

Are penalties in NZ high enough to deter or are they just a cost of doing business?

Hon Sir Terence Arnold QC  
Brent Snyder (HKCC)

Sarah Court (ACCC)  
John Dixon QC (Chair)

# Scope of what we are going to discuss

- Where NZ penalties for competition breaches currently stand.
- OECD study on Australian penalties and recent Australian decisions and changes.
- Approaches to penalty setting:
  - Key criteria for determining the size of penalties to ensure deterrent effect.
  - “instinctive synthesis” v structured or proscriptive models.
- Role of criminal sanctions – in particular imprisonment.

# Maximum penalties

- Corporation: Greater of \$10 million or 3 x commercial gain/10% turnover
- Individual: \$500,000
- Criminalisation: Up to 7 years' imprisonment.
- Comparison to Fair Trading Act breaches:  
*Corporation: \$600,000*  
*Individual: \$200,000*



# Factors taken into account

- Nature and seriousness of the contravening conduct / defendant's role
- Importance and type of market / market share and market power
- The extent of any benefit derived from the contravening conduct
- The extent of any loss or damage suffered by any person as a result of the contravening conduct
- The duration of the contravening conduct
- Deliberateness of the conduct
- Seniority of employees
- Size and resources of the defendant.

# Penalties imposed

- Highest penalty for competition case is Telecom: \$12 million
- Highest penalty for price-fixing: Air New Zealand \$7.5 million
  - > Other big companies: Other airlines (up to \$6 million); CHH: \$1.85 million; PGGW: \$2.7 million.
  - > Small companies/Big fines: Real estate companies – fines in range of \$1 million to \$3 million; for some equivalent to a year's profit.
  - > Individuals: Wood chemicals executives (up to \$100,000); PGG Wrightson executives (up to \$25,000); Dodds (\$5,000).



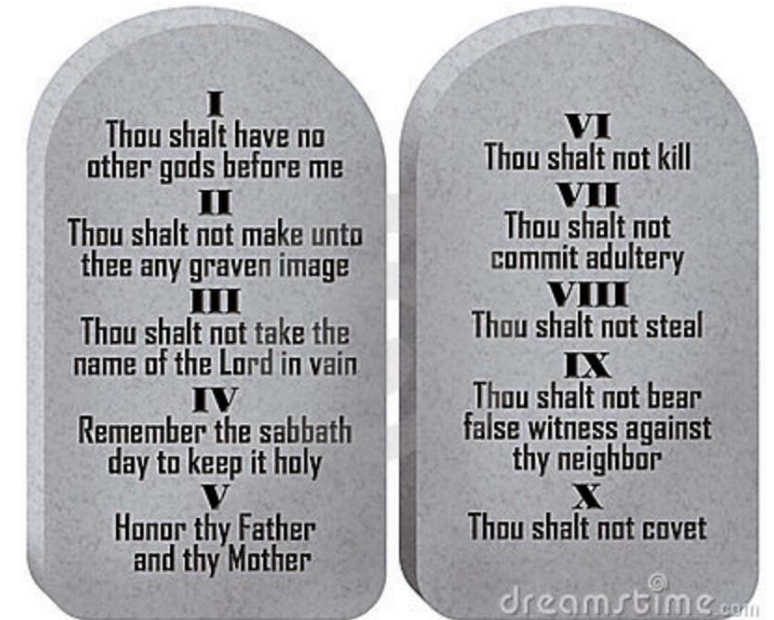
# OECD report in Australia

- What the OECD report says
- Recent changes to penalties in consumer cases
- Recent decisions in cartel cases



# The Role of Guidelines?

- “Instinctive synthesis” v structured regime
- Key criteria for setting penalties
- Australian thinking on potential for penalty guidelines



# Pros/Cons of a structured regime

- Advantages
  - Transparency/Fair Notice*
  - Consistency*
  - Proportionality*
  - Ease of Use/Predictability*
- Disadvantages
  - May limit judicial discretion*
    - Solution in US: USSG are advisory for judges (departures must be justified)
  - May not accommodate unusual scenarios*
  - May not always result in general deterrence*



# Calculating corporate fines under USSG

- Step 1: Calculate the Volume of Affected Commerce (VOC)  
*E.g. \$100,000,000 of affected widget sales*
- Step 2: Calculate Base Fine (20% of VOC – Proxy for Gain/Loss)  
*E.g. \$20,000,000 based on \$100M of affected widget sales*
- Step 3: Calculate Culpability Score  
*Number score based on various factors: size, senior management involvement, obstruction, recidivism, acceptance of responsibility*
- Step 4: Determine & Apply Minimum/Maximum Multipliers  
*Min & Max Multiplier applies to each possible culpability score*  
*E.g. Culpability score of 8 has min/max multipliers of 1.60-3.20*  
*Multiply Base Fine by Min & Max Multipliers to determine fine range*  
*E.g. \$20M x 1.60 = \$32M ; \$20M x 3.20 = \$64M*  
*Various factors considered in determining where in the range to place fine*
- Step 5: Apply Any Cooperation Discount

# Criminalisation

- The ultimate deterrent?
- How and why this is an appropriate sanction.
- Hasn't it always been available anyway?

