Increased Civil Pecuniary Penalties – The "Cost of Doing Business" or an Effective Deterrent?

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In this article, the authors look at the rise of the civil pecuniary penalty (CPP) as a tool for regulators. They examine how CPPs have been calculated in Australia with the community, regulators and businesses alike considering CPPs largely as the "cost of doing business" rather than a measurable and effective deterrent. The new statutory maximums under the Australian Consumer Law and the Australian Securities and Investments Commission Act 2001 (Cth) will be discussed. The authors opine that regulators are likely to place less reliance on quantum "consent", and will instead push the boundaries for higher CPPs to more effectively deter business misconduct. The article concludes by expressing caution in setting too high a CPP as untoward consequences may flow which would undermine the goal of CPPs as an effective deterrent.

Introduction

In this article, the rise of the civil pecuniary penalty (CPP) as a tool for regulators to "punish" or perhaps, more appropriately, "deter" business misconduct is examined.

First, how Australia has calculated CPPs to date is assessed. Established methods for calculating CPPs together with low prescribed maximum penalties have generally led to the judicial imposition of relatively low CPPs. Consequently, CPPs have been viewed by much of the community, regulators and businesses as nothing more than the "cost of doing business" rather than a measurable and effective deterrent.

Second, comparative jurisdictions and their methodologies for calculating CPPs are considered, providing a comparison of how some Australian CPP cases might have yielded much higher CPPs had these methodologies been employed.

Third, coupled with the recently introduced statutory increases to the maximum CPPs under the *Australian Consumer Law*[1] (ACL) and the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*), it is anticipated that regulators will place less reliance on quantum "consent" and push the boundaries for higher CPP amounts to more effectively deter business misconduct. Negotiated outcomes may become more protracted with the regulators being more bullish over the CPPs agreed to.

The authors conclude by expressing caution. In setting too high a CPP, the cost of doing business may be replaced with putting businesses out of business or lead to unscrupulous businesses failing to pay CPPs at all. These consequences will undermine the goal of CPPs as an effective deterrent.

What Are Civil Pecuniary Penalties, and What Are the Maximum Penalties Prescribed?

A CPP is a monetary penalty imposed by courts in civil matters where a contravention of a civil penalty provision in an Act has been proven on the balance of probabilities.

CPPs differ from fines which are used in criminal proceedings. In the *Commonwealth v Director, Fair Work Building Industry Inspectorate*, the plurality described CPPs as follows:

> In essence, civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth ("the regulator") with the statutory function of securing compliance with provisions of the regime that have the statutory purpose

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[1] *Competition and Consumer Act 2010* (Cth) Sch 2.

> of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification orders and civil penalties, with or…without criminal offences. That necessitates the regulator choosing the enforcement mechanism or mechanisms which the regulator considers to be most conducive to securing compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. And, finally, it requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings.[2]

Viewed this way, CPPs are one of the statutory tools available to regulators to promote the public interest and securing compliance with a statutory regime, principally through deterrence.

Under the ACL, CPPs are available for breaches of:

- Section 29 – false or misleading representations about goods or services in a variety of contexts including that they are of a particular standard, quality, value and grade; are new; or that a person has purported to provide a testimonial in connection with them;
- Section 21 – engaging in unconscionable conduct in the supply or possible supply of goods or services having regard to a number of factors including the relative bargaining positions of the parties; and whether undue influence or pressure was placed on the consumer;
- Sections 106 and 107 – supplying goods or services where there is a safety standard in place, and the goods do not comply with that safety standard. Examples of safety standards include those for aquatic toys, child restraints in motor vehicles, cots, portable swimming pools and projectile toys. Section 118 prohibits supplying goods where an interim or permanent ban is in place (such as those in relation to combustible candle holders, novelty cigarette lighters, sky lanterns and yo-yo water balls).

The maximum civil penalty which the Australian Competition and Consumer Commission (ACCC) can now seek under the ACL per contravention[3] is $500,000 for individuals, and for corporations, the greater of $10,000,000, three times the value of the benefit received that is reasonably attributable to the contravening act or omission, or 10% of the annual turnover in the preceding 12 months if the court cannot determine the benefit from the contravening conduct.

CPPs are not currently available for contraventions of the unfair contract term provisions of the ACL[4] nor s 18 (misleading or deceptive conduct). The authors understand the ACCC and equivalent State regulators are lobbying for the imposition of CPPs for contraventions of unfair contract terms.[5]

Under the *ASIC Act*, CPPs attach to a number of provisions, including unconscionable conduct, in connection with financial services, misleading representations in relation to financial products or interests in land, pyramid selling of financial products and unsolicited financial services.[6]

Of the Australian regulators, the Australian Securities and Investments Commission (ASIC) has the ability to seek the most significant monetary penalties. It can now seek[7] the greater of 5,000 penalty units for an individual,[8] and if the court can determine the benefit derived and detriment avoided from the contravening conduct, that amount multiplied by three. For a corporation, it is the greater of: 50,000 penalty units;[9] if the court can determine the benefit derived and detriment avoided from the contravening conduct, that amount multiplied by three; or 10% of annual turnover for the 12 month period ending the

[2] *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [23]–[24]; [2015] HCA 46.

[3] Australian Consumer Law s 224(3A).

[4] Australian Consumer Law ss 23–28.

[5] Rod Sims, "Address to the Law Council of Australia Competition Law Workshop 2019" (Speech delivered at the Law Council of Australia – Competition Law Workshop, 30 August 2019).

[6] *Australian Securities and Investments Commission Act 2001* (Cth) Subdivs C–D.

