



# Guidelines on ACCC approach to penalties in competition and consumer law matters

September 2023

## Acknowledgment of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

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# Purpose of these Guidelines

The *Competition and Consumer Act 2010* (Cth) (CCA), which includes, in Schedule 2, the Australian Consumer Law (ACL), regulates most areas of the Australian market. Its purpose is to enhance the welfare of Australians by promoting competition, fair trading, and consumer protection.

The Australian Competition and Consumer Commission (ACCC) is charged with enforcing compliance with the CCA. An important function of the ACCC is to bring proceedings seeking pecuniary penalties for contraventions of the CCA.

The primary purpose of civil pecuniary penalties is to secure compliance by deterring wrongdoing. Such penalties are intended to deter both the contravenor and others who might be tempted to engage in contravening conduct.

The penalty to be imposed in any given matter is solely for the Court to determine. However, in carrying out its functions the ACCC makes submissions to the Court on the appropriate penalty that it considers should be imposed. The submissions cannot bind the Court but provide it with the regulator's view on what is needed to achieve deterrence.

These Guidelines are being issued to:

- focus on the principal matters to be taken into account by the ACCC in determining an appropriate penalty that it will seek from the Court and which it considers will achieve deterrence
- promote consistency in the way the ACCC approaches penalty submissions
- increase transparency of the ACCC's approach for the broader community.

They do not address the ACCC's approach to other forms of relief that may be available, which may serve different purposes and involve different considerations.

These Guidelines set out the ACCC's general approach when determining the penalties it considers appropriate to include in its submissions to the Court. The approach reflects the relevant statutory provisions and the principles established by courts. These evolve over time, and therefore these Guidelines will be revised from time to time as appropriate. Consistent with the established principles in relation to the Court's approach to setting penalties, the approach taken by the ACCC is not a mathematical one. Given the wide variety of circumstances that may arise, the Guidelines are not intended to be applied as inflexible rules, but rather should be considered as indicative of the ACCC's approach.

The approach involves the following steps, which are set out in a diagram at **Annexure A**:

**Step 1. Identifying the contraventions**, including by whom and on how many occasions, and considering any overlap between multiple contraventions.

**Step 2. Identifying numerical guide(s) to deterrence.** This will include consideration of the applicable maximum penalty as well as other relevant numerical measures such as benefits from, and losses caused by, the contravening conduct and the size of the contravenor.

**Step 3. Considering the factors relevant to penalty** as set out in the CCA and as applied by the Court, such as the nature and extent of the conduct, the circumstances in which it occurred, deliberateness, the seniority of individuals involved, prior conduct and corporate culture.

**Step 4. Considering any reduction of the penalty for cooperation.**

**Step 5. Considering any final adjustments** to reflect totality, penalties imposed on co-contravenors and penalties in comparable cases (if appropriate).

# Step 1. Identifying the contraventions

It is necessary to determine which provisions of the CCA have been contravened, by whom, and on how many occasions. If several provisions have been contravened, or if there are multiple breaches of one provision, it is necessary to identify the precise conduct that gives rise to each contravention.

## Conduct that constitutes a contravention of different provisions

Where the same conduct constitutes a contravention of two or more provisions, a person is not liable to more than one penalty for that conduct.<sup>1</sup> However, conduct that is similar, or closely related to, or repeated, is not the *same* conduct, and constitutes a separate contravention.

## Overlap between multiple contraventions (course of conduct)

Where there are multiple contraventions and some overlap between them, the course of conduct tool of analysis is often used by the courts in determining what penalties ought to be imposed. It is for the court to determine if this tool of analysis is used.

In circumstances where a contravenor has engaged in multiple separate contraventions and the acts giving rise to those contraventions are inextricably linked, they may be viewed as one multi-faceted 'course of conduct'. In assessing whether it is appropriate to seek a penalty from the court on the basis that there has been one or more courses of conduct, the ACCC will consider how interrelated the acts giving rise to the contraventions are. It will do this having regard to their nature, timing, circumstances, harm suffered, benefits obtained, and gains achieved. Where these indicate that contraventions are properly viewed as a course (or courses) of conduct, the ACCC is likely to seek a penalty on that basis.

