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Cartel Criminalisation Findings of a Survey of Public Opinion in Australia

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Presentation at LCA Trade Practices Workshop

20-22 August 2010

About the presentors

Associate Professor Caron Beaton-Wells is an academic specialising in competition law at the University of Melbourne Law School. Her recent research focuses on cartels. This research has produced a series of conference papers, book chapters and journal articles in Australian and international journals. She is a co-author, with Professor Brent Fisse, of *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, to be published by Cambridge University Press in 2011 and, a co-editor with Dr Ariel Ezrachi of *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, to be published by Hart Publishing in 2011.

Chris Platania-Phung is a research assistant at the Melbourne Law School and PhD candidate at the University of Melbourne. He has a BA(Hons) from the University, majoring in behavioural sciences and psychology. He has been involved in a substantial number of research projects involved quantitative design and analysis, including projects involving large scale surveys, and has co-authored a series of articles reporting on the results. He has lectured and tutored in organisational psychology at the University of Melbourne and LaTrobe University for the last ten years.

About this presentation

- Background – The Cartel Project
- Why a survey of public opinion on cartel criminalisation?
- Survey design and methodology
- Outline of findings
 - Should cartel conduct be against the law?
 - Should cartel conduct be a criminal offence? Why?
 - What factors affect views of cartel conduct?
 - How should the law deal with companies and with individuals involved in cartel conduct?
 - Acceptability of immunity policy?
- High level take-outs

- **The Cartel Project**

- three year project funded by the Australian Research Council
- concerned with understanding the impetuses for and effects of cartel criminalisation in Australia
- interdisciplinary, comparative, empirical in orientation
- also includes interviews with stakeholders and previous offenders

Why a survey of public opinion?

- **Public opinion is relevant from several perspectives**
 - integrity of the criminal law
 - normative-based compliance
 - political support for criminal enforcement
 - ACCC outreach strategy
 - enforcement and prosecutorial policy
 - jury responsiveness
 - sentencing principles

Why a survey of public opinion?

- **The case for empirical evidence**
 - assertions about ‘the public’ and ‘public opinion’ may be misleading
 - other indicators of public opinion – eg media coverage - are problematic
 - only one other survey of public opinion on cartels in the world – the 2007 E&SRC CCP Survey

- **Research questions - public opinion on cartel conduct**
 1. whether the public think cartel conduct should be illegal and, if so, whether it should be a criminal offence?
 2. to the extent that the public think cartel conduct should be criminal, what are the particular reasons for this view?
 3. how does the public think the law should deal with companies and with individuals responsible for cartel conduct?
 4. what factors might affect public views of the seriousness of cartel conduct?
 5. to what extent are public views on cartel conduct influenced by attitudes generally towards business and towards competition?
 6. whether the public agrees with immunity policy?
 7. how does the public rate the seriousness of cartel conduct vis-à-vis a range of other crimes (white collar and blue collar)?



Survey design and methodology

- **Research questions – public opinion on deterrence/compliance**
 8. what knowledge individuals who are likely to be subject to the law have of the fact of criminalisation, the penalties available and their estimation of being caught and sanctioned?
 9. whether the change in sanctions from civil to criminal is likely to have an effect on individual decisions to engage in cartel conduct?
 10. whether countervailing economic or social pressures are likely to override the impact of criminal sanctions on individual behaviour?

- **Stages in design**

- drafting of questions by research team; consultation and personal trialling to test content validity and intelligibility and length [Nov 2009-Apr 2010]
- cognitive testing with cross-section of public in face to face interviews, conducted by Social Research Centre [Apr 2010]
- ‘soft’ launch/pilot followed minor adjustments based on results [Jun 2010]
- ‘hard’ launch [Jul 2010; data by 19 Jul]

- **Survey medium - online**
 - reach
 - speed
 - cost
 - flexibility
 - validity

- **Response formats**

- forced choice
- open text boxes
- rating scales
- vignettes
 - based on price fixing; market sharing and output restriction
 - lay non-leading language
 - readability ; length
 - story to which ordinary people can relate
 - communication of effects; credibility
 - instructions to avoid business size or industry bias

- **Vignette (1)**

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.

“price fixing” – *agreement between competitors on prices*

- **Vignette (2)**

This time, there are two plumbing companies that compete against each other in providing plumbing services to a town. They are the only plumbing companies in the town. In the past, if one plumbing company put up its prices, customers could switch to the other plumbing company. The plumbing companies have now reached an agreement to allocate customers between them. One company will only service buildings north of the river; the other will only service buildings south of the river. As a result, they can charge higher prices because customers can't switch between the plumbing companies when they are unhappy about the price they are being charged.

“market sharing” – *agreement between competitors to allocate customers*

- **Vignette (3)**

This time, there are two companies that compete against each other as producers of cheese. They are the only companies that produce cheese in a particular region. In the past they have decided what volume they would produce depending on how much consumers in the region wanted to buy. However, the companies have now made an agreement with each other to reduce the amount of cheese they produce. As a result of the agreement, they are no longer producing enough cheese to satisfy everyone in the region and can therefore charge higher prices. This is because consumers want to buy more cheese than is available for sale and are therefore prepared to pay more to try and get as much as they want.

