

SUBMISSION

Meaning of 'understanding' in the *Trade Practices Act 1974*

7 April 2009

Caron Beaton-Wells
Associate Professor
Melbourne Law School
The University of Melbourne
c.beaton-wells@unimelb.edu.au

Brent Fisse
Brent Fisse Lawyers
70 Paddington St
Paddington
NSW 2021
brentfisse@ozemail.com.au

1. Purpose and summary of this submission

The purpose of this submission is to respond generally to the Discussion Paper released by Treasury in which submissions are sought on the meaning and proof of ‘understanding’ in the *Trade Practices Act 1974* (‘TPA’) and, in particular, to the amendments that have been proposed by the Australian Competition and Consumer Commission (‘ACCC’) in its petrol pricing report.

The main points made in this submission are as follows:

- The case law has failed to provide a clear conceptual definition of the conduct that should be caught by the requirement of a ‘contract, arrangement or understanding’ under s 45 of the TPA. See section 2.
- Economic theory provides guidance on where the line should be drawn conceptually between legal and illegal coordination between competitors. See section 3.
- In determining how to interpret ‘understanding’ under the TPA consideration should be given to the approach taken under US and EC law and in particular to the concept of ‘concerted practice’ under EC law. See section 4.
- The ACCC’s proposed amendments are problematic for the reasons that:
 - they fail to provide a clear conceptual definition of the conduct that is or should constitute an ‘understanding’ (see section 5.1);
 - the proposed factual matters from which an ‘understanding’ may be inferred are limited in scope and ambiguous in meaning and significance (see section 5.2).

Each of these points is set out in detail below. Recommendations are made in section 6.

2. The case law on ‘contract, arrangement or understanding’

The concepts ‘contract’, ‘arrangement’ and ‘understanding’ have been interpreted in the case law as reflecting a ‘spectrum’ of dealings.¹ Thus, the concepts are seen as being related and overlapping, while at the same time falling within a range or sequence.² Further, as would be expected, the series is treated as descending, with ‘contract’ at the one end and ‘understanding’ at the other, and ‘arrangement’ at some point in between.³

This notion of a ‘spectrum’ implies an approach of interpreting each of the concepts in the range by reference to and distinction from the other concepts. Thus, the term ‘contract’ imports the traditional common law understanding of that concept as exhibiting a high degree of formality, with features such as an offer by one party, supported by consideration, and accepted by another, with sufficient certainty of terms to make what has been agreed to ascertainable.⁴ An ‘arrangement’ then is said to be a dealing ‘lacking some of the essential elements that would otherwise make it a contract’⁵ and an ‘understanding’ is said ‘to connote a less precise dealing than either a contract or arrangement.’⁶

This literalist approach to interpretation takes as its starting point the traditional paradigm for lawful business transactions but diverts attention from a more fundamental inquiry as to the proper scope of liability for cooperation between competitors in antitrust law.⁷

¹ *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 331 [24].

² The *Oxford English Dictionary* defines ‘spectrum’ as ‘[t]he entire range or extent of something, arranged by degree, quality, etc.’: see JA Simpson and ESC Weiner, *The Oxford English Dictionary*, 2nd edn, Clarendon Press, Oxford, 1989, vol. XVI, p. 170.

³ At least this appears to be the contemporary view. Cf Tonking’s description of the view taken in the early years that: ‘The term “arrangement” seemed sufficiently descriptive of an informal species of collusion to make it unnecessary to consider whether there were elements which an arrangement required which an understanding might lack.’ See I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 55.

⁴ A distinction between an unlawful cartel ‘contract’ and a lawful common law contract, however, is that the latter is accompanied by an intention by the parties to be legally bound whereas the former necessarily lacks such an element so as to negate the defence of illegality: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 331 [25].

⁵ *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 331 [26].

⁶ *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 332 [27].

⁷ Indeed, if analogies from contract are to be drawn on, greater inspiration might be derived from more modern relational contract theory which recognises a ‘continuum of commitment which is weak at the beginning and stronger as the process of negotiation develops’: RL Smith, A Duke and DK Round, ‘Signalling, Collusion and section 45 of the TPA’, *Competition & Consumer Law*

Further, while ‘contract’ has a distinctive meaning, the concepts of ‘arrangement’ and ‘understanding’ have not been distinguished clearly from each other and nor has either been given much operational content, other than by deduction from the requirements of a ‘contract’.⁸

For both concepts, the current law requires that the following criteria be met: (1) communication; (2) consent; (3) consensus; and (4) commitment. The first three of these requirements have been largely uncontroversial. The controversy surrounding the requirement of commitment has arisen only recently, and in large part, as a consequence of the outcomes in the *Apco* and *Leahy* cases.⁹

In *Apco* and *Leahy*, it was held that commitment by a party to a particular course of action or inaction is necessary to establish an ‘understanding’ within the meaning of section 45(2); whereas an expectation, and even less a hope, that the party will act or not act will fall short of an ‘understanding.’¹⁰ In both instances, the ACCC’s case failed because the Commission failed to prove the requisite commitment. Concerned about the implications of these cases for its ability to prove anti-competitive collusion,¹¹ the Commission, in its subsequent report into petrol pricing, recommended amendments said to be intended, amongst other things, to provide statutory clarification that an ‘understanding’ may exist

Journal, 2009 (forthcoming), citing N C Seddon and F Ellinghaus, *Cheshire & Fifoot’s Law of Contract*, 9th edn, LexisNexis Butterworths, Chatswood, NSW, 2007, pp. 93–4.

⁸ As Tonking observes, one of the problems with advocating a wider meaning for the concept of ‘understanding’ is that ‘courts have tended to approach it from the contract end of the CAU spectrum’: see I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 59 (and also his observations at p. 67 regarding the problems with the drafting technique of having a series of words with similar shades of meaning).

⁹ *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321.

¹⁰ *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, 464 [47]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 335 [37].

¹¹ See ‘Price fixers face tough new laws’, *Australian Financial Review*, 8 January 2009, p. 4. But in truth the ACCC’s record in proving collusion in the petrol industry has always been patchy. Petrol cases that the Commission has lost include *Trade Practices Commission v Leslievale* (1986) ATPR ¶40-679; *Trade Practices Commission v J J & Y K Russell Pty Ltd* (1991) ATPR ¶41-132; *TPC v Services Station Association Ltd* (1992) ATPR ¶41-179; *Australian Competition and Consumer Commission v Mobil Oil* (1997) ATPR ¶41-568.

‘notwithstanding that the party in question cannot be shown to be committed to giving effect to it.’¹² These proposals were based on an opinion by Julian Burnside QC.¹³

The petrol pricing report contends that there has been a ‘subtle but significant shift’ in the law away from the previous case law under which it was not necessary to show that a party had committed to an action but rather simply that a party had engendered, either consciously or intentionally, an expectation in another party that the first party would so act.¹⁴ The proposed amendments are said to restore the law to the state that Parliament originally intended – presumably through the combination of providing in proposed (a)(ii) that a court may find an understanding to have been arrived at notwithstanding that the parties are not committed to giving effect to it and in proposed (b)(ii) that one of the factual matters that a court can consider in so determining is ‘the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way’.

The ACCC’s assertions that there has been a shift in the law and that the proposed amendments would reflect the Parliament’s original intention do not appear to be well-founded.¹⁵ Both contentions are undermined by the High Court’s denial of special leave to appeal from the Full Court’s decision in *Apco*¹⁶ and the ACCC’s decision not to appeal against Gray J’s decision in *Leahy*.¹⁷ These developments may be regarded as

¹² Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol*, December 2007, pp. 228–9, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>, last viewed 11 March 2009.

¹³ J Burnside, *ACCC Report, Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol, Appendix R*, December 2007, pp. 368–74, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=16fed9965960216fd7066496dacfbddc&fn=Appendix%20R.pdf>, last viewed 11 March 2009.

¹⁴ Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol*, December 2007, p. 228–9 at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>, last viewed 11 March 2009.

¹⁵ See I Wylie, ‘Understanding “understandings” under the Trade Practices Act – an enforcement abyss?’, *Trade Practices Law Journal*, vol. 16, 2008, p. 35; I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, pp. 63–4.

¹⁶ Australian Competition and Consumer Commission v Apco Service Stations Pty Ltd [2006] HCATrans 272 (2 June 2006), at <http://www.austlii.edu.au/au/other/HCATrans/2006/272.html>, last viewed 23 March 2009.

¹⁷ Australian Competition and Consumer Commission, ‘No appeal against Geelong petrol decision’, Press Release, 19 June 2007, at

confirmation that these cases turned on their particular facts rather than on adoption of a more restrictive interpretation of the law than had previously been accepted. Treasury's Discussion Paper acknowledges that 'courts have always required... [that there be] some form of commitment by the parties to the alleged understanding' but claims that '[t]he difficulty arises in determining the nature and content of what is required to satisfy that element of commitment.'¹⁸

The debate about whether there has been a shift in the law with respect to a requirement or the meaning of commitment is largely academic. The law is as currently stated by the Full Court in *Apco*, and as evidently endorsed by the High Court in refusing special leave in that case. Rather, it seems, there are two key questions. The first is whether the law should be relaxed for the purposes of the civil prohibitions, removing the requirement of commitment (in the *Apco/Leahy* sense) in relation to an 'understanding'. This question should be approached, not by asking whether a commitment of some kind should be present, but by exploring conceptually what type of behaviour should constitute an 'understanding', that is, by deciding where on the theoretic spectrum an 'understanding' should lie (see Figure 1 below). The second question is whether the type of behaviour that amounts to an understanding for the purposes of civil liability should also be sufficient as a basis of liability for the cartel offences. The ACCC's proposal for amendment of the TPA answers neither of these questions.

3. Economic theory

In economic theory there is a relatively clear continuum on which horizontal conduct may be demarcated for antitrust purposes.¹⁹ At the one extreme are 'agreements' with the hallmark exchange of assurances about future intentions. At the other extreme is parallel behaviour, sometimes referred to as 'mere' parallelism as a means of emphasising that it is behaviour that cannot be explained by reference to any form of agreement. Mere parallelism, the most commonly observed outcomes of which are uniform or correlated pricing, may be due to external factors affecting cost and demand conditions facing all

<http://www.accc.gov.au/content/index.phtml/itemId/790103/fromItemId/776481>, last viewed 13 March 2009.

