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Pitfalls in Proving Price-Fixing: Are Price-Signalling Laws the Answer?

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Keywords

competition, interpretation, prohibitions, regulations, price, industry

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Abstract

Establishing a breach of the price-fixing prohibitions in Part IV Division 1 of the Competition and Consumer Act 2010 (Cth) ('CCA') depends on the apparently simple requirement that a 'contract, arrangement or understanding' to fix prices can be shown to exist between competitor corporations. However, proof of any such agreement has been problematic for the Australian Competition and Consumer Commission ('ACCC') in actions for alleged price-fixing within a range of industries. This article considers the judicial interpretation of the terms 'contract, arrangement or understanding' and the type of evidence needed to prove that a price-fixing agreement exists. It also examines the scope and effect of the price-signalling provisions under Part IV Division 1A of the CCA and, in the light of international competition law jurisprudence, contemplates how these provisions may affect the ACCC's ability to prove price-fixing claims. Possible future directions in this area of the law, resulting from the recommendations of the recent Harper Review, are explored as well.

I Introduction

Corporate competitors in Australia are prohibited by pt IV div 1 ('*Cartel conduct*') of the *Competition and Consumer Act 2010* (Cth) ('CCA')¹ from making or giving effect to a 'contract, arrangement or understanding' that has the purpose or effect of fixing the price of any goods or services they supply.² The inherently anti-competitive nature of price-fixing is reflected in the fact that this conduct is illegal per se.³

The introduction of CCA pt IV div 1A, 'Anti-competitive disclosure of pricing and other information' ('*the later provisions*') on 6 June 2012, dealing with instances of price-signalling, sought to amplify existing provisions, specifically in relation to private disclosures to competitors,⁴ and to impose a general prohibition against disclosures relating to price,

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¹ All Part references in this article are to the CCA unless otherwise indicated.

² See CCA ss 44ZZRD, 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK.

³ Price-fixing, a manifestation of cartel conduct (collusion between competitors), has been condemned as a 'cancer on the Australian economy': 'ACCC Chiefs Past and Present in Stand Against Price Fixing', *CCH News Headlines*, 25 June 2007, quoting Graeme Samuel, the previous Chair of the Australian Competition and Consumer Commission. It is the antithesis of competitive pricing, resulting in higher prices than market forces would permit.

⁴ CCA s 44ZZWW.

capacity and commercial strategy.⁵ The operation of the price-signalling provisions is currently restricted to the banking industry.⁶

Under *CCA* pt IV div 1, establishing a breach of the price-fixing prohibition depends on the apparently simple requirement that a ‘contract, arrangement or understanding’ to fix prices can be shown to exist between competitor corporations. However, proving the necessary ‘contract, arrangement or understanding’ has been problematic. Indeed, actions brought by the Australian Competition and Consumer Commission (‘ACCC’) for alleged price-fixing within a range of industries have often failed on this point. Defeats suffered by the ACCC include the dismissal of its price-fixing allegations against various petrol retailers in *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (the ‘Ballarat Petrol Case’)⁷ and *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (the ‘Geelong Petrol Case’).⁸ Public concern about price gouging and cartel activity continues to motivate scrutiny of Australia’s petrol suppliers by the ACCC.⁹

This article begins by examining the price-fixing prohibitions under the *CCA*. The article then analyses the *Ballarat Petrol Case* and the *Geelong Petrol Case* (collectively the ‘Petrol Cases’), contrasts these cases with the more recent case of *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (‘Woollam’),¹⁰ and outlines the resulting implications of these decisions for the ACCC in its pursuit of price-fixing agreements. In particular, the article considers the judicial interpretation of the terms ‘contract, arrangement or understanding’ — common to the later provisions as well as *CCA* s 45, which deals with anti-competitive agreements generally — and the type of evidence needed to prove that a ‘contract, arrangement or understanding’ to fix prices exists. The article then examines the scope and effect of the later provisions relating to price-signalling — a specific type of price-fixing — and how these provisions may affect the ACCC’s ability to prove price-

⁵ *CCA* s 44ZZX. The current Chair of the ACCC, Rod Sims, has described the provisions as closing ‘the gap between Australia’s competition law and that in Europe and the United States, where anti-competitive price-signalling and information disclosures can be unilateral and so more readily addressed’: Rod Sims, ‘ACCC Priorities in Enforcing Competition Law’ (Speech delivered at the 2012 Competition Law Conference, Sydney, 5 May 2012).

