Immunity for cartel conduct: revolution or religion? An Australian case study

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Immunity (leniency) policies are widely regarded as having revolutionized anti-cartel law enforcement. However, the generally unquestioning and universalist approach taken to such policies by competition authorities has as much the hallmarks of religion as it does of revolution. Drawing on the experience with the Australian Competition and Consumer Commission’s Immunity Policy for Cartel Conduct as a case study, this article suggests that there is value in a more searching approach to immunity policy. It explores the insights available from a critical empirical analysis of the role, operation and effectiveness of an immunity policy in the context of a specific jurisdiction. The analysis examines the extent to which the policy does and should adhere to the strict orthodoxy associated with immunity policy design and administration; the extent to which it is effective in facilitating detection, prosecution, and deterrence of cartel conduct and the challenges involved in effectiveness-testing; the policy’s interaction with other aspects of the overall system for enforcement and compliance and the degree to which the policy is consistent with the competition authority’s institutional values. It concludes by eliciting the implications of the analysis for the administration of immunity policies world-wide.

Keywords: cartels, leniency, immunity, settlement, detection, deterrence

JEL codes: K21, K14, L40 and L41

I. Introduction

Deterring, detecting, and prosecuting cartel conduct is a high priority for competition authorities worldwide. Cartel conduct involves various forms of arrangement between competitors that eliminate or subvert the normal processes

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of competition and thereby have at least the potential to increase prices, reduce consumer choice, and stifle innovation. Such arrangements are widely seen as the most harmful category of anti-competitive conduct. Serious or so-called ‘hard core’ cartels usually involve secrecy and deception by participants with the deliberate aim of avoiding discovery. They are therefore difficult to detect and as documentary evidence is rarely available, difficult to prosecute even when detected. Such activity is also often highly lucrative and therefore problematic to deter, even in the face of the toughest sanctions.

The challenges associated with anti-cartel law enforcement have prompted the widespread adoption by competition authorities of a distinctive tool—the immunity (or leniency, as it is alternatively called) policy. Providing the first eligible cartel member with full immunity from penalties, this is a tool employed only in respect of cartel conduct and not in relation to any other type of anti-competitive conduct. It is difficult to identify equivalent policies in the enforcement toolboxes of agencies enforcing the law against other forms of illegal or criminal conduct.

Based on the game theoretic model known as the ‘prisoner’s dilemma’, the use of an immunity policy in anti-cartel law enforcement is justified on the basis that it is the most effective and least costly mechanism for detecting and prosecuting activity that is generally systematic, deliberate, and covert. It is also seen as contributing to the deterrence of cartel conduct. These benefits are regarded by competition authorities as outweighing any adverse effects in terms of lower penalties overall as well as any unpalatable political or moral implications.

More than 50 jurisdictions have some form of immunity policy in their anti-cartel enforcement programme. Enforcers are zealous in their support for and

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1 A descriptor originating, it seems, in Organisation for Economic Co-operation and Development, ‘Recommendation of the Council concerning Effective Action against Hard Core Cartels’ (C(98)35/FINAL, 14 May 1998), intended to direct the toughest sanctions at cartel conduct at the most serious end of the spectrum of economic harm.

2 For convenience, this article uses the term ‘immunity’. That is the term used in Australia, the jurisdiction that is the focus of this article.


advocacy of such policies, and are at times defensive in the face of criticisms or perceived threats to their operation. With some justification, the adoption of immunity policies has been described as a ‘revolution’, a conceivably apt description in what is referred to by enforcers as ‘the war against cartels’.

Based largely on the experience of the United States (US) Department of Justice (DOJ), there is a high degree of consistency in the general design and administration of immunity policies around the world. Since the introduction of its revised policy in 1993, the DOJ has argued that there are certain prerequisites for ‘an effective leniency program’. Described as ‘cornerstones’ and ‘indispensable components’, these prerequisites have been articulated as follows:

‘First, the jurisdiction’s antitrust laws must provide the threat of severe sanctions for those who participate in hardcore cartel activity and fail to self-report. Second, organizations must perceive a high risk of detection by antitrust authorities if they do not self-report. Third, there must be transparency and predictability to the greatest extent possible throughout a jurisdiction’s cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not. These three major cornerstones – severe sanctions, heightened fear of detection, and transparency in enforcement policies – are the indispensable components of every effective leniency program.’

The US DOJ orthodoxy concerning the conditions or prerequisites for an effective immunity policy has widespread support. It is reflected in the discussions
and guidance on the topic by international organizations that represent a significant number of competition authorities—the Organization for Economic Co-operation and Development (OECD), International Competition Network (ICN) and European Competition Network (ECN), for example.\textsuperscript{15}

It is not uncommon for agencies to review the design and operation of their immunity policy every few years. While the impetuses for such reviews may be variable, it appears that they are generally operational or technical in nature. They tend to focus, for example, on the scope or interpretation of conditions for eligibility or on the practical aspects of the process for making applications or decisions in relation to applications, often with a view to assessing the degree to which the effectiveness prerequisites, as articulated above, are being met.\textsuperscript{16} Rarely do such reviews involve standing back and critically and objectively examining the effectiveness of the policy as measured against its objectives of facilitating detection, prosecution, and deterrence.

Similarly, such reviews tend to be inward-looking, focussed on the immunity policy in a fairly discrete and isolated way, neglecting the opportunity to consider: (1) the extent to which the policy has implications for or effects on other aspects of the overall enforcement system (such as advocacy and outreach activities, settlements, private actions and compliance programs); and (2) the extent to which the policy is reconcilable with the agency’s general approach to governance and its ‘constitutional’ values (such as transparency, consistency, proportionality, and fairness).

The narrow and generally uncritical approach taken to the review of immunity policies by enforcement agencies suggests that they might be described as much as a religion as a revolution in anti-cartel law enforcement.

\textbf{II. Background to and scope of this article}

There is a large body of economic research of both a theoretical and empirical nature that has sought to establish the ‘optimal’ design of immunity policies and test for their ‘success’ in cartel detection, prosecution, and deterrence. While valuable on its own terms, this research has limitations relating to data availability


\textsuperscript{16}See, eg the reviews undertaken in the past 5 years by the UK’s Office of Fair Trading (‘Applications for leniency and no-action in cartel cases: a consultation on OFT guidance’ (October 2011), OFT803con); the New Zealand Commerce Commission (‘The Commerce Commission’s draft revised Leniency Policy: Explanatory note’, 2009); the Competition Commission of Singapore (‘Consultation documents on guideline on lenient treatment for undertakings coming forward with information in cartel activity cases’, 2008) and the Irish Competition Authority (‘Cartel Immunity Programme Review-Consultation Paper’, 2010).
and methodology.\textsuperscript{17} It has also produced mixed results.\textsuperscript{18} More generally, the economic literature does not reveal how an immunity policy is actually perceived by the business sector generally and immunity applicants or prospective applicants specifically or by their advisers,\textsuperscript{19} and is limited also in the extent to which it reveals the way in which the policy is implemented by enforcement agencies in practice. The economic research has also not explored the role and impact of immunity policies in a broader policy setting, in which other interconnected

\textsuperscript{17} In the case of the theoretical literature, for example, the models that have been developed are often limited by the need to make unrealistic assumptions for tractability reasons. Many aspects of reality are excluded such as asymmetric information between firms, mistakes in law enforcement and uncertainty firms face about the level of fines, profitability of the cartel or defection and future market conditions. All of these factors influence a firm's willingness to participate in a cartel, willingness to remain in a cartel and also their propensity to report a cartel to the authorities. The theoretical studies are also limited by the fact that they tend not to reflect differences between specific policies. See Bruce H Kobayashi, 'Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws against Corporations' (2001) 69 George Washington L Rev 715–44. In the case of the empirical literature, it is unclear how success is to be measured because it is impossible to know how many undetected cartels exist or how many have been deterred from forming or even how many have formed. See Jun Zhou, 'Evaluating Leniency with Missing Information on Undetected Cartels: Exploring Time-Varying Policy Impacts on Cartel Duration' (SSRN working paper 1985816, 2012). Furthermore, it is difficult to establish how many cartels would have ended irrespective of the existence of the immunity policy. See Sjoerd Arlman, 'Crime but no Punishment. An Empirical Study of the EU's 1996 Leniency Notice and Cartel Fines in Article 81 Proceedings' (Master's thesis, Universiteit van Amsterdam 2005). A further difficulty with those studies that attempt to measure immunity policy effectiveness by reference to cartel duration is that it is difficult to differentiate between the long- and short-term effects of the policy, that is to determine when the short term ends and the long term starts. This is important because cartels already exist that would not have formed if a policy was in place, while others may form after a policy has been introduced that would not have formed otherwise. While many studies make some effort to separate out the long and short term, there is no consensus on which method is most accurate. Additionally, some articles do not make any attempt and so consequently may have biased results. Another limitation with the research is the difficulty that researchers have in determining what element of antitrust policy was responsible for the observed effects. Often there were a number of different elements to the immunity policy that were introduced at the same time, such as amnesty, and increase in fines and changes to individual liability, but it is not clear which of these factors is most important. Finally, a weakness of many articles is the use of duration data that is susceptible to measurement error. See Andrew R Dick, 'When are Cartels Stable Contracts?' (2006) 39 J L & Eco 241–83. First, often the start and end dates are negotiated by the firms and the competition authorities as part of the terms of the immunity agreement. Second, it may not be clear, even to the firms, when the cartel actually started. Furthermore, the duration of cartels is often not symmetric across firms as firms may have joined and left the cartel at different dates. See Oindrilu De, 'Analysis of Cartel Duration: Evidence from EC Prosecuted Cartels' (2010) 17(1) Int'l J Eco Busi 33–65. These factors could lead to biased estimates, although it is unclear in which direction the estimates would be biased.

\textsuperscript{18} See, eg Brenner finding that leniency policies have no effect on deterrence (Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program' (2009) 27(6) Int'l J Indus Org 639–45), while Miller finds that there is a 59% increase in deterrence (Nathan H Miller, 'Strategic Leniency and Cartel Enforcement' (2009) 99(3) Am Eco Rev 750–68).

\textsuperscript{19} This is a particular weakness of the experimental research that involves experiments conducted in university computer laboratories using university students as subjects under standard experimental settings. See, eg Jose Apesteguia, Martin Dufwenberg and Reinhard Selten, 'Blowing the Whistle' (2007) 31(1) Eco Theory 143–66; Jeroen Hinloopen and Adriaan R Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' (2008) 39 RAND J Eco 607–16; Maria Bigoni, and others, 'Fines, Leniency and Rewards in antitrust' (2012) 43 RAND J Eco 368–90. The results from such studies must be considered in light of the following limitations. First, since these experiments are conducted on university students who are paid small amounts of money relative to the amounts that firms and cartels are earning. It is therefore difficult to know whether the results 'scale' well to the type of situation under study. Similarly, it is also not clear whether university students have the same risk preferences as business executives. They may not have the same perspectives and experiences as firm employees, although it is not obvious what implications this would have on their decisions. Finally, cartels are often built on trust, which usually means personal relationships. It is thus not clear what impact being able to meet and discuss face-to-face, or the possibility of having worked together in other capacities, could have on a person's desire and willingness to collude in an illegal way. This is not captured in the experiments as subjects are only allowed to communicate with each other through a computer system.
aspects of enforcement are at work and in which general considerations of agency governance are relevant.

While qualitative approaches, involving case studies and interviews, have the potential to supplement and overcome some of the limitations of the economic research in this area, relatively little qualitative research appears to have been undertaken. As far as the author is aware, there have been only two case studies published about the impact of an immunity policy, both of which related to cartels investigated by European authorities.20 There have also been only two publicly reported attempts at eliciting information about immunity policy effectiveness through interviews with practitioners, one by Associate Professor Daniel Sokol in the USA21 and another by a consultancy firm commissioned by the Office of Fair Trading (the United Kingdom competition authority).22 The USA study raised questions about the effectiveness of the US immunity policy in practice and suggested it was having hitherto unreported adverse effects, including the use of the policy strategically by businesses to damage their rivals.23

There have also been a number of published commentaries by practitioners and others in recent years questioning the value of immunity policies and cautioning against putting ‘all the eggs in the immunity basket’24 as well as drawing attention to the potentially deleterious effects of such policies on private enforcement,25 on criminal trials,26 and on engendering a culture of compliance amongst the business community.27

23 Sokol (n 21) 203.
This article reports on a research project being conducted by the author in relation to immunity policies (the Immunity Project), the aims of which are:

(1) to review and critically assess the design and operation of immunity policies having regard primarily to the practical experience of agencies and applicants;
(2) to the extent possible, to review and critically assess the effectiveness of immunity policies—specifically the extent to which they facilitate or are capable of facilitating cartel detection, prosecution, and deterrence and approaches available in assessing these outcomes;
(3) to provide insight into the interaction between immunity policies and other aspects of or approaches to anti-cartel enforcement and compliance; and
(4) to provide insight into the relationship between immunity policies and general considerations relevant to the governance and institutional values of an enforcement agency.

