Title page

Justifying criminal sanctions for cartel conduct

A hard case

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Abstract

Competition authorities increasingly favour criminal sanctions for 'hard core' cartel conduct. However, the empirical case for criminalisation is thin. This article reports on 'first of its kind' empirical research that interrogates the key justifications offered by enforcers in support of criminal cartel law enforcement. Based on an Australian case-study, but with implications for other jurisdictions, the research findings raise serious questions about claims regarding the deterrence impact of criminal sanctions and the inherent criminality of cartel conduct. The implications for the criminalisation 'movement' are far-reaching. Specific implications for the advocacy and outreach strategies of competition authorities are discussed, with particular emphasis on how such strategies should be formulated so as to maximise their value, not just in securing deterrence, but ultimately in building compliance.

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Caron Beaton-Wells* and Christine Parker**

Introduction

Cartel conduct is regarded as anathema to competitive markets. It has been shown to raise prices artificially, reduce consumer choice and impede business responsiveness and innovation.[1] Driven by concern particularly about the damage caused by large scale cross-border cartels, competition authorities have made tougher anti-cartel law and enforcement a top priority over the last decade.[2] As part of this 'get tough' approach, it is possible to discern a contemporary movement in support of criminal sanctions for serious or so-called 'hard core' cartel conduct.[3] More than thirty countries have criminalised cartel conduct in some form. All but five have done

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[1] Organisation for Economic Co-operation and Development, 'Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws' (9 April 2002); John M Connor, Albert A Foer and Simcha Udwin, 'Criminalizing Cartels: An American Perspective' (2010) 1 New Journal of European Criminal Law 199, 200–202.

[2] See International Competition Network, 'Trends and Developments in Cartel Enforcement' (9th Annual ICN Conference, Istanbul, 29 April 2010).

[3] Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011).

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so since 1995 and over 20 since 2000, and the list is growing.[4] The campaign for criminal sanctions has been led by the United States authorities,[5] based primarily on the view that individual accountability through incarceration is the most effective means of deterring and punishing cartel conduct.[6]

Australia's introduction of cartel offences with criminal sanctions in 2009 was consistent with these international trends. At the same time it represented a major shift in the approach taken to anti-cartel enforcement in this country. The shift was from a fairly benign regime involving insipid civil fines to a heavy-handed one threatening the stigma of conviction and a jail sentence of up to ten years.[7] The Australian reform was justified principally on two grounds.[8] First, it was claimed that having a criminal regime is the most effective way to deter cartel conduct and induce compliance with the law through the fear of criminal sanctions — principally jail. Second, it was said that serious cartel conduct is inherently criminal; that it is sufficiently harmful and/or wrongful and is analogous in those respects with other crimes, particularly dishonesty-based offences such as theft and fraud, and should be treated accordingly. These were

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[4] Gregory C Shaffer and Nathaniel H Nesbitt, 'Criminalising Cartels: A Global Trend?' (2011) 12 Sedona Conference Journal 313.

[5] For discussion of the role played by the US, see Christopher Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 Critical Criminology 181.

[6] See, eg, Scott D Hammond, 'Charting New Waters in International Cartel Prosecutions' (20th Annual National Institute on White Collar Crime, San Francisco, 2 March 2006) 2; Christine A Varney, 'Vigorous Antitrust Enforcement in this Challenging Era' (Remarks as prepared for the Center for American Progress, Washington, DC, 11 May 2009); Scott D Hammond, 'The Evolution of Criminal Antitrust Enforcement over the Last Two Decades' (24th Annual National Institute on White Collar Crime, Florida, 25 February, 2010) 4, 6–9.

[7] The criminal provisions were introduced by the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 (Cth).

[8] Other justifications drew on overseas experience — the long-standing experience of the US, in particular, although the fact that the UK had criminalised in 2002 was also seen as influential. See Australian Competition and Consumer Commission, 'Submission to the Trade Practices Act Review' (June 2002) <www.accc.gov.au/content/index.phtml/itemId/303044> accessed 12 November 2012, 8–10.

arguments made by the Australian Competition and Consumer Commission ('ACCC'), the initiator and leading proponent of the reform, and the Australian government.[9]

The claims made in support of criminalisation in Australia are not novel. They echo claims made routinely by advocates for criminal enforcement of anti-cartel laws in other jurisdictions.[10] Yet such claims are rarely subject to rigorous testing. While there is no shortage of enforcer anecdote,[11] particularly from the US authorities which have had the most active experience with criminal enforcement,[12] an empirical basis for the deterrence claim is thin.[13] The evidence for the inherent criminality claim is virtually non-existent.[14] Research carried out by the University of Melbourne between 2009 and 2011 ('The Cartel Project') sought to fill this gap, at

[9] See Caron Beaton-Wells, 'Criminalising Cartels: Australia's Slow Conversion' (2008) 31 World Competition 205, 210–213; Caron Beaton-Wells and Fiona Haines, 'The Australian Conversion: How the Case for Cartel Criminalisation Was Made' (2010) 1 New Journal of European Criminal Law 499.

[10] Christopher Harding, 'A Pathology of Business Cartels: Original Sin or the Child of Regulation?' (2010) 1 New Journal of European Criminal Law 44.

[11] One of the most commonly cited anecdotes by a former US Department of Justice official is of a statement made to him by a senior corporate executive (who would go on to become CEO of one of America's largest enterprises): 'you've got it absolutely right on jail sentences … as long as you are only talking about the money, the company can at the end of the day take care of me — but once you begin talking about taking away my liberty, there is nothing that the company can do for me.' See Belinda A Bennett, 'Criminalization of Cartel Conduct: The Changing Landscape' (Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop, Adelaide, 3 April 2009) 1.

[12] See John M Connor, 'Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008' (2009) American Antitrust Institute Working Paper No 09-06.

[13] See Christine Parker, 'Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) ch 11, 239.

[14] This is not to say that there have not been efforts focussed on identifying the theoretical basis for such a claim. See, eg, Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 Melbourne University Law Review 675; Peter Whelan, 'Morality and Its Restraining Influence on European Antitrust Criminalisation' (2009) 12 Trinity College Law Review 40.

least in the context of the Australian criminalisation debate.[15] As far as the authors are aware, this is the only research of its scope to have been conducted anywhere in the world to date.[16]

This article reports the key findings of a major component of the Cartel Project involving a survey of the general public and a representative group of the business community.[17] The findings expose significant weaknesses in the key claims made in support of cartel criminalisation. Having regard to those findings, the authors reflect on the implications for the movement in favour of criminal anti-cartel enforcement — not just in Australia, but internationally and, in particular, for other jurisdictions recently embarked on or contemplating the criminal path.

The structure of the article is as follows. Part I outlines by way of background the aims, scope and methodology of the Cartel Project research. Part II reports on the findings that bear on the deterrence claim in support of criminalisation. Part III reports on the findings relevant to the inherent criminality claim in support of criminalisation. Part IV draws out and discusses the implications of the research highlighting the implications, in particular, for the advocacy and

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[15] See generally in relation to this Project <www.cartel.law.unimelb.edu.au>.

