

Scott,

I attach an article of mine published last year which addresses the ACCC's proposal at its conclusion and the issues more generally throughout.

Regards

Ian Wylie
Barrister
Blackstone Chambers
Level 62 MLC Centre
19 Martin Place
SYDNEY NSW 2000
ph: (02) 92209833 ; mobile 0409997050;
fax: (02)92334209 ;
email: i.wylie@blackstone.com.au
ABN: 20155783046

Understanding “understandings” under the Trade Practices Act – an enforcement abysm?

Ian Wylie*

*How can it be that petrol retailers with well-synchronised and upwardly mobile pricing behaviour have repeatedly been found not to have any “understanding” about prices sufficient to contravene ss 45/45A of the Trade Practices Act 1974 (Cth)? There is no direct guidance on the issue from Australia’s highest court, but one aspect of it, the (in)sufficiency of parallel conduct to prove collusion, has recently been considered by the Federal Court of Australia in *ACCC v Leahy Petroleum Pty Ltd* and the United States Supreme Court in *Bell Atlantic Corp v Twombly*. The objective of this article is to divine what is, and is not, an “understanding” under ss 45/45A, and to explore how Australian law might develop in this regard.*

INTRODUCTION

Politicians and petrol heads in particular continue to have difficulty understanding how it can be that petrol retailers have repeatedly been found not to have any “understanding” about prices sufficient to contravene ss 45-45A of the *Trade Practices Act 1974* (Cth) (the Act), more so when some of their close competitors have admitted that near identical conduct contravened the Act.¹

The most recent judicial example of the genre is the judgment of Gray J in *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 (*Geelong Petrol Case*), but it has a reasonably consistent history at trial and appellate level in the Full Federal Court, stretching from *TPC v Parkfield Operations Pty Ltd* (1985) 5 FCR 140; [1985] ATPR 40-526 at first instance to *TPC v Service Station Association Ltd* (1993) 44 FCR 206; [1993] ATPR 41-260 and, most recently, *Apco Service Station Pty Ltd v ACCC* (2005) 159 FCR 452; [2005] ATPR 42-078 (*Ballarat Petrol Appeal*) on appeal.²

The High Court refused the Australian Competition and Consumer Commission’s (ACCC) application for special leave to appeal against the *Ballarat Petrol Appeal* in *ACCC v Apco Service Stations Pty Ltd* [2006] HCATrans 272, declining the applicant’s invitation to consider the extent to which “commitment” is required for an “understanding” because of the factual findings in that case and the manner in which it had been conducted by the ACCC. Earlier, the High Court had the opportunity to consider the same issue (special leave having been granted on it) in *Rural Press Ltd v ACCC* (2003) 216 CLR 53, but, similarly, it did not do so in light of its conclusions as to the relevant factual findings in that case (at 68-70).

There accordingly remains no direct guidance on the issue from Australia’s highest court, but one aspect of it, the (in)sufficiency of parallel conduct to prove collusion, has recently been considered by the Supreme Court of the United States in *Bell Atlantic Corp v Twombly* 127 S Ct 1955 (2007).

The facts in the petrol cases and difficulties of proof relying on indirect evidence (and other practical enforcement difficulties arising out of the *Geelong Petrol Case*) have been considered elsewhere.³ The objective here is to divine as a matter of statutory construction what is, and is not, currently an “understanding” under ss 45/45A of the Act, and to explore how Australian law might develop in that regard in light of earlier High Court authority concerning similar words in other

* Barrister, Blackstone Chambers, Sydney.

¹ The history of recent prosecutions is complex, but for a very brief summary of the conflicting evidence and positions taken by those allegedly involved, see ACCC, *No appeal against Geelong petrol decision*, Media Release No 148/07 (19 June 2007).

² The first instance judgment of Merkel J in this case is *ACCC v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183 (*Ballarat Petrol Case*). Other unsuccessful petrol price-fixing claims include *TPC v JJ & YK Russell Pty Ltd* [1991] ATPR 41-132; *ACCC v Mobil Oil Australia Ltd* [1997] ATPR 41-568.

³ See, eg Corones S, “Can the ACCC’s Leniency Policy Survive the Geelong Petrol Case?” (2007) 35 ABLR 293.

legislation. Also to be weighed is recent consideration in New Zealand of identical words, the position in the United States under and prior to *Twombly*, the comparable prohibition in the European Union (EU), and the ACCC’s proposal for legislative change released after completion of this article and addressed at its conclusion.

UNITED STATES AND NEW ZEALAND LAW

Twombly arose following divestiture of AT&T’s local telephone business in the mid-1980s, leaving a system of regional service monopolies (ILECs), and a separate long-distance market from which the ILECs were excluded. A 1996 Act withdrew approval of the ILECs, fundamentally restructuring local telephone markets by subjecting them to duties intended to facilitate market entry⁴ and authorising them to enter the long-distance market. Central to the new scheme were obligations on ILECs to share their networks with competitive local exchange carriers (CLECs).⁵

Subscribers of local telephone and/or high-speed internet services claimed violations of s 1 of the *Sherman Act 1890* (US) (which prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations). They claimed that the ILECs (a) engaged in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs, and (b) agreed to refrain from competing against one another. The plaintiffs relied on the failure of the ILECs to pursue attractive business opportunities in contiguous markets and a statement by one ILEC’s chief executive officer to the effect that competing in another ILEC’s territory did not seem right.

The Supreme Court rejected the subscribers’ pleaded claim as insufficient (by majority of Souter J, Roberts CJ, and Scalia, Kennedy, Thomas, Breyer and Alito JJ; Stevens and Ginsberg JJ dissenting) for the reasons which follow.

- Stating a s 1 claim requires a complaint with enough facts (assumed true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice, even at the pleading stage.
- Because s 1 prohibits only restraints effected by a contract, combination, or conspiracy,⁶ the crucial question was whether the challenged anticompetitive conduct stemmed from independent decision or agreement.⁷ While a showing of parallel business behaviour is admissible, being circumstantial evidence from which agreement may be inferred, it falls short of conclusively establishing agreement or itself constituting a *Sherman Act* offence. Showing parallel conduct or interdependence is insufficient because that behaviour is consistent with both conspiracy and with many rational and competitive business strategies unilaterally prompted by common perceptions of the market.⁸
- The court required plausible grounds for the conspiracy alleged but did not impose a probability requirement at the pleading stage, calling for enough facts to raise a reasonable expectation that discovery would reveal evidence of illegal agreement. A parallel conduct allegation without further factual enhancement was held to fall short of the line between possibility and plausibility, the requirement of allegations plausibly suggesting an agreement serving the practical purpose of preventing a plaintiff with a largely groundless claim from taking up the time of a number of other people in expensive antitrust discovery. That potential expense was obvious where the plaintiffs

⁴ *AT&T Corp v Iowa Utilities Bd* 525 US 366 (1999) at 371.

⁵ *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP* 540 US 398 (2004) at 402.

⁶ *Copperweld Corp v Independence Tube Corp* 467 US 752 (1984) at 775.

⁷ *Theatre Enterprises, Inc v Paramount Film Distributing Corp* 346 US 537 (1954) at 540.