¹⁸ Treasury, *Discussion Paper: Meaning of 'understanding' in the Trade Practices Act*, January 2009, p. 2 [13], at http://www.treasury.gov.au/documents/1459/RTF/Discussion_paper.rtf, last viewed 11 March 2009.

¹⁹ The economic literature on this subject is voluminous. For a useful overview of the main theories, and their application in US and EC case law, see S Stroux, *US and EC Oligopoly Control*, Kluwer Law International, 2004, esp. chps 0 and 1.

firms in the market. Thus, while the firms may be acting in parallel, their actions are nevertheless the product of independent or uncoordinated decision-making.²⁰

In the grey area between these two ends, there are two other broad categories of behaviour.²¹ The first, commonly described as ‘conscious parallelism’ or ‘oligopolistic interdependence’, is behaviour generally observed in markets with particular structural features, known as oligopolistic markets.²² Such behaviour gives the appearance of coordination by agreement, but in fact is reflective of the mutual awareness by firms of each other’s activities and their interdependence on each other in making decisions about pricing and output.²³ Most, but not all, economists concede that, although such behaviour has the same anti-competitive effects as agreement, it should not and cannot attract liability given that it is neither culpable (because firms that engage in it are only acting rationally by taking into account each other’s actions) nor regulable (because the courts could only restrain such behaviour by direct price regulation).²⁴ Parallel conduct arising from oligopolistic interdependence is thus seen as a structural issue, as compared with collusive agreement, which is a behavioural issue.²⁵

²⁰ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 61 ¶1410.

²¹ This should not be taken to suggest that the lines between these categories are sharp. See the observations of Areeda and Hovenkamp, describing the ‘no man’s land’ between traditional agreement and tacit coordination in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2nd edn, Aspen Law & Business, New York, 2001, ¶1410.

²² Oligopolistic markets are generally defined by market concentration on the supply side, high entry barriers, inelastic product demand, product uniformity, multiple and smaller buyers, small variations in production costs and readily available price information. For a useful brief summary as to how each of these features engender price uniformity or price leadership, see W Pengilly, ‘What is required to prove a contract, arrangement or understanding?’, *Competition & Consumer Law Journal*, vol. 13, 2006, p. 241, p. 242.

²³ See F Scherer and D Ross, *Industrial Market Structure and Economic Performance*, 3rd edn, Houghton Mifflin, Boston, 1990, p. 199.

²⁴ See further D Turner, ‘The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal’, *Harvard Law Review*, vol. 75, 1962, p. 665, p. 669. With the prominent exception of Posner J (see *High Fructose Corn Syrup Antitrust Litig* 295 F.3d 651, 654 (2002)) or in his academic capacity Professor Posner (see RA Posner, ‘Oligopoly and the Antitrust Laws: A Suggested Approach’, *Stanford Law Review*, vol. 21, 1969, p. 1562; RA Posner, *Antitrust Law: An Economic Perspective*, University of Chicago Press, Chicago, 1976, ch. 4), courts in the US have agreed with this position: see, eg, *Clamp-All Corp v Cast Iron Soil Pipe Institute* 851 F.2d 484 (1988). See also the discussion in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 231–4 ¶1432d3. Cf the modification of Posner’s approach proposed in A Devlin, ‘A proposed solution to the problem of parallel pricing in oligopolistic markets’, *Stanford Law Review*, vol. 59, 2007, 1111.

²⁵ One possible consequence of which is that the former is better dealt with in the context of merger policy and the concern with acquisitions that create market structures conducive to coordinated effects. See Australian Competition and Consumer Commission, *Merger Guidelines*, November

The second category of behaviour in between agreement and independence is commonly referred to as ‘tacit’ collusion,²⁶ or ‘facilitating’ practices.²⁷ This behaviour goes beyond conscious parallelism or interdependence. In essence, it involves an activity, generally the provision or exchange of information in the market place, which makes coordination between competitors easier and more effective - easier because it facilitates communication, and more effective because it facilitates detection of cheating and administration of punishment for deviations.²⁸ Such facilitation assists in overcoming the uncertainty associated with competition or the impediments to oligopolistic interdependence.²⁹ Tacitly collusive or facilitating behaviour increases the likelihood of anti-competitive effects. However, it is recognised that such effects need not ensue - ‘the vice of a facilitating practice is its anti-competitive *tendency* rather than a proved anti-competitive *result* in the particular case.’³⁰ This concern is magnified by the difficulty in preventing or remedying the anti-competitive effects of oligopolistic interdependence as such.

Examples of tacit collusion, facilitating or signalling devices are as infinite as the creativity of commerce. The most commonly cited examples include:

2008, ch. 6, at

<http://www.accc.gov.au/content/item.phtml?itemId=809866&nodeId=7cfe08f3df2fe6090df7b6239c47d063&fn=Merger%20guidelines%202008.pdf>, last viewed 13 March 2009.

- ²⁶ Note there is a tendency in the US case law to use the terms ‘express’ and ‘tacit’ to draw evidential rather than conceptual distinctions, as well as a degree of confusion regarding the significance of labelling an agreement ‘tacit’. See WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, pp. 19-20; WH Page, ‘Tombly and Communication: The Emerging Definition of Concerted Action under the New Pleading Standards’, University of Florida Legal Studies Research Paper No. 2008-01, March 2009, pp. 14–15, at <http://ssrn.com/abstract=1286872>, last viewed 23 March 2009.
- ²⁷ See, eg, KJ Arquit, ‘The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude’, *Antitrust Law Journal*, vol. 61, 1993, p. 531; GA Hay, ‘Facilitating Practices’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, p. 1189; MD Blechman, ‘Conscious Parallelism, Signalling and Facilitating Practices: The Problem of Tacit Collusion under the Antitrust Laws’, *New York Law School Law Review*, vol. 24, 1979, p. 881; I Ayres, ‘How Cartels Punish: A Structural Theory of Self-Enforcing Collusion,’ *Columbia Law Review*, vol. 87, 1987, p. 295.
- ²⁸ The most commonly invoked example is of two petrol stations located on either side of a highway using price boards to signal price changes and facilitate coordination of conduct: see G Hay, *Facilitating Practices: The Ethyl Case (1984)*, in JE Kwoka and LJ White (eds), *The Antitrust Revolution*, 3rd edn, Scott, Foresman, Glenview, Illinois, 1989, p. 183.
- ²⁹ Uncertainty is seen as ‘the most general of the impediments to cartel-like results in oligopoly’: PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 36 ¶1407 (and for a description of the factors most likely to generate uncertainty, and so undermine coordination, in an oligopolistic market, see pp. 209–13 ¶1430 (e.g. wide product variety, lumpy or infrequent orders, secret negotiations, or opportunities for concealed price discrimination)).
- ³⁰ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 30 ¶1407.

- public speech (eg discussion of conditions affecting price in the media);
- private information exchanges (eg competitors sending price lists or manuals to each other);
- advance price announcements (eg announcing a specific price increase in advance of its stated effective date);
- price protection or ‘most favoured customer’ clauses (eg guaranteeing a buyer that it will be charged no more than the supplier’s most favoured customer, or that it will match or better a competitor’s price, or even that the buyer will receive a retroactive reduction if the supplier charges anyone a lower price within, say, six months);
- uniform delivery pricing methods (eg where suppliers each discount their regular f.o.b price plus transport to match a nearer rival’s delivered price);
- basing-point pricing (where each seller charges a delivered price computed as a base price plus a freight charge from a specified location calculated conventionally from published tariffs regardless of the mode of transport actually used or regardless of whether the buyer transports the product themselves);
- product standardisation or benchmarking (eg where competitors publish the technical specifications to manufacture a product to a certain standard).³¹

In the United States it has been observed that tacitly collusive behaviour has increased as enforcers have become more aggressive in their pursuit of cartel activity, sanctions have become more severe and courts have shown their willingness to recognise as an ‘agreement’ conduct that falls outside the traditional realm of written or spoken exchanges.³² Firms have been induced by these developments to devise ‘more subtle and less direct means for communicating intentions and exchanging assurances about future

³¹ See generally PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, ¶1435c-¶1435i; GA Hay, ‘Oligopoly, Shared Monopoly, and Antitrust Law’, *Cornell Law Review*, vol. 67, 1982, p. 439. The economic literature on each of these practices is prolific. For a selection, see RA Winter, ‘Price-Matching and Meeting Competition Guarantees’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 53, p. 1269; AS Edlin, ‘Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?’, *Harvard Law Review*, vol. 111, 1997, p. 528; M Hviid and G Shaffer, ‘Hassle Costs: The Achilles Heel of Price-Matching Guarantees’, *Journal of Economic and Management Strategy*, vol. 8, 1999, p. 489; I Bos and MP Schinkel, ‘Tracing the Base: A Topographic Test for Collusive Basing-Point Pricing’, Amsterdam Centre for Law and Economics Working Paper No. 2008-07, December 2008, at <http://ssrn.com/abstract=1300947>, last viewed 23 March 2009; J Kattan, ‘Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment’ *Antitrust Law Journal* vol. 63, 1994-1995, p. 133.

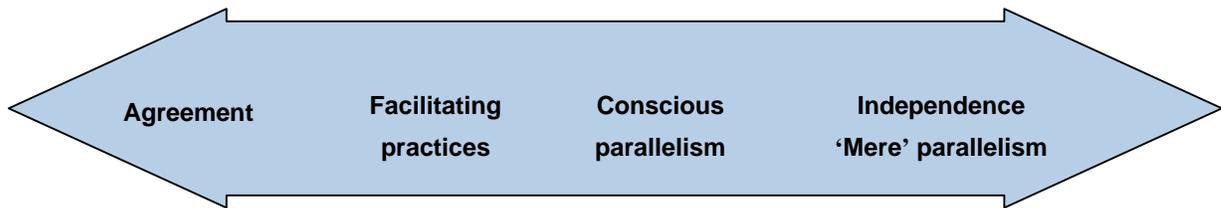
³² WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, pp. 2–13.

behaviour.’³³ There is no reason to think that Australian business is any different in this regard.

