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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The *Competition and Consumer Act 2010* (Cth) (**CCA**) is the primary Australian legislation governing competition law and governs the scope of claims that may be brought for any breach.

Part IV of the CCA prohibits a range of anti-competitive conduct, including cartel conduct, resale price maintenance, misuse of market power, anti-competitive mergers and acquisitions, and anti-competitive agreements, exclusive dealing, and concerted practices. Civil action can be brought for all such contraventions, while cartel conduct can also be prosecuted criminally.

There are some other parts of the CCA that provide specific competition law principles applicable to individual sectors (e.g. telecommunications rules under Parts XIB and XIC and liner shipping rules under Part X). However, in practice, these are less commonly used as the basis for prosecution than the general anti-competitive conduct provisions.

While corporations and individuals may commence actions for damages and certain other remedies under the CCA, the Australian Competition and Consumer Commission (**ACCC**) is the primary enforcer of competition laws.

1.2 What is the legal basis for bringing an action for breach of competition law?

If the ACCC considers there has been a contravention of the CCA, it may commence civil proceedings in the Federal Court of Australia (**Federal Court**) seeking various remedies, including pecuniary penalties (s 76), injunctions (s 80), divestiture in the case of mergers (s 81) or other orders (s 87). As well as primary liability for directly engaging in conduct, a person may be subject to civil or criminal consequences if they are an accessory to the primary conduct and for various forms of indirect involvement (e.g. attempt, attempt to induce, aiding, abetting, procuring or conspiring). (s 76). The ACCC has been increasingly focused on bringing cases to test what constitutes an attempt to induce a cartel and has succeeded in establishing liability in two recent decisions: *ACCC v BlueScope Steel Limited (No 5)* [2022] FCA 1475 (remedies judgment pending); and *ACCC v Delta Building Automation Pty Ltd* [2023] FCA 880.

The ACCC refers serious cartel conduct to the Commonwealth Director of Public Prosecutions (**CDPP**) for consideration for criminal prosecution in accordance with a Memorandum of Understanding (**MOU**) between the two agencies.

In practice, the ACCC undertakes the primary investigatory function in these cartel matters before handing a "brief of evidence" to the CDPP. The CDPP determines whether to prosecute the matter criminally.

Private litigation is also common under the CCA. A person (including a corporation) who has suffered loss or damage, or is likely to suffer loss or damage, as a result of a contravention of the CCA by another person, can bring proceedings directly against that other person in the Federal Court seeking damages (s 82) and a range of other remedies, including injunctions (s 80) (except in the case of an anti-competitive merger or acquisition), declarations and other orders, such as an order that a contract is void (s 87).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The legal basis for competition law claims is principally derived from national (i.e. Commonwealth) legislation.

The CCA is the principal national law, which relies on the constitutional powers of the Commonwealth for validity, the principal power being the ability of the Commonwealth to make laws with respect to corporations.

To ensure that competition laws had universal application in Australia, including to persons other than corporations, the Commonwealth, States and Territories agreed to enact the Competition Code in each State and Territory, which is a version of the competition law provisions of the CCA that mirrors those provisions, except that references to a "corporation" are replaced with references to a "person".

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no specialist courts for competition law. The Federal Court has primary jurisdiction to hear and determine all civil and criminal proceedings arising under the CCA (CCA, ss 86 and 163).

The Australian Competition Tribunal (**Tribunal**) is a specialist tribunal that operates as a form of merits review body. The Tribunal comprises a presidential member, who must be a judge of the Federal Court, and two non-presidential members, who have knowledge or experience in industry, economics, commerce, law or public administration.

The Tribunal has jurisdiction to receive a number of specific forms of application under the CCA, including undertaking reviews of the following determinations made by the ACCC:

- granting or refusing to grant authorisation for mergers;
- granting or revoking authorisations for other conduct and arrangements that would or may otherwise be prohibited under the CCA; and
- revoking notices for exclusive dealing conduct that would or may otherwise be prohibited under the CCA. The Tribunal can also hear reviews of determinations of the ACCC or the relevant Minister in relation to the national access regime governing access to certain natural monopoly infrastructure (CCA, Part IIIA) or international liner cargo shipping (CCA, Part X).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Civil actions for contraventions of competition laws may be commenced by the ACCC or a private party.

In certain circumstances, the ACCC may bring proceedings on behalf of other persons who have suffered, or are likely to suffer, loss or damage by the conduct of another person that was in contravention of Part IV. Those persons must consent in writing to the ACCC bringing proceedings on their behalf.

Representative proceedings, also referred to as class actions, may be brought for damages for competition law contraventions of the CCA. The *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) prescribes a detailed regime for representative proceedings. To bring a representative proceeding, the following criteria must be satisfied:

(a) seven or more persons have claims against the same person;
(b) the claims of all those persons are in respect of, or arisen out of, the same, similar or related circumstances; and
(c) the claims of all those persons give rise to a substantial common issue of law or fact.

Representative proceedings must describe the group of persons on whose behalf the proceedings are brought, usually by defining the common characteristics of the group members. A group could include both direct and indirect purchasers.

The Federal Court Act provides for an "opt-out" model – that is, persons who are within the defined group will be bound by the outcome of the proceedings unless they opt out by written notice by a date fixed by the court (s 33J).

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Federal Court has primary jurisdiction to determine civil or criminal matters arising under the CCA (CCA, ss 86 and 163).

For constitutional reasons, criminal matters have historically been dealt with in State and Territory courts. For this reason, criminal cartel proceedings are first filed in the relevant State or Territory court for mention and, if required, a committal hearing. If an accused is committed to trial, the matter will usually be referred to the Federal Court for a substantive hearing (and jury trial) as the Federal Court has relevant expertise in competition law matters (although the State and Territory courts still retain jurisdiction).

The CCA not only applies to conduct in Australia but to conduct outside Australia by:

- bodies corporate incorporated in or "carrying on business" within Australia;
- Australian citizens; or
- persons ordinarily resident within Australia (CCA, s 5).

