

1. INTRODUCTION

This survey has been undertaken in connection with a research project (The Cartel Project) that investigates various aspects of the criminalisation of cartel conduct in Australia. In section 1 of the Report we set out the background to cartel criminalisation in Australia (section 1.1) and explain the aims and components of The Cartel Project (section 1.2). We also set out why we decided to undertake this survey as part of The Cartel Project and, in particular, why we regard empirical evidence of public opinion on cartel criminalisation as relevant from various perspectives (section 1.3). The scope of the survey, as determined by the questions we were seeking to answer, is explained (section 1.4), and finally there is a note on the purpose and scope of this report (section 1.5).

1.1 BACKGROUND – CARTEL CRIMINALISATION IN AUSTRALIA

On 24 July 2009 the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* took effect, amending the *Trade Practices Act 1974 (Cth)* (TPA)¹ and thereby introducing cartel offences and criminal sanctions for cartel conduct in Australia.² In broad terms, the offences relate to conduct involving price fixing, output restriction, market allocation and bid rigging.³ Liability attaches to both corporations and individuals. Upon conviction, corporate sanctions include fines with substantial maxima (the greatest of AU\$10 million, three times the gain derived from the offence or 10% of annual corporate group turnover over a 12 month period) and individual sanctions include a maximum jail sentence of 10 years.

In line with an international movement towards tougher sanctions for such conduct⁴, criminalisation was introduced on the basis that cartel conduct is seen as causing or having the potential to cause significant harm to Australia's economy and consumer welfare.⁵ Cartel conduct is regarded as anathema to competitive markets. It has been shown to raise prices artificially, reduce consumer choice and impede business responsiveness and

¹ From 1 January 2011, the TPA will be renamed the *Competition and Consumer Act 2010 (Cth)*.

² See Pt IV, Div 1 of the TPA (the offences are in ss 44ZZRF-44ZZRG).

³ See the definition of a 'cartel provision' in s 44ZZRD. This definition is based broadly on the definition adopted by the OECD in 1998 regarding the types of cartel conduct that should attract the toughest sanctions (labelled 'hard core' cartel conduct). See Organization for Economic Co-operation and Development, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, C(98)35/FINAL (14 May 1998).

⁴ See generally C Beaton-Wells and A Ezrachi, 'Cartel Criminalisation: Why Critical Studies?' in C Beaton-Wells and A Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, Hart Publishing, 2011, ch. 1; C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Cartels' (2006) 14 *Critical Criminology* 181.

⁵ See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12 309, (Chris Bowen, Minister for Competition Policy and Consumer Affairs and Assistant Treasurer).

innovation.⁶ Driven by concern particularly about the damage caused by cross-border cartels, the international enforcement agency network has made tougher anti-cartel law and enforcement a top priority over the last decade.⁷ The campaign for criminal sanctions has been led by the United States in particular, based primarily on the view that individual accountability through incarceration is the most effective means of deterring and punishing cartel conduct.⁸

In Australia, the campaign for criminalisation was instigated in 2001 and led by the competition authority, the Australian Competition and Consumer Commission (ACCC).⁹ Its submission in support of criminalisation to an independent review committee ('the Dawson Committee') was accepted in 2003.¹⁰ The then conservative government in turn accepted the Dawson Committee's recommendation in favour of the criminal reform.¹¹ A working party was convened to examine the significant definitional and policy-related issues identified by the Dawson Committee and having considered the working party's report,¹² the Treasurer announced legislative proposals in 2005.¹³

The debate stalled over the next two years.¹⁴ It was revived by the imposition of record-breaking cartel-related penalties on one of Australia's largest manufacturing companies, Visy Ltd, accompanied by a public apology by Visy Chairman, billionaire Richard Pratt, in November 2007.¹⁵ In January 2008, the newly elected Labor government released an exposure draft bill for comment.¹⁶ Months of consultation and debate concerning technical

⁶ Organization for Economic Co-operation and Development, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels*, 9 April 2002; J Connor, A Foer and S Udwin, 'Criminalizing Cartels: An American Perspective' (2010) 1(2) *New Journal of European Criminal Law* 199, 200-202.

⁷ See International Competition Network, 'Trends and Developments in Cartel Enforcement' (Paper presented at the 9th Annual ICN Conference, Istanbul, Turkey, 29 April 2010).

⁸ See eg, S Hammond, *Charting New Waters in International Cartel Prosecutions*, Presentation to the 20th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education, San Francisco (Mar. 2, 2006) at 2; S Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, Presentation to the 24th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education, Florida (Feb. 25, 2010) at 4, 6-9.

