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Cartel Criminalisation
A survey of the Australian public

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Presentation to the ACCC

1 December 2010

About this presentation

- The Melbourne Law School Cartel Project
- Survey design and methodology
- Survey findings
 - General awareness and support for competition law (general public)
 - Views on treating cartel conduct as a crime (general public)
 - Views on penalising cartel conduct (general public)
 - Knowledge that cartel conduct is a crime (business people)
 - Perceptions of deterrence (business people)
 - Likely behavioural responses (business people)
- Summary of key findings and high level reflections
- Questions?

The MLS Cartel Project (1)

- **Aims**
 - investigate how and why cartel criminalisation has taken place in Australia
 - assess the likely impact on deterrence and compliance
 - compare policy and experience overseas (esp. US and UK)
 - elicit possible insights for other jurisdictions and other forms of business regulation

- **Empirical components**
 - interviews with stakeholders
 - interviews with prior offenders
 - **public survey**

The MLS Cartel Project (2)

- **The MLS Cartel Project Survey**
 - online survey
 - 1,334 randomly selected respondents
 - representative of the Australian public
 - multi-stage design to test accuracy and validity
 - wide ranging scope to cover views on how the law should respond to cartel conduct and how legal sanctions are likely to affect deterrence/compliance
 - use of simple factual scenarios to elicit views while avoiding technical and leading language
 - results will be relevant in various ways, including to the design of outreach and enforcement strategies
 - data phase completed in July 2010; full set of results to be available shortly

Survey findings

General awareness and support for competition law (1)

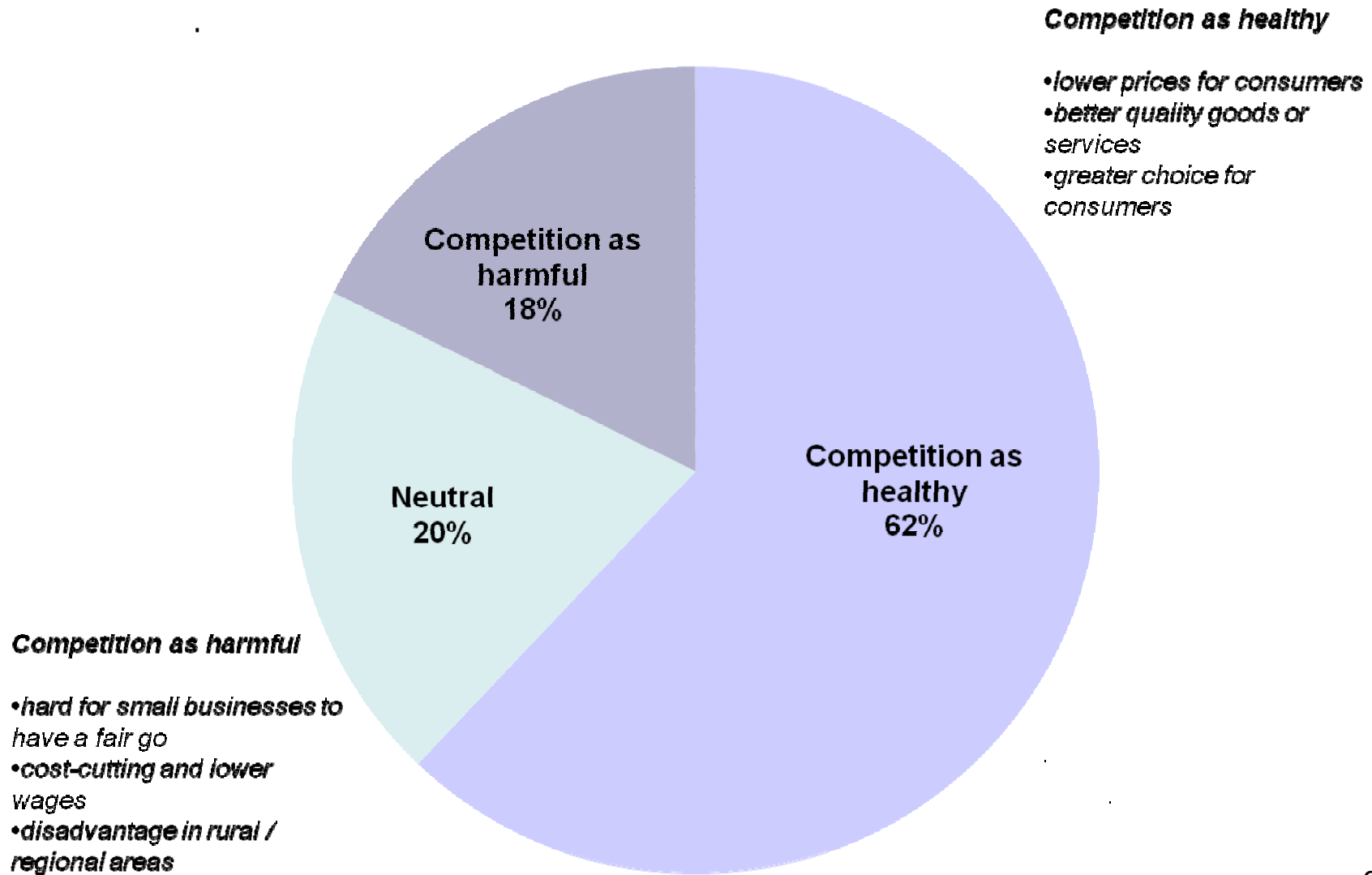
| Heard or read of..... | % |
|--|------|
| Price fixing | 79.5 |
| ACCC | 77.5 |
| Case involving Richard Pratt and the ACCC | 46.1 |
| Case involving Visy and Amcor for price fixing | 38.5 |
| Allan Fels | 37.6 |
| Cartels or cartel conduct | 28.5 |
| Graeme Samuel | 20.1 |
| Criminal penalties for cartel conduct | 15.2 |
| Haven't heard of any of these | 11.1 |

High level of awareness of relevant topics, people, or events - 9 in 10 respondents had heard or read of at least one of these items

Highest levels of awareness amongst older people, men and managers, esp. from large businesses

Survey findings

General awareness and support for competition law (2)



Survey findings

General awareness and support for competition law (3)

- **‘Price fixing’ scenario used in survey**

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.

‘agreement between competitors on prices’

- Similar scenarios used for market allocation and output restriction

Survey findings

General awareness and support for competition law (4)

| Conduct type | Yes % | No % | Not sure % |
|----------------------|-------------|------|------------|
| 'Price-fixing' | 70.9 | 16.8 | 12.3 |
| 'Market sharing' | 67.1 | 18.5 | 14.4 |
| 'Output restriction' | 68.7 | 17.6 | 13.7 |

High level of support for treating cartel conduct as against the law

Positive association with view of competition as healthy

Survey findings

Treating cartel conduct as a criminal offence (1)

Agreement

A large proportion of the public do not think that cartel conduct should be treated as a crime

But support for treatment as a crime increased with level of cartel awareness

Men and managers, esp. from large businesses were most likely to support treatment as a crime

| Conduct type | Yes % | No % | Not sure % |
|----------------------|--------------|-------------|-------------------|
| 'Price-fixing' | 44.3 | 42.8 | 8.8 |
| 'Market sharing' | 36.6 | 51.6 | 7.8 |
| 'Output restriction' | 44.6 | 45.5 | 7.1 |

Survey findings

Treating cartel conduct as a criminal offence (2)

Reasons

- The ACCC advocated several reasons for criminalisation
 - ✓ economic harmfulness of cartels
 - ✓ need for greater deterrence
 - ✓ cartel conduct is akin to other crimes, eg theft
 - ✓ such conduct warrants moral opprobrium
 - ✓ major trading partners have criminal sanctions

Survey findings

Treating cartel conduct as a criminal offence (3)

Reasons

| Reasons | Most common response | Most common response (%) |
|--|----------------------|--------------------------|
| Because the conduct involves deceiving consumers | Strongly agree | 64.0% |
| Because the conduct is dishonest | Strongly agree | 62.9% |
| Because making it a criminal offence will deter | Strongly agree | 59.1% |
| Because the conduct will harm competition or the free market | Strongly agree | 54.5% |
| Because making the conduct a criminal offence will allow for punishment | Strongly agree | 52.5% |
| Because consumers may have to pay more | Strongly agree | 50.0% |
| Because the conduct should be seen as the same as theft | Strongly agree | 47.6% |
| Because the conduct may harm or be unfair to other competitors | Agree | 44.0% |

Moral reasons had highest % of strong agreement

Survey findings

Treating cartel conduct as a criminal offence (4)

Reasons

- Morality was also a consistent theme in respondent comments eg:
 - *'it is a fraudulent and dishonest practice'*
 - *'nothing more than theft by another name'*
 - *'its not fair for the consumers'*
 - *'it is morally wrong, regardless of what the law says'*

Survey findings

Treating cartel conduct as a criminal offence (5)