Many economists, including George Hay, argue that facilitating or signalling devices should be illegal, not only because they produce the same cartel-like effects as explicit agreements, but also because they are culpable in the sense that they involve a deliberate attempt to overcome structural impediments to coordination and subvert the competitive functioning of the market, while having no offsetting business rationale.³⁴

The spectrum of conduct based on economic theory described in the preceding paragraphs is depicted in Figure 1 below. As explained in the next section, the current law in Australia on ‘contract, arrangement or understanding’ locates all three concepts at the ‘agreement’ end of the spectrum.

Figure 1



4. Overseas models

In the United States, the concepts of ‘contract, combination in the form of a trust or otherwise, or conspiracy’ in section 1 of the *Sherman Act* are all equated with an agreement.³⁵ Traditional formulations of an ‘agreement’ for this purpose are principally:

³³ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, pp. 17–18. This phenomenon was recognised as early as 1945: ‘The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age’: *William Goldman Theatres Inc v Loew’s Inc* 150 F. 2d 738, n. 15 (3d Cir. 1945). See further JM Joshua and S Jordan, ‘Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law’, *Northwestern Journal of International Law & Business*, vol. 24, 2004, p. 647, pp. 654–5; J Hinloopen and A Soetevent, ‘From Overt to Tacit Collusion’, Tinbergen Institute Discussion Paper TI 2008-059/1, May 2008, at <http://ssrn.com/abstract=1146347>, last viewed 23 March 2009.

³⁴ GA Hay, ‘Facilitating Practices’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, p. 1189.

³⁵ RA Posner, *Antitrust Law*, 2nd edn, University of Chicago Press, Chicago, 2001, p. 262; PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2nd edn, Aspen Law & Business, New York, 2001, ¶1403.

‘a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement’³⁶ and a ‘conscious commitment to a common scheme.’³⁷ In practice, however, ‘commitment’ is a weak and inarticulate concept and has no apparent operational meaning in the absence of express assurances.³⁸ Having recited the traditional definition of an agreement, courts appear largely to focus on whether an agreement can be inferred from evidence suggesting that D was not act independently. In other words, the inquiry is directed at whether there was something other or more than conscious parallelism or oligopolistic interdependence at work.³⁹ If so, then generally that ‘other’ is assumed to fall within the traditional concept of ‘agreement’.⁴⁰ In some cases, however, reliance has been placed on the concept of facilitating practices as developed in the economic literature.⁴¹

A different approach is taken under Article 81(1) of the European Community Treaty and the contrast is instructive. The prohibition in Article 81(1) distinguishes between ‘agreement’ on the one hand and ‘concerted practices’ on the other hand, with the aim of preventing firms from evading the application of the law by colluding in a manner that

³⁶ *Interstate Circuit Inc v United States* 306 US 208, 810 (1939).

³⁷ *Monsanto Co v Spray-Rite Service Corp* 465 US 752, 768 (1984).

³⁸ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, p. 25. Note further the comments of Areeda and Hovenkamp that ‘the commitment may be weak or strong, express or implied’ and that it should also be acknowledged that ‘weak commitments blend into mere interdependence.’ See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 60–1, 64–5 ¶1410.

³⁹ D Snider and I Scher, ‘Conscious Parallelism or Conspiracy?’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 49, p. 1144.

⁴⁰ C.f. the recent observation that, following the Supreme Court ruling in *Bell Atlantic v Twombly* 127 S. Ct. 1955 (2007), circuit courts have begun to explore adoption of a more meaningful conceptualisation, one that requires that the parties have communicated to each other their intentions to act in a certain way and their reliance on each other to do the same: WH Page, ‘Twombly and Communication: The Emerging Definition of Concerted Action under the New Pleading Standards’, University of Florida Legal Studies Research Paper No. 2008-01, March 2009, pp. 2–3, at <http://ssrn.com/abstract=1286872>, last viewed 13 March 2009. For further discussion of this model, see WH Page, ‘Communication and Concerted Action’, *Loyola University of Chicago Law Journal*, vol. 38, no. 3, 2007, p. 405; O Black, *Conceptual Foundations of Antitrust*, Cambridge University Press, Cambridge, 2005; WH Page, ‘Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act’, in K Hylton (ed), *Antitrust Law and Economics*, Edward Elgar Publishing, 2009 (forthcoming).

⁴¹ See, e.g., *Federal Trade Commission v Cement Inst* 333 US 683 (1948) (use of basing point system); *National Macaroni Mfrs Assn v Federal Trade Commission* 345 F.2d 421 (7th Cir. 1965) (standardisation of content of macaroni); *In re Coordinated Pretrial Proceedings in Petroleum Prods Antitrust Litg* 906 F.2d. 432 (9th Cir. 1990) (announcements of wholesale price changes). Facilitating practices are sometimes challenged as unfair methods of competition contrary to s 5 of the *Federal Trade Commission Act*: see PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 37 ¶1407.

falls short of an agreement.⁴² In general, the standard required to establish a ‘concerted practice’ is much less demanding than that required to establish an ‘agreement.’ As a result, the artificiality associated with having to stretch the notion of ‘agreement’ beyond what might be regarded as its normal bounds is avoided. In particular, a ‘concerted practice’ does not require any element of commitment.

The EC concept of ‘concerted practice’ has been equated with what is known in the economics literature, and recognised in some US cases, as a ‘facilitating practice.’⁴³ Like a facilitating practice, the economic vice of a ‘concerted practice’ is said to be that it enables competitors ‘to determine a coordinated course of action ... and to ensure its success by prior elimination of all uncertainty as to each other’s conduct regarding the essential elements of that action.’⁴⁴ In order to establish a ‘concerted practice’ all that needs to be shown is: (1) some form of contact between competitors (which may be indirect or weak as, for example, contact via a publicly announced price increase), (2) a meeting of minds or consensus in relation to cooperation which may be inferred from mere receipt of information, and (3) a relationship of cause and effect between the concertation and the subsequent market conduct.⁴⁵ However, in ‘hardcore horizontal cases’ that relationship is generally presumed once contact and consensus are established and rebuttal of the presumption is allowed only where the firm in question proves that the concertation did not have ‘any influence whatsoever on its own conduct on the market.’⁴⁶ In practice, the likelihood of rebutting the presumption is seen as slim.⁴⁷

⁴² J Faull and A Nikpay, *The EC law of competition*, Oxford University Press, Oxford, New York, 2007, p. 210 [3.103].

⁴³ JM Joshua and S Jordan, ‘Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law’, *Northwestern Journal of International Law & Business*, vol. 24, 2004, p. 647, p. 660.

⁴⁴ *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619, [118]. Similarly, it has been said that a ‘facilitating practice’ ‘operates by reducing uncertainty about rivals’ actions or diminishing their incentives to deviate from a coordinated strategy’: SC Salop, ‘Practices that (Credibly) Facilitate Oligopoly Coordination’, in JE Stiglitz and GF Mathewson (eds), *New Developments in the Analysis of Market Structure*, MIT Press, Cambridge, Massachusetts, 1986, p. 271. Uncertainty is seen as ‘the most general of the impediments to cartel-like results in oligopoly’: PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 36 ¶1407 (and for a description of the factors most likely to generate uncertainty, and so undermine coordination, in an oligopolistic market, see pp. 209–13 ¶1430).

⁴⁵ J Faull and A Nikpay, *The EC law of competition*, Oxford University Press, Oxford, New York, 2007, p. 212 [3.108]–[3.111].

⁴⁶ *Huls AG v Commission* [1999] ECR I-4287, [167].

⁴⁷ J Faull and A Nikpay, *The EC law of competition*, Oxford University Press, Oxford, New York, 2007, pp. 212–13 [3.111].

Although EC law is no different to the law in either the US or Australia in that it condemns neither ‘mere’ parallel nor interdependent conduct of itself, the concept of ‘concerted practice’ is intended specifically to catch so-called tacit collusion or facilitating practices, recognising that such activity is distinct from ‘agreement’.⁴⁸ As was pointed out by the Court of Justice in *Suiker Unie*:

... [while the Treaty] does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is to either influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor that the course of conduct which they themselves have decided to adapt or contemplate adopting on the market.⁴⁹

Subsequent cases have refined this test, indicating that disclosure of future intention in itself will not constitute a concerted practice. Rather, the communication must have the purpose or effect of removing or reducing the uncertainty that usually exists in competitive markets.⁵⁰

It is likely that the EC concept of a ‘concerted practice’ would catch the behaviour alleged to constitute an ‘understanding’ in *Apco* and *Leahy*. Applying this concept to the type of situation that arose in *Apco* and *Leahy*, there would be no need to establish commitment on the part of the respondents to increase prices in accordance with the signals provided. Nor would it be necessary to show that there was a reciprocal or two-way exchange of information – the concept of ‘concerted practice’ covers the situation where one party is active in disclosing information and another is passive in receiving or accepting it.⁵¹ Thus, for the purposes of finding those respondents who conveyed the information about changes in petrol prices liable, it would be sufficient to show that they did so with the purpose of influencing their competitors to follow the signalled price rise (even if in some cases, they failed to achieve the desired effect). For the purposes of finding the recipients of the information liable, it would be sufficient to show that their

⁴⁸ In *Commission v Anic Partecipazioni* [1999] ECR I-4125, [108] the European Court of Justice said that Art 81 is intended: ‘to apply to all collusion between undertakings, whatever the form it takes. ... The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion.’

⁴⁹ *Suiker Unie v Commission* [1975] ECR 1663,173–5.

⁵⁰ See I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 54.

