Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour

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This article explores the regulation of cartel conduct in Australia focusing, in particular, on the recent decision to criminalise so-called ‘hard-core’ cartels. It illuminates three interdependent ambiguities in regulating such conduct: economic, moral and legal. The case study is drawn on to highlight the challenges for the criminal law in attempting to resolve such ambiguities or tensions as they arise in the regulation of business behaviour generally. We argue that such challenges exist because the ambiguities reflect broader shifts taking place on an ongoing basis in economic policy, political ideology and social norms in Australian society.

For many criminologists, cartel conduct is the result of business greed and malfeasance. Clandestine arrangements between competitors designed to subvert competition and extract excessive profits are a classic example of crimes of the powerful (Freidrichs, 1996; Pearce & Tombs, 1990; Rostoff, Pontell, Henry, & Tillman, 2003), perpetrated by senior executives and their corporations to benefit at public expense. On this account, cartel conduct could be seen as unequivocally immoral and recent efforts by governments, including here in Australia, to punish it more severely as welcome. We argue in this article, however, that simply to laud these attempts as progress in the fight against corporate excess overlooks the tensions and complexities in the conduct itself and the substantial challenges facing the law, and the criminal law in particular, in controlling the behaviour of the powerful.

This article is a case study of the regulation of cartel conduct in Australia. While ambiguities in the definition of cartel conduct lie at the heart of the article, it may be useful to provide a general characterisation of such conduct at the outset. In essence, cartels involve arrangements between competitors in which they commit to act in a coordinated way with a view to subverting or removing the usual operation of competitive forces in the marketplace. A recent high-profile example of such conduct in Australia was the arrangement between the two cardboard manufacturing giants, Visy and Amcor, not to deal with each other’s customers and thereby maintain their

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respective market shares, while also fixing annual increases in the prices that they
charged those customers (Beaton-Wells & Brydges, 2008).

The purpose of this article is to critically assess the regulatory response to cartel
conduct in Australia and, in particular, the move to criminalise what may be charac-
terised as the most serious forms of collusion between competitors, as exemplified by
the Visy case. Recent events in the process of criminalisation include the ambivalent
approach by the former conservative government between 2003 and late 2007 when
it was voted out of office, followed by the release of an Exposure Draft Bill by the
newly elected Labor government in January 2008. A revised Exposure Draft Bill was
released in October 2008 and, in keeping with its election promise to take legislative
action by the end of the year, the Trade Practices Amendment (Cartel Conduct and
Other Measures) Bill 2008 was introduced to Parliament on 3 December 2008.1 Passed
in June 2009, this Act makes it an offence for two or more competitors to make a
contract, arrangement or understanding that contains a cartel provision, or give effect
to a cartel provision, such a provision being one that involves fixing prices, restricting
output, allocating customers or territories or rigging bids.2 Corporations and individu-
als may be liable for such cartel offences and significant fines as well as, for individu-
als, a maximum jail term of 10 years applies.

This article draws inspiration from the work of Aubert (1952) in focusing on the
ambiguities that characterise cartel criminalisation in Australia. In the context of
cartel conduct, we argue that there are three interdependent tensions, conflicts or
complexities underlying these ambiguities: economic, moral and legal. Rather than
attempt to resolve such ambiguities, in order to clarify what exact behaviour should
be criminalised, we argue that key insights into the challenges inherent in controll-
ing business behaviour through the criminal law can be explored by examining the
ambiguities themselves (consistent with the argument in Haines & Sutton, 2003).
Further, this examination reveals significant shifts taking place in broader
Australian society and politics as competition becomes adopted as inherently in the
public interest, replacing earlier assumptions around the benefits of the welfare state
(for Labor) or of industry per se (for the conservative side of politics).

Ambiguities in Cartel Criminalisation

Economic

Most competition lawyers would acknowledge that there is ambivalence in relation
to the impact of cartel conduct on the functioning and performance of the economy
and, ultimately, on consumer welfare. This ambiguity is reflected in the different
meanings or connotations traditionally associated with the concept of a ‘cartel’. As
Harding and Joshua (2003, pp. 13–14) have pointed out, historically, the idea of a
cartel connoted a form of truce between rivals in the interests of a common good. In
the business sense, this involved cooperation between rivals, often in defensive
mode, responding to economic disruption or crisis and with a view to stabilising
economic conditions. Only relatively recently has the concept of a cartel been used
pejoratively to convey a harmful and even sinister or delinquent form of activity in
which firms secretly suspend competition to advance their own self-interest at
the expense of others (Spar, 1994, p. 2). However, within this general frame of
reference, until very recently there has been minimal specific legal content to the
notion of anticompetitive collusion. At most, there is a list of what are characterised as the ‘most egregious’ antitrust violations by the Organisation for Economic Co-operation and Development (OECD) (1998, p. 2). On the list are arrangements between competitors aimed at price fixing, market sharing, output restriction and bid rigging (Organisation for Economic Co-operation and Development [OECD], 1998, p. 3). Beyond this, however, there is scant convergence at the national level in the legal definition of collusive conduct warranting criminal sanctions.

At a deeper level but still in an economic sense, there is also ambiguity in terms of the basic rationale for competition law (of which anticompete law is a critical part). Cartel regulation is underpinned by an acceptance of competition in the marketplace as the ‘best’ economic arrangement to promote consumer welfare over and above alternative arrangements — exclusive government ownership, for example. It rests on a fundamental belief that, in most cases, competition delivers the greatest public benefit. The theory is that, in competitive markets, for firms to increase profits they have to compete for the consumer dollar — by making their products efficiently, offering a greater variety of products, delivering better services and most importantly pricing their products competitively. In noncompetitive markets (for example, where competitors act in a coordinated way rather than independently), there is little incentive for firms to do any of these things because there is minimal risk of losing consumers to competitors (Williams, 1989; Yeung, 2004, p. 15–16). In more general terms, competition is seen by economists as consistent with ‘the kind of society in which we wish to live’, recognising that competition is not just an economic mechanism but a means of reducing economic power and ensuring that firms are responsive to the demands of the community. To this end, market regulation of firms’ conduct is substituted for government regulation (Brunt, 1965, p. 59).

Applying the economic justification for competition regulation, market ‘distortions’ such as price fixing or market sharing should be illegal since they act as a drag on competition which, in turn, is seen as crucial in generating efficiencies and thereby protecting and enhancing consumer welfare. However, the primacy of competition as being ‘in the public interest’ is often contested (Brunt, 1976, p. 100; Pitofsky, 1979; Rockefeller, 2007), and the tensions between the benefits of competition and other benefits (economic, social and political) of behaviour that is nevertheless anticompetitive are in fact recognised in the Trade Practices Act 1974 (Cwlth). This legislation, embodying much of the law regulating competition in Australia, allows business practices to apply for immunisation from the prohibitions on anticompetitive conduct where such practices are considered to yield a ‘net’ public benefit (for example, through the provision of essential services to rural and remote areas, the promotion of industrial harmony, the protection of natural heritage or the development of environmentally friendly technologies).3

