

THE AUSTRALIAN CONVERSION: HOW THE CASE FOR CARTEL CRIMINALISATION WAS MADE

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ABSTRACT

The phenomenon of cartel criminalisation provides a window on dynamics in society at large. In particular, it exemplifies the political risk that governments face in wrestling with conflicting economic and social imperatives. This article uses the experience in Australia to demonstrate how the political risk inherent in cartel criminalisation may be overcome. Alive to public ambivalence over neoliberal market-based reforms, the Australian competition authority and government downplayed the economic rationale for cartel criminalisation and capitalised instead on the public's need for certainty and security in the social order. This was done by playing up the role of the government as protector of the economy, exploiting public scepticism towards globalisation and distrust of big business and invoking populist egalitarian sentiment. The strategy has been effective in the short term. However, challenges still loom in the enforcement of the cartel regime that may yet expose the fallacies in the case that was made for criminalisation.

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1. INTRODUCTION

In 2009 Australia joined the growing list of countries with criminal laws and sanctions directed at serious forms of cartel conduct.¹ Cartel criminalisation is attracting increasing academic interest (as evidenced by the dedicated series in this Journal),² in turn reflecting the priority given to anti-cartel enforcement generally over the last 10 to 15 years by governments and enforcement agencies.³ However, much of the dialogue on the subject to date has involved an elite ‘epistemic community’,⁴ comprising primarily competition law officials, practitioners, and other commentators. In keeping with this trend, an earlier article described the Australian ‘conversion’ to cartel criminalisation as ‘slow’, there being limited empirical evidence that it had engaged constituencies beyond the government, the competition authority and the legal profession.⁵

Amongst this narrow expert community, much of the debate has focused on what might seem to external audiences to be technical issues regarding the nature and effects of cartel conduct.⁶ In contrast, relatively little attention has been paid thus far to the presentation of the criminalisation reform in the broader political sphere and from the perspective of the general public. This is despite the fact that criminalisation represents a significant shift in norms associated with economic policymaking. That is, behaviour seen to damage the economy is now not merely illegal, but criminal. As

¹ The new cartel regime was introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth). For an explanation of the legislative changes and the key technical debates that attended the process of legislative design, see C Beaton-Wells, ‘Australia’s Criminalisation of Cartels: Will It Be Contagious?’ in *The Development of Competition Law: Global Perspectives*, Academic Society for Competition Law Series (Edward Elgar, 2011) (forthcoming).

² See also K J Cseres, M P Schinkel and F O W Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar, 2006); C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011).

³ On trends in anti-cartel enforcement over the last decade, see International Competition Network, ‘Trends and Developments in Cartel Enforcement’ (Paper presented at the 9th Annual ICN Conference, Istanbul, Turkey, 29 April 2010) 7.

⁴ F van Waarden and M Drahos, ‘Courts and (Epistemic) Communities in the Convergence of Competition Policies’ (2002) 9 *Journal of European Public Policy* 913; S Wilks, ‘Competition Policy’ in W Grant, D Coen and G Wilson (eds), *The Oxford Handbook of Business and Government* (Oxford University Press, 2010) 730, 732.

⁵ See C Beaton-Wells, ‘Criminalising Cartels: Australia’s Slow Conversion’ (2008) 31 *World Competition: Law & Economics Review* 205.

⁶ Much of the debate has focused, for example, on quantifying the ‘overcharges’ resulting from cartels, the scale of monetary sanctions required to effectively deter such conduct, the impact of criminalisation on immunity policies, and the complex issues surrounding the legal design of cartel offences. For an insight into the degree of technicality associated with the Australian legislation, see C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011).

such, it raises important questions about what has precipitated this change and how it tracks shifts in values and attitudes in the population more generally.⁷

Using the Australian experience as a case-study, the aim of this contribution to the series is to highlight how cartel criminalisation might be used as a mirror on broader societal dynamics and, in particular, the challenges associated with managing political risk.⁸ This task comprises two elements. Firstly, there is a need to map briefly an analytical framework that places cartel criminalisation within the context of political risk. Secondly, drawing on this framework, the article highlights the particular rhetoric used in Australia to make the case for criminalisation. The article thus uses the theoretical analysis as an heuristic device to explore the arguments made by proponents of criminalisation and the ways in which they were crafted to resonate with the Australian public. This resonance in turn provided a way by which the government could manage the political risk to which it was subject in deciding to criminalise cartel conduct.

The focus in this article on public perceptions and its relationship to political risk is in some contrast to the reality that cartel criminalisation – both in Australia and overseas – has been a top-down reform.⁹ In Australia, it was instigated by the Australian Competition and Consumer Commission ('ACCC'), the country's competition authority, was supported by successive Australian governments,¹⁰ and after a lengthy debate concerning the design of the legislation, was passed with bipartisan political support.¹¹ There is no evidence that the ACCC's campaign was prompted by or responsive to a groundswell of concern by the public in relation to cartel activity (if indeed, there was much public awareness of the issue at all, independent of ACCC agitation for criminal penalties). But nor was there any sign of public opposition to the reform. Even big business appeared apathetic or perhaps resigned to its inevitability.¹² Nonetheless, in Parliament, politicians spoke of cartel criminalisation as a development that had broad-based community support, a reform

⁷ Consistent with W Aubert, 'White Collar Crime and Social Structure' (1952) 58 *American Journal of Sociology* 263.

⁸ For an earlier sociological analysis of the introduction of trade practices legislation in Australia, see A Hopkins, *Crime, Law and Business: The Sociological Sources of Australian Monopoly Law* (Australian Institute of Criminology, 1978).

⁹ Beaton-Wells, 'Criminalising Cartels', above n 5. In relation to the international movement, see C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Cartels' (2006) 14 *Critical Criminology* 181; C Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation' in Beaton-Wells and Ezrachi (eds), *Critical Studies*, above n 2, ch 16.

¹⁰ This is not to say that the conservative government did not exhibit a substantial degree of ambivalence about the reform, as documented in C Beaton-Wells, 'The Politics of Cartel Criminalisation' (2008) 29 *European Competition Law Review* 185.

¹¹ For background to the legislative process, see Beaton-Wells and Fisse, above n 6, ch 1.

¹² See the analysis of business responses to the independent review that considered the ACCC's criminalisation proposal in Beaton-Wells, 'Criminalising Cartels', above n 5, 215–20.

that met community expectations.¹³ The central concern in this article is to demonstrate how the ‘meaning’ of cartel criminalisation was communicated to the Australian community in such a way that politicians were confident in assuming such support.¹⁴

2. CARTEL CRIMINALISATION WITHIN A FRAMEWORK OF POLITICAL RISK

The forces at work in the criminalisation of cartel conduct may be analysed by drawing on a concept of political risk. The concept of political risk reflects a fundamental tension in the governance of capitalist democracies, a tension widely recognised in sociological scholarship,¹⁵ with regard to the presence of and impact on governance of two conflicting imperatives. The first imperative is for government to promote the individualistic risk-taking, profit-seeking and entrepreneurial behaviour essential to a vibrant capitalist economy. Inherent in the capitalist economy is the constant demand for growth and innovation, a dynamic that thrives on a certain level of uncertainty where the consequences of action are not always clear. In Schumpeter’s words:

A capitalist economy is not and cannot be stationary. Nor is it merely expanding in a steady manner. It is incessantly being revolutionized *from within* by new enterprise ... Any existing structures and all the conditions of doing business are always in a process of change. Every situation is being upset before it has had time to work itself out. Economic progress, in capitalist society, means turmoil.¹⁶

The second imperative is to accommodate the citizenry’s need for a social order to which they can relate and to which they feel they belong. The central concern of government in this context is to be sensitive to the need for a level of social integration and solidarity, based on shared norms, social values and cultural identity.¹⁷ Collective

¹³ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 23–4 (Chris Hayes); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 25–6 (Bernie Ripoll); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 33 (Brett Raguse); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 29 (Janelle Saffin).

