



SANCTIONS AGAINST CORPORATIONS AND INDIVIDUALS UNDER THE CCA AND ACL

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Sanctions under the CCA and ACL after 50 years

- 50th anniversary of TPA:
 - celebrations include *Competition Law and Economics in Australia* (Routledge, 2025) Vols I and II
 - 'Sanctions against Corporations and Individuals under Australian Competition and Consumer Legislation' is ch 9 in Vol II.
- Time to review CCA/ACL sanctions regime:
 - flood of corporate lawbreaking over past decade or more and ongoing/relentless
 - corporate fines and penalties often treated as readily manageable cost of business, especially by larger corporations
 - prohibitions relating to digital competition, unfair trading practices, price gouging will extend need for effective sanctions significantly.
- 'Big 5' weaknesses of means of deterrence now used under CCA and ACL:
 1. Individual liability for breaches often not imposed, and individual accountability within corporations neglected when courts impose monetary sanctions on corporations (Part 2)
 2. Fines or pecuniary penalties against corporations are determined by reference to 'shopping lists' of factors that give insufficient attention or weight to internal corporate controls upon which specific and general deterrence much depend (Part 3)
 3. Fines and pecuniary penalties against corporations often have been too low to provide a credible specific or general deterrent threat (Part 4)
 4. Non-monetary sanctions are available against corporations but their current statutory design is unsatisfactory in significant respects (Part 5)
 5. Courts often lack evidence of facts material to determination of fines or pecuniary penalties or other sanctions against corporations (Part 6)
- Can be avoided or reduced by statutory changes and judicial development.



COMPETITION LAW AND ECONOMICS IN AUSTRALIA, VOLUME II

COMPETITION AND CONSUMER LAW: PRINCIPLES,
ENFORCEMENT, AND COMPARATIVE PERSPECTIVES

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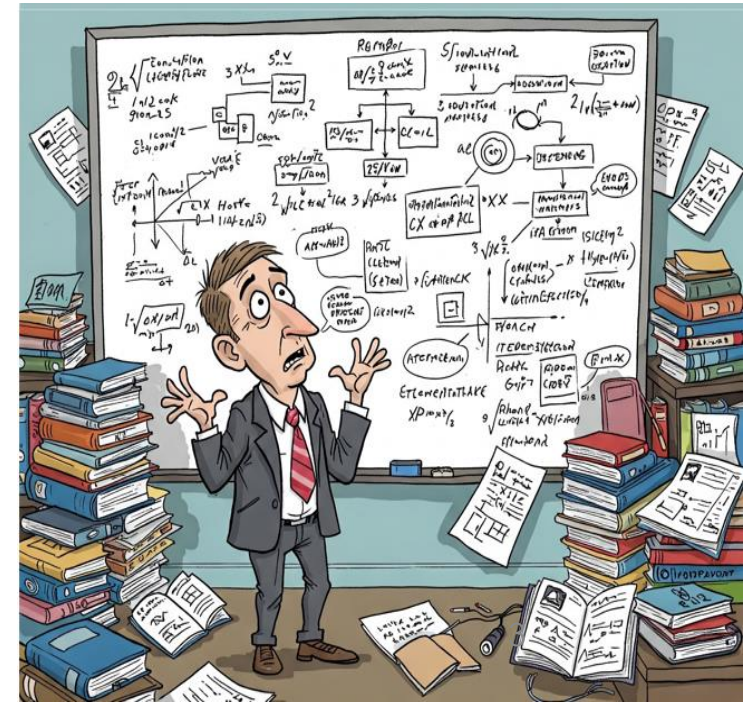


Related topics

- Not in focus here:
 - issues of liability
 - failure to prevent corporate offences/civil prohibitions
 - theories of punishment
 - civil-criminal divide
 - best mix of deterrence, prevention, and compensation
 - 'instinctive synthesis'
 - sentencing principles (including proportionality, totality, and parity)
 - civil penalty principles (including 'oppressive severity')
 - use of monetary sanctions against insolvent corporations
 - maxima for fines and monetary penalties
 - remedies
 - enforcement strategy
 - investigation reports and LPP
 - compliance and liability control
 - executive compensation
 - D&O insurance
 - regulatory capture
 - attempts by US to dictate design and application of Australian legislation re Big Tech and other corporations
 - sanctions under Commerce Act 1986 (NZ)
 - chain of enforcement in cross-border cases.
- On related topics:
 - D Kayis, E Gluer & S Walpole (eds), *The Law of Civil Penalties* (2023) chs 1-5
 - C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) chs 2, 6-7, 11-12.

