

## CHALLENGES IN CARTEL CLASS ACTIONS

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### I INTRODUCTION

Notwithstanding vigorous regulatory action against cartels in Australia and abroad, and the proliferation of antitrust class actions in North America, cartel class actions in Australia have been rare. Since the introduction of Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*') in 1992 to provide a mechanism for representative proceedings, only one cartel class action has been resolved, an action against the international vitamins price fixing cartel which settled in 2006.<sup>1</sup> At the time of writing, three cartel class actions are before the courts in respect of corrugated fibreboard packaging, international air freight and rubber chemicals.

The cartel class actions brought in Australia to date have faced significant challenges. These challenges are not necessarily unique to cartel class actions; some of the challenges might also arise in a regulatory prosecution or in an individual damages action and indeed probably explain why there are so few successful claims for damages arising out of cartel conduct.<sup>2</sup> However, the complexities can be magnified in the class action context. For example, difficulties in proving covert conduct, satisfying pleadings requirements, and progressing heavily defended actions against multiple, well resourced respondents, are not unique to cartel class actions. But together they may make cartel class actions very difficult to prosecute. We focus here on three such issues which are currently prominent in cartel class action litigation and likely to have

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1 *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322.

2 For a discussion of several challenges that could arise exclusively in the class action context, see 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 2009 Competition Law Conference, Shangri-La Hotel, Sydney, 23 May 2009).

significant consequences for the future conduct of such actions in Australia: pleading of market, jurisdictional issues and assessment of damages. To date, no cartel class action has proceeded to trial in Australia. Over the coming years, developments in private cartel enforcement, be they due to evolving case law, legislative reform or developments in practice, are likely to have significant consequences for the victims of cartel conduct.

We have focused on representative proceedings brought pursuant to Part IVA of the *FCA Act* because those provisions have been used exclusively to pursue compensation for classes affected by cartel conduct. While the Australian Competition and Consumer Commission ('ACCC') has limited power to bring representative actions on behalf of named persons under the *Trade Practices Act 1974* (Cth) ('*TPA*'),<sup>3</sup> and may commence a representative proceeding pursuant to Part IVA of the *FCA Act*,<sup>4</sup> to the authors' knowledge no such actions have been commenced by the ACCC seeking compensation in respect of cartel conduct.<sup>5</sup>

## II PLEADING OF MARKET

A representative proceeding commenced pursuant to Part IVA of the *FCA Act* attracts the ordinary rules of pleading,<sup>6</sup> and a defective pleading is liable to be struck out. Respondents to representative proceedings often apply to partially or wholly remove the pleading, alleging for example that the group member

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3 *Trade Practices Act 1974* (Cth) s 87(1A), (1B) (Cth) ('*TPA*'). This is at odds with the 'opt in' nature of Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('*FCA Act*'), the inclusive nature of which is probably better suited to recovery of compensation on behalf of broad groups of consumers affected by price fixing.

4 For a discussion of the difficulties faced by the ACCC in bringing a representative action, see Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework, 29 May 2007, Submission No 80 (ACCC), cited in 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, fn 30. See also discussion in Vince Morabito, 'Group Litigation in Australia – "Desperately Seeking" Effective Class Action Regimes' (National Report for Australia prepared for The Globalisation of Class Actions Conference, Oxford University, December 2007) 21.

5 We are aware of several instances in which the ACCC has pursued representative proceedings under Part IVA of the *FCA Act* in respect of: a claim of misleading and deceptive conduct and unconscionable conduct (see *Australian Competition and Consumer Commission v Chats House Investments Pty Limited* (1996) 71 FCR 250); and pyramid selling schemes (see *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424 and *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512).

6 *FCA Act* s 33ZG(b) specifically preserves the Court's powers in relation to a proceeding in which no reasonable cause of action is disclosed or that is oppressive, vexatious, frivolous or an abuse of the process of the court. There is an additional requirement to demonstrate that the numerosity, connectivity and commonality requirements for commencement of a representative proceeding (contained in *FCA Act* s 33C) have been satisfied: *FCA Act* s 33H(1).

definition lacks certainty and is embarrassing,<sup>7</sup> that the claims of group members lack the requisite commonality,<sup>8</sup> or that the representative party has failed to plead material facts sufficient to give rise to a cause of action.<sup>9</sup> The proliferation of interlocutory challenges (and appeals) to class action pleadings has been criticised by the courts as ‘litigation by attrition’<sup>10</sup> and a ‘disturbing trend that is ... best brought to an end.’<sup>11</sup> However these challenges seem likely to continue.

Several recent challenges have focused on whether and how a relevant market ought to be pleaded for the purpose of alleging cartel conduct and in particular price fixing. These challenges preceded the recent introduction of new provisions of the *TPA* specific to cartel conduct.<sup>12</sup> We examine here the Federal Court’s approach based on the former provisions, before reflecting upon the recent amendments.

In both versions of the *TPA*, section 45 prohibits the making of or giving effect to a contract, arrangement or understanding (‘CAU’), which contains a

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7 The early group member definition in the vitamins class action was criticised for being too broad and unwieldy: see *Bray v F Hoffman-La Roche Ltd* [2003] ATPR ¶41-906 and Transcript of Proceedings, *Bray v F Hoffman-La Roche Ltd* (Federal Court of Australia, Merkel J, 23 October 2002) 187 line 11. The group member definition was similarly criticised in the rubber chemicals class action: *Wright Rubber Products Pty Ltd v Bayer AG* [2008] ATPR ¶42-258 (‘Wright’). For a discussion of issues attending the class definition in class actions arising out of price fixing cartels, see Cashman and Abbs, above n 2.

8 In *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 (‘*Philip Morris*’), Sackville J (with whom Spender J and Hill J agreed on this issue) explained the procedural requirements in s 33C(1), including, at 514, that s 33C(1)(a) requires every applicant and represented party to have a claim against the one respondent or, if there is more than one, against all respondents. The issue was carefully considered by the Full Court of the Federal Court of Australia in *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317. Justice Branson, at 359, held that while the decision in *Philip Morris* had been the subject of criticism, it should be followed by the Federal Court unless and until the High Court took a different view of the proper construction of s 33C(1) of the *FCA Act*. In contrast, Finkelstein and Carr JJ declined to apply *Philip Morris*. Justice Finkelstein considered application of this decision would simply result in more litigation. Justice Carr did not think it strictly necessary to decide the point, but considered that *Philip Morris* had been wrongly decided and should not be followed, and there were sufficient safeguards elsewhere to protect against misuse of Part IVA. In *McBride v Monzie Pty Ltd* (2007) 164 FCR 559, 561–2, Finkelstein J determined that the holdings in *Bray* had overturned *Philip Morris*. The issue perhaps cannot be considered as finally resolved. In *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166, 182 (‘*Auskay*’), Tracey J commented, without being required to decide, that there appeared to be force in the argument by one respondent that the pleading did not plead sufficient facts to establish that the applicant and represented parties have a claim against all respondents.

9 The entitlement of the respondent(s) to be appraised from the outset of the case to be met (*Cameron v Qantas Airways Ltd* (1993) ATPR ¶41-251, 41,370) presents unique challenges for the representative party and group members in cartel matters, given that cartels usually involve concealed conduct, and private litigants lack recourse to investigative powers and immunity incentives employed by competition regulators. For discussion of relevant principles, see *Queensland v Pioneer Concrete (QLD) Pty Ltd* [1999] ATPR ¶42-691, 42,831 (Drummond J) citing with approval *Adsteam Building Industries v Queensland Cement and Lime Company Limited (No 4)* (1984) 1 Qd R 127, 133 (McPherson J).