¹⁴ The authors make no assertion or argument here about the extent to which the Australian public in fact supports treating cartel conduct as a criminal offence. However they are involved in a project in which a survey representative of Australian public opinion on such and related matters has been conducted. The results of the survey are published at <www.cartel.law.unimelb.edu.au>.

¹⁵ J Habermas, ‘What Does a Crisis Mean Today? Legitimation Problems in Late Capitalism’ in S Seidman (ed), *Jurgen Habermas on Society and Politics: A Reader* (Beacon Press, 1989) 266–83; D Nelken, ‘White-Collar Crime’ in M Maguire, R Morgan, and R Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 2nd ed, 1997) 891–924; P O’Malley, *Risk, Uncertainty and Government* (Glasshouse Press, 2004).

¹⁶ J A Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, first published 1943, 2010 ed) 27–8.

¹⁷ E Durkheim, *The Elementary Forms of Religious Life* (The Free Press, 1964); M Douglas, *Risk and Blame: Essays in Cultural Theory* (Routledge, 1992).

representations of the social order provide certainty and predictability and allow us to make assumptions about the behaviour of our fellow citizens. They infuse a 'social rationality' that 'recognizes the values placed on social ties, traditions, human dignity and the desire for security and predictability.'¹⁸ This security and predictability, based as it is on traditions and social ties, is under constant threat by the process of 'creative destruction'¹⁹ that the market represents.

Managing these two imperatives is difficult since political strategies to promote a vibrant economy and those designed to reassure the citizenry about the social order can conflict with one another. Despite their contradictory nature, however, both of these pressures must be managed in order to retain political legitimacy.²⁰ Evidence of a decline in the legitimacy of western governments may reflect weaknesses in meeting this challenge. There are signs, for example, that governments have over-emphasised transformative economic change while failing to address the uncertainties and insecurities that such change generates.²¹ In particular, governments have been criticised for underestimating the degree of public ambivalence towards market-based reforms such as deregulation, liberalisation and privatisation.²²

Governments have various methods on which they draw to reassure the citizenry about the certainty and stability of the social order. One such method involves placing greater emphasis on 'law and order' approaches. Such approaches are often seen as socio-culturally appropriate even if, in fact, they are largely ineffective or even potentially counterproductive in tackling the 'problem' at hand. Thus, in the case of heightened public anxiety over street crime, governments often respond by increasing police resources and lengthening terms of imprisonment, notwithstanding (at least in some instances) preventative and/or rehabilitative measures may be more effective. Equally, in the case of threats posed by business (whether to the environment, consumers or other businesses), governments have sought to reassure the public

¹⁸ J F Short Jr, 'The Social Fabric at Risk: Towards the Social Transformation of Risk Analysis' (1984) 49 *American Sociological Review* 711, 720, drawing on C Perrow, *Normal Accidents: Living with High Risk Technologies* (Basic Books, 1984).

¹⁹ Schumpeter, above n 16. See ch 7, entitled 'The Process of Creative Destruction', at 71–5.

²⁰ J Habermas, *Legitimation Crisis* (Heinemann, 1979); Habermas, 'What Does A Crisis Mean Today?', above n 15, 266–83; J Habermas, 'Legitimation Problems in the Modern State' in W Outhwaite (ed), *The Habermas Reader* (Polity, 1996) 248–65.

²¹ See J Nye and P Zelikow, *Why People Don't Trust Government* (Harvard University Press, 1997); E Papadakis, 'Constituents of Confidence and Mistrust in Australian Institutions' (1999) 34 *Australian Journal of Political Science* 75.

²² On the effects of the narrow focus by senior bureaucrats on economic competitiveness in Australia, see, eg, M Pusey, *Economic Rationalism in Canberra: A Nation State Changes Its Mind* (Cambridge University Press, 1991); M Pusey, *The Experience of Middle Australia: The Dark Side of Economic Reform* (Cambridge University Press, 2003). See also the sceptical view of such reforms in J Quiggin, *Great Expectations: Microeconomic Reform in Australia* (Allen & Unwin, 1996); J Carroll and R Manne (eds), *Shutdown: The Failure of Economic Rationalism and How to Rescue Australia* (Text Publishing, 1992).

through a 'law and order' inspired proliferation of regulation and regulatory agencies.²³ This is despite the criticism that excessive regulation is stifling enterprise and acting as a 'drag' on the economy.²⁴

In order to understand the relevance of political risk to cartel criminalisation it is necessary first to appreciate the essential economic nature of this reform. Anti-cartel law enforcement is part of a broader range of neoliberal reforms aimed to enshrine the competitive market at the heart of economic life. These reforms, including privatisation of public services, deregulation of key markets (including finance and labour deregulation) and trade liberalisation, are directed at creating a strong capitalist economy. However, as a collective neoliberal enterprise, such reforms also have the potential to undermine accepted wisdoms, dispense with traditions and fracture accepted social relationships. Such changes generate uncertainty both for businesses (by dispelling assumptions that what is good for business is good for the nation)²⁵ and for the citizenry as a whole.

Criminalisation provides (by removing the security and protection that government involvement in the marketplace brings) a mechanism to counter such uncertainty. Through the process of denunciation and the promise of tough sanctions government is able to provide the reassurance that it will act in the public interest to protect society from businesses that do not so act. As a 'law and order' reform, criminalisation resonates with security demands, even when the ultimate goal is one of valorising uncertainty and risk-taking in the form of competition. Criminalising cartel conduct thus represents a complex social project involving potentially mixed messages between goals and means. While the goal of the reform (enhanced competition) connotes growth and change, the means of achieving it (criminalisation) connotes restraint and protection.

Criminalisation also provides assurances that it is possible to identify 'bad' or damaging behaviour (and distinguish it from behaviour that is either benign or even beneficial), and that it is possible to prosecute and sanction such behaviour through the criminal justice system. In this way it distracts from the substantial complexities in distinguishing between the effects of various forms of business collaboration and glosses over the challenges that arise in enforcing a criminal cartel regime.²⁶

In this article we draw on social attitudes research to illustrate the ambivalence of the Australian public towards the neoliberal reforms that have transformed the

²³ D Levi-Faur, 'The Rise of Regulatory Capitalism: The Global Diffusion of a New Regulatory Order' (2005) 598 *The Annals of the American Academy of Political and Social Science* 12.

²⁴ Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (January 2006).

²⁵ See further C Beaton-Wells and F Haines, 'Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour' (2009) 42 *Australian and New Zealand Journal of Criminology* 218.

²⁶ See C Beaton-Wells, 'Cartel Criminalisation and the Australian Competition and Consumer Commission: Opportunities and Challenges' in Beaton-Wells and Ezrachi (eds), above n 2, ch 8.

Australian economy over the last 25–30 years.²⁷ We then analyse statements by members of the ACCC and Parliament to illustrate how this ambivalence was addressed by cloaking the criminalisation proposal in socio-culturally appropriate messages that resonated with public demands for security and certainty in compensation for the uncertainty and insecurity caused by market competition. Four such messages are singled out for this purpose:

- criminalisation as *protecting* the economy (Part 3);
- criminalisation as *safeguarding* against globalisation risks (Part 4);
- criminalisation as *policing* big business (Part 5); and
- criminalisation as *promoting* egalitarianism (Part 6).

Independently, each of these messages resonated with public attitudes, playing up the benefits of an open competitive economy and the government's role in securing such benefits for all Australians, exploiting public distrust towards big business, feeding scepticism of globalisation and invoking populist cultural imagery.²⁸ In the process the technical complexity involved in characterising conduct for the purposes of the legal prohibitions and the difficulties involved in enforcing the law were downplayed. Together, the messages promulgated by the ACCC and the government provided a critical public platform that, in the short term at least, has countered any threats to political legitimacy that criminalisation as a competition-based policy might have entailed.

