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SANCTIONS IN ANTITRUST CASES

Contribution by Australia

-- Session IV --

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SANCTIONS IN ANTITRUST CASES

-- Australia --

1. Introduction

1. The Competition and Consumer Act 2010 (the **CCA**) is Australia's national competition and consumer law. The Australian Competition and Consumer Commission (the **ACCC**) is the independent Australian Government agency responsible for enforcing compliance with the CCA.

2. There are prohibitions in the CCA against misuse of market power (unilateral conduct) and against arrangements (horizontal and vertical) that substantially lessen competition (SLC). *Per se* illegality applies to the arrangements that are most likely to cause competitive harm, such as agreements that fix prices, restrict output, rig bids or share markets.

2. Type and nature of penalties in antitrust cases

3. The CCA provides for both civil contraventions and criminal offences. In respect of civil contraventions, under the Australian model of competition enforcement, the ACCC investigates breaches of the CCA and, where it considers appropriate, prosecutes civil cases before the Federal Court of Australia for determination of relief.

4. Thus, where the ACCC believes that it has sufficient evidence to establish that there has been a breach of the competition provisions, it will decide whether or not to commence court proceedings against the individuals and/or businesses allegedly involved. If proceedings are commenced, the ACCC will decide the form of relief to be sought from the Federal Court against those involved. It is then for the Federal Court to determine whether contraventions of the CCA have occurred, and, if so, the types of relief/penalties that will be imposed.

5. The CCA provides for significant civil pecuniary penalties against both corporations and individuals for breaches of the Act. Other forms of relief include injunctions, orders disqualifying an individual from managing corporations and community service orders. The wide variety of penalty options available to the courts under the CCA gives them flexibility, which allows the courts to impose an appropriate penalty taking into account the particular circumstances of each case. A table summarising the main penalties available for breaches of the competition provisions in the CCA is set out in the Annex to this submission.

6. In respect of cartel conduct,¹ Australia has a parallel regime of civil contraventions and criminal offences, which took effect on 24 July 2009 (prior to this regime Australian law prohibited cartel conduct on a civil basis only). Criminal prosecutions may only be undertaken by the Commonwealth (federal)

¹ Cartel conduct comprises any of the following forms of conduct engaged in by parties that are, or would otherwise be, in competition with each other: price fixing, restricting outputs in the production and supply chain, allocating customers, suppliers or territories, or bid rigging. See section 44ZZRD of the CCA and the [ACCC Immunity and Cooperation Policy for Cartel Conduct](#).

Director of Public Prosecutions (CDPP). The CDPP is an independent prosecution service which prosecutes alleged offences against Australian federal (Commonwealth) law. The ACCC works with the CDPP in relation to the criminal prosecution of cartel conduct.

7. Significant criminal pecuniary penalties are available for both corporations and individuals, and individuals can be imprisoned. Punishing firms that engage in cartel behaviour is essential to deterrence; however, Australia also views the treatment of individuals under its sanctions regime as necessary both to halting the formation of cartels and to their detection. If individuals are not held personally liable for their actions, then the threat of sanctions may be perceived to be so remote from the illegal conduct that it constitutes an acceptable risk, particularly when compared to the supra-normal profits that flow from the illegal conduct. In that light, it is illegal for a body corporate to indemnify an employee against legal costs or financial penalties where the employee has been found liable.²

2.1 *Civil penalties*

8. For corporations, the maximum penalty per contravention of the CCA is the greater of:

- AUD 10 million;
- Three times the total value of the benefits obtained and reasonably attributable to the conduct (assuming the court can determine such value); or
- If the total value of the benefits cannot be determined, 10% of the annual turnover of the corporation (including related corporate bodies)³ attributable to Australia during the 12 months ending at the end of the month in which the conduct occurred.⁴

9. For individuals, the maximum penalty per contravention is AUD 500,000.⁵

10. To date, there have been no cases in which the maximum penalty based on turnover or on the gains from the conduct has been imposed on a corporation. The Australian courts often refer to the notion of “instinctive” or “intuitive synthesis” in exercising their discretion to impose fines. That notion “*requires all of the factors to be balanced in a way which reflects an application of the “rules of reason” (rationality) taking into account all relevant matters, excluding extraneous or irrelevant matters and*

² Section 77A of the CCA.

³ The annual turnover of a body corporate is defined such as to include turnover of any related bodies corporate: section 76(5) of the CCA.

⁴ Section 76(1A) of the CCA. Separate penalties apply to certain secondary boycotts (sections 45D-45E of the CCA) – essentially a boycott imposed on one person in order to damage the business of another person (for example, where members of a union place a ban on loading or unloading cargo in order to affect the importer) – where the maximum penalty is AUD 750,000 for corporations. A recent review of competition policy in Australia has recommended that the maximum penalty level for secondary boycotts should be the same as that applying to other breaches of competition law (see <http://competitionpolicyreview.gov.au/final-report/>). The Australian Government has supported this in principle (see http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20Competition%20Policy%20Review/Downloads/PDF/Govt_response_CPR.ashx).

⁵ Section 76(1B) of the CCA.

