

Scott Rogers  
Competition and Consumer Policy Division  
Treasury  
Canberra

Dear Scott

I would like to make the following submission on the subject of the meaning of "understanding" in Pt IV of the Trade Practices Act.

I attach two articles, the first published in (2008) 16 CCLJ 46, of which I attach a proof copy for ease of reference, the second submitted to the University of NSW Law Journal for publication in a forthcoming forum on trade practices.

The main points made are that an amendment as proposed does not appear to be necessary and would be of doubtful assistance in achieving the outcome which the ACCC seems to be looking for. The second articles deals with issues raising from importing the proposed amendment into Pt IV after the cartel criminalisation provisions are enacted, unless an number of modifications are made to enable the two to operate together.

Regards

Ian Tonking

---

A.I.Tonking SC  
Selborne Chambers  
7th Floor, 174 Phillip St,  
Sydney, NSW 2000.  
ph. (02) 9232 2704; f. (02) 9221 5386.



## Belling the CAU: Finding a substitute for 'understandings' about Price

Ian Tonking SC\*

*The ACCC has expressed misgivings about recent judicial interpretation of the expression 'contract, arrangement or understanding' in s 45 of the Trade Practices Act in the context of establishing breaches for price fixing, with particular reference to the retail petrol market. This article suggests the court has not changed its approach, but the cases the ACCC is dissatisfied with turned on their facts. Nonetheless, the ACCC's proposed amendment would not necessarily make the task any more certain, and it may be time to adopt a radically different approach. 'Belling the cat' involves 'undertaking a dangerous enterprise for the common good', and the author offers his suggestion in order to stimulate debate about what conduct ought to be prohibited.*

### The issue

In a recent report on petrol prices<sup>1</sup> the Australian Competition and Consumer Commission (ACCC) expressed concern that the term 'understanding' as used in the composite expression 'contract, arrangement or understanding' (CAU) in s 45 of the Trade Practices Act 1974 (TP Act) had latterly been interpreted more restrictively by the Federal Court than had been the case in the early years of operation of the TP Act. The ACCC, having considered advice from Burnside QC,<sup>2</sup> recommended that the TP Act be amended to clarify the meaning of the term 'understanding' in order to achieve the result that 'the conscious or intentional creation of an "expectation" regarding future conduct may be sufficient to constitute an understanding'. The ACCC's concern was aroused in particular by the approach taken by the Full Federal Court in *Apco Service Stations Pty Ltd v ACCC*<sup>3</sup> and the decision of Gray J in *ACCC v Leahy Petroleum Pty Ltd*<sup>4</sup> in which that approach had been applied. The High Court refused special leave to appeal from the *Apco* decision. The ACCC's concern was that the decisions disclosed 'a subtle but significant shift in the nature of the commitment that must be found to have established the existence of an understanding'. The ACCC continued:

earlier decisions of the Federal Court 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. However, the more recent decisions suggest that an understanding will not be regarded as having been reached in those circumstances; rather, there is 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.

---

\* New South Wales Bar.

1 *Petrol prices and Australian consumers: Report of the ACCC enquiry into the price of unleaded petrol, December 2007* (Petrol Prices Report).

2 *Ibid*, s 14.2 and App R

3 (2005) 159 FCR 452; [2005] FCAFC 161; BC200505938.

4 (2007) 160 FCR 321; [2007] FCA 794; BC200704008.

2 (2008) 21 Australian Journal of Labour Law

The ACCC's proposed amendment would necessarily retain the composite expression 'contract, arrangement or understanding' in s 45, but is intended to enable the court to determine that an understanding had been arrived at notwithstanding that its existence was ascertainable only by inference, and that some or all of the parties were not committed to giving effect to it, and would enable the court to consider a list of nine factual matters in making this determination. The composite expression 'contract, arrangement or understanding' is included in the exposure draft of the Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008 released by the Federal Government in January 2008, which would have the effect of criminalising certain types of cartel conduct and creating new civil contraventions in parallel. Accordingly, it becomes of considerable importance to appreciate the issues in this debate, and to examine whether the amendment recommended by the ACCC (or something similar) is likely to achieve the intended result.

The purpose of this article is to review the origins of the composite expression 'contract, arrangement or understanding', to contrast it with expressions used in earlier Australian and some overseas competition laws, to review briefly some of the Australian decisions on its meaning, to attempt an assessment as to whether the current interpretation fails to catch collusive conduct which ought to be prevented because of its effect on competition, and to consider whether persisting with the composite expression, aided by statutory guidelines to the court as to its meaning, is to be preferred over a more fundamental re-writing which abandons the language of agreement and the CAU formula.

## Origins

The composite expression 'contract, arrangement or understanding' has, since 1974 at least, provided the essential element for the definition of collusive conduct between competitors. While such conduct may extend over the whole gamut from overt agreements to tacit interchanges, it is at the latter end of the spectrum that difficulties and uncertainties have tended to arise. Clearly the existence of a formal contract or agreement ordinarily gives rise to no evidentiary difficulty. At the other extreme, conspiracies have always been notoriously difficult to prove and, when courts rely on inferences available from purely circumstantial evidence, are particularly controversial. In the area of collusion between competitors having the capacity to distort market behaviour, there is an added difficulty: industrial economics tells us that, in a workably competitive market, prices will gravitate to the same level. The same is true in relation to other features of the competitive offering such as quality and service. It follows that a competition law should not proscribe parallel behaviour alone since to do so might penalise the innocent and disrupt the competitive process. An effective law against collusion therefore requires some additional element to be found before adverse conclusions or inferences can be drawn from observable behaviour which may be equally consistent with an innocent or a guilty explanation. It is the search for this elusive element which has provided a challenge in drafting substantive provisions such as the present s 45 of the TP Act.

Belling the CAU: Finding a substitute for 'understandings' about Price 3

The language 'arrangement or understanding' appears to have been introduced into Australian trade practices legislation by way of an interpretative provision in s 91 of the Trade Practices Act 1965. That Act adopted the approach first found in the Restrictive Trade Practices Act 1956 (UK) of requiring certain types of agreement to be registered and subject to scrutiny and possible disallowance.<sup>5</sup> Section 35 of the Trade Practices Act 1965 contained a definition of an 'examinable agreement'. Section 91(2) provided:

An arrangement or understanding, whether formal or informal and whether express or implied, shall be deemed to be an agreement.

Subsection 91(5) provided:

A reference to an agreement shall be read as including a reference to an agreement that is not enforceable by legal proceedings, whether or not it was intended to be so enforceable.

This was to be contrasted with the language of the first Australian competition law, the Australian Industries Preservation Act 1906–10 (which was based in large measure on the Sherman Act of 1890 of the United States), s 4 of which provided:

Any person, who, either as principal or agent, makes or enters into any contract, or is or continues to be a member of, or engages in any combination in relation to trade or commerce with other countries or among the States (a) with intent to restrain trade or commerce to the detriment of the public . . . is guilty of an offence.

The terms 'combination' and 'conspiracy' were not defined; their meaning is considered later. In New South Wales the Monopolies Act 1923–65 provided in s 6:

No person shall be or continue to be a member of or engage in any combination with intent to restrain, to the detriment of the public, trade in any commodity or service.

Like its UK progenitor, the concept of an examinable agreement in the 1965 Act involved an agreement (as expanded by the definition in s 91) under which restrictions of certain kinds were accepted by one or more parties.<sup>6</sup> The inherent limitations in this approach were considered by Masterman and Solomon<sup>7</sup> in the context of price leadership and information or notification agreements. Likewise, Walker<sup>8</sup> considered the issue of 'conscious parallelism' and the fact that it did not constitute conclusive evidence of an agreement.

The original draft of the Trade Practices Bill 1973 was more redolent of the earlier models. Section 45(2) provided 'a corporation shall not make a contract, or engage in or be a party to a combination or conspiracy, in restraint of trade or commerce'. Rather confusingly, subs 45(4)(a) excluded a 'contract, combination or conspiracy . . . constituted by an agreement, arrangement or

---

5 The development of restrictive trade practices law in the United Kingdom has been surveyed by the House of Lords recently in *Norris v Government of the United States of America* [2008] UKHL 16 at [24]ff.

6 The Restrictive Trade Practices Act 1971 was in similar terms.

7 G Masterman and E Solomon, *Australian Trade Practices Law*, Butterworths, Sydney, 1967, pp 90–1.

8 G de Q Walker, *Australian Monopoly Law*, FW Cheshire, 1967, pp 95–7.

4 (2008) 21 Australian Journal of Labour Law

understanding of a kind referred to in subsection 47(3) or (4)', which dealt with exclusive dealing. This seemed to indicate that the draftsman regarded a combination or conspiracy as necessarily involving an agreement, albeit in the extended sense. The second draft, and the form of s 45 which was enacted after amendments introduced in March 1974, provided in subs 45(2) that:

A corporation shall not —

- (a) make a contract or arrangement, or enter into an understanding, in restraint of trade or commerce.

Although s 45 was repealed and replaced by the Trade Practices Amendment Act 1977, following the decision of the High Court in *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd*,<sup>9</sup> which removed the limiting reference to 'restraint of trade', the prohibition against making a contract or arrangement was retained, with the reference to 'entering into' an understanding being replaced by 'arriving at', and this formulation has continued until the present day. It is the model which New Zealand followed.<sup>10</sup> It was the 1977 amendments which introduced both the definition of 'exclusionary provision' in s 4D of the TP Act and, in the case of an understanding, defined 'provision' to mean 'any matter forming part of the understanding'. The meaning of 'provision' in the context of a contract, arrangement or understanding has been the subject of consideration by the High Court in *Visy Paper Pty Ltd v ACCC*.<sup>11</sup> The majority stated that 'provision' was used here and elsewhere in Pt IV 'in a comprehensive rather than a technical sense reflecting its usage in contract law . . . [so as to invite] . . . attention to the content of what has been, or is to be, agreed, rather than any particular form of expression of that content adopted, or to be adopted by the parties'. As mentioned earlier, the exposure draft of the legislation proposed to be introduced to criminalise certain types of cartel conduct adopts the composite expression 'contract, arrangement or understanding' as the basic building block for a 'cartel provision'.

