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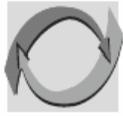
9<sup>th</sup> ASCOLA Conference Warsaw 2014 on  
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

# **Substance and Process in Competition Law and Enforcement Why We Should Care If It's Not Fair**

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Caron Beaton-Wells

CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW  
Warsaw, 26 – 28 June 2014



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# Substance and Process in Competition Law and Enforcement

## Why We Should Care If It's Not Fair

by

Caron Beaton-Wells\*

### 1. Introduction

The hallmark of an effective law is that it is obeyed by those subject to it. A law that prohibits certain types of conduct is not effective if it does not influence behaviour to conform with it.<sup>1</sup> Moreover, law enforcement authorities are limited in their capacity and resources and rely on most of those who are subject to the law to comply voluntarily with it most of the time. Given this, it is essential to understand the factors that influence compliance with the law.

A long-standing theory on compliance is that behaviour is most effectively influenced by increasing the likelihood of detection and punishment of wrong-doing and threatening the application of severe sanctions for transgressions. This is the well-known rational choice or classical deterrence paradigm that permeates much public policy thinking, particularly in the criminal justice realm,<sup>2</sup> but also in the realm of business regulation,<sup>3</sup> including competition and consumer regulation.<sup>4</sup> In the latter context, it is a paradigm that has spawned a substantial body of economic literature concerned with methods for calculating the 'optimally deterrent' monetary penalty.<sup>5</sup>

An alternative view challenges the assumption that it is the objective certainty and/or severity of punishment that is the most effective or sustainable approach to influencing compliance with the law. The challenge derives from an impressive body of theoretical and

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<sup>1</sup> T Tyler, *Why People Obey the Law* (1990), p19.

<sup>2</sup> The influence of this paradigm is perhaps most stark in the US 'war on drugs': T Tyler, 'Procedural Fairness and Compliance with the Law' in L Fennell and R McAdams (eds), *Fairness in Law and Economics* (2013), ch 11, pp159-180, p160.

<sup>3</sup> Consistent with emergence of what has been referred to as the 'regulatory state': see A Ashworth and L Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) *Criminal Law and Philosophy* 2

<sup>4</sup>; C Parker and V Lehmann Nielsen, 'Deterrence and the impact of calculative thinking on business compliance with competition and consumer regulation' (2011) 56.2 *Antitrust Bulletin* 377.

<sup>5</sup> Leading advocates of optimal deterrence theory include K G Elzinga and W Breit, *The Antitrust Penalties: A Study in Law and Economics*, Yale University Press, New Haven, 1976, ch. 7; G Becker, 'Crime and Punishment: An Economic Approach' (1968) 7 *Journal of Political Economy* 169; W Landes, 'Optimal Sanctions for Antitrust Violations', (1983) 50 *The University of Chicago Law Review* 652; R Posner, 'An Economic Theory of Criminal Law' (1985) 85 *Columbia Law Review* 1193, 1201-8; S Shavell, 'Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent' (1985) 85 *Columbia Law Review* 1232; W Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) *World Competition: Law & Economics Review* 183, 190.

empirical research that exposes the weaknesses in the classical deterrence paradigm. According to this research, predominantly from the disciplines of individual and organisational psychology and behavioural economics,<sup>6</sup> people's judgments about the risk of detection, enforcement and sanction are highly subjective and complex.<sup>7</sup> A common finding in this research is that, for various reasons, the perceived risk of adverse consequences from illegal behaviour is generally lower than the actual risk.<sup>8</sup> Moreover, perceptions of the risk of detection and the likelihood of enforcement action, as well as fear of threatened sanctions, assume people know about the law and sanctions that may apply to their behaviour. Yet, in reality, such knowledge is often less widespread than lawmakers and enforcement authorities might hope or imagine.<sup>9</sup>

Beyond discrediting the traditional deterrence perspective on compliance, a substantial body of research establishes that motivations to comply with the law are not only subjective but pluralistic and that, in the field of regulatory compliance, firms are driven by multiple motivations, sometimes serially and sometimes simultaneously, and in some instances may even be motivated to go 'beyond compliance'.<sup>10</sup> One typology that usefully draws together

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<sup>6</sup> See generally E Dawney and H Shah, *Behavioural Economics: Seven Principles for Policy-Makers* (2005); B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993) 101-32; J G March and H A Simon, *Organizations* (2nd ed, 1993); H A Simon, 'A Behavioral Model of Rational Choice' (1955) 69 *Quarterly Journal of Economics* 99; S Simpson, *Corporate Crime, Law and Social Control*, above n 9, 91-2; A Piquero R Paternoster, G Pogarsky, T Loughran, 'Elaborating the Individual Difference Component in Deterrence Theory' (2011) 7 *Annual Review of Law and Social Science* 335-360; G Pogarsky, 'Deterrence and Decision Making: Research Questions and Theoretical Refinements' in M Krohn, A Lizotte, G Hall (eds) *Handbook on Crime and Deviance* (2009) pp 241-258; C Parker and V Lehmann Nielsen, 'Deterrence and the impact of calculative thinking on business compliance with competition and consumer regulation' (2011) 56.2 *Antitrust Bulletin* 377.

<sup>7</sup> P H Robinson and J M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173; T Makkai and J Braithwaite, 'The Dialectics of Corporate Deterrence' (1994) 31 *Journal of Research in Crime and Delinquency* 347; J T Scholz and N Pinney, 'Duty, Fear, and Tax Compliance' (1995) 39 *American Journal of Political Science* 490; C Parker, 'The "compliance" trap: the moral message in responsive regulatory enforcement' (2006) 40(3) *Law and Society Review* 591.

<sup>8</sup> C Parker, C. and V Nielsen, 'How much does it hurt? How Australian businesses think about the costs and gains of compliance and noncompliance with the Trade Practices Act' (2008) 32(2) *Melbourne University Law Review* 554, 565.

<sup>9</sup> A 2010 survey of business people in Australia found low levels of awareness of cartel law and sanctions, for example: see C Beaton-Wells and C Parker, 'Justifying criminal sanctions for cartel conduct: a hard case' (2013) 1(1) *Journal of Antitrust Enforcement* 198. Moreover, beyond the psychological critiques of deterrence, there has been recognised to be a sociological dimension to people's perceptions of and reactions to the law. From this perspective, the extent to which individuals view the law as applicable to their behaviour and hence engage in assessments about the probability of detection and enforcement action depends to a large degree on their sense of social connection (or disconnection) from the law. See C Parker, 'The war on cartels and the social meaning of deterrence' (2013) 7(2) *Regulation & Governance* 174.

<sup>10</sup> For a useful review of this literature, see V Nielsen and C Parker, 'Mixed motives: economic, social, and normative motivations in business compliance' (2012) 34(4) *Law and Policy* 428. More generally, see C Parker and V Nielsen, *Explaining Compliance: Business Responses to Regulation* (2011).

the strands of this research characterises factors that influence compliance by firms as economic, social and normative.<sup>11</sup>

Economic motivation to comply is clearly based on the commitment by a firm or individual to maximise economic utility and hence is most directly influenced by the deterrence-oriented strategy of increasing the costs of non-compliance through the threat of formal legal sanctions.<sup>12</sup> However, informal economic sanctions, such as the damage to brand value and reputation through adverse publicity should also be counted as material to economic motivation.<sup>13</sup> Additionally, the economic costs and gains associated with compliance (as distinct from non-compliance) are relevant. Firms weigh the costs of investing in compliance programs and training, for example, against the benefits of improving customer and employee retention and satisfaction through a demonstrated commitment to compliance.<sup>14</sup>

Social motivation captures the extent to which firms or individuals are influenced in their decisions to comply or not comply with the law by the value that they attach to the approval or respect of significant others.<sup>15</sup> Social motivation may be linked to economic motivation in the sense that social disapproval might lead to economic losses. However, the independent distinctive motivation to be well regarded, including to the extent of acting against one's economic self-interest and even if not normatively committed to compliance, should not be discounted.<sup>16</sup> Consistent with this, there is empirical evidence to support the proposition that businesses are concerned to preserve the respect and esteem of 'third parties' including customers, shareholders, employees and business partners and that, in respect of

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<sup>11</sup> V Nielsen and C Parker, 'Mixed motives: economic, social, and normative motivations in business compliance' (2012) 34(4) *Law and Policy* 428, drawing on Soren Winter and Peter May, 'Motivation for compliance with environmental regulations' (2001) 20 *Journal of Policy Analysis and Management* 675.

<sup>12</sup> P H Robinson and J M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173; J Scholz, 'Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory' (1997) 60(3) *Law and Contemporary Problems* 253; C Tittle, *Sanctions and Social Deviance: The Question of Deterrence* (1980) 8.

<sup>13</sup> See E Bardach and R A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (2nd ed, 2002) 164; W N Davidson, D L Worrell and L Cheng, 'Are OSHA Penalties Effective?' (1995) 92 *Business and Society Review* 25; B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983) 249.

<sup>14</sup> See C Parker and V Nielsen, 'How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Non-Compliance with the Trade Practices Act' (2008) 32 *Melb. U. L. Rev.* 554.

<sup>15</sup> S C Winter and P J May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 *Journal of Policy Analysis and Management* 675, 678; H G Grasmick and R J Bursik Jr, 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 *Law & Society Review* 837.

<sup>16</sup> J Braithwaite, J, *Crime, Shame and Reintegration* (1989), pp69-83; T Makkai and J Braithwaite, 'The Limits of the Economic Analysis of Regulation: An Empirical Case and Case for Empiricism' (2003) 15 *Law & Policy* 271; D Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005).

some of these stakeholders (customers and employees especially), such concerns have a positive impact on compliance behaviour.<sup>17</sup>

Ultimately, however, the potentially most effective, efficient and sustainable form of compliance is compliance that is normatively motivated, that is, compliance based on a voluntary normative commitment to adhere to the law. This is the scenario in which compliance is internalised by a sense of duty and does not require activation by some external force or pressure. Normative motivation to comply can be based on a belief that a law is just or right in the sense that obeying the law leads to an outcome that fits with moral or ideological values – the firm complies with rules because its managers and employees see those rules as *substantively fair*. In the present context, this would mean that people agree with the ethos of competition and agree that there should be a law to protect it. Further, a large body of empirical research has established that people are also likely to obey a law where they see that law, and its enforcement, as 'legitimate', and that they judge legitimacy by whether the relevant legal authorities are *procedurally fair*. In the present context, this would mean that people comply because they respect the agencies and processes employed in enforcement of the law, rather than or in addition to respecting the substance of the law.<sup>18</sup>

Recognising that business behaviour is influenced by 'mixed motives', researchers have sought to understand how firms prioritise different motivations at different times and how they reconcile conflicting motivations. A range of internal and external factors have been found to be relevant in this regard. The personal characteristics of firm decision-makers and decision-implementers, and organizational resources, capacities, power structures and informal cultures have been found to affect the relationship between and relative priority of the three different kinds of motivations.<sup>19</sup> Moreover, different motivations are likely come to

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<sup>17</sup> See V Nielsen and C Parker, 'To What Extent Do Third Parties Influence Business Compliance?' (2008) 35(3) *Journal of Law and Society* 309. It should be expected that family and friends also would exert a powerful social influence on individual compliance.