But concerns about competition and its capacity to bring general public benefit go further. Critical criminologists, in particular, critique the supposed benefits of the market and capitalism in general, pointing to the corrosive effects of its underlying ethos based on self-interest (Glasbeek, 2002; Pearce & Tombs, 1990). At a more fundamental level, Marxists would point to what they see as the inevitability of market concentration (or rather capital accumulation) that necessarily undermines the pursuit of pristine competitive environments championed in economic texts and theories. Rather, they would anticipate the inevitability of markets dominated
by few and fewer firms (Marx, 1954–1962). There is instinctive recognition of these tensions within capitalism by governments, wary of their electoral success, such that government ‘interference’ in competition is common. Recent government attempts to control ‘big business’ include the failed attempt to establish a FuelWatch scheme as a means of responding to public pressure over increasing petrol prices (a scheme that some experts argued in fact would undermine competition; Davidson, 2008; Harding, 2008; contra Gans, 2008).4

Moral

Second, this article highlights the moral ambiguity surrounding cartel conduct. This ambiguity stems from the general tension between, on the one hand, the view that economic regulation lies outside of a moral frame of reference and on the other, the view that morality and economics are intrinsically linked. For some commentators, price-fixing and related activities may be illegal but they are or should not be treated as criminal (Kadish, 1963). Such illegalities are ‘mala prohibit’, as opposed to ‘mala in se’ — they arise because of the way in which the regulation of the economic system is constructed, and hence are, or should be legally distinct, from connotations of moral approbation. Criminality must have a moral component, an expressive element borne of its retributive orientation (Hart, 1958; Packer, 1968), which, so it may be thought, is lacking in cartel conduct. This objection to the criminalisation of business conduct generally has been met with various responses. There are those such as Stuart Green (2006) who take issue with the characterisation of business offending as morally neutral.5 His thesis is that, properly deconstructed, this category of conduct can be understood as offending against the same moral norms that support criminalisation of more traditional ‘blue-collar’ offences (the norms against cheating, stealing and deception, for example). Further, criminal penalties deter and hence, it is argued, are justifiable on a consequentialist theory of the criminal law (Wootton, 1981). Here the focus is on harms rather than wrongs where the criminal law can serve instrumental purposes. However, there are also those who advocate either combined (harms + wrongs) or mixed (wrongful harms; harmful wrongs) classifications of the conduct that warrants criminalisation, the result of which is a voluminous literature debating where the boundaries of the criminal law should lie (e.g., Baker, 2008; Feinberg, 1985a, 1985b; Husak, 2008; Ripstein, 2006).

For other commentators, attempts to separate economic and moral considerations are problematic. Celia Wells (2001), for example, argues that the crime/noncrime distinction arises from historical contingency and unequal power relations (particularly economic relations) rather than some false notion of a moral consensus. In the competition law context, Stucke (2006) has observed that behind antitrust’s positivist facade lie significant moral issues such as whether economic efficiency delivers just outcomes or whether a vibrant market economy is conducive to society’s moral progress, as measured by its tolerance and support for its most disadvantaged members. As Stucke acknowledges, however, competition law has been dominated by Chicagoan economic theory, the proponents of which regard antitrust analysis as concerned primarily, if not exclusively, with economic efficiency and in which normative judgments about morality are regarded as having no place (Bork, 1993; Posner, 1990;).6 Then there are those, admittedly few,
antitrust commentators who regard anticompetitive behaviour as moral on the basis that it is consistent with natural human tendencies and who thus regard competition law itself as immoral (Tucker, 1998).

These deliberations regarding the morality of cartel conduct, and whether morality is even a relevant consideration in regulating such conduct, are largely elite debates; albeit debates that nonetheless may influence policymaking. The views expressed in elite legal and business circles about such matters are not necessarily views that reflect general public perceptions of cartel behaviour and its regulation. Indeed, the only empirical evidence of such perceptions of which the authors are aware, derived from a survey of the British public in early 2007, suggests significant public ambivalence towards characterising price-fixing as immoral (in the sense of dishonest) and considering it as properly punishable by way of imprisonment (Stephan, 2007, 2008).

Legal

Finally, criminalising cartel conduct exposes tensions within the law itself. As Habermas (1996) has argued, as an instrument of social control, the law has dual roles: as statement of moral norms and as a formal system of rules. There are tensions between these two roles where the conduct regulated by the law is beset with ambiguities. In such circumstances, it will be difficult to satisfy the requirements of certainty, transparency, proportionality and equity or fairness demanded of the law as a system of rules (Rheinstein, 1954). As discussed below, such tensions are borne out by the experience, not confined to Australia, of attempting to formulate an offence for serious cartel conduct that both accurately represents the criminality of the conduct in question, in terms of its moral wrongfulness and its harmfulness (Beaton-Wells, 2007) and that also satisfies the criteria for legislative drafting aimed at clearly distinguishing between lawful and unlawful conduct and between conduct that warrants civil consequences only and that which warrants criminal sanctions (Ashworth, 2006; Fisse, 2008).

Case Study Structure and Sources

The case study begins in Part 2 of the article by outlining briefly the history of cartel regulation in Australia and, in particular, the approach taken to penalties; tracing the shift in the dominant view of cartel behaviour away from understanding it as normal business activity and beneficial to the public interest to an understanding of such conduct as illegal and potentially criminal. Part 3 documents the 2001 launch of the campaign by the Australian Competition and Consumer Commission (ACCC) for criminalisation of what it saw as the most serious forms of cartel conduct, drawing on both economic and moral arguments. The divergent responses from various groups to the proposal are analysed in Part 4. Next, in Part 5, the article charts the process of legislative design, including catalytic events that led to the long-awaited release for public comment of the Exposure Draft Materials in January 2008. Part 6 exposes key problems that arose (and to a significant extent remain) in the definition of the new cartel offences as well as in the policy for their enforcement. In conclusion, Part 7 suggests insights that can be derived from the case study about broader shifts in Australian society and, in particular, shifts in the
relationship between the interests of business and the public from an economic perspective, as well as possible shifts in moral standards or norms. The picture that emerges is complex and incomplete in many respects; yet we suggest that any story of cartel criminalisation in Australia necessarily will continue to unfold as economic ideologies and political interests shift.

The case study draws on a range of primary and secondary sources, including in the former category the provisions of the Trade Practices Act 1974 (Cwlth) and its predecessors, cases decided under it, submissions to and reports of government inquiries and statements made by members of the ACCC and government, as recorded in published speeches and in the media. In terms of secondary sources, there has been relatively little attention paid to competition regulation by scholars outside of the disciplines of the law and economics. However, the case study draws upon those few studies that have been undertaken, including early on in the history of the Act by Andrew Hopkins, and more recently by Christine Parker. The research of the first author and that of Brent Fisse regarding cartel criminalisation, both in relation to its origins and in relation to the design and enforcement of the proposed new legal regime, are also reflected in the case study.