⁶ *CCA* s 44ZZI(1), as prescribed in the *Competition and Consumer Regulations 2010* (Cth) reg 48.

⁷ (2005) 159 FCR 452.

⁸ (2007) 160 FCR 321.

⁹ In a subsequent Keynote address, Rod Sims, Chair of the ACCC, noted that the ACCC typically received 1000 complaints and enquiries per year relating to petrol, confirming that the ACCC was investigating the sharing of information about prices in the fuel retailing sector: Rod Sims, ‘Keynote Address’ (Speech delivered at the 2012 Australasian Convenience and Petroleum Marketers Association Conference, Melbourne, 12 September 2012).

¹⁰ (2011) 196 FCR 212.

fixing claims in the context of international competition law developments. Finally, the article discusses the impact of the implementation of changes proposed by Australia's Competition Policy Review (the 'Harper Review'), which released its Final Report on 31 March 2015.¹¹

The Harper Review panel recognised that current prohibitions against price-signalling in the *CCA* do not accurately address the distinction between anti-competitive and pro-competitive conduct, and that these prohibitions are also deficient in their limited application to the banking industry.¹² The Harper Review also cautions that a per se prohibition has the potential to overreach, and proposes that *CCA* s 45 be amended to address price-signalling issues rather than creating a separate Division in the *CCA*.¹³ Significantly, the Final Report recommends that s 45 be extended to cover 'concerted practices' that have the purpose, or would be likely to have the effect, of substantially lessening competition — which would include the regular disclosure or exchange of price information between firms — irrespective of whether or not it is possible to show that the firms reached an understanding about the disclosure or exchange.¹⁴ In this context the Harper Review defines the word 'concerted' as 'jointly arranged or carried out or co-ordinated', and regards a 'concerted practice' between market participants as 'a practice that is jointly arranged or carried out or co-ordinated between the participants'.¹⁵ This approach is commensurate with the European approach of 'concerted practices' and, if implemented, will be a step forward in aligning Australian law with European competition law.

II Regulation of Price-Fixing

A *Statutory Prohibitions*

CCA pt IV div 1 attempts to define cartel conduct with specificity.¹⁶ Pursuant to s 44ZZRD, a 'cartel provision' is a provision of a 'contract, arrangement or understanding' between parties that are, or are likely to

¹¹ Ian Harper et al, 'Competition Policy Review' (Final Report, Competition Policy Review Panel, 31 March 2015) <<http://competitionpolicyreview.gov.au/final-report/>>.

¹² *Ibid* 59.

¹³ *Ibid* 60. In its recommendation the Harper Review panel states unequivocally that the "price signalling" provisions of Part IV, Division 1A of the *CCA* are not fit for purpose in their current form and should be repealed'.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ The Harper Review panel expressed support for the intention behind the cartel conduct prohibitions, but noted that the provisions are 'excessively complex, which undermines compliance and enforcement' and 'should be simplified'. *Ibid* 58–59 ('Recommendation 27 — Cartel conduct prohibition').

be, in competition with each other, which has, or is likely to have, the purpose or effect of:

- fixing prices for the supply, re-supply or purchase of goods or services;
- preventing, restricting or limiting production of goods or the capacity to supply goods or services;
- allocating customers, suppliers and geographical areas in connection with the supply or purchase of goods or services; or
- bid-rigging.

Part 44ZZRF criminalises *making* a contract or arrangement, or arriving at an understanding, that contains a cartel provision, and s 44ZZRG criminalises *giving effect* to a ‘contract, arrangement or understanding’ that contains a cartel provision. The equivalent civil penalty provisions are found in ss 44ZZRJ and 44ZZRK, which, respectively, render it a contravention of the *CCA* to *make* a contract or arrangement, or arrive at an understanding, that contains a cartel provision or *give effect* to a ‘contract, arrangement or understanding’ that contains a cartel provision. This arrangement is intended to permit a ‘proportionate’ response, with criminal prosecution targeted at serious cartel conduct while minor conduct is punished civilly.¹⁷

The distinguishing feature between the criminal and civil penalty provisions is the so-called ‘fault’ element inherent in ss 44ZZRF and 44ZZRG. Drawing on principles of criminal responsibility embodied within the *Criminal Code Act 1995* (Cth), these Parts require that the corporation intended to make or give effect to a ‘contract, arrangement or understanding’ containing a cartel provision and knew or believed that the ‘contract, arrangement or understanding’ contained a cartel provision.¹⁸ It is also necessary to prove the offences beyond reasonable doubt and obtain a unanimous verdict of the jury.¹⁹ The lesser civil provisions do not involve any element of knowledge or belief, and the corresponding standard of proof is ‘on the balance of probabilities’.

