



Penalties for White Collar Crime

Australian Competition and Consumer Commission's Submission

April 2016

Summary

Competition law penalties

The ACCC submits that while the available penalties for breaches of the competition law in Australia are broadly appropriate and in line with international trends, there remains a challenge for the regulator and the Courts to bring down penalties in proportion to the wrongdoing occurring. The ACCC is committed to using the tools available in the legislation to meet this challenge.

Consumer law penalties

The penalties available for breaches of consumer law in Australia are currently inadequate. The ACCC considers that consumer law penalties ought to be more comparable to competition law penalties that also operate across the economy.

Other relevant law reform inquiries

In the context of the Harper Competition Policy Review, the ACCC argued for the increased legislative protections for whistle-blowers. The current 2016 Review of the Australian Consumer Law is likely to explore potential measures for better empowering regulators to deal with rogue traders and phoenix companies.

1. Introduction

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Senate Economics References Committee inquiry into Penalties for White Collar Crime.

This submission considers the penalties and remedies available for breaches of the competition, consumer protection and fair trading provisions contained within the *Competition and Consumer Act 2010* (CCA), including the *Australian Consumer Law* (ACL).

We have structured this submission around the issues raised in the terms of reference for this inquiry, having first taken the opportunity to provide a brief summary of the penalties available in the CCA and the factors that the ACCC considers when seeking a penalty. We also compare Australian competition and consumer protection penalties to some international jurisdictions, before concluding by reference to concurrent law reform processes which may be of interest to the Committee.

2. Background: The ACCC

The ACCC is Australia's national competition and consumer protection enforcement agency. Its role is to enforce compliance with the CCA with a view to ensuring that Australia's market economy works for the benefit of all Australians.

The ACCC does not have the power to decide whether there has been a contravention of the CCA or to impose a pecuniary penalty. Instead, the ACCC investigates potential breaches of the law with a view to, where appropriate, making an application to the Court for the imposition of remedies and penalties (refer to section 3 below and Attachment B). The appropriate remedy will depend upon the circumstances of each matter. Private litigants, such as consumers or competitors, are also able to bring civil action alleging contraventions of the CCA. Private parties can obtain recompense for loss or damage but only the ACCC can seek a pecuniary penalty.

If the ACCC considers that conduct warrants a criminal penalty, it can refer a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP) who has discretion to take action for a suspected breach of a criminal prohibition.

The CCA also provides the ACCC with a range of non-Court based enforcement remedies, which allow the ACCC the flexibility to respond to conduct proportionate to the potential harm. The ACCC can resolve matters through the following non-Court based methods:

- Administrative resolution, which is an informal agreement with a trader to remedy potential breaches of the CCA.
- Court enforceable undertaking.¹ These go on the public record and can be enforced in the Federal Court if breached.² Undertakings usually set out what the company will do to remedy harm caused by its conduct and establish processes to improve their practices.
- The ACCC can also, in relation to some ACL breaches, issue an infringement notice outlining an alleged breach as an alternative to Court proceedings.³ Where the trader pays the infringement notice penalty they are not taken to have contravened the law in relation to the conduct set out in the infringement notice and the Commonwealth cannot institute proceedings in relation to that conduct.

¹ *Competition and Consumer Act 2010* (Cth) s 87B (CCA).

² *Ibid* s 87B(4).

³ *Ibid* s 134A and 134C.

The ACCC cannot pursue all the complaints it receives (approximately 180 000 per year) and the ACCC rarely becomes involved in resolving individual disputes. While all complaints are carefully considered, the ACCC focusses on those matters that will, or have the potential to, harm the competitive process or result in widespread consumer detriment. The ACCC exercises its discretion to direct resources to matters that provide the greatest overall benefit for competition and consumers.

To assist with this determination, the ACCC gives compliance and enforcement priority to matters that demonstrate one or more of the impact factors and/or priority areas set out in the ACCC's *Compliance and Enforcement Policy*,⁴ which is released annually.

3. Penalties under the CCA and ACL

3.1. Prohibitions in the CCA and ACL

The CCA prohibits a broad range of harmful conduct by both corporations and individuals and applies across the economy. See **Attachment A** for more information about the range of CCA prohibitions. The majority of the prohibitions in the CCA attract civil liability, however a limited number also attract criminal liability (only cartel conduct allows for the possibility of incarceration). The ACCC can refer matters to the CDDP for possible criminal prosecution where the conduct is egregious or involves serious harm.

