



Pecuniary Penalties for Competition Law Infringements in Australia 2018



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Foreword

This OECD report compares the pecuniary sanctions regime for competition law infringements in Australia to that of a number of other major OECD jurisdictions. It has been prepared based on an analysis of Australia's pecuniary sanctions regime and its comparison with pecuniary sanctions regimes in the European Union, Germany, Japan, Korea, the United Kingdom and the United States. It builds on previous work on 'Sanctions in Antitrust Cases' pursued in the context of the 2016 OECD Global Forum on Competition.

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Executive Summary

Despite Australia's competition law system being in line with international practice, it has characteristics that differentiate it from other regimes. Notable among such differences is the method for applying sanctions. While in most regimes pecuniary penalties are set by reference to a detailed and publically available methodology that focuses largely on the size of the infringing company, in Australia the amount of pecuniary penalties is determined by the Federal Courts following an 'instinctive synthesis' of various factors. These differences do not prevent Australia from imposing substantial and deterrent sanctions for breaches of competition law. However, and as described in this Report, the maximum penalties that are imposed in Australia for competition law infringements are lower than in comparable jurisdictions.

In recent years, important cases have been increasingly brought before the Australian courts for decisions about sanctions for competition law infringements. This accumulated experience provides an opportunity for retrospective and comparative review, which is the objective of this report that compares Australia's framework and experience with competition law sanctions to the frameworks and experiences of other jurisdictions. The OECD jurisdictions selected for comparison are the European Union, Germany, Japan, Korea, the United Kingdom and the United States. These jurisdictions include leading large jurisdictions, such as the European Union and the United States, as well as smaller jurisdictions with advanced competition law regimes, such as Germany, Japan, Korea and the United Kingdom. Together, they provide a good sample of established competition jurisdictions, while also providing a valuable mix of characteristics that reflect the variety of competition law regimes across the world and illustrate the breadth of approaches in different legal systems.

Australia belongs to the set of jurisdictions where the competition authority brings cases for enforcement action before a court, which acts as a decision-maker with respect to the alleged breach of competition law and the applicable penalties. It has a bifurcated system where the adjudicative role in competition law matters is divided between the Australian Competition Tribunal and the Federal Courts. The latter have jurisdictions regarding enforcement proceedings undertaken by the Australian Competition and Consumer Commission (ACCC) for breaches of the competition provisions of the Competition and Consumer Act.

Civil penalties for competition law infringements in Australia have as their primary objective deterrence, both general and specific. Pecuniary penalties are one of a number of civil and criminal sanctions that Australian courts can impose for such infringements. When determining the amount of a pecuniary penalty, Australian courts take into account a number of different criteria and principles – including the course of conduct principle (where appropriate), the totality principle and the parity principle. The judicial assessment of the appropriate penalty is a discretionary judgement synthesising all factors and principles relevant to a particular case in a process of 'instinctive synthesis'. While the determination of the type and amount of penalties imposed on contraveners for

infringements of competition laws is an exclusive prerogative of the courts, the ACCC and respondents may make joint submissions to the court in which they propose an agreed civil penalty (and other relief) for the courts' consideration. If the court is persuaded that the agreed penalty is an appropriate penalty, it is consistent with principle, and highly desirable in practice, for the court to accept the parties' proposal and impose the agreed penalty

All the comparator jurisdictions share with Australia the goal of ensuring deterrence of competition law violations through pecuniary penalties. Unlike Australia, however, all comparator jurisdictions deploy structured methods for determining the level of pecuniary sanctions. These methods require the calculation of a base fine, generally based on some measure of the volume of affected sales in the country in question over the time period of the legal violation. This base fine can then be modified to take account of mitigating and aggravating circumstances and, in many jurisdictions, also to reflect other factors deemed of importance. Such methods are reflected in publically available guidelines. The existence of structured methods reflected in public guidelines ensures predictability, the uniform treatment of companies for comparable violations, and that fines reach levels that can enhance deterrence.

This report compares the level of actual fines in Australian competition law sanction cases to the level that would apply in the comparator jurisdictions. The result of this comparison is that the amount of pecuniary penalties imposed for competition law infringements in Australia is significantly lower, in both absolute and relative terms, than the amounts imposed in other OECD jurisdictions, particularly as regards large companies or conduct that lasted for a long period of time. This is despite pecuniary penalties in Australia and all reviewed jurisdictions: (i) ostensibly pursuing the same objective, deterrence; (ii) being set by reference to similar criteria – i.e. the corporation's turnover or the illicit commercial gains obtained through the anticompetitive conduct; and (iii) relying on a broadly similar list of mitigating and aggravating factors when determining the final amount of a pecuniary penalty. Looking at the amounts of penalties imposed in Australia in a number of cartel cases up to November 2017 – which exclude more recent cases that are still under appeal – and the base fine that would have been applied in the comparator jurisdictions, the average pecuniary penalty in Australia was AUD 25.4 million (Australian dollars), while the average base penalty in the comparator jurisdictions would have been AUD 320.4 million. Even considering that these calculations are rough estimates that do not take into account aggravating or mitigating circumstances, this means that the average Australian penalty would have to be increased 12.6 times to reach the level of the average penalty in the comparator jurisdictions. This is despite the fact that Australia's legal regime seems to allow for the imposition of pecuniary penalties at the same level or even higher than in the comparator jurisdictions. This disparity in the amount of pecuniary penalties imposed in Australia and elsewhere has the potential to limit the effective deterrence of sanctions against competition law infringements in Australia.

Ultimately, the two main differences that this Report finds between Australia and the comparator jurisdictions are that: (i) fines in Australia seem to be lower, at least at the higher end of imposed penalties; (ii) Australia does not follow a structured methodology for the determination of pecuniary penalties. While the Report is unable to conclude that there is a causal relationship between these two phenomena, it is plausible that they are related.

The Report ultimately recommends that Australian authorities consider actions to ensure that pecuniary penalties better deter anticompetitive conduct. Such recommendations

include, among others, increasing awareness of and taking into account international practices in the determination of pecuniary penalties; linking the amount of the penalty to the economic impact of the sanctioned company's conduct and the seriousness and duration of the infringement, and decoupling it from the sanction amounts imposed for similar anticompetitive conduct in the past; and studying whether to develop and adopt a structured method for the calculation of the amount of pecuniary penalties – including, potentially, the identification of a base pecuniary penalty. Public guidance could create a more transparent and predictable penalty framework, which, in turn, could be useful for companies and decision makers, ultimately promoting deterrence.

1. Introduction

Australia's system for imposing sanctions for breaches of competition law can result in substantial sanctions for breaches of competition law being imposed. Despite this, over the years there have been repeated legislative reforms that have imposed new sanctions for infringements of competition law. Before 2007, the courts only had the power to impose pecuniary penalties on corporations up to a maximum of AUD 10 million per contravention. Following a reform that year, the imposition of higher pecuniary penalties amounts – set by reference to either the value of the benefit the offender derived from its infringement or to the corporation's turnover – became possible. Furthermore, in 2009 Australia introduced criminal sanctions relating to cartel offences.

At the same time, the amount of pecuniary penalties imposed across the world has shown an upward trend for the past decade. In this context, and given the time that has lapsed since the legal reforms mentioned above were adopted, the OECD was asked to pursue a study regarding how Australia compares internationally regarding its sanctioning practices, particularly as regards the imposition of pecuniary penalties.

In order to prepare the present Report, the OECD pursued an in-depth review of the Australian system, as well as an analysis of the penalty setting mechanisms of selected jurisdictions. In the context of its in-depth review of the Australian system, the OECD conducted a fact-finding mission in Australia in May-June 2017. To ensure that the present Report reflected a sufficiently diverse amount of viewpoints, the fact finding mission included interviews with a wide variety of stakeholders – including members of the ACCC, other public officials, current and former members of the judiciary, members of the Bar, partners of law firms, economic experts, corporations, and NGO's – in Sydney, Melbourne and Canberra. In order to ensure that the opinions collected were candid, it was agreed that the information and opinions communicated to the OECD would not be attributed.

The report is structured as follows.

- **Section 2** provides an overview of the Australian competition regime, particularly as regards the imposition of sanctions for infringements of competition law.
- **Section 3** reviews how pecuniary penalties are applied in six OECD jurisdictions (the European Union, Germany, Japan, Korea, the United Kingdom and the United States). These jurisdictions were selected because they provide a good sample of established competition jurisdictions, while also providing a valuable mix of characteristics that reflect the variety of competition law regimes across the world.
- **Section 4** compares the Australian practices regarding the imposition of pecuniary penalties for infringements of competition laws identified in Section 2 with the international practices reviewed in Section 3.
- **Section 5** identifies a number of conclusions arising from this comparison.

2. Overview of Australian System for Competition Law Sanctions

This first section will provide an overview of the Australian system for the enforcement of competition law sanctions. It will begin by describing the institutional context in which enforcement occurs, placing Australia in the international context. It will then outline the regulatory framework for the imposition of penalties for the infringement of competition law, before looking in detail at the criteria used to determine the amount of pecuniary penalties imposed as civil penalties. The section will then conclude with examples of fining decisions.

2.1. Enforcement Structure

2.1.1. *International Context*

Judicial bodies play a significant role in the implementation of competition policy, even if their responsibilities may vary from jurisdiction to jurisdiction (OECD, 1996: 10; OECD, 2011: 12). In certain countries the competition authority brings cases for enforcement action before a court, which acts as a decision-maker with respect to the alleged breach of competition law. In other countries, the competition authority is empowered to take decisions regarding the existence and sanctioning of infringements, and courts merely intervene to review or address appeals of administrative decisions adopted by the authorities. In some cases there may be a specialised body for determination of competition law enforcement cases, which is distinct from the competition authority but is also not a full-fledged judicial body.

2.1.1.1. *Level of Specialisation*

Court specialisation is a measure of whether competition cases are subject to specific treatment, or whether the judge reviewing them retains special knowledge and expertise in this particular area of the law (Baum, 2011: 5; Gramckow and Walsh, 2013: 1-3). Court specialisation is a matter of degree, and can be observed across a number of axes.

First, courts may be generalists¹ or specialised. If a court is specialised, it may be:

- partially specialised in competition;
- fully specialised in competition; or
- fully specialised in competition and other areas of economic regulation.

Experience across countries demonstrates that effective judicial enforcement of competition law does not necessarily require either specialised or generalist courts or judges (OECD, 1996: 10).

2.1.1.2. Role in Competition Enforcement

Courts as Original Decision-Makers

There are competition systems in which different entities are granted the powers:

- to investigate possible infringements of competition law; and
- to adjudicate or decide whether such an infringement occurred and what the penalty should be.

In these systems, investigations are the responsibility of a competition authority or a private party, while the power to adopt a final decision falls to the courts. These systems are known as *adversarial competition law regimes* (ICN, 2015: 13) or *bifurcated models* (Fox and Trebilcock, 2015: 5; ICN, 2002: 39). They usually come in a number of variants:

- The competition authority is in charge of investigating all potential infringements of competition law, while first level adjudication belongs to a court that may or not be specialised in competition matters.
- While the competition authority is in charge of investigating all types of infringement of competition law, it must bring some of these cases (e.g. cartels and/or mergers) before a court that may or may not be specialised in competition matters.
- The first level of adjudication of some competition cases takes place in a specialised competition court, while other type of competition cases are enforced in a generalist court.

Judicial Review

A different enforcement model grants to competition authorities both investigative and adjudicative powers, with the authority's decisions then being subject to judicial review. These systems can be divided into two variants:

- administrative enforcement regimes – where the same agency investigates and decides a case without any internal separation;
- integrated models – where a competition authority contains two separate bodies – one responsible for the investigation of possible violations of competition law, and another independent body responsible for first-level adjudication of the investigated cases – within a single agency (Fox and Trebilcock, 2015: 4).

In each of these cases, the decision is then subject to full judicial review by a court, which may be specialised or generalist.

2.1.2. The Australian Experience²

In Australia:

- Federal Courts are responsible for adopting final decisions in enforcement proceedings brought by the ACCC for breaches of the competition provisions of the Competition and Consumer Act (2010) (the CCA). While Federal Courts are generalist courts, there are National Practice Areas (NPA) within each of them which attribute certain judges to respective practice areas based on their

experience. Competition law is part of the Commercial and Corporations NPA, Economic Regulator, Competition & Access Sub-area.³

- These proceedings follow an adversarial procedure.
- A bifurcated system for determining competition enforcement matters is adopted. The adjudicative role in competition law matters is divided between the Australian Competition Tribunal (ACT) and the Federal Courts. As a result, the first level of adjudication of some competition matters takes place in a specialised forum – the ACT – while other competition matters are assigned to the Federal Courts.

Regarding more specifically the ACT:

- For the purposes of hearing and determining proceedings, it comprises both a judicial member – who must be a Federal Court judge – and two non-judicial members – who are appointed by the Governor-General by virtue of their expertise in industry, commerce, economics, law or public administration. Members of the ACT are appointed for fixed terms of up to seven years, and may be removed on grounds of misbehaviour, physical or mental incapacity, or bankruptcy. Questions of law are determined by a judicial member, whereas all other questions are determined by the majority of the ACT's members.
- The ACT deals with applications for review of the ACCC's determinations in relation to authorisations of restrictive trade practices, revocation of notifications, and formal merger clearances. The ACT also considers applications for the authorization of mergers where it may authorise a merger if it would result in such a benefit to the public that it should be allowed to occur. If the amendments to merger authorisations proposed in the Harper Review go ahead, the ACCC will become the first instance decision maker on merger authorisations and the ACT will have, in effect, limited merits review based on the material before the ACCC. Finally, the ACT is responsible for the review of certain decisions of the ACCC in relation to regulatory determinations. The ACT is entitled to exercise all the powers of the ACCC, and may affirm, set aside or vary the ACCC's determinations as it sees fit.

Regarding enforcement proceedings undertaken by the ACCC for breaches of the competition provisions of the CCA, the Federal Courts will decide whether an infringement occurred and what the appropriate penalty should be. At first instance, decisions are made by a single Federal Court judge sitting alone. Hence, enforcement hearings take place before the Federal Court. Appeals may be taken to the Full Federal Court, comprising three judges. Unlike the ACT, the Federal Court cannot sit with lay members.

The ACCC's policy is that serious cartel conduct should be prosecuted criminally whenever possible. For this reason, the ACCC will distinguish serious cartel conduct from that which is less serious in nature. If the ACCC forms a view that serious cartel conduct has occurred, it forwards a brief of evidence to the Office of the Commonwealth Director of Public Prosecutions (CDPP). The CDPP is independent of the ACCC and considers whether to commence a criminal prosecution with reference to the Prosecution Policy of the Commonwealth. The CDPP will only commence proceedings if it considers that: (i) there is sufficient evidence to prosecute the case; and (ii) it is evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest. In most States, there are committal proceedings where the evidence

against the accused is tested by the court before trial. If the court determines that there is insufficient evidence to proceed, the matter is unlikely to progress to trial. Following committal, if the CDPP elects to proceed with a prosecution, it conducts the proceedings in accordance with Australia's criminal court procedures, which include trial by jury (OECD, 2011: 24).

2.2. Regulatory Framework

2.2.1. Basic Outline

In relation to cartels, the statutory scheme involves some parallel criminal and civil prohibitions with identical physical elements. Section 76 is the key civil penalty provision in relation to breaches of the restrictive trade practices provisions of the CCA, including breaches of the civil cartel provisions. Section 79 sets out the penalty regime for individual involvement in criminal cartel sentences, while sections 44ZZRF and 44ZZRG specify the maximum fines for contraventions by corporations, which are the same as civil penalties. The main difference between the civil and criminal cartel regimes are that they have different fault elements⁴, and that criminal liability places substantial reliance on prosecutorial discretion to ensure that criminal cartel provisions are applied only to 'serious' cartel conduct (Beaton-Wells and Fisse, 2011: 25).

2.2.2. Civil Penalties

The primary objective of civil pecuniary penalties is deterrence, rather than punishment. As noted by French J (as he then was):

*“Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation (...) have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. (...) The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.”*⁵

Deterrence for the purposes of section 76 includes both general and specific deterrence. As noted in *Singtel Optus Pty Ltd v ACCC*:⁶

*“in relation to offences of calculation by a corporation where the only punishment is a fine, the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by that offender or others as an acceptable cost of doing business... those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention.”*⁷

With a view to ensure deterrence, an assortment of sanctions is foreseen. To begin, if an entity is found to have infringed the competition provisions⁸, a court may order the payment to the Commonwealth of such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters. Such pecuniary penalties are set out in a number of provisions of the CCA:

- Under s. 76 CCA, a maximum pecuniary penalty per contravention can be imposed on corporations of: the greater of AUD 10 million or three times the gain

from the contravention or, where the gain cannot be readily ascertained, 10% of the annual turnover of the body corporate and all of its interconnected bodies corporate (if any) in the first 12 months after the contravention occurred.⁹ In applying the turnover test, turnover in relation to goods or services supplied outside Australia is disregarded.¹⁰

Before 2007, the courts only had the power to impose pecuniary penalties on corporations up to a maximum of AUD 10 million per contravention. It was only through statutory amendments adopted in 2007 that the imposition of higher pecuniary penalties amounts – set by reference to either the value of the benefit the offender derived from its infringement or to the corporation’s turnover – became possible.

- Section 76(1B) CCA foresees a maximum pecuniary penalty for individuals of AUD 500 000; and
- Section 77A CCA sets out that corporations are prohibited from indemnifying, directly or indirectly, their officers, employees or agents against the imposition of pecuniary penalties upon such officers, employees or agents.¹¹

In addition to civil pecuniary penalties, courts may make declarations, grant injunctions, make disqualification orders in relation to corporate executives, issue non-punitive orders (e.g. probation orders and community service orders), or impose information disclosure, advertisement and punitive adverse publicity orders (see Sections 80, 86C, 86D and 86E CCA and Section 21 of the Federal Court Act 1976).¹²

2.2.3. *Criminal Penalties*

Criminal sanctions relating to cartel offences were introduced in 2009. Under Section 79 CCA, these sanctions include:

- corporate fines equivalent to the civil pecuniary penalties applicable to cartel prohibitions;
- a maximum 10-year jail sentence, a pecuniary penalty not exceeding 2,000 penalty units for individual offenders, or both.¹³

The stigma and reputational cost associated with a criminal conviction for both corporations and individuals are often also identified as important considerations in the imposition of criminal sanctions (Beaton-Wells and Fisse, 2011: 422).

2.2.4. *General Principles in the Application of Penalties*

2.2.4.1. *Basic Procedural and Methodological Considerations*

The standard of proof for breaches of the competition provisions (other than in relation to criminal proceedings) is the civil standard: the balance of probabilities.¹⁴ The *Evidence Act 1995* (Cth) provides that regard is to be had to the nature of the cause of action or defence, the nature of the subject-matter of the proceeding, and the gravity of the matters alleged: the graver the allegation, the stronger the required evidence.¹⁵ However, that should not be understood as directed to the standard of proof, but rather as merely reflecting a conventional perception that members of society do not ordinarily engage in fraudulent or criminal conduct, and that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.¹⁶

As such, the gravity of the allegation must be taken into account and more than “inexact proofs, indefinite testimony or indirect references” are required.¹⁷ The ACCC has to establish that the circumstances give rise to a reasonable and definite inference, not merely to conflicting inferences of equal degrees of probability.¹⁸

Once an infringement is established, courts will then have to decide which penalty to apply. While statute and case law provide guidance regarding the methods and factors that should be taken into account by courts when imposing penalties, it should be emphasised that there is no clear formula for determining what a penalty for a competition law breach should be. Instead, courts engage in an extensive process to identify the appropriate penalty which varies from case to case. While courts must take into account a number of principles and criteria discussed in more detail below, these steps are mere elements of a more extensive process that courts engage in. It was emphasised to the drafters of this Report, but is also apparent from the case law, that courts have regard to the criteria set out in statute and in case law when determining penalties. In addition to this, however, courts then also apply a number of principles – in particular the course of conduct principle (where appropriate), the totality principle and the parity principles – as part of their consideration when determining penalties. This process occurs both when single and multiple penalties are imposed.

For analytical purposes and in the interest of clarity, this Report seeks to identify below the relevant principles and criteria relied by courts, and to analyse them individually. However, it should be borne in mind that to consider each factor/principle in isolation is likely to fail to provide an accurate reflection of the Federal Court’s process in determining penalties.

2.2.4.2. Single Conduct Infringing Various Provisions

Under sub-section 76(3) CCA, if a person contravenes two or more provisions of the Act, a proceeding may be instituted against that person in relation to the contravention of any one of those provisions. Further, although proceedings may be instituted against a person for breaches of more than one provision of the Act arising from the same conduct, the court can only impose one penalty in respect of that conduct. This requires a careful factually specific enquiry directed at the identification of what is “the same conduct”.¹⁹ An example provided by Miller is that, under section 45, it is a contravention both to enter an anticompetitive arrangement and to give effect to it. Where, in a practical sense, the conduct constituting the making of the arrangement is part and parcel of the conduct carrying it into effect, section 76(3) CCA will apply and only one penalty will be imposed.²⁰ However, this distinction is not clear cut, and depending on the facts of the case courts may reach different conclusions regarding whether entering into an agreement and implementing it are part and parcel of the same conduct.²¹

In any event, the penalty for breaches of more than one provisions arising from the same conduct may not exceed the maximum penalties set out in section 76(1) CCA.

2.2.4.3. Aggregation of Pecuniary Penalties

The CCA is silent on the question of whether multiple contraventions give rise to multiple penalties, or to one single aggregated penalty. It has been common, although not universal practice for courts to impose one aggregate penalty on a respondent for all contraventions by that respondent in proceedings.²²

Where penalties are imposed for a number of offences – either as a single penalty or as multiple penalties – it is necessary to ensure that the aggregate sanction is just and appropriate.²³ This assessment is ruled by a number of principles, which are applied following an initial determination of the relevant penalty(ies):

- Course of conduct – Like many of the principles that apply to the fixing of pecuniary penalties, the so-called course of conduct principle is derived from criminal law sentencing principles. It ‘recognises that, where there is an interrelationship between the legal and factual elements of two or more offences with which an offender has been charged, care needs to be taken so that the offender is not punished twice (or more often) for what is essentially the same criminality. The interrelationship may be legal, in the sense that it arises from the elements of the crimes. It may also be factual, because of a temporal or geographical link or the presence of other circumstances compelling the conclusion that the crimes arise out of substantially the same act, omission or occurrences.’²⁴ The course of conduct principle also applies in the civil pecuniary penalty proceedings, despite the fact that the principle is largely based on the need to avoid double punishment, whereas the primary, if not sole, purpose of imposing a pecuniary penalty is said to be to deter, not to punish.²⁵
- Totality – “The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: *McDonald v The Queen* [1994] FCA 956; (1994) 48 FCR 555. But that does not mean that a Court should commence by determining an overall penalty and then dividing it amongst the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined.”²⁶

In particular: “The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are being dealt with and specific punishments in respect of them are being tottered up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong [’]; ‘when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.’²⁷

In some instances there is process by which a penalty figure is assigned to the conduct that constitutes each contravention, and those figures are then added to arrive at the total penalty. In other instances, there is no breakdown but simply a determination of what is regarded as the appropriate total penalty in the case.²⁸

- Parity – The parity principle requires that, other things being equal, persons committing the same contravention should receive the same punishment. However, the parity principle only applies in cases where the respondents’ circumstances are comparable.²⁹ In particular, the parity principle does not require the imposition of similar penalties for similar contraventions: all it requires is that

there should not be such inequality in the penalties as to suggest that the defendants have not been treated even-handedly.³⁰ A rather common view among legal experts contacted in the context of the project was that the parity principle was mainly, if not exclusively, relevant for the determination of the penalties applicable to co-offenders.

2.2.4.4. Agreed Penalties

While the determination of the type and amount of penalties imposed on contraveners for infringements of competition laws is an exclusive prerogative of the courts, the ACCC and respondents may make joint submissions to the court in which they propose an agreed civil penalty (and other relief) for the courts' consideration.³¹ The court must be first satisfied that it is being given accurate, reliable and complete information on critical questions in order for it to take the parties agreed submissions on penalty (and other relief) into account. Cases that involve serious contraventions of the law cannot be: "*settled*" by agreed facts that do not present to the court a fair and accurate picture of the relevant offending conduct^{32, 33}.

The main principles regulating the adoption of agreed civil penalties by the courts are the following:³⁴

- While parties may propose a penalty to the court, it is for the court to determine the appropriate penalty to be imposed. The court is not a mere rubber stamp.
- Determining the quantum of a penalty is not an exact science and accordingly, within a permissible range, one figure cannot be said to be more appropriate than another. However, this does not mean that the court must commence its reasoning with the proposed penalty and limit itself to considering whether it is within the permissible range. It is open to the court to first address the appropriate range and then consider the penalty proposed by the parties.
- There is public interest in promoting the settlement of litigation, particularly where that litigation is likely to be lengthy, because this saves resources for both the regulator and the court, and there is a likelihood that a negotiated resolution will include measures suitable to promote competition;
- The view of the regulator as to an appropriate penalty is relevant but not determinative;
- The views of the regulator on matters within its expertise will be given greater weight than its views on other matters;
- In determining whether a proposed penalty is appropriate the court will examine all of the circumstances of the case. Where the parties have put forward an agreed statement of facts the court may act on that statement, as long as the agreed statement of facts has not been tailored or modified to reflect difficulties faced by the parties in proving their respective cases;
- The ACCC should always explain to the court its reasoning, providing justification for any discounted penalty, such as the level of co-operation by the relevant parties;
- If the court thinks that the evidence or information before it is inadequate for it to form a view on the appropriate penalty, the court may request the parties to

provide further evidence or information. If further evidence or information is not provided, the court may well not be satisfied with the proposed penalty;

- If the court is not disposed to impose the penalty proposed by the parties, it may be appropriate to give each party an opportunity to withdraw its consent to the proposed orders and for the matter to proceed on a contested basis.

In short, where a regulator and a contravenor agree to settle a civil penalty proceeding and propose an agreed penalty, the question for the court is whether the Court is satisfied that the submitted agreed penalty is appropriate. An appropriate penalty may be one that falls within a “permissible range”. The willingness of the ACCC to recommend a particular civil penalty as appropriate to the Court can be expected to reflect a considered, but also pragmatic, estimation or assessment that, given the hazards and expense of contested litigation, an agreed submission is apt to advance the public interest in the enforcement of the regulatory regime more effectively and efficiently than the continued prosecution of the claim.³⁵ If the court is persuaded that the agreed penalty is an appropriate penalty, it is consistent with principle, and highly desirable in practice, for the court to accept the parties’ proposal and impose the agreed penalty.³⁶

2.2.5. The criteria taken into account when setting out the amount of a pecuniary penalty

2.2.5.1. The Purpose of Civil Penalties

The object of the CCA is to “enhance the welfare of Australians through the promotion of competition ...”.³⁷ The purpose of the part of the CCA devoted to competition law, Part IV, is the adoption of provisions which: “*proscribe and regulate agreements and conduct and which are aimed at procuring and maintaining competition in trade and commerce*”.³⁸ More specifically as regards civil pecuniary penalties, the “object” to be served by section 76 CCA is to promote competitive conduct in trade or commerce by the use of penalties sufficient to deter acts that would tend to be destructive of such competition.³⁹ As noted in *ACCC v ABB (No 2)*:

“[Australia’s] economic system is based upon a philosophy of private enterprise and competition. Antitrust legislation has as its object the promotion of free competition by proscribing the misuse of monopoly or oligopoly power, and by making unlawful conduct such as market rigging, collusive tendering, price fixing, and other acts that inhibit the minimisation of production costs and the efficient allocation of resources. That is to say, antitrust legislation is founded on the underlying premise that free competition is essential for the welfare of the state. Conduct that affects the public, such as the anti-competitive behaviour that is outlawed by the [CCA], can never really be considered as anything other than serious.

