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The Cartel Project
REPORT ON INTERVIEWS WITH CIVIL
RESPONDENTS IN CARTEL CASES

Professor Christine Parker
Associate Professor Fiona Haines
Ms Jane Kotey
Ms Janette Nankivell
Professor David Round

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Authorship and Acknowledgments

Professor Christine Parker is the primary author of this report and any correspondence should be directed to her.¹

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¹ Centre for Regulatory Studies and Law Faculty, Monash University, Monash University Law Chambers, 555 Lonsdale St, Melbourne Victoria 3000. Email: christine.parker@monash.edu.au; Phone: 03 9903 8502

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EXECUTIVE SUMMARY

This report presents a summary and analysis of in-depth interviews with 19 Australian business people who had directly experienced enforcement proceedings under the previous civil regime in which they were found to have engaged in cartel conduct in breach of the *Trade Practices Act 1974* (Cth) (TPA) after 2004 and before 2010, and 6 in-house lawyers who had been the main people responsible for dealing with cartel enforcement proceedings on behalf of corporate respondents in the same time period.

These interviews were designed primarily to assist in evaluating the policy assumption that cartel criminalisation would induce greater compliance through the mechanism of deterrence. The interviews help to understand business people's perceptions of their own behavior, of the law and enforcement process and therefore of the likely impact of the law on their behavior. Since we only interviewed business people, this is a partial perspective. Here we report only on business people's perceptions of their own behavior. We do not examine and test their behavior and the reasons for it from the point of view of those who are the "victims" of cartels, of the regulators or the general public. (Other parts of the University of Melbourne Cartel Project research these other points of view.) Nor do we assume that business people's reports of their own behavior are necessarily accurate or represent the whole truth. We do however argue that understanding business people's perceptions of their own behavior and the reasons for it is crucial to understanding how deterrence will work in practice.

By understanding how business people perceived the circumstances in which they have engaged in cartel conduct in the past, what they knew about the law and why they believe they did what they did, we can begin to understand whether they are likely to be influenced by greater deterrence through criminal sanctions.

This is examined in Chapter 2 of this report. We find a cleavage between the perceptions of interviewees from small businesses and individuals lower down the hierarchy in large organisations compared with those near the top of the hierarchy in large organisations. Interviewees from small businesses generally did not perceive themselves to be breaking the law and claim that they did not know about the law. Rather they saw themselves as engaging in common sense behavior to survive in their industry. Those from the top of large businesses on the other hand know and understand the law well – but perceive the breaches of the law to be the fault of individual rogue employees and executives, rather than systemic or corporate issues. Thus they avoid a sense of personal (or legal) responsibility for the conduct on their own part or those of their peers at the top of the corporation.

Further, by examining how business people who were found liable for cartel conduct experienced the civil enforcement process and sanctions, we can have a sense of whether there was insufficient deterrence before and therefore whether criminal sanctions will make a difference. This is examined in Chapters 3 and 4 of this report.

Chapter 3 examines interviewees' experience of the enforcement process. We find that many interviewees were surprised by the vigour and seriousness of the investigation and enforcement process, and some had serious complaints about the ACCC's fairness. However, again we find a cleavage between those interviewees from the top of large business compared with the rest. The elite group has a general familiarity with legal processes that means they fully expect and

understand the ACCC investigation and enforcement process to be an adversarial game in which both sides play hard, while the smaller business people are surprised to be the subject of harsh treatment at all. We also find that many interviewees felt overwhelmed by the power and resources of the ACCC and therefore chose to settle because they did not feel they had any other choice.

Chapter 4 examines the interviewees' experience of the financial penalties and other non-financial impacts of the enforcement action, and whether it changed the conduct of themselves and others in their industry. We find quite a variation in the degree to which interviewees experienced financial penalties as a hardship. Some planned (using legitimate or illegitimate strategies) for penalties -- albeit usually only after the ACCC investigation began -- so that they would not experience any hardship. For others, however, the consequences were significant and included losing their house. However, the overwhelming message from our interviewees was that it was more the financial and non-financial costs of the investigation and enforcement *process*, rather than the actual formal penalties, that they remember experiencing as a hardship. For some there was also an impact of the enforcement action on their reputation. Many became hyper-sensitive to any risk of engaging in cartel conduct in the future as a result.

Analysis of these interviews also provides an insight into whether business people agree that cartel conduct is inherently immoral and therefore deserves criminalisation.

This is examined in Chapter 5 of this report. As with other aspects of the interviews, interviewees from small businesses generally had a different way of thinking about the appropriateness of cartel conduct than interviewees from the top of large businesses. Small business people tend to see criminalisation of cartel conduct as not appropriate at all or as contingently worthy of criminalisation where certain additional factors are present. People from the top of large businesses are much more likely to accept criminalisation of cartel conduct as generally appropriate. There are also a number of interviewees -- from both large and small businesses -- who comment that criminalisation is inappropriate as a method of business regulation in general and because of their experience of the ACCC in particular.

CHAPTER 1 INTRODUCTION

In July 2009 the Australian Parliament passed legislation criminalising cartel conduct and introducing jail penalties for individuals who engage in cartel behaviour. This represented a 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 Australia 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.

Close scrutiny and tough sanctioning of cartel conduct has 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, 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.

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. This report presents part of the research of the Cartel Project an interdisciplinary research project that has been funded by the Australian Research Council over the period 2009-2011 and conducted by Caron Beaton-Wells, Fiona Haines, Christine Parker, and David Round with the research assistance of Janette Nankivell to test each of these rationales.²

This report presents a summary and analysis of in-depth interviews with 19 Australian business people who had directly experienced cartel enforcement proceedings under the previous civil regime in which they were found to have engaged in cartel conduct in breach of the *Trade Practices Act 1974 (Cth) (TPA)*³ after 2004 and before 2010, and 6 in-house lawyers who had been the main people responsible for dealing with cartel enforcement proceedings on behalf of corporate defendants in the same time period.

² Details about the project and its other outputs can be found at <http://cartel.law.unimelb.edu.au/>

³ From 1 January 2011, the TPA was renamed the *Competition and Consumer Act 2010 (Cth)*.

These interviews were designed primarily to test the policy assumption that cartel criminalisation would induce greater compliance through the mechanism of deterrence. This, in turn, assumes that business people know about the law, and that they believe they are likely to be caught and face enforcement action and jail if they break the law. By understanding the circumstances in which business people have engaged in cartel conduct in the past, what they knew about the law and why they did what they did, we can test whether greater deterrence through criminal sanctions is likely to make a difference to cartel behavior in the future. (This is examined in Chapter 2 of this report.) Further, by examining how business people who were found liable for cartel conduct experienced civil enforcement and sanctions, we can have a sense of whether there was insufficient deterrence before and therefore whether criminal sanctions will make a difference. (This is examined in Chapters 3 and 4 of this report.)

Analysis of these interviews also provides an insight into whether business people agree that cartel conduct is inherently immoral and therefore deserves criminalisation. (This is examined in Chapter 5 of this report.)

1.1 ROADMAP TO REPORT

Chapter 1 of this report sets out the background to cartel criminalisation in Australia (section 1.2), introduces the Cartel Project of which this research was a part (section 1.3), and the purposes and methodology for interviewing those who had been penalised under the previous civil regime (section 1.4). Finally, there is a note on the purpose and scope of this report (section 1.6).

Chapter 2 examines why the interviewees engaged in the conduct for which they were eventually penalised, what they knew about the law at the time, and how they perceived the deterrence of the law before engaging in the conduct.

Chapter 3 examines how they experienced the investigation and enforcement process.

Chapter 4 summarises their experience of formal and informal sanctions for cartel conduct – and whether they experienced them as a hardship.

Chapter 5 reports on their opinions of the subsequent criminalisation of cartel conduct, and whether the prospect of criminal sanctions and jail in particular would have made any difference to their own behaviour or their experience of the enforcement process and sanctions.

Chapter 6 concludes.

1.2 BACKGROUND – CARTEL CRIMINALISATION IN AUSTRALIA

On 24 July 2009, the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* took effect, amending the TPA and thereby introducing cartel offences and criminal sanctions for cartel conduct in Australia.⁴ The offences relate to conduct involving price fixing, output

⁴ See Pt IV, Div 1 of the TPA (the offences are in ss 44ZZRF-44ZZRG).

restriction, market allocation and bid rigging.⁵ 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 conduct (Beaton-Wells & Ezrachi, 2011, chapter 1; Harding, 2006, 181), 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 (see Commonwealth Parliamentary Debates, 2008). Cartel conduct is regarded as anathema to competitive markets because it artificially raises prices, reduces consumer choice and impedes business responsiveness and innovation (Organization for Economic Co-operation and Development, 2009; Connor, Foer & Udwin, 2010). 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 (see International Competition Network, 2010). 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 (see e.g. Hammond, 2006, 2; Hammond, 2010, 4, 6-9).

In Australia, the campaign for criminalisation was instigated in 2001 and led by the competition authority, the Australian Competition and Consumer Commission (ACCC) (see Beaton-Wells, 2008a, 205). Its submission in support of criminalisation to an independent review committee ('the Dawson Committee') was accepted in 2003 (Trade Practices Review Committee, 2003, 161-2). The then conservative government in turn accepted the Dawson Committee's recommendation in favour of the criminal reform (Treasurer, 2003a). 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 (Treasurer, 2003b), the Treasurer announced legislative proposals in 2005 (Treasurer, 2005).

The debate stalled over the next two years (see account in Beaton-Wells, 2008b, 185). 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 (see *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 3]*, 2007). In January 2008, the newly elected Labor government released an exposure draft bill for comment (see Treasury, 2008a). Months of consultation and debate concerning technical aspects of the legislative and policy framework ensued. A revised exposure draft bill was released in October 2008 (see Treasury, 2008b). 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 (Senate Standing Committee on Economics, 2009). Following

⁵ 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, 1998).

amendments instigated by the government, the bill was passed on 26 June 2009 and took effect on 24 July 2009.

1.3 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 (Beaton-Wells & Fisse, 2011, chapter 11, section 11.3). The introduction of cartel offences with penalties that are high by international standards for cartel conduct,⁶ as well as by domestic standards for other business-related offences,⁷ is thus a dramatic development. Despite this, debate about the justifications for and likely effects of criminalisation has been shallow. Instead, attention has focused largely on the design of the legislation and the institutional framework governing enforcement.⁸

The Cartel Project was an interdisciplinary empirical research project that was 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
- compare criminalisation policy and enforcement in overseas jurisdictions, with particular focus on the United States and the United Kingdom.

The Cartel Project was 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 Professor Christine Parker (Melbourne Law School, University of Melbourne to June 2011 and Centre for Regulatory Studies, Monash University from July 2011 – 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 Ms Janette Nankivell and statistical assistance by Mr Chris Platania-Phung,

⁶ 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.

⁷ 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 Bowen, 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.

⁸ For an outline of the key technical debates that attended the process of legislative design, see Beaton-Wells (2011).

both of the University of Melbourne. Ms Jane Kotey (research assistant at the Centre for Regulatory Studies, Monash University) assisted with the write-up of this report.

The interviews that are the subject of this report are only one component of the Cartel Project. 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;⁹
- a survey of public opinion concerning cartel criminalisation including the extent to which people consider that cartel conduct should be treated as illegal and as a criminal offence; the reasons why some people consider that cartel conduct should be treated as a criminal offence, particularly whether this relates to the economic effects of the conduct, its moral character, and/or the instrumental features of the criminal law (for example, its deterrence capacity); what types of penalties and remedies should apply to companies and individuals responsible for cartel conduct;¹⁰
- an extra component of the above survey was addressed to a specific 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 (the 'Business group'). The extra survey component included questions to ascertain the extent of knowledge of anti-cartel law among business people; the perceived likelihood of enforcement of anti-cartel laws among business people; 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; and 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;¹¹ and
- 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.¹²

The Cartel Project aimed to:

- generate awareness and understanding of the issues involved in this major policy change;

⁹ The results of this analysis are published in Beaton-Wells & Fisse (2011).

¹⁰ The preliminary results of the survey were published in Beaton-Wells et al (2010).

¹¹ The results of this part of the survey are also included in the report cited *ibid*.

¹² 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 stakeholder interviews were undertaken in 2010 to 2011.

- provide important practical input to the implementation and enforcement of a criminal cartel regime, and the enforcement of competition law more generally;
- 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>.

1.4 INTERVIEWS WITH CIVIL DEFENDANTS: PURPOSE, SCOPE, AND METHODOLOGY

1.4.1 PURPOSE OF INTERVIEWS

According to Graeme Samuel AO, then Chair of the Australian Competition and Consumer Commission (ACCC), the new criminal offences should have a clear, simple and predictable impact on cartel behaviour. In an opinion piece published in *The Australian Financial Review* he warned that:

The world changes on July 24 [2009] for Australian business executives involved in cartel conduct. ...The concept should be simple enough for everyone to understand – engage in serious cartel conduct and you will face jail time... For those who want more clarity, here it is: you have until Friday to get your house in order.¹³ (Samuel, 2009, 63)

This rhetoric assumes that the supercharged threat of jail for individuals will deter cartel behaviour (see Parker, 2011).¹⁴ That is, it assumes that fear of jail (over and above the civil fines for corporations and individuals previously available¹⁵) will make cartelists and potential cartelists think again and decide not to engage in cartel behaviour. This in turn assumes, first, that business people can correctly identify cartel conduct and know that it is a criminal offence for which they can be jailed; and second, that they believe they are likely to be caught and face enforcement action and jail if they break the law. However there are also other mechanisms that

¹³ The quote was repeated in various television and newspaper interviews.

¹⁴ On deterrence theory in general, see Thornton, Gunningham & Kagan (2005), Simpson & Koper (1992), and Scholz (1997).

¹⁵ Before July 2009 the TPA imposed only civil sanctions 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, the actual financial penalties levied have remained low. In 1993, in response to the *Trade Practices Legislation Amendment Act 1992*, penalties for individuals rose from A\$50,000 to A\$500,000, and penalties for firms went from A\$250,000 to A\$10 million (Beaton-Wells, 2006). In 2007, penalties were again increased for firms. The A\$10 million fine was still an option, as well as the new alternatives of three times the value of the illegal benefit, or where there illegal benefit could not be ascertained, 10 per cent of the turnover of the preceding 12 months (Parker & Nielsen, 2008, 559). However, average penalties have fallen far short of these figures – the median corporate penalty for 1974-92 was A\$111,503, which rose for the period of 1993-99 to A\$521,665, and then again for 2000-09 to A\$826,584 (see Beaton-Wells & Fisse, 2011, 424-433). The new criminal offences attach liability to both corporations and individuals. Corporate sanctions include fines (the greatest of A\$10 million, three times the gain derived from the offence or 10 per cent of annual corporate group turnover over a 12 month period) and individual sanctions include a maximum jail sentence of 10 years.

may induce compliance with anti-cartel laws. Most importantly, if business people agree that the law should prohibit cartel conduct on the grounds that it is morally wrong or economically harmful, then this is an alternative (or additional) mechanism which might make them more likely to comply (see Parker & Nielsen, 2007; Tyler, 2006; Winter & May, 2001).

The interviews with those who had been penalised for civil cartel conduct in the past were designed to test these assumptions and provide a deeper, more complex understanding of business people's varying perceptions of, and relationships to anti-cartel law. The purpose of the interviews was to understand:

- why they engaged in the conduct for which they were eventually penalised, what they knew about the law at the time, and how they perceived the deterrence of the law before engaging in the conduct (Chapter 2);
- how they experienced the investigation and enforcement process (Chapter 3);
- their experience of the formal and informal sanctions for cartel conduct – and whether they experienced them as a hardship (Chapter 4);
- their opinions of the subsequent criminalisation of cartel conduct, and whether they would have made any difference to their own behaviour or their experience of the enforcement process and sanctions (Chapter 5).

1.4.2 SELECTION OF INTERVIEWEES

In-depth interviews were conducted with 19 Australian business people who had directly experienced enforcement proceedings in which they were found to have engaged in cartel conduct in breach of the TPA (under the previous civil regime), and 6 in-house lawyers who had been the main people responsible for dealing with cartel enforcement proceedings on behalf of corporate defendants.¹⁶ The interviews were semi-structured in-depth interviews, all of which lasted at least an hour. In each interview the interviewee was asked to tell the researchers in their own words:

- the story of the conduct that led to enforcement proceedings; that is, how did the conduct that was ultimately found to be cartel conduct occur and why they did it;
- the story of how the ACCC investigation and enforcement proceedings unfolded;
- their own personal view as to whether criminalisation of cartel conduct was a good idea and whether they felt it would have made any difference in their case.

The cases all took place after 2004 and before 2010, but some of the conduct extended some time before that. The interviews were constituted as follows:

¹⁶ The selection of interviewees and procedure for the interviews and their analysis is further described in the Methodology Appendix.

- 17 suitable civil anti-cartel enforcement cases were identified,¹⁷ and from those cases 72 potential interviewees.
- 23 interviews with 28 interviewees (multiple interviewees in three interviews) were conducted. There was at least 1 interviewee from each of 12 of the 17 cases.
- Many potential interviewees could not be found in order to be contacted. A number of potential interviewees who were contacted refused to be interviewed because they found the whole matter too upsetting and did not want to revisit it. Others simply said no or avoided follow up.
- The interviews overrepresented those from smaller businesses and who had engaged in what most people would consider less serious cartel conduct.

1.4.3 CONDUCT OF INTERVIEWS

Two researchers conducted each interview. We provided a detailed list of questions to each interviewee beforehand. But in the actual interview we just asked the interviewee to tell their story in the three parts described above, and we prompted them with contextually appropriate clarification questions and deeper probes as their story unfolded.

All interviews, except one, were audio-recorded (with the interviewees' permission) and transcribed by a transcription service. The researchers then checked each transcript, deleted names and very obvious identifying details, and sent it to the interviewees for approval.

Once approved, the interviews were analysed using a grounded theorising style (Glaser & Strauss, 1967).

1.4.4 LIMITATIONS OF INTERVIEW METHODOLOGY

The interviews occurred well after the cartel conduct and enforcement action. The strength of these data is therefore that the interviewees have been able to reflect on what difference the intrusion of the anti-cartel law enforcement regime into their lives has made to their consciousness of anti-cartel law. However there is also a weakness in that their memory of the events may have become blurred and we are relying on their own understanding of their behavior. The anonymity and confidentiality of the interviews and the independence of the researchers were emphasised so that interviewees would feel free to share their experiences as openly and honestly as possible. Nevertheless, the interviews represent just one – necessarily biased – perspective on cartel conduct. Customers, competitors or business partners who were

¹⁷ In order to meet the University's human research ethics requirements, to qualify as suitable for interview, there had to be final orders made by the Federal Court and not overturned on appeal. Since the interviews would be focused on discussing illegal conduct, it needed to be clear that illegal conduct had in fact been found to occur and had already been subject to enforcement action so that our interviewees would not run the risk of admitting to us that they had engaged in illegal conduct that the ACCC might still take action against. As a result it was not possible to interview any individuals who had not been the subject of proceedings on account of having received immunity under the ACCC's Immunity Policy for Cartel Conduct.

affected by the conduct are likely to have a different perspective, as is the ACCC. Accounts in this report are not necessarily consistent with facts as they occurred or as presented to or found by the Court in previous cases. The views expressed by the interviewees as recorded in this report are the views of the interviewees and are not necessarily shared by the researchers or authors of this report. It is the perceptions of the interviewees that is the focus of this report.

The interview data are also limited by the need to identify people via publicly available information about participants in cartel conduct who had been successfully prosecuted,¹⁸ not those that were not detected or were not successfully prosecuted. This means that the sample of interviewees was necessarily skewed towards business people from smaller businesses. This is because, despite the ACCC's rhetoric about the need for tough enforcement to address global cartels by big business, the majority of successful cartel enforcement proceedings are brought against small business.

Finally, these interviews provide a snapshot at one point in time of those who experienced civil penalties. It would be valuable to periodically interview defendants in cartel cases in order to find out how the change from civil to hybrid civil/criminal regime and the ongoing evolution of the ACCC's investigation and enforcement policies affects cartelists' behaviours and experiences. The current research provides a baseline for later comparison.

1.5 PURPOSE AND SCOPE OF THE 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 interviews. 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.

The report does not purport to set out exhaustively all of the potential results from the interviews. It reports the principal results based on a thorough first round of analyses based largely on the words of the interviewees themselves. 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. A briefing has been given to the ACCC.

¹⁸ Because of university human research ethics requirements and the practicalities of obtaining access.

CHAPTER 2 CIVIL DEFENDANTS' EXPLANATIONS OF THEIR CARTEL CONDUCT

2.1 INTRODUCTION

In the first half of each interview, the interviewee told their own story of why they had engaged in the conduct that was later enforced and penalised as cartel conduct, and what they knew and thought about the civil cartel prohibitions at the time they engaged in that conduct. Their understandings of why they engaged in this conduct and whether they knew it was against the law are highly relevant to evaluating what difference, if any, the criminalisation of cartel conduct will make.

This chapter is split into two sections:

- Section 2.2 concerns what interviewees told us about why they engaged in cartel conduct.
- Section 2.3 reports their accounts of what they knew about the law and how they perceived the deterrence of the law at the time that they engaged in the conduct.

In both sections we find a cleavage between the perceptions of interviewees from small businesses and individuals lower down the hierarchy in large organisations compared with those near the top of the hierarchy in large organisations. Interviewees from small businesses generally did not perceive themselves to be breaking the law and claim that they did not know about the law. Rather they saw themselves as engaging in common sense behavior to survive in their industry. Those from the top of large businesses on the other hand knew and understood the law well – but perceived the breaches of the law to be the fault of individual rogue employees and executives, rather than systemic or corporate issues. Thus they avoided a sense of personal (or legal) responsibility for the conduct on their own part or those of their peers at the top of the corporation.

2.2 INTERVIEWEES' UNDERSTANDING OF WHY THEY ENGAGED IN THE CONDUCT THAT WAS LATER PENALISED

2.2.1 SMALL BUSINESS: DENIAL

The first group of interviewees was those from smaller and medium sized business and managers down the line in larger organisations. These interviewees were at the front line of business. They personally engaged in relations with customers, suppliers and competitors. They say that they needed to engage in cartel conduct for economic survival, to manage imbalances of bargaining power in their markets, to ensure a reasonable income, and in some cases because they were bullied or manipulated into it. Some admitted that what they had done was technically illegal (at least by the time of their interview with us¹⁹), while others still did not

¹⁹ As we see in section 2.3, most denied they knew about the law at the time.

accept that their conduct was illegal. All denied that it was appropriate to apply the anti-cartel provisions to their conduct and take enforcement action against them.

THOSE WHO ADMITTED THEIR CONDUCT WAS TECHNICALLY ILLEGAL BUT DENIED IT SHOULD BE TREATED AS AN OFFENCE

Many interviewees were quite willing to admit in their interview that their conduct was clearly in breach of the anti-cartel laws. Yet they felt their behaviour was justified. Either it was necessary to even-up an unfair playing field by getting together to deal with other powerful players so as to ensure a fair margin for themselves, or it was because they saw themselves as so powerless as to be forced into colluding.

The most dramatic illustration of this was the story of an older man, Interviewee 1, who owned his own small business and by the time of interview was past retirement age. He had worked in larger businesses in an industry that had been subject to cartel arrangements for years. At his prime, Interviewee 1 had left a thriving business to his two partners who were two of the cartel leaders in the industry. He then set up his own small business in the same industry (ironically his partners did not have a non-compete clause in his contract!) but quickly found himself starved of work because he refused to be part of the cartel. The financial pressure was exacerbated by his family situation. He was then cajoled into joining back with the cartel, but left again after a couple of years, only to go through the whole process again—of being starved of work then cajoled and bullied into joining the cartel for which he ultimately faced ACCC enforcement action.²⁰

The cartel conduct for which Interviewee 1 was ultimately prosecuted started with the cartel generously giving him some small jobs without him realising that is where they are coming from. But then the cartel demanded that Interviewee 1 provide cover prices for others—leading back into the cartel:

So that job there, I did the job. Once again it wasn't a huge job. If they [the other tenderers who were members of the cartel] want to stand back [and put in higher prices so that I could get the job], well that's their business. Then they started putting pressure on me about all jobs and I found myself in a dreadful situation where you had to start agreeing with and you had no choice but to agree with them. ... The pressure was just enormous. I'd say, "No," like "I'm not interested," "Go away," "Piss off," you know. Then I'd receive another phone call from another person tendering the job. So there might be six people tendering it or five people or whatever, and you get a phone call from every one of them, and I thought, "Gee, what do you do?" At the end of the day they would wear you so thin we'd just say, "Look that's fine, I'll go along with you, you just tell me what price to put in." ...

²⁰ Another interviewee from a much larger company in the same cartel supports this story by commenting "Look, I think if being a small company as we were at the time, I think if we hadn't gone into the cartel then the cartel would have finished the company. Because, well, you know, they probably made sure that you wouldn't have enough work." (Interviewee 4). Sonnenfeld and Lawrence (1978, 149) also give evidence of bullying and coercion on executives to remain part of the heavy electrical cartel in the US in the 1960s and 1970s. See also Berzins (2007, 279) finding physical violence, harassment and commercial damage a relevant stimulus to cartel membership in a minority of cartel cases.