Relative to other crimes

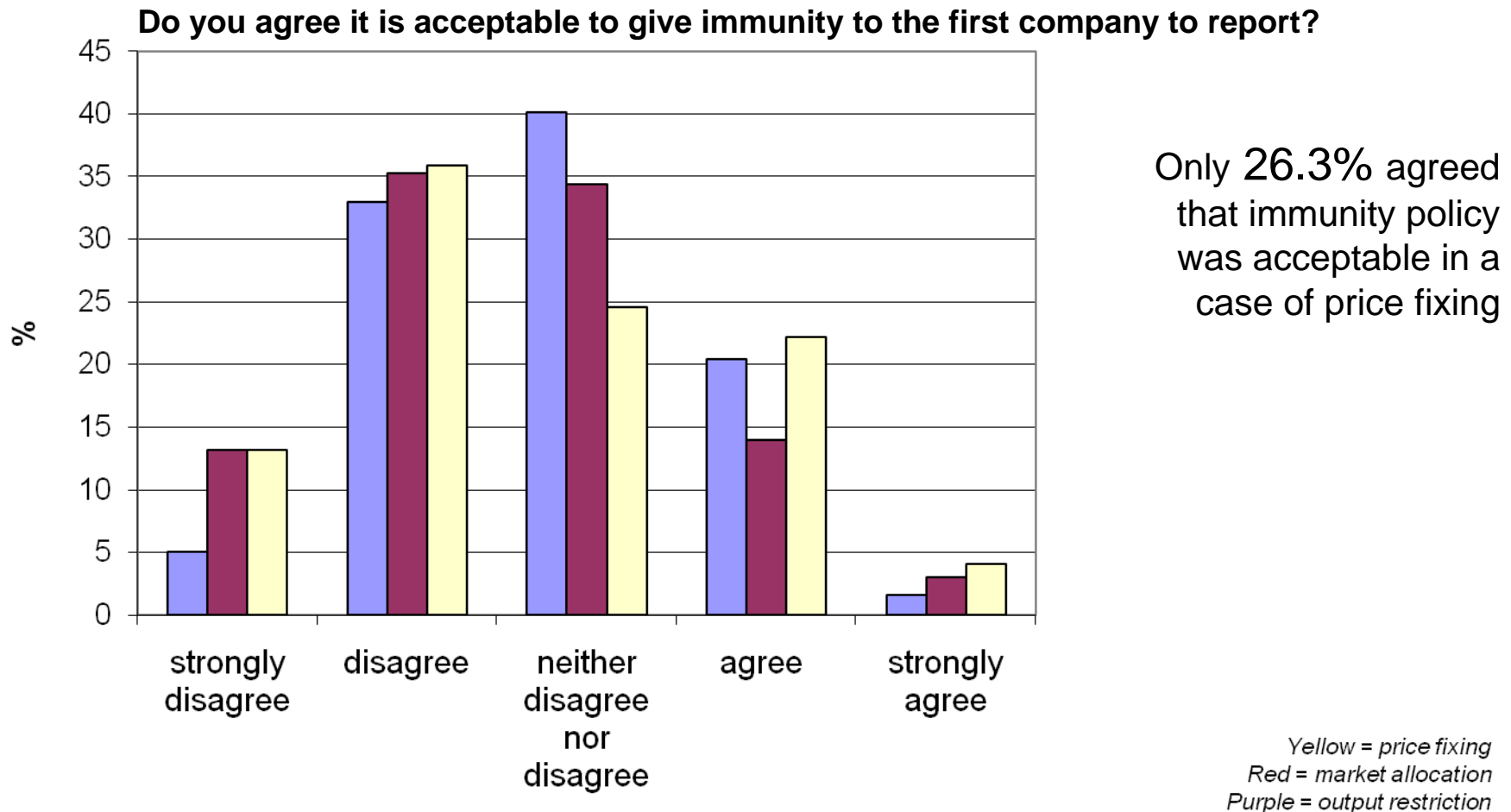
| As compared to price fixing ... | Most common response |
|---|-----------------------------|
| A person stealing another person's property is... | Just as serious |
| An insurance company denying a valid claim to save money is... | Just as serious |
| A company director using their position dishonestly to gain personal advantage is ... | Just as serious |
| A company evading government income taxes is ... | Just as serious |
| A person using inside information in deciding to buy or sell shares is ... | Just as serious |
| A person killing another person is ... | Alot more serious |
| A person sexually abusing another person is ... | Alot more serious |
| A company misleading consumers about the safety of goods is | Alot more serious |

‘Just as serious’ comparators also reflect ACCC’s moral message ¹³

Survey findings

Treating cartel conduct as a criminal offence (6)

Acceptability of immunity policy

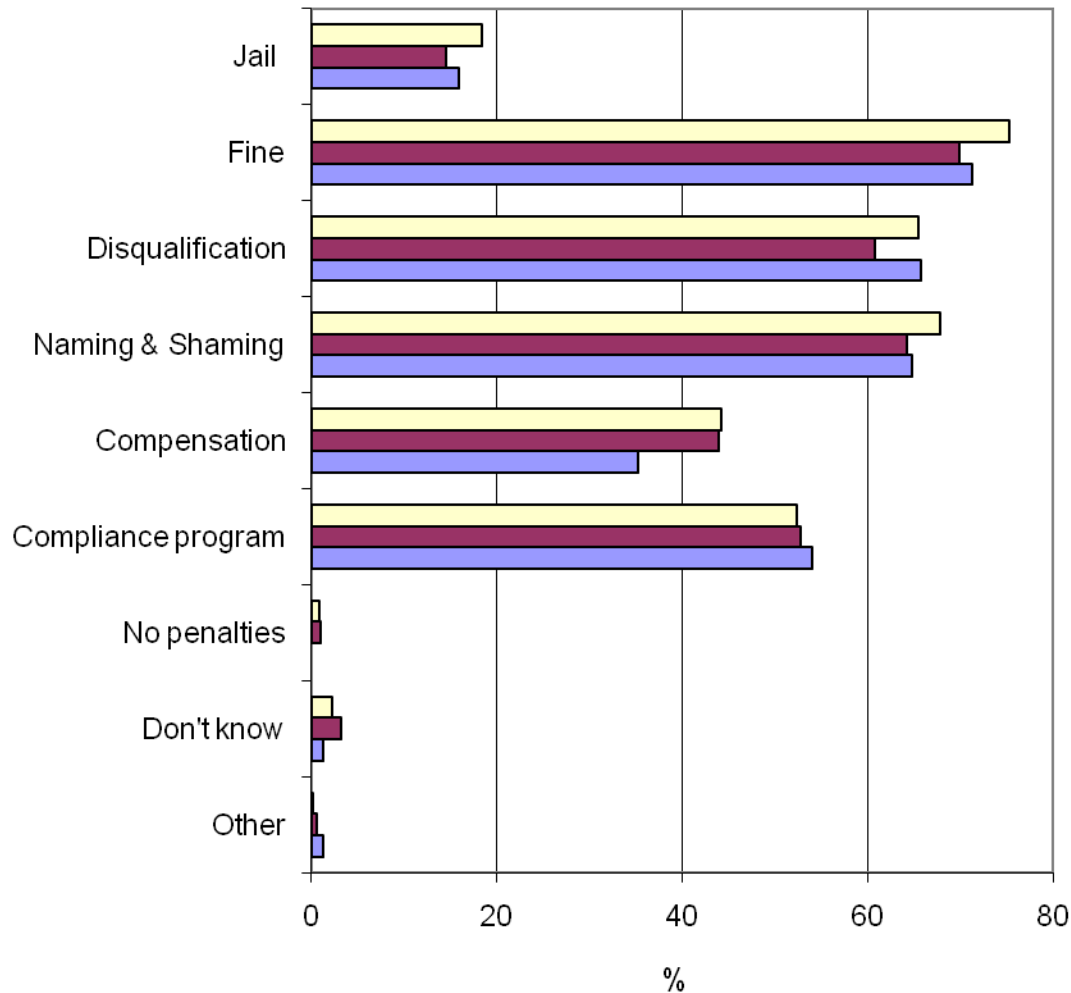


Lack of support for immunity policy could also suggest moral concerns

Survey findings

Penalties for cartel conduct (1)

