AMERICAN BAR ASSOCIATION

Section of Antitrust Law
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5550
FAX: (312) 988-5637
E-mail: antitrust@abanet.org
http://www.abanet.org/antitrust

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Via E-mail

Mr. Scott Rogers
Competition and Consumer Policy Division
The Treasury
Langston Crescent
PARKES ACT 2600

Dear Mr. Rogers:

On behalf of the American Bar Association Sections of Antitrust Law and International Law we are pleased to submit the attached comments in response to the January 9, 2009 Discussion Paper of the Competition and Consumer Policy Division of the Treasury entitled *Meaning of "Understanding" in the Trade Practice Act 1974.*

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

James A. Wilson
Chair, Section of Antitrust Law

Aaron Schildhaus
Chair, Section of International Law

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE MEANING OF "UNDERSTANDING" IN THE AUSTRALIAN TRADE PRACTICES ACT 1974

March 26, 2009

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law of the American Bar Association (collectively, the Sections) offer the following Comments in response to the January 9, 2009 Discussion Paper of the Competition and Consumer Policy Division of The Treasury of the Government of Australia (Government), entitled *Meaning of "Understanding" in the Trade Practices Act 1974* (Discussion Paper). The Comments address questions posed at ¶ 17 of the Discussion Paper, along with a proposed amendment of Section 45 of the Trade Practices Act 1974 (TPA) described in Annexure A to the Discussion Paper (Proposed Amendment).

The Sections recognize the concern of the Australian Competition and Consumer Commission (ACCC) that judicial interpretation of the word "understanding" in Section 45 has limited its ability to enforce the TPA to reach certain types of market conduct, and they appreciate the opportunity to respond to the Discussion Paper. The Sections' Comments are based on extensive experience with U.S. antitrust law and international competition laws. The discussion of Australian law in these Comments has been prepared by members of the Australian competition bar, and the Sections have relied upon it in outlining how U.S. antitrust law, along with competition law in the EU and Canada, may provide a helpful perspective for the Government as it considers whether changing Section 45 as described in the Proposed Amendment would be warranted. The Sections acknowledge the institutional differences

between U.S. and Australian systems of antitrust law but believe that the Comments, despite these differences, may have some value for this purpose.

Executive Summary

In addition to addressing issues posed by the Discussion Paper and the Proposed Amendment, the following Comments consider the relationship of those issues to the pending Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cartel Bill), which would amend Section 44 of the TPA to criminalize cartel conduct.

The Proposed Amendment would, if enacted, create the potential for subjecting a firm to liability under Section 45 for unilateral conduct. Since it would dispense with the requirement recognized by the Australian Federal Court for evidence of a meeting of minds or commitment to a common plan in order to prove an understanding, a firm could be liable for entertaining an undisclosed expectation that other firms will react in a certain way to its conduct. The Proposed Amendment would to this extent materially expand the scope of Section 45, which apparently is intended to address only joint conduct. (Pages 5-6.)

The Proposed Amendment would, if enacted, also subject a firm to liability under Section 45 for conscious parallelism. Since no meeting of minds or commitment to a common plan would be required for liability, firms in a concentrated market could violate Section 45 by independently arriving at uniform pricing, output or other decisions. There is consensus in the economic literature and among major antitrust regimes that antitrust liability cannot be premised on conscious parallelism. (Pages 6-19.)

In light of the Proposed Amendment's effective abrogation of a meeting of the minds to find an "understanding," its enactment would have implications for interpretation of the identical term in the criminal counterpart of Section 45, Section 44 in the Cartel Bill. While the

prohibition on arriving at an understanding that has a cartel provision or an understanding to give effect to a cartel provision would still require proof of criminal intent, there is considerable risk that a lowered liability threshold for "understanding" under Section 45 could be imported into the interpretation of Section 44. The result would be to blur the line between independent conduct and hard-core criminal cartel behavior, and the resulting uncertainty could chill legitimate, lawful procompetitive conduct. (Pages 19-20.)

The Sections understand that the Proposed Amendment stands on the premise that the current judicial interpretation of "understanding" limits the ability of the ACCC to enforce the TPA to address anticompetitive practices. However, the Sections question this premise. A review of the decisions which, according to the ACCC, point to the need for the Proposed Amendment suggests that they were the result of failures of proof, not statutory shortcomings. The Discussion Paper omits mention, moreover, of any possible changes to Section 45 other than those in the Proposed Amendment and, to this extent, may inadvertently narrow debate about whether Section 45 can be fine-tuned to enhance the ACCC's ability to address anticompetitive practices. (Pages 20-25.) To the extent the Proposed Amendment enumerates specific categories of circumstantial evidence to be considered in determining whether an "understanding" exists, it would appear to be unnecessary. Australian jurisprudence has long allowed consideration of a wide range of circumstantial evidence in determining whether an "understanding" exists, and this approach to the evidence is consistent with that of other major antitrust regimes. Itemizing categories of potentially relevant evidence – even when accompanied by a proviso that the list is non-exclusive – risks artificially limiting the range of evidence courts consider.

