Cartel compensation – a consumer perspective

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Cartel conduct has been described as a "cancer on our economy" and the Australian Competition and Consumer Commission (ACCC) has had success pursuing penal relief, but generally consumers have not been compensated for its effects. This article examines some of the challenges facing claimants and proposes solutions to them in terms of what the law does or should support from a consumer perspective

INTRODUCTION

When the then Minister for Competition Policy and Consumer Affairs, Chris Bowen, was introducing the criminal (and parallel civil) cartel legislation which came into force under the then *Trade Practices Act 1974* (Cth) from 24 July 2009, he wrote:

> Ordinary consumers can't afford expensive lawyers to ensure that competition is working in their interest. That's the job of the ACCC. When this legislation passes the Parliament, the commission will have the tools it needs to stand up for consumers against this type of theft.[1]

The first criminal prosecution by the Australian Competition and Consumer Commission (ACCC) for cartel conduct pursuant to ss 44ZZRF and/or 44ZZRG of what is now known as the *Competition and Consumer Act 2010* (Cth) (Act) is still awaited. However, given the ACCC's past practice, it seems unlikely that it will be pursuing cartel participants to compensate consumers who have been overcharged as a result of cartel conduct. Certainly the ACCC has historically generally pursued penal relief and not compensation, indeed arguably at the expense of compensation, under the prior civil penal regime.[2]

There is of course s 79B of the Act which provides that if both a pecuniary penalty and compensation order are appropriate, and a respondent does not have sufficient financial resources to pay both, the court must give preference to making a compensation order. That provision has, however not been given any work to do as the ACCC has typically claimed only penal relief and not compensation orders in cartel cases.[3]

What then are the prospects for consumers seeking redress? To date three individual claims have been pursued by large corporations under the prior cartel prohibitions in ss 45, 45A and 4D of the Act. All have settled on confidential terms and accordingly provide no guidance as to what is recoverable.[4] Most individual claimants do not have the resources to mount such actions, but three representative proceedings under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) have been

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[1] Chris Bowen (then Minister for Competition and Consumer Policy), "Making Jail as Real for Cartels as the Temptation to Steal", *Sydney Morning Herald* (5 November 2008) p 13, http://www.chrisbowen.net/media-centre/opinion-pieces.do?newsId=2292 viewed 10 May 2011.

[2] See Wylie I S, "When Too Much Power is Barely Enough – Section 155 of the *Trade Practices Act* and Noblesse Oblige" (2009) 16 CCLJ 314 at 316 and 340-341.

[3] The Australian Competition and Consumer Commission (ACCC) can theoretically take action under ss 87(1A)(b) and 87(1B) of the *Competition and Consumer Act 2010* (Cth) on behalf of consumers with their prior written consent, but it has not done so presumably because of practical difficulties identifying affected consumers. In respect of provisions of the Australian Consumer Law, a somewhat broader (but as yet untested) right of action by the ACCC is now permitted by s 237 of Sch 2 to the *Competition and Consumer Act 2010* (Cth), but the narrower provisions of ss 87(1A) and 87(1B) remain applicable to cartel conduct (and other contraventions of Pt IV and IVB of the *Competition and Consumer Act 2010* (Cth)).

[4] The claims of Ergon and Energex against Alstom and others in Federal Court VID 1212 of 2005 arising out of the transformer cartel and the claim of Cadbury Schweppes in Federal Court VID 1377 of 2006 against Amcor arising out of the cardboard box cartel.

taken in relation to vitamins, cardboard box and rubber chemicals cartels, also relying on the old prohibitions.[5] Each has now been resolved after a number of years of hard fought litigation by settlements, again providing no guidance as to what is recoverable at law.[6]

The object here is accordingly to advocate a consumer/class perspective as to what recovery the law does and/or should support, focussing first on basic damages principles under the Act, then applying them in the cartel context and addressing the principal practical issues which arise as to recovery.[7]

CAUSATION OF DAMAGE

Principles of causation of s 82(1) damages

Section 82(1) of the Act entitles consumers to recover the amount of the loss or damage (or injury) suffered *by* the pleaded conduct engaged in by cartel participants.[8] The word *by* generally takes up the common law practical or common-sense concept of causation.[9] Curiously the uniform Australian Consumer Law has now introduced the slightly different words "because of" in relation to damages actions for consumer law breaches, although apparently no change to the substantive law was intended.[10] In any event, s 82 remains in its pre Australian Consumer Law form applicable to cartel (and other anticompetitive conduct) claims, so that all existing authority undoubtedly applies.

The "but for" test is not a comprehensive and exclusive criterion, and can be tempered by value judgments and policy considerations.[11] Issues of causation under the Act are to be determined by reference to the statutory subject, scope and purpose of the Act.[12] Remoteness is relevant in assessing damages under s 82 so that damages which are reasonably foreseeable at least in a general way by the contravener are recoverable.[13]

The objects of the Act tell against a narrow inflexible construction of s 82(1). Where a breach has materially contributed to damage, it will be regarded as a cause despite other factors. The necessary causal connection will ordinarily exist even though the breach without more would not have brought about the damage, and the total damage actually suffered will be recoverable.[14]

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[5] The claims of Darwalla Milling against Hoffman-la Roche and others in Federal Court V359 of 1999, of Jarra Creek against Amcor and Visy in Federal Court proceeding NSD 702 of 2006 and of Wright Rubber Products against Bayer and Chemtura in Federal Court proceeding VID 882 of 2007.

[6] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388; final orders of Jacobsen J in NSD 702 of 2006; a proposed settlement awaits approval in NSD 882 of 2007.

[7] A complex related issue of law and policy which is accordingly beyond the scope of this article is what the ACCC and legislature should do to facilitate cooperation between public and private enforcers of the *Competition and Consumer Act 2010* (Cth), in particular to lower hurdles to proof faced by private litigators where public enforcement has been successful: see eg the Competition Roundtable on private enforcement convened by Associate Professor Caron Beaton-Wells of Melbourne Law School on 11 November 2010 at http://www.clen.law.unimelb.edu.au/go/news-and-events/roundtable-private-enforcement viewed 30 March 2011.

[8] Both directly and as corporations *involved* equally exposed to an award of damages to the extent that they were aware of the essential facts and matters constituting the contraventions: *Yorke v Lucas* (1983) 80 FLR 143 at 152-153 (Bowen CJ, Lockhart and Beaumont JJ).