10 *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] ATPR ¶42-691, [22] (Drummond J).

11 *Bright v Femcare Ltd* (2002) 195 ALR 574 (‘*Bright*’), 607 (Finkelstein J). For a discussion of a contrary view, see S Stuart Clark and Christina Harris, ‘The Push to Reform Class Action Procedure in Australia: Evolution or Revolution’ (2008) 32 *Melbourne University Law Review* 775, 800.

12 *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth). The relevant provisions came into effect on 24 July 2009.

provision which has the purpose or effect, or likely effect, of substantially lessening competition. Section 45A, now repealed, operated to *deem* a substantial lessening of competition where the relevant provision related to price fixing. Or in other words, price fixing agreements were (and remain) prohibited per se. In each of the cartel class actions to date, the pleadings have alleged price fixing conduct in contravention of section 45A (alongside allegations of other cartel arrangements including market sharing and bid rigging).

Section 45A(1) related to agreements or understanding between parties ‘in competition with each other’. Prior to recent amendment, section 45(3), which defines competition to mean ‘competition in any market in which a (relevant) corporation is a party’, explicitly applied to section 45A. Market is and was defined in section 4E to mean a market in Australia. It has therefore been held that it is material for an applicant under section 45A to establish that the relevant parties to the agreement or understanding are in ‘competition’ with each other, and that they are operating in the same market.<sup>13</sup> Identification of the relevant market depends on the purpose for which identification is required<sup>14</sup> and involves determination of relevant areas of close competition; analysis of the scope for cross-elasticity of demand and supply, and long-term substitution; and consideration of the dimensions of the market including as to product, functional level, space and time.<sup>15</sup>

Respondents in two of the three cartel class actions currently before the courts have argued that the pleadings are inadequate because they fail to plead or properly plead a relevant market in Australia for the purpose of section 4E.<sup>16</sup> We focus here on litigation involving the international air freight cartel, in which the relevant market pleading has been considered in the class action proceeding<sup>17</sup> and several contested matters involving the ACCC.

In *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd*,<sup>18</sup> the applicant did not initially plead a market and contended that it was not required to do so because it relied *exclusively* on the deeming provision in section 45A and therefore did not need to plead facts to establish a market in which competition was substantially lessened. The respondents argued the applicant must identify the relevant market or markets in which it alleged that any two or more of the respondents were ‘in competition with each other’.<sup>19</sup> Justice Tracey agreed with the respondents:

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13 *Australian Competition and Consumer Commission v McMahon Services Pty Ltd* (2004) ATPR ¶41-996, 48,671 (Selway J).

14 *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 104 ALR 633, 649 (French J).

15 *Re Tooth & Co Ltd; Re Tooheys Ltd* (1979) 39 FLR 1.

16 In the rubber chemicals matter, the Court found that the relevant pleading contained inconsistencies, was embarrassing and ought to be struck out. Following amendment, the respondents brought further applications to have the pleadings struck out. Those applications were heard on 23 February 2009 and the Court’s decision is pending.

17 *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd*, Federal Court of Australia, VID 12 of 2007.

18 *Ibid.*

19 Section 45A(1) relevantly required that the parties be ‘in competition with each other’.

The requirement that the geographic area of a market be identified arises from the terms of s 4E. The market must be 'in Australia'. ... [A]n applicant, in a proceeding such as the present in which exclusive reliance is placed on s 45A of the Act, must identify the market or markets in which it is said that the anti-competitive conduct has taken place. The pleadings must identify (at least) the relevant goods or services and the geographic boundaries of the market. ... The respondents in the present proceeding are entitled to know where in Australia it is said that they compete with each other named respondent for the provision of international airfreight services. This will depend on where negotiations between the respondents and their customers take place and contracts are entered into. These material particulars are not provided.<sup>20</sup>

Auskay filed an amended statement of claim which pleaded matters going to the existence of various markets in Australia for international airfreight services. The respondents again sought to strike out the pleading on several grounds, including that the market pleading was inadequate. They argued it was incumbent upon the applicant to establish that negotiations between the respondents and their customers took place in Australia, and that contracts were entered into in Australia. The applicant argued that a range of activities were relevant to establishing the 'field of rivalry' between the respondents, including for example the location where a relevant service was supplied. The ACCC intervened and argued that the restrictive approach advocated by the respondents might significantly impact on the efficacy of the *TPA* in dealing with international cartels, and that it was necessary to look not only at the transactions that occur in the market, but all facets of competition that might occur including the locations of the buyers and the sellers who transact in the market. The respondents' applications were heard on 29 and 30 April 2009 and the Court reserved its decision. At the time of writing, that decision remains pending.

Under the amended *TPA*, section 45A has been repealed and the per se prohibition is contained in Division 1 to Part IV, which includes parallel offences and civil penalty provisions relating to cartel conduct. In particular, a corporation must not make, or give effect to, a CAU that contains a cartel provision, being a provision relating to price fixing and certain other closely related practices such as bid rigging.<sup>21</sup> A cartel provision will only exist if at least two of the parties to the CAU are (or are likely to be or but for the CAU would be) in competition with each other.<sup>22</sup> 'Competition' is stated to include 'competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia'.<sup>23</sup> Section 45(3) has been amended to *only* apply to section 45, with the result that the section 4E 'market in Australia' requirement no longer specifically applies. Accordingly, it appears that the legislature has replaced the 'market in Australia' requirement with a general competition condition for the purpose of establishing the per se contravention.

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20 *Auskay* (2008) 251 ALR 166.

21 *TPA* ss 44ZZRD, 44ZZRF, 44ZZRG.

22 *TPA* s 44ZZRD(4).

23 *TPA* s 4.

This amendment is sensible given that the cartel provisions target conduct which is conclusively presumed to be illegal, in an increasingly global market place. Hopefully it will deflect emphasis away from sterile debate regarding the parameters of the market and towards a broader view of competition as simply the necessary backdrop against which cartel conduct is deemed to be anti-competitive. It is also consistent with recent authorities which have taken a broad approach to establishing a relevant market.<sup>24</sup> For example, in *Emirates v Australian Competition and Consumer Commission*<sup>25</sup> in the context of determining the validity of notices issued to two airlines pursuant to section 155 of the *TPA* (in relation to the international airfreight cartel), Middleton J stated:

In my view, the place of contracting is not determinative of the geographic locality of the relevant market. ... As the authorities referred to previously indicate, the concept of a 'market' refers to a range of 'competitive activities' relating to the field of actual or potential activities between buyers and sellers among whom there is, or can be, close competition. It involves the 'field of rivalry', not just referable to the place of contracting.

With the advent of modern telecommunications any other approach may fail to give protection to, and enhance the welfare of, Australians who use and obtain services in Australia. After all, the focus of s 45 is on the supply of the services.<sup>26</sup>

It remains to be seen whether an applicant that relies on the new cartel provisions will nonetheless be required to satisfy the competition condition by reference to a *market*, and how competition will be required to be pleaded. Justice Tracey's decision in *Auskay* relied heavily on sections 45(3) and 4E, which would no longer apply. Perhaps insight can be gained from Justice Jacobson's decision in *Australian Competition and Consumer Commission v Singapore Airlines Cargo Pte Ltd*,<sup>27</sup> involving an application by Singapore Airlines to strike out the statement of claim in contravention proceedings brought against it by the ACCC.<sup>28</sup> In light of earlier authorities Jacobson J considered the

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24 In *Riverstone Computer Services Pty Ltd v IBM Global Financing Australia Ltd* [2002] FCA 1608 (Unreported, Hill J, 20 December 2002), Hill J rejected an argument that 'market in Australia' means wholly within Australia, finding instead that a global market which includes Australia may be a market in Australia. In *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89, Lindgren J imposed penalties on Qantas for contraventions of the *TPA* (arising out of the same cartel the subject of the *Auskay* matter), on the basis of a statement of agreed facts in which Qantas admitted contraventions and agreed that the relevant market, for the purpose of those proceedings, was a worldwide market for air cargo services.