3. CRIMINALISATION AS PROTECTING THE ECONOMY

The ambivalence of Australians towards neoliberal economic reform is important to understand and draws on both the positive and negative impacts of those reforms. Certainly, the benefits of competition have been promoted strongly by both Labor and conservative governments in Australia over the last 25–30 years as part of an extensive

²⁷ In particular, the article draws on findings from The Australian Survey of Social Attitudes ('AuSSA'), a biennial survey which began in 2003 and has now been run four times (2003, 2005, 2007, 2009) by the Australian Demographic and Social Research Institute (ADSRI) at the Australian National University. It is a mail survey that gathers opinions on a range of topics from approximately 4000 Australians aged 18 or above who are selected randomly from the electoral roll. Significantly for present purposes, the first AuSSA survey was conducted in the year in which an independent review (the Dawson Review) recommended the introduction of criminal sanctions in Australia. See Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, 163 Conclusions point 2, 164 Recommendation 10.1. The data from the four AuSSA surveys to date is available on the AuSSA website <<http://aussa.anu.edu.au/index.php>>. The results of the 2003 survey and the 2005 survey have been analysed in reports on each of the surveys. See S Wilson et al (eds), *Australian Social Attitudes: The First Report* (UNSW Press, 2005); D Denmark et al (eds), *Australian Social Attitudes 2: Citizenship, Work and Aspirations* (UNSW Press, 2007).

²⁸ In particular, imagery associated with the constructs such as 'the fair go', 'mateship' and the Australian 'battler'. See, eg, R Ward, *The Australian Legend* (Oxford University Press, 1958); B Alder, 'The Australian Legend Fifty Years On' (2008) 52(9) *Quadrant* 78.

program of microeconomic reform. Together with measures for promoting economy-wide market competition, the reforms have involved privatisation of public services, trade liberalisation, and financial and labour deregulation.²⁹ This embrace of economic rationalist policies has spurred economic prosperity, income growth, employment rates and living standards.³⁰ The national competition policy reforms that commenced in the mid-1990s have been credited with delivering a productivity surge, price reductions (including in basic goods and services), and business innovation and responsiveness. Those benefits have been reported as flowing both to the low and high income earners and to the country and city.³¹

Social attitudes surveys in Australia show some level of public support for these reforms,³² including for private sector involvement in the provision of essential services.³³ Increased levels of international trade are also viewed by the public as providing better products for consumers,³⁴ and Australians are cognisant of enjoying a higher standard of living than previous generations.³⁵ Australians have been shown to understand that living standards depend on a growing economy. They place a premium on maintaining 'a high level of economic growth',³⁶ and are 'proud of Australia's economic achievements.'³⁷

²⁹ For documentation and analysis of the economic and political implications of these reforms, see, eg, P Kelly, *The End of Certainty: The Story of the 1980s* (Allen & Unwin, 1992); G Brennan and F Castles (eds), *Australia Re-Shaped: 200 Years of Institutional Transformation* (Cambridge University Press, 2002); Carroll and Manne (eds), above n 22; J Quiggin, *Great Expectations: Microeconomic Reform in Australia* (Allen & Unwin, 1996).

³⁰ See Organisation for Economic Cooperation and Development, *OECD Reviews of Regulatory Reform – Australia: Towards a Seamless National Economy* (15 February 2010).

³¹ Productivity Commission, *Review of National Competition Policy Reforms*, Report No 33 (28 February 2005) chs 3–4.

³² M Pusey and N Turnbull, 'Have Australians Embraced Economic Reform?' in Wilson et al eds, above n 27, ch 10, 161, 179. The findings on attitudes towards economic reform in the 2003 survey were consistent with the findings made on similar topics in a National Social Science Survey conducted in 1984–1985, as reported in J Braithwaite, 'Economic Policy: What the Electorate Thinks' in J Kelley and C Bean (eds), *Australian Attitudes: Social and Political Analyses from the National Social Science Survey* (Allen & Unwin, 1988) 26, 34.

³³ Pusey and Turnbull, above n 32, ch 10, 161, 164–8. Note also the responses to the AuSSA 2007 survey which reveal low levels of agreement with the proposition that 'privatisation of government has more benefits than costs'. The data for this survey is available at <<http://nesstar.assda.edu.au/webview/index.jsp?object=http://nesstar.assda.edu.au/obj/fCatalog/Catalog19>>. See the responses to question V311.

³⁴ Pusey and Turnbull, above n 32, ch 10, 161, 169.

³⁵ Pusey and Turnbull, above n 32, ch 10, 161, 173.

³⁶ Pusey and Turnbull, above n 32, ch 10, p. 161, 175. Interestingly, by the time of the AuSSA 2007 survey, expressed in terms of the aims of the country over the next 10 years, greater priority was given to issues of security, democracy and the environment. The data for this survey is available at <<http://nesstar.assda.edu.au/webview/index.jsp?object=http://nesstar.assda.edu.au/obj/fCatalog/Catalog19>> (see the responses to V315, V316). This may reflect a degree of contentment or complacency by Australians in relation to economic matters.

³⁷ Pusey and Turnbull, above n 32, ch 10, 161, 175.

At the same time, the social research demonstrates that Australians harbour a degree of uncertainty about the extent to which free markets and trade are likely to bring about an overall improvement in their quality of life.³⁸ A continued degree of protection of domestic industry and a centralised system of wage setting is supported,³⁹ and there is concern about the widening of the income gap (a development associated with economic reform) which in turn is said to explain strong support for social expenditure by government.⁴⁰ Overall, despite perennial demands by business to ‘cut red tape’, there is continued public support for state regulation.⁴¹ In particular, Australians have been shown to have high expectations that government will regulate effectively to protect consumers, the environment and workers.⁴²

Dispelling any ambivalence about the values of competition, then, was critical to the cartel criminalisation project. Invoking metaphors of disease and fears of death,⁴³ cartel criminalisation was presented by its proponents in Australia in a manner that drew on public support for the neo-liberal reforms that were argued to underpin economic welfare and growth. A tough stance on cartels was characterised as essential to the productive capacity of neo-liberal free market policy, specifically, by regulating to deter anti-competitive conduct that threatens the creativity and efficiency of the market. The economic benefits resulting from competition were a crucial aspect of the case made for criminalisation and were emphasised in almost every public statement made by members of the ACCC and Parliament, on both sides of the political divide, in support of the reform proposal.⁴⁴ They were front and centre in the speech by the

³⁸ This scepticism is consistent with surveys of happiness which consistently demonstrate that higher standards of living, beyond a given level, do not translate into a better overall quality of life, once satisfaction measures are taken into account. See T Jackson, *Prosperity without Growth? The Transition to a Sustainable Economy* (Sustainable Development Commission, 2009).

³⁹ Pusey and Turnbull, above n 32, ch 10, 161, 171.

⁴⁰ Pusey and Turnbull, above n 32, ch 10, 161, 172–5. Similar concerns and support for social spending by government on services are reflected in the 2007 and 2009 surveys.

⁴¹ This is consistent with what is seen as the strong attachment that Australians traditionally have had to the state. See W K Hancock, *Australia* (Ernest Benn, 1930) 72; N Butlin, ‘Colonial Socialism in Australia 1860–1890’ in H Aitken (ed), *The State and Economic Growth* (Social Science Research Council, 1959).

⁴² This specific finding was reported in Braithwaite, above n 32, 26, 34.

⁴³ The ACCC Chairman has repeatedly described cartels as a ‘cancer on our economy’. See, eg, G Samuel, ‘Cracking Cartels: Australian and International Developments’ (Speech delivered at Cracking Cartels: International and Australian Developments – Law Enforcement Conference, Sydney, 24 November 2004) 1; G Samuel, ‘Current Issues on the ACCC’s Radar’ (Paper presented at Competition Law Conference, Sydney, 29 May 2010) 3. The origin of this analogy is the reference to cartels as ‘a cancer on our open-market economy’ by then European Commissioner for Competition, Mario Monti, ‘Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?’ (Speech delivered at the Third Nordic Competition Policy Conference, Stockholm, 11 September 2000).

⁴⁴ See, eg, ACCC, Submission No 56 to Parliament of Australia, Treasury, Trade Practices Act Review, 2 June 2002, Part 2, 22–5; Samuel, ‘Cracking Cartels’, above n 43, 1; Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 881 (Mark Dreyfus) (member of the Labor Party); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 893

Minister for Competition Policy and Consumer Affairs in introducing the criminalising Bill to Parliament:

Competition is the primary means of ensuring that consumers get the best product or service for the lowest price possible. Competition enhances Australia's welfare generally, because the efficiencies it creates lead to improved productivity and ultimately increased standards of living.