<sup>18</sup> See T R Tyler (2006) *Why People Obey the Law* (1990); T R Tyler and J Darley 'Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law' (2000) 28 *Hofstra Law Review* 707. A potential further aspect of normative compliance recognises that while firms may be normatively committed to compliance in general (based either on agreement with the substance of the law and/or on trust in its administration generally), they nevertheless reserve the right to make a judgment as to whether the actual application of the law achieves appropriate substantive goals or is enforced appropriately in a particular situation, and to alter their commitment to compliance accordingly. See V Nielsen and C Parker, 'Mixed motives: economic, social, and normative motivations in business compliance' (2012) 34(4) *Law and Policy* 428.

<sup>19</sup> H Grenville, A Jennifer., J Nash, and C Coglianese, 'Constructing the License to Operate: Internal Factors and their Influence on Corporate Environmental Decisions' (2008) 30 *Law & Policy* 73-107; V Nielsen and C Parker, 'Mixed motives: economic, social, and normative motivations in business compliance' (2012) 34(4) *Law and Policy* 428.

the fore at particular times and in response to different external threats and opportunities to motivate different behaviour and actions.<sup>20</sup>

This research has significant implications for lawmakers and enforcers. It poses particular challenges in the field of competition law and enforcement. In this field, the dominant paradigm in formulating the law, selecting sanctions and designing enforcement strategies has been the paradigm of rational choice-classical deterrence, on the assumption that motivations to comply or not comply with the law will be amoral, calculative and primarily if not exclusively economic in nature.<sup>21</sup> Scant attention has been paid by authorities to the issue of normative compliance. Drawing on the Australian experience as illustrative, and drawing on comparisons with the United States (US) and European Union (EU) as relevant, this paper explores the potentially unproductive and distorting effects of focusing on an exclusively economic, deterrence-driven model for competition law and enforcement and failing to have sufficient regard to the influence of normative considerations – substantive and procedural – that shape business perceptions and behaviour.

The analysis proceeds in two parts. First, tensions between the goals and content of Australian competition law, on the one hand, and substantive fairness or morality, on the other, are highlighted (part 2). Secondly, the tensions between the prevailing approach to competition law enforcement in Australia and procedural fairness or legitimacy are examined (part 3). The tensions exposed in this analysis have important consequences for the extent to which normative compliance is being or capable of being achieved in competition law and enforcement, not just in Australia but generally. The paper concludes that recognising these tensions should prompt greater sensitivity on the part of lawmakers and enforcement agencies to fairness in which legal goals are conceived and communicated through the substantive law and to the way in which its enforcement is handled (part 4).

## **2. The substance of the law**

The contemporary goals of competition law in most jurisdictions are seen as predominantly economic and without overt moral, social or political referents.<sup>22</sup> Goals are

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<sup>20</sup> C Oliver, 'Strategic Responses to Institutional Processes' (1991) 16 *Academy of Management Review* 145.

<sup>21</sup> C Parker and V Lehmann Nielsen, 'Deterrence and the impact of calculative thinking on business compliance with competition and consumer regulation' (2011) 56(2) *Antitrust Bulletin* 377; C Parker, 'Economic rationalities of governance and ambiguity in the criminalization of cartels' (2012) 52(5) *British Journal of Criminology* 974.

<sup>22</sup> As has been pointed out elsewhere, this framing of competition law goals:

'...represents one aspect of a larger neo-liberal or economically rational approach to governance which proposes that the public interest is best achieved via efficient distribution of resources through competition, and that social control is best achieved by assuming that people are rationally calculating self-interested actors. ... it is now the dominant rationality of governance to propose that in every

framed largely in terms of economic efficiency, a term employed as a catch-all concept for an economic welfare orientation of competition law.<sup>23</sup> It is a utilitarian concept concerned with market-based outcomes or effects,<sup>24</sup> as distinct from a more deontological concept aligned with humanitarian values such as social justice, civil liberties and fairness.<sup>25</sup> This has not always been the case.

In the US antitrust emerged as a legal response to a social and political concern with the accumulation of excessive economic concentration at the expense of economic liberty and a fair market place. Antitrust was fuelled by a general popular mistrust of big business and a desire to divide, diffuse and control economic power for political reasons. Congress enacted the *Sherman Act 1890* in response to populist political pressures to regulate the actions of large ‘trusts’ dominating trade in key industries.<sup>26</sup> The impetus for antitrust law was thus a perceived need to contain economic power and thereby protect the ‘national religion’ of pluralist free enterprise.<sup>27</sup> In interpreting the vaguely worded laws entrusted to them, US courts emphasised competition as a ‘charter of economic liberty’, protecting both consumers and smaller businesses’ freedom to compete.<sup>28</sup> Economists were not instrumental and many were ambivalent if not hostile to this development in the law.<sup>29</sup> From about the 1950s and 1960s, however, antitrust was transformed in the US through the influence of economists associated with the Chicagoan school of thought. Thought leaders such as Posner, Bork and Stigler advocated an approach of examining business behaviour from a purely economic perspective, excluding from consideration any political or social values (for example, the

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sphere of life (both in business and outside it) people should be governed as if they are, and must become, economic men. Legal and political governance are expected to model themselves on this economic rationality, and divest themselves of social and political values that make alternative claims to legitimacy.’ (citations omitted).

See C Parker, ‘Economic rationalities of governance and ambiguity in the criminalization of cartels’ (2012) 52(5) *British Journal of Criminology* 974, 975.

<sup>23</sup> Amongst most competition authorities at least, there is widespread support for ‘efficiency’ and ‘welfare’ as the primary objectives of the law in this field: International Competition Network, ‘Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies’ (May 2007).

<sup>24</sup> J Vickers, ‘Concepts of Competition’ (1995) 47 *Oxford Economic Papers* 1.

<sup>25</sup> That said, it should not be assumed that economic thinking is unaffected by political orientation or social values (see E Fox in ‘Competition Policy Objectives: Panel Discussion’ in C Ehlermann and L Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy* (1998) 15), nor that economists deny the symbiotic relationship between liberal democracy and a free market economy (see S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (1999)).

<sup>26</sup> See, eg, E Fox and L Sullivan, ‘Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?’ (1987) 62 *New York University Law Review* 936; R Peritz, *Competition Policy in America* (1996).

<sup>27</sup> A Shonfield, *Modern Capitalism: The Changing Balance of Public and Private Power* (1965).

<sup>28</sup> *Northern Pacific Ry Co v US* 356 US 1, 4 (1958).

<sup>29</sup> T DiLorenzo and J High, ‘Antitrust and Competition, Historically Considered’ (1988) 26(3) *Economic Inquiry* 42.

protection of small business for the sake of smallness), and placing their faith in the free market system. Consideration of non-economic factors was dismissed as vague and therefore irrelevant.<sup>30</sup>

In Europe, the development of competition law was influenced by similar lines of thought that, in some circles, continue to carry influence today. Gerber's analysis of the origins and development of 20<sup>th</sup> century European competition law and its enforcement identifies four main sets of underlying objectives none of which relate to efficiency in the Chicago School sense, namely: the protection of the freedom of economic actors (appealing to a classical liberal conception of freedom); prevention of excessive concentration of economic resources and restraining private economic power in order to achieve and preserve a democratic polity after World War Two (especially in Germany); ensuring fairness and justice for small and medium sized enterprises which may be unfairly disadvantaged in competition and a fair go for the common man; and, as a matter of economic policy to counter inflation and assist in price control and later to promote economic development and increase international competitiveness.<sup>31</sup> However, despite these disparate political origins, Europe too has increasingly embraced what is sometimes referred to as 'the more economic' approach, particularly since the 'modernisation' process of the 2000s.<sup>32</sup>

While in both the US and Europe, an economic approach to competition law is now the governing paradigm (at least amongst policymakers and competition authorities), the contours of the economics have proven to be fluid and contested,<sup>33</sup> and in recent years a

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<sup>30</sup> R Pitofsky, 'Introduction: Setting the Stage' in R Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (2008), 3, 4-5.

<sup>31</sup> D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press, 1998), 418-420; see also G Amato, *Antitrust and the Bounds of Power: Dilemma of Liberal Democracy in the History of the Market* (1997). Gerber points out that the goal of 'economic efficiency' has been 'marginal' in Europe because its 'abstract economic language of wealth maximization does not comport easily with other [more substantive] goals or with administrative discretion' (420).

<sup>32</sup> S Voigt, *The More Economic Approach to European Competition Law* (2007); R Zach and A Kunzler, 'Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law' in Zach et al (eds), *The Development of Competition Law: Global Perspectives* (2010), ch 3, 61.

<sup>33</sup> Economists generally identify three categories of efficiency – allocative, productive and dynamic efficiency – as relevant to the goals of competition law. However, there is divergence on the relative importance of different types of efficiency in legal interpretation and enforcement. The related concept of 'welfare' also eludes universal definition, with arguments centring on whether a 'consumer welfare' or a 'total welfare' standard is appropriate (see L Kaplow, 'On the choice of welfare standards in competition law' in Zimmer, D (ed), *The Goals of Competition Law* (2012), ch 1, 3) and with some even challenging the notion that welfare is synonymous with efficiency, favouring instead concepts of consumer choice and sovereignty (R Lande, 'Consumer Choice as the Ultimate Goal of Antitrust?' (2001) 62 *University of Pittsburgh Law Review* 503; N Averitt and R Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 *Antitrust Law Journal* 713). Divergent approaches to these various concepts are associated with the Harvard school (Mason, Bain, Kayser and Turner) with its largely structural theory of competition, the Chicago school (Stigler, Bork and Posner) with its neoclassical pricing theory, the post-Chicago school (Salop, Shapiro, Ordover and Williamson), with its strategic, game-theoretic theory of firm behaviour, and more recently the behavioural economics school

vigorous and prolific academic discourse on the continued relevance of political, social and moral rationales for competition law has been flourishing.<sup>34</sup> More generally, it has been observed that the economic efficiency rationale for competition law is not necessarily self-evident to non-economists. In order to accept economic rationales as legitimate, ‘people need to be able to make and accept quite complex connections between means and ends on the basis of economic reasoning.’<sup>35</sup> As Aubert has commented in relation to another type of economic regulation, price regulation:

An illegal price will frequently create no immediate reaction and invoke no sanctions from the mores in the community. A tie-in with the mores can only be established through public acceptance of relatively complicated means-ends hypotheses from modern economic science. As long as these hypotheses have not become integrated parts of the individual’s moral system there will be a gap between the letter of the law and the requirements of the informal norms of the daily interactions between the members of society.<sup>36</sup>

In Australia, competition law has always been seen as an instrument of economic policy. Political overtones or concerns with morality or fairness have been explicitly rejected by lawmakers, enforcers and courts as having no place in the regulation of competition. There has nevertheless simmered beneath the surface of most legal debates in this field a deep-seated ambivalence about the goals of the law. At the heart of this ambivalence appears to lie concern about the social and moral cost of competition, a concern essentially about the value of competition at the expense of fairness in Australian economic and social life. There has been substantial public discourse, and at times considerable controversy, about the form that competition should take, who it should benefit and with what sacrifice. Amongst members of the specialised legal and economic community who work in this field it is generally seen as uncontroversial that the law strives to promote ‘workable competition’, a process of rivalry between market actors that ensures each actor is constrained to act

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(Sunstein, Gerla, Stucke, Tor) with its challenge to the rationality assumptions that underpin other economics theories.

