26 August 2022

The Treasury
Langton Cres
PARKES ACT 2600

Law Council
OF AUSTRALIA
Business Law Section

By email: morecompetition@treasury.gov.au

Dear Sir/Madam,

Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022

The Competition and Consumer Law Committee and the Small and Medium Enterprise Business Law Committee (the **SME Committee**) of the Business Law Section of the Law Council of Australia (the **Committees**) welcome the opportunity to comment on Treasury's draft bill *Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022* (the **Bill**) and in particular the proposal to increase the penalties for contraventions of the *Competition and Consumer Act 2010* (Cth) (**CCA**), including the Australian Consumer Law as set out in Schedule 2 to the CCA (**ACL**).

EXECUTIVE SUMMARY

The Committees submit that the proposed increases to maximum penalties under the Bill are not necessary or warranted, and may have disproportionate effects and other unintended consequences. We submit that Treasury should undertake more detailed evidence-based, cost/benefit analysis regarding whether the proposed changes would have the desired effect of increasing compliance and deterrence. We are of this view for the following reasons:

- The Australian Competition and Consumer Commission (**ACCC**) has been seeking, and Courts have been imposing, increasingly higher penalties over recent years. This illustrates that the current regime is sufficient to impose specific and general deterrence, as Courts have a broad discretion to determine a penalty which is appropriate and proportionate to the seriousness of the misconduct and potential harm.
- For ACL contraventions, maximum penalties were already significantly increased in 2018 to align with competition law contraventions, and that new regime should have adequate time to be tested.
- In a global context, Australia's consumer law penalties are the highest in the world and there does not appear to be any evidence that penalties have been inadequate.
- There are many implications of the proposed changes that stakeholders have not had sufficient time to consider, and may not have been fully worked through. The Explanatory Materials also do not explain in any detail the reasons for the proposed increases to the third limb of percentage turnover from 10 per cent to 30 per cent and

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005
www.lawcouncil.asn.au

the proposed "breach turnover period" which is effectively a dual increase (and a potentially unlimited increase) to the turnover limb.

- While the stated intention of the Bill is to bring Australia into line with other international jurisdictions, some other jurisdictions, such as the United Kingdom, have caps on the turnover threshold.
- The CCA and ACL (particularly provisions dealing with misleading and deceptive conduct, unconscionable conduct and unfair contract terms) do not always have equivalent provisions elsewhere in the world. Consideration should be given as to whether, in circumstances where contravening conduct is not always clear-cut, the proposed new penalty regime is appropriate.
- Recent proceedings have highlighted that judges will want to be convinced that penalties are appropriate even when agreed with the ACCC.[1] Accordingly the proposed increase in penalties may not see the ACCC and respondents being able to agree penalties. It is unclear whether such increased penalties may therefore see respondents less willing to defend proceedings and preferring to settle proceedings with the ACCC (which may chill the creation of new case law and guidance for the economy more broadly), or whether respondents in the face of higher penalties will vigorously defend them as occurs with criminal cases. Either way, it is not clear that the increased penalties will have the intended effect of increasing compliance.
- The proposed penalties are excessive compared to other Australian legislation such as corporations law and industrial manslaughter.
- Alternative (and effective) enforcement tools are available such as corrective advertising, adverse publicity orders, disqualification orders, compliance programs and staff training.
- Increased penalties are unlikely to be a material factor in the serious concerns surrounding the increases to the cost of living and doing business in Australia.
- On the contrary, the proposed increase in penalties may have a chilling effect on business activity and investment in Australia, and have a disproportionate adverse effect on small business.
- The Australian legislation is not always clear and, until the CCA and ACL are redrafted as some have suggested (including Professor Alan Fels AO), to simplify and clarify their operation, the Committees have substantial concerns with the proposed new penalty regime.

[1] See, eg, reported comments made by Justice O'Bryan in matter VID218/2022 on penalty sought by consent of ACCC and Uber B.V: Lexology article prepared by KWM 'Judge Casts Doubt on "Uber" Penalty' dated 3 August 2022); *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166, see also *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 [115].

COMPETITION AND CONSUMER LAW COMMITTEE

Current penalty regime is sufficient to 'deter unfair activity' and ensure 'robust consumer protection'

A. Deterrence and increase in penalties achieved under the current penalty regime

1. The current pecuniary penalty regime adequately serves to deter corporations and individuals from contravening the CCA, including the provisions of the ACL. Less than five years ago, in 2018, the consumer law maximum penalties were increased from $1.1 million for a body corporate to the greater of $10 million, three times the value of the benefit received, or (where the benefit cannot be calculated) 10 per cent of annual turnover in the preceding 12 months, per contravention. Penalties against individuals under the ACL were also increased from $220,000 to $500,000 per contravention, consistent with the maximum pecuniary penalty under the competition laws. The current penalty regime therefore enables the ACCC to seek, and courts to impose, substantial penalties against individuals and companies for breaches of the CCA and ACL (together with other powerful tools for deterrence, including imprisonment or disqualification for competition and/or consumer law contraventions).

2. If the proposed changes are passed, the maximum penalty for consumer law contraventions will jump by a multiple of almost 50, or by 4445.5 per cent over a five-year period (from $1.1 million to $50 million). This dramatic increase is clearly unnecessary and has not been sufficiently justified, particularly given recent trends of ever-increasing penalties sought by the ACCC and imposed by Courts.

3. For further context, the penalty regime for ACL contraventions is already world-leading. As acknowledged earlier this year by former Chair of the ACCC, Mr Rod Sims AO, in a speech in March 2022:

> *'It is, to me, amazing that there are still no penalties for breaches of consumer law in the USA and the UK... So we do need to realise that the ACL is ahead of what most countries around the world have. I also suspect our ACL penalties are the highest available anywhere in the world.'*[2]

4. The proposed increases should be considered in this broader context, particularly as they will potentially impact small and large businesses alike. For instance, a single instantaneous contravention by a small business or sole trader—that was not adequately trained and resourced (which the Committees acknowledge is no excuse for a contravention)—may result in it being put out of business given the new minimum breach period of 12 months, where that might not previously have been the case.

5. Further, the increase in the size of penalties being ordered by the courts, judges' willingness to impose custodial sentences,[3] and the ACCC's ongoing public profile as an active enforcer of both the competition and consumer protection provisions under the

[2] https://www.accc.gov.au/speech/continuing-the-acl-journey.

[3] See, for example, *Commonwealth Director of Public Prosecutions v Vina Money Transfer Pty Ltd* [2022] FCA 665

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.asn.au
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CCA indicate that general and specific deterrence is already being achieved to deter anti-competitive activity and ensure robust consumer protection.

6. In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, the High Court emphasised that the primary purpose of civil penalties is to secure deterrence. In contrast to criminal sentences, they are not concerned with punishment, retribution and rehabilitation but are "primarily if not wholly protective in promoting the public interest in compliance". In *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249, the Full Court explained the need to ensure that the penalty in such cases "is not such as to be regarded by that offender or others as an acceptable cost of doing business" and will deter them "from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention".

7. In recent years, the pecuniary penalties imposed for competition and consumer law contraventions have increased dramatically with record penalties achieved by the ACCC. **Annexure A** to this submission contains two graphs which illustrate the upward trends for both competition and consumer penalties. The following are notable examples:

    a) Australian Institute of Professional Education Pty Ltd (**AIPE**) was ordered to pay a record $153 million in December 2021 under the previous (pre-2018) ACL penalty regime;

    b) Volkswagen was fined $125 million in December 2019 under the previous ACL penalty regime;

    c) Kawasaki Kisen Kaisha Ltd was fined $34.5 million in August 2019 (plea for criminal cartel offence);

    d) Yazaki Corporation was fined $46 million in May 2018; and

    e) Rick Otton was personally fined $6 million in November 2018 for false or misleading representations under the previous ACL penalty regime (maximum of $220,000 per contravention for an individual).

8. These penalties were ordered in the context of:

    a) the ACCC announcing in 2015 that it would 'strive for tougher penalties'[4];

    b) the ACCC and Commonwealth Director Public Prosecutions actively pursuing prosecutions for alleged contraventions of the criminal cartel provisions, with the potential for imprisonment encouraging higher levels of general deterrence and compliance;

    c) the 2018 the maximum penalties under the ACL increasing from $1.1 million/ $220,000 per contravention to align with the CCA penalty regime; and

    d) the multiple contraventions model (i.e. the penalty regime operating on a per-contravention basis).

[4] https://www.accc.gov.au/media-release/accc-announces-priorities-and-strives-for-tougher-penalties

9. In the context of the ACCC's proceeding brought against AIPE, in which the current highest consumer penalty was ordered (under the previous ACL penalty regime), Bromwich J said:

> "*Substantial penalties are called for when a commercial enterprise systematically predates on both a government education support scheme designed to help disadvantaged members of the Australian community, and consequently, upon those consumers*."[5]

10. Even in this context, the Court was able to be satisfied that the penalties imposed would achieve the objective of general deterrence. In this case, when the ACCC had sought a penalty of $140–$170 million for systemic unconscionable conduct and a further $6–$7.2 million for the conduct involving the individual consumers, his Honour ordered $150 million and $3 million respectively. This indicates that, even in cases where a "*high level of immorality stood behind the deliberate and protracted unconscionable conduct of a highly predatory nature*"[6] (and the penalty ought to serve as "*a clarion call as to the consequences of engaging in such behaviour*"[7]), the Court could satisfy itself under the previous ACL penalty regime that the penalties imposed would achieve general deterrence (which were ultimately at the lower end of what was sought by the ACCC).

11. In respect of this decision, the former Chair Mr Sims said, '*The magnitude of these penalties should serve as a significant warning to all Australian businesses that there can be very serious consequences for those who choose to engage in misleading and unconscionable conduct…the penalties imposed nevertheless set an important benchmark for future cases and will serve to deter similar behaviour by others*.'[8] The Committees submit that this penalty was sufficient to achieve deterrence, even when based on the previous ACL penalty regime. Indeed, the Committees are not aware of any cases in which a judge has indicated that they felt constrained or restricted from imposing as high a penalty as they considered appropriate in the circumstances due to the existing maximum penalty regime, as discussed further below.

