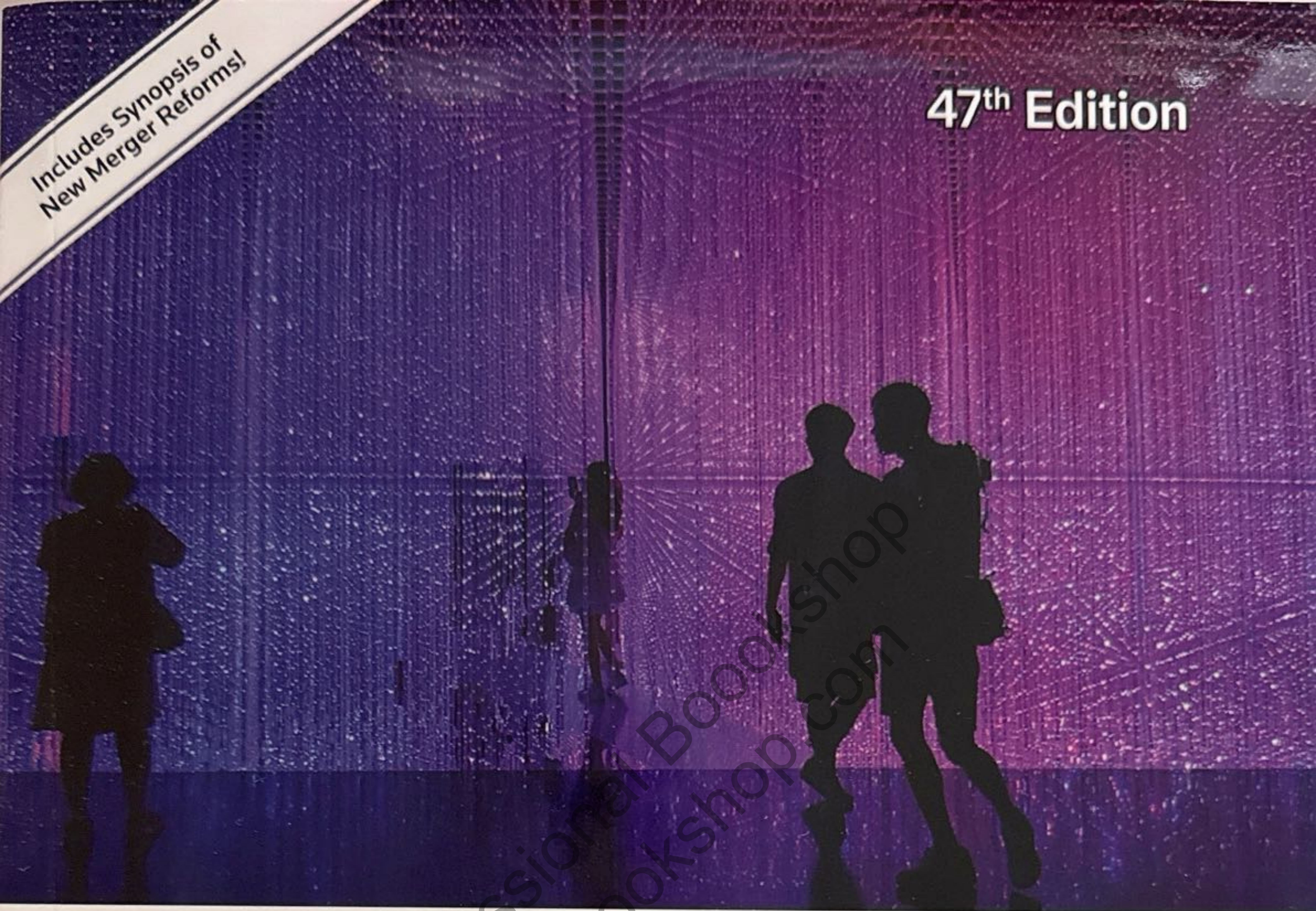


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MILLER'S

Australian Competition and
Consumer Law Annotated

RUSSELL V MILLER

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LEGISLATION

Miller's Australian Competition and Consumer Law Annotated. This edition contains the latest amendments to the Competition and Consumer Act 2010 (CCA), the Competition and Consumer Regulations 2010 (CCR) and related regulations as set out below have been incorporated into this publication.

Competition and Consumer Act 2010 (as amended, s. 11)

Competition and Consumer Regulations 2010 (as amended, s. 1 and 2)

Competition and Consumer (Industry Codes – Franchising) Regulation 2014

Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015

Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019

Competition and Consumer (Industry Codes – Dairy) Regulations 2019

Competition and Consumer (Industry Codes – Unit Pricing) Regulations 2021

Merger Guidelines 2004 (21 November 2004 version, updated November 2017)

Informal Merger Review Process Guidelines (September 2017 version, updated November 2017)

Merger Authorisation Guidelines (24 October 2016 version)

Notes

The Competition and Consumer Industry Code – Part 1 Transitional Arrangements (2017)

Competition and Consumer Industry Codes – Oils Regulation 2017, Competition and Consumer Industry Codes – Hairdressing Regulations 2017 and Competition and Consumer Industry Codes – Hairdressing Regulations 2017 are not reproduced in this edition of the book. These materials are available on the website of the publication.

CURRENCY

The Acts and Regulations have been updated to include all legislative amendments as of 1 January 2024.

LEGISLATIVE AMENDMENTS IN THIS EDITION

Amendments to the Competition and Consumer Act 2010 (CCA), the Competition and Consumer Regulations 2010 (CCR) and related regulations as set out below have been incorporated into this publication.

Competition and Consumer Act 2010

Amending Acts

- Statute Law Amendment (Prescribed Forms and Other Provisions) Act 2023 – Act 74 of 2023
- Public Health (Tobacco and Other Products) Amendment Act 2023 – Act 119 of 2023
- Competition and Consumer Amendment (Part 2B for Consumers and Small Business) Act 2023 – Act 16 of 2023
- Budget (Competition and Consumer) Act 2024 – Act 24 of 2024

SECTION 77 COMMENTARY

Outline [CCA.77.20]
 Standard of proof [CCA.77.40]
 Discovery [CCA.77.60]
 Section 155 notices [CCA.77.80]
 Witness statements [CCA.77.100]
 Time limit [CCA.77.120]

[CCA.77.20] Outline

Section 77 empowers the ACCC to bring proceedings for pecuniary penalties. Section 77(2) states that proceedings may be brought at any time within six years after the contravention occurs. The cause of action is created by s 76 and the time bar contained in s 77 presupposes the existence of that cause of action: *ACCC v PT Garuda Indonesia Ltd* [2016] FCAFC 42; (2016) 330 ALR 230.