'Deterrence', 'sanction', sanction array, and usage patterns

- Deterrence depends on sanctions that give a punitive incentive or inducement:
 - to refrain from engaging in unlawful conduct; and
 - to prevent such conduct by means of individual accountability, organisational precautions, and other internal corporate controls.
- 'Non-punitive' sanctions under CCA/ACL are mainly preventive or compensatory but also serve deterrence.
- Deterrence is 'special' and 'general'.
- Theories and empirical studies of deterrence proliferate but are not subject of this paper – focus is as specified in previous slide.
- See Part 1 of Paper on 'sanction', array of sanctions, and usage patterns (see also separate paper on usage patterns - referenced).



Allocation of individual and corporate liability for breaches of CCA/ACL – Part 2.1

- Allocation of individual and corporate liability is a fundamental issue of social control:
 - B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (1993);
 - B Garrett, *Too Big to Jail* (2014);
 - J Coffee, Jnr, *Corporate Crime and Punishment: The Crisis of Underenforcement* (2020).
- CCA/ACL provide for individual and corporate liability (with definitional variations/quirks).
- No allocation rule in CCA/ACL or case law – not considered in eg *Agreed Penalties* case (2015).
- Orthodox policy assumption – individual *and* corporate actors should be held liable for unlawful conduct on behalf of corporation
- Some contend that individual but not corporate actors should be liable.
- Contrast obverse view that corporate but not individual actors should be liable:
 - some economists (eg Polinsky & Shavell) have contended that corporate liability is more 'efficient' than individual liability and sufficient.



Individual liability – Allocation and usage patterns under CCA/ACL

- Individual liability often is not imposed for breaches of CCA/ACL:
 - A conviction for a cartel offence has been recorded against seven individuals and seven corporations since 2009. Four of the seven individuals convicted were co-accused in the same case (Vina Money case). In three of the seven cases where a corporation was convicted no individuals were prosecuted in Australia.
 - 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 five cases.
 - 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).
 - 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. More recently, a penalty of \$100 million was imposed on Qantas in the ghost flights case but no individual was the subject of that enforcement proceeding.
 - Civil cartel proceedings in Federal Court in December 2024 against Spotless Facility Services Pty Ltd and Ventia Australia Pty Ltd and *four senior executives*, for alleged price fixing relating to estate maintenance and operation services for Department of Defence – a change in enforcement policy towards individual liability in serious civil penalty cases?

Non-imposition & non-pursuit of individual liability – Explanations?

- Possible explanations depend on circumstances of case and include:
 - difficulty of proving accessorial or other liability against individuals implicated in contraventions (incl 'shut-eyed sentries');
 - elements of cartel offences are too complex for jury trials and jeopardise chance of successful prosecution;
 - individual liability may be taken off table as part of a deal with ACCC under which liability of manager/s is in effect bought off by agreement with corporation to pay a civil monetary penalty;
 - individuals implicated in contraventions may be beyond territorial jurisdiction or, if within territorial jurisdiction, be impossible to bring to justice in Australia.



Non-imposition & non-pursuit of individual liability – Modest proposals & question

- Address question of allocation in ACCC and CDPP enforcement policy statements (which do not currently refer to allocation of individual and corporate liability).
- Treat non-imposition of individual liability as a deterrence deficit to be offset by increasing the fine or penalty against the corporate respondent:
 - Non-imposition of individual liability should be taken into account as an explicit factor when determining a fine or pecuniary penalty against a corporation:
 - 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 non-pursuit or non-imposition of individual liability should be offset by an increase in the fine or penalty imposed on the corporation.
 - Contrary to implication of *Pattinson* (2022), courts have not applied deterrence deficit factor outlined above.
 - Section 16A(2) of the Crimes Act, s 76 of the Act and s 224 of the ACL should be amended accordingly.
- Change liability rules?
 - Note absence under CCA and ACL of basis of liability equivalent to that under s 180(1) Corporations Act (Cth) – failure to exercise care and diligence.
 - Accessorial liability issues – see *Australian Cartel Regulation*, 6.3, 6.5.

