ANNEX I:

THE EQUITABLE DOCTRINE OF CY-PRES AND CONSUMER PROTECTION

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Neither the asserted complexity of the issues nor the magnitude of the claimants and the asserted damages can be allowed to preclude the fair administration of justice. A judicial system which places a higher premium on convenient administration than on redress of grievances soon ceases to be just…Hard work and imagination will be required but these two requirements are not new to any of the parties or to the Court in this litigation…[2]

Theoretical Underpinnings

1. BACKGROUND TO SUBMISSION

Certain trade practices violations, though flagrant, may have dispersed and de minimis effects that present barriers to consumer action. A horizontal price fix that results in an incremental $2 rise in the price of a consumer good over a 12 month period is unlikely to warrant any individual cause. However, across a wide class, nugatory individual effects may aggregate to a significant total abuse. [3]

Class consumer claims are most likely to be pursued where: *per capita* damages exceed the costs in time, administrative legal expenses, effort and money of pursuing and complying with a claims process; affected parties have access to, and the facilities to comply with, this claims process; total damages can be ascertained with some ease, and individual damages can be demonstrated through corporate or personal records.

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2 *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions 410 F. Supp. 659, 669 (D. Minn. 1974)*

3 The *Report by the Independent Committee of Inquiry into National Competition Policy*, 1993 (hereafter, The Hilmer Report) noted this at page 169 of its report: "In many restrictive practices cases the social costs of contraventions may be significant in total but dispersed among many individuals. In such cases the costs of litigation militate against private actions." Recovery might be of trivial value where injury is significant but the cost of administering direct compensation would exhaust a large portion of the fund, or where the magnitude of the injury were so small that only trivial relief would be warranted.

However, many consumer class actions are characterised by large class size and small *per capita* damages,[4]a heterogenous affected class that presents difficulties of identification, education, communication and proof, and poor recovery rates.

While the fact and extent of a violation may be evident, probative and procedural issues may inadvertently shield the wrong-doer. As a consequence, "defendants may be permitted to retain ill-gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts."[5]

One mechanism developed - by extension from the law of charitable trusts - to circumvent these difficulties, is a cy-pres solution. Pursuant to a consumer class action, the portion of the recovered fund that cannot be directly distributed to individual class members is put to its "next best" use, and administered to the affected class by various possible legal mechanisms.

Pursuant to the Review Committee's Terms of Reference (2):

> *The Committee is to identify, where justified, improvements to the Act, its administration and/or additional measures to achieve a more efficient, fair, timely and accessible framework for competition law.*

this submission recommends the introduction into the *Trade Practices Act 1974* (Cth) (**TPA**) (with mirror provisions in the *Australian Securities Commission Act 1989* (Cth)) of provisions formulating *cy-pres* solutions in Australian consumer protection law.

2. EQUITABLE ORIGINS OF THE CY-PRES DOCTRINE

Although the charity cannot take place according to the letter, yet it ought to be performed cy-pres, *and the substance performed.*[6]

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4 In "Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma" 47 Southern California Law Review (1974) 842 at 845-6, Landers suggests an interesting symmetry that flows from the increasing interdependence of social interactions and the fact that the legal system is functionally established to deter the bringing of small claims: Businesses and consumers are alike in often having no means of redress for small losses. Businesses write off small bad debts as a matter of course, and consumers likewise may sometimes have no redress for small losses. (See also*: Hacket v. General Host Corp*. 455 F 2d 618, 626, (3rd Cir.) cert denied, 407 US 925 (1972)). Such a position may be mitigated by the suggestion that where abuses recur, governmental action, criminal prosecution or remedial legislation may be considered, but in isolated cases, losses sometimes simply lie where they fall. The analogy is flawed by the assumption that both types of loss are rationalised on the same basis and consequently that remedies would be sought on similar grounds. The consumer case may be characterised to a far greater extent by considerations of disgorgement and punishment, alongside considerations of compensation. Where the business may simply seek restitution, the wronged consumer class may also seek retribution.

5 *State v Levi Strauss & Company*, 41 Cal. 3d 460, 472 715 P 2d 564, 571, 224 Cal Rptr 605, 612 (1986)

6 Fonblanque, *Treatise of Equity* (1806) Vol. 2, page 216

The doctrine of cy-pres entered the common law by way of the Court of Chancery, which inherited the doctrine from the ecclesiastical courts upon assuming responsibility for cases concerning creditors.[7] Of disputed etymology, the term *cy-pres* (*comme possible*) is believed to derive from the Norman French meaning either "near this" or "as near as possible [to this]."[8] The evolution of the doctrine traces this linguistic ambiguity: having initially interpreted testators' wishes liberally, seeking to ensure that charitable gifts never failed, the doctrine narrowed with time to provide that the court can authorise an alteration of the purposes of a charitable trust where:

- the charitable purpose designated by the testator fails by reason of impossibility, impracticality or illegality;[9]

- in cases of initial failure, where a general charitable intent prevails in the deed, the court will direct a cy-pres scheme substituting a charitable mode "as close as possible" to the designated mode;[10] and

- in cases of supervening failure, (subject to any valid contrary intention in the trust instrument)[11] the fund is considered to be in charity and simple administrative assistance will render the trust viable.

3. "CY-PRES" CONSUMER PROTECTION

3.1 The nature of consumer cy-pres

Primarily an innovation of American jurisprudence,[12] cy-pres consumer solutions calculate aggregate damages for an affected class and then, by various price and nonprice mechanisms,

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7 Spence, *Equitable Jurisdiction of the Court of Chancery* (1846) Vol 1 p. 580

8 See the discussion at pp. 5-10 of *The Cy-Pres Doctrine*, LA Sheridan & VTH Delaney (Sweet & Maxwell, London, 1959). Sheridan and Delaney suggest that the term's first known use was in Littleton's *Tenures* (c. 1481), in the context of the application of the doctrine of conditions precedent.

9 In some jurisdictions, the test of failure of purpose as a pre-requisite for the making of a cy-pres scheme has been relaxed or abolished: see *Charities Act 1960* (England) section 13(2); *Charities Act 1978* (VIC) section 2 and *Charitable Trusts Act 1957* (New Zealand) Part III.

10 The definitive Australian opinion on "general charitable intent" is *A-G (NSW) v. Perpetual Trustee Co Ltd (1940) 63 CLR 209*, per Dixon & Evatt JJ. Where the court considers that the impossible or impractical mode of performance designated by the testator is indispensable to her purpose, the trust will fail and the fund will result to the estate.

11 *Re Lysaght [1966] Ch 191*

12 The cy-pres model entered US jurisprudence through a settlement entered into by antibiotics manufacturers, following criminal conviction, which sought to make settlement payments to all conceivable claimants, irrespective of individuals' ability to establish a right to recover and of the possibilities of multiple recoveries by individuals*: West Virginia v. Chas Pfizer & Co.* 314 F Supp 710 (SDNY 1970) aff'd 440 F 2d 1079 (2d Cir), cer't denied 404 US 871 (1971). The term "fluid recovery" was first used by Judge Tyler in *Eisen v. Carlisle & Jacqueline*, 52 FRD 253 (SDNY 1971), to denote the idea of " distribution of damages to the class as a whole rather than to adopt, at this initial planning stage, an inflexible mode of recovery running to specific class members." Californian law

distribute the damages fund among a group that maps as nearly as possible on to the affected class.[13] Some or all of the funds may be distributed to individuals or entities which either cannot establish their entitlement to individual damages or which were not directly damaged.