They just gnawed away and away and away at you, and of course I sat here as a sole person, I had no-one to bounce off, no-one to talk to, anything. (Interviewee 1)²¹

But Interviewee 1 was telling us that he was not a “sole person” at all: he was interdependent on his competitors and the lead contractor. The issue was that he had no countervailing social or economic support structure in order to withstand the pressure to collude. His economic and social connections all pointed in one direction, to join the cartel. As Interviewee 1 explained elsewhere in his interview, this pressure occurred because jobs came only through relationships with lead contractors and lead contractors have cosy (corrupt) relationships with certain potential tenderers (that is, Interviewee 1’s competitors):

You were reliant on going to the consultants. So the way the system works, you go along to the consultant, you absolutely lick his boots, you take him out to lunch, you fill him up with the best wine, and you do that consistently because they’re the people who are going to invite you to tender a job they put out and, of course, they have been engaged by the next level of persons [i.e. contractors up the chain]...

[Once Interviewee 1 went out on his own in business, he explained that it was very difficult to approach a consultant to get work] Of course, coming from the position I’d come from where you occasionally shared the very good red wine and lunch with the almighty consultant, I was extremely conscious of going out – I was almost in a position where I couldn’t go and see anybody because I would be seen to be poaching. (Interviewee 1)

Like many other interviewees, Interviewee 1 went on to morally justify his own behaviour by explaining that he did not feel he ever initiated any rigged tendering himself or took advantage of the cartel to obtain a higher margin than he should have.²² Rather, he saw his behaviour as the only reasonable and responsible way to stay in business and maintain an income, given the prevailing economic and social relationships and power structures:

I don’t think from memory, in amongst all of that, that the following two-year period, say, that I ever once turned around and said, look I’m in trouble, I need some work. Because what would happen is that the level of work that I was sort of doing and concentrating on – and that’s why we did probably fairly well sort of in the first couple of years – they were the crumbs, they were the rubbish that nobody else wanted. So they were pretty easy to win because they were won legitimately. But obviously companies were pricing them such that they ensured they didn’t get them. I’d win it and think, “Jeez I survived, I eat again this week”. So it was really the rubbish that the people didn’t want. And I never found myself ever asking, “Hey, I

²¹ Throughout this report all quotes have been edited for ease of reading, and most of the interviewees’ questions and comments have been deleted.

²² Another manager from a bigger company more centrally involved in the same cartel gave a similar moral justification on the second point: “No there was a few criteria [for the cartel]. One was that they had to know what the budget was for it and unless it was exceptional circumstances, they weren’t to go over that budget. The budgets were probably done by [professionals who were upstream managers of subcontractors], so the margin was there.” (Interviewee 4) That is, because this particular cartel was a subcontracting business all the tenders had to fit within a pre-set budget anyway.

want to stick my hand up and have this job.” I had no need to because I could win a job, and at the same time they were – and then there’s these persistent phone calls [from other members of the cartel who wanted him to put in a higher price for a tender he didn’t want so that they would get it for the price they wanted], “Oh we haven’t got any work, we’re going to have to sack ten people.” And I said, you know, “Look I’ll stop crying now. Yeah, I’ll go along, give me a cover price.” So that’s how it worked. ... And what I found is a job might come out, once again a fairly small job and I’d get all excited about it. You know, I’d been invited to tender a job. Well, life’s wonderful, you’ve got an opportunity to quote something. So I’d quote it and then I’d get a phone call saying, “Oh look can you give us a couple of prices on this tiddly, you know, insignificant little job?” I’d say, “Yeah, okay, I’ll ring you back and let you know.” Then I’d get another phone call from somebody else, and by the time I’d finished, five people had asked me to give them a cover price.

Now in that I always maintained an attitude we only ever did work — whether you’re aware you were going to get the job or not — that the price that was only ever charged for, that was the market price.²³ It never changed. I know that other companies had a different approach to that, very much so. (Interviewee 1)

Other interviewees gave less dramatic examples of similar dynamics in the contracting and sub-contracting systems to explain why various forms of collusion are necessary to manage the risks caused by others acting unfairly. In many cases in Australia, there has been a long history of managing uncertainty in the market together through collusive conduct (Parker, 2006:607; Freyer, 2006, 315; see also Geis, 1967). Cartel behaviour was only made subject to constitutionally valid prohibitions in Australia in 1974 and before that collusive practices (‘orderly marketing’) were widespread and well known (Karmel and Brunt, 1962, 94-95). Collusion as a legitimate risk management strategy is therefore still available within the personal memory of many business people as a justification for cartels in many industries.

Interviewee 4, a manager from a mid-sized company that was more centrally involved in the same large and longstanding cartel also commented on both the morality and reasonableness (in terms of price) of the cartel given the behaviour of others in the industry:

What it was going towards in the end was [the lead contractor] would send out the prices. Not the [professional]. What happens in a lot of instances there is that your risk factor becomes greater. One is [the lead contractor] will always, excuse the phrase, but will try and screw you down. Which means he will probably pick the three lowest which still happens to this day. *[So he’ll take the three lowest and try and get them down lower basically, by Dutch Auction?]* Even more. We presume he’s put his price out, he will still try and get that lower. So it was to alleviate a lot of times that would happen, we stuck together on that. Bad tendering practices. Also there was a lot of union risks which you can’t cover. Because the union here... I’ll give you a couple of examples of risk. It would be

²³ Here Interviewee 1 deploys talk about the “market” but, according to economics, this is a complete misuse of the term since he is really appealing to his own sense of a fair price on his own standards, not what an efficient market would produce.

that you could almost tell when there was going to be a Friday strike, and then it would be a 24 hour strike, close to a rostered day off. *[So if the Monday was a rostered day off?]* The union complained about flies in the lunch shed. So the project manager went out and got sprays and he sprayed it. Then they'd asked him for the chemical data sheet and he couldn't provide them. So there was a safety issue, and a 24 hour strike. Or mysteriously a mouse would be found in the pie warmer... So you had these kinds of risks. That was kind of taken care of. I don't think the ACCC really understood the risks of [our] industry. (Interviewee 4)

Similarly, for Interviewee 6, the owner-manager of a medium sized company involved in an industry where collusive behaviour had probably been endemic in the past, talking to competitors about price was a normal part of understanding one's business. It was essential to avoid being 'screwed' in the tendering process.

We always talk business, we always talk business. What did you go in on that? And - even as soon as the tender closes, what was your price? Because we all want to know where we stand. There's nothing up to it [ie nothing before the tender goes in], but we all know what prices everyone's [putting it at]... [Interviewee 6 goes on to explain that there is always discussion about prices between those deciding on the contracts and those bidding for the contracts and that information about other people's prices is passed on in that process.²⁴] ... So where's the defining line? Is it you talked to them before, and you collude, and you're going to put this in and I'm going to put that in [to the tender process]. Is that where it stops? Or the builder ringing you and saying well can you do it for this price? You know, as far as we're concerned I would rather that best price wins, straight up, 'cause we get screwed all the time. You put all the time and effort, you win the job, and someone else comes in, no, we'll do it cheaper. (Interviewee 6)

For Interviewee 5, borderline collusive conduct was part of the fabric of social interaction in the industry. This middle manager in a large company had been subject to enforcement action for attempted price fixing with another large company. He also worked in an industry where collusive practice had been common in the past and he described the circumstances which ultimately led to ACCC enforcement action as a process of "fucking around with someone's mind in business":

... particularly at an industry association or I think it was an award night that it first cropped up. It was a comment to the effect of, "Geez if it's not the discount king" ... Then there's a retaliation, "Oh not me, must be you, mate." That sort of stuff, you know. And that went on for some period of time. In it some discussion took place about specifically, "What about this client?"; "But what about what

²⁴ Or as another interviewee commented about his small family business that had attempted to make an agreement with a competitor not to compete without realising it was a breach of the cartel laws: "It's part of your due diligence to see if the project's viable. You find out what the competitors, who they are and what their plans are ... you'd be mad not to do it ..." (Interviewee 2)

you did to this client?" So it went over the edge of legality at that point.
(Interviewee 5)

Interviewee 5 feigned at anti-competitive conduct as part of a competition about competitiveness with his competitor. Later in the interview he admitted to pretending to agree to fix prices as part of the banter, a conversation that was overheard in the men's room.²⁵ None of this would have been possible in a market where competing sales managers did not meet socially at industry functions and where there had never been any collusive conduct in the past to make a pretence at a price fixing agreement plausible.

THOSE WHO DENIED THEY BREACHED THE LAW AT ALL

The interviewees quoted so far admit in the interviews that their behaviour did breach the law, although they might contest the justice of applying the law in their situation. But there was another category of interviewees who completely denied that they breached the anti-cartel law at all. According to them, the anti-cartel law or its enforcement agency, the ACCC, failed to understand how business really works: it was blind to the real economics of business pricing decisions. They simply deny they had the power to set the prices for their own goods and services at all. Others up the chain did so, and if they did not set their own prices, how could they be accused of price fixing? Their "collusion" was a collective attempt to wrest back some bargaining power; political action in an unfair and asymmetrical industry. It was aimed at making a more competitive market, although it involved a lack of competition.

One older retired man was a civil funeral celebrant.²⁶ He explained that the way his business worked; the funeral home director usually bought the service from him and included it in the whole funeral package for the bereaved client. This meant that the client paid one price to the funeral home director who set a standard fee for all funeral celebrants. Our interviewee had been trying to advocate for years that civil celebrants of funerals should just refuse to do business unless they could charge their own fee, but instead his professional association had periodically written to the funeral home directors asking for a fee rise. This collective request for a rise to what was a standard fee was seen by the ACCC as an attempt at price fixing and our interviewee faced an enforcement action that he simply could not understand since he never set the price for his own service.

Another two businessmen, Interviewee 17 and Interviewee 18, were part of a 'buying ring' that went in together at occasional auctions. They felt that the ACCC did not understand how the auctions actually worked. From their point of view the buying ring allowed some "small timers" to be included in the auctions and therefore buy something they would not have been able to afford, or even just still feel part of the industry (although they were more or less retired). It was an efficient way to pool resources²⁷ and it could not possibly affect competition given how many

²⁵ Perhaps with connotations of "my discount is bigger than yours"!

²⁶ This interviewee wanted to be identifiable.

²⁷ Australian competition law does recognise the possibility for exceptions to anti-cartel law where such arrangements have been authorised or where they take certain legal forms – but not in this type of informal arrangement.

other buyers there were. Their collusive activity did not fit a simplistic version of a sewn up market in their view:

That was 12 out of I don't know how many bidders there were at the auction. There were probably 100 or more bidders at the actual auction. ... We're competing against every other person but we five are going to form that syndicate to buy that horse. It's the same bloody thing. Sorry - the same thing. It's the same bloody thing. I said there was 11 of us there - some of these 11 blokes can't afford to buy their breakfast but they want to feel as though they're part of it. (Interviewee 18)

There was definitely nothing pre-organised or anything like that and it was free for everyone to buy, no restrictions on anybody ... Okay. I suppose a lawyer could probably pick the eyes out of it and say, look, at the end of the day, Mr [Interviewee 17], there was some money changed hands and it shouldn't have changed hands. But whether the vendor was any worse off, I very much doubt it. The whole idea of a cartel is to see that someone is worse off. (Interviewee 17)

In Chapter 5 we will see this reflected in some interviewees' view that cartel conduct should not be a criminal offence because neither the approach of the ACCC nor the law itself adequately reflect the complexities of how competition works (or fails to work) in each individual industry.

2.2.2 LARGE BUSINESS: AVOIDANCE

The second group of interviewees had a different understanding of the rationale for anti-cartel law and the way it applied to their business lives. These interviewees were lawyers and business people at the top of larger business firms. Their narratives about what caused the cartel conduct in their own cases invariably put the blame on a rogue individual or unit in the firm, and it was argued that the firm, as a firm, could not have done anything more to prevent the conduct. These interviewees did not see themselves (or their close associates at the top of the company) as having been directly and personally involved in the relevant conduct. They sought to excuse and justify the role of the firm, and to distance the firm and the top executives from the conduct. They accepted the application of the cartel law to the conduct but sought to avoid liability for themselves, their peers and bosses at the top of the organisation.

Thus Interviewee 24, the CEO of a large company that had had more than one incident with the ACCC, was careful to say that:

Generally the problems took place at a level where senior management was completely unaware of it. ... I think this was all about making his commercial life easier. Would he have done it if it had been criminal behaviour? I think he probably would have. I think, he was in flagrant defiance of company policy, which said you would be terminated if you behaved in that way. I think it was arrogance and hubris that he thought he could get away with it. ... I just can't imagine why I mean I can understand why if you are a junior sales person and [a powerful retailer puts pressure on you], you might succumb to that. [But] This was a highly experienced executive who had been around for a very long time... (Interviewee 24)

Interviewee 22, a senior in-house lawyer put it even more bluntly: "I don't think there's anything else we could have done to prevent the conduct at the time. This was a rogue senior manager in charge of a rogue department." Similarly, Interviewee 17, the in-house lawyer and compliance officer for a large corporation where an individual executive had engaged in an attempted price fix, spent much of the interview telling us everything he did in the company (successfully, he believes) to improve compliance. A series of price fixing incidents were the responsibility of rogues who knew it was illegal, and wanted the easy commercial life:

It was a one-off incident, by one person, with nothing anywhere that would show that it was part of a broader policy within the business, that this was the way things were done. ... Yeah okay so why was [that person] doing it? Try to keep the price up. The easy life. This was the way he'd always, I think, he'd always done business growing up. ... But I just think it was a case of he was feeling under a bit of pressure, and he wanted to keep the prices up, just so things would run smoothly, he'd make the money and he'd look okay. (Interviewee 17)

These interviewees seemed to countenance the idea that corporate underlings and rogues engage in cartel conduct for a complex range of understandable reasons. In-house lawyer, Interviewee 25, explained:

I don't think they really understood the Trade Practices implications to be honest. ... There really wasn't - my understanding of it, all the affidavits from what I've seen - is none of the actual participants probably appreciated what they were doing, if that makes sense? ... It wasn't high level management involved. Basically a whole lot of local guys in an industry all got together through an industry association. Didn't think there was anything wrong with sitting down together and ensuring that they didn't kind of rob Peter to pay Paul from their perspective, and kill each other out, and kind of took it in turns as to who would be the successful tenderer. ... There was clearly no corporate authorisation of the behaviour. ... And in fact the behaviour was very actively discouraged. ... So it really was these two, these groups of individuals who thought they'd struck a brilliant idea to make their budgets and do what they needed to do... I think it's the way the industries operate in those states, if that makes sense? Or the way they've historically operated and trying to fit them together. They're a bit more trusting you know? Oh Joe Blow said it was a good idea so we thought it was a good idea. It didn't even occur to us that it would be illegal. (Interviewee 25)

And a senior manager, Interviewee 3, who was prosecuted for cartel conduct further down his business, said:

Obviously, the manager in that unit found that the cartel was the only way to play the game. So they got into this cartel. In that business area, there might be 20 tenders a month. ... It's the environment of business and how it develops. Our ex-manager and the others wouldn't have been in the cartel because of greed. You've got to remember that the benefits wouldn't have gone to our ex-manager. It was for the company. He would have just been sucked into the behaviour. Because if you didn't do it, you wouldn't have a business. The way business is, you've got to be in business. (Interviewee 3)

But these elite interviewees told us that they, and their companies, accepted the objectives of anti-cartel law and the fact that deterrence is necessary and that this might mean jail sentences are also necessary, as we shall in section 5.2.1. However, it is possible for them to accept the harsh deterrence of cartel criminalisation because these interviewees felt confident that it would not impact on them personally. For example, they accepted the need for jail but see it as largely in the background compared to their own efforts to set up rational management systems that ensure compliance. Their concern was with showing that their company (meaning the elite of the company) was economically rational and 'clean' as far as collusive conduct was concerned, so that it will never really become an issue, as illustrated by the following in-house lawyer's understanding of why cartel conduct occurred in his organisation:

He was trained, he had a compliance program. He knew there was an issue and that's the reason why he sought legal advice. He on the record had told his people of having inappropriate discussions with competitors. He knew the law. He made a conscious decision. Frankly, the impression we got from talking is, he just thought he was brighter than we were, and brighter than the law was, and everybody else was doing it. ... I mean, there is no excuse for the conduct and that's the reason why [our company] has taken the approach it's taken.

[Yeah, 'cause I guess I was going to ask one of the classic things is, oh, well, they were under pressure to make profit, make targets or whatever...]

That's a cop out. I don't believe those excuses. I mean, he used those excuses. But he knew what the law was. He just believed that he was - I mean, he fundamentally believed that regardless of the legal advice, was if he unilaterally decided to do the same as everybody else, after having discussed the fact that they were going that, he was okay. (Interviewee 21)

The net result of criminalisation for large business might therefore be to take more care to put in place compliance systems that protect the corporate elite at the expense of underlings.

2.3 LACK OF KNOWLEDGE: THE LEGAL 'INNOCENCE' OF SMALL BUSINESS

So far we have considered why interviewees say they engaged in the cartel conduct and we have seen that small business people on the whole denied the applicability of the anti-cartel law to their behavior, while those at the top of large business sought to avoid it and push the responsibility onto individuals lower down the organisation. But what did they tell us they knew about anti-cartel law at the time they engaged in the conduct? Did they know at the time that what they were doing was illegal but neutralised or rationalised their conduct, or were they not aware at all of the illegality of their conduct?

Again, there is a difference between large and small business. For in-house lawyers and executives in corporate headquarters, knowledge of anti-cartel law was detailed and unproblematic. We have already seen above that the corporate elite knew about the law and saw it as their job to define it into boxes that their senior management can tick off in order to be able to say that their company has complied and is not responsible for any charge of cartel conduct. It is different for those who run small and medium sized businesses and managers down the line in larger organisations.

2.3.1 SMALL BUSINESS: 'INNOCENCE'

In their accounts of how and why they engaged in the conduct that was later the subject of anti-cartel enforcement action, many small business and lower down the line interviewees at first simply claimed not to know about the anti-cartel law and its enforcement regime at all. On further questioning, however, they admitted awareness of the anti-cartel law and the ACCC, but only as something distant from their everyday business life. That is, they knew “about” the anti-cartel law, but did not “know” it in the sense of relating to and engaging with the law and the ACCC. They explained this by reference first to their sense of who does have a relationship with the law (namely big business, not small, ordinary business people), and second, the social, economic and political substance of how the law should have applied in their situation. They perceived themselves as legally “innocent” in the sense that, like children, they did not know the technicalities and mysteries of the law and did not expect to engage with them. But they did know what was “fair” and believe that the law should reflect this.

These interviewees felt that the application and enforcement of the law would have been concerned with loftier matters and, therefore, “bigger fish” than them. They saw the law as concerned with and concerning to more important players than them. Thus, one manager from a small family business had a university degree in commerce (which included three law subjects) but his ignorance of competition and consumer protection regulation and the ACCC was typical:

[Did you know that the Trade Practices Act existed and the ACCC existed?] Yeah, I knew it existed but I had very, very little knowledge ... obviously I knew that it was against the law to collude and you'd see the odd case in there where Coca Cola or someone big has been fined \$20 million or whatever it be. You sort of just look and don't take a lot of notice. (Interviewee 11)

He plucked the brand name “Coca Cola” out of the air as the paradigmatic big business to which these laws apply and who should know about them (despite the fact that Coca Cola has never been fined for anti-cartel breaches in Australia).

Similarly, other interviewees said they know about cartel law but saw the law as some mysterious thing in the books in lawyers’ offices that big companies can know and worry about, but they themselves (as smaller, ordinary business people) could not be expected to understand how it would have applied to their own lives:

I shouldn't say they're not aware [of the anti-cartel law]. They'd probably be aware from the big corporations, alright, that's as far as the extent goes. But to talk candidly to one of your competitors, what did you go in for, or what do you reckon it's worth, and blah, blah, blah. And you could go and cop a big fine for that. No one's aware of that ... because the legislation is a pile of books like that [indicating a very high pile with his hand]. A lawyer doesn't even know what actually specifies every sub-clause in every paragraph, how are we [as normal workers] supposed to know? (Interviewee 6)

These interviewees felt that although the law is distant, it ought to be authoritative and predictable. These interviewees felt they should be able to predict the application of the law on the basis of their own moral and economic sensibilities – their own evaluation of what was appropriate behaviour in a situation – although these judgments will be contextual, variable and subjective. They believed that the substance of the law should be just enough and the process

fair enough to reflect their own subjective (i.e. contextual) evaluations and hence to maintain its authority and legitimacy with them. They filled the gap, which was the distance between themselves and the law, with their own beliefs about what behaviour should be stigmatised.

Thus most of our interviewees claimed ignorance of the law but backed up their ignorance with a moral judgment that what they were doing was not wrong. Therefore they had felt confident that the law (that they did not “know”) could not apply. For example, we asked one of the interviewees who was involved in a very large and longstanding cartel whether he had worried about joining the cartel in the beginning:

No because again there was no, the fact was we didn't really know about the ACCC... I certainly didn't know what their powers were. *[Did you think that it was wrong?]* ... No I think I'd seen it as OK! Possibly, looking at it now, yes, it was wrong. But I think it would have been more wrong if we'd been killing the pig [i.e. taking higher margins than we deserved] and I don't think we killed the pig. What do people consider as good margins? (Interviewee 4)

Another interviewee had full legal training and a particular knowledge of criminal law, yet he allowed his family business to ask for a non-compete undertaking from a potential competitor:

If I knew that it was a contravention of the Act at the time I wouldn't have done it ... Perfectly sensible undertaking. Perfectly reasonable. No immoral connotation to that at all. ... It just didn't occur to me there'd be a problem. ... All this Trade Practices stuff, as far as I can tell, does criminalise conduct which is not criminal. It's just normal – this is all normal commercial behaviour. And cartels are too, I'm sure. ... I was sort of going on my sense of morality. (Interviewee 2)

A third interviewee put it more instinctively: “When you are guilty of something, in my mind, your body tells you you're guilty” [and his did not] (Interviewee 17). His fellow colluder also commented that it just did not feel wrong what they were doing: “I'd heard that ... there might have been fellows from the ACCC [around looking for cartel conduct]. It didn't worry me ... I've got nothing to hide. I'm doing something I've done all my life and as far as I was concerned it wasn't illegal. ... I couldn't see that we were at fault...” (Interviewee 18)

In some cases interviewees had even engaged lawyers to advise them generally about the commercial arrangements that they entered into. In one case a group of business people had advice from two different lawyers about a marketing arrangement they were setting up – but neither lawyer informed them (nor was presumably aware) that it was a breach of the anti-cartel laws.

