# SANCTIONS AGAINST CORPORATIONS AND INDIVIDUALS UNDER AUSTRALIAN COMPETITION AND CONSUMER LEGISLATION

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## Abstract

Breaches of the Competition and Consumer Act and the Australian Consumer Law are subject to an array of sanctions. The array is extensive but weaknesses are apparent in the capacity to prevent law-breaking. Corporations, especially large corporations, have the ability to treat monetary sanctions as manageable costs of doing business. Individuals implicated in corporate breaches of the Act often are not brought to account.

Part 1 describes the sanctions, their legislative evolution and main usage patterns. Diagnostic scans are then carried out in Parts 2–6. They show:

- individual liability for breaches of the Act often is not imposed and individual accountability at the level of internal discipline is neglected when courts impose monetary sanctions on corporations (Part 2);
- fines or pecuniary penalties against corporations are determined by reference to 'shopping lists' of factors that give insufficient attention or weight to the internal corporate controls upon which specific and general deterrence depend (Part 3)
- fines and pecuniary penalties against corporations often have been too low to provide a credible specific or general deterrent threat (Part 4);
- non-monetary sanctions are available against corporations but their current statutory design is unsatisfactory in significant respects (Part 5); and
- courts often lack evidence of facts material to the determination of fines or pecuniary penalties against corporations (Part 6).

The main recommendations made are summarised in Part 7.

# 1 THE SANCTIONS REGIME UNDER THE ACT AND THE ACL

This chapter discusses the sanctions regime under the Competition and Consumer Act ('Act') and the Australian Consumer Law ('ACL').[1] The five dimensions indicated in the Abstract are focal.

Theories of punishment, the civil-criminal divide, 'instinctive synthesis', sentencing principles (including proportionality, totality, and parity), civil penalty principles (including 'oppressive severity'), enforcement strategy, and corporate governance are the focus of other works.[2] The different principles that apply in relation to criminal and civil liability are discussed in another chapter.[3]

The term 'sanction' is used in the broad sense of an order made against a law-breaker to punish, deter, or prevent a breach of the law. Compensation orders and other remedies are the subject of another chapter.[4] Collateral consequences are a topic for discussion elsewhere.

Part 1.1 outlines the sanctions available under the Act and the ACL and their legislative evolution. Part 1.2 describes their main usage patterns.

## 1.1 *Array of sanctions*

The sanctions available for breaches of the Act and the ACL are:[5]

- pecuniary penalties;[6]
- fines;[7]
- imprisonment;[8]
- non-custodial alternatives to imprisonment;[9]

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* Thanks are due especially to John Braithwaite, John Land and Rob Nicholls for comments on various issues. The usual disclaimers apply.

1 One foundation for this chapter is C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011), ch 10.

2 Relevant commentaries include *Australian Cartel Regulation*, n 1; B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993); I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); J Braithwaite, *Macrocriminology and Freedom* (ANU Press, 2022), ch 9; John C Coffee, Jr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Oakland, California: Berrett-Koehler Publishers, Inc, 2020); D Kayiz, E Gluer, & S Walpole (eds), *The Law of Civil Penalties* (2023); C Hodges and R Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Bloomsbury, 2017); C Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York, Harper 1975).

3 [Cross-reference Wigney chapter]]

4 [Cross-reference Lees chapter]

5 Costs orders may have a significant financial impact, but are not a sanction in the formal sense used here.

6 The main provisions are: Competition and Consumer Act, s 76; Australian Consumer Law, s 224. Pecuniary penalties also apply to breaches of codes of conduct under the Act; and in other contexts: see ACCC, Fines and Penalties, 2024, at: https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties.

7 The main provisions are: Competition and Consumer Act, s 44AF, s 44AG, s 79(1)(e) (cartel offences); s 155(6A); Australian Consumer Law, (Part 4-1 (offence provisions).

8 Competition and Consumer Act, s 79(1)(e) (cartel offences); s 155(6A) (failure to comply with s 155 notice).

9 Crimes Act 1914 (Cth), s 19B, s 20(1); s 20AB.

- adverse publicity orders;[10]
- non-punitive orders (community service, probation, prevention, information disclosure, advertising;[11]
- disqualification orders;[12]
- non-indemnification orders;[13]
- infringement notices;[14]
- injunctions;[15]
- enforceable undertakings;[16] and
- declarations.[17]

When the Act was enacted in 1974, breaches of Part IV (Restrictive Trade Practices) were subject to pecuniary penalties up to a maximum of $250,000 for bodies corporate and $50,000 for individuals (s 76). Certain breaches of Part V (Consumer Protection) were offences, subject to a maximum fine of $50,000 (for a body corporate), or $10,000 or imprisonment for up to 6 months (for individuals) (s 79).

The sentencing option of imprisonment for certain breaches of Part V was repealed by the Trade Practices Amendment Act 1977.[18]

The maximum fines under s 79 for relevant breaches of Part V were doubled by the Trade Practices Revision Act 1986 to $100,000 for bodies corporate and $20,000 for individuals.

The Trade Practices Legislation Amendment Act 1992 increased the maximum pecuniary penalties under s 76 to $10 million for bodies corporate and $500,000 for individuals. Maximum fines under s 79 for breaches of Part V were doubled to $200,000 for bodies corporate and $40,000 for individuals. Enforceable undertakings were legislated (s 87B), in lieu of the previous TPC practice of using deeds of compliance.[19]

The Trade Practices Amendment Act (No 1) 2001 introduced 'non-punitive orders' (s 86C) − community service orders, probation orders, information disclosure orders and corrective advertising orders – and 'punitive orders' (s 86D) – adverse publicity orders. Maximum fines

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10 Competition and Consumer Act, s 86D; Australian Consumer Law, s 247. See further B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany, NY, State University of New York Press, 1983).

11 Competition and Consumer Act, s 86C; Australian Consumer Law, s 246.

12 Competition and Consumer Act, s 86E; Australian Consumer Law, s 248.

13 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, [40], [116]; *ACCC v BlueScope Steel Limited (No 6)* [2023] FCA 1029, [159]-[175]. This is one respect in which s 77A of the Act and s 229 of the ACL call for redrafting; see further *Australian Cartel Regulation*, n 1, 470-472.

14 Competition and Consumer Act, s 51ACC, 134.

15 Competition and Consumer Act, s 80, Australian Consumer Law, s 232.

16 Competition and Consumer Act, s 87B; Australian Consumer Law, s 218.

17 Competition and Consumer Act, s 163A; Federal Court Act 1976 (Cth), s 21.

18 See also ALRC, Report No 68, *Compliance with the Trade Practices Act 1974* (1994), 10.31 (recommendation against re-introduction of imprisonment).

19 An example is the Toshiba deed, criticised in B Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 UNSW Law Journal 1, 33-36.

under s 79 were increased to 2000 penalty units (then amounting to $1 million for bodies corporate and $200,000 for individuals). The introduction of ss 86C and 86D and the increase in fines under s 79 stemmed from recommendations of the Australian Law Reform Commission in Report No 68, *Compliance with the Trade Practices Act 1974* (1994).[20]

The Trade Practices Legislation Amendment (No 1) Act 2006 amended s 76 to increase maximum pecuniary penalties for bodies corporate to the greatest of: $10 million; 3 times the value of the benefit obtained; or 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the act or omission occurred. This legislation also provided for disqualification of contraveners of Part IV from managing corporations for an 'appropriate' period (s 86E). These amendments reflected recommendations made by the Dawson Review in 2003.[21]

Cartel offences and civil cartel prohibitions were introduced in 2009.[22] For individual offenders, cartel offences were subject to a maximum 10-year jail sentence and a maximum fine of 2000 penalty units. For corporations, the same maximum fines and maximum pecuniary penalties for cartel conduct were provided: $10 million; 3 times the value of the benefit obtained; or 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the act or omission occurred.

The ACL came into effect at the beginning of 2011, long after the recommendation of the ALRC in 1994 that a national scheme of consumer protection laws be developed.[23] Maximum fines for serious offences were increased to $1.1 million for bodies corporate and $220,000 for individuals. Civil pecuniary penalties were introduced. The maxima for serious civil penalty breaches corresponded to those for serious offences.

The ACL was amended by the Treasury Laws Amendment (2018 Measures No 3) Act 2018 to bring maximum fines and maximum pecuniary penalties into line with those applicable to competition provisions under the Act.

Much higher maximum fines and civil monetary penalties for breaches of the Act and the ACL came into effect on 10 November 2022.[24] The new maximum fines or civil monetary penalties for a body corporate are the greatest of:

- $50,000,000,
- three times the value of the 'reasonably attributable' benefit obtained from the conduct,

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20 Ch 10.

21 *Review of the Competition Provisions of the Trade Practices Act* (2003), ch 10.

22 Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth). See further *Australian Cartel Regulation*, n 1, ch 1.

