

**MONETARY PENALTIES FOR BREACH OF THE COMPETITION AND CONSUMER ACT:
SEVEN QUESTIONS ABOUT THE OECD REPORT (2018)**

Competition Law Discussion Group

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1. Does the OECD Report make out a persuasive case for increasing monetary penalties under the CCA?
2. Does the OECD Report make out a persuasive case for adopting a structured approach (using a base penalty amount with weightings for aggravating and mitigating factors) for assessing the amount of monetary penalties under the CCA?
3. Does the OECD Report come adequately to grips with gaps/flaws in the French and *NW Frozen Foods* factors?
4. Does the OECD Report seek to reach an articulated and justified balance between corporate and individual liability?
5. The OECD Report proceeds on the basis of an economic theory of “optimal” monetary penalties. Is that theory satisfactory? Are there alternative and more cogent theories of deterrence/prevention?
6. What does the OECD Report say about the problems associated with monetary penalties against corporations, including pass through to consumers and shareholders and indirect or non-existent impact on the managers responsible?
7. What does the OECD Report say about the procedural and evidentiary difficulties that now arise in determining the factual basis upon which monetary penalties are assessed?

References:

Australian Competition and Consumer Commission v Yazaki Corporation [2018] FCAFC 73 (16 May 2018)

OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (March 2018)

C Beaton-Wells & J Clarke, “Corporate financial penalties for cartel conduct in Australia: A critique” (2018)

L Woodward, "Federal Court of Australia and Law Council of Australia Competition Law Conference – Penalties" (31 August 2018)

B Fisse, "Australian Cartel Law: Biopsies" Pt V (Competition Law Conference May 2018)

C Hodges & R Steinholtz, *Ethical Business Practice and Regulation* (OUP, 2017) ch 3

B Fisse, "Redress facilitation as a sanction against corporations" (2018) 37 UQLJ 85, 94, 104-5