3.2. Penalties Available

The CCA and ACL set out the maximum penalty that a Court can impose for contravention of its provisions. When imposing a penalty the Court is required to consider all relevant matters, including the nature and extent of the conduct and any loss suffered as a result, the circumstances in which the conduct took place and whether the person has breached the CCA or ACL previously.⁵ A summary of the penalties available under the CCA and ACL are set out at **Attachment B** and include pecuniary penalties, criminal fines, imprisonment, disqualification orders, and other Court orders requiring particular conduct or preventing conduct from continuing to occur.

4. Response to the Terms of Reference

(a) Evidentiary standards across various acts and instruments

The civil burden of proof for breaches of the CCA and ACL is 'balance of probabilities'. The criminal burden of proof for those breaches that provide for a criminal sanction is 'beyond a reasonable doubt'.

In relation to civil proceedings brought by the ACCC the *Briginshaw* principle requires additional rigour be applied to the balance of probabilities test. This requires that in civil penalty cases, due to the seriousness of the potential consequences for the respondent that consideration be given to additional factors. Justice Dixon explained this in the *Briginshaw v Briginshaw*⁶

“the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction.”

⁴ ACCC, *2016 ACCC Compliance and Enforcement Policy* 2016, viewed 2 March 2016, <http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>.

⁵ CCA s 76; *Competition and Consumer Act 2010* (Cth) Schedule 2 (ACL) s 224.

⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

Broadly, this principle provides that the greater the severity of the allegation and potential consequences, the higher the standard of proof.

(b) The use and duration of custodial sentences

In 2009 the CCA was amended to include criminal provisions for cartel conduct. The criminal cartel provisions provide for up to 10 years' imprisonment and fines. The ACCC works with the CDPP in relation to the potential criminal prosecution of cartel conduct although to date, no criminal cartel proceedings have been instituted. Regardless, the ACCC considers the deterrent effect of criminal sanctions to be important and has active criminal cartel investigations currently underway.

The 10 year maximum prison term leaves discretion to the Court to determine the length of incarceration in accordance with the seriousness of the conduct. A 10 year maximum term is also in line with international standards (see below).

In addition to the potential for a lengthy prison term, there are other consequences to criminal provisions which have an important deterrent effect. For example, criminal conviction may prevent a person from holding office, obtaining certain licences or being a company director. Criminal convictions may also prevent travel to certain countries and make it difficult to obtain visas, particularly business visas, in other jurisdictions. In addition, criminal conviction enables proceeds of crime rules to require a person to pay back any gains from misconduct.

In addition to the criminal provisions within the CCA and ACL, on occasion the ACCC files proceedings alleging criminal contempt of Court. Contempt arises where a person disregards or disrespects the authority of the Court, for example not complying with Court orders. Contempt can result in imprisonment or Court orders for additional fines (see further Section 5.2 and the Peter Foster case study).

(c) The use and duration of banning orders

As mentioned above and set out further in **Attachment B**, a disqualification order is available for a breach of the CCA or ACL. Disqualification orders are likely to be ordered by a Court having regard to the need to protect the public from future misconduct or where a person has had little regard for their legal obligations.⁷ Disqualification orders can be issued for any period of time that the Court considers to be appropriate. Noting that each order is based on the circumstances of each case, *Halkalia Pty Ltd & Ors*⁸ led to a disqualification order of 15 years, and in *Safe Breast Imaging*⁹ the order was for four years.

The ACCC considers the imposition of a disqualification order to be an important remedy, as it restricts a person from managing a company and sends a strong message to other potential offenders that there are consequences for misconduct. The first disqualification order under the ACL was issued by the Court in 2012 and since then the Court has regularly imposed similar bans. Disqualification orders are also available in the United Kingdom and Japan (see below).

(d) The value of fines and other monetary penalties, particularly in proportion to the amount of wrongful gains

Penalties for breaches of the competition law provisions were amended in 2007. The maximum penalty in competition cases is now the highest of \$10 million, three times the gain or, if the Court cannot determine the gain, 10% of annual turnover of the body corporate in the 12 months in which the conduct occurred (see **Attachment B**).¹⁰

⁷ *Safe Breast Imaging Pty Ltd* [2014] FCA 238.

⁸ *ACCC v Halkalia Pty Ltd (No 2)* [2012] FCA 535.

⁹ *Safe Breast Imaging Pty Ltd* [2014] FCA 238.

¹⁰ CCA s 76. This framework was introduced in January 2007.

