

# BROADENING THE DEFINITION OF COLLUSION? A CALL FOR CAUTION

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## 1 INTRODUCTION

In Australian competition law, the notion of collusion between competitors is encapsulated in the concepts of 'contract', 'arrangement' and 'understanding' under the *Trade Practices Act 1974* (Cth) ('TPA'). These concepts have been integral to the civil prohibitions on cartel conduct under s 45(2) of the TPA since 1974. The same concepts are used in the new cartel offences and civil per se prohibitions which took effect in July 2009 as a result of amendments made by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2008* (Cth).

In 2007, the Australian Competition and Consumer Commission ('ACCC') recommended amendments to the TPA in connection with the interpretation of 'understanding' in the wake of its largely unsuccessful cases against petrol retailers for alleged price fixing in Ballarat<sup>1</sup> and Geelong<sup>2</sup> and its subsequent petrol pricing inquiry.<sup>3</sup> In this article it is argued that the proposed amendments should be rejected.

Broadly speaking, the ACCC's proposal is misconceived, problematic and, to a significant extent, symptomatic of a failure to grapple with the fundamental issues. The former Minister for Competition Policy and Consumer Affairs, Christopher Bowen, announced that the government would give the proposals 'careful

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1 *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 ('Apco').

2 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 ('Leahy').

3 ACCC, *Petrol Prices and Australian Consumers: Report of the ACCC Inquiry into the Price of Unleaded Petrol* (2007) 228–9 <<http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>> at 11 March 2009.

consideration<sup>4</sup> and the Treasury subsequently released a discussion paper seeking submissions.<sup>5</sup> With one exception, the submissions were opposed to the ACCC's proposed amendments.<sup>6</sup> Subsequent statements by the new Minister, Craig Emerson, suggested that there will be no rush to make a decision on the issue.<sup>7</sup> However, the ACCC has since renewed the pressure for reform in its decision to oppose the Caltex/Mobil Oil acquisition and in its annual monitoring report on petrol prices. In both, the ACCC emphasised again its concern about coordinated conduct in this industry and the inaptness of the cartel prohibitions of the *TPA* in their current form to address the issue.<sup>8</sup> It would be unfortunate if the issues raised by the ACCC in its amendment proposal were seen as issues specific to the petrol industry. The *TPA* is legislation with economy-wide impact and should not be tailored to address sector-specific concerns.<sup>9</sup>

The proposed amendments are set out below in Section 2. A brief summary of the current law on the meaning of 'contract', 'arrangement' and 'understanding' follows in Section 3. The main argument of this article is that the meaning to be given to 'understanding' should be determined having regard to economic theory and the experience with overseas models. The relevant theory and overseas experience are examined in Sections 4 and 5 respectively. A detailed critique of the ACCC's proposed amendments ensues in Section 6. Recommendations on the way forward are set out in Section 7.

## 2 THE ACCC'S PROPOSED AMENDMENTS

The ACCC's proposed amendments would insert the following provisions in the *TPA*:

- (a) The court may determine that a corporation has arrived at an understanding notwithstanding that:

<sup>4</sup> Chris Bowen and Kevin Rudd, 'A National Fuelwatch Scheme' (Press Release, 15 April 2008) <<http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/023.htm&pageID=003&min=ceb&Year=2008&DocType=0>> at 13 March 2009.

<sup>5</sup> Treasury, Australian Government, *Discussion Paper: Meaning of 'Understanding' in the Trade Practices Act 1974* (2009) <[http://www.treasury.gov.au/documents/1459/PDF/Discussion\\_paper.pdf](http://www.treasury.gov.au/documents/1459/PDF/Discussion_paper.pdf)> at 30 March 2009.

<sup>6</sup> The submissions are available at Treasury, Australian Government, *Submissions: Discussion Paper – Meaning of 'Understanding' in the Trade Practices Act 1974* (2009) <<http://www.treasury.gov.au/contentitem.asp?ContentID=1511&NavID=037>> at 19 July 2009. The exception was the submission by Maurice Blackburn Pty Ltd.

<sup>7</sup> See David Crowe, 'If in Doubt, Just Stop It', *The Australian Financial Review* (Melbourne), 26 August 2009, 11.

<sup>8</sup> See ACCC, 'ACCC To Oppose the Acquisition of Mobil Retail Assets by Caltex' (Press Release, 2 December 2009) <<http://www.accc.gov.au/content/index.phtml/itemId/904296>> at 20 January 2010; ACCC, *Monitoring of the Australian Petroleum Industry: Report of the ACCC into the Prices, Costs and Profits of Unleaded Petrol in Australia* (2009) xxiii–xxvi <<http://www.accc.gov.au/content/index.phtml/itemId/906872>> at 20 January 2010.

<sup>9</sup> As emphasised by the Dawson Committee, see Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) ch 1 <<http://www.tpareview.treasury.gov.au/content/report/html/Chpt1.asp>> at 22 January 2010.

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- (i) the understanding is ascertainable only by inference from any factual matters the court considers appropriate;
  - (ii) the corporation, or any other parties to the alleged understanding, are not committed to giving effect to the understanding.
- (b) The factual matters the court may consider in determining whether a corporation has arrived at an understanding include but are not limited to:
- (i) the conduct of the corporation or of any other person, including other parties to the alleged understanding;
  - (ii) the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way in relation to the subject of the alleged understanding;
  - (iii) the extent to which the corporation was acting in concert with others in relation to the subject matter of the alleged understanding;
  - (iv) any dealings between the corporation and any other parties to the alleged understanding before the time at which the understanding is alleged to have been arrived at;
  - (v) the provision by the corporation to a competitor, or the receipt by the corporation from a competitor, of information concerning the price at which or conditions on which, goods or services are supplied or acquired, or are to be supplied or acquired, by any of the parties to the alleged understanding or by any bodies corporate that are related to any of them, in competition with each other;
  - (vi) whether the information referred to in (v) above is also provided to the market generally at the same time;
  - (vii) the characteristics of the market;
  - (viii) the likelihood of the information referred to in (v) above being useful to the recipient of the information for any purpose other than fixing or maintaining prices;
  - (ix) the extent to which, if at all, the communication referred to in (v) above was secret or intended by the parties to the communication to be secret.<sup>10</sup>

The ACCC's proposal explicitly relates to s 45 and presumably is intended to apply to the new civil per se prohibitions in Division 1 of the *TPA*. However, neither the ACCC nor Treasury has clarified publicly whether the amendments are intended to apply to the cartel offences.<sup>11</sup> Nor has any attempt been made to indicate whether or not the amendments are intended to apply to the concept of 'understanding' as it appears in numerous other provisions in the *TPA*.<sup>12</sup>

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<sup>10</sup> ACCC above n 3, 230.

<sup>11</sup> Treasury, *Discussion Paper*, above n 5, 2 is evasive. In footnote 2 it states that '[t]he expression "contract, arrangement or understanding" also forms part of the new cartel offences and prohibitions contained in the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008'.

<sup>12</sup> See, eg, ss 45C, 45E, 51, 65A, 73.

