



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

The ACCC's Penalties Project

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- **Aim - increase penalty levels within Australia to better achieve deterrence.**
- **Priority area of the ACCC in 2017.**
- **Includes a cross-jurisdictional analysis.**
- **In Australia – penalties imposed by courts.**
- **Penalties imposed in competition cases not sufficiently high to deter larger businesses.**
- **Penalties now *available* in Australia are broadly in line with international trends.**
- **Penalties *actually imposed* here in Australia are much lower than those in other comparable jurisdictions.**



Reasons for lower penalties.

- **Timing - Australian competition law maximum penalties were only brought into line with those overseas in 2007.**
- **Prevalence of agreed penalties jointly recommended to the Court by the ACCC and the defendant company.**
- **Non-transparent methodologies for determining penalties in Australia.**



Methodologies for determining penalties

- **In most jurisdictions the sanctioning methodology includes the calculation of a ‘base fine’.**
- **Usually done by reference to a set percentage of the relevant turnover of the business.**
- **Once the base fine is found, it is increased having regard to duration of the conduct and numbers of contraventions, and other aggravating factors.**
- **Mitigating factors are then applied which reduce the fine before a final figure is determined.**



- **Australian Courts do not commence by calculating a base fine calculated by reference to turnover.**
- **Base fines calculated in this way is far more likely to lead to the fixing of a penalty which achieves effective specific deterrence in respect of that firm.**
- **Avoid the imposition of fines at a level that might be considered an “acceptable cost of doing business” by large firms**
- **If the base fine approach was applied in Australia, firms with smaller turnover might end up with similar fines to those currently imposed, but larger firms would generally end up with much higher penalties.**
- **If used in Australia’s most high profile cartel case - Visy paper case – penalty of \$35m vs over \$200m.**



Recent cases - signs of change from the Courts?

- **Coles – one of Australia’s largest supermarkets – unconscionable conduct - \$10m penalty.**
- **Reckitt Benckiser – multinational pharmaceutical company – misleading advertising - \$6m penalty.**
- **ANZ and Macquarie - two of Australia’s largest banks – cartel conduct involving manipulation of rates - agreed penalties totalling \$15m jointly submitted to the court. Judge found that the agreed penalties were “*at the very bottom of the range of agreed penalties*” and that he would have ordered a much higher penalty had there been no agreed penalty.**



Conclusion

- **There are some encouraging signs from our Courts.**
- **ACCC's position is that to achieve effective deterrence, penalties imposed in Australia need to be much higher, particularly for larger firms.**
- **Given penalties in Australia are imposed by the Court, ACCC needs to work with the courts to bring about Parliament's clear intention of a step change in penalties for competition law breaches.**

Thank you