⁵¹ *Cimenteries v Commission* [2000] ECR II-491.

conduct was influenced even if merely by aiding their decisions as to whether or not to follow the signalled price.⁵²

As regards information recipients, the view taken in the EC is that firms will ‘necessarily and normally unavoidably act on the market in light of the knowledge and on the basis of the discussions which have taken place in connection’ with collusive practices.⁵³ Even proof of actual deviations from the prices discussed will not be sufficient to rebut this presumption of influence.⁵⁴ Nor necessarily will evidence of a rational alternative reason for subsequent parallel price increases, such as changes in demand or raw material prices. The receipt of information for the purpose of restricting competition will be enough, without the Commission having to prove a specific causal link between the information receipt and subsequent behaviour.⁵⁵ The justification for this strict approach, as identified by the European Court of Justice (ECJ), is that a ‘party which tacitly approves an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery.’⁵⁶

As suggested in the ECJ’s statement above, the only defence open to an information recipient (or, as in several of the EC cases, a passive attendant at a cartel meeting) is to show that it had distanced itself from the cartel or, in the other words, that it had clearly refused to ‘go with the flow.’⁵⁷ Consistent with a strict liability approach, the bar is set very high for this defence. The act of distancing must take place without undue delay; the objectives of the cartel and the matters agreed between its participants must be denounced; that denouncement must be clearly and equivocally expressed to the other cartel members; the firm in question must avoid disclosing its own strategy and pricing intentions; it must be able to establish that its subsequent commercial policy and behaviour is determined independently; and it must not participate in any further anti-

⁵² See, e.g., reference in *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, [47] to the finding that: ‘the information conveyed by Bentley and Carmichael may have been useful to Anderson because it helped him to know when to tell his franchisees to check competitor’s prices and when to raise Apco’s prices if he chose to do so ...’.

⁵³ *Rhone-Poulec SA v Commission* [1991] ECR II-867.

⁵⁴ *Commission v Anic* [1999] ECR I-4125, [127]–[128].

⁵⁵ *Polypropylene* OJ [1986] L 230/1, [73], [89].

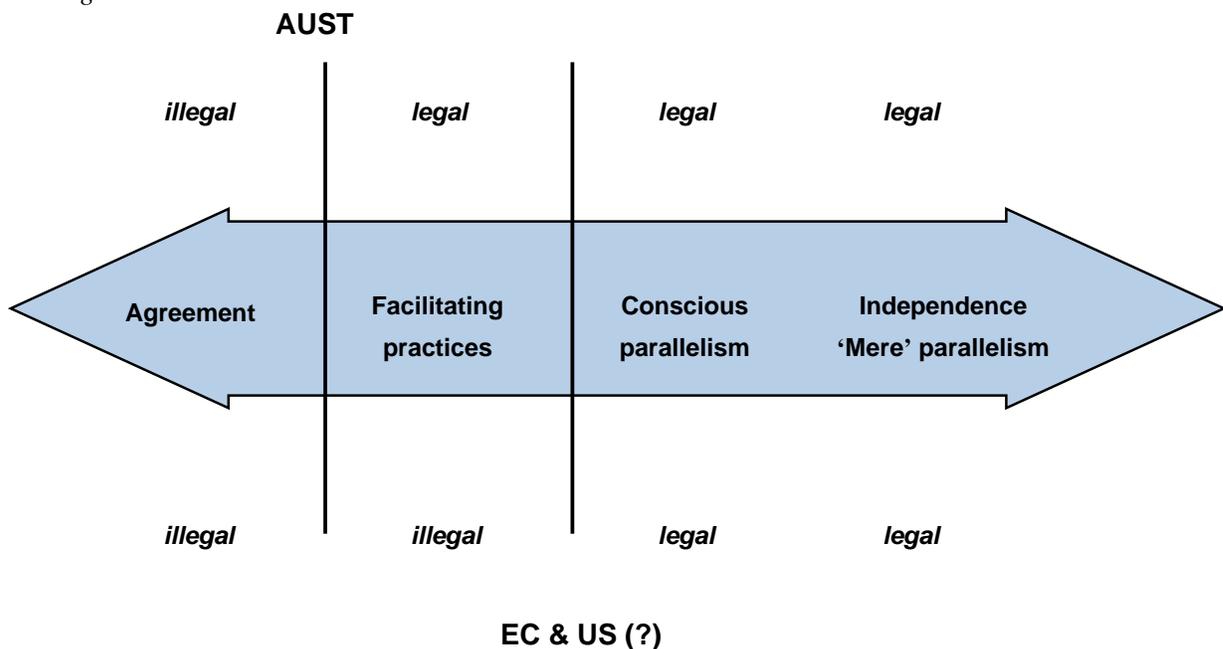
⁵⁶ *Dansk Rorindustri v Commission* [2005] ECR I-5425, [143].

⁵⁷ See generally the cases discussed in D Bailey, ‘Publicly Distancing Oneself from a Cartel’, *World Competition: Law and Economics Review*, vol. 31, no 2, 2008, p. 177, p. 178.

competitive discussions.⁵⁸ Satisfying these requirements strengthens the policy objective of the prohibition on collusion, namely to preserve the decision-making independence of competitors and maximise the risks of uncertainty associated with competition.⁵⁹ Blowing the whistle by reporting the cartel to the authorities, while the most public and effective method of distancing oneself from a cartel, is not seen as mandatory for this defence. The defence would probably become a dead letter if any such requirement were to be imposed.⁶⁰

Based on the preceding discussion, the point at the spectrum in Figure 1 at which the line is drawn between legal and illegal coordination between competitors under Australian law, as compared with the law in the EC and possibly also the US, is depicted in Figure 2 below.

Figure 2



⁵⁸ D Bailey, 'Publicly Distancing Oneself from a Cartel', *World Competition: Law and Economics Review*, vol. 31, no 2, 2008, p. 177, p. 179.

⁵⁹ O Odudu, *The Boundaries of EC Competition Law*, Oxford University Press, Oxford, 2006, pp. 81–6.

⁶⁰ D Bailey, 'Publicly Distancing Oneself from a Cartel', *World Competition: Law and Economics Review*, vol. 31, no 2, 2008, p. 177, p. 188.

5. The ACCC's proposed amendments

5.1 Failure to conceptually define an 'understanding'

The ACCC's proposals do not tackle the issue of how an 'understanding' should be defined from a conceptual perspective. Instead, the proposals approach the 'problem' perceived by the Commission predominantly from an evidentiary perspective, by suggesting that there be a list of factual matters that a court may consider in determining whether or an 'understanding' may be inferred from the evidence. A fundamental difficulty with this approach is that it does not direct or guide a court as to what exactly it is that needs to be inferred. The proposal is that courts be directed not to require proof (by inference or otherwise) of commitment. However, it is not clear what, if anything, is proposed as being required instead. Both the ACCC's petrol pricing report and the annexed Burnside QC opinion argue that an intentional or conscious arousal of an expectation regarding future conduct should be sufficient to establish an 'understanding.'⁶¹ However, the proposed amendments do not make such behaviour a condition or requirement of an 'understanding.' Rather, the concept of expectation is included as one of the factual matters that a court '*may consider*' (emphasis added) in determining whether or not an *understanding* has been arrived at (emphasis added).

The ACCC's proposed amendments could be read as intending to equate an 'understanding' with a 'concerted practice', or some close version thereof. This is suggested by: (1) the proposal that commitment be excluded as an element in establishing an 'understanding'; (2) the particular relevance, as explained below, of several of factors under the ACCC's proposals to the establishment of a 'concerted practice'; and (3) the restriction of the list of factual matters in proposed amendment (b) to proof of an 'understanding'.⁶² However, if this is what the ACCC is seeking to achieve by its amendments, the proposal should be re-stated clearly so that the desirability or otherwise

⁶¹ Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol*, December 2007, pp. 228–9, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>, last viewed 11 March 2009; J Burnside, *ACCC Report, Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol, Appendix R*, December 2007, pp. 368–74, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=16fed9965960216fd7066496dacfbddc&fn=Appendix%20R.pdf>, last viewed 11 March 2009.

⁶² The justification for this restriction, however, is not clear. There seems no reason in principle why at least some of the factual matters listed in (b) may not be relevant in determining whether or not an 'arrangement' has been made.

of such a change in the law can be fully debated. Moreover, careful consideration should be given to the statutory drafting of any Australian equivalent or variant of the EU concept of concerted practice.⁶³

There is a respectable case for adopting the concept of ‘concerted practice’ in the interpretation of an ‘understanding’ in the civil prohibitions on cartel conduct in Australia. The concept is recognised in both EC law (formally) and US law (at least to some extent, albeit informally).⁶⁴ It is consistent with economic theory as to where the line should be drawn between legal and illegal horizontal coordination, based on recognition that such practices may have the same anti-competitive effects as collusive agreements.⁶⁵ Extension of liability beyond agreements would acknowledge that there is a growing trend towards deliberate adoption of tacit collusive behaviour in response to the toughening of anti-cartel laws and enforcement,⁶⁶ aided by the emergence of the ‘electronic marketplace’ which facilitates instant universal exchange of volumes of market information.⁶⁷ Moreover, equating an ‘understanding’ with a ‘concerted practice’

⁶³ In the absence of clear interpretation provisions and extrinsic materials, courts may not appreciate the significance of the amendment: see I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 67. The impact of the change on all of the other provisions in the TPA that incorporate the expression ‘contract, arrangement or understanding’ also needs to be considered (e.g. ss 4F, 45C, 45E, 45EA, 49, 51, 65A, 73, 90).

⁶⁴ The mainstream position in the US continues to be that an agreement, as traditionally formulated, is required for liability under s 1 of the *Sherman Act*. However, there have been cases in which the concept of a facilitating practice has been recognised as a basis for liability (sometimes under section 5 of the *Federal Trade Commission Act*): see, e.g., *Federal Trade Commission v Cement Inst* 333 US 683 (1948) (use of basing point system); *National Macaroni Mfrs Assn v Federal Trade Commission* 345 F.2d 421 (7th Cir. 1965) (standardisation of content of macaroni); *In re Coordinated Pretrial Proceedings in Petroleum Prods Antitrust Litg* 906 F.2d 432 (9th Cir. 1990) (announcements of wholesale price changes). See also the discussion in GA Hay, ‘Facilitating Practices’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, pp. 1208–16; and J Kattan, ‘Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment’ *Antitrust Law Journal* vol. 63, 1994-1995, p. 133.

⁶⁵ See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 220–1 ¶1432b. Note also the authors’ comparison between the stability or sustainability of express agreements versus tacit collusion, concluding that ‘express cartels may involve nearly as much vagueness, incompleteness and uncertainty as afflicts oligopolists that coordinate prices’ (at p. 224).

⁶⁶ See the comments of Bill Reid regarding the contributions being made towards the education of business people in tacit methods of collusion by business schools and trade practices compliance training: B Reid, ‘Cartels – Criminal Sanctions and Immunity Policy’, Paper presented at the Competition Law Conference, 12 November 2005, Sydney, pp. 7–12.

