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Australia

COMPETITION LITIGATION

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This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Australia.

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AUSTRALIA
COMPETITION LITIGATION

1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

The Competition and Consumer Act 2010 (Cth) (CCA) regulates anti-competitive conduct in Australia. Part IV of the CCA contains a number of restrictive trade practices prohibitions, including provisions restricting cartel conduct and resale price maintenance that are "per se," or strictly, prohibited. Certain other conduct is prohibited where it has the purpose, effect or likely effect of substantially lessening competition in a relevant market in connection with:

- contracts, arrangements, understandings and concerted practices;
- misuse of market power;
- exclusive dealing and third line forcing; and
- mergers or acquisitions.

Any person who suffers loss or damage, or is likely to suffer loss or damage, as a result of a breach of the above prohibitions can bring proceedings under the CCA to recover loss or damage or seek compensation or other orders to limit the loss suffered or likely to be suffered as a result of the conduct.

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

Section 86(1) of the CCA confers jurisdiction on the Federal Court of Australia (Federal Court) in respect of matters arising under the CCA.

A competition damages claim is commenced in the Federal Court by filing an originating application. This originating application must state the relief that is claimed and the relevant section of the CCA under which the relief is claimed. Accompanying an originating application, an applicant is required to file a Statement of Claim, which is the pleading relied upon. The Statement of Claim sets out:

- the issues the party wants the Court to resolve;
- the material facts on which a party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial, but not the evidence by which the material facts are to be proved;
- the provisions of any statute relied upon; and
- the specific relief sought or claimed.

3. What remedies are available to claimants in competition damages claims?

The CCA sets out the relief (remedies) available to a claimant who has suffered, or could suffer, loss or damage as a result of a breach of the restrictive trade practices prohibitions discussed in question 1. These include damages for loss or damage suffered as a result of the conduct (see section 82 of the CCA), injunctions except in the case of an anti-competitive merger or acquisition (see section 80 of the CCA), and orders that compensate a person who has suffered, or is likely to suffer, loss or damage as a result of the relevant conduct, including orders that all or part of a contract is void, or varying or refusing to enforce a contract (see section 87 of the CCA).

It is noted that only the Commonwealth Government regulator under the CCA, the Australian Competition and Consumer Commission (ACCC), can institute proceedings for the recovery of pecuniary penalties provided for in the CCA.

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

Damages are compensatory in nature, being the recovery of the amount of loss or damage by action

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against the other person or any person involved in the contravention. Exemplary damages are not available under sections 82 or 87 of the CCA for breaches of the restrictive trade practices prohibitions. Nor are nominal damages, as the suffering of actual loss or damage is a required element in seeking such a remedy.

As noted above, section 82 of the CCA provides that an applicant may recover the full amount of their loss or damage from a person whose conduct in breach of the CCA caused that loss or damage. A claimant may also have an action against a person who is involved in the contravention. It is therefore possible that where multiple persons have engaged in the relevant conduct (which generally occurs in the case of cartel conduct, for example), or have been involved in such conduct, those respondents could have joint and several liability. Accordingly, a claimant may seek to recover the full amount of that loss or damage from any party to the cartel conduct.

However, there is no provision for apportionment of liability for loss or damage in relation to contraventions of Part IV of the CCA. Notwithstanding the inability to apportion compensation, the Court has a discretion as to the amount that is ordered to be paid and is not limited to the choices of awarding "all or nothing".

A compensation order made against one wrongdoer may give rise to an entitlement to equitable contribution from another wrongdoer.

Are there any exceptions (e.g. for leniency applicants)?

The restrictive trade practices prohibitions discussed in question 1 are subject to various exemptions and anti-overlap provisions. Broadly, these include:

- Anti-overlap: Where conduct constitutes cartel conduct but also falls under any of the resale price maintenance, exclusive dealing or mergers prohibitions, the conduct is exempt from the cartel conduct prohibition and assessed under the latter relevant prohibition.
- Collective acquisitions/joint advertising: The cartel conduct prohibition does not apply to cartel provisions that constitute price fixing under the CCA and relate to either the price for goods or services to be collectively acquired by the parties, or the joint advertising of the price for the re-supply of goods or services so acquired.
- Joint venture exemption: Cartel provisions that are for the purposes of, and reasonably necessary for undertaking, a joint venture for the supply, acquisition or production of goods or services are exempt from the cartel conduct prohibition (provided the joint venture is not carried on for the purposes of substantially lessening competition).
- Related bodies exemption: Conduct between related bodies corporate is also generally exempt from the cartel conduct prohibition.

