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

Email: understanding@treasury.gov.au

Dear Mr Rogers

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

Lovegrove & Lord acts for a number of companies in a mix of industries, most of which are in the small to medium category.

Companies and their officers need to know with some degree of certainty or exactitude what the law says and what they can or cannot do.

We believe that the amendments sought by the Australian Competition and Consumer Commission (ACCC) would:

- entrench uncertainty by allowing the court to determine that a corporation has arrived at an 'understanding' without commitment against accepted interpretation
- make it impossible to provide clear advice as to conduct which would fall within or outside the term

Law reform normally comes from judicial criticism of a statute or its interpretation. There is no such criticism here. Most unusually, the proposed reform involves relaxation of the rules of evidence.

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Initially there was some uncertainty as to the meaning of the words “contract, arrangement or understanding”, particularly the latter two words. Very quickly the decided cases provided guidance and there has been little controversy over the years as to the meaning and application of the word “understanding”

It is surprising then that, after almost 35 years, the term “understanding” is in issue because of 2 recent cases *Apco Service Stations Pty Ltd v ACCC*¹ (*Apco*) and *ACCC v Leahy*² (*Leahy*) each of which needs to be looked at on its facts and merits.

Before dealing with each case we make the following observations.

The ACCC has a range of statutory and administrative sanctions available to it in investigating and prosecuting offences against the TPA:

- section 155 (power to obtain information, documents and evidence)
- section 87B (enforceable undertaking)
- Immunity from Prosecution Policy for Cartel Conduct

Use of section 155 gives the ACCC considerable power and opportunity to gather documentary evidence and examine potential witnesses prior to proceedings being instituted. If the ACCC cannot obtain direct evidence of an understanding, in our submission, it should not issue proceedings.³

In such circumstances the use of an enforceable undertaking may be the more appropriate course. It has the advantage of a quick solution, without the cost, expense and uncertainty of litigation.

The use of the Immunity Policy in cartel matters also provides the ACCC with some prosecutorial advantage but as *Leahy* emphasizes, agreed statements must comply with strict evidentiary standards.⁴

It is inevitable that the ACCC will be unsuccessful in some cases. In fact it was successful against some respondents in *Apco*. Overall the ACCC has a significant success rate in the cases it brings.

We note that the new criminal and civil offences for cartel conduct are due to come into force later this year.⁵ The Bill is lengthy and apart from the new civil and criminal provisions it makes significant consequential amendments to the TPA and other legislation.

The terms “contract, arrangement or understanding” are used in the new provisions and it seems their interpretation, not without some uncertainty, will be based upon the terms as they appear in current sections of the TPA⁶.

¹ *Apco Service Stations v ACCC* [2005] FCAFC 161

² *ACCC v Leahy* [2007] FCA 794

³ *Discussion Paper: Paragraph 16*

⁴ *ACCC v Leahy* [2007] FCA 794, 962

⁵ *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008- clauses 44ZZRF, 44ZZRG (criminal offences) and 44ZZRJ and 44ZZRK (civil penalty provisions)*

⁶ *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 Explanatory Memorandum – see paragraph 1.12 for example. However the operation of Clause 44ZZRE is uncertain.*

As already stated we do not support the amendments sought by the ACCC as they would add uncertainty to existing provisions and very probably the new provisions. Prosecutions under the new criminal provisions will be based upon the criminal standard of proof⁷. Obtaining convictions based on circumstantial evidence is always difficult and unlikely in criminal cases.

We note that the Senate Economics Committee's Report deals with a number of uncertainties in the Bill, particularly the lack of certainty in delineating between criminal and civil cartel conduct.

*The committee recommends that, following the passage of this bill, the ACCC issue guidelines on those factors that are, in all the circumstances, most likely to lead it to refer an activity to the DPP as a possible criminal cartel offence.*⁸

We submit that these amendments will be significant enough without the amendments proposed in the Discussion Paper

With these comments in mind we answer the specific questions posed by the Discussion Paper.

Questions for discussion

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

We do not consider that judicial approach to the interpretation of 'understanding' limits the ability of the TPA to deal with anticompetitive activity. The Discussion Paper focuses only upon 2 recent cases, *Apco* and *Leahy*. Two cases are of limited value in substantiating amendments of such to the TPA.