Individuals



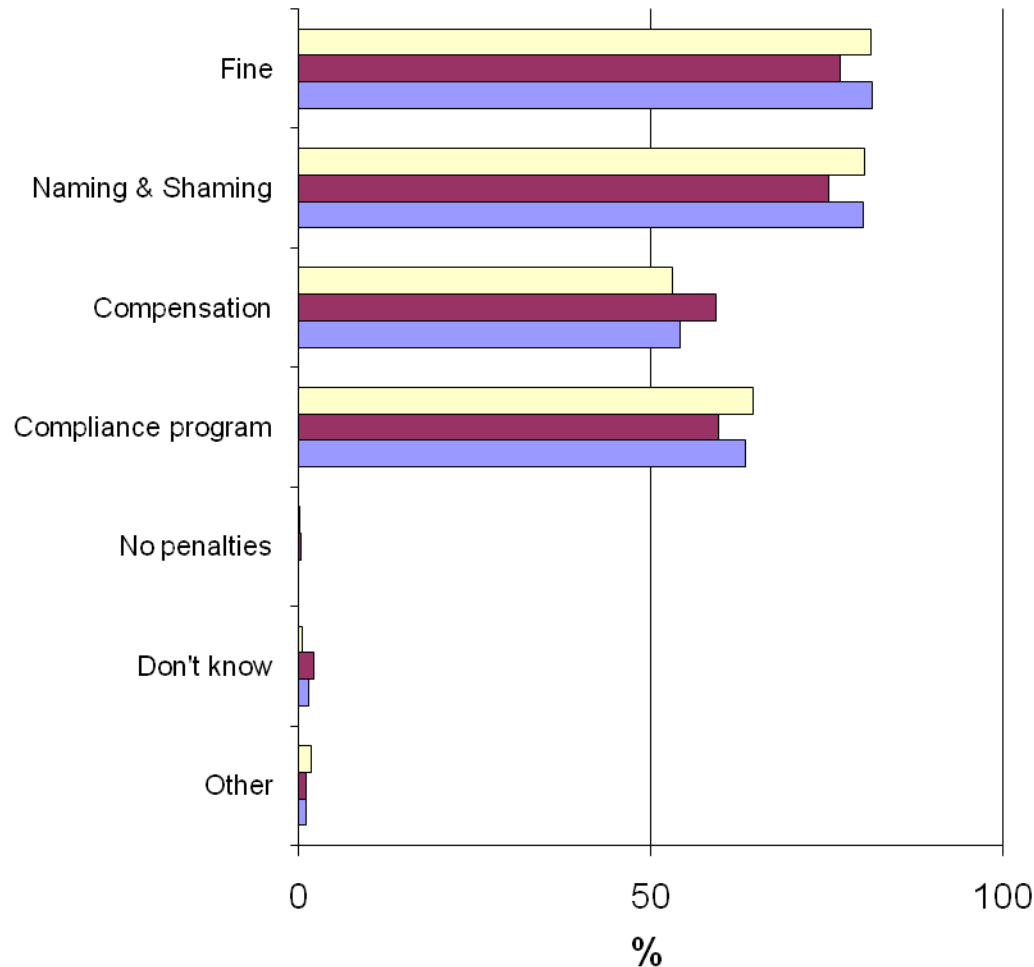
Yellow = price fixing
 Red = market allocation
 Purple = output restriction

Low support for jail as a cartel sanction

Survey findings

Penalties for cartel conduct (2)

Companies



Highest support was for a fine 3 times the profit made from the conduct

Yellow = price fixing
Red = market allocation
Purple = output restriction

Strong support for fines and naming and shaming also of companies

Survey findings

Penalties for cartel conduct (3)

Context

| Aspect of the conduct | Most common response | Most common response (%) |
|---|------------------------|--------------------------|
| The companies involved in the conduct were small businesses | Just as serious | 80.1 |
| The profits from the conduct were used to make products that are environmentally friendly | Just as serious | 79.5 |
| Prices did not go up as a result of the conduct | Just as serious | 58.0 |
| The reason for the conduct was that it would prevent factories from closing and would save jobs | Just as serious | 49.9 |
| The conduct included bullying another company into joining the agreement | More serious | 82.0 |
| Elaborate steps were taken to make sure the authorities did not find out about the conduct | More serious | 77.5 |

**Lack of support for mitigating factors + coercion and concealment
seen as aggravating – reflective again of moral emphasis**

Survey findings

Penalties for cartel conduct (4)

- **Comments again bear out concern with moral character rather than effects of conduct**
 - *'I don't believe the end justifies the means'*
 - *'there can be no excuse for price collusion whatsoever'*
 - *'if something is wrong it is wrong doesn't matter how you dress it up'*
 - *'the plea of environmentally friendly is rubbish'*
 - *'a law cannot be this flexible otherwise it would be the chance for people to come up with excuses for their dishonest actions'*
 - *'a crime is a crime regardless of why ... there are always reasons'*

Summary of key findings



There are solid foundations in terms of awareness and support for competition policy and enforcement amongst the public



ACCC outreach and advocacy relating to cartels and criminalisation over the last 10 years has yielded strong results – 42% of the public agree that cartel conduct should be a crime



Cartel conduct is seen by the public as serious and not readily excusable



Cartel conduct is seen as just as serious as other well-established crimes of dishonesty



The message that cartel conduct is morally wrong (as well as economically harmful) particularly appears to resonate with the public

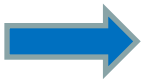
Summary of key findings



The public see cartel conduct as conduct for which BOTH companies and individuals should be sanctioned



The public support substantial fines and public naming and shaming for cartel conduct – for both companies and individuals (as well as disqualification for individuals)



There is still a long way to go in persuading the public that it is conduct for which individuals should go to jail



There is low public support for an immunity policy for cartel conduct

- **Purpose**

- assess the likely impact on target group
 - knowledge of law
 - perceptions of likelihood of enforcement
 - assess likely impact on compliance behaviour

- **Extra questions**

- Hypothetical 1: knowledge of law
- Hypothetical 2: perceptions of deterrence and likely compliance

- **Selection of business group**

- 567 chosen from general public and booster sample
- Main position held in job last week: owner, member of board of directors, senior manager or middle manager = 400

OR

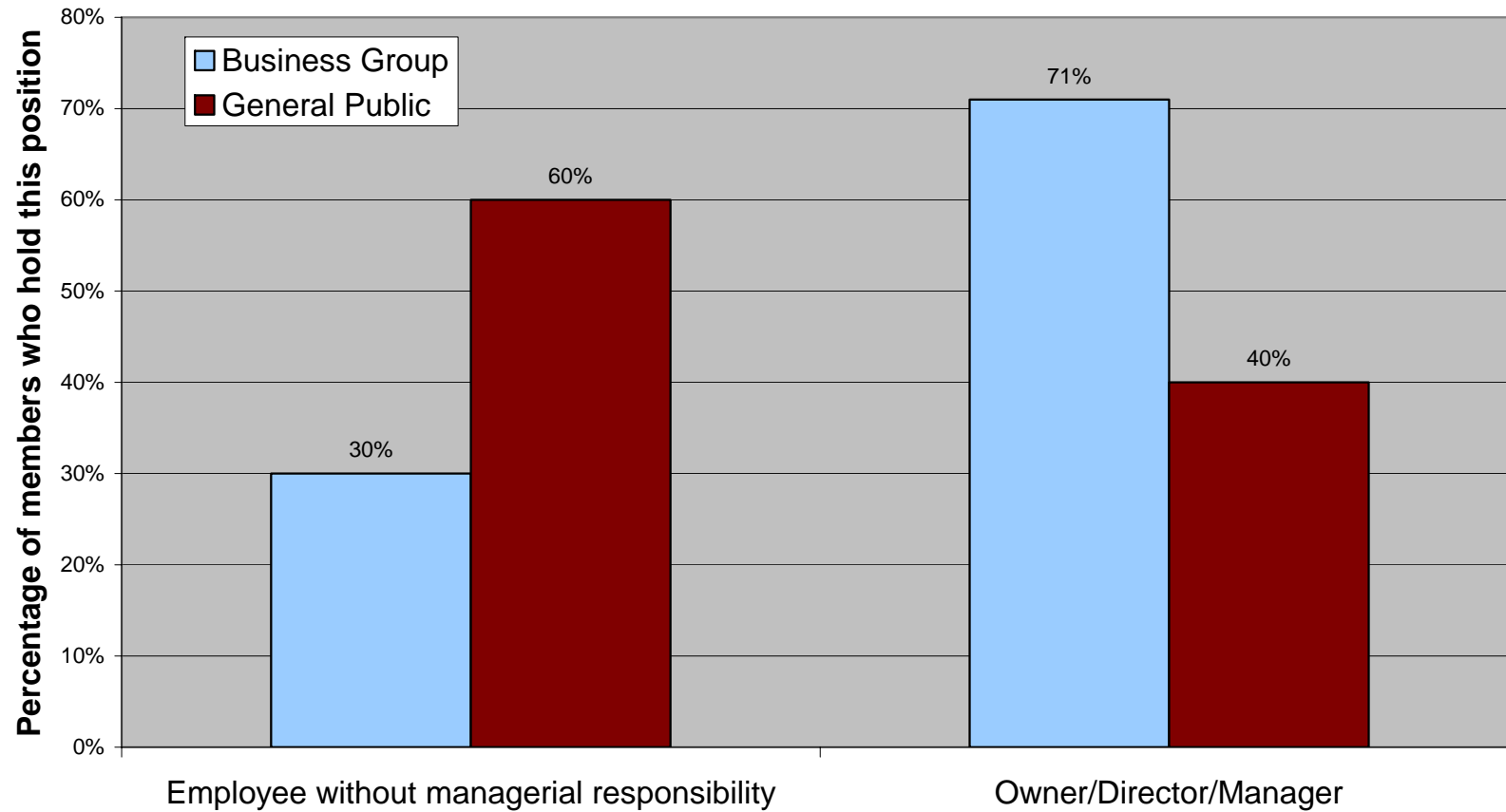
- Employee without managerial responsibility **plus** role included various things that might provide an opportunity to breach cartel provisions = 167

Business group Selection (2)

| In the main job you held last week, did your role include any aspect of : | Employees (400) | Managers (167) | Total (567) |
|---|--------------------|-------------------|----------------|
| Deciding, revising or negotiating prices for goods or services | 22% | 42% | 36% |
| Deciding, revising or negotiating cost of producing goods or supplying services | 7% | 29% | 23% |
| Marketing or promoting goods or services | 38% | 38% | 38% |
| Setting production, capacity or supply levels | 17% | 19% | 19% |
| Dealing with customers in any capacity | 79% | 74% | 75% |
| Dealing with suppliers in any capacity | 60% | 54% | 55% |
| Dealing with competitors in any capacity | 16% | 21% | 19% |
| Tendering for contracts | 6% | 19% | 15% |
| Overseeing or managing any of the above | 17% | 38% | 32% |