<sup>34</sup> This literature is voluminous, but see recently, J Kirkwood, ‘The essence of antitrust: protecting consumers and small suppliers from anticompetitive conduct’ (2013) 81 *Fordham Law Review* 2425; H First and S Waller, ‘Antitrust’s Democracy Deficit’, Law & Economics Research Paper Series, New York Center for Law, Economics and Organization, Working Paper No. 13-05, February 2013; J Wright and D Ginsburg, ‘The Goals of Antitrust: Welfare Trumps Choice’ (2013) 81 *Fordham Law Review* 2405; I Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’, CLES Working Paper Series, UCL Centre for Law, Economics and Society, January 2013.

<sup>35</sup> C Parker, ‘Economic rationalities of governance and ambiguity in the criminalization of cartels’ (2012) 52(5) *British Journal of Criminology* 974, 977.

<sup>36</sup> W Aubert, W, ‘White Collar Crime and Social Structure’ (1952) 58 *American Journal of Sociology* 263, 266.

efficiently, and that the resultant efficiencies are for the welfare ultimately of consumers.<sup>37</sup> However, there is increasing evidence of a fundamental divide in the understanding of and attitudes towards competition law between the epistemic community and the public, including parts of the business sector. The divide is captured in controversies surrounding the level of concentration in key sectors such as grocery retail, telecommunications and banking. It is evident also in the repeated emphasis by the Chairman of the Australian Competition and Consumer Commission (ACCC) on the need to educate the Australian public and businesses about the value of a market economy and strong competition,<sup>38</sup> while at the same time displaying considerable sensitivity to the concerns of small business.<sup>39</sup>

At a deeper level, the divide reflects ambivalence in the Australian community towards the effects of a free market economy (of which competition policy and law are constituent elements), including the effects of exposure to global market forces. According to social attitudes surveys, Australians appreciate that living standards and essential social services such as health and education depend on a growing economy and that international trade provides a greater range and quality of products and services than would otherwise be available.<sup>40</sup> At the same time, the research shows that Australians harbour a degree of uncertainty and insecurity about the extent to which free markets and economic openness guarantee an overall improvement in their quality of life and the threat that they pose to other interests that Australians value such as income equality, environmental sustainability and opportunities for domestic employment,<sup>41</sup> as well as to the more general ethos of egalitarianism (an ethos threatened by rapid economic change) and iconic imagery associated with ‘the battler’ and ‘a fair go’ in Australian popular culture.<sup>42</sup> There is also evidence of public mistrust of ‘big business’, a concern that large corporations have excessive power, and scepticism of the relationship between government and business.<sup>43</sup> Associated with this, and despite perennial demands by business to ‘cut red tape’, there is a strong expectation that

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<sup>37</sup> D Round, ‘Workable Competition in Australia’ (1973) 45(4) *The Australian Quarterly* 37.

<sup>38</sup> R Sims, ‘ACCC: Future Directions’, Speech at Law Council of Australia Competition and Consumer Workshop, 2011, Gold Coast.

<sup>39</sup> See, eg, R Sims, ‘The ACCC and Small Business’, Speech at COSBOA Business Leaders Dinner, 2011, Canberra; M Schaper, ‘Competition Law, Enforcement and the Australian Small Business Sector’ (2010) 17(1) *Small Enterprise Research* 7.

<sup>40</sup> M Pusey and N Turnbull, ‘Have Australians Embraced Economic Reform?’ in S Wilson et al (eds) *Australian Social Attitudes: The First Report* (UNSW Press, 2005).

<sup>41</sup> M Pusey and N Turnbull, ‘Have Australians Embraced Economic Reform?’ in S Wilson et al (eds) *Australian Social Attitudes: The First Report* (2005).

<sup>42</sup> E Thompson, *Fair Enough: Egalitarianism in Australia*, (1994).

<sup>43</sup> C Bean, ‘Is There a Crisis of Trust in Australia?’ in S Wilson et al (eds) *Australian Social Attitudes: The First Report* (2005), ch 8; E Papadakis, ‘Constituents of Confidence and Mistrust in Australian Institutions’ (1999) 34 *Australian Journal of Political Science* 75.

economic activity will operate within a framework of rules, if not norms, and there is continuing public support for government intervention in the market to protect consumers, communities, the environment and workers.<sup>44</sup>

In competition law terms, these tensions are often expressed as a contest over the protection that the law should offer to competition as distinct from competitors. Based on the hegemonic justification of efficiency (and its link to productivity and economic growth), most lawyers and economists defend the view that it is the competitive process that must be protected, even at the expense of competitors, particularly those exposed by the process as inefficient.<sup>45</sup> Damage to, even elimination of, such competitors is seen as the inevitable consequence of the sometimes brutal process of competition. Economic rather than social or moral considerations are seen as paramount in this process.<sup>46</sup> The alternative view, that individual competitors too deserve protection, is defended equally loudly but lacks the coherence of any unifying theory or principle. For some, the argument can be justified on economic grounds – competition, it is said, works best when there is a range of different-sized competitors and where efficient businesses can thrive and prosper, irrespective of size.<sup>47</sup> In a relatively small and concentrated economy such as Australia's, small businesses are seen as critical to economic performance – as the 'fundamental drivers of jobs, of innovation and growth'.<sup>48</sup> Others challenge the view that competition law is devoid of moral considerations,<sup>49</sup> a challenge bolstered by the introduction of criminal sanctions for cartel conduct,<sup>50</sup> the moral condemnation of such conduct by authorities (analogising with theft and fraud) in

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<sup>44</sup> J Braithwaite, 'Economic Policy: What the Electorate Thinks' in J Kelley and C Bean (eds), *Australian Attitudes: Social and Political Analyses from the National Social Science Survey* (1988) 26.

<sup>45</sup> Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (January 2003); S King, G Samuel and C Jose, 'Agenda for the National Competition Policy Inquiry', Monash Business Forum, November 2013.

<sup>46</sup> See the seminal statement by the High Court to this effect in *Queensland Wire Industries v BHP* (1989) 167 CLR 177.

<sup>47</sup> B Billson MP, 'Speech to Committee for Economic Development of Australia lunch, Melbourne', 9 May 2014.

<sup>48</sup> B Billson MP, 'Institute of International Finance Conference, G20 Sydney', Speech, 20 February 2014.

<sup>49</sup> See eg M Stucke, 'Morality and Antitrust' (2006) *Columbia Business Law Review* 443; M Stucke, 'Is competition always good?' (2013) *Journal of Antitrust Enforcement* 1.

<sup>50</sup> Cartel criminalisation has been driven by a deterrence agenda. However, the deterrent justification for the application of criminal sanctions for cartel conduct differs from the 'traditional' view of criminal sanctions as applying legitimately only where necessary to hold individuals accountable (after the fact) for conduct that is seen as immoral or unjust on the basis of social, moral or political evaluations. See, eg, N Lacey, 'Criminalization as Regulation: The Role of Criminal Law', in C Parker, C. Scott, N. Lacey and J. Braithwaite (eds), *Regulating Law* (2004), 144–67; R Williams, 'Cartels in the Criminal Law Landscape', in C. Beaton-Wells and A. Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011), 289–312.

campaigning for criminalisation and the tendency of members of the public to approach the legal treatment of cartels through a moral rather than an economic lens.<sup>51</sup>

While heightened in debates over the last decade, this tension over the goals of or justifications for competition law is not new in Australia. It permeated the debate surrounding the introduction of the *Trade Practices Act 1974* (as the current *Competition and Consumer Act 2010 (CACA)* was formerly known) and its predecessors,<sup>52</sup> and has been a recurring theme in major reviews of the legislation ever since. In particular, the ‘big vs small business’ debate has plagued assessments of the objectives and efficacy of Australia’s abuse of dominance (misuse of market power) prohibition in s 46 of the CACA.<sup>53</sup>

For advocates of the law as a mechanism to promote the competitive process in the interests of efficiency and consumer welfare, the tension over the goals of the law is often seen as essentially political in nature with potential to distort the law and its administration. There is also a perception that the public, some members of the business community (those in the small-medium business sector particularly), and even some politicians and judges simply do not understand the technicalities of the law in this field, with its complex economic arguments, fine distinctions and unavoidable ambiguity.<sup>54</sup> Albeit less well articulated, for those who view the law as intended to serve a wider range of interests, there is a powerful prevailing sense that the law is failing to fulfil its purposes and that it often falls short of protecting the public interest (broadly defined).

This is a conflict that the Australian government is attempting to come to terms with. The conservative party currently in power has fastened on a reinvigoration of competition policy as a key measure to address Australia’s declining productivity.<sup>55</sup> An important element of the government’s productivity policy is a review of competition policy and law (the

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<sup>51</sup> C Beaton-Wells, ‘Capturing the Criminality of Hard Core Cartels: The Australian Proposal’ (2007) 31 *Melbourne University Law Review* 675; C Beaton-Wells, ‘Anti-Cartel Advocacy: How Has The ACCC Fared?’ (2011) 33(4) *Sydney Law Review* 735; C Beaton-Wells and F Haines, ‘The Australian Conversion: How the Case for Cartel Criminalisation was Made’ (2010) 1(4) *New Journal of European Criminal Law* 499; R Finkelstein, ‘Crimes and punishments of competition law’ (2011) 18 *Competition & Consumer Law Journal* 207. Cf A Stephan, ‘Why Morality Should Be Excluded from the Cartel Criminalisation Debate’ (2012) 3 *New Journal of European Criminal Law* 126.

<sup>52</sup> For a historical sociological account, A Hopkins, *Crime, Law and Business: The Sociological Sources of Australian Monopoly Law* (AIC, 1978).

<sup>53</sup> See eg Commonwealth of Australia, Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*’ (2004); W Pengilly, ‘Misuse of Market Power – The Unbearable Uncertainties Facing Australian Management’ (2000) 8 *Trade Practices Law Journal* 56; M O’Byrne, ‘Section 46: Law or Economics’ (1993) 1 *Competition and Consumer Law Journal* 64.

<sup>54</sup> C Beaton-Wells and F Haines, ‘The Australian Conversion: How the Case for Cartel Criminalisation was Made’ (2010) 1(4) *New Journal of European Criminal Law* 499; C Beaton-Wells and F Haines, ‘Making Cartel Conduct Criminal: A Case-Study of Ambiguity in Controlling Business Behaviour’ (2009) 42(2) *Australian and New Zealand Journal of Criminology* 218.