The prohibitions on exclusive dealing and resale price maintenance (CCA, ss 47 and 48) extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.

Once it can be shown that the CCA is applicable to the facts in issue, the Federal Court (and other courts) will generally only assume jurisdiction when the respondent or defendant is validly served with court process or a requirement for service is dispensed with by court order.

Generally, it is necessary to obtain leave to serve process overseas, and to obtain that leave the applicant (including the ACCC) needs to establish a *prima facie* case for the relief claimed, although it is not necessary to establish this for each cause of action relied upon, only that it can be made out for any one of the causes of action (*Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153).

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

Many competition cases in Australia are commenced by the ACCC, with the proportion of private actions relatively low.

The number of private enforcement actions has been increasing, particularly with respect to claims brought under the misuse of market power (dominance) provisions, which were amended in November 2017.

While some private actions follow on from regulatory proceedings, this is not always the case.

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process in Australia is adversarial.

While adversarial in nature, the process before the Tribunal varies based on the type of application. For merger authorisation reviews, the process operates as a limited form of merits review of material before the ACCC (i.e. "on the papers"), with strictly constrained ability for parties to lead additional evidence or to call or cross examine witnesses (see *Applications by Telstra Corporation Limited and TPG Telecom Limited* (No. 1) [2023] ACompT 1).

1.9 Please describe the approach of the courts in your jurisdictions to hearing stand-alone infringement cases, including in respect of secret cartels, competition restrictions contained in contractual arrangements or allegations of abuse of market power.

A private party wishing to bring an infringement case can commence a standalone action or a follow-on action. As set out in question 1.2 above, if a person (including a corporation) has or is likely to suffer loss or damage as a result of a contravention of the CCA by another person, they can commence

proceedings directly against that other person in the Federal Court seeking damages (s 82), an injunction (s 80) and a range of other remedies. As only the courts have the power to determine whether there has been a contravention, the ACCC (for civil cases) and the CDPP (for criminal cartel matters) must commence court proceedings if they wish to establish a competition law infringement.

Standalone civil actions are commenced in the Federal Court of Australia by filing:

- an application setting out the relief sought (i.e. remedies); and
- a document setting out the key issues and facts of the claim – this will either be a "Concise Statement" or a "Statement of Claim".

A Concise Statement is a narrative style statement of the case limited to five pages, which enables matters to be brought before the courts efficiently without the need for formal, detailed pleadings via a Statement of Claim. The Federal Court anticipates that a Concise Statement is suitable for the majority of commercial and corporations matters, which includes competition cases, and encourages applicants to use this method unless it is clearly inappropriate (see clause 5.8, Commercial and Corporations Practice Note, 9 November 2022). The ACCC has readily adopted the Concise Statement method for commencing competition infringement cases, and several private civil infringement cases currently on foot have also been commenced this way.

Once a claim has been filed, the court will consider whether the matter is suited to proceed by way of Concise Statements or a more detailed Statement of Claim. This will usually (but not always) occur at the first case management hearing, which is typically held within a few weeks of filing. There are numerous examples of competition cases having been commenced by way of a Concise Statement, but the court subsequently ordering the applicant to file a Statement of Claim. Examples include *ACCC v BlueScope Steel Limited* (file number VID932/20–9 – civil case of attempts to induce a price fixing arrangement); *ACCC v Mastercard Asia/Pacific Pte Ltd & Anor* (file number NSD401/20–2 – civil case alleging misuse of market power and anti-competitive exclusive dealing); *Epic Games v Apple Inc* (NSD1236/2020); and *Epic Games v Google LLC* (NSD190/2021) (both private actions alleging misuse of market power).

After the first case management hearing, the precise steps in a civil infringement action will depend on the circumstances, including the nature of any procedural or interlocutory issues raised by the parties. However, broadly, the respondents will respond by way of a Concise Response or Defence, with provision for the Applicant to file a reply. Thereafter, there will be processes for discovery of documents by the parties relevant to the issues in dispute and for the parties to prepare and file evidence on which they intend to rely, including documentary evidence, lay evidence (usually by way of affidavit) and, if applicable, expert reports. There are several steps and processes that take place in the lead up to a hearing, including preparation of court books, written submissions, objections to evidence and lists of authorities. The court will monitor the management of the case through various case management hearings.

It is not unusual in infringement cases for the court to hold a separate hearing on liability and, if established, to then proceed to a further hearing on remedies, including penalties, damages and other orders. Where the ACCC is the applicant, there is scope for settlement including for the parties to make joint submissions on remedies, including to jointly propose a penalty (although it is ultimately for the court to determine whether the proposed penalty is within the appropriate range). A settlement with the ACCC may also involve the respondents giving a court-enforceable undertaking in favour of the ACCC.

The process for criminal cartel matters is substantially different to civil competition cases in terms of practice and procedure (but also in substantive terms). As set out in question 1.6 above, criminal matters will first be initiated in a State and Territory court by the CDPP on behalf of the Crown. In New South Wales, this occurs by serving one or more Court Attendance Notices on the accused, which sets out the charges and obliges the accused to appear at court for a mention. Unless the accused pleads guilty, the matter will usually proceed through a committal process, which varies by State. In some States, the purpose of the committal process is to determine whether there is sufficient evidence to commit the accused to stand trial. In other States such as New South Wales, the committal process is more of a procedural formality. The CDPP is required to serve its brief of evidence on the accused and must also comply with its duty of disclosure (see question 4.5 below).

If, following the committal process, the accused is committed to stand trial, the matter is usually referred to the Federal Court. While the proceedings are presided over by a judge, they are determined by a jury. In a criminal hearing, typically, witnesses are required to give all their evidence orally, whereas in a civil proceeding, the evidence in chief of a witness is usually given in writing (affidavit or statement) and the witness may then be asked questions by the opposing party in cross-examination.

If a jury finds the accused guilty on one or more charges, the matter will then proceed to a separate sentencing hearing.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim and interlocutory remedies are available in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

On the application of the ACCC or any other person, the court may grant an interim injunction pending determination of an application for a final injunction "*where in the opinion of the Court it is desirable to do so*" (CCA, s 80(2)). However, a person other than the ACCC is not able to seek an interim injunction to prevent an anti-competitive merger.

