the state of COMPETITION

Alexandra Merrett

Rhonda Smith

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"Access to justice" rates as one of the top five issues raised in submissions to the Harper Review into Australian competition policy. But a review of litigation over the last decade shows much more is at stake: ACCC competition cases focus almost exclusively on per se *prohibitions. While private litigants appear more prepared to pursue provisions subject to a competition test, they are an endangered species. In the US, private actions outnumber their public counterparts 10:1 - here, we have 3 public actions for every private one. Yet the importance of private litigation is acknowledged around the world. How then can we increase its incidence?*

The public benefits of private litigation

There's a funny thing happening in Australian competition law. Well, let's re-phrase: very little is happening in Australian competition law. Have no fear, the authors of this esteemed publication aren't running out of things to say (no danger of that!), but there's not a lot of case law to focus our attention.

Indeed, the competition provisions set out in Part IV of the *Competition and Consumer Act* (**CCA**) are in danger of seizing through lack of use. While the ACCC is an active litigator in relation to cartels and consumer protection, it doesn't tend to take on cases subject to a competition test. In fact, in the past 4 years, the ACCC has brought just 3 cases under the competition provisions of the Act: two misuse of market power cases (against Visa and Ticketek respectively) and a merger case against Metcash. Assessed over the last decade (see next page), the numbers don't look any better.

Looking at the last 10 years, just 15% of ACCC claims under Part IV fall within the competition-tested provisions. This needn't be a problem, but the 15% doesn't add up to much: just 10 claims, split evenly between substantial lessening of competition (**SLC**) claims and misuse of market power.

Again, of itself, this is not cause for alarm. After all, the Hilmer Committee considered that Part IV should be enforced via private actions "in most cases". As Maureen Brunt observed in 1994, "more significant judgments on the merits [in competition cases] have stemmed from private than from public actions". Indeed, of the 5 High Court decisions concerning misuse of market power, 3 are private: *Queensland Wire*, *Melway* and *NT Power*.

Despite these significant cases, however, private litigation in Australian competition law also appears to be in a deep slumber.

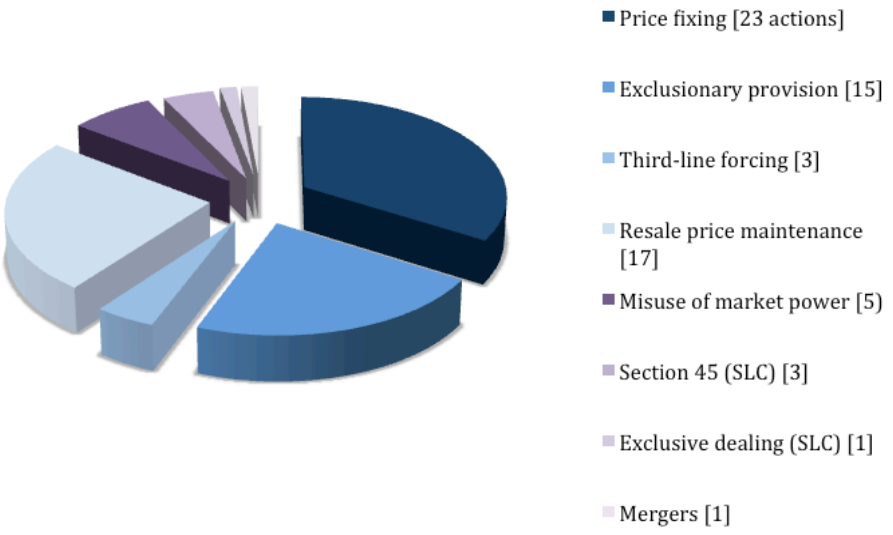
This means that cases involving s46 (misuse of market power), s47 (exclusive dealing), s50 (mergers) and s45 (a catch-all for commercial arrangements which substantially lessen competition) are not coming before the Courts with any frequency.

Given limited ACCC cases – and very few private actions – Australian competition case law is increasingly limited to *per se* claims

It seems unlikely that ACCC cases target all *anti-competitive conduct occurring in Australia*

Increasingly, our competition law is a bunch of *per ses*: exactly the model generally adopted by developing economies as their first attempt. But consumer protection + *per se* is like a primary school reader: you stick with Dick and Dora until you've built enough confidence and competence to tackle the advanced stuff. There is a danger that our agencies, Courts and practitioners are forgetting how to apply these provisions.