Business group Selection (3)

Main work position: business group vs general public

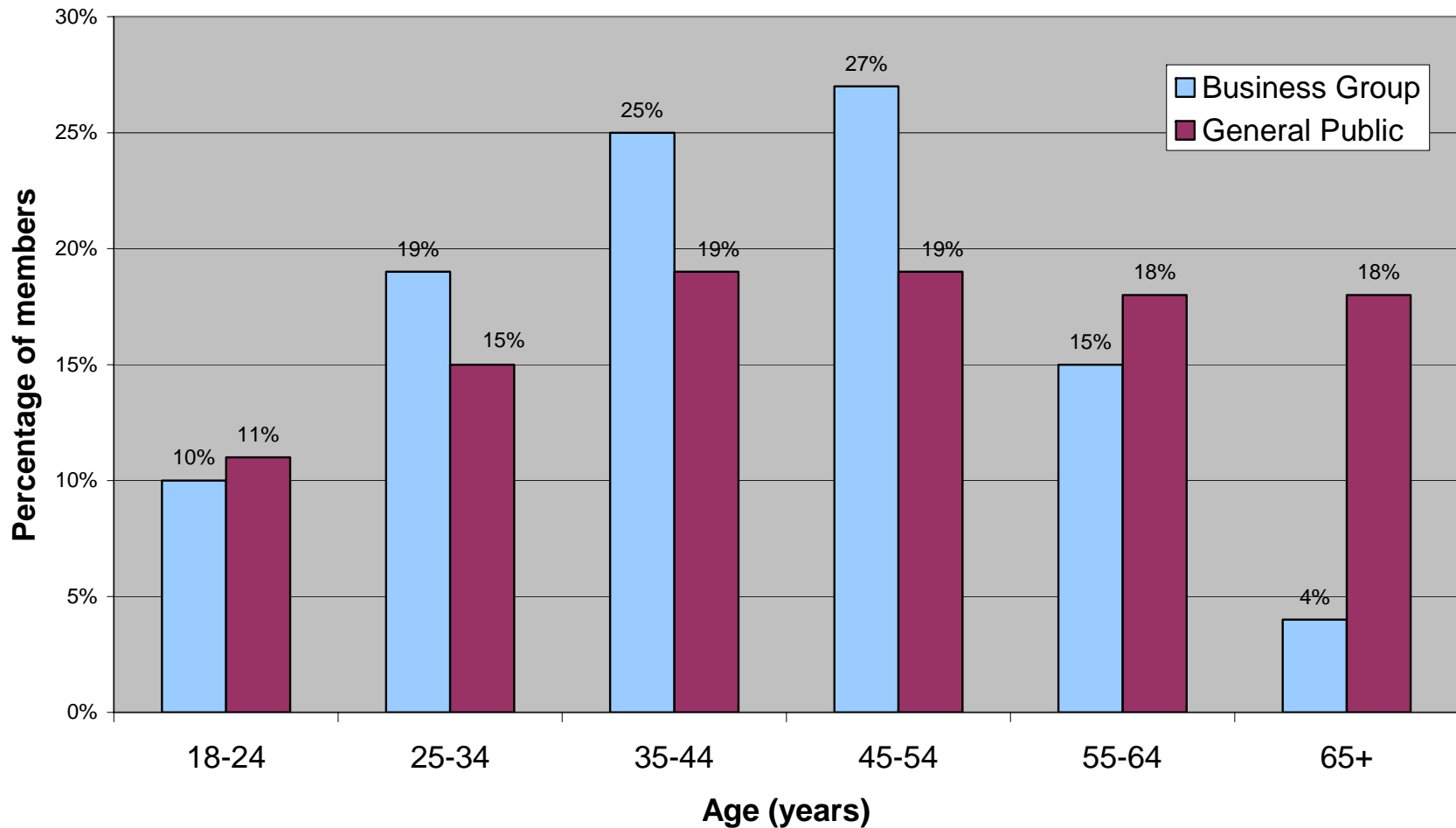


Business group Selection (4)

| How many people are employed at your workplace: | Business group n=567 | All Australian employing businesses (ABS figures) |
|--|---------------------------------|--|
| Micro (0-19) | 52% | 89% |
| SME (20-199) | 27% | 10% |
| Large (200 +) | 22% | <1% |

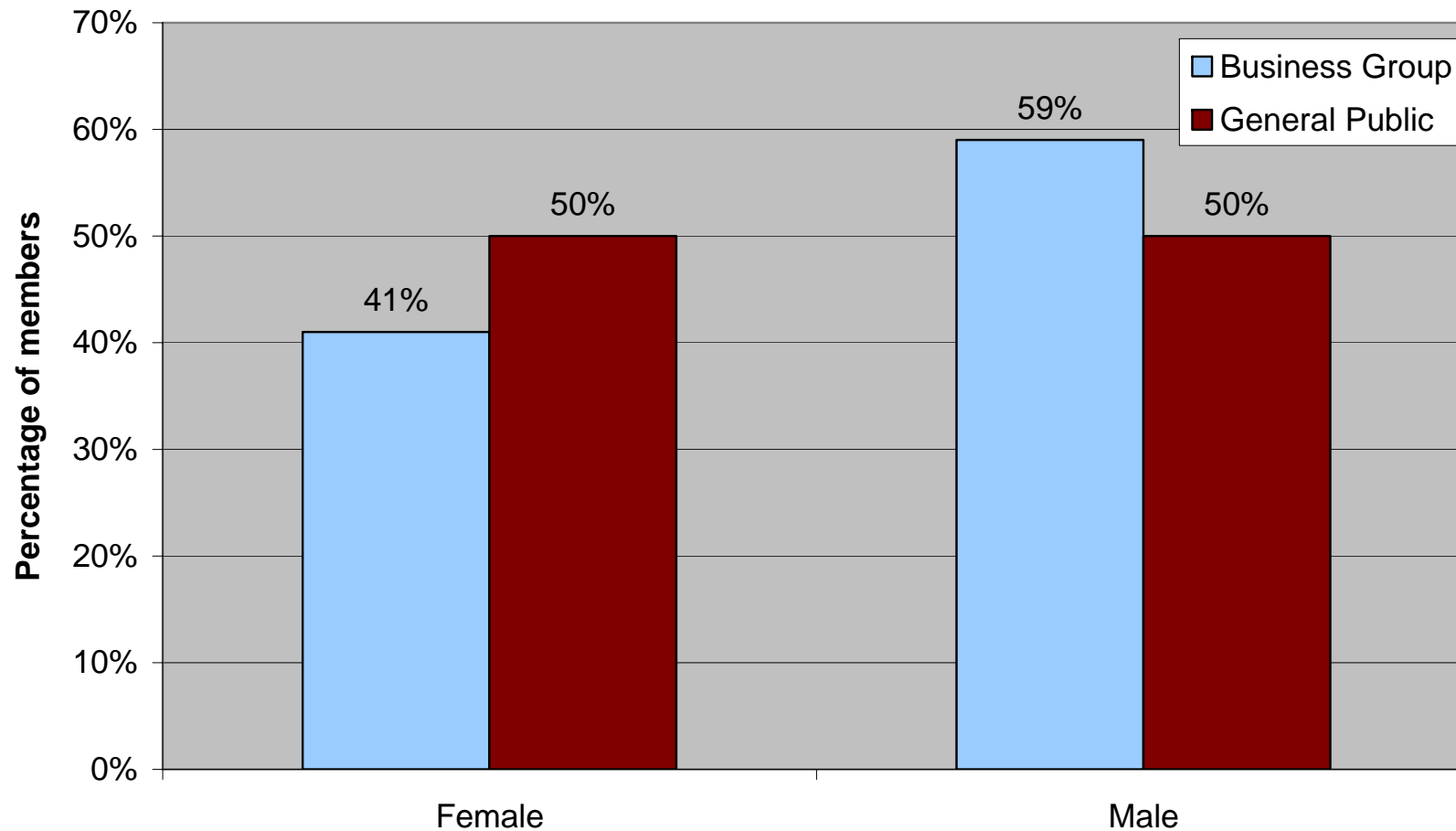
Business group Demographics (1)