⁸ The Supreme Court has repeatedly hedged against the risk of false inferences from identical behavior, eg at summary judgment stage: *Matsushita Elec Industrial Co v Zenith Radio Corp* 475 US 574 (1986).

represented 90% of subscribers to local telephone or high-speed internet services in an action against America's largest telecommunications firms for unspecified instances of alleged antitrust violations over a seven-year period.⁹

- Under the plausibility standard, the plaintiffs' claim rested on descriptions of parallel conduct, not on any independent allegation of actual agreement between the ILECs, and its sufficiency then turned on the suggestions raised by this conduct when viewed in light of common economic experience. There was nothing in the complaint as to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, to suggest that resisting the "upstarts" was anything more than the natural, unilateral reaction of ILECs, each of which was intent on preserving its regional dominance. The complaint's general collusion premise thus failed to address the reality that there was no need for joint encouragement to resist the 1996 Act, since each ILEC had reason to try to avoid dealing with CLECs and would have tried to keep them out, regardless of the other ILECs' actions.
- The plaintiffs' second claim rested on the competitive reticence among the ILECs themselves in the wake of the 1996 Act to enter into their competitors' territories, leaving the relevant market highly compartmentalised geographically, with minimal competition. That parallel conduct did not suggest conspiracy, as monopoly was the norm in telecommunications, not the exception. Because the ILECs were born in and liked that world, a natural explanation for the conduct was that the former government-sanctioned monopolists were sitting tight, expecting their neighbours to do the same. Antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus failed to state a valid s 1 claim.¹⁰

Twombly is not new in requiring more than parallel conduct¹¹ to establish contravention. What needs to be proved in the United States is that the alleged conspirators share "a common commitment to a common scheme designed to achieve an unlawful objective".¹² That has usually been done by adding to parallel behaviour evidence of so-called "plus factors"¹³ to demonstrate conspiracy and exclude independent self-interested conduct as an explanation. Thus, in particular evidence that the alleged conspirators acted in a manner contrary to their individual economic interests and were motivated to enter into a price-fixing conspiracy,¹⁴ and/or evidence of frequent communications among alleged co-conspirators,¹⁵ when added to parallel behaviour, can suffice for contravention. Given consideration of the prior law in *Twombly*, further space will not be devoted here to elaboration on the "plus factors" in the United States, but similar factors are outlined below in exploring the position in the EU. It should, however, be noted that *Twombly*, and some other recent cases, have focused on whether the facts tend to exclude the possibility of independent action e.g. by being contrary to independent economic self interest rather than the other traditional "plus factors".¹⁶

In New Zealand, s 27 of the *Commerce Act 1986* (NZ) is relevantly identical to s 45 of the Act. The New Zealand Court of Appeal held in *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 at 613-614:

we do not consider it appropriate to be tied in any determinative way to the concepts of mutuality, obligation and duty. While the concept of moral obligation is helpful in that it will often reflect the effect of an arrangement or understanding under s 27, the flexible purpose of the section is such that it

⁹ The court rejected the proposition that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given limited judicial success in checking discovery abuse.

¹⁰ Compare *Swierkiewicz v Sorema NA* 534 US 506 (2002) at 508 which the court distinguished.

¹¹ *Theatre Enterprises, Inc v Paramount Film Distributing Corp* 346 US 537 (1954) at 540-541.

¹² *Edward J Sweeney & Sons Inc v Texaco Inc* 637 F2d 105 (1980) at 111.

¹³ *In Re Baby Food Antitrust* 166 F3d 112 (1999) at 122; see generally *Interstate Circuit v United States*, 306 US 208 (1939) at 222.

¹⁴ See *Edward J Sweeney & Sons Inc v Texaco Inc* 637 F2d 105 (1980).

¹⁵ *Twombly v Bell Atlantic Corp* 425 F3d 99 (2005) at 114; *Apex Oil Co v DiMauro* 822 F2d 246 (1987) at 254.

¹⁶ *Bell Atlantic Corp v Twombly* 127 S Ct 1955 at 164 (2007); *Williamson Oil Co v Philip Morris USA* 346 F3d 1287 (2003) at 1304-1321.

is best to focus the ultimate enquiry on the concept of consensus and expectation. A finding that there was a consensus giving rise to an expectation that the parties would act in a certain way necessarily involves communications among the parties of the assumption of a moral obligation ... We therefore consider that the question whether a particular person entered into an arrangement or arrived at an understanding under s 27 should be answered by asking whether that person was a part of a consensus giving rise to an expectation that some proscribed action or inaction take place.

WHAT IS CONCERTED ACTION – HIGH COURT AUTHORITY AND THE EUROPEAN UNION?

The Australian High Court has not analysed the relevant words in ss 45/45A of the Act, but has considered the similar statutory language “contract, agreement or arrangement” in the context of taxation legislation; Isaacs J observed in *Jaques v FCT* (1924) 34 CLR 328 at 359 that “arrangement” in that context is in the nature of a bargain but may not legally or formally amount to a contract or an agreement. The court referred with approval to that statement in *Bell v FCT* (1953) 87 CLR 548 at 573, its joint judgment holding that “the word ‘arrangement’ is the third in a series which as regards comprehensiveness is an ascending series, and that the word extends beyond contracts and agreements so as to embrace all kinds of *concerted action* by which persons may arrange their affairs for a particular purpose or so as to produce a particular effect” (emphasis added).

That formulation was referred to with approval in *FCT v Newton* (1957) 96 CLR 570 by Williams J at 630-631 (Dixon CJ concurring at 619), and those judgments were affirmed on appeal to the Privy Council which observed that “the word ‘arrangement’ is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons – a plan arranged between them which may not be enforceable at law”.¹⁷

Following from those antecedents, in another passage dealing with the meaning of the word “arrangement” in taxation legislation that has often been cited in judgments dealing with arrangements or understandings under the Act, in *FCT v Lutovi Investments Pty Ltd* (1978) 140 CLR 434, Gibbs and Mason JJ (with whom Murphy J agreed) held (at 444):

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

The High Court’s early references to “concerted action” are echoed in the comparable prohibition in the United Kingdom and throughout the EU. Article 81 of the EC Treaty¹⁸ prohibits agreements between businesses that prevent, restrict or distort competition or are intended to do so and which affect trade. At least according to the UK Office of Fair Trading,¹⁹ “the prohibitions also cover decisions of associations of businesses as well as concerted practices (ie, cooperation which falls short of an agreement or decision)”.

The actual prohibition in Art 81 is relevantly on “decisions by associations of undertakings and concerted practices which may affect trade ... and which have as their object or effect the prevention, restriction or distortion of competition”, which leaves open the key question of the extent to which conscious parallelism contravenes EU law.

The European Court of Justice (ECJ) stated in Case 48/69 *Imperial Chemical Industries Ltd (ICI) v Commission* [1972] ECR 619 at [66] that a “concerted practice” within the meaning of Art 81 of the EC Treaty is:

a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between

¹⁷ *Newton v FCT* (1958) 98 CLR 1 at 7.

