12. Australia – a regulator's perspective

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1. INTRODUCTION

This chapter reviews some aspects of the political economy of Australian competition law, with an emphasis on developments since the 1990s. In the 1990s there was a sharp increase in the intensity of the enforcement of competition law. Not surprisingly, this created a clash between the regulator's attempt to enforce the law more vigorously and the wishes of big business to be left free from the pressures of competition law. This chapter reviews the political economy of the issues involved from the regulator's perspective, using a model that systematically analyses the tensions between the regulator's desire for better outcomes, the wishes of elected governments, and the political environment generally for business not to be subject to such pressures. The analysis is extended by considering the political economy of two more recent developments in competition law in the last five years: the introduction of criminal sanctions for cartels and amendments to the prohibition on the misuse of market power.

Section 2 of this chapter sets forth a model for the analysis of the strategy of a competition agency. This model is then used in Section 3 to analyse some recent developments in Australian competition law. In particular, the focus of the analysis will be on the clash between the interests of big and small businesses, the perceived value in the strong enforcement of competition law, and the role of the Australian Competition and Consumer Commission (the 'ACCC'), the Australian competition regulator, in shaping those relationships.

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2. A MODEL OF COMPETITION REGULATORY STRATEGY

Most discussions on competition law enforcement and strategy by competition agencies, and the political economy of competition law more generally, take a law and economics perspective.[1] Whilst useful, this approach does not sufficiently factor in change and political considerations, as it does not adequately take into account the clash between the regulator's objectives, its regulatory environment and the constraints it faces. To properly formulate and understand competition regulatory strategy, those actions and decisions that shape, influence, and guide a regulator's mission, enforcement approach, and activities must be considered. This requires an understanding of the character and goals of the regulator and the law(s) that it enforces, the political environment faced by the regulator, the operating capabilities and limitations of the regulator, the relationship of the regulator with other organisations, and the interrelationship of the foregoing factors. In short, it requires an understanding of the political economy of the regulatory environment.

The analytical framework for understanding the political economy of competition law to be used in this chapter consists of three main variables: (i) public value; (ii) the authorising environment; and (iii) operating capability (as per Figure 12.1).[2] It is important to note that this model does not set out a specific strategy or organisation plan for the competition regulator; rather it provides a framework to use in the formulation of such a plan.

This chapter does not intend to embark on a complete discussion of each variable. Instead, the aim is to highlight some important points that competition regulators should consider when devising their regulatory strategy.

Public value is the collective value created by government through services, laws, regulation, and other actions.[3] It is anything of value to the

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[1] See, e.g., Stigler, George J. (1971), 'The Theory of Economic Regulation', *The Bell Journal of Economics and Management Science,* 2(1), p. 3; Wilson, James Q. (1980), *The Politics of Regulation*, New York: Basic Books.

[2] This model was developed by the author in Fels, Allan (2010), 'A Model of Antitrust Regulatory Strategy', *Loyola University Chicago Law Review*, 41, p. 489. It is adapted from the 'strategic triangle' model that has been developed for analysis of strategy for the private sector and widely used in business schools. See, e.g., Moore, Mark H. (1995), *Creating Public Value: Strategic Management in Government,* Cambridge, MA: Harvard University Press.

[3] Kelly, Gavin, Mulgan, Geoff, and Muers, Stephen (October 2002), 'Creating Public Value: An Analytical Framework for Public Service Reform', Strategy Unit of the United Kingdom Cabinet Office, p. 4.

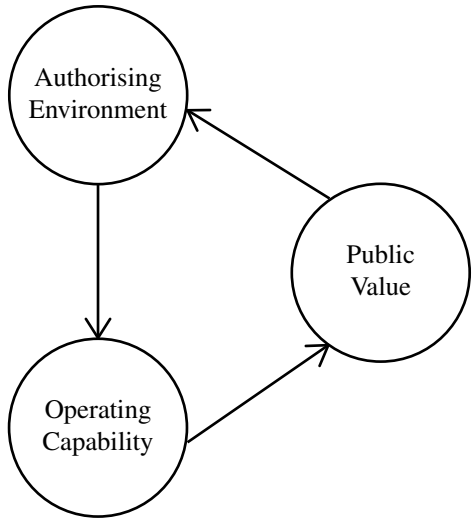

Figure 12.1 Competition Law Regulatory Strategy Model

public; hence the public itself, through the expression of preferences and the political process, ultimately determines public value. The notion of public value provides a rough standard against which to assess and guide the future development of the government's performance and policies and is related to the perceived legitimacy of the government.[4]

The competition regulator, as an organ of the government, exists or should exist to create public value. Maximising efficiency and enhancing economic welfare are commonly recognised objectives of competition law and the competition agencies' enforcement activities.[5] They may manifest themselves in the form of lower prices, improved quality, and greater choice of goods and services.

Competition agencies are given considerable coercive powers to carry out their enforcement duties under the law, such as the power to investigate, bring proceedings, and impose fines and other remedies. Given the scope of these powers, the public has an interest in and values the fair and

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[4] Id.

[5] See, e.g., 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies' (The Unilateral Conduct Working Group, International Competition Network, May 2007); 'Competition Enforcement and Consumer Welfare – Setting the Agenda' (ICN Discussion Document, International Competition Network and the Netherlands Competition Authority, May 2011).

proper use of that power. For example, the ACCC stepped up its enforcement and advocacy efforts in the mid-1990s, big business interest groups raised concerns about the ACCC's use of its powers of investigation and conduct of its advocacy activities via the media. This was despite the fact that the ACCC was merely upholding and enforcing a law passed by Parliament. The validity of this twin track approach was demonstrated by the fact that the ACCC won nearly all the cases it took to the courts during this period. These concerns (amongst other matters) led to the *Review of the Competition Provisions of the Trade Practices Act 1974* (the 'Dawson Review'), an independent review of Australia's competition legislation and its administration. Whilst the Dawson Review found that the ACCC's high media profile partly reflected its success as an enforcement agency and competition advocate and that its investigatory powers were essential for the proper administration of the competition legislation, the Dawson Review did recommend some changes to address businesses' concerns.

The authorising environment is the political environment that gives rise to laws, regulations, resources, and other political requirements that are the source of the authority, legitimacy, and values that govern the work of the regulator.[6] Some regulators may believe that an understanding of its authorising environment is irrelevant to their work as their role is to carry out the enforcement and advocacy mandate that is determined by the authorising environment. However, this chapter takes the opposite position: mandates from the authorising environment may be unclear, ambiguous, contradictory or subject to change, and it is imperative that regulators understand their authorising environment.[7] This requires an analysis of the drivers of the authorising environment, which include the statutory framework, political parties, the judiciary, various business interest groups,[8] consumers, the media, international organisations, economic and social structures and contexts, regional influences and integration, globalisation, trade and investment, and political and public administration processes.[9] Conflicts amongst these drivers of the authorising environment may cause the authorising environment to change and result in less than ideal laws, regulations, and policies.

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[6] Fels, p. 492 (n 2)

[7] Id, p. 499.

[8] It is important to note that business interest groups are not homogeneous. There are often conflicts between small and big businesses, and also between different sectors and companies within the same industry.

[9] See also Moore, Mark H. (1995), *Creating Public Value: Strategic Management in Government*, Cambridge, MA: Harvard University Press, pp. 118–25.

The demands and expectations of the authorising environment can change rapidly.[10] Both political power and the issues that are in the political spotlight fluctuate, and the political conditions that once supported a particular policy may change. Hence the authorising environment may be finely balanced and it might not take much to change the balance of forces for and against active regulation. Regulators must be prepared to adapt to the potentially unstable conditions of their authorising environment.[11]

This is especially important with respect to competition law. An important characteristic of competition law is that it encounters contradictory attitudes on the part of its stakeholders. On the one hand, businesses want their competitors, suppliers, and customers to be subject to the stringent application of competition law, as they do not want to be subject to anti-competitive conduct. On the other hand, when the law is applied to themselves, they do not welcome it.[12] For example, competition laws are regarded as more likely to affect big, rather than small, businesses. Therefore, small businesses tend to support competition law to a greater degree than big businesses, creating a separation of business interests in the competition law realm. However, these interests begin to converge when competition laws are applied to small businesses.

There are also strong forces for and against competition law and its enforcement. Governments generally recognise that it is in their interests to ensure that competition law is properly enforced. Their performance is judged and legitimacy derived, in part, on their ability to deliver good economic results and public value to citizens. Competition law and competitive markets can help governments achieve these aims as competitive markets contribute to economic growth and the delivery of a greater variety of goods and services to its citizens. However, there are also strong pressures against competition law. Interest groups such as big businesses are often ardent opponents of the existence, strengthening or vigorous application of competition law, and may well lobby to seek exemptions or the enactment of anti-competitive laws.

