

CONCERTED PRACTICES AND FACILITATING PRACTICES IN AUSTRALIA

SMOKE SIGNALS, LEGISLATIVE OPTIONS AND BASIC QUESTIONS

Discussion outline

**Trade Practices Discussion Group
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EXECUTIVE SUMMARY

Smoke signals have been emitted from various parties in Canberra about an imminent legislative war against price signalling. These signals are difficult to read. No one responsible for them has produced proposed amendments to the Trade Practices Act or an explanation of how the proposals would resolve perceived problems with the current law.

The signallers are wearing war paint. Their legislative arrows are likely to be fired soon. What are the targets? Will these arrows hit their intended mark? Will they be tipped with poison? Will they clang uselessly against corporate body armour? What will be the corporate counteractions?

There are no simple solutions in this area. To the extent that workable solutions are possible, they are unlikely to emerge from the current political process. A satisfactory way of distinguishing between oligopolistic interdependence and unjustified coordination of market activity by competitors has yet to emerge in any competition law around the world. Neither the ACCC nor the Treasury has published an options paper or any statement let alone analysis of the issues. Moreover, it remains unknown whether or not the legislation to be introduced will be subject to public consultation or, if there is to be public consultation, what the process will be.

This outline surveys the smoke signals from Canberra and sets out some of the possible legislative options they portend together with basic questions they raise.

1. THE SMOKE SIGNALS FROM CANBERRA

1.1 Graeme Samuel

Graeme Samuel has said that: changes in the law are needed to combat the big banks' use of public statements to signal pricing intentions (eg to flag out-of-cycle interest rate rises); the changed laws should be similar to those in the UK, US and EU; and the concern applies to a range of sectors, including retail petrol and grocery. See 'ACCC push for tougher laws to stop banks' price signalling; Samuel on warpath', *The West Australian*, 30/10/2010. See also 'Current Issues on the ACCC's Radar', Competition Law Conference, Sydney, 29 May 2010, pp 14-15.

Compare ACCC News Release, 'Bank interest rate 'Telegraphing' risks breaching Trade Practices Act', 23 December 1999.

1.2 Jill Walker

Commissioner Jill Walker, 'Agreements, Communication and Facilitating Practices: where is the harm?' ACCC Paper presented at the Law Council Trade Practices Workshop Gold Coast 21 August 2010:

'An alternative approach that has been suggested is to adopt a European type prohibition against facilitating or concerted practices to directly target the practices of concern. The Commission now favours this type of approach. This would be a separate provision from those covering cartels and anti-competitive agreements and there is no suggestion that it would be a criminal provision.' (para 39)

'The open question is how far this prohibition should go? I'm not going to express particular views on this, but will raise some issues for further discussion:

- Should there be a general prohibition against all facilitating practices that have the purpose or effect of substantially lessening competition or should there be a specific prohibition on particular practices?
- If the latter, which ones? Exchange of prices and/or other information?
- Should any of these practices be per se breaches of the Act?' (para 40)

1.3 Wayne Swan

Treasurer Wayne Swan, Treasurer's Economic Note, 7 November 2010 (as echoed by Julia Gillard, Interview with Laurie Oakes, Channel 9, 7 Nov 2010):

‘One part of this package has been working closely with the ACCC to carefully and methodically design new laws to prevent price signalling. There is no silver bullet here, and the global financial crisis hit smaller Australian lenders particularly hard, so it will take time to build up more competition between banks. But the Government has been working through it in a considered way to ensure these reforms are enduring and effective and don't let the banks off the hook, or have unintended consequences for other sectors of our economy. You'll be hearing more in this space soon.’

1.4 Bruce Billson

Media Release by Shadow Minister, ‘Price Signalling - Long History, Labor Inaction’, 7 November 2010:

Considerable media commentary and scholarly examination of the calls by the ACCC for additional powers has been published in recent years. Most favour a more direct approach to tackling anti-competitive ‘price signalling’ behaviour over expanding what a cartel-style ‘understanding’ could include.

As recently as August this year, ACCC Commissioner Dr Jill Walker was still making the case that this ‘*gap in the law*’ needed to be addressed by ‘*a European-type prohibition against facilitating or concerted practices to directly target the practices of concern*’.