¹⁸ Incorporated by member state legislation and also mirrored in it, eg in the United Kingdom given legal effect by s 2(1) of the *European Communities Act 1972* (UK) and mirrored in Ch I prohibitions in the *Competition Act 1998* (UK).

¹⁹ UK Office of Fair Trading, *Competing Fairly* (2005), <http://www.offt.gov.uk> viewed February 2008.

them for the risks of competition ... [b]y its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.

The ECJ qualified the operation of that principle in Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663 at [173]-[174], finding it legitimate for businesses to adapt themselves intelligently to the existing and anticipated conduct of their competitors and that parallel conduct alone does not create a presumption of collusion under Art 81. However, in *ICI* (at [66]) it was considered that parallel conduct may amount to strong evidence of “concerted practice/collusion if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market”.

Then, in joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A Ahlström Osakeyhtiö ea (Woodpulp II)* [1993] ECR I-1307 at [71], the ECJ reformulated its previous statement in *ICI* with the qualification that the goal of such an analysis is not to establish what “the normal conditions of the market” are, but rather to ascertain whether or not the parallel conduct can be explained otherwise than by “concertation”. Thus, parallel conduct can be considered sufficient proof of collusion if concertation is the only plausible explanation for it.

Legitimate plausible explanations include price leadership and market structure. For example, if there is a price leader, competing undertakings can adapt, and in an oligopoly producing homogeneous goods, such parallel behaviour will not in itself contravene Art 81.²⁰ The conclusion could be quite different if there is additional evidence of contacts between undertakings on desirable price changes prior to the adoption of a new price, or of another exchange of information that reinforces such contacts.²¹ The structure of the market can of course also lead to parallel conduct, so that for example in *Woodpulp II* (at [75] ff) economic experts, and the court, concluded that the normal operation of the market was a more plausible explanation for the uniformity of prices than concertation, accepting the practical consequences of the “oligopolistic interdependence” theory.

The ECJ then held in joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA (CRAM) and Rheinzink GmbH v Commission* [1984] ECR 1679 at [20] that to establish that parallel behaviour is the result of concerted action in the EU, evidence must be “sufficiently precise and coherent”, but the onus of proof can shift. Thus, the court stated:

The Commission’s reasoning is based on the supposition that the facts established cannot be explained other than by concerted action by the two undertakings. Faced with such an argument, it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the contested Decision.

Accordingly, it appears that in the EU, a competition authority must examine whether such an alternative explanation exists or not but, if it does not find a plausible alternative explanation, the burden of proof will, at least in practice, shift to the defendants to provide evidence which casts the facts established by the competition authority in a different light and therefore allows another explanation for those facts.²²

²⁰ See, eg Commission Decision EEC/84/405 of 6 August 1984, Case IV/30.350 – *Zinc Producer Group*, OJ L 220 [1984] at [75]-[76].

²¹ See also, eg Case T-202/98 *Tate & Lyle v Commission (British Sugar)* [2001] ECR II-2035 at [34]-[46].

²² See joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94: *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission (PVC II)* [1999] ECR II-931 at [728].

Parallel conduct can also be used to prove contravention in the EU when connected with other evidence of facilitating practices²³ or “plus factors”; eg if it is accompanied by evidence of any of the following (in addition to association membership, the decisions of which are specifically addressed in Art 81).²⁴

- Documents which establish that the practices were the result of concerted action can obviously suffice.²⁵
- Direct or indirect contact between competitors that can influence the conduct on the market of an actual or potential competitor, since contact removes the uncertainty of future competitor conduct and insulates the competitors from the risks of competition so that parallel conduct cannot be explained by intelligent adaptation. Meetings between competitors are the obvious example.²⁶
- Announcements of price increases.²⁷
- Exchange of sensitive data, particularly if closely linked to the competitive conditions in respect of which the conduct of competitors is parallel.²⁸
- Reciprocal supply agreements, particularly if the competitors refrain from supplying competitors’ clients at the same time.²⁹
- Having representatives on the board or any other management body of a competitor.³⁰
- Networks of interrelated joint ventures co-ordinated by common parent and technology providers.³¹

Thus, in the EU, parallel conduct combined with any of the above can prove contravention, and the defendants must then not only provide a plausible alternative explanation of the parallel conduct, but also satisfy the court that the additional allegations are not proved.³²

SECTIONS 45/45A AND FEDERAL COURT CASES

Section 45(2)(a) of the Act provides that a corporation is not to “make” a contract or arrangement, or to “arrive at” an understanding, if the contract, arrangement or understanding contains certain content. A corporation cannot “make” a contract or arrangement, or “arrive at” an understanding, without another party participating in the making or the arriving at it, and unless what is made or arrived at exists at the end of the relevant process. What must exist for the section to apply is one of those three forms of consensual dealing.

Contracts need not trouble us here. Clearly, the word addresses a consensual dealing involving offer, acceptance, consideration and a high degree of certainty, formality and enforceability (subject to illegality).

²³ Defined as activities that promote interdependent behaviour among competitors by reducing their uncertainty as to each other’s future action, or by diminishing their incentive to deviate from a co-ordinated strategy, in Areeda P, *Antitrust Law* (Little Brown, Boston, 1986) at [1407b].

²⁴ See Ritter L and Braun WD, *European Competition Law: A Practitioner’s Guide* (3rd ed, Kluwer Law International, 2005) pp 108 ff.

²⁵ *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artisanne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission (PVC II)* [1999] ECR II-931 at [724]-[728].

²⁶ For example, Case T-7/89 *Hercules Chemicals NV v Commission* [1991] ECR II-1711 at [259]-[261].

²⁷ *Imperial Chemical Industries Ltd (ICI) v Commission* [1972] ECR 619 at [83] ff.

²⁸ Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* [1981] ECR 2021 at [21].

²⁹ *Suiker Unie v Commission* [1975] ECR 1663 at [173]-[174]; and Commission Decision of 23 December 1977, Case IV/29176 – *Vegetable Parchment* OJ L 70 [1978].

³⁰ Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd (BAT) and RJ Reynolds Industries Inc v Commission* [1987] ECR 4487 at [46]; see also Commission Decision EEC/86/405 of 14 July 1986, Case IV/30.320 – *Optical Fibres* OJ L 236 [1986].

³¹ *Optical Fibres* OJ L 236 [1986].

³² Ritter and Braun, n 24.