All we did was try and improve the industry and got legal advice on how to do it properly and because of poor legal advice of and drafting of agreements [we] were deemed to have breached the Act and were deemed to be a cartel. (Interviewee 12)

This ignorance or bad advice from the lawyers just confirms these interviewees in their view that the law is a technical and mysterious thing that they could not have been expected to comprehend in their day to day business life. Instead the business person will fall back on his own sense of what is substantively moral in an imperfect (socially embedded) market:

A lot of [upstream processors] in Australia had been making money from actually crashing the price of [our product]. ... Yeah, we thought, okay, the only way we're going to do anything is form a co-op situation I suppose. ... Because we're price takers not makers. ... So much of the arguments in court were so technical as to whether something was – did actually qualify as a breach or not, you know. It was so technical. So, it got down to well, yeah, the way the wording was in our agreement. ... I certainly would accept that there might have been words or a clause in the agreement that might have been technically against the trade practices, but I was always of the view that if there was no intent and there was no victim and there was no public interest [then there was no cartel]. (Interviewee 1Interviewee 13 and Interviewee 1Interviewee 14)

Yet even large companies can get legal advice that does not discern the cartel conduct implications of certain conduct. There was one example where the company had actually explained to the ACCC exactly what the conduct was well before enforcement action took place, and not even the ACCC saw it as worthy of enforcement at that stage. (Later it became a huge case.) In another large company, a clear price fixing agreement became so institutionalised that the people involved did not know it was illegal (although those that had started it did know) – and even went to the ACCC to explain exactly how it worked:

We undertook a review and basically got told by [the people in that division], “What cartel? No cartel. We would never involve - engage in that conduct.” The managers who'd put us into the cartel had left, and this was a new set of managers who were doing exactly the same thing without actually knowing that what they were doing was illegal. And what's important is that we actually had a meeting with the ACCC in that period where our head of the division explained to the ACCC how this worked ... [The ACCC took no action at that stage.] (Interviewee 21)

On the other hand, some interviewees seemed to have very high expectations of the degree to which the ACCC or some other party would take responsibility for educating them specifically about the anti-cartel law and how it applied to their industry, rather than taking responsibility themselves for finding out about the law that applied to their business:

In the early 1990s, when this cartel was out there in that particular business, I had no knowledge that things were this bad. We were members of lots of industry associations, but not one of them ever sent out a flyer from the ACCC that this is illegal, that this is very bad, that the consequences will be very bad. I had no idea in the early 1990s that this was, like, such a big hot potato. We belong to lots of associations, but no-one ever educated us about how bad cartels are. (Interviewee 3)

Indeed, as we shall see in section 3.2.2, a number of interviewees felt they should have been personally told about the cartel laws, the powers of the ACCC and that standard industry practice was illegal. That is, rather than enforcement when it was found out, they should have first been “educated” and only when education had failed should there be enforcement. To some extent their protestations of lack of knowledge were made to support this story – that if they had only known, they would have behaved:

I was undereducated; I'd never done a Trade Practices training course for instance. I wouldn't have anything like what I've got on my poor buggers here [with the current

compliance program he is responsible for in his firm]. Particularly in [this state] – we use [name of a proprietary computer-based trade practices compliance training system]. But we didn't have anything like that under the old regime. (Interviewee 5)

As we have seen, many interviewees felt there was some justification for their conduct in terms of evening-up power imbalances in a market or some other public interest. There is a process by which cartel conduct can be authorised beforehand if it is judged to indeed be justified in the public interest. But no interviewees who used this rationalisation for their conduct was aware of the authorisation process at the time of their conduct and most were still not aware at the time of interview. Interviewee 11 did have some vague knowledge about authorisation by the time of interview, but had not been aware beforehand:

...As I said, from the start... Just you're amazed when you start to look at the industries where, I suppose, the passing on of marketing information happens. It's in everything. And seen differently in certain ... Even down in convenience stores, we'd get an invoice each week from Coca Cola and they'd tell us the recommended retail price to set, and tell all our competitors, have the same price to set. Work that out. Down to the oil companies. They've got a lot more money than us. But they subscribe to an organisation called, I think it's Informed Resources. I don't know if you know much about it. I don't know a lot about that. It's obviously a third party where all their pricing information relays back to it. So obviously this third party shares all the pricing information with everybody. It's exactly the same but they've just got more money and a better system. It's been approved by the ACCC, so or been endorsed, I believe, by the ACCC. *[Authorised.]* Yeah, authorised by the ACCC. It's amazing. It's easy and I suppose the ACCC they'd roll their eyes when you say, you're not aware of it. But it's just such a grey line in a lot of industries in regard to what's right, wrong, maybe wrong and where that line crosses. And I think that became very apparent with the [other case] and [our case] (Interviewee 11)

Those cartelists who were “innocent” in relation to the law in general, and competition law in particular, went on to deny the relevance of the deterrence of fines and jail. This fits the symptoms of psychological rationalisation or neutralisation to distance oneself from values one accepts as legitimate so that one can break the law (Sykes & Matza, 1957). For this group of interviewees, it was simply inconceivable that the anti-cartel law and their own everyday lives would ever have connected with one another (see also Simpson & Koper, 1992):

[And did people know that it was illegal at that stage?] Absolutely, yeah. Absolutely. ... *[So were you worried about that? Was it something you thought about?]* No, not essentially. *[You thought ACCC enforcement action would happen, or it may happen?]* I thought it was inevitable almost, that with the loose lips that were around, that one day you can expect something like that to happen. *[You didn't worry about being fined or penalised?]* At the time you most probably didn't consider that the... you most probably considered it wouldn't happen to you, or the level that you were involved in the thing was such that it probably wouldn't have brought such significant consequences. ... You had the idea that there was the Trade Practices Act there, that you weren't meant to collude or whatever, and this sort of thing. And every now and again you might read a case in the newspaper or something. You didn't really worry about it too much because that involved, you know, far greater things than what you had been exposed to... (Interviewee 1)

CHAPTER 3 INTERVIEWEES' EXPERIENCES OF THE PROCESS OF INVESTIGATION AND ENFORCEMENT

3.1 INTRODUCTION

In the second half of each interview, interviewees told their stories of their experience of the enforcement process once the ACCC became aware of this conduct and decided to investigate it. These interviewees experienced a civil investigation and enforcement process. Now that cartel conduct can be prosecuted as either a civil or a criminal process, the ACCC has stated that the investigation process will now always begin as a potential criminal investigation. Serious cases will go on to criminal prosecution, while less serious cases will be diverted to the civil track at some stage.²⁸

The stories of these interviewees provided valuable personal insights from respondents' points of view that might assist in the continual rethinking and improvement of investigation and enforcement processes under the new hybrid regime. Interviewees' reactions to the investigation and enforcement process also provide another angle of insight into both their perceptions of deterrence and also their evaluation as to whether it is appropriate that cartel conduct be treated as a criminal (or even civil) offence: were they completely surprised when the ACCC started investigating? If so, was it that they were surprised at having been caught? Or was it surprise about the kind of enforcement process and possible sanctions that they faced? Or was it the mere fact that they might have broken the law at all?

The bulk of this chapter is taken up with longer stories from our interviewees about their experience of the enforcement process. These are presented in two sub-sections with a summary of the themes arising from the stories at the beginning of each subsection:

- Section 3.2 sets out stories of interviewees' overall experience of the investigation and enforcement process. As we shall see, many interviewees were surprised by the vigour and seriousness of the investigation and enforcement process, and some had serious complaints about the ACCC's fairness. However, again we find a cleavage between those interviewees from the top of large business compared with the rest. The elite group had a general familiarity with legal processes that meant they fully expected and understood the ACCC investigation and enforcement process to be an adversarial game in which both sides play hard.
- Section 3.3 sets out interviewees' stories of why they chose to cooperate and settle with the ACCC. Most individuals and businesses that face enforcement action for cartel behavior by the ACCC do choose to cooperate and settle. We see here that many felt

²⁸ The ACCC states that 'In the absence of a clear indication that a matter will be prosecuted criminally or subject to civil proceedings, the ACCC will require investigators to conduct investigations in a manner that will preserve its capacity to seek criminal prosecution.' It also states that 'The ACCC's position is that serious cartel conduct should be prosecuted criminally wherever possible. For this reason, the ACCC will distinguish serious cartel conduct from that which is less serious in nature, including relatively minor conduct. ... In circumstances where the ACCC decides not to refer a cartel matter to the CDPP or the CDPP advises that a criminal prosecution should not be commenced, the ACCC may nevertheless decide to pursue the matter by way of civil penalty proceedings.' (ACCC, 2009)

overwhelmed by the power and resources of the ACCC and therefore chose to settle because they did not feel they had any other choice.

3.2 INTERVIEWEES' STORIES OF THE ACCC INVESTIGATION AND ENFORCEMENT PROCESS

3.2.1 SUMMARY OF INTERVIEWEES' EXPERIENCES

The main source of dissatisfaction for many interviewees was the tone and fairness of the investigation and enforcement process: they felt pre-judged as guilty; they weren't given adequate time or opportunity to defend themselves; they felt bullied or harassed by the ACCC investigators and lawyers; and that the process was geared towards getting a 'scalp' rather than educating and encouraging future compliance. However, it should be noted that many of these things might be said about any regulator by someone who is found liable. Moreover, our sample might be biased in the sense that those who wanted to talk to us may have been those who felt particularly unfairly dealt with and wanted to "vent" about the ACCC. Those who felt that they had done the wrong thing and got what they deserved (if there are any) might also have been too embarrassed or upset about the whole situation to participate in an interview. Finally, our ethics protocol meant that those who were not found liable (and therefore may have felt they were treated more fairly) could not be interviewed. This was because the main focus of the interviews was on the cartel conduct itself and only those who already had a legal finding against them could be interviewed for ethical reasons.²⁹

The next most common source of dissatisfaction was that the ACCC did not seem to understand their particular industry circumstances – where the power lay in the market, who really had the power to set prices – and did not seem interested in finding out. Some interviewees gave examples of investigators and lawyers who needed 'basic things' explained to them about their industries. Presumably interviewees felt that if the prosecutors knew more about their industries, they may have been more understanding and lenient. According to interviewees, the ACCC seemed to have an idealised version of an abstract competitive marketplace that was assumed to apply to every situation so that whatever the ACCC found that looked like a breach of s45 was assumed to be the only blemish on an otherwise competitive marketplace. Interviewees, on the other hand, saw themselves as operating in highly imperfect markets in which the conditions of competition were not present. This last point connects with the perception that the ACCC was on a mission that it would pursue at any cost. That is, the ACCC was seen as pursuing its vision of perfect competition (which it believes to be achievable by identifying instances of misconduct and taking tough action against it). The interviewees perceived their markets, and therefore their behavior, in much more ambiguous terms.

²⁹ We do have some evidence from our previous survey about how these opinions of the ACCC fit in with more general business opinion of the fairness etc of the ACCC from a more large scale representative sample: See Parker & Nielsen (2011, 20, 91-126); Parker & Nielsen (2007, 187-239).

Another common theme was interviewees' surprise at the seriousness of the investigation. The surprise with which many greeted the investigation and enforcement process underlines the fact that they did not know they had done something illegal, or if they had, that it was such a serious offence. Some were shocked when the case did not just 'blow over'. Others were surprised at the volume of information requested by the ACCC. As some of the stories suggest, however, the real issue here is often that interviewees felt so put out by the enforcement process because they did not expect to be subject to a punishment-oriented enforcement process. They expected to be 'counseled' and told what to do, not investigated and punished. These reactions to the investigation and enforcement process tend to contradict the idea that these cartelists engaged in a rational risk/benefit analysis beforehand since it suggests that they simply had not thought about their conduct as something that could be subject to punishment. It is possible that criminalisation will create a greater deterrent because, to the extent that business people are aware of it, they will also be more clearly aware of the seriousness of the offence and the attendant enforcement processes. In other words, criminalisation might match the approach the ACCC actually takes in enforcement better than the civil prohibitions.

A number also commented that they were surprised that the ACCC does not do its own investigation – that it relies on whistleblowers and on section 155 powers to get answers from the accused. This creates two sorts of problems. The accused themselves can feel harassed and bullied into giving the right answer. Or they can feel ambushed by the fact that the ACCC has information from a whistleblower which may be self-serving and incorrect because the whistleblower is trying to protect themselves. A couple of interviewees particularly criticised the reliance of the ACCC on whistleblowers and immunity applicants during the investigation and enforcement process. There were two main reasons for this: that the information may be inaccurate and self-serving, and that if someone had committed an offence, they should not be able to avoid punishment by applying for immunity. There was a sense that the 'wrong' people are being punished; that whistleblowers escape enforcement action regardless of their guilt; that smaller businesses face decimation when the ACCC is on the warpath to pursue larger industry offenders; and that those who can least afford it end up losing everything, while those who can most afford it manage to finance a fine and escape relatively unscathed (with the exception of a few high-profile cases such as the Visy case, and ensuing Pratt prosecution).

Finally, not all shared these bad experiences. In the last subsection below we see some quotes – mainly from experienced lawyers for the larger end of town – where interviewees said the process was as they expected. This latter group of interviewees did not necessarily have a substantively different experience to the former group. They perceived it differently because of what they expected, and because they knew how to play the game and protect themselves or their client.

3.2.2 STORIES OF INTERVIEWEES' EXPERIENCES

“YOU’RE AUTOMATICALLY GUILTY”

Interviewee 6’s comments spoke primarily to the issue of the tone and fairness of the investigation and enforcement process. Interviewee 6 painted a picture of an insurmountable force to be reckoned with, one that steamrolls through people’s lives indiscriminately. This war-like narrative (peppered with works like ‘firing’ and ‘bombarding’) reflected his experience of the process as a battle between him and the ACCC:

Well, you go to a criminal court, it’s you’re innocent until proven guilty. Going through this, you’re automatically guilty. They just string you up and hang you up and dangle you like a bloody carrot, which is crazy. You’re guilty, you’re done... They’re very aggressive... It all started, we get a phone call from – I can’t even remember her name – and then started going through yeah, yeah, yeah, remember the project? Yes, we didn’t even price it, we weren’t even involved. Then basically went into their office and their team leader went through the whole process. Then all of a sudden she goes, well what about this? [In an aggressive voice.] This has come from your office. I said well it’s not signed by us, or anything like that. Then the interrogation started.

Then we had to sit down with a panel of seven – myself and XX [two high profile barristers including a QC] and a whole range of academics and real high end solicitors and I’m there by myself. They’re just firing questions and – based from that outcome is, “Alright we’re going to go to trial”. Then bombarding us with paperwork. ...

Then at the end of the day, the Trade Practices Act is a stack of volumes like this [hand up high]. How are we supposed to know what’s right and wrong in all of that? They’re saying to us that even suggesting something to another competitor is breaking the Trade Practices Act. So when you overtake someone on the roads and you’re speeding are you breaking the law? And go back to the original speed? There’s no give or take it’s – the ACCC is glass. It either breaks – you break the law and that’s it. They’re very rigid ...

... [It] starts off with a phone call, then two of them in their offices, wherever they are. Then we want to see them and you go there and there’s like seven of them sitting on a table and there I was like this. [Looking like a rabbit.] Sitting up, it’s like, the only thing that was missing was a spotlight on my face... [Their QC] is very aggressive on that, very, very aggressive. ...

But these guys [the ACCC], they haven’t even got a budget. It’s just, whatever it takes, we do. So how do you fight people like that? They’ll go to the nth degree to try and get anyone. If they get that inkling or anything they will go, because it’s the type of people that they hire, the career hungry. Maybe what they instill what the ACCC think their values are – it’s like they’re all guilty, we’ve got to get them at all cost. That’s more than apparent when you go through it; ‘cause it’s no expense spared, nothing. We want this, we want that, we don’t care. We’ve got subpoenas, we’ve got timelines. You don’t do it we’re going to fine you, we’re going to do this.

It’s like – so you want us to run a business and get more resources to do this for you. This and then they go to the banks, and they subpoena the banks, then they subpoena the

insurance companies. Everyone gets roped in and automatically it triggers the bank, what's going on? So instead of being innocent till the final decision, mate, it's like someone making an allegation and the allegation is just as bad as being guilty 'cause you've already implanted it in their heads, you know. ... That's what they do. Then they walk away as if, oh well, if they lose, Samuel will go, yeah, yeah, oh we lost the case, blah, blah, blah. But there's another person down the road that they'll crucify. (Interviewee 6)

“SQUASHING A BLOODY ANT WITH A SLEDGEHAMMER.”

Interviewee 8 also found the process to be one-sided and difficult to fight. He felt that the ACCC deliberately failed to take the circumstances of the case into account (he said that as soon as he and his colleagues realised their conduct was unlawful, they stopped), and that the ACCC pursued them in a heavy-handed manner. He felt that they were trying to prove a point, without taking their individual circumstances into account. His comments suggested a belief that the ACCC does not care what personal impact they have on a respondent, as long as they can notch up another prosecution; that is, there is no sense of proportion employed by the ACCC in assessing how hard to go in investigating and prosecuting someone:

What rankles me a lot about ACCC is they didn't take any consideration for the fact that these business people had no legal experience. ... The [relevant activity] actually ceased as soon as we heard that it could be contrary to the legislation. But the ACCC, in my understanding, probably spent over a million dollars in progressing that case, taking it to the Federal Court just because they wanted to prove their point. So it just seemed to me a very, very heavy handed, one-eyed, non-commercial view that the ACCC had of someone's agenda that they would just focus on cartels, whether they're small or large, whether they're deliberate or not, whether they're small scale or large scale and waste a million dollars of taxpayers' money and resources – not unlimited, but enormous resources over what was, in the end, a relatively small commercial operation. ...

Yeah, so they flew me down to Melbourne, all expenses of course and got 20 other people on similar 155s and amassed all this information from their compulsory examinations, just to bolster their case. So when they eventually prepared their case it was like a bloody 50 page epistle, the statement of claim, as a result of all the information that they gleaned from the 155. It was just the equivalent of squashing a bloody ant with a sledgehammer. It was very ridiculous, very uncommercial. ... Yeah, it was very, very distressing. But as I say, I'm more upset about how one sided the system is. I mean right from the outset we said we'd stop if they wanted us to stop, we will change if you want us to change. I just think – well I think it's almost un-Australian, do you know what I mean? ... I think it's un-Australian the way that Graeme Samuel goes on and attacked us for [such a small operation – operating for a short time with little proceeds] from some guys just trying to improve the lot of everyone, for a win-win for everybody. I just think yeah, it's left a bad taste in my mouth, the whole experience. (Interviewee 8)

He also felt that the ACCC's case against Richard Pratt was a further example of the same regulatory over-kill.

The way – in a couple of weeks leading up before he died, I think the action of the ACCC was just despicable, the way they targeted him. I've got files on it at home of Samuel's

comments and what Samuel did and what he said he was going to do to Pratt, it was just despicable how they – to boost their own ego, what they were still trying to do to him, you know even after they had finished their civil case. They were still trying to nail him further personally. I think that's just, once again, just un-Australian. I think Samuel is a very, very dangerous person. (Interviewee 8)

“NOT ONE OF THEM WAS FAMILIAR WITH MY CASE”

Interviewee 9 also felt that the ACCC did not attempt to understand the circumstances of his case. He argued that he did not have control over the prices in his industry, and he did not support the action that he was charged with, so it was unfair that he copped the full force of the prosecution. He spoke of how he tried to write to the ACCC to explain his actions, and to see if it could be resolved in a way that did not involve going to court, but that the ACCC was utterly inflexible. He also felt that it was unfair that the prosecutors knew nothing about his industry and needed basic things explained to them about how it worked. If they had understood the specifics, he felt they may have been more understanding about the situation he got into:

So I was bundled in to the Federal Court and they said to me you've been price fixing. That was over two years, this was coming and coming. I wrote them a letter which I now realise they never read. They demanded evidence from me – I mean I'm talking every invoice I ever gave, every email I've ever written about it, every document I've ever, you know, the whole works. And if you don't do this you're liable for a fine of \$200,000. I said, “Is this serious?” This guy [from the ACCC] came in, you know with a very serious face... He said, “Of course it's serious”. I said, “But we don't set the price for our services.” [In this particular industry the buyers of the service are larger companies and they set the price that the service providers, who are individuals, get for providing the relevant service.] So I wrote Graeme Samuel a letter saying, “Look, this can't be happening.” ... Anyway they never even interviewed me. They didn't interview me. I just got papers taking me to the Federal Court. ...

I never had a face to face interview with anyone. ... I said to the guy from the ACCC, “This is all wrong.” He said, “Oh question 17 you can put down whatever you want to put down in your own defense.” I said, “Why am I doing this, you know?” He said, [mean voice] “Just do what we say or you will be sorry. You answer these questions; we're entitled to ask these questions.” But I said, “None of the questions are relevant. 57 questions I had.” So I go along to – somebody pushed me along to [name of solicitors firm]. Anyway it's become very formal then. I go through and answer all the questions. I said, “This is nothing to do with [our industry].” There wasn't one question about [our industry]. ...

Anyway bottom line is I ended up in court. ... So I'm sitting there and the registrar of the Federal Court is there. Six people from the ACCC and – I want you to note this down – not one of them was familiar with my case. Their lawyer, [name], was the only one with any intelligence in the whole room. They had the Government solicitor fellow, a young bloke who didn't know what he was doing. I had to explain to those eight people [something very fundamental about his industry and important to the case]. ... My barrister says, “We're going to plead guilty to a technical offence”. I said, “But I'm not guilty of any technical offence, I'm not guilty of anything”. [Another lawyer friend] says to me, “Just take the QC's advice and then we'll get a deal.” I'm thinking, these people are going to fine me \$100 or

\$500 for something I didn't do. They fine me \$46,000. I said, "What?" I said, "Mate your criminals don't get fined this much. I wrote a letter begging [the buyers in our industry] to have the decency, you know? [In incredulous voice] I'm not signing anything." My barrister and solicitor more or less frog-marched me to the lift. My barrister said, "I've signed it for you; we've got to get you out of here. Because if we don't get you out of here, you will lose your house, you will lose your health, you will lose your marriage, you know? We've done a deal, \$46,000 seems big to you; it isn't a lot of money". I said, "How can I pay that?" (Interviewee 9)

Interviewee 9 later commented that he thought the ACCC was just using cases like his to build a public profile and gain legitimacy – all done at the expense of those who can least afford it.

I discussed this with someone who left the ACCC who says they're totally focused on publicity - to gain and to keep their place in the fabric of society, which they do with statistics that they can give to the politicians. The consensus of opinion in my case is that they saw me as a soft target that couldn't defend myself; I'm an old aged pensioner. They took me to the federal court. (Interviewee 9)

"THEY WANTED A SCALP"

This theme of dissatisfaction with the tone and fairness of the investigation and enforcement process was touched upon by many of the interviewees. Interviewee 2 likened his experience to that of Jews in Nazi Germany. He tells that the ACCC would not accept any outcome other than prosecution, and felt that they just wanted a 'scalp':

There was no moral – I mean, I feel as though I've just been – picked on like the Jews, and we're in Nazi Germany. Well, we begged them to back off and that we would give undertakings to not continue although they really wanted our scalps... [Interviewee mentioned that the ACCC had previously issued a press release "saying that they were gunning for" his industry. He was later contacted and prosecuted.] So you know, they wanted a scalp. They decided that they needed it. Probably something to do with the boom, you know, lots of complaints about our industry...To this day I will never be convinced I've done anything wrong...

[And did the Commission ever look like giving you the chance to plead yourself out, as it were, and explain or did they...?] They were very aggressive and we capitulated on every single point. ... Once they issued a writ, which had a statement of their claim against us, we had to file a response and we conceded every fact alleged against us. But we said: yes, we've done it and we'll concede to injunctions and all these other orders but not – there was a bit of arguing around the edges about some of the orders. For example, they wanted me to go to a training course which is a complete waste of time. So we argued about that.

...

The ACCC is like all these Commonwealth organisations, because in my profession I have dealt with them all my life, they are out of control. The Defence Department, Customs, tax office, ACCC, anything Commonwealth, impossible to deal with. *[In what way?]* In terms of them having a sense of reality and proportion. Because their lawyers don't appear in court, and they haven't got the discipline imposed on them by virtue of being bashed around the ears by the judges. And they think that they're the Commonwealth and therefore they are

so much better than everyone else. They've got a sense of arrogance – again going on about the Commonwealth. [Told a story about his brother suing the Commonwealth – details deleted because may be identifying.] They denied liability, you know, ... The three court judges were spewing about it and it went to trial and three or four days into the trial, the Commonwealth suddenly realises that they're on a loser and they capitulated. \$X million every single cent of the claim that was made against them, they paid out there and then. That's just the typical Commonwealth and the ACCC was just the same. ... They deal with trivia, they make a great big mountain out of a molehill. (Interviewee 2)

“EVERYTHING WAS DESIGNED TO BLOODY GO TO COURT.”

Interviewee 13 and Interviewee 14 initially thought 'it would be fine', and that was what their lawyer told them too. They then began to see how serious it was becoming when one was served a summons in a social situation in front of his friends, and that they could not dissuade the ACCC from going to court. They felt harassed and unable respond to questions appropriately, and that regardless of their answers, the whole process was designed to go to court. Their comments suggest that they felt they went into the process in good faith, but that the ACCC did not respond in kind.

Interviewee 13: Yeah, I mean, initially it was, there's been a complaint and they were investigating, and even [solicitor 2] didn't seem to think that that would be a problem. They'd have a look at things and they'd be happy. So there was no major alarm at the time, but you know, when we realised shortly afterward, "Oh geez, it's quite an investigation going on here, you know". [And what made you think it's quite an investigation? Was that – were they bringing people in and questioning them?] Oh, yeah, well they notified us that they wanted to interview us, the individuals. You know, "Oh God. Yeah, we've got to take this quite seriously." [Tells the story of being served with a summons at 8:30pm at a local community sporting event in front of his friends.]

... Oh the advice from our lawyers was that this is trivial. Any trade practices contravention here is – would be fairly technical and fairly trivial. They were confident they could win a case ... Yeah, the barrister involved said, this would be the most sort of technical and sort of trivial breach that I've ever heard of. ... That was what he told us, yeah. So I guess we thought that it was worth defending on that basis. ...

[The ACCC] were really vindictive about the way they went about it. Really vindictive, and in the interviews, you know, the section, [section 155] interviews or whatever, they had a QC and that QC was just aggressive. Totally aggressive. Wouldn't give you time to answer questions properly. He'd jump in with another question when you were in the middle of answering one question. Totally aggressive. Designed to throw you off balance, yeah, and kept pursuing a certain outcome.

Interviewee 14: Harassing, really harassing.

Interviewee 13: Kept pursuing a certain outcome. ... it was an absolute disgrace. I thought it was a fact finding mission. I really thought these guys would be pretty professional and sort of fair about how they go about things. I thought it would be a fact finding mission, but it was so aggressive. It was like to get an outcome. There was no doubt about that, and

if they didn't like one answer they'd bang, bang, bang, try and get another answer out of you, you know. ...

