

Unclassified

DAF/COMP/WP3/WD(2015)17

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

02-Jun-2015

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Australia --

15 June 2015

This document reproduces a written contribution from Australia submitted for Item III of the 121st meeting of the Working Party No. 3 on Co-operation and Enforcement on 15 June 2015.

More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

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JT03377616

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-- Australia --

1. Overview of private enforcement in your jurisdiction

1. Private rights of action are an important aspect of competition law enforcement in Australia. They are available under the *Competition and Consumer Act 2010* (CCA) independently of public enforcement by the Australian Competition & Consumer Commission (ACCC). They may benefit from related ACCC investigations and proceedings under the CCA but in practice such ‘follow-on’ action has occurred most commonly in the context of cartels.

2. An understanding of the differing roles of private and public enforcement in Australia helps explain their interaction.

3. The ACCC is an independent statutory government authority which promotes competition and fair trading and regulates national infrastructure with the objective of making markets work for the benefit of all Australians. It does so by protecting consumers and ensuring competitive markets by enforcing the CCA; by conducting research and promoting compliance with the CCA; by reviewing and assessing company mergers and asset acquisitions, authorisation and notification applications;¹ and regulating for the promotion of competition in the communication, bulk water, postal, and transport industries. ACCC proceedings under the CCA constitute only part of that range of activities and must be seen in the following context. The ACCC balances its priorities within a confined budget. It receives around 200,000 enquiries and complaints a year. It usually investigates over 500 matters (including those arising from its own detection and other initiatives), and takes about 30-40 cases to court each year across its full range of responsibilities.² The ACCC cannot pursue all the complaints it receives. It focuses on those circumstances that have the potential to harm the competitive process or result in widespread consumer detriment. Where appropriate, the ACCC may also pursue matters that will assist to clarify aspects of the law.³ In its public enforcement function the ACCC seeks fines and penalties to punish the wrongdoer and deter others from breaching the CCA, and it seeks injunctions to stop unlawful conduct. (The ACCC does not have the power to decide whether there has been a CCA contravention. Instead, it investigates and brings appropriate matters before the Federal Court of Australia for determination.) The ACCC enters into administrative resolutions (e.g. through court enforceable undertakings) and uses less formal ways to address issues (e.g. writing warning letters). Other aspects of public enforcement are directed at encouraging compliance.

4. The ACCC’s aims are therefore 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.⁴

¹ The authorisation and notification provisions of the CCA allow the ACCC to grant legal protection for potentially anticompetitive conduct when the public benefit outweighs the public detriment, including any lessening of competition.

² Rod Sims, ACCC Chairman, Committee for Economic Development of Australia, Sydney 19 February 2015.

³ See *ACCC Compliance & Enforcement Policy* 2015.

⁴ In *ACCC v Bridgestone Corporation (2010) 186 FCR 214, 223*, Justice Finkelstein J (at para 40) commented that a ‘factor which will require future consideration is whether payment of compensation or making restitution to those adversely affected by the illegal conduct should go in mitigation of the penalty. It may be that a company should receive a lower (or discounted) penalty if it has assisted those affected by

5. Private enforcement can be a significant 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.

6. 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 (for further detail of the ACCC's interventions in private proceedings see section 4 below).

7. 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 which the ACCC is bound to keep confidential as part of its obligations under the ACCC's *Immunity and Cooperation Policy*.⁵ The ACCC may also wish to assert public interest immunity to prevent disclosure that would be damaging to the public interest, e.g. because it would undermine an ACCC investigation. The ways in which these evidentiary issues have arisen and been resolved are described in section 3 below.

8. A number of issues raised in this paper arose recently in the context of an independent 'root and branch' review of Australia's competition laws and policy, the Competition Policy Review, chaired by Professor Harper (Harper Review). These include removing the current requirement for Ministerial consent to rely on extraterritorial conduct in a private enforcement action; extending the existing use of findings of fact, as *prima facie* evidence of the same facts in later proceedings, to admissions; and improving access to justice for small businesses. The Final Report was released on 31 March 2014 (Harper Report).⁶ Relevant Harper Report recommendations are attached but are discussed in context below.

2. Instruments to foster private enforcement

2.1 Key statutory provisions for loss recovery for CCA contraventions

9. Section 82 of the CCA is the key provision which confers private rights of action. Anyone who suffers loss or damage by the conduct of another, that contravenes the restrictive trade practices prohibitions of the CCA, can recover the amount of their loss or damage in a private action against that person, or against anyone else involved in the contravention.⁷ There have been a number of private actions under the CCA, including some which have progressed to Australia's highest judicial authority, the High Court of Australia. Some private actions relate to cartels,⁸ while others concern exclusionary provisions, misuse of market power, resale price maintenance, or mergers.⁹ Only a few follow on from ACCC public

its actions by implementing a compensation scheme in the same way that a company may receive a discount for assisting the ACCC'.