12. Appellate courts are also consistently upholding penalty decisions under appeal by respondents and awarding higher penalties on appeal by the ACCC.[9] For example, in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 [115], the Full Court dismissed Volkswagen's appeal, concluding that 'the penalty imposed was not excessive, let alone manifestly excessive'[10]. As noted above, this penalty was made in the context of a maximum penalty per contravention of $1.1 million under the previous regime which still empowered the Court to impose a

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[5] *ACCC v Australian Institute of Professional Education Pty Ltd (in liq)* (No 5) [2021] FCA 1516 at [1].

[6] Ibid at [20].

[7] Ibid at [6].

[8] ACCC media release: Record $153 million in penalties ordered against training college AIPE dated 3 December 2021.

[9] *Viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87; *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 [115]; *Yazaki Corp v Australian Competition and Consumer Commission* [2018] HCATrans 215

[10] *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 [115] at [6].

penalty that it determined to be appropriate having regard to all relevant matters.[11] The applicable legislative regime did not inhibit the primary judge from ordering a penalty that would achieve specific and general deterrence.[12] In the ACCC's media release regarding the High Court denying Volkswagen leave to appeal, Mr Sims said, *'This case signals to large companies that penalties for egregious conduct which breaches the Australian Consumer Law can now reach very significant sums, and potentially make a big impact on their bottom line*.'[13] The Competition and Consumer Committee submits that the current regime is clearly effective and provides for sufficient penalties since penalty decisions under the previous ACL regime could have such a deterrent effect.

13. Likewise, in *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73, the ACCC successfully appealed the first instance judgment, arguing amongst other things that the penalty of $9.5 million imposed by the Federal Court at first instance was manifestly inadequate. The Full Federal Court ordered a penalty of $46 million (a 384 per cent increase) after considering the same facts and circumstances and applying the same penalties regime.

14. The Competition and Consumer Committee considers that the above examples clearly demonstrate the Court's broad discretion to effectively determine the appropriate penalty having regard to all aggravating and mitigating factors connected to the conduct in question under the existing regime. In this regard, the Committee acknowledges that, prior to the 2018 amendment of the ACL penalty regime, the Court had commented about the inadequacy of the maximum penalties available for ACL contraventions, eg: statements by Justice Gordon that the penalties available against Coles for unconscionable conduct were "arguably inadequate". However, similar statements have not been made in recent penalty decisions and there were no recommendations on increases to competition law penalties under the comprehensive Competition Policy Review in 2015. This may underscore judicial confidence that the current penalty regime enables the Court to effectively determine an adequate penalty which achieves the overarching objectives of general and specific deterrence.

15. Given the current trends, it appears the current penalty regime has only recently been utilised in such a way that is producing the size of penalties it was intended to achieve, as cases make their way through the courts. The increasing trend shows that significant penalties under the current regime can be achieved. Comments from the previous Chair of the ACCC have confirmed this trend. For example, in March 2022, Mr Sims noted the change in the level of penalties being achieved by the ACCC:

> *In 2018 the law was changed to align ACL and competition law penalties. For breaches of both the penalties are now the higher of $10 million or three times the gain made or, if the latter cannot be shown, 10 per cent of company turnover.*

[11] *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 [115] at [131].
[12] *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166 at [273]. [274].
[13] ACCC media release: Court orders Volkswagen to pay record $125 million in penalties dated 20 December 2019

When I arrived at the ACCC in 2011 a $1 million penalty against a large company was celebrated. I then remember the positive reaction to Optus having to pay a penalty of $3.6 million for a breach of the ACL in 2013.

Then in 2018 it seemed a milestone that Ford, Apple and Telstra faced $9-10 million penalties.

In 2021 we saw Telstra pay a $50m penalty, VW pay $125m and AIPE, a vocational training company, hit with a $153 million penalty.

What a change.

And these are all under the old penalty regime.

We will never know how much the new 2018 penalty regime helped convince everyone, including the courts, that penalties of around $10 million for large companies were largely meaningless. I think it was all part of the successful push the ACCC led, and of which I am most proud.[14]

16. Based on current trends and the significant penalties achieved, further increases to the penalty regime are not warranted on ground of general and specific deterrence.

17. Indeed, in circumstances where only one proceeding has been concluded with penalties imposed wholly under the current ACL penalty regime,[15] the Committee submits that it is premature to enact the proposed penalty increases given investigations under the current regime have not run their full course, and in light of the upward trends in higher penalties being sought by the ACCC and imposed by the Courts, as outlined above.