[9] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 (Mason CJ).

[10] Section 236 of Sch 2 to the *Competition and Consumer Act 2010* (Cth).

[11] *Chappel v Hart* (1998) 195 CLR 232 at [62] (Gummow J).

[12] *Travel Compensation Fund v Tambree* (2005) 224 CLR 627; [2005] HCA 68 at [28]-[29] (Gleeson CJ), [49] (Gummow and Hayne JJ), [57]-[60] (Kirby J) and (Callinan J) at [78]-[80] and the cases there referred to.

[13] *Henville v Walker* (2001) 206 CLR 459 at [136] (McHugh J).

[14] *Henville v Walker* (2001) 206 CLR 459 at [106] and [140] (McHugh J), [153] (Gummow J concurring) and [163] (Hayne J to the same effect); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [50] (Gaudron, Gummow and Hayne JJ).

Causation sufficient to ground s 82(1) damages claims against a respondent is established if the respondent's contraventions were one of the causes of the applicant's loss.[15] Once that causation is established, it is clear the respondent is liable for the entire loss; notions of contributory fault on the part of the applicant for relief do not operate.[16]

Moreover, as was made clear by Gaudron, Gummow and Hayne JJ in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [62]:

> because the relevant question is whether the contravention was a cause of (in the sense of materially contributed to) the loss, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare.

Loss or damage that is merely potential or contingent is not recoverable, but lost opportunity is loss or damage under s 82.[17]

How then to establish that cartel conduct in fact caused loss and damage?

Cartel operators typically maintain the Sergeant Schultz defence ("we know nothing"),[18] ie even if the cartel was entered into by senior management of a corporation, it did not in fact implement the cartel in a manner which raised prices higher than they would have been in its absence, because the (usually more junior) employees who quoted and otherwise set prices were not aware of the cartel. The next line of defence is then typically that if they gave effect to the cartel it was nevertheless not effective for a range of complex customer and other market specific reasons. Their third line of defence is that if the cartel was in fact effective, nevertheless no loss was suffered or can be proved given the invariably complex facts, variables, economics and econometrics involved. For example it is claimed that in the "but for" world, prices would have been as high as prevailed during the cartel for any number of reasons, including that prices were unsustainably low prior to it.

If defence hurdles 1 to 3 inclusive are overcome, the cartel participants maintain that even if consumers can prove that they have been overcharged, there is no recoverable damage as the overcharge was passed on to the consumers' downstream customers so that no compensable loss or damage was suffered.

The best answer may be that even if particular cartel participants establish that in particular instances they cheated on or otherwise did not implement the cartel that will not absolve them of responsibility for causation of loss. The consumer's case is at its most basic that all participants in the cartel materially contributed to all losses caused by their involvement so that each will be jointly liable for overcharges by the other, whether or not their own customers were the beneficiary of the equivalent of competitive pricing in particular instances.

Moreover, cartel participants do not usually engage in illegal activity with its attendant risks for their own amusement. They do so to secure market-wide pricing and related outcomes which lessen competition and as a result are favourable to them. A healthy degree of scepticism is required to their plaintive cries that "unsustainably low" prices could not and would not have continued absent the cartel.

[15] *Henville v Walker* (2001) 206 CLR 459 at 469 (Gleeson CJ).

[16] *Henville v Walker* (2001) 206 CLR 459 at [164]-[165] (Hayne J), *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [50] (Gaudron, Gummow and Hayne JJ).

[17] *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [46], [55] and [66]; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

[18] With apologies to *Hogan's Heroes*.

QUANTIFYING CARTEL LOSS AND DAMAGE

Principles of assessment of s 82(1) damages

Once a sufficient causal connection is established, assessment of damages is not to be limited by drawing analogies from the law of contract or tort. The wide language of s 82 reflects a desire to broaden the scope of recovery, not limit it. Loss is not limited to economic loss, and economic loss may take a variety of forms.[19]

The usual but not exclusive test when assessing s 82 damages is to compare the position the applicants are in with the position they would have been in had there been no contravention. There must be a relationship between the manner in which the conduct contravenes the Act and the alleged damage for it to be recoverable, so that damages will extend to the difference between the prices which were paid for the product or service concerned and the prices which would or should have been paid had the cartel not existed, along with damage causally flowing from that difference, subject to that damage not being too remote.

How consumers satisfy estimation and burden of proof principles

Once the court is satisfied that damage has occurred, the lack of precise evidence and uncertainty is no bar, and the court will do the best it can to quantify the loss even if a degree of speculation and guesswork is involved.[20] Consumers must prove that they have suffered loss or damage on the balance of probabilities, but need only prove the amount of damage with as much certainty as is reasonable in the circumstances.[21]

Moreover, the High Court has confirmed that where an applicant cannot adduce precise evidence of what has been lost, for example when it is based on information primarily within the knowledge of the respondent, a degree of estimation if not guesswork may be required.[22] Once a claimant puts forward a reasonable methodology and estimation, a respondent in a better position to provide information for a more accurate measure cannot simply criticise the claimant's methodology and estimation as inadequate.[23]

A failure to produce information can afford sufficient evidence to make out a prima facie case the respondent must displace, thus imposing an evidential burden on the respondents.[24] Likewise the evidential burden can shift to the respondents where it concerns matters peculiarly within their knowledge.[25]

The consumers' task is accordingly to settle on a methodology which as a practical matter can be used and is the most reliable/appropriate given the data available and its limitations, and to support that methodology with appropriate expert evidence, so that applicants may be entitled to "burden shifting" pursuant to *Placer (Granny Smith) Pty Ltd v Theiss Contractors Pty Ltd* (2003) 196 ALR 257 and its antecedents.

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[19] *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [45]; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525. Interest is claimed pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth).

[20] *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 57 ALR 167 at 182-183 and *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 (Mason CJ and Dawson J); *Jones v Schiffman* (1971) 124 CLR 303 at 308 (Menzies J). The same principle has been applied in American antitrust cases: *Story Parchment Co v Patterson Parchment Paper Co* 282 US 555 (1931).

[21] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 348-356; *O'Neill v Medical Benefits Fund of Australia Ltd* (2002) 122 FCR 455.

