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MEANING OF 'UNDERSTANDING' IN THE *TRADE PRACTICES ACT 1974*

SUBMISSION OF MAURICE BLACKBURN PTY LTD[1]

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MEANING OF 'UNDERSTANDING' IN THE *TRADE PRACTICES ACT 1974*

A. EXECUTIVE SUMMARY

1. For there to be an 'understanding' under the TPA there must be some 'meeting of minds' of the parties that makes the conduct collusive rather than independent or unilateral.
2. Recent decisions have located this requisite commonality in the *commitment* (or lack thereof) to the understanding by the parties thereto.
3. This approach represents a shift in what is required to establish an 'understanding'. In our submission, this shift:
   a) Undermines the object of the TPA and its effectiveness against anti-competitive conduct;
   b) Fails to provide a realistic or practical approach; and
   c) Facilitates avoidance of liability for collusive conduct.
4. We therefore agree that it is necessary to clarify or define the meaning of 'understanding' in the TPA.
5. As practitioners who represent the victims of cartel conduct in private actions, we are keenly aware of the importance of circumstantial evidence in establishing contraventions of s.45 of the TPA. We share the ACCC's concern that courts may currently feel constrained to an inappropriate degree in their ability to draw inferences from the evidence in determining whether or not an understanding exists. This constraint is likely to particularly affect private litigants.
6. Accordingly, we support amendment of s.45 to specifically provide that:
   a) An understanding may be found to exist whether or not the parties are committed to giving effect to the alleged understanding; and
   b) The Court may ascertain the existence of an understanding by inference from any factual matters put before it.
7. We also generally support the articulation of certain factual matters which the Court may consider in determining whether a corporation has arrived at an understanding. This would provide a more apt approach to identification of collusive conduct, and would be consistent with the approach taken in other jurisdictions, for example the use of 'plus factors' in the United States.
8. We submit that there are other factual matters, inclusion of which ought to be considered. We also suggest that the 'concerted practice' concept used in the European Union might usefully be considered as an alternative to the term 'understanding' or as a reference point for its further development.

B. INTRODUCTION

9. This submission is made in response to the discussion paper 'Meaning of 'Understanding' in the *Trade Practices Act 1974*' (**Discussion Paper**), which sought

submissions regarding the adequacy of the current interpretation of the term 'understanding' in s.45 of the *Trade Practices Act 1974* (Cth) (**TPA**) to capture anticompetitive conduct.

10. Maurice Blackburn Pty Ltd welcomes the opportunity to make a submission. Maurice Blackburn is a plaintiff law firm with the largest class actions practice in Australia, acting primarily on behalf of the victims of cartel conduct, sharemarket misconduct and faulty products. We also have large practices in commercial litigation, Workcover litigation, transport accident litigation, medical negligence litigation, superannuation claims, asbestos litigation and industrial law.

11. Maurice Blackburn is well placed to comment on this area of law because we are the leading plaintiff law firm in class actions on behalf of the victims of cartel conduct.

12. Maurice Blackburn conducted the vitamins class action, the first successfully concluded cartel class action in Australian legal history. The action was against Roche, BASF and Rhone-Poulenc (Aventis) and their Asian and Australian subsidiaries, and concerned an elaborate global cartel in the vitamins industry that took place over a 10-year period during the 1990's. In October 2006 a landmark settlement was approved of $30.5 million plus payment of costs and disbursements. A wide range of businesses, from small-scale livestock producers to large animal nutrition companies shared in this compensation.

13. In April 2006, Maurice Blackburn commenced the Amcor class action following the exposure of a national cartel involving corrugated fibreboard packaging claiming compensation for the losses that purchasers have suffered. The class action alleges that between January and April 2000, Amcor and Visy, through a number of its most senior executives, entered into a "primary cartel arrangement" to fix corrugated fibreboard packaging prices and to reduce competition for each other's customers.

14. In January 2007, Maurice Blackburn commenced the Air Cargo Class Action against several major international airlines including Qantas, Lufthansa, Singapore Airlines, Cathay Pacific, Air New Zealand, JAL and British Airways. Maurice Blackburn is claiming the large losses that victims have suffered as a result of the airline's price-fixing arrangements to set fuel and security surcharges in international air freight services.

15. In September 2007, Maurice Blackburn commenced the Rubber Chemicals class action against major international chemical manufacturers Bayer and Chemtura (formerly Crompton / Uniroyal) for fixing the price of rubber chemicals. Rubber chemicals are used as quality and/or productivity enhancers in the manufacture of rubber and rubber products. The cartel has been prosecuted in Europe, Canada and the United States, and class actions have been commenced and settled in both the United States and in Canada.

16. As we closely monitor cartel investigations, prosecutions and class actions in other jurisdictions, we are in a position to compare the Court's approach to legislation and practice for antitrust / anti-competitive conduct in the regimes of other jurisdictions.

17. This submission refers several recent decisions relating to the petrol markets of Ballarat and Geelong:

    a) *Australian Competition Commission v Leahy Petroleum* [2004] FCA 1678, decision of Justice Merkel (**the *Ballarat Petrol Case***);

    b) The Full Court's decision on appeal from the *Ballarat Petrol Case*, *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 161, decision of Heerey. Hely and Gyles JJ (***Apco Services Stations***); and

c) *Australian Competition & Consumer Commission v Leahy Petroleum Pty Ltd* [2007] FCA 794, decision of Justice Gray regarding the Geelong petrol market (**the *Geelong Petrol Case***).

18. We also refer to the amendment suggested in the legal advice on s.45 by Mr J Burnside QC for the Commission dated 6 December 2007 and reproduced as Annexure A to the Discussion Paper (**the Proposed Amendment**).

C. JUDICIAL APPROACH TO INTERPRETATION OF 'UNDERSTANDING'

19. Cartel conduct is the central focus of s.45 of the TPA. A cartel is a combination of 'competitors' designed to limit competition or fix prices. Being illegal, cartels are usually conducted in secret, and proof of the combination is often the most difficult part of a cartel case. A disciplined cartel will leave little or no direct documentary evidence. In the absence of cooperative witnesses, proof of the existence and operation of a cartel will likely rely on circumstantial evidence, such as 'communication evidence' (for example records of telephone conversations between competitors, or of meetings), or economic evidence, such as evidence of parallel pricing[2].

20. Two fundamental and closely related issues arise. Firstly, how is the distinction properly to be drawn between parallel conduct that is the result of 'individual decision making'[3] and therefore legal, and that which is the result of collusion and therefore is not? And secondly, from what evidence can it properly be inferred that conduct is collusive?

> Since formal, express agreements rarely present difficult questions, the bulk of the commentary has focused on the evidentiary standards for inferring 'conspiracy' from circumstantial evidence, particularly parallel conduct. Whether in the context of horizontal or vertical arrangements, the cases and commentary have struggled to discern the line that separates parallel, but nevertheless unilateral conduct motivated by self-interest, from parallel, but conspiratorial conduct prompted by tacit agreement.[4]

21. In the *Geelong Petrol Case*, Justice Gray considered where the line should be drawn to delineate 'understanding' within the meaning of s.45 from some kind of non-consensual (unilateral) dealing:

> [39] As I have said, the concepts of contract, arrangement and understanding relevant to the application of s 45(2)(a) of the Trade Practices Act are concepts representing points on a spectrum of consensual dealings. It is possible that the spectrum might be extended in one direction beyond contract, to include even more solemnly binding consensual obligations, such as deeds under seal. It is difficult to see that the spectrum of consensual dealings could extend in the other direction beyond the concept of 'understanding', whilst still remaining relevant for the purposes of s 45(2)(a). That end of the spectrum, therefore, lies somewhere between the outer limits of what constitutes an 'understanding' and the closest form of non-consensual dealing that could be imagined. It is possible that this closest form is the expectation that a party will act in a particular way, engendered by that party, to which Lindgren J referred in *CC (NSW) Pty Ltd* at [141]. It may be in the realm of parallel conduct, even conscious parallel conduct, such as the adoption of identical prices for homogeneous

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[2] Organisation for Economic Co-operation and Development, 'Prosecuting Cartels without Direct Evidence of Agreement' (Policy Brief, 2007)

3 Warren Pengilley, 'What is required to prove a 'contract, arrangement or understanding'?' (2005) 13 *Competition and Consumer Law Journal* 14. Pengilley uses the term "individual decision making" to denote conduct that is lawful, as opposed to agreed conduct which is not.

