

## DETERRENT PENALTIES FOR CORPORATE COLLUDERS: LIFTING THE BAR

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### I INTRODUCTION

A critical review of corporate pecuniary penalties for cartel conduct in Australia is timely if not overdue. Debates about the role of individual sanctions notwithstanding,<sup>1</sup> financial penalties against corporations remain the predominant means of sanctioning cartel conduct in this country as elsewhere.<sup>2</sup> These sanctions are therefore the primary mechanism by which deterrence is sought to be achieved. Consistent with the international position,<sup>3</sup> deterrence has long been accepted as the primary, if not exclusive, rationale for cartel sanctions in Australia.<sup>4</sup>

Despite their importance as the principal means of deterrence, corporate penalties have always been substantially below the maximum stipulated by the *Competition and Consumer Act 2010* (Cth) ('CCA') and there are scant signs of this changing in the future.<sup>5</sup> They also have failed to keep pace with the standard set in recent years internationally, in major jurisdictions such as the United States ('US') and European Union ('EU') particularly.<sup>6</sup>

Previous opportunities for a review of corporate penalties, both at the time of debating the design of the dual criminal-civil regime and in the context of the more recent Competition Policy Review, were not taken up. However, it is evident that the Australian Competition and Consumer Commission ('ACCC') is seeking to lift the bar in corporate penalty-setting,<sup>7</sup> and in 2017 the Australian government requested the Organisation for Economic Cooperation and Development ('OECD') to review its pecuniary penalties regime, including comparing it with practices of countries representative of OECD jurisdictions. Based on a fact-finding mission to consult with

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<sup>1</sup> See generally Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011). Australia has had a criminal regime in place since 2009 and the first prosecutions of individuals were announced in 2018: Australian Competition and Consumer Commission, 'Criminal Cartel Proceedings Commenced against Country Care and Its Managers' (Media Release, 12/18, 15 February 2018).

<sup>2</sup> Between 2007–17, less than 1.5% of total civil penalties imposed for cartel conduct were imposed on individual respondents. Individual penalties during this period totalled AU\$4,962,802.93, whereas corporate penalties totalled AU\$328,209,588 (CPI-adjusted to September 2017). Internationally, see, e.g., OECD Secretariat, 'Sanctions in Antitrust Cases' (Background Paper No DAF/COMP/GF(2016)6, Organisation for Economic Co-operation and Development, 14 October 2016) 5 ('2016 OECD Background Paper').

<sup>3</sup> See most recently OECD, 'Pecuniary Penalties for Competition Law Infringements in Australia' (Report, 2018) 35–7 ('2018 OECD Report').

<sup>4</sup> See, e.g., *Trade Practices Commission v CSR Ltd* [1990] FCA 521 [40].

<sup>5</sup> See the analysis in Caron Beaton-Wells and Julie Clarke, 'Corporate Financial Penalties for Cartel Conduct in Australia: A Critique' (Melbourne Law School, 26 March 2018) <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3149143](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3149143)>.

<sup>6</sup> See *2018 OECD Report*, above n 3, 7, 66.

<sup>7</sup> See Rod Sims, 'The Role of the ACCC in Restoring Faith in Free Markets' (Speech delivered at the Competition Law Conference 2017, Sydney, 6 May 2017).

stakeholders in Australia and a comparative study with six other jurisdictions,<sup>8</sup> the OECD's report was released in March 2018.

In honour of the scholarship of Laura Guttuso and its significant contribution to the debate regarding another challenging issue in this field — the balance between public and private enforcement — this article is intended to contribute to the debate about the level of pecuniary penalties for corporations for cartel conduct in Australia.<sup>9</sup> The article critically examines the key findings and recommendations in the OECD's 2018 report. Adopting the sequence of analysis in the concluding Part of the report, the remainder of the article is structured as follows. Part II reviews the level of pecuniary penalties in Australia as compared to other jurisdictions. Part III examines legal constraints on pecuniary penalty-setting. In Part IV the methods for assessing pecuniary penalties are canvassed, contrasting the Australian approach with that taken in most other jurisdictions. Part V highlights issues with transparency and predictability in penalty-setting methods. Part VI is our conclusion.

## II PENALTY LEVELS

The OECD's central finding regarding the level of pecuniary penalties for anti-competitive conduct in Australia is that it is low relative to other countries, 'particularly for large companies and for infringements that lasted for a number of years'.<sup>10</sup> Indeed the comparison was seen as so stark that the OECD described Australia as an 'outlier' in this respect.<sup>11</sup> This characterisation is difficult to refute. As the statistics set out below bear out, the contrast is particularly marked in the context of penalty levels over the last decade given the observed trend of increased fines across the world over this period.<sup>12</sup>

Between 2007–17, aggregate cartel fines imposed by the European Commission ('EC') for cartel conduct amounted to €21 billion, which translates to almost AU\$33 billion.<sup>13</sup> In the same period, total corporate fines of AU\$297 million (or AU\$328 million when adjusted for inflation) were imposed for cartels in Australia. There were 366 decisions taken by the EC, as compared to 95 decisions taken in Australia, during

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<sup>8</sup> The study compared the Australian methodology and experience in fine-setting with the approach taken in the EU (by the EC), Germany, Japan, Korea, the UK and the US (a sample that comprises a range of established large and small, civil law and common law, and administrative and judicial (generalist and specialist courts) jurisdictions, while also providing a mix of characteristics reflecting the variety of competition law regimes across the world: *2018 OECD Report*, above n 3, 11, 33).

<sup>9</sup> Debate concerning penalty levels in respect of other types of anti-competitive conduct (for example, misuse of market power) is also warranted. However, that debate is beyond the scope of this article. This article also excludes from its scope important questions relating to the lack of attention given generally to the balance between corporate and individual accountability and between public and private enforcement. These questions are examined at length in Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) ss 6.6, 7.2, 11.5.

<sup>10</sup> *2018 OECD Report*, above n 3, 71.

<sup>11</sup> *Ibid.*

<sup>12</sup> For a longer-term view, see statistics showing pecuniary penalty levels between 1974 and 2017 in Beaton-Wells and Clarke, above n 5, 7.

<sup>13</sup> See European Commission, '1. Cartel Statistics' (Statistics Report, 22 November 2017) <[www.ec.europa.eu/competition/cartels/statistics/statistics.pdf](http://www.ec.europa.eu/competition/cartels/statistics/statistics.pdf)> ('*Cartel Statistics Report*'); European Commission, *Report on Competition Policy* (2007) 10–11; European Commission, *Report on Competition Policy* (2008) 4; European Commission, *Report on Competition Policy* (2009) 27.

that period.<sup>14</sup> However, the average fine remains considerably higher in the EU, at AU\$89 million compared with an average of AU\$3 million per corporate respondent in Australia.<sup>15</sup> Total fines imposed by the EC exceeded total fines imposed by Australian courts by a factor of 110 while the number of EC decisions exceeded Australian decisions number by a factor of only 3.85.

It is also clear that EC fines have been rising at a considerable rate over the last 10–15 years, with the average fine imposed by the EC rising from less than €1.9 million in the period 1990–94 to €89 million per corporate offender between 2015–17.<sup>16</sup> By comparison, for the period 1993–99, the average corporate fine in Australia was AU\$1.38 million. It rose to an average of AU\$3.37 million in the period 2000–09.<sup>17</sup> This period included the second highest fine to date in Australia, AU\$36 million, imposed on one of the country's largest companies ('Visy') for a packaging cartel.<sup>18</sup> Excluding that outlier, the average for this period was substantially lower: AU\$2.29 million.<sup>19</sup> While the upward trend has continued since 2009 (with the average corporate penalty imposed between 2010–17 increasing to AU\$5.73m), it far from matches the scale of the increase in Europe.