[7] *Australian Securities and Investments Commission Act 2001* (Cth) s 12GBCA.

[8] Currently equating to $1,050,000.

[9] Currently equating to $10,500,000.

month in which it contravened, or began to contravene the Act, up to a maximum of 2,500,000 penalty units[10] if the contravening conduct value cannot be determined.

The *Telecommunications Act 1997* (Cth) prescribes CPPs for contraventions of carrier licence conditions, service provider rules, industry codes and industry standards.[11] The maximum amounts prescribed per contravention are $10 million, $10 million, $250,000 and $250,000 respectively.[12]

The maximum penalties for contraventions of a civil remedy provision under the *Fair Work Act 2009* (Cth) varies, increasing with "seriousness". For example, the maximum of 60 penalty units is imposed for contraventions of enterprise agreements, workplace determinations or equal remuneration orders. If these are deemed "serious contraventions", then 600 penalty units is the maximum.[13] A maximum of 30 penalty units is imposed for contraventions concerning voting actions (ss 462 and 467) and termination of employment requirements (s 785(4)).

Other Australian regulators or bodies which have the ability to seek CPPs include the Australian Taxation Office, Australian Energy Regulator (AER)[14] and Australian Prudential Regulation Authority; CPPs being available for a variety of differing contraventions. The Victorian Environment Protection Authority will receive that power on and from 1 July 2020.

THE THEORY BEHIND CPPS

The deterrence factor looms large in domestic case law and literature about the rationale and theory behind civil penalties.[15] Indeed, this is embedded, alternatively, inferred, in the legislation's "objects" or "purpose" clause(s).[16] Civil penalty decisions in anti-competitive conduct cases particularly illustrate the importance of the need to deter. This is not because such conduct is regarded as particularly heinous compared to other breaches of law. Rather, it is because the commercial incentives to engage in the conduct are very strong such that penalties must be large enough to remove the economic advantage gained and to create a strong deterrent.[17]

To that end, the Honourable Justice French, as he then was, stated that the primary objective of CPPs is deterrence rather than punishment "an attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act".[18] He went onto say that "the punishment must be fixed with a view to ensuring that the penalty is not such as to be regarded by that offender or others as an acceptable cost of doing business … those engaged in trade or commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention".

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[10] Currently equating to $525,000,000.

[11] *Telecommunications Act 1997* (Cth) ss 68, 101, 121 and 128 respectively.

[12] *Telecommunications Act 1997* (Cth) s 570.

[13] *Fair Work Act 2009* (Cth) s 539; ss 50, 280 and 305 for the respective contravention provisions.

[14] The AER has recently issued proceedings against EnergyAustralia Pty Ltd for alleged contraventions of the *National Energy Retail Rules* in failing to comply with life support requirements and breaching an Enforceable Undertaking.

[15] See *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68, [98]; [2017] FCAFC 113; *Australian Competition & Consumer Commission v Cabcharge Australia Ltd* [2010] ATPR 42-331, [41]; [2010] FCA 1261; *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46. For literature examples, see Jenny Cooper, "Making the Penalty Fit the Crime: The Pros and Cons of Civil Penalties as a Means of Enforcing Commercial Law" (2016) 14 *Otago Law Review* 213; Jade Winterton, "Examining the Effectiveness of Sanctions in Order to Deter Cartel Conduct in Australia" (2011) 4 *Global Antitrust Review* 116; Caron Beaton-Wells and Brent Fisse, "Criminal Cartels: Individual Liability and Sentencing" (Research Paper No 415, Legal Studies, University of Melbourne, June 2009); Caron Beaton-Wells and Fiona Haines, "Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour" (2009) 42(1) *Australian and New Zealand Journal of Criminology* 218.

[16] For example, *Competition and Consumer Act 2010* (Cth) s 2; *Australian Securities and Investments Commission Act 2001* (Cth) s 1; *Telecommunications Act 1997* (Cth) s 3.

[17] B Hamlin, M Connell and M Sumpter, "Fixing the Price of Commerce Act Breaches" [2011] *New Zealand Law Journal* 230.

[18] *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076, [40], [52].

The "cost of business" theme runs true not just in anti-competitive conduct cases run by Australian regulators, but consumer law cases alike. Some case examples are discussed further below.

In Japan, Germany, the United Kingdom, Korea and the European Union, the objective of CPPs also appears to focus on deterrence, at least in anti-competitive, cartel conduct. Disgorging of profits is also a focus in Germany and Japan, and in the United States, individual accountability in the form of threats of imprisonment acts as another key deterrent.[19]

How Are CPPs Calculated?

First and foremost, Australian courts must have regard to the maximum amounts prescribed in the relevant civil penalty provision – some of which have been extracted above.

The courts then take into account a number of factors in assessing the appropriate penalty, some of which are prescribed in the legislation, and others which are not. For example, ss 76 and 224 of the ACL specifically state the following matters are to be taken into account: the nature and extent of the contravening conduct; the amount of loss or damage caused as a result of the contravening act or omission; the circumstances in which the contravening conduct took place; and whether the person has previously been found to have engaged in similar conduct.[20]

In addition to the above, courts will consider the "French factors"[21] which were developed by French J (as he then was) in the seminal decision of *Trade Practices Commission v CSR Ltd*[22] in order to determine the "right" penalty to be set in each particular case given the defendant's particular circumstances. These factors include the following:

- the size of the contravening company;
- the degree of power it has, as evidenced by its market share and ease of entry into the market;
- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management or at a lower level;
- whether the company has a corporate culture conducive to compliance under the Act as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;
- whether the company has shown a disposition to co-operate with the authorities for the enforcement of the Act in relation to the contravention.

