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the state of COMPETITION

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In the two years since penalties were introduced for the consumer protection provisions of the Competition and Consumer Act, the ACCC has acheived some astounding results. But when penalites under the Australian Consumer Law are compared with those for anti-competitive behaviour, one has to question whether the right incentives are in place to encourage compliance with, and enforcement of, the competition provisions.

Faster, higher, stronger! Enforcement powers under the Australian Consumer Law

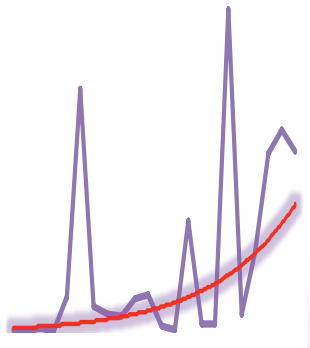
A little over two years ago, the enforcement landscape in Australian consumer law changed drastically. Civil penalties, along with a raft of other toys for the Australian Competition and Consumer Commission (the **ACCC**), were introduced and the regulator has since exhibited a strong liking for them. In this article, we look at civil penalties, disqualification orders and infringement notices, before considering the messages sent by the relative magnitude of the penalties ordered to date compared to outcomes under the competition provisions of the *Competition and Consumer Act* 2010 (**CCA**).

Civil penalties for consumer protection: "Think bigger"

Under section 224 of the *Australian Consumer Law* (**ACL**), the ACCC can seek penalties for particular contraventions up to a maximum of $1.1m for corporations and $220,000 for individuals. The specified contraventions largely cover the field: while section 18 (the old section 52) is an important omission, penalties are available for contraventions of section 29 (the old section 53), which often traverses similar territory. As can be seen by the table overleaf, penalties have been ordered in relation to component pricing, product safety, pyramid selling, labelling standards, consumer guarantees and a predictable suite of general misrepresentations.

Civil penalties are available only for conduct occurring *after* 15 April 2010. Within 2 months of this date, the ACCC had filed a matter in which they were sought. But, if one looks only at the dollar figures, penalties got off to a slow start: the first few cases related to infringement notices (discussed below), where small parties – not really sure how these notices worked – tried to "negotiate" their way out of them only to find themselves in Court.

Consequently, the amounts awarded by the Court were the subject of consent. In considering whether they fell within the appropriate range (the only test against which agreed penalties are measured), the Court was informed by the amounts payable under the infringement notices. Notices attract a maximum penalty of only $6,600 for companies, so even though multiple notices had been issued, the final penalties were very low.



Penalties (and trendline) under the ACL - details overleaf

Date of final order	*ACCC v*	Penalty	Type of conduct	Date of final order	*ACCC v*	Penalty	Type of conduct
02.11.10	*Gourmet Goody's*	$26,400	Component pricing	02.08.11	*SMS Global*	$85,000	Misrepresentations
06.12.10	*AI*	$20,000	Component pricing	21.10.11	*Sontax*	$40,000	Product safety
23.12.10	*CI & Co*	$50,000	Misrepresentations	08.12.11	*Harvey Norman*	$1,250,000	Misrepresentations
08.02.11	*Le Sands*	$15,000	Component pricing	19.12.11	*Turi Foods*	$100,000	Misrepresentations
08.04.11	*Dimmeys*	$400,000	Product safety (labelling)	29.02.12	*Trade Quip*	$100,000	Product safety
12.04.11	*Yellow Page*	$2,700,000	Misrepresentations	07.03.12	*Singtel Optus*	$3,600,000	Misrepresentations
14.04.11	*Smash Enterprises*	$300,000	Labelling standards	18.05.12	*Jutsen*	$200,000	Pyramid selling
15.04.11	*MSY Technology*	$203,500	Consumer guarantees	29.05.12	*Halkalia*	$900,000	Misrepresentations
30.05.11	*Willesee Healthcare*	$185,000	Misrepresentations	15.06.12	*TPG*	$2,000,000	Misrepresentations
15.06.11	*Global One*	$375,000	Misrepresentations	21.06.12	*Apple*	$2,250,000	Misrepresentations
23.06.11	*Marksun*	$430,000	Misrepresentations	13.06.12	*Energy Watch*	$2,015,000	Misrepresentations