B. Practicalities of litigation

18. The totality principle requires the Court to, as an initial step, impose a penalty appropriate for each course or episode of conduct and then as a check, at the end of the process, consider whether the aggregate penalty is excessive.[16] If the aggregate proposed penalty is considered appropriate, it is not necessary to impose any further reduction.[17] This is particularly relevant in cases where there are numerous (and potentially millions of) contraventions and the maximum theorical penalty becomes so vast as to make the calculation of the maximum penalty unnecessary and unhelpful.[18] In these instances, the Court applies the totality principle to do a "final check" of the penalties to be imposed on a wrongdoer as a whole. The totality principle ensures that the ultimate penalty is of appropriate deterrent value and enables the courts to make orders that achieve deterrence. Under the current regime, the courts have been able to fulfil their statutory directive to satisfy themselves that the penalties ordered are proportionate and provide specific and general deterrence. This is exemplified in not having ordered that the maximum penalty be paid, and demonstrated by judges rejecting the (sometimes higher) penalties submitted by the parties.

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[14] 'Continuing the ACL journey' speech by Mr Rod Sims, Chair of the ACCC, Ruby Hutchison Memorial lecture 2022, 15 March 2022.
[15] Being *ACCC v Lorna Jane Pty Ltd* [2021] FCA 852.
[16] *Cement Australia* at [629].
[17] *Mornington Inn* at [90]-[92]; *Cement Australia* at [629].
[18] *ACCC v Samsung Electronics Australia Pty Ltd* [2022] FCA 875 where 3.1 million Galaxy phones were sold to Australian consumers; *ACCC v Google LLC (No 4)* [2022] FCA 942.

19. However, the majority of penalty decisions are made by way of joint submissions and an agreed statement of facts by the ACCC and the respondent. This is in part because companies seek to be practical when it comes to resolving litigation commenced by the ACCC and the Federal Court requires the parties to mediate prior to a contested liability hearing. Respondents, particularly larger companies, will measure the costs and risk of litigation when deciding whether to contest a claim or seek to arrive at a mediated position with the ACCC. Like most commercial mediations, the parties will meet with respective figures in mind and negotiate from there. This is often informed by calculations of what the maximum benefit derived might be, although the parties accept that the courts regard benefit as 'incalculable'.[19] Once a submission on penalty is agreed, the parties often draft the contravention(s) to fit the penalty: e.g. one overarching making of an agreement or course of conduct (1 x penalty), or multiple instances of giving effect (5 x penalty). Based on the kind of benefit derived from conduct, it is unlikely the outcome of mediations will change under the new regime.

20. The drafting of some provisions in the CCA and ACL can also increase the complexity and cost of litigation and uncertainty regarding allegations brought against respondents/ defendants. For example, in the "ACCC bank cartel case", Justice Wigney of the Federal Court commented that:

> *Those responsible for drafting the cartel offence provisions in the C&C Act – none of whom could possibly have ever set foot in a criminal trial court before – appear to have approached the drafting task as if it were akin to producing a cryptic crossword.*
>
> *The offence provisions, when read with the extensive definitions of the terms used in them, are prolix, convoluted and labyrinthine.*[20]

21. Since the Australian legislation is not always clear, and until the CCA and ACL are redrafted to simply and clarify their operation—as some have suggested (including Professor Fels)—the Committees have substantial concerns with the proposed new penalty regime and the potential for the risk of extraordinary potential penalties to chill litigation and development of law.

C. Operation of the current penalty regime and the effect of proposed amendments

22. The Explanatory Materials explain that the context of the amendments includes the base penalty (i.e. $10 million) remaining unchanged for 30 years in respect of competition law contraventions. However, as also noted in the Explanatory Materials, this base penalty has been amended to operate in conjunction with the benefit of the conduct and turnover calculations for the 12-month period ending in the month in which the act or omission occurred. These additional limbs to the penalty regime were introduced less than 12 years ago (for the competition penalty regime) and less than 4 years ago (for the ACL penalty regime). As submitted above, the amendments proposed under the Bill—which would see the $10 million limb increase fivefold, and the 10 per cent turnover limb

[19] *Australian Competition and Consumer Commission v Visa Inc* [2015] FCA 1020 [63], [79]; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 [6], [185], [210]-[213].
[20] https://www.afr.com/chanticleer/reputations-riding-on-bank-cartel-case-20220111-p59nd5.

increase infinitely (as it is tied to the full period in which the conduct occurred)—are disproportionate and premature.

23. As a result of the tiered structure of the current regime, any business with an annual Australian-connected turnover in excess of $100 million will be dealt with under the benefit or turnover thresholds. It means that companies with a revenue less than $100 million will be dealt with under the maximum of $10 million per contravention or the benefit threshold. The Committees submit that a $10 million maximum per contravention may even be an excessive threshold for some companies, especially where there are multiple contraventions.

24. Further, the Explanatory Materials do not appear to give a full rationale for the proposed increase in:

    a) the percentage of turnover from 10 per cent of turnover to 30 per cent of turnover; or

    b) the 'breach turnover period' for which the percentage of turnover is to be applied.

25. The 'breach turnover period' would see a change from the calculation of turnover for the 12-month period ending in the month in which the act or omission occurred to either:

    a) the 12-month period ending in the date on which the offence, contravention or act or omission ceases or proceedings are instituted; or

    b) the period which commences at the beginning of the month in which the offence, contravention or act or omission occurred and concludes in the month in which such conduct ceases or proceedings are instituted.

