



26 August 2022

Treasury
Competition and Consumer Branch
Market Conduct Division

Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill 2022

The Australian Banking Association (**ABA**) on behalf of its members welcomes the opportunity to make a submission on this consultation.

The ABA supports properly designed penalty regimes to ensure the right incentives and, that industry is held to account for breaches of competition laws.

The ABA however notes that the issues being considered in this consultation are important as the current proposals, if implemented, will have significant impacts on Australian businesses and other penalty regimes in the economy. In light of this, the ABA recommends Treasury consult further with all stakeholders with an analysis of all the relevant materials.

Our position

The ABA makes the following points regarding the proposed 30% group turnover limb for the period during which the breach occurred:

- The change from the current position (10% of group turnover annually) to the proposed position would be significant. For large organisations, the existing 10% of turnover limb already equates to billions of dollars in penalties. Increasing this to 30% over a 3-year period, for example, would equate to practically the entire group turnover in a year.
- The proposal should be capped at a maximum dollar value. For example, consistent with the maximum civil penalty (currently \$555m) available to the Australian Securities and Investment Commission under the Corporations Act.
- While an increase in set dollar amounts might be justified by reference to the age of the existing penalty and the effects of inflation (as referenced in paragraph 1.4 of the Exposure Draft Explanatory Materials), the same cannot be said regarding the percent of turnover, which is effectively a self-adjusting calculation.
- The amendment to the ASIC civil penalty regime introducing the cap was fairly recent (2018) and that the Explanatory Memorandum noted (para 1.105):
“Limiting the maxim.” monetary value of any penalty given using the 10 per cent of annual turnover method to 1 million penalty units provides consistency with penalties under other frameworks such as under the amendments made by the Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018, and comparable competition and consumer provisions”.
- In addition to a dollar value cap, consideration should be given to whether limiting the proposed penalties to scenarios such as cartel conduct and / or misuse of market power may deliver more equitable outcomes for both large and small organisations.



Australian Banking Association

- The short consultation period does not allow the ABA to conduct a more detailed comparison with competition regulations / penalties in other jurisdictions. However, the ABA understands that the proposal to move to a 30% turnover limb was influenced by the European Union (EU) approach. Without the benefit of time to conduct more detailed research to confirm the exact position in the EU, we understand that the EU approach has multiple limbs.

One limb is to calculate a penalty of up to 30% of the value of relevant sales of the product related to the infringement over the duration of the breach with plus or minus factors. Another limb – the turnover limb – is 10% of global turnover in a year. Any penalty is capped at the greater of the relevant amounts.

- Further in New Zealand, for breaches of the Commerce Act by a business, the maximum penalty is the greater of \$10 million or, three (3) times the commercial gain or, if this cannot be easily established, 10% of turnover.
- Finally, the ABA also understands that in Canada, a country sharing similar banking market characteristics with Australia, the penalty for contraventions of misleading and deceptive conduct and abuse of dominance provisions are subject to maximum penalties being the greater of \$10 million (\$15 million for each subsequent violation), or three times the value of the benefit obtained, or if the benefit cannot be reasonably determined, 3% of annual worldwide gross revenue.

Again, thank you for the opportunity to comment on this proposal. The ABA would like to meet with Treasury to discuss our position, including the appropriateness of a cap on the 30% turnover proposal.

Yours sincerely

Steve Blinkhorn

Director of Legal Affairs

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership