

Anti-Cartel Advocacy – How Has the ACCC Fared?

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Abstract

The Australian Competition and Consumer Commission has been an active advocate for anti-cartel law and enforcement over the past decade. In particular, it has led a campaign in support of criminal sanctions for cartel conduct. Until now, there has been no empirical evidence of the effectiveness of the ACCC's advocacy insofar as the general public is concerned. This article reports on the results from a large-scale survey of the Australian public conducted in 2010. It provides unique insights into whether the Australian public consider that price fixing, market allocation and output restriction should be illegal and whether they should be a criminal offence; whether sanctions for such conduct should apply to companies or individuals or both, and what types and levels of penalties and remedies should apply; whether a policy of immunity for the first company to self-report is seen as acceptable; and whether the public regard cartel conduct as serious relative to other crimes, the bases on which they regard it as serious and the extent to which their perceptions of its seriousness are affected by a range of contextual factors. The article draws on the results to evaluate critically the extent to which the ACCC has influenced public opinion concerning cartels and anti-cartel law and enforcement.

I Introduction

Close scrutiny and tough sanctioning of cartel conduct has been a feature of competition law and enforcement across the globe for the

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last decade.¹ The focus on anti-cartel law and enforcement has seen a growing number of jurisdictions criminalise this type of conduct.² Underpinning these developments is the view shared by governments and competition authorities worldwide that cartels represent the most widespread and potent threat to competition and hence domestic and global economic welfare.³ The economic rationale for a penal approach has been accompanied by advocacy that adopts a moral high ground, invoking imagery of disease and war to support law reform and enforcement efforts.⁴

Consistently with these trends, for at least the last decade, cartel conduct has been identified as a priority on the enforcement agenda of the Australian competition authority, the Australian Competition and Consumer Commission ('ACCC'), and since 2008 it has been top of the priority list.⁵ Since 2003 it has instituted more proceedings in respect of breach of the cartel prohibitions of the *Competition and Consumer Act 2010* (Cth) ('CCA') than any other prohibition under Part IV of the Act.⁶ It has had an extremely high success rate in this litigation and has secured admissions to liability and agreement to submit to penalties in the majority of cases.⁷ The penalties imposed in these cases have been the highest imposed under the CCA, as evidenced by the \$38 million awarded in relation to the Visy/Amcor

¹ On trends in anti-cartel enforcement over the last decade, see International Competition Network, 'Trends and Developments in Cartel Enforcement' (Paper presented at the 9th Annual ICN Conference, Istanbul, Turkey, 29 April 2010) 7.

² See generally Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011); Greg Shaffer and Nathaniel Nesbitt, 'Criminalizing Cartels: A Global Trend?' (2011) 12 *Sedona Conference Journal* (forthcoming).

³ As exemplified by Organisation for Economic Cooperation and Development, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels* (C(98) 35/FINAL, 14 May 1998).

⁴ In 2000 the European Commissioner for Competition, Mario Monti, referred to cartels as 'a cancer on our open-market economy' in a speech 'Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?' (Speech delivered at the Third Nordic Competition Policy Conference, Stockholm, 11 September 2000). The cancer analogy has been widely used by competition enforcers since then, including by the former ACCC Chairman, Graeme Samuel. See eg, Graeme Samuel, 'Cracking Cartels: Australian and International Developments' (Speech delivered at Cracking Cartels: International and Australian Developments – Law Enforcement Conference, Sydney, 24 November 2004) 1. On the significance of the anti-cartel enforcement rhetoric from a criminological perspective, see Christopher Harding, 'A Pathology of Business Cartels: Original Sin or the Child of Regulation?' (2010) 1 *New Journal of European Criminal Law* 44.

⁵ ACCC, *ACCC Annual Report 2008-2009*, September 2009, 13; ACCC, *Corporate Plan and Priorities 2009-2010*, 30 September 2009, 7.

⁶ See Organisation for Economic Co-operation and Development, *Competition Policy in Australia*, OECD Reviews of Regulatory Reform, 2010, 40–1, Table 2: Trends in Competition Policy Actions.

⁷ See Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 433.

cartel⁸ and the \$46.5 million awarded to date in relation to the airline surcharge cartel.⁹

In 2001 the ACCC initiated, and over the ensuing eight years maintained, a campaign to have cartel conduct criminalised in Australia,¹⁰ culminating in the introduction of cartel offences attracting significant criminal sanctions in 2009.¹¹ Led primarily by its two chairmen over the period, Allan Fels and Graeme Samuel, the campaign was a high profile one that saw a substantial number of speeches made to specific audiences as well as statements made regularly in the general media explaining the justifications for criminalisation and calling for political action.¹² It was also a strategically astute campaign in that it offered a range of justifications for the reform so as to maximise the prospects of appeal to a diverse range of audiences. In essence, the justifications advocated by the ACCC for criminalisation were: (1) the economic harm caused by cartel activity; (2) the moral turpitude of cartel participants; (3) the distinctiveness of criminal sanctions (particularly jail time) as an effective mechanism of punishment and deterrence; and (4) the growing international commitment to criminal enforcement.¹³

Over the same period, the ACCC invested significant resources in more general educative efforts to raise awareness of and promote compliance with competition law, and the anti-cartel laws in particular.¹⁴ It provided website guidance on the design and review of

⁸ *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd* [No. 3] (2007) 244 ALR 673.

⁹ As referred to in ACCC Chairman Graeme Samuel's final speech to the National Press Club; Graeme Samuel, 'Collins Street Sleeper Agent or Castro's Right Hand Man', 15 June 2011, 6. Cases against some airlines in respect of this cartel are ongoing.

¹⁰ For an analysis of the ACCC's role as champion of this reform, see Caron Beaton-Wells, 'Criminalising Cartels: Australia's Slow Conversion' (2008) 31 *World Competition: Law & Economics Review* 205.

¹¹ The new cartel regime was introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth). For an explanation of the legislative changes and the key technical debates that attended the process of legislative design, see Caron Beaton-Wells, 'Australia's Criminalisation of Cartels: Will It Be Contagious?' in Roger Zach, Andreas Heinemann and Andreas Kellerhals (eds) *The Development of Competition Law: Global Perspectives*, Academic Society for Competition Law Series (Edward Elgar, 2011) 141.

¹² A search of the speeches on the ACCC's website using the keywords 'cartels' and 'criminal' reveals 102 speeches since 2002.

¹³ Beaton-Wells, above n 10, 212–13.

¹⁴ This approach is consistent with its general policy emphasising education, advice and persuasion before escalating to more non-consensual or litigious approaches. See ACCC, *Compliance and Enforcement Policy*, 2002, 2, based in turn on the well-known theory of responsive regulation; see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (Oxford University Press, 2002).

compliance programs¹⁵ and published brochures and guides aimed at increasing awareness of rights and obligations amongst consumers, small business, government procurement agencies and others.¹⁶ These efforts built on measures taken by the ACCC since 1991 to urge businesses to take trade practices compliance seriously and to develop internal competition and consumer protection compliance programs to a sophisticated standard.¹⁷

Public evidence of the ACCC's effectiveness in explaining and justifying its approach to anti-cartel enforcement is in limited supply.¹⁸ Some indicia are available, particularly as regards the impact of ACCC advocacy on specialist audiences. For example, it is evident that the ACCC has been successful in persuading politicians to toughen anti-cartel law and in persuading judges to impose what the ACCC regards as appropriate penalties. There is also no doubt that the ACCC has been effective in raising awareness of the law and penalties for its breach under the CCA amongst the legal profession and business community, at the larger end of town particularly.¹⁹

However, there is scant evidence of the extent to which ACCC advocacy has penetrated the consciousness of the general public. Do Australians generally understand what is meant by 'cartel conduct'? Do they regard it as serious and if so, why? Should it be a criminal offence, or even illegal? Who should be liable for it — companies and/or individual business people? What sanctions should apply? This article reports on a major survey of the Australian public conducted by The University of Melbourne in 2010 which provides empirical answers to

¹⁵ See ACCC, *Complying with the CCA*, <<http://www.accc.gov.au/content/index.phtml/itemId/841713>>.

¹⁶ See, eg, ACCC, *Cartels: a guide for consumers on cartel conduct* (16 March 2006) <<http://www.accc.gov.au/content/index.phtml/itemId/727610>>; ACCC, *Cartel conduct – how it affects you and your business* (1 August 2011) <<http://www.accc.gov.au/content/index.phtml/itemId/1000474>>; ACCC, *Cartels: What you need to know: A guide for business* (15 October 2009) <<http://www.accc.gov.au/content/index.phtml/itemId/897448>>; ACCC, *Cartels – deterrence and detection – a guide for government procurement officers* (6 June 2011) <<http://www.accc.gov.au/content/index.phtml/itemId/869010>>.

¹⁷ For summaries of the ways in which the ACCC has encouraged and promoted and in some cases enforced the implementation of compliance programs, see Brent Fisse, 'Corporate Compliance Programmes: The Trade Practices Act and Beyond' (1989) 17 *Australian Business Law Review* 356; Christine Parker, 'Evaluating Regulatory Compliance: Standards and Best Practice' (1999) 7 *Trade Practices Law Journal* 62.

¹⁸ Of course, the ACCC may conduct its own private polling.

¹⁹ However, questions have been raised about the extent to which compliance is taken seriously in the sense that it incorporates measures such as management accountability and whistleblowing protection, for example: see Christine Parker, 'Do Businesses Take Compliance Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia' (2006) 30 *Melbourne University Law Review* 441.

these questions for the first time.²⁰ There are good reasons why public opinion on such matters should be seen as relevant. The article sets out these reasons at the outset (Part II). The methodology of the survey is then outlined (Part III). The principal results are reported (Part IV) and there follows an analysis of what the results suggest regarding the effectiveness of ACCC anti-cartel advocacy to date (Part V).

II Reasons for a Survey of Public Opinion on Cartel Criminalisation

This article starts from the premise that effective competition advocacy requires engagement and education of the general public as to the merits of competition policy, law and enforcement. Competition advocacy has been defined by the peak world body of competition enforcers, the International Competition Network ('ICN'), as referring to:

those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.²¹

The first part of the definition excludes enforcement from the concept of advocacy. However, it is also recognised that enforcement and advocacy are complementary. As the ICN has explained, 'proper enforcement of the competition law and a widespread diffusion of enforcement activities contribute to the credibility and relevance of advocacy activities.'²² Further, advocacy promotes enforcement in that, through raising awareness of competition laws amongst a wide

²⁰ Cf Roy Morgan, 'Majority of Australians Agree Executives Should Be Jailed For Collusion', *Morgan Special Poll*, finding 3555 (18 September 2002). This poll has significant methodological flaws and should not be relied upon for the purposes of gauging public support in Australia for or views on cartel criminalisation. See Beaton-Wells, above n 10, 222–3. As far as the authors are aware, there has been only one other survey of this nature undertaken in the world — a survey of British public opinion conducted by the Economic & Social Research Council Centre for Competition Policy in the United Kingdom in March 2007. See A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 *Competition Law Review* 123. In 2009, a survey of European Union citizens was conducted by The Gallup Organization, Hungary for the European Commission. However, the survey concerned broad questions of competition policy and, in particular, perceptions of the lack of competition in certain sectors. It did not address issues specific to cartels. See European Commission, *EU citizens' perceptions about competition policy*, 'Summary' (November 2009) <http://ec.europa.eu/public_opinion/flash/fl_264_en.pdf>.

²¹ International Competition Network Advocacy Working Group, *Advocacy and Competition Policy*, Report (ICN's Conference, Naples, 2002) 25.

²² *Ibid* xi.

audience, it increases the prospects that those with knowledge of or affected by anti-competitive conduct will bring it to the attention of the authorities.²³

The second part of the definition has two branches. The first relates to initiatives taken by the competition enforcement agency to influence the regulatory framework and to prevent or seek to change decisions by other public bodies or legislation that is anti-competitive in effect.²⁴ The second branch covers all the activities by the competition agency aimed at raising awareness and support by the public at large for competition and for competition law and enforcement as a means of protecting and promoting it.²⁵ This involves a potentially wide range of activities which could include seminars and speeches at conferences for the business sector, legal profession, judges and academics, press releases about current enforcement actions and decisions or law reform proposals, holding and reporting on market studies and inquiries, publication of guidelines, brochures or fact sheets, and responding to media inquiries. All such activities are said to contribute to the establishment of a 'competition culture'.²⁶ Such a culture is said to be one in which consumers are vigilant against anti-competitive abuses and suppliers are conscious of their obligation to conform to competition rules.²⁷ A strong competition culture in turn makes a useful contribution to advocacy interventions aimed at changing the regulatory framework (the first branch of the definition referred to above) as well as to effective enforcement of the law.

This article is concerned with assessing the ACCC's advocacy performance in generating public awareness of and support for anti-cartel laws, and for criminalisation in particular. Public opinion surveys or polls have been identified by the ICN as one of the principal tools available to evaluate the effectiveness of a competition authority's advocacy.²⁸ However, there are many other reasons why public opinion regarding cartel conduct and its treatment at law and associated issues should be considered relevant. The reasons differ depending on the particular perspective taken and range from theoretical or policy-related considerations through to practical effects. Key reasons include that:

²³ Ibid.

²⁴ See Allan Fels, 'Frameworks for Advocacy', Paper at OECD Latin American Competition Forum, San-Jose, Costa Rica, September 2010.

²⁵ International Competition Network, above n 21, 31.

²⁶ Ibid.

²⁷ For a critique of what is actually meant by competition in this context and what are understood to be its goals, see Maurice Stucke, 'Better Competition Advocacy' (2008) 82 *St John's Law Review* 951.

²⁸ International Competition Network, *Advocacy Toolkit, Part I: Advocacy process and tools*, (Report presented at the 10th Annual conference of the ICN, The Hague, May 2011) 29.

- from the perspective of legal or moral philosophy, public support for the treatment of behaviour as an offence is seen as important to the integrity and coherence of the criminal law;²⁹
- from the perspective of legal policy, and specifically insofar as that policy is directed at cultivating compliance or deterring non-compliance with the law, consistency between legal standards and public opinion is seen as important if the law is to be effective in influencing behaviour;³⁰
- from the perspective of enforcement policy and practice, public opinion may be seen as relevant to assessing whether the public interest warrants prosecution of conduct (as distinct from treating it as a civil contravention or responding in some other way) and to determining the priority that is given as a matter of resources to any such prosecution;³¹
- from the perspective of both prosecutorial and defence strategy, public awareness and perceptions of the conduct in question may be seen as relevant in predicting jury responsiveness and attitudes towards particular types of evidence and lines of argument;³²
- from the perspective of sentencing policy and practice, public opinion may be seen as relevant to assessing appropriate types

²⁹ See eg, J Silvey, 'The Criminal Law and Public Opinion' [1961] *Criminal Law Review* 349; John Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done About It' (1992) 101 *Yale Law Journal* 1875; Paul H Robinson and John M Darley, *Justice, Liability and Blame: Community Views and The Criminal Law* (Westview Press, 1996).

³⁰ See eg, Johannes Andeneas, 'The Moral or Educative Influence of Criminal Law' (1971) 27 *Journal of Social Issues* 17; Paul Robinson, 'The Utility of Desert' (1997) 91 *Northwestern University Law Review* 453; Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2nd ed, 2006).

³¹ See the role of the 'public interest' in Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008) [2.8], and in ACCC, *Compliance and Enforcement Policy* (2010) 1, 2.

³² Such strategies should not be based on simplistic assumptions about jury hostility to or support for large corporations or senior executives, for example. There is a considerable body of research that suggests such assumptions are flawed: see eg, Valerie Hans, 'The Illusions and Realities of Jurors' Treatment of Corporate Defendants' (1998) 48 *DePaul Law Review* 327; Valerie Hans, 'The Jury's Response to Business and Corporate Wrongdoing' (1989) 52 *Law and Contemporary Problems* 177; Valerie Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (Yale University Press, 2000). Assumptions of jury incompetence in dealing with business issues or complex expert evidence are also problematic: see eg, N Vidmar and S Diamond, 'Juries and Expert Evidence' (2001) 66 *Brooklyn Law Review* 1121; Richard Lempert, 'Civil Juries and Complex Cases: Taking Stock after Twelve Years', in R Litan (ed), *Verdict: Assessing the Civil Jury System*, (Brookings Institution, 1993) 181.

and levels of sanctions for different categories of conduct as well as in individual cases;³³

- from the perspective of political support, public opinion may be seen as relevant in government decision-making about the nature and degree of powers and funding made available to enforcement agencies, as well as in government resistance to potential lobbying by business groups interested in undermining enforcement efforts;³⁴
- from a comparative perspective, evidence of public opinion in one country may facilitate comparisons of the impetuses generally and, in particular, levels and kinds of popular support for criminal cartel enforcement as between that country and other countries; and
- from an international perspective, such comparative analysis in turn may enable assessments to be made of the extent to which the criminalisation trend reflects international convergence in competition policy and enforcement or whether should be treated essentially as a local phenomenon.³⁵

Discussion of the significance of the survey results from any of these other perspectives is beyond the scope of this article.

III Outline of Survey Design and Administration

The approach taken to designing and administering the survey is outlined below.³⁶

³³ For an overview of the research on the role of public opinion in sentencing policy and practice, see J Roberts, 'Sentencing Policy and Practice: The Evolving Role of Public Opinion', in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan Publishing, 2008) 15. The increasing value placed on public opinion and public confidence in the criminal justice system generally and sentencing specifically is reflected in the proliferation of sentencing councils, commissions and other advisory bodies, a key mandate of which is to ensure that community views are incorporated into the sentencing process.

³⁴ See Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law & Society Review* 591.

³⁵ See Ariel Ezrachi and Jiri Kindl, 'Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus', in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011).

³⁶ For a more detailed explanation of design and methodological aspects of the survey, see Caron Beaton-Wells, Christine Parker, Fiona Haines and Chris Platania-Phung, *Survey of Public Opinion on Cartel Criminalisation in Australia* (December 2010) Report, at <<http://www.cartel.law.unimelb.edu.au>>. The questionnaire is Appendix A to that report. <<http://cartel.law.unimelb.edu.au/go/project-news/project-survey>>.

A Survey design

As there was no Australian precedent (or sufficiently closely comparable overseas precedent),³⁷ it was necessary to design an entirely novel instrument for the purposes of the survey. The design was informed by the research aims which, in broad terms, were to elicit public opinion on the following matters:

- the legal status of cartel conduct;
- the legal consequences (penalties and remedies) for cartel conduct; and
- the relative seriousness of cartel conduct.

In designing the survey, careful attention was given to ensuring respondents would have sufficient information on which to base their opinion about these matters while at the same time avoiding the use of technical or leading language (eg, ‘cartel’, ‘collusion’, ‘price fixing’). To these ends, vignettes (simple factual scenarios) were a crucial aspect of the survey design. Three vignettes were used, each relating to a different type of cartel conduct — price fixing, market allocation and output restriction — respectively.³⁸ Having read the relevant vignette describing conduct that would be classified at law as price fixing, market allocation or output restriction (as the case may be),³⁹ respondents were then asked to respond to a series of questions that were based on the type of conduct described.

Another important design feature of the survey was the use of open-text boxes. While it was necessary to use forced choice formats

³⁷ There were difficulties with attempting to replicate the UK survey in Australia. The elements of the cartel offence under the *Enterprise Act 2002* (UK) differ in significant respects to the Australian offences — not least, at the time of the UK survey, the UK cartel offence had an element of dishonesty that the Australian offences do not. There are additional differences in the legal framework — for example, criminal liability applies only to individuals in the UK, whereas it applies both to corporations and individuals in Australia. It should also be borne in mind that active enforcement of cartel prohibitions and the imposition of penalties are relatively new to the UK, whereas in Australia the ACCC has a strong track record of bringing legal proceedings and securing penalties against participants in cartel conduct for over 20 years.

