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A practical cross-border insight into competition litigation work

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1 General

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

Australia's principal competition statute is the *Competition and Consumer Act 2010* (Cth) (**CCA**). The competition provisions are contained in Part IV of the CCA and prohibit anti-competitive conduct affecting trade and commerce in Australia.

Claims can be brought under any of the following competition provisions of the CCA (each state and territory has also adopted these prohibitions by way of laws of local application):

(a) Cartel conduct (sections 44ZZRD, 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK) – civil and criminal prohibitions on entering into and giving effect to contracts, arrangements and understandings between competitors that contain cartel provisions, being provisions that have the purpose or effect of fixing prices, or the purpose of restricting production or supply of goods and services, allocating customers, suppliers or geographic areas, or rigging bids.

(b) Exclusionary provisions (sections 45 and 4D) – a prohibition on entering into and giving effect to contracts, arrangements and understandings between competitors that contain provisions that have the purpose of preventing or restricting the supply of goods or services to or from particular persons or classes of persons or in particular circumstances or conditions.

(c) Price signalling (Division 1A of Part IV) – prohibitions on the making of private disclosures of pricing information to competitors (whatever the purpose or effect of the disclosure) and the making of public or private disclosures of information about prices, capacity or strategy for the purpose of substantially lessening competition in a market. These prohibitions are currently limited to the banking sector only.

(d) Misuse of market power (section 46(1)) – a prohibition on a corporation with a substantial degree of power in a market taking advantage of that power for the purpose of eliminating or substantially damaging a competitor or preventing the entry of a person into that or any other market, or deterring or preventing a person from engaging in competitive conduct in a market.

(e) Predatory pricing (section 46(1AA)) – a prohibition on corporations with a substantial market share from supplying goods or services for a sustained period at below cost pricing for the purpose of eliminating or substantially damaging a competitor or preventing the entry of a person into that or any other market, or deterring or preventing a person from engaging in competitive conduct in a market.

(f) Anti-competitive mergers (section 50) – a prohibition on any acquisition of shares or assets that would be likely to have the effect of substantially lessening competition in an Australian market.

(g) Anti-competitive agreements (section 45) – a prohibition on corporations making or giving effect to contracts, arrangements or understandings containing a provision that has the purpose or likely effect of substantially lessening competition. This section typically covers horizontal arrangements, but is not limited to such arrangements.

(h) Exclusive dealing (section 47) – prohibitions on various types of vertical restraints (known as "full line forcing") which have the purpose, effect or likely effect of substantially lessening competition in a market. Section 47 also includes a prohibition on "third line forcing" which is where a supplier offers to supply goods or services, or goods or services at a certain price, on the condition that the acquirer obtains goods or services from a third party. Third line forcing (which also applies in situations of refusal to supply), is prohibited outright and is not subject to any substantial lessening of competition test.

(i) Resale price maintenance (**RPM**) (sections 48, 96 and 96A) – a prohibition on suppliers from specifying or enforcing a minimum price of supply or restricting the ability of their customers to sell below a specified price.

(j) Secondary boycotts (sections 45D and 45DA) – prohibitions on two persons engaging in conduct in concert with each other that hinders or prevents the supply or acquisition of goods or services between a third and fourth person, for the purpose and with the likely effect of causing damage to the business of the fourth person, or causing a substantial lessening of competition in any market in which the fourth person operates.

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

The legal basis for bringing an action for breach of any of the competition laws is the CCA.

A breach of those provisions can result in civil prosecution by the Australian regulator, known as the Australian Competition and Consumer Commission (**ACCC**), or private actions for damages and other orders (see question 3.1 below).

The CCA also provides for criminal prosecutions for breaches of the cartel provisions, for which action can only be taken by the Commonwealth Director of Public Prosecutions (**CDPP**).

As of June 2016, there have been no criminal prosecutions under the cartel provisions of the CCA, although the Chairman of the ACCC has recently indicated that Australia's first criminal prosecution for cartel conduct is imminent.

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

The legal basis for competition law claims is derived from an Australian Commonwealth (federal or national) law, being the CCA, as well as state and territory legislation that mirrors parts of the CCA.

Due to constitutional limits, the CCA creates primary liability for corporations in breach of the competition provisions, with accessorial liability for individuals in respect of the corporation's conduct. Corresponding state and territory legislation creates primary liability for individuals in breach of competition provisions.

