensate victims of antitrust violations. Cf William 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.
 - 13 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.
 - 14 First, above n 12, 23–5.
 - 15 *Perma Life Mufflers v International Parts Corp*, 392 US 134, 147 (1968).
 - 16 *Reiter v Sonotone*, 442 US 330, 344 (1979).
 - 17 *Perma Life Mufflers v International Parts Corp* 392 US 134, 139 (1968). See also *Fortner Enterprises v United States Steel*, 394 US 495, 502 (1969); *Zenith Radio Corp v Hazeltine Research*, 395 US 100, 130–1 (1969); *Pfizer v Government of India*, 434 US 308, 315 (1978).
 - 18 Donncaadh Woods, ‘Private Enforcement of Antitrust Rules – Modernization of the EU Rules and the Road Ahead’ (2004) 16 *Loyola Consumer Law Review* 431, 435 n 11. For data specific to private actions in the US relating to international cartels, see Connor, above n 9.

victims of per se unlawful conduct. The latter frequently, but not necessarily, follow on government criminal prosecutions, take the form of multiple class actions brought by counsel working on a contingent fee basis and eventually are settled.¹⁹

The volume of private antitrust litigation in the US has been attributed to a range of factors that, in combination, create a climate that is highly conducive to these types of proceedings. Such factors include the availability of treble damages;²⁰ recoverability of attorneys' fees²¹ 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);²² the existence of an aggressive and experienced plaintiffs' Bar;²³ 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.²⁴

Despite its long history, there have been fluctuations in the level of private enforcement in the US.²⁵ Furthermore, achieving an optimal balance between public and private antitrust enforcement is a subject of continuing debate in this jurisdiction. In particular, there is controversy as to whether there is an excessive level of private litigation, as to whether the treble damage remedy is legitimate and/or effective and as to the impact of perceived excesses on substantive

19 Spencer Weber Waller, 'The Incoherence of Punishment in Antitrust' (2003) 78 *Chicago-Kent Law Review* 207, 210–11.

20 This is provided for in § 4 of the *Clayton Act* 15 USC §§ 1–7 (2000 & Supp IV 2004). For a detailed discussion of treble damages in the US, see Edward Cavanagh, 'Antitrust Remedies Revisited' (2005) 84 *Oregon Law Review* 147, 169–80.

21 In the US, there is an asymmetric cost rule that enables the successful plaintiff, but not the successful defendant, to recover costs: Maureen Brunt, 'The Role of Private Actions in Australian Restrictive Practices Enforcement' (1990) 17 *Melbourne University Law Review* 582, 583.

22 Class actions account for approximately 20 per cent of all private actions in US antitrust law, however, their significance is greater than suggested by this figure given the sheer size of the claims involved: Clifford Jones, 'Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market' (2004) 16 *Loyola Consumer Law Review* 409, 427. US laws were reformed recently by the *Class Action Fairness Act of 2005*, Pub L No 109-2, 119 Stat 4 (2005) (codified as a note to 28 USC § 1711).

23 The match between the defendants' Bar and the plaintiffs' Bar has been referred to as 'a match between Goliath and Goliath': William E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' in Mads Andenas, Michael Hutchings and Philip Marsden (eds), *Current Competition Law* (British Institute of International and Comparative Law, 2004) vol 2, 167.

24 For a general description of these rules, see Antitrust Modernization Commission, 'Report and Recommendations' (Report, Antitrust Modernization Commission, 2 April 2007) 241. See also the US Contributions to *OECD Private Remedies Report*, above n 11, 353–61.

25 See, eg, documentation of the decline and resurrection of antitrust class actions in that jurisdiction: Stephen Calkins, 'An Enforcement Official's Reflections on Antitrust Class Actions' (1997) 39 *Arizona Law Review* 413, 414–19; Douglas Ginsburg and Leah Brannon, 'Determinants of Private Antitrust Enforcement in the United States' (2005) 1(2) *Competition Policy International* 29. Recently, it has been pointed out that the US Supreme Court under its current Chief Justice has been intent on cutting back on private enforcement – it having been more than 15 years since the Court decided an antitrust case in favour of a plaintiff: William Kolasky, 'Reinvigorating Antitrust Enforcement in the United States: A Proposal' (2008) 22(2) *Antitrust* 85, 85.

doctrine.²⁶ That said, in its 2007 report, the Antitrust Modernization Commission recommended no change to the fundamental remedial scheme of the US antitrust laws: namely, the treble damage remedy and the plaintiffs' ability to recover attorneys' fees.²⁷ This scheme, the Commission concluded, 'appears to be effective in enabling plaintiffs to pursue litigation that enhances the deterrence of unlawful behaviour and compensates victims.'²⁸

More generally, many commentators have emphasised the importance of private enforcement as both a complement to and a check on public enforcement in relation to performance of its deterrence function. The likening of private litigants to 'private attorneys general' has been based not only on 'a positive vision of private initiative and comparative advantage' but equally on 'a recognition of possible failures in public enforcement'.²⁹ Private enforcement has been said to compensate for weaknesses and fluctuations in public enforcement. In particular, it is seen as important to enhance detection and investigation of anti-competitive activity,³⁰ to counteract inaction or malfeasance by public enforcement officials in investigating and prosecuting such activity,³¹ to offset

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- 26 See, eg, William Breit and Kenneth Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 *Journal of Law and Economics* 405; Stephen Calkins, 'Corporate Compliance and Antitrust Agencies' Bi-Modal Penalties' (1997) 60 *Law and Contemporary Problems* 127; Michael L Denger and D Jarrett Arp, 'Criminal and Civil Cartel Victim Compensation: Does Our Multifaceted Enforcement System Promote Sound Competition Policy?' (2001) 15(3) *Antitrust* 41; Cavanagh, above n 20; American Bar Association Section of Antitrust Law, 'The State of Federal Antitrust Enforcement: Report of the Task Force on the Federal Antitrust Agencies – 2001' (Report, American Bar Association Section of Antitrust Law, January 2001); R Preston McAfee, Hugo M Mialon and Sue H Mialon, 'Private Antitrust Litigation: Procompetitive or Anticompetitive?' in Vivek Ghosal and Johan Stennek (eds), *The Political Economy of Antitrust* (Elsevier, 2007) 453; Donald I Baker, 'Revisiting History – What Have We Learned about Private Antitrust Enforcement That We Would Recommend to Others?' (2004) 16 *Loyola Consumer Law Review* 379; Roger D Blair and Christine Piette Durrance, 'Antitrust Sanctions: Deterrence and (Possibly) Overdeterrence' (2008) 53 *Antitrust Bulletin* 643; Daniel A Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011) chs 3 and 9.
- 27 Antitrust Modernization Commission, above n 24, vi; see further at 243–51.
- 28 Ibid vi. However, the Commission did recommend certain changes, particularly to allow for claim reduction on account of settlement and contribution between settling defendants, as well as overruling of the rules against the passing on defence and indirect purchaser claims: see further at 251–5 (contribution), 265–71 (indirect purchasers).
- 29 Kent Roach and Michael J Trebilcock, 'Private Enforcement of Competition Laws' (1996) 34 *Osgoode Hall Law Journal* 461, 481.
- 30 See William E Kovacic, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels' (2001) 69 *George Washington Law Review* 766; ICN Report, above n 11, 33. More generally, see William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 *Journal of Legal Studies* 1; A Mitchell Polinsky, 'Private versus Public Enforcement of Fines' (1980) 9 *Journal of Legal Studies* 105.
- 31 Roach and Trebilcock, above n 29, 475. See also Segal and Whinston, above n 7, 8, regarding the agency problem where individual employees in public enforcement agencies operate in accordance with their own personal agendas, not the general social welfare agenda.

the scarce resources and budgetary restraints constricting public agencies,³² and to ensure public enforcers are accountable for decisions not to prosecute.³³

In Europe, by comparison, the incidence of private enforcement of competition laws has been low.³⁴ The explanation for this is complex, but can be attributed in part at least to the following factors: 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);³⁵ costs rules under which the loser pays; and the availability of single line damages only.³⁶ More fundamentally, it has been said that the Europeans traditionally have lacked an 'antitrust litigation culture',³⁷ one of the consequences of which is that European lawyers and judges lack the expertise and experience of their US counterparts in this area.³⁸ In light of this, European commentators have debated questions as to whether and how a greater degree of private enforcement might be facilitated for some time.³⁹

The European Commission entered the debate substantively in December 2005 when it released a Green Paper on *Damages Actions for Breach of the European Community Antitrust Rules*.⁴⁰ The paper followed a study which had concluded that this area of law presented a picture of 'total underdevelopment' in

32 Renato Nazzini and Ali Nikpay, 'Private Actions in EC Competition Law' (2008) 4(2) *Competition Policy International* 107, 111–12.

33 Roach and Trebilcock, above n 29, 482–3. However, most of these benefits are operable where the private enforcer brings a stand-alone suit rather than a follow-on action. That said, it is not clear to what extent the prospect of private enforcement initiatives influences public enforcer decision-making: see Segal and Whinston, above n 7, 8.

34 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).

35 For discussion of the ramifications of this for private antitrust litigation, see Alan Riley, 'Beyond Leniency: Enhancing Enforcement in EC Antitrust Law' (2005) 28 *World Competition: Law & Economics Review* 377, 383–4.

36 Sweeney, above n 2, 864–5.

37 Although there are 'glimmerings' of such a culture emerging: Riley, above n 35, 389.

38 Sweeney, above n 2, 865.

39 See, for example, Wouter P J Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (Kluwer Law International, 2002) ch 8; Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?', above n 10; Assimakis Komninos, 'New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages' (2002) 39 *Common Market Law Review* 447; Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing, 2003); Clifford Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27 *World Competition: Law & Economics Review* 13; Woods, above n 18.

40 European Commission, *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 final, (19 December 2005) ('*EC Green Paper*'). It should be noted that prior to the release of the Green Paper, the EC modernisation program, instigated in 2003, was designed in part to facilitate private enforcement: Sweeney, above n 2, 863, 866.

the Member States.⁴¹ Following the consultation initiated by the Green Paper, on 3 April 2008, the Commission released a White Paper with detailed proposals for facilitating the establishment of an effective and efficient system of private enforcement of competition law, at both Community and national levels.⁴² In the White Paper, the lack of private enforcement in Europe was attributed to ‘considerable hurdles ... of a legal or procedural nature’ in the traditional tort rules of Member States.⁴³

Significantly, the White Paper’s starting premise is that the right of victims to compensation is guaranteed by EU law⁴⁴ and that all persons having suffered loss as a result of infringements are entitled to access effective redress mechanisms so that they can be fully compensated.⁴⁵ Thus, the primary objective of the White Paper was identified as being to improve the legal conditions for victims to exercise their right to reparation under the EC Treaty.⁴⁶ Providing for the exercise of this right is seen as necessary to ensure the full effectiveness of the EU competition rules.⁴⁷ However, it was also emphasised, albeit as a secondary consideration, that effective remedies for private parties increase the likelihood that anti-competitive conduct will be detected and that infringers will be held liable. Improving compensatory justice thus was seen as inherently producing

41 Waelbroeck, Slater and Even-Shoshan, above n 34, 1. According to this report, in the entire history of Community and national competition law, there have been only 60 judged cases in respect of competition damages in all the courts of the 25 Member States. This quantitative assessment is supported by a more recent study commissioned by the United Kingdom Office of Fair Trading on the deterrent effect of competition enforcement. The study found that companies and their advisers view private actions as the least effective aspect of the competition regime in achieving compliance. When asked for suggestions as to what could be done to improve compliance with competition law in the United Kingdom (‘UK’), the most frequent responses included encouraging private damages actions. See Office of Fair Trading, *The Deterrent Effect of Competition Enforcement by the OFT* (Report prepared for the OFT by Deloitte OFT962, November 2007) and Office of Fair Trading, *The Deterrent Effect of Competition Enforcement by the OFT* (Discussion Document OFT963, November 2007). To date, there has been only one representative action for a breach of competition law in the UK: see *The Consumers Association v JJB Sports plc* [2009] CAT Case No 1078/7/9/07.

