

# **IMMUNITY POLICY: REVOLUTION OR RELIGION?**

**ANTITRUST ENFORCEMENT SYMPOSIUM, 2013**

**CARON BEATON-WELLS**



**“the single most significant development in cartel enforcement is the proliferation of effective leniency programs”**

# IMMUNITY PROJECT

Review and critically assess design and operation of immunity policies based on practical experience of agencies and applicants

Review and critically assess effectiveness and ways of testing effectiveness of immunity policies in detecting, prosecuting and deterring cartel conduct

Provide insight into interaction between immunity policies and other aspects of systems for anti-cartel enforcement and compliance

Provide insight into interaction between immunity policies and agency governance / institutional values



Australian  
Competition &  
Consumer  
Commission

- **'Leniency' policy introduced in 2003**
- **Wide ranging review in 2004**
- **Criminal regime introduced in 2009**
- **Current review announced in May 2013**

# ACCC immunity policy for cartel conduct

July 2009

# ROAD MAP

- **Prerequisites for the AIPCC's effectiveness**
  - Severe sanctions, fear of detection, transparency and certainty
- **Testing the AIPCC's effectiveness**
  - Detection, prosecution, deterrence
- **The AIPCC as an element of an overall enforcement and compliance system**
  - Compensation, compliance
- **The AIPCC and ACCC governance**
  - Transparency

# **PREREQUISITES TO EFFECTIVENESS**

# SEVERE SANCTIONS



- **Civil penalty maxima increased in 2007 – not motivated by possible impact on AIPCC**
- **Low average civil penalties – mostly negotiated by ACCC**
- **Criminal sanctions introduced – but markers and proffers have since declined**

# FEAR OF DETECTION

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.'

It just never entered their mind that they wouldn't cooperate or wouldn't seek leniency or immunity.

an ethical position  
the right thing to do

... 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...

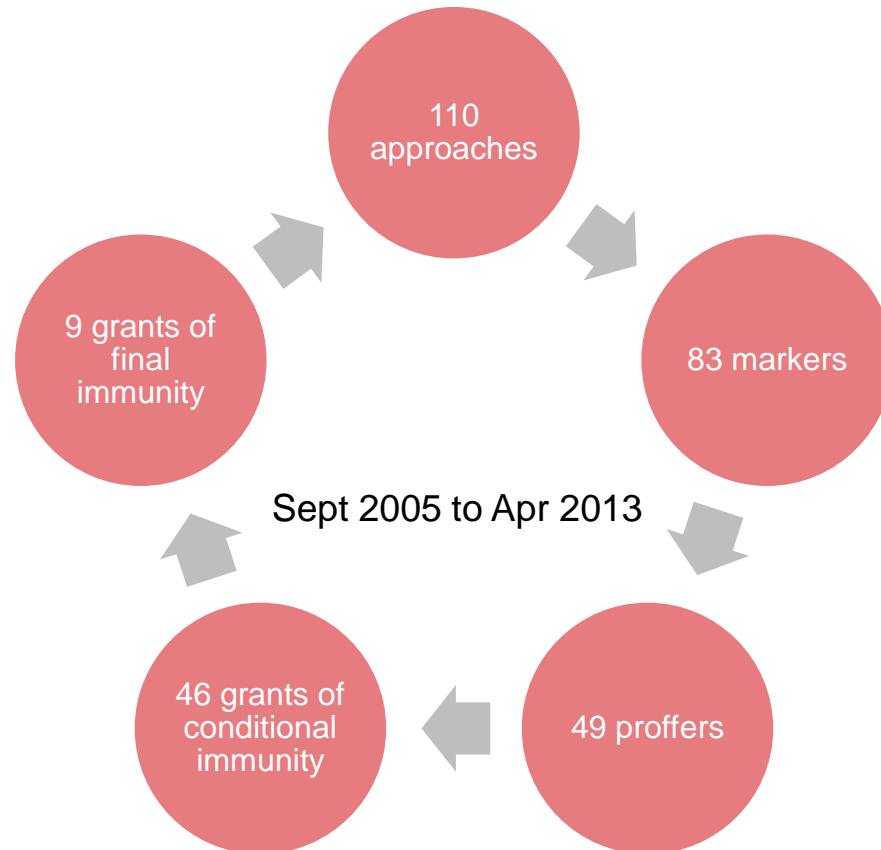


# **TRANSPARENCY, CERTAINTY**

- **Uncertainty about consequences of not applying for immunity – significant scope for negotiated discounts**
- **Uncertainty about process and decisions involving the CDPP – not seen as a deterrent to applications**
- **Substantial discretion and flexibility in application of the immunity policy – highly valued by ACCC and practitioners**

