
Regulation Impact Statement: Anti-competitive Price Signalling and Information Exchange

The objective of Government action is to prohibit anti-competitive price signalling and information exchange between competitors, through amendments to the *Trade Practices Act 1974* (the TPA). In doing so, the Government is seeking to advance the objective of the TPA by strengthening its safeguards against anti-competitive conduct, recognising that competitive markets enhance the welfare of Australians.

Problem

Summary

Collusive behaviour is detrimental to the economy and consumers and is prohibited under the long-standing cartel provisions and the new criminal cartel provisions in Part IV of the TPA.

Anti-competitive price signalling and other information exchanges are communications between competitors which facilitate prices above the competitive level and can lead to inefficient outcomes for the economy and lower wellbeing for consumers. The Australian Competition and Consumer Commission (ACCC) has recently expressed concerns about this type of conduct and its inability to adequately address the problem.

It is apparent from numerous judicial decisions that these existing cartel provisions do not effectively address anti-competitive information exchanges that occur outside of a ‘contract, arrangement or understanding’. Conversely, most comparable jurisdictions, including the UK, EU and US all have laws which are capable of dealing with anti-competitive price signalling and other information exchanges.

Information exchanges play a vital role in the economy; they increase transparency in the market to the benefit of consumers and the competitive process. With the exception of anti-competitive price signalling and other information exchanges, such communications are perfectly legitimate, pro-competitive and efficiency enhancing.

Addressing this problem will need to carefully balance the prohibition of anti-competitive, and continuation of legitimate information exchanges.

The TPA and anti-competitive conduct

The object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. Competitiveness of markets improves productivity and efficiency, leading to rising living standards in the form of higher incomes in real terms, increased consumer choices, sustainable economic growth, and lower unemployment rates than would otherwise be the case.

Effective competition can be reduced by businesses behaving, either independently or with other businesses, in ways that reduce rivalry in the market, or prevent or deter the entry of new businesses. Recognition of these problems gives rise to the core purpose of the competition rules in

Part IV of the TPA which seek to restrain conduct that tends to lessen competition, but to otherwise leave businesses free to act as they see fit.

Collusive behaviour is detrimental to the economy and consumers. By colluding with one another, competitors are able to distort the competitive process by, for example, reaching an agreement about the price to be charged for goods or an agreement about who will supply particular segments of the market.

Collusive or cartel behaviour is prohibited under the long-standing cartel provisions and the new criminal cartel provisions in Part IV of the TPA. Under the parallel civil and criminal cartel prohibitions¹, corporations are prohibited from making or giving effect to a 'contract, arrangement or understanding' that contains a cartel provision with a competitor. A 'cartel provision' is a provision that fixes prices, restricts outputs in the production or supply chain, allocates customers, suppliers or territories, or rigs bids. In addition, section 45 prohibits corporations from making or giving effect to a 'contract arrangement or understanding' which contains an exclusionary provision², or has the purpose, effect or likely effect of substantially lessening competition.

Anti-competitive price signalling and information exchange

The cartel provisions capture anti-competitive conduct which involves one competitor attempting to induce another into collusive conduct. They require the presence of a 'contract, arrangement or understanding' which Australian courts have held requires evidence of a 'meeting of minds' and a commitment (albeit moral, not legal) about the subject matter of the arrangement.³

Anti-competitive price signalling and other information exchanges do not have these characteristics. It is apparent from numerous judicial decisions⁴ that these existing cartel provisions do not effectively address anti-competitive information exchanges that occur outside of a 'contract, arrangement or understanding'.

Anti-competitive price signalling and other information exchanges are communications between competitors which facilitate prices above the competitive level and can lead to inefficient outcomes for the economy and lower wellbeing for consumers (these practices are sometimes referred to as facilitating, coordinated or concerted practices). The economic literature recognises a broad range of conduct which may theoretically meet the definition of anti-competitive price signalling and information exchanges, including conduct such as price matching guarantees. However overseas experience and legal advice indicates that as a practical matter, disclosures and exchanges of information are the most prevalent and harmful form of anti-competitive price signalling and information exchanges, as well as being the most readily distinguished from benign or pro-competitive forms of conduct. Anti-competitive price signalling and information exchange can occur as part of a wider cooperation agreement, or as a stand-alone practice absent of an explicit cartel arrangement.

Anti-competitive price signalling and other information exchanges can occur in a range of industries and have economy wide impacts. Depending on the industry in which they occur, the latter could be material. They most typically arise and have the greatest detriment in markets which

¹ Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK.

² As defined by section 4D.

³ See *Trade Practices Commission v Nicholas Enterprises Pty Ltd & Ors (No 2)* (1979) 26 ALR 609; *Trade Practices Commission v Email Ltd* (1980) 43 FLR 383; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344; *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321.

⁴ *Ibid.*

exhibit oligopolistic features and can be as harmful to competition and consumers as explicit cartel behaviour.⁵ In an oligopolistic market businesses are not ‘price takers’, as they have a degree of market power and impact on market outcomes and the decisions of competitors. Accordingly, oligopolists are able to take advantage of increased transparency as it enables them to better predict or anticipate the conduct of their competitors and thus align themselves to it, to the detriment of consumers and the economy.

The market outcome of repeated oligopolistic interaction over time, at least in circumstances where the only ‘communication’ between competitors is market action, can range from the competitive outcome to the monopoly outcome. Businesses’ incentives, and hence the likely outcome, will depend on how much each business has to gain from undercutting its rivals now, how likely are other businesses to cut prices in response, how much the business would lose from rivals’ price cuts in the future, and the discount rate the business applies to future profits relative to profits today.

That is not to say that anti-competitive price signalling and other information exchanges only occur in oligopolistic markets. For instance, the European Commission in the *UK Agricultural Tractor Registration Exchange*⁶ decision did not eliminate the possibility that there may be instances where communications between competitors may lead to collusive outcomes even in fragmented or non-oligopolistic markets.

Situation in Australia

It is not possible to accurately estimate the current extent of anti-competitive price signalling and information exchange in Australian markets. However, there is no available evidence, and no theoretical basis on which to conclude that the potential benefits available to Australian businesses from engaging in such anti-competitive conduct differ materially from those available overseas.