42 European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final, (2 April 2008) (‘EC White Paper’).

43 *EC White Paper*, above n 42, [5].

44 This guarantee was confirmed by the decision of the European Court of Justice in *Courage Ltd v Crehan* (C-453/99) [2001] ECR I-6297.

45 *EC White Paper*, above n 42, 2–3. This represented a paradigm shift from the position taken in the Green Paper that deterrence should be a primary goal of an expanded private enforcement regime: see *EC Green Paper*, above n 40. Crane explains that between 2005 and 2008, the Commission’s Legal Service, populated principally by lawyers rather than economists, ‘insisted that this US-style economic perspective on private enforcement did not fit with European values, where deterrence was to be a largely governmental function and compensation the primary function of private litigation’: Crane, above n 26, 205.

46 *Treaty on the Functioning of the European Union* [2008] OJ C 115/49.

47 See Paolisa Nebbia, ‘Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?’ (2008) 33(1) *European Law Review* 23, 28–36, discussing the effectiveness principle in EU law as being the foundation for private antitrust enforcement in Europe.

beneficial effects in terms of deterrence of future infringements and greater compliance with EU antitrust rules.⁴⁸

In the EU then, unlike the US, the authorities have tended to characterise deterrence as a beneficial effect of private actions, rather than as a primary justification for policies that provide for or support such actions. As European commentators have observed of the EC White Paper: '[i]ncreased deterrence is mentioned almost in passing and appears to be viewed as no more than a useful by-product [of reform to the private actions regime in the EU].'⁴⁹ This apparent ranking of compensation ahead of deterrence as the primary goal of private enforcement has been criticised by some. In contrast, a view that emerged from an OECD Policy Roundtable in 2006 was 'that differences between these two policy goals can be overstated and that they were not mutually exclusive.'⁵⁰ On the other hand, there is an argument that attempting to have both deterrence and compensation as objectives of private enforcement is problematic given that these objectives drive different policy agendas and design and may conflict with each other.⁵¹

At the same time, the White Paper identified as a guiding principle the importance of preserving a robust and effective system of public enforcement and ensuring that private actions complement, rather than replace or jeopardise, the measures taken by public competition authorities.⁵² Finally, it sought to promote a 'genuinely European approach' to private enforcement, offering a 'balanced solution to the current often inefficient compensation systems in place, while avoiding over-incentives that could lead to litigation excesses as perceived in some countries outside Europe'⁵³ (reflecting the aversion often expressed in Europe to developing a US-style litigation culture).⁵⁴ Thus, the Commission

48 *EC White Paper*, above n 42, 3. For discussion of the case for deterrence in EU private antitrust enforcement, see Nazzini and Nikpay, above n 32, 109–11. See also Peyer, above n 9, who concludes from an empirical study of German cases that the importance of compensation in European antitrust cases has been overemphasised.

49 Nazzini and Nikpay, above n 32, 109–10.

50 *OECD Private Remedies Report*, above n 11, 10. See also the view expressed that compensation and deterrence are distinct but interrelated in Nazzini and Nikpay, above n 32, 110.

51 On the question of standing for indirect purchasers, for example, a deterrence rationale might allow for these purchasers, as well as direct purchasers, to have standing notwithstanding that this might result in overcompensation and a windfall to those purchasers that have passed on the complete overcharge. Similarly, on the question of damages calculation, an approach to calculation driven by deterrence considerations is likely to be quite different to an approach based on principles of compensation: see Mark-Oliver Mackenrodt, 'Public vs. Private Enforcement of Antitrust Law in Unilateral Conduct Cases – The Interaction between the Economic Review of the Prohibition of Abuses of Dominant Positions and Private Enforcement' (Research Paper No 09-11, Max Planck Institute for Intellectual Property, Competition and Tax Law, 10 November 2009) 17–19.

52 *EC White Paper*, above n 42, 3.

53 *Ibid.* See also European Commission, 'Antitrust: Commission Presents Policy Paper on Compensating Consumer and Business Victims of Competition Breaches' (Press Release, IP/08/515, 3 April 2008).

54 Referred to, for example, in a question asked in the Roundtable Conference with Enforcement Officials at the American Bar Association Section of Antitrust Law Spring Meeting, Washington DC (28 March 2008), transcribed in *Antitrust Source* (April 2008) 9 <http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr08_FullSource4_25f.authcheckdam.pdf>.

made no proposals regarding the introduction of punitive damages, opt-out class actions, contingency fees, no-contribution rules or jury trials.

The European Commission initiatives to boost private enforcement in Europe have encountered political difficulties⁵⁵ and serious doubts have been expressed as to the workability of any uniform regime given the difference in substantive and procedural rules across national states.⁵⁶ The Commission has pressed on regardless, commissioning a report on the quantification of antitrust damages that was published in 2009⁵⁷ and engaging in a consultative process aimed at establishing a Europe-wide system of collective redress in 2011.⁵⁸ At the same time, there have been initiatives at the national level also aimed at facilitating a greater level of private enforcement.⁵⁹

III PUBLIC ENFORCEMENT OF COMPETITION LAW IN AUSTRALIA – DETERRENCE AND COMPENSATION?

Given the significance that has been attached to the objectives of deterrence and compensation in the US and EU, it is useful to assess the extent to which those objectives have been pursued and achieved in Australia in a system dominated by public enforcement. This assessment is set out below. In Part IV,

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- 55 The draft directive that the EC prepared, based on the White Paper, was removed from the agenda of the European Parliament in October 2009: see Nikki Tait, 'Future of European Antitrust Proposals in Doubt', *Financial Times* (London), 3 October 2009, 3.
- 56 See, eg, Jeroen S Kortmann and Christof R A Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States Are (Right to Be) Less than Enthusiastic' (2009) 30 *European Competition Law Review* 340.
- 57 Oxera, 'Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts' (Study Prepared for the European Commission, December 2009). The EC subsequently released draft guidance on the topic: see European Commission, 'Draft Guidance Paper – Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (Public Consultation, European Commission, June 2011).
- 58 See European Commission, 'Commission Staff Working Document – Public Consultation: Towards a Coherent European Approach to Collective Redress' (Working Document SEC (2011)173 final, European Commission, 4 February 2011). The proposals have been received with scepticism: see, eg, Luke Tolaini and Samantha Ward, 'Collective Redress Proposals for Europe: Seeking a Solution to a Non-Existent Problem?' (2011) 11(2) *CPI Antitrust Chronicle* 1. See also European Competition Network, 'Protection of Leniency Material in the Context of Civil Damages Actions' (Resolution of the Meeting of the Heads of the European Competition Authorities, 23 May 2012), adopted in the wake of the judgment in *Pfleiderer AG v Bundeskartellamt* (European Court of Justice (Grand Chamber), C-360/09, 14 June 2011).
- 59 See, eg, Office of Fair Trading, 'Private Actions in Competition Law: Effective Redress for Consumers and Business' (Discussion Paper OFT 916resp, Office of Fair Trading, November 2007); Department for Business Innovation & Skills, *Private Actions in Competition Law: A Consultation on Options for Reform* (Consultation Paper, Department for Business Innovation & Skills, 24 April 2012). Italy just recently introduced a class action device: see Alberto Martinazzi, 'Developments in Private Enforcement of Italian Antitrust Law: The Introduction of "Class Action" Legislation' (2010) 10(1) *Competition Policy International* 1. In Spain, the *Ley N° 15/2007, de 3 de Julio, de Defensa de la Competencia* paved the way for a private enforcement of national and EU antitrust rules: see Ignacio Sancho Gargallo, 'Private Enforcement of EU and National Competition Law' (2009) 1 *InDret*, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368121>.

however, it is argued that the objectives of enforcement should be formulated more broadly to encompass prevention (in which deterrence is subsumed), corrective justice (in which compensation is subsumed) and development of legal doctrine and that the contribution that may be made by private enforcement to these objectives should be examined within that broader framework.

A Deterrence

Theories as to how deterrence operates and how it might be measured, if it is measurable at all, are contested.⁶⁰ Nevertheless, the theory of deterrence underpinning most public enforcement policy assumes that business people make rational, self-interested and considered decisions to engage in anti-competitive conduct and that, consistently with this approach, they are likely only to be deterred where the expected costs of engaging in such conduct, particularly costs by way of legal sanctions, are likely to exceed the expected benefits of engaging in the conduct.⁶¹ This model of decision-making assumes in turn that potential offenders know the legal status of and sanctions for anti-competitive behaviour and further that they perceive it sufficiently likely that they will be detected, prosecuted and sanctioned if they engage in it.⁶² Applying this model, the ACCC's performance in deterring anti-competitive conduct may be assessed by having regard to the extent to which business people have such knowledge and perceptions. It may be assessed further by reference to the level and types of penalties that the ACCC has secured to date for contraventions of the competition provisions, as compared with the level of penalties considered 'optimal' for deterrence or otherwise as compared with international standards.

There is empirical evidence that enables assessments to be made regarding the knowledge and perceptions of Australian business people, albeit such

60 See generally on deterrence theory: Dorothy Thornton, Neil A Gunningham and Robert A Kagan, 'General Deterrence and Corporate Environmental Behaviour' (2005) 27 *Law & Policy* 262; Sally S Simpson and Christopher S Koper, 'Deterring Corporate Crime' (1992) 30 *Criminology* 347; and John T Scholz, 'Enforcement Policy and Corporate Misconduct: The Changing Perspectives of Deterrence Theory' (1997) 60 *Law and Contemporary Problems* 253. On cartel deterrence theory and measurement, see Christopher Harding, 'Cartel Deterrence: The Search for Evidence and Argument' (2011) 56 *Antitrust Bulletin* 345.

61 *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, OECD Doc DAF/FE/COMP (2002)7 (9 April 2002) (Report for the Financial, Fiscal and Enterprise Affairs: Competition Committee) 12–15 ('*OECD Hard Core Cartels Report*'). See also Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4 *Competition Law Review* 7; Wouter P J Wils, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 *World Competition: Law & Economics Review* 197.