### 3 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.<sup>13</sup> Thus, the concepts are seen as being related and overlapping, while at the same time falling within a range or sequence.<sup>14</sup> Further, as would be expected, the series is treated as descending, with 'contract' at the one end, 'understanding' at the other, and 'arrangement' at some point in between.

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, complete with the well-established formation requirements.<sup>15</sup> An 'arrangement', then, is said to be a dealing 'lacking some of the essential elements that would otherwise make it a contract'<sup>16</sup> and an 'understanding' is said 'to connote a less precise dealing than either a contract or arrangement.'<sup>17</sup>

This literalist approach to interpretation takes as its starting point the orthodox paradigm for lawful business transactions but diverts attention from a more fundamental inquiry into the proper scope of liability for cooperation between competitors in antitrust law.<sup>18</sup> Further, while 'contract' has a distinctive meaning, the concepts of 'arrangement' and 'understanding' have not been distinguished clearly from each other. Nor has either concept been given much operational content other than by deduction from the requirements of a 'contract'.<sup>19</sup>

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 have been largely uncontroversial. The controversy surrounding the requirement of commitment has arisen only recently, largely as a consequence of the outcomes in the *Apco* and *Leahy* cases.<sup>20</sup>

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 s 45(2) of the *TPA*; in contrast, an expectation, even less a hope, will fall short of an

<sup>13</sup> *Leahy* (2007) 160 FCR 321, 331 (Gray J).

<sup>14</sup> The *Oxford English Dictionary* defines 'spectrum' as '[t]he entire range or extent of something, arranged by degree, quality, etc': J A Simpson and E S C Weiner, *The Oxford English Dictionary* (2<sup>nd</sup> ed, 1989) vol XVI, 170.

<sup>15</sup> A distinction between an unlawful cartel 'contract' and a lawful contract at common law, 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: *Leahy* (2007) 160 FCR 321, 331 (Gray J).

<sup>16</sup> *Ibid* 331 (Gray J).

<sup>17</sup> *Ibid* 332 (Gray J).

<sup>18</sup> Cf 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': Nicholas C Seddon and Fred Ellinghaus, *Cheshire & Fifoot's Law of Contract* (9th Australian ed, 2008) 93-4.

<sup>19</sup> See also Ian Tonking, 'Belling the CAU: Finding a Substitute for "Understandings" about Price' (2008) 16 *Competition & Consumer Law Journal* 46, 59.

<sup>20</sup> *Apco* (2005) 159 FCR 452; *Leahy* (2007) 160 FCR 321.

'understanding'.<sup>21</sup> In both instances, the ACCC's case failed because it failed to prove the requisite commitment. Concerned about the implications for future cases,<sup>22</sup> the ACCC's proposed amendments are said to be intended, amongst other things, to provide statutory clarification that an 'understanding' may exist 'notwithstanding that the party in question cannot be shown to be committed to giving effect to it.'<sup>23</sup> The recommendations were based on an opinion by Julian Burnside.<sup>24</sup>

The ACCC's 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 it had engendered, either consciously or intentionally, an expectation in another party that the first party would so act.<sup>25</sup> The proposed amendments are said to restore the law to the state that Parliament originally intended – presumably through the combination of providing in clause (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 clause (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 Parliament's original intention do not appear to be well-founded.<sup>26</sup> Both contentions are undermined by the High Court's denial of special leave to appeal from the Full Court's decision in *Apco*<sup>27</sup> and the ACCC's decision not to appeal against Gray J's decision in *Leahy*.<sup>28</sup> These developments suggest that these cases turned on their particular facts rather than on a more restrictive interpretation of the law than was previously accepted. Treasury's *Discussion Paper* acknowledges that '[c]ourts 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

<sup>21</sup> *Apco* (2005) 159 FCR 452, 464 (the Court); *Leahy* (2007) 160 FCR 321, 335 (Gray J).

<sup>22</sup> See Sophie Morris, 'Price Fixers Face Tough New Laws', *The Australian Financial Review* (Melbourne), 8 January 2009, 1. In truth the ACCC's record in proving collusion in the petrol industry has always been patchy. See *Trade Practices Commission v Leslievale* [1986] ATPR ¶40-679; *Trade Practices Commission v J J & Y K Russell Pty Ltd* [1991] ATPR ¶41-132; *Trade Practices Commission v Services Station Association Ltd* [1992] ATPR ¶41-179; *Australian Competition and Consumer Commission v Mobil Oil* [1997] ATPR ¶41-568.

<sup>23</sup> ACCC, 'Petrol Prices', above n 3, 228-9.

<sup>24</sup> J Burnside, in ACCC, *Petrol Prices and Australian Consumers: Report of the ACCC into the Price of Unleaded Petrol*, Final Report, (2007) Appendix R, 368-74 <<http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=16fed9965960216fd7066496dacfbddc&fn=Appendix%20R.pdf>> at 11 March 2009.

<sup>25</sup> *Ibid* 228-9.

<sup>26</sup> See Ian Wylie, 'Understanding "Understandings" under the *Trade Practices Act* – An Enforcement Abyss?' (2008) 16 *Trade Practices Law Journal* 20; Tonking, 'Belling the CAU', above n 19, 63-4.

<sup>27</sup> Transcript of Proceedings, *Australian Competition and Consumer Commission v Apco Service Stations Pty Ltd* (High Court of Australia, Gleeson CJ and Hayne J, 2 June 2006).

<sup>28</sup> ACCC, 'No Appeal against Geelong Petrol Decision' (Press Release, 19 June 2007) <<http://www.accc.gov.au/content/index.phtml/itemId/790103/fromItemId/776481>> at 13 March 2009.

determining the nature and content of what is required to satisfy that element of commitment.<sup>29</sup>

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 implicitly 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 by exploring conceptually what type of behaviour should constitute an 'understanding': that is, by deciding where on the theoretic spectrum an 'understanding' should lie. The second question is whether the type of behaviour that amounts to an understanding for the purposes of civil liability should also be sufficient for the purposes of criminal liability for the cartel offences. The ACCC's proposal and the Treasury *Discussion Paper* answer neither of these questions.

#### 4 ECONOMIC THEORY

In economic theory, there is a relatively clear continuum on which horizontal conduct may be demarcated for antitrust purposes.<sup>30</sup> 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 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 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.<sup>31</sup>

In the grey area between these two ends, there are two other broad categories of behaviour, albeit the lines between them are by no means sharp. The first, commonly described as 'conscious parallelism' or 'oligopolistic interdependence', is behaviour generally observed in markets with particular structural features, known as oligopolistic markets.<sup>32</sup> 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.<sup>33</sup> Most, but not all, economists concede that, although such behaviour has

<sup>29</sup> Treasury, *Discussion Paper*, above n 5, [13].

<sup>30</sup> For a useful overview of the main theories and their application in United States ('US') and European Communities ('EC') case law, see Sigrid Stroux, *US and EC Oligopoly Control* (2004) especially chs 0-1.

<sup>31</sup> Phillip Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2003) 61 [1410].

<sup>32</sup> 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: see, eg, Warren Pengilley, 'What is Required To Prove a "Contract, Arrangement or Understanding"?' (2006) 13 *Competition & Consumer Law Journal* 241, 242.