They'd refused every meeting we ever asked for with them. When they started the investigation we asked to meet, you know, can we fix the problem. Isn't that what you do? Fix the problem, you know, rather than litigate. Wouldn't – refused to talk to us. Everything was designed to, you know. Everything was designed to create... Everything was designed to bloody go to court.

“IT WAS A DETAILED FISHING EXPEDITION.”

The following interviewee also felt that the process was unfair. He declined to have his interview audio-taped, so we refer to notes taken during the interview to represent his opinions.

By the time that the ACCC approached Interviewee 3, his company had gotten out of the industry in which the cartel conduct occurred, and the manager and all the people who were involved in that business had left. So he was left to answer all the questions from the ACCC. He seemed shocked at the sheer volume of questions they expected him to answer, indicating with his fingers the size of the document of questions a number of times. He said that he counted the questions and it was something like 240 questions. He was also surprised that they had the “affront” to give it to him just before Christmas and ask for it back the first week back at work in January. While the questions differed slightly, one was served on him and one on the company. He found it difficult to answer so many questions about practices that went on years before, involving employees that had long since left the company.

Interviewee 3 gave them back his answers and everything went quiet for a while. He commented³⁰:

So it goes hot and then it goes cold and you linger for a long time, not knowing what's going to happen. And as we found out, later, it went on for three years from when they first got the 155 till when the final result came out. It becomes like a normal commercial litigation thing. It's so legal and it just goes on and on with these little questions. Then the matter itself becomes quite complex, the different consent orders that they want to draft. You need to keep your head around what all the details are.

I had to start thinking what's the worst case for me? I was on my own. Was I going to lose the house? I started to tell my wife this was a nightmare. To fight the ACCC, you would need to have very deep pockets. But I was only there, I was only in the case because I was the general manager. I don't want you to get me wrong. I'm not against the principle of the Act. But the process and methodology of how they get results is a problem. The whistleblower gets immunity. In this case, the whistleblower was one of the ringleaders. If you look at the league table in the judgment, we're only a small fish as far as involvement in the cartel. The big fish get away with it. But of course, you don't know what the league table is at the time when you have to make the decision about what to do. You don't know

³⁰ These comments have been reconstructed from notes taken during interview.

what fine, as an individual and as a company, you're going to get. So I started doing research. You become an expert in this competition law.

They then called me in for an interview. It was a whole day. It might have been the second year that this was going on. It was a whole grilling for almost a day. The way it works is that the whistleblower has given them all this information and they don't have to go and do a forensic investigation. They don't send 100 police to do forensic investigation, because they just use the section 155s. You're blind because you don't know what they've got. It's like torture. It's a blind poker game. Then eventually they tell you they want a deal. You don't know at the beginning that it's just going to end up with a deal. You don't know at the beginning that it all comes down to a deal. Suddenly the number appears – that's the proposed amount of the penalty. There's a number for the corporation and a number for the individual.

The ACCC's method is who will cough to them and then frighten everybody into answering the 155s? They don't use 100 police to get the evidence. They just use the 155s. (Interviewee 3)

Interviewee 3 commented that he spoke with us for this research because he felt the way the investigation and enforcement process was structured at the time was unbalanced. He believed it has become more of a tactical game; that is, the ACCC was just working out how to "line them all up and shoot them". He also raised concerns about the worry and stress placed on the individual. He told us that they spent a quarter of a million on legal fees – a figure that doesn't take into account his time and the help he received from the in-house lawyer to collate information. He argued that the ACCC has got to work out a way to end the proceedings sooner with the smaller fish, and then concentrate on the big fish. He felt that you just end up "waiting to be shot for three years, while they work out the whole puzzle".

"[IMMUNITIES ARE] A JOKE."

Another interviewee, Interviewee 11, also thought they had been doing the right thing, and should have been rewarded by the ACCC for helping the consumer, rather than deserving the treatment they got. He was also surprised at the powers the ACCC had to investigate and prosecute. He was particularly surprised and dissatisfied with the ACCC's reliance on information from people with immunity:

Where I think there's a huge flaw in I suppose the law or the ACCC's rights or how they go about their business, is these immunities. I think they're a joke. I think if you've breached an Act or broken the law or done whatever, I think you deserve to be penalised, fined whatever. I think if you haven't, you don't deserve to be penalised. So I think these immunities are an absolute joke. I know when you read through their aims and so on, the ACCC says that they only give immunity to not the originators, the people on the outside and so on. That's a load of hogs wash. To get their ball rolling, they always ending up offering immunities to, well it appears to me, to so called ring leaders or whatever they're called. The pressure they put on those people with the immunities to keep the immunity to be fully frank if they don't want the answers. I think a lot of the time those statement of facts really get dollied up to suit the direction of the ACCC. I think that distorts a lot of the evidence in the case because of that.

[So originally, you didn't want to take the immunity because you didn't want to be putting your hand up to something that you felt you didn't do?] No, sorry, and I still didn't. As I just said, at that stage I still thought that against me personally, the ACCC didn't have a case whatsoever. And also, as I said, if I had done the wrong thing and ten other people or a dozen other people had, well so be it. I'd have to cop that on the chin. Obviously I still live in these communities and still do business here. I just didn't want to take immunity. *[So part of not taking it was also how it would be seen back here and how it would affect your relationships and the people you knew?]* Yeah, from a human or an ethical point of view. I know you might say a breach of Trade Practices Act, there's got to be some questions on ethics there. But also in regard to if there is a problem or something has been done, I think it comes back to how you handle it then. And obviously it's just something I wouldn't do in any case, whether it was the ACCC or other parts of life. I just wouldn't, I just don't think it's... *[Taking the immunity, do you mean?]* Correct, yeah. I just don't think it's fair. But that's only my personal opinion. *[Presumably he did not want to dob in others.]* (Interviewee 11)

Similarly, Interviewee 24 felt that immunity is not the way to achieve the outcomes the ACCC is pursuing. He also felt that if you have done something wrong, you should face the consequences.

My view is that in really serious cartel conduct there should be no immunity. But it means they have to work harder to get it. If you believe in rule of law and I do, ferociously, if you really believe in the rule of law, then people, particularly in criminal proceedings should be forced to prepare their case properly and put it to an independent court, and abide by the decision. Otherwise we erode personal freedoms generally. So that is my view. If conduct is going to be criminalised, then that is how it should be pursued. (Interviewee 24)

“I DON'T THINK THEY UNDERSTOOD WHAT I WAS TALKING ABOUT.”

Another interviewee also felt that the ACCC did not have the will or capacity to understand the context of his case and industry. Again, this suggested a belief that with the 'right qualifications' or understanding of the interviewee's experience, the investigators and prosecutors might have made more allowances and not treated them as harshly.

But the attitude of the ACCC was also I was guilty, there was no two ways in the world about it from their point of view. ... Goodness me. I don't think they understood what I was talking about. I think they were trainees. I don't think they had any qualifications – well, not the right sort of qualifications. I honestly think that – I could be wrong, but they made very little comment. They sat there with their piece of paper and wrote everything down I said. They didn't comment. There was one bloke that commented. He looked like the leader of the lot. ... But you know I think they were probably public servants on \$70,000, \$60,000 a year, not knowing what it was all about. I honestly do think that. And we're sitting on this side of the table, this great long table, I'll never forget that... And you're guilty. You almost feel like Breaker Morant like that movie. The old timber table ... There was no two ways about it. You were guilty. You weren't innocent until proven guilty – you were guilty. (Interviewee 18)

“YOU DON’T KNOW YOU’VE DONE SOMETHING WRONG UNTIL THEY THROW THE BOOK AT YOU”

For those who expressed surprise at the severity and speed of the investigation and enforcement process, some also commented that they had actually expected something more like a warning or more education about the regulations, instead of going straight to court on offences they claim to not know existed. Interviewee 6 explained above that he felt it was unfair that he should know all the specifics of the *Trade Practices Act*. Here went on to suggest that the ACCC use its role to educate businesspeople and clarify the law:

We hope it's, yeah, look, my summary would be these guys and the ACCC need to educate people on what they can, and what they can't do. Because it's so smoky, it's so unclear and you don't know you've done something wrong until they throw the book at you. It could be something inconceivable... (Interviewee 6)

Interviewee 8 also felt that a warning or some extra education about the *Act* would have been sufficient to stop him engaging in the behavior he would have then known to be illegal. These suggested alternatives to current ACCC practices fitted with the narrative of the cartelists deliberately and knowingly engaging in such behavior, and that for the interviewees, that did not include them as they were largely unaware of the illegal nature of their activity and would have responded well to education or a warning.

[To the extent that you had sort of drawn your mind to the idea that it could be illegal, what would you have thought would have happened if the ACCC had come knocking on the door?] Well we were up front. When they made their first letter of complaint, we were up front and sent them copies of documents and said this is our process, this is exactly what we do, we don't think we're doing anything wrong, but this is what we do. *[What did you think they would do then?]* Well, I thought they would tell us that – made an observation. Sorry, I really expected they would say in our view this is contrary to section 52 for these reasons - It's not section 52? [It's 45.] It's 45, thank you, 52 is something else. *[That's misleading and deceptive conduct.]* Yeah, so I expected they would come back and say this is contrary – in our view this is contrary to section 45 for reasons x, y and z. *[Sort of “please stop”?]* Yeah, “Please stop”. And I would have looked at it and if I thought they were right I would have stopped immediately. If I thought there was a grey area, I probably would have recommended the client to stop immediately, but essentially we stopped anyway because for a number of reasons, and probably because we were all scared – you know what, of ACCC. They saw the previous experience. It pretty much stopped immediately as soon as the first complaint was made. (Interviewee 8)

Others commented that the ACCC should do its best to avoid litigation, especially in the case of smaller businesses that are willing to do anything to stay out of court. Interviewees 13 and 14 suggested that they would have done anything to avoid litigation, and that the ACCC should have taken that into account. Indeed, they described information they received from the ACCC as indicating that that is also the ACCC's preference. However, as these same interviewees described above, they felt that every part of the process was designed to end up in court.

I personally thought that they would have had a look at the situation and maybe made a few recommendations and say, “Oh, well look, you'd better change this aspect of the contract or that one.” In fact, we have seen brochures, you know, since the case began –

since the investigation began, we actually – we were shown brochures where they say that we always attempt to fix problems before we litigate. Litigation's the last avenue. That was in the federal court, down on the desk there. They had brochures – ACCC brochures and you could see. You opened it up and read it and it said we try to... Yeah, it even said, we try to avoid litigation. Yeah, leave litigation to the last avenue. Yeah, and we talked – we tried to talk. What's this rubbish? They haven't tried to talk in our case. Yeah. Oh, well we asked for round table meetings. We said if there's problems here in the way we're operating, we've only just begun. If there's problems in the way we're operating and then Solicitor 2 as the solicitor sent these letters on our behalf – on the company's behalf. If there's any problem with the way we're operating, can we please have a round table meeting so we can remedy any of those problems, or we'll discontinue to operate if you prefer. But they refused any meeting. There was no meeting to remedy the problem. (Interviewees 13 and 14)

THOSE WHO UNDERSTAND THE ENFORCEMENT PROCESS AS AN ADVERSARIAL GAME

There are others though, who considered and accepted the process as an adversarial game to be played. Lawyers for larger companies who understood the process were not at all surprised by the adversarialism. It was what they expected and what they were prepared to fight against:

[W]hen I was in private practice I did a lot of like, I had quite a few ASIC investigations. And I would not anticipate that an ACCC interview is fun. I can imagine - I don't think people realise how confronting it is to be required to sit there and asked questions in a formal environment where people are there to ask you questions. It's not a discussion. It's not a chat. It's not, let's get together. To me, even if the ACCC was going as lightly and touching it as lightly as they possibly could, it's not going to be enjoyable. And I don't think people realise how stressful a situation it is too. So, I'm not surprised that that comment's come out. (Interviewee 25)

This empathy for smaller business was also expressed by Interviewee 21. He felt that the turnaround on paperwork demanded by the ACCC was unreasonable, and he thought that in a smaller company without the resources to 'throw at it', it could be particularly troublesome, although it was not a problem for him and his company.

The ACCC - it doesn't matter how you're dealing with them, I mean, the reality is that they take as much time as they need to get something done and then they put unreasonable demands on you to turn stuff around. So, the only difference of course, is because where we sit in the corporate tree, we've got more resources we can throw at it, so I can understand what people are saying. We found the level of expertise of the lot of the people at the ACCC as - we had to assist them during the process in order to ensure that they got the story. It would have been very difficult for them alone to have got the story. (Interviewee 21)

Interviewee 21's comments suggested that he believed the ACCC was under-resourced, and had to rely too heavily on assistance from respondents to obtain information. Interviewee 25 also made these points; she was surprised at how under-resourced and 'incompetent' the ACCC appeared to her. She felt that this would become particularly problematic if they had to conduct

criminal investigations. As a result of the perceived slowness of the investigation and enforcement process, it became a lesser priority for the in-house lawyers at her company.

[So just in concluding your views about the ACCC, how would you describe them? I suppose their attitude and their conduct with respect to your company?] From our perspective, I guess they were really under resourced and under prepared. Things took a lot longer than I would have expected - for what was fairly black and white early on. I just think that's just resourcing and getting through it all. My personal view - and this is a very personal view - is roles like that don't necessarily attract the best investigative lawyers.

When I found out we had ACCC proceedings I was like, "What the hell? Geez Louise. This is quite, this is major, this is serious. This is a big issue." I went through it all and I checked everything that came through. Where my predecessor was probably a bit more, "Oh yes, if the lawyer's happy with it, I'm happy." That was because it was never, I guess, run against us in those stages when he was involved as being with any real vigour, I'd suggest. I've been, I've done plaintiff work before and defendant work. A whole range. But usually, if I was the ACCC I'd be hammering it as hard as I can. Certain things where we were just - you know there were times when I just thought we really weren't on the agenda. Maybe we weren't. (Interviewee 25)

Moreover, not all small business interviewees felt they had been treated unfairly or unpleasantly. The next interviewee suggested that the ACCC did not treat him harshly precisely because they already had all the evidence needed to prosecute:

I think that prior to [my colleague] going in, I think somebody else had been in and told them exactly what was happening and how it happened. I think they knew then I think probably the icing on the cake for them was when they got the phone call from [my colleague's] lawyer and they offered them immunity. I think they realised then. Maybe we should have taken the Fifth Amendment. ... I must admit that the people in the ACCC, you know they weren't nasty to us No I didn't find them particularly rude. I thought they listened and they weren't really pointing fingers. Maybe it's because they had all the information anyway. The lemon's already been squeezed, no more juice. (Interviewee 4)

On the other hand, Interviewee 26 (an in-house lawyer for a very large company) thought that her client had been pre-judged as guilty, and was not given any credit for their willingness to cooperate with investigators. She also suggested that her client was part of the ACCC trying to make a public show of enforcement, and that the penalty was disproportionate to the offence for this reason.

I've seen not so much cartel issues but other breaches of the Trade Practices Act where the Commission will take a very strong and forceful line and it might be over a product safety issue, for instance, where mandatory labelling isn't applied. But it's in a tiny number of cases on a trial run of a product, where there was no please explain letter. There was simply Federal Court proceedings issued. And the commission then negotiated something that would, in my view, give them a very good public statement to be able to run about how seriously they take these things, and how the big boys of town are not exempt from these types of issues. In a sense, I think there's a little bit of this going on in [this] matter. There was certainly no sense within the business that this was something that was a problem for us until it was raised. As I said, you look at it carefully on its facts and it's clear

that it's a technical breach. But it has sort of evolved because of the practice that I've described. ...

[Our company's response was] "you're using the big stick to give us a whack to make a public point". The penalties, as I said, from the QC's advice that we had, really could have been considerably lower and there was a lot of pressure on [our CEO] to agree – the figure that we ended up agreeing, rather than spending a million or two million on fighting the matter in court and probably losing a component of it. So there was an expectation that by negotiating with the Commission, that's taken into account in assessment of what the penalty should be...

It's not just about enforcement of the law as it exists. If the law is broad enough to give you those enforcement rights, that's one thing. But I've seen instances of [the Commission] really pushing issues that they later will say to us, we didn't really have a legal case to make there but we were concerned about industry practice that would lead to bad laws. (Interviewee 26)

3.3 COOPERATING AND SETTLING WITH THE ACCC

3.3.1 SUMMARY OF REASONS FOR SETTLING

Currently the ACCC relies largely on cooperation and settlements to collect evidence and finalise enforcement actions. Most civil cases that the ACCC brings do settle one way or another. The quotations in this section explore the dynamics of cooperation from the respondents' points of view.

Many felt that it was just too expensive to continue to fight in court, and the associated risk of incurring the ACCC's costs was off-putting as well. Despite the fact that most interviewees felt they were innocent and would have liked to have fought, they made a commercial decision to settle. As noted above, our sample might be biased towards this group, as they may have welcomed the opportunity to air their grievances about their experiences.

A few interviewees said that it was the advice they received from their lawyer that convinced them to settle. For some, they felt the lawyer had their best interests at heart. In this case, the advice tended to lubricate the settlement system and help make people feel that it was OK to settle and admit to breaching the TPA even though they did not feel guilty. For other interviewees, there was a question of whether their lawyer had their own motivations for getting them to settle; that is, they suspected that their lawyer wanted to maintain a good working relationship with the ACCC and courts. This made them feel like a cog in the machine that just had to go along with the system, and added to the feeling that they were dealing with an insurmountable challenge that would be best resolved by settling.

Some interviewees talked about their feelings of intimidation that contributed to their decision to settle. They felt that the ACCC would not compromise, and in some cases (where it got to court) that the court was also on the side of the ACCC. This made some feel that they simply did not have a chance of winning if they fought, so decided to settle to end the proceedings.

3.3.2 STORIES OF INTERVIEWEES WHO SETTLED

“IT WOULD BE CHEAPER, COMMERCIALY, TO PAY THE FINE AND GET OUT OF IT”

The first interviewee in this section argued that settling with the ACCC was a commercial decision, not because he “felt” guilty. The process was becoming expensive, and so he took his lawyer’s advice to settle.

To this day, I still don't believe I was guilty of anything illegal. The reason I pleaded guilty at that particular time was on the advice of my barrister, who didn't quite understand it anyway. He said the judge probably wouldn't understand it anyway; no disrespect to the barristers or the judge. It would be cheaper, commercially, to pay the fine and get out of it.

... I wanted to fight it, to be quite honest. I wanted to go ahead and do it but not being a lawyer that you employ them for, you've got to take advice. You go to your doctor and he says, oh, well, take this tablet, you say, no, I don't want to take the bloody tablet. You shouldn't have gone to the doctor in the first place. [Laughter] So he advised that would be the best action. But criminal, I would have spent every penny I had in my life to...

[Did your lawyers advise about whether to fight it or to settle it change from the beginning through? I'm just wondering...] I think as time wore on it was getting more and more expensive and they may have had some talks to the ACCC, I don't know. I think they did have some chats, you know, behind the doors, if that be the right - is that fairly typical of that to happen? It was just dragging on and how long it took, I don't know, but it got to the stage where they said, look, it's far better - their advice is to accept a fine and costs. (Interviewee 17)

Similarly, Interviewee 3 maintained his innocence all the way through the process, and wanted to fight the ACCC on principle, after them ‘torturing’ him for three years during the investigation. He said it was like torture – like a “blind poker game” – and that suddenly they produce a figure for settlement and by that time you just wanted it over with. He ended up settling reluctantly after his lawyers coaxed him into it, and his company made the decision that they just wanted it finished. This suggests that, aside from the financial impact of fighting the ACCC in court, respondents also take into account the amount of time it will take and the personal toll inflicted.

“YOU CAN’T WIN THESE THINGS.”

Interviewee 18 also wanted to fight on the basis that he thought he was innocent and his behavior was not anti-competitive. In the end, he settled, also because of the financial and emotional costs of the process. He was also advised by a solicitor friend that he wouldn’t be able to win against the ACCC.

[He reiterated that he didn’t think his conduct had had any anti-competitive effect] This is what I was on about and I was so adamant about it. That’s why I kept going with the ACCC and that’s why it cost me so much flipping money. Until the finish when the solicitor said, “Look you’re going to win this, but just in case you don’t you’re going to have to pay the ACCC’s solicitor’s fees and that could be \$1,000,000.” *[That’s what decided you to settle?]* To settle was 100 grand - I think was the fine - and 400,000 for the solicitor’s fees I was up to. So I was running scared. Well I was hurt, and scared. Of course the people sitting on the

other side of table at the ACCC - five or six of them - and me and my solicitor – it felt like an inquisition. We felt terrible, and my feet were shaking. *[Was that when you were actually at court already or that's back when you were brought in and asked a lot of questions? What we call the Section 155.]* Yes. I actually didn't go to court. The solicitor went to court once for me. I didn't go. I kept saying to my mate - he's a solicitor - he says, "For God's sake pay your money and get out, go. You can't win these things." I said, "I am not guilty. I firmly believe that I wasn't guilty." *[Explained that he didn't think it was a breach because it was only a few people buying together out of a much larger group of buyers.]* (Interviewee 18)

"IT BECOMES A COMMERCIAL DECISION."

Interviewee 6 also made the decision to settle on a commercial basis. He felt intimidated by the ACCC's costs, and could see that the judge was going against them:

This has cost me a lot of money. But it's like you get there and it's like the Roman army against the little village. That's what it's like, it's just they throw everything at it, and you get intimidated. It's the intimidation and the costs and it could cost you this, and it could cost you that. Then they come back to you, sort of, "We'll absorb the costs." The costs are already at X amount plus the fine, and they offer you, "Alright you keep going it's going to cost you \$1 million, or you can get out of it \$150k. Accept the consequences. Accept the decision against you." So what do you do? It becomes a commercial decision. Or do you do like Pratt and you keep fighting it and fighting it and fighting it. *[Well Pratt could afford to, of course.]* Exactly and he would have the same size of teams and the same calibre of people fighting it as well. But we're not in that position. I think 99.9 per cent of the Australian population isn't in that position to fight these guys [the ACCC]. They just throw everything at it, everything

[When it came to negotiating the penalty, did they start at a much higher figure?] No, that was the figure. [They just gave you the figure?] That was the figure, and they would accept all their own costs. Then my lawyer - I think they probably intimidated him as well – "Look you know their costs are going to be so much." That's it [my business partner] and I sat back, we spoke to our guy and I said, "What's the chances?" By the way the judge was favouring them. You could tell their body language and the way they speak to them in lieu of us - it was, "Let's cut it now, and negotiate payment terms, over what amount of time, and let's get out of it." Accept our slap on the wrist or whatever.

We got forced into that agreement What I'm saying is the judge makes the final decision. It's not to a jury, a majority or anything like that. It's the judge based on the argument and the resources you've got behind you, can convince the judge either way. *[So you were kind of looking at the judge to see what you thought the judge would do?]* Well of course, you know as the case is heard, who he's listening to, who he's agreeing with, who he's not agreeing with. You get a picture of the whole thing, within the first four or five hours. In a sense like, you know we're going to lose. You know you're going to lose...

... But at the end of the day it's going to cost us this much to fight it, right or wrong. Even if you're right, it's going to cost you \$1 million to prove you're right. What's the commercial benefit of spending that money, or having your name in there, [the law reports] and it's

not going to affect you five years down the track. 'Cause the \$1 million has got to come out of your profit. You've got to make that money, so does your business fold 'cause you can't afford to pay it? So there's a whole a lot of underlying things, and they [the ACCC] know that. They know that. ... (Interviewee 6)

“[T]HEY BLACKMAIL YOU INTO [SETTLING]... FINANCIALLY BLACKMAIL YOU.”

The following interviewees also suggested the relationship between the lawyers and the ACCC influenced the outcome:

[So when you went back into mediation what did you expect to come out of that?]

Interviewee 13: We didn't really know. We sort of understood that the ACCC is a very powerful organisation. They've got laws on their side and a lot of power. You know, we – before we ever went to mediation I would have expected the mediation to be a lot fairer.

...

Interviewee 14: In the end they sit you in there and they – oh they got us in one by one in the end, once our lawyers said, “Oh you've got to make a deal.” But when they get in there they [the ACCC] say, “We spent over \$2 million on this case and if you hang out and try and go for more, we'll put our costs – we'll put that on you.” So they blackmail you into it, and we've got – just haven't got any money to do that sort of, you know. You can't defend yourself, even if you're feeling you're being unjust, you can't defend yourself because they blackmail you into it. Or, you know, financially blackmail you. You can't...

Interviewee 13: To run a case where you could really defend yourself would cost millions.

Interviewee 14: Unbelievable.

...

Interviewee 13: ... our advice was, you can't – you will not get a fair settlement with ACCC. The only way we'll get a fair settlement is through the court, or a fair result, a fair result, was the advice. The only way to get a fair result is through the court. You'll never get one with the ACCC, the mediation, but the lawyers changed their opinion sort of around midday, over lunch on the last day of mediation.