The principles applicable to when a court may grant an interim injunction are well established and are summarised in *ACCC v Pacific National Pty Ltd* [2018] FCA 1221 at [5]–[15] per Beach J.

Broadly, two issues need to be considered:

- whether the applicant can satisfy the court it has a *prima facie* case; and
- whether the "balance of convenience" favours the grant of an interim injunction.

As to the first issue, it is necessary to show a sufficient likelihood of success (in relation to the primary action) to justify the grant of an injunction, but the applicant does not have to go so far as to show a "high degree of assurance". The strength of the probability required depends, in part, on the consequences likely to flow.

As to the second issue, the balance of convenience looks at what the inconvenience, injury or injustice to the applicant would be if the injunction were refused and seeks to weigh that against the inconvenience, injury or injustice to the respondent if the injunction were granted. Only if the balance lies in favour of the applicant would an injunction be granted.

It is necessary to assess the balance of convenience in the context of considering the strength of the *prima facie* case. The stronger the *prima facie* case, the less strong the balance has to weigh in favour of the applicant.

Where the applicant is the ACCC, the court is also required to consider the inconvenience, injury or injustice to the public interest, market actors and consumers flowing from potentially detrimental effects on competition in the relevant markets if the injunction sought was refused.

Further, unlike where the applicant is a private party, the ACCC cannot be required to give an undertaking as to damages to protect the respondent if an injunction turns out to have been wrongly granted (see CCA, s 80(6)). The court must therefore take into account the detriment that may be caused to the respondents (and third parties associated with them) by the grant of an injunction that may not be mitigated by an award of damages.

In *Dialogue Consulting Pty Ltd v Instagram Inc* (file number VID369/2019), a case that remains open, an interim injunction has been in place since April 2019 (it was subsequently varied and also the subject of unsuccessful challenges to have the injunction discharged), restraining Instagram and Facebook from terminating, suspending or refusing Dialogue's access to the platforms. The orders required Dialogue to give the usual undertakings as to damages.

In *ACCC v IVF Finance Pty Limited (No 2)* [2021] FCA 1295, the ACCC sought an urgent interlocutory injunction to restrain Virtus Health Limited (**Virtus**), a global provider of fertility services, from completing its proposed acquisition of Adora Fertility. Virtus had sought informal merger clearance from the ACCC but before the ACCC had concluded its public review, informed the ACCC of imperatives necessitating completion and provided notice of the intended completion date. Justice O'Bryan granted the interlocutory injunction, finding the ACCC had established a *prima facie* case that the acquisition would be likely to have the effect of substantially lessening competition and, given this, the balance of convenience favoured the grant of an injunction as the substantial public interest in preventing the acquisition outweighed Virtus' and Adora's private interests.

3 Final Remedies

3.1 Please identify the final remedies that may be available and describe in each case the tests that a court will apply in deciding whether to grant such a remedy.

Civil remedies

The civil remedies available for competition law contraventions include pecuniary penalties, damages, injunctions (not available to private parties in merger cases), divestiture (in relation to mergers), non-punitive orders (e.g. community service), punitive orders (i.e. adverse publicity orders), disqualification orders for individuals in managing corporations, and other orders under s 87. The Federal Court is also empowered to grant declaratory relief (CCA, s 163A).

For conduct occurring on or after 10 November 2022, the maximum pecuniary penalty that is available for a contravention of the competition provisions of the CCA is the greater of:

(a) A$50 million per contravention (previously $A10 million);
(b) if the court can determine the value of the benefit obtained that is reasonably attributable to the contravention – three times that total benefit; or
(c) if the value of the benefit cannot be determined, 30% of the corporation's adjusted turnover during the breach turnover period (previously, 10% of the annual turnover). For individuals, the maximum pecuniary penalty per contravention is now $A2.5 million (A$500,000 prior to 10 November 2022).

For remedies to be available, liability of the respondent must be established on the balance of probabilities.

The overarching principle that courts will apply in determining the appropriate civil penalty is what is required to achieve specific and general deterrence. The primacy of deterrence was recently reiterated by the High Court in *Pattinson* (*Australian Building and Construction Commissioner v Pattinson & Anor* [2022] HCA 13). In addition to the general principle of deterrence, in determining the appropriate penalty, the court will apply other principles and have regard to all relevant factors, some of which are prescribed in the CCA as well as the "French factors", being those first developed by Justice French in *Trade Practices Commission v CSR Ltd* [ATPR 41-076, 52-152 (French J (as he was then)). Relevant penalty factors include:

- the nature and extent of the conduct: any loss or damage suffered;
- the circumstances in which the conduct took place;
- any previous findings regarding the same or similar conduct;
- the size and degree of market power of the company;
- the deliberateness of the conduct;
- whether the conduct was at the direction of senior management;
- the company's culture of compliance;
- the extent of cooperation; and
- specific and general deterrence.

Other relevant principles include the "totality" and "course of conduct" principles, both of which are tools (but not rules) to assist the courts in arriving at an appropriate penalty. Where there are multiple contraventions, the totality principle acts as a "check" to ensure the aggregate penalty for all conduct is just and appropriate in the circumstances and not excessive. The course of conduct principle recognises that where there is an interrelationship between the legal and factual elements of two or more contraventions, it may be appropriate for the court to treat multiple contraventions as one course of conduct such that a concurrent or single penalty should be imposed.

The course of conduct principle was applied by the primary judge in *ACCC v Yazaki Corporation (No 3)* [2017] FCA 465, who held that five acts engaged in by Yazaki comprised two broad categories of cartel conduct – the first being the making of the cartel arrangement and activities of the contravenors on the one hand, and the submission of the prices to the proposed purchasers on the other. The primary judge imposed two penalties in respect of each course of conduct. However, on appeal, the Full Federal Court instead found that three of the acts were separate and discrete, while two involved considerable overlap and could broadly be considered as one course of conduct. However, the Full Court went on to impose separate penalties for each of the five acts, including for each of the overlapping acts on the basis that the total penalty for those acts was appropriate.