[16] cf the survey reported in Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 Competition Law Review 123 which was of narrower compass to the Cartel Project survey. For a comparison of the two surveys, see Caron Beaton-Wells, 'Criminal Sanctions for Cartels — The Jury is Still Out' in Ariel Ezrachi (ed) *Research Handbook on International Competition Law* (Edward Elgar, 2012) ch 9 (in press). A pilot study of 200 consumers in Greece has also been reported in Vasiliki Brisimi and M Ioannidou, 'Criminalizing Cartels in Greece: A Tale of Hasty Developments and Shaky Grounds' (2011) 34 World Competition 157. In addition, 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 of Competition Policy: Summary' (November 2009).

[17] For detailed reports on the survey, see Caron Beaton-Wells and others, 'The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement' (December 2010); Christine Parker and Chris Platania-Phung, 'The Deterrent Impact of Cartel Criminalisation: Supplementary Report on a Survey of Australian Public Opinion Regarding Business People's Views on Anti-Cartel Laws and Enforcement' (12 January 2012).

outreach strategy of competition authorities and its relationship with enforcement and compliance.

I Research background

Criminalisation represented a major change in Australia's approach to cartel regulation. From the time of its enactment in 1974 up until 2009 when the cartel offences were introduced, the Competition and Consumer Act 2010 (formerly the Trade Practices Act 1974) imposed civil sanctions only for breaches of the cartel prohibitions. Despite substantial increases in the pecuniary penalty maxima on two occasions over the last 30 years, penalty levels have remained low.[18] The introduction of offences for behaviour that was not seen as unambiguously criminal[19] and with penalties that are high by international standards for cartel conduct,[20] as well as by Australian standards for other business-related offences,[21] was thus a dramatic development. Despite this, debate about the justifications for and likely effects of criminalisation in the years leading up to and during the legislative process was confined largely to professional and academic specialists in this highly technical field of discourse and even in those circles, the commentary was relatively shallow. Attention focussed largely on the design of the legislation

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[18] See Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) ch 11, para 11.3.

[19] 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; Fiona Haines and Caron Beaton-Wells, 'Ambiguities in Criminalising Cartels: A Political Economy' (2012) 52 British Journal of Criminology 953.

[20] Other jurisdictions that have a maximum jail sentence of 10 years for cartel offences are the US and Mexico. There is only one jurisdiction with a higher maximum — Canada, where the maximum is 14 years.

[21] Under the Corporations Act 2001 (Cth) the offences of market manipulation (s 1041A), market rigging (ss 1041B–1041C) and insider trading (s 1043A) all carry a maximum of five years imprisonment. Notably, however, shortly after passage of the cartel legislation, proposals to increase these maxima to 10 years were announced: see Chris Bowen, 'Greater Powers to the Corporate Regulator to Pursue Market Misconduct' (Media Release No 008, 28 January 2010). These increased penalties were incorporated into the Corporations Amendment (No 1) Bill 2010 (Cth). The Bill was introduced into Parliament on 24 June 2010. However it did not complete its passage into legislation before the calling of a Federal election and the proroguing of Parliament. It remains to be seen whether the Bill, in its current or a revised format, will be re-introduced and become law.

and the institutional framework governing enforcement.[22] The ACCC's justifications based on deterrence and inherent criminality escaped any serious and sustained interrogation.[23]

Responding to the significance of the proposed reform and the superficiality of the debate surrounding its introduction, the Cartel Project was an interdisciplinary empirical research project that was concerned to investigate how and why criminalisation of serious cartel conduct became bipartisan policy in Australia and to assess the likely impact of criminalisation on deterrence and compliance with the law. The Project had several components, of which the survey that is the subject of this article is one. Other components included interviews with people previously involved in enforcement action brought by the ACCC for cartel conduct to obtain insights into the factors influencing engagement in such conduct and interviews with 'stakeholders' (government, enforcement agencies, business and consumer organisations, the legal profession, judges and the media) in Australia and the United Kingdom to obtain insights into the impetuses for cartel criminalisation and the challenges involved in criminal enforcement. Results and analysis relating to these components of the Project have been published elsewhere.[24]

The survey had two parts directed at different albeit overlapping samples. The first part was completed by a stratified random sample of 1334 people representative of the Australian

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[22] For an outline of the key technical debates that attended the process of legislative design, see Caron Beaton-Wells, 'Australia's Criminalization of Cartels: Will It Be Contagious?' in Josef Drexl and others (eds), *More Common Ground for International Competition Law?* (Edward Elgar, 2011) ch 9.

[23] The reasons for this are complex and beyond detailed examination here. However, they relate in part to the politically powerful position of the ACCC. See generally Haines and Beaton-Wells, 'Ambiguities' (n 19).

[24] See, eg, Caron Beaton-Wells and Chris Platania-Phung, 'Anti-Cartel Advocacy: How has the ACCC Fared?' (2011) 33 Sydney Law Review 735; Haines and Beaton-Wells, 'Ambiguities' (n 19); Christine Parker, 'The War on Cartels and the Social Meaning of Deterrence' (2012) 7 Regulation & Governance (in press); Christine Parker, 'Economic Rationalities of Governance and Ambiguity in the Criminalization of Cartels (2012) 52 British Journal of Criminology 974. For a full list of publications from the Project, see <http://cartel.law.unimelb.edu.au/go/project-news/project-outputs>.

population and was intended to gauge public opinion on a range of issues relating to the legal status of cartel conduct, its legal consequences in terms of penalties and remedies and its seriousness relative to other offences. The second part was completed by a random sample of 567 people representative of the Australian business sector who were likely in their work life to be involved in activity to which the cartel laws apply (for example, in setting prices or tendering for contracts). This part was intended to test the extent to which anti-cartel law and sanctions affect perceptions and behaviour relevant to deterrence and compliance. Information elicited from respondents also allowed for testing to determine whether their responses were related to aspects of their demographic profile (age, gender, education level, etc),[25] work profile (business size, work position), degree of prior awareness of cartel-related topics[26] and in the case of the business respondents, agreement with criminalisation.[27]

The survey was carried out by way of self-completion online questionnaire.[28] The samples were provided by a commercial online survey company, ResearchNow.[29] Prospective

[25] The survey included 16 such questions that are standard in population surveys drawing on the form of questions used in the Australian census administered by the Australian Bureau of Statistics. See <www.abs.gov.au/census>.

[26] Prior awareness was measured by a question that asked respondents to indicate if they had heard or read about any of the following people, organisations or topics: the ACCC; cartels or cartel conduct; then current ACCC Chairman Graeme Samuel; former ACCC Chairman Allan Fels; price fixing; a case involving Visy and Amcor for price fixing; criminal penalties for cartel conduct; a case involving Richard Pratt and the Australian Competition and Consumer Commission. The items in this 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.

[27] The business respondents had filled in the first part of survey directed to the general public which included a range of questions about attitudes and opinions relevant to the criminalisation of cartel conduct.

[28] Online surveys are seen as having a range of advantages over pen and paper or face to face survey methods. See, eg, Samuel D Gosling and others, 'Should We Trust Web-Based Studies? A Comparative Analysis of Six Preconceptions about Internet Questionnaires' (2004) 59 American Psychologist 93; Robert Kraut and others, 'Psychological Research Online: Report of Board of Scientific Affairs' Advisory Group on the Conduct of Research on the Internet' (2004) 59 American Psychologist 105; Kevin B Wright, 'Researching Internet-Based Populations: Advantages and Disadvantages of Online Survey Research, Online Questionnaire Authoring Software Packages, and Web Survey Services' (2005) 10(3) Journal of Computer-Mediated Communication 11; Bobby Duffy and others, 'Comparing Data from Online and Face-to-Face Surveys' (2005) 47 International Journal of Market Research 615.

