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Cartel Criminalisation as Cultural Change

A report from findings of a survey of the Australian public

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About the presenter

Associate Professor Caron Beaton-Wells is an academic specialising in competition law at the University of Melbourne Law School, and is the Director of the University's Competition Law & Economics Network (www.clen.unimelb.edu.au). Her recent research focuses on cartels. This research has produced a series of conference papers, book chapters and journal articles in Australian and international journals. She is also a co-author with Professor Brent Fisse, of *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, to be published by Cambridge University Press in 2011 and, a co-editor with Dr Ariel Ezrachi, of *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, to be published by Hart Publishing in 2011. Dr Beaton-Wells teaches competition law at undergraduate and graduate levels and directs the specialist graduate program in competition law at the Melbourne Law School (www.masters.law.unimelb.edu.au/competitionlaw).

This presentation is based on research undertaken for a major Australian Research Council-funded project over three years into cartel criminalisation in Australia. Information about the project is available at www.cartel.law.unimelb.edu.au. The statistical assistance of Chris Platania-Phung is gratefully acknowledged.

About this presentation

- The Melbourne Law School Cartel Project
- Cartel criminalisation as cultural change
- The ACCC campaign to criminalise cartel conduct
- Survey findings
 - General awareness and support for competition law
 - Views on treating cartel conduct as a crime
 - Views on penalising cartel conduct
- Reflections

The MLS Cartel Project (1)

- **Aims**

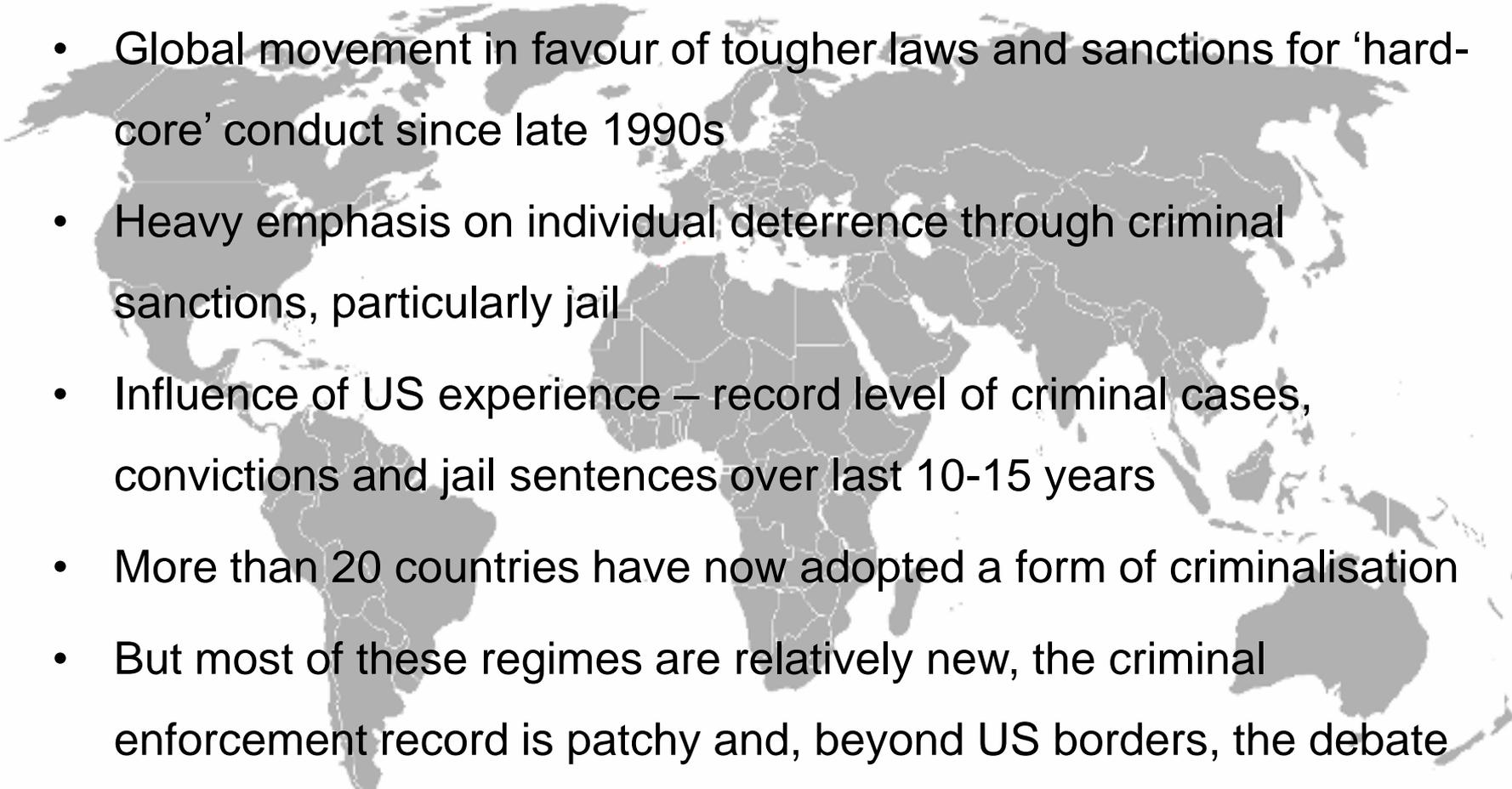
- investigate how and why cartel criminalisation has taken place in Australia
- assess the likely impact on deterrence and compliance
- compare policy and experience overseas (esp. US and UK)
- elicit possible insights for other jurisdictions and other forms of business regulation

