Balancing public and private enforcement – an Australian perspective

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I. INTRODUCTION

This paper is written from two perspectives. In part 1 Rebecca discusses the current state of private enforcement of cartel laws in Australia. In part 2 Marcus provides a flavor of recent public enforcement cases in Australia and then they each discuss a recent Australian Government Competition Policy Review Committee *('the Harper Committee")* reform proposal designed to improve private competition enforcement. The focus is on recommendation 41 of the Harper Committee report that relates to private actions and which has been considered and now accepted by the Australian Government.

II. THE PRIVATE ENFORCEMENT PERSPECTIVE

Private enforcement of laws prohibiting cartel conduct in Australia has been rare and has dwindled to almost nothing in recent years. To the extent that there has been some private enforcement, it has largely been in the form of class actions on behalf of the victims of cartel conduct who are seeking to recover compensation for their losses. The rarity of private enforcement actions in relation to cartel conduct in Australia is in contrast to the frequent public enforcement by the Australian Competition and Consumer Commission (ACCC). This tends to indicate that the absence of private enforcement is not due to a lack of cartel conduct occurring. It is also in particular contrast to the fact that cartel class actions are both very common and far more numerous than public enforcement actions in the United States.

In Australia, private enforcement action is expensive, complex, slow and difficult to conclude. For all but the wealthiest of companies, private enforcement is inaccessible. Even in the context of class actions, where litigants can band together to share in the cost and may be able to access litigation funding for the action, the legal costs are disproportionately high.

A recent empirical study of class actions in Australia found that in the first 22 years of operation of the Federal Court of Australia's class action regime, just five (or 1.5 percent) of class actions were cartel claims.[3]

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Those claims alleged cartel conduct in the domestic pre-mixed concrete industry, the international animal nutrition vitamins industry, the domestic corrugated fiberboard packaging industry, the international air cargo industry and the international rubber chemicals industry. No cartel class actions are currently underway and none have been commenced since 2007. After 2007, there has been just one private enforcement action that was in part based on cartel conduct (albeit not a class action) determined under the cartel provisions of the Competition and Consumer Act ("CCA").[4]

At a time when steps are being taken in Europe, including in the United Kingdom, to strengthen, increase and simplify private enforcement and where it is already vigorous in the United States and to a lesser but still significant extent in Canada, in Australia it has dwindled to the point of virtual extinction. This is regrettable, since private enforcement provides compensation to the victims of cartel conduct, it increases deterrence by ensuring that the risks outweigh the potential benefits and it does not consume limited public resources. For these reasons, private enforcement strengthens the effect of competition laws, enhances consumer welfare and complements publicly funded enforcement action.

One of the reasons that private enforcement is so rare is because of the significant challenges faced in running cartel class actions. The cartel class actions that have been brought have taken around five or more years to resolve. This is in contrast to the average duration of all types of class actions that was around two years[5] and the average duration of the public enforcement proceedings commenced and concluded by the ACCC since 2007 was less than two years. Despite their long duration, only one cartel class action has reached the stage of trial. The cases were beset by protracted interlocutory disputes about pleadings, access to regulator documents and work product, the scope of discovery, and jurisdiction and related issues such as ministerial consent to rely on extra-territorial conduct.

The main challenges faced in private prosecutions of cartel conduct in Australia include:

(a) the fundamental challenge of proving covert conduct in the absence of investigative powers, such as examinations or depositions, or access to regulator materials. Closely related to this is the struggle to obtain adequate documentary discovery;

(b) uncertainty that arises in relation to limitation periods where contravening conduct is covert and may not be discovered until some years after it has started;

(c) uncertainty in relation to the use to which admissions of contraventions elsewhere might be put in a private enforcement action;

(d) the cost and complexity of proving and quantifying loss which is compounded by the fact that no Australian court has made a determination as to the appropriate method or methods by which to measure the loss caused by price-fixing;

(e) uncertainty as to the treatment of 'pass through' of losses in the supply chain;

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3 Vince Morabito, "An Empirical Study Of Australia's Class Action Regimes, Third Report, *Class Action Facts And Figures – Five Years Later"* (2014) <http://ssrn.com/abstract=2523275>.

4 *Norcast S.ár.L* v *Bradken Limited (No 2)* [2013] FCA 235 (Gordon J).

5 Vince Morabito, "An Empirical Study Of Australia's Class Action Regimes, Third Report, *Class Action Facts And Figures – Five Years Later* (2014)" <http://ssrn.com/abstract=2523275>.