A person who suffers (or is likely to suffer) loss or damage by the conduct of another person contravene of competition laws may also recover that loss by action against that other person or against any person involved in the contravention (CCA, s 82).

When determining whether a disqualification order is justified, the court may have regard to the persons' conduct in relation to the management, business or property of any corporation and any other matters it considers appropriate.

The court also has broad powers to make other remedial orders for competition law contraventions, including declaring a contract void, varying a contract, refusing to enforce any or all provisions of a contract, directing the refund of money or return of property, directing payment of damages in the amount of loss or damage suffered, directing the repair of goods or directing supply of services (CCA, s 87).

Criminal remedies

Criminal remedies, including fines, can be imposed for criminal cartel offences. Individuals face the prospect of criminal fines not exceeding A$550,000 per offence for conduct on or after 1 January 2023 (A$444,000 before 1 January 2023), 10 years' imprisonment, or both.

Part IB of the *Crimes Act 1914* (Cth) (**Crimes Act**) governs sentencing of criminal offences. The key principle is that the sentence imposed must be of a "severity appropriate in all the circumstances of the offence". The court must take into account the matters in s 16A(2) (among others), some of which include:

- the degree to which the offender has shown contrition;
- if the person has pleaded guilty to the charge;
- the degree of cooperation with law enforcement agencies in the investigation of the offence or other offences;
- the need for adequate punishment; and
- the offender's prospects of rehabilitation.

The Federal Court has found the factors identified in civil penalty cases bear also upon criminal sentencing and most are, in any event, replicated in some way in the relevant considerations set out in the Crimes Act (*CDPP v NYK* [2017] FCA 876).

In June 2022, the Federal Court imposed its first custodial sentences for criminal cartel conduct on four offenders who pleaded guilty to fixing the Australian dollar/Vietnamese dong exchange rate and fees charged to customers *(CDPP v Vina Money Transfer Pty Ltd* [2022] FCA 665). The sentences ranged from nine months to two years and six months, although each offender was given a suspended sentence, meaning they will not serve any jail time unless the orders are breached. Since this case, the Federal Court imposed a custodial sentence of 32 months, the longest to date, on a former export manager following a guilty plea in the Alkaloids of Australia case (*CDPP v Alkaloids of Australia Pty Ltd* [2022] FCA 1424). Two further criminal cartel matters involving guilty pleas from both corporations and individuals are awaiting sentencing: *CDPP v Aussie Skips Bin Services* (file number NSD1093/2022); and *CDPP v Bingo Industries Ltd* (file number NSD647/2022).

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases that are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

In a claim for damages, the applicant may recover the actual loss or damage suffered by the conduct in contravention of competition laws (CCA, s 82).

The CCA does not provide any guidance as to how damages are to be quantified. While cases state the measure of damages is similar to that recoverable under the common law in tort (that is, to put the person in the position they would have been in had the conduct not occurred), damages are not confined to those recoverable in tort.

Punitive or exemplary damages are not available for competition law contraventions.

There are few recent examples of private actions/class actions for damages under the CCA. Of those that are commenced, many are settled out of court. For example, following the ACCC's successful prosecution of Visy for engaging in cartel conduct with its competitor, Amcor Limited, in which the Federal Court imposed civil penalties of A$38 million (*ACCC v Visy Industries Holdings Pty Ltd [No 3]* (2007) 244 ALR 673), a follow-on class action seeking A$466 million in damages settled for A$95 million (*Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 1402). A second private damages action commenced by Cadbury Schweppes was reported to have settled for A$235 million; however, the terms of the settlement were confidential, so it is not possible to verify that figure.

In 2014, the Federal Court approved a settlement of A$38 million in the air cargo cartel class action, brought by air freight customers in relation to alleged cartel conduct by various airlines between 2001 and 2006 regarding the fixing of fuel and other surcharges. This settlement followed the ACCC successfully obtaining agreed penalties against multiple airlines.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

In Australia, only a court can impose civil penalties or criminal fines. These are not taken into account by a court in damages actions, as an applicant is entitled to recover damages for the actual loss or damage suffered by conduct in contravention of competition laws.

If a respondent has provided an applicant redress prior to trial, this will generally be taken into account by the court if it wholly or partly compensates the applicant for any loss or damage suffered.

4 Evidence

4.1 What is the standard of proof?

In Australian civil proceedings, including competition litigation, the overall standard of proof is the "balance of probabilities".

However, the standard that applies to individual elements of a claim may differ. For example, in determining whether conduct (including a merger) would be "likely" to substantially lessen competition in contravention of the CCA, the court must be satisfied that there is a "real commercial likelihood" or "real chance" of the conduct doing so. This is accepted as being a standard that is less than the balance of probabilities (i.e. "more probable than not"). (*ACCC v Pacific National Pty Ltd* [2020] FCAFC 77.)

A review by the Tribunal of authorisation determinations by the ACCC is not a judicial decision, but an administrative one (i.e. it is a rehearing or review of the original decision). This means that an evidentiary standard of proof does not apply. Rather, the legal standard is an administrative one that requires the Tribunal to be "satisfied" or have "affirmative belief" that the authorised conduct meets the requisite statutory test (*Telstra Corporation Limited and TPG Telecom Limited (No. 2)* [2023] ACompT 2 at [99]).

The standard of proof in criminal cartel matters is higher – "beyond reasonable doubt".

4.2 Who bears the evidential burden of proof?

In civil matters before the Federal Court, the applicant bears the burden of proof – whether that be the ACCC or a private party. However, if a respondent wishes to rely on any available defences, the respondent bears the burden of proof in establishing that defence.

In an application for review of an authorisation decision of the ACCC before the Tribunal, the applicant bears the burden of proof.

In criminal cartel matters, the CDPP bears the burden of proof.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

No, there is no presumption of loss in damages claims – proof of actual loss, and the quantum of that loss, is required.