<sup>55</sup> Coalition, ‘[The Coalition's policy to create jobs by boosting productivity](#)’, September 2013.

Competition Policy Review (CPR)).<sup>56</sup> The CPR's Terms of Reference exhort the review panel to consider whether Australian competition law is 'driving efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy in recent decades and its increased integration into global markets'.<sup>57</sup> At the same time, the panel is to 'examine the competition provisions and the special protections for small business in the CACA to ensure that efficient businesses, both big and small, can compete effectively and have incentives to invest and innovate for the future'.<sup>58</sup> The government has a separate but equally clear policy commitment to small business, based on what is said to be recognition of 'the vital contribution that the sector makes to our economy and communities'.<sup>59</sup> The policy states that the CPR 'will ensure that both small and big business have a level playing field, assisted by helping small business better understand fair commercial conduct...'. Yet, a competition law that has economic efficiency and consumer welfare as its underlying purpose is in potential tension with a policy of protecting small business, levelling the playing field and having regard to fairness in business conduct.

This apparent policy tension is vividly played out in controversies surrounding the power of Australia's two major supermarket chains (MSCs), Coles and Woolworths. Australia's retail grocery sector is highly concentrated - the MSCs enjoy approximately 70% share of dry grocery goods sales and 50% of fresh grocery goods sales.<sup>60</sup> This has implications for competition in the sector and in turn for the prices, range and quality of grocery goods available to consumers. The power of the MSCs affects the business strategies, if not survival, of other grocery retailers and businesses participating in the supply chain directly and indirectly, including many small businesses and primary producers. More generally, MSC power affects many facets of Australian society, including the social amenity and sustainability of communities (rural and regional communities particularly), farmer livelihoods, employment opportunities, environmental sustainability, public health and animal welfare.<sup>61</sup>

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<sup>56</sup> See <http://competitionpolicyreview.gov.au/>.

<sup>57</sup> CPR Terms of Reference, at <http://competitionpolicyreview.gov.au/terms-of-reference/>.

<sup>58</sup> CPR Terms of Reference, at <http://competitionpolicyreview.gov.au/terms-of-reference/>.

<sup>59</sup> Coalition, 'The Coalition's policy for jobs and growth in small business', August 2013.

<sup>60</sup> ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008). For further background, see M Taylor, 'Wrestling with Giants - a critical account of supermarket power and competition law in Australia and the United Kingdom' (2013) 41 *Australian Business Law Review* 270.

<sup>61</sup> See K Larsen, *Sustainable and secure food systems for Victoria: What do we know?* VEIL Research Report No. 1 (Melbourne, 2008) University of Melbourne, Victorian Eco-Innovation Lab; J Dixon and B Isaacs, 'There's certainly a lot of hurting out there: navigating the trolley of progress down the supermarket aisle' (2013) 30 *Agriculture and Human Values* 283; C Parker, C Brunswick and J Kotey, 'The Happy Hen on your

Not surprisingly then, the Australian retail grocery sector and the strategies of the MSCs, in particular, attract a high degree of public interest, regulatory scrutiny and political attention. Consistent with a global trend,<sup>62</sup> the sector has been the subject of a large number of public inquiries and investigations in recent years<sup>63</sup> and is singled out for focus in the CPR.<sup>64</sup> Concerns relate to various MSC strategies including with respect to acquisitions, supply chain management, private labels, pricing, advertising and packaging and diversification into other sectors such as petrol, liquor and financial services. Several cases have been litigated, with mixed results, and a range of law reform proposals have been debated and some introduced including in the areas of merger review, misuse of market power, collective bargaining by small businesses, price discrimination, codes of conduct and unit pricing.<sup>65</sup> Opinion is divided about the effectiveness of these measures and the need for further reform.<sup>66</sup>

Much of the focus has been on the way in which the MSCs negotiate terms and conditions with their suppliers. Buyer power has clearly enabled the MSCs to generate significant efficiencies in the supply chain.<sup>67</sup> The dilemma that this poses is that, in the short run, Australian consumers are benefitting from the efficiencies that the chains derive from economies of scale and scope.<sup>68</sup> Consumers have increased their patronage of the chains at the expense of smaller retail outlets over the last decade, voting with their feet in favour of lower prices on a wider range of products, the convenience of one-stop shopping and flexible

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Supermarket Shelf: What Choice does Industrial Strength Free-Range Represent for Consumers?' (2013) 10 *Journal of Bioethical Inquiry* 165.

<sup>62</sup> D Burch, G Lawrence, and L Hattersley, 'Watchdogs and ombudsmen: monitoring the abuse of supermarket power' (2013) 30 *Agriculture & Human Values* 259.

<sup>63</sup> ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008); Commonwealth of Australia, Senate Economics Reference Committee, *Milking it for all it's worth – Competition and pricing in the Australian dairy industry* (2010); Commonwealth of Australia, Senate Economics Committee, *The Impacts of Supermarket Price Decisions on the Dairy Industry* (2011); Commonwealth of Australia, Select Committee on Australia's Food Processing Sector: Inquiry into Australia's food processing sector (2012).

<sup>64</sup> CPR Terms of Reference, [4.2], at <http://competitionpolicyreview.gov.au/terms-of-reference/>.

<sup>65</sup> See M Taylor, 'Wrestling with Giants – a critical account of supermarket power and competition law in Australia and the United Kingdom' (2013) 41 *Australian Business Law Review* 270; B Jedličková and J Clarke, 'The Grocery Retail Market: Is Antitrust Efficiently Handling This Market? Australian Perspective' (2014 – forthcoming).

<sup>66</sup> See, eg C Richards, G Lawrence, M Loong, and D Burch, 'A toothless chihuahua? The ACCC, neoliberalism and supermarket power in Australia' (2012) 21(3) *Rural Society* 250; N Xenophon, 'Move to give courts power to break up companies', *Media Release*, 26 January 2013; F Zumbo, 'Promoting a more diverse and competitive Australian supermarket sector' (2012) 20 *Australian Journal of Competition and Consumer Law* 25 cf. G Samuel and S King, 'If our grocery laws ain't broke, let's not fix them' *Australian Financial Review*, 1 August 2013, p55.

<sup>67</sup> A Merrett and R Smith, 'The Australian Grocery Sector: Structurally Irredeemable?', Paper for Supermarket Power Symposium by University of Melbourne Law School and Monash University Centre for Regulatory Studies, Melbourne, 2013.

<sup>68</sup> ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008).

shopping hours.<sup>69</sup> However, from a competition perspective the concern is that, in the long run, the MSCs may have insufficient incentives to compete through efficiencies (indeed, some argue that is the case now) and that consumers will face higher prices and reduced choice in the future as a consequence.<sup>70</sup> There is also an argument that over time suppliers for whom the supermarkets are competitors as well as customers, will be increasingly disincentivised to invest in product innovation and, again, consumers will be worse off as a result.<sup>71</sup>

The debate surrounding supermarket power in Australia is a useful illustration of the conflict between the economic policy goals of competition law and broader social and political concerns for fairness in the economy and society generally. Such concerns are typically raised in the context of concentrated markets in which there is an inevitable imbalance in bargaining power between participants in the supply chain, imbalances that do not necessarily reflect a lack of competition and may even be the product of it.<sup>72</sup> Such imbalances are recognised as having a disproportionately adverse effect on small-medium sized enterprises owing to their relative lack of sophistication in negotiating contracts and lack of access to specialist legal advice, higher switching costs and fewer trading relationships, and consequent reluctance to approach enforcement authorities or engage in public discourse about their concerns.

In Australia and elsewhere, in the retail grocery sector, it is increasingly evident that the concerns expressed by stakeholders are not just about competition. Many are of the view that, owing to their substantial power in the supply chain, the MSCs are able to act in ways that are not just potentially anti-competitive but may also or alternatively be objectionable on the ground that they are inherently unfair. This concern has seen a focus on whether some of the supermarkets' supply management practices offend fair trading rules (prohibitions on unconscionable conduct, in particular) which sit alongside the competition rules in the CACA. Similar developments have been taking place in Europe where authorities at both Community and national levels have been examining the impact of unfair trading practices in supply

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<sup>69</sup> A Fels, 'The Supermarket Revolution and its Causes', Paper for conference by the Crawford Fund for International Agricultural Research, Parliament House, Canberra, 14-16 August 2011.

<sup>70</sup> See King, 'Why the Australian Consumer Law can help small business', *The Conversation*, 14 November 2013.

<sup>71</sup> A Merrett and R Smith, 'The Australian Grocery Sector: Structurally Irredeemable?', Paper for Supermarket Power Symposium by University of Melbourne Law School and Monash University Centre for Regulatory Studies, Melbourne, 2013

<sup>72</sup> Consistent with this, a recent European Competition Network report concluded that certain trading practices considered to be unfair by many stakeholders 'do not fall within the scope of competition rules at the EU level or in most member states.' See European Competition Network, Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector', May 2012, [26].

chains generally, and the food chain particularly, and reviewing the effectiveness of competition and other rules in grappling with the challenges that such practices present.<sup>73</sup>

Unconscionability is not defined in the CACA,<sup>74</sup> albeit it is clear from the statutory provisions that the concept is not to be confined to equitable or common law doctrines,<sup>75</sup> that it applies not only to dealings with consumers but also business-to-business dealings and that it allows for consideration of both substantive unfairness (in the terms or outcome of a contract, for example) and procedural fairness (in the manner in which a contract was negotiated, for example).<sup>76</sup> Recent cases have approached the concept of unconscionability by reference to what is said to be its ordinary meaning, namely as referring to ‘something not done in good conscience ... it is conduct against conscience by reference to the norms of society’.<sup>77</sup> In taking this approach, the court has made clear that assessing unconscionable conduct requires reference to moral or normative standards, broadly cast. Unfairness will be an element, as may be other factors such as justice, vulnerability, advantage and honesty. No prescriptive threshold or attribute has been identified – rather, in determining liability for unconscionability, a broad-ranging consideration of the conduct is to be made in each case.<sup>78</sup>

This shift in focus, away from competition and towards fairness in addressing some aspects of ‘big business’ conduct, saw the ACCC launch proceedings in April 2014 alleging unconscionable and misleading and deceptive conduct by the supermarket, Coles, in relation to 200 of its smaller suppliers.<sup>79</sup> This development followed a long running investigation by

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<sup>73</sup> See, eg, European Commission, *A better functioning food supply chain in Europe*, COM(2009)591, 28 October 2009; European Commission, *Green Paper on Unfair Trading Practices in the Business to Business Food and Non-Food Supply Chain in Europe*, COM/2013/037final/, 31 January 2013, and the references therein.

<sup>74</sup> The prohibition in s 21(1) simply states that ‘a person must not, in trade or commerce, in connection with (a) the supply or possible supply of goods or services to a person (other than a listed public company); or (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company) engage in conduct that is, in all the circumstances, unconscionable.’

