Law Council
OF AUSTRALIA

Via email: understanding@treasury.gov.au

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

Dear Mr Rogers,

Discussion Paper – Meaning of 'Understanding' in the Trade Practices Act 1974

I have pleasure in enclosing a submission in response to the discussion paper entitled the "Meaning of Understanding" in the *Trade Practices Act* 1974.

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions in relation to the submission, in the first instance please contact the Deputy Chairman, Stephen Ridgeway, on [03] 9679 3529 or by email: stephen.ridgeway@blakedawson.com

Thank you for giving us the opportunity to comment.

Yours sincerely,

Bill Grant
Secretary-General

31 March 2009

Enc.

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Submission on the Australian Government information and consultation paper on The Meaning of "Understanding" in the Trade Practices Act 1974

Submission by the Trade Practices Committee of the Business Law Section of the Law Council of Australia

31 March 2009

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**Committee**) is pleased to offer the following comments on the Australian Government's information and consultation paper entitled "The Meaning of "Understanding" in the Trade Practices Act 1974" (**Consultation Paper**). In the Committee's view, there is no legal or practical justification for amending the generally accepted meaning of "understanding".

1. EXECUTIVE SUMMARY

1.1 The meaning of "understanding"

No need to clarify meaning of "understanding"

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

Legislative amendments in relation to "commitment" unnecessary and inappropriate

Legislative amendment is unlikely to produce greater clarity regarding the meaning of "understanding" than is available from existing case law, including in relation to the degree of "commitment" required to support a finding that the parties have arrived at or given effect to a provision of an understanding. The weight of authority does not require that the parties be absolutely committed to give effect to the subject matter of an understanding. Certain comments by Gray J in *Leahy* could arguably be interpreted as requiring a higher degree of commitment in relation to "giving effect" to an "understanding" than many other decisions. However, even if this interpretation of Gray J's comments is correct, Gray J's comments appear to be inconsistent with the larger body of case law and are likely to be considered mere obiter dictum. The proposed amendment in "(a)(ii)" is accordingly unnecessary and inappropriate.

In any event, the case law does not currently require an "absolute" commitment to give effect to its subject matter as a prerequisite to "arriving at" an understanding. The notion of "commitment" to some course of conduct, while not needing to be absolute or legally binding, is an intrinsic part of the process of arriving at an "understanding" which necessarily involves a meeting of the minds, or consensus between two or more parties that at least one of those parties intends to act or refrain from acting in a manner proscribed by the TPA. If there is no commitment to giving effect to the subject matter of an understanding, then logically there has only been, at most, communication but no consensus or meeting of minds sufficient to have arrived at an understanding. Depending on the facts, one party may have (illegally) attempted to contravene or to procure a contravention of the TPA, but there would be no understanding arrived at between the two parties.

Further, an amendment of the kind proposed would be over inclusive and inappropriately extend the range of conduct proscribed by the TPA to situations where there is insufficient evidence of actual collusion to warrant a finding of per se illegality. The fact that understandings containing cartel provisions are to be criminalised in the near future also weighs in favour of not simultaneously lowering the legal barrier for arriving at an understanding. Seeking legislative over-reach to deal with an issue raised in the circumstances of one particular case and a single judge's judgment on it, is not considered an appropriate response to the risks of litigation that all parties face.

Submissions

The Committee makes the following submissions on the meaning of "understanding".

- The Courts have not restricted the meaning of "understanding" in the manner or to the extent suggested in the Consultation Paper or the *Report of the ACCC inquiry into the price of unleaded petrol* (**Inquiry Report**). The requirement, in recent cases, that a necessary element of an understanding is the existence of an assurance or obligation, rather than solely one party's expectation, reflects without narrowing both the substance and the language of the earlier cases.
- The proposed form of amendment in (a)(ii) would not restore a previous interpretation of the law, but would rather expand the concept of "understanding" beyond the situation where there was a mutual obligation between the parties.
- As a matter of policy, the element of "commitment" is essential to any prohibition on collusive anti-competitive behaviour. The current interpretation of "understanding" appropriately delineates the outer bounds of dealings that are consensual, but not necessarily formal.
- The proposed amendment in (a)(ii) is unnecessary and undesirable as a matter of public policy.
- Any amendment to the meaning of the word "understanding" in the TPA could potentially have unintended flow-on effects in tax, corporate and other legislation where that term is used.
- To the extent that it is considered desirable to amend the TPA to prohibit a broader range of conduct than collusive pricing and other collusive and anti-competitive conduct, this should be achieved by specific provision, rather than by the proposed amendment in (a)(ii).

1.2 **Legislative amendment in relation to the proof of an "understanding"**

Proposed amendment in relation to drawing inferences an unnecessary codification

Legislative amendment of the TPA in relation to a Court's ability to draw inferences from circumstantial evidence is also considered unnecessary. There is a substantial body of case law demonstrating that Courts can, and will, draw inferences against a defendant who is alleged to have arrived at a proscribed understanding. There is no need for the proposed amendments "(a)(i) and (b)(i)-(ix)" as these amendments are essentially consistent with the Courts' current discretion to draw inferences. Although not necessarily harmful, they are an unnecessary attempt to codify existing evidentiary rules.