The provisions which provide for a maximum penalty by reference to the gain to the company or annual turnover have not been used often to date. This is because cases which are subject to these provisions are only now coming to the attention of the Court.¹¹

It is important to note that these provisions, as with all penalty provisions, provide for a maximum that a Court can impose. The determination of appropriate penalty in any particular case lies within the discretion of the Court. The ACCC is of the view that the current maximum penalties for competition cases allow a Court the flexibility to award a proportionate penalty. We also note that a maximum penalty determined by reference to 10% of annual turnover is consistent with international practice.

We discuss the appropriateness of these penalties in part 5 below.

(e) The availability and use of mechanisms to recover wrongful gains

Refer to d) above.

(f) Penalties used in other countries, particularly members of the Organisation for Economic Co-operation and Development (OECD)

Tables 1 and 2 below provide a brief comparison of competition and consumer protection remedies available to regulators across Canada, the European Union, the United Kingdom, the United States, Japan, Singapore, Korea and the Netherlands (collectively the international jurisdictions). All of the international jurisdictions also provide for a right of private action.

Comparing penalties in Australia to international jurisdictions is difficult for a number of reasons, including:

- each of the international jurisdictions has different prohibitions, especially in the sphere of consumer protection
- some countries have administrative jurisdictions, meaning that the agency is responsible for both investigating an alleged breach and imposing a penalty.

The tables below illustrate that in relation to competition law, the penalties available in Australia are broadly in line with international trends. However, penalties actually imposed in Australia are lower than those in other countries. This may be because, at least in part, cases in Australia using the higher penalties introduced in 2007 are only now coming before the Court. In relation to consumer law penalties those in Australia are considerably lower than other countries. Many countries have unlimited penalties for consumer protection which allows a Court the flexibility to award a penalty based on the conduct.

The disparity in Australian penalties with those awarded internationally is illustrated by two recent international cartel cases. The first case involved an international investigation into price fixing by airlines. Numerous jurisdictions instituted cases against airlines for involvement in this cartel that spanned the globe. Australian Courts have ordered \$98.5 million in penalties against 13 different traders for conduct impacting upon Australia. In the United States, penalties exceeded US\$1.8 billion against 19 companies, with numerous executives also being sentenced to jail. In Korea the penalties totaled over 120 billion KRN (approx. AUD\$136 million) against 11 airlines.

In a similar case regarding an international cartel between automotive parts manufacturers Australia imposed \$5 million in penalties against two different companies. Similar investigations in the European Union resulted in €953 million penalties across five manufacturers. Korea awarded 78 billion won (approx. \$88 million) on nine companies and Singapore awarded S\$9,306,977 (approx. \$9 million) against three companies. Both matters were decided in Australia under the old penalty regime and illustrated the necessity of scalable penalties to reflect the harm from the conduct and to enhance deterrence.

¹¹ These provisions were considered by Justice Logan in *ACCC v Flight Centre Limited (No 3)* [2014] FCA 292.

Table 1: Competition Law Penalties

Country	Individual Pecuniary penalty	Corporations Pecuniary penalty	Disqualification Orders	Prison	Undertakings	Court Based or Administrative Jurisdiction	Recent Penalty Example ¹²
Australia	\$500 000	Either: <ul style="list-style-type: none"> \$10 million 3 times the gain 10% turnover 	✓	10 years Fine of 2000 penalty units (\$360 000 as per <i>Crimes Act 1914 s 4AA</i>)	✓	Court Based	\$3 000 000 for cartel conduct ¹³
Canada	\$25 million per count (cartels) No maximum for other offences	\$25 million per count (cartels) No maximum for other offences	×	14 years	✓	Court Based	\$13 000 000 for bid rigging ¹⁴
European Union	None	10% of annual turnover	×	×	✓	Administrative	€110 929 000 for cartel conduct ¹⁵
United Kingdom	Unlimited	10% of annual global turnover	✓	5 years	✓	Administrative (civil regime) Court Based (criminal regime)	£37 606 275 for anti-competitive agreements ¹⁶
United States	\$1 million	\$100 million (can be increased in certain circumstances) ¹⁷	×	10 years	✓	Court Based	\$62 000 000 for criminal cartel conduct ¹⁸
Japan	¥5 million (criminal) Pecuniary penalties are calculated in accordance with a formula ¹⁹	¥500 million (criminal) 10% of turnover for pecuniary penalties.	×	5 years	✓	Court-Based (criminal) Administrative (civil)	¥100 063 000 for cartel conduct ²⁰
Netherlands	Between 0-50% of the companies	Between 0-50% of the companies relevant turnover ²¹	×	×	✓	Administrative	€9 600 000 for cartel conduct ²²

¹² This table depicts penalties awarded against one company, although in some cases many companies may have been found liable in relation to the same conduct.