62 This approach ignores the vast literature from the behavioural sciences which exposes human decision-making as far more complex. For a more holistic and sophisticated approach, see Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56 *Antitrust Bulletin* 377.

evidence relates to cartel conduct only.⁶³ It is in respect of this type of conduct that the ACCC has made its most concerted effort in recent years to maximise deterrence – in particular, through its strong advocacy in support of criminal sanctions for what are seen to be the most serious forms of cartel activity (price fixing, market allocation, output restriction and bid rigging).⁶⁴ The ACCC's sustained campaign in favour of this reform bore fruit with the introduction of cartel offences attracting severe penalties, including a maximum 10-year jail sentence for individual offenders, in 2009.⁶⁵

A major survey of Australian business people conducted in 2010 nevertheless reveals weaknesses in the proposition that potential public enforcement action, whether civil or criminal, has acted as a significant deterrent to cartel conduct. The survey was directed to a random sample of business people who were likely in their work life to be involved in activity to which the cartel laws apply (for example, in setting prices or production levels or tendering for contracts).⁶⁶ 567 business people responded to the survey and there are good reasons to consider that this group is a broadly representative sample from the Australian business sector, in terms of industries, geographical location and business size as well as in terms of age, gender and educational background of people who work in the sector.⁶⁷

The results from this survey show that Australian business people have quite a low degree of knowledge of the anti-cartel regime under the CCA, even though cartel prohibitions have been in existence and enforced in Australia for more than three decades and the survey was conducted almost a year after cartel conduct

63 It is not surprising that similar evidence in relation to other types of conduct is not available given the difficulties that would be associated with testing knowledge of and perceived likelihood of detection and enforcement action in relation to laws governing misuse of market power (abuse of dominance). Such difficulties arise largely from the fact that the scope and application of such laws are uncertain and the ACCC's enforcement record, as a result, has been patchy.

64 See Caron Beaton-Wells and Chris Platania-Phung, 'Anti-Cartel Advocacy – How Has the ACCC Fared?' (2011) 33 *Sydney Law Review* 735.

65 For background, see Caron Beaton-Wells, 'Australia's Criminalization of Cartels: Will It Be Contagious?' in Josef Drexler et al (eds), *More Common Ground for International Competition Law?* (Edward Elgar, 2011) ch 9.

66 The sample of business people for whom compliance with the anti-cartel law is salient was identified as a sub-group of a stratified random sample of the whole Australian population for the purposes of a larger survey of public opinion of cartel criminalisation. Further details of the procedure for the larger survey and the way the business respondents were selected are provided in Caron Beaton-Wells, Fiona Haines, Christine Parker and Chris Platania-Phung, 'The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement' (Research Paper No 519, University of Melbourne, 18 January 2011) 174–81 ('*Cartel Project Survey*') and Christine Parker and Chris Platania-Phung, 'The Deterrent Impact of Cartel Criminalisation: Supplementary Report on a Survey of Australian Public Opinion Regarding Business People's Views on Anti-Cartel Laws and Enforcement' (Research Paper No 73, University of Melbourne, 12 January 2012) ('*Cartel Project – Supplementary Report*').

67 *Cartel Project Survey*, above n 66, 174–81; *Cartel Project – Supplementary Report*, above n 66, 35–40.

became a criminal offence, following a lengthy high-profile debate.⁶⁸ They also have low knowledge of the penalties available for individuals for engaging in cartel conduct. Less than one quarter of the business respondents to the survey was aware that jail is available as a penalty for individuals for cartel conduct.⁶⁹ Less than half were aware that cartel conduct is a criminal offence.⁷⁰ Two thirds of respondents knew that engaging in cartel conduct is a civil contravention.⁷¹ However, significantly, less than half of respondents were aware that a fine is available as a penalty for cartel conduct (whether they believed it is a civil contravention or criminal offence).⁷²

Knowledge aside, the survey indicates that business people do not perceive detection, prosecution and sanctioning for cartel conduct as likely. The business respondents to the survey rated the likelihood of being caught for engaging in cartel conduct, being subject to legal action for cartel conduct, and being sentenced to jail (if found guilty of a criminal offence of cartel conduct) as all fairly low.⁷³ Perceptions of the likelihood of being caught and subject to enforcement action did increase modestly when business respondents were told that cartel conduct is a criminal offence.⁷⁴ However, since the survey indicates that many business people do not know (without being told) that cartel conduct is a criminal offence (and some do not even know it is a civil contravention), in everyday life many business people are likely to perceive the likelihood of enforcement against cartel conduct as low.⁷⁵

For those in the business sector who know about the cartel prohibitions and sanctions, there are questions as to whether potential sanctions (based on types and levels of penalties to date) are likely to deter in any event. The survey found that where civil penalties applied, half of respondents nevertheless saw it as likely that a hypothetical business person would still breach cartel laws.⁷⁶ That figure fell to 29 per cent when told that criminal sanctions applied – but still nearly a third of respondents considered breach of the law as likely even with the prospect of jail.⁷⁷ When asked about their own likely behaviour, respondents saw themselves as more virtuous than others – only 15 per cent indicated that they would be likely to breach the law where civil penalties applied and only 9 per cent where criminal sanctions applied. Nevertheless, that is still 1 in 10 who would seriously contemplate engaging in cartel conduct in spite of the risk of a

68 The legislation was enacted on 24 July 2009. The survey was conducted from 28 June 2010 to 7 July 2010. As there is no pre-existing empirical evidence on this topic, it is not possible to know what effect criminalisation has had on levels of knowledge. It may well be that knowledge rose considerably as a result of the criminalisation reform and will continue to increase with publicity accompanying criminal enforcement action.

69 *Cartel Project Survey*, above n 66, 185–6; *Cartel Project – Supplementary Report*, above n 66, 32.

70 *Cartel Project Survey*, above n 66, 183–4; *Cartel Project – Supplementary Report*, above n 66, 12–13.

71 *Cartel Project Survey*, above n 66, 3; *Cartel Project – Supplementary Report*, above n 66, 32.

72 *Cartel Project Survey*, above n 66, 186; *Cartel Project – Supplementary Report*, above n 66, 15.

73 *Cartel Project Survey*, above n 66, 189–97; *Cartel Project – Supplementary Report*, above n 66, 33.

74 *Cartel Project Survey*, above n 66, 4; *Cartel Project – Supplementary Report*, above n 66, 33.

75 *Ibid.*

76 *Cartel Project Survey*, above n 66, 198; *Cartel Project – Supplementary Report*, above n 66, 29.

77 *Cartel Project Survey*, above n 66, 199; *Cartel Project – Supplementary Report*, above n 66, 29.

jail term.⁷⁸ To its credit, the ACCC has acknowledged the significance of these findings and is taking active steps to promote awareness of anti-cartel law and sanctions amongst the business community and emphasise, in particular, the potentially grave consequences for individuals who fall foul of the law in this area.⁷⁹

At least as far as fines (civil or criminal) are concerned, one of the possible reasons for these findings is the level of prospective monetary penalties. If caught and prosecuted, the 'price' for engaging in cartel conduct is arguably too low. So-called 'optimal deterrence' theory requires the fine to exceed the expected benefits from the relevant activity in order to compensate for imperfect rates of detection and punishment. There are problems with this theory as an approach to fine-setting.⁸⁰ However, by any measure, it is widely accepted that corporate fines in most, if not all, jurisdictions applying competition law around the world have been inadequate to effectively achieve deterrence.⁸¹ In major jurisdictions such as the US and the EU, the response to this concern has seen legislative and administrative or judicial steps taken to dramatically increase the level of corporate fines. Indeed, the fining practices in these jurisdictions have been said by some commentators to approximate the approach required by optimal deterrence theory.⁸²

Despite long-standing acceptance of deterrence as the primary rationale for cartel sanctions in this country,⁸³ Australia lags considerably behind these international trends. In the period 1974–92 (when the corporate penalty maximum was A\$250 000), the median corporate penalty imposed for cartel conduct was A\$111 503.⁸⁴ In the period from 1993–99 (when the corporate penalty maximum was A\$10 million), the median rose only to A\$521 665 and in the most recent period, 2000–2009, the cases during which all fell under the maximum of \$10 million, the median only rose to A\$826 584, still less than a tenth of the maximum.⁸⁵ In the *Visy* case, which was described by the judge as 'by far, the most serious cartel case' in Australian trade practices history,⁸⁶ the total corporate penalty, A\$36 million, was imposed for 37 contraventions. This

78 *Cartel Project Survey*, above n 66, 202.

79 See Rod Sims, 'ACCC Priorities in Enforcing Competition Law' (Speech delivered at the Competition Law Conference, Sydney, 5 May 2012) 7–8; Rod Sims, 'Looking Back, Looking Forward – The ACCC's Approach to Making Markets Work for Australian Consumers' (Speech delivered at the 37th Law Council of Australia Competition and Consumer Law Workshop, Canberra, 25 August 2012) 4.

80 For a summary of the problems, see Beaton-Wells and Fisse, above n 6, 425–8.

81 *OECD Hard Core Cartels Report*, above n 61, 4–5 [7], 15 [44]; Office of Fair Trading, 'An Assessment of Discretionary Penalties Regimes' (Final Report OFT1132, Office of Fair Trading, October 2009) [3.21], [3.50]–[3.52].

82 See Douglas J Miller and John M Connor, 'The Predictability of Global Cartel Fines' (Summary of speech delivered at the New Frontiers of Antitrust Conference, Institute of Competition Law, Paris, 15 February 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1610284>.

83 See, eg, *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076, 52 152.

84 Beaton-Wells and Fisse, above n 6, 429.

85 Beaton-Wells and Fisse, above n 6, 429.

86 *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673, 711 (Heerey J) ('*Visy*').

equates to just under A\$1 million for each contravention – approximately 10 per cent of the statutory maximum of A\$10 million per contravention.

Since 1 January 2007, the statutory maximum has been changed to a formula that is intended to allow for greater deterrence, providing for the maximum to be calculated as the greatest of A\$10 million; three times the gain derived from the contravention; or, if the gain cannot be ascertained, 10 per cent of corporate group turnover for the 12 month period ending at the end of the month in which the act or omission occurred.⁸⁷ However, despite stated ACCC intentions to use the 2007 maxima to raise penalty levels,⁸⁸ the likely impact of this amendment is difficult to predict. One reason for the uncertainty relates to the fact that the gains from cartel conduct are notoriously difficult to calculate. Hence, it is uncertain whether the ‘gains’ limb of the potential maximum formula will have much work to do in practice.⁸⁹ Another is that the ‘10 per cent turnover’ limb is unlikely to contribute substantially to achieving optimally deterrent fines. The amount set as a maximum has been seen to have minimal impact on fine-setting to date in Australia, with fines tending to be significantly below the statutory maximum.⁹⁰ This is to be compared with the potential of a turnover or volume of commerce percentage set as a base fine, as is the approach in the US and EU.⁹¹

A further reason for questioning whether corporate fines are likely to increase significantly in Australia relates to the influence that the ACCC’s approach to ‘settlement’ has on fine levels.⁹² Settlements clearly have benefits,⁹³ as reflected in the substantial interest in the topic in jurisdictions in which they are only a relatively recent development.⁹⁴ However, in Australia, it is conceivable that settlements have been over-utilised.⁹⁵ The ACCC’s capacity to close cases and to secure penalties at a much quicker and more certain rate than would be possible

87 See CCA s 76(1A). See also CCA ss 44ZZRF(3) and 44ZZRG(3).

88 See, eg, Australian Competition and Consumer Commission, ‘Breaching the *Trade Practices Act* Has Never Been More Costly’ (Media Release, NR 028/10, 25 February 2010).

89 See the discussion of this limb in Beaton-Wells and Fisse, above n 6, 447–50.

90 See Peta Stevenson, Dana Stewart and Andrew Floro, ‘A Dollar in the Hand: Assessing Penalties for Contraventions of Part IV of the *Trade Practices Act*’ (2008) 16 *Trade Practices Law Journal* 203, 208, Appendix A.

