SUBMISSION BY DAVID WRIGHT

1. Background

I am a senior lecturer in law at the University of Adelaide. Additionally, I am practicing barrister. Also I am a member of the Law Council of Australia and am on the business law committee and am on the subcommittee on the Competition and Consumer Act. I have written numerous articles, contributed over a dozen chapters in various books and have written six books. One of them was entitled *Remedies under the Trade Practices Act* (published by Oxford University Press). I've just written the second edition of my last book which has a chapter on remedies under the Competition and Consumer Act, focus on remedies. A few years ago I spoke at the conference on the Trade Practices Act about unconscionable conduct under the TPA. My fellow speaker in this session was William Kovacic, the then chairman of the US Federal Trade Commission. Last year at another conference on the Act, a fellow speaker was his Honour Robert French, the current chief justice of the High Court. Finally, I'm the title editor of two volumes on Equity in the Laws of Australia, as well as co-editor of the Australian Succession and Trust Law Reports.. From these positions I have valuable insights to successful reform the remedial provisions of the Competition and Consumer Act. **I should stress that this submission is being written in my personal capacity only.**

2. Introduction

The recommendations in the Draft Report do a good job of modernising the competition law. But the recommendations neglect to a degree a very important area-private enforcement. It is of little use in having wonderful competition laws, if they are not well enforced. In Australia the enforcement of the competition laws is divided between

a. Public enforcement (done by the Australian Competition and Consumer Commission), and
b. Private enforcement

As the draft report notes, private enforcement is an important part of the competition laws. In numerous ways it adds to enforcement of competition laws and removes pressure upon the ACCC to attempt to pursue all matters. As the draft report notes, it does not have the resources to follow up all matters, a matter which the draft report notes particularly effecting small

business. But at the moment there is very little private enforcement in Australia.[1] This lack is the product of a few things, such as the time and expense of action. Fundamentally, this means it is simply not worth it for potential plaintiffs to privately enforce the competition law. As a consequence there is very little private enforcement of the competition law in Australia. Effectively Australia has no private enforcement of the competition laws. This should be contrasted with the United States, where the majority of actions for breach of competition laws are private enforcements. This submission focuses on increasing private enforcement of the competition laws, meaning greater enforcement, which results in more effective competition law. Further, greater private enforcement also means greater efficiency as persons injured by anti-competitive behaviour are truly compensated. Finally, it takes some of the pressure off the ACCC as effectively Australia's sole enforcer of the competition laws.

3. Why is there this lack of private enforcement of competition law in Australia?

Despite the provisions under the CCA for private actions, these have been rarely enforced.[2] For example, Beaton-Wells recorded that as at 2006, there had only been four private claims for damages brought in relation to contraventions of Part IV of the *Trade Practices Act* since it came into operation in 1974.[3] Proceedings for breaches of the competition provisions of the CCA has been predominantly enforced by the ACCC.

There are various reasons attributed to the low level of private actions for damages under Part IV of the CCA. The low amount of private enforcement cases can largely be attributed to the cost of pursuing damages actions and the difficulty in proving the damage amounts.[4]

According to Brunt:

> A prospective applicant for damages must weigh the probability of achieving compensatory damages of uncertain magnitude against costly litigation of

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[1] C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) UNSW Law Journal 648.

[2] C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648.

[3] C Beaton-Wells, 'Forks in the road: Challenges facing the ACCC‟s immunity policy for cartel conduct: Part 1' (2008) 72 *Competition & Consumer Law Journal* 71. See also D Round, 'Consumer protection: At the merci of the market for damages' (2003) 2 Competition & Consumer Law Journal 1, 3.

[4] Beaton-Wells, , 'Forks in the road: Challenges facing the ACCC‟s immunity policy for cartel conduct: Part 1' (2008) 72 *Competition & Consumer Law Journal* 71, 91; B Dellavedova and R Gilsenan, 'Challenges in cartel actions' (2009) 32(3) *UNSW Law Journal* 1001, 1021.

> uncertain length, the cost certain to be substantial even should the action be successful[5]

Commentators observe that there is considerable difficulty, time and expense in proving that breach caused the damage and establishing the extent of the damage. Corones described private actions as expensive and complex, particularly due to the extreme difficulty in establishing proof of damage[6], greatly limiting the effectiveness of the competition laws.

Another difficulty is that there is a very large evidentiary burden to those who have suffered damage due to anti-competitive conduct. As the injured parties do not possess the investigatory powers by the ACCC, this evidentiary burden makes it difficult for victims to obtain the required evidence to prove the claim. Accordingly, the cost of seeking damages is made prohibitive to these private litigants.