¹³ ACCC, *\$3 million penalty for bearings cartel case*, media release, 13 May 2014 <<http://www.accc.gov.au/media-release/3-million-penalty-for-bearings-cartel-conduct>>.

¹⁴ Competition Bureau, *Japanese auto parts company fined \$13 million for participating in a bid-rigging conspiracy*, media release, 1 April 2016 <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04058.html>>.

¹⁵ European Commission, *Antitrust: Commission fines car parts producers €137 789 000 in cartel settlement*, press release, 27 January 2016 <http://europa.eu/rapid/press-release_IP-16-173_en.htm>.

¹⁶ Competition and Markets Authority, *CMA fines pharma companies £45 million*, press release, 12 February 2016 <<https://www.gov.uk/government/news/cma-fines-pharma-companies-45-million>>.

¹⁷ The penalty can be increased above \$100 million. A judge first determines the volume of commerce affected by the conduct. If this is over the \$100 million maximum, the fine is then based on twice the gain or loss, or 20% of the volume of affected commerce.

¹⁸ Department of Justice, *KYB agrees to plead guilty and pay \$62 million criminal fines for fixing price of shock absorbers*, press release, 16 September 2015 <<https://www.justice.gov/opa/pr/kyb-agrees-plead-guilty-and-pay-62-million-criminal-fine-fixing-price-shock-absorbers>>.

¹⁹ This is roughly the amount of sales for the period during which the conduct took place, multiplied by a percentage which is determined based on the size of the business and industry engaged in.

²⁰ Japan Fair Trade Commission, *The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders to the Manufacturing Distributors Selling Poly Aluminum Chloride Ordered by the Local Governments in Tohoku District, Niigata District and Hokuriku District*, press release, 5 February 2016 <<http://www.jftc.go.jp/en/pressreleases/yearly-2016/February/160205.html>>.

²¹ The specific percentage relevant is determined based on the provision breached and severity.

	relevant turnover						
Korea	200 million won	Either: ²³ 3 times the gain 10% of annual turnover 2% of turnover	×	3 years	✓	Administrative (civil) Court Based (criminal)	1.8 billion won for resale price maintenance ²⁴
Singapore	×	Up to 10% of turnover for the years engaged in the conduct (up to 3 years)	×	×	✓	Administrative	\$7.4 million for anti-competitive agreements ²⁵

Table 2: Consumer Law Penalties

Country	Individual Pecuniary penalty	Corporations Pecuniary penalty	Disqualification Orders	Prison	Undertakings	Court Based or Administrative Jurisdiction	Recent Penalty Example
Australia	\$220 000	\$1.1 million	✓	×	✓	Court Based	\$100 000 for false and misleading conduct ²⁶
Canada	Unlimited for indictable offences \$200 000 for summary offences	No maximum for indictable offences \$200 000 for summary offences	×	14 years for indictable offence 1 year for summary offences	✓	Court Based	\$3 500 000 for misleading pricing ²⁷
European Union	None	×	×	×	×	Administrative	-
United Kingdom	Unlimited	×	×	2 years	✓	Court Based	£156 000 for pyramid selling ²⁸
United States	\$10,000 ²⁹	×	×		✓	Court Based	\$18 800 000 for breaching an FTC order ³⁰
Japan	¥5 million (criminal) Pecuniary	¥500 million, and no less than ¥10 000	✓	5 years	✓	Court-Based	

²² Authority for Consumers and Markets, *ACM imposed fines of EUR 12.5 million cold-storage firms*, news, 23 March 2016 <<https://www.acm.nl/en/publications/publication/15609/ACM-imposed-fines-of-EUR-125-million-on-cold-storage-firms/>>.

²³ The penalty is determined based on the provision breaches: 3 times the gain from the conduct applies to abuse of power, 10% of annual turnover for the years engaged in the conduct applies to cartel conduct and 2% of turnover for the years engaged in the conduct applies to unfair trading practices or resale price maintenance.

²⁴ Korea Fair Trade Commission, *Abuse of Market Dominance*, cases, 14 January 2013 <http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=54&pageId=0302>.

