

The Cartel Project Bulletin

Project genesis



Associate Professor Caron Beaton-Wells

The Cartel Project is an interdisciplinary research project that has been funded by the Australian Research Council over the period 2009 to 2011. While much of the research associated with the project will be ongoing, this newsletter marks the completion of the formal funding period and records the major activities, outputs and findings of the project over that period.

The genesis of the Cartel Project lies in the significant shift in the approach taken to regulating cartel conduct in Australia, from a regime involving civil penalties imposed at relatively low levels, to one threatening the stigma of conviction and a jail sentence of up to ten years. Cartel criminalisation in this country is consistent with a global trend towards tougher, more penal, anti-cartel law and enforcement. It is a development that raises a host of challenging questions from legal, regulatory and sociological perspectives.

Project scope

The Cartel Project has investigated:

- **impetuses and justifications** for the shift in policy to cartel criminalisation in Australia;
- **likely effects** of cartel criminalisation in terms of changes to business attitudes and behaviour in Australia;
- **comparative experience** in relation to the policy and implementation of criminal anti-cartel enforcement overseas, particularly in the United States and United Kingdom;
- **theoretical insights** from cartel criminalisation for the nature and process of economic regulatory reform and approaches to business compliance generally.

Project team

The Cartel Project was undertaken by an interdisciplinary team of researchers from the University of Melbourne's Law School ([Associate Professor Caron Beaton-Wells](#)) and School of Political and Social Sciences ([Associate Professor Fiona Haines](#)), Monash University's Centre for Regulatory Studies ([Professor Christine Parker](#)) and the University of South Australia's Centre for Regulation and Market Analysis ([Professor David Round](#)). The team was supported by research assistants [Janette Nankivell](#), Chris Platania-Phung, Christopher Tran and Kathryn Tomasic.



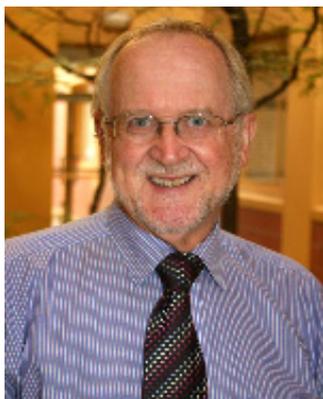
'Conduct that used to be seen as "orderly marketing" is now seen as "a cancer on our economy". This dramatic shift in perceptions and the associated transformation in regulatory approach demanded investigation...'

Associate Professor Caron Beaton-Wells

Project methodology

A significant proportion of the research for the Cartel Project involved an empirical approach:

- an online survey of 1334 people representative of the Australian public to gauge public opinion on a range of issues relating to cartel conduct and how the law should respond to it, with additional questions capturing the views of 567 people representative of the Australian business community on the extent to which the threat of criminal sanctions are likely to affect deterrence and compliance – a detailed report on the survey is available on the [Cartel Project website](#);
- in-depth interviews with 25 Australian business people who have previously been subject to civil enforcement action by the Australian Competition and Consumer Commission (ACCC) for cartel conduct regarding their experience as a party to cartel conduct and the impact of enforcement – a detailed report on the interviews is available on the [Cartel Project website](#);
- in-depth interviews with 46 stakeholders representing the government, competition authorities, legal profession, judiciary, business sector, consumer movement, academia and media in [Australia](#) and [Britain](#) regarding the impetuses for, and likely effects of, criminalisation.



Professor David Round

Communication of project research

The research team have engaged with many and diverse audiences to test their analysis and to disseminate findings from the project research.

Academic publications to which members of the research team have contributed include:

- *Australian Cartel Regulation; Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) – an extensive critique of Australia’s anti-cartel laws and approach to enforcement by Caron Beaton-Wells and Brent Fisse;
- *Criminalising Cartels; Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) – a compilation of 19 papers analysing the debate over cartel criminalisation from different jurisdictional and disciplinary perspectives, co-edited by Caron Beaton-Wells and Ariel Ezrachi;
- Numerous book chapters, conference papers and articles in leading Australian and international journals and law reviews, including the *Australian and New Zealand Journal of Criminology*, *Sydney Law Review*, *New Journal of European Criminal Law*.

