

Treasury Laws
Amendment
(Competition and
Consumer Reforms
No. 1) Exposure Draft
Submission

August 2022

Key points

The Business Council of Australia welcomes the opportunity to provide a submission to the consultation on exposure draft legislation to increase penalties for engaging in anti-competitive conduct.

Competition policy plays a critical role in promoting the long-term interests of consumers and a healthy society. Getting competition policies right and administering them well are critical to high-performing Australian businesses and a high-performing Australian economy. This includes competition policy settings that are fit-for-purpose in a world where markets are increasingly global, technology is changing our economy and empowering consumer choices and capital is increasingly mobile.

The exposure draft proposes a significant increase in penalties across the *Competition and Consumer Act 2010* and the Australian Consumer Law (ACL) to ensure these penalties “are more comparable with international jurisdictions”. However, the proposed increases – particularly the 30 per cent adjusted turnover approach – go beyond the size and scope of penalties in other major jurisdictions,¹ including those in recent and proposed reforms to competition laws in the EU and US. In cases where the benefit cannot be determined, the potential penalty size could have significant consequences for companies and the consequences of how this may be reflected in practice should be better understood. The proposed increases will impact both small and large businesses and sit alongside other tools for deterrence including imprisonment or disqualification for competition and/or consumer law contraventions.

The proposed penalty increases are beyond what is needed to provide a suitable disincentive to offend and be “internationally comparable”. For example, in the context of ACL breaches, the proposed increases will likely see a base penalty of \$50 million for most cases – an unprecedented penalty for breaches of consumer law and not in line with international benchmarks. When also considered alongside a material difference in the types of conduct ACL and competition penalties seek to deter, it is unclear there is a need to align these penalties.

The Business Council has not had sufficient time to consult member companies on all elements of the exposure draft legislation in detail, including the newly proposed ‘adjusted turnover’ definition and how it may operate in practice, including any unintended consequences. Another example is the proposed new approach to defining the ‘breach period’ may introduce an unintended element of retrospectivity, particularly in regard to conduct by omission. In addition, it is proposed that the changes will commence the day after Royal Assent for breaches from this date.

When considering the consultation in this context, the one-week consultation period is inadequate time to thoroughly consider the proposed changes, including their potential impact and an assessment of how the changes will promote “competition and better corporate behaviour, while ensuring consumers retain a robust level of protection.” It also sets a concerning precedent for future consultations and falls short of best practice consultation, which calls for “as much as 60 days but should not be less than 30”.² The consultation background provides no reason to justify the extraordinary urgency.

Key recommendations

1. Adjust the proposed increase in penalties to be internationally comparable, recognising this will still support the policy intent of the proposal while minimising the risk of unintended consequences.
2. Allow sufficient time for consultation to better understand the potential impact of the proposed changes before progressing the Bill. This is to ensure the proposed changes best deliver on the policy intent while avoiding unintended consequences.

¹ OECD (2018) *Pecuniary Penalties for Competition Law Infringements in Australia*

² Commonwealth of Australia, Department of the Prime Minister and Cabinet, *The Australian Government Guide to Regulatory Impact Analysis*

BUSINESS COUNCIL OF AUSTRALIA

42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 www.bca.com.au

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