Section 77(2) is a limitation provision, not a condition precedent to the ACCC bringing proceedings. The subsection empowers the ACCC to institute "[a] proceeding under subsection (1)" for the recovery of a penalty under s 76. It follows that a proceeding under s 77(1) relates to an identified contravention in s 76. Read in the context of ss 76(1) and 77(2), the term "proceedings" refers to individual claims for individual civil penalties. It does not refer to the overall originating process and pleading. If it were otherwise, it would be impossible for the ACCC to institute a proceeding containing a claim for a civil penalty with any other non-penalty claim because such a claim would fall outside s 77(1) (not being a claim for a penalty). Consequently, a proceeding will not be beyond ACCC power if it happens to include a claim that is outside the 6 year limit: *ACCC v Air New Zealand Ltd* [2014] FCA 1157; (2014) 319 ALR 388 (Perram J) upheld on appeal: *ACCC v PT Garuda Indonesia Ltd* [2016] FCAFC 42; (2016) 330 ALR 230.

See also [CCA.82.180].

[CCA.77.40] Standard of proof

The relevant standard of proof is the civil standard rather than the criminal standard. This means that the ACCC must establish the contravention on the balance of probabilities rather than beyond reasonable doubt. In *The Heating Centre Pty Ltd v Trade Practices Commission* (1986) 65 ALR 429; 9 FCR 153; (1986) ATPR 40-674, Pincus J said (*The Heating Centre Pty Ltd v Trade Practices Commission* (1986) 65 ALR 429; 9 FCR 153; (1986) ATPR 40-674 at FCR 160):

Whatever may be the reason for the distinction, the position is that the Act clearly characterises proceedings under s 76 as civil: see s 78 and contrast with s 79, while equally clearly characterising proceedings for a penalty in respect of a breach of Pt V of the Act as criminal proceedings. In so doing, Parliament must be taken to have intended that the court would apply the respective standards of proof applicable to each category. It is, of course, an attribute of civil proceedings that the necessary facts must be proved on the balance of probabilities, but, of course, "taking into account the gravity of the matters alleged": *Briginshaw v Briginshaw* (1938) 60 CLR 336; 12 ALJ 100; [1938] ALR 334; *Helton v Allen* (1940) 63 CLR 691.

Nevertheless, the court is required to have regard to the gravity of the matters in issue and the size of the civil penalties which can be imposed as a result of a breach. The graver the allegation, the greater the strictness of proof required: *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR 334 at 347, 353, 362 (CLR); see also *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)* (1979) 26 ALR 609; (1979) ATPR 40-126; *Peter Williamson Pty Ltd v Capitol Motors Ltd* (1982) 41 ALR 613; (1982) ATPR 40-291 at 264 (FLR).

[CCA.77.60] Discovery

In the absence of an express statutory provision the court should refuse to order discovery, production of documents or provision of information by a respondent against whom pecuniary penalties are sought: *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat & Livestock Corp* (1979) 42 FLR 204 at 207; *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; (1983) 152 CLR 328; 45 ALR 609; 57 ALJR 236; (1983) ATPR 40-341 at 336 (CLR).

Section 155 notices

The ACCC cannot issue a Section 155 Notice to a person after it has instituted proceedings against that person: *Brambles Holdings Ltd v TPC (No 2)* [1980] FCA 120; (1980) 44 FLR 182; 32 ALR 328; (1980) ATPR 40-179.

[CCA.77.100] Witness statements

Those who seek a penalty must prove the facts establishing the penalty and should not be able to compel the respondent to provide proof against himself: *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503; 52 FCR 96; (1994) ATPR 41-342 at 42,485 (ATPR); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; 118 ALR 392; 68 ALJR 127 at 532 (CLR).

Accordingly, the court will not require individual respondents in cases brought by the ACCC for penalties to file witness statements in advance of giving their evidence: *ACCC v FFE Building Services Pty Ltd* [2003] FCAFC 132; (2003) ATPR 41-938; *ACCC v Amcor Printing Papers Group Ltd* [1999] FCA 672; (1999) 163 ALR 465; (1999) ATPR 41-692.

See also *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat & Livestock Corp* (1979) 42 FLR 204; *ACCC v Pioneer Concrete (Qld) Pty Ltd* (unreported, Federal Court of Australia, Drummond J, QG 143 of 1992, 15 December 1995); *TPC v Tepeda Pty Ltd* (unreported, Federal Court, 11 December 1992); *ACCC v J McPhee & Son (Aust) Pty Ltd* (1997) 148 ALR 601; 77 FCR 217; (1997) ATPR 41-592.

[CCA.77.120] Time limit

Actions for recovery of pecuniary penalties for breach of the restrictive trade practices provisions can be brought within six years of the contravention.

Section 77(2) operates as a limitation provision that applies from the date on which the relevant cause of action created by s 76 is complete: *ACCC v P T Garuda Indonesia Ltd* [2016] FCAFC 42; (2016) 244 FCR 190; 330 ALR 230; (2016) ATPR 42-516 (Dowsett & Edelman JJ) applied in *ACCC v BlueScope Steel Ltd (No 6)* [2023] FCA 1029 (O'Bryan J). As the court said in the latter decision:

the application of s 77(2) ... requires the identification of all the facts that the ACCC was required to prove in order to establish the act or omission to which s 76(1) applies and for which a penalty may be imposed. In *ACCC v BlueScope Steel Ltd (No 6)* [2023] FCA 1029 (O'Bryan J) the court observed, but did not decide, that the 6-year limitation period may be inapplicable in instances involving attempts to contravene, or inducing others to contravene the Act.

77A Indemnification of officers

(1) [Where officers of bodies corporate are not indemnified]

A body corporate (the *first body*), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the first body:

- (a) a civil liability;
 - (b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.
- Penalty: 25 penalty units.

(2) [Outcome of proceedings includes appeal]

For the purposes of subsection (1), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

Definitions

(3) In this section:

civil liability means a liability to pay a pecuniary penalty under section 76 for a contravention of a provision of Part IV or Part V.

Def am Act 83 of 2014, s 3 and Sch 2 item 8, with effect from 18 Jul 2014; Act 103 of 2010, s 3 and Sch 5 item 53, with effect from 1 Jan 2011; Act 44 of 2010, s 3 and Sch 2 item 3

officer has the same meaning as in the *Corporations Act 2001*.
S 77A am Act 83 of 2014; Act 103 of 2010; Act 44 of 2010; insrt Act 131 of 2006, s 3 and Sch 9 item 23

SECTION 77A COMMENTARY

[CCA.77A.20] Outline

This provision prohibits corporations indemnifying their officers and employees against liability for civil penalties and costs incurred by them in contravention of the Act. That does not extend to indemnification under corporate directors and officers insurance policies, unless the court orders include a prohibition on those involved seeking such indemnification: see, for example *ACCC v BlueScope Steel Ltd (No 6)* [2023] FCA 1029.

77B Certain indemnities not authorised and certain documents void

(1) [Unlawful indemnities not authorised]

Section 77A does not authorise anything that would otherwise be unlawful.

(2) [Unlawful identities are void]

Anything that purports to indemnify a person against a liability is void to the extent that it contravenes section 77A.

S 77B insrt Act 131 of 2006, s 3 and Sch 9 item 23

77C Application of section 77A to a person other than a body corporate

If, as a result of the operation of Part 2.4 of the *Criminal Code*, a person other than a body corporate is:

- (a) convicted of an offence (the *relevant offence*) against subsection 77A(1) of this Act; or
- (b) convicted of an offence (the *relevant offence*) against section 11.4 of the *Criminal Code* in relation to an offence referred to in subsection 77A(1) of this Act;

the relevant offence is taken to be punishable on conviction by a fine not exceeding 5 penalty units.