A further reason for the lack of private enforcement is the lack of certainty concerning a full cost recovery. Round notes that injured parties have no guarantee of success, whether complete or partial.[7] Smith agreed that there is significantly uncertainty of the likely finding of damages. Thus, injured parties may not consider it worthwhile to pursue damages given the potential costs. She described:

> Given this, injured parties often take the view that the best outcome is simply to stop the conduct and to ensure, as far as possible, that it does not resume, rather than to seek redress for past losses.[8]

Consumers can seek to prevent the offending conduct by an injunction. This relief is generally preferred over damages. But an injunction completely fails to compensate the plaintiff for their loss. Further, it only prevents future anti competitive action but fails to deter the original anti competitive behaviour.

Due to the limited amount of private enforcement developments in case law, the outcome, duration and costs of any case is very difficult to predict, and is further exacerbated by appeals

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[5] As quoted in S Corones, 'Proof of Damages in Private Competition Law Actions' (2002) 76 *The Australian Law Journal* 374.

[6] Corones, 'Proof of Damages in Private Competition Law Actions' (2002) 76 *The Australian Law Journal* 374, 887. See also C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648, 681.

[7] D Round, 'Consumer protection: At the merci of the market for damages' (2003) 2 Competition & Consumer Law Journal 1, 23.

[8] R Smith, 'Further to Round on penalties, damages and Pt IV of the TPA' (2003) 2 *Competition & Consumer Law Journal* 1, 5.

due to the uncertainly in interpreting legislation regarding this.[9] Under the existing s 83 of the Act it is stated that any findings of fact made against a respondent in earlier proceedings are prima facie evidence of those facts in later compensation proceedings.[10] It is very difficult for a private party to prove a contravention of the Act, as there have been very few cases where private litigants have been successfully able to use s 83 in their case, hence the Draft Report's suggested amendment to s83 is welcome.

There are some situations where policy choices and resource allocations by the ACCC do very little to assist private enforcement. This is seen where public and private enforcement objectives do not align and it has been made clear the ACCC will prioritise public enforcement.[11] This can cause deficiencies in the enforcement of the competition laws. Three examples highlight this issue. One clear example of this relates to the ACCC's settlement priority. In this example, where the ACCC settles a case and the potential private enforcer, under the existing law, cannot use any admissions in their later litigation. The problem identified in the second example may be solved by the Draft Report's proposed amendment. The second example relates to where the ACCC does not litigate for numerous reasons. For example the ACCC decides not litigate as it has a priority area, for example, cartels. Say a small business, is the victim of misuse of market power. The ACCC priority would direct it away from any enforcement. In this case, the amendment to section 83 would not be of any assistance. This example indicates there is an important omission. The final example is where the private litigant decides not to involve the ACCC at all. Fundamentally, there is nothing for s83 to operate on. The propose amendment to s83 does nothing to alleviate this omission.

4. Why is this lack of private enforcement of competition law a problem?

Private actions for damages can play a useful role in improving the competition law enforcement regime. As such, private enforcement can compensate the deficiencies in the public enforcement system through compliance incentives, compensate victims of anti-competitive conduct, and provide a significant contribution to legal doctrine[12], so the lack of it in Australia is a concern.

Commentators have observed that the public enforcement system is not effective in deterring anti-competitive conduct. The current practice of the ACCC has, in the words of Lynch 'left a

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[9] Caron Beaton-Wells and Kathryn Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35, 3 *UNSW Law Journal*, 680, 2.

[10] Ibid 688, 3.

[11] Ibid 671.

[12] B Dellavedova and R Gilsenan, 'Challenges in cartel actions' (2009) 32(3) *UNSW Law Journal* 1001, 1003.

"deterrence gap" in Australia that can be filled by private enforcement."[13] Thus, improving the private enforcement regime can address the deficiencies in the public enforcement system. As Beaton-Wells and Tomasic put in:

> [I]t has [increasingly] been recognised that private enforcement can play a useful role in strengthening the overall competition law enforcement regime and can compensate for deficiencies in public enforcement.[14]

One example of the deficiencies in the public enforcement system is in relation to cartels.

Lynch discussed the important contribution that private enforcement can play in relation to the enforcement of cartels in Australia.[15] It can provide compensation to injured parties and contribute to the deterrence and punishment of cartels.