<sup>33</sup> See Frederic M Scherer and David Ross, *Industrial Market Structure and Economic Performance* (3<sup>rd</sup> ed, 1990) 199.

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).<sup>34</sup> Parallel conduct arising from oligopolistic interdependence is thus seen as a structural issue, as compared with collusive agreement, which is a behavioural issue.<sup>35</sup>

The second category of behaviour in between agreement and independence is commonly referred to as 'tacit' collusion,<sup>36</sup> or 'facilitating' practices.<sup>37</sup> This behaviour goes beyond conscious parallelism or interdependence. In essence, it involves an activity, generally involving 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.<sup>38</sup> Such facilitation assists in overcoming the uncertainty associated with competition or impediments to oligopolistic interdependence.<sup>39</sup> Tacit collusion or facilitating behaviour increases the likelihood of anti-competitive effects.

Examples of such behaviour (sometimes referred to as signalling devices) are as infinite as the creativity of commerce. Commonly cited examples include:

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- <sup>34</sup> See Donald F Turner, 'The Definition of Agreement under the *Sherman Act*: Conscious Parallelism and Refusals to Deal' (1962) 75 *Harvard Law Review* 655, 669. With the prominent exception of Richard Posner (see *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F 3d 651, 654 (7<sup>th</sup> Cir, 2002) (Judge Posner); Richard A Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach' (1969) 21 *Stanford Law Review* 1562; Richard A Posner, *Antitrust Law: An Economic Perspective* (1976) ch 4), courts in the US have agreed with this position: see, eg, *Clamp-All Corporation v Cast Iron Soil Pipe Institute*, 851 F 2d 484 (1<sup>st</sup> Cir, 1988). Cf Alan Devlin, 'A Proposed Solution to the Problem of Parallel Pricing in Oligopolistic Markets' (2007) 59 *Stanford Law Review* 1111.
- <sup>35</sup> 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 ACCC, *Merger Guidelines* (2008) ch 6 <<http://www.accc.gov.au/content/item.php?itemId=809866&nodeId=7cfe08f3df2fe6090df7b6239c47d063&fn=Merger%20guidelines%202008.pdf>> at 13 March 2009.
- <sup>36</sup> 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 William E Kovacic, 'The Identification and Proof of Horizontal Agreements under the Antitrust Laws' (1993) 38 *Antitrust Bulletin* 5, 19–20.
- <sup>37</sup> See, eg, George A Hay, 'Facilitating Practices', in ABA Section of Antitrust Law (ed), *Issues in Competition Law and Policy Vol II* (2008) ch 50, 1189; Michael D Blechman, 'Conscious Parallelism, Signalling and Facilitating Practices: The Problem of Tacit Collusion under the Antitrust Laws' (1979) 24 *New York Law School Law Review* 881. See also Christopher Decker, *Economics and the Enforcement of European Competition Law* (2009) 198–235, Appendix ('The Economics of Tacit Collusion') which provides a useful summary of the extensive economic literature on this topic.
- <sup>38</sup> 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 George A Hay, *Practices that Facilitate Cooperation: The Ethyl Case* in John E Kwoka Jr and Lawrence J White (eds), *The Antitrust Revolution* (3<sup>rd</sup> ed, 1989) 183.
- <sup>39</sup> See Areeda and Hovenkamp, above n 31, 209–13 [1430].

- public speech (eg discussion of conditions affecting price in the media);<sup>40</sup>
- private information exchanges (eg competitors sending price lists or manuals to each other);
- 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);
- uniform delivery pricing methods (eg where suppliers each discount their regular free on board 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); and
- product standardisation or benchmarking (eg where competitors publish the technical specifications to manufacture a product to a certain standard).<sup>41</sup>

In the United States ('US') it has been observed that tacitly collusive behaviour has increased as enforcers have become more aggressive in their pursuit of cartel activity, sanctions more severe, and courts more willing to recognise as an 'agreement' conduct that falls outside the traditional realm of written or spoken exchanges.<sup>42</sup> Firms have been induced by these developments to devise 'more subtle and less direct means for communicating intentions and exchanging assurances about future behaviour.'<sup>43</sup> There is no reason to think that Australian business is any different in this regard.

Many economists, including George Hay, argue that in appropriate circumstances, facilitating or signalling devices should be unlawful.<sup>44</sup> These devices can produce the same cartel-like effects as explicit agreements, and they can be 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.

The spectrum of conduct based on economic theory described in this Section is depicted in Figure 1 below.

<sup>40</sup> Sometimes this is referred to as 'cheap talk', referring to verbal messages or announcements that are costless, non-binding and generally unverifiable. See, eg, Marian Chapman Moore, Ruskin M Morgan and Michael J Moore, 'Only the Illusion of Possible Collusion? Cheap Talk and Similar Goals: Some Experimental Evidence' (2001) 20 *Journal of Public Policy & Marketing* 27.

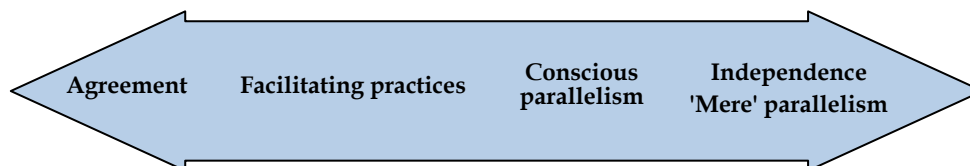
<sup>41</sup> The economic literature on each of these practices is prolific. For a selection, see Ralph A Winter, 'Price-Matching and Meeting Competition Guarantees', in ABA Section of Antitrust Law (ed), *Issues in Competition Law and Policy Vol II* (2008) 1269; Joseph Kattan, 'Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment' (1994) 63 *Antitrust Law Journal* 133; Steven C Salop, 'Practices that (Credibly) Facilitate Oligopoly Co-ordination', in Joseph E Stiglitz and G Frank Mathewson (eds), *New Developments in the Analysis of Market Structure* (1986) 265, 271.

<sup>42</sup> Kovacic, above n 36, 2-13.

<sup>43</sup> This phenomenon was recognised as early as 1945: see *William Goldman Theatres, Inc v Loew's, Inc*, 150 F 2d 738, fn 15 (3<sup>rd</sup> Cir, 1945).



Figure 1



## 5 OVERSEAS MODELS

In considering how an 'understanding' might be conceptualised for the purposes of the cartel prohibitions under the *TPA*, it is helpful to have regard to the models used in the major antitrust jurisdictions of the US and European Community ('EC').

### 5.1 The US model

In the US, the concepts of 'contract, combination in the form of a trust or otherwise, or conspiracy' in s 1 of the *Sherman Antitrust Act of 1890*<sup>45</sup> ('*Sherman Act*') are all equated with an agreement.<sup>46</sup> Traditional formulations of an 'agreement' for this purpose are principally: 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement'<sup>47</sup> and a 'conscious commitment to a common scheme'.<sup>48</sup> In practice, however, 'commitment' is a weak and inarticulate concept in this jurisdiction and has no apparent operational meaning in the absence of express assurances.<sup>49</sup> Having recited the traditional definition of an agreement, courts appear to focus on whether an agreement can be inferred from evidence suggesting that the defendant was not acting independently. In other words, the inquiry is directed at whether there was something other or more than conscious parallelism or oligopolistic interdependence at work.<sup>50</sup> If so, then generally that 'other' is assumed to fall within the traditional concept of 'agreement'.<sup>51</sup> In some cases reliance has been placed on the concept of facilitating practices as developed in the economic literature, although it is not pellucidly clear that this concept has been used to denote behaviour that is different to, albeit as culpable and harmful as, an agreement.<sup>52</sup> In addition, facilitating

<sup>44</sup> Hay, 'Facilitating Practices', above n 37, 1189.

