

The consistency and compatibility of transactional resolutions of antitrust proceedings with the due process and fundamental rights of the parties in Australia

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1. Overview

The Australian competition-law regime is primarily governed by the Competition and Consumer Act 2010 (Cth) (CCA)¹ and is based on both private and public enforcement. However, Australian competition law is primarily enforced and regulated publicly, by the Australian Competition and Consumer Commission (ACCC).² The ACCC has investigative and information-gathering powers under Part XIX of the CCA. It resolves matters either by administratively encouraging consultation or negotiation to settle disputes,³ or via litigation. Nevertheless, only the court has the power to declare whether particular conduct contravenes the CCA and make findings of liability. The ACCC is empowered to institute proceedings in the court for the declaration of an infringement of the CCA and for the recovery of a pecuniary penalty on behalf of the Commonwealth.⁴ The ACCC may also apply for injunctions, damages and a range of orders.

The current Australian regime includes a number of transactional procedures, which may be independent of, or complementary to, the main enforcement proceedings.⁵ The CCA has introduced the notion of ‘enforceable undertakings’ as a form of administrative settlement. The ACCC also uses other administrative settlements to encourage cooperation and disclosure of illegal activity by parties involved and to avoid lengthy and expensive litigation. These include making joint submissions as to penalties which incorporate ‘discounts’ for cost-savings associated with cooperation and even immunity for cartel whistleblowers who meet certain criteria.⁶

The ACCC’s *Cooperation Policy for Enforcement Matters* (July 2002)⁷ sets out the ACCC’s approach to administrative settlements associated with cooperation and reflect accepted practice in the Federal Court, which has taken into account the cost-savings to the community associated with avoiding litigating complex competition law matters.⁸ The Court is, however, unlikely to provide much or any

¹ The Act was previously named the Trade Practices Act 1974 (Cth).

² The ACCC was established by the Competition Policy Reform Act 1995 (Cth). It replaced the existing Trade Practices Commission. Australia has another regulator, the Australian Energy Regulator, which was established by the Trade Practices Amendment (Australian Energy Market) Act 2004 (Cth).

³ See ACCC, ‘Compliance & enforcement policy’ (February 2014), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

⁴ See ss 76-77 of the CCA.

⁵ The Australian competition-law/policy regime is in the early stages of a major *Competition Policy Review* (colloquially known as the ‘Root and Branch Review’). It is likely that the review will have an impact on transactional institutions. See Australian Government, *Competition Policy Review* <<http://competitionpolicyreview.gov.au/>>.

⁶ Transactional resolutions are summarised in the ACCC’s ‘*Cooperation Policy for Enforcement Matters*’ policy (July 2002). See also ACCC, ‘Compliance & enforcement policy’ (February 2014), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

⁷ The Cooperation Policy is available at <<https://www.accc.gov.au/publications/accc-cooperation-policy-for-enforcement-matters>>. It was developed and evolved from a 1998 ACCC guideline dealing with co-operation.

⁸ See, for example, *TPC v TNT Australia Pty Ltd and Others* [1995] FCA 1046 at [21] to [22]; (1995) ATPR 41-375 at 40,169 to 40,170; and *TPC v Patterson Cheney Pty Ltd and Others* [1990] FCA 421 at [11]; (1990) ATPR 41-059 at page 51,759.

credit to parties where they withdraw from proceedings late following ‘a period of protracted stonewalling’.⁹

Transactional resolution of competition law matters can happen at various times in the enforcement process. At its earliest, it could be utilisation of the opportunity offered by the ACCC’s immunity and leniency policy for a corporation or individual to inform the ACCC of a contravention of which it is unaware. Alternatively, it could occur at any point from the commencement of proceedings through to penalty hearings following an adverse finding. Importantly, the ACCC should not ignore alleged offenders’ proposals on administrative settlements. The ACCC’s failure or refusal to respond to or engage with a defendant regarding the possible administrative resolution of a matter may be visited by an adverse court order as to costs by the court even if the ACCC wins the proceeding before the court.¹⁰

A transactional resolution cannot be imposed on defendants, although the ACCC may propose a resolution in appropriate cases or may decline to accept a proposal made by the parties. When deciding whether to accept a transactional resolution in civil cases, the ACCC assesses each case on its merits. In the case of the criminal cartel provisions it is the Commonwealth Director of Public Prosecution who will determine whether or not immunity should be available to the parties, although it will take advice from the ACCC and will consider the same factors when making this determination.¹¹ To date there have been no criminal cartel cases in Australia with the result that it is difficult to assess the effectiveness of this policy.

1.1 Immunity Policy

The *ACCC Immunity Policy for Cartel Conduct* (July 2009) and its interpretation guidelines¹² have been developed over the past decade to assist the ACCC to detect or prove hard core cartels¹³ and has been justified on the basis that it is a necessary to identify covert cartel conduct. Importantly, the rationale for the immunity policy is not to “reward” parties for cooperation, but rather to provide powerful incentives to tear down the cloak of secrecy and ‘blow the whistle’ on these secret cartels. The destabilising impact of the leniency policy on cartels was recognised by the Federal Court in December 2003, when Justice Wilcox said:

It is sufficient to say that, because of the existence of the leniency agreement, there can be no valid argument for parity in outcome as between Tyco and FFE. If this approach leads to a perception amongst colluders that it may be wise to engage in a race to ACCC’s confessional, that may not be a bad thing.¹⁴

The immunity policy was developed in addition to the ACCC’s *Co-operation Policy for Enforcement Matters* which recognised the benefits to the ACCC, the courts, and the Community of defendants co-operating in enforcement matters. These time, resource, and cost benefits justified “rewarding” defendants for their co-operation.¹⁵

The *ACCC Immunity Policy for Cartel Conduct* applies to both individuals and corporations in relation to civil contraventions of the cartel laws.¹⁶ Immunity is granted to a corporation only if the corporation is the first to report the cartel, it provides full cooperation and disclosure of information

⁹ Justice French in *TPC v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076 at 52,155 to 52,156.

¹⁰ See *ACCC v BAJV Pty Ltd* [2014] FCAFC 52 at [54] to [62] and [69] to [70].

¹¹ CDPP, *Immunity from Prosecution in Serious Cartel Offences*, made under s 9(6D) of the Director of Public Prosecutions Act 1983 (Cth).

¹² Available at < <https://www.accc.gov.au/publications/accc-immunity-policy-for-cartel-conduct>>.

¹³ See ACCC Media Release “*Draft Leniency Policy to break hard core cartels issued*” – 4 July 2002 at <www.accc.gov.au/media-release/draft-leniency-policy-to-break-hard-core-cartels-issued>.

¹⁴ *ACCC v FFE Building Services Ltd* [2003] FCA 1542 at [30].

¹⁵ The Immunity Policy is restricted to cartel conduct; however, the cooperation policy is general and is capable of applying to any area of competition law.

¹⁶ *Immunity Policy for Cartel Conduct* and *Immunity Policy Guidelines* on 14 July 2009. Prior to the immunity policy the ACCC adopted a variety of leniency policies.

and evidence to the ACCC, it is prepared to cease its involvement in the cartel, it was not the clear leader of the cartel and it has not coerced others to join the cartel.¹⁷ The same conditions apply to persons in individual immunity proceedings, except that it is not essential that the individual or their corporate employer initiated the cartel.¹⁸

The current cartel immunity policy is under review. The ACCC issued a draft of the ‘ACCC immunity and cooperation policy for cartel conduct’ on 9 April 2014¹⁹ which proposes a number of changes. First, it reflects the amendment to the CCA which introduced criminal penalties for cartel conduct and gave enforcement power for criminal cartel conduct to the Commonwealth Director of Public Prosecutions (CDPP).²⁰ The draft policy clarifies the coordination of the processes for granting both civil and criminal immunity by the CDPP. Second, the draft policy does not require an immunity applicant to be the clear leader of the cartel. This can be difficult to prove in practice and removing this criterion will simplify the decision making process of the ACCC and open the immunity policy to a broader range of potential whistle blowers. This change to the immunity policy could also partially improve the testimonial credence of whistle blowers, which has at times been called into question by the Federal Court.²¹

Third, the draft introduces the concept of ‘amnesty plus’, which would involve the ACCC recommending a further penalty reduction for a leniency applicant who discovered a second, unrelated, cartel in the course of cooperating in relation to the first cartel. Finally, the draft includes criteria for the ACCC supporting leniency in relation to second and later immunity applicants. Although the ACCC will continue assessing reductions in penalties on a case-by-case basis, the specification of these criteria is likely to improve the transparency of the existing process.

1.2 Reduction of the Penalty

The *Cooperation Policy for Enforcement Matters* provides that the ACCC may be willing to reach an agreement with parties regarding joint submissions to be placed before the court on penalties if the corporation or individual cooperates with the ACCC.²² When assessing whether to support leniency (which applies to all area of competition law), the ACCC considers the different circumstances of the conduct and the company or individual concerned, such as cooperation with the ACCC, the seriousness of the conduct in question and the intention of the individuals involved. Although it is for the court to determine penalties for contravention, the ACCC may reach an agreement with parties to make a joint submission about penalties, having regard to their level of cooperation. The court is generally willing to follow the agreement, but is not obliged to do so.²³

The process of the defendants negotiating and agreeing with the ACCC the quantum of penalties to be put before the Federal Court started in 1981²⁴ and it has subsequently been applied in a number of competition law matters. The process has been approved by a Full Court of the Federal Court in competition law matters²⁵ and civil penalty matters in other areas of the law as well.²⁶ However, the

¹⁷ *Immunity Policy for Cartel Conduct*, para 8.

¹⁸ *Immunity Policy for Cartel Conduct*, para 17.

¹⁹ Available at <<https://consultation.accc.gov.au/compliance-enforcement/draft-immunity-and-cooperation-policy>>.

²⁰ Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth).

²¹ See, e.g., *ACCC v Leahy Petroleum Pty Ltd*, [2007] FCA 794, [42]-[55], [128]-[901].

²² Such an agreement has a basis in s 191(3)(a) of the Evidence Act 1995 (Cth).

²³ *ACCC v Ticketek Pty Ltd* [2011] FCA 1489; see also, *ACCC v Telwater Pty Ltd* (2009) ATPR 42-276; *ACCC v Qantas Airways Ltd* (2008) ATPR 42-266; *ACCC v Hobie Cat Australasia Pty Ltd* [2008] FCA 402; (2008) ATPR 42-225; *ACCC v Fchem (Australia) Ltd* [2008] FCA 344; *ACCC v Francis* (2004) 142 FCR 1; *ACCC v SIP Australia Pty Ltd* [1999] FCA 858 (1999) ATPR 41-702; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546.