Section 1 of the US Sherman Act provides in part:

Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

As is well known, the US approach to statutory interpretation is very different to that adopted in Australia. It enabled one distinguished commentator to say of the section just quoted:

First, it presents a single concept about common action, not three separate ones: contract . . . combination or conspiracy, becomes an alliterative compound noun, roughly translated to mean 'concerted action'. There is little need to grapple with issues about the meanings of the particular words of the statute nor to mark nice distinctions among them.<sup>12</sup>

The Canadian equivalent, which creates a criminal offence, is s 45 of the

---

9 (1976) 133 CLR 390; 8 ALR 555.

10 Commerce Act 1986 s 29.

11 (2003) 216 CLR 1; 201 ALR 414 at [7].

12 L A Sullivan, *Handbook of the Law of Antitrust*, West Publishing, 1977, p 312.

Belling the CAU: Finding a substitute for 'understandings' about Price 5

Competition Act 1985, which provides in part:

Every one who conspires, combines, agrees or arranges with another person . . . to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof . . . is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or both.

### Early applications

Although there has always been an element of the clandestine about collusion among competitors, many combinations or 'trusts' in the early periods of the enactment of the Sherman Act and the Australian Industries Preservation Act, as well as in the United Kingdom, involved formal agreements. That was what 'antitrust' was all about. The Coal Vend<sup>13</sup> and the Basic Slag Agreements<sup>14</sup> were instances of formal contracts; the issue was whether particular parties adhered to them in later periods and whether they were justifiable. Parties to secret agreements did not register them. As enforcement of competition law matured, agencies became concerned to prosecute such conduct and, in the absence of direct evidence of the collusion, courts became concerned with determining whether the parties whose conduct followed a parallel course could be said to harbour a common purpose, and were thereby exposed to statutory prohibitions. In *Interstate Circuit Inc v United States*,<sup>15</sup> the Supreme Court upheld the District Court's finding of a conspiracy between the distributors of motion films at the instigation of four theatre chains. It was sufficient that they engaged in parallel conduct of a similar nature; each was made aware of the request to engage in the conduct; each was unlikely to have engaged in it without some assurance that all the others would do so; there was no credible explanation, other than conspiracy, why they would have all imposed the same restrictions; and the conduct deviated from 'traditional business patterns'.<sup>16</sup> There was no element of commitment here, mere knowing participation sufficed. As the Supreme Court said:

It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that co-operation was essential to successful operation of the plan. They knew the plan, if carried out, would result in a restraint of commerce, which, we will presently point out was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan.<sup>17</sup>

By contrast in *Theatre Enterprises v Paramount Film Distributing Corp*,<sup>18</sup> the defendant motion picture distributors were able to persuade the jury that they had reached their decision uniformly to refuse to grant a licence to the plaintiff suburban cinema operator to show first run films because it was more

---

13 See discussion n 21 below.

14 See discussion n 25 below.

15 306 US 208 (1939).

16 S F Ross, *Principles of Antitrust Law*, Westbury, New York, 1993, p 160.

17 306 US 208 (1939) at 221.

18 346 US 537 (1954).

6 (2008) 21 Australian Journal of Labour Law

profitable to show these in downtown theatres, and that their conduct was consistent with their behaviour had they been competing.

Latterly in the United States the issue of inferring a conspiracy has tended to be resolved at the level of summary judgment, and the Supreme Court has recently given guidance on that issue in *Bell Atlantic Corp v Twombly*.<sup>19</sup> The alleged conspiracy between telephone companies to suppress competition by not complying with their obligations under the Telecommunications Act 1996 had been rejected at first instance, relying on *Theatre Enterprises*, on the basis that the plaintiffs must allege additional facts to rebut the inference that the alleged conspirators were simply engaging in parallel conduct. The Second Circuit Court of Appeals reversed this decision and was in turn reversed by the Supreme Court which stated that allegations of parallel conduct must 'be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action'.<sup>20</sup>

The *Coal Vend* case<sup>21</sup> was remarkable for its day. The trial in Sydney ran for about 77 sitting days including two consecutive weeks in August 1911 when the court sat from Monday to Saturday inclusive. The trial was conducted in the original jurisdiction of the High Court of Australia by Isaacs J. The defendants were the members of an association of about 18 colliery proprietors and a similar number of individuals, and four shipping companies and their respective managing directors. The charge relevantly for present purposes was a contravention of s 4, the terms of which are set out above. The allegation related to a formal contract (the Coal Vend) which had been renewed on several occasions. Detailed minutes were kept of the Coal Vend's activities. The defendants denied all of the allegations. There was a large amount of explicit evidence establishing the existence of the agreement but the defendants declined to give evidence. Because an appeal to the Full High Court<sup>22</sup> was successful on the grounds of reasonableness, a decision which was upheld on appeal by the Privy Council,<sup>23</sup> the case is of little more than academic interest, but the reasons at first instance gave rise to the classic statement by Isaacs J as to the circumstances in which an inference of a conspiracy, in this case to adhere to a pre-existing agreement, might be drawn. His Honour said:

Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestation of mutual consent to carry out a common

---

19 127 S Ct 1955 (2007).

20 Ibid, at 1966 and see W Kolasky and D Olsky, 'Laying *Conley v Gibson* to Rest' (2007) 22 *Antitrust* 27.

21 *R & Attorney-General (Cth) v The Associated Northern Collieries* (1912) 14 CLR 387.

22 Sub nom *The Adelaide Steamship Company Ltd v R & the Attorney-General* (1912) 15 CLR 65.

23 *Attorney-General (Cth) v The Adelaide Steamship Company Ltd* (1913) 18 CLR 30.

### Belling the CAU: Finding a substitute for 'understandings' about Price 7

purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.<sup>24</sup>

Here the formal *Coal Vend* agreement provided sufficient evidence of mutual consent; all that was needed was to show that the later separate acts of the defendants formed part of the common plan.

### UK precedents

As has been noted earlier, the Restrictive Trade Practices Act 1956 of the United Kingdom imposed a scheme whereby certain agreements were required to be registered. Section 6(1) identified 'any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being an agreement under which restrictions are accepted by two or more parties in respect of the following matters'. Subsection 6(3) provided that:

'agreement' included any agreement or arrangement, whether or not it is or is intended to be enforceable (apart from any provision of this Act) by legal proceedings, and references in this part of the Act to restrictions accepted under an agreement shall be construed accordingly; and 'restriction' includes any negative obligation, whether express or implied and whether absolute or not.

The requirement that restrictions be accepted by two or more parties is significant and in this respect was not followed by the 1965 and 1971 Australian legislation. It may have had a lingering effect on the approach by Australian courts to the composite expression 'contract, arrangement or understanding' under the TP Act. In *Re British Basic Slag Ltd's Agreements*,<sup>25</sup> a group of steel companies had entered into exclusive arrangements with BBS in relation to the whole of the basic slag produced as a residue in their steel mills and which was valuable for use as a fertiliser. It was conceded that each steel company accepted a restriction within s 6(1) and the only question was whether BBS also accepted a restriction, which would render the agreement registrable. At first instance it was held that it did. On appeal the Registrar of Restrictive Trading Agreements sought to argue an additional ground, namely, that when the steel companies had signed individual agreements with BBS an arrangement came into existence under which restrictions were accepted by each of them.

Although expressing some doubt as to the trial judge's reasoning, the Court of Appeal upheld the decision in relation to the restriction accepted by the BBS. The Registrar's decision that there was also an arrangement was attacked on the basis that something more was required than that one party should intentionally arouse in the other an expectation that the first will act in a certain way. The evidence was that the decision of the individual companies to execute the agreement with BBS was not the result of any prior agreement or consultation but solely on the basis of their commercial interests being best served by agreeing to do so. This version of events was not challenged in cross-examination, and all that was admitted was that none of them

---

<sup>24</sup> (1911) 14 CLR 387 at 400.

<sup>25</sup> [1963] 2 All ER 807.

8 (2008) 21 Australian Journal of Labour Law

contemplated that any other member company would enter into a different form of agreement with BBS. Willmer LJ said that the word 'arrangement' was to be given its ordinary meaning. An arrangement was present when each of two or more parties intentionally aroused in the others an expectation that the first would act in a certain way, thereby incurring at least a moral obligation to do so. An arrangement was therefore something 'whereby the parties to it accept mutual rights and obligations'.<sup>26</sup> Diplock LJ said that an arrangement involved a meeting of minds because under s 6(1) it had to be between two or more persons.<sup>27</sup> Moreover, since the statutory definition required that it be an arrangement 'under which restrictions were accepted by two or more parties', it involved mutuality:

in that each party, assuming he is a reasonable and conscientious man, would regard himself as being in some degree under a duty whether moral or legal to conduct himself in a particular way or not to conduct himself in a particular way as the case may be, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement.

He went on to say that, without being exhaustive, it would be sufficient to constitute an arrangement between A and B, if:

- (i) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way;
- (ii) such representation is communicated to B, who has knowledge that A so expected and intended; and
- (iii) such representation or A's conduct in fulfilment of it, operates as an inducement, whether among other inducements or not, to B to act in that particular way.<sup>28</sup>

This 'definition' is notable for the fact that, despite the narrative that preceded it, it contains no reference to commitment, obligation or duty. The third member of the court, Danckwerts LJ, while agreeing that at least moral obligations were required, was prepared on the evidence to infer from facts, including the nature and history of the company itself, that there was an arrangement. These were not facts which would test the limits of the meaning of 'arrangement'.

The Competition Act 1998 (UK) brought that country's prohibition of horizontal anti-competitive conduct into line with that of the European Union. Article 81 (previously 85) of the Treaty has been adopted as s 2 of the UK legislation which provides that, subject to certain exceptions:

Agreements between undertakings, decisions by associations of undertakings or concerted practices, which:

- (a) may affect trade within the United Kingdom; and
- (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

Subsection 2(2) then instances certain 'agreements, decisions or practices'

---

<sup>26</sup> Ibid, at 814.

<sup>27</sup> Ibid, at 819.

<sup>28</sup> Ibid, at 819.