25 *Emirates v Australian Competition and Consumer Commission*, Federal Court of Australia, VID 252 of 2008; *Singapore Airlines Ltd v Australian Competition and Consumer Commission* (2009) 255 ALR 35. Affirmed on appeal in *Singapore Airlines Ltd v Australian Competition and Consumer Commission* [2009] FCAFC 136 (Unreported, Black CJ, Mansfield and Jacobson JJ, 2 October 2009). The Full Court stated, at [77]:

Having regard to the concession, properly made by Singapore Airlines, that the boundaries of the market are presently unknown, and to the factual findings made by the primary judge, we think it is plain that the market identified by the Notices is not one which is wholly outside Australia, even though it includes routes between destinations that are outside Australia's territorial boundaries.

26 *Emirates v Australian Competition and Consumer Commission* (2009) 255 ALR 35, 52.

27 (2009) 256 ALR 458.

28 *Ibid* 471.

pleaded markets were at least capable of amounting to markets in Australia.<sup>29</sup> Nevertheless the pleading was struck out because no material facts had been pleaded which demonstrated that the price fixing understandings between destinations outside Australia had the proscribed effect on competition in a market in Australia. His Honour stated:

In short, there are two essential vices in the pleading. The first is a failure to address the ingredients of the field of rivalry between the parties to the understandings. The second is a consequent failure to state material facts which disclose how the parties to an understanding for the supply of air freight services from, for example, Jakarta to Paris are in competition with each other in a market in Australia.<sup>30</sup>

The ‘second vice’ would be less relevant under the amended *TPA*. However, it is not entirely clear what was being required in terms of addressing ‘the ingredients of the field of rivalry between the parties’, although it appears his Honour was requiring that further material facts be pleaded to establish competition. An amended statement of claim was filed, in which the most substantial amendments related to market and competition. It appears that the respondent has accepted the amended statement of claim for now.<sup>31</sup>

The apparent relaxation of the ‘market in Australia’ requirement in respect of the *per se* contravention is appropriate and welcome. Unfortunately, the amendment post-dates both of the cartel class actions currently on foot.<sup>32</sup> It remains to be seen what approach the courts will take in deciding whether facts which have been pleaded in a cartel class action are sufficient to establish ‘competition’. Certainly a restrictive view of what is required, for example by reference to particular contracts, negotiations and transactions, will make it more difficult for the applicant and group members in cartel class actions to plead their claims, particularly where those claims involve the provision of complex global services.

### III JURISDICTIONAL ISSUES

An important issue in the context of cartel class actions is the extent to which the *TPA* confers jurisdiction on the Federal Court with respect to foreign entities

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29 Ibid 469. For the purposes of the application Singapore accepted the market definitions alleged by the ACCC, but argued that the allegations in the statement of claim were beyond the reach of the *TPA* because they included understandings to fix the price of international air cargo services supplied on routes either wholly outside Australia, or from outside of Australia to Australia, neither of which was capable of constituting supply of a service within a market in Australia within the meaning of s 4E.

30 Ibid 470.

31 On 30 July 2009, Jacobson J made orders for the filing of defences.

32 In the *Auskay* matter, the adequacy of the market definition for the purpose of s 4E was one of the main grounds for applications by the respondents to strike out the amended pleading, heard on 29 and 30 April 2009 (at the time of writing the Court’s decision is pending).

and conduct outside Australia.<sup>33</sup> The issue is significant because cartels are often global in scope and conducted by multinational corporations. For example, the Australian class actions involving vitamins, rubber chemicals and international airfreight have all involved global cartels. The extent to which overseas conduct is amenable to domestic law may impact significantly on the ability of local victims to seek recompense. Broader issues of international comity, conflict between jurisdictions and problems of collecting evidence and enforcing judgment abroad are discussed elsewhere<sup>34</sup> and are beyond the scope of this paper. We confine ourselves here to examining the jurisdictional limits of the *TPA* with respect to global cartel conduct. It is our view that the *TPA*'s limited extraterritorial reach will mean that many global cartels which impact on Australian consumers will not be pursued by regulatory or private action, and the provisions which extend the operation of the *TPA* to foreign conduct are in need of reform if the loss caused by such conduct is to be recovered. As stated by Brendan Sweeney:

In the absence of a global competition agreement or a successful positive comity request, where a state suffers a loss of competition and a consequent loss of welfare from foreign conduct ..., it may very well have something to gain by applying its laws extraterritorially, simply because the alternative – failing to apply its law extraterritorially – is to accept the loss.<sup>35</sup>

Section 5(1) of the *TPA* provides for the limited extraterritorial application of Part IV to conduct outside Australia by bodies corporate 'incorporated or carrying on business within Australia'.<sup>36</sup> Unless the foreign party has registered as a foreign corporation in Australia, jurisdiction will depend on whether it was carrying on business in Australia, directly or through a local subsidiary or agent. Australian courts have been reluctant to 'lift the corporate veil' and have imposed a narrow test with respect to 'carrying on business'. In *Bray v F Hoffman-La Roche Ltd*,<sup>37</sup> Merkel J considered that the relevant question was whether the business carried on by the Australian subsidiaries was on their own account or on

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33 *FCA Act* s 86 confers jurisdiction on the Federal Court in civil actions relating to matters arising under the *TPA*. Parts IV (restrictive trade practices) and VI (remedies) are silent as to whether they apply to conduct outside Australia. The traditional presumption is that a statute will not, in the absence of a contrary statutory intention, apply to conduct occurring outside Australia: *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10.

34 Brendan Sweeney, 'Combating Foreign anti-Competitive Conduct: What Role for Extraterritorialism?' (2007) 8 *Melbourne Journal of International Law* 35; Chris Noonan, 'The Extraterritorial Application of New Zealand Competition Law' (2007) 22 *New Zealand Universities Law Review* 369.

35 Sweeney, above n 34, 42.

36 In recognition that the extraterritorial application of the *TPA* may impinge upon the laws or policies of the foreign country where the alleged conduct took place, there is a requirement that consent be obtained from the Minister for Trade and Commerce where section 5(1) is to be relied upon: *TPA* ss 5(3), 5(4). This requirement itself has become a source of conflict, with defendants in *Auskay* applying for judicial review of the Minister's consent, with attendant disputes relating to discovery and privilege.