Representative actions are ideally resolved where accurate and adequate compensation of affected claimants is possible. A two-stage cy-pres solution approximates the next best justice where this proves impossible: it first pays identifiable claims and then residual funds are distributed by some mechanism – for example, price roll-backs or consumer trust funds - to the affected class. This second stage contains elements of both cy-pres and constructive trust reasoning.[14]

Cy-pres reasoning may approximate to justice in two ways - as regards the form of restitution parties receive[15] and as regards the class receiving restitution. It may also occur at two points in the resolution of disputes - in settlements between parties or in judicially created damages funds.

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provides the paradigm of consumer cy-pres. The Californian Consumer Legal Remedies Act 1970, section 1781 provides: *Any consumer entitled to bring an action under l780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other customers to recover damages or obtain other relief as provided*. Section 1780 outlines certain practices prohibited under that statute, including: passing off goods or services as those of another, representing that goods or services have characteristics or benefits which they do not have, advertising goods or services without intending to sell them as advertised, and inserting an unconscionable provision in a contract. The California Code of Civil Procedure 1872 section 382, provides: *when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.* The Californian Civil Code expressly provides that the ordinary rules of escheat do not deprive the courts of the power to order other cy-pres solutions. CAL. CIV. PROC. CODE § 1519.5 (West Supp. 1988) (noted in *People v. Parkmerced Co., 88 D.A.R. 1907 (1988)).* There is little precedent for cy-pres consumer reasoning in the United Kingdom and Europe. Cy-pres reasoning has however been extended in some regards in the English court: see *Re Gillingham Bus Disaster Fund* [1958] Ch 300, [1958] 1 All ER 37 (aff'd) on other points [1959] Ch 62, [1958] 2 All ER 749); noted (1958) 74 LQ 190 (resulting trust cases as to what to do with the money of an unincorporated association where the association purposes come to an end and one does not know who put the money into the trust fund). See further: Gardner, "New Angles on Unincorporated Associations" [1992] Conv 41; Re St Andrew's Allotment Association [1969] 1 WLR 299, [1969] 1 All ER 147; *Re West Sussex Constabulary Trusts* [1971] Ch 1, [1970] 1 All ER 544; *Re Sick and Funeral Society of St John's School* [1973] Ch 51, [1972] 2 All ER 439; *Re Buckinghamshire Constabulary Fund* (No 2) [1979] 1 WLR 936, [1979] 1All ER 623.

13 Anna L Durand, "An Economic Analysis of Fluid Class Recovery Mechanisms" 34 Stanford Law Review (1981) 173, at 174. A genuine problem in class claims concerns the ability reliably to anticipate future claims or to gauge the demographics of potential claimants. Cy-pres solutions can address these concerns. These may contain a pour-over provision - setting a fixed sum that will be paid directly to claimants if possible and poured over into cy-pres if not exhausted by identified claims: *Ohio Public Interest Campaign v. Fisher Foods* 546 F. Supp 1,5 (ND Ohio 1982). Alternatively, it may establish a guaranteed residual amount where a low recovery rate is all but certain: *Rudolfi v. Bank of America* No. 720308 (SF Super. Crt. filed December 19 1987). In the latter category of case, the quantity of the cy-pres fund varies inversely with the direct claims made.

14 Most adjudicative instances of cy-pres solutions have used cy-pres as a back up to distribute funds unclaimed following individuated hearings: *Eisen v. Carlsile & Jacquelin*, 52 FRD 253, 264 (SDNY 1971) rev'd 479 F. 2d 1005 (2d Cir. 1973) vacated and remanded 417 US 156 (1974); *Colson v. Hilton Hotels Corp*. 59 FRD 324, 325-26 (ND Ill. 1972).

15 In *Ohio Public Interest Campaign v. Fisher Foods* 546 F. Supp. 1, 5 (N.D. Ohio 1982) the value of unpaid coupons was deposited into a consumer trust fund. All households within a specific area (save

As indicated above, cy-pres solutions address certain discontinuities at the borders of markets and the law. There is a clear antinomy between a market place defined by multiple, anonymous transactions, in which a single trade practices violation may have manifold discrete effects, and a legal system rightly requiring due process regarding plaintiffs' claims for damages. This tension requires flexibility in legal reasoning.

A cy-pres proposal has both remedial and substantive elements. It is partly informed by a desire to expand the procedural mechanisms facilitating individual relief in representative consumer actions. It is also informed by a substantive position regarding the manner in, and extent to, which breaches of consumer protection legislation should be penalised.

Cy-pres solutions may serve many ends. *Compensation* of wronged parties may be effected by a class action where private actions will be prohibited by the disproportionate legal and administrative costs of action. A subsidiary concern as regards compensation is the preservation of *intra-class equity*.[16] Demographic and socioeconomic factors may militate against recovery by certain sectors of affected consumer classes.[17] Barriers of information, education and access may prevent direct recovery by parties who would nonetheless be able to enjoy indirect compensation through the administration of a cy-pres mechanism.

Goals of *disgorgement/punishment* can be achieved through cy-pres – the defendant is not allowed to retain illegally obtained profits merely through the subtlety and dispersion of the illegal means.[18] Associated *deterrent ends* can similarly be achieved through demonstrating that wrongdoers will be prevented from retaining illegal profits. The purposes to which residual funds are then put can further achieve these ends through educational and litigation uses.

In ALRC 68, *Compliance with The Trade Practices Act 1974*, the Law Reform Commission recommended [Paragraph 4.8] that:

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those that had opted-out) received aUS$20 groceries voucher in the mail, and residues went towards a fund to provide food for the homeless and poor.

16 "Giving due regard to the interests of those unnamed" as it is described in *Norman v. McKee* 290 F Supp 29, 33 (ND Cal. 1968)

17 Hillebrand and Torrence discuss the implications of socio-economic status on likely recovery in depth in "Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits" 28 Santa Clara L. Rev. 747 (1988): "Socioeconomic bias may render a claims-based procedure unfair to some subgroups within a large consumer class. The evidence shows a strong tendency of claims procedures to skew the benefits of a settlement or judgment in favour of the well-educated, affluent class members and to short change the less fortunate." (at page 757). See also T Bartsh, F Boddy, B King and P Thomson, "A Class Action Suit that Worked" (1978) which studies the demographics of claimants in the settlement in 1975 of the In Re Antibiotics Antitrust Action. The study found, inter alia, that the claimants tended to be the better educated and higher income individuals amongst the affected class.

