FINES AND CIVIL MONETARY PENALTIES AGAINST CORPORATIONS

MAD MAXIMA?

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The legislative maxima prescribed for monetary sanctions against corporations limit the quantum of the sentence or penalty that can be imposed by a court. They also signal the level of seriousness of offences and contraventions to courts and corporations.[1] Unfortunately, the current maxima look haphazard. Some are very questionable. All call for review.

A Summary of a sample of current maxima under Commonwealth and national legislation

A summary of a sample of the legislative maxima for corporations under Commonwealth law and national laws is set out in the table below.

Legislative provisions	Maxima
Criminal Code (Cth) s 135.4 (conspiracy to defraud)	10 years imprisonment → 3000 penalty units x $313 = $939,000
Criminal Code (Cth) s 141.1(6) (bribery of Commonwealth public official)	Greatest of: • 100,000 penalty units = $31,300,000; • three times the value of the benefit obtained (if the amount can be determined); • (if the amount of the benefit cannot be determined), 10% of annual turnover during prescribed 12 month turnover period

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1 How that signal is received or reflected by the courts when determining penalties is another matter. See C Beaton-Wells & J Clarke, 'Corporate financial penalties for cartel conduct in Australia: A critique' (2018) at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149143, 47-49. Given the decision of the High Court of Australia in *Pattinson v Australian Building and Construction Commissioner* [2022] HCA 13, maximum civil penalties are no longer reserved for the worst case. More generally see Sentencing Advisory Council (Vic), *Maximum Penalties: Principles and Purposes, Preliminary Issues Paper* (2010).

Competition and Consumer Act (Cth) s 76(1A)(1B) (pecuniary penalties for various restrictive trade practices)	Greater of: • a pecuniary penalty of $50,000,000; • three times the value of the benefits obtained (if the value can be determined); or • (if the value of the benefits cannot be determined), 30% of adjusted turnover during prescribed breach turnover period
Competition and Consumer Act (Cth) ss 45AF, 45AG (cartel offences)	Greater of: • $50,000,000; • three times the value of the benefits obtained (if the value can be determined); or • (if the value of the benefits cannot be determined), 30% of adjusted turnover during prescribed breach turnover period
Australian Consumer Law ss 29, 224(3) (false or misleading representations)	Greater of: • $50,000,000; • three times the value of the benefits obtained (if the value can be determined); or • (if the value of the benefits cannot be determined), 30% of adjusted turnover during prescribed breach turnover period
Corporations Act ss 1041A, 1311C (pecuniary penalties for corporate offences)	Greatest of: • 45,000 penalty units = $14,085,000, • three times the benefit derived and the detriment avoided (if that can be determined); • 10% of annual turnover during prescribed 12 month turnover period
Corporations Act s 1317G(4) (pecuniary penalties)	Greatest of: • 50,000 penalty units = $15,650,000, • three times the benefit derived and the detriment avoided (if that can be determined); • 10% of annual turnover during prescribed 12 month period, subject to cap of 2,500,000 penalty units = $782,500,000

ASIC Act s 12GBCA (civil penalty contraventions)	Greatest of: • 50,000 penalty units = $15,650,000, • three times the benefit derived and detriment avoided (if that can be determined), • 10% of annual turnover during a prescribed 12 month period, subject to cap of 2,500,000 penalty units = $782,500,000
Foreign Acquisitions and Takeovers Act 1975 (Cth) s 89 (civil penalties)	Lesser of the following: • 2,500,000 penalty units = $782,500,000; • greater of the following: (i) 50,000 penalty units = $15,650,000; (ii) the amount worked out under s 98F for the action in relation to which the order was made.
Work Health and Safety Act 2011 (Cth), Sch 4 cl 1 (Category 1 monetary penalties)	$15,000,000
Fair Work Act 2009 (Cth) ss 539, 546 (serious contravention)	3000 penalty units x $313 = $939,000
Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 24D (requirement for approval of developments with significant impact on water resources)	50,000 penalty units = $15,650,000
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) s 175(4) (civil penalty)	100,000 penalty units = $31,3000,000
National Electricity Law s 2AB(1)(c)(ii) (Tier 1 civil penalty)	Greater of the following: • $11 060 000; • three times the value of the benefits obtained (if the value can be determined); • (if the value of the benefits cannot be determined), 10% of annual turnover during prescribed 12 month period
Privacy Act 1988 (Cth) s 13G (serious or repeated interference with privacy)	Greater of: • $50,000,000; • three times the value of the benefit obtained (if the value can be determined); or • (if the value of the benefit cannot be determined), 30% of adjusted turnover during prescribed breach turnover period

B Issues raised by current maxima

Some maxima in the sample summarised above are out of whack with others, or questionable in other ways:

- The maxima under the Criminal Code for serious offences such as conspiracy to defraud are significantly lower than the maxima for serious offences under the Corporations Act and cartel offences under the Competition and Consumer Act. That seems very odd. The conventional view is that conspiracy to defraud and other serious offences in the Criminal Code are high on the scale of offence seriousness.