- **Empirical components**

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

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

Cartel criminalisation as cultural change (1)

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- Global movement in favour of tougher laws and sanctions for ‘hard-core’ conduct since late 1990s
 - Heavy emphasis on individual deterrence through criminal sanctions, particularly jail
 - Influence of US experience – record level of criminal cases, convictions and jail sentences over last 10-15 years
 - More than 20 countries have now adopted a form of criminalisation
 - But most of these regimes are relatively new, the criminal enforcement record is patchy and, beyond US borders, the debate as to the merits of criminalisation is still active

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

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



Cartel criminalisation as cultural change (3)

- Cartel criminalisation is not just about changing the law. It is about changing socio-cultural norms.
- A range of stakeholders must be engaged and persuaded, including
 - ✓ politicians
 - ✓ the legal profession, including prosecutors and judges
 - ✓ members of the general public as taxpayers/voters and jurors
 - ✓ the media and other commentators
 - ✓ (most importantly) the business community
- It will be a slow process – in the US it has taken over a century.

The ACCC campaign (1)



- Chairman Allan Fels floated the idea in 1994
- ACCC made a formal submission to an independent review in 2002 and won support
- Conservative government fell into line in 2005

- Victory in Visy case in federal election campaign in late 2007 – record breaking penalties against high profile defendants
- Newly elected Labor government introduced draft legislation in January 2008
- Reforms passed in June 2009 after protracted consultation over drafting



The ACCC campaign (2)

- The platform for the ACCC's criminalisation campaign has been building for over 20 years
- From the early 1990s the agency began to establish itself as a politically powerful, committed and effective enforcement agency
- 'Cracking cartels' has been its top priority for at least the last decade
- The policy has been to bring penalty proceedings, <90% of which have been won by the agency, mostly without a contest
- Penalties have not been high by US or EU standards but collateral and reputational costs have been 'leveraged'
- At the same time there has been considerable investment in educating the business community about the harms of cartels and promoting the benefits of voluntary compliance

Survey findings

General awareness and support for competition law (1)