Interviewee 14: Yeah, we walked out before lunch saying, “No, bugger these people, you know.” Then we walked back after lunch and the ACCC took our legal team aside. They went away for an hour, an hour and a half, and as soon as they walked back into court, “Are we going to make a deal? Are we going to make a deal?” What's bloody changed? My goodness. We were looking at each other going, “What the...?” ...Something changed while they had that chat for an hour and a half. Something changed. I don't know what it was. Because they went out of that room saying this is – these people...

Interviewee 13: It's only my opinion, but I think the lawyers realised that if the case was finished and the judge made a full finding on the case that they might be implicated, or that the lawyers who drafted the agreements might be implicated somehow and just wanted to bury the problem. So they sent us back into mediation, refused to do it – wouldn't represent us in that mediation. Just said, you guys have got to go in on your own.

...

“I’VE SIGNED IT FOR YOU; WE’VE GOT TO GET YOU OUT OF HERE.”

This next interviewee felt pressured into settling by his lawyer, even though he did not think he was guilty.³¹ While he acknowledges the barrister was probably acting in his best interests (advising him that the fine could become much larger if he fought it), he felt as if he was just a cog in a much larger machine, and that the lawyer may have had other motives for getting him to settle:

[My barrister] says we’re going to plead guilty to a technical offence. I said, “But I’m not guilty of any technical offence, I’m not guilty of anything.” [Another lawyer friend] says to me, “Just take the QC’s advice.” He said, “And then we’ll get a deal.” I’m thinking, these people are going to fine me \$100 or \$500 for something I didn’t do. They fine me \$46,000. I said, “What?” I said, “Mate, your criminals don’t get fined this much.” ... I said, “I’m not signing anything.” [My barrister], who else was there? [my solicitor], They more or less frog-marched me to the lift. I said, “Well I’m not signing anything.” [My barrister] said, “I’ve signed it for you; we’ve got to get you out of here. Because if we don’t get you out of here, you will lose your house, you will lose your health, you will lose your marriage. We’ve done a deal, \$46,000 seems big to you; it isn’t a lot of money.” I said, “How can I pay that?”

...

The lawyer for the ACCC, he came to a deal with [my barrister]. Well that seems to me, here is the criminality of the ACCC – and I hope you as a lawyer won’t take this the wrong way. That ACCC is a cash cow. [My barrister] said to me, he said, “Go and thank them for coming to a decision in the mediation.” “Thank them?” He said, “Yeah I’ve got to deal with them; I’ve got to get jobs from them.” You know what I mean, like they’re good payers. So if [my barrister] beats them, the next thing that happens is that [my barrister]’s hired by the ACCC to go after someone else. Do you get what I mean? [*Yeah that’s what barristers do.*] That’s what barristers do. I was shocked at that. ... So [the barrister for the ACCC], who’s a nice guy, he understood what I was saying. He had an intellectual grasp. He got it straight off. But he was employed by the ACCC to pursue their brief. So he and [my barrister] and the registrar, they’re going in and out of rooms and I could tell what was going on. They were trying to say, how do we get this innocent guy out of here and yet you still keep your job as barrister for the ACCC? It’s so sick.

I mean what they told me was, this will go on – unless you agree to this \$46,000 plus \$20,000 for [name of solicitor]. Unless you agree to this, your life’s going to be hell for the next six years. So I’m [such and such an age]. You know the years that I thought I was going to take it easy, these bastards are going to have a field day because they know I don’t have the energy, they know I don’t have the money. The fact that I’ve done nothing wrong is of no relevance whatsoever. They can pretend to be pursuing the Trade Practices Act, doing their job. So to justify their existence they’ve got to find – if they can’t find real criminals...

³¹ This interviewee was not particularly wealthy or commercially savvy but he was well connected and therefore had excellent lawyers and friends around him.

... But the humiliation of that day is actually something I'll never forget. I felt deeply humiliated and treated as an absolute irrelevant little cog in a big wheel. We had to sort of recover from that, but we had decided that we couldn't go forward and take a chance of getting either emotionally or financially in deeper water. We really couldn't. That's the big thing about the mediation, is when we walked out, it was over. (Interviewee 9)

“YOUR ONLY CHOICE IS TO MAKE SOME CONCESSIONS.”

This interviewee got advice from his lawyers that, although he may have acted ethically, it was not necessarily legal, and that if he took the ACCC on in court, he would probably be bankrupted. So even though he thought he was in the right, he decided it was for the best to settle:

We were advised by a New South Wales SC that there was no way in a million years we could take them on. He said, “You will be bankrupted by this. Even though you might think you've got right on your side and you might have, although I'm still skeptical legally you do, you've got ethics on your side. But”, he said, “that's not the point.” But he said, “If you take them on, even if you win you will probably be bankrupted by this. Your only choice is to make some concessions.” And we got that advice very early on. Now whether we approached them with that or they came to us and said if you're prepared to settle blah-blah-blah or concede this is what we'll do. I cannot remember the mechanism of that. But from the outset we were never going to take them on.

...

[Did you ever think, “If we challenged this and fought it through the court even though it may have cost me a fortune we might have emerged...”] I wanted to do it. I was prepared to bankrupt myself. I wanted to do it. I'm on the record as wanting to do it. I said don't worry, I'll sell my house. I want to take these buggers on. But [my colleague] said, “I can't do it, it would cost me my retirement.” *[Sure. Interesting because it's quite possible in an open hearing where all these issues could have been debated.]* Absolutely, I wanted to get my side of the story out there. We knew we had to concede if we were going to settle. We knew that. We couldn't argue very strongly. We had to concede and make these concessions to be able to settle. That was clear. Otherwise we had to defend it. So we had to... (Interviewee 7)

“[WE HAD] CLEAR INSTRUCTIONS...TO MINIMISE OUR EXPOSURE BY COOPERATING.”

Whereas many of the smaller players felt bullied into “cooperating” and settling, for this in-house lawyer, cooperation and settlement was the main objective to minimise damage to the company. In this case, the fact it was illegal price fixing behaviour was obvious. They dealt with it by cooperating fully as a strategy to minimise media coverage and resulting brand damage. In the end, they got what they wanted in terms of the ACCC acknowledging that it was only one division of the company responsible, and that senior management was not aware of it.

The interesting thing was that when we first found out about this, we took this very seriously; we had to, even if we hadn't. I mean, [our company] does have a policy of we want to be perceived to be a really ethical company. I mean, we're still there to ensure maximum profitability for our shareholders but that doesn't affect your - the fact that you can be an ethical company. This is clearly not - this conduct is clearly not ethical. It's a

criminal offence in Canada; it's a criminal offence in the United States; it's a criminal offence in Korea; it was a civil offence in Australia, New Zealand and in Europe; and it's conduct, which in this day and age, is inappropriate. When we found out about it we immediately went to the board - to the CEO and to the board and I give the CEO his credit. He, at that point, gave clear instructions that we should continue with the investigation. When it became clear we had a problem I went to the chairman and the chairman said yes, you must immediately go to the ACCC. I wanted to make sure; we knew we weren't the first but I wanted to make sure we weren't the last. From that point on, our clear instructions from the board - the no doubt position by the way we put it to the board - but our clear instructions from the [our company] board was to cooperate fully and to minimise our exposure by cooperating rather than minimise our exposure by obfuscating.

...

I mean, from my perspective, I just - this is the fundamental difference of opinion - I believe that a corporation, if they're going to get through stuff, they have to be willing to admit it, and then say what they did wrong and what learnings they got out of it. I just think a corporation which tries to bury it, number one the media will never let you bury it, and particularly when you've got the media exposure we've got. So, my view is if we're up front - I actually personally think - and I'd be interested in your views - but for an organisation which has been through a global cartel, the [our company] reputation has been quite - we've got through it as well as we could have.

... I'm not sure if the board was quite as thorough as that. I think that the board's view was we just had to take it on the chin. Clearly, we tried to explain, and the main thing was to try and delineate where the conduct was, and that's the reason why, when you look at the statement of admissions, you'll note that the Commission has confirmed that there was no knowledge of the cartel above the level of [the relevant division]. The last thing we wanted was any allegations of executive management or the board being involved - or aware. (Interviewee 21)

“LET’S JUST GO DOWN AND LET’S GO THROUGH THE PROCESS.”

It is also true that some small business people/individuals chose to cooperate (rather than feeling bullied into cooperation) in order to get it over and done with – and perhaps because they felt it was ‘fair cop’. Interviewee 1 had the attitude that it was worth just doing what was necessary to get through the process and not fight it. He was surprised when he saw someone else in the case continuing to fight in court.

[W]e said well we’re not going to argue with this thing. Let’s just go down and let’s go through the process. So on this particular day as opposed to going down with all the smart legal eagles and having it extended and postponed for another six months, there were four companies just said yeah, that date’s fine. We’ll do it then and that’s it, you know...the barrister, I suppose, the barrister stood up and said, you know, and I read to your Worship this morning, you know, 900 pages and we just said yeah, we’ll accept that, that’s fine, we don’t need a solicitor for this bloody 900 pages just over and over again like a 78 record. So that was fine, you know. Bang, stick the hands up, you got us, yeah, yeah, dead right, yeah, that’s exactly what happened. *[When did you make the decision to cooperate fully?]* The day the packet of paper [the s155 notice] got here. Absolutely no doubt. I mean what were

you going to say; I'm not going to answer the questions? ...I've never seen that before, and it obviously did him some good at the end of the day whereas I sort of had the attitude, oh what's the point. The solicitor certainly didn't say, well no you need to oppose these ones and these ones, and there's a couple in there, there are one or two in there that are quite clearly wrong, but they're incorporated as being, you know, so. (Interviewee 1)

While most interviewees based their decision to settle on commercial factors, these last two also saw a benefit to settling in terms of minimising damage to their reputations. Most wanted to fight, or at least claimed they were innocent, but ended up conceding in the face of what they regarded as the ACCC's unwillingness to compromise and the potential toll a court battle could have taken – personally and financially. Often this decision was reached with the advice of a lawyer.

In terms of how criminalisation might change these equations, we might see people more willing to fight if they risk going to jail by settling.

CHAPTER 4 INTERVIEWEES' EXPERIENCES OF SANCTIONS AND OUTCOMES FROM ENFORCEMENT ACTION

4.1 INTRODUCTION

The criminalisation of serious cartel conduct was based to a large extent on the argument that the previously available civil penalties do not hurt individuals enough to deter cartel conduct, and that therefore jail for individuals is necessary. Financial penalties were the main penalties available under the civil cartel prohibitions, and the civil penalties actually imposed by the courts have generally been quite low compared to the maxima available, although they have increased in recent years.³² Our interviewees had actually experienced the full brunt of civil enforcement: what do they tell us about how much the penalties “hurt”? Were they deterred from further breaches as a result? Or would harsher penalties have been necessary to deter them? What about others in their industry? Their experiences can help us understand to what extent the previous civil fines were or were not inadequate as deterrence, and provides a baseline against which to compare the potential deterrent effect of criminal sanctions.

This chapter is divided into four sections:

- Section 4.2 considers our interviewees' experience of the financial penalties imposed as a result of the enforcement action. We found quite a variation in the degree to which interviewees experienced financial penalties as a hardship. Some planned (using legitimate or illegitimate strategies) for penalties – albeit usually only after the ACCC investigation began – so that they would not feel or minimise the extent of any hardship. For others, however the consequences included losing their house. We have already seen (in section 3.3 discussing the reasons for settling with the ACCC) that most interviewees found the financial costs of the investigation and enforcement process quite burdensome.
- Section 4.3 considers the non-financial costs of the ACCC enforcement action. The overwhelming message from our interviewees was that it was more the financial and non-financial costs of the investigation and enforcement *process*, rather than the actual formal penalties, that they remember experiencing as a hardship. For some there was also an impact of the enforcement action on their reputation.
- Finally section 4.4 reports on the interviewees' reflections and insights into the impact of enforcement on their future behaviour and that of others in their industry.

4.2 FINANCIAL PENALTIES

4.2.1 FINANCIAL PENALTIES NOT A HARDSHIP

For some individuals and businesses in a stable financial position, the penalties seemed relatively low for them. Two interviewees described their financial penalties as ‘peanuts’; one because he

³² See above note 15.

felt the dollar amount was low,³³ and the other felt the dollar amount was high, but not compared to other business losses. As he explained,

[i]t didn't change my life, it didn't change the way I do things... We naturally took commercial advantage. We wrote to the court and said we'd pay it off [over a period of months]. (Interviewee 17)³⁴

For some, although the fine was a 'hit', they were able to employ various strategies to lessen the impact. Interviewee 1 suggested that companies in his industry 'saved up' for the fines over a period of time as the enforcement process took so long. In the case of Interviewee 5, a small business owner, even though he did not set aside money in anticipation of a penalty, he had a savvy wife who was able to refinance their mortgage so that a fine that turned out to be in the tens of thousands did not ultimately disrupt their daily lives. In respect to his wife's response to the outcome, he said that she is "someone who sees the train coming. It's not as if it gets there and surprises her. She said, oh well, that was always going to be an option."

We also became aware during our attempts to identify businesses and individuals for interview that a number of businesses seemed to have used less legitimate financial planning strategies to avoid feeling the pain of the financial penalties. Searches of the Australian Securities and Investments Commission (ASIC) website showed that a number of businesses that had been penalised had closed down and reopened under a new name, but still with the same people involved. It seemed that they had used the 'phoenix strategy' to avoid their corporate fines, leaving only the (generally smaller) individual fines to be paid by the individual owners of the business that had been involved in the detected breach.³⁵

Other interviewees commented that the penalties were high, but they could afford them because of their financial situation prior to the process (as opposed to deliberately saving money for it), or they were able to use other, legitimate strategies to avoid the full costs imposed on them. One interviewee, Interviewee 17, was able to negotiate the fine, and in the end felt that the ACCC was more interested in notching up prosecutions rather than the fine itself – "[t]hey got the scalp and the money wasn't that important to them." This experience and opinion is echoed in Interviewee 11's comments, who stated that, "[a]fter the headline they were very cooperative...They didn't care about the money. They just wanted the headlines."

4.2.2 FINANCIAL PENALTIES WERE A HARDSHIP

For some interviewees, however, the fines were not easily absorbed into their daily financial operations, and had quite a severe impact on their businesses and lives. For one group of interviewees who had all been involved in the same conduct, their legal counsel was seen as the

³³ The penalty was agreed at less than \$20 000. That person said he had insurance and therefore could have challenged the ACCC case, but decided not to since the penalty was only \$15 000.

³⁴ The penalty was in the hundreds of thousands for the whole business and the individuals involved, but compared with the recent loss of millions in a business deal gone wrong, it was "peanuts": Interviewee 17

³⁵ Confidentiality promises prevent us from using any quotations about this issue.

main determinant of the outcome.³⁶ They all used the same lawyer who was apparently quite inexperienced in trade practices matters and did not negotiate as good a deal for these respondents in agreed penalties as some other interviewees had achieved:

Interviewee 13: [to the other interviewee] When you told them that I'm in a bit of trouble there, I'll probably have to sell my house, I think they said to you, well if you can show us financial documents to prove that then we'll look at that.

Interviewee 14: They wanted to see the house, the – yeah, like everything. Bank statements and all that sort of stuff. Now solicitors and our legal side said, no, that's – we're not going to show them that. What right have they got to show them all that?

Interviewee 13: He's been under a bank order to sell his house. That's the outcome of it basically.

For Interviewee 4, the fact that the penalty would have been extremely damaging was used as a way to justify avoiding paying it. If he were to pay the penalty, it would have “sunk” his business, putting around 30 people out of work, so it would have affected more lives than just the individual in the case.³⁷ Another interviewee only just survived the process due to a boom in his industry immediately after the process, but had expected the penalty to put him out of business. When asked whether he thought the ACCC intended for him to go out of business, one interviewee explained,

They fought very hard for it. But the Justice just laughed at them and said, “You know, you're not dealing with Mr Pratt here. You're dealing with a family business and a lawyer who'd tried but failed to get the law right.” (Interviewee 2)

While the penalties were reduced or rescinded in these stories, the interviewees still spoke about their shock at learning the amount of the fine, and the financial stress they were put under as a result of the process itself.

They wanted to send us under and my own research...was that – and I said to my lawyer: I reckon I'll get no more than a \$20,000 fine... He said: I think it'll be \$50,000 or something. Anyway, we went to another lawyer who said \$300,000, another one said \$100,000... So you know, we fought that and Justice French said \$20,000. But the costs order was immense. The costs order was 50 or 60 grand... I had to pay the ACCC's costs and my own legal fees... So, you know, it's been a terrible experience. (Interviewee 2)

Others simply felt they could not recover from the penalties imposed. For one interviewee, although he was not completely put out of business, his business suffered irreparable harm.

It's knocked the wind out of my sails... I don't think I'll be able to jump back up, and that's most probably contributed to the demise of this place [his business] also along with the stigma that goes with it. (Interviewee 1)

³⁶ While this is the only case of this discussed here, this is not the only mention made by interviewees of how they thought the outcome was impacted by not getting appropriate legal counsel.

³⁷ Confidentiality promises prevent us from disclosing the strategy the interviewee used to avoid paying the fine.

4.2.3 BIG BUSINESS EXPERIENCES

These and other similar experiences seemed limited to smaller businesses, however, as larger companies were mostly able to avoid penalties that put the future of their business at risk. For companies that already had demonstrable compliance programs in place, it was possible to lessen the impact by demonstrating that they did not instruct the person who committed the breach to do so, and in fact, had tried to educate their employees about compliance.

They were asked by the judge...well what else can [our company] have done, can you tell me? What is it that's wrong in any of this [i.e. our compliance program]? So that helped and I think that was probably part of the reason it went there [i.e. the individual getting off completely]. (Interviewee 17)³⁸

Where there was no evident corporate support for an individual's actions, outcomes such as the one just described were seen as 'good' outcomes. While in some cases the individuals offered up to the ACCC were absolved by the courts, others 'did not get off so lightly.' Companies that could point to their structures in place to prevent breaches were able to avoid the brunt of the process. As one in-house lawyer explained,

[w]e consented to orders saying we'd comply with our legal obligations. So from our perspective that was quite – that was a good outcome. Because it did recognise that there was no corporate support for the behaviour that was done and in fact the behaviour was very actively discouraged. (Interviewee 25)

4.3 NON-FINANCIAL PERSONAL AND REPUTATIONAL COSTS OF THE ENFORCEMENT PROCESS

The non-financial costs of the enforcement seemed to have more of an impact on the interviewees than the financial costs. Indeed, it is well established that it is not just the direct impact of financial penalties and any other formal legal penalties that are important in creating the deterrent effect desired by the ACCC. There are also a range of other indirect and informal effects of the sanctions and of the investigation and enforcement process that might increase specific (relating to those who have been prosecuted) and general deterrence.

In this section, we consider first the personal costs of dealing with the process of investigation and enforcement, and then the impact on reputation specifically.

4.3.1 PERSONAL COSTS OF THE ENFORCEMENT PROCESS

The idea that 'the process is the punishment' (Feeley, 1992), which is well-documented in others' research on criminal processes and business regulation, was common amongst our interviewees:

³⁸ This interviewee commented that beforehand he had thought the penalty would be several times the amount it actually turned out to be.

It disrupts your entire life. I don't think people really realise that until they're involved. It's not like a speeding fine. It doesn't come in the mail, so that you can pay it and you go "cool!" (Interviewee 25)

This theme is repeated by several interviewees who variously described the process as "so stressful" (Interviewee 22), and "totally draining" (Interviewee 13). Interviewee 5 felt that "just the process of disclosure of documents [s155] is so disturbing. You would never do anything that put you in the light of the ACCC, on the grounds that the compliance process is so onerous and so disturbing to home and work." Interviewee 6 experienced the process as "a big drain on my life...the jail thing doesn't worry me, it's just the whole exercise...it takes 10 years out of your life." Another interviewee described his experience:

I was bullied and it was just horrendous... I was plonked down in a chair a bit like the Spanish Inquisition I imagine... It was intimidating. It was aggressive... There was no ability to talk to my lawyer and my lawyer wasn't allowed to say anything. (Interviewee 7)

Aside from, or often due to, the stress of the process on themselves personally, many drew attention to the impact on their family and social lives. Some interviewees were able to survive the process better than others. Some actively tried to keep their business and personal lives separate in order to survive the process. As Interviewee 6 explained, "you have to, or you get consumed." For Interviewee 4, who had been through the process before, it was easier for him to just get through the process and move on, stating that "I couldn't do anything about it, so..."

For those who had some idea what to expect, the investigation process did not rattle them significantly. For those who did not, however, it was quite a shock. Lawyers who were more familiar with the aggressive nature of such matters were able to take it in their stride much more than inexperienced individuals from smaller businesses. Interviewee 25 tells that "the process is the punishment, not necessarily the dollars... I'm in litigation by background, a litigation lawyer. Only weirdoes like me like going to court... It's no fun if you're in any other position."

Many spoke of the detrimental impact the whole process had on their personal lives. One warned,

[f]rom the time you get charged you would almost be giving advice to someone: 'Put plans in place for the breakdown of your marriage, your family and your job. So get that in your head; that's the game you're playing for. And you won't have time to defend yourself and work and keep your family intact through this process.' (Interviewee 5)

One interviewee felt that even though he was able to keep his family sheltered from it for the most part (he did not tell his younger children at all), the stress of it all impacted on his health.

It certainly had an effect on me. I mean I used to shake every time I went to the ACCC. I mean I can't handle that sort of stuff. I'm not built that way. Then I had a few heart attacks... I've had three heart attacks, four stents. (Interviewee 18)

For one interviewee, when he believed he was prosecuted unfairly, the process shook his sense of a just society – the moral implications of the process were just as disturbing to him as the concrete ones.

It destroyed three years of my life...You can't sleep, you can't relate properly, you know all your life you've tried to contribute to a good society and you find that the people that run

the society are – bad is not quite the right word. But they're unintelligent, they're unfocused on what they should be doing, they're irresponsible. It's a shock to your system; it's a deep shock. What saved me was all my friends rallied around and had fundraisers to pay the fine....It saved my sanity to know that there are good people still out there, you know? (Interviewee 9)

This comment suggests that the non-financial impact of enforcement action is often felt more acutely and in a more ongoing and personal way than the financial penalties themselves. The time-consuming and expensive nature of fighting a charge often affects one's business, even if the penalty itself would not have had such a detrimental impact:

[The penalty] wasn't going to send us broke, but if we kept fighting it and fighting it, fighting it, it was like - and then what happens is you start focusing on one thing, instead of focusing with your whole business. So you're consumed in that case, and everything starts falling by the wayside. (Interviewee 6)

Interviewee 7 felt it changed who he is as a person, that he has become a bitter person. He stated that "I'm now bruised rather than broken from that, but the bruising's pretty long term." Interviewees 13 and 14 spoke of marriage break-downs, and one interviewee told a shocking story of how he learned that someone else being prosecuted for cartel conduct at a similar time to himself committed suicide.

[O]ne of the fellows who owned and managed a company who was part of the [cartel] in a big way and very much a mate of [one of the leaders of the cartel], he had taken his own life...I believe [the other members of the cartel] had gone to see [the fellow who suicided] and said to him, here's what we've done [invoked immunity and pointed the finger at him], and I think that precipitated that event. (Interviewee 1)

The interviewee unequivocally attributed the suicide to the situation with the ACCC and his fellow cartelists.

4.3.2 IMPACT ON REPUTATION

For individuals who relied on their professional reputation for work, the ramifications of having a mark on their 'CV' were quite high.

Professionally it's a flaw on my character, on my CV basically forever... I was unemployed for seven months and relatively lucky to get a job where I am now. They don't know my background and I'd like to keep it that way. (Interviewee 8)

Some felt that, rather than the direct and indirect financial impacts, it was the damage to their reputation that was detrimental to their business, and this was felt particularly acutely by Interviewee 1, who said that, "commercially it's destroyed this business." To some extent, this may be a matter of perception. For example, one felt that, while no-one approached him directly to discuss his involvement with the ACCC, the media coverage would have affected his business.

It almost certainly did because they [consumers] put two and two together and they think it's the worst thing in the world. (Interviewee 18)

Others felt that the impact on their reputation was negligible. One interviewee's explanation for not having sustained commercial damage was that the whole industry was doing the same thing, so there was not a sense that their company had acted wildly inappropriately given the industry standard.

Others simply avoided an impact on their reputation in a number of ways. One explained that the media did not cover their story as extensively as they expected.

The ACCC were spraying things out in the media. We're a listed company overseas. So we have to worry about these things...But when it did come out, the press coverage was more low key. There was something else happening at the time that meant the press weren't as interested. (Interviewee 3)

Interviewee 6 was able to change his business's trading name to avoid an impact on their reputation. Another interviewee felt that, as no-one takes the ACCC seriously, their reputation did not suffer for having been prosecuted by them.

