REDRESS FACILITATION ORDERS AS A SANCTION AGAINST CORPORATIONS

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I INTRODUCTION

The PhD thesis upon which Laura was working before her tragic death sought to resolve the intractable question of whether two key goals of anti-cartel enforcement, namely (a) deterrence and (b) compensation, can be achieved more effectively by integrating their pursuit.[1] The potential capacity of redress facilitation orders both to facilitate compensation and to enhance deterrence is one aspect of that question.[2]

The deterrence of cartel conduct and the redress of such conduct typically have been pursued in separate proceedings: public enforcement proceedings (deterrence) and civil remedial proceedings (redress).[3] A prevalent assumption is that compensation for losses from cartel conduct is best pursued in civil remedial proceedings given the

* Principal, Brent Fisse Lawyers; Special Counsel, Resolve Litigation Lawyers; Honorary Professor, University of Sydney Law School. Thanks are due to Caron Beaton-Wells, David Howarth and other colleagues for comments, and to Alma Pekmezovic for research assistance on examples of redress facilitation. The usual disclaimers apply.

1 The relevant goals are broader than these two; see e.g. C Beaton-Wells and K Tomasic, 'Private Enforcement of Competition Law: Time for An Australian Debate' (2012) 35 *University of New South Wales Law Journal* 648, Pt IV; C Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) 34 *World Competition Law and Economics Review* 383. Furthermore, when designing sanctions against corporations it is important to address not only regulatory goals but also enforcement strategies (e.g., enforced self-regulation): B Fisse, 'Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations' in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011) ch 14, 322–324.

2 See generally OECD, Working Party No 3 on Co-operation and Enforcement, Relationship between Public and Private Antitrust Enforcement, Executive Summary, Note by the Secretariat, 15 June 2015, Australia; A Ezrachi and M Ioannidou, 'Public Compensation as a Complementary Mechanism to Damages Actions: from Policy Justifications to Formal Implementation' (2012) 3 *Journal of European Competition Law and Practice* 536; D Rosenberg and J Sullivan, 'Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law' (2006) 2 *Journal of Competition Law and Economics* 159; A Foer and R Stutz (eds), *Private Enforcement of Antitrust Law in the United States: A Handbook* (Edward Elgar, 2012); D Baker, 'Revisiting History — What Have We Learned About Private Antitrust Enforcement that We Would Recommend to Others?' (2004) 16 *Loyola Consumer Law Review* 379; S Waller, 'The Incoherence of Punishment in Antitrust' (2003) 78 *Chicago Kent Law Review* 207. The present article does not debate the question of whether or not deterrence should trump compensation but the capacity of redress facilitation orders is relevant to that debate and counsels against undue preoccupation with deterrence, especially tunnel-visioned theories of so-called optimal deterrence.

3 See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) ch 11, section 11.5; W Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 *World Competition Law and Economics Review* 3. 'Redress' is a broad concept that means restoring the victim to the position he or she would have been in but for the contravening conduct. Hence the concept encompasses more than compensation and includes e.g. restitution and variation of contracts.

typically large number of victims, complexity of assessing the amount of damages payable and limitations on the public enforcement purse.[4]

This article canvasses the possibility of redress facilitation orders designed to facilitate compensation for loss caused by cartel and other unlawful conduct and at the same time to enhance deterrence. It advances a statutory model for redress facilitation orders under the *Competition and Consumer Act 2010* (Cth) (CCA). The model advanced is Australian in legislative style but could readily be adapted elsewhere.

Private actions for compensation of cartel conduct in Australia as elsewhere face many obstacles and are now a very limited means of achieving redress.[5] One improvement is the recent amendment of s 83 of the CCA to make a finding of any fact made by a court, or an admission of any fact made by the person, prima facie evidence of that fact if the finding or admission is made in proceedings under, e.g., Part IV.[6] Another is the removal of the requirement of Ministerial consent in actions relying on s 5(1) or s 5(2) in relation to the extended application of the CCA to conduct outside Australia.[7] However, these are modest changes. The Harper Review, although supposedly a 'root and branch' review, failed to address sanctions and remedies under the CCA with due care and attention.[8]

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4 But see M Hviid, 'Why Private Enforcement should be Reformed alongside Public Enforcement' (2011) at <www.competitionpolicy.wordpress.com/2011/05/03/why-private-enforcement-should-be-reformed-alongside-public-enforcement/>. For a critique of using environmental offences as a platform for compensation, see A Zimmerman and D Jaros, 'The Criminal Class Action' (2011) 159 *University of Pennsylvania Law Review* 1385.

5 See C Beaton-Wells, 'Less Rhetoric, More Restraint Required in "Cartel Crackdown"' *The Conversation*, 29 March 2011; C Beaton-Wells, 'Private Enforcement of Competition Law in Australia: Inching Forwards?' (2016) 39 *Melbourne University Law Review* 681; R Gilsenan, 'Could the Harper Review recommendations revive private enforcement of cartel prohibitions?' (2016) 24 *Australian Journal of Competition and Consumer Law* 6; Beaton-Wells and Tomasic, above n 1; I Wylie, 'Cartel Compensation — A Consumer Perspective' (2011) 39 *Australian Business Law Review* 177; ACCC, Submission to Competition Policy Review Panel, Competition Policy Review, 26 November 2014, 79 (ACCC recommendation that it be given the capacity to seek redress for victims of competition law breaches, similar to the power currently available under the ACL); ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) ch 7. The overseas experience is comparable; see e.g.: EU, Directive 2014/104/EU: <www.eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32014L0104andfrom=EN; K Daly, 'Public v Private Enforcement: Why Competition Litigation Won't Solve The Public Enforcement Deficit' in A Synnot (ed) *The Public Competition Enforcement Review* (Law Business Research, 7th ed, 2015) 1, 16; C Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) 34(3) *World Competition* 383; Ezrachi and Ioannidou, above n 2; N Rosenboom, V Kocsis and J Mulder, 'Consumer Damages for Breach of Antitrust Rules: How to Reach Full Compensation for Consumers?' (2017) 13 *Journal of Competition Law and Economics* 710; S Peyer, 'The European Damages Directive Fails to Deliver, But Can It be Fixed?' *Competition Policy Blog* (2015) <www.competitionpolicy.wordpress.com/2015/03/03/the-european-damages-directive-fails-to-deliver-but-can-it-be-fixed/>.

6 The former s 5(3) and s 5(4) have been repealed, as recommended in *Competition Policy Review: Final Report* (March 2015) 56–57, Recommendation 26. See further the critique in J D Heydon, 'Are there stresses and strains in the remedial structure of the Competition and Consumer Act 2010 (Cth)?' (2013) 41 *Australian Business Law Review* 354.

7 As recommended in *Competition Policy Review: Final Report* (March 2015) 71–72, Recommendation 41.

8 Consider *Competition Policy Review: Final Report* (March 2015) 3.15, ch 23. The false 'root and branch' description was first published by the Government in *The Coalition's Policy for*

Punitive sanctions have often been seen as a negative or deadweight form of social control. However, from a broader and more constructive perspective, some forms of punitive sanction can be designed to facilitate compensation as well as to promote deterrence.[9] One obvious type of punitive sanction with that potential is the redress facilitation order.[10]

Part II below explains what a redress facilitation order is and why it is worth exploring the potential significance of redress facilitation orders under the CCA. Part III sets out a statutory model (Proposed Section 86C) with explanatory notes. Part IV concludes by summarising the main themes.