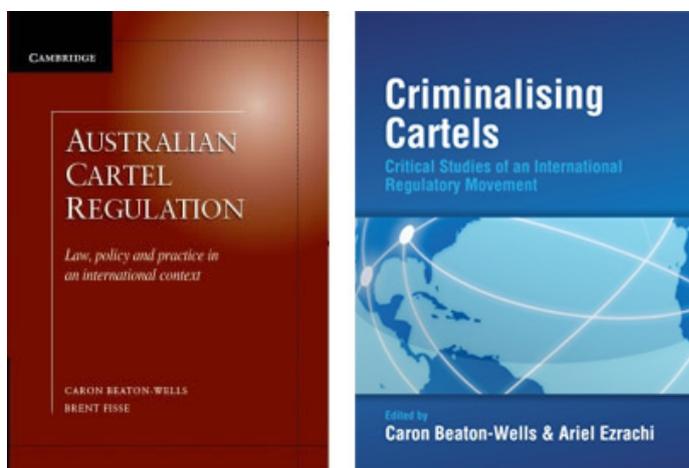
The project team has organised two major academic gatherings at which scholars from around the world debated issues relating to cartel criminalisation – at the [University of Oxford](#) in November 2009 and at the annual Socio-Legal Association Conference at the [University of Sussex](#) in April 2011. The following publications were generated:

- the Oxford papers were published in the book, *Criminalising Cartels; Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), co-edited by Caron Beaton-Wells and Ariel Ezrachi;
- the project team convened a stream involving five panels at the Sussex conference, featuring papers from 22 scholars from around the world on the topic of “Criminalising Commerce?”. A selection of the Sussex papers will be published in a special issue of the *British Journal of Criminology* in 2012, co-edited by Fiona Haines and Caron Beaton-Wells.

Individual team members have delivered papers from the project research at conferences around Australia and around the world, including in London, Stirling, San Francisco, Washington, Wellington and Yokohama.

Tailored seminars reporting on the research have been given to the ACCC, the International Competition Network, the Federal Court, the Law Council of Australia and individual law firms. Aspects of the research were also reported in the media and reflected in opinion pieces penned by team members for a wider audience.

A full list of published outputs from the project is available on the [project website](#).



Impetuses and justifications for cartel criminalisation

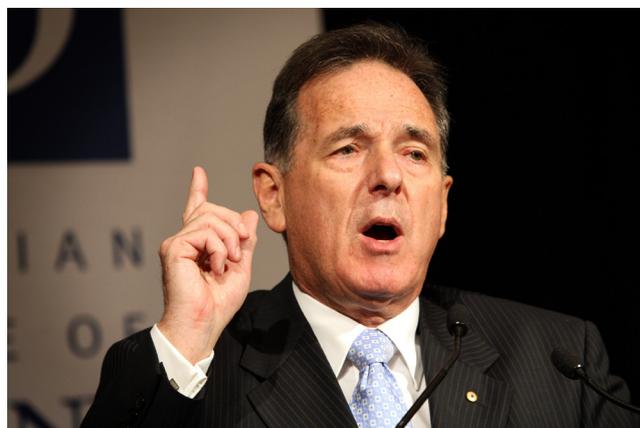
Close scrutiny and tough sanctioning of cartel conduct have been a feature of competition law and enforcement across the globe for the last decade. The focus on anti-cartel law and enforcement has seen a growing number of jurisdictions criminalise this type of conduct. Underpinning these developments is the view shared by governments and competition authorities worldwide that cartels represent a widespread and potent threat to competition, and hence to domestic and global economic welfare. This economic rationale for a penal approach has been accompanied by strong moral rhetoric in the advocacy of competition officials, rhetoric invoking imagery of disease and war to condemn cartel conduct and to boost law reform and enforcement efforts. Australia’s criminalisation of cartels in 2009 is consistent with this international trend.