Further, competition law involves the paradox that there needs to be substantial government intervention in order to achieve competitive markets. This paradox is sharply illustrated by the prohibition of the misuse of market power. The misuse of market power can result in

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[10] Id, p. 130.

[11] Id, p. 131.

[12] 'Competition Advocacy', in Khemani, R. Shyam (1998), *A Framework for the Design and Implementation of Competition Law and Policy*, Washington, DC: The World Bank and the Organisation for Economic Co-operation and Development, p. 99.

substantial anti-competitive harm and significant government intervention is often required to redress the balance of distorted markets. More so than other competition prescriptions (such as prohibition against cartels or anti-competitive mergers), there is a greater degree of government intervention in misuse of market power cases, as they require deeper investigatory work, involve more complicated rules and judgment, and the solution to the mischief may be regulatory. The strongest supporters of competition law are those who are happy to see strong intervention in order to achieve free markets. The attitude of libertarians is more ambiguous. They support free competitive markets but are extremely hesitant about the use of government intervention through competition law to achieve that result. Their attitudes to competition law are somewhat equivocal. Likewise, other groups in the community may be quite happy to see action being taken against big business in the name of competition laws without actually feeling any degree of support for the underlying pro-competition aims of the law. Finally, there are those groups who support neither competitive markets nor government intervention.[13]

The operating capability of a regulator refers to its physical, human, and financial resources, its culture, its organisational structure and arrangements, and its legal powers, all of which exist to enable the regulator to carry out its tasks.[14] The operating capability of the regulator acts as a significant constraint on its strategy – the government might seek certain outcomes and an analysis of public value and the authorising environment might suggest a certain enforcement and regulatory approach. However, a regulator will not be able to act on this if it does not have the requisite resources, powers, and capabilities. Therefore, a regulator needs to analyse its operating capability as part of the formulation of its regulatory strategy.

This is particularly important for a competition regulator because competition law, unlike some other laws, requires detailed enforcement and administration. Proper enforcement requires the undertaking of detailed investigations. Decisions about whether or not to initiate enforcement action have to be taken, and the public needs to be educated about the benefits of competition law. Moreover, competition law involves not only legal but also economic concepts; therefore the competition regulator needs to ensure that it is sufficiently equipped to deal with economic

[13] International Competition Network Advocacy Working Group (2002), 'Advocacy and Competition Policy', Report presented at the International Competition Network Conference, Naples, 2002. (2002), p. xi.

[14] Fels, p. 502 (n 2).

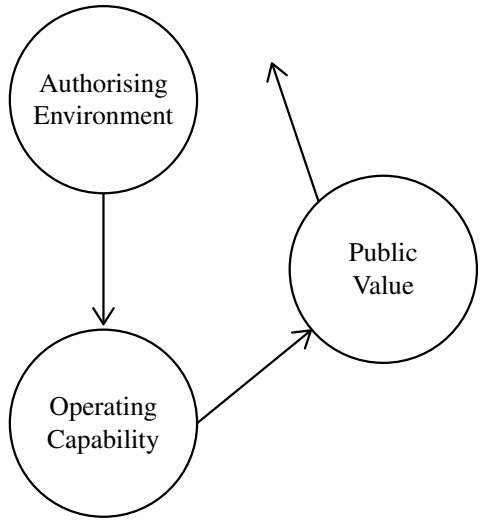

Figure 12.2 Misalignment between public value and the authorising environment

issues. Competition regulators must also be cognisant of the capacity of the courts to handle competition law issues. In addition to being part of the competition regulator's authorising environment (as it sets the legal rules and standards that a competition regulator must enforce and operate within), courts play a key role in the enforcement and implementation of competition law and are part of the regulator's operating capability. Depending on the jurisdiction, the competition regulator may only be able to seek penalties or other remedies through courts.

The variables in the regulatory model are interrelated and each variable influences, and is in turn influenced by, the other variables. The relationship between the variables can be in equilibrium or disequilibrium. If the variables are in equilibrium, this does not necessarily mean that the regulatory environment is optimal. There may be over- or under-regulation. There may also be a misalignment or a clash between the variables, resulting in an unstable regulatory environment. For example, misalignment might occur between public value and the authorising environment (see Figure 12.2).

The authorising environment may not favour a rigorous competition law due to lobbying efforts by business interest groups to weaken competition law or restrict the competition regulator's enforcement powers, even though the public values competition, competitive markets, and the outcomes that they deliver. This state of disequilibrium is unlikely to

persist and events are likely to occur that correct the misalignment. Public value may shift in response to the authorising environment or vice versa, or the regulator may try to act to influence the regulatory environment to return it to equilibrium. It is this misalignment between public value, the authorising environment and the competition regulator's role in managing that interrelationship, including the causes and nature of the problems, that will be the focus of the remainder of this chapter.

It is also important for regulators to consider their role vis-à-vis the regulatory environment. A question that often arises is, to what extent, if any, do regulators engage and interact with their regulatory environment – are they simply responsible for carrying out their mandate as determined by the regulatory environment or do they try to influence it?[15] If the regulator is an independent agency, it will generally not engage in government processes and will have relative freedom to decide on its regulatory strategy and enforcement decisions. If the regulator is an agency within the government, then the regulator cannot help but be involved with its authorising environment. However, this gives rise to a conflict between the independence of the agency, due to its enforcement role, and the regulator's involvement in the political process.

Competition regulators may engage in advocacy to enhance public value, help create a more pro-competition authorising environment, and boost its operating capability. Competition advocacy is defined as the activities 'related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition'.[16] There are generally two aims of competition advocacy. First, it is a way to influence other government agencies not to adopt anti-competitive laws and regulations that harm public value by assessing the impact on competition of proposed laws, regulations, and policies.[17] Second, it is aimed at developing or enhancing competition culture. Competition culture refers to the attitude, familiarity, and awareness of other government agencies, the courts, economic agents, and the public in general of the benefits of competition and the role of competition law and policy in promoting economic welfare.[18] The ACCC, for example, was particularly prolific in engaging in activities that enhanced competition culture through the 1990s and early 2000s.

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15 Moore, p. 132 (n 2).
16 International Competition Network Advocacy Working Group (n 13).
17 Id, p. 25.
18 Id, pp. 31–2.

The role of the regulator vis-à-vis its regulatory environment is particularly important where there is a misalignment between public value, the authorising environment, and/or operating capability. The competition authority can be both the cause of and remedy for this misalignment. The regulator can, through enforcement, education or advocacy efforts, return the variables into alignment. It can also cause the misalignment by those very same activities. For example, the regulator might embark on a strong enforcement or education campaign and shift public values in favour of increased regulation; however this may result in discontent in interest groups who might then try to lobby the government to weaken or curtail the regulator's powers.

The remainder of this chapter will explore the political economy of Australian competition law by using this model of regulatory strategy to examine some of its recent developments. These developments are: (i) the introduction of criminal sanctions for serious cartel conduct in 2009, and (ii) amendments to section 46 of the CCA – the provision that prohibits the misuse of market power – in 2007 and 2008. Examining the dynamic within the authorising environment and the reasons for any misalignment between the variables will be the focus of the discussion, along with consideration of the role, if any, of the ACCC in influencing its regulatory environment.

3. UNDERSTANDING THE POLITICAL ECONOMY OF THE AUSTRALIAN COMPETITION LAW REGULATORY CONTEXT

Australia has had competition legislation in some form since the enactment of the *Australian Industries Preservation Act* in 1906. The current competition legislation in Australia, the *Competition and Consumer Act 2010* (Cth) (the 'CCA', named the *Trade Practices Act 1974* (Cth) (the 'TPA') prior to 1 January 2011), is a modern competition law consistent with generally accepted international standards and covers anti-competitive agreements, misuse of market power, and anti-competitive mergers. It also contains consumer protection features (including certain prohibitions on misleading and deceptive conduct and unconscionable conduct) and covers the regulation of utilities. The broad framework and basic character of the CCA has remained largely unchanged since the enactment of the TPA in 1974, despite numerous reviews[19] of its legislative framework and its effectiveness and various amendments.

[19] These included the Swanson Committee in 1976, the Blunt Committee in

The government agency responsible for enforcing the CCA is the ACCC.[20] Whilst a detailed analysis of history and evolution of the role of the ACCC in the enforcement and development of Australian competition law is beyond the scope of this chapter,[21] a few points in relation to the activities of the ACCC and its predecessor, the Trade Practices Commission (the 'TPC'), are worth mentioning as they are particularly relevant for understanding the political economy of Australian competition law.