Comments

I. Background and Purpose of the Proposed Amendment.

As part of a December 2007 report to the Minister of Competition Policy and Consumer Affairs on the results of its inquiry into the pricing of unleaded petrol, the ACCC expressed the view that recent interpretations of "understanding" by the Federal Court "disclose a subtle but significant shift in the nature of commitment that must be found to establish the existence of an understanding."[1] According to the ACCC, earlier decisions by the Court had interpreted the term to include an "expectation regarding future conduct consciously or intentionally engendered in one person by the words or conduct of another person."[2] More recent decisions suggest, however, that evidence of such an expectation would not be sufficient and that there is, instead, "a need for at least one of the parties to give or accept a commitment, obligation, undertaking or assurance that they will act in a certain way."[3] In reaching this interpretation, the ACCC relied upon an opinion by its senior counsel, J.W.K. Burnside, analyzing the case law.[4]

To redress this shift in the interpretation of "understanding," the ACCC recommended that Section 45 be amended to recognize "that the conscious or intentional creation of an 'expectation' regarding future conduct may be sufficient to constitute an understanding."[5] The Sections understand that the Proposed Amendment was formulated to provide for this interpretation and that it would permit a court to determine that a corporation has arrived at an understanding even when neither party to the understanding is "committed to giving effect to the understanding." (Proposed Amendment (a)(ii).) Additionally, an understanding could be

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[1] ACCC, PETROL PRICES AND AUSTRALIAN CONSUMERS 228 (2007) [hereinafter PETROL PRICES REPORT].
[2] *Id.*
[3] *Id.*
[4] Burnside's opinion is reproduced as Appendix R to the PETROL PRICES REPORT.
[5] PETROL PRICES REPORT at 230.

inferred from "any factual matters the court considers appropriate" (Proposed Amendment (a)(i)), and nine categories of such factual matters are itemized (Proposed Amendment (b)).

The Discussion Paper was issued to solicit submissions "regarding the adequacy of the current interpretation of the term 'understanding.'" (Discussion Paper at 1, ¶ 2.)

II. The Proposed Amendment Would Subject a Firm to Liability for Unilateral Conduct.

The Proposed Amendment provides that the court may determine that a corporation has arrived at an understanding even though "the corporation, or any other parties to the alleged understanding, are not committed to giving effect to the understanding." (Proposed Amendment (a)(ii).) It should be enough, according to the ACCC, that a firm has consciously and intentionally created "an 'expectation' regarding future conduct."[6] The Sections believe that this liability formulation raises significant issues. Removing the case law's requirement of a meeting of the minds would depart sharply from existing Australian jurisprudence and substitute an asymmetric liability test for one based on mutual commitment.

It is clear from the Australian jurisprudence that, consistent with the U.S., EU, and Canadian positions, an understanding (or agreement) requires a meeting of the minds, and the case law is summarized at pages 8-11 below. Whether this threshold requirement can alternatively be characterized as a mutual commitment or a conscious commitment to a common plan, there can be no collusion without it. There is broad international consensus on this minimal requirement for liability for joint conduct under the conspiracy provisions of competition laws.[7]

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[6] *Id.*

[7] *See* OECD GLOBAL FORUM ON COMPETITION, PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE, 18 (2006) ("It is important, however, that in all cases competition laws will impose liability for entering into an unlawful agreement only if firms have consciously acted together, whether through formal or informal means of communication. To prove a competition law violation, it must be shown that there has been a 'meeting of the minds' toward a common goal or result, or, in other words, some 'conscious commitment to a common scheme.' Conversely, liability cannot be found where firms communicated purely in the form of a market place action, or

The Sections recognize that proof of an understanding under Section 45 does not require evidence of collusion rising to the level of a formal contract, but some meeting of the minds is essential. The Proposed Amendment effectively dispenses with this requirement, because the Amendment's specification that "the conscious or intentional creation of an 'expectation' regarding future conduct may be sufficient to constitute an understanding" when neither party is "committed to giving effect to that understanding," potentially exposes firms to liability for conduct recognized to amount to mere oligopolistic independence. For example, a firm (A) may run afoul of the Proposed Amendment when that firm raises price knowing that a rival (B) would expect A to undertake further price increases were B to follow, even though A makes no commitment to raise, and has no intention to raise, prices further. The Proposed Amendment thus undesirably could extend Section 45 to reach unilateral as well as collusive conduct.[8]

III. There Is No Economic Basis for Equating Conscious Parallelism and Actual Collusion, and Liability for Joint Conduct in Major Antitrust Regimes, Including Australia, Does Not Extend to Conscious Parallelism.

As the preceding discussion shows, the Proposed Amendment would expose firms in a concentrated market to liability for conscious parallelism. There is no support in the economic literature for the view that conscious parallelism should be prohibited or that it can only be explained as the product of collusive behavior. The U.S., Canada, the EU and other major antitrust regimes uniformly hold that evidence of conscious parallelism is not, by itself, sufficient for a finding of actual collusion.

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where firms communicated, but did not develop some 'conscious commitment to a common scheme.'" (footnotes omitted)) [hereinafter PROSECUTING CARTELS], *available at* http://www.oecd.org/dataoecd/19/49/37391162.pdf.

[8] *See, e.g.*, Ian Wylie, *Understanding "Understandings" under the Trade Practices Act – An Enforcement Abyss*, 16 T.P.L.J. 20, 36 (2008) (the Proposed Amendment would "be over-inclusive, since it and the wording currently proposed by the ACCC could catch unilateral conduct").

A. The Economic Literature Recognizes That Conscious Parallelism Is Consistent with Unilateral Decision-Making by Firms in an Oligopoly.

A market with few sellers, homogeneous products, inelastic demand, and significant barriers to entry is conducive to conscious parallelism.[9] In economic terms, the market is an oligopoly, and firms in such a market are necessarily interdependent. In an oligopoly, as distinct from an unconcentrated market, each firm "*must* consider rival firms' behavior to determine its own best policy."[10] Price uniformity in an oligopoly is consistent with independent decision-making by member firms, and "evidence of parallel conduct, such as simultaneous price increases by rivals, alone is not sufficient proof of a cartel agreement."[11] Parallel price movements in an oligopoly "could arise simply through independent rational behaviour."[12]

Price fixing can be achieved in an oligopoly only through actual collusion, coupled with enforcement of the collusive agreement.[13] Since a price-fixing cartel is not self-effectuating even in an oligopoly, "efforts at concurrence, coordination, and compliance" are required to carry it out,[14] and the courts have referred to these efforts as "plus factors," evidence of which tends to prove collusion.[15]

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[9] *See, e.g.*, FREDERIC M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 235-315 (3d ed. 1990).