“Moreover, antitrust contraventions do not occur as a result of passion or accident. The agents of a corporation have the choice to engage or refrain from engaging in the anti-competitive behaviour. A contravention most often occurs when there is a belief that the financial gain that is anticipated to result from the anti-competitive behaviour will be considerable, and well worth the risk of detection and the cost of prosecution. In many cases the expected financial gain will be very large, and in some markets could be in the millions of dollars. The corresponding losses that are suffered will fall across a range of organisations including competitors. But ultimately the losses are borne by consumers who are

usually economically weak and do not have meaningful power to obtain redress".⁴⁰

Deterrence is thus the primary objective when setting a pecuniary penalty.⁴¹ Whereas criminal penalties import notions of retribution and rehabilitation, a civil penalty is devoted to promoting the public interest in compliance. As a result, while pecuniary penalties may be high and severe, neither retribution nor rehabilitation has a part to play in the context of civil pecuniary penalties under the CCA:⁴²

*"Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act] ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."*⁴³

However, penalties for anticompetitive practices need to be substantial and significant:

*"[The penalty for contravention of the Act] "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business. ... [T]hose engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention".*⁴⁴

Their principal purpose is thus to underline the seriousness of Parliament's intention that the standards set out in the CCA are adhered to by providing for the imposition of penalties sufficient to deter a trader from contravening the Act.⁴⁵

2.2.5.2. Methodology

Section 76(1) CCA empowers courts, on being satisfied that a contravention has occurred, to order the respondent to pay such amount, by way of pecuniary penalties, "as the court determines to be appropriate" having regard to a number of matters. The matters specifically listed in section 76(1) CCA are: (i) the nature and extent of the act or omission, (ii) any loss or damage suffered as a result of the act or omission; (iii) the circumstances in which the act or omission took place; and (iv) whether the person has previously been found by the courts to have engaged in any similar conduct in related proceedings. This list of considerations is not exhaustive, and a number of additional considerations have been identified in the case law.⁴⁶

The fixing of a pecuniary penalty pursuant to section 76 of the CCA requires the identification and balancing of all the factors relevant to the contravention and the circumstances of the contravener, and making a value judgment as to what the appropriate penalty is in light of the protective and deterrent purpose of the statutory scheme.⁴⁷ Case law provides guidance on the methodology that courts should use to determine a pecuniary penalty.

As already noted above – but it is important to emphasise this point – there are no clear formulae for determining what a penalty for a competition law breach should be. Instead, courts engage in an extensive process to identify the appropriate penalty which varies from case to case. In determining an appropriate penalty the court shall not adopt a

mathematical approach; nor is it appropriate to determine an "objective" penalty and then adjust it by some mathematical value given to one or more factors, such as co-operation with the authorities.⁴⁸ Instead, assessment of the appropriate penalty is a discretionary judgement synthesising all factors relevant to a particular case, while also paying due regard to the maximum penalty for each contravening act and a number of applicable principles, such as the course of conduct, parity and totality principles.⁴⁹

This approach reflects the fact that the process of fixing an appropriate penalty under section 76 CCA has been likened to the process of arriving at an appropriate sentence for a criminal offence.⁵⁰ The setting of penalties for infringement of competition law follows an 'instinctive synthesis' approach first adopted for criminal sentencing, under which the factors bearing on a sentencing decision are aggregated and assessed in a single, global process of reasoning. This is typically opposed to the 'two-tiered' or 'sequential' approach, under which the decision-making process is compartmentalised, and particular factors isolated for the purpose of calculating their specific impact on the ultimate sanction.⁵¹

The origin of the 'instinctive synthesis' approach lies in a High Court decision concerning the sentencing of an individual over a drug related criminal offence,⁵² and was then imported into competition law, along with related criminal law principles. One such principle is that it will rarely be appropriate for a court to commence with the maximum penalty and proceed by making a proportional deduction from that maximum.⁵³ Nonetheless, careful attention must almost always be given to the maximum penalty. That is so for at least three reasons: first, because the legislature has legislated for the maximum penalty and it is therefore an expression of the legislature's policy concerning the seriousness of the prescribed conduct; second, because it permits a comparison between the worst possible case and the case that the court is being asked to address; and third, because the maximum penalty provides a "yardstick" which should be taken and balanced with all the other relevant factors.⁵⁴

Further, and as in criminal proceedings, the court must have regard to the totality principle to ensure that the penalties imposed are just and appropriate. Application of the totality principle requires the court to review the entirety of the conduct and to determine whether the proposed penalty is appropriate 'as a whole', looking at the degree of misconduct involved. The rationale underlying the totality principle is to ensure that the proposed penalty is not out of proportion to the contravening conduct taken as a whole, and to ensure that the penalty is just and appropriate from the perspective of that collective assessment.⁵⁵ In the final analysis, the question in applying the totality principle is one of discretion in coming to the correct, adequate and appropriate penalty.⁵⁶

This is not to say that there are no accepted differences between a criminal prosecution and civil penalty proceedings. While criminal prosecution is an accusatorial proceeding which is governed by the fundamental principle that the burden lies in all things upon the Crown to establish the guilt of the accused beyond reasonable doubt, civil proceedings are an adversarial contest in which the issues and scope of possible relief are largely framed and limited as the parties may choose, the standard of proof is upon the balance of probabilities, and the respondent is denied most of the procedural protections of a defendant in criminal proceedings. A civil penalty proceeding is precisely calculated to avoid the notion of criminality as such. As described above, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is primarily if not wholly protective in promoting the public interest in compliance by deterring would be contravenors. Unlike in criminal proceedings, in civil proceedings there is considerable scope for the parties to agree on the facts, consequences and appropriate

remedy.⁵⁷ As a result, the prohibition on prosecutors in criminal cases identifying a range of sentences that the Crown considers open to be imposed in the circumstances of each case⁵⁸ is not applicable to civil sanctions – which is why the agreed penalties described above in Section 2.2.4.4 are allowed.⁵⁹

Furthermore, civil penalty provisions are part of a statutory regime involving, *inter alia*, an economic regulator with the statutory function of securing compliance with the provisions of a regime that seeks to advance particular aspects of the public interest. The legislative scheme provides for a range of enforcement mechanisms beyond civil pecuniary sanctions, including declarations, injunctions, compensation orders, disqualification orders and other civil penalties, and even criminal charges in some cases. The regulator can thus choose the enforcement mechanisms which it considers to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. The statutory scheme then requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings.⁶⁰

Although the principled distinctions between a criminal prosecution and a civil penalty proceeding hold good for all purposes, the orthodox position has been to apply principles derived from a range of authorities regarding the sentencing of criminal offenders – and particularly those principles underpinning the “instinctive synthesis” – to the exercise of discretion under section 76(1) CCA (and analogous civil penalty regimes).⁶¹ As a result, the discretionary judgment to be made under section 76 CCA requires an “instinctive synthesis” of many conflicting considerations.⁶²

2.2.5.3. *Specific criteria* ⁶³

A large number of criteria must be taken into account when setting a civil pecuniary penalty – some are set out in the CCA, while others are prescribed by case law. As seen above, four considerations are listed in section 76(1) CCA:

- the nature and extent of the act or omission which constitutes the relevant contravention;
- any loss or damage suffered as a result of the act or omission;⁶⁴
- the circumstances in which the act or omission took place; and
- whether the person has previously been found by the Court in proceedings under Parts VI and XIB of the CCA to have engaged in similar conduct.⁶⁵

In fixing the amount of a civil penalty, reference is also frequently made to the lists of factors or considerations identified in a number of cases.⁶⁶ The main criteria to be taken into account in setting penalty amounts were summarised by French J (as he then was) in 1996 in *TPC v CSR Ltd.*⁶⁷

- 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 contravention⁶⁸ 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 Act, as evidenced by compliance programmes and corrective measures in response to an acknowledged contravention;⁶⁹ and
- whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention^{70, 71}.

In *NW Frozen Foods*, the Full Federal Court said that it was also appropriate to consider:⁷²

- the effects of the conduct on the functioning of the market and other economic effects of the conduct;
- similar conduct in the past (which is a concept broader than the concept of re-occurrence provided in section 76(1) CCA and described above);
- whether the conduct was systematic, deliberate or covert;
- the financial position of the contravening company.

These criteria have been referred to repeatedly in case law, and are commonly known as the “French Factors”.⁷³ However, it is accepted that the list is not intended to be exhaustive.⁷⁴ In effect, there are some additional considerations that are sometimes mentioned in the case law and seem to be conventionally accepted as relevant for the setting of a civil penalty, even if they have not been explicitly included in these lists of relevant criteria. These include:

- the expectation of very substantial penalties being imposed for the same or similar conduct in other jurisdictions, This consideration is usually presented as a reason for limiting the amount of the pecuniary penalty.⁷⁵
- the offending corporation’s gain from its unlawful conduct.⁷⁶ The relevance of gain for the setting of a civil penalty is made clear by the structure of s. 76 (1A) of the Act, which requires courts to impose a penalty based on the offending parties’ benefit, and only allows for the imposition of penalties based on turnover when “the court cannot determine the total value of those benefits”. However, even when the civil penalty is being set on grounds other than benefit, gain remains relevant given that one of the guiding criteria when setting pecuniary penalties is that they are sufficiently high to deter recurrence by the respondent and by others who might be tempted to contravene the Act.⁷⁷ It has been observed that “*most antitrust violations are profitable*” and, accordingly, “*the penalty must be at a level that a potentially-offending corporation will see as eliminating any prospect of gain*”.⁷⁸
- the ACCC’s submissions on quantum of penalty. These submissions represent the observations of a specialist regulator and should be given due weight, but they are not determinative.⁷⁹ The submissions of a regulator will be considered on their merits in the same way as the submissions of a respondent.⁸⁰
- even where the maximum penalty for the contravention is high, and the amount necessary to provide effective deterrence is large, the amount of the penalty should be proportionate to the contravention and should not be so high as to be oppressive.⁸¹

The relevance of each criterion will depend on the specific facts of the case. Individual criteria may not necessarily be relevant or important in every case. Thus, these criteria

should not be treated as a rigid catalogue or checklist of matters to be applied in each case: the overriding principle is that the court should weigh all relevant circumstances.⁸²

2.2.5.4. *Less Established Criteria*

In addition to those listed above, some other criteria have found occasional support in case law or doctrine, but do not seem to be as well established as the criteria listed in the previous section. These criteria include:

- **Corporate Group:** This criterion has been discussed in some court decisions. There are decisions suggesting that the size of the corporate group may not be relevant except where there is evidence that the parent company had some responsibility for the conduct of the respondent, or where it is relevant to the respondent's capacity to meet a substantial pecuniary penalty.⁸³ Nonetheless, there are also judicial decisions where the size of the corporate group was taken into account as a general consideration relevant to determine the appropriate penalty, since this would seem relevant to determine whether the penalty is sufficiently deterrent.⁸⁴
- **Punishment⁸⁵:** As seen above, the primary goal of the civil penalties set out in section 76 CCA is deterrence, both general and specific. Yet, the question of whether a pecuniary penalty involves an element of punishment appears to have excited some controversy.⁸⁶ It has been held that the authorities do not speak with one voice⁸⁷, and that the line that divides the terms 'civil' and 'criminal' in relation to the nature of proceedings, or the process by which persons are brought before courts, is something less than a bright line.⁸⁸ The controversy starts from a baseline consensus that, since the purpose of a civil penalty is primarily if not wholly devoted to promoting the public interest in compliance rather than retribution and rehabilitation, punishment is not a relevant consideration.⁸⁹ The only object of the penalties imposed by section 76 CAA is to attempt to put a price on contravention that is sufficiently high to deter repetition by the respondent and by others who might be tempted to contravene the Act.⁹⁰ However, in some other cases, punishment has not been "ruled out" or excluded as one of the purposes of a penalty under section 76 CAA,⁹¹ and in some cases courts have had difficulty with the proposition that the fixing of a penalty under section 76 CCA should not be regarded as punishment.⁹² Despite this, the overwhelmingly dominant view is that, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is only to promote the public interest in compliance with the law.⁹³ Punishment is well adapted to a criminal prosecution, rather than a notion inherent in the exercise of discretion in a civil penalty proceeding when determining an "appropriate" penalty.⁹⁴ According to this view, the goal of civil penalties is thus merely to ensure deterrence, and the amount of a pecuniary penalty should not be set with the goal of punishing or exerting retribution against the offending corporations.
- **Insolvency:** There is no general principle governing whether or not a penalty should be imposed on a company in liquidation. The judicial *dicta* on whether this is a relevant consideration when determining a pecuniary penalty amount indicate that: "*the bare fact that a company is in liquidation is not, of itself, an immutable reason for not imposing a penalty, even if it may be a factor militating against the imposition of a penalty. In any event there will be cases where other factors make it clearly desirable to impose a penalty on a company even though it is in*

*liquidation.*⁹⁵ The dominant approach seems therefore to be that the possibility that the penalty may be so high that the offender will become insolvent should not prevent the court from doing its duty, because otherwise the important object of general deterrence will be undermined.⁹⁶

- **Reputation:** There is some lack of clarity about whether reputational damage should affect the amount of a pecuniary penalty.⁹⁷ On the one hand, it has been held that reputational damage can be taken into account as concerns general deterrence⁹⁸, and hence the amount of the penalty. On the other, there is case law to the effect that reputational harm is not to be taken into account, at least when there is no evidence that the reputational damage had, or would have, any effect on profitability.⁹⁹

For example, in *TPC v Cue Design Pty*¹⁰⁰, it was held that, while the respondent had suffered financially from adverse publicity, the pecuniary penalty should not be reduced because "*one would think that this sort of publicity is the usual consequence of a prosecution of this nature*". On the other hand, in *Eva v Southern Motors Box Hill Pty Ltd*¹⁰¹, the court was inclined to take into account the consequences of adverse publicity: "*when it goes beyond the mere fact that the respondent was being prosecuted for named offences*", at least as "*part of the background against which the penalty should be assessed*". More recently, in *ACCC v Multimedia International Services Pty Ltd*¹⁰², the court expressed the view that, in appropriate circumstances, the financial consequences of adverse publicity could be taken into account because: "*loss of sales and loss of profits are matters that can be taken into account in the assessment of specific and general deterrence*".¹⁰³

2.2.5.5. Determination of a Pecuniary Penalty based on Turnover of the Offending Party

According to section 76 CCA, the maximum pecuniary penalty for corporations is the greater of AUD 10 million or three times the gain from the contravention or, where gain cannot be readily ascertained, 10% of the annual turnover of the body corporate and any related body corporate. The relevant turnover is "*the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period*", with some exceptions. Notably, turnover in relation to goods or services supplied outside Australia are disregarded.¹⁰⁴

Up until recently, the question of how to calculate turnover had not been very relevant for the determination of civil pecuniary penalties in Australia. This seems to be due to a number of factors:

- Up until 2007, the maximum pecuniary penalty for corporations was AUD 10 million, and the maximum pecuniary penalty was not susceptible to being calculated on the basis of annual turnover (not is such a basis available to be used for contraventions that occurred prior to the 2007 amendment).
- Pecuniary penalties will only be based on turnover when the offending party's gain from contravention cannot be readily ascertainable and when the offending party's turnover exceeds AUD 100 million. For lower annual turnover, the maximum AUD 10 million threshold will apply.

- The ACCC has made submissions to the court seeking to have penalties imposed by reference to turnover in a limited number of cases. Civil penalties based on turnover have been mainly adopted through the mechanism of agreed penalties' submissions described in Section 2.2.4.4.above. The first ever contested pecuniary penalty based on turnover was the recent *Yazaki* case which was decided in May 2017 and is currently on appeal.¹⁰⁵

Only recently – in the just mentioned *Yazaki* case – did the courts adopt a decision on how to calculate turnover for the purposes of determining the amount of a pecuniary penalty. The relevant statutory provision states that the turnover will be that of “the body corporate, and any body corporate related to the body corporate”, but excludes certain amounts including “supplies that are not connected with Australia” and “supplies that are not made in connection with an enterprise that the body corporate carries on”.

Yazaki did not itself make any supplies connected with Australia; rather, Australian customers (including Toyota, which was the subject of the contravening conduct) were supplied by *Yazaki*'s Australian subsidiary. The dispute turned on whether the annual turnover attributed to *Yazaki* included all of the turnover of its Australian subsidiary – leading to a turnover in the region of AUD 175 million and a maximum penalty in the region of AUD 17.5 million for each contravention – or only the turnover of the subsidiary generated from sales to Toyota's relevant Australian subsidiary – which would be limited to a AUD 65 million annual turnover and lead to a maximum penalty of AUD 10 million per contravention.

In an earlier decision, the court had held in relation to the extra-territorial application of Australia's competition legislation that, although both the parent and subsidiary were carrying on the business of supplying Toyota's relevant subsidiary in Australia, the wholly owned subsidiary in Australia was a distinct and separate entity and that the parent company “*appeared not to have exercised any significant control*” over the subsidiary's business with its other major customers.¹⁰⁶

In relation to amounts that are excluded from annual turnover for penalty purposes, the court considered that “*the most natural meaning of the word 'enterprise' is business*” and noted that the parent was not carrying on the business of its subsidiary in relation to customers other than Toyota.¹⁰⁷ As a consequence, the subsidiary's turnover which related to such other customers was not taken into account, and the court applied a maximum penalty of AUD 10 million per contravention. While the decision is on appeal¹⁰⁸, as it stands the law seems to restrict the imputation of turnover to specific companies within a corporate group.

2.2.6. Recent Penalty Decisions

Our review of decisions goes up to November 2017. Recent examples of penalties arrived at other than by agreed settlement include:

- In *ACCC v Flight Centre*¹⁰⁹ the court ordered the payment of AUD 11 million. Flight Centre's annual turnover was said to be AUD 859 million in May 2008, AUD 766 million in December 2008 and AUD 766 million in May 2009. The ACCC contended that maximum penalty in respect of four of the contraventions was the greater of AUD 10 million, three times the relevant benefit gained from the contravening conduct or, in the event that the relevant benefit cannot be determined, 10% of the turnover of the body corporate during the applicable twelve month “turnover period.”¹¹⁰ On procedural grounds, the court held that the

ACCC could not advance such an argument when it did, and that the maximum penalty per contravention was AUD 10 million.¹¹¹ This decision is currently under appeal.¹¹²

- In *ACCC v Cement Australia Pty Ltd*¹¹³, the ACCC contended for a penalty of AUD 97.5 million. The Cement Australia Partnership had revenues of AUD 867.87 million in 2007, with profits (before income tax) of AUD 83.95 million.¹¹⁴ The pre-2007 version of section 76(1A) CCA was applicable – i.e. the maximum sanction per contravention was AUD 10 million. Neither company turnover nor benefit derived from the contravention could be used to set the maximum applicable penalty.¹¹⁵ The court ultimately imposed penalties in a total amount of AUD 17 120 000.¹¹⁶ The ACCC and Cement Australia Pty Ltd both appealed the penalty. The Full Court replaced the previous sanctions with a pecuniary penalty of AUD 20.6 million.¹¹⁷
- In *ACCC v Yazaki*¹¹⁸, regarding a cartel related to the supply of automobile parts (wire harnesses), Yazaki was ordered to pay pecuniary penalties totalling AUD 9.5 million. The ACCC contended for a pecuniary penalty in the range of AUD 42-55 million, while Yazaki contended for an AUD 4-6 million pecuniary penalty. The latest version of section 76(1A) CCA applied – meaning that the maximum penalty per contravention was the greater of AUD 10 million, three times the relevant benefit gained from the contravening conduct or, in the event that the relevant benefit cannot be determined, 10% of the turnover of the body corporate during the applicable twelve month “turnover period.”¹¹⁹ The ACCC has appealed this decision.
- *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha*,¹²⁰ the first criminal prosecution applying the regime adopted in 2009, concerned a cartel in the market for the supply of ocean shipping services for “roll-on, roll-off” cargo, mainly cars and trucks. The court imposed an AUD 25 million penalty. The offender NYK pleaded guilty to a single charge of giving effect to a cartel provision between July 2009 and September 2012. Taking into account the size of NYK, the maximum fine was AUD 100 million, since the annual turnover from supplies connected with Australia in the relevant 12 month period was AUD 1 billion.¹²¹ The fine incorporates a global discount of 50% for NYK’s early plea of guilty and past and future assistance and co-operation, together with the contrition inherent in or demonstrated by NYK’s early plea and co-operation.

Sanctions arrived at by joint settlement include:

- In *ACCC v Visy Industries Holdings Pty Ltd*¹²², the court imposed a penalty of AUD 36 million for 37 contraventions related to a cartel in the market for corrugated fibreboard packaging in Australia. The maximum applicable penalty per contravention under the applicable rules was AUD 10 million.¹²³ While strictly speaking this was not an agreed settlement, the ACCC proposed a penalty of AUD 36 million and Visy did not contest it.
- *ACCC v Qantas*¹²⁴ was a cartel case regarding fuel surcharges on the carriage of air cargo by suppliers of services for the international carriage of air cargo across their global networks. The pre-2007 version of section 76(1A) CCA applied – i.e. the maximum sanction per contravention was AUD 10 million, while turnover and the value of the benefit reasonably attributable to the contraventions could not

be used to set the maximum applicable penalty.¹²⁵ The ACCC and Qantas made joint submissions on penalty, agreeing to a pecuniary penalty of AUD 20 million. During the 4 years of the infringement (2002-2006), Qantas had total global annual revenues from airfreight of between AUD 512.75 and AUD 783.20 million. It was agreed between the parties that the revenue generated by Qantas as a result of the fuel surcharges to and from Australia during the relevant period was approximately AUD 175 million; Qantas has assets of nearly AUD 20 billion; Qantas' total profit before tax for the year ended 30 June 2007 was AUD 1.032 billion, and it derived revenue of AUD 902 million from the carriage of air freight for the same financial year.

- In *ACCC v Prysmian*¹²⁶, the third respondent (Viscas) admitted liability for its participation in a cartel related to land cables and was ordered to pay a pecuniary penalty of AUD 1.35 million. Two other participants in this cartel disputed the ACCC's claim in court, with one of them – but not the other – eventually being found to have participated in this cartel.¹²⁷ The participant found liable (Prysmian) was ordered to pay a pecuniary penalty of AUD 3.5 million.¹²⁸ The conduct took place in 2003, so it could not be subject to any penalty other than the AUD 10 million maximum per contravention.
- In *ACCC v Mitsubishi Electric Australia Pty Ltd*¹²⁹, a resale price maintenance case, the court took account of the respondent's turnover before accepting the submitted penalty. The respondent was an Australian subsidiary of Mitsubishi Electric Corporation of Japan, a corporation with consolidated revenue of about AUD 36 billion per annum. The maximum penalty per contravention was the greater of AUD 10 million, three times the relevant benefit gained from the contravening conduct or, in the event that the relevant benefit cannot be determined, 10% of the turnover of the body corporate during the applicable twelve month "turnover period".¹³⁰ The court accepted that the maximum penalty under the turnover test for each contravention would have been in the range of AUD 25 to AUD 30 million.¹³¹ The penalties imposed were AUD 2.2 million in total for three different contraventions.¹³²
- In *ACCC v NSK Australia Pty Ltd*¹³³ (A-NSK), the maximum penalty per contravention was the greater of AUD 10 million, three times the relevant benefit gained from the contravening conduct or, in the event that the relevant benefit cannot be determined, 10% of the turnover of the body corporate during the applicable twelve month "turnover period. The court imposed a pecuniary penalty of AUD 3 million on A-NSK, a wholly owned subsidiary of NSK Ltd of Japan, for two contraventions related to the cartelisation of the supply of ball and roller bearings and associated components (i.e. bearing products) in Australia to aftermarket customers. The court discussed how a pecuniary penalty of AUD 3 million against A-NSK achieved parity with the pecuniary penalty of AUD 2 million that the Court ordered against Koyo Australia which had previously admitted its participation in the relevant 2008 and 2009 conduct in contravention of the Act. The proposed higher pecuniary penalty against A-NSK was a result of its larger market share (approximately 10% to 13% of the Australian bearings market compared to the approximate 6% to 10% share of that market held by Koyo Australia). The sales revenue of A-NSK from the sale of bearing products to aftermarket customers in the Australian bearings market was AUD 22.77 million for the period from April 2008 to March 2009, and AUD 23.66 million for the period from April 2009 to March 2010. For the years

2009 and 2010, the sales revenue of Koyo Australia from the sale of bearing products to aftermarket customers in the Australian bearings market was AUD 7.1 million and AUD 8.4 million respectively. Koyo had also approached the ACCC to assist with the investigation at least nine months before NSK approached the ACCC to provide assistance.

- In *ACCC v Visa*¹³⁴, the court imposed a pecuniary penalty of AUD 18 million on Visa Worldwide for infringing provisions on exclusive dealing regarding services supplied by Visa Worldwide to financial institutions in Australia in respect of access to and participation in the Visa payment card network.¹³⁵ The maximum penalty per contravention was the greater of AUD 10 million, three times the relevant benefit gained from the contravening conduct or, in the event that the relevant benefit cannot be determined, 10% of the turnover of the body corporate during the applicable twelve month “turnover period.”¹³⁶ It was agreed that the annual turnover of Visa Worldwide was AUD 331 million, which meant that the maximum penalty payable by Visa Worldwide in respect of its admitted contravention was AUD 33.1 million.¹³⁷
- *ACCC v Colgate*¹³⁸ was concerned with two types of conduct, one being the anticompetitive exchange of information relating to the price of laundry detergent products, and the other being the withholding of supply of such products. Colgate was ordered to pay pecuniary penalties of AUD 18 million following an agreed submission by ACCC and Colgate. In the related *ACCC v Woolworths*¹³⁹, Woolworths agreed to pay pecuniary penalties in the amount of AUD 9 million.¹⁴⁰ The maximum penalty per contravention was the greater of AUD 10 million, three times the relevant benefit gained from the contravening conduct or, in the event that the relevant benefit cannot be determined, 10% of the turnover of the body corporate during the applicable twelve month turnover period.¹⁴¹
- *ACCC v ANZ*¹⁴² concerned attempts by two major Australian banks to collude with certain other banks in Singapore to manipulate a benchmark rate for a foreign currency and thereby fix, control or maintain the price of foreign exchange forward contracts calculated by reference to that benchmark rate. There were ten separate attempted contraventions by ANZ, and eight separate attempted contraventions by Macquarie. The maximum penalty per contravention was the greater of AUD 10 million, three times the relevant benefit gained from the contravening conduct or, in the event that the relevant benefit cannot be determined, 10% of the turnover of the body corporate during the applicable twelve month turnover period.¹⁴³ The ACCC and ANZ agreed and jointly submitted that the appropriate pecuniary penalty for each of ANZ’s attempted contraventions was AUD 900 000, resulting in pecuniary penalties totalling AUD 9 million. The ACCC and Macquarie agreed and jointly submitted that the appropriate penalty for each of Macquarie’s attempted contraventions was AUD 750 000, resulting in pecuniary penalties totalling AUD 6 million. It should be noted that: (i) the annual turnover in Australia of Malaysian ringgit NDFs was estimated at face value equating to approximately AUD 9 to AUD 10 billion in 2011; (ii) Macquarie in 2012 had a net operating income exceeding AUD 4 billion and profit exceeding AUD 600 million, though most would have come from other types of activity than the product in question; and (iii) ANZ had, in 2012, an operating income exceeding AUD 17 billion and profit before income tax of almost AUD 8 billion, though most would have come from other types of activity than the product in question. Nonetheless, the maximum penalty payable in

respect of each contravention was deemed to be AUD 10 million.¹⁴⁴ The deciding judge, while holding that the penalties were within an acceptable range, considered that they were at the “*very bottom of the range of available appropriate penalties*”.¹⁴⁵

3. International Practices on Pecuniary Penalties for Competition Law Infringements

3.1. Introduction

In this section, we look at how pecuniary penalties are applied in six representative jurisdictions (the European Union – as represented by the European Commission and the European courts, and distinct from its member states –, Germany, Japan, Korea, the United Kingdom and the United States). These jurisdictions provide a good sample of established competition jurisdictions, while also providing a valuable mix of characteristics that reflect the variety of competition law regimes across the world:

- The jurisdictions selected include common (United States and United Kingdom) and civil law (Germany, Korea) jurisdictions. Australia is a common law system.
- Regarding the entity that sets civil penalties, the selection includes both jurisdictions cases where a competition agency sets the penalty (European Union, Germany, Japan, Korea and United Kingdom) and regimes where courts determine what the appropriate penalty may be (United States, Germany in the event of an appeal¹⁴⁶). In Australia, courts are ultimately responsible for setting penalties.
- Regarding the types of courts that decide competition cases, the selection include jurisdictions where generalist courts decide such cases (Germany, Korea, Japan, United States), as well as jurisdictions where competition cases can be dealt with by specialist courts (European Union, United Kingdom). In Australia, generalist courts decide competition law cases.
- Regarding the existence of criminal liability alongside civil liability, the jurisdictions selected include both systems that do not provide for criminal sanctions (European Union, Germany¹⁴⁷) and systems where hard-core cartel activity is deemed a criminal activity (Japan, Korea, United Kingdom, United States). In Australia, hard-core cartel activity can be a criminal activity.

While it would seem from a preliminary analysis that the closest regime to the Australian system can be found in the United States, a number of significant differences in how competition law is enforced in these countries mean that great caution is required when extrapolating from the United States to Australia. First, the levels of criminal enforcement against individuals are much higher in the United States than in Australia, and hence the relative importance of pecuniary penalties against corporations is much higher in Australia than in the United States. Secondly, the US system is heavily reliant on private enforcement, and contains a series of rules to incentivise private parties to enforce competition law directly in court.¹⁴⁸ Unlike the United States, Australia is aligned with the vast majority of jurisdictions where competition law developed primarily as an administrative enforcement tool and is primarily a means for the state to intervene in the

market to protect consumers. In such systems, as in Australia, private enforcement has to date played a minor role (OECD, 2015: 3-4). As a result, and particularly as regards the imposition of pecuniary penalties for infringements of competition law, the experience of jurisdictions other than the United States may prove more relevant for Australia.

