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Published in:
Bond Law Review

Bond University

Bond Law Review

Volume 30 Issue 2

2018

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Abstract

The US introduced the cartel leniency program in 1978. In the past two decades, there has been a surge in the implementation of leniency programs in more than sixty jurisdictions. Although there have been numerous scholarly discussions to support the cartel leniency program, inconsistent views exist among different jurisdictions and stakeholders as to the effectiveness of the leniency program in practice. In evaluating new leniency programs, scholars and commentators have typically referred to the US and the EU models as benchmarks, but little attention has been paid to the question of whether it is desirable to apply these models in designing various leniency programs in different jurisdictions and societies. Given that Australia has recently revised its cartel immunity program for the third time, and that China's competition authorities have proactively relied on the leniency concept to combat cartels in the past few years and are currently drafting a guideline for more effective implementation of the cartel leniency program, the time is now ripe for an apple-versus-pear comparison of these two immunity/leniency programs so as to provide more insights into the different institutional designs of immunity/leniency programs.

I Immunity/leniency Program in Competition Law

Cartel leniency programs, otherwise known as amnesty programs or immunity programs, [1] are an incentive-based mechanism used by competition authorities to combat cartels. These programs aim to destabilise cartels and to erode the collusion between cartel members by providing immunity from governmental penalties to cartel members who

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1 In some jurisdictions, 'amnesty' or 'immunity' means exemption from punishment, while 'leniency' refers to both the exemption from punishment and the partial reduction in punishment. In this article, the terms 'immunity policy' and/or 'immunity program' are used only in the Australian context, and the term 'leniency program' is used mainly to describe the corresponding regimes in China, the US and the EU and in certain discussion settings to include the Australian cartel immunity program or policy.

come forward to report cartel conduct.[2] Compared with the long history of modern competition law, leniency programs are still in their infancy, but they are expected by competition authorities to play a more significant role in tackling cartel issues in the future.[3] Initially established in 1978, the US leniency program had not been very effective until 1993, when the US Department of Justice ('USDOJ') made a significant revision to the old program to provide the leniency applicants with more incentives to cooperate.[4] Between 1978 and 1993, only 17 leniency applications were made in the US — roughly one application every year — while the application rate from 1993 to 2003 averaged more than one application per month.[5] Possible reasons for the ineffectiveness of the original US Leniency Program include the less severe sanctions in cartel law,[6] the broad discretion afforded to antitrust enforcers,[7] and the lack of transparency.[8] The revised leniency program introduced in the US in 1993, which was renamed the Corporate Leniency Policy,[9] is generally regarded as a very effective tool in the detection and deterrence of cartel conduct.[10] Statistical evidence also indicates that the US leniency program is effective in achieving its objectives.[11]

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2 Joseph E Harrington Jr, 'Optimal Corporate Leniency Programs' (2008) 56(2) *Journal of Industrial Economics* 215, 215.

3 Gönenç Gürkaynak, K Korhan Yildirim and E Açelya Setkaya, 'Granting Immunity and Revoking Immunity: A Global Overview of Leniency Programs' (2014) 25(6) *International Company and Commercial Law Review* 195.

4 In comparison to the voluminous literature on the US Corporate Leniency Policy (1993), less literature has been found on the ineffectiveness of the US Leniency Program (1978). Regarding the ineffectiveness of the 1978 US Leniency Program, see Christopher R Leslie, 'Editorial — Antitrust Leniency Programmes' (2011) 7(2) *Competition Law Review* 175, 175.

5 See, eg, Nathan H Miller, 'Strategic Leniency and Cartel Enforcement' (2009) 99(3) *American Economic Review* 750, 752; James M Griffin, 'The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program' (Speech delivered at the American Bar Association Section of Antitrust Law Annual Meeting, San Francisco, 12 August 2003) <http://www.justice.gov/atr/public/speeches/201477.pdf>.

6 See Scott D Hammond, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' (Speech delivered at the 24th Annual Meeting of the National Institute on White Collar Crimes, Miami, 25 February 2010) ('*The Evolution of Criminal Antitrust Enforcement*') <http://www.justice.gov/atr/public/speeches/255515.pdf>.

7 See Leslie, 'Antitrust Leniency Programmes', above n 4, 175.

8 See Michel Cloutier, *Three Essays on Leniency Policies* (PhD Thesis, Queen's University, Canada, 2014) 51 <http://qspace.library.queensu.ca/bitstream/1974/12378/3/Cloutier_Michel_201408_PhD.pdf>.

9 United States Department of Justice ('*USDOJ*'), *Corporate Leniency Policy* (10 August 1993) <http://www.justice.gov/atr/public/guidelines/0091.htm>.

10 See, eg, Daniel A Crane, 'Technocracy and Antitrust' (2008) 86 *Texas Law Review* 1159, 1186; Leslie, 'Antitrust Leniency Programmes', above n 4; Gary R Spratling, 'Detection and Deterrence: Rewarding Informants for Reporting Violations' (2001) 69 *George Washington Law Review* 798, 799.

11 From 1995 to 2010, companies were fined over $5 billion for antitrust crimes, of which over 90 percent was attributable to the assistance of the leniency applicants under investigation. The USDOJ usually has 50 international cartel investigations open at a time, and more than half of these investigations are initiated based on the information from the leniency applications. See Hammond, *The Evolution of Criminal Antitrust Enforcement*, above n 6.

The first European leniency policy, *the Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases*,[12] was inspired by the US leniency program and adopted by the European Commission in 1996. Since that time, the European Commission has twice revised the relevant rules to better combat cartels.[13] It has been claimed that the leniency program adopted by the EU is equally as successful as its US counterpart.[14] Encouraged by the purported success in the US and the EU, more than 60 cartel leniency regimes have been established around the globe since 2011.[15]

While the proliferation of leniency programs appears to correspond to competition law enforcers' preference for such policies, their real effectiveness is difficult to assess. This is especially so because different jurisdictions have different level of market openness and different understandings of market competition, and, hence, different perceptions of the appropriate penalties in cartel law.[16] Until now, empirical studies undertaken to investigate the effectiveness of leniency or immunity programs in different jurisdictions appear to produce mixed results, no matter whether those different leniency programs have much in common in terms of their institutional design. For example, while empirical studies of the US leniency program usually confirm that it has been effective in detecting and deterring cartels since 1993,[17] some earlier empirical studies of the EU leniency program do not confirm a positive relationship between the adoption of that program and the level of cartel detection and deterrence.[18] One reason for these different results may be that the US leniency program is supported by criminal penalties, whereas the EU leniency program is not.[19] Another possible reason for the apparent

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12 *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases* [1996] OJ C 207/4.

13 The European Commission reformed twice its leniency notice twice, in 2002 and 2006, respectively. See *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* [2002] OJ C 45/3; *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* [2006] OJ C 298/11.

14 The European Commission is said to receive two leniency applications every month on average. See Grant Murray, 'European Union' in Samantha J Mobley and Ross Denton (eds), *Global Cartels Handbook: Leniency: Policy and Procedure* (Oxford University Press, 2011) 188, 188. It has also been reported that the EU Leniency Notice had yielded 31 cases with over €6 billion fines as of April 2007. See Andreas Stephan, 'An Empirical Assessment of the European Leniency Notice' (2008) 5(3) *Journal of Competition Law & Economics* 537, 539 ('*An Empirical Assessment of the European Leniency Notice* ').

15 Samantha J Mobley and Ross Denton, 'Introduction: The Race for Leniency: Solving the Global Puzzle' in Samantha J Mobley and Ross Denton (eds), *Global Cartels Handbook: Leniency: Policy and Procedure* (Oxford University Press, 2011) lxxxv, lxxxv.

16 Gordon J Klein, 'Cartel Destabilization and Leniency Programs — Empirical Evidence' (Discussion Paper No 10-107, Centre for European Economic Research, December 21 2010) <ftp://ftp.zew.de/pub/zew-docs/dp/dp10107.pdf>.

17 See, eg, Miller, above n 5, 750, 765.

18 See, eg, Stephan, 'An Empirical Assessment of the European Leniency Notice', above n 14, 539, 558–9; Andreas Stephan, 'Cartels' in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar, 2013) 217, 229–30; Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program' (2009) 27 *International Journal of Industrial Organization* 639, 639, 645.

19 See Brenner, above n 18, 645.

ineffectiveness of the EU leniency is that immunity is available only to the first leniency applicant.[20] It may be argued, then, that if the main features of the US leniency program were transposed into the programs adopted in the EU and other jurisdictions, similar levels of effectiveness would be more likely. This argument seems to be supported by a recent study of the European situation, since the European 2006 Leniency Notice is said to be much more in line with the US leniency program.[21] However, even if the new EU leniency program is effective, this does not necessarily mean that a model leniency program based on the US and EU model would be readily adaptable to other jurisdictions. Neither does it necessarily mean a seemingly successful model of leniency program in one jurisdiction would be successful in other jurisdictions. The purpose of this paper is to conduct further studies of the adoption of leniency policies in jurisdictions other than the US and the EU to ascertain the function of leniency program as an anti-cartel instrument and whether it is desirable to transplant all or most of the features of a purportedly successful model in designing a leniency program.[22]

Australia and China both introduced immunity/leniency programs to their competition law regimes based on the US and EU experiences. In terms of institutional design, the Australian immunity program displays more features of the US leniency program, whereas the Chinese leniency program displays more features of the EU program. Moreover, while the Australian immunity program has been defined and widely recognised as a cartel leniency program, the Chinese leniency program has not yet been clearly defined as a cartel leniency program, either at home or by the international community.[23] For these reasons, it may be argued that this article sets out to compare an apple with a pear, and that no meaningful comparisons can be drawn between the Australian and Chinese programs. However, a closer examination of the institutional designs and practical applications of the Australian and Chinese programs reveals that both have

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20 See Stephan, *An Empirical Assessment of the European Leniency Notice*, above n 14, 559–60.

21 See Wouter P J Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years' (2016) *World Competition* 317, 331–5, 350–2. However, this study has also expressed the view that the success of a cartel leniency program relies heavily on the level of credibility of the competition enforcement authorities to detect and punish cartel infringements on its own.

22 Especially with regard to the assessment of leniency program in combating cartels, more comparative study on the newly implemented leniency/immunity programs has been called for. See Pariz Lythgo-Marshall, *The Australian Competition and Consumer Commission Immunity Policy for Cartel Conduct: A Critical Legal Analysis* (PhD Thesis, University of Wollongong, 2016) 335.

23 For example, Nate Bush contends that the leniency provisions of the Chinese Antimonopoly law are more an extension of general principles of Chinese law than an adoption of foreign antitrust leniency or amnesty program. See Nate Bush, 'Weathervanes, Lightning Rods, and Pliers: The NDRC's Competition Enforcement Program' (2014) *The Antitrust Source* 1, 6. Some Chinese commentators also hold the similar views, see, eg, 吴汉洪，孙耀祖 [Wu Hankong, Sun Yaozu], «反垄断领域中的宽大政策：实践、理论及中国的对策思考» [Leniency Policy in Antitrust: Practice, Theory and Thoughts on China] (2010) 4 中国人民大学学报 *Journal of Renmin University of China* 85, 90.

been instituted to detect and deter anticompetitive cartel behaviour. Although they are at different stages of their development, a comparative analysis of these programs may foster a better understanding of each program, which may prove especially important given the expanding business cooperation between these two countries. Moreover, just as the competition policies and laws of Australian and China have been influenced to varying degrees by US antitrust and EU competition regulatory regimes, Australia and China have adopted immunity/leniency programs that display US and EU characteristics, respectively. Therefore, a comparison of the Australian and Chinese immunity/leniency programs will also provide views in addition to those offered in the context of the US-EU programs as to the function of leniency program as an anti-cartel tool.

The article is structured as follows. Section 2 briefly explains the commonly recognised rationale behind, and the key features of, the leniency program. Section 3 then critically highlights the development of, and the main elements of, the immunity/leniency programs in Australia and China. Having set the scene, Section 4 compares the two immunity/leniency programs against the commonly recognised benchmark of designing immunity/leniency programs. Section 5 concludes and makes recommendations on the institution and improvement of the leniency programs in other jurisdictions.

II Rationale and Key Features of an Effective Immunity/Leniency Program

Nowadays, cartels are universally regarded as the most harmful of anticompetitive practices with hardly any perceivable benefits to consumers.[24] Although some scholars have argued that cartels may actually enhance welfare,[25] many jurisdictions declare so-called hard-core cartels to be illegal per se.[26] Cartels usually continue for years and are highly insidious. Hence, the detrimental impacts of cartels on consumer welfare are often long-term and extensive.[27] Cartels are qualitatively different from other types of illegal market behaviour in that they often involve deliberate

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24 See, eg, OECD Competition Committee, 'Recommendation of the Council concerning Effective Action Against Hard Core Cartels' (Recommendation Report No C(98)35, OEC Competition Committee, 25 March 1998) < https://www.oecd.org/daf/competition/2350130.pdf>; Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge University Press, 2014) 2–3.