Cartels are widely condemned as the most egregious forms of anticompetitive behaviour. At its heart, a cartel is an agreement between competitors not to compete. Cartel conduct harms consumers, businesses and the economy by increasing prices, reducing choice and distorting innovation processes.

The total annual cost of such conduct is difficult to quantify because the effects are dispersed and it is by its nature secretive, but it is likely to exceed many millions of dollars to the Australian economy each year, and many billions worldwide.⁴⁵

The complexity of the economic argument around the undesirable nature of certain types of cartel activity, the myriad of factors that affect prices and the problems with market creativity in the pursuit of profit at the expense of the public good were glossed over.⁴⁶ It was not expected that the public would appreciate the technical points of distinction in relation to competition law and cartel activity. There was confidence, however, that laypeople would understand a simplified message about the effects of such conduct on them as consumers, namely, that cartels raised prices. According to the ACCC Chairman, 'they [referring to the public] don't understand what's not a cartel but they do understand when they've been ripped off.'⁴⁷ Similarly one Parliamentary member described her specific experience in interacting with members of the public on the issue as follows:

Nothing irritates Australian consumers more than paying too much for goods and services that are offered in the marketplace. They absolutely hate it, and they talk to us politicians about it all the time. I do mobile offices almost every Saturday morning in my electorate,

(Patrick Secker) (member of the Liberal Party).

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12 309, (Chris Bowen, Minister for Competition Policy and Consumer Affairs and Assistant Treasurer).

⁴⁶ On the ambiguities (economic, legal and moral) associated with cartels and criminalisation, see Beaton-Wells and Haines, above n 25. This is not to say that there was not substantial debate within the expert community in relation to definition of the cartel offences, and efforts in particular to ensure that they do not over-reach to capture or chill benign or even pro-competitive conduct. See, eg, the submissions to the Senate Economics Committee that examined the Trade Practices (Cartel Conduct and Other Measures) Amendment Bill 2009 (CC&OM Bill). The submissions are available at <www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/report/e01.htm>. See, more generally, D McBarnet, and C Whelan, *Creative Accounting and the Cross-Eyed Javelin Thrower* (J Wiley, 1999).

⁴⁷ Interview with Graeme Samuel AO, ACCC Chairman, Sarah Court, ACCC Commissioner and Marcus Bezzi, ACCC Executive General Manager, Enforcement and Compliance (Melbourne, 23 March 2010) ('ACCC Interview'). For a similar account, see Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 27 (Christopher Hayes).

and I can guarantee you that when I am at Brassall Shopping Centre in Ipswich on Saturday morning someone will come and talk to me about the prices of goods offered in the supermarkets across Ipswich and beyond. We have seen absolutely stark displays of malfeasance by leading companies in this country in relation to price fixing. It is a national disgrace and it really annoys the Australian public.⁴⁸

The message about the impact of cartel conduct on ordinary consumers was fuelled by judicial statements made in a case in which record-breaking penalties were imposed on one Australia's largest companies, Visy Pty Ltd, and its owner, Australia's 4th richest business person, Richard Pratt, in November 2007 relating to a price fixing cartel in the market for cardboard packaging.⁴⁹ The case was resolved in the course of a federal election campaign and proved catalytic in the final push to introduce criminalisation in Australia.⁵⁰ In a condemnatory judgment, endorsing the penalties proposed by the ACCC, Heerey J made the comment:

Every day every man, woman and child would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case therefore had the potential for the widest possible effect.⁵¹

That statement particularly, and the *Visy* case generally, were drawn on by criminalisation advocates in the debate as a means of reinforcing the relevance of the reform to the general Australian public.⁵² In the ACCC Chairman's view, this strategy was effective – the *Visy* matter and Heerey J's 'judgment of outrage' gave the reform proposal 'enormous impetus'; the subject of extensive newspaper and talk-back radio coverage, it was a case and a judgment that 'captured the imagination'.⁵³

The ACCC's triumph in the *Visy* case came on the eve of the 2008 financial crisis that engulfed the global economy. The crisis provoked critical reflection by the then Australian Prime Minister on the need for greater government intervention in

⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 891–2 (Nola Marino). See, to similar effect, Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 909 (Janelle Saffin). Ironically, this statement bears out the ACCC Chairman's point about people not understanding 'what's not a cartel'. Inquiries into the grocery sector in Australia have found it to be competitive (collusion-free) and yet public perceptions evidently appear to be otherwise.

⁴⁹ See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 3]* (2007) 244 ALR 673 ('*Visy*').

⁵⁰ See Beaton-Wells and Haines, above n 45, 219, 232–3.

⁵¹ *Visy* (2007) 244 ALR 673, [312].

⁵² Samuel, 'Current Issues', above n 43, 4; G Samuel, 'Cartel Reform and Compliance with the *Trade Practices Act*' (Paper presented at Australian Corporate Lawyers Association National Conference, Melbourne, 13 November 2009) 2; Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 2009, 785 (Luke Hartsuyker); Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 2009, 791 (Judi Moylan).

⁵³ ACCC Interview, above n 47, 43.

markets,⁵⁴ a theme that proved effective in the ensuing Parliamentary debate over cartel criminalisation. Noting the re-assertion of government oversight in response to the global financial crisis, one Parliamentary member felt it necessary to affirm the virtues of the market (and the threat posed to those virtues by cartel conduct):

It is well known that cartel behaviour is the antithesis of the market economy. It is a reality that we live in a market economy. There is political debate flying around at the moment about various interpretations of the ideologies of the market economy we live in: whether it is a welfare capitalist state or whether it is a neoliberal state. The reality is that Australia is a market economy and, therefore, one of the greatest offences under competition laws that could take place is cartel behaviour at the top end.⁵⁵

However, consistent with the need to placate public insecurities associated with competition, it was also asserted that a free market economy did not mean eschewing a role for government. As another member was quick to point out, government must act as protector of the market and competition – hence the need for anti-competitive conduct of the worst kind to be criminalised:

A free market does not mean one which is free of government intervention and regulation. Indeed, I wholeheartedly believe the government should play a key role in facilitating market competition – not just the basic functioning of maintaining the legal system and protecting property rights but by ensuring it is also free of private force and fraud.⁵⁶

4. CRIMINALISATION AS SAFEGUARDING AGAINST GLOBALISATION RISKS

The ambivalence of the Australian public towards market competition is also mirrored in attitudes towards globalisation. Australia's social attitudes research has revealed that, at the time of criminalisation debate, there were reservations about the acceleration of Australia's engagement with the global economy through the relaxation of the protectionist and regulated framework of the Australian settlement that has

⁵⁴ Kevin Rudd, 'The Global Financial Crisis', *The Monthly* (Melbourne) Issue No 42, February 2009. See also P A Hall and D Soskice, 'Introduction' in P A Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001) 1–68.

⁵⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 28 (Robert Oakeshott). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 906–7 (Brett Raguse).