<sup>45</sup> 15 USC § 1-7.

<sup>46</sup> Richard A Posner, *Antitrust Law* (2<sup>nd</sup> ed, 2001) 262; Areeda and Hovenkamp, above n 31, [1403].

<sup>47</sup> *American Tobacco Co v United States*, 328 US 781, 810 (1946).

<sup>48</sup> *Monsanto Co v Spray-Rite Service Corporation*, 465 US 752, 768 (1984).

<sup>49</sup> Kovacic, above n 36, 25.

<sup>50</sup> Darryl Snider and Irving Scher, 'Conscious Parallelism or Conspiracy?', in ABA Section of Antitrust Law (ed), *Issues in Competition Law and Policy Vol II* (2008) 1143, 1144.

<sup>51</sup> Cf the analysis in William H Page, 'Twombly and Communication: The Emerging Definition of Concerted Action under the New Pleading Standards' (2009) 5 *Journal of Competition Law & Economics* 439; William H Page, 'Communication and Concerted Action' (2007) 38 *Loyola University of Chicago Law Journal* 405.

<sup>52</sup> See, eg, *Federal Trade Commission v Cement Institute*, 333 US 683 (1948); *National Macaroni Mfrs Association v Federal Trade Commission*, 345 F 2d 421 (7<sup>th</sup> Cir, 1965); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F 2d 432 (9<sup>th</sup> Cir, 1990).

practices have been challenged as unfair methods of competition contrary to s 5 of the *Federal Trade Commission Act 1914*.<sup>53</sup> They have also been relied on in support of decisions to block mergers, recently as part of the Federal Trade Commission's case for blocking the acquisition by health-care giant, CSL, of one of the world's largest blood plasma suppliers.<sup>54</sup>

## 5.2 The EC model

A different approach is taken under art 81(1) of the *Treaty Establishing the European Community*<sup>55</sup> (now art 101(1) of the *Treaty on the Functioning of the European Community*) and the contrast is instructive. The prohibition in art 81(1)/101(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 falls short of an agreement.<sup>56</sup> In general, the standard required to establish a 'concerted practice' is less demanding than that required to establish an 'agreement.' This avoids the artificiality in stretching the notion of 'agreement' beyond its normal bounds. 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 device'.<sup>57</sup> Like a facilitating device or 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'.<sup>58</sup> In order to establish a 'concerted practice' all that needs to be shown is:<sup>59</sup>

<sup>53</sup> 15 USC § 5. See Areeda and Hovenkamp, above n 31, 37 [1407]. Broadening s 5 for this purpose is controversial: see, eg, the criticisms in US Chamber of Commerce, 'Unfair Methods of Competition under Section 5 of the *FTC Act*: Does the US Need Rules "Above and Beyond Antitrust"?' *GCP: The Antitrust Chronicle* (Issue 2, September 2009) <<http://www.uschamber.com/NR/rdonlyres/e3sp4kmveqppwjzvovo6rnhbv7izz46gkf2idhii2ja6npw4compiaoheuabc3s6gem2bcfkhbksu4mcmh75ym5pgc/0909antrust.pdf>> at 22 January 2010.

<sup>54</sup> See Eli Greenblat, 'US Watchdog Accuses CSL of Price fixing', *The Sydney Morning Herald* (Sydney) 30-1 May 2009, 3; Eli Greenblat, 'Warning on Tough Merger Stance in US', *The Sydney Morning Herald* (Sydney), 2 June 2009, 21. CSL subsequently withdrew its bid: Eli Greenblat, 'CSL Pays Break Fee and Retreats', *The Sydney Morning Herald* (Sydney), 10 June 2009, 23. A private suit against CSL and rival, Baxter, followed: see Eli Greenblat, 'CSL Taken To Court over Price Fixing Claims', *The Age* (Melbourne), 17 July 2009. Similarly, facilitating practices were one of the primary reasons for the ACCC's decision not to grant clearance to Caltex's proposal to acquire Mobil Oil retail outlets: see ACCC, 'ACCC to Oppose the Acquisition of Mobil Retail Assets by Caltex', above n 8.

<sup>55</sup> Opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958) ('the *EC Treaty*').

<sup>56</sup> Jonathan Faull and Ali Nikpay, *The EC Law of Competition* (2007) 210 [3.103].

<sup>57</sup> Julian M Joshua and Sarah Jordan, 'Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law' (2004) 24 *Northwestern Journal of International Law & Business* 647, 660.

<sup>58</sup> *Imperial Chemical Industries Ltd v Commission* (C-48/69) [1972] ECR 619, [118].

<sup>59</sup> Faull and Nikpay, above n 56, 212, paras [3.108]-[3.111].

- (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.

In 'hardcore horizontal cases' the causal relationship is generally presumed once contact and consensus are established and rebuttal of the presumption is allowed only where the defendant proves that the concertation did not have 'any influence whatsoever on its own conduct on the market.'<sup>60</sup> In practice, the likelihood of rebuttal is slim.<sup>61</sup> This is particularly so in relation to the exchange of pricing information. The case law has clearly established that, in the absence of public distancing (referred to below), contact with competitors that involves discussion about present or future prices is generally regarded as an infringement of art 81(1) on the basis that it has the object of restricting competition.<sup>62</sup>

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'.<sup>63</sup> The European Court of Justice ('ECJ') has noted that while the *EC 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 either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to

<sup>60</sup> *Huls AG v Commission* (C-199/92) [1999] ECR I-4287, [167].

<sup>61</sup> Faull and Nikpay, above n 56, 212-13 [3.111]. Even a meeting between competitors on a single occasion, as opposed to a regular exchange of information over a period of time, may raise the presumption: see *T-Mobile Netherlands BV and others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08), [2009] ECR 00, [54]-[62].

<sup>62</sup> Richard Whish, *Competition Law* (6<sup>th</sup> ed, 2009) 524-5.