*accurately having regard to the objective facts, all brought together in exposed reasons for the exercise of the discretion in the particular way, serving the public interest in transparency”.*⁶

11. In calculating the penalty, a parent company’s turnover is generally not considered relevant unless the parent bore some responsibility for its subsidiary’s conduct or where it is relevant to the subsidiary’s capacity to meet a substantial pecuniary penalty.⁷ Generally, the ACCC will only bring proceedings against the party(ies) responsible for the breach; therefore, unless a parent company is directly involved it will not generally be a party to the proceedings, and therefore not liable for any fine imposed on any of its subsidiaries.

12. In practice, in civil cases, it is common for the ACCC to submit agreed penalties to the court, after cooperation and negotiation with parties, although the amount of any penalty ultimately imposed remains at the discretion of the court.⁸

13. Where there are multiple contraventions, the court must ensure that the aggregate penalty imposed, taken as a whole, is just and appropriate, such that the total penalty for related contraventions does not exceed what is proper for the entire contravening conduct involved. This is known as the “totality principle”.⁹

14. Failure to pay a penalty ordered by the court would give rise to the possibility of proceedings for contempt of court. Actions for recovery of pecuniary penalties can be brought within six years of the contravention.¹⁰

2.2 Criminal penalties

15. For corporations, the maximum fine for each criminal cartel offence is, as for civil contraventions, the greater of:

- AUD 10 million;
- Three times the total benefits that have been obtained and are reasonably attributable to the conduct (assuming the court can determine such value); or
- If the total value of the benefits cannot be determined, 10% of the annual turnover of the corporation (including related corporate bodies)¹¹ attributable to Australia during the 12 months ending at the end of the month in which the conduct occurred.¹²

⁶ *ACCC v Cement Australia Pty Ltd* [2016] FCA 453 at [86]. See also *ACCC v OmniBlend Australia Pty Ltd* [2015] FCA 871 and *ACCC v Singapore Airlines Cargo Pte Ltd* [2012] FCA 1395.

⁷ See *Schneider Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 2. In *ACCC v Humax Pty Ltd* [2005] FCA 706 the Court sought financial information about the Humax’s parent company as Humax could not be viewed merely as a small start-up company divorced from its large parent, and there was insufficient evidence before the Court as to Humax’s financial capacity to pay.

⁸ The High Court of Australia recently confirmed the possibility for parties to civil proceedings to submit agreed penalties to the Court, *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46.

⁹ See, for example, *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40, 169; *ACCC v Baxter Healthcare Pty Ltd* [2010] FCA 929, at paragraph 22.

¹⁰ Section 77 of the CCA.

16. Individuals found guilty of criminal cartel conduct face imprisonment of up to 10 years and/or fines of up to AUD 360,000 per offence.¹³ Cartels are widely condemned as the most egregious form of anticompetitive behavior and the prospect of a jail term for committing a cartel offence sends a clear message to would-be offenders; the 10-year jail term reflects the seriousness of the crime. Such a penalty has an immediate deterrent effect for individuals, who, if not held personally liable for their actions, might perceive the threat of sanctions to be so remote from the illegal conduct that it constitutes an acceptable risk.

17. In criminal matters, the CDPP may not (unlike in civil matters) make joint submissions with the defence as to sentence, including as to what term of imprisonment or fine should be determined or what range within the sentencing options would be appropriate.¹⁴ The Courts have held that: “*it is inconsistent with the nature of criminal sentencing proceedings for a sentencing judge to receive a submission from the Crown as to the appropriate sentence or even as to the available range of sentences*”.¹⁵

18. The CDPP may, however, bring to the court’s attention sentencing statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases.¹⁶ In addition, the CDPP is under a duty to, “*assist the court to avoid appealable error where a sentencing judge indicates the form (as opposed to the duration) of a proposed sentencing order and the prosecutor considers it to be manifestly inadequate*”.¹⁷

19. The first criminal charge against a corporation under the criminal cartel provisions of the CCA was laid in July 2016 against Nippon Yusen Kabushiki Kaisha (**NYK**), a global shipping company based in Japan. The matter relates to alleged cartel conduct in connection with the transportation of vehicles, including cars, trucks, and buses, to Australia between July 2009 and September 2012.¹⁸

20. NYK has pleaded guilty to the charges and the matter is expected to come before the Court in early 2017 for appropriate penalties to be determined.

21. The ACCC has a number of other ongoing criminal cartel investigations, and expects to make an announcement on a second criminal cartel matter in the near future.

¹¹ The annual turnover of a body corporate is defined such as to include turnover of any related bodies corporate: section 44ZZRB of the CCA.

¹² Sections 44ZZRF and 44ZZRG of the CCA.

¹³ Section 79(1) of the CCA.

¹⁴ *Barbaro v The Queen* [2014] HCA 2, (2014) 305 ALR 323.

¹⁵ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, at [56]; *Barbaro v The Queen* [2014] HCA 2, (2014) 305 ALR 323; *CMB v Attorney-General (NSW)* [2015] HCA 9; (2015) 89 ALJR 407, at 420-421 [63]- [64].

¹⁶ *Barbaro v The Queen* [2014] HCA 2, (2014) 305 ALR 323, at [40].