18 *Levi Strauss* 41 Cal. 3d at 472, 715 P 2d at 571, 224 Cal Rptr 612. In *People v. Thomas Shelton Powers MD Inc*, 3 Cal Rptr 2d 34 (Ct. App. 1992) at 41, the Court of Appeal held that the lack of a cognisable victim to whom an award of restitution can be made does not prevent a court from ordering a defendant to disgorge illegally derived profits. The *Powers* case effectively authorised equitable remedies necessary for effective representative actions.

the TPA be amended to make it clear that where the court has found a contravention of the Act it may make orders for one or more of the following purposes:

- *to compensate a person who has suffered loss or damage as a result of the contravention*
- *to undo the effects of the contravention*
- *to prevent a future contravention of the Act, both immediately and in the longer term, and to promote and encourage community-wide compliance with the TPA*
- *to provide deterrence and, as a secondary or incidental outcome, retribution.*

It later commented [paragraph 8.1] that:

> *Two of the purposes that may be served by action to enforce the TPA are to undo the effects of a contravention, so far as is possible, and to prevent further contraventions. In many cases, undoing the effects of a contravention will be achieved largely by compensating persons who have suffered loss or damage as a result of the contravention. In other cases, an order to pay compensation will not necessarily remove all the benefits gained by the contravener or overcome distortions in the market caused by a contravention.*[19]

Conceptualising a legislative cy-pres solution requires the formulation of the substantive and remedial goals the solution seeks to achieve. These substantive goals should be consistent with the existing goals of consumer protection and trade practices legislation. As noted above, these should include compensation, restitution, deterrence, and retribution. The ordering of goals will then guide decisions as to the maximally efficient mechanism by which to distribute excess funds.

The *Report by the Independent Committee of Inquiry into National Competition Policy*, 1993, (the Hilmer Report) notes:

> *To provide a suitable deterrent, penalties should be set at levels which reflect the significant profits that might be gained from anti-competitive conduct in contravention of the TPA, the costs to society of that conduct and the probability of detection.*[20]

In this regard, it is suggested that the determining goals of cy-pres reasoning be fully to compensate affected individuals, to deter future violation, and the comprehensive disgorgement of the defendant's calculated gains.

4. OBJECTIVES AND FORMS OF CY-PRES SOLUTIONS

[19] Similarly, the Hilmer Report at page 161 notes: "The basic objectives of a system of remedies are to deter people from contravening the law and to compensate injured third parties."

[20] At page 162

Throughout both adjudication and settlements in consumer class cases, various mechanisms have been deployed to effect cy-pres solutions. The Law Reform Commission has commented on the desirability of variety among sanctions in trade practices violations. In ALRC 68 *Compliance with the Trade Practices Act 1974*, the Commission recommended [Paragraph 10.4] that:

> *The court should have available to it a range of sanctions that is sufficiently flexible to cope with relatively minor contraventions as well as extremely serious offences, for example, persistent misleading advertisements despite warnings from the TPC or where a culture of non-compliance has pervaded a corporation…. If a range of sanctions is available, a court should be able to impose a number of sanctions in whatever combination it considers appropriate, taking into account the overall penalty impact imposed.*

Various cy-pres mechanisms are available. [21]

4.1 Price rollback

Price rollbacks are effected by an order of the court requiring that an amount equal to the unrecovered portion of the fund is distributed to the affected class by ordering a reduction of the price of the defendant's product for a stipulated period of time.[22]

Durand has noted the putative appeal of price mechanisms. They ostensibly engender only moderate operating costs: the defendant's administrative costs are minimal, plaintiffs are not required to make claims, and the court incurs only the cost of enforcing the price decreases.[23]

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21 *Bruno v. Superior Court 179 Cal Reptr 342* (Ct. App. 1981). Plaintiffs, in an antitrust action, alleged price fixing by supermarkets selling milk and sought a total damage award for a class of milk-buying consumers. The plaintiffs requested that any unclaimed funds be disposed of under one of three alternative means: a court order requiring defendants either to: lower future milk prices; deposit the unclaimed funds with the state of California for charitable purposes benefiting consumers, or deposit the funds with a state agency for the same purposes. The court of appeal held that each of the three remedies was proper in large class actions involving small individual claims and that each was consistent with the purposes of the antitrust laws.

22 See *Daar v. Yellow Cab Company* 67 Cal 2d 695, 433 P 2d 732, 63 Cal Rptr 724 (1967) in which taxi fares were reduced over a stipulated period. In *Colson v. Hilton Hotel Corporation* 59 FRD 324 (ND I11 1972) hotel room rates were temporarily reduced by US$0.50 per night. In *Eisen v. Carlise & Jacquelin, (Eisen III)* 479 F 2d at 1018, the Federal Court in the United States held that price reductions were improper, inadmissible as a solution to the manageability problems of class actions, and constituted a violation of due process. The Court in *Eisen v. Carlise & Jacquelin* (*Eisen IV)*, 417 US 156, 172, n. 10 (1974) refused to rule on the propriety of price reduction. Some courts have felt that too large a gap exists between the class benefited by price reduction and the initial affected consumer class: *City of Philadelphia v. American Oil Co*., 53 FRD 45, 72 (DNJ 1971). See also *Bebchick v. Public Utilities Commission* 318 F 2d 187, 204 (DC cir.) cer't denied 373 US 913 (1963) (a case involving two parties as opposed to a class).

23 See Anna L Durand, "An Economic Analysis of Fluid Class Recovery Mechanisms" 34 Stanford L: Rev (1981) 173, 181 et seq

However, these peripheral objectives are secured at the expense of central goals of cy-pres solutions. Compensation occurs only to the extent that the affected class maps onto the class benefiting from a price decrease. The solution is therefore effective only if affected consumers will continue to buy the defendant's product or services. Inevitably, however, the members of the purchasing class will change over time, as will the frequency with which goods are purchased.

Further consumer harm may be generated insofar as consumers incur inconvenience costs in trying to secure the lower price[24] or to the extent that the producer of the goods produces an inferior quality or reduced quantity of goods/services to set off against the necessary price reduction. The goals of disgorgement and deterrence will be threatened insofar as a reduction in prices may counter-productively increase the firm's sales. Such solutions may therefore only be feasible in a monopoly market. Finally, operating costs may mushroom where the defendant does not directly control retail prices (eg where the defendant is a wholesaler). In such cases, the court will be required to assume the task of price monitoring to ensure that retailers do not absorb any savings.[25]

Durand notes a generic advantage of nonprice mechanisms over price mechanisms. Regardless of the market structure in which the defendant operates, the nonprice methods of fluid recovery are allocation-neutral. The distribution changes each party's income level but does not affect the process by which the defendant decides how many units to produce or at what price to sell its output. The distribution also does not affect the calculus of the recipient's purchasing decisions. In contrast, price mechanisms intentionally affect the price of the goods/services sold. If the court does not also determine the defendant's response to the change in price, the defendant will adjust output to the level that maximises enterprise profitability. This adjustment could injure consumers unless the court actively shapes the producer's output decision.

4.2 Direct rebate

Here, the court requires that the defendant send a rebate to every identifiable class member. It is incumbent on the defendant to identify and locate each class member, to determine the quantum of each individual's damages, and to pay appropriate damages. To the extent that such identification and quantification is possible, the triple goals of compensation, disgorgement and deterrence are served. To the extent that the defendant does not or cannot locate claimants, these goals must be served beyond the stage of individual recovery. This further stage will provide crucial motivation to a defendant. Given that defendants will typically bear the costs of locating individuals and would currently, under section 33ZA(5) of the *Federal Court of Australia Act 1976* (Cth), (**FCA**) retain any unrecovered funds, there is little motivation robustly to pursue

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[24] Note, An Economic Analysis of Fluid Class Recovery mechanisms, 34 Stanford Law Review 173, 180 (1981)

[25] Hillebrand & Torrence, "Claims procedures in large consumer class actions and equitable distribution of benefits" Santa Clara Law Review Fall 1988, 747, at 764

eligible claimants. To the extent that this creates an onus on the court to oversee the defendant's pursuit, operating costs of the action increase and judicial resources are unnecessarily consumed.