The History of Cartel Regulation

Up until the 1960s in Australia, the regulatory environment was accommodating if not supportive of cartels. The policy in respect of restrictive trade practices generally was one of 'laissez-faire' (Brunt, 1965, p. 56). This was because such practices were viewed largely as being in the national or public interest. Price-fixing, market-sharing and bid-rigging practices were common, policed by a web of trade associations that stretched across Australian industries (Karmel & Brunt, 1963). Indeed, Australia’s first competition statute, the Australian Industries Preservation Act 1906 (Cwlth), had been concerned primarily, as its name suggests, with protecting Australian markets from the incursions of substantial overseas business interests (Hopkins, 1978, p. 28). It was thus essentially a protectionist measure aimed at safeguarding the interests of Australian producers. In any event, the Act was short-lived, being declared unconstitutional only 3 years after its enactment.8

However, this consensus between business and government that ‘what was good for business was good for Australia’ was challenged in the 1960s. The shift was motivated initially by a concern over rising inflation, but it came to be driven fundamentally by the view that protectionism and nationalism were incapable of generating a strong economy (Hopkins, 1978, pp. 34–38). The challenge to existing economic arrangements, and the assumptions underpinning them, was led by Liberal Attorney-General Barwick who regarded the levels of cartelisation in the Australian economy as antithetical to his vision of a free enterprise society (Hopkins, 1978, p. 38). In particular, he was concerned about the harmful effects of restrictive trade practices on small traders and it was their protection, rather than protection of consumer interests, that became a key tenet of his campaign for more effective restrictive trade practices legislation (Hopkins, 1978, p. 36).

However, Barwick’s proposals, involving outright bans on certain types of anticompetitive conduct, met with stiff opposition from the major organised business groups, outraged by the notion that government would contemplate such
interference in business affairs and even offended by criticism of practices that hitherto had been seen as the ‘right and proper’ way of doing business (Hopkins, 1978, pp. 38–41). Although there was some support for the legislation among associations representing the small business sector, particularly independent retailers, their views were expressed not nearly as vocally as those of their opponents (Hopkins, 1978, p. 46). This may have reflected the rather ambivalent position in which small firms find themselves, vis-à-vis legislation against restrictive trade practices. While it may benefit small firms by preventing collusion among their larger rivals, it also potentially restricts them from acting collectively in dealing with larger buyers or suppliers so as to secure greater influence in the marketplace.

The sustained and skilled lobbying by national business groups against the Barwick proposals was premised, not on self-interest, but on the idea that ‘orderly marketing’ (as many cartel arrangements were described (Brunt, 1965, p. 68)) benefited both producers and consumers, that is, it was in the public interest, broadly conceived (e.g., Associated Chambers of Manufacturers of Australia, 1963, pp. 6–7). In particular, there was opposition to the proposal that certain practices, such as collusive bidding, should be seen as inherently harmful and incapable of justification so as to warrant outright bans and criminal prosecution. Voicing an opinion thought to be widely held in Australian society at the time, business argued that regardless of the detriment caused by any particular business practice, business people were not criminal by nature and thus it was inappropriate and unfair to stigmatise such practices as criminal (Hopkins, 1978, pp. 54–55). Moreover, the government (including Barwick himself) appeared sympathetic to this view (Hopkins, 1978, p. 56). Indeed, one of the reasons the government gave for introducing new legislation, rather than reintroducing the Australian Industries Preservation Act 1906 (Cwlth) (the constitutional impediments to which had since been overcome), was that that Act made restraints of trade criminal offences and, as the government of the day argued, imposing a ‘criminal form of control’ over industry was ‘undesirable’ (Hopkins, 1978, p. 56).

By the time Barwick had ascended to the High Court, his proposals had been watered down to such an extent that the result was an ineffectual statute (the Trade Practices Act 1965 (Cwlth)) modelled on the English rather than the American approach to antitrust enforcement (Hopkins, 1978, p. 57, cf. the more positive assessment of Brunt, 1976, pp. 85–86). The model relied on business to register its arrangements and, once registered, those arrangements could continue lawfully unless and until they were challenged. Once challenged, it was for the Trade Practices Tribunal to determine their lawfulness depending on whether or not the arrangement was in the ‘public interest’ (Hopkins, 1978, p. 58). The remedy was a cease and desist order that could include the acceptance of undertakings, enforceable by contempt proceedings in the Commonwealth Industrial Court. This system of case-by-case examination was seen as consistent with the view that most restrictive trade practices are ‘inherently equivocal’ and that ‘the self-same practice may be desirable or at any rate tolerable in one set of circumstances and harmful in another’ (Barwick, 1963, p. 6). Consistent with the description of the bill in its preamble (‘to preserve Competition in Australian Trade and Commerce to the extent required by the Public Interest’), the criterion for distinguishing between these circumstances was the ‘public interest’. Notably, business was successful in arguing the public interest be specified to include benefits not just to consumers but
also to producers, employees, distributors, importers, exporters, proprietors, investors and small businessmen. No direction was given on how to weigh these various interests, rather that invidious task was left to the tribunal in what has been described by the government as effectively passing the buck (Brunt, 1965, p. 53). Business was also successful in persuading the government to include features in the legislation aimed at reducing the extent of the administrative burden imposed by the registration scheme, as well as minimising the uncertainty inherent in not knowing whether certain commercial practices were within the scope of the Act (Brunt, 1965, p. 53; Hopkins, 1978, pp. 58–59).

A total of 10,841 agreements were registered in the first year, suggesting at the very least that such conduct had not been seen as undesirable, let alone immoral. The first Trade Practices Commissioner tasked with administering the legislation described the environment in which he was operating as ‘fear and non-understanding, hostility and hurt’ (Brenchley, 2003, pp. 29–30). In essence, it appeared that the business sector was struggling to come to terms with the formal public questioning of its practices, practices that it long had assumed as being in the best interests of Australian industry and hence in the public interest.

Less than a decade after the 1965 Act was passed, it was replaced by the current Act in 1974. This was at the instigation of another Attorney-General (Lionel Murphy), this time from the Labor side of politics who, like Barwick, saw a tougher approach to anticompetitive conduct as critical to reviving Australia’s lagging economic performance. Again, acceleration in the inflation rate was instrumental to the legislative change. However, by the early 1970s there was also increasing consciousness of consumer interests and, in particular, political pressure to undertake any legislative measure that promised to curb price rises (Hopkins, 1978, pp. 83, 87). Pre-existing assumptions that what was in the business interest was automatically in the public interest fell away. The public interest in turn became aligned far more closely with the interests of consumers. This was reflected in the statement of the object of the 1974 Act as being ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’. Such a view was a comfortable fit with Labor sentiments and their historic antipathy towards business motives, albeit one that was distinct from socialist ideals of strong government intervention in the market. Competition had replaced protectionism as the means thought to best serve economic growth and efficiency and thereby consumer welfare.

In addition, unlike in the 1960s, there was a new lobbyist in the form of the regulator. The Commissioner for Trade Practices was pressing for stronger legislation that removed the need to examine every agreement (an inordinately slow and resource-intensive task and one that invariably found the agreement to be against the public interest). What was sought instead was a presumption that all agreements were contrary to the public interest unless proved otherwise (Hopkins, 1978, p. 79). The Murphy proposals endorsed this approach. Derisive of the restrained British model, Murphy adopted the American system of general prohibitions backed up by penalties in the new Act, enforceable by courts of law (Brunt, 1976, p. 87). At the same time, the legislative scheme reflected the economic and legal complexities in distinguishing between business practices depending on their degree of harm to competition and also in weighing the possibility that such practices, while anti-
competitive, might nevertheless have genuine countervailing merits. In short, it was
difficult to tarnish all collaborations between competitors as antithetical to the
public interest (Harpham, Robertson, & Williams, 2006). A selective approach
relying on a range of standards of liability and methods of regulation was thus neces-
sary. Reflecting this, the prohibitions were drafted in such a way as to distinguish
between two categories of conduct — that which should be prohibited per se, a
form of strict liability, and that which should be subject to a rule of reason or
substantial lessening of competition test. Furthermore, the per se prohibitions
allowed exemptions or defences for certain types of conduct (for example, collective
buying groups and joint ventures).