Submissions

The Committee makes the following submissions.

- The Courts have not shown reluctance to infer the existence of an "understanding" from circumstantial evidence. The Courts' current approach to the treatment of circumstantial evidence strikes the right balance between effective enforcement and proper caution.
- The proposed amendments in (a)(i) and (b) would non-exhaustively codify, rather than modify or improve on, the Courts' current approach; as such, they are not necessary to address any perceived shortcoming in that approach.
- If, contrary to the above submissions, codification of factors Courts should be required to take into account was considered necessary, such codification should:
    - be undertaken with considerable caution, in light of the risk that such codification would tend to prohibit competitive as well as anticompetitive conduct;
    - include, in addition to the factors proposed in proposed amendment (b), consideration of (at the least):

- the extent to which the conduct is inconsistent with the independent economic self-interest of the parties that engage in it; and
- those factors that would help negate the inference that parties had engaged in collusive conduct.

2. INTRODUCTION

2.1 Background and context

On 8 January 2009, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Honourable Chris Bowen MP, released the Consultation Paper.

It is important to note the context in which the issue of the Consultation Paper by the Minister has arisen. The Consultation Paper followed the Government's announcement that it would give careful consideration to the amendments the ACCC proposed to s 45 of the TPA, arising out of the Inquiry Report. Public debate and disquiet over petrol prices has been a major social, economic and political issue for some years, and will continue as long as price volatility remains for crude oil and for petrol, and as long as retail petrol prices in Australia fluctuate on a daily or weekly basis, apparently in unison. The way price competition operates (or fails to operate) in the retail petrol market is different from the way price competition works in other markets, for a range of reasons.

There is a widespread perception in the public that the regular variations in retail petrol prices, where prices at competing retail outlets rise and fall apparently in unison, can only occur as a result of some sort of collusive arrangement between petrol resellers and/or wholesalers. The TPA prohibits collusive price arrangements, so there is a perfectly reasonable public expectation that any collusion in petrol retailing should be stamped out by applying that Act.

In practice the cases brought against petrol retailers in relation to alleged collusive conduct have not been uniformly successful, and the proposed changes to the TPA have been suggested as a means of addressing the evidentiary and legal issues raised in those cases. The difficulty with that approach is that the TPA prohibitions apply to all markets and any amendments to the TPA will have application across the board for all future cases concerning alleged price fixing or anti-competitive collusive conduct.

The Committee's difficulty with this approach is that the issues said to be raised by the “petrol cases” have arisen in the peculiar circumstances of those cases. Consequently, the proposed amendments may produce unintended consequences if applied to all of the widely differing circumstances governed by the TPA. That is why the Committee in this submission submits that the proposed amendments are unnecessary and inappropriate.

2.2 Questions raised by the Consultation Paper

The Consultation Paper makes the following request for submissions.

17. The Government seeks submissions from interested parties regarding the meaning and proof of ‘understanding’ in the TPA, and in particular views on the following issues:

- Does the current judicial approach to the interpretation of ‘understanding’ limit the ability of the TPA to properly address anticompetitive practices?
  - If so, is there a need to clarify or define the meaning of ‘understanding’ in the TPA? What should be the scope of any such clarification or definition?
- Is the Court currently constrained to an inappropriate degree in its ability to draw inferences from the evidence in determining whether or not an understanding exists?
  - If so, is there a need to specifically provide that the court may ascertain the existence of an understanding by inference from any factual matters put before the court?

3. DOES THE CURRENT JUDICIAL APPROACH TO THE INTERPRETATION OF "UNDERSTANDING" LIMIT THE ABILITY OF THE TPA TO PROPERLY ADDRESS ANTICOMPETITIVE PRACTICES?

3.1 Concerns raised

The Consultation Paper and the Inquiry Report raise concerns about the current judicial interpretation of the term "understanding". Specifically, they suggest that:

- the Courts have adopted a narrow interpretation of the term "understanding", which does not allow s 45 to capture the full range of conduct that should properly constitute price fixing, according to the intention of the Parliament in 1974, and to the views of the public currently; and
- the narrower meaning of "understanding" impedes the ACCC's ability to succeed in price fixing cases.

The Consultation Paper attaches the following possible amendment to s 45, as a proposed means of addressing the concerns outlined above:

> (a) The court may determine that a corporation has arrived at an understanding notwithstanding that: …
>
> (ii) the corporation, or any other parties to the alleged understanding, are not committed to giving effect to the understanding.

Accordingly, this section of the submission addresses two questions: does the Courts' current interpretation of the term "understanding" narrow the meaning of this term in the manner described, and is it appropriate to amend the TPA in the manner proposed?

3.2 The meaning of the term "understanding": have Courts narrowed the scope of the term?

Views on the narrowing of the meaning of "understanding"

The Consultation Paper notes as follows in relation to the meaning of "understanding".