26. The effect of both an increase in the *percentage* of turnover to be applied, and the increase in the *period* over which the revenues forming the basis of the maximum penalty is to be calculated, has a real prospect of tipping any balance away from achieving deterrence towards an unintended retributive effect that crushes corporations and/or individuals. This, in turn, may have the effect of stifling competition and reducing incentives to innovate or invest in Australia.

27. It is worth noting that the only threshold that remains unchanged is the benefit limb - 'three times benefit derived' - which has rarely been used to determine appropriate penalties. With the exception of *Woolworths*[21], the Court has generally accepted submissions from the parties or made a finding that the benefit is incalculable.[22]

Misalignment with international jurisdictions

28. While the Explanatory Memorandum indicates that these changes have been formulated with a policy objective of better aligning Australian competition and consumer penalties

[21] *ACCC v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676.

[22] *Australian Competition and Consumer Commission v Visa Inc* [2015] FCA 1020 [63], [79]; *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 [6], [185], [210]-[213].

with those in other jurisdictions, in fact the proposed reform to Australia's penalty regime is not comparable with other jurisdictions. For example,

a) Fines for breaking EU Competition Law are subject to an **overall cap of 10%** of world-wide turnover during the preceding year (per infringement);[23]

b) In the UK, **no penalty fixed by the CMA may exceed 10 per cent of the world-wide turnover** of the undertaking;[24] and

c) In Canada, the pecuniary penalty is similar to our current regime with contraventions of misleading and deceptive conduct and abuse of dominance provisions subject to maximum penalties the greater of:

1. $10 million ($15 million for each subsequent violation);
2. three times the value of the benefit obtained; or
3. if benefit cannot be reasonably determined, 3 per cent of annual worldwide gross revenue.

29. As noted above, Australia already has the highest consumer law penalty regime in the world (ahead of the USA and UK), and this is the area in which increased penalties are likely to have the harshest and unintended consequences for smaller businesses.

Impact on future litigation

30. Significant penalties may suppress respondents' willingness to defend claims brought by the ACCC due to the risk of an aberrant finding under such a large penalty regime. For example, if a company with annual Australian-connected turnover of $10 billion was found to have engaged in four contraventions of the CCA, the current maximum penalty would be $1 billion per contravention with a total maximum penalty of $4 billion. The new maximum would $12 billion ($3 billion per offence). As discussed in paragraphs 38–39 below, this is out of step with penalties for other types of serious corporate offences, noting the maximum penalty for industrial manslaughter in Victoria is $18.17 million.

31. The proposed new penalty regime does not appropriately balance the interest in penalties for contraventions being 'more than a cost of doing business', against the principle that the penalty ought to be proportionate to the harm suffered by the counterparty.

32. Practitioners are often required to advise on these matters before their clients contest allegations. It is likely that parties will elect to mediate with the ACCC or enter pleas instead of running points of law at trial even where the client's case has good prospects of success to avoid such large potential financial exposure. This will chill the creation of law under the CCA.

33. Conversely, the increase in the maximums may result in more contested penalty hearings, as the divergence in what the ACCC and the respondent consider to be

[23] European Commission - Fines to breaking EU Competition Law Factsheet ; OECD, Pecuniary Penalties for Competition Law Infringements in Australia 2018.

[24] Section 36 of the *Competition Act 1998* (UK); CMA's guidance as to the appropriate amount of a penalty.

appropriate in the circumstances may increase. This could result in an increase in litigation and a greater burden on our courts.

Alternative enforcement action is available

34. The payment of a pecuniary penalty is one of a range of tools available to the regulators and the courts. The court can impose other remedial orders, including injunctions, corrective advertising, adverse publicity orders, disqualification orders, compliance programs and staff training, all of which have associated costs (in addition to any adverse cost orders), as well as significant reputational effects.

35. Further, the recent acquittal of Country Care, its director and former junior employee, and the withdrawal of charges against various employees at the ANZ Bank, Deutsche Bank and Citi Bank, has increased public awareness of the human and financial burden in defending criminal allegations under the CCA, even when the defence is successful.[25]

36. The publicity attracted with alternative enforcement action provides an additional deterrent for corporations engaging in anti-competitive conduct. Adverse publicity is a valuable form of social control for companies and can be effective in achieving deterrence even when there is no pecuniary penalty. Study data has revealed that the impacts of adverse publicity are widespread and include loss of corporate and individual prestige, declines in morale, distractions, and a stimulus to reform conduct and culture.[26]

37. The ACCC can seek redress for affected parties as part of enforcement proceedings such as the requirement that they set up a scheme for the repayment of monies obtained by the prohibited conduct.

38. More frequent alternative enforcement action may be more effective in achieving deterrence than an increase to the current penalty regime.

Penalties are excessive compared to other Australian penalty regimes

39. The proposed penalty increases would have the effect of imposing maximum penalties that are extremely high in comparison to contravention of other serious corporate or white-collar civil and criminal offences. Contraventions of corporate laws have the following maximum civil penalties for comparison (as per the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act* 2019):
    a) 50,000 penalty units (currently $11.1 million),
    b) three times the benefit obtained and detriment avoided, or
    c) 10 per cent of annual turnover, capped at 2.5 million penalty units (currently $555 million).
    d) Maximum civil penalty for individuals is the greater of 5,000 penalty units (currently $1.11 million) or three times the benefit obtained and detriment avoided.