“output restriction” – *agreement between competitors to reduce production levels*

- **Sample**
 - randomly selected from online panel
 - 13,913 invitations
 - response rate of 9.6%
 - 1,334 respondents
 - representativeness; weighting to correct for biases
 - level of prior awareness / consideration of the survey subject-matter?

Demographic background

Age	n	%
18-24	153	11.5
25-34	210	15.7
35-44	248	18.6
45-54	251	18.8
55-64	234	17.5
65+	238	17.8
Gender		
Female	664	49.8
Male	670	50.2
State/Territory		
ACT	26	1.9
NSW	392	29.4
Vic	344	25.8
QLD	264	19.8
SA	135	10.1
WA	133	10.0
NT	22	1.6
Tas	18	1.3

Demographic background: education

Education level	n	%
Year 8 or below	17	1.3
Year 9 or 10	201	15.1
Year 11 or 12	255	19.1
Certificate, Diploma or Trade	459	34.4
Bachelor degree	266	19.9
Postgraduate degree	136	10.2
Formal education in law		
Qualification	28	2.1
No qualification	374	28
Formal education in economics, commerce or business		
Qualification	104	7.8
No qualification	298	22.3



Demographic background: work

Paid work status	n	%
Doing paid work	787	59.0
Not doing paid work	547	41.0
Type of paid work		
Employed for wages/salary	667	50.0
Self-employed	119	8.9
Main position		
Employee	464	34.8
Middle manager	163	12.2
Senior manager	55	4.1
Member Board of Directors	6	0.4
Owner	99	7.4
Workplace size (employees)		
0-19	327	24.5
20-199	242	18.1
200 or more	218	16.3



Prior awareness

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

- **About the findings presented today**
 - preliminary statistical analysis
 - mostly descriptive variables
 - notable exclusions
 - attitudes to business and competition
 - ratings of crime seriousness
 - deterrence/compliance effects
 - full statistical analysis with initial interpretation and analysis of implications by December 2010

Should 'cartel conduct' be against the law?

Conduct type	Yes	No	Not sure
'Price-fixing' : Do you think that an agreement between competitors on prices should be against the law?	70.9%	16.8%	12.3%
'Market sharing' : Do you think that an agreement between competitors to allocate customers should be against the law?	67.1%	18.5%	14.4%
'Output restriction' : Do you think that an agreement between competitors to reduce production levels should be against the law?	68.7%	17.6%	13.7%

Should 'cartel conduct' be a criminal offence?

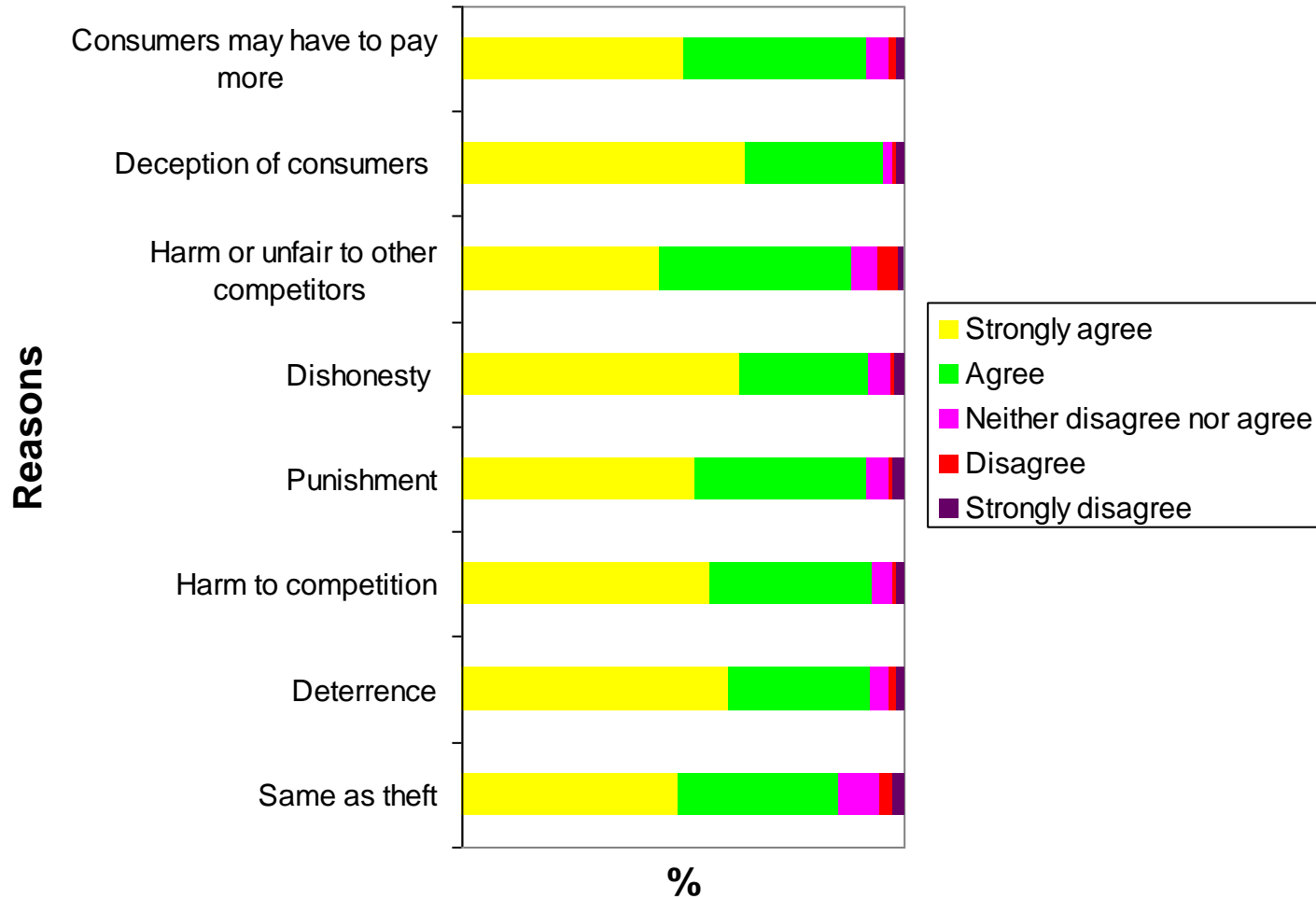
Conduct type	Yes	No	Not sure	Not sure - difference
'Price-fixing' : Do you think that an agreement between competitors on prices should be a criminal offence?	44.3%	42.8%	8.8%	4.1%
'Market sharing' : Do you think that an agreement between competitors to allocate customers should be a criminal offence?	36.6%	51.6%	7.8%	4.0%
'Output restriction' : Do you think that an agreement between competitors to reduce production levels should be a criminal offence?	44.6%	45.5%	7.1%	2.8%