This is what the Coalition's considered approach and Private Members Bill will do by giving the ACCC new powers to investigate ‘price signalling’ concerns where the private exchange of information between competitors and public disclosure of information with the purpose or effect of lessening competition.

1.5 Unidentified person said to be ‘involved in’ drafting proposed TPA amendments for the government

M Drummond, ‘Bank, petrol chiefs face ACCC grilling’, AFR 9 November 2010, p 1:

‘The Australian Competition and Consumer Commission will have the power to haul in chief executives of banks and petrol companies and force them to give evidence under oath about their pricing decisions, under new laws being prepared by the

Gillard government.

The new rules will allow the ACCC to use its coercive investigation powers as soon as the regulator suspects price signalling has occurred, an individual involved in drafting the laws said.

This is a much lower threshold than in present laws, under which the ACCC can only use its coercive powers if it suspects competitors have agreed to collude. ...

Once the price signalling laws are in place, any public utterance by a bank about its interest rates coming under funding pressures could immediately trigger Section 155, allowing the ACCC to demand all documents in relation to interest rate decisions as well as requiring the chief executive and other executives and employees to attend a coercive examination in the ACCC's offices.

"That will put them under pressure," the source said. "An essential of competition is uncertainty, not knowing what your competitors are going to do. But they have been making each other more comfortable with each other by price signalling." ...'

1.6 Treasury

No signal by Treasury has been seen since the note on 1 April 2009 that 15 submissions on the meaning of the concept of an 'understanding' under the TPA had been received in response to Treasury's request of 8 January 2009:

<http://www.treasury.gov.au/contentitem.asp?ContentID=1511&NavID=037>

1.7 The danger of unsatisfactory legislation

There are warning signs:

- There is no Government discussion paper on the possible legislative options and their pros and cons. The Treasury Discussion Paper on the meaning of the concept of an 'understanding' under the TPA set out the flawed proposals advanced by the ACCC in December 2007. The Discussion Paper did not discuss EU, UK or US law on concerted practices and facilitating practices. There has been no official statement about the Government's response to the submissions made in March 2009 about the 2007 ACCC proposals. Most of those submissions criticised those proposals, which seem beyond resuscitation.
- The media release of the Shadow Minister on 7 November 2010 did not set

out any clear indication of the Coalition's proposed amendments: see 'Cheap talk about price signalling by the Shadow Minister 7 November 2101', at:

<http://www.brentfisse.com/news.html>

- There is no indication even at this late stage that an exposure draft bill will be provided for public comment by the Government.
- The Trade Practices Commission Information Circular No 14 of 18 April 1976 on information exchanges between competitors is not endorsed by the ACCC and is out of date. In any event, the Circular does not seem to be an accurate reflection of the law then or now.
- There are no off-the shelf models from overseas that lend themselves readily to adoption under the TPA: see C Beaton-Wells and B Fisse, 'Broadening the Definition of Collusion: A Call for Caution', *Federal Law Review*, vol. 38, 2010, p. 71. The EU concept of a concerted practice is perhaps the strongest contender but this concept differs considerably from the precepts embodied in Part IV of the TPA.
- OECD reports and commentaries restate the issues without advancing workable legislative proposals. Nor have proposals been developed by the ICN.
- Given the cartel amendments to the TPA, it is far from clear that the Government is committed to ensuring that amendments to the TPA are clear to apply and economically principled in definition and scope. There is no apparent political champion to drive economically principled and well defined competition law reform.
- Treasury has a chequered record on competition law and policy. The exposure draft bill on cartels in January 2008 had numerous significant defects notwithstanding the Dawson Committee review and almost 4 years of subsequent development.
- The discussion in ACCC, *Monitoring of the Australian Petroleum Industry* (December 2009, pp. 11-12, does not canvas the issues that need to be addressed.

1.8 Main concepts

1.8.1 Collusion (arrangement or understanding between competitors or likely competitors)



1.8.2 Concerted practice

(a) Article 101 EU Treaty (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case

of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(b) 'Concerted practice'

See J Faull and A Nikpay, *The EC Law of Competition*, Oxford University Press, Oxford, New York, 2007, pp. 210-7; R Whish, *Competition Law*, 6th edn, 2009, Oxford University Press, Oxford, pp. 104-7.