23 ALRC, Report No 68, *Compliance with the Trade Practices Act 1974* (1994) 2.16-2.17, 6.9.

24 Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth). This was a response to criticisms that penalties had been too low. 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; Beaton-Wells, 'Cartels caught ripping off Australian consumers should be hit with bigger fines', *The Conversation*, 2 June 2017; OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (2018) at: http://www.oecd.org/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm.

- 30 per cent of adjusted turnover during the breach period.

The maximum civil monetary penalty for an individual were increased from $500,000 to $2.5 million. The maximum sentence for an individual in relation to a cartel offence remained 10 years imprisonment and/or a fine of 2,000 penalty units ($660,000, at 1 July 2024).[25]

The ALRC Final Report, *Corporate Criminal Responsibility* (2020), recommended the introduction of redress facilitation orders as an additional type of sanction against corporations under Commonwealth law.[26] The Report also recommended that dissolution be made available as a sanction for serious corporate offences.[27]

Further types of sanctions have been mooted. One is the equity fine, as proposed by John C Coffee Jr.[28] The equity fine is an order requiring the defendant corporation to issue new shares to a state victim compensation fund. This sanction seeks to punish a corporation without causing spillover effects on employees or consumers or forcing a corporation out of business.

Another possible type of sanction is the punitive injunction.[29] A punitive injunction would require a corporate defendant to take punitively exacting precautions, including special accountability and reporting requirements,[30] additional whistleblower protections,[31] and rigorous testing of the effectiveness or otherwise of compliance programs.[32]

Divestiture has been proposed as an additional sanction for serious forms of anti-competitive conduct where monetary sanctions and injunctions are unlikely to be sufficient.[33]

No scheme of deferred prosecution agreements applies to offences or civil penalty prohibitions under the Act. Deferred prosecution agreements in the USA and elsewhere have been used against unlawful corporate conduct as an expedient avenue of deterrence, prevention and compensation.[34]

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25 Criticised in B Fisse, 'Australian Cartel Law: Recent Developments – First Set of Two Sets' (2023) 51 ABLR 70, 79.

26 ALRC Report 136, Recommendation 12(d). See further B Fisse, 'Redress Facilitation Orders as a Sanction Against Corporations' (2018) 37 University of Queensland Law Journal 85.

27 Recommendation 13. See also Corporations Act 2001 (Cth), s 461, which gives power to wind up a corporation on certain grounds.

28 '"No Soul to Damn No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 387, 413–24; *Corporate Crime and Punishment*, n 2, 145-146.

29 See further B Fisse, "Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations", in C Beaton-Wells & A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, Oxford, 2011) ch 14. 'Punitive injunction' in that sense means an injunction that is punitive in form and purpose, not a civil injunction that is punitive only in the sense that it carries the possibility of punishment if breached.

30 Compare Treasury, *Implementing Royal Commission Recommendations 3.9, 4.12, 6.6, 6.7 and 6.8 Financial Accountability Regime: Proposal Paper* (2020); AFP and CDPP, *Best Practice Guidelines on Self-Reporting Foreign Bribery and Related Offending by Corporates* (2017).

31 See eg ASIC, *Report 758: Good practices for handling whistleblower disclosures* (2023).

32 See eg M Rorie & B Van Rooij (eds), *Measuring Compliance* (2022).

33 See eg Australian Council of Trade Unions, Inquiry into Price Gouging and Unfair Pricing Practices, Final Report, February 2024, 66. See further D Lumer, 'Divestiture: Doctrinal Development and Modern Application' (2022) 67 Antitrust Bulletin 146.

34 See BL Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge, Belknap Press, 2014); *Corporate Crime and Punishment*, n 2; C King and N Lord, *Negotiated Justice and Corporate Crime* (London, Palgrave, 2018). For a critique of deferred prosecution agreements in the USA from see *Corporate Crime and Punishment*, n 2. In Australia, deferred prosecution agreements were on the legislative table in 2017 and 2019 for foreign bribery offences, but the proposal lapsed.

1.2 *How the array of sanctions is used*

Six main patterns are apparent.

First, criminal sanctions are exceptional. The main arena of criminal liability is cartel conduct as prohibited by s 45AF and s 45AG. Since 2009, when cartel offences were introduced, convictions have been recorded against 7 individuals and 7 corporations.[35] These convictions are to be contrasted with the acquittals in the *Country Care case*[36] and the collapse of the prosecution in the ill-conceived ANZ Bank cartel case.[37] A conviction has yet to be attained in a contested cartel prosecution. The complexity of the definition of cartel offences defies translation into workable jury directions. That problem has been known since the outset of the legislation but has not been rectified.[38]

The first three cartel convictions were against corporations, each of which was fined.[39] No individuals were prosecuted in those three cases. Cartel offences were introduced in Australia in the general expectation that individuals would be the main offenders and would be sentenced to imprisonment.[40]

The sanctions imposed on the 7 individuals convicted of cartel offences to date were as follows:

- In the *Vina Money case*,[41] four individuals were sentenced to imprisonment (for terms of between nine years and two years and six months) but were released on recognisance orders requiring good behaviour.
- In the *Alkaloids case*,[42] Mr Joyce was sentenced to 32 months imprisonment to be served by way of intensive community correction, fined $50,000, and disqualified under s 86E from managing corporations for five years.
- In the skip bin and waste processing cartel case,[43] a former CEO (Mr Tartak) was sentenced for two criminal cartel offences to two terms of imprisonment of 18 months each, to be served concurrently over two years as an intensive correction order, including 400 hours of community service. Mr Tartak was also fined $100,000 and disqualified under s 86E from managing corporations for a period of five years.
- In the same cartel, another former CEO (Mr Roussakis) was sentenced to 18 months'

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35 See B Fisse, 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns' (2024) at: https://brentfisse.com/wp-content/uploads/2024/08/Usage-Patterns-2024.docx

36 *Director of Public Prosecutions(Cth) v The Country Care Group Pty Ltd* [2019] FCA 2200; 'Australian Cartel Law: Recent Developments – First Set of Two Sets', n 25, 95-96.

37 *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Limited* (No 5 – Indictment) [2021] FCA 1345 'Australian Cartel Law: Recent Developments – First Set of Two Sets', n 25, 72-78.

38 'Australian Cartel Law: Recent Developments – First Set of Two Sets', n 25, 95-96.

39 *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876; *Director of Public Prosecutions (Cth) v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170; *Director of Public Prosecutions (Cth) v Wallenius Wilhelmsen Ocean AS* [2021] FCA 52.

40 See Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Second Reading Speech, Hansard, House of Representatives, 3 December 2008, 12309; G Samuel, 'Delivering for Australian consumers: making a good Act better', 25 June 2008, National Press Club, Canberra, 5-6.

41 *Director of Public Prosecution (Cth)s v Vina Money Transfer Pty Ltd* [2022] FCA 665.

42 *Director of Public Prosecutions (Cth) v Joyce* [2022] FCA 1423.

43 *Director of Public Prosecutions (Cth) v Bingo Industries Pty Ltd* [2024] FCA 121.

imprisonment for one cartel offence, to be served as an intensive correction order, including 300 hours of community service.[44] Mr Roussakis was also fined $75,000 and disqualified under s 86E from managing corporations for a period of five years.

Secondly, civil pecuniary penalties against corporations are the mainstay of public enforcement. In 25 cases between 1 January 2016 and 30 June 2024 a pecuniary penalty of $10 million or more was imposed on a corporate respondent. These 25 cases are catalogued in a separate paper.[45] In five of those 25 cases[46] a penalty or other sanction was imposed on an individual implicated in the corporate contravention. A penalty of $40 million or more was imposed in seven of those 25 cases.[47] A penalty of $100 million or more was imposed in three cases;[48] a fourth case looks imminent, namely *ACCC v Qantas Airways Limited* (2024)[49] (misleading representations in relation to 'ghost flights'; a penalty of $100 million has been agreed to by Qantas and the ACCC, subject to review by the Federal Court).

Thirdly, declarations and injunctions are often made against corporate respondents in civil proceedings. Compliance program orders under s 86C(2)(b) of the Act, and their equivalents under s 246(2)(b) of the ACL, are also common. Compliance program orders were made against corporate respondents in over 60 cases between 1 January 2011 and 30 June 2024 (2011-2024).[50] Corrective advertising orders under s 86C(2)(d) of the Act and s 246(2)(d) of the ACL are less common; they were made against corporate respondents in 26 cases during 2011-2024.[51] Other types of non-monetary sanctions have been used less frequently. Information disclosure orders under s 86C(2)(c) of the Act and s 246(2)(c) of the ACL were made against corporate respondents in 10 cases during 2011-2024.[52] Adverse publicity orders under s 86D and adverse publicity orders under s 247 of the ACL were made against corporate respondents in 18 cases during 2011-2024.[53] Community service orders under s 86C(a) of the Act and s 246(2)(a)(aa) of the ACL are rare; 2 community service orders were made during 2011-2024.[54]

Design flaws in the non-monetary sanctions authorised by s 86C and s 86D of the Act, and s

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44 *Director of Public Prosecutions (Cth) v Aussie Skips Recycling Pty Ltd* [2024] FCA 122.

