

# CPI Antitrust Chronicle

October 2012 (1)

## Education Before Enforcement? Key Insights From Australian Cartel Research

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### I. INTRODUCTION

Close scrutiny and tough sanctioning of cartel conduct (involving price-fixing, market sharing, output reduction, or bid-rigging by competing businesses) have been a focus of competition law and enforcement across the globe for the last decade and a half. A growing number of countries have criminalized or are contemplating criminalization of this type of conduct. Criminal treatment is based on the view that cartels represent a widespread and potent threat to competition and hence to domestic and global economic welfare. The economic rationale for a penal approach has been accompanied by strong moral rhetoric by enforcement officials, tarnishing cartelists as cheats and thieves.

Australia's introduction of cartel offenses and criminal sanctions in 2009 is consistent with this international trend. At the same time it represents a significant shift in the approach taken to regulating cartel conduct in this country. The shift is from a fairly benign regime involving civil penalties imposed at relatively low levels, to a heavy-handed one threatening the stigma of conviction and a jail sentence of up to ten years.

Consistent with the position taken by criminalization advocates world-wide, the Australian reform was justified on the grounds that having a criminal regime is the most effective way to deter cartel conduct (through the fear of criminal sanctions—principally jail) and induce compliance (through the stigmatizing effect of the criminal process). These were the arguments made by the Australian Competition and Consumer Commission (“ACCC”), the initiator and leading proponent of the reform, and the Australian government.<sup>2</sup>

However, research carried out in the course of the University of Melbourne's [Cartel Project](#) exposed weaknesses in the key justifications given for cartel criminalization. It revealed problems with the assumptions that are made about the likely effects of criminalization on business behavior both as a deterrence mechanism and as a moral inducement.

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<sup>2</sup> C. Beaton-Wells & F. Haines, *The Australian Conversion: How the Case for Cartel Criminalisation Was Made*, 1(4) NEW J. EUROPEAN CRIMINAL LAW 500 (2010); C. Beaton-Wells & F. Haines, *Making Cartel Conduct Criminal* 42(2) AUSTRALIA & NEW ZEALAND J. CRIMINOLOGY 218 (2010); F. Haines & C. Beaton-Wells, [‘Ambiguities in Criminalizing Cartels: A Political Economy’](#) 52(5) *British J. Criminology* 953 (2012).

A year after criminal sanctions took effect in Australia, the researchers conducted [a large scale survey](#)<sup>3</sup> of the Australian public,<sup>4</sup> including [a representative sample of 567 business people](#)<sup>5</sup> who were likely in their work life to be involved in activity to which the anticartel laws apply (for example, in setting prices or production levels or tendering for contracts).

[Interviews](#) were also done with [25 business people](#) who have been subject previously to civil enforcement proceedings by the ACCC,<sup>6</sup> as well as with a range of other stakeholders from the legal profession, the judiciary, consumer movement, academia, and the media, as well as from the ACCC itself.

## II. KNOWLEDGE THAT CARTEL CONDUCT IS A CRIMINAL OFFENSE

The research found considerable variation in the knowledge by business people that cartel conduct is against the law and a criminal offense.

The business respondents were given a vignette illustrating a clear, real-life price-fixing situation which avoided the use of technical, leading, or pejorative language (e.g., “cartel”, “collusion”). The scenario also made it clear that the conduct would have a harmful economic impact on a wide range of customers.

Only 42 percent of the business people surveyed could identify that the conduct in the scenario—agreeing prices with competitors—was a criminal offense. Another 21 percent knew it was against the law but either thought it was not a criminal offense or were not sure whether it was a criminal offense. The remaining 37 percent believed either that it was not against the law at all or were not sure whether it was against the law.

Significantly, less than half (45 percent) knew a fine was available as a penalty for this type of behavior and less than a quarter (23 percent) knew that jail for individuals was available as a sanction.

Why did some business people know that cartel conduct was a criminal offense while most did not? The study tested whether there is any predictable, systematic variation in knowledge of the anticartel law by age, level of education, the size of the business worked in, and

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<sup>3</sup> Information about and a detailed report on the survey is *available at* <http://cartel.law.unimelb.edu.au/go/project-news/project-survey>.

<sup>4</sup> For a detailed report on the survey *see* C. Beaton-Wells, F. Haines, C. Parker, & C. Platania-Phung, [Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement](#), (December 2010). The Report is available [here](#).

<sup>5</sup> For a detailed report on this part of the survey *see* C. Parker & C. 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).