As the ACCC's budget woes continue to bite, a radical change to its litigation strategy is unlikely. Competition cases are notoriously expensive to run: these cases are by far the most costly sort of litigation that the ACCC undertakes. Accordingly, maybe we need to look elsewhere to make sure *all* parts of our competition laws remain relevant.



ACCC Part IV filings (not subsequently withdrawn): 10 years to July 2014

Notes: there were also 3 cases involving secondary boycotts; cases falling under multiple provisions have been double-counted (excluding where allegations have been dropped), as the issue is whether particular provisions are being tested; multiple proceedings involving the same cartel have been grouped as a single case; no distinction drawn between cases under TPA/CCA or Competition Code

So what IS happening with private litigation in Australia?

In the mid-1980s, research showed that the ratio of private:public antitrust proceedings in the United States had "declined" to 10:1. It seems this ratio has remained relatively constant in the decades since. In Australia – notwithstanding the Hilmer exhortation above – actions are generally public in nature. Using judgments (as distinct from filings) as a reference point, over the last 10 years, the Australian ratio is around 1:3 (18 private actions as against 56 brought by the ACCC).

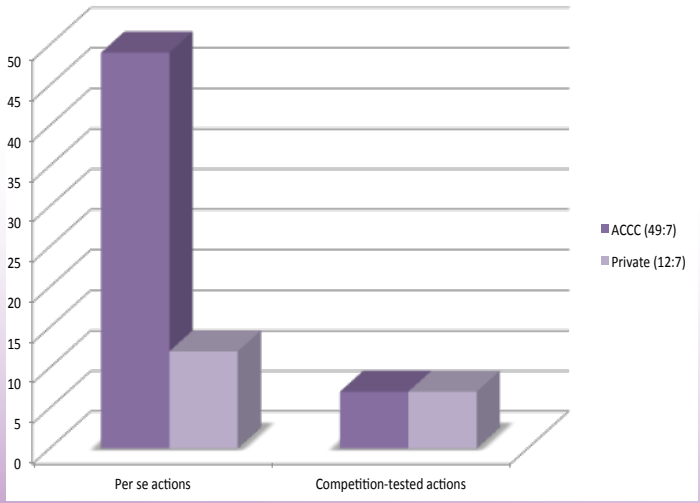
Ian Harper reports that many submissions to the current inquiry have raised the issue of whether small business has appropriate "access to justice". But the lack of private litigation suggests the issue is much broader. Large businesses aren't bringing claims either. This could mean Australian competition lawyers sadly/happily (depending on your perspective) work in an extraordinarily compliant sector; alternatively, it might suggest that there's something about our regime that is not working.

Examination of the cases which have resulted in some form of final judgment (as shown in the table overleaf) leads to some interesting observations:

- only 1 is in the nature of a "piggy-back" proceeding – following-on from action brought by the ACCC (that said, there is another currently before the courts, relating to the airlines cartel);
- the ratio of *per se*:competition-tested claims in private proceedings is very different from the ACCC's breakdown (see the graph below);
- third-line forcing is not on its deathbed as one might think – rather it is becoming the domain of private actions (something to think about, if a reason for deciding not to change its *per se* nature is that the ACCC doesn't generally pursue it); and
- the private use of Part IV can be quite different from what one sees in ACCC actions – in particular, private actions frequently raise Part IV issues in order to avoid contractual obligations (including as a "defence"). This can lead to some interesting legal developments (eg the High Court on severability in *SST Consulting v Rieson*).

What is not apparent from the table of cases is the amount of private litigation getting bogged down at the interlocutory stage without ever (or at least rarely) proceeding to final judgment. There are many examples of applications to strike out statements of claim (or to obtain summary judgment, where Part IV has been raised by the respondent). In one case, partial indemnity costs were even awarded against a party for bringing a hopeless s46 case (*Sundararajah v Teachers Federal Health Ltd* (2011)).

It is also clear that members of the competition "mafia" are very unlikely to instigate a Part IV claim. In the last 10 years, just 3 top tier law firms have pursued a Part IV claim to a final outcome. The majority of Part IV claims involve law firms not known for their competition expertise. While it could be argued that – acting in their clients' best interests – the large law firms send would-be complainants off to the ACCC, the relative lack of ACCC filings suggests otherwise. So why do competition practitioners not see private litigation as an appropriate option?