The highest single corporate fine in Europe to date was just under €1.009 billion imposed on Daimler for a trucking cartel.<sup>20</sup> The highest total amount for a single cartel to date is €3.807 billion (AU\$5.972 billion) imposed on the undertakings implicated in the same cartel in 2016–17.<sup>21</sup> By contrast, the highest total fines in respect of a cartel in Australia to date relate to the air cargo cartel in which fines in the aggregate of AU\$98.5 million were imposed.<sup>22</sup>

It is more difficult to make direct comparisons with the US but available statistics indicate that from 2012–17, total cartel fines of US\$6.4 billion were imposed,<sup>23</sup>

<sup>14</sup> The EC figure of 366 decisions includes leniency applicants that were not subject to fines but are included in the EC's formal decision. The Australian figure of 95 decisions does not include leniency applicants, given that these firms are not subject to a legal proceeding. This has the result that the figures are slightly misleading (in that they *understate* the average fine imposed by the EC) for the purposes of making comparisons.

<sup>15</sup> To assist in comparisons, these figures have not been adjusted for inflation.

<sup>16</sup> See *Cartel Statistics Report*, above n 13. These figures have not been adjusted for inflation.

<sup>17</sup> These figures have been adjusted for inflation, as at September 2017. Beaton-Wells and Clarke, above n 5, n 37. Most of the penalty decisions during this period applied the pre-2007 penalty regime.

<sup>18</sup> *ACCC v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673 ('Visy'). The highest fine imposed to date is the fine of AU46 million imposed on the Japanese car manufacturer, Yazaki, following the ACCC's successful appeal against the fine imposed at first instance. See *ACCC v Yazaki Corporation* [2018] FCAFC 73.

<sup>19</sup> This figure has been adjusted for inflation, as at September 2017.

<sup>20</sup> See *Cartel Statistics Report*, above n 13.

<sup>21</sup> *Ibid.*

<sup>22</sup> At the time of writing, there remain some penalty proceedings outstanding in relation to the air cargo cartel against PT Garuda Indonesia Ltd and Air NZ Ltd, with the result that this total penalty is likely to increase: Australian Competition and Consumer Commission, 'High Court Rules in ACCC's Favour in Air Cargo Cartel Case' (Media Release, MR 88/17, 14 June 2017).

<sup>23</sup> Figures derived from Allen & Overy, 'Global Cartel Enforcement: 2017 Full-Year Cartel Report' (Report, 2018) 4; Allen & Overy, 'Global Cartel Enforcement: 2016 Full-Year Cartel Report' (Report, 2017) 4; Allen & Overy, 'Global Cartel Enforcement: 2015 Year in Review' (Report, 2016) 4; Allen & Overy, 'Global Cartel Enforcement: 2014 Year in Review' (Report, 2015) 3; Allen & Overy, 'Global Cartel Enforcement: 2013 Year in Review' (Report, 2014) 3; Allen & Overy, 'Cartel Enforcement 2012' (Report, 2012) <[www.allenoverly.com/publications/en-gb/Pages/Cartel-Enforcement-2012.aspx](http://www.allenoverly.com/publications/en-gb/Pages/Cartel-Enforcement-2012.aspx)>.

compared with US\$133 million total fines in Australia over this period.<sup>24</sup> Corporate filings in the US have reduced in recent years, with an average of 21 companies charged annually during the period 2005–15, down from 68 companies charged annually during 1990–94. This, combined with the reduced fine level over the last two years,<sup>25</sup> correlates with a rise in individual criminal indictments in cartel cases.<sup>26</sup>

Despite the reduced volume of enforcement activity, there has been a clear long term upward trend in cartel fines, with total collected corporate fines increasing from around US\$28 million per annum in the early 1990s to US\$234 million from the mid-1990s to 2005 and up to US\$634 million per year on average from 2006–2015.<sup>27</sup> The average collected corporate fine has increased dramatically from US\$0.5 million in the 1990s to US\$41 million per year over the 2006–15 period.<sup>28</sup> The highest cartel fine imposed by the US Department of Justice since the increase in the maximum in 2004 was US\$925 million, against Citicorp in 2015 for its participation in the FOREX cartel.<sup>29</sup>

In recent years, other jurisdictions have also imposed significant cartel fines,<sup>30</sup> most notably South Korea, with total fines of US\$765 million in 2016, and India, with total fines of US\$941 million in 2016.<sup>31</sup> Significant fines were also imposed in Brazil, with total fines of US\$231 million imposed in 2016, and South Africa, imposing total fines of US\$111 million. Although few fines were imposed in China in 2016, in 2015 the authorities in this jurisdiction imposed a total of US\$1.12 billion in cartel fines.<sup>32</sup> Total corporate cartel fines in Australia in 2016 were, by comparison, US\$31.25 million.<sup>33</sup>

The OECD was cautious in suggesting reasons for the relatively lower penalties in Australia. However, it was prepared to offer three possible explanations. First, it acknowledged that Australia is a smaller market than the jurisdictions that it had used for comparison, although it hastened to add that ‘pecuniary penalties in Australia are usually lower than in these jurisdictions, even after having due regard for this’.<sup>34</sup> An

<sup>24</sup> In Australian dollars, fines amounted to AU\$172,890,000 (including individual fines to facilitate direct comparison with US statistics).

<sup>25</sup> Reports show a reduction in fines in FY2016 and FY2017 after significant penalties in the preceding few years. See above n 23.

<sup>26</sup> See American Antitrust Institute, ‘American Cartel Enforcement in Our Global Era’ in American Antitrust Institute, *Presidential Transition Report* (forthcoming) <[www.antitrustinstitute.org/sites/default/files/Cartels.pdf](http://www.antitrustinstitute.org/sites/default/files/Cartels.pdf)> 14.

<sup>27</sup> Ibid 19–20. These figures are not adjusted for inflation and they relate only to ‘collected’ fines, which can create some distortions where fines are paid by instalments over a number of years. The upward trend in ‘announced’ fines is even greater.

<sup>28</sup> Ibid 20. When adjusted for inflation, it is estimated that the increase is in the order of six times the 1990 figures: 21.

<sup>29</sup> This cartel involved major banks conspiring to ‘manipulate the price of US dollars and euros exchanged in the foreign currency exchange (FX) sport market’: see Department of Justice, ‘Five Major Banks Agree to Parent-Level Guilty Pleas’ (Press Release, 15–643, 20 May 2015). Cf the highest fine to date in Australia, AU\$46 million imposed in *ACCC v Yazaki Corporation* [2018] FCAFC 73.

<sup>30</sup> See generally John M Connor, ‘The Rise of ROW Anti-Cartel Enforcement’ (2015) 9(1) *Antitrust Chronicle*, <[www.competitionpolicyinternational.com/assets/Uploads/ConnorSep-151.pdf](http://www.competitionpolicyinternational.com/assets/Uploads/ConnorSep-151.pdf)>.

<sup>31</sup> Allen & Overy, ‘Global Cartel Enforcement: 2016 (Full-Year) Cartel Report’ (Report, 2017) 4.

<sup>32</sup> Ibid. Note that statistics are approximate based on available information. The statistics for the US were based on fiscal year rather than calendar year; all other statistics were based on calendar year.

<sup>33</sup> This is based on actual (not CPI adjusted) Australian penalties in 2016 (AU\$42 million) converted to US currency based on average annual USD–AUD exchange rate of 0.7440: TransferMate, *Historical Exchange Rates* (16 April 2018) <[www.transfermate.com/en/currency-converter-historic-exchange-rates.asp](http://www.transfermate.com/en/currency-converter-historic-exchange-rates.asp)>.

<sup>34</sup> *2018 OECD Report*, above n 3, 71.

explanation for the discrepancy based on market size is not compelling. To take the EU and US as illustrative, although the markets are significantly larger in those jurisdictions, this does not account adequately for the significant difference in fines. GDP in the EU in 2016 was less than 14 times that of Australia's GDP,<sup>35</sup> significantly short of the 110+ fold difference in total cartel fines imposed over the last decade. Australian fines over the period 2012–17 represented less than 2.1% of fines imposed in the US, with GDP of 6.47% that of the US.<sup>36</sup>

Secondly, the OECD noted that the statutory maximum that applied to most of the Australian cases it had reviewed was AU\$10 million.<sup>37</sup> In 2007 the maximum was changed to the greater of AU\$10 million, three times the total value of the benefit derived from the contravention or, if the benefit is not reasonably ascertainable, 10% of corporate group turnover over a 12-month period.<sup>38</sup> The OECD is correct in observing that relatively few cases to date have involved conduct to which the post-2007 maximum would wholly or partly apply.<sup>39</sup> Moreover, there is some evidence of a nascent upward trend in penalties under the more recent maximum.<sup>40</sup> However, the sample remains too small to allow for drawing any firm conclusions in this respect.