S 77C insrt Act 131 of 2006, s 3 and Sch 9 item 23

78 Criminal proceedings not to be brought for contraventions of Part IV

Criminal proceedings do not lie against a person by reason only that the person:

- (a) has contravened a provision of Part IV (other than section 45AF or 45AG); or

Para (a) am Act 114 of 2017, s 3 and Sch 2 item 38, with effect from 6 Nov 2017; subst Act 103 of 2010, s 3 and Sch 5 item 54, with effect from 1 Jan 2011; am Act 111 of 2009, s 3 and Sch 1 item 37; Act 59 of 2009, s 3 and Sch 1 item 30; Act 31 of 2001, s 3 and Sch 1 item 259; Act 69 of 2000, s 3 and Sch 1 item 6; subst Act 61 of 1999, s 3 and Sch 1 item 8

- (b) has attempted to contravene such a provision;
- (c) has aided, abetted, counselled or procured a person to contravene such a provision;
- (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) has conspired with others to contravene such a provision.

S 78 am Act 114 of 2017; Act 103 of 2010, s 3 and Sch 5 item 54(am Act 184 of 2011), with effect from 1 Jan 2011; Act 111 of 2009, s 3 and Sch 1 item 37; Act 59 of 2009; Act 31 of 2001, s 3 and Sch 1 item 259; Act 69 of 2000, s 3 and Sch 1 item 6; Act 61 of 1999, s 3 and Sch 1 item 8

SECTION 78 COMMENTARY

[CCA.78.20] Outline

Section 78 provides that, with the exception of the cartel provisions, criminal proceedings are not able to be brought for breach of the restrictive trade practices provisions of the Act. Civil penalties are available instead. In relation to the cartel provisions, both criminal and civil penalty provisions apply: see s 79. As far as the consumer protection provisions are concerned, criminal proceedings may be brought for relevant breaches, but the provisions to which criminal proceedings attach are in the ACL: see ACL Pt 4-1.

79 Offences against section 45AF or 45AG

(1) [Contravention of cartel offence provisions]

A person who:

- (aa) attempts to contravene; or
- (a) aids, abets, counsels or procures a person to contravene; or
- (b) induces, or attempts to induce, a person (whether by threats or promises or otherwise) to contravene; or
- (c) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
- (d) conspires with others to contravene;

a cartel offence provision is taken to have contravened that provision and is punishable:

- (e) in a case where:
 - (i) the provision is a cartel offence provision; and
 - (ii) the person is not a body corporate;
 by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both; or
- (f) in any other case—accordingly.

Subs (1) am Act 103 of 2010, s 3 and Sch 5 item 55, with effect from 1 Jan 2011; Act 59 of 2009, s 3 and Sch 1 items 31–33; Act 63 of 2001, s 3 and Sch 1 items 9 and 11; subst Act 31 of 2001, s 3 and Sch 1 item 260; am Act 222 of 1992, s 11; subst Act 17 of 1986, s 47; am Act 81 of 1977, s 47

(1AA) [References to a corporation]

For the purposes of the application of subsection (1) to a case where:

- (a) the provision is a cartel offence provision; and
- (b) the person is a body corporate other than a corporation;

assume that each reference in paragraph 45AF(3)(c) or 45AG(3)(c) to a corporation were read as a reference to a body corporate.

Subs (1AA) am Act 114 of 2017, s 3 and Sch 2 item 38, with effect from 6 Nov 2017; insrt Act 59 of 2009, s 3 and Sch 1 item 34

(1AB) [Application of Criminal Code]

Subsections 11.1(2) to (6) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(aa) in the same way that they apply in relation to the offence of attempt under subsection 11.1(1) of the *Criminal Code*.

Subs (1AB) insrt Act 59 of 2009, s 3 and Sch 1 item 34

(1A) [Application of Criminal Code]

Subsections 11.2(2) to (5) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(a) in the same way that they apply in relation to subsection 11.2(1) of the *Criminal Code*.

Subs (1A) insrt Act 31 of 2001, s 3 and Sch 1 item 260

(1B) [Application of Criminal Code]

Subsections 11.5(2) to (5) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(d) in the same way that they apply in relation to the offence of conspiracy under subsection 11.5(1) of the *Criminal Code*.

Subs (1B) insrt Act 31 of 2001, s 3 and Sch 1 item 260

(2) [Repealed]

Subs (2) rep Act 103 of 2010, s 3 and Sch 5 item 56, with effect from 1 Jan 2011; am Act 31 of 2001, s 3 and Sch 1 item 261; insrt Act 81 of 1977, s 47

(3) [Repealed]

Subs (3) rep Act 103 of 2010, s 3 and Sch 5 item 56, with effect from 1 Jan 2011; am Act 31 of 2001, s 3 and Sch 1 items 262 and 263; insrt Act 81 of 1977, s 47

(4) [Repealed]

Subs (4) rep Act 103 of 2010, s 3 and Sch 5 item 56, with effect from 1 Jan 2011; am Act 63 of 2001, s 3 and Sch 1 item 12; Act 31 of 2001, s 3 and Sch 1 item 264; insrt Act 17 of 1986, s 47

(5) [No application of Criminal Code]

Subsections 11.1(1), 11.2(1), 11.2A(1), 11.4(1) and 11.5(1) of the *Criminal Code* do not apply in relation to an offence against a cartel offence provision.

Subs (5) am Act 114 of 2017, s 3 and Sch 14 item 12, with effect from 28 Oct 2017; Act 103 of 2010, s 3 and Sch 5 item 57, with effect from 1 Jan 2011; Act 4 of 2010, s 3 and Sch 11 item 23; Act 59 of 2009, s 3 and Sch 1 item 35; subst Act 31 of 2001, s 3 and Sch 1 item 265; insrt Act 17 of 1986, s 47

Editor's Note: Act 114 of 2017, s 3 and Sch 14 item 13 provides the amendment made by item 12 applies in relation to contraventions that occur on or after 28 Oct 2017. Sch 14 item 13 commenced on 28 Oct 2017.

(6) [Repealed]

Subs (6) rep Act 103 of 2010, s 3 and Sch 5 item 58, with effect from 1 Jan 2011; am Act 31 of 2001, s 3 and Sch 1 item 266; insrt Act 17 of 1986, s 47

(7) [Definition: cartel offence provision]

In this section:

cartel offence provision means section 45AF or 45AG.