The ACCC also operates a "first-in" immunity policy for cartel conduct, which enables one participant to apply for immunity from civil proceedings if certain criteria in the "ACCC Immunity and Co-operation Policy for Cartel Conduct" (2019) (Immunity and Co-operation Policy) are met. Derivative immunity is available to cover related corporate entities, individual employees, directors and officers of a corporation that has obtained corporate immunity. Parties not eligible for "first-in" immunity may be able to obtain reduced penalties for civil proceedings.

Additionally, certain conduct can be notified to, or authorised by, the ACCC with the result that the relevant conduct will not contravene the CCA as follows:

- Authorisation: Conduct that would otherwise breach competition law, for example, because it amounts to cartel conduct or has the purpose or effect of substantially lessening competition, can be authorised by the ACCC and exempt from legal action.
- Notification: Exclusive dealing, resale price maintenance and small business collective bargaining (cartel conduct or anti-competitive arrangements) can be notified to the ACCC and will generally be exempt from legal action, provided the notification is not opposed by the ACCC.

Lastly, the ACCC may also introduce a class exemption in respect of specific activity that might contravene the CCA. Such conduct will be exempt from legal action if the requirements of the exemption are met. Currently, there is a class exemption for small business collective bargaining.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

Section 82 of the CCA provides that an action for loss and damage may be commenced at any time within six years after the day on which the cause of action related to the conduct accrued. A cause of action for the purposes of section 82 of the CCA encompasses not only the contravention of the provision but also the loss or damage suffered as a result of such contravention.

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Accordingly, the time limit to bring an action does not commence on the date of the contravening conduct, but rather, when the loss or damage is suffered as a result of the contravention. Further damage arising from the same contravention does not constitute a fresh cause of action. The Federal Court does not have the discretion to extend the time for commencing proceedings contained in section 82 of the CCA.

The time limits under section 87 of the CCA vary depending on which provisions apply. For compensation orders or injunctive orders sought under section 87(1), where proceedings have otherwise been instituted under sections 80, 82 or for an offence against the cartel provisions, no specific time limit applies. However, such orders are expressly subject to the Court's discretion. The application of these provisions of the CCA after the expiration of six years has not been tested in the Courts of Australia. The Courts have applied the equivalent provisions of the CCA's predecessor, the Trade Practices Act 1974 (Cth) (TPA), and allowed compensation to be ordered notwithstanding the expiration of the six-year limitation period.

Applications for compensation under section 87(1A) of the CCA, that is, proceedings independent from any other proceeding, must be brought within six years from the day on which the cause of action related to the conduct occurred.

6. Which local courts and/or tribunals deal with competition damages claims?

Section 86 of the CCA confers jurisdiction on the Federal Court to hear competition damages claims.

Limited jurisdiction is conferred on other Federal Courts (i.e. the Federal Circuit Court and Family Court of Australia have jurisdiction to hear misuse of market power claims and certain matters under industry codes) and State and Territory Supreme Courts. However, conventional practice is that matters are commenced in the Federal Court.

Australia also has a subject matter tribunal, being the Australian Competition Tribunal, which has limited jurisdiction associated with certain merger activities and third-party access matters that are not sufficiently broad to encompass any damages claims.

7. How does the court determine whether it has jurisdiction over a competition damages claim?

The Federal Court's jurisdiction to hear competition damages claims derives from section 86 of the CCA.

The Federal Circuit Courts are given jurisdiction over certain matters as set out in response to question 6 under section 86(1A) of the CCA.