II REDRESS FACILITATION ORDERS — THE CONCEPT AND ITS POTENTIAL SIGNIFICANCE

A *The concept of a redress facilitation order*

A redress facilitation order is a sanction that serves the goals of deterrence and compensation concurrently.

Deterrence is enhanced by requiring a corporate wrongdoer[11] to take steps to facilitate the compensation of victims in a separate civil proceeding or administrative process or under a collective victim redress scheme. The mode of deterrence[12] is:

(a) imposition of cost additional to that otherwise likely to result from contravening conduct; and
(b) imprinting the message that contravening conduct is likely to require action to provide redress to victims, not merely the expedient payment of a penalty to the state as a non-victim.

Compensation is facilitated by the requirement that proactive steps be taken to promote and practically assist redress in a separate civil proceeding or administrative process or under a collective victim redress scheme.

Small Business (August 2013) 2. A short time frame was allowed for this ostensibly fundamental review.

9 B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1231–2. See also Ezrachi and Ioannidou, above n 2. Redress facilitation orders may also be seen as a means of restorative justice; see generally J Braithwaite, *Restorative Justice and Responsive Regulation* (OUP, 2002); C Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *Modern Law Review* 209.

10 Fisse, above n 1, 330–331. Another obvious type of punitive sanction with redress potential is a fine or monetary penalty where the money generated is allocated at least partly to a scheme to provide compensation or other redress to victims.

11 In this article, corporate contraveners of the CCA, i.e. not the ACCC, nor a successful immunity applicant (by hypothesis, a successful immunity applicant will not be subject to proceedings in which a redress facilitation order could be made). Accordingly, this article is not concerned with: (a) statutory constraints (e.g. CCA Protected Cartel Information regime; s 155AAA) or self-imposed restraints on ACCC disclosure of information; or (b) the possible detraction from ACCC/CDPP immunity policy by extending or facilitating private actions for redress of cartel conduct.

12 See Fisse, above n 9, 1159–66. Contrast OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (2018) (non-specification of modes of deterrent impact that monetary penalties imposed on corporations are intended to have).

A redress facilitation order may be a sentence, a civil penalty, a civil remedy, or an administrative order. Particular rules governing the substantive or procedural application of redress facilitation orders may vary accordingly.

A redress facilitation order that is a sentence or civil penalty is a form of punitive injunction.[13] A punitive injunction is a punitive variant of the mandatory civil injunction or a corporate probationary order.[14] The punitive element is to require a corporate wrongdoer to act in a demanding way that may go beyond the limits of civil remedial action. The punitive impact is calculated to achieve a positive regulatory outcome. The main positive regulatory outcomes of a punitive injunction sought are:

(a) the imposition of internal accountability for the offence or contravention;
(b) the revision of organisational precautions against future possible offences or contraventions; and
(c) the facilitation of redress to the victims of an offence or contravention in a separate civil proceeding or administrative process or under a collective victim redress scheme.

This article is concerned with outcome (c).

The particular types of redress facilitation required by a redress facilitation order include:

(a) disclosing information about the circumstances of the contravention, the nature of the loss likely to have been caused and the persons or classes of persons likely to have incurred the loss;
(b) giving notice to persons who may have suffered or may suffer loss as a result of corporate wrongdoing;
(c) cooperating with someone acting on behalf of victims by making employees available for interview, waiving confidentiality obligations, and providing documents and data and explanations of them; and
(d) establishing a collective redress scheme.

The concept of a redress facilitation order is potentially relevant in many areas of corporate regulation, including consumer protection.[15] The present article explores the concept mostly in the context of unlawful cartel conduct under the CCA.

B *The potential significance of redress facilitation orders*

There are six main reasons for introducing redress facilitation orders under the CCA.

First, the deterrence of cartel conduct is likely to be compromised unless the sanctions and remedies imposed reflect the gravity and extent of the harm caused.[16]

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[13] See Fisse, above n 1. A punitive injunction seeks to require action to be taken in a way that is punitively demanding or exacting and has in itself a deterrent impact additional to that of sanctions for contempt in the event of non-compliance with an injunction; contrast R Miller, *Australian Competition and Consumer Law Annotated* (40th ed, 2018) 80.560.

[14] See Fisse, above n 1.

[15] Proposed Section 86C (see Part III below) should have corresponding provisions in s 245 of the Australian Consumer Law. The orders authorised by s 242 and s 243 of the Australian Consumer Law do not fully reflect the concept of redress facilitation in Proposed Section 86C.

[16] This is widely accepted without necessarily endorsing questionable theories of 'optimal' penalties; see Beaton-Wells and Fisse, above n 3, 425–428.

The current regime of fines, monetary sanctions and civil private actions falls well short of doing that.[17] Redress facilitation orders are one possible way of helping to reduce the shortfall.

Secondly, redress facilitation orders seek to deter cartel conduct partly by impressing upon corporate wrongdoers that more is required than writing a cheque for a fine or monetary penalty.[18] A redress facilitation order requires that action be taken to assist redress in a separate civil proceeding or administrative process or under a collective victim redress scheme and the performance of that requirement itself has a deterrent impact. Well-designed redress facilitation orders would promote that impact by including generals as well as sergeants among the personnel specified in an order as being responsible for compliance with it.[19]

Thirdly, redress facilitation orders promote victim compensation whereas the government now exacts fines and monetary penalties for cartel conduct without allocating the funds wholly or in part to the compensation of victims.[20] Fines and pecuniary penalties are paid into Commonwealth general revenue. There is no mechanism for allocating those funds to victim compensation. This neglect of victims is reduced to a limited extent only under the Act by making the ability of a defendant to pay compensation relevant when determining a fine or monetary penalty.

To amplify:

- Where a fine is imposed for a cartel offence, s 16C of the *Crimes Act* requires a court to take into account an offender's financial circumstances before imposing the fine. Section 16C enables a court to consider the financial impact of a reparation order that it has made or proposes to make when imposing a fine on a federal offender.
- Where a monetary penalty or a compensation order could be imposed, and the defendant does not have sufficient financial resources to pay both, s 79B requires a court to give preference to an order for compensation.

However, s 16C has limited practical relevance and s 79B does not apply where, as is often the case, compensation is the subject of separate civil proceedings. Accordingly, it has been proposed, in relation to s 79B, that courts be given the

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17 See e.g. Beaton-Wells and Fisse, above n 3, 428–433; Beaton-Wells and Tomasic, above n 1.

18 On the deterrent limitations of monetary sanctions against corporations see Fisse, above n 1, 315–317; B Fisse, 'The First Cartel Offence Prosecution in Australia: Implications and Non-Implications' (2017) 45(6) *Australian Business Law Review* 482. Proposals to increase monetary penalties against corporations need to heed those limitations as well as exploring ways of improving alternative means of deterrence (e.g. stronger focus on individual liability and on individual accountability within organisations) but some fail to do so; see e.g. OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (2018). See further B Fisse, 'Australian Cartel Law: Biopsies' (2018) Part V at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3180392.