In any event, a review of the selected jurisdictions as regards the setting of pecuniary penalties for infringements of competition law finds substantial similarities in the ways such penalties are set in those jurisdictions.¹⁴⁹ As discussed in more detail in this section, despite some differences all jurisdictions reviewed can be said to:

- Have the ability to impose pecuniary penalties on corporations. Other than the European Union, all jurisdictions also have the ability to impose sanctions on individuals (ICN, 2017: 10).
- Have as one of their main goals the deterrence of corporations from engaging in anti-competitive conduct when determining the applicable penalties. Certain jurisdictions may also follow other objectives, such as punishment or the disgorgement of profits, or may consider these objectives to be relevant for deterrence. However, the relevance of objectives other than deterrence is limited for civil pecuniary penalties. For example, the United States relies largely on criminal prosecution for its public enforcement of competition law, and Korea and Japan limit punishment to criminal prosecutions which are distinct from civil procedures leading to the imposition of pecuniary penalties.
- Broadly follow a methodology when setting the amount of a pecuniary penalty that includes: (i) identifying an initial amount that will provide a basis to calculate a final pecuniary penalty (i.e. the ‘base penalty’); (ii) amending the base penalty to reflect aggravating and mitigating circumstances; and (iii) adjusting the final amount of the pecuniary penalty to ensure deterrence, adequateness and that it does not exceed the maximum penalty allowed by law.
- Have published guidelines that describe how base pecuniary penalties should be calculated, and which factors should be considered when adjusting them.
- Rely on corporate turnover for the relevant product, or on a similar concept that seeks to identify the economic impact of the competition infringement, to determine the base pecuniary penalty, and ultimately the final amount of the penalty.
- Take into account a wide array of aggravating or mitigating circumstances when determining the final amount of a pecuniary penalty. Examples of aggravating circumstances include: recidivism; playing the role of leader, instigator or coercer; and involvement of senior management. Examples of mitigating circumstances include: co-operation with the investigating authorities; compliance programmes; and minor role in the infringement.

In the jurisdictions reviewed, competition laws prohibit both anticompetitive agreements and anticompetitive unilateral practices, even if in the United States public enforcement is in practice directed exclusively at cartels.¹⁵⁰ In the other five jurisdictions reviewed, public enforcement has been mainly directed at cartels as well, with significantly more decisions regarding horizontal agreements than regarding abuses of dominant position. Over the past five years, the European Union and Korea have only adopted sanction decisions in five abuse of dominance cases each;¹⁵¹ the United Kingdom has adopted two

sanctioning decisions on abuse of dominance;¹⁵² Germany has sanctioned one case for abuse of dominance;¹⁵³ and Japan does not have any abuse of dominance decision.

3.2. The objectives of pecuniary penalties

Around the world, the vast majority of competition law systems impose sanctions with a view to ensure general and specific deterrence. Additional goals that are pursued by some jurisdictions but not others include punishment and the recovery of any unlawful gains obtained by offenders at the expense of their customers (OECD, 2016a: 9; ICN, 2017: 5-6).

Pecuniary penalties have the objective of ensuring deterrence in all jurisdictions reviewed. With the exception of the United Kingdom, all these jurisdictions also express a goal to punish the participants in a cartel. However the European Union seems to perceive punishment of past conduct as an element of deterrence of future infractions (ICN, 2017: 7), while Korea and Japan limit punishment to criminal prosecutions and do not consider it an objective of civil penalties. In Korea, the recovery of illicit gains is seen as the main objective of civil pecuniary penalties against corporations. Such an objective has also been identified as a goal of fining policy in the European Union, Germany, Japan, and the United States (ICN, 2017: 5-6).

3.2.1. European Union

Public enforcement is a key driver of antitrust enforcement in the European Union. Its purpose is to ensure effective deterrence by detecting infringements of competition rules and imposing sanctions (OECD, 2016b: 9). Pursuant to the European Commission's fining guidelines, pecuniary penalties: "*should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to [competition law] (general deterrence).*" (European Commission, 2006: para. 4).

This means that pecuniary penalties should not only punish past behaviour, but also that their level must deter that particular corporation, or any other, from entering into anticompetitive conducts in the future. To this end, pecuniary penalties may be increased to ensure that pecuniary penalties have a sufficient deterrent effect and repeat offenders will be sanctioned more heavily. The European Commission: "*will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.*" (European Commission, 2006: para. 31).

3.2.2. Germany

Under the German fining guidelines: "*the punishment must be adequate to [the size of the company, the] further circumstances of the offence and offender and be justifiable in terms of special and general deterrence effect.*" (Bundeskartellamt, 2013: para.4)

In addition to deterrence, other objectives may include punishing the infringing party and the disgorgement of economic benefits obtained in breach of competition (Bundeskartellamt, 2013: para.17). However, the recoupment of any economic benefit an offender may have derived from the infringement is kept logically distinct from the process of quantifying pecuniary penalties. The competition agency is entrusted with the power to skim off illicit gains either in the main proceedings leading to the imposition of the pecuniary penalty, or in separate proceedings. If the authority decides to confiscate excess profits in the context of the main proceedings, the total sum imposed may well

exceed the statutory cap set for pecuniary penalties for the infringement of competition law (ICN, 2017: 7).

The recovery of unlawful profits is, however, optional and lies at the discretion of the German competition authority. The reason for this is that the standard for proving the exact amount of the illicit gain is high and the underlying data is not easy to obtain. Thus, in cases where the authority expects private damage claims to take place, or where it prioritises other uses for its limited resources, the competition authority will usually decide against disgorging illicit gains in addition to imposing pecuniary sanctions (ICN, 2017: 7).

3.2.3. Japan

In Japan, the objective of civil pecuniary penalties is to prevent cartels or other offences. Civil penalties were nonetheless originally limited to the disgorgement of illegal profits from anticompetitive conduct. In order to enhance deterrence, the Anti-Monopoly Act was amended to increase the applicable civil pecuniary penalty in such a way that the penalty could exceed the amount of illegal gains, and thus serve as a deterrent against cartels (Marquis and Seryo, 2014).

The objective of the civil pecuniary penalties is not punitive. Punishment is an objective pursued through criminal sanctions alone (OECD, 2016a: 10; 2016c: 3). Under criminal rules, hard core cartels and bid rigging shall be punished by imprisonment with work for not more than five years, or by a pecuniary penalty of not more than JPY 5 million (about AUD 57k). The Japan Fair Trade Commission has a policy of only bringing criminal prosecution cases when administrative measures are not suitable to attain the Anti-Monopoly Act's objectives, such as vicious and serious violations or repeated violations (OECD, 2016a: 10; 2016c: 3).

In order to avoid criticism that a civil pecuniary penalty could lead to double jeopardy, the Japan Fair Trade Commission defines such penalties as surcharges, i.e. the mere collection of the economic gain derived from illicit behaviour.¹⁵⁴ Furthermore, if a criminal pecuniary penalty is imposed in the same case, a surcharge is decreased by an amount equal to half of the amount of a criminal pecuniary penalty (Marquis and Seryo, 2014).

3.2.4. Korea

In Korea, civil sanctions have as their main objective the recovery of unlawful profits. While punishment is also an objective of the Korean competition system, it is an objective pursued solely through criminal sanctions. In order to avoid the duplication of punishment for the same conduct, it has been emphasised that civil pecuniary penalties seek solely the recovery of illegal gains obtained through antitrust infringements (OECD, 2016d).

While enforcement is pursued mainly through administrative sanctions, Korea also uses criminal sanctions.

3.2.5. United Kingdom

The UK Competition Act 1998 provides that, when fixing the amount of the financial penalty for an infringement, the Competition and Markets Authority ("CMA") must have regard to both the seriousness of the infringement and the desirability of deterring both the penalised corporation and others from infringing competition law in the future.¹⁵⁵ The

CMA emphasises the importance of deterrence in its two dimensions (general deterrence and specific deterrence).¹⁵⁶

3.2.6. *United States*

The imposition of a sentence under U.S. law is governed by 18 U.S.C. § 3553, which requires courts to “*impose a sentence sufficient, but not greater than necessary, to comply*” with specified purposes. These purposes include the need to “*reflect the seriousness of the offense . . . and to provide just punishment for the offense*” as well as the need to “*afford adequate deterrence.*” Given the seriousness of cartel offenses, the Federal Sentencing Guidelines require a minimum pecuniary penalty of 15 percent of the volume of affected commerce for the least serious case, which is thought to ensure that pecuniary penalties imposed in antitrust cases will exceed the average monopoly overcharge.¹⁵⁷

It should be noted, however, that in U.S. federal competition law enforcement, sanctions are used almost exclusively against hard-core cartel activity, which is a crime. Furthermore, unlike in the other jurisdictions reviewed, individual accountability is a cornerstone of effective cartel enforcement in the United States, and the principal cartel deterrents are the threat of imprisonment for culpable individuals and of private damages claims (OECD, 2016e: 2).

3.3. Common Principles Regarding Transparency and Pecuniary Penalty Setting

3.3.1. *Transparency*

All jurisdictions reviewed have some form of public guidance which provides clearly defined steps that must be followed when determining pecuniary penalties.¹⁵⁸ Adopting public guidance does not mean that discretion is fettered. Instead, it is common for the entity imposing pecuniary penalties to have a large amount of discretion either under the terms of the guidelines, or by being able to depart from that guidance:

- An example of extensive discretion within the scope of guidelines can be found in Germany, where adjustments to the base amount of a pecuniary penalty are: “*based on an overall appraisal of all aggravating and mitigating factors*” (Bundeskartellamt, 2013: para. 8-16).
- An example of discretion to depart from the guidelines can be found in the United Kingdom, where the CMA may depart from the penalties guidance where there are good reasons for doing so.¹⁵⁹ This is so even though it is a statutory requirement for the CMA to prepare and publish guidance as to the appropriate amount of the penalty, and the CMA and the Competition Appeal Tribunal are required to have regard to the guidance when setting the financial penalty for any infringements in respect of which such penalties can be imposed.¹⁶⁰

Transparency in penalty setting is not only related to good enforcement practice and openness of information, but also to other factors such as the relationship between the predictability of sanctions and deterrence. Guidelines are thought to deter corporations from anticompetitive conduct by making clear that the expected costs of engaging in the conduct are substantial and can exceed the potential gains. In addition, guidelines enable authorities to implement a consistent sanctioning policy, thereby avoiding pressure for unfair special treatment in certain individual cases.¹⁶¹

Public guidance has been adopted not only in regimes where administrative agencies determine the amount of pecuniary penalties, but also where such competence belongs to the courts. The best example of this is the United States. Before guidelines were introduced there in 1987, the sentence imposed on a defendant in the United States was left largely to the discretion of judges, subject to offence-specific statutory minimum and maximum sentences. In 1984, Congress passed the Sentencing Reform Act, which created a permanent commission charged with developing sentencing guidelines to define parameters that sentencing judges should follow in their sentencing decisions. While the guidelines were originally deemed mandatory to sentencing judges, in *United States v. Booker* the Supreme Court held that the sentencing guidelines only have an advisory status for sentencing judges.¹⁶²

3.3.2. Penalty-setting methodology

As already noted in Section 3.1 above, a common approach can be said to have been adopted in all comparator jurisdictions, which includes the following three steps: (i) determination of base pecuniary penalties; (ii) adjustments (including taking into account aggravating and mitigating circumstances); and (iii) adjustment of amount to ensure that pecuniary penalty is sufficiently deterrent, adequate and that the legal maximum is not exceeded. An additional final step, which we will shortly review in the context of mitigating circumstances, is to make final adjustments to reflect immunity and leniency policies. As noted above, each jurisdiction has also set out those steps in detail in guidelines.

While an international common practice regarding the setting of pecuniary penalties can be said to exist, each jurisdiction follows a methodology of its own that reflects the local characteristics of competition law enforcement. A good example of this is how the methodology for the calculation of pecuniary penalties reflects the objectives that the statutory frame set for pecuniary penalties. If pecuniary penalties should not only punish past behaviour but also deter anticompetitive conduct in the future, pecuniary penalties may be increased to ensure that they have a sufficient deterrent effect. Thus, in the European Union the European Commission may increase a pecuniary penalty to ensure that the penalty has a sufficient deterrent effect, particularly where the infringement has an impact beyond the sale of goods or services to which it directly relates; and, in the United Kingdom, the CMA can increase a pecuniary penalty to ensure specific deterrence.¹⁶³

3.4. Penalty Setting Methodologies in Detail

While a common international practice can be identified based on a three-step approach, each jurisdiction reviewed follows its own approach to each of these steps. This section will begin by providing an overview of each of these jurisdictions, before looking in detail at each one of these three methodological steps.

3.4.1. Overview

European Union

The European Union's fining guidelines adopt a three-step method for the determination of pecuniary penalties: (i) they set a basic amount for each offender by reference to their value of sales derived from the infringement. In order to deter hard core cartel conduct, the Commission will include in the basic amount an "entry fee" of between 15% and 25

% of the value of sales; (ii) they provide for adjustments to the basic amount to reflect the case's specific circumstances; and (iii) they provide for final adjustments to reflect the need for deterrence and to comply with the legal maximum.¹⁶⁴ This methodology can be departed from, however, if the particularities of a given case or the need to achieve deterrence in a particular case justify such a departure.¹⁶⁵

Germany

The German Federal Cartel Office (FCO) uses a two-step methodology for the setting of pecuniary penalties: (i) it determines a base penalty based on the domestic turnover arising from the sale of the products or services connected with the infringement over the duration of the infringement, with an upper limit of 10 per cent of the offending corporation's total annual worldwide turnover; and (ii) it determines the final pecuniary penalty via an overall assessment of aggravating and mitigating factors concerning the infringement and the offending party. The German guidelines do not set any specific value to the adjustments to be made in the light of aggravating and mitigating factors; instead, adjustments to the base penalty are: "*based on an overall appraisal of all aggravating and mitigating factors*" (Bundeskartellamt, 2013: para.8-16).

Japan

In Japan, a pecuniary penalty is determined by: (i) calculating a base penalty that reflects the size of the company and the seriousness of its conduct; (ii) adjusting this base penalty following criteria set in the Antimonopoly Act. The calculation of the pecuniary penalty must strictly follow the provisions set out in the Antimonopoly Act, which does not allow any discretion of the decision-making body with regards to the issuance of the pecuniary penalty order and the calculation of its amount (OECD, 2016c: 3).

Korea

The Korean competition authority (KFTC) follow a four-step method to determine civil pecuniary penalties: (i) it determines a base penalty range depending on the degree of seriousness of the conduct; (ii) 1st adjustment: it adjusts the base penalty based on period and frequency of the infringement; (iii) 2nd adjustment: it adjusts the pecuniary penalty based on factors concerning the offender; and (iv) it considers the offending corporation's ability to pay.

United Kingdom

The CMA guidelines set out five steps (and an additional one regarding the impact of its immunity and leniency programme) for the calculation of penalties. These are as follows: (i) calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking; (ii) adjustment for duration; (iii) adjustment for aggravating or mitigating factors; (iv) adjustment for specific deterrence and proportionality; (v) adjustment if the maximum legal penalty is exceeded or to avoid double jeopardy. As already mentioned above, the CMA is not bound by the penalties guidance: the CMA may depart from the penalties guidance where there are good reasons for doing so.¹⁶⁶

United States

The United States differs from all the above jurisdictions in that an administrative agency does not set the pecuniary penalty. Rather, the amount of pecuniary penalties is

determined by a non-specialised court which adjudicates antitrust cases. Nonetheless, since 1987 both individual and corporate sanctions for cartel activity have been governed by guidelines promulgated by the United States Sentencing Commission. These guidelines set out the following methodology for the determination of pecuniary penalties: (i) calculation of a base pecuniary penalty; (ii) adjustment based on a culpability score.¹⁶⁷

The guidelines prescribe sentencing ranges from within which a sentencing court must select a sentence. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for its departure from the guidelines.¹⁶⁸ In cartel cases, companies typically enter into settlements with the government that specify the fine amount.

3.4.2. Step I – Calculation of Base Pecuniary Penalties

When calculating base pecuniary penalties, all jurisdictions reviewed take two considerations into account: (i) an initial measure, which seeks to reflect the offending corporation’s illegal gain from the anticompetitive conduct or the presumed damage to consumers; (ii) a rate applicable to this initial measure, which will lead to the identification of a base penalty (OECD, 2016a: 11; ICN, 2017: 19).

The initial measure

Most regimes around the world rely on concepts related to the corporation’s turnover when determining the initial measure of a pecuniary penalty. Turnover can be measured by reference to the product-related turnover of the perpetrator of the offence, or to the total turnover of the corporation in the jurisdiction at hand, or even to the worldwide consolidated turnover of the corporate group to which the perpetrator of the offence belongs. Different, but related measures can be found in the United States, which relies on the volume of affected commerce as the basis for determining pecuniary penalties.

There are two main elements that must be taken into account when determining the initial measure of a pecuniary penalty: the scope of the relevant corporate activity, and its duration.

Scope of Activity

While some jurisdictions are known to refer to global turnover when determining the initial measure of a pecuniary penalty, in most jurisdictions – and in all of the jurisdictions reviewed here – this initial measure is determined by reference to the value of sales on the relevant market affected by the infringement, usually through proxies such as relevant turnover, value of affected sales and/or value of affected commerce.¹⁶⁹

European Union – The European Union looks at the “value of sales in the relevant market”, i.e. the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the European Economic Area during the last full business year of the undertaking’s participation in the infringement (European Commission, 2006: para. 13).¹⁷⁰

Germany – In Germany, the relevant turnover to determine the initial measure of a pecuniary penalty is “the domestic turnover achieved by the corporation from the sale of the products or services connected with the infringement over the duration of the violation”. This reflects an assumption of “gain and harm potential of 10% of the

company's turnover achieved from the infringement during the infringement period" (Bundeskartellamt, 2013: para.10-11).

Japan – Japan starts by taking into account the amount of the sales or purchases of the goods or services in question during the period of the infringement, up to a three years maximum.

Korea – Korea looks at the “related turnover” of the offending party, i.e. the turnover of an offending corporation from the sale of goods or services in specific transaction areas during the period of violation, or the corresponding amount thereof.¹⁷¹

United Kingdom – In the United Kingdom, the initial measure is set by reference to the “the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement” during the last business year preceding the date when the infringement ended (OFT, 2012: para. 2.7).

United States – Calculation of a pecuniary penalty in the United States starts by looking at the volume of commerce attributable to a participant in an antitrust infringement, which is the volume of commerce done by the participant’s principal in goods or services that were affected by the violation. When multiple counts of infringement are involved, the volume of commerce should be treated cumulatively to determine a single, combined offence level.¹⁷²

Temporal Dimension

When setting the initial measure of a pecuniary penalty, the duration of the infringement is taken into account in all jurisdictions reviewed. However, some slight differences in calculation method exist between jurisdictions, especially when taking into account periods of less than a year (OECD, 2016a: 12).

Another way in which time is relevant for the determination of the initial measure concerns the identification of the period during which the relevant turnover / value of commerce should be measured. In the European Union and the United Kingdom, the relevant turnover or value of sales are those of last full business year of the offending corporation’s participation in the infringement. By contrast, in Korea, Japan, Germany and the United States, the whole period of infringement within the statute of limitations is taken into account.

European Union – In the European Union, the duration of an infringement is taken into account by multiplying the relevant turnover during the last full business year of the offending corporation’s participation in the infringement by the number of years that participation lasted. Periods of less than six months will be counted as half a year. Periods longer than six months, but shorter than one year, will be counted as a full year (European Commission, 2006: para. 24).¹⁷³

Germany – In Germany, the duration of an infringement will be considered when determining pecuniary penalties. In cases in which the infringement lasted less than 12 months, the calculation will be based on a period of 12 months irrespective of the actual duration of the infringement. The last 12 months before the infringement ceased are relevant in this respect (Bundeskartellamt, 2013: para.12).

Japan – In Japan, the initial measure is set by reference to the period of the infringement. However, Japan only considers a maximum of three years when taking into account of the duration of the infringement.¹⁷⁴

Korea – In Korea, the full period of the infringement is taken into account when setting out the initial measure of a base penalty (OECD, 2016d).

United Kingdom – In the United Kingdom, the initial amount may be multiplied by the number of years that the infringement lasted. Where the total duration of an infringement lasts longer than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up part of a year to a full year. Where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement (OFT, 2012: para. 2.12).

United States – In the United States, the length of the duration of infringement is fully taken into account when determining the initial measure.

Calculation of the base penalty

All jurisdictions reviewed calculate the base amount of pecuniary penalty as a percentage of the initial measure identified through the mechanisms described above. This percentage falls within a specific range that reflects the gravity of the conduct and its duration (OECD, 2016a: 13; ICN, 2017: 24-26). Below are listed the maximum percentages in each of the jurisdictions reviewed.

Table 1. Calculating Base Penalties

Jurisdiction	Maximum percentage of initial amounts
European Union	30% of value of sales in the relevant market (plus 15-25% for cartels)
Germany	10% of domestic turnover from the sale of products and services connected with the infringement
Korea	3% of turnover from the sale of goods and services related to the transaction for abuse of dominance 10% turnover from sale of goods and services related to the transaction for cartels
Japan	10% of sales or purchases of goods or services involved in the infringement for cartels and private monopolisation ¹ (control type) 6% of sales or purchases of goods or services involved in the infringement for private monopolisation (exclusion type)
United Kingdom	30% of turnover in the relevant product and geographic market affected by the infringement during last year of infringement
United States	20% of value of commerce attributable to infringing party in goods or services affected by the infringement

Notes: ¹ Within private monopolisation (which is broadly similar, but not identical, to abuse of dominance in the European Union), there are two distinct types of infringement– control type and exclusionary type. The difference concerns the type of conduct. Very roughly speaking, control-type conduct (which very rare in practice) occurs where the company restricts competition by controlling other companies or the market. Exclusionary conduct has the same meaning as in other jurisdictions.

Source: OECD (2016a) ‘Sanctions in Antitrust Cases: Background paper’, p. 13-14.

European Union – The European Commission reflects the gravity of an infringement by calculating a proportion of the net value of sales during the last full business year. This proportion will be set at a level up to 30% of the value of sales depending on the gravity of the infringement, which in turn depends on several factors including the nature of the infringement (e.g. abuse of market dominance, price fixing, market sharing), its geographic scope, and whether the infringement has been implemented. In practice, this level varies on a case by case basis. For cartels, the proportion tends to be in the range of 15-20%. The Commission will add a sum equal to 15% to 25% of relevant yearly sales to the penalty as an "entry-fee" to deter undertakings from entering into price fixing, market

sharing and output limitation agreements. The Commission may also add an entry-fee to other infringements.¹⁷⁵

Germany – In Germany, it is assumed that an infringement of competition law leads to a gain and harm potential of 10% of the corporation's domestic turnover arising from the sale of the products or services connected with the infringement over the duration of the infringement (Bundeskartellamt, 2013: para.12). This amount is then adjusted by reference to the size of the offending corporation.¹⁷⁶

Japan – The percentage of relevant turnover taken into account for the purpose of identifying the base penalty depends on the type of conduct and business pursued by the offending corporation.¹⁷⁷

Table 2. Base Penalty Rates Applied to Value of Sales or Purchases of Goods or Services involved in the Infringement in Japan

	Cartel and bid rigging		Private monopolisation ¹	
	Large enterprises	Medium & Small enterprises	Control type	Exclusionary type
Manufacturing, construction, transportation etc.	10%	4%	10%	6%
Retail	3%	1.2%	3%	2%
Wholesalers	2%	1%	2%	1%

*Note:*¹ See OECD (2016a) ‘Sanctions in Antitrust Cases: Background paper’, p. 13-14.

Source: OECD.

Korea – In Korea, the percentages applicable to the initial amount are broken into three categories that reflect the nature and gravity of the conduct. Furthermore, different percentages are applicable under each category depending on whether the infringement is an anticompetitive agreement (i.e. cartel) or a unilateral conduct (i.e. abuse of dominant position). The three categories are: (i) highly significant infringement (7-10% for cartels, 2.3-3% for abuse of dominance); (ii) significant infringement (3-7% for cartels, 1.5-2.3% for abuse of dominance); and (iii) not very significant infringement (0.5-3% for cartels, 0.3-1.5% for abuse of dominance). When assessing the nature and gravity of infringements in order to determine the applicable percentage, the Korean competition authority will consider several factors, including: the conduct's qualitative effects; the extent of damage/amount of illegal gains; the market share(s) of the offender(s); the amount of related turnover; and the size of the geographic markets affected by the infringement (OECD, 2016a: 13-14).

United Kingdom – The applicable percentage will depend on the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. When making its assessment, the competition authority will consider a number of factors, including: the nature of the product; the structure of the market; the market share(s) of the undertaking(s) involved in the infringement; entry conditions and the effect of the conduct on competitors and third parties; the need to deter other undertakings from engaging in such infringements in the future; and the damage caused to consumers directly or indirectly.¹⁷⁸ Each assessment of the starting point will be conducted on a case-by-case basis for all types of infringement, taking into account all the circumstances of the case.¹⁷⁹

United States – In the United States, the percentage applicable to bid rigging, price fixing or market allocation agreements is generally set at 20% of the volume of affected

commerce. While it is estimated that the average gain from price-fixing is 10% of the selling price, the loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who do not buy the product at the higher prices. Because the loss from price-fixing exceeds the offender corporations' gain, 20% of the volume of affected commerce is to be used in lieu of pecuniary loss.¹⁸⁰

3.4.3. Step II – Adjustment of the base penalty: Aggravating and mitigating circumstances

In all jurisdictions reviewed, the base pecuniary penalty is subject to adjustment for aggravating and mitigating circumstances. The most common aggravating and mitigating circumstances are listed below. Naturally, different jurisdictions take into account different sets of aggravating and mitigating circumstances. Furthermore, in Japan aggravating and mitigating circumstances do not allow discretion to be exercised to adjust the size of the pecuniary penalty. Since the goal of civil sanctions is merely to recover the economic gain derived from anticompetitive conduct, the only adjustments allowed consist in the application of mandatory rates which have been set in advance by reference to the ordinary profit rate of the industry type identified in corporate statistics over the past ten years.

Aggravating Circumstances

- Coercive or retaliatory measures to ensure continuation of the infringement
- Duration of the infringement
- Type of infringement
- High degree of organization
- Intentional conduct
- Involvement of senior management
- Leading role of the offending corporation in the conduct
- Obstruction of the investigation
- Recidivism
- Size of firm
- Tolerance of criminal activity
- Violation of an order

Mitigating Circumstances

- Acceptance of responsibility
- Compensation of injured parties
- Co-operation with the investigation
- Effective compliance programme
- Infringement authorized/encouraged by legislation/public authorities
- Infringement committed negligently
- Minor role in the infringement
- Non-implementation
- Participation under duress
- Self-reporting
- Size of firm
- Termination of the infringement as soon as investigation starts
- Uncertainty as to unlawfulness of conduct

Below, we pursue a short analysis of some aggravating and mitigating circumstances. The selection is mostly based on how common these aggravating and mitigating circumstances are; the exception is compliance programmes, which role as a mitigating circumstance is controversial at the international level.

3.4.3.1 Aggravating circumstances

Recidivism

Recidivism features as the most common aggravating factor across the world, with repeat offenders facing increased pecuniary penalties in all jurisdictions reviewed. Increased pecuniary penalties for recidivists are necessary since such companies were not effectively deterred from violating competition law by the pecuniary penalties already imposed upon them, and thereby show a propensity to infringe competition law (OECD, 2016a: 13; ICN, 2017: 15).

European Union – In the European Union, the penalty increase for recidivism will be of up to 100% of the base penalty for each infringement. There is no limit of time since the last offence took place (European Commission, 2006: para. 28).

Germany - In Germany, recidivism is taken into account as an offender-related criterion, but no specific aggravation percentage is prescribed (Bundeskartellamt, 2013: para.16). The prior infringement must have taken place within the last 5 years (Bundeskartellamt, 2013).

Japan – In Japan, pecuniary penalties will be increased by 50% if the corporation was sanctioned for prior infringement decisions within the previous 10 years.¹⁸¹

Korea – In Korea, the base pecuniary penalty may be adjusted in the first adjustment stage by taking into account of recidivism. If a corporation committed a previous infringement within the last three years, the pecuniary penalty will be raised by up to 20%; if it committed two previous infringements during that period, the pecuniary penalty may be increased up to 40%; and if it committed three previous infringements during that time period, the pecuniary penalty may be increased by up to 50% (OECD, 2016d).

United Kingdom – In the United Kingdom, recidivism within 15 years of an infringement decision may result in an increase of up to 100% of the pecuniary penalty.

