

## DISCUSSION PAPER — MEANING OF ‘UNDERSTANDING’ IN THE *TRADE PRACTICES ACT 1974*

1. On 15 March 2008, in response to recommendations made by the Australian Competition and Consumer Commission (ACCC) in the *Report of the ACCC inquiry into the price of unleaded petrol* (the Petrol Report), the Government announced that it would give careful consideration to the ACCC’s proposed amendments to section 45 of the *Trade Practices Act 1974* (TPA).
2. This discussion paper follows on from the Government’s announcement. It seeks submissions from interested parties regarding the adequacy of the current interpretation of the term ‘understanding’ in the TPA to capture anticompetitive conduct.
3. This paper does not put forward recommendations in relation to the issues raised, and its contents do not necessarily reflect a settled position on the issues by the Government. The Government will consider submissions made as part of its consideration of this issue.

### Background

4. On 18 December 2007, the ACCC released the Petrol Report, the result of its public inquiry into the price of unleaded petrol pursuant to subsection 95H(2) of Part VIIA of the TPA. One of the issues considered in the Petrol Report was the role of the TPA in addressing impediments to competition, in particular section 45.
5. The ACCC examined the term ‘understanding’ under section 45 of the TPA. The ACCC expressed concerns (supported by the advice of senior counsel) that court decisions have, over time, narrowed the conduct that is caught by the term ‘understanding.’
6. The ACCC also raised concerns as to the readiness of the Court to draw inferences from the evidence in determining whether parties have reached an understanding.
7. To address these concerns, the ACCC recommended that amendments to the TPA be made in order to broaden and clarify the meaning of the term ‘understanding’. In particular, it recommended that the TPA provide that an understanding may be found to have been arrived at, notwithstanding that it was ascertainable only by inference from surrounding circumstances. A copy of the ACCC’s recommendation is at **Annexure A**.

## Meaning of 'understanding' under section 45 of the TPA

8. Section 45 of the TPA prohibits a corporation from making or giving effect to a provision of a contract, arrangement, or understanding if that provision constitutes an exclusionary provision, or if it has the purpose or likely effect of substantially lessening competition.<sup>1</sup>
9. The terms 'contract', 'arrangement' and 'understanding' are not defined under the TPA, but have received a degree of interpretation in court decisions.
10. The term 'contract' is well established and involves: consensual dealing, offer, acceptance, consideration, certainty, formality and enforceability. Courts have interpreted term 'arrangement' to mean a less formal form of consensual dealing lacking some of the essential elements that would otherwise make it a contract.
11. A number of cases have suggested that the words 'arrangement' and 'understanding' are synonymous. However, the Court in the recent case of *ACCC v Leahy*<sup>2</sup> interpreted the terms 'contract,' 'arrangement' and 'understanding' as representing a spectrum of consensual dealings, where an 'understanding' is considered a less precise dealing than either a contract or arrangement.
12. Other cases have similarly interpreted the term 'understanding' as a broad and flexible form of consensual dealing, the requirements for which can probably be more easily satisfied than the requirements for making an 'arrangement.'
13. Courts have always required, as necessary elements for conduct to come within section 45 of the TPA, that there be a meeting of the minds of the parties to the alleged understanding and some form of commitment by the parties to the alleged understanding. As to the latter element, this requires that at least one party to an alleged understanding be understood, by the other parties, to be committed to act in a certain way. The difficulty arises in determining the nature and content of what is required to satisfy that element of commitment.
14. The ACCC's concern, as set out in the Petrol Report, is that there has been an apparent shift over the last decade in judicial interpretation of the term 'understanding' in section 45 of the TPA and, in particular, what is required to satisfy the element of commitment.<sup>3</sup>

## Proof of understanding

15. The ACCC also expressed a concern that courts have shown a reluctance to draw inferences from the evidence in establishing an arrangement or understanding.<sup>4</sup>

---

1 The expression 'contract, arrangement or understanding' also forms part of the new cartel offences and prohibitions contained in the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 – see sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK.

2 [2007] FCA 794, at [24] and [27].

3 Petrol Report, p228.

4 Petrol Report, p229.

16. The ACCC has noted that in many investigations, it will not have direct evidence of the making of an arrangement or understanding, and must ask the court to infer the existence of an agreement from the factual circumstances surrounding it.

### Questions for discussion

17. The Government seeks submissions from interested parties regarding the meaning and proof of 'understanding' in the TPA, and in particular views on the following issues:
- Does the current judicial approach to the interpretation of 'understanding' limit the ability of the TPA to properly address anticompetitive practices?
    - If so, is there a need to clarify or define the meaning of 'understanding' in the TPA? What should be the scope of any such clarification or definition?
  - Is the Court currently constrained to an inappropriate degree in its ability to draw inferences from the evidence in determining whether or not an understanding exists?
    - If so, is there a need to specifically provide that the court may ascertain the existence of an understanding by inference from any factual matters put before the court?
18. Submissions will be made publicly available on the Treasury website. If a submission, or any part of it, is to be treated as confidential, please indicate this clearly on the submission.
19. Submissions should be made by **31 March 2009** to:

Scott Rogers  
Competition and Consumer Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600  
Email: [understanding@treasury.gov.au](mailto:understanding@treasury.gov.au)  
Fax: (02) 6263 3964

## Petrol prices and Australian consumers: Report of the ACCC inquiry into the price of unleaded petrol (December 2007)

### 14.2.1, Section 45 and the petrol industry (p230)

The ACCC recommends that consideration be given to an amendment to provide for the following:

- (a) The court may determine that a corporation has arrived at an understanding notwithstanding that:
  - (i) the understanding is ascertainable only by inference from any factual matters the court considers appropriate
  - (ii) the corporation, or any other parties to the alleged understanding, are not committed to giving effect to the understanding.
- (b) The factual matters the court may consider in determining whether a corporation has arrived at an understanding include but are not limited to:
  - (i) the conduct of the corporation or of any other person, including other parties to the alleged understanding
  - (ii) the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way in relation to the subject of the alleged understanding
  - (iii) the extent to which the corporation was acting in concert with others in relation to the subject matter of the alleged understanding
  - (iv) any dealings between the corporation and any other parties to the alleged understanding before the time at which the understanding is alleged to have been arrived at
  - (v) the provision by the corporation to a competitor, or the receipt by the corporation from a competitor, of information concerning the price at which or conditions on which, goods or services are supplied or acquired, or are to be supplied or acquired, by any of the parties to the alleged understanding or by any bodies corporate that are related to any of them, in competition with each other
  - (vi) whether the information referred to in (v) above is also provided to the market generally at the same time
  - (vii) the characteristics of the market
  - (viii) the likelihood of the information referred to in (v) above being useful to the recipient of the information for any purpose other than fixing or maintaining prices;
  - (ix) the extent to which, if at all, the communication referred to in (v) above was secret or intended by the parties to the communication to be secret.