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TREASURY LAWS AMENDMENT (COMPETITION AND CONSUMER  
REFORMS NO. 1): MORE COMPETITION, BETTER PRICES

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# ***Glossary***

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This Explanatory Memorandum uses the following abbreviations and acronyms.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ACL	Australian Consumer Law as set out in Schedule 2 to the <i>Competition and Consumer Act 2010</i>
Bill	Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022: More competition, better prices
CCA	<i>Competition and Consumer Act 2010</i>









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# **Chapter 1: More competition, better prices**

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## Outline of chapter

- 1.1 Schedule [X] to the Bill amends the CCA to:
- increase the maximum penalty for anti-competitive behaviour in breach of certain offence and civil penalty provisions in Part IV, IVBA, XIB and XICA to ensure the price of misconduct is high enough to deter unfair activity, and
  - increase the maximum penalty for breach of certain offence and civil penalty provisions in the ACL to maintain consistency with maximum penalties under the competition provisions of the CCA, and ensure consumers retain a robust level of protection.
- 1.2 All references in this Chapter are to the CCA unless otherwise stated. A reference to the ACL is a reference to Schedule 2 of the CCA.

## Context of amendments

- 1.3 Schedule [X] to the Bill will implement one part of the Government’s Better Competition election commitment to strengthen Australia’s competition laws by increasing penalties for anti-competitive behaviour.
- 1.4 Nearly 30 years ago, the maximum penalty for breach of the competition provisions in Part IV was increased to \$10 million for a body corporate and \$500,000 for an individual. While the maximum penalty for a body corporate

has since been updated to allow the court to impose penalties based on the benefit obtained or a percentage of corporate turnover, the base penalty has remained the same. As a result, a breach of competition law may be seen as an acceptable cost of doing business, particularly for large businesses.

- 1.5 In 2018, the Organisation for Economic Co-operation and Development (OECD) report *Pecuniary Penalties for Competition Law Infringements in Australia* also found that the average and maximum competition penalties in Australia are, in practice, substantially lower than those in comparable international jurisdictions.
- 1.6 The amendments will increase the severity of Australia's penalty regime and facilitate the imposition of penalties that are more comparable with international jurisdictions. This will ensure the price of misconduct is high enough to deter unfair activity and improve competition in Australia for the benefit of consumers and small businesses.
- 1.7 Maximum penalties available in consumer cases must be also high enough to achieve deterrence and ensure that consumers retain a robust level of protection against egregious conduct.
- 1.8 Penalties under the ACL were last increased in 2018 to align with competition penalties. The amendments will maintain this consistency by increasing maximum penalties in line with those proposed for the competition provisions of the CCA. This will sufficiently deter breaches of consumer law in circumstances where there is significant financial benefit to be had.
- 1.9 By strengthening penalties, Australia will be promoting competition and better corporate behaviour, while ensuring consumers retain a robust level of protection.

## Summary of new law

- 1.10 Schedule [X] to the Bill will strengthen the penalty regime under the CCA to deter non-compliant conduct and reduce the financial benefits and incentives for businesses to engage in conduct in breach of competition and consumer law.
- 1.11 The maximum financial penalty for breach of certain offences and civil penalty provisions in Parts IV, IVBA, XIB and XICA and the ACL by a body corporate, or a person that is not a body corporate, will increase.
- 1.12 The new maximum penalty for breach of a relevant offence or civil penalty provision under Parts IV, IVBA, and XICA and the ACL by a body corporate will be the greatest of:
  - \$50 million;

- if the court can determine the value of the benefit obtained—three times the value of that benefit; and
  - if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the offence, act or omission.
- 1.13 The new maximum penalty for breach of a corresponding civil penalty provision under Parts IV, IVBA and XICA of the CCA, and offence or civil penalty provision in the ACL by a person that is not a body corporate will increase from \$500,000 to \$2.5 million.
- 1.14 The new maximum penalty for contravention of the competition rule under Part XIB by a body corporate will be the greatest of:
- where the contravention continued for more than 21 days—the sum of \$71 million and \$3 million for each day in excess of 21 that the contravention continued;
  - otherwise—the sum of \$50 million and \$1 million for each day that the contravention continued; or
  - 30% of the body corporate’s adjusted turnover during the breach turnover period for the contravention.
- 1.15 The new maximum penalty for contravention of the competition rule in Part XIB by a person that is not a body corporate will increase from \$500,000 to \$2.5 million.
- 1.16 The amended penalty regime will apply in relation to acts, omissions or offences that occur on or after the commencement of Schedule [X].
- 1.17 The amendments primarily increase penalties for anti-competitive conduct and breach of consumer law, so the maximum penalties for contraventions which relate to, for example, the Consumer Data Right or industry codes will not change. Similarly, penalties for secondary boycott provisions will remain at their current maximum level, except for secondary boycotts that cause substantial lessening of competition.