[10] DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 157 (4th ed. 2005) (emphasis in original).

[11] PROSECUTING CARTELS, *supra* note 7, at 18.

[12] OECD COMPETITION COMMITTEE, OLIGOPOLY 8 (1999) ("[P]arallel behaviour could have causes other than collusion. In oligopoly settings, parallel price movements for example could arise simply through independent rational behaviour."), *available at* http://www.oecd.org/dataoecd/35/34/1920526.pdf.

[13] *See, e.g.*, George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 45-48 (1964).

[14] Kenneth G. Elzinga, *New Developments on the Cartel Front*, 29 ANTITRUST BULL. 3, 25 (1984).

[15] *See, e.g.*, PROSECUTING CARTELS, *supra* note 7, at 18 (in order to prove a cartel agreement in a market exhibiting parallel conduct, evidence is needed which tends to prove the existence of an unlawful agreement, and "[c]ourts sometimes refer to this additional evidence as 'plus factors'"). In the U.S., for example, courts have looked at whether the conduct would be in the parties' self-interests if they all agreed to act in the same way but would be contrary to their self-interests if they acted alone. The conduct could include, e.g., artificial standardization of products, raising prices in times of oversupply, or pretextual explanations for a course of action. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 224-27 (1939); InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 165 (3d Cir. 2003); C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 496-97 (9th Cir. 1952). Plus factors are discussed further at notes 44-49 *infra* and accompanying text.

To the extent that the Proposed Amendment would permit Section 45 to be applied to mere conscious parallelism, it would ignore the economic consensus that conscious parallelism is a function of the structure of a concentrated market and not the product of collusion. It would expose a firm in such a market to liability for unilaterally entertaining the expectation that its rivals will react in a particular manner to the firm's conduct or for unilaterally engendering similar expectations in other firms regarding its own conduct. In dispensing with the need, under the Australian case law, to prove commitment to an "understanding" or a meeting of minds, the Proposed Amendment would put at risk any firm engaging in rational profit-maximizing conduct in a concentrated market.

B. Section 45 of the TPA Has Been Interpreted to Require a Meeting of Minds.

The Sections understand that courts in Australia have consistently viewed the requirement in Section 45 of the TPA for an "arrangement" or an "understanding" as calling for something more than oligopolistic interdependence and consciously parallel conduct. The statutory terms have been interpreted to mean collusion, a meeting of minds, consensus, or plan.[16]

The Sections understand that the consistent theme running through the case law has been to require a meeting of minds. This classic meaning of "understanding" was enunciated in *Top Performance Motors v. Ira Berk Ltd.*:[17]

> [W]here the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct it would seem that there would be an understanding within the meaning of the Act.

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[16] *See* J.D. HEYDON, TRADE PRACTICES LAW § 4.260 (2002).
[17] (1975) 24 F.L.R. 286, 291.

In *ACCC v. Amcor Printing Papers Group Ltd.*,[18] the court distilled the main elements of an "understanding" or "arrangement" to be a plan between two or more people that may not be legally enforceable but that involves (1) a meeting of the minds of those who are parties to it and (2) a consensus as to what is to be done, rather than a mere hope that something will be done.

Australian courts have long recognized that evidence of parallel action is admissible to support an inference in certain circumstances that a prohibited understanding has been reached: "[P]arallel conduct may constitute certain circumstantial evidence from which an arrangement or understanding may be inferred."[19] Uniformity of pricing has been a significant basis for inferring a prohibited understanding.[20]

Australian courts have made it clear, the Sections understand, that the fact of parallel behavior may not support such an inference in every case; particularly where there is some independent explanation or rationale for the parallel conduct. Circumstantial evidence was insufficient in *Trade Practices Commission v. Email Ltd.*,[21] even where the parties had been shown to exchange price lists and charged the same prices. The evidence was not sufficiently strong to counteract other explanations provided for the parallel conduct:

> For there to be an arrangement or understanding there must be a meeting of the minds of those said to be parties to the arrangement or understanding. In some cases this may be inferred from circumstantial evidence. There must be a consensus as to what is to be done and not just a mere hope as to what might be done or happen. Independently held beliefs are not enough.[22]

Based on evidence adduced by the respondents to explain that their "parallel conduct resulted, not from an arrangement or understanding between them, but from commercial considerations

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[18] (2000) 169 A.L.R. 344, 359.
[19] Trade Practices Comm'n v. Allied Mills Indus., (1980) 32 A.L.R. 570, 576 (Sheppard, J.).
[20] *See, e.g.*, Trade Practices Comm'n v. David Jones (Australia) Pty, (1986) 13 F.C.R. 446.
[21] (1980) 31 A.L.R. 53.
[22] *Id.* at 56.

unconnected with collusion,"[23] the court was convinced that swapping price information was not based on any understanding and that external market factors explained the common pricing.

The Sections are aware that cases such as this have been criticised. However, the Sections are sympathetic with the suggestion that the criticism may be misplaced because the problem has been a failure of proof, not shortcomings in the statute:

> Much of the criticism is misconceived in that it consists of an assault on the factual conclusions arrived at by the courts without any close regard to the evidence or to an attempt to show where precisely the courts erred, which witnesses they wrongly believed, which inferences they should or should not have drawn.[24]

This caution would appear to apply with particular force to the run of cases in Australia from the mid-1980s until recently in which petrol retailers have repeatedly been found not to have arrived at any prohibited understanding, notwithstanding evidence of parallel conduct and sometimes more.[25]

C. Proof of Liability under Section 1 of the Sherman Act Requires Evidence of a Meeting of Minds or Conscious Commitment to a Common Scheme.