Why should 'cartel conduct' be a criminal offence?

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 companies or people from engaging in this sort of conduct in the future	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 mean that the companies or people involved can be punished for it	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%

Why should 'cartel conduct' be a criminal offence?



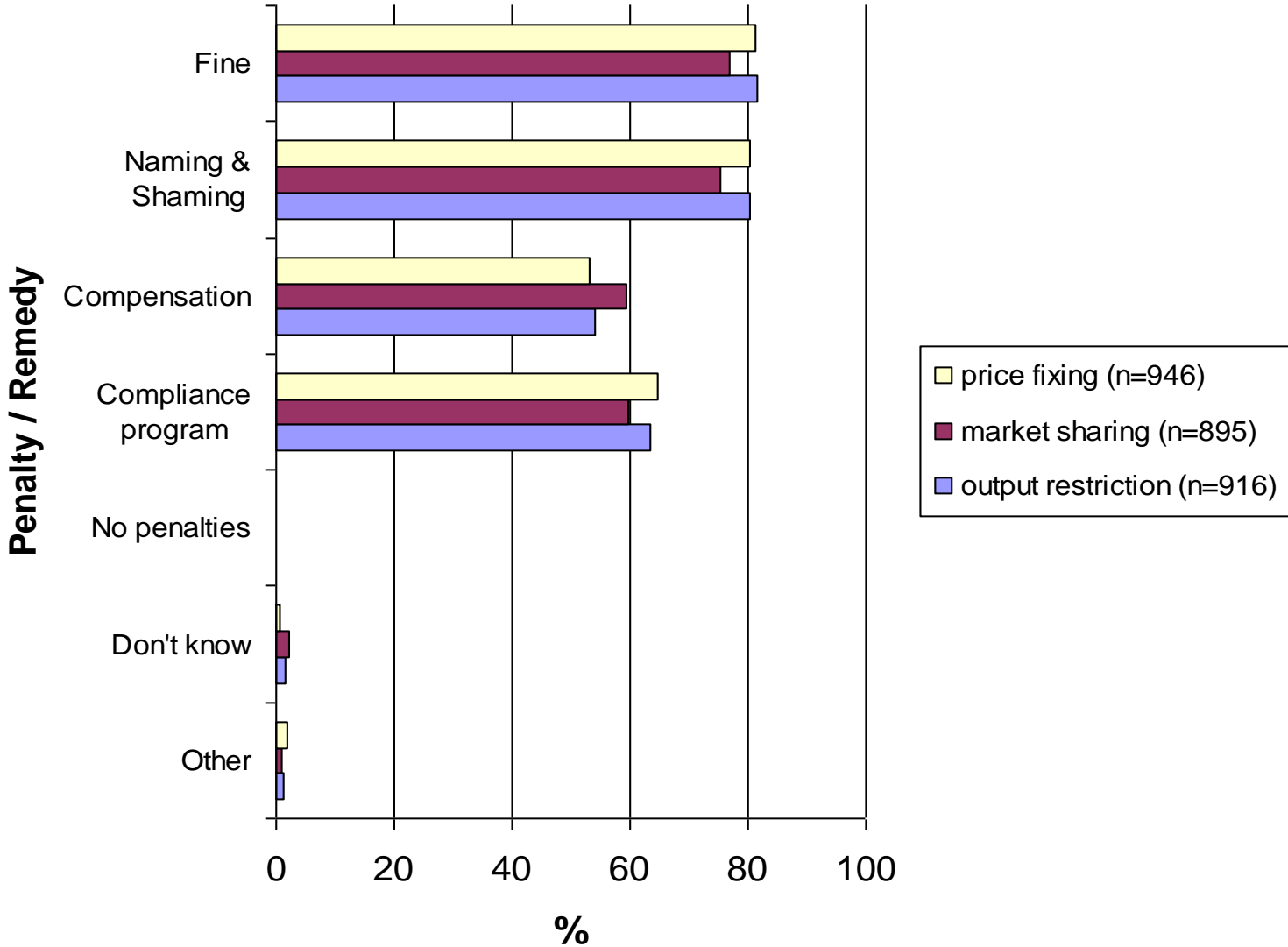
(n=419); results shown relate to price fixing; similar pattern for market sharing and output restriction