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

The CCA gives jurisdiction over civil (both regulatory and private party actions) and criminal proceedings to the Federal Court of Australia. The Federal Court has a specialist panel of judges who deal with economic regulation, competition and access matters.

The Australian Competition Tribunal has jurisdiction to review certain ACCC decisions, such as merger clearance decisions.

Private proceedings in respect of the misuse of market power provisions claiming damages of up to AU$750,000 may also be heard by the Federal Circuit Court.

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

The ACCC has standing to bring proceedings for any civil breach of the competition provisions and the CDPP has standing to bring criminal proceedings for breach of the cartel provisions.

Private parties who have suffered loss caused by a breach of the competition provisions of the CCA have standing to bring claims for damages or other orders against any party involved in the breach (sections 82 and 87).

Representative proceedings (known as class actions) under the *Federal Court of Australia Act 1976* (Cth) can be commenced where seven or more persons have claims against the same person in respect of (or arising out of) the same, similar or related circumstances and the claims give rise to a substantial common issue of law or fact.

The representative proceeding regime is an "opt-out" regime, under which persons that fall within the group definition used by the representative plaintiff in the originating process are covered by, and potentially bound by, the outcome of the proceeding unless they take steps to opt out of the proceedings.

The ACCC can also bring representative proceedings on behalf of persons who have suffered, or are likely to suffer, loss or damage by conduct in contravention of the competition provisions of the CCA (section 87(1A)), with those persons' consent. This power is rarely used.

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

The jurisdiction under the CCA extends to:

(a) conduct in Australia by Australian corporations, foreign corporations, and individuals; and

(b) conduct outside Australia by corporations incorporated or carrying on business in Australia, and by Australian citizens and persons usually resident in Australia.

The CCA also extends the prohibitions on misuse of market power to conduct in respect of trans-Tasman markets (section 46A) and conduct by New Zealand corporations, residents and bodies corporate carrying on business in New Zealand (section 5(1A)).

As of June 2016, private litigants could not rely on conduct outside Australia without the consent of the relevant Federal Minister. However, the recent Harper Review (see question 11.3 below) recommended that this requirement be abolished.

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

Consistent with overseas trends, the Federal Court of Australia has seen an increase in ACCC prosecutions and private competition law claims, particularly class actions following on from cartel enforcement action by the ACCC.

However, as a jurisdiction, Australia does not currently have a reputation for attracting claimants or defendant applications in competition law cases.

1.8 Is the judicial process adversarial or inquisitorial?

The Australian judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Interim remedies, such as interim injunctions, are available in competition law cases.

However, only the ACCC has standing to seek injunctions in merger cases.

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

Interim injunctions can be sought in cases where a permanent final injunction is also sought as part of the claim.

In order to grant an interim injunction, the Court must be satisfied that:

(a) there is a *prima facie* case, in the sense that there is a serious question to be tried;

(b) the balance of convenience favours the granting rather than the refusal of the injunction;

(c) damages will not be adequate remedy; and

(d) where a private litigant is seeking the injunction, they have provided an undertaking to pay any damages which may result from the injunction being granted.

3 Final Remedies

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

There are a range of final remedies available under the CCA. The nature of the remedy will vary depending on whether the proceedings are brought by the ACCC, CDPP or a private party.

The available remedies in competition cases are:

(a) pecuniary penalties – available only to the ACCC (in the case of civil actions) or the CDPP (in the case of criminal cartel actions);

(b) jail terms for individuals (of up to 10 years) – available only to the CDPP in the case of criminal cartel actions;

(c) declarations;

(d) injunctions – only the ACCC has standing to seek injunctions in relation to mergers (section 80(1A));

(e) divestiture orders;

(f) orders declaring a contract void in whole or in part, or to vary a contract;

(g) damages in private party actions – there are no exemplary damages available in Australian competition cases;

(h) redress or compensation orders – available only to the ACCC;

(i) other orders, such as non-punitive orders requiring a compliance programme (section 86C), adverse publicity orders (section 86D) and disqualification orders (section 86E) – all of which are only available to the ACCC.