1.8.3. Facilitating practice

GA Hay, 'Facilitating Practices', ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, ABA Book Publishing, Chicago, 2008, vol. 2, ch. 50, p. 1189:

The term "facilitating practices" describes various kinds of activities in which firms engage to better enable coordination of their actions and avoid (or at least reduce) competition without the need for a meeting or other forms of explicit communication. For example, a firm might announce a forthcoming price increase publicly and well in advance of its effective date primarily for the purpose of signaling competitors of its intentions and thereby enabling those competitors to match the increase if they wish to do so. Or competitors might exchange information on salaries paid to various categories of employees to permit one another to monitor any deviations from standard industry levels.

1.9 Select references

- Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 ('*Apco*')
Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (2007) 160 FCR 321 ('*Leahy*')
Trade Practices Commission v Email Ltd (1980) 31 ALR 53 ('*Email*')
E.I. duPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) ('*Ethyl Corp*')
Ahlström Oy and others v Commission [1993] ECR I-1307 ('*Wood Pulp*')
 GJ Werden, 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory', *Antitrust Law Journal*, vol. 71, 2004, p. 719
 GA Hay, 'Facilitating Practices', ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, ABA Book Publishing, Chicago, 2008, vol. 2, ch. 50, p. 1189
 DW Carlton and JM Perloff, *Modern Industrial Organization*, Pearson, 4th ed, 2005, 379-87
 M Porter, *Competitive Strategy*, The Free Press, New York, 1980
 DS Clark, 'Price Fixing without Collusion: An Antitrust Analysis of Facilitating Practices after *Ethyl Corp*', *Wisconsin Law Review*, 1983, p. 887
 C Beaton-Wells and B Fisse, 'Broadening the Definition of Collusion: A Call for Caution', *Federal Law Review*, vol. 38, 2010, p. 71
 RL Smith, A Duke and D Round, 'Signalling, Collusion and s 45 of the Trade Practices Act' *Competition & Consumer Law Journal*, vol. 17, 2009, p. 22
 M Noble, 'Facilitating Practices: Innocuous, Illegal or Somewhere in Between?' (2010) 17 CCLJ 276
 I Tonking, 'Belling the CAU: Finding a Substitute for "Understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46
 J Walker, 'Agreements, Communication and Facilitating Practices: where is the harm?' ACCC Paper presented at the Law Council Trade Practices Workshop Gold Coast 21 August 2010
 I Wylie, 'Understanding "Understandings" under the *Trade Practices Act* – an Enforcement Abyss?', *Trade Practices Law Journal*, vol. 16, 2008, p. 33
 J Faull and A Nikpay, *The EC Law of Competition*, Oxford University Press, Oxford, New York, 2007, pp. 210-7
 R Whish, *Competition Law*, 6th edn, 2009, Oxford University Press, Oxford, pp. 104-7.
 G. Van Gerven and E. Navarro Varona, 'The Wood Pulp Case and the Future of Concerted Practices', 31 *Common Market Law Review*, 1994, p. 575
 B Fisse, 'Avoidance and Denial of Liability for Cartel Offences: Proactive Lawful Escape Routes Left Open by the Cartel Legislation', Paper presented at the 2009 Competition Law Conference, Sydney, 23 May 2009, pp. 1-3, 9-14
 M Moore, R Morgan and M Moore, 'Only the Illusion of Possible Collusion? Cheap Talk and Similar Goals: Some Experimental Evidence', *Journal of Public Policy and Marketing*, vol. 20, 2001, p 27

2. LEGISLATIVE OPTIONS AND BASIC QUESTIONS

2.1 Legislative options

Possible legislative options include:

1. preserve the status quo (see section 2.2)
2. adopt or modify EU concept of a concerted practice (see section 2.3)
3. prohibit ‘facilitating practices’ that have the purpose, effect or likely effect of substantially lessening competition in a market (see section 2.4)
4. prohibit one or more specific facilitating practices (eg price signalling; discussing pricing with a competitor; using a MFN or price-matching clause; etc) (see section 2.5)
5. extend the ACCC investigative powers to enable investigation where use of a facilitating practice is suspected (see section 2.6)
6. follow s 5 of the Federal Trade Commission Act (US) and prohibit ‘unfair competition’ (see section 2.7).