37 (2002) 118 FCR 1 ('*Bray*').



the account, or on behalf of, the European or the regional parent,<sup>38</sup> and was not satisfied this was established by the evidence.<sup>39</sup>

The alternative case put by the representative party was that the foreign respondents, by their own conduct and acting by their Australian subsidiaries, *gave effect to* or were persons involved in the cartel arrangement *in Australia*. Justice Merkel found that the directions and communications to local personnel from foreign personnel implementing the cartel could be regarded for the purpose of section 45 as conduct taking place in Australia. He also considered that conduct of the European or regional parent companies may be said to have been conduct that had taken place *in Australia* where the conduct was engaged in by the subsidiary, or by its officers, *on behalf of the parent*:

[R]ather than view the Australian subsidiaries as making the cartel arrangement, which at the micro level they plainly admitted to doing, it may be more accurate to describe their conduct as implementing the cartel arrangement of the European parent as directed by the European and regional parent. In so doing the subsidiary, or more accurately its officers, was performing the obligations undertaken under the cartel agreement made by the European (or regional) parent, rather than carrying out a separate and independent obligation undertaken by it.<sup>40</sup>

His Honour's approach can be understood as an application of the traditional territorial principle, 'which justifies proceedings against foreigners and foreign companies only in respect of conduct which consists in whole or in part of some activity by them in the territory of the State claiming jurisdiction',<sup>41</sup> albeit with a degree of flexibility.<sup>42</sup> Justice Merkel's approach was followed in a New Zealand case involving the vitamins cartel, *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd*.<sup>43</sup> In *Bomac*, Harrison J likewise declined to find that the overseas companies were carrying on business in New Zealand through their local subsidiaries. However, his Honour concluded there was a 'good or strongly arguable' case that the overseas companies had used the New Zealand companies as instruments to give effect to the arrangements which they had made overseas and which were designed to affect the New Zealand market:

It would have been inconsequential to the international defendants whether the local subsidiaries knew or were ignorant of the global arrangement. The local subsidiaries could be characterised as conduits or pawns. They followed directions from the international defendants to submit inflated tender prices, pre-set among them in accordance with the price fixing provision of the global arrangement ...<sup>44</sup>

A recent decision of the Court of Appeal of New Zealand developed this approach further. In *Harris v Commerce Commission*,<sup>45</sup> regarding alleged price

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38 Ibid 18.

39 Ibid 23.

40 Ibid 46.

41 British Aide-Memoire to the Commission of the European Communities, 20 October 1969, reprinted in Ian Brownlie, *Principles of Public International Law* (4<sup>th</sup> ed, 1990) 311–15, cited in Noonan, above n 34, 372.

42 The territorial principle is also discussed in Sweeney, above n 34, 53.

43 (2002) 7 NZBLC 103, 627 ('*Bomac*').

44 Ibid [92].

45 [2009] NZCA 84 (Unreported, Hammond, O'Regan and Arnold JJ, 18 March 2009) ('*Harris*').

fixing of wood treatment chemicals, certain foreign defendants (appellants) contested jurisdiction. None of the relevant defendants was resident or carrying on business in New Zealand at any material time (as required under section 4 of the *Commerce Act 1986* (NZ) ('*Commerce Act*'), which is in similar terms to section 5 of the *TPA*).<sup>46</sup> The defendants had engaged in no conduct in New Zealand, nor addressed any relevant communications to persons in New Zealand (with the exception that one of the defendants had attended one meeting in New Zealand). All relevant communications and directions concerning New Zealand activities were imparted to New Zealand actors outside New Zealand. The issue was whether the *Commerce Act* nevertheless applied. The judge at first instance found that each of the appellants had acted in New Zealand through agents who participated in and performed unlawful agreements/conspiracies to fix prices in New Zealand, and each of the appellants was a party to unlawful agreements/conspiracies in breach of the Act, pursuant to which other people did overt acts in New Zealand.<sup>47</sup> The Court of Appeal endorsed this approach and stated:

... we accept that, if overseas parties agree outside New Zealand to implement a course of conduct in New Zealand which contravenes ss 27 and 30, and a person in New Zealand takes action to give effect to that agreement, the overseas parties can properly be regarded as acting in New Zealand through the New Zealand actor, certainly in circumstances where they have some authority over him or her, as is alleged here. The liability of the overseas persons does not depend on the liability of the New Zealand actors – they may be innocent agents as [the judge at first instance] noted ...<sup>48</sup>

The Court of Appeal's decision indicates a willingness to attribute liability outside a subsidiary relationship or even conduct by the respondents within the jurisdiction, although it suggests a requirement that there be some *authority* exercised by the respondent over the local actor. At the time of writing, the appellants in *Harris* have been granted leave to appeal from the decision of the Court of Appeal.<sup>49</sup>

The reasoning of the New Zealand Court of Appeal echoes the approach taken in Europe. In the European Union extraterritorial jurisdiction is founded on

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46 The Commerce Commission's argument effectively side-stepped s 4: *Harris* [2009] NZCA 84, [23]. The Commission argued that s 4 was not an exhaustive statement of the circumstances in which the Commerce Act applied to overseas conduct. Where there had been some conduct in New Zealand by someone (ie, other than the overseas resident), s 4 did not address issues such as the liability of a overseas resident who procured the conduct in New Zealand or who was party to an unlawful agreement/conspiracy from which the conduct in New Zealand flowed. As s 4 was not exhaustive, the Court should look to the general principles of territorial scope developed in the authorities, to the policy goals of the Act and to relevant concepts drawn from public international law in determining the territorial scope of the Act. It would be interesting to see how this argument would be received by Australian courts.

47 *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2007) 2 NZLR 805 ('*Koppers Arch*').

48 *Harris* [2009] NZCA 84, [34].

49 *Elias Akle and A R Poynter v Commerce Commission* [2009] NZSC 60.

two principles: the single economic unit doctrine or ‘attribution rule’,<sup>50</sup> and the implementation doctrine.<sup>51</sup> The Court of Justice of the European Communities held in *Imperial Chemical Industries Ltd v Commission of the European Communities* that the Commission could exercise jurisdiction over companies not incorporated or carrying on business in the Common Market where the conduct of their subsidiaries so situated could be attributed to them.<sup>52</sup> In *Re Wood Pulp Cartel; A Ahlstrom Oy v European Communities Commission*, the Court considered there were two elements to infringement of the relevant price fixing provision, formation of the agreement and its implementation. The Court focused on implementation within the Common Market to find jurisdiction with respect to defendants incorporated outside the jurisdiction, and stated:

The [foreign] producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contracts with purchasers within the Community.<sup>53</sup>

Thus the attribution doctrine as applied in Europe operates independently of the existence of local agents and their relationship with the foreign defendant.

Insofar as these doctrines provide a mechanism for finding the respondent’s constructive presence in the jurisdiction where the effects of its conduct are felt, they may be regarded as sharing a family resemblance to the ‘effects doctrine’ (or ‘objective territorial principle’) employed in the United States. Under this doctrine, conduct which occurs outside the jurisdiction but which infringes local antitrust laws can be held to be within the jurisdiction if it has an intended economic effect within the United States.<sup>54</sup> Interestingly, Merkel J considered there was ‘much to be said’ for an effects doctrine in ‘an era of e-commerce, electronic fund transfers, internet trading and information technology’,<sup>55</sup> notwithstanding his view that its application was precluded in Australia by a contrary statutory intention. Importantly however, the US effects doctrine has a much broader application than doctrines founded on the territorial principle or the implementation doctrine, since it does not require the presence of related

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50 *Imperial Chemical Industries Ltd v Commission of the European Communities* (C-48/69) [1972] ECR 619 (‘Dyestuffs Case’).

51 *Re Wood Pulp Cartel; A Ahlstrom Oy v European Communities Commission* [1988] 4 CMLR 901; [1993] 4 CMLR 407 (‘Woodpulp Case’). For an overview of European law with respect to competition and extraterritorialism see Sweeney, above n 34. See also Alexander Layton, ‘Extraterritorial jurisdiction – European responses’ (2004) 26 *Houston Journal of International Law* 309.

52 *Dyestuffs Case* (C-48/49) [1972] ECR 619, [130]–[142].

53 *Woodpulp Case* [1988] 4 CMLR 901; [1993] 4 CMLR 407, [17].