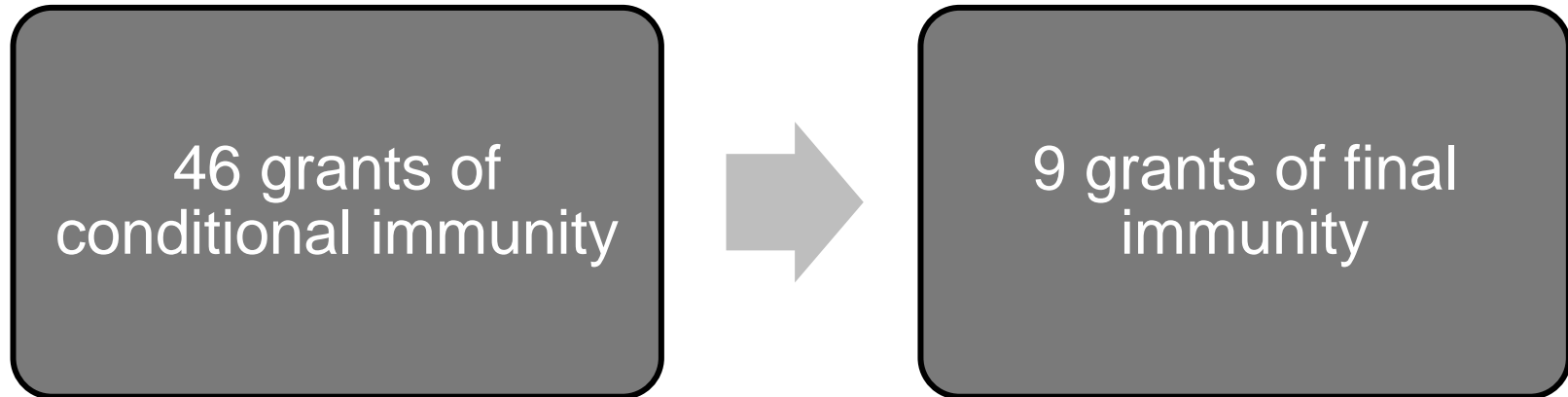
# **TESTING EFFECTIVENESS**

# DETECTION



**WHAT DOES THIS TELL US?**

# PROSECUTION



**THIS COULD TELL US SOMETHING...**

# DETERRENCE

58% of business people **do not know** cartel conduct is a criminal offence and 77% **do not know** that jail applies

Business people perceive the **likelihood of detection and enforcement** action as **low** and only marginally higher when criminal sanctions are available