Additionally, reflecting the size of the Australian economy and also the value
placed on a vigorous small-business sector, the 1974 Act introduced a system for
which there was no US counterpart, under which businesses could have their
arrangements authorised (and thereby immunised from proceedings for breach of
the prohibition). As pointed out in Part 1, authorisation is granted on the grounds
that the public benefits flowing from the arrangements outweigh any detriment
(particularly anticompetitive effects). This allows, for example, parties to a merger
proposal or members of a trade or professional association to press the merits of their
proposals or arrangements in a process that recognises the limitations of viewing
cooperation between competitors as intrinsically undesirable. The authorisation
procedure embraces the idea that, in some circumstances, restrictive trade practices,
including cooperation or coordination between competitors, can be welfare-
enhancing in such a way that justifies or outweighs any detraction from competition.
That said, the scope of the welfare concept in this context was undefined and
was then and remains contested today. In particular, there have been arguments as
to whether it should be based solely on consumer welfare (which would limit author-
isation to practices that benefit consumers directly) or whether it should be a
broader concept of total welfare (which would extend authorisation to practices
that benefit other groups such as employees or investors, notwithstanding a lack of
direct benefit flowing to consumers) (e.g., Gans, 2005).

In terms of penalties, the 1974 Act was also a compromise. While criminal
penalties were enacted for breach of the consumer protection provisions of the Act
(albeit without imprisonment as a sentencing option), the legislators stopped short
of full criminalisation in the case of the competition provisions, preferring instead
the hybrid pecuniary penalty. The reasons for this are not entirely clear. One
possibility is that there was a concern that criminal penalties would be more diffi-
cult to enforce (Hopkins, 1978, pp. 88–89), reflecting the legal ambiguity referred
to previously. Another is that while many of the practices covered by the consumer
protection provisions (misleading advertising, false pretences and the like) involved
an element of fraud long recognised as a criminal offence, there was little precedent
in English law for classifying the practices covered by the restrictive trade provisions
(price-fixing, monopolisation, exclusive dealing, etc.) as criminal offences
(Hopkins, 1978, p. 89). Reflecting the moral ambiguity also referred to previously, it
may have seemed a step too far to legislatively characterise competition as a virtue
and restricting competition a criminal vice.

The history of enforcement of the Act further illustrates the manifestation of
both economic and moral ambiguity in cartel conduct. In the early years of its
enforcement, prior to 1993, the quantum of cartel cases brought was low (on average one per year), most cases involved relatively small firms in local retail markets and the penalties imposed were extremely modest (Round, 2000; Round, Siegfried, & Baillie, 1996). However, as government acceptance and promotion of neoliberal philosophies surrounding competition increased, manifested particularly in the adoption of a National Competition Policy in 1993 (Independent Committee of Inquiry into Competition Policy in Australia [Hilmer Committee], 1993), the pressure to increase penalties associated with ‘anticompetitive’ behaviour intensified. With effect from 1993, the statutory maxima were increased (from $250,000 to $10m for corporations and $50,000 to $500,000 for individuals). In the next 10 years, between 1994 and 2004, the number of cases brought increased (to an average of 3.2 per year). These cases included major prosecutions for serious price-fixing activity (including high-profile cases in the express freight and premixed concrete industries) and there was a notable increase in the levels of penalties imposed (Round, 2000). Notwithstanding this increase, penalties have remained far below the allowable limit and extremely low by the standards of other key antitrust jurisdictions such as the United States and the European Community (Beaton-Wells, 2008, pp. 228–229).

In an attempt to compensate for the low penalties, the ACCC adopted a strategy aimed at ‘converting’ business to the view that cartel conduct was not only illegal but also unacceptable and contrary to the public interest. Under Allan Fels, who was appointed to the Chairmanship in 1991, the ACCC began a practice of leveraging up the deterrence value of the penalties under the Act with the administrative and personal cost and inconvenience of the investigation process and the reputational damage caused by adverse publicity (Parker, 2006, p. 599). On one view this strategy could be seen as effective, as reflected in the high rates of settlement of legal proceedings and in reports that business saw the process and publicity associated with ACCC investigations as a greater motivation for compliance than the penalties ultimately imposed (Parker, 2006, pp. 599–601). But business nevertheless appeared to remain unconvinced of the immorality (as opposed to the illegality) of cartel activity. They reacted negatively to the moral message with which the ACCC strategy was infused and felt the ACCC’s approach lacked legitimacy (Parker, 2006, p. 605). The ACCC’s leveraging was seen as procedurally unfair and stigmatising of ‘ordinary honest business-people’ and it generated significant hostility between the regulator and the business community that led, in turn, to frequent backroom lobbying by powerful business groups and figures to ‘have something done’ about Fels and his ACCC (Brenchley, 2003, p. 218; Parker, 2006, pp. 611–613).

**The Campaign for Cartel Criminalisation**

Fels, however, fought back. In 2001 he used the independent and respectable forum of an Australian Law Reform Commission conference to call for criminal penalties for what he referred to as ‘hard core collusive activity’ (Fels, 2001). The call would have caught many off guard. Criminal penalties had not been on the policy or legislative agenda and there appeared to be no readily identifiable catalyst for the call, such as evidence of an increase in levels of cartel activity in the Australian economy. It was, however, entirely consistent with a strong belief by the regulator in
the virtue of competition as a public good. Business lobbying to curtail ACCC activity represented a challenge to the regulator and its belief in the virtue of competition. Consistent with the adage that ‘the best form of defence is attack’, Fels’s call for criminalisation can be understood as an attempt to shift the agenda of a forthcoming independent review of the Act and ACCC practices towards one more sympathetic towards Fels’s leadership and his aim to champion the virtues of vigorous competition, whether through orthodox or unorthodox means.

Fels evidently considered there to be strong arguments in favour of criminalisation, both economic and moral, as a tool to promote the benefits of competition. It is also almost certainly the case that he was influenced by the increased international activity on the cartel front at the time (such activity indeed, continuing today). Since cracking the most famous international cartel case to date (the animal vitamins cartel) in 1996, the United States’ Department of Justice had made it that agency’s mission to ‘convert’ foreign regulators and governments to the criminalisation cause (Harding, 2006). It sponsored a recommendation by the OECD in 1998 calling for tougher sanctions for what were called ‘hard-core cartels’ (the terminology adopted by Fels in his 2001 speech) (OECD, 1998). The significance of this terminology (placing serious cartel conduct in the same category as ‘hard core’ porn or ‘hard core’ drugs) signalled a shift in places outside of the United States from an attitude of tolerance, even encouragement, to one of intolerance and moral condemnation (Harding & Joshua, 2003). The challenge to economic orthodoxy through market reforms was now clearly accompanied by questioning of the hegemonic assumption of the morality of business as working virtuously for the public good.

Influenced by the approach taken in the United States’ case law, the OECD defined so-called ‘hard-core’ cartel conduct in terms of four practices — price-fixing, market division, output restriction and bid-rigging — all of which are currently prohibited per se, either directly or indirectly, under the Trade Practices Act 1974 (Cwlth). These practices were singled out by the OECD as the most ‘egregious violations’ of competition law on the grounds that they raise prices, restrict output and stifle innovation, while perceived as having no countervailing economic or social benefits (OECD, 1998). These practices, then, were intended to provide the ‘bright line’ between the merely illegal, on the one hand, and the immoral and therefore criminal behaviour, on the other. This was so notwithstanding the acknowledged difficulties in quantifying the economic effects of such practices (in particular, estimating the level of cartel mark-up or overcharge) remains difficult (OECD, 2002; cf. attempts by Connor & Lande, 2006).