<sup>75</sup> Australian Consumer Law, s 21(4)(a).

<sup>76</sup> Australian Consumer Law, s 21(4)(c).

<sup>77</sup> *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41].

<sup>78</sup> *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41].

<sup>79</sup> See ACCC, ‘ACCC takes action against Coles for alleged unconscionable conduct towards its suppliers’ *Media Release*, 5 May 2014, at <http://www.accc.gov.au/media-release/accc-takes-action-against-coles-for-alleged-unconscionable-conduct-towards-its-suppliers>. The allegations in the proceeding relate to Coles’s use of a so-called Active Retail Collaboration (ARC) program, as part of a strategy to improve its earnings by obtaining better trading terms from its suppliers. It is alleged that one of the ways Coles sought to improve its earnings was through the introduction of ongoing rebates to be paid by its suppliers in connection with the Coles ARC program, based on purported benefits to large and small suppliers that Coles asserted had resulted from changes Coles had made to its supply chain. The ACCC alleges that through implementation of the ARC program Coles has engaged in unconscionable conduct towards 200 of its smaller suppliers by among other things: providing misleading information to suppliers about the savings and value to them from the changes Coles had made; using undue influence and unfair tactics against suppliers to obtain payments of the rebate (Coles personnel were allegedly instructed to escalate the matter to more senior staff, and to threaten commercial consequences if the supplier did not agree; threats allegedly were made when suppliers declined to agree to pay the rebate); taking

the ACCC into a range of possible CACA contraventions by the MSCs and some have highlighted the significance of the fact that the outcome of the investigation is not an allegation of anti-competitive conduct and of misuse of market power, in particular, but rather an allegation of unconscionable behaviour.<sup>80</sup>

Fairness concerns have also led to consideration of whether legal protections against unfair standard form contracts, currently available under the Australian Consumer Law, for consumers, should be extended to small business. The introduction of unfair consumer contract protections for consumers was based in part on the recognition that ‘fairness in contracts is a valued ethical principle’.<sup>81</sup> The current law enables the courts to declare void a term within a standard form consumer contract that is ‘unfair’ and a term is ‘unfair’ if it: causes a significant imbalance in the parties’ rights and obligations under the contract; is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and would cause detriment to a consumer if it were relied on.<sup>82</sup>

Responding to what are said to be recurring accounts of small business vulnerability and disadvantage arising from unfair contract terms and considerable support from the small business community for government intervention in this area, the current government has committed to extending the current protections. It is notable that the rationales given for the extension are framed not just in economic terms but also in terms of the need to recognise and preserve an ‘ethical norm of fairness’ in business dealings:

The economic case for intervening rests on the range of costs associated with unfair contract terms in standard form contracts. They may lead to a higher social cost of managing the risk of adverse events, particularly where the party drafting the contract can influence their likelihood or cost, or can diversify the risk across a pool of customers. Small businesses seeking to avoid UCTs may incur additional costs in analysing contracts, either internally or through fees for legal services. The presence

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advantage of its superior bargaining position by, amongst other things, seeking payments when it had no legitimate basis for seeking them; and requiring those suppliers to agree to the ongoing ARC rebate without providing them with sufficient time to assess the value, if any, of the purported benefits of the ARC program to their small business.

<sup>80</sup> A Merrett, ‘ACCC signals strategic change in battle with supermarkets’, *The Conversation*, 6 May 2014.

<sup>81</sup> Productivity Commission, *Review of Australia’s Consumer Policy Framework* (2008). See CAANZ, 218.1.

<sup>82</sup> Australian Consumer Law, s 24. In determining whether a term is unfair the court is required to take account of the extent to which the contract is transparent (that is, if the term is expressed in reasonably plain language, legible and presented clearly and readily to the party affected by it) and the contract as a whole. If a court finds a contract term to be unfair, it can make orders such as: an order declaring all or part of the contract to be void; an order varying a contract or arrangement as the court sees fit; or an order directing the respondent to repair or provide parts for a product provided under a contract at their expense. Civil pecuniary penalties are not available in the event that a court declares a term unfair and void.

of UCTs may also reduce small business confidence in contracting and violate the ethical norm of fairness.

The policy objective is to help to provide a level playing field for small business customers when interacting with other businesses through standard form contracts. This will enhance the welfare of Australians by increasing small business certainty and confidence.<sup>83</sup>

Some commentators have welcomed this development, pointing out that the small business debate should not be addressed by weakening the competition laws. Those laws should be concerned with protecting the competitive process, not with individual competitors, it is said. Tampering with the competition rules and in particular, the misuse of market power prohibition, in the interests of addressing small business concerns is seen as ‘wrong-headed’. Rather, the solution is said to lie in recognising small business vulnerability to unconscionable and unfair tactics by big business and dealing with this through the consumer laws.<sup>84</sup>

In addition, and consistent also with the approach taken in some European countries,<sup>85</sup> attention has turned to whether retailer-supplier relations should be dealt with using other regulatory instruments such as codes of conduct.<sup>86</sup> A code of conduct is generally understood as a set of guidelines that outlines an acceptable standard of behaviour, and may be a stand-alone self-regulatory instrument negotiated within an industry and/or supported by legislation. Codes of conduct can be prescribed under the CACA and are then enforceable by the ACCC.<sup>87</sup> Some aspects of these codes deal with procedural fairness concerns in the sector. Further, in recent changes to the Franchising Code, fairness concerns in dealings between franchisors and franchisees have prompted the introduction of a general duty to act in good faith, providing extra protections to franchisees against unfair practices - such as franchisors imposing significant capital expenditure or unreasonable restraint of trade clauses.<sup>88</sup>

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<sup>83</sup> See Treasury, *Extending Unfair Contract Term Protections to Small Business*, May 2014, prepared by Consumer Affairs Australia and New Zealand.

<sup>84</sup> See S King, G Samuel and C Jose, ‘Agenda for the National Competition Policy Inquiry’, Monash Business Forum, November 2013; S King, ‘Why the Australian Consumer Law can help small business’, *The Conversation*, 14 November 2013.

<sup>85</sup> For example, in Portugal, Slovenia, Spain, Belgium and the United Kingdom there are codes of conduct focused on the grocery supply chain, while in the Netherlands and Ireland there are plans to adopt such codes. See European Commission, Green Paper on *Unfair Trading Practices in the Business to Business Food and Non-Food Supply Chain* in Europe, COM/2013/037final/, 31 January 2013, and the references therein.

<sup>86</sup> Treasury, *Extending Unfair Contract Term Protections to Small Business*, May 2014, prepared by Consumer Affairs Australia and New Zealand.

<sup>87</sup> See CACA, Pt IVB. There are currently four mandatory industry codes under the CACA — the Franchising Code, the Unit Pricing Code, the Horticulture Code and the Oilcode. Except for the Unit Pricing Code.

<sup>88</sup> See Treasury, Amendments to the Franchising Code and Competition and Consumer Act, 2 April 2014, at <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Franchising-Code>.

Mirroring similar developments in the UK,<sup>89</sup> in 2013 the MSCs and supplier representatives released a draft of a new code of conduct intended to self-regulate supermarket-supplier relations and introduce greater transparency, predictability and, ultimately, fairness into relationships between the MSCs and their suppliers.<sup>90</sup> The code would require supply contracts to be in writing and to include certain minimum terms and conditions and it would also rule out practices that have been branded unfair by suppliers such as retrospective and unreasonable changes to terms and demands for contributions towards the costs of promotion. However, critics describe the code as intended to dilute political concerns around the misuse of market power and unconscionable conduct by supermarkets, heading off any attempt to introduce more draconian remedial measures such as market capping and divestiture - while not altering the underlying economics of lop-sided supermarket-supplier relations. Others have pointed out the weaknesses in the proposed dispute resolution procedures and have expressed the view that, in the absence of sanctions for breach of the code, it is unlikely to be effective.<sup>91</sup> The Commonwealth Government is currently considering whether to prescribe the proposed Grocery Code as an industry code under the CACA. Any decision on this is likely to await the outcome and recommendations of the CPR.

### **3. The enforcement of the law**

As stated at the outset of this paper, normative commitment to compliance with the law is influenced as much by respect for the approach taken to enforcement of the law as by agreement with the substantive values inherent in and objects of the legal provisions. The primary aims of public enforcement are punishing offenders and deterring future offences and fairness in the manner in public authorities seek to achieve these ends is essential in shoring up the perceived legitimacy of the law and hence to strengthening voluntary compliance on normative grounds.<sup>92</sup> However, effective provision for compensation of those harmed by illegal conduct is arguably equally important in contributing to perceptions that the enforcement system is fair as a whole. Moreover, there is a risk that trust in public

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<sup>89</sup> See United Kingdom Government, *Groceries Supply Code of Practice* (4 August 2009) <https://www.gov.uk/government/publications/groceries-supply-code-of-practice>

<sup>90</sup> *Food and Grocery Prescribed Industry Code of Conduct*, November 2013, at <http://images.smh.com.au/file/2013/11/18/4933032/codeofconduct.pdf?rand=1384740257431>.

<sup>91</sup> S King, 'Coles and Woolworths code useful, but beware disputes', *The Conversation*, 20 November 2013; <https://theconversation.com/coles-and-woolworths-code-useful-but-beware-disputes-20483>; C Beaton-Wells, 'Toughen up: what Australia's supermarket code could learn from the UK' *The Conversation*, 27 November 2013, at <https://theconversation.com/toughen-up-what-australias-supermarket-code-could-learn-from-the-uk-20764>.

<sup>92</sup> Procedural fairness in public enforcement action is not the focus of this paper but has been a major issue in the EU, in particular: see, eg, the collection of papers in the *Competition Law Review* (2010, Issue 7(1)) and the other papers at this conference.

enforcement agencies will be damaged where they are seen to stand unreasonably in the way of efforts by private litigants to secure compensation.