Public vs private Part IV* judgments: 10 years to July 2014

**cases involving secondary boycotts have been excluded*

Case	Nature of Pt IV claim	Outcome	Lawyers for party bringing Pt IV claim
Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2) [2006] FCA 1388	Price fixing: class action piggy-backing on ACCC action in vitamins cartel	Settled ($41m payout, inc costs)	Maurice Blackburn Cashman
Wright Rubber Products v Bager AG (No 3) [2011] FCA 1172	Price fixing	Settled ($1.5m payout)	Maurice Blackburn
Bradken Ltd & Ors v Norcast SarL [2013] FCAFC 123	Price fixing	At first instance, applicants won and were awarded damages of USD22.4m. Appeal did not proceed	Allens Linklaters
Corporate Sports Aust v ARU [2008] FCA 993	Exclusionary provision	Application for interlocutory injunction refused	Lavan Legal
SPAR Licensing v MIS Qld (No 2) [2012] FCA 1116	Exclusionary provision & SLC (s45)	Claim failed	Clamenz Evan Ellis
Fadu v ACN 008 112 196 Pty Ltd atf International Linen Service Unit Trust [2007] FCA 1965	Exclusionary provision	Both parties conceded the existence of an exclusionary provision	Cowell Clarke
Fairbairn v NCC Fashions Wholesale Pty Ltd [2005] FCA 1874	Resale price maintenance	Injunctions granted (respondents failed to appear)	Martin Legal
RP Data v Qld [2007] FCA 1639	Misuse of market power	Claim failed (failure to show purpose)	ClarkeKann
Eden Construction v NSW (No 2) [2007] FCA 689	Misuse of market power	Claim failed (Act held not to apply to government)	Johninfo Lawyers
Pacific National v Queensland Rail [2006] FCA 91	Misuse of market power	Claim failed	Allens
Seven v News [2009] FCAFC 166	Misuse of market power & SLC (s45)	Various claims failed	Freehills
Technology Leasing Ltd v Lennmar Pty Ltd [2012] FCA 709	Third-line forcing (raised in cross-claim by respondent)	Subsidiary of applicant shown to have engaged in third-line forcing	Not identified
Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 10) [2012] FCA 25	Third-line forcing (not piggy-backing on, but related to, ACCC litigation)	Third-line forcing made out (to some extent)	Lynch Morgan Lawyers
Rose Ice Cream Manufacturing v Cold Rock Management [2010] FCA 1253	Third-line forcing (*ex parte* hearing)	Injunctions granted	Lynch Morgan Lawyers
SST Consulting Services v Rieson (2006) 225 CLR 516	Third-line forcing	Third-line forcing made out & offending clause severed	Synkronos Lawyers
Australian Automotive Repairers Assn (Political Action Committee) Inc (in liq) v Insurance Australia Ltd [2006] FCAFC 33	Third-line forcing	Claim failed	Peter R Glover
Parmalat Australia Pty Ltd v VIP Plastic Packaging Pty Ltd [2013] FCA 119	SLC (s47)	Application for interlocutory injunction failed - failure to demonstrate serious question re the purpose of the refusal to supply (including whether it was to SLC)	Thynne & Macartney
McHugh v Australian Jockey Club Ltd (No 13) [2012] FCA 1441	SLC (s45) - pursued only at first instance	No SLC made out	Brock Partners

Private Part IV judgments: 10 years to July 2014

Why so few cases?

Those "in the know" are likely deterred by factors such as the duration, expense and complexity of competition cases. With a team comprising solicitors, barristers (often numbering more than the usual single silk + junior) and at least one expert (often supported by a "strategic" – or "dirty" – economist), the costs of running a competition case frequently exceed seven figures.

These issues present no less an obstacle for private litigants than they do for the ACCC – but without the benefit of investigative powers such as s155 notices, private litigants face even more difficulties in bringing proceedings. Their costs could also be higher: where a private case raises interesting issues, the ACCC tends to intervene (see most recently in *Bradken*) – one can only assume this adds to the costs of all parties involved. And private parties are not likely to get access to quality counsel at Commonwealth rates! In addition, the risk of paying the other side's costs if your case is unsuccessful is far more stark for a private litigant than for the ACCC.

In the competition space, there is also the issue of remedies. Even if a claim is successful, the court process is generally too slow to assist the victim, eg, of a misuse of market power. The prospect of damages may not – and indeed doesn't seem to – be enough to outweigh the time, expense and risk of bringing proceedings.

