

“SUFFICIENT SEVERITY”: A NEW ERA OF COMMERCE ACT PENALTIES

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[T]he purpose of penalty and [remedial] provisions in competition law is to penalise today’s offender with sufficient severity to discourage others from committing similar acts.
- *Select Committee report, Commerce Amendment Bill 2011*²

A Introduction

1. In early 2007 I gave a conference speech in which I described the ‘altered states’ into which the Commerce Commission and a cartelist must enter if they are to co-operate in the pursuit of other cartel participants before the Courts.³ The speech discussed a number of elements of the relationship that ‘alter’ when these co-operation commitments are entered into. These included the need for the co-operating party and the Commission to come together, if they can, in identifying the appropriate penalty to submit to the Court (where the cartelist lacks full immunity).
2. This paper is a companion-piece and an update to that earlier paper. Since 2007 there has been a string of judgments in which the High Court has imposed penalties for breaches of the Commerce Act 1986, and has offered guidance to the legal and commercial communities as to the processes and principles that apply.
3. Equally importantly, in that time there has been a step-change in the penalties being imposed for breaches of the Act. While still not approaching the available maxima, they are increasingly not penalties that the business community or the public at large can consider trivial.
4. In the single financial year 2010-2011 the Commission was awarded pecuniary penalties totalling \$34.95 million for breaches of the Act, including a \$12m penalty against one firm.⁴ The aggregate figure is unprecedentedly high, and to some extent results from the timing of penalty hearings across a range of cases. But it is also the product of two other factors:
 - The Commission’s increasing willingness to receive admissions of breach and to work together with defendants’ counsel to craft an appropriate penalty recommendation to the Court.

¹ The views expressed in this paper are my own, and should not be assumed to represent those of the Commerce Commission. The usual disclaimers apply. But I acknowledge gratefully the contributions towards this paper made by Charles Tingley, Deputy General Counsel (Competition) at the Commerce Commission, and Ben Hamlin, Associate at Meredith Connell.

² Commerce Amendment Bill 2011 (Select Committee report) at 23.

³ “Altered States” Co-operation between Carteliser & Commerce Commission”, 7th Annual Competition and Regulatory Review, Wellington, 26 February 2007; available online at www.comcom.govt.nz.

⁴ *Commerce Commission v Telecom Corporation of New Zealand Ltd* HC Auckland CIV-2004-404-1333, 19 April 2011 (*DataTails*). The decision is presently under appeal.

- The Court’s increasing willingness to impose penalties that will serve as a genuine deterrent and a meaningful fiscal punishment.
5. The first of those points is easy to gloss over, when we are on the subject of penalties. But it is worth noting that the Commission’s publicly stated objective is to continue refining its responses to non-compliance with the Acts that it enforces, “to ensure we have the appropriate response to each situation.”⁵ The Commission’s published Compliance Pyramid⁶ emphasises the importance of providing education and guidance so that businesses are able voluntarily to comply.⁷ And it follows that, with its limited resources, the cases that reach the stage of penalty-setting are those in which the Commission has purposefully decided that the public value of a penalty determination – with the deterrence effect and guidance that it offers – outweigh the benefits of any lesser intervention.
 6. Compliance is not always achieved. Some executives know the law and choose to be non-compliant. Others do not ask the questions that could ensure that they and their businesses comply. So I offer today some reflections on the developments in Commerce Act penalty-setting since 2007.⁸ My references to earlier cases will be very brief.
 7. But first I need to sound the standard note of care and caution in generalising too extensively from recent penalty developments, and in applying one case to the next; the range of variables arising in each new case is broad and the differences often subtle and easily overlooked.

Past cases may help determine the possible range of penalties in future cases. Precedent is, however, unlikely to provide more than an indication of what the actual figure should be. Care is required. In *Ellingham*, Gendall J acknowledged that past penalties had ranged from \$5 to \$500,000 and, at that time, had gone as high as \$1,500,000.

Still, there will be like-for-like matters. Case studies can be a useful way of benchmarking a penalty in any given matter, subject to a ratchet which will always push up penalties as Commerce Act understanding and compliance evolve in sync with the sophistication of our economy.⁹

8. There is not time enough here for case-studies. But the cases to date will be discussed in the paper that follows, inasmuch as they allow us to draw out the embedded principles and the methods for approaching the problems of penalty-setting under the Act.

B Commerce Act penalty architecture

⁵ Commerce Commission Statement of Intent 2011-2014 at 4, available online at <http://www.comcom.govt.nz/accountability/>.

⁶ Statement of Intent at 9.

⁷ The Commission has extensively developed its cartel outreach and education programme, and presented around 50 seminars to business groups in 2010-2011. These educative measures are designed to prevent breaches through inadvertence, and to educate on reporting breaches and the seeking of leniency.

⁸ Unlike that earlier speech, this paper will not touch on penalty-setting for the criminal breaches of the Commerce Act, e.g. section 103. I am not sure that the jurisprudence has developed meaningfully in the interim, nor that the principles are as sophisticated. Nor will this paper discuss penalties for individuals; nor other consequences of breaching the Act, such as management bans, divestiture orders, cease & desist orders or the broad s89 “such [other] order or orders as [the Court] thinks appropriate.”

⁹ Sumpter *New Zealand Competition Law and Policy* CHH 2010 at ¶1705.

9. Before we develop our thinking about the principles underlying fixing penalties for breach of the Act, we ought to remind ourselves of the available penalties and the statutory maxima.
10. The imposition of financial penalties is “the principal mechanism for incentivising compliance with the Commerce Act.”¹⁰
11. Section 80 of the Act confers on the Court jurisdiction to impose pecuniary penalties for breaches of Part 2 containing, importantly, ss27, 30 and 36:

80 Pecuniary penalties

- (1) If the **Court** is satisfied on the application of the Commission that a person –
 - (a) Has contravened any of the provisions of Part 2 of this Act; or
 - (b) Has attempted to contravene such a provision; or
 - (c) Has aided, abetted, counseled, or procured any other person to contravene such a provision; or
 - (d) Has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or
 - (e) Has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or
 - (f) Has conspired with any other person to contravene such a provision, -

the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate.

- (2) The Court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the Court considers that there is good reason for not making that order.
 - (2A) In determining the appropriate penalty under this section, the Court must have regard to all relevant matters, in particular, -
 - (a) any exemplary damages awarded under s82A; and
 - (b) in the case of a body corporate, the nature and extent of any commercial gain.
 - (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed, -
 - (a) In the case of an individual, \$500,000; or
 - (b) In the case of a body corporate, the greater of –
 - (i) \$10,000,000; or
 - (ii) either –
 - (A) If it can be readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
 - (B) If the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).

12. Section 80(1) creates a broad discretion: such pecuniary penalty as “the Court determines to be appropriate.”
13. The discretion is subject to the provisions of ss(2A) and (2B).

¹⁰ Sumpter at ¶1701.