³⁸ Together with bid rigging, these are the types of cartel conduct that have been classified as the most serious forms of collusion, warranting the toughest of sanctions by the OECD. See OECD, above n 3. That classification was reflected in the definition of conduct attracting criminal and civil liability under the 2009 amendments to the CCA (see s 44ZZRD of the *Competition and Consumer Act 2010* (Cth)). The decision was made to exclude questions specific to bid rigging from the survey for two reasons. First, from an economic perspective, bid rigging is in many instances a species of price fixing and/or market allocation. Second, from a practical perspective, it was necessary to find ways to keep the survey to a manageable length.

³⁹ The vignettes are set out in Beaton-Wells, above n 36, 46–7.

for most questions in order to limit the length of the survey and to ensure clarity in responses, it was also appreciated that the issues raised by the questions are complex. Thus it was considered desirable that respondents have the opportunity to supplement or qualify their categorical responses in the forced choice formats through the provision of comments. To this end, open textboxes were provided after each of the questions, marked 'Comments (optional)'.⁴⁰ A large number of respondents took advantage of the open text box format to provide comments. For instance, 212 (16.4 per cent) of respondents provided comments on the issue of whether 'price fixing' should be against the law. Some of the comments provided by respondents are referred to as relevant below.⁴¹

B Survey Testing and Launch

The survey instrument was cognitively tested through face-to-face interviews with 10 members of the general public. These respondents completed the questionnaire in paper form and were asked to give feedback on the comprehensibility of concepts and questions in the process of completion. The questionnaire was then programmed into an online format and trialled. Once the online instrument was finalised, a 'soft launch' of the survey was undertaken. The objective of the soft launch was to confirm the duration of survey completion and to check questionnaire performance in the online environment. The 'hard launch' of the survey was then undertaken. An online medium was used for the survey on the basis that online surveys are fast, flexible, cost-effective and are established as providing valid responses.⁴²

⁴⁰ This device also enabled testing of the validity of the vignette-related questions by indicating, for example, the extent to which the respondents comprehended the scenarios in the way that was intended.

⁴¹ A full set of the comments are available in Beaton-Wells, above n 36, Appendix C.

⁴² Online surveys are also seen as having a range of advantages over pen and paper or face-to-face survey methods. See, eg, S D Gosling et al, 'Should We Trust Web-Based Studies? A Comparative Analysis of Six Preconceptions about Internet Questionnaires' (2004) 59 *American Psychologist* 93; R Kraut et al, 'Psychological Research Online: Report of Board of Scientific Affairs' Advisory Group on the Conduct of Research on the Internet' (2004) 59 *American Psychologist* 105; K B Wright, 'Researching Internet-Based Populations: Advantages and Disadvantages of Online Survey Research, Online Questionnaire Authoring Software Packages, and Web Survey Services' *Journal of Computer-Mediated Communication* (2005) 10 XX; B Duffy et al, 'Comparing Data from Online and Face-to-Face Surveys' (2005) 47 *International Journal of Market Research* 615.

C Survey Sample

The survey was administered to a random sample representative of the Australian public. The sample was provided by a commercial online survey company, ResearchNow.⁴³ Prospective participants were informed, through a plain language statement, that participation was voluntary, anonymity and confidentiality would be protected throughout the research and reporting process, and participants could contact the research team and ethics committee if they had concerns about participation.⁴⁴ There were 1334 participants in the final sample. There were 13 913 invitations and a 9.6 per cent response rate — thus, approximately one in every 10 people who received an invitation responded by completing the survey. In order to optimise generalisation of the sample to the general population a weighting approach was adopted to correct for imbalances in representation.⁴⁵ The data was also screened for outliers in length of survey response times.

IV Survey Results

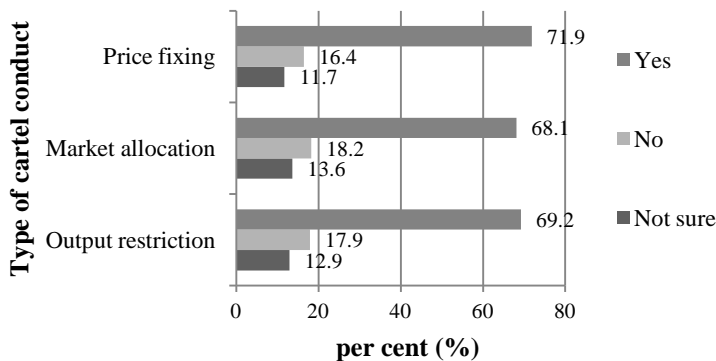
A The Legal Status of Cartel Conduct

In terms of the legal status of cartel conduct, the starting point for the survey was to ascertain the extent to which the public agreed with the treatment of such conduct as illegal in the sense of constituting a civil contravention. Civil cartel prohibitions have applied under Australian competition law since 1974. Thus, after being presented with the vignette that represented one of the particular types of cartel conduct covered by the survey, respondents were asked whether such conduct should be ‘against the law.’ The terms ‘civil’, ‘contravention’, ‘breach’, ‘unlawful’, and variants thereof, were avoided on the grounds that they were likely to be too technical for lay respondents. The results on this question are presented in Figure 1 below.

⁴³ The particular panel where participants were accessed is the ‘Valued Opinions’ panel: see <<http://www.valuedopinions.com.au/>>. This panel is exclusively ‘research only’, with panelists recruited by email and online marketing, with over 125 diverse online affiliate partners (to avoid bias associated with panel recruitment from limited sources).

⁴⁴ The invitation to participate and plain language statement are available in Beaton-Wells, above n 36, Appendix B.

⁴⁵ See eg, Geert Loosveldt and Nathalie Sonck, ‘An Evaluation of the Weighting Procedures for an Online Access Panel Survey’ (2008) 2(2) *Survey Research Methods* 93.

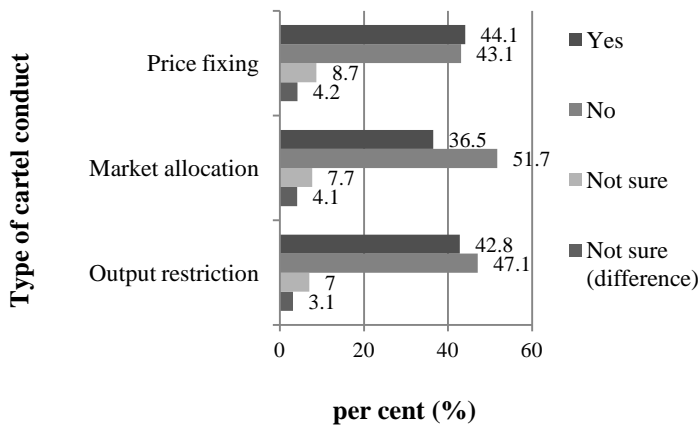
Figure 1: Cartel conduct as against the law⁴⁶

As indicated in Figure 1, a high proportion (more than two thirds) of respondents agreed that cartel conduct should be against the law. There were no major differences in this response between the three different forms of conduct.

Those respondents who agreed that the conduct in question should be against the law were then asked whether they thought it should be a criminal offence. It was decided for the purposes of this question not to define the term 'criminal offence'. This was essentially because it was not considered possible to formulate a definition that was sufficiently brief and intelligible for the purposes of the survey to distinguish criminal from civil liability without invoking the applicability of jail as a potential sanction. It was considered desirable to avoid explicit introduction of the concept of sanctions, and jail in particular, at this point of the survey as it was seen as important to capture respondents' views on whether conduct should be labelled as a criminal offence separate from their views on whether conduct should be sanctioned as a criminal offence.⁴⁷ It was evident nevertheless that some respondents may not be sure about the distinction between conduct being 'against the law' and conduct being a 'criminal offence'. Hence, respondents were given the option of indicating that they were not sure of the difference. The results on this question are presented in Figure 2.

⁴⁶ n=1296, all respondents.

⁴⁷ This approach reflects the widely recognised distinction drawn in criminal theory and policy between the expressive or communicative function and the instrumental or consequential function of the criminal law. For a recent useful summary of such theories (on which there is a voluminous literature), see David Wood, 'Punishment: Consequentialism' (2010) 5 *Philosophy Compass* 455; David Wood, 'Punishment: Nonconsequentialism' (2010) 5 *Philosophy Compass* 470.

Figure 2: Cartel conduct as a criminal offence⁴⁸

As reflected in Figure 2, the proportion of respondents who considered the relevant conduct should be a criminal offence and the proportion who considered it should be against the law (but not a criminal offence) were similar, particularly in relation to price fixing and output restriction. A much lower proportion considered cartel conduct should be a criminal offence as compared to the proportion who considered it should be against the law (see Figure 1). In the case of each type of conduct, the decrease in proportion of respondents from the proportion agreeing with the proposition that the conduct should be against the law to the proportion agreeing that it should be a criminal offence was more than 50 per cent.

Less than 10 per cent of respondents were not sure about whether cartel conduct should be a criminal offence and, suggesting greater appreciation of the difference between civil and criminal liability than had been anticipated, less than 5 per cent were not sure about the difference between conduct being against the law and conduct being a criminal offence.

There were very few statistically significant relationships found between the demographic characteristics of respondents and views as to the legal status of cartel conduct. A notable exception related to respondent gender. In relation to each of the types of cartel conduct, a significantly higher proportion of men considered the conduct should be a criminal offence than women.⁴⁹ Similar results were found in relation to market allocation and output restriction.

⁴⁸ For price fixing, n=952; market allocation, n=898; output restriction, n=920.

⁴⁹ A similar finding was reported in relation to the UK survey: see Stephan, above n 20, 131.

Those respondents who indicated that cartel conduct should be a criminal offence were then asked to indicate why they thought as much by indicating the extent of their agreement with a range of possible reasons. The reasons were chosen to reflect three of the key themes drawn upon in the case made for criminalisation by the ACCC:

- the effects/harmfulness of cartel conduct;
- the immoral character of cartel conduct; and
- the instrumental features of the criminal law as a mechanism for deterrence and punishment.

The results on this question in relation to price fixing are presented in Figure 3. Very similar results were recorded in relation to market allocation and output restriction.