> 13. Courts have always required, as necessary elements for conduct to come within section 45 of the TPA, that there be a meeting of the minds of the parties to the alleged understanding and some form of commitment by the parties to the alleged understanding. As to the latter element, this requires that at least one party to an alleged understanding be understood, by the other parties, to be committed to act in a certain way. The difficulty arises in determining the nature and content of what is required to satisfy that element of commitment.
>
> 14. The ACCC's concern, as set out in the Petrol Report, is that there has been an apparent shift over the last decade in judicial interpretation of the term 'understanding' in section 45 of the TPA and, in particular, what is required to satisfy the element of commitment.

The Inquiry Report suggested that earlier decisions had interpreted "understanding" to include an expectation regarding future conduct, where one person consciously or intentionally engendered that expectation in another person, whether by their words or conduct. However it suggested that more recent decisions – namely, *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161 (***Apco***), and *Leahy* – suggest that an understanding:

- will not now be established in the circumstances contemplated by the early cases, and will not now be established unless at least one party gives or accepts a commitment, obligation, undertaking or assurance that they will act in a certain way;
- cannot be established where there is no more than a hope or factual expectation that a party to an alleged understanding would act in a certain way (*Apco*); and
- may not be established where there are regular communications by one competitor to one or more other competitors on proposed future pricing changes, and where the recipient of the information regularly (but not always) follows that proposed price change (*Leahy*).

The Inquiry Report attached an opinion from Senior Counsel, which expressed the view that Courts have consistently required that an understanding involve a "commitment" of some form, but that the interpretation of what would constitute a "commitment" has become narrower in recent cases, such

that it might be appropriate to amend the TPA to reinstate the interpretation of "understanding" that existed in 1974.

The case law has not narrowed the meaning of "understanding" in the manner suggested

The Committee submits that recent cases have not restricted the meaning of "understanding" in the manner or to the extent described. Accordingly, we here set out a brief outline of the cases on the meaning of "understanding", and then discuss the basis for our view.

Case law on "understandings"

Early cases

In *Top Performance Motors v Ira Berk (Qld)* [1975] 24 FLR 286 (***Ira Berk***), Smithers J established that both an arrangement and an undertaking require "a meeting of the minds" among two or more parties. An arrangement required a meeting of minds whereby one party is understood (and intends to be understood) by at least one other as regarding itself as being in some degree under a moral or legal duty to conduct itself in a given way so long as the other party conducts itself in the manner contemplated by the arrangement. An understanding required a meeting of minds that a proposed transaction between the parties proceeded on the basis that a state of affairs would be maintained or a course of conduct adopted.

In *TPC v Nicholas Enterprises* [1979] 40 FLR 83 (***Nicholas***), Fisher J applied the analysis in *Ira Berk* of the "meeting of minds" required to establish an arrangement, in the context of an understanding. Accordingly, Fisher J considered that, to establish that an understanding existed, there must be a meeting of minds, which requires that each party have raised an expectation in the other's mind, have accepted an obligation with respect to the other, and have communicated the raised expectation to the other (arguably communication might also be required of the acceptance of the obligation). Fisher J rejected submissions that an undertaking could be unilateral, on the basis that this submission removed the requirement of mutual obligation, which he considered was "the essential feature of an understanding". (On appeal, the Full Court agreed with Fisher J's statement, but thought it possible to have an understanding restricted to the conduct which one of the parties to it would pursue without any element of mutual obligation; however it was not necessary to decide this point, and accordingly it was left open). In summary, the necessary elements of an understanding, following *Nicholas*, were that there be a meeting of minds involving a raised expectation, acceptance of an obligation, and a communication of, at the least, the raised expectation giving rise to the obligation.

Concrete Constructions

In *ACCC v CC (NSW)* (1999) 92 FCR 375 (***Concrete Constructions***), Lindgren J found that an understanding requires that there be a meeting of minds of the parties that at least one party has assumed an obligation or given an assurance or undertaking that it will act in a given way. A mere expectation as a matter of fact that a party will act in a given way, even if engendered by that party, is not sufficient; "independent expectations are not part of an arrangement or understanding". Lindgren J considered that the following passage from Smithers J's judgment in *Ira Berk* (albeit addressed to arrangements rather than understandings), "describe[d] appropriately that further necessary element of the "understanding":

> 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 arrangement.

The adoption of this passage with respect to "understandings" confirmed the application of the *Ira Berk* approach to the meeting of minds to both arrangements and understandings.

The recent cases: Apco and Leahy

In *Apco*, the Full Court of the Federal Court noted that the appellants had not disputed that the primary judge had enunciated the correct legal principles at first instance, and noted that the primary judge referred to the approach in *Concrete Constructions*, above. The Full Court considered that there was no understanding where party A provided information on its own price rise to party B, who then independently decided whether to match party A's price (and sometimes

did match, and sometimes did not). The Full Court noted that although the information provided to party B may have been useful, the fact that party B chose how it would conduct its pricing, and that there was no expectation from party A that party B would increase prices, meant that there was no commitment from party B, and hence no understanding. Further, an understanding did not arise from the fact that party B may have expected that party A (and other competitors) would hold their increased price while party B made up its mind about its own pricing – the Full Court considered that this represented only party B's "assessment of what was likely to occur, without any assurance being given to him that the competitors would act in that way", and was "no more than what Lindgren J described as a “factual expectation” which falls short of an “understanding”". The Full Court observed that "a mere hope or expectation that a party will act in a particular way is insufficient to constitute an “understanding”".