25 According to a recent study, there are situations in which hard-core cartels may lead to an increase of aggregate welfare. See Iwan Bos and Erik Pot, 'On the Possibility of Welfare-Enhancing Hard Core Cartels' (2012) 107(3) *Journal of Economics* 199, 199.

26 See, eg, Eleanor M Fox and Daniel A Crane, *Global Issues in Antitrust and Competition Law* (West, 2010) 5–6.

27 See, eg, Nicolo Zingales, 'European and American Leniency Programmes: Two Models Towards Convergence?' (2008) 5(1) *Competition Law Review* 5, 7; Wardhaugh, above n 24, 2.

and covert conspiracies between two or more culpable participants.[28] Investigating cartel conduct is also a very costly and resource-intensive task, and it can be very hard for competition authorities to successfully detect, gather evidence against and prosecute cartels. Leniency programs offer a more cost-effective means of combating cartels. The use of leniency programs to destabilise cartels is underpinned by the famous game theory of the 'prisoner's dilemma'.[29] Although the situation that cartel members face is in fact different from that of a classical prisoner's dilemma,[30] the competition enforcers believe that the leniency program can serve to create a similar situation. The primary goal of a well-designed leniency program is to manipulate cartel members' incentives to self-report and to create a sufficient degree of distrust among cartel members.[31] Until now, it has been generally accepted that a well-designed leniency program must encompass at least the following three prerequisites: threat of severe sanctions; heightened fear of detection; and transparency in enforcement policies.[32]

While these three prerequisites are commonly embedded in most jurisdictions with cartel leniency programs, the concretisation of and emphasis placed on each individual prerequisite differs between jurisdictions. For example, the EU has so far favoured larger administrative fines over the criminalisation of cartel conduct to strengthen the threat of severe sanctions,[33] and focused more on the heightened-fear-of-detection component in its design of leniency program.[34] The different emphasis placed on each individual prerequisite in different jurisdictions reflects differences in local competition culture and perceptions as to the proper role of competition law enforcement. It would for this reason be fallacious to conclude that the failure of a leniency program in one jurisdiction is due to the emphasis that it places on each of the three prerequisites, or that modelling the program in one jurisdiction on that adopted in another will necessarily produce the same outcomes. For instance, Australia has been applying criminal sanctions to cartel activities since 2009. However, one recent empirical study showed that the introduction of criminal sanctions might have adversely affected the effectiveness of the Australian immunity program.[35] This is contrary to the situation in the US, where the use of criminal sanctions appears to be successful.

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28 See, eg, Zingales, above n 27, 7; Thomas O Barnett, 'Seven Steps to Better Cartel Enforcement' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007) 141, 146.

29 For a detailed delineation of the prisoner's dilemma, see Christopher R Leslie, 'Antitrust Amnesty, Game Theory, and Cartel Stability' (2006) 31 *Journal of Corporation Law* 453, 455–6 ('*Antitrust Amnesty*'). See also Zingales, above n 27, 8–10.

30 See Leslie, *Antitrust Amnesty*, above n 29, 456–61. See also Zingales, above n 27, 10–11.

31 Ibid 465–77.

32 Scott D Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (2008) 4(2) *Competition Law International* 4, 5 ('*Cornerstones of an Effective Cartel Leniency Programme*').

33 Ibid 6.

34 See, eg, Zingales, above n 27, 27.

35 See Caron Beaton-Wells, 'Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study' (2014) 2(1) *Journal of Antitrust Enforcement* 126, 166 ('*Immunity for Cartel Conduct*').

It follows that, while the three prerequisites are important for the design of a functioning leniency program in a theoretical sense, the more important issue is how to concretise them in a specific jurisdiction and make the three of them internally coherent and externally consistent with the overall enforcement of competition law and policy in that jurisdiction. The following section attempts to look beyond the US-EU context by comparing the institutional design and application of the Australian and Chinese immunity/leniency programs.

III Overview of the Australian and Chinese Immunity/Leniency Programs

Considering that the Australian Immunity Program and the Chinese Leniency Program are at different stage of development and have different institutional designs, a direct comparison of the respective institutional settings is not possible and may even cause confusion. This Section therefore outlines the development of the immunity/leniency programs in Australia and China separately, and then elaborates on the substantive provisions of the two programs in order to provide a foundation for a more in-depth comparative analysis.

A *The Development of the Immunity/leniency Programs in Australia and China*

1 *Development of the Australian Cartel Immunity Program*

Like the US and the EU, Australia did not introduce a cartel leniency program to its competition law until relatively recently. In the course of doing so, two intertwined sets of policies have developed in Australia. One set of policies applies specifically to those involved in cartels, whereas the other seems to apply to other contraventions of the *Australian Competition and Consumer Act 2010* (Cth) ('*ACCA*').[36] However, the relationship between the two sets of policies was not clarified until the recent release of the *ACCC Immunity and Cooperation Policy for Cartel Conduct 2014* ('*ACCC Immunity Policy 2014*').[37] In addition, the name of the set of policies on cartel leniency has changed several times in the past two decades.

The inception of the Australian leniency policy is said to date back to 1998, when the Australian Competition and Consumer Commission ('ACCC') published a guideline dealing with cooperation and leniency in

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[36] The *Australian Competition and Consumer Act 2010* (Cth) ('*ACCA*') was previously called the *Trade Practice Act 1974* (Cth).

[37] Australian Competition and Consumer Commission ('*ACCC*'), 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) <https://www.accc.gov.au/system/files/884_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct_FA2.pdf>.

enforcement.[38] However, 'plea bargaining' between the Trade Practices Commission and respondents over penalties in cartel prosecution can be found in much earlier cases.[39] The 1998 guideline dealing with cooperation and leniency in enforcement was not, however, a cartel leniency program in its current sense and was succeeded by the *ACCC Cooperation Policy for Enforcement Matters 2002* ('*ACCC Cooperation Policy 2002*').[40] The *ACCC Cooperation Policy 2002* is still in force and applies to all contraventions of the *ACCA*. It is expressed in general terms and allows the ACCC to grant complete or partial immunity from action, submission to the court for a reduction in penalty or even administrative settlement in lieu of litigation.[41] This means that the *ACCC Cooperation Policy 2002* is a flexible policy and does not constitute an immunity program in the sense here defined. The Australian cartel immunity program in its current form was officially launched in June 2003, when the *ACCC Leniency Policy for Cartel Conduct* ('*ACCC Leniency Policy 2003*'),[42] was published. Since then, the ACCC immunity program and the *ACCC Cooperation Policy 2002* have both afforded a basis upon which to grant of leniency to parties who cooperate with the ACCC in cartel investigation and any subsequent litigation.[43]

In the first eighteen months of its operation ten applications for leniency were made under the *ACCC Leniency Policy 2003*,[44] seemingly suggesting that the Australian leniency policy was more effective at its inception stage than was the US leniency program.[45] To ensure that the operation of leniency policy in Australia will become a real incentive for prospective applicants to cooperate, the ACCC called for a review of the *ACCC Leniency Policy 2003* and published a substantially revised policy in 2005, known as the *ACCC Immunity Policy for Cartel Conduct 2005* ('*ACCC Immunity Policy 2005*').[46] This revised policy implemented significant changes. These changes were reflected in the replacement of the word

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38 Louise Sylvan, 'Trade Practices — New Developments in Australia' (Speech delivered at the Forum of Commonwealth Agencies, 17 September 2004) <https://www.accc.gov.au/system/files/20040917%20Commonwealth%20Agencies.pdf>.

39 In 1981, the Federal Court of Australia approved the plea-bargaining agreement regarding the cartel penalties between the Trade Practices Commission and its respondents. See *Trade Practices Commission v Allied Mills Industries Pty Ltd* (1981) 37 ALR 256, 259. See also Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) 392.

40 ACCC, 'ACCC Cooperation Policy for Enforcement Matters' (Policy Paper, 31 July 2002) <https://www.accc.gov.au/system/files/ACCC%20cooperation%20policy%20July%202002.pdf>.

41 Ibid 1.

42 ACCC, 'ACCC Leniency Policy for Cartel Conduct' (Policy Paper, 30 June 2003).

43 See Lythgo-Marshall, above n 22, 116.

44 ACCC, 'Review of the ACCC's Leniency Policy for Cartel Conduct' (Discussion Paper, 24 November 2004) 5 <https://www.accc.gov.au/system/files/Discussion%20paper%20-%20Review%20of%20the%20ACCC%27s%20leniency%20policy%20for%20cartel%20conduct.pdf>.

45 As aforementioned in Section 1, there were only 17 leniency applications from 1978 to 1993 in the US.

46 ACCC, 'ACCC Immunity Policy for Cartel Conduct' (Policy Paper, 26 August 2005).

'leniency' with 'immunity',[47] which emulated the US model more than its predecessor and placed more emphasis on transparency, certainty and predictability throughout the enforcement process.[48]

In 2009, to introduce a dual civil/criminal regime for cartel conduct,[49] a further revised *ACCC Immunity Policy for Cartel Conduct 2009* ('*ACCC Immunity Policy 2009*')[50] was released, which was accompanied by the *ACCC Immunity Policy Interpretation Guidelines 2009* ('*ACCC Immunity Interpretation Guidelines 2009*').[51] The *ACCC Immunity Policy 2009* and its interpretation guidelines differ from the *ACCC Immunity Policy 2005*, especially in the management of the applications for immunity from civil and criminal proceedings and the respective roles of, and the relationship between, the ACCC and the Commonwealth Director of Public Prosecutions ('CDPP') in the process.[52] Changes implemented by the *ACCC Immunity Policy 2009* were primarily confined to issues relating to the dual civil/criminal regime in anti-cartel enforcement. However, no other extensive review of the Australian immunity policy has been undertaken since 2004.[53] In the light of the need for further clarification on such issues as the CDPP process and the 'clear leader' requirement, the ACCC undertook a more wide-ranging review of the *ACCC Immunity Policy 2009* in 2013.[54] After more than one year of consultation, the new *ACCC Immunity Policy 2014,* supplemented by the *ACCC Immunity and Cooperation Policy: Frequently Asked Questions 2014* ('*ACCC Supplementing FAQs 2014*'),[55] was published on 10 September 2014. This new policy addresses some key issues regarding the enforcement process and is expected to provide more incentives for self-reporting.

2 *Development of the Chinese Cartel Leniency Program*

In contrast to Australia, China's Anti-Monopoly Law ('AML') came into force with a built-in cartel leniency clause, Article 46, in 2008.[56] However,

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47 See Ky P Ewing, *Competition Rules for the 21st Century: Principles from America's Experience* (Kluwer Law International, 2006) 586–7.

48 See Beaton-Wells and Fisse, above n 39, 380.

49 On 26 June 2009, the Australian Parliament passed the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) which imposed criminal liability for cartel conduct.

50 ACCC, 'ACCC Immunity Policy for Cartel Conduct' (Policy Paper, July 2009).

51 ACCC, 'ACCC Immunity Policy Interpretation Guidelines' (Policy Paper, July 2009).

52 Caron Beaton-Wells, 'The ACCC Immunity Policy for Cartel Conduct: Due for Review' (2013) 41 *Australian Business Law Review* 171, 172. ('*The ACCC Immunity Policy for Cartel Conduct*')

53 Ibid.

54 On 4 May 2013, the ACCC's Executive General Manager for Enforcement and Compliance, Bezzi Marcus, announced the new round review of the ACCC's immunity policy. See ACCC, 'ACCC Immunity Policy for Cartel Conduct' (Policy Paper, 14 July 2009). <http://www.australiancompetitionlaw.org/guidelines/2009immunity.html>

55 ACCC, 'ACCC Immunity and Cooperation Policy: Frequently Asked Questions' (Policy Paper, September 2014).

56 «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007.

this clause sets out only the general principles regarding the self-reporting of cartel participants and the possible reduction of penalty or full immunity from punishment. Based on this general clause, it appears that China has launched a cartel leniency program and intends to utilise it as a tool to battle against cartels. It is, however, not clear what the Chinese cartel leniency program encompasses and how the leniency program will be enforced. Although the Chinese National Development and Reform Commission ('NDRC') and the Chinese State Administration for Industry and Commerce ('SAIC') have promulgated their respective implementation rules to elaborate on the general principles laid down in Article 46, the relevant provisions are not detailed enough and in certain aspects are even inconsistent with each other. Clearly these shortcomings are not conducive to the overall effectiveness of the leniency program. In any event, since China has not yet implemented a stand-alone and unified policy or guideline on the cartel leniency program, it is necessary to review the development of China's leniency program in the broader context of Chinese law.

