

Record \$46 million for Yazaki cartel signals trend towards higher penalties

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In brief

On 16 May 2018, the Full Court of the Federal Court ordered Japanese company Yazaki Corporation (Yazaki) to pay \$46 million for cartel conduct, the highest pecuniary penalty ever imposed under the *Competition and Consumer Act (2010)* (CCA).

The judgment comes at a time when:

- Australian courts are demonstrating an increased willingness to impose higher penalties in competition and consumer law cases, with the Australian Competition and Consumer Commission (ACCC) continuing to strongly advocate for higher penalties.
- The *Treasury Laws Amendment (2018 Measures No. 3) Bill* (Penalties Bill) proposes to significantly increase maximum Australian Consumer Law (ACL) penalties to align them with current penalties for contravention of the competition provisions of the CCA.
- A recent Organisation for Economic Co-operation and Development (OECD) Report has indicated that Australia's average penalties for competition law infringements are significantly lower than in other OECD jurisdictions.

In detail

In December 2012, the ACCC commenced proceedings against Yazaki and its Australian subsidiary, Australian Arrow (AAPL), for cartel conduct. On 24 November 2015, the Federal Court held that Yazaki engaged in cartel conduct in relation to the supply of wire harnesses to Toyota Motor Corporation and its related entities in Australia. On 9 May 2017, Justice Besanko of the Federal Court ordered Yazaki to pay \$9.5 million in penalties. The ACCC appealed the initial penalty, with ACCC's Chairman Rod Sims quoted as stating that the ACCC "considered that the original penalties... were insufficient to deter Yazaki or other like businesses from engaging in cartel conduct in the future". The ACCC had submitted during the initial penalty hearing that a total penalty of \$42-55 million would be appropriate, having regard to the serious nature of Yazaki's conduct and size of its global operations.

Appeal decision

In its decision in *ACCC v Yazaki Corporation [2018] FCAFC 73*, handed down on 16 May 2018, the Full Court of the Federal Court increased the total pecuniary penalties payable by Yazaki from \$9.5 million to \$46 million. The Full Court held that the primary judge had erred in calculating the aggregate maximum penalty, including that:

- The appropriate aggregate maximum penalty was \$87.4 million (comprising five contraventions multiplied by around \$17.5 million, being 10 per cent of relevant annual turnover).
- The primary judge had incorrectly calculated the aggregate maximum penalty as \$20 million (comprising two courses of conduct multiplied by \$10 million), and had also erred in excluding certain turnover of AAPL in concluding that 10 per cent of relevant annual turnover was only around \$6.5 million.

In re-fixing the penalties, the Full Court had regard to a number of findings by the primary judge, noting (among other things) that:

- Yazaki is one of the main suppliers of wire harnesses globally, with considerable market share globally, and in Japan and Australia.
- Yazaki's conduct was "deliberate, sophisticated and devious", involved serious or hard core cartel conduct undertaken in the context of a longstanding overarching cartel agreement, and was engaged in by senior management.
- Yazaki's conduct "bore upon substantial financial transactions between substantial corporations in Australia", and "caused loss or damage and enabled Yazaki or AAPL to secure a not insignificant profit or avoid a not insignificant loss".
- There was no evidence of contrition, or cooperation by Yazaki before the proceeding was commenced, and Yazaki did not have a competition or anti-trust compliance program at the time of the conduct.
- Cartel conduct is generally regarded as "the most pernicious of all breaches of competition law", and is notoriously difficult to identify.
- A pecuniary penalty of \$9.5 million represented "a very small proportion of Yazaki's total turnover of all operations" (which was billions of Australian dollars), and failed to make clear that the "cost of counting a risk of contravention of the [Act] cannot be regarded as an acceptable cost of doing business" (*referencing Singtel Optus v ACCC [2012] 287 ALR 249*).
- The penalty may well have needed to be higher if there had not been such a limited connection with the Australian market, with conduct being limited to a narrow Australian market.

Penalties Bill proposes increase maximum ACL pecuniary penalties

The Penalties Bill proposes to significantly increase the current maximum pecuniary penalties payable under ACL, to align them with the maximum pecuniary penalties for contraventions of the competition provisions of the CCA, as follows:

	Current maximum penalties under ACL	Proposed maximum penalties under ACL
Corporation	\$1.1 million	Greater of \$10 million, 3x value of benefit, or 10 per cent annual turnover (if benefit cannot be determined)
Individual	\$220,000	\$500,000

The proposed increase of penalties in the Penalty Bill is consistent with recommendations from both:

- Consumer Affairs Australia and New Zealand, in its Final Report on its ACL Review, released in April 2017.
- Productivity Commission, in its Final Report on Consumer Law Enforcement and Administration, released in April 2017.

The Penalties Bill was introduced into Parliament on 15 February 2018, and if passed as currently proposed, will take effect from the later of 1 July 2018 or the date that the Penalties Bill receives Royal Assent.

The ACCC has also been actively advocating for higher ACL penalties. Chairman Rod Sims has been quoted as stating that “the ACCC will continue to advocate for higher penalties for breaches of Australia’s consumer laws to ensure that they act as an effective deterrent and are not simply viewed as a cost of doing business”.

Even in the absence of a legislative increase in maximum ACL penalties, last month alone there were a number of significant penalty judgments for contraventions of ACL, including:

- **26 April 2018:** \$10 million penalty for Ford for unconscionable conduct in relation to its dealings with complaints concerning PowerShift transmission cars.
- **26 April 2018:** \$10 million penalty for Telstra for false or misleading representations in relation to its third party billing service, Premium Direct Billing.
- **11 April 2018:** \$4,608,500 penalty for Thermomix for false or misleading representations in relation to its Thermomix kitchen appliances.

OECD report notes significantly lower Australian penalties for anti-competitive behaviour

An OECD Report on Pecuniary Penalties for Competition Law Infringements in Australia, released 26 March 2018, has indicated that Australia’s average penalties for competition law infringements are significantly lower than other OECD jurisdictions. The OECD Report noted that the average pecuniary penalty in Australia for the sample of cartel cases covered by the study was AUD25.4 million, while the average base penalty in comparator jurisdictions (European Union, Germany, Japan, Korea, and the United Kingdom) would have been AUD320.4 million.

In making such a comparison, there is clearly a greater need to appropriately account for local Australian factors, such as the substantially smaller size of the Australian economy relative to many offshore

jurisdictions and that many Australian market participants are much smaller financial concerns than their offshore counterparts.

Nonetheless, the ACCC in its media release on the OECD Report stated that it ‘will rethink its approach to penalties for breaches of the competition law’. ACCC Chairman Rod Sims was quoted as stating that “[t]he ACCC has been concerned that competition cases historically have not been sufficiently high to deter breaches, especially in cases involving large businesses”, and the ACCC “will reflect carefully on the report, including the OECD’s suggestion to consider developing penalty guidelines, similar to the approach in other jurisdictions”.

The takeaway

The Full Federal Court’s record penalty of \$46 million issued to Yazaki for cartel conduct is consistent with a recent trend of increasing penalties for contraventions of Australian competition and consumer law. The ACCC is likely to continue to advocate for higher pecuniary penalties for such contraventions, including having regard to the OECD Report, and the Penalties Bill currently before Parliament, which proposes to significantly increase maximum ACL penalties to align them with current penalties for contravention of the competition provisions of the CCA.

Let’s talk

For a deeper discussion of how these issues might affect your business, please contact:

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