14. So, it can be seen that the critical device for determining the applicable maxima is the ready ascertainability of commercial gain; where gain cannot be readily ascertained it is necessary to look to the turnover of the corporate group.
15. To date, no Commerce Act penalty has drawn close to the applicable statutory maximum.
16. We can briefly get out of the way a few points about turnover:
 - “Turnover” is defined in s2 as the total gross revenues (exclusive of tax required to be collected) received or receivable by the corporate “in an accounting period” as a result of trading within New Zealand.
 - “An accounting period” is defined as having the same meaning as in s2(1) of the Financial Reporting Act 1993, that is “a year ending on a balance day of the [body] corporate.” As applied in the Telecom *DataTails* decision of the High Court, the Court takes a single year’s accounting period to ascertain turnover and calculate the maximum.¹¹ The Court in that case took the most recent complete accounting period, notwithstanding that the conduct had ended some 5-6 years beforehand. The judgment is under appeal, although not on that confined point.¹²
17. And briefly, some points on the question of penalising a course of conduct or a range of breaches:¹³
 - Where the contravening acts are part of the ‘same conduct’ the defendant will be liable to *one* penalty under the Act.
 - If there are separate courses of conduct, each course of conduct will (at least notionally) attract a separate penalty; and *each* will be subject to the maximum penalty amount.
 - Where particular incidents are separated in time, by the entities involved or the markets to which they relate, or where they are clearly separate acts of the same person, each act attracts a separate penalty. (See, for example, the Air Cargo penalty judgments – each cartel ‘hub’ and entry-into was acknowledged as a separate breach.)
 - But if the same act would breach more than one Commerce Act provision, it is a single incident for the purposes of the maximum penalty.
 - And where conduct spans pre and post May 2001 (when the applicable maxima increased) the Court must determine the penalty applicable for each of those periods. Ongoing breaches will have a penalty maximum notionally applied for the pre-2001 period, and an amended notional maximum for the

¹¹ *DataTails* at [46]-[47].

¹² CA 313/2011 Telecom Notice of Appeal (Penalty Judgment) dated 19 May 2011. An alternative approach mooted in the Sumpter text is to use the offending firm’s most successful period and then ‘discount back’ from the figure produced in the s80(2B)(b)(B) formula: Sumpter at ¶1702.

¹³ I acknowledge here my debt to the excellent summary of principles contained in the Sumpter text at ¶1702.

post-2001 period, but in the event the Courts are unlikely to impose separate penalties for each period but will penalise the breach in the round.¹⁴

18. It is worth considering what represents the ‘same conduct’ or ‘separate conduct’. In the first *Koppers Arch* decision, Williams J accepted that separate instances of ‘customer-specific understandings’ and ‘price-rise understandings’ that fell within the overarching agreement amounted to separate breaches of the Act, and “would justify the imposition of a substantial penalty.”¹⁵ A penalty of \$2.85m was imposed for the price-fixing contraventions – as a group of these separate offences – and the sum of \$750,000 for the competitor-exclusion conduct (treated as a separate group of offending.)
19. The ‘grouping’ methodology can also be seen in a later Williams J judgment in the same cartel matter:

Whilst the Commission contended that separate penalties were open in respect of each of the series of specific undertakings relating to specific customers, price increases and exclusionary undertakings it took the view that the conduct involved entering the overarching understanding and each customer-specific understanding was too close to warrant separate penalties. A single penalty reflecting the totality of conduct for each category of anti-competitive conduct was more in accordance with the intention of the Act and with the totality principle. Accordingly, a separate penalty should be imposed for all the actions within each class of anti-competitive behaviour, the quantum of which should be conditioned by the overall total to reflect the entire conduct and comparable penalties.¹⁶
20. The statute provides small guidance as to how a penalty is to be set within the applicable maxima. It is one thing to determine which maximum applies (and we will return to this, for the difficulties this can entail), but another to identify where within the maximum the penalty should be positioned. Factors that come into play include sentencing principles deriving from the criminal law, and the developing principles of discounting of sentences for early admissions, co-operation with the authorities and other mitigating elements.
21. But one particular ingredient in the Court’s treatment of Commerce Act penalties in recent years can be found in the Act: the Courts recognise the ‘signal’ sent by the Commerce Amendment Act 2001 doubling of the maximum penalties. Prior to May 2001 the maximum penalty for a corporate defendant was \$5m for each breach.
22. Consistently the Courts have acknowledged that the primary objective of Commerce Act penalties is deterrence,¹⁷ and that the deterrence goal underpinned the 2001 increases to the maxima. The deterrence orthodoxy is

¹⁴ See for example *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 (HC) at [40]-[41] (*Koppers Arch* (No 1)).

¹⁵ *Koppers No 1* at [39]-[41].

¹⁶ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV-2005-404-2080, 4 October 2006 at [62] (*Koppers Arch* (No 2)). See also *ACCC v Visy Industries Holdings Ltd (No 3)* [2007] FCA 1617 at [298]: a myriad of separate breaches were subject to one penalty, rather than separate penalties for each contravention (*Visy*).

¹⁷ *Commerce Commission v Deutsche Bahn AG & Ors* HC Auckland CIV-2010-404-5479, 13 June 2011 at [24]; *DataTails* at [3]; *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 at [197]-[199]; *Commerce Commission v New Zealand Bus Ltd (No 2)* (2006) 3 NZCCLR 854 at [17]; *Koppers Arch (No 2)* at [31]; *Koppers Arch (No 1)* at [39]-[41]; *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC) at [18].

summarised in the Select Committee Report on the penalty increase back in 2001 when it was proposed:

The dominant reason for penalties under competition law is the forward looking aim of promoting general deterrence. To promote deterrence, illegal conduct must be profitless, which means that the expected penalty should be linked to the expected illegal gain. The courts should severely penalise today's offender to discourage others from committing similar acts.¹⁸

....

... the purpose of penalty and [remedial] provisions in competition law is to penalise today's offender with sufficient severity to discourage others from committing similar acts. The proposed changes are consistent with that approach. They will provide a much stronger signal than the current provisions that the deterrence objective will only be served if anti-competitive behaviour is profitless.¹⁹

....

Government and ACT members consider that the size of the penalty should be sufficiently high to make the offence profitless.²⁰

23. So it can be seen that deterrence has two separate objectives: *specific* deterrence of the offender against future breaches, and *general* deterrence to the community at large. As Sumpter notes, the twin objectives of deterrence need to keep in some rough harmony; if the Commission relied too heavily on general deterrence as a justification for a substantial or unprecedented penalty a defendant might reach for s9 of the New Zealand Bill of Rights Act 1990, which protects everyone from disproportionately severe punishment at the hands of the state.²¹ A penalty must always be broadly proportionate to the defendant's own culpability.

C High Court's approach to penalty recommendations

24. It is noteworthy that as between the Court receiving an agreed penalty submission (or indeed where there is a defended penalty application), and the parties and their counsel who are submitting to the Court, there is an asymmetry of information. As Williams J noted in a *Koppers Arch* decision, in complex cartel or market power cases the Court is "much less optimally informed than counsel and the parties of the detail of relevant matters."²²

C1 Court's willingness to accept recommendations

25. The Court is rightly not prepared to be a 'rubber-stamp' of agreed penalty arrangements, and will be mindful of "being overly influenced"²³ by the penalty position taken by the Commission.
26. The difficulty is managed by the submission to the Court of a careful and detailed Agreed Statement of Facts, and submissions (joint or not) on penalty. But the Court will depend to an unusual degree on the diligence and even-handedness of the Commission and counsel in making submissions.

¹⁸ Commerce Amendment Bill 2001 (Select Committee report) at 3; cited in *DataTails* at [3].

¹⁹ Commerce Amendment Bill 2001 (Select Committee report) at 23.

²⁰ Commerce Amendment Bill 2001 (Select Committee report) at 24-25.

²¹ Sumpter at ¶1704.

²² *Koppers Arch (No 2)* at [35].

²³ *ACCC v FFE Building Services Ltd (2003) ATPR 47,798 at 47,805 (FFE)*, referred to in *Koppers (No 2)*.