She argued that there are limitations with the public enforcement of cartels.[16] For example, there are not sufficient sanctions to provide a compliance incentive. These limitations can be addressed by supplemental means of enforcement, namely, private enforcement.

Lynch argued that damages awards contribute to the pecuniary penalties on participants involved in cartel conduct. She illustrated this by reference to the effect of securities class actions that operate in conjunction with ASIC actions as a means of regulation:

> [P]rivate enforcement is frequently more intimidating to corporations, particularly in the case of … class actions which can aggregate the claims of thousands or even millions … and thereby significantly increase a corporation's legal exposure in comparison with the relatively meagre statutory fines that attach to corporate misfeasance.[17]

The contribution of damages awards would therefore bring the sanctions on cartel participants to the "optimal level".[18]

The contribution of private enforcement in deterring anti-competitive conduct was noted by Beaton-Wells and Tomasic. They said:

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13 Sarah Lynch, "The case for increased private enforcement of cartel laws in Australia" (2011) 39 *Australian Business Law Review* 385, 394.
14 C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648, 681.
15 Sarah Lynch, "The case for increased private enforcement of cartel laws in Australia" (2011) 39 *Australian Business Law Review* 385.
16 Sarah Lynch, "The case for increased private enforcement of cartel laws in Australia" (2011) 39 *Australian Business Law Review* 385, 397.
17 Ibid.
18 Sarah Lynch, "The case for increased private enforcement of cartel laws in Australia" (2011) 39 *Australian Business Law Review* 385, 398.

> There is a substantial literature to support the theory that a higher rate of compliance is expected when multiple actors (public and private) employ their multiple resources and relations with those from whom compliance is sought in order to activate compliance motivations.[19]

Lynch also noted that the ACCC incurs the total costs that are involved in detecting and prosecuting cartels. Where there is a limitation of resources available to ACCC, the ACCC is unable to prosecute every cartel. Rather, it will have to be selective with the cartels it prosecutes. If private parties direct their resources to the prosecution of cartels, it will allow the ACCC to focus its resources on the more serious cartels.

The lack of private enforcement is further problematic as the public enforcement system does not adequately provide compensation to victims of anti-competitive conduct. According to ACCC's *Compliance and Enforcement Policy*, one primary aim is to 'undo the harm caused by contravening conduct (for example by corrective advertising or restitution for consumers and businesses adversely affected)'.[20] Despite this aim, the ACCC's focus has been on deterrence. It has largely ignored compensation, leaving a "compensation gap"[21]. Beaton-Wells and Tomasic described: "„[the] ACCC has not yet demonstrated any practical interest in securing compensation for businesses and consumers harmed by such conduct."[22] Indeed, it has been noted that while the ACCC can bring representative proceedings to secure compensation for victims of anti-competitive conduct, the ACCC has been yet to use this power.[23] An independent review of consumer protection enforcement had recorded 'most experts noted the lack of an effective power to compensate consumers in the course of enforcement proceedings.'[24]

The low level of private enforcement has also resulted in its lack of contribution to the development and clarification of legal doctrine. This problem was discussed by Beaton-Wells and Tomasic:

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[19] C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648, 662.
[20] As quoted in C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648, 666.
[21] C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648, 666.
[2222] C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648, 673.
[23] Sarah Lynch, The case for increased private enforcement of cartel laws in Australia (2011) 39 *Australian Business Law Review* 385, 394.
[24] As noted by Sarah Lynch, The case for increased private enforcement of cartel laws in Australia (2011) 39 *Australian Business Law Review* 385, 394.

> Given the major challenges posed by the limited litigation budget of the ACCC, it is important not to overlook the potentially significant contribution that may be made to the development and clarification of legal doctrine by private litigation. **Some of the most significant developments in judicial interpretation of the legislative provisions have taken place in the context of private actions brought by competitors and other market actors pursuing compensation for harm caused by breaches of the Act**.[25] [Emphasis added]

Thus, it would be anticipated that increased private enforcement would provide a significant contribution to legal doctrine. Currently the ACCC limited resources is hindering the potentially significant contribution that may be made to the development of legal doctrine by private litigation.[26] As has noted, some of the most significant developments in interpretation of legislation have taking place when private actions have been brought by competitors. This can be seen in relation to s 46 in cases such as *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [27] and *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd.*[28] Similarly in relation to price fixing and resale price maintenance, cases such as *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* [29] and *Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd* [30] have been important. With such a lack of private enforcement the development of case law is suffering which is a disadvantage to the Australia court system.