²⁴ See Justice Sheppard in *TPC v Allied Mills Industries Pty Ltd (No. 4)* [1981] FCA 142; (1981) 37 ALR 256 at 259. This process was subsequently applied in 1995 by Justice Burchett in *TPC v TNT Australia Pty Ltd and Others*. [1995] FCA 1046 at [6] to [8].

²⁵ *NW Frozen Foods Pty Ltd v ACCC* [1996] FCA 1134; (1996) 71 FCR 285.

²⁶ *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72

process was questioned in 2013 by a State Supreme Court (Court of Appeal) dealing with civil penalties in the context of a Corporations Law matter.²⁷

At present, resolving disputes in court through agreements in the form of a joint submission on penalties and other orders is more common than full-hearing cases.²⁸ The ACCC and the courts evaluate different public values for and against the reduction of the penalty. On one hand, cooperation policies assist with detection and are less costly than full-hearing cases.²⁹ The principle of *interest reipublicae ut sit finis litium* was recognised by the court in the cases of *Frozen Foods*,³⁰ *Real Estate Institute*³¹ and cases that followed, which observed that it is in the public's best interests to avoid lengthy and expensive litigation.³² On the other hand, agreed penalties tend to be significantly lower than the maximum allowable penalties which may limit their broader deterrence value.³³

The court has also noted the broader public concern that plea bargaining involved 'disreputable conduct'.³⁴ Importantly, however, the final determination regarding penalty is a matter for the courts and is determined on a case-by-case basis.³⁵ Agreed penalties will only be accepted by the courts if they fall within the range a court would fix,³⁶ although a court will not refuse to agree to a penalty merely because the court may have 'selected a different figure'.³⁷

The issue of a regulator, such as the ACCC, negotiating and agreeing a civil penalty with a defendant for submission to the court for its consideration³⁸ seems to have been thrown into some doubt by a recent decision of the High Court of Australia, in *Barbaro*,³⁹ dealing with sentencing in a criminal law context. The case involved an allegation that a sentencing hearing was unfair because the sentencing judge said at the start of the sentencing hearing that she did not seek, and would not receive, any

²⁷ *ASIC -v- Ingelby* [2013] VSCA 49; and see "Some Recent Developments in Corporate Regulation – ASIC from a Judicial Perspective" Paper by Justice Mark Weinberg, Court of Appeal, Supreme Court of Victoria presented to the Monash University Law School, Commercial CPD Seminar, Melbourne 16 October 2013, especially at p14 [50] to p22 [80]. Available at <www.supremecourt.vic.gov.au/find/publications/speeches>.

²⁸ See, *ACCC v ABB Transmission and Distribution Ltd* [2001] FCA 383; (2001) ATPR 41-815, at 42,936.

²⁹ *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCACFC 72; (2004) ATPR 41-993, at 51; also see, e.g., *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, at [118]-[121]; *ACCC v Cargolux Airlines International SA* [2009] FCA 342, (2009) ATPR 42-282; *ACCC v Westminster Retail Pty Ltd* [2005] FCA 1299, (2005) ATPR 42-084.

³⁰ *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546.

³¹ *ACCC v Real Estate Institute of Western Australia Inc* [1999] FCA 18; (1999) ATPR 41-673.

³² *Ibid*, at 42,599; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546, at 43,580.

³³ See, *ACCC v ABB Transmission and Distribution Ltd* [2001] FCA 383; (2001) ATPR 41-815, at 42,936; R Baxter, 'Trade Practices – Agreeing the Level of Penalties with the Trade Practices Commission in Lieu of Prosecution' (1995) 69 *ALJ* 243.

³⁴ See, e.g., *TPC v Allied Mills Industries Pty Ltd* (1981) ATPR 40-241.

³⁵ *TPC v Allied Mills Industries Pty Ltd* (1981) ATPR 40-241 at 43,182. See also *ACCC v SIP Australia Pty Ltd* [1999] FCA 858 (1999) ATPR 41-702, at 43,000; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546, at 43,557-8.

³⁶ See, *TPC v Simsmetal Ltd* (1996) ATPR 41-449; *TPC v TNT Australia Pty Ltd* (1995) ATPR 41-375; *TPC v Axive Pty Ltd* (1994) ATPR 41-368.

³⁷ *TPC v Allied Mills Industries Pty Ltd* (1981) ATPR 40-241.

³⁸ It has continued to be applied and to expand into other areas of law including Consumer Law - see *ACCC v AGL Sales Pty Ltd* [2013] FCA 1030 at [12] to [45]; Corporations Law - see *ASIC in the matter of Chemaq Ltd v Chemaq Ltd* [2006] FCA 936 at [90] to [104]; Customs law (Customs Act 1901 (Cth)) - see *CEO of Customs by Robert Harry Wales his duly authorised Delegate v Corniche Motors Pty Ltd & Others* [2003] WASC 244 at [3] to [15]; Health Law (Therapeutic Goods Act 1999 (Cth)) - see *Secretary, Department of Health & Ageing v Pagasa Australia Pty Ltd* [2008] FCA 1545 at [17] to [42]; Media Law (*Broadcasting Services Act 1992* (Cth)) - see *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd* [2009] FCA 754; Industrial Law - see *Australian Building & Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2011] FCA 810 at [34]; Environment Law (*Environment Protection and Biodiversity Conservation Act 1999* (Cth)) - see *Minister for Sustainability, Environment, Water, Population and Communities v De Bono* [2012] FCA 643 at [15]; and Tax Law (*Tax Agent Services Act 2009* (Cth)) - see *Tax Practitioners Board v Shanahan* [2013] FCA 764 at [14] to [23].

³⁹ *Barbaro v R; Zirilli v R*, [2014] HCA 2; (2014) 88 *ALJR* 372.

submission from the prosecution about what range of sentences she could impose on each defendant. The essence of the majority judgment's conclusion in the High Court was as follows:

The prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge.⁴⁰

As the High Court was considering a criminal sentencing context and did not even refer to the Full Court decision supporting the negotiated penalty process in the context of civil penalty proceedings, the High Court's decision has been distinguished and, so far, held to be inapplicable to the civil penalty proceedings context.⁴¹ However, it is an important reminder of how processes and development for competition law proceedings can be affected by cases dealing generally with the administration of justice in Australia.⁴²

1.3 Administrative Settlements: Undertakings

Administrative settlements are based on the ACCC's belief that certain conduct contravenes the CCA, but do not involve findings of infringement, which may only be determined by the courts.

In the late 1980s and early 1990s the ACCC deliberately and vigorously settled a number of investigations via deeds of settlement governed by rules of contract law and related civil procedure rules. This was a very innovative and successful way of settling cases administratively and had the advantage of securing remedies for alleged infringements quickly with less cost and greater prediction. Nevertheless, the extent of enforceability of such deeds of settlement was questionable.⁴³ This changed when the ACCC was given the power to accept 'enforceable undertakings' under a new provision of the CCA, section 87B. The use of undertakings has been successful, highlighted by the fact that this legislative instrument has been incorporated into other areas of the law since its introduction into the CCA.⁴⁴

Undertakings are court-enforceable offerings by companies and individuals who are under scrutiny for a potential contravention of the CCA. The ACCC may decide to accept such an undertaking if the person accepts liability for its action(s) and agrees to remedies and compliance with competition law.⁴⁵ If the terms of the undertaking concerned are breached, the ACCC can apply to the court for orders directing the person to comply with the terms of its undertaking.⁴⁶

⁴⁰ Id at [7].

⁴¹ See *Tax Practitioners Board v Dedic* [2014] FCA 511 at [3]; *ACCC v Mandurvit Pty Ltd* [2014] FCA 464 at [37] to [80] and *ACCC v Energy Australia Pty Ltd* [2014] FCA 336 at [113] to [152].

⁴² A five-member Full Court of the Federal Court is going to reconsider the agreed penalty process for civil penalties in the Queensland case of *Director of the Fair Work Building and Industry Inspectorate v Construction, Forestry, Mining and Energy Union (CFMEU) & Anor* QUD 257 of 2013. The hearing is scheduled for August 2014. However, as discussed above, a three-member Full Court of the Federal Court approved the negotiated penalty process for competition law in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546.

⁴³ See Subchapter 2.1; see also Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review*, 209, 214, 219; Michael Duffy, Trade Practices Amendment Bill 1992, Second Reading Speech, Parliament of Australia, 2405, 3 November 1992.

⁴⁴ See, Marina Nehme, 'Enforceable Undertaking: A Restorative Sanction?' (2010) 36 *Monash U.L.Rev.* 108; Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review*, 209.

⁴⁵ See ACCC, *Compliance & enforcement policy* (February 2014), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

⁴⁶ Undertakings are also commonly used in Merger Control. This is discussed in Subchapter 6 'Merger Control'.

1.4 Authorisations and Notifications: Obtaining Immunity through the ACCC

Australian competition laws provide a means for a corporation or an individual confronting *some* competition law issues to obtain certainty and resolution of those issues by means of an administrative, transactional process, rather than through anti-trust legal proceedings through litigation and court processes. These administrative and transactional processes, known as “authorisation” or “notification”, are transparent and accountable processes.

Australian Parliaments have acknowledged and allowed for the possibility that some anti-competitive conduct may provide public benefits. Accordingly, the Commonwealth Parliament through the CCA, and the State and Territory Parliaments through their Competition Codes, have conferred a right on a corporation (the CCA) or an individual (the Competition Codes) to apply to the ACCC to seek exemption or ‘authorisation’ for engaging in proposed specified conduct which may be at risk of breaching various competition law provisions. These include anti-competitive contracts, arrangements or understandings, collective bargaining and collective boycott arrangements, secondary boycotts, exclusive dealing and resale price maintenance. The ACCC cannot directly authorise conduct that may contravene the misuse of market power under section 46 of the CCA and has no power to authorise mergers.⁴⁷ If the ACCC grants an authorisation, the corporations and persons covered by the authorisation may engage in the authorised conduct without contravening the CCA.⁴⁸

Australian competition laws also confer a right on a corporation or individual wanting to engage in conduct which may be at risk of breaching the exclusive dealing provisions to file a ‘notification’ of that conduct with the ACCC. The effect of notification is that the specified conduct is deemed, by section 93(7) of the CCA, not to have a substantial lessening effect on competition for the purposes of the exclusive dealing provision in section 47 of the CCA.⁴⁹ In most cases the notification will provide immediate protection from exclusive dealing proceedings by either the ACCC or a private party⁵⁰ which will continue unless and until the notification is withdrawn by the ACCC, which may only occur if certain legislative criteria are met. In addition, small business⁵¹ may notify the ACCC of proposed collective bargaining conduct which will confer protection for the parties against possible cartel claims after 14 days, provided the ACCC does not object within that timeframe. The ACCC will object where they do not believe the proposed conduct would result in public benefits sufficient to outweigh any likely anticompetitive detriment.