United States – In the United States, recidivism increases a corporation's culpability score by up to one point if the previous infringement was committed more than five but less than ten years before, and two points if the previous infringement occurred less than five years ago.¹⁸² This may result in an increase of pecuniary penalties of up to 16%. The Department of Justice likely would seek a pecuniary penalty near the top of the Sentencing Range in a case of recidivism. However, recidivism is extremely rare in the United States (OECD, 2016e: 4).

Playing the role of leader, instigator or coercer

All jurisdictions reviewed consider the role of an offending corporation as a leader, instigator or coercer in an infringement as an aggravating factor, reflecting a judgement that a corporation that takes the role of a leader or instigator bears a special responsibility. The differentiation of pecuniary penalties depending on the role played by the different cartelists is an effective instrument to raise the cost for those most active in operating a cartel (OECD, 2016a: 16-17).

European Union – In the European Union, a pecuniary penalty may be increased by 50% of the base pecuniary penalty where the Commission finds that an undertaking has taken a role of leader or instigator of an infringement (European Commission, 2006: para. 28).

Germany – In Germany, this factor is taken into account as an offender-related criterion, but no specific aggravation percentage is prescribed (Bundeskartellamt, 2013: para.16).

Japan – In Japan, pecuniary penalties will be increased by 50% if a corporation played a leading role in the illegal activity.¹⁸³

Korea – In Korea, the base penalty may be increased from 10% up to 30% for corporations which took or ordered retaliatory measures against other corporations that refused to participate in the infringement (OECD, 2016d).

United Kingdom – In the United Kingdom, the CMA guidance considers the “role of the undertaking as a leader in, or an instigator of, the infringement” as an aggravating factor that leads to an increase of up to 10% of the base pecuniary penalty (OFT, 2012: para. 2.14).

United States – In the United States, if the defendant was an organizer or leader of a cartel that involved five or more participants or was otherwise extensive, the culpability score shall be increased by 4 points. If the defendant was an organizer or leader of a cartel that involved less than five participants and that was deemed not to be otherwise extensive, the culpability score shall be increased by 2 points.¹⁸⁴

Involvement of senior management

While many jurisdictions take into account the role of senior management as an aggravating factor, there does not seem to be an international common practice in this regard (ICN, 2017: 30). This is reflected in the fact that, from our sample, only the United Kingdom and the United States explicitly consider involvement of senior management as an aggravating factor.

United Kingdom – In the United Kingdom, the participation of senior management and directors is an aggravating circumstance (OFT, 2012: para. 2.14). While there is no specific amount of aggravation of the base pecuniary penalty foreseen in the guidelines, in practice the base pecuniary penalty has been increased by up to 20% in cases where senior management was involved in cartel conduct.¹⁸⁵ Even if senior management had relatively little knowledge of the workings of the business, their presence at the meetings during which the agreement was concluded, and the fact that at that time they did not publicly distance the company from that agreement, constitutes involvement in the infringement.¹⁸⁶

United States – In the United States, high-level personnel’s participation in antitrust conduct is considered to be an aggravating factor.¹⁸⁷ From 1999 to 2008, the culpability scores of 87.8 percent of all organizations convicted of antitrust offences were increased due to the involvement of or tolerance by individuals who were either high-level or substantial authority personnel (Howell, 2009: 11).

3.4.3.2. Mitigating circumstances

Co-operation with the investigating authorities

The most common mitigating factor is co-operation with competition authorities. Co-operation may be taken into account as a mitigating factor or it may result in reductions in

pecuniary penalties under leniency programmes. The reduction in the amount of a pecuniary penalty for co-operation reflects the resources that can be saved because the authorities can obtain evidence proving the existence of infringements more quickly and at lower costs. Further, in the case of cartels co-operation may enable the authorities to prosecute cartelists successfully (OECD, 2016a: 17; ICN, 2017: 31).

While leniency and immunity programmes are not usually taken into account as mitigating factors, but are instead treated as an independent step that occurs after the pecuniary penalty calculation is finished, they shall be reviewed below for ease of exposition.

European Union – In the European Union, a reduction of the pecuniary penalty will be granted to offenders when the undertaking concerned has effectively co-operated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so. No specific penalty reduction amount is foreseen (European Commission, 2016: para. 29).

Furthermore, immunity from the payment of a pecuniary penalty will be granted to a corporation that disclosed its participation in an alleged cartel if that corporation is the first to submit information and evidence which enables the European Commission to carry out a targeted inspection in connection with the alleged cartel or find a competition infringement in connection with the alleged cartel.¹⁸⁸ Reductions in the amount of the pecuniary penalty can also be granted to corporations that provide evidence of the alleged infringement which represents significant added value with respect to the evidence already in the European Commission's possession. The reductions are: (i) for the first corporation to provide significant added value: a reduction of 30-50%; (ii) for the second corporation to provide significant added value: a reduction of 20-30%; and (iii) for subsequent corporations that provide significant added value: a reduction of up to 20%.¹⁸⁹

Germany – In Germany, while the fining guidelines do not list co-operation outside the scope of the leniency programme as a mitigating circumstance, co-operation with the investigating authorities may be taken into as a mitigating circumstance when setting the amount of a pecuniary penalty.¹⁹⁰

Regarding Germany's leniency programme, a pecuniary penalty to be imposed on a cartel participant is waived if he is the first to contact the competition agency in order to uncover the cartel. Immunity from pecuniary penalties can also be granted at a later date if the participant provides the competition agency with decisive evidence without which the existence of a cartel could not have been proved.¹⁹¹ A pecuniary penalty can be reduced by up to 50% for all other leniency applicants depending on the value of their contributions to proving the offence. The amount of the reduction shall be based on the value of the individual contributions to uncovering the illegal conduct and the sequence of leniency applications.¹⁹²

Japan – In Japan, co-operation with the authorities is not considered a mitigating circumstance. However, if a corporation ceases the infringement at least one month prior to the investigation start date, the base rate applied to the initial amount is reduced by 20%.¹⁹³

In the context of Japanese immunity and leniency rules, the first applicant for leniency that fulfils its conditions can benefit from full immunity from the payment of a pecuniary penalty if the leniency application is made before the investigation start date. The second applicant may benefit from a discount of up to 50% of the final pecuniary penalty if the leniency application is made before the investigation start date. Lastly, the third to fifth

applicants that submit a leniency application before the investigation start date, or any applicants that apply on and after the investigation start date, may benefit from a discount of up to 30%.¹⁹⁴

Korea – When an offender sincerely co-operated with an investigation, the pecuniary penalty may be reduced. Reductions can be of up to 20 per cent in case the corporation actively co-operates, for instance, by acknowledging its violation during the investigation stage, by submitting informative materials, or by testifying in the context of the case (OECD, 2016d: 4).

In the context of Korea's leniency programme, the first applicant to have fulfilled all necessary requirements will be granted full immunity from payment of a pecuniary sanction, while the second applicant to fulfil all conditions will benefit from a 50% reduction (OECD, 2016d: 4).

United Kingdom – According to the United Kingdom's fining guidelines, mitigating factors include co-operation which enables the enforcement process to be concluded more effectively and/or speedily (OFT, 2012: para. 2.15).

Regarding the United Kingdom's immunity and leniency programme, the first participant in a cartel to come forward with information that will allow the authorities to open an investigation into a previously unknown cartel will benefit from total immunity from financial penalties. Alternatively, total immunity or a reduction of up to 100% from financial penalties may be offered to a participant who is the first to come forward when the investigation into the cartel has already started and the information adds significant value. A participant which is not the first to come forward may benefit from a reduction of up to 50 per cent in the amount of the financial penalty imposed if it provides documents and information that genuinely advance the investigation.¹⁹⁵

United States – In the United States, the Federal Sentencing Guidelines decrease the culpability score by five points if the organisation reported the offence to the appropriate governmental authorities, fully co-operated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct. If the organisation did not self-report, but fully co-operated in the investigation and clearly demonstrated recognition and affirmatively accepted responsibility for its conduct, the culpability score is subtracted by two points. Finally, if the organisation did not self-report or co-operate, but clearly demonstrated recognition and affirmative acceptance of responsibility for its conduct, the culpability score is subtracted by one point.¹⁹⁶

Regarding leniency, the Department of Justice will not bring criminal charges against a corporation that either reports illegal cartel activity unknown to the authorities before an investigation has begun, or, if the Department of Justice is already aware of the cartel, it nonetheless does not yet have evidence against the corporation that is likely to result in a sustainable conviction. The granting of leniency is conditional on the corporation making restitution to injured parties, and the corporation not having been a leader, instigator or coercer of the cartel activity.¹⁹⁷

Compliance Programme

Implementation of antitrust compliance programmes may result in a reduction of the applicable pecuniary penalty in some jurisdictions. However, there is no international consensus on whether competition law offenders that have compliance programmes should receive lighter sanctions – which is reflected in the patchy adoption of this mitigating factor across the world.¹⁹⁸

There are different views on whether compliance programmes should be treated as a mitigating factor (OECD, 2012). On the one hand, it has been maintained that a substantial pecuniary penalty reduction should be granted to companies with effective compliance programmes. As regards regimes with effective criminal sanctions against individuals (i.e., the United States), it has also been argued that if a corporation has made a reasonable effort to comply with competition law it makes no sense to impose a pecuniary penalty on the corporation for the behaviour of its directors, officers or employees.¹⁹⁹ The opposite view holds that authorities should not give any credit for a compliance programme that did not work. In addition, granting penalty reductions will actually encourage anticompetitive activities by making them cheaper. Lastly, it is difficult for competition authorities or courts to distinguish sham compliance programmes from genuine ones (OECD, 2016a: 18-19).

This difference of approaches is reflected in the jurisdictions reviewed:

European Union – In the European Union, compliance programmes are not accepted as a mitigating factor.²⁰⁰

Germany – In Germany, compliance programmes are not treated as a mitigating factor.

Japan – In Japan, compliance programmes are not treated as a mitigating factor.

Korea – Korea used to take compliance programmes into account as a mitigating factor. Nonetheless, in 2014 the guidelines were amended so that compliance efforts are no longer considered a mitigating factor.²⁰¹

United Kingdom – While the adoption of adequate steps to ensure compliance with competition law may be taken into account as a mitigating factor, the mere existence of compliance activities will not be treated as a mitigating factor. Instead, the decision-making body will consider carefully whether a corporation's compliance activities in a particular case merit a discount from the penalty of up to 10%. Evidence of adequate steps having been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation (from the top down) – together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities – will likely be treated as a mitigating factor.²⁰²

United States – In the United States, the Sentencing Guidelines allow for the reduction of a pecuniary penalty if a convicted corporation had in place, at the time of the infringement, an effective compliance and ethics program.²⁰³ However, Guideline 8C2.5(f)(3)(B) establishes a rebuttable presumption that a corporation did not have an effective compliance programme if an individual with substantial authority within the corporation “participated in, condoned, or was wilfully ignorant of, the offense.” In most cartel cases in the United States, such individuals actively participated in the cartel activity. As a result, compliance efforts have very rarely been taken into account as a mitigating factor (OECD, 2016e: 2).

Minor role in the infringement

Limited participation in a cartel, or generally playing a minor role in an offence, is a mitigating circumstance recognised in a large number of jurisdictions. Similarly, failure to implement a cartel can be taken into account as a mitigation factor. The same way that taking a leading role in an infringement is an aggravating factor, some jurisdictions may reduce the amount of a pecuniary if the offender had a more passive role compared to other participants. The rationale behind this adjustment is not only to ensure that

pecuniary penalties are proportional to the gravity of the infringement, but also to raise the cost for those corporations most active in a competition law infringement (OECD, 2016a: 16-17; ICN, 2017: 31).

European Union – In the European Union, the basic penalty amount may be reduced where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market (European Commission, 2006: para. 29).²⁰⁴ In practice, this may be one of the most widely accepted mitigating factors. Since 2005, the European Commission has reduced pecuniary penalties in order to reflect an undertaking's limited role in a cartel 36 times, applying an average discount of 14.4% (French, 2015).

Germany – The competition authority in Germany takes into account the role of the corporation in the infringement. No specific discount amount is foreseen (Bundeskartellamt, 2013: para. 15).

Korea – In Korea, the relevant guidelines list as an attenuating circumstance the non-implementation of anticompetitive conduct (OECD, 2016d).

United Kingdom – In the United Kingdom, the role of the relevant corporation may be taken into account as a mitigating factor where, for example, it is acting under severe duress or pressure (OFT, 2012: para. 2.15).

United States – Limited participation is not directly considered under the Sentencing Guidelines, even though it may be indirectly reflected in the calculation of the corporation's culpability.²⁰⁵

3.4.4. Step III – Final Adjustments

After the base penalty has been adjusted to take into account of aggravating and mitigating factors, a number of final adjustments may still be required so that the final pecuniary penalty is adequate, sufficient to ensure deterrence, and does not exceed maximum legal limits.

3.4.4.1. Adequacy and Deterrence

As regards ensuring the adequacy and deterrence of a penalty, the main concern across the world seem to be to make sure that the penalty is suitable given the corporation's size: when determining the final amount of a pecuniary penalty, all jurisdictions reviewed consider the size of the offender in one way or another – even if this is not done at a final stage. The rationale behind this consideration seems to be to ensure that the penalty has a sufficiently deterrent effect.

European Union – In the European Union, the European Commission will pay particular attention to the need to ensure that pecuniary penalties have a sufficiently deterrent effect. For that purpose, it may – after having taken into account the base penalty, and aggravating and mitigating circumstances – decide to increase the pecuniary penalty to be imposed on corporations which have a particularly large turnover beyond the sales of goods or services to which the infringement relates. The European Commission may also take into account the need to increase the pecuniary penalty in order for it to exceed the amount of gains improperly made as a result of the infringement (European Commission, 2006: para 30-31).

Germany – In Germany, the size of the corporation is taken into account not as an autonomous third step, but at different steps of the calculation of the pecuniary penalty. The base penalty will be adjusted by a multiplication factor of: (i) 2-3 if the corporation's turnover is below EUR 100 million; (ii) 3-4 if the corporation's turnover is from EUR 100 million to EUR 1 billion; (iii) 4-5 if the corporation's turnover is from EUR 1 billion to EUR 10 billion; (iv) 5-6 if the corporation's turnover is from EUR 10 billion to EUR 100 billion; (v) over six if the corporation's turnover is above EUR 100 billion (Bundeskartellamt, 2013: para.13).

This calculation will lead to the identification of the upper limit of the pecuniary penalty range. Where the value arrived at under this formula is obviously too low, on account of a significantly higher gain and harm potential of the offender's conduct, this value can be exceeded in order to set an adequate pecuniary penalty (Bundeskartellamt, 2013: para.15). Furthermore, the decision-making body also takes the corporation's financial capacity into account as a potential aggravating or mitigating factor (Bundeskartellamt, 2013: para.16).

Japan – In Japan, as we saw above in Table 2, the base amount will be adjusted in accordance with a rate related to the size of and business categories of the infringing companies. No other adjustments are allowed as final adjustments.

Korea – If, after having taken into account aggravating and mitigating factors, the amount arrived at does not properly reflect elements such as the ability to pay of the offender, the effects the infringement has on the market, other market or economic conditions or the scale of profits gained by the infringement, the pecuniary penalty can be adjusted to reflect this (OECD, 2016d).

United Kingdom – After determining the base penalty and taking into account aggravating and mitigating factors, the decision-making authority will determine whether the overall penalty proposed is appropriate in the round. In carrying out this assessment, regard should be had to the size and financial position of the offending corporation, the nature of the infringement, the role of the corporation in the infringement, and the impact of the illicit activity on competition (OFT, 2012: para.2.16-2.17).

As a result, the amount of the penalty to be imposed may be increased to ensure deterrence. When considering whether to increase a penalty, regard should be had to appropriate indicators of the size and financial position of the corporation – including, where available, total turnover, profits, cash flow and industry margins – at the time the penalty is being imposed and, where relevant, at the time of the infringement. Such an increase will generally be limited to situations in which a corporation has a significant proportion of its turnover outside the relevant market, or where there is evidence that the offending corporation has derived or is likely to derive an economic or financial benefit from the infringement that is above the level of penalty.²⁰⁶ On the other hand, the penalty amount may also be decreased to ensure that the level of penalty is not disproportionate or excessive.

United States – The Sentencing Guidelines do not foresee any explicit rectification of the pecuniary amount after the factors listed in those guidelines have been taken into account. Nonetheless, firm size is taken into account when the base pecuniary penalty is being adjusted according to those guidelines. For example, the culpability score takes into account whether personnel with substantial authority in an organisation participated in, condoned, or were wilfully ignorant of the offense. If this condition is met, the culpability score increases with the size of the corporation: one point for 10 or more employees; two

points for 50 or more employees; three points for 200 or more employees; four points for 1,000 or more employees; and five points for 5,000 or more employees.²⁰⁷

3.4.4.2. *Legal Maxima*

Most legislative frameworks around the world provide for a maximum amount of pecuniary penalties that can be imposed for competition law infringements. These maxima may take the form of a specific monetary amount, or of a percentage of some other value – usually the relevant corporation’s total (worldwide) turnover. Some jurisdictions use the value of affected sales in the market concerned, while some focus on other criteria such as losses or gains caused by the practice. Lastly, some jurisdictions rely on a combination of these criteria – usually with the criterion eliciting the larger amount applying (ICN, 2017: 39).

All the jurisdictions reviewed apply legal maxima, which are reflected in the table below. Japan, however, has no legal maximum for civil pecuniary penalties, which reflects the mandatory application of the provisions set out in Japanese Anti-Monopoly Act which leaves no discretion to the penalty-setting authority.²⁰⁸

Table 3. Maximum Pecuniary Penalties

Jurisdictions	Maximum Pecuniary Penalties	
	Corporations	Individuals
European Union	10% of total world-wide turnover during the preceding business year	Not Applicable
Germany	10% (or, in the case of an infringement attributable to negligence, 5%) of world-wide turnover in the business year preceding the authority’s decision	EUR 1 million (bid-rigging only)
Korea	Cartel: 10% of the undertaking’s relevant turnover Abuse of dominance: 3% of the undertaking’s relevant turnover	KRW 200 million
Japan	Criminal sanctions: JPY 500 million	Criminal sanctions: JPY 5 million
United Kingdom	10% of total world-wide turnover during the last business year	Magistrate Court: GBP 5 000; Crown Court: no limit
United States	The greatest of USD 100 million, twice the pecuniary gains derived from the criminal conduct, or twice the pecuniary loss caused to the victims of the crime	The greatest of USD 1 million, or twice the gross pecuniary gains the offenders derived from the crime

Source: OECD.

An important distinction must also be drawn regarding the entity by reference to which these maxima are measured. Two main approaches can be found:

- According to the first approach, the autonomy of corporate bodies and legal form must be respected. In jurisdictions that follow this orientation, the mere ownership of 100% of a subsidiary will not suffice to attribute liability to the parent company for a subsidiary’s conduct; nor does it create a presumption that the parent company exercises the degree of control over the subsidiary necessary to impute liability on the parent company for the subsidiary’s conduct (OECD, 2016a: 25).
- A second approach tends to look at the whole corporate group.²⁰⁹ In the European Union, for example, the focus is the economic reality underlying the corporate structure that infringed competition law. The unit of analysis is not the specific legal entity that committed the infringement, but the relevant “undertaking”, which can include several different legal entities which, by virtue of their structural and contractual links, operate as a single economic unit in a specific

market.²¹⁰ The corollary of this is that, when attributing liability for an infringement, several legal entities belonging to the same undertaking may be held liable. This means that liability will be attributed jointly and severally not only to the offending corporation, but also to its parent company (and, by extension, to the wider corporate group to which the corporation belongs) when the parent was capable of determining the commercial policy pursued by this subsidiary, i.e. when this subsidiary did not independently determine its conduct in the market.

This phenomenon of parental liability can have substantial consequences for the way pecuniary penalties are calculated. The most important is that any maximum statutory limits for pecuniary penalties (e.g. 10% of the worldwide turnover) apply to the undertaking as a whole (i.e. the corporate group) and not to individual companies. As a result, subsidiaries may be held liable for higher pecuniary penalties than the cap that would apply to them as an individual company. This avoids the possibility that large groups which (intentionally) participate in cartels via one of their very small subsidiaries may benefit from the lower maximum statutory limit of the pecuniary penalty. Another relevant implication concerns recidivism: rules on a repeating offender apply to the economic unit, which may increase the risk that this aggravating circumstance will be applied (ICN, 2017: 14; OECD, 2016: 26).

3.4.4.3. *Inability to Pay*

As pecuniary penalties imposed for breaches of competition laws have increased substantially in recent years, companies often claim that the imposition of high penalties could drive them out of the market. Most jurisdictions take this claim seriously (OECD, 2016a: 23). While some jurisdictions approach the question from a legal point of view, applying the principle of proportionality, others take an economic approach and hold that the imposition of a pecuniary penalty should not lead to the driving out of the market of the corporation in question, thus causing an additional harm to competition. It is also possible that these two approaches are mixed in certain circumstances (ICN, 2017: 34). Another distinction that can be made regarding how jurisdictions treat claims of inability to pay is between those jurisdictions that deal with inability to pay only after the final penalty has been set and autonomously of other considerations, and those jurisdictions which take it into account when determining the final amount of the pecuniary penalty, e.g. as a mitigating factor.

However, reductions in the amount of pecuniary penalties due to the addressees' inability to pay may undermine the legitimacy and credibility of competition regimes. Therefore, such claims must be addressed through specific, objective, and transparent criteria. There are several alternatives available to maintain deterrence without increasing the likelihood of bankruptcy of the offending corporation. For example, some authorities provide for extended payment periods or payment in instalments, rather than reducing the amount of the applicable pecuniary penalty (OECD, 2016a: 24).

The jurisdictions reviewed deal with such claims differently:

- *European Union* – In the European Union, the European Commission may, in exceptional cases, take into account the corporation's inability to pay in a specific social and economic context. Reductions granted for this reason will not be based on the mere finding of an adverse or loss-making financial situation. Instead, a reduction will be granted solely on the basis of objective evidence that the imposition of a pecuniary penalty in the foreseen amount would irretrievably

jeopardise the economic viability of the corporation concerned and cause its assets to lose all their value (European Commission, 2006: para. 35). Despite this apparent strictness, the European Commission has accepted numerous claims of inability to pay, and substantially reduced pecuniary penalties in order to avoid undermining the corporations' financial viability.²¹¹

- *Germany* – In Germany, the ability of an undertaking to pay the pecuniary penalty is taken into consideration when determining the amount of the pecuniary penalty, where the corporation's economic viability is a factor to be taken into account. The competition authority is not authorized to skim off the profit obtained in the course of the unlawful conduct if the recovery of the profits would threaten the existence of the corporation. The inability of an undertaking to pay the pecuniary penalty can also be taken into account by granting the corporation accommodations for payment (Bundeskartellamt, 2013: para.16; ICN, 2017: p.35).
- *Japan* – In Japan, inability to pay is not taken into account.
- *Korea* – In Korea, the competition authority can take into account the corporation's financial condition. Ultimately, if a corporation lacks the ability to pay the penalty for a number of reasons e.g. because it is undergoing a process of reorganization, penalties may be reduced or exempted. In case of a corporation with impaired capital, the penalty can be reduced by 50%; when the corporation's impaired capital exceeds 50% of total assets, the penalty can be reduced by more than 50% (ICN, 2017: 35).
- *United Kingdom* – Under exceptional circumstances, a corporation's inability to pay the penalty proposed as a result of its financial position may lead to a reduction of the penalty. However, such financial hardship adjustments are exceptions to the rule, and there can be no expectation that a penalty will be adjusted on this basis (OFT, 2012: para. 2.27).
- *United States* – In the United States, the Sentencing Guidelines allow pecuniary penalties to be reduced on the basis of inability to pay but “not more than necessary to avoid substantially jeopardizing the continued viability” of the corporation.²¹² When a corporation asserts limited ability to pay in plea discussions, it must open its financial books to the Department of Justice. The Department of Justice does not seek a pecuniary penalty that a corporation cannot pay, although sometimes the penalty recommended cannot be paid immediately, and is instead paid in instalments over a period of up to five years (OECD, 2016e: 4).

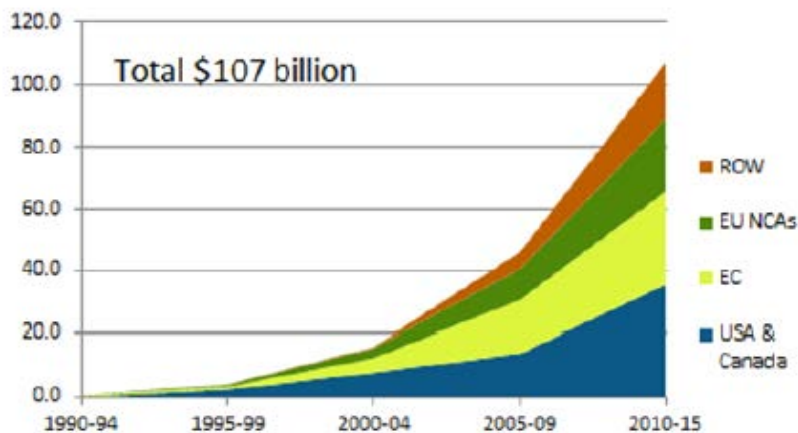
4. Comparison of Australian and International Practices

This section pursues a comparative assessment of the Australian practices regarding the imposition of pecuniary penalties on corporations for infringements of competition laws identified in Section 2 with the international practices reviewed in Section 3.

4.1. The Objectives of Penalties

Statistics from several of the largest OECD economies show dramatic growth in pecuniary penalties imposed for corporate and (in some jurisdictions) individual anticompetitive activity over the past twenty years compared to the period of 1990-1994. During the same time, prison sentences for cartel participants became more frequent and severe in the United States, while leniency programmes and the criminalisation of cartels spread across the world (OECD, 2012: 2).

Figure 1. Cumulative Corporate Penalties (USD)



Source: OECD (2016f), Sanctions in Antitrust Cases, Note by J.M. Connor.

As noted in Section 3 above, there is an international consensus that monetary sanctions against corporations are essential to deter anticompetitive conduct. Pecuniary penalties may have goals in addition to deterrence – which may include punishment, disgorgement of profits, or compensation of loss. Nonetheless, deterrence is a concern that underpins monetary sanctions for competition infringements across the world (ICN, 2017: 55). In all regimes reviewed – as in most of the world – deterrence is addressed not only to the party found to have contravened competition laws (specific deterrence) but also to potential contraveners more generally (general deterrence).²¹³

There is substantial economic literature concerning the theoretical basis on which pecuniary penalties should be calculated in pursuit of deterrence. The most well-known theory is the ‘optimal deterrence’ theory, which is premised on the assumption that deterrence through pecuniary penalties will only be achieved if the expected penalty exceeds the expected gain from the violation.²¹⁴ However, the optimal penalty theory has been considered by the Australian courts and deemed unsuitable for the purposes of setting penalties for breaches of competition law and other trade rules in Australia.²¹⁵

There are good reasons for not adopting the optimal deterrence theory in its pure form. A fundamental criticism of optimal deterrence theory is that the ‘gains’ from the illegal activity and the probability of detection and punishment are too difficult to determine and, from an enforcement perspective, too costly or impossible to measure.²¹⁶ Instead, monetary sanctions across the world are mainly determined by reference to a base pecuniary penalty that is identified by using yardsticks such as turnover or volume of commerce. These yardsticks are assumed to be positively correlated to the excess profit or expected gain from an infringement of competition law. They also have advantage of providing an easy to determine, readily quantifiable starting point for the calculation of pecuniary penalties and ensuring a degree of consistency in fining practice.²¹⁷

Looking specifically at Australia, its legal provisions are aligned with international best practices – inasmuch as they seek to deter anticompetitive conduct by imposing pecuniary penalties which maxima may be set by reference to the infringing corporation’s turnover or the illicit commercial gains obtained through the anticompetitive conduct (ICN, 2017: 55).

4.2. Absolute Amounts of Pecuniary Penalties

In 2009, a report commissioned by the UK’s Office of Fair Trading (now replaced by the CMA) confirmed that “*at a fundamental level, the most important result [of a review of the literature] is that high fines are a crucially important element of deterrence.*”²¹⁸ As seen above, Australian legal provisions are aligned with international practices regarding pecuniary penalties for infringements of competition law. However, some commentators have suggested that, in Australia: “*For much of the last three decades [...] the sanctions that have been available have been inadequately applied. Moreover, the measures introduced in 2001 and 2007 with the intention of rectifying this situation suffer from design flaws and anomalies and create difficulties of proof.*” (Beaton-Wells and Fisse, 2011: 423). While we are unable to comment on the accurateness of this assessment, as we will see below pecuniary penalties imposed in Australia for competition law infringements seem to be significantly lower than pecuniary penalties applied elsewhere.

