

Redress Facilitation Orders As a Sanction Against Corporations

Symposium for Laura Guttoso

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Laura's thesis and redress facilitation orders

- ▶ Laura:
 - can the goals of anti-cartel enforcement – deterrence and compensation – be achieved more effectively by integrating their pursuit?
- ▶ Potential dual capacity of redress facilitation orders to deter and to promote compensation:
 - some forms of punitive sanction can be designed to facilitate compensation as well as to promote deterrence
 - a punitive sanction with that potential is the redress facilitation order
- ▶ My paper develops a statutory model for redress facilitation orders for cartel and other contraventions under the *Competition and Consumer Act 2010* (Cth):
 - Proposed Section 86C
 - Australian legislative style but model adaptable elsewhere

Redress facilitation orders – concept

- ▶ RFO = a sanction that serves the goals of deterrence and compensation concurrently
- ▶ RFO may be a sentence, a civil penalty, a civil remedy, or an administrative order
 - particular rules governing the application of redress facilitation orders may vary accordingly
- ▶ Deterrence enhanced by requiring a corporate wrongdoer to take steps to facilitate the compensation of victims in a separate civil proceeding or administrative process
 - mode of deterrence:
 - a) imposition of cost additional to that otherwise likely to result from contravening conduct
 - b) imprinting the message that contravening conduct is likely to require action to provide redress to victims, not merely the expedient payment of a penalty to the state as a non-victim
- ▶ Compensation facilitated by requiring proactive steps to promote and practically assist redress in a separate civil proceeding, administrative process or collective redress scheme
- ▶ Main types of RFO:
 - a) disclosing information about the circumstances of the contravention, the nature of the loss likely to have been caused and the persons or classes of persons likely to have incurred the loss
 - b) giving notice to persons who may have suffered or may suffer loss as a result of corporate wrongdoing
 - c) cooperating with someone acting on behalf of victims by making employees available for interview, waiving confidentiality obligations, and providing documents and data and explanations of them
 - d) establishing a collective redress scheme

Redress facilitation orders – why?

- ▶ Deterrence of cartel conduct likely to be compromised unless sanctions and remedies reflect gravity and extent of harm caused
 - current regime of fines, monetary sanctions and civil private actions falls well short
- ▶ RFOs seek to deter cartel conduct by requiring more than writing a cheque for a fine or monetary penalty:
 - RFO requires action to assist redress in a separate civil proceeding, administrative process or collective redress scheme and performance of that requirement itself has a deterrent impact
 - well-designed RFOs include generals as well as sergeants among the personnel specified as being responsible for compliance – helps to instil/reinforce individual accountability
- ▶ RFOs promote victim compensation
 - contrast present spectacle of government exacting fines and monetary penalties without allocating funds to compensation of victims
- ▶ Undertakings under s 87B may be used to facilitate redress but are insufficient
 - are voluntary/optional for corporate contraveners
- ▶ Other sections of CCA – s 80 (injunctions), s 82 (actions for damages) and s 87 (other orders) – are limited
 - do not explicitly authorise RFOs proposed here
- ▶ Proposed scheme for deferred prosecution agreements in Australia is ill-designed:
 - scheme does not apply to cartel offences or cartel civil penalty prohibitions
 - redress facilitation is relevant to deferral of prosecution but not as a sanction in the event of prosecution and conviction

Redress facilitation orders – a proposed statutory model

- ▶ Limitations of current s 86C (non-punitive orders) are starting point:
 - 1) concept of redress facilitation not reflected squarely or adequately
 - 2) information disclosure under s 86C(2)(c) is limited form of redress facilitation
 - 3) orders are explicitly non-punitive and hence cannot be used as punitive sanction
 - 4) examples of probation orders in s 86C do not include an order requiring a corporate defendant to prepare and provide an internal discipline report detailing who was implicated in the corporate contravening conduct and what internal disciplinary measures have been taken against them in order to prevent similar conduct in future
 - 5) no power under s 86C to require that compliance program be independently audited
 - 6) power to make an order depends on application by ACCC or CDPP – should be a decision for court, not enforcement agency or prosecutor
 - 7) s 86C leaves courts in dark about factual basis of sentencing, assessment of penalty or design of remedy
 - no power to require detailed pre-sentence, pre-penalty or pre-remedy report setting out what responsive steps, if any, have been taken by corporation since contravention
- ▶ Proposed Section 86C:
 - see the proposed amendments to s 86C set out in Attachment 1 (changes in italics)
 - amends s 86C in ways that address and rectify current limitations indicated above
 - RFOs are main new feature:
 - 4 main types of RFOs
 - seeks to resolve compliance issues