Business people perceive the **likelihood of a jail sentence** as **low**

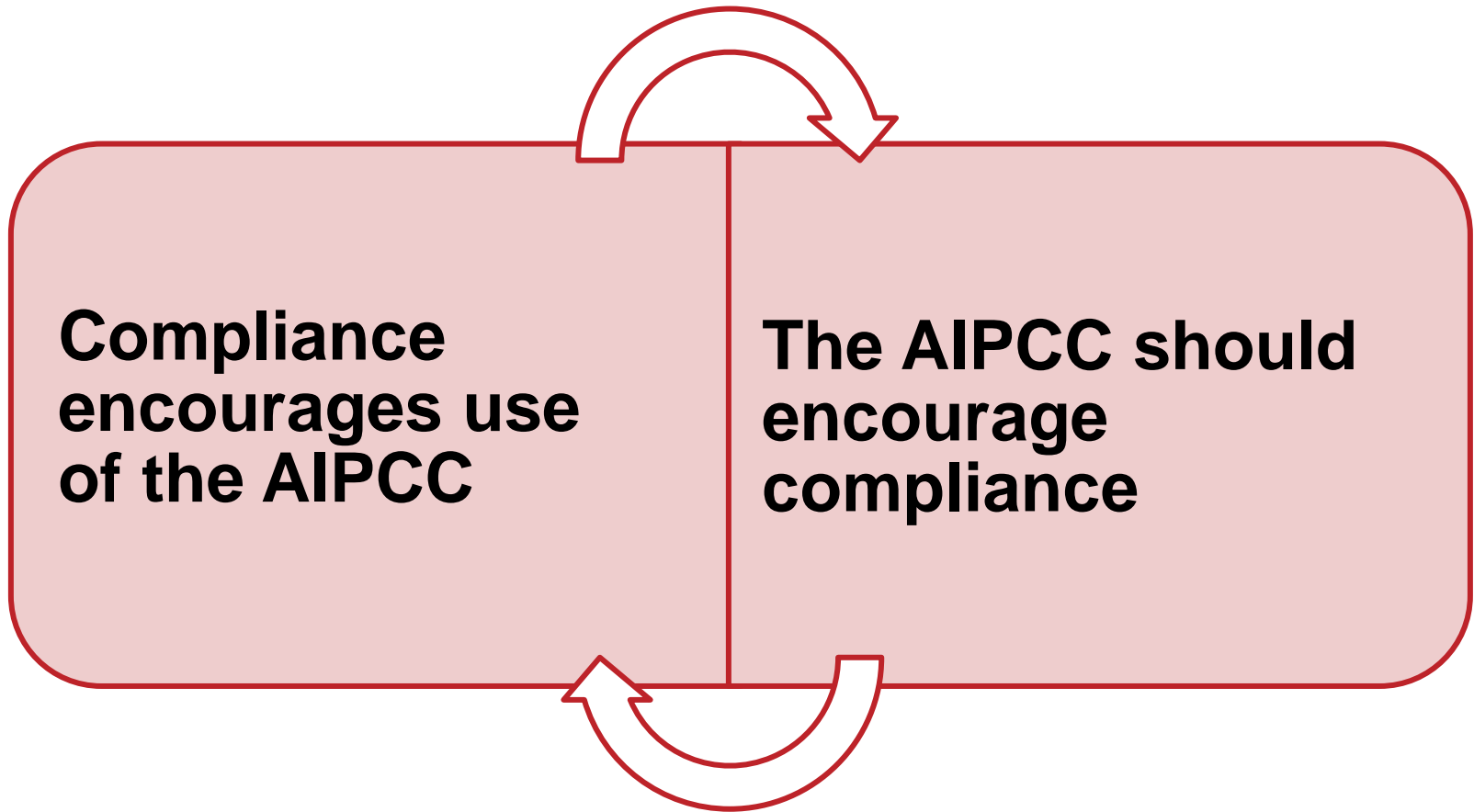
- Beaton-Wells et al, *The Cartel Project*, 2010

# **AIPCC AS AN ELEMENT OF AN OVERALL SYSTEM**

# COMPENSATION

- **Immunity documents not to be disclosed to private claimants – but no general policy to otherwise facilitate private actions**
- **Compensation not to be a condition of eligibility under the AIPCC – but no other ACCC measure to secure compensation for victims**

# COMPLIANCE





# **AIPCC AND ACCC GOVERNANCE**

## 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.

- ACCC, *Compliance and Enforcement Policy*, 2013

**BUT THE ACCC DOES NOT REPORT ON USAGE OF OR OUTCOMES UNDER THE AIPCC...**

**TAKE-OUTS...?**

**Failure to follow orthodoxy in immunity policy design and administration does not necessarily spell ineffectiveness**

**Effectiveness testing is hard! But a combination of quantitative and qualitative approaches yields some insights...**

**Assessing immunity policy in isolation, ignoring other aspects of enforcement and compliance, is not recommended**

**Immunity policy administration should not be carved out from key agency governance principles**

# **IMMUNITY POLICIES... A RELIGIOUS REVOLUTION?**

**Feedback welcome.  
Please contact Caron at [c.beaton-wells@unimelb.edu.au](mailto:c.beaton-wells@unimelb.edu.au).**