The maximum pecuniary penalties for both civil and criminal breaches are:

(a) for an individual – AU$500,000; and

(b) for a corporation – the greater of:

i. AU$10 million;

ii. three times the value of the benefits obtained by the contravention; and

iii. if those benefits cannot be determined, 10% of the annual Australian turnover of the corporation and its related bodies corporate.

All remedies for relief in Australia are awarded at the discretion of the Court. However, factors that are regularly taken into consideration by the Court in assessing the size of any pecuniary penalty for breaches of competition laws include the nature of the conduct, the damage caused, the size and degree of power of the contravening company, the deliberateness of the conduct, involvement of senior management, the corporate culture of compliance, and cooperation.

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

Any person who has suffered loss or damage by reason of a breach of the competition provisions of the CCA may bring a claim for damages against a party involved in the breach.

Damages for breach of the CCA are compensatory in nature – there are no exemplary or punitive damages available in Australian competition law cases. A claimant can only recover the amount of loss or damage actually suffered by them by reason of the contravening conduct.

Some examples of cases are:

(a) in 2011, the Federal Court made orders approving a settlement of a class action arising out of a price-fixing cartel in respect of corrugated fibreboard packaging requiring payments to affected customers of AU$95 million. The Court also awarded AU$25 million in legal costs;

(b) in 2013, the Federal Court awarded damages of US$22.4 million to a private party in respect of findings of breaches of the CCA's bid-rigging cartel provisions and the Australian Consumer Law's misleading and deceptive conduct provisions;

(c) in 2014, the Federal Court made orders approving a settlement of AU$38 million in respect of a class action against a number of airlines in respect of an alleged cartel to fix the prices of certain international air freight services; and

(d) in April 2016, the Federal Court imposed penalties of AU$18.6 million in respect of a number of contraventions of the prohibition on anti-competitive agreement in section 45. The ACCC has since appealed the penalty judgment.

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

As damages are assessed by the Courts by looking at the actual loss suffered by the party making the claim, the Court does not take into account whether any pecuniary penalty has been imposed in assessing the appropriate level of damages.

However, if the actual loss suffered by a claimant has already been partially or fully mitigated by, for example, a compensation order or redress scheme, this would factor into the Court's assessment of any award of damages.

If the Court considers it appropriate to impose a civil penalty (or criminal fine) and order compensation to persons that have suffered loss, and the party in breach does not have the financial resources to pay both, the Court must give preference to an order for compensation. The better view is that this consideration only arises in representative proceedings commenced by the ACCC (see question 1.5 above).

4 Evidence

4.1 What is the standard of proof?

In civil proceedings, the standard of proof is "on the balance of probabilities".

In criminal proceedings, the criminal standard of proof of "beyond reasonable doubt" applies.

4.2 Who bears the evidential burden of proof?

The evidential burden of proof is usually borne by the party bringing the legal action (the ACCC, CDPP or a private party).

The burden of proof may switch to the defendant in certain circumstances, such as if they wish to rely on a particular defence (for example, asserting a statute of limitations defence or seeking to rely on an exception under the CCA).

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

A finding of fact by a Court made in competition law proceedings, including in cartel cases, can be relied upon in subsequent damages claims as a rebuttable presumption as it is considered to be *prima facie* evidence of that fact. This is provided for by section 83 of the CCA.

Admissions of fact made by a party and findings made by consent do not fall within the scope of section 83. However, the Harper Review has recommended that section 83 be extended to such admissions and findings (see question 11.3 below).

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

Evidence in competition law cases is by way of a written statement, affidavit or outline filed with the Court and served on the other parties to the case, followed by oral evidence by cross-examination at the hearing.

Rules about what constitutes relevant evidence and any limitations on the admissibility of evidence (for reasons such as hearsay, opinion, legal privilege and without prejudice) are governed by the *Evidence Act 1995* (Cth).

Expert evidence is often given in competition law cases. It is an accepted form of opinion evidence in Australia, subject to the evidence satisfying the requirements of specialised knowledge based on study, training or experience and the evidence being given in accordance with the Federal Court's published Expert Witness Guidelines.

Expert evidence is usually provided by way of written reports, with experts being made available for cross-examination during trial. Concurrent expert evidence is relatively common in Australian competition trials.

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

The Federal Court Rules govern the manner in which parties may apply for the disclosure of documents (known as discovery) prior to and during proceedings.