4 Andrew Gavil, *An Antitrust Anthology* (1996), cited in Paulo Corea and Frederico G. De Aguiar, *Circumstantial Evidence and Plus Factors in Cartel Cases* (1996) Secretariat for Economic Monitoring , Brazil <http://www.seae.fazenda.gov.br/document_center/papers-and-articles/1996-1/2-circumstantialevidenceandplusfactorsincartelcases>

products, which clearly lies beyond the realm of 'understanding'. See the American authorities cited by Lockhart J in *Email* at 56-57.

[40] 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.

22. Recent authorities have emphasised that a *commitment* or obligation to the alleged understanding is the relevant delimiter.

23. In the *Geelong Petrol Case* Justice Gray found:

[948] Thus, all of the witnesses called to give evidence for the ACCC who acted on behalf of parties to the alleged arrangements or understandings confirmed to a greater or lesser degree the absence of any commitment, moral obligation, or obligation binding in honour on the part of any party to any of those arrangements or understandings. The evidence on the issue is all one way. It is not possible to dismiss it, as counsel for the ACCC attempted to do in submissions, as indicative of freedom to withdraw from, or to act inconsistently with, an arrangement or understanding on a particular occasion. The plain fact is that there was nothing by way of constraint to raise prices, felt or otherwise, from which any party had to withdraw, or with which it was necessary to act inconsistently, if prices were not increased on a particular occasion. The express evidence is overwhelmingly to the effect that an essential element of an arrangement or understanding, whether in the abstract or as pleaded, in the form of a commitment or obligation to increase prices, did not exist. The ACCC invited me to draw the inference from the circumstantial evidence that, in fact, such a commitment or obligation did exist in the case of each alleged arrangement or understanding. For numerous reasons that I have already given, the circumstantial evidence does not point to this conclusion. Even if it did, it would not do so with sufficient strength to cause me to disbelieve the oral evidence on this issue. The situation was that each party to each alleged arrangement or understanding was free to do as it wished on every occasion when information about a prospective price increase was passed to it. As I have said, an arrangement or understanding in which each party is free to do as it wishes is a creature unknown to s 45(2) of the Trade Practices Act.

[949] This finding is fatal to the ACCC's case. <u>The absence of any element of commitment, or obligation, from any of the alleged arrangements or understandings must lead to the conclusion that none of those arrangements or understandings is capable of amounting to an arrangement or understanding within the meaning of s 45(2)(a) of the Trade Practices Act.</u> None of them is capable of containing a provision for the fixing of prices.

24. In reaching this conclusion, Justice Gray relied on the precedent and reasoning from *Apco Service Stations*. In that decision, the Full Court allowed appeals by Respondents Apco and Anderson (Apco's Managing Director) against the trial judge's finding that they had arrived at an understanding in breach of the TPA. The Full Court stated:

[43] . . . Thus his Honour [the trial judge] in explicit terms declined to make a finding that Apco (not being an initiating respondent) became committed to any price increase agreed on by the initiating respondents. This is consistent with the later passage at [368] in which his Honour found that there was no expectation by the other respondents that Anderson's readiness to receive calls from Bentley and Carmichael meant that Apco would substantially match the increased prices . . .

[44] . . .Certainly Apco received information about price increases (albeit the fact of an increase rather than the amount) from Bentley and Carmichael, as it did from other sources such as its franchisees, but it reserved to itself the decision, as a matter of commercial judgment, whether to follow those prices up. More often than not (40 occasions out of 69) it did not, or at the very least, there is no evidence that it did.

. . . . .

> [54] The direct evidence against Apco and his Honour's preference in credibility terms for other witnesses as against Anderson do not take the matter any further. It does not matter how useful Anderson found the information received from Bentley and Carmichael if he was in no way committed to follow it.
>
> . . .
>
> [57] . . . If Apco and Anderson were not committed to increase prices, the fact that sometimes they did so is consistent with them exercising their own judgment on those occasions. Unilaterally taking advantage of a commercial opportunity presented is not to arrive at or give effect to an understanding in breach of the Act.

25. We refer to Mr Burnside QC's analysis of decisions interpreting 'commitment' from *Re British Basic Clag Limited's Agreements* [1963] 2 All ER 807 though to the *Geelong Petrol Case*[5]. We agree with the ACCC that *Apco Service Stations* and the *Geelong Petrol Case* "disclose a subtle but significant shift in the nature of the commitment that must be found to establish the existence of an understanding."[6]

26. These decisions also seem to be at odds with authorities *doubting* whether it is necessary to show a commitment or obligation, at least with respect to another party, in order to prove an understanding.

27. In *TPC v Email* Lockhart J, his Honour went on to say (at [66]) "… I incline to the view that there is no necessity for an element of mutual commitment between the parties to an arrangement or understanding such that each accepts an obligation qua the other; although in practice such cases would be rare."

28. In *FCT v Lutovi Investments Pty Ltd* (1978) 22 ALR 519, a case regarding the requirements of an arrangement for the purposes of s 80b(5) of the *Income Tax Assessment Act 1936*, Gibbs J (as he then was) and Mason J held in their joint decision (at [525], our emphasis):

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

29. This decision has been cited with approval in a number of TPA cases[7].

30. In *Morphett Arms Hotel Pty Ltd v Trade Practices Commission* (1980) 30 ALR 88[8], the Full Court of the Federal Court expressly doubted (in *obiter*) that mutual obligation was necessary. This qualification to his earlier decision was accepted by Fisher J in *Trade Practices Commission v David Jones (Aust) Pty Ltd* (1986) 13 FCR 446.

31. In *Rural Press v ACCC* [2002] FCAFC 213 the Full Court of the Federal Court seems to have accepted that the provision of a "mild assurance" by a party that it would act in a particular way was significant to the establishment of the arrangement (see [80] to [84]).

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[5] Advice on s.45 by Mr J Burnside QC for the Commission dated 6 December 2007, paragraphs 9 to 13.

[6] Petrol Report, 228.

[7] *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No2)* (1979) 26 ALR 609; *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53; *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1; *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446; (1986) 64 ALR 67; (1986) ATPR 40-671.

[8] On appeal from the decision of Fisher J in *Trade Practices Commission v Nicholas Enterprises Pty Ltd* (1979) 26 ALR 609 Fisher J subsequently accepted the qualification in *Trade Practices Commission v David Jones (Aust) Pty Ltd* (1986) 13 FCR 446; 64 ALR 67; (1986) ATPR ¶40-671 at 47,409.

32. Whether viewed as a shift in the *meaning* of commitment, or the requirement that there *be* a commitment, our submission is that conduct which ought to be caught by the TPA is now excluded.