⁶⁷ J Baker, ‘Identifying Horizontal Price Fixing in the Electronic Marketplace’, *Antitrust Law Journal*, vol. 65, 1996, p. 41; DW Carlton, RH Gertner and AM Rosenfield, ‘Communication Among Competitors: Game Theory and Antitrust’, *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423, p. 432; S Borenstein, ‘Rapid Price Communication and Coordination: The Airline Tariff Publishing

would enable ‘understanding’ to be differentiated clearly from ‘contract’ or ‘arrangement’, leaving those concepts to occupy the ‘agreement’ end of the spectrum (as depicted in Figure 1) – an ‘arrangement’ being understood for this purpose as a less formal and less certain version of an agreement than a ‘contract’.

Against extending liability in this way is the understandable concern about the potential for over-reach and over-deterrence.⁶⁸ This is particularly so given that the concept of ‘concerted practice’, as applied in EC law may be established having regard to the purpose of conduct, irrespective of its effects. However, communication between competitors can have at least ambiguous, if not pro-competitive and welfare-enhancing, effects.⁶⁹ Consider the scenario in which competitors post their prices, including future prices, on an electronic bulletin board. This is a practice that has been used in the airline industry (but ceased in the United States as a result of an antitrust suit)⁷⁰ and in the fuel industry (in Australia, through the fuelwatch scheme administered by the Western Australian government).⁷¹ Such devices provide consumers with access to information more quickly and cheaply than would otherwise be possible and correct information asymmetries between suppliers and consumers. At the same time, they may be used to coordinate pricing amongst rivals just as effectively, and arguably more efficiently, than if the firms in question sat together in the proverbial smoke-filled room.

Case’, in JE Kwoka and LJ White (eds), *The Antitrust Revolution: Economics, Competition and Policy*, 4th edn, Oxford University Press, New York, 2004, p. 310.

⁶⁸ Albeit this concern would not be as pronounced if the civil per se prohibitions, both existing and proposed, were not so plagued by over-reach and uncertainty: see generally C Beaton-Wells and B Fisse, ‘Cartel Offences – Elemental Pathology’, paper at Federal Court of Australia and Law Council of Australia workshop, 3-4 April 2009 (forthcoming), section 2.3.

⁶⁹ RL Smith, A Duke and DK Round, ‘Signalling, Collusion and section 45 of the TPA’, *Competition & Consumer Law Journal*, 2009 (forthcoming); PB Overgaard and HP Mollard, ‘Information Exchange, Market Transparency and Dynamic Oligopoly’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 52.

⁷⁰ See *United States v Airline Tariff Publ’g Co*, 836 F. Supp. 9 (DDC 1993), at <http://www.usdoj.gov/atr/cases/f4700/4796.htm>, last viewed 23 March 2009, discussed in DW Carlton, RH Gertner and AM Rosenfield, ‘Communication Among Competitors: Game Theory and Antitrust’, *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423, pp. 436–8; GA Hay, ‘Facilitating Practices’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, pp. 1211–12.

⁷¹ See <http://www.fuelwatch.com.au>. In relation to the failed attempt by the federal government to establish a Commonwealth equivalent, see J Soon, ‘Fuelwatch: A Tale of Two Interventions’, at <http://www.abc.net.au/news/stories/2009/03/04/2506817.htm>, last viewed 23 March 2009, observing ‘[a] government-mandated website for posting the petrol prices of retailers across Australia rather than just Geelong, would, presumably given the ACCC’s concerns, have multiplied significantly any opportunities for petrol retailers throughout the country to collude, relative to the situation in *ACCC v Leahy*. Any such collusion opportunities would then have been rendered even more potentially successful by the requirement that petrol retailers not change their prices for 24 hours...’. See also D Harding, ‘Fuelwatch: Evidence Based Policy or Policy Based Evidence?’, *Economic Papers*, vol. 27, 2008, p. 315.

Accordingly, there is a good argument that such practices should be subject to a competition or rule of reason test, so as to enable their effects to be assessed having regard to the nature of the practices and the market context in which they occurred.⁷² A per se rule may not be appropriate given that, in the absence of such an assessment, it is not possible to say with any degree of certainty that the majority of such practices would be likely to have anti-competitive effects.⁷³ On the other hand, the TPA now has several per se prohibitions the economic justification for which is ambiguous or flimsy, but which have been adopted to facilitate enforcement by the ACCC and which depend heavily on the possibility of error correction through the bureaucratic mechanism of authorisation.⁷⁴

It might also be argued that behaviour of the kind illustrated by *Apco* and *Leahy* could be addressed by seeking to impose liability for an attempt to contravene the Act⁷⁵ or an attempted inducement of a contravention.⁷⁶ However, that approach would necessarily focus liability on the parties that initiated contact with or transmitted information to competitors, to the potential exclusion of the passive recipients or beneficiaries of the contact or information. It thus would not catch a person such as Mr Anderson in *Apco*. In receiving the phone calls from his competitors and then considering the information given when making a decision about whether to follow the price increase, clearly Mr Anderson did nothing that amounted to an attempt to arrive at an understanding or to induce other

⁷² DW Carlton, RH Gertner and AM Rosenfield, 'Communication Among Competitors: Game Theory and Antitrust', *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423; ME Stucke, 'Evaluating the Risks of Increased Price Transparency' 19 Spring ANTITRUST 81 (2005), at <http://ssrn.com/abstract=927417>, last viewed 23 March 2009. Such an assessment would have to be made in any event in the context of a private damages suit given the requirements to prove loss and, as importantly, causation (that is, a causal nexus between the impugned conduct and the claimed loss).

⁷³ See the view that 'an act can facilitate undesirable consequences without being an unalloyed evil ... [such an act] cannot be found unreasonable without considering the offsetting economic or social benefits of the practice. Thus, the label "facilitating practice" is only an invitation to further analysis, not a license for automatic condemnation.' See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 30–1 ¶1407.

⁷⁴ See the prohibitions on third line forcing in s 47(6) and resale price maintenance under s 48. See also the general discussion of the legitimate and beneficial purposes served by facilitating practices in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 251–5 ¶1435. Cf the exemption under Article 81(3) of the EC Treaty.

⁷⁵ See, e.g., *Trade Practices Commission v Parkfield* (1985) 7 FCR 534, 538–9, in which the Court held that conversations between two petrol retailers, in the course of which one sought to ascertain the other's attitude to raising petrol prices, were sufficient to constitute attempts to contravene s 45(2), notwithstanding that the price fixing proposal had not reached an advanced stage.

⁷⁶ For an attempted inducement, it would be necessary to show an intention to bring about a prohibited result: see *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 3 FCR 168, 183 (Toohey J).

dealers to arrive at an understanding. The other option open in such situations may be to pursue a passive recipient of information on the basis of ancillary liability, the most obvious possibility being liability for being knowingly concerned in the attempt by a competitor to contravene the Act.

A further possible approach to definition of the concept of an understanding may involve drawing on the ‘invitation-to-collude’ theory (or the related theory of ‘solicitation to conspire’). Such theory holds that an invitation to engage in unlawful anticompetitive conduct, if lacking any countervailing pro-competitive benefit, demonstrates a dangerous anti-competitive tendency that should be condemned for that reason.⁷⁷ The theory has been applied by the Federal Trade Commission in several cases under s 5 of the *Federal Trade Commission Act* that have been settled. While theoretically available, these possible bases of liability appear complicated and unlikely to achieve outcomes that cannot be achieved by adoption of the tried and tested EC concept of ‘concerted practice.’

If it is decided that ‘understanding’ should be equated with ‘concerted practice’, then the TPA should be amended to make this clear, rather than by inserting a list of factual matters directed at that end in the hope that courts will take the cue (see proposed amendment (b)(ii)). In general terms, there appear to be three principal options for such an amendment. The first is to remove the expression ‘contract, arrangement or understanding’ altogether and replace it with ‘agreement or concerted practice’, indicating in extrinsic materials that the amendment is intended to reflect broadly the approach taken in EC law, but otherwise leaving it to the courts to determine the precise distinction and boundaries between the two. The downside of this option is that the principles that have been developed in the case law in relation to ‘contract, arrangement or understanding’ will be lost. The second option is to retain ‘contract, arrangement or understanding’ but to add ‘concerted practice’ (thus the wording would read ‘contract, arrangement, understanding or concerted practice’). This option lacks appeal because it involves extending the ‘spectrum’ without clearly delineating the various types of behaviour along it; in particular, the intended scope of ‘understanding’ would be even less

⁷⁷ For a discussion of the ‘invitation to collude’ theory and its comparison with the theory of facilitating practices, SS DeSanti, ‘Game Theory and the Legal Analysis of Tacit Collusion’, *Antitrust Bulletin*, vol. 38, 1993, p. 113. See also KJ Arquit, ‘The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude’, *Antitrust Law Journal*, vol. 61, 1993, p. 531. For a discussion of the related concept of solicitations, see PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 122–38 ¶1419.

clear than it is now. The third option is to insert a definitional provision explaining that ‘understanding’ includes a concerted practice and to indicate in the Explanatory Memorandum that ‘concerted practice’ is intended to have the same meaning as ‘concerted practice’ under Article 81(1) of the EC Treaty. In our view, the third option is the most promising.

A modified version of a ‘concerted practice’ has been offered by Ian Tonking SC who has suggested an amendment that would add a paragraph (c) to s 45(2) so that s 45(2) would read as follows:

A corporation shall not:

- (c) communicate with any competitor for the purpose, or with the effect, of inducing or encouraging the competitor (or any other competitor) to alter or adjust the price (the ‘new price’) (including any discount, allowance, rebate or credit in relation to the price) at which such competitor supplies, or offers to supply, goods or services, in a manner, or to an extent, so that the new price differs (materially) from the price (including any discount, allowance, rebate or credit in relation to the price) at which such competitor:
 - (i) before receiving the communication, intended to supply, or offer to supply, the same goods or service;
 - (ii) in the absence of becoming aware of the terms of the communication, would have supplied, or offered to supply, the same goods or services.⁷⁸

As Tonking explains:

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

...