The word “arrangement” at least connotes a less formal form of consensual dealing lacking some of the essential elements that would otherwise make it a contract. The *Oxford English Dictionary* relevantly defines the word as “a settlement of mutual relations or claims between parties; an adjustment of disputed or debatable matters; a settlement by agreement” or “disposition of measures for the accomplishment of a purpose; preparations for successful performance”. It will usually involve express negotiations,³³ and certainly must involve some express communication, not least because otherwise the parties could not “make” it as required by the section.³⁴

A number of authorities have suggested that the words “arrangement” and “understanding” in ss 45-45A³⁵ are synonymous. However, the word “understanding” is, to apply *Bell* by analogy, the third in a series which, as regards comprehensiveness, is an ascending series. Moreover, it must connote a less precise dealing than either a contract or arrangement as the parties to it may “arrive at” rather than “make” it.³⁶ The *Oxford English Dictionary* relevantly defines “understanding” as “a mutual arrangement or agreement of an informal but more or less explicit nature”. It has elsewhere been described as a “broad and flexible”³⁷ form of consensual dealing, the requirements for which can probably be more easily satisfied than the requirements for making an arrangement.³⁸ However, it appears at least on the early authorities that, like an arrangement, an understanding must involve communications, because adoption of a proposal must be made known in some way to the proposer or he/she will be unaware whether an understanding has been achieved.³⁹

An understanding can be tacit, in the sense of being understood without being openly expressed, but it must involve a meeting of the minds of the parties to it. The starting point of analysis in most of the cases is the statement of Smithers J (with whom Evatt J agreed) in *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286 at 291:⁴⁰

[By] parity of reasoning it would follow that the existence of an arrangement of the kind contemplated in s 45 is conditional upon a meeting of the minds of the parties to the arrangement in which one of them is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man, to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conducted themselves in the way contemplated by the arrangement. It seems to me also that an understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act.

Many authorities have followed this formulation, but their effect is usefully summarised in the

³³ *FCT v Cooper Brookes (Wollongong) Pty Ltd* (1979) 41 FLR 277 at 301-302 (Fisher J, Brennan and Deane JJ), referred to by Franki J in *TPC v TNT Management Pty Ltd* (1985) 6 FCR 1 at 24 in the context of s 45(2), suggesting that an arrangement can be “tacit”.

³⁴ *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at 331-332, but see n 40 below as to whether communication directly between the parties is required.

³⁵ *ACCC v CC NSW Pty Ltd* (1999) 92 FCR 375; [1999] ATPR 41-732, citing *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10 at 32; [1986] ATPR 40-736; see also the cases cited therein by Toohey J.

³⁶ *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at 332.

³⁷ *L Grollo & Co Pty Ltd v Nu-Statt Decorating Pty Ltd* (1978) 34 FLR 81 at 89 (Smithers J).

³⁸ Notwithstanding n 32 above, Toohey J went on in *Hughes* to adopt an approach suggesting that an “understanding” can be established although it only relates to the conduct of one party and a party is aware of though not necessarily committed to each provision: *Hughes v Western Australia Cricket Association (Inc)* (1986) 19 FCR 10 at 32; [1986] ATPR 40-736; see also the cases there referred to including *TPC v TNT Management Pty Ltd* (1985) 6 FCR 1 at 25.

³⁹ *TPC v Nicholas Enterprises Pty Ltd (No 2)* [1979] ATPR 40-126.

⁴⁰ Referring to what Diplock LJ said in *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* [1963] 2 All ER 807 at 819 in relation to different English legislation; subsequently, the decision of Fisher J in *TPC v Nicholas Enterprises Pty Ltd* [1979] ATPR 40-126 was to similar effect, incorporating *British Basic Slag* principles into Australian law. Notably the principles in *British Basic Slag* were themselves developed in *Re Agreement of the Mileage Conference Group of Tyre Manufacturers' Conference Ltd* [1966] 2 All ER 849 at 859-860 to find an arrangement between conference members despite no direct communications between them.

judgment of Lindgren J in *ACCC v CC (NSW) Pty Ltd* (1999) 92 FCR 375 at 408, which was adopted by the Full Court in *Rural Press Ltd v ACCC* (2002) 118 FCR 236 at 257-258 and not addressed by the High Court on appeal in that case.⁴¹ His Honour said:

the cases require that at least one party “assume an obligation” or give an “assurance” or “undertaking” that it will act in a certain way. A mere expectation that as a matter of fact a party will act in a certain way is not enough, even if it has been engendered by that party. In the present case, for example, each individual who attended the Meeting may have expected that as a matter of fact the others would return to their respective offices by car, or, to express the matter differently, each may have been expected by the others to act in that way. Each may even have “aroused” that expectation by things he said at the Meeting. But these factual expectations do not found an “understanding” in the sense in which the word is used in ss 45 and 45A. The conjunction of the word “understanding” with the words “agreement” and “arrangement” and the nature of the provisions show that something more is required.

Shortly afterwards, *ACCC v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 was decided to similar effect, Sackville J stating (at 359-360):

in order for there to be an arrangement or understanding there must be a meeting of the minds of those said to be parties to the arrangement or understanding. There must be a consensus as to what is to be done and not merely a hope as to what might be done or happen ... Ordinarily, an arrangement or understanding involves communications between the parties arousing expectations in each that the other will act in a particular way.

The early judgment of Lockhart J in *TPC v Email Ltd* (1980) 43 FLR 383; 31 ALR 53 further illustrates that proposition; his Honour holding that, while sending price lists to a competitor assisted the competitor to follow the sender’s prices if it chose to do so, and to do so more quickly than might otherwise be the case, in the absence of any commitment, such communications were not sufficient to give rise to the meeting of minds essential to an arrangement or understanding. In that context, Lockhart J said (at 66):

it is important to bear in mind that there is a fundamental distinction between a hope or prediction of future behaviour on the one hand and the expectation of certain behaviour on the other; that is, behaviour which, as a result of communication between the parties, the party restricted is at least morally bound to adopt. For my part I find it difficult to envisage circumstances where there would be an understanding involving a commitment by one party as to the way they should behave without some commitment by the other party. Unless there is reciprocity of commitment I do not readily see why the parties would come to an arrangement or understanding ... Presumably, if they were to reach an understanding or arrangement each would have some commercial objective beneficial to itself in mind. I see no point in an arrangement bare of reciprocity.

Notably, there was considerable criticism of the decision on the facts in *TPC v Email Ltd* as an overly benign application of the Act and misapplication of the Unites States authorities cited in it,⁴² but it was nevertheless applied in the most recent decision of Gray J in the *Geelong Petrol Case* (at 335-336).

Likewise, the Full Federal Court held in the *Ballarat Petrol Appeal* (at 43,235) that the same principle was applicable. Information conveyed by some dealers to an uncommitted dealer may have been useful in enabling him to have his franchisees check competitors’ prices and know when to raise his own prices if he chose to do so, but the absence of any expectation that he would do so was fatal to the existence of an “understanding”. In that case, Merkel J at first instance had declined to make a finding that one dealer became committed to any price increase agreed on by the other dealers, and had made a finding that the other dealers had no expectation that the uncommitted dealer’s readiness to receive telephone calls about prices meant that he would substantially match those prices. The Full Court concluded that these findings led to the inescapable conclusion that the uncommitted dealer was

⁴¹ Also adopted in *ACCC v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at 359-360. See also *News Ltd v Australian Rugby Football League* (1996) 64 FCR 410 at 571-575, and most recently see the *Apco Service Stations Pty Ltd v ACCC* [2005] ATPR 42-078 at 43,234-43,235, the Full Court finding at the trial judge’s findings amounted to no more than what Lindgren J described as a “factual expectation”, falling short of an “understanding”.

⁴² See, eg Pengilly W, “Price Fixing and Exclusionary Provisions” (2001) *Prospect Media* 21 and the papers and authorities cited therein.

not a party to any understanding that it would fix its prices at the same level as the other dealers or at any particular level, or even that it would increase its prices at all. In expressing this view, the Full Court pointed out (at 43,234) that the ACCC in that case had not disputed that the trial judge had enunciated the correct legal principles (essentially as summarised in this section above).