[25] MLex Market Insight: The human story behind Australia's landmark Country Care criminal-cartel trial

[26] Interviews with 17 transnational corporations which were involved in publicity crises as a result of allegations of harmful business behavior. From: Impact of publicity on corporate offenders, B Fisse & J Braithwaite, https://www.ojp.gov/ncjrs/virtual-library/abstracts/impact-publicity-corporate-offenders.

40. Another example by way of comparison, is the penalty for industrial manslaughter for companies. This varies by state, with the maximum penalty for companies varying from $10 million to $18.17 million, which is far lower than the proposed increase to maximum penalties: greater of $50 million, three times the benefit derived, or 3 per cent of turnover for the period the contravening conduct took place, per contravention.

Effect on economic activity and business investment

41. Assistant Minister Leigh's announcement is made in the context of 'The Albanese Labor Government…delivering on its election commitment to protect Australian households and help ease the cost of living by increasing penalties for breaches of competition and consumer law'[27]. The Competition and Consumer Committee submits that penalties under the CCA are not a material factor in addressing the serious concerns surrounding the increases to the cost of living and doing business in Australia.

42. On the contrary, the proposed increase in penalties may have a chilling effect on business activity and investment in Australia as businesses may not be prepared to even consider innovative activities, which may be legal or very low risk of contravention but which are nevertheless untested. The costs of doing business may also increase as further compliance training and resources will need to be deployed to ensure sales and marketing teams, commercial team, senior leadership teams and boards are educated about the increased penalties and risks to their business.

SME COMMITTEE

43. While the ACCC focuses a great deal of its enforcement action on large businesses, there are still enforcement actions taken against small businesses.

44. Given the level of ACCC enforcement action against small businesses, the SME Committee is concerned about the impact of the increases in the base penalty amounts in both the CCA and the ACL which is likely to significantly (and disproportionally) adversely impact small businesses against which the ACCC commences legal proceedings.

45. Under the CCA and ACL the court must determine which of the three specific measures for the calculation of penalties apply—either $10 million, three times the benefit derived from the contravening conduct, or 10 per cent of turnover, whichever is the highest. Where the respondent is a large corporation with annual turnover of more than $100 million, the court's focus automatically defaults to either the three times the benefit measure or the 10% of turnover measure. In almost every pecuniary penalty case determined by the court under the CCA and ACL since the higher penalties were introduced, the 10% of turnover measure has been used because the three times the benefit measure could not be calculated with any level of certainty.

46. However, where the relevant business is a small business with an annual turnover of significantly less than $100 million, the court is required to commence its assessment of the appropriate maximum penalty at $10 million.

[27] Andrew Leigh MP, Increase to penalties for breaches of competition and consumer law, Media Release, 23 August 2022.

47. By way of example in 2021 the Federal Court considered the case of a *ACCC v Superfone Pty Ltd* [2021] FCA 278. In that case Superfone had an annual turnover of approximately $1 million. Superfone made submissions to the court that the appropriate starting point in any penalty calculation should be three times the benefit derived from the contravening conduct rather than $10 million, as to commence the penalty analysis at $10 million would result in a disproportionately large penalty which was likely to force Superfone into liquidation.

48. The ACCC argued strongly against the submissions made by the respondent, stating that the $10 million maximum measure should be the starting point for the calculation of any penalty. The Federal Court accepted the ACCC's submissions:

> *53. Superfone also submits that the determination of the maximum penalty is affected by the proper construction of s 224(3A), which applied to its contravening conduct between 1 September 2018 and 7 December 2018. It relies on s 224(3A)(b) and contends that the Court should impose a penalty of $60,000, as that is three times the value of the benefit it received from the contravening conduct being approximately $20,000.*
>
> *54. Superfone's submission misconstrues s 224(3A), which must be read with s 224(3). Item 2(a) in the table at s 224(3) provides that in respect of contraventions of a provision of Part 3-1 (which includes s 29) in respect of a body corporate the pecuniary penalty is not to exceed "the greater of the amounts mentioned in subsection (3A)" (emphasis added). The three alternative amounts mentioned in subs (3A) are:*
>
> > *(a) $10 million;*
> >
> > *(b) if the court can determine the value of the benefit that the body corporate and any related body corporate obtained directly or indirectly, and that is reasonably attributable to the act or omission – three times the value of that benefit;*
> >
> > *(c) if the court cannot determine the value of that benefit - 10% of the annual turnover of the body corporate during the 12 month period ending at the end of the month in which the act or omission occurred or started to occur.*
>
> *55. Since 1 September 2018, the maximum penalty has been the greater of those three amounts. This construction is plain on the text and in the context of s 224(3A) and also consistent with the legislative intent in enacting the provision. The Explanatory Memorandum to the Treasury Laws Amendment (2018 Measures No. 3) Bill 2018 (**EM**) which amended the ACL to introduce the higher penalties in s 224(3A) expressly provides that the aim of the introduction of higher maximum penalties is to deter conduct that is non-compliant with the ACL where such conduct is "highly profitable" and where "[s]ome entities see these penalties as 'a cost of doing business'": see: EM paragraphs 1.6 and 1.13.*

56. The evidence regarding the value of the benefit Superfone received directly or indirectly from its contravening conduct, or having regard to 10% of its annual turnover, shows that the greater of the three alternatives is $10 million, which is therefore the maximum penalty. Superfone's calculation that $60,000 represents three times the value of the benefit it received is not a proper basis from which to determine the maximum penalty.