D. CONCERNS WITH JUDICIAL APPROACH

33. The restrictive judicial approach set out in *Apco Service Stations* and the *Geelong Petrol Case* is problematic because:

    a) It undermines the object of the TPA and its effectiveness against anti-competitive conduct;

    b) It does not provide a realistic or practical approach;

    c) It facilitates avoidance of liability for collusive conduct;

    d) It constrains the Court to an inappropriate degree in its ability to draw inferences from the evidence in determining whether or not an understanding exists; and

    e) This constraint is particularly burdensome for private litigants, who do not have access to the same investigative tools as regulators. This is significant because private actions typically provide the only means of redress for victims of price-fixing.

Object of the TPA

34. In *Visy Paper Pty Ltd v ACCC* [2003] HCA 59; 201 ALR 414 at [70], Justice Kirby (in minority) stated:

> It is in the context of such legislative opacity and unwieldiness that it is essential, in my view, to adopt a construction of the TPA that achieves the apparent purposes of that Act by furthering the objectives of Australian competition law. Keeping such purposes in mind helps to shine the light essential to finding one's way through the maze created by the statutory language. Even then, there is a substantial danger of losing one's way in the encircling gloom.

35. The object of the TPA is to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".[9]

36. The judicial interpretation of 'understanding' as requiring a *commitment* (narrowly construed) by a party is at odds with the object of the TPA and means that conduct that would be widely regarded as anti-competitive is considered legal. As the ACCC stated in the Petrol Report, "[p]ublic expectation of what amounts to price fixing may vary from this restrictive view".[10]

37. The point is illustrated by the ACCC in the Petrol Report by reference to the following hypothetical (**the ACCC Hypothetical**):

> 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 9 am although it does not consider itself obliged to change its price.

38. This situation would not be caught by the TPA on the current judicial approach, and yet we suggest it ought to be.

39. We consider that the approach of Justice Merkel in the *Ballarat Petrol Case* is more consistent with the object of the TPA. In that decision, his Honour focussed on the anti-competitive nature and effect of the alleged conduct and found that that Apco and

9 S.2 TPA
10 Petrol Report, 229

Anderson had made an arrangement notwithstanding that Anderson had never *committed* to the alleged arrangement. The critical element was that by continuing to receive information, and sometimes acting on it, Anderson was engendering an expectation in the other parties that Apco would substantially implement the arrangement. In so doing, Apco was increasing general confidence around the arrangement, and increasing the likelihood that price increases would 'stick' and that that prices would be artificially inflated.

40. It is worth quoting at length, since his Honour's approach contrasts so markedly with that of Justice Gray in the *Geelong Petrol Case*. Justice Merkel said (at [174], italicised emphasis in original, underlined emphasis ours):

> … the fact that Anderson was prepared to receive and did receive price increase calls did not justify any expectation on Carmichael's or Bentley's part that Apco *would* increase its prices. However, the fact that Anderson was prepared to receive, received and acted on the calls (eg by instructing franchisees to obtain price information and by making observations about other sites not rising from time to time) was likely to have led Anderson, and the parties to the price fixing understanding who are linked to him, to conclude that:
>
> - the calls to Anderson were a significant aspect of any price fixing arrangement;
> - <u>the calls increased the likelihood of Apco increasing its prices in that they enabled Anderson to be confident that if he matched an increase it was likely to stick</u>;
> - <u>the calls made it more likely that the price increase would be taken up by Apco and would therefore 'stick', than if the calls had not been made</u>;
> - <u>if Apco matched the increase it was likely that it would stick</u>.

41. Justice Merkel also found (our emphasis):

> [368] The position of Apco is more difficult because, unlike Triton, its involvement was primarily limited to receiving price-increase or follow-up calls from Bentley and Carmichael. It did not initiate such calls nor did it initiate price increases. Also, unlike Triton, there was no expectation by any of the respondents that Apco's preparedness to receive calls from Bentley and Carmichael meant that Apco would substantially match the increased prices. <u>Some of the witnesses could go no further than stating that it was their "hope" that Apco would increase its prices</u>.
>
> [369] <u>Nonetheless</u>, I have found that there is reasonable evidence that Anderson, acting on behalf of Apco, was aware that:
>
> - the purpose of the price-increase and follow-up calls was to influence or persuade him to substantially match the increase;
> - those calls were part of a longstanding and collusive process involving a number of the corporate respondents coordinating price increases to bring to an end a discount cycle in the Ballarat retail petrol market.
>
> <u>With this awareness, Anderson continued to receive such calls during the relevant period and acted upon the calls by closely monitoring the price increases and then determining whether to match them</u>.
>
> [370] In my view Anderson's preparedness to receive the price-increase and follow-up calls in the above circumstances, his occasional responses to Carmichael that other outlets had not yet increased their prices and that he was "looking" at whether he would increase his prices, together with his decision from time to time to increase his prices to match the market increase by the other corporate respondents, <u>aroused an expectation</u> in at least Bentley (Justco) and Palmer and Carmichael (the Leahy Companies) that during the relevant period:
>
> - Anderson would continue to receive those calls;
> - Anderson would continue to act upon the calls by closely monitoring the prices of the other corporate respondents in Ballarat and decide whether to participate in the coordinated increases being sought;

- Anderson's receipt of the calls made it more likely that he would substantially match an increase than if he did not receive the calls.

> [371] Importantly, Anderson was aware that, in the usual course, his decision was likely to be determinative of whether the coordinated price increase being sought by the other participants would "stick" so that on each occasion that he made the decision to increase his prices after the receipt of price-increase or follow-up calls he was aware that his increase was likely to ensure that the collusive process achieved its purpose on that occasion. In the circumstances I am prepared to infer that Anderson expected that the participants in the collusive process would maintain their price increases while Apco was deciding whether to match the increases.
>
> [372] The above matters amount to participation in, and adoption of, the understanding by Anderson. I would add that Anderson's responses to follow-up calls from Carmichael, when Anderson said that certain sites had not yet increased their prices or that he was looking at whether to increase his prices, constitute evidence that is confirmatory of his adoption of, and participation in, the understanding.

42. In our submission the approach in *Apco Service Stations* and the *Geelong Petrol Case* does not achieve the apparent purposes of the TPA by furthering the objectives of Australian competition law. The object of the TPA would be better served by a broader consideration of factors such as whether parties engendered an expectation in another party, benefited from the information they received, were aware of the collusion, or acted on the information they received to effect price.

Not Realistic

43. The approach recently adopted by the Courts has an air of unreality. Why were 'competitors' in the Ballarat and Geelong petrol markets in the regular habit of giving each other a 'heads-up' about their prices? Can such conduct be properly characterised as independent? Consider for example the ACCC Hypothetical. Can it be said that the price of petrol charged by Petrol Station A and Petrol Station B is a result of individual decision making, where "the party increasing price will have to make a market evaluation and take the risk that others may not follow"?[11] Or can it be, or *ought* it to be, inferred that Petrol Station A does have some assurance that its competitors will follow? Or put differently, that because of Petrol Station A's communications to other suppliers, it is more likely (than without the communication) that its competitors will follow and that the price of petrol will be artificially inflated?

44. In our submission, to give effect to the object of the TPA, it is necessary to have regard to the real impact of the alleged conduct on price and the relevant market. Focussing narrowly on whether a commitment has been established obscures the real impact of conduct which increases the *likelihood* of anti-competitive prices being charged.

45. This point is demonstrated by analysis of the petrol cases. The findings of the trial judge in the *Ballarat Petrol Case* are set out in detail above. In overturning that decision, the Full Court in *Apco Service Stations* preferred the view that absent a commitment to the arrangement, Apco was simply exercising its own independent commercial judgment. The Full Court stated:

> [44] . . . [Apco] reserved to itself the decision, as a matter of commercial judgment, whether to follow those prices up. More often than not (40 occasions out of 69) it did not, or at the very least, there is no evidence that it did.
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> [54] . . . It does not matter how useful Anderson found the information received from Bentley and Carmichael if he was in no way committed to follow it.
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> . . . .