## Belling the CAU: Finding a substitute for 'understandings' about Price 9

which are specifically the object of the prohibition. Section 60 of the Act requires the meaning of the statutory terms to be determined in a manner consistent with the decisions of the European Court of Justice, the Court of First Instance and the Commission of the European Communities. Relevant EU decisions were recently summarised in the decision of the Competition Appeal Tribunal in *JJB Sports Plc v Office of Fair Trading*.<sup>29</sup> Quoting the Court of Justice in the *Dyestuffs* case<sup>30</sup> the tribunal drew attention to the fact that concerted practices as well as agreements were brought within the prohibition. The Court of Justice stated:

although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.<sup>31</sup>

The tribunal then noted the statement by the Court of Justice in *Suiker Unie v Commission* that coordination 'must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt. . .' and that while the requirement of independence:

does not deprive economic operators to the right to adopt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the *object or effect* whereof is to either influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor that the course of conduct which they themselves have decided to adapt or contemplate adopting on the market.<sup>32</sup>

Later cases referred to by the tribunal qualified this to some extent by noting that more than a disclosure of future intention was required and there must be sufficient to have eliminated, or at least substantially reduced, uncertainty as to the conduct the second competitor would adopt, although another decision referred to by the tribunal suggested that it was sufficient if information was communicated for any anti-competitive purpose, or that information which would become available in any event was communicated more simply, rapidly and directly than would occur in the normal course. This would be sufficient to create a climate of mutual certainty as to the future pricing policies of the party communicating the information. Again, if one market participant accepted complaints made to it by a competitor in connection with the competition to which the latter was exposed by the first's conduct, the conduct amounted to a concerted practice.<sup>33</sup>

### Early Australian interpretation of CAU

Given the extent of consideration elsewhere of the word 'arrangement' the word 'understanding' tended, in the early years of the TP Act, not to be given

---

29 [2004] CAT 17.

30 *ICC v Commission* [1972] ECR 619.

31 [2004] CAT 17 at [66].

32 [1975] ECR 1663 at 173-5 (emphasis added).

33 [2004] CAT 17 at [159]-[160].

10 (2008) 21 Australian Journal of Labour Law

a distinctive meaning. The term 'arrangement' seemed sufficiently descriptive of an informal species of collusion to make it unnecessary to consider whether there were elements which an arrangement required which an understanding might lack. In a very early decision on s 45 the Australian Industrial Court<sup>34</sup> referred to the reasons of Diplock LJ in *British Basic Slag*. While noting that s 45 of the TP Act was not in the same terms as s 6 of the Restricted Trade Practices Act 1956, Smithers J reasoned that:

it would follow that the existence of an arrangement of the kind contemplated in s 45 is conditional upon a meeting of the minds of the parties to the arrangement in which one of them is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man, to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conducted themselves in the way contemplated by the agreement.

His Honour went on:

it seems to me that an understanding must involve the meeting of two or more minds. Where 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.<sup>35</sup>

The decision was obiter as the application failed. However, the passage was quoted with approval by Gray J in *ACCC v Leahy Petroleum Pty Ltd*.

It is not proposed to review each of the subsequent decisions of the Federal Court of Australia in which the concept of an arrangement or an understanding has been considered. However, some decisions stand out. Among them is the commendably short *ex tempore* judgment of Bowen CJ for the Full Court in *Morphett Arms Hotel Pty Ltd v Trade Practices Commission*.<sup>36</sup> The court dismissed an appeal from a decision of Fisher J<sup>37</sup> about an understanding between hoteliers. While agreeing in all other aspects with the trial judge, Bowen CJ added this qualification in respect of the nature of 'an understanding' for the purposes of s 45:

Fisher J reached the conclusion that it is a necessary ingredient of such 'an understanding' that there be an element of mutual commitment between two or more parties in the sense that each must have accepted an obligation qua the other or others. As at present advised, it seems to me that one could have an understanding between two or more persons restricted to the conduct which one of them will pursue without any element of mutual obligation, insofar as the other party or parties to the understanding are concerned. It is not, however necessary that I reach or express any final view on this question since Mr Justice Fisher's view that such an element of mutual commitment was required plainly imposed a heavier burden on the respondent commission, and therefore favoured the appellant.<sup>38</sup>

*Morphett Arms* was one of the few cases where a finding was made of an

---

<sup>34</sup> *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 5 ALR 465; ATPR 40-004.

<sup>35</sup> *Ibid*, ALR 469-70; ATPR 17,116.

<sup>36</sup> (1980) 30 ALR 88; ATPR 40-157.

<sup>37</sup> *TPC v Nicholas Enterprises Pty Ltd* (1979) 28 ALR 201; ATPR 40-141.

<sup>38</sup> It remains the present writer's view, as noted in the editorial comment to the report of that

Belling the CAU: Finding a substitute for 'understandings' about Price 11

understanding based solely on inferences from conduct in the absence of evidence of any specific communication. It is all the more remarkable in that the commission's case withstood a no case submission, a full trial and the appeal just referred to.<sup>39</sup> There was evidence of a meeting but no evidence of what was said. There was sufficient corroborative evidence in the conversations of one of the alleged participants in the arrangement with third parties to satisfy the trial judge on the no case submission that a prima facie case existed. This was borne out at the trial where the evidence was gone into in much greater detail, such that the judge was prepared to infer the element of commitment from circumstantial evidence. That element seems to have been regarded by both Fisher J and Bowen CJ as being of the essence of an arrangement or understanding. The only question was whether the commitment needed to be mutual.

The element of mutuality was considered by Lockhart J in a decision of the Full Federal Court in *Trade Practices Commission v Service Station Association Ltd*<sup>40</sup> where specific reference was made to the comments of Bowen CJ in *Morphett Arms*. His Honour there referred to his decision as trial judge in *Trade Practices Commission v Email Ltd*<sup>41</sup> where he had expressed the view that, while mutuality was not a necessary element, the cases where it would not be present would be rare. The matter was left open in the *Service Station Association* case. The commission's attack on the petrol stations and their association failed largely because, on the facts of the case, there was no agreement to increase prices by a specified amount. The decision was one of the first to deal with horizontal conduct in relation to petrol prices and the beginning of the regulator's dissatisfaction with its ability to attack conduct which it considered restrictive of competition in that politically sensitive market.

In *Email*, Lockhart J had rejected the commission's case that an understanding should be inferred where, in a market in which there were only two competitors dealing with the same customers, the substantially larger participant regularly sent its price lists to its smaller competitor which reciprocated. Both parties gave evidence as to their practices and the way in which the market operated. The larger company, Email, believed that it was the market leader and that its competitor, Warburton Franki, had a higher cost structure. There was no direct evidence of any commitment, although there were opportunities for the parties to meet at a trade association. The commission's case was that the issuing and forwarding of the price lists by each company to the other constituted the communication necessary to give rise to the meeting of minds essential to an arrangement or understanding. After referring to the *British Basic Slag* case and *Morphett Arms*, Lockhart J observed:

---

decision, that the terms of the UK statutory provision may have influenced the earlier reasoning as to the requirement for mutual commitments.

39 *TPC v Nicholas Enterprises Pty Ltd* (1978) ATPR 40-097; *TPC v Nicholas Enterprises Pty Ltd* (1979) 28 ALR 201; ATPR 40-141.

40 (1993) 44 FCR 206; 116 ALR 643.

41 (1980) 31 ALR 53; 43 FLR 383.

12 (2008) 21 Australian Journal of Labour Law

It is important to bear in mind that there is a fundamental distinction between a hope or prediction of future behaviour on the one hand and the expectation of *certain* behaviour on the other; that is behaviour which, as a result of communication between the parties, the party restricted is at least morally bound to adopt.<sup>42</sup>

His Honour went on to observe that he found it difficult to envisage circumstances where there would be an understanding involving a commitment by only one party. In the absence of any finding of any moral obligation on Email to adhere to the prices notified in its price lists, his Honour found no arrangement or understanding. He rejected the argument that the conduct provided 'an umbrella of comfort' for the parties. Accepting evidence from the witnesses that they did not regard the price lists as communications of the prices which either company would charge or was expected to charge, his Honour found that it was not the exchange of price information that led to parallel prices; this was produced by market forces, competition and the necessity for Warburton Franki to follow Email. There was no 'moral or other obligation' on Email to adhere to the prices notified in its price list.

Fisher J returned to the subject in *TPC v David Jones (Aust) Pty Ltd*. After referring to the Full Court's comments in *Morphett Arms* and those of Lockhart J in *Email*, he quoted with approval from the joint judgment of Gibbs and Mason JJ in *Commissioner of Taxation (Cth) v Lutovi Investments Pty Ltd*<sup>43</sup> concerning the nature of an arrangement under s 80B(5) of the Income Assessment Act 1936:

It is, however, necessary that an arrangement should be consensual, and that there should be some adoption of it. But in our view it is not essential that the parties are committed to it or are bound to support it. An arrangement may be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it.<sup>44</sup>

In *David Jones* the evidence consisted of examinations of company representatives by the Trade Practices Commission under s 155(1)(c) of the TP Act, a price list tabled at a meeting of those representatives, and parallel pricing conduct thereafter. None of the respondents gave evidence at the trial. The evidence of an understanding was therefore circumstantial. Fisher J considered what had been said by the members of the High Court in *Jones v Dunkel*<sup>45</sup> about drawing inferences. After referring to Isaac J's dictum, his Honour reviewed all of the undisputed evidence and concluded that an understanding in the terms alleged had been arrived at.

### Recent interpretation of CAU

The authorities just referred to were the starting point for a discussion by Burchett J in *News Ltd v Australian Rugby Football League Ltd*.<sup>46</sup> His Honour observed that light was shed on the reservation made by Gibbs and Mason JJ

---

42 Ibid, at ALR 66 (emphasis added).

43 (1978) 140 CLR 434; 22 ALR 519.

44 (1986) 13 FCR 446 at 462; 64 ALR 67.

45 (1959) 101 CLR 298.

46 (1995) 58 FCR 447 at 527; 135 ALR 33.

Belling the CAU: Finding a substitute for 'understandings' about Price 13

in *Lutovi* as to the need for parties to an arrangement to be committed to or bound to support it when regard was had to what had been said by Bowen CJ (dissenting) in the Full Court of the Federal Court in *Lutovi*:

In attempting to identify an arrangement for the purpose of s 44(2D)(b), one helpful guide is to determine whether any party who failed to take one of the steps set out above, would thereby have become liable to censure by another party for breach of a moral obligation arising under the arrangement, whether or not the latter party could avail himself of a legal remedy. This, though, need not be an essential feature of an arrangement. There may, for example, be a consensus as to a convenient course of procedure, a subsequent dissent from which might carry no obloquy. It can nevertheless be an arrangement.