The early focus in the research is on the experience in Australia with the immunity policy of the Australian Competition and Consumer Commission (ACCC). The Australian experience is used as an initial case study to assist in refining the research aims and formulating specific research questions. Thereafter, the experience in other selected jurisdictions will be examined and compared. The research method for the case study has involved a series of interviews with representatives of the ACCC and the Commonwealth Director of Public Prosecutions (CDPP) and with legal practitioners, specifically those who have the most experience in advising immunity applicants and making immunity applications (the pool of such practitioners is small in Australia). Interviews have been conducted with 20 interviewees, listed in the Appendix. The case study draws also on the author’s research concerning the introduction of criminal sanctions for cartel conduct in Australia and on her contribution to an emerging debate concerning private enforcement of competition law in this country and its interaction with public enforcement.

The ACCC has had a form of immunity policy for cartel conduct since 2003, known since 2005 as the ACCC Immunity Policy for Cartel Conduct (AIPCC), elaborated upon in ACCC Immunity Policy Interpretation Guidelines (Interpretation Guidelines). This policy emulates the general model of such
policies employed by competition authorities around the world and immunizes the party that is first to report a cartel and meets other specified conditions from any legal proceeding or penalty in connection with the conduct that is the subject of immunity.

The ACCC has stated for some time that it has received ‘1-2 approaches per month’ under the AIPCC since 2005. In a recent public statement on the matter, the current Chairman stated that the AIPCC ‘continues to be the lead source of information for cartel investigations and proceedings’. Apart from statements such as these, little else has been reported publicly about the use, effectiveness, and role of the policy, including its contribution to or detracion from other aspects of the system for enforcement and compliance generally. The AIPCC was reviewed in connection with the introduction of a dual civil/criminal regime for cartel conduct in 2009. At the same time the CDPP’s Prosecution Policy was amended and an annexure added to explain how immunity from cartel offences would be handled by the CDPP (Annexure B). The focus of that review was primarily on how applications for immunity from civil and criminal proceedings would be managed and the respective roles of and relationship between the ACCC and CDPP in that process. There has not been a more wide ranging examination of the AIPCC since the review undertaken of what was then known as the leniency policy in 2004, 9 years ago (the 2004 Review). However, on 4 May 2013, it was announced that the ACCC is currently undertaking a review of the AIPCC (ACCC review).

Consistently with the approach taken generally to such reviews, the ACCC review is entirely operational in nature, described in the announcement as having the aims of: ‘better understanding the operation of the policy’—‘what aspects are working well’, and ‘what aspects could be improved’. Examples given of the types of matters being reviewed include the scope of the eligibility condition

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35 More specific figures have been provided to the author for the purposes of her research and are referred to below.


41 ibid.
relating to coercion or clear leadership and the process involved in handling dual civil/criminal applications. It is evident that the review does not encompass a more general interrogation of the extent to which the policy has been effective in fulfilling its objectives or a holistic consideration of the role of the policy in the system for enforcement of and facilitating compliance with Australia’s anti-cartel laws.

This article reports on preliminary findings of the Australian case-study. It is structured from this point as follows:

Section III Prerequisites for the AIPCC’s effectiveness
Section IV Testing the AIPCC’s effectiveness
Section V The AIPCC as an element of an overall enforcement and compliance system
Section VI The AIPCC and ACCC governance
Section VII concludes with reflections on the significance of the case-study as an insight into the religion of immunity policy.

III. Prerequisites for the AIPCC’s effectiveness

Severe sanctions

The first prerequisite to an effective immunity policy is said to be severe sanctions and, more specifically, sanctions that are so severe that the potential penalties associated with cartel conduct outweigh the potential rewards. This has obvious implications for the way in which monetary penalties are calculated. However, given the limitations on imposing what would be seen as ‘optimal’ fines from this perspective, there is also a view (most fervently propounded by the US DOJ) that an immunity policy will be most effective where there are criminal sanctions—and more particularly jail time for individuals—that apply.

In Australia, between 1993 and 2007, the maximum pecuniary (civil) penalty applicable to cartel conduct for corporations was AUD10 million and AUD 500,000 for individuals. From 2007, the corporate maximum was changed to the greater of AUD 10 million, three times the gain derived from the contravention or, where the gain is unascertainable, 10 per cent of annual corporate group turnover over a 12-month period. There was no change to the maximum for individuals. The change to the maximum for corporate penalties was prompted

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42 For discussion of these and other operational aspects of the AIPCC that should be covered by the ACCC review, see Caron Beaton-Wells, ‘The ACCC Immunity Policy for Cartel Conduct: Due for Review’ (2013) 41 Australian Business L Rev 171.
43 Hammond, ‘Cornerstones of an Effective Leniency Program’ (n 13) 6–7.
44 See the discussion in Beaton-Wells and Fisse (n 25) 425–8.
45 Hammond, ‘Cornerstones of an Effective Leniency Program’ (n 13) 8–9.
46 See ss 76(1A), 76(1B), 44ZZRF(3), 44ZZRG(3) of the Competition and Consumer Act 2010 (Cth).
by a recommendation by an independent review committee on the basis of
general acceptance ‘that an effective sanction for cartel activity should take
into account the expected gains from the cartel’. 47

On average, pecuniary penalties for cartel conduct have fallen far below the
pre-2007 statutory maxima and considerably below the level of fines in major
antitrust jurisdictions, the USA and the European Union (EU). 48 Between 2000
and 2012, the average corporate penalty was AUD 1,159,552 million and the
average individual penalty, AUD 32,000. It is too early to assess the impact of
the 2007 amendment as there has yet to be a cartel case in which the new
maximum has been applied. In part the low level of penalties in Australia
has been a product of a non-transparent and unstructured approach to penalty
assessment 49 and in part it has been a product of the fact that, in a significant
proportion of cartel cases, fines are negotiated between the respondents and
the ACCC pursuant to its general Cooperation Policy for Enforcement Matters
2002 (CPEM) and then presented to the court for approval based on an
agreed statement of facts. 50 In almost all cases, judicial approval has been
given for the negotiated ‘settlement’. As discussed below, the process of negoti-
ation relating to jointly recommended penalties often involves significant
compromises on the part of the ACCC as to the quantum of penalty, amongst
other things. 51

There was no suggestion at the time of the 2007 penalty maximum amend-
ment that it was a change necessary to increase the effectiveness of the AIPCC.
The change also did not appear to have any impact on the number of immunity
applications—it having been consistently reported that the policy has attracted
‘1-2 approaches’ per month since 2005. 52 Aside from these intermittent and
largely uninformative reports, the ACCC has not had a practice of publishing
figures about the use of or outcomes under the AIPCC. 53

Moreover, having regard to its practice in negotiating agreed penalties that
do not reflect legislative expectations (as indicated by the statutory maxima) and
fall far below international standards, the ACCC does not appear to have regarded
the level of such penalties as undermining the effectiveness of the
AIPCC. To some extent this may be attributable to the fact that, between
2002 and 2008, the ACCC waged a concerted public campaign in support
of the introduction of criminal sanctions for cartel conduct, including jail time

(2003), 160.
48 See Beaton-Wells and Fisse (n 25) 431–2.
49 For discussion of the approach taken to penalty assessment, see ibid 433–5.
50 For discussion of the impact of negotiated penalties under the CPEM, see ibid 436–8. Low penalty levels
may be attributable to other factors, of course, including judicial reluctance to impose higher penalties in relation
to conduct that judges may not regard as being as harmful and/or culpable as other types of conduct that attract
penalties.
51 See further Section ‘Detecting cartel conduct’ below.
52 See n 35, above.
53 See further Section ‘The AIPCC and ACCC governance’, below.
for individuals.\textsuperscript{54} The campaign resulted in the introduction of cartel offences and criminal sanctions,\textsuperscript{55} including a maximum 10 year jail sentence for individual offenders in 2009.\textsuperscript{56}

One of the key claims made by the ACCC in support of the criminal reform was that it would bolster the AIPCC.\textsuperscript{57} The simple logic offered was that, by adding clout to the ‘stick’, the ‘carrot’ of immunity from prosecution will be more irresistible. The decision as to whether or not to apply for immunity would no longer be a business decision (weighing the avoidance of pecuniary penalties against exposure to civil damages). It would be a decision about whether or not to risk imprisonment—a decision to which it is much more difficult to attach a ‘price tag’. Several of the practitioners interviewed for the Immunity Project supported this view. Typical of the views expressed in this regard was the observation of one practitioner: ‘it’s also been pretty clear that until the law changed, they [referring to international clients implicated in cartel activity affecting Australia] saw Australia as only a fining jurisdiction and therefore it was not top of mind concern compared to say concerns in other jurisdictions’. However, these views are by their nature anecdotal, if not impressionistic, and may say more about the effectiveness of the rhetoric than the reality. Alternatively, they may reflect the fact that more international cartels are being reported under the AIPCC since the introduction of criminal sanctions.

Figures provided to the author for the purposes of her research and subsequently published by the ACCC for the first time since the policy was introduced (the ACCC figures)\textsuperscript{58} cast doubt on the claim that individual criminal liability and sanctions will enhance the effectiveness of the AIPCC. The ACCC figures do not demonstrate an increase in markers or proffers (the oral application made for conditional immunity) since 2009. In the 4-year period between 2005 and 2009, 47 markers were received (56 per cent of the total markers received between 2005 and 2013), whereas in just under 4 years since 2009, 36 have been received (43 per cent of the total markers). Twenty-eight proffers were made between 2005 and 2009 (57 per cent of the total proffers), and 21 since 2009 (42 per cent of the total proffers). Thus, in fact, markers and proffers have been fewer in number since criminal sanctions were introduced. It is also not clear how many of the post-2009 markers or proffers related to conduct potentially subject to the offences introduced in 2009; however, it appears to be a low proportion. The CDPP representative interviewed for the Project indicated that


\textsuperscript{55} Introduced by the \textit{Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009} (Cth).

\textsuperscript{56} See s 79(1)(e) of the \textit{Competition and Consumer Act 2010} (Cth).


\textsuperscript{58} These figures were published in Bezzi (n 40).
the CDPP has received only nine referrals of applications for criminal immunity from the ACCC to date.

Another possible interpretation of these low numbers is that the introduction of criminal sanctions has deterred cartels from forming and thus there are relatively fewer cartels to report than prior to 2009. Such an interpretation is arguably premature and, in any event, is highly problematic in the assumptions it makes about the way in which deterrence works. A further possibility is that the introduction of criminal sanctions has in fact stabilized existing cartels, prompting cartel members to adopt greater vigilance and internal punishment mechanisms for defection, given that the stakes of detection of the cartel by the ACCC are now much higher. Yet another possible explanation for the drop-off in markers and proffers is that, given the stigma attached to involvement in a criminal offence, reporting is less palatable than it was pre-2009 when cartel conduct was a civil contravention only. Such possibilities, of course, can only be speculated upon.

While it may be said that it is still too early to assess the impact of criminalization on the detection effectiveness of the AIPCC, the initial signs (based on 4 years of data) appear to contradict the argument that the more severe the sanctions applicable to cartel conduct, the more effective an immunity policy will be. At least, that argument does not appear to have been borne out in Australia to date. If anything, the signs are that the criminal regime may be having the opposite of the intended effect.

Furthermore, the process by which dual civil/criminal applications for immunity is being handled by the ACCC and the CDPP is clearly not working as smoothly as was intended. While it was acknowledged that the independence of the two agencies had to be respected and, in particular, the exclusivity of the CDPP’s power to make decisions with respect to criminal prosecution preserved, the process for handling dual applications was fashioned with the intention, perhaps hope, that decisions would be made in a coordinated, certain and timely fashion and communicated simultaneously to applicants. The Immunity Project interviews have revealed that, contrary to that intention, there have been, at times, delays in decision-making and uncertainty surrounding the attitude and approach of the CDPP to immunity matters. While this


60 The Committee that recommended the introduction of criminal sanctions expressed substantial concerns that the introduction of a criminal regime would undermine the effectiveness of the policy owing to the risk that the CDPP would not be prepared to adopt a consistent policy. See Review of the Competition Provisions of the Trade Practices Act (n 47) generally ch 10, 147–65, and specifically 156–7.