Figure 3: Reasons for treating price fixing as a criminal offence⁵⁰

Reason	Most common response	Most common response (%)
Because the conduct involves deceiving consumers	Strongly agree	64.6
Because the conduct is dishonest	Strongly agree	63.5
Because making it a criminal offence will deter companies or people from engaging in this sort of conduct in the future	Strongly agree	59.7
Because the conduct will harm competition or the free market	Strongly agree	55.0
Because making the conduct a criminal offence will mean that the companies or people involved can be punished for it	Strongly agree	52.6
Because consumers may have to pay more	Strongly agree	50.4
Because the conduct should be seen as the same as theft	Strongly agree	47.4
Because the conduct may harm or be unfair to other competitors	Agree	43.4

As reflected in Figure 3, high proportions of respondents agreed or strongly agreed with all of the reasons offered for why cartel conduct should be a criminal offence. Thus the most common response for all reasons was ‘Strongly agree’ (except ‘Because the conduct may harm or be unfair to other competitors’ to which the most common response was ‘Agree’). The highest proportions of respondents selecting ‘Strongly agree’ were seen in response to the reasons —

⁵⁰ n=419.

'Because the conduct involves deceiving consumers' and 'Because the conduct is dishonest' (64.6% and 63.5% respectively). Similar moral themes were emphasised in the comments provided by respondents in the text box following the question — for example: 'it is a fraudulent and dishonest practice'; 'it is a rip off for the consumers'; 'nothing more than theft by another name'; 'if a private citizen obtains financial gain through deception it is a criminal offence. Why should a business get away with it?'; 'too many bigger companies try this sort of thing and it's [sic] not fair for the consumers'; 'it is morally wrong, regardless of what the law says'.

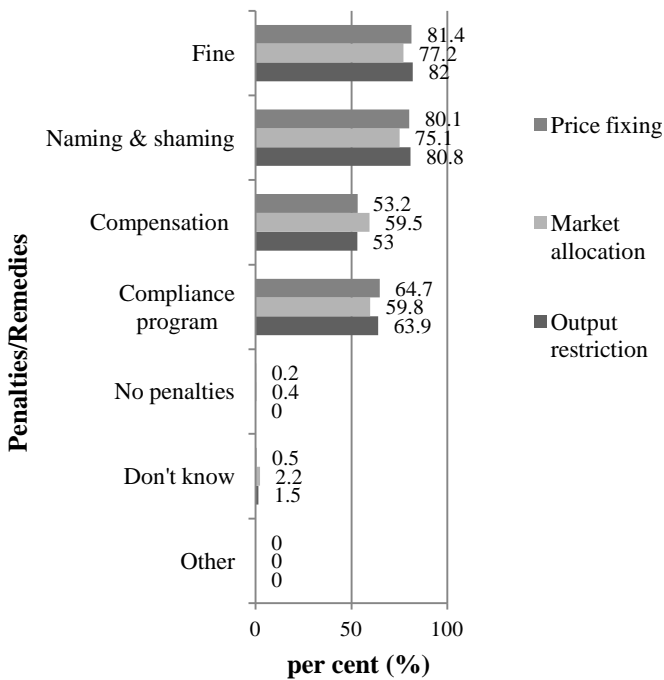
B Penalties and Remedies for Cartel Conduct

Following the questions relating to the legal status of cartel conduct, the survey asked respondents a series of questions about how the law should deal with the companies and individuals involved in such conduct.⁵¹

(a) Corporate Penalties and Remedies

In relation to companies that engage in cartel conduct, respondents were given a range of options and asked to select all that should apply. The results on this question are presented in Figure 4.

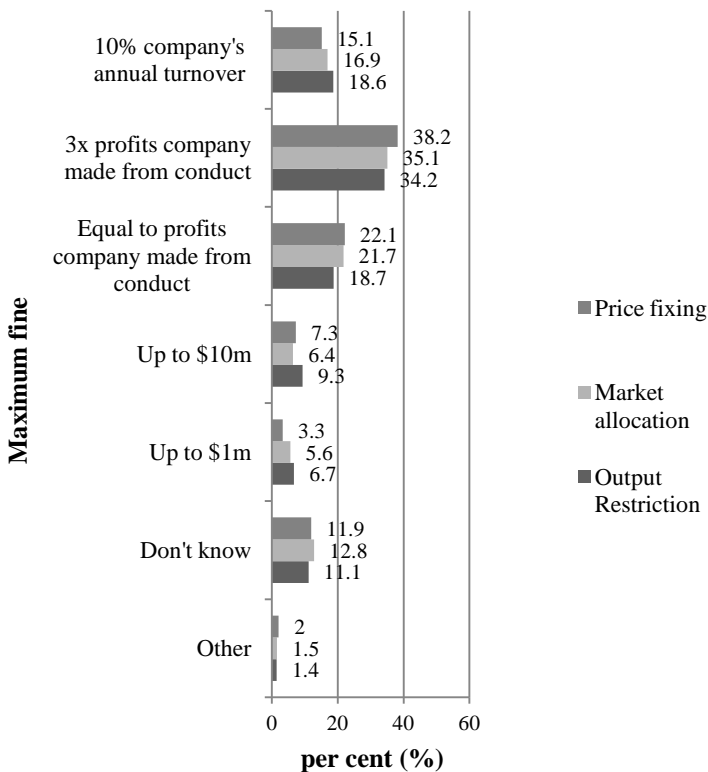
⁵¹ Respondents were directed to these questions irrespective of whether or how they had answered the question about whether cartel conduct should be a criminal offence. This was because, as previously noted, it was sought to distinguish between views on how conduct is labelled as a matter of law and views on what consequences might flow from conduct being unlawful (whether as a civil contravention or as a criminal offence).

Figure 4: Corporate penalties and remedies⁵²

As reflected in Figure 4, there were no major differences between types of cartel conduct in the level of support for different penalties or remedies for companies. Across all three types of conduct, the highest levels of support were for payment of a fine and, close behind (only 1–2 per cent difference), the company being publicly named for its involvement in the conduct. Only just over half of respondents considered the companies should have to pay compensation and just under two-thirds of respondents considered that companies should have to take measures to ensure that the conduct does not happen again (for example, through the institution of a compliance program). There was negligible support for the view that the companies should not have to face penalties.

Those respondents who selected the option of a fine were directed to a follow up question which asked how such fine should be calculated. The results on this question are presented in Figure 5.

⁵² For price fixing, n=781; market allocation, n=703; output restriction, n=756.

Figure 5: Maximum fines for companies⁵³

The first, second and fourth of the fine calculation options presented to respondents in this question represent the three possible maxima applicable to corporate fines under Australian law since January 2007 (prior to this, the maximum was AU\$10 million).⁵⁴ In any given case it will be the greatest of the three options that applies as the maximum. However, the maximum of 10 per cent of company turnover only applies if the treble gain measure is not ascertainable. Given the difficulties in calculating the gain, the turnover measure is used as a proxy for cancelling out the gain. The treble gain/turnover proxy measures were introduced based on the widely accepted economic theory of 'optimal' deterrence.⁵⁵

⁵³ For price fixing, n=952, market allocation, n=703; output restriction, n=756.

⁵⁴ See CCA s 76(1A), s 44ZZRF(3), s 44 ZZRG(3).

⁵⁵ Leading advocates of this theory include: Kenneth G Elzinga and William Breit, *The Antitrust Penalties: A Study in Law and Economics* (Yale University Press, 1976) ch 7; Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169; William Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 *The University of Chicago Law Review* 652; Richard Posner,

The second option ('an amount equal to the profits that the company made from the conduct') was included to give respondents the option of considering whether the penalty should act solely as a measure for confiscating the illicit profits (a disgorgement approach) without any further element of deterrence or punishment. The fifth option ('up to \$1 million') was included to give respondents an option of expressing a view that fines should be calculated based on a maximum well below that prescribed by the legislature since 1993.⁵⁶ It would also enable testing of the extent to which there is public support for the actual level of corporate fines imposed in Australia. Cartel fines imposed in this jurisdiction have been well below the statutory maxima. For the ten-year period between 2000 and 2009, for example, the median corporate penalty was AU\$826 534 per contravention; that is, less than AU\$1 million.⁵⁷

As reflected in Figure 5, there were no major differences between types of cartel conduct in the choice of method for calculating the corporate fine. Across all three types of conduct, more than one third of respondents considered that the corporate fine should be calculated based on a maximum of three times the profit the company made from the conduct. Less than 10 per cent of respondents considered the maximum fine should be AU\$10 million (the maximum that applied in Australia up until 2007) and there was minimal support for very low penalties (less than AU\$1 million — the level of penalty per contravention that has been imposed on average for the last 10 years).

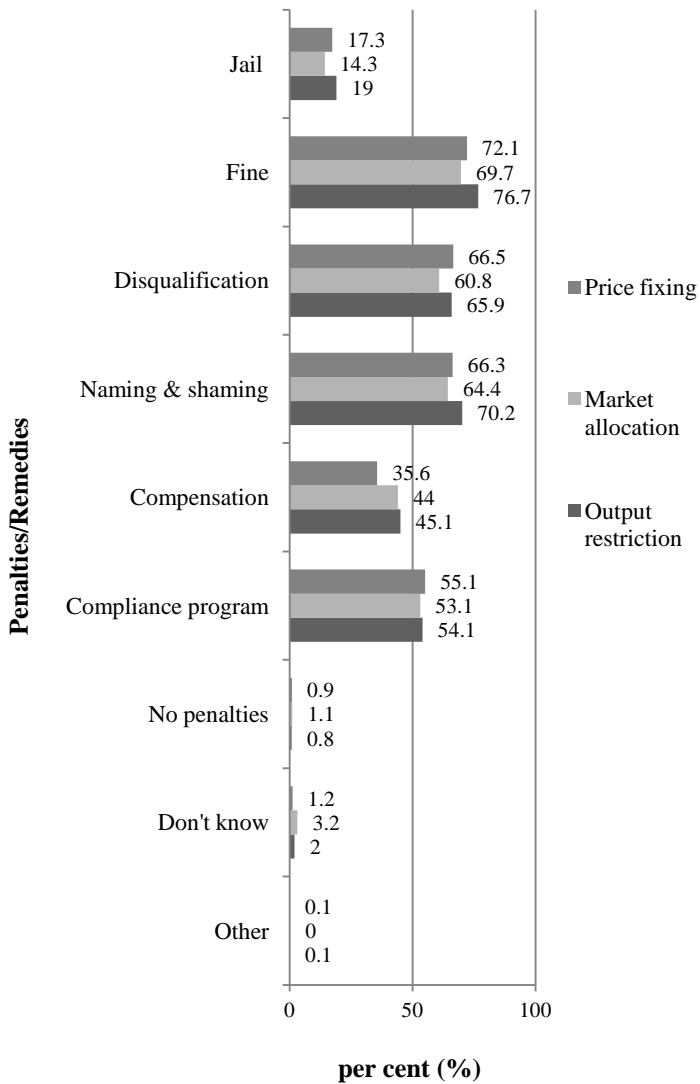
(b) Individual Penalties and Remedies

In relation to individuals who engage in cartel conduct, respondents again were given a range of options and asked to select all that should apply. The results on this question are presented in Figure 6.