⁵ *ACCC immunity and cooperation policy for cartel conduct*, September 2014, para.50.

⁶ See Competition Policy Review, Final Report, March 2015. The website for the Review is at: <http://competitionpolicyreview.gov.au/>.

⁷ S.82 applies to anti-competitive contracts, arrangements and understandings, price-fixing and other cartels, misuse of market power, resale price maintenance, exclusive dealing, and conduct which contravenes an industry code.

⁸ *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* (No 2) [2006] FCA 1388 (follow on); *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671 (follow on); *Wright Rubber Products v Bayer AG* (No 3) [2011] FCA 1172; *Bradken Ltd v Norcast SARL* [2013] FCAFC 123; *De Brett Seafood Pty Ltd & Anor v Qantas Airways Limited & Ors*, Federal Court of Australia Proceeding VID 12/2007, Orders dated 6 June 2014 (follow on).

⁹ Exclusionary provisions (ss.4D/45(1)(a)/45(1)(b) of the CCA): *Corporate Sports Australia v Australian Rugby Union Ltd* [2008] FCA 993; *SPAR Licensing v MIS QLD Pty Ltd* (No 2) [2012] FCA 1116; *Fadu*

enforcement.¹⁰ ACCC proceedings and follow on proceedings in relation to the same conduct are frequently of different scope, as a result of the strategic considerations or the priorities of those pursuing such action.

10. Quite separately the ACCC may take representative action under section 87(1B) of the CCA on behalf of those who have suffered loss by contravening conduct, and who consent to proceedings being brought on their behalf. The ACCC has brought a number of representative proceedings for consumer protection, but not for competition-related, contraventions.¹¹

11. The CCA confers a wide power on the Federal Court to make remedial orders in appropriate cases, both public and private, including compensation for loss already suffered, or behavioural orders to prevent or reduce loss or damage. Among other available orders the Court may declare the whole or part of a contract void, it may vary contracts, refuse to enforce them, and may direct the refund of money or return of property.¹²

12. The claimant in a private action must prove that it has suffered loss on the balance of probabilities; it must establish the necessary link between the contravention and the loss; and it must prove the extent of its loss with as much certainty as is reasonable in the circumstances.¹³ The calculation of damages has a statutory basis (section 82) which does not indicate any limits on the types of damages available. Economic loss and consequential loss are recoverable. Punitive, exemplary or nominal damages are not (since section 82 is confined to recovery of the amount of loss or damage by the contravening conduct).

13. Anyone who has suffered loss or damage by the relevant contravention of the CCA has standing.¹⁴

Pty Ltd v ACN 008 112 196 as trustee of the 'International Linen Service Unit Trust' [2007] FCA 1965. Misuse of market power: *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177; *Melway Publishing Pty Limited and Robert Hicks Pty Ltd* (2001) 178 ALR 253; *NT Power Generation Pty Ltd v Power and Water Authority & Anor* [2004] HCA 48; 219 CLR 90; *RP Data Limited v State of Queensland* [2007] FCA 1639; *Eden Construction Pty Ltd v State of New South Wales (No 2)* [2007] FCA 689; *Pacific National Limited v Queensland Rail* [2006] FCA 91; *Seven Network Ltd v News Limited* [2009] FCAFC 166. Third line forcing: *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516; *Australian Automotive Repairers Association (Political Action Committee) Inc (in liquidation) v Insurance Australia Ltd* [2006] FCAFC 33. RPM: *Fairbairn v NCC Fashions Wholesale Pty Ltd* [2005] FCA 1874. Mergers: *Davids Holdings v Coles Myer Ltd* [1992] FCA 1033.

¹⁰ See footnote 8 identifying follow on actions.

¹¹ See *ACCC v Allphones Retail Pty Ltd* [2011] FCA 538 (industry code contravention); *ACCC v Golden Sphere International Inc* (1988) 83 FCR 424; *ACCC v Giraffe World Australia Pty Ltd* (1998) 84 FCR 512.

¹² In its submissions to the Harper Review the ACCC suggested a broadening of its powers to seek redress on behalf of identifiable classes of persons, such as consumers or small businesses, impacted by anti-competitive conduct. The aim would be to bring the ACCC's powers in such cases in line with its existing powers in the context of consumer protection and fair trading after a contravention has been found. For competition matters, this might e.g. enable the ACCC to seek an order requiring the offending firm to honour existing contracts while offering a discount corresponding to the anti-competitive surcharge to its customers. However, the Harper Report does not address this issue.