- The maximum fines for cartel offences are no higher than the maximum civil penalties for contraventions of cartel prohibitions. Given the greater severity of conduct labelled as criminal, the level of fines would be expected to be higher than that for civil monetary penalties.[2]

- The maximum fines for serious offences under s 1311C of the Corporations Act are lower than the maximum civil penalties for contraventions under s 1317G(4) of that Act.

- The maximum civil penalties under the Work Health and Safety Act are much lower than the maximum civil penalties that apply in consumer protection contraventions under the Australian Consumer Law.

- The maximum penalties under the Environment Protection and Biodiversity Conservation Act are much lower than the maximum penalties that apply under the Competition and Consumer Act and the Australian Consumer Law.

- The benefit/s formulae vary. None are satisfactory. Some versions apply to benefit obtained or 'detriment avoided'. None are defined in terms of benefit/s obtained *or loss caused* (compare the Sherman Act (US), which permits a fine of up to twice the gross financial loss or gain resulting from a violation).[3] None are defined explicitly in terms of *expected benefit* despite expected benefit being a core element of orthodox theories of deterrence.[4] The leading model, under s 76(1A)(1B) of the Competition and Consumer Act, has been a failure: the courts have been unable to arrive at a benefits-based maximum except where the parties have agreed on the value of the

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2 C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 501.

3 18 USC §3282. Is causing a loss and not having to pay compensation to those suffering the loss is a 'benefit' under the benefits formula? It does seem to be an 'advantage' indirectly obtained. But converting loss into benefit in that way seems contrived. If the maximum amount of a penalty is meant to relate to losses as well as gains, well-drafted legislation should say so explicitly.

4 See eg K Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23 Melbourne University Law Review 440. *Financial Markets Authority v Zhong* [2023] NZHC 2196 is an instructive case where expected gains from market manipulation were included as gains under the three times commercial gain formula in s 490 of the Financial Markets Conduct Act 2013 (NZ). The term 'benefit' in the benefit/s formula is broadly defined to include any advantage. Presumably an expected benefit is an 'advantage'. However, the statutory wording should refer explicitly to expected benefit. The requisite degree of probability of obtaining the benefit should also be indicated.

benefits.[5] The experience under s 80 of the Commerce Act 1986 (NZ) has been similar.[6]

- 'Benefit' in s 70.2(5) of the Criminal Code means gross benefit not net benefit: see the decision of the High Court of Australia in *R* v *Jacobs Group (Australia) Pty Ltd*.[7] The interpretation decided in *Jacobs Group* much depended on the purpose and context of the relevant statutory provisions and made sense in that context. However, the gross benefit/s approach is no solution in other contexts where a workable approach is also needed. In *Jacobs Group*, D obtained contracts as a result of bribery and hence the amounts received for performing those contracts counted as a gross benefit. By contrast, in price fixing cases the benefit reasonably attributable to the price fixing almost always is the amount of the overcharge, not the value of the sales affected by the price fixing. The amount of overcharge from price fixing is often difficult to determine.[8] A better measure of the seriousness of offences or contraventions than gross benefit/s in many contexts, including price fixing, misuse of market power and failure to prevent mass hacking of consumer data, would be a percentage of the volume of commerce affected by an offence or contravention.[9]

- A cap of 2,500,000 penalty units ($782,500,000) applies to turnover-based penalties under s 1317G(4) of the Corporations Act and s 12GBCA of the ASIC Act but not to turnover-based penalties under the Competition and Consumer Act or the Australian

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5 As in *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 3)* [2016] FCA 676. See further Beaton-Wells & Clarke, 'Corporate financial penalties for cartel conduct in Australia' where it was concluded, at 45-46, that:

> The difficulties in quantifying illegal gains or excess profits derived from cartel conduct are notorious. They arise from issues relating to availability of the relevant data and the assumptions involved in establishing a robust counterfactual so as to estimate the relevant overcharge ('but for' price). There are also challenges in quantifying benefits beyond additional revenues obtained from the overcharge; for example, benefits derived from stability in market shares and market foreclosure. Presumably this explains why very few jurisdictions around the world employ a gains-based element in setting maximum fines. [Footnotes omitted

6 See eg *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805, [33]; *Commerce Commission v Oceanbridge Shipping Limited* [2022] NZHC 1371, [32]. John Land drew my attention to the latter case and kindly made a number of observations about the NZ experience with statutory maxima.