2.2 Preserve the status quo?

- In what particular respects, if any, is the current requirement of a contract, arrangement or understanding prone to underreach?
- Is the difficulty that arose in *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* and *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 attributable to the theory of the case upon which the ACCC proceeded, and/or the evidence put?
 - ⇒ Alternative possible theory of case: there was an understanding between competitors containing a provision that one would receive information about pricing from the other and that provision was likely to control a price to be offered by one competitor. Consistent with the evidence in *Apco? Leahy?*
- Can the difficulty that is believed to arise from the requirement of

‘commitment’ be overcome by reliance on liability for attempting to arrive at an understanding?

⇒ proximity rule

⇒ legal impossibility

⇒ mental element.

- Is the reasoning in *Trade Practices Commission v Email Ltd* (1980) 31 ALR 53 sound? See the criticisms in eg W Pengilley, *Price Fixing and Exclusionary Provisions*, Prospect Media, Sydney, 2001, pp. 20-22.
- If the present law does suffer from underreach, is that problem more or less significant than problems likely to result from the particular amendments proposed (eg possible overreach, uncertainty, intrusion in market conduct, creation of further information asymmetry, compliance costs)?

2.3 Adopt or modify the EU concept of a concerted practice?

- What are the essential elements of the EU concept of a concerted practice? How do those elements differ from those of an arrangement or understanding?
- Would adoption of the EU concept of a concerted practice avoid the underreach from which the current law is alleged to suffer? What results would be likely if this approach were to be applied on the facts of *Apco*, *Leahy*, *Email*, and *Ethyl Corp*?
- Is the EU concept of a concerted practice sufficiently well-defined? Have any problems of interpretation and application arisen? Is the concept prone to overreach?
- How exactly would the concept be adopted or modified under the TPA?
 - ⇒ The concept of a concerted practice is different from that of a contract, arrangement or understanding and may not involve any ‘provision’.
 - ⇒ Article 101(3) of the EU Treaty has no counterpart under the TPA. Is it proposed that efficiencies will be relevant to deny liability? Is it proposed that defendants will carry a persuasive as well as evidential burden of proof?

- Guidelines issued by the EC are binding whereas those issued by the ACCC are not. To what extent is the imprecise definition of the concept of a concerted practice explicable on the basis that concept can be clarified more definitively via EC guidelines?
- Is it possible to tighten up the definition of a concerted practice? See eg O Black, *Conceptual Foundations of Antitrust*, Cambridge University Press 2005, ch 5. Is Black's joint action model workable? What would be the effect of any such tightening up in situations where the current law is alleged to suffer from underreach?
- Exceptions? Will the current range of exceptions that apply to the prohibitions relating to cartel provisions and exclusionary provisions apply? If so, is that satisfactory given the many deficiencies of those exceptions (see C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, Cambridge University Press, 2011, ch 8)?
- Vertical supply agreements between competitors? There is no adequate carve out under the TPA at present; a specific exemption is needed. Vertical relationships between competitors fall within the concept of a concerted practice (see J Faull and A Nikpay, *The EC Law of Competition*, Oxford University Press, Oxford, New York, 2007, pp. 214-5).
- Statements made in compliance with continuous disclosure obligations? If there is to be an exemption for continuous disclosure, will that provide a major loophole?
- Is authorisation a satisfactory solution for dealing with the overreach of a probation cast in terms of a concerted practice? No authorisation procedure applies to Article 101 (the ground is covered by Article 101(3)).

2.4 Prohibit facilitating practices that have the purpose, effect or likely effect of substantially lessening competition in a market?

- How are 'facilitating practices' to be defined? There are many different kinds of facilitating practices: see eg PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, ¶1435; D Gilo and A Porat, 'The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transactions Costs, Segmentation of Consumers, and Anticompetitive Effects', *Michigan Law Review*, vol. 104, 2006, p. 983. Terms like 'price

signalling' have myriad possible meanings that include pro-competitive communications as well as anti-competitive communications.