91 Beaton-Wells and Fisse, above n 6, 440–3.

92 See generally the discussion of this approach in Beaton-Wells and Fisse, above n 6, 392–8 and its impact on penalty levels: at 436–8. Nevertheless, it is important to acknowledge that there are likely to be many factors that have influenced the relatively low penalty levels in Australia to date. Judicial reticence to recognise the seriousness of cartel conduct, at least in the early years of enforcement, is likely to have had an impact. It should also be noted that many of the proceedings brought by the ACCC have been against small- to medium-sized businesses and this would also explain to some extent the divergence in penalty levels between Australia and the US and EU.

93 Not least of which they enable enforcers to secure timely outcomes, allocate their resources efficiently and reduce the financial and reputational risks associated with complex litigation, while for respondents, settlements provide for potentially substantial penalty discounts and the unquantifiable benefit of certainty and finality.

94 *Experience with Direct Settlements in Cartel Cases* OECD Doc DAF/COMP(2008)32 (1 October 2009).

95 A high proportion of cartel cases in Australia have been settled pursuant to the ACCC Cooperation Policy: Australian Competition and Consumer Commission, *Cooperation Policy for Enforcement Matters* (31 July 2002).

without a settlement process may have contributed to perceptions of it as an effective regulator that is likely to detect and take action against conduct that breaches the CCA.⁹⁶ However, any benefits that this may have had for deterrence may have been undermined by the low level of penalties, representing in many cases a fraction of the gains derived from the conduct.⁹⁷

Beyond monetary penalties, the ACCC has access to a range of non-monetary sanctions that may be invoked with a view to leveraging up deterrence. These sanctions were introduced in 2001, reflecting broad recognition that monetary penalties not only have limitations as a deterrence mechanism but, at a certain level, can also have negative spillover effects.⁹⁸ The non-monetary sanctions under the CCA include injunctive orders, probation orders, community service orders, information orders and adverse publicity orders.⁹⁹ With the exception of injunctions and probation orders (relating to the establishment or revision of compliance orders), these sanctions rarely have been invoked by the ACCC as a response to breaches of the competition provisions of the CCA and in some instances (as in the case of adverse publicity orders), they are yet to be invoked in this context.

Even if they were to be used to a greater degree, however, the non-monetary sanctions under the CCA may be limited in the extent to which they are capable of enhancing deterrence. The reason for this is that, with the exception of adverse

96 See generally Christine Parker and Vibeke Lehmann Nielsen, 'What Do Australian Businesses Really Think of the ACCC, and Does It Matter?' (2007) 35 *Federal Law Review* 187, 206–8. That said, the survey results reported above suggest perceptions of detection and enforcement action in fact are weak.

97 Consider the example of the *Visy* case, which, despite being described by the judge as 'by far the most serious cartel case' in Australian trade practices history, only resulted in penalties equivalent to 10% of the statutory maximum per contravention: see above n 86 and surrounding text. The Marine Hose case provides another example of the low level of penalties in Australia by international standards: *Australian Competition and Consumer Commission v Bridgestone Corporation* (2010) ATPR ¶42–320. In that case, the ACCC secured total penalties for the four cartel participants of \$8.235 million, compared with penalties in excess of €131 million in the EU. See Australian Competition and Consumer Commission, '\$8 Million Plus Penalty Imposed on Cartel Members' (Press Release, NR 074/10, 14 April 2010); cf European Commission, 'Antitrust: Commission Fines Marine Hose Producers €131 Million for Market Sharing and Price-Fixing Cartel' (Press Release, IP/09/137, 28 January 2009) <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/137&format=HTML&aged=1&language=EN&guiLanguage=en>>. The ACCC secured a fine of \$20 million against Qantas for its participation in the fuel surcharge cartel; by contrast, a fine of approximately US\$61 million was imposed on Qantas in the United States: *Australian Competition and Consumer Commission v Qantas Airways Limited* (2008) 253 ALR 89.

98 See Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) ch 10 [10.3]. Spillover effects refer to unintended indirect effects on third parties flowing from the imposition of a penalty. For example, the imposition of a fine on a corporation may reduce the overall profitability and commercial viability of the business, which can have adverse flow-on effects for shareholders, employees, consumers and other stakeholders. In other cases, the amount of the fine will simply be passed on to consumers in the form of higher prices and will have little or no impact on the corporation subject to the penalty.

99 See CCA, pt VI.

publicity orders, they are non-punitive.¹⁰⁰ Thus, it is unlikely that these powers could be exercised for the purposes of making punitive orders such as an order requiring a company to take disciplinary action against an employee (by way of probation order) or requiring a company to provide a service for free (by way of community service order). The adverse publicity order power could potentially be used as a punitive response and a sanction that overcomes the undesirable side-effects of excessive fines (for example, the bankruptcy of a financially weak firm). As has been argued elsewhere:

At least in the context of cartel offences, adverse publicity orders against corporate offenders should be the rule rather than the exception. It may be objected that adverse publicity orders are unnecessary because cases of any moment will be well-publicised in the media in any event. This objection neglects the selective and sometimes misleading nature of informal media publicity. It is also counter-intuitive. Formal court-ordered adverse publicity in the form of a well-placed full page or half page advertisement in leading newspapers is prosaic but has significant advantages, namely accuracy, legitimacy, guaranteed visibility and resistance to spin-doctoring by corporate contraveners or enforcement agencies.¹⁰¹

In relation to the deterrence of individuals, the ACCC has advocated for criminal sanctions and the threat of jail time as the ‘silver bullet’ that is required to address the weak deterrence effect of the civil sanctions regime.¹⁰² There are at least two major problems with this argument. First, the ACCC has an uneven record in seeking individual accountability for cartel conduct (and even less, in respect of other forms of anti-competitive conduct) to date. There have been many cases in which the ACCC has taken enforcement proceedings against employees as well as against their corporate employers and the employees joined in the proceedings have often included senior executives.¹⁰³ However, there also have been major cases settled by the ACCC in which no individuals have been

100 For a detailed discussion of this, see Beaton-Wells and Fisse, above n 6, 453–60. For discussion of the punitive injunction as a potential sanction in response to cartel conduct that overcomes the limitations and avoids the adverse spillover effects of fines, see Brent Fisse, ‘Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 313, 314.

101 Beaton-Wells and Fisse, above n 6, 461.

102 Christine Parker, ‘Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality’ in Beaton-Wells and Ezrachi, above n 100, 239, 240.

103 Christine Parker, Paul Ainsworth and Natalie Stepanenko, ‘ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases’ (Working Paper, Australian National University Centre for Competition and Consumer Policy, May 2004) 80–2 [3.4.1].

joined without any explicit justification¹⁰⁴ (which is not to deny the existence of a justification but rather to point out that it is not publicly known) or, in at least one known instance, in which individuals have been joined but the settlement appears to have proceeded on the basis that the corporate defendant will pay a penalty, without a penalty also being imposed on one or more of the individual officers or employees.¹⁰⁵ In cases in which penalties have been sought against individuals, the penalties have been low. In fact, despite the strong deterrence rhetoric of the ACCC over the last 10 years, the median individual fine fell 58 per cent. For the period 1993–99, the median was A\$76 752, while for the period 2000–09, the median was just A\$31 986.¹⁰⁶ Since 1993, the maximum pecuniary penalty for individuals has been A\$500 000. The ACCC has had disqualification orders, another potentially potent deterrent tool, available to it since 2007, but is yet to use them in a case involving anti-competitive conduct. As at the time of writing (July 2012), three years after the introduction of the cartel offences in July 2009, there is yet to be a prosecution announced. These observations are not intended to cast doubt on the ACCC's commitment to use of the criminal regime. Rather, they are intended to suggest that a degree of conservatism is warranted in estimating the extent to which the criminal regime is likely to act as a supercharge to individual deterrence.

104 One example is the settlement of enforcement proceedings brought by the ACCC against Patrick Stevedores Holdings and DP World Australia (formerly P&O Ports) and a number of their senior executives for price fixing: see Vanda Carson, 'Regulator Abandons Pursuit of Corrigan' *Sydney Morning Herald* (online), 26 June 2009 <<http://www.smh.com.au/business/regulator-abandons-pursuit-of-corrigan-20090625-cyac.html>>. Under the terms of the settlement, each of the companies agreed to pay a penalty of A\$1.9 million for entering into an agreement likely to substantially lessen competition. No penalty orders were sought against the directors named in the proceedings. The settlement proposed was accepted by the Federal Court of Australia. See *Australian Competition and Consumer Commission v PRK Corporation Pty Ltd* (2009) ATPR ¶42-295. The contravention of the general prohibition against anti-competitive agreements under s 45(2) of the *Trade Practices Act 1974* (Cth) was said to be serious, but no specific justification was given for not imposing a penalty on the individual directors concerned. There are further examples. The ACCC brought enforcement proceedings against major airlines, including Qantas, British Airways, and Singapore Airlines for fixing the price of air cargo services by agreeing to impose fuel surcharges. Individuals were not joined as parties to those proceedings. In making penalty orders against Qantas and British Airways, the Federal Court set out the factual background including the involvement of particular individuals, but without discussing whether or not those individuals had been the subject of enforcement action in Australia or overseas. See *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89, 91–2 citing paragraphs [15]–[18] of the Statement of Agreed Facts (which identified two senior members of staff within Qantas freight who arrived at and/or gave effect to the Fuel Surcharge Understanding); *Australian Competition and Consumer Commission v British Airways plc* (2008) ATPR ¶42-265, 49 742–5, citing paragraphs [28]–[49] of the Statement of Agreed Facts and Admissions (which identified the relevant conduct of several senior executives in arriving at and giving effect to the Fuel Surcharge Understanding).

105 The prime example of this is the settlement of the enforcement proceedings against Visy Industries Holdings Pty Ltd and Mr Pratt, the Chairman and owner of the company, for price fixing and market sharing: see *Visy* (2007) 244 ALR 673. As part of the settlement agreed between the ACCC and the respondents, no separate penalty was sought against Mr Pratt. Heerey J of the Federal Court of Australia imposed a penalty of A\$36 million on the corporation without imposing a separate penalty on Mr Pratt. For criticism of this aspect of the decision, see Caron Beaton-Wells and Neil Brydges, 'The Cardboard Box Cartel Case: Was All the Fuss Warranted?' (2008) 36 *Australian Business Law Review* 6, 16–19.

106 Beaton-Wells and Fisse, above n 6, 462.

The second possible limitation on reliance on the criminal regime to inject individual deterrence into the public enforcement system is that, as previously observed, deterrence is reliant on knowledge of the law and available sanctions and, where knowledge exists, on the perceived likelihood of detection, prosecution and sanctioning. The survey results outlined above indicate that the ACCC has much work to do in this regard to maximise the deterrence impact of the criminal regime on individual business people. As previously mentioned, the ACCC is clearly aware of this knowledge deficit and is taking active steps to address it. Further, the extent to which that regime is used and the nature of the outcomes (number of prosecutions brought, number of convictions and types of sentences), will have a significant role in determining its ongoing deterrence impact. It is important in this respect not to underestimate the challenges involved in administering the criminal regime. As documented elsewhere, those challenges include reduced autonomy and the demands of a relationship with a culturally different agency in the Commonwealth Director of Public Prosecutions, scope for investigatory error in the context of an agency that has minimal criminal investigatory experience, difficulties associated with case selection given that the legislation does not differentiate significantly between civil and criminal liability, and general resource limitations having regard to the breadth of the ACCC portfolio.¹⁰⁷

B Compensation

In its *Compliance and Enforcement Policy*, the ACCC identifies one of its primary aims as being to ‘undo the harm caused by the contravening conduct (for example by corrective advertising or restitution for consumers and businesses adversely affected)’.¹⁰⁸ However, in practice, in relation to breaches of the competition provisions of the CCA (as distinct from the consumer and fair trading provisions) it is fair to say that the ACCC’s focus has been almost exclusively on deterrence.¹⁰⁹ The ACCC has not made restitution a condition or requirement of immunity or leniency, has not been consistent in seeking to obtain findings of fact for use in follow-on actions and has not itself brought proceedings in a representative capacity to secure compensation for victims of anti-competitive conduct.