The more fundamental difficulty with the OECD's second explanation is that it presupposes that the maximum plays a significant role in penalty assessments. However, there is evidence to the contrary. In the past, courts appear to have paid scant attention to the maximum as an important legislative expression of the seriousness of the conduct in question and the need for penalties to match.<sup>41</sup> More recently it has become increasingly commonplace for judges to cite High Court exhortations about the significance of the maximum in this respect.<sup>42</sup> However, such citations are not translating into penalties that might be seen to reflect the maximum more closely.

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<sup>35</sup> GDP comparisons as a proxy for commerce affected by cartels are imperfect, but provide some indication of the adjustments necessary for market size. According to World Bank figures, GDP in the European Union in 2016 was US\$16.49 trillion: The World Bank and OECD, *GDP (Current US\$)* (2018) The World Bank <data.worldbank.org/indicator/NY.GDP.MKTP.CD>. In Australia, GDP in 2016 was US\$1.204 trillion. These comparisons are also imperfect because they do not account for penalties imposed by national courts in the EU for cases that do not fall within the jurisdiction of the EC.

<sup>36</sup> According to World Bank figures, GDP in the US in 2016 was US\$18.62 trillion compared with GDP of US\$1.204 trillion in Australia: *ibid*.

<sup>37</sup> *2018 OECD Report*, above n 3, 71.

<sup>38</sup> *Competition and Consumer Act 2010* (Cth) s 76(1A)(aa) ('CCA').

<sup>39</sup> Between 2007–17, decisions were handed down in relation to 26 cartels involving 95 corporate respondents. 18 of the 26 cartels, with 79 corporate respondents, involved conduct occurring exclusively or predominantly prior to the maximum adjustment. Eight of the cartels with 16 corporate respondents concerned conduct occurring wholly or predominantly after 2007, with the result that the higher maximum applied. However, in respect of only three of the respondents in this period was the highest penalty determined to be more than AU\$10m.

<sup>40</sup> For conduct subject to the pre-2007 maximum, the mean corporate cartel penalty was AU\$2,884,234, rising 221% to an average of AU\$6,380,527 for the cartels considered under the post-2007 maximum.

<sup>41</sup> A study of 31 penalty cases prior to 2007 found that 15 made no reference at all to the maximum, while of the remaining 16 cases, 10 simply recited the maximum, leaving only six in which the appropriate penalty was actually analysed by reference to the maximum. See Peta Stevenson, Dana Stewart and Andrew Floro, 'A Dollar in the Hand: Assessing Penalties for Contraventions of Part IV of the *Trade Practices Act*' (2008) 16 *Trade Practices Law Journal* 203, 208, Appendix A.

<sup>42</sup> See, e.g., references to *Markarian v The Queen* (2005) 228 CLR 357, 372 in *Australian Competition and Consumer Commission v Visa Inc* (2015) 339 ALR 413, 427–8 [85]–[91] ('*Visa*'); *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2016) 118 ACSR 124, 144 [90]; *Australian Competition and Consumer Commission v Yazaki Corp (No 3)* [2017] FCA 465 (9 May 2017) [45].

The average civil penalty imposed per cartel between 2007–17 was less than 10% of the statutory maximum available.<sup>43</sup> In what was described by the judge as ‘the most serious case’ in Australian cartel history, although a maximum penalty of AU\$370 million was available, a penalty of AU\$36 million was imposed.<sup>44</sup> More recently, in the first criminal sentencing of a corporation under the 2009 regime, a maximum fine of AU\$100 million was identified.<sup>45</sup> A fine of AU\$25 million was imposed, incorporating a 40% discount for past cooperation and 10% for future cooperation.<sup>46</sup> Even removing the discount, the fine for the first cartel prosecution in Australia reached only 50% of the maximum available.

The third possible explanation for Australia’s low penalty level identified by the OECD was that ‘Australia does not take into account the length of the contravention when determining the amount of a pecuniary penalty’.<sup>47</sup> However, courts do have regard to the duration of the contravening conduct as one of the many factors seen as relevant in assessing the objective seriousness of the breach for the purposes of penalty assessment.<sup>48</sup> The OECD observation is nevertheless correct insofar as it is true to say that, unlike the approach taken in most other jurisdictions in setting a base fine for an infringement (discussed further below), Australia does not have a formal standardised approach to the treatment of this factor.

Finally, the OECD suggested that the role of precedent in this country may be instrumental in sustaining relatively low penalty levels.<sup>49</sup> Certainly it is the case that parties routinely invite comparisons with previous cases in making penalty submissions. Such comparisons are warranted by the need to ensure consistency and parity in penalty-setting.<sup>50</sup> However, in most instances, courts have found such comparisons of minimal assistance.<sup>51</sup> Moreover, in the criminal sentencing context, it has been recognised that past penalties are not determinative of the upper and lower limits of the proper range of the sentencing discretion in respect of a particular offence.<sup>52</sup> Further, as the High Court recently emphasised, current sentencing practices should not act as such a constraint on discretion as to result in a sentence that is manifestly inadequate.<sup>53</sup> That said, it may be conceded that the ACCC is hampered in seeking to lift the benchmark for penalties

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<sup>43</sup> The statutory maximum referred to here has been determined based on the number of contraventions identified. This might not always be a true reflection of the maximum penalty available where the same conduct has given rise to multiple contraventions. As a result, the percentage may in fact be higher than 10%. Unfortunately, in many cases the Court has not identified how many contraventions are subject to penalty, nor has it identified the maximum fine based on a factor of the contraventions identified.

<sup>44</sup> *Visy* (2007) 244 ALR 673.

<sup>45</sup> *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (3 August 2017) [186] (‘*NYK*’).

<sup>46</sup> *Ibid* [267], [270], [299].

<sup>47</sup> *2018 OECD Report*, above n 3, 71.

<sup>48</sup> See, e.g., *Australian Competition and Consumer Commission v Yazaki Corporation (No 3)* [2017] FCA 465 (9 May 2017) [51]; *NYK* [2017] FCA 876 (3 August 2017) [223]–[224].

<sup>49</sup> *2018 OECD Report*, above n 3, 72.

<sup>50</sup> See *Wong v The Queen* (2001) 207 CLR 584, 591 [6], 608 [65]; *Hili v The Queen* (2010) 242 CLR 520, 535–6 [49]; *R v Pham* (2015) 256 CLR 550, 559 [28].

<sup>51</sup> See, e.g., *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, 295; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249, 264 [60]; *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2016) 336 ALR 1, 143 [562]; *Australian Competition and Consumer Commission v Yazaki Corporation (No 3)* [2017] FCA 465 (9 May 2017) [82].

<sup>52</sup> *R v Pham* (2015) 256 CLR 550, 558 [27].

<sup>53</sup> *Director of Public Prosecutions v Dalgeish* (2017) 349 ALR 37.

where comparisons arise with previous cases in which the conduct has been found to be ‘extremely serious’<sup>54</sup> or even ‘the most serious in Australian trade practices history’<sup>55</sup> and yet have fallen considerably below the maximum.

The OECD took the view that challenges in significantly increasing penalties in individual cases may be ‘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’.<sup>56</sup> The ACCC’s approach to negotiating ‘agreed’ penalties has been seen by others as significant in accounting for the level of penalties in Australia.<sup>57</sup> It might be argued that if courts were not constrained by a perceived need to give weight to a joint submission on penalty, they may assess appropriate penalties closer to the statutory maximum.