⁹ See C Beaton-Wells, 'Criminalising Cartels: Australia's Slow Conversion' (2008) 31 *World Competition: Law & Economics Review* 205.

¹⁰ Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 161-162.

¹¹ Treasurer, 'Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974' (2003).

¹² Treasurer, 'Working Party to Examine Criminal Sanctions for Cartel Behaviour' (Press Release, 3 October 2003).

¹³ Treasurer, 'Criminal Penalties for Serious Cartel Behaviour' (Press Release, 2 February 2005).

¹⁴ See the account in C Beaton-Wells, 'The Politics of Cartel Criminalisation: A Pessimistic View from Australia' (2008) 3 *European Competition Law Review* 185.

¹⁵ See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 3]* (2007) 244 ALR 673.

¹⁶ See Treasury, 'Criminal penalties for serious cartel conduct: Draft Legislation' (11 January 2008).

aspects of the legislative and policy framework ensued. A revised exposure draft bill was released in October 2008.¹⁷ The final bill was introduced to Parliament in December 2008. A subsequent inquiry was held by the Senate Economics Committee which reported in February 2009 with the recommendation that the bill be passed unamended.¹⁸ Following amendments instigated by the government, the bill was passed on 26 June 2009 and took effect on 24 July 2009.

1.2 ABOUT THE CARTEL PROJECT

Criminalisation represents a major change in Australia's approach to cartel regulation. Since its enactment, the TPA has imposed civil sanctions only on anti-competitive conduct, including breaches of the cartel prohibitions. Despite substantial increases in the pecuniary penalty maxima on two occasions over the last 30 years, penalty levels have remained low.¹⁹ The introduction of cartel offences with penalties that are high by international standards for cartel conduct,²⁰ as well as by domestic standards for other business-related offences,²¹ is thus a dramatic development. Despite this, debate about the justifications for and likely effects of criminalisation has been shallow. Instead attention has focussed largely on the design of the legislation and the institutional framework governing enforcement.²²

The Cartel Project is an interdisciplinary empirical research project that is concerned to:

- investigate how and why criminalisation of serious cartel conduct has become bipartisan policy in Australia;
- assess the likely impact of criminalisation on deterrence and compliance with the law; and

¹⁷ See Treasury, 'Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (27 October 2008).

¹⁸ Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (2009).

¹⁹ See C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, Cambridge University Press, 2011, ch 11, section 11.3.

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

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

²² For an outline of the key technical debates that attended the process of legislative design, see C Beaton-Wells, 'Australia's Criminalisation of Cartels: Will It Be Contagious?' in R Zach, A Heinemann and A Kellerhals (eds), *The Development of Competition Law: Global Perspectives*, Academic Society for Competition Law Series, Edward Elgar, Cheltenham, UK, 2011.

- compare criminalisation policy and enforcement in overseas jurisdictions, with particular focus on the United States and the United Kingdom.

The Cartel Project is funded by a three year (2009-2011) grant by the Australian Research Council. Led by Associate Professor Caron Beaton-Wells of the Melbourne Law School, University of Melbourne, the other researchers on the project team are Associate Professor Christine Parker (Melbourne Law School, University of Melbourne – compliance and regulation), Associate Professor Fiona Haines (School of Political and Social Sciences, University of Melbourne – criminology and regulation) and Professor David Round (Centre for Regulation and Market Analysis, University of South Australia – competition law and economics). Research and administrative assistance have been provided by Janette Nankivell and statistical assistance by Chris Platania-Phung, both of the University of Melbourne.

The Cartel Project has several components, of which the survey that is the subject of this report is one. Other components include:

- a detailed legal, practical and policy analysis of the new legislative scheme governing the regulation of cartel conduct in Australia, highlighting issues arising from the past 30 years of experience as well as issues arising from the 2009 amendments;²³
- a series of interviews with people previously involved in enforcement action brought by the ACCC for cartel conduct to obtain insights into the complex motivations and factors influencing engagement in such conduct, the impact of enforcement action and the potential effects of the shift to criminal prosecution and sanctions;²⁴
- a series of interviews with ‘stakeholders’ (encompassing government, enforcement agencies, business and consumer organisations, the legal profession, judges and the media) in Australia and the United Kingdom to obtain insights into the impetuses for cartel criminalisation, the challenges involved in criminal enforcement, and the likely effects – both in terms of cartel regulation and more broadly in terms of relationships between key constituencies in this field.²⁵

The Cartel Project aims to:

- generate awareness and understanding of the issues involved in this major policy change;
- provide important practical input to the implementation and enforcement of a criminal cartel regime, and the enforcement of competition law more generally;

²³ The results of this analysis are published in C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, Cambridge University Press, 2011.