²⁵ Competition Commission Singapore, *CCS Imposes Penalties on Ball Bearings Manufacturers involved in International Cartel*, media release, 27 May 2014, <<https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-imposes-penalties-on-ball-bearings-manufacturers-involved-in-international-cartel>>.

²⁶ ACCC, *Electronic Bazaar operator to pay penalties of \$100,000 for misleading consumers*, media release, 13 May 2015 <<http://www.accc.gov.au/media-release/electronic-bazaar-operator-to-pay-penalties-of-100000-for-misleading-consumers>>.

²⁷ Competition Bureau, *Michaels to pay \$3.5 M penalty to settle frames and custom framing services price advertising case*, media release, 6 May 2015 <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03923.html>>.

²⁸ Competition and Markets Authority, *Pyramid scheme organisers ordered to pay over £500,000*, press release, 21 July 2015 <<https://www.gov.uk/government/news/pyramid-scheme-organisers-ordered-to-pay-over-500000>>.

²⁹ US consumer protection laws focus on providing redress to affected consumers rather than pecuniary penalties available by application to a Court by a regulator.

³⁰ Federal Trade Commission, *New Jersey-Based Telephone Fundraisers Banned from Soliciting Donations; Will Pay \$18.8 Million for Violating FTC Order*, press release 31 March 2010 <<https://www.ftc.gov/news-events/press-releases/2010/03/new-jersey-based-telephone-fundraisers-banned-soliciting>>.

	penalties are calculated in accordance with a formula ³¹	(criminal) Pecuniary penalties are calculated in accordance with a formula					
Netherlands	Between 0-50% of the companies relevant turnover	Between 0-50% of the companies relevant turnover ³²	*	*	✓	Administrative	€1 190 000 for misleading consumers ³³
Korea	30 million won (civil) 50 million won (criminal)	-	*	3 years	✓	Administrative	300 million won for coercive pricing ³⁴
Singapore	There is no regulator who enforces Consumer laws. Consumers can take complaints to an NGO	-	-	-	-	-	-

(g) Any other relevant matters

In evaluating the suitability of the current penalty regime the ACCC considers the following underlying theories fundamental:

- the availability of penalties against individuals in addition to corporate penalties, and
- the importance of deterrence.

i. Penalties for individual under the CCA

The ACCC considers that one of the most effective ways to combat corporate misconduct is to hold the individuals who perpetrated the wrongdoing, either individually or on behalf of the company, responsible and accountable. This view is widely held internationally. For example, when considering penalties for individuals for cartel conduct the OECD concluded that ‘corporate sanctions rarely are sufficiently high to be an optimal deterrent against cartels, there is a place for sanctions against natural persons’.³⁵ These principles were echoed by the US Department of Justice in 2015 when Deputy Attorney General Sally Yates announced a crackdown on corporate misconduct committed by individuals. In her memorandum Deputy Attorney General Yates stated that ‘one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing’.³⁶

The focus on individual deterrence is also an important reason for the non-indemnity clause in the CCA.³⁷ The non-indemnity clause provides that an organisation cannot indemnify an employee against legal costs or financial penalties where the employee has been found liable. This increases the risk to an individual that engages in corporate misconduct and therefore provides deterrence. It also encourages individuals to cooperate with ACCC during investigations and litigation.

³¹ Consumer protection is largely dealt with through the Consumer Affairs Agency which facilitates mediation between consumers and corporations.

³² The specific percentage relevant is determined based on the provision breached and severity.

³³ International Consumer Protection and Enforcement Network, *The Netherlands- Consumer Authority fines provider of SMS services*, news, 2 August 2010 <<https://www.icpen.org/news/the-netherlands-consumer-authority-fines-provider-of-sms-services.html>>.

³⁴ Korea Fair Trade Commission, *Abuse of Market Dominance*, cases, 14 January 2013 <<http://eng.ftc.go.kr/bbs.do>>.

³⁵ OECD, *Cartel Sanctions Against Individuals 2003*, Policy Roundtables.

³⁶ US Department of Justice, *Individual Accountability for Corporate Wrongdoing* (9 September 2015).