45 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

46 *ACCC v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528; *ACCC v Cement Australia Pty Limited* [2017] FCAFC 159; *ACCC v Campbell (No 3)* [2021] FCA 528; *ACCC v We Buy Houses Pty Limited* [2017] FCA 915; *ACCC v BlueScope Steel Limited (No 6)* [2023] FCA 1029.

47 'Sanctions Against Corporations and individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

48 *ACCC v Volkswagen AG* [2019] FCA 2166; *Australian Institute of Professional Education Pty Ltd (in liq)* (No 5) [2021] FCA 1516; *Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement) (No 3)* [2023] FCA 859.

49 Federal Court of Australia, Online File, at: https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/accc-v-qantas

50 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

51 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

52 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

53 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

54 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

246(2) and s 247 of the ACL, hinder or prevent the application of these sanctions to some extent. The main flaw is that a court is unable to impose an order under any of these sections unless the enforcement agency applies for such an order. See Part 5.2.

Fourthly, where individual civil liability is imposed, the predominant types of non-monetary sanctions are declarations and injunctions. Disqualification orders under s 86E of the Act or s 248 of the ACL were made in 25 cases during 2011-2024.[55] Non-punitive orders against individuals under s 86C of the Act or s 246 of the ACL are rare, as are adverse publicity orders under s 86D of the Act and s 247 of the ACL. One non-indemnification order was made during 2011-2024.[56]

Fifthly, most civil enforcement cases are settled. To give one snapshot, of the 25 pecuniary penalty cases between 2016 and 30 June 2024 where a penalty of $10 million or more was imposed on a corporate respondent, in 15 cases the parties agreed on the amount of the penalty to be imposed.[57] In one case, *ACCC v Volkswagen AG*,[58] the penalty agreed by the parties was increased by the court (from $75 million to $125 million). In another case, *ACCC v Uber BV*,[59] the penalty agreed was reduced by the court (from $26 million to $21 million).

Agreement by the parties on the level of a pecuniary penalty and/or the type of sanction to be imposed influences the determination of pecuniary penalties and other sanctions under the Act.[60] The process is expedient but has adverse side-effects including non-disclosure of internal disciplinary action, depression of the level of penalty, and suppression of facts relevant to the determination of sanctions. See Parts 2, 4 and 6.

Sixthly, court-enforceable undertakings under s 87B are a prevalent means of enforcement.[61] Typically they are directed at compliance programs, complaints handling systems and consumer redress.

The key questions addressed in this chapter are up next. The allocation of individual and corporate liability is considered in Part 2. The approach taken to internal corporate controls is assessed in Part 3. The level of monetary penalties against corporations is discussed in Part 4. The design of non-monetary sanctions is reviewed in Part 5. The factual foundation for determining sanctions against corporations is examined in Part 6.

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55 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

56 *ACCC v BlueScope Steel Limited (No 6)* [2023] FCA 1029 (under appeal).

57 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

58 [2019] FCA 2166.

59 [2022] FCA 1466.

60 See eg *ACCC v Australia and New Zealand Banking Group Limited* [2016] FCA 1516; *Australian Cartel Regulation*, n 1, 11.3.2. On agreed penalties, joint submissions on penalty, and judicial review see *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors* [2015] HCA 46; *Australian Cartel Regulation*, n 2, 11.3.2; R Bromwich and A Holtby, 'What's in the Box? Instinctive Synthesis in the Determination of Civil Penalties' in D Kayiz, E Gluer, & S Walpole (eds), *The Law of Civil Penalties* (2023) 31, 47-49. For a critique of the extensive use of settlements in the USA see *Corporate Crime and Punishment*, n 2.

61 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35. See eg Undertaking to the Australian Competition and Consumer Commission Given under section 87B of the Competition and Consumer Act 2010 (Cth) by Qantas Airways Limited (ACN 009 661 901), 5 May 2024.

## 2 INDIVIDUAL LIABILITY AND INDIVIDUAL ACCCOUNTABILITY

Individual liability for breaches of the Act or the ACL often is not imposed (Part 2.1) and individual accountability at the level of internal discipline does not appear to matter much when courts impose monetary sanctions on corporations (Part 2.2).[62]

### 2.1 *Extent to which individuals are subject to sanctions under the Act or the ACL*

The allocation of individual and corporate responsibility for breaches of the law lies at the heart of social control.[63] Consistently with the Nuremberg principle of individual and corporate responsibility for wrongdoing, all individuals and organisations responsible for law breaking should be held responsible. Corporate responsibility complements individual responsibility; it is not a general substitute.

Individual liability often is not imposed for breaches of the Act or the ACL[64]

- A conviction for a cartel offence under the Act has been recorded against seven individuals and seven corporations since 2009.[65] Four of the seven individuals convicted were co-accused in the same case (the *Vina Money case*). In three of the seven cases where a corporation was convicted no individuals were prosecuted.[66]
- In 25 cases between 1 January 2016 and 30 June 2024 where a pecuniary penalty of $10 million or more was imposed on a corporate respondent, a penalty or other sanction was imposed on an individual implicated in the corporate contravention in only five cases.[67]
- In seven cases between 1 January 2016 and 30 June 2024 where a pecuniary penalty of $40 million or more was imposed on a corporate respondent, a penalty or other sanction was imposed on an individual implicated in the corporate contravention in one case (*BlueScope Steel*).[68]
- In three cases between 1 January 2016 and 30 June 2024 where a pecuniary penalty of $100 million or more was imposed on a corporate respondent, no penalty or other sanction was imposed on an individual implicated in the corporate contravention.[69] A penalty of $100 million has been agreed upon by the ACCC and Qantas in the ghost flights case but no individual has been the subject of that enforcement proceeding.[70]

There are various explanations for these shortfalls. One is the difficulty of proving accessorial

62 For earlier critiques see *Australian Cartel Regulation*, n 1, ch 6; B Fisse, 'Australian Cartel Law: Recent Developments – Second Set of Two Sets' (2023) 51 ABLR 258, 258-261.

63 See *Corporations, Crime and Accountability*, n 2; RH Jackson, *The Nürnberg Case* (Alfred A Knopf, 1947).

64 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

65 'Sanctions Against Corporations and Individuals under Australian Competition and Consumer Legislation: Usage Patterns', n 35.

66 *Director of Public Prosecutions (Cth) v Vina Money Transfer Pty Ltd* [2022] FCA 665.

67 *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876; *Director of Public Prosecutions (Cth) v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170; *Director of Public Prosecutions (Cth) v Wallenius Wilhelmsen Ocean AS* [2021] FCA 52.

68 *ACCC v BlueScope Steel Limited (No 6)* [2023] FCA 1029.

69 See n 48.

70 See n 49.

liability on the part of the individuals implicated in contraventions, especially those pulling the strings from high places.[71] Secondly, the elements of cartel offences are complex and decrease the chance of successful prosecution.[72] Thirdly, individual liability may be taken off the table as part of a deal with the ACCC under which the liability of a manager is in effect bought off by agreement to pay a civil monetary penalty.[73] Fourthly, individuals implicated in contraventions may work from offshore and be beyond territorial jurisdiction or, if within jurisdiction, be impossible to bring to justice in Australia (for example, extradition does not apply to civil penalty prohibitions).[74] Lastly, there is no apparent enforcement strategy to seek to impose individual liability where possible. The ACCC 2024-25 Compliance and Enforcement Policy and Priorities statement[75] does not articulate the importance of individual liability or the balance to be struck between individual and corporate liability. Nor does the Prosecution Policy of the Commonwealth.[76]

One advance would be for the ACCC and the CDPP to revise their statements of enforcement policy in light of the US Department of Justice Memorandum, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (15 September 2022):[77]

> The Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime. Such accountability deters future illegal activity, incentivizes changes in individual and corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system. See Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015 …

Another advance would be to take the non-imposition of individual liability into account as an explicit factor when determining a fine or pecuniary penalty against a corporation.[78] The deterrent impact of prosecution or enforcement action will be too low unless the write-off of individual liability is offset on the corporate side of the deterrence calculation. A deterrence deficit that arises from inability to prosecute individual persons should be offset by an increase in the fine or penalty imposed on the corporation. Section 16A(2) of the Crimes Act, s 76 of the Act and s 224 of the ACL should be amended accordingly.

2.2 *Extent to which individual accountability is actuated by monetary sanctions against*

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71 *Australian Cartel Regulation*, n 1, 6.5.