²⁴ The results of this analysis are to be published in a separate report in the first half of 2011.

²⁵ The interviews with UK stakeholders were undertaken in 2009 (for a list of interviewees, see <http://cartel.law.unimelb.edu.au/go/project-news/uk-stakeholder-interviews>). The Australian stakeholders interviews have been begun and will be completed in 2011.

- contribute to the effectiveness ultimately of criminalisation in reducing serious cartel conduct in Australian industry; and
- inform current policy debates about the nature, process and effectiveness of regulatory reform generally, and about competition policy and business regulation particularly.

Further information about the Cartel Project – the team members, activities and outputs to date - is available at the Project website: <http://www.cartel.law.unimelb.edu.au>.

1.3 WHY A SURVEY OF PUBLIC OPINION ON CARTEL CRIMINALISATION?

1.3.1 THE RELEVANCE OF PUBLIC OPINION

The debate in relation to cartel criminalisation in Australia (as elsewhere in the world) has been dominated by legal and economic policymakers, enforcement officials, practitioners and academics. In this sense, it has been an elite debate, special to an ‘epistemic community’²⁶ interested in this highly specialised and technical area of the law and economic regulation. To some extent this is to be expected. Questions relating to the justification for and design of a criminal cartel regime are complex questions of legal-economic policy, statutory drafting and enforcement process.²⁷ They do not lend themselves readily to engagement with the views of the broader public.

Nevertheless, public perceptions of and attitudes towards cartels, anti-cartel law, competition law more generally and its enforcement should not be excluded from the discourse about cartel criminalisation. There are at least nine reasons why public opinion regarding cartel conduct and its treatment as a criminal offence and associated issues warrant study:

1. from the perspective of legal or moral philosophy, public support for the treatment of behaviour as an offence is seen as important to the integrity and coherence of the criminal law;²⁸
2. from the perspective of criminal justice policy insofar as it is concerned with cultivating compliance or deterring non-compliance, consistency between the

²⁶ M Drahos and F van Waarden, ‘Courts and (epistemic) communities in the convergence of competition policies’ (2002) 9 *Journal of European Public Policy* 913; S Wilks, ‘Competition Policy’ in W Grant, D Coen and G Wilson (eds) *The Oxford Handbook of Business and Government* (Oxford, Oxford University Press, 2010) 747.

²⁷ By way of illustration, see the analysis in C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press – for example, Ch 4 (on Cartel and Other Provisions) and Ch 8 (on Exceptions).

²⁸ See, eg, J Silvey, ‘The Criminal Law and Public Opinion’ (1961) *Criminal Law Review* 349; J Coffee, ‘Paradigms Lost: the Blurring of the Criminal and Civil Law Models – And What Can Be Done About It’ (1992) 101 *Yale Law Journal* 1875; P Robinson and T Darley, *Justice, Liability and Blame: Community Views and The Criminal Law*, 1996, Westview Press; R Williams, ‘Cartels in the Criminal Law Landscape’, in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, 2011, Hart Publishing, ch 13.

standards imposed by the criminal law and public opinion is seen as important if the law is to be effective in influencing behaviour;²⁹

3. from the perspective of enforcement policy, public opinion may be seen as relevant to assessing whether the public interest warrants prosecution of conduct (as distinct from treating it as a civil contravention or responding in some other way) and to determining the priority that is given as a matter of resources to any such prosecution;³⁰
4. from the perspective of both prosecutorial and defence strategy, public awareness and perceptions of the conduct in question may be seen as relevant in predicting jury responsiveness and attitudes towards particular types of evidence and lines of argument;³¹
5. from the perspective of sentencing policy and practice, public opinion may be seen as relevant to assessing appropriate types and levels of sanctions for different categories of conduct as well as in individual cases;³²
6. from the perspective of the outreach strategy of competition authorities in relation to cartels and competition law and enforcement generally, levels of public awareness of and opinion on cartel conduct are relevant to determining the appropriate level and content of and medium for outreach messages;
7. from the perspective of political support, public opinion may be seen as relevant in government decision-making about the nature and degree of powers and funding made available to enforcement agencies, as well as in government resistance to

²⁹ See, eg, J Andeneas, 'The Moral or Educative Influence of Criminal Law' (1971) 27 *Journal of Social Issues* 17; P Robinson, 'The Utility of Desert' (1997) 91(2) *Northwestern University Law Review* 453; T Tyler, *Why People Obey the Law*, 2006, Princeton University Press, 2nd edn.