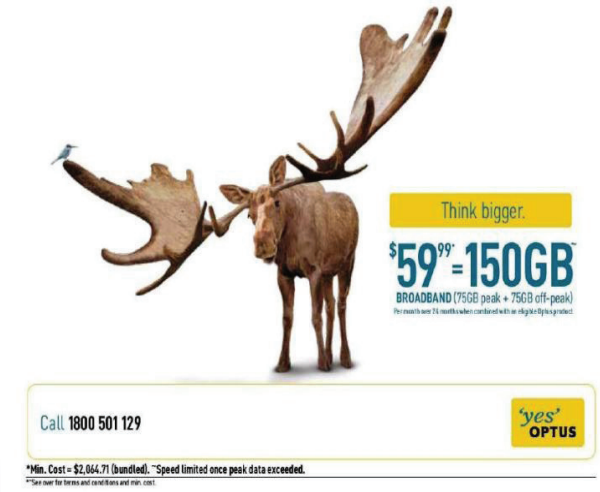
The *Dimmeys* case attracted the first penalty of any particular note. This concerned fire rating labels on children's nightwear. While the respondent conceded liability, it opposed the ACCC's application for a $500,000 penalty. The Act specifies certain mandatory factors to guide the Court in determining penalties, eg the nature and extent of the conduct, any resulting damage, whether the respondent has "priors" and the like – these are the same factors governing penalties for anti-competitive behaviour. As a logical consequence, the ACCC submitted that principles developed in competition law cases (such as the "French factors" – named for the current chief justice of the High Court) should apply.

With some modifications, Gordon J agreed. Consequently, relevant factors also include matters such as the size of the offender, the deliberateness of the contravention and its duration, the involvement of senior management, and the extent of any co-operation with the ACCC. Gordon J also endorsed the proposition that deterrence "both specific [ie for the respondent] and general [for the community at large]" is the principal objective of imposing a penalty. This general framework has been applied in all penalty cases since.

The quantum of penalties ordered then took an enormous leap in another case before Gordon J: the *Yellow Page* case. This was a scam, where businesses were hoodwinked into paying for advertising in directories that were not *the* Yellow Pages. The respondent companies did not show up for the trial, and the ACCC was granted default judgment – consequently, there was no contradictor to oppose the ACCC's application for a penalty. Anyone who was present in Court, however, could assure you that Gordon J gave the ACCC a hard time before making final orders!

In fact, the ACCC had submitted that a penalty of $4.5-5.5m was appropriate, but Gordon J ordered $2.7m. Nonetheless, this was an extraordinary amount. General *and* specific deterrence were significant here – the respondents had no assets in Australia and any penalty would be unenforceable overseas. Thus, to a large degree, the penalty served as a warning to others. But many victims of the scam "owed" the respondents money, so a substantial penalty was also a strong disincentive for them chase their Australian "debtors".

Just a few months later, Perram J ordered Optus to pay $5.26 million for misrepresentations in its "Think Bigger" campaign. Optus *does* have a presence in the jurisdiction, so unsurprisingly it appealed and we got our first considered position on the new regime from the Full Court. This appeal was resolved in March this year, with penalties reduced to a "mere" $3.6m. The Full Court found there had been a (relatively minor) factual error by the primary judge, which meant that the Court had to exercise its discretion afresh and set a new penalty. Significant factors influencing this penalty were Optus' prior "record" weighed against an absence of loss or damage to consumers (particularly as consumers were informed of the true position before committing to a contract).