It was widely held in the early 2000’s that, at the international level, corporate pecuniary penalties were generally too low to achieve effective deterrence (OECD, 2002: 7 and 44). Pecuniary penalties across the world have increased significantly since then as a result of this international consensus (OECD, 2004). In the United States, the average corporate pecuniary penalty increased from USD 13.5 million in 1998 to USD 52 million in 2007 (Beaton-Wells and Fisse, 2011: 432). In the European Union, the average fine per cartel imposed during 1999-2009 was EUR 141.6 million. The average median fine imposed between 2009 and 2013 increased to EUR 255 million (Connor, 2013).

More recent times also seen the imposition of some extremely large pecuniary penalties for competition law infringements. The European Commission in 2016 imposed its largest ever pecuniary penalties on five truck producers (EUR 3.807 billion), which

included its second largest ever individual pecuniary penalty (EUR 1.009 billion imposed on Daimler).²¹⁹ The largest ever penalty was imposed on Alphabet (Google) in 2017 (EUR 2.4 billion). In the United States, the largest pecuniary penalties to ever arise from a single investigation were the recent USD 2.9 billion fines imposed on auto parts producers. The largest individual pecuniary penalty ever imposed on a single company was the USD 925 million fine imposed on Citicorp as a result of an investigation into foreign currency exchange manipulation (ICN, 2017: 43).

Table 4. Maximum Penalty in Each Jurisdiction

Jurisdiction	Maximum Penalty ¹	Year and Addressee
Australia	AUD 36 million USD 26.5 million	2009 – Visy
European Union	EUR 2.4 billion USD 2.6 billion	2017 – Alphabet (Google)
Germany	EUR 251.5 million USD 272.48 million	2003 – HeidelbergCement ²
Korea	KRW 1.03 trillion USD 873.9 million	2016 – Qualcomm
Japan	JPY 13 billion USD 111.4 million	2014 – Nippon Yusen
United Kingdom	GBP 84.2 million USD 104.2 million	2016 – Pfizer
United States	USD 925 million	2017 – Citicorp

Notes: ¹ Conversion to US dollars at the average yearly rate for 2017 calculated by the US Internal Revenue Service – see www.irs.gov/individuals/international-taxpayers/yearly-average-currency-exchange-rates.² This fine was reduced on appeal to EUR 169.9 million.

Source: OECD.

As seen in Table 4, the size of pecuniary penalties imposed across the world can be extremely high – and this conclusion can be reached even without taking into account the fact that the maximum penalty amounts in the United Kingdom and Germany could be higher if serious anticompetitive conduct with wide geographic effects in Europe were not usually investigated at the European Union level. Even accounting for differences in the size of the respective economies, there are substantial differences between the size of the maximum pecuniary penalties imposed in the jurisdictions reviewed and in Australia.

4.3. Relative Amounts of Pecuniary Penalties

Just identifying the maximum pecuniary penalties imposed in different jurisdictions is hardly an appropriate measure of whether the amounts of pecuniary penalties are similar across these jurisdictions. This is particularly the case given the disparity in the size of the economies of each jurisdiction, and hence of the relevant gains / turnover / value of commerce of an offending corporation in that economy. After all, Australia has a population of 23 million and a GDP of 1 040 billion US dollars, which is smaller than all the comparator jurisdictions – sometimes significantly so.

Table 5. Comparative Size of Each Jurisdiction

	Australia	European Union	Germany	Japan	Korea	United Kingdom	United States
Population (million)	23	511.8	82.8	126.7	50.9	65.8	324
GDP (billion USD)	1.169	20.267	4.028	5.266	1.825	2.796	18.569

Source: OECD Data for 2016 or later, available at <https://data.oecd.org/>, accessed on 18 July 2017.

From this point of view, and given Australia’s relative size to these jurisdictions, it is to be expected that penalties in Australia will often be lower compared to those penalties imposed in the other jurisdictions reviewed.

Nonetheless, it has been argued that pecuniary penalties for infringements of competition law in Australia would be considerably higher, particularly for large corporations, if the methodology to determine the quantum of a pecuniary penalty was similar to that deployed in the European Union and United States.²²⁰ And while it is impossible to estimate how much pecuniary penalties in the jurisdictions reviewed would have been in Australia – given the lack of structure of the “instinctive synthesis” methodology – it is possible, on the other hand, to estimate what the base pecuniary penalty for infringements in Australia would be under the methodologies adopted in the jurisdictions reviewed in Section 3.

We engage in just such an estimation exercise in Table 6 below. While the details of each estimation are provided in the notes below, the calculation follows a number of steps that can be broadly said to be common to all comparator jurisdictions, namely: (i) identification of the relevant base measure, which will correspond to the infringing party’s sales or turnover related to the infringement; (ii) identification of the base penalty, which is arrived at through the application of each jurisdiction’s choice of percentage to the base measure; (iii) multiplication of the amount arrived at in (ii) by the number of years that the infringement lasted.

While we believe that such an exercise is useful for illustrating how Australia compares to the comparator jurisdictions, its results must be handled with care:

- To begin, there is only a limited number of Australian cases not currently under appeal regarding which there is enough data to engage in even a rough estimation exercise;
- There are significant differences between the comparator jurisdictions. This is a result of the differences reviewed in Section 3 above between these jurisdictions. Foremost among these are: (i) the percentage of the base amount that each jurisdiction applies to arrive at a base penalty; (ii) rules regarding the relevance of the duration of the infringement for calculation of the base pecuniary penalty; (iii) in some cases the base penalty starts from the relevant turnover for the duration of the infringement, while in others the base pecuniary penalty is arrived at by multiplying an annual turnover figure by the number of years the infringement lasted. Our estimations ignore this difference altogether.
- Importantly, the final estimates do not take into account either aggravating or mitigating circumstances, so they do not represent realistic estimations of what the final penalty amounts would be.

Furthermore, the results below cannot be used to comment on the appropriateness of the specific penalties adopted in the cases used for this comparison exercise. On the contrary:

- Some of the infringing conduct took place before the 2007 and 2009 reforms came into force – i.e. for these anticompetitive practices, the AUD 10 million statutory maximum would be the only available yardstick for the setting of a pecuniary penalty;
- In establishing the duration of the infringements, periods that would not have been relevant under Australian law due to the application of the statute of limitations may have been taken into account in our calculations;
- The numbers for determining the base amount in each case – i.e. the infringing party's sales or turnover in the relevant market – were mainly taken from the decisions imposing the relevant pecuniary penalty. However, in most cases these values were not subject to detailed analysis by the parties or the judge, as they were ultimately irrelevant for the calculation of the applicable pecuniary penalty. Instead, these values were often merely mentioned in passing. As such, they are at best rough approximations of what the relevant turnover would be if it was relevant to calculate a pecuniary penalty.

In other words, the estimation exercise reflected in the table below is a mere illustrative exercise and should not be perceived as commenting on the appropriateness of the individual penalties adopted in these cases, nor as in any way containing a judgement or evaluation of specific penalties that have actually been applied. Further details beyond those available in public documents, concerning both the duration of the infringements and relevant turnover, would increase the precision of the estimates.

Table 6. Pecuniary Penalties – Methodological Comparison with Hypothetical Base Fines

	Actual Penalty		Estimate Base Pecuniary Penalty on the basis of local methodology				
	Australia	European Union	Germany	Korea	Japan	United Kingdom	United States
ACCC v Visy	36 million	1.272 billion	Up to 1.06 billion	371 million	318 million	1.06 billion	1.06 billion
ACCC v Qantas	20 million	103.3 million	Up to 221.4 million	31 million	22.14 million	88.58 million	88.58 million
ACCC v NSK	3 million	13.92 million	Up to 9.28 million	3.2 million	4.64 million	9.28 million	9.28 million
ACCC v Colgate	18 million	117 million	Up to 117 million	27.3 million	39 million	78 million	78 million
CPP v NYK Commonwealth	25 million (50 million without discount)	800 million	Up to 900 million	210 million	300 million	600 million	600 million

Note: The figures in this table are estimates of base fines from applying methodologies used in six comparator jurisdictions, taking into account available information about alleged Australian cartels. These estimates are based on authors' limited understanding of the noted cases and do not reflect mitigating or aggravating circumstances, or later adjustments that might have been made using these comparator methodologies. These estimates are thus not purported to represent likely final outcomes of pecuniary penalties applying the three-step methodology. While potentially of comparative interest, these estimates are not based on all the information or views that would have been available to judicial deciders in Australia and are limited in these respects.

Notes on jurisdictions: **European Union:** While in the European Union the base fine can go up to 30% of the relevant turnover, the values provided here are calculated on the basis of 20% of the relevant turnover, reflecting the observation that, in practice, for cartels the relevant percentage tends to be in the range of 15-20%. The base amount is then multiplied by the number of years the infringement lasted. To this is then added an "entry fee" of 20% (i.e. the halfway point between 15% and 25% of the value of sales) to cartels. **Germany:** As regards Germany, please note that these amounts are the upper limit of a range for the assessment of the amount of the pecuniary penalty. This amount corresponds to 10% of the corporation's domestic turnover arising from the sale of the products or services connected with the infringement over the duration of the violation, adjusted by a multiplication factor of: (i) 2-3 if the corporation's turnover is below EUR 100 million; (ii) 3-4 the corporation's turnover is from EUR 100 million to EUR 1 billion; (iii) 4-5 if the corporation's turnover is from EUR 1 billion to EUR 10 billion; (iv) 5-6 the corporation's turnover is from EUR 10 billion to EUR 100 billion; (v) over six if the corporation's turnover is above EUR 100 billion. For ease of calculation, the duration of the infringement was replaced by the number of years the infringement lasted. **Korea:** In Korea, the relevant turnover is a percentage of the turnover incurred by an enterprise which commits a violation from selling goods or services in specific transaction areas during the period of violation. The relevant percentages are distributed across three different ranges: significant violation

(7-10% for cartels, 2.3-3% for abuse of dominance); (ii) significant violation (3-7% for cartels, 1.5-2.3% for abuse of dominance); and (iii) not very significant violation (0.5-3% for cartels, 0.3-1.5% for abuse of dominance). We will assume a percentage of 7%, reflecting the seriousness of cartels but not assuming worst case scenarios. This base amount is then multiplied by the number of years the infringement lasted. **Japan:** The amount of the base penalty in Japan is calculated as a percentage of amount of the sales or purchases of the goods or services in question during the period of the infringement, up to a three years maximum. For a large sized manufacturer the percentage is 10%, while for large sized retailers the percentage is set at 3%. This base amount is then multiplied by the number of years the infringement lasted, up to a maximum of three years. **United Kingdom:** In the United Kingdom, the base penalty will be up to 30% of the turnover of the undertaking in the relevant product and geographic markets affected by the infringement in the undertaking's last business year preceding the date when the infringement ended, multiplied by the number of years that the infringement lasted. As with the European Union, we will assume a practice of using 20% of the turnover to calculate the relevant fine. **United States:** In the United States, the base amount will be 20% of the volume of affected commerce, multiplied by the duration of the infringement. For ease of calculation, the duration of the infringement was replaced by the number of years the infringement lasted.

Source: Author based on the following cases: *ACCC v Visy Industries Holdings Pty Ltd [No. 3]* (2007) 244 ALR 673, *ACCC v Qantas Airways Ltd* [2008] FCA 1976; (2008) 253 ALR 89; [2008] ATPR 42-266, *Australian Competition and Consumer Commission v NSK Australia Pty Ltd* [2014] FCA 453, *ACCC v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528 and *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876.

- *ACCC v Visy*²²¹ – The conduct was a cartel in the market for the supply of corrugated fibreboard packaging that lasted from January 2000 to October 2004 (which we rounded to 5 years). Visy had a 53 per cent share of sales in the corrugated fibreboard packaging market, valued at AUD 2 billion. 53 per cent of AUD 2 billion is AUD 1.06 billion, which we will use as the relevant yearly turnover. The amount of the pecuniary penalty in Australia was originally submitted by the ACCC, and was uncontested by Visy.
- *ACCC v Qantas Airways*²²² – The infraction was an international cartel on a surcharge of fuel. Qantas had total revenues of AUD 15.2 billion in 2006. The court set out that the revenue from the fuel surcharge in Australia was AUD 175.42 million for the duration of the cartel. In the last year of the cartel this revenue amounted to AUD 73.82 million, which is the amount used for the purposes of this table. The relevant conduct took place between early 2000 and February 2006 (i.e. six years). The amount of the pecuniary penalty was jointly submitted by Qantas and the ACCC.
- *ACCC v NSK Australia Pty Ltd*²²³ – The case relates to price fixing conduct in relation to the supply of ball and roller bearings and associated components (i.e. bearing products) in Australia to aftermarket customers. The contravening conduct extended over two periods; the first understanding was entered into on 14 May 2008 and given effect on 1 July 2008, the second understanding was entered into on 21 January 2009 and given effect in May 2009. For the 2008-2009 and 2009-2010 periods, the average yearly sales revenue of A-NSK in Australia from sales of bearing products to aftermarket customers was AUD 23.215 million, which is the value used for our calculations.
- *ACCC v Colgate*²²⁴ – The case involved understandings which limited the supply and controlled the price of concentrate laundry detergents. The conduct lasted two years (1 January 2008 to 31 December 2009). We estimate that the market was worth around AUD 500 million in 2008.²²⁵ The parties controlled approximately 80% of the relevant laundry detergent market. Colgate held a 39.7% market share (by value). Thus, we will assume that Colgate's annual turnover from this market was AUD 195 million. Colgate's total annual turnover was AUD 509.3 million in 2008 and AUD 527.79 million in 2009.
- *CPP v NYK*²²⁶ – This was the first criminal prosecution in Australia, concerning a cartel in the market for the supply of ocean shipping services for “roll-on, roll-

off' cargo, mainly cars and trucks. According to the Court, the cartel lasted between July 2009 and September 2012. The court also identified an annual turnover from NYK supplies connected with Australia of AUD 1 billion, which is the figure we used in our calculations.²²⁷ The AUD 25 million fine incorporates a global discount of 50% for NYK's early plea of guilty and past and future assistance and co-operation, together with the contrition inherent in or demonstrated by NYK's early plea and co-operation.

A comparison of the methodologies for the imposition of pecuniary penalties in Australia and in the jurisdictions reviewed in Section 3 above gives rise to a number of hypotheses regarding what one would expect to see in the table above. First, given the statutory maximum of at least AUD 10 million, anticompetitive conduct by relatively small companies (i.e. those with turnover in the relevant market below AUD 100 million) could potentially be sanctioned as heavily, if not more heavily in Australia than in other countries. Second, in the selected jurisdictions the length of the duration of an infringement is relevant for the calculation of the pecuniary penalty – the longer an infringement lasted, the larger a penalty is likely to be. This is not the case in Australia, where penalties are imposed for each contravention regardless of how long the contravening conduct lasted. However, this effect could be counteracted in practice by the identification in Australia of multiple contraventions for conduct that in other jurisdictions would amount to a single infringement. Thirdly, given section 76(1) CCA's focus on the total turnover of the infringing party – instead of on the turnover related to the illegal conduct, as elsewhere – pecuniary penalties in Australia have the potential to be comparatively higher for multi-product corporations, i.e. those corporations for which the revenues from products or services affected by an anticompetitive conduct constitute only a limited percentage of their revenues. In the comparator jurisdictions, on the other hand, the pecuniary penalty is set by reference to activities in the market where the infringement occurred, which limits the impact of the infringing party's business activities on the amount of the pecuniary penalty. If the penalty is perceived to be too small, however, most of the selected jurisdictions can increase the size of the pecuniary penalty to reflect the size of the infringing party and ensure deterrence.

In other words, the Australian regime does not necessarily lead to the imposition of lower pecuniary penalties than in other jurisdictions – even if such an outcome would be more likely when sanctions are imposed on large corporations or for long term infringements. Yet, the most important and obvious inference from Table 6 is that pecuniary penalties in Australia are consistently lower, sometimes significantly so, than they would likely have been in other jurisdictions.

A perception that the pecuniary penalties imposed in Australia for competition infringements may be lower than desirable can arguably be detected in the sequence of legal reforms that have consistently and incrementally increased the relevant legal maxima for pecuniary penalties. In 1992, the maximum penalty was increased from AUD 250 000 to AUD 10 million.²²⁸ In 2007, the maximum penalty was increased to its current level.²²⁹ In 2009, criminal sanctions were introduced.²³⁰

On the other hand, the feedback obtained from stakeholders during the OECD's fact finding mission was that corporations in Australia are not subject to large pecuniary penalties across the regulatory spectrum. While there are some recognised outliers – the highest ever penalty imposed on a corporation was in an amount of AUD 45 million, and was adopted in March 2017 for breach of anti-money laundering rules²³¹ – it was consensual among these stakeholders that sanctions for infringements of competition law

were consistently amongst the highest penalties imposed on corporations. A number of stakeholders expressly questioned whether any problem existed regarding the current level of corporate sanctions. For example, in the Harper Review, which was finished in 2015, it was found that: “*there appears to be general approval of the severity of the sanctions for contravention of the competition law*” (Harper et al., 2015: 407).

There was also a widespread perception among stakeholders contacted during the OECD’s fact finding mission that one of the reasons that civil penalties for competition law infringements are not larger is the ACCC’s practice of submitting agreed penalties to the courts – as described in Section 2.2.4.4 above. While this seems to have provoked some judicial questioning about why agreed submissions fail to propose higher pecuniary penalties, it is deemed consistent with principle and highly desirable in practice for the court to accept the parties’ proposal and impose the agreed penalty as long as the court is persuaded that the penalty is within a permissible range.²³² Accepting agreed penalties promotes predictability of civil proceedings and avoids lengthy and complex litigation, freeing the resources of courts and regulators alike for other uses.²³³ According to some of the feedback obtained during the OECD fact finding mission, the court’s incentives to accept agreed submissions are further reinforced because courts receive only the statement of facts provided by the ACCC and the respondent, which will usually not provide enough information for courts to be able to confidently decide that the pecuniary penalty is not within a permissible range.

Another explanation advanced for the amounts imposed is that up until now only a limited number of cases reaching the courts were subject to the more stringent penalties adopted during the 2007 reform. Yet another explanation was that previous cases which set precedent adopt relatively low pecuniary penalties, thereby precluding – in practice if not in theory – the imposition of truly significant civil pecuniary penalties on corporations.

This report takes no position on the causes of the current level of pecuniary penalties in Australia. At this point, the only preliminary conclusion is that, despite: (i) ostensibly pursuing the same objective, deterrence; (ii) relying on similar elements to determine the amount of a pecuniary penalty – i.e. the corporation’s turnover or the illicit commercial gains obtained through the anticompetitive conduct –, even if reliance on specific elements varies across jurisdictions; and (iii) taking into account a list of factors broadly similar to those taken into account in the jurisdictions reviewed – as is made clear by a comparison of the aggravating and mitigating criteria in Australia (Sections 2.2.5.3 and 2.2.5.4.) and internationally (Section 3.3) – pecuniary penalties are in practice lower in Australia than they would likely be in other jurisdictions, particularly as regards large companies or conduct that lasted for a long period of time.

4.4. Alternative Sanctioning Mechanisms

Pecuniary penalties are usually coupled with other sanctions in statutory schemes. The combination of various sanctions which may be imposed for a competition law infringement is often called the sanction mix – and it is ultimately the sanction mix that determines the deterrent effect of competition law. Accordingly, a potential explanation for the difference in the amounts of pecuniary penalties imposed in Australia and in the reviewed jurisdictions could be differences in the sanction mix – with Australia emphasising sanctions other than pecuniary penalties.

However, as will be shown below, the sanction mix in Australia is comparable to the sanction mix of the comparator jurisdictions. As such, the existence of alternative sanctioning mechanisms does not explain why pecuniary penalties imposed in Australia tend to be lower than in comparable jurisdictions.

4.4.1. Criminal Sanctions

Although a broad range of jurisdictions have now adopted criminal cartel offences – including, in our sample of jurisdictions, Germany²³⁴, Korea, Japan, the United Kingdom and the United States – it is well known that successful criminal enforcement has not been widely used other than in the United States (OECD, 2016a: 32). Australia is no exception to this, and the ACCC only recently brought the first criminal charge against a corporation, even though Australia introduced a criminal cartel offence in 2009.²³⁵

Two main reasons were identified in a recent OECD Report as to why criminal sanctions are not usually imposed in reaction to anticompetitive conduct, and Australia was used in that Report as a practical example of these difficulties (OECD, 2016a: 32). The first reason is that criminalization is associated with moral judgments that vary with socio-cultural context, and the public might believe that cartels are not sufficiently reprehensible to justify criminal sanctions against individuals. As was noted in that Report, less than one quarter of those surveyed in Australia expressed support for the view that individuals should be imprisoned for cartel conduct. Furthermore, it was also found that the requisite conditions for deterrence to occur, including knowledge of the law and sanctions, were not met among business people in Australia. Second, it is very difficult to obtain sufficient evidence on cartelists in order to bring a successful criminal prosecution, because the criminal standard of proof is much higher than the civil standard. As criminal enforcement is more resource intensive and risky than administrative enforcement, the relevant authorities may avoid treating cartels as a criminal offence and decide to bring civil and administrative proceedings instead.²³⁶

4.4.2. Individual Sanctions

Regarding the imposition of non-criminal sanctions on individuals – such as pecuniary penalties or disqualification orders – all the reviewed jurisdictions other than the European Union can impose such sanctions.²³⁷

Furthermore, while such sanctions can be onerous to the individuals who are subject to them, they are widely perceived to be unable to deter anticompetitive practices on their own. There is widespread international agreement that financial penalties on individuals alone are relatively ineffective because it is difficult to prevent a corporation from reimbursing an individual, even when the law prohibits such reimbursement (OECD, 2004: 8). Another obstacle relates to cases involving overseas elements – which make up a significant part of recent competition law enforcement in Australia. Individuals involved in anticompetitive conducts are often based abroad, and are thus often either legally or practically beyond the reach of the individual sentences set out in Australian law.

4.4.3. Compensation claims

Private actions for damages arising from competition law infringements can reinforce the deterrent effect of pecuniary penalties imposed as a result of public enforcement. Private damage claims also put money back in the actual victims' pockets, rather than in the public treasury. The ability to claim damages is common across the world. Nonetheless, while such actions have become more common in a number of jurisdictions – including

all the jurisdictions included in our sample – they are, as with criminal sanctions, prevalent only in the United States, where they constitute the main pecuniary deterrence mechanism for competition law infringements (OECD, 2015: 4).

Regarding Australia, the environment for class actions is perceived to have become much more favourable over the last decade. The feedback obtained during the OECD’s fact finding mission was that companies under investigation were concerned about the possibility of follow-on claims. On the other hand, no one contacted by the OECD with knowledge of the sector thought that the total number of claims brought for competition infringements reached double digits, and there was widespread concern at how difficult it was to bring such claims in the first place. Specific obstacles to private actions include lack of access to the ACCC’s file, and the cost of bringing proceedings.²³⁸

The CCA provides one mechanism intended to reduce the costs associated with private enforcement proceedings. Section 83 is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be used as *prima facie* evidence against the corporation in another proceeding (typically a proceeding brought by a private litigant). However, as noted by the Harper Review: “*a significant potential deficiency has emerged in respect of the scope of section 83. Many ACCC proceedings are resolved by the corporate defendant making admissions of fact(s) that establish the contravention, but it is uncertain whether section 83 applies to such admissions. A number of decisions of the Federal Court suggest that section 83 is confined to findings of fact made by the court after a contested hearing.*” (Harper et al., 2015: 406-407). Following the Harper Review, legal changes will allow private litigants to rely on agreed facts filed in support of agreed settlements.

While the Harper Review looked in detail at a number of alternative dispute resolution methods (Harper et al., 2015: 409-412), the fact remains that private enforcement actions would only ever serve to compensate victims of an infringement for the losses that they have suffered. As a result, and as in other jurisdictions, the purpose and effect of private enforcement in Australia is not deterrence – unlike in the United States, where treble damages are available.

4.4.4. Reputation

Reputational effects are perceived to have the potential to have significant deterrent effects. The possible economic impact derived from damage to a corporation’s reputation, which can be enhanced by the publication of infringement decisions, may be larger than the loss arising from a pecuniary penalty. The economic impact may be particularly large when companies sell consumer goods rather than intermediate goods, because consumers can be very sensitive to corporate reputation when they make purchase decisions (OECD, 2016a: 35)

Nonetheless, reputational effects are likely to prove the same across jurisdictions, and thus they cannot explain why pecuniary penalties are lower in Australia than elsewhere.

4.4.5. Conclusion

In short, the sanctioning regime for competition law infringements in Australia is similar to other such regimes across the world, and in particular to the sanction mix adopted by the jurisdictions reviewed in Section 2. As a result, the existence and application of other

sanctioning tools is unable to explain or justify why pecuniary penalties in Australia are often set at amounts below international levels.

4.5. Methodologies for Determining Pecuniary Penalties

As seen above in Section 2, all comparator jurisdictions adopt very structured approaches to the determination of pecuniary penalty amounts. In Australia, by contrast, it has been suggested that “*the method for setting fines for infringements of competition law (...) is relatively opaque*”.²³⁹ Despite this opaqueness, a number of specific methodological differences between Australia and the comparator jurisdictions can be identified:

- First, Australia seems to put less emphasis on the turnover (or size) of the offending corporation when setting a pecuniary penalty than what is common internationally. An opinion expressed by a number of stakeholders contacted during the OECD’s fact-finding mission was that this is the result of a focus on the type of conduct, instead of on the size of the company, when imposing pecuniary penalties – with the result that broadly similar pecuniary penalties are imposed for similar conduct.

It is true that the size of the contravening corporation is a criterion explicitly listed as one of the so-called French factors discussed in Section 2.2.5.3 above. The size of the contravening corporation may be relevant in determining the amount of the pecuniary penalty that would operate as an effective deterrent: the sum required to achieve that object will generally be larger where the corporation has vast resources.²⁴⁰ Furthermore, companies above a certain size may “*have a responsibility to the public at large to ensure that its commercial activities do not contravene Part IV of the Act. When a corporation’s commercial activities substantially permeate the commercial and consumer life of the public it is appropriate (...) to take that fact into account in determining an appropriate level of penalty for contravention*”.²⁴¹ However, it has also been held that the size of the contravening corporation does not of itself justify a higher penalty than might otherwise be imposed.²⁴²

- A related difference is that, unlike what occurs in all comparator jurisdictions, Australia does not identify an initial base amount related to the impact of the illicit conduct when calculating the amount of a pecuniary penalty.²⁴³ While most jurisdictions start with some measure of turnover or value of commerce affected, this is a relevant consideration in Australia only as a maximum penalty, and even then only if this amount is above AUD 10 million.
- Another difference between Australia and the reviewed jurisdictions relates not only to the absence of a structured penalty setting methodology, but to the absence of public guidance on how pecuniary penalty amounts are arrived at. As was explained above at section 3.3.1, public guidance is deemed desirable for a number of reasons, including not only good enforcement practice and openness of information, but also factors such as the relationship between the predictability of sanctions and deterrence (ICN, 2017: 14).

A commonly held view internationally is that optimal deterrence is achieved where there is a threat of severe sanctions, coupled with a significant fear of detection. Assuming that sufficiently high sanctions are available, the higher the level of certainty that pecuniary penalties will be set based on a methodology that ensures sufficiently large pecuniary penalties, the less likely it will be that a

corporation and its executives will engage in anticompetitive conduct. Furthermore, self-reporting of anticompetitive conduct may become more likely if guidelines are in place, because the consequences of potential exposure to penalties will become more evident (ICN, 2017: 15).

It is true that, as in Australia, in some countries where pecuniary penalties can be imposed by courts at their discretion there are no guidelines on how to set pecuniary penalties available to the public.²⁴⁴ However, many jurisdictions where courts are responsible for setting out penalties do have such public guidance.²⁴⁵ For an example taken from the sample of jurisdictions reviewed in this report, the United States is the sole jurisdiction reviewed above with a prosecutorial system – i.e. where penalties are determined by the courts – and it also has an extremely detailed, prescriptive sentencing guidance document which is publicly available. On the other hand, in some jurisdictions – including some included in our sample, such as the European Union²⁴⁶, the United Kingdom²⁴⁷ and Germany²⁴⁸ – courts conduct full merit reviews, or may even adopt a decision *ex novo*. Courts are, in these circumstances, not under a legal obligation to take fining guidelines into account. However, the benchmark for the pecuniary penalty is ultimately provided by an administrative fining decision setting out a fine on the basis of a publicly set methodology; and the amount of the pecuniary penalties adopted by the courts seems to be in line with those of the relevant administrative decisions – and hence, with the fining guidelines as well.²⁴⁹

In the light of this, the OECD has recently expressed the view that, despite divergences regarding the imposition of competition law sanctions around the world: “*it is widely accepted that adoption and publication of a method of setting fines such as guidelines in antitrust cases brings positive effects in several ways. The guidelines deter undertakings from anticompetitive conduct if they realise that the expected costs of engaging in the conduct exceed the potential gains. In addition, the guidelines on fines enable competition authorities to implement a consistent fining policy thereby avoiding pressure for unfair special treatment in certain individual cases. Further, they make it easier for the addressees of fines to understand why the fine was set at the level it was, thus possibly reducing the number of appeals and promoting compliance with competition law.*” (OECD, 2016a: 37).