³⁰ See the role of the 'public interest' in Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, 2008, [2.8] and in the Australian Competition and Consumer Commission, *Compliance and Enforcement Policy*, 2009.

³¹ Such strategies should not be based on simplistic assumptions about jury hostility to or support for large corporations or senior executives, for example. There is a considerable body of research that suggests such assumptions are flawed: see, eg, V Hans, 'The Illusions and Realities of Jurors' Treatment of Corporate Defendants' [1998] 48 *DePaul Law Review* 327; V Hans, 'The Jury's Response to Business and Corporate Wrongdoing' (1989) 52(4) *Law and Contemporary Problems* 177; V Hans, *Business on Trial: the Civil Jury and Corporate Responsibility*, Yale University Press. Assumptions of jury incompetence in dealing with business issues or complex expert evidence are also problematic: see, eg, N Vidmar and S Diamond, 'Juries and Expert Evidence' [2001] 66 *Brooklyn Law Review* 1121; R Lempert, 'Civil Juries and Complex Cases: taking Stock after Twelve Years' in R Litan (ed), *Verdict: Assessing the Civil Jury System*, 1993, 181.

³² For an overview of the research on the role of public opinion in sentencing policy and practice, see J Roberts, 'Sentencing policy and practice: the evolving role of public opinion' in A Freiberg and K Gelb, *Penal populism, Sentencing Councils and Sentencing Policy*, 2008, Willan Publishing, ch 2, p. 15. The increasing value placed on public opinion and public confidence in the criminal justice system generally and sentencing specifically is reflected in the proliferation of sentencing councils, commissions and other advisory bodies, a key mandate of which is to ensure that community views are incorporated into the sentencing process. For a review of such developments around the world, see A Freiberg and K Gelb, *Penal populism, Sentencing Councils and Sentencing Policy*, 2008, Willan Publishing.

potential lobbying by business groups interested in undermining enforcement efforts;³³

8. from a comparative perspective, evidence of public opinion in one country may facilitate comparisons of the impetuses generally and, in particular, levels and kinds of popular support for criminal cartel enforcement as between that country and other countries;
9. from an international perspective, this in turn may enable assessments to be made of the extent to which criminalisation should be analysed in terms of international convergence in competition policy and enforcement or whether should be treated essentially as a local phenomenon.³⁴

1.3.2 THE NEED FOR AN EMPIRICAL APPROACH IN ASCERTAINING PUBLIC OPINION

In general discourse, statements about ‘the public’ and ‘public opinion’ are common, and are to be treated with caution.³⁵ Rarely is the scope or basis for such statements articulated or clarified. Moreover, ‘the public’ is a problematic term. There is significant debate amongst political and social theorists regarding the construct and whether it exists in any meaningful sense at all.³⁶ The concept of ‘public opinion’ is equally complex. There are debates, for example, surrounding distinctions between public ‘opinion’, public ‘attitudes’ and public ‘judgment’.³⁷ Integral to such debates are questions such as whether public ‘opinion’ is instinctive or informed, rational or intuitive, simplistic or sophisticated, punitive or pragmatic.³⁸

³³ See C Parker, ‘The ‘Compliance Trap: The Moral Message in Responsive Regulatory Enforcement’ (2006) 40(3) *Law & Society Review* 591.

³⁴ See A Ezrachi and J Kindl, ‘Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus’ in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, 2011, Hart Publishing, ch 19.

³⁵ T Miethe, ‘Public Consensus on Crime Seriousness: Normative Structure or Methodological Artifact?’ (1982) *Criminology* 515; P Roberts, ‘Public opinion, crime and criminal justice’ in M Tonry (ed), *Crime and Justice: An Annual Review of Research*, 1992, Vol. 16, University of Chicago Press, Chicago.

³⁶ W Lippmann, *The Phantom Public*, 1927, Macmillan, New York; B Robbins (ed), *The Phantom Public Sphere*, 1993, University of Minnesota Press, Minneapolis, 1; J Habermas, *The Structural Transformation: An Inquiry into a Category of Bourgeois Society*, 1989, MIT Press, Cambridge; C Calhoun (ed), *Habermas and the Public Sphere*, 1992, MIT Press, Cambridge.