Cartel criminalisation in this country, as in many other jurisdictions, has been a top-down reform. It was championed by the Australian Competition and Consumer Commission (ACCC), supported by successive Australian governments (albeit with ambivalence on the conservative side of politics) and, after a lengthy debate concerning the design of the legislation, was passed with bipartisan political support. There is no evidence that the ACCC's campaign was prompted by, or responsive to, a groundswell of concern by the public in relation to cartel activity. But nor was there any sign of public opposition to the reform. Even big business appeared apathetic or perhaps resigned to its inevitability. Nonetheless, in Parliament, politicians spoke of cartel criminalisation as a development that had broad-based community support, a reform that met community expectations.

The ACCC advocated three key reasons for criminalising serious cartel conduct: (1) the assurance that criminal sanctions would provide greater deterrence; (2) the inherently immoral nature of cartel conduct; and (3) the overseas experience with criminal anti-cartel enforcement. The Cartel Project tested each of these rationales. Each was found to be problematic. The research findings regarding (1) and (3) are discussed below. As to (2), the project survey suggested that moral characterisations of cartel conduct (in the sense of such conduct being inherently wrong, aside from its economic effects) do resonate with the Australian public to a greater extent than economic concerns. Significantly, however, this does not translate into support for criminalisation. Less than 50% of the Australian public agree cartel conduct should be a criminal offence and less than a quarter consider that individuals should be jailed for it. This disparity in public opinion between immorality and criminality simply reflects the fact that, ACCC rhetoric aside, morality is not an absolute concept delineated by bright lines. People can and do make 'fine-grained' moral distinctions and judgements about conduct and how it should be dealt with at law.

These findings may lead some to question the integrity of the cartel criminalisation reform, while for others they may simply highlight the role of the law in setting moral standards and shaping public perceptions. For those concerned more with practical rather than philosophical implications, the lack of public support for cartel criminalisation is likely to draw attention to significant challenges that lie ahead in enforcing the new regime – in persuading prosecutors, juries and judges to share the ACCC's worldview when it comes to cartel conduct.

The project survey findings also raise the question as to why there was no public resistance to the reform. This can only be answered by understanding its broader political dimensions. In Australia, cartel criminalisation reflects a shift by Labor (the side of politics that ultimately championed the reform in the face of stone-walling by the conservative party) away from reliance on the welfare state and towards an embrace of market principles, with the competition principle key among them. In particular, it is consistent with Labor's determination to establish its credentials as an effective manager of the economy, capable of delivering the growth and prosperity vital to electoral success. At the same time, the criminalisation reform reflects Labor's traditional distrust of business and its preference for government intervention in the market and regulation of the private sector to secure outcomes seen as being in the public interest. Thus, as a social and political phenomenon, cartel criminalisation is arguably explained as an attempt by Labor to establish or retain its legitimacy - by



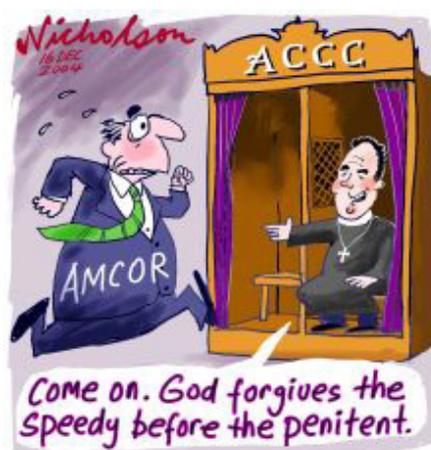
Graeme Samuel, AC, Former Chairman of the Australian Competition and Consumer Commission.

Photo: Bob Finlayson, *The Australian*, 20/06/2008

entrenching market competition as a fundamental norm in the Australian economic and social order (similar to its entrenchment in Europe and the US), while at the same time maintaining the role of the state as the ultimate protector of the people by punishing those who break society's rules.