In *Leahy*, Gray J made observations on the meaning of both arrangements and understandings.

Gray J considered that an arrangement generally connotes a "consensual dealing lacking some of the essential elements that would otherwise make it a contract" (and so might establish a moral rather than legal obligation), but noted that the boundaries of what constitutes an arrangement may be broader than this description. He considered that an arrangement requires, at the least, some express communication between the parties, albeit less than is required to establish a contract, although there have been suggestions that an arrangement could be tacit.

Gray J considered that an understanding is "a less precise dealing than either a contract or arrangement"; it must be consensual, and must involve a meeting of 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". The essential element of an understanding is the assumption of an obligation, unenforceable at law but binding morally or in honour; an understanding is not established if each party is free to do as it wishes. An understanding may be tacit "in the sense that it can be arrived at by each party, either by words or acts, signifying an intention to act in a particular way in relation to a matter of concern to another party". Gray J neither adopted nor rejected the idea that a commitment was required to establish the existence of the understanding: "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" (see discussion below on this point); he further noted that "any reservation that may have existed about this has been dispelled by the High Court". Gray J noted that parallel conduct, even where conscious, lay outside the scope of an understanding. Gray J did not need to resolve the question whether an understanding required the assumption of mutual obligations.

Points of disagreement with the suggested narrowing of the term "understanding"

The outline of the cases set out above demonstrates that there has not been a substantial change over time in the manner in which the Courts have interpreted the term "understanding". In particular:

- It is incorrect to suggest that by requiring that an understanding involve the giving or accepting of a commitment, obligation, undertaking or assurance, the decisions in *Apco* and *Leahy* departed from the approach in the earlier case law. As set out above, the interpretation of a "meeting of minds" in *Ira Berk* was applied to understandings in *Nicholas* and later *Concrete Constructions*, the early cases considered that the establishment of an understanding required both the raising of an expectation and the assumption of some form of obligation. Accordingly, we do not accept the suggestion that the decision in *Concrete Constructions* evidences a shift from the earlier cases.

- The Committee further disagrees with the proposition that the decisions in *Apco* and *Leahy* would have been different had they been decided in accordance with the earlier cases, and with the suggestion that recent cases have given the concept of a "mere expectation" a life of its own. The requirement under each of *Ira Berk*, *Nicholas* and *Concrete Constructions* that there be a meeting of minds involving an acceptance or assumption of an obligation would have precluded a Court finding that an understanding existed in the situation in *Apco*, where there was no more than a hope or factual expectation that Apco would act in a certain way. This requirement would similarly have precluded the finding of an understanding in *Leahy*, where the recipient could independently choose, but was not compelled, to adjust its price following receipt of information from another retailer.

The Committee submits that the requirement in *Apco* and *Leahy* that a necessary element of an understanding is the existence of an assurance or obligation, rather than solely one party's expectation, reflects without narrowing both the substance and the language of the earlier cases.

The decision in Leahy

There is, however, one aspect of the judgment of Gray J in *Leahy* where his Honour may have added a gloss to earlier authorities and increased the degree of commitment or obligation required. At paragraph 37, Gray J stated that:

> 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.

The authorities cited by Gray J, namely *Apco*, *Concrete Constructions* and *Rural Press v ACCC* [2002] FCAFC 213, however, did not use the term "*binding*". The authorities required some form of assurance. commitment or obligation, but it is not clear that the level of any such assurance, commitment or obligation needed to be binding, even in honour.

For example, in *Rural Press*, the Full Court of the Federal Court appears to have accepted that a "mild assurance" contributed to the establishment of an arrangement or understanding for the purposes of the TPA. There was certainly no suggestion that the assurance or commitment was "binding", even in honour (see paragraphs 79-84).

Also, in *Leahy*, Gray J emphasised, on a number of occasions, that the term "understanding" in the TPA could not be satisfied if each party is free to act as it sees fit (see, for example, paragraph 34). In this regard, Gray J was at pains to distinguish *FCT* v *Lutovi Investments Pty Ltd* (1978) 140 CLR 434, in which the High Court had dealt with the meaning of the word "arrangement" in legislation other than the TPA. His Honour quoted the following passage from *Lutovi* (Gibbs and Mason JJ, Murphy J agreeing):

> It is, however, necessary that an arrangement 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. (See paragraph 33 of *Leahy*).

This passage has been quoted with approval in numerous other cases on the TPA[1], but Gray J sought to distinguish this passage by stating that an arrangement or understanding under the TPA needed to have some substance to it, in order to have one of the requisite purposes or effects. It is submitted, however, that the substance goes to the subject matter of the understanding or commitment, not to the level of the commitment required.

It is submitted, therefore, that Gray's attempt to distinguish *Lutovi* and to require a "binding" obligation or commitment were attempts to extend the earlier cases on the TPA.

The proposed amendment is not necessary to reinstate a broader interpretation

The Committee submits that there is no need to adopt the proposed amendment to the definition of "understanding".