The first version of the ACCC *Immunity Policy* (published in 2003 and then called ‘*Leniency Policy for Cartel Conduct*’) made it a requirement for corporate immunity from proceedings or penalty that ‘where possible, [the corporation] will make restitution to injured parties’.¹¹⁰ That requirement was based on the US

107 See the discussion in Caron Beaton-Wells, ‘Cartel Criminalisation and the Australian Competition and Consumer Commission: Opportunities and Challenges’ in Beaton-Wells and Ezrachi, above n 100, 183.

108 Australian Competition and Consumer Commission, *Compliance and Enforcement Policy* (20 February 2012) 2.

109 In addition to stopping the conduct in question and encouraging the use of compliance systems, both of which are also identified as primary aims in the ACCC’s *Compliance and Enforcement Policy*: *ibid.*

110 Australian Competition and Consumer Commission, *Leniency Policy for Cartel Conduct* (June 2003) pt A, [2(e)]; pt B, [2(e)].

Department of Justice's *Corporate Leniency Policy* and was said to be in 'recognition of consumers' expectations that the applicant not be able to obtain immunity from penalty or prosecution and keep their ill-gotten gains'.¹¹¹ There is no public information available on whether or to what extent the restitution requirement was enforced against or fulfilled by applicants in the first 18 months of its operation (the ACCC received 10 applications during that time).¹¹² However, in November 2004, the ACCC announced a review of the leniency policy and sought comment on a range of matters, including 'whether the requirement, as expressed in section 3.12 [sic] of the leniency policy, should remain in the policy'.¹¹³ Following the review, the requirement of restitution was removed from the policy. The reasons given for this decision arguably are not compelling.¹¹⁴ Moreover, there have been six years since the review, during which time cartel offences have been introduced, and yet there has been no indication that the ACCC is considering revisiting the issue of restitution as a condition of immunity. This is despite the fact that the ACCC itself has acknowledged that criminal sanctions should alter significantly incentives in favour of immunity applications.¹¹⁵

Immunity aside, the ACCC has also not sought to facilitate the payment of compensation to victims by parties that win significant concessions from the Commission by cooperating under its *Cooperation for Enforcement Matters Policy* ('*Cooperation Policy*'). That policy states that leniency is likely to be

111 Australian Competition and Consumer Commission, 'Review of the ACCC's Leniency Policy for Cartel Conduct' (Discussion Paper, 24 November 2004) 4, 13 ('*ACCC Leniency Discussion Paper*').

112 Ibid 5.

113 Ibid 13 (comment 14).

114 See Graeme Samuel, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Speech delivered at the International Class Action Conference, Sydney, 25 October 2007) 3–4, outlining some of the ACCC's concerns in relation to the requirement of making restitution. See further Beaton-Wells and Fisse, above n 6, 520–1. In explaining the decision to remove the requirement, the ACCC indicated that it had been included in the policy originally out of concern that leniency applicants should not be seen to escape any payment of restitution. However, as the ACCC pointed out, the experience in the US and Canada has been that private law suits generally follow an application for immunity even where no public enforcement action is taken. This reasoning is not compelling by way of justification for removing the restitution requirement in Australia. It remains the case that immunity beneficiaries escape the payment of penalties. They should not also escape the payment of restitution. It is true that injured parties have an entitlement to pursue damages. However, whether this is a feasible or likely pursuit in all cases, is another question altogether. The conditions in Australia are much less conducive to private actions than are those in the US and Canada, as is clear from the handful of such actions that have been brought (see n 2 above). In the absence of other measures to support private enforcement, it is arguable that the number of private actions is unlikely to climb significantly in the future. As a result, there is a stronger case for restitution as a condition of immunity in Australia than there is in other jurisdictions where the private enforcement climate is much more robust. Furthermore, it seems anomalous that parties who apply for leniency under the ACCC *Cooperation Policy* have their application assessed having regard to their preparedness to make restitution: Australian Competition and Consumer Commission, *Cooperation Policy for Enforcement Matters* (31 July 2002) The contrast between this position and the position under the ACCC *Immunity Policy* appears difficult to justify.

115 Samuel, 'The Relationship between Private and Public Enforcement in Deterring Cartels', above n 114, 8–9; Graeme Samuel, 'Current Issues on the ACCC's Radar' (Speech delivered at the Competition Law Conference, Sydney, 29 May 2010) 6.

considered for a corporation where, amongst other things, the corporation is 'prepared to make restitution where appropriate.'¹¹⁶ However, there is no evidence that the ACCC enforces or promotes restitution as a consideration in the 'settlement' negotiation process relating to breaches of the competition provisions.¹¹⁷

Indeed, there are indications that the 'settlement' process may have the effect of undermining rather than facilitating the payment of compensation by cartelists. The legislature intended that follow-on actions be facilitated by public enforcement action.¹¹⁸ That intention is conveyed in section 83 of the CCA which provides that findings of fact made against a respondent in earlier proceedings (including proceedings for an offence under sections 44ZZRF or 44ZZRG) are prima facie evidence of those facts in later proceedings for damages or compensation orders.¹¹⁹ However, there have been few cases in which section 83 has operated in the manner evidently intended by the legislature.¹²⁰ This is due in large part to the process under the ACCC *Cooperation Policy* whereby the ACCC and respondent negotiate an agreed statement of facts and consent orders and present the statement and proposed orders to the court for its endorsement.¹²¹ There have been instances in the past in which orders have been made that findings of fact made in the case are findings for the purposes of section 83 –

116 Australian Competition and Consumer Commission, *Cooperation Policy for Enforcement Matters* (31 July 2002) 2.

117 In the Marine Hose case, only one of the four cartel participants (Parker ITR) had provided for a compensation scheme for customers. Finkelstein J observed that a 'factor which will require future consideration is whether payment of compensation or making restitution to those adversely affected by the illegal conduct should go in mitigation of the penalty. It may be that a company should receive a lower (or discounted) penalty if it has assisted those affected by its actions by implementing a compensation scheme in the same way that a company may receive a discount for assisting the ACCC': *Australian Competition and Consumer Commission v Bridgestone Corporation* (2010) 186 FCR 214, 223. However, despite identifying the provision of compensation as a relevant factor in the assessment of penalties, Finkelstein J did not specify how this factor had been taken into account in determining the penalties in this case, or indicate whether any distinction had been drawn between the amount payable by the parties based on whether they had provided for compensation schemes. A press release issued by the ACCC identifies that the penalties reflected the 'number of contraventions found against each respondent with some discount for co-operation with the ACCC', but made no reference to the role of compensation in assessing the appropriate penalties: Australian Competition and Consumer Commission, '\$8 Million Plus Penalty Imposed on Cartel Members' (Press Release, NR 074/10, 14 April 2010).

118 See also CCA s 79B which evinces a legislative intention to prioritise compensation over penalties, at least in cases in which both are sought.

119 Cf ss 1317E–1317F of the *Corporations Act 2001* (Cth), which requires the Court to make a declaration of a contravention and provides for the declaration to be conclusive evidence of the matters declared (which include the parties to and the conduct constituting the contravention).

120 Cf *Australian Competition and Consumer Commission v Tasmanian Salmonid Growers Association Ltd* (2003) ATPR ¶41-954 (in which the respondents consented to findings being made for the purposes of CCA s 83); *Hubbards Pty Ltd v Simpson Ltd* (1982) 60 FLR 430 (in which a private litigant was able to invoke CCA s 83 in proof of its case, albeit the case involved resale price maintenance rather than cartel conduct).

121 See generally Beaton-Wells and Fisse, above n 6, 394–8 [10.2.2.1].

presumably such orders have been made on the application of the ACCC.¹²² However, uncertainty has emerged as to whether this course is open given the possible interpretation of ‘findings of fact’ in section 83 as requiring a finding based on evidence, as distinct from a finding based on admissions.¹²³ Conceivably, as a result of this uncertainty (albeit possibly also for other reasons), the ACCC has not sought ‘section 83 findings’ in competition cases in recent years.¹²⁴ Nor has it sought to have the uncertainty resolved through appeal in those cases in which its application for section 83 orders has been denied.

Moreover, in the settlement process, respondents may be able to avoid or diminish responsibility for loss or damage caused by the conduct in question, with a view no doubt to minimising exposure in follow-on damages suits.¹²⁵ As a result, cartelists 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, requiring claimants to prove both of these elements of their cause of action at significant risk and expense, without the assistance from the ACCC forerunner suit that appears to have been envisaged by the legislature.¹²⁶

Many ACCC matters are resolved by enforceable undertakings without the institution of proceedings. In 2002, the Australian Law Reform Commission considered the impact of section 87B undertakings on, and their use in, third

122 See *Australian Competition and Consumer Commission v Roche Vitamins (Australia) Pty Ltd* (2001) ATPR ¶41-809; *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* (2002) ATPR ¶41-880; *Australian Competition and Consumer Commission v Tasmanian Salmonid Growers Association Ltd* (2003) ATPR ¶41-954.

123 See *Australian Competition and Consumer Commission v Monza Imports Pty Ltd* (2001) ATPR ¶41-843, 43 440 (Carr J); *Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 (17 October 2011) [22]–[26] (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 [106]–[107] (Kiefel J).

124 Section 83 orders were not sought, for example, in *Visy* (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 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 the airline cargo cartel.

125 This is what evidently occurred in the *Visy* case. The ACCC did acknowledge in its submissions that the amount of loss or damage caused to non-contract customers by the price increases instigated under the cartel arrangements is likely to have been substantial see the Australian Competition and Consumer Commission’s ‘Outline of Submissions of the Applicant on Penalty’ submission in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd*, VID1650/2005, 12 October 2007, [46]. However, as to contract customers, the ACCC did not allege that the cartel ‘had any negative financial impact or caused loss to’ such customers – a non-allegation plainly won by Visy in its settlement negotiations with the ACCC in order to minimise exposure in private damages actions: see *Australian Competition and Consumer Commission v Pratt (No 3)* (2009) 175 FCR 558, 584 [35] (Ryan J).

126 This is what occurred in the class action against Visy and Amcor: see L Wood, ‘Sweet Relief for Amcor in Cadbury Box Battle’, *The West Australian* (Perth), 23 July 2009, 47; Elisabeth Sexton, ‘Cadbury Setback in Cartel Claim’, *Sydney Morning Herald* (online), 12 June 2009 <<http://www.smh.com.au/business/cadbury-setback-in-cartel-claim-20090611-c4y7.html>>.

party claims, recommending that the ACCC publish guidelines as to when and how third party interests will be taken into consideration, having regard to the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator.¹²⁷ Amended guidelines published in 2009 provide that ‘the impact of the conduct on third parties and the community at large’ is a relevant factor which will inform the ACCC’s decision to institute proceedings or accept an undertaking.¹²⁸ The guidelines also provide that the ACCC will not accept an undertaking which states that it ‘is not an admission for the purposes of third party actions’ or which imposes obligations on third parties.¹²⁹ Otherwise, the guidelines still provide little clarification of when and how third party interests are to be taken into account in deciding whether to accept an undertaking.