In the US, there has been long-standing strong recognition of the worth in a combination of public and private actions to enforce antitrust laws.<sup>93</sup> Albeit of much more recent origin, private enforcement has been invigorated in Europe also, through the active acknowledgement of the European Commission and some national competition authorities of the importance of private actions as a complement to public enforcement.<sup>94</sup> In both jurisdictions, the benefits of private actions have been seen to lie in providing a mechanism for compensation of victims as well as in bolstering the deterrence impact of public enforcement action.<sup>95</sup>

Australia lags behind the US and EU in recognising and valuing the contribution of private actions in enforcement of competition law. This is so despite statutory provision for

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<sup>93</sup> There is some disagreement amongst scholars as to the original intent of the US lawmakers in including a private right of action in the *Sherman Act* in 1890. However, it is generally accepted that by the time of the passage of the *Clayton Act* in 1914, the private right of action was seen as a crucial counter-balance to weak government enforcement in the early years of US antitrust law and private actions were treated by legislators as important to deterrence, as much as to compensation. It has been estimated that about 90 per cent of US antitrust cases are brought by private litigants and the threat of civil damages exposure in private cases is today generally regarded as an equal if not more powerful deterrent than criminal prosecution in the US. See eg, H First, 'Lost in Conversation: The Compensatory Function of Antitrust Law' (NYU Law and Economics Working Paper No 10-14, 27 March 2010) 5–16; W Page, 'Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury' (1979) 47 *University of Chicago Law Review* 467; D Woods, 'Private Enforcement of Antitrust Rules — Modernization of the EU Rules and the Road Ahead' (2004) 16 *Loyola Consumer Law Review* 431, 435 n 11. This is not to say that there is not controversy as to whether there is an excessive level of private litigation, as to whether the treble damage remedy is legitimate and/or effective and as to the impact of perceived excesses on substantive doctrine. See See, eg, W Breit and K Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 *Journal of Law and Economics* 405; M Denger and D Jarrett Arp, 'Criminal and Civil Cartel Victim Compensation: Does Our Multifaceted Enforcement System Promote Sound Competition Policy?' (2001) 15(3) *Antitrust* 41; American Bar Association Section of Antitrust Law, *The State of Federal Antitrust Enforcement: Report of ABA Section of Antitrust Law Task Force on the Federal Antitrust Agencies — 2001* (January 2001); R Preston McAfee, Hugo M Mialon and Sue H Mialon, 'Private Antitrust Litigation: Procompetitive or Anticompetitive?' in V Ghosal and J Stennek (eds), *The Political Economy of Antitrust* (Elsevier, 2007) 453; D I Baker, 'Revisiting History — What We Have Learnt about Private Antitrust Enforcement That We Would Recommend to Others' (2004) 16 *Loyola Consumer Law Review* 379; R D Blair and C Piette Durrance, 'Antitrust Sanctions: Deterrence and (Possibly) Overdeterrence' (2008) 53 *Antitrust Bulletin* 643.

<sup>94</sup> See, eg, European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM(2008) 165 final, 3 April 2008); European Commission, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (2013/0185 (COD)), and Amendments by the European Parliament to the Commission Proposal, AM?p&\_AMA(2014)0089(002-002)\_EN.doc.

<sup>95</sup> The starting premise of the European Commission's 2008 White Paper is that the right of victims to compensation is guaranteed by EU law and that all persons having suffered loss as a result of infringements are entitled to access effective redress mechanisms so that they can be fully compensated. Thus, the primary objective of the White Paper was identified as being to improve the legal conditions for victims to exercise their right to reparation under the EC Treaty. Providing for the exercise of this right is seen as necessary to ensure the full effectiveness of the EU competition rules. See European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (COM(2008) 165 final, 3 April 2008).

private actions since the contemporary competition law took effect in 1975<sup>96</sup> and the availability of a general class action scheme since 1992.<sup>97</sup> In this jurisdiction, competition law enforcement has been dominated by the ACCC. Proceedings brought by the ACCC in respect of breaches of the competition provisions of the CACA have outnumbered proceedings by private parties,<sup>98</sup> there have been only five class actions (representing 2% of all class actions brought between 1992 and 2009),<sup>99</sup> and law reform efforts to bolster detection and deterrence have focussed exclusively on a model of public enforcement.<sup>100</sup> At the same time, several high-profile suits brought by the ACCC in recent years have been followed by private proceedings. These suits have highlighted the enormity of the challenges facing such litigants and have produced a degree of controversy where such hurdles have been seen to be erected or exacerbated by the public enforcement system.<sup>101</sup>

In its *Compliance and Enforcement Policy*, the ACCC identifies one of its primary aims as being to ‘undo the harm caused by the contravening conduct (for example by

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<sup>96</sup> See s 82 of the CACA.

<sup>97</sup> An opt-out class action scheme is provided for in Part IVA of the *Federal Court of Australia Act 1976* (Cth). For an overview of the scheme and its use in recent cartel class actions, see C Beaton-Wells, B Dellavedova and L Taylor, ‘Private Antitrust Enforcement in Australia – Untapped Potential’ in G Monti and M Marquis, (eds), *Shaping Private Antitrust Enforcement in Europe* (2015 - forthcoming).

<sup>98</sup> A review of the Australian Trade Practices Reporter series (renamed the Australian Competition and Consumer Law Reporter in 2011) identified 86 proceedings involving alleged contraventions of the competition provisions of the TPA/CACA over the period 2000–2011 (inclusive). Of these, only 27 (approximately 31%) were brought by private applicants. This figure does not include proceedings that were settled: see, eg, *Energex v Alstrom* (2005) ¶ATPR 42-086 and nor of course does it include instances in which ‘compensation’ was negotiated without the need to bring proceedings.

<sup>99</sup> Under the Part IVA of the *Federal Court of Australia Act 1976* (Cth) approximately 22.4% of the 249 class actions between 1992 and 2009 were product liability cases followed by industrial/workplace claims (17.4%) whilst migration cases constituted 10.3% of all class actions. Since 2004, there has been a marked increase in shareholder claims (25%), as well as a growing number of claims relating to impugned investment advice (17.8%) and consumer protection (9%). See V Morabito, ‘An Empirical Study of Australia’s Class Action Regimes: First Report, Class Action Facts and Figures’, December 2009.

<sup>100</sup> In recent years such efforts have seen significant increases in the maxima applicable to corporate penalties and in 2009, saw the introduction of cartel offences attracting a maximum jail sentence of 10 years for individual defendants: see *Trade Practices (Cartel Conduct and Other Measures) Amendment Act 2009* (Cth). For background, see C Beaton-Wells, ‘Australia’s Criminalisation of Cartels: Will It Be Contagious?’ in J Rexl et al (eds), *More Common Ground for International Competition Law?*, Academic Society for Competition Law Series (2011), ch 9, pp148-173.

<sup>101</sup> See, eg, C Beaton-Wells, ‘Forks in the Road: Challenges Facing the ACCC’s Immunity Policy for Cartel Conduct: Part 1’ (2008) 16 *Competition & Consumer Law Journal* 71; P Cashman and R Abbs, ‘Problems and Prospects for Victims of Cartels: The Strengths and Limitations of Representative and Class Action Proceedings’ (Paper presented at the Competition Law Conference, Sydney, June 2009); B Slade and R Ryan, ‘Representative Proceedings in Competition Law’ (Paper presented at the Competition Law Conference, Sydney, June 2009); B Dellavedova and R Gilseman, ‘Challenges in Cartel Class Actions’ (2009) 15 *University of New South Wales Law Journal* 1001; H Spier, ‘A “Mature” Trade Practices Act Needs Some Fine Tuning’ (2009) 17 *Trade Practices Law Journal* 287; C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011) pp405–19 [10.3], pp517–27 [11.5]; I Wylie, ‘When Too Much Power is Barely Enough — Section 155 of the Trade Practices Act and Noblesse Oblige’ (2009) 16 *Competition & Consumer Law Journal* 314, 316, 340–1; I Wylie, ‘Cartel Compensation - A Consumer Perspective’ (2011) 39 *Australian Business Law Review* 177.

corrective advertising or restitution for consumers and businesses adversely affected)<sup>102</sup>. However, in practice, in relation to breaches of the competition provisions of the CACA (as distinct from the consumer and fair trading provisions) it is fair to say that the ACCC's focus has been almost exclusively on deterrence.<sup>103</sup> The ACCC has not made restitution a condition or a relevant factor in the consideration of immunity or leniency, has been reluctant in recent years to apply for findings of fact for use by private litigants in follow-on actions and has not itself brought proceedings in a representative capacity to secure compensation for victims of anti-competitive conduct, despite having had the power to do so since 2001.

The first version of the ACCC *Immunity Policy for Cartel Conduct* (published in 2003 and then called '*Leniency Policy for Cartel Conduct*') made it a requirement for corporate immunity from proceedings or penalty that 'where possible, [the corporation] will make restitution to injured parties'.<sup>104</sup> That requirement was based on the US Department of Justice's *Corporate Leniency Policy* and was said to be in 'recognition of consumers' expectations that the applicant not be able to obtain immunity from penalty or prosecution and keep their ill-gotten gains'.<sup>105</sup> There is no public information available on whether or to what extent the restitution requirement was enforced against or fulfilled by applicants in the first 18 months of its operation (the ACCC received 10 applications during that time).<sup>106</sup> However, in November 2004, the ACCC announced a review of the leniency policy and sought comment on a range of matters, including 'whether the requirement, as expressed in section 3.16 [sic] of the leniency policy, should remain in the policy'.<sup>107</sup> Following the review, the requirement of restitution was removed from the policy. The reasons given for this decision arguably are not compelling.<sup>108</sup> Moreover, it has been a decade since the review, during which time cartel

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<sup>102</sup> ACCC, *Compliance and Enforcement Policy*.

<sup>103</sup> In addition to stopping the conduct in question and encouraging the use of compliance systems, both of which are also identified as primary aims in the ACCC's *Compliance and Enforcement Policy*.

<sup>104</sup> ACCC, *Leniency Policy for Cartel Conduct* (June 2003) Pt A, [2(e)]; Pt B, [2(e)].

<sup>105</sup> ACCC, *Review of ACCC's Leniency Policy for Cartel Conduct*, Discussion Paper (24 November 2004) 4, 13.

<sup>106</sup> ACCC, *Review of ACCC's Leniency Policy for Cartel Conduct*, Discussion Paper (24 November 2004) 5.

<sup>107</sup> ACCC, *Review of ACCC's Leniency Policy for Cartel Conduct*, Discussion Paper (24 November 2004) 4, 13 comment 14.

<sup>108</sup> See G Samuel, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Speech delivered at International Class Action Conference, 25 October 2007) 3–4, outlining the some of the ACCC's concerns in relation to the requirement of making restitution. In explaining the decision to remove the requirement, the ACCC indicated that it had been included in the policy originally out of concern that leniency applicants should not be seen to escape any payment of restitution. However, the ACCC pointed out, the experience in the US and Canada has been that private law suits generally follow an application for immunity even where no public enforcement action is taken. This reasoning is not compelling by way of justification for removing the restitution requirement in Australia. It remains the case that immunity beneficiaries escape the payment of penalties. They should not also escape the payment of restitution. It is true that injured parties have an entitlement to pursue for damages. However, whether this is a feasible or likely pursuit in all cases, is another question altogether. The conditions in Australia are much less conducive to private actions than are those in the US and Canada, as is clear from the handful of such actions that have been brought. In the absence of other

offences have been introduced, and yet there is no sign that the ACCC is considering revisiting the issue of restitution as a condition of immunity. This is despite the fact that the ACCC itself has acknowledged that criminal sanctions should alter significantly incentives in favour of immunity applications.<sup>109</sup>

Immunity aside, the ACCC has also not sought to facilitate the payment of compensation to victims by parties that miss out on immunity but nevertheless win significant concessions by way of leniency from the Commission by cooperating under its *Cooperation for Enforcement Matters Policy*. That policy states that leniency is likely to be considered for a corporation where, amongst other things, the corporation is ‘is prepared to make restitution where appropriate.’<sup>110</sup> However, there is no evidence that the ACCC enforces or promotes restitution as a consideration in the ‘settlement’ negotiation process relating to breaches of the competition provisions. Nor is cooperation with or payment of compensation to victims treated by either the ACCC or the courts as a factor relevant in the assessment of penalties.<sup>111</sup>

Indeed, there are indications that the ‘settlement’ process may have the effect of undermining rather than facilitating the payment of compensation by parties that have admitted to breaching the competition rules. The legislature intended that follow-on actions be facilitated by public enforcement action. That intention is conveyed in s 83 of the CACA which provides that findings of fact made against a respondent in earlier proceedings (including proceedings for a cartel offence) are prima facie evidence of those facts in later

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measures to support private enforcement, it is arguable that the number of private actions is unlikely to climb significantly in the future. As a result there is a stronger case for restitution as a condition of immunity in Australia than there is in other jurisdictions where the private enforcement climate is much more robust.