To read more about the findings and analysis of this aspect of the Cartel Project, see:

- Caron Beaton-Wells and Fiona Haines, 'Making cartel conduct criminal: a case-study of ambiguity in controlling business behaviour' (2009) 42(2) *Australian and New Zealand Journal of Criminology* 218;
- Caron Beaton-Wells and Fiona Haines, 'The Australian conversion: how the case for cartel criminalisation was made' (2010) 1(4) *New Journal of European Criminal Law* 500;
- Fiona Haines and Caron Beaton-Wells, 'Competition is a Labor word! Ambiguity and cartel criminalisation in Australia' (2012) (forthcoming);
- Caron Beaton-Wells, 'Criminal sanctions for cartels – the jury is still out' in Ariel Ezrachi (ed), *International Research Handbook of Competition Law* (2012), Edward Elgar (forthcoming).



Cartoon by Nicholson from *The Australian* newspaper: www.nicholsoncartoons.com.au



Melbourne Law School, The University of Melbourne

Impact of cartel criminalisation on business behaviour

The policy rationale for criminalisation of cartel conduct assumes that individuals and firms can be deterred from engaging in cartel conduct by the threat of criminal sanctions and particularly by jail for individuals. This in turn assumes that business people know that cartel conduct is a criminal offence, that they can correctly identify cartel conduct in practice and that they believe that if they engaged in such conduct they are likely to be caught and to face enforcement action and jail. The policy rationale for cartel criminalisation also assumes that there will be a moral stigma associated with making cartel conduct a criminal offence that will encourage compliance. However, as Christine Parker has shown in her new book, *Explaining Compliance* (co-edited with Vibeke Lehmann Nielsen, Edward Elgar, 2011) empirical socio legal research on compliance has shown that it is much more complex to elicit compliance than this policy rationale suggests.

We tested these assumptions by surveying 567 Australian business people whose role makes compliance with anti-cartel law salient one year after cartel conduct had become a criminal offence, and by interviewing 25 Australian business people who have previously been subject to civil enforcement action by the ACCC for cartel conduct.

We found that knowledge that cartel conduct is against the law and a criminal offence varies greatly. The survey included a brief and very simple scenario of price fixing conduct followed by a series of questions designed to test whether business people could correctly identify that this conduct was illegal price fixing and that it was a criminal offence, and whether they knew what sanctions were available for this conduct. Just under two thirds of the business respondents could identify that the conduct in the vignette was illegal, but only 42 per cent knew that agreeing prices with competitors was a criminal offence. Less than one half knew that a fine was available as a penalty for this type of behaviour, and less than a quarter knew that jail for individuals is available as a sanction.

A second scenario provided a brief and simple case of market-sharing and asked a series of questions designed to measure what business people thought the likelihood of detection, enforcement and jail would be in such a case. The respondents' estimations of the likelihood of being caught for cartel conduct, facing enforcement action and being sentenced to jail were also fairly low, although they did increase when survey respondents

were told that cartel conduct has changed from a civil offence to a criminal offence. However, they did not see it as very likely at all that a person would be sentenced to jail if found guilty of price fixing, even when they knew that this conduct is a criminal offence. Nearly a third (29%) of the business people responding to the survey thought a hypothetical person would breach the anti-cartel law despite criminalisation and jail.

Our in-depth interviews with those who had been subject to civil enforcement action for cartel conduct found that those who are already relationally engaged with the law (they know about it, agree with it and engage with lawyers and the ACCC) – generally business people and lawyers in larger firms – are more likely to seriously consider and calculate the likelihood of enforcement. For those with no sense of prior relationship with the law in general and competition law in particular – generally small business people and individuals lower down the hierarchy in larger firms – the logic of deterrence is largely irrelevant because they do not think about anti-cartel law at all. Instead, they make decisions about whether to engage in cartel conduct on the basis of their own common sense evaluations of what it takes to survive in their own particular industry context and their own perceptions of their lack of bargaining power.