In *Australian Competition and Consumer Commission v Visa Inc*,[23] the Federal Court stated "This [above] list is plainly not exhaustive. Nor should it be approached in a regimented or formulaic way. To do that would impermissibly constrain or formalise what is, at the end of the day, a broad evaluative judgement".

It is important that any aggregate penalty is just and appropriate in the circumstances. In setting such a penalty, the courts will have regard to the course of conduct, parity and totality principles, which are derived from the criminal law, and now applicable in CPP cases.

The course of conduct principle recognizes that "where there is an interrelationship between the legal and factual elements of two or more offences with which an offender has been charged, care needs to be taken so that the offender is not punished twice (or more often) for what is essentially the same criminality. The interrelationship may be legal, in the sense that it arises from the elements of the crimes. It may also be factual, because of the temporal or geographical link or the presence of

[19] Organisation for Economic Co-operation and Development (OECD), *Pecuniary Penalties for Competition Law Infringements in Australia*, Report (2018) 35–37 <http://www.oecd.org/daf/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>.

[20] *Australian Securities and Investments Commission Act 2001* (Cth) s 12GBA is in identical form.

[21] *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076, 52-152 (French J (as he was then)).

[22] *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076, [42].

[23] *Australian Competition and Consumer Commission v Visa Inc* (2015) 339 ALR 413, [83]; [2015] FCA 1020.

other circumstances compelling the conclusion that the crimes arise out of substantially the same act, omission or occurrences".[24]

Whether certain contraventions should be treated as being truly one single course of conduct is a factual inquiry to be made, even in a CPP case, having regard to all of the circumstances of the case.

For example, in *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd*,[25] the Honourable Murphy J noted that each relevant telemarketing call to a Job Applicant involved numerous acts or omissions which were contraventions of the misleading conduct, unconscionability, and unsolicited consumer agreement provisions of the ACL. The same telephone call also involved Acquire breaching the unsolicited consumer agreement provisions through the failure to provide prescribed information to the Job Applicant. The number of contraventions in each telephone call was relevant to the maximum available penalty.

The parties submitted, and his Honour agreed, that each telephone call between a Career Adviser and a Job Applicant was a single course of conduct or transaction, translating into eight courses of conduct. On that basis, the maximum penalty for the contraventions was $8.8 million ($1.1 million × eight courses). A CPP of $4.4 million was awarded, taking into account all relevant matters including the need for general and specific deterrence.

The parity principle, as the name suggests, requires all things being equal, persons committing the same contraventions should receive the same punishment (or penalty). This is more difficult to apply in practice as the respondents' circumstances must be comparable: it requires that there should not be such inequality in the penalties so as to suggest that the defendants have not been treated even-handedly. It has been said that "the parity principle was mainly, if not exclusively, relevant for the determination of penalties applicable to co-offenders".[26]

In the pecuniary penalty setting at least, the courts have used the parity principle as a comparator to "like" cases. In *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd*,[27] Perry J stated that while caution must be exercised in referring to penalties in other cases, some assistance may be gleaned from such penalties, particularly to determine if a penalty is within an appropriate range. The case of *Director of Consumer Affairs Victoria v Manningham Property Group*[28] provides another example of determining the parity of penalty where "like" cases were observed as context for the appropriateness of the penalty (see also *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd*[29] where after looking at previous cases involving airline misconduct (in a cartel setting),a $19 million penalty was ordered).

Finally, the totality principle ensures that the overall sentence or penalty is appropriate and that the sum does not exceed what is proper in the circumstances having regard to the totality of the contravening conduct. The principle has been stated many times in various forms "when a number of offences are being dealt with and specific punishments in respect of them are being tottered up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong; when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".[30]

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[24] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68, [112]; [2017] FCAFC 113.

[25] *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd* [2017] ATPR 42-543; [2017] FCA 602.

[26] OECD, n 19, 17.

[27] *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2019] FCA 797.

[28] *Director of Consumer Affairs (Vic) v Manningham Property Group Pty Ltd* [2017] FCA 1448.

[29] *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* [2019] FCA 786, [225]–[239].

[30] *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2016) 242 FCR 389, [121]; [2016] FCA 453.

In *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd (No 2)*,[31] the Court considered that the totality principle required it to consider the appropriateness of both the pecuniary penalty and the disqualification order to ensure that the total penalty imposed on the individual director, Mr Otton, was appropriate.[32] After weighing up all the evidence and relevant principles, the Court reasoned that $6 million and a 10 year disqualification period from being a director, was appropriate.

Taking all these matters and principles into account, the discretionary calculation of a CPP has been described as requiring an "instinctive synthesis".[33] While "like" cases may provide a comparator, each case will be taken on its own facts and the extent of deterrence – general and specific – will differ accordingly, as the penalties in the following cases illustrate.

These principles, which are largely matters going to mitigation or parity, also underscore that deterrence, whether specific or general, is not *the* underlying or primary objective of CPPs. It is but one of a number of objectives. The amounts ordered by courts by way of CPPs have therefore been reduced and lowered as a matter of course.