The course of conduct approach will not be applied by the ACCC in its analysis where the separate contraventions involve substantive differences, for example because they:

- involve separate unrelated and discrete acts
- are temporally distinct or involve different parties
- occur in different circumstances or are the result of different decisions, or
- result in different outcomes in terms of the revenue, profit, savings or other benefits to the contravenor, or the loss or damage to consumers, competitors, and the community.

Where multiple contraventions are grouped into a course (or courses) of conduct, the number of distinct contraventions is not reduced, but the court may impose a single penalty for those contraventions. However, the maximum penalty available to be imposed for the course of conduct will not be capped at the statutory maximum penalty for a single contravention. In some cases, the court may consider that the maximum penalty for a single contravention is an appropriate guide against which the whole of the overlapping wrongdoing in each course of conduct can be considered.

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<sup>1</sup> This is a requirement of s 76(3) of the CCA and s 224(4) of the ACL.

Ultimately, the penalties imposed by the court will reflect what the court considers is necessary to deter the conduct in its entirety having regard to the actual, substantive wrongdoing.

The following example illustrates circumstances in which the ACCC is likely to adopt the 'course of conduct' approach:

### **Example A**

Company F ran a multi-media advertising campaign (including on multiple television stations, multiple radio stations, various websites, and in multiple national and capital city newspapers) advertising internet services for a particularly attractive price. Company F did not disclose that the services were only available at that price to consumers who purchased additional services.

The conduct could give rise to thousands or even millions of separate contraventions, one for each time a misleading representation was made. The ACCC is likely to assess this conduct on the basis of one course of conduct for the repeated television advertisements, one for the radio advertisements and so on. The penalty sought for each course of conduct may well be in excess of the maximum penalty for a single contravention but be far less than the cumulative statutory maximum penalty.

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The following example illustrates where the ACCC will not adopt the 'course of conduct' approach:

### **Example B**

Company L and Company M entered a cartel agreement in relation to the supply of electronic components for wireless car ignitions to vehicle manufacturers. Subsequently Company L and Company M gave effect to the agreement on four separate occasions.

While this conduct was engaged in to give effect to a single agreement, it involved separate and discrete acts at different points in time, reflecting separate decisions taken. Separate penalties will be sought for each contravention.

# Step 2. Identifying numerical guide(s) to deterrence

The process of arriving at an appropriate penalty involves a synthesis of the various factors relevant to a penalty of appropriate deterrent value in all of the circumstances. That synthesis of factors is outlined at Step 3. The purpose of this step is to ensure that attention is given to identifying the numerical guide (or guides) that will best assist in ensuring that whatever penalty is set through that instinctive synthesis can be seen to have the necessary deterrent value, and not be regarded as an acceptable cost of doing business by the contravenor or others in the future.

In identifying what is required for effective deterrence, the ACCC will always consider the maximum penalty and will generally also consider the following numerical guides:

- the financial gains and benefits made, or expected
- the financial harm or loss to others
- the scale and resources of the contravenor.

## The maximum penalty

The seriousness with which the Parliament views contraventions of the CCA is reflected in the applicable maximum penalty. The maximum penalty indicates the scope of Parliament's intended deterrent response to contraventions of the particular provisions and used appropriately can serve as a useful numerical guide.