[29] The particular panel where participants were accessed is the 'Valued Opinions' panel: see <www.valuedopinions.com.au/>. This panel is exclusively 'research only', with panelists recruited by email and

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.[30] In designing the survey instrument careful attention was given to ensuring respondents would have sufficient information on which to base their opinion on the matters about which they were being asked 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.[31] In the case of the second part of the survey an additional advantage of the vignette approach was that it enabled collection of real life data of sufficient quality about perceptions and behaviour relevant to deterrence. Such data is otherwise virtually impossible to obtain.[32] The use of hypothetical scenarios allowed the researchers to conduct a statistically robust study with a 'quasi-experimental' design in order to test how different conditions (here, cartel conduct as a civil contravention compared with a criminal offence) would be likely to affect perceptions of deterrence and illegal behaviour.[33]

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online marketing, with over 125 diverse online affiliate partners (to avoid bias associated with panel recruitment from limited sources).

[30] The invitation to participate and plain language statement are available in Beaton-Wells and others, 'Report on a Survey' (n 17) app B.

[31] The vignette design and the questions that measure perceptions of likelihood of enforcement and likelihood of engaging in cartel conduct were particularly based on work done by Professor Sally Simpson: see Sally S Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press, 2002). For another example of this vignette technique being used in other research on similar issues see Yuval Feldman and Oren Perez, 'How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement' (2009) 36 Journal of Law and Society 501.

[32] On the difficulties of conducting robust research on compliance conduct from which causal inferences can be drawn, see Christine Parker and Vibeke Nielsen, 'The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism' (2009) 5 Annual Review of Law and Social Science 45.

[33] The disadvantage of the vignette approach is that the measures of respondents' knowledge, perceptions and conduct are based on purely hypothetical scenarios imagined in the context of filling out a questionnaire. It is not possible to be sure that people would think and behave that way in real life. It is generally expected that individuals filling out a questionnaire would be more likely to remember their knowledge about the legal status of cartel conduct and also to overestimate the chances of being caught compared with how they would think in real life. This is

II Deterrence – key findings

As indicated above, a key if not the primary justification given for cartel criminalisation is that fear of criminal sanctions and jail in particular will deter potential offenders. This reflects the assumptions of classical deterrence theory that people know the law and make considered, rational and self-interested decisions to comply or not comply with it. It is assumed that potential cartelists calculate the guarantee of increased financial profitability from cartel behaviour against the likelihood of being detected and prosecuted by an enforcement agency and the nature and size of the sanction that will be applied. The law is therefore supposed to be able to deter cartel behaviour by ensuring that sanctions are 'swift, sure and substantial', and that 'optimal' sanctions are levied.[34]

The problem is that there is thought to be no 'optimal' financial penalty to deter cartel conduct. Economists generally consider that the amount of the financial penalty should be based on an amount that is greater than the gains of the misconduct and is then increased to take into account the fact that not all cartels are swiftly detected and prosecuted.[35] Since the risk of

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because the context of the questionnaire itself would put them on notice that they should think about the legality of the conduct described and carefully consider the penalties available. In real life their attention would not necessarily be drawn to the law and penalties. One clear finding from previous empirical research on business deterrence is that many business managers do not make cost–benefit calculations about compliance and act on them — until something like a regulatory enforcement action or publicly reported breach or accident brings the risks of noncompliance to their attention. See Hazel Genn, 'Business Responses to the Regulation of Health and Safety in England' (1993) 15 Law & Policy 219, 223; John Mendeloff and Wayne B Gray, 'Inside the Black Box: How Do OSHA Inspections Lead to Reductions in Workplace Industries?' (2005) 27 Law & Policy 219, 220–221; John T Scholz and Wayne B Gray, 'OSHA Enforcement and Workplace Injuries: A Behavioral Approach to Risk Assessment' (1990) 3 Journal of Risk and Uncertainty 283, 302.

[34] OECD, 'Nature and Impact of Hard Core Cartels' (n 1) 85, 89. See also Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4 Competition Law Review 7; Wouter P J Wils, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 World Competition 197.

[35] OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003) 27. See Charles R Tittle, *Sanctions and Social Deviance: The Question of Deterrence* (Praeger, 1980); Whelan, 'A Principled Argument' (n 34) 31; Wouter P J Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 World Competition 183.

discovery and enforcement for cartels is quite low,[36] most commentators and policy-makers believe that fines for cartel behaviour should be many times the amount of the gain from the cartel.[37] However, very large, 'optimally' deterrent fines may be too large for an organisation to bear, and enforcement agencies and courts might baulk at imposing financial penalties so heavy that a firm's innocent employees and investors lose their jobs and savings.[38]

Criminalisation of individual involvement in cartel conduct, and therefore the availability of jail sentences as a sanction, is proffered as the solution to this problem. However this assumes first that business people are able to identify cartel conduct and know that it is a criminal offence for which jail is available as a sanction and second, that they perceive it as likely that if they engage in such conduct, they will be caught and if caught, that they will face enforcement action which if successful will result in them serving a jail sentence. The Cartel Project survey tested these assumptions.

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[36] John Connor's review of empirical research attempting to 'guesstimate' cartel discovery rates finds that most evidence suggests there is only between a 10% and 20% chance of any cartel being discovered, with the highest detection rate estimated at 33 %: John M Connor, 'Optimal Deterrence and Private International Cartels' (2007) <http://ssrn.com/abstract=1103598> accessed 12 November 2012.

[37] Penalties in many jurisdictions, including Australia, are considered to be too low to deter on this basis: see in relation to the US and the EU, John M Connor, 'Cartels Portrayed: The Deterrence Effects of Penalties — A 21-Year Perspective, 1990 to 2010' (8 February 2011) AAI Working Paper No 11-06. In relation to Australia, see David K Round, 'An Empirical Analysis of Price-Fixing Penalties in Australia from 1974 to 1999: Have Australia's Corporate Colluders Been Corralled?' (2000) 8 Competition & Consumer Law Journal 83; Beaton-Wells and Fisse, *Australian Cartel Regulation* (n 18) ch 11, para 11.3.

[38] This is known as the 'deterrence trap': see John C Coffee Jr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 386. See also Brent Fisse 'Sentencing Options against Corporations' (1990) 1(2) Criminal Law Forum 211; Brent Fisse, 'Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) ch 14, 313, 315–320; Christine Parker, 'The "Compliance Trap": The Moral Message in Responsive Regulatory Enforcement' (2006) 40 Law & Society Review 591.

A Do business people know cartel conduct is illegal and criminal and the sanctions that apply?

Presented with a vignette that unambiguously involved a serious case of price fixing,[39] respondents were asked whether what the character in the scenario had done, in agreeing on prices with his competitors, was against the law. 63% thought that it was; 18% thought it was not and 19% were not sure. The 63% were then asked whether they thought it was a criminal offence. Only 67% knew that it was a criminal offence, that is, 42% (less than half) of the whole sample. This means that 58% of the whole sample did not know it was an offence.