4.3 Plaintiff fund sharing

This involves the sharing of the aggregate damages among only the identifiable plaintiffs. To be a viable form of redress it assumes (an assumption often flawed in such cases) the possible recovery of non-trivial sums that will justify raising a claim. This mechanism creates genuine concerns relating to intra-class justice in distribution. It ignores the fluidity of absentee plaintiffs and introduces the risk that absentees are concentrated within certain socio-economic bands. The mechanism can provide disproportionate windfalls to identified plaintiffs to the loss of these absentee plaintiffs.[26] Claimant fund-sharing may serve the ends of compensation disgorgement and deterrence, however, it is inappropriate for any case in which a large proportion of the class is likely to be unrepresented. Administrative costs (in identifying, locating and communicating with identified plaintiffs) may also consume large quantities of the fund.

4.4 General escheat.[27]

General escheat requires a deposit of the residue left over after the satisfaction of individual claims into the government's general fund, to be distributed according to the Government's discretion.[28] This mechanism does disgorge wrongfully gained profits from a defendant. However, there is no real focus on future deterrence of the offence, benefits are thinly spread throughout the general public, and compensation may poorly map on to actual individual losses: there is likely to be some under- or over-inclusion of parties. Escheat introduces discretion as to the appropriate purpose to which to put the funds and creates a danger of funds being absorbed into Government allocations. It also necessarily requires Government impartiality regarding the circumstances of the case.[29]

4.5 Earmarked escheat

Earmarked escheat directs awarded funds to specific government agencies that are in a position to use the funds for lawsuits, lobbying, or other projects that may benefit class members in the

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26 *Eisen v. Carlise & Jacquelin, (Eisen III)* 479 F 2d 1005, 1010 (2d Cir. 1973) (vacated on other grounds)

27 In *State v. Levi Strauss & Co.* 41 Cal. 3d 460, 475, 715 P. 2d 564, 572-73, 224 Cal Rptr. 605, 613-14 (1986) the Californian Supreme Court suggested that general escheat is "the least focused compensation" and should be a last resort where other options are not feasible.

28 Escheat is an automatic unclaimed funds mechanism under statutes such as *California Civil Code section 1519.5*, which provides that any unclaimed monies held by a firm under a court order to make refunds to claimants escheats to the state after one year.

29 *Levi Strauss* 41 Cal 3d at 475, 715 P2d at 572-73, 224 Cal Rptr 613

future.[30] As with general escheat, there is the potential that the agency may use the funds for purposes that do not benefit class members. In order to protect against a reduction in the agency's funding from central government in light of this receipt of funds, the parties may stipulate a provision in the court order making payment of the funds to the agency conditional upon proof that the agency's allocations have not been diminished in any way as a consequence of the award.

4.6 Consumer trust funds

Consumer trust funds are widely considered to be the most effective "next best" use of unclaimed funds. Trust funds achieve the triple goals of disgorgement, deterrence and compensation. They are cost effective and conserve judicial resources. They can be put to multiple purposes: [31] research; funding litigation; to effect broad antitrust ends, and to protect the potentially largest class of consumers.[32] The benefits are also more likely to reach lower socio-economic classes under a consumer trust fund. The trustees under such a fund will be bound by a fiduciary duty that will render them accountable to the court, while simultaneously conserving judicial resources.

A consumer trust fund also provides the defendant with an incentive to maximise class member knowledge of the right to make a claim, given it is more beneficial for a defendant to encourage the return of funds to its own customers (thereby restoring or creating brand loyalty) than to anonymous beneficiaries of a fund.

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30 In *West Virginia v. Chas. Pfizer & Co*. 314 F Supp. 710 (SDNY) aff'd 440 F. 2d 1079 (2d Circuit), cer't denied, 404 US 871 (1971), the court employed earmarked escheat to allocate residual funds of a $100 million settlement entered into by a number of antibiotics manufacturers. The fund was given to state governments to be used for "public health purposes" and ultimately financed various projects, including treatment of narcotic addiction, instituting pollution control programs, and education of the public in environmental pollution laws.

31 *Market Street Railway co v. Railroad Commission* 171 P 2d 875 (Cal 1946). In an early action, the Californian court ordered refunds to identified passengers of fares collected in excess of approved rates. It further ordered that unclaimed funds be used for improvements in the railway system, which would benefit all passengers. In *Three Mile Island Litigation* 557 F Supp 96 (M.D. 1982) a fund was established to study the biological effects of radiation exposure from future possible nuclear accidents and incidents; see also *Six Mexican Workers v. Arizona Citrus Growers* 641 F Supp 259, 265 (D. Ariz. 1986). In *US v. Exxon* F Supp 816 (DDC 1983) affd. 773 F 2d 1240 (TECA 1985); cert. denied 474 US 1105 (1986) reh'g denied 474 US 1112 (1988), a fund was adopted for the portion of overcharged oil allocated by decision or settlement to consumers rather than to commercial users of overpriced oil. In one of the Petroleum cases, the overcharged monies were used to establish one or more of five possible energy conservation programmes. *In Butowsky v. Prince George's County Board of Realtors CA* No. 71-1086K (D Mass filed 1975) a default option to receive a discount on future services was included within the cy-pres solution.

32 So stated, the appeal of cy pres is presented in a utilitarian tenor, suggesting a justification for the broad distribution of unrecovered funds on consequentialist grounds. This could equally have a primarily deontological tenor: that the wrongness of the violation consists in its violation of legal and social duties, and should thus be punished as comprehensively and accurately as possible. Broad distribution of unclaimed funds would then be merely a corrective for the administrative hurdles to accurate identification of individuals, and consequentialist or utilitarian theories of distribution would enter consideration only at this point.

Consumer trust funds are however, criticised on several grounds, and further potential difficulties will be discussed below. They are criticised for providing a windfall and for the possibility of double recovery by identified plaintiffs. They raise concerns regarding paternalism in the distribution of funds (particularly where the whole fund is paid into trust and no individual meeting of identifiable claims occurs) and regarding due process, that an aggregate of claims from a fluid class deprives the defendant of the right to contest damages ascertained from individual claims.[33]

Cy-pres consumer funds require a balancing of considerations as to whether their benefits justify depriving defendants of funds not allocated to identified individuals and also the possibility of occasional over-inclusion or over-reimbursement. *Ex facie*, the impossibility of perfect mapping of affected onto assisted class should not bar action altogether, particularly where disgorgement and compensation are goals of the process. Charitable cy-pres itself will operate to effect windfalls to the testator's estate in certain circumstances, and the law often accepts imperfect solutions to otherwise insoluble problems (eg damages as opposed to specific performance consequent to a failed employment contract).

As noted above, a variety of nonprice mechanisms and one price mechanism is available to the court in determining a cy-pres solution. Amongst these, the consumer trust funds seems most likely to serve the various objectives of cy-pres solutions and to fit best within the existing framework of Australian law.