<sup>109</sup> G Samuel, ‘Current Issues on the ACCC’s Radar’ (Speech delivered at Competition Law Conference, Sydney, 29 May 2010) 6.

<sup>110</sup> ACCC, *Cooperation Policy for Enforcement Matters* (31 July 2002) 2. Notably, following a 2013 review of its immunity policy, the ACCC has published a draft combined and revised Immunity and Cooperation Policy for Cartel Conduct. The draft policy cites the factors that the ACCC will treat as relevant in assessing leniency for cooperating parties and the list of such factors omits the reference to restitution that appears in its general *Cooperation Policy*. See draft *ACCC Immunity and Cooperation Policy for Cartel Conduct* (April 2014).

<sup>111</sup> In the *Marine Hose* case, only one of the four cartel participants (Parker ITR) had provided for a compensation scheme for customers. Finkelstein J observed that a ‘factor which will require future consideration is whether payment of compensation or making restitution to those adversely affected by the illegal conduct should go in mitigation of the penalty. It may be that a company should receive a lower (or discounted) penalty if it has assisted those affected by its actions by implementing a compensation scheme in the same way that a company may receive a discount for assisting the ACCC’: *Australian Competition and Consumer Commission v Bridgestone* (2010) ATPR ¶42-320, [40]. However, despite identifying the provision of compensation as a relevant factor in the assessment of penalties, Finkelstein J did not specify how this factor had been taken into account in determining the penalties in this case, or indicate whether any distinction had been drawn between the amount payable by the parties based on whether they had provided for compensation schemes. A press release issued by the ACCC identifies that the penalties reflected the ‘number of contraventions found against each respondent with some discount for co-operation with the ACCC’, but made no reference to the role of compensation in assessing the appropriate penalties: Australian Competition and Consumer Commission, ‘\$8 Million Plus Penalty Imposed on Cartel Members’ (Press Release NR 074/10, 14 April 2010).

proceedings for damages or compensation orders.<sup>112</sup> However, there have been few cases in which s 83 has operated in the manner evidently intended by the legislature.<sup>113</sup> This is due in large part to the process under the *Cooperation Policy* whereby the ACCC and respondent negotiate an agreed statement of facts and consent orders and present the statement and proposed orders to the court for its endorsement.<sup>114</sup> Uncertainty has emerged as to whether ‘findings of fact’ in s 83 require a finding based on evidence, as distinct from a finding based on admissions.<sup>115</sup> Conceivably as a result of this uncertainty (albeit possibly also for other reasons), the ACCC has not sought ‘s 83 findings’ in competition cases in recent years.<sup>116</sup> Nor has it sought to have the uncertainty resolved through appeal in those cases in which its application for s 83 orders has been denied. By contrast in Europe, pursuant to Art 16(1) of Regulation No 1/2003, a decision of the European Commission relating to proceedings under Arts 101 or 102 of the Treaty has a probative effect in subsequent actions for damages, and a national court cannot take a decision running counter to such Commission decisions.<sup>117</sup> The Commission’s proposed Directive would extend this by giving similar effect to final infringement decisions of national competition authorities.<sup>118</sup>

The reluctance in Australia to allow for findings made by consent in prior proceedings to have probative effect in follow-on suits is explained largely by nervousness on the part of the ACCC that it would disincentivise respondents from settling and thereby inhibit the ACCC from resolving allegations in an efficient and certain fashion. However, there is a good case for treating this concern as more theoretical than real. Firstly, it is not a concern borne

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<sup>112</sup> See also s 79B of the CACA which evinces a legislative intention to prioritise compensation over penalties at least in cases in which both are sought.

<sup>113</sup> Cf *Australian Competition and Consumer Commission v Tasmanian Salmonid Association* [2003] ATPR ¶41-954 (in which the respondents consented to findings being made for the purposes of CACA s 83); *Hubbards Pty Ltd v Simpson Ltd* [1982] ATPR ¶40-925 (in which a private litigant was able to invoke CACA s 83 in proof of its case).

<sup>114</sup> See generally C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (2011), pp394–8 [10.2.2.1].

<sup>115</sup> See *Australian Competition and Consumer Commission v Monza Imports Pty Ltd* (2001) ATPR ¶41-843 [22]–[28]; *Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 (17 October 2001); *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [No 2]* (2002) 190 ALR 169, 183–4 [51]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd [No 3]* (2005) 215 ALR 301, 323 [116]–[118]; *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665, 691–2 [106]–[107].

<sup>116</sup> Section 83 orders were not sought, for example, in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd* (2007) 244 ALR 673, *Australian Competition and Consumer Commission v Vanderfield Pty Ltd* [2009] FCA 1535 (3 November 2009); *Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd [No 8]* (2011) 277 ALR 446 and have not been sought in the series of proceedings brought by the ACCC in respect of the airline cargo cartel.

<sup>117</sup> Case C-199/11 *European Community v Otis and others*, [2012] ECR I-0000.

<sup>118</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, COM(2013) 404 final, 11 June 2013, [4.3.1].

out by experience in the US or Europe. Secondly, the incentives for settling with the ACCC are powerful. Lengthy, expensive and distracting investigations and proceedings may be avoided and substantial discounts on potentially significant corporate penalties are on offer through the settlement process. Moreover, it is possible in settlement negotiations to avoid having individuals joined as respondents to the proceedings. Thirdly, there are avenues available for the use of prior admissions by plaintiffs in follow-on suits, quite apart from s 83 (albeit such avenues are yet to be judicially tested).<sup>119</sup>

Moreover, in the Australian settlement process, respondents are evidently able to avoid or diminish responsibility for loss or damage caused by the conduct in question, with a view no doubt to minimising exposure in follow-on damages suits.<sup>120</sup> As a result, cartelists that have settled with the ACCC and paid significant penalties are in a position to deny both liability as well as allegations of loss and damage, requiring claimants to prove both of these elements of their cause of action at significant risk and expense, without the assistance from the ACCC forerunner suit that appears to have been envisaged by the legislature.<sup>121</sup> Confining admissions to use in the proceeding in which they are made may make sense to lawyers. However, most lay people would be likely to regard it as unfair, if not a major failing in the system, that an offender be permitted to confess to wrong-doing for the purposes of negotiating a reduced penalty while at the same time being able to deny wrong-doing for the purposes of attempting to avoid liability to pay compensation to victims.

Since 2001 the ACCC has had power to bring representative proceedings under s 87(1B) of the CACA seeking compensation on behalf of persons who have suffered loss as a

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<sup>119</sup> For example it is arguable that a follow-on claimant can rely on admissions made in a respondent's defence in the ACCC proceeding and by a respondent's counsel on its behalf on the penalty hearing of the ACCC proceeding or in public statements (as statements against interest made by a duly authorised agent: *R v Delgado-Guerra* (2001) 2 QD R 384); and further that, invoking the doctrine of estoppel, a respondent should not be permitted to re-agitate matters admitted in the ACCC proceeding and so attack the prior verdict (see *Kirby v Centro Properties Limited* [2009] FCA 1505 at [16]-[18] per Finkelstein J). It is also arguable that under various provisions of the *Evidence Act 1995* and/or the *Federal Court of Australia Act 1976* and related rules a claimant may tender portions of transcripts of ACCC examinations and voluntary interviews containing admissions, and/or that the Court is empowered to and should force admissions under its case management powers. Further, in a cartel case, once it is (otherwise) established, the acts of one party in furtherance of common purpose are admissible against other parties to the conspiracy (see *R v Associated Northern Collieries* (1911) 14 CLR 387).

<sup>120</sup> This is what evidently occurred in the *Visy* case. The ACCC did acknowledge in its submissions that the amount of loss or damage caused to non-contract customers by the price increases instigated under the cartel arrangements is likely to have been substantial: see Australian Competition and Consumer Commission, 'Outline of Submissions of the Applicant on Penalty', *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd*, VID 1650/2005, 12 October 2007, [46]. However, as to contract customers, the ACCC did not allege that the cartel 'had any negative financial impact or caused loss to' such customers — a non-allegation plainly won by Visy in its settlement negotiations with the ACCC in order to minimise exposure in private damages actions: see *Australian Competition and Consumer Commission v Pratt [No 3]* (2009) 175 FCR 558, 578 [29], 583 [35].

<sup>121</sup> This is what occurred in the class action against Visy and Amcor: see L Wood, 'Sweet Relief for Amcor in Cadbury Box Battle', *The West Australian* (Perth), 23 July 2009, 47; Elisabeth Sexton, 'Cadbury Setback in Cartel Claim', *Sydney Morning Herald*, Sydney, 12 June 2009, 19.

result of a Pt IV contravention.<sup>122</sup> That provision has never been used by the ACCC in respect of a contravention of the competition provisions. Yet, it has been used in respect of contraventions of the fair trading and consumer provisions,<sup>123</sup> and, in its 2007 submission to a Productivity Commission inquiry into consumer policy, the ACCC sought broader powers enabling it to seek redress for consumers in such matters.<sup>124</sup> Those powers were granted in 2010.<sup>125</sup> By contrast, there is no sign of readiness on the part of the ACCC to seek compensation for consumers in matters involving anti-competitive conduct, either directly or through the exercise of its intervention power.<sup>126</sup>

Aside from the general statement of aims in its *Compliance and Enforcement Policy*, and in stark contrast to the statements made by authorities in the US and Europe, the ACCC has made few public statements of policy in relation to matters of private enforcement. In several speeches by former ACCC Chairman, Graeme Samuel AM, a positive, albeit qualified, perspective was offered. The ACCC was said to see ‘private proceedings as a legitimate and valuable avenue of redress’ while also to be likely to ‘act as a further deterrent’ to cartel activity.<sup>127</sup> At the same time ‘competing demands’ and ‘tensions’ between ACCC enforcement and private litigation were emphasised.<sup>128</sup> In particular, the potential for private follow-on litigation to disincentivise use of the ACCC *Immunity Policy* was highlighted, as was the prospect of ACCC investigations and the Commission’s ability to persuade parties to cooperate generally being undermined by requests for information from private litigants. It was made clear that in resolving these tensions, ACCC enforcement will always be given first priority.