(f) the inability of Australian courts to make 'bar orders' that would facilitate early settlement by some parties where not all parties are willing to settle and would allow private litigants to obtain co-operation from willing parties;[6]

(g) uncertainty in relation to the scope of the business residence test as it applies to participants in overseas cartel conduct that has an impact in Australia; and

(h) the absence of any "cy-pres"[7] remedies that would facilitate the distribution of quantified losses where it is not possible to specifically identify victims.

In cartel class actions, these difficulties are amplified due to the high stakes nature of class action litigation as well as procedural complexities that attend class actions generally. The terms of reference of the Harper Review included considering whether enforcement and redress mechanisms can be effectively used by people, in particular small business, to enforce their rights. It is in this context that the Harper Review examined some of the areas that have created challenges for private enforcement of cartel laws. The recommendations of the Harper Review, if implemented, would go some way to alleviating some of the difficulties however substantial impediments would remain.

III. THE PUBLIC ENFORCEMENT PERSPECTIVE

A. Recent Public Law Enforcement Highlights

The ACCC has a very active program of public competition law enforcement. In recent years it has had sufficient resources to enable it to investigate and take enforcement action in between six and eight complex matters each year. This includes misuse of market power, exclusionary conduct and cartel cases. Some recent cases illustrating the breadth and scope of the ACCC's public enforcement include**:**

- *The "Informed Sources" litigation* — Proceedings taken by the ACCC against a number of petrol retailers and a price collection and exchange service — resolved by the ACCC accepting commitments from petrol retailers to only subscribe to a petrol price exchange service if the service shares the information exchanged with consumers and certain regulators, researchers and third parties.
- *Visa Worldwide Pte Ltd* — The Federal Court ordered Visa Worldwide to pay a pecuniary penalty of $18 million for engaging in anti-competitive conduct.
- *Renegade Gas Pty Ltd, Speed-E-Gas (NSW) Pty Ltd* and 3 current and former senior executives were penalized a total of $8.3 million for engaging in a cartel in the Sydney region over many years.
- *Air cargo* — 13 airlines have paid a total of $98.5 million to date for cartel conduct, including:
  - Malaysia Airlines - $6 million
  - Korean Airlines - $5.5 million
  - Japan Airlines - $5.5 million
  - Emirates - $10 million
  - Singapore airlines - $11.75 million

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[6] The prospect of contribution claims makes it virtually impossible to settle a private enforcement action involving more than one respondent unless settlement can be reached with all respondents. Bar orders would block non-settling respondents from claiming contribution from a settling respondent.

[7] In the context of a class action, a cy-pres mechanism is one that would facilitate the distribution of some or all of a pool of damages to a charitable cause, the objects of which are usually consistent with or promote the interests of class members. Such a mechanism would be employed where it is not economically rational to distribute the fund to class members, for example where per capita damages are very small, not possible to distribute to class members or where part of the pool of damages remains unclaimed.

- Cathay Pacific - $11.25 million
- Thai airways International - $7.5 million
- Garuda and Air NZ are subject to appeal.

- *Mitsubishi Electric* ordered to pay a $2.2 million penalty for resale price maintenance.
- *NSK Australia and Koyo* — $3 million and $2 million penalties for cartel conduct.
- *Yazaki Corporation* — The Federal Court recently determined that Yazaki Corporation engaged in collusive conduct with its competitor in the supply of wire harnesses to Toyota Motor Corporation (Toyota) in Australia — a penalty is to be determined in a separate hearing.

The ACCC also has a busy civil litigation program and a very active Serious Cartel Group. That group is working closely with the Commonwealth Director of Public Prosecutions in considering whether there is a basis for taking a criminal prosecution in respect of alleged cartel conduct investigated by the ACCC.

B. Private Enforcement And The ACCC

There have been very few private competition law enforcement cases in recent years. These include a class action relating to the *Air Cargo* case and *Norcast SarL v. Bradken Ltd* [2013] FCA 235 and [2013] FCA 283.

Nevertheless, the ACCC recognizes that private rights of action are an important aspect of competition law enforcement in Australia. Generally they may benefit from related ACCC investigations and proceedings under the CCA, such as in the air cargo case, but in practice such 'follow-on' action has occurred most commonly in the context of cartels.

The ACCC's aims are not identical to those of private action litigants, who primarily seek to recover or prevent loss suffered as a result of CCA contraventions. The level of damages recoverable in a private action is unaffected by fines or penalties that may be awarded as a result of public enforcement. However, there is some judicial support for the suggestion that payment of compensation or restitution to those adversely affected by the illegal conduct may mitigate a penalty [*ACCC v. Bridgestone Corporation* (2010) 186 FCR 214, 223, Justice Finkelstein J (at para. 40)].