Arguably, penalties agreed between the parties for the purposes of such submissions would be lower than what the respondent considers would be imposed if it was to contest liability and/or the penalty. It is also typical that the agreed fine incorporates a discount for cooperation. When joint submissions are made, they are invariably accepted by the Court.<sup>58</sup> In the 19 civil penalty cases in which the penalty was contested over the period 2007–17, an average penalty per respondent of AU\$2,881,998 was imposed.<sup>59</sup> In the remaining 75 civil penalty cases either there was no application for pecuniary penalty or agreed penalties were submitted. The average penalty per respondent (CPI adjusted) in these cases was AU\$3,310,000. Excluding the 23 cases in which no pecuniary penalty was sought, the average agreed penalty per respondent was AU\$4,254,000.<sup>60</sup> No clear conclusion can be drawn from these statistics about whether agreed penalties are likely to result in lower final penalties than contested claims. Nevertheless, it is clear that in the case of both agreed and contested penalties, the penalty imposed by the Court was well below the maximum available.

Ultimately, the OECD took ‘no position about the causes of the current level of pecuniary penalties in Australia’.<sup>61</sup> However, in our view, at least one if not a major reason is that the Australian method of penalty setting differs substantially from the method employed in most other jurisdictions.<sup>62</sup> Notably, the OECD recommended that steps be taken to increase awareness of international practices and to have such practices taken into account in the setting of pecuniary penalties with a view to maximising deterrence.<sup>63</sup>

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<sup>54</sup> As the conduct was described in *NYK* [2017] FCA 876 (3 August 2017), for example at [7].

<sup>55</sup> *Visy* (2007) 244 ALR 673, 677 [6].

<sup>56</sup> *2018 OECD Report*, above n 3, 72.

<sup>57</sup> See, e.g., Beaton-Wells and Fisse, above n 9, 433–7. This practice takes place pursuant to Australian Competition and Consumer Commission, ‘ACCC Immunity and Cooperation Policy for Cartel Conduct’ (Policy, 10 September 2014) (*Immunity and Cooperation Policy*), formerly the Australian Competition & Consumer Commission, ‘ACCC Cooperation Policy for Enforcement Matters’ (Policy, 31 July 2002) (as it related to cartel conduct).

<sup>58</sup> During the 2007–17 period, only one joint submission on penalty was rejected by the Court and this resulted in the agreed penalty being reduced: *Australian Competition and Consumer Commission v Australian Abalone Pty Ltd* (2007) ATPR [42]–[199].

<sup>59</sup> If *NYK* [2017] FCA 876 (3 August 2017) is included as a contested penalty case then the average penalty per respondent rises to AU\$3,868,400.

<sup>60</sup> This includes *Visy* (2007) 244 ALR 673, and the air cargo cases which resulted in significant penalties, collectively netting corporate penalties in excess of AU\$157 million (CPI adjusted).

<sup>61</sup> *2018 OECD Report*, above n 3, 62.

<sup>62</sup> Penalty-setting methods are discussed in Parts III and IV below.

<sup>63</sup> *2018 OECD Report*, above n 3, 72.

### III LEGAL CONSTRAINTS ON PENALTY-SETTING

The OECD came to the conclusion that the reasons for Australia's relatively low penalty levels did not lie in the legal framework in this jurisdiction. Indeed, it expressed the view that 'the Australian regime would seem to allow for pecuniary penalties higher than those imposed in other jurisdictions'.<sup>64</sup> This reasoning is questionable.<sup>65</sup>

The framework applicable to penalty-setting in Australia requires that penalties be assessed and imposed by the Federal Court in proceedings brought by the ACCC. The approach taken to this task has evolved in judicial practice over the more than four decades in which penalties have been imposed pursuant to the *CCA*.<sup>66</sup> Unlike the approach taken in most other jurisdictions (described below), the Australian approach is unstructured, highly flexible and substantially discretionary.<sup>67</sup>

In essence, it involves application to the facts of the case of a list of factors seen as relevant to the exercise of penalty-setting discretion.<sup>68</sup> Although the distinction is often not explicit, generally factors that may be considered aggravating are examined first, followed by factors in mitigation. However, there is no explicit attempt in this process to assign a particular sequence or weight to any of the relevant factors. Courts have emphasised that not all of the factors are necessarily relevant or important in every case and the factors should not be treated as a rigid catalogue or checklist: the overriding principle is that the Court should weigh all relevant circumstances.<sup>69</sup>

Moreover, applying criminal sentencing principles in favor of so-called 'intuitive or instinctive synthesis' over sequential or two-tiered approaches,<sup>70</sup> it is emphasised that courts should not adopt a mathematical approach of increments or decrements from a pre-determined range, or assign specific numerical or proportionate value to the various relevant factors. It is not appropriate to determine an objective sentence and then adjust it by some mathematical value given to one or more factors such as a plea of guilty or assistance to authorities and courts may not add and subtract item by item from some apparently subliminally derived figure to determine the penalty to be imposed.<sup>71</sup>

The challenge posed by this approach in relation to securing higher penalties is that it does not allow for the economic seriousness of the conduct (as represented by the illegal gains and harms it entailed or may be presumed to have entailed) to be given precedence in the penalty-setting process. It also does not accommodate the use of a mathematical formula for representing seriousness in the way that applies in most other parts of the world. As discussed below, Australian courts are clearly sensitive to the

<sup>64</sup> Ibid 72.

<sup>65</sup> Although it may reflect a distinction between 'legal framework' for and 'method' of penalty-setting, a distinction which is difficult to understand. The OECD discussed these separately in the Conclusions to its report: *ibid* 73 [5.3].

<sup>66</sup> Prior to 2010, the *Trade Practices Act 1974* (Cth).

<sup>67</sup> The approach is described in detail in Beaton-Wells and Clarke, above n 5, Part IV.

<sup>68</sup> The list is derived from *CCA* s 76(1) and a long line of cases in which penalties have been assessed for *CCA* breaches. For a recent example, see *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* (2016) 118 ACSR 124, 143 [86]–[88].

<sup>69</sup> See, e.g., *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* (2016) 118 ACSR 124, 142 [82].

<sup>70</sup> See *Markarian v The Queen* (2005) 228 CLR 357. The approach set out in *Markarian* has been said to be applicable to civil penalty proceedings under the *CCA*: see, e.g., *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277, 294 [145].

<sup>71</sup> See, e.g., *TPG Internet v Australian Competition & Consumer Commission* (2012) 210 FCR 277, [146]; *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2016) 336 ALR 1, [26]–[27], [83]–[87].



importance of taking such matters into account in assessing penalties. However, they have repeatedly and explicitly rejected attempts to quantify them<sup>72</sup> and have steadfastly adhered to the view that they represent some of the many ‘incommensurable’<sup>73</sup> factors relevant to assessing an appropriate penalty.

Where there are multiple contraventions arising from the same or similar conduct, courts will not apply more than a single penalty.<sup>74</sup> Consideration is also given to principles of totality and proportionality.<sup>75</sup> Such principles are often taken into account in the context of examining the appropriateness of a proposed penalty having regard to the statutory maximum. The OECD seemed to suggest that the statutory maximum was relevant in its conclusion that ‘prima facie there is nothing preventing pecuniary penalties arrived at under the “instinctive synthesis” method from reaching levels in line with international practice’.<sup>76</sup> It noted in this regard that the maximum may be set at 10% of the turnover of the infringing company, and compared this with other regimes where the penalty is set by reference to turnover in the affected market. It also noted that elsewhere ‘a single infringement is identified for conduct that in Australia may amount to multiple contraventions’.<sup>77</sup>

However, this analysis is problematic for several reasons. First, as acknowledged by the OECD, the turnover-related maximum sets a ceiling on penalties.<sup>78</sup> It is a maximum not a minimum. Secondly, as previously observed, it is rare that the maximum appears to have a substantial bearing on the determination of the appropriate penalty. Thirdly, the concept of a single infringement — at least in Europe and other jurisdictions that follow the European model — in fact allows for fines to be inflated. In essence, the concept enables a series of related events in a cartel’s formation and maintenance over a period of (often many) years to be wrapped into a single violation.<sup>79</sup> This has significant consequences for calculation of the base fine which is determined by reference to a percentage (generally 25–30% for ‘hard core’ cartel conduct) of the value of sales in the affected goods or services, and that figure is then multiplied by the duration of the conduct.<sup>80</sup> Finally, in relation to the OECD comparison of how Australia treats multiple contraventions arising from similar conduct, it should be noted that the Court does not have a consistent track record in distinguishing between contraventions and penalisable contraventions (as determined in application of the course of conduct principle).<sup>81</sup> Moreover, even where multiple penalisable contraventions are identified, it

<sup>72</sup> Most recently, see *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2016) 336 ALR 1, 202 [818(28)], 204–5 [818(41)]; *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159 (5 October 2017) [434]–[565]; *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* (2016) 343 ALR 327, 340 [51]–[54], 342 [62].