## Detailed explanation of new law

- 1.18 Schedule [X] to the Bill increases the maximum financial penalties for the breach of certain offences and civil penalty provisions in Parts IV, IVBA, XIB, XICA and the ACL by a body corporate, and a person that is not a body corporate.
- 1.19 The new penalty regime will deter non-compliant conduct and reduce the financial benefits and incentives for businesses to engage in conduct in breach of competition and consumer law.

- 1.20 The new financial penalties are in dollar amounts rather than penalty units, consistent with current approach in the CCA. This is intended to achieve a uniform maximum across jurisdictions implementing relevant parts of the CCA as nationally uniform legislation, which may have differences in the value of a penalty unit.

## Parts IV, IVBA AND XICA

### Civil penalties in Parts IV, IVBA and XICA

- 1.21 Civil penalties apply for a range of anti-competitive behaviour in breach of Parts IV, IVBA and XICA by a body corporate and a person that is not a body corporate.
- 1.22 The amendments impose new maximum pecuniary penalties for breach of certain civil penalty provisions in Part IV, IVBA and XICA by a body corporate and a person other than a body corporate. Civil penalty provisions where the maximum penalty has been increased are listed in Table 1.1. If the civil penalty does not appear in the table, the penalty has not changed.

#### *Body corporate*

- 1.23 The current maximum pecuniary penalty for a body corporate that breaches a civil penalty provision in Part IV, IVBA and XICA, listed in Table 1.1, is broadly the greatest of the following three limbs:
- \$10 million;
  - if the court can determine the value of the benefit obtained—3 times the value of that benefit, and
  - if the court cannot determine the value of the benefit obtained—10% of the body corporate’s annual turnover in the 12 months prior to the act or omission.
- 1.24 The new maximum pecuniary penalty for these provisions will be the greatest of:
- \$50 million;
  - if the court can determine the value of the benefit obtained—three times the value of that benefit; and
  - if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the act or omission.
- 1.25 This means that the first limb will increase five-fold. The second limb will remain unchanged. The third limb will increase from 10% of annual turnover in the 12 months prior to the breach, to 30% of the adjusted turnover for the period of the breach.

- 1.26 Additional detail on calculating the new maximum penalty for a body corporate and the meaning of ‘adjusted turnover’ and ‘breach turnover period’ are set out below.

*[Schedule [X], items 23, subsections 76(1A) and (1B) of the CCA]*

*Person not a body corporate*

- 1.27 The new maximum penalty for breach of a civil penalty provision in Parts IV, IVBA and XICA (see Table 1.1) by a person that is not a body corporate will increase from \$500,000 to \$2.5 million. As the base penalty for a body corporate is increasing five-fold, the penalty for a person that is not a body corporate will also increase five-fold, from \$500,000 to \$2.5 million.
- 1.28 A person that is not a body corporate may be subject to a pecuniary penalty for breach of a provision of Table 1.1 through the extended liability regime in subsection 76(1). This includes circumstances where a person has aided or abetted a body corporate to contravene a relevant provision.
- 1.29 Pecuniary penalties may not be ordered under the extended liability regime against certain individuals in relation to contraventions of sections 153E, 153F, 153G or 153H in certain circumstances.

*[Schedule [X], items 23, subsections 76(1A) and (1B) of the CCA]*

**Table 1.1 Civil penalty provisions in Parts IV, IVBA and XICA**

<b>Provision of CCA</b>	<b>Conduct</b>
<b>Part IV (and Scheduled version of Part IV)</b>	
45AJ	Making a contract etc. containing a cartel provision
45AK	Giving effect to a cartel provision
45	Contracts, arrangements or understandings that restrict dealings or affect competition
45DA	Secondary boycotts for the purpose of causing substantial lessening of competition
46	Misuse of market power
46A	Misuse of market power—corporation with substantial degree of power in trans-Tasman market
47	Exclusive dealing
48	Resale price maintenance
49	Dual listed company arrangements that affect competition