Respondents who knew that the conduct was against the law were then asked what penalties were available for the conduct. More than two thirds (71%) knew that a fine was available but only just over a third (36%) knew that jail was available as a penalty. This means that as a proportion of the whole sample less than one half (45%) knew that a fine is available as a penalty and less than a quarter (23%) knew that jail for individuals is available.

B Do business people perceive it as likely that cartel conduct will be detected, prosecuted and sanctioned?

Just because people know something is against the law or what the penalty for it is, they do not necessarily perceive the risk of being caught and having enforcement action against them as very high. Empirical deterrence research persistently finds that the factors that make the most

[39] The vignette was as follows:

> Lee, a sales manager at Brick Company, considers whether to get together with representatives from companies that compete with Brick Company to agree on product prices for the next year. Brick Company is currently experiencing growing sales and revenues in an industry that is economically healthy. Lee's conduct would boost revenues further and therefore result in a very positive impression of Lee by top management. Lee decides to meet with representatives from competitor brick companies to agree on the prices for the next year. As a result brick prices rise throughout the big city in which Brick Company and its competitors are based. This means that governments, companies and individuals all have to pay more for new buildings and houses and Brick Company makes millions of dollars in extra profits.

difference to compliance behaviour are the perceived likelihood of detection and enforcement, more than the objective severity and subjective fearsomeness of the sanctions imposed.[40] Parker and Nielsen have found that this is also true of Australian businesses' responses to competition and consumer protection regulation and enforcement in general.[41] Business people may well feel that although they might be caught for misconduct, the authorities will use their discretion in deciding not to take formal legal enforcement action against them. Indeed business regulators often informally settle potential prosecutions for business misconduct on the basis that the business agrees to comply in the future rather than taking businesses to court.[42] Moreover businesses often put pressure on regulators to make sure this happens.[43]

The survey used a different vignette to measure perceptions of deterrence, a market sharing scenario, although again the facts involved a very clear case of cartel conduct.[44] At this

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[40] See, eg, John Braithwaite and Toni Makkai, 'Testing an Expected Utility Model of Corporate Deterrence' (1991) 25 Law & Society Review 7, 8–9; Raymond Paternoster and Leeann Iovanni, 'The Deterrent Effect of Perceived Severity: A Reexamination' (1986) 64 Social Forces 751; cf Patrick Ronald Edwards, 'Choices that Increase Compliance' (1991) 10(4) Policy Studies Review 6.

[41] Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56 Antitrust Bulletin 377. Parker and Nielsen's analysis of their survey results finds that the perceived risk of complaints from customers, suppliers and business partners (which could lead to both ACCC enforcement and informal third-party sanctions) and perceived likelihood of ACCC enforcement are more important than fear of the severity of the sanction in changing compliance management behaviours.

[42] The ACCC makes extensive use of a settlement strategy to resolve legal proceedings against cartel offenders: see Beaton-Wells and Fisse, *Australian Cartel Regulation* (n 18) 392–405, 433–436; Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 Modern Law Review 209–246. On the prevalence of this sort of approach to regulatory enforcement against business generally, and its effects, see Lauren B Edelman, Christopher Uggen and Howard S Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 American Journal of Sociology 406.

[43] See Parker, 'The "Compliance Trap"' (n 38).

[44] The vignette was as follows:

> Ashley, a manager at Express Freight Company, considers whether to get together with representatives from Express Freight Company's competitors in order to make an agreement not to try to win over each other's customers. This would mean Ashley does not have to discount prices or increase the quality of service in order to keep existing customers. This would increase firm revenues, and result in a positive impression of Ashley by top management.

point, respondents were told whether the conduct was a civil contravention or criminal offence. The first time they read the scenario, they were told that it was a civil contravention. The second time they were told it was a criminal offence. After reading the scenario each time, respondents were asked a series of questions about their perceptions of the likelihood of being found out for engaging in cartel conduct; being subject to legal action; and, in the second version of the scenario (where it was a criminal offence), being jailed. Respondents were given a scale of 1 to 10 (marked 'very unlikely' to 'very likely') on which to respond to each of these questions.

The main purpose of these questions was to test whether business people's perceptions of deterrence would be different where they knew that cartel conduct amounted to a criminal offence as opposed to merely a civil contravention. There is not necessarily any strong reason why criminalisation should lead to higher perceptions of likelihood of detection and enforcement action if it involves only a change of sanction. However, proponents of criminalisation argue that people should fear enforcement of a criminal offence more than a civil violation. This is because they should estimate their likelihood of being caught in breach as higher (because of the increased powers of investigation that accompany a criminal offence); they should 'read' criminalisation as implying a greater commitment of time and resources to pursuing their conduct through enforcement action; and they should fear the higher sanctions of a criminal offence, particularly jail. In the case of the amendments to the Australian cartel provisions,

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Market sharing rather than price fixing (as in the previous scenario) was used because it was important that respondents stay interested and engaged in the survey process and read the vignette and questions properly in order to pay attention to the fact that they were being asked to answer a different type of question to the previous questions. A 'consistency bias' in the responses was particularly to be avoided. That is, if respondents had previously answered that price fixing should be — and indeed was — against the law and then saw another very similar price fixing scenario, they might feel that they should answer the survey 'consistently' by overestimating their own sense of deterrence and compliance: See Brian P Mathews and Adamantios Diamantopoulos, 'An Analysis of Response Bias in Executives' Self-Reports' (1995) 11 Journal of Marketing Management 835. By changing the type of cartel conduct in the second vignette, it was intended to disrupt this process and make it more difficult for respondents to second guess what a 'consistent' answer would be.

criminalisation came with greater investigative powers for the ACCC and was said to be likely to strengthen the appeal of the ACCC's Immunity Policy for Cartel Conduct thereby making whistle-blowing — and hence detection — more likely.[45]

However, respondents on average considered it unlikely that the character in the market sharing scenario would be caught if he/she engaged in cartel conduct, especially where only civil sanctions are present. That is, they mostly rated likelihood around the mid-point of the scale. The mean response under civil sanctions condition was 4.33. Where criminal sanctions were present, they thought that the character in the vignette was a little more likely to be caught, but still mostly rated likelihood of being caught around the mid-point of the scale. The mean response was 5.05. There was a statistically significant difference between their ratings of likelihood where only civil sanctions were present as compared to where criminal sanctions were available.[46]

Respondents on average considered it slightly more likely that the hypothetical offender would be subject to legal action if caught than that he or she would be caught in the first place. However the rating was still below the mid-point of the scale (mean response was 4.9 under civil sanctions). Where criminal sanctions applied, respondents saw it as more likely that there will be legal action: they rated the likelihood as above the mid-point on the scale (6.35). There was a statistically significant difference between the likelihood ratings when the scenario moved from

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[45] See 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) ch 8, 183, 185–186.

[46] Repeated measure tests were used, including one between-subject factor in each model (age, gender, education, job position, business size) to more robustly test this relationship. There was a consistent change in perceptions of deterrence from the civil offence vignette to the criminal offence vignette regardless of what other factors were included in the model. For the model with age included as a between-factors variable, there was a significant age and condition interaction, with small effect size. Full statistics available from the second author upon request.

civil sanctions to criminal sanctions.[47] Hence respondents saw enforcement action as more likely where a cartelist is caught and there is a criminal offence than where the offence is only civil.