Any party to a proceeding may request for the Court to make an order for discovery from the other party (including the ACCC) during the course of proceedings. Discovery is not automatically granted and disputes often arise as to the scope of discovery to be provided.

If discovery is ordered, it is usually limited to categories of documents which are directly relevant to the issues raised in the pleadings or in any affidavits and the party is aware of, having conducted a reasonable search.

The party required to give discovery must provide all parties to the proceeding with a list of documents describing each category of documents within its control.

Pre-action discovery is also available in Australia to prospective claimants in limited circumstances. For example, where a prospective claimant needs documents to ascertain the identity of a defendant or where they believe they may have a claim against a known defendant but do not have sufficient information to decide whether to start a proceeding.

Pre-action discovery is typically only used by private parties as the ACCC has extensive powers under the CCA (section 155) to compel a party to produce documents, furnish information or attend to give evidence during an investigation undertaken prior to the commencement of legal proceedings.

After proceedings have been commenced by the ACCC, a party has a right to request access to the ACCC's file in connection with the proceeding, where the documents tend to assist the case of the party (other than documents prepared by or on behalf of the ACCC, section 157).

During proceedings, documents may also be obtained from third parties by way of third party discovery orders or by issuing a subpoena on the third party for the production of documents.

It is common practice for claimants in private actions to use third party discovery orders or subpoenas to try to access documents held by the ACCC. However, the CCA provides that the ACCC may refuse to produce documents containing information given to the ACCC in confidence relating to a breach of the cartel provisions of the CCA. The Court has discretion to order that the ACCC produce that information to a party, but only after it has taken into account a number of factors, almost all of which favour non-disclosure. That regime will not prevent a party from obtaining the ACCC's documents indirectly from a cartel participant that has been prosecuted by the ACCC.

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

A witness may be forced to appear at a hearing if a party obtains leave of the Court to issue a subpoena on the witness compelling them to attend Court and answer questions.

During the hearing, a party is entitled to cross-examine all witnesses of the other parties to the proceedings, including those subpoenaed by another party. Cross-examination of a party's own witness is not available unless leave is granted by the Court.

There is generally no opportunity to question or cross-examine an opposing party's witness prior to the hearing by way of deposition or interrogatory.

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

A decision by a competition authority (the ACCC or an international competition authority) does not have any significant probative value as to liability in any follow-on damages claim in the Courts.

However, as noted in question 4.3 above, some evidentiary assistance may be obtained in damages claims from findings of fact made by an Australian Court in prior regulatory Court proceedings in which the defendant was found to have breached the competition provisions of the CCA.

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

Confidentiality issues often arise in competition law cases in Australia.

Parties can seek orders from the Federal Court to restrict the publication of confidential evidence or information. In addition, parties to competition law cases often agree orders or inter-party arrangements to restrict disclosure of commercially sensitive information to certain classes of persons involved in the proceedings, such as external lawyers, experts and in-house lawyers.

Confidentiality is not a basis for refusing to make discovery, produce documents or give evidence in Australia.

In addition to any confidentiality regime ordered by the Court or agreed between the parties, a party that obtains information under a compulsory process during Court proceedings (such as discovery) is bound by an implied undertaking to the Court to keep the information confidential and cannot, without the leave of the Court, use it for any purpose other than the purpose of the proceedings.

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

The ACCC has a right to intervene in private competition law proceedings with the Court's leave and subject to any conditions imposed by the Court (section 87CA).

The ACCC considers intervention in private proceedings which involve:

(a) issues of significant public interest;

(b) construction of the CCA in untested areas; or

(c) international conduct such as anti-competitive conduct and consumer exploitation on an international scale.

The ACCC has intervened in private competition proceedings on a limited number of occasions. In one such cartel class action, leave was granted to intervene but the ACCC's involvement was limited to the filing of written submissions.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

There is no general defence of justification or public interest available in competition law proceedings in Australia.

However, there is a regime under the CCA which provides for certain conduct or arrangements that would otherwise breach competition laws to be authorised (that is, protected from legal action) if it can be shown that the public benefits from the conduct outweigh any anti-competitive detriment. The Harper Review recommended that these powers be expanded (see question 11.3 below).

In addition, there are a range of defences and exceptions to the criminal offences and civil prohibitions on cartel conduct and other competition provisions of the CCA.