11 Pengilley, above n3, 2.

> [56] . . . .If Apco and Anderson were not committed to increase prices, the fact that sometimes they did so is consistent with them exercising their own judgment on those occasions. Unilaterally taking advantage of a commercial opportunity presented is not to arrive at or give effect to an understanding in breach of the Act.

46. Likewise in the *Geelong Petrol Case* Justice Gray preferred the view that Leahy was simply making independent commercial decisions:

> [923] The passing of information about prices does not necessarily indicate that it was done pursuant to any arrangement or understanding, in contravention of s 45(2) of the Trade Practices Act. In a competitive market involving a number of competitors, information about the prices of others is certainly one of the most useful factors in the setting of a dealer's own prices. In such a market, there is a tendency for prices of homogeneous commodities to move towards uniformity across the market. Petrol is such a commodity. The public display of board prices by all or most competitors would ensure a high degree of uniformity in the market in any event. Telephone calls and face to face conversations were other ways in which information about prices was conveyed.
>
> [924] Throughout the trial, the ACCC placed much emphasis on the proposition that what was being passed in the communications between competitors was advance notice of prices to be adopted, as distinct from notice by means of price boards of prices already being charged. In principle, there is little or no difference between the two. A dealer in the market who has decided to adopt a particular price communicates it to competitors, as well as to the public at large, once it is displayed on a price board. If, instead, the price is conveyed by means of oral communication, the result is the same. The ACCC does not seek to establish that whichever of Peter Anderson and Ian Carmichael initiated a communication simply told the other that his company may or may not increase its price for ULP to a particular level at a particular time. The case is that the initiating party would indicate that it had already made a decision to change its price to a particular level from a particular time. If that party had posted notices outside its outlets, advertising that its price would increase to a particular level at a particular time, and competitors took advantage of that information in making their own pricing decisions, there could have been no complaint. The practical advantage for the recipient of a communication about a decision to increase prices before the implementation of the decision is obvious. The competitor has more time to consider whether to increase its price to match the communicated price and, if so, at what time. The recipient of the communication did not have to wait until the board price was displayed by a competitor, and information of that price was conveyed as a result of observation of the board, either by the decision-maker or by someone else.
>
> [925] There is nothing inherently sinister about the use of the telephone to convey information. A telephone call in which one competitor informed another that the first had just increased its prices to a particular level, or had just observed the board price of another competitor, would not be an illegitimate means of conveying information about existing board prices. Of course, private communication of intended price increases, without communication of the intention to potential purchasers, lends itself readily to price-fixing. It does not constitute price-fixing, in contravention of s 45(2) of the Trade Practices Act, without more. Advance notice of the proposed implementation of a decision already made to increase prices would provide a competitor with the advantage of more time, but cannot itself be indicative of the existence of an arrangement or understanding containing a provision to fix prices. There are additional elements that need to be established before a finding can be made that an arrangement or understanding exists, or that effect is being given to it.

47. The assessment that all that is taking place is some sharing of information about independent decisions, to help others to conveniently and quickly make their own independent decisions, is artificial. A party that periodically receives a communication about future prices, and sometimes acts on it, and in so doing knowingly increases the likelihood that it and its 'competitors' will be able to charge a higher price, is not making independent commercial decisions, even if it received the communication with a 'maybe I will, maybe I wont' attitude.

48. This is particularly so in markets which follow a cyclical pattern of falling and rising retail prices. In the *Ballarat Petrol Case* Justice Merkel described such a pattern in the

Ballarat petrol market as involving (at [11]) "prices being discounted to relatively low levels by stepped decreases over a period until they bottomed out, after which the discounting came to an abrupt end with a substantial price increase. If that increase took effect in the market (ie by "sticking") the discounting period terminated until the discount cycle re-commenced". Further, "[s]ome time after the increase, the discount cycle would recommence, but from the higher, rather than the lower, levels in the cycle" (at [30]).

49. In a cyclical market, each cycle provides an opportunity to make a price increase 'stick' and to generate more profit. Conduct which increases the general *likelihood* that price increases will 'stick' (for example continuing to accept communications regarding price increases and at least sometimes acting on them), is conduct that is likely to increase illicit profit, and is conduct that ought to be caught by the TPA.

50. Another important factor at play is the *confidence* each of the parties has regarding the conduct of the others. In the *Ballarat Petrol Case* Justice Merkel states at [36] (our emphasis):

> The gravamen of Professor Williams' evidence is that it is inherently unlikely that a competitive petrol retailer in a highly competitive market would initiate a significant price increase without being confident that the major competitors in the market would match the increase. The evidence in relation to the Ballarat market during the relevant period establishes that the high risk involved in a significant price increase, of which Professor Williams spoke, would clearly be reduced if the party or parties increasing the price were confident that other competitors in the market would become aware of the increase and would be likely to match it. There was no real contest about that fact.

51. Confidence may exist in degrees. The evidence referred to above supports the view that the initiating respondents had at least some confidence that that their price increases would stick, at least some of the time. If to some degree that confidence was engendered by Apco, and if that confidence facilitated price increases (by reducing associated risk), then the conduct of engendering the confidence, or expectation, is very relevant to the price result.

52. It is inconsistent with the object of the TPA and the reality of how collusive arrangements work to construe the regular receipt of collusive information as just another piece of commercial information, and to construe acting on that information to increase your profits and those of your competitors as independent commercial decision making or simply taking advantage of a commercial opportunity. A realistic approach needs to take account of intention or likelihood to effect prices.

53. For the reasons outlined above we agree with the ACCC that:

> It would be a retrograde development if the word 'understanding' was to be construed to 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.[12]

54. Adoption of the Proposed Amendment would reinstate the position of previous authorities (refer paragraph 25 above) and clarify the law.

Avoiding Liability

55. The recent judicial approach to 'understanding' provides a blue print for 'competitors' to increase prices by sharing price information but being careful to never commit to doing anything with it. In its Petrol Report the ACCC stated "the ACCC is concerned 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

[12] Petrol Report, 229

themselves as obliged, either to provide that information or to act upon the information."

56. Apco's managing director did not deny that the information he was given was useful because it helped him to know precisely when to check competitors' prices and thus when to raise his own. He also knew that if he increased Apco's prices it would probably prevent the price rise from collapsing and that this was the reason price information was provided to him. It is unjust, and contrary to the purpose of the TPA, that a 'non-committed' party who says 'I will look at it' has the luxury of deciding whether or not to enjoy the benefits of the illegal arrangement, while escaping liability because it had never committed to taking part.

57. It does not follow that that party must 'cease trading simply because it knew of the existence of a price fixing arrangement'.[13] The managing director of Apco understood the information being given to him by Bentley, and why it was being provided. He could have made it clear that he was not participating in the arrangement and refused to receive further communications from his 'competitor' as to price.

58. It is contrary to the object of the TPA that a party can avoid liability by keeping its options open.

Constraint on Ability to Draw Inferences

59. The reluctance of the Court to draw inferences from circumstantial evidence in the *Geelong Petrol Case* exacerbates the issues identified above.

