

THE POLITICAL ECONOMY
OF COMPETITION LAW
IN CHINA

The Political Economy of Competition Law in China provides a unique perspective of China's competition law that is situated within its legal, institutional, economic and political contexts. Adopting a framework that focuses on key stakeholders and the relevant governance and policy environment, and drawing upon stakeholder interviews, case studies and doctrinal analysis, this book examines China's Anti-monopoly Law in the context of the political economy from which it emerged and in which it is now enforced. It explains the legal and economic reasoning used by Chinese competition authorities in interpreting and applying the Anti-monopoly Law, and offers valuable and novel insights into the processes and dynamics of law- and decision-making under that law. This book will interest scholars of competition law and professionals advising clients that operate in China, as well as scholars of Chinese law, Asian law, comparative law and political and social science.

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For my mother

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FOREWORD

Since it came into effect in August 2008, research on China's Anti-monopoly Law, both within and outside China, has grown and spread like bamboo shoots after a spring rain. This research examines the issues of the Anti-monopoly Law itself and the specific decisions made by the competition authorities and courts, and engages in comparative analysis of the Anti-monopoly Law and the competition laws of other jurisdictions, with the aim of improving the Anti-monopoly Law and the effectiveness of its enforcement. I am pleased to recommend Dr Wendy Ng's book on the Anti-monopoly Law, *The Political Economy of Competition Law in China*, to the international community. The author explores the development and implementation of China's Anti-monopoly Law through the study and analysis of China's political, economic and societal contexts.

I believe that this book will justifiably attract a great deal of interest from the international community. Although there is no shortage of foreign academics researching and writing on the Anti-monopoly Law, what distinguishes Dr Ng from many other foreign academics is that she is a 'China hand'. She is fluent in Mandarin Chinese, able to converse and interact face-to-face with Chinese academics and undertakes research using Chinese-language primary and secondary materials. She has the ability, skill and opportunity to deeply understand the background, law-making and enforcement of the Anti-monopoly Law, and China's political, economic and other relevant contexts. As a result of Dr Ng's combined expertise on China and competition law, this book provides many valuable and thoughtful insights into the Anti-monopoly Law that cannot be furnished by other research and published work in English. Further, Dr Ng's Australian background means that she brings a perspective to the Anti-monopoly Law that is different to that taken by Chinese academics, including myself. As a Chinese academic, I am greatly interested in her book.

Another reason for my recommendation of Dr Ng's book is that, in addition to examining the Anti-monopoly Law from a legal perspective, it explores the impact of the political economy on the making and enforcement of the Anti-monopoly Law in considerable depth. In Chapter 3, she adopts a demand-side perspective to explore the stakeholders and wider environment surrounding the Anti-monopoly Law. For example, Dr Ng points out that while China's economic reforms are conducive to developing the Anti-monopoly Law, there is also resistance and opposition to the law on the part of state-owned enterprises and monopoly industries. In Chapter 4, Dr Ng examines the actors and various factors shaping and constraining the Anti-monopoly Law from a supply-side perspective, observing, for example, that it is inevitable that there will be compromise and coordination between competition authorities and industry regulators. The various debates and issues discussed during the drafting and deliberation of the Anti-monopoly Law are analysed in Chapter 5 from a political economy perspective. Such issues include whether the Anti-monopoly Law would prohibit administrative monopoly, protect the state-owned economy, strengthen macroeconomic regulation and control and encourage mergers to expand economies of scale and scope. The clash of these different ideas and views not only demonstrates the difficulties involved in developing the Anti-monopoly Law and the potential problems that may arise in its enforcement, but also reflects China's politics, economy, society and culture. Thus, Dr Ng astutely points out that China's adoption of the Anti-monopoly Law is the product of the coordination and balancing of the different views and ideologies within Chinese society. The impact of China's political economy on the enforcement of the Anti-monopoly Law is studied in Chapter 6. One consequence of the political economy, as the author observes, is that industrial policy and intervention of industry regulators feature in enforcement; her views in this regard are correct.

With this book, Dr Ng commendably provides readers with a clear, sophisticated and critical understanding and analysis of the Anti-monopoly Law, informed by her deep, comprehensive and nuanced understanding of China's political economy. Her critical analysis reveals that the Anti-monopoly Law faces some challenges and problems. Nevertheless, I must also bring attention to the fact that the enactment of the Anti-monopoly Law evidences the market-orientated direction of China's economic reforms; it is therefore a milestone in China's economic reform process. Inevitably, various problems will arise in the enforcement of the Anti-monopoly Law, especially concerning

the independence of the competition authorities. However, I believe that the general direction of its enforcement is on the right track. For example, in the case of Qualcomm, where a record-high administrative penalty was imposed, some academics comment that the Anti-monopoly Law could have been enforced more strongly, but virtually no one believed that the Chinese competition authorities were not capable of handling the case simply because Qualcomm was a foreign company.