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

High level of awareness of competition / cartel-related topics

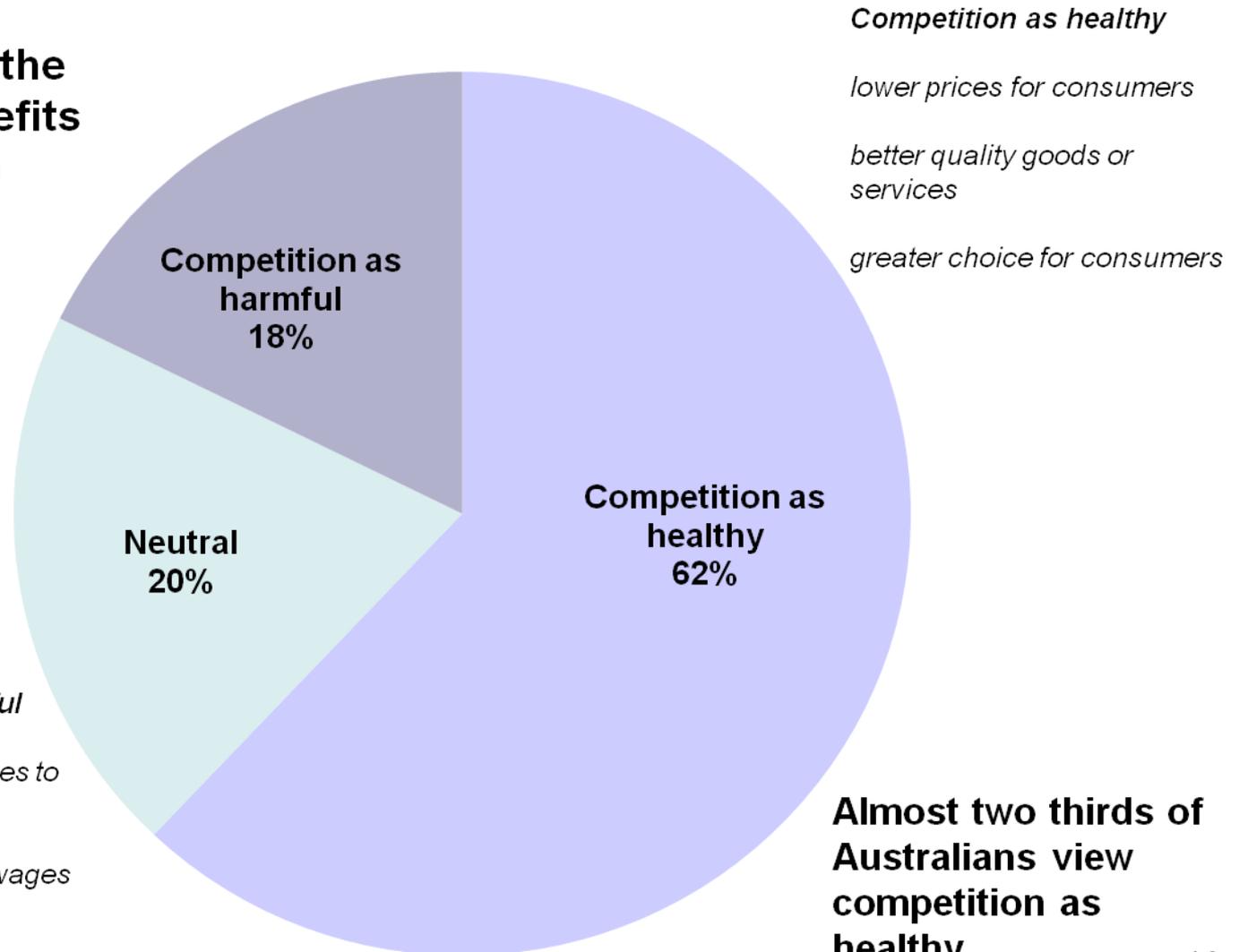
9 in 10 respondents had heard or read of at least one of these topics

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

Survey findings

General awareness and support for competition law (2)

High level of recognition of the economic benefits of competition



Competition as healthy

lower prices for consumers

better quality goods or services

greater choice for consumers

**Competition as healthy
62%**

**Competition as harmful
18%**

**Neutral
20%**

Competition as harmful

hard for small businesses to have a fair go

cost-cutting and lower wages

disadvantage in rural / regional areas

Almost two thirds of Australians view competition as healthy

Survey findings

General awareness and support for competition law (3)

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

There are two butchers in a town. In the past they have set their prices independently of each other. This has meant that if one butcher put up its prices, consumers could switch to the other butcher to find a lower price. The butchers have now reached an agreement with each other to set the prices they charge for the most popular cuts. As a result, they can charge higher prices because if consumers are unhappy with the price at one butcher, they are unable to switch to the other butcher for a better price.