His Honour observed that this suggested that arrangements without obligation were likely to be uncommon, the exception relating to the possibility of a change of mind and not implying 'that you can have an arrangement or understanding so amorphous that no one can be expected to act pursuant to it'. His Honour then distinguished the situation where members of a trade association entered into a number of separate agreements with different retailers from the circumstances in *British Basic Slag Ltd* where, his Honour suggested:

Communication between their representatives may quite apparently have occurred in circumstances where a wink or a nod might easily have sufficed to set in place a plan of action. Any paucity of evidence of direct and express communication between them [might] be accounted for by their alertness, as commercial people, to the existence of competition laws.

His Honour continued:

If the court can be satisfied that the parties intended each other to draw inferences of mutual acceptance of obligations without open statements being made, it is appropriate that the court should draw the same inferences those parties expected each other to draw.<sup>47</sup>

On appeal the Full Federal Court differed from Burchett J as to whether there was an understanding between the football clubs whose relationship his Honour had found to be very different from that of members of the trade association or a group of retailers.<sup>48</sup> Again referring to Isaac J's dictum, the Full Court considered that the fact that each of the clubs had entered into substantially identical agreements with players within a short time of each other, in the context in which they occurred, supported a conclusion of mutual consent even in the absence of evidence of direct communications. They were consenting to carry out a common purpose; 'they were not merely hoping that the other clubs would join in; what they were doing made sense only as a common undertaking'.<sup>49</sup> In rejecting an explanation on the part of the respondents of mere 'conscious parallelism' the court, referring to *Theatre Enterprises*, stated that this argument failed to pay due regard to the undisputed facts.

The difficulty for those who would advocate a wider meaning for the word

---

<sup>47</sup> Ibid, at FCR 529.

<sup>48</sup> *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 573; 139 ALR 193.

<sup>49</sup> Ibid, at FCR 575.

14 (2008) 21 Australian Journal of Labour Law

'understanding' is that courts have tended to approach it from the contract end of the CAU spectrum. This is particularly so in the case of Lindgren J in *ACCC v CC (NSW) Pty Ltd*<sup>50</sup> who commenced his review of the authorities with a reference to *Newton v Commissioner of Taxation (Cth)*<sup>51</sup> where the Privy Council was concerned with the expression 'contract, agreement or arrangement' in s 260 of the then Income Tax and Social Services Contribution Assessment Act 1936. His Honour then referred to *British Basic Slag, Top Performance, Nicholas Enterprises, Email and Service Stations*, and continued:

The cases require that at least one party 'assume an obligation' or give an 'assurance' or 'undertaking' that it will act in a certain way. A 'mere expectation that as a matter of fact' a party will act in a certain way is not enough, even if it has been engendered by that party. In the present case, for example, each individual who attended the meeting, may have expected that as a matter of fact the others would return to their respective offices by car, or, to express the matter differently, each may have been expected by the others to act in that way. Each may even have 'aroused' that expectation by things he said at the meeting. But these factual expectations do not found an 'understanding' in the sense in which the word is used in sections 45 and 45A. *The conjunction of the word 'understanding' with the words 'agreement' and 'arrangement' and the nature of the provisions show that something more is required.*<sup>52</sup>

One of the questions before the court was whether competing tenderers who attended a meeting had undertaken to take into account in calculating their tender price an undertaking to pay an unsuccessful tenderer's fee. His Honour held that each tenderer held an independent expectation as to what the others would do but that this was not enough; there must be a consensus. This discussion was picked up in the appeal to the Full Federal Court from the decision of the trial judge in *ACCC v Rural Press Ltd*.<sup>53</sup> On the appeal there was no dispute about the legal principles involved.<sup>54</sup> The attack was on the factual findings of the trial judge which led to his conclusion that an arrangement or understanding had been arrived at. The same position obtained in the High Court.<sup>55</sup> There was no consideration by the High Court of the reasoning below and it would not be correct to say that the approach adopted by Lindgren J has received approval by the High Court.

### **Ballarat Petrol case**

That is where the matter rested until the decisions involving petrol retailing in Victoria. The first of the decisions, relating to allegations of price fixing in the Ballarat market, was the decision on liability by Merkel J in *ACCC v Leahy Petroleum Ltd*.<sup>56</sup> Reduced to its essentials the case involved an allegation against a number of corporate and individual respondents that they were involved in a price fixing understanding constituted by the continuation of

---

50 (1999) 92 FCR 375; 165 ALR 468.

51 (1958) 98 CLR 1.

52 (1999) 92 FCR 375; 165 ALR 468 at [141] (emphasis added).

53 (2001) ATPR 41-804.

54 *Rural Press Ltd v ACCC* (2002) 118 FCR 236; 193 ALR 399 at [79].

55 *Rural Press Ltd v ACCC* (2003) 216 CLR 53; 203 ALR 217 at [29].

56 (2004) 141 FCR 183; ATPR (Digest) 46-260.

Belling the CAU: Finding a substitute for 'understandings' about Price 15

pre-existing arrangements which had commenced in about 1999. The arrangements involved a series of steps comprising telephone calls, followed by price increases, reinforced by follow up calls where necessary. Certain of the respondents, including the Leahy companies, had admitted the contraventions; the other respondents, including Apco, either did not admit the allegations or actively contested them. The major area of contest was whether the ACCC had established that there was the requisite meeting of minds in relation to a price fixing understanding involving Apco and the other contesting respondents, in particular whether there was a consensus at any time as to what was to be done by any of them in relation to the fixing or controlling of petrol prices in Ballarat.<sup>57</sup> Some of the contesting respondents gave evidence. There was an issue whether the admissions which had been made by some respondents were admissible against the others. Merkel J considered that the principle in *Ahern v R*<sup>58</sup> was applicable in civil proceeding so as to make the acts done or words uttered outside the presence of the contesting parties admissible against them, once it was shown there was a conspiracy, and that reasonable evidence existed that the contesting party was a participant, and finally that the acts or words had been uttered by a participant in furtherance of the common purpose. His Honour considered the analogous position which had arisen in *David Jones* and the operation of s 87(1)(c) of the Evidence Act 1985 (Cth).

His Honour concluded that the evidence related to an understanding which had evolved from existing arrangements, adapted from time to time as a result in changes in personnel and market forces. His Honour then observed in a critical passage:

For present purposes it may not matter if the steps [in the conduct involved in giving effect to the understanding] are framed in terms of an expectation, rather than a commitment, as to what was to be done. However, if it matters I am satisfied that the evidence establishes that the first three steps involved a commitment on the part of each of the initiating respondents who intended to bring the discount cycle to an end and who gave effect to that intention by implementing the understanding.<sup>59</sup>

His Honour found that each of the contesting respondents was a party to the alleged understandings. Apco and its Managing Director, Anderson, who had been found to be a party to the contraventions, appealed successfully to the Full Court.<sup>60</sup> Anderson had given evidence, and the finding of the trial judge was that Apco's reaction to the price increases initiated by others was critical to whether the price increase would 'stick'. While the foreshadowed increases were communicated to Anderson, he generally did not react to this information and never solicited it. Anderson admitted that he never asked for the information flow to stop and conceded that it was useful to him since it enabled him to know when to raise his own prices. The Full Court held that Merkel J had 'in explicit terms declined to make a finding that Apco (not being an initiating respondent) became committed to any price increase agreed upon by the initiating respondents' and that this led to the unavoidable conclusion

---

<sup>57</sup> Ibid, at [58].

<sup>58</sup> (1998) 165 CLR 87; 80 ALR 161.

<sup>59</sup> *ACCC v Leahy Petroleum Ltd* (2004) 141 FCR 183; ATPR (Digest) 46-260 at [331].

<sup>60</sup> *Apco Service Stations Pty Ltd v ACCC* (2005) 159 FCR 452; ATPR 42-078.

16 (2008) 21 Australian Journal of Labour Law

that Apco was not a party to any understanding to fix its prices at the same level as the other respondents, or at any particular level, or even that it would increase its prices at all.<sup>61</sup>

The Full Court, noting that the appellants had not disputed the trial judge's statement of legal principle as to what was necessary to constitute an understanding, characterised Anderson's expectation about what his competitors would do in relation to prices while he was deciding whether to follow them as no more than what Lindgren J had described as a 'factual expectation', falling short of an understanding. It was analogous with the situation in *Email*. There was no commitment on the part of Anderson and therefore Apco. The appeal by Apco and Anderson succeeded; there was no appeal by the other corporate respondents.

### Geelong Petrol case

A number of the respondents to the Ballarat case were also the subject of proceedings by the ACCC in relation to allegations of price fixing in the Geelong petrol market.<sup>62</sup> Again, some of the respondents had admitted the arrangement or understanding alleged, and issues arose as to the admissibility of that evidence against the contesting respondents, including Leahy. Unlike the Ballarat case, the Geelong allegations did not involve a single, multi-party price fixing arrangement or understanding. Rather the ACCC alleged eight separate arrangements which were said to be interlocking.<sup>63</sup> The mere statement of these arrangements involved considerable complexity, as illustrated by the trial judge Gray J's summary of the first arrangement, said to have existed between Leahy and Apco, as follows:

Arrangement No 1 was alleged to have existed between Leahy and Apco. It was alleged to have five distinct provisions, which are summarised as follows: (a) Leahy and Apco would communicate with each other regarding the amount and timing of proposed increases in the retail price of ULP and Super to be charged at Leahy outlets and Apco outlets, including commission sites; (b) Leahy and Apco would endeavour to agree to increase such prices to the same or about the same prices at or about the same time; (c) between them, Leahy and Apco would advise or cause to be advised some or all of the other participants in the Geelong petrol market of the amount and timing of the proposed increases, each knowing and intending that other market participants would be likely to increase their prices at or about the advised time to prices the same or about the same as the advised prices; (d) Leahy and Apco would at or about the advised time increase the retail prices for ULP and Super at Leahy outlets and Apco outlets to prices the same or about the same as the advised prices; and (e) Leahy and Apco would use their best endeavours to persuade or influence other market participants to increase the retail prices for ULP and Super at their sites to the advised prices, if they had not done so shortly after the advised time (these endeavours were described during the trial as 'follow-up calls').

