AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS
ABN 11 008 484 197

NATIONAL OFFICE

Level 2, 255 George Street
Sydney NSW 2000 Australia
TELEPHONE 02 8248 6600
FACSIMILE 02 8248 6633
aicd@companydirectors.com.au
www.companydirectors.com.au

9 April 2009

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

Email: understanding@treasury.gov.au
Fax: (02) 6263 3964

Dear Mr. Rogers

DISCUSSION PAPER — MEANING OF 'UNDERSTANDING' IN THE TRADE PRACTICES ACT 1974

The Australian Institute of Company Directors (AICD) is the peak organisation representing the interests of company directors in Australia. Our current membership consists of over 24,000 individuals drawn from large and small organisations, across all industries and from private, public and the not-for-profit sectors.

AICD welcomes the opportunity to comment on Treasury's Discussion Paper. We do not support the change to the Trade Practices Act 1974 (TPA) sought by the Australian Competition and Consumer Commission (ACCC) and have the following comments to make about the specific issues raised in the Discussion Paper.

Background

The ACCC examined the term 'understanding' under section 45 of the TPA and expressed concerns that court decisions have, over time, narrowed the conduct that is caught by the term 'understanding.'

The ACCC Report[1] which has prompted the Discussion Paper, deals only with two recent cases, Apco Service Stations Pty Ltd v ACCC[2] (Apco) and ACCC v Leahy[3] (Leahy). Apco, following a long line of cases, made it clear that 'commitment' is an essential element of an understanding[4]. AICD is concerned that the ACCC amendment seeks to remove 'commitment' as a basic element of understanding, against the requirements of Apco, Leahy and a long line of cases.

[1] *Petrol Prices and Australian Consumers Report of the ACCC Inquiry into the price of unleaded petrol Australian Competition & Consumer Commission December 2007, 228-230*
[2] *Apco Service Stations v ACCC[2005] FCAFC 161*
[3] *ACCC v Leahy [2007] FCA 794*
[4] *Apco Service Stations v ACCC [2005 FCAFC 161, paragraphs 45-47*

Proof of understanding

The ACCC also expressed a concern that courts have shown a reluctance to draw inferences from the evidence in establishing an arrangement or understanding. It is open to the courts to draw inferences from evidence and all have the discretion to do so. However, given the seriousness of the consequences, we understand that courts have been reluctant to find that a respondent came to an arrangement or understanding based on circumstantial evidence. The penalties and consequences are now considerably greater than they were when the TPA came into force in 1974. For corporations they are the greatest of:

- $10,000,000
- 3 times the value of the benefit
- 10% of annual turnover if the benefit cannot be determined[5]

For individuals:

- $500,000[6]
- disqualification from managing corporations[7]

In addition, corporations and individuals may be subject to a range of injunctive and other relief[8]. With the consequences for corporations and individuals being material, AICD believes that liability should not be established on the basis of inference without direct and non-conflicting evidence.

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. However, the ACCC has significant investigatory powers under section 155 of the TPA and the availability of a number of strategies to base a case on sufficient evidence to justify the institution of legal proceedings. The ACCC has considerable guidance from decisions such as *Leahy* as to the type and standard of evidence necessary to issue proceedings. Each case must be considered on its own facts and merits.

Ultimately the question of whether or not an arrangement or understanding has been reached will depend on the view formed by the court of all the circumstances in each case[9].

Questions for discussion

Does the current judicial approach to the interpretation of 'understanding' limit the ability of the TPA to properly address anticompetitive practices?