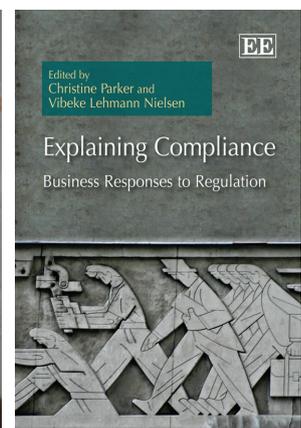
The policy rationale supporting criminalisation assumes that the deterrent message of jail will penetrate the whole business community with ease. Our findings suggest that while it is true that many business people do 'get' the clear and simple message of criminalisation of cartel conduct, there is significant variation among the business population as to whether that message has been received or not. For substantial parts of the business community, the logic of deterrence breaks down, and their own moral evaluation of appropriate behaviour may not coincide with what is allowed by the law.

To read more about the findings and analysis of this aspect of the Cartel Project, see:

- Christine Parker, 'Criminalisation and compliance: the gap between rhetoric and reality' in Caron Beaton-Wells & Ariel Ezrachi (eds), *Criminalising Cartels; A Critical Interdisciplinary Study of an International Regulatory Movement* (Hart Publishing, Oxford, 2011);
- Christine Parker and Chris Platania-Phung, 'Questioning the deterrence orthodoxy: a critical test of the impact of cartel criminalisation' (2012) (forthcoming);
- Christine Parker, 'The war on cartels: deterrence and legal consciousness' (2012) (forthcoming).



Professor Christine Parker



Overseas experience

The project studied the experience with criminal anti-cartel laws and enforcement in a number of jurisdictions, but focussed in particular on the US and the UK. The US has the longest track record in criminal antitrust enforcement and has played a leadership role in advocating criminalisation in other jurisdictions. One of the countries that was influenced heavily by US advocacy was the UK. A cartel offence was introduced in that jurisdiction in 2002 and its move to criminalise cartel conduct, in turn, was influential in the Australian debate. The research found that the US experience in this field is distinctive, both in the nature of the legal and institutional framework that facilitates it, as well as in the political and social conditions that support it. These are conditions and a framework that have evolved for over a century. They include features such as the integrated investigatory/prosecutorial model of enforcement, the grand jury system, plea bargaining and substantial reliance on sentencing guidelines. Moreover, the US is supported by a broad and robust political and public consensus that cartels are inherently 'bad' and that a penal approach which invests prosecutors with significant power is warranted.

Given its age and distinctiveness, the US model of criminal cartel enforcement is not readily replicable. Its limited transplantability is borne out by the experience in the UK. In that jurisdiction there have been only three convictions in just under ten years, and those convictions were secured by virtue of a plea bargain with the US authorities. The only other prosecution that has been initiated collapsed within days of the trial commencing due to the prosecutorial incompetence or inexperience of the Office of Fair Trading (OFT). This experience has been highly damaging to the OFT and to the credibility and effectiveness of the criminal regime in that jurisdiction. It has led to calls to revise elements of the offence, to reconsider how immunity policy should operate in the context of a criminal regime, and even to revisit whether the OFT should maintain its role as prosecutor.

It should not be concluded, however, that the US approach is the only or most effective approach in any jurisdiction designing and implementing a criminal anti-cartel regime. There are also reasons to be more optimistic about the Australian experience with criminal enforcement as compared with the UK experience. Two key such reasons are the relatively greater experience that the ACCC has had in litigation, as compared with the OFT, and the involvement of the Commonwealth Director of Public Prosecutions (CDPP) in the Australian regime. The CDPP has substantial experience in prosecution of complex commercial cases that will not only be material in prosecuting cartel offences but also in assisting the ACCC with case selection and evidence collection and handling. Research into the Canadian and Irish experiences with criminal enforcement also has shown that different approaches are capable of producing outcomes (in terms of the number of prosecutions and convictions, at least) that are respectable in the particular context of the jurisdictions in question. That said, more research is needed into the experience of these and other jurisdictions that have had criminal regimes for some time so as to develop a greater understanding of the workability of approaches that differ in various respects from the US formula.