Gleeson CJ in the High Court, in dismissing ACCC's application for special leave to appeal from the *Ballarat Petrol Appeal*, said (at line 619 delivering the decision of himself and Hayne J after earlier querying different meanings of the word "understanding"):

the decision of the Full Court of the Federal Court turned not upon any controversial view of the meaning of the relevant provisions of the Act but upon the Full Court's view of the facts in the light of the case as pleaded and argued by the Commission. In the light of the facts as found, the case does not raise any issue of law suitable to a grant of special leave to appeal.

Most recently in the *Geelong Petrol Case*, Gray J applied the joint judgment in the *Ballarat Petrol Appeal*, and elaborated (at 333-334) to distinguish what is required for the formation of an "understanding" (on which most of the earlier authorities focus) from its content. To fall within s 45(2)(a), an arrangement or understanding must be substantial enough to contain at least one "provision", relevantly defined in the *Oxford English Dictionary* as meaning "each of the clauses or divisions of a legal or formal statement, or such a statement itself, providing for some particular matter; also, a clause in such a statement which makes an express stipulation or condition; a proviso".

His Honour observed (at 333) that the kind of provision contemplated by s 45(2)(a)(ii) must provide for something to occur, or not to occur, and must be a provision capable of having a "purpose" or an "effect". This element is supplied by the deeming effect of s 45A(1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, among other things, a price. By s 45A(5), the determination of whether a provision of the required kind exists is not dependent upon form, or upon express description, and s 45A(6) permits a proscribed provision to be found even if it is only in the form of a recommendation. Clearly substance, not form, is important, and there must be sufficient substance to whatever is the result for the understanding to contain a provision of the required kind.⁴³

Thus, his Honour pointed out (at 333) that *Lutovi* (and inferentially other cases dealing with the formation of arrangements and understandings) cannot be relied upon to suggest that an arrangement or understanding under s 45(2)(a) of the Act need have no substance at all. There must be something of substance from which the parties can withdraw, or with which they can act inconsistently, and by their "adoption" of whatever that is, the parties will necessarily have adopted a provision that they see as an appropriate way to regulate their future conduct. Saying that they are able to withdraw from the adoption of, or act inconsistently with, such a provision says nothing more than that an arrangement or understanding is not enforceable in court in the same way as a contract. The idea that parties could have an arrangement or understanding where each acts as it sees fit on every occasion was said to be entirely foreign to s 45 of the Act.

His Honour therefore rejected (at 335) the ACCC's submission that the Full Court in the *Ballarat Petrol Appeal* was in error when it required that there be some commitment before there could be an understanding for the purposes of s 45(2)(a), holding that the previous authorities dealing with the content of an understanding, as distinct from its formation, provide ample support for what the Full Court said, as does analysis of the relevant provisions. Whatever word may be chosen to represent the essential element of an understanding for the purposes of the relevant statutory provisions, it is clear that element involves the assumption of an obligation, unenforceable in any court of law, but merely morally binding or binding in honour.

Notably, in the *Geelong Petrol Case*, the court was not required to consider the numerous authorities cited on the question of whether, for an arrangement or understanding to exist, it is necessary for the parties to have assumed mutual obligations, or whether an arrangement or understanding can exist where only one party assumes an obligation towards the other party, because

⁴³ A similar sentiment was expressed in terms of insufficient certainty as to the arrangement or understanding in earlier cases, eg *TPC v Service Station Association Ltd* (1993) 44 FCR 206; [1993] ATPR 41-260.

the ACCC had pleaded a series of arrangements or understandings to the effect that both (or all three in the case of one alleged arrangement or understanding) parties to each of them would increase their prices to the same or a similar amount at or about the same time.⁴⁴ The better view is probably that mutual obligations, although likely and usual, are not a prerequisite for an arrangement or understanding under ss 45-45A.⁴⁵

Finally, in considering recent Australian authority, despite not wishing to become bogged down in the facts of the petrol cases (of which there are many), one aspect of the decision on the facts in the *Geelong Petrol Case* does require comment. That is because it appears to go beyond earlier Australian authority, and that a contrary result would be likely to be found on the same facts in other jurisdictions.⁴⁶ Reliance was placed on communications between competitors of advance notice of prices to be adopted, as distinct from notice by means of price boards or otherwise of prices already being charged. His Honour concluded that there was no difference between the two. The case was that the initiating party would indicate by telephone that it had made a decision to change its price to a particular level from a particular time. His Honour noted the practical advantage for the recipient of such communications before implementation of the decisions, but said that there was nothing inherently sinister about the use of the telephone to convey information and that no complaint could have been made if the same information had been posted publicly at the service stations concerned. Although he noted that private communication of intended price increases, without communication of the intention to potential purchasers, lent itself readily to price-fixing, it did not in itself constitute price-fixing.

CONSIDERATION

The position in the United States is of interest not only for the depth of its antitrust jurisprudence, but also historically for its contribution to the origins of modern Australian restrictive trade practices law and, looking forward, as an indicator of possible trends. It is, in the writer’s view, not insignificant that its ultimate appellate court has decided nine antitrust cases since the beginning of 2004, and in each of them has tended towards a narrowing of antitrust liability, having in large measure been urged to do so by the regulatory agencies charged with enforcement of its antitrust laws.

Strikingly, these cases all generally involved a decision below favouring the plaintiff, with the Supreme Court following recommendations of the Department of Justice (DOJ) and/or Federal Trade Commission (FTC) in granting certiorari, and one or both of those regulators then filing an amicus brief favouring the defendant and a narrowing of antitrust liability. The Supreme Court then delivered pro-defendant judgments in all nine cases, with wide (mostly unanimous) margins in all but one. Brief summaries follow.

- In January 2004, in *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP* 540 US 398 (2004) the court unanimously (9:0) reversed and remanded the Second Circuit’s decision in favour of the plaintiff. The DOJ and FTC submitted amicus briefs favouring the defendant and urging the court to grant certiorari. The court held that the complaint alleging breach of an incumbent local exchange carrier’s duty to share its network with competitors did not state a claim under s 2 of the *Sherman Act* and cautioned against the risk of “false positives” chilling competition.
- In June 2004, in *F Hoffmann La Roche Ltd v Empagran SA* 542 US 155 (2004), the court vacated and remanded the DC Circuit’s decision for the plaintiff, the DOJ and FTC having filed an amicus brief supporting the defendant. The court held (8:0) that, where price-fixing conduct significantly

⁴⁴ *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at 336.

⁴⁵ The unanimous Full Federal Court in *Rural Press Ltd v ACCC* (2002) 118 FCR 236 at 257-258; *Morphett Arms Hotel Pty Ltd v TPC* [1980] ATPR 40-157 at 42,234 (Bowen CJ); *ACCC v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at 359-360 (Sackville J); cf *TPC v Email Ltd* (1980) 43 FLR 383 at 396; 31 ALR 53; *TPC v Parkfield Operations Pty Ltd* (1985) 5 FCR 140; [2005] ATPR 40-526; *TPC v Service Station Association Ltd* (1993) 44 FCR 206; [1993] ATPR 41-260.