Def am Act 114 of 2017, s 3 and Sch 2 item 38, with effect from 6 Nov 2017

Subs (7) insrt Act 59 of 2009, s 3 and Sch 1 item 36

S 79 am Act 114 of 2017, s 3 and Sch 2 item 38, with effect from 6 Nov 2017; Act 103 of 2010, s 3 and Sch 5 item 55, with effect from 1 Jan 2011; Act 4 of 2010; Act 59 of 2009, s 3 and Sch 1 item 31; Act 63 of 2001; Act 31 of 2001, s 3 and Sch 1 item 260; Act 222 of 1992; Act 17 of 1986; Act 81 of 1977

SECTION 79 COMMENTARY

Summary	[CCA.79.20]
Cartels – who is liable?	[CCA.79.30]
Concept: Penalty units	[CCA.79.40]
Constitutional validity	[CCA.79.60]
Defences	[CCA.79.80]
Principles of construction of a penal section	[CCA.79.100]
Criminal code	[CCA.79.120]
ACCC – DPP responsibilities	[CCA.79.140]
Assessing penalty – matters to be considered	[CCA.79.160]
Assessing penalty for individuals	[CCA.79.180]
Penalties – relevance of legal advice	[CCA.79.200]
Liability and penalties – reliance on others	[CCA.79.220]
Penalties – cooperation	[CCA.79.230]
Parity principle	[CCA.79.240]
Optimal penalty theory	[CCA.79.260]
Totality principle	[CCA.79.280]
Inexperienced employee	[CCA.79.300]
Agreed penalties	[CCA.79.320]
Liability – corporations	[CCA.79.340]
Jurisdiction of courts	[CCA.79.360]
Costs – power to award	[CCA.79.380]
Pleas – procedures	[CCA.79.400]

[CCA.79.30]	Power to dismiss	[CCA.79.420]
	Penalties – technical breaches	[CCA.79.440]
	Relevance of publicity to penalty	[CCA.79.460]
	Compliance programs	[CCA.79.480]
	Imprisonment	[CCA.79.500]
	ACCC Enforcement Guidelines	[CCA.79.510]
	Further reading	[CCA.79.520]

[CCA.79.20] Summary

Section 79 supports ss 45AF and 45AG, which provide that it is an offence to enter or give effect to a contract, arrangement or understanding containing a cartel provision. This section extends those provisions by adding that anyone who was involved in a cartel is also taken to have contravened the Act and is punishable accordingly. The effect is to draw in individuals who aided, abetted, counselled, procured or induced a corporation to contravene the cartel provisions of the Act, conspired with others to do so, or was knowingly concerned in a contravention.

Each of the terms used in this section are well known terms in the general law. Each is explained, by reference to competition or consumer decisions, in the annotations at [CCA.75B.60] – [CCA.75B.90].

For individuals the penalty is imprisonment for up to 10 years and/or a fine of up to 2,000 penalty units.

Although a 6-year time limit applies to civil penalty proceedings in relation to breaches of the cartel provisions (s 77(2)) prosecutions in relation to a contravention of the cartel provisions are not the subject of a time limit.

[CCA.79.30] Cartels – who is liable?

A person commits a cartel offence if:

- they were the principal actor in a contravention or attempted contravention: see [CCA.76.40];
- they aided, abetted, induced or were knowingly concerned in a contravention: see [CCA.75B.60]; [CCA.75B.90];
- they induced, or attempted to induce a contravention: see [CCA.75B.70]; or
- they conspired with others to contravene the Act.

The effect of Criminal Code s 11.2(2) to (5) [see [CCA.79.120]], which s 79(1)(a) applies, is that, for the accused to be guilty of aiding or abetting a cartel prohibition contravention, it must be proved that:

- the accused's conduct in fact aided, abetted, counselled or procured the commission of the offence by another person;
- the offence was committed by another person; and
- the accused intended that their conduct would aid, abet, counsel or procure the commission of any offence of the type committed by the other person: see *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 757 (Wigney J).

However, the prohibition does not extend to aiding, abetting, counselling or procuring a person to attempt to induce another person to contravene a cartel prohibition: *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)* [2020] FCAFC 30.

Where the accused is alleged to have been knowingly concerned in, or party to, a contravention the relevant fault element under the Code in relation to that conduct is intention – the accused intended, by conduct, to participate in the contravention: Criminal Code s 5.6(1). But accessory liability under s 79(1)(c) also involves the fault element of knowledge – knowledge of the essential matters that constitute the contravention. It has been suggested that, therefore, accessory liability under s 79(1)(c) involves twin fault elements of intention and knowledge. It has also been suggested that *the same can most likely be said in respect of accessory liability under s 79(1)(a)*: *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 757; [2021] FCA 1345 (Wigney J).

Section 75B has no application in relation to cartel prohibitions because that section deals only with references to a person “involved in a contravention” and that term is not used in s 79. However, as the operative terms used in that provision, are the same as in s 79, commentary on those terms in relation to s 75B is relevant to their interpretation in s 79.

[CCA.79.40] Concept: Penalty units

With effect from 1 July 2023 a penalty unit is equivalent to \$313. The amount is indexed in line with the consumer price index on 1 July each 3 years: *Crimes Act 1914* s 4AA(3). Between 1 July 2020 and 31 December 2022 the value was \$222 and between 1 January 2023 and 30 June 2023 it was \$275. The relevant value of a penalty unit is determined as at the date of the contravention: *Crimes Act 1914* s 4AA(6). The penalties specified in the Act are maximum penalties for the offences: *Crimes Act 1914* s 4D(1). Relevantly for cartel offences and contravention of some consumer provisions, *Crimes Act 1914* s 4B(2) empowers the court to impose an appropriate fine instead of, or in addition to, a term of imprisonment.

[CCA.79.60] Constitutional validity

Although s 79 imposes liability on persons, as opposed to corporations, it is a valid exercise of Commonwealth legislative power: *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* [1977] HCA 6; (1977) 136 CLR 235; 13 ALR 273; 51 ALJR 362; (1977) ATPR 40-017.

[CCA.79.80] Defences

In proceedings against individuals (but not corporate bodies), if the person can establish that he or she acted honestly and reasonably, and ought fairly to be excused, having regard to all of the circumstances, the court may waive or reduce the penalty on such terms as it thinks fit: s 85.

See also [CCA.79.440].

[CCA.79.100] Principles of construction of a penal section

Section 79 is a penal provision. The proper approach to the construction of a penal section has been the subject of a great deal of consideration. In *R v Adams* [1935] HCA 62; (1935) 53 CLR 563; [1935] ALR 421 at 567-568 (CLR) in a joint judgment, Rich, Dixon, Evatt and McTiernan JJ said:

No doubt, in determining an offence has been created or enlarged, the court must be guided, as in other questions of interpretation, by the fair meaning of the language of the enactment, but when that language is capable of more than one meaning, or is vague or cloudy, so that its denotation is uncertain and no sure conclusion can be reached by a consideration of the provisions and the subject matter of the legislation, then it ought not to be construed as extending to any penal category.

In *Beckwith v The Queen* [1976] HCA 55; (1976) 135 CLR 569; 12 ALR 333; 51 ALJR 247 at 576 (CLR), Gibbs J said:

The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences.

In *Re Craig; Ex parte Zietsch* (1944) 44 SR (NSW) 360 at 365, Jordan CJ, with whose judgment Davidson and Street JJ concurred, said:

In *Tuck and Sons v Priester* (1887) 19 QBD 629 at 645, reference was made to "the well settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it," and it was said (at 638) that "if there are two reasonable constructions we must give the more lenient one". The regulations in question are highly penal, since they subject persons who disobey their prohibitions to the risk of being imprisoned for an unlimited period and to a fine of unlimited amount. In my opinion, to adopt the words of Barton J in *Ingham v Hie Lee* ((1912) 15 CLR 267 at 271), "it is clear that the phrase in question is open to more interpretations than one: and in construing a penal provision we are bound to remember that we ought not to adopt a construction adverse to an accused person unless he is brought clearly within the words of the Act".