Gray J undertook a lengthy review of the meaning and authorities on the terms 'contract, arrangement or understanding'. He said that they were

---

61 Ibid, at [43]–[44].

62 ACCC v *Leahy Petroleum Pty Ltd* (2007) 160 FCR 321; [2007] FCA 794; BC200704008.

63 Ibid, at [199].

Belling the CAU: Finding a substitute for 'understandings' about Price 17

intended to represent a spectrum of consensual dealings. They required the existence of at least one other party who must also participate in the making, or arriving at the contract, arrangement or understanding, which must exist at the end of the process of making or arriving at it.<sup>64</sup> For an arrangement to exist, there was a need for express communication suggested by the use of the verb 'make'. Unlike an arrangement, an understanding could be tacit but must be consensual and involve a meeting of minds. His Honour accepted what Smithers J had said in *Top Performance*.<sup>65</sup> It was important not to confuse what was required for the formation of an understanding with its content. An arrangement or understanding of the kind referred to in s 45(2)(a) of the TP Act must have some substance from which the parties could withdraw or with which they could act inconsistently. Referring to the Full Court decision in *Apco*, his Honour noted that counsel for the ACCC in the case before him, recognising that Gray J was bound by the Full Court decision in *Apco*, had made the formal submission that the Full Court was in error when it required that there be some commitment before there could be an understanding for the purposes of s 45. His Honour continued:

As I have said, for the purposes of s 45(2)(a) there can be no such thing as an understanding that leaves each party to it free to do whatever it wishes. Whatever word may be chosen to represent the essential element of an understanding for the purposes of the relevant statutory provisions, it is clear that element involves the assumption of an obligation, unenforceable in any court of law but merely morally binding or binding in honour. Any reservation that may have existed about this has been dispelled by the High Court, which dismissed the ACCC's application for special leave to appeal from the Full Court in *Apco Service Stations* on 2 June 2006.<sup>66</sup>

His Honour then referred to the reasoning of Gleeson CJ and Hayne J in refusing special leave, where their Honours stated that the decision of the Full Court turned on that court's view of the facts and not on any controversial view of the meaning of the relevant provisions of the TP Act. Finally, his Honour noted that the ACCC in the instant case had pleaded a series of arrangements or understandings involving the parties to each increasing their prices to the same or a similar amount at or about the same time. It was therefore unnecessary to consider what would have happened if the allegation had been that only one party would increase its prices, the other parties being free to do whatever they saw fit. Later in the decision, his Honour observed that for an arrangement or understanding to exist it must have had an origin.<sup>67</sup> This could arise from a communication or 'it might be the case that a culture has developed among those engaged in a particular market, so that the recipient of a certain type of information will know that there is an expectation that he or she should act upon that information in a particular way'. However, the present case fitted neither of these categories. None of the alleged arrangements was founded in any particular oral communication and the ACCC was therefore driven to rely on evidence that they had resulted from a

---

<sup>64</sup> Ibid, at [23].

<sup>65</sup> (1975) 5 ALR 465; ATPR 40-004.

<sup>66</sup> (2005) 159 FCR 452; ATPR 42-078 at [37].

<sup>67</sup> Ibid, at [150].

18 (2008) 21 Australian Journal of Labour Law

course of conduct or could be inferred from the fact that they were given effect to. His Honour then analysed the evidence in relation to each of the alleged arrangements. Ultimately Gray J found that none of the witnesses gave evidence that the respondent was under any obligation or commitment to act in accordance with the alleged arrangements. The circumstantial evidence did not provide adequate support for the existence of the arrangements or understandings alleged. The absence of those elements of commitment or obligation was fatal to the ACCC's case.

It is against this background that the ACCC has expressed its concern at the court's interpretation of the term 'contract, arrangement or understanding' and has proposed the amendment referred to earlier.

### What shift?

The review of the cases just undertaken does not reveal any significant shift in the court's interpretation of the expression 'contract, arrangement or understanding'. The decision by Gray J in the Geelong case turns on the facts; the ACCC chose not to appeal. It cannot be characterised as an extreme interpretation of the law. Indeed his Honour's reference, quoted above, to an expectation arising from a 'culture' in a market appears to come very close to what the ACCC seems to be concerned to attack, although it must be assumed Gray J was not resiling from the need for some commitment by at least one of the parties.

If any conclusion can be drawn from the contested cases, making the necessary allowance for the differences in the types of arrangements or understandings alleged and the nature of the evidence available to the commission in the cases which have been contested, it is that the court has, on the whole, been more prepared to infer an understanding from conduct which the respondents failed to explain. In those cases where the court was provided with greater detail as to the conduct of the parties and the evidence, particularly of respondents, provided an alternative explanation for their behaviour, the court has been less likely to infer an arrangement or understanding based on subsequent conduct. In those cases where the evidence suggests an arrangement or understanding may exist, the court will generally require evidence that the element of commitment or obligation is present. In the first category are cases such as *Nicholas, David Jones* and *ApcO* (at first instance) while the second category includes *Email, Stationers*,<sup>68</sup> *Parkfield, ApcO* (on appeal) and *Leahy*. However the sample is a limited one and the pattern does not appear universally. For example, in *News Ltd* on appeal, the court found an understanding in circumstances where the respondents had given evidence which offered an alternative explanation. In the first *Service Stations* case and in *Leahy* the respondents did not give evidence but the court, because of the absence of evidence of any commitment, was still not prepared to infer the existence of an understanding. If there has been any trend in cases in recent years it is that the court has shown greater reluctance to infer the existence of an understanding where the objective evidence is unavailable than in earlier times.

---

<sup>68</sup> *Stationers Supply Pty Ltd v Victorian Authorised Newsagents Association Ltd* (1993) 44 FCR 35.

Belling the CAU: Finding a substitute for 'understandings' about Price 19

The opinion of Burnside QC published by the ACCC with its Petrol Prices Report identifies the alleged 'shift' in the nature of the evidence required to enable a commitment to be inferred. It is suggested in the opinion that on the *British Basic Slag* formulation, as articulated by Willmer LJ, it was sufficient that one party's conduct gave rise to an expectation in another such that it would be morally reprehensible to act contrary to that expectation. This is said to be analogous to what is required to raise an equitable estoppel. It is then suggested that a subtle but significant shift occurred when Lindgren J in *CC (NSW)* spoke of a 'mere expectation' as being insufficient to constitute an understanding. This had introduced a degree of ambiguity in decisions since that time.

### The ACCC proposal

Whether the conclusion and explanation advanced in the opinion are correct is now beside the point. The factual context of cases like *British Basic Slag* and *Apco* are so different as to make the task of comparison almost meaningless. The solution suggested by the ACCC is apparently designed to enable the court to infer the existence of an understanding from circumstantial evidence. This would be done by amending s 45 to add words to the following effect:

- (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

20 (2008) 21 Australian Journal of Labour Law

- (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.<sup>69</sup>

Yet in its explanation the ACCC argues that it should be able to impugn a situation in relation to pricing where 'an expectation regarding future conduct [is] consciously or intentionally engendered in one person by the words or conduct of another'. This describes something which is not consensual, and which involves no commitment. It appears to be unilateral, at least in the sense that a tort is unilateral. For this reason the proposed wording change may not achieve the desired result, as discussed below. There is a danger that seeking to achieve that result may involve an approach which would be over-inclusive.

The proposed amendment is directed at assisting the court to infer the existence of an understanding in the absence of direct or explicit evidence that one exists. It will therefore remain necessary to plead the existence of the understanding and its terms in the statement of claim, as if it were an agreement. What the ACCC apparently seeks to achieve is to have the court construct an understanding by a process of deduction. The amendment will permit, but not require, the court to disregard the absence of direct evidence of, and any commitment to giving effect to, the understanding. That approach has always been open, and as some of the cases discussed illustrate, has been adopted in the past. The amendment will not change the meaning of 'understanding'. The language of 'parties' and 'provision' remains, and is redolent of contract law, where parties accept commitments. If what the ACCC wants to prohibit is conduct which causes another market participant to act in a certain way based on an expectation, but without any commitment by the first party, it might be better to approach the task more directly. There is a certain artificiality in trying to characterise such conduct as an 'understanding', which the courts have said involves at least a moral commitment, when collusion is notoriously affected by cheating and backsliding. Courts are understandably reluctant to find, on the balance of probabilities, that there must have been such commitment unless all other possibilities are eliminated. It does not seem to make a great deal of sense to ask the court to engage in a form of make believe, by inferring the existence of something which has not been objectively established, but which is required in order to take the case over the magic statutory threshold. There is also the risk that the court may find that the understanding is not the one described in the pleadings.

### **More radical surgery?**

If the ACCC, and the government, wish to prohibit conduct where no commitment is undertaken, it may be time to consider whether the 'contract, arrangement or understanding' formula requires more radical surgery to enable what is being prohibited to escape the contractual straightjacket. As noted earlier, the location of 'understanding' in a consensual spectrum may be to blame for the reticence of the court to infer the existence of an understanding where evidence of commitment is lacking. This should not necessarily be the case. In the context of contracts it has been observed that:

---

<sup>69</sup> ACCC Petrol Prices Report, above n 1, p 230.

Belling the CAU: Finding a substitute for 'understandings' about Price 21

It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of 'offer', 'acceptance', 'consideration' and 'intention to create a legal relationship' which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship. cf Atiyah, 'Contracts, Promises and the Law of Obligations' 94 *Law Quarterly Review* at 194. A bilateral contract of this type exists independently of and indeed precedes what the parties do. Consequently, it is an error 'to suppose that merely because something has been done then there is therefore some contract in existence which has thereby been executed': Howard, 'Contract, Reliance and Business Transactions' [1987] *Journal of Business Law* at 127. Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words: *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (Court of Appeal) (11/11/88). The question in this class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. The conduct of the parties, however, must be capable of proving all the essential elements of an express contract: cf *Baltimore and Ohio RR Co v US* 261 US 592 (1923); *Fincke v US* 675 F2d 289 (1982). Care must also be taken not to infer anterior promises from conduct which represents no more than an adjustment of their relationship in the light of changing circumstances.