The leniency program is applicable to cartel conduct which, in China, is referred to as monopoly agreements. Before China's AML was implemented, various different forms of monopoly agreements were forbidden by several statutory provisions. For example: Article 15 of the Chinese Anti-Unfair Competition Law,[57] and Article 32 of the Chinese Tendering and Bidding Law,[58] clearly state that 'bid-rigging' is forbidden; Article 14(1) of the Chinese Price Law forbids collusion between business operators to manipulate market price;[59] and Article 52(2) of the Chinese Contract Law declares any malicious collusion which will damage the interests of the State, a collective or a third party to be void.[60] The 2003 Interim Provisions on Preventing the Acts of Price Monopoly,[61] which have been succeeded by the Rules against Pricing-related Monopolies,[62] also identify certain specific acts that constitute price monopoly: (1) unified determination, maintenance or alteration of prices; (2) manipulation of prices through restriction of production or supply volume; (3) manipulation of prices in the invitation and submission of bids or in auctions; or (4) other

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[57] «中华人民共和国反不正当竞争法» [Anti-Unfair Competition Law of the People's Republic of China] ('Anti-Unfair Competition Law') (People's Republic of China) Standing Committee of the National People's Congress, 2 September 1993.

[58] «中华人民共和国招标投标法 » [The Tendering and Bidding Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 1999.

[59] «中华人民共和国价格法» [Price Law of the People's Republic of China] (People's Republic of China) ('Price Law') Standing Committee of the National People's Congress, 29 December 1997.

[60] «中华人民共和国合同法» [Contract Law of the People's Republic of China] (People's Republic of China) National People's Congress, 15 March 1999.

[61] «制止价格垄断行为暂行规定» [Interim Provisions on Preventing the Acts of Price Monopoly] (People's Republic of China) National Development and Reform Commission, 18 June 2003.

[62] «反价格垄断规定» [Rules against Pricing-related Monopolies] (People's Republic of China) National Development and Reform Commission, 29 December 2010.

acts of price manipulation. Various provisions target the prohibition of cartel behaviour, but none include any provision on the lenient treatment of self-reporting forbidden business activities.[63] Although the current Chinese cartel leniency program is often regarded as a copy of the US and the EU cartel laws,[64] the notion of providing leniency to those who confess to and/or cooperate with the investigating authorities in China is not new in Chinese law. A survey of the various criminal codes in Chinese dynastic time reveals that an offender was able to receive lesser punishment, mitigated punishment or exemption from punishment when he/she confessed and/or cooperated in a criminal investigation.[65] The current Chinese Criminal Law stipulates in its section 3 (including Article 67 and Article 68) that a criminal defendant who voluntarily surrenders and truthfully confesses his/her criminal conduct, exposes a crime committed by another individual, or provides significant information to support the investigation of other crimes may be exempted from punishment or receive lesser or mitigated punishment.[66]

Prior to the promulgation of the AML, the provision most relevant to the principle of lenient treatment of a cooperating business operator who conducted illegal business activities was Article 27(3) of the Chinese Administrative Punishment Law. According to this law, an offender shall be given lesser or mitigated administrative penalty if he or she voluntarily cooperates with the investigation of any illegal conduct.[67] However, the Chinese notion of leniency might not have resulted in the establishment of a cartel leniency program in China had there not also been outside influence and advocates from other jurisdictions in which such programs had been established with apparent success. Thus, the current Chinese cartel leniency program is perhaps best seen as being rooted in both the general notion of leniency in Chinese law *and* in the leniency or amnesty regimes

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63 张昕竹，黄坤 [Zhang Xinzhu and Huang Kun], «"坦白从宽"在反垄断法中的应用 — 中国垄断协议的宽大政策研究» [The Application of 'Leniency to Confessors' to China's Anti-monopoly Law: A Study of the Leniency Policy in Anti-monopoly Law] (2011) 2 山东大学学报哲学社会科学版 *Journal of Shandong University (Philosophy and Social Sciences)* 1, 5.

64 In general, it is often admitted that the Chinese Antimonopoly Law is conceptualized on the basis of both the US and the EU competition laws. See 王晓晔[Wang Xiaoye], «中华人民共和国反垄断法详解» [Explanations of Chinese Anti-Monopoly Law] (知识产权出版社 [Intellectual Property Publishing House], 2008) 9.

65 For example, Article 38 of the *Criminal Code of Tang Dynasty* and Article 26 of the *Criminal Code of Ming Dynasty* provided possibilities of exemption and mitigated penalty to offenders who confessed or cooperated. See 钱大群，钱元凯 [Qian Daqun and Qian Yuankai] «唐律论析» [The Analysis of the Laws of Tang Dynasty] (南京大学出版社 [Nanjing University Press], 1989) 111–12; 黄彰健 [Huang Zhangjian] «明代律例汇编» [The Collection of the Laws of Ming Dynasty] (中央研究院历史语言研究所 [Institute of History and Philology, Academia Sinica], 1979) 365.

66 «中华人民共和国刑法» [Criminal Law of the People's Republic of China] (People's Republic of China) National People's Congress, 14 March 1997.

67 «中华人民共和国行政处罚法» [Administrative Punishment Law of the People's Republic of China] (People's Republic of China) National People's Congress, 17 March 1996.

implemented in other jurisdictions (and in particular the US and the EU).[68] It was against this background that, in 2008, the general cartel leniency clause, Article 46 of the AML, started to take effect. In the first two years after AML's introduction, the two authorities in charge of implementation of the leniency program, the NDRC and the SAIC, dedicated their attention and resources mainly to familiarising themselves with the necessary enforcement knowledge and issuing implementation rules in relation to their respective competence. To date, two sets of rules concerning the implementation of the AML cartel leniency clause have been issued by the NDRC and the SAIC, respectively: the Rules on Administrative Enforcement Procedures for Pricing-related Monopolies ('NDRC Administrative Enforcement Procedures Rules')[69], the Rules of the Administration for Industry and Commerce on the Procedures to Investigate Monopoly Agreements and Abuse of Market Dominance ('SAIC Procedures Rules'),[70] and the Rules of the Administration for Industry and Commerce on Prohibition of Monopoly Agreements ('SAIC Prohibition Rules').[71] Article 46 of the AML and the three implementation rules thus form the direct legal basis of the current Chinese cartel leniency program.

B *Substantive Law of the Cartel Immunity/Leniency Programs in Australia and China*

1 *The ACCC Immunity and Cooperation Policy for Cartel Conduct 2014*

The discussion above shows that the Australian cartel immunity program has come of age, with more than one decade of experience in practice and several reviews left behind. The new *ACCC Immunity Policy 2014* and its

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68 Nate Bush contended that China's leniency provision is rather an extension of general principles of Chinese law than an adoption of foreign antitrust leniency or amnesty program. See Bush, above n 23, 6. In view of the insufficiencies in current Chinese leniency design, his opinion seems to make sense. However, a closer look at all the available leniency provisions currently present in the AML, the NDRC Rules on Administrative Enforcement Procedures for Pricing-related Monopolies and especially the Chinese State Administration for Industry and Commerce Rules of AIC on Prohibition of Monopoly Agreements will reveal that the design of the Chinese cartel leniency program emulates the designs of both the US and the EU, although currently the Chinese cartel leniency program does leave much discretionary room to its enforcing authorities as the provisions of leniency in the Chinese Criminal Law and the Administrative Punishment Law do. Some Chinese commentators also hold similar views. See, eg, 吴汉洪，孙耀祖 [Wu Hankong, Sun Yaozu], above n 23, 90.

69 «反价格垄断行政执法程序规定» [Rules on Administrative Enforcement Procedures for Pricing-related Monopolies] (People's Republic of China) National Development and Reform Commission, 29 December 2010.

70 «工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定» [Rules of the Administrations for Industry and Commerce on the Procedures to Investigate Monopoly Agreements and Abuse of Market Dominance] (People's Republic of China) State Administration for Industry and Commerce, 26 May 2009.

71 «工商行政管理机关禁止垄断协议行为的规定» [Rules of the Administration for Industry and Commerce on Prohibition of Monopoly Agreements] (People's Republic of China) State Administration for Industry and Commerce, 31 December 2010.

supplementing FAQs showcase a high standard of policy design and encompass all the commonly recognised factors of a presumably effective immunity program.

As to the type of conduct that leniency might be afforded in respect of, the *ACCC Immunity Policy 2014* applies to cartel conduct in contravention of Division 1 of Part IV and section 45(2)[72] of the *ACCA*, including (a) price fixing, (b) restricting outputs in the production and supply chain, (c) allocating customers, suppliers or territories, (d) bid rigging.[73]

Both corporations and individuals who have engaged in cartel conduct may apply for immunity.[74] An important change implemented in the *ACCC Immunity Policy 2014* is the removal of the rule that a 'clear leader' cannot apply for immunity. According to the new policy, cartel participants are eligible for immunity application, whether they are primary contraveners or in ancillary capacities.[75] However, if cartel participants have ever coerced others to participate in the cartel, they will not be eligible for immunity under this policy.[76] In addition, immunity cannot be afforded to corporations or individuals who have unilaterally attempted, without success, to create a cartel.[77] Similarly to the previous versions of immunity policy,[78] only the first applicant to disclose the cartel conduct is eligible for immunity. Such an applicant is to be automatically immunised from the civil proceedings initiated by the ACCC and will likely be granted immunity from criminal prosecution instituted by the CDPP as long as the conditions for immunity are satisfied.[79] In the case of a corporation that is granted conditional immunity, derivative immunity in the same form as that conditional immunity is available to related corporate entities and/or current and former directors, officers and employees of the corporation who have been involved in the relevant cartel, as long as the corporation follows the ACCC's investigation procedure during the immunity application and the related corporate entities and/or current and former directors, officers and employees meet the designated criteria.[80]

With respect to other requirements that a cartel immunity applicant needs to meet so as to secure the grant of immunity, the *ACCC Immunity Policy 2014* stipulates that the applicant must admit participation in cartel

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72 The clear statement of including the *ACCA* s 45(2) to the policy scope eliminates the doubt of whether an application for immunity, in respect of conduct which may be caught by the prohibitions in s 45(2) but not by the prohibitions in pt IV div 1, will be accepted by the ACCC. The 2009 ACCC Immunity Policy for Cartel Conduct was ambiguous on this point. See, eg, Beaton-Wells, *The ACCC Immunity Policy for Cartel Conduct*, above n 52, 175.

73 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) [1], [3].

74 Ibid 3 [9].

75 Ibid.

76 Ibid 3 [16(a)(iv)], 5 [28(a)(iv)].

77 Ibid 3 [10].

78 See ACCC, 'ACCC Immunity Policy for Cartel Conduct' (Policy Paper, 26 August 2005); ACCC, 'ACCC Immunity Policy for Cartel Conduct' (Policy Paper, July 2009).

79 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) 3–6.

80 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) [19]–[26].

conduct that may constitute a contravention or contraventions of the *ACCA*, have ceased or committed to cease its involvement in the cartel, cooperate as a truly corporate act, provide full, frank and truthful disclosure of the suspected cartel, cooperate fully and expeditiously throughout the ACCC's investigation and any ensuing proceedings, and submit the application to the ACCC before the ACCC receives written legal advice to institute proceedings regarding the suspected cartel on reasonable grounds.[81]

An immunity applicant satisfying all the aforementioned conditions will be granted conditional (civil) immunity.[82] To receive final (civil) immunity, the applicant must maintain confidentiality regarding its status as an immunity applicant and the details of the investigation and any ensuing proceedings, in addition to providing full, frank and truthful disclosure and cooperating fully and expeditiously on a continuing basis until the ACCC's investigation and any ensuing proceedings conclude.[83] The ACCC may revoke immunity or conditional immunity if it suspects that the immunity applicant has breached conditions of immunity and the suspicion cannot be dispelled after an informal dialogue with, a written caution to, and a further letter requesting explanations to the applicant.[84]

Cartel participants can also seek criminal immunity. Applications for either form of immunity (civil or criminal) are to be made to the ACCC, although the ACCC and the CDPP are in charge of granting civil immunity and criminal immunity, respectively.[85] To provide better certainty to immunity applicants, especially with respect to criminal immunity, the CDPP will provide a letter of comfort to the applicant upon the recommendation of the ACCC and in accordance with the criteria set out in Annexure B to the *Prosecution Policy of the Commonwealth*.[86] The letter of comfort from the CDPP is generally provided to the immunity applicant at the same time as the ACCC grants the conditional civil immunity and states the intention of the CDPP to grant criminal immunity according to section 9(6D) of the *Director of Public Prosecutions Act 1983* ('*DPP Act 1983*')[87] to the applicant.[88] Following the letter of comfort, a written undertaking granting criminal immunity pursuant to section 9(6d) of the *DDP Act 1983* will be provided by the CDPP to the applicant if the applicant complies with the on-going obligations and conditions.[89] Unless revoked upon the recommendation by the ACCC, the written undertaking granting criminal immunity will remain in place and become final.[90]

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81 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) 3.
82 Ibid 3 [12].
83 Ibid 9 [57].
84 Ibid 10.
85 Ibid 2 [4]–[7].
86 Ibid [7]; Commonwealth Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth' (Policy Paper, September 2014) 20.
87 *Director of Public Prosecutions Act 1983* (Cth) (2012) s 9(6D).
88 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) 6 [35]–[36].
89 Ibid [37].
90 Ibid 10 [59], [63].