Compensation for competition damages for certain matters arising under Part IV of the CCA is a "special federal matter" under the Jurisdiction of Courts (Cross-vesting) Acts of each State and Territory. Under those acts, the Supreme Courts of the States or Territories may determine proceedings for special federal matters if they are satisfied that there are special reasons for doing so in the particular circumstances other than reasons relevant to the convenience of the parties.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

The substantive law applying to competition damage claims is confined to the CCA and the case law arising from the provisions of that act (and its predecessor, the TPA). However, the law of evidence and procedure will vary depending on whether the proceeding is commenced in the Federal Court or one of the Supreme Courts of the States and Territories, each with their own law of evidence and procedure.

The standard of proof is the same, irrespective of the Court in which the competition damages claim is brought and is the balance of probabilities. It is, however, noted that in respect of proving the extent of the applicant's loss or damage for the purposes of awarding damages, where an applicant establishes that conduct has caused the loss of a commercial opportunity, the value of the lost opportunity is to be ascertained by reference to hypotheses and possibilities that, although they may not be capable of proof on the balance of probabilities, are to be evaluated as a matter of informed estimation.

Where a competition law damages claim is brought following the ACCC or some other party having successfully brought enforcement or other proceedings against a person, section 83 of the CCA provides an easier method for individual applicants to prove their case against. In particular, section 83 of the CCA enables a person in a proceeding for damages under section 82 of the CCA to rely on, as prima facie evidence of a fact or admission in proceedings, findings of fact made by a Court or admissions of fact made by a person (for example in an agreed statement of facts that form part of the agreed orders or judgment of the Court) in earlier proceedings.

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9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

The ACCC is responsible for investigating breaches of the competition prohibitions of the CCA but does not have the power to make any finding that a person has contravened the Act nor to impose sanctions. Rather, the ACCC may commence civil proceedings, and the Court, if satisfied that a contravention has occurred, may impose a range of sanctions, including civil pecuniary penalties.

All competition prohibitions may be enforced civilly, and cartel conduct may be enforced through either civil or criminal proceedings. The Commonwealth Director of Public Prosecutions (CDPP) is the authority responsible for prosecuting criminal Commonwealth offences, including criminal cartel conduct. The ACCC may investigate and then refer cartel conduct to the CDPP, who will make an independent decision under the Prosecution Policy of the Commonwealth whether to commence a criminal prosecution.

The ACCC may elect to resolve a competition investigation through an informal 'administrative resolution'. Otherwise, it may accept an undertaking where it considers a formal resolution is warranted and an undertaking is an appropriate alternative to a court-based outcome.

If an undertaking is breached, the ACCC may commence enforcement proceedings seeking an order from the Court, which may include a direction to comply with the undertaking, to pay the Commonwealth an amount up to any financial benefit attributable to a breach or to pay compensation to affected parties.

The ACCC and parties can also jointly propose a court-imposed sanction, such as a civil penalty, on an agreed basis. However, the Court is not bound to accept an agreed penalty.

The ACCC's decision and any findings it makes following an investigation are not binding on the Federal Court. Further, where the ACCC and a corporation reach an agreement (whether prior to, or during, civil proceedings) in respect of the penalty and orders that can be sought from the Federal Court (for example, under the ACCC's Immunity and Co-operation Policy, referred to in question 4 above), the agreement is not binding on the Court. The Court, having regard to the agreed facts, can change the joint penalty and orders submitted.

Decisions by authorities from other jurisdictions have little to no probative value in Australian Courts.

Claimants must be able to establish the relevant elements of their claim under Australian law.

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

There is no bar against bringing private damages action proceedings while related public enforcement action by the ACCC or the CDPP is pending. However, section 83 of the CCA allows an applicant to rely on prior findings and admissions of fact as evidence of that fact or admission, including those made in prior criminal cartel proceedings. This is proved by producing a copy of the findings sealed by the Court in the prior proceeding or producing a document filed in Court that contains the admission.

This prima facie evidence can assist a claimant in proving their case of the alleged contravention and reduce the costs associated with the fact or expert evidence required to prove a particular finding or admission of fact.