[22] *Placer (Granny Smith) Pty Ltd v Theiss Contractors Pty Ltd* (2003) 196 ALR 257 at 259, [6] (Gleeson, McHugh and Kirby JJ) and 266, [37]-[38] (Hayne J).

[23] *Placer (Granny Smith) Pty Ltd v Theiss Contractors Pty Ltd* (2003) 196 ALR 257 at 267, [40]-[41] (Hayne J) and 277, [72] and 278, [75] (Callinan J).

[24] *Katsilis v Broken Hill Co Pty Ltd* (1977) 181 ALR 181 at 197 per Barwick CJ whose observations, though in the minority, have subsequently been approved and applied, recently for example in *IPN Medical Centres (NSW) Pty Ltd v Idoshore Pty Ltd* [2008] FCAFC 163.

[25] *Morgan v Babcock* 43 CLR 163 at 178; *Hampton Court v Crooks* (1957) 97 CLR 367 at 371-372; *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168; *Apollo Shower Screens Pty Ltd v B & CILSP Corp* (1985) 1 NSWLR 561.

Australian and United States cases on assessment of antitrust damages

There is little Australian authority on the assessment of damages caused by contravention of Pt IV of the Act,[26] although the approach in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 has been applied in the context of a Pt IV claim.[27]

There is no direct Australian authority on the appropriate measure of loss, damage or related relief in cartel proceedings,[28] but it is clear in the United States that the applicants can recover increased costs (prices) they were obliged to pay as a result of the impugned conduct (usually described and measured as "overcharge") from all participants in the cartel.[29]

Alternative ways in which the competitive price might be determined on United States authority are noted below, and should be considered depending on what data is or is not available from the respondents or otherwise in the particular case:

- the general free market price in other periods or the price charged by the respondent during a prior free market period adjusted forward: *Armco Steel Corp v North Dakota* 376 F 2d 206 at 210ff (1967), *Muskin Shoe Co v United Shoe Machinery Corp* 167 F Supp 106 at 111 (1958), *Hanover Shoe Inc v United Shoe Machinery Corp* 247 F Supp 258 at 287ff (1965) and *Ohio Valley Electric Co v General Electric Co* 244 F Supp 914 at 946ff (1965);
- the respondent's price to other buyers in the same area or in other geographical areas where the price has not been fixed: *Strauss v Victor Talking Machine Co* 297 F 791 at 803 (1924), *Chattanooga Foundry and Pipeworks v Atlanta* 203 US 390 (1906);
- the price of other brands of the same goods not subject to price fixing: *Osborn v Sinclair Refining Co* 324 F 2d 566 at 570 (1963);
- prices revealed by national averages: *Bray v Safeway Stores Inc* 392 F Supp 851 at 863ff (1975), and
- in the United States a number of those factors can be considered in order to determine the price which would have been charged but for the conspiracy: *Wall Products Co v National Gypsum Co* 357 F Supp 832 (1973).

As between the applicant/group members and the respondents, cartel members should be jointly and severally liable for all overcharges, as is the case in the United States.[30] The United States position is of course not determinative, but the same result should prevail on Australian causation principles – each materially contributed to the other's prices being higher than they otherwise would have been and vice versa. Thus each is responsible for the other's overcharges regardless of the individual supply and capacity constraints and other variables which may be asserted in their defences.

As to quantum, a number of approaches have been used in the United States to determine the price the applicant would have had to pay in a competitive market unaffected by the impugned conduct. The most common approaches are yardstick and benchmark approaches. There often being no appropriate yardstick (other market) for the Australian market being considered (given our small

[26] In *Hubbards Pty Ltd v Simpson Ltd* (1982) 60 FLR 432 at 440, Lockhart J compared the position the applicant might have expected to be in if resale price maintenance had not occurred with the position it was in as a result of that contravention, his Honour stating that he approached the matter as akin to a tortious claim. In *Cool & Sons Pty Ltd v O'Brien Glass Industries Ltd* (1981) 35 ALR 445 at 463, Keely J awarded lost profits on sales lost as a result of illegal exclusive dealing and price discrimination along with the extra price paid as a result of receiving a lower discount and adding a fee for after hours sales. That award was reduced slightly on appeal without reasons but with the Full Court's approach was generally consistent with *Hubbards*: *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1983) 48 ALR 625 at 637.

[27] *Parry's Pty Ltd v Simpson Ltd* (1983) 76 FLR 60 at 87-88 (Toohey J), his Honour estimating part of a resale price maintenance damages claim based on the principle that in assessing damages which depend on what will happen in the future or would have happened if something had not happened in the past, the court will estimate the chances that a particular thing will or would have happened and reflect those chances (whether more or less than even) in the amount of damages awarded.

[28] Corones S, "Proof of Damages in Private Competition Law Actions" (2002) 76 ALJ 374.

[29] *Hanover Shoe Inc v United Shoe Machinery Corp*, 392 US 481 at 489, 88 S Ct 2224 at 2229, 20 L Ed 2d 1231 (1968),; *Lee-Moore Oil Co v Union Oil Company of California* 599 F 2d 1299 (1979).

[30] *Texas Industries Inc v Radcliff Materials* 451 US 630; Areeda P, *Antitrust Law* (Aspen Law & Business, New York, 1986) para 330d.

economy and concentrated markets compared to the United States), it is likely that a benchmark approach will be adopted, being a comparison to a clean period (ie a cartel-free workably competitive period) in the same market. Typically (at least based on United States jurisprudence) that involves conducting multiple regression analysis to isolate and measure the effects of the alleged cartel from other determinants of prices, and then cross checking against alternative econometric estimations and simpler non-econometric estimations based on other available data.

AGGREGATING AND ESTIMATING INDIVIDUAL DAMAGES

Sections 33Z(1)(f) and 33Z(3) of the FCA Act should apply to broaden consumers' rights

Perhaps the biggest challenge for cartel affected consumers is proving their individual loss or damage, faced with respondents who with some factual basis claim that the market circumstances of each customer consumer is different and requires individual treatment and assessment. Such treatment will in most cases defeat the objective of representative proceedings to yield compensation for wrongs where individual pursuit of claims is not possible or economic.