54 *US v Aluminium Company of America et al*, 148 F 2d 416 (2<sup>nd</sup> Cir, 1945) (‘Alcoa’); *Timberlane Lumber Co. v Bank of America*, 549 F 2d 597 (9<sup>th</sup> Cir, 1976); *Foreign Trade Antitrust Improvements Act of 1982*. There exists obvious tension between the effects doctrine and principles of international comity, in recognition of which the Supreme Court recently refused to apply US antitrust laws to foreign conduct where the plaintiff’s claim was based solely on foreign harm. However, the doctrine would still apply where foreign conduct caused harm to plaintiffs in the United States: see *F. Hoffmann-La Roche v Empagran SA* (03-724), 542 US 155 (2004).

55 *Bray* (2002) 118 FCR 1, 15.

entities in the jurisdiction and avoids the need to determine what acts amount to implementation.

With respect to the position in Australia, the Court's approach in *Bray* would enable jurisdiction to be established where local subsidiaries (or their offices) implemented a cartel on behalf of their foreign parents, whether or not, if the court adopted the reasoning of Harrison J in *Bomac* and subsequent authority in New Zealand, the subsidiaries were aware of the cartel arrangement.<sup>56</sup> However the limits of this approach are unclear. Would the *TPA* apply, for example, where there was no local subsidiary through which the foreign respondent implemented the cartel? What remedy might be available against a cartel which globally increased the price of a commodity, which was sold in Australia through an independent distributor on a 'cost plus margin' (and therefore cartel inflated) basis? It remains to be seen whether the simple act of selling a product in Australia pursuant to a cartel arrangement is enough to establish jurisdiction under the *TPA*. To take another example, could a remedy be had against a global cartel that inflated the price of a product, which was incorporated into another product that was manufactured or assembled in another jurisdiction before being imported into Australia? Consider for example the global price fixing cartel operated by international manufacturers of Dynamic Random Access Memory (DRAM), which operated between 1999 and 2002. A small amount of DRAM is supplied directly into Australia by wholesalers and distributors. The bulk of DRAM however comes into Australia in modules manufactured overseas, for use in computers assembled in Australia for instance, or in modules already incorporated into computers assembled overseas. Thus while the effect of the DRAM cartel is likely to have been experienced in Australia though cartel inflated prices either for DRAM on its own or as a component of another product, it would be difficult to argue that cartel participants had implemented the cartel in Australia through their local conduct and therefore that their conduct was within the scope of the *TPA*. As has been remarked of the position in Australia, '[m]ere effects, no matter how substantial, will not be sufficient to attract jurisdiction'.<sup>57</sup>

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56 *Koppers Arch* (2007) 2 NZLR 805, 823 (Williams J):

A person also engages in contravening conduct under the Act in New Zealand if they act by directing an agent, even an innocent agent, who carries the contravening conduct into effect in this country though unaware of the contravening motivation behind their actions (*Bomac* at [75]–[89]).

The local actors may be 'innocent agents', meaning presumably they may be oblivious to the existence of the arrangements they are implementing. To establish a contravention of the cartel offence provision under the amended *TPA* it is necessary to establish that an individual or corporation *intended* to enter into a CAU (refer to Chapter 2 of the *Criminal Code Act 1995* (Cth), and knew or believed the CAU contained a cartel provision (s 44ZZRF(2)); or they knew or believed a CAU contained a cartel provision (s 44ZZRG(2)) and intended to give effect to that cartel provision. The civil penalty provisions do not contain a fault element and so presumably an 'innocent agent' could be liable for giving effect to a prohibited arrangement in Australia, at least for the purpose of civil penalties and damages or for the purpose of attributing contravening conduct to a related company, for example pursuant to s 44ZZRC, which provides that for the purposes of Division 1, if a body corporate is a party to an understanding each body corporate related to that corporation is taken to be a party to that understanding.

57 Sweeney, above n 34, 64.

With respect to cartel conduct, there is a need to ensure that the policy objective of protecting Australian consumers is capable of being met in an increasingly global marketplace. The issue is acute in a jurisdiction such as Australia, where direct local presence of or conduct by foreign multinationals is less likely than in, for example, North America. Foreign corporations should not be permitted to damage Australian consumers by fixing prices but avoid liability by structuring their operations beyond the reach of the *TPA*. The New Zealand Court of Appeal in *Harris* articulated this principle with respect to New Zealand:

We consider that this approach is consistent with basic principle and reflects the realities of globalisation. Increasingly, large international entities are responsible for the manufacture and distribution of goods. If such entities enter into anti-competitive arrangements overseas directed at a New Zealand market, *we do not accept that they can insulate themselves from liability in New Zealand by operating through local entities (whether or not they are subsidiaries) and taking care not to hold meetings in, or to send communications to, New Zealand in relation to the arrangements ...*

...

We consider that it would be contrary to the policy of the Act, reflecting the legitimate interests of New Zealand, to require that the conduct on the part of an overseas principal establishing the agency relationship occur within New Zealand. That would create a significant loophole in the Act, *particularly as New Zealand is a relatively small country with a heavy dependence on imported products and technology. We do not consider that either s 4 or principles of international comity require such an outcome ...*<sup>58</sup>

While case law in Australia and in particular New Zealand suggests courts may take an expansive view of what will be construed as local conduct, it remains the case that unless the respondent is incorporated or carrying on business within the territory, a finding of jurisdiction is likely to require territorial conduct, however construed. We suggest that section 5 of the *TPA* needs to be amended to broaden the extraterritorial operation of the *TPA*, and in particular the legislature should consider a US style ‘effects doctrine’,<sup>59</sup> since it would permit Australian courts to exercise jurisdiction in respect of conduct outside Australia which purposively causes harm to Australian consumers, and might avoid the protracted technical argument which currently attends section 5.<sup>60</sup>

#### IV DAMAGES ASSESSMENT, PASS ON AND THE BURDEN OF PROOF

The legal and economic principles governing the quantification of damages in private cartel claims in Australia are uncertain. Following is a consideration of the legal principles. It is beyond the scope of this paper to meaningfully consider

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58 *Harris* [2009] NZCA 84, [44]–[46], (The Court). (Own emphasis).

59 For a discussion of the advantages and disadvantages to a State applying its competition laws extraterritorially, see Sweeney, above n 34, 42–51.

60 See *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, 23; *Auskay International Manufacturing and Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166, 180–1.

the economic principles and approaches used to estimate damages and in particular what prices would have been under competitive conditions, however there is a vast literature on the topic particularly in North America.<sup>61</sup>

There is little authority on the assessment of damages caused by contraventions of Part IV of the *TPA* and, as far as the authors are aware, no individual or aggregated private cartel damages action in Australia has proceeded to a judicial determination of damages.<sup>62</sup> Accordingly, there is no local authority on the appropriate measure of damages, including as to the treatment of any portion of damages which is passed on by a claimant to its own customers (pass-on).<sup>63</sup>

### A Damages under the TPA

Section 82 of the *TPA* relevantly entitles a person who suffers loss or damage by conduct done in contravention of a provision of Part IV to recover the amount of loss or damage suffered. Section 87(1) confers a wide discretionary power to make orders (including damages orders in the nature of those encompassed by section 82)<sup>64</sup> where a person has suffered or is likely to suffer loss or damage by contravening conduct, if the court considers such order(s) will compensate, prevent or reduce loss or damage. In *Marks v GIO Australia (Marks)*, Gaudron J observed that there is no punitive aspect to sections 82 and 87, and that section 82 is concerned to provide for recovery of ‘the amount of the loss of damage’ and section 87 is intended to ‘compensate’ or ‘prevent or reduce’ loss or damage.<sup>65</sup>

61 See, for example, James A Brander and Thomas W Ross, ‘Estimating Damages from Price-Fixing’ (2006) 3 *Canadian Class Action Review* 335 and the literature cited at fns 1–4 therein. See also, Stephen Coronos, ‘Proof of Damages in Private Competition Law Actions’ (2002) 76 *Australian Law Journal* 374.