Clearly, ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK have been drafted with the longstanding civil provision in *CCA* s 45(2) in mind.

¹⁷ Commonwealth, ‘Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct’ (2009) [1.2].

¹⁸ Pursuant to the *Criminal Code Act 1995* (Cth) sch 1 ch 2, a person has ‘knowledge’ of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events. The term ‘belief’ is not defined, but presumably refers to a level of awareness less than knowledge.

¹⁹ Commonwealth, ‘Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct’ (2009) [6].

This permits guidance from existing precedents and provides businesses with a general sense of the conduct to be avoided.

CCA s 45(2)(a)(ii) prohibits *making* a contract or arrangement, or arriving at an understanding, if a provision of the proposed ‘contract, arrangement or understanding’ has the purpose, effect or likely effect of substantially lessening competition. *CCA* s 45(2)(b)(ii) prohibits *giving effect* to a provision of a ‘contract, arrangement or understanding’ that has the purpose, effect or likely effect of substantially lessening competition.²⁰ In contrast to the cartel conduct provisions, these are not per se prohibitions, but are linked to certain requirements in respect of a substantial lessening of competition.

Two newer provisions introduce a direct prohibition on certain forms of price-signalling. Part 44ZZW (the per se prohibition) specifically prohibits the private disclosure of pricing information to one or more actual or potential competitors where the disclosure does not occur ‘in the ordinary course of business’. Significantly, this prohibition does not distinguish between past, present and future pricing information, and does not require proof of anti-competitive purpose or effect. Part 44ZZX (the general prohibition) is a prohibition against companies making certain disclosures ‘for the purpose of substantially lessening competition in a market’. Thus, a breach of these provisions requires only proof of the prohibited unilateral action instead of the collusive elements envisaged by s 45(2). At present these provisions apply only to the banking sector;²¹ however, the Minister may prescribe further classes of goods and services to which they may apply in the future.²²

B Sanctions

The *CCA* applies civil sanctions to parties in breach of ss 45(2), 44ZZW and 44ZZX,²³ and specifically excludes criminal sanctions for breaches of these provisions.²⁴ Corporations are principally liable for such breaches, and face a pecuniary penalty of whichever is the greatest of an amount capped at \$10 million, three times their gain from the illegal conduct, or, where the gain cannot be readily ascertained, ten per cent of their annual turnover during the preceding twelve month period.²⁵ Individuals may be

²⁰ The composite expression ‘contract, arrangement or understanding’ is thus a familiar one.

²¹ *CCA* s 44ZZT(1), as prescribed in the *Competition and Consumer Regulations 2010* (Cth) reg 48.

²² *CCA* s 44ZZT(3). Before the Governor-General makes regulations, for the purpose of subPart (1), prescribing a class of goods or services, the Minister must be satisfied that the prescribed process has been complied with, as prescribed in the *Competition and Consumer Regulations 2010* (Cth) reg 49.

²³ *CCA* s 76(1A).

²⁴ *Ibid* s 78.

²⁵ *Ibid* s 76(1A). For one example of a penalty determination by the Federal Court, see *Australian Competition and Consumer Commission v Gullyside Pty Ltd* [2005] FCA 1727,

accessorily liable as persons ‘involved in’ a contravention of the *CCA*,²⁶ incurring pecuniary penalties of up to \$500 000.²⁷

These penalties apply equally to all parties in breach of the civil cartel conduct provisions in ss 44ZZRJ and 44ZZRK,²⁸ and also to corporations found criminally liable under ss 44ZZRF and 44ZZRG, although the language in the latter provisions is slightly different—penalties being described as a ‘fine’ rather than a ‘pecuniary penalty’.²⁹ Individuals convicted of involvement in the criminal cartel offences in ss 44ZZRF and 44ZZRG face maximum penalties of imprisonment for 10 years, a fine of up to \$220,000, or both.³⁰