For many provisions of the CCA, the maximum pecuniary penalty for a contravention by an individual is \$2.5 million, and for a corporation, the maximum penalty is the greater of:

- \$50 million
- if the court can determine the value of the benefits reasonably attributable to the contravention, three times that value, or
- if the court cannot determine the value of the benefits reasonably attributable to the contravention, 30% of the company's adjusted turnover during the breach turnover period for the relevant contravention.<sup>2</sup>

The maximum penalty will often be the primary reference point for the ACCC in its assessment of appropriate penalties to be sought from the court. This is done by seeking to achieve a reasonable relationship between:

- Parliament's indication of the level of deterrence that may be necessary for such conduct by such a contravenor, having regard to the different limbs of the maximum penalty, and

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<sup>2</sup> There are some provisions in relation to which the applicable penalty is less than the amounts stated in this paragraph – see s 76 of the CCA and s 224 of the ACL. For breaches of the ACL prior to 1 September 2018, the applicable maximum penalty was \$220,000 for individuals and \$1.1 million for corporations (although, the applicable penalty for contraventions of some provisions was less than this). For breaches of the CCA, including the ACL, from 1 September 2018 to 9 November 2022 (inclusive), the applicable maximum penalty was \$500,000 for individuals and for corporations it was the greater of \$10 million, or if the court could determine the value of the benefits reasonably attributable to the contravention, three times that value, or if the court could not determine the value of the benefits reasonably attributable to the contravention, 10% of the company's annual turnover in the 12 months ending in the month of the relevant contravention (although, again, the applicable penalty for contraventions of some provisions was less than this).

*Note:* There are definitions for 'adjusted turnover' and 'breach turnover period' included in s 4(1) of the CCA. Careful attention to those definitions is required if it is likely that the maximum penalty will be calculated by reference to turnover.

- the magnitude of the deterrent message required in the particular case, having regard to all relevant factors.

The statutory maximum does not operate as a mandatory 'yardstick'. However, where the penalty factors point to a need for a particularly high level of deterrence, a penalty amount at or near the statutory maximum may be appropriate; conversely, where the penalty factors indicate that only a lower level of deterrence is required, an appropriate penalty may be relatively low when compared with the statutory maximum.

The statutory maximum is not reserved for the most serious examples of misconduct, and there may be circumstances in which although it may be possible to imagine a 'worse case', the ACCC considers a penalty close to, or at, the maximum is otherwise required for deterrence, and it will seek such a penalty in its submissions to the court. There can also be circumstances in which the theoretical maximum penalty is so great, and so far exceeds the amount which would ever be necessary for deterrence, that the maximum penalty does not serve as the most useful numerical guide. In such cases, other numerical guides may assume greater significance in the ACCC's approach to its assessment of an appropriate penalty to be sought from the court.

## The financial gains and benefits made, or expected, from the conduct

In cases where the scale of the financial gains and benefits from the contravening conduct can be meaningfully assessed or estimated, this will be a relevant indicator of the magnitude of an appropriate deterrent penalty and will usually have a significant impact on the size of the penalties the ACCC seeks from the court. This is so even in cases where the benefits reasonably attributable to the conduct do not increase the statutory maximum (for example, where three times the benefit does not exceed \$50 million or where the contravenor is an individual).

The overall penalty sought by the ACCC should be expected to exceed, and perhaps greatly exceed, all of the financial gains and benefits which the contravenor obtained, or stood to obtain, from the contravening conduct. Other things being equal, higher penalties will be sought where there is a greater prospect of financial gains and benefits to the contravenor. It will usually be appropriate to seek total penalties that remove any commercial incentive by the contravenor, or others in a similar position, to pursue such a benefit. A penalty which leaves the contravenor with an advantage from having engaged in the contravening conduct could readily be treated as an acceptable cost, and therefore is unlikely to be a sufficient deterrent. Accordingly, the ACCC will seek penalties high enough to prevent contravenors from being tempted to take the risk.

The ACCC will take into account *all* benefits and potential benefits associated with the contraventions. This includes profits,<sup>3</sup> any increase in resources or revenue, other forms of business growth, any savings of cost (such as savings in costs and resources in avoiding compliance burdens) and any quantifiable competitive advantage obtained (such as an ability to charge a price premium as a result of reduced competition). If it is not possible to calculate the benefits with precision, an estimate may be made or a proxy may be used.