Private enforcement can be a useful complement to public enforcement in building compliance and deterring anti-competitive conduct, since it enables action against wrongdoers where the ACCC is not able to respond within its priorities and allocated budget.

Private actions have also helped develop significant judicial precedent relevant to Australian competition law. The ACCC may intervene in private proceedings on matters of general public importance or to clarify the law. High Court examples of such ACCC interventions in the public interest include *NT Power Generation Pty Ltd v. Power & Water Authority* [2004] HCA 48; *Queensland Wire Industries v. Broken Hill Pty Co Ltd* [1989] HCA 6 and *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* [2001] HCA 13.

C. The Harper Committee Recommendations On Private Actions

Recommendation 41 of the Harper Committee is to amend section 83 of the CCA to allow admissions of fact in a case brought by the ACCC, in addition to findings of fact made by the court in such a case, to be relied upon in subsequent private action.

The Australian Government has announced that it supports the recommendation and intends to develop exposure draft legislation for consultation with the public and states and territories to allow private parties to rely on admissions of fact made in another proceeding.

IV. SECTION 83 AND ADMISSIONS OF FACT — THE ACCC PERSPECTIVE

The ACCC supports the proposed amendment. It considers that it is likely that it will facilitate private enforcement and be a significant complement to public enforcement in building compliance and deterring anti-competitive conduct. Effective deterrence occurs where sanctions, having regard to the likelihood of detection and conviction, outweigh the gains associated with a contravention. The threat of increased 'sanctions' in the form of damages payouts resulting from private litigation can play a vital role in a firm's consideration of the costs and benefits of engaging in anti-competitive conduct.

There are two main categories of private litigation that were relevant to the Harper Committee's considerations, first instance litigation and follow-on actions.

First instance litigation matters are those run by private parties from commencement, with no material involvement by the ACCC. By contrast, follow-on actions are those where private parties seek damages against a firm that has already been found to be in contravention of the CCA by virtue of litigation by the ACCC.

The Committee's recommendation regarding section 83 relates particularly to these latter types of action.

Section 83 assists private actions by making findings of fact that established a contravention in ACCC proceedings to be prima facie evidence of the same facts in later proceedings, including private actions. Its greatest weakness is that certain court decisions interpret findings of fact to mean those made after a contested hearing, but not a settlement hearing in which formal admissions are made[8]. The Harper Report concluded that section 83 would be more effective if it applied to admissions of fact made in another proceeding, in addition to findings of fact, to remove doubt about its operation [Harper Report pp.71-71, 407-409].

The ACCC raised two concerns about this during the Harper Review process. First, that firms may be less likely to cooperate under the ACCC's Immunity and Cooperation Policy if admissions made to the ACCC may be used in private proceedings. Admissions by cartel participants (other than the immunity applicant) are commonly made in settlement of ACCC proceedings in the form of "agreed facts". These evidence the contraventions on which the parties submit a settlement to the Court. Secondly, the ACCC raised the concern with the section 83 proposal that respondents may be less willing to settle at all with the ACCC, less willing to agree to facts, or willing only to agree to limited facts, meaning more matters would have to be fully litigated.

In principle the ACCC agrees that greater deterrence would be achieved if — all else equal — it were simpler for private firms to pursue such follow-on actions.

Ultimately the ACCC supports the final Harper Committee recommendation. While it may impact on cooperating parties who are not immunity applicants we expect the recommendation will be unlikely to have any impact on the rights or incentives of immunity applicants. This is because immunity applicants do not

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[8] *ACCC v Monza Imports Pty Ltd* [2001] FCA 1455; *ACCC v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 at [24]; *ACCC v ABB Transmission & Distribution Ltd* [2002] FCA 559; *ACCC v Leahy Petroleum Pty Ltd* (No 3) (2005) ALR 301 at [118]; *ACCC v Dataline.net.au Pty Ltd* (2006) 236 ALR 665 at [107].

make admissions of fact in proceedings taken by the ACCC or the Commonwealth Director of Public Prosecutions.

If implemented, both the admissions of fact made by a person in proceedings brought by the ACCC, together with the findings of fact made by the Court, will be available for persons willing to take private action for the harm suffered from anti-competitive conduct. This has some potential to simplify and expedite the process for private litigants as the essential issues that were relied upon by a Court in finding a contravention in the ACCC proceedings may not be in issue in the private proceedings and could facilitate greater access to justice, particularly for businesses that have been impacted by anti-competitive conduct.