27. Having done so, perhaps it is unsurprising that to date the Court has not imposed a penalty different from the recommended penalty.
28. Similarly, in Australia most restrictive trade practices penalty proceedings resolve by agreement. In the *ABB Transmission* judgment in 2001 Finkelstein J noted that:

It is now quite common in antitrust litigation for the parties to reach agreement on the appropriate level of penalty and to submit jointly that the court should implement their agreement. It is so common that an examination of the reported cases shows that, in the last five years or so, most prosecutions under Part IV of the Trade Practices Act have been resolved by “consent.”²⁴

29. One suspects that a similar more recent study would confirm that this trend continues.
30. In the recent *Alstom* decision, Rodney Hansen J not only endorsed that there is a significant public benefit to the agreed resolution of otherwise costly and drawn-out proceedings, but asserted that:

The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.²⁵

31. And in the *Qantas Air Cargo* penalty decision, Allan J noted that:

... provided I am satisfied that the ultimate penalty falls within the appropriate available range, the Court ought to accept the penalty proposed by the parties.²⁶

32. In *ABB*, despite some words of warning to which we will shortly return, the Judge also adopted the parties’ recommendations. Finkelstein J held that the sums proposed “fall within the range that the court would consider appropriate”, and noted the satisfactory largeness (as against precedent penalties) of the amounts.²⁷
33. In reaching that conclusion, Finkelstein J captured with succinctness the arguments in favour of courts’ acceptance of agreed recommended penalties:

There is not a long line of cases that hold that it is not only appropriate, but often desirable, for such agreements [on penalties] to be made. It is said that settlements encourage the resolution of complex disputes. They allow the court to deal with other matters. They promote competition in the particular markets concerned. They provide certainty to the business community. Indeed, the Full Court has said that the court should “not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure”: *NW Frozen Foods v Australian Competition and Consumer Commission* (1997) ATPR ¶41-546 at 43,580. Departure should occur only in a clear case, such as where the proposal is outside the range of penalties that a court would fix, even though the court would not itself have imposed the suggested penalty: *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR ¶41-375.

²⁴ *ACCC v ABB Transmission and Distribution Ltd* [2001] FCA 383 at [6] (*ABB*).

²⁵ *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [19] (*Alstom*).

²⁶ *Qantas* at [31].

²⁷ *ABB* at [27].

C2 Court not a ‘rubber-stamp’

34. But complacency should not set in. The courts are careful to ensure that counsel do not ‘capture’ the process of determining the correct penalty, and in several cases here and in Australia have suggested that the courts might have been inclined to be more heavy-handed than the antitrust agency:

- *Giltrap City Ltd v Commerce Commission*:²⁸

We agree with the [High Court] that, but for the constraining effect of the penalty imposed on the other participants [\$50,000], the case could well have been regarded as justifying, in Giltrap City’s case, a higher penalty than \$150,000...

Without the constraining effect we consider a penalty in the vicinity of \$250,000 could not have been challenged.

- *Koppers Arch (No 2)*:

For conduct of the type undertaken by Mr Newell but [for] that period of 16 months, the recommendation seems, if anything, a little light...²⁹

In all the circumstances, were it not for the mitigating features, the recommended penalties for Mr Greenacre’s price-fixing and exclusionary conduct respectively of \$65,000 and \$35,000 might seem understated but, given the significance of the mitigating factors, the Court is not prepared to decline the recommendations.³⁰

- In *Koppers Arch (No 3)* Williams J distilled all of the previous penalties in an excellent summary, and then expressed some doubts as to what had been recommended for the remaining companies Fernz and Nufarm:

Given the seriousness of the Fernz Group breaches through their employees, a penalty of \$1.9m for their price-fixing conduct, though seemingly stern and slightly out of line with the penalty imposed on the Osmose group, is not so far out of line as to warrant the Court declining to approve it.³¹

- In *NZ Diagnostic Group* Allan J spoke of accepting a penalty as long as it is within “the Court determined permissible range”³² – not, it should be noted, the range determined by the parties, although in practice they will often coincide.
- In *FFE Building Services* the Federal Court described it as “a most unsatisfactory position” that there were then no known cases in which the Court had declined a penalty recommendation:

[This] involves an abrogation of responsibility by the Court. My concern is exacerbated by the level of penalties often accepted by the ACCC. In 1992, Parliament made a dramatic revision of the scale of penalties available for breaches of Part IV of the Act. The maximum penalty for a corporate respondent was increased from \$250,000 to \$10,000,000. Parliament obviously intended to achieve a quantum leap in the size of penalties imposed for breaches of Part IV. Yet, as the

²⁸ *Giltrap City v Commerce Commission* [2001] 1 NZLR 608 (CA) at 624.

²⁹ *Koppers Arch (No 2)* at [60].

³⁰ *Koppers Arch (No 2)* at [80].

³¹ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* HC Auckland CIV-2005-404-2080, 8 February 2008 (*Koppers Arch (No 3)*) at [34].

³² *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45] (*Diagnostics*).

cases cited to me demonstrate, ACCC has continued to negotiate penalties that are but a small fraction of the new maximum.³³

35. It behoves both counsel to satisfy the Court that the test of appropriateness is met, lest their joint recommendation be rejected.
36. And it is interesting that in each of these cases where the Court has harboured a reservation as to what has been recommended, its inclination would have been to impose a higher – rather than lower – penalty.

C3 Precedent value of recommended penalties

37. One related point is worth noting here. Counsel opposing the Commission occasionally submit that penalties resulting from agreed recommendations have lower precedent value than penalties resulting from a contest between the parties.
38. There is some authority to that effect, from the Australian *ABB* decision. The Court there juxtaposes the arguments in favour of agreed resolutions (at 33 above) against the arguments against a court accepting such recommendations:

One consequence of this practice [joint agreed penalty recommendation] is to make it more difficult for a court to determine whether the penalty which has been agreed is within the range that the court would fix. Moreover, decisions which sanction agreed penalties are not a good yardstick against which to measure whether what is agreed in later cases is within the range of appropriate penalties. This is because the agreed penalty need not be the penalty that would have been imposed by the court, although the penalty was not inappropriate.³⁴

39. And in New Zealand, in *DataTails* R Hansen J noted the lack of assistance that he received from reviewing the previous penalties under the Act, and that “in recent years most penalties have been negotiated.”³⁵ One genuine disadvantage is that where penalties follow admissions of breach, they necessarily depend upon ‘postulations’ as to the evidence that might have emerged at trial, but without the Court’s assessment of its credibility and weight.³⁶
40. However, it is perhaps useful to consider the following:
 - In no case is the phrase ‘agreed penalty’ correct to capture what a Court has decided. What is agreed is a joint penalty recommendation. Penalties can only be imposed by the Court, not agreed. See the Australian *Visy* decision, per Heerey J:

The fact that the Commission and the respondents have proffered a penalty agreed as between themselves is relevant, although not of course conclusive, since the responsibility of imposing penalties is conferred by the Trade Practices Act on the Court.³⁷

³³ *FFE* at [36].

³⁴ *ABB* at [6].

³⁵ *DataTails* at [59].

³⁶ *Koppers Arch (No 2)* at [37].

³⁷ *Visy* at [305].