The above principles were applied in relation to s 79 in *Thompson v Mastertouch TV Service Pty Ltd (No 3)* (1977) 29 FLR 270; 15 ALR 487; (1977) ATPR 40-031 and presumably apply in relation to offences under former TPA Pt VC (ACL Ch 4).

Criminal code

Section 79(1A) and 79(1B) apply s 11.2(2) – (5) of the Criminal Code to the offences created by s 79(1)(a) and 79(1)(d) respectively. Section 11.2(2) – (5) provide:

- (2) For the person to be guilty:
 - (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
 - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
 - (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
 - (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
 - (a) terminated his or her involvement; and
 - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

Section 79(5) provides that ss 5, 7 and 7A of the *Crimes Act 1914* and s 11.1 of the *Criminal Code Act 1995* (Criminal Code) do not apply in relation to an offence against ACL Ch 4 (formerly TPA Pt VC), however, ss 5, 7 and 7A of the *Crimes Act 1914* were repealed by Act No 24, 2001, Sch 51, item 4. Section 11.1 of the Criminal Code provides as follows:

Criminal Code:

11.1 Attempt

- (1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.
- (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
- (3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note

Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

- (3A) Subsection (3) has effect subject to subsection (6A).
- (4) A person may be found guilty even if:
 - (a) committing the offence attempted is impossible; or
 - (b) the person actually committed the offence attempted.
- (5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.
- (6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.
- (6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.5 (conspiracy to commit an offence) or section 135A (conspiracy to defraud).

[CCA.79.120]

[CCA.79.140] ACCC — DPP responsibilities

The Commonwealth DPP is responsible for prosecuting criminal cases of allegations involving serious cartel conduct. The DPP does so pursuant to the Prosecution Policy of the Commonwealth published on the DPP's website at [immunity policy].

The ACCC is responsible for civil penalty proceedings in relation to allegations involving cartel conduct. The ACCC's policy is on its website at [immunity policy].

As to the ACCC/DPP immunity policy, see [CCA.76.760].

[CCA.79.160] Assessing penalty — matters to be considered

Section 16A of the *Crimes Act 1914* (Cth) provides that, in determining the order to be made in relation to a federal offence (including under the CCA), the court must make an order that is of a severity appropriate to all the circumstances of the offence. The section then sets out 13 matters to be taken into account by the court, including:

- the nature and circumstances of the offence;
- any injury, loss or damage resulting from the offence;
- the personal circumstances of any victim;
- the degree of contrition shown by the defendant, whether through reparations or otherwise;
- whether the defendant has pleaded guilty;
- the degree to which the defendant cooperated in the investigation of the offence;
- the deterrent effect any penalty may have on the defendant;
- the need to ensure the defendant is adequately punished;
- the character, antecedents, cultural background, age, means and physical or mental condition of the defendant; and
- the prospects of rehabilitation.

Prior to the enactment of s 16A, the courts developed the following list of major matters to be taken into account in assessing penalty in trade practices matters:

- the objectives of the legislation and in particular its policy of consumer protection;
- the importance of any untrue statement made;
- the degree of wilfulness or carelessness in the defendant's conduct;
- the extent to which the statements depart from the truth;
- the degree of dissemination of the statements;
- the resulting prejudice to consumers;
- the efforts made to correct the statements; and
- the deterrent effect of a conviction and fines.

See *Gardam v Splendid Enterprises Pty Ltd* (1987) ATPR 40-779; *Dawson v World Travel Headquarters Pty Ltd* (1981) 53 FLR 455; (1981) ATPR 40-187.

In *Eva v Mazda Motors (Sales) Pty Ltd* (1977) ATPR 40-020 at 17,309, Smithers J said:

There can be no doubt that Parliament intended that serious contraventions of the Act should be punished by substantial penalties.

The terms of the Act reveal an intention on the part of the Parliament that the standards of commercial probity which it enjoins should actually be the standards prevailing in trade and commerce. Its purpose is not that such contraventions as may occur should be punished but that contraventions should not occur.

Accordingly, subject to the observation above concerning the risk of an appropriate penalty being oppressive in a particular case, it seems clear that penalties imposed by the court ought to be such as to reflect the degree of culpability involved and to have a deterrent quality. In current circumstances the decline in money values is relevant.

Northrop J said, in *Ducret v Nissan Motor Co (Aust) Pty Ltd* (1979) ATPR 40-111 at 133 (FLR):

[CCA.79.180]

Lax or inefficient management control between departments of a corporation cannot amount to a defence of a breach of s 53(c), nor can it mitigate against the seriousness of the offences committed.

In *TPC v Stahl Chain Saws (Aust) Pty Ltd* [1978] FCA 104; (1978) ATPR 40-091, a case under s 76, Smithers J said (at 17,896):

The penalty should constitute a real punishment proportionate to the deliberation with which the defendant contravened the provisions of the Act. It should be sufficiently high to have a deterrent quality, and it should be kept in mind that the Act operates in a commercial environment where deterrents of those kind to contravene provisions is not likely to be achieved by penalties which are not realistic. It should reflect the will of Parliament that the commercial standards laid down by the Act must be observed, but not be so high as to be oppressive.

In *Hartnell v Sharp Corp of Australia Pty Ltd* (1975) 5 ALR 493 Smithers J said:

To fix a penalty a number of matters have to be considered. First, the importance of untrue statements and the departure from standards; secondly, the degree of wilfulness or carelessness in the making of these statements; thirdly the degree that the statement departs from the truth; fourthly the degree that the statement has been disseminated.

Next, what efforts had been made to correct the situation; finally we have to look at it in the context of the Act and to consider the deterrent effect of any penalty that we must impose.

Although assistance can be gained from considering the facts and penalties in other cases, ultimately the determination of an appropriate penalty involves considering the objective circumstances surrounding the contravention and then having regard to the subjective factors of each defendant: *Trade Practices Commission v Carnavella* (1994) ATPR 41-293.

For a case in which the ignorance of the respondent and his action in recalling the offending goods were taken into account in mitigation, see *Lennox v Megray Pty Ltd* (1986) ATPR 40-640.

See also *Ransley v Spare Parts & Reconditioning Co Pty Ltd* (1975) ATPR 40-055; *Hartnell v Sharp Corp of Australia Pty Ltd* (1975) 5 ALR 493; *Dawson v World Travel Headquarters Pty Ltd* (1981) 53 FLR 455; (1981) ATPR 40-187; *Trade Practices Commission v Australian Autoglass Pty Ltd* (1988) ATPR 40-881; *Trade Practices Commission v Commodore Business Machines Pty Ltd* (1989) ATPR 40-976; *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296; (1985) ATPR 40-503; *Trade Practices Commission v Quality Publications Pty Ltd* (1990) ATPR 40-991; *Sest v Copperart Pty Ltd* (1989) ATPR 40-945; *ACCC v Allans Music Group Pty Ltd* [2002] FCA 1552.