Cy-pres Consumer Trust Funds in Australian Law

5. PRIVATE ACTIONS IN AUSTRALIA

Private actions are rare in response to breaches of the competition law provisions of the TPA.[34] This shortcoming was noted by the ALRC throughout its Report, *Compliance with the Trade Practices Act 1974*.[35] At section 1.4 the Commission noted that:

> *The TPA is a vital piece of economic legislation. Private enforcement is likely to be the most effective way of enforcing the Act and is essential to its success.*

In Chapter 5 of the Report, the several barriers to such actions were noted:

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33 Compliance with procedural rights in a representative trail determining aggregate damages may be suffice for due process and allow for challenges to any potential over-inclusion or double recovery by class members.

34 See Stephen Corones, "Proof of Damages in Private Competition law Actions" (2002) 76 Australian Law Journal 374 and Brunt, "The Role of Private Actions in Australian Restrictive Trade Practices Enforcement" (1990) 17 MULR 582.

35 ALRC report 68

> *5.1 Private litigation has always been a vital element in the enforcement of the TPA. However, there are a number of barriers which impede and often prevent private enforcement, especially for individual consumers and small businesses. The principal factors that will determine whether consumers or small businesses are able to enforce the TPA are knowledge of their rights under the Act and the cost and accessibility of enforcement mechanisms.*

Further prohibitive factors included: lack of knowledge and understanding by consumers and business operators of their rights under Pts IVA and V of the TPA;[36] the complexity and expense of litigation (particularly where the monetary value of the goods or services involved is relatively small) and the paucity of legal or financial assistance for private litigants who want, but cannot afford, to enforce their rights under the TPA.

Private actions provide for direct enforcement of consumer protection legislation by injured parties and also reduce the burden on public administration, regulation and enforcement. Given this role, representative actions provide an important source of alternative action in circumstances prohibitive to individual private actions.

The ALRC recognised this in observing:

> *5.15 Representative actions remove many of the financial barriers which ordinary people face when seeking to enforce their legal rights, give the courts a more efficient process for dealing with cases involving large numbers of people and help to ensure that laws are enforced more efficiently and more often.*

A representative action typically does not involve a congeries of persons who would otherwise individually bring actions, but provides redress for persons, who, absent the representative remedy, would not otherwise sue. Therefore, the representative action supplements and does not supplant existing options. Moreover, it conserves social and judicial resources by assimilating similar claims; provides a strong deterrent to corporations that would otherwise anticipate the inefficiency of private actions, and addresses the social policy concerns of uncorrected trade practices violations.[37]

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36 This could be remedied by residual funds within a trust being directed towards education, lobbying and litigation.

37 Kohn and Kaplan observe in "The Antitrust Class Suit: A Manageable Instrument for Social Justice" 41 Antitrust L J 292 (1972) at page 294: "The class action is of at least double benefit. It "provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation" (Eisen v. Carlisle & Jacquelin et al 391 F. 2d 555, 560 (2d Circuit 1968)) It also benefits the individual citizen, indirectly, through fulfillment of the competitive goals of antitrust enforcement, and the discouragement of anticompetitive acts." See generally: Kenneth W Dam, "Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest" 4 Journal of Legal Studies 47, 54-56 (1975)

6. REPRESENTATIVE ACTIONS IN AUSTRALIA

Part IVA of the FCA governs representative actions (where seven or more people have claims against the same person).[38] The claims must arise from similar circumstances and there must be at least one substantial issue of law or substantial issue of fact that is common to the claims. One or more of the group conducts the proceedings on behalf of the others.

6.1 Scope of Part IVA

In the second reading speech introducing Part IVA, the Minister referred to two purposes of the new procedure:

(i) to provide a real remedy where although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions; and

(ii) to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons will obtain redress at less expense and with more efficiently than would be the case under individual actions.[39]

Part IVA should not be read restrictively. In *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 it was observed that:

> *Part IVA is not to be read by making implications or imposing limitations not found in the words used; this is so even if the evident purpose of the statue is to displace generally understood procedures.*

7. ANTICIPATING DIFFICULTIES IN THE CY-PRES MODEL

7.1 Potential barriers to cy-pres actions under Part IV[40]: reversion of residual funds to the defendant

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38 Part IVA broadly derives from the Australian Law Reform Commission report grouped proceedings in the Federal Court (ALRC report number 46 AGPS 1998) tabled in Parliament in December 1988. Some significant changes to the initial proposals did occur at the drafting stage.

39 Commonwealth Hansard, House of Representatives, 14 November 1991, page 3174 to 3175

40 Generic barriers to representative actions under Part IVA are contained within sections 33M and 33N. Section 33M provides that where the relief claimed is or includes payment of monies to group members, otherwise than in respect of costs, and on application by the respondent, the court concludes that it is likely that if judgement where to be given in favour of the representative party the costs of the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts, then the court may direct

The provisions of the FCA presently preclude the second stage of a two-tier cy-pres solution. While section 33Z(1)(f) allows for an award of damages in aggregate amounts without specifying amounts to be awarded to individual group members, and section 33ZA(1)(a) allows for the constitution and administration of a trust fund consisting of all the money to be distributed to claimants, [41] section 33ZA(5) of the Act requires that where a court establishes a trust fund in a representative action, and any amount remains in the fund after the satisfaction of all identifiable group members' claims, the excess must be returned to the defendant.[42]

The Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, [paragraph 239] recommended that in such cases the excess be returned to the respondent:[43]

> *The grouping procedure is not intended to penalise respondents or to deter behaviour to any greater extend provided for under the existing law. Any money order to be paid by the respondent should be matched, so far as possible, to an individual who has a right to receive it. If this cannot be done there is no basis for confiscating the residue to benefit group members indirectly, or for letting it fall into consolidated revenue, simply because the procedure used was the grouping procedure. It would be a significant extension of present principles of compensation to require the respondent to meet an assessed liability in full even if there is no person to receive the compensation. Any such change would be in the nature of a penalty, and would go beyond procedural reform.*

The Law Reform Commission was limited by its terms of reference to procedural reforms. The current review committee is not similarly constrained. The grouping procedure *per se* is not intended to penalise defendants or to increase deterrents. However, the cy-pres proposal stretches beyond procedural reform. It also states objectives for substantive trade practices policy, stressing the ends of compensation, deterrence and disgorgement.

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that the proceedings no longer continue as a representative action. Section 33N(1) (a) provides that the court on application by the respondent or on its own motion may order that a proceeding no longer continue as a representative action where it is satisfied that it is in the interests of justice to do so because the costs that would be incurred if the proceeding where to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or (d) it is otherwise inappropriate that claims be pursued by means of a representative proceeding. Any of the considerations listed in Section 33N can justify an order if established to the requisite degree of seriousness. As to the comparison that determines "excessiveness": *see Ryan v Great Lakes Council* (1998) SCA 646. Section 33N is discretionary. Where its requirements are made out the court may act but it is not required to do so: *Australian Competition and Consumer Commission v Giraffe World Australia Pty Limited* (1998) 84 FCR 512. The mere existence of issues that will at some point require individual determination will not of itself justify an order under 33N.

41 Section 33ZA, and the final orders of Justice O'Loughlin in the *ACCC v Golden Sphere International Inc* (1998) 83 FCR 424.

42 For US cases involving reversion of funds to the defendant see: Van Gemert v. Boeing Co. 114 553 F. 2d 812, 815-816 (2d Cir. 1977); Illinios Bell Tel. Co. v. Slattery, 102 F 2d 58 (7th Cir. 1939).

