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

Email: understanding@treasury.gov.au

Business Council of Australia

Dear Mr Rogers

GOVERNMENT CONSULTATION ON THE MEANING OF 'UNDERSTANDING' UNDER THE TRADE PRACTICES ACT 1974

The Business Council of Australia (BCA) appreciates the opportunity to comment on the government's information and consultation paper entitled *The Meaning of 'Understanding' in the Trade Practices Act 1974* (Cth) (TPA).

The BCA represents the chief executives of over 100 of Australia's leading companies. The BCA develops and advocates, on behalf of its members, public policy reform that positions Australia as a strong and vibrant economy and society. The businesses that the BCA members represent are among Australia's largest employers and represent a substantial share of Australia's domestic and export activity.

The BCA commends the government for its consultation on the issue of the meaning of 'understanding' in relation to the prohibitions against collusive conduct under the TPA. The BCA believes that in general the existing legislation promotes robust competition whilst ensuring that business is also provided with a regime that is workable and certain. Accordingly, amendment to the TPA should be considered with caution, taking into account the costs and benefits of such a change.

The term 'understanding' (as it currently appears in the TPA) is underpinned by a substantial body of case law. It also allows courts sufficient flexibility to consider and make a determination based on the individual facts and circumstances of each case. Accordingly, the BCA considers that the current legislation is preferable to amending the TPA in relation to this issue. This is particularly so given the risk of undue prescription and introduction of a lack of flexibility by the proposal.

Whilst it appears that there have been concerns expressed from some quarters about recent judicial interpretation of the term 'understanding', the BCA considers that proposed changes to existing laws should only occur where there is a clearly identifiable market problem to be addressed, and the proposed change is demonstrably appropriate to address that concern. Changing the law to accommodate an individual set of circumstances has the potential to affect the whole market and may therefore not be the appropriate response.

The BCA supports the detailed legal analysis contained in the Law Council of Australia Trade Practices Committee (Business Law Section) (LCA) submission on this issue. In particular, the LCA comments that:

> *…the TPA prohibitions apply to all markets and any amendments to the TPA will have application across the board for all future cases concerning alleged price fixing or anti-competitive collusive conduct.*
>
> *The Committee's difficulty with this approach is that the issues said to be raised by the "petrol cases" have arisen in the peculiar circumstances of those cases. Consequently, the proposed amendments may produce unintended consequences if applied to all of the widely differing circumstances governed by the TPA.*

Proposed reforms should achieve the purpose for which they are intended without creating additional uncertainties.

Concerns that recent judicial interpretation has increased the degree of 'commitment' that needs to be shown in order for parties to reach an 'understanding' are also not founded. The vast body of case law does not generally require an 'absolute' commitment in order to demonstrate an arrival at an understanding. Therefore the proposed amendments (such as '(a)(ii)' and 'b(iii)') are unnecessary. The LCA submission states amongst other things:

> *There is no need to clarify the meaning of "understanding" in the Trade Practices Act (Cth) (TPA) to address recent judicial interpretation of this term. Whilst there are a number of formulations used in the case law, effectively what is required is communication between two or more competitors which results in a "consensus", "meeting of the minds" or "mutual expectation" that at least one of the parties has assumed an obligation or commitment to engage in conduct proscribed by the TPA. Although there will always be difficulties of proof in marginal cases, the recent case law has not created any "loophole".*

Amendments should not be disproportionate or stifle ordinary and legitimate business behaviour. Lowering the threshold for demonstrating an 'understanding' is likely to have the consequence of widening the scope of the laws. A significant degree of uncertainty is introduced into the market where a 'meeting of the minds or consensus' may not be required to be shown to establish an 'understanding'. The proposals are therefore particularly concerning given the potential for criminal prosecutions in respect of these laws. For example, the LCA submission states:

> *…..an amendment of the kind proposed would be over inclusive and inappropriately extend the range of conduct proscribed by the TPA to situations where there is insufficient evidence of actual collusion to warrant a finding of per se illegality. The fact that understandings containing cartel provisions are to be criminalised in the near future also weighs in favour of not simultaneously lowering the legal standard for arriving at an understanding.*

We note that making or giving effect to an 'understanding' that contains a cartel provision may be established in circumstances which require no more than the alleged conduct being *likely* (meaning a possibility that is not remote) to have an *indirect* effect of fixing, controlling or maintaining prices. This is coupled with the introduction of very serious criminal penalties for corporations and individuals that are found to have breached such a provision, including for individuals a maximum of 10 years imprisonment and/or a monetary fine of up to $500,000 per offence. Similarly, civil proceedings, where the standard of proof is merely on the balance of probabilities, can be brought in the equivalent circumstances. Such proceedings also carry serious consequences for individuals, including a penalty of up to $500,000 per offence. These points support the conclusion that it is inappropriate to lower the standard for arriving at an 'understanding' at the same time as exposing individuals to severe criminal sanctions for understandings that contain cartel provisions.

Further, we understand that the proposal for lowering the threshold for demonstrating an 'understanding' may be related to difficulties associated with gathering evidence to prove the existence of an understanding. In this context it should be noted that the ACCC has in the last few years obtained broader search and seizure powers, including the ability to obtain evidence by way of search warrant. The proposed cartel amendments also allow for evidence to be obtained by way of phone tapping. Broader powers of this nature will make it significantly easier for the ACCC to obtain direct evidence of an alleged understanding, further reducing the need to introduce new provisions in relation to this issue.

In summary, the BCA considers that there is no clear problem with the existing provision of the TPA in relation to the meaning of 'understanding' and instead considers that there is a real risk of regulatory overreach by such intervention. Accordingly, the BCA believes it is inappropriate at this time to amend the existing provisions of the TPA as proposed by the government's information and consultation paper.

I have copied this letter and submission to Lindsay Tanner MP, Dr Craig Emerson MP, Chris Bowen MP and Su McCluskey, Executive Director of the Office of Best Practice Regulation, for their information.

Please feel free to contact Ms Leanne Edwards, Assistant Director – Regulatory Affairs, on (03) 8664 2614 or leanne.edwards@bca.com.au if you wish to discuss the BCA's concerns further.

Yours sincerely

Melinda Cilento
Deputy Chief Executive

cc The Hon Lindsay Tanner MP
The Hon Dr Craig Emerson MP
The Hon Chris Bowen MP
Ms Su McCluskey