- **Comments bear out emphasis on 'moral' concerns, eg:**
 - 'it is a fraudulent and dishonest practice'
 - 'it is a rip off for the consumers'
 - 'nothing more than theft by another name'
 - 'if a private citizen obtains financial gain through deception it is a criminal offence. Why should a business get away with it?'
 - 'too many bigger companies try this sort of thing and its not fair for the consumers'
 - 'it is morally wrong, regardless of what the law says'
 -



How should the law deal with companies involved in 'cartel conduct'?

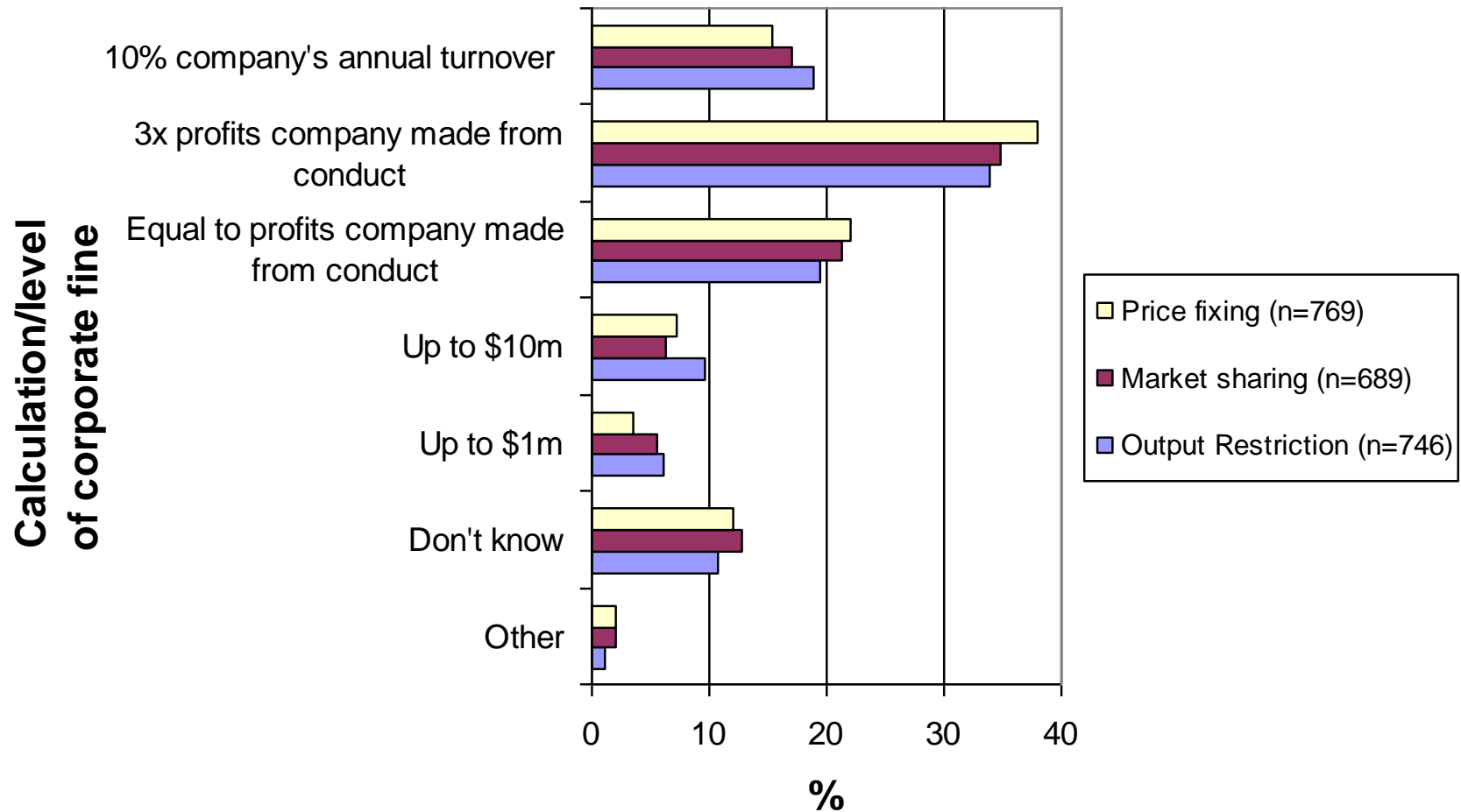


How should the law deal with companies involved in ‘cartel conduct’?

Penalty / remedy options	Price fixing (n=946)	Market sharing (n=895)	Output restriction (n=916)
Pay a fine	81.3	77.0	81.5
Be publicly named (e.g. on the TV news) as having been involved in the conduct	80.3	75.3	80.2
Pay compensation to anyone who suffered loss or damage as a result of the conduct	53.1	59.3	54.1
Have to take measures to make sure the conduct does not happen again (e.g. by providing a training program for its employees)	64.6	59.6	63.5
There should be no penalties for the companies	0.2	0.4	0.0
Don't know	0.5	2.1	1.5
Other	1.9	1.0	1.1



How should the law deal with companies involved in 'cartel conduct'?