49. The Federal Court ultimately imposed a pecuniary penalty of $300,000 which represented 15 times the benefit derived from the contravening conduct or 30 per cent of Superfone's turnover. The penalty imposed resulted in the removal of a competitor, with Superfone going into liquidation.

50. For these reasons, the SME Committee is concerned that an increase in the base penalty from $10 million to $50 million will exacerbate the problems identified above where the ACCC takes legal action against a small business.

51. The SME Committee has similar concerns about the proposed increase in the pecuniary penalties for individuals under both the CCA and the ACL from $500,000 to $2.5 million. In the event that a small business owner is taken to court by the ACCC and a pecuniary penalty sought, the starting point of any penalty analysis will be $2.5 million. The SME Committee believes that the increase in the base penalty will result in significant increases in the total pecuniary penalties being imposed and accordingly, significant financial distress on small business respondents, possibly leading to liquidation and bankruptcy.

Further opportunity for consultation

52. In light of the significance of the proposed amendments, the Committees would welcome further consultation or the opportunity to discuss this submission and the proposed amendments.

53. Please contact Jacqueline Downes of the Competition & Consumer Committee at Jacqueline.downes@allens.com.au or Michael Terceiro at michael@terceiro.com.au of the SME Committee, if you would like to discuss any aspect of the Committees' respective submissions.