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

The availability of a pass-on defence in private competition actions has not yet been determined by an Australian Court. However, if it were available, it is expected that it would operate to reduce the quantum of damages claimed by a direct purchaser, rather than as a complete defence to a claim for damages for breach of the cartel provisions of the CCA.

Indirect purchasers have standing to bring damages claims under the CCA if they have suffered loss or damage caused by the breach of the competition provisions.

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

Defendants to a damages claim in a competition law case may apply to join other cartel participants as cross-respondents to the proceedings.

This joinder would be on the basis that the other cartel participants should contribute to any damages for breach as they are jointly and severally liable for any loss or damage. However, there is no legal requirement that all cartel participants be named as respondents to a damages claim.

6 Timing

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

A six-year limitation period applies to claims for breach of the competition provisions for:

a) damages – such proceedings must be commenced within six years from the day on which the cause of action that relates to the conduct accrued;

b) compensatory orders – must be applied for within six years of the loss or damage being suffered or becoming likely to be suffered, whichever occurred earlier; and

c) pecuniary penalties – the ACCC must commence proceedings within six years of the date of the contravention.

An application for divestiture must be made within three years.

There is no limitation period for a criminal prosecution of cartel conduct.

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

The length of a competition law case will depend on the nature and complexity of the case. They can take anywhere from 18 months to over five years before final resolution.

Expedition is available for urgent cases, usually where injunctions are sought. The Australian Federal Court also has a Fast Track procedure.

7 Settlement

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

Representative claims (class actions) require the approval of the Court before they can be discontinued or settled.

Other competition law cases can be discontinued with the leave of the Court at any time, or without leave if the pleadings have not yet closed.

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

A collective settlement in a representative proceeding (class action) is permitted but only where certain steps have been followed (including providing notice of the proposed settlement to all class members) and approval of the Court is obtained. Under the terms of its approval, the Court may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

8 Costs

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

In Australia, the usual rule is that costs follow the event: that is, the unsuccessful party will be ordered to pay the legal costs of the successful party. This usual rule also applies in regulatory proceedings involving the ACCC.

In representative proceedings, costs orders can only be made against the named group member(s) who commenced the proceedings.

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

Contingency fee agreements, where fees are calculated by reference to any judgment, settlement or monetary sum recovered by the client, are prohibited in all Australian jurisdictions.

However, in most Australian jurisdictions, fees may be charged on a "no win, no fee" basis under which clients will only be required to pay for their legal services if their claim is successful, and costs agreement can allow for an uplift (generally limited to 25%) to be applied to the fees ordinarily payable by the client upon a successful outcome being obtained.

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

Third party litigation funding for competition law claims is permitted in Australia.

The number of litigation funders active in Australia has continued to rise, and two funders are currently listed on the Australian Securities Exchange.

The litigation funder usually covers the costs to bring the action and is responsible for any costs awarded in favour of defendants. This is in return for a share of the proceeds of a successful claim or settlement.

9 Appeal

9.1 Can decisions of the court be appealed?

A first instance decision of the Federal Court (one judge) may be appealed to the Full Federal Court (three judges) within 21 days of the judgment.

Appeals to the Full Federal Court may be based on an incorrect application of the law or on findings of fact that are not supported by evidence. The Full Federal Court appeal is limited to the evidence before the first instance judge except in very exceptional circumstances.

A decision of the Full Federal Court may only be appealed to the High Court of Australia (five or seven judges) if special leave to appeal is granted. This is a matter of discretion on the part of the High Court, and leave is granted in limited cases.

10 Leniency

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

The ACCC has an immunity and cooperation policy for cartel conduct for granting leniency (which may involve a grant of immunity) in relation to cartel and other anti-competitive conduct under the CCA.

The ACCC's immunity policy provides that only the "first through the door" will be eligible for immunity. As a condition of immunity, that party must fully cooperate with the ACCC's (or the CDPP's) investigation and prosecution of the cartel. Where a company applies for immunity, it is possible for the company to gain derivative immunity for its officers and employees.

A grant of immunity or leniency does not provide immunity from private proceedings (such as a damages claim).