Even when litigation is "successful", it is not always capable of delivering a useful outcome. The first and most significant s46 case to go to the High Court – *Queensland Wire* – sits in the Australian Competition Dictionary under the definition of "pyrrhic victory". After losing at first instance and on appeal, Queensland Wire was able to persuade the High Court that BHP's refusal to supply amounted to

a misuse of market power and the matter was remitted to the first instance judge to assess remedies. But before relief could be determined, Queensland Wire went out of business.

What does the CCA say?

There is some statutory support for private litigation but it is sadly underutilised. Section 83 of the CCA specifically envisages "follow-on" actions, enabling the ACCC to obtain "findings of fact" that will benefit private parties. But "findings of fact" are often one of the first things given away by the ACCC when it settles a proceeding. And the ACCC has been very territorial in protecting parties who 'fess up to cartel conduct under the umbrella of its immunity policy or leniency policy. Both these factors have inhibited private actions following the Visy/Amcor cartel – a cartel which affected thousands of businesses across Australia.

Idle nights reviewing the Act also reveal the surprise packet that is s170: this enables a party involved in specified proceedings to apply to the Attorney-General for legal and/or financial assistance. But its scope is very limited, applying to Court proceedings instituted under Part IVB (Industry Codes), Part VI (Enforcement & Remedies: it's unclear what this is intended to capture), certain consumer protection actions and the declaration power in s163A. It's also available for authorisation processes and merger clearances, as well as general reviews going before the Tribunal. The key criteria are hardship and the "reasonable"-ness of the application. We are not aware of a case where such assistance has been granted (please tell us if you know of one). In any event, we doubt this will provide the platform for expanded Part IV litigation!

Other than these rare exceptions, over time, the CCA appears to be becoming the exclusive domain of the ACCC, entrenching what Daniel Crane ironically refers to as the "governmental monopoly over enforcement". For example, in 1977, private parties lost the right to seek injunctions under s50 (ie to stop a merger). Some years later, the ACCC was granted a statutory right of intervention in TPA (now CCA) proceedings. Although the Attorney-General had certain enforcement rights, particularly in relation to s50, Brunt notes that "in practice the [ACCC] has taken almost exclusive public enforcement responsibility" in relation to competition matters. Speaking 20 years ago, she observed, "The practical effect is that the [ACCC] has become the main enforcer – and indeed interpreter for the time being – of the law…". Since that time, the ACCC's position has only become more entrenched.

Despite statutory & policy support for private actions, Australia is tending towards a "governmental monopoly over enforcement"

Why should we care?

Private parties are best placed to anticipate long-term harm to a market. Their understanding of their own industry provides an unmatched insight into the strategic possibilities and consequences of particular conduct. But – aside from these esoteric aspirations – there is a more prosaic reason to encourage private litigation. Right now, we need more cases coming before the courts.

As recently observed by US Assistant Attorney-General Bill Baer:

> *A high volume of private litigation in the United States means a constant flow of new competition law decisions. We still rely on decades old court decisions, but we also have the benefit of new judicial glosses on them. And our courts are constantly presented with new questions, new slants on old questions, and new factual settings, all of which can provoke rethinking the rationale of older decisions and restating core principles with added clarity. Competition law in the United States is constantly evolving.*

What's the position overseas?

The American way

The United States has for many years successfully encouraged private litigation via its use of treble damages – that is, if the victim of anti-competitive conduct can prove $x damages, it will receive 3*$x. This approach occurs in a framework where, in the general course, costs do not follow the event. Nonetheless, the specific encouragement of private action is thought to be justified as a public good that arises when any person intervenes to stop anti-competitive conduct. Indeed, the Supreme Court has described treble damages as "a chief tool" in the antitrust enforcement scheme, providing a "crucial deterrent".

From an outsider's perspective, the American approach appears to have been highly successful. Indeed, there have been claims that it has been too successful (see, for example, criticisms by Daniel Crane). Recent research by Davis and Lande, however, suggests that more should be done to encourage private actions. Noting that private litigation involves far more than simple follow-on cartel actions, they report that:

> *… 'a substantial portion of private recoveries occurred in cases subject to the rule of reason, as well as in cases in which it was unclear whether the rule of reason or a* per se *rule would apply'… These findings suggest that private litigation may play an important complementary role to public litigation by challenging conduct that the government – and especially the DOJ – may rarely address.*

Consequently, they recommend that "consideration [should be given to] ways to strengthen private enforcement so that it can serve as a more effective means of compensating victims and deterring potential transgressors". That such a recommendation should be made in the United States – given the rate of private litigation in that jurisdiction – highlights just how valuable a role it has in supporting an effective and vigorous competition regime.