Examples of Recent CPP Cases

The outcome of recent ACCC (under the ACL) and ASIC cases prior to the introduction of higher penalties illustrates the wide-ranging quantum of CPPs ordered which could be argued to contribute to their lack of deterrent value and businesses simply absorbing CPPs as the cost of doing business:

Case (ACCC)	Contravention Summary	CPP
Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)[34]	Misrepresentations that some of its product lines were hand painted by Aboriginal persons, and made in Australia	$2,300,000
Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd[35]	Misrepresentations as to the nature and availability of consumer guarantees	$1,950,000
Australian Competition and Consumer Commission v Amaysim Energy Pty Ltd[36]	Misrepresentations as to discounts and savings available to consumers	$900,000
Australian Competition and Consumer Commission v Optus Mobile Pty Ltd[37]	Misrepresentations that customers had agreed to acquire financial services	$10,000,000
Australian Competition and Consumer Commission v We Buy Houses Pty Ltd (No 2)[38]	Misrepresentations which could equip customers with techniques to purchase property	$18,000,000
Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)[39]	Misrepresentations as to consumer guarantees	$9,000,000
Australian Competition and Consumer Commission v Ford Motor Co of Australia Ltd[40]	Unconscionable conduct in connection with the supply of goods	$10,000,000

[31] *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd (No 2)* [2018] FCA 1748.

[32] *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd (No 2)* [2018] FCA 1748, [56].

[33] The origin of which can be traced to the (criminal law) decision of *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25.

[34] *Australian Competition and Consumer Commission v Birubi Art Pty Ltd (in liq) (No 3)* [2019] FCA 996.

[35] *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2019] FCA 797.

[36] *Australian Competition and Consumer Commission v Amaysim Energy Pty Ltd* [2019] FCA 430.

[37] *Australian Competition and Consumer Commission v Optus Mobile Pty Ltd* [2019] FCA 106.

[38] *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd (No 2)* [2018] FCA 1748.

[39] *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953.

[40] *Australian Competition and Consumer Commission v Ford Motor Co of Australia Ltd* (2018) 360 ALR 124; [2018] FCA 703.

Case (ACCC)	Contravention Summary	CPP
Australian Competition and Consumer Commission v Telstra Corp Ltd[41]	Misrepresentations as to its direct billing service	$10,000,000
Australian Competition and Consumer Commission v Thermomix in Australia Pty Ltd[42]	Misrepresentations as to the standard or quality of products	$4,608,500
Australian Competition and Consumer Commission v MSY Technology Pty Ltd[43]	Misrepresentations as to consumer guarantees	$750,000
Australian Competition and Consumer Commission v HJ Heinz Co Australia Ltd[44]	Misrepresentations as to "healthy" childrens' snacks	$2,250,000
Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd (No 2)[45]	Misrepresentations as to price	$545,000
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd[46]	Misrepresentations that its bakery goods were "baked today"	$2,500,000
Australian Competition and Consumer Commission v Valve Corp (No 7)[47]	Misrepresentations as to consumer guarantees	$3,000,000
Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd (No 2)[48]	Misrepresentations as to price	$200,000
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd[49]	Unconscionable conduct in respect of its dealings with suppliers	$10,000,000

Across the 16 selected cases, the average CPP is $5,066,900.[50]

[41] *Australian Competition and Consumer Commission v Telstra Corp Ltd* [2018] ATPR 42-593; [2018] FCA 571.

[42] *Australian Competition and Consumer Commission v Thermomix in Australia Pty Ltd* (2018) 360 ALR 676; [2018] FCA 556.

[43] *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2017] FCA 1251.

[44] *Australian Competition and Consumer Commission v HJ Heinz Co Australia Ltd* (2018) 363 ALR 136; [2018] FCA 360.

[45] *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd (No 2)* [2017] FCA 205.

[46] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73; [2014] FCA 634.

[47] *Australian Competition and Consumer Commission v Valve Corp (No 7)* [2016] FCA 1553.

[48] *Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd (No 2)* [2017] FCA 204.

[49] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405.

[50] The recent decision of *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166 has been excluded as it is currently under appeal. The parties had agreed on a CPP of $75 million for false and misleading representations as to diesel car emissions. Foster J considered a CPP of $125 million more appropriate and ordered accordingly. The respondent appealed.

The following is a list of some recent ASIC cases:

Case (ASIC)	Contravention Summary	CPP
Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liq) (No 2)[51]	Breaches of responsible lending obligations under the Credit Code	$17,875,000
Australian Securities and Investments Commission v Westpac Banking Corp (No 3)[52]	Unconscionable conduct concerning the supply of financial services	$3,300,000
Australian Competition and Consumer Commission v Equifax Australia Information Services and Solutions Pty Ltd[53]	Breaches of responsible lending obligations under the Credit Code and price misrepresentations	$3,500,000
Commonwealth Bank of Australia[54]	Market manipulation and unconscionable conduct	$5,000,000[55]
Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd[56]	Conduct in relation to consumer credit contracts	$5,000,000
Australian Securities and Investments Commission v National Australia Bank Ltd[57]	Unconscionable conduct in the context of financial services	$10,000,000

This represents a CPP average of just under $7,500,000.[58]

The authors located two matters where the AER litigated and secured a CPP. The first for $400,000 against Snowy Hydro Limited[59] and the second, $500,000 against EnergyAustralia Pty Ltd.[60] According to its 2017/2018 annual report, it issued seventeen infringement notices, each with a $20,000 penalty, to retailers and electricity distribution businesses for failing to meet various obligations to its customers, transferring customers to other providers without their customers' consent and failing to comply with requisite dispatch instructions.[61]

A review of the Fair Work Ombudsman's litigation outcomes reported in its 2018/2019 annual report, yielded an average CPP amount of approximately $110,000 over the course of 28 separate proceedings.

[51] *Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liq) (No 2)* [2014] ASC 155-201; [2015] FCA 93; CPP broken down as follows: Cash Store $10,725,000 and Assistive Finance Pty Ltd $7,150,000.

[52] *Australian Securities and Investments Commission v Westpac Banking Corp (No 3)* (2019) 139 ACSR 25; (2018) 131 ACSR 585; [2018] FCA 1701.