Since 2001, the ACCC has had power to bring representative proceedings under section 87(1B) of the CCA seeking compensation on behalf of persons who have suffered loss as a result of a pt IV contravention.¹³⁰ That provision 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,¹³¹ and, 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.¹³² Those powers were granted in 2010.¹³³ By contrast, there is no sign of readiness on the part of the ACCC to seek compensation for consumers in matters involving anti-competitive conduct, either directly or through the exercise of its intervention power. For example, it has been observed that, in recent years, the ACCC has increasingly intervened in proceedings (pursuant to section 163A of the CCA), even in one instance in a cartel damages claim, but it has apparently never done so to support a claim for compensation.¹³⁴

Aside from the general statement of aims in its *Compliance and Enforcement Policy*, the ACCC has made few public statements of policy in relation to matters of private enforcement. In several speeches by former ACCC Chairman, Graeme Samuel AM, a positive, albeit qualified, perspective was offered. The ACCC was

127 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) 46 (Recommendation 16.3(e)).

128 Australian Competition and Consumer Commission, *Section 87B of the Trade Practices Act* (18 September 2009) 4.

129 *Ibid* 6.

130 The ACCC may also use the broader power to bring representative actions under the *Federal Court of Australia Act 1976* (Cth).

131 See, eg, *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1988) 83 FCR 424; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512.

132 Australian Competition and Consumer Commission, *Submission No 80 to the Productivity Commission, Inquiry into Australia’s Consumer Policy Framework*, June 2007, pt 5.2.

133 See *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth), inserting ss 87AAA–87AAB into the then *Trade Practices Act 1974* (Cth). See now CCA sch 2 s 239.

134 Wylie, ‘When Too Much Power is Barely Enough’, above n 6, 326.

said to see 'private proceedings as a legitimate and valuable avenue of redress' while also to be likely to 'act as a further deterrent' to cartel activity.¹³⁵ At the same time, 'competing demands' and 'tension' between ACCC enforcement and private litigation were emphasised.¹³⁶ In particular, the potential for private follow-on litigation to disincentivise use of the ACCC *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 will always be given first priority.

In the former Chairman's speeches, an intention to assist private claimants insofar as would be 'appropriate' or 'reasonable' was expressed.¹³⁷ Moreover, it was stated that the ACCC would not wish to 'hinder private action against cartels'.¹³⁸ It is not publicly known whether the ACCC has assisted private claimants in appropriate circumstances. However, there has been at least one instance in which ACCC has sought to withhold such assistance. In this instance, the ACCC refused requests by a private litigant, Cadbury, for access to proofs of evidence prepared by the ACCC in connection with its civil penalty proceeding against Visy. Despite the resolution of that proceeding with record-breaking penalties,¹³⁹ access to the proofs was refused on grounds of legal professional privilege and public interest immunity privilege. The Commission was held to have waived legal professional privilege by filing the documents and serving them on Visy.¹⁴⁰ The public interest claimed by the ACCC to require protection of the documents was 'to encourage, by ensuring the confidentiality of the information they provide, cartel whistleblowers to come forward'.¹⁴¹ Without being able to rely on the confidentiality of such information, so the ACCC argued, 'whistleblowers might be dissuaded from coming forward and the public interest in rooting out cartel conduct correspondingly injured'.¹⁴² However, the

135 Graeme Samuel, 'The ACCC Approach to the Detection, Investigation and Prosecution of Cartels' (Speech delivered at the Economics Society of Australia, Melbourne, 28 September 2005) 21–2. These views were reiterated in two later speeches: Graeme Samuel, 'The Enforcement Priorities of the ACCC' (Speech delivered at the Competition Law Conference, 12 November 2005) 26–7; Graeme Samuel, 'Key Developments in Antitrust Regulation in Australia' (Speech delivered at the 2nd Antitrust Spring Conference, Sydney, 28 April 2006) 25–6.

136 Samuel, 'The Relationship between Private and Public Enforcement in Deterring Cartels', above n 114, 2, 5–7.

137 Samuel, 'Key Developments in Antitrust Regulation in Australia', above n 135, 25; Samuel, 'The Relationship between Private and Public Enforcement in Deterring Cartels', above n 114, 5, 7.

138 Samuel, 'The Relationship between Private and Public Enforcement in Deterring Cartels', above n 114, 2.

139 *Visy* (2007) 244 ALR 673.

140 *Cadbury* (2008) 246 ALR 137, 143–4 [20] (Gordon J).

141 *Ibid* 145 [27] (Gordon J).

142 *Ibid* 145 [28] (Gordon J). This argument found some support in the observation of Emmett J in *Australian Competition and Consumer Commission v ABB Power Transmission Pty Ltd* [2003] FCA 626 [43] that:

It may be that the public interest would be served by a principle that communications between the Commission and a party who has contravened the Act, which occur in an endeavour to make frank disclosure and give full cooperation to the Commission in its investigations, should have some protection in order to induce such frank disclosure and full cooperation. It may well be that there would be a reluctance to make frank disclosure and cooperate fully if communications that thereby resulted were then to be available for general publication.

court rejected those arguments also. As to the former, Gordon J pointed to the fact that Amcor itself had not sought any guarantee of confidentiality in its immunity application and that, in any event, the ACCC had led no evidence that any cartel whistleblower, whether in this case or otherwise, ‘has demonstrated reluctance to come forward based on a concern that information provided might become public’.¹⁴³ Justice Gordon also rejected the notion that a party in the position of Amcor could have a reasonable expectation of confidentiality given the inevitability that statements of a cooperating conspirator will be ‘used against (ie, disclosed to) the non-cooperating conspirators’.¹⁴⁴ Nor did Gordon J accept the ACCC’s fall-back ‘free-rider’ argument that ‘Cadbury should not have the benefit of the ACCC’s work precisely because it could easily do the work itself’.¹⁴⁵

there is at least an equal, if not more compelling, public interest in allowing private litigants to rely on the output of regulatory investigations, which are undertaken by public regulators at least in part on their behalf. The ACCC should be ‘motivated by a desire to do its duty, both towards the public and towards individual investors’. It is not motivated by corporate profit motives or competitive concerns. Indeed, the ACCC often justifies requests for findings of fact, declarations and injunctions that may be of little or no importance in the matter before the court on the grounds that they will be useful to follow-on private litigants.¹⁴⁶

The ‘real concern’ of the ACCC, in Justice Gordon’s view, was that potential immunity applicants would be deterred from cooperation, not by the disclosure of information but by the heightened prospects of damages exposure:

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 (ie, penalties plus damages) an actor should face for cartel conduct is a valid issue, and one which was long ago recognized 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. On the contrary, the ACCC’s attempt to use common law privilege doctrine to protect cooperators when they are faced with private suits for damages, albeit partially successful here, appears to me to be misguided. Whether cartel whistleblowers such as Amcor or those who cooperate with the regulators after the commencement of penalty proceedings (either by settling like Visy or in some other manner) should be rewarded or encouraged by reduced exposure or enhanced protection in damages proceedings is a broad question of policy that should be addressed by the legislature, not by ad hoc judicial tinkering through the backdoor of privilege.¹⁴⁷

The ACCC unsuccessfully appealed against Justice Gordon’s decision on the issue of waiver of legal professional privilege.¹⁴⁸ It chose not to appeal the ruling

143 *Cadbury* (2008) 246 ALR 137, 145–6 [29].

144 *Ibid* 146 [30].

145 *Ibid* 146 [31].

146 *Ibid* 146 [32] (citations omitted).

147 *Ibid* 150 [46]–[47].

148 *ACCC v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547.

on public interest immunity privilege.¹⁴⁹ The ‘competing demands’ of public and private enforcement exposed by the Cadbury case apparently caused some discomfort for the ACCC¹⁵⁰ and the approach taken by the ACCC in that litigation has been the subject of commentary and criticism.¹⁵¹ However, four years on and three years since the introduction of criminal sanctions, there is yet to be any public statement by the ACCC as to the lessons learnt from that case and any prospective change to its approach. Since the case, however, the CCA has been amended to introduce provisions under which the ACCC may deal with requests for access to categories of cartel-related information.¹⁵² Controversially, those provisions limit the scope for judicial review of ACCC decisions to refuse access to information.¹⁵³ It is not known whether the ACCC has yet had an occasion to apply the provisions and, if so, how it has approached their application.

IV THE ROLE FOR PRIVATE ENFORCEMENT OF COMPETITION LAW IN AUSTRALIA: A BROADER PERSPECTIVE

The US and EU debates about private enforcement have focussed largely on the extent to which private actions for breaches of competition laws should and/or are capable of effectively contributing towards deterrence and compensation objectives of competition law enforcement. Focussing on these objectives, the foregoing analysis suggests strongly that private actions should play a far more significant role in Australian competition law enforcement than they have to date. There are good reasons to consider that public enforcement has been and may well continue to be of limited efficacy in deterring anti-competitive conduct, albeit at this stage it remains difficult to foreshadow the full impact of the introduction of criminal sanctions for cartel conduct. Further, the ACCC has not yet demonstrated any practical interest in securing compensation for businesses and consumers harmed by such conduct. In defence of the ACCC, this may simply reflect limitations on its resources relative to its significant responsibilities and it can also be explained, at least in part, by the challenges

149 The two key issues on appeal were: (1) whether the ACCC’s proofs of evidence were subject to legal professional privilege (specifically, litigation privilege); and (2), whether the filing and service of the proofs constituted a waiver of privilege (and if so, to what extent). Since then, the ACCC has suffered another loss in attempting to invoke the privilege to protect immunity-related information: see *ACCC v Prysmian Cavi E Sistemi Energia SRL* (2011) 283 ALR 137.

150 Graeme Samuel, ‘Current Issues on the ACCC’s Radar’, above n 115, 6.

151 See Beaton-Wells, ‘Forks in the Road: Challenges Facing the ACCC’s Immunity Policy for Cartel Conduct: Part 1’ above n 6; Cashman and Abbs, above n 6; Slade and Ryan, above n 6. For a more general discussion of the ACCC’s *Immunity Policy* and the disclosure of information to third parties, see Kon Stellios and Caterina Cavallero, ‘Immunity: A Dilemma for both Whistleblowers and the ACCC’ (2011) 19 *Australian Journal of Competition and Consumer Law* 163.

152 See *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) ss 157(1A), 157(1B), 157B, 157C.

153 See the discussion in Beaton-Wells and Fisse, above n 6, 414–15.

associated with attempting to pursue both deterrence and compensation objectives in an even-handed manner given the tensions that arise between these objectives.

More fundamentally, it is argued in this section that the objectives of enforcement should be construed more broadly than deterrence and compensation. The objectives of enforcement activity should be: (1) prevention, (2) corrective justice, and (3) the development of legal doctrine.¹⁵⁴ Approaching the framework of objectives in this way makes it possible to obtain a more thorough and holistic view of the contributions that may be made respectively to competition law enforcement by both public and private mechanisms.