<sup>63</sup> See *Commission v Anic Participazioni* (C-49/92) [1999] ECR I-4125, [108]. The submissions of the Law Council of Australia and the American Bar Association in relation to the ACCC's proposed amendments both claimed that under EC law there is little distinction between an 'agreement' and a 'concerted practice.' See Submission to Treasury on the Meaning of 'Understanding' in the *Trade Practices Act 1974*, Parliament of Australia, 31 March 2009, Submission No 7, 10 (Law Council of Australia) <[http://www.treasury.gov.au/documents/1511/PDF/Law\\_Council\\_of\\_Australia\\_Trade\\_Practices\\_Committee.pdf](http://www.treasury.gov.au/documents/1511/PDF/Law_Council_of_Australia_Trade_Practices_Committee.pdf)> at 19 July 2009; Joint Comments Of The American Bar Association Section Of Antitrust Law And Section Of International Law On The Meaning Of "Understanding" In The Australian *Trade Practices Act 1974*, Parliament of Australia, 26 March 2009, Submission No 1, 14-16 (American Bar Association) <[http://www.treasury.gov.au/documents/1511/PDF/American\\_Bar\\_Association.pdf](http://www.treasury.gov.au/documents/1511/PDF/American_Bar_Association.pdf)> at 19 July 2009. This claim is inconsistent with authoritative statements on EC law, including Whish, above n 62, 552-5; Faull and Nikpay, above n 56, 210-14; Barry J Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (4<sup>th</sup> ed, 2009) 174-6.

adopt or contemplate adopting on the market'.<sup>64</sup> It is likely that the behaviour in *Apco* and *Leahy* would constitute a 'concerted practice' as that concept is understood in EC law. Applying this concept to the type of situation that arose in those cases, 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 passively receives or accepts it.<sup>65</sup> Thus, for the purposes of finding information transmitters 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 information recipients liable, it would be sufficient to show that their conduct was influenced even if merely by aiding their decisions as to whether or not to follow the signalled price.<sup>66</sup>

As regards information recipients, the EC view 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.<sup>67</sup> Even proof of actual deviations from the prices discussed will not be sufficient to rebut this presumption of influence.<sup>68</sup> 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.<sup>69</sup> The justification for this strict approach, as identified by the 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'.<sup>70</sup>

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 other words, that it had clearly refused to 'go with the flow'.<sup>71</sup> 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 the participants must be denounced and the denouncement must be clearly and unequivocally expressed to the other cartel members;

<sup>64</sup> *Suiker Unie v Commission* [1975] ECR 1663, 173–5. See also *Gerhard Züchner v Bayerische Vereinsbank AG* (C-172/80) [1981] ECR 2021, [13]; *Deere v Commission* (C-7/95) [1998] ECR I-3111, [86]; *Thyssen Stahl v Commission* (C-194/99) [2003] ECR I-10821, [81].

<sup>65</sup> *S. A. Cimenteries CBR v Commission* (T-309/00) [2000] ECR II-491, [1849].

<sup>66</sup> See, eg, the finding in *Apco* (2005) 159 FCR 452, 465 [47] (the Court).

<sup>67</sup> *Rhone-Poulenc SA v Commission* (T-1/89) [1991] ECR II-867.

<sup>68</sup> *Commission v Anic Partecipazioni* (C-49/92) [1999] ECR I-4125, [127]–[128].

<sup>69</sup> *Polypropylene* OJ [1986] L 230/1, [73], [89].

<sup>70</sup> *Dansk Rorindustri v Commission* (C-205/1) [2005] ECR I-5425, [143].

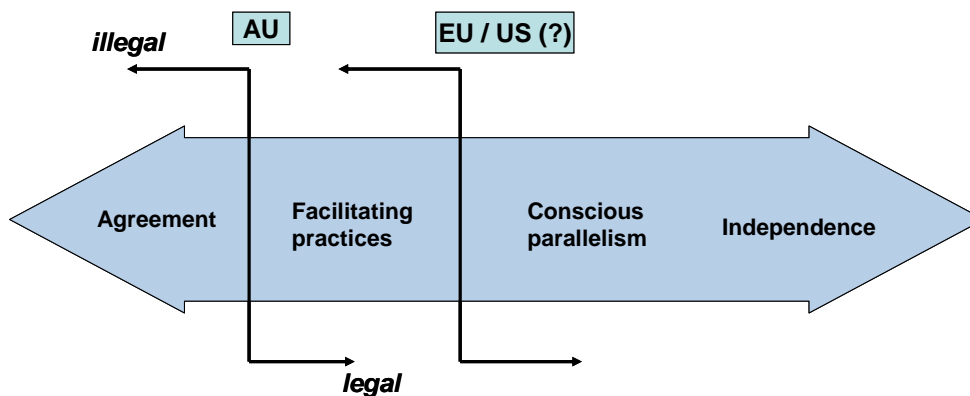
<sup>71</sup> David Bailey, "Publicly Distancing" Oneself from a Cartel' (2008) 31 *World Competition* 177, 178; Whish, above n 62, 101–2.

- the firm in question must avoid disclosing its own strategy and pricing intentions and must be able to establish that its subsequent commercial policy and behaviour is determined independently; and
- it must not participate in any further anti-competitive discussions.<sup>72</sup>

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.<sup>73</sup> 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.<sup>74</sup>

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



## 6 FLAWS IN THE ACCC'S PROPOSED AMENDMENTS

### 6.1 Failure to conceptually define an 'understanding'

The ACCC's proposal does not tackle the issue of how an 'understanding' should be defined from a conceptual perspective. Instead, it approaches 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 not 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

<sup>72</sup> Bailey, above n 71, 179.

<sup>73</sup> Okeoghene Odudu, *The Boundaries of EC Competition Law* (2006) 81–6.

<sup>74</sup> Whish, above n 62, 102.

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 opinion argue that an intentional or conscious arousal of an expectation regarding future conduct should be sufficient to establish an 'understanding'.<sup>75</sup> 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).

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.<sup>76</sup> As explained in Section 5, the concept is recognised in both EC law (formally) and US law (at least to some extent, albeit informally). It is consistent with economic theory, as outlined in Section 4, as to where the line should be drawn between legal and illegal horizontal coordination. Further, extension of civil 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,<sup>77</sup> aided by the emergence of the 'electronic marketplace' which facilitates instant universal exchange of volumes of market information.<sup>78</sup> Moreover, equating an 'understanding' with a 'concerted practice' 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).

Against extending liability in this way is the understandable concern about the potential for overreach and over-deterrence. 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.<sup>79</sup> Communication between competitors can have at least ambiguous, if not pro-competitive and welfare-enhancing, effects.<sup>80</sup> Consider the scenario in which competitors post their prices,

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<sup>75</sup> ACCC, *Petrol Prices and Australian Consumers: Report of the ACCC into the Price of Unleaded Petrol*, above n 3; J Burnside, in ACCC, *Petrol Prices and Australian Consumers: Report of the ACCC into the Price of Unleaded Petrol*, above n 24.

<sup>76</sup> See Wylie, above n 26, 33.

<sup>77</sup> See Bill Reid, 'Cartels – Criminal Sanctions and Immunity Policy' (Paper presented at the Competition Law Conference, Sydney, 12 November 2005) 7–12 regarding the education of business people in tacit methods of collusion by business schools and trade practices compliance training.

<sup>78</sup> Jonathan B Baker, 'Identifying Horizontal Price Fixing in the Electronic Marketplace' (1996) 65 *Antitrust Law Journal* 41; Dennis W Carlton, Robert H Gertner and Andrew M Rosenfield, 'Communication Among Competitors: Game Theory and Antitrust' (1997) 5 *George Mason Law Review* 423, 432; Severin Borenstein, 'Rapid Price Communication and Coordination: The Airline Tariff Publishing Case', in John E Kwoka Jr and Lawrence J White (eds), *The Antitrust Revolution: Economics, Competition and Policy* (4<sup>th</sup> ed, 2004) 310.

