

## Chapter 9

### Penalties and Remedies for Part IV Breaches

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#### Pecuniary penalties

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**9.2** The Dawson recommendations regarding changes to the civil penalty regime referred to in this paragraph have now been implemented as a result of the passage of the TPLA 2006. Thus, under the amended s 76(1A), the pecuniary penalty payable by a body corporate for each act or omission relating a provision of Part IV (apart from ss 45D, 45E or 45EA) is to be the greatest of the following:

1. \$10,000,000;
2. if the Court can determine the value of the benefit that the body corporate (or any related body corporate) have obtained directly or indirectly and that is reasonably attributable to the act or omission – 3 times the value of that benefit;
3. if the Court cannot determine the value of that benefit – 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the act or omission occurred.

A definition of ‘annual turnover’ is provided in s 76(5).

As a result of the TPLA 2006 having been passed, corporations are now also prohibited from indemnifying persons against a pecuniary penalty imposed for a contravention of Part IV or the costs of any legal proceedings in respect of which a person is found to have such a liability: see s 77A.

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#### Damages

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**9.18** As noted in this paragraph, there have been very few private actions in Australia claiming damages for loss arising out of a contravention of Part IV of the Act. There is therefore very little judicial guidance on the types of loss that might be claimable and the ways in which loss might be calculated. Recently, however, these matters were discussed in a judgment by Jessup J, approving a settlement agreement that resolved a representative proceeding brought against animal vitamin manufacturers by the firms that use the vitamins in pre-mixes and stock feed, etc: see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd & Ors (No. 2)* [2006] FCA 1388. Previously, the Commission had taken proceedings against the Australian manufacturers alleging price fixing and market sharing. The respondents had admitted the contraventions and the court had imposed penalties totalling \$26m: see *ACCC v Roche Vitamins Australia Pty Ltd* (2001) 23 ATPR 42,806. Pursuant to s 83, the applicants in the representative proceeding relied on the findings of fact made in the ACCC-initiated proceeding.

The settlement that was approved by Jessup J was for a sum of \$30.5m, plus costs of \$10.5m. After a sum set aside for reimbursement of the applicants' out-of-pocket legal expenses, the settlement fund was divided into two parts, reflecting two main categories of damages arising out of the anti-competitive arrangements between the vitamin manufacturers. These were referred to as (1) the loss of market share fund, reflecting damages available to group members that had lost market share as a result of the respondents' conduct; and (2) the overcharge fund, reflecting damages available for those group members who were obliged to pay more for vitamins as a result of the respondents' conduct. The judgment provides useful guidance on the manner in which categories of loss in private actions (especially those involving s 45 breaches) might be identified and calculated.

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### **Disqualifying orders**

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**9.22** In accordance with the Dawson recommendations, the court now has power to make a disqualifying order of the kind referred to in this paragraph: see s 86E, introduced by the TPLA 2006.