Compared with the *ACCC Immunity Policy 2009*, the new policy implementing a two-step process for the CDPP to grant criminal immunity enhances transparency, certainty and predictability regarding criminal immunity. In particular, the letter of comfort is expected to be used to avoid unnecessary delay of investigations and promote the potential settlement of civil cases by providing more certainty to the applicant for being immunised from criminal prosecution in exchange of the applicant's further cooperation.[91]

While the exposure to domestic and/or foreign follow-on private actions for damages and public enforcement actions in other jurisdictions have always been another major concern for cartel immunity applicants, the use of information collected through immunity application has always been sensitive and regarded as crucial to the success of immunity programs.[92] Except as required by law and pursuant to sections 1555AAA, 157B and 157C of the *ACCA*[93], the ACCC will try its best to protect confidentiality of the relevant information provided by the applicant.[94] However, under certain circumstances, especially on international matters, the ACCC may request a confidentiality waiver from the immunity applicant for each jurisdiction in which the applicant has sought or intends to seek immunity or leniency for the relevant cartel conduct in that jurisdiction.[95] Moreover, the failure to provide a satisfactory explanation by the immunity applicant on why such a waiver cannot be provided may be deemed a failure to fulfil its full cooperation obligations, thus resulting in no-grant of immunity, revocation of immunity, or conditional immunity.[96] Although the ACCC is supposed to impose conditions on the use of information disclosed to overseas competition authorities,[97] what these conditions are and how well they will work are beyond the immunity applicant's control.[98] Therefore, it is arguable that the new immunity policy may in practice increase the immunity applicant's concern of exposure to domestic and/or foreign follow-on private actions and public enforcement actions in other jurisdictions. This will, in turn, deter rather than incentivise immunity applications under the new immunity policy.

Cartel participants who come forward after the first application and are not eligible for immunity, but who are nonetheless willing to cooperate with the ACCC's investigation, may also be afforded lenient treatment in civil and/or criminal proceedings. In exceptional circumstances, full

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91 Beaton-Wells, *The ACCC Immunity Policy for Cartel Conduct*, above n 52, 195–6, 199.
92 Ibid 191.
93 *ACCA* ss 155AAA, s 157B, s 157C.
94 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) 9 [50].
95 Ibid 8 [48].
96 Ibid [49].
97 See International Competition Network, *Charts Summarising Information Sharing Mechanisms: Australia* (July 2012) <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/ism.aspx>.
98 See Beaton-Wells, *The ACCC Immunity Policy for Cartel Conduct*, above n 52, 194.

immunity from ACCC-initiated civil proceedings may even be granted.[99] One question is whether the immunity granted to the first eligible applicant or the more lenient treatment (or full immunity from civil proceedings in exceptional cases) granted to those who come forward after the first eligible applicant to cooperate with the ACCC in its investigation is only applicable to those involved in cartel conduct. According to the *ACCC Cooperation Policy* 2002, corporations or individuals involved in conduct in contravention of the *ACCA*, other than cartel conduct, who cooperate with the ACCC's investigation may seek leniency, including immunity, from the ACCC.[100] Over the past 12 years, this is the first time that the ACCC has clearly distinguished between the jurisdictions under the *ACCC Immunity Policy 2014* and that under the *ACCC Cooperation Policy 2002* regarding cooperation with the ACCC's investigation in relation to conduct contravening the *ACCA*, thus providing clearer guidance to cartel participants in respect of immunity and/or leniency application.

An 'amnesty plus' is also available to a cartel participant who is not eligible for immunity, but who nonetheless cooperates with the ACCC's investigation of one cartel pursuant to the *ACCC Immunity Policy 2014,* and who has reported and later received conditional immunity for a second cartel which is independent and unrelated to the first one. Under the amnesty plus regime, a cartel participant may not only obtain immunity for the second cartel, but may also be offered a further reduction in civil and possibly criminal penalties for the first cartel.[101] The amnesty plus regime clearly provides more incentives for cartel participants to come forward to cooperate with the ACCC, thus promoting more efficient disclosure of cartels.

2 *The Current Chinese Cartel Leniency Program*

As mentioned above, the current Chinese cartel leniency program consists of only one general clause in the AML and some implementation rules respectively issued by the two enforcement authorities. Article 46 of the AML provides the legislative foundation for China's leniency program: 'where a business operator voluntarily reports the relevant information concerning the conclusion of monopoly agreements and provides important evidence to the anti-monopoly enforcement authorities, the anti-monopoly enforcement authorities *may* at their discretion grant this operator mitigated punishment or exemption from the punishment.'[102] According to the AML, the Price Law and the Anti-Unfair Competition

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99 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) 11.

100 Ibid 3 [8], 11 [70].

101 Ibid 13.

102 «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] ('AML') (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, art 46.

Law,[103] the designated anti-monopoly enforcement authorities that have jurisdiction over monopoly agreements are the NDRC and the SAIC.

The types of conduct prohibited by Article 46 include the making of hard-core cartels among competitors as well of other monopoly agreements, such as vertical restraints or competitor collaborations.[104] Articles 13 and 14 of the AML list the most popular kinds of cartel conduct as monopoly agreements, such as price-fixing, restriction of outputs in the production and supply, division of markets, restriction of the purchase and development of new technology or new products and joint boycotting, etc.[105] Although there have been doubts about whether bid-rigging falls under the Chinese leniency program,[106] it is generally accepted that bid-rigging is included, as there is a miscellaneous provision in both Article 13 and Article 14 referring to other monopoly agreements as determined by the anti-monopoly enforcement authorities.[107]

According to Article 46 of the AML, the subject that is eligible to apply for leniency refers to business operators.[108] Although the term 'business operator' in the AML legal text seems to include any natural person who engages in the manufacture and transaction of commodities or provision of services,[109] it in fact does not include the 'individuals' under mature leniency programs in other jurisdictions, but rather still represents the meaning of a corporation.[110] This means individuals are not qualified leniency applicants in the current Chinese leniency program. Industry associations also seem to be ineligible for leniency. Although Article 46 of the AML stipulates the sanctions that may be imposed upon industry associations that organise business operators to enter into monopoly

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[103] The relevant provisions are AML art 10; Price Law art 6; Anti-Unfair Competition Law art 15.

[104] American Bar Association, *Competition Laws Outside the United States* (American Bar Association Press, 2nd ed, 2011) 4–31.

[105] «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, arts 13–14.

[106] As there is no explicit stipulation in the AML to include bid-rigging in the category of monopoly agreement, bid-rigging is regarded by some commentators as not being included in the monopoly agreements to which Chinese leniency program applies. See 毕金平 [Bi Jinping], «诱惑、惩罚与威慑：反垄断法中的宽恕制度研究» [Incentive, Punishment and Deterrence: Study on the Leniency Program in the Anti-Monopoly Law] (法律出版社[Law Press], 2014) 225.

[107] See «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, arts 13–14. See also H Stephen Harris et al, *Anti-Monopoly Law and Practice in China* (Oxford University Press, 2011) 76; American Bar Association, above n 104, 4–29.

[108] 中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, art 46.

[109] «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, art 12.

[110] 毕金平 [Bi Jinping], above n 106, 226–7.

agreements, the general leniency clause seems to qualify only business operators as potential leniency applicants.[111]

As to the degree of leniency, both mitigated punishment and exemption from punishment are available. However, it is not clear whether self-reporting a monopoly agreement will guarantee that a self-reporting business operator will receive either of the lenient treatments. Article 46 itself does not clearly indicate under what circumstances mitigated punishment or exemption from punishment will be granted. Neither does Article 46 impose any obligation on the anti-monopoly enforcement authorities to grant mitigated punishment or exemption from punishment. The discretion to grant leniency rests with the enforcement authorities.[112] There is also no guidance as to what kind of 'relevant information' shall be submitted and what constitutes 'important evidence'.[113] Article 46 has therefore been criticised on the basis that it provides no transparency and predictability to leniency applicants. It is to be expected that the operation and scope of Article 46 is likely to be refined over time as further guidelines and rules are implemented, and some such guidelines and rules have already been issued by the NDRC and the SAIC.

Responsibility for the enforcement of the AML is shared between three different authorities within the Chinese government. The specific allocation of responsibility between these authorities can be traced to their respective historical roles in the enforcement of Chinese law prior to the promulgation of the AML, and in some instances responsibility overlaps.[114] Specifically, the Ministry of Commerce ('MOFCOM') has sole jurisdiction over merger control, while the non-merger enforcement power is divided between the NDRC and the SAIC, with the NDRC in charge of the price-related violations and the SAIC for the non-price-related cases.[115] Under this division of jurisdiction, the NDRC put into effect the NDRC Administrative Enforcement Procedures Rules on 29 December 2010, and the SAIC promulgated the SAIC Procedures Rules on 26 May 2009 and the SAIC Prohibition Rules on 31 December 2010, all of which include provisions on leniency.

Article 14 of the NDRC Administrative Enforcement Procedures Rules is considered the implementation rules of Article 46 with regard to leniency within the NDRC's jurisdiction. It stipulates that the government price supervision authority (that is, the NDRC) *may* at its discretion grant mitigated punishment or exemption from the punishment to a business operator who voluntarily reports the relevant information concerning the

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111 See, eg, 张昕竹，黄坤 [Zhang Xinzhu and Huang Kun], above n 63, 7; 毕金平 [Bi Jinping], above n 106, 227–8.

112 See American Bar Association, above n 104, 4–31.

113 See Sharon Oded, 'Leniency and Compliance: Towards an Effective Leniency Policy in the Chinese Anti-Monopoly Law' in Michael Faure and Xinzhu Zhang (eds), *The Chinese Anti-Monopoly Law: New Developments and Empirical Evidence* (Edward Elgar, 2013) 142, 155.

114 Andrew W Eichner, 'Battling Cartels in the New Era of Chinese Antitrust Enforcement' (2012) 47 *Texas International Law Journal* 587, 595–6.

115 See Richean Zhiyan Li, 'Unraveling the Jurisdictional Riddle of China's Antitrust Regime' (2011) 2 *CPI Antitrust Chronicle* 2, 2–5.

conclusion of price-related monopoly agreements, and who provides important evidence to the government price supervision authority.[116] Except for the requirement that the business operator provide information concerning the conclusion of price-related monopoly agreements, Article 14 is in essence a repetition of Article 46 of the AML. The would-be leniency applicant still receives no firm assurance of the grant of leniency even if he or she meets the requirements of the leniency program.[117] However, and contrary to Article 46, Article 14 does clarify the kind of leniency treatment available to an applicant on the basis of (1) when in the sequence of applications, if there is more than one, the applicant self-reported, and (2) the amount of information that he or she submitted. For example, Article 14(2) states that the first business operator coming forward to report and provide important evidence may be granted full exemption from punishment, the second may receive at least 50% reduction of the original punishment, and any subsequent reporters may benefit from up to 50% reduction of the original punishment. Article 14(3) also indicates that the 'important evidence' shall play a key role in proving the existence of the monopoly agreement.[118] It is thus obvious that these provisions explain the requirements for the application of leniency program by defining what 'important evidence' is and providing a sliding-scale structure of leniency treatment in accordance with the order in which applications are made.[119] Thus, the would-be leniency applicants may, to a certain extent, anticipate the consequences of their applications.[120] Article 14, however, does not go further to clarify what concrete requirements applicants need to meet, how the applicants shall cooperate with the investigation, and when a leniency application can be submitted.[121] Nor are any other relevant provisions in this respect to be found in current NDRC leniency rules. What is implied in Article 14 is that ringleaders can apply

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116 «反价格垄断行政执法程序规定» [Rules on Administrative Enforcement Procedures for Pricing-related Monopolies] (People's Republic of China) National Development and Reform Commission, 29 December 2010, art 14.