‘agreement between competitors on prices’

- Similar scenarios used for market allocation and output restriction

Survey findings

General awareness and support for competition law (4)

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

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

Positive association with view of competition as healthy



Survey findings

Treating cartel conduct as a criminal offence (1) *Agreement*

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

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

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

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

Survey findings

Treating cartel conduct as a criminal offence (2)

Reasons

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

Survey findings

Treating cartel conduct as a criminal offence (3)

Reasons

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

Moral reasons had highest % of strong agreement

Survey findings

Treating cartel conduct as a criminal offence (4)

Reasons

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

Survey findings

Treating cartel conduct as a criminal offence (5)

Relative to other crimes

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

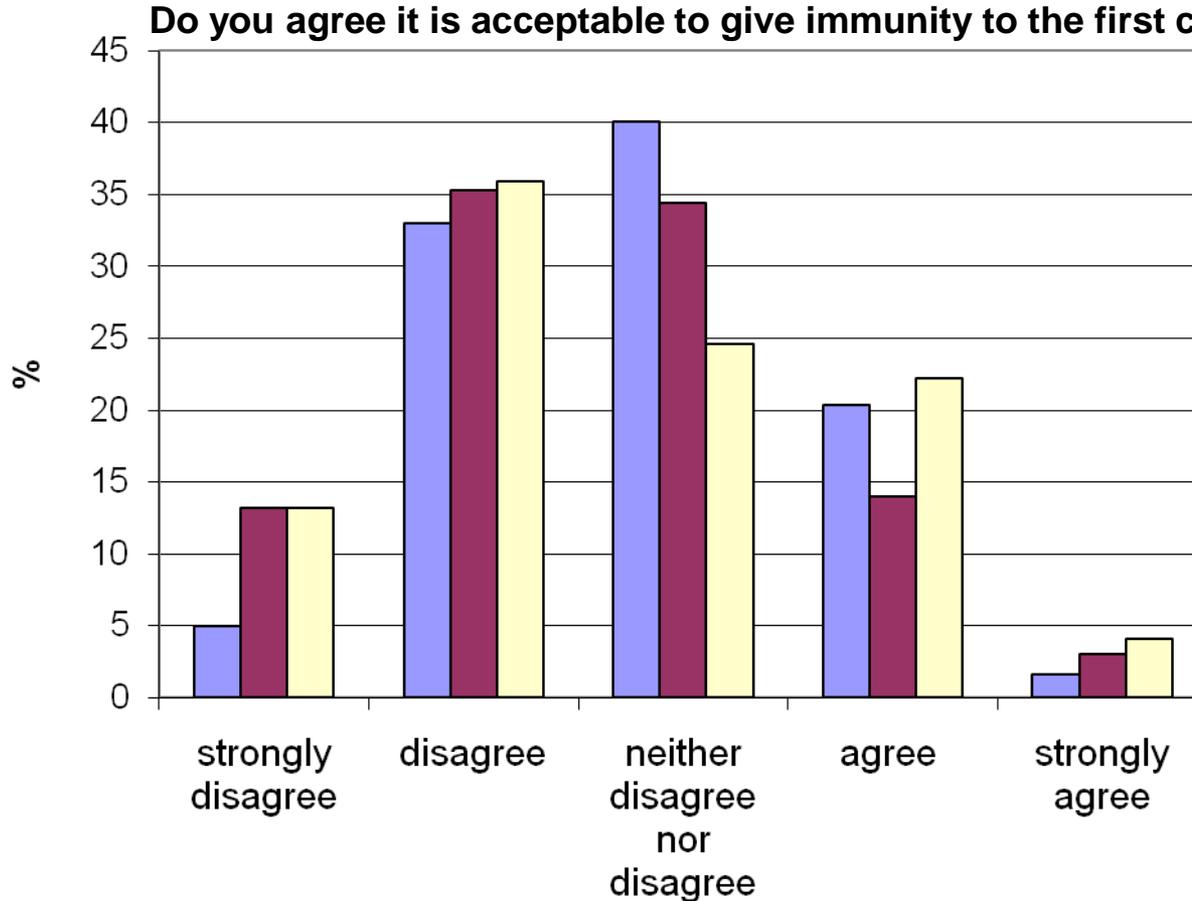
'Just as serious' comparators also reflect ACCC's moral message ¹⁹