The ACCC’s ability to gather evidence through its formal information gathering powers to highlight the current extent of the problem is limited. The ACCC’s powers can only be used where it has a reason to believe that a person has information related to a matter that constitutes a contravention, or possible contravention of the TPA in its current form. As anti-competitive price signalling and information exchange do not constitute a contravention of the existing TPA prohibitions, and are frequently secretive in nature, widespread evidence of their current occurrence is difficult to obtain. Once a prohibition has been implemented, the majority of businesses are likely to comply voluntarily with the new laws. Consequently, an ex-post assessment could not accurately take into account the deterrent value of the prohibition. The extent of any future occurrences will be clearer once a prohibition has been enacted, and the ACCC has undertaken specific investigations.

Recently, the ACCC has expressed concerns around conduct which could amount to anti-competitive price signalling and information exchange.

In its decision concerning the proposed acquisition of Mobil retail assets by Caltex, the ACCC stated that it had regard to the coordinated behaviour associated with the jump in fuel prices as part of the weekly price cycle. It noted that it considers that this coordination is facilitated through the frequent exchange of pricing information between competitors via the Informed Sources Oil Pricewatch System. In relation to this, the Chairman of the ACCC, Mr Graeme Samuel stated

‘While the enhancement of coordinated conduct resulting from the proposed acquisition is likely to substantially lessen competition in contravention of section 50 of the Trade Practices Act, the ACCC is

⁵ Beaton-Wells, C and Fisse, B (2009) Submission to *Meaning of ‘understanding’ in the Trade Practices Act 1974* discussion paper at 17. Cited at http://www.treasury.gov.au/documents/1511/PDF/Beaton-Wells_and_Fisse.pdf (last retrieved 3 November 2010).

⁶ *United Kingdom Agricultural Tractor Registration Exchange* [1993] 4 CMLR 358.

concerned that the Act does not appear to adequately cover facilitating practices which enables such coordinated conduct.⁷

The ACCC has also expressed concern regarding the public signalling of future interest rate pricing intentions between banks. On 18 October 2010, the Chairman of the ACCC indicated that price signalling by major banks was of concern as, in his view, it provided businesses who sought to raise their own interest rates with an amount of comfort that their competitors will not undercut them.

Australian case examples

The ACCC and its predecessor have unsuccessfully sought to take action against businesses engaging in conduct which can be described as anti-competitive price signalling and information exchange. Some of these cases are outlined in detail Box 1.

Box 2: Anti-competitive price signalling and information exchange – Australian case examples

TPC v Email Ltd & Ors [1980] FCA 86; ATPR 40-172

The two parties involved in this case, Email and Warburton Franki, were at the time the only manufacturer and suppliers of electricity meters in Australia. The parties issued identical price lists, submitted identical tenders, adopted the same price variation clause, sent to each other their respective price lists which showed the prices as identical, forwarded to each other new price lists immediately they changed prices or introduced any new meter or component, and tendered in accordance with their respective price lists.

The Trade Practices Commission (now known as the ACCC) contended that the respondent's actions constituted an arrangement or understanding under section 45 of the TPA and that the requisite meeting of minds was to be construed from the circumstances. The Commission also alleged that the communications about price gave rise to mutual expectations that each party (or at least one) would accept restrictions as to its conduct.

However, the Court found that there was no evidence of commitment, either to exchange the price lists or to charge particular prices, and hence no contract, arrangement or understanding, and considered the conduct to be parallel, explained by "rational commercial considerations". The Court held that the Warburton Franki could readily have found out prices from sources other than Email and therefore it was not the exchange of price information which resulted in parallel prices but 'market forces, competition and the necessity for Warburton Franki to follow Email'.⁸

⁷ ACCC media release, 2 December 2009, <http://www.accc.gov.au/content/index.phtml/itemId/904296>, last retrieved 16 November 2010

⁸ *TPC v Email & Ors* (1980) ATPR 40-172 at 42,380.

Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161

In this case, the Court found evidence that some petrol station owners (in the Ballarat region of Victoria, Australia) had entered into arrangements or understandings regarding the retail price of petrol in the area.

However, in relation to Apco, the Court did not find that it had entered a contract, arrangement or understanding with the other parties to the agreement, despite receiving information regarding its competitors pricing. The Court accepted Apco's contentions that it was not a party to any price-fixing understanding because it did not commit to changing its price based on the information it received.

The Court affirmed that a mere hope or expectation that a party will act in a particular way is insufficient to support an arrangement or understanding in contravention of section 45 of the TPA. In this instance, the Court held there was no expectation that Apco would match the price increases of its competitors, which unavoidably led to the conclusion that Apco was not a party to any understanding to fix prices. As the Court pointed out, '(u)nilaterally taking advantage of a commercial opportunity presented is not to arrive at or give effect to an understanding in breach of the Act'⁹ and therefore Apco's actions did not result in a contravention of section 45 of the TPA.

ACCC v Leahy Petroleum [2007] FCA 794

In this case, it was admitted that a petrol retailer had telephoned a competitor to advise of its intention to increase prices and the timing of those increases. However, the Federal Court found this conduct was not sufficient to constitute a contract, arrangement or understanding and therefore was not a breach of the TPA because the initiator was not obliged to provide the information and the recipient was not obliged to act upon the information. In the Court's view there was no commitment, moral obligation or obligation binding a party in honour to act in a particular way.¹⁰

However, his Honour did note that private communication of intended price increases, without communication of the intention to potential purchasers, lent itself readily to price-fixing, but without more did not in itself constitute price-fixing.¹¹

This case considers the words contract, arrangement and understanding to be distinct legal concepts and finds these concepts, although 'plainly intended to represent a spectrum of consensual dealings'¹², all require one essential element to satisfy their meaning in section 45: that is, the element of obligation or commitment.¹³ Gray J stated:

'The absence of any element of commitment or obligation, from any of the alleged arrangements or understandings must lead to the conclusion that none of those arrangements or understandings is capable of amounting to an arrangement or understanding within the meaning of s.45(2)(a) of the Trade Practices Act. None of them is capable of containing a provision for the fixing of prices.'¹⁴

⁹ *Apco Service Stations v Australian Competition and Consumer Commission* [2005] FCAFC 161 at [31].