Adopting the OECD definition, the ACCC’s submission to the Dawson Committee in 2002 made cartel criminalisation its centrepiece (Australian Competition and Consumer Commission [ACCC], 2002, chap. 2). The multifaceted argument in its submission sought to convince a wide range of audiences and constituencies of the need for tougher criminal penalties. The current regulatory regime, it argued, had failed both to deter cartels and also to send a strong message that cartel behaviour was morally reprehensible and comparable with other white-collar criminal offences (ACCC, 2002, chap. 2, Fisse, 2007c). It was also out of step with international trends and, in particular, with Australia’s major trading partners including the United States, Canada and the United Kingdom, each of which treat cartel activity as criminal (ACCC, 2002, chap. 2). As an active member of multilateral fora in
which competition policy and enforcement is debated among regulators from around the world, it was not surprising that the ACCC was alive to these trends.\textsuperscript{15} Its submission to the Dawson Committee was a comprehensive attempt to change the moral and political climate around cartel behaviour (Beaton-Wells, 2008).

Some of the ACCC's arguments met an early demise, illustrating the challenge in drafting legally unambiguous criminal offences. For example, the ACCC's initial proposal was to limit criminal liability to large corporations, drawing on a ‘big and bad’ rationale for use of the criminal law, and protecting small businesses, the professions, the rural sector and the unions from criminal liability (ACCC, 2002, p. 41). This move was interesting for two reasons. First, it fits neatly with the ideology of capitalism that public benefit derives largely from a vibrant small business sector (Glasbeek, 2002). Under this view, it is the activities of large business that pose the greatest risk to competition. Second, it can be seen as unashamedly populist in purporting to protect ‘battlers’ against unscrupulous big business. It read well the egalitarian streak within Australia. But, it clearly misjudged the reaction of legal and business elites and their insistence on the need for equality and fairness in the law. The singling out of big business in this way caused such consternation (Australian Chamber of Commerce and Industry, 2002; Law Council of Australia, Business Law Committee, 2002) that the ACCC hastily retreated from this position, accepting in a subsequent submission, in effect, that a crime for one should be a crime for all (Dawson, 2003, p. 149).

With this failure, another basis for distinguishing civil from criminal had to be found. Inclusion of an element of dishonesty in the proposed cartel offence was settled upon for this purpose. Although initially opposed to it (ACCC, 2002, pp. 45–46), the ACCC ultimately supported this idea, albeit with a degree of ambivalence and on legal grounds that have been described as spurious (Fisse, 2007c).\textsuperscript{17} It is not known what prompted the change in position. It is notable, however, that Fels’s speech, the ACCC’s submissions and other public statements by ACCC representatives around this time were heavily laden with moral overtones, and the analogy between cartel activity and theft (of which dishonesty is a key element) became then and continues now to be a recurring feature (Charles, 2004; Samuel, 2004, pp. 1, 5; Wood, 2007, p. 1; ‘Failure may be the best option’, 2008). Thus, the theme of the regulator attempting to convert stakeholders, including the business sector and the public, to the moral basis for criminalisation was seen to continue.

The Reactions to the ACCC’s Campaign

The ACCC’s proposal received significant media attention (Fels, 2002; Maiden, 2002; Murphy, 2002). A Roy Morgan poll in September 2002 reported 87% of respondents agreed with the proposition that jail terms should be imposed on business people involved in ‘hard-core collusion’ (Roy Morgan, 2002). While unrepresentative and methodologically flawed (Beaton-Wells, 2008, pp. 222–223), the poll (and perhaps even just the mere fact that it was taken), could have been seen as a signal that the political climate was changing and that, compared to the ‘cool’ response to Barwick’s proposals in 1960s, there appeared to be a more fertile climate for cartel criminalisation in the early 21st century. Almost certainly, and this is evidenced by many of the comments made by the respondents to the Morgan Poll, there had been a
shift in public attitudes towards greater intolerance of what was perceived as corpo-
rate greed and misconduct and a corresponding demand for greater government inter-
vention in and regulation of business affairs (Baldwin, 2004; Holland, 1995; Miller,
Rossi, & Simpson, 1992). What was not clear, however, was that there was a clear
understanding by the public of what cartel conduct was and how it exemplified
corporate greed or what exactly constituted ‘hard-core’ cartel conduct, and how this
differed from other ‘less heinous’ business arrangements.

Business, in contrast to the media, did not appear to take the ACCC criminali-
sation proposal all that seriously. It is possible that, taken as a whole, business did
not regard its position or practices as threatened by the proposal. Of the 91 submis-
sions to the Dawson Committee, from either individual businesses or industry
bodies, only 37 (41%) of those submissions commented on the proposal (Beaton-
Wells, 2008). Among these, opinion was fairly evenly divided with 17 (46%) oppos-
ing the proposal outright and 20 (54%) supporting it; of the latter, 12 of these gave
their support without qualification, and the remaining 8 gave only qualified or
conditional support (Beaton-Wells, 2008, p. 218). Submissions in favour of crimi-
nalisation without qualification were mostly (8 or 66%) from small business or
industry bodies representing the small-business sector. Of the submissions comment-
ing on the ACCC proposal from big business or industry bodies representing it, 18
(82%) opposed the proposal, 11 of these opposed criminalisation outright and 7
This apparent divergence in views between big business and small business may
reflect the fact that the ACCC’s role is often understood by small business as being
to protect them from larger business predators, an arguably simplistic view given
that small firms may be the beneficiaries as much as the victims of cartelisation.

In its 2003 report, the Dawson Committee gave a superficial and arguably
lukewarm treatment to the proposal (Fisse, 2003), but ultimately recommended
that criminal penalties be introduced for ‘serious’ (an apparent rejection of the
more emotive ‘hard-core’ label) cartel behaviour (Trade Practices Committee of
Review [Dawson Committee], 2003, pp. 161–162). The committee’s support was
made conditional upon resolution of two critical issues — finding a way to
distinguish properly between criminal and civil prohibitions and formulating a
clear and workable immunity policy to coincide with the criminal regime. The
committee’s concerns, then, can clearly be understood as referable to the need
to minimise legal ambiguity, and, in particular, to provide certainty and clarity
in drawing the boundaries between legality and illegality and between ‘mere’
illegality and criminality (or immorality).

The government accepted ‘in principle’ the recommendation of the Dawson
Committee and promised to ‘further consider’ the matter (Costello, 2003a). Its
less than enthusiastic response appeared to be motivated by concerns similar to
those that had dogged the 1965 Act, namely concerns about the impact of the
offence on economic investment in Australia, tarring all business as immoral
and the problem of generating more ‘red tape’ for business to deal with. Thus, in
response to the recommendation, the former Treasurer emphasised the need for
any new criminal penalty regime to apply broadly, not to impose ‘significant
additional uncertainty and complexity for business’ and to ‘work well in the
context of the Australian legal system’ (Costello, 2003a).
The Process of Legislative Design

The next challenge for proponents of criminalisation was to create a workable proposal for legislative design that could address the concerns of government, the business sector and its lawyers. The challenge was considerable; it required dispelling economic and moral ambiguities through careful legislative drafting. A government working party on penalties for cartel behaviour was convened in October 2003 for the purpose of resolving these issues (Costello, 2003b). The working party comprised representatives of the Commonwealth Treasury, the ACCC and the Commonwealth Director of Public Prosecutions (DPP).

Contrary to the approach generally taken to corporate regulatory reform, however, the working party did not issue a discussion paper or invite submissions on the issues before it. It reported to the government some time in 2004 (Costello, 2005). However, its report was not released publicly then and has not since been released. No explanation for the nonrelease was offered at the time and concerted efforts have been made by the Treasury to resist its disclosure since, including defending a proceeding under the Freedom of Information Act 1982 (Cwlth) in the Administrative Appeals Tribunal and the Federal Court in which access to the report has been sought.18

On 2 February 2005, the then Treasurer announced in a press release that criminal sanctions for ‘serious cartel behaviour’ would be introduced (Costello, 2005). The press release sketched out the legislative proposals, including a cartel offence that included the element of ‘intention to dishonestly obtain benefit’ as the key mechanism for differentiating between conduct that should be treated as criminal and conduct warranting civil penalties only. It thus appeared that the majority on the working party had succeeded in arguing that the statutory formulation of the offence required a ‘moral’ element to deliver the deterrent and educative effects of criminalisation (Beaton-Wells, 2007). Just as had occurred in the United Kingdom (the only jurisdiction to adopt a dishonesty element in its cartel offence to date) (Black, 2005, p. 128; Harding & Joshua, 2002, pp. 937–939), the proposal to incorporate dishonesty in the Australian offence attracted severe criticism (Fisse, 2007b) and became one of the most controversial aspects of the criminalisation project.

Criticisms of the dishonesty proposal emphasised the moral ambiguity of cartel conduct, predicting that juries may struggle with the notion that such conduct is dishonest according to the standards of ordinary people (the first requirement of the test for dishonesty in the Criminal Code Act 1995 (Cwlth)),19 (Fisse, 2007a, pp. 255–257, echoing the criticism made of the test as applied to other corporate offences Elliott, 1982; Halpin, 1996). Empirical research demonstrating the complexity of the motivations for engaging in cartel conduct, particularly when associated with saving jobs, responding to the threat of imports or dealing with organisational pressures (Geis, 1977; Parker, 2006) appears to support this prediction. Such complexity is likely to also complicate proof of the second requirement of the test, namely that the defendant knew the behaviour to be dishonest according to the standards of ordinary people (Fisse, 2007a, pp. 255–261).

In the 2 to 3 years following the Dawson Committee’s recommendation, the ACCC’s public campaign for cartel criminalisation fell strangely silent, despite declarations by the new chairman, Graeme Samuel, that cartels would be the
agency's highest priority (Charles, 2004; Samuel, 2004, p. 9; 2005, p. 12). This might have reflected the difficulties being encountered in the working party process in relation to the technical aspects of the draft legislation (consistent with the legal ambiguity involved) casting a shadow over the initial euphoria that swept over the commission following release of the Dawson report (ACCC, 2003). Consistent with the moral and economic ambiguities highlighted earlier, it might also have reflected signals from the then government that political support for criminalisation was far from robust at the highest levels (consistent with the approach historically of conservative governments towards trade practices penalties; Beaton-Wells, 2008; Hopkins, 1978). Subsequent news article reports suggested that there was a degree of backbencher unrest about the criminalisation proposal given its potential implications for small business owners (‘Regulator to Tap Phones’, 2007). Further, reminiscent of the campaign by big business against the 1965 Act, there were reports that despite its stated support for criminalisation before the Dawson Committee, there were members of the powerful peak business group, the Business Council of Australia, who were pressuring the government to abandon the proposal (‘Regulator to Tap Phones’, 2007).

In a continuing campaign to dispel the moral ambiguity, efforts were made by the ACCC over this period to increase education of key groups about the undesirability and illegality of cartel activity. It published a series of brochures explaining what cartel conduct involves and what to do about it that were addressed, for example, to consumers, government procurement agencies and small business (ACCC, 2005, 2006, 2007b). It also launched several high-profile cartel cases. Among them was the Visy case, described by the judge as the ‘most serious cartel case in Australian trade practices history’.\textsuperscript{20} It involved a price-fixing and market-sharing cartel that continued over at least 5 years and that was authorised at the most senior levels of management, including by Richard Pratt, Visy’s owner and one of Australia’s wealthiest and most powerful men, as well as being a high-profile supporter of philanthropic and political causes. Each key development in the case attracted substantial media interest (e.g., Ahmed, 2007; Gettler, 2007; ‘Judge sets date’, 2006).

Undoubtedly, 2007 was a watershed year for cartel criminalisation in Australia. In August 2007, the \textit{Trade Practices Amendment (Cartel Conduct and Other Measures) Bill} and \textit{Federal Court Amendment (Criminal Jurisdiction) Bill} were listed on the government’s web site as legislation proposed to be introduced in the spring sittings of Parliament. Almost certainly noncoincidentally, this listing occurred within days of increased pressure to take action over petrol prices (and renewed ACCC calls for criminal sanctions for cartel conduct in this context), as well as publicity given to significant penalties for price-fixing in the air-conditioning industry, a global airline cargo cartel in which the national carrier Qantas was implicated (Rochfort, 2008) and the announcement of an ACCC investigation into price-fixing in stevedoring operations on Australian wharves (O’Sullivan, Hopkins, & Carson, 2007).

Subsequently, a federal election intervened and the fate of the bills was left hanging on the outcome (ACCC, 2007c; Creedy, 2007; Drummond, 2007a, 2007b; Editorial, 2007a, 2007b).

In October 2007, Pratt fell on his sword, publicly admitting to and apologising for Visy’s part in the cartel and agreeing to record-level penalties of $38 million...
Ahmed, 2007; Drummond, 2007c). At the same time, a federal election was underway and the conservative government was under siege, trailing far behind a reinvigorated Labor party in the opinion polls. For criminalisation (which many had seen as interminably stalled), there was a critical moment when the former Prime Minister, John Howard, responding to questions about Visy's capitulation, professed his personal admiration for Pratt and refused to commit to criminal penalties for the kind of conduct uncovered in the Visy/Amcor case (‘No Plans’, 2007; ‘PM Backpedals’, 2007). Economic and moral ambiguities were thus still well in evidence. The criminalisation campaign was reinvigorated nevertheless and the ACCC once again grabbed the opportunity to press the case for criminalisation. Critics of the delay and lack of transparency and consultation in the process by the former government received media coverage (e.g., Fisse, 2007d) and Samuel seized the opportunity to publicly reiterate the moral message in favour of jail sentences for price-fixers (or ‘well-dressed thieves’, as he called them (Wood, 2007, p. 1). The opposition weighed in reaffirming its support for criminalisation and promising to introduce the legislation within its first year of office (Bowen, 2007).