¹⁷ *CMB v Attorney-General (NSW)* [2015] HCA 9; (2015) 89 ALJR 407, at 420-421 [63]- [64].

¹⁸ <http://www.accc.gov.au/media-release/australia%E2%80%99s-first-criminal-cartel-charge-laid-against-nyk>.

2.3 *Alternatives to fines*

22. The court can impose any other orders that it considers necessary to resolve the matter before it or address the harm. This gives the court considerable flexibility to impose an appropriate penalty taking account of the particular circumstances of each case.¹⁹

2.3.1 *Disqualification orders*

23. Disqualification orders allow the court to impose a time period during which an individual is prohibited from being involved in the management of a company.²⁰ To impose a disqualification order, the court must be satisfied that a person has breached, attempted to breach, or been involved in a breach of the CCA and that the order is justified in all the circumstances, having regard to the need to protect the public from future misconduct or where a person has had little regard for their legal obligations.²¹ Disqualification orders can be issued for any period of time that the court considers to be appropriate, based on the circumstances of each case.²²

24. The ACCC considers the imposition of a disqualification order to be an important remedy and an effective deterrent, as it restricts the future professional activities of the individual(s) subject to the order and sends a strong deterrence message to directors of industry and business associations, and business managers generally, and underscores the significant legal risks that may arise from bringing competing firms together without appropriate safeguards in place.

25. In the ACCC's view, it is of critical importance that individuals understand that they are accountable for the actions they undertake in the course of their duties for the company. Individual accountability reduces the likelihood that a prospective cartel member would see the risk of a fine against the company as "simply a cost of doing business".

2.3.2 *Injunctions*

26. The court may grant an injunction in terms it considers appropriate where it is satisfied that a person has engaged in, or is proposing to engage in, conduct contravening the CCA.²³ The court must be convinced that, on the balance of convenience, an injunction should be granted.

27. An application for an injunction may be made by any person; it is not necessary for the applicant to have suffered or be likely to suffer loss or damage.

2.3.3 *Other orders*

28. The court has broad powers to make other remedial orders as a result of contraventions of the competition provisions in the CCA. These include orders requiring the respondent to establish a competition compliance or education and training program.²⁴

¹⁹ Sections 80, 86C-E and 87 of the CCA.

²⁰ Section 86E of the CCA.

²¹ See *Safe Breast Imaging Pty Ltd* [2014] FCA 238.

²² In extreme cases, the court may order disqualification for life: see, for example, *ACCC v Sensaslim Australia Pty Ltd (Administrator Appointed) & Ors* [NSD 1163/2011](#).

²³ Section 80 of the CCA.

2.4 Recent examples of penalties

2.4.1 Colgate-Palmolive Pty Ltd²⁵

29. In December 2013, the ACCC filed proceedings in the Federal Court of Australia against Colgate-Palmolive Pty Ltd (Colgate), PZ Cussons Australia Pty Ltd (Cussons), Woolworths Ltd (Woolworths) and Mr Paul Ansell, a former Colgate sales director, alleging that Colgate, Cussons and Unilever Australia Ltd (Unilever) had made and given effect to cartel and other anti-competitive arrangements in respect of laundry detergent products. The ACCC alleged that Mr Ansell and major supermarket chain Woolworths were knowingly concerned in the conduct. Unilever was granted immunity under the ACCC's *Immunity and Cooperation Policy for Cartel Conduct*.

30. In or around early 2008, Colgate and its competitors decided to replace what were previously marketed as "standard-concentrate" laundry detergent products with "ultra-concentrate" laundry products. Ultra-concentrates allow less detergent to be used to achieve a comparable level of product performance. They also yield significant cost savings and gross margin improvements for the manufacturer through reduced expenditure on ingredients, packaging, transport and other logistics.

31. The ACCC alleged that through a series of meetings, telephone calls and correspondence, the parties sought to limit the supply and control the price of laundry detergents by:

- Ceasing to supply standard concentrate laundry detergents in the first quarter of 2009 and supply only ultra-concentrates from that time;
- Simultaneously transitioning their laundry detergents to ultra-concentrates which met certain requirements; and
- Selling ultra-concentrates for the same price per wash as the equivalent standard concentrated products and not pass on the cost savings to consumers.

32. Colgate admitted to the conduct and agreed with the ACCC to joint submissions on penalty being put to the Court. In April 2016, the Federal Court imposed total penalties of AUD 18 million on Colgate for its role in the conduct. It also ordered Colgate to update its competition compliance program and maintain it for three years, and pay a contribution of AUD 450,000 towards the ACCC's costs.

33. The proceedings against Mr Ansell were also resolved by consent: Mr. Ansell admitted to being knowingly concerned in the conduct. The Court ordered that he be disqualified from managing corporations for seven years and pay a contribution of AUD 75,000 towards the ACCC's costs.

34. In June 2016, the proceedings against Woolworths were also resolved by consent. Woolworths admitted to being knowingly concerned in the conduct. The Federal Court ordered it to pay penalties

²⁴ Other orders provided for in the CCA, some of which are more common in consumer protection cases and rarely used in competition matters, include: orders requiring the respondent to undertake community service, disclose information, or publish an advertisement; orders declaring a contract void (in whole or in part), varying a contract or refusing to enforce any or all of the provisions of a contract; and orders for the payment of compensation.