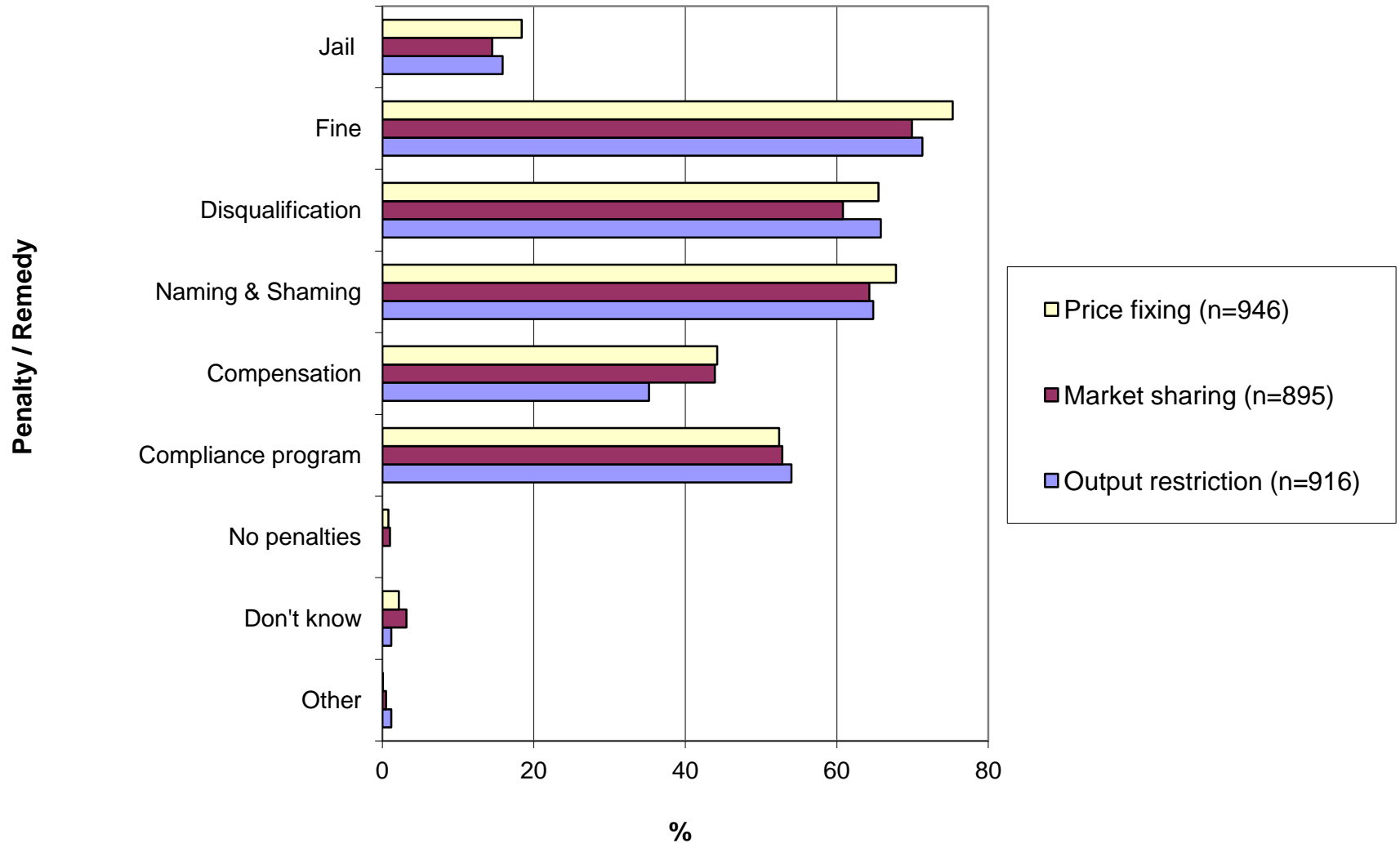


How should the law deal with companies involved in 'cartel conduct'?

- **Comments bear out complexity of setting corporate fines**
 - 'hitting them in the pocket will be an effective deterrent'
 - 'depends on the size of the company'
 - 'would not like to see a small company being put out of business'
 - 'fine should increase for repeated incidents'
 - 'companies know it is against the law; if they breach the law the penalty should be harsh and unambiguous'
 - 'plus a prison term'
 - 'difficult choice'
 - 'too complex for this forum'



How should the law deal with individuals involved in 'cartel conduct'?