This particular advertisement scored a penalty of $300,000; the campaign, $3.6m

Since the *Optus* decision, very substantial penalties have become commonplace, with multi-million dollar penalties being awarded on several occasions. Most of the high-end penalties including *Harvey Norman* and *Apple* were by consent, but *Global One* and *TPG* were vigorously defended. Indeed, both parties appealed to the Full Court – judgment is pending in *Global One*, while *TPG* has been listed for hearing in November.

When penalties are contested

It is interesting to see how the ACCC fares when penalties are contested. To date, about two-thirds of cases are going before the Courts with agreed penalties, while the remaining third have been fought. These cases are outlined below.

ACCC v	Ordered penalty	ACCC proposed	Comment
Dimmeys	$400,000	$500,000	
Global One	$375,000	$450,000*	Appealed - judgment reserved
SMS Global	$85,000	$175,000*	
Sontax	$40,000	$100,000	Respondents submitted not more than $20,000
Singtel Optus	[$3,600,000]	?	Reduced on appeal from $5,260,000
Jutsen	$200,000	$480,000	
TPG	$2,000,000	$4,500,000*	Appealed. Respondents submitted $450,000
Energy Watch	$65,000	$100,000	Contested only by individual respondent
Total	**$3,165,000+**	**$6,305,000**	

** Indicates that the ACCC submitted a range – for the purposes of this exercise, the mid-point of the range has been taken*
+ Given the uncertainty about the ACCC's original submission, the Optus penalty has been excluded from this calculation

Analysis of the above cases reveals two key points. One, the penalties ordered by the Courts are about half of what the ACCC has sought. Because of the size of the penalty, arguably, *ACCC v TPG* provides a degree of distortion – if one removes this from the equation, penalties as ordered are about 65% of what the ACCC seeks.

The second point to be taken from the contested cases is that, on each occasion the matter has been in issue, the Court has accepted the number of "courses of conduct" proposed by the ACCC. The courses of conduct determine the maximum penalty that can be imposed, and thus provide the starting point for calculating a penalty. Taking *ACCC v Yellow Page* as an example, the false and misleading representations were made via thousands of faxes – the ACCC contended that each fax amounted to a separate contravention. But, in accordance with principles originating in criminal law, the penalty was to be assessed by reference to general categories of conduct, not the number of contraventions:

> *[W]here several offences are heard together and arise out of the same transaction it is a sound working rule that the sentences imposed for those offences should be made concurrent; it is inappropriate to sentence consecutively when the offences were all really involved in the same episode (TPC v Bata Shoe).*

Thus, in *Yellow Page*, the ACCC submitted – and Gordon J accepted – that there were three courses of conduct, attracting a maximum penalty of $6.6m (with $2.7m being ordered).

The contested cases are instructive both in terms of settled proceedings, as well as the issuing of infringement notices. If the ACCC were too ambitious in its submitted penalties, then one would need to be wary about agreeing to a penalty. Equally, if the ACCC were regularly getting its approach to courses of conduct wrong, then concerns regarding multiple infringement notices would also be warranted. The ACCC regularly issues multiple infringement notices to the same party in respect of (broadly speaking) the same conduct. The best example of this is the 27 infringement notices (with a total penalty of $178,200) issued to Optus in relation to its "max cap" plans. The above analysis suggests that the ACCC is getting the breakdown right and for all the concerns one might have about infringement notices (see the brief discussion below), this needn't add to the list.

In the context of contested penalties, one would expect the ACCC to shoot above the target, much like a damages claim in a normal commercial dispute. As for whether the ACCC is aiming *too* high, where the amount is relatively low, the regulator is mostly in the ball park. It seems to be where a relatively high penalty is sought that the Court is pulling back. This is relatively self-correcting, as it is this end of the penalty "market" that is most likely to appeal. Given how hard it is to determine these numbers in a complete vacuum, the ACCC seems to have done pretty well. Nonetheless, further Full Court authority will be a very welcome development.