One answer[31] is to seek aggregate damages (awarding damages in an aggregate amount without specifying amounts awarded to individual group members), which are available pursuant to s 33Z(1)(f) and s 33Z(3) of the FCA Act, provided that a "reasonably accurate assessment" of the total amount to which group members will be entitled can be made.[32]

The *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424 (*Golden Sphere*) provides some authority for a broad application of s 33Z(1(f), O'Loughlin J there deciding:

> "assessment of damages" imports an element of judicial discretion: assessing damages is not the application of mathematical formulae. When it is qualified by the words "reasonably accurate" it can be said, with confidence, that the judicial discretion has been widely extended. I am satisfied that the legislature has intended that the practical application of the provisions of Part IVA of the FCA Act is not to be read down through any evidentiary inability to identify every member of the group and the relevant amount of damage that each member has or may have suffered.

Notably in the *Golden Sphere* decision, O'Loughlin J considered burden of proof issues carefully, but rejected the respondents' claim that he should only award the damages which the ACCC had proved on an individual basis at trial, namely $1,000 lost by a selected few persons who gave evidence, compared to the $550,000 ordered principally on the basis of a rough and ready assessment of variable damages amounts and claimant numbers advanced by the ACCC.

In *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 (*Schutt*), Ormiston JA described O'Loughlin's approach in the *Golden Sphere* decision as "broad brush" at [36], but only explicitly addressed and disagreed with it to the extent that it could be interpreted as endorsing awards which were *insufficient* to enable group members to recover full damages (which was not Ormiston J's reading of the approach). The minority expressed the view that s 33Z(f) and s 33Z(3) expanded traditional damages principles consistent with O'Loughlin J.[33]

On appeal, the High Court in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 held the Rules valid over multiple objections, with the court not in substance addressing the particular issue of

[31] Cy-pres remedies have also been suggested more generally in the context of representative proceedings, but despite use in the United States have not found favour in this area in Australia. Most recently the NSW Parliament proposed their introduction in Supreme Court representative proceedings by s 178(5) of the *Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010*, but then heeded calls by large corporate law firms and the State's law society by removing them from the Bill: "Cy-pres Remedies Dumped from Bill", *Financial Review* (3 December 2010). Fundamental tension remains between the generally compensatory (rather than punitive) approach of our legislation, and advocates of improved access to justice and avoid unjustly enriching wrongdoers.

[32] *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1998) 83 FCR 424 at 448-449 (O'Loughlin J).

[33] Importantly, *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 at [23]-[29] (Brooking JA)], at [5] Winneke P] was not itself a decision on s 33Z, but rather a decision on whether the equivalent Victorian

the scope of s 33Z. Only Gleeson CJ (in obiter at [25]) cited with approval the observations of Ormiston J in *Schutt* (at [35]-[37]); no other judge considered it and the case did not concern it. A number of other cases have challenged the constitutional or other validity of various aspects of Pt IVA of the FCA Act. They have not generally succeeded and no such challenge has been made to s 33Z(1)f).

It is one thing to construe a rule of court narrowly so that it is within power and valid as the Victorian Supreme Court and High Court did in the *Schutt/Mobil* decision. It is quite another to construe a section of a Federal statute which is aimed at increased access to justice and efficiency narrowly, contrary to those objects and in the absence of any challenge to validity.

The *Golden Sphere* decision has not been overruled and there is no binding Full Court or High Court authority disapproving it or to the contrary. Trial courts should accordingly follow it unless convinced that it is "clearly wrong" or "plainly wrong".[34]

In construing s 33Z(1)(f), the court must strive to give meaning to every word of the relevant provisions to give them the meaning the legislature intended them to have. That is ordinarily the literal or grammatical meaning, but informed by the consequences of a literal or grammatical construction and the purpose of the Act and its provisions.[35]

To similar effect the court should adopt a construction of the section which achieves the purposes of Pt IVA of the FCA Act, by furthering its objectives.[36] The purpose of Pt IVA is relevantly to make it economically viable to recover relatively small individual amounts, and to deal more cheaply and efficiently with the recovery of larger amounts.[37]

Section 33Z(1)(f) should accordingly be construed broadly with a view to efficiency and to give meaning to the qualifying words used, "reasonably accurate", as O'Loughlin J did in the *Golden Sphere case*. If anything, the section should now be construed more broadly since the introduction of s 37M of the FCA Act on 1 January 2010 which requires that the court construe and apply it in the way that best promotes the overarching purpose. That purpose of course focuses on the quick, inexpensive and efficient resolution of disputes at a cost proportionate to the importance and complexity of the matters in dispute.

Courts should accordingly apply the *Golden Sphere* decision for the above reasons and because it is also consistent with the more specific extrinsic materials relating to a forerunner to the section prior to the introduction of Pt IVA.[38]

Rules of Court were within power and accordingly valid. It is only in that latter context that a majority held that they were within power, in part on the basis that the new Victorian Rules did not require assessment other than accordingly to existing principle, and were accordingly within the relevant power to make rules relating to practice and procedure: Ormiston JA at [35].

[34] *Marr v Australian Telecommunications Corp* (1991) FCR 82 at 85.5 per Hill J; *Bank of Western Australia Ltd v Commissioner of Taxation* (1994) 55 FCR 233 at 255E (Lindgren J and the authorities there cited); *Interpharma Pty Ltd v Commissioner of Patents* [2008] 78 IPR 51 at [14] (Sundberg J).

[35] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] and [78] (McHugh, Gummow, Kirby and Hayne JJ). No word is to be considered superfluous or insignificant if by any other construction it can be made useful and pertinent: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71].

[36] *Visy Paper Pty Ltd v Australian Competition and Consumer Commssion* (2003) 216 CLR 1 at 24 [70]-[78] (Kirby J) and *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447 at 533-534 (Burchett J). That principle of course also has a statutory basis in s 15AA of the *Acts Interpretation Act 1901* which provides that a construction which promotes the purpose or object of the relevant Act is to be preferred to a construction which would not.