Age: business group vs general public



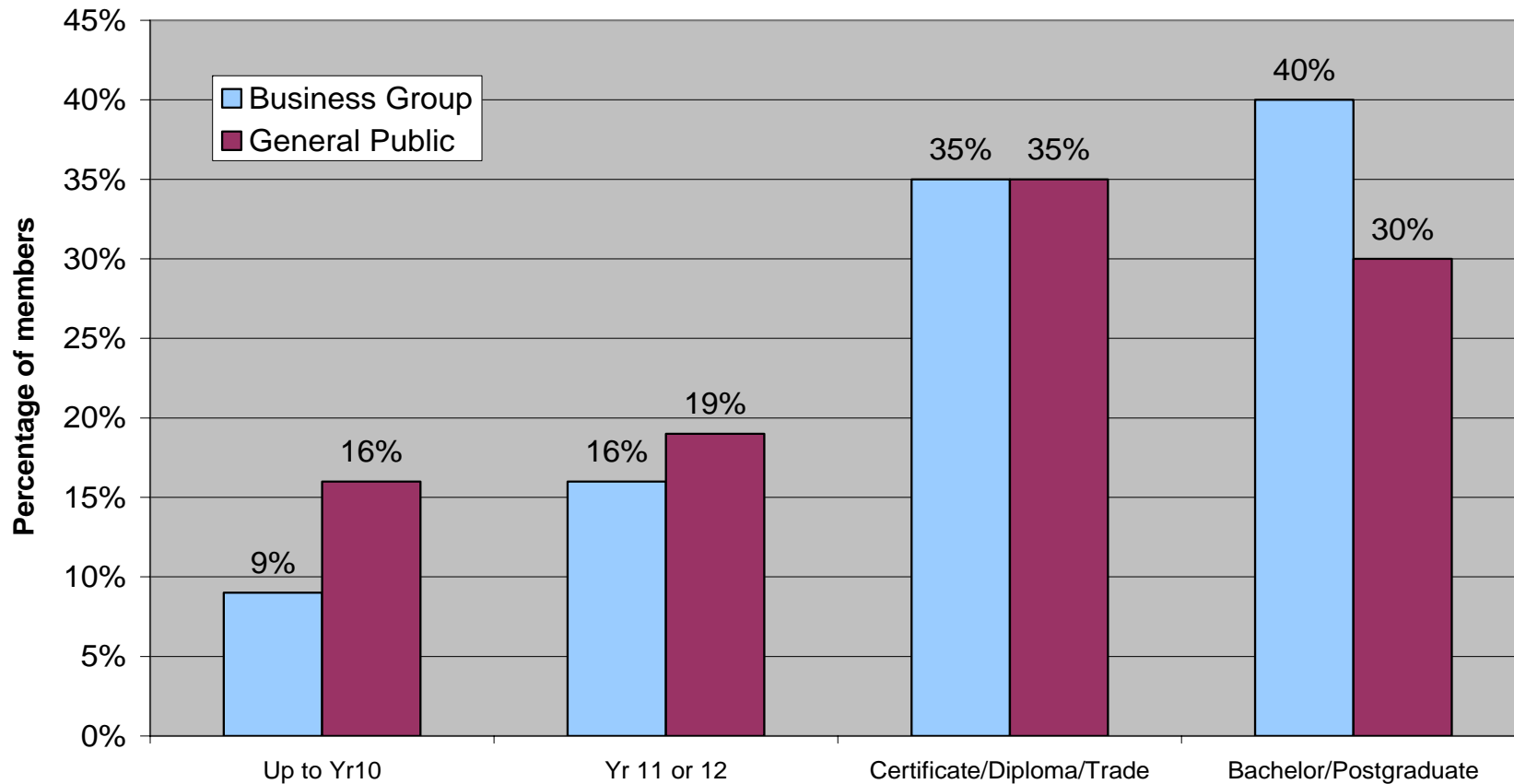
Business group Demographics (2)

Gender: business group vs general public



Business group Demographics (3)

Highest education: business group vs general public



Business group

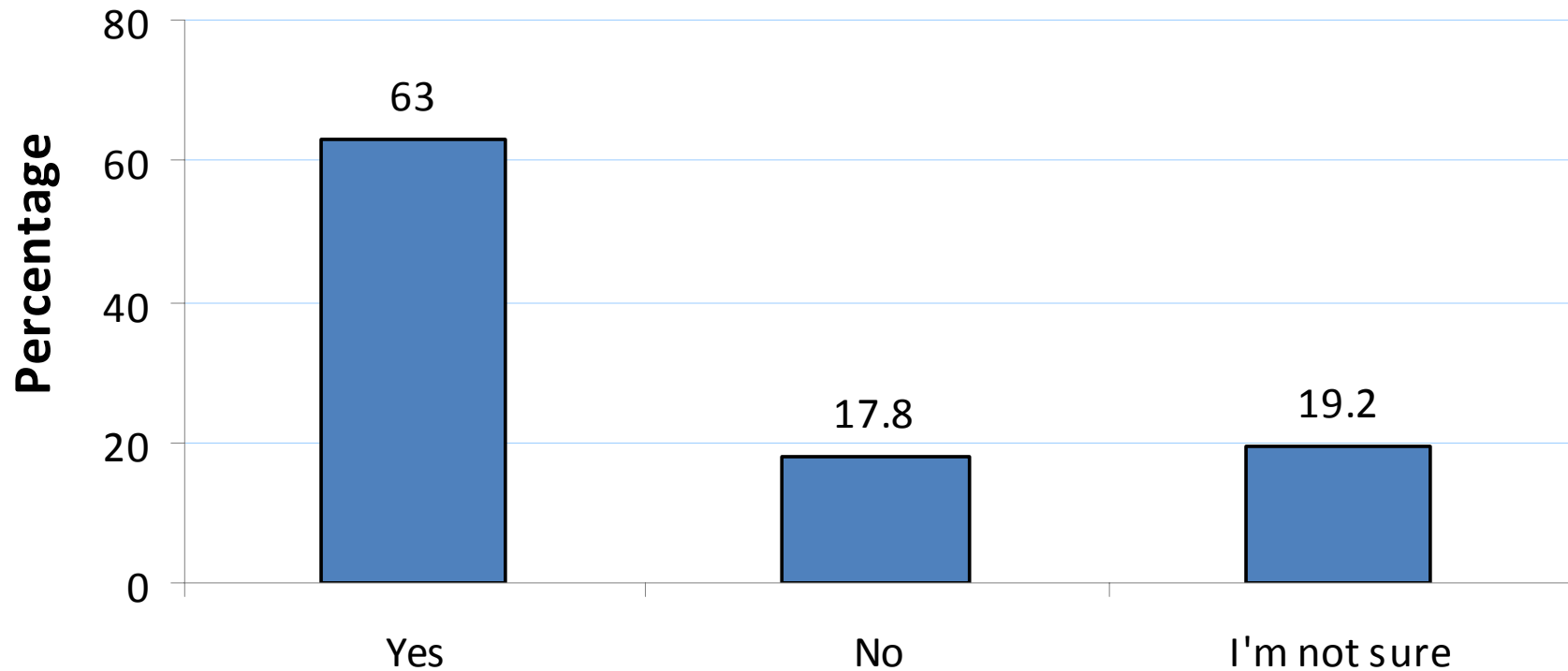
Knowledge of law (1)

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.

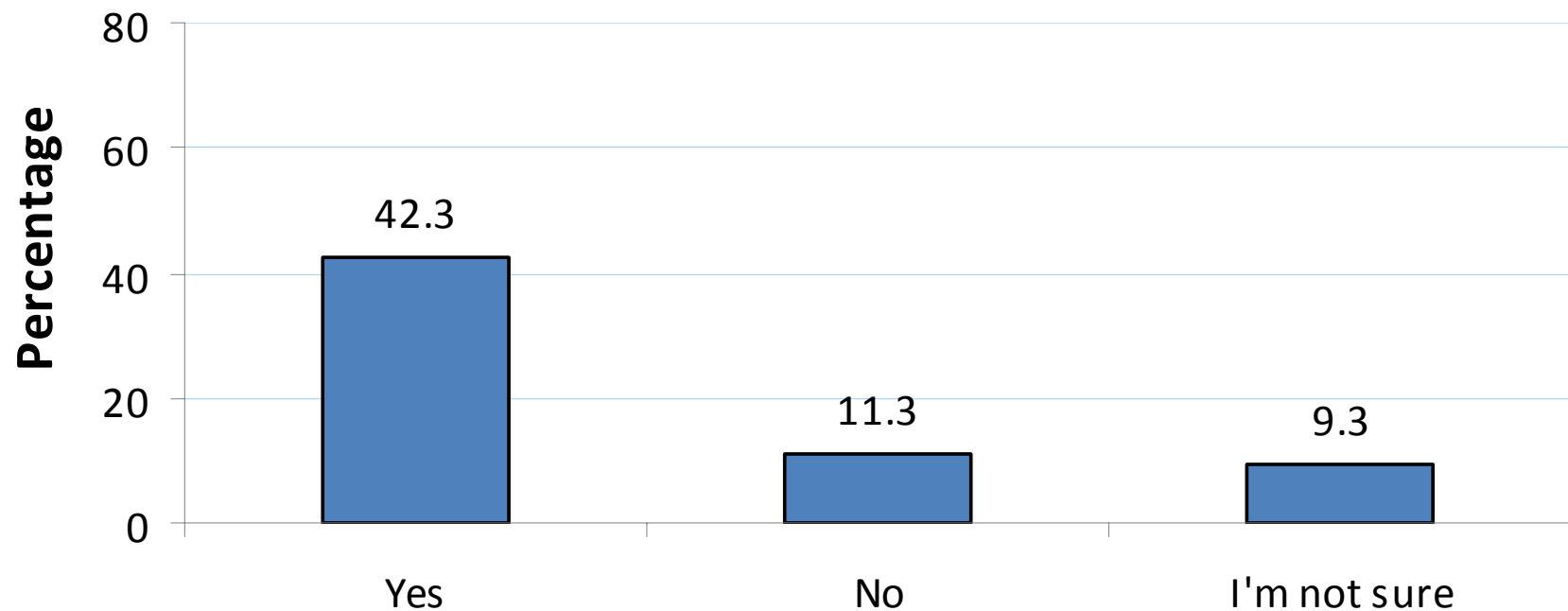
Please answer the next questions given what you think the law **ACTUALLY IS**, rather than what you think the law **SHOULD BE**.