⁴⁶ See in particular the conclusions of Gray J in *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at [924]-[925].

and adversely affects customers both outside and within the United States, but the adverse foreign effect is independent of any adverse domestic effect, the *Sherman Act* does not apply to a claim based solely on the foreign effect.

- In January 2006, in *Volvo Trucks North America, Inc v Reeder-Simco GMC Inc* 546 US 164 (2006), the court reversed and remanded the Eighth Circuit's decision for the plaintiff, the DOJ and FTC having filed an amicus brief in support of the defendant. The court held (7:2) that a manufacturer may not be held liable for price discrimination under the *Robinson-Patman Act 1936* (US) in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer.
- In February 2006, in *Texaco Inc v Dagher* 547 US 1 (2006), the court reversed the Ninth Circuit's decision for the plaintiff. The DOJ and FTC submitted joint amicus briefs favouring the defendant and urging the grant of certiorari, and the court held (8:0) that it is not per se illegal under s 1 of the *Sherman Act* for a lawful, economically integrated joint venture to set the prices at which it sells its products.
- In March 2006, the court in *Illinois Tool Works, Inc v Independent Ink* 547 US 28 (2006) vacated and remanded the Federal Circuit's decision for the plaintiff, the DOJ and FTC having filed an amicus brief supporting the defendant's position. The court held (8:0) that because a patent does not necessarily confer market power upon the patentee, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.
- In February 2007, in *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co, Inc* 127 S Ct 1069 (2007), the trend continued, the court unanimously reversing the intermediate appellate court and holding that the *Brooke Group* test requiring a dangerous prospect of recoupment to be established for a successful predatory pricing claim applied also to predatory bidding.
- In May 2007, the decision in *Twombly* was delivered (as described above), it being the seventh recent case with similar history and outcome.⁴⁷
- In June 2007, the court delivered its decision in *Credit Suisse Securities (USA) LLC v Billing* 127 S Ct 2383 (2007). By a 7:1 margin, the court held allegedly collusive conduct between underwriters to facilitate the execution of initial public offerings to be impliedly immune from antitrust scrutiny, in part by reason of the chilling effect which exposure would have brought to bear on the effective operation of the securities regulatory scheme.
- Finally, on 28 June 2007, in *Leegin Creative Leather Products, Inc v PSKS, Inc* 127 S Ct 2705 (2007),⁴⁸ the court overruled (5:4) the longstanding per se proscription of minimum resale price maintenance under United States federal law from *Dr Miles Medical Co v John D Park & Sons Co* 220 US 373 (1911), subjecting such conduct to Rule of Reason analysis.

This trend suggests, at least to this writer, that the court's approach in *Twombly* cannot be discounted merely as a technical pleading case; rather, it is an indication that, in the United States, antitrust liability, not only for ambiguous unilateral conduct, but also for the horizontal collusive conduct under consideration in Australia, has, if anything, narrowed rather than broadened. That conclusion is supported by the fact that, although all the cases involved private litigation rather than enforcement action at the behest of the relevant regulators, those regulators were effectively supporting the defendant's position in each case.

It is true that *Twombly* did not itself involve the type of "hard-core cartel" activity of particular current concern in Australia and overseas.⁴⁹ However, it is notable that defendants in the United States are already relying on *Twombly* in such cases to seek summary dismissal on the basis that allegations of a "contract, combination or conspiracy, in restraint of trade" are insufficient conclusory assertions

⁴⁷ See also *Twombly v Bell Atlantic Corp* 425 F3d 99 (2005) (cert granted); *Bell Atlantic Corp v Twombly* 126 S Ct 2965 (2006).

⁴⁸ *Leegin Creative Leather Products, Inc v PSKS, Inc* 171 F App'x 464 (5th Cir); 127 S Ct 763 (2006) (cert granted).

⁴⁹ Depending on how one defines "hard core cartel" – for a different perspective on *Twombly*, see Cherry SF and Pearson G, "Why *Twombly* Does (and Should) Apply to All Private Antitrust Actions, Including Alleged Hard-Core Cartels: A Reply to William J Blechman" (2007) (Dec) *TheAntitrustSource*, <http://www.antitrustsource.com> viewed February 2008.

and that matters should not be permitted to proceed in the absence of specific allegations of who met with whom, where and when.⁵⁰ That, of course, presents particular challenges, given the fundamentally secret nature of such activity.

Closer to home, the recent approach in New Zealand in *Giltrap* suggests that an understanding might more readily be found in that jurisdiction, since the concepts of mutuality and moral obligation are not determinative. It appears that in New Zealand it is sufficient for contravention if a party is a “person (who) was a part of a consensus giving rise to an expectation”.⁵¹

Likewise, the relevant prohibition in the EU in practice has had broader reach, in part by the effective shifting of the burden of proof, and in part by more favourable consideration of a range of practices which facilitate collusion. It thus extends more readily to cooperative behaviour falling short of “agreement or decision” in its proscription of “decisions by associations of undertakings and concerted practices which may affect trade ... and which have as their object or effect the prevention, restriction or distortion of competition”.⁵²

Notwithstanding the approach in the EU, our High Court’s references to “concerted action” in the context of taxation legislation and to the absence of a “commitment” requirement in *Lutovi* have not to date resulted in a broader test of the meaning of “arrangement” or “understanding” under the Act in Australia. It accordingly appears that the legal position in Australia remains closer to the United States than New Zealand or the EU. “Common commitment to a common scheme” as required in the United States may literally state the Australian test too highly, since *Lutovi* and some of the trade practices cases which have referred to it suggest a lower threshold. However, it should be noted that despite the literal terms of the test in the United States and *Twombly*, in practice, even America has had a lower threshold for contravention than Australia, largely because of the plethora of case law on the use of “plus factors” which can facilitate proof, an approach which has not been adopted in the same way in Australia.

Moreover, as early as 1921, the United States Supreme Court was prepared to find liability based on exchanges of detailed information as to sales made and prices charged in *American Column and Lumber Co v United States* 257 US 377 (1921) at 410, finding that courts should not be “blinded by words and forms to realities which men in general very plainly see”. In Australia, at least *TPC v Email* and the *Geelong Petrol Case* are regarded by some as mistakenly removed from that approach.

In Australia, it appears that it is important to distinguish commitment in formation of an understanding from commitment as to its content and enforceability, as the *Geelong Petrol Case* suggests. The early and most recent cases under the Act can perhaps only be satisfactorily reconciled in that regard if “commitment” is required at the time of formation of the “understanding”, but not in its content in the sense of subsequently containing any enforceable obligation. Otherwise the petrol cases sit very uncomfortably with the High Court’s approach in *Lutovi*.

Certainly, none of the recent Australian cases suggest any trend towards broadening liability or otherwise making the ACCC’s job any easier, and the most recent *Geelong Petrol Case* goes incrementally further than its forerunners in permitting communication to competitors of advance notice of the timing and amount of price changes. Both the *Ballarat Petrol Appeal* and *Geelong Petrol Case* otherwise adopt the earlier conservative approach of cases such as *TPC v Email Ltd*, and accordingly do not suggest that any pro regulator judicial change is in the wind.