'An Economic Theory of Criminal Law' (1985) 85 *Columbia Law Review* 1193, 1201–8.

⁵⁶ Prior to 1993, the maximum corporate penalty was AU\$250 000.

⁵⁷ See Beaton-Wells and Fisse, above n 7, 431.

Figure 6: Individual penalties and remedies⁵⁸

The penalties and remedies in the first six options presented to respondents reflect, broadly, the penalties and remedies applicable to individuals under Australian law currently, although some have been introduced only recently. Jail has been available since only July 2009 and disqualification orders have been available since only January

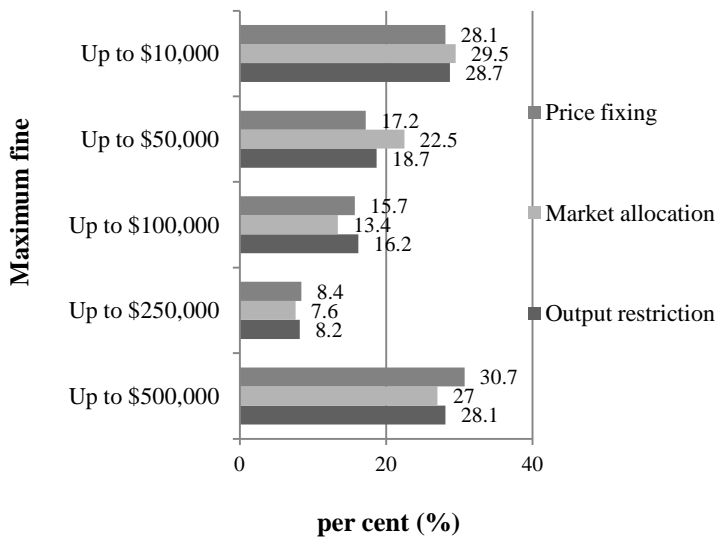
⁵⁸ For price fixing, n=952; market allocation, n=898; output restriction, n=920.

2007. Neither of these penalties has been applied in a case to date. As with companies, it was considered important to provide an option of ‘no penalties’ so as not to assume that respondents would be of the view that penalties should apply to individuals involved in cartel conduct (as opposed to a view, for example, that only companies should be penalised — a situation that pertains in many jurisdictions (in the European Union, for example) — or that no-one should be penalised).

As reflected in Figure 6, there were no major differences between types of cartel conduct in the level of support for different penalties or remedies for individuals. Across all three types of conduct, the highest level of support was, in descending order, for payment of a fine, followed closely by the individual being banned from being a director or manager of any company for a number of years and individuals being publicly named for involvement in the conduct. Nearly two thirds of respondents (and in some instances, more than two thirds) supported all three types of penalty. Just over half of respondents considered the individuals should have to take measures to make sure the conduct does not happen again (for example, by taking part in a compliance program). As with companies, there was relatively lower support for the payment of compensation.

Perhaps most strikingly, however, is that putting aside those very low proportions of respondents who selected ‘no penalties’ or ‘don’t know’, the lowest level of support was for the sanction of jail. Less than 20 per cent (and in the case of market allocation, less than 15 per cent) of respondents selected this as an option in considering how the law should deal with individuals responsible for cartel conduct.

Those respondents who selected the option of a fine in assessing the penalties or remedies that should apply to individuals for cartel conduct were directed to a follow up question which asked how such a fine should be calculated. The results on this question are presented in Figure 7.

Figure 7: Maximum fines for individuals⁵⁹

The options provided in answer to this question were chosen to provide respondents with a wide range of potential maximum fines for individuals from as low as anything below AU\$10 000 to as much as AU\$500 000. A maximum of AU\$500 000 has applied to civil contraventions by individuals since 1993 (it was AU\$50 000 prior to 1993). Somewhat anomalously, the maximum criminal fine for individuals has been set at AU\$220 000. As with corporate fines, it was also sought to ensure that the range covered by the options in the survey question reflected the level of fines that have been imposed in practice. Like corporate fines, the level of individual fines imposed for cartel conduct in Australia has been well below the statutory maximum. For the period 2000 to 2009, the median individual penalty has been AU\$31 986.⁶⁰

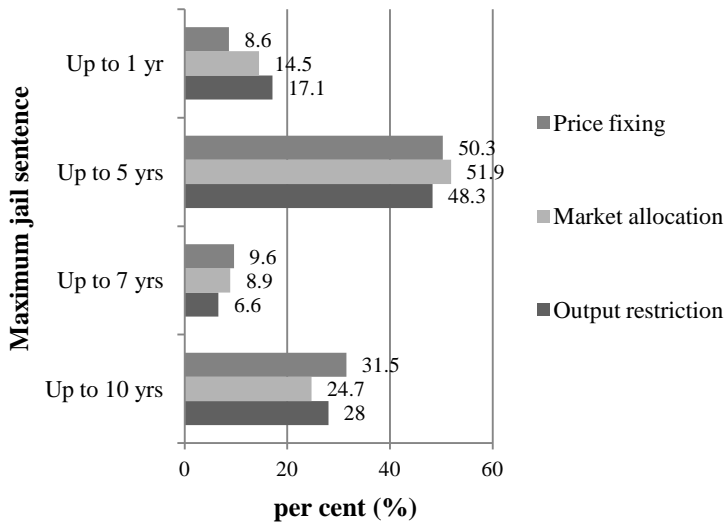
As reflected in Figure 7, there were no major differences between types of cartel conduct in the choice of method for calculating the fine for individuals. Across all three types of conduct, there was a fairly even spread of support for a wide range of maximum fines for individuals. The most common responses, however, were in favour of either the lowest end of the range ('up to \$10 000') or the highest end of spectrum ('up to \$500 000').

⁵⁹ For price fixing, n=678; market allocation, n=633; output restriction, n=695.

⁶⁰ See Beaton-Wells and Fisse, above n 7, 464. This is in fact a substantial decrease from the average fine for the period of 1993-99, which was AU\$76 752. This decline in individual fines is difficult to explain.

Those respondents who selected the option of a jail sentence in assessing the penalties or remedies that should apply to individuals for cartel conduct were directed to a follow-up question which asked what the maximum jail sentence should be. The results on this question are presented in Figure 8.

Figure 8: Maximum jail sentence for individuals⁶¹



Again, the options were designed to provide respondents with a wide range of potential maximum jail sentences for individuals from as low as anything below one year to as high as 10 years. The maximum introduced by the 2009 amendments is 10 years and is on par with the highest maxima in the world.⁶² A maximum of five years is consistent with the maximum in Australia for corporate law offences that could be considered comparable (for example, market manipulation and insider trading). In fact, five years was the maximum that was proposed for cartel offences in the draft legislation formulated during the term of the former conservative government but was increased to 10 years by the subsequent Labor government after consultation — specifically on the question of whether the ACCC should have telecommunications interceptions powers (which require a maximum of seven years).⁶³

⁶¹ For price fixing, n=157; market allocation, n=131; output restriction, n=172.

⁶² The United States and Mexico also have a 10 year maximum. The only jurisdiction which has a higher maximum is Canada (14 years).

⁶³ The ACCC proposed a seven year maximum in its submission in favour of criminalisation to the Dawson Committee, drawing attention to offences that it considered comparable under the *Criminal Code* such as theft, obtaining property by

As reflected in Figure 8, for all types of cartel conduct, the most common responses in relation to maximum jail sentences for individuals were for ‘up to 5 years’ and ‘up to 10 years’. About half of respondents supported a maximum jail sentence of five years and about a quarter supported a maximum of 10 years.

(c) *Immunity from Penalties*

A crucial aspect of anti-cartel law enforcement is the use of a form of immunity policy or leniency policy, as it is also known. More than 50 jurisdictions now have some form of immunity policy in support of their anti-cartel enforcement activities.⁶⁴ The ACCC has had a version of an immunity policy in place since 2003 and the ACCC Chairman describes it as ‘absolutely vital’ in the Commission’s efforts to crack cartels⁶⁵ and as its primary source of disclosure of cartel activity.⁶⁶ The use of an immunity policy in anti-cartel law enforcement is justified on the basis that it is the most effective and least costly mechanism for detecting activity that is generally systematic, deliberate and covert.⁶⁷ It is also seen as a means of deterring the formation of cartels.⁶⁸ These benefits are regarded as outweighing any adverse effects in terms of lower penalties overall as well as any adverse political or moral implications.⁶⁹

It was seen as important to attempt to capture the degree of public support for an immunity policy in the survey. Such support (or lack thereof) is important as a matter of public policy in assessing the legitimacy of an immunity policy. From a practical perspective, it is

deception and conspiracy to defraud a Commonwealth entity, all of which attract a maximum of 10 years. See ACCC, Submission No 56 to Parliament of Australia, *Trade Practices Act Review* (2 June 2002) 54.