³⁷ See, eg, G Maassen, ‘An application of structural equation modelling in public opinion research: conceptualising public and opinions’ (1997) 2 *International Journal of Public Opinion Research* 146; D Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Complex World*, 1991, Syracuse University Press; J Roberts and M Hough, *Understanding Public Attitudes to Criminal Justice*, 2005, Open University Press, UK.

³⁸ See, eg, D Green, ‘Public opinion versus public judgment about crime: Correcting the “comedy of errors”’ (2006) 46 *British Journal of Criminology* 131; P Almond, ‘Public Perceptions of Work-Related Fatality Cases: Reaching the Outer Limits of “Populist Punitiveness”?’ (2008) 48 *British Journal of Criminology* 448; A Durham, ‘Public opinion regarding sentences for crime: Does it Exist?’ (1993) 21(1) *Journal of Criminal Justice* 1; D McKillop and E. Helmes, ‘Public Opinion and Criminal Justice: Emotion, Morality and Consensus’ (2003) 10(1) *Psychiatry, Psychology and Law* 210.

Despite these difficulties, so-called ‘public opinion’ and variants thereon (such as ‘community sentiment’) are frequently invoked – particularly by politicians – in support of law reforms that involve a more punitive or intrusive approach to regulating behaviour.³⁹ The phenomenon of ‘popular punitiveness’,⁴⁰ as adopted by policymakers and legislators, has attracted a long tradition of empirical social science research. In particular, since the 1960s,⁴¹ public perceptions about the nature and seriousness of criminal behaviour have been an important area of empirical study.⁴² These studies have shown consistently that public opinion on issues relating to crime and criminal justice is far more complex and nuanced than presumptions of penal populism would suggest.⁴³

1.3.3 LACK OF EMPIRICAL EVIDENCE OF PUBLIC OPINION ON CARTEL CRIMINALISATION

There is no reliable empirical evidence of public opinion in Australia in relation to cartel conduct or associated topics. In September 2002, following a press statement by the then Chairman of the ACCC, Professor Allan Fels AO, in favour of jail sentences for executives involved in ‘hard core collusion’, the market research company Roy Morgan, conducted a telephone poll of 682 Australian electors aged 14 years or over.⁴⁴ Respondents were told:

³⁹ S Casey and P Mohr, ‘Law-and-Order Politics, Public Opinion Polls and the Media’ (2005) 12(1) *Psychiatry, Psychology and the Law* 141.

⁴⁰ A phrase coined by Bottoms to capture the practice of politicians ‘tapping into and using for their own purposes what they believe to be the public’s generally punitive stance’: see A Bottoms, ‘The Philosophy and Politics of Punishment and Sentencing’ in C Clark and R Morgan (eds) *The Politics of Sentencing Reform*, 1995, Oxford, Clarendon Press.

⁴¹ Starting with T Sellin and M Wolfgang, *The Measurement of Delinquency*, 1964, Wiley, New York.

⁴² See generally, S Stylianou, ‘Measuring crime seriousness perceptions: What have we learned and what else do we want to know’ (2003) 31 *Journal of Criminal Justice* 37. Crime seriousness surveys are predated, of course, by opinion polls administered by media organisations. These polls date back to the 1930s when they were pioneered by George Gallop (for a historical account, see F Fishkin, *The Voice of the People: Public Opinion and Democracy*, 1995, Yale University Press, New Haven), pp.76-80. Since then they have taken on a range of forms and have become a ubiquitous feature of western political and social life, carrying significance disproportionate to their scientific rigour. For a useful critique, see D Green, ‘Public opinion versus public judgment about crime: Correcting the “comedy of errors”’ (2006) 46 *British Journal of Criminology* 131.

⁴² See, eg, D Green, ‘Public opinion versus public judgment about crime: Correcting the “comedy of errors”’ (2006) 46 *British Journal of Criminology* 131; P Almond, ‘Public Perceptions of Work-Related Fatality Cases: Reaching the Outer Limits of “Populist Punitiveness”?’ (2008) 48 *British Journal of Criminology* 448; A Durham, ‘Public opinion regarding sentences for crime: Does it Exist?’ (1993) 21(1) *Journal of Criminal Justice* 1; D McKillop and E. Helmes, ‘Public Opinion and Criminal Justice: Emotion, Morality and Consensus’ (2003) 10(1) *Psychiatry, Psychology and Law* 210.