19 See Part III C 3(a) below.

20 See e.g. Beaton-Wells and Fisse, above n 3, 11.5; Canada Law Reform Commission, *Criminal Responsibility for Group Action* (Working Paper 16, 1976) 47 (fines should be used to satisfy civil judgments or otherwise to fund victim compensation); J C Coffee Jr, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 387, 413–24 (proposal for equity fine as a sanction against corporate offenders, with equity to vest in victim compensation fund); American Bar Association, Section of Antitrust Law, 'The State of Federal Antitrust Enforcement — 2001', Report of the Task Force on the Federal Antitrust Agencies (2001) 4–5; CUTS Centre for Competition, Investment and Economic Regulation 'Cartel Fines Could Be Better Used' 2007 8(3) *ReguLetter* 1.

discretion to set aside a proportion of a penalty until the expiry of the limitation period for private actions or, more radically, that the whole penalty imposed be reserved for the payment of damages.[21] That proposal lies fallow.

Fourthly, s 87B undertakings may be used to facilitate redress[22] but are insufficient. Undertakings under s 87B are voluntary.[23] Court-ordered sanctions are necessary to deal with cases where a defendant has contravened the CCA, is unwilling to enter into an undertaking, and where a suitable penalty or remedy needs to be imposed. Moreover, s 87B undertakings are no substitute for enforcement proceedings in cases of serious or flagrant contraventions.[24]

Fifthly, the orders that may be made under s 80 (injunctions), s 82 (actions for damages) and s 87 (other orders) of the CCA do not explicitly authorise the types of redress facilitation set out in the statutory model advanced in Part III below.[25] Unless explicit provision is made for redress facilitation orders (as remedial orders and as punitive orders)[26] the Court is most unlikely to apply s 80, s 82 or s 87 in that way.

Sixthly, the proposed scheme for deferred prosecution agreements in Australia makes compensation a possible condition of deferral of prosecution.[27] However, the proposed scheme does not adequately reflect the concept of redress facilitation:

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21 D Round, 'Consumer Protection: At the Merci of the Market for Damages' (2003) 10 *Competition and Consumer Law Journal* 29, 31–32.

22 See e.g., 'Coles refunds over $12 million to suppliers following ACCC action', ACCC MR 112/15, 30 June 2015, <www.accc.gov.au/media-release/coles-refunds-over-12-million-to-suppliers-following-accc-action>; Undertaking to the Australian Competition and Consumer Commission pursuant to section 87B of the Act by Coles Supermarkets Australia Pty Ltd ACN 004 189 708 and Grocery Holdings Pty Ltd ACN 007 427 581, 14 December 2014, <www.accc.gov.au/system/files/public-registers/undertaking/1183859-1-87b%20Undertaking%20-%20Coles%20-%20signed%2016%20December%202014.pdf>. Note the frequent use of undertakings by ASIC partly to achieve some form of redress; see M Nehme, 'Justice to Outsiders through Undertakings' (2009) 9 *Queensland University of Technology Law and Justice Journal* 85; ASIC, '18-102MR ASIC accepts enforceable undertaking from Commonwealth subsidiaries for Fees No Service conduct' (13 April 2018); ASIC, '18-017MR ASIC acts against Thorn's Radio Rentals and secures multi million customer refunds for poor appliance rental outcomes' (23 January 2018); ASIC, '17-393MR ASIC accepts enforceable undertakings from ANZ and NAB to address conduct relating to BBSW' (20 November 2017); ASIC, '17-144MR ASIC accepts enforceable undertaking from Macquarie Bank to address inadequacies within their wholesale FX business' (19 May 2017); ASIC, '16-455MR ASIC accepts enforceable undertakings from NAB and CBA to address inadequacies within their wholesale spot FX businesses' (21 December 2016); ASIC, '16-047MR Affected consumers to be compensated as ASIC accepts EU from ACE Insurance' (25 February 2016). See also 'ASIC calls for power to force compensation' *Australian Financial Review*, 18 April 2018, 6.

23 Moreover, the ACCC does not have a practice of addressing redress in s 87B undertakings in competition matters despite the ALRC's recommendations and the suggestion in ACCC s 87B guidelines that it will do so: Beaton-Wells and Tomasic, above n 1, 670. Contrast ASIC's frequent use of enforceable undertakings to achieve some form of redress; see references in previous footnote.

24 Note also that s 87B undertakings do not appear to be enforceable by private litigants.

25 See Proposed Section 86C in Part IIIB below.

26 See Proposed Section 86C(3) in Part IIIB below.

27 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, referred to Senate Legal and Constitutional Affairs Legislation Committee (07/12/2017), report 20/04/2018); Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia*, Public Consultation Paper, 2017, <www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf>. For

- strangely, the scheme does not apply to cartel offences or cartel civil penalty prohibitions
- perversely, redress facilitation is relevant to deferral of prosecution but not as a sanction in the event of prosecution and conviction.[28]

The statutory model for redress facilitation orders proposed in Part III below applies to the cartel offences and civil penalty cartel prohibitions.

III REDRESS FACILITATION ORDERS — A STATUTORY MODEL

This Part III sets out a statutory model for redress facilitation orders as a sanction for breach of the *Competition and Consumer Act 2010* (Cth). The current limitations of s 86C (non-punitive orders) are taken as a starting point.[29] Amendments to s 86C are then proposed to help overcome those limitations. Explanatory notes spell out the aims of the proposed amendments and their intended application.

A *Non-punitive orders under s 86C — limitations*

Section 86C provides for four types of non-punitive orders: community service orders, probation orders, information disclosure orders and notification orders.

Section 86C is unduly limited in seven significant ways. First, the concept of redress facilitation is reflected obliquely and inadequately by s 86C in its current form. Information disclosure orders and advertisement publication orders may be used to facilitate redress but these represent only two possible forms of redress facilitation. The full potential of redress facilitation as a sanction is unachievable unless all of the main possible types of redress facilitation orders are covered and authorised by the section.

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one critique see S Bronitt, 'Regulatory bargaining in the shadows of preventive justice: Deferred prosecution agreements' in T Tulich, R Ananian-Welsh, S Bronitt and S Murray (eds), *Regulating Preventive Justice* (Routledge, 2017) ch 12. DPAs in the USA are often conditional on providing compensation; see e.g. United States Department of Justice, Press Release 09-136, 'UBS Enters into Deferred Prosecution Agreement' (2009); 'HSBC to pay $100 million to settle US probe into currency rigging', *US Legal News*, 19 January 2018; B Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014), 124–126. For the UK, see Serious Fraud Office, 'Deferred Prosecution Agreements' <www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/; Serious Fraud Office, 'SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC', 17 January 2017 (including disgorgement of £258,170,000 profits) at: <www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/. DPAs or NPAs can also be used to generate admissions that may be used in civil actions: see J Sack and E Haines, 'Be Careful What You Wish For: How Deferred and Non-Prosecution Agreements Can be used in Civil Litigation', *Bloomberg Law Reports*, 10 January 2012, at: <www.maglaw.com/publications/articles/2012-01-10-be-careful-what-you-wish-for-how-deferred-and-non-prosecution-agreements-can-be-used-in-civil-litigation/_res/id=Attachments/index=/morvillo_abramowitz_sack_haines_article.pdf. DPAs and NPAs have been criticised as violating the rule of law; see e.g. J Arlen, 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements' (2016) 8 *Journal of Legal Analysis* 191.

[28] See further the criticism of US pre-trial diversion cases at the time in B Fisse, 'Community Service as a Sanction Against Corporations' [1981] *Wisconsin Law Review* 970, 977–978.