¹⁰ *ACCC v Leahy Petroleum Pty Ltd (No 2)* [2005] FCA 254.

¹¹ *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794 at [924]-[925].

¹² *Ibid*, at [24].

¹³ *Ibid* at [26], [37], [948].

¹⁴ *Ibid* at [949].

Subsequent to these rulings, there has been considerable debate around the issue of commitment. It is important to note that the “success” of facilitating practices such as price signalling and information exchanges in sustaining supra-competitive prices does not depend on whether the conduct requires any sort of obligation or “commitment” by the parties – moral or otherwise. Rather it depends on the ability and incentive for participants to maintain prices above competitive levels and thereby harm consumers. The issue becomes whether the existence of the practice in question enhances the ability and/or incentive of participants to coordinate their conduct and thereby raise or sustain prices above competitive levels and harm consumers.

Anti-competitive price signalling in international jurisdictions

Recent OECD Roundtables (2007 and 2010) on Facilitating Practices and Information Exchanges have highlighted the harm to competition and consumers that can arise from these anti-competitive information exchanges between competitors and the ways in which they are dealt with in various jurisdictions.

Most comparable jurisdictions, including the UK, EU and US all have laws which are capable of dealing with anti-competitive price signalling and other information exchanges (sometimes called ‘concerted practices’ or ‘facilitating practices’). Box 1 provides some specific international examples of where anti-competitive price signalling or information exchanges has resulted in penalties being paid.

Box 2: International examples of information exchanges

Case box: Exchange of school fee information between independent fee-paying schools

On 20 November 2006, the UK Office of Fair Trading (OFT) found 50 independent schools infringed subsection 2(1) of the Competition Act 1998. The case was settled with the OFT.

The OFT found that information was exchanged between the schools on a regular and systemic basis regarding their future pricing intentions (intended fees and fee increases). All schools were able to see other schools’ pricing intentions prior to setting their own fee increases for the next school year (which were then fixed for the next 12 months). At the time of exchange, the information was highly confidential; the information was not made available to parents of the pupils or published more generally.

The OFT decided this arrangement constituted a restriction of competition whereby the schools knowingly substituted practical cooperation for the risks of competition – that is, a concerted practice having as its object the prevention, restriction or distortion of competition.

The OFT found the information exchange amounted to an ‘agreement’ on two levels:

- Each school submitted their pricing information on the understanding and expectation that they would receive similar information from other schools;
- There was a ‘gentleman’s agreement’ that the stated fee increases would accurately reflect actual future fee levels.

Given that it was ‘obvious’ that the conduct had anti-competitive effects, it was considered to have the object of restricting competition and it was therefore not necessary for the OFT to prove actual or likely effects.

Case box: Royal Bank of Scotland

In March 2010, the Royal Bank of Scotland (RBS) agreed to pay a fine of £28.5 million after admitting competition law breaches. The RBS disclosed generic and confidential future pricing information to Barclays Bank, which Barclays took into account in determining its pricing.

It is understood the conduct raised concern as a concerted practice as distinct from a cartel; that is liability arose because of the price disclosures to a competitor, not because prices were fixed.

Case box: US Airline Industry

A further example of information exchanges caught by overseas laws occurred in the US airline industry.¹⁵ This case involved both signalling proposed price increases and likely punishments. Airline Tariff Publishing Company (ATP) acted as a central clearing house for distribution of airline fare change information. ATP essentially allowed rival airlines to engage in ‘cheap talk’, signalling and ‘negotiating’ a collusive outcome before it was implemented. The United States Department of Justice (DOJ) cited two types of conduct:

- The airlines used ATP to reach agreements¹⁶ and concerted actions to fix prices by increasing fares, eliminating discount fares and setting fare restrictions for domestic tickets.
- The airlines had reached agreement to operate ATP as a fare exchange system with the purpose of communicating information about fares and reducing uncertainty about future price intentions.

The case was settled in court with penalties by consent order.

For the most part, the examples outlined in Box 2 would not be captured under the TPA. While there is direct evidence of communication, they generally do not approach the threshold required by the TPA, that is, evidence of an actual commitment to act in a certain way.

Some matters, such as the UK schools case are more likely to be able to be captured under the existing TPA prohibitions. As set out above, anti-competitive price signalling or information exchange occurring in conjunction with a contract, agreement or understanding will be captured by existing TPA prohibitions. The UK OFT found the conduct of the schools at the very least amounted to a concerted practice, however the UK OFT did not regard it to necessary to arrive at a definitive conclusion whether the behaviour amounted to an agreement or concerted practice. It concluded that the information exchange amounted to an agreement and/or a concerted practice.

The Treasury’s consultation on the meaning of ‘understanding’ in the TPA

Previously, the Treasury has consulted on a model proposed by the ACCC to capture anti-competitive conduct presently not prohibited by the TPA. In January 2009, as a result of the concerns raised by the ACCC in its 2007 Petrol Report¹⁷, the Treasury issued a discussion paper