[37] Australia, House of Representatives, Second Reading Speech (14 November 1991) (*Hansard*, pp 3174-3175). "Like other provisions conferring jurisdiction upon or granting powers to a court, Part IVA is not to be read by making implications or imposing limitations not found in the words used; this is so even where the evident purpose of the statute is to displace generally understood procedures": *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at [11] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

[38] In 1988, the Australian Law Reform Commission Report No 46 (ALRC 46), which ultimately lead to Pt IVA, considered only permitting aggregate assessment where the same degree of accuracy could be obtained as in an individual action of the same kind, but the Commission was of the view that was too strict and instead recommended that it should be permitted provided the

Not only must the words of s 33Z(1)(f) be construed broadly, but there is precedent for aggregate awards to be made and the court should exercise its discretion to make it. They have not to date commonly been made in Australia, but they have recently been upheld consistently in other common law class action jurisdictions.[39]

Aside from the *Golden Sphere case*, aggregate assessments have been used in consumer credit actions for overcharging in Australia.[40] They have been used historically where the relief claimed is more in the nature of restitution than unliquidated damages and/or quantum can be calculated from the respondent's records.[41] Consumer cartel damages proceedings are analogous.

In those earlier cases it might be said that the process is a relatively simple calculation rather than broader more complex aggregate assessment, but is some cases in Canada and the United States total liability in complex overcharging cases has been assessed with individual calculation and adjustment left to the distribution stage.[42]

Aggregate assessment is equally possible under pre-existing damages principles, with Pt IVA procedures applied to finalise distributions

In the alternative, if a "reasonably accurate assessment" of damages is no more and no less than is ordinarily made when unliquidated damages are assessed individually,[43] the court can of course in proceeding pursuant to s 33Z and generally nevertheless apply all the pre-existing common law principles developed to facilitate proof of damages where difficulties arise as summarised above.

Alternatively consumers may be able to rely on s 33Z(1)(e) which provides for the award of specified amounts or formula assessment which is not limited by the requirement of "reasonably accurate assessment".[44]

Defeating the "each individual case is different and must be heard" approach

Multiple regression methods can produce individual and aggregate assessments taking into account all available data about the market and similar customers, and in many cases are likely to be the most accurate method realistically available to assess the overcharge of any individual group member. Customer by customer analyses that do not account for information about the market generally can generate less reliable damages estimates and would be prohibitively expensive. If respondents establish that the damages model used does not have sufficient regard to the individual circumstances of group members and for that reason there may be inaccuracies within the group or over or under compensation in any individual cases, that can be addressed in representative proceedings following determination of the common questions and establishment of a fund pursuant to s 33ZA of the FCA Act by appropriate rules for the making and assessing of claims.

assessment "is reasonably accurate": ALRC 46 at [228]. Notably the ALRC recognised room for error (cf the respondents' averaging criticisms), but considered that overcome by procedures for establishing a fund, distributing it after establishing some level of individual group member entitlement, and returning the residue to respondents: ALRC 46 at [229]-[240].

[39] *Markson v MBNA Bank* [2007] OJ No 1684 (Ontario Court of Appeal); *Irving Paper Ltd v Atofina Chemicals Inc* [2009] OJ No 4021 (a Hydrogen Peroxide Cartel class action); *Pro-Sys Consultants Ltd v Infineon Technologies AG* (British Columbia Court of Appeal 12.11.09).

[40] *Re Grace Bros Financial Services Ltd* (1987) ASC 55-591.

[41] ALRC 46 [224]-[225] and *Chastain v British Columbia Hydro and Power Authority* (1972) 32 DLR (3d) 443.

[42] In *Alberta Pork Producers Marketing Board v Swift Canadian Co Ltd* 34 Alba LR (2d) 274 (1984) the Board conspired to fix hog prices. Once the extent to which prices had been illegally lowered was established, total damages could be assessed by multiplying the price differential by the number of hogs sold, leaving the amount of each individual's entitlement to the distribution stage. *Daar v Yellow Cab Company* 67 Cal 2d 695 (1967) was another overcharging class action involving aggregate assessment concerning taxi fares with many variables involved. It went further to suggest that the unclaimed residue of aggregate assessment could be applied to reduce prices generally until it was consumed, beyond the principles advocated by the ALRC.

[43] *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 at [55] (Phillips JA).

[44] Its scope does not appear to have been the subject of considered authority, although it was the basis of the claims in *Marks v GIO* (1998) 196 CLR 494. *Cameron v Qantas Airways Ltd* [1995] FCA 1304 resulted in the award of small specified amounts pursuant to it, and the claims in *Metcalfe v NZI Securities* [1995] FCA 1271 were also based on it.

Individual representative sample customer claims can also be advanced at the initial trial of common questions, but their utility as being representative of other claims will depend on the market and other facts in particular cases. At least in some cases, an aggregate approach is likely to provide the most reliable overall estimate of market impact based on all available market data, having both the robustness of reliance on all available data and an ability to adjust for individual discrepancies. Importantly, multiple regression models can calculate both individual group member and aggregate damages, the latter being simply the sum of the former.[45]

PASS-ON DEFENCE SHOULD NOT BE AVAILABLE

The authorities do not support legal availability of the defence

United States Federal Courts have consistently rejected the "pass on" defence – that the applicant suffered no damage because it passed on the overcharging – for reasons of remoteness, pragmatism and policy.[46] That approach was confirmed by the United States Supreme Court when an indirect purchaser sought unsuccessfully to use the pass on defence offensively to recover building price increases from masonry manufacturers and distributors which allegedly fixed the price of concrete blocks.[47]

The United States Antitrust Modernisation Commission foreshadowed possible repeal of *Illinois Brick Co v Illinois* 431 US 720 (1977) and other changes to the availability of indirect purchaser claims in the United States in April 2007, but that has not occurred. Various States have legislated to permit indirect purchaser claims but the position remains generally that the pass on defence is not available nationally in the United States.[48] The defence has been discussed but not established in Europe.[49]

Heydon has expressed extra curially a preference for the minority view in the *Illinois Brick* decision, but it is premised on the respondent establishing that the applicant passed on the unlawful cost increase to the ultimate customer and on that indirect purchaser bearing the higher price being entitled to recover that damage.[50] More difficult questions arise where both direct and indirect purchasers sue, but it is suggested that at least where only direct purchasers claim, pass on should be disregarded by the courts.

There is to date no Australian authority on the availability of the defence to a damages claim under s 82 of the Act. However, in *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 77-78 and 90-91 (*Royal*), the High Court held in the context of an unjust enrichment claim concerning stamp duty allegedly passed on that the defence will not be available; ie the fact that the burden was passed on to a third party did not affect the fact that, as between the Commissioner and Royal, the former had been enriched at the expense of the latter.