117 See Oded, above n 113, 156.

118 «反价格垄断行政执法程序规定» [Rules on Administrative Enforcement Procedures for Pricing-related Monopolies] (People's Republic of China) National Development and Reform Commission, 29 December 2010, art 14(1).

119 黎明，党鸿钧 [Li Ming and Dang Hongjun], «我国反垄断法宽恕制度的法律适用研究» [Study on the Application of the Leniency Program of China's Anti-Monopoly Law] (2013) 3 价格理论与实践 *Price Theory and Practice* 29, 29.

120 See Oded, above n 113, 157.

121 As to the question of when an application should be lodged, it seems that leniency applications both before and after the initiation of cartel investigation are valid. Recently concluded cases by the NDRC demonstrate that leniency applications after the initiation of cartel investigation are accepted and regarded as valid for consideration. See, eg, « 国家发展和改革委员会免于处罚决定书（发改办价监免（2013）4 号）» [Written Decision for Immunity from Administrative Penalty of National Development and Reform Commission, *Fa Gai Ban Jia Jian Mian* (2013) No4] <http://jjs.ndrc.gov.cn/fjgld/201409/t20140903_624624.html> accessed 17 September 2018; «国家发展和改革委员会免除行政处罚决定书（发改办价监免（2014）2 号）» [Written Decision for Immunity from Administrative Penalty of National Development and Reform Commission, *Fa Gai Ban Jia Jian Chu Fa* (2014) No.2] < http://jjs.ndrc.gov.cn/fjgld/201409/t20140918_626063.html> accessed 17 September 2018.

for leniency under the NDRC leniency rules, which has also been confirmed by the outcome of concluded cases.[122]

In comparison with the NDRC Administrative Enforcement Procedures Rules, the two SAIC rules provide more predictability and transparency to would-be leniency applicants. Article 20 of the SAIC Procedures Rules attempts to set the scene for the SAIC leniency rules by indicating that the SAIC and its local offices (that is, the Administrations for Industry and Commerce) may at their discretion grant mitigated punishment or exemption from punishment to the business operator who voluntarily reports the collusion of monopoly agreements and provides important evidence which is sufficient to initiate an investigation or plays a key role in proving the existence of the monopoly agreement. In addition, it clearly states that the organisers of the monopoly agreement are excluded from lenient treatment, exemption from punishment, or mitigated punishment.[123] The exclusion of organisers from lenient treatment clearly distinguishes the SAIC leniency rules from the NDRC leniency rules. Although whether the 'organiser' is identical to the 'ringleader' is disputable, it can be inferred that the 'ringleader' is also excluded from lenient treatment in the SAIC leniency rules.

On the basis of the SAIC Procedures Rules, Articles 11, 12 and 13 of the SAIC Prohibition Rules go further to elaborate on Article 46 of the AML. Article 11 not only stipulates that the extent of leniency treatment is to be granted on the basis of the order in which applications are made the importance of the evidence provided, the circumstances of the conclusion and execution of the monopoly agreement, and the degree of the business operator's cooperation, but also further defines 'important evidence' as evidence that is sufficient for the SAIC local offices (the Administrations for Industry and Commerce) to initiate an investigation or that plays a key role in proving the existence of the monopoly agreement, and regards the information of participating business operators, the scope of products involved, the content and forms of the monopoly agreement, and the information regarding the execution of the monopoly agreement as

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122 In 2012, in the 'Sea Sand Case', the Guangdong Price Bureau which is the provincial executive entity of NDRC granted the Guangdong Baohai Sand and Stone co., Ltd. a 50% reduction in its fine because it voluntarily provided important information, despite the fact that it was a ring-leader of that price-fixing cartel. See Xue Qiang and Yang Xixi, 'Anti-Cartel Law and Enforcement in China: A Survey' in Adrian Emch and David Stallibrass (eds), *China's Anti-Monopoly Law: The First Five Years* (Kluwer Law International, 2013) 83, 92; 王晓晔, 叶高芬 [Wang Xiaoye and Ye Gaofen], '《中国竞争法律与政策实施的现状与发展》[Status Quo and Development of the Chinese Competition Law and Policy]' in 中国世界贸易组织研究会竞争政策与法律专业委员会 [Commission of Competition Policy and Law of the China Society for WTO Studies]; 《年中国竞争法律与政策研究报告》[Report on Competition Law and Policy of China 2013] (法律出版社 [*Law Press*], 2013) 72, 77–8.

123 《工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定》[Rules of the Administrations for Industry and Commerce on the Procedures to Investigate Monopoly Agreements and Abuse of Market Dominance] (People's Republic of China) State Administration for Industry and Commerce, 26 May 2009, art 20.

important evidence.[124] This provision, in comparison with NDRC leniency rules, provides the leniency applicants with a clearer notion of 'important evidence' and seems to set a lower threshold as to the information expected from the leniency applicants. Therefore, some commentators regard it as being more favourable to potential leniency applicants.[125] However, similar to the NDRC leniency rules, several issues necessitate further clarification as to what concrete requirements the leniency applicants need to meet, how the applicants shall cooperate with the investigation and when the leniency applications can be submitted.

Another highlight of the SAIC leniency rules lies in Article 12 of the SAIC Prohibition Rules. Article 12 clearly stipulates that the business operator who is the first to voluntarily report the information regarding the conclusion of the monopoly agreement, and provides 'important evidence' to and full cooperation with the investigation is to be granted exemption from punishment.[126] This stipulation brings the SAIC leniency rules closer to the mature leniency programs in other jurisdictions and gives more certainty to the first leniency applicant. What remains weak in the SAIC leniency rules is that subsequent cooperators still remain in the uncertainty of the enforcement authorities' discretion. Moreover, unlike the NDRC leniency rules, the SAIC leniency rules do not even limit the authorities' discretion by providing a range of lenient treatments that must be awarded if lenient treatment is granted when the subsequent cooperators come forward to cooperate with the investigation.[127] As China does not impose criminal penalties for engaging in monopoly agreements, Article 13 of the SAIC Prohibition Rules makes reference to Article 46 of the AML and confirms that the lenient treatment, be it mitigated punishment or exemption from punishment, refers mainly to a reduction or exemption from a fine.[128] Thus, it would appear that no other forms of leniency are to be awarded under the current leniency program.

As outlined above, it is clear that the substantive rules of the Chinese leniency program are still rudimentary, with only one general clause in the AML and a few inconsistent implementation rules. Except for the inconsistences reflected in the NDRC and the SAIC leniency rules and the ambiguity with regard to the conditions of leniency application and the scope of leniency, the current Chinese cartel leniency program in its

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124 «工商行政管理机关禁止垄断协议行为的规定» [Rules of AIC on Prohibition of Monopoly Agreements] (People's Republic of China) State Administration for Industry and Commerce, 31 December 2010, art 11.

125 See Oded, above n 113, 157.

126 «工商行政管理机关禁止垄断协议行为的规定» [Rules of AIC on Prohibition of Monopoly Agreements] (People's Republic of China) State Administration for Industry and Commerce, 31 December 2010, art 12.

127 «工商行政管理机关禁止垄断协议行为的规定» [Rules of AIC on Prohibition of Monopoly Agreements] (People's Republic of China) State Administration for Industry and Commerce, 31 December 2010, arts 11–12.

128 «工商行政管理机关禁止垄断协议行为的规定» [Rules of the Administrations for Industry and Commerce on Prohibition of Monopoly Agreements] (People's Republic of China) State Administration for Industry and Commerce, 31 December 2010, art 13.

institutional design differs markedly from many mature leniency or immunity programs in the world, although it seems to have exerted influence as incentives on the cartel participants to cooperate with the investigation of several recent cases.[129]

The preceding analysis reveals that China may yet learn from the pioneers of the leniency programs, the US and the EU, to improve its institutional design. It may also learn from the experience of other jurisdictions, such as Australia, which have already implemented tailored versions of these leniency programs in the light of their own anti-cartel enforcement practices. To this end, the following section of this article compares China's leniency program and Australia's immunity program, and measures each against the commonly recognised notion of what institutional design an effective leniency program should have.

IV A Comparative Analysis

As discussed above, Australia has substantially improved the design of its cartel immunity program, which is now more effective at combating cartels through such new policy designs as providing the immunity applicants with enhanced transparency, certainty and predictability securing civil and criminal immunities. China, in contrast, has only established the cartel leniency mechanism on the basis of one general clause and therefore lacks the detail of the mature leniency models. Both Australia and China have learned and are learning from the US and the EU. In the result, both the Australian immunity program and the Chinese leniency program are to some extent hybrids of the US and the EU leniency programs, which thus makes a comparison, though only to a limited extent, valuable, as such a comparison not only touches upon the two programs per se but also reveals the fact that no universal solution to cartel problems can be expected by one or two mature programs. This section explores the underlying logic of the competition law enforcement in the two countries, and then compares their institutional designs against the commonly recognised key factors of an effective leniency program.

A *The Underlying Logic of the Two Competition Regimes*

Although neither Australian nor Chinese legislatures expressly articulate the underlying logic of their respective competition regimes, it appears that important differences exist in this regard between Australian and Chinese cartel laws.

In general, two types of perception-error underpin the preferences of legislators and law enforcers in their law making and enforcement: (1)

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[129] See, eg, the 'Rice Noodle Cartel Case' in 2010 <http://jjs.ndrc.gov.cn/fjgld/201003/t20100331_338262.html>; the 'Hainan Crystal Cartel Case in 2013 <http://jjs.ndrc.gov.cn/gzdt/201309/t20130929_560736.html>, the 'International LCD Panel Cartel Case' in 2013 <http://jjs.ndrc.gov.cn/gzdt/201301/t20130117_523205.html>; and the 'Infant Formula Price-fixing Case in 2013 <http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807_552991.html>. (Full citations unavailable).

'false positives' (mistakenly punishing the innocent); and (2) 'false negatives' (mistakenly failing to punish the guilty).[130] In competition law enforcement, a false positive refers to the situation where a competition authority incorrectly finds a pro-competitive conduct to be harmful and prohibits it, whereas a false negative means that a competition authority incorrectly regards an anti-competitive conduct as not harmful and permits it.

As both false positives and false negatives will generate costs to the legal system and society at large, and since the absolute avoidance of both costs is probably impossible in the real world, legislators and law enforcers must choose which of these two evils is the lesser.[131] The choice exercised will depend, in part, on the degree of confidence that legislators and law enforcers have in their ability to assess whether a conduct is harmful to the competition and whether their rulings will generate less costs to the society.[132] When a false positive occurs, consumers will be harmed as there will be less competition-enhancing behaviour in the market, and company wrongly found guilty will suffer as it will incur the loss of profits and related advantages which might be obtained through the prohibited pro-competitive conduct. When a false negative occurs, however, only consumers will suffer as the wrongly permitted anti-competitive conduct will bring profits to the company deemed not guilty at the cost of consumer welfare.[133] The view might therefore be taken that, normatively, the costs of false positives are more acceptable than the costs of false negatives. Some have even argued that the error of false negatives can be more readily corrected by the market, whereas the error of false positives will not be so easily expunged through market processes.[134] In any event, the appropriate 'trade-off' between false positives and false negatives in the context of competition law enforcement depends largely on the belief of the competition authorities in the function of unfettered market to correct the errors generated by false positives or false negatives,[135] which is further conditioned upon the degree of market liberalisation and the economic and political theories underpinning the development of competition policies.[136]

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130 See, eg, A Mitchell Polinsky and Steven Shavell, 'The Theory of Public Enforcement of Law' in A Mitchell Polinsky and Steven Shavell (eds), *Handbook of Law and Economics* (Elsevier B V, 2007) vol 1, 403, 427–9; Frank H Easterbrook, 'The Limits of Antitrust' (1984) 63(1) *Texas Law Review* 1, 14–17; Fred S McChesney, 'Easterbrook on Errors' (2010) 6(1) *Journal of Competition Law & Economics* 11, 14–15; Christian Ahlborn and David Bailey, 'Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison' in Philip Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar, 2006) 195, 207.

131 See, eg, Easterbrook, above n 130, 14–15; McChesney, above n 130, 14, 16.

132 *In re Winship*, 397 US 358 (1970), 370.

133 See Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 6th ed, 2012) 193.

134 See Easterbrook, above n 130, 15.

135 See Benjamin Klein and Andres V Lerner, 'Introduction: The Economics Revolution in Antitrust Law' in Benjamin Klein and Andres V Lerner (eds), *Economics of Antitrust Law* (Edward Elgar, 2008) vol 1, ix, xxxv.