60. For a number of reasons, obtaining direct evidence of the existence and operation of a 'contract, arrangement or understanding' is difficult, even for a regulator with significant powers for obtaining evidence and encouraging cooperation:

> Proving the existence of a cartel agreement, whether formal or informal, poses special problems for the competition law enforcer. Cartels are usually formed and conducted in secret; their participants understand that their conduct is unlawful, and that their customers would object to the conduct if they knew about it, and so they take pains to conceal it. If an investigation into their conduct is undertaken, the participants usually do not co-operate with it, except though a leniency programme. Obtaining *direct* evidence of a cartel agreement – evidence that identifies a meeting or communications between the subjects and describes the substance of their agreement – requires special investigative tools and techniques, which the authority may lack. Thus, the competition law enforcer may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence . . . .[14]

61. Thus cartel cases will often rely on circumstantial evidence.

62. However, following recent authorities, Courts may feel unduly constrained in their ability to infer the existence of an understanding. As put by Mr Burnside QC, "[a]n analysis of cases decided since *Ira Berk* suggests that the nature of the commitment required has shifted by degrees, or at least that the factual circumstances which enable a commitment to be inferred have changed".[15]

63. In *Trade Practices Commission v Nicholas Enterprises Pty Ltd and Others* (1979) 26 ALR 609 case Justice Fisher stated (at page 631) " . . . 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 . . . that [conduct] was dictated not by commitment to an understanding but by ordinary commercial considerations." He also at page 643 cited with approval

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13 Pengilley, above n 3, 19

14 Organisation for Economic Cooperation and Development, 'Global Forum on Competition, Roundtable on Prosecuting Cartels Without Direct Evidence of Agreement', Background Note by the Secretariat, DAF/COMP/GF(2006)3, [7].

15 Advice on s.45 by Mr J Burnside QC for the Commission dated 6 December 2007, paragraph 9.

earlier authority that "[i]n questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture".

64. Such tests are difficult to satisfy in cartel cases, where innocent or not, the circumstances relied upon may be individually capable of alternative explanation. A good example is the use of price observations, which on their own are unlikely to provide conclusive evidence of price fixing, particularly since economic factors in some industries lead to parallel pricing without collusion.[16]

65. Given the importance of circumstantial evidence to cartel cases it is important to amend the TPA to:

    a) Make it clear that the Court may determine that a corporation has arrived at an understanding notwithstanding that the understanding is ascertainable only by inference from factual matters; and

    b) Provide guidance of the kinds of factual matters which may be considered.

Difficulties for Private Litigants

66. Constraints on the ability of courts to infer the existence of an 'understanding' are likely to have particular impact on victims seeking to recover compensation through private litigation.

67. Private actions, usually representative proceedings, provide the only real means for victims of cartel conduct to obtain compensation, and the threat of a significant damages pay-out provides a significant deterrent to engage in cartel conduct.

68. However, in respect of proving anti-competitive conduct, private litigants are 'on the outside looking in', with significantly fewer investigative and legal tools than the regulator. In particular, in Australia;

    a) Private litigants cannot provide an immunity/leniency policy to encourage cooperation. In Canada, parties to a class action may seek "bar orders" which block non-settling respondents from claiming contribution from a settling respondent, thus providing an incentive for a respondent to provide assistance to the private action, in exchange for a reduced damages liability.[17] Jurisprudence in this area is as yet undeveloped in Australia.

    b) Private litigants do not have the same investigative powers as the regulator, for example pursuant to s.155 of the TPA.

    c) Even where there has been a successful prosecution by the ACCC, there is only a vague requirement to make restitution to injured parties under the ACCC Leniency Policy.[18]

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16 Pengilley, above n 3, 2

17 See for example *Ontario New Home Warranty Program v. Chevron Chemical Company* (1999) 46 OR (3d) 130, *Gariepy v. Shell Oil Co* (2002) CanLII 12911; *British Columbia Ferry Corp v. T&N plc* [1996] 4 WWR 161, 16 BCLR (3d) 115.

18 Australian Competition and Consumer Commission, *ACCC Leniency Policy for Cartel Conduct* (2003), 3.12, which provides:
The corporate leniency policy includes a condition requiring a leniency applicant to make restitution to injured parties, where this is possible. Restitution is most likely to be possible when the parties harmed by the conduct can be identified. This might be the case where the conduct directly affects particular customers or suppliers of the cartel participants, such as in bid-rigging or customer sharing cartels.
The United States Department of Justice Leniency Policy requires that "[w]here possible, the corporation makes restitution to injured parties". The Model Corporate Conditional Leniency Letter Provides:
(2) Cooperation: Applicant agrees to provide full, continuing, and complete cooperation to the Antitrust Division in connection with the anticompetitive activity being reported, including, but not limited to, the following:

d) The ability to rely on findings of fact in proceedings brought by the regulator as *prima facie* evidence of those facts, pursuant to s.83 of the TPA, may be of limited practical assistance to private litigants as those findings may vary significantly from the scope of alleged conduct in the civil matter[19].

e) Regulators are reluctant to provide information to private litigants.[20]

f) There is little incentive for respondents to settle price fixing class actions and much incentive to vigorously defend. A respondent who invests in fighting the case has a chance of significantly reducing its liability or removing it altogether. If unsuccessful in this approach, the cost to the respondent is limited to legal costs, which may be modest relative to the amount of damages. This is in contrast with the position in the U.S. where under the Clayton Act, private litigants who succeed in Court may be awarded treble damages plus the costs of the action.[21]

69. The significant difficulties faced by victims seeking redress for cartel conduct add further weight to the argument that the TPA needs to be amended to specifically provide that the court may ascertain the existence of an understanding by inference from any factual matters put before it.

E. OTHER JURISDICTIONS

70. The challenge of distinguishing between collusive and non-collusive conduct in the absence of direct evidence of collusion is not unique to Australia.

71. In many jurisdictions this challenge is met by allowing collusion to be inferred by reference to market conduct (for example, parallel pricing) *plus* certain other factors.

72. In a briefing paper about prosecuting cartels without direct evidence, the Organisation for Economic Co-operation and Development stated:

> The fundamental task in the analysis of parallel conduct is to exclude, with reasonable certainty, the possibility that the parties were acting unilaterally, according to what each perceived was in its own best interest. For example, when a competitor raises price in response to a rival's price increase, such activity may be fully consistent with each firm's unilateral best response. If one cannot condemn a firm for lowering its price in response to rivals' lowering their prices, then one could not do so for price increases. Something more needs to be shown. A formulation for making this decision is sometimes called "action against self-interest". That is, it must be shown that it was against the self interest of the parties to take certain actions unless they were acting collectively, i.e., there was an agreement.[22]

73. The 'something more that needs to be shown' is often articulated by reference to certain 'plus factors' to which courts may have regard to infer collusion, including for example evidence showing communications or opportunities for communications

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(g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported, in which Applicant was a participant. However, Applicant is not required to pay restitution to victims whose antitrust injuries are independent of any effects on United States domestic commerce proximately caused by the anticompetitive activity being reported. . .

[19] See for example *Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR 41-809 cf *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322.

[20] See, eg, *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137; *ACCC v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2008] FCA 554, at [37] - [38]; *ACCC v Visy Industry Holdings Pty Ltd (No 2)* [2007] FCA 444 at [103] - [108]; *Visy Industries Holdings Pty Ltd v ACCC* [2007] FCAFC 147 at [94] - [113]; *Australian Securities & Investment Commission (ASIC) v P Dawson Nominees Pty Ltd* [2008] FCAFC 123,

[21] 15 U.S.C. § 15

[22] OECD Policy Briefs, Competition Law and Policy: Prosecuting Cartels without Direct Evidence, June 2007, page 5

among suspected cartel operators, actions against self-interest, and market characteristics that lend themselves to collusion.[23]

74. It is important to note that 'plus factors' articulate factors which facilitate the establishment of price agreements and increase the probability of serious side effects. They are not necessary conditions for the existence or proof of a cartel.[24]

North America

75. Section 1 of the Sherman Act prohibits every "contract, combination . . . , or conspiracy" in restraint of trade. The gist of the action is the *agreement*. It then falls to be considered, what is an agreement?[25] Or more relevantly for these submissions, how is an agreement to be differentiated from individual action, in the absence of direct evidence?