72 'Australian Cartel Law: Recent Developments – First Set of Two Sets', n 25, 95-96.

73 See eg *ACCC v Visy Industries Holdings Pty Ltd (No 3)* (2007) 244 ALR 673.

74 See further B Fisse, 'Australian Cartel Law: Biopsies' (2018) 85]-[98] at: https://brentfisse.com/wp-content/uploads/2020/07/Australian_Cartel_Law_Biopsies_050518_2.pdf . Individual accountability may nonetheless be imposed in internal discipline systems, which is one reason for equipping courts with the power to make internal discipline orders.

75 March 2024, at: https://www.accc.gov.au/system/files/compliance-enforcement-policy-priority-2024_0.pdf . Contrast the importance given to individual liability in Commerce Commission, *Enforcement Response Guidelines* (July 2024), at: https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines.

76 See at: https://www.cdpp.gov.au/system/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf.

77 At: https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf .

78 See Fisse, 'Australian Cartel Law: Biopsies', n 74, [94]-[98].

*corporations under the Act or the ACL*

Internal corporate systems can be harnessed to deliver individual accountability.[79] The potential deterrent and preventive impacts of individual accountability within corporations are significant, for these reasons:[80]

> The imposition of individual accountability within corporate internal discipline systems is less formal and usually invisible to the general public, but .. it is misleading to discount the deterrent impact. Breaches of company rules may jeopardise opportunities for promotion or even retention of one's job. Being upbraided by a superior may be a trying experience. Discomfort may result from being made to feel disloyal or untrustworthy. Above all, there is the risk of being shamed before one's peers. Shaming has a personalised conscience-building and educative role that is lacking in purely legalistic regimes of punishment. Furthermore, shaming within corporations may involve the repeated day-to-day attentions of a group of associates. By contrast, a financially oriented regime of enterprise liability is not geared to achieving such effects: a financial disincentive is imposed on the enterprise and the loss is passed on to shareholders and any individuals to whom the cost may be transmitted without anyone necessarily experiencing a sense of personal responsibility. This exemplifies the tendency of economic analysis to abstract itself from non-market but nonetheless essential features of social life.

Individual accountability is not treated explicitly as an impact to be achieved by means of monetary sanctions against corporations. Section 16A(2) of the Crimes Act, s 76(1) of the Act and s 224(2) of the ACL are mute on this subject. The case law on fines and pecuniary penalties gives scant direction. For instance, the 'French Factors' in *Trade Practices Commission v CSR Ltd*[81] refer to a 'culture of compliance' and 'disciplinary and other corrective measures' without focussing on the basic importance of individual accountability.[82]

Given that individual accountability is not a focus of the statutory framework or the case law, it is unsurprising that this factor has been neglected by the courts and that corporate respondents have been allowed to get way with non-disclosure of whether or not individual accountability has been imposed.

*ACCC v Telstra Corporation Limited*[83] highlights the problem. Telstra was ordered to pay $50 million in penalties for engaging in unconscionable conduct when it sold mobile contracts to more

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79 See *Corporations, Crime and Accountability*; n 2; *Australian Cartel Regulation*, n 1, 6.6. A recent example is the clawback by Qantas of $9.3 million from Mr Joyce (former CEO) partly by reason of the 'ghost flights' debacle: 'Qantas cuts former CEO Alan Joyce's pay by $9.3 million following damning review', Sydney Morning herald, 8 August 2024. Left to their own devices, some organisations may fail to deliver internal accountability; see B Fisse, 'Accountability and the PwC Tax Leak Scandal' (2023) 51 ABLR 120.

80 *Corporations, Crime and Accountability*, n 2, 79.

81 *TPC v CSR Ltd* [1991] ATPR 41-076 at 52,152.

82 Contrast the 'Beach factors' in *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538, [58]; ALRC, Final Report, *Corporate Criminal Responsibility* (2020), Recommendations 10(i) and 11(o); ACCC, *Guidelines on ACCC approach to penalties in competition and consumer law matters*, 30 August 2023, 9. The term 'culture of compliance' is froth unless defined in concrete and workable operational terms: *Australian Cartel Regulation*, n 1, 538-539.

83 [2021] FCA 502.

than 100 Indigenous consumers across three states and territories. Sales staff at five licensed Telstra-branded stores signed up 108 Indigenous consumers to multiple post-paid mobile contracts which they did not understand and could not afford. No employees or agents were subject to enforcement proceedings. According to the ACCC media release, 'Telstra's board and senior executives failed to act quickly enough to stop these illegal practices when they were later alerted to them'. But Telstra was let off the hook by being allowed to use the settlement process to conceal what if any internal disciplinary action it had taken. That is apparent from the judgment:[84]

> There are no agreed facts about what, if anything, has happened to the staff who engaged, on the ground, in this conduct on behalf of Telstra. As individuals, they bear considerable personal responsibility for the unconscionable conduct, for the predicaments then experienced by affected consumers, and at least in many cases, the distress, embarrassment and anxiety caused by the accrual of debts which on any view were very large for these consumers.
>
> Whether or not individuals acting on behalf of telecommunications service providers such as Telstra will be in any way deterred by the penalties and other orders in this case was also not a matter addressed by the parties. Nevertheless, it is important to state the obvious: none of these contraventions can occur without individuals deciding, or agreeing, to be the ones who unconscionably encourage, persuade or cajole vulnerable consumers to enter into such contracts, with or without false representations. The Court deprecates the behaviour of the individual staff members at the Telstra stores, even if the legal responsibility for the unconscionable conduct has been assumed by Telstra itself.

The statutory framework should be amended to require account to be taken of individual accountability and other internal corporate controls when determining sentence or penalty; see Part 3. Internal corporate controls should also be part of the prescribed content of pre-sentence and pre-penalty reports; see Part 6.

## 3 INTERNAL CORPORATE CONTROLS

Fines or pecuniary penalties against corporations are determined by reference to 'shopping lists' of factors that give insufficient attention or weight to the internal corporate controls upon which deterrence depends.

### 3.1 *The shopping lists*

The shopping lists used for determining fines and pecuniary penalties consist of statutory provisions and factors that the courts have read into the legislation.

The statutory provisions are set out in s 16A(2) of the Crimes Act, s 76(1) of the Act, and s 224(2) of the ACL.

Section 16A(2) of the Crimes Act sets out a non-exhaustive list of 17 factors that a court must take into account in sentencing an offender, to the extent they are relevant and known to the court. The list includes: the deterrent effect that any sentence or order under consideration may have on the person; the deterrent effect that any sentence or order under consideration may have on other

[84] [2021] FCA 502, [69]-[70].

persons; the need to ensure that the person is adequately punished for the offence; and the prospect of rehabilitation of the person. This list does not refer to internal corporate controls. The characteristics of the offender that are mentioned are human not corporate in character. Despite long-standing criticism,[85] s 16A(2) has never been amended in terms that set out clearly and separately: the purposes of sentencing, the factors relevant to human offenders, and the factors relevant to corporate offenders.[86]

Section 76(1) of the Act and s 224(2) of the ACL refer to 'all relevant matters' including: the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; the circumstances in which the act or omission took place; and whether the person has previously been found to have engaged in any similar conduct. These provisions do not refer to internal corporate controls, nor even deterrence.

The courts have added factors to the statutory framework in s 76(1) of the Act and s 224(2) of the ACL[87]. The main addition has been the list of factors advanced by French J in *Trade Practices Commission v CSR Ltd*:[88] for s 76 of the Act ('French factors').

The French factors are:

(1) the nature and extent of the contravening conduct.

(2) the amount of loss or damage caused.

(3) the circumstances in which the conduct took place

(4) the size of the contravening company

(5) the degree of power it has, as evidenced by its market share and ease of entry into the market

(6) the deliberateness of the contravention and the period over which it extended

(7) whether the contravention arose out of the conduct of senior management or at a lower level

(8) whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention [and]

(9) whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the TPA in relation to the contravention.

In *ACCC v NW Frozen Foods Pty Ltd*,[89] Heerey J considered three additional factors: similar conduct in the past; financial position; and deterrent effect ('Heerey factors').

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85 See especially Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, 2006. See also *Australian Cartel Regulation*, n 1, 11.4.

86 For judicial work-arounds see eg *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876; *Director of Public Prosecutions (Cth) v Joyce* [2022] FCA 1423.

87 They remain relevant after the decision of the High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13l; they are not a rigid catalogue of matters for attention as if it were a legal checklist (at [19]).

88 1991] ATPR 41-076 at 52,152. See also *ACCC v Woolworths Limited* [2016] FCA 44, [122]-[137].

89 [1996] ATPR 41-515 at 42,444.