V. SECTION 83 AND ADMISSIONS OF FACT — THE PRIVATE ENFORCEMENT PERSPECTIVE

Unsurprisingly, the proponents of private enforcement actions are very much in favor of this reform. Public enforcement actions in relation to cartel conduct are most often resolved by defendants making admissions of contraventions and it is neither a fair nor an efficient use of public and private resources for private litigants to have to re-litigate facts that are admitted or otherwise established in proceedings brought by the ACCC.

Of course, the utility of admissions in private enforcement actions will depend on the scope and nature of the admissions that are negotiated. The party being prosecuted will be motivated to settle on the basis of admissions that are as narrow and as unhelpful to private litigants as possible. It will fall to the ACCC, and to some extent the courts in the penalty hearing process, to counter-balance this motivation and to ensure that the policy object of assisting private litigants is fulfilled.

VI. REDRESS FOR VICTIMS

The ACCC noted in its submission to the Competition Policy Review that section 239 of the Australian Consumer Law allows the ACCC to seek orders from a court for consumer redress (other than damages) after a contravention has been found. We consider that it may be useful if this power was also available for it to seek redress on behalf of identifiable classes of persons, such as consumers or small businesses, impacted by anti-competitive conduct. For example, the ACCC might seek an order requiring the offending firm to honor existing contracts while offering a discount corresponding to the anti-competitive surcharge to its customers. The ACCC considers this could, in appropriate cases, provide a cost effective way to provide redress to victims of breaches of the competition law.

VII. DETECTING CARTELS THROUGH A WELL-FUNCTIONING IMMUNITY PROGRAM

The ACCC strategy for cartel enforcement relies on three key elements:

1. awareness raising,
2. detection and investigation of cartels; and
3. court action to punish cartel conduct.

A significant tool used by the ACCC to detect cartels is the Immunity and Cooperation Policy. The ACCC immunity policy enables it to detect and successfully prosecute breaches of the CCA and in particular, cartel conduct. In fact, the majority of cartels are detected via applications for immunity and the ACCC relies heavily on the policy to prosecute cartels effectively.

The ACCC seeks to maintain incentives for firms seeking to cooperate with the ACCC under its immunity policy. Fewer applicants coming forward with information on the existence of cartels could affect the number of breaches that the ACCC detects and prosecutes each year.

Immunity applicants face the risk that they may be the subject of legal claims or class actions brought against them once the cartel they report becomes public. Specifically, substantial damages in United States cartel class action litigation are often claimed as a significant concern by international immunity applicants.

The perceived risk that information published, admissions made or evidence adduced in Australia could lead to action in the United States (or even in Australia) is regularly cited by legal representatives of parties as a factor that goes into assessing whether to seek immunity in Australia. It is also claimed that total damages awarded in follow on cartel cases in the United States on an annual basis regularly exceed all penalties imposed in global anti cartel public enforcement.

The ACCC operates its immunity program in a way that seeks to maintain high levels of confidence in its ability to keep information from an immunity applicant confidential. This policy has led to a steady flow of immunity applicants to the ACCC immunity program.

Australian and international experience has shown that most cartels are detected, stopped and punished through well-functioning immunity programs. While victims of cartels would like restitution for any loss they have suffered, it is also in their direct interests if those cartels are detected and stopped as soon as possible and that the cartelists are punished to deter future cartels. Public and private interests are aligned in supporting a well-functioning immunity program that detects cartels and supports enforcement action.

VIII. PROTECTED CARTEL INFORMATION — THE ACCC PERSPECTIVE

At times the interests of the ACCC and litigants in private proceedings have the potential to conflict. Private litigants may seek documents held by the ACCC that the ACCC is bound to keep confidential as part of its obligations under the ACCC's Immunity and Cooperation Policy. A number of statutory provisions address the disclosure requirements in litigation in light of the ACCC's public enforcement functions.

Specifically, section 155AAA of the CCA prevents ACCC officials disclosing material obtained by the ACCC using its coercive powers, or that were provided to it in confidence (such as under the Immunity and Cooperation Policy), except in the course of performing their duties or functions, or as "required or permitted" by law. That term would include the various statutory means by which parties to private or public enforcement proceedings may access the documents of other parties.

The Federal Court's rules on discovery allow respondents to ACCC proceedings, and parties to private proceedings, to seek orders relating to the discovery of relevant documents that the ACCC has acquired compulsorily [Federal Court Rules 2011, Part 20]. The ACCC may itself seek discovery orders of material that it has not obtained by its own compulsory processes. The Court will generally fashion any order for discovery to suit the issues in a particular case.

In addition, respondents in ACCC enforcement proceedings for civil penalties have a general right to access documents acquired by the ACCC in connection with the matter that is the subject of those proceedings [See CCA ss.157, 157(1B), 157B and 157C]. In the case of criminal proceedings, the prosecution has broad obligations to disclose material that it intends to use to prove its case, as well as material affecting the credibility or reliability of a prosecution witness, and unused materials. It must also disclose any other material that may assist the defense.