Other Court orders of note

Before leaving the Court room, there are two other significant developments in the area of remedies. The first is of general application to the CCA: in late May, Tracey J made the first ever disqualification order under section 87E, banning Mr Laurence Hann of Heartlink from managing a company for 15 years. This was an exciting development, as the ACCC has had this power for a while now, but its application is relatively confined. The power mimics ASIC's powers under the *Corporations Act*, although in ASIC's case there's a clear nexus between running a company badly and subsequently being disqualified for a period of time. The ACCC's power seems more based on a sense of regulatory endorsement – if you abuse public trust, you shouldn't be entitled to hold a position that carries with it a degree of implicit authority.

The length of disqualification granted in the Heartlink (*Halkalia*) case was quite extraordinary – to the end of 2009/10 financial year, ASIC reports that 70 directors had been disqualified under the *Corporations Act* for a total of 225 years. In other words, an average

In contested matters, Court-ordered penalties are about half of what the ACCC has submitted

of about 3 years each. A quick review of ASIC's register for the financial year just ended shows that most individuals are disqualified for between 1 and 3 years, with several orders for 5 years. There are 2 stand-outs on the register: Timothy Johnson (former Firepower group chair, banned for 20 years), and Laurence Hann – the Heartlink director, banned pursuant to the CCA. It's extremely unfortunate that there is almost no discussion in the *Halkalia* decision explaining the duration of this order. The order was not opposed and Tracey J notes only that it is appropriate in the circumstances having regard to ASIC authority (principally Santow J in *ASIC v Adler)*. Given the significance of the order, further guidance would have been welcome.

The second notable remedy was the first order for non-party redress under section 87AAA, as granted by Gordon J in *Yellow Page*. Whereas one might wonder whether the substantial penalty ordered against the respondents was particularly useful (given they seemed unlikely to pay it), the redress order had real value. Victims of the scam had outstanding contractual commitments to pay a second instalment for their directory advertisements – Gordon J, however, relieved them of the risk of being chased for this payment. The contracts were declared void *ab initio* (unless specifically affirmed by the "victim"), relieving these parties – who, in legal terms, were "strangers" to the proceedings – of any outstanding payment obligations. Further, the respondents were required to refund any money already paid (although the Court acknowledged such refunds may not be forthcoming). Gordon J noted, however, that this form of compensation order needed to be taken into account when the penalty was determined, this being one reason why she ordered a significantly lower penalty than the ACCC had sought.

Other weapons in the ACCC armoury

At the time the new penalty regime was introduced, the ACCC was also granted the ability to issue infringement notices, substantiation notices and public warning notices. While the last two have been sparingly used, the ACCC has demonstrated a distinct fondness for infringement notices. Maximum penalties are $6,600 for companies and a bizarrely specific $1,320 for individuals. At the time of writing, the ACCC had issued about 80 notices, with total fines now exceeding half a million dollars. As mentioned earlier, there is a tendency to issue multiple notices for related conduct. For example, Dodo was issued with 4 notices at once (totalling $26,400); Foxtel, 7 ($46,200); and Optus, 27 ($178,200).

The regime prompts a degree of residual concern – it's hard to imagine how it could be worth anyone's while to fight an infringement notice. (Fighting would generally take the form of failing to pay, with the ACCC then litigating.) Even if ultimately vindicated, a company's out-of-pocket expenses will likely exceed the amount of the infringement notice, and this is even more true for individuals. Perhaps a partial solution might be a legislated entitlement to solicitor-client costs for parties who successfully challenge infringement notices.

Relativities and incentives

The elephant in the room is how ACL penalties compare with penalties under the CCA's competition provisions in Part IV. The maths is complicated, but maximum penalties under Part IV are at least 9 times as high as their ACL equivalent. But the penalties we have seen under the ACL don't appear to reflect this legislatively-enshrined priority. Indeed, many in the legal profession have been shocked at the high penalties imposed under the ACL. Taking two cases close to the author's heart:

- *Yellow Page* was a essentially a business-to-business scam, for which a penalty of $2.7m was imposed;
- Approximately six months earlier, the ACCC achieved the *highest ever* penalty for predatory pricing when Cabcharge was fined $3m (it was also penalised a further $11m for 2 separate refusals to deal).