<sup>79</sup> As recently confirmed in *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*, (C-8/08), [2009] ECR 00.

<sup>80</sup> See generally Areeda and Hovenkamp, above n 31, 251–5 [1435]; Rhonda L Smith, Arlen Duke and David K Round, 'Signalling, Collusion and s 45 of the *Trade Practices Act*' (2009) 17 *Competition & Consumer Law Journal* 22; Per Baltzer Overgaard and H Peter Mollgaard, 'Information Exchange, Market Transparency, and Dynamic Oligopoly', in ABA Section of

including future prices, on an electronic bulletin board. This is a practice that has been used in the airline industry (but ceased in the US as a result of an antitrust suit)<sup>81</sup> and in the fuel industry (in Australia, through the FuelWatch scheme administered by the Western Australian government).<sup>82</sup> 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. Indeed, perfect competition is dependent on consumers having perfect information about the market. At the same time, information exchange 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. It should also be acknowledged that information exchange between competitors often goes beyond information about prices (as, for example, in the case of benchmarking) and that such exchange often has benefits for the competitive process.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> On the other hand, the TPA now has several per se prohibitions the economic justification for which is ambiguous or flimsy,<sup>86</sup> but which have been adopted to facilitate enforcement by the ACCC and

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Antitrust Law (ed), *Issues in Competition Law and Policy Vol II* (2008) 1241; Whish, above n 62, 525.

81 See *United States v Airline Tariff Publishing Co*, 836 F Supp 9 (DDC 1993) <<http://www.usdoj.gov/atr/cases/f4700/4796.htm>> at 23 March 2009, discussed in Carlton, Gertner and Rosenfield, above n 78, 436–8; Hay, 'Facilitating Practices', above n 37, 1211–2.

82 See Department of Commerce, The Government of Western Australia, *FuelWatch* <<http://www.fuelwatch.com.au>> at 19 July 2009. In relation to the failed attempt by the federal government to establish a Commonwealth equivalent, see Jason Soon, 'Fuelwatch: A Tale of Two Interventions', *ABC News*, 4 March 2009 <<http://www.abc.net.au/news/stories/2009/03/04/2506817.htm>> at 23 March 2009.

83 See generally Swedish Competition Authority, *The Pros and Cons of Information Sharing* (November 2006), Konkurrensverket <[http://www.kkv.se/t/NewsPage\\_\\_\\_1852.aspx](http://www.kkv.se/t/NewsPage___1852.aspx)> at 19 July 2009.

84 Carlton, Gertner and Rosenfield, above n 78. See also Maurice E Stucke, 'Evaluating the Risks of Increased Price Transparency' (2005) 19 *Antitrust* 81. Such an assessment would have to be made in any event in the context of a private damages suit to determine loss and causation. This would also be consistent with the approach taken to information-sharing agreements in other jurisdictions. See, eg, Canada: Competition Bureau, *Competitor Collaboration Guidelines: Draft for Public Consultation* (2009) 28–30, <[http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/\\$file/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf](http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/$file/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf)> at 19 July 2009.

85 Areeda and Hovenkamp argue 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': above n 31, 30–1 [1407].

86 The prohibition on third line forcing in TPA s 47(6), in particular.

which depend heavily on the possibility of error correction through the administrative mechanism of authorisation.<sup>87</sup> In addition, any extension of the law by adopting the concept of 'concerted practices' should ensure that it does not catch vertical relationships between suppliers and their distributors given the generally pro-competitive nature of such relationships.<sup>88</sup> Another matter to consider is whether 'public distancing' or withdrawal should be introduced as an exception or defence.

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 Act<sup>89</sup> or an attempted inducement of a contravention.<sup>90</sup> 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. Another approach may be to pursue a passive recipient of information on the basis of ancillary liability, one possibility being liability for being knowingly concerned in the attempt by a competitor to contravene the Act. A further possible approach could involve drawing on the 'invitation-to-collude' theory (or the related theory of 'solicitation to conspire'). Under this theory, an invitation to engage in unlawful anti-competitive conduct, if lacking any countervailing pro-competitive benefit, demonstrates a dangerous anti-competitive tendency that should be condemned for that reason.<sup>91</sup> While theoretically available, these possible alternative bases of liability appear complicated and unlikely to achieve outcomes that cannot otherwise be achieved by adoption of the tried and tested EC concept of 'concerted practice'.

The ACCC's proposed amendments could reflect an underlying intention 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 the factors under the ACCC's proposal to the establishment of a 'concerted practice'; (3) the restriction of the list of factual matters in proposed amendment (b) to proof of an 'understanding';<sup>92</sup> and (4) the reference by the ACCC to 'facilitating practices' as a major concern in its recent publications with respect to the petrol industry.<sup>93</sup> However, if this is what the ACCC is seeking to achieve by its

<sup>87</sup> Cf the 'ancillary restraints' defence under art 81(3) of the *EC Treaty*.

<sup>88</sup> Under EC law the concept seems to extend to vertical as well as horizontal arrangements: see Faull and Nikpay, above n 56, 215 [3.116]-[3.117]. However, vertical arrangements should be explicitly and clearly excluded from per se prohibition: see Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, section 4 (B Fisse) <[http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub05.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf)> at 19 July 2009.

<sup>89</sup> See, eg, *Trade Practices Commission v Parkfield Operations* (1985) 7 FCR 534, 538-9 (the Court).

<sup>90</sup> See *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 3 FCR 168, 183 (Toohey J).

<sup>91</sup> See Dennis A Yao and Susan S DeSanti, 'Game Theory and the Legal Analysis of Tacit Collusion' (1993) 38 *Antitrust Bulletin* 113; Kevin J Arquit, 'The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude' (1992 - 1993) 61 *Antitrust Law Journal* 531; Areeda and Hovenkamp, above n 31, 122-38 [1419].

<sup>92</sup> The justification for this restriction, however, is not clear. There seems to be 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.

<sup>93</sup> See above n 8.



amendments, the proposal should be restated clearly and fully debated on that basis. Moreover, careful consideration should be given to the statutory drafting of any Australian concept of concerted practice.<sup>94</sup>

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)). A suggested amendment has not been drafted or set out in this article.<sup>95</sup> However, in general terms, there appear to be three main options. 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. A disadvantage of this option is that the principles that have been developed in the case law in relation to 'contract, arrangement or understanding' will no longer apply. A 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 clear than it is now. A 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 art 81(1)/101 (1) of the *EC Treaty*. The third option appears to be the most promising.

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 that the amendment should necessarily apply to the cartel offences. There is no criminal liability for cartel conduct in the EC. In the US, the courts continue, at least 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'.<sup>96</sup>

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<sup>94</sup> Without clear interpretation provisions and extrinsic materials, courts may not appreciate the significance of the amendment: see above n 19, 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.