76. The issue can be aptly framed by reference to what is known in the US as the "oligopoly problem":[26]

> In relatively highly concentrated industries, which dominate much of the domestic and world economy, the phenomenon of conscious parallelism results in firms' coordinating their behavior based on their knowledge of what other firms are doing and their anticipation of what other firms will do. The question is whether and under what circumstances a finder of fact should be able to infer agreement from such parallel conduct.

77. In *Monsanto Co. v. Spray-Rite Service Corp* 465 U.S. 752, 764 (1984) the US Supreme Court found that "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the . . . [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" In addition, "[t]here must be evidence that tends to exclude the possibility that the . . . [defendants] were acting independently."[27]

78. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* 475 U.S. 574 (1986) two further principles were developed. Firstly, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Further, "if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[28]

79. Under US law, "conscious parallelism" is not of itself enough to show that the defendants were acting pursuant to an agreement. There must be one or more "plus factors" which exclude the possibility that the defendants were acting individually.[29] In *In re Flat Glass Antitrust Litigation* for example, the United States Court of Appeals stated:[30]

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[23] Organisation for Economic Cooperation and Development, 'Global Forum on Competition, Roundtable on Prosecuting Cartels Without Direct Evidence of Agreement', Background Note by the Secretariat, DAF/COMP/GF(2006)3.

[24] John M. Connor, Global Price Fixing, Edition 2, Springer, 2008, Chapter 17, page 442

[25] A question to which there is no clear answer, see William Page, 'Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act', (2008) http://ssrn.com/abstract=1117667.

[26] Daniel Shulman, '*Matsushita* and the Role of Economists with Regard to Proof of Conspiracy', (2007) 38 *Loyola University Chicago Law Journal*, 497, 498.

[27] Cited in Shulman, ibid.

[28] Ibid.

[29] The following authorities are cited by Daniel Shulman, ibid: Interstate Circuit v. United States, 306 U.S. 208, 222–27 (1939); C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 493 (9th Cir. 1952); Esco Corp. v. United States, 340 F.2d 1000, 1007–08 (9th Cir. 1965); Apex Oil Co. v. DiMauro, 822 F.2d 246, 253–54 (2d Cir. 1987); In re Plywood Antitrust Litig., 655 F.2d 627, 634 (5th Cir. 1981).

[30] 385 F 3d 350, 359-60 (3d Cir. 2004)

> …we have required that plaintiffs basing a claim of collusion on inferences from consciously parallel behaviour show that certain "plus factors" also exist. Existence of these plus factors tends to ensure that courts punish "concerted action"—an actual agreement—instead of the "unilateral, independent conduct of competitors." In other words, the factors serve as proxies for direct evidence of an agreement.

80. Unfortunately 'there appears to be a great deal of uncertainty and variability in the case law as to what evidence is sufficient to constitute a plus factor enabling evidence of consciously parallel conduct to go to the jury'.[31]

81. The following have been identified as relevant "plus factors":

    a) Existence of a rational motive for defendants to behave collectively

    b) Actions contrary to the defendant's self-interest unless pursued as part of a collective plan

    c) Market phenomena that cannot be explained rationally except as the product of concerted action

    d) Defendant's record of past collusion-related antitrust violations

    e) Evidence of interfirm meetings and other forms of direct communications among alleged conspirators

    f) Defendant's use of facilitating practices

    g) Industry structure characteristics that complicate or facilitate the avoidance of competition

    h) Industry performance factors that suggest or rebut an inference of horizontal collaboration[32]

82. Section 45 of the Canadian Competition Act makes it an indictable offence to conspire, combine, agree or arrange with another person to do certain specified acts which would unduly limit or lessen competition.[33] Section 36 provides that a person who suffers loss as a result of a contravention of *inter alia* section 45 may sue for damages.

83. The Competition Act makes it clear that a conspiracy, combination, agreement or arrangement may be inferred from circumstantial evidence with or without direct evidence of communication between the alleged parties (subsection 2.1, but note it must be proven beyond reasonable doubt). The Act also makes it clear that the accused shall not be convicted if the conspiracy etc relates only to one or more of certain factors (such as the exchange of statistics), *unless* the conspiracy etc would lessen competition unduly[34].

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[31] Shulman, above n 27, 499.

32 William Kovacic, The Identification and Proof of Horizontal Agreements Under the Antitrust Laws, 38 Antitrust Bulletin 5 (1993)

[33] Section 45. (1) Every one who conspires, combines, agrees or arranges with another person
(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product, (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or (d) to otherwise restrain or injure competition unduly,
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 to both.

[34] Section 45 (3): Defence Subject to subsection 4… the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following: (a) the exchange of statistics; (b) the defining of product standards; (c) the exchange of credit information; (d) the definition of terminology used in a trade, industry or profession; (e) cooperation in research and development;

84. Certain amendments to the Competition Act recently received royal assent including amendments introducing a dual-track approach to agreements between competitors, with a limited criminal anti-cartel provision and a civil provision to address other agreements that substantially lessen or prevent competition. The provision under s.45 regarding circumstantial evidence will remain in place.[35]

Europe

85. The European Union and United Kingdom equivalents of s.45 of the TPA are Article 81(1) of the Commission of the European Communities Treaty and the Chapter I Prohibition of the Competition Act 1998 respectively. The wording of the Chapter I Prohibition is identical to that of Article 81 save that the effect on trade must be on trade within the United Kingdom or any part of it. The European Union approach to and case law is applied by the United Kingdom when considering potential infringements of the Chapter I Prohibition.

86. Article 81 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may effect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market".

87. The word “agreements” in Article 81(1) has been interpreted by the EU Courts to have a wide meaning and covers agreements whether or not they are legally enforceable. It covers so-called "gentlemen's agreements" as the expression of a moral obligation. Agreements can be oral or written or may be inferred from the circumstances, e.g. a continuing business relationship between the parties.

88. The effect of EU case law relating to the interpretation of the word “agreements” was summarised by the Court of First Instance in the *Adalat* case (Case T-41/96 *Bayer -v-* Commission [2000] ECR 11-3383, [2001] 4CMLR 126, [2001] All ER (EC)1) as follows:

> The concept of an “agreement” within the meaning of Article 81(1)...centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.

89. The concurrence of wills test was applied in cases T-44/02 *Dresdner Bank -v- Commission* [2006] ECRU 11-3567, [2007] 4 CMLR 467 and case T-368/00 *General Motors Nederland and Opel Nederland -v- Commission* [2003] ECR 11-4491.

90. The concept of "decision" in Article 81(1) includes the rules or governing regulations of an association, codes of conduct, decisions and recommendations and anything else which seeks to coordinate the conduct of its members. Even if an act of the association is not binding on members it may be a decision if members in fact comply with it.

91. The European Court of Justice explained the concept of a “concerted practice” in Article 81(1) in *ICI -v- Commission (Dyestuffs)* [1972] ECR 619 as covering (our emphasis): "...a form of coordination between undertakings which, without having

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(f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media; (g) the sizes or shapes of the containers in which an article is packaged; (h) the adoption of the metric system of weights and measures; or (i) measures to protect the environment.
Exception
(4) Subsection (3) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following: (a) prices, (b) quantity or quality of production, (c) markets or customers, or (d) channels or methods of distribution; or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

[35] Bill C-10, *Budget Implementation Act, 2009*.

reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for risks of competition".