There was thus a clear increase in perception of likelihood of detection and action when the offence in the scenario was changed from a civil to a criminal offence. However, it is important to bear in mind that it was made very clear to respondents that this was the only change between the first and second scenario they answered. It would have been surprising if there was not an increased perception of deterrence when they are aware of the change. Respondents rated the likelihood that the hypothetical offender in the vignette would be sentenced to jail if found guilty of price fixing below the midpoint on the scale — even though they had been explicitly told that this conduct is a criminal offence. The mean response was 4.45.

C What influences knowledge and perceptions of detection, prosecution and sanction?

Based on these survey results there appears to be considerable variation in business people's knowledge of anti-cartel law and sanctions and perceptions of likely detection and enforcement. However, even where knowledge is accurate, it cannot be counted on as the sole basis for perceptions of deterrence. Business people's prior biases and commitments also will be influential in explaining people's perceptions of the likelihood of being caught and facing enforcement action. Previous research on deterrence in other areas makes it clear that people's perceptions of the risks of detection, enforcement and sanction are affected by a range of cognitive biases,[48] and that individual personalities, levels of emotionality, and senses of moral obligation to obey the law each play a part in how individuals perceive the costs and gains of

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[47] The same procedure was used as described in above note 46.

[48] Paul H Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 Oxford Journal of Legal Studies 173.

non-compliance[49] and, indeed, whether they even seek out information about the costs and gains of compliance and non-compliance at all.[50]

Moreover, agreement with the law indirectly increases deterrence. Individual cartelists are likely to estimate their chances of being caught and punished as higher if they think it is a just law in the sense that it aligns with their personal beliefs and values and they think that it is right to apply the law to them. A guilty conscience magnifies the risk of detection and sanction.[51] Political commitment to supporting and resourcing effective enforcement also depends on whether governments and the wider public share a normative commitment to the criminal prohibition of cartel conduct.[52] Third parties may also be more likely to apply informal economic and social sanctions (such as selling stock or consumer boycotts) if cartel behaviour is generally seen as morally wrong.[53] Potential cartelists' perceptions of the likelihood of enforcement might therefore also be influenced by their perception that governments, stakeholders and the general public believe cartel conduct is harmful or wrong, and should be subject to criminal sanctions.

Given this range of potential influences on deterrence and compliance, the researchers tested whether certain variables, including gender, age, education level, job position, business

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[49] Toni Makkai and John Braithwaite, 'The Dialectics of Corporate Deterrence' (1994) 31 Journal of Research in Crime and Delinquency 347; John T Scholz and Neil Pinney, 'Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior' (1995) 39 American Journal of Political Science 490.

[50] Toni Makkai and John Braithwaite, 'The Limits of the Economic Analysis of Regulation: An Empirical Case and a Case for Empiricism' (1993) 15 Law & Policy 271; Dorothy Thornton, Neil A Gunningham and Robert A Kagan, 'General Deterrence and Corporate Environmental Behavior' (2005) 27 Law and Policy 262, 280.

[51] See Robinson and Darley, 'Does Criminal Law Deter?' (n 48).

[52] See Parker, 'The "Compliance Trap"' (n 38).

[53] Harold G Grasmick and Robert J Bursik Jr, 'Conscience, Significant Other, and Rational Choice: Extending the Deterrence Model' (1990) 24 Law & Society Review 837. See also Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' [2003] Public Law 62; Neil Gunningham, Robert A Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation and Environment* (Stanford University Press, 2003) 35–40; Vibeke Lehmann Nielsen and Christine Parker, 'To What Extent Do Third Parties Influence Business Compliance?' (2008) 35 Journal of Law and Society 309.

size, and agreement with criminalisation, are associated with varying knowledge and perceptions of the likelihood of detection and enforcement action. They also tested whether variation in prior knowledge of the law itself, that is, whether respondents had an accurate knowledge of the law before reading the second market sharing vignette as measured by their response to the earlier price fixing vignette, made any difference to perceptions of the likelihood of detection and enforcement action. The rhetoric supporting criminalisation would assume that it should not matter what age or gender a business person is, or what their level of education, job position or workplace size is — they should still fear criminal enforcement and be deterred from engaging in cartel conduct if it is at all relevant to their work. Nor should it matter what their prior awareness of the law or opinions about what the law should be. These should all be irrelevant once they know what the law is — they should simply fear jail and comply.[54]

A significant association between gender and knowledge was found. Men are more likely than women to know that cartel conduct is criminal. Perhaps not surprisingly, a significant association between knowledge and prior awareness of cartel-related matters was also shown. However, the strongest predictor of knowledge and perceived likelihood of detection and enforcement was agreement with criminalisation. Respondents had been asked in the first part of the survey whether they thought cartel conduct should be against the law and whether it should be a criminal offence. Those who believed that price fixing should not be against the law and should not be a criminal offence were seven times more likely to believe that in fact it is not

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[54] This view was reflected in a number of statements made about cartel criminalisation by the then ACCC Chairman, Graeme Samuel. See, in particular, his statement that 'The world changes on July 24 for Australian business executives involved in cartel conduct. For the first time, those who steal from their customers by rigging bids, fixing prices with competitors or other forms of cartel activity face the very real possibility of finding themselves behind bars … The concept should be simple enough for everyone to understand — engage in serious cartel conduct and you will face jail time … For those who want more clarity, here it is: you have until Friday to get your house in order': Graeme Samuel, 'Corporate Thieves Can Expect Jail Time' *Australian Financial Review* (Melbourne, 22 July 2009) 63. The quote was repeated in various television and newspaper news interviews.

against the law. This is arguably also not surprising as it is clear from research in other compliance fields that people are more likely to comply with the law if they agree with the substance of the law itself and regard the way it is applied and enforced as legitimate and just. However, what is significant for present purposes is that this premises the preconditions for deterrence on an individual's normative appraisal of the law and its enforcement and undermines the rationally calculating self-interested actor assumed by basic deterrence theory.

D Will business people be deterred when they know about the law and sanctions?

The ultimate test of deterrence is whether or not people are actually deterred from engaging in cartel conduct in circumstances where they have accurate knowledge of the law and sanctions that apply. Therefore, in the last set of questions on the market sharing scenario, respondents were given an accurate account of the law and, in the case of civil sanctions, a brief summary of the level of fines that have been imposed by the courts to date for cartel conduct and in the case of criminal sanctions, a brief summary of the sanctions that are available for such conduct (there is yet to be a prosecution). They were then asked, all things considered, how likely they thought it was that the vignette character would decide to make an agreement with competitors not to try to win over each other's customers.[55] A follow up question asked how likely it was that the respondent himself or herself would decide to engage in the conduct in the same circumstances.

[55] In both cases the respondents were given four options in response: Very unlikely/Unlikely/Likely/Very likely. Respondents were given only four options with no mid-point so that they had to make a choice between saying the conduct was likely or unlikely and could not 'sit on the fence'. This gave the researchers more useful data for statistical analysis. It also avoided the possibility that respondents will refuse to give the 'socially undesirable' answer that the vignette character is likely to breach. (Where a mid-point on the scale is available, they might take the socially desirable option of choosing the mid-point rather than being honest about the likelihood of engaging in the conduct.) Similarly, by providing an option of both 'likely' and' very likely', respondents could show that they thought that illegal conduct was likely without having to choose the most extreme (and most socially undesirable) option of 'very likely'.