Once a valid authorisation application is lodged, the ACCC puts the application on its public register and website⁵² and consults with all interested parties on the application. The ACCC is obliged by law⁵³ to prepare and publish a draft written determination setting out a summary of its reasons. The Applicant or other interested party can call for a public hearing (“conference”) regarding the ACCC’s draft determination. If a conference is called for, all interested persons are entitled to attend and to participate at the conference (either with or without assistance). However, persons providing assistance to an interested party are not allowed to personally participate in the discussion.⁵⁴ The ACCC is obliged to make a record of the discussions at the conference. After taking into account all

⁴⁷ Authorisation is possible for mergers but only the Australian Competition Tribunal has the power to grant authorisation (see Subchapter 6).

⁴⁸ Section 88 CCA.

⁴⁹ The ACCC is empowered to withdraw the protection, but must undertake various inquiries and comply with a pre-determination hearing procedure before making its decision to withdraw the protection [sections 93(3), (4) and (5) of the CCA].

⁵⁰ Notification for some forms of exclusive dealing do not take effect for 14 days to enable the ACCC to consider its position whether or not to allow those notifications to stand.

⁵¹ This is determined based on the value of the transactions involved.

⁵² See ACCC, ‘Authorisations Register’ <www.accc.gov.au/authorisationsregister>.

⁵³ Section 90A(1) of the CCA.

⁵⁴ See sections 90A(6) and (7) of the CCA.

matters raised at the conference, the ACCC may make and issue a final determination with its reasons in respect of the application.⁵⁵

A similar public hearing process is contemplated if the ACCC proposes to issue a notice revoking the protection afforded by a valid notification.⁵⁶ The ACCC's decisions regarding an authorisation application or a notification are decisions under an enactment and subject to judicial review by the Courts.⁵⁷

2. Nature of the Settlement and Legal Consequences for the Parties

Only the court has the power to determine whether the CCA has been infringed. A finding of liability and declaration of contravention of any law or the imposition of a penalty or fine is quintessentially part of the exercise of judicial power. Accordingly, in Australia, under Chapter 3 of its Constitution, those tasks can only lawfully be undertaken by a court (judicial arm of Government), not any administrative agency forming part of the Executive arm of Government.

As a result, only two forms of transactional resolutions involve findings of infringement and liability. First, a reduction of the penalty is part of the main litigation. This must be approved by the court. Second, granting immunity includes ancillary findings of infringement and of liability if it leads to a successful litigation.

In enforcement matters, including those where the ACCC is seeking a finding of liability and declaration of contravention, an injunction or the imposition of civil pecuniary penalties (or, of course, fines and/or imprisonment for criminal cartel offences), the ACCC's role is to investigate the matter and, if it has sufficient admissible evidence, to institute legal proceedings in the Federal Court. A defendant is fully informed of the ACCC's case through the pleadings.

The ACCC is directly involved in all forms of administrative settlements. However, only two of them, undertakings under s87B of the CCA and a penalty agreements, are enforceable by the court. Penalty agreements must be formalised in a court judgment. The court is not bound to accept the agreed penalty, but is likely to do so if the agreed penalty is within the range that a court would fix.⁵⁸

2.1 Administrative Settlements: Undertakings

Undertakings are not approved by the court, but s 87B of the CCA permits the ACCC to decide whether to accept undertakings offered by alleged offenders. If the ACCC accepts such an undertaking and the alleged offender breaches its terms, the ACCC can apply to the court for an order or orders. Such orders include directing the entity to comply with the undertaking, compensating the Commonwealth and/or any other person for any financial benefits which arose from the breach, as well as any other orders which the court finds appropriate.⁵⁹ The Federal Court's approach to enforcing such undertakings and the importance of carefully and clearly drafting the undertakings was recently highlighted in *ACCC v Coles Group Ltd*⁶⁰ and *ACCC v Woolworths Ltd*,⁶¹ which involved proceedings initiated by the ACCC to enforce undertakings given by Coles and Woolworths.

⁵⁵ Section 90A(11) of the CCA.

⁵⁶ See section 93A of the CCA.

⁵⁷ For example, see *Jones v ACCC* [2003] FCAFC 164; (2003) 131 FCR 216 – where the Full Court of the Federal Court set aside an ACCC authorisation decision because the application for authorisation was not valid; and *Hospital Benefit Fund of WA v ACCC* [1997] FCA 655; (1997) 76 FCR 369 – where the court set aside an ACCC decision to allow a third line forcing notification to stand (which had the effect of removing a private cause of action instituted against the conduct). The ACCC had not provided the third party affected an opportunity to be heard in the matter.

⁵⁸ See, *TPC v Simsmetal Ltd* (1996) ATPR 41-449; *TPC v TNT Australia Pty Ltd* (1995) ATPR 41-375; *TPC v Axive Pty Ltd* (1994) ATPR 41-368.

⁵⁹ Section 87B of the CCA.

⁶⁰ [2014] FCA 363.

In the Australian context, to appreciate the role and use of enforceable undertakings for resolving competition law enforcement matters, it is necessary to understand the enforcement objectives of the ACCC. From its creation in 1995, these were:

- Detection of anti-competitive conduct;
- Establishing anti-competitive conduct;
- Stopping anti-competitive conduct (c.f. authorising anti-competitive conduct);
- Preventing future anti-competitive conduct;
- Obtaining redress / compensation for anti-competitive conduct;
- Deterring anti-competitive conduct; and
- Punishing anti-competitive conduct.⁶²

Proceeding down the path of enforcement of a competition law matter involves a judgment by the ACCC of the particular enforcement objectives it seeks to achieve through that matter. The objectives are achieved at different levels through pursuit of a particular matter. Litigation or use of enforceable undertakings are a means to an end (namely, the enforcement objectives), not the end in themselves. Accordingly, if a party is willing to offer an enforceable undertaking which meets the ACCC's enforcement objectives for that particular matter, it is likely that the ACCC would be willing to resolve that competition matter on a transactional basis through the use of section 87B. However, if, in a particular matter, the ACCC's enforcement objective includes deterrence through the imposition of penalties or clarification of the law, enforceable undertaking would not be acceptable to the ACCC.

The nature of enforceable undertakings as administrative-settlement means that their function is not to punish the potential offenders, but rather should ensure that future breaches are prevented, that the public is protected and that corrective measures take place, such as compensation for those harmed by the conduct.⁶³ Their function involves, therefore, restorative rather than punitive elements.⁶⁴ Those elements are reflected in sanctions, which have 'the purpose of identifying, correcting and preventing the original breach and its underlying causes,'⁶⁵ and in the process of these administrative settlements because they empower both the alleged offender and the ACCC to discuss, negotiate and agree on the settlement and its sanctions.⁶⁶

The ACCC makes undertakings publicly available in its 'Undertaking Public Registry' unless it has 'compelling' reasons to keep an undertaking or its term(s) confidential.⁶⁷ Undertakings can, therefore,

⁶¹ [2014] FCA 364.

⁶² They are similarly expressed by the ACCC in its Guideline on *Section 87B of the Competition and Consumer Act* April 2014 at page 3. See <www.accc.gov.au/publications/section-87b-of-the-competition-consumer-act>.

⁶³ Australian Law Reform Commission, *Compliance with Trade Practices Act 1974*, Report No 68 (1994) 38. Corrective measures are more common in consumer-law undertakings than in competition-law undertakings.

⁶⁴ See, e.g., Marina Nehme, 'Enforceable Undertaking: A Restorative Sanction?' (2010) 36 *Monash U.L.Rev.* 108; Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review*, 209.

⁶⁵ Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review*, 209, 211.

⁶⁶ See, Marina Nehme, 'Enforceable Undertaking: A Restorative Sanction?' (2010) 36 *Monash U.L.Rev.* 108; Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review*, 209.

⁶⁷ ACCC, *Compliance & enforcement policy* (February 2013), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>; Australian Law Reform Commission (ALRC), *Compliance with the Trade Practices Act 1974*, Report 68, Sydney, June 1994, [11.5]; see, Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable

have an impact on reputation; however, this will be arguably less harmful than in the case of litigation because undertakings are voluntary commitments recognised as being less detrimental than successfully litigated cases.

The ACCC's practice is to accept undertakings only if it believes that it has sufficient evidence to prove an infringement of the CCA. Undertakings are based on an individual evaluation by the ACCC which tries to ensure that such an administrative settlement is appropriate, preventing potential breach of the CCA and reflecting their restorative nature. It is a practical, effective and flexible way to resolve an alleged infringement of the CCA, occasionally including more innovative and preventive remedies than court orders, such as corrective advertising, broad compliance programs and community service.⁶⁸ In contrast, the Court can be reluctant to impose such remedies because, as Yeung explains, the breach of such court orders involves serious consequences resulting in criminal punishment, which is not present when an enforceable and voluntary undertaking is breached.⁶⁹

The ACCC makes its decision on the form of enforcement or settlement based on its enforcement objectives for that matter, the available evidence for the infringement of the CCA and counsel's judgment on the probability of success if the case was litigated. In order for an undertaking to be approved by the ACCC it must be a suitable settlement ensuring specific deterrence and full and voluntary compliance, which means, amongst other things, that the alleged offender must accept responsibility for its actions.

Indeed, an undertaking includes a commitment by the party offering the undertaking to cease the conduct in question and not recommence it in the future. Undertakings commonly contain an acknowledgement of, at the least, the potential risk of a breach of the CCA, and/or notices and other forms of redress such as compensation and reimbursement of affected third parties, an implementation of an internal compliance program and compensation.⁷⁰ Finally, it is important for the ACCC to ensure that undertakings are drafted clearly and precisely to reflect the intention of the parties.⁷¹

2.2 Authorisation and Notification

In the authorisation and notification transactional or administrative procedure, as provided for by Part VII of the CCA, the rights of the parties are generally protected. The process is initiated by the corporation or individual, not the ACCC. There is no requirement for the ACCC to make any finding about whether the proposed conduct would, or would be likely to, contravene the specified provisions of the CCA (or Code of Conduct). Subject to some relatively minor confidentiality provisions, all submissions received by the ACCC are made public and available to the parties. The ACCC is obliged to issue a draft decision in writing. Parties can call for a public hearing in respect of the ACCC's draft decision. Parties can participate at the public hearing. The ACCC is obliged to take into account the matters raised at a public hearing before issuing a final decision. The ACCC's final decision is in writing and provides reasons for the decision. The process is subject to both judicial review and a complete rehearing on the merits by way of an appeal to the Australian Competition Tribunal.

Undertakings' (2004) 67(2) *The Modern Law Review*, 209, 216; ACCC, *Public Register of Undertakings*, available at <<http://registers.accc.gov.au/content/index.phtml/itemId/815599>>.