Although Section 1 of the Sherman Act (15 U.S.C. § 1) declares unlawful "[e]very contract, combination . . . or conspiracy" in restraint of trade, the courts have long since ceased to make any distinction among the terms contract, combination or conspiracy. The Supreme Court observed more than sixty years ago that a combination or conspiracy could be proved by circumstances showing that the defendants "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."[26]

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[23] *Id*. at 57.
[24] HEYDON, *supra* note 18, § 4.390.
[25] *See, e.g.*, Trade Practices Comm'n v. Parkfield Operations Pty, (1985) 5 F.C.R. 140; Trade Practices Comm'n v. Serv. Station Ass'n, (1993) 44 F.C.R. 206; Apco Serv. Stations v. ACCC, (2005) 159 F.C.R. 452; ACCC v. Leahy Petroleum Pty, (2007) 160 F.C.R. 321.
[26] Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).

Because conspiracies operate in secret, direct evidence of collusion is typically difficult to develop, and conspiracies under Section 1 of the Sherman Act must often be proved through circumstantial evidence alone.[27] Circumstantial evidence may be ambiguous, reflecting "conduct as consistent with permissible competition as with illegal conspiracy,"[28] and conscious parallelism is one type of ambiguous circumstantial evidence.[29] The Supreme Court acknowledged in *Theatre Enterprises v. Paramount Film Distributing Corp.*[30] that parallel conduct is admissible circumstantial evidence from which an agreement may be inferred but stated that it had "never held that proof of parallel business behavior conclusively establishes agreement."[31] The Court went on to say that while "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy, . . . 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."[32]

In holding that a complaint will be insufficient under Section 1 if it alleges conduct that amounts only to conscious parallelism, the Court in *Bell Atlantic Corp. v. Twombly*[33] recently reiterated the need for proof of a meeting of minds:

> A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without

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[27] *See, e.g., In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656, 662 (7th Cir. 2002) ("The fact that price fixing has to be kept secret in order to avoid immediate detection followed promptly by punishment tends to rule out price fixing in markets that have many sellers selling a product heterogeneous with regard to quality and specifications . . .. [M]ost [price-fixing] cases are constructed out of a tissue of . . . [ambiguous] statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial.").

[28] Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

[29] Conscious parallelism is also sometimes referred to as tacit collusion. *See, e.g*., Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993); CARLTON & PERLOFF, *supra* note 11, at 127 n. 7.

[30] 346 U.S. 537 (1954).

[31] *Id.* at 541.

[32] *Id.* (footnote omitted). As pointed out in Donald Turner's famous article, Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal, 75 HARV. L. REV. 669 (1962), prohibiting interdependent parallelism is not even possible; any attempt to do so would inevitably enjoin rational independent behavior without leaving the actor any plausible alternative course of action.

[33] 127 S.Ct. 1955 (2007).

> that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory.[34]

At issue in *Twombly* were the actions of Incumbent Local Exchange Carriers (ILECs), which were required under the Telecommunications Act of 1996 to share their networks with competitive local exchange carriers (CLECs) that wanted to provide local telephone service. The plaintiffs alleged that the ILECs had conspired to restrain trade and inflate prices on their services by agreeing to take similar actions to inhibit the growth of CLECs and agreeing to refrain from competing with one another within their respective territories. The Court held that the case should be dismissed because "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."[35] Examining the structure and characteristics of the industry, the Court found that nothing in the complaint suggested that resisting the CLECs was anything more than the natural, unilateral reaction of each ILEC intent on preserving its regional dominance. The apparent reluctance among the ILECs to enter each others' territories did not suggest conspiracy, as "monopoly was the norm in telecommunications, not the exception . . . [, and] a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."[36]

The Court in *Twombly* confined its attention to the procedural issue of what a plaintiff must allege in a complaint to survive a motion to dismiss, and the lower federal courts are divided on whether and to what extent a plaintiff alleging conscious parallelism must also allege facts, or plus factors, which, if believed, would constitute circumstantial evidence of an

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[34] *Id*. at 1966.
[35] *Id.* at 1971.
[36] *Id.* at 1972.

agreement or conspiracy under Section 1.[37] Allegations of "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason" could, for example, support a plausible inference of conspiracy.[38]

There is no rigid formula by which plus factors are to be weighed and no finite set of factors,[39] and the U.S. courts flexibly analyze circumstantial evidence in determining whether collusion, not oligopolistic interdependence, is the explanation for price uniformity in a concentrated market. Even if an oligopolist raises prices with the expectation that other firms will match them, there is no liability without evidence that the other firms agreed to do so.[40] Jury instructions on what may be considered in weighing whether price uniformity is the result of collusion rather than conscious parallelism illustrate the flexibility with which courts analyze circumstantial evidence of conspiracy.[41]

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[37] *Compare* Schafer v. State Farm Fire & Cas. Co., 507 F.Supp.2d 587, 596 (E.D. La. 2007) ("it seems that the *Twombly* ruling supersedes any articulation of the 'plus factor' test given that [the] *Twombly* court sought 'to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct'" (quoting *Twombly*, 127 S.Ct. at 1963)), *with In re* Digital Music Antitrust Litig., 592 F.Supp.2d 435, 441 (S.D.N.Y. 2008) ("[w]hatever those 'plus factors' or 'factual enhancements' may be, suffice it to say for present purposes that, after *Twombly*, they must appear in a § 1 plaintiff's complaint").

[38] Bell Atl. Corp. v. Twombly, 127 S.Ct. 1955, 1966 n.4 (2007).

[39] *See, e.g., Flat Glass Antitrust Litig.*, 385 F.3d at 360 ("[t]here is no finite set of such criteria; no exhaustive list [of plus factors] exists"). In addressing what he characterizes as "the oligopoly problem" and without purporting to be exhaustive, Posner identifies some 17 conditions that may make a market conducive to collusion and 14 classes of economic evidence from which collusion may be inferred irrespective of otherwise observable market conditions. RICHARD A. POSNER, ANTITRUST LAW 69-93 (2d ed. 2001).