4.4 Are there limitations on the forms of evidence that may be put forward by either side? Is expert evidence accepted by the courts?

Proceedings heard in the Federal Court (and Australia's other federal courts) are subject to the *Evidence Act 1995* (Cth) (**Evidence Act**), which governs the forms of evidence that are admissible.

Relevance is a necessary but not sufficient condition to admissibility (Evidence Act, s 56(2)). Once it is established that evidence is relevant, it will be admissible if it is not excluded by any other applicable rules (for example, inadmissible hearsay, opinion, tendency or credibility evidence) or in the exercise of judicial discretion.

Expert evidence is accepted by the courts and is commonly used in competition cases in Australia. Expert evidence is governed by the Evidence Act, Part 23 of the *Federal Court Rules 2011* (Cth) (**Federal Court Rules**) and the Expert Evidence Practice Note. Any expert witness must read and agree to be bound by the Harmonised Expert Witness Code of Conduct.

Where there are multiple competing expert witnesses, it is common for their evidence to be presented concurrently through what is referred to as a joint expert conference (or, colloquially, a "hot tub"). Commonly, judges will also request that experts seek to agree and file a joint expert report identifying matters that are agreed, and identifying key differences, prior to trial.

While the approach adopted to expert evidence varies depending upon the matters in issue and preferences of the presiding judge, in a hot tub, each expert typically presents his or her opinion (this can also be done jointly if there are multiple expert witnesses sharing the same opinion) and then each other expert witness is given the opportunity to respond. The experts can be cross-examined, and the judge may ask experts questions directly.

It is also possible for a party to seek to adduce survey evidence – that is, out-of-court statements or responses to a survey.

In limited merits reviews of merger authorisation decisions by the ACCC before the Tribunal, there are strict limitations on the evidence that may be put forward by parties. This is substantially restricted to material that was before the ACCC at the time of its original determination (CCA, s 102(9)-(10)).

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Before proceedings have begun

The ACCC is responsible for investigating potential competition law contraventions – whether civil or criminal. The ACCC has broad statutory powers to compel the provision of information and documents, and conduct examinations of individuals, if it has reason to believe that a person is capable of providing information of documents regarding a matter that constitutes or may constitute a contravention of competition laws. The ACCC will refer serious cartel conduct matters to the CDPP for consideration for criminal prosecution.

Generally, a private party has limited ability to obtain documents from the ACCC before proceedings have begun.

For private civil actions, there is the ability under the Federal Court Rules for parties to apply to the court for preliminary discovery before commencing a substantive claim (rule 7.22 and 7.23). To obtain preliminary discovery, the applicant must show that after making reasonable enquiries, they do not have sufficient information to decide whether to commence a proceeding and they reasonably believe that they may have a right to relief (see *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193).

After proceedings have commenced

Civil matters

Where a proceeding is commenced by the ACCC, the respondent is entitled to request that the ACCC provide it with every document in connection with the matter that tends to establish the corporation or other person's case (CCA, s 157), subject to some exceptions.

All parties to civil proceedings are also able to seek discovery. There are a range of discovery orders available to litigants, and the court will generally grant discovery if doing so will facilitate the just resolution of the proceeding and is necessary for the determination of issues in the proceeding.

Outside of formal discovery, a party to a proceeding can also obtain documents from another party by issuing a notice to produce. A notice to produce can seek documents that are mentioned in pleadings or affidavits or require a party to produce certain documents at a hearing or trial.

Criminal cartel matters

Unlike civil matters, the prosecutor in a criminal matter has a duty of disclosure, which derives from the central tenet of the Australian criminal justice system that accused persons are entitled to know the case against them. The duty of disclosure arises from the combination of the common law, statute, professional conduct rules, prosecution policies and practice directions of the courts. If a prosecutor does not comply with their duty of disclosure, this can result in a miscarriage of justice.

In prosecuting criminal cartel matters, the CDPP must comply with any applicable State or Territory laws and any court directions regarding disclosure (this will depend on the State or Territory in which the proceedings are commenced) as well as professional conduct rules. If not already required by those laws, the CDPP must comply with the requirements set out in the "Statement on Disclosure in Prosecutions Conducted by the Commonwealth" (**Statement of Disclosure**), which requires the CDPP to disclose any material that:

- can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case;
- might reasonably be expected to assist the accused to advance a defence; or
- might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.

Ordinarily, the CDPP's case will be provided to the accused by way of a "Brief of Evidence". The timing of provision of the Brief will depend on the jurisdiction in which the claim is first commenced, but often this will be during committal proceedings.

From third parties (by subpoena) during proceedings

Third-party evidence can be compelled through the issuance of subpoenas in both civil and criminal proceedings. A subpoena can be issued in relation to the production of documents or to compel a witness to appear to give evidence (or both).

In the Federal Court, a subpoena may be issued only with leave of the court. The party seeking leave for the issuing of a subpoena bears the onus of demonstrating to the court that the subpoena has a legitimate forensic purpose in relation to the issues

in the proceeding. The party seeking leave is also subject to pay any reasonable costs of compliance incurred by the third party.

There is no requirement for the party issuing the subpoena to provide notice to any other party.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Yes, a subpoena can be issued to compel a witness to give evidence.

Once a witness is sworn in and during the course of giving evidence, he or she may object to answering questions only on the basis of a particular privilege (e.g. legal professional privilege).

A person may apply to set aside a subpoena. The court may excuse a person from giving evidence without setting aside the subpoena if it would be unreasonable or unjust to require the person to comply with it.

Cross-examination of witnesses is common practice in competition law proceedings in Australia.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The ACCC does not make infringement decisions in Australia – any such decisions are made by the courts.

Findings of fact made by a court, or admissions of any facts made by a person, in public enforcement proceedings, are *prima facie* evidence of that fact in follow-on proceedings for damages (CCA, s 83). However, the cases state that it is inappropriate to make orders allowing for extended use of findings of fact where those facts have not been the subject of critical analysis (see *Australian Competition and Consumer Commission v Leahy Petroleum* (No 3) (2005) 215 ALR 301 per Goldberg J).