- In cases where a penalty is imposed following a joint recommendation by the parties, a ‘contest’ as to the rightness of the penalty has occurred but has been undertaken out of sight – but not out of oversight – of the Court. These penalty exchanges can take many months, and in some recent cases years, to complete. They are not the contrivance that some might imagine.
- The enforcement agency is seeking a penalty that accords with the framework of precedents and applicable penalties principles, as the agency interprets them. Opposing counsel is arguing for the lowest penalty he or she can achieve for the client. And both parties have to be satisfied that whatever they agree can be advocated to the Court in some considerable detail. After rigorous exchanges, therefore, the court can have a measure of comfort that the parties’ recommendation is well-formulated and sound.
- An agreed penalty recommendation is only that: a recommendation. Or more correctly, a matter of submission. The courts have no difficulty rejecting submissions even when made by both parties. In *ACCC v Colgate Palmolive* Weinberg J correctly warned that fixing a pecuniary penalty is ‘parallel’ to the ordinary sentencing process “which is quintessentially a matter for the courts.”³⁸
- Where the court feels that it lacks sufficient information as to the process through which the parties arrived at their recommendation, it will seek it. In *Koppers Arch (No 1)* Williams J asked the Commission to file supplementary submissions as to the process that had been undertaken:

... when parties approach the Court to seek approval of recommended penalties, they should hereafter advise of the process followed by which they have reached their recommended figures by reference to precedent and the facts rather than approach it, as was the case here, on a global factual basis with no great reference to such precedent as there is, both before and after the penalty increase and they should, in most cases, recommend a range of penalties and discuss the reasons for their recommendation within the range.³⁹

- In *DataTails*, R Hansen J was primarily making reference to the fact that where penalties are agreed they are less directly useful as a precedent (in the event of a disputed hearing) because agreed penalties invariably make allowance for any acknowledgment of wrongdoing and co-operation – of which there are none in a usual penalty contest.⁴⁰
41. Some counsel may be reluctant to focus too heavily on the growing penalties jurisprudence, and may adopt a once-over-lightly approach to how the penalty might be justified to the Court: the ‘headline number’ may be all that interests the defendant.
 42. But defendants and their counsel should bear in mind that articulating the penalty rationale is not just for the Commission’s benefit. It is done to ensure that the Court has confidence in the appropriateness of the penalty submitted to

³⁸ *ACCC v Colgate Palmolive Pty Ltd* (2002) ATPR 41-880 at [34].

³⁹ *Koppers Arch (No 1)* at [37].

⁴⁰ *DataTails* at [59].

it. The downside risk to a defendant of skimping on these essential preparations is that the Court sends the parties away for further work, unsatisfied in the number; or, worse, imposes a higher penalty of its own volition.

43. One frequent warning sounded in penalty cases is that an overridingly important factor is parity: the comparability of the penalty for the conduct as against other cases concerning like conduct, and likewise regarding the defendant's circumstances, the applicable discounts etc. Counsel acting for defendants will need to be familiar with this evolving penalties jurisprudence, so that they can effectively advocate on their client's behalf as to which are the most apposite penalty precedents.
44. In multi-party proceedings, intra-case parity is obviously a dominant consideration: ensuring that the parties are appropriately penalised and receive appropriate discounts, as against their co-cartelists. In *Giltrap* the earlier penalties were characterized as having a "constraining effect."⁴¹

- *Deutsche Bahn & Ors* per Allan J:

The Commission acknowledges the application of the parity principle. Starting points for conduct of equal culpability ought to be at least broadly similar.⁴²

D Factors relevant to penalty

45. Since May 2001 s80(2A) of the Act has required the Court to determine an appropriate penalty subject to the statutory maximum by:
- Having regard to all relevant factors.
 - And having particular regard to the nature and extent of any commercial gain.
46. 'All relevant factors' is a typically broad and permissive sentencing discretion. What is ordinarily encompassed by the phrase is clarified in the case-law. In *Alstom Rodney Hansen J* confirmed that criminal sentencing principles provide an appropriate framework for the assessment of a proposed penalty under the Act. His Honour explained:

The parties invite me to consider the proposed penalty, broadly by reference to orthodox sentencing principles. That requires assessing the seriousness of the offending, identifying relevant aggravating and mitigating factors to determine an appropriate starting point and, finally, having regard to any factors specific to the defendant that may warrant an uplift in, or reduction from, the starting point. I accept that approach is appropriate. It is consistent with the statute and is endorsed in practice in New Zealand and other jurisdictions.⁴³

47. The same Judge considered the criminal sentencing analogy again in *DataTails*, and noted that there are limits to the direct transfer of principles from criminal sentencing (emphasis added):⁴⁴

⁴¹ *Giltrap* at 624.

⁴² *Deutsche Bahn* at [45].

⁴³ *Alstom* at [14]. See also *NZ Bus (No 2)* at [19].

⁴⁴ *DataTails* at [6].

For the purpose of identifying and weighing relevant factors, it has been said that assistance may be derived from the approach to sentencing in the criminal jurisdiction. The analogy is not inapt but should not be taken too far. While the approach to sentencing in the criminal jurisdiction may provide a helpful framework for assessing the gravity of the contravention and weighing factors specific to the contravener, the identification of relevant factors and the way in which they are measured and weighed must be **informed by the distinctive character and consequences of anticompetitive conduct and the overriding objective of the pecuniary penalty regime. Civil penalties are not to be confused with fines.**

48. General factors going to penalty include:
- The circumstances of the breach.
 - How the breach ended/ was detected.
 - The seriousness of the breach (nature & extent).
 - The timing of any acknowledgments and admissions.
49. More specific ‘relevant matters’ going to penalty include (drawing principally from the non-exhaustive list supplied in *TPC v Annand & Thompson*):⁴⁵
- Whether the conduct was deliberate or not.
 - Whether loss or damage was caused to the public or a retailer.
 - The size of the firm’s activity in the relevant market.
 - The degree to which the conduct was initiated or condoned by senior management.
 - What steps were taken by the employer to educate its employees prior to the contravention.
 - Whether the conduct was the result of a mistake on the part of an employee.
 - Whether there has been similar conduct in the past.
 - The existence or otherwise of an internal compliance policy.
 - Whether, since breach, controls have been improved to prevent a repetition of the conduct.
 - Whether the corporation has made a full and frank disclosure.
 - Whether the company has co-operated with the Commission, and the value of that co-operation.
 - Whether any exemplary damages have been awarded in respect of the same breach: s80(2A)(a).
50. This is becoming quite a long list. You can see the range of applicable factors that might arise in any given case, depending on the character of the offending and the situation of the company.
51. The list includes several factors that s80(2) formerly specified as ‘relevant matters’ going to penalty, but which were reformulated in 2001 into the broader

⁴⁵ *Trade Practices Commission v Annand & Thompson Pty Ltd* (1987) ATPR 40-772; Sumpter at ¶1705; *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406; *Carter Holt Harvey Building Products Group v Commerce Commission* (2001) 10 TCLR 247 at [46]; *Ophthalmological Society* at [17].

and unbounded “all relevant matters” prescription. But it is said to be common ground that the previously-prescribed s80(2) factors remain relevant.⁴⁶

52. Sumpter also ensures that we note some additional ‘case-specific factors’:⁴⁷
- First-time discount – where the circumstances arising are novel.
 - Ignorance of the law. (Importantly, Sumpter doubts whether this would be an effective factor in mitigation.)
 - The standing of the defendant.
 - The capacity of the defendant to bear a penalty. Although there is authority that penalties for anti-competitive behaviour may, in egregious cases, be so large as to put a defendant out of business.⁴⁸
 - Gains by the defendant.
 - The stigma of a finding of breach.
53. And finally, the Courts frequently note that many precedent penalties were decided under the pre-2001 regime, and that it is necessary to in some way acknowledge the doubling of the maximum penalties.⁴⁹
54. In the Commerce Act context there are several commonly-recurring factors that assume especial significance. These include the mitigating factors of co-operation and early admission of breach, and also the applicability of sentencing discounts that quantify the value of these and other mitigating considerations.