61 ACCC Immunity Policy Interpretation Guidelines (n 33) 4 [31].

62 See the discussion in Beaton-Wells, 'The ACCC Immunity Policy for Cartel Conduct' (n 42) 194–9.
may be hampering the ACCC in progressing its investigations, it is not clear yet whether ultimately it is likely to undermine the efficacy of the AIPCC. This is because, despite the delays and uncertainty, the reward of full immunity from sanctions (particularly criminal sanctions) is still seen as sufficiently compelling to warrant applications for immunity.

**Fear of detection**

The second prerequisite to an effective immunity policy is said to be the creation of a genuine fear by cartelists and potential cartelists that their activity will be detected.\(^63\) Such a fear is seen as essential not only to inducing immunity applications, but also to deterring cartel conduct. Instilling the requisite fear is said to be predicated on the enforcement agency having access to significant law enforcement powers and a track record of detecting cartels. No doubt the agency’s reputation as a well-resourced and committed enforcer would also be material. The risk of detection is said to create distrust and panic amongst cartel members, a dynamic that ‘literally creates a race to be the first to the enforcer’s office’.\(^64\) That dynamic is seen as further enhanced by the opportunity for individuals to make immunity applications in their own right, generating a ‘race between the company and its employee’.\(^65\)

In Australia, University of Melbourne research in 2010 revealed that business people in this country regard it as fairly unlikely that cartel conduct will be detected and moreover, that if detected, enforcement action will ensue.\(^66\) This is despite the ACCC having extensive investigatory powers available to it\(^67\) and a general reputation as an aggressive, if not zealous, enforcement agency.\(^68\) However, while the research results have implications for deterrence and compliance,\(^69\) they do not appear necessarily to have implications for the efficacy of the AIPCC.

The practitioner interviewees for the Immunity Project were asked about the factors that prompt clients to seek advice relating to the making of an immunity application. None identified consideration of the likelihood of detection, either through the ACCC’s use of its investigatory powers or through the immunity

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\(^{63}\) Hammond, ‘Cornerstones of an Effective Leniency Program’ (n 13) 9–10.

\(^{64}\) ibid 10.

\(^{65}\) ibid 12.


\(^{67}\) The ACCC has powers relating to compulsory information gathering, search and seizure, telecommunications data and interceptions, and covert surveillance.


\(^{69}\) See the discussion of such implications in Beaton-Wells and Parker (n 59).
application of an individual employee, as a highly material factor in practice. As one practitioner observed: 'I have never come across a situation where someone’s come to me, sought advice, it looks like a problem and they’ve said, “oh but we’ll never be caught”.’

In the factors that were identified as relevant to the decision to apply for immunity, two common themes strongly emerged.

Firstly, consistent with the rejection of detection risk as a consideration, practitioners indicated that for large corporate clients, the mere discovery of cartel conduct within their business was sufficient to prompt the making of an immunity application. In part, this was because of an ‘in principle’ view that if the company has been involved in illegal, let alone criminal, conduct, then it was something that should be reported to the authorities. Senior executives in large companies were described by a practitioner interviewee as, in his experience, ‘completely horrified’ to find their company has been involved in cartel activity. Aligned with this strong emotive response, reporting was seen as ‘an ethical position’ to take, as ‘the right thing to do’ as a ‘good corporate citizen’. As another practitioner put it, for the large corporate clients with which he has dealt, once cartel conduct was discovered in their ranks, ‘it just never entered their mind that they wouldn’t cooperate or wouldn’t seek leniency or immunity…. That was their corporate culture and that was what they were going to do’.

In part, reporting upon discovery without close, if any, regard to the risk of detection was considered a pragmatic response. Reporting was seen as the first step in taking prompt practical measures to end the conduct, deal with the problem and start the process of moving on from it. One example given of this was where there was an acquisition of a company and during the due diligence process, cartel activity was discovered. Reporting such conduct, as the practitioner described, was seen in those circumstances ‘as part of cleaning up their own stables... effectively a view was taken that they needed to deal with this risk before the transaction took place. The way to deal with it was to go and see the US DOJ and EC.’

Secondly, practitioners explained that it was increasingly common for immunity applications to be made in Australia as a consequence of an approach by a foreign practitioner on behalf of a multinational client in connection with discovery of cartel activity in one or more overseas countries. Where the client has operations in Australia, the Australian application is made pursuant to a multi-jurisdictional process of applications. This is consistent with the reflection by the ACCC interviewees that approximately half of the Commission’s investigations in recent years have concerned international cartels. However, what is significant for present purposes is that, in these circumstances, the application is sought from overseas and generally made under the AIPCC regardless of any risk of detection in Australia—indeed, without detailed inquiry, if any at all, into whether or not the relevant activity is likely to be
actionable or be the subject of enforcement proceedings in this jurisdiction. As one practitioner explained:

‘...conduct has occurred in other countries, the decision has already been made to seek immunity or co-operate in those countries, and then there is that flow-on impact...you may not actually be asked to give initial advice. The decision is really just to adopt a consistent approach that is, if you’re seeking immunity in some countries then you would seek it here...’

Practitioner interviewees gave examples of international matters in which they had been involved in which applications had been made for immunity, and conditional civil immunity granted, for conduct that would not or was unlikely to be the subject of proceedings in Australia for one reason or another. This may be because of jurisdictional issues (while the Australian cartel prohibitions apply to extraterritorial conduct, jurisdiction only applies to companies incorporated in or carrying on business in Australia and to individuals who are citizens of or ordinarily resident in Australia), because of expiry or imminent expiry of the limitations period (a period of 6 years from the time of the contravention), or because of the scope of Australian law on some elements of liability (the nature of an ‘understanding’ for the purposes of the cartel prohibitions and offences in this jurisdiction, for example, is a much narrower concept than that of a ‘concerted practice’ under European competition rules).

Practitioners explained that immunity applications for potentially unactionable conduct are made virtually automatically and despite the fact that, if successful, the applicant will be subject to the onerous burden of disclosure and cooperation with the ACCC, may have reputational effects, and may expose it to private actions. With a degree of cynicism, one practitioner described this process involving foreign law firms and their local agents or partners as ‘an industry, a farce’.

**Transparency, certainty, and predictability**

The third prerequisite to an effective immunity policy is said to be ‘transparency to the greatest degree possible throughout the enforcement program’ and the ability of a company to ‘predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not’. Such transparency and the certainty and predictability it provides is said to be essential in the written policy as well as in abdication to the extent possible of discretion in the way in which the policy will be applied. In particular, it is emphasized that ‘uncertainty in the qualification process (a reference to the

70 See s 5(1) of the *Competition and Consumer Act 2010* (Cth).
71 See s 77(2) of the *Competition and Consumer Act 2010* (Cth). However, no limitations period applies to cartel offences.
72 See Beaton-Wells and Fisse (n 25) 47–57 [3.4].
73 Hammond, ‘Cornerstones of an Effective Leniency Program’ (n 13)18.
conditions that determine eligibility for immunity) will kill an amnesty program.\footnote{74 ibid 19.}

The ACCC has sought to achieve the prescribed standards of transparency, certainty, and predictability in its written policy and detailed written guidelines that set out how the policy is interpreted. There remains, nevertheless, uncertainty in several respects. In general terms there is some uncertainty arising from differences in the approach taken by different ACCC staff to immunity matters. As one practitioner explained, for example, the time taken to communicate with a practitioner or make decisions can vary, at times significantly, depending on the staff member with whom the practitioner is dealing on a particular matter.

Further, as referred to above, there is uncertainty amongst practitioners as to how decisions involving the CDPP in relation to criminal immunity are made. None of the practitioners suggested, however, that this is proving or is likely to prove a disincentive to applications. There is also uncertainty as to the likely consequences if an application is not made. In part this is because in those instances in which the conduct is likely to involve a civil contravention, the parties involved will be able to cooperate under the CPEM and, as explained above, be able to negotiate with the ACCC a jointly recommended penalty with a potentially significant discount that is seen as likely to be approved by the Court (discounts have ranged from 5 per cent to 50 per cent). As pointed out below, the flexible discretionary nature of this process is valued by both the ACCC and practitioners. The practitioner interviewees also indicated that there was considerable uncertainty as to the prospects of negotiating successfully with the CDPP in relation to rewards for cooperation in cases involving an alleged cartel offence.\footnote{The CDPP’s approach to such ‘negotiations’ is far removed from both the ACCC’s approach to settlement under the CPEM, as well as the approach taken in the USA to plea bargaining (see the description of the USA approach in Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, ‘Plea Bargaining/Settlement of Cartel Cases’ (DAF/COMP(2007)38, 22 January 2008) 149–203). In short, it is a far more conservative approach. The CDPP will not ‘bargain’ as to the facts to be presented to the court upon a guilty plea and nor will it agree a recommendation as to sentence. At best, it will negotiate different and/or fewer charges to which a defendant may choose to plead guilty and may decide that it will not oppose a defence submission on sentence and inform the defendant and court accordingly (see Commonwealth Director of Public Prosecutions, ‘Prosecution Policy of the Commonwealth’ (1992) [6.21]).} However, again, there was no suggestion that this is reducing the attractiveness of the AIPCC from the perspective of potential applicants.

There are also evidently various respects in which the ACCC retains and exercises discretion in connection with the conditions that determine eligibility under the AIPCC. It is significant that, as was evident from the interviews, this was not seen as a problem or as likely to undermine the efficacy of the policy. To the contrary, it was seen as beneficial. Practitioners commented that they expected and generally found the ACCC to be ‘pragmatic’ and ‘flexible’ in its administration of the policy. They rejected any suggestion that the ACCC should
take a rigid ‘black letter’ approach to its interpretation of the policy and its
guidelines in the interests of certainty and predictability. In addition, several
reflected on how negotiations with the ACCC in relation to its exercise of dis-
ccretion are assisted where there is prior familiarity, mutual respect, and a positive
working relationship between the ACCC staff and practitioners who are regular
‘users’ of the policy.

Three examples suffice to illustrate the discretionary nature of the immunity
process in practice.

First, it is a condition of eligibility under the AIPCC that the applicant is the
first person to apply for immunity in respect of the cartel under the AIPCC. 76
The Interpretation Guidelines expressly exclude joint applications. 77 However,
the ACCC and applicants clearly regard it as in their mutual interests that there
is flexibility in the application of this condition. Consistent with this, several
instances were cited in the interviews of a grant of full immunity to a party
that was not first to apply under the AIPCC. These were either situations of
which the interviewee had actual experience or situations about which an inter-
viewee hypothesized as a situation in which full immunity was likely to be given.
Such situations include where a corporate applicant seeks to cooperate following
an individual’s application, where a corporate applicant is ineligible on account
of having coerced others or been a clear leader in the cartel, where there are joint
applications by related corporations or by individuals, and where an individual
receives derivative immunity in connection with his/her role with one cartel party
and seeks to cooperate in respect of his/her role with another party. In these types
of matters, the relevant party or parties have been or could be given full immu-
nity under the CPEM. Despite the acknowledged risk to the AIPCC’s efficacy
entailed in rewarding subsequent cooperating parties to the same extent as
immunity applicants, full immunity under the CPEM appears often to be seen as
the most pragmatic and constructive way to deal with situations arising under
the AIPCC that are unforeseen or unusual in some respect. 78

76 ACCC immunity policy for cartel conduct (n 32) 1 [8], condition (a)(iii).
77 ACCC immunity policy interpretation guidelines (n 33) 4 [25].
78 Unlike the approach taken in other jurisdictions, neither the CPEM nor the AIPCC provide a transparent
tiered approach to rewards for subsequent co-operators (second-in, third-in, etc). The CPEM provides the
ACCC with significant discretion and flexibility in determining the conditions on which it will deal with coop-
erating parties and the nature and extent of the benefits that it will offer such parties in return for cooperation.
Such benefits can take the form of complete or partial immunity from action by the ACCC, negotiation of agreed
facts and joint submissions to the court for a reduction in penalty based on those facts or even administrative
settlement in lieu of litigation. See ACCC, ‘Cooperation Policy for Enforcement Matters’ (2002) 1. By com-
parison, in New Zealand, for example, in an attempt to make the rewards available for cooperation more explicit,
the Commerce Commission’s 2011 leniency policy and process guidelines state that the Commission will con-
sider recommending reductions in penalty in the range of 25–40% and potentially up to 50%, depending on the
value of the information provided: see New Zealand Commerce Commission, ‘Cartel Leniency Policy and
Process Guidelines’ (2011) 11 [4.08]. Note that the Commission also indicates that ‘[i]n exceptional circum-
stances’ it may consider taking no enforcement action against ‘an individual whose assistance is considered
critical to the successful outcome of an investigation’: 12 [4.09]. In Canada, the Competition Bureau has pub-
lished a leniency policy under which the first leniency applicant is eligible for a recommended reduction of up to
50% of the fine that would have otherwise been recommended and for subsequent leniency applicants, reductions
of up to 30% are available: see Canadian Competition Bureau, ‘Leniency Program’ (Bulletin, 29 September
Secondly, it is a condition of eligibility that the applicant has not coerced others to participate in the cartel and was not clear leader in the cartel.\textsuperscript{79} It was clear from the interviews that the ACCC exercises its discretion in that it essentially refrains from applying this condition. The ACCC interviewees indicated that there has not been a matter to date in which the Commission has refused to grant immunity on the grounds of this condition and this is consistent with the views of practitioner interviewees that the ACCC takes a ‘very conservative’ approach to it (one observing that where the ACCC is part of a global process of immunity applications involving an international cartel, it ‘doesn’t even give it [referring to the condition] lip service’, even where ‘there’s clear evidence that the immunity applicant was the leader’).\textsuperscript{80} Practitioners cited the Visy/Amcor cartel (Australia’s most serious case of cartel conduct to date) and the airfreight cartel as at least two instances in which immunity was granted to a so-called ‘clear leader’ (Amcor in the former and Lufthansa in the latter).