[CCA.79.180] Assessing penalty for individuals

In *ACCC v ABB Transmission & Distribution Ltd [No 2]* [2002] FCA 559; (2002) 190 ALR 169; (2002) ATPR 41-872 at [27]–[28] (ATPR) Finkelstein J set out the following considerations applicable to penalty in relation to individuals who breach the Act: *Giorgianni v The Queen* [1985] HCA 29; (1985) 156 CLR 473; 58 ALR 641; 59 ALJR 461:

Generally the corporate agent is a top executive, who has an unblemished reputation, and in all other respects is a pillar of the community. These people often do not see antitrust violations as law breaking, and certainly not conduct that involves moral turpitude, an attitude that is prevalent in relation to many so-called white collar crimes. There are ... however, important matters of which the sentencing judge should not lose sight.

- The first is the gravity of an antitrust contravention. It is not unusual for antitrust violations to involve far greater sums than those that may be taken by thieves and fraudsters, and the violations can have a far greater impact upon the welfare of society, albeit with less public resentment.
- Secondly, there is a great danger of allowing too great an emphasis to be placed on the "respectability" of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made their choice to do so.

- Thirdly, there are limits on how far one can take the “good citizen” plea in mitigation. If one accepts ... that general deterrence is the most important element of sentencing antitrust offenders, “the character of the offence, rather than that of the offender [is] the central determinant in the sentencing decision”: D Baker and B Reeves, “The Paper Label Sentences: Critiques” (1977) 86 Yale LJ 619, 622.
- The last point, and perhaps the most important, is the need to avoid the erosion of public confidence in the administration of justice that would occur if it is perceived that the law will be applied discriminatorily as regards white collar and blue collar offenders. The court must be vigilant to ensure that there is absolutely no justification for the view, which often finds expression in the popular press, that there is one law for the rich and another for the poor.

The legislature did not intend to impose imprisonment as a punishment for a breach of the Act, other than in relation to cartels. Therefore every effort must be made to avoid doing indirectly that which can not be done directly, particularly in relation to a defendant of limited financial means. Imprisonment for failure to pay a fine should be reserved, if that is possible, for offenders who refuse, or fails for no just cause, to pay fines. To impose a fine of an amount that the offender could never pay is tantamount to imposing a term of imprisonment – and that offends the spirit of the legislation. A sentencing court must make careful investigations before extending this leniency to an offender: *TPC v J & R Enterprises Pty Ltd* (1991) 99 ALR 325; (1991) ATPR 41-133. See also *ACCC v Murray (No 2)* [2003] FCA 47; (2003) ATPR 41-927.

[CCA.79.200] Penalties – relevance of legal advice

The fact that legal advice was obtained by one of the parties is of little consequence. Legal advice is obtained for the benefit of the company and only for the benefit of the company. It is not a discounting factor. If legal advice is wrong, that is a matter between the company and the legal adviser: *Universal Music Australia Pty Ltd v ACCC* [2003] FCAFC 193; (2003) 131 FCR 529; (2003) ATPR 41-947.

[CCA.79.220] Liability and penalties – reliance on others

The fact that the person may have felt constrained to act because of orders from superiors is immaterial when considering questions of guilt. It may, however, in appropriate circumstances, become important when considering questions of penalty but a person cannot avoid the responsibilities that are imposed by the legislation: *TPC v J & R Enterprises Pty Ltd* (1991) 99 ALR 325; (1991) ATPR 41-133; *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661; 61 ALR 307; 59 ALJR 776; (1985) ATPR 40-622 at 666 (CLR).

[CCA.79.230] Penalties – cooperation

See [CCA.76.440].

[CCA.79.240] Parity principle

Other things being equal, persons concerned in the same contravention should receive the same punishment, and where other things are not equal, a due discrimination should be made. Consistency in penalty is an attribute of a rational and fair system of justice. Inconsistency would erode the public confidence in the administration of justice: *ACCC v ABB Transmission & Distribution Ltd (No 2)* [2002] FCA 559; (2002) 190 ALR 169; (2002) ATPR 41-872 at [40] (ATPR); *R v Tiddy* [1969] SASR 575 at 577; *Postiglione v The Queen* [1997] HCA 26; (1997) 189 CLR 295; 145 ALR 408; 71 ALJR 875 at 335 (CLR), 439 (ALR).

However, the parity principle only applies in cases where the respondents’ circumstances are comparable. In *Lowe v The Queen* [1984] HCA 46; (1984) 154 CLR 606; 54 ALR 193; 58 ALJR 414 at 609 (CLR) Gibbs CJ stated:

It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account.

[CCA.79.260] Optimal penalty theory

The optimal penalty theory holds that penalties should be set at a level which fully reflects the cost to society of the illegal activity, for otherwise society would bear the cost of the harm. The optimal penalty, according to the theory, is the sum of the illegal gains from the unlawful conduct, the cost of detecting the offence

multiplying by a factor which represents the probability that the violation will escape detection, and the cost of prosecuting the offence: see Becker, *Crime and Punishment: An Economic Approach* (1968) 76 J Pol Econ 166; Posner, “Optimal Sentences for White-Collar Criminals” (1980) 17 Am Crim L Rev 409.

The optimal penalty theory is not one that has or should be adopted in relation to trade practices breaches in Australia: *ACCC v ABB Transmission & Distribution Ltd [No 2]* [2002] FCA 559; (2002) 190 ALR 169; (2002) ATPR 41-872 at [19]–[25] (ATPR).

[CCA.79.280] Totality principle

Where a penalty is being imposed for a number of offences, it is necessary to ensure that the penalties in aggregate are just and appropriate: *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59; 83 ALR 1; 63 ALJR 117 at 63 (CLR); *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40,169; *ACCC v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36; 75 FCR 238; (1997) ATPR 41-562 at 43,817 (ATPR); *ACCC v ABB Transmission & Distribution Ltd [No 2]* [2002] FCA 559; (2002) 190 ALR 169; (2002) ATPR 41-872 at [39] (ATPR).

[CCA.79.300] Inexperienced employee

In *Henderson v Bowden Ford Pty Ltd* (1979) 5 TPC 272; (1979) ATPR 40-129, an inexperienced employee sold a superseded model motor vehicle as a new vehicle. The court, imposing a penalty of \$1,000, stated (1979) ATPR 40-129 at 18,401):
I do not see the deception as deliberate but rather as the consequence of the lack of control and the carelessness of the defendant in permitting such an inexperienced salesman, who had not completed the defendant’s training sessions, to make sales to the public. I can, and do, take into account the difficulties of an inexperienced employee in completing an order form containing such an ambiguous word as “new” and the problem of adapting that form to fit truthfully diverse circumstances.

[CCA.79.320] Agreed penalties

See [CCA.76.220], [CCA.76.260].

[CCA.79.340] Liability – corporations

The fact that a corporate respondent is insolvent should not affect the court’s assessment and imposition of a penalty, even though the penalty may never be paid: *ACCC v Vales Wine Co Pty Ltd* (1996) ATPR 41-528 at 42,776; *ACCC v GIA Pty Ltd* [2002] FCA 1298; [2003] ASAL 55-093; *ACCC v SIP Australia Pty Ltd* [2003] FCA 336; (2003) ATPR 41-937; *ACCC v Fila Sport Oceania Pty Ltd* [2004] FCA 376; (2004) ATPR 41-983.