<sup>6</sup> Fuller discussion of these interviews is available in: C. Parker, *The war on cartels and the social meaning of deterrence*, REGULATION & GOVERNANCE, in press (2012); C. Parker, *Economic rationalities of governance and ambiguity in the criminalization of cartels*, 52(5) BRITISH J. CRIMINOLOGY 974 (2012).

whether the person was a manager or not. None of these factors correlated with the knowledge (or lack thereof) shown in the survey responses.

However, there were three factors that were shown to be fundamental in this regard: (1) whether business people agreed that cartel conduct should be a criminal offense, (2) gender (women were twice as likely as men to believe that price-fixing was not against the law) and (3) whether they had any prior awareness of anticartel law and enforcement.

By far the most important of these three was agreement with criminalization. Those who believed that price-fixing should not be a criminal offense were seven times more likely to believe that price-fixing was not against the law than those who believed it should be a criminal offense. Significantly in this regard, the wider survey of the Australian public showed high levels of disagreement with criminalization. Amongst the general survey population, a large majority agreed cartel conduct should be illegal; however, less than half thought it should be a criminal offense and less than a quarter regarded it as sufficiently serious to attract a jail term.

The finding of a relationship between knowledge of the law and belief as to what the law should be is consistent with a substantial body of socio-legal scholarship that shows that people are more likely to comply with any law if they agree with the substance of the law itself, see the way it operates, and is enforced as legitimate and fair. Tough enforcement of a law that is seen as unjust, on the other hand, can provoke resistance.

As to the bases on which people might agree with the substance of anticartel law, findings from the survey of public opinion suggested that the public was more inclined to make their assessments on moral rather than economic grounds. Thus, for example, the reasons for treating cartel conduct as a criminal offense that attracted greatest support were reasons relating to moral characterizations of the conduct as dishonest and deceptive (as distinct from characterizations 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. By contrast, there was low level of support for allowing an offender to escape penalties in return for reporting the conduct (pursuant to an immunity policy), a response that sits more comfortably with a moral rather than a pragmatic approach.

There was also 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.

### **III. PERCEPTIONS OF LIKELIHOOD OF BEING CAUGHT, FACING ENFORCEMENT ACTION, AND BEING JAILED**

Just because people know something is a criminal offense, 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 difference to compliance behavior are the perceived likelihood of detection and enforcement, more than the objective severity and subjective fearsomeness of the sanctions available. 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.

The Cartel Project survey therefore also asked business people to respond to a basic market-sharing scenario. Based on this scenario, respondents were asked a series of questions about their perceptions of the likelihood of being found out for engaging in the conduct in question; being subject to legal action; and, in the context of a second version of the scenario (where it was made clear that the conduct was a criminal offense) being jailed. Respondents on average rated the likelihood of being caught for cartel conduct only around the mid-point of a scale from 1 to 10. They rated the likelihood of facing legal action if caught as slightly above the mid-point of the scale. However they rated the likelihood of being sentenced to jail if found guilty of price-fixing below the midpoint on the scale—even though they were explicitly told that the conduct was, in fact, a criminal offense.

Once again the study found that business people's personal opinions of whether cartel conduct should be a criminal offense had a significant influence on their perception of the likelihood of being caught and facing enforcement action. There was no systematic difference by age, gender, educational level, job position, or workplace size.

Previous research on deterrence in other areas shows that people's perceptions of the risks of detection, enforcement, and sanction are affected by a range of cognitive biases, 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 non-compliance and, indeed, whether they even seek out information about the costs and gains of compliance and non-compliance at all. The Cartel Project research shows that business people's prior views and commitments in relation to the economic and moral desirability of cartel conduct will filter their perceptions of deterrence via cartel criminalization.

#### **IV. LIKELIHOOD OF COMPLIANCE**

The complexity inherent in predicting responses to the law and sanctions was also borne out in the survey's findings on the question of whether business people are likely to comply even when they know what the law is and the sanctions that apply to its breach. Nearly a third (29 percent) of the business people responding to the survey thought a hypothetical person would breach the anticartel law despite the prospects of criminal sanctions including jail (half thought it likely with only civil sanctions).

When asked about their own likely behavior, respondents saw themselves as more virtuous than others—only 15 percent indicated that they would be likely to breach the law where civil penalties applied and only 9 percent where criminal sanctions applied. Nevertheless, that is

still one in 10 who would seriously contemplate engaging in cartel conduct in spite of the risk of a jail term.