[40] *See, e.g., In re* Digital Music Antitrust Litig., 592 F.Supp.2d 435, 444 (S.D.N.Y. 2008) ("There is no agreement . . . merely because an oligopolist charges an inflated price knowing (or even hoping) that other oligopolists will match his high price. Such is bald conscious parallelism . . . .").

[41] The following, for example, is a model jury instruction for finding a contract, combination, or conspiracy in a market exhibiting conscious parallelism:

> The plaintiff contends that the existence of a conspiracy can be inferred from the fact that the defendants have [*state nature of parallel conduct*].
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> The mere fact that the defendants have [*state nature of conduct*] does not by itself establish the existence of any conspiracy among the defendants. Their behavior may be no more than the result of the exercise of independent judgment in response to identical or similar market conditions. For example, everyone might open their umbrellas on a rainy day, but that similar behavior would not necessarily mean that they had agreed or conspired to open their umbrellas. A

In dispensing with any requirement of a communicated conscious commitment or meeting of the minds, the Proposed Amendment would mark an abrupt departure, thus, from antitrust jurisprudence in the U.S. as well as the EU and Canada, as described further below.

D. Proof of Agreement Under Article 81(1) of the EC Treaty Requires Evidence of a Concurrence of Wills.

The prohibition in Article 81(1) of the EC Treaty of both "agreements between undertakings" and "concerted practices" has been the subject of a long-running, well documented but never entirely resolved debate as to how the two concepts dovetail into one another and, indeed, whether in practical terms there is any clear distinction to be made.[42]

> business may lawfully adopt the same prices, conditions of sale or other practices as its competition as long as it does so independently and not as part of an agreement with one or more of its competitors.
>
> Therefore, the fact that the defendants have [*state nature of parallel conduct*] is not, by itself, sufficient to prove the existence of the alleged agreement. You may consider the defendants' [*parallel conduct*] along with other evidence in deciding whether the defendants' conduct was the result of an agreement, and not the result of separate decisions made by each defendant on its own.
>
> To establish the existence of an agreement, the plaintiff must produce evidence that tends to exclude the possibility that the defendants acted independently. For example, the plaintiff argues that you should conclude that an agreement existed because [*describe evidence put forward by the plaintiff, such as whether the parallel conduct is contrary to the independent business interests of the defendants*]. However, the defendant argues that the plaintiff has failed to carry its burden of proving an agreement because [*summarize the defendant's argument in opposition, including whether the defendant argues that any evidence undermines an inference of conspiracy, such as evidence of shifting market shares or competitive conduct inconsistent with conspiracy*]. You should consider all of this evidence as a whole against the entire background in which the alleged behavior takes place. After considering all of the evidence, if you conclude that the plaintiff has failed to carry its burden of producing evidence that tends to exclude the possibility that the defendants acted independently, then you must find for the defendant. Likewise, if you conclude that the plaintiff has carried its burden of producing evidence that tends to exclude the possibility that certain defendants acted independently, then you must find for the plaintiff and against those certain defendants on the question of whether those defendants participated in a conspiracy.

ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES B-7 to -9 (2005) (italics in original).

[42]For judicial discussion of the issue, see, e.g., Case C-49/92, Comm'n v. Anic Participazioni SpA, 1999 E.C.R. I-4125, ¶¶ 102-38; Cases T-1/89-4/89, Rhône-Poulenc SA v. Comm'n, 1991 E.C.R. II-867, ¶¶ 107-27 (review of decisional law on definition of "concerted practice" in opinion of Judge Vesterdorf acting as Advocate-General); Case 41/69, ACF Chemiefarma NV v. Comm'n, 1970 E.C.R. 661, 713-21. It has been considered by commentators as well. *See, e.g.*, A. Albors-Llorens, *Horizontal Agreements and Concerted Practices in EC Competition Law: Unlawful and Legitimate Contacts between Competitors*, 51 ANTITRUST BULL. 837, 848 (2006); J. Joshua & S.

Various phrases have been used in the case law of the European courts and decisional practice of the European Commission (EC) to capture the essence of "agreement," often echoing U.S. usage, including "meeting of the minds," "consensus on a plan," "common intention," "common purpose," and "joint decision making and commitment to a common scheme."

While the courts have tended to interpret "agreement" in a broad and liberal way, what is clear in the case law of the European courts is that the key issue is a "concurrence of wills," an expression that has been identified as "canonic" by one commentator.[43] In *Bayer AG v. Commission*,[44] the Court of First Instance (CFI) emphasized the centrality to the concept of agreement of "a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."[45] Later in the judgment, the CFI stated that a concurrence of wills is "the subjective element that characterizes the very concept of an agreement."[46] Although fundamental differences in the respective legal and legislative frameworks between the EC and Australia mean that the drawing of analogies is an exercise to be undertaken with some caution, European case law would not seem to be sympathetic to any approach that would extend the meaning of "understanding" outside the boundaries of the consensual spectrum.

In EC jurisprudence, a concerted practice may be inferred from circumstantial evidence, but the threshold is high and the test is difficult to meet in practice. In the *ICI* case in 1972,[47] the European Court of Justice (ECJ) found on the basis of comparatively slight evidence that three

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Jordan, *Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law*, 24 NW. J. INT'L L. & BUS. 646, 658-60, 666-76 (2004); P. Willis & P. Hughes, *What is an Agreement?*, 6 COMPETITION L.J. 123, 126 (2007).

[43] O. Black, *Agreement: Concurrence of Wills, or Offer and Acceptance*, 4 EUR. COMPETITION. J. 103, 106 (2008).