Thirdly, there is a condition that, for conditional immunity to be granted, the applicant undertakes to provide full disclosure and cooperation in the ACCC’s investigation, and for final immunity to be granted, there is ongoing disclosure and cooperation until proceedings against other cartel members are completed.\textsuperscript{81} It is clear from the Interpretation Guidelines and from the practical experience of interviewees that this condition is an extremely onerous one and includes obligations to collect and provide information and make employees available for interviews and potentially court appearances, all generally at the applicant’s expense and in accordance with the timetable set by the ACCC.\textsuperscript{82} That said, most practitioners expressed confidence in the reasonableness and pragmatism of the ACCC in negotiating over the nature and extent of compliance with cooperation obligations. They were confident that the ACCC would exercise discretion, and exercise it reasonably, in relation to such matters. Consistently with this, most practitioners did not support the introduction of a

\textsuperscript{79} ACCC immunity policy for cartel conduct (n 32) 2 [8], condition (a)(iv).

\textsuperscript{80} The reasons for this appear to relate to the difficulties associated with identifying objective evidence of coercion or clear leadership. Such difficulties are aggravated in cartels involving only two parties and cartels in which the role of leader in the cartel has rotated or changed amongst the parties over time. See further the discussion of the condition in Beaton-Wells, ‘The ACCC Immunity Policy for Cartel Conduct’ (n 42), pt IV.ii.

\textsuperscript{81} ACCC immunity policy for cartel conduct (n 32) 2 [8], condition (a)(vii), 2 [10], 3 [19].

\textsuperscript{82} ACCC immunity policy interpretation guidelines (n 33) 11–12 [77]-[80].
dispute resolution mechanism, involving an independent arbiter, to deal with disputes arising under the AIPCC. This was so despite the potential for immunity to be revoked should the ACCC reach the view that the applicant is not fulfilling its cooperation obligations. Moreover, a number expressed the view that the potential for disagreements between the ACCC and applicants in the resolution of uncertainties was minimized if the practitioner was known by and has a sufficiently good relationship with ACCC staff so as to be ‘trusted’ by such staff in their exercise of professional judgment. Such relationships were seen as highly valuable in minimizing any risks associated with the exercise of ACCC discretion.

IV. Testing the AIPCC’s effectiveness

As explained in Section III, there are several respects in which the AIPCC or the way in which it is administered deviate from the ‘formula’ for an ‘effective’ immunity policy. However, such deviations do not necessarily mean that the Australian policy is ineffective, or less effective than it might otherwise be, and in some respects, it is evident that the deviation is seen by users and the ACCC as beneficial. Thus, the question remains: how can or should the effectiveness of the policy be tested?

According to the ACCC, and consistently with statements made concerning the value of immunity policies generally, the AIPCC is said to provide the benefits of:

- facilitating detection of conduct that would otherwise be difficult to detect on account of being systematic, deliberate, and covert;
- stopping cartel conduct and facilitating its prosecution;
- deterring the formation of cartels as potential participants will perceive a greater risk of ACCC detection and court proceedings. 83

There are significant challenges in assessing the effectiveness of any immunity policy in delivering such benefits. As previously noted, there is a significant body of economic research on this topic. 84 However, its results are to be treated with a degree of caution and, in any event, no such research has been conducted in the Australian context. This Part of the article attempts to test the effectiveness of the AIPCC to date in relation to its stated objectives of facilitating cartel detection, prosecution, and deterrence. It does so by reference to the ACCC figures and interviewee accounts. While the attempt yields some insights, it also

83 ibid 1 [1]-[7]. The ultimate objective of detecting, stopping, prosecuting and deterring cartel conduct is identified by the ACCC as protection of the competitive process that delivers lower prices, greater choice and better service and thereby enhances the welfare of Australians, consistent with the objective in s 2 of the Competition and Consumer Act 2010 (Cth). The Immunity Project is not purporting to test the effectiveness of the AIPCC in delivering these broader benefits, at least not directly.

84 See Section II above.
illustrates the challenges associated with measuring the effectiveness of an immunity policy.

**Detecting cartel conduct**

As previously stated, up until May this year, the ACCC had not released figures relating to the extent of use of or outcomes under the AIPCC. According to the figures released in May, there have been 110 ‘approaches’ in relation to the AIPCC in the eight year period, between September 2005 and April 2013. The ACCC defined an ‘approach’ for this purpose as ‘a contact which we receive via the immunity hotline, which we consider is relevant to the cartel provisions and which may lead to further investigation’. It has received 83 ‘first in markers’ and five ‘non first in markers’ over the same period. Twenty-two of the ‘approaches’ did not result in a marker. Over the same period, the ACCC has received 49 proffers. Forty-six of these proffers resulted in a grant of conditional civil immunity and two relate to ongoing matters in which a decision as to conditional immunity has not yet been made. Of the 46 matters in which conditional immunity has been granted, there have been 9 in which final immunity has been granted and there are 16 matters in which investigations and/or proceedings are ongoing.

There are difficulties with determining the stage at or circumstances in which an immunity application should be treated as a ‘detection’ for the purposes of assessing the AIPCC’s effectiveness in facilitating cartel discovery. Marker requests do not necessarily enable the ACCC to detect cartel conduct (particularly where they are made on a hypothetical basis), although such requests may raise suspicions or put the ACCC on a train of inquiry that may lead to detection. It may be misleading to treat proffers as detections given that the proffer will be accepted even though the ACCC has already detected the cartel, provided it has not received written legal advice that it has sufficient evidence in relation to at least one contravention. In the case of international cartels in respect of which the AIPCC application follows investigations and immunity applications made in other jurisdictions it is also difficult to attribute detection of the relevant conduct directly to the AIPCC.

More fundamentally, without knowing the full extent of cartel conduct that has affected Australian markets over the 8-year period to which the ACCC figures relate, it is impossible to know what proportion of that conduct has been the subject of an immunity application and hence to assess the extent to

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85 A person seeking a marker need only provide the ACCC with sufficient information to allow the ACCC to determine whether or not any other person has obtained a marker or applied for immunity in respect of the cartel, and that the ACCC has not received legal advice that it has sufficient evidence to commence proceedings in respect of the cartel: ACCC immunity policy interpretation guidelines (n 33) 5 [40]. Generally speaking, marker requests involve identifying the general nature of the conduct involved (eg price fixing, bid rigging), the industry and possibly the geographic area/s affected.

86 ibid.
which the AIPCC has been effective in detecting such conduct. Nor do the ACCC figures allow for a qualitative assessment of the detections that the immunity applications to date have facilitated. It is impossible to say whether the AIPCC is enabling the most serious cartels affecting Australian consumers to be discovered and stopped or whether those cartels remain well hidden.\(^{87}\)

An alternative approach to assessing the effectiveness of the AIPCC as a detection tool is to compare the number of cartels in respect of which proceedings were brought prior to the introduction of the AIPCC and the number in respect of which proceedings were brought following its introduction. An increase in the number of proceedings in the latter period could be taken to suggest an increase in detections pursuant to the leniency policy (albeit other influences, such as changes in the legal or sanctioning regime, would have to be excluded for this purpose). Applying this approach, the reported proceedings relating to cartel conduct in the period 2000–2012 were reviewed. In the 5 years and 8 months from 2000 to 26 August 2005 (the date on which the AIPCC was introduced), there were proceedings commenced in respect of 15 cartels. In the 7 years and 4 months from 26 August 2005 to the end of 2012, proceedings were commenced in respect of 14 cartels.\(^{88}\) These figures suggest that the AIPCC has not generated a significant increase in cartel detections.\(^{89}\) Indeed, there has been a decline in the number of cartel proceedings brought since the policy’s introduction.

A number of practitioner interviewees expressed the view that the AIPCC has been effective in facilitating detection. When pressed, most found it difficult to articulate a basis for this view beyond general impression. In any event, the reasons given for the decision of a company to report (see sub-Section ‘Fear of detection’ above) suggest that, in some cases at least, the cartel may have been reported to the ACCC even in the absence of the AIPCC. Several interviewees were of the view that the policy’s effectiveness in facilitating detection has been boosted by the introduction of criminal sanctions in this jurisdiction. However, as pointed out in sub-Section ‘Severe sanctions’ above, these views are inconsistent with the decline in markers and proffers since the introduction of criminal sanctions in 2009—an inconsistency that underscores the caution that is warranted in relying on user views as a basis for effectiveness testing.

Furthermore, the information that has emerged as a result of immunity-led proceedings against other cartel members is unlikely to detect, in the sense of publicly and comprehensively divulge, the nature and extent of the cartel in

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\(^{87}\) If the size of penalties imposed over the past three decades are any guide, then it could be suggested that the cartels discovered to date fall on the minor end of the scale. See the penalty averages set out in Beaton-Wells and Fisse (n 25) 429 (corporate penalties), 462 (individual penalties).

\(^{88}\) The number of cartels has been counted rather than the number of proceedings given that, in many instances, multiple separate proceedings are brought against different respondents in respect of the same cartel.

\(^{89}\) cf the experience in the USA where the introduction of the DOJ’s 1993 Corporate Leniency Policy has been said to have resulted in a significantly larger percentage of cartels being detected than prior to the policy’s existence: see Miller (n 18).
question. As previously pointed out, most cartel cases in Australia are ‘settled’ under the CPEM. Over the period 2000–2012 there were 52 proceedings concluded by the ACCC, involving 189 respondents (99 corporate and 90 individual respondents). About 114 (60 per cent) of these respondents (64 corporations and 50 individuals) did not contest liability and reached agreement with the ACCC on a joint recommendation as to penalties, while 50 (26 per cent) respondents (23 corporations and 27 individuals) admitted liability but contested penalties. This means that over the past 10 years 87 per cent of respondents have either fully or partially ‘settled’ proceedings brought by the ACCC in respect of cartel conduct. The remaining 25 (13 per cent) respondents contested both liability and penalties.

In practice, although this cannot be verified, it would be reasonable to assume that cases that are immunity-led are more likely to be ‘settled’ than others given the extent of the information and evidence the ACCC would have available to it for the purposes of prosecuting the other cartel members. However, as practitioner interviewees acknowledged, it is usual to ‘win’ significant concessions from the ACCC in relation to the admissions made and penalties imposed for the purposes of settlement. Commonly, the number of markets and products or services affected and number of parties (particularly individuals) involved will be reduced for the purposes of the agreed statement of facts presented to the Court. It is also possible to avoid any admission being made as to harm caused by the cartel in terms of an overcharge. The distortionary impact of immunity and cooperation processes on the ‘version’ of the cartel that emerges on the public record was described by one practitioner as follows:

‘...what tends to happen is the immunity applicant will cooperate the frame up - the conduct - and it'll put its complexion on everything. Then once the other cartelists work out that at the end of the day they're going to get pinged for this, it all becomes artificial and the whole structure and evidence and outcomes are all driven by the immunity applicant. What you end up is you get - a picture gets painted of the cartel that may be vastly different to the reality. That's because of the practical exigencies of the way it plays out, whereas if no one goes in - it's one of those things that the commission uncovers for itself and prosecutes in a wholly adversarial way with no cooperating parties, you might get a totally different picture.