Redress facilitation orders – main types of order

▶ Information disclosure

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

▶ Notice to victims

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

▶ Cooperation

- *Example (c)*: an order requiring a person who has engaged in contravening cartel conduct to make employees who were implicated in that conduct available for interview by a person who has suffered loss from that conduct
- *Example (d)*: an order requiring a person who has engaged in contravening conduct to waive a confidentiality obligation in order to enable access to information, documents or evidence by a person who has suffered loss from that conduct
- *Example (e)*: an order requiring a person who has engaged in contravening conduct to explain data to which that person has access in order to assist the calculation of damages by a person who has suffered loss from that conduct that is relevant to assessment of damages

▶ Collective redress

- *Example (f)*: an order requiring a person who has engaged in contravening conduct to establish a collective redress scheme and to appoint at its own expense an independent arbiter to administer the scheme
- *Example (g)*: an order requiring a person who has engaged in contravening price fixing conduct to pay into a consumer trust fund an amount that represents the estimated total amount of the overcharge imposed on consumers where the amount of the overcharge for each of those consumers is too small to be the likely subject of individual or class action for recovery

Redress facilitation orders – compliance with orders

- ▶ **Responsibility for compliance with order**
 - an order against a corporate defendant is to specify the individual representatives who are to direct and supervise the steps to be taken to comply with the order
- ▶ **Pre-order report**
 - court may require a pre-order report to be prepared in order to assist the determination of the factual basis for sentencing, assessment of penalty or design of remedy
- ▶ **Monitoring and auditing compliance with order**
 - a court may require a post-order report to be prepared at the expense of the corporation on specified matters relating to compliance with an order
- ▶ **Consequences of breach of order**
 - breach of an order is subject to corporate and individual liability for contempt of court under s 31 of *Federal Court of Australia Act 1976* (Cth)

- ▶ RFOs worth considering as a sanction against corporations
- ▶ Main potential advantages:
 - offer a way of pursuing the goals of deterrence and compensation by the same sanction mechanism
 - can help to bridge the divide between public enforcement action and private redress
 - can promote deterrence and compensation by impressing upon corporate defendants that they are accountable for the harm caused by wrongdoing and that they can be required to take proactive steps to facilitate redress instead of being allowed to wait and see what if anything may ensue from private actions
 - can avoid the spectacle of the state using public enforcement as a revenue-raiser by imposing larger and larger monetary penalties while doing little or nothing to assist the provision of redress to victims
 - can be used to deliver deterrence and compensation formally through front door, not informally and loosely through backdoor of a deferred prosecution scheme
- ▶ Proposed Section 86C is a detailed statutory model for RFOs as a sanction for breach of the cartel and other prohibitions under the CCA
- ▶ Proposed Section 86C is one of many possible steps that could usefully be taken to reduce the public and private enforcement deficits that now prevail

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

- (1) The Court may make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.
- (2) The orders that the Court may make in relation to the person are:
 - (a) except in the case of contravening conduct that relates to section 60C or 60K—a community service order; and
 - (b) except in the case of contravening conduct that relates to section 60C or 60K—a probation order for a period of no longer than 3 years; and
 - (c) a redress facilitation order.
- (3) An order under this section may be made:
 - (a) as a punitive order; or
 - (b) as a remedial order.
- (4) An order under this section against a corporation shall specify the individual representatives who are to direct and supervise the steps to be taken to comply with the order.
- (5) The Court may require a corporation that has been found liable for contravening conduct, or another person appointed by the Court, to provide a pre-order report at the expense of the corporation on specified matters relating to the contravening conduct and to one or more possible orders under this section.
- (6) The Court may require a corporation that has been found liable for contravening conduct, or another person appointed by the Court, to provide a post-order report at the expense of the corporation on specified matters relating to compliance with an order made under this section.
- (7) This section does not limit the Court's powers under any other provision of this Act.
- (8) In this section:

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

- (a) is specified in the order; and
- (b) relates to the conduct;

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

Examples of community service orders:

- (a) an order requiring a person who has engaged in cartel conduct to supply products of the type affected by the cartel conduct at no charge or reduced charge to a class of persons who were or were likely to have been exposed to overcharge by the contravening conduct; and

Attachment 1 – Proposed Section 86C (cont)

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

contravening conduct means conduct that:[¶]

- (a) contravenes Part IV or IVB or section 55B, 60C, 60K or 92; or[¶]
- (b) constitutes an involvement in a contravention of any of those provisions.[¶]

probation order, in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order, and includes:[¶]

- (a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and[¶]
- (b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and[¶]
- (c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct; and[¶]
- (d) an order directing the person to provide an internal discipline report setting out details of the individual persons who were implicated in the corporate contravening conduct and the internal disciplinary measures that have been taken against them in order to promote the deterrence of similar conduct in future.[¶]

redress facilitation order, in relation to a person who has engaged in contravening conduct, means an order that facilitates the compensation or other redress of loss caused by the contravening conduct in a separate civil or administrative proceeding or under a collective victim redress scheme, and includes:[¶]

- (a) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and[¶]
- (b) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order; and[¶]

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

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

Examples of redress facilitation orders:

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

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

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

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

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

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

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