From the enactment of the TPA in 1974 until the early 1990s, the TPA was more symbolic than real in its effect. There was a low level of support for competition law within the authorising environment and, in response, there was only a moderate level of enforcement of the TPA by the TPC. However, in the early 1990s, the TPC decided to increase its activities across a range of areas to achieve what it perceived to be a higher degree of public value that would be provided by the TPA. It did so by sharply increasing enforcement and engaging in advocacy, in particular through the use of media and other publicity channels. These activities raised public awareness of the benefits of competition and the public profile of the ACCC. However, this increase in public value was not accompanied by a corresponding increase in support for competition law in the authorising environment. Therefore, the ACCC had created a mismatch between public value and the authorising environment. Over time, the ACCC was able to obtain an overall increased level of government support for the ACCC and enhanced competition enforcement, although this support would wax and wane, over time. This was despite strong opposition from big business, which lobbied the government fiercely against the ACCC and wanted to change the authorising environment to restrict the ACCC's powers.[22] The main factors that helped the ACCC endure the various attacks on it during this time included: (i) its successful enforcement record, including winning high profile cases; (ii) its reinvigoration of the somewhat dormant consumer protection provisions of the TPA, helping

1979, the Griffiths Committee in 1989, the Cooney Committee in 1991, the Hilmer Committee in 1993, the Baird Committee in 1999, and the Dawson Committee in 2003.

[20] The ACCC was created in 1995 as a result of the merger of the Trade Practices Commission (established under the *Trade Practices Act 1974* (Cth) with the Prices Surveillance Authority).

[21] For a more comprehensive discussion of the development of Australian competition legislation and the role of the ACCC in its development, see Fels (n 2).

[22] Parker, Christine (2006), 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement', *Law & Society Review*, 40(3), p. 603.

to advance its profile as a consumer advocate;[23] (iii) its use of publicity and the media to advance its goals and build public support for the agency and its policies, which also re-activated small business and consumer lobby groups;[24] and (iv) the fact that the ACCC was an independent agency provided it with some (although incomplete) cover from political pressures at various points in time.[25] All these factors continue to be relevant to understanding developments in Australian competition law today.

3.1 Introduction of Criminal Sanctions for Serious Cartel Conduct

In 2009, the TPA was amended to provide for criminal sanctions for corporations and individuals who make or give effect to any contract, arrangement or understanding containing a provision relating to price-fixing, output restriction, market sharing, and bid rigging (commonly referred to as 'hard-core' or 'serious' cartel conduct).[26] Prior to 2009, breaches of the competition provisions of the TPA attracted only civil penalties.[27]

The ACCC first advanced arguments in favour of the criminalisation of hard-core cartel conduct in June 2001[28] and subsequently developed its proposal in its submission to the Trade Practices Act Review Committee (the 'Dawson Committee') in July 2002.[29] In January 2003, the Dawson Committee recommended, subject to certain provisos, 'the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals'.[30]

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[23] Fels, p. 509 (n 2).

[24] Id, p. 511. However, the ACCC's use of publicity also attracted much criticism from businesses and the legal profession: Parker, pp. 606–8 (n 22).

[25] Fels, pp. 511–13 (n 2).

[26] *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth).

[27] A criminal penalty regime has existed for certain breaches of the consumer protection provisions of the TPA since 1974. See, e.g., Beaton-Wells, Caron (2008b), 'The Politics of Cartel Criminalisation: A Pessimistic View from Australia', *European Competition Law Review*, 29(3), p. 185.

[28] Fels, Allan (9 June 2001), 'Regulating in a High-Tech Marketplace', Speech delivered at the Australian Law Reform Commission Conference on 'Penalties: Policy, Principles & Practice in Government Regulation', Sydney.

[29] Australian Competition and Consumer Commission (2 July 2002), Submission No 56 to the Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Australia: Senate Economics References Committee, Parliament of Australia, pp. 20–54.

[30] Trade Practices Act Review Committee (2003), *Review of the Competition*

Shortly thereafter, the Coalition Federal Government (comprised of the Liberal[31] and National Parties) announced that it had accepted, 'in principle, that criminal penalties may be more effective than civil penalties in deterring people from engaging in serious cartel behaviour' and that it would 'further consider the introduction of criminal penalties for serious cartel behaviour'.[32] In October 2003, a working party was established by the Federal Government to consider whether criminal sanctions for cartel conduct could be introduced into Australian competition law.[33] In February 2005, the Federal Treasurer announced that the TPA would be amended to introduce criminal penalties for serious cartel conduct.[34] Despite intentions to introduce a bill into Parliament in 2006, and again in 2007, this did not transpire before the Federal election in November 2007.[35]

After the election, the newly elected Labor Federal Government, acting on its pre-election promise to introduce criminal penalties in its first year in office, released an exposure draft of the bill,[36] together with a discussion paper and draft memorandum of understanding between the ACCC and the Commonwealth Director of Public Prosecutions, for public comment in January 2008.[37] A second exposure draft of the bill was released in October 2008[38] and the bill was introduced into Parliament on 3 December 2008.[39] The bill passed both Houses of Parliament on 16 June 2009, with minor changes, and came into effect on 24 July 2009.[40]

Provisions of the Trade Practices Act 1974, Australia: Senate Economics References Committee, Parliament of Australia, p. 164.

[31] The Liberal Party is a conservative party aligned with and perceived to be the 'pro-business' party in Australia.

[32] Costello, Peter (16 April 2003), 'Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974'.

[33] Costello, Peter (3 October 2003), 'Working Party to Examine Criminal Sanctions for Cartel Behaviour', Media Release, No 086 of 2003.

[34] Costello, Peter (2 February 2005), 'Criminal Penalties for Serious Cartel Behaviour', Media Release, No 004 of 2005.

[35] Beaton-Wells, Caron and Fisse, Brent (2001), *Australian Cartel Regulation: Law, Policy and Practice in an International Context*, Cambridge: Cambridge University Press, p. 5.

[36] Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth).

[37] Commonwealth Treasury (11 January 2008). For critique of the bill, see Beaton-Wells and Fisse (2008), p. 166.

[38] Minister for Competition Policy and Consumer Affairs (27 October 2008).

[39] Bowen (3 December 2008).

[40] For a more detailed and comprehensive discussion of the background to the criminalisation of cartels, see Beaton-Wells and Fisse (n 35), pp. 3–7; Beaton-Wells,

This path to the criminalisation of serious cartel conduct, which spanned over eight years, was characterised by an authorising environment that was finely balanced, tense, and precarious. The ACCC played a key role in championing the reforms and in doing so caused a sharp mismatch between its wishes and the wishes of the authorising environment. This section will use the regulatory strategy model to examine the reasons behind the ACCC's push for the introduction of criminal sanctions for serious cartel conduct, the reactions it provoked from within the competition law regulatory environment, and the altered regulatory environment thereafter.

From the very outset, the campaign to adopt criminal sanctions for hard-core cartel conduct in Australia was initiated and driven by the ACCC.[41] As noted above, the ACCC first publicly made the case for criminal sanctions in 2001 and put forth its proposal for criminal sanctions to the Dawson Committee in 2002.[42] Whilst the ACCC's decision to advocate criminalisation might have been unexpected, as criminal sanctions had not been on the government policy or legislative agenda and seemingly was not in response to increased public concerns about cartels,[43] a confluence of factors led the ACCC to believe that the time was right to challenge its existing authorising environment.

First, the ACCC believed that the then-existing civil penalty regime was ineffective, on its own, to sufficiently deter cartel conduct. Although the civil penalties for a breach of the competition provisions of the TPA had been increased in 1993 from a maximum of $250,000 to $10 million for corporations and $50,000 to $500,000 for individuals,[44] the ACCC considered that the penalty regime was weak compared to those in other developed countries.[45] In particular, the ACCC believed that, despite

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Caron (2008a), 'Criminalising Cartels: Australia's Slow Conversion', *World Competition*, 31(2), p. 205; Beaton-Wells, Caron and Haines, Fiona (2009), 'Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behaviour', *The Australian and New Zealand Journal of Criminology*, 42(2), p. 218.

41 Beaton-Wells, pp. 210–13 (n 40).

42 The ACCC also put forth the case for increased civil penalties to a maximum penalty of the greater of $10 million, three times the value of any commercial gain from the contravention, or where it is difficult to quantify the commercial gain from the contravention, 10 percent of the firm's Australian turnover for the duration of the infringement for a maximum of three years: see Australian Competition and Consumer Commission (2 July 2002), pp. 54–8.

43 Beaton-Wells and Haines, p. 227, pp. 500-01 (n 40).

44 *Trade Practices Legislation Amendment Act 1992* (Cth) s 10.