⁶⁴ See Scott Hammond, ‘The Evolution of Criminal Antitrust Enforcement over the Last Two Decades’ (Paper presented at the 24th Annual National Institute on White Collar Crime Conference, American Bar Association Criminal Justice Section and Center for Continuing Legal Education, Miami, Florida, 25 February 2010) 1. On the adoption of immunity policies or revisions to such policies over the last decade, see also, International Competition Network, above n 1, 7.

⁶⁵ See Elizabeth Sexton, ‘To Catch a Cartel’, *Sydney Morning Herald* (Sydney) 21 March 2008, 35.

⁶⁶ Graeme Samuel, ‘Cartel Reform and Compliance with the Trade Practices Act’ (Australian Corporate Lawyers Association National Conference, 13 November 2009) 1, 6.

⁶⁷ Timothy Barnett, ‘Seven Steps to Better Cartel Enforcement’, in Claus-Deiter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007) 141, 146–8.

⁶⁸ See Gary Spratling, ‘Detection and Deterrence: Rewarding Informants for Reporting Violations’ (2001) 69 *George Washington Law Review* 798; Giancarlo Spagnolo, ‘Divide et Impera: Optimal Leniency Programmes’ (CEPR Discussion Paper No 4840, Centre for Economic Policy Research 2004).

⁶⁹ Wouter Wils, ‘Leniency in Antitrust Enforcement: Theory and Practice’ (2007) 31 *World Competition: Law and Economics* 35.

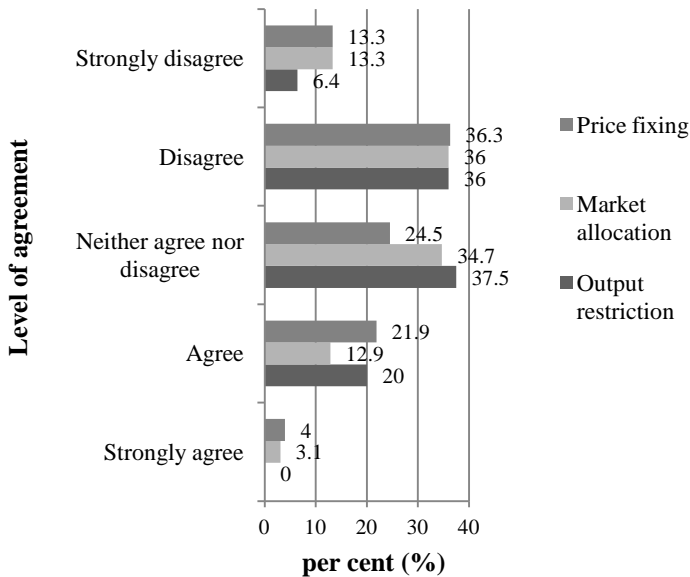
also relevant in evaluating how juries are likely to respond to prosecution witnesses who have been immunised under such a program.⁷⁰

Having reminded respondents of the vignette describing the particular type of conduct being asked about, the survey then provided the following further facts:

Imagine one company decides to report the agreement [on prices/to allocate customers/to reduce production levels] to the authorities in return for immunity from prosecution for the company. The other company is prosecuted. If the agreement had not been reported, the authorities would not have found out about it.

Respondents were then asked: ‘To what extent do you agree that it is acceptable to give the first company immunity?’ and were given a five point scale on which to indicate the extent of their agreement or disagreement. The results on this question are presented in Figure 9.

Figure 9: Acceptability of immunity policy⁷¹



⁷⁰ For the concerns that this has raised in the United Kingdom, see eg, Julian Joshua, ‘Shooting the Messenger: Does the UK Criminal Cartel Offense Have a Future?’ (2010) *Antitrust Source* 1.

⁷¹ For price fixing, n=952; market allocation, n=156; output restriction, n=60.

As reflected in Figure 9, across the three types of cartel conduct, disagreement with the view that it is acceptable to give the first company immunity ranged from 42.4 per cent to 49.6 per cent. Strong agreement with the view that it is acceptable to give the first company immunity was very low and agreement was low. Quite a large proportion of respondents were neutral or possibly ambivalent in their response (selecting ‘neither agree nor disagree’).

C The Relative Seriousness of Cartel Conduct

To a degree, respondent perceptions of the seriousness of cartel conduct may be taken to be reflected in their views on the legal status that such conduct should have and the types and levels of penalties it should attract. However, such perceptions are also likely to be context-dependent and relative, depending on the conduct chosen for comparison. The survey sought to explore these additional dimensions of public perceptions towards cartel conduct.

(a) Context

Having answered questions relating to the legal status and penalties or remedies for cartel conduct, respondents were then asked to consider various additional facts to those with which they had been provided in the vignettes with a view to assessing how particular aspects of the context or circumstances surrounding cartel conduct might affect respondents’ views as to its seriousness. Both potentially aggravating and mitigating aspects of the conduct were included. The results on this question in relation to price fixing are presented in Figure 10. Very similar results were recorded in relation to market allocation and output restriction.

**Figure 10: Contextual factors bearing on seriousness —
Price fixing⁷²**

	Less serious	Just as serious	More serious	Most common response
Prices did not go up as a result of the conduct	40.7	57.8	1.5	Just as serious
The conduct included bullying another company into joining the agreement	1.1	16.1	82.8	More serious
The reason for the conduct was that it would prevent factories from closing and would save jobs	46.2	49.3.	4.5	Just as serious

⁷² n=952.

The companies involved in the conduct were small businesses	16.5	79.9	3.6	Just as serious
Elaborate steps were taken to make sure the authorities did not find out about the conduct	1.4	20.3	78.2	More serious
The profits from the conduct were used to make products that are environmentally friendly	15.8	79.2	5.1	Just as serious

As reflected in Figure 10, none of the factors listed in the question were regarded by respondents as rendering an ‘agreement between competitors on prices’ as ‘less serious’. In terms of the most common response, the only two factors that were considered to make it ‘more serious’ were ‘The conduct included bullying another company into joining the agreement’ and ‘Elaborate steps were taken to make sure the authorities did not find out about the conduct’. In all the other circumstances cited, the conduct was considered ‘just as serious’. This apparent lack of support for mitigation on a range of grounds was reflected also in the comments provided by respondents — for example: ‘I don’t believe the end justifies the means’; ‘there can be no excuse for price collusion whatsoever’; ‘if something is wrong it is wrong doesn’t matter how you dress it up’; ‘the “crime” is still the same — we seem to have lost the art of being fair to everyone’; ‘the plea of environmentally friendly is rubbish’.

(b) Relativity

There is an extensive literature on and a large body of precedents for crime seriousness ranking or rating surveys.⁷³ However, such material was of limited assistance for the purposes of this survey given the novelty of the conduct with which it was concerned, and given that it was sought to have respondents compare the seriousness of that conduct relative to various other crimes, rather than to engage in a ranking/rating exercise as such. The offences that were listed in the survey for comparison with cartel conduct on the grounds of seriousness⁷⁴ were selected for their representativeness of certain

⁷³ For a useful review, see Stelios Stylianou, ‘Measuring Crime Seriousness Perceptions: What Have We Learned and What Else Do We Want to Know’ (2003) 31 *Journal of Criminal Justice* 37.

⁷⁴ The construct of ‘seriousness’ that is commonly employed in crime seriousness studies has been criticised for its subjectivity and opaqueness and its failure to distinguish between the bases for seriousness (between ‘serious on moral grounds’ and ‘serious on harm grounds’, for example). See eg., Mark Warr, ‘What Is the Perceived Seriousness of Crimes?’ (1989) 27 *Criminology* 795. However, length restrictions again prevented adopting a design that would overcome these issues.

offence categories seen as relevant in the present context for the specific reasons.⁷⁵

The results on this question in relation to price fixing are presented in Figure 11. Very similar results were recorded in relation to market allocation and output restriction.

Figure 11: Crime seriousness ratings — Price fixing⁷⁶

		Most common response	
A	A person stealing another person's property is...	just as serious as	competitors agreeing on prices
B	An insurance company denying a valid claim to save money is...	just as serious as	
C	A company director using their position dishonestly to gain personal advantage is...	just as serious as	
D	A company misleading consumers about the safety of goods is...	a lot more serious than	
E	A company failing to ensure worker safety is...	a lot more serious than	
F	A person killing another person is...	a lot more serious than	
G	A person driving while drunk is...	a lot more serious than	
H	A company evading government income taxes is...	just as serious as	
I	A person using inside information in deciding to buy or sell shares is...	just as serious as	
J	A person abusing another person is...	a lot more serious than	

As reflected in Figure 11, respondents regarded none of the comparator crimes listed as 'less serious' than competitors agreeing on prices.

They regarded five crimes as 'a lot more serious': 'A company misleading consumers about the safety of goods'; 'A company failing to ensure worker safety'; 'A person killing another person'; 'A person driving while drunk' and 'A person sexually abusing another person'. All of these crimes involve an element of bodily harm or risk thereof.

Further, it would be able to discern respondent views on moral versus harm dimensions through responses to other questions (for example, the questions that sought reasons as to why respondents considered cartel conduct should be a criminal offence and the questions that tested whether factors that might be regarded as mitigating or aggravating affected respondent views on seriousness).

⁷⁵ The offence categories and reasons for their selection are set out in Beaton-Wells et al, above n 36, 34–5.

⁷⁶ n=425. Only respondents who had agreed that cartel conduct should be a criminal offence were directed to this question.

Thus, consistent with findings generally in crime seriousness research,⁷⁷ offences involving physical harm or the risk of such harm to other persons (including consumer protection offences involving misrepresentations over product safety) are seen as more serious than cartel conduct. The other five comparators were considered ‘Just as serious’.

D Prior Awareness of Some Aspect/s of Competition Law

At the end of the survey, there was a question that asked respondents to indicate if they had heard or read about any of a series of people, organisations or topics associated with competition law and cartels in particular. The items in the list were selected on the basis that they were names or topics that had appeared regularly in the media over the last five years, either in association specifically with the debate over cartel criminalisation or more generally in association with competition law and enforcement related issues.