²⁵ *ACCC v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528; see also <http://www.accc.gov.au/media-release/colgate-ordered-to-pay-18-million-penalty-in-laundry-detergent-cartel-proceedings>, and <http://www.accc.gov.au/media-release/woolworths-ordered-to-pay-9-million-in-penalties-in-laundry-detergent-cartel-proceedings>.

totalling AUD 9 million, to update its compliance program, and to pay a contribution of AUD 250,000 towards the ACCC's costs.

35. The ACCC's case against Cussons is ongoing.

2.4.2 *Visa Worldwide Pte Ltd*²⁶

36. *Visa Worldwide Pte Ltd* was a case involving international payment card transactions at point of sale (POS) and at ATMs in Australia. For international travellers to Australia wishing to use their Visa cards to make purchases at point of sale, Visa has always supplied the currency conversion services necessary to allow the Australian merchant to be paid in Australian dollars and the purchases to be billed to the cardholder in their home currency. Visa earns substantial revenue from the provision of these services, both in the form of foreign currency trading revenue and fees.

37. Dynamic Currency Conversion (DCC) is a service which competes with Visa's currency conversion services and gives international cardholders a choice to complete a transaction in their home currency rather than in the local currency of the merchant. If a cardholder chooses DCC, the exchange rate is locked in and disclosed to the cardholder at the time of making a transaction. This provides cardholders with certainty about the exchange rate applied and reduces the risk to cardholders from subsequent changes in exchange rates.

38. During the period 1 May 2010 to 6 October 2010, Visa Worldwide made changes to its rules which prohibited further expansion of the supply of DCC services on POS transactions on the Visa network by Visa's rival suppliers of currency conversion services. This effectively meant that retail stores, hotels and restaurants that were not already offering DCC services to their customers as at 30 April 2010 could not offer those services, effectively freezing the pool of merchants who could offer DCC services during the period of the prohibition.

39. The ACCC commenced proceedings against Visa in February 2013 in the Federal Court. It was concerned that Visa's conduct was likely to stop the growth of currency conversion services which competed with its own currency conversion services and, as a result, limit the choices available to consumers.

40. In September 2015, Visa admitted that its conduct infringed the competition provisions of the CCA and the Federal Court imposed a pecuniary penalty of AUD 18 million. The court explained the relatively high penalty on the basis of a number of factors, including because the decision to engage in this conduct was made at the highest levels of Visa's executive management, and the necessity of providing adequate deterrence to large multinational corporations such as Visa Inc.

41. The penalty took account of a number of mitigating factors, including Visa's cooperation with the investigation and throughout the litigation, its lack of past breaches of the CCA, its culture of compliance, and showing contrition.

²⁶ [ACCC v Visa Inc and others \[2015\] FCA 1020](http://www.accc.gov.au/media-release/visa-ordered-to-pay-18-million-penalty-for-anti-competitive-conduct-following-accc-action); see also, <http://www.accc.gov.au/media-release/visa-ordered-to-pay-18-million-penalty-for-anti-competitive-conduct-following-accc-action>.

2.4.3 *Bearings cartel*²⁷

42. In *NSK Australia Pty Ltd*, the Federal Court imposed total fines of AUD 3 million on NSK Australia Pty Ltd (NSK) for its involvement in cartel conduct in relation to the price of bearings in Australia. Bearings are an essential component in mechanical items involving movable connections and have a wide range of uses, such as in motor vehicles, mining conveyors, household electrical items and farm machinery.

43. The Court held that from at least 2000 to May 2011, the senior Japanese executives of NSK residing in Australia and two other bearings companies, Nachi (Australia) Pty Ltd and Koyo Australia Pty Ltd (Koyo Australia), met to discuss and share confidential information, including pricing plans.

44. The ACCC and NSK reached agreement as to the suggested penalty and the Court accepted that the proposed penalty of AUD 3 million was within a range that was appropriate. The amount agreed reflected a significant discount for cooperation with the ACCC during the investigation. The Court also required NSK to implement a competition compliance training program.

45. The ACCC had previously reached agreement with Koyo Australia, which fully cooperated with the ACCC's investigation and was willing to admit to the conduct and resolve the proceedings by consent. This resulted in a substantial discount to the penalty. Koyo Australia was fined AUD 2 million for its participation in the conduct and required to establish and implement a compliance training program.²⁸

2.4.4 *Sydney forklift gas cartel*²⁹

46. The *Sydney forklift gas cartel* case involved a no-poaching understanding between Renegade Gas Pty Ltd (Renegade Gas) and Speed-E-Gas (NSW) Pty Ltd (Speed-E-Gas), which included each company agreeing not to supply liquid petroleum gas cylinders for forklifts (forklift gas) to each other's customers.

47. The Federal Court imposed penalties totalling AUD 8.3 million on the two companies and three current or former senior officers of those companies for engaging in cartel conduct. Renegade Gas received a penalty of AUD 4.8 million and Speed-E-Gas a penalty of AUD 3.1 million. Speed-E-Gas cooperated with the ACCC's investigation from a very early stage, and the fine imposed on it reflected that cooperation.