Notwithstanding the incontrovertible influence of US experience and advocacy in this field, the impetuses for the introduction or reform of a criminal cartel regime are wide-ranging and vary from one jurisdiction to another. In Ireland, for example, the impetus for criminalisation was the constitutional bar on civil penalties. In the UK, the impetus was the view of a freshly re-elected Labor government that criminalisation would be an important plank in a broader program of enterprise modernisation. In Australia, the impetus for criminalisation was the campaign led by the ACCC, the high profile and effective advocacy of which persuaded government that criminal sanctions were indispensable in the detection and deterrence of serious cartel conduct. In New Zealand, the proposal to criminalise cartel conduct appears to have been based to a large extent on the political commitment to trans-Tasman harmonisation. Future research will allow exploration of the extent and ways in which the impetuses behind the decision to criminalise affect the degree and effectiveness of enforcement.

To read more about the findings and analysis of this aspect of the Cartel Project, see:

- Caron Beaton-Wells & Ariel Ezrachi (eds), *Criminalising Cartels; A Critical Interdisciplinary Study of an International Regulatory Movement* (Hart Publishing, Oxford, 2011).



Pembroke College, University of Oxford – venue of 2009 conference

Broader theoretical insights into regulatory reform

This project drew from a broad theoretical base. The criminalisation reforms can be understood to place an increased emphasis on the fundamental importance of competition in the marketplace as characteristic not only of a strong economy, but also of a 'good' society. Analysing criminalisation from this perspective both reflects and extends theoretical traditions that range from the work of Wilhelm Aubert and Jürgen Habermas to that of Karl Polanyi. These traditions are concerned with the implications for society when economic norms are elevated to the realm of morality.

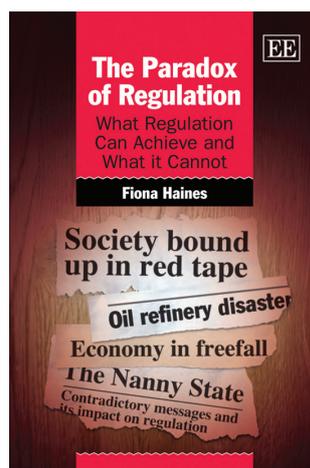
The project was able to highlight and extend an analysis that understands that different imperatives shape reform when compared with those that impinge upon compliance. Thus, the project highlighted how conflicting interests in reform generate ambiguities of an economic, legal and moral nature. This work on ambiguity drew from and extended Aubert's pioneering analysis in the 1950s. The work of Jürgen Habermas was used to highlight the way in which criminalisation allows security to be provided to the citizenry despite the overall intention of the legislation being one to promote uncertainty through competition. Habermasian analysis also informed Fiona Haines' analysis of political risk used in her 2011 book, *The Paradox of Regulation*. Political risk is the risk to the legitimacy of government which stems from the need to maintain and strengthen the economy whilst also reassuring the population of their social identity and security. Political risk has been shown to shape regulatory reform. Haines's earlier work on political risk was instrumental in informing the project's analysis of cartel criminalisation. What was unique about political risk in this project was the particular theoretical location of cartel criminalisation. Cartel criminalisation is an initiative that is aimed at stimulating greater levels of economic activity, whilst at the same time reassuring the public that such activity will bring greater security.

Christine Parker's work on compliance extended the themes above. In particular, her work drew on Karl Polanyi's critique of how the primacy of economic values tries to tease apart the economics from the social. Polanyi argues that such 'disembedding' of the economic from the social is an impossible project. Parker's analysis shows how this disembedding in the context of cartel enforcement misunderstands the nature of

business in the contemporary Australian economy. In particular, it misses inequalities in power where industries and contracting relationships are comprised of both small and large businesses. In her work, what is clear is that 'doing business' is not only, or even primarily, a narrowly economic concern. The economic aspects of doing business are inextricably intertwined with its social and political dimensions, and as such there is a need for careful attention to relationships with other businesses, both those that are potential competitors as well as others higher up or lower down the contracting hierarchy. Her work is a nuanced analysis of the problem of 'blind economics', where economic models and idealised versions of competitive markets misrecognise the far more complex nature of business.