The Royal decision was applied by the High Court in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 and recently by the Victorian Court of Appeal in *Hilliard v Westpac Banking Corp* [2009] VSCA 211 at [83] (*Hilliard*).

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[45] This was the approach adopted by the applicant in the Amcor Visy class action: see the applicant's report of Professor D Rubinfeld filed on 11 March 2010 in the Federal Court proceeding NSD 702 of 2006.

[46] *Hanover Shoe Inc v United Shoe Machinery Corp* 392 US 481 (1968).

[47] *Illinois Brick Co v Illinois* 431 US 720 (1977), applied recently, for example, in the United States Court of Appeals, Third Circuit in *Howard Hess Dental Laboratories, Inc v Dentsply International, Inc* 424 F 3d 363 (2005).

[48] See recently for example *Clayworth v Pfizer Inc* No S166435, 2010 WL 2721021 (Cal July 12 2010).

[49] See the European Commission's *Green Paper: Damages Actions for Breach of the Antitrust Rules*, COM (2005) 1732 (Brussels, 20 December 2005) and more recent responses to and debate concerning it including EC White Paper of 2 April 2008.

[50] Heydon JD, *Trade Practices Law* (Thomson Lawbook Co, 2002) 18.1530 at [18-20053].

Moreover, the broad policy-based approach to causation under the Act affirmed in the High Court in *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 points towards a generous measure of "loss or damage", and the s 2 objects of the Act support a lenient approach to an applicant consumer seeking to establish "damage".[51]

Additionally, the practical reality is that proving pass on or its absence is a factual and economic morass, one of the reasons why the defence remains unavailable federally in the United States. American (and other) forests have been destroyed to facilitate learned writings on the topic,[52] but the reality is that there are almost as many views available as there are expert economists opining on the subject.[53]

Victims of cartel conduct should accordingly contend that pass on will not be available as a matter of law as a defence to s 82 claims. If that contention fails, the defence should not in any event be available if s 87 and/or unjust enrichment/restitution or deceit claims can be maintained in the alternative.[54]

Claimants should maintain in any event that, if the defence is available, the respondents bear the onus of establishing pass on to reduce damages. Heydon (extra curially) and Tracey J[55] have both approached the issue on the basis that pass on would have to be demonstrated by respondents, in the same way that generally the burden of proving that a plaintiff should have taken steps to mitigate his loss to reduce damages is on the defendant.[56]

Where the burden of proof lies is confirmed by asking whether the allegation of failure to pass on (or its converse) is alleged by the applicant or respondents.[57] Applicants should accordingly not allege the absence of pass on so that it must be raised and proved in defence.

To the extent that pass on is alleged in defence, cartel participants should accordingly be required to prove as a matter of fact that pass on occurred and can be measured reliably, and that it is not counterbalanced by output effect – ie the tendency to sell less product given the elevated prices caused by the cartel. Complex economic and econometric evidence is likely to be required.

Section 87(1), unjust enrichment, restitution and deceit claims

If pass on is a defence to s 82 claims given their compensatory nature, what other claims can be pursued?

Section 87(1) confers a wide discretionary power to order compensation in whole or part where a party has suffered or is likely to suffer loss or damage (or injury see s 4K) whether or not an injunction is granted under s 80. It expressly authorises damages orders in the nature of those encompassed by s 82 by its reference to including the relief stated in s 87(2), in particular s 87(2)(d) which reflects the substance of s 82(1).[58]

Section 87(1) provides for compensatory damages like s 82(1), but it goes further. In its terms it permits orders which will compensate in whole or in part for loss or damage and orders which will prevent or reduce loss or damage, including pursuant to s 87(2)(c) an order directing the person who

[51] See eg Corones, n 28.

[52] See eg Verboven F and Van Dijk T, "Cartel Damages Claims and the Passing-on Defence" (2009) 57 *Journal of Industrial Economics* 457 and the articles there referred to.

[53] See eg the court record in the Jarra Creek proceeding Federal Court NSD 702 of 2006 in which two renowned experts from the United States and two well-known Australian economic experts had wildly diverging views as to both the existence and measurement of pass on, and as to the extent to which it was counter-balanced by output effect.

[54] For the contrary view, see Edgerton G, "Cartel Damages and the Passing on Defence: A Comparative Analysis" (2009) 17 CCLJ 56.

[55] In *Auskay International Manufacturing and Trade Pty Ltd v Qantas Airways Ltd* [2008] FCA 1458 at [41].

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

[57] *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd* (2010) 240 CLR 444; [2010] HCA 9 at [36]; *The "Torenia"* [1983] 2 Lloyds Rep 210 at 215 (Hobhouse J).

[58] *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [2001] 109 FCR 528 at [31].

engaged in the conduct or was involved in the contravention to refund money. It does not generally permit providing for less than full compensation or distributing responsibility to the applicants or other respondents. Its broad scope is not to be read down by s 82 or notions of a remedial hierarchy with s 82 at the apex.[59]

Subject to the discretionary nature of the relief, the principles of causation and contribution discussed above in relation to the s 82(1) claims apply equally to the s 87(1) claims. The live issue advocated here is whether s 87 orders must be limited to compensatory orders which adjust for pass on?

If respondents succeeded in establishing that their pass on defence is as a matter of law a partial (or total) answer to consumers' s 82 claims, it is contended that the court should nevertheless uphold s 87 claims, and exercise its discretion to make orders pursuant to s 87 for the payment of an amount equal to "overcharge" plus interest given the breadth of s 87 and s 2 object of the Act.

If, however, respondents succeed in establishing that their pass on defence is as a matter of law an answer to both consumers' ss 82 and 87 claims, claimants should consider alternative unjust enrichment or deceit claims.[60]

The most recent example of analogous application of the principle is the unanimous judgment of Maxwell P, Osborn AJA and Dodds-Streeton in *Hilliard* decision, their Honours holding that (at [83]-[84]):

> It is irrelevant, in our view, that Westpac then recouped itself by debiting the relevant customer account. To adapt what Brennan J said in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Limited*, "the passing on of the burden of the payments made does not affect the situation that, as between [Hilliard] and [Westpac], the former was enriched at the expense of the latter". It is likewise irrelevant that Westpac later "resumed" the loss by reimbursing the account-holders under the terms of settlement.