50	Prohibition of acquisitions that would result in a substantial lessening of competition
50A	Acquisitions that occur outside Australia
<b>Part IVBA</b>	
52ZC	Digital service to be supplied without differentiating in relation to registered news businesses
52ZH	Obligation to negotiate in good faith
52ZS	Obligation to participate in arbitration in good faith
52ZZE	Bargaining parties must comply with the determination
<b>Part XICA</b>	
153E	Prohibited conduct – retail pricing
153F	Prohibited conduct—electricity financial contract liquidity
153G	Prohibited conduct—electricity spot market (basic case)
153H	Prohibited conduct—electricity spot market (aggravated case)

## **Offences in Part IV**

- 1.30 The application of criminal cartel offences to corporations applies by way of two offences in Part IV (sections 45AF and 45AG) that prohibit a corporation from making, or giving effect to, a provision of a contract, arrangement or understanding with a competitor that fixes prices, restricts outputs, allocates markets between competitors, or rigs a bidding process.
- 1.31 The maximum fine payable on conviction of a criminal offence against section 45AF or 45AG is currently the greater of the following three limbs:
- \$10 million;
  - if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence—3 times that total value; and
  - if the court cannot determine the total value of those benefits—10% of the corporation’s annual turnover in the 12 month period ending at the end of the month in which the corporation committed, or began committing, the offence.
- 1.32 The new maximum fine payable on conviction of a criminal offence will be the greatest of:
- \$50 million;

- if the court can determine the total value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence—three times the value of that benefit; and
- if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the offence.

1.33 This means that the first limb will increase five-fold. The second limb will remain unchanged. The third limb will increase from 10% of annual turnover in the 12 months prior to the breach, to 30% of the adjusted turnover for the period of the breach.

1.34 Additional detail on calculating the new maximum penalty for a body corporate and the meaning of ‘adjusted turnover’ and ‘breach turnover period’ are set out below.

1.35 The new maximum penalty reflects the seriousness of the conduct covered by the offences, while more adequately reflecting the nature and potential consequences of cartel conduct. Consistent with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the increased maximum penalty will be adequate to deter and punish the worst case offence.

*[Schedule [X], items 4, 5, 6 and 7, paragraphs 45AF(3)(a) and (c), 45AG(3)(a) and (c) of the CCA]*

Parallel amendments will be made to the Scheduled version of Part IV in Schedule 1 of the CCA to mirror the amendments to Part IV.

*[Schedule [X], items 10, 11, 12 and 13, paragraphs 45AF(3)(a) and (c), 45AG(3)(a) and (c) of Schedule 1 of the CCA]*

## Part XIB

### Civil penalties in Part XIB

1.36 Part XIB contains specific prohibitions against anticompetitive conduct in the telecommunications industry. The telecommunications market has a number of unique characteristics that provides increased risk of anti-competitive conduct compared to other industries.

1.37 Section 151AK sets out a rule for the purposes of Part XIB, known as ‘the competition rule’. This rule is that a carrier or carriage service provider must not engage in anti-competitive conduct. Contravention of the competition rule is subject to a civil penalty in accordance with subsection 151BX(1).

1.38 The existing penalties for contravention of the competition rule may not provide an effective deterrent because it is open to larger providers in the telecommunications industry to weigh the potential benefit in the market of

breaching the competition rule against the possible size of the financial penalty, and to knowingly take action in breach of the competition rule.

- 1.39 To more strongly deter anti-competitive conduct, the amendments impose larger maximum penalties for breach of the competition rule.

*Body corporate*

- 1.40 Paragraph 151BX(3)(a) currently sets the maximum pecuniary penalty for contravention of the competition rule by a body corporate. The penalty must not exceed:

- in circumstance where the contravention continued for more than 21 days—the sum of \$31 million and \$3 million for each day in excess of 21 that the contravention continued; or
- otherwise—the sum of \$10 million and \$1 million for each day that the contravention continued.

- 1.41 The new maximum pecuniary penalty for contravention of the competition rule will be the greatest of:

- in circumstance where the contravention continued for more than 21 days—the sum of \$71 million and \$3 million for each day in excess of 21 that the contravention continued;
- otherwise—the sum of \$50 million and \$1 million for each day that the contravention continued; or
- 30% of the body corporate’s adjusted turnover during the breach turnover period for the contravention.