⁵⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 894 (Patrick Secker). See also the views expressed in G Reback, *Free the Market: Why Only the Government Can Keep the Marketplace Competitive* (2009, Portfolio).

been taking place since the 1980s.⁵⁷ The survey results show that many Australians saw increased economic openness as risky for both workers and businesses. In particular, a large majority of respondents were anxious about the multinational companies 'doing more and more damage to local businesses in Australia'.⁵⁸

In the criminalisation debate, public ambivalence towards foreign businesses could be exploited with messages that 'predatory' international cartels needed to be deterred from Australian shores. The initial call made by the then ACCC Chairman Allan Fels in favour of criminal sanctions for the most serious acts of collusion placed particular emphasis on the risks to the Australian consumers from international cartels operating in the global economy.⁵⁹ This was consistent with much of the US rhetoric in support of a tougher more coordinated response to cartels worldwide, justifying its uncompromising application of criminal enforcement to foreign companies and executives whose collusive activities were damaging to the US economy.⁶⁰

Fels tailored the message for Australian audiences by emphasising the vulnerability of Australia's small economy. In essence his argument was that, while microeconomic reforms aimed at ensuring Australia's participation in international trade and commerce brought benefits, it also posed threats:

The relative leniency of Australia's penalty regime leaves us exposed to enormous risks in the global economy. Globalisation, technological innovation, deregulation and lower barriers to trade and investment have opened our markets to increased competition from multinational firms. While the entry of such firms into Australian markets can promote the benefits of increased competition, their entry can be equally damaging if it involves cartel activity, either on a global scale or targeted at Australian markets. Because Australian markets are comparatively small by international standards and tend to be characterised by high levels of concentration, they are particularly vulnerable to the detrimental effects of hard core cartels. It is vital to the future integrity of Australian markets that these multinational firms, which operate in major foreign markets with much tougher penalties, do not come to see Australia as being soft on serious hard core collusion and anti-competitive conduct.⁶¹

⁵⁷ I Marsh, G Meagher and S Wilson, 'Are Australians Open to Globalisation?' in Wilson et al (eds), above n 27, ch 14, 240.

⁵⁸ Marsh, Meagher and Wilson, above n 57, ch 14, 243.

⁵⁹ A Fels, 'Regulating in a High-Tech Marketplace' (Paper presented at the Australian Law Reform Commission Conference on Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 9 June 2001).

⁶⁰ See, eg, S Hammond, 'Charting New Waters in International Cartel Prosecutions' (Paper presented at the 20th Annual National Institute on White Collar Crime, Miami, 2 March 2006); T Barnett, 'Global Antitrust Enforcement' (Paper presented at Georgetown Law Global Antitrust Enforcement Symposium, Washington, 26 September 2007).

⁶¹ Fels, above n 59, 1. And further, at the conclusion of his speech: '[t]he future integrity of Australian markets in the global economy depends on Australia's competition laws keeping pace with those of our major trading partners. We simply cannot be left behind. The stakes are too great.' The same

In Fels' speech, and throughout the criminalisation debate, the argument about susceptibility to international cartels was bolstered by unflattering comparisons of the Australian penalty regime with those of Australia's 'major trading partners' which have a criminal regime in place.⁶² The 1998 Recommendation of the Organisation for Economic Co-operation and Development ('OECD') in favour of sanctions that effectively deter 'hard core' collusion was repeatedly relied upon to make it clear that Australia had fallen behind 'international best practice'.⁶³ Indeed, international developments (including the introduction of a cartel offence in the UK in the same year as the ACCC submission to the Dawson review) were said by the ACCC to make it 'inevitable that criminal sanctions will be introduced to Australia'.⁶⁴ Once the criminalising legislation had been passed, Australia's position in the global 'war on cartels' went from one of 'lagging behind' to 'cement[ing] its place in the big league of international anti-cartel enforcement'.⁶⁵

The case for criminalisation thus capitalised on Australian uncertainties regarding the effects of globalisation generally – and its economic effects in particular.⁶⁶ In the Parliamentary debate accompanying the introduction of the legislation, Australia's vulnerability to international cartels on account of its small size was asserted as a 'fact' ... that the man or woman in the street also knows'.⁶⁷ It was also a matter identified as being of renewed concern in light of the global financial crisis.⁶⁸ Public

theme was developed in ACCC, 'Submission', above n 44, Part 3, 192–5. It was picked up subsequently in the legislative debate. See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 898 (Chris Hayes).

⁶² Fels, above n 59, 1; ACCC, 'Submission', above n 44, Part 2, 24. The poor record of enforcement outside of the US barely rated a mention. See generally C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Cartels' (2006) 14 *Critical Criminology* 181.

⁶³ ACCC, 'Submission', above n 44, Part 2, 21, referring to Organisation for Economic Co-operation and Development, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, C(98)35/FINAL (14 May 1998). The definition given to 'hard core' conduct in this Recommendation became the blueprint for the drafting of the Australian cartel offences, with unfortunate results. See the analysis in Beaton-Wells and Fisse, above n 6, ch 2, ch 4.

⁶⁴ ACCC, 'Submission', above n 44, Part 2, 32.

⁶⁵ Samuel, 'Current Issues', above n 43, 4.

⁶⁶ Globalisation is, of course, a multi-layered phenomenon, with political, social and cultural effects, as much as economic effects. There is a vast literature on these various dimensions of globalisation and their impact in Australia. See, eg, C Bean, 'Open or Closed Boundaries? Attitudes towards Sovereignty Issues in Australia' (2002) 21 *Policy, Organisation and Society* 25; G Melleuish, *The Packaging of Australia: Politics and Culture Wars* (UNSW Press, 1998); J Vowles and C Bean, 'Electoral Politics: Does Globalisation Matter?' (2006) 41 *Australian Journal of Political Science* 273. For present purposes, however, the focus is on public attitudes towards the economic aspects of globalisation.

⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 927 (Nick Champion).

⁶⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 11 (Mark Dreyfus); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 890 (Shayne Neumann).

attitudes towards globalisation reflect well the tensions inherent in political risk, namely tensions between the need to nurture the pursuit of entrepreneurial opportunity whilst responding to demands for greater security. As indicated above, at the time of the criminalisation debate, a substantial proportion of Australians agreed that ‘free trade leads to better products becoming available in Australia’,⁶⁹ but an even higher proportion agreed with the statement that ‘Australia should limit the import of foreign products in order to protect its national economy.’⁷⁰ Australian ambivalence towards global competition could be assuaged by criminal legislation that appeared to protect the local entrepreneurial spirit and defend the country against malevolent predators.

5. CRIMINALISATION AS POLICING BIG BUSINESS

Public ambivalence towards ‘big business’, including mistrust of the relationship between government and big business, was also drawn on in the case for cartel criminalisation in Australia. On the one hand, Australians revel in the success of high profile business executives,⁷¹ yet, at the same time social attitudes research shows a large proportion of Australians to be concerned that ‘big business should have less power’.⁷² While there is evidence of declining levels of confidence in several important institutions in society (the political system, banks, courts and media, among them),⁷³ it is Australia’s major companies that have suffered the largest and most sustained fall in public trust over the last 20 years.⁷⁴ Such mistrust has been fuelled by extensive media coverage given to instances of corporate malfeasance generally, particularly

⁶⁹ Marsh, Meagher and Wilson, above n 57, ch 14, 243.

⁷⁰ Marsh, Meagher and Wilson, above n 57, ch 14, 243. The results showed a similar wariness about greater cultural engagement with the world, particularly Asia. It was this latent resistance to building closer ties with our Asian neighbours (a key plank of the political and economic agenda of the Labor government in the 1990s) that spawned support for a right wing party, ‘One Nation’. It has been noted that ‘many who voted for One Nation linked new economic insecurities to the open economy and wanted a return to economic nationalism and/or worried about Asian influence and immigration’: see Marsh, Meagher and Wilson, above n 57, 241.

⁷¹ Particularly when business success is combined with success in sport: see, eg, P Barry, *The Rise and Fall of Alan Bond* (Transworld, 1991).

⁷² C Bean, ‘Is There a Crisis of Trust in Australia?’ in Wilson et al (eds), above n 27, ch 8, 122, 132–3. This is to be contrasted with views in the 1970s and 1980s when people believed that the trade unions had too much power. See I McAllister, *Political Behaviour: Citizens, Parties and Elites in Australia* (Longman Cheshire, 1992).

⁷³ Papadakis, above n 21; D Burchell and A Leigh (eds), *The Prince’s New Clothes: Why Do Australians Dislike their Politicians?* (UNSW Press, 2002). A similar ‘crisis of confidence’ has been observed in the US, and has generated a substantial literature on the associated concept of social capital: see S Lipset and W Schneider, *The Confidence Gap: Business, Labor and Government in the Public Mind* (The Free Press, 1983); Nye and Zelikow, above n 21; R Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, 2000).