Individual accountability within corporations – Part 2.2

- Individual accountability within corporations can be a significant deterrent or preventive mechanism, whether or not individual liability is imposed for a breach of the law by or on behalf of a corporation (Paper, p 11).
- This mechanism can be harnessed by legal system, as by making individual accountability a key factor in determination of monetary sanction against corporation.
- However, individual accountability is not treated explicitly as an impact to be achieved by monetary sanctions against corporations (Part 2.2):
 - statutory provisions are mute (Crimes Act s 16A(2), CCA s 76(1), ACL s 224(2))
 - case law gives scant direction:
 - ‘French factors’, ‘Heerey factors’, ‘Beach factors’

ACCC v Telstra Corporation Limited (2021) (\$50 mill penalty – unconscionable conduct)

- [2021] FCA 502, [69]-[70]:
 - no agreed facts about what, if anything, happened to the staff who engaged, on the ground, in this conduct on behalf of Telstra
 - those individuals bore 'considerable personal responsibility' for the unconscionable conduct and severe impacts
 - not a matter addressed by the parties despite obvious major role of those individuals in perpetrating the unconscionable conduct
 - Court 'deprecated' conduct of the individuals responsible
 - but no indication in judgment whether or not Telstra had imposed individual accountability for the unconscionable conduct.
- Difficult to reconcile FC decision with instructions on deterrence later issued by HC in *Pattinson*.

'I thought I was going to jail'



The story of how Telstra signed up vulnerable Australians to unfair phone and tablet contracts

ACCC v Qantas Airways (2024)

(\$100 mill penalty – ghost flights ≤ 880,000 consumers)

- ACCC v Qantas Airways [2024] FCA 1219, [120]-[121]:
 - 'Senior managers responsible for different aspects of Qantas' systems and operations separately knew of at least one of the following matters:
 - (1) that flights the subject of a cancellation decision were not immediately removed from sale;
 - (2) that some consumers could and did make bookings on flights after those flights had been the subject of a cancellation decision;
 - (3) that consumers who had made bookings on flights that were the subject of a cancellation decision were not notified of that decision immediately; and
 - (4) that the Manage Booking Pages for flights that were the subject of a cancellation decision were not updated to reflect that decision promptly.

Although no single person knew all these matters, Qantas was aware of the way in which its system operated in relation to the removal of cancelled flights from sale, and the notification of consumers regarding flight cancellations.'



Individual accountability within corporations – Left up in air in *Qantas Ghost Flights* case

- Judgment does not answer questions of individual accountability avoided in the Statement of Agreed Facts and Admissions:
 - number of the senior managers involved?
 - who were the senior managers?
 - ‘no single person knew ..’ – so?
 - *were the senior managers concerned subject to disciplinary action by Qantas?*
 - *if so, what was that action?*
- Difficult to reconcile FC decision with instructions on deterrence issued by HC in *Pattinson*.

Individual accountability within corporations – Solutions?

- Amend statutory framework to require account to be taken of individual accountability and other internal corporate controls when determining sentence or penalty (see Recommendations (3)(4)(5)(15)(16)).
- Make internal corporate controls, including action taken to uphold individual accountability, part of the prescribed content of pre-sentence and pre-penalty reports and statements of agreed facts (Part 6.2).
- NB potential of *cooperation* factor in French factors to be clarified and used by courts to strengthen the sanctions regime considerably before (or even without) statutory change (Paper, p 19).