Where they are able to be ascertained, at least broadly, benefits and potential benefits will be important as indicating the kind of level below which a penalty would be ineffective to secure deterrence. However, even in those cases other numerical guides (maximum penalty, value of harms and size of contravenor) may indicate the need for a deterrent message which is not tied to the value of benefits. In other words, benefits may often indicate a penalty 'floor' but not a penalty 'ceiling'.

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<sup>3</sup> In determining the extent to which regard will be had to gross or net profit, the ACCC will look closely at the circumstances of the contravening conduct. Where the contravening conduct goes to the core of the trader's business, the ACCC will generally pay closer regard to gross profit or total revenue, but where the trader conducts a legitimate business and the contravention relates to a small and discrete part of its operations, the net profit from affected sales may in some circumstances be more relevant.



There will be cases, such as those involving strategic anti-competitive conduct or intangible matters (including the collection and use of personal data and information) where the value of any benefits may not be readily ascertainable. There will be other cases (such as those involving minor benefits and major harms) where benefits are not of great significance in the penalty analysis. In such cases, the ACCC will focus more on other numerical guides in determining the level of deterrence required to be achieved through the penalties it will seek from the court.

## The financial harm or loss caused by, or suffered as a result of, the conduct

Any financial loss or damage caused by, or suffered as a result of, the contravening conduct, including loss or damage experienced by those who are the subject of the conduct, consumers, competitors or the public, will also be a relevant indicator of the penalty that would be of appropriate deterrent value.

Any penalty sought by the ACCC will take loss or damage into account. This will include the scale of the potential loss or damage, and the magnitude of the risk that such loss or damage would arise. This is to ensure that individuals and businesses regulate their conduct, not only by reference to their own potential benefits, but also by reference to the related costs and risks of their conduct for those who will be affected by it. If it is not possible to calculate the financial harm or loss with precision, an estimate may be made or a proxy may be used.

As with the assessment of benefits, there will be cases where harms are not of a financial kind (for example risks and harms to consumer safety, public interests, market efficiency, human dignity, and loss of personal data and information) or are unable to be quantified. Again, in such cases the ACCC will focus more on other numerical guides in determining the level of deterrence required to be achieved through the penalties it will seek from the court.

## Scale and resources of the contravenor

In many cases the size and resources of the contravenor will be a key numerical guide to evaluating whether a proposed penalty is likely to have the necessary 'sting or burden' to secure specific and general deterrence. Where the contravenor is large and has substantial resources, the appropriate penalty may need to be set more by reference to scale, turnover and magnitude of the contravenor, than by reference to benefits or losses attributable to the contravening conduct, in order to be a sufficient deterrent and not simply be treated as a trivial cost of doing business. This is particularly so where the benefits from, or losses caused by, contravening conduct are not readily ascertainable or are relatively small.

Matters that will be taken into account by the ACCC in assessing this will include, but not be limited to:

- the 12 month annual turnover of the contravenor, which will be a guide to its size and position
- the market share of the contravenor
- the profit of the contravenor
- the size of the market likely to be affected by the conduct and the contravenor's position in that market
- any corporate group of which the contravenor is a member, including the value of the assets and the quantum of its returns.

In some cases, an overall penalty that may result in the contravenor becoming insolvent, but is no greater than is necessary to achieve the objective of general deterrence, may be sought by the ACCC.

# Step 3. Considering the factors relevant to penalty

Both s 76 of the CCA and s 224 of the ACL specify several (non-exhaustive) factors that must be taken into account: the nature and extent of the contravening conduct, any loss or damage suffered, the circumstances of the contravention and any court findings as to prior similar conduct. The courts have also identified a number of additional factors that are often relevant. The weight to be given to these factors is a matter for the Court and will depend upon the particular circumstances of each case.

In each case the penalties should be sufficient to achieve deterrence (specific and general) but without being greater than reasonably necessary to deter.