136 An interesting discussion of the differences and causes of differences in the US antitrust law and the EU competition law suggests that ordo-liberalism, originating from the Freiburg

Although the world's two most influential competition regimes, the US antitrust law and the EU competition law, are converging in many aspects, the response taken in these jurisdictions to the trade-off between false-positives and false-negatives is quite different.[137] The US approach has been to minimise the occurrence of false positives, whereas the EU approach has tended to be more concerned with preventing false negatives.[138] This divergence may be traced both to the economic theories that underpin the epistemology of the two competition regimes, and to the tradition and degree of market liberalisation. More importantly, the different perception of error and thus to the different preferences for competition law enforcement approaches will surely impact on their respective institutional designs and the application of law in practice.

Coming to the Australian context, it may be inferred that Australian competition authorities are perhaps more concerned with the occurrence of false positives. That inference is based not only on the influence of the US antitrust model on the shape and development of the Australian competition law over the past century,[139] but also on the degree of market liberalisation and the general belief in market economy.[140] According to

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School of Law and Economics, and the political goal of economic integration in Europe have exerted far more influence on behavioural directions of the European competition law enforcers towards the preservation of competitive order through necessary government regulation. See Nicola Giocoli, 'Competition Versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy' (2009) 5(4) *Journal of Competition Law & Economics* 747. There is also Chinese scholarship on this topic, focusing on the Chinese competition policy. See, eg,李剑 [Li Jian], «中国反垄断法实施中的体系冲突与化解» [Conflicts of the Legal Systems in the Enforcement of China's Anti-Monopoly Law and Their Resolutions] (2014) 6 中国法学 *China Legal Science* 138, 146–50.

137 John Fingleton, 'De-Monopolising Ireland' in Claus-Dieter Ehlermann and Isabela Antanasiu (eds), *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (Hart Publishing, 2006) 53, 60.

138 The discussions of the divergence between the US approach and the EU approach are mainly from the perspective of unilateral behaviour. However, it is arguable that the differences in attitude towards errors in competition law enforcement across the Atlantic do not limit to the analysis of unilateral behaviour. See, eg, Alison Jones, 'Analysis of Agreements under US and EC Antitrust Law — Convergence or Divergence?' (2006) 51(4) *The Antitrust Bulletin* 691, 806; Philip Marsden and Peter Whelan, 'Re-Examining Trans-Atlantic Similarities and Divergences in Substantive and Procedural Competition Law' (2009) 10 *The Sedona Conference Journal* 1, 12; Whish and Bailey, above n 133, 194.

139 Australian competition law was first modelled on the *US Sherman Act*. See, eg, Russell V Miller, *Miller's Australian Competition Law and Policy* (Thomson Reuters, 2nd ed, 2012) 1; Alex Bruce, *Australian Competition Law* (LexisNexis, 2nd ed, 2013) 7; Philip Clarke, Stephen Corones and Julie Clarke, *Competition Law and Policy: Cases and Materials* (Oxford University Press, 3rd ed, 2011) 9; Deborah Healey, 'Australia' in Mark Williams (ed), *The Political Economy of Competition Law in Asia* (Edward Elgar, 2013) 344, 352; Ray Steinwall, 'Tensions in the Development of Australian Competition Law' in Ray Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, 2000) 1, 1, 9. In addition, it has been noted that Australian courts have encountered a growing body of US literature on the economic theories of all aspects of competition regulation. See Vijaya Nagarajan, 'Designing Learning Strategies for Competition Law — Finding a Place for Context and Problem Based Learning' (2002) 13(1) *Legal Education Review* 1, 6. Moreover, Australia's anti-cartel law recently emulates the US model even more by introducing the criminalisation of cartels into its competition law.

140 In fact, the current economic philosophy used by the ACCC also supports this inference. See Rod Sims, 'Economic Philosophy and the ACCC' (Speech delivered at the National Press

the Economic Freedom Reports issued by the Fraser Institute and the Economic Freedom Index issued by the Heritage Foundation, Australia is one of the freest economies in the world, with a highly liberalised market.[141] The general belief in Australia is that the market can work well to regulate business behaviour and government intervention is only needed in limited circumstances.

In contrast with Australia, both the Chinese Anti-Monopoly Law itself and its accompanying implementation guidelines — though based in part on US antitrust law — are more heavily influenced by the EU competition law.[142] Thus, the underlying logic of Chinese competition law is inevitably closer to the European model than the US model. Moreover, the interventionist tradition of the former Chinese planned economy and the relatively lower level of China's market liberalisation will certainly impact on the competition law enforcers' preference when making the trade-off between false positives and false negatives.[143] The Chinese competition authorities are therefore more likely to focus on avoiding false negatives than false positives, and may take a more active role in policing business behaviours in the market to this end.

The divergence in the underlying logic of the Australian and Chinese competition laws surely will impact on the implementation of their immunity/leniency programs in practice, which also explains the competition law enforcers' preference of one criteria of institutional designs over another in either of the two countries.

Club of Australia, Canberra, 27 March 2013) < https://www.accc.gov.au/speech/economic-philosophy-the-accc-we-are-all-economic-philosophers>.

141 According to the Fraser Institute's Economic Freedom Annual Report 2014, the cornerstones of economic freedom are personal choice, voluntary exchange coordinated by markets, freedom to enter and compete in markets, and protection of persons and their property from aggression by others. In an economically free society, the allocation of goods and resources relies more fully on markets rather than government spending and regulation. Since 1980, Australia has been mostly ranked within the top 10 countries in the world. See James Gwartney, Robert Lawson and Joshua Hall, 'Economic Freedom of the World: 2014 Annual Report' (Annual Report, The Fraser Institute, 2014) 1, 31. The Heritage Foundation's 2015 Economic Freedom Index shares similar opinions on Australia's economic freedom and the analysis results. See Terry Miller and Anthony B Kim, '2015 Index of Economic Freedom: Promoting Economic Opportunity and Prosperity' (Report, The Heritage Foundation and the Wall Street Journal, 2015) 11, 107–8.

142 This can be explained by the fact that China belongs to the civil law tradition. See, eg, William E Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?' (2008) 4 *Competition Law International* 8, 8–9. For a discussion of the influence of EU competition law on the institution of China's AML, see Roger Van den Bergh, 'The Economics of Competition Policy and the Draft of the Chinese Competition Law' in Thomas Eger, Michael Faure and Zhang Naigen (eds), *Economic Analysis of Law in China* (Edward Elgar, 2007) 77–111.

143 In both the Fraser Institute's Economic Freedom Annual Report 2014 and the Heritage Foundation's 2015 Economic Freedom Index, China ranks behind 100 and belongs to mostly the category of 'unfree economies'. See James Gwartney, Robert Lawson and Joshua Hall, 'Economic Freedom of the World: 2014 Annual Report' (Annual Report, The Fraser Institute, 2014) 8; Terry Miller and Anthony B Kim, '2015 Index of Economic Freedom: Promoting Economic Opportunity and Prosperity' (Report, The Heritage Foundation and the Wall Street Journal, 2015) 163–4. For a discussion of the extent of China's market liberalisation and its impact on the belief in and reliance on the market to correct the error of false negatives, see 李剑 [Li Jian], above n 136, 146–50.

B *Australian Immunity Program and Chinese Leniency Program through the Lens of the Commonly Recognised Criteria of Institutional Design*

Although the discussions above have revealed the differences in Australian and China's institutional designs, a comparative analysis of these regimes in terms of the three commonly recognised cornerstones of an effective immunity/leniency program may provide a better basis for understanding the two programs and explaining the differences of institutional designs of immunity/leniency programs in different jurisdictions.

1 *Threat of Severe Sanctions*

The cartel leniency program assists competition authorities in detecting, prosecuting and deterring cartels. To realise these outcomes, Hammond argues that an effective leniency program must be accompanied by the threat of severe sanctions against those who participate in cartels.[144] These sanctions must be so severe that the potential penalties cartel participants will incur if they are caught outweigh their potential gains from the cartel.[145] However, what is a sufficiently severe sanction is subject to debate. While some countries have embraced criminal sanctions against cartel conduct,[146] the implementation of criminal sanctions has so far not proved to be universally successful in detecting and deterring cartels in every jurisdiction.[147] Therefore, the effective threat of severe sanctions might not depend on whether the sanctions are criminal, civil and/or administrative,[148] but rather on whether the institutional design in respect of sanctions can fit well into the whole institution of competition law enforcement in a particular jurisdiction and create a real deterring environment for cartel behaviour.

In Australia, penalties for cartel conduct used to be limited to pecuniary penalties (a civil penalty regime). As the pecuniary penalties for cartel contraventions between 1974, when the Trade Practice Act 1974 was promulgated, and 1992 were considered too low to achieve the goal of deterring cartels, an increase in the maximum fines was called for in

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144 See Hammond, *Cornerstones of an Effective Cartel Leniency Programme*, above n 32, 4, 5.

145 Ibid 5–6.

146 According to a report on cartel regulation, about 20 jurisdictions had adopted criminal penalties for cartel behaviour by the year 2010. See Kirby D Behre, Michael PA Cohen and Kristen Warden, 'Cartel Regulation: Getting the Fine Down in 42 Jurisdictions Worldwide' (Report, Paul Hastings, 2010) <http://www.paulhastings.com/docs/default-source/PDFs/1527fc22df6923346428811cff00004cbded.pdf>.

147 For example, in addition to the aforementioned possible adverse effects of the introduction of criminal sanctions on the effective enforcement of an immunity program in Australia, the adoption of criminal cartel sanctions in the UK has also seemed to be unsuccessful. See Mark Furse, *The Criminal Law of Competition in the UK and in the US* (Edward Elgar, 2012) 1.

148 A strong supporter for criminal cartel sanctions is Scott D Hammond, the former Deputy Assistant Attorney General for Criminal Enforcement in the US Department of Justice's Antitrust Division. See Hammond, *Cornerstones of an Effective Cartel Leniency Programme*, above n 32, 4, 5–6.

1993.[149] From 1993 to 2007, the highest fines applicable to cartel conduct were AUD10 million for corporations and AUD 500,000 for individuals.[150] Since 2007, the maximum corporate fines associated with cartel conduct were changed to (1) AUD 10 million, or (2) three times the total value of the benefits obtained from the contravention, or (3) ten per cent of the annual turnover over a 12-month period if the benefits cannot be ascertained, and the maximum individual fines remained the same as before.[151] Although there was a gradual increase in the pecuniary penalty amounts after 1993, Beaton-Wells and Fisse argue that, until 2009, the civil pecuniary penalty regime failed to exert a sufficiently deterrent impact on cartels,[152] as judges seemed to be reluctant to impose penalties up to the allowable limit and showed sympathy to cartel participants.[153] Though the reasons for these behaviours are likely complex, they may reflect, in part, the cautious approach preferred by the Australian competition law enforcers to avoid or minimise false positives in law enforcement (outlined above). To exert more deterrence on cartels, criminal cartel sanctions was introduced in 2009, with a maximum jail term of 10 years for individual offenders. While enhancing the effectiveness of the immunity program was an important argument for the adoption of criminal sanctions,[154] the empirical evidence so far does not appear to provide strong support for the adoption of criminal sanctions.

According to an empirical study conducted by Beaton-Wells, since 2009 fewer applications or intentions to apply for immunity have been made to the ACCC than in the years preceding the introduction of criminal sanctions.[155] This might suggest that criminal sanctions have deterred the formation of cartels. However, other explanations are also possible. For example, a more straightforward explanation for the low numbers of immunity applications after 2009 might well be that the introduction of criminal cartel sanctions has added extra complexity to the decision-making of (and risks faced by) potential immunity applicants. Notwithstanding the promise of more certainty offered by the CDPP, dual civil/criminal applications are to be handled by the ACCC and the CDPP independently, which adds uncertainty to the outcome of an immunity

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149 See Beaton-Wells and Fisse, above n 39, 429.

150 Ibid 429–30.

151 See ss 76(1A), 76(1B), 44ZZRF(3), 44ZZRG(3) cited in Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 134.

152 Beaton-Wells and Fisse, above n 39, 430–2.

153 See, eg, David K Round, John J Siegfried and Anna J Baillie, 'Collusive Markets in Australia: An Assessment of Their Economic Characteristics and Judicial Penalties' (1996) 24(4) *Australian Business Law Review* 292, 299; David K Round, 'An Empirical Analysis of Price Fixing Penalties in Australia from 1974 to 1999: Have Australia's Corporate Colluders Been Corralled?' (2000) 8(2) *Competition & Consumer Law Journal* 1, 12; Beaton-Wells and Fisse, above n 39, 424–33.

154 See, eg, Graeme Samuel, 'The Relationship between Private and Public Enforcement in Deterring Cartels' (Paper presented at the International Class Action Conference, Sydney, 25 October 2007) 8 <https://www.accc.gov.au/system/files/The%20relationship%20between%20private%20and%20public%20enforcement%20in%20deterring%20cartels.pdf>.