It is arguable that cartel victims paid the inflated prices charged by cartel participants on the mistaken basis that they were competitive prices not resulting from the cartel arrangements, and that there has been sufficient failure of consideration, reliance by and detriment to cartel victims to require the respondents to make restitution of the benefits derived by them.[61]

Notably as the remedy for unjust enrichment requires disgorgement of the entirety of the benefit obtained by the respondents without regard to the usual principles of measuring loss or damage, the amount recoverable under this cause of action at least equals and may well exceed the amount found to be recoverable under causes of action pursuant to the Act.

Whatever complications (if any) arise in estimating *damages* by reason of the respondents' assertions that prices would have been no more favourable in the absence of the cartel, it is clear that cartel participants derive substantial financial benefit from their conduct which they should be required to disgorge. For example, whether or not pre cartel margins and profits were "unsustainable" as respondents typically allege, the entirety of their increase during the cartel and its lingering benefits to the respondents should be recoverable, as in effect an account of profits.[62]

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[59] *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *Henville v Walker* (2001) 206 CLR 459; and *Marks v GIO* (1998) 196 CLR 494.

[60] With the caveat that the related doctrines of mistake, unjust enrichment and restitution are not straightforward as a matter of law or application, and that although deceit claims were advanced in Ergon and Energex's claims, such claims have not been tested legally in the cartel context.

[61] See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525 and 529, [16]-[29] (Gleeson CJ, Gaudron and Hayne JJ).

[62] *Dart Industries Inc v Décor Corp Pty Ltd* (1992) 179 CLR 101 at 110.9-111.3 (Mason CJ and Deane, Dawson and Toohey JJ).

NO CONSUMER CONTRIBUTION AND CARTEL PARTICIPANTS EACH LIABLE FOR ALL LOSSES

Once causation is established it is clear that the contravener is liable for the entire loss; notions of contributory fault on the part of the applicant for relief do not operate.[63]

In general an applicant is entitled to select and sue for the entirety of its loss any respondent whose contravention materially contributed to that loss, or to proceed against all such contributors and hold all such respondents jointly and severally liable for that loss.[64] Consumers should accordingly maintain all claims against each cartel participant as each materially contributed to all losses claimed regardless of the supplier who overcharged in each particular case.

A question will then arise as to the extent to which the various respondents can claim contribution from each other towards liabilities incurred by each. There is no basis in the Act for contribution or indemnity orders to be made in this context.[65] There is jurisdiction to make orders for contribution based on rights at law or in equity arising out of a co-ordinate liability imposed on the parties by the Act.[66]

Equitable contribution may be available between the respondents if they can demonstrate a "co-ordinate liability" or a "common obligation", which depends on whether the liabilities are "of the same nature and to the same extent".[67]

Orders for equitable contribution have historically been made equally between contributors, as it was a remedy for parties sharing liabilities that were not only co-ordinate but also equally extensive.[68] Purely equitable contribution may therefore penalise a respondent beyond its level of culpability or the extent to which it profited from its contraventions. It may accordingly become necessary as between respondents to consider whether and how State contribution legislation will apply in particular proceedings.

Given the consumer advocacy position adopted in this article, it is unnecessary to explore the unsettled law in this area as to rights as between cartel participants. Suffice to say that as between respondents, contribution is not straightforward.[69]

AVOIDING TIME BAR

Cartels are by their nature secret and are typically discovered many years after they are made or arrived at. As a result respondents typically maintain that consumer action is time barred when commenced more than six years after damage was first suffered, ie when cartel-elevated prices were contracted for or paid. How, then, to overcome the defence?

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[63] *Henville v Walker* (2001) 206 CLR 459 at [164]-[165] (Hayne J), *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [50] (Gaudron, Gummow and Hayne JJ); Although the courts have recognised that a respondent is only liable for that part of the loss that it caused where the loss can be divided according to cause, that qualification has limited operation, as is made clear in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [62] (Gaudron, Gummow and Hayne JJ).

[64] *Grant v Sun Shipping Co Ltd* [1948] AC 549.

[65] *Re la Rosa; Ex-parte Norgard v Rodpat Nominees Pty Ltd* (1991) 31 FCR 83; *Trade Practices Commission v Manfal Pty Ltd (No 3)* (1991) 33 FCR 382; and *Burke v LFOT Pty Ltd* (2002) 209 CLR 282.

[66] *Trade Practices Commission v Manfal Pty Ltd (No 3)* (1991) 33 FCR 382 at 385 (Lee J), *Re la Rosa; Ex-parte Norgard v Rodpat Nominees Pty Ltd* (1991) 31 FCR 83 at 87-89 and 90-92, *Jones v Mortgage Acceptance Nominees Ltd* (1996) 63 FCR 418.

[67] *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 292-293 (Gaudron A-CJ and Hayne J); cf *Henville v Walker* (2001) 206 CLR 459 at [6] (Gleeson CJ); *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 at 348 (Lord Ross).

[68] See *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 12-13.

[69] See *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 5 and *Law Reform Act 1995* (Qld), s 6; *Australian Breeders Co-operative Society Ltd v Jones* (1997) 16 ACLC 100 at 150, and *Jonstan Pty Ltd v Nicholson* [2003] NSWSC 500 at [93] (Hulme J); *ANZ Banking Group Ltd v Turnbull & Partners Ltd* (1991) 33 FCR 265 at 277 (Sheppard J) 276; *Burke v LFOT Pty Ltd* (2000) 178 ALR 161 at 163; Heydon, n 51 at 18-25552; the *Wrongs Act 1958* (Vic), s 23B and *Henderson v Amadio Pty Ltd* (1995) 62 FCR 1 at 201-202; s 79 of the *Judiciary Act 1903* (Cth); Corrigan M, "Passing the Hat Around? – Contribution Amongst Cartel Members" (2009) 116 CCLJ 347; *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 12-13.