Do you think that Lee has broken the law by agreeing on prices with competitors? (n=567)



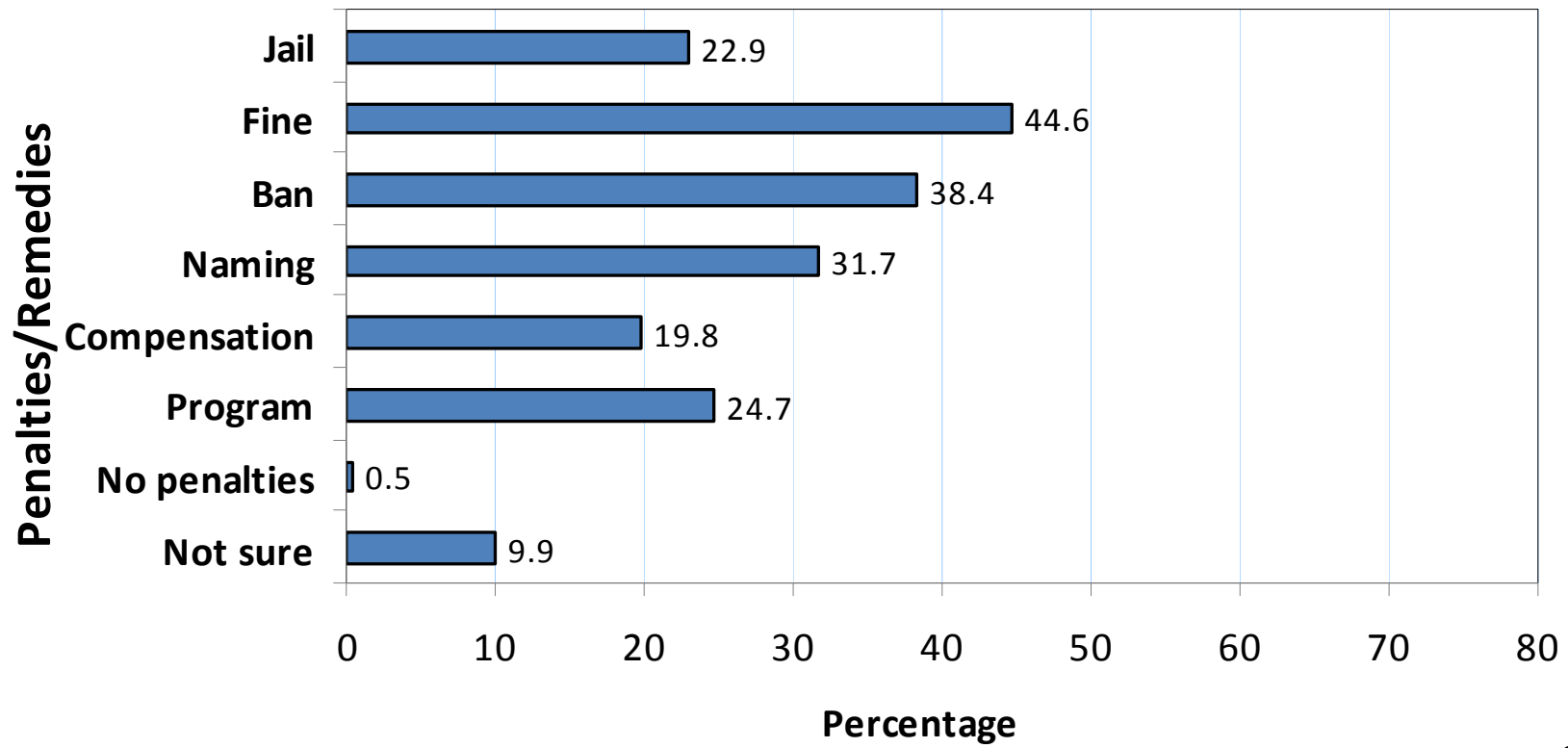
Business group Knowledge of law (3)

**Do you think that Lee has committed a criminal offence by agreeing on prices with competitors?
(As proportion of total business group: n=567)**



Business group Knowledge of law (4)

As far as you know, what penalties are available for someone like Lee who agrees on prices with competitors?
(As proportion of business group: n=567)



- **Comments on whether Lee has broken law:**
 - *'It's dishonest' (yes)*
 - *'Yes, absolutely, Lee's decision was based on personal gain and manipulation and not in the interests of fair competition' (yes)*
 - *'it's just another way of being dishonest for profit' (yes)*
 - *'I'm pretty sure price fixing is against the law. Even if not, this is an example of business manipulating the market and screwing the consumer' (not sure)*

Business group

Knowledge of law (6)

- **Comments on whether Lee has committed criminal offence:**
 - *'Yes in this case as he would have been aware he was breaking the law for his and companies gain' (yes)*
 - *'I don't think there is a law in place for this but there should be' (no)*
 - *'It's probably a civil offence rather than criminal' (no)*
 - *'I know that this has something to do with price fixing laws, but I don't know if they are an actual criminal offence or not.'* (not sure)
 - *'I believe there are laws against price-fixing, but do not know if the individual or company is "at fault".'* (not sure)

Business group

Hypotheticals: Deterrence and compliance (1)

Basic scenario

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.

Business group

Hypotheticals: Deterrence and compliance (2)

- Variations on this scenario to test difference between effect of civil and criminal sanctions for cartel conduct. Respondents are told either:
 - Civil:** This conduct is against the law but it is **not** a criminal offence
 - Criminal:** This conduct is against the law and **is** a criminal offence.

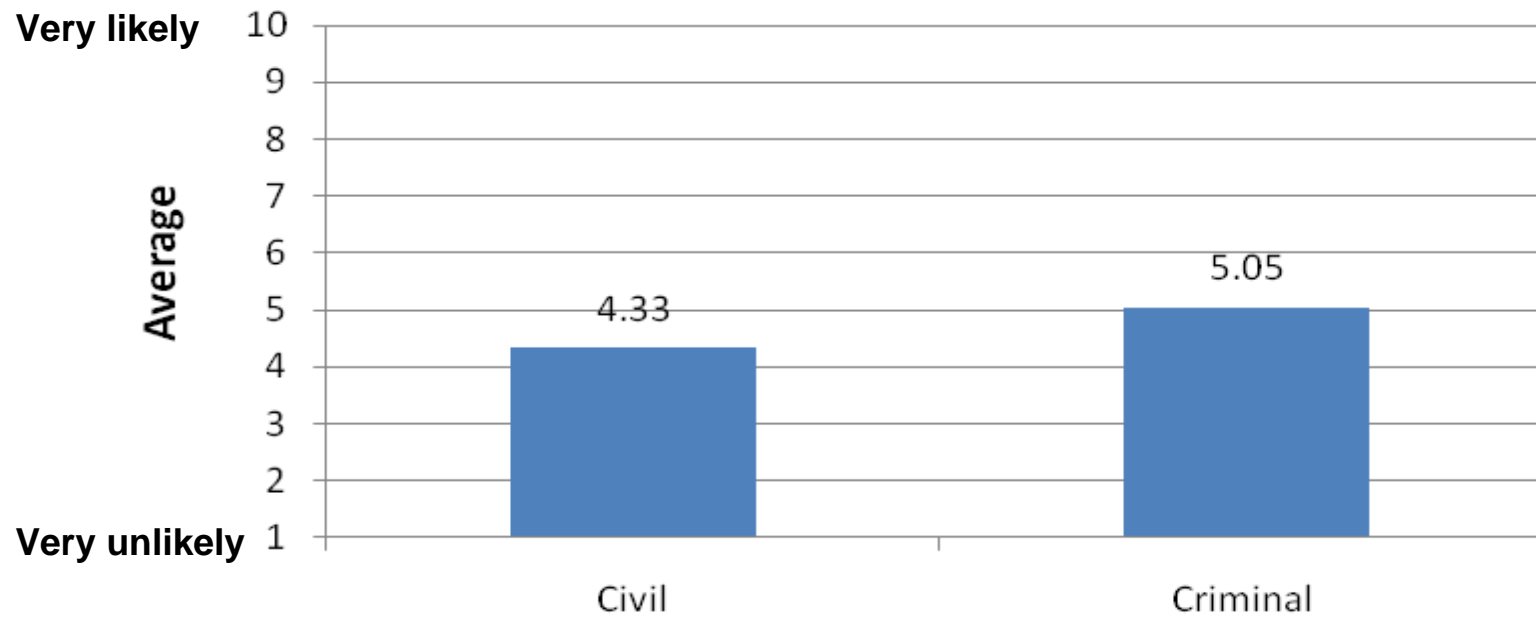
- Then a series of questions about perceptions and behaviour:
 - Perceptions of likelihood of enforcement:** likelihood of being found out; being subject to legal action; and being jailed.

 - Compliance behaviour:** likelihood of Ashley engaging in the conduct, and of respondent engaging in the conduct in Ashley's place.

Business group

Perceptions : Likelihood caught

Perceive it unlikely Ashley will be caught – even less likely when civil sanctions.