<sup>73</sup> *Elias v The Queen* (2013) 248 CLR 483, 494 [27].

<sup>74</sup> See *CCA* s 76(3).

<sup>75</sup> See, e.g., *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 3)* [2017] FCA 10 (19 January 2017) [27]–[28].

<sup>76</sup> *2018 OECD Report*, above n 3, 72.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.* 73.

<sup>79</sup> See generally Julian Joshua, ‘Single Continuous Infringement of Article 81 EC: has the Commission Stretched the Concept beyond the Limit of its Logic?’ (2009) 5 *European Competition Journal* 451.

<sup>80</sup> *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003* [2006] OJ C 210/2, [12]–[26] (‘*EC Guidelines on the Method of Setting Fines*’).

<sup>81</sup> Section 76(3) of the *CCA* and the associated ‘course of conduct’ principle prevent the same substantially similar conduct giving rise to double penalisation. It is not always clear from the judgments whether the identified contraventions arise out of the same conduct and are therefore subject to a single penalty. For example, in *Visy* the Court made clear that, while there were 69

is rare that courts will take the sum of the maximum applicable to each such contravention and reason from that vantage point that a higher penalty overall is warranted.

Despite its view that the prevailing legal framework does not inhibit higher penalties in Australia, the OECD recommended that consideration be given to ‘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’.<sup>82</sup> This recommendation has substantial merit and necessitates a more detailed examination of the method employed in penalty-setting in Australia, as compared with other jurisdictions.

#### IV METHODS FOR SETTING PECUNIARY PENALTIES

Notwithstanding its conclusions regarding Australia’s legal framework, the OECD did regard it as ‘plausible that the reason for the difference between Australia and its peers [in relation to penalty levels] may be related to the method adopted to determine the relevant pecuniary penalty’.<sup>83</sup> In our view, this is an understatement of the extent to which methodology explains the difference. While not excluding or discounting the influence of other factors, there is strong reason and evidence to support the view that the Australian method, or certain aspects of it at least, is a major reason for the relatively lower penalties in this jurisdiction.

The OECD singled out two differences that it regarded as salient in its analysis. First, the Australian method is unstructured as compared to the international method. Secondly, the method does not start from a base amount that reflects the turnover of the offending firm or the volume of commerce affected. Correspondingly it made recommendations that Australia ‘study the possibility of adopting a more structured approach’ and ‘[identify] a base penalty’.<sup>84</sup>

The two points are not unrelated. The setting of a base penalty represents a first and critical step in the structured method employed in other jurisdictions. Without this step it would be difficult for there to be a clear sequence to the process. Penalty adjudicators would need to consider a series of factors in the round, in similar fashion to the Australian method. The approach taken in most other jurisdictions, referred to here as the ‘international method’, is both highly structured and sequential.<sup>85</sup> It comprises a

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contraventions, only 37 were subject to penalty, with the result that the statutory maximum penalty was AU\$370m: *Visy* (2007) 244 ALR 673, 706 [292]. In other cases, the division between contraventions and penalisable contraventions is less clear. For example, in *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89 (*Qantas*), Justice Lindgren discussed the regularity of Qantas’ contravening conduct, without identifying the specific number of contraventions subject to penalty or the maximum penalty available for all of the contraventions: at 92–3 [28] (Lindgren J). The number of contraventions is also not clear from the Orders made in the case. The judge accepted the ACCC’s submission that a non-discounted amount of AU\$40m for Qantas’s conduct was within the range he would have imposed: at 99 [63]–[64] (Lindgren J).

<sup>82</sup> 2018 OECD Report, above n 3, 73.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> This comparison is borne out by the detailed analysis of the differences between the two methods in 2018 OECD Report, above n 3, Part 4, 55–70, but is consistent also with numerous other reports on the topic. See, e.g., International Competition Network Cartels Working Group, ‘Setting of

series of steps undertaken largely in the order briefly explained, and then contrasted with the Australian method as relevant, below.<sup>86</sup>

#### A Step 1: Base Fine

The first step involves identifying a base fine. As previously explained, this amount is seen as indicative of the economic gravity of the conduct in question in that it is intended to reflect the benefits derived by the offender and the harms inflicted on consumers or the market. The base fine is calculated using measures such as value of sales, volume of commerce or turnover, generally relating to the infringing conduct, in approximating at least the excess profits if not the benefits more broadly that are derived by the cartellists.<sup>87</sup> The percentage amount is then multiplied applying factors that include the duration of the conduct,<sup>88</sup> but may also include special considerations such as a particular need for deterrence.<sup>89</sup>

As the Australian method does not incorporate the concept or step of calculating a base amount for the penalty, it is not possible to discern whether and how the ACCC and the courts determine an appropriate starting point for penalty-setting. It also means that there is not an explicit and workable mechanism for ensuring that the economic seriousness of the offending conduct is properly reflected in the fine. Further, as highlighted above, there is not a formal or standardised approach to incorporating consideration of the duration of the conduct in the calculation of the penalty.

In most Australian judgments, consideration will be given at various stages in the reasoning process to questions that are relevant to the economic significance of the conduct. Often there will be reference to harm to competition and consumers, generally on the basis that this is presumed.<sup>90</sup> In more specific terms, courts may consider questions concerning the benefits or profits derived from the conduct by the respondent and the extent of loss or damage to direct customers or end-consumers. However, in the

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Fines for Cartels in ICN Jurisdictions (2017)' (Report to the 16<sup>th</sup> ICN Annual Conference, Porto, May 2017); OECD Secretariat, 'Sanctions in Antitrust Cases' (Background Paper No DAF/COMP/GF(2016)6, Organisation for Economic Co-operation and Development, 14 October 2016). The method as explained below does not distinguish between fine assessment for administrative/civil liability and fine assessment for criminal liability. The terminology of 'fine' is used as that is the most common terminology internationally.

<sup>86</sup> The OECD collapsed the five steps as outlined in this article into three (four, if final reductions pursuant to a leniency policy are added). See *2018 OECD Report*, above n 3, 38. It goes without saying that not all of these steps are followed and in this order or in the exact same way by all jurisdictions. However, the approach described here reflects the basic tenets of the method adopted in most jurisdictions.

<sup>87</sup> *Ibid* 40–41. See further International Competition Network Cartels Working Group, 'Setting of Fines for Cartels in ICN Jurisdictions' (Report to the 7<sup>th</sup> ICN Annual Conference, Kyoto, April 2008) 15, 19.

<sup>88</sup> *2018 OECD Report*, above n 3, 41. Some jurisdictions also consider duration as an aggravating or mitigating factor. See International Competition Network Cartels Working Group, above n 85, 21.

<sup>89</sup> For example, the EC may add an extra sum to the base amount, set between 15% and 25% of the value of sales, known as the 'entry fee'. Its main purpose is to deter undertakings from participating in anticompetitive behaviour (ie preventing them from participating 'to try and see'). The entry fee is commonly imposed on hardcore cartel participants and is not multiplied by the number of years of participation in the infringement. Since 2000, this fee has been used by the Commission in 24 cartel decisions. See Damien Geradin and Katarzyna Sadrak, 'The EU Competition Law Fining System: A Quantitative Review of the Commission Decisions Between 2000 and 2017' (Discussion Paper No DP 2017-018, Tilburg University, April 2017) 8.