³⁷ CCA s 77A; ACL s 229.

ii. Deterrent effect of penalties

Specific and general deterrence is a critical component to encouraging compliance with the CCA. To prevent infringing behaviour both the theoretical maximum penalty and the penalties obtained in practice must have a strong deterrent effect. To be effective, the prohibitions must be able to be efficiently enforced by the ACCC and private litigants, and the penalties achieved must outweigh the gains that businesses obtain from anti-competitive or unfair conduct. In *Trade Practices Commission v CSR Ltd* Justice French stated that the purpose of penalties is deterrence:

“to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act”³⁸

A key factor a Court will consider in determining a penalty is the deterrent effect, both to the specific corporation or individual that breached the law, as well as to the community at large. In the CSR case, Justice French set out a number of factors for the Court to consider when imposing a penalty (often called the ‘French factors’). These include the size of the company, the amount of market power it has, the deliberateness of the conduct and whether the company has cooperated.³⁹ Subsequent cases have outlined additional factors such as any similar past conduct and the size of the damage to the market.

5. Concurrent law reform processes

5.1. Competition penalties

The ACCC considers that the penalties currently available for breaches of the competition provisions are broadly appropriate and in line with international trends. The current challenge in Australia is for regulators and Courts to ensure that the penalties actually imposed are sufficiently high to provide for sufficient deterrence. Cases are now coming before the Courts which involve conduct that is subject to the higher penalty regime for competition cases in Australia, and the ACCC will continue to seek high penalties where we consider it appropriate based on the facts of the case.

The ACCC considers that increased protection for whistleblowers in the CCA is likely to strengthen our ability to obtain information and evidence. The ACCC’s submissions to the Competition Law Review provide more information on the ACCC’s views.⁴⁰ In this regard the ACCC has an *Immunity and cooperation policy for cartel conduct* to encourage self-reporting of cartel involvement. Such policies are used around the world, with approximately 50 other countries currently using a similar approach. Immunity is conferred on the first person to report conduct, providing they meet certain criteria.⁴¹ The ACCC also uses a *Cooperation policy for enforcement matters* to encourage persons and companies who might have contravened other provisions of the Act, or who are not the first cartel informant, to come forward and cooperate with the ACCC to address these possible contraventions.

In the ACCC response to the Harper inquiry,⁴² we suggested that to complement these tools and assist with gathering evidence for investigations greater protection for whistle-blowers or informants should be provided through:

- sanctions that better deter intimidation; and

³⁸ *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152.

³⁹ *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 at 52, 153.

⁴⁰ ACCC, *ACCC Submissions*, viewed on 24 February 2016 <https://www.accc.gov.au/about-us/consultations-submissions/accc-submissions>.

⁴¹ This criteria often includes requirements for full and frank disclosure and full cooperation with the investigation and any subsequent legal proceedings etc.

⁴² ACCC, *ACCC Submissions*, viewed on 24 February 2016 <https://www.accc.gov.au/about-us/consultations-submissions/accc-submissions>.

- the creation of a third-party whistle-blower regime, modelled on the *Corporations Act 2001*.

This is an issue that may also be of relevance to the Committee given the concurrent Commonwealth Attorney General's Department's Public Consultation Paper *Consideration of a Deferred Prosecution Agreements scheme in Australia*.⁴³

5.2. Consumer protection penalties

The ACCC welcomes the current ACL Review which will include a consideration of whether the penalties provided for in the ACL remain appropriate. The final report of the ACL Review is expected in March 2017.

The ACL Review will also consider whether legislating maximum penalties with reference to, for instance, the *Crimes Act 1914* 'penalty units' that are periodically adjusted to keep pace with inflation, would be appropriate.

The ACCC considers that the current maximum penalties available under the ACL are too low to provide a powerful deterrent effect. This is particularly the case for breaches by large corporate players that are unlikely to be deterred by a maximum penalty of \$1 100 000 per contravention. There appears to be no strong policy reason for the maximum penalties under the ACL being considerably lower than those available for breaches of competition laws. We do not consider that consumer harm resulting from ACL breaches is necessarily less significant than that arising in competition cases. We consider that the ACL penalty regime should be reviewed in light of this disparity.

This view has also been expressed by the Courts. In *ACCC v Coles* the ACCC alleged that Coles had:

- demanded payments from suppliers that it was not entitled to
- threatened harm to the suppliers that did not comply with the demand
- withheld money from suppliers it had no right to withhold.

In December 2014 the Federal Court of Australia by consent made declarations that Coles had engaged in unconscionable conduct in breach of the ACL⁴⁴ and ordered Coles to pay \$10 million in financial penalties. Coles also entered Court enforceable undertakings to provide redress to over 200 affected suppliers.