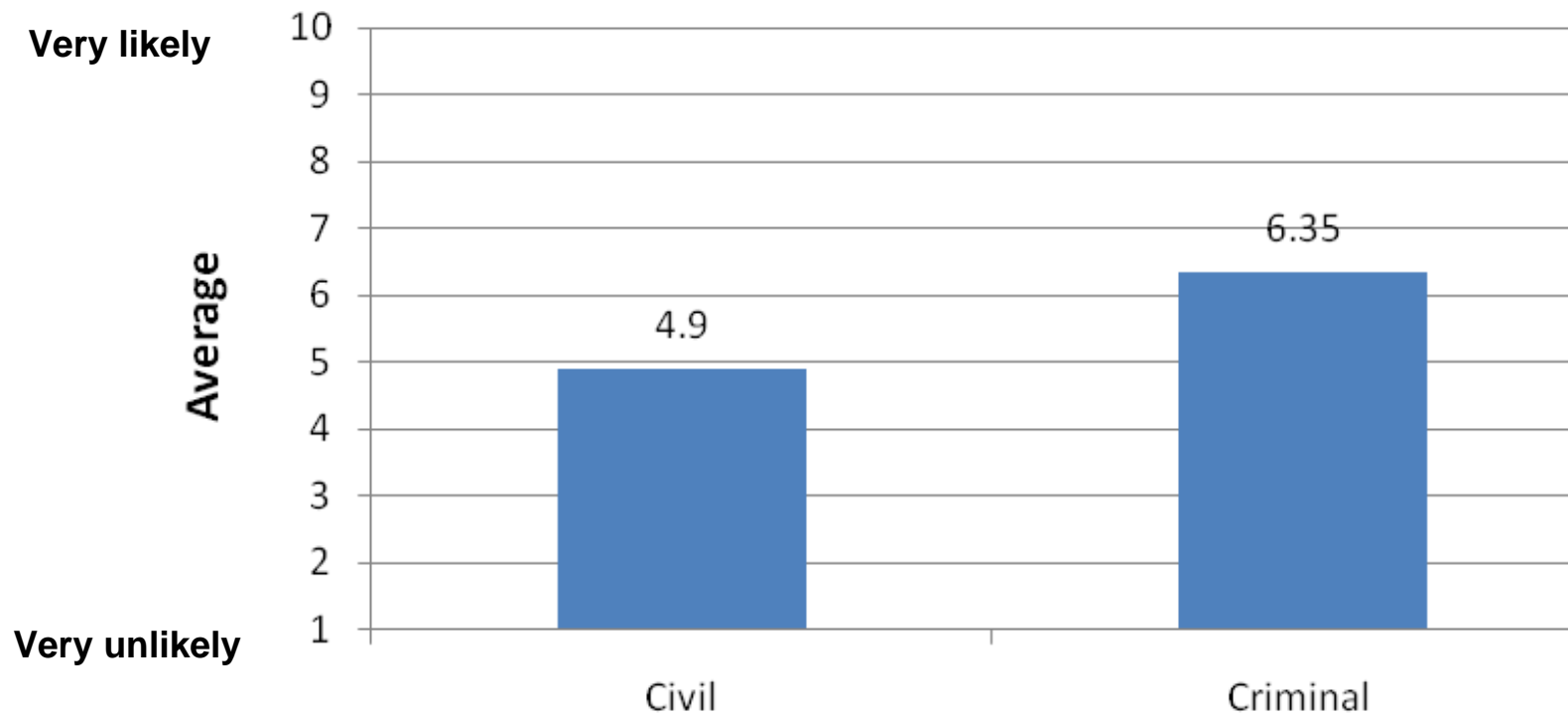


If Ashley goes ahead and agrees with representatives from competitors not to win over each other's customers, how likely do you think it is that Ashley would be found out by the law enforcement authorities for doing...

Business group

Perceptions: Likelihood of legal action

Legal action (if caught) perceived as more likely, especially if criminal sanctions.

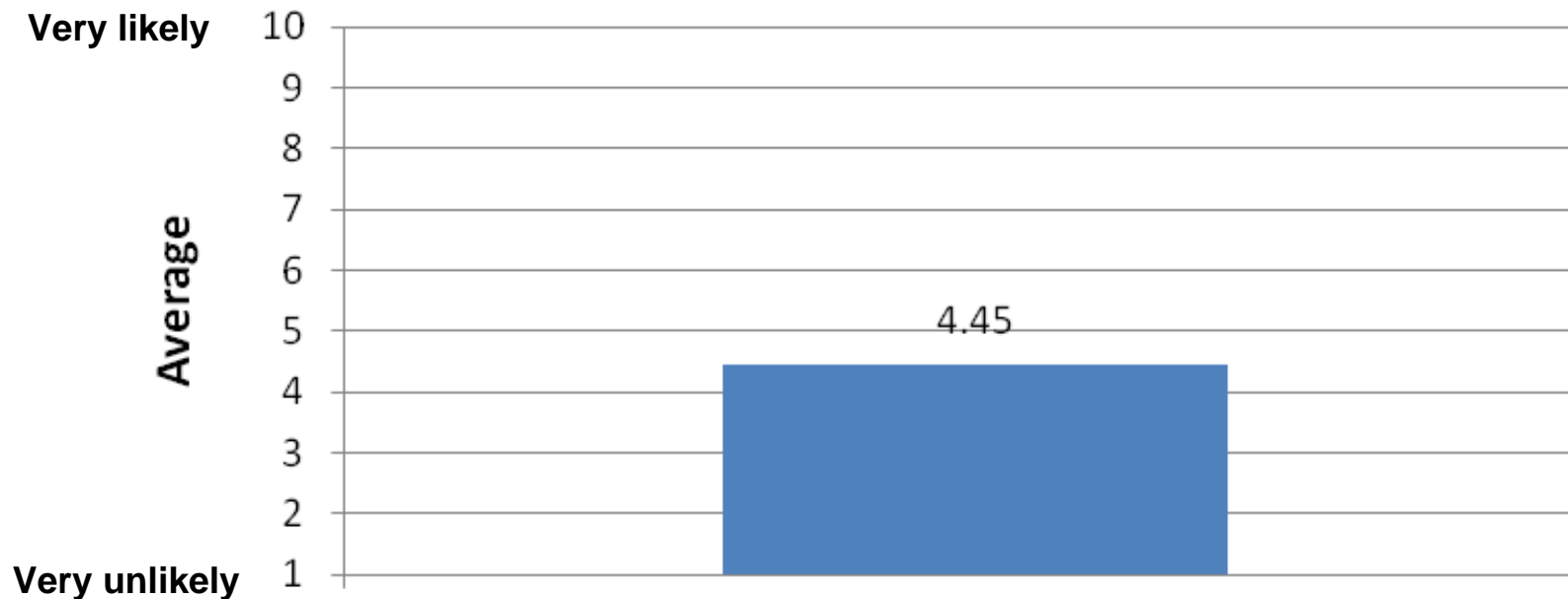


If Ashley is found out by the authorities, how likely do you think it is that the authorities will actually take legal action against Ashley?

Business group

Perceptions: Likelihood of jail

Jail sentence (if found guilty) perceived as unlikely.



If Ashley is found guilty, how likely do you think it is that Ashley will be sentenced to jail for making an agreement with competitors to no longer try to win over each other's customers

Business group

Open text comments on likelihood of enforcement

It's the Australian way, and hardly anyone seems to be caught or punished – particularly from a big business.

I have never heard of a jail term being imposed on a business leader for such behaviour. At most they get a simple fine and are told, "Naughty boy, don't do it again".

Business group

Likelihood of breach: question (civil)

Civil

In recent years the average fine that the courts have imposed on individuals involved in the same sort of conduct that Ashley is considering has been \$40,000. The maximum fine available under the law against individuals for this sort of conduct is \$500 000. The law also says that individuals who take part in this sort of conduct can be banned from managing a company in the future.

Ashley – likelihood of breach

All things considered, how likely do you think it is that Ashley will decide to make an agreement with competitors not to try to win over each other's customers?

Respondent – likelihood of breach

If you found yourself in the same circumstances as Ashley, how likely is it that you would make an agreement with your competitors not to try to win over each other's customers?

Business group

Likelihood of breach: question (criminal)

Criminal

The law says that people who engage in the sort of conduct that Ashley is considering can be convicted and put in jail. The maximum jail term available under the law against individuals for this sort of conduct is 10 years. The law also says that individuals who take part in this sort of conduct can be banned from managing a company in the future.