[44] 2000 E.C.R. II-3383.

[45] *Id.* ¶ 69.

[46] *Id.* ¶ 173.

[47] Imperial Chem. Indus.v. Comm'n, 1972 E.C.R. 619.

simultaneous price increases applied by dye producers between 1964 and 1967 was a concerted practice. The companies argued that the increases were explicable in terms of the oligopolistic nature of the market. The ECJ found that the market was not in fact oligopolistic, so it was "hardly conceivable that the same action could be taken spontaneously at the same time, on the same national markets and for the same range of products."[48] On its own, parallel pricing did not constitute a concerted practice, although it may be strong evidence of such a practice if it were to lead to conditions of competition which do not correspond to normal conditions of a market.

It is unlikely that the Commission could be allowed today to prove a case based solely on "economic plus factors." The later judgment of the ECJ in *Woodpulp*[49] in 1993 elevated the burden of proof for the Commission. In the absence of direct evidence of anticompetitive contacts between market players, parallel conduct will only be sufficient to prove collusion where there is no other plausible explanation for the phenomenon. Further, in a case based largely on inferences as opposed direct evidence, authorities alleging collusion will need to show unequivocally that "the line that separates behavior resulting from market structure and intelligent adaptation to market conditions has been well and truly crossed."[50] Following *Woodpulp,* the European Commission has abandoned attempts to prove infringements of Article 81 solely by "economic evidence," preferring to devote its resources to cases where conclusive evidence of hard-core cartel conduct has been obtained from the suspected cartel participants themselves in "dawn raids."

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[48] *Id*. ¶ 109.
[49] Joined Cases C-89/85 etc., A. Ahlström Osakeyhtiö v. Comm'n, 1993 E.C.R. I-1307.
[50] Albors-Llorens, *supra* note 52, at 857.

E. Proof of Liability Under Section 45 of the Canadian Competition Act Requires Evidence of Agreement.

Section 45(1) of Canada's Competition Act of 1986[51] criminalizes certain collusive conduct: "Every one who conspires, combines, agrees or arranges with another person to . . . restrain or injure competition unduly, is guilty of an indictable offence."[52] It has been held that "all four words contemplate a mutual arriving at an understanding or agreement between the accused and some other persons to do the acts forbidden"[53] and that the essential ingredients of the offenses are agreement and common design. While conscious parallelism is not illegal, parallelism implemented, enhanced, maintained, enforced, or disciplined "by tacit agreement" is.[54] This distinction resembles the concept in U.S. antitrust law that an agreement cannot be established solely on evidence of parallelism but must also include the demonstration of "plus factors" such as facilitating practices tending to exclude the possibility that the defendants acted independently.[55]

Where the existence of an agreement has been at issue, the outcome of Crown prosecutions has often pivoted on the presence of such "plus factor" circumstantial evidence. For example, in *R. v. Armco Canada*,[56] the court convicted ten firms of a conspiracy to lessen competition in bids for government contracts for metal culverts via a transparent pricing system. The court emphasized that, in the absence of direct evidence of a conspiracy, the defendants could be convicted based on circumstantial evidence only if the inferences drawn therefrom are "consistent only with the establishment of an illegal or unlawful arrangement or agreement and

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[51] R.S.C. 1985, ch. C-34.
[52] *Id.* § 45(1).
[53] R. v. Armco Can., [1976] 13 O.R. (2d) 32, 41 (C.A.).
[54] R. v. Atl. Sugar Refineries, [1980] 2 S.C.R. 644, 656.
[55] *See, e.g.*, Blomkest Fertilizer v. Potash Corp., 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc) (explaining additional facts required as a prerequisite to finding that parallel pricing is pursuant to conspiracy). See the discussion of plus factors at notes 44-49 *supra* and accompanying text.
[56] [1974] 6 O.R. (2d) 521 (H.C.J.).

inconsistent with any other rational conclusion,"[57] but "[a] mere intention or design on the part of one or more of the accused to effect an agreement or arrangement is not sufficient upon which to found a conviction."[58]

In *R. v. Canadian General Electric*,[59] the Crown charged three electric lamp manufacturers, which controlled 95% of the Canadian market, with conspiracy to lessen competition through the adoption and enforcement of similar sales plans and price lists. The alleged conspiracy began when one of the defendants, Canadian General Electric (CGE), circulated its sales plan in advance of the effective date. CGE did this in an attempt, the prosecution argued, "to allow the market leader to flag a signal to its co-accused of a change in market strategy in time from them to adopt the same policy at a common starting date."[60] CGE argued that advance publication was useful in the oligopolistic market in permitting it to ascertain whether other market members would follow it.[61] The court stated that it "d[id] not think a definitive statement c[ould] be made concerning the simultaneous adoption of price changes,"[62] but evidence of intra-firm communications citing deviations by competitors on price quotations, surveillance to ensure adherence to the sales plans, and other methods of discipline was sufficient to permit an inference that the CGE plan was actually an industry agreement.[63]

The Competition Act was amended in 1986 to add Section 45(2.1) to clarify the scope of circumstantial evidence from which to infer a conspiracy, combination, agreement, or arrangement,[64] and it provides as follows:

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[57] *Id.* at 568.
[58] *Id*.
[59] [1976] 15 O.R. (2d) 360 (H.C.J.).
[60] *Id*. at 377.
[61] *Id*.
[62] *Id*. at 380.
[63] *Id*. at 395.
[64] *See* PROSECUTING CARTELS, *supra* note 7, at 40-41.

