

## EXECUTIVE SUMMARY

- Amongst the Australian public, there is substantial majority support for the view that cartel conduct is unacceptable in the sense that it should be against the law. This view is associated with a positive attitude towards competition as healthy. It is also associated with pre-existing awareness of cartel-related topics, such as the ACCC and price fixing.
- However, less than a majority support the view that cartel conduct should be a criminal offence and less than a quarter support the view that individuals should be jailed for it. There are few associations between views on whether cartel conduct should be a criminal offence or conduct for which individuals are jailed and demographic attributes such as age, education, work status and political affiliation. However, men are less lenient in their views than women in that they are more likely to consider that cartel conduct should be a crime and that individuals should go to jail for it.
- Insofar as there is support for treating cartel conduct as a criminal offence, that support is based on a wide range of reasons that encompass its economic effects, its moral character and the instrumental characteristics of the criminal law as a mechanism for deterrence and punishment.
- There is almost no support for the view that cartel conduct is behaviour for which either companies or individuals alone should be sanctioned; rather, there is almost universal support for the view that sanctions should attach to both.
- There is substantial majority support for the view that companies and individuals involved in cartel conduct should be publicly named and shamed and that they should be fined.
- There is clear majority support for the view that the fine imposed on a company for cartel conduct should at least disgorge the company of the illegal profits and strong (one third) support for basing the fine on treble the profits derived from the conduct. There is a significant gap between public opinion about the appropriate level of corporate fines for cartel conduct and the actual level of fines that have been imposed over the last decade in Australia. Opinion is divided on the level of the fine that should be imposed on

an individual for cartel conduct as reflected in the fact that maxima of AU\$10,000 and AU\$500,000 attract similar levels of support.

- There is relatively less but still majority support for other legal consequences for corporate and individual offenders, such as the requirement that compensation be paid or compliance programs be implemented or, that in the case of individuals, disqualification orders be made.
- There is low support for the view that immunity from sanctions for cartel conduct should be available in return for being the first to report the conduct to the authorities even if, without such a report, the authorities are unlikely to have detected the conduct. There is thus a clear misalignment between enforcement policy with respect to immunity and public opinion.
- Cartel conduct is clearly regarded as serious insofar as it is seen as behaviour that:
  - should be treated as illegal, if not criminal;
  - should attract fines that, for companies at least, are considerable and public naming and shaming of those involved; and
  - should not be readily excused on grounds relating to the nature of the companies involved, the reasons for the conduct, or its effects.
- For those members of the public who consider that it should be a criminal offence, cartel conduct is seen as just as serious as a range of long-standing or well-established criminal offences such as theft, fraud, tax evasion, breach of directors' duties and insider trading. Consistent with findings generally in crime seriousness research, offences involving physical harm or the risk of such harm to other persons (including consumer protection offences involving misrepresentations over product safety) are seen as more serious than cartel conduct.
- The seriousness of cartel conduct is viewed generally by the public more in moral terms than in terms of its economic effects, as reflected in:
  - the fact that the reasons for treating such conduct as a criminal offence that attract greatest support are reasons relating to moral characterisations of the conduct as

dishonest and deceptive (as distinct from characterizations based on economic effects);

- the high level of support for publicly naming those involved in the conduct, suggesting this is conduct seen as warranting the stigma of community disapproval;
- the low level of support for allowing an offender to escape penalties in return for reporting the conduct, a response that sits more comfortably with a moral rather than an instrumental approach;
- majority support for the view that cartel conduct should be seen as just as serious regardless of its effects or circumstances, that is, even if prices do not increase as a result of the conduct, the conduct would prevent factories from closing and would save jobs, or the companies involved are small businesses;
- substantial majority support for the view that the conduct should be regarded as more serious when it has elements that make it less acceptable from a moral perspective, namely when it involves coercion of another company to join the cartel or where elaborate steps are taken to conceal the conduct from authorities.
- There are no significant differences in views on the legal treatment and seriousness of different types of cartel conduct, except to the extent that the public appears to take a more lenient view of market allocation than of price fixing or output restriction.
- Business people who have roles that make the anti-cartel laws relevant to them have quite a low degree of knowledge of the fact that cartel conduct is a criminal offence. They also have low knowledge of the fact that jail is available for individuals for engaging in cartel conduct:
  - less than one quarter of the business respondents are aware that jail is available as a penalty for individuals for cartel conduct;
  - less than half are aware that cartel conduct is a criminal offence;
  - two thirds know that cartel conduct is a civil contravention but one third are either unsure or think it is not a civil contravention;
  - less than half are aware that a fine is available as a penalty for cartel conduct (whether they believe it is a civil contravention or criminal offence).

