Gavin Jackman

Director, Government Affairs

BP Australia Pty Ltd
ABN 53 004 085 616
360 Elizabeth Street
Melbourne Vic 3000
AUSTRALIA

Tel: +61 3 9268 4111
Fax: +61 3 9268 4333
www.bp.com.au

31 March 2009

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

Dear Mr Rogers

Re: Meaning of 'Understanding' in the Trade Practices Act 1974

BP Australia Pty Ltd (BP) welcomes the opportunity to respond to the recommendations made by the Australian Competition and Consumer Commission (ACCC) in the *Report of the ACCC inquiry into the price of unleaded petrol* to amend section 45 of the *Trade Practices Act 1974* (TPA).

BP believes that the current interpretation of the term 'understanding' in the TPA is adequate to capture anticompetitive conduct, and does not limit the ability of the TPA to properly address such anticompetitive practices. We do not believe that courts are constrained in their ability to draw inferences from the evidence in determining whether or not an understanding exists. Further, we are of the view that the proposed amendments to section 45 will create business uncertainty and have unintended commercial implications.

The ACCC possesses strong investigative powers afforded to it under section 155 of the TPA, as well as the use of leniency policies to encourage people to cooperate in prosecutions. These mechanisms provide them with the capacity to uncover sufficient evidence of 'understanding' to be acceptable to a court.

It is currently open to a court to consider the matters referenced in the proposal and to infer anticompetitive conduct, and the fact that an inference was not drawn in a particular case does not mean that it may not be drawn in other cases where the circumstances differ. Circumstances where courts have not drawn such inferences may in fact point to insufficient evidence being made available to them in the course of prosecution or deficiencies in the conduct of the litigation.

BP has a number of commercial concerns with the proposal. BP believes that the proposal in (a)(ii) to remove the requirement for a 'commitment' may end up catching parallel behaviours which the ACCC has repeatedly stated is not the aim of section 45. For example, competitors cannot control what unsolicited messages competitors may send them - they can only control their response to ensure illegal conduct is rejected by not making any commitment to the message. BP is concerned that while each competitor may be reacting to the market rather than the message they can nonetheless be caught because the behaviours coincide with the message. For instance, there would be uncertainty and risk in responding to purely market conduct of a competitor, there being the risk that the competitor conduct could subsequently be interpreted as being undertaken to intentionally arouse an expectation in other parties.

This issue is again reinforced by the proposal in (b)(v) where the mere receipt by a corporation of pricing information from a competitor is to be a factor in the consideration of whether there is an understanding.

It appears that the proposal is aimed at stopping competitors from exchanging price information whether or not they act on it. While BP is very clear in not allowing any of its staff or agents to provide, receive or exchange any pricing information with competitors, it must be asked whether receiving information from a third party will create a risk in view of these proposals, even if the pricing information is received indirectly, such as through competitor advertising.

BP is also concerned that competitor pricing information gained directly and deliberately in order to understand the market better, for example through third parties such as Informed Sources, has the potential of being viewed as anticompetitive conduct under the proposed amendments.

A fundamental tenet of competition and sound business is to have knowledge of the going market price of your product and to respond to market competition. Yet these recommendations seem to put this at risk.

The proposal to remove the requirement of commitment from the term 'understanding' effectively removes the substance of the notion of 'understanding' and creates substantial uncertainty in any interpretation. The introduction of new terms such as 'intentionally aroused in the other parties an expectation' adds to the confusion. Such uncertainty, including the catching of parallel conduct, is unhealthy for competition.

BP believes that there must be a clear indication of what constitutes price fixing and a clear distinction between price fixing and parallel conduct. To effect this, there must be a minimum requirement as to what is necessary for there to be 'an understanding'. BP believes the current requirement adopted by the courts (of a meeting of minds) achieves this.

BP believes it is preferable to leave the interpretation of the TPA (including the term 'understanding') and the issue of whether the requirement is satisfied on any given set of facts, to the courts.

The proposed changes add complexity to the price fixing provisions and their interpretation. Complexity and uncertainty are especially unhelpful in a climate of criminal penalties, where businesses need clear legal principles to assist them to ensure they are acting within the law.

BP believes that the proposal is unnecessary and will create complexity and uncertainty which will not help competition or business efficiency.

If you would like any further information, please contact me on 03 9268 3854 or gavin.jackman@bp.com or Megan O'Brien, Senior Legal Advisor, on 03 9268 4842 or megan.obrien@bp.com.

Yours sincerely

Gavin Jackman