48. In addition, the Court imposed the following individual penalties:

- The former Managing Director of Renegade Gas was disqualified for three years from managing corporations and ordered to pay a fine of AUD 250,000;
- A fine of AUD 100,000 on a senior officer of Renegade Gas; and
- A fine of AUD 50,000 on a former senior officer of Speed-E-Gas.

²⁷ *ACCC v NSK Australia Pty Ltd* [2014] FCA 453. See also: <http://www.accc.gov.au/media-release/3-million-penalty-for-bearings-cartel-conduct>.

²⁸ *ACCC v Koyo Australia Pty Ltd* [2013] FCA 1051.

²⁹ *ACCC v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135. See also: <https://www.accc.gov.au/media-release/court-orders-penalties-of-83-million-for-sydney-forklift-gas-cartel>.

49. The fine imposed on the former Managing Director of Renegade Gas is one of the largest pecuniary penalties that has been imposed on an individual for engaging in cartel conduct.

50. The Court also required Renegade Gas to implement an updated competition compliance and education/training program and its former Managing Director to undertake competition compliance training.

2.4.5 *Air Cargo Cartel*³⁰

51. Between 2008 and 2010, the ACCC commenced separate proceedings against fifteen international airlines alleged to be part of an international cartel engaged in price fixing in relation to surcharges for the carriage of air cargo from origin ports outside Australia to destination ports within Australia.³¹ Thirteen of the fifteen airlines settled with the ACCC and civil penalties totaling a combined AUD 98.5 million were imposed by the Federal Court on those settling airlines.

52. Two airlines, Garuda and Air New Zealand, elected to challenge the allegations in court, and, while initially successful, recently lost on appeal before the Full Court of the Federal Court.³² The cases have been remitted to the Federal Court to determine the relief to be granted, and judgment is pending.

3 Criteria for determining fines

3.1 *Civil*

53. There are no formal guidelines on the calculation of fines. However, Section 76(1) of the CCA requires the court to have regard to all relevant matters, including:

- The nature and extent of the conduct;
- Any loss or damage suffered as a result of the conduct;
- The circumstances in which the conduct took place; and
- Whether the person has previously been found by the court to have engaged in similar conduct.

54. In addition, common law precedent has developed a number of factors, commonly referred to as “French” and “Heerey” factors, after the judges who developed them, which the court will take into account when imposing penalties.

55. Emphasising that the main object of penalties imposed under section 76 of the CCA is deterrence, Justice French listed the following (non-exhaustive) factors to which the court should have regard in the assessment of a penalty of appropriate deterrent value:³³

³⁰ See, for example, *ACCC v Singapore Airlines Cargo Pte Ltd* [2012] FCA 1395.

³¹ Qantas, British Airways, Air France & KLM, Cargolux, Martinair, Japan Airlines, Korean Air Lines, Malaysian, Emirates, Cathay Pacific, Singapore, Thai Airways.

³² *ACCC v P T Garuda Indonesia Ltd* [2016] FCAFC 42; <http://www.accc.gov.au/media-release/accc-appeal-upheld-in-air-cargo-case>.

³³ *Re Trade Practices Commission v CSR Limited* [1990] FCA 521; (1991) 13 ATPR 41-076 at 52,153. See also *NW Frozen Foods v ACCC* [1996] FCA 1134 and *ACCC v. Visa Inc* [2015] FCA 1020. See also *Trade Practices Commission v. Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR 40-091, where the Court stated

- The nature and extent of the contravening conduct;
- The amount of loss or damage caused;
- The circumstances in which the conduct took place;
- The size of the contravening company;
- The degree of power the contravening company has, as evidenced by its market share and ease of entry into the market;
- The deliberateness of the contravention and the period over which it extended;
- Whether the contravention arose out of the conduct of senior management or at a lower level;
- Whether the company has a corporate culture conducive to compliance with the CCA, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;
- Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the CCA in relation to the contravention.

56. In addition to those factors, in *ACCC v NW Frozen Foods Pty Ltd* Justice Heerey identified as additional relevant factors the financial position of the infringing party and the deterrent effect of the penalty.³⁴

3.2 Criminal

57. In criminal matters, The Crimes Act 1914 provides that the court must impose a sentence that is “*of a severity appropriate in all the circumstances of the offence*”. Part 16A of that Act requires the court to take into account a number of factors, insofar as relevant, when imposing a fine. These include:

- The nature and circumstances of the offence;
- Other offences (if any) that are required or permitted to be taken into account;
- Whether the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character;
- The personal circumstances of any victim of the offence;
- Any injury, loss or damage resulting from the offence;

that: “*The penalty should constitute a real punishment proportionate to the deliberation with which the defendant contravened the provisions of the Act*” (Justice Smithers at 17,896).

³⁴

ACCC v NW Frozen Foods Pty Ltd (1996) ATPR 41-515 at 42,444 to 42,445; see also *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529. It is open to the court to order payment of penalties by instalment where there is sufficient financial material before the court to justify the instalment arrangements, *ACCC v Eternal Beauty Products Pty Ltd* [2012] FCA 1124.