The High Court made it clear that Full Court's view of the law in *Apco* (followed in *Leahy*) was correct:

*The decision of the Full Court of the Federal Court turned not upon any controversial view of the meaning of the relevant provisions of the Trade Practices Act but upon the Full Court's view of the facts in the light of the case as pleaded and argued by the Commission. In the light of the facts as found, the case does not raise any issue of law suitable to a grant of special leave to appeal. The application is dismissed with costs*⁹.

In *Leahy* the Court found that:

The overall effect of the evidence in this case is that it is more probable than not that none of the arrangements or understandings alleged by the ACCC in fact existed. Not only did the evidence led by the ACCC fail to prove the existence of such arrangements or understandings, particularly the requisite

⁷ Criminal Code Act 1995 Part 2.6, section 13.2

⁸ The Senate Standing Committee on Economics: Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008[Provisions] February 2009 Recommendation 1, 4.11

⁹ ACCC v Apco Service Stations Pty Ltd & Anor [2006] HCA Trans 272 2 June 2006

*element of commitment, but the preponderance of the evidence suggests that no such arrangements or understandings existed*¹⁰

The Discussion Paper states that courts have always required that there be a meeting of the minds of the parties to the alleged understanding and some form of commitment¹¹. We oppose an amendment which would remove commitment as a basic element of understanding against a long line of case law.

– 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?

Given our views expressed above the answer to this question is no.

• 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?

Courts have the ability to draw inferences from evidence but are reluctant to do so in civil cases where the consequences are significant.¹²

*Ultimately the question of whether or not an arrangement or understanding has been reached will depend on the view formed by the court of all of the circumstances in each case. Given the seriousness of the consequences, courts have been reluctant to find that a respondent came to an arrangement or understanding based on circumstantial evidence. However, where the case rests on inferences to be drawn from primary facts, it is not sufficient for the circumstances to give rise to conflicting inferences of equal degrees of probability: see Luxton v Vines [1952] 85 CLR 352; [1952] ALR 308; 26ALJ 44.*¹³

The institution of proceedings by the ACCC and the consequences for corporations and individuals if those proceedings result in penalties and other orders are matters of gravity and courts will always be reluctant to establish liability other than on clear and unequivocal evidence.

The penalties are significant. For corporations they are the greatest of:

- \$10,000,000
- 3 times total benefit
- 10% of annual turnover if benefit cannot be determined¹⁴

For individuals:

- \$500,000¹⁵
- disqualification from managing corporations¹⁶

Corporations and individuals may also be subject to injunctive and other relief¹⁷.

¹⁰ ACCC v Leahy [2007] FCA 794 at [960]

¹¹ Discussion Paper: Paragraph 13. These cases go back to 1975 starting with: Top Performance Motors v Ira Berk (Qld) (1975) 24 FLR 286

¹² The Uniform Evidence Acts require a court to consider the gravity of the matters alleged in civil proceedings where the case must be proved on the balance of probabilities: for example, Evidence Act 1995 (Cth), Evidence Act 1995 (NSW) and Evidence Act 2008 (Vic) – section 140(2)(c) in each statute

¹³ Millers Annotated Trade Practices Act 30th Edition Russell v Miller 2009 [1.45.17] 291.

¹⁴ Trade Practices Act 1974 section 76 (1A) (b)

¹⁵ Trade Practices Act 1974 section 76 (1A) (c)

¹⁶ Trade Practices Act 1974 section 86E

¹⁷ Trade Practices Act 1974 Part VI Enforcement and Remedies: for example sections 80 (injunctions), 82 (actions for

*Leahy*¹⁸ and *Apco*¹⁹ each discuss the problems associated with circumstantial evidence.

- **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?**

As courts do have the ability to determine the existence of an understanding by inference from factual matters we submit that there is no need to provide them with a specific power to do so. They should not be compelled to do so. This would be in conflict with established evidentiary rules and standards.

We do not believe that the proposed amendments in Annexure A to the Discussion Paper are warranted or necessary.

Certainty is a key factor in effective compliance in any statute, but particularly the TPA, with the ACCC's emphasis upon compliance programs.

Thank you for the opportunity to make a submission.

Yours faithfully,

Kim Lovegrove

Kim Lovegrove
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Andrew Lord
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damages), 86C (non-punitive orders) 86D (punitive orders-adverse publicity) and 87 (other orders)

¹⁸ *ACCC v Leahy* [2007] FCA 794, 932-936

¹⁹ *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161, 51