Traditionally, the ACCC have been more (rightly) concerned with cases that affect large numbers of people, which is where private litigation would help bring justice when smaller groups are affected.[31] Private enforcement is important because there are going to be failures in deterrence and compliance of competition law and enhanced private enforcement can overcome these shortcomings.[32]

Finally, it should be recognised that the public enforcement is completely resourced by the Commonwealth government. The ACCC is totally at the financial "mercy" of the government.

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[25] C Beaton-Wells and K Tomasic, 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648, 673.

[26] Ibid 680, 1.

[27] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

[28] *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd* (1990) 21 FCR 385.

[29] *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1983) 48 ALR 361.

[30] *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd* (1986) 162 CLR 395.

[31] Rod Sims, 'ACCC – Future Directions' (Speech delivered at the Law Council of Australia Competition and Consumer Workshop, Gold Coast, 27 August 2011).

[32] Caron Beaton-Wells and Kathryn Tomasic, , 'Private enforcement of competition law: time for an Australian debate' (2012) 35(3) *UNSW Law Journal* 648, 676.

Budgets of public bodies can be slashed. A good example of this reality is the financial regulator which is the equivalent of the ACCC, ASIC. The financial woes of ASIC, following deep financial cuts, compromises ASIC's public enforcement role. If enforcement of the competition laws is almost exclusively public, this reality of complete financial vulnerability of the ACCC is extremely frightening.

5. The Amendment to s83 is Necessary But Not Sufficient

This submission supports entirely the amendment of s83 as suggested by the Draft Report. Certainly, this amendment will have an effect on private enforcement. Alas, I fear this will only have a marginal effect by itself. Although it should be made, by itself it is a relatively minor, positive change. This amendment needs to be coupled with something additional to make it truly effective. The missing additional element is found in the American legislation, where private enforcement is extremely common. That additional element is the existence of treble damages. In isolation the amendment to s83 does nothing about the frequent situation where the ACCC does little/ nothing about a competition law breach. This is because s83 is (in reality) dependent on some legal activity by the ACCC. Even with the amendment the ACCC remains essential to competition law enforcement.

6. Utilizing Overseas Experience

Under federal US antitrust law, persons and companies harmed by anticompetitive conduct may seek an award of triple their damages, against a party that violates federal antitrust laws. For example, price fixing or an agreement among competitors on the price they will charge is considered a per se illegal violation of Section 1 of the Sherman Act, 15 U.S.C.S. § 1, that the government may prosecute as a felony. Importantly, as a further deterrent to such activity, those harmed by the violation may seek treble damages. Additionally, section 4 of the Clayton Act, 15 U.S.C.S. § 15, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue" for treble damages. Treble damages is a longer standing and well established feature of US competition law.

Basically Congress enacted the treble damages to ensure a robust enforcement procedure by guaranteeing a healthy private enforcement regime. The treble damages section is believed to have four major benefits;

1 deterrence,

2 moving the burden of substantial enforcement from just one public body,

3 true loss compensation, and

4 rewarding the plaintiff's risk and time in bring the action

What this results in, is there is a marked increase in the private enforcement of the competition laws, which reduces the burden on the public regulator. Basically, this results in plaintiffs acting to enforce the competition law. This addition, plus the amendment to s83, addresses all the shortcomings (identified in this submission) with Australian competition laws. Importantly, this move to treble damages (producing more private enforcement) takes away the vulnerability of having enforcement of the competition laws almost exclusively dependent upon one vulnerable public regulator. Effectively, Australia has placed all its (the competition laws enforcement) eggs in just one basket called public enforcement. This is a very dangerous strategy. What this submission is attempting to do is diversifying enforcement, to minimize this risk.

7. Conclusion

It is the thrust of this submission that this review consider allowing treble damages for loss caused by a breach of the competition law. Instead of public and private enforcement being seen as competing and separate limbs of compliance and deterrence, this strategy might be found that lead to their activities working to complement the other. Any increase in private litigation would benefit the public enforcer's role through clarification of law; attention to non priority areas; and arguably better deterrence/ compliance outcomes. This would lead to a better use of the public body's resources in the long term. Further, it would truly compensate for losses, as well as making significant contributions to doctrinal developments.

That is, all that needs to occur is an amendment to section 82 so it reads

"(1) A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or IVB, or of section 60C or 60K, may recover treble the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued."

Not a big statutory change, but together with the amendment to section 83, it will have a positive impact on the operation of the competition law.

David Wright