D Penalty ranges

55. From the Court’s injunction to counsel in *Koppers Arch (No 1)*, the Courts have anticipated that parties submitting as to penalty will come before it with not only a recommended sum, but a recommended penalty range within which the sum is said to sit.⁵⁰
56. The notion of a penalty range has considerable merit. It is a rare case indeed where examination of the admissions, conduct, effect, defendant and precedents allows you to say and agree “X is the right penalty.” If penalty-setting is an art and not a science, and a “highly imprecise exercise”⁵¹, then it is false scientism to imagine one can be so accurate as to pinpoint a single penalty as the appropriate penalty. Much more likely, one can isolate the outer parameters of an appropriate penalty, the boundaries beyond which the penalty would be simply too low or disproportionately high. The High Court has referred to this as seeking the “properly available range.”⁵²
57. Notwithstanding the artifice of the exercise by which one recommends a precise penalty, that is of course what is the purpose of the penalty submission. As Allan J noted in *Geologistics*:

⁴⁶ See, for example, *Diagnostics* at [17], *Alstom* at [19], *Gault on Commercial Law* at CA 80.06(2)..

⁴⁷ Sumpter at ¶1705.

⁴⁸ *ABB* at [66], cited in *Koppers Arch (No 1)* at [34].

⁴⁹ *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [28], [29] (*Geologistics*).

⁵⁰ *Koppers Arch (No 1)* at [37].

⁵¹ *Koppers Arch (No 2)* at [41].

⁵² *Deutsche Bahn* at [59].

Ultimately, it is the final figure which the Court is asked to approve. The identification of appropriate starting points and discounts for mitigating factors are simply tools aimed at producing a result which is in accordance with the ends of justice and which properly reflects the aims and objectives of the Act.⁵³

58. In identifying the range within which that ‘final figure’ will fall, two ranges always come into play:

- Starting-point range: the assumed post-trial penalty range for the admitted conduct.
- The post-discount range: the ultimately applicable range, having settled on the applicable penalty discount.

59. In cases where there are different types of conduct that it is sensible to disaggregate, there will be starting-point ranges for each type of conduct. For example, in the recent Freight Forwarding cartel penalty cases there was one starting range for the UK NES agreement (entry into and giving effect), and one for the Chinese CAF agreement.⁵⁴ Added together these produced a ‘combined starting point range’ which could then be adjusted for the totality principle and discounts.

60. In all cases, as will be familiar to criminal law practitioners, the ‘totality principle’ must be applied. This principle will have application when the Court is determining the range within which the penalty must fall:

Relevant to [the totality principle] is the consideration that there is an inter-relationship between entry into these agreements and giving effect to them, and also that separate agreements may be taken to simply form part and parcel of a single approach adopted within the industry.... The Commission accepts that a reduced range of \$4 - 6.5 million is appropriate to recognise the totality of the conduct of BAX ad Schenker taken together.⁵⁵

61. The penalty that is submitted by the parties will not always sit squarely in the middle of the range. It is often assumed that penalties are agreed on the basis of what the defendant can bear, and a range is reverse-engineered around that sum.

62. This is not the approach adopted by the Commission. Taking its cue from the Courts, the Commission establishes first the lower and upper bounds of the range, and then the appropriate penalty within that range. This is done for good reason. Often the range can be agreed with ease; the precedents now provide meaningful guidance, and counsel are in many cases likely to agree on the range within which a Court might properly fix the penalty. But there can be genuine dispute as to whether, taking all circumstances in the round, the penalty belongs at the upper end of the range, in the middle or is at the lower end.

63. So we see, in the cases, some accepted movement within the recognised range. In a recent Freight Forwarding judgment, Allan J noted that the post-discount

⁵³ *Geologistics* at [37].

⁵⁴ See, for example, *Deutsche Bahn* at [38].

⁵⁵ *Deutsche Bahn* at [39].

recommended penalty of \$2.5m was “at the lower end of the available range”⁵⁶ (\$2.4 - 3.9m), but was one with which His Honour was satisfied.⁵⁷

64. In closing out this topic, I should note a recent innovation that may be fruitful in future; this is the idea of ‘overlapping ranges’. In the Air Cargo *Qantas* penalty negotiation the parties had developed, after much negotiation, differing perspectives on the appropriate range. Agreement on all essentials had been reached – including, most importantly, on the final end-point sentence - but the ranges remained somewhat apart. In fact, they overlapped. The parties agreed on an effective starting point of \$13m. But the Commission submitted that the appropriate penalty range was \$12 - 17m and Qantas submitted that was \$8 - 14.5m. So, for the first time, the parties submitted to the Court on the agreed penalty end-point and starting-point, but submitted each according to their view of the relevant range.
65. The ranges intersected, or overlapped, and the end-point sat within that “window” of intersection. The Court was satisfied with the approach and imposed the recommended \$6.5m penalty:⁵⁸

The Commission’s starting point of \$12 to 17 million overlaps with that of \$8 to 14.5 million advocated on behalf of Qantas. That overlap provides a window of agreement between the parties which has enabled them to reach final agreement, subject to the Court’s approval.⁵⁹

66. Submissions along these lines will not succeed where what is demonstrated to the Court is a lack of genuine unanimity, such that the Court cannot have confidence in proceeding according to counsels’ recommendations. But if, as in the *Qantas* case, there is a deal of common ground and some disagreement as to the boundaries, a submission in those terms should be inoffensive. Well-informed counsel may legitimately differ in their assessments.

E Graduated penalty discounts

67. A matter of much interest to defendant’s counsel is the penalty discount that may be available in respect of their client’s conduct. The dilemma as to whether to promptly acknowledge breach is heavily influenced by the likely final penalty outcome, and that in turn is influenced both by the starting point and the applicable discount.
68. The Courts have long recognised in Commerce Act cases that a significant discount will be appropriate where an early settlement has been reached.⁶⁰ But in the early days, the penalty arrived at by the Court included an allowance for the benefits of early admission, remorse and the like but did not make explicit what was the applicable discount.

⁵⁶ *Deutsche Bahn* at [51]. Note: this is the ‘adjusted’ starting-point range before the 40% discount for mitigating factors was applied.

⁵⁷ See also *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [26].

⁵⁸ *Qantas* at [39], [63].

⁵⁹ *Qantas* at [49].

⁶⁰ *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730.