The shopping list approach makes the seriousness of an offence or contravention one factor among many. The resulting depreciation, coupled with the method of 'instinctive synthesis',[90] partly explains why the level of fines or monetary penalties imposed under the Act often has been low compared with the level that would be likely under the more structured and better focused approaches used in the USA and the EU.[91] See Part 4.

The French factors and the Heerey factors are incomplete in four major respects:

- there is no clear indication of the basic importance of internal corporate controls to the deterrence of breaches of the Act – see Part 3.2;
- the deterrence deficit that arises where individual liability is not imposed is a basic concern yet is omitted – see Part 2.1;
- the key concept of reactive corporate fault is not reflected adequately;[92] and
- the factor of cooperation does not explicitly include disclosure of the steps taken by the corporation to achieve individual accountability and organisational precautions; see Part 3.2 and Part 4.2.

Stating factors to be taken into account is one thing, ability to apply them in cases quite another. Courts often do not have evidence of material facts about those factors – see Part 6.

### 3.2 *Deterrence and internal corporate controls*

Deterrence is a main objective of fines and the primary objective of pecuniary penalties.[93] But what does 'deterrence' mean? The concept means in part offering an incentive to comply with the law. But there is much more to it. Deterrence of unlawful corporate conduct also entails the use of a punishment or penalty as an inducement to corporate and individual actors to prevent such conduct by means of individual accountability, organisational precautions, and other internal controls.

Deterrent threats or incentives directed to corporations do not operate in the same way as deterrent threats or incentives directed to individuals.[94] Deterrent signals or incentives are received and

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90 See *R v Markarian* (2005) 228 CLR 357. See also *ACCC v Woolworths Limited* [2016] FCA 44, [129]-[131].

91 See Beaton-Wells & Clarke, 'Corporate financial penalties for cartel conduct in Australia: A critique', n 24.

92 See R Faugno, 'Ideas of Corporate Culture from the Perspective of Penalties Jurisprudence' in E Bant (ed), *The Culpable Corporate Mind* (Hart, 2023) Ch 8, ; *Corporations, Crime and Accountability*, n 2, 177-179. Reactive corporate fault is fault in failing to take adequate preventive or corrective action as a responsive reaction to having committed unlawful acts or omissions; see B Fisse, 'Reactive Corporate Fault' in E Bant (ed), *The Culpable Corporate Mind* (Hart, 2023) Ch 7; *Corporations, Crime and Accountability*, n 2, 210-213; B Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 Southern California Law Review 1141, 1195-213; A Orsina, *La responsabilità da reato dell'ente: Tra colpa di organizzazione e colpa di reazione* (G Giappichelli Editore, Torina, 2024). On the need to reflect the corporateness of corporate action and avoid narrow legalistic conceptions of corporate responsibility see N Lacey, 'Philosophical Foundations of the Common Law: Social Not Metaphysical', in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000), 17.

93 On deterrence as the primary objective of pecuniary penalties see *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13, [15], [66].

94 See 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions', n 92, 1159–66. This was made clear by an early empirical study of the impact of the Act: A Hopkins, *The Impact of Prosecutions under the Trade Practices Act* (Australian Institute of Criminology, 1978).

processed by a corporate system for receiving and managing external information. Managers and employees participate in that management process but the output is not merely self-restraint or self-activation — the input of deterrent signals or incentives is fed into the internal controls of the organisation. Those internal controls include policies, procedures and processes. If the external threat or incentive is to be heeded, those policies, procedures or processes need to be applied and, if necessary, revised.

The shopping lists used under the current law (see Part 3.1 above) do not focus on internal corporate controls. The lists should be replaced by a new statutory framework. A suitable framework would set out the primary factors to be taken into account in determining whether the amount of a fine or pecuniary penalty is likely to be an adequate specific and general deterrent. The primary factors should include:

(a) the extent to which disciplinary action has been taken by the corporation to impose individual accountability on the individuals implicated in the offence or contravention;

(b) the extent to which individual accountability has been imposed on representatives of the corporation for undertaking internal disciplinary action and organisational precautions in relation to future similar offences or contraventions;

(c) the extent to which organisational precautions were taken to prevent the offence or contravention before the offence or contravention occurred; and

(d) the extent to which organisational precautions have been taken after the offence or contravention to prevent future similar offences or contraventions by the corporation; and

(e) whether or not the corporation has cooperated with the enforcement agency by providing full details of the action taken to impose individual accountability (see (a) and (b) above) and undertake organisation precautions (see (c)) and (d) above.

A draft statutory framework is under construction, together with draft guidelines suitable for adoption by the ACCC after public consultation.

Material facts about primary factors and other considerations need to be in evidence in sentence and penalty proceedings but that is not always the position at present; see Part 6.

## 4 LEVEL OF FINES AND PECUNIARY PENALTIES AGAINST CORPORATIONS

Courts seek to fix a fine or civil penalty with a view to ensuring that the impact is not such as to be regarded by the offender or others 'as an acceptable cost of doing business.[95] However, the fines and pecuniary penalties imposed on corporations have often seemed to be too low to provide

[95] *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at 265 [62] (civil penalty context). That aspiration is difficult or impossible to realise, particularly in the case of large multinational corporate respondents; see eg A Patrick, 'Booktopia's outsized ACCC penalty may have sped up its decline', AFR,10 July 2024 (criticising the $20 million penalty imposed in *ACCC v Meta Platforms Inc* [2023] FCA 842 and the $6 million penalty imposed in *ACCC v Booktopia Pty Ltd* [2023] FCA 194).

a credible specific or general deterrent threat.[96] The maxima were increased considerably in late 2022. The main cause of unduly low fines or monetary penalties – instinctive synthesis of a shopping list of factors – remains.

### 4.1 *Beaton-Wells and Clarke analysis of fines and pecuniary penalties for cartel conduct*

The main criticism of the level of fines and pecuniary penalties under the Act is that by Caron Beaton-Wells and Julie Clarke in their detailed study in 2018 of fines and pecuniary penalties for cartel conduct.[97]

While penalties for cartel conduct increased over time and markedly during 2007-2017, there had been striking consistency in the extent to which penalties fell significantly below the maximum allowable.[98]

A key reason for the relatively low corporate penalties was found to be the method used in assessing them:[99]

> The Australian method is unstructured and non-sequential. It is also non-transparent and highly discretionary. It differs substantially in these respects from the method used in most other jurisdictions around the world.

The first two (of six) differences uncovered were:[100]

a. The Australian method does not employ a base amount as a starting point that reflects the economic seriousness of the conduct in question in assessing the appropriate penalty. The international method uses this mechanism, employing measures such as a percentage of value of sales or turnover as a proxy for reflecting illegal gains derived and harms caused by the conduct.

b. The Australian method addresses economic seriousness of the conduct as one of many factors relevant to penalty assessment that may be aggravating or mitigating and does not approach the application of these factors in any particular order. Under the international method, once the base amount is determined, it is adjusted (mostly upwards) having regard to other factors.

The study recommended that the Australian method for assessing corporate penalties for cartel conduct be revised to reflect more closely the international method (the revised method). The revised method would incorporate these five steps:[101]

a. calculation of a base amount for the penalty using a measure such as a percentage (either fixed (say 10%) or within a range (say 10%-30%) to allow for tailoring to the particular conduct) of the affected sales or turnover relating to the affected sales,

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96 See especially 'Corporate financial penalties for cartel conduct in Australia: A critique', n 24. Other critics include the ACCC chair, in an interview in 2023: '"They price it in": The woman taking on corporate Australia', Saturday Paper, 16-22 September 2023. Contrast A Thorn, 'Fine Qantas $250m for 'ghost flights', says ACCC', Australian Aviation, 1 September 2023 (reporting the ACCC chair as having said: 'If a corporate giant is told to pay $100 million, it is seen as the cost of doing business').

97 'Corporate financial penalties for cartel conduct in Australia: A critique', n 24.

98 At 55.

99 At 55.

100 At 55-56.

101 At 57-58.

multiplied by the duration of the conduct;

b. adjustment of the base amount having regard to aggravating and mitigating factors (the latter not including any discount derived from cooperation pursuant to the Immunity and Cooperation Policy), allowing for the size of the adjustments to be determined as a matter of discretion in accordance with the particular circumstances of the case;

c. consideration as to whether the adjusted amount is appropriate (either too high or too low, as the case may be) having regard to the statutory maximum;

d. consideration of any prospect that the respondent will be unable to pay the adjusted amount, including any impact that the penalty may have on the respondent's capacity to make restitution to victims;

e. reduction of the amount arrived at upon completion of steps (a)-(d) by a percentage that represents a 'discount' for cooperation pursuant to the Immunity and Cooperation Policy, that percentage being as set out in the Policy based on the timing of the cooperation and possibly other factors such as the value of the cooperation (provided such factors are clearly defined).

The recommendation that a revised method be used for determining fines and pecuniary penalties has yet to be followed.