<sup>95</sup> Cf the form of amendment proposed by Tonking: above n 19, 69. This could be seen as a modified version of a 'concerted practice' and has much to commend it, albeit with some limitations. For comments on Tonking's proposal, see Caron Beaton-Wells and Brent Fisse, 'The Cartel Offences: An Elemental Pathology' (Paper presented at the Joint Law Council of Australia-Federal Court of Australia Workshop on Cartel Criminalisation, Adelaide, 4 April 2009) <[http://www.brentfisse.com/images/Beaton-Wells\\_&\\_Fisse\\_LCAFCA\\_Paper\\_4\\_April\\_2009.pdf](http://www.brentfisse.com/images/Beaton-Wells_&_Fisse_LCAFCA_Paper_4_April_2009.pdf)> at 27 March 2010.

<sup>96</sup> As argued in numerous submissions made in relation to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth).

## 6.2 Evidentiary considerations

In Australia, as elsewhere, a conspiracy, howsoever conceived, may be proven by direct evidence, circumstantial evidence or, as is often the case, a combination of both.<sup>97</sup> Self-evidently, the 'hard' cases are those in which the direct evidence is weak or lacking altogether. 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 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.<sup>98</sup>

The ACCC perceives reluctance by the courts to accept circumstantial evidence.<sup>99</sup> 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.<sup>100</sup>

Nevertheless, 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. Only after that question has been resolved can questions of evidence and proof be sensibly addressed.

### 6.2.1 Limited scope and ambiguity in the proposed list of factual matters

The need for conceptual definition aside, the ACCC's proposed list of factual matters is unsatisfactory in many respects. It appears to have been inspired partly by the approach taken in the US 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.<sup>101</sup> As most antitrust cases are tried before juries in the US, the question of sufficiency of proof of an agreement in practice reduces to whether the evidence is

<sup>97</sup> Organisation for Economic Co-operation and Development, *Prosecuting Cartels without Direct Evidence of Agreement*, OECD Doc DAF/COMP/GF(2006)7 (2006) <<http://www.oecd.org/dataoecd/19/49/37391162.pdf>> at 13 March 2009.

<sup>98</sup> See Warren Pengilley, 'ACCC Fails in Geelong Petrol Price-fixing Litigation: What Are the Lessons?' (2007) 23(4) *Australian and New Zealand Trade Practices Bulletin* 54; Christopher Hodgekiss, 'Not Worth the Paper it was Written on ... When Admissions Mean Nothing' (2008) 16 *Trade Practices Law Journal* 155.

<sup>99</sup> ACCC, *Petrol Prices*, above n 3, 229.

<sup>100</sup> As the Full Court acknowledged, the ACCC succeeded against the other respondents in *Apco* based on a 'powerful case' of circumstantial evidence: *Apco* (2005) 159 FCR 452, 465.

<sup>101</sup> The term 'plus factors' appears to have originated in the trial judgment in *C-O Two Fire Equipment Co v United States*, 197 F 2d 489 (9<sup>th</sup> Cir, 1952).

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'.<sup>102</sup> Such an inference will be available if the evidence "tends to exclude the possibility" that the alleged conspirators acted independently'.<sup>103</sup> 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.<sup>104</sup> There is no codified list of such factors. However, key examples include:

- existence of a rational motive for defendants to behave collectively (or 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 inter-firm 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.<sup>105</sup>

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 attempt to rank plus factors according to their probative value or specify the minimum critical mass of plus factors that must be established' to sustain an inference of collusion.<sup>106</sup> Nor have the courts adequately explained how each factor supports or detracts from the relevant inference.<sup>107</sup> These failings have been said to make the 'disposition of future cases unpredictable' and to impart 'an impressionistic quality to judicial decision making'.<sup>108</sup> 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.<sup>109</sup>

The loose or arbitrary tendencies alleged against the plus factors in the US would not necessarily be repeated here if the ACCC's proposed amendment were accepted.

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<sup>102</sup> Snider and Scher, above n 50, 1152.

<sup>103</sup> *Matsushita Electric v Zenith Radio Corp*, 475 US 574, 588 (1986).

<sup>104</sup> This rule was recently extended to the pleadings context in *Bell Atlantic Corporation v Twombly*, 550 US 544, 549 (2007).

<sup>105</sup> This list is taken from Kovacic, above n 36, 37-54. See also Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003) 151.

<sup>106</sup> Kovacic, above n 36, 35.

<sup>107</sup> Hay, 'Facilitating Practices', above n 37, 1189.

<sup>108</sup> Kovacic, above n 36, 35-6.

<sup>109</sup> *Ibid.*

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.<sup>110</sup> 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.<sup>111</sup> This is apparent from the limited scope and the ambiguity of the ACCC's proposed factors, as criticised below. Each of these factors is likely to create issues of interpretation regarding their scope and significance in inferring the existence of an 'understanding'.

*(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.<sup>112</sup> 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).<sup>113</sup> However, the experience in the US has been that '[f]ew cases ... have found parallelism so extraordinary that agreement could be inferred without more.'<sup>114</sup>

*(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 defendant taking action with the purpose of influencing the conduct of competitors and thereby reducing the uncertainty of competition. However, it does not capture fully 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 art 81(1)/101(1) the causal relationship required plays an important role in distinguishing between unilateral and concerted action.<sup>115</sup>

<sup>110</sup> As recommended in Organisation for Economic Co-operation and Development, above n 7, 9. That said, it has been observed that courts applying a 'holistic plausibility' analysis approach in the US 'seem to arrive at similar outcomes' to those applying the plus factor approach, and not always with the same degree of transparency in reasoning: Snider and Scher, above n 50, 1172.

<sup>111</sup> To get a sense of the complexity, see the suggested steps in the analysis required to appraise facilitating practices generally in Areeda and Hovenkamp, above n 31, 279–80 [1436e].

<sup>112</sup> Ibid [1425e].

<sup>113</sup> For discussion and examples, see ibid [1425].

<sup>114</sup> Gregory J Werden, 'Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory' (2004) 71 *Antitrust Law Journal* 719, 748.

<sup>115</sup> See the text accompanying n 59 above.

(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.<sup>116</sup> 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,<sup>117</sup> 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).<sup>118</sup> 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.<sup>119</sup> On the other hand, 'innocent stealth' by competitors might be explained by plans for lawful lobbying, research, advertising or joint ventures.<sup>120</sup>

(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), the provision or receipt of information by itself is insufficient to cross the line from 'innocent' to illegal coordination. The purpose or effect of that behaviour is what is critical. As explained above, the exchange of information between competitors might be benign, if not pro-competitive or welfare-enhancing. For this reason, 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

<sup>116</sup> See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed, 2005) 372–7.

<sup>117</sup> See, eg, *Seagood Trading Corporation v Jerrico Inc*, 924 F 2d 1555, 1574–5 (11<sup>th</sup> Cir, 1991); *Valley Liquors Inc v Renfield Importers*, 822 F 2d 656, 662 (7<sup>th</sup> Cir, 1987).

<sup>118</sup> See, eg, *International Distribution Centers Inc v Walsh Trucking Co*, 812 F 2d 786, 794–5 (2<sup>nd</sup> Cir, 1987).

<sup>119</sup> See Areeda and Hovenkamp, above n 31, [1417].

<sup>120</sup> *Ibid* [1417d].