155 Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 136.

application.[156] To solve this problem, more clarification about the co-working relationship between the ACCC and the CDPP and more certainty in view of the criminal immunity — which the new *ACCC Immunity Policy 2014*, together with its *ACCC Supplementing FAQs 2014*, are designed to provide — would reinforce the role of criminal cartel sanctions in incentivising immunity applications. In the meantime, it must also be borne in mind that the civil pecuniary penalty regime has not yet assumed its full function.[157] Indeed, setting a punitive standard of fines does not necessarily have the expected deterring effect on (potential) cartel participants if this standard is never met. In order to achieve the goal of deterring cartels, therefore, the punitive fines should be enforced rather than relaxed.

Unlike Australia, China does not currently have a criminal cartel penalty regime.[158] Except for the complicated situation in relation to bid-rigging, [159] the sanctions imposed on cartel conduct are mostly of administrative nature,[160] which, to certain extent, reflects the proactive role of the Chinese competition law enforcers in punishing cartels and their preference for false positives over false negatives. The sanctions concerning monopoly agreements are stipulated in Article 46 of the AML, according to which business operators, in addition to being ordered to cease the contravention, will be fined between 1 per cent and 10 per cent of the total turnover in the preceding year and all the illegal gains derived from that contravention, if the monopoly agreement has been concluded and implemented, will be confiscated.[161] If a monopoly agreement has been concluded but not implemented, a fine of no more than RMB 500,000 may

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156 Ibid 137.

157 Notwithstanding the increase of the maximum pecuniary penalty for corporations and individuals, the average fines imposed on corporations and individuals are fare below the supposedly punitive standard, with the average corporate penalty at AUD 1,159,552 and average individual penalty at AUD 32,000 between 2000 and 2012. See ibid 135. See also Beaton-Wells and Fisse, above n 39, 423.

158 See, eg, Chunfai Lui, 'China' in Samantha J Mobley and Ross Denton (eds), *Global Cartels Handbook: Leniency: Policy and Procedure* (Oxford University Press, 2011) 103, 105; Harris et al, above n 107, 288.

159 Although the AML does not contain any criminal penalties, AML art 52 states that criminal liability may be pursued if a violation of criminal law occurs. According to the Chinese Criminal Law art 223, bid-rigging will result in specific criminal penalties. Therefore, criminal penalties may apply to big-rigging. See «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, art 52; «中华人民共和国刑法» [Criminal Law of the People's Republic of China] (People's Republic of China) National People's Congress, 14 March 1997, art 223.

160 See Roger Van den Bergh and Michael Faure, 'Critical Issues in the Enforcement of the Anti-Monopoly Law in China: A Law and Economics Perspective' in Michael Faure and Xinzhu Zhang (eds), *Competition Policy and Regulation: Recent Developments in China, the US and EU* (Edward Elgar, 2011) 54, 66; American Bar Association, above n 104, 32.

161 «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, art 46.

be imposed.[162] In addition to pecuniary sanctions against business operators, Article 46 of the AML also provides for sanctions against industry associations that organise business operators in their industry to conclude monopoly agreements, in which case the Anti-Monopoly Law enforcement authorities may impose a fine of up to RMB 500,000 on the industry association. Alternatively, the social organisation registration authorities may revoke the registration of the industry association when the contravention is serious.[163]

In comparison with Australian cartel sanctions, the Chinese cartel pecuniary regime distinguishes implemented monopoly agreements from unimplemented ones and also establishes two types of fines based on this distinction. Although the concept of 'implemented monopoly agreements' is not defined in the law, the language makes it clear that agreeing upon a prohibited monopoly agreement is culpable and may be penalised, even if the business operators take no action to further the said agreement.[164] Though the maximum fine of RMB 500,000 is not especially punitive, the stigma of penalisation alone is likely to have a deterrent effect on the formation of monopoly agreements. In addition, and notwithstanding the lack of clarification on issues relating to the calculation of penalties, the fine of 1% to 10% of the total turnover resembles the level of pecuniary penalties under the EU regime and the Australian regime.[165] Compared with the Australian approach of providing three fining-methods, the single but variable fine in Chinese law may be better in terms of cartel deterrence, as it provides less room for speculation and bargaining. Surely, if the benefits derived from cartel conduct can be accurately ascertained, the Australian approach of fining cartel participants with three times the benefits may prove to be more effective in obtaining deterring effect if the fine amount of three times the benefits is greater than the 10% of the turnover. Moreover, the Chinese cartel sanctions regime adds the confiscation of illegal gains derived from the cartel conduct to a fine of the 1% to 10% of the turnover, which is believed to have an additional deterrent effect on (potential) cartel participants.[166]

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162 «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, art 46.

163 Ibid.

164 American Bar Association, above n 104, 32.

165 The 1–10 per cent range of turnover has often been criticised as not being a proxy of the cartel participants' potential gains from the cartel conduct. Thus, some scholars doubt the efficacy of this kind of fines in deterring cartels. Whether this criticism of the 1–10 per cent range and the related doubt are well-founded is, however, beyond the scope of this article. For some discussions of this particular concern, see Van den Bergh and Faure, above n 160, 66–7; Roger Van den Bergh and P D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Sweet & Maxwell, 2006) 313–4; Adrian Emch and Qian Hao, *The New Chinese Anti-Monopoly Law — An Overview* (November 2007) eSapience Center for Competition Policy <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1030451>.

166 See, eg, Van den Bergh and Faure, above n 160, 68; Roger Bowles, Michael Faure and Nuno Garoupa, 'Economic Analysis of the Removal of Illegal Gains' (2000) 20 *International Review of Law and Economics* 537, 547.

2 *Heightened Fear of Detection*

As explained above, false positives and false negatives are inevitable in the enforcement of cartel laws, and both kinds of errors will reduce the deterrent effect of those laws. Therefore, to achieve the goal of deterring violations, it is necessary to either expand the magnitude of sanctions or to raise the probability of detection to offset the negative effect of errors.[167] One measure that might therefore be taken to improve the deterrent effect of immunity/leniency programs is to increase the probability of cartel detection in order to incentivise the self-reporting of contraventions.[168] The fear of detection is likely to be greater when competition law authorities have access to every possible law enforcement power and can demonstrate a good track record of detecting cartels.[169] It is hence not only important that competition law enforcement authorities are well-resourced,[170] but also that a set of coherent, technically practicable mechanisms are available to enforcers who are committed to do their jobs.[171]

In Australia, the ACCC is given extensive investigatory powers, ranging from compulsory information gathering to covert surveillance.[172] Although the ACCC has a reputation as an aggressive enforcer, empirical studies seem to suggest otherwise,[173] While the ACCC is well-resourced, it does not boast a good track record of detecting cartels. In terms of providing coherent, technically practicable institutions, the new *ACCC Immunity Policy 2014* is generally in line with the currently alleged most successful model — the US leniency program. In fact, all these technical institutions were present in the *ACCC Immunity Policy 2009*. However, whether this set of technical institutions has played in detecting and deterring cartels in the past years is difficult to assess.

The Chinese regulatory regime, in contrast, is in a rudimentary state. The two designated enforcement authorities, the NDRC and the SAIC, are generally understaffed.[174] According to Article 10 of the AML, the NDRC

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167 For a detailed analysis of the errors in public enforcement of law and the way to counter the negative effects of the errors, see Polinsky and Shavell, above n 130, 427–8.

168 See Hammond, *Cornerstones of an Effective Cartel Leniency Programme*, above n 32, 6.

169 Ibid 6–8.

170 Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 138.

171 Under the US model of leniency, a set of coherent technical institutions includes corporate leniency, individual leniency, amnesty plus, penalty plus, and other proactive strategies, such as cartel profiling. See, eg, Hammond, *Cornerstones of an Effective Cartel Leniency Programme*, above n 32, 6–10.

172 Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 138.

173 For example, Parker and Nielsen's research reveals that while almost half of their survey respondents regard the ACCC as threatening and more than one-third of their survey respondents see the ACCC as not threatening. See Christine Parker and Vibeke Lehmann Nielsen, 'The Fels Effect: Responsive Regulation and the Impact of Business Opinions of the ACCC' (2011) 20(1) *Griffith Law Review* 91, 116. Moreover, Caron Beaton-Wells' interviews with practitioners reveal that business operators seem not to regard the ACCC's investigatory power as a real threat of detection. See Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 138–9.

174 候利阳 [Hou Liyang], «反垄断法不能承受之重 — 我国反垄断法执法五周年回顾与展望 » [What China's Anti-Monopoly Law Cannot Bear — Retrospect and Prospect of the Enforcement of China's Anti-Monopoly Law] (2013) 2 交大法学 *SJTU Law Review* 49, 60.

and the SAIC both have designated departments at the central-governmental level to preside over the relevant responsibilities and delegated enforcement powers of their corresponding provincial-level authorities to take charge of law enforcement.[175] According to Article 39 of the AML, all of these enforcement authorities may take investigatory measures ranging from onsite inspection and interrogation of business executives to the seizure and detention of relevant evidence,[176] which is generally seen as sufficient for investigation purpose. However, in comparison with the investigatory powers enjoyed by the ACCC, there is still room for China to improve in order to have a better chance to instil a genuine fear of detection. Certainly, through the increased number of investigations in the past few years, both the NDRC and the SAIC have gradually built their reputation as very active, if not aggressive, enforcers.[177] Despite criticisms such as selective law enforcement,[178] the trend of proactive enforcement is likely to help in cultivating an environment in which (potential) cartel participants perceive a high risk of detection. What remains weak in China, however, is that a coherent set of technical mechanisms is still absent. There are no clear additional incentive mechanisms such as 'amnesty plus' in the US leniency program, which (as demonstrated earlier) are likely to prevent the reporting and/or cooperating cartel participants from providing more information than necessary for the grant of penalty exemption or reduction under investigation. It is therefore not easy for the NDRC and the SAIC to quickly detect and prosecute enough cartel violations and build a good track record.

3 *Transparency in Enforcement Policies*

The third prerequisite of an effective program is said to be its transparency and predictability from the perspective of (potential) leniency applicants.[179] These qualities should not only be reflected in written policies (such as those regarding, for example, the eligibility of leniency application, the procedures for the application and grant of leniency, and the gradation of lenient treatment) — they should also be demonstrated in the form of clear explanations as to when and how the discretionary power of the enforcement authorities is allowed to be applied.[180]

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175 «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, art 10.

176 «中华人民共和国反垄断法» [Anti-Monopoly Law of the People's Republic of China] (People's Republic of China) Standing Committee of the National People's Congress, 30 August 2007, art 39.

177 Fei Deng and Yizhe Zhang, Interview with Xu Kunlin (People's Republic of China, August 2014) <https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug14_xu_intrvw_7_23f.authcheckdam.pdf> 1.

178 Michael Han and David Boyle, 'Antitrust Enforcement: China Ups the Ante' in Vanessa Yanhua Zhang (eds), *Competition Policy in Asia: Essays on Recent Development* (Competition Policy International, 2015) 30, 32.

179 See Hammond, *Cornerstones of an Effective Cartel Leniency Programme*, above n 32, 9.

180 Ibid 9–10.

The new *ACCC Immunity Policy 2014* has again made progress to enhance the transparency. To a certain extent, it can be readily seen as a transparent and predictable immunity program.[181] Taking account of the concerns of (potential) immunity applicants about how the CDPP makes decisions regarding criminal immunity,[182] the new policy provides more certainty and predictability by stipulating that a letter of comfort from the CDPP in relation to criminal immunity will be issued at the same time as the ACCC grants conditional civil immunity to the applicant. As long as the immunity applicant complies with stipulated on-going obligations and conditions, and unless revoked upon the recommendation from the ACCC, a written undertaking from the CDPP granting the criminal immunity will follow and become final.[183] This two-step process reduces uncertainty in relation to granting criminal immunity by the CDPP and avoids unnecessary delay in the overall cartel investigation.