To read more about the findings and analysis of this aspect of the Cartel Project, see:

- Caron Beaton-Wells and Fiona Haines 'Making cartel conduct criminal: a case-study of ambiguity in controlling business behaviour' (2009) 42(2) *Australian and New Zealand Journal of Criminology* 218;
- Fiona Haines and Caron Beaton-Wells, 'Competition is a Labor word! Ambiguity and cartel criminalisation in Australia' (2012) (forthcoming);
- Christine Parker, 'Blind economics and the criminalisation of cartels' (2012) (forthcoming).



Associate Professor Fiona Haines



Cartoon by Nicholson from *The Australian* newspaper:
www.nicholsoncartoons.com.au

Resources generated by the project

The Cartel Project website has become a popular resource for people wanting to keep up with project and cartel-related news, including Australian cartel cases and conferences throughout the world touching on cartels and enforcement issues. The website has attracted in the order of 12,000 visitors since inception in 2009.

The project survey serves as a major resource for future research in this field. Scholars across disciplines will be able to access and utilise the survey data which will be archived in the Australian Social Science Data Archive.

The Cartel Project has generated an archive listing and, where possible, links to the documentary record of cartel criminalisation in Australia. The documents include: government and parliamentary reports, parliamentary bills and legislation; ACCC speeches; academic commentary such as journal articles; and media commentary such as news reports. The archive list will be available on the project website.

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Associate Professor Caron Beaton-Wells presenting at 2009 Oxford conference



Brighton, UK – venue of 2011 conference



The Cartel Project

- ▶ Aims and background
- ▶ Significance
- ▶ Approach and methodology
- ▶ Benefits of the research
- ▶ Communication of project results



Cartel Events & Cases

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- ▶ Upcoming conferences and events
- ▶ Past conferences
- ▶ Recent Australian cartel cases



Contact Us

- ▶ Cartel Project team contact details
- ▶ Information for interviewees



Competition Law Graduate Program



Project News

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- ▶ Project outputs
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- ▶ Project interviews



People

- ▶ Caron Beaton-Wells
- ▶ Fiona Haines
- ▶ Christine Parker
- ▶ David Round
- ▶ Janette Nankivell



Useful Links

- ▶ Competition regulators
- ▶ Competition law centres, institutes, professional associations and international organisations
- ▶ Australian competition law resources
- ▶ International competition law resources



Related Projects

- ▶ The Economic and Business History of Cartels in Australia
- ▶ The Australian Competition and Consumer Commission Enforcement and Compliance Project

About the Cartel Project

On 26 June 2009 the long-awaited Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2008 received Royal Assent and became law, introducing criminal offences and sanctions for cartel conduct. In line with an international movement towards tougher sanctions for serious cartel conduct, the Australian Government has introduced this measure on the basis that such conduct causes significant harm to Australia's economic and consumer welfare.

Criminalisation represents a major change in Australia's approach to cartel regulation consistent with global trends. This interdisciplinary empirical research project will investigate how and why criminalisation of serious cartel conduct has become bipartisan policy in Australia. It will assess the likely impact of criminalisation on deterrence and compliance with the law, and compare criminalisation policy and enforcement in the US and UK. It will make recommendations about the practical implementation of the criminal regime and draw broader conclusions about regulatory reform processes, the reasons for business compliance with the law, and the most effective approaches to enforcing business regulation generally. [See more...](#)

The people involved in the research Project are [Associate Professor Caron Beaton-Wells](#), [Associate Professor Fiona Haines](#), [Professor Christine Parker](#) and [Professor David Round](#). The Research Assistant is [Janette Nankivell](#). The research team members are individually recognised experts in their fields, including criminology and white collar crime, economics, competition law and regulatory theory and reform.

On this website you will find more detail about the [Cartel Project](#), the [people](#), [project outputs](#), links to [useful information and resources](#) relevant to competition law and a link for you to [contact us](#).

Your input is welcome. We would be happy for you to [contact us](#) with your comments about the Cartel Project. We also welcome any resources on cartel regulation or criminalisation that you may have that can be shared with others through inclusion on our [Useful Links](#) page.

Information for interview participants.

The Cartel project involves interviews with a wide range of people involved in or directly affected by the criminalisation of cartel conduct in some way.

For more information about these interviews, click [here](#).

Cartel Mailing List

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