⁷⁴ Papadakis, above n 21, 76; Bean, ‘Crisis of Trust?’, above n 72, 122, 131–3.

involving well-known individuals falling from grace,⁷⁵ as well as by political crackdowns on senior executive pay-packets in times of economic trouble.⁷⁶

If the criminalisation campaign was effective in exploiting public cynicism about big business, it might also have been seen as a vehicle for easing public mistrust in government generally and the extent to which the federal government is 'run for a few big interests' rather than 'run for the benefit of all',⁷⁷ responses consistent with declining legitimacy of contemporary Australian governments.⁷⁸ As a policy of cracking down on greedy self-interested big business, cartel criminalisation would have played well to politicians concerned about public attitudes of the kind revealed in this research. It would have signalled that government was ready to be tough on big business and so emphasise its independence from their influence.

The case made for cartel criminalisation was focussed, explicitly at the outset, on big business. In Fels' 2001 speech he 'emphasised' that his proposal was 'aimed only at the larger end of the economy where there is scope for highly profitable collusion on a massive scale'.⁷⁹ To be clear, he went on:

Small business, the rural sector and the professions have nothing to fear from this proposal and much to gain, since they too are potential victims of global cartels. Similarly this proposal is not about targeting unions. The continuing dialogue on civil remedies will be of utmost relevance to these sectors of the economy, but the debate on the need for

⁷⁵ In 1980s–1990s, such scandals involved well known business men Alan Bond and Christopher Skase. See, eg, Trevor Sykes, *Bold Riders: Behind Australia's Corporate Collapses* (Allen & Unwin, 1994); T Pryor, *Christopher Skase: Beyond the Mirage* (Crown Content, 1994); Paul Barry, *The Rise and Fall of Alan Bond* (Transworld Publishers, 1991). On a similar phenomenon in the US, see Kathleen F Brickey, 'From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals' (2008) 33 *The Journal of Corporation Law* 625.

⁷⁶ The most recent of these, in the course of the global financial crisis, saw an inquiry commissioned into executive remuneration led, perhaps not coincidentally, by ex-ACCC Chairman and criminalisation advocate, Professor Allan Fels. See L Tingle, F Anderson and D Kitney, 'Labor Attacks Executive Pay', *Australian Financial Review* (Sydney) 19 March 2009, 14; P Williams, 'Cartel Buster Set Loose in Cosy Club of Bosses' Pay', *Australian Financial Review* (Sydney) 8 April 2009, 60.

⁷⁷ 2003 survey data showed 60% of respondents to believe that the federal government was 'entirely run for a few big interests' or 'mostly run for a few big interests'. See Bean, 'Crisis of Trust?', above n 72, 127. Consistent with evidence that political trust follows cyclical patterns, the 2003 survey was conducted at a time when a conservative party government (the party most aligned traditionally with business interests) had been in power for seven years. In 2005, the theme of trust was explored further in the social attitudes research, revealing substantial support for the views that the government 'doesn't care what [ordinary people] think' and 'cannot be trusted to do what is right'. See C Bean and D Denmark, 'Citizenship, Participation, Efficacy and Trust in Australia' in Denmark et al (eds), above n 27, ch 3, 58, 67–8. The view that the average citizen has minimal input to or influence on government decision-making was also reflected in the Australian Survey of Social Attitudes 2007 survey. The data for this survey is available at <<http://nesstar.assda.edu.au/webview/index.jsp?object=http://nesstar.assda.edu.au/obj/fCatalog/Catalog19>> (see the responses to questions V126, V127).

⁷⁸ Papadakis, above n 21; Burchell and Leigh (eds), above n 73.

⁷⁹ Fels, above n 59, 3.

imprisonment should not be side-tracked by baseless fears of heavy handed intervention in these areas.⁸⁰

To an extent, the exclusion of small business from the ACCC's criminalisation proposal could be defended on economic grounds – a vibrant small business sector is argued as important to competition in a relatively small and hence concentrated economy.⁸¹ At the same time, this aspect of the proposal highlighted the small business versus big business debate in Australian politics generally,⁸² a debate that has influenced so much of Australian trade practices law.⁸³ It also had an undeniably populist association with the ACCC as the 'watchdog'⁸⁴ protecting Australian 'battlers' against unscrupulous big business⁸⁵ while appealing more generally to an egalitarian streak in Australian society (referred to further below). Cracking down on big business was said to be necessary to ensure a 'fair and proper playing field'⁸⁶ in business; to ensure a 'fair go' for small business. As was argued by the Minister for Competition Policy and Consumer Affairs in the Parliament, the criminalising legislation:

protects those businesses doing the right thing – businesses out there working hard, putting in tenders, reducing their prices to try and get business, and not colluding with the people who should be their competitors. Businesses doing the right thing deserve to know that businesses doing the wrong thing will be dealt with in the strictest possible way.⁸⁷

The proposal of limiting criminal liability to big business was developed in the ACCC's subsequent submission to the Dawson Review.⁸⁸ Not surprisingly, however, criticism

⁸⁰ Fels, above n 59, 3.

⁸¹ See ACCC, 'Submission', above n 44, Part 3, 191. On the capitalist underpinnings of this argument, see H Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (Between the Lines, 2002).

⁸² As evidenced in a number of contributions made to the Parliamentary debate over the CC&OM Bill: see, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 35 (Brett Raguse); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 40 (Tony Zappia).

⁸³ See W Pengilly, 'Imperfect Competition', *Australian Financial Review* (Sydney) 20 June 2008, 9; John Durie, 'Yet Another Review of Competition Law', *The Australian* (Sydney) 21 July 2010, 44. For some parliamentarians it appears that cartel criminalisation was solely about protecting small business and promoting small business development in the absence of abuses by major corporations: see, eg, the contribution by Nola Marino: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 15–16 (Nola Marino).

⁸⁴ F Brenchley, *Allan Fels: A Portrait of Power* (John Wiley & Sons, 2003) 3.

⁸⁵ Beaton-Wells and Haines, above n 25, 219, 229.

⁸⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 904 (Christopher Hayes).

⁸⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 67 (Chris Bowen).

⁸⁸ See ACCC, 'Submission', above n 44, Part 2, 21, 41–2, proposing that criminal sanctions apply only to a corporation that alone, or in combination with its related entities, satisfied two or more of the following criteria in a year in which the contravention occurred: gross revenue in excess of AU\$100

from the legal profession and peak organisations representing big business meant these limits were jettisoned,⁸⁹ with the ACCC effectively accepting that ‘a crime for one should be a crime for all’.⁹⁰

However, in substance, the idea that serious cartel conduct was a crime of big business was by no means abandoned. It re-emerged in the Memorandum of Understanding (‘MOU’) subsequently published by the ACCC and the Commonwealth Director of Public Prosecutions concerning the factors that they would take into account in deciding when to treat a matter as involving a potential offence rather than a civil contravention. While avoiding the language of small or big business and any variants thereon, the MOU made it clear that criminal enforcement would concentrate on ‘conduct that can cause large scale or serious economic harm’.⁹¹ More specifically an apparent threshold requirement would be that the value of commerce affected by the cartel would have exceeded AU\$1 million within a 12 month period.⁹² While not as explicit as its original proposal, the ACCC evidently interprets this guidance as preventing criminal investigations and prosecutions of small business.⁹³

The focus on big business should be seen not only as concerned to send a message to small business and their supporters about immunity from the ‘heavy handed intervention’⁹⁴ that a criminal regime would represent. It can also be interpreted as exploiting popular perceptions more generally about big business. At times, the case made for criminalisation was based as much if not more on a moral rather an economic characterisation of cartel conduct. Quite aside from its economic effects ‘hard core collusion is morally reprehensible’, it was submitted by the ACCC in its proposal to the Dawson Review.⁹⁵ This portrayal became a recurring theme, with emphasis on cartel conduct being dishonest, deliberate and clandestine and, in these respects,

million, gross asset value in excess of AU\$30 million, more than 1000 full-time equivalent employees.

⁸⁹ Law Council of Australia, Business Law Committee, Submission No 138 to Parliament of Australia, Treasury, *Trade Practices Act Review*, 24 July 2002; Australian Chamber of Commerce and Industry, Submission No 104 to Parliament of Australia, Treasury, *Trade Practices Act Review*, 15 July 2002.