Applications under the immunity policy must be made to the ACCC. The ACCC has power to grant immunity from civil prosecution by the ACCC, whereas the CDPP grants immunity to corporations and their officers and employees from criminal prosecution. In making decisions to grant criminal immunity, the CDPP takes into account recommendations made by the ACCC and applies the same criteria as the ACCC.

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

An applicant for leniency, whether successful or not, cannot in any subsequent Court proceedings withhold evidence provided to the ACCC solely on the basis that it was provided for the purposes of an immunity or leniency application.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable in Australia.

11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in your jurisdiction?

This is not applicable in Australia.

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

Australia's competition laws were the subject of a review by an expert panel appointed by the Australian Federal Government, known as the Harper Review, which released its final report on 31 March 2015.

The final report of the Harper Review included a range of proposals for reform, including changes to the competition provisions of the CCA which, if implemented, may impact the nature of and the way in which claims for breaches of competition laws may be made in the future.

On 24 November 2015, the Federal Government released its response to the Harper Review, indicating that it proposed to adopt the majority of the review's recommendations, and on 16 March 2016, the Prime Minister confirmed the Federal Government would adopt the review's most controversial recommendation – a change to the test for misuse of market power. The extent of the changes to the CCA, including the controversial effects test, may depend on the outcome of Australia's federal election on 2 July 2016.

Some of the key recommendations made by the Harper Review which the Federal Government has either supported or not ruled out include:

(a) the amendment of the cartel provisions, including by way of simplification;

(b) removing the prohibition on exclusionary provisions from section 45 on the basis that the conduct should be addressed through amendments to the cartel provisions;

(c) introducing an "effects" test to section 46, so that the prohibition would be on conduct that had a requisite purpose, effect or likely effect in the relevant market, and also that the requirement for the corporation to take advantage of its market power be abolished;

(d) repealing the price-signalling provisions and the predatory pricing provisions from section 46(1AA);

(e) extending section 45 to prohibit a person engaging in a "concerted practice" with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition;

(f) repealing section 47, on the basis that such conduct should be captured instead by the general prohibition in section 45 and the proposed amendment to the prohibition on misuse of market power in section 46;

(g) allowing private litigants to rely on conduct outside Australia without the consent of the relevant Federal Minister (as is currently required); and

(h) introducing block exemption power to enable the ACCC to create safe harbours, where conduct or categories of conduct are unlikely to raise competition concerns or would be likely to result in benefit to the public that would outweigh any detriment.

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Trish Henry is a senior partner of King & Wood Mallesons (KWM) in the firm's Sydney office. She has practised across all areas of competition law in Australia, and has particular expertise in competition litigation and advising clients involved in ACCC investigations and enforcement proceedings.

She has extensive experience representing clients in the Federal Court and Australian Competition Tribunal, including in civil and criminal prosecutions brought by the ACCC, and in private competition damages actions.

With a high-calibre client base of multinational corporates and a track record advising on some of the most significant matters in the market, Trish has a longstanding reputation as a market leader in the areas of competition litigation, antitrust, regulatory and telecommunications law – recognised by the *Australian Financial Review* as Telecommunication Lawyer of the Year for 2016.

Trish has also been the practice team leader of KWM's competition practice and is recognised in Global Competition Review's *Who's Who Legal (Competition)*, listed in *International Who's Who of Competition Lawyers and Economists*, and included in Euromoney's *Expert Guide for Competition and Women in Business Law Guide*.

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Peta Stevenson is a partner of King & Wood Mallesons (KWM) in the firm's Sydney office, with a thriving contentious competition practice. Ms. Stevenson's practice includes advising clients in investigations by the ACCC, defending enforcement proceedings and acting in third-party actions for damages. She is currently representing a global bank in respect of ongoing ACCC cartel investigations, has recently been advising British Airways in its defence of cartel class action proceedings relating to the air cargo industry, and has represented a major listed corporation in its defence of the first private enforcement proceedings under Australia's new cartel laws. Her practice consists of advising blue-chip corporates and financial institutions (many of which are household names) and has advised extensively on international matters involving global investigations.

Recognised by the *Australian Financial Review* in their 2016 *Best Lawyers for Competition, Litigation, Regulatory, Telecommunications*, Ms. Stevenson is widely published on issues relating to competition law including the assessment of penalties for cartel conduct, extradition and accessorial liability, and co-leads the firm's class action practice.

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