The purpose of the question was to attempt to have some basis on which to assess the extent of familiarity by respondents with the subject-matter under examination in the survey. It was considered necessary to be able to make this assessment given the view that there is a difference between public opinion that is ‘top of mind’ (in the sense that it is uninformed and instinctive) and public judgment that is based on some pre-existing awareness and understanding the subject-matter on which judgment is being made. The latter is said to be a superior measure for the purposes of influencing public policy.⁷⁸

The results on this question are presented in Figure 12.

Figure 12: Prior awareness

	No (%)	Yes (%)
The Australian Competition and Consumer Commission (ACCC)	21.4	78.6
Cartels or cartel conduct	71.3	28.7
Graeme Samuel ⁷⁹	80.0	20.0

⁷⁷ See eg, Paul Wilson, John Walker and Satyanshu Mukherjee, ‘How the public sees crime: an Australian survey’, Trends and Issues in Crime and Criminal Justice Series No 2, Australian Institute of Criminology (October 1986); John Walker, Mark Collins and Paul Wilson, ‘How the public sees sentencing: an Australian survey’, Trends and Issues in Crime and Criminal Justice Series No 4, Australian Institute of Criminology (April 1987).

⁷⁸ See eg, David A Green, ‘Public opinion versus public judgment about crime: Correcting the “comedy of errors”’ (2006) 46 *British Journal of Criminology* 131.

⁷⁹ Chairman of the ACCC from 2003 until 2011.

	No (%)	Yes (%)
Allan Fels ⁸⁰	64.3	35.7
Price fixing	19.4	80.6
A case involving Visy and Amcor for price fixing ⁸¹	60.8	39.2
Criminal penalties for cartel conduct	84.9	15.1
A case involving Richard Pratt and the Australian Competition and Consumer Commission ⁸²	53.2	46.8
Haven't heard or read about any of these	89.4	10.6

These results indicated a high level of awareness of some aspect or aspects of competition law or cartels by the survey respondents. Nine out of 10 respondents had heard of at least one of these topics; whereas only one out of 10 had heard of none.

In order to examine the relationships between level of prior awareness and responses to questions about the legal status, characterisation and consequences of cartel conduct, an overall measure of prior awareness was created.⁸³ Perhaps not unexpectedly, level of awareness tended to increase with age and education level.⁸⁴ There was also a higher level of awareness amongst men than women.⁸⁵ Also somewhat predictably, in terms of high awareness, managers in large

⁸⁰ Chairman of the ACCC from 1991 until 2003.

⁸¹ Referring to the ACCC's proceeding against Visy in respect of price fixing with its major competitor Amcor (which obtained immunity) which resulted in record breaking penalties against Visy and two of its senior executives: see *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No. 3]* (2007) 244 ALR 673. For description of the significance of the case in the context of the criminalisation campaign, see Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal: A Case-Study of Ambiguity in Controlling Business Behaviour' (2009) 42 *Australian and New Zealand Journal of Criminology* 218, 232–3.

⁸² Referring to the high-profile prosecution of then Visy Chairman and Australia's 4th richest man, Richard Pratt, for obstruction of justice in connection with his interview by the ACCC under s 155 of the CCA. The prosecution collapsed as Mr Pratt lay on his deathbed and attracted immense media attention including criticism of the ACCC. See eg Leonie Wood, 'ACCC Pursuit of Pratt Raises Many Questions' *Sydney Morning Herald* (Sydney) 29 April 2009, 5.

⁸³ First, a total score on prior awareness was derived from summing the number of 'yes' responses to the following topics: ACCC; cartels or cartel conduct; Graeme Samuel; Price fixing; a case involving Visy and Amcor; criminal penalties for cartel conduct; a case involving Richard Pratt and the ACCC. The total score ranged from 0 to 7. In order to simplify analysis, and with interest in creating relatively evenly sized groups, the scores were then recoded into four categories: 'no awareness' (if total score was 0), 'low awareness' (if total score was 1 or 2), 'medium awareness' (if total score was 3 or 4), and 'high awareness' (if score was between 5 and 7). These scores did not include the item of 'Allan Fels'. This was because we wanted to create an overall score in order to compare across *all* participants in the random general population. The 'Allan Fels' item had not been present in the question when the survey was administered on soft launch.

⁸⁴ See Beaton-Wells et al, above n 36, 58, 60.

⁸⁵ *Ibid* 59.

workplaces represented the largest proportion among all groups.⁸⁶ In terms of the relationship between level of prior awareness and responses on the substantive questions, statistical analysis showed that the higher the level of awareness, the more likely the respondent was to agree that cartel conduct should be a criminal offence. For example, in the high awareness group, 54.2 per cent indicated that price fixing should be a criminal offence, compared to 37.5 per cent who indicated that it should not. Similarly, the level of support for jailing individuals for cartel conduct increased with the apparent level of awareness by the respondent of cartel-related matters. For example, for price fixing and market allocation, the largest proportions of respondents supporting jail were those with either high or medium awareness.

V ACCC Anti-Cartel Advocacy: The Report Card

It is important to acknowledge that this survey did not set out to test the relationship between the ACCC's advocacy efforts and public opinion on anti-cartel law and enforcement. However, in our view, it is reasonable to attribute the opinion evidenced in the survey in large part to the public campaign by the ACCC in support of its enforcement activity and agenda over the last two decades and in support of criminalisation specifically over the last decade.

The push for criminal reform was spearheaded by the ACCC Chairmen who have become figures familiar to the Australian public through other high profile campaigns over many years (including on consumer protection matters, the introduction of the GST, and recurring debates over grocery, petrol and bank prices).⁸⁷ The reach and impact of the criminalisation campaign was accentuated by the bipartisan support it received publicly from politicians and the interest taken in it by media commentators.⁸⁸ It also benefited considerably, in terms of its media coverage, from the extreme public interest in the Visy/Amcort cartel case⁸⁹ and ensuing prosecution of Richard Pratt for obstruction,⁹⁰ and the connection that the ACCC was able to make with this cartel and the need for criminal sanctions for serious cartel conduct.⁹¹ The

⁸⁶ Ibid 62.

⁸⁷ For discussion of the media strategy of the ACCC under Allan Fels, see Fred Brenchley, *Allan Fels: A Portrait of Power* (John Wiley, 2003), ch 8.

⁸⁸ This is not to say that the conservative government did not exhibit a substantial degree of ambivalence about the reform, as documented in C Beaton-Wells, 'The Politics of Cartel Criminalisation' (2008) 29 *European Competition Law Review* 185.

⁸⁹ See n 81 above.

⁹⁰ See n 82 above.

⁹¹ Graeme Samuel, 'Opening Statement' (Speech delivered at Visy News Conference, ACCC Melbourne, 2 November 2007) 3.

attribution of the public opinion captured in this survey to the advocacy of the ACCC is supported further by the survey findings which indicate high levels of prior awareness of some aspect or aspects of competition or cartel law and enforcement by respondents.⁹²

In terms of evaluating the ACCC's anti-cartel advocacy, the survey results present a mixed report card. On the positive side, the results demonstrate that there is substantial majority support among the Australian public for the view that cartel conduct is unacceptable in the basic sense that it should be treated as illegal. Indeed, a large majority regard such conduct as sufficiently unacceptable or serious such that they consider it should attract significant fines and public naming and shaming of the companies and individuals involved. As referred to below, there is also a strong view that cartel conduct should not be readily excused, at least not on grounds relating to the size of the companies involved, the reasons for the conduct or its effects on price.⁹³ This could suggest that the ACCC concern to confine application of the criminal regime to large businesses and to exclude politically sensitive sectors such as rural producers and trade unions may have been misplaced.⁹⁴

Further, the survey suggests that the seriousness of cartel conduct tends to be viewed by the public more in moral terms than in terms of its economic effects or harmfulness.⁹⁵ This insight may be derived from having regard collectively to several aspects of the survey results, namely:

- the reasons for treating such conduct as a criminal offence that attracted greatest support were reasons relating to moral characterisations of the conduct as dishonest and deceptive (as distinct from characterisations based on its economic effects);
- there was high level of support for publicly naming those involved in the conduct, suggesting this is conduct seen as warranting the stigma of community disapproval;
- there was low level of support for allowing an offender to escape penalties in return for reporting the conduct, a response that sits more comfortably with a moral rather than an pragmatic approach;

⁹² See Part IV D above.

⁹³ Almost 80 per cent considered it just as serious if the companies involved were small businesses or if the profits from the conduct were to be invested in environmentally friendly products. More than half of the respondents to the survey considered the conduct to be just as serious when it did not cause prices to increase.

⁹⁴ Beaton-Wells and Haines, above n 81, 229.

⁹⁵ Further statistical testing is being conducted to verify this relationship.

- there was substantial majority support for the view that cartel conduct should be regarded as more serious when it has elements that make it less acceptable from a moral perspective, namely when it involves coercion of another company to join the cartel or where elaborate steps are taken to conceal the conduct from authorities; and
- among those members of the public who considered that it should be a criminal offence, the view most commonly held was that cartel conduct is just as serious as a range of dishonesty-related offences such as theft, fraud, tax evasion, breach of directors' duties and insider trading.

The ACCC's invocation of moral judgments in its public advocacy of the criminal reform suggests that the Commission appreciated (consciously or unconsciously) that the public would be more likely to relate to a moral perspective than to an economic analysis. Certainly the ACCC's moralising would not have been for the benefit of competition lawyers or business people. The former have long rejected the idea that moral concepts have a place in the design or interpretation of competition legislation⁹⁶ and the latter have been said to respond negatively to attempts by the ACCC to stigmatise anti-competitive conduct on moral grounds.⁹⁷

In terms of who should be held accountable for cartel conduct, the survey results support the ACCC's long held position that both companies and individual executives should be accountable.⁹⁸ The survey evidenced virtually no support for the view that cartel conduct is behaviour for which either companies or individuals alone should be sanctioned; rather, there is almost universal support for the view that sanctions should attach to both.