¹³ *O'Neill v Medical Benefits Fund of Australia Ltd* [2002] FCAFC 188.

¹⁴ CCA s.82(1).

14. A party needs Ministerial consent to rely on extraterritorial conduct in a private enforcement action.¹⁵ This requirement was introduced at a time when many jurisdictions did not have competition laws and there was greater risk that conduct representing a contravention in Australia was authorised or permitted in such countries. The Harper Panel recommended (and the ACCC supported) removing the consent requirement given the widespread opportunity for anti-competitive conduct to affect multi-national markets.¹⁶

2.2 *Statutory provisions supporting the respective roles of private and public enforcement*

15. The CCA contains separate provisions to assist private actions and public enforcement, as follows.

16. Section 83 assists private actions by making findings of fact that established a contravention in proceedings *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.¹⁷ 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.¹⁸ The ACCC raised two concerns about this during the Harper Review. First that firms will 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.¹⁹ Secondly, the ACCC raised the concern with the section 83 proposal that respondents would 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. The Government is yet to respond to the Harper Review recommendations.

17. A number of statutory provisions address the disclosure requirements in litigation in light of the ACCC's public enforcement functions.

18. Section 155AAA of the CCA prevents the ACCC disclosing material it obtains using its coercive powers, or which were provided to it in confidence (such as under the *Immunity and Cooperation Policy*), except when ACCC staff perform 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.

¹⁵ CCA s.5(3).

¹⁶ Harper Report pp.57-58, 415-416.

¹⁷ *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].

¹⁸ Harper Report pp.71-71, 407-409.

¹⁹ Following the Full Federal Court decision in *Director, Fair Work Building Industry Inspectorate v CFMEU & Anor* QUD257/2013 [2015] FCAFC 59 parties are not permitted to make submissions on penalty.

19. 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 which the ACCC has acquired compulsorily.²⁰ The ACCC may itself seek discovery orders of material which 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.

20. 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 which is the subject of those proceedings.²¹ In the case of criminal proceedings, the prosecution has broad obligations to disclose material which it intends to use to prove its case, as well as material affecting the credibility or reliability of a prosecution witness, and unused materials.²² It must also disclose any other material which may assist the defence.²³

21. 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 cardboard box litigation (discussed in section 3 below) 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.²⁴ As the explanatory memorandum for the provisions explains, 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.

2.3 Other measures to foster private enforcement

22. The Harper Report addressed a number of issues concerning the effectiveness of private enforcement and access to justice for small businesses.

23. Submissions expressed concern that the ACCC is unable to take proceedings in respect of all complaints brought to it, given that it prioritises those matters it will pursue within budgetary constraints. They also noted that small businesses either lack the time and financial resources to take action themselves or are concerned about the impact this might have on their ongoing business relationships. The Harper Panel considered that the ACCC should place some priority on its response to small business complaints concerning competition law. It also recommended that where the ACCC considers a complaint has merit

²⁰ Federal Court Rules 2011, Part 20.

²¹ See CCA ss.157, 157(1B), 157B and 157C.

²² 'Unused material' is all information relevant to the charge/s which has been gathered in the course of the investigation and which the prosecution does not intend to rely on and either runs counter to the prosecution case or might reasonably be expected to in advancing a defence.

²³ Director of Public Prosecutions *Statement on Prosecution Disclosure*. See also *Prosecution Policy of the Commonwealth, Guidelines for the Making of Decisions in the Prosecution Process*.

²⁴ CCA s.157(1B).

but chooses not to pursue public enforcement, the ACCC should communicate this and take a more active role in connecting small business with dispute resolution schemes.²⁵

24. In general, the dispute resolution processes currently available to smaller businesses do not meet their expectations. A recent Productivity Commission report, *Access to Justice Arrangements*, made recommendations (which the Harper Report supports) to enhance the capacity of the small business commissioners and dedicated small business offices in each Australian jurisdiction to provide alternative dispute resolution processes.²⁶

25. The Harper Panel noted that some submissions argued that ‘no costs’ orders for small businesses would help,²⁷ but concluded that this could have unintended consequences, such as encouraging frivolous or vexatious private actions.

26. In Australia third party litigation funding is lawful.²⁸ The Productivity Commission’s Report considered third party litigation funding had the potential to provide access to justice, particularly in class actions where it can level the playing field against well-resourced parties.