In determining the penalties it considers appropriate to include in its submissions, the ACCC will consider the various factors in the order and combination most appropriate to the circumstances of the case. In some cases, the circumstances of the contravenor may be more significant in terms of what is necessary for deterrence than the circumstances of the contravention. For example, all else being equal, a higher overall penalty will be necessary to deter a well-resourced contravenor than will be necessary for a poorly-resourced one, and the ACCC will seek penalties accordingly.

Assessment of the appropriate penalty will be made taking all relevant factors into account. Some of the factors relevant to penalty have already been discussed at Step 2 in the context of considering the appropriate numerical guide(s) to the level of penalty that would have appropriate deterrent value. Without repeating those matters, the following broad approach will generally be taken to each of the various factors.

## Nature, extent and circumstances of the conduct

Although not intended to be an exhaustive list, the ACCC will seek higher penalties for conduct:

- that is systematic or involves a high level of coordination
- in which the contravenor acts as leader or instigator of the wrongdoing
- that occurs over a lengthy period of time or that is repeated
- that affects a large number or wide range of consumers, small businesses or competitors
- directed towards, or impacting on, vulnerable consumers and community members
- that affects a product or service that is of importance or in high demand
- that involves product safety risks and concerns, and loss or damage associated with such conduct
- that affects a market that is of considerable economic importance to Australia (or a substantial part of such a market)
- that involves retaliation or coercive action against others.

The degree to which the conduct has the effect, or potential effect, of:

- limiting or distorting competition or consumer choice
- increasing prices or reducing the quality of goods or services available to consumers
- providing the contravening business with an unfair advantage over its competitors

will also influence the penalties sought by the ACCC.

## Loss or damage caused by the contravention

In addition to the financial loss or damage outlined at Step 2, the harm that the ACCC will take into account in determining the penalties it will seek from the court will include, but not be limited to:

- non-financial or unquantifiable loss suffered by competitors (for example, loss of opportunity to gain custom from consumers, or competitors being forced to exit the market)
- distortion of consumer choice
- distortion of prices in the market
- reduction in the quality of goods or services, including suppression of innovation
- loss of opportunity for those affected by the conduct to obtain goods or services on more beneficial terms and conditions
- loss of opportunity for those affected by the conduct to exercise rights based on accurate information or to obtain redress
- unquantifiable loss suffered by those who are affected by the contravening conduct or non-financial harm caused by the conduct (for example, causing distress and anxiety or, in the case of some contraventions, risk to physical safety and well-being).

The ACCC will also take into account the value of any amounts expended by the contravenor to remedy the conduct or make reparation as this may indicate a reduced need for specific deterrence. However, the total penalties sought by the ACCC will not automatically be reduced by an equivalent value, as the need for general deterrence will remain relevant.

## Deliberateness of the contravention

The ACCC considers that deliberate, calculated or covert conduct requires stronger deterrence. It will be significant to the penalty sought if the conduct:

- was carefully planned
- was carried out in a way that revealed an awareness of the risk of contravention (especially through covertness or concealment of incriminating records)
- involved a calculated risk of contravention
- was part of a calculated strategy to increase or maximise profit
- was inconsistent with guidance given, or was continued after being put 'on notice' of the conduct being likely to contravene
- could have been avoided through reasonable steps and precautions which were known to be available or which were obvious in the circumstances (for example, an effective compliance program).

As it is often not necessary for a contravenor to know or intend that their conduct is unlawful for a contravention of the CCA to occur, the absence of knowledge or intent will not be treated as mitigating. However, conduct which arises from carelessness or inadvertence will generally be more readily deterred and, unless accompanied by other significant features such as extensive harms, may not require as great a penalty to be sought.

## Seniority of representatives involved in the contravention

Where the contravening conduct is engaged in, directed or tacitly approved by senior management, higher penalties will be sought. Likewise, where senior representatives are on notice of the conduct and fail to take steps to remedy it, this is likely to be an important penalty consideration.