Internal corporate controls — Part 3

- Fines or pecuniary penalties against corporations are determined by reference to statutory and judicial ‘shopping lists’ of factors that give insufficient attention or weight to the internal corporate controls upon which deterrence fundamentally depends (Part 3.1).
- Current shopping lists lack focus and have major gaps:
 - no clear indication of the basic importance of internal corporate controls to the deterrence of breaches of the CCA or ACL (Part 3.2)
 - no explicit reference to the deterrence deficit that arises where individual liability is not imposed (Part 2.1)
 - key concept of *reactive corporate fault* is not reflected adequately
 - factor of *cooperation* does not explicitly include disclosure of the steps taken by the corporation to achieve individual accountability and organisational precautions (Part 3.2, Part 4.2).



Internal corporate controls – Revised statutory framework

- Revise statutory framework to set out primary factors to be taken into account in determining whether amount of a fine or pecuniary penalty imposed on corporation likely to be adequate/appropriate means of specific and general deterrence (Recommendation (5)).
- Five primary factors:
 - (a) 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) 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) extent to which organisational precautions were taken to prevent the offence or contravention before the offence or contravention occurred
 - (d) extent to which organisational precautions have been taken after the offence or contravention to prevent future similar offences or contraventions by the corporation
 - (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).



CCA s 76(1), ACL s 224(2), Crimes Act s 16A(2) — Statutory revision and judicial development

- Design aim is to give ‘deterrence’ a clearer and stronger operational meaning in context of unlawful corporate conduct.
- New statutory provisions are needed to give full effect to the proposals in paper.
- Merely adding further items to the current shopping lists is unlikely to work.
- Revision of relevant provisions in CCA, ACL and Crimes Act from the ground up (see *Australian Cartel Regulation*, 483-485) is warranted.
- Much achievable through judicial development by focusing more on individual accountability, internal controls and cooperation
 - French factors are over 30 years old;
 - call for substantial reconsideration given experience and advances in thinking since 1991.

Level of fines and pecuniary penalties against corporations – Part 4

- Fines and pecuniary penalties imposed on corporations have often seemed too low to provide a credible specific or general deterrent threat.
- Maxima under CCA & ACL were increased considerably in late 2022 but main underlying cause of unduly low fines or monetary penalties remains – ‘instinctive synthesis’ of a shopping list of factors.
- Beaton-Wells and Clarke analysis of fines and pecuniary penalties for cartel conduct (2018)?
- Significance of *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13?
- Significance of *R v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23?



Level of fines and pecuniary penalties – EU fine fixation is no solution

Tech fines tracker

Big Tech, small consequences

	 Apple	 Google	 Microsoft	 Meta	 Amazon
2024 free cash flow	\$108.81 billion	\$47.93 billion	\$74.07 billion	\$40.51 billion	\$15.08 billion
Total fines 2024	\$2,117,203,000	\$2,974,752,000	\$1,605,000,000	\$1,462,850,000	\$57,478,000
Time to pay off its fines (using free cash flow)	7 days, 2 hours, 28 minutes	16 days, 21 hours, 25 minutes	7 days, 21 hours, 49 minutes	9 days, 19 hours, 15 minutes	1 day, 0 hours, 51 minutes