<sup>90</sup> See, e.g., *Australian Competition and Consumer Commission v McMahon Services Pty Ltd* (2004) ATPR ¶42-031, 49, 228–9 [16].

vast majority of cases, it is observed that benefits derived from, or losses caused by, the contravention are not or not reasonably quantifiable. Typically this reflects the position taken by both the ACCC and respondent in the case, often by way of agreement between them.<sup>91</sup> That said, it commonly will be inferred that some profit or benefit was derived, or at least intended to be derived, on the basis that the respondent otherwise would not have engaged in the impugned conduct.<sup>92</sup>

Recently there have been cases in which the ACCC has led evidence aimed at quantifying benefits directly attributable to the contravening conduct, even if not (at least explicitly) for the purposes of identifying a base amount for the recommended penalty.<sup>93</sup> In such cases the exercise has largely been fruitless. The evidence has been considered by the courts in detail but ultimately has failed to carry any weight in the assessment of the fine. In one such case, the Court observed:

At the end of the day the task is principally an evaluative exercise for the trial judge. And in any event it is only one input into a broader evaluative exercise being the setting of the pecuniary penalty itself, with any input only being weighed as part of an intuitive synthesis approach. Precision in the quantification of one of the inputs may be unrealistic given the broader nature and context of the task in setting a penalty.<sup>94</sup>

The position taken by courts in response to ACCC efforts to introduce a more rigorous evidence-based approach to quantifying the illegal benefits/harms in penalty assessments underscores the need to adopt the concept of a base fine that is a hallmark of the method employed in most other parts of the world.

There is also no doubt that such a reform would facilitate a significant increase in the level of fines proposed by the ACCC in cartel cases, even if it would remain a matter for judicial discretion to assess the appropriateness of the fine in each case. This is illustrated in the following table, which sets out the results of five case studies undertaken by the OECD as part of its 2018 report. The case studies compared the base fines that would have resulted applying the international method with the actual penalty imposed in Australia.<sup>95</sup>

	<b>Actual penalty</b>	<b>Estimate Base Pecuniary Penalty on the basis of local methodology</b>					
	Australia	European Union	Germany	Korea	Japan	United Kingdom	United States

<sup>91</sup> See, e.g., *Qantas* (2008) 253 ALR 89, 96 [47]; *NYK* [2017] FCA 876 (3 August 2017) [185]. Indeed, in *Qantas*, the ACCC submitted that ‘the benefit obtained by the contravening conduct is not the only, or indeed the main, determinant of the size of the appropriate penalty in price fixing cases’: at 116 [57].

<sup>92</sup> See, e.g., *Qantas* (2008) 253 ALR 89, 96 [47]; *NYK* [2017] FCA 876 (3 August 2017) [246].

<sup>93</sup> See above n 72.

<sup>94</sup> *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159 (5 October 2017) [509].

<sup>95</sup> *2018 OECD Report*, above n 3, 58–9. The table appears on page 59 of the report. Figures relate to either millions (m) or billions (b) of Australian dollars. The estimates are of a base fine, applying information available to the OECD and do not reflect mitigating or aggravating circumstances or other adjustments that might apply following international methodologies. The penalties in *Visy* and *Qantas* were determined under the pre-2007 penalty regime in Australia, with the result that the maximum penalty was \$10m per contravention.

<i>ACCC v Visy</i> <sup>96</sup>	36m	1.272b	Up to 1.06b	371m	318m	1.06b	1.06b
<i>ACCC v Qantas</i> <sup>97</sup>	20m	103.3m	Up to 221.4m	31m	22.14m	88.58m	88.58m
<i>ACCC v NSK</i> <sup>98</sup>	3m	13.92m	Up to 9.28m	3.2m	4.64m	9.28m	9.28m
<i>ACCC v Colgate</i> <sup>99</sup>	18m	117m	Up to 117m	27.3m	39m	78m	78m
<i>CDPP v NYK</i> <sup>100</sup>	25m	800m	Up to 900m	210m	300m	600m	600m

### B Step 2: Aggravating and Mitigating Factors

The second step in the international method involves adjustments to the base amount having regard to aggravating or mitigating factors. In most cases there is a generally accepted list of such factors; however it is non-exhaustive and it is also recognised that not all factors will apply in all cases. These factors largely mirror the factors considered under the Australian method.<sup>101</sup>

In some instances a numerical approach is taken to identifying the adjustment to be made to the base amount as a result of the factor (for example in the case of recidivism).<sup>102</sup> The most extreme version of this approach is found in the US Sentencing Commission, *Federal Sentencing Guidelines Manual*.<sup>103</sup> An alternative model involves the application of a combination of numerical and narrative approaches depending on the factor under consideration, as found in EC's *Guidelines on the Method of Setting Fines*, for example.<sup>104</sup>

In most jurisdictions, a numerical approach is taken in calculating the discount for cooperation pursuant to a leniency policy. However, this adjustment is made as the final step in the process and is independent of and additional to any discount awarded for cooperation at this earlier stage. It is in these respects that the Australian approach to the treatment of aggravating and mitigating factors most clearly diverges from the approach taken under the international method at this stage in the fine calculation process (see further the discussion regarding *Step 5: Leniency* below).

<sup>96</sup> *Visy* (2007) 244 ALR 673.

<sup>97</sup> *Qantas* (2008) 253 ALR 89.

<sup>98</sup> *Australian Competition and Consumer Commission v NSK Australia Pty Ltd* (2014) ATPR [42]–[472].

<sup>99</sup> *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676 (3 June 2016).

<sup>100</sup> *NYK* [2017] FCA 876 (3 August 2017).

<sup>101</sup> See *2018 OECD Report*, above n 3, 44.

<sup>102</sup> For example, in the EU the increase for recidivism will be up to 100% of the basic amount for each such infringement established: see *EC Guidelines on the Method of Setting Fines* [2006] OJ C 210/2, [28]. The same 100% uplift in fine applies in Lithuania and Brazil. In Japan and Korea, the law provides for the amount of fines to be increased by 50% on account of recidivism. See *2016 OECD Background Paper*, above n 2, [40].

<sup>103</sup> United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (2016).

<sup>104</sup> *EC Guidelines on the Method of Setting Fines* [2006] OJ C 210/2. The approach under these guidelines is usefully summarised in Geradin and Sadrak, above n 89, 1–12.

### C Step 3: Maximum Limit

The third step in the international method is the point at which consideration is given to whether the adjusted fine exceeds the maximum limit. The maximum may be a specific monetary amount, a combination of or alternatives between two or more amounts. However, it is most commonly a percentage of turnover of the firm or corporate group (and hence is distinguishable from the turnover referable to the sales or commerce affected by the infringing conduct, used in many jurisdictions to calculate the base fine).<sup>105</sup>

By and large, the main role played by the statutory limit is to act as a safeguard by placing a cap on fines to ensure that they ‘do not exceed what is necessary to effectively sanction and achieve an adequate level of deterrence’.<sup>106</sup> Further, the fining cap is intended to avoid fines being set at levels that would jeopardise the viability of or bankrupt the firm and thereby reduce the number of active competitors in the market.<sup>107</sup>

In Australia the maximum is seen as relevant in that it is an important expression of the seriousness with which the legislature views the conduct in question. It is also taken to reflect the worst possible case and permit for comparison between that case and the case at hand and, in that sense, provides a yardstick against which the current case can be assessed.<sup>108</sup> In practice, reference to the maximum for these purposes is arguably of limited assistance in penalty-setting and, as previously suggested, may even have a dampening effect on the levels at which penalties are assessed as appropriate.

The *CCA* maximum undoubtedly reflects the legislative perception of the seriousness of cartel conduct and, given the challenges in its detection, the primacy to be given to deterrence in the sanctioning of cartel conduct especially. However, at best, acknowledgement of this perception serves to frame the general policy setting in which the conduct with which the case is concerned is being assessed. It cannot and should not substitute for a specific assessment of the objective seriousness of the conduct in the case. This assessment should be undertaken by employment of an approach to setting a base fine that can reasonably be taken to reflect the illegal gains obtained from/harms caused by the conduct in question.

The yardstick role of the maximum can present difficulties for the ACCC in pursuing particularly high penalties. It is generally always possible to imagine an even worse hypothetical case.<sup>109</sup> As recently illustrated by the ‘canyon’ between the parties in relation to appropriate penalties in the *Cement Australia* case,<sup>110</sup> hypothetical scaling of seriousness is inevitably a highly subjective exercise.<sup>111</sup> The more confined and objective role for the maximum employed under the international method avoids such difficulties inherent in assigning a more expansive, subjective and uncertain role of the maximum.