69. By *Ellingham* a clearer discounting method developing. Justice Gendall noted that \$15,000 was the appropriate final penalty, where post-trial the assumed penalty would have been \$20,000.⁶¹ This indication at least allowed observers to deduce the level of discount being applied.
70. For the first time, in *Koppers Arch* in 2006 the Court was asked to explicitly discount a s80 penalty to acknowledge the defendants' early admission and full co-operation with the Commission's case. The discount that was extended to all defendants in that case was 50%, in line with the parties' submissions to the Court.
71. Williams J considered the previous cases that had involved negotiated settlements, and noted:
- Although, of course, Commerce Act proceedings alleging anti-competitive behaviour substantially differ from criminal proceedings, it is the Court's view that a rough-hewn comparability exists in the principles to be applied.⁶²
72. His Honour noted that sentence reductions of 25 - 30% were routinely given in the criminal sphere, for early admissions, with lesser discounts applied where pleas were entered closer to trial. But more importantly, the Court noted that where an offender not only pleads guilty at an early stage, but co-operates with the Police and gives evidence, sentence reductions of 50% were not uncommon. Williams J concluded that a 50% discount was appropriate for Koppers, given its willingness to co-operate against the remaining defendants.
73. Today there is significantly more texture to the discounting regime, with the Commission having submitted – and the Courts having recognised – other discounts applicable to parties who are in-betweeners. As well, in the intervening period the Supreme Court has issued a guideline penalty judgment in *Hessell v R*.⁶³
74. Authorities containing criminal sentencing principles are not applied by the High Court directly – but rather, by analogy – to those Commerce Act breaches that are the subject of penalty proceedings. In the *Waikato Pathology* case, Allan J noted the Court of Appeal's earlier guideline sentencing decision in *R v Hessell*, but observed that “cases under the Commerce Act have their complexities, and might not always be susceptible to a strict application of the *Hessell* tariff.”⁶⁴
75. For example, in *EGL Rodney Hansen* J noted that there is little room to attribute remorse to a corporation.⁶⁵ (Although note also the statement in *Qantas* that “to the extent that a corporate organization is capable of displaying remorse, Qantas has done so.”⁶⁶)

⁶¹ *Commerce Commission v Ellingham* HC Wellington CIV-2002-485-720, 27 October 2005 at [14].

⁶² *Koppers Arch (No 1)* at [44].

⁶³ *Hessell v R* [2011] 1 NZLR 607, modifying the earlier Court of Appeal guideline judgment in *R v Taueki* [2005] 3 NZLR 372.

⁶⁴ *Diagnostic* at [28]; cited with approval in *EGL* at [23].

⁶⁵ *EGL* at [24].

⁶⁶ *Qantas* at [55].

76. Following the *Waikato Pathology* decision, the Supreme Court adjusted the *Hessell* principles. In a Freight Forwarding sentencing decision, Rodney Hansen J considered the newer *Hessell v R* principles. His Honour found that the Supreme Court judgment provided ‘greater flexibility’. The Judge recognised that in the cartels sphere the benefits of early and full cooperation are likely to be of even greater public benefit than in the criminal sphere, and said that:

It is in the public interest that substantial allowance is made for a high level of cooperation, both for the purpose of recognising the savings achieved and providing appropriate incentives to firms and individuals who have engaged in anti-competitive conduct.⁶⁷

77. The penalties and discounts recently recognised are:

Discount	Case	Party	Early admission	Cooperation
50%	<i>Koppers Arch</i>	Koppers	✓	Full ongoing
	<i>Koppers Arch</i>	Osmose	✓	Limited ongoing
	<i>Koppers Arch</i>	Fernz/ Nufarm	x	x – nothing required
40%	<i>Air Cargo</i>	Qantas	✓	Full ongoing
	<i>Freight Forwarding</i>	EGL	✓	Full ongoing
	<i>Air Cargo</i>	British Airways	✓	Full ongoing
33%	<i>Freight Forwarding</i>	Schenker/BAX	✓	Limited ongoing
	<i>Freight Forwarding</i>	Geologistics	✓	x – began but stopped (“muted” cooperation) ⁶⁸
	<i>Freight Forwarding</i>	Panalpina	✓	Limited
30%	<i>Waikato Pathology</i>	NZ Diagnostic Group	✓	x
	<i>Air Cargo</i>	Cargolux	✓	Limited
	<i>GIS</i>	Schneider	✓	Limited

78. Several points call for comment from this summary:

- The Fernz/ Nufarm 50% discount might appear disproportionately high in the light of more recent penalties and given the absence of co-operation. This is partly the effect that the recent refinements have on the older penalties. But also the devil is in the detail; while the companies’ admissions were entered long after those of Koppers and Osmose, they had been ‘queuing’ for some time to admit and be penalised. And while the companies were willing to co-operate, they had sold the chemicals business and lacked relevant records. They were therefore unable to co-operate; this inability was not held to their disadvantage in the specific circumstances of that case.

⁶⁷ *EGL* at [25].

⁶⁸ *Geologistics* at [32].

- The twin principal factors going to the level of discount are the timing of admissions, and the extent & value of co-operation.
- The bottom of the discount range is, of course, 0%. It applies to those parties who contest a proceeding. To date there have been few such cases, but they include the recent *DataTails* case and the *NZ Bus* proceeding.
- The High Court has noted that in criminal cases particularly valuable co-operation can occasionally lead to discounts as high as 60%.⁶⁹
- The objective of the Commission in developing and clarifying the applicable penalties for breach, together with the applicable discounts, is to make clear for defendants the choices they have and to stimulate all defendants to consider the benefits of early resolution. It is now possible to predict with some degree of precision what penalty discount will apply to a defendant.⁷⁰

F Ascertaining commercial gain

79. What role is played by commercial gain, in assessing the appropriate penalty? How central to the exercise is gain or the inability to determine gain? And how hard must it be before gain is considered unascertainable?
80. To some extent these questions must remain temporarily unclear. The Telecom *DataTails* litigation, which confronts these issues, is before the Court of Appeal in September and that Court will provide further clarity. This is also the first opportunity for the Court of Appeal to consider penalties under the Act since the 2001 amendments.
81. So for now, I will simply call to mind what the High Court has decided in that case, and how the Courts have treated the issue to date.
82. Commercial gain plays two separate functions in a penalty assessment:
- If commercial gain is readily ascertainable it can produce the applicable maximum penalty (if 3 x the gain is more than \$10 million): s80(2B).
 - The “nature and extent of any commercial gain” is a prescribed ‘relevant’ matter to be taken into account in determining an appropriate penalty: s80(2A).
83. As to the second function, there are twin considerations operating when gain is able to be factored into penalty: (penalization (stripping the gains) and (2) deterrence both specific and general. The concepts go hand in hand.
84. The *NZ Bus (No 2)* penalty judgment concerned a breach of Part 3 of the Act, arising from NZ Bus’s agreement to acquire shares in a rival bus business in

⁶⁹ *Cargolux* at [48].

⁷⁰ See “Fixing the Price of Commerce Act Breaches” Ben Hamlin & Matt Sumpter, article to be shortly published.

breach of the Act. Justice Miller fixed the penalty by estimating NZ Bus's potential unlawful gains from the deal. His Honour put these at \$2m, but discounted the penalty back to \$500,000 to acknowledge "the risk of error in the calculation of gains", the contribution of the Commission, the absence of loss and other factors.⁷¹

85. Estimating the gain like this is one method, but in some cases the parties will be able to agree on the position regarding commercial gain. In the *Qantas* decision it is recorded that the Commission and Qantas agreed that commercial gain was not readily ascertainable – and also that the Commission had submitted that this is a different thing to saying there is *no* commercial gain.⁷² The Court's treatment of the submissions is interesting for its coupling of gain and deterrence:

... counsel for Qantas emphasises the uncertainty of Qantas's precise commercial gain from the challenged conduct and the need to focus in particular on harm to markets and consumers in New Zealand (as distinct from consumers overseas who must have borne part of the cost of the unlawful surcharges). I consider this factor to be of only minor relevance. The Court is concerned with the deterrence of conduct in New Zealand and is obliged to impose a sanction that will be effective to that end, without the need for a close analysis of the incidence of detriment.⁷³