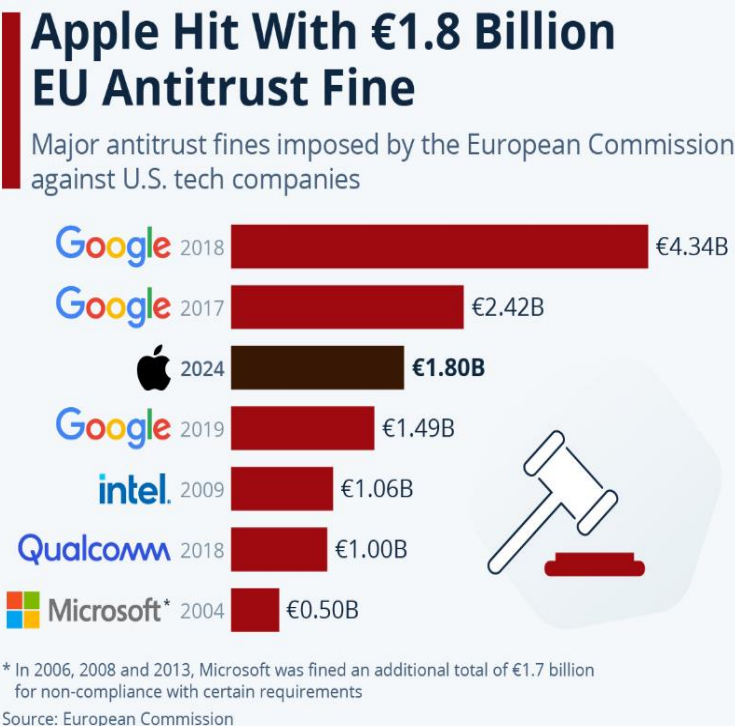
<https://proton.me/tech-fines-tracker>

Level of fines & pecuniary penalties against corporations – Solutions?

- Many steps other than increasing monetary sanctions can be taken to improve deterrence under CCA/ACL.
- Recommendations in Part 7 include:
 - (1) upgrade enforcement policies to address allocation of individual and corporate liability;
 - (2) take non-imposition of individual liability in a prosecution or civil enforcement proceedings into account as an explicit factor when determining a fine or pecuniary penalty against a corporation;
 - (3) require account to be taken of individual accountability and other internal corporate controls when determining sentence or penalty;
 - (4) make Internal corporate controls part of prescribed content of pre-sentence and pre-penalty reports and, as per (15), agreed statements of facts;
 - (5) replace shopping lists of factors with new statutory framework;
 - (6) NB amplify factor of *co-operation* 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 CCA or ACL (Paper, p 19).

Non-monetary sanctions against corporations — Part 5

- Non-monetary sanctions under CCA and ACL:
 - array (Part 5.1)
 - usage patterns (Part 1.2).
- *Why non-monetary sanctions?*
 - seek to deter in ways other than exaction of money (eg loss of reputation, public exposure, reduction of autonomy, and refocus of decision-making)
 - enable mix of preventive impacts, avoid EU fine fixation
 - give options where a corporation is insolvent and unable to pay a fine or penalty commensurate with the gravity of contravention.
- Range of *punitive non-monetary orders* now limited to adverse publicity orders – unduly limited range – further possible types?
 - punitive community service orders
 - punitive injunctions
 - equity fines
 - designation of a corporation as an entity subject to an additional accountability regime comparable to the FAR regime.
- *Divestiture* – limited potential practical use.
- *Incapacitation* (civil preventive orders constraining the capacity of a corporate defendant to break the law) – important frontier given:
 - inability of monetary sanctions to deter big tech and other large corporations;
 - potential to trump deterrence as means of preventing law-breaking (see J Braithwaite, *Macrocriminology and Freedom* (2022) ch 10).