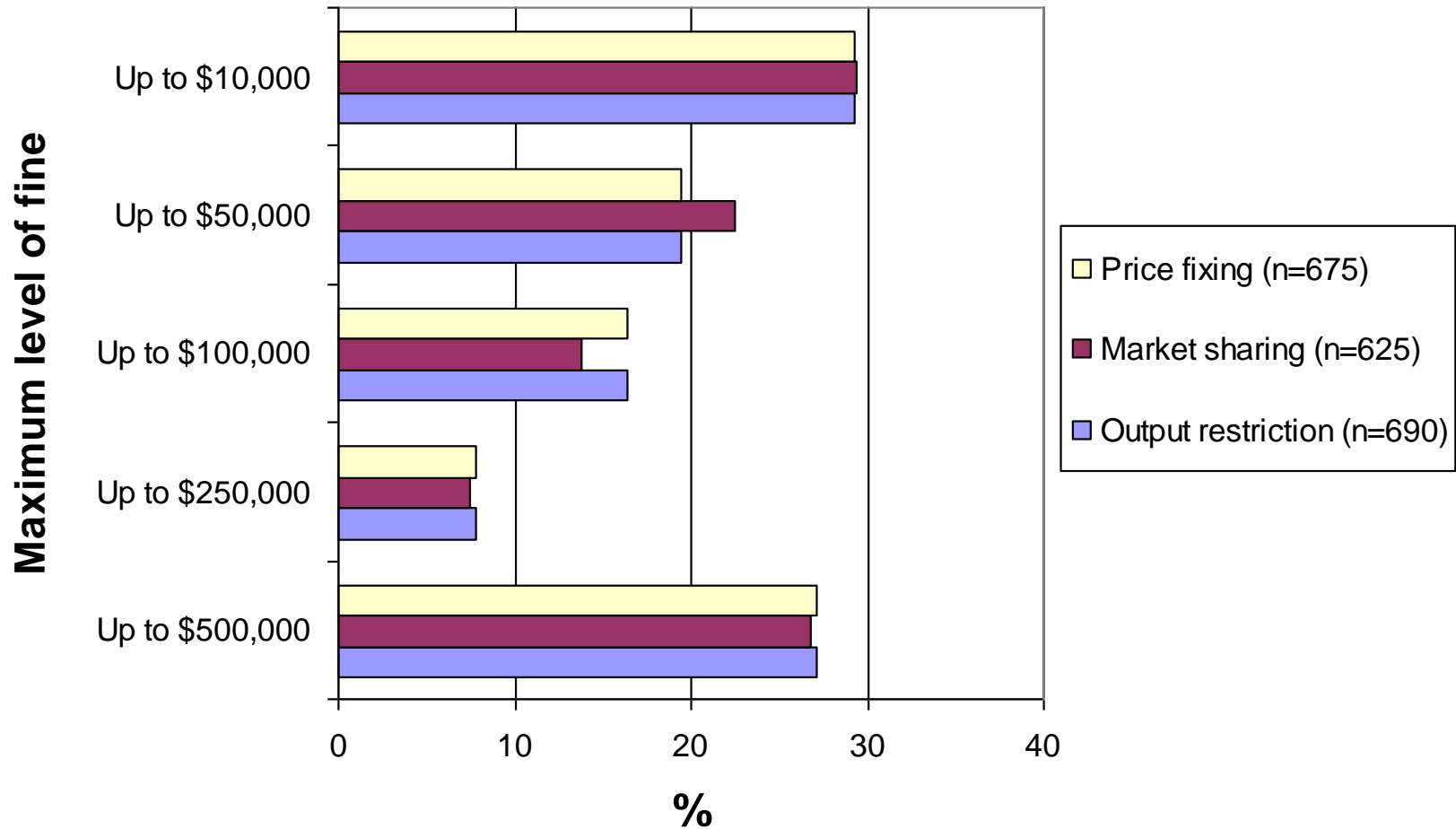


How should the law deal with individuals involved in 'cartel conduct'?

Penalty / remedy options	Price fixing (n=946)	Market sharing (n=895)	Output restriction (n=916)
Go to jail	15.9	14.5	18.4
Pay a fine	71.3	69.9	75.3
Be banned from being a director or manager of any company for a number of years	65.8	60.8	65.5
Be publicly named (e.g. on the TV news) as having been involved in the conduct	64.8	64.3	67.8
Pay compensation to anyone who suffered loss or damage as a result of the conduct	35.2	43.9	44.2
Have to take measures to make sure the conduct does not happen again (e.g. by taking part in a training program)	54.0	52.8	52.4
There should be no penalties for the individuals responsible	0.0	1.0	0.8
Don't know	1.2	3.2	2.2
Other	1.2	0.5	0.1



How should the law deal with individuals involved in 'cartel conduct'?