The Federal Court has a wide discretion to stay proceedings in the interests of justice. Common circumstances for a stay of proceedings include:

- Stay owing to common questions of law or fact: Where pending proceedings involve common questions of law or fact or are the subject of claims arising from the same transactions, a party to any proceedings can apply to the Court for an order that the proceedings be stayed until the other proceedings have been determined.
- Stay by consent: Parties may request (but not be automatically granted) that a matter be stayed, for example, pending the determination of a related matter.
- Stay on the basis of exclusive jurisdiction clause: The Court is not bound to grant a stay to force the parties to litigate in a chosen forum where a contractual agreement requires that litigation or dispute resolution to take place in a particular jurisdiction. Further, a stay of proceedings based on such a clause may be refused where there are strong reasons to do so. For example, public policy considerations associated with competition claims under the CCA may provide such reasons. This issue was recently considered

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on appeal by the Full Federal Court in Epic Games Inc v Apple Inc (2021) FCFCA 122, in which a stay was refused.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

Representative proceedings (class actions) can be brought in the Federal Court, including in proceedings for damages for breach of the restrictive trade practices prohibitions in the CCA.

There are detailed requirements to bring such proceedings in the Federal Court. These include the following:

- seven or more persons have claims against the same person;
- the claims of all such persons are in respect of, or have arisen out of, the same or similar or related circumstances; and
- the claims of all such persons give rise to a substantial common issue of fact or law.

It is noted that such proceedings operate on an "opt-out" basis, which means that the Court will fix a date by which group members of a representative proceeding can opt-out of the representative action by giving notice in writing.

The Supreme Courts of each Australian State also have jurisdiction to hear representative proceedings, although not all jurisdictions have a specific class action regime. The ACCC is also authorised to bring proceedings on behalf of other persons where those persons consent in writing– although, the ACCC has not sought to utilise this power to date.

Where the claims do not meet the requirements for a class action, the claimants may nonetheless be joined in the same proceedings. Multiple respondents to competition claims may also be joined in the same proceedings. The joinder of parties may be ordered under rule 9.02 of the Federal Court Rules:

- if separate proceedings by or against each of them would give rise to a common question of fact or of mixed fact and law;
- if all rights to relief claimed in the originating application are in respect of, or arise out of, the same transaction or series of transactions; or
- by leave of the Court.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

There is no established pass-on defence in Australia.

Australia's damages regime is intended to compensate for actual loss or damage suffered as provided for in section 82 of the CCA. As such, it would be necessary to show that the relevant loss or damage has in fact been suffered and that such loss has not been passed on to subsequent purchasers, for example.

The evidential burden lies with the applicant as section 82 is a requirement for the applicant to prove, and the standard of proof applied is the balance of probabilities.

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Expert evidence is commonly used in competition enforcement actions in Australia, particularly on questions of market definition, for example.

Similarly, in any competition damages action, expert evidence may be required to address the significant economic issues that arise.

There are substantial differences in the law and rules for expert evidence between the different State, Territory and Commonwealth jurisdictions. Under the rules and practices applicable to proceedings in the Federal Court, while parties will generally be permitted to adduce and test relevant expert economic evidence, its admissibility will be based on whether:

- the opinion is relevant;
- the expert possesses specialised knowledge in that field;
- the specialised knowledge is based on the expert's training, study or experience; and
- the opinion tendered is based on the specialised knowledge.

An expert may be appointed by the Court or the parties, but the usual course is that the parties will seek to appoint their own experts to provide evidence to the Court in any hearing.

The procedural rules of the Federal Court vary depending on whether the expert is court-appointed or

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called by a party to the proceedings. In both cases, however, the expert is required to prepare a report outlining their opinion on the particular questions on which they have been asked to opine. The expert may then be required to give oral evidence at the hearing.

The role of an expert in Federal Court proceedings is to assist the Court on matters relevant to their area of expertise. An expert's paramount duty is to the Court and not to the person who has retained them. Accordingly, experts appointed by parties to the proceedings are required to adhere to strict guidelines in the provision of their evidence, including in relation to the form of their reports.

Where there are competing expert witnesses, the Federal Court often requires the experts to meet for the purpose of identifying and addressing issues not agreed between them with a view to reaching agreement, where possible (a conference of experts). The parties and their lawyers must not involve themselves in the conference of experts process. The output of the conference of experts is a joint report that is provided to the Court that details the points of agreement, partial agreement and disagreement among the experts, with the objective of narrowing the issues in dispute between the parties.