The fact that the respondent is part of a larger corporate group will not necessarily be relevant to assessing penalty. This may, however, be a relevant consideration where there is evidence that the parent company had some responsibility for the conduct of the respondent or where it is relevant to the respondent’s capacity to meet a substantial pecuniary penalty: *Schneider Electric (Aust) Pty Ltd v ACCC* [2003] FCAFC 2; (2003) 196 ALR 611; 127 FCR 170; (2003) ATPR 41-957; *ACCC v Fila Sport Oceania Pty Ltd* [2004] FCA 376; (2004) ATPR 41-983.

[CCA.79.360] Jurisdiction of courts

Prosecutions for an offence under s 79 may be brought in the Federal Court of Australia. Other than the jurisdiction of the High Court under s 75 of the Constitution and for cartel offences that jurisdiction is exclusive. Prosecutions for cartel offences may also be brought in a State or Territory Supreme Court and committals for trial on indictment may be brought in State and Territory magistrates courts: s 163(2).

[CCA.79.380] Costs – power to award

Although the Act makes no express reference to the question of costs, under s 43 of the *Federal Court of Australia Act 1976* (Cth) the judge has an absolute and unfettered discretion to award costs in trade practices matters: *Trade Practices Commission v Nicholas Enterprises Pty Ltd* [1978] FCA 51; (1979) ATPR 40-097.

The principles in relation to awarding costs were summarised in *Hughes v WA Cricket Assn (Inc)* [1986] FCA 382; (1986) ATPR 40-748 at 48,136 as follows:

1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order. *Ritter v Godfrey* (1920) 2 KB 47.

2. Where a litigant has succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed. *Forster v Farquhar* [1893] 1 QB 564.
3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, "issue" does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law. *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12.

See also *Inn Leisure Industries Pty Ltd v McCloy Pty Ltd (No 2)* (1991) 28 FCR 172; *ACCC v Boral Ltd (No 2)* [1999] FCA 1641; (2000) ATPR 41-738.

In *Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2)* (1996) 141 ALR 727; 72 FCR 151; (1997) ATPR 41-557, the court ordered costs on an indemnity basis in favour of the ACCC in relation to a challenge by the respondent to an order of the Federal Court referring a consumer protection matter to the New South Wales Supreme Court.

[CCA.79.400] Pleas – procedures

In *TPC v Madad Pty Ltd* [1979] FCA 11; (1979) 40 FLR 453; (1979) ATPR 40-105 at 455 (FLR), Keely J said:

[E]ach party which wishes the court to take into account in determining a penalty any matter of fact should establish that fact by sworn evidence, unless some reason is advanced which satisfies the court that particular facts, which have been expressly agreed upon by the parties, should be accepted by the court. I do not consider that it is satisfactory that counsel for either party should have to decide whilst opposing counsel as addressing the court whether to object to assertions in that address as to the facts. A properly informed decision as to whether those assertions are accurate might well require counsel to have discussions with officers of the plaintiff or the defendant (as the case may be) with officers of one or more companies affected by the alleged contraventions.

Accordingly, I consider it preferable that evidence of facts which either party proposes to rely on should be placed on affidavit and filed and served upon the opposing party in a sufficient time to enable it to check the accuracy of the statements in it.

See also *O'Neill v El Camino Autos Pty Ltd* [1980] FCA 30; (1980) 42 FLR 35; (1980) ATPR 40-158; *Quinn v Given* [1980] FCA 23; (1980) 41 FLR 416; 29 ALR 88.

[CCA.79.420] Power to dismiss

Section 19B of the *Crimes Act 1914* (Cth) entitles the court to dismiss a proven charge where it is appropriate to do so having regard to the character, antecedents, age, health or mental condition of the person, to the trivial nature of the offence, or to extenuating circumstances.

This provision can apply to criminal charges brought under the consumer protection provisions of the Act: *Trade Practices Commission v Sun Alliance Australia Ltd* (1994) ATPR 41-286; *TPC v Parker* (1990) 97 ALR 403; (1990) ATPR 41-055. However, in strict liability cases under ACL Ch 4 (formerly TPA Pt VC), it is unlikely that *Crimes Act 1914* (Cth), s 19B, would be extended to excuse a person who was responsible for a misleading advertisement where that person was in the business of preparing advertisements: *ACCC v Nissan Motor Co (Aust) Pty Ltd* (1998) ATPR 41-660.

The provision applies to corporations as well as individuals; *John C Morish Pty Ltd v Luckman* (1977) 16 SASR 143; 30 FLR 88; *Sheen v Geo Cornish Pty Ltd* (1987) 22 ALR 155.

However, at least one judge has observed that it is unlikely that the section would assist a major corporation in cases involving protection of the public: *Trade Practices Commission v Sun Alliance Australia Ltd* (1994) ATPR 41-286.

[CCA.79.440] Penalties – technical breaches

In *Eva v Southern Motors Box Hill Pty Ltd* [1977] FCA 2; (1977) 15 ALR 428; 30 FLR 213; (1977) ATPR 40-026 at 215 (FLR) Smithers J said:

[I]f the employer has done everything reasonably required of him to avert ... misconduct on the part of ... (his employees) then so far as the employer is concerned his culpability in respect of the event would be technical and not reprehensible. A penalty imposed in such a case would reflect this.

See also *Ransley v Spare Parts & Reconditioning Co Pty Ltd* (1975) ATPR 40-055.

[CCA.79.460] Relevance of publicity to penalty

In assessing appropriate punishment for a crime, the court is required to have in mind not only the nature and extent of the offence itself but also a wide variety of associated circumstances. Such circumstances constitute a context in which to view the penalty. Adverse publicity is often one of the inevitable consequences of wrongdoing and in most cases is without influence in the assessment of the appropriate penalty.

Adverse publicity initiated by the prosecuting authority itself requires special consideration. If the matter is publicised ahead of the trial and widely and in terms likely to induce public censure of the parties concerned and those parties are in day-to-day business relationships with the public then there is obvious danger of injury to the lawful business of the parties which from a practical point of view may have the effect of effectuating a cumulative punishment ... In such a case an element has been injected into the situation which subjects the parties to more than the natural and probable consequences of mere publication of the fact that they are being prosecuted for named offences. In my view this is a case in which, by reason of the press release of the prosecuting authority, the danger of cumulative punishment along these lines is real and should be treated as part of the background against which the penalty should be assessed: *Eva v Southern Motors Box Hill Pty Ltd* [1977] FCA 2; (1977) 15 ALR 428; 30 FLR 213; (1977) ATPR 40-026 at 222 (FLR).

See also *Thompson v JT Fossey Pty Ltd [No 1]* (1978) 20 ALR 496; (1978) ATPR 40-079; *TPC v Cue Design Pty Ltd* (1996) ATPR 41-475.

[CCA.79.480] Compliance programs

See [CCA.76.860].