There were those who felt that their reputation was able to survive the process because of the good reputation they already had in their communities. Interviewee 11 reflected that the impact on his reputation was not as bad as he anticipated because his business had a reputation for driving competition that was good for consumers in the local area, so people were simply surprised to hear of his company being investigated for anti-competitive conduct by the ACCC, and generally remained supportive of the business. His business obviously relied heavily on its reputation as part of its business model (by being seen to actively be on the side of the consumer), and he did mention that he thought the potential impact on one's reputation was a larger deterrent than financial penalties. This is echoed by another interviewee, who felt the process had a strong impact on his personal life, but that the impact on his reputation was not as bad as he expected, in part due to the amount of support he received from the local community.

In my case the customers understood that the industry was competitive because I made it competitive. I don't think they believed I would ever do anything different. I think there was a mismatch between the outcome and what they thought. (Interviewee 5)

The same interviewee found that his friends and clients continued placing orders with him, which he puts down to them deliberately showing support.

I received untold orders [for product] during the process and immediately after the details of the case were released, which I put down to friends supporting me. It took me a while to work out what they were. For them it was business as usual but for me I wasn't sure what that was. (Interviewee 5)

4.4 IMPACT ON FUTURE BEHAVIOUR

One important objective of enforcement action is ‘specific deterrence’; that is, deterring the specific individuals and companies proceeded against from engaging in the same misconduct in the future. The ACCC might also hope that rather than just frightening them into not doing it again, it might teach them about the law. A number of interviewees made some comment about how the investigation, enforcement proceeding, and penalty changed (or did not change) the behaviour of themselves and others in their industry who had suffered enforcement action.

4.4.1 NEVER AGAIN

For Interviewee 4 and Interviewee 18, who claimed to be unaware that what they were doing was illegal, their response was that now that they know about the ACCC and the consequences of engaging in that kind of behaviour, they’ll just never do it again. For Interviewee 2, this extends to a hyper-sensitivity to potential grey areas that could land him in hot water again.

Interviewee 5 explained to his employees, “it’s not about right or wrong or justice: just don’t do it. Don’t get anywhere near a competitor. If you do then you fill in your report, declare it, and keep a record of the conversation of what was said, because that’s what will protect you.” This comment indicated an opinion that the ACCC blindly and amorally prosecutes unsuspecting people, and as a result you could end up unwittingly in the firing line without any warning.

This feeling is echoed by other interviewees – that they have learned that they cannot rely on their own sense of right and wrong in relation to cartel conduct, so they need to make sure they do everything by the book in case the ACCC sets their sights on them. As Interviewee 5 explained, “at the time you think, ‘oh well, this will blow over; it’s nonsense.’ But now I would understand that whether it’s nonsense or not, it’s going to be expensive and long-term and injurious to people.”

Interviewee 13 now will not do certain things without ACCC approval (the ultimate bullet-proof vest) – “whatever you do, you’d put it before the ACCC.” Another interviewee now leaves a paper trail to prove he is trying to stay on the right side of the law.

[After the enforcement action] I’ve actually excused myself and been noted from meetings that I think have gone the wrong way...[One time] they started talking about pricing...I excused myself from that, I just thought well I don’t know if it was wrong or right. But I thought, I’m not going to jail over this... (Interviewee 11)

This interviewee ended up leaving the industry he was in. This was a move that was planned before the ACCC enforcement action, but was sped up by his newfound hyper-sensitivity to certain aspects of what he considered normal business operations in that industry. Interviewee 1 also felt so shaken by his experience that it put him off actively pursuing work in that industry. He explained that, “[m]y wife often says to me, this thing absolutely broke you...I guess I lost a lot of, perhaps, desires to get out in the industry and continue contracting.”

4.4.2 LITTLE IMPACT

On the other hand, some interviewees felt that the enforcement action made little impact on their behaviour afterwards. For Interviewee 6, while he was careful to avoid explicit behaviour that could be interpreted as price fixing, he still acknowledged that that's just how his industry worked and that "we always talk business...because we always want to know where we stand", so it hasn't completely deterred him from talk of pricing. He was conscious, though, of the possible implications of being caught out again given he has already been prosecuted once. Although he became more careful, the possibility of jail time remained relatively abstract, and he still discussed prices after purchases had gone through. Interviewee 1 felt that, although he personally became a bit of a pariah in his industry, and people steered clear of him, there has not been any impact on standard practices within the industry itself.

4.4.3 COMPLIANCE PROGRAMS IN BIG COMPANIES

For larger companies, there was the added effect of changes to their in-house compliance programs. The compliance programs may be as much about educating people about how to protect themselves from liability, as about the substantive policy of the legislation. As Interviewee 5 explained, "the message to my staff is make sure you can prove yourself innocent, and don't get anywhere near the edge [of illegal conduct]".

Some interviewees who had been personally prosecuted by the ACCC had since become the compliance officers for their companies, with these interviewees citing the reason that going through the process made them experts. Interviewee 5, however, said that he wanted to be the new compliance officer for his company after the enforcement action, but his company's law firm wouldn't allow it.

What they basically said was it would be seen by the ACCC as putting the fox in charge of the hens, which I found a little bit offensive. But you know, I pleaded guilty so I was guilty. Basically the person that drove the compliance manager was me, so he thought I was relentless and unyielding, and I was. But I didn't want anyone else to have to go through that. (Interviewee 5)

From these interviewees' perspectives, their experiences have them uniquely placed to be passionate advocates for compliance, and to help prevent others from going through the same process.

In some cases, prosecution acted as a catalyst for better in-house compliance programs and training. As one interviewee explained,

[i]f you are in-house in a large company and its trouble like that, there's one little ray of sunshine in there. You've got the cheque book open and you can set up a hell of a lot of good stuff for going forward, because that's the time they will not scrimp. (Interviewee 17)

Other companies hired full time compliance officers to make sure they stayed up-to-date, and implemented new reviewing processes to make sure the right people have the right training, as was the case for Interviewees 21 and 26, and Interviewee 22 found that they were better able to "keep the compliance message current".

4.4.4 COUNTER-PRODUCTIVE EFFECTS

A couple of interviewees felt that the enforcement action was counter-productive, based on their understanding that enforcement is intended to create better corporate citizens. Interviewee 9 felt that it had hindered competitive behaviour because people in his industry were too scared to change prices. Interviewee 5 considered how jail time may affect a person.

I think I've got a pretty positive attitude, a very positive attitude to compliance. But if my marriage had failed and my kids weren't talking to me, and I'd been to jail, and I couldn't get a job because I'd been to jail, and I'm frustrated on a lesser role, would that make you a better citizen? I'd be surprised. (Interviewee 5)

In the corporate environment, one interviewee also felt that the enforcement process had a decidedly negative effect on morale within their company. For the employees who had done the right thing, it was very disheartening to hear that someone higher up was being investigated. As the interviewee (an in-house lawyer) explained, when the news of one of their company directors being investigated broke,

[t]hey're all going, hang on, we understood this stuff...We understood it and yet here's a director of the company, how could he not have understood it? The anger, the hatred that was in there was palpable...It starts to undermine the whole foundations of what you've put in place [i.e. compliance programs]. (Interviewee 17)

While he explained that the incident was clearly a one-off within the company, it made it harder for those who were trying to get the compliance message across to be taken seriously.

CHAPTER 5 INTERVIEWEES' OPINIONS OF APPROPRIATENESS AND LIKELY IMPACT OF CRIMINALISATION

5.1 INTRODUCTION

In the final part of each interview we asked the interviewee for their opinion as to whether cartel conduct should have been criminalised and whether any cartel conduct should be treated as a criminal offence (even if they did not think their own conduct should have been treated as a criminal offence.) This chapter reports on their responses to this question.

Section 5.2 reports on whether interviewees thought criminalisation was appropriate as a moral response to cartel conduct in any circumstances. As with other aspects of the interviews, interviewees from small businesses generally had a different way of thinking about the appropriateness of cartel conduct than interviewees from the top of large businesses. Small business people tended to see criminalisation of cartel conduct as not appropriate at all or as contingently appropriate where certain additional factors are present. People from the top of large businesses were much more likely to accept criminalisation of cartel conduct as generally appropriate (although as we saw above in section 2.2.2 they see themselves and their peers as likely to be able to avoid criminal responsibility).

Section 5.2.1 reports on the responses of those interviewees who saw the criminalisation of cartel conduct as appropriate at least for some types of cartel conduct. Section 5.2.2 reports on those who saw it as never appropriate to treat cartel conduct as a criminal offence. There were also a number of interviewees – from both large and small businesses – who commented that criminalisation is inappropriate as a method of business regulation in general and because of their experience of the ACCC in particular. These latter responses are discussed in section 5.2.3. Here interviewees made a distinction between what the criminal law should do and what business regulation should do – so that criminalisation of business conduct was seen as “regulatory overkill” and inappropriately sensitive to specific industry circumstances.

Section 5.3 reports interviewees’ responses concerned with their opinions of the likely impact of criminalisation and whether they believed it would be an effective deterrent in the future. A number of interviewees commented on whether they would have behaved differently if cartel conduct had been a criminal offence in their time.

These are business people who are, in one sense, best informed about the ACCC and the cartel offence – due to their own experience. These comments provide a valuable insight into how well-informed business people think about the appropriateness and impact of cartel criminalisation. This is a useful supplement to the public opinion survey we conducted as part of this research, which measured general public opinion about the appropriateness of cartel criminalisation (Beaton-Wells et al, 2010). On the other hand, these interviewees had a strong (and natural) tendency to define criminal behaviour as something that “others” do and to define themselves outside of the set of the type of people for whom criminal behaviour is possible.

5.2 APPROPRIATENESS OF CRIMINALISATION

5.2.1 CARTEL CRIMINALISATION IS MORALLY APPROPRIATE (AT LEAST IN CERTAIN CRICUMSTANCES)

CRIMINALISATION CONTINGENTLY APPROPRIATE: SMALL BUSINESS

When asked whether they agreed with the criminalisation of cartel conduct, small business people generally drew on moral (often implicitly legal) concepts to set out the circumstances in which they believe it is and is not appropriate to treat cartel conduct as a criminal offence. These included: deliberateness of the breach; the scale of harm or damage to others; whether the perpetrator personally benefited from the conduct; whether the perpetrator has a high income; and in big corporations where senior management is involved. A number of interviewees specifically mentioned the *Visy/Amcor* matter and Richard Pratt as examples of a situation where criminalisation was appropriate.³⁹

Needless to say, they mostly did not believe that their own conduct fitted these criteria. Small businesses, among which they counted themselves, were seen as uneducated and barely making ends meet and therefore incapable of inflicting great harm or making great gains anyway. They generally assumed that big business and high up executives were much more likely to engage in cartel conduct that is deliberate and harmful to a larger number of people.⁴⁰ In the event that a breach was deliberate, large scale, and directed from a senior level, many interviewees expressed strong support for criminalisation.

Like I think, certainly if you were looking at a large scale [cartel] involving senior management, wherein that should know better and know what they're doing. That real deliberate breach - I don't have a problem with the criminalisation... (Interviewee 25)

For one interviewee, white collar crimes, such as price fixing for personal gain, should be treated the same as blue collar crimes, such as physical violence, even though white collar “criminals” might not expect this and therefore will find it even more stressful. This interviewee also commented that he believes criminalisation is appropriate where there is an awareness and level of sophistication by the perpetrator of a breach, implying that for small-time operators who may not ‘know better’, it might not be so appropriate.

That's where like you said with the Pratts and the upstanding community members, it affects them more because they're all put on a pinnacle and say well this guy is an

³⁹ In 2005, the ACCC began an investigation into price fixing allegations made towards one of Australia's largest manufacturing companies, Visy. In November 2007, Visy was prosecuted for cartel conduct and given a record-breaking penalty, and was accompanied by a public apology from Visy's chairman, Richard Pratt. Amcor is the rival company with whom they engaged in price fixing. See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 3]* (2007) 244 ALR 673. Later the ACCC sought to take criminal action against Mr Pratt in relation to alleged misrepresentations during the investigation of Visy's conduct. However this potential criminal action was abandoned and Mr Pratt passed away soon after.

⁴⁰ Ironically an early proposal for the criminalisation of anti-cartel conduct put forward by the ACCC had explicitly adopted this type of reasoning, by suggesting that the offence only apply to big business (Beaton-Wells and Haines 2009, 236).

upstanding citizen, this, that. All of a sudden he's not really that side of person that you are – that he's pretending to be. And his whole life falls apart and it drives them down. They get sick and stress and depression sets in. Because they think a white collar crime is different from a blue collar crime as in a criminal matter, you know, and it's just as bad. Really, if you're ripping someone off it's the same as pointing a gun to their head. If you're actually out there doing that, they should be punished the same, really... Mate, jail straight away, throw them in there. I've got no - and the same thing with this - if the price could be such a low - and it's for personal gain, lock them up, not a problem. If you've gone out of your way and they can easily demonstrate 100 per cent guilty, see you later. You deserve it, you deserve it. (Interviewee 6)

Another interviewee also expressed the opinion that if a breach is deliberate and it detrimentally affects thousands of people, then criminalisation is appropriate. However the example he gave was not cartel conduct but something closer to 'abuse of market power', the more common concern of small business people:

Now having said that, if someone deliberately goes out and if Visy had deliberately gone out and said we're going to screw Amcor, we're going to make it really hard for them and we're going to kill their business and they will have to close down and the lives of thousands of people are going to be ruined because we're going to deliberately go out and do that. Well I can understand that being a bit different. (Interviewee 8)

One in-house lawyer from a large company agreed with the view that only deliberate conduct should be criminalised:

I think certainly in the circumstances we went through, criminalisation is not appropriate. I don't think the skill set is appropriate. Like I think, certainly if you were looking at a large scale involving senior management, wherein that should know better and know what they're doing. That real deliberate breach – I don't have a problem with the criminalisation... I think you've got to have a - I think you're back to that good old you know, mens rea and what's the intent? I think there's got to be an element where the intent can't just be ignorance. It needs to be the reckless ignorance or something. You know, reckless indifference or something along those lines. So I think that means in terms of its effectiveness as a deterrent, I don't think it's that effective. But I do think it is appropriate where there is clear, where there's deliberate misconduct with intent. (Interviewee 25)

The following interviewee drew a distinction between large companies that have a 'responsibility' to the public to conduct themselves in an ethical manner but who still deliberately engage in misconduct, and smaller business people (like himself) who do not know better. This interviewee felt that there should be a clear dividing line between cartel conduct by big corporations (that should be criminalised), and cartel behavior by small businesses (that should remain in the civil realm only):

I mean, if the corporation sets out to defraud the public or something, well yeah of course... You know, where there are victims and, you know, many, many victims... Or even if there's any victim in the public from big corporations... If there were checks and balances to ensure that that actually – that was the way [criminalisation] was sort of carried out, yeah, I'd say it would probably be beneficial. Beneficial to business and the community to

have the demarcation line [between what counts as criminal and what doesn't]. (Interviewee 1 Interviewee 13)

Another interviewee also saw the need for this demarcation, and that criminalisation for big business would be appropriate. This was based on a moral assessment of price fixing and bid-rigging as 'evil' if it involves the whole market. His initial response on what an appropriate sanction might be was a 'substantial fine'. When pressed about the appropriateness of jail as a sanction he commented that it is appropriate for other white collar crime such as corporate fraud, but was reluctant to see it as appropriate for cartel conduct:

I can definitely see where it is illegal if ... you know there's only three tenderers and you go talk to those other two tenderers. That is evil...I see that as a criminal thing. I really do see that as a criminal thing. Where there's only say three tenderers and they all put their heads in - dead set criminal.

[Do you see jail as an appropriate thing or just a fine?] No. A fine. A substantial fine, yes. Depending on how big it is. And, I don't think it's jail. But depending on how big it is. I mean if it was collusion on [a big] tender, you know, I think they should give them five million bucks [in penalties]. *[Do you think there's anything where jail would be appropriate - in this area - collusion, and that kind of thing?]* Personally, aah I think depending on the level of it. You see some of these blokes have got jail like the bloke in Sydney from HIH...Ray Williams yes and his off-sider Adler and all those blokes. They were naughty. They deserved to go to jail. Depending on the extent of how much it is. I guess there's somewhere there for jail. [Sounding reluctant.] I do if it's bad enough. You know jail's a pretty awful place. Mind you that's a punishment for a pretty serious crime. Collusion - it's a naughty crime. It's naughty if it's real collusion. I don't really think it's jail... If it's corporate [fraud]. They think they're smart and they can get away with it - you know, corporate crap. Well then maybe, maybe corporations and big time [corporate fraudsters], but [not] little fartarse blokes - I know a bloke who went to jail and didn't come out. That was for speeding. He wouldn't pay his fines. What happened in jail was just horrendous. So I think jail's a terrible place. ... I didn't ever think I'd go to jail for this and I didn't think the fine was going to be anywhere near that sort of money. (Interviewee 18)

Overall these comments indicate quite nuanced or ambiguous views about when cartel conduct should count as criminal and when it should not:

It really does depend on the scale I think. I mean if you look at something like and I don't know all the details but like the Pratt situation, then well that's probably up there with the criminal issues because it really is a deliberate attempt to extract more money ... on a fairly massive scale. But for the little blokes who are sort of plodding along essentially trying to do the thing, they're trying to find the margin and we're talking margins of two or three per cent ... I mean yeah the actions are probably motivated the same, it's just the quantum involved. I suppose if you looked at it on assault basis, you have summary assaults where there's pretty much there's a fine and you get a conviction and you have criminal assaults which are indictable offences or serious indictable offences ... that sort of scaling would be appropriate. (Interviewee 15)

However, in the law itself and also in the results from our survey of public opinion, there is no such contextual sensitivity: cartel conduct is a "per se" offence and contextual factors may only

be taken into account for sentencing or for the purposes of authorization of contravening conduct before engaging in it. In our public opinion survey we found that various “extenuating” circumstances added to our vignettes (such as that the conduct was engaged in small business rather than big business, to save jobs, or to pursue environmental goals) largely did not change the views of respondents as to the seriousness of cartel conduct (see Beaton-Wells et al, 2010, 96-108).

CRIMINALISATION GENERALLY APPROPRIATE: BIG BUSINESS

In-house lawyers from a big business had a different view to those of small business people. They generally assumed that cartel behaviour is wrong and therefore should be criminalised without any need to make contextual judgments about when cartel conduct is criminal and when it is not. They also suggested that it would make their jobs of encouraging compliance easier, as they felt people would take potential criminal sanctions more seriously.

From a professional level, I think it should be criminal. I'd like to see the investigation and the enforcement process improved, and I think that's going to take a bit of teething time, but I think it should be criminal, and I think it's important in a compliance message to be able to say it is criminal to change a conduct. (Interviewee 22)

I mean, I've got to admit I'm very much in the Allan Fels/Graeme Samuel camp on this, it's either theft or fraud and it should be treated like a theft or fraud. Again, from a compliance perspective, if you're the general counsel or responsible for the compliance within the organisation, being able to say that it's a criminal offence, then actually people take it seriously. The problem previously was individuals didn't get prosecuted. I mean, not even Pratt. (Interviewee 21)

Only one in-house lawyer, Interviewee 27, who we will hear from below, worried that, in practice, the ACCC might not actually limit themselves to enforcement in the archetypical cases of cartel, where criminal enforcement was morally justified.

Another in-house lawyer from a big company assumed that it was inevitable that cartel conduct would be criminalised without making any personal assessment as to whether it was morally appropriate or not:

I don't have any firm opinion, but wasn't it going to happen? Wasn't it inevitable that something, if the rest of the world was doing it? (Interviewee 19)

5.2.2 CARTEL CRIMINALISATION IS NOT MORALLY APPROPRIATE

There were a number of interviewees, generally from small businesses or lower down the hierarchy in large businesses, who believed treating cartel conduct as a criminal offence was never appropriate, regardless of the scale or circumstances:

I remember them talking about it. I always thought: how could anyone contemplate such an absurd thing? ... It has a huge effect because so much of this conduct is not morally wrong, like mine. Everyone assumes that price fixers and anti-competitive conduct is somehow morally wrong. But there's a whole body of philosophical and economic...who

say it's not... But you know, to think that you could be in jail for something like this just takes me to Nazi Germany. (Interviewee 2)

[Cartel conduct is] serious stuff that affects people which should be closely looked at, now, whether it should be criminal or not, I don't know. A heavy fine might be just as good. To me, the criminals these days, you go around and do some horrible things and they hardly put you in jail. That, to me, is criminal. You know, they murder somebody or they have an armed robbery or something like that and all of a sudden a judge says, oh, he had a bad childhood or something like that and we won't be too hard on him. I don't think they're in the same league, in my opinion. No way. (Interviewee 17)

This next interviewee had a very bad experience in the whole ACCC enforcement process. He did not know beforehand that competition law would apply to his industry because he thought other public interest considerations would override competition law. He believed that the previous situation where cartel conduct was a civil contravention and financial penalties (not jail) were available was appropriate:

I'm not a lawyer obviously and so I speak obviously out of turn in certain ways, but I would have thought it sits exactly where it ought to sit. It is against the law but it's a civil penalty as opposed to a criminal conviction and fine and/or jail term. I would have thought that was highly appropriate. I guess if you look at some of the bigger issues, as opposed to ours which is obviously in the overall scheme of things pretty small, if you look at the Visa guy...Pratt. I don't know, is there a quantum or a size whereby it's so horrendous and it's hurt so many people that it should be criminal? I truly don't know the answer to that. My gut feeling is no. The money to the system put back by these heavy fines is fantastic. I can't imagine that governments don't like that. If you're going to put people in jail, I mean you might fine them a lot as well, jail doesn't achieve much, convicting them doesn't achieve much. Having a conviction doesn't achieve much. I suppose the only reason to do it is to look good and seemingly become a more significant deterrent. But boy, I mean even a \$60 million fine and your name all over the paper and being found guilty of these things is a pretty big deterrent. I guess my gut feeling is it's not necessary and it's inappropriate, highly inappropriate, ... I could have a criminal record now and even been threatened with a jail term which would seem just outrageous for firstly ignorance and, b) with the best of intentions... The fact that competition law overrides [public interest] seemed really bizarre to me. The fact that the ACCC weren't even that interested in the [public interest] issues that we felt we were addressing... (Interviewee 7)

Another interviewee suggested that, as attempting to get the highest price for a product was just the way his industry worked, sometimes through withholding goods until the buyer meets the price, such behaviour should not be criminalised.

I mean really, an individual in this issue could say to a processor, I'm not going to sell you my [product] unless you give me an extra dollar more. That essentially is manipulating the market. Of course in a small industry that will have an effect. He might be able to extract an extra 50 cents or a dollar a kilo for it, but is that really a manipulation of the market or is it just a person trying to get more for what he's got? He's going to have to sell to one of these four or five blokes anyway, so who's going to pay him the most for those [products]? That doesn't seem to be - shouldn't be criminal as far as I'm concerned... (Interviewee 15)

Some interviewees felt that criminalisation was inappropriate because it focuses liability on individuals to whom it might not be fair to wholly apportion blame given the corporate context in which the conduct typically occurs:

I think serious criminal cartels that affect somebody in a financial way should be outlawed. Now, whether it should be a criminal thing or not, I don't know because a lot of the time, who is the instigator of it? Is it the board of directors? Is it the salesmen? Is it the storeman? You know, where does it start and where does it finish? If I was a director, for example, of [names large company in his industry] and they were involved in it, am I guilty of it? Did I authorise it? I'd probably say no, I didn't but somewhere down the line, did Richard Pratt organise it? He would have defended it, he would have said it was someone else down the line and where does it start and where does it finish? I don't know. (Interviewee 17)

Interviewee 25, an in-house lawyer in a large company, considered that, for this reason, criminalisation might not work. She argued that it would be impossible to prove the relevant intent against senior management in large corporations:

Like I think, certainly if you were looking at a large scale involving senior management, wherein that should know better and know what they're doing. That real deliberate breach – I don't have a problem with the criminalisation. But I do think that means it would be very, very difficult to prove and I do think it makes it a bit like insider trading, you know? We do training on insider trading. I have a lot of staff who are very concerned with complying with their insider trading laws. But if you asked me does insider trading happen left, right and centre in the financial industry? I would say, yes it does. The difficulty is because they can't make, they can't get the prosecutions. It's so hard to prove. I think that's one of the real Catch 22s with it. I think criminalisation should be limited to those real extreme circumstances. Which means you won't get the gumf out, you know the power of the - we got someone and he's going to jail... How many men have been done for manslaughter because no one can actually prove the intent to kill, as opposed to the intent to cause harm? (Interviewee 25)

This interviewee felt it might be more appropriate to have the deterrence of jail for individuals who were actually responsible, rather than fines for a company, which might impact on innocent employees.

Well you've got the criminal bit. Again, in retrospect you've got to also watch, if the fines are there, where the impact is going to be on a company. If, say for example, our company went into liquidation/administration, then you know you're actually affecting probably [x] other people, who've got their wives. The fact with sub contractors you can almost affect a couple of hundred people with a decision. Whereas if it's criminal, at least the company is not going to go bust. (Interviewee 4)

This comment suggested that, regardless of where the blame lies, he believes it is not fair to target a whole company at the expense of innocent employees' jobs. Conversely, Interviewee 3 believed that cartel conduct is not engaged in because of individual or personal greed but on behalf of the company. Therefore he thought it was not appropriate to direct criminal offence at individuals, but rather put greater effort into regulating companies and changing business cultures (although he did mention Pratt as a possible exception where criminalisation would be

appropriate as he believed that case was so blatant and straightforward). Generally, though, he believed that locking up individuals would not change anything because their companies would just continue on – you have to target the corporation and the industry.