⁴³ See, eg, D Green, ‘Public opinion versus public judgment about crime: Correcting the “comedy of errors”’ (2006) 46 *British Journal of Criminology* 131; P Almond, ‘Public Perceptions of Work-Related Fatality Cases: Reaching the Outer Limits of “Populist Punitiveness”?’ (2008) 48 *British Journal of Criminology* 448; A Durham, ‘Public opinion regarding sentences for crime: Does it Exist?’ (1993) 21(1) *Journal of Criminal Justice* 1; D McKillop and E. Helmes, ‘Public Opinion and Criminal Justice: Emotion, Morality and Consensus’ (2003) 10(1) *Psychiatry, Psychology and Law* 210; J V Roberts and L J Stalans, *Public Opinion, Crime and Criminal Justice*, Westview Press, 1997; D Garland, *Culture of Control: Crime and Social Order in Contemporary Society*, 2001, Chicago, University of Chicago Press.

⁴⁴ Roy Morgan, ‘Majority of Australians Agree Executives Should be Jailed For Collusion’, Morgan Special Poll, finding 3555, 18 September 2002 <<http://www.roymorgan.com/news/polls/2002/2555/index>> (last viewed 11 March 2007).

Next, about the ACCC and Professor Allan Fels. The ACCC enforces the Trade Practices Act, which promotes competition, fair trading and consumer protection. Professor Allan Fels recently proposed changes to the Trade Practices Act which would allow jail terms to be imposed on individual executives and employees found to be personally involved in such things as hard-core collusion, including secret price fixing, competitive bid rigging, and other activities that corrupt normal business competition.

Respondents were then asked:

Do you agree or disagree that the Trade Practices Act should be changed to allow jail sentences to be imposed on offenders?'

87% agreed, 6% disagreed, 7% could not say. When asked why they agreed with the proposal, the main reasons given by respondents (as summarised and interpreted by the pollster) 'centred around the belief that executives should be responsible and accountable for their actions, just as all other members of the community are.' There was also said to be a 'very strong sentiment that white-collar crime should be treated the same as any other and that such crime goes relatively unpunished.' Respondents were said not only to see collusion as 'wrong' but also to be concerned about the 'victims' (apparently identified as the consuming public). The view that fines did not pose a sufficient deterrent, and that the prospect of jail 'will make them think twice', was also said to be prevalent.

For those who disagreed with the proposal, the main reasons were identified as 'the perception that jail sentences should be reserved for more serious crimes', the concern that 'such laws would prevent people from running their business productively' and that 'jail sentences would simply be 'a waste of tax payers' money.'

The results of this poll should not be relied upon for the purposes of gauging public support in Australia for or views on cartel criminalisation. The sample size appears small, the age range too young (including a 14-17 age bracket) and there is no indication given as to its representativeness. Further, from the point of view of obtaining a representative sample, a telephone survey has certain limitations. It is difficult to find a time convenient to respondents. Many members of the public refuse to answer survey questions over the phone. Respondents may not understand the question or may feel rushed or pressured and this may not be discerned by the interviewer.⁴⁵ More significantly perhaps, there appears to have been no screening of respondents for understanding of the TPA, the role of the ACCC, or the activities referred to as 'hard core collusion' and their effects.

The information provided to respondents about these matters in the lead-up to the polling question was extremely limited and the question itself required consideration of a complex issue involving multiple variables. It is also material that the poll was carried out shortly after Fels' announcement which would have attracted significant attention in the

⁴⁵ See L Oksenberg and C Cannell, 'Effects of Interviewer Vocal Characteristics on Non-response' and L Stokes and Y Ming-Yih, 'Searching for Causes of Interviewer Effects in Telephone Surveys' in R Groves et al, *Telephone Survey Methodology* (John Wiley & Sons, 1988) 257, 357.

mainstream media.⁴⁶ The fact that it was Fels making the call for jail terms may well also have coloured respondents' views given his positive and high public profile.⁴⁷ Furthermore, both the lead-up information (referring to 'hard core', a phrase more commonly associated with pornography or drugs and to 'other activities that corrupt normal business competition') and the question itself (referring to 'offenders') were value-laden and leading in nature, tantamount to asking 'Should politicians be paid more?' or 'Should criminals be given tougher sentences?'