Japan

92. In Japan, indirect or circumstantial evidence is sufficient to prove that there has been a communication of intentions among the participating firms.[36]

93. Article 3 of the Antimonopoly Act prohibits an entrepreneur from effecting unreasonable restraint of trade. Article 2, paragraph 6, of the Antimonopoly Act provides that the unreasonable restraint of trade means such business activities, by which any entrepreneur, by contract, agreement *or any other means irrespective of its name*, in concert with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

94. *Yuasa Mokuzai et al. v. FTC*[37] established the rule that evidence which shows that there has been a communication of intentions among firms is sufficient to prove the existence of an undue restraint of trade: "evidence showing the parties' concurrence of an agreement of wills is not necessary." In *Toshiba Chemical v. FTC*[38] the Tokyo High Court held that in proving the existence of a communication of intentions, *while it is not sufficient for a firm to recognise and accept other firms' price increases, it is sufficient if it is proved that firms mutually recognise each others' price increase and tacitly accept it*.[39]

Korea

95. Article 19(5) of the Monopoly Regulation and Fair Trade Law of Korea, allows the Korean Fair Trade Commission to investigate and impose liability on respondents for cartel activities based on a legal 'presumption' of collaborative behaviour (our emphasis):

> …when two or more companies engage in any of the collaborative activities prohibited under the FTL, this provision allows the KFTC to presume that a cartel exists even though there is no direct evidence of an agreement by the accused parties. This is to alleviate the burden of the government to prove the existence of an agreement which in practice is difficult to prove. In establishing support for a presumption of a cartel, the KFTC may look for certain 'plus factors', such as communications between company employees or parallel pricing activities that are contrary to the interests of the companies involved. If the cartel is presumed under article 19(5), then the parties must prove that there was in fact no agreement among the parties and the seeming-cartel incident in the market is a mere result of parallel activities.[40]

South Africa

96. In South Africa, Chapter 2 of the Competition Act (1998) prohibits certain anti-competitive conduct if two or more firms engage in the conduct as a concerted practice, or pursuant to an agreement between them. The recent amendments to the complex monopoly provisions of the Act insert the definition of 'conscious parallel' conduct: "Conscious parallel conduct occurs when two or more firms, in a concentrated market, being aware of each other's actions conduct their business affairs in a co-operative

36 Kitagawa, Zentaro, 'Doing Business in Japan' (Matthew Bender & Co., Inc. Rel.30-10/00 Pub.368) § 3.04 Proof of Undue Restraints of Trade
37 Fair Trade Commission, 1 Shinketsushu 62, August 30, 1949
38 Tokyo High Court, Fair Trade Commission, 42 Shinketsushu 393, September 25, 1995
39 Kitagawa, Zentaro, 'Doing Business in Japan' (Matthew Bender & Co., Inc. Rel.30-10/00 Pub.368) § 3.04 Proof of Undue Restraints of Trade
40 Luke Shin, Chang Sik Hwang, Patrick Monaghan, The Asia Pacific Antitrust Review 2008, Section 3: Country Chapters, Korea: Cartels

manner without discussion or agreement." The Department of Trade and Industry's Director of Consumer and Competition Law and Policy, Nomfundo Maseti, said conscious parallel conduct "is an act of price fixing between competitors but without actual discussion or agreement, and could have the same outcome as hardcore cartels" and "the purpose of the complex monopoly provisions is to deal with multi-firm behaviour or co-ordinated conduct that may evade the current horizontal and vertical restrictive practices, as well as abuse dominance provisions of the Competition Act."

New Zealand

97. The equivalent New Zealand provision is s. 27 of the *Commerce Act* 1986 which prohibits contracts, arrangements or understandings if they have the purpose, effect or likely effect of substantially lessening competition in any market.

98. While it has been held that parallel pricing of itself will not provide sufficient grounds for a Court to infer the existence of an arrangement or understanding,[41] it has also been held that an arrangement or understanding may be proved by circumstantial evidence such as parallel pricing, and that a Court should hesitate to strike out a statement of claim even when the allegations are scant and it is difficult to see how admissible evidence will be led to support them. [42]

99. In *New Zealand Commerce Commission v Caltex NZ Ltd*[43] the plaintiff relied on inferences to be drawn from facts to establish the existence of an arrangement or understanding. Salmon J considered the appropriate standard to adopt in relation to inferences was that formulated by Isaacs J in *R v Associated Northern Collieries*[44]:

> 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 facts is attributable to the person whose acts they are, and to him alone , there may be such a concurrence of a 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 manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.

100. His Honour noted that the reference to facts which are such as "naturally to lead to the inference" was an approach which commended itself to all parties. Otherwise, his Honour was content to approach the matter in the manner suggested by Beaumont J in *TPC v The Healing Centre Pty Ltd* (1985) ATPR 40-516 (FCA) that in reaching conclusions and drawing inferences the Court should be mindful of the seriousness of the allegations having regard to the penalties involved.

101. Salmon J found in favour of the Commerce Commission, relying on a range of the following facts and circumstances to infer an understanding (at p 324):

    (i) The fact that all three promotions ceased on 30 May 1996.
    (ii) The fact that each of the three oil companies gave the direction to cease the promotion within a few days of each other at the end of May.
    (iii) The fact that the opportunity existed to discuss the cessation of the free car wash promotion at PULP (Premium Unleaded Petrol) industry committee meetings, or, indeed discussions between committee members relating to PULP issues outside these meetings.

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[41] *Re NZ Master Grocers' Federation* [1961] NZLR 177, at p 181

[42] *New Zealand Commerce Commission v Qantas Airways Ltd (No 2)* (1992) 4 TCLR 444; 5 PRNZ 227, at p 448; pp 230-231

[43] (1999) 9 TCLR 305, summarized in Gault on Commercial Law.

[44] (1911) 14 CLR 387 (HCA), at p 400

(iv) The fact that each of the oil companies had an incentive to cease a loss making promotion.
(v) There was at least some disincentive to move unilaterally, evidenced by Caltex losing sales following its earlier unilateral decision to terminate its free car wash offer.
(vi) The fact that the offer was no longer achieving any competitive advantage.
(vii) The Judge's conclusion that representatives of each of the oil companies made relevant untruthful statements to the commission.
(viii) The content of the Caltex email and a Caltex executive's evidence of knowledge that Shell's management were willing to charge for car washes.
(ix) The admissions from Mobil that there had been several discussions at PULP meetings with representatives of Caltex and Shell regarding the removal of car wash promotions.
(x) The signaling by a Caltex representative of the company's intention to withdraw its free car washes including conversations to this effect with a Shell representative.

Brazil

102. In 1999 the Brazilian Competition Tribunal (CADE) passed Resolution 20 which provides directives for the judgment of anticompetitive conduct. The resolution specifically provides for the use of circumstantial evidence:[45]

> [T]he adequate fact finding of the process requires that the records gather enough evidence of the conduct in analysis, which do not have to be limited to documentary evidence, and can include circumstantial evidence such as the lack of economic rationality to explain the conduct other than the infringement of the law.

103. It is apparent from the first successful cartel prosecution in Brazil[46] that great significance was attached to communications among competitors regarding price:

> The fact to be highlighted is that competitors contacted each other to discuss prices, before the price increase took place, and it does not matter how or where.

104. The Judge highlighted that the conduct for conscious parallelism without rational economic explanation could be used to condemn a cartel:[47]

> In this case, there is the following situation: the only three firms that produce common steel sheet in the national market, after more than a year without an alteration in the price of the product, decide to increase the prices in similar levels in close dates. In the time of the conduct, there was no determinant cause for the continuity of the exercise of the economic activity developed by the firms that kept them from maintaining the prices that were being practiced by them for a longer time, such as the increase of productive inputs or the costs of production.