To the extent that the amendment seeks to redress a perceived narrowing of the meaning of "understanding" by the Courts, the amendment is unnecessary, as, for the reasons set out above, we submit that the recent case law on s 45 has not narrowed the meaning of this term in the manner or to the extent described in the Consultation Paper and the Inquiry Report.

We further submit that the proposed form of amendment in (a)(ii) – allowing an "understanding" to be established notwithstanding that the parties are not committed to giving effect to it – would not, for the reasons outlined above, restore a previous interpretation of the law, but would rather expand the concept of "understanding" beyond the situation where there was any mutual obligation between the parties at all. In so doing, it would rewrite, rather than reinstate, the original interpretation of the provision.

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[1] *TPC v Nicholas Enterprises Pty Ltd* (1979) 26 ALR 609 at 629; *TPC v Email* (1980) 31 ALR 53 at 65-66; *TPC v TNT Management* (1985) 58 ALR 423 at 447-8; *TPC* v *David Jones (Australia) Pty Ltd* (1986) 64 ALR 67 at 84; *ACCC v IPM Operation and Maintenance Loy Yang Pty Ltd* [2006] FCA 1777 at [106].

3.3 **Is the current scope of the term "understanding" otherwise narrower than it should properly be?**

Views on the proper scope of the term "understanding" in the context of price fixing

The Inquiry Report suggested that the "public expectation" of what constitutes price fixing might vary from the view adopted in *Apco* and *Leahy*, and provided the following example of what the public might consider to amount to price fixing:

> At 7am every day, Petrol Station A tells Petrol Station B the price it proposes to retail its petrol at from 9am that day. Petrol Station B generally accepts the information but does not respond. Petrol Station B generally (but not always) adjusts its price to the level of Petrol Station A at or around 9am although it does not consider itself obliged to change its price.

The Inquiry Report further noted the concern that "the effect of recent cases is that competitors may safely provide or receive information on each other's future pricing insofar as they have not made a commitment, or regard themselves as obliged, either to provide that information or to act upon the information." It stated that "an approach to s. 45 that recognises that the conscious or intentional creation of an 'expectation' regarding future conduct may be sufficient to constitute an understanding best reflects parliament's intention in enacting s. 45 of the Act."

The Inquiry Report also articulated a more specific concern about the impact of the current law on understandings on the conduct of price fixing cases. It suggested that recent cases "provide a basis for defendants to argue that it must now be found that a party has assumed an obligation or given an assurance to act in a particular way before an understanding can arise", and that, if this was the case:

> the ACCC's ability to prosecute alleged price fixing and market sharing would be impaired. The capacity to 'catch' such conduct is inextricably linked to the ability to prove the existence of a contract, arrangement or understanding.
>
> … it would be a retrograde development if the word "understanding" was to be construed so restrictively 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.

The element of "commitment" is an essential requirement of a prohibition on collusive anti-competitive behaviour

The Committee submits that the element of "commitment" is essential to any prohibition on collusive anti-competitive behaviour. Accordingly, the amendment proposed in (a)(ii) should be rejected.

Requirement of a "commitment" as a matter of economics – what notion of "understanding" would enable the TPA to properly address anticompetitive practices?

There is a very extensive literature debating this question. Some writers, with a background in jurisprudence, have argued that arrangements and understandings do not need to involve obligations. The best-known current exponent of this view is Oliver Black.[2]

Writers with a background in economics are generally reluctant to condemn as illegal a concerted practice (to use the European term) unless it results from a "hard" form of agreement or arrangement – generally involving the undertaking of a reasonably firm obligation. The reason for this is that economists generally acknowledge that the various elements of communication and obligation entailed in an understanding or an arrangement may be good and bad from the point of view of the proper functioning of markets. An example of this reasoning was the expert economic evidence in *TPC v Email Ltd* (1980) 31 ALR 53.

Exchanges of information are an obvious example of elements of an arrangement or understanding that can have good or bad effects, depending on the circumstances in which these occur. The more

[2] See, for example his article "Communication and Obligation in Arrangements and Concerted Practices", *European Competition Law Review,* vol 13, 1992 or his book, *Conceptual Foundations of Antitrust,* Cambridge University Press, 2005, pp 166-169.

the law makes illegal 'soft' forms of arrangement, the more likely is it to condemn concerted practices that are, on balance, good rather than bad.

Requirement of a "commitment" in other jurisdictions - what notion of an "understanding" is used to address anticompetitive practices elsewhere?

The requirement that there be a commitment between the parties to an alleged collusive agreement is also well established as a matter of antitrust law in the United States, and in the competition law of the European Union.

In the United States, the relevant test under s 1 of the Sherman Act was set out in *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752 (1984). This test requires a conspiracy to be proven by direct or circumstantial evidence that reasonably tends to prove the parties had a "conscious commitment to a common scheme designed to achieve an unlawful objective". This test was restated in *Bell Atlantic Corp v Twombly* 550 U.S. 1 (2007).