Beyond the petrol cases, and perhaps ironically in light of the ACCC’s civil prosecution against Visy based on apparent admissions by Amcor,⁵³ earlier not dissimilar claims brought by the ACCC

⁵⁰ See, eg *In re Insurance Brokerage Antitrust Litigation*, MDL Docket No 1663, Civ No 04-5184 (GEB), 2007 WL 2533989 at 18-19 (31 August 2007); *In re Elevator Antitrust Litigation*, Docket No 06-3128-CV, 2007 WL 2471805 at 2 (4 September 2007); *In Re Graphics Processing Units Antitrust Litigation*, No C06-07417, 2007 WL 2875686 at 12 (27 September 2007); *In re Travel Agent Commission Antitrust Litigation*, No 1:03 CV 3000, 2007 WL 3171675 at 11-12 (29 October 2007).

⁵¹ *Giltrap City Ltd v Commerce Commission* (2004) 1 NZLR 608 at 614.

⁵² Article 81 of the EC Treaty.

⁵³ *ACCC v Visy Industry Holdings Pty Ltd* (Federal Court Proceeding No VID 1650 of 2005).

against Amcor under ss 45 and 4D were dismissed on the basis that it had no case to answer in 2000 because whether there was an arrangement or understanding or not was a matter of mere conjecture.⁵⁴ Likewise, in 2002, the ACCC's ss 45-45A proceeding against Pauls Ltd was also dismissed on a "no case" basis without the respondents going (or being required to elect to go) into evidence.⁵⁵

Of course whether that is a problem depends on one's perspective. The current United States approach suggests caution rather than over enforcement, the risk of false positives and overly burdensome private litigation, but in an era of increasingly cross-border international commerce, and objectives of convergence in antitrust enforcement to address that challenge, it is curious and problematic, at least from the regulator's perspective, for Australia to have a higher threshold to prove collusion that its near (New Zealand) or far (EU) neighbours, and less practical/evidentiary means to do so than the United States.

ACCC v Visy would have provided an interesting opportunity to test the boundaries of "understanding", given Visy's confess-and-avoid defence to the effect that certain meetings and other communications of confidential pricing and related information with Amcor had occurred, but that rather than colluding with Amcor, Visy was misleading it to gain market intelligence and obtain a commercial advantage.⁵⁶ That opportunity was lost when Visy decided that it had, after all, been colluding,⁵⁷ and the relevant entities and individuals were ordered based on a joint submission by the parties to pay record penalties totalling \$38 million.⁵⁸

CONCLUSION

Leaving policy considerations and speculation aside, what then is an "understanding" within the meaning of ss 45-45A⁵⁹ of the Act? It is tempting to conclude that it cannot be adequately defined; one just knows it when one sees it. Perhaps that explains the apparent reticence of our High Court to date to explore the issue in *Rural Press* or *ACCC v Apco Service Stations Pty Ltd* [2006] HCATrans 272. However, the writer suggests the following criteria may assist.

- Concerted action to achieve a purpose or effect is required.
- Communication is required, although communication via an industry body or another form of "hub and spokes" communication or communication through agents may, depending on the facts, suffice.
- The dealings in issue must be consensual, and there must be some adoption of whatever it is that is understood.
- The understanding must have some content – at least one provision intended to regulate future conduct.
- The parties' minds must meet, at least as to the offending provision, and although they may be at liberty subsequently to depart from compliance with it.
- There must be a commitment to the understanding at the time of its formation rather than mere expectation as to what will occur.
- Although it is usual and likely, it is not necessary that mutual obligations be assumed, and the content of the understanding is not required to include any enforceable commitment.

⁵⁴ *ACCC v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at 362.

⁵⁵ *ACCC v Pauls Ltd* [2002] ATPR 41-911; [2002] FCA 1586.

⁵⁶ Paragraph 222 of Visy's original defence filed on 22 December 2006.

⁵⁷ Agreed Statement of Facts and Further Amended Defence filed 16 October 2007.

⁵⁸ *ACCC v Visy Industry Holdings Pty Ltd (No 3)* [2007] ATPR 42-185; [2007] FCA 1617 (Heerey J).

⁵⁹ It is not suggested that any different test or meaning applies when the conduct under consideration is alleged to be an exclusionary provision under s 45/4D of the *Trade Practices Act 1974* (Cth) or otherwise to contravene s 45. As to the scope of s 4D, see Wylie IS, "What IS an Exclusionary Arrangement: Newspapers, Rugby League, Liquor and Beyond?" (2007) 35 ABLR 33.

- Whatever it is, it is not easy to prove “an understanding” indirectly in light of the *Briginshaw* standard.⁶⁰ In particular, parallel conduct combined with communications between competitors, even as to future pricing intentions, will not (without more) be sufficient to infer conspiracy in Australia.

Is there any hope of an easier life for the ACCC and a less quiet one for competing businesspersons meeting in smoke-filled rooms (which are themselves, at least in New South Wales, now largely prohibited) in future? Not on the case law as it stands, unless the courts could be persuaded that the words of the Act still have some unexplored work to do.

In that regard, few of the cases (the *Geelong Petrol Case* excepted) have focused on the lesser requirement that an “understanding” be “arrived at”⁶¹ rather than made. One can of course “arrive at” a destination by many and varied routes, in company or alone, and without direct communications with one’s fellow travellers, while “making” in context is a considerably higher threshold requiring committed, direct bilateral or multilateral action.

Accordingly, the words of the Act could in fact accommodate an “understanding” arising from parties which are on parallel paths as a result of direct or indirect communications arriving at the same state of mind as to future conduct. There is at least some early judicial support for that approach in the context of considering evidence of common purpose in a case concerned with contracts and combinations rather than understandings, Isaacs J observing in *The King v The Associated Northern Collieries* (1911) 14 CLR 387 at 400.5:

[albeit that] there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.

However, it is clear on historical and recent judicial evidence that contravention by such conscious parallelism is unlikely to be found in Australia, and that unhappy motorists may be left with some prices surveillance but no real relief short of more dramatic legislative intervention.

The ACCC did not appeal the *Geelong Petrol Case*,⁶² but did lobby the federal government for legislative action.⁶³ It remains to be seen where that will end up with a new federal government and the ACCC’s ultimate untested success against Visy. One possibility is essentially procedural provisions facilitating easier proof from indirect evidence and use of admissions. A more effective outcome might result from amendment of the substantive provision, for example, to adopt the EU approach and in practice catch a broader range of “decisions by associations of undertakings and concerted practices”, and/or to incorporate an independent economic self-interest or other explicit “Plus Factor” test.

To finish at the start, there is also irony in recent politicisation of the petrol pricing issue and lobbying in that regard. Public concerns prompted past and present regulators to re-agitate for the urgent introduction of the long awaited “hard core” cartel legislation with its serious criminal consequences.⁶⁴ It is of course to be hoped that, when it does ultimately pass the drafting stage, that

⁶⁰ For example, *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (Dixon J). The matter must be susceptible of clear proofs, applied in the context of the Act, eg in *ACCC v Safeway Stores Pty Ltd (No 2)* (2001) 119 FCR 1 at [72] (Goldberg J); [2001] FCA 1861.