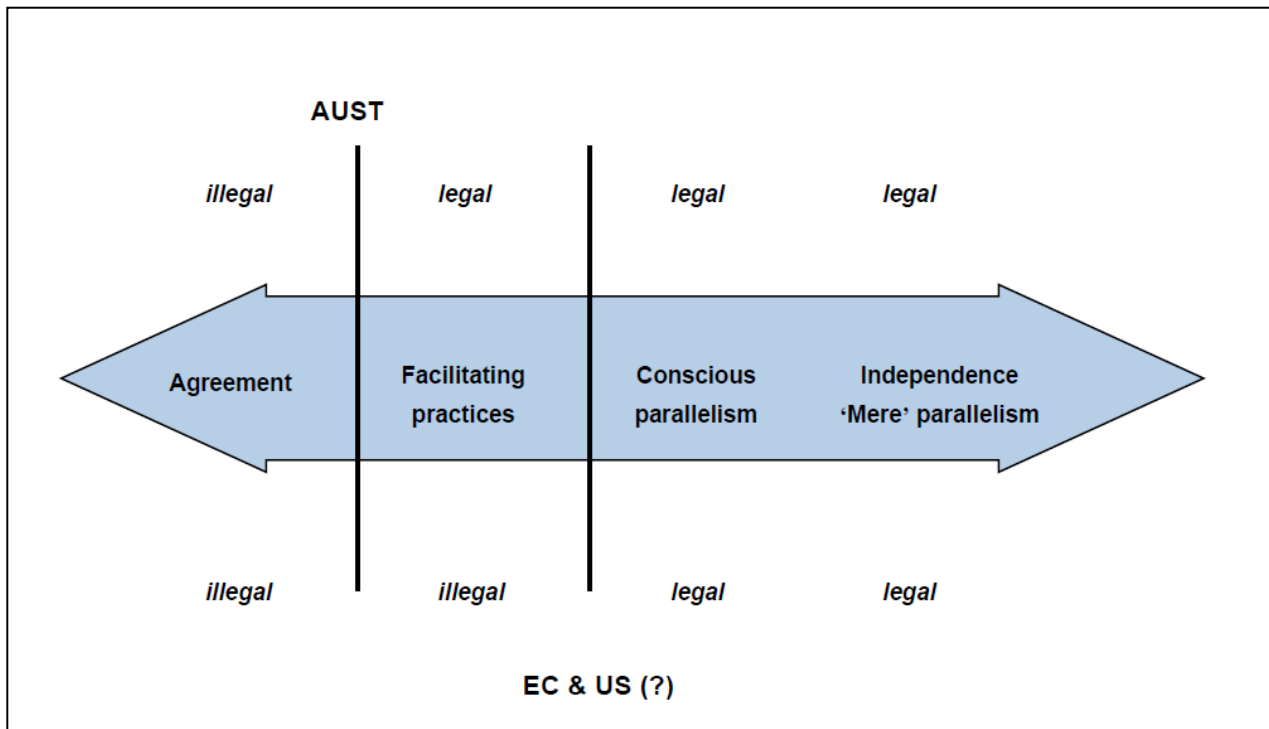
¹⁵ *United States v. Airline Tariff Publishing Co.*, 1994-2 Trade Cas. (CCH) 70,687 (D.D.C. Aug. 10, 1994).

¹⁶ This illustrates the greater willingness of US courts to infer the existence of an agreement from the evidence when compared with Australian courts.

¹⁷ ACCC (2007), *Petrol Prices and Australian Consumers*, Report of the ACCC inquiry into the price of unleaded petrol, December.

(Treasury Discussion Paper) which sought submissions regarding the adequacy of the current interpretation of the term ‘understanding’ in section 45 of the TPA to capture anti-competitive conduct. A number of parties submitted that there is conduct which is anti-competitive, such as the sharing of price information between competitors, which falls outside the scope of the TPA.

In their submission, Brent Fisse and Caron Beaton-Wells noted that facilitating practices/concerted practices¹⁸ were legal in Australia however illegal in Europe and possibly the US:



Brent Fisse and Caron Beaton-Wells noted¹⁹:

‘There is a respectable case for adopting the concept of ‘concerted practice’ in the interpretation of an ‘understanding’ in the civil prohibitions on cartel conduct in Australia. The concept is recognised in both EC law (formally) and US law (at least to some extent, albeit informally). It is consistent with economic theory as to where the line should be drawn between legal and illegal horizontal coordination, based on recognition that such practices may have the same anti-competitive effects as collusive agreements... Many economists, including George Hay, argue that facilitating or signalling devices should be illegal, not only because they produce the same cartel-like effects as explicit agreements, but also because they are culpable in the sense that they involve a deliberate attempt to overcome structural impediments to coordination and subvert the competitive functioning of the market, while having no offsetting business rationale.’

Maurice Blackburn Lawyers submitted that:

‘The recent judicial approach to ‘understanding’ provides a blue print for ‘competitors’ to increase prices by sharing price information by being careful to never commit to doing anything with it...It facilitates the avoidance of liability for collusive conduct.’

Recent media commentary on this issue centres around the need to carefully address the complexities involved in addressing public communications, but is otherwise supportive of the need

¹⁸ Fisse and Beaton-Wells described facilitating practices as ‘an activity, generally the provision or exchange of information in the market power, which makes coordination between competitors easier and more effective’.

¹⁹ Beaton-Wells, C and Fisse, B (2009) Submission to *Meaning of ‘understanding’ in the Trade Practices Act 1974* discussion paper. Cited at http://www.treasury.gov.au/documents/1511/PDF/Beaton-Wells_and_Fisse.pdf (last retrieved 3 November 2010).

to address the issue of anti-competitive price signalling and information exchange. Blake Dawson's Stephen Ridgeway (who is also head of the Law Council's Trade Practices Committee) has made public statements agreeing that the ACCC lacks some power, but urged caution in what is done to the law.²⁰

Legitimate communications

Information exchanges play a vital role in the economy; they increase transparency in the market to the benefit of consumers and the competitive process. Businesses communicate to the public and stakeholders for a variety of reasons including to inform customers, to advertise their market positioning, to improve brand awareness, and to fulfil legal and regulatory obligations. Industry associations and representative organisations can fulfil important roles in our economy which require the free flow of certain types of information amongst their members and to governments and other businesses.

In general, such communications are perfectly legitimate, pro-competitive and efficiency enhancing. Freedom to communicate with suppliers and customers are essential to gaining competition and efficiency benefits in a well-functioning market. However, the positive benefits of many information exchanges do not imply that the potential for harm to competition and consumers which may arise from anti-competitive price signalling and information exchanges should be disregarded.

Accordingly, any proposal to address anti-competitive price signalling and other information exchanges will need to carefully balance the potential anti-competitive impacts of particular information exchanges, with the benign and pro-competitive effects of other information exchanges. These considerations are further set out in the impact analysis on particular options which follows.