- The degree to which the infringing party has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence, or in any other manner;
- Whether the infringing party has pleaded guilty to the charge in respect of the offence;
- The degree to which the infringing party has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
- The deterrent effect that any sentence or order under consideration may have on the infringing party;
- The need to ensure that the infringing party is adequately punished for the offence;
- The character, antecedents, age, means and physical or mental condition of the infringing party;
- The prospect of rehabilitation of the infringing party;
- The probable effect that any sentence or order under consideration would have on any of the infringing party's family or dependents.

3.3 *Relevance of compliance programs in determining penalties*

58. In relation specifically to compliance programs, while a factor to be considered when setting penalties, it is not enough to show that a compliance guide exists or that training has taken place. It must be shown that these things were effective in establishing a culture of compliance.³⁵ This can be seen in the case law, where the courts have been reluctant to accept the mere existence of a compliance manual as a mitigating factor.

59. Thus, for example, in *Re Trade Practices Commission v CSR Limited*,³⁶ a 1991 decision of the Federal Court involving abuse of market power, there was evidence of a corporate compliance program: CSR Limited had produced a guide to the competition rules and had conducted staff seminars in the 1980s. However, there was no evidence that the guide had been updated and nothing to suggest that any subsequent educational program had been undertaken. One of the officers found responsible for the infringement had attended a training session but gave evidence that he found the provisions of the CCA (then the Trade Practices Act) difficult to understand.

60. In fixing a penalty close to the maximum, the Court held that there was little convincing evidence of a corporate culture seriously committed to the need to comply with the requirements of the CCA. The compliance program “*appeared desultory and in need of reinforcement*”.³⁷ There was no indication that corrective measures were taken when a breach was identified.

³⁵ To assist organisations that do not have the resources to develop a tailored compliance program, the ACCC has produced a series of templates that businesses can use to develop their own programs. The [templates](#) provide an indication of what the ACCC considers advisable in voluntarily compliance programs. It is the ACCC's experience that compliance activities must be undertaken in conjunction with an active and effective enforcement program. The program must create both a credible threat of detection and a real prospect that any penalty that applies to the businesses and individuals involved will outweigh the private gain that can be obtained through anti-competitive conduct.

³⁶ *Re Trade Practices Commission v CSR Limited* [\[1990\] FCA 521](#); [\(1991\) 13 ATPR 41-076](#).

³⁷ *Re Trade Practices Commission v CSR Limited* [\[1990\] FCA 521](#) at [48].

61. More recently, in *ACCC v Visy Industries Holdings Pty Ltd (No. 3)*,³⁸ in imposing what was at the time a record penalty of AUD 36 million on Visy for price fixing and market sharing in the market for the supply of corrugated fibreboard packaging, the Court made reference to the non-existence of a culture of compliance with the law. While noting that there was a trade practices compliance manual which indicated that Visy required strict compliance with the law, the senior management did not hesitate in embarking on unlawful conduct. The judge noted: “*The Visy Trade Practices Compliance Manual might have been written in Sanskrit for all the notice anybody took of it.*”³⁹

4. Impact of leniency on penalties

62. The ACCC has a policy covering immunity and cooperation for cartel conduct and a policy for cooperation in matters concerning infringements of the competition provisions more generally.

63. Australia considers that an effective immunity policy is integral to the detection, deterrence and prosecution of cartels. The majority of cartels are detected through applications for immunity and the ACCC relies heavily on its leniency policy, which has been in place since June 2003, to prosecute cartels effectively.

64. The ACCC’s *Immunity and Cooperation Policy for Cartel Conduct*⁴⁰ allows corporations and individuals who have engaged in cartel conduct to seek immunity from both civil and criminal prosecution. The ACCC is responsible for granting civil immunity while the CDPP is responsible for granting criminal immunity, although the ACCC receives and manages requests for immunity for both criminal and civil proceedings, and makes recommendations to the CDPP as to whether the immunity applicant meets the criteria set out in the ACCC’s Immunity and Cooperation Policy for Cartel Conduct.⁴¹

65. Immunity is available only to the first eligible party to disclose the cartel conduct. Subsequent applicants may be eligible for lenient treatment in return for their cooperation in the ACCC’s investigation.⁴² As a matter of general principle the courts afford more lenient treatment to persons who cooperate with the ACCC or other law enforcement agencies, and the ACCC, or the CDPP in criminal matters, will identify in submissions to the court any cooperation provided by a party.⁴³ However, the size of any penalty imposed on parties who engage in cartel conduct is ultimately determined by the court, including the extent of any discount for cooperation.

66. The ACCC also offers the possibility of “amnesty plus”, which is available to a party who is cooperating with the ACCC in relation to one cartel who discovers a second cartel that is independent and unrelated to the first cartel. In such circumstances, the party may apply for conditional immunity for the second cartel and also seek “amnesty plus” for the original cartel conduct. “Amnesty plus” is a

³⁸ *ACCC v Visy Industries Holdings Pty Limited (No 3)* [2007] FCA 1617. See also *ACCC v George Weston Foods Ltd* [2000] FCA 690; *ACCC v Australian Safeway Stores Pty Ltd* [1997] FCA 450; *ACCC v Rural Press Ltd* [2001] FCA 1065.