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?<sup>121</sup>

*(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.<sup>122</sup> However, as pointed out previously, 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. Consumers may be disinterested in this type of information.<sup>123</sup> 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, the public/private dichotomy may be misleading.<sup>124</sup>

*(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 meaningless. It also does not appear to cater for comparison between different markets.<sup>125</sup>

In antitrust analysis generally, market structure is recognised as significant in assessing the prospects of coordinated behaviour between rivals.<sup>126</sup> Broadly speaking, collusion is seen as unlikely in settings in which there are 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.<sup>127</sup>

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.<sup>128</sup> In addition, a failure of the market to reflect the adjustments ordinarily expected from effective competition would be evidence of its absence. Thus,

<sup>121</sup> Overgaard and Mollgaard, above n 80.

<sup>122</sup> Carlton, Gertner and Rosenfield, above n 78, 432-434.

<sup>123</sup> Ibid, 432.

<sup>124</sup> Smith, Duke and Round, above n 80, 39.

<sup>125</sup> Non-competitive performance may reflect collusion where competitive results are observed in an otherwise identical market: see Areeda and Hovenkamp, above n 31, [1421].

<sup>126</sup> There is extensive economic literature on this. See the surveys of theoretical and empirical work by Switgard Feuerstein, 'Collusion in Industrial Economics — A Survey' (2005) 5 *Journal of Industry, Competition and Trade* 163; Margaret C Levenstein and Valerie Y Suslow, 'What Determines Cartel Success?' (2006) 44 *Journal of Economic Literature* 43.

<sup>127</sup> Pengilly, 'What is Required', above n 32, 241-42.

<sup>128</sup> Kovacic, above n 36, 54-5.

stable prices in the face of a substantial decline in demand or substantial excess capacity may imply that the market is not functioning competitively.<sup>129</sup>

*(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 the defendant's 'motive-to-conspire' or the related question of whether its actions could be said to be contrary to its self-interest unless pursued as part of a collective plan.<sup>130</sup> Thus, for example, an agreement may be inferred where the evidence is that the defendant failed to respond rationally to changing demand or supply conditions by raising prices in the face of sluggish or declining demand.<sup>131</sup> 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).<sup>132</sup>

*(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 inter-firm communications is strengthened where the communications took place in secret.<sup>133</sup> Not surprisingly, it is taken to be strengthened further where the parties to the communications adjust their behaviour in parallel shortly thereafter<sup>134</sup> and even further if no non-conspiratorial explanation is offered, or an innocent explanation is offered that later turns out to be false.<sup>135</sup> 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.

### 6.2.2 Additional complications

As should be evident from Section 6.2.1, the danger with a list of factors such as that proposed by the ACCC is that, without proper explanation of the conceptual

<sup>129</sup> See Areeda and Hovenkamp, above n 31, 221 [1432b].

<sup>130</sup> Werden, above n 114, 748–50.

<sup>131</sup> See, eg, *C-O Two Fire Equipment Co v United States*, 197 F 2d 489, 497 (9<sup>th</sup> Cir, 1952); *Bond Crown & Cork Co v Federal Trade Commission*, 176 F 2d 974, 978–9 (4<sup>th</sup> Cir, 1949).

<sup>132</sup> Areeda and Hovenkamp, above n 31, 92–101 [1415], 224–47 [1434c].

<sup>133</sup> Kovacic, above n 36, 47.

<sup>134</sup> *Ibid.*

<sup>135</sup> Areeda and Hovenkamp, above n 31, 105–15 [1417].

theoretical relevance of each factor and/or various potential combinations of factors, there is potential for confusion, distorted reasoning and erroneous outcomes. However, there are four further considerations that are relevant to assessment of the ACCC's 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, referred to above.<sup>136</sup> 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.<sup>137</sup> Although the bar is set high to establish this defence, it is accepted nevertheless in both the US and the EC that a defendant may be able to prove that its behaviour was explicable on the grounds of independent decision-making having regard to its own commercial interests.<sup>138</sup> 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.<sup>139</sup> In criminal cases the burden is to prove beyond a reasonable doubt that the circumstances exclude any reasonable hypothesis consistent with innocence.<sup>140</sup> 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 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 an understanding is a physical element of the offence. The relevant fault element for this physical element is intention.<sup>141</sup> 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 been arrived at. Indeed, several of the factors may also be relevant to establishing that the defendant knew or believed that the understanding contained a cartel provision.<sup>142</sup> 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 (contrary

<sup>136</sup> See generally *ibid* [1412-5]; Kattan, above n 41, 140.

<sup>137</sup> See the cases discussed in Areeda and Hovenkamp, above n 31, 74-5, 81-91 [1412-3].

<sup>138</sup> Kovacic, above n 36, 55-7. See Ian Tonking, 'From Coal Vend to Basic Slag: Winning the Hearts and Minds?' (2009) 32 *University of New South Wales Law Journal* 227, 237, for the suggestion that, if the ACCC's proposed amendments are adopted, a similar defence should be introduced in Australia.

<sup>139</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>140</sup> *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 535 (Gibbs CJ and Mason J).

<sup>141</sup> Criminal Code (Cth) para 4.1 (schedule to the *Criminal Code Act 1995* (Cth)).

<sup>142</sup> Sections 44ZZRF(2), 44ZZRG(2).



to all of the submissions made to Treasury, bar one), this issue would have to be resolved.

Finally, the proposed list may encourage greater reliance on expert economic evidence. Most of the factors in the list relate to the defendant's interactions with other competitors in the market and the inferences to be drawn from those interactions may depend on expert economic evidence.<sup>143</sup> This is certainly the experience in the US,<sup>144</sup> 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.<sup>145</sup> Given that the use of expert economic evidence raises particular challenges in jury trials,<sup>146</sup> this is a further reason why the ACCC's proposed amendments on the element of 'understanding' should not be adopted for the cartel offences.

## 7 THE WAY FORWARD

For the reasons stated in this article the ACCC's proposed amendments to the meaning of 'understanding' in the *TPA* should be rejected. This is not to say that the question as to whether Australian law should be extended to recognise the notion of facilitating practices recognised in the economic literature and reflected in the EC concept of 'concerted practices' does not merit serious consideration. However, the mode and implications of such an extension warrant close scrutiny and further public debate.

If further consideration is to be given to possible extension of liability under the prohibitions in s 45 and the new Division 1 of the *TPA*, the ACCC or 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, or modified versions thereof, and their formulation should reflect relevant economic theory.

Any such 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 a possible extension to criminal liability should be reviewed, if necessary, in a later inquiry after the new cartel offences have been tested.

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<sup>143</sup> See *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F 3d 651, 655 (7<sup>th</sup> Cir, 2002). For a description of the economic models underpinning economic evidence in this area, see Werden, above n 114.

<sup>144</sup> See Joshua and Jordan, above n 57, 662.

<sup>145</sup> See George J Stigler, 'What Does an Economist Know?' (1983) 33 *Journal of Legal Education* 311; H Hovenkamp, 'Economic Experts in Antitrust Cases', in David L Faigman, David H Kaye, Michael J Saks, Joseph Sanders and Edward K Cheng (eds), *Modern Scientific Evidence* (1999) 179 §38-2.0; Roger D Blair and Jill Boylston Herndon, 'Inferring Collusion from Economic Evidence' (2001) 15 (Summer) *ANTITRUST* 17, 18.

<sup>146</sup> 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).