To our knowledge, there has been only one other survey of public opinion in relation to cartel conduct.⁴⁸ That was a survey of the British public undertaken by the Economic & Social Research Council Centre for Competition Policy in the United Kingdom in March 2007.⁴⁹ The UK survey was undertaken online in March 2007 by YouGov Plc, a British internet-based market research firm, on behalf of the CCP. It involved a representative sample of 1,219 British residents aged 18 or over. These survey results appear to suggest considerable British support for the punishment of serious cartel conduct (at least for price fixing, that being the activity at which most questions in the survey were directed).⁵⁰ However, beyond this, there is substantial ambiguity as to why and how such conduct should be punished. On the "why" issue, there is ambiguity particularly in relation to the grounds on which people hold the belief that punishment is warranted.⁵¹

There are also difficulties in applying the findings of the UK survey in the Australian context. The elements of the cartel offence under the *Enterprise Act 2002* differ in significant respects to the Australian offences – not least the former has an element of dishonesty that the latter do not.⁵² There are additional differences in the legal framework – for example,

⁴⁶ See, e.g. Editorial, 'Jail will deter: Fels' *Herald Sun* (Melbourne), 13 September 2002, 7; A Fraser, 'Global threat to consumers ± Fels' *The Australian* (Sydney), 17 September 2002, 5; F Anderson and M Hart 'Corporate Crooks in firing line of action' *The Courier Mail* (Brisbane), 17 September 2002, 23.

⁴⁷ See generally the account in F Brenchley, *Allan Fels A Portrait of Power* (John Wiley & Sons Australia Ltd, 2003).

⁴⁸ There have been studies of media coverage of cartel cases, however, using media coverage as a proxy for levels of public engagement. See, eg, A Stephan, 'The Battle for Hearts and Minds': The Role of the Media in Treating Cartels as Criminal' in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, 2011, Hart Publishing, ch 17; D Sokol, 'Neo-Chicago Antitrust, Cartel Enforcement and Corporate Compliance', *Antitrust Law Journal* (2011) (forthcoming).

⁴⁹ A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 *Competition Law Review* 123.

⁵⁰ A majority of respondents (73 %) recognised that price fixing is harmful and considered that it should be punished.

⁵¹ The key question which elicited support for the punishment of price fixing combined belief as to harm, with belief that the practice should be punished. A similar connection between belief as to dishonesty and support for punishment was not drawn or elicited in the survey. Hence, it is difficult to reach conclusions as to whether punishment is regarded as justified based on the harmfulness of price fixing and/or based on a view that it is dishonest.

⁵² For reflections on this difference, see A MacCulloch, 'The Cartel Offence: Is Honesty the Best Policy?' in BJ Rodger (ed), *Ten Years of Competition Law Reform* (Dundee, Dundee University Press, 2010) 283. For a critique of the element in the UK offence, eg, J Joshua, 'D.O.A.: Can the UK Cartel Offence be Resuscitated?' in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of International Regulatory Movement*, 2011, Hart Publishing, ch 6. For background on the proposal and reasons as to why it was desirable not to have such an element in the Australian offence, see C

criminal liability applies only to individuals in the UK, whereas it applies both to corporations and individuals in Australia. It should also be borne in mind that active enforcement of cartel prohibitions and the imposition of penalties are relatively new to the UK;⁵³ whereas in Australia the ACCC has a strong track record of bringing legal proceedings and securing penalties against participants in cartel conduct for over 20 years.

1.4 SCOPE OF THE SURVEY

The Cartel Project survey was designed with a view to collecting empirical evidence on a range of aspects of public opinion concerning cartel criminalisation. In particular, the survey was addressed to the following broad questions:

- how the public considers cartel conduct should be treated as a matter of law, that is, whether the public considers that cartel conduct should be treated as legal or illegal and, to the extent that it is considered that such conduct should be treated as illegal, whether the public considers that cartel conduct should be treated as a criminal offence;
- the reasons why the public considers that cartel conduct should be treated as a criminal offence, with a view to exploring particularly the extent to which these reasons relate to the economic effects of the conduct, its moral character, and/or the instrumental features of the criminal law (for example, its deterrence capacity);
- whether the public considers that companies or individuals or both companies and individuals should be penalised for cartel conduct;
- what types of penalties and remedies the public considers should apply to companies and individuals responsible for cartel conduct and what the maximum level of such penalties (for example, fines or jail sentences) should be;
- the extent to which public views on cartel conduct – particularly whether it should be treated as a criminal offence and whether individuals should be jailed for it – are related to:
 - prior awareness of competition or cartel law-related topics;
 - public attitudes towards the trustworthiness of business;
 - public attitudes towards the value of competition;
 - demographic factors, such as gender, age, status and type of employment, level of education, political affiliation and the like;

Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, 2011, Cambridge University Press, ch 2, section 2.4.1.