A "commitment" is also required to establish the existence of a collusive agreement under article 81 of the Treaty Establishing the European Union. For example, this requirement was expressed in the following manner in *Argos Ltd & Anor v Office of Fair Trading* [2006] EWCA Civ 1318 (emphasis added):

> 21. The prohibition on concerted practices applies to all collusion between undertakings whatever the form it takes. An agreement arises from the expression by the participating undertakings of their joint intention to conduct themselves in a specific way. Concerted practices include forms of collusion having the same nature as agreements which are distinguishable from agreements by their intensity and the forms in which they manifest themselves: *Commission v Anic Partecipazioni* [1999] ECR I-4125
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> 22. [Counsel for the Appellants] pointed out that it is just as essential to a concerted practice as it is to an agreement that there be a consensus between the two or more undertakings said to be parties to the agreement or concerted practice.
>
> …
>
> 27. Counsel also cited a passage from Competition Law, 5th edition, by Professor Whish, at page 100, the correctness of which was not challenged, as follows:
>
> > These two cases [*Dyestuffs* and *Suiker Unie*] provide the legal test of what constitutes a concerted practice for the purpose of Article 81: there must be a mental consensus whereby practical co-operation is *knowingly* substituted for competition; however the consensus need not be achieved verbally, and can come about by direct or indirect contact between the parties.

Need for the "commitment" element under Australian law

The Committee submits that the current interpretation of "understanding" is appropriate to prohibit the range of conduct that constitutes price fixing under the existing s 45A of the TPA, and so is deemed to constitute a contract, arrangement or understanding that restricts dealings or affects competition for the purposes of s 45 of the TPA. That is, the current approach to "understanding" appropriately delineates the outer bounds of dealings that are consensual, but not necessarily formal.

The scope of conduct currently prohibited under the existing interpretation of "understanding" was discussed in *Leahy*, where Gray J referred to a "spectrum of consensual dealings". At one end of this spectrum, he suggested that there might be agreements even more formal than contracts, such as deeds under seal. However he suggested that the spectrum would not extend, in the opposite direction, beyond understandings, as currently defined. He recognised that "the line between what amounts to an "understanding" … and what falls outside the spectrum of consensual dealings relevant to that provision" is "shadowy" and "difficult to draw". He considered that "the closest form of non-consensual dealing that could be imagined" represented the point closest to an understanding that nonetheless did not appear on the spectrum.

Gray J's spectrum can be represented as follows; the dotted line indicates the conduct that falls outside the scope of "contracts", "arrangements" or "understandings".

The "spectrum of consensual dealings" (Gray J in *Leahy*)

Deed under seal | **Contract** | **Arrangement** | **Understanding**

Other – "The closest from of non-consensual dealing that could be imagined". For example: Lindgren J's expectation, engendered by the other party, that the other party will act in a particular way; parallel conduct – even conscious parallel conduct such as the adoption of identical prices for homogeneous products.

It may be that the range of conduct prohibited by s 45 is in fact broader than the scope indicated by Gray J's spectrum when the impact of the prohibition on attempts to engage in conduct prohibited under s 45 is further taken into account. For example, it may be that a competitor's unilateral provision of pricing information in the mere hope or expectation that a second competitor will use that information to fix prices, with no assumed obligation, could constitute an attempt to form an understanding, notwithstanding that such an understanding was not actually formed. This could be the case in relation to the scenario extracted in part 0 above. The need to consider this situation did not arise in *Apco* or *Leahy*.

Accordingly, the Committee submits that the element of "commitment" is essential to establishing the existence of collusive anti-competitive arrangements (as is recognised in the law of other key jurisdictions). The proposed amendment should be rejected on this basis.

The Committee further submits that, to the extent that it is considered desirable to amend the TPA to prohibit a broader range of conduct than collusive pricing and other collusive and anti-competitive conduct (and without commenting on the merits of such a proposal), this should be achieved by specific provision, rather than by the proposed amendment to the definition of "understanding".

4. IS THE COURT CURRENTLY CONSTRAINED TO AN INAPPROPRIATE DEGREE IN ITS ABILITY TO DRAW INFERENCES FROM THE EVIDENCE IN DETERMINING WHETHER AN UNDERSTANDING EXISTS?

4.1 Views on the Court's ability to draw inferences from the evidence

The Consultation Paper notes the concern that Courts have "shown reluctance to draw inferences from the evidence in establishing an arrangement or understanding", and that in many investigations, there will not be direct evidence of the making of an arrangement or understanding, and it will be necessary to ask the Court to infer the existence of an agreement from the factual circumstances surrounding it.

The Inquiry Report expressed concerns about Courts' readiness to draw inferences from the evidence in determining whether parties have reached an understanding. It noted:

> In many investigations concerning alleged cartels, in the absence of one of the participants coming to the ACCC and confessing (either pursuant to the ACCC's immunity/leniency policy or for other reasons), the ACCC will not have direct evidence of the making of an arrangement or understanding. Where the ACCC brings proceedings without such direct evidence, it must ask the court to infer from all the surrounding circumstances that such an arrangement or understanding existed. In the *Leahy Petroleum* case in particular, the Federal Court showed a reluctance to accept inferential evidence.