- A last difference is that most jurisdictions reviewed multiply the value of the basic pecuniary penalty arrived at for the number of years that the conduct lasted. While such a mechanism is not foreseen under Australian law, it is compensated in practice by the fact that under Australian law conduct that usually amounts to a single infringement under most competition laws around the world could correspond to multiple contraventions under the CCA.

Ultimately, only limited conclusions can be derived from these observations. The “instinctive or intuitive synthesis” methodology under the current Australian statutory scheme does not prevent the imposition of pecuniary penalties at levels comparable to those of the jurisdictions reviewed in Section 3. It is also not possible to arrive at any definite conclusions regarding the relevance and impact that individual criteria taken into account when calculating the amount of a pecuniary penalty may have in determining the final amount of such penalty.

Ultimately, the conclusions are that:

- despite the existence of similar powers to those in place in comparable jurisdictions to impose civil pecuniary sanctions, the pecuniary penalties imposed in Australia are consistently lower than in the comparator jurisdictions; and
- unlike the comparator jurisdictions, Australia does not adopt a structured approach to setting pecuniary penalties. Relatedly, Australia is also the only jurisdiction reviewed in this Report that does not use an amount based on the size of the corporation or the value of affected commerce as a basis for calculating the relevant pecuniary penalties, although these factors are taken into account.

While no causation mechanisms can be identified between these two conclusions, it is nonetheless plausible to consider that they are related.

4.6. Pecuniary Penalties and Deterrence

Ultimately, and independently of how Australia compares with its international peers, the normative question of whether pecuniary penalties are too low in Australia will depend on the impact of penalty amounts on deterrence. This is a complex question, which has been the subject of extensive discussion in the competition policy literature.

This literature mentions quite a few factors that affect the degree of compliance with competition law, which suggests that promoting compliance with the law could involve more than ensuring deterrence alone. The list of factors includes fear of monetary sanctions imposed on corporations or individuals, fear of imprisonment, fear of damage to individual or corporate reputation, morality, training, employer-driven incentives for compliance, desire to avoid the diversion of corporation's attention that competition investigations and litigation cause, and a culture of competition within the firm, industry, and/or country (OECD, 2012: 3).

Despite the widespread acknowledgment of the relevance of these various factors, and the recent increase in the amounts of pecuniary penalties described in section 4.2 above, there have been repeated calls for the application of larger pecuniary penalties. Academic studies have compared the average amounts cartels gained from their illegal overcharges with the levels of pecuniary penalties imposed in the United States and European Union. After finding that cartel overcharges ranged from 18 to 37% in the United States and from 28 to 54% in the European Union, it seemed that the gains from cartels were significantly higher than the resulting pecuniary penalties. The view that pecuniary penalties need to be higher for effective deterrence seems to be a prevailing one, among both academics and agencies.²⁵⁰

While it is hard to measure the impact that specific sanctions may have in deterring anticompetitive conduct (both generally and specifically), fortunately Australia has been the subject of one of the most comprehensive studies ever regarding the deterrent effect that pecuniary penalties may have on competition law infringements.²⁵¹ This study built on the international consensus that deterrence is affected not only by what the law says, but by how likely people think it is that the law will be enforced and by the perceived risk of illegal conduct being caught and punished.²⁵² In Australia, the empirical evidence is that there is high awareness of competition law and its basic prohibitions, and high levels of support for competition.²⁵³ Nonetheless, that evidence also points towards a lack of deterrent effect of current sanctions, with nearly half of business people in a sample seeing it as likely that a hypothetical business person would still breach cartel laws if he was aware of them. That figure fell to 29% when they were told that criminal sanctions applied — but nearly a third of respondents still considered a breach of the law to be

likely even with the prospect of criminal sanctions. When asked about their own likely behaviour, respondents saw themselves as more virtuous than others — only 15% indicated that they would be likely to breach competition law where civil penalties applied, a number which went down to 9% where criminal sanctions applied (Beaton-Wells and Parker, 2012b: 457; 2012a: 13-14).

Two further indicators could provide evidence that the current level of pecuniary penalties is not fully deterrent:

- If corporations continue to engage in anticompetitive practices after having been placed under investigation;
- If corporations in a specific sector continue to engage in anticompetitive practices even after they become aware of investigations against one or more companies operating in that sector.

The reason for this is that, if one observes continued lack of compliance by corporations falling within these two scenarios – in which the companies are not only aware of competition law, but also that they may be subject to special attention on the part of the authorities –, it is at least likely that those corporations regard the possible imposition of sanctions as a cost of doing business. While there have been no decisions establishing recidivism in Australia, a number of sectors have attracted constant attention from the ACCC due to repeated infringements. This is the case of cement²⁵⁴, construction²⁵⁵, petrol retailing²⁵⁶, and taxis.²⁵⁷

There are also some indications that purportedly high pecuniary penalties do not ultimately affect a corporation's bottom-line or mode of operation, with implications for general and specific deterrence alike.²⁵⁸ A measure of the deterrence potential of penalties is the impact that a competition investigation or penalty has on stock prices, which reflects the financial impact of penalties on corporations' earnings. If an adverse event – such as the opening of competition investigations or the imposition of a pecuniary penalty – occurs in relation to a corporation, one could expect that its stock prices would be affected if the event is commercially significant. In Europe, it has been found that the total effect of competition enforcement actions ranges from minus 3.03% to minus 4.55% of a firm's market value during a relevant 31 days' period.²⁵⁹ In the United States, it has been observed that shares of indicted firms lose a cumulative 1.08% of their value in the days immediately after the public announcement of the indictment.²⁶⁰ While one must take into account the fact that a large number of factors influence stock prices, and further analysis and more cases would be needed for a conclusive empirical demonstration of this point, it is hard to identify any significant effect of sanctioning decisions on stock price in the context of a high-level review of stock price variation following the imposition of a pecuniary penalty in Australia, which can be found in Annex 1.²⁶¹

Regarding multinational corporations, another means through which penalties may fail to have a sufficient deterrent effect is through the manipulation of the rules on jurisdictional reach of Australian competition law. As noted by the Harper Review, under section 5(1) CCA: *“Overseas conduct will only be subject to Australian law if it is engaged in by a corporation incorporated in, or carrying on business within Australia. The effect of that provision is that, in respect of contravening conduct that occurs overseas, a foreign corporation will only be subject to Australian competition law if it otherwise carries on business in Australia.”* (Harper et al., 2015: 412). One concern in this regard is the possibility that multinational companies may be able to deploy corporate structures that protect the corporate group or parent companies from liability by establishing subsidiaries

without significant assets or activities in Australia to whom liability will attach exclusively, or by refusing to incorporate any corporation in Australia. As seen above, Australian law may take a restrictive view on the relevant entity for the purposes of identifying a relevant turnover from which to calculate a pecuniary sanction.²⁶² When taken together with rules on the jurisdictional scope of Australian law, there is a risk that the pecuniary sanctions that will attach to large multinational companies in Australia will be much lower than in other jurisdictions – and that their deterrent effect will be significantly lower as well.

In conclusion, while it is impossible to establish definitively on the basis of the data above that the current level of pecuniary penalties in Australia lacks sufficient deterrent effect – that would require an empirical assessment which is beyond the scope of the present Report – there is a substantial amount of circumstantial evidence pointing in that direction.

5. Conclusions and Recommendations

A number of points emerge from the analysis in this report. They are outlined below.

5.1. Amount of Pecuniary Penalties in Australia and in Selected Jurisdictions

Australia is an outlier in how low the pecuniary penalties it imposes are by comparison to all other systems, particularly for large companies and infringements that lasted for a number of years. This comparison holds even after one has regard to the overall sanctioning regime, taking into account sanctioning mechanisms that exist other than pecuniary penalties.

There are a number of potential explanations for this. First, Australia is a smaller market than the comparator jurisdictions – but pecuniary penalties in Australia are usually lower than in these jurisdictions, even after having due regard for this.

A second explanation is that the sanctioning regime that was applicable to the majority of cases before the courts to date did not link the quantum of the pecuniary penalty to the economic impact of the sanctioned company's conduct or to the damage caused by its conduct. Instead, it imposed a maximum penalty of AUD 10 million per contravention, which could lead to pecuniary penalties being either very high or very low by comparison to the size of the sanctioned entity and the effects of its conduct. Since competition cases are costly to bring and usually directed towards conduct that risks causing significant harm, relatively large companies are more likely to be investigated by the regulator. Given the sanctioning regime in place, it is likely that this would lead to penalties in Australia being relatively smaller than those imposed in jurisdictions that take relevant corporate sales into account expressly when setting the amount of the penalty.

A third possible explanation is that, while cartels can last for many years, Australia does not take into account the length of the contravention when determining the amount of a pecuniary penalty. As a result, pecuniary penalties in the selected jurisdictions increase with time, while in Australia this does not occur. There is one mechanism in Australian law for determining the amount of pecuniary penalties that indirectly takes into account the duration of the infringement – setting a penalty by reference to the benefit derived from the contravention. However, to our knowledge this mechanism has never been applied in Australia, and is deployed very rarely elsewhere, given how difficult it is to calculate the benefit derived from a competition law infringement.

Against these second and third possible explanations, conduct that would be the subject of a single sanction in comparable jurisdictions can be the subject of multiple sanctions for different contraventions in Australia. This mechanism could, in theory, operate to compensate for the lack of consideration in Australia of corporate turnover and length of an infringement – and, thereby, lead to higher aggregate fines. However, our analysis indicates that aggregate penalties remain smaller in Australia than in comparator jurisdictions.

A fourth explanation relates to precedent. A number of stakeholders contacted during the OECD's fact-finding mission held that it was possible that the current amount of pecuniary penalties was a consequence of initial decisions based on the statutory regime in place before 2007, which set a maximum penalty amount that did not take into account the size of the infringing companies' conduct – and which adopted relatively low pecuniary penalties by international standards. Subsequent judgments, even those that were adopted after the law was reformed to allow for larger penalties to be imposed, merely followed precedent when imposing pecuniary penalties which were low by international standards, in accordance with the principle that similar conduct should be treated similarly. This dynamic was then reinforced by the regulator's propensity to settle on penalty, agreeing on the quantum of penalty with the infringing company based on existing precedent, and making those submissions to the court for a final determination.

We are unable to determine whether these possibilities, individually or taken together, are able to adequately explain why Australian pecuniary penalties from competition law infringements are lower than in the selected jurisdictions. What is clear is that this is not a result of the Australian legal framework.

Recommendations

- Increase awareness of international practices on the sanctioning of competition infringements, and of the reasons and studies underpinning those practices.
- In the context of discussions with offending parties, and of preparing submissions regarding the appropriate amount of a civil pecuniary penalty, the ACCC should take into account international practices to the setting of pecuniary penalties in order to maximise deterrence.
- Study whether it would be appropriate to adopt mechanisms that explicitly link the amount of a pecuniary penalty to the economic size of the infringing corporation's conduct (such as annual sales of the relevant product) and the length of the infringement, which would more closely align with the likely benefit from the infringing conduct.
- Study ways to ensure that the economic size of the infringing corporation's conduct and the length of the infringement take precedence over the amounts imposed for similar infringements in past enforcement actions.

5.2. Legal Constraints to the Setting of Pecuniary Penalty Amounts

Prima facie, there is nothing preventing pecuniary penalties arrived at under the “instinctive synthesis” method from reaching levels more in line with international practice. If anything, the Australian regime would seem to allow for pecuniary penalties higher than those imposed in other jurisdictions.

Under the current regime – and given the unlikelihood of the penalty being set by reference to the benefit derived from the contravention – the maximum pecuniary penalty will either be: (i) 10% of the total turnover of the infringing company or (ii) AUD 10 million, if the turnover of the infringing company is below AUD 100 million. Furthermore, this maximum penalty refers to each infringement of competition law.

This should be compared with other regimes, where the penalty is set by reference to the turnover in the affected market, and not the total turnover of the infringing company; and where a single infringement is identified for conduct that in Australia may amount to

multiple contraventions. Nonetheless, the fact that penalties are comparatively lower in Australia seems to indicate that, while turnover or benefit are used as a ceiling for pecuniary penalties, they are not otherwise taken into account in practice as an important element when calculating the amount of a pecuniary penalty.

Recommendation

Consider ways of ensuring that the turnover of the infringing corporation in the market where the infringement occurred, or the benefit derived from the infringing conduct, becomes a necessary element in the calculation of the relevant pecuniary penalty.

5.3. Methods for Setting Pecuniary Penalties

It follows from the above that: (i) pecuniary penalties for competition law infringements in Australia are, at least in some cases, lower than in comparable jurisdictions; and (ii) this is not the result of constraints imposed by the Australian legal framework. It is thus plausible that the reason for the difference between Australia and its peers in this regard may be related to the method adopted to determine the relevant pecuniary penalty.

While Australia takes into account broadly the same considerations that are deemed relevant for setting the amount of a pecuniary penalty in other jurisdictions, it differs from them in: (i) how unstructured its process for arriving at a final pecuniary penalty is; (ii) not starting from a base amount that reflects the turnover of the offending corporation / the volume of commerce affected. Of course, it is impossible to establish a causal relationship between: (i) the different amounts of pecuniary penalties in Australia and in comparable jurisdictions; and (ii) the different methods for determining the amount of a pecuniary penalty. Nonetheless, it is plausible that alignment of pecuniary penalties in Australia with those found in international practices would be facilitated by Australia adopting: (i) a mechanism to identify a base pecuniary penalty that reflects the size of the offending corporation or the volume of commerce affected by the unlawful conduct; (ii) a more structured approach to penalty setting; or (iii) a mixture of the two.

Recommendations

Study the possibility of:

- Adopting a structured approach to the identification of the amount of civil pecuniary penalties;
- Identifying a base pecuniary penalty that reflects the size of the offending corporation or the volume of commerce affected by the unlawful conduct, as well as the duration of the infringement;

5.4. Transparency and Predictability of Penalty-Setting Method

Another way in which Australia differs from international practice is in the absence of public guidance regarding how pecuniary penalties are set. While none of those contacted in Australia were able to indicate any example of a regulator or public authority setting sentencing guidelines in areas reserved to the judiciary (with the possible exceptions of fining guidelines in tax²⁶³ – which are imposed by the tax authority – and merger assessment guidelines – which, while assessed by the courts, is not about imposing penalties), it seemed consensual that such guidelines could potentially be useful, if adequately designed and respecting the separation of powers.

An alternative would be for the Australian bodies responsible for bringing infringement proceedings before the courts to adopt internal rules or guidelines, based on similar principles, regarding the penalties they will submit before the courts. We understand that, given Australian law, this proposal is not well suited for criminal prosecutions. However, given the distinction between criminal and civil sanctions, there would seem to be no obstacle to the adoption of these suggestions as regards the calculation of suggested pecuniary penalties for civil sanctions.

An alternative would be for the legislature to provide that civil penalties should not be subject to criminal law principles, and set out a mechanism for identifying a base pecuniary penalty and identify a number of factors could be taken into account to increase or reduce civil pecuniary penalty.

Adopting public rules about the setting of civil pecuniary penalties – as is common in jurisdictions similar to Australia – has additional advantages. It may enhance general deterrence by allowing companies to understand how heavy the sanctions to which they may be subject are. It helps ensure that there is a principled approach to ensure deterrence. It adds transparency to ACCC’s approach and the logic underpinning it. Ultimately, public guidance on the setting of civil pecuniary penalties would add to legal certainty.

Furthermore, guidance in this area could also be said to reflect a couple of basic principles enshrined in Australian law:

- That ACCC’s submissions on the quantum of penalty represent the observations of a specialist regulator and should be given due weight, though they are not determinative.²⁶⁴ This is so even though submissions of a regulator will be considered on their merits in the same way as the submissions of a respondent and subject to being supported by findings of fact based upon evidence, agreement or concession.²⁶⁵
- Under Australian administrative law: “*Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which otherwise might appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.*”²⁶⁶ At the same time, a “*decision-maker must not fetter the future exercise of the discretionary power by inflexibility [sic] applying a rule or policy without regard to the individual merits of the case or by entering a binding undertaking.*”²⁶⁷

While respecting the judiciary’s prerogative and the allocation of competences in Australia, the preparation of such guidelines could provide an occasion to reflect on international experience.

Recommendations

- Consider adopting guidelines for the setting of pecuniary penalties, while respecting the separation of powers, and the independence and autonomy of the judiciary;
- Consider whether it is appropriate to reform the law in order for it to provide for a method for the calculation of civil pecuniary penalties applicable to economic agents for infringements of competition law – and, potentially, for other regulatory infringements.

Annex

Analysis – General remarks

Consideration of the share prices a month prior and a month following the imposition of pecuniary penalties by the Federal Court (**the relevant period**) have been observed in relation to the following matters (see graphs below):

- ACCC v QANTAS Airways Ltd [2008] FCA 1976
- ACCC v Cabcharge Australia Ltd [2010] FCA 1261
- Flight Centre Limited v ACCC [2014] FCA 658
- ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405
- ACCC v Colgate-Palmolive Pty Ltd (No 2) [2016] FCA 528 (Woolworths)
- ACCC v Australia New Zealand Banking Group Limited [2016] FCA 1516 (ANZ)
- ACCC v Australia New Zealand Banking Group Limited [2016] FCA 1516 (Macquarie Bank)

In relation to trading entities Flight Centre, Woolworths, ANZ and Macquarie Bank, an observation of the share prices over the relevant period for each corporation respectively shows little to no change in the share prices despite the imposition of pecuniary penalties by the Federal Court. Interestingly, it would appear that ANZ and Macquarie's share price actually increased soon after the adverse penalty decision and any negative media attention was inconsequential in this respect.

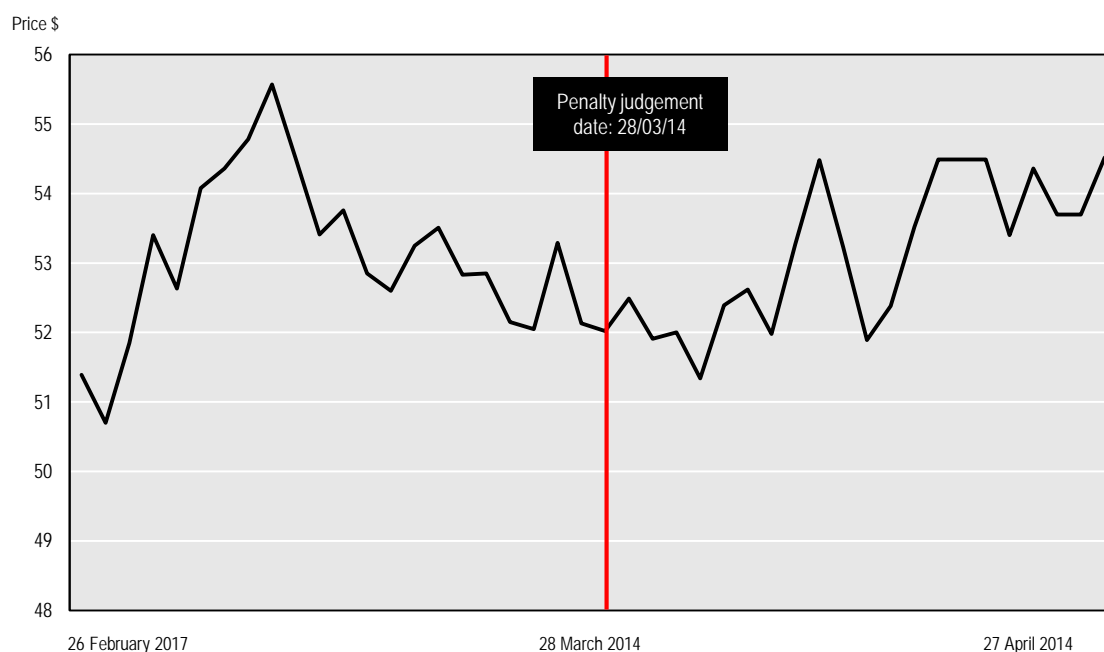
In a number of cases, the share price declined shortly after the sanctioning decision by the Federal Court:

- Regarding the *Qantas* decisions, one can observe a slight decrease in the share price following the Federal Court's decision handing down a AUD 20 million pecuniary penalty for Qantas' role in price fixing on fuel surcharges on international air cargo. Other factors that may have contributed to the decline in the share price at the particular time were that: (i) in July 2008, former Qantas executive Bruce McCaffrey was jailed for six months after pleading guilty in an anti-trust prosecution by the US Department of Justice, for a multimillion-dollar price-fixing conspiracy; (ii) following the imposition of the pecuniary penalty, Qantas was under a looming threat of class action on behalf of purchasers of air freight services for losses suffered as a result of the alleged cartel conduct by the airlines.
- Regarding the *Coles* decision, the trading price declined slightly following the Federal Court's imposition of a AUD 10 million pecuniary penalty. As part of the settlement terms, Coles also provided a court enforceable undertaking to the ACCC to establish a formal process to provide options for redress for over 200

suppliers. The market may have taken into account the Court imposed obligation on Coles to pay compensation to suppliers, and that may have also impacted on the share price.

- The only case where the share price of a corporation dropped sharply following the Federal Court's imposition of a pecuniary penalty occurred when Cabcharge Australia Ltd was condemned to pay AUD 15 million. The pecuniary penalty imposed was high relative to the annual profit of Cabcharge (of around AUD 60 million), with the penalty amount representing about 25% of the corporation's profit after tax.

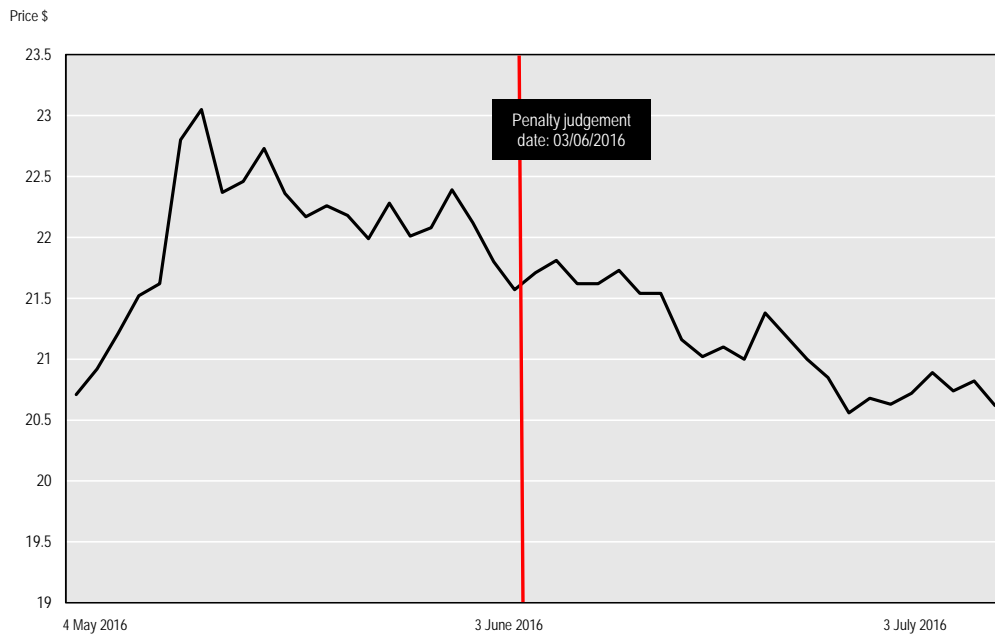
Figure 2. Flight Centre - Variation of stock price before and after penalty judgement of 28 March 2014



Note: Case Flight Centre Limited v ACCC [2014] FCA 658. Stock code: AU: FLT.

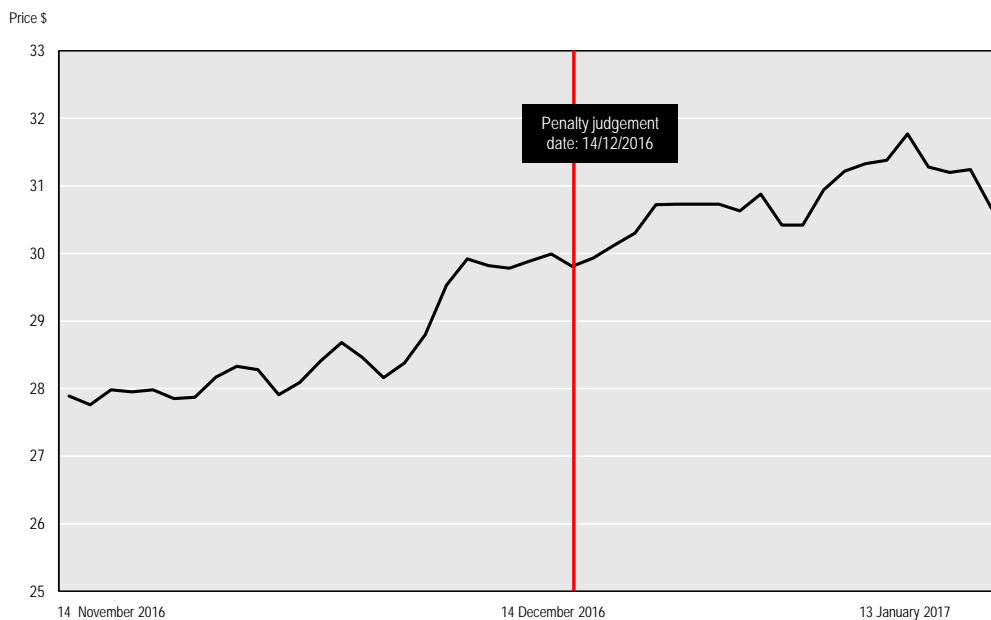
Source: Thomson Reuters.

Figure 3. Woolworths - Variation of stock price before and after penalty judgement of 3 June 2016



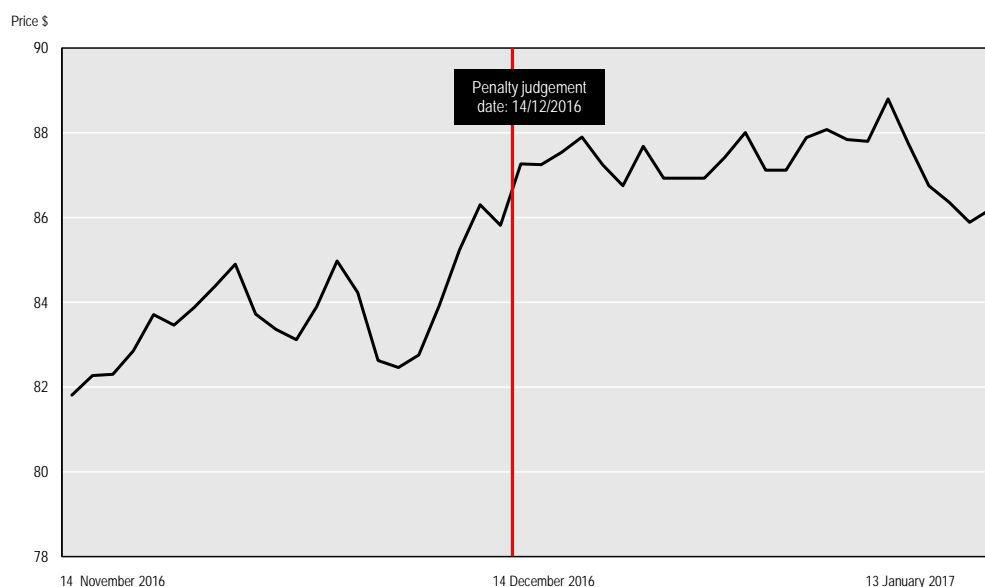
Note: Case ACCC v Colgate-Palmolive Pty Ltd (No 2) [2016] FCA 528. Stock code: AU: WOW.
Source: Thomson Reuters.