Research in the United States and Great Britain suggests that probably the majority of people in ongoing business relationships regulate their relationships in accordance with what they consider is fair and reasonable or commercially necessary at particular points of time rather than by reference to a priori rights and duties arising under a contract: Beale and Dugdale, 'Contracts Between Businessmen' [1975] *British Journal of Law and Society* at 45; Lewis, 'Contracts Between Businessmen' [1982] *Journal of Law and Society* at 153. This is the case even where their relationship is governed by a written contract. There is no reason to suppose that the position is any different in Australia. For this reason 'action and conduct before the inception of a controversy is of much greater weight than what they said or did after a dispute arose': *Fincke v US* at 295.

Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.<sup>70</sup>

While these observations are helpful in understanding how commercial people behave, they do not provide an alternative framework for analysis of something as imprecise as an 'understanding'. It is unlikely that we will ever get away from the requirement of a 'meeting of minds' as long as we continue to use the CAU formulation.

Nor will the adoption of terminology used elsewhere necessarily alter this outcome if all that is done is to substitute another word for 'understanding': we do not have the ability to rise above the words of the statute as the

---

<sup>70</sup> *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Australia) Pty Ltd* (1988) 5 BPR 11,110 at 11,117 per McHugh JA.

22 (2008) 21 Australian Journal of Labour Law

American commentator quoted earlier suggests the courts in that country have done.<sup>71</sup> The word 'conspiracy', whether in a criminal or civil context, clearly involves agreement<sup>72</sup> as does the word 'combination', which first came into the law by way of the early legislation outlawing worker organisations in certain industries,<sup>73</sup> and is often used interchangeably with conspiracy.

Another expression sometimes encountered refers to 'mutual consent to carry out a common purpose' and has similar overtones. It also suggests that the obligations must be undertaken by all of the parties, making it narrower than an arrangement or understanding. Besides, the drafting technique of using a series of similar words varying in intensity or shade of meaning has long been out of favour. Apart from anything else the practice raises the prospect of the application of the *noscitur a sociis* rule of interpretation.<sup>74</sup> If any one of these expressions (understanding, conspiracy, combination) is to be relied on it would be preferable if it appeared in the statute on its own, and not in combination with 'contract', with any statutory guidance of the type proposed by the ACCC made referable to the chosen expression alone; this may be what is intended by the ACCC proposal, but it does not seem to be achieved.

Is any assistance to be derived from the civil law use of expressions such as 'concerted practices' or 'pre-concert'? The earlier discussion<sup>75</sup> suggests these expressions have been given a wider interpretation by the Court of Justice, allowing an inference from parallel conduct, but they may not receive a similar interpretation in an Australian court, unless accompanied by interpretation provisions, or at least some explanation in the extrinsic materials, given the dictionary meanings: 'concerted' means 'contrived or arranged by agreement; pre-arranged; planned or devised'.<sup>76</sup> If the policy objective described by the ACCC is to be achieved and, indeed, if the court is to be encouraged to depart from the alleged ambiguity of the current composite expression, some new formulation seems to be required. The present writer remains agnostic on the question, but considers it useful to examine the alternatives, if only to see what new issues are thrown up by that process.

### What conduct should be proscribed?

If a different approach is to be adopted, it is essential first to characterise the conduct to be prohibited as precisely as possible, since the drafting of exceptions or defences would be unlikely to offer a workable solution, and one does not wish to be over-inclusive. In attempting this characterisation it is useful to refer to some descriptions which identify the features of the conduct the ACCC appears to wish to proscribe. The discussion by the European Court

---

71 Above n 12.

72 See *Crofter Handwoven Harris Tweed Co Ltd v Veitch* [1942] AC 435; [1942] 1 All ER 142.

73 Combination Acts 1799, 1800 United Kingdom: see Butterworths *Australian Legal Dictionary*.

74 See, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 376; 94 ALR 11.

75 Above n 29.

76 *Macquarie Dictionary*, 3rd ed.

Belling the CAU: Finding a substitute for 'understandings' about Price 23

of Justice in *Suiker Unie* quoted earlier<sup>77</sup> is helpful: the notion that each economic operator must determine its policy independently, while being free to adapt itself to the existing and anticipated conduct of its competitors, but precluding any contact the object or effect of which is to influence a competitor, or disclose the course of conduct proposed by the initiating party. The latter might need to be qualified by reference to a disclosure which occurred in the ordinary course, for example where the competitor was also a customer. The communication must have the purpose or effect of removing or reducing the uncertainty which usually exists in competitive markets. The inclusion of purpose as well as effect would be preferable to having to rely on an allegation of an attempt to contravene, in circumstances where only one party was involved. The court should be able to infer purpose in the same way in relation to this type of conduct as it can under s 46(7) of the TP Act.

The formulation by Diplock LJ in *British Basic Slag*<sup>78</sup> set out earlier is also instructive. Another discussion (although expressed in terms of inferring an agreement) which helps to illustrate the probable boundaries is found in the opinion of the US Supreme Court in *Federal Trade Commission v Cement Institute* delivered by Black J:

The commission did not adopt the views of the economists produced by the respondents. It decided that even though competition might tend to drive the price of standardized products to a uniform level, such a tendency alone could not account for the almost perfect identity in prices, discounts, and cement containers which had prevailed for so long a time in the cement industry. The commission held that the uniformity and absence of competition in the industry were the results of understandings or agreements entered into or carried out by concert of the Institute and the other respondents. It may possibly be true, as respondents' economists testified, that cement producers will, without agreement express or implied and without understanding explicit or tacit, always and at all times (for such has been substantially the case here) charge for their cement precisely, to the fractional part of a penny, the price their competitors charge. Certainly it runs counter to what many people have believed, namely, that without agreement, prices will vary — that the desire to sell will sometimes be so strong that a seller will be willing to lower his prices and take his chances. We therefore hold that the commission was not compelled to accept the views of respondents' economist-witnesses that active competition was bound to produce uniform cement prices. The commission was authorised to find understanding, express or implied, from evidence that the industry's Institute actively worked, in cooperation with various of its members, to maintain the multiple basing point delivered price system; that this pricing system is calculated to produce, and has produced, uniform prices and terms of sale throughout the country; and that all of the respondents have sold their cement substantially in accord with the pattern required by the multiple basing point system . . .<sup>79</sup>

From these formulations the following elements emerge: there must be deliberate conduct, involving contact with one or more competitors, having

---

<sup>77</sup> Above n 32.

<sup>78</sup> Above n 25.

<sup>79</sup> 333 US 638 (1948) at 715–16.

24 (2008) 21 Australian Journal of Labour Law

the purpose or effect of inducing or encouraging the competitor to alter its pricing behaviour in a way which involves a departure from its previous conduct or its apparent intention.

This formulation has the advantage of eliminating the need to demonstrate any consensual element or any commitment on the part of the initiating party, which has become controversial in practice, but which it remains necessary either to prove or infer so long as the language of agreement continues to be used. Because of the requirement for deliberate contact, it would not catch normal parallel conduct. Because of the need to prove purpose or effect, and because of the final qualification, it would not catch normal exchanges of information which might take place in a market and which were not designed to raise expectations in an abnormal way, or to bring about a departure from normal competitive reactions, such as the mere publication of a price in the normal course.

The proposed prohibition could be added to s 45(2) as para (c), preserving the present prohibition of a contract, arrangement or understanding which lessens, or is deemed to lessen, competition. The statutory wording might read as follows:

A corporation shall not:

...

- (c) communicate with any competitor for the purpose, or with the effect, of inducing or encouraging the competitor (or any other competitor) to alter or adjust the price (the 'new price') (including any discount, allowance, rebate or credit in relation to the price) at which such competitor supplies, or offers to supply, goods or services, in a manner, or to an extent, so that the new price differs (materially) from the price (including any discount, allowance, rebate or credit in relation to the price) at which such competitor:
  - (i) before receiving the communication, intended to supply, or offer to supply, the same goods or service;
  - (ii) in the absence of becoming aware of the terms of the communication, would have supplied, or offered to supply, the same goods or services.

In contrast to the current wording, the new prohibition is directed only at the initiator of the contact; there need be no other 'party'. However there is scope for the recipient of the communication to be exposed to remedies if that person becomes a person involved within the meaning of s 75B(1),<sup>80</sup> for example by aiding or abetting or being knowingly concerned in the initiator's contravention.

The circumstances described in subparas (i) and (ii) are designed to remove from the scope of the prohibition communications which result in changes in the recipient's pricing conduct which are explicable solely in terms of parallel conduct, price leadership or false signalling. The first, parallel pricing, resulting for example from changes in input prices experienced by both, will not be the *effect* of the communication; similarly price leadership, which will be excluded under (ii) in any event. If a corporation communicates a change which it in fact does not intend to make, and the recipient reacts by putting its price up, the initiator might be at risk of contravening, but the recipient would not.

---

<sup>80</sup> See also ss 76(1), 80(1) and 82(1).

Belling the CAU: Finding a substitute for 'understandings' about Price 25

The proposal may be seen as a radical one, and lacks any close precedent. The writer is not advocating its adoption, merely offering it as a means of addressing what the ACCC appears to be looking for, and as a vehicle for debate which avoids the sterile discussion about the CAU formula. It might be argued that the proposal concentrates too much on the initiator and its conduct, and ignores other market participants who may respond to the communication and generate a climate of collusion. If that occurs the current prohibition will remain to deal with the situation. However, if the initiator's conduct is nipped in the bud, no arrangement or understanding, or culture of acting on information, develops. It will be said that the proposal is over-inclusive and will constrain legitimate announcements of price changes, including price reductions. This ignores the need to prove purpose or demonstrate an effect different from what might be expected in a competitive market.

If the ACCC's thesis is correct that the present law is being interpreted in such a way that 'no amount of coordination on pricing between competitors can fall foul of the Act unless one of the parties can be shown to have given or accepted a commitment, obligation, undertaking or assurance to act in a certain way regarding their pricing',<sup>81</sup> and there is conduct occurring which is intended to affect how competitors make pricing decisions in a way which differs from a workably competitive one, the proposal may offer a way to curtail that behaviour. However it is not suggested that the proposal should be transported into the definition of cartel conduct in the proposed cartel criminalisation legislation, at least until the latter has had a reasonable period of operation using the current formulation of anti-competitive pricing conduct.