Ashley – likelihood of breach

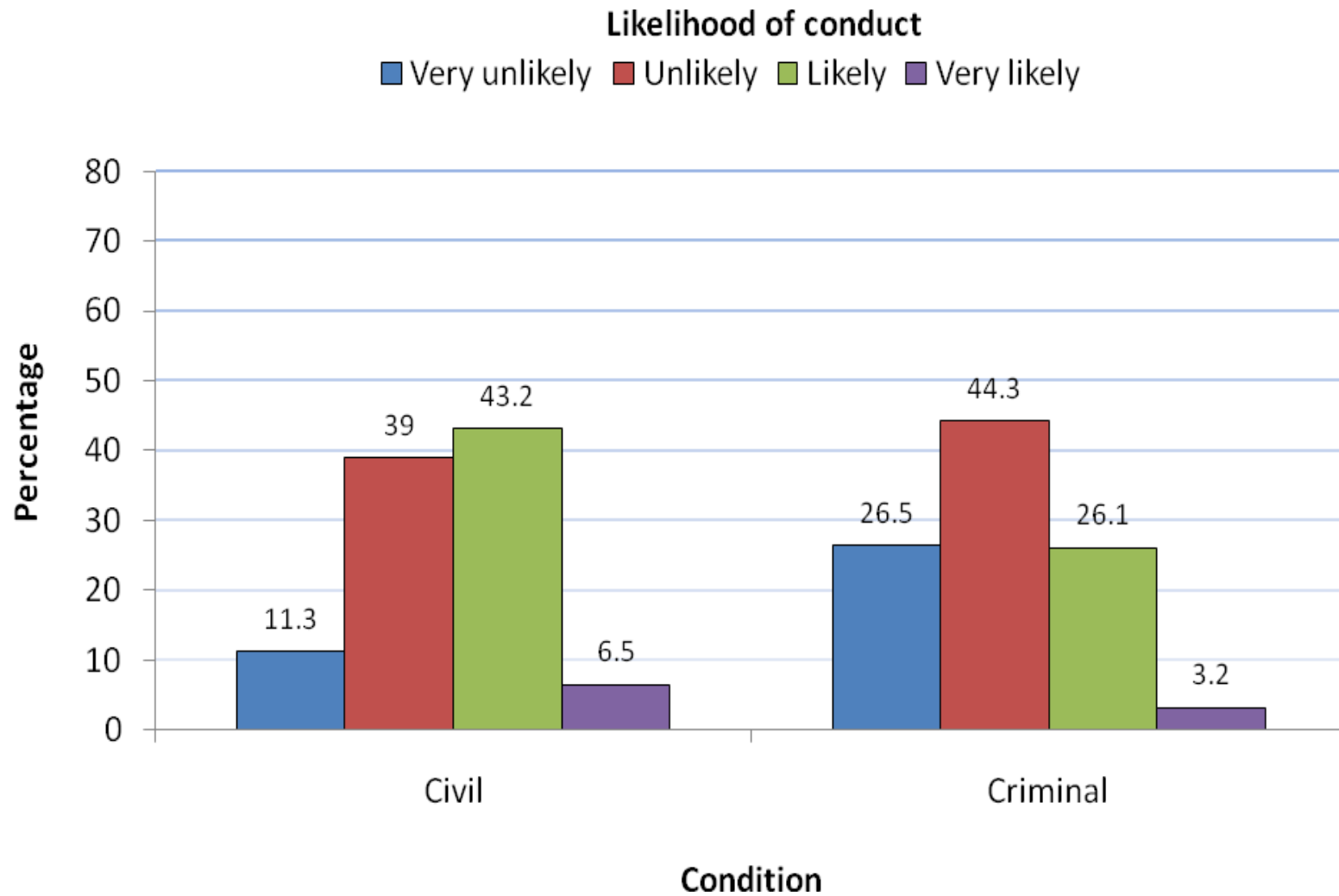
All things considered, how likely do you think it is that Ashley will decide to make an agreement with competitors not to try to win over each other's customers?

Respondent – likelihood of breach

If you found yourself in the same circumstances as Ashley, how likely is it that you would make an agreement with your competitors not to try to win over each other's customers?

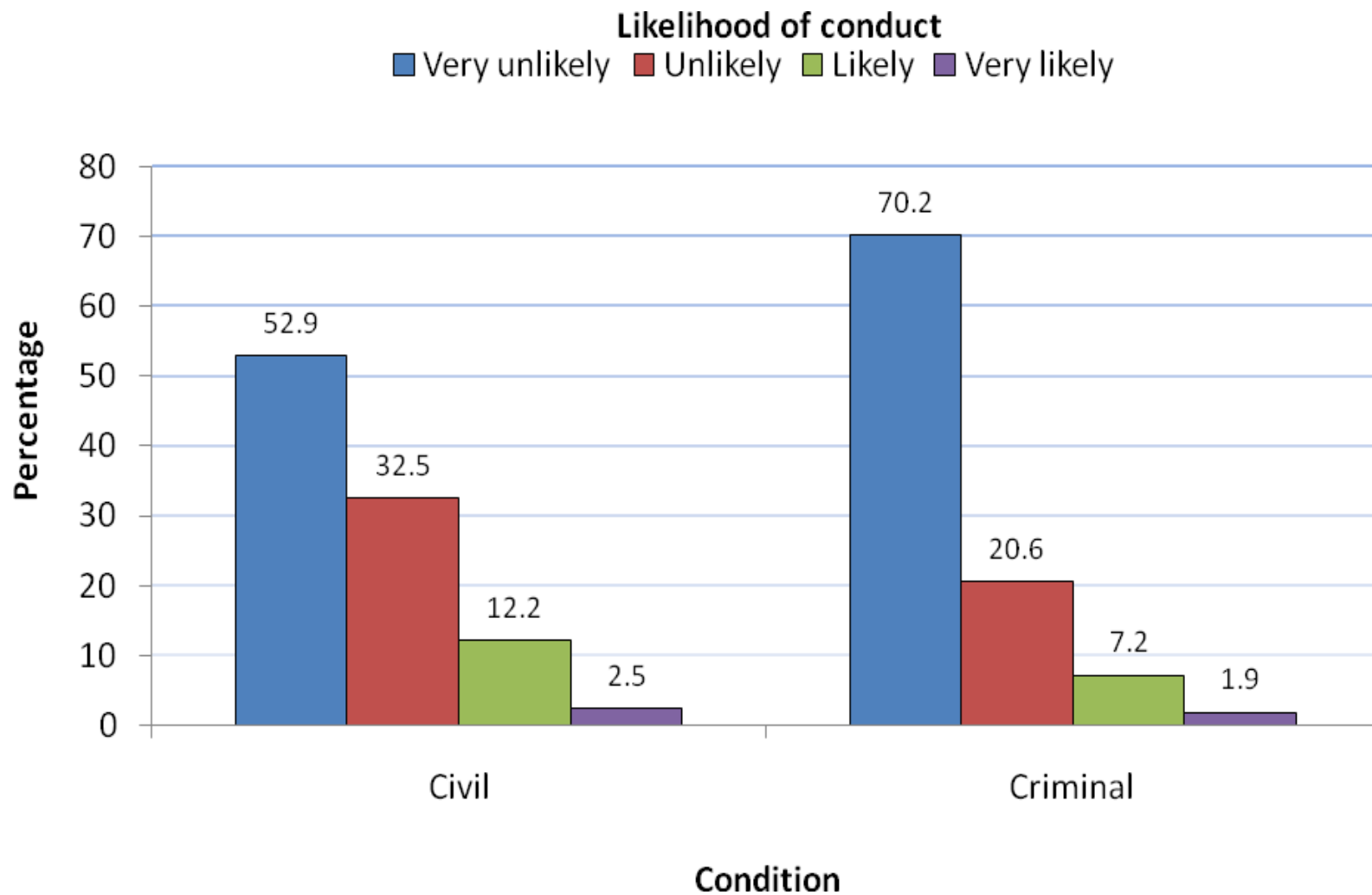
Business group

Likelihood of breach: civil vs criminal (Ashley)



Business group

Likelihood of breach: civil vs criminal (respondent)



Business group

Likelihood of breach:

Are perceptions of greater likelihood of enforcement correlated with lower likelihood of breach? (Asterisk indicates strongest results.)

| Perceptions: | Civil sanctions | | Criminal sanctions | |
|----------------------|---------------------|------------|---------------------|---------------------|
| | Ashley | Respondent | Ashley | Respondent |
| Likely to be caught | Breach less likely* | No effect | Breach less likely* | No effect |
| Legal action likely | Breach less likely | No effect | Breach less likely* | Breach less likely* |
| Jail sentence likely | NA | NA | Less likely | No effect |

Summary of key findings



Plenty of room for improvement in degree of knowledge of cartel laws among business group, especially knowledge of criminalisation and jail



Perceptions of likelihood of detection, legal action and jail sentence all perceived as low.



Perceptions of likelihood all increase (modestly) when respondents know conduct is criminal – but knowledge is lacking so deterrence is lacking.



Likelihood of engaging in cartel conduct is low and even lower when respondent knows conduct is criminal – but the challenge is knowledge:

I certainly wasn't aware that such penalties existed! You would have to be desperate to try and get away with such a thing when the punishment would make you extremely worse off. (civil sanctions/economic pressure; Ashley unlikely to breach)

Summary of key findings



Respondents are more likely to see “Ashley” as engaging in cartel conduct, than themselves. Respondents see Ashley as engaging in calculated decision making about the costs and gains of cartel conduct and themselves as ethical decision makers.



Does this indicate that business group reflects general public’s concern with the moral character of cartel conduct? This could have implications for the ACCC’s enforcement strategy and whether it assumes calculated decision making about cartel conduct or primarily ethical concerns about cartel conduct



People might like to see themselves as more ethical than most other people. But reality might be somewhere between their response for Ashley and for themselves.



Questions?

For more information:

Contact Caron (c.beaton-wells@unimelb.edu.au) or

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See <http://www.cartel.law.unimelb.edu.au>



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