[53] *Australian Competition and Consumer Commission v Equifax Australia Information Services and Solutions Pty Ltd* [2018] FCA 1637.

[54] *Australian Securities and Investments Commission v Commonwealth Bank of Australia* (2018) 128 ASCR 289; [2018] FCA 941.

[55] Plus $15 million to establish a community benefit fund.

[56] *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2018] ASC 155-221; [2018] FCA 155.

[57] *Australian Securities and Investments Commission v National Australia Bank Ltd* (2017) 123 ACSR 341; [2017] FCA 1338.

[58] The recent decision of *Australian Securities and Investments Commission v Westpac Banking Corp* [2019] FCA 1244 has been excluded as it is under appeal. The parties had initially agreed to a CPP of $35 million for breaches of responsible lending obligations. However, Perram J did not "approve" the settlement *Australian Securities and Investments Commission v Westpac Banking Corp* (2018) 132 ACSR 230; [2018] FCA 1733. The matter proceeded to trial and his Honour dismissed ASIC's case. ASIC appealed.

[59] *Australian Energy Regulator v Snowy Hydro Ltd (No 2)* [2015] FCA 58.

[60] *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] ATPR 42-491; [2015] FCA 274; the ACCC in the (concurrent) proceeding securing an additional $1 million CPP.

[61] Refer to the Australian Energy Regulator Media Releases; NR 17/18, dated 13 June 2018; NR 23/18, dated 24 July 2018; NR 21/18, dated 19 July 2018 for more information.

Are CPPs Effective as a Deterrent? What Was the Case for Higher Penalties?

In the authors' view, it is difficult to categorically conclude that CPPs did or did not have sufficient deterrent value (prior to the increases). It is a complex question that relies on hard, empirical data, which is lacking. There is, however, a significant amount of anecdotal or circumstantial evidence suggesting that prior to the recent statutory increases, CPPs did not have sufficient deterrent value, as the following discussion illustrates.

A. Regulator Views

In its final report on the ACL Review, Consumer Affairs Australia and New Zealand concluded that a penalty may be considered insufficient if it is disproportionately low compared to the size of the business, or is only a fraction of the potential advantage a business may gain from the conduct.[62]

The Explanatory Memorandum to the Bill which introduced the higher pecuniary penalties cited the *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (*Coles*) case as an example of penalties being insufficient to deter conduct that is highly profitable. It also found that the (then) existing penalty regime was inconsistent with other provisions in the *Competition and Consumer Act 2010* (Cth) and, accordingly, such penalties should align particularly given that breaches of the ACL can significantly affect consumer wellbeing, competition in the market place and economic efficiency overall.[63]

The ACCC Chair, Rod Sims, recently spoke of the *"element of arrogance of corporate Australia, that they are in a privileged position as they can do as they like in almost an unfettered way"*.[64] He warned that breaches of consumer laws will be more harshly dealt with under the increased penalty regime, and in cases such as *Australian Competition and Consumer Commission v Telstra Corp Ltd* and *Australian Competition and Consumer Commission v Ford Motor Co of Australia Ltd*,[65] ACCC would have been pushing for penalties "way north of $100m". As noted above, the ACCC had been advocating for increased penalties for some years,[66] Sims stating in his belief, "Parliament intended that in particular cases there should be penalties of over $100 million for breaches of consumer laws to improve deterrence".[67]

Mr Sims is also quoted as saying "Increased penalties will help to deter large companies from breaching consumer laws. This is a profound change that I believe will improve corporate behaviour significantly, and so improve the Australian economy and how it works for consumers".[68]

Similarly, ASIC Deputy Chair Daniel Crennan QC recently said that "The passing of the penalties bill is a significant step for ASIC's enforcement regime. The legislation is the culmination of ASIC's recommendations to Government to increase penalties and provide the legislative reform[69] to ensure breaches of the law are appropriately punished. Without this Bill very significant aspects of the law

[62] Australian Government, *Australian Consumer Law Review: Issues Paper* (March 2016) 41–43.

[63] Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No 3) Bill 2018* (Cth) Ch 1.

[64] James Thomson, "ACCC Warns 'Arrogant' Business Sector of Huge Fines", *The Australian Financial Review*, 6 January 2019 <https://www.afr.com/policy/accc-warns-arrogant-business-sector-of-huge-fines-20181221-h19e27>.

[65] Referred to in the ACCC table above – $10 million each for ACL breaches; Telstra for false or misleading representations and Ford for unconscionable conduct.

[66] Aspect Legal, *Episode 083 – Talking Law, The Inside Scoop: The ACCC Talks about Tougher New Penalties for Breaches of the Consumer Law* (22 April 2019) <https://www.aspectlegal.com.au/the-accc-talks-about-tougher-new-penalties/>.

[67] Rod Sims, "Compliance and Enforcement Policy Speech" (Speech delivered at the Committee for Economic Development Australia (CEDA), 26 February 2019).

[68] ACCC, "Consumer Law Penalties Set to Increase" (Media Release, MR164/18, 23 August 2018).