86. In the recent Freight Forwarding penalty cases, what was at issue was a component of the total price that had been fixed. In *Geologistics* the actual commercial gain could not be quantified, but it was acknowledged by the Court that it was likely to have produced benefits for the defendant that called for 'a significant penalty':

... the defendant accepts that its conduct, together with other members of the cartel, enabled participants to impose a surcharge without the need to consider the likely commercial response of competitors. So there was an effect both on price competition and upon competitive dynamics in the industry, with a corresponding reduction on efficiency incentives.⁷⁴

87. In *Koppers Arch* no commercial gain was identified, but the Commission argued that it could be assumed. The Court acknowledged that the price-fixing agreements must have had some effect on the prices charged to consumers.⁷⁵ This seems like an approach that is likely to be followed again. Although cartel participants will tell the Commission and the Court that they exposed themselves to great legal jeopardy for no gain, one might be skeptical as to whether that was really correct. In *Geologistics* the Court treated the question by focusing instead on what had been the potential gains:

... although the Court is required to pay particular attention to the actual commercial gain resulting from the conduct, the potential gain or harm associated with that conduct is of equal significance.⁷⁶

⁷¹ *NZ Bus (No 2)* at [66].

⁷² *Qantas* at [35].

⁷³ *Qantas* at [49] per Allan J.

⁷⁴ *Geologistics* at [24].

⁷⁵ *Koppers Arch (No 1)* at [32]-[33], per Williams J "quantification of such losses is elusive".

⁷⁶ *Geologistics* at [22].

88. And in many cases a very broad estimate indeed is adopted:

- *Cargolux* per Potter J:

The parties accept that the precise amount of commercial gain arising here is not readily ascertainable, although they are agreed that it would be in the realm of “several million dollars.” It is not possible to determine whether three times the value of that figure would be higher than the \$10 million stipulated in s80(2B)(b)(i)... As a result the parties are agreed that the maximum penalty for each breach is \$10 million.⁷⁷

- *EGL* per R Hansen J:

It is accepted that the precise amount of the commercial gain is not readily ascertainable. On the basis of the indicated approximate figure of a “low six-figure sum”, it would not, in any event, have produced the maximum pecuniary penalty....⁷⁸

89. Sumpter takes the position that “a feature of penalisation is the disgorgement of gain by a firm on the wrong side of the Commerce Act”, so that even if quantification of supracompetitive profits is difficult “it can and should be undertaken or attempted in ss27, 36 and 47 cases” and, after all, a Court can always discount for the inherent uncertainty of the exercise.⁷⁹

90. How far, then, must one go to attempt quantification? After all, the Commission is equipped with and has access to economic resource,⁸⁰ but such work can be enormously complex, time-consuming (for all parties) and ultimately may not be productive of an answer.

91. In *DataTails*, R Hansen J accepted the Commission’s submission that as a matter of principle a gain cannot be readily ascertained:

... unless it can be quantified in a timely, efficient and relatively straightforward manner and with reasonable precision and specificity. This accords with the context and purpose of s8[0].⁸¹ [sic]

92. His Honour continued, holding that it was “clear” that Telecom’s commercial gain could not be readily ascertained.

93. The Court noted that it is especially difficult to determine the quantum of penalty in a case of this kind, where “there is no quantification of the commercial gain which may sometimes provide a pointer to the penalty required to meet the goal of deterrence.”⁸² The statement is an interesting one. It relegates gain to being a sometime ‘pointer’ to penalty, when one might think that – where there is confidence in the number – it rather supplies a ‘floor’ to penalty if deterrence is to be achieved by stripping a wrongdoer’s gains.

⁷⁷ *Cargolux* at [20].

⁷⁸ *EGL* at [10].

⁷⁹ Sumpter at ¶1705.

⁸⁰ But recall, of course, that the defendant often will not and might be ill-equipped to engage in a costly and highly-refined quantification exercise.

⁸¹ *DataTails* at [45].

⁸² *DataTails* at [51].

94. But the Court rejected Telecom’s submission that no penalty should be imposed, or at most a modest penalty based on an assumed commercial gain of \$1.1m. The Judge held as follows:

The penalty should reflect the size and financial circumstances of Telecom and its position of influence and importance in the telecommunications industry. The goal of specific deterrence requires that the penalty take account of the size and resources of the contravening company.⁸³

95. As has been noted, the judgment is under appeal. In particular, Telecom appeals on the ground that the Court erred in holding that it was entitled to assume significant commercial gain by Telecom, effectively reversing the onus of proof.
96. It should finally be noted that in some cases, the defendant’s gain will be not merely the revenue produced by the conduct, but will be represented by commercial disadvantage to its competitors or exclusionary gains (like additional sales made because of a price squeeze imposed on a competitor). So, for example, in *ACCC v Telstra Corporation* Justice Middleton noted that:

As is regularly the case where anti-competitive conduct has resulted in denial or delay of entry to a market, it is not easy to quantify the exact amount of loss or damage in these circumstances. Part of the difficulty in quantifying the loss is that there are significant qualitative aspects, such as how the conduct affects the quality of the access seekers’ overall competitive offering.⁸⁴

G Deterrent penalties

97. It is, as above, widely acknowledged that penalties are intended to deter, both generally and specifically. Deterrence is acknowledged in all Commission cases as the guiding consideration; indeed, in *Koppers Arch* it was anointed as possibly the most important factor going to penalty.⁸⁵
98. In the *Visy* price-fixing case in Australia, Justice Peter Heerey said:

Price fixing and market sharing are not offences committed by accident or in a fit of passion. The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin.⁸⁶

99. When *ABB* was decided in 2001 Finkelstein J asserted as a fact that “high penalties will deter unlawful conduct.” His Honour concluded this from the fact that the electricity transformer cartel had ended in late 1995, and “that was around the time when multi-million dollar penalties were imposed in respect of cartel arrangements in the Australian express freight industry... and the pre-mixed concrete industry.”⁸⁷

⁸³ *DataTails* at [57].

⁸⁴ *ACCC v Telstra Corporation Ltd* (2010) ATPR ¶143-322.

⁸⁵ *Koppers Arch (No 1)* at [30].

⁸⁶ *Visy* at [307].

⁸⁷ *ABB* at [24].

100. To similar effect, in *Alstom* counsel advised the Court that the switchgear cartel appeared to have not operated in North America due to the severity of the penalties in that jurisdiction.⁸⁸

101. But it cannot be regarded as clear that Commerce Act penalties in New Zealand have that desirable deterrent effect. Indeed, the fact that the *Alstom* cartel was acknowledged as having operated here – when it avoided North America – rather suggests not. And when the Air Cargo cartel proceeding launched, a business columnist noted that:

Analysts say any fines imposed here would have little effect on airlines, including Air New Zealand.