Labor’s Commitment

Optimists might have thought that the change in government would dispel the ambiguities surrounding cartel criminalisation and provide a relatively easy passage into legislation. However, such optimism would fail to appreciate the nature and extent of the ambiguities in this context. In early January 2008, consistent with its election promise, the government released an exposure draft bill (EDB), a draft memorandum of understanding between the ACCC and the DPP (draft MOU) and a discussion paper calling for public comment by the end of February (Bowen, January 2008). These materials raised a host of complex and, in several respects controversial, legal and policy issues (Beaton-Wells & Fisse, 2008). It suffices for present purposes to highlight two of these issues, one relating to the definition of the new cartel offences and one relating to the policy for their enforcement.

The proposed definition of cartel conduct in the EDB, in terms of its physical elements, was the same for both the civil prohibitions and the criminal offences and was strikingly wide, catching conduct that not only is lawful under the current statutory provisions but also that many would regard as benign, if not procompetitive (Law Council of Australia, Trade Practices Committee, 2008). The proposed law thus failed to limit coverage of the criminal offences to only the most serious forms of conduct (i.e., eliminating overreach). Overreach was compounded by the complexity of the offence as drafted, which would seriously undermine the capacity of potential offenders, their advisers, investigators, prosecutors, judges and jurors to understand what behaviour is proscribed by the offences (Fisse, 2008). For example, the proposed offences contain no less than five fault elements, most of which are imported by default from the provisions of the Criminal Code Act 1995 (Cwlth) and hence are not explicit in the offences themselves. The new government, in its enthusiasm for criminalisation, had thus apparently failed to grasp the fragile nature of the consensus between key players concerning what activity should be criminalised and what remained ‘normal’, even desirable business activity. It had also
failed to deliver the certainty and transparency required of the law to function as a form of rules.

These definitional issues became the focus of the submissions made to Treasury on the EDB. ‘Overreach’ with its chilling effect on economic investment and business activity in particular, was the central concern of the powerful Trade Practices Committee of Australia’s peak legal body, the Law Council of Australia, comprising most of the senior competition lawyers in the country (Law Council of Australia, Trade Practices Committee, March 2008). The committee’s approach to dishonesty became entangled with this concern — dishonesty, the committee argued in its submission, was not an appropriate mechanism for distinguishing between criminal and civil prohibitions. The appropriate means of distinction was by way of separate definitions for each offence, the civil and the criminal. Only a subset of the civil contraventions should be criminalised and the physical and mental elements applicable to each should be stated with clarity. By contrast, the Criminal Law Committee of the council, which made its own separate submission, came down strongly in support of dishonesty as an overarching element of the proposed cartel offence (Law Council of Australia, Criminal Law Committee, 2008). It seemed unconcerned about whether or how the definitional issues were resolved, rather that dishonesty provided the clear moral basis for criminalisation.

The difficulty in finding a moral consensus or an unambiguous economic rationale for criminalisation of cartel conduct was evident also in the design of the proposed policy for enforcement of the new cartel offences, as set out in the draft MOU. Two observations may be made in this regard. The draft MOU makes it clear that enforcement efforts would focus on the most ‘serious’ cases of cartel activity (‘Draft Memorandum of Understanding’ [draft MOU], 2008, [1.2], [4.3]). But seriousness would be judged not on moral terms but as defined primarily by the economic harmfulness (actual or potential) of the conduct. The factors identified as guiding ACCC decisions to launch a criminal investigation and to refer a matter to the DPP for prosecution, as well as the latter’s decision whether or not to prosecute, relate primarily to the duration of the conduct, its impact on the market in which it occurred and the extent to which it caused or could cause detriment to the public or loss or damage to customers or consumers (Draft MOU, 2008, [4.3]). But this was at odds with the EDB, which sought to differentiate between the criminal and civil prohibitions on the grounds of the dishonesty (read immorality) of the conduct (Beaton-Wells & Fisse, 2008, p. 200). The draft MOU made no mention of dishonesty and moreover, it failed to include in the list of factors guiding investigatorial and prosecutorial decisions any other culpability indicia that one would expect to be seen as relevant (for example, whether the participants in the conduct attempted to conceal it or to enforce the involvement of others or knew it was illegal or appreciated the effects of the conduct) (Beaton-Wells & Fisse, 2008, pp. 206–207).

Possibly, the drafters of the draft MOU considered the challenge of dispelling moral ambiguity as too great and opted for an arguably more objective task of assessing economic harm. The draft MOU identified as a threshold criterion (or ‘proxy’ for economic harm) the requirement that the combined value for all cartel participants of the specific line of commerce affected by the cartel exceed $1 million within a 12-month period (Draft MOU, 2008 [4.3]). However, further reinforcing the ambiguity associated with the economic effects of this type of conduct, the
proposed threshold criterion has been criticised as both potentially overinclusive and underinclusive, depending on the size of the market involved, and hence as a poor filter for ensuring that only ‘serious’ (in terms of harmfulness) cases are dealt with under the criminal regime (Clarke, 2005, 162–164; Fisse, 2007a, pp. 244–246).

In October 2008, after apparent consideration of the submissions lodged in the consultation period, the government released a further exposure draft bill (Bowen, October, 2008). Tellingly, this version removed the element of dishonesty from the proposed cartel offences, suggesting that on this occasion the competition lawyers (with their focus on the economics underpinning the reform) had trumped the criminal lawyers (with their focus on morality). However, even then, many of the concerns expressed by legal commentators regarding overreach had not been resolved, resulting in yet another submission by the Law Council Trade Practices Committee complaining, in effect, that the government had got it wrong in distinguishing between ‘legitimate and commonplace commercial arrangements (including many involving small businesses)’ and arrangements that should be treated as unlawful and subject to criminal or civil sanctions (Law Council of Australia, Trade Practices Committee, November 2008). When the bill was introduced in December 2008, some but not all of the concerns of the Law Council and other expert legal commentators had been addressed, demonstrating that after more than 30 years of anticartel law, consensus on the proper scope of regulation remains elusive.

**Broader Insights and Reflections**

The history of cartel regulation within Australia to date provides a fascinating insight into shifts taking place in broader Australian society and politics. What is evident from this history is that there has been a sustained and determined attempt to weaken the historic hegemonic assumption that what is in the interests of business is in the interests of Australia generally. The lever used to challenge this assumption, however, has not been the promotion of economic welfare and the provision of security through nationalised industries, a socialist ideal, but rather the promotion of competition as essential to the public interest. Significantly, from a political perspective, this has seen Labor, the party that grew out of a belief in socialism as serving the interests of labour, shift to become the champion of competition — first, in introducing the system of prohibition (as distinct from a system of registration) in the 1974 Act, including per se prohibitions backed by quasi-criminal penalties, and, most recently, becoming the party to introduce legislation that makes breach of the per se prohibitions an offence punishable by imprisonment. The ambivalence marking the former government’s approach to the criminalisation project, by contrast, supports Hopkins’ thesis that conservative governments have been loathe to penalise Australian businesspeople for business misconduct and, in particular, that such governments are reticent to brand as ‘criminal’ the types of people to whom members of the government closely relate (Hopkins, 1978, p. 120).

However, it is important to recognise that the shift away from conflating the interests of business with the national or broader public interest has been partial and contested. From the outset, it has been argued by business that not all restrictive trade practices, including coordination between competing firms, is necessarily anticompetitive and that even if there is a downside for competition, such conduct
may nevertheless have redeeming features that justify exemption or immunisation from the legal prohibitions. The resultant economic ambiguity has meant that designing clear rules distinguishing ‘acceptable’ from ‘unacceptable’ business arrangements has remained complex and controversial (as reflected, for example, in the debate as to the scope of ‘public interest’ for authorisation purposes and whether it encompasses total, as opposed to just consumer welfare). Equally, enforcement outcomes have been unconvincing, if not equivocal.