45 Australian Competition and Consumer Commission (2 July 2002), p. 24.

the increased penalties after 1993 and larger penalties imposed in the mid-1990s on the parties involved in the express freight and Queensland pre-mixed concrete cartels, the civil penalty regime was still insufficient to deter harmful collusive agreements.[46] Instead, the ACCC regarded a criminal penalty regime as the most effective way to deter and prevent hardcore cartel conduct.[47]

In other words, the civil penalty regime limited the ACCC's ability to pursue what it saw was great public value in the deterrence, detection, and sanction of cartels.[48] The ACCC considered that the potential for cartels to be highly profitable for its participants and substantially economically harmful for the public was very great, yet the likelihood that cartels would be detected and caught was so remote that a penalty regime that provided sufficient deterrence was urgently required.[49] This was particularly important as economic globalisation had increased Australia's exposure to international cartels and the significant economic harm that they cause.[50] Moreover, the ACCC believed that cartel criminalisation would also enhance its capacity to obtain results in its enforcement of the TPA – that is, its operating capability. Not only would a criminal penalty regime provide increased deterrence, it would allow the ACCC to draw upon the apparatus and gravity of criminal sanctions to support its enforcement efforts against cartels.

Second, the ACCC believed that criminal sanctions for serious cartel conduct represented international best practice.[51] ACCC was of the view that there was 'a growing consensus that criminal sanctions are more effective deterrents and appropriate in the case of cartels',[52] referring to experiences in the United Kingdom in its consideration of criminal sanctions for cartel conduct, the experience of the United States' Department of Justice in administrating its criminal penalty regime, and the debate in the European Union on criminal sanctions.[53] The ACCC also noted that several of Australia's major trading partners with well-developed competition legislation – the United States, Canada, Japan, South Korea, and Germany – provided for criminal sanctions for hard-core cartels.[54] The

46 Id.
47 Id, p. 21.
48 See, eg, Beaton-Wells and Haines, pp. 227–8 (n 40).
49 Australian Competition and Consumer Commission, pp. 22–33 (n 29).
50 Fels (n 28).
51 Australian Competition and Consumer Commission, p. 21 (n 29).
52 Id, p. 32.
53 Id.
54 Id, p. 21.

introduction of criminal sanctions for serious cartel conduct would, the ACCC believed, ensure that Australian competition law would 'remain in step with that applying in many of its major trading partners'.[55]

Third, the ACCC felt that it had sufficient public support and political protection to embark upon a campaign to introduce criminal sanctions for hardcore collusion. It had been nearly a decade since the ACCC stepped up its enforcement and advocacy efforts, and during that time the ACCC had built up a reputation of credibility, for enforcement, and for being a consumer advocate. So strong was the ACCC's credibility and reputation that the Federal Government, in its introduction of a new goods and services tax ('GST') in 2000, a policy that had the potential to be politically disastrous for it at the next election, turned to the ACCC to oversee its implementation.[56] The Federal Government recognised that it could leverage the ACCC's credibility and reputation to help it successfully implement the GST. The introduction of the GST was an overall success and it boosted the ACCC's public profile. The Federal Government was also extremely pleased with the ACCC's efforts and government funding to the ACCC was substantially increased in the post-GST period.[57] Therefore, the ACCC felt that this gave it enhanced political protection to continue doing its job as a competition regulator.[58] However, the role of the ACCC in supervising the introduction of the GST highlighted the tensions existing between the ACCC and business and galvanised business sentiment against the ACCC.[59] It also made the Federal Government wary of the increasingly powerful and prolific regulator and consequently the political protection that the ACCC thought that it would have in the post-GST period was in fact short-lived.[60]

The ACCC also felt that the public was growing increasingly dissatisfied with corporate excesses and the behaviour of some corporate executives, having witnessed a series of high profile corporate collapses in Australia and overseas during the late 1990s and early 2000s.[61] As a result, the public was thought to be receptive to arguments in favour of criminal sanctions

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55 Id, p. 9.

56 For a more detailed discussion of the ACCC's involvement in the introduction of the GST, see generally Brenchley, Fred (2003), *Allan Fels: A Portrait of Power*, Milton, Qld: John Wiley & Sons, pp. 97–115.

57 Id, p. 114.

58 Id, pp. 98, 213–14.

59 Id, pp. 98, 213, 217.

60 Id, p. 217.

61 Id, pp. 13–15.

for serious cartel conduct.[62] Further, to appeal to and increase public value, the ACCC couched the criminalisation of hardcore collusion in moral terms as the 'seriousness of cartel conduct is viewed generally by the public more in moral terms than in terms of its economic effects'.[63] The ACCC called hard-core collusion 'morally reprehensible'[64] and likened hard-core collusion to fraud and 'a form of theft and little different from other white collar crimes . . . that already attract criminal sentences'.[65]

Finally, the Dawson Review provided the ACCC with the opportunity to vigorously advocate the adoption of criminal penalties for serious cartel conduct. In early 2001, the Business Council of Australia (the 'BCA'), the most important representative body of big business and an ardent critic of the ACCC, began to campaign for a review of the TPA and its administration to argue for reforms to its merger rules and processes, and also to address issues related to the governance and accountability of the ACCC.[66] In response to these intense lobbying efforts, in October 2001 the Prime Minister announced the establishment of the Dawson Review.[67] The ACCC welcomed the Dawson Review 'as proof that the ACCC was doing its job' and that it would bring 'criticism out into the public domain from the backrooms of politics'.[68] It used this opportunity to focus attention on its proposed criminal penalty regime and the ACCC's cartel criminalisation proposal attracted significant media attention.[69] It also diluted the effectiveness of the BCA's proposed reforms.

However, the response from the Federal Government and big business lobby – the two main drivers of the regulatory environment – to the ACCC's reform proposal was ambivalent at best.

The lack of real government support for criminal sanctions for hard-core

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62 Beaton-Wells and Haines, pp. 513–14 (n 40).

63 Beaton-Wells, Caron, Parker, Christine and Platania-Phung, Chris (2010), *Survey of Public Opinion on Cartel Criminalisation in Australia: Report of Preliminary Findings*, Melbourne: The University of Melbourne Cartel Project, Melbourne Law School, pp. 2–3. See also Parker, pp. 603–5 (n 22).

64 Australian Competition and Consumer Commission, p. 24 (n 29).

65 Id.

66 Business Council of Australia (20 February 2001), 'Let's Make Australia Great', Media Statement; Business Council of Australia (9 July 2002), Submission No 71 to the Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Australia: Senate Economics References Committee, Parliament of Australia, pp. 9–13; Brenchley, pp. 218–27 (n 56).

67 Brenchley, p. 227 (n 56); Prime Minister (15 October 2001). 'Securing Australia's Prosperity', Media Release.

68 Brenchley, p. 233 (n 56).

69 Beaton-Wells and Haines, pp. 229 –30 (n 40).

cartel conduct was reflected in the substantial delay between the Federal Government's agreement, in principle, to the introduction of criminal sanctions in April 2003, and the announcement nearly two years later in February 2005 that the Federal Government would commit to the introduction of criminal sanctions, along with suggestions in 2006 (and again in 2007) that a bill would be introduced for consideration by Parliament. Ultimately, however, the Coalition Federal Government did not act on its stated commitment and it was not until a newly elected Labor Federal Government took office that cartel criminalisation regained momentum.

There are a few reasons for the coalition Federal Government's apparent lack of support for cartel criminalisation, despite its official statements in favour of such a reform.[70] First, Australian governments (especially conservative governments) have traditionally displayed a strong reluctance to embrace criminal enforcement in business-related matters.[71] Second, the Dawson Committee itself was only mildly in favour of criminalisation, as its recommendation to criminalise hard-core cartel conduct was conditioned on the resolution of certain definitional and operational issues.[72] It was also widely rumoured that the Dawson Committee was not unanimous in its support for the criminalisation of cartel conduct, itself being split two to one.[73] Third, and perhaps most importantly, it was the ACCC and not the Federal Government that drove the criminalisation proposal; therefore the Federal Government did not fully 'own' the reform and instead reluctantly responded to pressure exerted by the ACCC.[74]

The response from the business community to the ACCC's proposal was somewhat mixed. Small businesses generally supported cartel criminalisation.[75] The ACCC's initial proposal, which applied the criminal sanctions only to large corporations, was a clear tactic to appeal to small

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[70] For a discussion on government support of criminalisation generally, see Beaton-Wells (n 40) and Beaton-Wells (n 27).

[71] Beaton-Wells (n 27).

[72] Trade Practices Act Review Committee (2003), p. 164.

[73] Beaton-Wells, p. 211 (n 40).

[74] Beaton-Wells, p. 189 (n 27).