These findings, together with the findings that it is business people's prior personal evaluations of whether cartel conduct should be criminalized that most influences their knowledge of what the law actually is and their estimations of the likelihood of detection and enforcement, raise questions about the underlying assumptions of much of the criminalization rhetoric. This rhetoric assumes that criminalization will produce a clear deterrent message that will be received and acted upon by business people in a fairly straightforward manner. Assertions that any law will give a clear, simple message and have an easy-to-predict impact on behavior should be treated with great caution. The impact of the law on people's behaviors is likely to be complex.

The Cartel Project's interviews of 25 business people who had faced cartel enforcement action in the recent past (under the previous civil regime) explored the question of how they had thought about anticartel law when they engaged in the cartel conduct for which they subsequently were fined.<sup>7</sup> Based on the interviews the researchers concluded that some business people know, understand, and broadly agree with anticartel law and competition policy and are well aware of cartel criminalization and its consequences. These are generally sophisticated business people at the top of large organizations. They are also, however, closely scrutinizing the behavior of the competition authority to assess whether the enforcement actions taken match their own sense of what is appropriate and fair.

Other business people, however, are barely aware of the law and its potential impact on their lives at all. These are generally owners and managers in small-to-medium size businesses ("SMEs") and employees at junior levels in large organizations. To the extent they are aware, they strongly disagree with the way competition policy and anticartel law apply to their markets and industries. They might believe, for example, that their industry is characterized by the abuse of bargaining and market power by bigger players up the supply chain (such as supermarkets or large development and construction companies). They could not conceive that a competition authority would take action against individuals or smaller businesses in such a market and see it to be unfair when it does.

Even individuals in very large, powerful companies were part of this group and could rationalize their own cartel conduct as necessary because of unfair market conditions and pressure from senior management to perform. This group looked at the whole range of things that the competition authority was doing to secure fair competition in their own market. They filtered their understanding of cartel criminalization and its deterrent threat through their own personal evaluation of how well competition policy was working in their industry.

## V. THE ACCC'S RESPONSE

These research findings are challenging for the ACCC—the agency that led the campaign for criminal sanctions on the promise that it would supercharge deterrence and convince Australian business people about the immorality of cartel conduct. Moreover, more than three years after the criminalizing legislation took effect, there is yet to be a prosecution.

To its credit, the ACCC has paid attention to the research findings. It has renewed 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 penalties. In particular there has been:

- 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 the Cartel Project's lead researcher, Associate Professor Caron Beaton-Wells.

The ACCC's educative efforts are likely to have an impact, particularly at the big end of town. Released on August 30, 2012, the ACCC's film was sent to the major media outlets (TV, internet, radio, and print). It was posted on the ACCC website and You Tube and a letter about it was sent by the ACCC Chairman to the CEOs of Australia's top 300 companies, calling on them to take steps to ensure that their workforces understand what constitutes cartel conduct and the adverse risks and consequences associated with it. Many of the CEOs of Australia's top companies are likely to heed the call of ACCC Chairman Rod Sims to educate their workforces in this fashion.

However, it is questionable whether the campaign will penetrate the consciousness of the vast majority of Australian business people in SMEs. Even if they know about the anticartel laws, the Cartel Project research indicates that owners and managers in SMEs do not tend to see these laws as relevant to their affairs. Indeed, the white-collar characters and skyscraper companies depicted in *The Marker* may serve to reinforce this impression.

For the SME sector of the business community, different strategies will be required. Undoubtedly the ACCC will be aware of this. It will also be sensitive to the fact that members of the small business community are more likely to be receptive to ACCC advances on cartels if they perceive the ACCC as protecting their ability to participate fairly in the market place through its other regulatory enforcement and compliance activities. People in SMEs may not have *The Marker* at the top of their favorite movie list. But they will be watching what the ACCC does in areas such as merger review, misuse of market power, and unconscionable conduct (to name a few) where the behavior of big businesses has a direct and, at times, devastating impact on the lives of small business people.

Moreover, the ACCC's outreach efforts will be boosted by the publicity that will attend the first criminal case, when it is brought. The importance of prior awareness in relation to knowledge of the law indicates that hearing about big prosecutions of cartel conduct in the media might increase people's awareness and knowledge of the criminal offense of cartel conduct. Many business people will not necessarily proactively scan the regulatory environment for themselves; they need to have their attention drawn to the issue of cartel conduct by high profile cases.

That said, a business person has to believe that issues covered in the press are relevant to him or herself in order to pay attention in a way that leads to greater knowledge and understanding of how the law applies to his or her own situation. Publicity about major actions can be helpful—but may be a blunt tool in this regard. Business people can often dismiss stigmatizing publicity about major enforcement as applying to others and not themselves. More targeted and differentiated education and moral persuasion may need to come first.