Infringement decisions by competition authorities in other jurisdictions have no probative value in Australian courts.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

In general, confidentiality is not a bar to the production of material through discovery, notices to produce, subpoena or interrogatories. Nor is it ordinarily a sufficient reason to deny inspection of documents, as the disclosing party is usually protected by the obligation to the court that the documents be used only for the purposes of the litigation (*Harman* obligation).

However, if will often be different when the party obtaining discovery is a competitor, as is often the case in competition cases, where disclosure would not only mean confidentiality is lost, but disclosure may cause commercial harm. The courts are well versed in dealing with issues of commercial confidentiality in such cases – and will typically make orders restricting the disclosure of truly confidential and competitively sensitive material to certain individuals where appropriate – such as to outside counsel, experts, and internal counsel.

However, the courts are increasingly reluctant to make general confidentiality orders without understanding the material to which the orders will relate, and applications for confidentiality generally need to be accompanied by evidence supporting the claim for confidentiality and why disclosure would cause prejudice.

Courts can conduct closed hearing sessions where competitively sensitive material is likely to be disclosed.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The ACCC does not have any formal or administrative process for expressing views on cases that are the subject of private litigation.

The ACCC has an express statutory right to formally intervene as a third party in private proceedings commenced under the CCA, with leave of the court (CCA, s 87CA). If the ACCC does intervene, it will be regarded as party to the proceeding and has all the rights, duties and liabilities of a party.

Usually, the ACCC will consider intervening only where a case involves either significant public interest, there are important or novel questions of statutory construction, or to make submissions about the "deleterious international nature of the conduct" even if the economic impact in Australia is small. While the ACCC does not intervene in every private case, it has done so over the years and will continue doing so where it considers the public interest to be served in some way.

The ACCC may also seek leave to appear in proceedings as an *amicus curiae* ("friend of the court") or as a non-party. This occurred recently in the *Epic v Apple* proceedings, which are currently on foot and due to be heard in March 2024. In that case, Apple sought a stay of the proceedings on the basis that the commercial agreement between it and Epic required all disputes to be determined in Californian courts. The ACCC made submissions concerning the public policy in favour of disputes involving Australia's competition laws being heard and determined by Australian courts. The court granted the ACCC leave to intervene as a non-party and make written submissions only as to issues of public policy.

4.10 Please describe whether the courts in your jurisdiction have a track record of taking findings produced by EU or domestic *ex-ante* sectoral regulators into account when determining competition law allegations and whether evidential weight (non-binding or otherwise) is likely to be given to such findings.

Findings of the EU or domestic *ex-ante* regulators are not taken into account by Australian courts and have no evidential weight in determining whether there has been a competition law contravention.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no justification or public interest defence available in civil competition or criminal cartel litigation.

Public benefits are only considered in the context of applications for authorisations from the ACCC. Parties can seek statutory protection from legal action to engage in future conduct that would otherwise contravene competition laws, including cartel conduct, exclusive dealing, misuse of market power, and anti-competitive mergers (s 88).

The ACCC must not grant authorisation unless it is satisfied that either (s 90):

- the conduct in question would not be likely to substantially lessen competition (this applies where the conduct sought to be authorised would otherwise be prohibited if it has the purpose, effect or likely effect of substantially lessening competition); or

- the conduct would result, or be likely to result, in a benefit to the public that would outweigh the public detriment that would or would be likely to result from the conduct.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

While it may be more apt to consider this issue in Australia as one relevant to whether the claimant has suffered loss, rather than as a defence, the question of whether there is a "passing on" or "pass-through" defence in Australia has not been determined.

There has been no authoritative judicial decision in Australia regarding the "passing on defence" and it has only been considered cursorily. However, in an interlocutory judgment in *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (2008) 251 ALR 166, the court commented that if a direct purchaser "*had passed on the full cost of the international airfreight services to all of its clients … it would seem to have suffered no loss*", which may indicate openness to the defence.

Indirect purchasers have legal standing to sue and will need to prove that they have suffered loss or damage by conduct in contravention of competition laws to be entitled to recover damages.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Yes, defendants can join other cartel participants to a claim as co-defendant in accordance with the Federal Court Rules. This occurred in the air cargo cartel class action, where various airlines who were the original respondents to the class action successfully applied to join other airlines to the proceeding, after those airlines settled related penalty proceedings with the ACCC.

A party may apply for an order that a person be joined as a party if the person:

- ought to have been joined as a party to the proceeding; or
- is a person:
- whose cooperation might be required to enforce a judgment;
- whose joinder is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined; or
- who should be joined as a party in order to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings.

Where an award for damages is made, defendants are jointly and severally liable (i.e. each person involved in the contravention that led to the litigant's loss and damage is jointly and severally liable for that loss).

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The applicable limitation period depends on whether the competition proceedings are criminal or civil, and in the case of civil claims, the relief sought.

There is no limitation period for criminal cartel cases. The only time constraint is that a criminal case can only be brought for conduct occurring since 24 July 2009, which is the date that criminal cartel offences took effect in Australia.

There is a six-year limitation period for civil claims seeking penalties or damages. Claims for damages must be brought within six years of the date on which the cause of action accrued, which is the date the loss or damage is suffered, rather than when it is discovered.

There is no limitation period for a proceeding seeking an injunction. While there is also no limitation period for relief sought under s 87 of the CCA (which gives the court broad discretion to make a range of other orders), s 87 does not provide applicants with a stand-alone right of action and therefore relies on another claim for relief (e.g. damages or an injunction).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The length of competition law litigation varies significantly, depending upon the circumstances. Proceedings at first instance can often exceed two years to complete but could be longer, depending on the number of parties, the number of witnesses, the volume of discovery, the legal and economic complexities of the case and the need for expert evidence. It is not uncommon for liability to be heard first, before a separate hearing on the question of remedies.

It is possible for a party to seek an order that an appeal or application to the court be expedited.

The timing of a criminal matter will also depend on the committal process in the relevant State or Territory where the proceedings are first commenced.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example, if a settlement is reached)?