[29] See Beaton-Wells and Fisse, above n 3, 11.3.5.

Secondly, a court has power under s 86C(2)(c) to impose an information disclosure order 'requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to'. Taken literally, this wording seems wide enough to enable a court to facilitate redress by requiring a corporate defendant to provide access to information in its possession that is likely to be useful as evidence in follow-on civil proceedings. However, it is uncertain how expansively courts are likely to interpret the wording. In any event, information disclosure is a more limited concept than redress facilitation. For instance, unlike information disclosure, redress facilitation extends to making employees available for interview, generating explanations of data in corporate records or investigating the impact on victims of cartel conduct.

Thirdly, the orders that may be made under s 86C(2) are explicitly non-punitive and hence cannot be used as a punitive sanction. That limit is highly questionable given the limitations of monetary sanctions and the deterrent value of non-monetary sanctions.[30] It is also difficult to reconcile with the introduction of cartel offences in 2009.[31] For example, a punitive community service order would be an appropriate and superior alternative to imposing a monetary penalty or a fine for cartel conduct in some situations:[32]

Assume that two pharmaceutical companies, V1 and V2, agree to restrict the production of a new wonder drug in order to increase profits. They alone have the patent rights necessary to be able to manufacture the drug. Instead of or in addition to fining the companies for committing the cartel offence by agreeing to reduce output, a punitive community service order could be used to require the corporations to supply a quantity of the drug (e.g. 10 per cent of the quantity affected by the cartel conduct) at no charge to public hospitals for a specified period (e.g. a period corresponding to the period during which the parties gave effect to their reduction of output arrangement). A community service order of this kind would be more likely to make a punitive impact in such a case than a monetary penalty or a fine. The main punitive impact would be a short-term restraint on autonomy and an institutional shock over and above mere monetary loss.

A court is most unlikely to impose a punitive community service order unless given the power expressly to do so. Section 86C should be amended accordingly, with an additional example along the lines of that given above.[33]

Fourthly, a weakness of s 86C is that the power to make an order under the section depends on application by the ACCC or, in the context of cartel offences, the CDPP. There is no good reason why the discretion of the courts when sentencing corporations or making orders in relation to civil contraventions should be fettered in such a way.

Fifthly, the examples of probation orders in s 86C do not include an order requiring a corporate defendant to prepare and provide an internal discipline report

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30 Fisse, above n 1, 315–317. Note also ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68, [10.14], [10.17] (recommending that community service orders be introduced as a penalty, not merely as a remedy).

31 The question does not appear to have been on the drawing board of the architects of the cartel offences; see Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Explanatory Memorandum, [6.14]–[6.15].

32 Beaton-Wells and Fisse, above n 3, 458–459. See further Fisse, above n 28.

33 Examples are now used in s 86C. Example (a) of a community service order in Proposed Section 86C below limits the amount of products to be supplied under a CSO to an amount commensurate with the estimated approximate amount of overcharges to first purchasers of the products affected by the cartel conduct.

detailing who was implicated in the corporate contravening conduct and what internal disciplinary measures have been taken against them in order to prevent similar conduct in future.[34] Individual accountability is a fundamental pillar of social control but is imposed in enforcement actions by the ACCC only to a limited and selective extent. Internal discipline orders are a means of making individual accountability count in cases where, as is common, few of the individuals implicated in contravening conduct can be proceeded against and held liable under s 76 or s 79 of the CCA. Section 86C should provide expressly for internal discipline orders.

Sixthly, it has been held in several cases that there is no power under s 86C to require that a compliance program be independently audited.[35] This is a cramped and unsatisfactory interpretation of s 86C. Independent auditing is often required in undertakings under s 87B as a safeguard against corporate cheating or laxity. Section 86C should be amended to include the power to require independent auditing as part of an order or consequential order under the section.

Seventhly, s 86C leaves courts in the dark about the factual basis of sentencing, assessment of penalty or design of remedy. They should have the power to require a corporate defendant to provide a detailed pre-sentence or pre-penalty or pre-remedy report setting out what steps have been taken by the corporation since the contravention:

(a) to improve its internal controls and to discipline the persons implicated in the contravention; and
(b) to compensate victims or to facilitate the compensation of victims.

B *Amending s 86C to avoid or reduce its limitations*

Section 86C could be amended to avoid or reduce the limitations indicated in Part IIIA above. An amended version is advanced below (Proposed Section 86C) with the main amendments indicated in italics. Readers may wish to read the explanatory notes in Part IIIC below before navigating these proposed amendments.

s 86C Orders — community service, probation and redress facilitation

(1) The Court may make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.
(2) The orders that the Court may make in relation to the person are:
    (a) except in the case of contravening conduct that relates to section 60C or 60K[36] ─ a community service order; and
    (b) except in the case of contravening conduct that relates to section 60C or 60K ─ a probation order for a period of no longer than 3 years; and
    (c) a redress facilitation order.

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[34] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) 30.15, 30.16; Beaton-Wells and Fisse, above n 3, 6.6.3, 6.6.4; B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (CUP, 1993) ch 5; Coffee, above n 20.

[35] *BMW Australia Ltd v Australian Competition and Consumer Commission* (2004) 207 ALR 452; *Australian Competition and Consumer Commission v Visy Paper Pty Ltd [No. 2]* (2004) 212 ALR 564; *Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd* (2004) 207 ALR 329.

[36] This follows existing s 86C. The subject matter of ss 60C, 60K is: s 60C (price exploitation in relation to carbon tax repeal); s 60K (false or misleading representations about the effect of carbon tax repeal on prices).

(3) An order under this section may be made:

(a) as a punitive order; or

(b) as a remedial order.

(4) An order under this section against a corporation shall specify the individual representatives who are to direct and supervise the steps to be taken to comply with the order.

(5) The Court may require a corporation that has been found liable for contravening conduct, or another person appointed by the Court, to provide a pre-order report on specified matters relating to the contravening conduct and to one or more possible orders under this section.

(6) The Court may require a corporation that has been found liable for contravening conduct, or another person appointed by the Court, to provide a post-order report on specified matters relating to compliance with an order made under this section.

(7) This section does not limit the Court's powers under any other provision of this Act.

(8) This section does not limit the rights of action of any person under any other provision of this Act.

(9) In this section:

community service order, in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:

(a) is specified in the order; and

(b) relates to the conduct;

for the benefit of the community or a section of the community.

Examples of community service orders:

(a) an order requiring a person who has engaged in cartel conduct to supply a product of the type affected by the cartel conduct: (i) to a class of persons affected by or at risk of being affected by the cartel conduct; and (ii) at an average price reduced by the estimated approximate amount of the average overcharge made as a result of the cartel conduct to first purchasers of that type of product; and (iii) for a period of similar duration to that of the period during which the cartel conduct occurred;[37] *and*

(b) an order requiring a person who has engaged in misuse of market power to supply a product of the type subject to that misuse of market power: (i) to a class of persons affected by or at risk of being affected by the misuse of market power; and (ii) at a price determined by a CPI-x formula;[38] *and (iii) for a period of three years; and*

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[37] This approach does not require assessment of the loss resulting from the cartel conduct to everyone affected downstream by that conduct. The amount of the overcharge to first purchasers is used as a simpler measure. Furthermore, it is sufficient to reflect the *estimated approximate* average amount of overcharges to first purchasers.