- 1.42 This is broadly consistent with proposed increase in maximum pecuniary penalty for contraventions of Part IV by a body corporate. The base penalty of \$10 million will similarly increase to \$50 million. However, the daily penalty rates of \$1 million per day for the first 21 days and \$3 million per day for each day in excess of 21 days will be retained, to continue incentivising the expeditious rectification of conduct that contravenes the competition rule.

- 1.43 The new ability to calculate the maximum penalty based on 30% of a body corporate’s adjusted turnover during the breach turnover period for the contravention aligns with the new penalty regime proposed for Parts IV, IVBA and XICA and the ACL. However, in the Part XIB context it will not be limited to circumstances where the court cannot determine the value of the benefit obtained.

- 1.44 Additional detail on the meaning of adjusted turnover and breach turnover period is set out below.

***[Schedule [X], items 26, 27, paragraph 151BX(3)(a), subparagraph 151BX(3)(a)(i) and (ii) of the CCA]***



### *Person not a body corporate*

- 1.45 Subsection 151BX(4) sets the maximum civil pecuniary penalty for contravention of the competition rule by a person that is not a body corporate as \$500,000. As the base penalty for a body corporate is increasing five-fold, the penalty for a person that is not a body corporate will also increase five-fold, from \$500,000 to \$2,500,000.

*[Schedule [X], item 28, paragraph 151BX(4)(b) of the CCA]*

## **Australian Consumer Law**

- 1.46 The ACL provides consumers with rights and protections. Breaches of the ACL can significantly affect consumer wellbeing, competition in the market and economic efficiency.
- 1.47 The new maximum penalties align with those proposed for anti-competitive behaviour in the CCA discussed above. The increase is necessary to ensure the price of misconduct is high enough to provide a strong deterrent against breaches of consumer law.

## **Civil penalties in the ACL**

- 1.48 Under the ACL, civil penalties may be imposed where a person engages in certain conduct including unconscionable conduct, making false or misleading representations, and supplying consumer goods or certain services that do not comply with safety standards or which are banned.
- 1.49 The amendments impose new maximum civil pecuniary penalties for breach of a civil penalty provision in the ACL by a body corporate and a person other than a body corporate. Civil penalty provisions where the maximum penalty has been increased are listed in Table 1.2. If the civil penalty does not appear in the table, the penalty has not changed.

### *Body Corporate*

- 1.50 The current maximum pecuniary penalty for a body corporate that breaches a civil penalty provision in the ACL listed in Table 1.2, is the greatest of the following three limbs:
- \$10 million;
  - if the court can determine the value of the benefit obtained—3 times the value of that benefit, and
  - if the court cannot determine the value of the benefit obtained—10% of the body corporate’s annual turnover in the 12 months prior to the act or omission.

- 1.51 The new maximum pecuniary penalty for these provisions will be the greatest of:
- \$50 million;
  - if the court can determine the value of the benefit obtained—three times the value of that benefit; and
  - if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the act or omission.
- 1.52 The first limb of the maximum penalty will increase five-fold. The second limb will remain unchanged. The third limb will increase from 10% of annual turnover in the 12 months prior to the breach, to 30% of the adjusted turnover for the period of the breach.
- 1.53 Additional detail on calculating the new maximum penalty for a body corporate and the meaning of adjusted turnover and breach turnover period are set out below.

***[Schedule [X], items 101, 102 and 103, subsection 224(3) and paragraphs 224(3A)(a) and (c) of the ACL]***

*Person not a body corporate*

- 1.54 The new maximum penalty for breach of a civil penalty provision in the ACL listed in Table 1.2 by a person that is not a body corporate will increase to \$2,500,000. As the penalty for a body corporate is increasing five-fold, the penalty for a person that is not a body corporate will also increase five-fold, from \$500,000 to \$2,500,000.

***[Schedule [X], item 101, subsection 224(3) of the ACL]***

**Table 1.2 Civil penalty provisions in ACL**

<b>Provision of ACL</b>	<b>Conduct</b>
20	Unconscionable conduct
21	Unconscionable conduct in connection with goods and services
29	False or misleading representations about goods or services
30	False or misleading representations about sale of land
31	Misleading conduct relating to employment
32	Offering rebates, gifts, prizes or other free items with intention of not providing it