Under the Federal Court Rules, a party claiming relief may discontinue a proceeding in whole or in part by filing a notice of discontinuance (this includes but is not limited to where proceedings are settled). The party may file the notice:

- without leave of the court or the other party's consent, at any time before the first court date; or, if the proceeding is continuing on pleadings, at any time before the pleadings have closed;
- with the opposing party's consent (before judgment); or
- with leave of the court, at any time.

Unless the terms of consent or an order of the court provide otherwise, a party who files a notice of discontinuance is liable to pay the costs of each other party to the proceeding in relation to the claim, or part of the claim, that is discontinued.

In the case of settlement of civil cases commenced by the ACCC involving the payment of a penalty, it is for the court to determine the appropriate penalty – although the parties may agree in principle on an appropriate penalty and make joint submissions to the court. The court is not a "rubber stamp", and while often the court will make orders in accordance with the parties' agreement, this not always the case, and there have been notable exceptions. In the high-profile civil case instituted by the ACCC against Volkswagen under Australia's consumer laws in relation to the emissions scandal, an agreed penalty of A$75 million was rejected by the Federal Court, which instead imposed a penalty of A$125 million. An appeal to the Full Federal Court by Volkswagen was unsuccessful, and the High Court refused an application for special leave to appeal.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Class actions/representative proceedings are permitted and are usually resolved by way of a collective settlement.

A representative proceeding may not be settled or discontinued without approval of the court, and if the court gives approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the court (s 33V, Federal Court Act).

The Federal Court has developed criteria for approving settlements, which are reflected in the Class Actions Practice Note (GPN-CA).

When applying for court approval, the parties will be required to persuade the court that:

- the proposed settlement is fair and reasonable having regard to the claims made on behalf of the class members who will be bound by the settlement; and
- the proposed settlement has been undertaken in the interests of class members, as well as those of the applicant, and not just in the interests of the applicant and the respondent(s).

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In civil proceedings, costs generally "follow the event". This means that the successful party is generally entitled to an order that the unsuccessful party pay its legal costs. However, costs orders are usually made on a "party/party" costs basis, which only account for a proportion of the total legal costs actually incurred by the successful party.

The court may depart from the usual party/party order and order indemnity costs, which are more generous, if there is "some special or unusual feature in the case" that justifies that course (*Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2)* (1996) 72 FCR 151). Indemnity costs entitle the recipient to all its costs apart from those unreasonably incurred.

The question of cost recovery becomes more complex where a party is only partially successful.

In civil cases commenced by the ACCC, the court can order indemnity costs against the ACCC where a reasonable offer of settlement was made to and rejected by it (*Australian Competition and Consumer Commission v Black on White Pty Ltd* [2002] FCA 1605).

In criminal cases, at common law, a successful defendant in a criminal case is not entitled to costs. Generally, an accused is not able to recover legal costs from the CDPP if it successfully defends criminal cartel proceedings.

8.2 Are lawyers permitted to act on a contingency fee basis?

Until 2020, there was a blanket prohibition on lawyers charging contingency fees in any Australian jurisdiction.

In the State of Victoria, following the passing of the *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic) on 18 June 2020, plaintiff lawyers are permitted to charge contingency fees in class actions commenced in the Supreme Court of Victoria and for those fees to be borne by group members. This creates an exception to s 183 of the Victorian Legal Profession Uniform Law, which provides that a law practice must not calculate its fees by reference to the amount of any award or settlement or the value of any property that may be recovered.

8.3 Is third-party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third-party litigation funding is permitted in Australia. The position on litigation funding was clarified by the High Court in 2006, where it held that it was not an abuse of process or contrary to public policy for proceedings to be funded and run by a litigation funder (*Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] 229 CLR 386).

Third-party litigation funding is common in Australia for class actions, although there have been relatively few competition class actions compared to others such as securities class actions. That said, in June 2022, twin class actions were launched against each of Apple and Google on behalf of end-consumers alleging various competition laws contraventions including misuse of power, as well as unconscionable conduct, in relation to Apple and Google requiring developers to use their respective payments systems for apps and in-app purchases, which it is alleged resulted in consumers paying higher prices for purchases than if there had been competition for payment methods. Both actions are funded by litigation funder Vannin Capital. In March 2023, the Federal Court allowed the class actions to be expanded to include local app designers and founders.

In addition, two class actions recently commenced against electricity generation companies alleging misuse of market power appear to have third party litigation funders: *Stillwater Pastoral Co Pty Ltd v Stanwell Corporation Ltd* (**Stillwater**), which is reported to be funded by LCM (file number QUD19/2021, commenced 20 January 2021) and *SA Country Pubs Pty Ltd v AGL Energy Ltd*, (file number NSD500/2023, commenced 1 June 2023), which has been filed by the same law firm as that running Stillwater. The cases, which are on foot, concern allegations of manipulation of the wholesale national electricity market to cause spikes in the regional spot prices of electricity in the states of Queensland and South Australia, respectively.

The air cargo cartel class action, which commenced in 2007 and settled in 2014, was also funded by a third-party funder.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes, first instance decisions of the Federal Court (single judge) can be appealed to the Full Federal Court (usually three judges) on errors of law (such as where the court has applied an incorrect legal principle or made findings of fact that are not supportable by the evidence).

Decisions of the Full Federal Court can be appealed to the High Court of Australia, with leave. The High Court is Australia's highest court. The High Court will only hear cases of significant importance, such as on new points of law, to resolve questions of law decided inconsistently by lower courts, or on matters of public importance.

In criminal cases, except in very limited circumstances, appeals must only involve questions of law, unless leave is granted.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes, immunity and leniency are available in Australia for civil competition claims, although civil (and criminal) immunity is only available for cartel conduct. Immunity provides legal protection from proceedings commenced by the ACCC (or CDPP), but it does not provide protection from third-party claims.

The ACCC is responsible for granting civil immunity and the CDPP is responsible for granting criminal immunity.