The Consultation Paper attaches the proposed amendments (a)(i) and (b) to s 45 to address the concerns outlined above (**the evidential amendments**).

> (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 …

(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;
   (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.

4.2 The current approach to the treatment of circumstantial evidence is not unduly restrictive

The current approach to the consideration of circumstantial evidence in the context of s 45 is demonstrated in *Apco* and *Leahy*. It has not been suggested in the Consultation Paper or the Inquiry Report that any other case has given rise to its concern.

Apco

In *Apco*, the majority of respondents alleged to have engaged in price fixing were found so to have engaged, and the Full Court appeal related only to two respondents who appealed from the first instance decision. Circumstantial evidence was an important part of the case both against those respondents found to have engaged in price fixing, and the two appellant respondents, as the Full Court noted:

> the ACCC's case against all respondents depended heavily on circumstantial evidence of the coincidence of telephone conversations between the parties and sharp price increases. This provided a powerful case against the initiating respondents. However, in the case of Apco it rather pointed the other way. For example, in the case of the other respondents, there was a marked increase in telephone traffic on price-increase days. As has already been mentioned however, with Apco there was, if anything, a slight decrease.

The Federal Court, both at first instance and on appeal, recognised the persuasiveness of circumstantial evidence led in relation to those respondents against whom the ACCC succeeded. However, the Court considered that the circumstantial evidence in relation to Apco was not compelling. For example, this evidence indicated that Apco's price only increased on 29 out of 69 occasions on which the case theory against Apco suggested that it should have increased; it further demonstrated that Apco's price increased at times that were not explained by the case theory. The Full Court noted that:

> the circumstantial evidence was consistent with the finding that Apco and Anderson were not committed to increasing prices and Anderson made decisions whether or not to increase prices on the basis of his assessment of the market.

Further, later in its judgment, the Full Court rejected a submission on the basis that:

> would be a quite unreal and artificial view of the evidence. Amongst other things, it would mean ignoring the circumstantial evidence which, as we have said, pointed in favour of Apco and Anderson, however effective it might have been against the other respondents.

Leahy

In *Leahy*, Gray J held that it had not been established on the balance of probabilities, that price fixing arrangements or understandings existed between the respondents alleged to have engaged in price fixing. The case against the respondents relied on direct oral evidence, circumstantial evidence and admissions made in pleadings, and this evidence formed the basis of Gray J's decision. Gray J noted the difficulty of establishing the existence of an understanding in this case, where the case against the respondents relied significantly on circumstantial evidence:

> The line between what amounts to an "understanding" for the purposes of s 45(2)(a) and what falls outside the spectrum of consensual dealings relevant to that provision will always be difficult to draw. This is particularly so in a case such as the present, in which there is an absence of evidence of express communications from which arrangements or understandings might have been derived, and a consequent reliance upon courses of conduct, coupled with circumstantial evidence, as the only means by which the existence of arrangements or understandings can be established. The crucial question in this case is on which side of the shadowy line delimiting "understanding" the conduct of various parties fell.

However, while Gray J acknowledged this difficulty, he was not reluctant to consider or draw conclusions on the basis of the circumstantial evidence, a significant part of which was a document referred to as "Annexure B". This document contained data outlining the telephone calls made between various respondents, and the pricing of respondents before and following the telephone calls. In some instances it contained information about the times at which price movements occurred.

Gray J engaged in an extensive analysis of Annexure B. He noted that:

> At first sight, the data in Annexure B might appear to provide some support for the ACCC's theory of the case. A more detailed examination, such as the one I have undertaken in these reasons for judgment, shows that the data is at best equivocal, and in many instances more apt to refute than to support the ACCC's contentions." (at [932])

Gray J set out some of his conclusions from his analysis of the circumstantial evidence tendered in Annexure B from paragraph 932 of the judgment; those conclusions can be summarised as follows.

- **The data in Annexure B sometimes supported the allegations against the respondents:** On a "very small number of occasions" Annexure B supported the allegation that the respondent gave effect to a multi-part "chain" of alleged arrangements or understandings (at [932]).

- **On other occasions, Annexure B undermined the allegations**, meaning that it was necessary, "on a significant number of occasions", to allege that, notwithstanding the allegation of a chain of arrangements or understandings, sometimes the respondents gave effect to arrangements in the chain in a manner substantially contrary to the alleged chain.

- **There were inconsistencies between Annexure B and the oral evidence**. For example, there was an inconsistency between Annexure B and oral evidence that there may have been a small number of oral discussions between respondents that began a chain of telephone calls represented in Annexure B. However, these discussions were not recorded in the telephone data in Annexure B, and no attempt was made to use Annexure B to surmise when such communications may have occurred. As a result, Gray J noted:

  > it is quite impossible to find on the balance of probabilities which of the shaded periods in Annexure B that do not appear to contain relevant telephone communications … might have involved communications … by other means. There is, therefore, an inconsistency between Annexure B and the oral evidence …(at [932])

  Further such examples are identified at paragraphs [933] and [934].