Objectives

The objective of Government action is to prohibit anti-competitive price signalling and information exchanges between competitors, through changes to the TPA.

This is consistent with the overall objective of the TPA, in particular the enhancement of the welfare of Australians through the promotion of competition, without imposing undue compliance costs on businesses.

Options

In considering possible reforms in this area, the 2009 Treasury Discussion Paper sought the community's views on the case for reform and in particular on Option 2. The views of a range of submitters expressed have been considered in developing options for addressing the problem have been considered, as well as the views expressed by business, OECD members, economists, legal scholars and other parties in relation to Australia and overseas.

The Options that are considered in this RIS are:

- Option 1: No amendments to the TPA to address anti-competitive price signalling and other information exchanges.

²⁰ The Australian, 23 October 2010, 'Banks' easy margin gains over' (<http://www.theaustralian.com.au/business/opinion/banks-easy-margin-gains-over/story-e6frg9if-1225942441984>).

- Option 2: Amend the TPA to expand the meaning of ‘understanding’ in the cartel prohibitions (sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45) to ensure that activities such as anti-competitive price signalling and information exchange are captured by these provisions.
- Option 3: Amend the TPA to include new, specific provisions to prohibit anti-competitive price signalling and information exchange, with consultation to take place on exposure draft legislation.

Targeted consultation will be undertaken on exposure draft legislation to ensure that the provisions introduced to deal with anti-competitive price signalling and other information exchanges prevent the most detrimental anti-competitive conduct, while minimising the risk of unintentionally prohibiting benign conduct and the regulatory burden on businesses. A decision on the final form of the legislation will be taken after this consultation process has been completed.

Impact analysis

Analysis of Option 1

Option 1 proposes no change to the law.

The benefits of retaining the status quo are that it would avoid introducing any uncertainties and costs that may potentially arise in pursuing legislative change. Some stakeholders advocated in favour of this option in the previous consultation process. For instance, BP Australia in their submission to the Treasury Discussion Paper advised:

‘the current interpretation of the term “understanding” in the TPA is adequate to capture anticompetitive conduct, and does not limit the ability of the TPA to properly address such anticompetitive practices.’

However, Option 1 fails to address the problems identified above and does not meet the objective of prohibiting anti-competitive price signalling and information exchange. As a result, it will continue to be the case that businesses, particularly those in oligopolistic markets, will be able to engage in practices capable of, or even designed with the purpose of, reducing the competitive tension between them and thereby increasing prices paid by consumers.

The broader economic impact of reduced competition is likely to include higher prices and/or reduced quality or choice for consumers. It may also lead to fewer gains in efficiency and productivity. In turn, this diminishes the wellbeing of the Australian people. Option 1 would leave the problem unaddressed, would not meet the desired policy objective and is therefore not a feasible option.

Analysis of Option 2

Option 2 (canvassed in the Treasury Discussion Paper) proposes to amend the cartel prohibitions (sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45) to clarify and expand the meaning of ‘understanding’ under the TPA.

This option seeks to address the problem by capturing further conduct which does not currently meet the threshold of ‘understanding’ as applied by the Courts. It would do so by modifying the existing ‘contract, arrangement or understanding’ test, through alterations to the meaning of ‘understanding’.

If minor amendments were made to the meaning of ‘understanding’ to address the concern that Courts have been insufficiently willing to infer an understanding from the evidence, this may fail to capture much of the conduct of concern where no premise of an understanding can be inferred. In

addition, the existing prohibitions were not drafted to capture such conduct and consequently unforeseen consequences may result through such an alteration.

If, alternatively, the meaning of ‘understanding’ was substantially amended so as to include all possible anti-competitive information exchanges as understandings, this would appear to inappropriately distort the meaning of ‘understanding’ and may inadvertently prohibit some conduct which is benign or even pro-competitive. This would impose costs on both businesses and consumers by denying them the possible benefits that may arise from this conduct.

In the Treasury Discussion Paper, it was asked whether if the definition of ‘understanding’ were to be expanded, would it be an appropriate means to address any perceived shortfalls of the current prohibitions. On balance the submissions indicated that expanding the definition of ‘understanding’ was not a well targeted means of capturing this conduct.

Ian Wylie (Blackstone Chambers) noted:

‘The ACCC did not appeal the Geelong Petrol Case, but did lobby the federal government for legislative action. It remains to be seen where that will end up ... 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.’

The Law Council of Australia Trade Practices Committee considered the changes to the meaning of ‘understanding’ proposed by the ACCC:

‘...would codify rather than modify the Court’s current approach, and as such are not necessary to address any perceived shortcoming in that approach.’

It was also argued by some submitters that such a change would introduce further uncertainty to the meaning of ‘understanding’ and would fail to provide a clear conceptual definition of the conduct that is, or should, constitute an ‘understanding’. This would increase business compliance costs, as businesses would have to seek legal advice as to whether their conduct would breach the prohibition. Further, benign or pro-competitive conduct may be unduly chilled.

Submissions also indicated that it would be unwise to lower the legal barrier for arriving at an understanding given the recent criminalisation of cartel conduct. If Option 2 were implemented, either anti-competitive information exchanges may result in criminal prosecution²¹ or substantial legislative changes to the cartel prohibitions (recently implemented in 2009) may have to be made to ensure that anti-competitive information exchanges were not exposed to criminal prosecution.

Taking into account the potential problems and shortcomings of this option it is considered an inferior option to Option 3.

Analysis of Option 3

Option 3 proposes to amend the TPA to include new, specific provisions to prohibit anti-competitive price signalling and information exchange, with consultation to take place on exposure draft legislation.

²¹ This would be inconsistent with the widespread view that cartel offences should be limited to ‘serious cartel conduct’.

It is evident from the consultations undertaken already, the advice of the ACCC and the experience of comparable overseas jurisdictions, that there are a range of anti-competitive information exchanges which are presently not covered by the TPA.

Submitters to the Treasury Discussion Paper considered, on balance, that amending the meaning of ‘understanding’ was not a well targeted means of capturing anti-competitive conduct not presently captured by the TPA, a number of submitters brought forward alternative proposals that would address conduct which did not meet the definition of a cartel, however had anti-competitive impacts.