I met Dr Ng in 2012, when she moved from Melbourne to Beijing to undertake fieldwork and research on the Anti-monopoly Law. During her eight-month stay in Beijing, we met regularly to engage in academic discussions, over the course of which I encountered her rigorous approach to research and solid competition law knowledge. Dr Ng has a strong interest in China, and one that she seeks to share with others. This is demonstrated not only through her research on China's Anti-monopoly Law and in the publication of this book, but also in her tireless efforts as the editor of an online bulletin that provides regular updates to the international community on developments in Chinese competition law. As a Chinese academic, I would like to express my gratitude and respect for her dedication and valuable contribution. On a personal note, I am thankful to Dr Ng for her substantial assistance in helping me to communicate my research to the global competition law community, especially in the publication of my book in 2014 – there are very few native English speakers who speak Chinese proficiently in the global competition law community. Through our common research interests and shared desire to engage with the international community on the Anti-monopoly Law, we have developed a firm friendship. I am delighted to commend her book to readers.

Finally, I would like to express my heartfelt congratulations to Dr Ng on the publication of the first monograph of her academic career! I believe that this valuable book will be welcomed and very well received by the international community. I sincerely hope that Dr Ng continues to work hard and forge ahead in her teaching and research of competition law, and will become a new shining star in the global competition law community.

Xiaoye Wang

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Many moons ago, as a second-year lawyer working in the competition law group at a law firm in Melbourne, I worked on a global merger that involved coordinating and securing merger approvals from competition authorities in multiple jurisdictions. These jurisdictions were varied: some were rich, developed countries with lengthy experiences of competition law; others were poorer, developing countries with relatively new competition laws and limited enforcement experience. I was intrigued by the fact that these jurisdictions, despite variations in their development levels, economies, cultures and socio-economic situations, all had a competition law. What drives the decision to adopt a competition law and to dedicate resources to enforcing that law, in the face of competing priorities, challenges and considerations, especially for poorer or less developed countries? What are the differences in the ways in which competition laws are understood and enforced in various countries, and why do these differences arise? These questions lingered in my mind long after the merger had closed and I had moved overseas to study and work. Eventually, with the aim of satiating my curiosity, and perhaps with a dash of naiveté, I decided to do a PhD, focusing my research on China's competition law.

This book, which draws substantially from my doctoral research, is the culmination of these efforts. But, much like raising a child, it took a village to develop my initial curiosity into a doctoral dissertation and, eventually, into a book. I am immensely grateful to my village of colleagues, mentors, friends and family.

To my PhD supervisors, Caron Beaton-Wells and Sean Cooney, I will always be grateful for your wise counsel, support and encouragement.

To the participants in my interviews, thank you for giving me your time, sharing your experiences and insights and answering my questions candidly and openly. Your generosity enabled me to engage with my research with more depth and nuance, with an enhanced appreciation and awareness of the very real impact that the law has on its

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constituents. I hope that the book adequately and appropriately reflects your contributions.

To Wang Xiaoye, Allan Fels, Mark Furse and Mark Williams, who variously read my work, discussed my research at length and provided useful and insightful comments and suggestions; Gabrielle Appleby and John Williams, who offered useful advice at the beginning stages of this book project; and Cate Read and the staff at the Academic Research Service at Melbourne Law School, who provided incredible and unparalleled assistance in the preparation of the manuscript for this book, my sincere thanks for your support, advice and help in this project; I am lucky to have such wonderful mentors and colleagues.

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To my friends, thank you for your understanding, humour, friendship and distraction. To quote The Beatles, who said it best, 'I get by with a little help from my friends'.

And finally, and certainly not least, to my family. Thank you for your unwavering and unconditional support, nourishment and belief, and for instilling in me a love of learning and a curious mind.

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 ADMINISTRATIVE DECISIONS AND
 POLICY DOCUMENTS

Legislation

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LIST OF ABBREVIATIONS

AIC	Administration for Industry and Commerce
AMC	Anti-monopoly Commission
AML	Anti-monopoly Law
AUCL	Anti-Unfair Competition Law
CAAC	Civil Aviation Administration of China
CASS	Chinese Academy of Social Sciences
CBRC	China Banking Regulatory Commission
CIRC	China Insurance Regulatory Commission
CNPC	China National Petroleum Corporation
CPC	Communist Party of China
CPPCC	Chinese People's Political Consultative Conference
CSRC	China Securities Regulatory Commission
FCS	Fiscal contracting system
FRAND	Fair, reasonable and non-discriminatory
HHI	Herfindahl–Hirschman Index
IPR	Intellectual property right
LAO	State Council Legislative Affairs Office
MIIT	Ministry for Industry and Information Technology
MOFCOM	Ministry of Commerce
NDRC	National Development and Reform Commission
NPC	National People's Congress
Politburo	Political Bureau of the Central Committee
SAIC	State Administration for Industry and Commerce
SAPPRFT	State Administration of Press, Publication, Radio, Film and Television
SASAC	State-owned Assets Supervision and Administration Commission
SCNPC	Standing Committee of the National People's Congress
SEP	Standard essential patent
SETC	State Economic and Trade Commission
Sinopec	China Petrochemical Corporation
SOEs	State-owned enterprises

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SPC	Supreme People's Court
VATS	Value-added telecommunications services
VIE	Variable interest entity
WTO	World Trade Organization