⁹⁰ Trade Practices Committee of Review, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, 149.

⁹¹ *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct*, July 2009, [4.4].

⁹² *Ibid.* For criticisms of this requirement as ambiguous and ineffective as a criterion for filtering the seriousness of cartel conduct, see Beaton-Wells and Fisse, above n 6, ch 9.

⁹³ Referring to political concerns about the possible prosecution of small local businesses, the Chairman, Graeme Samuel, thus stated: ‘there is no way they’ll be criminally prosecuted, because the MOU prevents it occurring’: ACCC Interview, above n 47, 45.

⁹⁴ Fels, above n 59, 3.

⁹⁵ ACCC, ‘Submission’, above n 44, Part 2, 20.

tantamount to ‘theft’.⁹⁶ Such conduct, it was asserted, is solely for the illegitimate enrichment of greedy companies and executives that engage in it at the expense of Australian consumers and ‘honest’ Australian businesses.⁹⁷ While logic dictates that this description apply to cartel conduct regardless of the size of the business engaged in it, the arguably inescapable association was with big business as the target of the proposed criminal regime.⁹⁸ The association was reinforced by the ACCC’s insistence that defendants will not be able to negotiate a substantial civil settlement as a strategy for avoiding criminal charges ‘[i]n the case of serious cartel activity’, the Chairman has said, ‘no matter how fat your cheque book, nor to what lengths a corporation will go to defend the position of its executives, there is no amount of money that will remove the risk of you going to gaol.’⁹⁹ Ultimately, the disparaging portrayal of big business in the arguments made for criminalisation in Australia took advantage of high levels of public distrust in this sector of society.

6. CRIMINALISATION AS PROMOTING EGALITARIANISM

The final element in the case for cartel criminalisation appealed to an ethos of egalitarianism in Australian culture, an egalitarianism seen under threat by rapid economic change.¹⁰⁰ In the context of the criminalisation debate this egalitarian ethos

⁹⁶ ACCC, ‘Submission’, above n 44, Part 2, 24; Samuel, Cracking Cartels, above n 43, 5; G Samuel, ‘Opening Statement’ (Visy News Conference, 2 November 2007) 3; G Samuel, ‘Cartel Reform and Compliance with the *Trade Practices Act*’, 13 November 2009, 2–3; Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 67 (Chris Bowen); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 21 (Patrick Secker); Samuel, ‘Current Issues’, above n 43, 3.

⁹⁷ Samuel, ‘Cracking Cartels’, above n 43, 1; Samuel, ‘Opening Statement’, above n 96, 3.

⁹⁸ As inherent, for example, in the statement by the relevant Minister that serious cartel conduct is ‘theft by the powerful from the powerless’: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 67 (Chris Bowen).

⁹⁹ ACCC, ‘ACCC Warns of Gaol for Cartel Conduct’ (News release NR 162/09, 9 July 2009). The suggestion that companies would seek to pay their way out of responsibility for their criminal conduct or that of their executives is of itself tarnishing. That said, the alternative scenario in which companies cut loose employees facing criminal charges may be even less flattering: see, eg, the reaction to Rio Tinto’s handling of the conviction and imprisonment of one of its senior executives in China for bribery-related offences. The media noted that Stern Hu and other executives were sacked ‘within hours’ of the guilty verdicts and ‘even before an appeal was considered’. See ABC Radio, ‘Rio Tinto to Launch Investigation into China Bribes’, *AM Program*, 30 March 2010 (Peter Ryan and Tony Eastley). In an extremely unflattering portrayal of Rio Tinto’s action in sacking Stern Hu and his three colleagues, one commentator has said ‘[a]t Rio Tinto they just could not wait to give their four employees the sack’ and gave the general warning that ‘[y]ou work for this lot at your own peril’. See R Farmer, *Work at Rio Tinto at Your Peril* (30 March 2010) Crikey <www.crikey.com.au/2010/03/30/work-at-rio-tinto-at-your-peril/>.

¹⁰⁰ See, eg, E Thompson, *Fair Enough: Egalitarianism in Australia*, (UNSW Press, 1994); F Argy, *Where To From Here? Egalitarianism under Threat in Australia* (Allen & Unwin, 2003).

was used to appeal to the idea that all should be treated equally before the law.¹⁰¹ In this context, an egalitarianism message could draw on the emphasis on law and order in the contemporary era,¹⁰² allowing for comparisons between cartel conduct and other ‘crimes’ both of a white collar and street nature to be made. Such an emphasis was consistent also with a well-established trend across the world of ‘populist punitiveness’, that is, a trend of western governments taking advantage of what they perceive as the generally punitive stance of the public and its view that the criminal justice system is unacceptably lenient.¹⁰³

Public perception of the unequal nature of the justice system is captured by social attitudes research in Australia. In a 2003 social attitudes survey 81% of respondents agreed with the statement that ‘when big businesses break the law they often go unpunished’ and 40% strongly agreed with the statement.¹⁰⁴ There is also evidence that Australians regard the criminal justice system generally as too ‘soft’ in punishing criminals – a recent series of surveys reporting high levels of agreement with the proposition that there should be ‘stiffer sentences’ for ‘people who break the law.’¹⁰⁵

Evidently the ACCC and Australian politicians were of the view that assertions about equality of legal treatment were helpful to the case for cartel criminalisation. An early and consistent message was that the nature and effects of ‘hard core’ collusion rendered it comparable with other so-called ‘white collar offences’ such as insider trading or market manipulation.¹⁰⁶ Hence the argument was made that failing to treat serious cartel conduct as criminal would be ‘anomalous’ in the treatment of white

¹⁰¹ As noted in Part 5 above, egalitarianism in business was also a consistent theme.

¹⁰² D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001).

¹⁰³ The term ‘populist punitiveness’ was coined by A Bottoms, ‘The Philosophy and Politics of Punishment and Sentencing’ in C Clark and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, 1995). There has since been a large body of empirical research that has revealed that in fact public attitudes are far more sophisticated, complex and nuanced than politicians (and the mass media) seem to perceive: see, eg, D Green, ‘Public Opinion Versus Public Judgment about Crime: Correcting the “Comedy of Errors”’ (2006) 46 *British Journal of Criminology* 131; P Almond, ‘Public Perceptions of Work-Related Fatality Cases: Reaching the Outer Limits of “Populist Punitiveness”?’ (2008) 48 *British Journal of Criminology* 448; A Durham, ‘Public Opinion regarding Sentences for Crime: Does It Exist?’ (1993) 21 *Journal of Criminal Justice* 1; D McKillop and E Helmes, ‘Public Opinion and Criminal Justice: Emotion, Morality and Consensus’ (2003) 10 *Psychiatry, Psychology and Law* 210; J Roberts and A Doob, ‘Sentencing and Public Opinion: Taking False Shadows for True Substances’ (1989) 27 *Osgoode Hall Law Journal* 491.

¹⁰⁴ Pusey and Turnbull, above n 32, ch 10, 161, 176.

¹⁰⁵ The data for the 2003, 2005 and 2007 surveys is available at <<http://nesstar.assda.edu.au/webview/index.jsp?object=http://nesstar.assda.edu.au/obj/fCatalog/Catalog19>>. But see also L Roberts and D Indermaur, ‘What Australians Think about Crime and Justice: Results from the 2007 Survey of Social Attitudes’ (AIC Research and Public Policy Series 101, 2009) 18.