5.2.3 CRIMINALISATION NOT AN APPROPRIATE FORM OF BUSINESS REGULATION

A variation or development on the view that criminalisation of cartel conduct is not morally appropriate is the view of a number of interviewees that criminalisation of cartel conduct is not appropriate for business regulation. Business should be regulated not criminalised – and, in their view, criminalisation is therefore essentially regulatory “overkill”.

CRIMINALISATION IN GENERAL IS REGULATORY “OVERKILL”

This argument could be based on a general belief that society should be wary of giving too many coercive powers over business to regulators in general. While it might be appropriate to regulate certain conduct by educating business and giving the regulator powers to fine or to tell businesses not to do certain things again, criminalising business conduct goes too far.

... [I]f a few doctors in a country town think that the consultation should be \$40 for 15 minutes, I can't see why that should be a criminal offence... I think in our case they could have said to us, you're contravening section 45, you should cease. And obviously we would have definitely closed down immediately. As it was, I think a few dribs and drabs happened for one or two months afterwards, but my understanding of a regulator is they should – if they've got the wherewithal and the monopoly on the brains trust with section 45, they should have said, okay this contravenes section 45. I don't think it should allow them to go and spend a million dollars on resources just so they can get a warm fuzzy feeling for talking up a win. (Interviewee 8)

This seemed to be based on a view that business regulators like the ACCC should regulate via negotiation rather than punishment. The reason is that this would achieve their purpose of protecting consumers better than punishment for punishment's sake:

I think the culture in the ACCC is counter-productive and you don't get any feeling at all ... They've got the power to wish you any kind of – they've got screamingly excessive power to me, for such uneducated people... I didn't detect at any stage from anyone [at the ACCC] – nor did my colleagues ever question - any feeling they were out to protect the consumer, which is their main object. They had no feeling for the big picture of why they existed. And Graeme Samuel, I read his stuff to the National Press Club – you know I just looked at it and said, he's not protecting the consumer. He's not oriented that way, nor is his staff. They're out to get statistics and results and legal cases and mediations where things are settled; it shouldn't have come there in the first place ... what's really wrong about this is that I should have been called in and then counseled if they really thought I'd done anything wrong. They should have called me in and counseled me, give me a chance to explain what happened ... (Interviewee 9)

ACCC IN PARTICULAR IS NOT TRUSTED WITH CRIMINAL ENFORCEMENT POWERS

As foreshadowed by the interviews quoted above, many interviewees commented that they specifically did not trust the ACCC to exercise criminal enforcement powers fairly and reasonably. In other parts of the interview, many interviewees had a number of complaints about how the ACCC treated them and their case (see chapter 3) – leading them to believe that the ACCC should not have criminal enforcement powers.

Well my experience from my case, about how one-eyed they were and how uncommercial they were, and my understanding of the Pratt situation, once again, they've been one-eyed, uncommercial. I just think it's over the top and overkill...particularly the way it's been used. In our case, I feel aggrieved, I feel sorry for Pratt in the Visy case. So just based on the way they handle their powers, I think they've over exercised their powers, I think [criminalisation is] very dangerous... So I just think it's very, very dangerous giving the ACCC those powers based on the way they manipulate the system. ... I think it's just – I made a comment to someone 10 years ago that the ACCC is the biggest power force in Australia and those words turned out to be correct based on my ... I foreshadowed my own doom. I don't believe they should have criminal sanctions. I don't know what the international experience is, I don't know whether you've researched that or not. (Interviewee 8)

Yeah I just think putting that sort of power [with the ACCC is inappropriate], the power to take someone to court and say, plead guilty or we've got unlimited taxpayer money and we'll follow you right through and we'll lose but your life will be ruined. ... Even from the ACCC. There's got to be checks and balances...My thing is the ACCC doesn't have the culture, doesn't have the education, doesn't have the sense of responsibility to deal with it, you know? I think it should be limited – anyone under \$100,000 a year salary shouldn't be eligible to be a criminal. You know what I mean? (Interviewee 9)

Another interviewee also commented on the culture of the ACCC – that it is too 'vindictive' (Interviewee 13) to be given more power. Even though he conceded that criminalisation might be necessary for big business, he did not trust the ACCC to not apply the full force of criminal prosecutions to small businesses as well.

[M]y initial response [to finding out about the criminalisation of cartel conduct] was that, God, why would they want to give the ACCC any more power?...They've got enormous power to crush anybody they want to sort of thing, you know, and they do it very vindictively too. It's not – if we had have thought they were reasonably fair people and they actually ran sort of information finding sessions and things, you know, well it's sort of unbiased. (Interviewee 13)

Again, another interviewee also feared the ACCC would use criminalisation to go after scalps of "little people."

One of my overriding concerns with statutory authorities is it's very easy for them to take the scalps of little people, or people who co-operate and leave alone the really big offenders. So again that's my concern, if you criminalise this behaviour, who are you going to use it against? (Interviewee 24)

One interviewee felt that the legislation is too broad and hard to interpret, as opposed to ordinary street crime:

How can ordinary people comply with legislation that is not able to be easily interpreted by a QC and relies upon one line in an agreement that was drafted between 2 lawyers who also could not clearly understand the cartel legislation and it is so broad most businesses could breach it? How can something so simply mis-interpreted become criminal? The legislation is too broad, confusing and hard to interpret, the ACCC is too rigid and heartless to be entrusted with such legislation. This is not like killing someone, the legislation can be breached unknowingly and this should not be criminalised. (Interviewee 12)

Even some who strongly supported the criminalisation of cartels had reservations about the way the ACCC will put it into practice, especially given how wide the provisions are:

I think in principle, it's no bad thing. We have the US experience, and experience of other jurisdictions over the world, so I've never had a problem in principle with it. I think the proof of the pudding will be in the eating. It's important that it is managed well. The present Chairman of the Commission has given quite a few speeches talking about how they're going to manage the bifurcated regime, and I think it's still all really - the game is yet to be played. It sounds as if almost everything is going to go down a criminal path before it is pushed across the other way. Which doesn't necessarily sound, in theory to me, as necessarily the best way to deal with it, because there's a lot of cartel conduct that's serious, [but] there's [also] a lot of cartel conduct that falls into different categories: It might be inadvertent, it might be industry-wide, there might have been lawyers involved over many years and it might be a technical breach rather than an obvious cartel arrangement. ... That's why at the outset I think I said that the problem at the moment seems to be it's a blunt instrument. Because we're told everything at the moment will go down a criminal pathway until it's proven not to be appropriate for criminal prosecution. That seems like an odd way to spread your resources... I don't have a lot of confidence in any of the regulatory organisations in the criminal area based on my experience with them over the years, neither ASIC or APRA. The ACCC hasn't done it before. The DPP are better at it than the other regulators, but the DPP have got a pretty ordinary record too, I think. So it's going to be interesting to see how they manage it. The DPP would say, we're the experts, we'll do it properly. But the way in which ASIC and the DPP have worked together or not worked together over the years isn't that good. (Interviewee 27)

One interviewee stood in contrast to all of these previous ones, however. He was an in-house lawyer for a large company who took the view that the ACCC was just doing its job.

A lot of people think they're the demon when you know they're not. They're a regulator doing their job and if you have a level playing field it's good for everybody. (Interviewee 19)

CRIMINALISATION DOES NOT ALLOW ENOUGH CONTEXTUAL JUDGMENT ABOUT SPECIFIC INDUSTRY CIRCUMSTANCES

Finally, a number of interviewees also suggested that the ACCC did not understand the particular circumstances of the interviewees' particular industries. Indeed there was a suggestion that the wide-ranging application of the cartel offences is not appropriate, especially where it is a criminal offence – and that more specific regulation for each industry to ensure a competitive market would be more appropriate. Again, these arguments related to the fact that many interviewees felt that in their own industry there was not a competitive market to begin with – and that their own actions (that the ACCC saw as “cartel conduct”) were in fact designed to even-up bargaining power in the industry or would not harm competition anyway for one reason or another.

Thus, Interviewee 10 thought it was a waste of money to pursue a criminal case when the ACCC has not done enough research to understand the specifics of the industry involved:

[L]ook, every industry is different... I don't believe you can put an overall spread over what's collusion and what it is because each industry has its different features and different things that happen. Our industry is such a moving target, it goes, it changes. [Gave a specific example of the complexity] and that's the way the industry's always worked. There's just so many changes in it, but criminalisation - to try to say how you're going to – I don't know... [Talked a lot about how the industry worked and the role of different players in the industry. Referred back to the fact that it was the big companies in the industry that controlled pricing down the line, not the smaller retail operators who had been targeted by the ACCC.] So the criminalisation side of it, I don't know, I would see that you're wasting a lot of taxpayers' money and really going down a burrow that they haven't researched correctly, they don't understand. (Interviewee 10)

Another seemed to think that, in his industry, breaches are inevitable, and that the ACCC should have taken that into account. Given the pressures he thought people in his industry faced to break the law, it would not be fair to implement criminalisation in that context.

Its level of detail or level of impact. It's really hard in [our] industry where you're so heavily regulated and tied anyway and it's such a small industry that eventually you would expect that there'd have to be transgressions of trade practices laws just purely because it's such a small industry. That you know because people talk amongst each other and I know every person in the industry... and of course they know each other as well and they have [meetings] and essentially it should be only marketing but of course everything gets discussed among one - so it would be hard to [identify what counts as criminal conduct]... we've only got a limited amount of products. ... All we can do is get more money for what we've got and so that's the only thing we can do and that's what you have to do essentially is try and extract the most out of the marketplace and of course if the marketplace is only four or five people then of course it makes it really difficult ... (Interviewee 15)

5.3 IMPACT OF CRIMINALISATION

A number of interviewees answered our question about whether cartel conduct should be a criminal offence by stating their opinion about whether it was likely to have a deterrent impact. That is, rather than engaging in a moral assessment of criminalisation of cartel conduct, they engaged in an instrumental assessment of criminalisation. The views of those who believed that criminalisation would be an effective deterrent are discussed in section 5.3.1. The views of those who believed it may not be an effective deterrent are discussed in section 5.3.2.

These interviewees were able to speak from personal experience and offered insights about what difference it might have made in their own case if cartel conduct had been a criminal offence. Their specific reflections on this issue are discussed in section 5.3.3.

5.3.1 CRIMINALISATION AS EFFECTIVE DETERRENT

Some interviewees believed criminalisation would create the desired deterrent effect. For example, Interviewee 4 believed that as long as there was also more education and awareness-raising, criminalisation would have a significant deterrent effect:

I think to get rid of it [should be criminal]. I think if they don't do that, I think it will stay prevalent. It's like everything else, it's putting money on a horse, it's a risk, you getting caught isn't it? I mean the ACCC is only so big, and god knows they must have a lot of backlog up there. I don't know how big their office is here in [this city]. I think the odds of you getting caught and taking the money, people will think twice, I would imagine think twice. Provided the message is out there that it is a criminal offence. That's the biggest factor, it's got to get out there. I mean I would, well in the construction industry I would say there's still cartels... I think jail is needed. I think, well correct me if I'm wrong, I think in America it's jail isn't it? (Interviewee 4)

A junior lawyer for a large company believed criminalisation would result in greater deterrence because there is more at stake.

It's a much easier message to disseminate if you tell people that they can go to jail. I mean, if you tell people that the company can be fined or even that they personally can be fined, that doesn't hit people the same way as saying that you could end up in jail does. So undoubtedly, I think boards and management take more notice - that's not to say that people didn't take notice in the past - but definitely people will take more notice because of the criminal sanctions ... I think a criminal sanction is going to make much more of an impact in people's minds than a financial penalty, even if they know that that financial penalty could be against them individually. (Interviewee 26)

As did a senior lawyer for a large company:

I think [criminalisation is] the best possible way of convincing individuals of the perils of price fixing. It changes the risk equation so much, and that's certainly the feedback I've had over the years from talking to different people. It's one thing that there's a penalty, and particularly in the old days when arguably they were paid by the companies anyway. But the company's not going to spend two years or three years in a little cell at Long Bay with

big bubba on the top bunk. That changes things. [He also commented that cases like Visy and Amcor would provide] your basic education programs and a few things like that. Better than lots of little ones, you know, something really big that just gets the press coverage, and it's the big end of town and everybody sits up and takes notice. (Interviewee 17)

Once again, however, many of our interviewees drew a distinction between large and small business – arguing that deterrence is necessary for larger companies and their executives rather than smaller business people:

I'm glad [criminalisation is] only happening now [as opposed to when I faced enforcement action]. [Laughs.] I don't think it's a bad thing... I think some of these larger companies, I keep saying Coca Cola, I haven't got it in for Coca Cola, but these large public companies. The deterrent there for directors and so on financially, probably isn't great. Again, I think ours compared to the size was abnormally high. As a percentage it was huge. But even when you look at the size of Pratt's fine and so on, they're not big fines when you consider their capacity to pay. It's more a blip on the radar and "I'm okay". Certainly I think it would be a big deterrent to people if, in fact, they can be charged with a criminal offence. ... In a large corporation ... one of the directors that gets paid \$10 million a year, the most he can get - if he gets the maximum, which I don't know if they've dished out a maximum penalty yet, is \$500,000. Who cares? It's not really going to upset him that greatly. (Interviewee 11)

Interviewee 24 also thought that deterrence was appropriate for senior executives who make a personal gain and have their companies pay any fine for them, but that it may not be appropriate in smaller cases such as his where fines have a larger impact:

I think criminalisation is appropriate when people have a lot of money or when they have made a lot of money and when paying a fine doesn't really matter to them...I would rather see criminalisation in the area of corporate law, where people have made large sums, than here necessarily...I think that criminalisation is appropriate, if you actually [do] send them to jail. If you do a deal with them and they just leave the company facing a big penalty, what's the point of it? ...I think for very senior people where, for example where their company pays the fines and so they really don't have any pain, then criminalisation is appropriate. (Interviewee 24)

Interviewee 13 initially balked at the idea of the ACCC having more power, but then considered that criminalisation and jail might be necessary for deterring big 'evil' corporations, for the reason already given by previous interviewees – that fines may not have a big enough impact on large corporations. He still thought it would be too harsh to apply criminalisation to small businesses, however.

The impact on a small business, you know, who contravene one way or another who cops fines in the hundreds of thousands of dollars, you know, ...the impact of that is enormous. It can break up marriages, it can destroy your business. Well it, yeah, I mean it almost got one of my businesses, put it that way ... On a corporation, you know, if they get a \$500,000 fine or \$1 million fine, the corporation that's in the hundreds of millions earnings every year sort of thing, then it's just a business expense and there's no individual who would give a rat's. (Interviewee 13)

5.3.2 CRIMINALISATION IS NOT AN EFFECTIVE DETERRENT

Some had specific insights (in most cases from their own experience) of situations where criminalisation would not be an effective deterrent at all – either because a person is not rationally engaging in a risk/benefit calculus, or because they are engaging in such a calculus and think it is worth the risk.

Interviewee 24 argued that not everyone engages in a risk/benefit analysis when choosing particular behaviour. He gave an example where a junior person in a company may be under pressure, and may not stand to make a personal gain from illegal behaviour, but will still feel compelled to do it regardless.

[In another case] a 20 odd year old salesman, under pressure, is criminalisation going to stop him? Possibly not. Would sending him to jail help? I don't think so. (Interviewee 24)

Other interviewees argued that some people do engage in a risk assessment and decide to do it anyway. Interviewee 1 believed that criminal penalties would have deterred him if he knew about them, but that a month in jail might not deter a lot of people in his industry:

[If you were now back 10 years ago and knowing that price fixing was a criminal offence, would you have behaved any differently?] Yeah... Absolutely. ... [What if you knew, though, for doing it you'd only be sent away for a month?] Hypothetically I think you'd have to weigh up the financial gains, wouldn't you? In my scenario it wouldn't interest me a great deal, but I would think there's a lot of people in the industry who would think a month's a pretty small price to pay for the financial gain. I once had one of the contractors say to me - he's in a different area now, he's sold his business – and I said to him one day something about sales tax, or when we had sales tax, and I was just being quite honest saying, you know, I just can't understand these people who shaft the sales tax system by putting an exemption form on everything, it's just crazy. Then he said to me, well for whatever the penalty or whatever the fine I would receive is insignificant with the gains I've made over the years. And I thought jeez, what a strange attitude, you know, but I suppose that's true, do you know what I mean? In hindsight under this arrangement you could have made an enormous amount of money, huge amounts of money. I've never, ever wished to do that. I've only ever wished to be able to employ people, manage our overheads and that's it. I'm a bit stupid in that regard. I still live in the same house I moved into 33 years ago. I don't have the million dollar houses on the coast and so on. (Interviewee 1)

We saw in the section above that some in-house lawyers and compliance officers felt that criminalisation gave them a more powerful tool for persuading executives and employees not to engage in cartel conduct. But others felt that it would not make any difference as big companies are already giving out all the relevant messages to their people and doing the right thing.

Above we heard from Interviewee 26, a more junior lawyer who felt criminalisation would have a deterrence effect, however, here we meet her more senior lawyer colleague (Interviewee 27), who was more ambivalent.

Interviewee 27 felt that there is certainly a lot of awareness of criminalisation – which might make a difference – but felt that most of the conduct had already been cleaned up under the old provisions anyway. For this reason, he felt that criminalisation might not make much difference

for the more inadvertent breaches deriving from industry practices. He did think, however, that it might make a difference for covert, deliberate cases.

Interviewee 27: In behavioural terms, I think people are very conscious of it. Certainly directors are even more conscious of these provisions than they were before. The larger corporations, of course, understand the provisions and they also understand that it's a major reputational issue. The Amcor case obviously was very visible.

Interviewee 26: Do you think the criminal sanctions, then, will stop the covert, deliberate cartel conduct but not necessarily the inadvertent overt?

Interviewee 27: Well, if it's inadvertent, people - I think the Trade Practices Act is 36 years old, so I think there's a lot of industry-wide practices that are starting to see - if you shine some light on a lot of industry practices, you tend to find agreements are not masked, practices are improved. So I think it's partly generational. I think a lot of those sorts of things will naturally be cleaned up, even if there's no issue recognised. But in terms of covert or serious cartel behaviour, the risks are greater. I guess in a public policy sense, I think it's too early to judge what effect it's going to have. We know what the theory is and we know what case is being made for legislation. We understand the implications of it. But how it actually works in practice will be interesting to see. I mean, there's obviously been a lot of progress in Australia over time. It's a much more modern economy and a much more sophisticated market than it was. I think the regulators and government would like to think, and people in business would agree, that many of the problem areas have been sorted out.

Ultimately Interviewee 27 concluded that the main difference criminalisation will make is a different process to deal with if you do get caught up in it:

I never had problems with the threat of penalty proceeding and substantial fines was enough to get everything done that needed to be done. I think the thing about criminal sanctions is it's a much more significant problem, and much more worrying...So if you're an executive caught up in it obviously, it's a far worse issue, because it's a criminal process rather than a civil one. And if you're a company, having people go to jail is a big deal. Penalty proceedings are as well though. In a corporate sense, in a way you could be agnostic. Corporations may be better off financially to have errant executives go to jail than pay a \$10 million fine, by definition. But the criminal sanctions have obviously changed the landscape. (Interviewee 27)

These next interviewees were in-house lawyers for a large company who did not feel criminalisation would make any difference to their company because it wanted to comply anyway, although they did wonder whether it might make a difference to individuals and companies in some other industries where there had been problems.

Interviewee 20: Yeah, because the principal deterrent effect [of criminalisation] is the individuals who might engage in serious cartel conduct, and so it'd be interesting to hear what those individuals say from an external lawyer's point of view, or probably from a corporate point of view. The rules have always been pretty clear and the compliance material. [But] then there's evidence like the Amcor/Visy case [where people have breached the law]. But [our company] has always had, "You don't talk about prices, you

don't talk about anything with your competitors", and whether it's significant fines that you impose on the company, and you and the company would take action against you and sort of things. [Criminalisation means] adding to that, "and you could go to jail".

Interviewee 19: [Our company] doesn't necessarily, if you do something which is willful and outside...You're on your own. So there was enough deterrence... I think it only perhaps leads to the fact that these days you do need well defined frameworks within organisations around compliance, training, works reporting, lines, codes of conduct, clearly enunciated terms of engagement so that you can have all that to support an individual. Because I think from a training perspective, this is using another hat, I'm very conscious of you want people to know they can do a job within a defined space supported by the organisation with proper operating procedures. And if there's anything that they're uncomfortable about, you ask or you have whistle blower programs. All that sort of stuff, because no one wants somebody to go to jail. So if somebody really wants to be that naughty and he's...He's going to get a bigger fine, or she'll get a bigger fine. Now you're in the context of doing something really naughty which could have a criminal thing ... I can sort of say this from a [company] person's perspective, [the company] will comply with the law. If it happened to be criminal conduct that you've got to make sure you don't breach, it just happens to be criminal conduct.

You just have to put the controls in place. I suppose the only problem that once you put a mantra of criminality around it, and having regard to large organisations or any organisations, there's that tragic consequence that you try and make sure that everything goes according to plan. Then we just hope that nothing would ever happen that triggers that...

5.3.3 LIKELY IMPACT OF CRIMINALISATION ON INTERVIEWEES' CARTEL BEHAVIOUR

Finally, we asked most interviewees whether criminalisation of cartel conduct would have made a difference to their own behaviour and their own experience of the enforcement process. Many interviewees commented that, although it probably would have made a difference if they had known about it, they did not know that what they were doing would have amounted even to a civil contravention. Therefore criminalisation would not have made much difference to their behavior unless there was also better education and awareness-raising that went with criminalisation.

Interviewee 4 commented that criminal sanctions would have been very different to a financial penalty and would have had a deterrent effect, but also commented that the ACCC should spend its resources on education to make sure people are aware rather than on taking cases against people like him:

[Would it have been different if you'd been sentenced to two months jail?] Absolutely...Oh I think it would probably make my children look at me differently. Probably make also my father would probably look at me differently and my in-laws. I think it would have really had a major impact having a jail sentence. I probably think it's got to be more of a deterrent having a criminal aspect there. ... I mean the price of the investigation and going through it and tying up the courts and that. You could have had a major seminar in every

city even and just publicly make it, yes we're having this, and somebody goes up there and stands from the ACCC for an hour and explains exactly what a cartel is...You can easily be trapped into it. (Interviewee 4)

Interviewee 13 echoed this argument. He guessed that if they had known a criminal penalty was a possibility (or indeed any penalty), they would have done more to avoid the behaviour that constituted a breach. They only thought it would have been a greater deterrent, though, if it was clear what was criminal and what was civil:

Yeah, if somebody had have said to us, you get those agreements wrong you're up on criminal charges. Yeah, especially if a lawyer had have said it...Yeah, if you knew that the breach could put you up on a criminal charge, you'd do more. You would do more. I mean, it's hard to say if that have had – you know, what we would have done, but we probably would have got advice from some trade practices specialist I suppose, and he would have said straight away, you must have this approved by the ACCC before you can go into business. ... I think if the knowledge was shared – if the knowledge was there, but you know, some of the trade practices offences are criminal and others aren't, you would want to make sure that you weren't ever going to put yourself in the criminal category, but that being said, I think having a criminal classification there in law as against civil is only good if it's got a really clear sort of definition and demarcation line. If it's going to create days and days or weeks of debate in court as to whether this guy was in that category or that category, then that would crush a small operator. (Interviewee 13)

Again, we heard another interviewee explain that, as he did not know what he was doing was wrong, the prospect of jail for cartel conduct would not have made a difference to his behaviour.

I wouldn't have known it was an offence. I would've gone – I would've done two months in jail instead of getting a \$20,000 fine. That's the only difference. (Interviewee 2)

Interviewee 18 also felt that, as he believed he did not doing anything wrong, even the fine he got was unreasonable. His comments supported the previous interviewee's opinions that if you do not know that your behaviour is illegal, then no manner of penalty will be a deterrent.

...I was positive I was doing nothing wrong. So the first fine [the first settlement offer made by the ACCC] of \$30,000 - that's ridiculous. That sort of fine for doing nothing wrong - I said we'll fight that and away we go. (Interviewee 18)

As Interviewee 18's comment indicated, interviewees' sense of whether criminalisation would have deterred them or not is influenced by their sense of whether they agreed with cartel criminalisation as a moral matter. This in turn relied on their own 'common sense' contextual evaluation of whether their own behaviour was wrong or not. When they talked about lack of education and awareness, they were really indicating that they had no inbuilt moral sense that the conduct they engaged in was wrong.