⁶⁸ Corrective advertising and other corrective measures are usually utilised in consumer-law undertakings. They are not common in competition-law undertakings. See an empirical study: Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review*, 209, 214-220.

⁶⁹ Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004), pp. 211-212.

⁷⁰ See, ACCC, *Public Register of Undertakings*, available at <<http://registers.accc.gov.au/content/index.phtml/itemId/815599>>; Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *The Modern Law Review*, 209, 218.

⁷¹ See *ACCC v Coles Group Ltd* [2014] FCA 363 and *ACCC v Woolworths Ltd* [2014] FCA 364.

2.3 The Risk of Non-compliance

The ACCC's main objective when enforcing competition law is to 'select the course of action most likely to achieve the desired marketplace outcome and lasting compliance with the Act'.⁷² It ensures that appropriate steps are taken to prevent non-compliance.⁷³ It is common for the ACCC to include the implementation of a compliance program in the administrative settlement.⁷⁴ The ACCC used to resolve more cases through administrative settlements than by litigation;⁷⁵ however, currently, the litigated cases prevail over formal administrative settlements in competition law.⁷⁶ Therefore, transactional procedures are applied by the ACCC only when such forms of resolving the issue have a higher chance of ensuring compliance. Although accepting an undertaking will not guarantee compliance, it provides the ACCC with the opportunity to enforce the undertakings in Court should they be breached by the parties.⁷⁷

Reductions in penalty and immunity policies do not bear an obvious risk of non-compliance. A penalty reduction is at the discretion of the court and is, therefore, a part of the court judgement, while immunity is only granted if the corporation involved in the cartel in question fully cooperates and it is at least prepared to cease its involvement in the cartel. A cartel case will follow after granting immunity if the ACCC decides to litigate. Therefore, if the ACCC is successful, the court judgement will forbid the cartel and will include further injunctions and penalties (for the defendants - the other parties to the cartel). In addition, cartel immunity from the ACCC does not preclude a third party bringing an action for damages caused by the cartel. Finally, the court judgement and undertakings can be enforced in the event of non-compliance occurs. There are, however, no significant studies in Australia reviewing the level of non-compliance with undertakings or court orders.

2.4 Efficiency Prompts Transactional Resolution

Transactional resolutions are not likely to result in the abandonment of efficient conduct that does not infringe upon competition law (i.e., over intervention) or the continuance of inefficient conduct infringing upon competition law (i.e., under intervention), particularly given the enforceable nature of the undertakings and the nature of the obligations normally imposed upon parties to such undertakings.

As discussed above, transactional resolutions are designed to supplement the litigation process and provide for maximum public benefit by addressing competition contraventions while reserving public funding for the most serious breaches of the CCA.⁷⁸ The public nature of any agreed settlement and the often significant cost (including, for example, establishing compliance programs) provide significant deterrence for minor contraventions of the CCA.

There is no apparent increase in unpredictability of the competition law itself as a result of the application of transactional resolutions. To the extent that they are used to avoid litigation that might

⁷² Former policy: Trade Practices Commission, *Guideline on administrative resolution* (TPC Canberra 1993); also see ACCC, *Compliance & enforcement policy* (February 2013), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

⁷³ ACCC, *Compliance & enforcement policy* (February 2013), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>; for the former policy see, Trade Practices Commission, *Guideline on administrative resolution* (TPC Canberra 1993).

⁷⁴ See, for example, ACCC and Australian Energy Regulator, *Annual Report: 2012-13*, Canberra, p.35.

⁷⁵ See, for example, Australian Law Reform Commission (ALRC), *Compliance with the Trade Practices Act 1974*, Report 68, Sydney, June 1994, [11.1].

⁷⁶ ACCC and Australian Energy Regulator, *Annual Report: 2012-13*, Canberra, p.57.

⁷⁷ For instance, on 25 February 2014, the ACCC instituted court proceedings against supermarket chains, Coles and Woolworths, claiming they had breached the enforceable undertakings.

⁷⁸ Compare Frank Zumbo, 'Section 87B undertakings: there's no accounting for such conduct!' (1997) 5 *Trade Practices Law Journal* 121.

otherwise assist in resolving interpretation issues, they may reduce predictability of competition laws, but this would not appear to occur to a significant degree.

3. The Principle of Fairness and Related Principles and Concerns

Australian administrative law is governed by ‘the duty to accord natural justice’ (procedural justice).⁷⁹ At present this principle of procedural fairness applies to the ACCC in all situations with a limited exception in relation to the special Telecommunication Industry regime.⁸⁰

In the case of administrative settlements in competition law, the *Compliance and Enforcement Policy* of the ACCC recognises the principle of fairness as one of the underpinning principles. It applies this principle in a similar way to the principle of proportionality. For example, the ACCC policy provides that fairness means that it ‘seeks to strike the right balance between voluntary compliance and enforcement while responding to any competing interests’.⁸¹

Good Administration

Good administration includes a review of the substance of the ACCC’s decisions. Besides the mechanisms, which the ACCC applies itself and which arise from the *Compliance and Enforcement Policy*, there are other means of ensuring good administration in antitrust proceedings of transactional resolutions in Australia. First, it is in the power of the Australian Competition Tribunal to review the ACCC’s formal merger and acquisition clearance decisions and the decisions of the ACCC in relation to authorisations and notifications.⁸² Second, the Commonwealth Ombudsman can review the ACCC’s decisions on good administration grounds,⁸³ which include, among others, different errors including legal, factual and human and decisions and actions that are unreasonable, harsh or discriminatory and government policy that has unreasonable or harsh impacts.⁸⁴

Good Faith

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) includes ‘bad faith’ as one of the grounds for a judicial review of administrative decisions.⁸⁵ A decision based on poor or irrational decision-making does not on its own satisfy the requirements for a judicial review on the bad-faith grounds under s5(2)(d) and 6(2)(d) ‘an exercise of a discretionary power in bad faith’. Bad faith represents personal fault usually in the form of an absence of honesty and must be demonstrated by showing ‘recklessness in the exercise of power’.⁸⁶ This recklessness involves intent manifested ‘in the form of actual bias’.⁸⁷

Legitimate Expectation

Contrary to European Union Member States, which apply the full principle of fairness (including both procedural fairness and fairness in connection with the legitimate expectation of substance of an administrative decision), in Australia judicial review of the federal administrative decisions is based

⁷⁹ See Robin Creyke and John McMillan, *Control Government Action: Text, Cases & Commentary* (3rd ed., LexisNexis Butterworths, 2012), Chapter 10.

⁸⁰ Section 151AKA, s152BCF, s152BCG and s152BD of the CCA.

⁸¹ ACCC, *Compliance & enforcement policy* (February 2013), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>. For the discussion about the principle of proportionality, see Subchapter 4 ‘The Principle of Proportionality’.

⁸² The decision by the Tribunal can be appealed to the Federal Court on a question of law (s44ZR of the CCA).

⁸³ The Commonwealth Ombudsman does not have enforcement powers.

⁸⁴ Commonwealth Ombudsman, *Administrative Deficiency*, available at <<http://www.ombudsman.gov.au/>>.

⁸⁵ Subsections 5(2)(d) and 6(2)(d).

⁸⁶ *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749, [756].

⁸⁷ *Minister for Immigration and Multicultural Affairs v SBAN* [2002] FCAFC 431, [8].

on procedural grounds and thus includes only procedural fairness.⁸⁸ Although this concept of fairness is based on the Australian Constitution,⁸⁹ its concept of separation of powers and relevant legislation,⁹⁰ including specific acts dealing with specific administrative decisions, it has its roots in the former English common law.

In relation to administrative decisions, the court only reviews whether a legitimate expectation was met in terms of the procedural rules and rights of the party concerned. Administrative settlements, such as undertakings, are reviewable by the Federal Court on the procedural fairness grounds, including bad faith grounds.⁹¹

Judicial review of administrative decisions does not apply in the reduction of penalties, given that the ACCC does not have the power to make such binding decisions. As it is the court alone which has the power to determine penalties, the Court will consider both the legal and factual matters in connection with fairness, which is a broader concept than legitimate expectation.⁹²

4. The Principle of Proportionality

Australia does not include the principle of proportionality in administrative decision legislation. The *Administrative Decisions (Judicial Review) Act 1977 (Cth)*, which provides legal grounds for a judicial review of administrative decisions and conduct related to the making of administrative decisions, applies the test of unreasonableness to the exercise of an administrative power. The focus is on whether a reasonable person would exercise his/her power in the same way.⁹³

The ACCC refers to ‘proportionality’ in its *Compliance and Enforcement Policy*, which provides that its ‘enforcement response is proportionate to the conduct and resulting harm’⁹⁴ as it follows from the principles of transparency, confidentiality, timeliness, consistency and fairness. It further states that the principle of fairness is projected by striking ‘the right balance between voluntary compliance and enforcement while responding to many competing interests’.⁹⁵ Therefore, the ACCC’s *Compliance and Enforcement Policy* is focused on appropriateness and the prescribed purpose (in other words, meeting the purpose of the ACCC’s enforcement policy). The enforcement by the ACCC, which

⁸⁸ See *Re Minister for Immigration and Multicultural Affairs, Ex parte Lam* (2003) 214 CLR 1, 195 ALR 502, [22]-[23]; Anthony Mason, ‘Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation’ (2005) *AJAL* 103. Federal courts have no jurisdiction to review merits of administrative decisions. However, the judicial review on reasonable-person grounds (discussed in Subchapter 4 ‘The Principle of Proportionality’) has the highest possible threshold and thus almost overlaps with the concept of a judicial review on merits. See, discussion in Peter Billings and Anthony E Cassimatis ‘Statutory Judicial Review in Australia’ (2013) 23 *JJA* 73, 105-109; and application in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [26] to [30]; [63] to [76] and [105].

⁸⁹ Subsection 75(v) of the Commonwealth of Australia Constitution Act 1900.

⁹⁰ Section 39B Judiciary Act 1903 (Cth) and in the Administrative Decisions (Judicial Review) Act 1977 (Cth).

⁹¹ See *Australian Petroleum Pty Ltd v ACCC* (1997) 73 FCR 75; (1997) ATPR 41-155 Justice Lockhart held (at pages 43,685 - 43,688).

⁹² See *Muin v Refugee Review Tribunal* (2002) 190 ALR 601; *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550.