> In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.[65]

It has been observed that the 1986 amendment did not clarify "what in law constitutes an agreement, what sort of communication among the alleged conspirators is necessary and how to distinguish agreements from mere 'conscious parallelism.'"[66] Nonetheless, it remains clear that conscious parallelism does not fall within the range of conduct prohibited by Section 45(1).[67] Indeed, Canada has explicitly rejected even the proposition that intentionally arousing an expectation in another party that one will act in a certain way is sufficient to constitute a prohibited agreement or arrangement.[68]

IV. Amendment of Section 45 Would Have Implications for Interpretation of "Understanding" in the Cartel Bill.

The potential impact of the Proposed Amendment on the Cartel Bill should not be overlooked. Section 44 of the Cartel Bill would criminalize an "understanding" if it "contains a cartel provision." (Cartel Bill @44ZZRF.) Since Section 44 contains wording identical to that in Section 45 regarding proscribed conduct, namely "contract," "arrangement," or "understanding," a revision of "understanding" in Section 45 would impact the reach of Section 44. The Discussion Paper expressly acknowledges that the formulations are identical.[69] Notwithstanding the elevated burden of proof in criminal matters (beyond a reasonable doubt rather than a

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[65] Competition Act, R.S.C. ch. C-34, § 45(2.1).
[66] PROSECUTING CARTELS, *supra* note 7, at 41, quoting ROBERT S. NOZICK, THE 2004 ANNOTATED COMPETITION ACT 87 (2004).
[67] *See, e.g.*, 1 ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES Canada-45 (2001).
[68] *See, e.g.*, R. v. Armco Can., [1976] 13 O.R. (2d) 32, 41-42 (C.A.).
[69] Discussion Paper n.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").

preponderance of the evidence), a revision that expands the definition of what conduct constitutes an "understanding" would expand liability not only under Section 45, but also under Section 44. Thus, the Proposed Amendment may, if enacted, have significant impact on the scope of potential criminal liability.

A definition of "understanding" in the TPA that does not require a meeting of minds or mutual commitment would effectively lower the threshold for criminal liability. Aligning the meaning of "understanding" in Sections 44 and 45 could lead to the extraordinary result of criminal liability for a firm that unilaterally entertains expectations that its conduct may prompt rivals to engage in competition-lessening activity, without any consensus or meeting of minds with the rivals to do so.

V. The Premise for the Proposed Amendment Appears to be Questionable.

The Sections understand that the premise for the Proposed Amendment is ACCC's view that recent decisions involving the retail petrol market in Australia have made it more difficult to prove an unlawful "understanding": "[T]hese recent decisions provide a basis for defendants to argue that it must now be found that a party has assumed an obligation or given an assurance to act in a particular way before an understanding can arise."[70] The Sections have concern both that the premise for the Proposed Amendment may be unfounded and that, in attempting to address the asserted problem, the ACCC may not have considered alternative approaches to the perceived problem.

A. Statutory Shortcomings Do Not Appear to Explain ACCC Enforcement Experience in the Retail Petrol Market.

The critique of the judicial interpretation of "understanding" in the Burnside legal opinion (Opinion), Appendix R to the PETROL PRICES REPORT, is based on an analysis of the

[70] PETROL PRICES REPORT, *supra* note 1, at 228.

decision of Justice Gray in *ACCC v. Leahy Petroleum Pty Ltd.*[71] and of the line of cases preceding *Leahy* and relied upon in that case. The Opinion focuses upon judicial treatment of the notion of "commitment" as a necessary element of an "understanding" and the assertion that, over the course of a number of years, "the nature of the commitment required has shifted by degrees, or at least that the factual circumstances which enable a commitment to be inferred have changed."[72] The following analysis of the case law, undertaken by Australian members of the Sections, suggests that the assertion is subject to question.

In *Leahy*, Justice Gray concluded that, while an understanding can be tacit, it must be a consensual dealing between parties involving a meeting of minds with respect to each party's intention to act in a particular way in relation to a matter of concern to the other party.[73] This relatively orthodox description of the necessary element for illegality under Section 45 can be traced back to *Top Performance Motors Pty Ltd. v. Ira Berk (Queensland) Pty Ltd.*[74] in which Justice Smithers, having considered the analysis of the meaning of "arrangement" by the English Court of Appeal in *British Basic Slag Ltd. v. Registrar of Restrictive Trading Agreements,*[75] concluded that "an understanding must involve the meeting of two or more minds."[76]

In setting out the case law that has evolved since *Ira Berk* with respect to the meaning of the term "understanding," the Opinion does not dispute the importance of the meeting of minds nor does it take issue with the requirement that "commitment," at least by one party to an understanding, is a necessary element.[77] It is the conclusion of the Opinion that, whereas the required commitment in early cases was "merely a moral obligation which could arise as a result

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[71] (2007) 160 F.C.R. 321.
[72] Opinion ¶ 9.
[73] ACCC v. Leahy Petroleum Pty Ltd., (2007) 160 F.C.R. 321, ¶ 28.
[74] (1975) 24 F.L.R. 286.
[75] [1963] 2 All E.R. 807.
[76] (1975) 24 F.L.R. at 291.
[77] *See* Opinion ¶ 8.

of each of two or more parties intentionally arousing in the other an expectation that she or he would act in a certain way,"[78] a degree of ambiguity has arisen in the cases since the decision in *ACCC v. CC (New South Wales) Pty Ltd.,*[79] in which Justice Lindgren observed that a "mere expectation" that as a matter of fact a party will act in a certain way is not enough to establish an understanding, even if it has been engendered by that party.[80]

While conceding that Justice Lindgren likely used "mere" to equate a "mere expectation" with an unsupported hope, the author of the Opinion contends that "later decisions have given it a life of its own and have thereby narrowed the concept of an understanding,"[81] such that later cases as *Leahy* and *Apco Service Stations Pty Ltd. v. ACCC*[82] inappropriately fail to take account of the moral obligations which may arise from an expectation which has been intentionally engendered by the conduct of the parties and which therefore should amount to an understanding for purposes of Section 45.[83]