“There is no reason to see them as being material,” said Forsyth Barr head of research Rob Mercer.⁸⁹

102. There has been a Government response to the concerns that current cartel penalties, specifically, are not sufficiently effective. The Ministry of Economic Development is currently consulting on the draft Cartel Criminalisation Bill that has as its objective the criminalisation of ‘knowing’ hard-core cartel breaches, so as to punish offenders and deter breaches.⁹⁰

103. Dealing here with the current civil penalty regime, logic suggests that only a penalty that exceeds the available gain from breach will serve as a deterrent. So we see Miller J in the *NZ Bus (No 2)* penalty judgment observing that orthodox economics underpin the 2001 policy shift towards increased maxima:

[Orthodox economics] holds not only that effective deterrence requires that the wrongdoer’s unlawful gains or intended gains be eliminated but also that a rational wrongdoer takes into account ex ante, when contemplating the wrong, the probability that it will be detected and penalised. This rational approach is appropriate because general deterrence is concerned with violations that have yet to occur, viewed from the perspective of those who may be contemplating them. It recognises that firms must have an incentive to comply where enforcement resources are limited and enforcement is costly.⁹¹

104. The Courts acknowledge this crucial deterrence objective, and so too the Commission’s recent steps to incrementally increase Commerce Act penalties have as their express objective meaningful deterrence. The animating idea is simple: if you are a very big company, only a very big penalty will do.

105. As the Court of Appeal accepted in *Carter Holt*:

It is commonly accepted that it requires higher monetary penalties to constitute deterrence to affluent parties than to “indigent” ones. Indeed, it is not easy to envisage a small and indigent company contravening s36.⁹²

106. Rodney Hansen J captured the simplicity of the idea in *DataTails*:

⁸⁸ *Alstom* at [16].

⁸⁹ “Overseas cartel cases a threat, say analysts” Grant Bradley, www.nzherald.co.nz at 16 December 2008.

⁹⁰ Available at the Ministry’s website www.med.govt.nz/cartels.

⁹¹ *NZ Bus (No 2)* at [25].

⁹² *Carter Holt* at [94], per Gault J.

In short, penalties imposed must be such as to amount to a real deterrent “and not merely some kind of acceptable license fee.”⁹³

107. In this regard, the recent *Alstom* authority has relevance. It indicates the kind of cartel tariff that might apply where no gain at all is asserted.
108. That case involved a worldwide price-fixing understanding for a key component of electrical substations. The understanding related to the manner in which pricing enquiries were to be handled. In the result, there were no enquiries and therefore no gain. The High Court adopted a recommended starting range of \$1.25 - 1.75m. The final penalty of \$1.05m reflects, then, almost entirely deterrence; it could not be gain-based because there had been none.⁹⁴
109. In one of the *DataTails* issues under appeal we can expect to see the gain v deterrence dichotomy (or relationship) explored by the Court of Appeal. A ground of appeal is that by styling the company’s gains as “significant”, the High Court failed to provide a ‘rational connection’ between achieving the object of deterrence and the \$12m penalty to be imposed upon the company.⁹⁵
110. Finally, in New Zealand there has so far been little discussion of the relativities or differences between penalties for collusion, s36 breaches and for illegal mergers. Arguably the latter categories call for higher penalties: each necessarily entails breach by a company with market power. Cartel participants need not have market power, and where they do not their capacity to do harm might be more limited. But for now, we note that there is little discernible difference in penalty levels. The judgment in *DataTails* produced a \$12 million post-trial penalty. The *Qantas* decision (the highest cartel penalty to date) had an assumed post-trial penalty of \$13 million. This might profitably be the subject of further consideration.

H Relevance of overseas sanctions

111. An issue that has received some modest attention of late, for the first time, is the notion that a penalty imposed overseas might militate against the imposition of a large penalty in New Zealand. The issue is potentially of some real relevance, because increasingly the cartel enforcement activities of the Commission have been directed towards overseas cartels implemented in New Zealand. Often those cartels have been punished overseas before the same stage is reached in New Zealand.
112. The argument ran, cursorily, in the *Qantas* penalty submissions. It was accepted by the Court that Qantas had paid, and was still paying, significant penalties in other jurisdictions in respect of related conduct. In some cases those penalties were considerably greater than were contemplated in New Zealand. The parties disagreed as to the mitigation impact (if any) of those penalties imposed elsewhere.

⁹³ *DataTails* at [4], quoting from *Commerce Commission v BP Oil New Zealand Ltd* [1992] 1 NZLR 377 (HC) at 383.

⁹⁴ It should be noted that the applicable maximum penalty in that case was \$5m, because the conduct occurred before the 2001 amendments.

⁹⁵ CA 313/2011 Telecom Notice of Appeal (Penalty Judgment) dated 19 May 2011 at 1.2(g), 1.2(n).

113. Qantas argued that the payment of penalties in other jurisdictions served as a future deterrent to Qantas, and to that extent diminished the need to impose deterrent-based penalties here.
114. The Commission submitted that the overseas penalties might assist in deterring Qantas, but no significant discount should be allowed on that score since the penalty sought in New Zealand was referable only to deterrence in New Zealand.
115. The Court found that there was “some substance” to Qantas’s position, but that “in the overall scheme of things it is a relatively minor factor.”⁹⁶
116. And in other recent decisions the Courts have noted the argument, but said that the discount (“some allowance”) that applies for this factor might be limited, since the penalty currently sought is in any event for deterrence in New Zealand.⁹⁷
117. One cannot tell from the Qantas decision what if any allowance is made for this in the final figure; one suspects none, because the 50% discount that was jointly submitted is accepted, suggesting perhaps that the Court did not consider any additional discount increment for overseas penalties to be appropriate.

I Future developments

118. It is difficult to predict what the next 2-3 years of Commerce Act penalties may look like. Major turning-points could be introduced through the *DataTails* appeal or through cartel criminalisation.
119. It now appears clear that the Ministry of Economic Development, while still consulting on the draft cartel criminalisation bill, has developed views about the primary benefits of criminalisation. These are said to be harmonisation with other relevant jurisdictions, and deterrence of hard-core cartel conduct (while encouraging pro-competitive alliances). If the bill is passed in its current form it is possible that we may see the courts interpreting that development as, like in 2001, an incitement to impose more severe penalties within the current civil maxima (which are left unchanged in this draft bill).
120. But in any case, as a matter of observation, it is clear that there has so far been “a trend of steadily increasing penalties since Parliament signaled its intention to treat anti-competitive conduct more seriously by increasing the maximum possible penalty” in 2001.⁹⁸
121. We can cautiously anticipate that the Courts will continue to deliver greater transparency in the imposition of Commerce Act penalties. A meaningful body of jurisprudence has developed in the last 5 years, which the Courts increasingly draw on in each new penalty case brought under the Act.

⁹⁶ *Qantas* at [57].

⁹⁷ *Alstom* at [31], *EGL* at [28], *Cargolux* at [46].

⁹⁸ “Commerce Act penalties – the bigger they are, the harder they fall?” Simon Ladd & Richard Flanagan, 6 May 2011 *NZ Lawyer* at 15.

122. One area in which the domestic penalties jurisprudence is underdeveloped is in relation to penalties against individuals. As above, this has not been the subject of this paper, but as a result of the cases taken by the Commission there have not been a great deal of individual penalty judgments. So penalties against executives will remain somewhat harder to predict.
123. In the early days of this 'new era', with the *Koppers Arch* case, there was such parity between defendants that each received a standard 50% discount. Now the Commission and the Courts are drawing finer distinctions between the varied circumstances of defendants.
124. So in the recent Air Cargo and Freight Forwarding penalty cases, the airlines and forwarders did not have the same starting-points as each other; there was a more de novo assessment undertaken, rather than starting with the first penalty imposed in the case and then adjusting it for differences. Differences are accounted for when the penalty is cross-checked for parity, before discounts are applied – which are themselves assessed for parity.
125. These evolutions bring the penalty jurisprudence closer to what might be regarded as 'sufficient severity' to deter. But whether that goal is achieved will be determined by the policy-makers in the light of observation from the number and kind of cases that continue to emerge.