



17th March 2009

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

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Dear Mr Rogers

The Motor Trades Association of Queensland (MTA-Queensland) responds to the "*Discussion Paper – Meaning of 'understanding' in the Trade Practices Act 1974*" (TPA) requesting views on whether the current interpretation of "understanding" limits the ability of the TPA to properly address anticompetitive conduct, as well as what inferences a court may draw from the evidence before it when considering the existence of an "understanding." The MTA-Queensland has formed a view on this issue and our submission is attached.

We would be pleased to provide further comment on any matters in our submission that may require clarification.

Yours sincerely

Richard Payne
Principal Policy Director

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Summary

MTA-Queensland is the peak organisation in the State representing the specific interests of 2,500 businesses in the retail, repair and service sector of the Australian's automotive industry. It is an industrial association of employers incorporated pursuant to the Industrial Relations Act of Queensland.

The Association represents and promotes the issues of the automotive industries to all levels of government and within Queensland's economic structure. MTA-Queensland comprises 14 separate divisions, each representative of a specialist area of the State's automotive industry.

Ultimately the "meaning of *understanding* in the *Trade Practices Act 1974*" (TPA) has a direct relevancy to a majority of the MTA-Queensland membership. The Independent fuel retailing sector however, has experienced the direct consequences of anti-competitive behaviour based on *understandings* and is therefore used as the empirical framework for this submission.

MTA-Queensland strongly supports a statutory definition of *understanding* or *understandings* as applies in the TPA.

The competency of the current legislation to provide the intended outcomes in protecting consumer interests, facilitating competition and encouraging appropriate business behaviour is not being achieved under the current legislative provisions. The behaviour of businesses that use economic and financial measures to limit competition to the detriment of consumers is predicated in large part on limited interpretations of the term *understanding* or *understandings*.

It is MTA – Queensland's belief that in the case of the fuel retail industry, a statutory definition of the term *understanding* in the TPA **has the potential to make a significant difference** to the competitive behaviour of the major oil companies enabling a real improvement in the levels of competition in the fuel market benefiting the final consumer by allowing independent fuel retailers to restore competition to metropolitan and regional markets.

MTA-Queensland supports a statutory definition of *understanding* that encompasses both explicit and implicit understandings within the meaning of term. We consider that the effective operation of the TPA across a number of markets where the real level of competition is being compromised by explicit and implicit *understandings* is not possible without the courts having this important vocabulary defined for the purposes of interpreting the Act.

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MTA-Queensland Submission

“Meaning of ‘Understanding’ in the Trade Practices Act 1974”

1. Introduction

- 1.1 The Motor Trades Association of Queensland (MTA-Queensland) responds to The Treasury Competition and Consumer Policy Division’s Discussion Paper “*Meaning of ‘Understanding’ in the Trade Practices Act 1974*”.
- 1.2 We note the proposed key changes for retailers from whom comment is sought. Our responses reflect our membership who constitute a significant link in the automotive value chain and are enunciated below.
- 1.3 It has been the long-held view of MTA-Queensland that the absence of a relevant interpretation of the term *understanding* (understandings) is deficient in the *Trade Practices Act 1974* (TPA).
- 1.4 We have been active participants in the debate on fuel prices and the behaviour of parties in the industry - by way of a submission to the Australian Consumer and Competition’s (ACCC) *Inquiry into Price of Unleaded Petrol* and appearance before Hearings before the Commissioner on the same matter and a submission to the Federal Department of Resources, Energy and Tourism (*Industry Codes – Oilcode*) *Regulations 2006 Review*.
- 1.5 MTA-Queensland strongly supports the Federal Government’s enquiry into this matter and should it decide to release a draft definition of the term *understanding* pursuant to the TPA we would provide comment to assist any determination.

2. Motor Trades Association Queensland Background

- 2.1 MTA-Queensland is the peak organisation in the State representing the specific interests of 2,500 businesses in the retail, repair and service sector of the Australia’s automotive industry. It is an industrial association of employers incorporated pursuant to the Industrial Relations Act of Queensland.
- 2.2 The Association represents and promotes the issues of the automotive industries to all levels of government and within Queensland’s economic structure.
- 2.3 MTA-Queensland comprises 14 separate divisions, each representative of a specialist area of the State’s automotive industry. They are:
 - Australian Automotive Dealers’ Association of Queensland;
 - Queensland Farm and Industrial Machinery Dealers’ Division;
 - Auto Electrical Specialists’ Division;
 - Queensland Motorcycle Industry Division;
 - Automotive Engineers’ Division;
 - Queensland Tyre Dealers’ & Re-treaders’ Division;
 - Engine Re-conditioners’ Association of Queensland;
 - Rental Vehicle Industry Division;
 - Independent Tow Truck Operators;

- Service Station & Convenience Store Association of Queensland;
- National Auto Collision Alliance;
- Used Car Division;
- Automotive Under Car Division; and
- Auto Parts Recyclers' Association of Queensland.

2.4 The Association is the leading automotive training organisation in Queensland offering nationally recognised training, covering all aspects of the retail motor trades industry.

2.4.1 The Association's Motor Industry Training entity is the largest automotive apprentice trainer in Queensland and has trainers positioned in Papua New Guinea and Fiji to increase knowledge and skills base of the automotive industry and career opportunities in these countries.

2.5 In Queensland, the automotive trade's value chain generates in excess of an estimated \$16 billion annually, directly employing more than 60,000 people contributing significantly to both Queensland's and the nation's economy.

3. **MTA-Queensland's Perspective**

3.1 Our comments are confined to issues that have direct relevance to our service station sector membership comprising approximately 400 operators.

3.2 Our Service-Station Division Members comprise:

- Independent operators selling refiner/marketer branded petrol;
- Franchisee / distributor owned sites selling refiner/marketer branded petrol; (Franchisees do not control the pump price but are centrally set by the oil companies. Franchisees operate on modest margins.)
- Independent chains (such as 7-Eleven and Neumann Petroleum); and
- Small Independent operators selling their private branded petroleum products.

3.3 MTA-Queensland strongly supports a statutory definition of *understanding* or *understandings* as applies in the *Trade Practices Act*¹ (TPA).

3.4 The competency of the current legislation to provide the intended outcomes in protecting consumer interests, facilitating competition and encouraging appropriate business behaviour is compromised under the current legislative provisions.

3.4.1 The behaviour of businesses that use economic and financial measures to limit competition to the detriment of consumers is predicated in large part on limited interpretations of the term *understanding* or *understandings*.

¹Section 45(3) states:

(3) For the purposes of this section and section 45A, *competition*, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

- 3.4.2 The MTA-Queensland in its previous submission to and in Hearings before the ACCC has explained that where small or independent business (such as independent service stations) have to source fuel stock from large oligopoly suppliers they are in fact “consumers” and are exposed to the threat of anti competitive consumer behaviour.
- 3.4.3 In cases brought before the courts, behaviour is defended - not on the basis of its ultimate outcome - but on semantics relating to the meaning of understanding/s. Semantics should not be the basis on which the TPA operates to determine behaviour.
- 3.5 It is MTA-Queensland’s conviction that in the case of the fuel retail industry, a statutory definition of the term *understanding* in the TPA **has the potential to make a significant difference** to the competitive behaviour of the major oil companies enabling a real improvement in the levels of competition in the fuel market benefiting the final consumer by allowing independent full retailers to restore competition to metropolitan and regional markets.

4. Discussion

- 4.1 The MTA-Queensland suggests that any statutory definition of the term *understanding* or understandings must have the competence to deal with **explicit and implicit** understandings.
- 4.1.1 There are empirical examples where a prima facie case² of anti-competitive behaviour has been established on the basis of both explicit and implicit understandings operated by oligopolies who have the market and financial power to competitively disadvantage franchisee and independent fuel retailers in adjacent market areas, subsuming their market share and then adjusting price to oligopolistic levels to the detriment of consumers.
- 4.2 In order for the TPA Act to function in terms of the spirit of the legislation and in a way the legislators intended, and in a manner the ACCC (clearly) is desirous for it to apply there is a requirement for the term *understanding* (and understandings) to be defined in a comprehensive and unambiguous way. The definition of itself would constitute a guide, having the potential to deter anti-competitive and market distorting behaviour.
- 4.2.1 Should perpetrators persist with primary anti-competitive activity, the consumer interest and the interest of smaller participants in highly organised markets would be assisted by a real opportunity to obtain redress in the courts - on a level playing field either directly or by the ACCC acting without a direct complainant.
- 4.3 Where behaviour is implicit and there is a claim that the understanding is circumstantial, the definition should go further to enable Courts or the ACCC to provide relief. This particularly applies in the petroleum industry where there are different terminal gate

² Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd [2007] and Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (2004)

prices and in some cases an independent operator faces a wholesale price which is higher than the retail price of his oligopolistic competitors. These prices are discounted by *understandings* such as non specific (implicit) regional promotion or marketing subsidies.

- 4.4 We made a submission to the Federal Department of Resources, Energy and Tourism Trade Practices (Industry Codes – Oilcode) Regulations 2006 Review. This was an important issue for our Service Station members. Key recommendations included: “That changes should be made to eliminate hidden discounts to the Terminal Gate Price (TGP); Franchisees, Independents, Commission Agents should know the base TGP and the volume level at which premiums cut in to assist in making fuel purchasing decisions or other business arrangements; and that the Franchise Code be amended to require the inclusion of termination arrangements.”
- 4.5 MTA-Queensland submits that in the case of the petroleum TGP, the TPG is in fact the “understanding” particularly where they are applied retrospectively to reimburse income foregone in under-pricing competitors. It is the contract and any hidden or retrospective discounts that are the implicit “understanding”.
 - 4.5.1 The TGP and the use of support mechanisms such as advertising and promotional rebates is an “understanding”. Independents are denied access to source information and technology in oligopolistic markets and subject to differential discriminatory pricing because of “understandings”.
- 4.6 In the fuel retailing sector, the role of Independent fuel retailers to protect the interests of consumer has been diminished because there are pricing policy “understandings” by the oligopolies which cause injury to the Independents.
- 4.7 The “understanding” does not have to be explicit, it does not have to be written, and it can be implicit. This behaviour as stated above is transmitted through Terminal Gate Pricing “understanding” to the local discount “understandings”.
- 4.8 Probably the most blatant understanding is the instance of an Independent in the general area of two Major Oil retailers which discount sequentially or simultaneously until the Independent has lost market share and ceases to trade.
 - 4.8.1 In this example, discounting is discontinued on the cessation of the Independent’s operations and the consumer is the loser. There was never a formal “understanding” between the oil Majors to drive the Independents out but they implicitly acted on the “understanding” that they would mutually benefit.
- 4.9 If in such an instance, redress is sought in the courts, the action brought under the TPA has not been defended by arguing the behaviour of the supplier rather the defence has been the meaning of the term *understanding*.
 - 4.9.1 In any such prosecutions, the defence should not be able to construct a case on semantics. This option should be limited by a statutory definition of *understanding* either explicit or implicit and the case should be judged on the behaviour of the defendant in terms of the TPA.
 - 4.9.2 Courts should have the power to make orders in circumstances where the agents, representatives or subsidiaries operating in a market on behalf of their

oligopolistic parent has an *understanding* in relation to a price advantage over an Independent who is made uncompetitive by this “understanding” and whose demise will ultimately diminish the consumer’s position.

5. Conclusion

- 5.1 MTA-Queensland supports a statutory definition of *understanding* that encompasses both explicit and implicit “understandings” within the meaning of term. We consider that the effective operation of the TPA across a number of markets where the real level of competition is being compromised by explicit and implicit “understandings” is not possible without the courts having this important vocabulary definition for the purposes of interpreting the Act.

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