An applicant (either a corporation or individual) will be granted conditional immunity by the ACCC if it satisfies the following criteria:

- admits it has engaged in cartel conduct and that conduct may constitute a contravention of the CCA;
- is the first party to apply for immunity in respect of the cartel;
- has not coerced others to participate in the cartel;
- has either ceased its involvement in the cartel or undertakes to the ACCC that it will cease its involvement in the cartel;
- for corporations, the admissions are a "truly corporate act", rather than isolated confessions of individual representatives;
- has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application (including taking all reasonable steps to procure the assistance and cooperation of witnesses and provide sufficient evidence to substantiate its admissions) and agrees to continue to do so on a proactive basis throughout the ACCC's investigation and any ensuing court proceedings;
- has entered into a cooperation agreement; and
- has maintained, and agrees to continue to maintain, confidentiality regarding its status as an immunity applicant, details of the investigation and any ensuring civil or criminal proceedings unless otherwise required by law or with the written consent of the ACCC.

In May 2023, the ACCC expressly clarified that the obligation to provide "full, frank and truthful disclosure" and to cooperate "fully and expeditiously" includes providing all records of factual accounts given by witnesses in respect of the alleged cartel conduct, whether or not they are subject to claims of legal professional privilege.

If the ACCC is satisfied that the applicant has met the eligibility criteria for conditional immunity, it will write to the applicant granting conditional immunity in relation to any civil proceedings the ACCC might otherwise have taken against the applicant.

The ACCC is not likely to grant conditional immunity if, at the time the application is received, the ACCC is already in possession of evidence that is likely to establish at least one contravention of the CCA arising from the cartel.

If a corporation or individual does not qualify for immunity, or the conduct in question is not cartel conduct, they may choose to cooperate with the ACCC under its cooperation policy. Cooperation by a company or individual may allow for leniency with respect to penalties or sentencing should either civil or criminal proceedings be brought. However, in Australia, there is no pre-determined penalty discounts or other benefits for cooperating with the ACCC. Ultimately, it is a matter for the courts to determine what the appropriate penalty (or sentence) will be. However, the extent and value of a party's cooperation is a relevant factor that the courts will take into account in determining the appropriate penalty.

At the time of writing, the ACCC was in the process of reviewing its immunity policy including consulting with interested stakeholders.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

In Australia, there is no general right that enables a successful or unsuccessful applicant for immunity or leniency to withhold evidence disclosed by it to the ACCC (or CDPP) when obtaining leniency in any subsequent court proceedings.

Whether an applicant may be able to resist an application for access to or discovery of such documents will depend on the circumstances and the evidence being sought. In the past, the ACCC has successfully resisted an application for access to admissions made by a competitor in securing leniency from the ACCC on the grounds that the documents related purely to credit and are not discoverable (*Australian Competition & Consumer Commission v Visy Industries Holdings Pty Ltd* (No 2) [2007] FCA 444, upheld on appeal: see *Visy Industries Holdings Pty Ltd v Australian Competition & Consumer Commission* [2007] FCAFC 147). A leniency applicant may possibly be able to resist an application on the same grounds.

By contrast, in 2009, provisions were introduced in the CCA that enable the ACCC to withhold producing to the court or another party to a proceeding "protected cartel information", being information provided to the ACCC in confidence and relating to a possible breach of the civil or criminal cartel provisions. The ACCC may, but cannot be compelled to, produce protected cartel information to a party to proceedings or a court or Tribunal (except with leave in the latter case). However, in deciding whether to disclose protected cartel information, or to grant leave, the ACCC or the court/Tribunal (as applicable) must have regard to specific statutory factors (and not any other matters). Similarly, the ACCC may, but cannot be required to, disclose protected cartel information to another party to a proceeding, and if it does, it must consider specific statutory factors (and not any other matters). The ACCC may seek to resist disclosing leniency documents sought by a private litigant under subpoena based on the common law protection known as public interest immunity.

A private litigant could theoretically access leniency documents from the ACCC under freedom of information (**FOI**) legislation. However, the ACCC has almost invariably resisted FOI production, relying on one or more of the numerous exemptions in ss 33 to 47 of the FOI Act, and the courts have supported decisions to refuse access (e.g. *Telstra Australia Ltd v Australian Securities and Investments Commission* [2000] AATA 71).

11 Anticipated Reforms

11.1 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

The Directive does not apply in Australia.

11.2 Please identify, with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation; or, if some other arrangement applies, please describe it.

The Directive does not apply in Australia.

11.3 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The ACCC (as investigating body) and the CDPP (as prosecuting body) have experienced some significant setbacks in successfully prosecuting criminal cartels where liability has been contested. In mid-2021, in the first-ever criminal cartel jury trial, Australian mobility aid company Country Care and two individuals were acquitted of all charges following a lengthy 12-week trial and only four hours of deliberations. The CDPP then withdrew all remaining criminal charges against the Construction, Forestry, Maritime, Mining and Energy Union and a union official in August 2021 and in the high-profile bank cartel case in February 2022, the latter having been on foot since mid-2018.

These cases prompted calls to improve the drafting of the cartel provisions, which have been described as "devilishly complex and labyrinthine" – but there are no current proposed reforms.

However, with these setbacks and following the appointment of the new ACCC Chair, Ms Gina Cass-Gottlieb and new Enforcement Commissioner, Ms Liza Carver in March 2022, the ACCC has publicly stated that it is reviewing its processes and approach to investigating suspected cartel conduct to ensure that they are robust and can withstand scrutiny in future cases.

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His practice spans general competition law/antitrust as well as regulation of utilities and infrastructure. He regularly advises clients on complex merger clearances as well as acting in strategic competition and regulatory litigation. Simon has been involved in numerous leading competition litigation matters, including complex merger and cartel proceedings and private litigation under section 46 (misuse of market power) of the *Competition and Consumer Act 2010* (Cth). Simon is also one of Australia's leading advisers on regulatory issues in infrastructure markets, including telecommunications, energy, ports, rail, and water. He has acted for both regulators and infrastructure owners on a range of regulatory litigation, including defending proceedings and in judicial and merits review processes (both for and against regulators).
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