[38] See further e.g., R Baldwin, M Cave, M Lodge, *Understanding Regulation Theory, Strategy, and Practice* (2nd ed, 2012) 478–487; S King, 'Principles of Price Cap Regulation' in M Arblaster and M Jamieson (eds) *Infrastructure Regulation and Market Reform* (1998) 45; R Rees and J Vickers, 'RPI-X Price Cap Regulation' in M Bishop, J Kay and C Mayer (eds), *The Regulatory Challenge* (OUP, 1995) 358. The aim of a community service order under Proposed Section 86C in this context is not utility regulation but deterrence of misuse of market power by requiring a corporate misuser of market power to offset that misuse of market power by incurring capped

(c) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and
(d) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.

contravening conduct means conduct that:
(a) contravenes Part IV or IVB or section 55B, 60C, 60K or 92; [39] or
(b) constitutes an involvement in a contravention of any of those provisions.

probation order, in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order, and includes:
(a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
(b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
(c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct; and
(d) an order directing the person to provide an internal discipline report setting out details of the individual persons who were implicated in the corporate contravening conduct and the internal disciplinary measures that have been taken against them in order to promote the deterrence of similar conduct in future.

***redress facilitation order**, in relation to a person who has engaged in contravening conduct, means an order that facilitates the compensation or other redress of loss caused by the contravening conduct in a separate civil or administrative proceeding or under a collective victim redress scheme, and includes:*
(a) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and

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future pricing in relation to an affect product type. The sanction thus seeks to counteract misuse of market power by imposing a responsive detraction from that market power. A pragmatic approach would be to set X in CPI–X at 0 by regulation under the CCA as a general rule.

[39] This follows existing s 86C. The subject matter of ss 55B, 60C, 60K and 92 is: s 55B (payment surcharges must not be excessive); s 60C (price exploitation in relation to carbon tax repeal); s 60K (false or misleading representations about the effect of carbon tax repeal on prices); s 92 (providing false or misleading information to the Commission or Tribunal in specified circumstances).

(b) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order; and

(c) an order requiring the person to cooperate by providing access to employees for interview and providing documents or data and explanations of those documents or data, in the way and to the persons specified in the order; and

(d) an order requiring the person to establish a collective redress scheme.

Examples of redress facilitation orders: [40]

(a) an order requiring a person who has engaged in contravening cartel conduct to prepare a detailed investigative report disclosing information about the circumstances of the contravention, the persons concerned in that contravention, the nature of the loss likely to have been caused by the contravention, and the persons or classes of person likely to have suffered loss; and

(b) an order requiring a person who has engaged in contravening cartel conduct to provide notice of the contravening conduct in newspapers and, in relation to customers affected by the conduct, by email or text messaging; and

(c) an order requiring a person who has engaged in contravening cartel conduct to make employees who were implicated in that conduct available for interview by a person who has suffered loss from that conduct; and

(d) an order requiring a person who has engaged in contravening conduct to waive a confidentiality obligation in order to enable access to information, documents or evidence by a person who has suffered loss from that conduct; and

(e) an order requiring a person who has engaged in contravening conduct to explain data to which that person has access in order to assist the calculation of damages by a person who has suffered loss from that conduct that is relevant to assessment of damages; and

(f) an order requiring a person who has engaged in contravening conduct to establish a collective redress scheme and to appoint at its own expense an independent arbiter to administer the scheme; and

(g) an order requiring a person who has engaged in contravening price fixing conduct to pay into a consumer trust fund an amount that represents the estimated total amount of the overcharge imposed on consumers where the amount of the overcharge for each of those consumers is too small to be the likely subject of individual or class action for recovery.

[40] This follows the usage of examples in s 86C in relation to community service orders and probation orders.

C *Explanatory notes on Proposed Section 86C*

1 *Overview*

Proposed Section 86C makes redress facilitation orders an authorised type of sentence, penalty or remedy for unlawful cartel conduct and other breaches of the CCA.

The concept of redress facilitation is recognised explicitly in Proposed Section 86C and supplements the current provisions in s 86C(2) for information disclosure orders and advertisement orders. In addition, Proposed Section 86C:

- enables orders under the section to be used punitively or non-punitively;[41]
- authorises the Court to make an order under the section whether or not the ACCC or the CDPP applies to the Court for such an order; [42]
- adds two examples of community service orders to indicate that community service orders may be used in relation to cartel conduct and other competition law contraventions;[43]
- requires an order against a corporation to specify the individual representatives who are to direct and supervise the steps to be taken to comply with the order;[44]
- includes an internal discipline order as an example of a probation order; [45]
- promotes and facilitates compliance with orders under the section by requiring the Court to specify the individual persons who are charged with the obligation to direct and supervise compliance with an order; [46]
- empowers the Court to require a pre-order report for the purpose of ascertaining the factual basis of sentencing or penalty assessment; [47] and
- creates a mechanism for monitoring and auditing compliance with orders made under the section.[48]

There are four types of redress facilitation orders in Proposed Section 86C:

(a) information disclosure;
(b) notice to victims;
(c) cooperation;
(d) collective redress.

Proposed Section 86C expands on each of these to indicate non-exhaustively the terms of the orders that may be made. Four dimensions of compliance with redress facilitation orders are also addressed in Proposed Section 86C:

(a) responsibility for compliance with the order;

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41 Proposed Section 86C(3). Punitive orders are subject to the principles that govern sentencing for offences under the CCA and the principles that govern assessment of civil penalties under the CCA.
42 Proposed Section 86C(1).
43 Proposed Section 86C(3).
44 Proposed Section 86C(4).
45 Proposed Section 86C(9).
46 Proposed Section 86C(9).
47 Proposed Section 86C(5).
48 Proposed Section 86C(6).

(b) pre-order report;
(c) monitoring and auditing compliance with orders; and
(d) consequences of non-compliance with order.

The application of sanctions and remedies under the CCA much depends on case-by-case judicial development. Where necessary, case-by-case development can be complemented by Federal Court Rules and a General Practice Note on the Application of Proposed Section 86C.[49]

2 *Types of redress facilitation order*

(a) Information disclosure

The first type of redress facilitation order specified is information disclosure: an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to.

The definition in s 86C(2)(c) is relocated as part of the definition of 'redress facilitation order' in Proposed Section 86C. In the vast majority of cases, information disclosure will relate substantially to redress facilitation.

Example (a) of a redress facilitation order makes it clear that this type of order is not limited to disclosure of existing documents but may be used to require a corporate defendant to prepare a detailed investigative report disclosing information about the circumstances of the contravention, the persons concerned in that contravention, the nature of the loss likely to have been caused by the contravention, and the persons or classes of person likely to have suffered loss.[50]

As indicated in Example (a), an order may be made in relation to information to which the defendant has access whether or not that information already exists in one or more documents — where, for instance, a defendant has access to information where it is necessary to interview employees in order to obtain it. Where information beyond the scope of an information disclosure order under Proposed Section 86C is relevant to redress facilitation, the relevant type of redress facilitation order is a cooperation order, discussed in Part III 2(c) below.

The type of order in Example (a) is akin to, but more focussed than, the self-investigative reports requested of the banks by the Royal Commission on Banking.[51] The questions to be addressed in the self-investigation reports included the following:

> Has the entity identified any conduct, practice, behaviour or business activity it has engaged in, including by its director's offices or employees or by anyone otherwise acting on its behalf, since 1 January 2008, which it considers has fallen below community standards and expectations? If so, what is the nature, extent and effect of that conduct, practice, behaviour or activity?