Maurice Blackburn Lawyers submitted that:

‘We ... generally support the articulation of certain factual matters which the Court may consider in determining whether a corporation has arrived at an understanding. This would provide a more apt approach to identification of collusive conduct, and would be consistent with the approach taken in other jurisdictions, for example the use of ‘plus factors’ in the United States...the “concerted practice” concept used in the European Union might usefully be considered as an alternative to the term ‘understanding’ or as a reference point for its further development.’

Ian Tonking SC advanced for discussion an option of ‘radical surgery’²²:

‘The proposed prohibition could be added to s 45(2) as para (c), preserving the present prohibition of a contract, arrangement or understanding which lessens, or is deemed to lessen, competition. The statutory wording might read as follows:

A corporation shall not... (c) communicate with any competitor for the purpose, or with the effect, of inducing or encouraging the competitor (or any other competitor) to alter or adjust the price (the ‘new price’) (including any discount, allowance, rebate or credit in relation to the price) at which such competitor supplies, or offers to supply, goods or services, in a manner, or to an extent, so that the new price differs (materially) from the price (including any discount, allowance, rebate or credit in relation to the price) at which such competitor:

- (i) before receiving the communication, intended to supply, or offer to supply, the same goods or service;
- (ii) in the absence of becoming aware of the terms of the communication, would have supplied, or offered to supply, the same goods or services.’

Fisse and Beaton Wells advanced a number of options, drawing on European and US law in relation to coordination between competitors and considered the option:

‘to insert a definitional provision explaining that ‘understanding’ includes a concerted practice and to indicate in the Explanatory Memorandum that ‘concerted practice’ is intended to have the same meaning as ‘concerted practice’ under Article 81(1) of the EC Treaty... [to be] the most promising.’

In response to the views raised by submitters to the Treasury Discussion Paper, the ACCC has publicly stated that a more direct approach to targeting anti-competitive price signalling and information exchange directly may be preferable at this time. The ACCC Chairman, Mr Graeme Samuel stated:

‘suffice to say, I have publicly indicated we have got a problem. We have a loophole in the law in Australia in relation to cartels and collusive communications, and I have indicated that we should have a look at what is done in the US and Europe as a possible means of dealing with the issue.’²³

²² Note that this paper was written prior to Treasury’s Discussion Paper release which was published in the Australian Journal of Labour Law (2008) 21.

²³ The Australian Financial Review, 2 November 2010, ‘ACCC seeks price signal crackdown’, page 8.

In terms of the broad direction of reform, amending the TPA to prevent anti-competitive disclosures may be expected to yield material wellbeing improvements through the improved operation of markets. The information available to the Treasury indicates that it is reasonable to expect that the law can be amended to proscribe anti-competitive price signalling and information exchange to avoid stopping behaviour that is benign or pro-competitive and so as to not impose an inappropriate burden on business.

There is a range of activities which could constitute anti-competitive price signalling or information exchange and some activities are of greater concern than others. The competitive concerns arising from the exchange of information also depends on the nature of the information shared. Other things being equal, the sharing of information in relation to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information about less competitively sensitive matters.

Similarly, other things being equal, the sharing of information on current operating and future business plans are more likely to raise concern than the sharing of historical information.

The private exchange of pricing information may be readily distinguished from more benign or pro-competitive information exchanges. For example, a private discussion of future pricing intentions between competitors is likely to have little or no redeeming qualities. This is distinct from public communications, which may be undertaken for a variety of benign and pro-competitive reasons. Any prohibition capable of capturing public communications therefore needs to be capable of filtering between the various purposes underlying public communications, to ensure that only anti-competitive communications are prohibited.

It is important to recognise that any provision which seeks to address anti-competitive price signalling and other information exchanges will be exposed to the difficulty of only capturing anti-competitive exchanges, whilst not impacting on pro-competitive or benign information exchanges. Any option must balance these considerations. The way in which the proposed option does so is outlined further below.

The potential shape of the Australian prohibition to address anti-competitive price signalling and information exchange draws upon European competition law where particularly harmful disclosures between competitors, such as the exchange of future prices, are dealt with quite strictly.²⁴

Given the nature of the problem and the option set out below, it is not possible to precisely quantify its costs and benefits. As outlined above, it is difficult to accurately assess the extent of the issue as the ACCC's powers do not currently allow them to investigate instances of anti-competitive price signalling and information exchange. This makes it difficult to assess the likely compliance costs for business and to quantify the benefits (in terms of improvements to competition) of the proposed changes to the TPA. Nevertheless, where possible, the likely costs and benefits of particular elements of the proposed model are explained below in qualitative terms.

The proposed option

Under this option, the Government will release exposure draft legislation for public consultation, outlining its proposed form of amendments to the TPA to address anti-competitive price signalling and information exchange. This proposed model is as follows:

²⁴ The EC notes (Draft guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union to horizontal co-operation agreements) that some forms of information disclosures between competitors are particularly harmful, such as the exchange of intended future prices or quantities, and as such are considered to breach European laws simply by their object. Outside that category, the effect of the conduct will be considered on a case by case basis.

Per Se Prohibition

It would be *per se* unlawful for a corporation to privately disclose, directly or indirectly, to an actual or likely competitor, information that relates to a price for, or a discount, allowance, rebate or credit in relation to, goods or services acquired or to be acquired, or supplied or to be supplied, by the corporation in a market in which it competes with the recipient.

Substantial Lessening of Competition Prohibition

It would be unlawful for a corporation to provide information, directly or indirectly, to an actual or likely competitor if the information relates to:

- a price for, or a discount, allowance, rebate or credit in relation to, goods or services acquired or to be acquired, or supplied or to be supplied, by the corporation;
- levels of supply capacity or production capacity of the corporation; or
- any aspect of the commercial strategy of the corporation,

if, in providing the information to the competitor, the corporation has the purpose of substantially lessening competition (SLC) in that or any other market.

Per Se Prohibition

The *per se* prohibition targeted towards the information disclosures that are the most clearly anticompetitive, namely private disclosures of pricing information.