So you could have two cartels with identical facts but you have one of them - if you look back at it at the end of the prosecution process, it might look in a certain way if

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90 A number of these proceedings related to the same cartel.
91 In practice the figure may be higher as it is evident from the author's interviews that in some cases cartel parties are granted full immunity pursuant to the CPEM. Examples of such cases are given in Section 'Transparency, certainty, and predictability' above.
92 This is what evidently occurred in the Visy case. In the submissions as to penalty, jointly recommended by the parties, in relation to contract customers, the ACCC stated expressly that it did not allege that the cartel ‘had any negative financial impact or caused loss to’ such customers. As was clear from evidence of the settlement negotiations that subsequently emerged, this was a non-allegation plainly won by Visy from the ACCC in order to minimise exposure in private damages actions: see Australian Competition and Consumer Commission v Pratt [No 3] (2009) 175 FCR 558, 579-80 [30], 584 [35] (Ryan J).
the ACCC did it all itself. It might look a different way if it was cooperative. To me, that’s interesting fact that - you end up basically - you might end up with a much smaller public disclosure of the cartel and the subsidiary issues. You might end up with one that’s crafted for convenience. From a general deterrence and detection perspective, whilst the immunity policy is an overall net positive in terms of revealing and policing cartels, it actually presents a false picture, I believe. I believe that if there was a - there’s two parallel universes, the one that emerges by reason of immunity applications and there’s the one that might’ve emerged if we didn’t have one.

...it has to be brought in mind that the cartels that are getting busted and getting disclosed aren’t necessarily the cartels that are happening in real life.’

This disjuncture between the ‘real’ cartels and the cartels that are the subject of public record in proceedings has several consequences. One is that courts are assessing penalties based on an incomplete portrayal of the conduct involved. This may mean that penalties are lower than they would otherwise be, with potentially adverse implications for general deterrence. Another is that private parties contemplating or conducting follow-on actions for damages do not have the benefit of a comprehensive disclosure of the cartel in question from the record created in the ACCC’s proceedings, thereby making the task of pleading and discovery even more burdensome and complex than it already is in private litigation relating to cartel conduct. Such parties also do not have the benefit of admissions in relation to aspects of the cartel that have been excluded from the negotiated settlement, albeit such admissions may be of limited value in any event (in the sense that they are unlikely to constitute prima facie evidence of facts for the purposes of section 83 of the Competition and Consumer Act 2010 (see further sub-Section ‘Information disclosure’ below)). Yet another consequence is that the true nature and full extent of cartel activity affecting the Australian economy (insofar as such activity is detectable pursuant to the ACCC’s immunity and cooperation processes) is not publicly revealed. This limits the capacity of policymakers and researchers to analyse and assess the effectiveness of the prevailing legal and sanctions regime in tackling this harmful conduct.

**Stopping and prosecuting cartel conduct**

Given that it is a condition of eligibility for immunity that the applicant ceases participation in the cartel, it can be said that in 46 cases over 8 years the AIPCC has been responsible for stopping cartel conduct. At the very least it has stopped the conduct on the part of the applicant and it may be assumed that, in a large proportion of cases, the withdrawal of the applicant from the cartel

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93 ACCC immunity policy for cartel conduct (n 32) 1–2 [8](a)(v), 3 [17](a)(v).
has led to the other cartel parties also ceasing their involvement at some point. If this was not simply the consequence of suspicions raised by the immunity applicant’s withdrawal from the cartel, it would almost certainly have been a consequence of the commencement of investigations by the ACCC.

Again, however, it is impossible to know what proportion the 46 matters represent of all cartels affecting Australian markets over the 8-year period to which the data relates. It may be a significant proportion. It may be insignificant. It is also arguable that in a number of these matters involving international cartels the conduct in Australia would have stopped as a consequence of overseas investigations and grants of immunity or leniency, irrespective of whether or not there was a grant of immunity under the AIPCC.

Based on the ACCC figures it is difficult to conclude that the AIPCC has been highly effective in facilitating proceedings against or prosecution of cartel conduct. While there were 46 grants of conditional immunity from civil proceedings between September 2005 and April 2013, there were only 11 cartels that were the subject of proceedings brought by the ACCC and not all of these would have been immunity-led proceedings. Final immunity is generally available only after the resolution of any proceedings against cartel participants for conduct in relation to the cartel. Yet final immunity has only been granted in nine (19.5 per cent) of the 46 matters in which conditional immunity has been granted to date. There are said to be 16 ongoing matters. However, even if it is assumed that these matters will all result in proceedings (and that may be a generous assumption), then that means that just over half of the grants of conditional immunity (25 such grants or 54.3 per cent) have led or will lead to proceedings.

Practitioner interviewees were asked about why there have not been more cartel proceedings brought given the reported number of approaches that have been made to the ACCC under the AIPCC (the ACCC figures concerning number of markers, proffers, and grants of immunity were not available at the time of these interviews). Several reasons were offered in response. They included:

1. that conditional grants of immunity can be and are granted in matters that are not actionable for some reason;
2. that the ACCC is slow in investigating—the reasons for this differed, however; some attributed it to a lack of forensic skills and training on the part of the ACCC staff and others to funding cuts and under-resourcing of the Commission;

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94 It is difficult to know exactly how many of these proceedings followed an immunity application given that court judgments do not routinely indicate when this is the case and the ACCC does not report on such matters (see further Section VI below). It is also possible that there was more than one grant of immunity in respect of a single cartel, depending on how the cartel was defined for the purposes of the immunity.

95 ACCC immunity policy for cartel conduct (n 32) 2 [11].

96 See Section ‘Fear of detection’ above.
that the ACCC, at least in the past, has been too risk averse\(^97\) and is reluctant to bring cases that test the boundaries of the law;\(^98\) and

in relation to the lack of criminal cases to date, for reasons that are not clear, the ACCC is not as committed to prosecuting cartels as it may have been a few years ago when the criminal regime was introduced.

Moreover, the ACCC figures do not say anything about the extent to which immunity applications reduced the cost and time associated with investigations and proceedings, as compared with proceedings that may have been brought in respect of the same cartel but in the absence of any immunity application. In the most well-known immunity-led proceeding in Australia, relating to the Visy/Amcor cartel, the ACCC was put to the expense of amassing a significant body of evidence in preparation for trial before Visy ultimately capitulated and settled.\(^99\) In relation to the airfreight cartel, many of the airlines against which the ACCC has brought proceedings have settled with the Commission. However, there are some that are contesting liability and these proceedings have proven complex and protracted.\(^100\)

Nor do the figures indicate the outcome of the proceedings or when penalties have been imposed, their quantum, in the nine matters in which final immunity was granted (and hence, it is assumed, proceedings were brought). With only a handful of high profile exceptions, it is difficult to identify these matters because the ACCC generally does not report when proceedings have been brought following an immunity application and court judgments do not provide this information.

As to whether immunity applications will facilitate criminal prosecutions, the jury is still out—there has yet to be a prosecution in Australia. However, some have warned of the risks of prosecutorial reliance on an immunity applicant's


\(^{98}\) One practitioner attributed this to past high profile losses in cartel cases: ‘I definitely think they’ve been spooked by those petrol cases.’.

\(^{99}\) For background on the case, see Caron Beaton-Wells, ‘The Billionaire, Prime Minister and Chairman: ACCC v Visy Ltd’ in Barry Rodger (ed), Landmark Cases in Competition Law (Kluwer International (Law) 2012) 27–45.

\(^{100}\) In the case against the Indonesian airline for example, there have been almost 3 years of interlocutory disputes: see Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd (No 9) [2013] FCA 323; Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd (No 2) [2012] FCA 1429; Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd [2010] FCA 551; Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd (No 3) [2012] FCA 1481; Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd (No 8) [2013] FCA 172.
evidence, particularly in the context of a two-party cartel. Such risks were borne out in the collapsed prosecution brought by the Office of Fair Trading against British Airways and its executives in connection with the airfreight cartel.

Deterring cartel conduct

It goes without saying that the ACCC figures cannot assist in ascertaining the extent to which the AIPCC has deterred cartels from forming. In any event it is arguably meaningless to speak of the AIPCC, in isolation, as a mechanism or tool for deterrence. It is well established in research relating to deterrence and compliance that decisions about whether comply with or break the law will depend on multiple factors. Critically, though, deterrence is said to depend on the extent to which the potential offender knows the law and the sanctions applicable to the conduct in question, the extent to which there is a perceived risk of detection of the conduct and the extent to which there is a perceived risk that, if detected, enforcement action will be taken and sanctions applied. The University of Melbourne research referred to above indicates that a significant proportion of the Australian business community do not know the law and the sanctions applicable to cartel conduct. Knowledge of the availability of imprisonment as a sanction is particularly low. Further, even when knowledge exists, the likelihood of detection and enforcement action is also perceived as low, albeit somewhat higher when the potential offender knows that criminal sanctions apply. Even more disconcertingly, the research results indicate that a significant proportion of business people will still contemplate engagement in cartel conduct knowing what sanctions potentially apply.

That said, the AIPCC clearly is relevant to perceptions of likely detection. In theory, business people contemplating engaging in cartel conduct should regard the risk of that conduct being detected, and hence the costs of such engagement, as greater in light of the AIPCC. However, the relevance of the AIPCC in this regard is premised on the potential cartelist’s awareness of the policy and his/her assessment of whether other parties to the contemplated cartel are also aware or likely to become aware thereof.

Over the past year the ACCC has engaged in a significant awareness-raising campaign, the centrepiece of which has been its film, ‘The Marker’, aimed not

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101 Edghill (n 26).
102 See the discussion in Andreas Stephan, ‘How Dishonesty Killed the Cartel Offence’ [2011] Crim LR 446–55.
104 For further information about the research methodology and results, see the reports generated by the Cartel Project available at <http://www.law.unimelb.edu.au/cartel/project-news/project-outputs> accessed 23 September 2013. For a summary see Beaton-Wells and Parker, ‘Justifying Criminal Sanctions for Cartel Conduct’ (n 59).
only at increasing awareness amongst business people of the AIPCC but more broadly at ensuring that the severity of the consequences for individuals engaging in cartel conduct are better understood.\textsuperscript{105} The ACCC’s campaign may well have an impact, particularly at the big end of town. The film was sent to the major media outlets (TV, internet, radio, and print). It was posted on the ACCC website and YouTube and a letter about it was sent by the ACCC Chairman to the CEOs of Australia’s top 300 companies, calling on them to take steps to ensure that their workforces understand what constitutes cartel conduct and the adverse risks and consequences associated with it. Many of the CEOs of Australia’s top companies may heed the call of ACCC Chairman to educate their workforces in this fashion.

However, it is questionable whether the campaign will penetrate the consciousness of the vast majority of Australian business people in small to medium size (SME) businesses. Even if they know about the anti-cartel laws, the University of Melbourne research indicates that owners and managers in the SME sector do not tend to see these laws as relevant to their affairs.\textsuperscript{106} Indeed, the white-collar characters and skyscraper companies depicted in ‘The Marker’ may serve to reinforce this impression.

Consistent with this assessment, many of the practitioner interviewees commented that awareness of the AIPCC was not a problem amongst large companies, particularly those with in-house legal departments. For these businesses the AIPCC is an important element of the company’s compliance programme. Such programmes are far less common amongst SMEs. As one practitioner commented:

‘I think at [sic] the large corporations segment, there is an awareness, because for the most part, they have compliance programs and they have whistle-blower programs. That’s part of the totality of the advice we give to those clients, so there is an awareness. At the SME level, I don’t necessarily think there is a significant awareness, albeit my exposure to them is somewhat limited. But I am surprised constantly by franchise organisations, that one, they don’t consider themselves competitors in the first place, but secondly, that there’s a level of ignorance about the breadth of the cartel provisions and the immunity policy.’

\textsuperscript{105} See at <http://transition.acc.gov.au/content/index.phtml/itemId/1076067> accessed 23 September 2013. The ACCC has also taken actions in specific industries to raise awareness of the AIPCC. For example, in 2012 it wrote to 2500 executives in the heavy construction and construction supply industries–providing a reminder about the potential sanctions for cartel conduct, and providing the name of someone they can contact if they want to report their involvement in a cartel and apply for immunity. See Rod Sims, ‘ACCC Priorities in Enforcing Competition Law’ (Competition Law Conference, Sydney, 5 May 2012) <http://www.accc.gov.au/publications/cartel-the-marker-dvd> accessed 23 September 2013.