The circumstances described in subparas (i) and (ii) are designed to remove from the scope of the prohibition communications which result in changes in the recipient’s pricing conduct which are explicable solely in terms of parallel conduct, price leadership or false signalling. The first, parallel pricing, resulting for example from changes in input prices experienced by

⁷⁸ I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 69.

both, will not be the *effect* of the communication; similarly price leadership, which will be excluded under (ii) in any event. If a corporation communicates a change which it in fact does not intend to make, and the recipient reacts by putting its price up, the initiator might be at risk of contravening, but the recipient would not.⁷⁹

This proposal has much to commend it.⁸⁰ However, it also has some limitations. One of these, acknowledged by Tonking, is that it would expose only the initiator of the communication to primary liability, leaving the recipient to be the subject of ancillary liability.⁸¹ However, as Tonking points out, ‘if the initiator's conduct is nipped in the bud, no arrangement or understanding, or culture of acting on information, develops.’⁸² Another limitation is that the proposed amendment is confined to conduct relating to price and does not deal with practices having the purpose of facilitating coordination relating to output. This objection might be answered on the basis that concerted practices in relation to price are likely to be the most harmful in terms of competitive effects and that any other such practices may still be dealt with under the remaining prohibitions. Finally, it should be noted that the specific prohibition proposed by Tonking would extend liability beyond what is caught by a concerted practice under EC law because it does not appear to allow denial of liability on the basis of a legitimate business rationale. Such a rationale would be irrelevant if the ‘effect’ of the communication was to induce or encourage a change in price, regardless of its purpose. Extending liability to that extent is questionable given the risk of catching some conduct that is unlikely to harm competition.

If the law is to be amended to allow recognition of the equivalent of a ‘concerted practice’ for civil liability under s 45(2) and the new civil prohibitions in Division 1, it does not follow necessarily that the amendment should also apply to the cartel offences. There is no criminal liability for cartel conduct in the EC. In the US, the courts continue, at least

⁷⁹ I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 69. A further attribute of the proposal is that it overcomes the question as to whether it is necessary to prove reciprocity or mutuality in commitments. This question is yet to be settled: see, e.g., *Trade Practices Commission v David Jones (Aust) Pty Ltd* (1986) 13 FCR 446; *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344; *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd [No 8]* (1999) 165 ALR 468; *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd* [2006] FCA 1777, [110].

⁸⁰ Consideration should also be given to the related proposal in RL Smith, A Duke and DK Round, ‘Signalling, Collusion and section 45 of the TPA’, *Competition & Consumer Law Journal*, 2009 (forthcoming) as a means of specifically tackling signalling behaviour.

⁸¹ I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 69.

⁸² I Tonking, ‘Belling the CAU: Finding a substitute for “understandings” about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 70.

formally, to require ‘commitment’ to establish a *Sherman Act* agreement in the context of both criminal and civil liability. By extending liability to ‘concerted practices’ for the purposes of the civil prohibitions in Australia, a broader range of conduct would be caught by those prohibitions than by the cartel offences. This would be consistent with the widespread view that cartel offences should be limited to ‘serious cartel conduct’.⁸³

5.2 Problems with the ACCC’s proposed list of factual matters

The ACCC perceives a reluctance by the courts to accept circumstantial evidence.⁸⁴ It is not clear whether the ACCC’s concern is with the approach taken in *Apco* and *Leahy* specifically, or with petrol cases generally or cartel cases across the board. Nor is it clear whether the concern is that courts are hostile to this category of evidence in principle or that there are particular types of circumstantial evidence that the ACCC considers should be given greater weight than currently.

Further, whether in fact the claimed reluctance exists is debatable.⁸⁵ In Australia, as elsewhere, it has always been and remains the case that an ‘understanding’, howsoever conceived, may be proven by direct evidence, circumstantial evidence or, as is often the case, a combination of both.⁸⁶ Self-evidently, the ‘hard’ cases and thus those most likely to be contested are the ones in which the direct evidence is weak or lacking altogether.⁸⁷ Indeed, the ACCC’s failures in *Apco* and *Leahy* have been ascribed as much to weaknesses in the direct evidence offered by the Commission – in particular, problems in

⁸³ See section 2.2 above.

⁸⁴ Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol* December 2007, p. 229, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>, last viewed 11 March 2009.

⁸⁵ Indeed, as the Full Court acknowledged, the ACCC succeeded against the other respondents in *Apco* based on a ‘powerful case’ of circumstantial evidence: *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, 465 [52].

⁸⁶ Organisation for Economic Co-operation and Development, ‘Prosecuting Cartels without direct evidence of agreement’, DAF/COMP/GF(2006)7, 11 September 2006, at <http://www.oecd.org/dataoecd/19/49/37391162.pdf>, last viewed 13 March 2009.

⁸⁷ For a discussion of the problems with interpretation of direct testimony by participants to an alleged conspiracy, see PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 116–22 ¶1418.

the evidence of non-contesting respondents and admissions made pursuant to the ACCC's Cooperation Policy – as to the difficulties associated with the circumstantial evidence.⁸⁸

Thus, to provide that a court may determine an 'understanding' has been arrived at 'notwithstanding that the understanding is ascertainable only by inference from any factual matters the court considers appropriate' (as per proposed amendment (a)(i)) is unlikely to make much, if any, difference in practice. The question is not whether it is or should be possible to infer the existence of an 'understanding' from circumstantial evidence alone. That possibility has always been and remains open. Rather, the question is what types of circumstantial evidence are or should be considered to be probative. That question can only be answered once one knows what it is that needs to be proved. Thus, as previously argued, a serious flaw in the ACCC's proposal is that it fails to grapple first and fundamentally with the conceptual question of how an 'understanding' should be defined.⁸⁹ Only after that question has been resolved can questions of evidence and proof be addressed sensibly.

The need for conceptual definition aside, the ACCC's proposed list of factual matters is unsatisfactory in many respects. It would appear to have been inspired partly by the approach taken in the United States under s 1 of the *Sherman Act* where the courts have developed a list of so-called 'plus factors' that may be relied on to support a finding of conspiracy.⁹⁰ As most antitrust cases are tried before juries in the United States, the question of sufficiency of proof of an agreement in practice reduces to whether the evidence is enough to allow the jury to consider and potentially draw inferences that an agreement was reached. In general, in deciding this question, the view is taken that the court 'should analyze [the evidence] as a whole to determine if it supports an inference of concerted action'.⁹¹ Such an inference will be available if the evidence 'tends to exclude

⁸⁸ See the description of the evidentiary issues in the case in W Pengilley, 'ACCC Fails in Geelong petrol price-fixing litigation: what are the lessons?', *Australian and New Zealand Trade Practices Bulletin*, vol. 3, no. 4, 2007, p. 54. See also the general discussion of problems associated with the use of admissions in this context in C Hodgekiss, 'Not Worth the Paper it was Written On... When Admissions Mean Nothing', *Trade Practices Law Journal*, vol. 16, 2008, p. 155.

⁸⁹ As Areeda and Hovenkamp frame this 'difficult question': it is 'how far we may move away from direct, detailed, and reciprocal exchanges of assurances on a common course of action and yet remain within the statutory and conceptual boundaries of an agreement': PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 2nd edn, Aspen Law & Business, New York, 2001, ¶1404.

⁹⁰ The term 'plus factors' appears to have originated in the trial judgment in *C-O Two Fire Equipment Co v US* 197 F 2d 489 (9th Cir 1952).

⁹¹ D Snider and I Scher, 'Conscious Parallelism or Conspiracy?', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 49, p.

the possibility of independent action.’⁹² In turn, the exclusionary tendency is analysed by reference to the ‘plus factors’. Thus, the basic principle is that, while consciously parallel conduct is of itself insufficient to enable an agreement to be inferred, evidence of such conduct coupled with evidence of inculpatory plus factors will be sufficient to support such an inference.⁹³ There is no codified list of such factors. However, key examples or factors recurrently cited in the case law have been identified by commentators as including:

- existence of a rational motive for defendants to behave collectively;
- actions contrary to the defendant’s self-interest unless pursued as part of a collective plan;
- market phenomena that cannot be explained rationally except as the product of concerted action;
- defendant’s record of past collusion-related antitrust violations;
- evidence of interfirm meetings and other forms of direct communications among alleged conspirators;
- the defendant’s use of facilitating practices;
- industry structure characteristics that complicate or facilitate the avoidance of competition;
- industry performance factors that suggest or rebut an inference of horizontal collaboration.⁹⁴

The ‘plus factor’ approach to determining whether or not an ‘agreement’ has been established has been criticised heavily. A major complaint is that courts ‘rarely rank plus factors according to their probative value or specify the minimum critical mass of plus

1152. For a useful discussion of the consistent approach taken in EC law, employing a concept of the ‘cartel as a whole’, see C Harding and J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford University Press, Oxford, 2003, pp. 151–64.

⁹² *Matsushita Elec Indus Co v Zenith Radio Corp* 475 US 574, 588 (1986).

⁹³ This rule was recently extended to the pleadings context when, in *Bell Atlantic Corp v Twombly* 127 S. Ct. 1955 (2007) the Supreme Court held that a conspiracy claim under s 1 of the Sherman Act should be dismissed when it alleges only parallel conduct, absent ‘factual context suggesting agreement’ (at 1961). Thus the Court endorsed the applicability of the principles used at the summary judgment stage to judgments on the sufficiency of pleadings - in this instance the principle of the presumptive lack of illegality of consciously parallel conduct standing alone (at least when rational nonconspiratorial explanations for the conduct exist) and the notion that something more, whether or not captured by the plus factors, must be identified to render such conduct probative of conspiracy.

⁹⁴ This list is taken from WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, p. 5, pp. 37–54. See also the categorisation in C Harding and J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford University Press, Oxford, 2003, p. 151.

factors that must be established to sustain an inference of collusion.’⁹⁵ Nor have courts devoted much effort to explaining how each factor supports or detracts from the relevant inference.⁹⁶ These failings have been said to make the ‘disposition of future cases unpredictable’ and to impart ‘an impressionistic quality to judicial decision-making.’⁹⁷ Further, it has been suggested that reliance on the plus factors may be manipulated to reflect the individual judge’s personal intuition about the likely cause of the observed parallel behaviour.⁹⁸

It should not be assumed that the loose or arbitrary tendencies alleged against the plus factors in the United States would be repeated here if the ACCC’s proposed amendment were accepted. However, a list of factors does encourage a factor-by-factor approach rather than assessment of the circumstantial evidence as a whole with due regard to its cumulative effect.⁹⁹ Further, it is difficult, if not impossible, to capture fully and accurately in a list of factors the complex factual and economic analysis involved in determining whether or not there is an ‘understanding’ for the purposes of the cartel prohibitions.¹⁰⁰ This is apparent from the limited scope and the ambiguity of the ACCC’s proposed factors, as criticised below.