Private disclosures of price information between competitors is only likely to occur in circumstances where one or other of the competitors is seeking to facilitate prices above the competitive level, and the disclosure gives rise to an increased probability of such an outcome occurring. This conduct is suitable for prohibition, even if the competitors are otherwise able to ascertain each other's prices from the market. That is, it is the circumstance of private disclosure which creates the high risk of collusion, and it is therefore considered appropriate that it be prohibited *per se*.

In this context, 'private' is intended to convey that the disclosure is directed towards one or more competitors and not to anyone else, ie. not to the public at large, or to customers of the business. 'Disclosure' is intended to convey that the conduct is active, not passive or accidental, ie. it is a deliberate disclosure of information to one or more competitors.

This prohibition would also limit the ability of competitors to engage in, and maintain more explicit cartel behaviour by elimination of a key element of communications required for the purposes of setting and subsequently monitoring adherence to, and punishing deviations from, agreed prices.

The prohibition would have benefits including that it will act as a deterrent against the most harmful anti-competitive price signalling and information exchanges or in cases where this activities continues, provide the ACCC with clearly defined powers to prosecute the offending parties.

Further benefits which may arise from this prohibition relate to the absence of significant uncertainty from its application. Avoidance and compliance costs for businesses can consequently be expected to be low.

There may be circumstances in which behaviour otherwise subject to this prohibition may be commercially justified or required under other statutory and regulatory obligations. The

circumstances are similar to those in relation to which the cartel provisions do not apply, and will not apply here through the application of comparable defences (as outlined below in *Defences, exceptions and authorisation*).

Substantial Lessening of Competition Prohibition

The SLC prohibition would apply to both public and private disclosures of information (other than those subject to the *per se* prohibition).

By incorporating a competition test, the SLC prohibition is consistent with the framework of the TPA as it is the basis of various Part IV prohibitions including section 45 (exclusionary provisions), section 47 (vertical restraints) and section 50 (mergers).

Caron Beaton-Wells has remarked recently²⁵:

‘Use of the competition test is a welcome suggestion because it is consistent with the policy and other prohibitions in the Act and prevents over-reach and capture of pro-competitive conduct’.

However, she also stated that²⁶:

‘as a matter of practice the competition test is very onerous in law and in evidence.’

It is recognised that commercial conduct frequently has more than one purpose. Conduct that has the purpose of SLC will only be caught if that purpose was a substantial purpose behind the conduct engaged in, as reflected in section 4F of the TPA. Ultimately it will be up to the Courts to consider whether the conduct in question, if it has multiple purposes, was engaged in for the substantial purpose of SLC. However, a court would be unlikely to infer an anti-competitive purpose in the absence of direct evidence where the conduct is commonplace and commercially justifiable. By way of example, if a business advertises its prices or erects a price board then it would be unlikely that the conclusion will be reached that it was engaged in for a purpose of SLC as the business has a legitimate purpose for engaging in the conduct - to communicate to potential customers.

It is also expected that the provision would outline a range of non-exhaustive factors that the Court may take into consideration for the purposes of ascertaining whether the business had the requisite purpose of SLC. This would assist in providing guidance to the Courts and the ACCC and may reduce uncertainty for business in applying the new provisions. These factors will be incorporated into the exposure draft legislation, on which further consultation will be undertaken.

The Australian Bankers Association chief executive Steven Munchenberg has said the law could lead to inadvertent comments being investigated by the ACCC²⁷:

‘As a consequence, executives will shy away from talking about issues that are perfectly valid.’

It is noted that, by only incorporating a purpose test, this conduct would not come under consideration by the ACCC unless the communications were made with the purpose of SLC.

Relative to the proposed *per se* prohibition, the purpose SLC prohibition may be less certain in its initial application, potentially resulting in increased compliance costs for businesses in the short term. It may raise concerns for some stakeholders, as the Australian Bankers Association has stated

²⁵ The Australian Financial Review, 5 November 2010, ‘TPA crackdown on price signals ‘confusing’’, page 8.

²⁶ The Australian Financial Review, 5 November 2010, ‘TPA crackdown on price signals ‘confusing’’, page 8.

²⁷ The Australian Financial Review, 3 November 2010, ‘Backlash at signals plan’, page 10.

above, that it could act to discourage otherwise legitimate commercial comments, such as public communications to consumers or investors.

Any amendment to the TPA will place compliance burdens on business. Additional resources will be required by businesses to ensure that their current and any future conduct is not prohibited by the changes to the law. This may involve businesses devoting resources to amend their compliance policies and programs and education initiatives. Any changes to the law will create uncertainty and risks for businesses, particularly in the short term while case law develops. This is, however, unavoidable in any change to the law and can be expected to diminish over time. It can be further minimised through the consultation process to be undertaken and guidance from the ACCC on how it will interpret amendments once enacted.

It is considered that the inclusion of an effects test is not warranted at this time. An effects test may cause undue uncertainty for businesses in determining whether a particular disclosure would breach the new prohibition. This is because, at the time of the information disclosure, it may be necessary for the corporation to consider the effect of the disclosure on competition, but this is partly determined by the response of competitors, which is largely beyond the control of the corporation disclosing the information.

Further, in so far as the SLC test is based on the effect or likely effect of the public communication, the prohibition may require a causal relationship between the relevant conduct (the public communication of information) and the SLC effect. This may place the ACCC and the Courts in a difficult position in terms of establishing that the conduct had the requisite anti-competitive effect.

Defences, exceptions and authorisation

In order to ensure that only the conduct of most concern is prohibited, it is anticipated that provision would be made for reasonable defences, similar to those available for the cartel provisions of the TPA so that the *per se* prohibition would not apply to disclosures between:

- related companies²⁸
- joint venture participants or their representatives on a joint venture management board or committee concerning the prices to be charged by the joint venture²⁹
- a supplier and an acquirer concerning a supply price, where the supplier and acquirer also compete in respect of the supply of the relevant product³⁰ and
- entities that comprise a dual listed company³¹.