- Would adoption of the proposal avoid the underreach from which the current law is alleged to suffer? What results would be likely if this approach were to be applied on the facts of *Apco*, *Leahy*, *Email*, *Ethyl Corp*, and *Wood Pulp*?
- A 'facilitating practice' requires some form of communication to competitors. What types of communication will be required? Will the public display of current prices offered to customers be a communication under the definition proposed? Should it be?
- Various commentators have suggested that a prohibition against facilitating practice be limited to private communications between competitors. What is the definition of 'private' and 'communication'? What is the proscribed content of such private communications? What is to stop competitors achieving the same effect as a public announcement by means of communications with all their customers where the communication inevitable will soon be published in the trade press (see eg *Wood Pulp*)?
- Does the definition of 'facilitating practices' include price-matching guarantees and MFN clauses? If so, why? Contracts, arrangements or understandings containing price matching or MFN clauses are subject to the prohibitions against SLC provisions under s 45(2).
- Should the test be: (a) purpose, effect or likely effect; (b) purpose; or (c) effect or likely effect?
- Possible overreach? A key feature of Article 101 of the EU Treaty is that liability for a concerted practice is excluded where is a legitimate business justification for communication. There is no such exclusion from liability under Part IV of the TPA. Authorisation is impractical and cannot sensibly be advocated as a sufficient escape route. Is this important issue addressed adequately in RL Smith, A Duke and D Round, 'Signalling, Collusion and s 45 of the Trade Practices Act' *Competition & Consumer Law Journal*, vol. 17, 2009, p. 22? In Walker's commentary?
- What will be impact of the approach proposed on market research companies (eg Nielsen; Informed Sources; GFK)? Will there be overreach in this context? Consider the sweeping propositions in Walker's commentary at paras 33-34. Where information hubs involve a series of contracts with the

corporations that supply information, the contracts will be subject to the SLC test under s 45(2) and the aggregate effect of the contracts on competition will be taken into account. Why urge the need for a prohibition against facilitating practices in this context?

- Why a SLC test rather than a per se test? Contrast the EU concept of a concerted practice. Is a SLC test workable in this context? Consider for example the application of SLC counterfactual analysis to ‘price signalling’ in the Australian retail banking market. Consider also the approach commended in RL Smith, A Duke and D Round, ‘Signalling, Collusion and s 45 of the Trade Practices Act’ *Competition & Consumer Law Journal*, vol. 17, 2009, p. 22. How realistic is it to expect corporations to run the gauntlet of the kind of economic analysis they advocate? Is a requirement of a ‘facilitating practice’ a sufficient threshold requirement to justify triggering the work and cost entailed in applying the SLC test in this context? Contrast the limiting and cost-reduction effect of a CAU requirement. Consider the implications of the US case law discussed in GA Hay, ‘Facilitating Practices’, ABA Section of Antitrust Law, *Issues in Competition Law and Policy*, ABA Book Publishing, Chicago, 2008, vol. 2, ch. 50, p. 1189 at pp 1208-16. The ACCC rarely brings proceedings alleging that a provision in a CAU is likely to substantially lessen competition. How realistic is it to expect the Commission to take on complex and easily losable cases like eg *Ethyl Corp*?
- Is the aggregate effect of a number of similar facilitating practices relevant? What is the test of aggregation?
- What is the alignment (or misalignment) between this proposal and the s 46 prohibition against misuse of market power? Is the proposal a back-door way of introducing an effects test? Consider the sweeping proposition in Walker’s commentary at para 34 that ‘any conduct which substantially lessens competition in a market should be unlawful unless authorised on public benefit grounds’. Should market power be a requisite additional element of liability?
- A facilitating practice is akin to an attempt. How will the TPA prohibitions against attempt, inducement and attempted inducement operate in this context? For example, liability for attempting to engage in a facilitating practice would be a form of double inchoate liability. Is double inchoate liability justified?
- Exceptions? Will the current range of exceptions that apply to the prohibitions

relating to cartel provisions and exclusionary provisions apply? If so, is that satisfactory given the many deficiencies of those exceptions (see C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, Cambridge University Press, 2011, ch 8)?