7 [2023] HCA 23.

8 See *Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd* [2001] ATPR ¶41–809; *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805 [33]; Beaton-Wells & Fisse, *Australian Cartel Regulation*, 447-449.

9 See eg United States Sentencing Commission, Federal Sentencing Guidelines Manual (2016) §2R1.1(b)(2) (relates to calculation of the base fine, not specification of the maximum fine, but the same concept could be adopted as a revenue measure for maximum penalties). Adoption of a revenue measure rather than a measure of gain or benefit was suggested by Asher J in *Commerce Commission v Rural Livestock Ltd* [2015] NZHC 3361, [39]-[40] (John Land drew my attention to Asher J's suggestion). Consider also the potential superiority of a volume of affected commerce test in other restrictive trade contexts where benefits cannot readily be determined: consider eg *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159, [509]; *Telecom New Zealand Corporation v Commerce Commission* [2012] NZCA 344, [43]. See further Beaton-Wells & Clarke, 'Corporate financial penalties for cartel conduct in Australia', 26-27, for a detailed discussion of various comparative approaches to using turnover or volume of commerce to define or limit maximum penalties.

Consumer Law.

- The relevant percentage of turnover is 30% in some instances (s 76(1A)(1B) of the Competition and Consumer Act, s 224(3) of the Australian Consumer Law; s 13G of the Privacy Act) but 10% in others (eg s 1317G(4) of the Corporations Act and s 12GBCA of the ASIC Act).

- Turnover-based formulae are unduly preoccupied with corporate size. There are alternative possible formulae. One is a multi-factor formula that takes into account not only corporate size but also the range of the loss or gain likely to result from an offence or contravention.

- Turnover-based formulae also raise difficulties of application.[10] One is determining the turnover period where it is unclear when an offence or contravention occurred or started to occur.

- The formula in s 89 of the Foreign Acquisitions and Takeovers Act 1975 (Cth) is labyrinthine. Kafkaesque is another possible description.[11]

The trend in recent years has been to increase the maxima of monetary sanctions against corporations[12] but the process has been slow. Cases continue to arise where maxima at the time of the offending conduct were too low to enable the court to impose a penalty high enough to have any hope of achieving the objective of deterrence. Three examples:

- *ASIC v National Australia Bank Limited (No 2)*[13] (penalty' of $2,100,000 'woefully insufficient in the circumstances');
- *ASIC v Westpac Banking Corporation (No 3)*[14] ($3.3 million penalty 'paltry penalty' going nowhere close to achieving specific and general deterrence); and
- *ASIC v Westpac Banking Corporation (Penalty Hearing)*[15] ($1.8 million penalty, 'manifest and striking disparity between the nature of the contravening conduct and the maximum pecuniary penalty').

Too much should not be expected of the trend to escalate monetary maxima. $50 million maxima, and turnover-based maxima running into hundreds of millions, may look impressive in second reading speeches and ministerial media statements, but become roadkill on real pathways to penalties that can be delivered in actual cases.[16] For instance, the assertion that the new maxima in the Competition and Consumer Act will 'ensure the price of misconduct is

10 Beaton-Wells & B Fisse, *Australian Cartel Regulation*, 451-453; Beaton-Wells & Clarke, 'Corporate financial penalties for cartel conduct in Australia', 46-47

11 Arie Freiberg drew this statutory formula to my attention.

12 Eg Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth).

13 [2023] FCA 1118, [150].

14 [2018] FCA 1701, [130}.

15 [2024] FCA 52, [24}.