[75] See, eg, Council of Small Business Organisations of Australia Ltd (July 2002), p. 4; National Association of Retail Grocers of Australia (July 2002), Submission No 126 to the Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Australia: Senate Economics References Committee, Parliament of Australia, pp. 125–8; Liquor Stores Association of Victoria Inc. (19 July 2002), Submission No 124 to the Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Australia: Senate Economics References Committee, Parliament of Australia; pp. 218–19.

businesses to support cartel criminalisation. It expressly stated that criminal sanctions would not apply to small businesses, professionals in small businesses, trade unions, and farmers, and that they would only gain from the proposal as potential cartel victims.[76] The ACCC's proposal also enabled it to gauge big business support for cartel criminalisation more generally. Unsurprisingly, big businesses (amongst others) strongly criticised the ACCC's initial proposal and argued that criminal sanctions should apply to all businesses, regardless of size,[77] a criticism that was accepted by the ACCC.[78] In terms of support for criminalisation more generally, big business was reluctant in its support.[79] For example, the BCA argued that the then-existing penalty regime provided adequate deterrence for serious cartel conduct.[80] However, it qualified its opposition by stating that it would conditionally support cartel criminalisation if the Dawson Committee recommended the introduction of criminal sanctions for serious cartel conduct.[81] This conditional support was largely due to the BCA's concerns that continued opposition to cartel criminalisation would detract from the key items in its reform agenda (related to mergers and the ACCC's administration of the TPA). However, some members of the BCA also reportedly lobbied the Federal Government to abandon its commitment to cartel criminalisation.[82]

As discussed above, in the aftermath of the Dawson Committee's recommendation to implement criminal penalties for serious cartel conduct in January 2003, there was only sporadic and largely noncommittal activity by the Federal Government to begin to implement criminal penalties for serious cartel conduct. This reflected the Coalition Federal Government's

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[76] Australian Competition and Consumer Commission (2 July 2002), Submission No 56 to the Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Australia: Senate Economics References Committee, Parliament of Australia, p. 41. See also Fels (n 28).

[77] See, e.g., Business Council of Australia (9 July 2002) (n 66); Australian Consumers Association (July 2002), Submission No 105 to the Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Australia: Senate Economics References Committee, Parliament of Australia, p. 32. See also Trade Practices Act Review Committee, p. 149 (n 30).

[78] Id.

[79] For an analysis and discussion of the submissions received by the Dawson Committee from businesses and industry organisations and their support or otherwise of the criminalisation of cartel conduct, see Beaton-Wells, pp. 217–20 (n 40).

[80] Business Council of Australia (9 July 2002), p. 117 (n 66).

[81] Id.

[82] Gray, Joanne (24 October 2007), 'Regulator to Tap Phones in Cartels Blitz', *Australian Financial Review*, 1, p. 4.

lukewarm support for the proposal and pressure from interest groups who continued to resist the reforms. It took until late 2007 (in the lead-up to a federal election) for a political commitment to cartel criminalisation to manifest itself clearly: the Labor Party, then in opposition, pledged itself to the introduction of cartel criminal sanctions within 12 months of its election and it subsequently acted on this promise.[83]

The lack of support from the authorising environment was not helped by the ACCC's relative silence on criminal sanctions in the post-Dawson Review period. Despite the initial vigorous and public advocacy of criminalisation of serious cartel conduct, the ACCC did little to sustain the momentum for reform following the Dawson Review.[84] The ACCC published a series of documents in 2006 and 2007 that explained cartel conduct which were aimed at consumers, small business, and government procurement officers[85] and launched some high-profile cartel cases. However, the effectiveness of the ACCC's campaign during this period diminished significantly compared to the 2001–02 period. This coincided with the appointment of its new Chairman in July 2003, who had an equivocal attitude towards cartel criminalisation and adopted a different approach to advocacy and enforcement. However, the ACCC's campaign for cartel criminalisation was somewhat reinvigorated in 2007 in the period leading up to the federal election.[86] In November 2007, the ACCC had a major victory in a high-profile case involving cartel conduct in the cardboard packaging industry involving one of Australia's largest manufacturing companies, Visy, and its well-known owner Richard Pratt. The ACCC also used petrol prices and attendant publicity to increase pressure on the to-be-elected government to introduce criminal cartel sanctions.[87]

By using the regulatory strategy model to analyse the introduction of criminal sanctions for cartels in Australia, several valuable insights into the political economy of Australian competition law can be gleaned. The first and most obvious is that the competition regulator can, if it chooses to, actively influence its regulatory environment. The ACCC perceived that great public value would be derived from the criminalisation of serious cartel conduct and embarked on a very public campaign to introduce

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[83] Shadow Minister for Revenue and Competition Policy (9 October 2007).

[84] Beaton-Wells and Haines, pp. 231–2 (n 40).

[85] Id, p. 232. These brochures have since been revised and re-released. See Australian Competition and Consumer Commission (16 March 2006, 6 June 2011, 15 October 2009, 1 August 2011).

[86] Beaton-Wells, p. 212 (n 40).

[87] Id.

such a reform. However, when the ACCC fell silent on cartel criminalisation in the post-Dawson Review period, the reform progress languished. Successful competition reform in Australia also requires strong government support and the reaction of businesses to the reform proposal must be considered as they are able to wield substantial political power.

3.2 Amendments to the Prohibition on the Misuse of Market Power

One of the most intensely contested and politically charged provisions of the CCA is section 46, which prohibits a firm that possesses substantial market power from taking advantage of that power for an anti-competitive purpose. Section 46, more than any other provision of the competition provisions in the CCA, is inherently political as it mediates the balance of power between large and small businesses. Australia is a small and relatively concentrated economy and markets in Australia tend to be dominated by a few major players. Section 46 regulates these businesses' behaviour; therefore they ardently oppose any attempts to strengthen section 46. In fact, in the aftermath of the High Court's *Boral*[88] decision on section 46, the BCA stated that it would rather relinquish the Dawson Review reforms than accept any changes to section 46.[89] For big businesses, the benefits of keeping the High Court's narrow interpretation of the application of section 46 to predatory pricing (therefore allowing them relative freedom in their pricing policies and conduct) far outweighed the benefits of the new merger processes and ACCC oversight measures that they had fought so hard to obtain just a few months prior. This demonstrated just *how* critical section 46 is to big business interests. On the other hand, section 46 is regarded by small businesses as essential to protect them from the anti-competitive conduct of big businesses and they oppose changes that weaken its operation or effect. Therefore, debates in relation to section 46 are marked by struggles between big and small business interest groups, and the government plays a key role in trying to mediate between these competing groups to find a balance within the authorising environment and the wider political economy. Judicial decisions on section 46 matters also tend to have a great impact. The most recent rounds of amendments to section 46 aptly illustrate the dynamics of section 46.

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[88] *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* (2003) 215 CLR 374 ('*Boral*').

[89] Business Council of Australia (20 June 2003), 'Stopping Price Competition Will Hurt Consumers' (News Release).

Section 46 was amended in 2007 and again in 2008 largely to implement the recommendations made in March 2004 by the Senate Economics Reference Committee (the 'Senate Committee') in its inquiry, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (the 'Senate Inquiry'). The Senate Inquiry was commissioned in June 2003 to examine whether the TPA adequately protected small businesses from anti-competitive or unfair conduct. In particular, it was asked to consider whether section 46 dealt 'effectively with abuses of market power by big businesses, and, if not, the implications of the inadequacy of section 46 for small businesses, consumers and the competitive process'.[90] In contrast to the Dawson Review, where the debate on section 46 focused largely on whether an effects test should be introduced, the discussion on section 46 in the Senate Inquiry shifted to examining substantial market power, taking advantage, and predatory pricing.[91] The non-government Senators in the Senate Committee, which comprised its majority, made six recommendations relating to section 46 to provide for small business protection. It recommended that the TPA be amended to: (i) clarify that the threshold for the establishment of 'substantial market power' should be lower than that for 'substantial control'; (ii) outline the factors that courts should consider when interpreting 'taking advantage'; (iii) provide that courts may consider the capacity of a business to sell below its variable cost and, in relation to predatory pricing, that it is unnecessary to demonstrate recoupment; (iv) provide that substantial financial power is relevant for the determination of substantial market power; (v) proscribe the leveraging of substantial market power from one market into another; and (vi) clarify that a company may be regarded as possessing substantial market power through its ability to act in concert with another company.[92]

In March 2004, the Federal Treasurer announced that the Federal Government had accepted the recommendations relating to leveraging,

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[90] Senate Economics References Committee (2004). p. 1.

[91] Id, p. 8. The reason for this shift was due to the handing down of two High Court decisions, *Boral* (2003) 215 CLR 374 and *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53 ('*Rural Press*'), after the Dawson Report. The Senate Committee considered that these decisions demonstrated that the questions of effect and purpose had become much less prominent and that the concepts of market power and taking advantage had become contentious.