It is anticipated that provision will be made for justifiable exchanges of certain price information for the purposes of confidential merger discussions. Any need to further amend these defences will be considered through consultation on exposure draft legislation.

There may be circumstances in which behaviour otherwise subject to this prohibition may be required under separate statutory or regulatory obligations. Subsection 51(1) of the TPA excepts from the prohibitions of Part IV conduct that is engaged in and specifically authorised by statutory

²⁸ cf sections 44ZZRN and 45(8).

²⁹ cf sections 44ZZRO, 44ZZRP and 76C.

³⁰ cf sections 44ZZRS and 45(6).

³¹ cf 44ZZRT and 45(6A).

or regulatory obligations. The application of this section can be extended to cover any circumstances in which statutory or regulatory obligations would otherwise place businesses in contravention of the new prohibitions.

Further, businesses who wish to continue engaging in conduct in contravention of the new prohibitions, and can demonstrate that doing so provides a net public benefit can seek authorisation from the ACCC. This will incur the costs associated with seeking authorisation from the ACCC for the activities. The standard fee for ACCC authorisations is \$7500, however it may be waived in part or in full where the ACCC considers that it would impose an undue burden on parties.³² Additionally, businesses may encounter costs associated with seeking and obtaining legal advice or otherwise on authorisation. The costs associated with the authorisation process varies significantly in accordance with the complexity of the matter and the independent decisions of individuals regarding the choices they make in acquiring legal advice.

The time the ACCC will take to assess an application is dependent on the complexity of the matter. An interim decision can be made by the ACCC within 28 days and a draft authorisation typically taking around three to four months. On average, a final decision is made within five to six months, with a statutory limit of six months imposed on the ACCC. The decisions of the ACCC can be reviewed on their merits by the Australian Competition Tribunal.

The managing director and owner of Informed Sources, Alan Cadd, has recently stated:

‘the contention is, if they do this [price signalling laws], then Informed Sources goes out of business and if Informed Sources goes out of business then presumably that’s because they are trying to stop the petrol price cycle. If this initiative does away with the petrol price cycle the people who will be hurt are the working families that the Gillard government is purporting to be looking after.’³³

The availability of the authorisation mechanism ensures that, where arrangements such as those operated by Informed Sources are potentially in breach of the new (or existing) prohibitions, they can continue where they are found to be operating in the net public interest. It therefore provides an effective mechanism for avoiding the capturing benign or pro-competitive conduct.

Penalties

Consistent with the framework of the TPA, it is proposed that whatever the final form of the provisions proposed following consultation, contravention of the provisions would lead to civil penalties only.

It is not anticipated that this option will impose additional costs to the ACCC as it will be incorporated into its general enforcement activities.

Conclusion on Option 3

Taking into account the substantial benefits, the relatively low and manageable costs and risks associated with this proposed approach, Option 3 is considered to be superior to Options 1 and 2 and is the recommended option.

³² ACCC Guide to Authorisation, March 2007.

<http://www.accc.gov.au/content/item.phtml?itemId=788405&nodeId=4bf0ad866bd2a81832572000977ed0e6&fn=Guide%20to%20Authorisation.pdf>. (Last retrieved 18 November 2010).

³³ The Australian Financial Review, 9 November 2010, ‘Bank, petrol chiefs face grilling’, page 48.

Consultation

In January 2009, a Treasury discussion paper was issued on the ‘Meaning of ‘Understanding’ in the *Trade Practices Act 1974*’. Fifteen public and one confidential submission were received from interested parties regarding the adequacy of the current interpretation of the term ‘understanding’ in the TPA to capture anticompetitive conduct.

Members of the business and legal communities have made public statements about the issue of price signalling recently in the media. Their comments support further consultation on the issue, and call for careful consideration on the final form of any prohibition. Comments around the possible effects of any prohibition have been general in nature, do not canvass the proposed prohibition set out in the preferred Option, and therefore do not necessarily directly address its impacts. Stakeholders will have an opportunity to directly express views on the impacts of the package when consultation is undertaken on exposure draft legislation.

These views have informed the preferred option. The current practices and legal precedent in Australia have also been considered, along with the views expressed by business, the ACCC, economists and legal advisors both in publications and at the OECD Roundtables on Facilitating Practices and Information Exchange in 2007 and 2010, the statute and case law in jurisdictions including the US, EU and UK and other interested parties.

By engaging in further consultation on exposure draft legislation and providing an opportunity for key stakeholders to raise any issues or concerns with the proposed model for addressing anti-competitive price signalling and information exchange, the Government will be able to make any necessary changes to the legislative amendments to the TPA before they are introduced into Parliament.

Conclusion and Recommended Option

Following careful consideration of this issue, it has been concluded that there is an identified problem in Australian markets with respect to anti-competitive price signalling and other information exchanges. The available evidence, overseas experience, and consultation in 2009 indicates that these practices can be effectively addressed by well targeted legislation, but the TPA as it stands does not deal adequately with this problem. As such, Option 1 would not be feasible as it would leave the problem unaddressed.

Option 2 (canvassed in Treasury’s discussion paper) proposes to amend the cartel prohibitions (sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45) to clarify and expand the meaning of ‘understanding’ under the TPA. Taking into account the potential problems and shortcomings of this option as well as the lack of support for it, it is considered an inferior option to Option 3.

By comparison, Option 3 has significant advantages in increasing the welfare of consumers by promoting competitive markets and ensuring that anti-competitive price signalling and information exchanges are targeted explicitly and directly. Undertaking targeted consultation on the exposure draft legislation for the model outlined in Option 3 will allow the any risks associated with unintended consequences to be identified and addressed.

A decision on the final form of legislation will be taken by Government after this consultation process has been completed. This decision will be accompanied by a further Regulation Impact Statement.

Implementation and Review

Changes to the Trade Practices Act

These changes to the TPA will need to be implemented by passing amending legislation through the Commonwealth Parliament.

Enforcement

The ACCC would have responsibility for enforcing the amended Act.

Review

The effectiveness of the proposed amendments would be monitored by Treasury, and reviewed after a sufficient period of time has elapsed.