16 A classic example is *Commerce Commission v Air New Zealand Limited* [2013] NZHC 1414 [28] (maximum penalty based on turnover calculation would have been $NZ448 million but penalty of $NZ7.5 million was imposed). See further NZ Law Commission, *Pecuniary Penalties*, Report 133 (2014) 16.37-16.38.

high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses'[17] is fanciful. Many variables govern and limit the impacts that monetary sanctions have on the ground.[18] These are some of them:

- The 'instinctive synthesis' mode of sentencing and assessment of penalty still applies.[19] By contrast, a structured approach to the exercise of judicial discretion may be needed to lead the courts to impose higher penalties.[20]
- Monetary sanctions against corporations have significant limitations:[21]
  - Monetary sanctions are an indirect method of achieving sanctioning impacts on managers and other personnel in a position to control corporate behaviour. However, they may have little impact on those in a position of control. They may inflict substantial loss on shareholders. They may have adverse spillover effects on employees, consumers, and other innocent bystanders.
  - Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by taking internal disciplinary action against those implicated in the offending conduct. The cheapest and least embarrassing or risky response may be to pay the fine or monetary penalty and continue with business as usual.
  - Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by revising their internal operating procedures so as to guard against re-offending. The response may be to treat the offence or contravention as an isolated incident or inevitable blip, and move on.
  - The size of the fine or pecuniary penalty warranted by the goal of deterrence may be larger, possibly much larger, than that which the corporation is able to pay.[22] That limitation was described by John Coffee, Jr as the 'deterrence trap'.[23]

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17 Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth), Explanatory Memorandum [1.6].

18 B Fisse, 'Australian Cartel Law: Recent Developments – First Set of Two Sets' (2023) 51 ABLR 70, 80-82.

19 *Markarian v The Queen* [2005[HCA 25, [84] (McHugh J), See further G Brown, 'Four Models of Judicial Reasoning in Sentencing' [2019 (3) Irish Juridical Studies Journal 55.

20 Beaton-Wells & Clarke, 'Corporate financial penalties for cartel conduct in Australia', 59-62.

21 B Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40 Adelaide Law Review 285, 293-294.

22 There are many examples. See eg *ACCC v Phoenix Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement) (No 3)* [2023] FCA 859; *ACCC v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)* [2019] FCA 1982.

23 JC Coffee, Jr, 'No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 387, 389-93.

C Revving up mad maxima and fixing the transmission

Review of the legislative maxima for monetary sanctions against corporations in Australia is overdue. Review was recommended by the ALRC in 2020.[24]. The ALRC Final Report was tabled in Parliament on 31 August 2020. The ALRC website says that the implementation status is 'awaiting response' from the Government. Perhaps a review is underway.

The review should make recommendations for improving the consistency and cogency of Commonwealth and national legislation as regards fixed maximum amounts of monetary sanctions, benefit/s-based formulae, and turnover-based formulae.

Getting the maxima in better shape is one thing. Other shortfalls in the design and application of monetary sanctions against corporations are more important. Those shortfalls are:

- the fines or monetary penalties imposed on corporations, especially larger corporations, have often been low, largely because the judicial discretion to determine penalties is not structured in the ways that result in higher penalties in the USA and the EU;[25]
- the financial incentive that monetary sanctions give to comply with the law does not necessarily bring about the internal corporate controls needed to achieve compliance;[26]
- the non-monetary sanctions now available against corporations are not well-designed in significant respects;[27]
- fines and civil monetary penalties against corporations now often displace individual liability and/or individual accountability;[28]
- the courts often lack evidence of facts material to the determination of a fine or penalty against a corporation.[29]

These shortfalls require further consideration and constructive proposals for change.

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24 ALRC, Final Report, *Corporate Criminal Responsibility* (2020) 370-373.

25 See Beaton-Wells & Clarke, 'Corporate financial penalties for cartel conduct in Australia'.

26 See Fisse, 'Australian Cartel Law: Recent Developments – First Set of Two Sets', 80-81.

27 ALRC, Final Report, *Corporate Criminal Responsibility*, 8.68; Beaton-Wells & Fisse, *Australian Cartel Regulation*, 11.3.5.

28 See eg *Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538; *ACCC v Telstra Corporation Limited* [2021] FCA 502; *ASIC v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2021] FCA 1008. See further B Fisse, 'Australian Cartel Law: Recent Developments – Second Set of Two Sets' (2023) 51 ABLR 258, 258-261.

29 See eg *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Crown Melbourne Limited* [2023] FCA 782, [15]-[17] (expressing concern about agreements on penalty not disclosing relevant facts where it is unrealistic to expect a court to delay proceedings in order to rectify that problem); *ACCC v Telstra Corporation Limited* [2021] FCA 502, [69] (no agreed facts about what, if anything, happened to the staff who engaged in the serious unconscionable conduct).