There are, however, certain statutory limits to what the ACCC may be ordered to produce or disclose to the Court, or to a party to non-ACCC proceedings. These were introduced in 2009 as a result of ACCC concerns following the corrugated fiber board litigation (discussed above) about its ability to obtain confidential cartel information from informants if the scope of protection for such information were not clarified. As a consequence, a legislative amendment was made to the effect that the ACCC may refuse to disclose information given to it in confidence if it relates to a breach, or possible breach, of a cartel prohibition ("protected cartel information"), having regard to various criteria, including the fact that the information was given to the ACCC in confidence, and the need to avoid disruption to national and international law enforcement efforts.

In the case of informants, the ACCC must also have regard to their protection and safety, and whether disclosure may deter them in future [CCA s.157(1B)]. For the CCA to meet its objectives it is essential that the ACCC is able to obtain the information necessary to effectively enforce the CCA. If the protection provided to confidential cartel information is not clearly stated, the ACCC's ability to enforce the cartel provisions may be frustrated, especially given the ACCC's reliance on informants, who may otherwise be discouraged from providing it.

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

IX. PROTECTED CARTEL INFORMATION — THE PRIVATE ENFORCEMENT PERSPECTIVE

This is an area in which the perspectives of the ACCC and proponents of private enforcement actions differ. The regime provides that the ACCC cannot be required to make discovery of documents or produce documents containing protected cartel information in proceedings where it is not a party. Where the ACCC or a court receives a request from a party to court proceedings for discovery or for production of documents containing protected cartel information, the ACCC or the court need have regard only to a finite list of considerations, all of which weigh against production and disclosure, and must not have regard to matters beyond the list. The limited considerations do not give weight to the purpose for which the documents are sought, and therefore prevent a decision being made upon a balancing of interests. In contrast, there are well established principles at general law for dealing with claims for public interest immunity that applied prior to the introduction of the protected cartel information regime. Those principles require that all competing public interests be taken into account.

While it is acknowledged that this is a difficult matter of conflicting policy imperatives and that an effective immunity policy is very much in the interests of private litigants, private enforcement has not been well served by the ACCC's desire to ensure its investigative and immunity processes are not compromised. This approach has produced overbroad legislation that is out of step with the more pragmatic approach to access to documents and information by third party litigants in the United States and Europe.[9] For example, while the protected cartel information provisions are intended to protect the immunity process, they are not limited to information obtained from immunity applicants.

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[9] Brooke Dellavedova, "Private Enforcement in Australia Plaintiff's Perspective" (2014) (3) *ABA Antitrust Section Civil Redress Committee 2-5; Peta Stevenson* 'Private Enforcement in Australia Defendant's Perspective' (2014) (3) *ABA Antitrust Section Civil Redress Committee 5-7; Laura Guttuso* "Private Enforcement in Australia Comparison (to the EU and US) and Comment" (2014) (3) *ABA Antitrust Section Civil Redress Committee 7-10.*

Witness statements, transcripts of compulsory examinations, documents and other material compiled by the ACCC may be critical to the success of private enforcement action. This is particularly so in circumstances where private litigants do not have any rights to conduct depositions to obtain information and struggle to obtain adequate documentary discovery to enable them to establish liability and assess losses. There are no mechanisms available either that would enable a private litigant to obtain co-operation from one of the parties to a cartel, such as bar orders that are available in Canada or a reduction in damages that is available in the United States. Reform is needed to give greater weight to the interests of private litigants in obtaining information to support their claims. This could be by adjusting the Protected Cartel Information regime to facilitate access to documents and work product held by the ACCC and/or by other mechanisms that would allow private litigants to help themselves, such as those just mentioned.

X. CONCLUSION

Public enforcement is in a far healthier state in Australia than private enforcement. For the most part, the interests of public and private litigants are aligned, with both recognizing the critical importance of detecting and stopping cartel conduct although there is some tension when it comes to access by private enforcers to documents and work product held by the ACCC. The lack of compensation flowing to the victims of cartel conduct in Australia is a matter of significant concern to those victims but it is also a matter of some concern in terms of how effectively cartel conduct can be deterred. It is most likely that in Australia, due to the absence of effective private enforcement, a company assessing the risk of participating in a cartel can be reasonably confident that even if it is subject to successful public enforcement action, there is a reasonably good chance it may retain a significant portion of the gains of the unlawful conduct because it is unlikely that private enforcement action will be pursued.