It was found that where civil sanctions applied, half of respondents nevertheless saw it as likely that a hypothetical business person would still breach cartel laws. That figure fell to 29% when told that criminal sanctions applied — but still nearly a third of respondents considered breach of the law as likely even with the prospect of jail. When asked about their own likely behaviour, respondents saw themselves as more virtuous than others — only 15% indicated that they would be likely to breach the law where civil penalties applied and only 9% where criminal sanctions applied. Nevertheless, that is still 1 in 10 who would seriously contemplate engaging in cartel conduct and in spite of knowing of the risk of a jail term.

III Inherent criminality — key findings

While the deterrence justification for criminalisation promotes a pragmatic consequentialist role for the criminal law in this field, a separate rationale is that such conduct is inherently criminal. The argument made by criminalisation proponents in this regard is that this conduct warrants the societal stigma and opprobrium distinctive of the criminal law because it is inherently delinquent in the sense generally understood of other long standing offences.[56]

The Cartel Project sought to test this thesis empirically by reference to public opinion on the assumption that if cartel conduct is sufficiently delinquent to warrant criminal sanctions, then that would be reflected in the way in which the public responds to the conduct. This approach is consistent with the school of thought that 'what distinguishes a criminal from a civil sanction and all that distinguishes it ... is the judgment of community condemnation which accompanies and

[56] See generally Rebecca Williams, 'Cartels in the Criminal Law Landscape' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) ch 13, 289.

justifies its imposition.'[57] From this perspective, lack of public support for cartel criminalisation would be seen as a case of 'sticky norms'[58] (seen to arise where there is a gap between what the law treats as sufficiently harmful and/or morally wrongful and what a substantial segment of society views as such), the result of which may be said to be dilution in the meaning and force of the criminal law.[59]

To test the level of community support, the survey again adopted a vignette method, ensuring that respondents understood the type and effects of conduct that they were being asked about and avoiding any use of leading or pejorative language. The survey posed three different scenarios — each dealing with a different type of cartel conduct (price fixing, output restriction and market allocation)[60] — and based on those scenarios, asked respondents a series of questions

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[57] Henry M Hart Jr, 'The Aims of the Criminal Law' (1958) 23 Law and Contemporary Problems 401, 404. See also Sanford H Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 University of Chicago Law Review 423, 447; Joel Feinberg, *The Moral Limits of the Criminal Law: Vol 4 — Harmless Wrongdoing* (Oxford University Press, 1990) 294–305; D J Galligan, *Law in Modern Society* (Oxford University Press, 2007) 228. It is important to acknowledge however a different school of thought which accepts the role of the criminal law in leading and shaping public opinion: see Harry V Ball and Lawrence M Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View' (1964) 17 Stanford Law Review 197, 217. See also Paul Robinson, 'Criminalization Tensions: Empirical Desert, Changing Norms and Rape Reform' in R A Duff and others (eds), *The Structures of the Criminal Law* (Oxford University Press, 2009) 186.

[58] Dan M Kahan, 'Gentle Nudges vs Hard Shoves: Solving the Sticky Norms Problem' (2000) 67 University of Chicago Law Review 607.

[59] See the discussion and references cited in Williams (n 56) 296–297.

[60] 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, 'Recommendation of the Council concerning Effective Action against Hard Core Cartels' (C(98)35/FINAL, 1998). That classification was reflected in the definition of conduct attracting criminal and civil liability under the 2009 amendments to the Australian legislation: see s 44ZZRD of the Competition and Consumer Act 2010 (Cth).

The price fixing vignette was as follows:

> There are two butchers in a town. In the past they have set their prices independently of each other. This has meant that if one butcher put up its prices, consumers could switch to the other butcher to find a lower price.
>
> The butchers have now reached an agreement with each other to set the prices they charge for the most popular cuts. As a result, they can charge higher prices because if consumers are unhappy with the price at one butcher, they are unable to switch to the other butcher for a better price.

The market allocation and output restriction vignettes were along similar lines.

about how the law should deal with the conduct, and what sanctions should apply, as well as questions that sought to establish the basis for the views held about such matters.

A Does the public think cartel conduct should be illegal or criminal?

While more than two-thirds of the public sample agreed that cartel conduct should be against the law, the level of support for treating it as a criminal offence was considerably lower. Less than a majority of respondents supported the view that cartel conduct should be a criminal offence. In the case of each of the three types of cartel conduct covered by the survey, 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 . Thus, only 44% considered that price fixing should be a criminal offence (as compared with 72% who considered it should be against the law) and that percentage fell to 43% in respect of output restriction and 37% in respect of market allocation.

B What sanctions does the public think should apply to cartel conduct?

The level of support for jail as a sanction for cartel conduct was even lower. Less than 20% (and in the case of market allocation, less than 15%) of respondents to the survey selected this as an option in considering how the law should deal with individuals responsible for price fixing or output restriction. Across all three types of conduct in the survey, the highest level of support was, in descending order, for payment of a fine (around 70%), followed closely by the individual being banned from being a director or manager of any company for a number of years (between 64% and 70%) and individuals being publicly named for involvement in the conduct (between 61% and 70%).

C What reasons for treating cartel conduct as criminal are supported by the public?

The survey also sought to establish the reasons why people might hold the view that cartel conduct should be a criminal offence. Respondents were given eight possible reasons and asked to indicate their level of agreement or disagreement with each one on a 5 point scale ranging from 'Strongly disagree' to 'Strongly agree'.

The reasons were:

1. Because consumers may have to pay more
2. Because the conduct involves deceiving consumers
3. Because the conduct may harm or be unfair to other competitors
4. Because the conduct is dishonest
5. Because making the conduct a criminal offence will mean that the companies or people involved can be punished for it
6. Because the conduct will harm competition or the free market
7. Because making it a criminal offence will deter companies or people from engaging in this sort of conduct in the future
8. Because the conduct should be seen as the same as theft.

The reasons were chosen to reflect the three main themes drawn upon in the case made for criminalisation by the ACCC, namely:

- the effects/harmfulness of cartel conduct (as reflected in reasons 1, 3, 6)

- the moral character of cartel conduct (as reflected in reasons 2, 3, 4, 8)
- the instrumental features of the criminal law as a mechanism for deterrence and punishment (as reflected in reasons 5, 7).

While respondents did not disagree with any of the postulated reasons (perhaps unsurprisingly), the highest proportions of respondents selecting 'Strongly agree' were in response to the reasons — 'Because the conduct involves deceiving consumers' and 'Because the conduct is dishonest' (65% and 64% respectively). This could be taken to reflect greater public affinity or concern with 'moral' aspects or the inherent nature of the conduct as distinct from its economic effects. The lowest proportion of respondents in agreement with a suggested reason (43%) was in relation to the reason — 'Because the conduct may harm or be unfair to other competitors.'