---

81 ACCC Petrol Prices Report, above n 1, p 229.

THE UNIVERSITY OF NEW SOUTH WALES  
LAW JOURNAL ARTICLE  
2009

**FROM COAL VEND TO BASIC SLAG: WINNING THE HEARTS  
AND MINDS?**

IAN TONKING SC

7<sup>TH</sup> FLOOR SELBORNE CHAMBERS, SYDNEY

**Introduction**

1. One of the functions of the Australian Competition and Consumer Commission (**ACCC**) is to examine critically and report on the laws protecting consumers: *Trade Practices Act 1974 (TPAct)*, s.28(1). The ACCC has been active in this role of late, promoting the criminalisation of cartel conduct<sup>1</sup>, and suggesting that the TPAct may need to be amended to redress what the ACCC describes<sup>2</sup> as a “*subtle but significant shift in the nature of the commitment that must be found to establish the existence of an understanding*”. If the ACCC’s advocacy is accepted by the Government, and the TPAct is amended in this respect, there is every reason to expect that the amendment will apply to the word “*understanding*” where it contains a “*cartel provision*” within the meaning of what is currently cl.44ZZRD of the Bill (which creates new criminal

---

<sup>1</sup> Which has led to the introduction of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (the Bill)*.

<sup>2</sup> *Petrol Prices and Australian Consumers*: Report of the ACCC inquiry into the price of unleaded petrol, December 2007, p.228 (**Petrol Price Report**).

offences in cl.44ZZRF and 44ZZRG), as well as to s.45, the existing civil provisions prohibiting anti-competitive contracts, arrangements or understandings. The Bill also contains mirror-image civil provisions prohibiting making and giving effect to contracts, arrangements or understandings that contain a “*cartel provision*”: cl.44ZZRJ and 44ZZRK.

### **Extended meaning of “party”**

2. Moreover, cl.44ZZRC of the Bill provides that, for the purposes of the new Division 1 of Pt IV, “*if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a party to that contract, arrangement or understanding*”. It is not an offence merely to be or become a party to a contract, arrangement or understanding that contains a cartel provision; the relevant *actus reus* (or “*physical element*” as it is described in the *Criminal Code*) of the offence is to make or give effect to such a contract or arrangement or arrive at or give effect to an understanding. However, there may be little difference between arriving at an understanding and becoming a party to it<sup>3</sup>. Likewise it has been held that effect may be given to an arrangement or understanding by inaction (even, it would seem inadvertently) and without acting in concert<sup>4</sup>. The physical element of the offence which consists of making or arriving at the arrangement or understanding does not specify a fault element. In default the fault element of intention will apply to the act of making or arriving at the contract or arrangement<sup>5</sup>, or arriving at an understanding, whereas the existence of a cartel provision involves the fault element of knowledge or belief<sup>6</sup>. In order for the members of a

---

<sup>3</sup> It may turn on whether an understanding changes its character if a party is added, as discussed in 7 and 8 below.

<sup>4</sup> *TPC v TNT Management Pty Limited* (1985) 6 FCR 1 at 68; and see *Bray v F. Hoffmann-La Roche Ltd & Ors* (2002) 190 ALR 1; ATPR 41-865 at [160].

<sup>5</sup> Explanatory Memorandum to the Bill, paragraph 2.30 and *Criminal Code* s.5.6.

<sup>6</sup> Bill, cl. 44ZZRF(2).

corporate group (including foreign entities) to be treated as being party to an arrangement or understanding, the issue would seem to be whether they had knowledge of the cartel provision it contained and whether they intended to become a party to it: cf. *Yorke v Lucas* (1984) 158 CLR 661. It is unclear whether cl.44ZZRC is intended to displace the second of these fault elements<sup>7</sup>.

### What shift?

3. The present writer has argued elsewhere<sup>8</sup> that the “*shift*” detected by the ACCC may be overstated, and it is not proposed to repeat the analysis here. Early in 2009 however the Government responded to the ACCC’s call for the TPAAct to be amended in this regard by inviting submissions<sup>9</sup>.
4. The present purpose is to join the debate, in particular to consider the scope of the proposed amendment, in the context of the proposed new criminal offences.
5. Without debating the history again, the point of departure which seems to trouble the ACCC is the nature of the “*commitment*” required for an understanding, and whether a “*mere expectation*” as a matter of fact<sup>10</sup>, as opposed to a moral obligation, such as might found an equitable estoppel, should suffice<sup>11</sup>.

### Element of commitment

---

<sup>7</sup> The provision is not as prescriptive as those considered in *Hookham v The Queen* (1994) 181 CLR 451.

<sup>8</sup> “*Belling the CAU: Finding a substitute for “understandings” about Price*”, (2008) 16 CCLJ 46.

<sup>9</sup> <http://www.treasury.gov.au/documents/1459/RTF/Discussionpaper/rtf>

<sup>10</sup> A “*factual expectation*” as described by Lindgren J in *ACCC v CC (NSW) Pty Limited* (1999) 92 FCR 375 at [141].

<sup>11</sup> See opinion of Burnside QC in Petrol Prices Report, App R at p.370.

6. The two positions may conveniently be identified by reference on the one hand to Isaacs J's famous dictum in the *Coal Vend* case<sup>12</sup> and to the formulation by Diplock LJ in the *Basic Slag* case<sup>13</sup> (at least as that case has generally been understood in Australia<sup>14</sup>) on the other. The difference may no doubt be stated in a variety of ways. For present purposes it is convenient (and in the context of the Bill, and the criminal liability it creates, desirable) to look at it in terms of where the onus of proof (both evidentiary and persuasive) would or should lie. Broadly speaking the *Coal Vend* formulation would allow the tribunal of fact (in the case of a criminal offence, the jury) to infer the existence of an understanding, and the identity of the parties, from the circumstances identified by Isaacs J, the "*concurrence of time, character, direction and result*" pertaining to certain proven, but seemingly independent, acts. The *Basic Slag* formulation is said to require some evidence that the parties regard themselves as under a duty, whether legal or merely moral, to act in accordance with the understanding. This is what is described as the element of "commitment". However it was in the context of legislation which made registrable only those arrangements between competitors under which "*restrictions are accepted by two or more parties*". The substance of the amendment sought by the ACCC would "*make it clear that courts are entitled to infer the existence of an understanding from the surrounding circumstances and in the absence of a 'commitment' by the parties*"<sup>15</sup>. The factual matters the courts might take into account would be listed in the legislation.

---

<sup>12</sup> *R v Attorney-General (Cth) v The Associated Northern Collieries* (1911) 14 CLR 387 at 400.

<sup>13</sup> *Re British Basic Slag Ltd's Agreements* [1963] 2 All ER 807 at 819.

<sup>14</sup> Burnside QC seems to read the judgments of Willmer and Diplock LJJ as involving no more than a factual expectation. His point of departure is what he sees as Lindgren J's additional requirement (in *ACCC v CC (NSW) Pty Ltd* (1999) 92 FCR 375) of some assurance by the party receiving the communication that it assumes an obligation. He might have pointed out that it probably reached its high point in the reasoning of O'Loughlin J in *ACCC v Pauls Ltd* (2003) ATPR 41-911 [105].

<sup>15</sup> Petrol Prices Report, p.373-4

## The new offences

7. The two new criminal offences created by the Bill are in cl.44ZZRF, arriving at an understanding, and cl.44ZZRG, giving effect to an understanding, being an understanding which contains a cartel provision. As noted earlier, there is no separate offence of becoming or being a party to such an understanding. However, becoming a party to an understanding, whether pre-existing or otherwise, probably involves “*arriving at*” the understanding. An understanding about prices or market sharing is more likely to be varied or reformulated depending on the identity of the parties, in contrast to a contract, particularly a formal contract recorded in writing. Further, to the extent that some sort of commitment is essential to the existence of an understanding, a new party to a pre-existing understanding probably could be said to “*arrive at*” an understanding when making that commitment, whether the understanding is regarded as the same as that which previously existed between other parties, or whether it can be said to have been varied or replaced by a new understanding by dint of the additional party having made a commitment to it.
8. Likewise, it is unlikely a person could be accused of “*giving effect*” to an understanding unless it was also alleged that that person had previously “*arrived at*” the understanding. Accordingly, save to the extent that cl.44ZZRC is to be taken to displace the requirement of “*arriving at*” an understanding (with its component fault element of intention) upon a related body corporate becoming a party to the understanding, the questions whether an understanding exists and whether a particular defendant is a party to it is likely to involve the same issues as arise in relation to whether a person has “*arrived at*” that understanding. It will also be, as a practical matter, an issue to be determined before a person

can be found to have given effect to the understanding for the purposes of cl.44ZZRG.

## Onus

9. Under the *Criminal Code* the legal or persuasive onus for the elements of the offence, and in respect of any exception or defence, remains with the prosecution<sup>16</sup>. Therefore, in the absence of the proposed amendment, the prosecution would need to establish, beyond reasonable doubt, that:

- the defendant arrived at the understanding;
- it had the requisite intention;
- the understanding contained a cartel provision;
- the defendant knew or believed this;
- the relevant elements of the cartel provision (that is either the “*purpose/effect condition*” or the “*purpose condition*” respectively set out in cl.44ZZRD(2) or (3) as well as the “*competition condition*” in cl.44ZZRD(4)) were present;
- in the case of a corporate defendant, the relevant physical element was committed by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment or authority, and that they had the requisite intention, knowledge or belief to establish the fault elements<sup>17</sup>.

---

<sup>16</sup> Criminal Code, s.13.3.

<sup>17</sup> Criminal Code, s.12.2 and TPAAct, s.84(1) and (2) as amended by the Bill.

10. The defendant bears the evidentiary burden of showing that there was an innocent explanation for the apparent conspiracy<sup>18</sup>. It could do this by itself leading evidence, or by pointing to evidence led in the prosecution case<sup>19</sup>. Whether it would need to lead evidence would therefore depend on the nature of the explanation.