⁹³ See, subsections 5(2)(g) and 6(2)(g) of the Administrative Decisions (Judicial Review) Act 1977 (Cth). Nevertheless, in Australia, there is a tendency for the courts to apply a test of ‘reasonable proportionality’ in public law, most notably, in constitutional law. The test of reasonable proportionality is used to determine the existence of a valid connection between executive action and the source of authority for that particular action. See, Robin Creyke and John McMillan, *Control Government Action: Text, Cases & Commentary* (3rd ed., LexisNexis Butterworths, 2012), p. 448. The test of reasonable proportionality was applied in the following cases in connection with administrative regulations: *Vanstone v Clark* (2005) 147 FCR 299, 224 ALR 666, 88 ALD 520; *South Australia v Tanner* (1989) 166 CLR 161, 83 ALR 631.

⁹⁴ ACCC, *Compliance & enforcement policy* (February 2014), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

⁹⁵ ACCC, *Compliance & enforcement policy* (February 2014), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

includes all of the ACCC's transactional resolutions, must be proportionate to the conduct and resulting harm and must reflect genuine interest in voluntary and effective compliance.

In practice, the ACCC applies one of three forms of resolutions, voluntary compliance, administrative resolution and settlements or court litigation, when it receives a complaint or suspects infringement of competition law. It takes into consideration its priorities and resources and evaluates the potential risk of the conduct in question and then identifies the most appropriate resolution that would 'provide the greatest overall benefit for competition and consumers'.⁹⁶ This last statement indicates that the ACCC understands and evaluates proportionality not only from the perspective of third parties directly affected by the practice in question (e.g. consumers), but also from the perspective of a broader public interest.

4.1 Enforceable Undertakings

To some extent, the principle of equal treatment and proportionality are followed by the ACCC and the CCA in relation to enforceable undertakings. Firstly, the ACCC accepts undertakings if it believes there is sufficient evidence to prove an infringement of the CCA. Secondly, the CCA includes one form of an *a posteriori* safeguard mechanism to ensure the ACCC does not go beyond what the court would find reasonable. Under s 87B, in the case of a breach of term(s) of the undertaking concerned, the court would make only those orders that are *appropriate*. Finally, orders for a breach of undertakings are not as severe as orders and remedies available for the infringement of the CCA in the court proceedings. The reason for this is to ensure that orders are used *appropriately* and that the nature of undertakings is taken into consideration, in that they are based on situations when a party cooperates, admits its responsibility and initiates an undertaking to resolve the issue.⁹⁷

5. Fundamental and Procedural Rights

5.1 Right to Trial

There are two aspects to the right to trial in transactional resolutions in Australia. The first involves the determination of whether the right to trial is recognised in Australia and to what extent it covers transactional resolutions in antitrust proceedings. The second is specific to administrative settlements and their forms, as they provide a basis on which to decide whether there exists the right to trial in the form of a judicial review of administrative decisions.

General Right

Australia recognises 'the right to a fair trial before punishment or deprivation of property' (including deprivation of life and liberty) as an essential aspect of the rule of law.⁹⁸ Although, the Australian Constitution does not include a list of rights, this right can be determined from provisions on judicature⁹⁹ and from the operation and the interpretation of such a right by courts.¹⁰⁰ Deprivation of property does not include deprivations based on social policy objectives as arising from law, such as taxation, but are rather forms of wrongdoings.¹⁰¹ Besides a few specific exceptions, generally punitive

⁹⁶ ACCC, *Compliance & enforcement policy* (February 2014), available at <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

⁹⁷ See Australian Law Reform Commission (ALRC), *Compliance with the Trade Practices Act 1974*, Report 68, Sydney, June 1994, [11].

⁹⁸ Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (3rd ed., Oxford University Press, 2012), p. 400.

⁹⁹ See section 80 'Trial by jury' and subsection 51(xxxi).

¹⁰⁰ See Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (3rd ed., Oxford University Press, 2012), p. 400-407.

¹⁰¹ *Ibid*, pp. 400-401.

deprivation of life, liberty and property should arise from a fair trial and not from the implication of executive power.¹⁰²

Enforceable undertakings are not punitive but rather have a restorative nature (see subchapter 2.1, above). As a consequence, this general right does not apply to this form of administrative settlement. In the case of a penalty reduction, the penalty in competition law has specific and general deterrence as its objective. It also includes a secondary, punitive aim.¹⁰³ Therefore, contrary to undertakings, this must be subject to a fair trial; in other words, only the court can determine this. In the case of a penalty reduction, it is the Federal Court who has jurisdiction in this matter. Generally, decisions made by the Federal Court about the penalty can be appealed to the Full Federal Court and if a special leave to appeal is granted by the High Court of Australia, the case can be appealed from the Full Federal Court to the High Court of Australia.¹⁰⁴ If the decision by the Federal Court is based on trial proceedings, the Full Federal Court will allow the appeal on the grounds that the trial judge made an error by applying an incorrect principle, if there was a misapprehension of the facts, or by admitting irrelevant materials or not admitting relevant materials.¹⁰⁵

Only the Court may make orders and decide on penalties.¹⁰⁶ The decision on orders and penalties is a public function, with the result that the courts must consider a number of public values. For instance, the primary objective of pecuniary penalties in competition law is deterrence, including both specific and general deterrence.¹⁰⁷ Retribution is also recognised as playing a certain role in penalties in competition law.¹⁰⁸ However, as recognised by the court, the reduction of the penalty can diminish this objective.¹⁰⁹ The court also expresses that the absence of a trial in the case of agreed infringements of the CCA could be ‘at the expense of justice’,¹¹⁰ for instance, because it is difficult for the court to determine the rightness of the penalty in cases without trial (and with the consent of the parties).¹¹¹ Nevertheless, the court should only decide on penalties, including agreed penalties by the parties, when it believes that it has accurate and complete information to make such a decision.¹¹²

The behaviour of the corporation in question in an investigation by the ACCC is a factor to be considered in determining whether the penalty should be reduced and to what extent.¹¹³ Cooperation with the ACCC which aids in detecting anticompetitive conduct and reducing the time and cost associated with investigation and litigation are substantial public values recognised as reasons for a

¹⁰² Ibid, pp. 402-403.

¹⁰³ For the punitive aim, see *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [7] and [9].

¹⁰⁴ Questions of law.

¹⁰⁵ See *J McPhee & Son (Australia) Pty Ltd v ACCC* [2000] FCA 365, (2000) 172 ALR 532; *Pye Industries Sales Pty Ltd v TPC* (1979) ATPR 40-124.

¹⁰⁶ As discussed previously (Subchapter 1 ‘Overview’), the court usually accepts any reduced penalty agreed between the ACCC and the defendant, provided it is within the appropriate range for the infringement in question (see, e.g., *ACCC v Chaste Corp Pty Ltd* [2004] FCA 398; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285) with the result that an appeal relating to agreed penalties is highly unlikely.

¹⁰⁷ See, e.g., *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, at [112]; *ACCC v April International Marketing Services Australia Pty Ltd (No 8)* [2011] FCA 153, at [32]; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, at 294-295; *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 (*CSR*) at 52,152; *TPC v Mobil Oil Australia Ltd* (1985) 4 FCR 296, at 298; *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR 40-091 at 17,896.

¹⁰⁸ See, e.g., *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [7] and [9].

¹⁰⁹ See, e.g., *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [5].

¹¹⁰ *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [5].

¹¹¹ *ACCC v ABB Transmission & Distribution Ltd* [2001] FCA 383, at [6].

¹¹² See, e.g., *ACCC v Chaste Corp Pty Ltd* [2004] FCA 398.

¹¹³ See, e.g., *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, at [118]-[121]; *ACCC v Cargolux Airlines International SA* [2009] FCA 342, (2009) ATPR 42-282; *ACCC v Westminster Retail Pty Ltd* [2005] FCA 1299, (2005) ATPR 42-084; *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCACFC 72; (2004) ATPR 41-993, at 51.

reduction of the penalty in competition law by the court.¹¹⁴ The ACCC attempts to balance all public values when determining whether to use one of its transactional resolutions. In connection with the reduction of a penalty, such a decision by the ACCC is then evaluated by the court during litigation. The fact that the court usually approves the ACCC's reduction of the penalty indicates that the ACCC's process in this regard is satisfactory and balances well with different public values.

Right to Judicial Review

The administrative decisions by the ACCC can be reviewed by the Federal Court under s163A of the CCA and the *Administrative Decisions (Judicial Review) Act 1977* (Cth); however, it is not absolutely clear which decisions made by the ACCC are decisions under the Act and are thus reviewable by the Federal Court. The courts hold that the reviewable decisions must be made under a statute¹¹⁵ and must be expressly or impliedly required by that statute to have a character of a decision.¹¹⁶

Undertakings meet the first requirement because they have a basis in the CCA in s87B. In relation to the second requirement, the process of undertakings is based on negotiation rather than an administratively-imposed decision. An undertaking itself is not a decision of the ACCC but rather an offer made by the alleged offender. However, the ACCC must *decide* whether or not to accept or decline the undertaking.

The Federal Court clarified in *Australian Petroleum*¹¹⁷ that undertakings meet both requirements. Justice Lockhart held that an undertaking "answers the description of an 'instrument' under the [CCA]."¹¹⁸ Therefore, undertakings could be subject to judicial review. It remains, however, at the discretion of the court whether to allow or refuse relief under s16 of the *Administrative Decisions (Judicial Review) Act 1977*. Furthermore, the scope for private litigation still exists where undertakings have been given; undertakings do not affect the right of third parties to sue for damages and other orders under the CCA. However, if the consequences of the undertakings are that those third parties are compensated and the practice in question stops, so that justice (particularly restorative justice) is seen to be done, affected third parties are unlikely to have a reason to litigate.

In relation to the authorisation and notification process, those resolutions are subject to both judicial review on procedural grounds and non-judicial review on merits by way of a complete rehearing on appeal to the Australian Competition Tribunal. The Tribunal must make its own findings of fact and come to its own decision.¹¹⁹ The general principles governing the administrative authorisation process, including the broad width of the public benefit test at the centre of the authorisation process; the future with and without (the proposed conduct) test; the discretion to authorise; and the conditions which may be imposed upon authorisation, are helpfully set out by the Tribunal in *Application by Medicines Australia Inc.*¹²⁰

5.2 The Principle of Impartiality: Bias and Right to an Impartial Judge

The principle of impartiality can play a role in the form of bias or in the form of breach of right to an impartial judge in Australian competition law. In the case of litigation (for instance, concerning the reduction of the penalty), the impartiality of judges, in other words, the duty to act judicially, is a

¹¹⁴ See, e.g., *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, at [12]-[16], [118]-[121]; *ACCC v Ticketek Pty Ltd* [2011] FCA 1489; *ACCC v Tyco Australia Pty Ltd* [2000] FCA 401; *TPC v Carlton & United Breweries Ltd* (1990) 24 FCR 532.

¹¹⁵ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337.

¹¹⁶ *Electricity Supply Association of Australia Ltd v ACCC* (2001) 113 FCR 230 at [76]-[79].