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49 Under *Federal Court of Australia Act 1976* (Cth) s 59(1).

50 See also Fisse and Braithwaite, above n 34, 193–198 (self-investigative reports in context of individual accountability for corporate contraventions).

51 In the Matter of a Royal Commission into Misconduct in the Banking, Superannuation and Financial services Industry, Transcript, 12 February 2018, at: <www.financialservices.royalcommission.gov.au/public-hearings/Documents/transcripts-2018/12-february-2018-initial-public-hearing.pdf>.

The task of conducting the investigative work specified in an information disclosure order would be undertaken by the managers and staff of the defendant, with or without the assistance of outside experts such as lawyers or accountants. The report prepared would be filed with the Court as a matter of public record.

(b) Notice to victims

The second type of redress facilitation order specified in Proposed Section 86C is a notice order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.[52]

The definition in s 86C(2)(d) is relocated as part of the definition of 'redress facilitation order' in Proposed Section 86C. The main function of such an order is to provide notice to victims and other persons informing them that they may have suffered or may suffer loss and alerting them to the right to seek redress. By contrast, where the main aim is to impose adverse publicity as a sanction, the relevant order is an adverse publicity order under s 86D.

Example (b) indicates that the term 'advertisement' is used broadly. The term is not limited to newspaper advertisements but includes notice by email, text messaging and social media. Effective notice in a digital age requires the use of modern technologies. Consider Aiken's overview of what effective notice requires in the context of class actions:[53]

> Recognizing limitations in traditional forms of notice, some courts and parties have begun using modern technologies. They are using email notice to deliver individual notice, and banner and pop-up advertisements on websites, as well as dedicated websites, to try to reach unknown class members. Although these efforts are a promising first step, courts and parties can do more. For example, machine learning systems — which analyse massive accumulations of data to discern unobserved patterns — could be used to identify previously unknown class members, with the ultimate goal of sending them individual notice. Social media also offers an inexpensive way for parties to reach a potentially vast, diverse class. Finally, text messaging could allow parties to deliver notice directly to class members in a matter of seconds. In the digital age, it is imperative that courts and parties harness modern technologies to provide the best notice practicable and protect the interests of class members.

It is unrealistic to expect courts to identify the persons or classes of person to whom notice should be directed or to harness modern technologies in notice orders unless assisted on those questions. The willingness of the ACCC or the CDPP to do so is likely to be limited by resources and other enforcement priorities. Corporate defendants are not a source of independent advice. Accordingly, Proposed Section 86C(5) empowers a court to require a pre-order report by a court-appointed adviser

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[52] Compare Federal Court of Australia Class Actions Practice Note (GPNCA) [11.2(d)] ('sent, published or broadcast via media which are best calculated to achieve the effective dissemination of the notice to persons who have or may have suffered loss as a result of the contravening conduct'). If necessary, similar guidance could be provided in General Practice Note on the Application of Proposed Section 86C.

[53] A Aiken, 'Class Action Notice in the Digital Age' (2017) 165 *University of Pennsylvania Law Review* 967, 967.

where necessary to provide the factual and technical information upon which a notice order can be made.

(c) Cooperation

The third type of redress facilitation order specified in Proposed Section 86C is a cooperation order requiring the defendant to provide access to employees for interview and to provide documents or data or explanations of those documents or data to plaintiffs seeking compensation in a separate civil proceeding or administrative process or under a collective victim redress scheme.

Example (c) indicates that a cooperation order may require a defendant to make employees available for interview. This type of cooperation obligation has often been used in class action settlements, as in the settlement agreement between class action plaintiffs and Lufthansa and Swiss International Air Lines in the US in the wake of air cargo price fixing:[54]

> Interviews. Lufthansa shall make available, at a location of its choice, for interviews with Settlement Class Counsel and/or experts, upon reasonable notice, and at Lufthansa's expense, all current and former directors, officers, and employees of Lufthansa who have been interviewed by the US Department of Justice, the European Commission, or any other national competition authority investigating the air cargo industry. For persons interviewed only by the European Commission or one or more national competition authorities other than the US Department of Justice, Lufthansa shall not be obligated to make them available pursuant to this subsection unless (i) the proposed individual possesses information concerning anti-competitive behaviour affecting air cargo commerce within, to, or from the United States, and (ii) such information was a subject of his or her interview with the European Commission or other national competition authority.

A suitable template for this type of redress facilitation order might well be crystallised from examples in settlement agreements, incorporated in a Federal Court Rule, and expanded upon in a General Practice Note.

Example (d) indicates that a cooperation order may require a defendant to waive a confidentiality obligation in order to enable access to information, documents or evidence by a person who has suffered loss from that conduct.

Cashman and Abbs have drawn attention to the obstacle presented by confidentiality obligations for plaintiffs seeking statements or other evidence from employees or other persons.[55] Regulators may use broad statutory investigative powers

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[54] In re Air Cargo Shipping Services Antitrust Litigation, 'Settlement Agreement between Air Cargo Plaintiffs and Defendants Deutsche Lufthansa AG, Lufthansa Cargo AG, and Swiss International Air Lines Ltd', Master File 06-MD-1775 (CBA)(VVP), 2006, US District Court, Eastern District of New York, cl 54(a) (copy on file with author, formerly at: <www.aircargosettlement.com>. See also 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) 28–9. Kim Parker drew my attention to these cooperation provisions.

[55] Cashman and Abbs, above n 54, 22–28. A comparable issue arose in the Royal Commission on Banking; see *Australian Financial Review*, 9 February 2018, 17 (the four main banks released employees from confidentiality agreements should they decide to make submissions or appear

(eg under s 155 of the CCA) to compel disclosure of such information, but private plaintiffs have no corresponding powers. Private plaintiffs can subpoena witnesses to give evidence at trial and confidentiality constraints that preclude pre-trial disclosure do not prevent disclosure for the purpose of evidence in civil trial proceedings (subject to the application of privilege, including the privilege against self-incrimination). However, that power is of limited use:[56]

> [I]t is unrealistic to expect that a party to a proceeding will subpoena someone to give evidence, particularly of complex matters, at a trial without advance knowledge of what they are likely to say. If the person is called constraints on leading questions may give rise to additional difficulties.

Example (e) indicates that a cooperation order may require a defendant not only to provide documents or data but also to provide explanations of those documents or data. Documents or data by themselves may be difficult to understand or unhelpful as evidence unless explained. For instance, raw price or cost data may mean little to expert economists seeking to calculate damages in a cartel case unless that data is explained.[57]

(d) Collective redress

The fourth type of redress facilitation order specified in Proposed Section 86C is an order requiring the defendant to establish a collective redress scheme.

Example (f) is comparable to the s 87B undertaking entered into by Coles in December 2014 to facilitate the redress of unconscionable trading arrangements with numerous suppliers.[58] Coles agreed to appoint Mr Jeff Kennett (a former Premier of Victoria) as Independent Arbiter to review the claims of the suppliers and to resolve those claims in accordance with a timetable. On 30 June 2015 the ACCC announced

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before the Commission, paving the way for more than 100,000 current and former bank employees to potentially turn whistleblower).