\textsuperscript{106} See Parker and Platania-Phung, ‘The Deterrent Impact of Cartel Criminalisation’ (n 66), and the discussion and analysis in Christine Parker, ‘Economic Rationalities of Governance and Ambiguity in the Criminalization of Cartels’ (2012) 52 (5) British J Criminol 974–96; Parker, ‘The War on Cartels and the Social Meaning of Deterrence’ (n 11).
The deterrence impact of the AIPCC is also premised on the assumption that, in addition to being aware of the policy, potential cartelists will assess the incentives associated with applying for immunity as greater than the disincentives. Moreover, the potential offender would need to consider that other parties to the potential cartel would be likely to make this assessment and hence regard an immunity application by one of the cartel parties as a credible threat to the cartel.

Assessing the incentives associated with making an immunity application again requires knowledge of the applicable sanctions and the perception that they are likely to be applied. In addition to escaping sanctions, incentives would include relief from the costs, disruption, and reputational damage associated with investigations and proceedings. Disincentives would include the time and cost associated with investigations and proceedings, the foregone profits generated by the cartel, the burden involved in the cooperation obligations imposed by the AIPCC, exposure to follow-on private actions, and the stigma and potential commercial fall-out associated with blowing the whistle. Not only are these benefits and costs inestimable but it would seem highly unrealistic to expect a potential cartelist to engage in such a calculative weighing exercise in connection with the decision as to whether or not to engage in cartel conduct. Rather, it is an exercise more likely to become relevant at the point of deciding whether or not to apply for immunity.

V. The AIPCC as an element of an overall enforcement and compliance system

It is trite to observe that immunity policies do not operate in a vacuum. They are one, albeit an important, element of an overall approach to and system for enforcement and compliance and should be seen in that light. Recognition of this should mean that the effectiveness of an immunity policy is not only measured against the objectives of the policy (as a tool for detection, prosecution, and deterrence) but also against its interaction with and potential contribution to or detractor from the objectives of the overall system.

The ACCC’s Compliance and Enforcement Policy states that one of the agency’s main goals is to maintain and promote competition and remedy market failure. To that end, the policy states that the ACCC takes action to:

‘stop unlawful conduct
deter future offending conduct
where possible, obtain remedies that will undo the harm caused by the contravening conduct (for example, by corrective advertising or securing redress for consumers and businesses adversely affected)
encourage the effective use of compliance systems

where warranted, take action in the courts to obtain orders which punish the wrongdoer by the imposition of penalties or fines and deter others from breaching the Act.’

The AIPCC’s relevance and contribution to stopping, deterring, and prosecuting cartel conduct has been discussed. In this section of the article, its contribution to securing ‘remedies that will undo the harm caused by the contravening conduct’ (specifically in the context of compensatory remedies) and encouraging ‘the effective use of compliance systems’ is discussed.

Compensation

Despite identifying compensatory measures as a key action that it takes, wherever possible, in its Compliance and Enforcement Policy, it is fair to say that the ACCC’s focus has been largely on deterrence in its anti-cartel law enforcement activities. Policy questions regarding the extent to which the ACCC should focus on compensation as an objective of enforcement and how it should address tensions that arise between pursuit of such an objective and the pursuit of deterrence are large and complex ones, beyond the scope of this article.108 However, in the context of the AIPCC specifically, two particular issues warrant attention:

- whether information generated in the immunity process should be disclosed to private claimants so as to facilitate follow-on actions for damages; and
- whether payment of compensation should be a condition of eligibility under the AIPCC.

Information disclosure

The question of whether information generated in the immunity process should be disclosed to private claimants has been the subject of much debate around the world.109 On balance, competition authorities favour non-disclosure on the grounds that disclosure will undermine the attractiveness of an immunity policy as it will heighten the exposure of applicants to follow-on actions.110 However, in

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109 The literature on the topic is voluminous.

110 Maintaining the confidentiality of the information provided by immunity applicants is generally recognized as a key attribute of an effective immunity policy. In particular, exposure to or strengthening of follow-on damages claims based on information provided to a regulator is said to be a genuine concern for and a potential disincentive to immunity applicants—if not in making the application in the first instance then in doing so in a
the EU at least, this policy position has been taken in the context of more general consideration of ways in which private actions can be encouraged and facilitated. In the USA, there is not as much, if any, need for consideration of this kind given the high level of private litigation in that jurisdiction. However, even in that jurisdiction, steps have been taken to encourage cooperation by immunity applicants with private claimants in a way that does not interfere with the DOJ's immunity policy.

The contrast between the approaches taken to the interaction between public and private enforcement in the USA and the EU, on the one hand, and in

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111 The European Commission entered the debate substantively in December 2005 when it released a Green Paper on Damages Actions for Breach of the European Community Antitrust Rules. See European Commission, ‘Green Paper-Damages Actions for Breach of the EC Antitrust Rules’ (COM (2005) 672 final, 19 December 2005). The article followed a study, which had concluded that this area of law presented a picture of ‘total underdevelopment’ in the Member States. See Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, ‘Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules’ (Comparative Report, Ashurst, 31 August 2004). Following the consultation initiated by the Green Paper, on 3 April 2008, the Commission released a White Paper with detailed proposals for facilitating the establishment of an effective and efficient system of private enforcement of competition law, at both Community and national levels. See European Commission, ‘White Paper on Damages actions for breach of the EC antitrust rules’ (COM (2008) 165 final, 2 April 2008). The White Paper’s starting premise is that the right of victims to compensation is guaranteed by EU law and that all persons having suffered loss as a result of infringements are entitled to access effective redress mechanisms so that they can be fully compensated. Thus, the primary objective of the White Paper was identified as being to improve the legal conditions for victims to exercise their right to reparation under the EC Treaty. Providing for the exercise of this right is seen as necessary to ensure the full effectiveness of the EU competition rules. See mostly recently the European Commission’s proposal for a Directive to facilitate damages claims by victims of antitrust violations: European Commission, ‘Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law’ (C (2013) 3539/3, 11 June 2013).


113 The Antitrust Criminal Penalty Enhancement and Reform Act 2004, 15 USC § 1 offers immunity applicants the prospect of a significant reduction in civil liability, conditional upon the applicant providing ‘satisfactory cooperation’ to civil plaintiffs. The reduction takes two forms. First, only single damages will be allowed against the cooperating immunity applicant/defendant. This de-trebling provision is seen as significantly lowering the expected cost of future damages claims. Secondly, the Act limits the federal and state liability of an immunity applicant to the damages attributable to the commerce of the applicant in the goods and services affected by the violation. This provision has the effect of eliminating the doctrine of joint and several liability for an immunity applicant under which, in the context of a cartel prosecution, each corporate cartel member would potentially be liable for the full amount of a plaintiff’s damages, irrespective of the cartel member’s share in the affected commerce.
Australia, on the other, is stark. The ACCC’s attitude towards private actions is neutral, if not ambivalent. The ACCC has made it clear that it does not support disclosure of immunity information to private claimants and has gone to lengths to prevent disclosure. However, at the same time, the ACCC has not given any indication that it considers it necessary or appropriate that it take other steps that might facilitate an increase in the historically low level of private enforcement in this country. For example, the ACCC has not sought to facilitate the payment of compensation to victims by parties that win significant concessions from the Commission by cooperating under the CPEM. That policy states that leniency is likely to be considered for a corporation where, amongst other things, the corporation is ‘is prepared to make restitution where appropriate’.

However, there is no evidence that the ACCC enforces or promotes restitution as a consideration in the ‘settlement’ negotiation process relating to breaches of the competition provisions. Since 2001 the ACCC has had power to bring representative proceedings seeking compensation on behalf of persons who have suffered loss as a result of a contravention of the competition provisions. While it has been used in respect of contraventions of the fair trading and consumer provisions, the provision has never been used by the ACCC in respect of cartel contraventions.

Moreover, it is evident that the ACCC is prepared to act in ways that may hinder the prosecution of private claims for damages. In the context of settlements under its CPEM it is evident that the ACCC will agree to limiting the scope of admissions specifically to assuage the cooperating party’s concerns about exposure to follow-on actions. As previously noted, in one case, it was prepared to go so far as to expressly disavow any allegation of loss or harm caused by the cartel in the agreed statement of facts. In recent years it has also been unlikely to see findings of fact in its cartel proceedings that, pursuant to section 83 of the Competition and Consumer Act 2010 would constitute prima facie evidence of a breach of the cartel prohibitions.

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115 See, eg the position that it adopted in Cadbury Schweppes Pty Ltd v Amcor Ltd (2008) 246 ALR 137, as discussed in Beaton-Wells and Fisse (n 25) 408–10.

116 Cooperation Policy for Enforcement Matters (n 78) 2.

117 The ACCC may also use the broader power to bring representative actions under the Federal Court of Australia Act 1976 (Cth).


Compensation as a condition of eligibility for immunity

The 2003 version of the AIPCC made it a requirement for corporate immunity from proceedings or penalty that ‘where possible, [the corporation] will make restitution to injured parties’. That requirement was based on the US DOJ’s Corporate Leniency Policy and was said to be in ‘recognition of consumers’ expectations that the applicant not be able to obtain immunity from penalty or prosecution and keep their ill-gotten gains’. There is no public information available on whether or to what extent the restitution requirement was enforced against or fulfilled by applicants in the first 18 months of its operation (the ACCC received 10 applications during that time). However, following the 2004 Review, the restitution condition was removed from the policy.

In explaining the decision to remove the condition, the ACCC indicated that it had been included in the policy originally out of concern that leniency applicants should not be seen to escape any payment of restitution. However, the ACCC pointed out, the experience in the USA and Canada has been that private law suits generally follow an application for immunity even where no public enforcement action is taken. This reasoning is not compelling by way of justification for removing the restitution condition in Australia. It remains the case that immunity beneficiaries escape the payment of penalties. They arguably should not also escape the payment of compensation. Penalties and compensation serve entirely different purposes. Furthermore, it seems anomalous that according to the CPEM, the ACCC purportedly takes ‘preparedness to make restitution where appropriate’ into account in assessing what rewards should be available for cooperation. The contrast between this position and the position under the AIPCC appears difficult to justify.

It is true that injured parties have an entitlement to pursue actions for damages under section 82 of the Competition and Consumer Act 2010 (Cth). However,
whether this is a feasible or likely pursuit in all or even most cases, is another question altogether. The conditions in Australia are much less conducive to private actions than are those in the USA and Canada, as is clear from the very small handful of such actions that have been brought in recent years and the challenges they have faced. In the absence of other measures to support private enforcement, it is arguable that the number of private actions is unlikely to climb significantly in the future. As a result there is arguably a stronger case for compensation as a condition of immunity in Australia than there is in other jurisdictions where the private enforcement climate is much more robust and/or is supported in other ways by the competition authority.

The removal of the restitution condition was justified further by the ACCC in the 2004 Review on the grounds that it would act as a disincentive to immunity applications. This proposition is untested in Australia and several practitioner interviewees for the Immunity Project expressed doubt about it. Moreover, there have been 9 years since the 2004 Review, during which time cartel offences and criminal sanctions have been introduced. The ACCC itself has acknowledged that criminal sanctions should alter significantly incentives in favour of immunity applications, implying that this may allow for a softening of its position on non-disclosure to private claimants. To date, however, no such softening has been discernible.

Finally, it was said in the context of the 2004 Review that victims may be too difficult to identify and loss too difficult to quantify, making a restitution condition unworkable and practically burdensome. This argument against having such a condition in the AIPCC was relied on by a number of the practitioner interviewees in speaking against the re-introduction of the restitution condition. The argument has some force. There are good reasons to consider that private
plaintiffs may be in a better position to do the work of identifying victims and quantifying loss than the ACCC, an agency that has other legitimate objectives and finite resources with which to pursue them. However, this should not necessarily mean that the ACCC cannot and should not take steps to facilitate this process where it is possible and feasible to do so.