Another recommendation in the Beaton-Wells and Clarke study was that maxima be increased (to a base amount of $20 million).[102] Maxima for breaches of the Act and the ACL were increased considerably in late 2022.[103] The base amount was increased from $10 million to $50 million. The turnover percentage rate was increased from 10% to 30%.

### 4.2 *Level of monetary sanctions and improving deterrence*

$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 fines or pecuniary penalties that can be delivered in actual cases.[104] The assertion that the increased maxima under the Act will 'ensure the price of misconduct is high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses'[105] is wishful. The main root cause of unduly low fines and pecuniary penalties − instinctive synthesis of shopping lists of factors – remains.[106]

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102 At 58.

103 See n 24. New Zealand has yet to increase fines or pecuniary penalties under the Commerce Act 1986 (NZ).

104 A classic example is *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414, [28] (maximum penalty in relation to multiple breaches 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.

105 House of Representatives], Treasury Laws Amendment (More Competition, Better Prices) Bill, Explanatory Memorandum, 1.6.

106 See further 'What's in the Box? Instinctive Synthesis in the Determination of Civil Penalties', in D Kayiz, E Gluer, & S Walpole (eds), *The Law of Civil Penalties* (2023) ch 2; G Brown, 'Four Models of Judicial Reasoning in Sentencing' (2019) 3 Irish Juridical Studies Journal 55.

In *Australian Building and Construction Commissioner v Pattinson*[107] the High Court of Australia decided that maxima are not reserved for the 'worst' category of conduct in contravention of the law, and that pecuniary penalties are not subject to the limit of proportionality (a reasonable balance is to be drawn between deterrence and 'oppressive severity').[108] The first change seems of minor significance given the limited apparent weight given to maxima in the past.[109] The second change may lead to some increase in pecuniary penalties; depending on the meaning given to the concept of 'oppressive severity', and where the balance between deterrence and oppressive severity is drawn.[110]

In *R v Jacobs Group (Australia) Pty Ltd*[111] the High Court of Australia held that 'benefit' in s 70.2(5) of the *Criminal Code* means gross benefit not net benefit. It has been suggested that *Jacobs Group* may lead to higher maximum amounts under the three times benefit formula in the Act (s 76, s 45AF, s 45AG).[112] Perhaps. However, to take price fixing as an acid test, the decision in *Jacobs Group* seems most unlikely to give the three times benefit formula a new lease on life. In *Jacobs Group*, D obtained contracts as a result of bribery and 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.[113] Where the amount of overcharge cannot be determined the three times benefit formula cannot apply.

Looking to some economic theory of optimal deterrence for help would be forlorn. Optimal deterrence theories were held not to apply under the Act in *ACCC v ABB Transmission & Distribution Ltd (No 2)*,[114] for good reason. One fundamental criticism is that the 'gains' from the illegal activity and the probability of detection and punishment are too difficult and, from an enforcement perspective, too costly or impossible to measure.[115] Another fundamental criticism is that optimal deterrence theories have failed to allocate corporate and individual liability in any cogent way.[116]

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107 [2022] HCA 13.

108 [2022] HCA 13, [41], [46]-[47].

109 See *Director of Public Prosecutions (Cth) v Wallenius Wilhelmsen Ocean AS* [2021] FCA 52, [169] (the maximum penalty is no more than a guidepost or yardstick; it is but one of the many relevant considerations in fixing the appropriate penalty); *Australian Cartel Regulation*, n 1, 431.

110 See *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Ombudsman (The 250 East Terrace Case)* [2023] FCAFC 161, [37]-[39] ('manifestly excessive' test); T Game and S Palaniappant, 'Proportionality by Another Name in the Imposition of Civil Penalties' in D Kayiz, E Gluer, & S Walpole (eds), *The Law of Civil Penalties* (2023) ch 3.

111 [2023] HCA 23.

112 '"Accounting in Wonderland": High Court throws open the potential for higher competition and consumer penalties – and beyond', 4 Aug 2023, at: https://www.claytonutz.com/insights/2023/august/accounting-in-wonderland-high-court-throws-open-the-potential-for-higher-competition-and-consumer-penalties-and-beyond.

113 See *ACCC v Roche Vitamins Australia Pty Ltd* [2001] ATPR ¶41–809; [2001] FCA 150; *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805, [33]; *Australian Cartel Regulation*, n 1, 447–449.

114 [2002] FCA 559, [21]-[25].

115 See *Australian Cartel Regulation*, n 1, 427.

116 See *Australian Cartel Regulation*, n 1, 427-428; *Corporations, Crime and Accountability*, n 1, ch 3.

A readily achievable step would be to amplify the factor of cooperation specifically to cover what a corporation has done or not done to improve its internal controls in response to having committed a breach of the Act. At present, the factor of cooperation is listed in s 16A(2) of the Crimes Act (s 16A(2)(h)) and the French factors (factor (9) and is often given considerable weight.[117] However, 'cooperation' is not spelt out adequately.[118] The concept should be clarified to include revision of internal corporate controls and refer explicitly to the most relevant types of internal corporate controls, which are: individual accountability via internal disciplinary action; and organisational precautions via operating policies, procedures and processes. That approach is part of the revised statutory framework proposed in Part 4.2. It is consistent with the *Corporate Cooperation Guidelines* (2021) issued by the Australian Federal Police. It also reflects the US Department of Justice Memorandum, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (15 September 2022).[119]

Many other steps can be taken to improve deterrence under the Act and the ACL. See Part 7, which summarises the main recommendations made in this chapter.

## 5 NON-MONETARY SANCTIONS AGAINST CORPORATIONS

Non-monetary sanctions are available against corporations under the Act and the ACL but their current statutory design is unsatisfactory in significant respects.[120]

### 5.1 *Range of non-monetary sanctions*

Punitive adverse publicity orders may be made under s 86D and s 247 of the ACL. Non-punitive non-monetary orders may be made under s 86C and s 246 of the ACL, namely:

(1) information disclosure orders;

(2) advertisement publication orders;

(3) community service orders; and

(4) probation orders under s 86 C of the Act, and preventive orders under s 246 of the ACL.

Non-monetary sanctions seek to deter in ways other than exaction of money (eg loss of reputation, public exposure, reduction of autonomy, arrest of attention and refocus of decision-making). They enable a mix of regulatory tools to be used.[121] They also provide options where a corporation

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117 See eg *Director of Public Prosecutions (Cth) v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (fine of $25 million reflected a 50% discount for cooperation); ACCC, *Guidelines on ACCC approach to penalties in competition and consumer law matters*, 30 August 2023, 10 (where there is full and meaningful cooperation, the ACCC may consider a discount in the order of 30 to 50% of the total penalty it will seek from the court).

118 See *TPC v CSR Ltd* [1991] ATPR 41-076 at 52,152; ACCC, *ACCC Cooperation policy for enforcement matters*, July 2002, 3; ACCC, *Guidelines on ACCC approach to penalties in competition and consumer law matters*, 30 August 2023, 10. Compare ASIC, *Cooperating with ASIC*, Information Sheet 172, February 2021.

119 3-4, at: https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf .

120 Non-monetary sanctions against individuals have similar design issues. Note also that s 86E of the Act has been held not to apply where the offence or contravention is attempting to induce another to commit an offence or contravention: *ACCC v BlueScope Steel Limited (No 6)* [2023] FCA 1029, [124].

121 On the advantages of using a mix of regulatory tools rather than emphasising one approach, see J Braithwaite, 'Regulatory Mix, Collective Efficacy, and Crimes of the Powerful' (2020) 1 J of White Collar and Corporate Crime 62.

is insolvent and cannot realistically be made to pay a fine or penalty commensurate with the gravity of contravention. Unfortunately, the non-monetary sanctions now available are not well-designed, and their use is hindered or prevented by the flaws. See Part 5.2.

The range of punitive orders is limited to adverse publicity orders. That range is unduly limited.

Cartel offences were introduced in 2009 without enabling community service orders to be imposed for punitive purposes. Community service orders offer one potentially constructive way of punishing corporations where monetary sanctions alone are too light-handed.[122]

Punitive injunctions[123] have not been introduced despite their potential as another form of punishment for serious breaches of the law where a monetary sanction against a corporation is not enough.