56 Cashman and Abbs, above n 54, 24.

57 See American Bar Association, *Proving Antitrust Damages: Legal and Economic Issues* (ABA, 3rd ed, 2017) 188; A Gavil, 'The Challenges of Economic Proof in a Decentralised and Privatized European Competition Policy System' (2007) 4 *Journal of Competition Law and Economics* 177, 198–9.

58 'Coles refunds over $12 million to suppliers following ACCC action', ACCC MR 112/15, 30 June 2015 at: <www.accc.gov.au/media-release/coles-refunds-over-12-million-to-suppliers-following-accc-action>; Undertaking to the Australian Competition and Consumer Commission pursuant to section 87B of the Act by Coles Supermarkets Australia Pty Ltd ACN 004 189 708 and Grocery Holdings Pty Ltd ACN 007 427 581, 14 December 2014 at: <www.accc.gov.au/system/files/public-registers/undertaking/1183859-1-87b%20Undertaking%20-%20Coles%20-%20signed%2016%20December%202014.pdf>. Note also: ACCC, 'ACCC establishes trust fund', MR 182/98, 8 October 1998; ACCC, '$5 Million paid from Waterfront Trust Fund', MR 156/00, 30 June 2000; ACCC, 'Trust fund for waterfront-affected businesses' (1998) 2 ACCC Update 11; ACCC, 'ACCC to publish Golden Sphere refund notices', MR 228/98, 11 December 1998; ACCC, '$A250 000 compensation for internet domain name consumers after international co-operative action', MR 078/99, 1 June 1999; ACCC, '$300,000 refunds to scam victims', MR 209/07, 9 August 2007; 'Radio Refunds: How to avoid breaching your responsible lending obligations' (2018) at:<www.maddocks.com.au/radio-refunds-avoid-breaching-responsible-lending-obligations/>; Australian Competition and Consumer Commission v FDRA Pty Ltd and Jackson Anni – FCA Proceeding No. NTD70 of 2015 (Settlement Distribution Scheme), at: <www.accc.gov.au/system/files/FDRA%20refund%20scheme%20and%20claim%20form.pdf>.

that Mr Kennett had instructed Coles to refund over $12 million to suppliers and had allowed suppliers to exit Coles' Active Retail Collaboration (ARC) program without penalty or have their ARC contribution rebates reviewed. The terms of the s 87B undertaking in this case are a useful precedent for a collective redress order under Proposed Section 86C.

A similar approach could be formalised in a Collective Redress Regulation under the CCA or other legislation. One possible building block is the collective redress scheme introduced by the *Consumer Rights Act 2015* (UK).[59] Under s 49C of the *Competition Act 1998* (UK) a person may apply to the CMA for approval of a redress scheme during an investigation or upon its completion. The Competition Act 1998 (Redress Scheme) Regulations 2015[60] prescribe requirements for a redress scheme. The UK voluntary collective redress scheme seeks to facilitate redress for victims of competition law infringements and enable infringing businesses to offer compensation quickly and cost-effectively. The main incentive to come forward voluntarily with such a scheme is the offer of a discount of up to 20% on the fine that would otherwise be imposed by the CMA.[61]

Many other examples of collective redress schemes are instructive as inputs when drafting a collective redress order or designing a Collective Redress Regulation.[62]

Example (g) illustrates that a redress facilitation order may be used to facilitate redress where numerous victims have suffered loss as a result of cartel conduct but the loss suffered by each victim is small and unlikely to be the subject of civil actions for damages. The aim is to help reduce a gap in the present law. Under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) a class action may be stayed or discontinued if the costs of identifying group members and distributing damages to them are excessive compared to the amount of damages. In practice this means that class actions will often not be possible for end consumers. In the vitamins class action[63] these considerations led to amendment of the group to exclude end consumers who had not spent over a certain threshold on animal vitamins. The Visy/Amcor[64] and air cargo

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59 See UK Department for Business Innovation and Skills, 'Private Actions in Competition Law: A Consultation on Options for Reform', January 2013 at: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf>; C Hodges, 'Delivering Competition Damages in the UK' (2012) University of Oxford Legal Research Paper No 66/2012, <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2170385>; Ashurst, 'Major overhaul of UK competition litigation regime enters into force today' (2015), <www.ashurst.com/en/news-and-insights/legal-updates/major-overhaul-of-uk-competition-litigation-regime-enters-into-force-today/>; Norton Rose, 'UK Voluntary Redress Scheme: An Alternative to Litigation' (2015) <www.www.nortonrosefulbright.com/knowledge/publications/133389/uk-voluntary-redress-scheme-an-alternative-to-litigation>.

60 See CMA, *Guidance on the Approval of Redress Schemes for Infringements of Competition Law*, 14 August 2015, <www.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf>.

61 See CMA, *Guidance on the Approval of Redress Schemes for Infringements of Competition Law*.

62 See e.g. Pinsent Mason, 'An introduction to collective redress schemes' (2016), <www.out-law.com/en/topics/commercial/consumer-protection/an-introduction-to-collective-redress-schemes/>; R Van Loo, 'The Corporation as Courthouse' (2016) 33 *Yale Journal on Regulation* 547.

63 *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388, [5], [26].

64 *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2009] FCA 60, [6].

class actions[65] also imposed purchase amount thresholds for this reason. The upshot is that cartel class actions in Australia are run for business victims rather than for individual consumers. There is no provision in Australia for *cy-près* remedies to be awarded in these situations.[66]

The payment of funds into a consumer trust fund is an efficient form of *cy-près* remedy.[67] A National Consumer Trust Fund with appropriate terms of reference should be established formally by a regulation under the CCA for the purpose of Proposed Section 86C and *cy-près* remedies in class actions.[68] In some cases, a community service order may be used as a *cy-près* remedy[69] but in other cases it may be simpler to require redress by means of a monetary contribution to a consumer trust fund.

3 *Compliance with orders under Proposed Section 86C*

The explanatory notes below outline how Proposed Section 86C addresses the following issues of compliance:

(a) responsibility for compliance with an order;
(b) pre-order report;
(c) monitoring and auditing compliance with order; and
(d) consequences of non-compliance with order.

(a) Responsibility for compliance with order

Under Proposed Section 86C(4), an order under the section against a corporate defendant is to specify the individual representatives who are to direct and supervise the steps to be taken to comply with the order.

The main reason for designating primary responsibility for compliance in this way is to deter non-compliance with an order by promoting and facilitating individual

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65 *Auskay International Manufacturing and Trade Pty Ltd v Qantas Airway Ltd* [2010] FCA 1302, [2].

66 See further Beaton-Wells, 'Private Enforcement of Competition Law in Australia: Inching Forwards?', above n 5, 733 (failure of Harper Review to give due consideration to need for *cy-près* remedies).

67 See further R Higgins, 'The Equitable Doctrine of Cy Pres and Consumer Protection' (2002) at: <www.tpareview.treasury.gov.au/content/subs/105_Attachment1_ACA.rtf>. Contrast e.g. OFT Decision No CA98/05/2006 (UK Independent Schools) at: <www.webarchive.nationalarchives.gov.uk/20140402162745/>; <www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools>; 'Loblaws' price-fixing may have cost you at least $400', *Maclean's*, 11 January 2018, <www.macleans.ca/economy/economicanalysis/14-years-of-loblaws-bread-price-fixing-may-have-cost-you-at-least-400/>; 'Loblaws was part of a giant bread price-fixing conspiracy', *The Loop*, 20 December 2017, <www.theloop.ca/loblaws-part-giant-bread-price-fixing-conspiracy/>.