The Federal Court may also determine it appropriate when giving expert evidence before the Court, that some or all of this evidence be given concurrently. Each expert presents their opinion, and then each other expert is given an opportunity to respond. The judge will also ask questions of the experts, and cross-examination of the experts by the parties may be permitted.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

The trial process depends on the Court in which the claim for competition damages is commenced. As noted above, this is most likely in the Federal Court.

The decision maker at a trial in the Federal Court is a Justice of the Federal Court.

Generally, the evidence in chief in a trial before the Federal Court is written in the form of affidavits from lay witnesses and a report from an expert. Witnesses of fact (lay witnesses) and expert witnesses are generally subject to oral cross-examination. See the answer to question 13 above regarding particular procedures associated with concurrent evidence given by experts.

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

It is difficult to estimate the time that is typically taken from the commencement of proceedings to trial as this will depend on the nature and complexity of the proceedings, the number of lay witnesses, whether discovery is ordered and in what form, the extent of expert evidence and the number of parties involved.

According to the Federal Court's 2020-2021 Annual Report, during the five-year period from 1 July 2016 to 30 June 2021, 91 per cent of cases (excluding native title matters) were completed in 18 months or less and 84 per cent in 12 months or less. These figures relate to all cases within the Federal Court's jurisdiction, other than native title cases. It is important to note that the nature and complexity of competition cases means that they usually take longer.

Representative actions in Australia tend to take considerably longer again. This can be because applicants seek a stay to use the findings or admissions in related regulator proceedings, owing to the complexity of the proceedings, or because the proceedings are delayed due to the numerous interlocutory applications and procedural steps that are required to be complied with.

Parties can seek to expedite proceedings in urgent matters and obtain directions from the Court to enable this expedition.

A judgment of a single judge of the Federal Court can be appealed to the Full Court of the Federal Court. The Full Court is usually constituted by three judges of the Federal Court. The Full Court can consider appeals on questions of fact as well as questions of law and the exercise of judicial discretion. Appeals can be brought as of right from a final judgment. However, leave is required to appeal from an interlocutory decision.

A party seeking to appeal from a decision of the Full Court may obtain special leave to appeal to the High Court of Australia, the country's ultimate appellate Court. The criteria for granting special leave includes that the proceedings involve a question of law that is of public importance or in respect of which the High Court is required to resolve differences of opinion within or between Courts, or where the interests of the administration of justice require consideration by the High Court.

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16. Do leniency recipients receive any benefit in the damages litigation context?

The ACCC is responsible for administering the Immunity and Co-operation Policy, referred to earlier in question 4. The ACCC also has a co-operation policy in relation to parties not eligible for "first-in" immunity under the Immunity and Co-operation Policy as well as for other contraventions of the CCA in accordance with the "ACCC Cooperation Policy for Enforcement Matters".

The Immunity and Co-operation Policy refers to "immunity" from civil proceedings or criminal prosecutions and "cooperation" with the ACCC in exchange for a reduced civil penalty. In this regard, the term "immunity" is equivalent to the term "leniency" as understood in the European context. Where the term "co-operation" is used, this generally refers to a lesser penalty in return for co-operating with the ACCC.

Immunity provides full amnesty from enforcement action by the ACCC and the CDPP. Cooperation under the relevant ACCC policy allows a party to seek reduced penalties for cooperating with the ACCC in its investigations and providing assistance in court proceedings.

However, immunity and co-operation do not provide protection from private court actions, such as follow-on damages proceedings.

In its Immunity and Co-operation Policy, the ACCC states it will "use its best endeavours to protect any confidential information provided by an immunity applicant."

17. How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

Section 82 of the CCA requires an applicant to establish the loss or damage suffered as a result of the contravention of the restrictive trade practices prohibitions. The applicant is entitled to recover the amount of the loss or damage against the other person or against any person involved in the contravention. Such loss or damage may include, for example, loss of profit. Under section 87, an order for compensation can also be made if it is likely that loss or damage will result from the contravention, and actual loss or damage need not be proven.

In quantifying damages under sections 82 and 87, a comparison must generally be made between the position in which the person who suffered the loss or damage is in, and the position that person would have been in had there been no contravention. Loss is not limited to economic loss and may include injury. However, damages are not available to compensate merely for disappointed expectations.