[92] Senate Economics References Committee (2004), pp. xii–xiv. The government Senators agreed with the non-government Senators on recommendations (v) and (vi), partly agreed with recommendations (i) and (iii), and disagreed with recommendations (ii) and (iv): id, pp. 85–8.

partially accepted the recommendations on predatory pricing[93] and acting in concert,[94] and rejected the remaining section 46 recommendations.[95] In June 2007, the Federal Government introduced the Trade Practices Legislation Amendment Bill (No 1) 2007 (the '2007 Amendment Bill') to implement the recommendations it had accepted.[96] The introduction of the bill coincided with the end of the Coalition's term in government and the upcoming federal election in November 2007. The bill, which was amended to include the controversial 'Birdsville Amendment', was passed by both Houses of Parliament on 19 September 2007 and came into effect on 25 September 2007 (the '2007 Amendments'), less than one month before the House of Representatives was dissolved prior to the federal election.[97]

In April 2008, the newly elected Labor Federal Government announced that it would further amend the TPA to implement the Senate Committee's recommendations relating to 'taking advantage' and recoupment (both of which were rejected by the previous Coalition Federal Government) and to address the uncertainty brought about by the Birdsville Amendment.[98]

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[93] The government agreed that courts may consider below cost pricing but did not favour an amendment that: (i) examined capacity to engage in below cost pricing in isolation; or (ii) specified an exact measure of cost. The government disagreed with the Senate Committee on recoupment; instead it considered that the reasonable prospect or expectation of recoupment is a factor that courts may take into account in predatory pricing cases. See Costello (23 June 2004), 'Australian Government Response'.

[94] The government considered that the court may take into account the market power that results from a corporation's contracts, arrangements or understandings with others: Costello (23 June 2004), 'Australian Government Response', p. 8.

[95] Costello, Peter (23 June 2004), 'Australian Government Response to the Senate Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business', pp. 2–8; Costello, Peter (23 June 2004), 'Major Package of Trade Practices Act Reforms', Media Release, No 052 of 2004.

[96] Costello, Peter (20 June 2007), Commonwealth, *Parliamentary Debates*, House of Representatives, p. 6. The government did not include any amendment to provide for the consideration of the reasonable prospect or expectation of recoupment in predatory pricing cases. Also, although the government initially rejected the recommendation to clarify that the threshold of 'substantial degree of market power' is not a threshold of 'substantial control', the government subsequently accepted this recommendation and included it in the amendment bill.

[97] *Trade Practices Legislation Amendment Act (No 1) 2007* (Cth).

[98] Minister for Small Business, Independent Contract and the Service Economy Craig Emerson and Assistant Treasurer and Minister for Competition Policy and Consumer Affairs Christopher Bowen. (Emerson, Craig and Bowen, Christopher (28 April 2008), 'Rudd Government Act to Strengthen Laws to Promote Fair Competition', Media Release, No 027 of 2008).

The Federal Government introduced the Trade Practices Legislation Amendment Bill 2008 into the House of Representatives in June 2008,[99] but the proposed changes relating to the Birdsville Amendment were ultimately rejected. An amended bill was passed by both Houses of Parliament on 21 November 2008 and the changes came into effect on 22 November 2008 (the '2008 Amendments').[100]

This section will apply the regulatory strategy model to examine the political economy of the competition law regulatory environment relating to the 2007 Amendments and 2008 Amendments. In particular, it will focus on the impact of the High Court's *Boral* decision on the regulatory environment and the circumstances surrounding the adoption of the Birdsville Amendment.

As noted above, the 2007 Amendments and 2008 Amendments were made to implement the recommendations made by the Senate Inquiry in 2004. The catalyst for the Senate Inquiry was *Boral*, a decision handed down by the High Court in February 2003 and concerned alleged predatory pricing in contravention of section 46.[101] This was the first time that the High Court had ruled on predatory pricing and section 46. The case reignited the political debate over section 46,[102] as it highlighted the

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[99] Bowen, Christopher (26 June 2008), Commonwealth, *Parliamentary Debates*, House of Representatives, 6030.

[100] *Trade Practices Legislation Amendment Act 2008* (Cth).

[101] A number of other High Court and Federal Court decisions on section 46 matters also influenced the 2007 and 2008 amendments to section 46. These cases include: *Rural Press* (2003) 216 CLR 53; *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Limited* [2003] FCAFC 149; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1; and *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109.

[102] See, eg, Stephen Dabkowski (8 February 2003), 'Boral Win Challenge for Trade Practices', *The Sydney Morning Herald* (online). Retrieved from http://www.smh.com.au/articles/2003/02/07/1044579933326.html (last accessed 2 February 2013); Senator Ron Boswell (4 March 2003), 'Boswell Warns Open Season on Small Business . . . Boral Decision Removes Vital Section 46 Safeguard', Media Release, No B17/2003; Frank Zumbo (4 March 2003), 'Boral Ruling Calls for Section 46 Review', *The Australian Financial Review (Sydney)*, p. 59; 'Boral Case Raises Fears Over Sect 46' (11 March 2003). *The Australian Financial Review* (online). Retrieved from http://www.afr.com/p/national/item_dHh5Ym1FJBvYZU7c8e3R4M (last accessed 2 February 2013); Bill Reid (12 March 2003), 'Boral Court Decision Benefits Consumers', *The Australian Financial Review* (online). Retrieved from http://www.afr.com/p/opinion/item_jAgJdnNPxoBcN3U1f675YM (last accessed 2 February 2013); 'Boral Fallout Causes Concern' (20 March 2003), *The Australian Financial Review* (online). Retrieved from http://www.afr.com/p/national/item_RljbDJ3btvneVrb40Nd3HL (last accessed 2 February 2013); John Durie (29 March 2003), 'Time to Judge

significant gap between the high public expectations as to what section 46 could achieve and the substantial hurdles (including the high legal standards and lack of successful cases) involved in establishing a breach of section 46 – that is, a misalignment between public value and the authorising environment in the section 46 regulatory environment.

The *Boral* decision revived the long-standing policy debate over the objectives of section 46. Small and big businesses held different views on the public value of section 46. Small businesses argued that competition requires competitors and therefore section 46 needs to protect the ability of small businesses to compete on an equal footing with their larger competitors.[103] They argued that *Boral* had rendered section 46 ineffective in protecting small businesses from the misuse of market power by large and powerful oligopolists.[104] Big businesses, on the other hand, agreed with the Dawson Committee[105] and the High Court in *Boral*,[106] and took the view that the purpose of the TPA is to promote and protect the competitive process rather than individual competitors. They believe that the nature of competition itself is ruthless and results in the elimination of businesses; therefore section 46 should protect the competitive process rather than competitors.[107]

Small Business Protection', *The Australian Financial Review* (online). Retrieved from http://www.afr.com/p/item_vSMgl2P8OtAyTc3CbTWWfJ (last accessed 2 February 2013).

[103] See, e.g., Fair Trading Coalition (August 2003), Submission No 5 to the Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Australia: Senate Economics References Committee, Parliament of Australia, p. 8; Motor Trades Association of Australia (September, 2003), Submission No 28 to the Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Australia: Senate Economics References Committee, Parliament of Australia, p. 8; Independent Liquor Group (August 2003), Submission No 4 to the Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Australia: Senate Economics References Committee, Parliament of Australia, p. 5.

[104] See, eg, National Association of Retail Grocers of Australia, p. 6 (n 75).

[105] Trade Practices Act Review Committee, p. 35 (n 30).

[106] *Boral* (2003) 215 CLR 374, [87] (Gleeson CJ and Callinan J), [160] (Gaudron, Gummow, and Hayne JJ), [261] (McHugh J), [410] (Kirby J).

[107] See, e.g., Business Council of Australia (29 August 2003), Submission 13 to the Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Australia: Senate Economics References Committee, Parliament of Australia, pp. 13–4, 16, 22–3; Australian Chamber of Commerce and Industry (September 2003), Submission 33 to the Senate Economics References Committee, *The Effectiveness of the Trade Practices*

Boral also crystallised the frustration felt by small businesses and the ACCC in relation to the ability of section 46 to achieve concrete results. The ACCC, in particular, had often been dissatisfied with the inability of section 46 to effectively proscribe the misuse of market power. In the Dawson Review, the ACCC strongly advocated (largely unsuccessfully) for the adoption of an effects test and for greater enforcement powers to help it overcome the enforcement difficulties associated with section 46 – namely that the legal tests are difficult to satisfy, it is often hard for plaintiffs and/or the ACCC to obtain the relevant evidence, and that the cases tend to take many years to reach a conclusion due to the lengthy judicial process. The ACCC was vocal in its disagreement with *Boral*,[108] stating that it 'raised concerns as to the ability of [section 46] to protect viable small businesses and efficient new entrants from anti-competitive targeting by larger and better resourced competitors, thereby undermining the benefits of competition'.[109]

In its decision, a majority of the justices in *Boral* noted that, whilst it was not necessary or legally required to prove recoupment[110] to establish that pricing conduct amounted to a breach of section 46, it might nonetheless be factually important and relevant.[111] Both the ACCC and small business interest groups were concerned that the High Court had effectively added a requirement of recoupment to section 46, thus making it more difficult to prove a violation of section 46, injecting further uncertainty into section 46 and compromising the ability of section 46 to adequately capture and prohibit predatory pricing conduct.[112] In contrast, big business interest

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Act 1974 in Protecting Small Business, Australia: Senate Economics References Committee, Parliament of Australia, p. 17.