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<sup>122</sup> The ACCC may also use the broader power to bring representative actions under the *Federal Court of Australia Act 1976* (Cth).

<sup>123</sup> See, eg, *Australian Competition and Consumer Commission v Golden Sphere International Inc* (1988) 83 FCR 424; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* (1988) 84 FCR 512.

<sup>124</sup> ACCC, *Submission to the Productivity Commission Inquiry into Australia’s Consumer Policy Framework* (June 2007) pt 5.2

<sup>125</sup> See *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth), inserting ss 87AAA–87AAB into the then *Trade Practices Act 1974* (Cth). See now s 237 of the Australian Consumer Law, under Schedule 2 of the CACA.

<sup>126</sup> Pursuant to s 163A of the CACA.

<sup>127</sup> G Samuel, ‘The ACCC Approach to the Detection, Investigation and Prosecution of Cartels’ (Speech to Economics Society of Australia, 28 September 2005) 21–2. These views were reiterated in two later speeches: G Samuel, ‘The Enforcement Priorities of the ACCC’ (Speech delivered at Competition Law Conference, 12 November 2005) 26–7; G Samuel, ‘The ACCC Approach to the Detection, Investigation and Prosecution of Cartels’ (Speech delivered at 2<sup>nd</sup> Antitrust Spring Conference, 28 April 2006) 25–6. The subject of private enforcement is notable by its conspicuous absence from speeches by the current Chairman, Rod Sims.

<sup>128</sup> G Samuel, ‘The Relationship between Private and Public Enforcement in Deterring Cartels’, (Speech delivered at International Class Action Conference, 25 October 2007), 5-7.

It was stated by the Chairman that the ACCC would not wish to ‘hinder private action against cartels’.<sup>129</sup> However, there has been at least one instance in which ACCC has sought to withhold assistance from private litigant, refusing access to proofs of evidence in had prepared in connection with its civil penalty proceeding. The refusal attracted strong judicial criticism:

... there is at least an equal, if not more compelling, public interest in allowing private litigants to rely on the output of regulatory investigations, which are undertaken by public regulators at least in part on their behalf. The ACCC should be ‘motivated by a desire to do its duty, both towards the public and towards individual investors’. It is not motivated by corporate profit motives or competitive concerns.<sup>130</sup>

The ‘real concern’ of the ACCC, in the judge’s view, was that potential immunity applicants would be deterred from cooperation, not by the disclosure of information but by the heightened prospects of damages exposure:

In my view, the confidentiality and free-rider arguments ostensibly advanced here by the ACCC are, at best, a proxy for that concern, and at worst a smokescreen obscuring it. To be fair, the appropriate total level of private civil liability (ie, penalties plus damages) an actor should face for cartel conduct is a valid issue, and one which was long ago recognized by authorities and commentators in the US in the context of cooperation and leniency ...

But to acknowledge the ACCC’s concern is not to approve of its proposed method for resolving that concern. On the contrary, the ACCC’s attempt to use common law privilege doctrine to protect cooperators when they are faced with private suits for damages, albeit partially successful here, appears to me to be misguided. Whether cartel whistleblowers ... or those who cooperate with the regulators after the commencement of penalty proceedings ... should be rewarded or encouraged by reduced exposure or enhanced protection in damages proceedings is a broad question of policy that should be addressed by the legislature, not by ad hoc judicial tinkering through the backdoor of privilege.<sup>131</sup>

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<sup>129</sup> G Samuel, ‘The Relationship between Private and Public Enforcement in Deterring Cartels’, (Speech delivered at International Class Action Conference, 25 October 2007).

<sup>130</sup> *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137, 146 [32] (citations omitted).

<sup>131</sup> *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137, 150 [46]–[47].

The case apparently caused some discomfort for the ACCC<sup>132</sup> and the approach taken by the agency in that litigation was the subject of considerable commentary and criticism.<sup>133</sup> However, six years on and five years since the introduction of criminal sanctions, there is yet to be any public statement by the ACCC as to the lessons learnt from that case and any prospective change to its approach. Since the case, however, the CACA has been amended to introduce provisions under which the ACCC may deal with requests for access to categories of cartel-related information.<sup>134</sup> Controversially, those provisions omit any reference to the legitimate interests of private claimants in the prescribed factors relevant to ACCC and judicial discretion to disclose information and they limit the scope for judicial review of ACCC decisions to refuse disclosure.<sup>135</sup>

The ACCC is not alone in its stance on access to information by private litigants. While there is growing support for private competition law enforcement around the world, public enforcement agencies by and large remain adamant that private claimants should receive minimal assistance from agencies by way of access to information on their files. The rationale for this stance relates primarily to protection of the efficacy of immunity policies. At its essence, the argument made in support of such protection prioritises deterrence (through the heightened prospects of detection with an immunity policy) over the facilitation of compensation for victims of cartel conduct. Ironically, perhaps, there is also an argument that immunity applicants should not be unfairly disadvantaged vis-à-vis other cartel members in exposure to private suits for damages by reason of having been the first to report.<sup>136</sup> Fairness for immunity applicants appears in this context to trump fairness for victims. From a normative compliance perspective, such arguments in favour of protecting immunity

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<sup>132</sup> See G Samuel, 'Current Issues on the ACCC's Radar' (Speech delivered at Competition Law Conference, 29 May 2010) 6.

<sup>133</sup> See C Beaton-Wells, 'Forks in the Road: Challenges Facing the ACCC's Immunity Policy for Cartel Conduct: Part 1' (2008) 16 *Competition & Consumer Law Journal* 71; P Cashman and R Abbs, 'Problems and Prospects for Victims of Cartels: The Strengths and Limitations of Representative and Class Action Proceedings' (Paper presented at the Competition Law Conference, Sydney, June 2009); B Slade and R Ryan, 'Representative Proceedings in Competition Law' (Paper presented at the Competition Law Conference, Sydney, June 2009). For a more general discussion of the ACCC's *Immunity Policy* and the disclosure of information to third parties, see K Stellios and C Cavallero, 'Immunity: A Dilemma for both Whistleblowers and the ACCC' (2011) 19 *Australian Journal of Competition and Consumer Law* 163.

<sup>134</sup> See *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth), ss 157(1A), 157(1B), 157B, 157C.

<sup>135</sup> For a summary of criticisms made of the 'protected cartel information' scheme, see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011), section 10.3.2, pp410-414. It is not known whether the ACCC has yet had an occasion to apply the provisions and, if so, how it has approached their application.

<sup>136</sup> See European Commission, Proposal for a Directive of the European Parliament and of the Council *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU* (2013/0185 (COD)), p16.

information may be less problematic where other measures are taken to facilitate compensation, including requiring immunity beneficiaries to take reasonable steps to compensate victims or otherwise incentivising cooperation with private claimants.<sup>137</sup> However, normative compliance is conceivably threatened where, as in Australia, policymakers and the competition authority pursue an enforcement agenda that makes no provision or does not reasonably provide in some way for compensation.<sup>138</sup>

#### 4. Conclusion

This paper exhorts lawmakers and enforcement authorities to take a broad and sophisticated perspective on the range of factors likely to influence compliance with competition laws. The prevailing model in most jurisdictions focuses predominantly on economic considerations in the conception of legal goals and design of enforcement strategies. There are risks in this of overlooking the importance of perceived fairness in the law and its enforcement as a factor that affects compliance on normative grounds. Such risks are borne out by, albeit are by no means unique to, the Australian experience.

In Australia, the longstanding focus of policymakers on competition, ignoring stakeholder concerns about fairness, has generated a distorted and arguably unproductive debate about the role and efficacy of the competition rules, and in some quarters a deep discontent with if not disrespect for the law in this field. Recently have there been efforts to address bargaining power imbalances in concentrated markets and supply chains, independently of the question as to whether such imbalances reflect anti-competitive market structures or conduct, and in recognition of fairness as a valued norm in business to business

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<sup>137</sup> As for example, under the *Antitrust Criminal Penalty Enhancement and Reform Act* (2004) 15 USC 1 and the European proposal that an immunity recipient's liability, as well as its contribution owed to co-infringers under joint and several liability, would be limited to the harm it caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect suppliers (European Commission, Proposal for a Directive of the European Parliament and of the Council *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU* (2013/0185 (COD), Arts 11(2), 11(3), 11(4)).

<sup>138</sup> There is a broader ground on which to be concerned that immunity policies may threaten normative compliance. Such policies arguably reduce law enforcement to a 'game' – the company that is first to 'the confessional' wins, and winner takes all. The outcome is determined by timing only, and sometimes as a matter of days or hours. Neither the circumstances in which the immunity beneficiary came to be first nor the compliance commitment of the beneficiary, relative to other parties to the offending conduct, are relevant. Moreover, in most jurisdictions, the immunity prize does not include any requirement to implement, improve or update a compliance program. Nor does it generally require the beneficiary to take reasonable steps to make restitution to the victims of the cartel. It is difficult to imagine how this scenario promotes respect for the law or its administration. See further J Murphy, 'Compliance Policy at the Antitrust Division', *Bloomberg Law Reports*, 8 November 2011; J Murphy, 'Promoting Compliance with Competition Law: Do Compliance and Ethics Programs Have a Role to Play?', Paper for Roundtable on Promoting Compliance with Competition Law, OECD DAF/COMP(2011)5, 7 October 2011, [30]-[37] (Paper circulated for Competition Committee meeting on 29-30 June 2011).

dealings. Such efforts, including ACCC actions to enforce the unconscionability prohibitions and proposed extension of the unfair contract protections, are nascent but are consistent with developments in Europe and with growing sensitivity by authorities around the world to the need to address fairness, separately from competition, in business regulation. It is important that these initiatives be pursued with political commitment and enforcement vigour so as to ensure that economic conditions are not just competitive but fair also. In the long run, failing to create such conditions will undermine business respect for the law and reduce decisions about compliance to an economic calculation, at a significant cost to enforcement resources. There may be costs also for business certainty and as a consequence for the willingness of firms to innovate and innovate, ultimately to the detriment of consumers and the economy generally. Moreover, a legal regime that permits, if not fosters, unfairness in trade and commerce will carry inevitably a social cost, damaging to the type of society in which we might aspire to live.

Similarly, the approach taken in Australia to the enforcement of competition law has evinced a pre-occupation with economically motivated compliance, driven almost exclusively by financial penalties intended to punish and deter. Not only has this approach been dismissive of the inherent unfairness in failing to compensate victims, it has seemingly also overlooked the contribution that private enforcement can make to deterrence. The provisions of the CACA and the enforcement policies of the ACCC, particularly those relating to immunity and leniency, not only fail to support private actions but in some respects actively obstruct them. They create imbalances that favour protections for admitted cartel members over the rights of harmed parties. For enforcement to be perceived as fair, both deterrence and compensation need to be valued and authorities need to commit themselves to developing strategies that address the tensions that arise in a system that relies on both public and private enforcement action. Australia has much to learn from US and European experience in this regard.