The Court found that Coles had acted unconscionably by threatening its suppliers in a manner not consistent with acceptable business and social standards. In her judgment, Justice Gordon stated that:

*“while it is a matter for the Parliament to review whether the maximum available penalty of \$1.1 million for each contravention by a body corporate is sufficient when a corporation with annual revenue in excess of \$22 billion acts unconscionably... the current maximums are arguably inadequate for a corporation the size of Coles.”*⁴⁵

We note the discussion of the adequacy of ACL penalties to deter wrongdoing as part of the *ACL Review*.⁴⁶

i. Practical law enforcement challenges

⁴³ Attorney-General's Department, *Deferred Prosecution Agreements*, viewed on 30 March 2016, <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx>.

⁴⁴ ACL s 22.

⁴⁵ *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, at 106.

⁴⁶ See ACL Issues paper at <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/>.

A challenge associated with the ACL penalty regime is the ACL's ability to effectively deal with recidivist rogue traders. In some instances repeat offenders show no regard for the civil penalties imposed by the Courts. For example in the Peter Foster case, Court orders preventing Mr Foster from being involved in carrying on a business were insufficient to protect future consumers from similar conduct. As such the ACCC needed to pursue a resource intensive, time consuming and indirect route of seeking compliance with the law where the only option remaining was to seek an order for contempt of Court with a custodial sentence. We note that non-custodial sanctions may also be of use in these cases due to the carry-on effects of criminal conviction such as difficulty obtaining business licenses (discussed above). In these cases disqualification orders could be imposed but are unlikely to be effective due to a complete disregard of the law.

This is particularly an issue where rogue traders manifest as scams (where a personal or business veneer masks a fraud) or phoenix companies (a company that previously traded as another entity, declared insolvency to avoid debts or other legal obligations and then re-emerged, under another name, to do business again) making it difficult to enforce Court orders, serve documentation or compel cooperation with investigations. These rogue traders also make it difficult for consumers, including business consumers, to obtain redress using the CCA. They also have the potential to cause significant harm to consumers due to their shrewd nature. The ACL Review will consider whether higher penalties or increased enforcement powers would better enable deterrence of such blatant disregard for the law.

The ACCC thanks the Committee for the opportunity to make a submission.

Appendix A: Prohibitions under the CCA

Competition prohibitions

Anti-competitive agreements: the CCA prohibits contracts, arrangements or understandings that are likely to substantially lessen competition in a market.

Cartel conduct: cartels are prohibited under civil law and are a criminal offence punishable by imprisonment. There are certain forms of anti-competitive conduct that are known as cartel conduct. They include:

- *price fixing*, when competitors agree on a pricing structure rather than competing against each other
- *sharing markets*, when competitors agree to divide a market so participants are sheltered from competition
- *rigging bids*, when suppliers agree among themselves who will win and at what price
- *controlling the output or limiting the amount of goods and services* available to buyers.

Collective boycott: a collective boycott occurs when a group of competitors agree not to acquire goods or services from, or not to supply goods or services to, a business with whom the group is negotiating, unless the business accepts the terms and conditions offered by the group.

Secondary boycott: occurs when one person, in concert with a second person, engages in conduct that hinders or prevents a third person supplying to or acquiring from a fourth person.

Exclusive dealing: broadly speaking, exclusive dealing occurs when one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal. Most types of exclusive dealing are against the law only when they substantially lessen competition, although some types are prohibited outright. There are two broad categories of exclusive dealing:

- **Third line forcing:** occurs when a business will only supply goods or services, or give a particular price or discount on the condition that the purchaser buys goods or services from a particular third party. If the buyer refuses to comply with this condition, the business will refuse to supply them with goods or services.

In contrast to other types of exclusive dealing, third line forcing is prohibited no matter what its effect on competition.

- **Other types of exclusive dealing:** including conduct known as full line forcing, involve a supplier refusing to supply goods or a service unless the intending purchaser agrees not to:
 - buy goods of a particular kind or description from a competitor
 - resupply goods of a particular kind or description acquired from a competitor
 - resupply goods of a particular kind acquired from the company to a particular place or classes of places.

These types of exclusive dealing will only break the law when the conduct has the effect of substantially lessening the competition in the relevant market.

Resale price maintenance: a supplier may recommend that resellers charge an appropriate price for particular goods or services but may not stop resellers charging or advertising below that price.

Misuse of market power: a business with a substantial degree of power in a market is not allowed to use this power for the purpose of eliminating or substantially damaging a competitor or to prevent a business from entering into a market.

Consumer protection prohibitions

False, misleading or deceptive conduct: businesses are not allowed to make statements that are incorrect or likely to create a false impression. This rule applies to advertising, product packaging, and any information provided by staff or online shopping services. It also applies to any statements made by businesses in the media or online, such as testimonials on their websites or social media pages.