[69] Includes expanding the civil penalty regime to the breach of duties under *Corporations Act 2001* (Cth) ss 912A and 912D, together with new ASIC powers to issue a relinquishment order (disgorgement of profits) and increase the scope of infringement notices. Increased enforcement options all round are likely to generate more civil actions by ASIC in line with its new mantra of "Why not litigate?" adopted since October 2018, though it appears that the 25 identified matters arising from the recent Royal Commission at least, are likely to be criminal.

lacked sufficient penalties to punish corporate wrongdoing in Australia. In part, the core obligations owed by banks and other financial licensees to the citizens of Australia did not carry any penalties. ASIC will now be in a stronger position to pursue harsh civil penalties and criminal sanctions against those who have breached the corporate laws of Australia".[70]

The authors note that the recent high profile case of chef George Colombaris attracted significant criticism across the board as a result of the low $200,000 "fine" (or contrition payment) imposed by the Fair Work Ombudsman for underpaying his restaurant staff to the tune of approximately $8,000,000. As a result, the Ombudsman will adjust its methodology to take into account the quantum of the underpayment as a major factor in determining penalty. It conceded "We didn't make it as big a priority as we think clearly the public and others believe we should".[71]

Given Woolworths' current revelation that it underpaid its supermarket staff up to $300 million dating back almost a decade,[72] one would expect that this would attract the imposition of a very high penalty or payment to the Ombudsman, possibly in the millions.

B. Business and Community Comments

Submissions were made to government by various industry bodies and stakeholders when assessing the perceived inadequacy of CPPs.[73] They were generally supportive of higher CPPs, with comments that [they] "have not kept up with inflation and it certainly has not kept pace with community expectations".[74] Further, it has been suggested that CPPs were too low, particularly in relation to the level of remuneration of directors comparative to the penalty for breach of a director's duties under the *Corporations Act 2001* (Cth) (ie then $200,000).[75] Mr Mayne on behalf of the Australian Shareholders' Association opined that unless the penalty increased to reflect the gravity of the offence, courts would be reluctant to impose anything more than a nominal penalty even though shareholders may have suffered severely as a result.

Others expressed the view that the lower degree of flexibility in the non-criminal regime in Australia compared to other jurisdictions meant that it was not always possible to ensure that wrongdoers did not profit from their conduct since the maximum fine may be substantially lower that the financial benefit obtained,[76] including banks and bankers that have acted deceitfully and dishonestly.[77]

Further, some have commented that the imposition of a custodial sentence together with a high(er) fine would result in personal and general deterrence being achieved,[78] particularly when combined with an intensive correction order and/or some form of community sentence.

Unsurprisingly, Australia (prior to the new penalty regime) lagged behind other countries such as Canada, Hong Kong, the United Kingdom and the United States, which all had the ability to seek the disgorgement of profits in non-criminal proceedings.[79]

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[70] ASIC, "ASIC to Pursue Harsher Penalties after Laws Passed by Senate" (Media Release, 19-032MR, 15 February 2019). See also ASIC, "ASIC's 2018/2019 Annual Report"; ASIC, "Annual Report for 2018–19" (Media Release, 19-284MR, 17 October 2019) where it confirmed its plans for aggressive enforcement of corporate and financial misconduct.

[71] "Admission Is Not Contrition: FWO Warns Woolies after $300m Wage Theft Revelations", *The News Daily*, 30 October 2019.

[72] Admission Is Not Contrition, n 71.

[73] Senate Economics Reference Committee, *Lifting the Fear and Suppressing the Greed: Civil and Administrative Penalties for White Collar Crime*, Report (March 2017) Ch 6 <https://www.aph.gov.au/parliamentary_business/committees/senate/economics/whitecollarcrime45th/Report>.

[74] Senate Economics Reference Committee, n 73, per Greg Golding, Business Law Section, Law Council of Australia.

[75] Senate Economics Reference Committee, n 73, per Mr Stephen Mayne, Director of Australian Shareholders Association (ASA).

[76] Senate Economics Reference Committee, n 73, per NSW Young Lawyers Business Law Committee.

[77] Senate Economics Reference Committee, n 73, per Tasmanian Small Business Council.

[78] Senate Economics Reference Committee, n 73, Professor Adams, Dr Hickie and Mr Ian Lloyd QC.

[79] Senate Economics Reference Committee, n 73, per ASIC.

C. Judicial Comments

In past civil penalty cases, judges have made observations from time to time as to the utility and effectiveness of the maximum statutory limits of CPPs and their ability to sufficiently deter the contravenor and others from contravening.

For example, in the *Coles* unconscionable conduct matter referred to above, Gordon J stated "it is a matter for Parliament to review whether the maximum available penalty of $1.1 million for each contravention by a body corporate is sufficient when a corporation with annual revenue in excess of $22 billion acts unconscionably … the current maximum penalties are arguably inadequate for a corporation the size of Coles".

Similarly, Lee J in the case against *Apple* referred to above, stated that "One might think that this case is a paradigm example of the difficulties that can arise when a penalty regime fixes maximum penalties as to body corporates, without reference to the size of the contravener".[80]

In the high profile decision of *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)*[81] concerning collusive price fixing in the supply of cardboard box markets, the Court ordered a penalty of $36 million against Visy, consistent with the parties' agreed submission on penalty. In doing so, Heerey J also made observations regarding the progressive increase in the maximum penalties over time and the growing call for criminal sanctions to deter cartel behaviour. His Honour said:

> **[297]** The maximum penalties applicable at the time of the contraventions in this case were, in respect of each contravention, $10m for a corporation and $500,000 for an individual: s 76(1A)(b) and (1B). In 1993 and 1994 the maximum penalties had been increased to their present level from $250,000 and $50,000 respectively: s 10 of the *Trade Practices Legislation Amendment Act 1992* (Cth) and s 46 *Industrial Relations Reform Act 1993* (Cth). As from 1 January 2007 the penalties for a corporation may exceed $10m where the court can determine the benefit obtained as a result of the contravening. The maximum penalty is three times the value of that benefit or 10% of annual turnover, whichever is the greater: …
>
> **[306]** Cartel behavior of the kind which is case is concerned is extremely destructive of the competition on which the prosperity of a free market economy depends. Often the profits can be immense, and the risk of detection slight. …
>
> **[307]** The progressive increase in the maximum penalties mentioned above shows how gravely the legislature regards this kind of conduct. Price fixing and market sharing are not offences committed by accident, or in a fit of passion. The law, and the way it is enforced, should convey to those disposed to engage in cartel behavior that the consequences of discovery are likely to outweigh the benefits, and by a large margin.
>
> **[308]** Critical to any anti-cartel regime is the level of penalty for individual contravenors. We tend to overlook the fact that corporations are constructs of the law; they only exist and possess rights and liabilities as a consequence of the law. Heavy penalties are indeed appropriate for corporations, but it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets…
>
> **[310]** The Australian Government appointed an expert committee chaired by former High Court Justice Sir Daryl Dawson to report on Australia's competition laws. In April 2003 the Dawson Committee in its report … recommended … that, in the light of submissions made to it and growing overseas experience, criminal sanctions deter serious cartel behavior and should be introduced.

These criminal sanctions were later introduced.

D. Case Law Review and Commentary

The authors' cursory review of the recent Federal Court cases, including those extracted in the tables above, reveal a consistent or recurring number of themes and issues. These include misrepresentations

[80] *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953, [65].

[81] *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673; [2007] FCA 1617.

as to price, quality of goods or services, and the availability (or not) of consumer guarantees. This is probably not surprising given the consumer welfare mandate for most regulators.

What is less clear, however, is whether the above actions can be further analysed into industry sectors such that an "X factor deterrent" can be ascertained. For example, can it be said that the airline industry has been deterred from drip pricing, that the retail sector is deterred from price misrepresentations, or that banks have sharpened their lending practices? Does that even matter given that CPPs also have a general deterrent aim as well?

Perhaps when statements are or were made that CPPs were or are not an effective deterrent for businesses, this must be accepted as being the case, to some degree at least. One cannot ignore that constrained statutory maximums, a lack of focus on larger scale companies, the voice of the judiciary and the lack of an alternative method of calculating CPPs have all played a part in the result and perception that CPPs have not been a sufficient deterrent. In other words, CPPs were simply the cost of doing business *most of the time*.

THE INTERNATIONAL EXPERIENCE – HOW DO WE COMPARE?

Having now moved to an increased CPP regime, how does or did Australia compare internationally? Readers may not be surprised to learn that Australian CPP maximums were much lower – at least insofar as cartel and other restrictive competition practices are or were concerned.[82]

In the European Union, for example, maximum penalties for corporations are 10% of total worldwide turnover during the preceding business year. This is the same for Germany although the 10% is expressed as the year preceding the authority's decision (to the extent that may be different to the European Union) reduced to 5% if the infraction is due to negligence.

In, Korea, the maximum is 10% of relevant turnover for cartel conduct and 3% if it relates to and abuse of dominance.

In Japan, there is no limit for civil penalties, but it is limited to $500 million for criminal sanctions.

In the United Kingdom, the maximum is 10% of worldwide turnover during the last business year, and in the United States, the maximum is the greater of $100 million, twice the pecuniary gains derived from criminal conduct, or twice the pecuniary loss caused to the victims of crime. There are some distinctions regarding the entity concerned by reference to the maximum measured.[83]

In Australia, the process of calculating and determining CPPs is set out above. In Germany, Japan, Korea, the European Union, United Kingdom and the United States, the process is somewhat different.

The methodology employed by these countries is generally a three-step process involving (1) the determination of a base penalty (2) making adjustments to take into account various aggravating and mitigating circumstances (3) an adjustment to ensure the penalty amount is a sufficient deterrent, and does not exceed maximum prescribed amounts.[84] This seems to place an overriding emphasis on deterrence.

Each of the jurisdictions broadly follows the process outlined in the preceding paragraph, as well as:

- Publishing guidelines that describe how base penalties should be calculated (which the authors understand the ACCC is currently looking into);
- Relying on corporate turnover to varying degrees (as detailed above);
- Taking into account a vast amount of aggravating and mitigating circumstances. For the former, recidivism, playing the role of the leader, instigator or coercer; and involvement of senior management. For the latter, considerations include co-operation with the regulator and compliance programs.

[82] OECD, n 19, 52.

[83] OECD, n 19.

[84] OECD, n 19, 33–54.

On that note, the role and importance of compliance programs as a mitigating factor varies between the jurisdictions. For example, in Germany, Japan and the European Union they are *not* treated as a mitigating factor whereas in the United States and United Kingdom they *may* have some effect in mitigation.

It is known that from experience in Australia, and from the decided cases, that an effective and auditable compliance program is an important factor for a party's level of contrition and commitment for not repeating the conduct in the future. It may have some bearing on the "agreed" CPP.

AUSTRALIAN CASES USING OECD COMPARATORS

Translating some key Australian CPP cases into the international formula described above produces some compelling results. Although limitations and caveats have been noted by the authors, the OECD report has produced the following comparisons:[85]

Case – Australia	European Union	Germany	Korea	Japan	United Kingdom	United States
Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)[86] $36 million	$1.272 billion	Up to $1.06 billion	$371 million	$318 million	$1.06 billion	$1.06 billion
Australian Competition and Consumer Commission v Qantas Airways Ltd[87] $20 million	$103.3 million	Up to $221.4 million	$31 million	$22.14 million	$88.58 million	$88.58 million
Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd[88] $78 million	$117 million	Up to $117 million	$27.3 million	$39 million	$78 million	$78 million
Australian Competition and Consumer Commission v NSK Australia Pty Ltd[89] $3 million	$13.92 million	Up to $9.28 million	$3.2 million	$4.64 million	$9.28 million	$9.28 million

[85] OECD, n 19, 59.