- **Annexure B some relevant information that was available to the ACCC,** which fact supported an inference that that data would not have improved the case against the respondents. Specifically, as noted above, precise data about the times of price increases was included in Annexure B for some respondents, but not for others; these gaps made Annexure B less useful than it would otherwise have been (at [935]).

- **Where Annexure B contained such relevant information, it painted a "confused" picture** – in some instances this circumstantial evidence supported the case against the respondents, but "significant parts" of that evidence were "inconsistent" with the allegations against the respondents ([at 936]).

4.3 The limits of circumstantial evidence balanced by investigatory powers

The Committee recognises that it may in some instances be necessary to ask the Court to draw inferences from circumstantial evidence in order to establish the existence of an arrangement or understanding. Indeed this fact was expressly recognised in the judgment in *Nicholas*. Reliance on

circumstantial evidence, while sometimes necessary, necessarily brings with it attendant complexities, as was acknowledged in the judgment in *Nicholas*.

> … each of the defendants did in fact decrease its allowance on 6th December, in other words they engaged in parallel action. This is significant circumstantial evidence from which the existence of an understanding might be inferred. But as doubtless is true with all circumstantial evidence, the drawing of the relevant inference is seldom irresistible. As is the case here, it is frequently possible for another explanation of the facts to be given in evidence, for example, that the reduction in the allowance was dictated not by commitment to an understanding but by ordinary commercial considerations. However, failure to explain the reasons for and circumstances of the parallel reduction encourages the tribunal to feel and it is "less unsafe to make" the requisite finding…

We consider that, when regard is had to the extensive investigatory powers available to the ACCC, for the production of documents and examination of witnesses on oath, the Courts' current approach to the treatment of circumstantial evidence strikes the right balance between effective enforcement and proper caution.

4.4 Submission on the proposed amendments

As the outline above indicates, the Full Court's judgment in *Apco* reveals the Federal Court's willingness to draw inferences from circumstantial evidence – both when doing so tends to substantiate allegations against defendants (as at first instance), and when it exonerates them (as recognised on appeal).

Similarly, in *Leahy*, Gray showed no reluctance to draw inferences from the circumstantial evidence in Annexure B. Gray J considered this evidence in extensive detail, and was prepared to draw inferences on the basis of it. Gray J's reluctance to use circumstantial evidence to support a conclusion that the alleged arrangements or understandings existed arose from the fact that circumstantial evidence pointed away from that conclusion – not that circumstantial evidence was an unreliable or otherwise inappropriate basis on which to found a conclusion as to the existence of such arrangements or understandings.

Accordingly, the Committee submits that the evidential amendments would codify rather than modify the Courts' current approach, and as such are not necessary to address any perceived shortcoming in that approach.

The Committee makes the following specific submissions.

Amendment proposed in paragraph (a)(i)

The amendment proposed in paragraph (a)(i), providing that a Court may establish the existence of an understanding even though the understanding is ascertainable only by inference from any factual matters the Court considers appropriate restates the current approach of the Courts and is accordingly not necessary.

Amendment proposed in paragraph (b)

The codification in paragraph (b) is unnecessary.

As indicated above, the Courts have not been reluctant to draw inferences from circumstantial evidence – the ACCC's many successes in *Apco* amply demonstrate that point. In each instance in *Apco* and *Leahy* the Courts engaged with and drew inference from a wide range of circumstantial evidence.

The amendments in paragraph (b) are accordingly not necessary, as they only codify, non-exhaustively, some of the types of evidence to which Courts might (and do) properly have regard in considering circumstantial evidence. In fact, most of these factors simply restate what the cases have already decided about the factors that would tend to support an inference of an understanding being drawn. As such, the factors in paragraph (b) do not usefully improve upon the Courts' current approach.

If a codification of factors Courts should be required to take into account was considered necessary (noting that it has not been required for example in the United States for its simpler prohibition on s 1 of the *Sherman Act 1890* to work effectively over a long period), the proposal should include in addition at least consideration of the extent to which the conduct is inconsistent with the

independent economic self-interest of the parties that engage in it. In addition, if codification was considered necessary, it should include those factors that would help negate the inference that parties had engaged in collusive conduct.

For the reasons set out above, the Committee submits that the codification in paragraph (b) does not improve on the Courts' current approach, and as such is unnecessary.

Codification of matters going to proof of a collusive anticompetitive agreement should be undertaken with caution

If, contrary to the Committee's submission, it is considered necessary to undertake a codification of the matters to which a Court may have regard when establishing the existence of an understanding, such a codification should be undertaken with caution.

In particular, writers with a background in economics have warned against inferring arrangements or understandings from levels of prices or patterns of price movements. The reason for this is that what may appear to be collusive patterns of prices may arise without any of the forms of communication or obligation that would normally be required to constitute an arrangement or understanding. See Massimo Motta, *Competition Policy, Theory and Practice,* Cambridge University Press, 2004, pp 185-195.

5. CONCLUSION

The Committee submits that:

- there is no legal or practical justification for amending the generally accepted meaning of "understanding" under the TPA; and
- the proposed amendment to the TPA to codify the matters to which a Court may have regard in determining the existence of an understanding is unnecessary, and would not modify or improve on the Courts' current approach.