⁵³ See generally B Rodger and A MacCulloch, *Competition Law and Policy in the EC and UK*, Routledge Cavendish, 4th ed, Ch 2.

- the extent to which public perceptions about the seriousness of cartel conduct are affected by different aspects or effects of the conduct, with a view to exploring particularly whether there are factors that the public regard as aggravating or mitigating of the seriousness of the conduct;
- how public compares cartel conduct to a range of other criminal offences in terms of seriousness;
- whether the public supports the ACCC's Immunity Policy for Cartel Conduct.

The relevance of such questions generally is explained in section 1.3.1 above. As noted in that section, one of the perspectives from which public opinion is relevant is the perspective of cultivating compliance (or deterring non-compliance) with Australia's anti-cartel laws. In light of this, the survey was designed so as to enable the potential effects of criminal sanctions on compliance (or deterrence) to be tested specifically on a group of respondents who were likely in their work life to be involved in activity (for example, in setting prices or production levels or tendering for contracts) to which the anti-cartel laws apply (this group of respondents is referred to as the 'Business group' from hereon). The survey design assumes that in order for criminalisation of cartel conduct to have an effect on cartel behaviour, first business people must know about the law, second they must perceive enforcement of the law as likely and third they must respond by deciding not to engage in cartel conduct when the opportunity presents itself. Therefore in relation to the Business group, the survey was addressed to the following broad questions:

- the extent of knowledge of the law among business people, that is, whether business people know that cartel conduct is against the law, whether they know that it is a criminal offence, and whether they know what penalties are available for cartel conduct including jail;
- the perceived likelihood of enforcement of anti-cartel laws among business people, that is the extent to which business people perceive it as likely or unlikely that:
 - those who engage in cartel conduct will be found out;
 - if they are found out that legal action will be taken against them;
 - if legal action is taken against them and they are found guilty, that they will be jailed;
- the extent to which the perceived likelihood of enforcement increases where criminal sanctions are available compared with where only civil sanctions are available;
- how likely it is that business people would engage in cartel conduct where only civil sanctions are present and the extent to which this changes when criminal sanctions are present;

- the extent to which likelihood of engaging in cartel conduct varies when there is economic or social pressure on a business person to engage in cartel conduct.

Business people's opinions about whether cartel conduct should be illegal and criminal and whether it is immoral may also affect whether or not they comply with anti-cartel laws. Therefore, rather than asking the Business group to complete a separate survey with different questions, we asked the Business group to fill in the same survey as the general public (including all the questions about attitudes and opinions relevant to the criminalisation of cartel conduct) and to fill out an additional module of questions addressed to the issues outlined above.

The methodology relevant to identifying the Business group is explained in section 2.5.1 below.

1.5 PURPOSE AND SCOPE OF THIS REPORT

The purpose of this report is to communicate to the largest audience possible in Australia and overseas the rationale, methodology and key findings of the survey (the approach taken to the presentation of findings is set out in section 3 of the report). To this end the report is published online at The Cartel Project website (at <http://www.cartel.law.unimelb.edu.au>) and is thereby readily accessible to all. In accordance with the ethics protocols to which the research is subject, a full set of the data from the survey will be deposited within six months of completion of The Cartel Project (by mid-2012) with the [Australian Consortium for Social and Political Research Inc \(ACSPRI\)](#).

The report does not purport to set out exhaustively all of the potential results from the survey. It reports the principal results based on a thorough first round of analyses. Most of the analyses are bi-variate crosstabulations which do not take into account the role of other variables. Further statistical analysis, including multivariate analysis, will be undertaken over time to address this. This analysis may yield additional results that are reported in other sources. For instance, a variety of regression analyses may be conducted to identify the major and independent predictors of views on cartels, and attitudes towards business and competition.

The report does not contain any theoretical, policy or practical analysis of the results. This analysis will follow in other publications by the research team.

The research team welcomes approaches by any stakeholders interested in a briefing on the results and their potential implications. To date the results have been the subject of presentations by Associate Professor Caron Beaton-Wells at:

- the Annual Trade Practices Workshop of the Law Council of Australia (held in Queensland, Australia on 20-22 August 2010);
- the Annual Cartels Workshop of the International Competition Network, at the invitation of the ACCC (held in Yokohama, Japan on 4-7 October 2010);

- a meeting of the senior managers of the ACCC Enforcement and Compliance branch (in Melbourne, on 1 December 2010, with Associate Professor Christine Parker);
- the annual research workshop of the Asian Competition Law and Economics Centre (in Hong Kong on 4 December 2010).