The punitive injunction is a punitive variant of the mandatory civil injunction or a corporate probationary order. It is a way of punishing a corporation for a serious offence or serious civil contravention without going to the extreme of disqualification from conducting business, or dissolution. The punitive element is to require a corporate offender to act in a demanding way that goes beyond the limit of remedial action but has a positive compliance-enhancing impact. Various types of punitive requirements are conceivable. The more obvious include additional reporting obligations[124] and whistleblowing channels.[125]

If necessary, it would be possible for law-makers to introduce other forms of non-monetary sanctions against corporations. One possibility is the equity fine, as mentioned in Part 1.1. Another is the designation of a corporation as an entity subject to an additional regime of accountability, comparable to the FAR regime.[126]

### 5.2 *Application of non-monetary sanctions*

The main difficulty about s 86C and s 86D, and s 246 and s 247 of the ACL, is the need for application by the enforcement agency to the court to make an order under these sections. The discretion of the courts when sentencing corporations or making orders in relation to civil contraventions should not be fettered in that way.[127] In particular, the determination of the orders to be made by a court should not be governed by deals negotiated by a corporate respondent with an enforcement agency.[128]

There are other flaws:[129]

- The characterisation of orders under s 86C and s 246 of the ACL as 'non-punitive' limits their application for the pluralist purposes of sentencing or determination of

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122 See *Australian Cartel Regulation*, n 1, 458-459.

123 See 'Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations', n 29.

124 As are often imposed in the USA under deferred prosecution agreements.

125 Secure and anonymous reporting systems for employees are commercially available; they include the Elker system.

126 Financial Accountability Regime Act 2023 (Cth).

127 ALRC, Final Report, *Corporate Criminal Responsibility* (2020), Recommendation 12.

128 Consider eg the situation that arose in *ASIC v Commonwealth Bank of Australia (No 2)* [2021] FCA 966, [67]-[70] where a community service order had not been suggested by ASIC.

129 *Australian Cartel Regulation*, n 1, 11.3.5.

sanction.[130] Thus, community service orders cannot be used to punish a cartel offender, as noted above. Moreover, information disclosure orders and advertising orders cannot be used punitively and punitive advertising orders under s 86D of the Act and s 247 of the ACL are limited to some extent by the unduly limited language of those sections.[131]

- The examples of probation orders in s 86C do not include an order requiring a corporate defendant to prepare and provide an internal discipline report detailing who was implicated in the corporate contravening conduct and what internal disciplinary measures have been taken against them in order to prevent similar conduct in future.[132]
- The concept of redress facilitation is reflected obliquely and inadequately. Information disclosure orders and advertisement publication orders may be used to facilitate redress but these represent only two possible forms of redress facilitation.[133] The potential of redress facilitation as a sanction is unachievable unless a wider range of redress facilitation orders is covered and authorised by the section.[134] The range should include orders to:

    (a) disclose information about the circumstances of the contravention, the nature of the loss likely to have been caused and the persons or classes of persons likely to have incurred the loss;

    (b) give notice to persons who may have suffered or may suffer loss as a result of corporate wrongdoing;

    (c) cooperate with someone acting on behalf of victims by making employees available for interview, waiving confidentiality obligations, and providing documents and data and explanations of them; and

    (d) establish a collective redress scheme.

- It has been held in some cases that there is no power under s 86C to require that a compliance program be independently audited.[135] However, perhaps such an order may be made under s 80 of the Act, s 232 of the ACL, or s 23 of the Federal Court Act.[136] An information disclosure order under s 86C(2)(c) of the Act or s 246(2)(c) of the ACL may be made to require disclosure of information about a compliance program to the ACCC or an independent reporter.[137] By contrast, independent auditing

130 ALRC, Final Report, *Corporate Criminal Responsibility* (2020), 8.68.

131 See *ACCC v B & K Holdings (QLD) Pty Ltd t/as FE Sports* [2021] FCA 260, [108]-[111].

132 See further ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, 30.15, 30.16; *Australian Cartel Regulation*, n 1, 6.6.3, 6.6.4; *Corporations, Crime and Accountability*, n 2, ch 5; Coffee, '"No Soul to Damn No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment', n 28.

133 See 'Redress Facilitation Orders as a Sanction against Corporations', n 26.

134 Undertakings under s 87B of the Act or s 218 of the ACL can be and are used for redress facilitation, and redress facilitation is relevant to assessment of sentence and penalty. Courts also need the power to make redress facilitation orders of the kind indicated.

135 See especially *BMW Australia Ltd v ACCC* (2004) 207 ALR 452, [51]. See also *ACCC v 117 372 915 Pty Limited (in liq)* [2015] FCA 1087. Note the limitations laid down in *ACCC v Z-Tek Computer Pty Ltd* [1997] FCA 871.

136 *ACCC v 117 372 915 Pty Limited (in liq)* [2015] FCA 1087.

137 *ACCC v 117 372 915 Pty Limited (in liq)* [2015] FCA 1087.

is often required in undertakings under s 87B as a safeguard against corporate cheating or laxity. Specific provision for monitoring and auditing powers should be made in s 86C of the Act and s 246 of the ACL.

- Under s 246(2)(aa) of the ACL, an order may be made for performance of community service by a third-party service provider. Outsourcing the performance of community service entirely to a third-party is inconsistent with the orthodox conception of corporate community service, which is that the corporation itself should experience expurgation by doing something useful itself.[138] It would be more sensible to limit the proposed power in a way that allowed minor aspects to be performed by the third party but required the defendant to perform the major steps required by the obligation.
- Section 86C and s 246 of the ACL do not provide for a corporate accused or respondent to be required to provide a detailed pre-sentence or pre-penalty or pre-remedy report setting out what steps have been taken by the corporation since the contravention:

  (a) to improve its internal controls and to discipline the persons implicated in the contravention; and

  (b) to compensate victims or to facilitate the compensation of victims.[139]

  See Part 6.

## 6 EVIDENCE OF MATERIAL FACTS

Courts often lack evidence of facts material to the determination of a fine or penalty or other sanction, especially against a corporation. Part 6.1 outlines the problem. Part 6.2 considers possible solutions.

### 6.1 *Determination of the amount of a fine or monetary penalty on an incomplete factual basis*

Difficulty often arises in determining the factual basis for determining a fine or monetary penalty. It may be in the self-interest of a corporate defendant to limit and contain information about what happened internally, fortified by the knowledge that the courts are supposed to assess fines and monetary penalties on the basis of proven facts. In the context of civil penalties, the opportunity to conceal adverse facts is much increased by the settlement process.[140] The settlement process gives corporate defendants the ability to negotiate a statement of agreed facts that minimises the inclusion of adverse facts and avoids giving too much away. A court can require further evidence and further submissions[141] but that course of action may cause delay and not be taken.

Consider the concerns expressed by Lee J in *Chief Executive Officer of the Australian*

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138 See further B Fisse, 'Community Service as a Sanction against Corporations' [1982] Wisconsin LR 970, 973 (statutory proposal requiring a project of community service shall to be performed by personnel employed by the offender except where the court is satisfied that the assistance of an independent contractor is necessary to make best use of the offender's own skills and resources).

139 See 'Redress Facilitation Orders as a Sanction against Corporations', n 26, 103-105.

140 On statements of agreed facts see RV Miller, *Australian Competition and Consumer Law Annotated* (2024, 46th ed) [CCA.76.260]. There is no exact equivalent of the civil penalty settlement process in criminal cases, but discussions about sentence between accused and prosecutors occur: they are relevant to an accused's decision whether or not to plead guilty.

141 As was done in *ACCC v Uber BV* [2022] FCA 1466.

*Transaction Reports and Analysis Centre v Crown Melbourne Limited*.[142] Crown Melbourne and Crown Perth (Crown) were ordered by the Federal Court to pay a $450 million penalty over two years after AUSTRAC launched civil penalty proceedings against them for breaches of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth). Lee J expressed these reservations at the outset of his judgment:[143]

> Fourthly, it is naïve to consider that agreements as to penalty do not sometimes present real challenges at the hearing. The Court is presented with a joint resolution and submissions are made along the lines made here that: "the parties have agreed to a figure of 450 million without interest … that's the deal that the parties have struck, so we would urge for your Honour – for the [C]ourt not to interfere with that deal" (T73.19–21). Here, an affidavit was filed as to the financial position of Crown in support of oral submissions that a penalty on deferred payment terms was agreed "because [Crown] can't afford to pay more than what we've agreed" (T71.14–15). This was buttressed by the submission that evidence as to the cash and borrowing position of Crown should be accepted because it was not the subject of cross-examination by the regulator (see T69.45). This was in circumstances where aspects of the evidence going to the financial position of Crown were scant, unsupported by business records, or not addressed. Most notably, there was no evidence as to the past payment of dividends and diminution of retained earnings or the group's current enterprise value; and only the most superficial evidence of its ability to obtain future, alternative sources of debt capital or additional equity capital.
>
> One can easily imagine how this evidence in chief could have led to cross-examination of a chief financial officer as to whether it was correct to say, for example, we can pay no more or, perhaps more accurately given the terms of the evidence adduced, cannot pay now "without significant financial hardship". Although AUSTRAC in submissions rejected the idea that the paction was struck based on it accessing what Crown could pay (T78.10), as noted above, there was no cross-examination. The reality is that AUSTRAC had become, not unnaturally, a friend of the deal. In other types of cases where this phenomenon presents itself, for example, settlement approvals in class actions, the Court commonly appoints a contradictor which assists in avoiding the Court entering into the fray. With the benefit of hindsight, it may have been prudent to adopt this course, which I raised at the last case management hearing on 12 May 2023 (T3.25; T12.33).
>
> Fifthly, and although not presently relevant, I have previously remarked that when these types of agreements dictate future steps to be taken by a contravener as part of the remedial response, or agreement is reached as to how compensation is to be paid, the agreements can often have the practical effect of presenting the Court with a fait accompli: so many costs have been expended, and so much work has been done, that it is difficult for the Court to put in place a different approach: see *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; (2020) 142 ACSR 277 (at 335 [252] per Lee J).