[108] Australian Competition and Consumer Commission (7 February 2003), 'High Court Decision Highlights Difficulties in Establishing Misuse of Market Power' (News Release, No MR 024/03); 'Allan Fels Slams Section 46 of Trade Practices Act' (10 March 2003), *The Sydney Morning Herald* (online), Retrieved from http://www.smh.com.au/articles/2003/03/09/1047144870668.html (last accessed 2 February 2013).

[109] Id. Australian Competition and Consumer Commission (7 February 2003) (n 108).

[110] Recoupment is an economic concept and refers to the ability of a business to recoup its lost profits from the sale of its goods below its costs.

[111] *Boral* (2003) 215 CLR 374 [124], [130] (Gleeson CJ and Callinan J), [278]–[80], [289], [292] (McHugh J), [408]–[12] (Kirby J).

[112] Australian Competition and Consumer Commission (2003), Submission No 30 to the Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Australia: Senate Economics References Committee, Parliament of Australia pp. 21–2; National Association of Retail Grocers of Australia (September 2003), Submission No 41

groups argued that *Boral* had not undermined the ability of section 46 to deal with predatory pricing and delineate between pro-competitive conduct and anti-competitive conduct.[113] Instead, they cautioned against the overregulation of pricing conduct as it might have a chilling effect on legitimate, serious price competition. The lowering of prices is the very essence of competition, they argued, and the mere fact that prices have been lowered below cost does not necessarily mean that that business is exercising market power.[114]

Small businesses and the ACCC were also concerned that the High Court had not applied section 46 in accordance with the intention of Parliament to make it easier to establish a breach of section 46. Prior to 1986, section 46 only applied to corporations that were in a position to 'substantially control' a market. This threshold was changed in 1986, when section 46 was amended to apply to corporations with a substantial degree of market power.[115] The explanatory memorandum accompanying the amendment bill and the Attorney-General in his second reading speech made it very clear that this amendment was intended to lower the threshold of applicability for section 46.[116] However, there were concerns that the High Court in *Boral* had interpreted 'substantial degree of market power' in such a way that it had raised the threshold back to its pre-1986 level.[117] Small business interest groups argued that *Boral* had undermined Parliament's intention to lower the threshold in section 46 and that, following *Boral*, the concept of market power is uncertain.[118] These concerns were echoed by

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to the Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Australia: Senate Economics References Committee, Parliament of Australia, pp.102–3, 106.

[113] See, e.g., Business Council of Australia (29 August 2003), p. 29 (n 107); Australian Chamber of Commerce and Industry (October 2003), Supplementary Submission 33 to the Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Australia: Senate Economics References Committee, Parliament of Australia, pp. 7–10.

[114] See, e.g., Business Council of Australia (29 August 2003), pp. 28–9 (n 107); Business Council of Australia (19 November 2003), Supplementary Submission 13 to the Senate Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, Australia: Senate Economics References Committee, Parliament of Australia), pp. 14–16.

[115] *Trade Practices Revision Act 1986* (Cth) s 17.

[116] Explanatory Memorandum, Trade Practices Revision Bill 1986 (Cth) [3], [35], [42], [45]; Murphy (19 March 1986), 1624–7.

[117] Senate Economics References Committee (2004), 9.

[118] See, e.g., Fair Trading Coalition (August 2003), pp. 9–12 (n 103); National Association of Retail Grocers of Australia (September 2003), pp. 100–1 (n 75); Motor Trades Association of Australia (September 2003), pp. 13–4, pp. 21–3 (n 103).

the ACCC.[119] On the other hand, big business interest groups argued that the High Court had not caused any uncertainty in *Boral* but had simply followed and reaffirmed the principles adopted in previous cases on section 46 and was consistent with parliamentary intention in 1986.[120]

There were also concerns that the Dawson Committee had not adequately considered the ramifications of *Boral* for its recommendations. During the Dawson Review, discussion on the substance of section 46 had centred on whether an effects test should be introduced to supplement the purpose test. The ACCC had advocated for the effects test and argued that its introduction would enable section 46 to better protect competition, align section 46 with other competition provisions of the TPA, and overcome enforcement difficulties associated with proving purpose.[121] However, the *Boral* decision, whereby the majority of the High Court found that the defendant did not breach section 46 by engaging in below-cost pricing as it did not possess substantial market power, shifted the focus of the section 46 debate from the question of purpose and effect to the threshold issue of substantial market power. The Dawson Committee's report was released to the Federal Government on 31 January 2003, which was prior to the High Court's delivery of the *Boral* judgment. Upon the release of the *Boral* decision, the Federal Treasurer (responding to increasing political pressure) sent the report back to the Dawson Committee and asked it to review its recommendations in light of the *Boral* decision.[122] The Dawson Committee reaffirmed its recommendation that no amendment be made to section 46, preferring to let the courts resolve any section 46 issues raised by *Boral*.[123] The Federal Government accepted that recommendation in April 2003. However, the small business lobby was dissatisfied with this response and put significant political pressure on the Federal Government and Parliament to initiate a new inquiry into section 46 to more speedily clarify the operation of section 46.[124] In response to

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[119] Australian Competition and Consumer Commission (2003), pp. 17–19 (n 112).

[120] See, eg, Business Council of Australia (29 August 2003), pp. 23–4 (n 117); Business Council of Australia (19 November 2003), pp. 5–13 (n 114); Australian Chamber of Commerce and Industry (October 2003), pp. 4–6 (n 113).

[121] Australian Competition and Consumer Commission (2 July 2002), pp. 60–1, 79–93 (n 29).

[122] Senate Economics References Committee (2004), 2; Brenchley, pp. 258–9 (n 56).

[123] Senate Economics References Committee (2004), 2; Brenchley, p. 259 (n 56).

[124] See, e.g., Fair Trading Coalition (August 2003), pp. 9, 12–13 (n 103); Independent Liquor Group (October 2003), p. 3.

this pressure, less than six months after the Dawson Committee delivered its report, the Senate Inquiry was launched in June 2003, initiated by a Labor Senator with the support of a cross-party coalition in the Senate.[125]

Therefore, the High Court's *Boral* decision and the reactions it provoked from big and small business interest groups (and, to a lesser extent, the ACCC) placed significant political pressure on the government and Parliament to act, the result of which was the Senate Inquiry.[126] However, the Senate Committee's recommended changes to section 46 would not really have changed the substance of the law; these were largely symbolic changes that simply incorporated then-existing case law into the statute.[127] There was also a lack of enforcement and advocacy activity from the ACCC on section 46 matters in the aftermath of the Senate Inquiry. It went from being influential in the Senate Inquiry (the proposals made in the ACCC's submissions were the focal point of submissions from big and small business interest groups to the Senate Inquiry and were largely adopted by the majority of the Senate Committee) to adopting a relatively passive role on section 46 matters. It also did not commence any section 46 legal proceedings in the period 2003 to 2008.[128] This reflected the then-new Chairman's approach to enforcement and advocacy, reflecting a preference to adopt a less prescriptive and more voluntary approach to compliance, use a variety of processes (including litigation and undertakings) to obtain outcomes, and deal privately (and not in public) with government and Parliament when advising on competition law and policy.[129] Therefore, both the Senate Inquiry and the ACCC failed to bridge the gap between the expectation and reality of section 46.

It was this gap that the Birdsville Amendment tried to fill. The Birdsville Amendment was and remains the most controversial of the 2007 and 2008

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[125] Brenchley, p. 256 (n 56).

[126] Bartholomeusz, Stephen (9 September 2003), 'Illegality or Competition: Drawing the Line', *The Age* (online). Retrieved from http://www.theage.com.au/articles/2003/09/08/1062901996162.html?from=storyrhs (last accessed 2 February 2013).

[127] The exception was the Senate Committee's recommendation relating to leveraging.

[128] Obtained from a review of the ACCC Annual Reports between 2002–03 and 2010–11.