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<sup>105</sup> 2018 *OECD Report*, above n 3, 51–3.

<sup>106</sup> 2016 *OECD Background Paper*, above n 2, [49].

<sup>107</sup> *Ibid* [49].

<sup>108</sup> *Markarian v The Queen* (2005) 228 CLR 357, 372 [31].

<sup>109</sup> Cf the Australian High Court’s caution that ‘once it is recognised that an offence falls within the “worst category”, it is beside the point that it may be possible to conceive of an even worse instance of the offence’. See *R v Kilic* (2016) 339 ALR 229, 235.

<sup>110</sup> *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2016) 336 ALR 1, 146 [581].

<sup>111</sup> See *Visa* (2015) 339 ALR 413, 428 [90]–[91].

#### D Step 4: Inability to Pay

In the fourth step under the international method consideration may be given to any claim by the firm in question of an inability to pay.<sup>112</sup> However, in some jurisdictions the maximum is regarded as a method of taking ability to pay into account.<sup>113</sup> The treatment of inability to pay claims may include consideration of how the fine will affect the company's capacity to make restitution to victims.<sup>114</sup>

The Australian method does not make clear separate provision for the consideration of a corporate respondent's inability to pay a proposed penalty. Nor does it provide 'specific, objective and transparent criteria' for the purposes of assessing inability to pay claims, contrary to the advice of the OECD.<sup>115</sup> A substantial majority of cases are 'settled' in accordance with the ACCC's *Immunity and Cooperation Policy*.<sup>116</sup> Pursuant to this policy, the amount of the jointly recommended fine is agreed by the ACCC and the respondent in advance of proceedings. As a result, questions as to inability to pay generally do not arise in penalty proceedings before a court.

By virtue of this approach, unlike under the international method, Australian penalty judgments do not reveal what the fine would have been were it not for, and how much it has been reduced by, consideration of the respondent's inability to pay. Nor is attention given to how the fine will affect the respondent's capacity to make restitution to victims, as is the case in some other jurisdictions. Fines are paid into the Commonwealth's general revenue. Under the civil regime, no provision is made for the court to order compensation as a part of the fine-setting process.<sup>117</sup>

#### E Step 5: Leniency

The final step under the international method involves reductions to the fine on account of the competition authority's leniency policy. The general practice is for leniency reductions at this stage in the process to be treated as additional to any mitigatory effect yielded by cooperation beyond the leniency applicant's obligations under the relevant policy, considered at an earlier stage in the process.<sup>118</sup>

Generally speaking, for the first-in applicant, application of the leniency policy means that the fine is reduced to zero. In many jurisdictions, the amount of the reduction for other applicants is expressed as a percentage and will be set in descending order depending on the timing of the application and possibly other factors such as the value of the cooperation provided: for example, 50% for the second-in, 30% for the third-in, etc.<sup>119</sup>

<sup>112</sup> See, e.g., *EC Guidelines on the Method of Setting Fines* [2006] OJ C 210/2, [35].

<sup>113</sup> International Competition Network Cartels Working Group, above n 85, 26, 44.

<sup>114</sup> See, e.g., US Sentencing Commission, *Federal Sentencing Guidelines Manual* (2016) §8C3.3.

<sup>115</sup> *2018 OECD Report*, above n 3, 53.

<sup>116</sup> *Immunity and Cooperation Policy*, above n 57, formerly the Australian Competition & Consumer Commission, 'ACCC Cooperation Policy for Enforcement Matters' (Policy, 31 July 2002) (as it related to cartel conduct).

<sup>117</sup> However, s 79B of the *CCA* reflects the legislative concern that a respondent's financial resources not be depleted by a pecuniary penalty, leaving no or insufficient resources for payment of compensation to private damages claimants. This section stipulates that preference must be given to compensation for victims. Unfortunately, it applies only to an action in which compensation is claimed at the same time as a breach is alleged. It thus rewards those who take the risks and expense of running private actions prior to, as distinct from following on, an ACCC proceeding.

<sup>118</sup> See *2018 OECD Report*, above n 3, 46–7.

<sup>119</sup> See, e.g., *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, [2006] OJ C 298/17 [26]; Competition Bureau Canada, 'Leniency Program' (Bulletin, 29

In some jurisdictions, independently of its leniency program, the competition authority may employ a policy to facilitate faster more efficient handling of cartel cases (a different objective to leniency policies which are directed at facilitating detection and deterrence of cartels). Such settlement policies generally award a fixed percentage of discount to parties who admit liability and waive rights of review or appeal.<sup>120</sup>

Based on discussions with the business community, the ICN has advised that penalty reductions are ‘pivotal’ for companies in deciding whether to cooperate or settle. Thus, ‘the more specificity that the prosecuting agency can provide as to the amount of the fine and its determination, the easier it will be for the settling party to take a decision on the settlement proposal’.<sup>121</sup> Similar conclusions in favour of transparency and predictability in dealing with cooperation and settlement have been reached by the OECD, and reflect the practices of many competition authorities around the world.<sup>122</sup> In its 2018 report, the OECD pointed out that all of the jurisdictions it had reviewed for its study had public guidance on the steps followed in determining financial penalties and that this included jurisdictions in which penalties are ultimately determined by the courts (as in the US).<sup>123</sup>

In contrast to the international method, the Australian approach to assessing fine reductions on account of cooperation is opaque and conflates cooperation as a mitigating factor with application of a leniency policy. Moreover, it does not distinguish between leniency and settlement. In accordance with the ACCC’s *Immunity and Cooperation Policy*,<sup>124</sup> the first eligible party to apply under the policy receives full (conditional) immunity from proceedings and penalties. Unlike the position in many other jurisdictions, as no proceeding is brought and no official determination of penalties made, there is no consideration given to what the appropriate penalty would have been for the first-in leniency applicant, absent leniency. Indeed, unlike other jurisdictions, the ACCC does not publish any record of decisions made pursuant to its *Immunity and Cooperation Policy*.<sup>125</sup>

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September 2010) [13]–[14]; Commerce Commission New Zealand, ‘Cartel Leniency Policy and Process Guidelines’ (12 April 2011) [4.08].

<sup>120</sup> For example, the EC’s cartel settlement policy offers infringers a fine reduction of 10% (additional to any leniency reduction) in exchange for settling and waiving the right to judicial review. The policy has been seen as a success — 22 cases (more than 50% of all prohibition decisions) have been dealt with under the policy since 2010, and the rate has been increasing over time (80% in 2014, 60% in 2016)). See Geradin and Sadrak, above n 89, 23–4. See generally Directorate for Financial and Enterprise Affairs Competition Committee, ‘Plea Bargaining/Settlement of Cartel Cases’ (Competition Policy Roundtable No DAF/COMP (2007) 38, Organisation for Economic Co-operation and Development, 16 December 2009).

<sup>121</sup> International Competition Network Cartels Working Group, above n 85, 39.

<sup>122</sup> Directorate for Financial and Enterprise Affairs Competition Committee, ‘Experience with Direct Settlements in Cartel Cases’ (Competition Policy Roundtable No DAF/COMP (2008) 32, Organisation for Economic Co-operation and Development, 1 October 2009) 7–8. Cf. the argument against predictability in relation to fining policy in Wouter P J Wils, ‘Optimal Antitrust Fines: Theory and Practice’ (2006) 29 *World Competition* 183.

<sup>123</sup> The OECD further explained that having such guidance does not necessarily entail a fettering of discretion and that such transparency is not only a matter of ‘good enforcement practice’ but important also in light of the relationship between predictability of sanctions and deterrence. See *2018 OECD Report*, above n 3, 37–8.

<sup>124</sup> *Immunity and Cooperation Policy*, above n 57.

<sup>125</sup> See the discussion and critique of this lack of transparency in ACCC reporting in Caron Beaton-Wells, ‘The ACCC Immunity Policy for Cartel Conduct: Due for Review’ (2013) 41 *Australian Business Law Review* 171, 211–12.