Survey findings

Treating cartel conduct as a criminal offence (6)

Acceptability of immunity policy



Only 26.3% agreed that immunity policy was acceptable in a case of price fixing

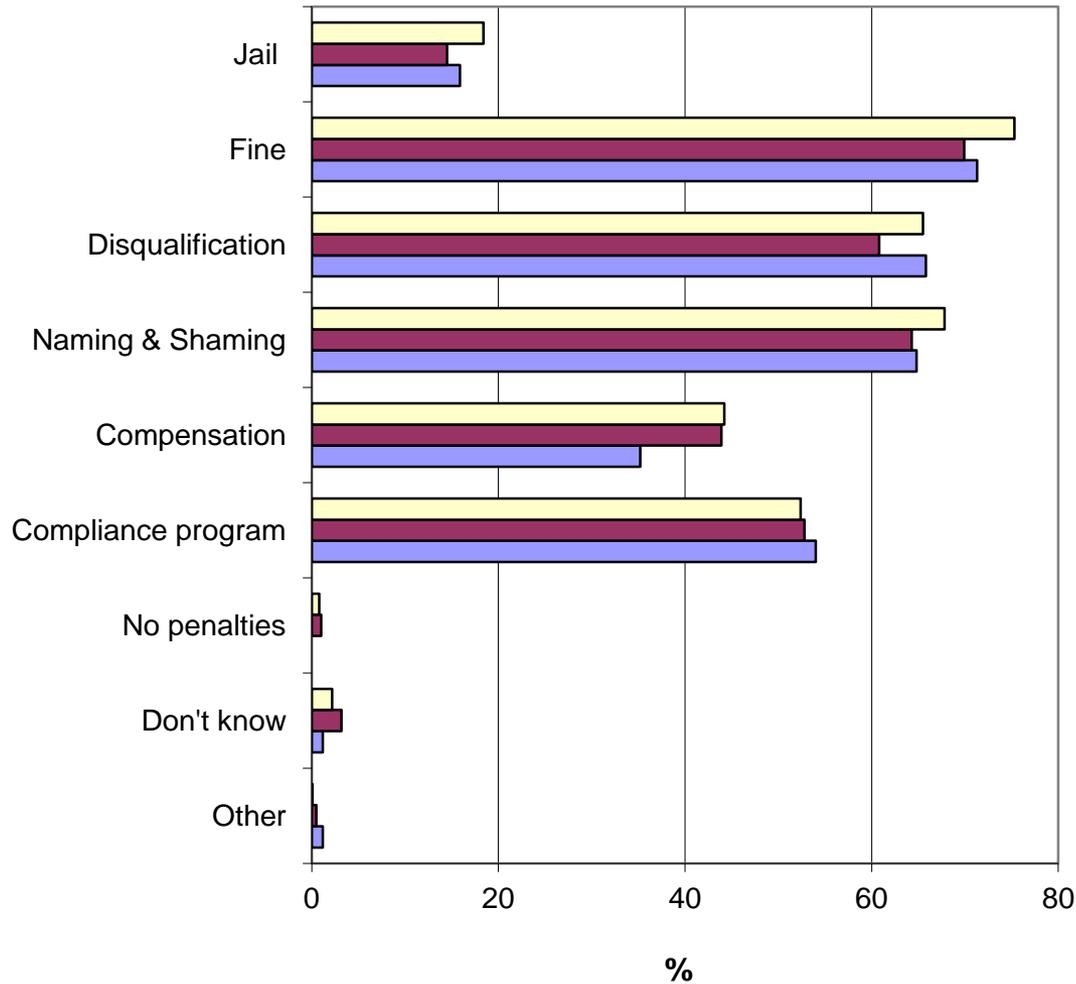
Lack of support for immunity policy could also suggest moral concerns



Survey findings

Penalties for cartel conduct (1)