68 Compare the US SEC Fair Funds for Investors under s 308(a) of the *Sarbanes-Oxley Act 2002* 116 Stat 745; U Velikonia, 'Public Compensation for Private Harem: Evidence from the SEC's Fair Fund Distributions' (2015) 67 *Stanford Law Review* 331. Note also the Law Foundation of Ontario's Access to Justice Fund, <www.lawfoundation.on.ca/our-revenue-sources/cy-pres-2/>. On *cy-près* remedies in class actions see Victorian Law Reform Commission, *Civil Justice Review*, Report (2008) ch 8; M Redish, P Julian and S Zyontz, 'Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis' (2010) 62 *Florida Law Review* 617; Higgins, above n 67; Note, 'The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions' (1987) 38 *Hastings Law Journal* 729.

69 See Proposed Section 86C(9) community service order, example (a).

accountability in the event of non-compliance.[70] Trying reactively to allocate individual responsibility for corporate breaches of law is often difficult given the cloak of diffused accountability that often confronts those investigating corporate non-compliance after the event.[71]

(b) Pre-order report

Under Proposed Section 86C(5), the court may require a pre-order report to be prepared in order to assist the determination of the factual basis for sentencing, assessment of penalty or design of remedy.

Proposed Section 86C(5) reflects recommendations made by the Australian Law Reform Commission (ALRC).

The ALRC, in *Compliance with the Trade Practices Act 1974* (1994), recommended that a court be empowered to require a pre-penalty report:[72]

> The Commission considers that in many cases the court would be greatly assisted in its task of determining a penalty if it had detailed information from the contravening corporation about what it has done, if anything, since the contravention to improve its compliance mechanisms. No doubt a corporation that had made improvements would seek to inform the court of this before the court imposed a penalty. Enabling the court to require a corporation to prepare a written report would, however, emphasise the importance of compliance measures and provide a formal way for the court to obtain detailed information prior to imposing a penalty. The Commission recommends that the TPA be amended to provide that the court may require a corporation that has contravened the Act to provide to the court, prior to the court assessing the need for or the amount or nature of a penalty, a report detailing what steps have been taken by the corporation since the contravention to improve the corporation's internal controls and to discipline the persons implicated in the contravention.

In *Same Crime, Same Time* (2006), the ALRC recommended that federal sentencing legislation enable pre-sentence reports to be prepared in sentencing matters involving corporations:[73]

> Recommendation 14–2:
> Federal sentencing legislation should make comprehensive provision for the use of pre-sentence reports in the sentencing of federal offenders, including corporations. Those provisions should, among other things:
> (a) authorise a court to request a pre-sentence report prior to the imposition of any sentence, where the court considers it appropriate to do so;
> (b) authorise a court to specify any matter it wishes to have addressed in the pre-sentence report;
> (c) require the pre-sentence report to be prepared by a suitably qualified person within a reasonable time;

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70 See Fisse and Braithwaite, above n 34, 151–152.
71 Ibid 36–41.
72 Report No 68, [10.40].
73 Report No 103.

(d) preclude the author of the pre-sentence report from expressing an opinion about the offender's propensity to commit further offences, unless the author is suitably qualified to give such an opinion;
(e) allow the content of the pre-sentence report to be contested, for example by cross-examination of any person other than the offender; and
(f) provide that a pre-sentence report may be given orally or in writing, but where it is in writing, a copy of the report should, so far as practicable, be provided to the prosecution and to the offender or the offender's legal representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

Proposed Section 86C(5) provides for pre-order reports in the context of orders under s 86C. It would also be desirable to provide for pre-order reports in relation to penalties under s 76 of the CCA and sentences for cartel offences under s 79. Ideally, pre-penalty, pre-sentence and pre-order reports would be covered by general provisions under the CCA and the *Crimes Act 1901* (Cth). In the meantime, a provision equivalent to Proposed Section 86C(5) should be added to s 76 and s 79.

(c) Monitoring and auditing compliance with order

Under Proposed Section 86C(6), a court may require a post-order report to be prepared at the expense of the corporation on specified matters relating to compliance with an order under the section.[74]

The need for a monitoring and auditing mechanism of this kind has been addressed by the ALRC in the context of community service orders:[75]

> Community service orders will in most cases require more supervision than, for example, a monetary penalty. If more supervision is required than could be performed by the court, the court should appoint a person to be an independent representative of the court. This representative could, for example, be a lawyer, accountant, auditor, receiver or other appropriately qualified person. He or she would supervise compliance with the project and, if necessary, prepare reports on a proposed project. The fees of such a person would be payable by the contravener. The court should be able to require an independent representative to prepare pre-service reports or post-service reports. It should also be able to require the directors of the corporation to certify that the community service project has in fact been performed.

The same applies to redress facilitation and probation orders under Proposed Section 86C.

(d) Consequences of breach of order

Breach of an order under Proposed Section 86C is subject to corporate and individual liability for contempt of court under s 31 of the *Federal Court of Australia Act 1976* (Cth).[76]

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74 Independent expert review of compliance measures is a well-known mechanism. It is used by the ACCC and by ASIC in enforcement undertakings.

75 ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68, 114. See also Fisse and Braithwaite, above n 34, 152–153; WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006) chs 4–5.

IV CONCLUSION

The regime of fines, monetary sanctions and civil private actions under the CCA has been widely criticised but little has yet been done to address the deficiencies.[77] The little that has been done resulted from the Harper Review but that Review otherwise lacked due consideration of sanctions and remedies under the CCA.[78]

This article has advanced a detailed statutory model — Proposed Section 86C — for redress facilitation orders as a sanction for breach of the cartel prohibitions and other prohibitions under the CCA. Introducing redress facilitation orders is one of many possible steps that could usefully be taken to reduce the current public and private enforcement deficits under the CCA.

Redress facilitation orders offer a way of pursuing the goals of deterrence and compensation by the same sanction mechanism. They could help to bridge the divide between public enforcement action and private redress. They could promote deterrence and compensation by impressing upon corporate defendants that they are accountable for the harm caused by wrongdoing and are required to take proactive steps to facilitate redress instead of being allowed to wait and see what if anything may ensue from private actions. They could alleviate the spectacle of the state using public enforcement as a revenue-raiser by imposing larger and larger monetary penalties while turning a blind eye to redress for victims. They could be used to deliver deterrence and compensation formally through the front door of court proceedings, not informally and loosely through the backdoor of a deferred prosecution scheme.

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[76] See *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21; *Witham v Holloway* (1995) 183 CLR 525; *ACCC v Hughes* [2001] FCA 38; Federal Court of Australia, 'Enforcement, Endorsement and Contempt Practice Note' (GPN-ENF); ACCC, 'ACCC contempt action results in jail sentence for director', 19 May 2017, <www.accc.gov.au/media-release/accc-contempt-action-results-in-jail-sentence-for-director>.

[77] See e.g. Beaton-Wells and Tomasic, above n 1; Beaton-Wells, 'Private Enforcement of Competition Law in Australia: Inching Forwards?', above n 5.

[78] Consider *Competition Policy Review: Final Report* (March 2015) 3.15, ch 23.