⁶¹ Defined non-exclusively in s 4 of the *Trade Practices Act 1974* (Cth) to include “reach or enter into”.

⁶² This is somewhat surprising, in the writer’s view, given the adverse impact which some of the trial judge’s conclusions (concerning communications of future pricing intentions, the admissibility of admissions and relevance of leniency agreements) are likely to have on its enforcement capabilities. See ACCC Media Release, n 2.

⁶³ ACCC, *Letter to Commonwealth Treasurer* (14 June 2007).

⁶⁴ See, eg the comments of Chairman Graeme Samuel and former Chairman Allan Fels reported in *The Sydney Morning Herald* (25 June 2007) p 1. The *Exposure Draft Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008* (Cth) was finally released for public comment in January 2008 by the incoming Labor Government with the intention of coming into force by 2009.

legislation will have a general deterrent effect. It will, however, be even more difficult to prove a petrol-pricing cartel to the required criminal standard of proof than the civil penal proceedings taken to date,⁶⁵ and as those regulators acknowledge, inquiries and price monitoring alone are not the solution.

POST SCRIPT – ACCC PROPOSAL FOR LEGISLATIVE CHANGE

After completion of this article, the ACCC released a report following its six-month inquiry into petrol prices.⁶⁶ It critiqued the recent case law, and proposed legislative amendment based on published advice received by it from senior counsel.⁶⁷

The ACCC expressed concern⁶⁸ that recent cases disclose a significant shift in the nature of the commitment that must be found to establish the existence of an understanding – from earlier decisions interpreting the term to include an expectation regarding future conduct consciously or intentionally engendered in one person by the words or conduct of another person, to recent decisions suggesting a need for at least one of the parties to give or accept a commitment, obligation, undertaking or assurance that they will act in a certain way.

It pointed to difficulties prosecuting price fixing and market sharing under recent case law if the word “understanding” was to be construed so restrictively that no amount of co-ordination on pricing between competitors can fall foul of the Act unless one of the parties can be shown to have given or accepted a commitment, obligation, undertaking or assurance to act in a certain way regarding their pricing.

The ACCC then expressed the view⁶⁹ that an approach to s 45 that recognises that the conscious or intentional creation of an “expectation” regarding future conduct may be sufficient to constitute an understanding best reflects parliament’s intention in enacting the section. It accordingly then recommended an amendment to s 45 which it said would have the effect of largely restoring the law regarding the meaning of the term “understanding” to that which existed in 1974 by providing for the following:

- (a) The court may determine that a corporation has arrived at an understanding notwithstanding that:
 - (i) the understanding is ascertainable only by inference from any factual matters the court considers appropriate;
 - (ii) the corporation, or any other parties to the alleged understanding, are not committed to giving effect to the understanding.
- (b) The factual matters the court may consider in determining whether a corporation has arrived at an understanding include but are not limited to:
 - (i) the conduct of the corporation or of any other person, including other parties to the alleged understanding;
 - (ii) the extent to which one party intentionally aroused in other parties an expectation that the first party would act in a particular way in relation to the subject of the alleged understanding;
 - (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

⁶⁵ See, eg reports on difficulties with the draft legislation and delays in *The Australian Financial Review* (24 October 2007) pp 1, 4, 66, and the *Exposure Draft Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008* (Cth) which incorporates a dishonesty element to the proposed offence consistent with the untested position in the United Kingdom and contrary to the position in the United States and a number of other jurisdictions.

⁶⁶ ACCC, *Petrol prices and Australian consumers: Report of the ACCC inquiry into the price of unleaded petrol* (2007).

⁶⁷ ACCC, n 66, Appendix R, pp 368-374.

⁶⁸ ACCC, n 66, pp 228-229.

⁶⁹ ACCC, n 66, p 230.

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.

The change proposed at (a)(i) above is premised on the ACCC’s assertion that in recent cases, in particular the *Geelong Petrol Case*, the Federal Court showed a reluctance to accept inferential evidence.⁷⁰ That is not strictly accurate and the change accordingly may not strictly be necessary, as in that case and others the court has been prepared to consider and accept inferential evidence. The problem for the ACCC was the court’s factual findings that the relevant circumstantial evidence which was admitted was at best equivocal and inconsistent with the oral evidence. Nevertheless, the proposal does appear to have some utility, as its inclusion of the word “only” could constrain over-eager exchangers of competitive information, and may contribute more flexibility akin to the approach in the United States. It would also be consistent with the approach taken elsewhere in the Act, eg in s 46(7), which permits purpose to be established solely by inference from conduct.

The proposed shopping list of factual matters to be taken into account proposed in (b)(i)-(ix) set out above is also unobjectionable, albeit strictly unnecessary as there is already clear authority for all of those matters to be considered. Such codification has not been required in the United States for a simpler prohibition to work effectively over a much longer period.⁷¹ If such codification is to be pursued, the shopping list should include the extent to which the conduct is inconsistent with the independent economic self-interest of the parties to it

However, although the writer is sympathetic to the regulator’s objectives, it is submitted that the ACCC’s core conclusion and recommendation at (a)(ii) above does not sufficiently identify the problem or provide a solution to it or the following reasons.

First, the approach is based on advice from senior counsel that “the approach of the courts has excluded from the reach of the statute various forms of behaviour which parliament intended to prohibit”. No evidence of the legislative intention asserted is cited, and it must be questioned when the advice itself goes on to note that “Research into the earliest origins of s 45 reveals little”.⁷²

Secondly, what is said to be a significant shift in recent cases is in substance not, as detailed above. In particular, the recent petrol cases relevantly⁷³ go no further than did *Smithers J* did in 1975 in *Top Performance Motors v Ira Birk* or than *Lockhart J* did in 1980 in *TPC v Email*.

Thirdly, the ACCC’s approach does not address the distinction between commitment in formation of an understanding and commitment as to its content and enforceability suggested by the *Geelong Petrol Case*. It accordingly does not consider how the most recent cases under the Act can be reconciled with the High Court’s approach in *Lutovi* if “commitment” is required at the time of formation of the “understanding”, but not in its content in the sense of containing enforceable obligations.

Consequently, the core change proposed at (a)(ii) to address the concern identified is ineffective, because it perpetuates ambiguity as to the point in time at which, and scope of commitment, which is or is not required.

⁷⁰ ACCC, n 66, p 229.

⁷¹ Arguably too effectively (pro plaintiff) if one agrees with the more conservative approach reflected most recently in *Twombly* – see, eg *Cherry and Pearson*, n 49.

⁷² ACCC, n 66, pp 368.5, 372.1.

⁷³ Save for the aspect of *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 identified above and in n 45 above.

If the intention of the legislature really is to proscribe intentional creation of an “expectation” regarding future conduct by one party short of any commitment by any party (which (a)(ii) could do), then the section should be amended to say that squarely. However, to do so would, in this writer’s view, be over-inclusive, since it and the wording currently proposed by the ACCC could catch unilateral conduct, when the fundamental basis of the prohibition is collusion, requiring consensus in some form. We arrive at an understanding. This writer alone cannot.