[86] *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673; [2007] FCA 1617.

[87] *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89; [2008] FCA 1976.

[88] *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528.

[89] *Australian Competition and Consumer Commission v NSK Australia Pty Ltd* [2014] ATPR 42-472; [2014] FCA 453.

The ACCC has acknowledged the OECD's body of work noting that it sees merit in considering the relevance of the baseline approach (although this may be less so given that higher CPP maximums are now available). If it were applied in Australia, it would appear likely that companies with large turnover would generally end up with even higher penalties.[90] Further, the size of the contravening corporation may not have been given sufficient weight by the ACCC and respondents in their penalty submissions to the court.

While the OECD methodology is attractive, especially as the comparator cases reveal a much higher CPP yield, there should be caution in expressing the view in setting the CPPs too high such that deterrence is not achieved and businesses consider defaulting in their CPP payments, or placing themselves in liquidation to avoid payment. This would have a consequential negative impact on the broader economy and to the public's confidence in the administration of justice.

A Contravenor's Ability to Pay CPPs

In Australia, a party's ability to pay a proposed CPP *may* be a consideration in determining a CPP, including whether payment of CPPs by instalments is appropriate as the following discussion illustrates. It is submitted that such issues are likely to assume more significance if higher CPPs are ordered.

In *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd*,[91] Murphy J considered that in light of Acquire's reduced financial position, the proposed penalties totalling $4.5 million were appropriate to deter it from a repetition of similar conduct. The penalties were proposed in circumstances where Acquire's most recent financial statements showed an after-tax loss of almost $13 million and a negative net asset position (following an approximately $15 million worsening of its asset position in one financial year).

Orders for payment of penalties by way of instalments may be made where the Federal Court is satisfied that there is "sufficient financial information" to justify such arrangements: *Australian Competition and Consumer Commission v Humax Pty Ltd*.[92]

In *Director of Consumer Affairs Victoria v Hocking Stuart (Richmond) Pty Ltd*[93] Middleton J stated "The Court should take into account the nature, size and financial resources of Hocking Stuart Richmond when making an order regarding an instalment plan for the payment of the penalty. An instalment order that Hocking Stuart Richmond is unable to satisfy will have significant consequences for the employees of Hocking Stuart Richmond, particularly if the order has the consequence that Hocking Stuart Richmond becomes insolvent".[94]

However, it should also be noted that while The Cash Store and Birubi Art cases (referred to in the tables above) produced encouraging CPPs results, both were in liquidation at the time of judgment.

The overseas experience suggests that the status of the contravener's financial position to pay CCPs *may* be a relevant consideration for reducing the CPP. In Japan it is *not*, whereas in the European Union, United Kingdom, United States, Korea and Germany, it *may*.

Therefore, a balance needs to be struck between deterrence through rigorous enforcement and higher expected levels of CPPs and the pursuit of very high CPPs as an end in itself, which cannot be paid and which results in companies and businesses collapsing.

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[90] ACCC, "OECD Finds Australian Competition Law Penalties Are Significantly Lower" (Media Release, 26 March 2018).

[91] *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd* [2017] ATPR 42-543, [89]; [2017] FCA 602.

[92] *Australian Competition & Consumer Commission v Humax Pty Ltd* [2005] ATPR 42-072, [12]; [2005] FCA 706, , reaffirmed in *Australian Competition and Consumer Commission v Burden* [2017] FCA 399, [102].

[93] *Director of Consumer Affairs (Vic) v Hocking Stuart (Richmond) Pty Ltd (No 2)* [2016] FCA 1435, [4].

[94] See also *Director of Consumer Affairs Victoria v Gibson (No 3)* [2017] FCA 1148, [100] where Justice Mortimer left open an application by the parties to pay the CPP ordered by way of instalment. Ms Gibson did not make such an application and has still failed to pay the $410,000 CPP.

Other Relevant Orders Sought by Regulators

Finally, although this article has focused on CPPs, the authors do not wish to understate the importance and effectiveness of other relief and orders which regulators seek usually in conjunction with CPPs. In the authors' view, and in their experience, orders for compliance programs,[95] corrective advertising, refunds (compensation orders) do assist in deterring future contravening conduct. Compliance program assessments and implementation can cost north of $100,000 and as much as $1,000,000 for large companies.

Conclusion

Time will tell whether the new CPP maximums which now form part of the statutory weaponry available to the ACCC and ASIC will lead to high(er) CPPs, and the effect of increasingly deterring corporate misconduct. Regulators have stated an increasing willingness to seek higher amounts in negotiations and in penalty hearings.

The perception that CPPs are nothing more than the "cost of doing business" needs to be shaken *and* stirred, with confidence restored back into the economy that those who breach the law, will be dealt with accordingly. There is every reason to believe that regulators will more rigorously prosecute and seek higher CPPs which have a meaningful deterrent effect on industries. There is also every reason to believe that courts will impose higher and more meaningful CPPs. Businesses have been warned.

However caution must be exercised in ensuring that the "cost of doing business" is not replaced with putting "businesses out of business" or leading unscrupulous businesses to employ methods to avoid payment. Regulators should not be left with mere symbolic and empty judgments which do not further the goal of deterrence and undermine public confidence.

[95] For a useful, recent discussion on the appropriateness and discretionary nature of compliance programs refer to the recent decision of *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd* (2020) 142 ACSR 277; [2020] FCA 69, [236]–[262].