The ACCC could consider making it a condition of eligibility for immunity that corporate applicants acknowledge any harm caused by the cartel and identify, to the extent possible, the persons or classes of persons likely to have suffered loss as a result. It could also make such a condition relevant to the benefits it is prepared to offer cooperating parties under the CPEM. The ACCC could also make steps to compensate victims relevant to submissions on penalty mitigation, as an indication of a cooperating party’s contrition.132

A more onerous version of this proposal has been suggested to involve: (a) including an estimate of the damage caused by the agreed conduct and requiring that the settling respondent put aside that amount for compensation to private claimants, with a distribution model to be developed and implemented by claimants’ representatives subject to court approval;133 and/or (b) requiring that the settling respondents provide information to claimants’ representatives to enable them to calculate the damage caused, and as per above requiring that amount to be set aside and distributed.134

Compliance

It is implicit, if not explicit, in the ACCC’s Compliance and Enforcement Policy that the ACCC considers measures to foster and facilitate compliance by the Australian business community as much of a priority as enforcement action. The relationship between compliance and the AIPCC should be seen as a reciprocal mutually reinforcing one for at least the following reasons.135

132 In the Marine Hose case, only one of the four cartel participants (Parker ITR) had provided for a compensation scheme for customers. Finkelstein J observed that a ‘factor which will require future consideration is whether payment of compensation or making restitution to those adversely affected by the illegal conduct should go in mitigation of the penalty. It may be that a company should receive a lower (or discounted) penalty if it has assisted those affected by its actions by implementing a compensation scheme in the same way that a company may receive a discount for assisting the ACCC’: Australian Competition and Consumer Commission v Bridgestone Corporation (2010) 186 FCR 214, 223. However, despite identifying the provision of compensation as a relevant factor in the assessment of penalties, Finkelstein J did not specify how this factor had been taken into account in determining the penalties in this case, or indicate whether any distinction had been drawn between the amount payable by the parties based on whether they had provided for compensation schemes. A press release issued by the ACCC identified that the penalties reflected the ‘number of contraventions found against each respondent with some discount for co-operation with the ACCC’, but made no reference to the role of compensation in assessing the appropriate penalties: Australian Competition and Consumer Commission, '$8 Million Plus Penalty Imposed on Cartel Members' (Press Release, NR 074/10, 14 April 2010).

133 Section 79B of the Compensation and Consumer Act 2010 (Cth) evinces a legislative intention to prioritise compensation over penalties, at least in cases in which both are sought.


135 Consider also the broader considerations as to whether the AIPCC may undermine so-called ‘normative compliance’, that is, compliance based on a voluntary normative commitment to adhere to the law. This is the scenario in which compliance is internalized by a sense of duty and does not require activation by some external...
It was evident from both the practitioner and ACCC interviews for the Immunity Project that often it is the information received by business people through compliance training and programmes that leads to the discovery of cartel conduct and subsequently to an approach to the ACCC that may result in a marker request, if not an application for immunity. One practitioner also observed that explanations regarding the AIPCC that are provided in compliance programmes and training assist in deterrence ‘... because it is creating in the minds of business executives that are aware of it, a greater sense of detection’. This experience underscores the importance of compliance programmes to the efficacy of the AIPCC as a detection and deterrence device and of the value of the ACCC’s work in promoting such programmes—particularly in the SME sector.\(^{136}\)

At the same time, the AIPCC should be seen as presenting an opportunity for engendering a greater level of compliance in the Australian business community. Under the CPEM, a relevant factor in assessing the type and degree of leniency afforded to cooperating parties is stated as whether the corporation ‘is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking’.\(^{137}\) There is no equivalent eligibility condition, indeed no reference at all to compliance, in the AIPCC.\(^{138}\) This is arguably incongruous. It could also be seen as a missed opportunity.

Normative motivation to comply can be based on a belief that a law is just or right in the sense that obeying the law leads to an outcome that fits with moral or ideological values—the regulated business complies with rules because its managers and employees see those rules as substantively just or right. They agree with the ethos of competition and agree there should be a law to protect it. As has been pointed out by the author elsewhere:

‘Immunity policies are justified entirely by the need to detect and deter conduct that is said otherwise to be largely undetectable and hence undeterred. However, the impact of such policies on normative compliance appears rarely, if ever, to be considered by public enforcers and other immunity advocates. These policies reduce law enforcement to a “game”—the company that is first to “the confessional” wins, and winner takes all. The outcome is determined by timing only, and sometimes as a matter of days or hours. Neither the circumstances in which the immunity beneficiary came to be first, nor the compliance commitment of the beneficiary relative to other parties to the offending conduct, are relevant. Moreover, in most jurisdictions, the immunity prize does not include any requirement to implement, improve, or update a compliance program. Nor does it generally require the beneficiary to take reasonable steps to make restitution to the victims of the cartel.

It is difficult to imagine how this scenario promotes respect for the law or its administration. The challenges of cartel detection are not to be discounted. However, as with any enforcement tool, good public policy demands that both the benefits and costs of its use be counted.’

See Beaton-Wells, ‘Normative Compliance – The End Game’ (n 27).

\(^{136}\) This work is overseen by a Compliance Strategies Branch: see Australian Competition and Consumer Commission, ‘Compliance Strategies’ <http://foi.accc.gov.au/node/37> accessed 23 September 2013.

\(^{137}\) ACCC Cooperation Policy for Enforcement Matters (n 78) 3.

Practitioner interviewees observed that, as a matter of course, a corporate immunity applicant will introduce or review its compliance programme as a result of its experience in discovering cartel conduct within the corporation and applying for immunity (one describing it as an ‘unwritten condition’ under the AIPCC, and another pointing out that, for public companies, accountability to shareholders compels the institution of a ‘souped up compliance program’ by immunity applicants). However, they all also agreed that, as a matter of good public policy, consistency with the treatment of cooperating parties under the CPEM and ‘sending the right message’, compliance should be incorporated as a condition of eligibility under the AIPCC. None of the practitioner interviewees considered that such a condition would deter immunity applications.

The ACCC interviewees, however, expressed some reservations about adding a potential disincentive to immunity applications. These interviewees also pointed out that there is or should not be a ‘one size fits all’ approach to compliance programmes—self-evidently, a programme for a large company operating in many markets in more than one country would have to differ in scale and scope to that required, if one was required at all, for a sole trader or small business. However, there is no reason why a compliance condition could not be sensibly qualified to accommodate such differences. ACCC interviewees further appeared to suggest that adding such a condition would be futile given that most of the corporate immunity applicants with which they have dealt to date already had compliance programmes in place at the time of the conduct. However, a condition that required the applicant to update, revise or reinforce its programme would readily address such situations and serve the overall policy objective of encouraging ‘the effective use of compliance systems’.

VI. The AIPCC and ACCC governance

The ACCC’s *Compliance and Enforcement Policy* spells out the principles that guide its decisions and activities in enforcing the competition rules. The first such principle is transparency. It is explained as follows:

‘Transparency

- the ACCC’s decision-making takes place within rigorous corporate governance processes and is able to be reviewed by a range of agencies, including the Commonwealth Ombudsman and the courts
- the ACCC does not do private deals, every enforcement matter that is dealt with through litigation or formal resolution is made public.’

Contrary to this principle, the ACCC has been entirely non-transparent in reporting on the use of or outcomes under the AIPCC.\(^{139}\)

\(^{139}\) As pointed out in Section ‘Transparency, certainty, and predictability’ above, there are various respects in which the ACCC’s administration of the AIPCC is non-transparent, in the sense that it interprets or applies
In its 2004 Review of the policy the ACCC appeared to recognize the importance and value of transparency in an immunity programme. To this end it concluded that it would ‘include information in its annual report about the number of leniency applications during that financial year where appropriate’. It did not identify when including such statistical information in its annual reports could be seen as inappropriate. It also stated that, after consulting with the immunity applicant, it would consider whether to include information concerning an immunity applicant and application in media releases issued at the point of commencing or concluding a proceeding. It did not explain why it was considered necessary to consult with an immunity applicant about such matters if (as is assumed was intended) references in press releases would not disclose confidential information.

However, since 2004, the ACCC has done almost nothing to enhance transparency in AIPCC reporting. A review of its annual reports since 2005–2006 indicates that the ACCC generally does not report on the use of or outcomes under the AIPCC. General references are made to the AIPCC in the context of aspects of the policy in ways that do not strictly reflect the text of the policy or the Interpretation Guidelines. The deals that the ACCC negotiates pursuant to the CPEM also lack transparency in that, as pointed out above, the statements of facts that it presents for judicial consideration often do not fully reflect the nature and extent of the cartel known to the ACCC. Moreover, the process by which the Commission assesses appropriate penalties lacks any explicit mechanism that enables the ACCC’s view of the economic harm caused by the cartel to be properly understood. By contrast, in other jurisdictions, the authorities adopt the mechanism of a base fine that is calculated using measures such as turnover or volume of commerce as a proxy for the excess profits achieved by the cartelists. These excess profits or ‘overcharges’ are seen as reflecting the economic gravity or seriousness of the infringement. The excess profit or expected gain from a violation is assumed to be positively correlated with the cartelist’s turnover or volume of commerce in the affected market for the period of the infringement. See the discussion in Beaton-Wells and Fisse (n 25) 438–55.

140 ACCC Position Paper, Review of ACCC’s Leniency Policy for Cartel Conduct (n 39) [160].
141 ibid [161].

[In line with the Commission’s practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine.]

Press releases by the Directorate General after the conclusion of proceedings contain details about both the fine that would have been imposed on immunity applicants but for the immunity, as well as any leniency, or ‘procedural discounts’ that were actually applied. See eg European Commission Directorate General Competition, ‘Antitrust-Commission fines producers of TV and computer monitor tubes € 1.47 billion for two decade-long cartels’ (Press release IP/12/1317, 5 December 2012) <http://europa.eu/rapid/press-release_IP-12-1317_en.htm> accessed 23 September 2013; European Commission Directorate General Competition, ‘Antitrust-Commission fines producers of water management products € 13 million in 6th cartel settlement’ (Press release IP/12/704, 27 June 2012) <http://europa.eu/rapid/press-release_IP-12-704_en.htm> accessed 23 September 2013. Notably the press releases also include a statement alerting persons affected by the behaviour that is the subject of the release to their rights to seek damages and confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was illegal. ACCC press releases make no reference to private rights. cf also the more uncertain position under s 83 of the Competition and Consumer Act 2010 (Cth) regarding the evidentiary status of findings of fact made in Commission proceedings, particularly where the proceedings are settled (see Section ‘Information disclosure’ above).
reporting on Key Performance Indicators.\textsuperscript{143} However, specific information about the numbers of approaches, markers, proffers or grants of conditional or final immunity or the number and outcomes of immunity-led proceedings is not provided.\textsuperscript{144} One practitioner interviewee commented that a potential downside associated with such reporting is that, if the figures are low, it may suggest that the policy is not functioning as it should and that may reduce its effectiveness as a deterrent. However, he also conceded that low figures relating to the number of applications could also be interpreted as indicating that the AIPCC is acting as a deterrent and that there are fewer cartels as a result.

A review of media releases regarding the commencement and conclusion of cartel proceedings since 2005 found only one media release in which the grant of immunity was referred to and this related to the Visy cartel case.\textsuperscript{145} In other cases it is possible that the ACCC consulted with the immunity applicant about disclosure in media releases and upon meeting resistance, decided not to disclose. It is equally possible that the ACCC did not consult with the applicant but simply decided unilaterally not to make any mention of the immunity application in any media release.

It is also apparent that the ACCC does not disclose the fact of an immunity application, let alone the identity of the applicant or any other aspect of an immunity application, to the Court in the context of proceedings against or submissions on penalties relating to the other cartel parties. At least, as much is suggested from the lack of references to such matters in cartel judgments. A review of these judgments since 2005 found only one in which mention was made of a grant of immunity and again, that related to the Visy cartel.\textsuperscript{146}

For the purposes of its current review, it is not clear that the ACCC will adopt a fully transparent approach. It has indicated that initially it is undertaking consultations internally, with members of the office of the CDPP and with a select group of practitioners who are regular users of the policy. It has suggested that if significant issues are identified in connection with the policy in this initial phase then it will consider a broader and potentially public consultation process.

The initial phase of the process described by the ACCC should be useful in understanding the perspectives and identifying any issues associated with the operation of the AIPCC by important stakeholders. However, it is essential that the ACCC then conduct a formal public review in similar fashion to the


\textsuperscript{144} The one exception to this is in the ‘ACCC’s Annual Report 2007-2008’ where it is stated that the Commission had ‘concluded four cases that had been instituted following the granting of immunity’ see 45.

\textsuperscript{145} Australian Competition and Consumer Commission, ‘Proceedings instituted against Visy group, senior executives for alleged cartel in the corrugated fibreboard container market’ (MR 327/05, 21 December 2005).

\textsuperscript{146} See \textit{ACCC v Visy Industries Holdings Pty Ltd} (2007) 244 ALR 673, 677-8 [8]-[12] (Heerey J).
2004 Review, publishing a discussion article inviting comments from any interested parties followed by a response or position article setting out the ACCC’s views on the issues, having taken submissions into account, and its proposed changes, if any, to the AIPCC and its administration. This is standard practice in other jurisdictions.147 For a policy of this significance, sound public administration demands no less. Moreover, a public review would be likely to attract media attention, and hence would provide an invaluable opportunity to build on the ACCC’s recent efforts to boost awareness of the policy and to educate the business sector (particularly in SMEs) about the law and sanctions applicable to cartel conduct in this country.