The concerns expressed by Lee J are relevant to civil penalty proceedings generally, including

142 [2023] FCA 782.

143 [2023] FCA 782, [15]-[17].

those under the Act and the ACL. Mention has been made above of *ACCC v Telstra Corporation Limited*,[144] where Telstra was ordered to pay $50 million for unconscionable conduct. There were no agreed facts about what, if anything, happened to the staff who engaged, on the ground, in the unconscionable conduct.

### 6.2 *Production of facts material to determination of sentence or penalty*

Pre-sentence and pre-penalty reports would help to improve the flow of facts material to the determination of sentence or penalty.

The ALRC Report, *Corporate Criminal Responsibility* (2020) recommended that the *Crimes Act 1914* (Cth) be amended to empower the court to order a pre-sentence report for a corporation convicted under Commonwealth law (Recommendation 16). A similar recommendation was made by the ALRC in 2006 in the Report, *Same Crime, Same Time*.[145]

In relation to civil penalty proceedings, in *Compliance with the Trade Practices Act 1974* (1994), the ALRC recommended that a court be empowered to require a pre-penalty report:[146]

> The Commission considers that in many cases the court would be greatly assisted in its task of determining a penalty if it had detailed information from the contravening corporation about what it has done, if anything, since the contravention to improve its compliance mechanisms. No doubt a corporation that had made improvements would seek to inform the court of this before the court imposed a penalty. Enabling the court to require a corporation to prepare a written report would, however, emphasise the importance of compliance measures and provide a formal way for the court to obtain detailed information prior to imposing a penalty. The Commission recommends that the TPA be amended to provide that the court may require a corporation that has contravened the Act to provide to the court, prior to the court assessing the need for or the amount or nature of a penalty, a report detailing what steps have been taken by the corporation since the contravention to improve the corporation's internal controls and to discipline the persons implicated in the contravention.

The scope of pre-sentence reports and pre-penalty reports should not be limited to internal corporate controls but extend generally to any factor or circumstance relevant to sentence or penalty that is specified by a court.

However, measures additional to the introduction of pre-penalty reports seem necessary to help guard against suppression of material facts in agreed statements of facts and joint submissions on penalty in civil proceedings. In civil penalty proceedings, pre-penalty reports seem unlikely to be required often by the courts given the extensive reliance on settlements and statements of agreed facts and the need for expediency. Something more is needed to increase the production of relevant facts in statements of agreed facts.

In the usual context where there is no pre-sentence report, statements of agreed facts should be required by legislation to provide clear and detailed information about the internal corporate

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144 [2021] FCA 502, [69].

145 Report No 103.

146 Report No 68, [10.40].

controls taken against law breaking.[147] Internal corporate controls' are as defined in Part 4.2. Two relevant timeframes are important: first, the timeframe before the law breaking subject to enforcement proceedings (the factor of proactive corporate fault), and secondly, the time frame after the law-breaking in response to the need to guard against repetition (the factor of reactive corporate fault).[148] The approach proposed is a form of enforced self-regulation.[149]

A persuasive burden of proof could be imposed by legislation on a corporate defendant where the court is asked by the defendant to take into account any fact in mitigation or reduction of a civil monetary penalty, in support of time for payment, or choice of the type of sanction to be applied. That approach would help to avoid the problem of courts having to grapple with the neglect or concealment of relevant facts by a corporate respondent or an enforcement agency.

## 7 RECOMMENDATIONS

The sanctions regime under the Act and the ACL is reviewed in Parts 2−6. Sixteen main recommendations are summarised below.

*Extent to which individuals are subject to sanctions under the Act and the ACL* (Part 2.1)

(1) The stated enforcement policies of the ACCC and CDPP do not deal with the allocation of individual and corporate liability, criminal or civil. They should be upgraded by indicating how individual and corporate liability is to allocated and making individual liability as important an objective corporate liability.

(2) The non-imposition of individual liability in a prosecution or civil enforcement proceedings should be taken into account as an explicit factor when determining a fine or pecuniary penalty against a corporation.

*Limited extent of individual accountability actuated by monetary sanctions against corporations under the Act and the ACL* (Part 2.2)

(3) The statutory framework should be amended to require account to be taken of individual accountability and other internal corporate controls when determining sentence or penalty (see Part 3.2).

(4) Internal corporate controls should be part of the prescribed content of pre-sentence and pre-penalty reports (see Part 6.2).

*Deterrence and internal corporate controls* (Part 3)

(5) The shopping lists used under the current law should be removed and replaced by a new statutory framework (see Part 3.2). A suitable framework would set out the primary factors to be taken into account in determining whether the amount of a

147 See further '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment', n 28, 431; *Corporations, Crime and Accountability*, n 2, ch 5. Under the approaches proposed in those commentaries the reports would not be confidential. A possible alternative approach, not recommended by this author, would be to make the reports confidential until they have been considered by a court and sentence or penalty has been determined.

148 See text and references at n 92.

149 J Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80 Michigan Law Review 1466.

fine or pecuniary penalty is an adequate specific and general deterrent. The primary factors include:

(a) the extent to which disciplinary action has been taken by the corporation to impose individual accountability on the individuals implicated in the offence or contravention;

(b) the extent to which individual accountability has been imposed on representatives of the corporation for undertaking internal disciplinary action and organisational precautions in relation to future similar offences or contraventions;

(c) the extent to which organisational precautions were taken to prevent the offence or contravention before the offence or contravention occurred; and

(d) the extent to which organisational precautions have been taken after the offence or contravention to prevent future similar offences or contraventions by the corporation; and

(e) whether or not the corporation has cooperated with the enforcement agency by providing full details of the action taken to impose individual accountability (see (a) and (b) above) and undertake organisation precautions (see (c)) and (d) above.

*Level of fines and monetary sanctions* (Part 4)

(6) The factor of cooperation should extend to what a corporation has done or not done to improve its internal controls in response to having committed a breach of the Act or the ACL. That approach is part of the revised statutory framework proposed in Part 3.2.

(7) The recommendations made in Parts 2−3 and 5−6 are relevant to making sanctions under the Act and the ACL more effective means of specific and general deterrence.

*Range of non-monetary sanctions* (Part 5)

(8) Section 86C of the Act and s 246 of the ACL should be amended to enable a court to impose a community service order for a punitive purpose in criminal or civil penalty proceedings.

(9) Section 86C of the Act and s 246 of the ACL should be amended to enable a court to impose a punitive injunction in criminal or civil penalty proceedings. Provision should be made for the punitive element to be prescribed additional reporting obligations and whistleblowing protections.

*Application of non-monetary sanctions* (Part 6)

(10) Section 86C and s 86D of the Act and s 246 and s 247 of the ACL should be amended to enable a court to make an order under any of those sections in the exercise of its discretion whether or not an application for such an order has been made by an enforcement agency.

(11) Section 86C of the Act and s 246 of the ACL should be amended so as make provision for an order requiring a corporate defendant to prepare and provide an internal discipline report detailing who was implicated in the corporate contravening conduct and what internal disciplinary measures have been taken against them in order to prevent similar conduct in future.

(12) Section 86C of the Act and s 246 of the ACL should be amended so as make provision for redress facilitation orders, as outlined in Part 5.2.

(13) Section 86C of the Act and s 246 of the ACL should be amended to give a court the power to require that a compliance program or other internal corporate controls be independently audited.

*Facts material to determination of sentence or penalty* (Part 6.2)

(14) The Act and the ACL should be amended to enable a court to require a pre-sentence and pre-penalty report at the expense of the corporate accused or respondent.

(15) The revised statutory framework proposed in recommendation (5) above should include a provision requiring statements of agreed facts to provide clear and detailed information about the internal corporate controls taken against law breaking (a) before the law breaking subject to enforcement proceedings, and (b) after the law-breaking in response to the need to guard against repetition.

(16) The revised statutory framework proposed in recommendation (5) above should include a provision imposing a persuasive as well as evidentiary burden of proof on a respondent where a court is asked to take into account any fact in mitigation or reduction of a civil monetary penalty, in support of time for payment, or choice of the type of sanction to be applied.