- Vertical supply agreements between competitors? There is no adequate carve out under the TPA at present; a special exemption is needed.
- Will withdrawal be a defence? If not, why not?
- Statements made in compliance with continuous disclosure obligations? If there is to be an exemption for continuous disclosure, will this create a major loophole?
- If a related corporation exception applies, might corporations exploit it by using a special purpose vehicle that makes them related corporations?
- Will greater use be made of joint ventures as a facilitating practice? Consider eg MA Rabkin, 'Tactical Interdependence and Institutionalized Trust: The Unrecognized Risks of Joint Ventures among Competitors', *DePaul Business & Commercial Law Journal*, vol. 7, 2008, p. 63.
- Will s 51(3) apply? Might s 51(3) be used strategically as a facilitating practice?

2.5 Prohibit one or more specific facilitating practices?

- Would specific prohibitions against certain kinds of facilitating practices be preferable to a general prohibition? Given the issues raised in section 2.4 above, what would be the comparative advantages and disadvantages?
- What specific prohibitions would be responsive to the particular areas of underreach from which the current law is alleged to suffer? In relation to the *Apco/Leahy* 'problem' see the possible amendment to s 45 raised for consideration in I Tonking, 'Belling the CAU: Finding a Substitute for "Understandings" about Price', *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46, p. 69.
- Should there be sector-specific prohibitions against facilitating practices (whether defined generally or limited to some specific kinds of facilitating practices)?

- Exceptions?

2.6 Extend ACCC investigative powers to enable investigation where use of a facilitating practice is suspected?

- Is it necessary or desirable to create any additional special powers of investigation in relation to concerted practices or facilitating practices? Would such an approach resolve the problem of underreach from which the current law is alleged to suffer? What would it be likely to achieve in cases such as *Apco*, *Leahy*, *Email*, *Ethyl Corp*, and *Wood Pulp*?
- What is the need for any additional special power of *investigation* if concerted practices or facilitating practices are made the subject of *liability*?
- Why should the ACCC have a special power of investigation in relation to suspected facilitating practices and not in relation to suspected naked price fixing? In general, naked price fixing is much more anti-competitive than facilitating practices.

2.7 Prohibit 'unfair competition'

- The broad brush drafting approach of the Australian consumer law invites speculation as to the possibility of a Part IV prohibition against unfair competition based on s 5 of the Federal Trade Commission Act (US). Why have generally worded prohibitions become the fashion in Australian consumer protection but not in Australian competition law? The difference in approach seems schizoid.
- Would prohibiting unfair competition resolve the problem of underreach from which the current law is alleged to suffer? What results would be likely if this approach were to be applied on the facts of *Apco*, *Leahy*, *Email*, *Ethyl Corp*, and *Wood Pulp*?
- If the main effect of adopting an 'unfair competition' prohibition would be to cover 'invitation to collude' cases would it be preferable to deploy a prohibition specifically against invitations to collude? Consider *Apco* and *Leahy* in light of eg the recent U-Haul case (FTC Release 06/09/2010, 'U-Haul and its Parent Company settle FTC Charges that They Invited Competitors to Fix Prices on Truck Rentals').
- Consider *Ethyl Corp*. Is the reasoning persuasive? Is the analytical framework

workable from a practical standpoint?

3. CONCLUSION: THE NEED FOR A PUBLIC DISCUSSION PAPER ASSESSING THE POSSIBLE LEGISLATIVE OPTIONS

It is uncertain what will materialise from the various smoke signals that have puffed out of Canberra. The outline above sets out some of the possible legislative options together with basic questions about each of them.

Stepping back from the smoke, is amending the TPA likely to be futile? Whatever amendments to the TPA may be made, corporations are likely to react strategically in ways that pursue their rational self-interest while avoiding liability. For every legislative action there are corporate counteractions. Many facilitating practices potentially are available. The fundamental underlying problem of oligopolistic interdependence will remain. It is also possible that the problem will be accentuated if corporations are forced into a corner and thereby led to consider the strategies available to them more assiduously than they now do. It would be a vicious irony if an inept clampdown on facilitating practices were to facilitate the increased exploitation of the strategic opportunities available to oligopolists.

To the extent that headway can be made in this area, the first essential step is to review the various possible legislative options, to set out how they would apply by using telling worked examples, and to assess their pros and cons. Yet Australian law makers seem to think that they can take a short-cut and distil some legislative concoction from crude populist vapours. They are acting dangerously, not only for businesses but also for themselves: concerted practices and facilitating practices show every sign of becoming a political booby-trap.

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