- This same group of business people also perceive the likelihood of enforcement action against cartel conduct as fairly low. They rate the likelihood of being caught for engaging in cartel conduct, being subject to legal action for cartel conduct, and being sentenced to jail (if found guilty of a criminal offence of cartel conduct) as all fairly low.
- Business respondent perceptions of the likelihood of being caught or of being subject to legal action both increase modestly when they know that cartel conduct is a criminal offence. However:
  - being caught is still considered unlikely even when business people know cartel conduct is a criminal offence;
  - the likelihood of a person being subject to legal action once caught is perceived as a little higher than being caught in the first place, but it is still not seen as very likely, even when criminal sanctions apply.
- Even though perceptions of the likelihood of enforcement do increase when business respondents are told that cartel conduct is a criminal offence, overall the survey results suggest that many business people do not know (without being told) that cartel conduct is a criminal offence. Some do not even know it is a civil contravention. This low level of knowledge suggests that in real life many business people will tend to perceive the likelihood of enforcement against cartel conduct as low.
- Business respondents generally rate the likelihood of a hypothetical third person or themselves actually engaging in cartel conduct as fairly low, but there are still substantial numbers who report that engaging in cartel conduct would be likely in certain circumstances. In particular:
  - half of the business respondents report that a hypothetical person would be likely or very likely to engage in cartel conduct where only civil sanctions are available, and nearly one third still see cartel conduct by a hypothetical person as likely where criminal sanctions are available;
  - almost one in ten business respondents report that they themselves would be likely to engage in cartel conduct if the opportunity presented itself – even where criminal sanctions are available.

- Business people's ratings of the likelihood of themselves or another person engaging in cartel conduct are lower when the respondent knows the conduct is criminal than when they know it is only a civil contravention. But, as mentioned above, the survey also shows that knowledge that cartel conduct is a criminal offence is in fact quite low. Therefore many business people might still have a tendency to engage in cartel conduct if the opportunity arises, not knowing that it is a criminal offence.
- Preliminary analysis of the survey results suggests that business people are more likely to engage in cartel conduct when they are under economic pressure to do so, even though they know that criminal sanctions are available for such conduct. That is, knowing about criminal sanctions and the availability of jail may not outweigh economic pressure to engage in cartel conduct. Further analysis is necessary to test the robustness of this result.
- Not surprisingly, business respondents are more likely to rate another person as likely to engage in cartel conduct, than they are to rate themselves as likely to engage in such conduct. It is likely, however, that to some extent at least respondents' ratings of what another person is likely to do in fact reflect their own tendencies.
- Moreover business respondents see other business people as influenced by deterrence (that is the likelihood of enforcement) in making decisions about engaging in cartel conduct. They do not see themselves as influenced by likelihood of enforcement in deciding whether to engage in cartel conduct to the same extent as other people. It therefore seems likely that business people like to think of themselves as making decisions about engaging in cartel conduct on an ethical basis (in relation to the morality or harm of the conduct), rather than making a calculated decision about the costs and gains of non-compliance with anti-cartel law (on the basis of perceptions of the likelihood of deterrence). This is consistent with the survey findings that suggest that members of the public generally view cartel conduct through a moral rather than an economic lens.