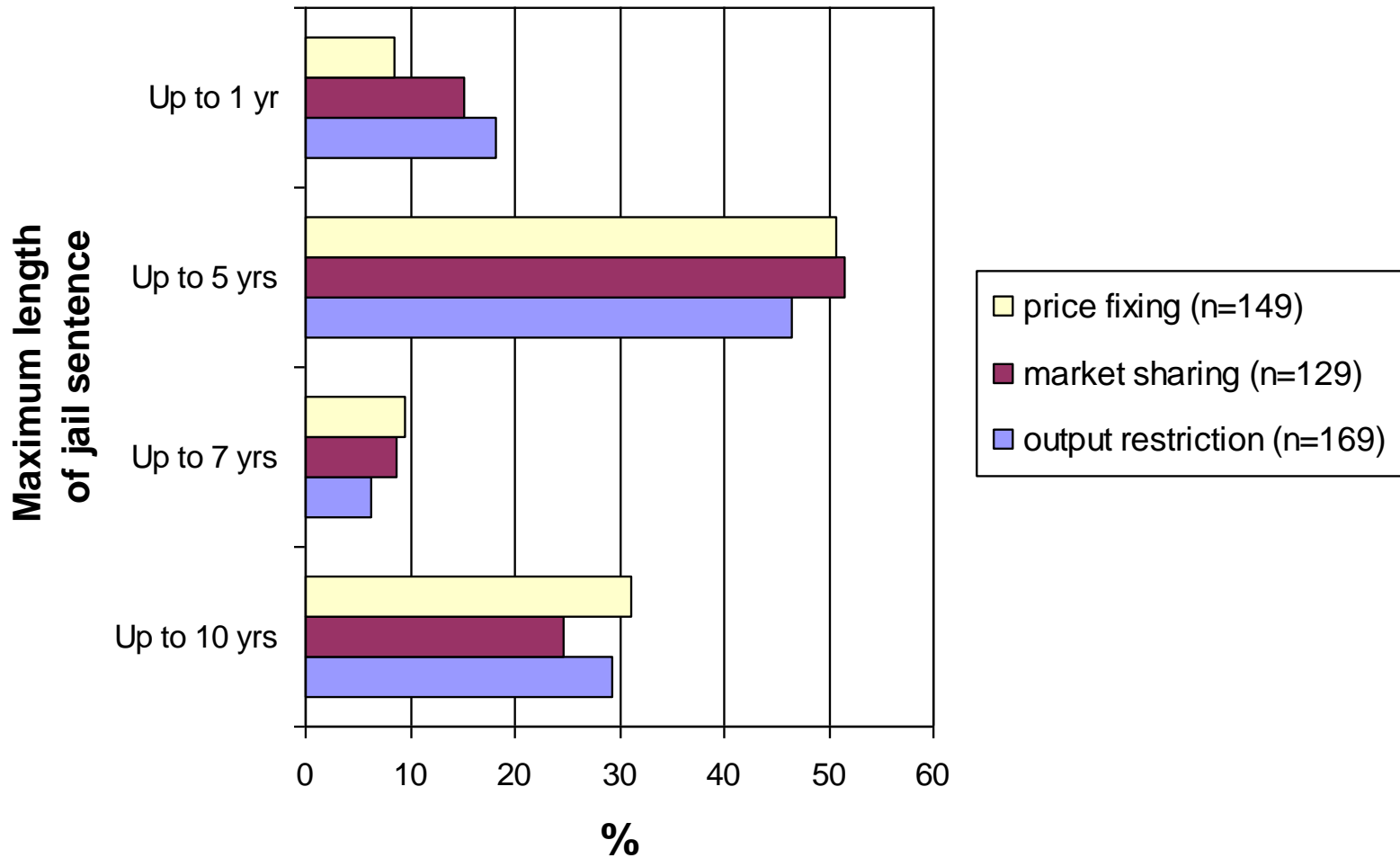


How should the law deal with individuals involved in 'cartel conduct'?

Maximum level of fine	Price fixing (n=675)	Market sharing (n=625)	Output restriction (n=690)
Up to \$10,000	28.0	29.4	29.3
Up to \$50,000	17.2	22.5	19.4
Up to \$100,000	16.3	13.8	16.4
Up to \$250,000	8.2	7.5	7.8
Up to \$500,000	30.2	26.8	27.1



How should the law deal with individuals involved in 'cartel conduct'?



How should the law deal with individuals involved in 'cartel conduct'?

Maximum length of jail sentence	Price fixing (n=149)	Market sharing (n=129)	Output restriction (n=169)
Up to 1 year	8.5	15.1	18.2
Up to 5 years	50.8	51.5	46.4
Up to 7 years	9.4	8.7	6.2
Up to 10 years	31.2	24.7	29.2

What factors affect views of 'cartel conduct'?

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
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
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

(n=946); results shown relate to price fixing; similar pattern for market sharing and output restriction

- **Comments bear out general lack of sympathy for ‘excuses’**
 - ‘I don’t believe the end justifies the means’
 - ‘there can be no excuse for price collusion whatsoever’
 - ‘if something is wrong it is wrong doesn’t matter how you dress it up’
 - ‘the “crime” is still the same – we seem to have lost the art of being fair to everyone’
 - ‘the plea of environmentally friendly is rubbish’
 - ‘the last “additional fact” is a red herring – obviously designed by defence counsel’