## Defences

11. At present there are no specific defences to an allegation that a contravention has resulted from making or giving effect to a cartel provision<sup>20</sup>. Current drafting policy apparently prefers to avoid a proliferation of defences in individual offence-creating legislation<sup>21</sup>. However, the defences set out in s.2.3 of the Criminal Code would apply to the extent relevant. Most of those defences are more relevant to offences relating to the person or to property rather than to “*economic crimes*”, however s.9.1 which relates to mistaken belief about, or ignorance of, facts, to the extent the belief or ignorance negates the fault element in relation to the physical element of the offence, may well be relied on. In considering whether the defence applies the tribunal of fact is entitled to consider the reasonableness of the belief or ignorance. There are also the statutory exceptions to the definitions of cartel provision found in Subdivision D of Div.1 of Pt. IV, as well as cl.44ZZRH.
12. When the elements of the offence in cl.44ZZRF of arriving at an understanding containing a cartel provision are considered in the context of the proposed amendment permitting the existence of the understanding to be inferred from relevant circumstances, those elements most directly relevant to a defendant will be:

---

<sup>18</sup> As the defendants did in *Theatre Enterprises v Paramount Film Distribution Corp* 346 US 537 (1954). The present writer suggests the Courts in Australia have been more prepared to find an understanding where the respondents failed to explain their actions: (2008) 16 CCLJ 46, 63.

<sup>19</sup> Criminal Code s.13.3.

<sup>20</sup> Save that s.85(6) applies in the case of a person other than a body corporate.

<sup>21</sup> S. Odgers, Principles of Federal Criminal Law, Lawbook Co, 2007, p.221 at note 9.

- whether the defendant intended to arrive at the understanding (as that expression is presently understood);
- if the defendant had that intention, whether the defendant was mistaken about, or ignorant as to, relevant facts (in relation to arriving at the understanding);
- whether the defendant knew or believed that the understanding contained a cartel provision.

The existence of the requisite intention, knowledge and belief, are questions of fact<sup>22</sup>. It will be a matter for the judge, when instructing the jury, to formulate the elements that constitute the offence in light of the evidence which has been adduced.

### **Fault Elements**

13. Intention is defined in s.5.2 of the *Criminal Code* by reference to conduct, circumstances and results.
14. In the context of alleged understanding a defendant might want to argue that it was not aware of a relevant circumstance which gave significance to a communication with a competitor.
15. Of course intention itself will often be a matter of inference<sup>23</sup>, and knowledge or awareness of the existence of the cartel provision in a particular understanding which has been established will not be essential to proof that the defendant was a party to it, but will clearly be relevant considerations.

---

<sup>22</sup> *Kural v The Queen* (1987) 162 CLR 502, at 505 per Mason CJ, Deane and Dawson JJ.

<sup>23</sup> See for example *Kural v The Queen* (1987) 162 CLR 502, 505.

16. Belief is not defined in the *Criminal Code*, but a defendant might believe a certain set of circumstances to exist in the market, even though harbouring doubts about their existence. Those circumstances might involve the way in which competitors or others in the market would behave or respond to certain conduct, events or stimuli.

### **Courses open to Defence**

17. If any of these elements is not established beyond reasonable doubt the prosecution will have failed to prove the offence.
18. While in some cases it may be sufficient for the defendant to discharge the evidentiary burden by pointing to defects or ambiguities in the prosecution's case, there may be a need for the defendant itself to adduce evidence, either by way of proffering an explanation for its conduct to demonstrate that it was innocent, or to establish the context for such a submission.
19. A defendant might want to argue that it was mistaken or ignorant about a relevant set of circumstances in a market the existence of which is not alluded to in the prosecution case.
20. It will be seen that these elements and defences open up a number of avenues for a defendant to cast doubt on that part of the prosecution case which depends on having the tribunal of fact draw an inference from evidence as to the defendant's intention to arrive at or join in an understanding, or the defendant's knowledge or belief as to what the understanding was about. An example could be where the defendant contends that there is an innocent explanation for its response to a communication from a competitor. The prosecution might argue that the defendant's response indicated assent to a proposition that the competitors adopt a common course. The defendant might argue that its

response was open to an alternative interpretation. There have been cases in the past where the Court has been prepared to infer that an understanding has come about notwithstanding the absence of direct evidence of any element of commitment<sup>24</sup>. However that has been in respect of a civil contravention, giving rise to a pecuniary penalty, not a criminal offence. If the evidence adduced in the prosecution case does not go far enough to establish any commitment on the defendant's part, the prosecution will (on the ACCC's view of the current state of the law) likely fail to make out its case.

### **Proposed Amendment**

21. The proposed amendment will operate on the first physical element of the offence in cl.44ZZRF(1)(a) which is concerned with whether an understanding has been arrived at. Therefore it will operate in circumstances which differ from those just referred to and which apply in the situation where (on the present state of the law as the ACCC expounds it) evidence going to the issue of "*commitment*" has necessarily been adduced, and the defendant is seeking to give an alternative explanation. Nor will it operate in relation to the question whether the understanding contains a cartel provision (cl.44ZZRD).
22. The amendment is said to cater for the situation where there is an absence of evidence of "commitment", that is that it is not established that the alleged parties generally, or the particular defendant in the case, have "assumed an obligation" to the other(s) in terms of the understanding

### **"Relevant matters" will overlap with fault elements**

23. However the range of matters it is proposed the Court might consider in deciding whether it should draw an inference that an understanding has

---

<sup>24</sup> Eg. *Trade Practices Commission v David Jones (Aust) Pty Ltd* (1986) 13 FCR 446.

been arrived at, (or that the defendant is a party to it) is not limited and includes matters that will raise a wide variety of potential considerations for the defendant, and ultimately for the jury, should the defendant dispute them<sup>25</sup>. For example one factual matter listed is “*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 allegation*”. If the “first party” is the defendant the Court may be required to revisit the fault element of intention from the perspective of “*commitment*”. Other matters on the list potentially go to the defendant’s knowledge or belief about conditions in the market.

24. The inclusion in the list of matters to which the Court may have regard of considerations bearing on the fault elements of the offence has a tendency to add a further layer of analysis to the evidence placed before the jury. It will add to the complexity of the judge’s instructions to the jury, as well as to the potential for error and appeal. It is certainly not limited to the fault element of intention which operates by virtue of s.5.6 of the *Criminal Code*. The matters proposed to be included in a non-exhaustive list are ones which go not only to the conduct of the defendant and other parties to the alleged understanding, but also “*the characteristics of the market*”. If such an amendment is considered necessary, it should be drafted in such a way that the physical and fault elements of the offence are not confused, but are separated out in a logical way which is consistent with the approach in the *Criminal Code*. Even if this precaution is taken, in those cases where there is no direct evidence of “commitment”, the judge will have to explain to the jury:
- The requirements of cl.44ZZRD in relation to the conditions whose existence may reveal the existence of a cartel provision, including whether the parties are in competition with each other.

---

<sup>25</sup> The complete list is contained in the Petrol Prices Report and reproduced in the Government’s recent announcement.

- The requirements of cl.44ZZRF in relation to whether the defendant has arrived at an understanding, being the physical and the fault elements.
  - The requirements of the proposed amendment in relation to whether the relationship or conduct of the parties, including the defendant, should be taken to amount to the understanding that is alleged, having regard to any relevant matters, including the parties' intentions and the characteristics of the market.
25. It might be argued in response that, if the amendment is not required because there has been no shift in the Court's interpretation of "understanding", the amendment will merely codify the law and add nothing to the steps which will be required in a case where the evidence of the understanding is circumstantial. Clearly there is some merit in that argument. However the practical difficulty which is highlighted here is that the terms in which the amendment is presently proposed do not accommodate themselves to the highly structured statutory environment in which cl.44ZZRF will operate, including the backdrop of the Criminal Code.
26. It may therefore be preferable if the fault element of the first physical element of the offence (arriving at an understanding) is made explicit (rather than relying on s.5.6 of the Criminal Code), and is expressed in terms which make it clear that the matters to be considered go to the question of intention. At the same time it would be desirable to clarify the role of the fault element in cl.44ZZRC, dealing with related bodies corporate.

### **Business justification defence**

27. There has been debate about the notion of a “*business justification defence*” to a finding of contravention of s.46<sup>26</sup>. Although the context is somewhat removed, it needs to be borne in mind that, for perhaps the first time, juries in Australia will be grappling with how to evaluate the conduct of defendants in a business context which is likely to be quite unfamiliar to most of them. It may be one thing to expect a jury to appreciate how a person might react under provocation or duress but quite another to expect the members of a jury, uninstructed except as to the formal language of the offence, to form a view about how participants in a competitive and volatile industry might behave in response to price-cutting by competitors, or how price leadership might operate in a more stable environment.
28. If the amendment makes explicit the ability of the Court to find that an understanding exists based purely on inference, there is room for debate about whether a statutory defence should be provided in relation to what might be termed a “*business justification*” or, more broadly, a defence based on the characteristics of the market. As mentioned above, this is a matter which, under the proposed amendment, may be taken into account by the Court in deciding whether there is an understanding. This would seem to provide an opportunity for the defendant to lead or point to evidence tending to suggest that conduct which might appear consistent with the existence of an understanding is capable of innocent explanation.
29. However it may be desirable, out of an abundance of caution, to include a provision to the effect that the express reference to market characteristics in the context of the proposed amendment is not to be taken as limiting by inference the matters which may be taken into account in deciding whether any of the other elements of the offence has been made out. This would make it clear that, should a defendant desire to do so, it can adduce

---

<sup>26</sup> See for example Corones, *SG Competition Law in Australia*, 4<sup>th</sup> ed, 2007, p390-393.

evidence, possibly of an expert character, as to how markets operate in the context of issues such as the existence of a cartel provision and the defendant's knowledge or belief as about that matter, and how market players behave, as well as evidence bearing on the defendant's intention in engaging in the conduct said to constitute arriving at or giving effect to the understanding. A preferable alternative might be, if the fault element in cl.44ZZRF is made explicit, as suggested above, to include those matters which go to market characteristics in such a defence, rather than including them in the list to which reference may be made in determining whether the requisite intention to arrive at an understanding exists.

## **Conclusion**

25. The writer has suggested elsewhere that the proposed amendment is not necessary. The proposed amendment, in its present form, is not well adapted to inclusion in new Division 1 of Part IV of the TP Act and, if it is to be enacted, careful consideration needs to be given to its interaction with cl.44ZZRF and 44ZZRG of the Bill and the relevant provisions of the *Criminal Code*.

5 March 2009.