62 The case brought by Cadbury Schweppes Pty Ltd against Amcor Limited (*Cadbury Schweppes Pty Ltd v Amcor Limited*, Federal Court of Australia, VID 1377 of 2006) settled on the day the trial was to commence (on 22 July 2009).

63 For a comprehensive review of the principles applicable to private damages claims by cartel victims in Europe and the US, see Sweeney ‘The Role of Damages in Regulating Horizontal Price Fixing Comparing the Situation in the United States, Europe and Australia’ (2006) 30 *Melbourne University Law Review* 26.

64 Section 87(1) expressly authorises damages orders in the nature of those encompassed by s 82 by its reference to the relief stated in s 87(2), in particular s 87(2)(d) which states: ‘The Court may make an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage’.

65 *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 496, 501 (Gaudron J) (‘*Marks*’). The High Court has explored the breadth of s 87 and the relationship between s 82 and s 87 in detail and in a number of cases. According to Callinan J in *I & L Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited* (2002) 210 CLR 109, 179:

Section 87(1), on its ordinary reading, can be seen to be in expansion, and not in any way in diminution, of s 82. ...What s 87 contemplates, however, is the making of orders, either in substitution of a mere monetary judgment, or in addition to, or in supplement of, a money judgment, moulded and appropriate to the circumstances of the particular case. It was intended, obviously, to give the court more flexibility than courts have in giving relief in conventional common law, and indeed even equitable forms.

In the same case, McHugh J stated, at 145–6:

Both sections are concerned with loss or damage ‘by’ unlawful conduct. In determining what causal link must be established between contravention and loss, a contextual rather than a rigid approach should be adopted and regard must be had to the terms or objects of the statute.<sup>66</sup> More broadly, where there is ambiguity or contest as to the interpretation of a provision of the *TPA*, a construction ought to be adopted which promotes its purpose,<sup>67</sup> which includes to ‘enhance the welfare of Australians through the promotion of competition and fair trading...’.<sup>68</sup>

While earlier courts took a narrow approach to assessment of damages under section 82 and compensation under section 87, in that they felt constrained by common law and equitable principles, more recently courts have not felt so restricted.<sup>69</sup> In *Marks*, Gaudron J explained that:

Once it is appreciated that references to the “established measures of damages ... [for] contract and tort”, as in *Gates*, signify different kinds of loss and not different methods by which loss is measured, it is irrelevant to inquire as to the appropriate measure of damages for the purposes of ss 82 and 87 of the Act. Rather, the task is simply to identify the loss or damage suffered or likely to be suffered and, then, to make orders for recovery of that amount under s 82 or to compensate for or prevent or reduce that loss or damage under s 87 of the Act.<sup>70</sup>

Although it is unequivocal that each case must be considered on its particular facts and the assessment of damages under section 82 or compensation under section 87 is not to be constrained by the principles applicable to the assessment

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Sections 82 and 87 provide complementary but independent powers. If there is any conflict between the two sections – and I do not think that there is - that conflict is best resolved by giving full effect to the specific provisions of s 82 when they apply. The conflict is then alleviated by treating the general provisions of s 87 as a supplementary power to be used when an award under s 82 will not properly compensate the applicant for its loss or damage. Of course, there is nothing to stop a court going directly to s 87 and including in the applicant's relief all the compensation that it could recover under s 82. But the terms of s 87 provide no warrant for depriving an applicant of the right that s 82 gives it.

66 See *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 639 (Gleeson CJ), 643–4 (Gummow and Hayne JJ), 646–7 (Kirby J), 653 (Callinan J) and the cases there referred to; *Henville v Walker* (2001) 206 CLR 459, 491–3 (McHugh J).

67 See, eg, *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, 23 (Kirby J); *Allianz Alliance Australia Insurance Ltd v GSF Australia* (2005) 221 CLR 568, 597 (Gummow, Hayne and Heydon JJ). See also *Acts Interpretation Act 1901* (Cth) s 15AA.

68 *TPA* s 2.

69 See *Gates v City Mutual Life Assurance Society* (1986) 160 CLR 1, 12 (Mason, Wilson and Dawson JJ). A tort measure was employed as an analogue in one of the few Australian authorities on the assessment of damages caused by contravention of Part IV of the *TPA*. In *Hubbards Pty Ltd v Simpson Ltd* (1982) 60 FLR 430, 440, Lockhart J compared the position the applicant might have expected to be in if resale price maintenance had not occurred with the position it was in as a result of that contravention, and stated that he approached the matter as akin to a tortious claim. In *Cool & Sons Pty Ltd v O'Brien Glass Industries Ltd* (1981) 35 ALR 445, 463–4, Keely J awarded lost profits on sales lost as a result of illegal exclusive dealing and price discrimination plus the extra price paid as a result of receiving a lower discount and adding a fee for after hours sales.

70 See also *Marks* (1998) 196 CLR 494, 512, where McHugh, Hayne and Callinan JJ identify the appropriate inquiry as finding out what damage flowed from the contravening conduct.

of damages in tort, contract or equity,<sup>71</sup> the examples of departures from those principles are relatively few.

## B Pass-on

An issue of considerable importance to parties to cartel damages claims is whether a plaintiff can recover from a defendant the full amount of any overcharge, irrespective of the extent to which the overcharge was passed on by the plaintiff to downstream consumers.

In the United States, pass-on is treated as a defence by which a cartelist sued by a direct purchaser can assert that the direct purchaser passed on some or all of the overcharge to its downstream customers (indirect purchasers). Courts in the US have generally rejected the defence – for reasons of remoteness, pragmatism and policy.<sup>72</sup> This approach was confirmed by the US Supreme Court in *Illinois Brick Co v Illinois*, where an indirect purchaser sought unsuccessfully to use the pass-on defence offensively to recover building price increases from masonry manufacturers and distributors who allegedly fixed the price of concrete blocks.<sup>73</sup> The Supreme Court held that only direct purchasers can sue for violations under federal antitrust law. In reaching that decision, the Supreme Court was influenced by concerns of maintaining the incentive for direct purchasers to sue, the increased complexity for indirect purchasers in establishing causation, and the risk of double recovery (or sixfold recovery, given the mandatory trebling requirement). Subsequently, around 25 states and one district have passed some form of legislation giving indirect purchasers the right to recover damages and permitting the pass-on defence.<sup>74</sup>

It is unclear whether the pass-on defence is available in Europe. It appears that indirect purchasers have standing to claim damages, which implicitly suggests that the defence could be available.<sup>75</sup> In the White Paper on Damages Actions for Breach of the EC Antitrust Rules, the Commission of the European Communities suggested that defendants should be able to invoke the pass-on defence. The Commission was concerned to ensure that damages should be available to any injured person who can show sufficient causal link with the infringing conduct and to avoid the possibility of defendants being required to pay multiple compensation and upstream purchasers enjoying a windfall as a result. Acknowledging the difficulties for indirect purchasers in proving

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71 Ibid 503 (Gaudron J); 512 (McHugh, Hayne and Callinan JJ). See also *Tenji v Hennebery & Associates Pty Ltd* (2000) 98 FCR 324, where the Full Federal Court held that the operation of s 87 is not constrained by equitable principles (and, in that case, were not a bar to relief under s 87).

72 *Hanover Shoe Inc v United Shoe Machinery Corp* 392 US 481 (1968).

73 *Illinois Brick Co v Illinois*, 431 US 720 (1977).