Although concerns have been expressed about the discretionary nature of the immunity program in practice (such as, for example, the qualification of coercion as a condition for the applicant eligibility and the extent of on-going cooperation during the investigation), those concerns appear to have been overstated, and did not in any event represent the overall opinion of the stakeholders.[184] Nevertheless, the new immunity policy also improves the status of the 'ringleader', making the 'clear leader' eligible to apply for immunity so long as he or she complies with the other conditions.[185] Another noticeable institutional improvement to provide more clarity lies in the clear delineation of a cartel-specific cooperation policy and the jurisdictional divide between the *ACCC Immunity Policy 2014* and the *ACCC Cooperation Policy 2002*. Unlike the previous versions of the immunity policy, the *ACCC Immunity Policy 2014* carves out the ACCC's position on cooperation in relation to cartel conduct from the ACCC's position on cooperation in relation to other conduct in contravention of the *ACCA*. Moreover, the new policy also sets out clearly defined criteria for the assessment of 'later-in' cartel participants' cooperation in civil matters and provides clear guidance regarding the later-in cartel participants' cooperation in criminal matters.[186] Considering the risk of follow-on private actions and public enforcement actions in other jurisdictions, one

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181 Transparency, as defined by ACCC's Compliance and Enforcement Policy, involves two primary considerations: first, 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, and second, the ACCC does not do private deals — every enforcement matter that is dealt with through litigation or formal resolution is made public. From this definition, the current immunity policy can be considered a transparent policy. See, ACCC, 'Compliance & Enforcement Policy' (Policy Paper, 19 February 2015).

182 How the Commonwealth Director of Public Prosecutions would decide in relation to criminal immunity was a major uncertainty for (potential) immunity applicants in the previous versions of immunity policy. See Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 141.

183 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) 2 [7], 10 [59].

184 Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 141–4.

185 ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Paper, September 2014) 3 [9].

186 Ibid 11–2.

remaining concern is the confidentiality of the information provided to the ACCC, because, under certain circumstances, the relevant information may be released to corresponding parties, and the conditions which will be set for the use of confidential information by the corresponding parties lies in the discretion of the ACCC.[187]

On the other hand, the problem of ambiguity and uncertainty in the Chinese leniency program appears to be the biggest concern of (potential) leniency applicants. Not only is the broad language in the relevant provisions difficult to grasp, but the inconsistencies reflected in the NDRC and the SAIC rules regarding the implementation of Article 46 of the AML are likely to lead (potential) leniency applicants into confusion. Together with the overlaps of jurisdiction over the various types of anticompetitive behaviour between the NDRC and the SAIC, the current Chinese leniency program has been criticised for lacking even elementary transparency.[188] Consider, for example, a scenario in which a business operator participates in a monopoly agreement to restrict output, but which agreement in turn brings about a price rise in the market. What will happen to this business operator if he or she perceives the risk of detection and wants to cooperate for leniency? Considering this monopoly agreement has caused a price increase, this case will fall under the NDRC's jurisdiction as price-related monopoly agreements lie in the hand of the NDRC. Under this circumstance, this business operator is eligible for leniency application. But the purpose of this monopoly agreement is output restriction. Therefore, this case may also fall under the SAIC's jurisdiction as output-related monopoly agreements are controlled by the SAIC. Which enforcement authority should this business operator approach? Or should this business operator report to both the NDRC and the SAIC? If this business operator reports to both authorities and is the first one to come forward to both authorities, what can it expect with regard to the leniency treatment when it provides 'important evidence' and fully cooperates with the investigation? According to the SAIC rules, this business operator *shall* be granted exemption from punishment. Pursuant to the NDRC rules, however, this business operator *may* be granted exemption from punishment. Furthermore, the different benchmarks of 'important evidence' in the NDRC and the SAIC create uncertainty as to whether a business operator can expect exemption from punishment from the NDRC, even if he or she qualifies for the SAIC exemption. And, if the business operator is the organiser of the monopoly agreement, how will the NDRC and SAIC deal with this case? Based on the decisions of the NDRC, this business operator is eligible to apply for leniency. However, under SAIC jurisdiction, the business operator is not so eligible. Considering the broad discretion of the NDRC and the SAIC regarding the extent of leniency treatment, should this business operator come forward to report or not? This scenario clearly reveals the uncertainties and inconsistencies in the current Chinese

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[187] See Beaton-Wells, *The ACCC Immunity Policy for Cartel Conduct*, above n 52, 194.
[188] See Oded, above n 113, 158.

leniency program, which must be addressed before we can expect a really functioning leniency program that supports the detection, prosecution and deterrence of cartels.

V Conclusion

The cartel immunity/leniency program has existed for over three decades. While the first 15 years were uneventful, the past two decades have witnessed the introduction of leniency programs in more than 60 jurisdictions. This proliferation may be attributed to the perception that immunity/leniency programs are effective in destroying the internal trust between cartel participants and in inducing self-reporting for cartel detection and deterrence. In fact, however, while competition law enforcement authorities typically claim that immunity/leniency programs are successful, empirical studies, although still in limited scope, do not seem to confirm these claims. In addition, in those jurisdictions where immunity/leniency programs are regarded by enforcement authorities as beneficial to detecting and deterring cartels, no strong empirical evidence exists to confirm the success of the much lauded institutional design of the US model. From a theoretical perspective, the three cornerstones of an effective leniency program are important and mutually reinforcing. In practice, however, their respective impacts on incentivising cartel participants to self-report and cooperate with the investigation may differ.

In some jurisdictions, the imposition of criminal sanctions may work well to create a race to the enforcement authorities. In some jurisdictions, however, the introduction of criminal sanctions may in fact make a leniency program less palatable and prompt cartel participants to be more vigilant and to adopt stricter internal punishment mechanisms for defection, thus actually *stabilising* existing cartels.[189] In some jurisdictions, administrative pecuniary penalties may well suffice in achieving a deterrent effect, provided penalties are high and punitive enough to outweigh the potential gains derived from the cartel conduct.[190] Besides, the criminalisation of cartel enforcement also has its limitations with regard to its theoretical construction.[191] Therefore, whether the use of criminal sanctions can be perceived as an appropriate threat of severe sanctions in the case of an effective cartel leniency program is perhaps a question of public cognition in different jurisdictions. In some jurisdictions, like China, punitive pecuniary penalties combined with the ability to confiscate illegal gains may well be an appropriate choice. Given that China's situation of

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189 See Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 137.

190 Neelie Kroes, 'Tackling Cartels — A Never-ending Task' (Speech delivered at the Anti-Cartel Enforcement Panel Session of the European Commission, Brasilia, 8 October 2009) <http://europa.eu/rapid/press-release_SPEECH-09-454_es.htm?locale=en>.

191 In the course of the debate over whether the EU should introduce criminal sanctions to the realm of anti-cartel enforcement, several theoretical challenges have been raised, for example, personal criminal sanctions being incapable of generating more benefits than costs. For a detailed discussion of this topic, see Peter Whelan, *The Criminalization of European Cartel Enforcement* (Oxford University Press, 2014) 58–79.

competition law enforcement is relatively complicated due to jurisdiction overlap a simpler mechanism of fines may be more effective to achieve the goal of a leniency program.

Certainly, without a high probability of detection, strict maximum sanctions are unlikely to achieve the goal of deterring cartels.[192] While in some jurisdictions, such as Australia, empirical studies seem to show that the consideration of the likelihood of detection does not dominate cartel participants' choice of applying for immunity,[193] the high probability of detection is valued by many jurisdictions. Not only there is a strong advocacy for a set of coherent institutional mechanisms within the leniency program to create a heightened fear of detection in the US, the EU leniency program is also regarded as a program focused on detection.[194] In fact, the ACCC's work in recent years has been to create an environment of high risk of detection, whether to bring its institutional design of immunity program in line with the US model or to increasingly showcase its success in destroying cartels. As to the situation in China, notwithstanding the lack of a coherent set of institutional mechanisms, the Chinese competition law enforcers have taken a proactive role in investigating and punishing cartel conduct in order to cultivate an environment in which there is a high risk of detection.[195] Indeed, realistically, to cultivate a fair competitive market environment, corporate candour is an important factor, but it is not always expectable. Creating the perception of high risk of detection as an external pressure is more reliable than pure corporate candour for the effective use of leniency program in deterring cartels.

Although the literature reflects differing views as to the effectiveness of severe sanctions and the fear of detection, there would appear to be universal support for the assurance or transparency and predictability throughout the enforcement process. In both the US and the EU, emphasis has been placed on enhancing transparency so that (potential) leniency applicants can really see the benefit of immunity or leniency. Although empirical studies in Australia seem to suggest that a certain amount of discretion in the hands of the competition authorities is beneficial and even expected by some stakeholders,[196] this discretion is confined in scope and does not in fact deviate from the guiding principle of transparency sought by the ACCC. By the same token, although the current Chinese experience seems to provide some justification for the high amount of discretion enjoyed by the enforcement authorities, this argument does not have

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192 See Hammond, *Cornerstones of an Effective Cartel Leniency Programme*, above n 32, 6.

193 Two common considerations for the application for immunity in Australia have been identified through empirical studies: the corporate culture in many large Australian companies, and the flow-on effects of overseas immunity applications with regard to conduct having the potential to affect Australian markets. For further discussion, see Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 139–40, 166.

194 See Zingales, above n 27, 27, 58.

195 It must be admitted that there have been concerns of whether the National Development and Reform Commission and the Chinese State Administration for Industry and Commerce have rightfully used their powers to implement the law. This point is however beyond the scope of this article and is expected to be examined in the future studies.

196 See Beaton-Wells, *Immunity for Cartel Conduct*, above n 35, 141–3, 166.

enough supporters. Arguably, the most criticised features of the Chinese leniency program is the ambiguity and unpredictability of the leniency application process.[197] This uncertainty and lack of transparency have even led some to conclude that the Chinese AML leniency provisions are more like an extension of the general notion of leniency of Chinese law than a cartel leniency program in modern sense.[198] This may not be what Chinese competition law enforcers want to hear. In fact, although institutional improvements are needed, the NDRC's recent decisions have shed light on its intention and willingness to establish a commonly recognised leniency program by referring explicitly to the relevant, though limited, leniency provisions when making and reasoning its penalty decisions.[199] In addition, the NDRC's recent public releases have also demonstrated its commitment to enhance the transparency and predictability in enforcing the Chinese AML.[200] It is therefore arguable that high levels of transparency and predictability throughout the enforcement process is valued not only by mature immunity/leniency programs but also by newly adopted ones.

The theoretical argument for cartel leniency programs is well made in the existing literature. However, few studies have been undertaken as to the effectiveness of leniency programs in practice.[201] This article demonstrates that the purported "orthodox" principles are, in theory, important elements for its design and administration. However, the linkage between the concretisation of these principles and the effectiveness of a leniency program is much more complicated. Although the Australian immunity program and the Chinese leniency program differ substantially in their institutional designs, an apple-versus-pear comparison against the commonly recognised features of a successful leniency program model still can, to a certain extent, reveal that even the homologous programs can

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197 See, eg, Eichner, above n 114, 612–13; Oded, above n 113, 158–9; 张昕竹，黄坤 [Zhang Xinzhu and Huang Kun], above n 63, 6–7; 毕金平 [Bi Jinping], above n 106, 229–30.

198 See Bush, above n 23, 6.

199 There have been four decisions involving the grant of immunity to first self-reporters. See, «国家发展和改革委员会免于处罚决定书（发改办价监免（2013）4 号）» [Written Decision for Immunity from Administrative Penalty of National Development and Reform Commission, *Fa Gai Ban Jia Jian Mian*] [2013] 4; «国家发展和改革委员会免除行政处罚决定书（发改办价监处罚（2014）2 号）» [Written Decision for Immunity from Administrative Penalty of National Development and Reform Commission, *Fa Gai Ban Jia Jian Chu Fa*] [2014) 2]; «国家发展和改革委员会免除行政处罚决定书（发改办价监处罚（2014）10 号）» [Written Decision for Immunity from Administrative Penalty of National Development and Reform Commission, *Fa Gai Ban Jia Jian Chu Fa*] [2014) 10; «国家发展和改革委员会免除行政处罚决定书（2015）1 号» [Written Decision for Immunity from Administrative Penalty of National Development and Reform Commission] [2015) 1.

200 Fei Deng and Yizhe Zhang, Interview with Xu Kunlin (People's Republic of China, August 2014)<https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug14_xu_intrvw_7_23f.authcheckdam.pdf> 1, 2–3.

201 Although there have been a few empirical studies to analyse the effects of different immunity and leniency programs on detecting and deterring cartels, these studies have their limitations and may not be able to reflect the real situation in practice. See Caron Beaton-Wells, 'Testing the Effectiveness of Immunity Policies for Cartel Conduct: Reflections and Proposals' in Nye Perram (eds), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, 2014) 215, 249–51.

expect much different outcomes. While the two programs may share the same logic, they may not necessarily lead to the same or similar results in practice. To evaluate the effectiveness of an immunity/leniency program, it is important not to always attempt to test the programs against the "orthodox" design. From this perspective, this apple-versus-pear comparison does not only make sense in fostering a better understanding of the immunity/leniency programs in Australia and China, but also providing a counter-argument against the strong advocacy for the adoption of the seemingly most successful US leniency model.