In terms of the types of sanctions that should apply to cartel conduct, the results support the ACCC's practice of seeking pecuniary penalties in almost every proceeding that it initiates for breach of the cartel prohibitions under the CCA. For both companies and individuals found responsible for cartel conduct, between approximately 70 and 80 per cent of survey respondents considered that fines should be applied. The ACCC is also clearly acting in alignment with public opinion in issuing a press release, as is the standard practice of the Commission, to announce the outcome of enforcement action taken in cartel cases.

⁹⁶ Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 *Melbourne University Law Review* 675, 676–7.

⁹⁷ Parker, above n 34.

⁹⁸ Cf the criticism of failure by the ACCC, contrary to its rhetoric, to join individuals consistently as respondents to enforcement proceedings taken against their corporate employers in Beaton-Wells and Fisse, above n 7, 193–4.

Public announcements received levels of support amongst survey respondents similar to the support received for fines.⁹⁹

Less favourable for the ACCC is the significant gap between public opinion about the appropriate level of corporate fines for cartel conduct and the actual level of fines that has been imposed over the last decade in Australia. The survey evidenced clear majority support for the view that the fine imposed on a company for cartel conduct should at least disgorge the company of the illegal profits and strong (one third) support for basing the fine on treble the profits derived from the conduct.¹⁰⁰ As noted previously, most of the pecuniary penalties that have been imposed for cartel conduct over the last 10 years have reflected a 'settlement' negotiated by the ACCC and most have fallen considerably short of the statutory maximum available for such conduct. The ACCC might argue that it was not able to negotiate a higher level of penalty in these cases and that such compromises are in the public interest in that they save limited ACCC resources and court time.¹⁰¹ Notably, however, the ACCC has recently signalled an intention to raise the bar in terms of penalty levels, particularly in cases in which the maximum penalty introduced in 2007 applies.¹⁰² That maximum reflects the 'treble the gain' approach favoured by more than a third of survey respondents.

Also perhaps disconcerting for the ACCC is the low public support for its Immunity Policy for Cartel Conduct. Less than a fifth of respondents agreed that immunity from sanctions for cartel conduct should be available in return for being the first to report the conduct to the authorities even if, without such a report, the authorities were unlikely to have detected the conduct. There is thus a clear misalignment between the ACCC's immunity policy and public opinion. However, as with penalty levels, this may be in an instance in which the ACCC might argue that respondents lacked important contextual information. Respondents might have reacted more favourably, it could be said, had they had a fuller appreciation of the difficulties of detecting and prosecuting cartel conduct. A more positive response may also have been facilitated by information about the

⁹⁹ Arguably, these findings suggest the public would support the ACCC doing more than issuing a press release, including making use of its power to seek punitive adverse publicity orders pursuant to s 86D(1) of the CCA. For an argument that more should be made of this power, see Beaton-Wells and Fisse, above n 7, 461.

¹⁰⁰ By contrast, opinion was divided on the level of the fine that should be imposed on an individual for cartel conduct as reflected in the fact that maxima of AU\$10 000 and AU\$500 000 attracted similar levels of support.

¹⁰¹ As recognised in cases such as *NW Frozen Food v Australian Competition and Consumer Commission* (1996) 71 FCR 285; *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR ¶41-993.

¹⁰² See eg, ACCC, 'Breaching the Trade Practices Act Has Never Been More Costly', (Media Release, NR 028/10, 25 February 2010).

consistency and objectivity with which the policy is applied and its exclusion of clear leaders and coercers.¹⁰³

Beyond pecuniary penalties and press releases, the survey indicated that there is relatively less but still majority public support for other legal consequences for corporate and individual offenders, such as the requirement that compensation be paid and compliance programs be implemented and, that in the case of individuals, disqualification orders be made. While in many cases the ACCC will seek a compliance program order,¹⁰⁴ we are not aware of any cartel case to date in which an order for compensation or an order for disqualification has been sought. In respect of the latter, the reason for this may be because the order only became available to the ACCC as of 1 January 2007 and applies only to conduct after that date.¹⁰⁵ In respect of compensation, the reasons are more complex and are likely to relate to the difficulties in identifying victims and quantifying the harm associated with cartel conduct.¹⁰⁶ It is not clear, and is hazardous to speculate, why survey respondents favoured fines and naming and shaming as legal responses to cartel conduct over the other options listed. However, one possible explanation (consistent with the apparently moral stance of the public referred to above) is that monetary penalties and public denunciation were perceived as more punitive responses than the others.

More difficult to explain are the survey results that show less than half of the public agrees that cartel conduct should be a criminal offence.¹⁰⁷ Based on these results it could be said that the ACCC has failed to persuade a majority of the Australian public that cartel participants should be treated as criminals.¹⁰⁸ An alternative view would be that in a relatively short space of time, and before the first case has been brought, the ACCC has performed well in persuading a large proportion of the public (44 per cent in the case of price fixing) to

¹⁰³ See ACCC, *Immunity Policy for Cartel Conduct*, 2009 (2011 ed), para 8(a)(iv).

¹⁰⁴ See CCA s 86C(4)(a).

¹⁰⁵ See CCA s 86E.

¹⁰⁶ These were the reasons, amongst others, for the ACCC's removal of a requirement of restitution from an earlier version of its immunity policy. See ACCC, *Review of ACCC's Leniency Policy for Cartel Conduct* (ACCC Position Paper, 26 August 2005) 12–14.

¹⁰⁷ The survey did not elicit opinion on why respondents did not agree that cartel conduct should be treated as a criminal offence.

¹⁰⁸ Whether this poses a problem in terms of policy or philosophy depends on whether one supports the view that the criminal law should reflect public opinion or whether one is open to the view that the criminal law plays a legitimate role in leading and shaping public opinion. See Tom Tyler and John Darcy, 'Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account When Formulating Substantive Law' (2000) 28 *Hofstra Law Review* 707, 714–24; John Coffee Jr, 'Does Unlawful Mean Criminal? Reflecting on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 *Boston University Law Review* 193, 200.

its way of thinking.¹⁰⁹ While both characterisations are open, the more favourable view could be supported by regard to the fact that, relative to the United States where cartels have been an offence since 1890 and a felony since the 1970s, competition law and enforcement is still in its infancy in Australia.¹¹⁰ Relative to that jurisdiction,¹¹¹ there is also not a tradition of viewing white collar crime as harshly as blue collar crime, and this too might explain public hesitancy to view cartel conduct as a criminal offence.¹¹²

Perhaps more troubling for the ACCC, then, is the finding showing that less than a fifth of the public support jail for individuals responsible for cartel conduct. This is particularly striking given that the availability of a custodial sanction was a major plank in the ACCC's justification for criminalisation, its argument being that a potential jail term is the only sanction that will effectively deter individuals.¹¹³ A practical concern for the ACCC (and even more so perhaps the Commonwealth Director of Public Prosecutions, who will

¹⁰⁹ One flaw in this argument is that it overlooks the possibility that some and possibly many of these respondents had been of the view that cartels should attract criminal sanctions before the ACCC even began its campaign. The extent to which that is so will never be known.

¹¹⁰ Unfortunately there is no empirical data of which we are aware that indicates the level of public support in the US for the Department of Justice's active criminal enforcement program. However, experienced commentators assert that treating individual cartel offenders as criminals is simply part of the American 'public psychology'. See Donald Baker, Punishment for Cartel Participants in the US: A Special Model' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), 27, 28. Others emphasise that establishing social consensus in support of criminalisation is a long term process. See William Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from US Experience' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), 45, 46–7.

¹¹¹ See Francis Cullen, Jennifer Hartman and Cheryl Jonson, 'Bad guys: Why the public supports punishing white-collar offenders' (2009) 51 *Crime, Law and Social Change* 31 documenting the transformation of American public opinion from apathy to hostility in respect of white collar offending since 1970. There is also evidence that in some instances white collar offending is seen as more serious than blue collar offending. See Kristy Holtfreter et al, 'Public perceptions of white-collar crime and punishment' (2008) 36 *Journal of Criminal Justice* 50; Donald Rebovich and John Kane, 'An Eye for an Eye in the Electronic Age: Gauging Public Attitudes toward White-Collar Crime and Punishment' (2002) 1 *Journal of Economic Crime Management*, 1.

¹¹² Wilson, Walker and Mukherjee, above n 77. Cf Robert C Holland, 'Public perceptions of White Collar Crime Seriousness: A Survey of an Australian Sample' (1995) 19 *International Journal of Comparative and Applied Criminal Justice* 91 which shows Australian are increasingly regarding white collar offences as serious.

¹¹³ See eg, Graeme Samuel, 'Cartels, criminal penalties and the leniency policy', (Speech delivered at International Bar Association International Competition Enforcement Conference Tokyo, 21 April 2005), 7–8; Graeme Samuel, 'Cartel reform and compliance with the Trade Practices Act', (Speech delivered at the Australian Corporate Lawyers Association National Conference, Melbourne, 13 November 2009) 2.

have carriage of cartel prosecutions and sentencing submissions) is that this could suggest difficulties in persuading a jury unanimously to convict individual defendants in cartel cases in the future. To the extent that sentencing practice should reflect public opinion,¹¹⁴ it may also be reflected in judicial timidity about imposing a custodial sentence.¹¹⁵

This survey was conducted prior to any criminal investigation or prosecution having been announced or completed. It therefore provides a significant baseline in terms of data regarding public opinion at the inception of the new legal regime. It will be important to conduct a follow up survey after a number of cases have been run. These cases are likely to attract substantial media coverage and their nature and outcomes are likely to affect public opinion on the matters canvassed in this survey — particularly on whether cartel conduct should be treated as a criminal offence and whether individuals should be jailed for it. Just as the 2010 survey has enabled the impact of ACCC anti-cartel advocacy on public opinion to be assessed, a sequel will enable an assessment to be made of the impact of criminal enforcement.

¹¹⁴ See n 33 above.

¹¹⁵ See the discussion of such challenges and others that lie ahead in enforcing the criminal regime in Caron Beaton-Wells, 'Cartel Criminalisation and the Australian Competition and Consumer Commission: Opportunities and Challenges' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), chapter 8, 181.