74 American Bar Association Section of Antitrust Law, *Antitrust Law Developments* (6<sup>th</sup> ed, 2007). There is no comprehensive national position, even though the US Antitrust Modernisation Commission recommended repeal of *Illinois Brick* and other changes to the availability of indirect purchaser claims in April 2007: see Antitrust Modernization Commission, Report and Recommendations (2007). Consequently, the prospect of duplicative litigation and recovery, that so concerned the Supreme Court in *Illinois Brick*, is great.

75 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, [63].



causation and in quantifying damages, and to avoid the defendant retaining an unjust enrichment, the Commission recommended that the burden of proof on indirect purchasers be lessened to a rebuttable presumption that the entirety of the overcharge was passed on to them.<sup>76</sup>

In Australia, whether or how pass-on may affect the assessment of *TPA* damages has yet to be judicially considered. In *Munchies Management Pty Ltd v Belperio*,<sup>77</sup> the Full Federal Court stated, in relation to sections 82 and 87:

It remains to be seen whether the phrase ‘loss or damage’ in ss 82 and 87 is sufficient to support not only a compensatory remedy in the sense of injury to the plaintiff’s interests, as generally understood in the law of torts, but also a restitutionary remedy to disgorge the respondent’s gains and profits at the expense of the applicant, as ‘the loss’ of the applicant in the language of the section.<sup>78</sup>

In *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd*,<sup>79</sup> Gyles J considered whether an account of profits is a remedy available under section 87(1) for a breach of Part IV of the *TPA*. After acknowledging that the point was left open by Gummow J in *Telmak Teleproducts (Aust) Pty Ltd v Coles Myer Ltd*<sup>80</sup> and Lehane J in *C-Shirt Pty Ltd v Barnett Marketing & Management Pty Ltd*,<sup>81</sup> his Honour held that the decision of the High Court in *Marks* dictated that an account of profits ought not to be available because of the emphasis in the majority decision on the compensatory nature of section 87 and because of the rejection of an analogy between section 87 and equitable relief.<sup>82</sup> He then stated that there may be arguments for such a remedy in Part IV cases but that this would require an amendment to the *TPA*.<sup>83</sup> Elsewhere, French J has interpreted the same passages in *Marks* as meaning that the scope of the orders authorised by section 87 is not to be constrained because, in particular cases, they may resemble common law or equitable remedies.<sup>84</sup> Justice French referred to *Kizbeau Pty Ltd v WG & B Pty Ltd*,<sup>85</sup> wherein the High Court described section 87 as conferring a wide discretionary power on courts to make remedial orders in appropriate cases to ensure a fair result.<sup>86</sup> In our view, Justice French’s analysis more accurately reflects the breadth of orders permitted by the section.

Most recently, in the context of a strike out application in *Auskay*, Tracey J declined to express any final view on the availability of a pass-on defence in the context of a claim for cartel damages under section 82 but observed that a group member who passes on an overcharge would seem to have suffered no loss.<sup>87</sup> His

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76 Commission of the European Communities, ‘White Paper on Damages Actions for Breach of the EC antitrust rules’ (White Paper No 165, 2008) 165.

77 (1988) 58 FCR 274.

78 *Ibid* 287–8 (Fisher, Gummow and Lee JJ).

79 (2001) 109 FCR 528.

80 (1988) 84 ALR 437, 455.

81 (1997) 38 IPR 171.

82 *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* (2001) 109 FCR 528, 546.

83 *Ibid*.

84 *Tenji and Anor v Henneberry and Associates* (2000) 98 FCR 324, 329.

85 (1995) 184 CLR 281, 298.

86 *Tenji and Anor v Henneberry and Associates* (2000) 98 FCR 324, 329.

87 *Auskay* (2008) 251 ALR 166, 177–9.

Honour did not consider other forms of loss that might be suffered even in circumstances where the entirety of an overcharge appears to be passed on, such as the holding cost of the overcharge in the period before it is passed on and lost profits, nor did his Honour consider the complexities involved in the assessment of whether overcharge has been passed on. This is understandable given the context in which his comments were made. It should also be noted that in *State of Queensland v Pioneer Concrete (Qld) Pty Ltd*,<sup>88</sup> Drummond J required the applicant to address pass-on issues when pleading indirect claims although his Honour did not appear to require pass-on to be pleaded in relation to direct claims.

In our view, the position in relation to pass-on remains open<sup>89</sup> and the correct interpretation of *Marks* requires that remedies not be constrained by analogy to tort (or contract or equity), and each instance of loss or damage ought to be analysed and a remedy fashioned that is appropriate and fair in the circumstances, having regard to the nature of the contravening conduct and the purpose of the *TPA*.

In considering how to further the purpose of the *TPA*, a court might consider that direct purchasers are likely to be the only ones with sufficient resources and enough at stake in terms of volume of purchases to bring proceedings. Given the additional difficulties for indirect purchasers, in particular in proving the requisite causation and quantifying losses, the reality is that indirect purchasers are much less likely than direct purchasers to bring a claim. In these circumstances, if direct purchasers cannot claim the full extent of overcharge, the party who most often will enjoy a windfall as a result of cartel conduct is the cartel member. Perhaps then, where it is unlikely that indirect purchasers will bring a claim, either because of the difficulties identified above or because the limitation date has passed, allowing any windfall to end up with a direct purchaser rather than a cartel member would not be punitive and would be more consistent with the purposes of the *TPA*.

### C Evidentiary and Case Management Issues

If pass-on does need to be accounted for, it is not yet clear which party would bear the onus of establishing the fact and extent of pass-on. In the US the

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88 (1999) ATPR ¶41-691; see also *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1999)157 ALR 135, 146.

89 Graeme Edgerton suggests that the position is likely to be that the pass on defence will be recognised in the context of damages claims under the *TPA*, on the basis that it appears from a number of interlocutory judgments that indirect purchasers have standing to sue for damages and because the underlying rationale for damages actions under ss 82 and 87 of the *TPA* has been compensatory rather than punitive: Graeme Edgerton, 'Cartel damages and the passing on defence: A comparative analysis' (2009) 17 *Competition and Consumer Law Journal* 56. In the authors' view, it does not necessarily follow from the possibility that indirect purchasers have standing to sue for damages that the passing on defence will be available. It may be that this proposed interrelationship does not hold constant but rather is assessed according to the facts and circumstances of a particular case. Also, in our view, there is greater breadth to s 87(1), albeit largely unexplored, than is acknowledged. The section clearly permits orders to be made beyond compensatory orders.

defendant bears the onus. Justice Tracey in *Auskay*<sup>90</sup> and J D Heydon<sup>91</sup> appear to approach the issue on the basis that pass-on is a matter of defence, in the same way that the burden of proving that a plaintiff should have taken steps to mitigate its loss to reduce damages is on the defendant.<sup>92</sup> In our view, the correct approach is that pass-on is a defence that must be demonstrated by a defendant.<sup>93</sup>

If, as a matter of principle or in a particular case a direct purchaser can only recover overcharge to the extent that it was not passed on, direct purchasers might seek to avoid the issue altogether by pleading a cause of action such as mistake or some other form of unjust enrichment, so as to pursue a restitutionary remedy based on disgorgement of the defendant's gain rather than compensation for loss.<sup>94</sup>

A further issue yet to be considered specifically in the context of a cartel damages claim is the degree of certainty with which a plaintiff must quantify its loss. Given the complexity and expense of the factual and economic work involved in loss assessment, it is likely that plaintiffs seeking cartel damages will need to rely on case law which establishes that difficulty in assessing the precise amount of loss is not a bar to recovery. A plaintiff must prove the fact of loss or damage on the balance of probabilities, but need only prove the amount of damage with as much certainty as is reasonable in the circumstances.<sup>95</sup>

Where precise evidence is not available, such as where the evidence would be based on information primarily within the knowledge of the defendant, a court must approach the matter on the broad common sense basis with which a jury might have approached the issue<sup>96</sup> and do the best it can to estimate the loss even if a degree of speculation and guesswork is required.<sup>97</sup>

Once a claimant puts forward a reasonable methodology and estimation, a respondent in a better position to provide information for a more accurate measure cannot simply criticise the claimant's methodology and estimation as

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90 *Auskay* (2008) 251 ALR 166, 178.