43 See also: *EMI Records Ltd v Riley* [1981] 2 All ER 838

To allow residual funds to be awarded other than to identifiable claimants progresses the objectives of deterrence and disgorgement, and could effect broader TPA aims (through the funding of consumer education, litigation and lobbying). Moreover, where non-affected parties do indirectly receive awards from cy-pres funds, there may be certain attendant efficiencies. To the extent that the non-class recipient of funds is an efficient user of the resources, the award may be a socially beneficial transfer.[44]

7.2 Overlap with section 87 TPA

Part IVA FCA is not to be read down in its application to claims under the TPA by reason of section 87(1B) of that Act.[45] It has been observed, however, that the existence of section 87 (1A) and (1B) of the TPA may be relevant to the exercise of the court's discretion under section 33N to order that a preceding not continue as a representative preceding.[46]

7.3 Extension of judicial power

Cy-pres solutions may be criticised for excessively extending judicial power along the axes of improper discretion and paternalism.[47] The discretion *could* be amorphous: it is left to the court to determine where comprehensive individual recovery is unlikely and when it is exhausted; to decide the need for cy-pres solutions; the form of cy-pres mechanism to be preferred; and thereafter, possibly the constitution and ends of a trust fund, and the means by which these ends should be obtained (or, the form, scope and duration of a price mechanism cy-pres solution). This may feed in to the further concern that savings in administration and costs at the beginning of the action are lost at the end of the action.

The coupling of concerns relating to judicial discretion and the difficulties of identifying individual class members in a representative action under the TPA have recently been favourably considered by the Federal Court.

In *ACCC v Golden Sphere International Incorporated* (1998) 83 FCR 424, approximately four thousand people invested money in a scheme promoted by the respondent in violation of section 61(2)(a) of the TPA. The investments varied between $50 and $150 per person. The ACCC's representative application called a small number of investors as witnesses, whose losses totalled

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44 Geoffrey Miller and Lori Singer, "Nonpecuniary class action settlements" Draft of February 11, 1998 Law and Contemporary Problems, Vol. 60, No. 4, Autumn 1997

45 *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 SCR 250; *Australian Competition and Consumer Commission v Golden Sphere International Incorporation* (1998) 83 FCR 424.

46 *Practice and Procedure of the High Court and Federal Court of Australia* (Butterworths Australia 2000) at 34,795.15 and *see Australian Competition and Consumer Commission v Giraffe World Australia Pty Limited* (1998) 84 FCR 152.

47 See Handler, 24th Annual Antitrust Review, 72 Columbia L. Rev. 1, 41 (1972).

around $1000. The respondent argued that this entailed that the court could award no more than $1000 damages. Justice O'Loughlin observed:

> *This submission is entirely devoid of merit. Findings have been made against the respondents that they have knowingly engaged in breaches of the TPA: various sums of money, including an amount of $254,650, have been intercepted by the authorities and if this submission was accepted those monies would have to be disbursed to the respondents. That is enough to dismiss the submission similarly… if the court were to accept the submission it would, in my opinion, destroy the efficacy of representative proceedings. The purpose of such proceedings is to avoid the very exercise that the respondents now describe as a deficiency or hiatus; as I understand their submission they would expect the ACCC to call every person who participated in the Golden Sphere system (to) prove the individual loss or damage of each such person. If that exercise had to be carried out, the whole purpose of representative proceedings would be emasculated…*
>
> *The amounts of damages that I propose to award will be "an aggregate amount without specifying amounts awarded in respect of individual group members" but I remain satisfied that the calculations that have been made by the ACCC….constitute a "reasonably accurate assessment" of the "total amount to which group members will be entitled under the judgement."* The word "assessment" used in the phrase "assessment of damages" imports an element of judicial discretion: assessing damages is not the application of mathematical formulae. When it is qualified by the words "reasonably accurate" it can be said, with confidence, that the judicial discretion has been widely extended. *I am satisfied that the legislator has intended that the practical application of provisions of Part IVA of the FCA is not to be read down through any evidentiary inability to identify every member of the group and the relevant amount of damage that each member has or may have suffered…The respondents have proffered no evidence or assistance; they are content to sit back and despite their conduct, claim they should not be the object of award of damages because of the applicant's alleged inability to prove those damages. To allow such an attitude to prevail would be tantamount to allowing the respondents to profit from the wrong doings.*

Were the issue of judicial discretion considered sufficiently serious, it could be addressed at the drafting stage. Depending upon a variety of substantive matters, it might be decided to provide:

(a) that in class actions that seem susceptible to cy-pres treatment, this option should be pursued by the courts, having regard to the appropriateness of the various mechanisms available, but with preference in principle for trust fund solutions; or conversely

(b) that the circumstances in which cy-pres solutions are available are given narrow and clear ambit.[48]

7.4 Quantification of damages

For an aggregate assessment of damages, the margin, if not the total, of the consumer overcharge should be constant. This will often be derived from a simple equation, eg: X = U x O (DP – PP) (where X = damages; U = total units purchased; O = degree of overcharge; DP = distorted price charged; and PP = proper price). Alternatively, one might ascertain a dollar amount statistically arrived at for the entire abuse that can be translated into a percentage of purchase formula for distribution.[49]

The greater the number of variables involved in an abuse (eg variable pre-agreement prices among competitors; fluctuations in the price of the good intra- and inter-competitors over time; a price fixing agreement that specifies that prices will not be raised from current levels but sets no determinate fixed price) the harder it will be to derive a constant margin of relative overcharge across all affected class members. [50]

These difficulties, though genuine, should often be far from insuperable, and econometric modelling from data within the defendant's pricing records may often be possible.

In ALRC 68, *Compliance with the Trade Practices Act 1974*, the ALRC observed:

> *8.4 The Commission acknowledges the likely difficulties in accurately calculating the profit made from contraventions occurring in a commercial environment and which are often just one component of otherwise lawful business activities. It agrees that the difficulties are probably so great that they would outweigh the benefits of a scheme to confiscate the profits of contraventions of the TPA. Nevertheless, the Commission considers it important that there be an express mechanism in the TPA which takes into account the principle that profits made from contraventions should be removed wherever possible. The practice of courts taking into account the estimated profits of a contravention when imposing a penalty should be formalised. The Commission* ***recommends*** *that the TPA be amended to require the court to take into consideration the estimated profits of a contravention when imposing a penalty, civil or criminal.*

7.5 The contrast between settlement and adjudication

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48 This option seems to contradict the flexibility that constitutes much of the appeal of cy-pres solutions.

49 See Kohn and Kaplan "The Antitrust Class Suit: A Manageable Instrument for Social Justice" 41 Antitrust L J (1972) 292 at page 296

50 See Michael Malina, "Fluid Recovery as a Consumer Remedy in Antitrust Cases"(1972) 47 NYU Law Review, 477, at 487-488.

Cy-pres solutions may seem a more likely outcome of settlement than of adjudication. In settlement, the defendant offers a fixed sum of money, thereby pre-empting difficulties relating to the quantification of damages. Moreover, the defendant has no interest in how this money is distributed (save perhaps long-term goals that actual and potential future customers receive funds thereby creating or restoring some brand loyalty).

In adjudication, however, the defendant will typically dispute the fact and extent of individual plaintiff injury. This may introduce probative issues regarding the quantification of the aggregate damages incurred by the class. Moreover, the defendant will be entitled to dispute every individual claim upon the aggregate fund.