¹¹⁷ *Australian Petroleum Pty Ltd v ACCC* [1997] FCA 175; (1997) ATPR 41-155.

¹¹⁸ *Ibid.*, at 43,685 - 43,688.

¹¹⁹ *Application by Medicines Australia Inc* [2007] ACompT 4 at [135].

¹²⁰ [2007] ACompT 4 at [93] to [134]; (2007) ATPR 42-164 at 47,515 [93] to 47,524 [134].

well-established principle in Australia.¹²¹ If a court makes a decision that is not impartial but is, for instance, influenced by a preconception or an unwillingness to hear the other party's argument, this could constitute grounds for appeal in the form of bias. The High Court of Australia approved the reasonable apprehension or suspicion test in the case of *Webb v R*.¹²²

The principle of bias applies in a decision-making process. The grounds for bias include a decision-making process, where the decision is influenced by private communications with one of the disputing parties, including communications with both proper and improper motives.¹²³ These grounds could have some minor relevance in competition law, for instance, in the immunity policy of the ACCC, because the ACCC communicates privately with the party who discloses information about the cartel and decides whether to grant immunity. If immunity is granted, the party in question is not prosecuted; therefore, to some extent, it is on the other side of the dispute to the other parties in the cartel.

Nevertheless, cartel cases are not decided by the ACCC, but by the courts, who determine both whether the CCA was infringed and the appropriate penalties or injunctions to be applied. This should ensure the impartiality and thus the protection of the right of an impartial judge. Similarly, a decision on the reduction of the penalty is in the hands of the court, therefore, impartiality should be ensured. Undertakings are not decisions imposed upon parties by the ACCC, but are voluntary submissions by those parties approved by the ACCC. If the party breaches the undertaking, the ACCC can take this matter to the court where both parties face an impartial judge.

5.3 Right to Equal Treatment

Neither the Australian Constitution or the CCA provide an explicit and general provision which would ensure the right to equal treatment.¹²⁴ Nevertheless, the Australian courts apply equal treatment when deciding on penalties.¹²⁵ This is well implemented by the court in competition-law cases, and imposes that there must be even-handed treatment of the parties infringing the same law with comparable circumstances.¹²⁶

5.4 Right against Self-Incrimination, Presumption of Innocence and Related Issues

The Obligation to Provide Information to Authorities

There is no general duty to provide information spontaneously to the ACCC in relation to competition law matters, whether they are pursued through the courts or result in administrative resolution. However, the CCA provides the ACCC with considerable investigatory powers. These powers

¹²¹ See, for example, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Sir Frank Kitto, "Why Write Judgments?" (1992) 66 ALJ 787; Sir Harry Gibbs, "Judgment Writing" (1993) 67 ALJ 494; Sir Laurence Street, introduction to "The Writing of Judgments: A Forum" (1992) 9 ABR 130; The Hon L J Priestley, "The Writing of Judgments: A Forum" (1992) 9 ABR 130; The Hon John Doyle, "Judgment Writing: Are there needs for change?" (1999) 73 ALJ 737.

¹²² (1994) 181 CLR 41; see also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; 63 ALD 577.

¹²³ See *Re JRL; Ex parte CJL* (1986) 161 CLR 342; Robin Creyke and John McMillan, *Control Government Action: Text, Cases & Commentary* (3rd ed., LexisNexis Butterworths, 2012), p.644.

¹²⁴ The High Court of Australia, therefore, denies ensuring the right to equal treatment [see *Kruger v Commonwealth* (1997) 190 CLR 1; *Leeth v Commonwealth* (1992) 174 CLR 455] unless it relates to religion, which is present in s116 of the Constitution, or non-discrimination based on the grounds of residency in a particular State of Australia, as provided in s117. Nevertheless, Australian legislation can, and for different situations does, protect equal treatment to outlaw arbitrary discrimination.

¹²⁵ *Lowe v The Queen* (1984) 154 CLR 606, at 609: '[P]ersons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence.'

¹²⁶ See, *ACCC v Australian Abalone Pty Ltd* [2007] FCA 1834; *ACCC v SIP Australia Pty Ltd* [2003] FCA 336; *ACCC v ABB Transmission & Distribution Ltd (No 2 – Distribution Transformers)* [2002] FCA 559, (2002) 190 ALR 169; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285.

include requiring disclosure of information and materials where the ACCC believes a person or corporation is capable of furnishing them in relation to a matter that either does or might constitute a contravention of the Act.¹²⁷

The key powers in this regard arise under s 155 and Part XID of the CCA. Section 155 provides that where the ACCC has ‘reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act’ the ACCC may service written notice on that person requiring them to furnish the information, produce the documents or appear to give evidence either orally or in writing.¹²⁸ This power may be exercised any time until the ACCC commences proceedings, other than proceedings for an injunction, in which case the power extends until the close of pleadings in relation to an application for final injunction. A person who fails to comply with a s155 notice or knowingly furnishes false or misleading information is guilty of an offence, punishable by a fine or imprisonment for up to 12 months.¹²⁹ The ACCC has been proactive in working with the Commonwealth Department of Public Prosecutions to launch criminal prosecutions where they believe such conduct has taken place with some success, including imprisonment in some cases.¹³⁰

In addition, Part XID of the CCA provides the ACCC with the ability to apply to a magistrate for a warrant, which the magistrate may issue if satisfied that there is evidential material on the premises or that there may be within the next 72 hours.¹³¹ When a warrant is being executed the executing officer may require a person at the premises to answer questions or produce evidentiary material relating to the warrant and may seize the material. Failure to comply with such a requirement is a criminal offence.¹³²

Presumption of Innocence

Parties have a general presumption of innocence in criminal matters in Australia. This includes the criminal cartel offences introduced into the CCA in 2009 and is consistent with Australia’s obligations under Article 14(2) of the International Covenant on Civil and Political Rights. To be found guilty of a criminal offence the Crown must prove the offence beyond a reasonable doubt. The Crown also bears the burden of proof in civil matters under the CCA, but a lesser standard of proof is required to establish the contravention.

Right against self-incrimination

Australia has a common law privilege against self-incrimination, which encompasses both criminal matters and exposure to administrative or civil penalties, such as those that apply in relation to the civil contraventions of the CCA.¹³³ This applies to individual, but not corporations. However, this common law privilege may be altered by statute and, in relation to the ACCC’s investigatory powers under the Act, the privilege has been expressly abrogated. Both s 155 (ACCC notices) and s 154X (in relation to search warrants) provide that self-incrimination is no excuse for failing to provide the information or answer the questions put to them.¹³⁴

¹²⁷ See, for example, Ian Wylie, ‘When too much power is barely enough – s 155 of the Trade Practices Act and noblesse oblige’ (2009) 16 *Competition and Consumer Law Journal* 314.

¹²⁸ Section 155(1) CCA.

¹²⁹ Section 155(5)(5A)(6A)CCA.

¹³⁰ Ian Wylie, ‘When too much power is barely enough – s 155 of the Trade Practices Act and noblesse oblige’ (2009) 16 *Competition and Consumer Law Journal* 314, 330 and *ACCC v Rana* [2008] FCA 374.

¹³¹ Section 154X(2) CCA.

¹³² Section 154R CCA.

¹³³ See, for example, ALRC, ‘Uniform Evidence Law’ (ALRC Report 102) chapter 15 <<http://www.alrc.gov.au/publications/15.%20Privilege%3A%20Other%20Privileges/privilege-respect-self-incrimination-other-proceedings>>.

¹³⁴ Section 155(7) and 154X(3) CCA.

However, in both cases, the information or other evidentiary material gathered pursuant to this power is not admissible in evidence against the *individual* in any criminal proceedings, other than those relating to failure to comply with the notice or search warrant.¹³⁵ Consequently, the information so obtained could not be used in criminal cartel proceedings, but could be (and has been) used in civil proceedings which expose individuals to significant penalties. The ACCC is alive to the restrictions and treats all cartel investigations as potentially criminal until a decision is made about whether to pursue them criminally or civilly.

Apart from the limitations in s 155, transactional procedures do not involve a formal or informal waiver of the right against self incrimination or the presumption of innocence. However, parties wishing to resolve matters through administrative decisions, or seek immunity or reduction in penalties, will generally be required to admit the conduct they have engaged in and to acknowledge it did or may have contravened the CCA. This is not the same as a judicial finding of guilt, however, as only the Court has the power to determine whether the CCA has been contravened.

Legal Professional Privilege

Until relatively recently there remained some doubt about whether legal professional privilege attached to documents and information required to be furnished pursuant to a s 155 Notice from the ACCC. This was initially resolved by the High Court in *Daniels Corp*¹³⁶ which held that s 155 did not abrogate legal professional privilege.¹³⁷ Subsequent to that decision and following recommendations of the Dawson Committee,¹³⁸ the CCA was amended to make clear that s 155 'does not require a person to produce a document that would disclose information that is the subject of legal professional privilege',¹³⁹ although the party asserting such privilege has the onus of demonstrating the privilege operates in relation to the documents requested. Legal professional privilege attaches to communications made for the dominant purpose of providing legal advice, including communications relating to possible transactional resolutions.

Acknowledgment of Guilt

There is no formal requirement for parties to acknowledge guilt or liability in order to benefit from non-merger transactional resolutions.¹⁴⁰ However, in practice, for parties to benefit from administrative settlement resolutions, including those made pursuant to enforceable undertakings, the ACCC generally requires that parties admit their conduct did or was likely to breach the CCA and make a positive commitment not to commit the act again.¹⁴¹ In relation to cartel immunity claims, it is essential that the party seeking immunity admits guilt before they can benefit from the policy.¹⁴²

When Do Matters Become Transactional?

¹³⁵ Section 155(7) and 154X(4) CCA.

¹³⁶ *Daniels Corp International Pty Ltd v ACCC* [2002] HCA 49; (2002) 213 CLR 543.

¹³⁷ This followed a decision in the Federal Court which found that legal professional privilege was not protected in relation to s 155 notices. See further Alex Bruce, 'The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373.

¹³⁸ *Review of the Competition Provisions of the Trade Practices Act* (January 2003) chapter 13 <<http://tpareview.treasury.gov.au/content/report.asp>>.

¹³⁹ Section 155(7A).

¹⁴⁰ Transactional resolutions for mergers (merger remedies) are considered in Chapter 6, below.

¹⁴¹ ACCC, 'Section 87B of the Trade Practices Act' (September 2009) page 5. See also, for example, ACCC, 'ACCC accepts Ray White Real Estate administrative undertakings' (Media Release 016/05, 28 January 2005), at <<http://www.accc.gov.au/media-release/accc-accepts-ray-white-real-estate-administrative-undertakings>> as an example of a less formal administrative undertaking.