33	Misleading conduct as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods
34	Misleading conduct as to the nature, characteristics, suitability for purpose or quantity of services
35	Bait advertising
36	Wrongly accepting payment
37	Misleading representations about certain business activities
39	Unsolicited credit or debit cards
40	Assertion of rights to payment for unsolicited goods or services
43	Assertion of rights to payment for unauthorised entries or advertisements
44	Pyramid schemes
48	Single price to be specified in certain circumstances
49	Referral selling
50	Harassment and coercion
106	Supplying consumer goods that do not comply with safety standards
107	Supplying product related services that do not comply with safety standards
118	Supplying consumer goods covered by a ban
119	Supplying product related services covered by a ban
127	Compliance with recall notices
136	Supplying goods that do not comply with information standards
137	Supplying services that do not comply with information standards

## Offences in the ACL

- 1.55 Criminal penalties may be imposed for certain offences committed under the ACL, including where a person has made false representations about goods or services, sought payment for unsolicited goods and services or supplied consumer goods covered by a ban.
- 1.56 The amendments impose new maximum penalties for offences committed under the ACL by a body corporate and a person that is not a body corporate. Offences where the maximum penalty has been increased are listed in Table 1.3. If the offence does not appear in the table, the penalty for the offence has not changed.
- 1.57 The new maximum penalty reflects the seriousness of the conduct covered by the offences, while more adequately reflecting the potential consequences of a breach of the ACL, including possible harm to consumers. Consistent with the principles set out in the *Guide to Framing Commonwealth Offences*,

*Infringement Notices and Enforcement Powers*, the increased maximum penalty will be adequate to deter and punish the worst case offence.

### *Body corporate*

- 1.58 The current maximum fine for a body corporate that commits an offence under the ACL listed in Table 1.3, is the greatest of the following three limbs:
- \$10 million;
  - if the court can determine the value of the benefit obtained—3 times the value of that benefit, and
  - if the court cannot determine the value of the benefit obtained—10% of the body corporate’s annual turnover in the 12 months prior to the offence.
- 1.59 The new maximum fine payable on conviction of a criminal offence will be the greatest of:
- \$50 million;
  - if the court can determine the value of the benefit obtained—three times the value of that benefit; and
  - if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the offence.
- 1.60 This means that the first limb will increase five-fold. The second limb will remain unchanged. The third limb will increase from 10% of annual turnover in the 12 months prior to the breach, to 30% of the adjusted turnover for the period of the breach.
- 1.61 Additional detail on calculating the new maximum penalty for a body corporate and the meaning of ‘adjusted turnover’ and ‘breach turnover period’ are set out below.

*[Schedule [X], items 32, 33, 35, 36, 38, 39, 41, 42, 44, 45, 47, 48, 50, 51, 53, 54, 56, 57, 59, 60, 62, 63, 65, 66, 68, 69, 71, 72, 74, 75, 77, 78, 80, 81, 83, 84, 86, 87, 89, 90, 92, 93, 95, 96, 98, 99, paragraphs 151(5)(a) and (c), 152(2A)(a) and (c), 153(3)(a) and (c), 154(5A)(a) and (c), 155(3)(a) and (c), 156(3)(a) and (c), 157(3A)(a) and (c), 158(10A)(a) and (c), 159(4)(a) and (c), 161(7)(a) and (c), 162(6)(a) and (c), 163(5A)(a) and (c), 164(4)(a) and (c), 166(8)(a) and (c), 167(3)(a) and (c), 168(2A)(a) and (c), 194(8)(a) and (c), 195(4)(a) and (c), 197(8)(a) and (c), 198(4)(a) and (c), 199(4)(a) and (c), 203(9)(a) and (c), 204(4)(a) and (c) of the ACL]*

**Person not a body corporate**

- 1.62 The maximum fine for an offence against a provision of the ACL set out in Table 1.3 by a person who is not a body corporate, will increase from \$500,000 to \$2,500,000.
- 1.63 This aligns with the increase in maximum penalty for an offence against a provision of the ACL by a body corporate. As the maximum penalty for a body corporate will increase five-fold, the penalty for a person that is not a body corporate will also increase five-fold, from \$500,000 to \$2,500,000. This is a proportionate increase for a person that is not a body corporate consistent with subsection 4B(3) of the *Crimes Act 1914*.