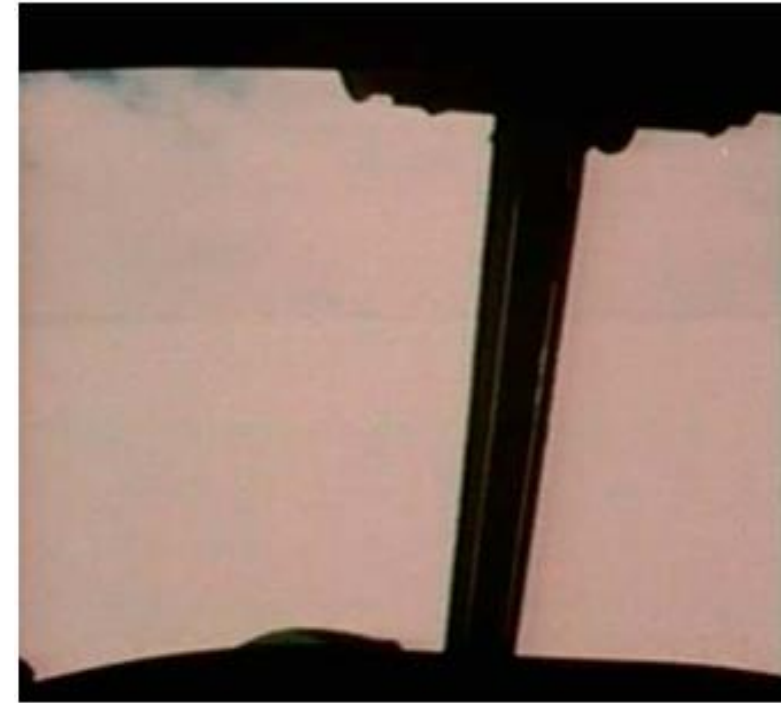


Non-monetary sanctions against corporations – CCA, ACL limitations – Part 5.2

- Main limitation under CCA s 86C, s 86D and ACL s 246, s 247 is need for application by enforcement agency :
 - discretion of the courts when sentencing corporations or making orders in relation to civil contraventions should not be fettered in that way
 - determination of orders to be made by a court should not be governed by deals negotiated by a corporate respondent with an enforcement agency
 - limit fetter to cases where penalty is not agreed?
- Further limitations:
 - 'non-punitive' characterisation of orders under CCA s 86C and ACL s 246 unduly limits their application in cases where punishment is called for
 - probation orders in CCA 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 were taken against them
 - concept of redress facilitation is reflected obliquely and inadequately
 - power to require that a compliance program be independently audited?
 - performance of community service by a third-party service provider (ACL, s 246(2)(aa))?
 - pre-sentence/pre-penalty/pre-remedy reports?

Evidence of material facts – Part 6

- Courts often lack evidence of facts material to determination of a fine or penalty or other sanction, especially against a corporation, eg:
 - *ACCC v Telstra Corporation Limited* [2021] FCA 502
 - *ACCC v Qantas Airways* [2024] FCA 1219
 - *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Crown Melbourne Limited* [2023] FCA 782, [15]-[17]



Sector-whiteout, Air-NZ-Flight-901-crash-site, Mt-Erebus

CEO of AUSTRAC v Crown Melbourne Limited (2023)

- [2023] FCA 782, [15]-[17] (Lee J) – sobering recognition of challenges that can arise in penalty hearings about material facts:
 - ‘naïve to consider that agreements as to penalty do not sometimes present real challenges at the hearing’
 - ‘aspects of the evidence going to the financial position of Crown were scant, unsupported by business records, or not addressed’
 - ‘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”’
 - ‘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’ – may have been prudent here
 - ‘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’.

Evidence of material facts – Part 6.2

Solutions?

- Amend CCA and ACL to enable a court to require a pre-sentence or pre-penalty report (at expense of corporate accused/respondent), see eg:
 - ALRC Report 136 (2020), Recommendation 16
 - ALRC Report 103 (2007), Recommendation 14-2
 - ALRC Report 68 (1994) [10.40]
 - Federal Rules of Criminal Procedure (US) 32(c)(1).
- Under the statutory framework proposed re internal corporate controls (see Part 3):
 - 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
 - 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.
- Short of such statutory change, the approach to cooperation recommended (see Paper p 19, Slide 20) would help to induce production of material facts about internal controls by a corporate defendant in order to qualify for a significant discount on penalty.

Recommendation 16 The *Crimes Act 1914* (Cth) should be amended to empower the court to order a pre-sentence report for a corporation convicted under Commonwealth law.

Pre-penalty report by corporations

10.40 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.

Deterrence ahead?

- Sanctions against corporate respondents for a breach of CCA/ACL are often said to be enough to achieve deterrence but that claim is dubious where the individuals concerned in the breach have not been subject to:
 - liability or enforcement proceedings; or
 - individual accountability imposed by the corporation.
- 16 recommendations in paper seek to address 5 weaknesses of the current regime of sanctions under CCA and ACL (Part 7).
- Recommendations seek to give ‘deterrence’ under the CCA/ACL a clearer and stronger operational meaning, and more thrust.
- NB potential of *cooperation* factor in French factors to be clarified and used by courts to strengthen the sanctions regime considerably before (or even without) statutory change (Paper, p 19).



Business as usual?



"And though in 2023, as in previous years, your company had to contend with spiraling labor costs, exorbitant interest rates, and unconscionable government interference, management was able once more, through a combination of deceptive marketing practices, false advertising and price fixing, to show a profit which, in all modesty, can only be called excessive."¶