27. Legal practitioners may not currently charge on the basis of the amount recovered (damages-based billing) but may charge contingency fees based on regular hourly rates (with an uplift for the risk of recovering no fees if unsuccessful). The Productivity Commission’s Report recommended that restrictions on damages-based billing by lawyers be removed, provided consumers are protected through comprehensive disclosure requirements, and percentage limits apply on a sliding scale to all but sophisticated commercial clients. (Restrictions may remain in criminal and family matters.)

28. Third party funders are not subject to specific regulation but the report recommended that funders be licensed to ensure they hold adequate capital to manage their financial obligations and they adopt systems to manage conflict of interest and to provide full disclosure.²⁹

3. Balancing public and private enforcement

3.1 Access to documents in practice

29. A number of evidentiary issues emerged in one particular case, a private action arising from the cardboard box cartel involving allegations of price-fixing and market sharing. This followed related ACCC proceedings.³⁰ The private action plaintiff persuaded the Court to order the respondent in the ACCC proceedings (Visy) to disclose a number of finalised witness statements which the ACCC had served on Visy in the earlier ACCC proceedings. The witness statements included information provided by those cooperating under the ACCC’s Immunity Policy.

²⁵ Harper Report pp. 84-85.

²⁶ See Productivity Commission Report, *Access to Justice Arrangements*, 2014, Recommendation 8.3. The final Productivity Commission Report was sent to Government on 5 September 2014 and was publicly released on 3 December 2014.

²⁷ For example, *Master Grocers Australia*, page 58; *Independent Supermarket Retailers Guild of South Australia*, page 6.

²⁸ The High Court decision in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 ended a period of uncertainty by confirming that litigation funding is not in principle contrary to public policy.

²⁹ Productivity Commission Report, *Access to Justice Arrangements*, 2014, pp.22-23 and Chapter 18.

³⁰ *ACCC v Visy Industries Holdings Pty Limited (No 3)* [2007] FCA 1617.

3.1.1 *Legal professional privilege (LPP)*

30. The ACCC resisted disclosure on the basis of litigation privilege enjoyed by the ACCC in the final proofs. ‘Litigation privilege’ protects material created at the instigation of a party or the party’s lawyer for the dominant purpose of conducting anticipated or pending litigation.³¹ The Court decided that the object of disclosing finalised witness statements was not within the scope of litigation privilege but was instead to provide advance notice to the other parties of the evidence which the witnesses are expected to give and thereby to facilitate the hearing.³² LPP did not therefore prevent disclosure under the court order.

3.1.2 *Public interest immunity*

31. In the same matter the Court also addressed the scope of ‘public interest immunity’ in relation to the witness proofs. Public interest immunity prevents a court from ordering production of a document where a public interest in not disclosing it outweighs the principle that a court should have access to relevant evidence. The ‘public interest’ claimed by the ACCC in the private proceedings was to encourage cartel whistle-blowers to come forward by ensuring the confidentiality of information they provide.

32. The Court did not support the ACCC’s claim for public interest immunity in this instance because there was no evidence to show that the witnesses providing the proofs expected their evidence to remain confidential. On the contrary, they should know they may have to testify in open court and their statements may ultimately fall into the public domain. There was also no specific evidence that a cartel witness would be dissuaded from coming forward without the guarantee of confidentiality.³³

33. As mentioned earlier, these proceedings led to the introduction of the ‘protected cartel information’ provisions which limit what the ACCC may be ordered to produce or disclose to the Court, or to a party to non-ACCC proceedings.

3.2 *Availability of court documents to assist private actions*

34. A number of documents filed in public enforcement proceedings will be available to benefit private actions. Pleadings may be inspected by the public, unless a confidentiality order is in place, by searching the Registry.³⁴ However, affidavits and witness statements may not be inspected without the leave of the Court (which may be denied if the affidavit or witness statement has not been admitted into evidence or has not been relied on or referred to).³⁵

³¹ The term LPP in Australia embraces ‘advice privilege’ and ‘litigation privilege’. ‘Advice privilege’ protects confidential communications made for the dominant purpose of giving or receiving legal advice. The basis for litigation privilege is that, in the adversarial system, legal representatives and their clients generally control and decide for themselves what evidence they will lead at trial, without any obligation to disclose to the opposing party the material acquired in preparation of the case. If a document is privileged, it is not disclosed at all in court, and it would remain confidential.

³² *ACCC v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32; (2009) 174 FCR 547; 254 ALR 198.

³³ *Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 88.

³⁴ Federal Court Rules 2011, rule 2.02/3.02.

³⁵ Federal Court Rules 2011, rule 2.01.