91 J D Heydon, *Trade Practices Law* (2002) [18-1530], [18-20053].

92 *Roper v Johnson* (1873) LR 8 CP 167 confirmed in *Garnac Grain Co Inc v Faure and Fairclough* [1968] AC 1130.

93 This appears to be the approach adopted by the parties, at least on their pleadings, in *Cadbury Schweppes Pty Ltd v Amcor Limited*, Federal Court of Australia, VID 1377/2006, where it was pleaded only as a matter of defence.

94 See, eg, *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 77–8, 90–1, where the High Court held in the context of an unjust enrichment claim concerning stamp duty allegedly passed on that the defence will not be available. The fact that the burden was passed on to a third party did not affect the fact that, as between the Commissioner and Royal, the former had been enriched at the expense of the latter.

95 *Sellars v Adelaide Petroleum; Poseidon Limited v Adelaide Petroleum* (1994) 179 CLR 332, 348–56; *O'Neill v Medical Benefits Fund of Australia Ltd* (2002) 122 FCR 455.

96 *Poseidon Limited v Adelaide Petroleum NL* (1992) ATPR ¶41-164; *Sellers v Adelaide Petroleum* (1994) 179 CLR 332.

97 *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 57 ALR 167, 182–3; and *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 83 (Mason CJ and Dawson J). See also, *Placer (Granny Smith) Pty Ltd v Theiss Contractors Pty Ltd* (2003) 196 ALR 257 ('Placer'), at 259 (Gleeson, McHugh and Kirby JJ), 266 (Hayne J).

inadequate.<sup>98</sup> Faced with a *prima facie* estimate of loss based on a reasonable methodology, a court may find that the respondent, with its access to the relevant information, is obliged to meet the claim. If not, the respondent's failure to give evidence or produce information to upset the estimate may, in some circumstances, be enough for the court to follow the applicant's methodology even if it is lacking in precision.<sup>99</sup> US courts have recognised that the antitrust plaintiff is rarely able to quantify damages with mathematical precision.<sup>100</sup> This, together with a view that it would be inequitable to allow a wrongdoer to defeat recovery by insisting on rigorous proof of loss, has resulted in a lesser burden of proving the amount of damages than in other contexts and a less stringent standard for proving the amount of damage than for proving the fact of damage.<sup>101</sup>

A further area, specific to class actions, and that is not governed by existing law or practice, is the case management aspect of damages assessment, which will of course depend on the circumstances of the particular case. In a class action where there is a high degree of similarity in the pattern of loss or damage suffered by members of the class, determining the loss or damage of one or a small number of group members (as 'test cases') is likely to be an efficient way to resolve a large number of claims. In a class action where there is a high degree of differentiation of loss then a court might be inclined to assess loss on an aggregate basis or by reference to a formula.

Section 33Z of Part IVA of the *FCA Act* provides that the court may, in a representative proceeding, make an award of damages for group members, subgroup members or individual group members of specified amounts;<sup>102</sup> amounts worked out in such manner as the court specifies (by a formula);<sup>103</sup> or in an aggregate amount,<sup>104</sup> provided a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.<sup>105</sup> Section 87 might also be sufficiently broad to enable a court to fashion a more approximate remedy on a class-wide basis.<sup>106</sup>

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98 *Placer* (2003) 196 ALR 257, 267 (Hayne J), 277–8 (Callinan J).

99 *Katsilis v Broken Hill Co Pty Ltd* (1977) 181 ALR 181, 197 (Barwick CJ). Although these observations were in the minority, they have subsequently been approved and applied recently: *IPN Medical Centres (NSW) Pty Limited v Idoshore Pty Limited* [2008] FCAFC 163 (Unreported, Gray, Lindgren and Tracey JJ, 9 September 2008).

100 American Bar Association Section on Antitrust Law, above n 74, 837.

101 *Zenith Radio Corp v Hazeltine Research*, 395 US 100, 123 (1969); *Bigelow v RKO Radio Pictures*, 327 US 251, 264 (1946); *Story Parchment Co. v Paterson Parchment Paper Co.*, 282 US 555, 563 (1931); *Bell Atlantic Corp v AT&T Corp.*, 339 F.3d 294, 303 (5<sup>th</sup> Cir, 2003); *New York v Julius Nasso Concrete Corp.*, 202 F3d 82, 88 (2<sup>nd</sup> Cir, 2000); *Conwood Co v United States Tobacco Co*, 290 F 3d 768, 795 (6<sup>th</sup> Cir, 2002); *Coastal Fuels of Puerto Rico Inc v Caribbean Petroleum Corp.*, 79 F 3d 182, 200 (1<sup>st</sup> Cir, 1996); *Stelwagon Mfg. Co v Tarmac Roofing Sys.*, 63 F 3d 1267, 1273 (3<sup>rd</sup> Cir, 1995).

102 *FCA Act* s 33Z(1)(e).

103 *FCA Act* s 33Z(1)(e).

104 *FCA Act* s 33Z(1)(f).

105 *FCA Act* s 33Z(3).

106 Note, in this regard, that in contrast to s 82, s 87 does not refer to the 'amount' of loss or damage.

Although a class-wide damages assessment is unlikely to provide as precise an analysis as individual assessments, it would nevertheless be consistent with the objectives of the class actions procedure<sup>107</sup> and the trend toward quick, inexpensive and efficient resolution of disputes<sup>108</sup> and would certainly be more attractive than the prospect of determining hundreds or thousands of individual claims.

## V CONCLUSION

Typically the costs and risks attendant upon private action are prohibitive to individual plaintiffs. Class actions provide the most practical opportunity for redress. To date, all such actions have been brought by private litigants, and the proceedings have been difficult, slow and expensive. In part this is a natural consequence of the complexity of the scope and subject matter of the proceedings. However, it is important to keep in mind that private actions for damages provide a significant compliance incentive as well as compensation for those affected. The legislature and the judiciary ought to ensure where possible that the law in this area develops in a manner that is consistent with the policy objectives of the *TPA*: to enhance competition in the Australian market and provide relief for victims of anti-competitive conduct.

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107 In *Bright v Femcare Ltd* (2002) 195 ALR 574 and *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, the principal objectives of the class action procedure have been described as being to (1) promote the efficient use of court time and the parties' resources by eliminating the need to try the same issue separately; (2) provide a remedy in favour of persons who may not have the funds to bring a separate action or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) protect defendants from multiple suits and the risk of inconsistent findings.

108 The Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, introduced into Parliament on 22 June 2009, is designed to improve access to justice and the efficient management and resolution of Federal Court proceedings. The centrepiece of the Bill is the introduction of an overarching purpose principle into the *FCA Act*. The overarching purpose is to facilitate the just resolution of disputes according to the law and as quickly, inexpensively and efficiently as possible. The Bill, together with the High Court's recent decision in *AON Risk Services Australia Limited v Australian National University* (2009) 258 ALR 14, is part of a shift towards a greater emphasis on efficiency, economy and proportionality of cost in the exercise of case management discretion.