*[Schedule [X], items 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 82, 85, 88, 91, 94, 97, 100, subsections 151(6), 152(2B), 153(4), 154(5B), 155(4), 156(4), 157(3B), 158(10B), 159(5), 161(8), 162(7), 163(5B), 164(5), 166(9), 167(4), 168(2B), 194(9), 195(5), 197(9), 198(5), 199(5), 203(10), 204(5) of the ACL]*

**Table 1.3 Offences in ACL**

<b>Provision of ACL</b>	<b>Conduct</b>
151	False or misleading representations about goods or services
152	False or misleading representations about sale of land
153	Misleading conduct relating to employment
154	Offering rebates, gifts, prizes or other free items with intention of not providing it
155	Misleading conduct as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods
156	Misleading conduct as to the nature, characteristics, suitability for purpose or quantity of services
157	Bait advertising
158	Wrongly accepting payment
159	Misleading representations about certain business activities
161	Unsolicited credit or debit cards
162	Assertion of rights to payment for unsolicited goods or services
163	Assertion of rights to payment for unauthorised entries or advertisements
164	Pyramid schemes
166	Single price to be specified in certain circumstances

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167	Referral selling
168	Harassment and coercion
194	Supplying consumer goods that do not comply with safety standards
195	Supplying product related services that do not comply with safety standards
197	Supplying consumer goods covered by a ban
198	Supplying product related services covered by a ban
199	Compliance with recall notices
203	Supplying goods that do not comply with information standards
204	Supplying services that do not comply with information standards

## Calculating the maximum penalty for a body corporate

- 1.64 The new maximum fine payable on conviction of a relevant criminal offence under Part IV or the ACL by a body corporate, and maximum pecuniary penalty for breach of a relevant civil penalty provision under Part IV, IVBA, XIB, XICA or the ACL by a body corporate and will broadly be the greatest of:
- \$50 million;
  - if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly—three times the value of that benefit; and
  - if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the offence, contravention, act or omission.
- 1.65 The base penalty under the first limb will increase five-fold, from \$10 million to \$50 million.
- 1.66 The second limb will not change. If the court can determine the value of the benefit obtained due to the offence, act or omission, the maximum penalty available will be \$50 million under the first limb, or 3 times the value of the benefit under the second limb.
- 1.67 If the court cannot determine the total value of the benefit that was obtained from the offence, act or omission, the maximum penalty will be \$50 million under the first limb, or 30% of the body corporate’s adjusted turnover during the breach turnover period for the act or omission under the third limb.
- 1.68 The percentage of turnover which may be used to calculate the maximum penalty under the third limb (the adjusted turnover) will increase from 10% to

30%. This is intended to ensure a penalty cannot be considered an acceptable cost of doing business.

- 1.69 The period of time over which the penalty may be calculated (the breach turnover period) will also increase to cover the period of time during which the breach occurred, with 12 months being the minimum. The 12 months minimum will ensure that maximum penalties are appropriate for breaches that are instantaneous rather than continuous.
- 1.70 The amendments to the first and third limb of the penalty for a body corporate will increase the severity Australia's penalty regime. In the competition context, it will facilitate the imposition of penalties that are more comparable with international jurisdictions and ensure the price of misconduct is high enough to deter unfair activity and anti-competitive behaviour in breach of Parts IV, IVBA, XIB, XICA. In the consumer context, it will provide a strong deterrent against breaches of the ACL, and ensure consumers retain a robust level of protection against egregious conduct.

### **Adjusted turnover**

- 1.71 The current definition of 'annual turnover' in the CCA and the ACL will be replaced with the definition of 'adjusted turnover' as the penalty under the third limb of the formula will be calculated using a body corporate's turnover during the period of the breach, which may not be an annual period.
- 1.72 Adjusted turnover will similarly mean the sum of the value of all the supplies made by the body corporate or related bodies corporate in connection with Australia's indirect tax zone. There are exceptions such as supplies made between related bodies corporate, supplies that are not made in connection with the body corporate's business, supplies that are input taxed, or supplies that are not for consideration and are not taxable. The exception for supplies that are not connected with Australia under the definition of annual turnover has been updated to cover supplies that are not connected with the indirect tax zone, for consistency with the *A New Tax System (Goods and Services Tax) Act 1999*.
- 1.73 The definition of adjusted turnover will rely on terms and definitions used in the *A New Tax System (Goods and Services Tax) Act 1999* similarly to the former definition of annual turnover.

*[Schedule [X], items 1 and 29, subsections 4(1) of the CCA and subsection 2(1) of the ACL]*

### **Breach turnover period**

- 1.74 The concept of a 'breach turnover period' will be defined for the purposes of the CCA and the ACL.
- 1.75 The breach turnover period provides the formula for determining the period of time over which the adjusted turnover may be valued.