Settlement will also often be more beneficial than adjudication for both parties. There are likely to be many legal and probative hurdles facing plaintiffs in a large, complex representative action, and it will often favour them to avoid protracted litigation and the delayed recovery this entails. Defendants will often be relieved to secure a once and for all statement of their liability.

However, although cy-pres solutions may more easily extend from settlement, the existence of representative actions under the TPA and FCA illustrates that the crucial shift in reasoning relates not to the nature of adjudication in representative proceedings, but to the issue of civil liability of defendants under the TPA and the possibility of residual funds being ascribed to non-individuated claimants, as discussed at section 7.1 above.

7.6 Entrepreneurial solicitors and spurious settlements

A significant concern relates to instances under the US and Californian cy pres regimes of solicitors prosecuting massive lawsuits on behalf of a huge class that will receive no significant benefit while the solicitors do. Actions are often settled in circumstances where defendants offer huge solicitor's fees and inadequate class settlements. Mechanisms (in the drafting of provisions or otherwise) to guard against this should be immanent in the procedure. The central aim will be to prevent solicitors from accepting a settlement that is less favourable to group members than could otherwise be obtained by further pursuit of the case. Section 33V(1) of the FCA requires that a representative proceeding may not be settled or discontinued without the approval of the court. The existing jurisprudence on matters such as pre-hearing offers, alongside judicial evaluation of settlement offers should provide adequate constraint.[51]

[51] See *ACCC v. Chats House Investments Pty Ltd* (1996) 71 FCR 250 and *Brian McMullin v ICI Australia Operations Pty Ltd* (no 6) (supra).

8. PROPOSAL

8.1 Commencing proceedings

Consistent with Section 33C(2) FCA, a representative cy-pres proceeding could be commenced where the relief sought is or includes: equable relief; damages; claims for damages that would require individual assessment; or is the same for each person represented.

Proceedings could also be commenced whether or not the preceding is concerned with separate contracts or transactions between the respondent and individual group members, or involves separate acts or omissions of the respondent, done or admitted to be done in relation to individual group members.

8.2 Standing

The representative applicant must herself have standing to sue the, or each, respondent.[52] Both the applicant and every group member must have a personal claim against the respondent(s).[53]

The persons who have the claims need not be aware of, or have asserted, the claims,[54] but must have been in the "same, similar or related circumstances".[55]

The applicant need not sue for all persons known or suspected to share her claim against the respondent. She may sue only for some of them. However, it must be clear whether the list is exhaustive of the group members, and if not, what are the boundaries of the description of the group.

Existing judicial comment establishes that conduct challenged under section 52 of the TPA as misleading or deceptive can of itself be sufficiently substantial to warrant determination on a representative bases.[56]

Section 33C requires that the applicant and the group members share a *substantial common question* as opposed to a common interest. Consequently, the ACCC can bring representative

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52 *Symington v Hoechst Schering Agrevo Pty Limited* (1997) 78 FCR 164.

53 *Phillip Morris Australia Pty Limited v Nixon* (2000) 170 ALR 487

54 *Australian Competition and Consumer Commission v Giraffe World Pty Limited* (1998) 84 FCR 512.

55 Section 33C(1)(b) FCA. For comment upon this requirement see: "Representative Proceedings in the Federal Court: A Progress Report" Australian Product Liability Report Volume 8, number 5, 1997 Honourable Justice Mr Wilcox

56 *King v GIO Australia Holding Limited* (2000) FCA 1543

proceedings - not withstanding the divergence between its interests (public interest in enforcing the TPA) and consumers' interests (compensation).[57]

Consistent with section 33C, the existence of non-common issues will not necessarily render the representative form inappropriate. *In Tropical Shine Holdings (trading as KC Country) v Lake Gesture Pty Limited* (1993) 45 FRC 457 the applicant, a trade competitor of the respondent, sued on its own behalf in seeking to restrain misleading advertising and on behalf of those customers of the respondent who had been mislead.[58]

The ACCC would also, consistent with section 87(1B) TPA, have standing. This supplementary provision would extend the substantive exception to section 33ZA(5) of the FCA to proceedings raised by the ACCC in such matters.

8.3 Ambit of the provision: conduct caught

Any violation of the Act will justify the application of cy-pres reasoning.

8.4 Cy-pres awards of damages by the court

As under the existing provisions of the FCA, in making awards of damages, the court may, *inter alia*:

- make an award of damages for group members, sub-group members or individual group members, consisting of specified amounts or amounts worked out in such manner as the Court specifies (section 33Z(1)(e));

- make an award damages in an aggregate amount without specifying amounts awarded in respect of individual group members (section 33Z(1)(f));

- not (subject to section 33V regarding settlements) make an aggregate award of damages under paragraph unless a reasonably accurate assessment can be made of the total amount to which group member will be entitled under the judgement (section 33Z(3)) and thereafter, must proceed to make orders for the distribution of the damages among the group members (section 33Z(2));

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57 *Australian Competition and Consumer Commission v Chats House Investments Pty Limited* (1996) 71 FRC 250; approved in *Australian Competition and Consumer Commission v Golden Sphere International Incorporation* (1998) 83 FRC 424.

58 The point in the distribution chain at which an over-charge initially occurs will be relevant to the assessment of a claim. If a party's price is determined by a competitive market as opposed to price fixing, he will not have sustained a clear legal injury. This is much more likely to affect parties at higher points in the distribution chain than the end-user consumer.

- having made an order for the award of damages, give such directions (if any) as it thinks just in relation to: (a) the manner in which a group member is to establish her entitlement to share in the damages; and (b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is determined. (section 33Z(4));

For these purposes, "aggregate assessment of damages" denotes any assessment of damages not requiring individualised evidence.[59] There are two broad types of aggregate assessment:

(i) each group member's loss or right of recovery may be a function of something else which is independently quantifiable: eg a formula based on a firm's pricing practices or a certain sum per annum spent in a defendant's employment;

(ii) the court may assess the respondent's global liability as a lump sum, fixing a limit on that liability, with the question of each group member's entitlement determined subsequently, either according to a formula or through a process of individual assessments.[60]

Diverging from section 33ZA(5) FCA: where damages have been suitably estimated and all other requirements of the action have been satisfied, following exhaustion of identifiable individual claims, residual funds may be distributed according to the cy-pres mechanisms discussed above at section 7.1 above.

8.5 Cy-pres settlements approved by the court

Pursuant to section 33V, a representative cy-pres proceeding may not be settled or discontinued without the approval of the court, and if the court gives such approval it may make such orders as are just with respect to the distribution of any money paid under settlement or paid into the court.[61]

The court, in determining whether to approve a settlement, *need not* be able to make a "reasonably accurate assessment" of either the amount that will be received by each member under the settlement or the amount each group member would be likely to achieve if the litigation were to continue to judgement.[62]

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59 See generally the ALRC report number 46, AGPS 1998 pages 223 to 228

60 All relevant sections relating to notice and timing would also apply.

61 Section 33V is not limited to but does include a global settlement of all group members' claims: *McMullin v ICI Australia Operations Pty Limited* (6) Federal Court for Appeal, Wilcox J NJ305 of 1995, 12 June 1988, unreported, DC9803267. An application for court approval of a settlement proposed under section 33V must be notified to group members under section 33X(4), although the mere making of a settlement offer is not required to be notified.