An element of dishonesty had been proposed initially as the element that would distinguish a civil contravention from a criminal offence under the Australian legislation. However, amongst the competition law bar, the proposal was controversial. For lawyers in this technical field, the seriousness in cartel conduct could be understood in economic terms only; morality had no place in the regulatory discourse.[61] Ultimately this was the view that prevailed and the result was that differentiation between conduct that would constitute a civil breach and conduct that would be treated as an offence was left as a matter of prosecutorial discretion, the exercise of which was to be guided primarily by economic factors.[62] At the same time, moral condemnation remained and remains a significant feature of ACCC advocacy concerning the need for tough measures against

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[61] The extent to which moral considerations have a legitimate role in relation to cartel criminalisation or antitrust more generally is controversial. See Maurice E Stucke, 'Morality and Antitrust' [2006] Columbia Business Law Review 443; Andreas Stephan, 'Why Morality Should Be Excluded from the Cartel Criminalisation Debate' (2012) 3 New Journal of European Criminal Law 127.

[62] See Beaton-Wells and Haines, 'Making Cartel Conduct Criminal' (n 19) 227–236; Beaton-Wells and Fisse, *Australian Cartel Regulation* (n 18) 19–31.

cartels and, as the survey bears out, it is a theme that appears to resonate with the Australian public.

D What factors affect the public's view of the seriousness of cartel conduct?

Respondents were also 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 views as to its seriousness. The factors chosen for this question were intended to reflect a range of possible factors that could be regarded as aggravating (eg 'The conduct included bullying another company into joining the agreement'; 'Elaborate steps were taken to make sure the authorities did not find out about the conduct') or mitigating (eg 'The reason for the conduct was that it would prevent factories from closing and would save jobs'; 'The companies involved in the conduct were small businesses'; 'The profits from the conduct were used to make products that are environmentally friendly') or if not mitigating then possibly neutral or irrelevant (eg 'Prices did not go up as a result of the conduct').

None of the listed factors were considered mitigating (in the sense of being 'less serious') by a majority of respondents. Thus, for example, only 41% of respondents considered it 'less serious' when 'Prices did not go up as a result of the conduct'. 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' (83% of respondents considered this to make it 'more serious') and 'Elaborate steps were taken to make sure the authorities did not find out about the conduct' (78% considered this to make the conduct 'more serious'). In all the other circumstances cited (including 'The companies involved in the conduct were small businesses' and 'The profits from the conduct were used to make products that are

environmentally friendly'), the conduct was most commonly considered 'just as serious' (by 80% of respondents in the case of both factors). Again, this aspect of the results could be taken to suggest that the public approaches their evaluation of cartel conduct through a 'moral' rather than an 'economic' lens.

E How does the public compare the seriousness of cartel conduct in relation to other crimes?

Finally, the survey examined public perceptions of the seriousness of cartel conduct relative to a range of other crimes. Respondents were given a list of ten criminal offences and asked to indicate by comparison how serious they thought each offence was relative to a particular type of cartel conduct.[63] The results revealed that for those members of the public who consider that it should be a criminal offence, cartel conduct is seen by a majority as 'just as serious' as a range of long-standing or well-established criminal offences such as theft, fraud, tax evasion, breach of directors' duties and insider trading. Consistent with findings generally in crime seriousness research[64], offences involving physical harm or the risk of such harm to other persons (including consumer protection offences involving misrepresentations over product safety) were shown to be seen as 'more serious' than cartel conduct.

IV Reflections on research implications

The research reported on in this article exposes the official justifications given for cartel criminalisation in Australia as seriously flawed. The primary justification for the reform was that

[63] For an explanation of how these offences were chosen and acknowledgement of the limitations of this type of exercise, see Beaton-Wells and others, 'Report on a Survey' (n 17) 32–36.

[64] See generally 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.

the threat of criminal sanctions would 'supercharge' deterrence of cartel conduct in the Australian business sector. However, the Cartel Project survey showed that crucial preconditions for deterrence — knowledge of the law and sanctions and perceptions that detection and prosecution are likely — are not sufficiently present amongst a large proportion of business people for whom the anti-cartel laws are relevant. A further significant justification was that cartel conduct is inherently criminal and should be treated accordingly. However, while the survey suggested that moral characterisation of such conduct may resonate with the Australian public, this does not translate into substantial support for criminalising it, let alone jailing individuals for it. Moreover the survey demonstrated that deterrence preconditions are linked to views on criminalisation. In other words, it is business people's prior assessment of whether cartel conduct should be criminalised that most influences what they believe the law is as well as their estimations of being caught and facing enforcement action for involvement in such conduct.

These findings have significant implications, not just for the likely effectiveness of the criminal cartel regime in Australia, but for any jurisdiction reviewing its approach to anti-cartel enforcement or specifically considering the introduction of cartel offences and criminal sanctions. A key implication is that assertions or projections about the deterrence potential of criminalisation should be treated with great caution. This is particularly so where such projections are based on the experience in the US. Not only does the legal and prosecutorial system in that jurisdiction have several peculiarities not shared by many others,[65] but it is also highly uncertain as to whether in fact the US approach has been effective in deterring cartel

[65] See Donald I 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) ch 2.

activity.[66] The underpinnings of any deterrence predictions should be closely scrutinised and to the extent possible, empirically tested. At the very least there should be some attempt to assess the existing state of knowledge and perceptions of anti-cartel law and enforcement amongst the relevant business community. To address any gaps in knowledge and perceptions exposed by such an assessment, educational and awareness strategies should be devised to ensure, not only that business people know about the law and sanctions but that they are aware of the competition authority's powers and commitment to enforce the law. In particular, it would be important that potential offenders be aware of the authority's immunity (leniency) policy, the weapon of choice for cartel destabilisation and detection for most competition enforcers around the world.[67] Further, it would be highly desirable that the competition authority have and be seen to have robust political support with commensurate funding and personnel so that its deterrent threat is seen as credible.

Given the substantial costs and risks (operational and reputational) associated with administering a criminal anti-cartel regime,[68] there is a good case for suggesting that advocacy, education and dialogue of the kind referred to should precede any change in the law to introduce criminal sanctions. This is particularly so in jurisdictions where the competition authority is yet

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[66] See Maurice E Stucke, 'Am I a Price Fixer? A Behavioural Economics Analysis of Cartels' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) ch 12, 263, 267–269; Jesse W Markham Jr, 'Does Criminalization of Cartels Work? A Few Lessons from the United States Experience' (2012) 3 New Journal of European Criminal Law 116.

[67] See Hammond, 'The Evolution of Criminal Antitrust Enforcement' (n 6) 1. See further on the adoption of immunity policies or revisions to such policies over the last decade in International Competition Network, 'Trends and Developments in Cartel Enforcement' (n 2) 7.

[68] For a discussion of these costs and risks in the Australian context, see Beaton-Wells, 'Cartel Criminalisation' (n 45) 183. For a summary of the poor record of criminal enforcement by the Office of Fair Trading in the UK to date, see Julian Joshua, 'DOA: Can the UK Cartel Offence Be Resuscitated?' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) ch 6; Andreas Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) 6 Criminal Law Review 446. In the European context, see the discussion of relevant considerations in Christopher Harding, 'Hard Core Cartel Conduct as Crime: The Justification for Criminalisation in the European Context' (2012) 3 New Journal of European Criminal Law 139.

to develop a strong public profile and/or a credible enforcement record using its existing arsenal of civil or administrative fines and possibly other sanctions such as disqualification and adverse publicity orders.[69] In other jurisdictions in which anti-cartel law and enforcement are more established, advocacy and enforcement programs should be seen as being of at least equal importance as well as being interconnected.[70] The advent of harsher laws and more penal sanctions should not lead to the allocation of resources in favour of enforcement activity, at the expense of advocacy and outreach programs.