By and large, governments of both political persuasions have been receptive to the argument that distinctions have to be drawn, conscious of the need to retain an economic climate conducive to business investment, particularly investment they consider essential to Australia’s (and their own) continuing viability. Thus, heightening the ambiguity associated with the existing multilayered system of prohibition, exemption and authorisation under the Act, it is notable that even behaviour that might potentially constitute a criminal offence under the new legislation will be capable of authorisation subject to demonstrating that it is, overall, in the public interest (howsoever defined).

Consistent with the role that it played in calling for stronger legislation in the early 1970s, the regulator in Australia (i.e., the ACCC) has been at the forefront of championing the moral case for cartel criminalisation since 2001. At its base, the moral argument has been premised on the virtue of competition as fundamental to the public interest. From this premise, anticompetitive conduct, by definition, should be seen as contrary to society’s accepted moral standards. Clearly, however, the ACCC and other stakeholders (particularly from the criminal law field) have had misgivings as to the extent to which this argument will resonate with the public. In its stead, alternative moral bases for criminalisation have been sought. Perhaps the most revealing of these was the ACCC’s initial proposal that the criminal offence should be prosecuted exclusively against the top end of town. This fitted well with the ideology of a vigorous small-business sector lying at the heart of the economy as well as a popular distrust of the motives of big business. However, such a stance was doomed to failure and business found a ready argument rejecting the proposal by calling on the need to adhere to the basic principle of indiscriminatory application, underpinning the rule of law. The alternative moral base proposed by the legislative designers — that of dishonesty — proved to be highly controversial, not to mention politically problematic for the government given the opposition raised by powerful legal groups.

These economic and moral ambiguities have been both compounded by and reflected in legal imperatives. As Habermas (1996) has identified, law as both a statement of norms and a system of rules requires a clear moral underpinning for criminalisation as well as robust adherence to principles of equity, clarity and certainty in the law. The history of attempts to criminalise cartel conduct within Australia would suggest that, as yet, neither has been achieved. While some may argue that what is needed is a stronger political commitment to the project (Parker, 2006, p. 617), others may caution against support for government placing such emphasis on competition as the ultimate arbiter of what should be considered in the public interest. Whatever one’s view, it is clear that much of the story of cartel criminalisation in Australia remains to be told and that its telling will continue to deliver critical insights into the challenges of using the criminal law to control business behaviour.
The text of the bill, the explanatory memorandum and the second reading speech are available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=group;holdingType=id=;orderBy=priority,title:page=8;query=Dataset%3AbillsCurBef%20SearchCategory_Phrase%3A%22bills%20and%20legislation%22%20Dataset_Phrase%3A%22billhome%22;querytype=;rec=5;recordsCount=  

The offences are contained in ss 44ZZRF and 44ZZRG of the amended Trade Practices Act 1974 (Cwlth) and there are parallel new civil penalty prohibitions in ss 44ZZRJ and 44ZZRK. The definition of ‘cartel provision’ in s 44ZZRD is extremely complex (running for 6 pages of the bill).  

Trade Practices Act 1974 (Cwlth), Part VII. The ACCC has published guidelines on the authorisation process that provide some guidance on possible public benefits (2007a).  

The National Fuelwatch (Empowering Consumers) Bill 2008 was defeated in the Senate of the Federal Parliament on 12 November 2008.  

This is not to say that distinctions should not be drawn between degrees of morality. For example, some argue that breach of only the most fundamental of moral norms should attract criminal sanctions: see e.g., Bagaric (2001, n 11).  

No more authoritative statement of this view in Australian trade practices jurisprudence can be found than that of the High Court in its first and still most influential judgment on the proper approach to be taken to the competition provisions of the Trade Practices Act: Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR 177. The decision of the court has been lauded for its acknowledgement that the competition provisions of the Trade Practices Act reflect ‘economic law’ (Brunt, 1990, pp. 88–89). There, Deane J, reflecting the views of the court generally, made it clear that the notions and objectives of the law are to be seen as ‘economic and not moral ones’ (at p. 194).  

There are also tensions that arise from the use of the law as an instrument for administering economic policy, specifically ambiguity associated with the divergence between legal and economic concepts and modes of reasoning. This ambiguity has been manifested in the debate that surrounds the proper scope and use of expert evidence by economists in competition decision-making by the ACCC, Tribunal and the courts: see, e.g., Brunt, M. (1986), ‘The use of economic evidence in antitrust litigation: Australia. Brunt, M. (1965), reprinted in M. Brunt (Ed.), Economic Essays on Australian and New Zealand Competition Law. (2003). The Hague, London, New York: Kluwer Law International. Ch. 4, pp. 127–175. Examination of these issues is beyond the scope of this article.  

Huddart Parker and Co Ltd v Moorehead (1909) 8 CLR 330.  

This is not to say that remnants of the protectionist approach did not linger, as for example in provision for export exemptions where notified in advance: see Trade Practices Act 1974 (Cwlth), s 51(2)(6), and for commentary, see Rennie (2006); Victor (1992).  

Trade Practices Act 1974 (Cwlth), s 2.  

Trade Practices Act 1974 (Cwlth), s 45(2).  

Trade Practices Act 1974 (Cwlth), s 45(4), s 76C, s 76D.  

See also the recent discussion of total vs consumer welfare standards in Re Qantas Airways Ltd [2004] ACompT 9.  

Trade Practices Act 1974 (Cwlth), s 76. Note that for avoidance of doubt s 78 provided that criminal proceedings will not lie for breaches of Part IV of the Act.  

The ACCC participates regularly in discussions of the Organisation for Economic Co-operation and Development’s Competition Committee, its associated working groups, and the Joint Group on Trade and Competition: see http://www.accc.gov.au/content/index.phtml/itemId/304796#h3_22, last viewed 1 December 2008. The ACCC was a founding member of the International Competition Network in 2001: at http://www.accc.gov.au/content/index.phtml/itemId/304796#h3_22, last viewed 1 December 2008 and its personnel are also regular members of the
ICN’s working groups. For example, between 2003–2005 Mark Pearson, the ACCC’s Executive General Manager, Enforcement & Compliance Division was Co-chair of ICN Subgroup 2 on Enforcement Techniques. In 2004, the ACCC hosted the ICN’s Cartel and Leniency workshops in Sydney at which representatives from competition agencies around the world attended: at http://www.accc.gov.au/content/index.phtml/itemId/572851/fromItemId/623367

16 This subsequent submission was not made public at the time but has since been released in response to a request under the Freedom of Information Act 1982 (Cwlth) by Brent Fisse (2007d). Notably, while conceding the appropriateness of universal criminalisation, the ACCC nevertheless sought differential treatment of corporations depending on their size, observing: If a cartel involving small companies had only a limited impact on the economy, it would be expected that a judge would exercise his/her discretion to impose penalties at the lower end of the possible range. In practice, this may rule out imprisonment for those involved in small businesses.

17 Fisse (2007d).

18 For details of these proceedings, see http://www.brentfisse.com/news.html

19 The common law test was articulated by the English Court of Appeal in R v Ghosh [1982] QB 1053 and has been codified in s 130.3 of the Criminal Code Act 1995 (Cwlth).


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