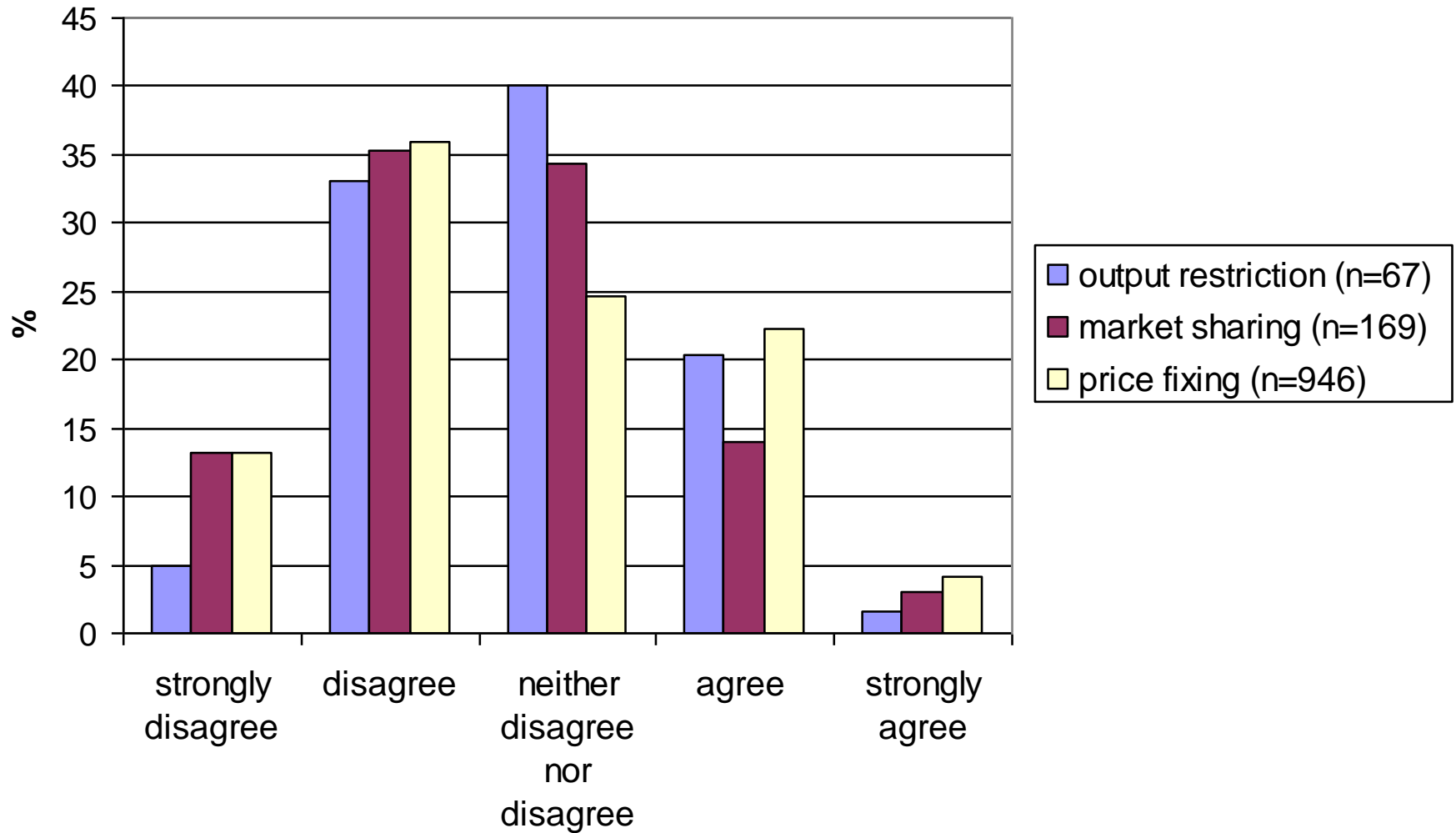
Question:

Imagine that one company decides to report the agreement on prices to the authorities in return for immunity from prosecution for the company. The other company is prosecuted. If the agreement had not been reported, the authorities would not have found out about it.

To what extent do you agree that it is acceptable to give the first company immunity?



Acceptability of immunity policy?



Acceptability of immunity policy?

	n	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
Price fixing						
Should be against the law	946	4.1	22.2	24.6	35.9	13.2
Should be a criminal offence	419	5.6	23.2	22.7	34.9	13.5
Market sharing						
Should be against the law	169	3.0	14.0	34.4	35.3	13.2
Should be a criminal offence	21	11.2	17.2	32.6	30.2	8.8
Output restriction						
Should be against the law	67	1.6	20.4	40.1	33.0	5.0
Should be a criminal offence	16	0.0	21.0	58.6	17.6	2.8

High level take-outs and reflections

- **Legal status of cartel conduct?**
 - high level of agreement that cartel conduct should be against the law; possible link with support for competition generally
 - significantly lower level of agreement that it should be a criminal offence – less than 50%; reasons for this are unclear
- **Penalties / remedies for cartel conduct?**
 - high support for penalties generally
 - particularly high support severe fines and public naming and shaming
 - but low support for jail
- **Factors bearing on views of cartel conduct?**
 - concern seems to be with inherent character of the conduct – ‘moral’ aspects in particular
 - less concern with aspects of the offenders or the situation or with the effects
 - consistent with high level of disagreement with acceptability of immunity policy?

A useful reflection

“Criminalization and similar major adjustments in a legal system do not ‘occur in a vacuum.’ Social and political acceptance for robust criminal antitrust enforcement will vary across nations depending on each country’s legal framework and sensibilities. It is unlikely to emerge automatically on the day a criminal statute becomes law. Existing norms that disfavor criminalization of antitrust offenses need not be immutable, but a careful analysis of existing conditions is necessary to understand what must be done to gain acceptance for criminal punishment.”

W E Kovacic, ‘Criminal Enforcement Norms in Competition Policy’, 2010



Cartel Criminalisation – Public Opinion Survey

For more information:
see <http://www.cartel.law.unimelb.edu.au>



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