This is what appears to have occurred for a period in Australia. The campaign for criminalisation and the period immediately after the introduction of the criminal legislation saw a significant focus and investment by the ACCC in 'gearing up' for criminal enforcement. Capacity building of the kind undertaken by the ACCC for its role in criminal investigations and prosecutions has been important. However, more than three years since the reform took effect, there is yet to be a prosecution and in the meantime the ACCC's focus on advocacy appears to have been compromised. To its credit, however, spurred in part by the Cartel Project findings, the ACCC has reinvigorated its advocacy program in the last 12 months, revising and renewing its efforts to raise awareness and educate Australian business people and the wider public about cartel conduct — what the conduct involves, why it should be regarded as serious (both economically and morally), the substantial penalties that it attracts, and the ACCC's immunity policy that allows for cartel parties to report their conduct in return for immunity from

[69] For discussion of these orders in the Australian context, see Beaton-Wells and Fisse, *Australian Cartel Regulation* (n 18) ch 11, paras 11.3.5.5, 11.3.7.

[70] See International Competition Network, 'Advocacy and Competition Policy' (Report prepared by the Advocacy Working Group, ICN's Conference, Naples, Italy, 2002) 25.

penalties.[71] These efforts will be boosted in turn by the publicity that will attend the first prosecution when it is brought.

At the same time, it is important to bear in mind that those business people who lack knowledge of the criminal offence for cartel conduct and do not perceive the likelihood of being caught and facing enforcement action as very high will not necessarily have their ideas changed simply by being presented with the objective facts about anti-cartel law and enforcement. Some business people are not aware of the law or do not believe there is a credible threat of enforcement because of their subjective lack of understanding and commitment to the goals of anti-cartel law.[72] In order to address this, advocacy messages should not just present the facts but also explain why cartel conduct should be seen as economically damaging and morally undesirable. This should be done in a way that does not simply seek to increase deterrence by condemning and stigmatising certain business behaviour but also seeks to promote compliance by looking for and strengthening alignment between business people's own normative appraisal of what is acceptable or unacceptable in their commercial dealings and legal prescriptions.[73]

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[71] These efforts have included a major revamp of the ACCC's website, adopting a new way of presenting information about cartels under the heading: *Businesses compete, cartels just cheat* and presenting case studies that better explain what constitutes cartel conduct and the consequences for business and individuals who become involved; expansion and promotion of the ACCC's Cartel Information Network newsletter designed to build relationships and help business people be aware of the way cartels operate so that they can identify, avoid, and report cartel conduct; and the production of a film about cartels — The Marker — intended to assist business people in understanding how they might become involved in a cartel and the consequences for them personally of such involvement, accompanied by video news releases featuring commentary by the ACCC Chairman, the CEO of Qantas, and Associate Professor Caron Beaton-Wells: see ACCC Website, <www.accc.gov.au/content/index.phtml/itemId/815252>.

[72] See also Parker, 'The War on Cartels' (n 24); Parker, 'Economic Rationalities' (n 24).

[73] On the importance of normative compliance, see Caron Beaton-Wells, 'Normative Compliance: The Endgame?' Competition Policy International, Antitrust Chronicle (14 February 2012) <www.competitionpolicyinternational.com/normative-compliance-the-endgame/>. A number of regulatory theorists and empirical researchers have argued that democracies generally work on the basis of voluntary compliance. Tyler's procedural justice theory is the leading theory that explains people's compliance with the law by reference to their normative and relational evaluations of the regulator. Tyler broadly conceives people's evaluation of the procedural justice of regulatory authorities as including their evaluation of opportunities for participation, quality of decision-making (neutrality), quality of interpersonal treatment and trust in the motives of authority. He regards

Moreover, in the interests of building commitment to compliance, competition authorities should listen to and engage with business people's subjective understanding and experience of how competition works in their industries and what competition policy and law can do to improve their markets. A sense of normative commitment to any area of law and its enforcement will only develop in circumstances where people feel that their concerns, experiences and values have been respected and listened to in the formulation of the law and its implementation. This does not mean that the views of those who criticise the law must be adopted, but competition enforcement agencies and policy makers should be receptive to criticisms of the law and its enforcement and respond with reasons and dialogue (whether they decide it is appropriate to adjust their implementation of the law or not) that show that they are genuinely committed to facilitating fair, competitive markets through the implementation of anti-cartel and other competition laws.[74] Parker and Nielsen's previous research on business perceptions of the ACCC has shown that where businesses held a 'a sophisticated, nuanced and generally positive view of the ACCC as posing a strong deterrent threat, but also being a just, flexible and strategic regulator' then 'this attitude contributes positively to both their compliance management behaviour and normative commitment to compliance'.[75] It is not the introduction of more severe penalties and a greater armoury of enforcement that is important to business commitment to compliance. As Parker and Nielsen conclude, '[i]t is certainly crucial that a regulator project a

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people's evaluations of both the procedural justice and substantive justice delivered by regulators as relevant to their evaluations of the legitimacy of such agencies. His findings show that people are more likely to comply with a regulator that they see as legitimate as a matter of procedural justice, even where compliance with the law leads to outcomes that are not in their self-interest, or do not accord with their own personal sense of substantive justice. By contrast, where people see regulators as not procedurally just, this can break down willingness to comply. See Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1990).

[74] Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar, 2009); Tyler (n 69).

[75] Christine Parker and Vibeke Lehmann Nielsen, 'The Fels Effect: Responsive Regulation and the Impact of Business Opinions of the ACCC' (2011) 20 Griffith Law Review 91, 116; Pauline Westerman, 'Pyramids and the Value of Generality' (2013) 7 Regulation & Governance (in press).

large deterrent threat — a regulator that is not threatening is useless in changing behaviour. However, in projecting a serious threat of enforcement, a regulator should also ensure that it is seen as using that threat in a sophisticated way that is both strategic and fair.'[76] In the cartel criminalisation context, this might mean ensuring that the early cases brought under the criminal regime are important ones in the sense that the harm is clear and readily communicated. It might also mean taking other types of administrative and remedial action that helps to build a fair and competitive market, and striving to ensure that the regulator is not seen merely as wanting a cartel scalp at any cost.[77]

[76] Parker and Nielsen, 'The Fels Effect' (n 75) 116.

[77] The interviews with business people conducted by the Cartel Project, and also earlier by Parker, show that these are common criticisms of the ACCC among some businesses. See Parker, 'The War on Cartels' (n 24); Parker, 'Economic Rationalities' (n 24); Christine Parker and Vibeke Lehmann Nielsen, 'What Do Australian Businesses Think of the ACCC and Does It Matter?' 35 Federal Law Review 187; Christine Parker and others, 'Report on Interviews with Civil Respondents in Cartel Cases' (Melbourne Law School Cartel Project, December 2011).