62 See by way of contrast in the making of an award of damages, section 33Z(3) FCA.

Settlement proposals need not contain adequate provision for the calculation and distribution of each group member's share in the settlement.[63] Nonetheless these matters are likely to occupy a court presented with a settlement proposal under section 33V.[64] Similarly, the court in a cy-pres solution should:

- state a formula or equivalent measure for the calculation of individual shares;
- make provision for the date by which individual claims should be made;
- make provision for the distribution of money remaining in the fund after this date.

Diverging from section 33ZA(5) of the FCA: after settlement, where all other requirements of the action have been satisfied, and upon exhaustion of identifiable individual claims, residual funds may be distributed according to the cy-pres mechanisms discussed above at section 7.1 above.

8.6 Degree of culpability and mitigation of penalties

Action taken by the defendant to mitigate damages or in quick response to complaints received will go towards the assessment of penalty levels but will not affect the assessment of liability *per se*.[65]

9. STRUCTURING A CONSUMER TRUST FUND[66]

As suggested above, the most flexible and amenable form of cy pres solution will often be the creation of a consumer trust fund. This section outlines the mechanical requirements on a court in structuring such a fund.

9.1 Mechanical requirements

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63 Again by way of contrast in the making of awards of damages, see section 33Z(2) FCA.

64 *Sam Lopez v Star World Enterprises Pty Limited* (1999) ATPR 41-678. Criteria as to the reasonableness of settlements were set out by Justice Goldburg *in Williams v FAI Home Security Pty Limited (4)* (2000) SCE 1925.

65 The Hilmer Report observed at page 162: "it will also be appropriate to examine matters such as the deliberateness of the contravention, whether the firm has shown a disposition to cooperate with the enforcement authorities, and the level of involvement of senior management. In assessing penalty levels, the courts take into account these various factors." See also: *TPC v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR 40-091 at 17,896; *TPC v CSR Ltd* (1991) ATPR 41-076 at 52,152.

66 See ALRC 68, Compliance with the Trade Practices Act, where the Commission observes at 5.6: "*AJAC has recommended to the federal Government that it should establish a fund to provide legal assistance for test cases in the interests of disadvantaged groups and for large scale litigation involving many parties in different jurisdictions. Such a fund would provide assistance in appropriate trade practices cases. The Commission endorses the establishment of this fund*." (AJAC Report, Action 9.6.)

Typically, the total settlement fund will be placed into escrow for distribution to the class, the class members will be notified and given an opportunity to make direct individual claims and the residual fund will be distributed according to the court's chosen purposes/methods.

The settlement or adjudication should address:

(a) **Amount of the fund.**

(b) **Recipient of the trust funds**.

(c) **Appointment of an administering body** to direct the operations of the trust, to administer the funds, to make any discretionary decisions and to assume (financial or court) reporting responsibility. Several different options exist in determining the identity of a trustee: (a) an existing institution;[67] (b) a newly founded institution;[68] (c) reposing funds in a non-party disinterested third party;[69] and (d) create a foundation that allocates funds as grants to relevant and deserving organisations for projects that align with the purposes set by the court. The board of a trust fund may also include members of the affected class.[70]

(d) **Purpose or funding priorities.** These should be consistent with the circumstances of the case and/or the relevant class. Depending on the case a court might decide both the purposes to which a fund will be put and the optimal means for achieving these purposes. The court may, however, prefer the more flexible option of coupling discretionary means with defined purposes.[71] There may be multiple possible ancillary ends, including to: disseminate consumer information; establish consumer centres; establish fellowships for

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67 An example of this is the Marshfield Clinic case, 8 December 1997: On December 8, 1997, Federal District Court Judge Barbara Crabb approved the proposed $4.7 million settlement of an antitrust class action filed by purchasers of physician services from the Marshfield Clinic and its wholly-owned HMO, Security Health Plan, Rhinelander Medical Center, and North Central Health Protection Plan. The lawsuit alleged that consumers paid supra-competitive prices for the defendants' physician services as a result of illegal market divisions between Marshfield and its potential competitors. The settlement will directly benefit several organisations which provide health care to uninsured and under-insured individuals in the eight-county region in which class members reside.

68 Following *Household Finance Services Limited (formerly HFC Financial Services Limited) v. Various Debtors & Anor, 91992) ASC 56-197* [Credit Tribunal of Victoria, 4 December 1992] which concerned an objection to the licensing of a large finance company on the ground that the company was engaging in dishonest and unfair selling practices, compensation of consumers at large under the doctrine of "cy-pres" was effected (it being impossible to identify every single consumer that may have been wronged by the finance company). The "cy-pres" solution resulted in the finance company being required to pay $2.25 million into a fund to establish a centre which would advocate for Victorian consumers (the Consumer Law Centre of Victoria).

69 *United States v. Exxon Corp*., 561 F. Supp. 816 (D.C.D.C. 1983) (residual damages funnelled through energy conservation programs in various states), *aff'd*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) (residual funds given to public health programs)

70 *In re Agent Orange Product Liability Litigation* 597 F. Supp 740, 858-62 (EDNY 1984)

71 *Stern v. US Sprint* No. 000933 (LA super. Crt. filed 4 April 1988).

work on consumer protection issues in a commercial or academic context; participation in administrative hearings or litigation; mass media education programmes; educational forums; grants to selected groups; commercial outreach projects; consumer lobbying/product testing etc; and furthering the ends of consumer protection legislation. Some settlements are deliberately vague - in *Vasquez v. Avco Financial Services Co*.[72] the settlement stated only that the fund be deployed: "for a purpose that is reasonably designed to benefit those persons who would otherwise have received the refund." A further question concerns whether the court alone will be adequate to determine the purposes to which a fund ought to be directed. The involvement of experts, economists, and surveys of the affected class and parties might assist in precise tailoring of the funds to appropriate ends and may also mitigate claims of paternalism.

(e) **Duration of the trust**.

(f) **Administrative fees**. Monitoring costs should be kept low. Once trustees are appointed they are bound by a fiduciary duty and the terms of their appointment. The court can oversee and retain control in the event of any need for correction or alteration over time or in event of breach of fiduciary duty, but otherwise need not be involved in the daily governing of the trust.

(g) **Interest provisions**. Interest bearing funds accrue monies for uses benefiting injured and affected consumers. [73]

(h) **Reporting requirements** (financial or judicial) to the court or to parties. Judicial retention of control may be important here. Part IVA of the FCA is constructed so as to ensure that the court retains a general supervisory role in ensuring the protection of the interests of affected parties (eg section 33Z(2) and section 33ZA(3)(b)).

(i) **Restrictions on the defendant**: for example instructions that the defendant is not to benefit in any way from the trust fund, be it by way of marketing goals or any corporate profit motive.[74]

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72 No. NCC119338 (LA Super. Crt. filed 9 May 1984)

73 See 33ZA(1)(c) FCA. Cases in which interest payments on cy-pres funds have been ordered by the court include: *Alpine Pharmacy Inc v. Chas. Pfizer & Co.* 481 F 2d 1045 (2d Cir. 1973*); Kohn v. American Metal Climax Inc* CA No. 70-933 (ED pa. 1973) (unreported class action settlement notice, NY Times June 7 1973)

74 See 33ZA(1)(c) of the FCA which allows interest to be accrued on trust funds established by the Court.