For all other firms that cooperate, the size of the discount for cooperation under the policy is determined in the penalty proceeding and in the context of one of the factors in mitigation. The discount is a matter that is negotiated between the ACCC and the respondent in accordance with the *Immunity and Cooperation Policy* and the agreed discount is then the subject of submissions to the Court. There is no additional fine reduction that is distinguished from the reward for timely cooperation and offered by way of settlement to expedite proceedings.

As with every other aspect of the fine-setting process, the method for determining the level of discount is based on applying a series of factors and it does not appear that any one factor (for example, timeliness of cooperation) is necessarily given more weight than any other (for example, value of evidence provided).<sup>126</sup> Applying these factors, it is in the discretion of the ACCC (and the Court upon reviewing the parties' submissions), to determine where on a scale of 0–99% the discount should fall. Further, there is no standard practice with respect to disclosure of the percentage that is settled upon. In some cases, having identified the appropriate penalty, a specific figure representing a discount for cooperation with the ACCC is identified in the judgment and the penalty is reduced accordingly.<sup>127</sup> In others, while cooperation may be cited as a mitigating factor, there is no indication of the proportion by which the penalty has been discounted as a result.<sup>128</sup>

It is evident that the current practice with respect to cooperation provides the ACCC with significant discretion and flexibility in determining the conditions on which it will deal with cooperating parties and the nature and extent of the 'reward' that it will offer such parties in return for cooperation. Such flexibility is valuable in that it allows the ACCC to tailor enforcement responses and penalty submissions to the particular circumstances of the case and the respondent. However, it is highly desirable also that the ACCC's approach in this process maximises incentives for parties to cooperate and is transparent, fair, proportionate and consistent. This is not just a matter of good public administration. It is also important for ensuring that the courts retain confidence in the ACCC's approach to negotiating the agreed facts and penalties that it presents for judicial endorsement.

Amongst some there is seen to be at least a lack of transparency if not a degree of arbitrariness and inconsistency in the ACCC's approach to negotiating discounts to fines on account of cooperation.<sup>129</sup> A more structured and transparent approach akin to that taken in many other jurisdictions would provide substantially greater clarity and certainty for cooperating parties as it would stipulate the maximum (and potentially the minimum) level or range of ACCC-endorsed discount. It would also then leave considerable discretion to the ACCC and in turn the Court to determine whether there

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<sup>126</sup> *Immunity and Cooperation Policy*, above n 57, [77]. This is not to say that as a matter of its internal deliberations the ACCC may have a standard approach of giving more weight to one factor than another.

<sup>127</sup> See, e.g., *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301, 314 [66], 317 [77]; *Australian Competition and Consumer Commission v McMahon Services Pty Ltd* (2004) ATPR 42-022, 49, 85 [123]; *Qantas* (2008) 253 ALR 89, 99–101 [65]–[69].

<sup>128</sup> See, e.g., *Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd* (2004) 207 ALR 329, 336 [39]–[42]; *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676 (3 June 2016) [97]–[98]; *Visa* (2015) 339 ALR 413, 433–4 [118]–[123]; *ACCC v Thai Airways International Public Company Limited* [2012] FCA 1434 (14 December 2012) [35].

<sup>129</sup> See Beaton-Wells, above n 125, 205–8, reporting on views expressed by practitioners regarding various aspects of the ACCC's approach to cooperation discounts.

should be additional credit applied for cooperation above and beyond the conditions identified in the *Immunity and Cooperation Policy*.

## V TRANSPARENCY AND PREDICTABILITY OF PENALTY-SETTING METHOD

The OECD highlighted additional divergence from ‘international practice’ in the ‘absence of public guidance regarding how pecuniary penalties are set in this country’.<sup>130</sup> It noted that this was a feature of other regulatory regimes as well but also observed that in its consultation for the review, ‘it seemed consensual that such guidelines could potentially be useful, if adequately designed and respecting the separation of powers’.<sup>131</sup>

As alternatives, the OECD suggested the ACCC adopt internal rules or guidelines or that Parliament legislate to make it clear that civil penalty-setting should not be governed by criminal law principles, and prescribe a mechanism for identifying a base pecuniary penalty and identify factors that could be taken into account to increase or reduce the base amount to result in an appropriate penalty.<sup>132</sup>

The OECD highlighted the advantages associated with greater transparency and predictability, particularly the enhancement of general deterrence and ultimately, legal certainty. It further observed that ACCC guidelines on penalty-setting could be expected to be given weight by courts, even if not treated as determinative, and that flexible application of policy was recognised in administrative law principles as important to consistency and integrity in decision-making. Preparation of such guidelines, it observed, could provide an occasion for the ACCC to reflect further on international experience.<sup>133</sup>

Consistent with these findings, the OECD recommended that the ACCC adopt guidelines for the setting of pecuniary penalties, while respecting the independence and autonomy of the judiciary, and that there be consideration given to legal reforms that would prescribe a method for the calculation of civil penalties.<sup>134</sup>

The OECD’s findings in relation to transparency and predictability are plainly correct. They are borne out by much of the analysis in its report and in this article regarding the Australian approach to penalty-setting. Currently a lack of transparency pervades much of the approach. As highlighted in this article, this is particularly so as regards treatment of the economic seriousness of the impugned conduct and its duration, the relevance of the maximum, the way in or extent to which inability to pay is factored in, and the degree to which cooperation results in a discount.

The OECD’s recommendations on this topic warrant support also. However, for there to be guidance that substantially increases transparency and predictability there will need to be changes in the method used to set penalties. The latter necessarily precedes the former.

## VI CONCLUSION

Corporate pecuniary penalties are and are likely to remain a crucial element of the sanctions regime for cartel conduct in Australia. It is therefore imperative that these

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<sup>130</sup> 2018 OECD Report, above n 3, 73.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid 74.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

penalties be set at a level conducive to achieving deterrence as the primary objective of enforcement. On this score, Australia currently lags behind much of the rest of the world.

A key reason for this is the method employed in assessing penalties. The method is unstructured and non-sequential, as well as non-transparent and highly discretionary. It differs substantially in these respects from the method used in most other jurisdictions around the world. Crucially, the Australian approach does not have an explicit and workable mechanism for capturing the economic seriousness of the conduct in question in assessing the appropriate penalty.

While it is possible to take issue with aspects of the OECD's analysis, it has made a series of recommendations that deserve close attention. In our view, consistent with the OECD's conclusions, the Australian method for assessing corporate pecuniary penalties for cartel conduct should be revised to reflect more closely the international method (the revised method). The revised method should incorporate the following steps:

- a. calculation of a base amount for the penalty using a measure such as a percentage (either fixed (say 10%) or within a range (say 10–30%) to allow for tailoring to the particular conduct) of the affected sales or turnover relating to the affected sales, multiplied by the duration of the conduct;
- b. adjustment of the base amount having regard to aggravating and mitigating factors (the latter not including any discount derived from cooperation pursuant to the *Immunity and Cooperation Policy*), allowing for the size of the adjustments to be determined as a matter of discretion in accordance with the particular circumstances of the case;
- c. consideration as to whether the adjusted amount is appropriate (either too high or too low, as the case may be) having regard to the statutory maximum;
- d. consideration of any prospect that the respondent will be unable to pay the adjusted amount, including any impact that the penalty may have on the respondent's capacity to make restitution to victims;
- e. reduction of the amount arrived at upon completion of steps (a)–(d) by a percentage that represents a 'discount' for cooperation pursuant to the *Immunity and Cooperation Policy*, that percentage being as set out in the *Immunity and Cooperation Policy* based on the timing of the cooperation and possibly other factors such as the value of the cooperation (provided such factors are clearly defined).

The revised method should be published in guidelines that set out clearly the approach that will be taken by the ACCC in assessing appropriate penalties, whether for the purposes of submissions on agreed penalty or in matters in which penalties are contested.

The ACCC should draw on international experience in encouraging courts to adopt the revised method in judicial assessment of penalties. Judicial adoption of the revised method may be difficult having regard to long-standing High Court-approved adherence to the 'intuitive synthesis' approach to penalty assessment. In due course, this may necessitate legislative intervention to ensure adoption of the revised method and ultimately to facilitate an increased level of penalties in the interests of deterrence.