Section 82 claims

Since 26 July 2001, s 82(2) of the Act has required action under s 82(1) to be commenced "within 6 years after the day on which the cause of action that relates to the conduct accrued". The relevant causes of action accrued when actual loss or damage was suffered.[70]

The loss must be actual, not merely potential or contingent or likely,[71] so that where a party enters a contract that exposes it to a contingent loss or liability, damage is arguably not sustained (and hence time does not run) until the contingency is fulfilled and the loss becomes actual.[72]

Although a party's unawareness of the existence of the cause of action ordinarily does not prevent time running,[73] the cause of action under s 82(1) has been seen as involving a balancing of "benefits and burdens" so that loss or damage results only if/when an adverse balance is struck.[74]

The notion of balancing benefits and burdens has been applied in the cartel context[75] for the proposition that time did not commence to run for the purposes of the causes of action based on s 82(1) until it became clear what the market value of the goods actually was. Consumers can accordingly contend that the losses claimed only crystallised on discovery of the cartel as the Full Court in *Energex Ltd v Alstom Australia Ltd* [2004] ATPR 46-251; FCA 575 (*Energex*) observed without deciding.

Other available arguments are that the equitable doctrine of concealed fraud should apply,[76] although the better view is probably that it does not apply to the statutory cause of action. Similarly, it can be argued that any time bar is avoided by construing "suffers" within s 82(1) as requiring the applicants to "feel, undergo or endure" loss or damage in a sense connoting that they appreciated that the loss had been incurred before time started to run, and that pleading a limitation defence in the circumstances is unconscionable conduct giving rise to a right to claim damages or an injunction for

[70] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Arcadi v Colonial Mutual Life Assurance Society Ltd* [1984] ATPR ¶40-473 at 45,454.

[71] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 348.

[72] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 532; *Marks v GIO Holdings Ltd* (1998) 196 CLR 494 at [107]-[108]; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [46], [55] and [66].

[73] *Hawkins v Clayton* (1998) 164 CLR 539 at 560-561, 587-588 and 598-602, but the majority of the High Court observed in reasoning which was strictly obiter in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527: "When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But…detriment in this general sense has not universally been equated with the legal concept of 'loss and damage'. And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of under compensation or overcompensation, the risk of the former being the greater".

[74] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 (Brennan J) at 536-537: "The quantification of the diminution in value of an asset or of a liability incurred or the value of any benefit acquired may not be ascertainable at the time when the burden of the transaction is borne. In that event, the suffering of any loss cannot be said to occur before it is reasonably ascertainable (not before it is ascertained) that the burdens which the plaintiff has borne are greater than the value of the benefits that the plaintiff has acquired or will acquire. In other words, no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is 'worse off than if he had not entered into the transaction'."

[75] Weinberg J in *Energex Ltd v Alstom Australia Ltd* [2004] FCA 575 at [175], [178] and [196] and the Full Court on appeal in [2005] FCAFC 215 at [60]-[65]).

[76] See eg Bruce A, "Legal Formalism and the Trade Practices Act – a Case of Concealed Fraud" (1998) 72 ALJ 216 and Christensen S and Lumb S, "Ascertaining When Loss is First Suffered by Misleading Conduct: Relevance of Contingencies, Future Predictions and Concealment" (2005) 13 TPLJ 149.

that contravention. Finally, resort could be had if necessary to the doctrine of equitable estoppel to seek to restrain the respondents from relying on the limitation defence.[77]

Section 87, unjust enrichment and deceit claims

Section 87(1) confers a wide discretionary power to order compensation in whole or part where a party has suffered or is likely to suffer loss or damage (or injury) by conduct including that alleged in these proceedings, whether or not an injunction is granted. It contains no time limit (relevant for present purposes: see s 87(1CA)), and expressly authorises damages orders in the nature of those encompassed by s 82 by its reference to including the relief stated in s 87(2), in particular s 87(2)(d).[78]

As the section only provides for ancillary relief, s 87 claims remain subject to the time limit applicable to the claim on which the power to grant relief under s 87 depends.[79] However, injunctions should be claimed in any such proceeding under s 80 of the Act, and the Act contains no time limit on such claims. Section 87(1) claims are accordingly arguably not affected by a time limitation.[80]

Respondents typically submit that the s 87(1) claim is in substance a claim for a damages order under s 87(2)(d) of the Act in terms similar to the damages claim under s 82(1) which is subject to a limitation period, and that it is an abuse of process to seek to circumvent the operation of the s 82(1) limitation period in that way. However, that argument did not succeed in the *Energex case*. Equally *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd* (2001) 114 FCR 108 considered use of the section in the same way and did not so conclude. Moreover, the *Mayne Nickless case* has been applied where an applicant freely acknowledged his purpose in seeking injunctive relief was thereby to become entitled to seek remedial orders under s 87.[81]

Section 87(1) claims should accordingly not be time-barred and abuse of process arguments should not succeed. There is no inappropriate "circumvention" in relying on a remedy for which the Act expressly provides when it is admitted that the respondents' conduct was concealed from the applicants.

Respondents will presumably nevertheless contend that the court will not as a matter of discretion ultimately grant the relief sought under s 80 and s 87(1) as the primary injunctive relief should be refused for lack of utility, and no ancillary damages award should be made in so far as the claims under s 82 are out of time. However, fraudulent concealment would be a discretionary factor in favour of the claimants, injunctions can be granted whether or not continuing contravention is threatened (s 80(4) of the Act and see, for example, *Lean v Tumut River Orchard Management Ltd* (2003) 47 ACSR 452; [2003] FCA 1004 at [60]), and the approach of the primary judge and Full Court in *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [2001] 109 FCR 528 and the *Mayne Nickless case* respectively, and the approach of the primary judge and Full Court in the *Energex* decision, all support orders under s 87(1) being made.

If or to the extent that the various matters raised above do not avoid the operation of any time bar in relation to s 82 or s 87 claims, they will avoid the operation of any time bar in relation to unjust enrichment claims and deceit claims where, in particular, the doctrine of concealed fraud will certainly apply.

[77] *Hawkins v Clayton* (1998) 164 CLR 539 at 590 (Deane J); *The Commonwealth v Verwayen* (1990) 170 CLR 394.

[78] *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* [2001] 109 FCR 528 at [31].

[79] *Sent v Jet Corp of Australia Pty Ltd* (1986) 160 CLR 540.

[80] *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd* (2001) 114 FCR 108 at [55].

[81] *Lean v Tumut River Orchard Management Ltd* (2003) 47 ACSR 452; [2003] FCA 1004 at [20].