As with pass-on referred to in question 12 above, no specific "umbrella effect" damages are recognised in Australia.

Given the lack of competition damages claims that have been instituted in Australia, no clear economic methodology has emerged in respect of quantifying damages. An applicant will likely need to adduce expert evidence, in addition to lay evidence, to demonstrate the loss or damage suffered by the applicant as a result of the contravention of the restrictive trade practices prohibition.

18. How is interest calculated in competition damages cases?

Where the Federal Court has ordered that an amount of damages be paid, upon application under section 51A of the Federal Court of Australia Act 1976 (Cth) (Federal Court Act), the Court may order that a further amount be paid, either as interest calculated at a rate that the Court thinks fit starting from the date when the cause of action arose, or a lump sum in lieu of interest.

For damages payable under section 82 of the CCA, interest will begin accruing when the loss or damage is suffered as a result of the contravention. Compound interest is not allowable under section 51A of the Federal Court Act. The rate of interest will be determined at the Court's discretion, having regard to the rate that is 4 percent above the cash rate last published by the Reserve Bank of Australia.

The application for pre-judgment interest (or a lump sum in lieu) must be granted unless good cause is shown to the contrary. Good cause will only be shown rarely and in exceptional circumstances.

Under section 52 of the Federal Court Act, post-judgment interest applies automatically from the date on which the judgment is entered. Such interest is payable at the rate that is 6 percent above the cash rate last published by the Reserve Bank of Australia, or at a lower rate if the Court thinks that justice so requires.

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19. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

The Federal Court has the power to make an award of damages to compensate an applicant in Federal Court proceedings for loss or damage suffered by the conduct of other parties in breach of the CCA. Under section 82 of the CCA, an applicant in proceedings brought in the Federal Court may recover the full amount of their loss or damage from a person (the respondent) who has contravened the CCA, where the respondent's conduct has caused loss or damage to the applicant.

Where multiple respondents have engaged in conduct in contravention of the CCA, for example, in cartel cases, joint and several liability will apply to those persons for the loss or damage arising from their conduct.

Where proceedings are brought in the Federal Court against multiple respondents, it is a matter for the Court to apportion liability based on the evidence before the Court.

Where an applicant commences proceedings against only one, or some, of all persons involved in conduct contravening the competition provisions of the CCA, case law suggests that nothing in either section 87 of the CCA, or the act more broadly, expressly enables a contravening party to bring a contribution claim against a party that is not joined in the original proceedings. In such circumstances, it is expected that any order for contribution, if available, must be made in accordance with equitable or common law principles.

20. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

It is not possible to have an award of damages by the Federal Court without the trial going to a full hearing. However, the Court may, on application by a party, give summary judgment dismissing the application in limited circumstances.

Parties to the litigation may also resolve the matter after an interlocutory hearing seeking to restrain the alleged contravening conduct and settle the matter based on that initial hearing (except in the case of merger proceedings, where the ACCC is the only party that can bring such proceedings).

For example, under section 80 of the CCA, the Federal Court may grant an injunction where a person has engaged (or proposes to engage) in conduct that constitutes, or would constitute, a contravention of the CCA. Before the Federal Court grants an interlocutory injunction, it must be satisfied that there is a serious question to be tried and that the balance of convenience favours the granting of the injunction to the applicant and that the applicant provides an undertaking as to damages if it is ultimately unsuccessful. If an applicant is successful, it will incentivise the respondent to settle the matter.

21. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Having regard to the cost and complexity of competition matters, the CCA provides for the ability for parties to rely upon findings of the Federal Court in proceedings brought by the ACCC.

However, while section 83 of the CCA provides that findings in public enforcement proceedings by the ACCC can be used in subsequent civil proceedings, it is unclear whether this provision applies to admissions made by respondents in public enforcement proceedings as part of the settlement of those proceedings, as opposed to findings made by the Court after a hearing.

In litigation brought by private parties, including class actions, collective settlements framed by the Federal Court are technically possible once a finding of a contravention of the CCA is made, otherwise the Court will consider it does not have the power to order remedies.