4. How can public enforcement help to promote private enforcement?

35. See Sections 2 and 3 above for access to documents in private proceedings that arise as a result of public enforcement; and Section 2 for the use of findings of fact in later proceedings, and the role of the ACCC in taking representative action.

4.1 ACCC intervention in private proceedings

36. The ACCC is empowered by section 163A of the CCA to intervene in any proceedings instituted under that Act, with the leave of the Court. In applying to intervene the ACCC generally will seek to provide the Court with a broader perspective than that of private litigants.

37. The ACCC would usually only intervene in cases involving significant public interest. For example, if it involves an issue of general public importance,³⁶ or there is a major detrimental effect on fair trading and competitive market forces and the ACCC wishes to make submissions to preserve the competitive process and prevent future contraventions of the CCA. A key objective of the ACCC's enforcement functions is to seek clarification of the law. The ACCC believes it can provide a perspective from a wider public interest context than private parties, who may be unable or unwilling to do so. If a party contends that a provision of the CCA is ambiguous and the matter to be determined rests on the interpretation of that provision, or if there are important and novel questions of interpretation, the ACCC may wish to make submissions to clarify the CCA through precedent. For example, the ACCC successfully intervened in one High Court appeal to put forward an interpretation of a provision that had not previously been considered by either party to the proceedings.³⁷ The ACCC sought to draw the Court's attention to a new issue of statutory interpretation. The ACCC will not intervene in private litigation if its role is confined to reiterating the views of a party to the proceedings.

38. In general, the ACCC will do nothing to impede a private action but neither will the ACCC assist a private action if to do so would impede its ability to effectively enforce the law or address its other pressing priorities.

4.2 The use of agreed facts

39. In Australia, 'agreed facts' (containing admissions) and submissions in settlement proceedings inform the Court in making its decision on penalty. The Federal Court may seek further information,³⁸ and will not 'rubber stamp' a settlement, whether in a public or private action, as exemplified by the Court's recent refusal to approve a proposed settlement in the *Vioxx* class action proceedings because it did not consider the settlement was in the interests of group members as a whole.³⁹ A recent Court decision held

³⁶ See, e.g., *NT Power Generation Pty v Power and Water Authority and Gasco* (2001) ATPR 41-814, a case involving derivative Crown immunity and the application of s.46 to the Crown.

³⁷ *Melway Publishing Pty Limited and Robert Hicks Pty Ltd* (2001) 178 ALR 253 in relation to the interpretation of s.46 (misuse of market power).

³⁸ See e.g. *ACCC v Qantas Airways Limited* [2008] FCA 1976, para. 68; Transcript of hearing of 2 December 2008.

³⁹ *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd (No 6)* [2013] FCA 447.

that in civil penalty proceedings, including those taken by the ACCC, the parties are not permitted to make submissions on penalty, agreed or otherwise.⁴⁰

40. The need for transparency and fairness requires reasons that explain and justify the relevant decision. The level of reasoning required to support a settlement decision is self-evidently less than for a decision following a fully contested hearing in which numerous factual and legal issues are in dispute (it need only be sufficient to support the penalty sought). This may not be comparable to the detail that a private litigant may need or wish, but is appropriate given limited public resources. There is an obvious public interest in settlements (to reach quick resolution, reduce the burden on court resources, and avoid cost).

⁴⁰ See Full Federal Court decision in *Director, Fair Work Building Industry Inspectorate v CFMEU & Anor* QUD257/2013 [2015] FCAFC 59. It had previously been the practice of parties to such proceedings to make penalty submissions. The uncertainty this adds may make settlement less attractive. .

NATIONAL COMPETITION POLICY REVIEW FINAL REPORT

RECOMMENDATIONS

1. Recommendation 26 — Extra-territorial reach of the law

1. Section 5 of the CCA, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Instead, the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.

2. The in-principle view of the Panel is that the foregoing changes should also be made in respect of actions brought under the Australian Consumer Law.

2. Recommendation 41 — Private actions

3. Section 83 of the CCA should be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought in addition to findings of fact made by the court.

3. Recommendation 53 — Small business access to remedies

4. The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.

5. Where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes. Where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation.

6. Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

7. Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services.

8. The Panel endorses the following recommendations from the Productivity Commission's *Access to Justice Arrangements* report:

- Recommendations 8.2 and 8.4 to ensure that small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services;
- Recommendation 8.3 to ensure that small business commissioners, small business offices or ombudsmen provide a minimum set of services, which are delivered in an efficient and effective manner;

- Recommendation 9.3 to ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;
- Recommendation 11.1 to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and
- Recommendation 13.3 to assist in managing the costs of litigation, including through the use of costs budgets for parties engaged in litigation.