Thus, Interviewee 25, further to her argument that criminalisation will have a greater deterrent effect above, believed that while that may be the case, some people "don't think it is real" that cartel conduct would be criminal behaviour – they are just doing their job so would not be deterred by criminalisation. If they see it as an ordinary practice in their industry, then again that is because they see it as "appropriate" conduct and do not think to question whether it is right

or wrong, legal or illegal. She argued that financial penalties seem more concrete and realistic, so are a better deterrent than criminal penalties.

People don't think that's real, I don't think. You'll be fined \$10,000 is probably more scary. Oh, that's a big fine. Or up to 250 [thousand dollars] or whatever, you know. I think monetary hurts. I don't think people ever think they would be involved in criminal conduct per se. So I think they disregard that...But I'm sure if you asked the two guys that we had involved - you know - that was criminal behaviour. They'd go, "What? [Surprised] No, we were just doing our job." Well no, you weren't doing your job and that's not the way - you know. (Interviewee 25)

This next long quote summed up a number of the themes about criminalisation as deterrence and its relation to a moral assessment of whether cartel conduct deserves jail. Interviewee 5 saw jail as not doing anyone any good. He saw the process of prosecution as a sufficient deterrent already, and saw education as more important than the nature of the penalty:

But yeah, I have a feeling the criminalisation – will it be a deterrent? I don't think so. I think education's a deterrent. I think just straight out knowledge. Unless it's cultural, unless there's an industry where this is an accepted practice. One of our employees used to work for one of the cardboard box manufacturers 10 years ago. So he was trying to dig up information on what he knew [referring to the Visy Case]. I'm just sort of saying, "Do you reckon there was price fixing or collusion?" And he's saying, "I assume so." It was almost an assumption that there probably was...

And they [the ACCC] have no – what I see as no commercial reality. As in, the costs the company and the individual are expected to incur are part of the deterrent. I think they deliberately make it excessive, and the more the better. So if they can find a reason to magnify the effect, they will. I think that's part of the deterrent effect, and I don't think either Samuels or his predecessor would say differently. ...

[And if it had been a jail term of two months?]

I don't know. I know a dentist who had a car accident and he was over 0.05. I think he was under 0.08. But his passenger was killed, so he went to jail for – well he was sentenced to three years. He did a third of that time. That would have been more than 10 years since he's been out of jail, and when you're a dentist you can't practice...and you can't put a locum in. His business went bankrupt, so he went bankrupt. His wife had already left him; his kids were pretty loyal to him. But when he got out of jail – I don't think he's ever recovered. ... I think spending time in jail did no one any good, including him. I understand there need to be deterrents, but knowing he could go to jail didn't stop him drinking what he thought was okay. ... So in terms of criminalising this behaviour, I don't think the deterrent is the issue. I'd go back to what I said. I think it's education. I think people don't realise that you fiddle around the edge with this stuff, and you could get into a situation where what you didn't think is illegal now you do think is illegal. But with the right education that shouldn't happen. ... It'll be interesting to see what happens after a couple of people get jailed. Would I know that justice prevailed? No, I wouldn't have that feeling at all.

[I guess the reasoning is that people like yourself just don't pay enough attention to it, and having the jail penalties is the way to get the media publicity to make sure that people are aware...]

By having sacrificial lambs, yeah, maybe. So here are the sacrificial lambs, and you're going to ruin their lives. Because you failed to get the message through about compliance you're going to destroy a couple of people's lives. I'm not sure I could live with myself. But maybe that's true; maybe the world is that cruel a place. (Interviewee 5)

Finally a number of interviewees commented that from their own experience, it was more the whole process of dealing with the investigation and enforcement process that was a specific deterrent to themselves personally against future misconduct and that jail or criminality were irrelevant. As we shall see in the following section, some commented that if it was a criminal offence, they may have fought harder throughout the process, but regardless even a civil process (in which most interviewees cooperated fully) was a huge deterrent against further entanglement with the ACCC that made criminal sanctions pale into insignificance:

It has put a bit of a rocket up us. Because we've already been through this, what's going to happen to us next time? I'm not prepared to go through that. Like I said before, the jail thing doesn't worry me, it's just the whole exercise. It takes, over a year, it takes 10 years out of your life. It's just a big burden on your shoulders...It is, and it's like until you're put in that position, like you said before, how would you cope with the possibility of jail, well that doesn't – but until you're put into that position, you don't know how you're going to react, or what the consequences it does personally. Different pressures put different loads on you, so. (Interviewee 6)

Interviewee 25 also believed that the process is the main deterrent, and that jail is not relevant. She argued that regardless of the outcome, simply being subject to investigation and court proceedings is enough to tarnish a person or company's name, and is enough of a deterrent in itself.

[Because part of a thing with criminal offences is, is a short sharp shock necessary, like jailing an executive for a month? But how about the corporate stigma of being found...]

But I think there's also, even not necessarily stigma but the fact that one's involved in proceedings is negative, even before they're determined. The press that [our company] got during the course of the hearing wasn't good. (Interviewee 20)

However it is important to note that it was really only the personal experience of the process that activates this form of deterrence since those who have not experienced the process are likely to have even less idea of how harrowing the process of enforcement is than they are likely to know about the formal sanctions for cartel conduct.

5.3.4 LIKELY IMPACT OF CRIMINALISATION ON INTERVIEWEES' APPROACH TO INVESTIGATION AND ENFORCEMENT PROCESS

Criminalisation is intended to deter cartel behavior, but it might also have the effect of prompting cartelists to resist the ACCC's attempts at investigation and enforcement more vigorously. Indeed, a number of interviewees commented that they would have fought harder to avoid a criminal conviction and a jail sentence, rather than cooperating with the ACCC as they did with the civil process.

In the following quotation Interviewee 8 said "most people would do anything to try and keep out of jail". Even then, he still did not seem confident that he would have been able to win against the ACCC:

Well if I was looking at jail I would have probably borrowed from family - \$200,000. But no one should have to do that if they don't think they've done anything wrong. At the end of the day, even if I had done that and even if I had got my own separate representation, the way the system is, biased in favour of ACCC, I would have still lost. ... I think most people would do anything to try and keep out of jail. You definitely would be a lot more serious about it for sure. (Interviewee 8)

Interviewee 2 said he would have fought "tooth and nail" to avoid a criminal conviction and jail.

Of course it would've, yes. Two months in jail, two minutes in jail would've... Yes, it would've been a greater effect on me. Wholly disproportionate to the conduct and blame...then you've got a criminal record... What that means is that people like me would fight tooth and nail the conviction. You'd go all the way to the High Court... It's just a waste of resources... You could never with confidence say a jury will understand this evidence especially when – you know, a lot of those economic concepts like what is the market. There's no answer to that... So the bureaucrats should just stick with what they've got because they'll get people like me to plead guilty and just move on and everyone's happy. We don't go to jail and spend our lives fighting the courts and they get their scalps. (Interviewee 2)

Interviewee 13 said that they would have fought harder if they had been up on criminal charges, but without much hope of winning. He believed it is a problem that small business people would not be able to fight the case in court, or would be sent bankrupt trying.

You simply can't even afford to defend your case properly as it is. If you're not an extremely rich person, you can't defend a case really successfully against the ACCC. It's as simple as that. If they make a charge against you, they've got you unless you've got a million bucks to spend on a court case, or more. They spent two million. For us to get an expert to even – to go anywhere near to equaling Dr Phillip Williams – he's the highest sort of authority of economics in Australia apparently, I don't know what we'd have to do. You'd have to probably fly somebody in from overseas who would have to be fully briefed on the details of the case...something like that, and I mean that's probably what you'd have to do, something like that. You'd probably need more experts in other areas. A small person simply can't do it. You're out of business. You're bankrupt if you even attempt it, you know. (Interviewee 13)

Another interviewee felt his case would never have gone to court if it would have had to have been a criminal prosecution because the protections for a criminal case would have ruled him out – but again he worried that the ACCC would not use its powers appropriately.

... [I]f there's protections built in, this would never have got to a criminal court...You know it would never have got there. So if there is to be criminality, you need people who are thoroughly trained in the proper process and a number of safeguards before it gets to court. If that happened, I just know I wouldn't have got there...there should be some kind of independent person who checks the whole thing on the way through...I mean if you could make the necessary safeguards well that would stop them, in a facile way, trying to get victims to boost their statistics. Hopefully you can't do that in a criminal court, yeah that might well be the case. Unless they do what they do now with civil and then they go onto to a criminal [case], like they did with Pratt, and then use the mediated evidence where people admit things they didn't do and then that use that for a criminal case. I mean it has to be one or the other. It has to be one or the other... These people, they just lack education, they lack intelligence, and they've got enormous power. (Interviewee 9)

Another interviewee supposed that he would have made the same calculations and asked the same questions in deciding how to proceed, but he may have been less likely to settle if he thought it would result in a criminal conviction being recorded against him:

Well again I think it would have come down to what the offer might have been. If they'd said you can get a good behaviour bond or whatever, or you risk going to jail for five years or being fined with a conviction a million dollars I guess we would have gone back the same way again and looked at what concessions we would have been forced to make, how serious they might have been and what that might have resulted in. It's really, an individual fighting an organisation like this is next to impossible in my observation. I just would not have had the resources without having nothing left at the end of it, even I think with a win, to be honest. I can't see how I would have got my costs back. It would have cost me millions of dollars, of my own dollars, and I would have had nothing left for a hard working career.

So had it been criminalised, same thing probably. What are the sort of rules of conceding here? What are you offering me? I don't want to go to jail obviously. I don't want a million dollar fine. If I agree to the following, what will you give me? So would have I risked a jail term and/or massive fine and a conviction? I don't know. If I had an automatic conviction by conceding I may have thought differently...No, look I just applaud you on the research...They need to know that occasionally they do things like this. They're not going to like that term but these events take place and these events are so murky that if this were criminalised, God help us all, as opposed to perhaps the Pratt incident where it was a little more clear cut. (Interviewee 7)

One in-house lawyer thought it may have had the opposite effect to the one intended – that his client may have been less likely to tell the truth given the potential consequences.

I think it would have entrenched [that executive] in his lying. I don't think it would have made him any more likely to tell the truth for example, because he would have known what would have happened to him. I think if there was criminalisation, if you don't send a person like that to jail and you do a deal with them, what's the point? (Interviewee 24)

Interviewee 11 said he would have contested the charge if it was criminal. He explained that when it was civil, it was as much a commercial decision than anything else, but if it was criminal, he would have had to take more personal issues into account.

Yes, it would have made a difference. I hadn't thought about it but it would have made a difference. It's still something that makes the front paper and something that you're not proud of admitting a breach or being involved in anything. There's that, so it's not the most exciting thing. But in the same thing it still really comes down to a commercial decision. We weighed up what it was going to cost, the probabilities of fighting and losing and what a potential fine, or what we thought a potential fine, would be. So when it is civil, I suppose, it's more of a commercial decision than a personal one as much. Although there's still a lot of elements that are personal in it as well. It would make a difference, I think. Given the same facts and the same position, if it's criminal, I probably would have contested...Absolutely, so yeah it would make a difference. [Interviewee 11]

Another interviewee also said he would have fought the charge to his "last penny", even if it was against his lawyer's advice in a criminal (as opposed to a civil) case:

I knew it wasn't a criminal offence. If it had have been a criminal offence, I would have defended to my last penny because as I said earlier, I didn't believe that I did anything criminal. Because it was a civil or a fine nature, on advice from the lawyer, he said, you know, pay 100,000, whatever it was, or 200,000 and get rid of it. So that's the advice there.

What did I think was going to happen at the end? I wanted to fight it, to be quite honest. I wanted to go ahead and do it but not being a lawyer that you employ them for, you've got to take advice. You go to your doctor and he says, oh, well, take this tablet, you say, no, I don't want to take the bloody tablet. You shouldn't have gone to the doctor in the first place. [Laughter] So he advised that would be the best action. But criminal, I would have spent every penny I had in my life to...

[Is that because of jail or because of the criminal tag?]

No, no way in the world. It's like that guilt feeling I said about when you're driving along the street and you're doing 70 or 80 in a 50 kilometre zone and the policeman pulls you over and your body says - your mind, your body says, I'm guilty. Never had one guilty feeling. Not one, not even in a little finger that I was guilty of anything when I received the notice from the ACCC. And even right through, I still, to this day, say I don't think I did anything wrong. (Interviewee 17)

However, one interviewee commented that – depending on the length of the jail term he was likely to serve – he would not have done anything differently if he faced criminal rather than civil prosecution. That is, he would have cooperated with the ACCC and take the jail time if it was only going to be a short term. His comments were also suggestive that jail may not be a powerful deterrent in some industries:

[But if say you had been prosecuted criminally, would you have fought it? What do you think?] ... I would look at it on a commercial sense as, how is it going to affect the rest of our working career? What case have they got against us? Then do a risk assessment based on that. How much is it going to cost us? Is there a possibility for a plea bargain? There's a whole lot of things. ... Three or six months [in jail] wouldn't - no, I would rather - I would

probably go the same way as I did that way. [That is, I would settle with the ACCC and do the 3 months jail.] That doesn't worry me. If it was like five, six years then it would. Oh, for sure. Of course, and you'd have to think of that. *[So you'd do the three or six months?]* It wouldn't worry me, It would not worry me at all. Because at the end of the day I look at it, it's a small price to pay. At least you come out and still can trade with the business and you've got income. If it comes down to where the point they're going to take every - the worst case scenario for us was they would slap an embargo - like a bankruptcy, you cannot trade. That would be worse than going to jail for that. ... it's the amount of time obviously ... That's myself anyway...Out [name of local low security jail] there, no worries. [Laughing]. Mobile ... Do my computer – do my work from there ... [Laughs] Paid by the State. ... the CEOs...It's more of a - what's it called - stigma thing. For me - like I look - for ourselves we don't get involved with the... A-list is what you'd call it - or the groups, the socialites, 'cause they're all false pretences. [So we are not worried about the sort of reputational issues that they worry about.] We've got our close circle of friends and we all look after ourselves. Okay, and we go out and it's, oh well, if something happens we all back each other. It's not like oh "he's been to jail". [as if whispering/gossiping] *[So there would be - are you saying there maybe some people in your industry who've been to jail?]* But I wouldn't care and that's how we build our business up, we don't care about other contractors what they say or think. We move with the times, we stick to what we know. We do well from that, so, and we branch out. So we've got other businesses on the side as well. (Interviewee 6)

6. CONCLUSION

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 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.

The interviews summarised here show that it is much more complex to elicit compliance with anti-cartel laws than this policy rationale suggests. This is also the message of much other empirical and scholarly research on regulatory compliance in other areas (see Parker, 2011; Parker and Nielsen, 2011a, 2011b, 2011c).

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.

This points to the contested nature of business regulation in general and whether white collar crime is morally equivalent to blue collar crime. It also points to the contested nature of the ACCC in particular. Interviewees are moving the discussion away from an assessment of whether or not cartel conduct is wrongful or harmful in moral terms and towards a discussion of “how” best to “regulate” business. That is, for some interviewees the strategy is to admit that cartel conduct can be harmful and equivalent to a criminal offence, but they distinguish their own circumstances from circumstances that should count as criminal. But for other interviewees the whole strategy is to try to move the discussion away from this kind of black and white distinction to a discussion of the legitimate and effective techniques of regulation and compliance.

Finally, although most of our interviewees were not knowledgeable and calculating about the possibilities of being caught for cartel conduct before the ACCC investigation, once the investigation and enforcement process began, they were forced to think in a calculating way about how much it was worth agreeing to pay in financial penalties to conclude the enforcement

process as quickly as possible, and how this could be done with minimal impact to their personal and business lives. Some interviewees were quite enterprising in developing strategies to avoid the pain and hardship of financial penalties, while for others the penalties and especially the process were financially and personally crippling.

The interview findings are supported by the results of our survey of 567 Australian business people, whose roles make compliance with anti-cartel law salient one year after cartel conduct had become a criminal offence. The survey 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 (Beaton-Wells et al, 2010, 76-82).

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 are also fairly low, although they do increase when survey respondents are told that cartel conduct has changed from a civil offence to a criminal offence. However, they do 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 know that this conduct is a criminal offence. Nearly a third (29%) of the business people responding to the survey think a hypothetical person would breach the anti-cartel law despite criminalisation and jail (Beaton-Wells et al, 2010, 198-202).

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APPENDIX

Questions for Interviews with Respondents

Notes:

Not all questions will be appropriate for all interviewees – depending on what sort of conduct is involved and how directly they were involved in the cartel conduct.

As written, most of these questions will only be relevant if the interviewee was personally involved in the cartel. If they weren't personally involved, we will just need to ask them what they think was the attraction for those involved. In that case, we should be careful to ask questions to figure out whether they are just speculating or have some evidence for their views. Note that we do not want any information that may identify a third party if the third party's conduct has not been subject to a finding of fact by a court.

These questions have been written out in detail in case it is necessary to prompt interviewees to cover specific issues. It is expected that in most cases answers to most questions will flow naturally as the interviewee tells their story. The interviewers will not be mechanically going through all the questions one by one.

Preliminary

Researchers to make sure interviewee has filled in and signed consent form, discuss anonymity requirements and remind interviewee we do not want them to talk about any illegal conduct not the subject of the completed enforcement action, whether the conduct is their own or that of a third party..

Confirm with the interviewee that their case was one where the court made a finding of fact that they were involved in cartel conduct (although it should be if we have reviewed and included the case on the potential interview list). We may need to explain to the interviewee that this means a finding of fact that there was a relevant breach of s 45 as the word 'cartel' may not have been mentioned in their case.

1. Background Questions

Can you tell us a little about yourself? Your education and career history?

What position were you in at your work when the cartel conduct occurred? What responsibilities did you have? What are you doing now?

Can you tell us a bit about the business that was involved in the cartel conduct? What industry/ies did it operate in? How big was it? What sort of management style and culture? Who were the customers?

What about the industry at the time? How was it structured? What sort of competition did your firm have? Were things tough in the industry?

2. Facts of cartel

Ask about broad facts of cartel as far as respondent is aware and the involvement of their business in it. (Don't talk about enforcement action yet.)

3. Getting involved in the cartel?

How did you get involved in the cartel?

- Who explained it to you? Probe for relationships.
- Probe for whether they were the one who initiated it.
- Probe for whether the hierarchical supervisory relationships were such as to make them feel that they had to do it.

When you got involved, did you know any of the other people involved?

- Eg social or business relationships with people in other firms, acquaintance through industry association, previous employment?

What were the reasons for getting involved in the cartel?

- Probe for both personal/individual and corporate level benefits that the interviewee perceived for being involved in the cartel at the time.
- Probe for both positive and negative pressures to be involved:
 - positive includes profits for the company or for oneself individually (ie bonus calculations), desire to feel sense of control over market conditions...
 - negative includes pressure to be involved in pre-existing cartel from other members of cartel or your own company, economic conditions,...

Did you have any concerns at the time about getting involved in the cartel?

- What was the source of your concern?
- Did you turn to anyone for advice?

Did you think over whether to get involved or not? For example, did you try to do a cost:benefit analysis? Did it just happen naturally? [Probe for the thought process at the time.]

4. Operation of the Cartel

How did the cartel operate on a day by day basis?

- Probe for how cartel members communicated with each other, how decisions were made and implemented...

What was your authority for making decisions as part of the cartel? Did you have to report back to someone in your own firm? Did you have carte blanche? What constraints did you work under?

Were there points at which the cartel was at risk of break-up or did break-up? How did it get back together? Why?

Did you achieve the benefits you saw in it? [refer back to answers given above about reasons for getting involved]

How did you feel about being involved? How did your feelings change over the course of the cartel?

- Probe for feelings about being involved – sense of excitement, power, subterfuge, fear, Probe for feelings at different specific points...
- Were you afraid at different points that your opponents might do you in or that the regulator might be breathing down your neck? Why or why not?

Did you ever want to get out of the cartel? If so, what was the trigger? Who did you talk to? What did you do? If you stayed in, what persuaded you to stay?

At the time of the conduct did your firm have any sort of explicit policy or program aimed at ensuring compliance with competition law and avoiding cartel conduct?

- If so, what did it involve (eg training sessions; any monitoring or sign-offs required)?
- Did you have to do anything to avoid the reach of the compliance program?

5. Awareness and moral perception of the law

Did you think that what you did was against the law at the time you did it? If so, how did you know that? If not, when and how did you find out?

Did you think it should be against the law?

Did you feel it was wrong? Why?

- Probe for whether the sense of wrongfulness was because they felt it was morally wrong like lying, cheating or stealing or because it was harmful to the economy.

Did you think that others would think it was wrong if they knew?

- Probe: Others in the company? Customers? The general public? Your family and personal friends?

Did you think that your behavior in being part of the cartel was unusual in your industry, in Australian business in general? Or do you think there was lots of behavior like this at that time?

- Probe if they knew it was against the law, did they think what they did specifically was wrong or did they think there was some excuse (either a legal excuse or a moral excuse).
- Probe if there was any change over time – did they not know it was wrong to start with but did later or vice versa.

Did you tell anyone else about your involvement in the cartel?

- Probe: Did your family and friends know? Other work colleagues?

6. Deterrence: fear of being discovered and sanctioned

Did you try to conceal the cartel and your involvement in it? How? How clever did you have to be to keep it secret?

Did you think about getting discovered?

- Probe: By management? By regulator? By customers?

If so, what did you think were the chances of getting discovered? Why?

- Did you feel that customers were monitoring your industry? Did you feel that others in the company were monitoring your conduct? Did others in the company know?
- Probe as to who exactly in the company knew about it and whether there was a fear of being discovered by management or whether they knew.
- Did you think about one of the other members of the cartel possibly defecting and telling the authorities? If so, what did you think were the chances of this happening? Why?

Was the cartel and your involvement in it ever in danger of being discovered?

What did you think would happen if the cartel and your involvement in it was found out? Who did you think would deal with this sort of conduct if it was found out?

- Management? Customers? The authorities?
- Try to probe as to whether they had a sense that it would be dealt with purely privately by management and client, by civil regulatory authorities, by criminal authorities.
- Would it go to court? Would there be a fine? Jail? Compensation payment ordered? How big?
- Who did you think would pay any fine? Legal costs? If you thought jail was a possibility, who did you think would go to jail?

Did you personally worry about being caught and sanctioned? How did this make you feel?

Were you aware of any cases of enforcement against cartels?

- Probe as to details of what they knew.

Were you aware of the ACCC? If so, did you think they did a good job? Tough? Fair? Competent? Doctrinaire? Bully boy? Not understanding the market?

Do you know who the chair of the ACCC was at the time the ACCC commenced enforcement action against your firm? What did you think of him?

7. Experience of Enforcement

How was your cartel discovered? Had you tried to prevent this kind of discovery? Had you been threatened with discovery before?

What enforcement action occurred?

Note that we do not want the sort of detailed disclosures that might uncover evidence of perjury or obstruction of justice.

- Probe as to details of how process unfolded.

What sanctions were applied to you, to the company? By the court and ACCC, by clients, by management?

How did the reality of the enforcement process and sanctions match what you had expected or feared might happen before the cartel was discovered?

- Probe for both nature of formal enforcement action and also informal “enforcement” by management, customers, the public, friends and family.

Did you feel punished? What if the penalty had been greater? Or different?

- Probe for different levels of financial penalties, jail

Did it make a difference to you personally? In terms of job, family, friends?

How did the firm respond to your involvement? Was it supportive of you in the proceedings or were you left to deal with it on your own? Did you perceive a conflict between your interests and the firm’s interests in connection with the proceedings?

At the time you were involved in the cartel, did you think about the effect it might have on your future job prospects? your family?

Would you do it again? What do you say to people now about what happened? What if someone else was suggesting similar activity today?

How did the enforcement process and action affect the firm? Did your firm change things after the enforcement action? How? [Probe for details]

What penalty do you think would have been appropriate for the conduct in your case? What penalty do you think would have stopped the members of the cartel you were involved in?

- \$5000; \$500 000; a fine based on the gain from the cartel; a fine based on a percentage of the firm’s turnover; 1 month in jail; 1 year in jail??? Probe for who (ie what role) should pay or spend time in jail?

8. Criminalisation

Were you aware before we contacted you about this research about the criminalisation of serious cartel conduct? How did you become aware of it? Do you know what the main issues are with criminalisation? Do you know who the people leading the debate about it are? Does your company have a view on criminalisation? Your industry association?

[Explain criminalisation and sanctions that will be available.]

Do you think that would have made a difference to your conduct? Why or why not?

- Probe for whether it is the status of “criminal” that makes a difference, or jail penalties for individuals etc.

Do you think it would make a difference to other people's behaviour?

You have been an executive for X years, during which time there have been Liberal and Labor governments with differing views of welfare and the working of markets. Have your views of price fixing etc changed over time as a result of your observations of these political processes? How have they changed?

Conclusion

Is there anything else that you would like to tell us about that you think is relevant to understanding how cartel conduct comes about or how the new criminal provisions are likely to work in practice?

Is there anybody else who you think might be willing to be interviewed by us who would be useful for us to talk to in order to understand these matters further? [If so, ask them to pass on the Plain Language Statement to them and ask them to contact us.]