¹⁰⁶ Fels, above n 59, 3.

collar criminal behaviour.¹⁰⁷ Emphasis was also given to the importance of not treating and not being seen to treat white collar crime (as serious cartel activity was characterised) more leniently than blue collar crime.¹⁰⁸ Thus cartel criminalisation was advocated as a matter of fair and equitable treatment by the legal system, regardless of the defendant's socio-economic status. The same idea could be seen as the subtext to the repeated description by the ACCC Chairman of executives who engage in cartel conduct as 'well dressed thieves',¹⁰⁹ the inference being that white collar cartelists are the same as blue collar thieves except only for the fact that they dress better.¹¹⁰

The justification for cartel criminalisation based on ensuring equivalent treatment of 'crimes in the suites' and 'crimes in the streets' was taken up by politicians, as reflected in the following contribution by a Labor member of Parliament in the legislative debate:

Cartel conduct is effectively extortion – often to the tune of millions of dollars. I cannot for the life of me see why a car thief, a bank robber or a person practising extortion should go to prison while company executives can walk free after colluding with each other to set artificially high prices and to enrich themselves in the process. Professor Allan Fels quite rightly points out that conduct of this nature is not a victimless crime. The victims are real people who are being cheated out of real money. This government will not stand by and watch Australians being exploited by white collar criminals intent on extortion by stealth. We will act.¹¹¹

And in a similar vein by another Parliamentarian:

it irks and irritates the Australian public that the big fish seem to get away with so much. It is very important that we have this type of legislation. If you go to the magistrate's court in any particular part of this country you see lots of people with drink-driving, drug or stealing offences. They are facing criminal charges in a magistrate's court or a court of petty sessions across this country. Too often, we do not have the big guys, the big

¹⁰⁷ ACCC, 'Submission', above n 44, Part 2, 20. A related argument was that criminalisation was justified by the emphasis placed by 'members of the community, including in the business community' on 'strong law and order policies': at 25.

¹⁰⁸ Fels, above n 59, 3. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 22 (Chris Hayes): 'Society no longer treats white collar crime as a lesser evil. People are more inclined today to ask why white collar offenders are not pursued and punished with as much vigour as less sophisticated criminals?'

¹⁰⁹ Samuel, 'Opening Statement', above n 96, 3; Samuel, 'Cartel Reform' above n 96, 3, and further: 'they may carry a briefcase rather than a gun, but if a business executive steals millions from consumers, he or she will be exposed to the same prospect of time behind bars'; Samuel, 'Cracking Cartels', above n 43, 1, 5; Samuel, 'Current Issues', above n 43, 3, 5.

¹¹⁰ For an analysis that is largely tongue in cheek, albeit exposes the farcical nature of the ACCC's fixation with cartelists' attire and accessories, see B Fisse, 'Cartellists Beware – Do Not Wear Flash Suits or Shiny Shoes', *Australian Financial Review* (Sydney) 22 March 2010, 55.

¹¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 42 (Nick Champion).

corporations – the big fish. They seem to escape the net. We are rebuilding the net with this legislation and the two other pieces of legislation. We are actually building a great net that is going to capture cartel behaviour and we will legislate for the benefit of the Australian public.¹¹²

These egalitarian sentiments, combined with the theme of populist punitiveness, proved particularly effective. A maximum jail sentence of 10 years was introduced for cartel conduct,¹¹³ a maximum that exceeded the maxima applicable to other corporate law offences with which analogies were drawn for the purposes of the debate.¹¹⁴

7. CONCLUSION

Cartel criminalisation can be understood as an offence of the times, times in which neoliberal gains are seen as requiring consolidation (or perhaps even elevation) through the invocation of the criminal law.¹¹⁵ The passage of criminalising legislation, then, may be viewed as a further triumph of neoliberalism. However, tensions between certainty and uncertainty may not be so easily dispelled. The decline in legitimacy of governments, combined with increasingly strident recourse to law and order solutions to garner sufficient support, remains in critical tension to the demands of the capitalist market for uncertainty, entrepreneurialism and creativity.¹¹⁶

¹¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 19 (Nola Marino).

¹¹³ See, eg, the comment made in the Parliamentary debate: ‘through consultation I think reflecting what the community view is with respect to cartel or cartel-like behaviour, the decision was made to increase that to a 10 year term [referring to the initial proposal which had been for a seven year maximum] as it better reflects the seriousness of the crime’: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2009, 23 (Chris Hayes).

¹¹⁴ Under the *Corporations Act 2001* (Cth) the offences of market manipulation (s 1041A), market rigging (ss 1041B and 1041C) and insider trading (s 1043A) all carry a maximum of five years imprisonment. Notably, however, shortly after passage of the cartel legislation, proposals to increase these maxima to 10 years were announced: see C Bowen, ‘Greater Powers to the Corporate Regulator to Pursue Market Misconduct’ (Media Release No 008, 28 January 2010). These increased penalties were incorporated into the *Corporations Amendment (No 1) Bill 2010* (Cth). The Bill was introduced into Parliament on 24 June 2010 however it did not complete its passage into legislation before the calling of a Federal election and the proroguing of Parliament. As at the date of writing, it remains to be seen whether the Bill, in its current or a revised format, will be re-introduced and become law.

¹¹⁵ For an analysis of cartel criminalisation as part of a process of economic juridification, see S Wilks, ‘Cartel Criminalisation as Juridification: Political and Regulatory Dangers’ in Beaton-Wells and Ezrachi (eds), above n 2, ch 15, drawing on G Teubner (ed), *Juridification of Social Spheres* (de Gruyter, 1987). See also I Maher, ‘Juridification, Codification and Sanction in UK Competition Law’ (2000) 63 *Modern Law Review* 544.

¹¹⁶ See, eg, Garland, above n 102; Habermas, ‘What Does a Crisis Mean Today?’, above n 20, 266–83; F Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar, 2011) (forthcoming). See also the contradictory strands of neo-liberalism discussed in O’Malley, above n 15.

The criminalisation of cartel conduct contains mixed metaphors of security (criminalisation) and insecurity (market competition). The legitimating ‘scripts’¹¹⁷ adopted in the Australian campaign for criminalisation featured the government as protector of the economy, consumers, small business, and Australian cultural values. These scripts sought to reassure the public of their adherence to norms around egalitarianism and the values of the ‘Aussie Battler’.¹¹⁸ This strategy of reassurance sought to counter public ambivalence about market-based reforms by masking the substantive nature of the reform as one that in fact valorises the uncertainty and risk taking inherent in competition.

Over the long-term, public support for treating cartel participants as criminals will be vulnerable to shifts in broader societal dynamics including dynamics relating to the role of government in market regulation, Australia’s engagement in the global economy, and the social (and political) capital associated with small business. However, public attitudes are also likely to be shaped by the extent to and way in which the criminalising legislation is administered and enforced.

The passage of legislation in no way assures its effective implementation.¹¹⁹ The scripts employed in the Australian criminalisation debate glossed over the intricacies and complexities inherent in cartel conduct and opted for simplistic and unequivocal statements about the nature of cartel conduct, the threats of the global economy, the untrustworthy nature of big business and the sentiment that ‘a law for one should be a law for all’. However, the complexities are likely to be exposed in the interpretation and enforcement of the law which looms as a major challenge for the ACCC, the Commonwealth Director of Public Prosecutions and the courts.¹²⁰ The degree of ‘success’¹²¹ with which those challenges are navigated is likely to influence public attitudes and perceptions. One possibility is that the experience of enforcement reinforces the messages that saw the criminal cartel regime enacted. Another is that it exposes the fallacies in those messages with the potential of undermining the credibility of the reform in the eyes of the Australian public.

¹¹⁷ R Chen and J Hanson, ‘The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law’ (2004) 103 *Michigan Law Review* 1.

¹¹⁸ See above n 28 and sources cited therein.

¹¹⁹ This has been borne out by experience with enforcement of criminal cartel regimes in other jurisdictions: see Harding, ‘Business Collusion’, above n 9; T Calvani and TH Calvani, ‘Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?’ (2009) 17 *Competition & Consumer Law Journal* 119.

¹²⁰ The key challenges are highlighted in C Beaton-Wells, ‘Cartel Criminalisation and the Australian Competition and Consumer Commission’, above n 26, ch 8.

¹²¹ What represents success in this regard and how it might be measured are complex questions in themselves and are beyond the scope of this article. For a sophisticated analysis on how effectiveness in competition enforcement might be measured, see W E Kovacic, ‘The Federal Trade Commission at 100: Into Our 2nd Century – The Continuing Pursuit of Better Practices’ (Federal Trade Commission, January 2009).