5.2.1 Limited scope and ambiguity of the ACCC’s proposed factors

Each of the factual matters proposed by the ACCC is likely to give rise to issues of interpretation regarding their scope and significance in inferring the existence of an ‘understanding’.

⁹⁵ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, p. 35.

⁹⁶ GA Hay, ‘Facilitating Practices’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, p. 1189.

⁹⁷ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, p. 36.

⁹⁸ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, p. 36.

⁹⁹ As recommended by the OECD in ‘Prosecuting Cartels without direct evidence of agreement’ DAF/COMP/GF(2006)7, 11 September 2006, p. 9, at <http://www.oecd.org/dataoecd/19/49/37391162.pdf>, last viewed 13 March 2009. That said, it has been observed that courts applying a ‘holistic plausibility’ analysis approach in the United States, ‘seem to arrive at similar outcomes’ to those applying the plus factor approach, and not always with the same degree of transparency in reasoning: D Snider and I Scher, ‘Conscious Parallelism or Conspiracy’, in American Bar Association, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, p. 1143, p. 1172.

¹⁰⁰ To get a sense of the complexity, see the suggested steps in the analysis required to appraise facilitating practices generally, in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 279–80 ¶1436e.

(i) **the conduct of the corporation or of any other person, including other parties to the alleged understanding**

This factor is so broadly stated as to be of little or no assistance. Presumably it is intended to highlight the potential significance of identical or parallel conduct by the parties to the alleged understanding. However, as economic theory makes clear, parallel conduct may be just as explicable by market conditions and structures as by any form of collusion. For example, the fact that 1,000 sellers of beef charge precisely the same price at a given time does not provide evidence of a conspiracy if each is indifferent to what the others are doing. The more obvious explanation is that they are each selling by reference to the going market price.¹⁰¹

It may be possible in theory to infer collusion based on simultaneous identical actions alone (a form of ‘unnatural parallelism’ – for example identical secret bids on a made-to-order item unlike anything previously sold).¹⁰² However, the experience in the US has been that ‘few cases have found parallelism so extraordinary that an agreement could be inferred without more.’¹⁰³

(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**

This factor is the ACCC’s intended replacement for the current requirement of commitment. It is consistent with the notion of a ‘concerted practice’ in EC law to the extent that an intentional arousal of an expectation is similar to the idea of a D taking action with the purpose of influencing the conduct of competitors and thereby reducing the uncertainty of competition. However, it does not capture the concept of concerted practice given that it fails to specify the need to show a causal relationship between the purpose and subsequent conduct in the market. Under Article 81(1) the causal

¹⁰¹ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 169–70 ¶1425e.

¹⁰² For discussion and examples, see PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 167–85 ¶1425.

¹⁰³ GJ Werden, ‘Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory’, *Antitrust Law Journal*, vol. 71, 2004, p. 748.

relationship required plays an important role in distinguishing between unilateral and concerted action.¹⁰⁴

(iii) the extent to which the corporation was acting in concert with others in relation to the subject matter of the alleged understanding

It is unclear what this factor is intended to mean. If all that it means is ‘the extent to which the corporation was acting [jointly] with others...’, it is unhelpful. The concept of “acting in concert” may refer to the law relating to distinction between principal liability and liability as a secondary party. In that context, “acting in concert” requires a joint agreement to act.¹⁰⁵ If that is the meaning intended, it merely rephrases the question in issue.

(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

Presumably this factor is directed at establishing that the alleged parties to an understanding had the opportunity to arrive at an understanding. However, the ‘mere opportunity to conspire’, without more, is insufficient to support an inference of collective action,¹⁰⁶ and generally any suggested inference may be readily rebutted by explanations of innocent activities by which such opportunities are presented (the most obvious example being attendance at trade association meetings).¹⁰⁷ The factor might also be intended to embrace other furtive collaborations, ‘cover-ups’ and suspicious behaviour that, by their nature, could be taken to reflect consciousness of wrongdoing.¹⁰⁸ On the other hand, ‘innocent stealth’ by competitors might be explained by plans for lawful lobbying, research, advertising or joint ventures.¹⁰⁹

¹⁰⁴ SS DeSanti, ‘Game Theory and the Legal Analysis of Tacit Collusion’, *Antitrust Law Bulletin*, vol. 38, 1993, p. 113.

¹⁰⁵ See S Bronitt and B McSherry, *Principles of Criminal Law*, 2nd edn, Thomson Lawbook, Pyrmont, NSW, 2005, pp. 372–7.

¹⁰⁶ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 105 ¶1417. See, e.g., *Seagood Trading Corp v Jerrico Inc* 924 F.2d 1555, 1574–5 (11th Cir, 1991); *Valley Liquors Inc v Renfield Importers* 822 F.2d 656, 662 (7th Cir, 1987).

¹⁰⁷ See, e.g., *International Distribution Centers Inc v Walsh Trucking Co* 812 F.2d 786, 794–5 (2nd Cir, 1987).

¹⁰⁸ See the discussion of what may be drawn from such behaviour in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 111–12 ¶1417.

¹⁰⁹ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 111 ¶1417d.

- (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**

This factor also captures in part the notion of a facilitating or concerted practice. However, as with factor (ii), on its own, the provision or receipt of information is or should not be sufficient to cross the line from ‘innocent’ to illegal coordination. The purpose or effect of that behaviour is what is critical. The exchange of information between competitors might be benign, if not pro-competitive or welfare-enhancing.¹¹⁰ It is for this reason that economic theory counsels the need for a detailed analysis of the effects of information exchange before concluding that it is anticompetitive. Such an analysis would encompass consideration of at least the following features of the exchange: ‘Is the information exchanged kept proprietary by existing firms or does it flow to the public (potential buyers and entrants)? When do the different parties gain access to the information exchanged? Absent formal information exchange, who has access to which pieces of information? Does the information exchanged relate to the past, the present or to future intentions? Can the information exchanged be subsequently retracted or revised? If the information exchanged relates to future intentions, does it commit firms vis-à-vis potential buyers?’¹¹¹

- (vi) **whether the information referred to in (v) above is also provided to the market generally at the same time**

It is true that there is a tendency to view the private exchange or transfer of information as more likely to be collusive than a public exchange or transfer.¹¹² However, as pointed out above, the complexity inherent in information exchange between competitors means that focussing on any single facet of the exchange carries the risk of oversimplification and error. Even a private exchange of information amongst competitors (for example, in relation to costs) can reduce the dispersion or even level of price. A private exchange is not certain to be anti-competitive and furthermore consumers may be uninterested in this

¹¹⁰ RL Smith, A Duke and DK Round, ‘Signalling, Collusion and section 45 of the TPA’ *Competition & Consumer Law Journal*, 2009 (forthcoming); PB Overgaard and HP Mollard, ‘Information Exchange, Market Transparency and Dynamic Oligopoly’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 52.

¹¹¹ PB Overgaard and HP Mollard, ‘Information Exchange, Market Transparency and Dynamic Oligopoly’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 52

¹¹² DW Carlton, RH Gertner and AM Rosenfield, ‘Communication Among Competitors: Game Theory and Antitrust’, *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423.

type of information.¹¹³ Further, for firms that have operated in the same market for a substantial period of time, have similar structures, frequent interactions with each other and are well-informed about cartel laws, communication through public statements may be just as effective as private communication. Consequently, in some circumstances, an emphasis on the ‘public’ vs ‘private’ nature of the communication may be misleading.¹¹⁴

(vii) the characteristics of the market

To what does this factor refer? Structural characteristics? Performance characteristics? Both? Unless this factor is spelt out in considerable detail it is vacuous.

In antitrust analysis generally, market structure is recognised as significant in assessing the prospects of coordinated behaviour between rivals.¹¹⁵ Broadly speaking, collusion is seen as unlikely in settings in which there is a large number of sellers, entry barriers are low, the product is relatively homogeneous and not subject to rapid technological change, the buyer community consists of a relatively small number of sophisticated purchasers and transactions are infrequent.¹¹⁶

Market performance may also be a source of evidence from which inferences about collusion are available. In particular, performance data that shows stable market shares over time, the profitability of the firms allegedly party to the conspiracy, the existence of sustained market-wide supra-competitive pricing or systematic price discrimination may be relied on as evidence that firms have succeeded in coordinating pricing and output decisions.¹¹⁷ In addition, a failure of the market to reflect the adjustments ordinarily expected from effective competition would be evidence of its absence. Thus, stable prices

¹¹³ DW Carlton, RH Gertner and AM Rosenfield, ‘Communication Among Competitors: Game Theory and Antitrust’, *George Mason Law Review*, vol. 5, no. 3, 1997, p. 432; ME Stucke, ‘Evaluating the Risks of Increased Price Transparency’ 19 Spring ANTITRUST 81 (2005), at <http://ssrn.com/abstract=927417>, last viewed 23 March 2009.

¹¹⁴ RL Smith, A Duke and DK Round, ‘Signalling, Collusion and section 45 of the TPA’, *Competition & Consumer Law Journal*, 2009 (forthcoming).

¹¹⁵ There is extensive economic literature on this. See the surveys of theoretical and empirical work by M Ivaldi, B Jullien, P Rey, P Seabright and J Tirole, *The Economics of Tacit Collusion*, DG Competition, Brussels, 2003; S Feuerstein, ‘Collusion in Industrial Economics - A Survey’, *Journal of Industry, Competition and Trade*, vol. 5, 2005, p. 163; MC Levenstein and VY Suslow, ‘What Determines Cartel Success?’, *Journal of Economic Literature*, vol. 44, 2006, p. 43.

¹¹⁶ W Pengilly, ‘What is required to prove a “contract, arrangement or understanding?”’, *Competition & Consumer Law Journal*, vol. 13, 2006, p. 241.