[129] See, e.g., Samuel, Graeme (18 July 2003), 'A New Chairman of the Australian Competition and Consumer Commission: A Change in Substance or a Change in Style?', Speech delivered at the Melbourne Press Club, Melbourne. See also Fahrer, Marion (2006), 'Graeme Samuel: Regulation, Deal Making and the Public Interest', *The Melbourne Review*, 2(2), p. 18; Grant (14 June 2005); Brenchley, pp. 265–6 (n 56).

Amendments. The Birdsville Amendment specifically addresses predatory pricing conduct under section 46 and provides that a corporation with a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price less than its relevant cost for an anti-competitive purpose.[130]

The Birdsville Amendment did not originate from the Dawson Review, the Senate Inquiry or any of the submissions made to the Senate Inquiry; rather it was conceived and drafted by National Party Senator Barnaby Joyce in a motel room in the southwest Queensland town of Birdsville in response to what he perceived to be the shortcomings of the 2007 Amendment Bill (which largely reflected the Federal Government's accepted Senate Committee recommendations that, as discussed above, did little to change the substance of the law already in existence) which had been presented in Parliament.[131] He believed that the 2007 Amendment Bill did not go far enough in preventing predatory pricing by big businesses, which he considered to be of great public value.[132] Therefore, he drafted the Birdsville Amendment to lower the threshold of applicability of section 46 to predatory pricing cases and to address the uncertainty introduced by *Boral* with respect to recoupment.[133] The Birdsville Amendment was first announced by Senator Joyce on 28 June 2007[134] and subsequently added to the 2007 Amendment Bill on 11 September 2007,[135] a mere two weeks before the 2007 Amendment Bill was passed by both Houses of Parliament. Its inclusion at the eleventh hour was a last minute attempt to appeal, by the Federal Government, to the small business vote in the forthcoming election. The provision was hastily drafted and there was no consultation on the Birdsville Amendment either before or after its addition to the 2007 Amendment Bill; therefore, it was subject to less legislative and public scrutiny than the other provisions of the bill.[136]

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130 *Competition and Consumer Act 2010* (Cth) s 46(1AA), inserted by Trade Practices Legislation Amendment Act (No 1) 2007 (Cth) pt 1 s 1A.

131 Joyce, Barnaby (11 September 2007), Commonwealth, *Parliamentary Debates*, Senate, p. 91.

132 Joyce, Barnaby (28 June 2007), 'Joyce to Move the "Birdsville Amendments" for Small Business', Media Release; Joyce, Barnaby (11 September 2007), Commonwealth, *Parliamentary Debates*, Senate, pp. 91–3.

133 Id, pp. 91–2.

134 Joyce (28 June 2007) (n 132); Joyce (11 September 2007) (n 131).

135 Joyce (11 September 2007), p. 91 (n 131).

136 Law Council of Australia (19 September 2007), 'Letter to Treasurer Peter Costello'. Retrieved from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=FD47FB45-1E4F-17FA-D274-83CE1BB14E2B&siteName=lca (last accessed 2 February 2013), p. 9; Campbell, Garth (2007), 'The

The Birdsville Amendment was widely criticised, by the ACCC and others, for introducing uncertainties and difficulties into section 46.[137] In contrast to its silence during the debates surrounding the 2007 Amendment Bill, where it had taken the stance that its views were reflected in its submission to the Senate Inquiry and that it was not its role to comment on matters of policy,[138] the ACCC actively advocated the repeal of the Birdsville Amendment and publicly supported the Labor Federal Government's proposed amendments to section 46 to clarify the issues raised by the Birdsville Amendment.[139] The ACCC regarded those revisions as necessary to strike an appropriate balance 'between ensuring that businesses are exposed to the rigours of competition – with all the associated economic benefits – while being protected from the possible anti-competitive consequences associated with firms gaining power from that competitive process'.[140] Despite the ACCC's increased engagement with its regulatory environment and lending credibility to the Federal Government's proposal, the small business lobby was too powerful. The Coalition (now in opposition) thwarted the attempted revision. The ACCC remains encumbered by what it perceives to be a less than ideal authorising environment in relation to section 46 matters.

From the preceding analysis, it is clear that the dynamic between big

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Big Chill from Birdsville', *Law Society Journal*, 10, pp. 64–5, Corones, Stephen (2009), 'Sections 46(1) and 46(1AA) of the TPA: The Struggle of the Small against the Large', *Australian Business Law Review*, 37, p. 110.

137 See, e.g., Samuel, Graeme (12 October 2007), 'Promoting Competition or Protecting Consumers – the Role of Competition Policy and its Implications for Australian Businesses', Speech delivered at the John Curtin Institute of Public Policy Forum, Perth. For a critique of the Birdsville Amendment, see Law Council of Australia (n 136); Campbell (n 136); Corones (n 136); Duke, Arlen (2008), 'The Need to Close the "Take Advantage" Gap in the Regulation of Unilateral Anti-competitive Conduct', *Competition & Consumer Law Journal*, 15, pp. 284, 288–9; Clarke, Julie (2008), 'Australia's Radical Predatory Pricing Reforms: What Business Must Know', *Deakin Business Review*, 1, p. 6.

138 Samuel, Graeme (3 July 2007), 'Competition and Fair Trading: A Fair Go for Small Business', Speech delivered at the National Small Business Summit, Sydney.

139 See, e.g., Samuel, Graeme (11 June 2008), 'Taking a Holistic Approach to Assisting Small Businesses', Speech delivered at the National Small Business Summit, Sydney; Samuel, Graeme (24 May 2008), 'Recent and Foreshadowed Reforms of the Trade Practices Act', Speech delivered at the Competition Law Conference, Sydney; Franklin, Matthew (4 September 2008), 'Birdsville Act a Bad Deal for Consumers', *The Australian* (online). Retrieved from http://www.theaustralian.com.au/news/birdsville-act-bad-deal/story-e6frg6no-1111117386806 (last accessed 2 February 2013).

140 Samuel (11 June 2008) (n 139).

and small business interests greatly influences the political economy of Australian competition law. These interest groups can exert great pressure on the government and parliamentarians. The impact of court decisions can also be quite significant and provoke political responses from interest groups, the government, and the competition regulator. These observations reinforce and extend the earlier observations about the political economy of Australian competition law gained from the examination of the introduction of criminal sanctions for serious cartel conduct.

4. CONCLUSION

Through the use of the regulatory strategy model to analyse recent developments in Australian competition law, it is clear that the political economy of Australian competition law is strongly influenced by the political struggle between big and small business interest groups, the level of government support for competition law, and, most importantly, the competition regulator's level of engagement with its regulatory environment. The actions and inaction of the ACCC relating to the recent Australian competition law reforms have been essential in shaping the regulatory environment.

If the ACCC chooses to engage with its regulatory environment, it can often be effective in obtaining desirable outcomes. It was the ACCC that instigated the public debate on the criminalisation of serious cartel conduct and pioneered a reform proposal. It was also the ACCC that had, prior to the Dawson Review and thereafter, pushed for reform of section 46 and formulated proposals that would ultimately be reflected in the amendments made to section 46 in 2007 and 2008 (despite reservations about their effectiveness in achieving true reform).

Conversely, the ACCC can choose to disengage from the regulatory environment by stepping back and letting the dynamics of the regulatory environment run their course. This occurred in both the criminalisation of serious cartel conduct and reforms to section 46 where the ACCC decided to adopt a low profile after initially strongly advocating those reforms. There are, of course, risks associated with this approach. It often takes a long time for the regulatory environment to change. Six years elapsed from the time the Federal Government agreed to introduce criminal sanctions for serious cartel conduct until the enactment of legislation to put those sanctions in place. Similarly, three years passed before the Federal Government acted on the Senate Inquiry and legislated to introduce the first round of amendments to section 46 and, even then, it is arguable whether the amendments made in 2007 and 2008 had any real impact. Had

the ACCC been more engaged with the regulatory environment during that period, it might have been able to ensure that the momentum for reform did not slow. Another risk from a strategy of comparative disengagement is that a less-than-ideal regulatory environment may result, such as what occurred in the case of the Birdsville Amendment. It was only after the Birdsville Amendment came into effect that the ACCC publicly voiced its concerns and subsequently attempted, albeit unsuccessfully, to remedy this unfavourable authorising environment. This strategy of disengagement unfortunately resulted in a less than optimal outcome for the ACCC.

The ACCC's experience shows that a regulator can rarely afford to be disengaged from its regulatory environment. However, this raises an important broader issue: *should* a regulator engage with its regulatory environment? The answer to this question is a qualified yes. What the government and parliament, or perhaps even the regulator, should do is bring issues to the attention of the public and encourage public debate and participation.[141] Public inquiries and consultation processes such as the Dawson Review and the Senate Inquiry are good examples of the types of open and transparent processes that are appropriate and useful means to allow all parties, including the ACCC, to participate equally in the regulatory environment and wider policymaking arena.

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