Unconscionable conduct: to be considered unconscionable, conduct it must be more than simply unfair—it must be against conscience as judged against the norms of society.

Consumer guarantees: the ACL requires businesses to provide consumer guarantees for most consumer goods and services they sell.

Product safety: the ACL contains a range of protections to help ensure that the products sold in Australia are safe.

Unfair contract terms: the ACL prohibits the enforcement by businesses of certain unfair terms in most standard form contracts with consumers and smaller businesses by enabling a Court to find that a term is unfair and therefore void if, for example, it causes a significant imbalance between the interests of the parties (in favour of the stronger party).

Attachment B: Penalties and Remedies

Competition penalties

Table 1 Competition penalties, sets out the spectrum of available penalties for breaches of the competition provisions contained in the CCA.

Table 1 Competition penalties

Prohibition	Max penalty (individual) ⁴⁷	Max penalty (corp) ⁴⁸	Criminal offence	Prison	Injunctions ⁴⁹	Disqualification orders ⁵⁰	Infringement Notice	Court enforceable undertaking ⁵¹	Representative action
Anticompetitive Agreements	\$500 000	Either: \$10 million 3 times the gain 10% turnover	x	x					
Cartel conduct	\$500 000 (civil penalty) \$360 000 (criminal)	Either: (civil or criminal) \$10 million 3 times the gain 10% turnover	✓	10 years	✓	✓	x	✓	✓
Misuse of market power	\$500 000	Either: \$10 million 3 times the gain 10% turnover	x	x					
Exclusive dealing	\$500 000	Either:	x	x					

⁴⁷ CCA s 76.

⁴⁸ Ibid s 76.

⁴⁹ Ibid s 80.

⁵⁰ Ibid s 86E(1).

⁵¹ Ibid s 87B.

		\$10 million 3 times the gain 10% turnover							
Resale price maintenance	\$500 000	Either: \$10 million 3 times the gain 10% turnover	*	*					

Consumer protection penalties

Table 2 Consumer protection penalties, sets out the penalties available for breaches of the consumer protection provisions of the ACL.

Table 2 Consumer protection penalties

Prohibition	Max penalty (individual) ⁵²	Max penalty (corp) ⁵³	Criminal offence	Prison	Injunctions	Disqualification orders ⁵⁴	Infringement Notice ⁵⁵	Court enforceable undertaking ⁵⁶	Representative action ⁵⁷
Misleading or deceptive conduct	*	*	*	*	✓	*	✓	✓	✓
False or misleading conduct	\$220 000	\$1.1 million	✓			✓			
Unconscionable conduct	\$220 000	\$1.1 million	*			✓			
Consumer guarantees	*	*	✓			*			

⁵² ACL s 224.

⁵³ Ibid s 224.

⁵⁴ Ibid s 248(1).

⁵⁵ Ibid s 134.

⁵⁶ Ibid s 218 and 87B.

⁵⁷ Ibid s 239(1).

Product safety	\$220 000	\$1.1 million	✓			✓			
Unsolicited Consumer Agreements	\$10 000	\$50 000	✓			✓			
Multiple Pricing	\$1 000	\$5 000	*			✓			

Consistent Remedies within the CCA and ACL

Disqualification orders

Disqualification orders are available for breaches of the CCA and ACL. This allows the Court to impose a time period during which the person cannot be involved in the management of a company. To impose a disqualification order the Court must be satisfied that a person has breached the CCA (or ACL) and that the order is justified in all the circumstances.

Other Court orders

The Court can impose any other orders that it considers necessary to resolve the matter or address the harm. These include injunctions, remedial orders or the obligation to undertake compliance training and other orders that are appropriate.

Rights of private action

The CCA and ACL provide for a right of private action for corporations and individuals that have suffered loss or damage as a result of a civil breach of the competition or consumer protection provisions can seek injunctions, damages and remedial orders in their own right.

Follow on actions

Where the ACCC has established a breach of the CCA or ACL in a contested proceeding, the findings of fact by the Court can be used as *prima facie* evidence of that fact in any 'follow-on' private proceedings.

Representative actions

The ACCC can make an application on behalf of one or more identified people seeking to obtain damages for a breach of most of the competition and consumer protection provisions. The ACCC can also seek a redress order for non-party consumers for certain breaches of the ACL, including misleading or deceptive conduct, unfair practices (such as false misrepresentations) and failure to honour the statutory consumer guarantees.