Figure 4. ANZ - Variation of stock price before and after penalty judgement of 14 December 2016



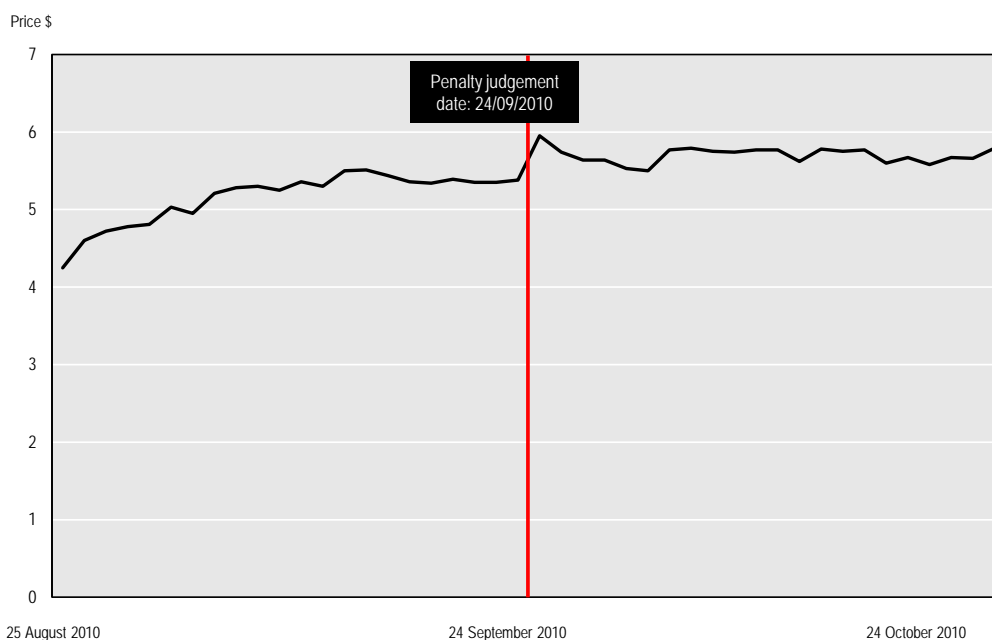
Note: Case ACCC v Australia New Zealand Banking Group Limited [2016] FCA 1516 (ANZ). Stock code: AU: ANZ.
Source: Thomson Reuters.

Figure 5. Macquarie Bank – Variation of stock price before and after penalty judgement of 14 December 2016



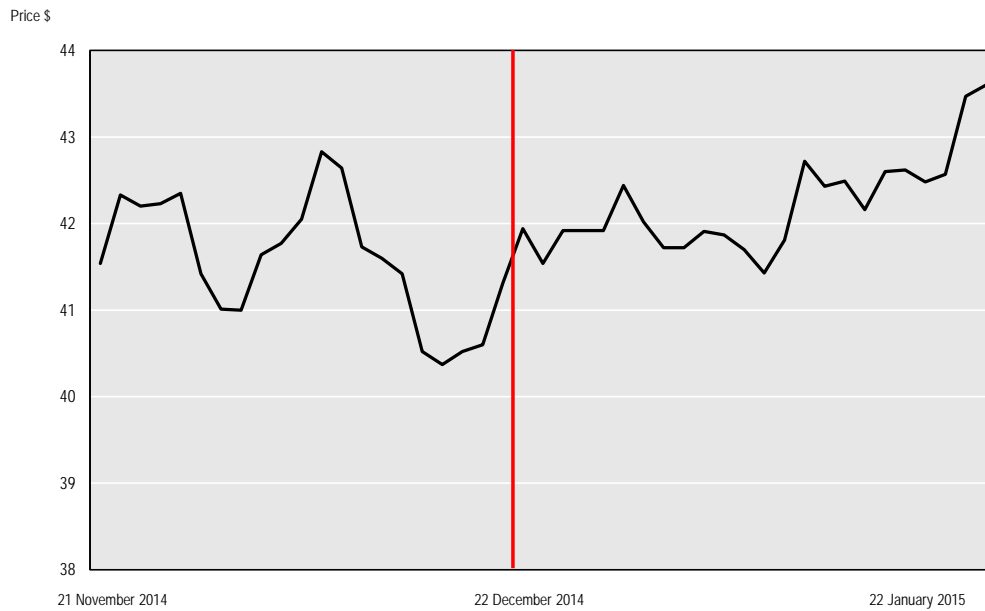
Note: Case *ACCC v Australia New Zealand Banking Group Limited [2016] FCA 1516 (Macquarie Bank)*.
 Stock code: AU: MBLPA.
 Source: Thomson Reuters.

Figure 6. Cabcharge - Variation of stock price before and after penalty judgement of 24 September 2010



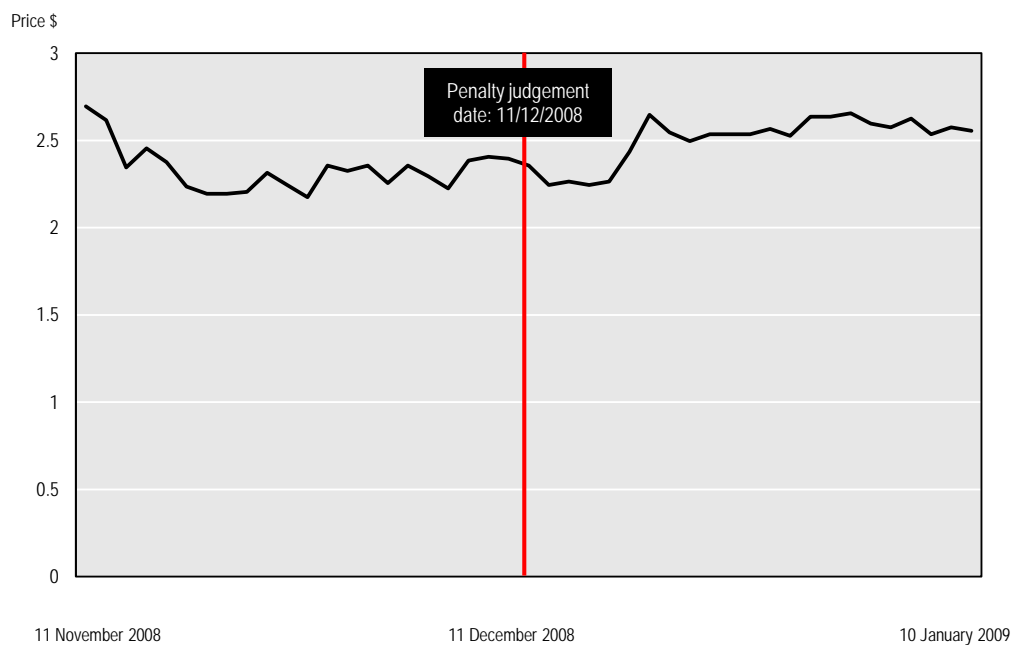
Note: Case *ACCC v Cabcharge Australia Ltd [2010] FCA 1261*. Stock code: AU: CAB.
 Source: Thomson Reuters.

Figure 7. Wesfarmers (Coles) – Variation of stock price before and after penalty judgement of 22 December 2014



Note: Case *ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405*. Stock code: AU: WES.
Source: Thomson Reuters.

Figure 8. QANTAS – Variation of stock price before and after penalty judgement of 11 December 2008



Note: Case *ACCC v QANTAS Airways Ltd [2008] FCA 1976*. Stock code: AU: QAN.
Source: Thomson Reuters.

Notes

- ¹ Depending on the jurisdiction these could be civil, administrative or criminal.
- ² We here follow closely Fox and Trebilcock (2015), p. 64.
- ³ See www.fedcourt.gov.au/law-and-practice/national-practice-areas/commercial/judges, accessed on 3 October 2017.
- ⁴ These additional fault elements are essentially: for the offence of making a contract or arrangement, or arriving at an understanding, containing a cartel provision, intention to make a contract or arrangement, or to arrive at an understanding, and knowledge or belief that the contract, arrangement or understanding contains a cartel provision; for the offence of giving effect to a cartel provision, knowledge or belief that a cartel provision is contained in a contract, arrangement or understanding, and intention to give effect to the cartel provision. See, for more detail, Beaton-Wells and Fisse (2011), p. 135-152.
- ⁵ *Trade Practices Commission v CSR Ltd* [(1991) ATPR 41–076, para 52.
- ⁶ [2012] FCAFC 20; (2012) 287 ALR 249, 265
- ⁷ Paras. 62-63. This was endorsed by the High Court of Australia in *ACCC v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 para. 66. See, more recently, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, para. 98.
- ⁸ Or: (i) has attempted to infringe competition; (ii) has aided, abetted, counselled or procured a person to infringe competition; (iii) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to infringe competition; (iv) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of competition law; or (v) has conspired to infringe competition law.
- ⁹ A fine of \$750,000 is applicable to infringements of sections 45D (Secondary boycotts for the purpose of causing substantial loss or damage), 45DB (Boycotts affecting trade or commerce), 45E (Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services) and 45EA (Provisions contravening section 45E not to be given effect).
- ¹⁰ Section 76(5) CCA.
- ¹¹ This provision was amended in 2010.
- ¹² Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.20.
- ¹³ At the date of the report, 2,000 penalty units is equivalent to AUD 420 000 (as of 1 July 2017, each Penalty Unit is AUD 210 pursuant to Section 4AA of the Crimes Act 1914).
- ¹⁴ Evidence Act 1995, s140(1).
- ¹⁵ Evidence Act 1995, s140(2). See also *Briginshaw v Briginshaw* (1938) 60 CLR 336; 12 ALJ 100; [1938] ALR 334 at 347, 353, 362 (CLR)

- ¹⁶ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170; 110 ALR 449 applied in a cartel case in *ACCC v Yazaki Corp* (No 2) [2015] FCA 1304 (Besanko J).
- ¹⁷ *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-363, quoted in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v ACCC* [2007] FCAFC 132, para. 31.
- ¹⁸ Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.180. See also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v ACCC* [2007] FCAFC 132, para. 38; *Watson v Foxman* (2000) 49 NSWLR 315; *ACCC v Dateline Imports Pty Ltd* [2014] FCA 791.
- ¹⁹ Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.600. See also *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 and *ACCC v Cement Australia Pty Ltd* [2016] FCA 453.
- ²⁰ See Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.600: "In *ACCC v Rural Press Ltd* [2001] FCA 1065; (2001) ATPR 41-833 (Mansfield J), the ACCC submitted that separate penalties should be imposed for entering the contravening arrangement (s 45), for giving effect to it (s 45) and for misuse of market power in effecting the offending arrangement (s 46). The Court decided that the first two contraventions were part of the same conduct, but the contravention of s 46, although "closely allied" was not. In *J McPhee & Son (Aust) Pty Ltd v ACCC* [2000] FCA 365; [2000] ATPR 41-758; (2000) 172 ALR 532 a Full Court decided that the trial judge had erred in imposing separate penalties for making and for giving effect to a market sharing arrangement in relation to a specific customer."
- ²¹ See, for example, *ACCC v Yazaki* (No 3) [2017] FCA 465, where different fines were imposed for "making of the agreement and activities between the contraveners on the one hand, and the submission of the prices to the purchaser on the other". However, the pecuniary penalty for this latter course of action was considerably lower "to reflect the fact that to an extent, but not entirely, there is a connection between all the conduct."
- ²² Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.600. For examples of the imposition of a single penalty, see *ACCC v Rural Press Ltd* [2001] FCA 1065; [2001] ATPR 41-833; *ACCC v ABB Transmission & Distribution Ltd* (No 2 – Distribution Transformers) [2002] FCA 559; (2002) 190 ALR 169; [2002] ATPR 41-872; *ACCC v Tyco Australia Pty Ltd* [1999] FCA 1799; [2000] ATPR 41-740; *TPC v TNT Australia Pty Ltd* [1995] ATPR 41-375 at 40,169;. This course was not, however, followed in *TPC v Madad Pty Ltd* (1979) 40 FLR 453; [1979] ATPR 40-105 or *TPC v Simpson Pope Ltd* [1980] FCA 83; (1980) 47 FLR 334 (note); 30 ALR 544; [1980] ATPR 40-169. Holding that it is not appropriate for the Court to fix a single penalty for the multiple contraventions – with the possible exception of when this is accepted by the parties – but that, instead, the court should impose a penalty for each course of conduct and then 'after fixing separate penalties for the contraventions, consider whether the aggregate penalty is excessive, see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, paras. 146-148.
- ²³ *Mill v The Queen* (1988) 166 CLR 59; 83 ALR 1; 63 ALJR 117; 36 A Crim R 468 at 63 (CLR); *TPC v TNT Aust Pty Ltd* [1995] ATPR 41-375 at 40,169; *ACCC v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; 145 ALR 36; [1995] ATPR 41-562 at 43,817 (ATPR).
- ²⁴ *Royer v Western Australia* [2009] WASCA 139, para. 22.

- ²⁵ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, paras. 113-115.
- ²⁶ *ACCC v Australian Safeway Stores Pty Ltd* [1997] FCA 450; (1997) 75 FCR 238; 145 ALR 36; [1997] ATPR 41-562. See also *ACCC v Yazaki (No 3)* [2017] FCA 465, para. 37, which is focused on the course of conduct principle, but discusses how this principle is closely connected to the totality principle.
- ²⁷ Thomas, *Principles of Sentencing*, 2nd Ed. (1979), pp. 56-57, quoted in *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 121.
- ²⁸ Beaton-Wells and Fisse (2011), p. 439. Arguing that, while the totality principle is sometimes conflated with the course of conduct principle, these principles are distinct – and that: “the proper approach [...] is to first consider the course of conduct principle and determine whether the sentences should be consecutive, or wholly or partly concurrent. Once that is done, the Court should then review the aggregate sentence to ensure that it is just and appropriate.” – see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, para. 117.
- ²⁹ *ACCC v ABB Transmission & Distribution Ltd (No 2 – Distribution Transformers)* [2002] FCA 559; (2002) 190 ALR 169; [2002] ATPR 41-872 at [40] (ATPR); *R v Tiddy* (1969) SASR 575 at 577; *Postiglione v The Queen* (1997) 189 CLR 295; 94 A Crim R 397; 71 ALJR 875; 145 ALR 408 at 335 (CLR); *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 91.
- ³⁰ *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 at 295; 141 ALR 640; [1997] ATPR 41-546; *Quinlivan v ACCC* [2004] FCAFC 175; (2004) 160 FCR 1; [2004] ATPR 42-010; *Schneider Electric (Aust) Pty Ltd v ACCC* [2003] FCAFC 2; (2003) 127 FCR 170; 196 ALR 611; [2003] ATPR 41-957; *ACCC v SIP Aust Pty Ltd* [2003] FCA 336; [2003] ATPR 41-937; [2003] Aust Contract R 90-177; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, paras. 92.
- ³¹ *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46.
- ³² *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; [2004] ATPR 41-993; *ASIC v Ingleby* [2013] VSCA 49; (2013) 275 FLR 171.
- ³³ Miller’s ‘Australian Competition and Consumer Law Annotated’, Title 76 Pecuniary penalties, CCA.76.260.
- ³⁴ The following follows closely Miller’s ‘Australian Competition and Consumer Law Annotated’, Title 76 Pecuniary penalties, CCA.76.180. The principles are initially set out in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71FCR 285; 141 ALR 640; [1997] ATPR 41-546 and in *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; [2004] ATPR 41-993. More recently, they were adopted in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, (with paras. 25-32 of this judgment describing those two judgments) .
- ³⁵ *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, para. 57-61.
- ³⁶ *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46, para. 27-28; *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 103-104.
- ³⁷ Competition and Consumer Act 2010 (Cth), section 2.
- ³⁸ *Refrigerated Express Lines (A/asia Pty Ltd v Australian Meat and Livestock Corp* [No 2] (1980) 44 FLR 455 at 460, Deane J.

- ³⁹ *Trade Practices Commission v Prestige Motors Pty Ltd* [1994] ATPR 41-359 at 42,699; *Australian Competition and Consumer Commission v Rural Press Ltd* [2001] ATPR 41-833 at 43,289 [12]; *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, para. 55; *ACCC v Visa Inc* [2015] FCA 1020, para. 92-97.
- ⁴⁰ *ACCC v ABB (No 2)* (2002) 190 ALR 169; [2002] FCA 559, paras. 13-14. This line of reasoning was recently followed in *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 56.
- ⁴¹ *Cabcharge Australia Ltd* [2010] FCA 1261 *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, para. 55, 59; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, para. 98. Specifically addressing s 76 CCA, see *Cabcharge Australia Ltd* [2010] FCA 1261, para. 41.
- ⁴² See, recently, *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476 at 490 [55]; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 29.
- ⁴³ *Trade Practices Commission v CSR Ltd* [(1991) ATPR 41-076 at 52, para. 152.
- ⁴⁴ *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20; (2012) 287 ALR 249, endorsed by the High Court in *ACCC v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640; 88 ALJR 176. See also Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.320 and 360.
- ⁴⁵ *TPC v Prestige Motors Pty Ltd* [1994] ATPR 41-359; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; 141 ALR 640; [1997] ATPR 41-546; *ACCC v High Adventure Pty Ltd* [2005] FCAFC 247; [2006] ATPR 42-091; *ACCC v Cabcharge Australia Ltd* [2010] FCA 1261; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 57.
- ⁴⁶ *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 76; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 53.
- ⁴⁷ *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 84; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 53.
- ⁴⁸ *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357.
- ⁴⁹ *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20; (2012) 287 ALR 249; *ACCC v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238 (applying Section 570 of the Telecommunications Act which, for the purposes of this case, is substantially the same as section 76 CCA – para. 201-202); *ACCC v TPG Internet Pty Ltd (No 2)* [2012] FCA 629; *ACCC v South East Melbourne Cleaning Pty Ltd (in liq) (No 2)* [2015] FCA 257; *Fair Work Building*, para. 108.
- ⁵⁰ *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 294; *Australian Competition and Consumer Commission v Visa Inc* [2015] FCA 1020, para. 84.
- ⁵¹ See Ross Abbs "Markarian v The Queen (2005) 228 CLR 357" [2008] NewcLawRw 8; (2006-2008) 10 The Newcastle Law Review 135, at 136; Sally Traynor and Ivan Potas, 'Sentencing Methodology: Two tiered or Instinctive Synthesis' (2002) 25 Sentencing Trends and Issues, available at www.judcom.nsw.gov.au/st/st25/index.html; *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357, [110]-[124] (Kirby J).
- ⁵² *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357.
- ⁵³ *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357, applied in *ACCC v Spreets Pty Ltd* [2015] FCA 382 (Collier J)

- ⁵⁴ *ACCC v Visa Inc* [2015] FCA 1020, para. 88.
- ⁵⁵ *ACCC v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238, paras. 228-230.
- ⁵⁶ *ACCC v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238, paras. 235.
- ⁵⁷ *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46, para. 51-61; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 28
- ⁵⁸ *Barbaro v The Queen* (2014) 253 CLR 58; 88 ALJR 372.
- ⁵⁹ *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46, para. 46. However, it may be possible for a defendant to submit a criminal penalty range to the court which, in its view, would not be an error. In response, the Crown may submit that it does not disagree with the defendant's assessment. This could, theoretically, permit the parties to reach a result similar to an agreed penalty, but always subject to the penalty being ultimately set by the court.
- ⁶⁰ *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46, para. 24, 59.
- ⁶¹ *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 45 and 48.
- ⁶² Recent examples of this can be found in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46; *Singtel Optus Pty Ltd v ACCC* [2012] FCAFC 20; (2012) 287 ALR 249; *ACCC v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238; *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 85; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 83-87. See also Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.280.
- ⁶³ This section follows Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.300 closely.
- ⁶⁴ The Federal Court noted in *ACCC v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238 that the: "inability of the ACCC to quantify the damage is a consideration to be given some weight" (para. 187). In this case, one of the arguments the Court adopted to refuse to impose a pecuniary penalty under the range submitted by the ACCC was that the ACCC had "failed to prove any actual loss being sustained" (para. 280).
- ⁶⁵ *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 76; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 53.
- ⁶⁶ See *Australian Securities and Investments Commission v Adler* (No 5) [2002] NSWSC 483; (2002) 42 ACSR 80 (Santow J) at 114-115 [126].
- ⁶⁷ [1991] ATPR 41-076 at 52,152. This list has been endorsed by Full Courts in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; 141 ALR 640; [1997] ATPR 41-546; and *ACCC v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513:
- ⁶⁸ See also *ACCC v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; 145 ALR 36; [1997] ATPR 41-562 and *ACCC v Korean Air Lines Co Ltd* [2011] FCA 1360, which expressed a view that, unconstrained by authority setting out that the goal of the penalties is to deter infringement of the Act, the courts would have been inclined to punish "flagrant and wilful contraventions" with a severe penalty.
- ⁶⁹ *ACCC v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; 145 ALR 36; [1997] ATPR 41-562.

- ⁷⁰ See *TPC v Carlton & United Breweries Ltd* (1990) 24 FCR 532; [1990] ATPR 41-037; *TPC v TNT Australia Pty Ltd* [1995] ATPR 41-375; *TPC v Palmer Corp Ltd* [1990] ATPR 40-995; *TPC v CC (NSW) Pty Ltd* [1995] ATPR 41-415; *ACCC v Tyco Australia Pty Ltd* [2000] FCA 401; [2000] ATPR 41-760. It should be noted that the Australian system does not set clear benchmarks to the amounts of discounts granted to companies coming forward after the original immunity applicant.
- ⁷¹ For more detail, see Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.440.
- ⁷² *ACCC v NW Frozen Foods Pty Ltd* [1996] ATPR 41-515. See also *ACCC v Kokos International Pty Ltd (No 2)* [2008] FCA 5; [2008] ATPR 42-212.
- ⁷³ For recent examples, see *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413, paras. 10-11; *ACCC v Visa Inc* [2015] FCA 1020, para. 82; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, paras. 57-58; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, paras. 57-58.
- ⁷⁴ *ACCC v Visa Inc* [2015] FCA 1020, para. 83.
- ⁷⁵ *ACCC v Cargolux Airlines International SA* [2009] FCA 342; [2009] ATPR 42-282.
- ⁷⁶ A good summary is provided in *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, paras. 66-72.
- ⁷⁷ Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.420.
- ⁷⁸ *ACCC v ABB Transmission and Distribution Limited* [2001] ATPR 41-815; [2001] FCA 383 at 13. A famous formulation of this principle can be found in *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249, para 62: "in relation to offences of calculation by a corporation where the only punishment is a fine, the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business. The primary judge was right to proceed on the basis that the claims of deterrence in this case were so strong as to warrant a penalty that would upset any calculations of profitability. (...) Generally speaking, those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention."
- ⁷⁹ *ACCC v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513; *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; [2004] ATPR 41-993 at 48, 626; *ACCC v Dermalogica Pty Ltd* [2005] FCA 152; (2005) 215 ALR 482; [2005] ATPR 42-046 at para. 61.
- ⁸⁰ *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; 141 ALR 640; [1997] ATPR 41-546 at 298; *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46, para. 61.
- ⁸¹ *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; 141 ALR 640; [1997] ATPR 41-546 at 293.
- ⁸² *ACCC v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238, para. 251; *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 85.
- ⁸³ *Schneider Electric (Aust) Pty Ltd v ACCC* [2003] FCAFC 2; (2003) 127 FCR 170; 196 ALR 611; [2003] ATPR 41-957; *ACCC v Fila Sport Oceania Pty Ltd* [2004] FCA 376; [2004] ATPR 41-983; [2004] Aust Contract R 90-192; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, para. 105.

- ⁸⁴ See, for example *ACCC v ABB Power Transmission Pty Ltd* [2004] FCA 819; [2004] ATPR 42-011; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, para. 105.
- ⁸⁵ This section follows Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.400 closely.
- ⁸⁶ As recognised in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, para. 99.
- ⁸⁷ *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 80.
- ⁸⁸ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v ACCC* [2007] FCAFC 132, para. 21.
- ⁸⁹ *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; 141 ALR 640; [1997] ATPR 41-546; *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 90 ALJR 113; 255 IR 87; 326 ALR 476 applied in relation to section 76 ACA in *ACCC v Cement Australia Pty Ltd* [2016] FCA 453. However, see also *ACCC v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; 145 ALR 36; [1997] ATPR 41-562 and *ACCC v Korean Air Lines Co Ltd* [2011] FCA 1360, which expressed a view that, unconstrained by authority setting out that the goal of the penalties is to deter infringement of the Act, the courts would have been inclined to punish "flagrant and wilful contraventions" with a severe penalty.
- ⁹⁰ See discussion above.
- ⁹¹ For example, Carr J (in the minority) in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; 141 ALR 640; [1997] ATPR 41-546.
- ⁹² *ACCC v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238, at 241 (Goldberg J); *ACCC v Ithaca Ice Works Pty Ltd* [2001] FCA 1716; (2002) ATPR 41-851 at para. 44 and 50.
- ⁹³ *TPC v CSR Ltd* [1991] ATPR 41-076 at 52,152; *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249, para. 62-63; *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 90 ALJR 113; 255 IR 87, para. 55; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640; 304 ALR 186; 96 ACSR 475; [2013] HCA 54 at para. 66; and *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 83. Also, Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.400.
- ⁹⁴ *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, para. 56; *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 75.
- ⁹⁵ Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.480. See also *ACCC v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513. See also [ACL.224.260]; *ACCC v EDirect Pty Ltd (in liq)* [2012] FCA 976; (2012) 206 FCR 160; 296 ALR 769; *ACCC v Vales Wine Co Pty Ltd* [1996] ATPR 41-528 at 42,776; *ACCC v GIA Pty Ltd* [2002] FCA 1298; *ACCC v Vales Wine Co Pty Ltd* [1996] ATPR 41-528 at 42,776; *ACCC v GIA Pty Ltd* [2002] FCA 1298; [2003] ASAL 55-093; *ACCC v SIP Australia Pty Ltd* [2003] FCA 336; [2003] ATPR 41-937; [2003] Aust Contract R 90-177; *ACCC v Fila Sport Oceania Pty Ltd* [2004] FCA 376; [2004] ATPR 41-983; [2004] Aust Contract R 90-192; *Commonwealth v Leahy Petroleum – Retail Pty Ltd* [2005] FCA 1422; (2005) 55 ACSR 353; 23 ACLC 1985.
- ⁹⁶ *ACCC v High Adventure Pty Ltd* [2005] FCAFC 247; [2006] ATPR 42-091.
- ⁹⁷ Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.240.

- 98 *ACCC v Multimedia International Services Pty Ltd* [2016] FCA 439.
- 99 *ACCC v AirAsia Berhad Company* [2012] FCA 1413.
- 100 Ltd (1996) 85 A Crim R 500; [1996] ATPR 41-475.
- 101 (1977) 30 FLR 213; 15 ALR 428; [1977] FCA 2.
- 102 [2016] FCA 439.
- 103 Id., para. 113.
- 104 Section 76 (5) CCA.
- 105 *ACCC v Yazaki* [2017] FCA 465, decided on 9 May 2017
- 106 *ACCC v Yazaki* [2017] FCA 465, para. 24. It was held that “AAPL was a wholly owned subsidiary of Yazaki” and that both AAPL and Yazaki were “carrying on business in Australia” in relation to the supply to Toyota’s relevant Australian subsidiary but not the whole of AAPL’s business: in *ACCC v Yazaki* (No 2) [2015] FCA 1304, paras. 3, 362 - 364.
- 107 *ACCC v Yazaki* [2017] FCA 465, para. 29. Even if “enterprise” meant “commercial activity”, the court considered that Yazaki did not carry on AAPL’s commercial activity of supplying customers other than Toyota (at para 31).
- 108 www.accc.gov.au/media-release/accc-appeals-yazaki-corporation-penalty-decision (30/05/2017)
- 109 *ACCC v Flight Centre Limited (No 3)* [2014] FCA 292.
- 110 *ACCC v Flight Centre Limited (No 3)* [2014] FCA 292, para. 10.
- 111 *ACCC v Flight Centre Limited (No 3)* [2014] FCA 292, para. 42.
- 112 Following the decision of the High Court of Australia in *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, the matter was remitted to the Full Court of the Federal Court of Australia for the determination of the appeal and cross-appeal regarding the penalty.
- 113 *ACCC v Cement Australia Pty Ltd* [2016] FCA 453.
- 114 *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 226. The ACCC estimated that the total anticipated benefit at the time of the first contravention was up to AUD 42 million, and ACCC contended that ex-post analysis suggested that the actual benefit of the contraventions, by preventing competitive entry, could have been around AUD 50 million – see *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 436. A thorough discussion of the ACCC’s submissions regarding expected benefit from the contravention can be found in *ACCC v Cement Australia Pty Ltd* [2017] FCAFC 159, paras. 488-552.
- 115 *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, para. 17 (“*The [2007] amendment has no application to the determination of a penalty in respect of any of the contraventions found against the relevant respondents in these proceedings*”).
- 116 See Orders made on 29 April 2016, which are set out in pages i. to iii. in *ACCC v Cement Australia Pty Ltd* [2016] FCA 453, as amended by Orders made on 25 May 2016.
- 117 *ACCC v Cement Australia Pty Ltd* [2017] FCAFC 159.
- 118 *ACCC v Yazaki (No 3)* [2017] FCA 465.
- 119 *ACCC v Yazaki (No 3)* [2017] FCA 465, para. 6. This was, as far as we are aware, the first time that the ACCC argued for a turnover-based maximum penalty when the relevant amount of the turnover has been contested by the respondents.
- 120 *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876.