105. The plus factors identified in this case have been described as follows:[48]

> This case was decided under the parallelism plus theory. So, the plus factors found as sufficient to conclude that there was a collusion were: a) the fact that the first company to raise the price was the company with the lowest market share; b) there wasn't an increase in costs that could explain the joint raise of prices; c) the companies used the same way at almost the same time to communicate the price raising; d) the joint meeting at SEAE… Concerning this aspect, the following understanding was adopted: if the companies asked for

45 Paulo Correa and Frederico de Aguiar, Circumstantial Evidence and Plus Factors in Cartel Cases, www.seae.fazenda.gov.br
46 Administrative Procedure nº 08012.002299/2000-18
47 Roberto Augusto Castellanos Pfeiffer, 'Recent Aspects of Hard-core Cartel Prosecution in Brazil', Submitted to Third Meeting of OECD Latin American Competition Forum, 19-20 July, 2005, page 4
48 Roberto Augusto Castellanos Pfeiffer, 'Recent Aspects of Hard-core Cartel Prosecution in Brazil', Submitted to Third Meeting of OECD Latin American Competition Forum, 19-20 July, 2005, page 3

a joint meeting to communicate the price raising, they must have to know that each one will raise their prices. So, this fact was an evidence of the collusion.

F. AMENDMENT

106. As McHugh J said in *Visy Paper Pty Ltd v ACCC* [2003] HCA 59; 201 ALR 414:

> Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong. Frequently, there is simply no "right" answer to a question of construction.

107. It is important that a line can be drawn between collusive and non-collusive conduct. The issue becomes where, and how, to draw it.

108. The ACCC has made it clear that parallel pricing is not price fixing,[49] and even "conscious parallelism" of itself is generally regarded as lawful.[50] Competition law "does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors".[51]

109. Authorities establish that a unilateral communication by one supplier to another of the price it will charge with nothing more than a 'mere hope' that the second supplier might change its price an 'understanding'.[52] Obviously if a party telephones its competitor and says "we are going to charge $x", and there is no response and nothing happens, there is no arrangement.

110. It is the grey area between the two, involving for example the conduct set out in the ACCC Hypothetical, which must be capable of being caught by the TPA whether or not a commitment has been established.

The 'Proposed Amendment' – Factual Matters

111. The Proposed Amendment is as follows:

> The ACCC recommends that consideration be given to an amendment to provide for the following:
>
> (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

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49 See, eg, Petrol Report, 228

50 Organisation for Economic Cooperation and Development, 'Global Forum on Competition, Roundtable on Prosecuting Cartels Without Direct Evidence of Agreement', Background Note by the Secretariat, DAF/COMP/GF(2006)3. See [36] "'Conscious Parallelism' involving nothing more than identical pricing or other parallel behaviour deriving from independent observation and reaction by rivals in the marketplace, is not unlawful."

51 Ivo Van Bael & Jean-François Bellis, *Competition Law of the European Community* (2005), at 55, quoting from Case 48/69, ICI v. Commission, [1972] ECR 619, para. 118, cited ibid.

52 *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53 at 56

(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.

112. We submit that the Proposed Amendment should be adopted. We have already set out in our submissions the reasons why we consider part (a) of the Proposed Amendment ought to be adopted. We turn now to consider more specifically the factual matters set out in part (b) (**Factual Matters**).

113. Regarding inclusion of the Factual Matters generally, we note that his approach reflects the US practice of referring to 'plus factors', and we endorse this approach. Inclusion of plus-factors is important because they provide a clear yet flexible means for delineating collusive and non-collusive conduct:[53]

> Plus factors are evidence that the parties have gone through a process of negotiation and exchange of assurances in addition to, or as the reason for, their parallel price behaviour. They support a conclusion based on the totality of the circumstantial evidence that the parties have done more than merely watch each other's market behaviour and respond to it independently, as leaders and followers.
>
> This judicial methodology carries with it an important point: the legal idea of "agreement" does not describe a result or equilibrium, but one particular process of reaching supracompetitive marketplace outcomes – what may be termed the "forbidden process" of negotiation and exchange of assurances. The forbidden process consists of behaviour that can be enjoined. Thus, if the oligopoly reaches a high price equilibrium through the forbidden process that the law calls an agreement, Sherman Act Section 1 has been violated. If the same result were reached through leader-follower behaviour, no agreement on price will be found.

114. We suggest however that other factors be considered for inclusion in the Factual Matters, for example:

a) Whether firm behaviour is more complex than would be plausible if outcomes had been reached without collusion;[54]

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53 Jonathan Baker, 'Identifying Horizontal Price Fixing in the Electronic Marketplace' (1996) 65 *Antitrust Law Journal*, 41, 48.

54 Baker, above n 53, 50.

Three economic indicators could help courts infer that firms have selected a coordinated equilibrium, by engaging in the forbidden process of negotiation and exchange of assurances. First, firm behaviour might be more complex that would be plausible if the outcomes had been reached absence the forbidden process, as though mere leader-follower behaviour. . . .Second, the inference of the agreement would be strengthened if the explanations offered by the parties about their putative legitimate business purposes are weak or even pretextual. The most

b) Whether explanations offered by the parties are weak or pretextual;[55]

c) Whether there is an element of intention or likelihood to effect prices;[56]

d) Whether the party has benefited from the information; and

e) Whether parties have engaged in "action against self-interest", that is, actions that were against the self interest of the parties to take unless they were acting collectively[57].

115. We consider that clear articulation of the Factual Matters in s.45 TPA will assist to avoid the confusion that exists in the US regarding identification of relevant plus factors (refer paragraph 80 above).

116. We identify two difficulties with the adoption of the Factual Matters, to which consideration ought to be given. The first is that as presently framed, the Proposed Amendment simply sets out matters which the court *may* consider, but does not provide any guidance as to *how* the Factual Matters should be considered, for example the relative weight to be given to particular matters. Secondly, the Proposed Amendment does not positively define what is meant by an 'understanding', only how one might be identified. We suggest that an amendment of s.45 to clarify the meaning of 'understanding' might usefully include a clear statement of the conduct intended to be caught by the term.

Other Suggestions

117. The difficulties identified in the preceding paragraph might be overcome by equating 'understanding' with the notion of 'concerted practices' used in the EU (refer paragraph 91 above). It seems likely that this approach would catch conduct such as that in the petrol cases and the ACCC hypothetical.

118. Another approach might be to shift the onus of proof from the regulator or plaintiff to the defendant once certain threshold requirements are established. The threshold requirement might be, for example, that the regulator or private litigant establishes on the balance of probabilities, by reference to specified plus-factors, a *prima facie* case regarding contravention. Once a *prima facie* case is established, the onus would shift to the defendant to show that pricing was arrived at independently and legally.

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common efficiency justification for posting prices – to tell prospective customers what a firm charges – is very persuasive. For this reason mere price advertising to buyers does not raise antitrust concerns, even if rivals also pay attention or the prices are posted in the electronic marketplaces. But other justifications may be less convincing or less related to a legitimate purpose. Third, the inference of agreement would be strengthened if the rivals had an opportunity to communicate, and strengthened even more if their conduct includes overt communications spurring immediate responses even if those communications constitute "cheap talk".

[55] Ibid

[56] In *Radio2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1983) 48 ALR 361 at 363 a Full Court upheld the decision of Justice Lockhart and observed that "price fixing" requires an element of intention or likelihood to effect prices.

[57] OECD, above n 2, 5.