The relativities of these two cases are astounding – think about the time and resources required to conduct the investigation and proceedings, and the likelihood of Court success. For example, on the question of time, Cabcharge's predatory pricing commenced in May 2004, with the Court making final orders in November 2011 (a time frame which was substantially hastened by the matter settling prior to trial). The Yellow Page scam started around May 2010, with final orders being granted in April 2011 when the ACCC received default judgment. If matters go to a contested hearing, the difference in timing becomes accentuated, as ACL proceedings almost always qualify for the expedited Fast Track List, whereas Part IV cases generally do not.

The ACCC has already achieved in excess of $17m worth of penalties under the ACL (subject to appeals), even though they apply only to conduct occurring since April 2010. Total penalties under Part IV for conduct occurring since April 2010? Zero. Part IV cases just don't get to Court that quickly.

The surprising relativities of ACL penalties as against Part IV penalties are not anyone's "fault". In part they are a product of the courses of conduct issue. Even though maximum

An elephant has been spotted near the Federal Court...

penalties under Part IV are substantially higher than for the ACL, misrepresentation cases in particular tend to give rise to a splintering effect. Hence, Optus' "Think Bigger" campaign was considered to constitute 11 separate courses of conduct, meaning the total maximum penalty available to the Court was approximately the same as for the predatory pricing allegation made against Cabcharge. Part IV conduct, however, tends occur in distinct tranches – there may be multiple refusals to deal or price fixes, but, for a significant range of anti-competitive conduct, each distinct type of behaviour will constitute a single course of conduct.

But one has to query the impact of such penalties on incentives for deterrence *and* enforcement. Imagine you're a company examining its compliance focus: there seems to be a strong chance that misleading conduct will land you in Court quickly and you'll get whacked with a big fine. Furthermore, to the extent you think you might get away with telling lies, your competitors can do precisely the same thing, so there's not likely to be any lasting competitive advantage generated by dodgy conduct. On the other hand, if you have market power and are thinking about engaging in exclusionary conduct, there's a low chance you'll be caught, any enforcement proceedings are likely to take forever and in the meantime you might have changed the very structure of the market to your ongoing benefit.

Consider too the position of the ACCC. Penalties make for lovely headlines. Think of the publicity generated by the *Apple* "4G" iPad proceedings. In June this year, an agreed penalty of $2.25m was ordered for conduct that commenced in *March*! This, when Apple had given an early undertaking to provide refunds to disgruntled customers, so any consumer detriment was extremely confined. There may have been competitor detriment, but again this seems likely to be limited. On the other hand, section 46, merger or cartel investigations are incredibly resource intensive, require considerable expertise and expense to run and are high-risk. ACL conduct must surely look like low hanging fruit.

Conclusions

The universal agreement that the principal objective of penalties is deterrence – particularly general deterrence – seems ironic in light of the above discussion. Judging by maximum penalties, Parliament seems to consider that contraventions of the competition provisions are about ten times more significant than contraventions of the consumer protection laws. Yet systemic incentives give the key participants – both businesses and the regulator – precisely the opposite message. Perhaps policy-makers might consider whether some fine tuning is appropriate. Meanwhile, there's no doubt practitioners need to recalibrate their expectations of likely penalties in consumer protection cases.

About the author

Dr Alexandra Merrett is an experienced lawyer specialising in competition and consumer law. She has a particular interest in market power and the use of economic evidence. Alexandra may be contacted on 03 9523 6236 or mail to: alexandramerrett@bigpond.com

Note: Alexandra was the ACCC's principal in-house lawyer on a number of the cases discussed in this article, including *ACCC v Yellow Page*; *ACCC v TPG*; and *ACCC v Cabcharge*. The views expressed in this issue of *The State of Competition* are of course her own.

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