³⁹ *ACCC v Visy Industries Holdings Pty Limited (No 3)* [2007] FCA 1617 at [319].

⁴⁰ See: [ACCC Immunity and Cooperation Policy for Cartel Conduct](#).

⁴¹ The CDPP will grant immunity from criminal prosecution for cartel conduct on the basis set out in Annexure B to the [Prosecution Policy of the Commonwealth](#).

⁴² In rare and exceptional circumstances, the ACCC may exercise its discretion to grant full immunity from ACCC initiated civil proceedings to a cooperating party.

⁴³ Cooperation is one of the “French” factors referred to above. In criminal matters, the court is required to take account of the degree to which a person has cooperated with law enforcement agencies in the investigation of the offence (section 16A(2) of the Crimes Act 1914).

recommendation by the ACCC to the court for a further reduction in the civil penalty in relation to the first cartel. If the first cartel is being dealt with as a criminal matter, the CDPP will advise the court of the full extent of the party's cooperation so that it will be taken into account for sentencing purposes.

67. As regards non-cartel infringements, the ACCC's *Cooperation Policy for Enforcement Matters*⁴⁴ sets out the ACCC's approach to leniency, which may be available to individuals and corporations who come forward with valuable and important evidence of a contravention of the CCA and/or who cooperate in the ACCC's investigation. The policy reflects the importance of cooperation in uncovering anti-competitive conduct and to efficient case-handling.

68. Recognition of cooperation and assistance can take a variety of forms, including complete or partial immunity from action by the ACCC, submissions to the court for a reduction in penalty or an administrative settlement in lieu of litigation.

5. Level of fines

69. The current challenge in Australia is for regulators and courts to ensure that the penalties actually imposed for infringements of the competition provisions of the CCA are sufficiently high to provide for sufficient deterrence. The ACCC considers it essential that penalties for anti-competitive conduct in breach of the law are fixed with a view to ensuring that they are not regarded by businesses as an acceptable cost of doing business.

70. In that regard, the ACCC has recently brought an appeal against the penalty decision of the Federal Court of Australia against Cement Australia Pty Ltd (Cement Australia) for breaches of the competition provisions of the CCA.⁴⁵

71. The conduct at issue in that case involved contracts entered into by Cement Australia with various power stations in Southeast Queensland for the supply of flyash. Flyash is a by-product of burning black coal at power stations, and can be used as a relatively cheap partial substitute for cement in the making of pre-mix concrete. Under those contracts, Cement Australia paid high prices to obtain almost all of the available flyash even though it did not need or use it all. The conduct prevented others from obtaining flyash and competing in the relevant downstream market for the supply of concrete grade flyash in Southeast Queensland.

72. Given the serious nature, extent and effect of the conduct – in particular the fact that it effectively precluded any competition by preventing competitors from entering the market – the ACCC argued for significant penalties, in excess of AUD 90 million. This was also with a view to creating sufficient deterrent effect.

73. The Federal Court found that Cement Australia's conduct infringed the CCA.⁴⁶ It imposed a fine of AUD 17.1 million on Cement Australia, holding that the conduct deprived the market of engaging with a new entrant who would have provided competition that would have competed away inefficient costs and service offerings, with a likely significant effect on prices.

⁴⁴ See: [ACCC Cooperation Policy for Enforcement Matters](#) (July 2002).

⁴⁵ *ACCC v Cement Australia Pty Ltd* [2016] FCA 453; <http://www.accc.gov.au/media-release/accc-appeals-cement-australia-level-of-penalties>.

⁴⁶ *ACCC v Cement Australia Pty Ltd* [2013] FCA 909. The Court found an infringement of section 45 of the CCA, which prohibits entering into, or giving effect to, contracts, arrangements and understandings that have the purpose or effect of substantially lessening competition.

74. In June 2016, the ACCC challenged the penalty decision on various grounds. In particular, it has argued that the total penalties imposed were manifestly inadequate taking into account the serious nature and extent of the conduct, the apparent benefit derived by Cement Australia and the market harm caused. The magnitude of the financial benefit to Cement Australia resulting from the conduct and the harm to the market was estimated to be in the order of tens of millions of Australian dollars. Given those factors, together with the size of the corporations involved, whose annual turnover in the relevant year was in the region of AUD 700-800 million, the ACCC is concerned that the penalty imposed by the Court does not achieve either specific or general deterrence; it may simply be viewed as a “cost of doing business”.

75. The appeal will be heard from 20-23 February 2017.

6. Appeals against penalties

76. Appeals against penalty decisions of single judges made at first instance by the Federal Court of Australia are brought before the full Federal Court, which comprises two or more Federal Court judges. Appeals against full Federal Court decisions may be brought before Australia’s highest judicial decision making body, the High Court of Australia, if the High Court grants special leave to appeal.

77. Generally speaking, appeals against the final decision of the court in civil matters must be made within 21 days and in criminal matters within 28 days.