A Prevention

The primary objective of most if not all activity by a competition enforcement agency should be the prevention of anti-competitive conduct. Enforcement action driven by considerations of deterrence is one element of a preventative strategy. However, as (if not more) important are those activities that might be broadly characterised as relevant to securing compliance (so as to avoid the need for enforcement action). There is a substantial literature to support the theory that a higher rate of compliance is expected when multiple actors (public and private) employ their multiple resources and relations with those from whom compliance is sought in order to activate compliance motivations.¹⁵⁵ Private actors for this purpose would include not just potential damages claimants (generally customers or competitors), but others, both internal and external to the regulated business; for example industry associations, consumer groups, unions, employees, shareholders, investors and business partners.

Further, it is important to recognise the potential for these various actors to be interdependent in maximising compliance and, in particular, for public

¹⁵⁴ It is arguable that a further objective should be punishment, particularly in respect of that conduct to which criminal sanctions apply. Given that this article is concerned with competition law enforcement generally (and not just anti-cartel enforcement), punishment has been excluded from the discussion. In any event, the proposition that private actions should have a punitive function is highly debatable.

¹⁵⁵ See Neil Gunningham, Robert Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press, 2003) 35–8; Vibeke Lehmann Nielsen and Christine Parker, ‘To What Extent Do Third Parties Influence Business Compliance?’ (2008) 35 *Journal of Law & Society* 309; Julia Black, ‘Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation’ (Spring 2003) *Public Law* 63; Peter May and Søren Winter, ‘Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy’ (1999) 18 *Journal of Policy Analysis and Management* 625; Peter Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995) 8 *Governance: An International Journal of Policy, Administration and Institutions* 527.

authorities to enrol or enlist private actors in aid of increased compliance.¹⁵⁶ The nature of public–private enforcement debate to date tends to obscure the significant potential for private and public actors to work together in producing compliance, an outcome in which public and private interests are aligned. The enforcement focus of the debate risks creating a climate in which competition authorities may be inclined to view private claimants (or their representatives) as adversaries rather than allies, and to overlook or underestimate the opportunity to enlist private actors in fulfilling their public mandate of promoting competition through compliance with competition law.

The ACCC has been a leader in educating business about and setting standards for compliance programs.¹⁵⁷ It has been proactive in enlisting a range of third parties (including industry associations, peak bodies, and other government agencies) in promoting the compliance message. However, it is conceivable that its current approach to private actions risks undermining some of this positive work. It is well established that compliance is influenced by multiple motivations, not just by economic considerations (as suggested by the narrower deterrence paradigm outlined above).¹⁵⁸ While the impact of economic motivations should not be discounted, in the long run, the most sustainable and efficient basis for compliance is arguably a normative commitment to adherence to the law. Normatively motivated compliance captures the idea of behaviour that is internalised by a sense of duty and does not require activation by some external force or pressure. Normative motivation to comply can be based on a belief that a law is just or right in the sense that obeying the law leads to an outcome that fits

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- 156 Drawing on the pyramidal concept of responsive regulation (the seminal exposition of which remains Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992)), this approach would treat the regulatory pyramid as having at least two faces – a face representing measures taken by the public authority and a face representing measures taken by private actors (widely defined). If action taken by the regulated business itself or by the industry is added, there would be three faces (the third face representing self-regulation or co-regulation). The idea is of regulation across the different faces of the pyramid, allowing for action on one face to catalyse or facilitate action on another: see Neil Gunningham, ‘Strategizing Compliance and Enforcement: Responsive Regulation and Beyond’ in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 199.
- 157 See Christine Parker, Paul Ainsworth and Natalie Stepanenko, ‘ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases’ (Working Paper, Australian National University Centre for Competition Policy, May 2004) 99–100, 104; Christine Parker and Vibeke Lehmann Nielsen, ‘How Much Does It Hurt? How Australian Businesses Think about the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*’ (2008) 32 *Melbourne University Law Review* 554, 561–2. For ACCC policy statements on compliance, see Australian Competition and Consumer Commission, *Compliance and Enforcement Policy* (20 February 2012); Sarah Court, ‘Compliance Makes Good Business’ (Speech delivered at the Australasian Compliance Institute 13th Annual Conference, Sydney, 14 October 2009); Marcus Bezzi, ‘The ACCC’s Enforcement Approach – New and Old’ (Speech delivered at the Trade Practices Compliance Summit 2009, Sydney, 28 September 2009) 2–3; Louise Sylvan, ‘Future Proofing – Working with the ACCC’ (Speech delivered at the Australian Compliance Institute, Melbourne, 1 September 2005).
- 158 See Vibeke Lehmann Nielsen and Christine Parker, ‘Mixed Motives: Economic, Social and Normative Motivations in Business Compliance’ (2012) 34 *Law & Policy* 428, drawing in turn on Søren Winter and Peter May, ‘Motivation for Compliance with Environmental Regulations’ (2001) 20 *Journal of Policy Analysis and Management* 675. More generally, see Parker and Nielsen, above n 156.

with moral or ideological values – the regulated business complies with rules because its managers and employees see those rules as *substantively just or right*.¹⁵⁹ They agree with the ethos of competition and agree that there should be a law to protect it. Further, an impressive body of empirical research has established that people are also likely to obey a law where they see that law, and its enforcement, as ‘legitimate’, and that they judge legitimacy by whether the relevant legal authorities are *procedurally* just or fair. People comply because they recognise the legitimate authority of the law and of the regulatory agencies that administer and enforce the law, rather than or in addition to evaluating the substance of the law.¹⁶⁰

There are several aspects of the ACCC’s current approach to enforcement of the competition provisions that possibly could be seen as damaging to normative compliance, either because they may be seen as antithetical to the substantive rationale for competition law or because they may be viewed as procedurally unjust or unfair. The policy of granting either immunity or leniency without requiring the business in question to take reasonable steps to make restitution is one aspect of the ACCC’s approach that may jeopardise normative compliance.¹⁶¹ Another is the apparent reluctance by the ACCC to bring representative proceedings on behalf of consumers or small businesses that have suffered loss or damage by reason of anti-competitive conduct, despite there being a well-established legislative scheme facilitating such actions. The ACCC’s failure to seek section 83 orders on a consistent basis or appeal in cases in which it has been refused such orders is a further possible example. The same could also be said of instances in which the ACCC has refused to provide access to information sought by private claimants. It is not overlooked that there may have been good reasons for these actions by the ACCC. However, any assessment of those reasons can only be made with the benefit of a full understanding of their implications. At this point it is possible only to theorise about the impact of such actions on normative compliance across the general Australian business community. Empirical research on such matters is required and any such impact (assuming it is measurable) has to be weighed against the impact on detection and enforcement activity by the ACCC if the cooperation incentives under the ACCC’s immunity and settlement policies are diluted.

B Corrective Justice

Corrective justice becomes relevant as an objective where, as is inevitable, there are failures in deterrence or compliance. Unlike deterrence and compliance

159 Winter and May, above n 158; Tom R Tyler and John M Darley, ‘Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law’ (2000) 28 *Hofstra Law Review* 707.

160 The leading scholar in relation to this aspect of compliance is Tom Tyler. For a summary of the relevant theory and empirical research, see Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006) 269–76.

161 A survey of the Australian public in 2010 found high levels of disagreement with the acceptability of the ACCC’s *Immunity Policy*: see Beaton-Wells and Platania-Phung, above n 64, 767.

strategies (which are largely forward-looking), corrective justice is backward-looking in its frame of reference. Broadly,¹⁶² corrective justice can be understood as the pursuit of ‘transactional equality’ between the parties.¹⁶³ It has a remedial function, aiming to ‘correct’ or undo the consequences of a violation of the law.¹⁶⁴ Where wrongdoing results in loss to the plaintiff or gain to the defendant, the role of corrective justice is to restore both parties to the position in which they would have been but for that wrongdoing.¹⁶⁵ As such, corrective justice has been described as requiring ‘annulments of both wrongful gains and losses.’¹⁶⁶ This restorative function involves two distinct but correlative elements: (1) reparation of losses incurred by the plaintiff; and (2) disgorgement of gains obtained by the defendant.¹⁶⁷

Focussing initially on the first of these elements, as discussed in Part IIB above, ACCC enforcement action has not extended to seeking reparation of losses in the context of breaches of the competition provisions. It is important to recognise, however, that reparation is not achievable solely or exclusively through monetary remedies. The CCA authorises the making of a wide range of remedial orders that, while not monetary in nature, are intended nevertheless to repair or reduce loss or damage suffered as a result of anti-competitive conduct. Under section 87(2), such orders include the voiding or variation of a contract, the directing of payment of a refund, and the directing of the supply of specified services.¹⁶⁸ The ACCC has the power to seek such orders in a representative capacity. As previously observed the ACCC also has power to seek publication orders under section 86D. Such orders could alert third parties to their right to seek damages under the CCA and facilitate negotiations for proceedings for compensation from contraveners. Such orders could be sought by the ACCC in aid of corrective justice.

162 The concept of ‘corrective justice’ is complex and has been the subject of diverse accounts in the literature: see, eg, Richard A Posner, ‘The Concept of Corrective Justice in Recent Theories of Tort Law’ (1981) 10 *Journal of Legal Studies* 187; Jules Coleman, ‘Corrective Justice and Wrongful Gain’ (1982) 11 *Journal of Legal Studies* 421; Steven Walt, ‘Eliminating Corrective Justice’ (2006) 92 *Virginia Law Review* 1311.

163 Ernest J Weinrib, ‘Corrective Justice’ (1991) 77 *Iowa Law Review* 403, 404.

164 See, eg, Roach and Trebilcock, above n 29, 496; Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ above n 10, 487.

165 Ernest J Weinrib, ‘The Gains and Losses of Corrective Justice’ (1994) 44 *Duke Law Journal* 277, 277.

166 Coleman, above n 162, 423.

167 A distinction is drawn between the aims of corrective justice and those of distributive justice. Corrective justice is not concerned with the fairness of the allocation between the plaintiff and the defendant; it simply aims to repair the consequences of the wrongdoing, ‘irrespective of the wealth of the parties’: see Roach and Trebilcock, above n 29, 496. See also Peter Benson, ‘The Basis of Corrective Justice and Its Relation to Distributive Justice’ (1991) 77 *Iowa Law Review* 515, 538. By contrast, distributive justice aims to correct ‘allocative inequities’ to achieve a welfare-maximising outcome: see, eg, Elbert L Robertson, ‘A Corrective Justice Theory of Antitrust Regulation’ (2009) 49 *Catholic University Law Review* 741, 743–4.

168 Section 87 does not authorise an account of profits – it has been held to authorise compensatory remedies only – and hence cannot be invoked in support of the second limb of corrective justice (the disgorgement of gains): see *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* (2001) 109 FCR 528.

In relation to the second element of corrective justice, the disgorgement of gains, as pointed out in Part IIIA above, the level of penalties sought by the ACCC to date are likely to fall short (in some cases, far short) of disgorgement levels. Furthermore, despite stated ACCC intentions to ‘lift the bar’ in applying the 2007 penalty provisions, there is little basis for predicting substantial penalty increases while the approach to penalty calculation remains without a harms- or gains-based formula for setting a base fine, and while the ultimate penalty remains heavily influenced by ACCC ‘settlement’ negotiations.

C Development of Legal Doctrine

Many of the amendments made to the part IV prohibitions in the last five to 10 years have been controversial and remain untested. The ACCC Chairman, Rod Sims, has conceded that the Commission should litigate more frequently and that it should take more cases where the outcome is unpredictable and ACCC success less assured.¹⁶⁹ The ACCC, he pointed out, has enjoyed a success rate in litigation at first instance of almost 100 per cent. That rate is considerably higher than the Commission’s international counterparts and suggests that the agency has been ‘too risk averse’.¹⁷⁰ The ACCC’s litigation strategy, Sims argued, should extend to testing the law in areas where its scope and application are uncertain.