- 1.76 For an offence provision, the breach turnover period will generally begin at the start of the month in which a body corporate committed, or began committing, an offence, and end at the end of the month in which the body corporate ceased committing the offence or was charged with the offence. However, the minimum breach turnover period will be 12 months, ending at the end of the month in which the body corporate ceased committing the offence or was charged with the offence.
- 1.77 For a civil penalty provision, the breach turnover period will generally begin at the start of the month in which the contravention, act or omission occurred, or began occurring, and end at the end of the month in which the body corporate ceased the contravention, act or omission. However, the minimum breach turnover period will be 12 months, ending at the end of the month in which the body corporate ceased the contravention, act or omission.

*[Schedule [X], items 1 and 31, subsections 4(1) of the CCA and subsection 2(1) of the ACL]*

**Example 1.1 Calculation of new maximum corporate penalty**

An ACL regulator takes successful action against AB Co., a fictitious corporation, for misleading conduct in relation to the nature of goods over a period of 24 months, which generates a \$25 million benefit. AB Co.'s adjusted turnover is valued at \$1 billion for the 24 month period ending in the month when AB Co. was charged.

The court determines that three times the value of the direct or indirect benefit to AB Co. (and any related bodies corporate) attributable to the act or omission is \$75 million.

As the benefit can be determined, the maximum penalty that the court could impose is the higher of:

- \$50 million; or
- three times the value of the direct or indirect benefit to AB Co (and any related bodies corporate) attributable to the act or omission, which in this instance is \$75 million.

Therefore, the maximum penalty is \$75 million.

However, if the benefit could not be determined, the maximum penalty that the court could impose would be the higher of:

- \$50 million; or
- 30 per cent of adjusted turnover of AB Co. during the 24 month period ending at the end of the month in which AB Co was charged, which in this instance is \$1 billion. That is, \$300 million.



Therefore, if the benefit could not be determined the maximum penalty would be \$300 million.

### **Example 1.2 Calculating the breach turnover period**

If Marwah Pty Ltd, a fictitious corporation, began to commit an offence for false and misleading representations about services on 1 April 2023, and ceased committing the offence on 1 April 2026, the breach turnover period would be from 1 April 2023 to 30 April 2026. The maximum penalty would be 30% of Marwah Pty Ltd's adjusted turnover from 1 April 2023 to 30 April 2026.

If Marwah Pty Ltd instead ceased committing the offence on 1 October 2023, the breach turnover period would be 12 months ending on 31 October 2023. The maximum penalty would be 30% of Marwah Pty Ltd's adjusted turnover from 1 November 2022 to 31 October 2023.

### **Example 1.3 Calculating the breach turnover period for an instantaneous breach**

Susa Ltd, a fictitious corporation, made a contract that contained a cartel provision on 1 April 2023, which constitutes an offence against subsection 45AF(1).

While the offence is instantaneous, the breach turnover period would be calculated as 12 months ending at the end of the month in which the offence ceased. That is, 12 months ending on 30 April 2023.

## **Consequential amendments**

1.78 Schedule [X] to the Bill will make a number of technical amendments to the CCA to implement the new maximum penalty regime. This includes amendments to:

- repeal the definition of annual turnover and redundant provisions;
- update references;
- reformat subsections 76(1A) to (1B) into table format, and
- reformat the table to subsection 224(3) of the ACL for consistency with the new table to subsection 76(1A).

*[Schedule [X] items 2, 3, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 24, 25, 30 and 101, sections 45AB, 45AE and 57GA, subsections 51AE(2B), 56BN(4), 56CC(3), 56EV(3), 76(1A), 76(1B), 76(4) and 76(5) to (6), paragraphs*

***56BN(3)(c), 56CC(2)(c) and 56EV(2)(c) and subparagraph 51AE(2A)(a)(iii) of the CCA, sections 45AB and 45AE of Schedule 1 of the CCA and subsections 2(1) and 224(3) of the ACL***

## Commencement, application, and transitional provisions

- 1.79 The amendments in Schedule [X] to the Bill will commence the day after Royal Assent.
- 1.80 The amendments only apply in relation to offences committed, or contraventions, acts or omissions that occur on or after the commencement of Schedule [X].

***[Schedule [X], items 104, 105 and 106, Parts 1 and 3, XIII of the CCA and Chapter 6 of Schedule 2 of the ACL]***