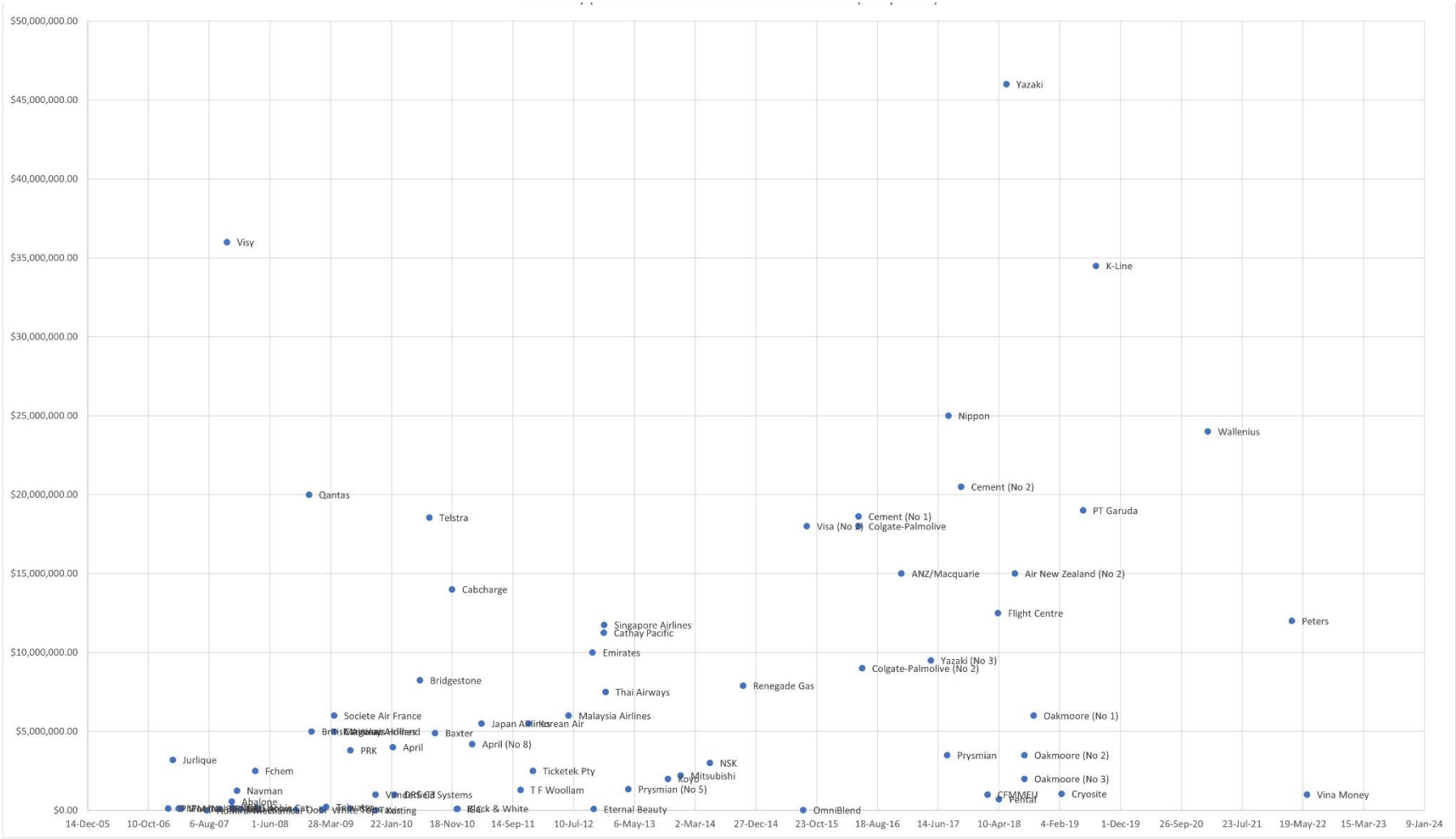
Yours faithfully

Philip Argy
Chairman, Business Law Section

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005
www.lawcouncil.asn.au

Annexure A

Graph 1: Pecuniary penalties for contraventions of the competition provisions of the CCA (companies) since 2005 (with company names from 2010 onwards)



Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.asn.au
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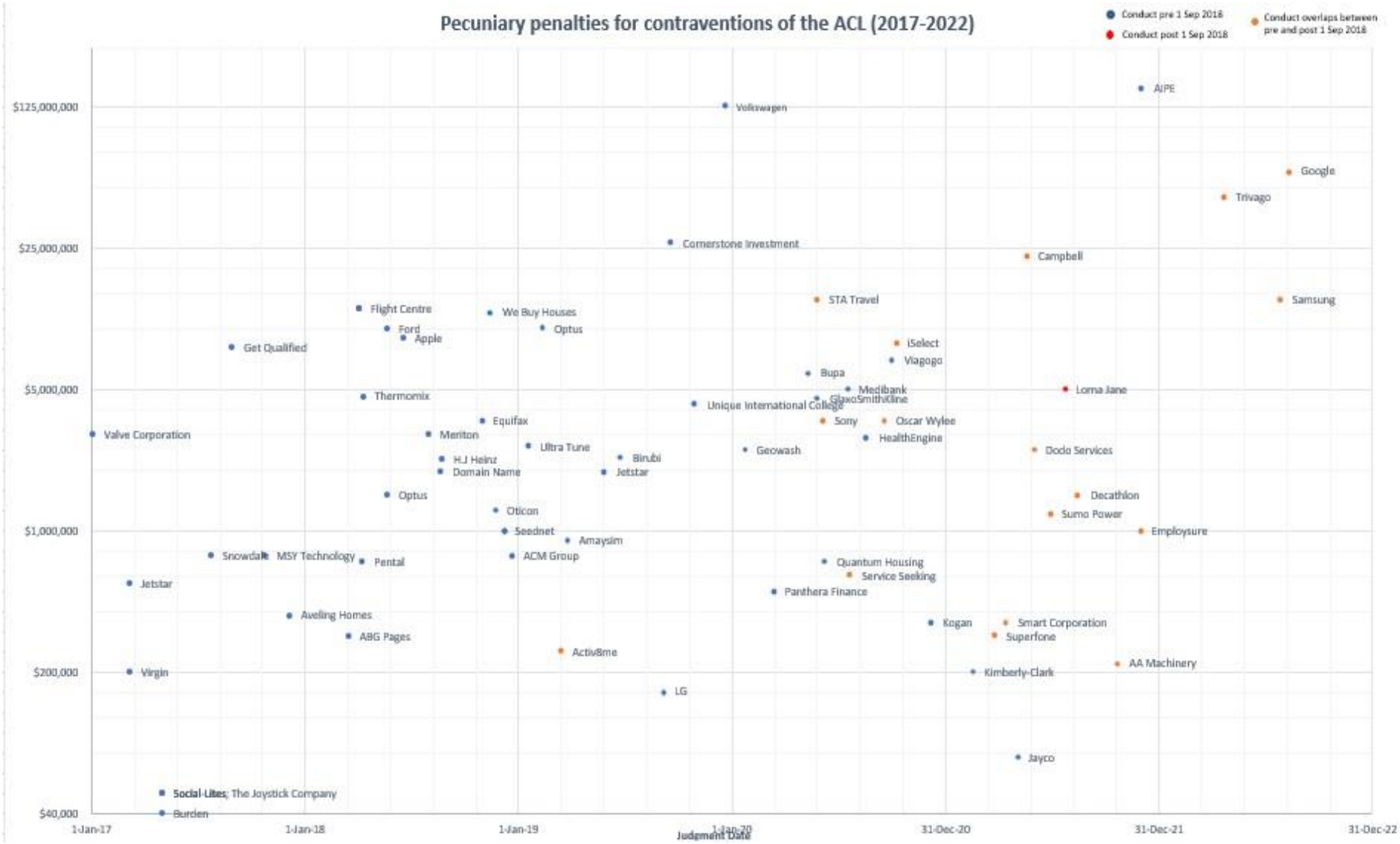
Graph 2: Pecuniary penalties for contraventions of the ACL (2017 – 2022)



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