The Australian Competition and Consumer Competition (ACCC) is going after larger fines from companies for cartel conduct that costs the Australian consumer. The difficulty is bringing Australian penalties into line with international standards, to be great enough to deter this kind of activity, often perpetrated by companies overseas.

The significance of this latest push by the regulator has been highlighted by a recent case where the Federal Court fined a Japanese manufacturer, Yazaki, A$9.5 million for a cartel involving car parts. Australians who bought a Toyota Camry could have paid more for the parts for these cars because of the way the manufacturer acted.

The court described the conduct as “deliberate, sophisticated and devious”. It rejected the Japanese company’s argument that it made only a “modest” profit, said to have been in the region of A$3.6 million - that is, about A$340 per vehicle.

The ACCC is now appealing that decision. It says the more appropriate fine is between $42 and $55 million.

ACCC chairman, Rod Sims, rightly points out that a far greater fine is warranted “to reflect both the size of Yazaki’s operations and the very serious nature of its collusive conduct”. He stressed the penalty should serve as a deterrent against breaking Australia’s competition laws.

This appeal is timely if not overdue. An OECD review of our fining policy and practice is currently under way. There’s been a need for some time for higher fines against companies that fix prices or engage in other types of collusion, undermining competition for consumers, while also damaging other businesses (often smaller ones) that play by the rules.

The level of corporate fines for anti-competitive conduct in Australia is woefully below international benchmarks. In the US and Europe these fines are typically in the hundreds of millions.

They are higher in large part because the authorities in those jurisdictions take a substantial percentage of the offending company's turnover (up to 30%) as the starting point in calculating the penalty. This figure acts as a proxy for the economic harm caused by the conduct or the illegal gains that it yielded for the corporate law breaker.

That base fine is then increased, sometimes even doubled, by reference to aggravating factors such as the seniority of the management involved and ultimately by the need to deter others from playing fast and loose with the law. The approach is a highly structured and certain one, and room for negotiating out of the penalty is limited.

In Australia, the approach could not be more different. The same factors are taken into account but the room for bargaining with the regulator in the context of settlement negotiations is considerable. What's more there is not a clear mechanism for producing a penalty that will deter prospective colluders tempted to pursue cartel-derived profits at the expense of consumers.

The high watermark for fines against companies that engage in cartel conduct in this country remains the fine of A$36 million against packaging company Visy in 2007 , for its price fixing arrangement with Amcor - a cartel sanctioned by the company's Chairman, Richard Pratt. A$36 million was the total fine imposed for no less than 37 breaches of the law, representing under A$1 million per contravention – about 10% of the then statutory maximum. The judge described it as "by far the most serious cartel case" in Australian competition law history.

Overseas comparisons are stark. At the time of the Visy decision, the highest cartel fine in the EU stood at €896 million in relation to a car glass cartel. Today, the highest is more than €1 billion, imposed on Daimler for a trucking cartel . Had the method used in the EU and US for calculating these fines been used in the Visy case, the starting point for the fine imposed on the packaging giant would have been in the order of A$212 million.

US cartel fines are not quite as hefty as their European counterparts but are still in an entirely different league to Australian fines. In the US, deterrence is driven largely by the fact that executives found liable for breaking cartel laws are routinely put behind bars.

Australia has had criminal sanctions for individual cartelists on our statute books since 2009. The first prosecution was brought only last year. But to date, no individuals have been charged.

Our approach to fining corporate colluders also lacks transparency and predictability. The ACCC and then the Court apply a list of factors in a holistic way without any clear ranking or weighting of them. Past cases with similar facts are sometimes considered as a guide, but it's almost impossible to know in advance what the likely penalty will be.

This too weakens deterrence but it also exposes the system to criticisms of arbitrariness and inconsistency, damaging to its legitimacy. A perception that large businesses are able to negotiate an acceptable cost of doing cartel business only erodes confidence in the system further.

A root and branch review of our competition policy, law and enforcement system, chaired by Ian Harper, was completed in 2015 and the government is in the process of implementing most of its recommendations. Many of these, including the controversial introduction of an effects test for misuse of market power, are inspired by the view that Australian competition law should match international best practice. Regrettably, the approach taken to calculating fines was one of the "roots" that received least attention in the review. That was a missed opportunity.

But in the recent budget the government committed to bring maximum fines for breaches of the consumer protection laws into alignment with those applicable to competition law breaches. So now is the time to revisit how such penalties are calculated.

Caron Beaton-Wells receives funding from the Australian Research Council.

Read more http://theconversation.com/cartels-caught-ripping-off-australian-consumers-should-be-hit-with-bigger-fines-78750