There is no evidence to suggest that the current judicial approach to the interpretation of "understanding" limits the ability of the TPA properly to address anticompetitive practices. The ACCC has won more cases than it has lost in this area. In cases involving section 45A,

[5] *Trade Practices Act 1974 section 76 (1A) (b)*
[6] *Trade Practices Act 1974 section 76 (1A) (c)*
[7] *Trade Practices Act 1974 section 86E*
[8] *Trade Practices Act 1974 Part VI Enforcement and Remedies: for example sections 80(injunctions), 82 (actions for damages), 86C (non-punitive orders) 86D(punitive orders-adverse publicity) and 87 (other orders)*
[9] *Miller's Annotated Trade Practices Act 30th Edition Russell V Miller 2009 [1.45.17]*

which proscribes the most egregious of anti-competitive behaviour, it appears that the ACCC has been successful in 39 of 51 cases reported since 1980[10].

Section 45A is shortly to be repealed and replaced by the new criminal and civil offences for cartel conduct[11]. The concepts "contract, arrangement or understanding" also form part of the new offences and, whilst not entirely clear, it seems that the interpretation of these concepts under these new provisions may be based upon their current interpretation in the TPA[12]. For that reason alone, AICD does not support the amendment sought by the ACCC as it would introduce an uncertain aspect to the new provisions.

AICD also points out that these new provisions are comprised in an 86 page Bill, the provisions of which are extensive and new. Although the provisions criminalise existing conduct, it is not correct to suggest, as the Explanatory Memorandum does, that the compliance cost impact will be low[13]. The Bill will introduce some 16 pages of completely new sections to the TPA, dealing with criminal and civil cartel conduct, quite apart from the consequential amendments made to the TPA and other legislation. This in itself is significant regulatory change without making a material addition to section 45 which deals with only one expression in that section.

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?

Please refer to our discussion above which recommends no change.

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?

The Court is not currently constrained to an inappropriate degree in its ability to draw inferences from evidence. It has an inherent discretion to do so but will exercise that discretion with reluctance given the significant penalties and consequences for corporations and individuals under the TPA. Inferences must be clearly established on the evidence and not capable of conflicting inferences of equal degree of probability.

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?

Please refer to our answer above.

General Observations

AICD has some observations of general application. These comments are based on the form of the suggested amendments attached to the Discussion Paper which are broad drafting notes. We note the ACCC says that the precise form of the words are a matter for the "drafter and the parliament"[14].

[10] *Miller's Annotated Trade Practices Act 30th Edition Russell V Miller 2009 [1.45A.40] 318-324. This survey of the reported cases may not be exhaustive but it is certainly representative of the proportion of cases won by the ACCC*

[11] *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008- clauses 44ZZRF, 44ZZRG (criminal offences) and 44ZZ RJ and 44ZZRK (civil penalty provisions)*

[12] *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 Explanatory Memorandum – see paragraph 1.12 for example.. However the operation of Clause 44ZZRE is uncertain.*

[13] *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 Explanatory Memorandum, 3*

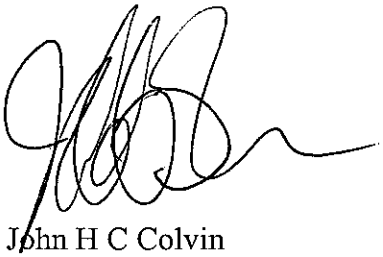
[14] *Petrol Prices and Australian Consumers Report of the ACCC Inquiry into the price of unleaded petrol, Australian Competition & Consumer Commission December 2007, 230*

If the ACCC amendments are intended to require courts to determine cases upon inferences from evidence and an absence of commitment in establishing an understanding then they go much further than evidentiary rules and established law allow, and they should be rejected upon grounds of principle and basic fairness.

Additionally, as a practical matter, the amendments would make compliance near impossible as an understanding would be capable of being established on inferential grounds and without any form of commitment. Questions would arise such as what could or could not be done? How would anyone know? The proposed changes could work to effectively block any form of communication between competitors which would not be in the interests of a genuinely competitive economy.

Thank you for the opportunity to make a submission. Please do not hesitate to contact me or Legal Counsel, Gabrielle Upton, on (02) 8248 6600 should you require any further information or wish to discuss any aspect of our submission.

Yours sincerely



John H C Colvin
Chief Executive Officer