Individuals



Support for jailing individuals increased with level of cartel awareness

Men more likely to support jailing individuals than women

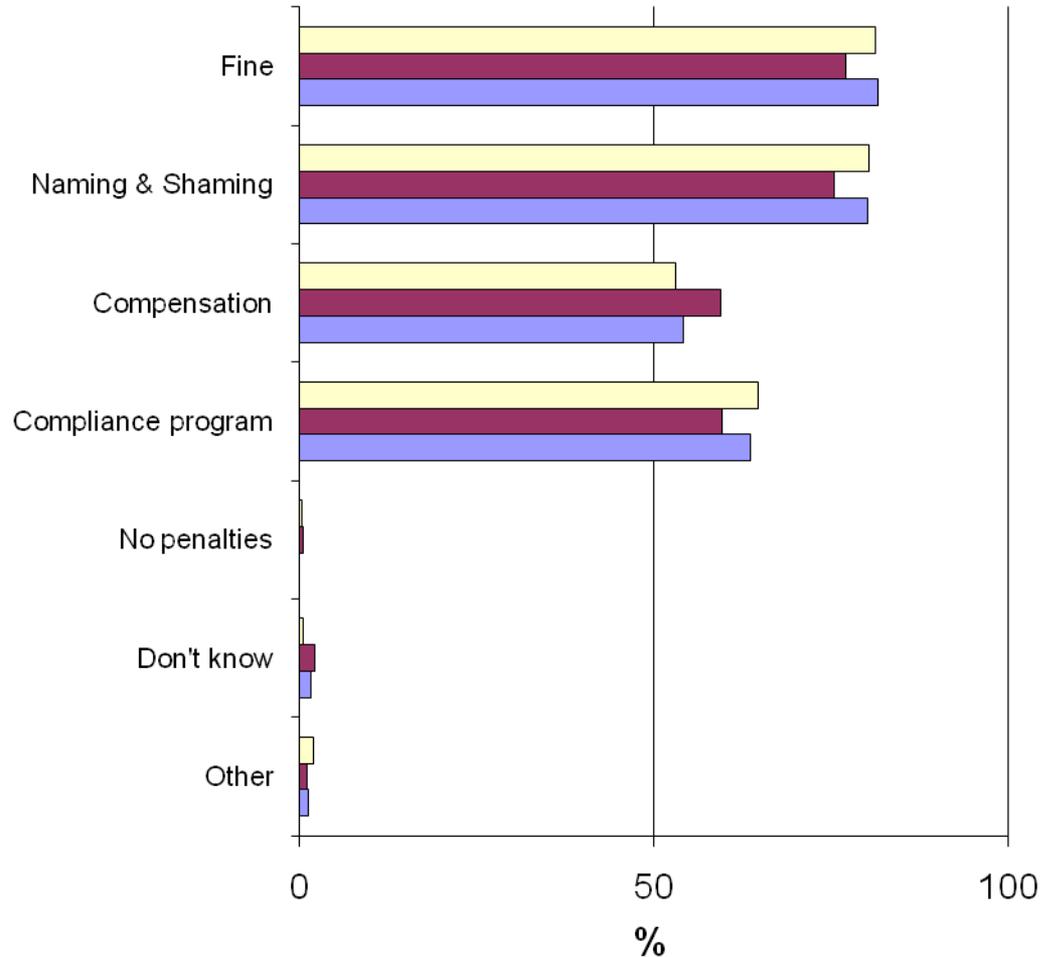
Low support for jail as a cartel sanction



Survey findings

Penalties for cartel conduct (2)

Companies



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

Strong support for fines and naming and shaming also of companies

Survey findings

Penalties for cartel conduct (3)

Context

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

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

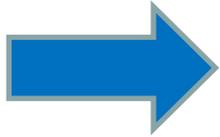


Survey findings

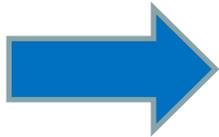
Penalties for cartel conduct (4)

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

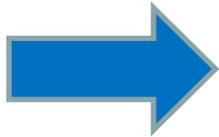
Reflections



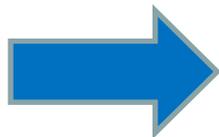
There are solid foundations in terms of awareness and support for competition policy and enforcement amongst the Australian public



The ACCC campaign to 'sell' criminalisation over the last 10 years has yielded strong results – 42% of Australians agree that cartel conduct should be a crime



Its message that such conduct is morally wrong (as well as economically harmful) appears to resonate



But there is still a long way to go in persuading people that it is conduct for which individuals should go to jail



Questions?

For more information:

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



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