[CCA.79.500] Imprisonment

The Act provides for imprisonment of offenders in two circumstances – for cartel offences and for non-payment of fines: see ss 45AF, 45AG and 79A.

Imprisonment for cartel offences is dealt with at [CCA.45AF.120].

In relation to non-payment of fines, the term of imprisonment to be imposed is to be determined as an encouragement to pay the fine imposed and not as a punishment for the primary offence: *Wilde v Menville Pty Ltd* [1981] FCA 6; (1981) 50 FLR 380; (1981) ATPR 40-195; see also *Ducret v Colourshot Pty Ltd* (1981) 35 ALR 503; (1981) ATPR 40-196; *Hollis v Clark* (1981) 40 ALR 179.

[CCA.79.510] ACCC Enforcement Guidelines

See [CCA.76.750].

[CCA.79.520] Further reading

See Beaton-Wells & Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) ch 7; Walker-Munro, "The Sound of One Hand Shaking Itself: Inchoate Conduct under the Competition and Consumer Act 2010" (2018) 26 AJCCL 21.

79A Enforcement and recovery of certain fines

(1) [Defaulting on fine]

- (a) a fine has been imposed on a person for:
 - (i) an offence against section 44AAFB, 45AF or 45AG, subsection 56BN(1) or 56BZI(1) or section 154Q or 155; or
 - (ii) an offence against section 149.1 of the *Criminal Code* that relates to Part XIX; and
- (b) the person defaults in payment of the fine;
- (c) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or

(d) make an order, on the application of the Minister, the Commission or (in the case of an offence against section 44A(1)) the AER declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.

Subs (1) am Act 75 of 2024, s 3 and Sch 1 item 192, with effect from 27 Aug 2024; Act 115 of 2019, s 3 and Sch 2 items 7 and 8, with effect from 10 Dec 2019; Act 63 of 2019, s 3 and Sch 1 item 26, with effect from 13 Aug 2019; Act 114 of 2017, s 3 and Sch 2 item 38, with effect from 6 Nov 2017; subst Act 103 of 2010, s 3 and Sch 5 item 59, with effect from 1 Jan 2011; am Act 59 of 2009, s 3 and Sch 1 item 37; Act 131 of 2006, s 3 and Sch 8 items 1 and 2; Act 31 of 2001, s 3 and Sch 1 item 267.

(2) [Security for payment]

Where a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.

(3) [Fine paid by instalments]

Where the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to pay the fine or allow the person to pay the fine by specified instalments, and, in that case:

- (a) the order shall not be executed unless the person fails to pay the fine within that time or fails to pay an instalment at or before the time when it becomes payable, as the case may be; and
- (b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine.

(4) [Where subs (1) order ceases effect]

Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect:

- (a) on payment of the fine; or
- (b) if the fine is not paid—on full compliance with the order.

(5) [Calculation of custodial sentence]

The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 15A of the *Crimes Act 1914* (including an order described in subsection 15A(1AA) of that Act) in respect of a fine shall be calculated at the rate of one day's imprisonment for each \$25 of the amount of the fine that is from time to time unpaid.

Subs (5) am Act 59 of 2009, s 3 and Sch 2 item 1

(6) [Consecutive prison sentences]

Subject to subsection (7), where a person is required to serve periods of imprisonment by virtue of an order or orders under subsection (1) in respect of 2 or more fines, those periods of imprisonment shall be served consecutively.

(7) [3 years maximum prison sentence]

Subject to subsection (8), where:

- (a) a person would, but for this subsection, be required by virtue of an order or orders under subsection (1) in respect of 3 or more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 3 years; and
- (b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature;

the Court shall, by order, declare that the order or orders shall cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

(8) [Maximum benefit]

Where subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the Court shall make an order under that subsection with respect to one only of those periods, being whichever period would give the person the maximum benefit from the application of that subsection.

(9) [Variation or revocation of order]

For the purposes of subsection (8), the Court may vary or revoke an order made under subsection (7).

(10) [Repealed]

Subs (10) rep Act 59 of 2009, s 3 and Sch 2 item 2

(1) [Application of section]
This section applies only in relation to fines imposed for offences committed after the commencement of this section.
s 79A am Act 75 of 2024; Act 115 of 2019; Act 63 of 2019; Act 114 of 2017; Act 103 of 2010; Act 59 of 2009; Act 131 of 2006; Act 31 of 2001; insrt Act 17 of 1986, s 48

79B Preference must be given to compensation for victims

If the Court considers that:

- (a) it is appropriate to order a person (the *defendant*):
 - (i) to pay a pecuniary penalty under section 76; or
 - (ii) to impose a fine under section 45AF or 45AG or subsection 56BN(1) or 56BZI(1);
 in respect of a contravention, or an involvement in a contravention, of this Act, a gas market instrument or the consumer data rules; and

Para (a) am Act 75 of 2024, s 3 and Sch 1 item 192, with effect from 27 Aug 2024; Act 96 of 2022, s 3 and Sch 1 item 15, with effect from 17 Dec 2022; Act 63 of 2019, s 3 and Sch 1 items 27 and 28, with effect from 13 Aug 2019; Act 114 of 2017, s 3 and Sch 2 item 38, with effect from 6 Nov 2017; Act 103 of 2010, s 3 and Sch 5 items 60 and 61, with effect from 1 Jan 2011; Act 44 of 2010, s 3 and Sch 2 item 4; Act 59 of 2009, s 3 and Sch 1 item 38

- (b) it is appropriate to order the defendant to pay compensation to a person who has suffered loss or damage in respect of the contravention or the involvement; and
- (c) the defendant does not have sufficient financial resources to pay both the pecuniary penalty or fine and the compensation;

the Court must give preference to making an order for compensation.
s 79B am Act 75 of 2024; Act 96 of 2022; Act 63 of 2019; Act 114 of 2017; Act 103 of 2010; Act 44 of 2010; Act 59 of 2009; Act 63 of 2001, s 3 and Sch 2 item 1 (am Act 63 of 2002); insrt Act 63 of 2001, s 3 and Sch 1 item 14

SECTION 79B COMMENTARY

[CCA 79B.20] Summary

This section, and its equivalent, ACL s 227, requires the court to give preference over pecuniary penalties to compensation orders for victims of conduct that contravenes the Act. However, the section only applies if the contravening party does not have sufficient financial resources to pay both compensation and the appropriate pecuniary penalty.

See [ACL.227.20].

80 Injunctions

(1) [Grant of injunction]

Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

- (a) a contravention of any of the following provisions:
 - (i) a provision of Part IV;
 - (ii) a provision of Division 2 or 5 of Part IVB;
 - (iia) a provision of Part IVBA;
 - (iiab) subsection 53ZQ(1), (2) or (3), section 53ZV, subsection 53ZW(1) or a civil penalty provision of a gas market instrument;
 - (iia) section 55B;
 - (iib) subsection 56BN(1), 56BO(1) or 56BU(1), section 56BZA, 56BZB or 56BZC, subsection 56BZD(1) or 56BZI(1), section 56BZI or a civil penalty provision of the consumer data rules;
 - (iic) a provision of Division 3 of Part IVE;
 - (iii) section 60C;