## Prior similar or relevant conduct

If a contravenor has previously engaged in conduct of a similar nature, or has a history of conduct involving contraventions of the CCA (including where there are repeated breaches arising from carelessness or inadvertence) higher penalties will be sought.

## Corporate culture conducive to compliance

Consideration will be given to the substance and effectiveness of any compliance program and training relating to the CCA that existed during the contravening period, as well as any disciplinary or other corrective measures taken in relation to any failure to adhere to those programs and training. Where there is an absence of a compliance program, or a meaningful compliance program, higher penalties will be sought.

For the purpose of specific deterrence, consideration will also be given to the attitude of the contravenor to the contraventions, both during the course of engaging in the relevant conduct and in the course of the investigation or any proceedings.

## Step 4. Cooperation

Cooperation by a party who is alleged to have contravened the CCA will be taken into account in determining the penalties the ACCC will seek from the court. In most cases, cooperation will involve some reduction in the total penalty the ACCC will seek from the court. However, there is no automatic right to a discount for cooperation, and there may be occasions where the ACCC considers that the seriousness of the contraventions, the strength of the case against the contravenor, and the applicable maximum, supports a submission that no discount is appropriate.

The value of any discount will depend on the nature of the cooperation. It will be directly tied to the significance of the issues which are (and are not) contested, the extent to which the cooperation on some issues merely reflects an 'acceptance of the inevitable' and the extent to which the lack of cooperation on other issues indicates an unwillingness to assist in relation to the substance of the matter. Merely responding to compulsory notices is a legal obligation and will not generally be regarded as evidencing any meaningful cooperation.

In cases where there is full and meaningful cooperation, the ACCC may consider a discount in the order of 30 to 50% of the total penalty it will seek from the court. Full and meaningful cooperation includes cooperation during the investigation, admissions as to liability, provision of admissible evidence, agreement as to the penalty amount(s) to be submitted to the court, and providing significant assistance in relation to other proceedings and contravenors. The discount is more likely to be towards the higher end of the range where the conduct is self-reported, would have been otherwise difficult to detect, and when evidence the ACCC would not otherwise have obtained has been provided. In cases where there is a more limited form of cooperation, and a discount is appropriate, the ACCC will consider a discount that is less than 30% of the total penalty it will seek from the court.

# Step 5. Other adjustments

Consideration will be given to whether any adjustment to the penalties the ACCC will seek from the court is required for one or more of the following reasons.

- **Totality:** If separate penalties are being sought for multiple contraventions, the cumulative total of those penalties will be examined to consider whether it is appropriate that they be adjusted. Adjustment is less likely to be required in cases where the ACCC has sought penalties on a course of conduct basis.
- **Co-contraenors (if any):** Where there are multiple contraenors, the ACCC will consider whether the penalties sought for each should be similar, or whether there are important differences between them justifying disparate penalties.
- **Comparable cases (if any):** While usually of limited relevance, the ACCC may refer to previously decided cases to ensure a consistent application of relevant principles, rather than seeking numerical consistency between different cases. Reference to the actual penalties imposed in previous cases will generally be of limited utility because (i) there are almost always relevant and significant differences between cases (ii) where cases are truly comparable, the fact of further equivalent contraventions is likely to suggest that the earlier penalties were not high enough to ensure general deterrence (iii) changes in the value of money over time will generally require that larger penalty values be imposed in order to ensure that penalties reflect inflation and continue to remain effective in deterring contravening conduct and (iv) changes to the maximum penalty will also require that larger penalty values be imposed. However, if there are truly comparable cases they will be taken into account.
- **Other forms of relief:** Various forms of relief are available for contraventions of the CCA. Whilst they serve different purposes (including compensation, remediation and prevention) and do not necessarily have a bearing on penalty, where the relief sought has some bearing on the extent of deterrence required it will be taken into account and may affect the penalties sought by the ACCC.

## Annexure A – Diagram of ACCC process to develop submissions on an appropriate deterrent penalty