¹⁴² *ACCC immunity and cooperation policy for cartel conduct* (Draft, April 2014).

There is no ‘bright line’ delineating when matters may become transactional. This will depend on a variety of factors and the type of conduct involved. For example, the ACCC has very specific guidelines about when a party might be able to benefit from immunity in cartel matters; on the other hand, whether other forms of conduct are resolved through administrative processes, including s 87B orders, will depend upon a variety of factors, including the willingness of parties to admit conduct, the type of concessions they may be willing to proffer to the ACCC, the seriousness of the conduct involved and their history of competition law compliance. The decision to resolve matters administratively, rather than through the courts, is generally not revocable, although this will depend on the terms of the administrative settlement and whether or not they have been complied with.

Without Prejudice, Confidentiality and Publicity of Transactional Solutions

Parties who are unsure of whether or not they will benefit from immunity¹⁴³ or leniency may, and frequently do, provide information to the ACCC on a ‘without prejudice’ or otherwise confidential basis. There are legislative measures in place to protect certain information provided to the ACCC as part of transactional resolutions. This is most notable in the case of cartel information produced for purposes of immunity applications. The ACCC considers this vital to the effectiveness of their immunity policy¹⁴⁴ and has indicated it ‘will use its best endeavours to protect any confidential information provided by an immunity applicant’.¹⁴⁵

Specific laws governing ‘Protected Cartel Information’ were introduced with the new cartel laws in 2009. These can be found in sections 155AAA, 157B and 157C (protected cartel information provisions). Section 155AAA provides that an ACCC official ‘must not’ disclose protected information to any person except in a limited range of circumstances. Protected information is defined in s 155AAA(21) and includes information given to the Commission and relating to a matter arising under a core statutory provision that was given in confidence, obtained under Part XID (search and seizure power) or s 155.

In addition, section 157B regulates disclosure of protected cartel information¹⁴⁶ to a court or tribunal – specifically providing that the ACCC is not required to produce to a court or tribunal a document containing ‘protected cartel information except with the leave of that court or tribunal. In assessing whether it should grant such leave, the court or tribunal must have regard to a range of factors, including the fact that the information was provided in confidence. Similarly, the ACCC may choose to disclose such information to a court or tribunal, but must also have regard to a range of factors including the fact that the information was provided in confidence and ‘the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation.’¹⁴⁷ In addition to these statutory protections, the ACCC have indicated that they ‘may be able to claim privilege and/or public interest immunity to protect confidential information from disclosure’.¹⁴⁸

¹⁴³ See further, ACCC ‘Discussion Paper: Review of the ACCC’s Leniency Policy for Cartel Conduct’ (2004) (<<https://www.accc.gov.au/system/files/Discussion%20paper%20-%20Review%20of%20the%20ACCC%27s%20leniency%20policy%20for%20cartel%20conduct.pdf>>) accessed 25 April 2014.

¹⁴⁴ See also Beaton-Wells and Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 147. Compare *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137 (comments of Gordon J).

¹⁴⁵ ACCC *immunity and cooperation policy for cartel conduct* (Draft, April 2014) para 50. See also Ayman Guirguis, ‘Risk of Disclosure of Immunity Applicant Confidential Information and Documents – The Position in Australia’ (IBA Annual Conference, Dublin) <<http://www.corrs.com.au/assets/thinking/downloads/Cartel-Paper-Ayman-Guirguis-IBA-Annual-Conference-Dublin.pdf>>.

¹⁴⁶ Defined in this section to mean information given to the ACCC in confidence and relating to breach or possible breach of the cartel provisions.

¹⁴⁷ Section 157B(5).

¹⁴⁸ ACCC *immunity and cooperation policy for cartel conduct* (Draft, April 2014) para 51.

As discussed above, ‘confidential’ information provided as part of an immunity process is fiercely protected by the ACCC. A similar approach may be adopted by the ACCC with respect to other information obtained in confidence. However, most administrative settlements (in the form of general agreements between the ACCC and the parties) will be published on the ACCC website via a press release. When more formal enforceable undertakings are provided they are published on the ACCC’s website via an undertaking register.¹⁴⁹ Although not a statutory requirement, the ACCC has expressed the view that all enforceable undertakings ‘should be a matter of public record’¹⁵⁰ and will publish them in full. It has, however, conceded that it may sometimes be possible to grant confidentiality with respect to some aspects of undertakings provided.¹⁵¹ The publication of enforceable undertakings, in particular, has the benefit of increasing transparency of processes that is otherwise negotiated in private.¹⁵²

Incentives to Accept Transactional Resolutions

Administrative resolutions are considered by the ACCC to be lower on their ‘enforcement pyramid’ than litigation.¹⁵³ There are significant incentives for both the ACCC and the parties to resolve matters through transactional resolutions, including reducing the burden both on the public and private purse. They do not alter the burden and standard of proof required of the ACCC in enforcement matters, save that they may encourage parties to make admissions they might otherwise not be willing to provide. Parties, however, will always have the choice between accepting administrative resolution or defending claims of contravention in Court. Consequently, while incentives to resolve matters administratively can be great for both parties, the availability of administrative options in some cases does not undermine the legal standard required of the ACCC to prove a matter in Court and the parties retain the right to pursue this option.

5.5 Ne Bis in Idem and Other Concerns

Australia, as a common law country, applies the procedural defence of double jeopardy, which prevents the defendant from being tried twice for the same conduct on the same or similar charges previously decided upon by the court. Although double jeopardy has not been raised as an issue in competition law, it could theoretically occur if state and federal competition law regimes were applied simultaneously. Australian federal competition legislation, the CCA, primarily relies upon the corporations power in s51(xx) of the Australian Constitution, which allows the Commonwealth to regulate matters related to corporations. State Competition Codes¹⁵⁴ apply to ‘persons’, a broad term that also includes corporations. However, the risk of double-liability has been removed, both by the fact that the States have vested authority in the ACCC (the federal enforcer) to enforce their Competition Codes¹⁵⁵ and the Commonwealth has vested jurisdiction in the Federal Court to hear

¹⁴⁹ See further Richard Johnstone and Christine Parker, ‘Enforceable Undertakings in Action – Report of a Roundtable Discussion with Australian Regulators’ (February 2010), available at <<http://www.law.unimelb.edu.au/files/dmfile/ParkerandJohnstoneEnforceableUndertakingsinActionReportofaRoundtableDiscussionwithAustralianRegulatorsFinalEUWorkingPaper17Feb20101.pdf>>.

¹⁵⁰ ACCC, ‘Section 87B of the Trade Practices Act’ (September 2009) page 5.

¹⁵¹ Ibid.

¹⁵² Compare Frank Zumbo, ‘Section 87B undertakings: there’s no accounting for such conduct!’ (1997) 5 *Trade Practices Law Journal* 121.

¹⁵³ See, for example, Louise Sylvan, ‘Australia’s competition and consumer law: ensuring compliance and enforcing the law’ (Trade Practices & Competition Law Conference, Sydney, 16 February 2004) <<https://www.accc.gov.au/system/files/Australias%20competition%20and%20consumer%20law%20ensuring%20compliance%20and%20enforcing%20the%20law.pdf>>. See also ACCC, ‘ACCC Compliance and Enforcement Policy’ (February 2014) <<http://www.accc.gov.au/publications/compliance-and-enforcement-policy>>.

¹⁵⁴ See Part XIA and Schedule 1, the Schedule version of Part IV of the CCA.

¹⁵⁵ See, e.g., s19 of the Competition Policy Reform (New South Wales) Act 1995 (NSW).

matters under the Codes;¹⁵⁶ and, more importantly, because the legislation includes provisions which prevent double-liability.¹⁵⁷

There is no risk of being tried twice for an offence (for example, a cartel criminal offence) and for a civil contravention in a case brought by the ACCC or a private party. Section 76B of the CCA provides expressly that the court may not impose a pecuniary penalty in a situation where the entity in question has been convicted of a cartel offence and any existing civil proceedings are stayed if a criminal proceeding has commenced in relation to the conduct. It is, however, possible for the ACCC or a private party to bring proceedings for other orders, such as injunctions, declarations and damages.

In the case of undertakings and grants of immunity, the ACCC promises that it will not sue the alleged offender. However, there is nothing preventing private parties from suing the alleged offender. If harmed by the conduct, private parties can institute court proceedings to recover damages pursuant to s82 of the CCA,¹⁵⁸ mandatory and prohibitory injunctive reliefs under s80 and other orders under s87. Therefore, in practice, private parties could seek injunctions and damages for conduct resolved by the ACCC through transactional resolutions other than a reduction of the penalty. Importantly, however, this does not represent a case of double jeopardy because those transactional resolutions do not include findings of infringement and liability.

Collection of Evidence for Civil Litigation in Administrative Settlements

In cases of transactional resolutions, it could be difficult for private parties to collect the relevant evidence necessary to bring proceedings. Private cases for damages are commonly instituted after the ACCC's institution of court proceedings because private parties can use the findings from the ACCC's cases as *prima facie* evidence, as provided in s 83 of the CCA. However, this does not include enforceable undertakings. Furthermore, Justice Carr expressed the opinion (without ruling in the matter) in *Monza Imports*¹⁵⁹ that s 83 does not apply when the party claiming damages relies on a previous judgement on the infringement of the CCA, where the ACCC and the entity concerned reached a settlement and admitted an agreed statement of facts. Justice Carr held that s 83 applies and *prima facie* evidence is established from a case on the subject matter only when findings were made after a hearing of the issue at trial.¹⁶⁰ Undertakings under s 87B and reduction of penalties based on mutual agreement and the joint submission of facts do not include trials and, thus, a finding of evidence. Justice Finkelstein made similar statements in *ABB Transmission and Distribution*.¹⁶¹ Therefore, it is likely that infringement of the CCA and other claims would have to be proven, and thus the evidence must be established in private litigation that follows undertakings and a reduction of the penalties in cases based on joint submissions of the ACCC and the alleged offender.

6. Merger Control

Australia operates a voluntary merger regime with the result that parties are not required to notify or receive clearance prior to merging. Parties concerned about whether the merger will be challenged by the ACCC or third parties have a number of options. Most commonly, they may seek 'informal clearance' from the ACCC, which involves the ACCC assessing the merger and providing an indication to parties about whether or not they will challenge the proposed merger. Where the ACCC indicates it will challenge the merger the parties either modify or abandon their transaction or,

¹⁵⁶ See Part XIA of the CCA; Jurisdiction of Courts Legislation Amendment Act 2000 (Cth).

¹⁵⁷ Section 150H of the CCA; also see, e.g., s34 of the Competition Policy Reform (New South Wales) Act 1995 (NSW).

¹⁵⁸ The ACCC cannot sue for damages because, as a specialist, independent public enforcement regulator, it does not suffer loss or damage.