Alternative approaches

The legal systems of the United Kingdom and Europe are, in many respects, more akin to Australia. And encouraging private litigation has been a significant priority in those jurisdictions as well: both have recently been quite active in the area.

In its 2008 White Paper on the topic, the European Commission observed:

> *More effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers, and not by the victims and law-abiding businesses. Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable. Improving compensatory justice would therefore inherently also*

produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules. Safeguarding undistorted competition is an integral part of the internal market... A competition culture contributes to better allocation of resources, greater economic efficiency, increased innovation and lower prices.

The European Commission found that the limited number of private actions was "largely due to various legal and procedural hurdles". While many of those hurdles do not apply in Australia, several do. In particular it was interesting to note the EC's position on costs:

The Commission considers that it would be useful for Member States to reflect on their cost rules and to examine the practices existing across the EU, in order to allow meritorious actions where costs would otherwise prevent claims being brought, particularly by claimants whose financial situation is significantly weaker than that of the defendant…

It continued that the "'loser pays' principle [for costs]… could… discourage victims with meritorious claims". Other recommendations included considering ways to encourage the early resolution of cases, and limitations on Court fees.

Following the release of the EC White Paper, the United Kingdom conducted its own consultation process. This resulted in a range of proposals designed to ensure private claims constitute "a credible and effective complement to the public enforcement of competition law". While principally these reforms concerned the role of the Competition Appeals Tribunal, they also included the introduction of a "fast-track procedure for simpler antitrust claims in the [Tribunal] (principally for the benefit of [small to medium businesses])".

The Competition Appeals Tribunal itself is leading the way in reform. Until recently, exemplary damages were considered inappropriate as defendants also faced the threat of fines. (Such damages are one way of avoiding the network externality of an individual incurring costs for the benefit of society more generally.) But in the 2012 decision, *Cardiff Bus*, the Tribunal overturned that position – no fines had been imposed and there were no other policy reasons not to award exemplary damages. A decision to award exemplary damages of course occurs well after a plaintiff's decision to commence litigation, but *Cardiff Bus* could open the way for an English take on the idea of treble damages.

Steps to improve the rate of private litigation

When considering the respective positions of defendants and plaintiffs, Davis and Lande observe:

Defendants in antitrust cases tend to be very wealthy and powerful. After all, violators of the antitrust laws must have market power for their illegal conduct to harm others. Their wealth allows them to retain effective counsel, pay the costs of litigation, and tolerate risk….

The plaintiffs in antitrust litigation, in contrast, tend to have limited means. By their nature, they generally lack market power and are vulnerable to the market manipulations of others…

These comments are made in the context of the American regime. But, as stated earlier, costs don't generally follow the event in the US. Hence these observations are even more apt in Australia where the "loser pays" principle applies.

So what steps can be taken to encourage private litigation here? There seem to be 3 areas upon which to focus:

- reducing the duration and complexity of proceedings – what can be done to get matters through the Court process more quickly?
- managing the risk of costs – is there scope to allow relief from the usual approach to costs where private proceedings benefit the general public?
- improving the utility of remedies – can we devise remedies which both encourage litigation and provide effective relief to victims of anti-competitive conduct?

One thing is clear: stand-alone proceedings are just as important – probably more so – than "piggy-back" actions. So the more effective use of s83 by the ACCC, Courts and private parties – while necessary – will only be a tiny part of the solution. Some more food for thought for Professor Harper and friends...

We've tried very hard to identify all the relevant actions for this edition of TSoC. If, however, we've missed something, our apologies (and, of course, please let us know!).

About the authors

Dr Alexandra Merrett is an experienced lawyer specialising in competition and consumer law. She has a particular interest in market power and the use of economic evidence. Alexandra may be contacted on 0432 942 098 or mail to: alexandramerrett@bigpond.com

Dr Rhonda Smith is an economist and academic, specialising in competition issues. A former Commissioner of the ACCC, Rhonda provides strategic and expert advice to both commercial parties and regulators. Rhonda may be contacted on 03 8344 9884 or mail to: rhondals@unimelb.edu.au

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