In upholding a general principle of transparency, it is not suggested that the ACCC report confidential information provided by immunity applicants. However, greater reporting in relation to the AIPCC, such as statistics relating to its use and, when proceedings are commenced or at least when they are concluded, the identity of immunity applicants, should be undertaken as a matter of transparent and accountable public administration.148 Such reporting would also arguably enhance the AIPCC’s effectiveness in detecting and deterring cartel conduct as it would provide an additional avenue for publicising the policy and its use by the business community.

Another key principle identified in the Compliance and Enforcement Policy as intended to guide the ACCC’s work is ‘fairness’. Fundamentally, the AIPCC could be seen as unfair in that it rewards an admitted offender without regard to the offender’s culpability or the harmfulness of its conduct and results in unequal and potentially disproportionate treatment of offenders. A University of Melbourne survey of public opinion in relation to cartel conduct in 2010 revealed that a large proportion of the Australian public regard it an ‘unacceptable’ to give the first company to report a cartel immunity, even if the authorities would not otherwise have found out about the cartel.149 This may reflect a tension between immunity policies and the community’s basic sense of fairness.

The operation of the AIPCC may be seen as unfair in another respect. The experience overseas, if not conceivably also in Australia,150 is that increasingly immunity policies are invoked predominantly by large multinational corporates that have been involved in international cartels. This is no doubt a reflection of the fact that these firms are well resourced and advised and in the case of recidivists,151 experienced in how to play the immunity ‘game’. The effect of this

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147 See, eg the reviews cited in n 16, above.
148 By the time that proceedings are concluded, the identity of the immunity applicant is likely to deducible in any event from the fact that it is the one party to the cartel against which proceedings have not been brought.
149 See the results of this and other aspects of the survey in Caron Beaton-Wells and Chris Platania-Phung, ‘Anti-Cartel Advocacy: How has the ACCC Fared?’ (2011) 33 Sydney L Rev 735–70.
150 It is not possible to assess the Australian experience in this regard as the identity of immunity applicants is not disclosed. However, currently half of the ACCC’s investigations relate to international cartels.
is that such policies tend to favour major international companies at expense of domestic, often smaller, businesses that do not have the same legal resources at their disposal. In Korea, the backlash from the public and SME sector to this phenomenon has been such that the Korean Fair Trading Commission has amended its immunity policy to prevent a company from receiving immunity more than once in 5 years. It has been explained to the author by a KFTC official that the principal reason for this change was the concern that the policy was seen as being exploited unfairly by large multinational companies operating in multiple markets and repeatedly applying for immunity, leaving domestic companies to ‘cop the full brunt of penalties time after time’.

Plainly, immunity policies in general are seen by competition authorities as providing such significant benefits for enforcement as to override any competing interest of fairness. However, fairness considerations should not be lightly dismissed. Perceptions of unfair treatment by law enforcement agencies can undermine respect for and voluntary compliance with the law. Such concerns may be addressed in part by ensuring that immunity policies are transparently and consistently administered and, in part, by making the payment of compensation to victims a condition of eligibility for immunity.

VII. Conclusion

The case-study of the Australian experience with its immunity policy reported on this article demonstrates the value to be derived from a more searching critical analysis of immunity policies than is generally reflected in the approach taken by competition authorities to such policies.

It reveals that while the orthodox principles espoused by competition authorities in relation to immunity policy design and administration make sense in theory, their strict application may not necessarily be realisable or even desirable in practice. Thus, assessing the likely effectiveness of an immunity policy by reference to the extent to which it reflects these principles may be an exercise of limited utility. The Australian experience suggests that the formula advocated for immunity policy design and administration is over-simplified and that there...
are significant insights available from appreciating the nuanced way in which such policies work in practice in specific jurisdictions.

First, in terms of sanction severity, the Australian experience to date has been that the harshness of the sanctions applicable to cartel conduct does not appear to bear significantly on the extent to which immunity applications are made. Indeed, while it may be too early to make a definitive assessment, there are signs that the introduction of criminal sanctions, including jail time for individuals, has undermined the strength of the AIPCC.

Secondly, fear of detection by cartelists is not necessarily a paramount driver of such applications in this jurisdiction. There are other, more influential, factors at work. In Australia at least these include an alignment between reporting cartel conduct and the corporate culture in many large Australian companies, and the flow-on effects of immunity applications made overseas in respect of conduct potentially affecting Australian markets.

Thirdly, a certain amount of uncertainty and discretion may be inevitable in the administration of an immunity policy. In Australia, discretion and flexibility by the ACCC in its interpretation and administration of the AIPCC is not only expected, but seen as beneficial by both the Commission and practitioners who advise immunity applicants. Such discretion is often exercised in relation to the scope of and conditions of eligibility under the policy as well as in relation to the consequences for parties that are, for one reason or another, ineligible. With respect to the latter, the ACCC relies heavily on the non-transparent, highly discretionary nature of the CPEM to provide cooperating parties that are ineligible under the AIPCC with the same degree of immunity as is available under that policy.

The case-study illustrates the formidable challenges involved in attempting to assess the effectiveness in practice of an immunity policy in facilitating detection, prosecution, and deterrence of cartel conduct. One approach to such assessment entails a numerical examination of applications and outcomes. That is, the number of applications is taken to indicate the extent to which the policy has been used and thus the degree to which the policy has been effective in facilitating detection of and stopping cartel conduct. The number of proceedings brought, the number of those proceedings that resulted in a finding of liability and the quantum of penalties imposed on the other cartel members are taken to indicate the extent to which the policy has been effective in facilitating the prosecution of cartel conduct. Based on assumptions about the effects that publicised proceedings and penalties have on the perceptions and behaviour of potential cartel offenders, these numbers might also be taken to indicate the degree of effectiveness of the policy in achieving general deterrence.

The case study demonstrated the substantial limitations of such an approach. First, it is contingent on the competition authority disclosing information about the use of and outcomes pursuant to its immunity policy. This has not been the practice of the ACCC. Not only has it not published figures relating to the
number of applications and grants of immunity made under the AIPCC until very recently, it also does not generally disclose the fact of an immunity application when proceedings are brought or concluded as a result of it. Secondly, even when such information is available, it says nothing about the nature or extent of unreported cartel activity taking place. Hence, it is impossible to know what proportion of cartel activity affecting an economy is being detected, stopped, and prosecuted by reason of the immunity policy. Thirdly, assumptions about the effects of publicized proceedings and penalties on general deterrence are problematic in that they are insensitive to the complexity that attends business people’s decision-making processes in relation to compliance.

A modified but still largely numerical approach to effectiveness-testing involves focussing on the quality rather than the volume of usage and outcomes pursuant to an immunity policy. It examines the extent to which the policy is yielding detection and prosecution of the most serious cartels, based on proxies for harm such as the scope and duration of the cartel. This approach is also dependent on information disclosure by the competition authority and, again, it provides an incomplete picture. This is not only because it does not reveal those cartels that do not fall into the immunity net. It is also because the immunity application itself and the process of cooperation by the other cartel members create at best a distorted, at worst a false, representation of the cartels that are detected and prosecuted pursuant to the immunity policy. The account given by the immunity applicant of the cartel will be influenced by the extent of the applicant’s knowledge of the cartel’s operations and that knowledge may not be complete—in the case of a marginal or late cartel member, it may be considerably deficient. Nevertheless it is that account which provides the roadmap and frames the competition authority’s understanding and investigation of the cartel. Even if a fuller picture emerges subsequently, as it often does, through the authority’s investigation, it is not always the same as the picture that becomes the public record of the cartel. The extent of admissions made by and penalties imposed on other cartel members will be influenced, sometimes significantly, by ‘deals’ that are done by the authority in return for cooperation.

Another approach is a more qualitative one that involves asking stakeholders who have experience in using the policy for their views of its effectiveness. The value in making such an inquiry of a competition authority is curtailed inevitably by the authority’s vested interest in attesting to the policy’s effectiveness. The value in making the inquiry of users, be they practitioners or business people who have been applicants under the policy, may be greater but there remains a problem of bias in favour of positive views of a policy that, for practitioners at least, is a source of lucrative work. Furthermore, the views that would be elicited from such individuals are by their nature anecdotal or impressionistic and may also be influenced by the individual’s concern to preserve their relationship with the authority. A guarantee of anonymity may not overcome this difficulty where, as
in Australia, the pool of users and number of immunity matters is so small as to enable identification even without disclosure of sources.

In contrast to its limited results in relation to the AIPCC’s performance as a tool for detection, prosecution and deterrence, the case-study highlights the benefits in evaluating an immunity policy’s contribution to or detraction from the effectiveness of the overall system for promoting anti-cartel law enforcement and compliance.

In Australia, the administration of the AIPCC has been undertaken largely without regard to its interaction with other aspects of and mechanisms for facilitating enforcement and compliance. The ACCC’s approach to the issues raised by disclosure of immunity information to private claimants is illustrative. These issues have been approached by the Commission in a narrow and unidirectional fashion. The focus has been entirely on the threat that disclosure poses to the efficacy of the AIPCC by deterring future whistleblowers. That focus has meant that, in effect, the ACCC has adopted a position of non-disclosure in any circumstances. The ACCC has evidenced little if any concern for the impact on private actions, reflecting the more general malaise in this country regarding the need to foster a climate conducive to private enforcement in furtherance of general objectives of compensation and deterrence. Consistently with this attitude, the ACCC has eschewed any attempt to use the AIPCC as a mechanism for facilitating redress for cartel victims in that it has shown no interest in making cooperation with private claimants, let alone the payment of compensation, a requirement under the policy.

The ACCC also appears to have overlooked the potential positive interaction between its immunity policy and the promotion of compliance. Making the establishment or refurbishment of a compliance programme a condition of eligibility under the AIPCC seems an obvious common sense measure that would bolster the ACCC’s efforts to inculcate a greater ‘culture’ of compliance in the Australian business community.

Finally, as a crucial and arguably controversial enforcement tool, it is vital that the administration of an immunity policy conform to the general governance principles of the competition authority. Identifying and upholding such principles are essential in justifying the immense public power vested in such authorities, in holding authorities accountable for their exercise of such power, and in safeguarding those subject to the power from its abuse.

The ACCC’s administration of the AIPCC has been inconsistent with the principle of transparency which it has identified as a key aspect of its governance charter. Reporting non-confidential information about applications and outcomes under the AIPCC would correct this inconsistency and would do so without in any way damaging the policy. If anything, in publicizing the use and outcomes of the AIPCC, a practice of reporting should contribute to the policy’s effectiveness in providing its stated benefits of detecting, prosecuting, and deterring cartel conduct.
An immunity policy may also be seen as violating a competition authority's commitment to fairness in its policies and procedures. Whether or not this is of concern will depend, in part, on one's view of the importance of fairness to an authority's legitimacy and in turn to the legitimacy of the law and its administration. Perceived illegitimacy may ultimately undermine the extent to which business people are prepared to adhere to the law based on respect for its precepts and the approach taken to its enforcement, no matter how fearsome the sanctions applicable to its breach may be. The same may be said of any religion.

Appendix

Australian Interviewees for the Immunity Project

(1) Peter Armitage, Ashurst
(2) Marcus Bezzi, Australian Competition and Consumer Commission
(3) Bob Baxt AO, Herbert Smith Freehills
(4) Andrew Christopher, Webb Henderson
(5) Michael Corrigan, Clayton Utz
(6) Graeme Davidson, Commonwealth Director of Public Prosecutions Office
(7) Brooke Dellavedova, Maurice Blackburn
(8) Richard Fleming, Australian Competition and Consumer Commission
(9) Rob Ghali, Australian Competition and Consumer Commission
(10) Scott Gregson, Australian Competition and Consumer Commission
(11) Ayman Guirguis, Corrs Chambers Westgarth
(12) Lisa Huett, King & Wood Mallesons
(13) Chris Jose, Herbert Smith Freehills
(14) Matthew Lees, Arnold Bloch Leibler
(15) Nick McHugh, Norton Rose
(16) Carolyn Oddie, Allens
(17) Aldo Nicotra, Johnson Winter Slattery
(18) Bill Reid, Ashurst
(19) Stephen Ridgeway, King & Wood Mallesons
(20) Luke Woodward, Gilbert + Tobin