Sims’ statements herald a potentially significant shift in enforcement thinking at the top of the ACCC. To a certain degree, the preference of his predecessor, Graeme Samuel AM, was to avoid litigation where a settlement solution was perceived as more appropriate.¹⁷¹ As a result of the ACCC’s heavy reliance on settlements (the benefits of which in terms of cost savings and outcome certainty must be acknowledged), there are provisions in the CCA on which there is little if any jurisprudence. Section 46 of CCA, singled out in Sims’ speech, is a case in point.¹⁷² This complex, and in some respects controversial, prohibition on misuse of market power has been frequently amended. Many of the amendments,

169 Rod Sims, ‘ACCC – Future Directions’ (Speech delivered at the Law Council of Australia Competition and Consumer Workshop, Gold Coast, 27 August 2011) 4–5; Rod Sims, ‘Some Compliance and Enforcement Issues’ (Speech delivered at the Law Institute of Victoria Breakfast, Melbourne, 25 October 2011) 2–3; Rod Sims, ‘Some Perspectives on Competition and Regulation’ (Speech delivered at the Melbourne Press Club, 10 October 2011) 3–4.

170 Sims, ‘ACCC – Future Directions’, above n 169, 5.

171 For example, Samuel stated that ‘[i]t’s no secret that the ACCC has made greater use of section 87B court enforceable undertakings’ as an alternative to litigation, as such undertakings can facilitate ‘more efficient and timely relief for consumers’: Graeme Samuel, ‘The Enforcement Priorities of the ACCC’, above n 135, 9–10. Whilst Samuel acknowledged that litigation is an integral aspect of ACCC enforcement, he also observed that a negotiated settlement is more appropriate in various cases: at 9.

172 Sims, ‘Some Compliance and Enforcement Issues’, above n 169, 3–5. The statutory prohibitions relating to the formal merger review process (CCA pt VII div 3 sub-div B) and the provisions on unconscionable conduct are other examples (CCA sch 2 (‘*Australian Consumer Law*’) ss 20–21, formerly *Trade Practices Act 1974* (Cth) ss 51AA–51AC). The unconscionability provisions were the subject of a Senate Economics Committee Inquiry in 2009, in response to concerns about their operation: see Senate Economic Committee, Parliament of Australia, *Report on the Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* (2009).

particularly those relating to so-called ‘predatory pricing’, were seen as having far-reaching implications for Australian businesses when they were enacted.¹⁷³ Yet case law that may have assisted businesses and advisors in working through the implications has remained sparse. The ACCC opens numerous s 46 investigations each year, only a tiny fraction of which result in legal proceedings. Greater certainty in this area of the law would be welcomed by businesses. It would be conducive to compliance, including normative compliance, and it would also facilitate private actions for damages as it would remove some of the risk associated with uncertainty in the law.¹⁷⁴

Sims has acknowledged, correctly, that ACCC enforcement decision-making is essentially about making choices and that it is important to make ‘careful decisions about where to allocate limited resources.’¹⁷⁵ The ACCC will need to be strategic in ensuring that it selects cases where the conduct in issue poses the greatest threat of consumer detriment. This has always been the policy of the ACCC.¹⁷⁶ However, it needs to be acknowledged that such cases are not always the ones that present the clearest opportunities for testing the law. More often those will be cases in which the impact of the conduct, in terms of competitive harm, falls in a grey area. In these cases, the ACCC will not be able to rely on the strict liability provisions of the CCA, but will have to prove that the purposes or likely effects of the conduct are to substantially lessen competition.¹⁷⁷ Such

173 Bill Reid, ‘Section 46 – A New Approach’ (2010) 38 *Australian Business Law Review* 41.

174 See Roger Featherston, ‘Trends in Enforcement by Individual Plaintiffs’ (Paper presented at the Roundtable on Private Enforcement of Competition Law, Melbourne Law School, Melbourne, 12 November 2010) (copy available on request).

175 Sims, ‘ACCC – Future Directions’, above n 169, 3.

176 See Australian Competition and Consumer Commission, *Compliance and Enforcement Policy* (20 February 2012) 2.

177 Cases brought by the ACCC or the Trade Practices Commission over the last 35 years which went to a hearing and judgment on a ‘substantial lessening of competition’ test are: *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; *Australian Competition and Consumer Commission v Australian Medical Association Western Australia Branch Inc* (2003) 199 ALR 423; *Australian Gas Light Co v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd [No 2]* (2008) 170 FCR 16; *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297.

assessments are invariably heavily contested and the outcomes of such contests are uncertain.¹⁷⁸

Given the major challenges posed by the limited litigation budget of the ACCC, it is important not to overlook the potentially significant contribution that may be made to the development and clarification of legal doctrine by private litigation. Some of the most significant developments in judicial interpretation of the legislative provisions have taken place in the context of private actions brought by competitors and other market actors pursuing compensation for harm caused by breaches of the Act. In relation to section 46, the *Queensland Wire*,¹⁷⁹ *Pont Data*,¹⁸⁰ *Melway*¹⁸¹ and *NT Power*¹⁸² cases spring to mind. In relation to price fixing, resale price maintenance and third line forcing, cases such as *Radio 2UE*,¹⁸³ *Paul Dainty*¹⁸⁴ and *Castlemaine Tooheys*¹⁸⁵ have been significant.

In commenting on the capacity for private actions to contribute to legal development, some have foreshadowed the risk of unmeritorious or ‘strategic’ litigation, particularly in relation to unilateral exclusionary conduct.¹⁸⁶ This is seen as a concern particularly in the US where perceived excesses, driven by the incentives available to private litigants (treble damages, costs protection, prejudgment interest and generous discovery rules among them), have been said

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- 178 As most recently borne out by the litigation concerning Metcash’s acquisition of Franklins: see *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 282 ALR 464; *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297. Many commentators have criticised the ACCC’s decisions to pursue this litigation: see, eg, Alex Boxsell, ‘Metcash Ruling Calls for Rethink’, *Australian Financial Review* (online), 2 December 2011 <http://afr.com/p/national/legal_affairs/metcash_ruling_calls_for_rethink_Y6V7OcS7JpexDBBGQDPDoM>; Patrick Durkin, ‘ACCC Mired in Merger Indecision’, *Australian Financial Review* (online), 5 December 2011 <http://afr.com/p/accc_mired_in_merger_indecision_uWd1sgRzINUlv95JXv3GEN>; Tony Boyd, ‘ACCC Appeal Risky for All’, *Australian Financial Review* (online), 10 September 2011 <http://afr.com/p/accc_appeal_risky_for_all_tRhBOKsliBJhzbWWSXEdP>; Bryan Firth, ‘The Competition Watchdog Needs to Get Real in Its Merger Outings in Court’, *The Australian* (online) 7 December 2011 <<http://www.theaustralian.com.au/business/opinion/the-competition-watchdog-needs-to-get-real-in-its-merger-outings-in-court/story-e6frg9kx-1226215561817>>.
- 179 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1987) 16 FCR 50; *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1987) 17 FCR 211; *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.
- 180 *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd* (1990) 21 FCR 385.
- 181 *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* (1999) ATPR ¶41-668; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1.
- 182 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90.
- 183 *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1983) 48 ALR 361.
- 184 *Paul Dainty Corp Pty Ltd v National Tennis Centre Trust* (1990) 22 FCR 495.
- 185 *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* (1986) 162 CLR 395.
- 186 Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’, above n 10, 9–10; Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’, above n 10, 483.

to result in the narrowing of legal doctrine as courts attempt to correct what are regarded as ‘imbalances’ in the antitrust enforcement system.¹⁸⁷

Such concerns do not arise in Australia. There are rules that enable the courts to closely control litigation and deal with claims that are vexatious or otherwise an abuse of process.¹⁸⁸ Moreover, there is a strong case for considering that there are currently excessive hurdles or disincentives facing private actions for damages in respect of anti-competitive conduct in Australia.¹⁸⁹ Uncertainty as to the content and interpretation of the law has already been mentioned in this regard. Duration and cost of proceedings are also material and are exacerbated by appeals flowing from the aforementioned uncertainty. There are also significant evidentiary difficulties associated with asymmetry of information in favour of respondent parties and in some instances, the ACCC (which, as discussed, is reluctant to share information with private claimants), with the requirement to prove hypothetical situations (as in the case of the ‘future with and without test’ relevant to the substantial lessening of competition element) and with the proof and quantification of loss and damage (particularly difficulties arising where there has been ‘pass through’ of the cartel overcharge).¹⁹⁰

V CONCLUSION

Private enforcement of competition law is a well-established feature of the US legal landscape and is now growing in importance in other key jurisdictions such as the EU. Increasingly, it has been recognised that private enforcement can play a useful role in strengthening the overall competition law enforcement regime and can compensate for deficiencies in public enforcement. Not only can it represent an effective means of achieving corrective justice by facilitating the provision of remedies such as compensation of victims of anti-competitive conduct, it can also support the objectives of prevention of violations and clarification of legal doctrine.

However, for a variety of reasons, the Australian regime for private enforcement of competition law has been under-utilised. Despite their considerable potential to contribute to competition law enforcement in this

187 See Stephen Calkins, ‘Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System’ (1986) 74 *Georgetown Law Journal* 1065; Kovacic, ‘Private Participation in the Enforcement of Public Competition Laws’ above n 23; Douglas H Ginsburg, ‘Comparing Antitrust Enforcement in the United States and Europe’ (2005) 1 *Journal of Competition Law and Economics* 427, 435–6.

188 See, eg, *Federal Court Rules 2011* (Cth) r 2.26 (filing of documents); r 16.02(2) (content of pleadings); r 16.21 (striking out of proceedings); r 26.01 (summary judgment); r 29.03 (contents of affidavits).

189 See Featherston, above n 174; Spier, above n 6, 289–90; Wylie, ‘Cartel Compensation – A Consumer Perspective’, above n 2. On the limitations of representative proceedings, see Cashman and Abbs, above n 6, 2–20.

190 See generally Coronas, above n 2. See also Trevor Lee and Hank Spier, ‘Abuser Pays – Compensating the Victims of Cartel Conduct’ (2008) 16 *Trade Practices Law Journal* 285, 295–7; Sweeney, above n 2, 874–6; Wylie, ‘Cartel Compensation – A Consumer Perspective’, above n 2, 179, 181–2.

country, private proceedings remain relatively rare. To some extent, the low rate of private litigation in respect of anti-competitive conduct in Australia can be explained by the well-documented procedural and evidentiary hurdles faced by private plaintiffs, particularly in relation to representative proceedings.

In addition, private enforcement often raises tensions with public enforcement action by the ACCC. Inevitably, public and private enforcement objectives are not always aligned, and in some cases policy choices or resource allocation decisions by the ACCC will do little to facilitate private enforcement, or may even undermine follow-on litigation by plaintiffs. These choices or decisions may be vulnerable to criticism. However, any such criticism should be informed by careful consideration of the objectives of the overall enforcement system and the contributions that may be made to fulfilling those objectives by different modes of enforcement.

Clearly, the interaction between public and private enforcement is a complex issue. In Australia to date the challenges presented by that interaction have attracted scant attention or debate. No matter how difficult or how elusive answers may seem to the questions raised by the tensions between different modes of enforcement, it is essential and timely that we have that debate.