¹⁵⁹ *ACCC v Monza Imports Pty Ltd* [2001] FCA 1455, [2001] ATPR 41-843.

¹⁶⁰ *ACCC v Monza Imports Pty Ltd* [2001] FCA 1455, [2001] ATPR 41-843, at [24]-[26].

¹⁶¹ *ACCC v ABB Transmission and Distribution Ltd [No 2]* [2002] FCA 559, at [51]. The court referred to *Dawson v Great Central Railway* (1919) 88 LJKB 1177.

alternatively, vigorously defend injunction proceedings brought by the ACCC to prevent the transaction proceedings.¹⁶² The ‘informal’ nature of the process can, however, present difficulties if the ACCC indicates it will oppose the merger but is not prepared to bring injunction proceedings. This occurred in the *AGL* case¹⁶³ and generated uncertainty for AGL which resulted in it successfully instituting court proceedings for a declaration that the proposed action would not contravene the merger provision. In the Federal Court,¹⁶⁴ the Judge observed:

In this case the opposition of the ACCC is unequivocal. It has not proceeded to claim injunctive relief but has threatened post-acquisition divestiture action. It is not in the least surprising that AGL would not wish to enter into this major transaction with that sword of Damocles hanging over it and the other members of the consortium. Indeed it is difficult to see how, if the transaction were to proceed in the face of such a threat, the public interest would be served with such uncertainty hanging over the operation of a major public utility.¹⁶⁵

The second option for parties preparing to merge involves ‘formal clearance’, which is a voluntary statutory process. This has the advantage of being binding both on the ACCC and third parties and it provides an avenue of appeal for aggrieved parties. However, although the formal clearance process was introduced in 2006, no party has yet adopted this process, preferring the informal system.

The third option involves ‘authorisation’. Parties may apply to the Australian Competition Tribunal for authorisation of a merger where the parties can demonstrate that there are public benefits that outweigh any anti-competitive detriment.

It is in relation to informal clearance that the issue of merger remedies has arisen in practice. Parties seeking clearance may propose ‘enforceable undertakings’ to the ACCC designed to eliminate any competition concerns the ACCC might otherwise have about their proposal.¹⁶⁶ The ACCC is free to accept or reject any such proposal. In practice, although it is the parties who must propose the undertaking, this will frequently occur in consultation with the ACCC.

Merger remedies may be proposed at any time during the informal clearance process. For example, parties aware of possible competition concerns may submit an undertaking proposal at the time they apply for clearance or they might submit undertakings (or modified undertakings) following a ‘statement of issues’ outlining concerns the ACCC might have with the merger. Parties may submit modification or changes to proposed undertakings at any time prior to their acceptance, although this might delay the outcome of the ACCC’s merger assessment. Remedies may also be varied after they have been accepted by the ACCC, but only with the consent of the ACCC.¹⁶⁷ The ACCC’s conduct in accepting or rejecting modifications to existing undertakings constitutes a ‘decision’ in relation to a legislative instrument and is, therefore, subject to judicial review.¹⁶⁸ The ACCC has an absolute discretion whether to accept or refuse a proffered undertaking (remedy) and there is no requirement that it contain any particular conditions; for example, it is not contingent on the waiver of particular rights by the notifying parties.

¹⁶² See, for example, *ACCC v Metcash Trading Limited* [2011] FCA 967 and *ACCC v Metcash Trading Limited* [2011] FCAFC 151 (appeal).

¹⁶³ *AGL v ACCC (No.3)* [2003] FCA 1525.

¹⁶⁴ *AGL -v- ACCC (No.3)* [2003] FCA 1525 at [1] to [10] and [600] to [612]; (2003) ATPR 41-966 at 47,632 [1] to 47,634 [10] and 47,762 [600] to 47,765 [612].

¹⁶⁵ Id at [612]; 47,765 [612].

¹⁶⁶ Section 87B CCA.

¹⁶⁷ See Ayman Guirguis, Richard Flitcroft and Sarah Godden, ‘The Australian merger process: Challenges to ACCC views on mergers by litigation and in an administrative context’ (2013) 58 *The Antitrust Bulletin* 401, 420-421.

¹⁶⁸ *Australian Petroleum Pty Ltd v ACCC* (1997) ATPR 41-555.

In relation to formal merger clearance, the ACCC requires the parties to give an undertaking that they will not conclude the merger during the clearance review period.¹⁶⁹ It is possible, under the statutory regime, for the ACCC to address concerns through the imposition of conditions on clearance. However, these conditions are likely to take the form of compliance with undertakings under s87B.¹⁷⁰

6.1 Mergers Remedies v Other Remedies

Enforceable undertakings (remedies) relating to mergers are designed to prevent conduct (the proposed merger) breaching the substantive competition prohibition. On the other hand, administrative settlements in the case of agreements and abuse of dominance are designed to deal with existing contraventions. Consequently, they play quite different roles. Although the rights of the parties remain essentially the same, third parties have a diminished role in relation to non-merger undertakings. They are generally not part of the negotiation or party to the ACCC decision to pursue transactional resolution, although the ACCC will take public interest into account in reaching this determination.

One of the concerns about enforceable undertakings is that it may give the ACCC the power to extract concessions from parties that are not necessary to avoid contravention of the legislation. This is a common concern in many jurisdictions and is not easily resolved. Although the parties are not required to proffer undertakings, they may feel compelled to do so to ensure that time-sensitive merger is not further delayed or opposed by the ACCC. The extent to which this is a concern in practice is difficult to assess. For example, while the ACCC may threaten to delay or refuse clearance, in Australia this does not preclude parties from merging, although often the parties themselves will make it a condition of the merger that they receive regulatory approval.

6.2 Enforcement of Remedies

The ACCC's compliance monitoring unit monitors compliance with any agreed merger remedies and the undertakings themselves will generally make provision for monitoring and enforcement.¹⁷¹ Normally, in the case of mergers, this will involve ensuring any agreed divestitures take place. Parties who fail to comply will be in breach of their s 87B undertaking and a Court may order compliance or make any other order it considers appropriate.¹⁷² In addition, if failure to comply means that the parties will contravene the substantive merger prohibition in s 50 of the Act, the ACCC is likely to challenge the merger under that provision which may result in divestiture orders.

6.3 Third Parties

In relation to proposed mergers that raise competition concerns the ACCC will generally consult with third parties about the merger and any proposed undertakings.¹⁷³ However, third parties have no 'right' to be heard and no right of access to the file.¹⁷⁴ Generally, however, there is limited risk that third parties can 'hijack' proceedings. Although they are invited to comment, they have no right to intervene or appeal in relation to the informal clearance process.

¹⁶⁹ See, for example, ACCC, *Formal Merger Review Process Guidelines* (2008) para 3.13 and CCA s 95AE and regulation 73.

¹⁷⁰ See, for example, ACCC, *Formal Merger Review Process Guidelines* (2008) para 2.9.

¹⁷¹ See Ayman Guirguis, Richard Flitcroft and Sarah Godden, 'The Australian merger process: Challenges to ACCC views on mergers by litigation and in an administrative context' (2013) 58 *The Antitrust Bulletin* 401, 421.

¹⁷² CCA, section 87B(4).

¹⁷³ See ACCC, *Merger Review Process Guidelines* (September 2013) and ACCC, *Formal Merger Review Process Guidelines* (June 2008), parta 3.102.

¹⁷⁴ See, for example, Frank Zumbo, 'Section 87B undertakings: there's no accounting for such conduct!' (1997) 5 *Trade Practices Law Journal* 121.

In connection with enforcement of remedies, third parties have no right to enforce merger remedies, but may inform the ACCC of any suspected non-compliance.

7. Conclusion and Recommendations

Transactional resolutions play an important role in the Australian competition law regime. They are well-established means for the public enforcement of competition law and ensure that the enforcement objectives of the ACCC, such as detection and prevention, are met efficiently. In particular, administrative settlements in the form of enforceable undertakings have no punitive nature but they rather include elements of restorative justice and thus assist with the future compliance of alleged offenders and with correcting their business behaviour. Moreover, transactional resolutions serve the public interest as they allow the ACCC to allocate its time and resources adequately and, thus, detect and deal with a higher number of potential anticompetitive practices than if the ACCC were only allowed to litigate.

Although some contra-arguments rooted in the value of deterrence and punishment, which would suggest restricting transactional resolutions, could be raised, the overall public benefit arising from the Australian enforcement system, which includes transactional resolutions, outweighs those arguments. Based on the available information on the enforcement policy of the ACCC, the utilisation and the decision-making of the ACCC on whether to litigate or apply transactional resolutions appear to be proportionate and rightly-based on the evaluation of the potential harm of the conduct in question.

It is essential to frame the due process and fundamental rights of parties within the Australian legal system, including the Australian Constitution. The framework shows, for instance, that the right to trial is ensured in cases with a punitive nature. Hence, this right does not apply to transactional resolutions where negotiation and mutual consensus leads to the detection of anticompetitive practices and compliance and where it is not in its nature to punish alleged offenders.

In general, it appears that there are adequate checks and balances in the Australian context to ensure consistency and compatibility of transactional resolutions of antitrust proceedings brought by the ACCC with due process and fundamental rights of the parties. However, it is essential to maintain, and perhaps even increase, the transparency of transactional resolutions and the ACCC reasoning behind them to provide the public with grounds for a review of the appropriateness and public values on which those particular resolutions stand.

Another recommendation which should be made lies in the field of immunity policy. The authors support the proposed change of policy which will lead to the avoidance of the criterion that an immunity applicant must be the clear leader of the cartel. This will simplify the decision-making process of the ACCC when deciding whether to grant immunity and will improve the testimonial credence of the whistle blower by avoiding any doubts (so common in practice) as to whether a cartel participant was or was not a clear leader.

Finally, the recent criminal case of *Barbaro*¹⁷⁵ throws some doubt on the development of penalty settlements in civil law cases, including litigation initiated by the ACCC. Due to the substantial public benefits in the forms of detection, compliance and time and cost savings, it is highly advisable that the option to negotiate penalties to a certain extent is allowed in competition law. If the High Court of Australia (or the Full Court of the Federal Court) overturns the decision on penalty agreements in *NW Frozen Foods*,¹⁷⁶ and thus changes or prohibits the process of the ACCC on these agreements, reform options should be considered to maintain the public interests recognised in *NW Frozen Foods* for such

¹⁷⁵ *Barbaro v R; Zirilli v R*, [2014] HCA 2; (2014) 88 ALJR 372.

¹⁷⁶ *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; (1997) ATPR 41-546.

a process to be allowed to continue. If necessary, it could proceed with some additional safeguards, depending on the reason(s) for the process being disapproved or overturned.