¹¹⁷ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, pp. 54–5.

in the face of a substantial decline in demand or substantial excess capacity may imply that the market is not functioning competitively.¹¹⁸

In addition, inferences about whether or not there is an understanding between competitors in a given market may be drawn by comparing the level of competition in that market with competition in a similar market. Non-competitive performance may reflect collusion where competitive results are observed in an otherwise identical market.¹¹⁹ To be provable, such propositions necessitate statistical evidence from an economist about the similarity of markets and their relative performance.¹²⁰ Albeit of a different nature, the evidentiary considerations associated with possible inferences of conspiracy drawn from evidence of past conspiracy by the same competitors are equally challenging.¹²¹

(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;

Like factor (v), this factor appears directed at capturing the notion of a ‘concerted practice’. However, what is intended by the notion of ‘usefulness’ is uncertain. If it means that the recipient will take the information into account in making its own decisions about price, then as much may be presumed (as it is in the EC). Further, it is not clear why the use is limited to a price-related purpose. An ‘understanding’ may relate to a range of other purposes, including the restriction of output or allocation of markets.

Further, the motives of both the party receiving and the party providing the information are likely to be as relevant if not more relevant. In the US and the EC, it is common for courts to examine D’s ‘motive-to-conspire’ or the related question of whether D’s actions could be said to be contrary to its self-interest unless pursued as part of a collective plan.¹²² Thus, for example, an agreement may be inferred where the evidence is that D failed to respond rationally to changing demand or supply conditions by raising prices in

¹¹⁸ See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, p. 221 ¶1432b.

¹¹⁹ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 145–6 ¶1421.

¹²⁰ See, e.g., *City of Tuscaloosa v Harcros Chemicals* 158 F.3d 548, 566 (11th Cir. 1998); *Ohio v Louis Trauth Dairy* 925 F. Supp 1247 (SD Ohio 1996).

¹²¹ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 146–54 ¶1421.

¹²² GJ Werden, ‘Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory’, *Antitrust Law Journal*, vol. 71, 2004, p. 748–50.

the face of sluggish or declining demand.¹²³ In most cases, however, the ‘conspiratorial motivation’ or ‘acts against self-interest’ factors do no more than reflect interdependence. For that reason their absence is commonly used to preclude a conspiratorial inference (rather than it being necessary to prove such factors positively in order to raise the inference).¹²⁴

- (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.**

This seems to be an extension of the point that factor (vi) attempts to make. Generally, it has been recognised that an inference of conspiracy based on interfirm communications is strengthened where the communications took place in secret.¹²⁵ Not surprisingly, it is taken to be strengthened further where the parties to the communications adjust their behaviour in parallel shortly thereafter¹²⁶ and even further if no non-conspiratorial explanation is offered, or an innocent explanation is offered that later turns out to be false.¹²⁷ The compounding effect of these various factors illustrates the importance of viewing the evidence as a whole, and in a cumulative rather than sequential fashion.

5.2.2 Additional considerations

As should be evident from the observations made in relation to each of the factors in the ACCC’s proposed list, the danger with such a list is that, without proper explanation of the conceptual theoretical relevance of each factor and/or various potential combinations of factors, there is potential for confusion, distorted reasoning and erroneous outcomes. However, in addition to these criticisms, there are four further considerations that are relevant to assessment of the ACCC’s list proposal.

First, there is a glaring omission from the list, namely the existence of a plausible business justification for the conduct in question. Plausible business justifications may be used to negate the inferences of a motive to conspire or action taken against self-interest,

¹²³ See, e.g., *C-O Two Fire Equipment Co v United States* 197 F.2d 489, 497 (9th Cir, 1952); *Bond Crown & Cork Co v FTC* 176, F. 2d 974, 978–9 (4th Cir, 1949).

¹²⁴ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 92–101 ¶1415, 224–47 ¶1434c.

¹²⁵ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, p. 47.

¹²⁶ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, p. 47.

¹²⁷ PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 105–15 ¶1417.

referred to above.¹²⁸ The most obvious examples of such cases include parallel refusals to supply when the product in question is in short supply, parallel denials of credit to a customer adjudged a poor credit risk or parallel terminations of a ‘troublemaker’ dealer.¹²⁹ Although the bar is set high to establish this defence, it is accepted nevertheless in both the US and the EC that D may be able to prove that its behaviour was explicable on the grounds of independent decision-making having regard to its own commercial interests.¹³⁰ Such evidence considerably weakens and may even eliminate any inferences that might otherwise be drawn from evidence of communications, parallel conduct, market structure and/or performance.

Secondly, the ACCC’s proposed list of factors will not ease in any way the evidentiary burden associated with proving cases based on circumstantial evidence. In civil cases, the burden is to prove that the circumstances raise a more probable inference in favour of what is alleged. This burden is heightened by the *Briginshaw* principle, requiring evidence to be assessed with regard to the gravity of the allegations and the consequences for the defendant of finding them proven.¹³¹ In criminal cases the burden is to prove beyond a reasonable doubt that the circumstances exclude any reasonable hypothesis consistent with innocence.¹³² In practice, this means that a plausible business justification will raise a reasonable doubt that D did not arrive at an ‘understanding’.

Thirdly, the ACCC’s proposes that its list of factual matters be used for the purposes of determining whether an understanding has been arrived at. In the context of the cartel offences, arriving at the understanding is a physical element of the offence. The relevant fault element for this physical element is intention. Depending on the circumstances of the offence and the evidence available, the factual matters in the ACCC’s list may be as relevant to establishing intention as they are to establishing that an understanding has

¹²⁸ See generally PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 68–101 ¶1412–¶1415; J Kattan, ‘Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment’ *Antitrust Law Journal* vol. 63, 1994-1995, p. 133, p. 140.

¹²⁹ See the cases discussed in PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, pp. 74–5, 81–91 ¶1412–¶1413.

¹³⁰ WE Kovacic, ‘The identification and proof of horizontal agreements under the antitrust laws’, *The Antitrust Bulletin*, Spring, 1993, pp. 55–7. See I Tonking, ‘From Coal Vend to Basic Slag: Winning the Hearts and Minds?’ *University of New South Wales Law Journal* (submitted) for the suggestion that, if the ACCC’s proposed amendments are adopted, a similar defence should be introduced in Australia.

¹³¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

¹³² *Chamberlain v R [No 2]* (1984) 153 CLR 521, 535.

been arrived at. Indeed, several of the factors may also be relevant to establishing that D knew or believed that the understanding contained a cartel provision. In light of this, it would be anomalous to have the list included in the legislation as relevant to the physical element but not the fault elements. If the list is to be adopted and if it is to apply to the cartel offences, this issue would have to be resolved. One possible solution might be to make the fault element of intention explicit in the offence provisions, and to provide that the list of factual matters is relevant to determining whether or not an understanding has been arrived at, as well as whether or not D intended to arrive at the understanding.¹³³ However, as discussed in this submission, major problems surround the ACCC proposals and we do not recommend their adoption.

Finally, the proposed list may encourage greater reliance on expert economic evidence. Most of the factors in the list relate to D's interactions with other competitors in the market and the inferences to be drawn from those inter-actions may depend on expert economic evidence.¹³⁴ This is certainly the experience in the United States,¹³⁵ despite the fact that many commentators and even economists agree that, apart from questions of market structure and performance, economics does not provide any particular expertise for determining the difference between tacit and overt collusion.¹³⁶ Given that the use of

¹³³ I Tonking, 'From Coal Vend to Basic Slag: Winning the Hearts and Minds?' *University of New South Wales Law Journal* (submitted).

¹³⁴ The two basic categories of circumstantial evidence used in conspiracy cases have been described by Posner as follows: 'economic evidence suggesting that the defendants were not in fact competing, and non economic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types ... : evidence that the structure of the market was such as to make secret price fixing feasible ... and evidence that the market behaved in a non-competitive manner.' (*Re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)) For a description of the economic models underpinning economic evidence in this area, see GJ Werden, 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory', *Antitrust Law Journal*, vol. 71, 2004, p. 719.

¹³⁵ 'The variable geometry of the oligopoly theory will fit almost every type of conduct. It can be invoked to explain why prices stick and [why] they go up. In almost every parallel pricing case, therefore, teams of expert economists are produced to testify that the parallel pricing is the result of free market forces - and on the other side equally distinguished economists will give exactly the opposite opinion': JM Joshua and S Jordan, 'Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law', *Northwestern Journal of International Law & Business*, vol. 24, 2004, p. 647, p. 662. Economic evidence appears to have played a significant role in the trial of Gary Swanson in the DRAM price fixing case: see R Bunzel and H Miller, 'Defending "The Last Man Standing": Trench Lessons from the 2008 Criminal Antitrust Trial *United States v Swanson*', *Antitrust Source*, June 2008, at <http://www.antitrustsource.com>, last viewed 18 September 2008.

¹³⁶ See GJ Stigler, 'What Does an Economist Know?', *Journal of Legal Education*, vol. 33, 1983, p. 311; H Hovenkamp, 'Economic Experts in Antitrust Cases', in DL Faigman et al (eds), *Modern Scientific Evidence*, West Group, St Paul, Minnesota, 1999, 179 §38-2.0; RD Blair and JB Herndon, 'Inferring Collusion from Economic Evidence', *Antitrust*, Summer, 2001, p. 17, p. 18.

expert economic evidence raises particular challenges in jury trials,¹³⁷ this is a further reason why the ACCC's proposed amendments on the element of 'understanding' should not be adopted for the cartel offences.

6. Recommendations

We make the following recommendations on the basis of the analysis above:

1. The ACCC's proposed amendments should be rejected.
2. If further consideration is to be given to possible extension of liability under the civil prohibitions in s 45 and the new Division 1 of the TPA (when it takes effect), Treasury should prepare and circulate for consultation a comprehensive discussion paper that canvasses the main options and the arguments for and against each one of them. The options should include leading overseas models and their formulation should reflect the implications of modern economic theory.
3. The discussion paper should be limited to the definition of a 'contract, arrangement or understanding' for the purposes of civil liability under the TPA. The merit or otherwise of any possible extension to criminal liability should be reviewed if necessary in a later inquiry after the new cartel offences have been tested in at least several cases.

¹³⁷ For suggestions as to how such challenges may be met, see Justice Finkelstein, 'Running a Criminal Jury Trial in Cartel Cases: The Special Problem of Economic Evidence and Some Proposals for its Judicial Management', Paper presented at the Law Council Trade Practices Workshop, September 2008.