78. An appellate court may only interfere with a penalty imposed if the trial judge fell into error by acting on a wrong principle, by acting on a misapprehension of the facts, by taking into account irrelevant material or by failing to take into account relevant material. Error can also be presumed if the penalty imposed is manifestly excessive.⁴⁷

79. Section 30AJ of the Federal Court of Australia Act (1976) sets out when the Federal Court will allow appeals in relation to a cartel offence. This includes if it is satisfied that some other sentence (whether more or less severe) is warranted in law. The Court may allow an appeal if it is satisfied that it is in the interests of justice to do so.

80. There is no automatic suspension of a fine if an appeal is lodged. However, fines and other orders are usually, as a matter of course, suspended pending the outcome of the appeal process. This is a matter for the Federal Court.

7. Private enforcement: interaction with fines

81. The CCA provides for a right of private action for corporations and individuals that have suffered loss or damage as a result of a breach of the competition provisions.⁴⁸ Individuals must bring proceedings in the Federal Court within six years of the date the cause of action arose.

82. The ACCC considers that private enforcement can be a significant complement to public enforcement in building compliance and deterring anti-competitive conduct. Effective deterrence occurs where penalties, having regard to the likelihood of detection and conviction, outweigh the gains associated

⁴⁷ *Pye Industries Sales Pty Ltd v TPC* [1979] ATPR 40-124; *J McPhee & Son (Aust) Pty Ltd v ACCC* [2000] FCA 365. See also *NW Frozen Foods Pty Ltd v ACCC* [1996] FCA 1134; *ACCC v Ithaca Ice Works Pty Ltd* [2001] FCA 497; *ACCC v Ithaca Ice Works Pty Ltd* [2001] FCA 1716.

⁴⁸ Section 82 of the CCA. The ACCC also has the power to make an application to the court on behalf of those who have suffered loss and seeking to obtain damages for a breach of the competition provisions; the CDPP has a similar power in relation to criminal cartel conduct (section 87 of the CCA).

with a contravention. The threat of increased “penalties” in the form of damages payouts resulting from private litigation can play a vital role in a firm’s consideration of the costs and benefits of engaging in anti-competitive conduct.⁴⁹

83. There have been a number of private actions under the CCA. However, only a few follow on from public enforcement by the ACCC.⁵⁰ An example can be seen in the *Visy* case, where the Court approved a settlement that awarded 4500 Australian businesses AUD 95 million in damages in a class action settlement following enforcement action by the ACCC for price fixing and market sharing in the market for the supply of corrugated fibreboard packaging.⁵¹ The damages awarded amounted to almost three times the total fines of AUD 36 million imposed.

84. Concerns have been expressed in relation to regulatory and practical impediments to private enforcement in Australia. In that regard, a recent comprehensive independent review of Australia’s competition laws and policy concluded in 2015 – “Competition Policy Review”⁵² – recognised that there were certain regulatory and practical impediments which could be reduced. For example, the review has resulted in a recommendation that it should be possible in private damages actions to rely on admissions of fact made in proceedings establishing an infringement of the CCA by the party against whom proceedings are brought.⁵³ Currently, it is only possible to rely on findings of fact made by the court.⁵⁴ The Australian Government has accepted this recommendation, which will be included in new legislative proposals.⁵⁵

⁴⁹ See in this regard a paper submitted by Australia to Working Party No. 3 on Co-operation and Enforcement on 15 June 2015, *Relationship between public and private antitrust enforcement*, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2015\)17&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)17&docLanguage=En).

⁵⁰ See, for example, *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* (No 2) [2006] FCA 1388; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671; *De Brett Seafood Pty Ltd & Anor v Qantas Airways Limited & Ors*, [2015] FCA 979.

⁵¹ *ACCC v Visy Industries Holdings Pty Limited* (No 3) [2007] FCA 1617.

⁵² Competition Policy Review, Final Report, March 2015, p. 407, <http://competitionpolicyreview.gov.au/>.

⁵³ Competition Policy Review, Final Report, March 2015, Recommendation 41, <http://competitionpolicyreview.gov.au/final-report/>.

⁵⁴ Section 83 of the CCA assists private actions by providing that findings of fact establishing an infringement of the CCA made in proceedings amount to *prima facie* evidence of the same facts in later proceedings, including private actions. This has been interpreted not to apply to *admissions* of fact (See, for example, *ACCC v Leahy Petroleum Pty Ltd* (No 3) [2005] FCA 265 at [118]; *ACCC v Dataline.net.au Pty Ltd* [2006] FCA 1427 at [107]).

⁵⁵ http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20Competition%20Policy%20Review/Downloads/PDF/Govt_response_CPR.ashx, at page 32.

ANNEX

PENALTIES AVAILABLE FOR BREACHES OF THE MAIN COMPETITION PROVISIONS IN THE CCA

Prohibition	Maximum penalty (individual)	Maximum penalty (corporation)	Criminal offence	Prison	Injunctions	Disqualification orders
Anti-competitive agreements	AUD 500,000	Either: \$10 million 3 times the gain 10% turnover	x	x	✓	✓
Cartel conduct	AUD 500,000 (civil penalty) AUD 360,000 (criminal)	Either: (civil or criminal) \$10 million 3 times the gain 10% turnover	✓	10 years		
Misuse of market power	AUD 500,000	Either: \$10 million 3 times the gain 10% turnover	x	x		