The analysis of the case law in the Opinion is orthodox in respect of the accepted elements of an "understanding" set out in the cases up to and including *ACCC v. CC (New South Wales) Pty Ltd.* The question is whether the decisions in *Leahy* or *Apco Service Stations* reflect any perceptible shift in judicial interpretation. The Sections submit that a close analysis of the decisions shows none. In *Leahy*, having considered the evidence before him, Justice Gray concluded that there was a failure of proof:

> Thus, all of the witnesses called to give evidence for the ACCC who acted on behalf of parties to the alleged arrangements or understandings confirmed to a greater or lesser degree the absence of any commitment, moral obligation, or obligation binding in honour on the part of any party

[78] *Id.* ¶ 9.
[79] (1999) 92 F.C.R. 375.
[80] Opinion ¶ 10.
[81] *Id.* ¶ 13.
[82] (2005) 159 F.C.R. 452.
[83] *See* Opinion ¶ 13.

> to any of those arrangements or understandings. . . . The plain fact is that there was nothing by way of constraint to raise prices, felt or otherwise, from which any party had to withdraw, or with which it was necessary to act inconsistently, if prices were not increased on a particular occasion. The express evidence is overwhelmingly to the effect that an essential element of an arrangement or understanding, whether in the abstract or as pleaded, in the form of a commitment or obligation to increase prices, did not exist. . . . The situation was that each party to each alleged arrangement or understanding was free to do as it wished on every occasion when information about a prospective price increase was passed to it.[84]

Similarly, in *Apco Service Stations*, on the basis of the evidence before them, Justices Heerey, Hely, and Gyles found the evidence insufficient to prove that Apco was party to an understanding:

> Certainly Apco received information about price increases (albeit the fact of an increase rather than the amount) from Bentley and Carmichael, as it did from other sources such as its franchisees, but it reserved to itself the decision, as a matter of commercial judgment, whether to follow those prices up.[85]

The judges also considered the decision in *Trade Practices Commission v. Email Ltd.*,[86] decided before *ACCC v. CC (New South Wales) Pty Ltd.*, in which Justice Lockhart found that, by sending price lists, one party helped a competitor to follow its prices if it chose to do so and to do so more quickly than might otherwise be the case. Nonetheless, he held that, in the absence of any commitment, such communications were not sufficient to give rise to the meeting of minds essential to an arrangement or understanding.[87] On the basis of that decision, the judges concluded that "although the information conveyed by Bentley and Carmichael may have been useful to Anderson because it helped him to know when to tell his franchisees to check competitor's prices and when to raise Apco's prices if he chose to do so, the primary judge

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[84] ACCC v. Leahy Petroleum Pty Ltd., (2007) 160 F.C.R. 321, ¶ 948.
[85] Apco Serv. Stations Pty Ltd. v. ACCC, (2005) 159 F.C.R. 452, ¶44.
[86] (1980) 31 A.L.R. 53.
[87] *Id.* at 56.

specifically found . . . that there was no expectation by any of the respondents that Apco's preparedness to receive calls from Bentley and Carmichael meant that Apco would substantially match the increased prices."[88]

Even on the basis of the factual findings in the "early cases" to which the Opinion refers, it is difficult to argue that the parties in *Leahy* and *Apco Service Stations* reached any meeting of the minds, much less took on any form of "moral obligation" by merely receiving information while retaining the capacity to set their own prices independently and without giving any indication to the other parties as to whether they would meet the prices about which they were notified.

The Opinion suggests that "the early cases recognize that a party to an understanding is free to withdraw from it, or to act inconsistently with it,"[89] and it agrees with the observation of Justice Gray in *Leahy* that, although parties will be free to act inconsistently with the understanding that they have made, they must nevertheless have reached some consensus about future conduct for an understanding to arise.[90]

A close analysis of *Leahy* and *Apco Service Stations* does not reveal any discernible shift in the interpretation of the degree of "commitment" required to constitute an understanding. Rather, it would appear that there was a failure of proof of any consensus or meeting of the minds about future conduct. A meeting of minds has always been considered by the Federal Court, according to Australian members of the Sections, as an essential element of an understanding for the purposes of Section 45, and it is this element that forms the fundamental basis of the "commitment" by the parties to a course of conduct. The evidence considered by the

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[88] (2005) 159 F.C.R. 452, ¶ 47.
[89] Opinion ¶ 12.
[90] *Id.*

Court in these cases and the application of Section 45 to the evidence do not appear to provide support for the contrary conclusion in the Opinion.

B. There May be Preferable Alternatives by which the ACCC Could Accomplish its Objectives.

The Sections submit that the Proposed Amendment may not be the only means by which to redress what the ACCC considers to be judicial reluctance to give "understanding" a sufficiently broad interpretation. One commentator has suggested that a better approach might be to leave the definition of "understanding" intact and to amend Section 45 by adding an entirely new provision to address the enforcement hurdles encountered in the petrol retailers cases.[91] He proposes, hypothetically, a provision that would make unilateral price-signaling or equivalent invitations to collude unlawful, without regard to whether or how any firm were to respond, but cautions that the proposal is floated only for the purpose of encouraging debate.[92]

This is only an example of an alternative approach that might have been considered by the ACCC. The enforcement obstacles identified in the PETROL PRICES REPORT may very well be remediable by less drastic action than adoption of the Proposed Amendment, and the Sections suggest that other options should be fully explored.

Conclusion

The Sections are grateful for the opportunity to offer these Comments in response to the Discussion Paper, and it is hoped that they will be found useful by the Government in its consideration of the Proposed Amendment.

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[91] *See* Ian Tonking, *Belling the CAU: Finding a Substitute for "Understandings" about Price*, 16 COMPETITION & CONSUMER L.J. 46, 68-70 (2008).
[92] *Id.* at 70.