- 121 *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876, para. 186.
- 122 *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617.
- 123 *ACCC v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617, para. 297.
- 124 *ACCC v Qantas Airways Ltd* [2008] FCA 1976; (2008) 253 ALR 89; [2008] ATPR 42-266. This case influenced the setting of pecuniary penalties of other companies involved in this cartel, which were also agreed: see *Australian Competition and Consumer Commission v British Airways PLC* [2008] FCA 1977 (a fine of AUD 5 million); *Australian Competition and Consumer Commission v Martinair Holland NV* [2009] FCA 340 (a fine of AUD 5 million).
- 125 *ACCC v Qantas Airways Ltd* [2008] FCA 1976; (2008) 253 ALR 89; [2008] ATPR 42-266, para. 21.
- 126 *ACCC v Prysmian Cavi E Sistemi Energia S.R.L. (No 5)* [2013] FCA 294.
- 127 *ACCC v Prysmian Cavi E Sistemi S.R.L. (No 12)* [2016] FCA 822.
- 128 *ACCC v Prysmian Cavi E Sistemi S.R.L. (No 13)* [2017] FCA 851.
- 129 *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413.
- 130 *Id.*, para. 103.
- 131 *Id.*, para. 104.
- 132 Miller's 'Australian Competition and Consumer Law Annotated', Title 76 Pecuniary penalties, CCA.76.200.
- 133 *ACCC v NSK Australia Pty Ltd* [2014] FCA 453.
- 134 *ACCC v Visa Inc* [2015] FCA 1020.
- 135 By reason of Visa Worldwide's conduct, when it communicated contractual changes to the relevant Australian financial institutions, it became a condition of the supply of the services Visa supplied to financial institutions in Australia in respect of access to and participation in the Visa payment card network that the financial institutions not acquire, except to a limited extent, currency conversion services from Dynamic Currency Conversion providers that supplied currency conversion services in competition with Visa Worldwide, or Visa entities related to it. The market in which that competition occurred was the market in Australia for currency conversion services on the Visa payment card network.
- 136 *ACCC v Visa Inc* [2015] FCA 1020, para. 78.
- 137 *ACCC v Visa Inc* [2015] FCA 1020, para. 79. In the 12 month period ending 30 June 2010, there were over 50 million cross-border purchases on payment cards in Australia involving a payment volume of approximately AUD 8 billion. Visa payment cards accounted for approximately 60 percent of those transactions (i.e. around 30 million cross-border purchases and 58 percent of the payment volume (i.e. circa AUD 4.6 billion). In 2010, the total volume of inbound cross-border multi-currency transactions was approximately USD 3.74 billion. The revenue derived by Visa from foreign currency trading arising from those transactions was between approximately USD 6.74 million and USD 14.98 million, and its fee revenue was USD 7.36 million. See paras. 22 and 36.
- 138 *ACCC v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528.
- 139 *ACCC v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676.
- 140 *Id.*, para. 10.

- 141 *ACCC v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528, para. 17; *ACCC v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676, para. 9.
- 142 *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516.
- 143 *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 73.
- 144 *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 6.
- 145 *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516, para. 146.
- 146 Section 81(1)1 of the Act Against Restraints of Competition sets out that cartel violations are administrative offences. Section 71 (1) of the Administrative Offences Act holds that the trial procedure for objections to decisions on cartel infringements is to be governed by the rules of the criminal procedures code. As a result, if there is an appeal the public prosecutor takes over and decides if he will bring the infringement decision to court. The German competition agency has only an advisory function during the court procedure. The court conducts a full merits review following a public oral hearing (effectively this can last more than 100 days in complex cases) and adopts its own, independent decision regarding the infringement, including as regards the fine. Courts are not bound by the guidelines on fines.
- 147 However, in Germany criminal sanctions can be imposed for bid-rigging.
- 148 These include the attribution of treble damages, opt-out class actions, jury trials, contingency fee agreements, an extensive discovery system, and the exclusion of the passing-on defence.
- 149 Although the United States has a prosecutorial regime, the methodology used to set pecuniary penalties is broadly in line with that of the other jurisdictions reviewed here. The approach of the United Kingdom closely resembles that of EU, even more so than Germany. Korea and Japan also follow methods more similar to the EU than to the United States.
- 150 As a matter of United States policy, unilateral conduct is never considered as suitable for sanctions by the authorities because too much case-by-case judgment and ex post assessment are required to decide whether the conduct was illegal in the first place. See OECD (2006) Roundtable on Remedies and Sanctions in Abuse of Dominance Cases, Background Paper, [https://one.oecd.org/document/DAF/COMP\(2006\)13/en/pdf](https://one.oecd.org/document/DAF/COMP(2006)13/en/pdf).
- 151 For the EU, these decisions include: Case COMP/39984 *OPCOM/Romanian Power Exchange* C(2014) 1342 final (fine of EUR 1 million); Case COMP/39985 *Motorola* C(2014) 2892 final (no fine imposed); Case COMP/39612 *Perindopril (Servier)*, C(2014) 4955 (EUR 41.2 million fine in respect of breach of Article 102 TFEU; separate, higher fines were imposed in respect of Article 101 TFEU. This case is currently under appeal); Case AT.39523 *Slovak Telekom* C(2014) 7465 (EUR 70 million); CASE AT.39759 – *ARA Foreclosure*, decided on 20 September 2016 (EUR 6 million fine). For Korea, see KFTC 2016 Statistics Yearbook, available at www.ftc.go.kr/policy/case/caseStaticView.jsp?open_info_lt_no=26&currpage=1&searchKey=&searchVal=&startdate=&enddate=.
- 152 These were decisions to fine GSK and others GBP 45 million (decision of 12 February 2012) and to fine Pfizer and Flynn Pharma GBP 90 million (decision of 6 December 2016, not yet published).
- 153 Cases B3-50/12 and B3-164/14 *SodaStream*, decision of 22 January 2015 (EUR 250,000 fine).
- 154 ‘Administrative Surcharge System to deter Cartel Conduct – Experience of Japan’ www.internationalcompetitionnetwork.org/uploads/library/doc656.pdf.
- 155 Section 36(7A) UK Competition Act 1998.

- 156 As noted in OFT (2012), "OFT's Guidance as to the Appropriate Amount of a Penalty", Report by the UK Office of Fair Trading, OFT423, para. 1.5: "*There are two aspects to the deterrence objective. First, there is a need to deter the undertakings which are subject to the decision from engaging in future anti-competitive activity (often referred to as 'specific deterrence'). Second, there is a need to deter undertakings at large which might be considering activities contrary to any of Article 101, Article 102, the Chapter I or Chapter II prohibitions from breaching the law (often referred to as 'general deterrence').*"
- 157 Federal Sentencing Guidelines Manual §2R1.1, Background.
- 158 Mostly this takes the form of guidelines. In Japan, the criteria for the determination of fines are instead stipulated in the Antimonopoly Act and binding Cabinet Orders, which are accessible to the public. In a recent survey by the International Competition Network, it was found more than half of responding jurisdictions, namely 18 jurisdictions (6 jurisdictions where fines can be imposed by courts and 12 jurisdictions where the fine is set by the agency), have guidelines and make them public. See ICN (2017) , p. 18.
- 159 The Court of Appeal in its judgment in *Argos (1) Argos Ltd (2) Littlewoods Ltd v Office of Fair Trading: JJB Sports Plc v Office Of Fair Trading* [2006] EWCA Civ 1318 made it clear, at paragraph 161 of the judgment, that section 38(8) of the Act does not bind the CMA (or the OFT at the time of the judgement) to follow the penalties guidance in all respects in every case but that, in accordance with general principle, the CMA must give reasons for any significant departure from the penalties guidance.
- 160 Sections 38(1) and (8) Competition Act 98. See OFT423, Guidance as to the Appropriate Amount of the Penalty, www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf.
- 161 ICN (2017) p. 14. This is despite the fact that guidelines are not binding on courts which conduct full merits reviews of sanctioning decisions, as occurs in Germany and in the United Kingdom.
- 162 *United States v. Booker*, 543 U.S. 220 (2005).
- 163 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006, para. 30; OFT (2012), "OFT's Guidance as to the Appropriate Amount of a Penalty", Report by the UK Office of Fair Trading, OFT423: para. 2.17.
- 164 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006, para. 9-33.
- 165 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006, para. 37.
- 166 See note 159 above.
- 167 The culpability score is based on a number of qualitative factors, including past history of violations, obstruction of justice, degree of involvement in the conspiracy, and the level of co-operation with the US Department of Justice. The score indicates the minimum and maximum multipliers applicable to the base penalty in order to identify the final pecuniary penalty's range.
- 168 18 U.S.C. § 3553(b). Under this statute, a court may depart from a guideline-specified sentence only when it finds "*an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.*"

- 169 Global turnover can be used as an ex-post check of the adequacy or reasonableness of the final amount of the fine: ICN (2017), p. 19-20.
- 170 In order to achieve deterrence, ‘it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine’ – see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006: para. 5.
- 171 Paragraph (1) of Article 9 of the Decree of the Monopoly Regulation and Fair Trade Act.
- 172 Federal Sentencing Guidelines Manual §2R1.1.(b)(2).
- 173 The combination of the value of sales and of the duration of the infringement (see below) is considered to provide “an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement” – see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006: para. 6. As such, ‘The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement’ – id: para. 19.
- 174 Antimonopoly Act, Article 7-2 (1).
- 175 Fines for breaking EU Competition Law, available at http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf
- 176 The base amount will be adjusted by a multiplication factor of: (i) 2-3 if the corporation’s turnover is below EUR 100 million; (ii) 3-4 the corporation’s turnover is from EUR 100 million to EUR 1 billion; (iii) 4-5 if the corporation’s turnover is from EUR 1 billion to EUR 10 billion; (iv) 5-6 the corporation’s turnover is from EUR 10 billion to EUR 100 billion; (v) over six if the corporation’s turnover is above EUR 100 billion.
- 177 Article 7(2) of the Antimonopoly Act. The difference is based on the average sales amount of operating income according to the type of industry, as found in corporate statistics.
- 178 OFT423, Guidance as to the Appropriate Amount of the Penalty, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf– paras. 2.4 to 2.7.
- 179 OFT423, Guidance as to the Appropriate Amount of the Penalty, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf, para. 2.10.
- 180 Federal Sentencing Guidelines Manual § 2R1.1. The commentary to Rule 1.1 explains the rationale for a readily-determined proxy for gain and loss: goal of specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. Thus, in cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10%, this factor should be considered in setting the fine within the guideline fine range.
- 181 Article 7-2 (7) of the Antimonopoly Act.
- 182 Federal Sentencing Guidelines Manual §8C2.5.
- 183 Article 7-2 (8)3 of Antimonopoly Act. This can apply cumulatively with the aggravation related to recidivism, which means that pecuniary penalties will be doubled if the corporation was sanctioned for prior infringement decisions within the previous 10 years and plays a leading role in the cartel (Article 7-2 (9) of Antimonopoly Act).
- 184 Federal Sentencing Guidelines Manual § 3B1.1.
- 185 *Umbro Holdings Ltd v. OFT* [2005] CAT 22 (judgment on penalty), paras. 39, 203.

- 186 *Sepia Logistics Ltd v. OFT* [2007] CAT 13, para 628.
- 187 Federal Sentencing Guidelines Manual § 8A1.2 n.3.
- 188 Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), para. 8.
- 189 Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11), para. 24-26.
- 190 OLG Düsseldorf, 26 June 2009, VI-2a Kart 2 - 6/08 OWi, www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2009/VI_2a_Kart_2__6_08_OWiurteil20090626.html, paras 414-420. See also Germany, Immunity, Sanctions & Settlements, GCR, available at <http://globalcompetitionreview.com/jurisdiction/1000435/germany>.
- 191 The sole ringleader of the cartel and cartel members who coerced others to participate in the cartel cannot be granted immunity from fines.
- 192 Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases - Leniency Programme - of 7 March 2006.
- 193 Article 7-2(6) of the Antimonopoly Act.
- 194 Article 7-2 (10) to (18) of the Antimonopoly Act. Up to five applicants who have applied for leniency before, during and after the investigation start date may be granted surcharge immunity or reductions. However, for applications made on after the investigation start date, only up to three applicants may receive surcharge reductions.
- 195 OFT (2012), chapter 3.
- 196 Federal Sentencing Guidelines Manual §8C2.5.
- 197 US Department of Justice Corporate Leniency Policy, www.justice.gov/atr/file/810281/download.
- 198 According to an ICN survey, only 9 of 33 jurisdictions take a company's antitrust compliance programme into consideration when setting out a pecuniary penalty. See ICN (2017), p. 32.
- 199 Douglas Ginsburg and Joshua Wright 'Antitrust Sanctions' (2010) Competition Policy International, Vol. 6, no. 2. 3, p. 4.
- 200 In a speech in 2011, Joaquin Almunia, Vice President of the Commission responsible for Competition Policy at that time, reaffirmed that compliance programs implemented in companies that violate EU competition law have "failed" and thus cannot be considered as a mitigating factor in the assessment of the level of the pecuniary penalty to be imposed ("*A successful compliance programme brings its own reward. The main reward for a successful compliance programme is not getting involved in unlawful behaviour. Instead, a company involved in a cartel should not expect a reward from us for setting up a compliance programme, because that would be a failed programme by definition.*") SPEECH/11/268, 14 April 2011)
- 201 But statute separately stipulates that the base pecuniary penalty shall be reduced by up to 10% when an infringement occurred due to inscrutable reasons despite efforts to comply with competition law. See OECD (2016d) p. 4 .
- 202 OFT (2012) para. 2.15, fn. 26.
- 203 Federal Sentencing Guidelines Manual §8B2.1 and §8C2.5 (f).
- 204 However, the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the base penalty.

- 205 Under Federal Sentencing Guidelines Manual §3B1.2, a penalty applicable to an individual defendant can benefit from a mitigating factor if he was a minimal or minor participant in any criminal activity.
- 206 OFT (2012), para. 2.16-2.17. Another reason to increase the pecuniary penalty may be that the turnover of the corporation in the relevant market may be close to zero, in which case it may be appropriate to increase the fine for purposes of general and specific deterrence – para, 2.18.
- 207 Federal Sentencing Guidelines Manual §8.C.2.5
- 208 ICN Anti-Cartel Enforcement Template: Japan (2015), p. 25, www.jftc.go.jp/en/policy_enforcement/cartels_bidriggings/anti_cartel.files/set_ICN_Cartel_Template_Japan2015.pdf.
- 209 In a recent survey by the International Competition Network, more than half of the jurisdictions surveyed followed a variant of this system. See ICN (2017), p. 13.
- 210 The parent entity can be held liable for an antitrust infringement in which its (current or former) subsidiary was directly involved under the double condition that the Commission proves that the parent entity: (i) had the capability of exercising decisive influence over the commercial policy of its subsidiary and (ii) in fact made use of such power, having regard to the economic, legal and organisational links between them. While the burden of proof is on the Commission, such burden is alleviated in cases of wholly owned subsidiaries (and of shareholding of slightly more than 96%). In such cases, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the commercial policy its subsidiary. In such cases, therefore, it is sufficient for the Commission to prove that the subsidiary is wholly owned (or nearly wholly owned) by the parent company to establish parental liability. It is then for the respondents to provide evidence rebutting this presumption. Parent and subsidiary will normally be held jointly and severally responsible for the payment of the pecuniary penalty. See Case C-97/08 P *Akzo Nobel a.o. v Commission* [2009] ECR I-8237.
- 211 The European Commission granted reductions of fines to 13 companies on account of inability to pay between November 2009 and December 2012. See OECD (2016) p.23.
- 212 Federal Sentencing Guidelines Manual §8C3.3.
- 213 OECD (2002), p. 3 and 12; International Competition Network, Cartels Working Group, Subgroup 1 – General Framework, Setting of Fines for Cartels in ICN Jurisdictions, Report to the 7th Annual Conference, Kyoto, April 2008, p. 7. OECD (2016a) p.9.
- 214 This theory builds on Gary Becker’s work on optimal criminal sanctions – see Gary Becker, ‘Crime and Punishment: An Economic Approach’, *Journal of Political Economy*, vol. 76, 1968, p. 169. Specifically for antitrust, see Kenneth G Elzinga and William Breit *The Antitrust Penalties: A Study in Law and Economics* (Yale University Press, 1976), particularly chapter 7; William M Landes ‘Optimal Sanctions for Antitrust Violations’ (1983) T 50 U. Chi. L. Rev. 652.
- 215 *ACCC v ABB Transmission & Distribution Ltd (No 2 – Distribution Transformers)* [2002] FCA 559; (2002) 190 ALR 169; [2002] ATPR 41-872 para. 19–25.
- 216 OECD (2002) pp. 13–14; ICN, Cartels Working Group, Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties, Report to the 4th ICN Annual Conference, Bonn, June 2005, p. 59; Beaton-Wells and Fisse (2011), p. 427.
- 217 International Competition Network, Cartels Working Group, Subgroup 1 – General framework, Setting of Fines for Cartels in ICN Jurisdictions, Report to the 7th Annual Conference, Kyoto, April 2008, pp. 15, 19; Competition Bureau (Canada), Revised Draft

- Bulletin on Sentencing and Leniency in Cartel Cases, 25 March 2009, p. 10; Caron Beaton-Wells and Brent Fisse ‘Australian Cartel Regulation’ (CUP, 2011), p. 441.
- 218 Office of Fair Trading, An Assessment of Discretionary Penalties Regimes, OFT1132 (2009) at p. 8.
- 219 <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>, updated at 16 November 2017.
- 220 Caron Beaton-Wells and Brent Fisse ‘Australian Cartel Regulation’ (CUP, 2011), pp. 442. They also provide an example: “*applying the method employed in the US, the base corporate fine (i.e., the starting point without taking account of aggravating factors) [in Visy would have been A\$212 million [per year]. (...) Under the EC’s 2006 guidelines, Visy’s base fine would have been even higher.*” In this case – *ACCC v Visy Industries Holdings Pty Ltd [No. 3]* (2007) 244 ALR 673 -, which imposed the largest fine up to that point in Australia, the fine was A\$36 million, imposed for 37 contraventions.
- 221 *ACCC v Visy Industries Holdings Pty Ltd [No. 3]* (2007) 244 ALR 673.
- 222 *ACCC v Qantas Airways Ltd* [2008] FCA 1976; (2008) 253 ALR 89; [2008] ATPR 42-266. This case influenced the setting of fines of other companies involved in this cartel, which were also agreed: see *Australian Competition and Consumer Commission v British Airways PLC* [2008] FCA 1977 (a fine of AUD 5 million); *Australian Competition and Consumer Commission v Martinair Holland NV* [2009] FCA 340 (a fine of AUD 5 million).
- 223 *Australian Competition and Consumer Commission v NSK Australia Pty Ltd* [2014] FCA 453.
- 224 *ACCC v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528.
- 225 See www.smh.com.au/news/environment/unilevers-pitch-dissolves-in-the-wash/2008/03/06/1204402632343.html.
- 226 *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876
- 227 *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876, para. 186.
- 228 As was noted in the Second Reading Speech of the Trade Practices Legislation Amendment Act 1992: “*Current penalties for breaches of the Act are inadequate. (...) The deterrent value of the penalties no longer reflects the seriousness with which the Government and the community view corporate misbehaviour and there has similarly been judicial comment to this effect.*”
- 229 According to the 2001 Dawson Report, Chapter 10: “*Comparable jurisdictions enable a court to deter illegal trade practices by imposing a maximum monetary penalty upon corporations that is either a multiple of the gain or a proportion of the corporation’s turnover. Recent amendments in New Zealand provide a pertinent example. The Committee considers it desirable to amend the Australian law along the same lines.*” As noted in the Second Reading Speech of the Trade Practices Legislation Amendment Act (No. 1) 2006 (Cth), the government adopted the recommendations made by the Dawson review for larger pecuniary sanctions as a means of better deterring corporations or individuals from engaging in anticompetitive conduct.
- 230 According to the Second Reading Speech of the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009: “*This bill makes much needed changes to the Trade Practices Act 1974 and will operate to deter cartel conduct by widening the range of regulatory responses available.*”

- 231 See “Record \$45 million civil penalty ordered against Tabcorp” (16 March 2017) in www.austrac.gov.au/media/media-releases/record-45-million-penalty-ordered-against-tabcorp.
- 232 See, for a recent example, *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516.
- 233 *ACCC v NW Frozen Foods* (1996) 71 FCR 285 at 291; *ACCC v ANZ* (2016) FCA 1517, para. 97.
- 234 But only for bid-rigging cases.
- 235 Which has led to a successful conviction – see *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876.
- 236 See also Caron Beaton-Wells et al., *The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement* (University of Melbourne Legal Studies Research Paper No. 519, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743268; and Caron Beaton-Wells and Christine Parker (2013), “Justifying Criminal Sanctions for Cartel Conduct: A Hard Case”, (2013) 1(1) *Journal of Antitrust Enforcement* 198.
- 237 OECD (2016d) p. 9. In particular, Germany, Korea, Japan, the United Kingdom and the United States all allow for the imposition of individual fines – see ICN (2017), p. 22. Less common individual sanctions include disqualification orders.
- 238 Parties can seek the ACCC’s evidence by way of subpoena or by seeking access to evidence that has been read and is on the Court File. That being said, the ACCC often resist access to this information, particularly when it comes to protected information as defined in section 155AAA CCA. This is particularly relevant for immunity applicants.
- 239 Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, Final Report OFT 1132, October 2009, p. 142
- 240 *ACCC v Leahy Petroleum Pty Ltd* (No 3) [2005] FCA 265; (2005) 215 ALR 301 at 309 [39]; *ACCC v Apple Pty Limited* [2012] FCA 646, para. 38; *ACCC v Visa Inc* [2015] FCA 1020, para. 112-11
- 241 *ACCC v Australian Safeway Stores Pty Ltd & Ors* (1997) 75 FCR 238 at paras. 35-36.
- 242 *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, para. 89-92; (2015) 327 ALR 540 at 559-561.
- 243 Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, Final Report OFT 1132, October 2009, section 4.21.
- 244 These include Austria, Estonia and Ireland.
- 245 These include, for example, Finland, South Africa, Sweden and the United States.
- 246 In the EU, courts have full jurisdiction to review penalties – see Art. 261 TFEU. However, in practice the European courts usually do not pursue their own analysis of the fines, and limit themselves to verifying whether the European Commission applied the fining guidelines correctly – see Ian Forrester, ‘A Challenge for Europe’s Judges: The Review of Fines in Competition Cases’ (2011) *European Law Review* 36 185, p. 198-199.
- 247 Sch 8, para. 3 of the 1998 Competition Act. But the UK’s Competition Appeal Tribunal will not disregard the fining guidance or the competition authority’s approach. Instead, it will seek to determine whether the competition authority made an error in its application of the principles set in the fining guidance – see *Napp Pharmaceutical Holdings Ltd v DGFT Case No. 1000/1/1/01* [2002] CAT 1, para. 511, confirmed by the Court of Appeal in *Argos*

Limited & Littlewoods Limited v OFT/JJB Sports PLC v OFT [2006] EWCA Civ 1318; See, more recently, *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, paras. 74-77; and *Balmoral Tanks Ltd. v CMA* [2017] CAT 23, para. 133-135.

248 See note 146 above.

249 As noted above. Even when the courts decide *ex novo*, the pecuniary penalties may end up being higher than what was imposed by the authority, as has been known to happen in Germany – see the recent wallpaper cartel case decision, available on www.bundeskartellamt.de/SharedDocs/Meldung/DE/AktuelleMeldungen/2017/12_10_20_17_Tapeten.html;jsessionid=CA83B8629EB088112EC922D8678664E3.1_cid387, and the even more recent case on the resale price maintenance of coffee, available on http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_03_2018_Rossmann_BGH.html.

250 OECD (2012) p. 6. See John Connor & Robert Lande, “Cartel Overcharges: Implications for U.S. and EU Fining Policies,” 51 *Antitrust Bulletin* 983 (2007); Wouter Wils, “Is Criminalization of EU Competition Law the Answer?” 28 *World Competition: Law and Economics Review* (2005). There are also voices against uncritically raising the level of fines on the basis of doubts about their deterrent effect – see Douglas Ginsburg & Joshua Wright, “Antitrust Sanctions,” 6 *Competition Policy International* 3, p. 4 (2010) –, limits to how much firms are able to pay - Frederic Jenny, “Optimal Antitrust Enforcement: From Theory to Policy Options”, in *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos & Ioannis Kokkoris, eds. 2010) 121, p. 128 – and concerns about the proportionality of such fines.

251 This research was carried out by the University of Melbourne in the context of its ‘Cartel Project’ between 2009 and 2011 (‘The Cartel Project’).

252 John Braithwaite and Toni Makkai, ‘Testing an Expected Utility Model of Corporate Deterrence’ (1991) 25 *Law & Society Review* 7, 8–9; Raymond Paternoster and Leeann Iovanni, ‘The Deterrent Effect of Perceived Severity: A Reexamination’ (1986) 64 *Social Forces* 751; Patrick Ronald Edwards, ‘Choices that Increase Compliance’ (1991) 10(4) *Policy Studies Review* 6. Specifically for Australia, see Christine Parker and Vibeke Lehmann Nielsen, ‘Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation’ (2011) 56 *Antitrust Bulletin* 377.

253 See Caron Beaton-Wells ‘Cartel Criminalisation as Cultural Change - A report from findings of a survey of the Australian public’ Presentation at ICN Cartels Workshop (5 October 2010), available at www.jftc.go.jp/en/int_relations/yokohama_materials.files/1_3.pdf; Caron Beaton-Wells and Christine Parker ‘Justifying criminal sanctions for cartel conduct – A hard case’ *Journal of Antitrust Enforcement* (2012) 1 (1), p. 8.

254 Since 2007 (to look only at cases brought since the higher pecuniary penalties were enshrined in law), this includes the *Cement Australia* case, which followed numerous price-fixing cases in previous years in the same sector.

255 This includes, since 2007, an air-conditioning cartel in 2010, the Queensland Construction Cover pricing case in 2011 (*ACCC v TF Woollam & Son Pty Ltd (No 2)* [2011] FCA 1216), and other investigations currently ongoing.

256 Which, after a number of price fixing investigations until 2007, has come into the spotlight again in the context of: (i) investigations of exclusionary conduct aimed at driving out competition and (ii) of the use of shopper docket for fuel purchases.

257 The ACCC undertook a number of investigations between 2007-2009 and 2013-2014 into the taxi industry for alleged breaches of various sections of Part IV: misuse of market power,

price fixing and exclusive dealing. A number of the investigations involved the restriction of access to alternative suppliers of booking and payment services.

- 258 For example, in the “Financial Review” report on pecuniary penalties of AUD 11 million imposed on Flight Centre for trying to enter into agreements with airlines to fix prices, the sanction was repeatedly described as “immaterial” and as not having led to “any significant changes to the way the business operates” by financial analysts. See “Flight Centre on Course” *The Australian Financial Review* 1 April 2014.
- 259 L. Aguzzoni, G. Langus, and M. Motta ‘The Effect of EU Antitrust Investigations and Fines on a Firm’s Valuation’ (2013) *J Ind Econ* (61) 290. Other studies have found significant negative stock price responses of almost –5% around the dawn raid and –2% around the final decision, and a significantly positive response of up to 4% around a successful appeal: see A. Günster and M. van Dijk ‘The impact of European antitrust policy: Evidence from the stock market’ (2016) *International Review of Law and Economics* (46) 20.
- 260 J. M. Bizjak and , J. L. Coles ‘The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm’ (1995) *American Economic Review* (85) 436; J. Detre and A. Golub ‘A Reexamination of the Profitability of Price Fixing Using Stock Price Movement: Has New Antitrust Legislation Been a More Effective Deterrent of Price Fixing?’, (2004) Staff Paper 04-03 (Department of Agricultural Economics, Purdue University, West Lafayette, Indiana, U.S.A.)
- 261 It is worth noting that studies of stock market movements have limited power to show actual impact to the extent that markets have internalised an accurate prediction of stock value impact from publicly known investigations.
- 262 *ACCC v Yazaki* [2017] FCA 465.
- 263 See, for example, www.ato.gov.au/general/interest-and-penalties/penalties/statements-and-unarguable-positions/.
- 264 *ACCC v Dataline.Net.Au Pty Ltd (in liq)* [2007] FCAFC 146; (2007) 161 FCR 513; *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; [2004] ATPR 41-993 per Branson, Sackville and Gyles JJ at 48, 626; *ACCC v Dermalogica Pty Ltd* [2005] FCA 152; (2005) 215 ALR 482; [2005] ATPR 42-046 at [61].
- 265 *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285; 141 ALR 640; [1997] ATPR 41-546 at 298; *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476; [2015] HCA 46, para. 61.
- 266 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640 per Brennan J.
- 267 B. J. Preston, “Judicial review of illegality and irrationality of administrative decisions in Australia,” Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, 11-13 April 2006. See *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 98.

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