Settlements involving parties outside of the jurisdiction are possible provided those parties have carried on business in Australia and have been properly joined in the proceedings in accordance with Federal Court Rules, and the Court has made orders against them.

22. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

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In Federal Court proceedings in Australia, discovery of documents is available with the Court's leave from both the respondents and applicants where the discovery is necessary for the determination of the issues in the proceedings.

As to rules for discovery, the Federal Court can order discovery in different ways. Generally, documents that are privileged (whether on the grounds of legal professional privilege, without prejudice privilege or public interest immunity) must be discovered. However, subject to challenges on those grounds, such documents are not available for inspection by the other parties to the proceedings.

Where documents contain confidential information, the Court can make orders to protect such information by putting in place confidentiality orders, for example, by limiting disclosure to external legal counsel or to limited internal counsel of the litigating parties by making them subject to confidentiality undertakings.

It is also possible for parties to seek documents from third parties by issuing a subpoena for production with similar rules as to production and confidentiality subject to Federal Court orders.

Access in civil proceedings to ACCC documents is subject to specific provisions introduced in 2009, along with the ACCC's criminal cartel prosecution powers. These rules are intended to protect what is known as "protected cartel information" from disclosure. Section 157B of the CCA provides that the ACCC is not required to produce protected cartel information to the Court, except with the leave of the Court having regard to certain grounds set out in that section. However, section 157C of the CCA provides that while the ACCC is not required to produce protected cartel information to a person, it may do so after having regard to the same factors that the Court must consider under section 157B.

The Court has previously allowed applicants in private proceedings to obtain access to witness statements and documents relied upon by the ACCC in penalty proceedings it has brought in respect of the same cartel conduct.

23. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

In Australia, the usual rule in the Federal Court is that "costs follow the event". In general, a successful party in proceedings will usually be entitled to obtain an order that the unsuccessful party pay their costs on what is known as a "party-party" basis, unless there are special circumstances where indemnity costs can be ordered, but this is rare.

As a practical matter, party-party costs orders see the successful party only recovering some 50 to 70 per cent of actual costs.

24. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

Third party litigation funding is allowed in Australia.

Litigation funders will usually enter into funding arrangements pursuant to which they receive a certain percentage of the damages awarded in return for funding the cost of the proceedings.

Under Australian law, lawyers may enter into conditional fee agreements pursuant to which all or some of the fees and disbursements are payable in the event of a successful outcome to the proceedings.

However, it is not permitted to enter into contingency arrangements with clients pursuant to which lawyers are entitled to a percentage of the damages awarded.

25. What, in your opinion, are the main obstacles to litigating competition damages claims?

Competition litigation in Australia is complex, involves lengthy court processes and is very expensive compared to consumer protection litigation (for example, consumer protection litigation is unlikely to involve the determination of relevant markets).

Unless an applicant has deep pockets, the expense and time involved is a deterrent for corporations and their executives to commence such action.

While section 83 of the CCA provides that findings in public enforcement proceedings by the ACCC can be used in subsequent civil proceedings, it is unclear whether this provision applies to admissions made by respondents in public enforcement proceedings as part of the settlement of those proceedings, as opposed to

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findings made by the Court after a hearing. This may mean the benefit of section 83 in a practical sense is limited.

26. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

Class action reform that was considered before the May 2022 federal election in Australia is likely to be the most significant issue affecting whether private actions are brought.

In June 2022, the Full Court of the Federal Court in LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103 determined that litigation funding schemes are not managed investment schemes subject to regulation under the Corporations Act 2001 (Cth) (Corporations Act). The Court's decision overturns a long-established precedent and will undoubtedly prompt further debate over the need for regulation of the litigation funding industry.

In December 2022, the Government enacted the Corporations Amendment (Litigation Funding) Regulations 2022 (Regulations). The Regulations amend the Corporations Regulations 2001 to provide litigation funding schemes with an explicit exemption from the managed investment scheme, Australian Financial Services Licence, product disclosure and anti-hawking provisions of the Corporations Act.

Further, if the Australian Government proceeds with a form of ex ante regulation in relation to digital platforms such as those that have been implemented in Europe under the Digital Markets Act, this may see litigation against digital platforms increasing if they have contravened such upfront rules.

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