The higher monetary penalty for individuals found to have breached a civil cartel provision than for the contravention of a criminal provision reflects the likelihood that a period of incarceration will be imposed in the latter instance and recognises the broader ramifications of a criminal conviction for an individual.³¹

C Threshold Elements

The threshold element of both s 44ZZRD and s 45(2) is a ‘contract, arrangement or understanding’ between the parties. As the Federal Court neatly explained in the *Geelong Petrol Case*, these three concepts represent ‘a spectrum of consensual dealings’.³² While the term ‘contract’ is apt to describe a more formal agreement, consistent with its general legal meaning, ‘arrangement’ suggests something looser than a ‘contract’, and ‘understanding’ suggests something even looser than an ‘arrangement’.³³ Interestingly, however, the case law to date reveals no material distinction between the two latter terms.³⁴

In fact, the balance of authority indicates that both ‘arrangement’ and ‘understanding’ involve a ‘meeting of minds’.³⁵ According to the Full Federal Court’s judgment in the *Ballarat Petrol Case*, this requires

another petrol price-fixing case, where pecuniary penalties amounting to \$470 000 were imposed on two service stations for price-fixing conduct in the Woodridge area of Brisbane.

²⁶ *CCA* s 75B(1).

²⁷ *Ibid* s 76(1B).

²⁸ *Ibid* ss 76(1A)–(1B).

²⁹ *Ibid* ss 44ZZRF(3), 44ZZRG(3).

³⁰ *Ibid* s 79(1). See also the effect of *CCA* s 6(2)(b) and the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth) sch 1 version of *CCA* pt IV in extending principal liability under *CCA* ss 44ZZRF–G, 44ZZRJ–K to persons who are not corporations.

³¹ Explanatory Memorandum, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth) 34–5 [2.45]–[2.49].

³² (2007) 160 FCR 321, 331 (Gray J).

³³ *Ibid* 331–2, reflecting established precedent.

³⁴ See, eg, *Re British Basic Slag’s Agreements* [1963] 2 All ER 807; *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286.

³⁵ A point confirmed by the Full Federal Court in the *Ballarat Petrol Case* (2005) 159 FCR 452, 464 (Heerey, Hely and Gyles JJ).

communication between the parties and *commitment* to a course of action, rather than a mere hope or even an expectation that a course of action will be followed.³⁶ Later, in the *Woollam Case*, Logan J, in finding that the respondents had come to an ‘arrangement or understanding’,³⁷ observed that an arrangement or understanding must also ‘be consensual and carry with it an element of obligation rather than a mere expectation’.³⁸

On the question of proving a ‘meeting of minds’, the former ACCC Chair, Graeme Samuel, commented that

Cartel cases come in a variety of shapes and sizes. Some, a very few, have written agreements. These are the easiest to prove. More commonly, there is no express agreement and the ACCC must rely on a mixture of direct and circumstantial or inferential evidence to prove a contravention.³⁹

The current ACCC Chair, Rod Sims, has also noted the difficulties experienced by the ACCC in proving that an ‘arrangement or understanding’ exists between parties suspected of engaging in cartel conduct, and referred to the *Geelong Petrol Case* as providing the impetus for the new provisions.⁴⁰

The requirement of ‘direct evidence’ refers to documentary evidence or the oral testimony of witnesses. In relation to this type of evidence, Samuel cautioned that:

[In] some cartels, particularly price-fixing cartels ... collusion becomes part of the normal course of doing business. In these circumstances, it may be very difficult for participants to recall specific instances of giving effect to the cartel. Obtaining direct evidence that an agreement has been acted on can be problematic.⁴¹

In the price-fixing context, ‘circumstantial evidence’ encompasses factors such as:

- motive, incentive and opportunity of the parties to reach an ‘arrangement or understanding’;
- parallel behaviour engaged in by the parties, as well as meetings or exchanges of correspondence or other information;
- the parties’ inability or unwillingness to explain the concurrence of their conduct;

³⁶ Ibid.

³⁷ (2011) 196 FCR 212, 226 [49].

³⁸ Ibid 227 [51], citing Lindgren J in *Trade Practices Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375, 408–9 [141].

³⁹ Graeme Samuel, ‘The Enforcement Priorities of the ACCC’ (2006) 14 *Trade Practices Law Journal* 71, 84.

⁴⁰ Sims, above n 5.

⁴¹ Samuel, above n 39, 84.

- an unusual pattern of parallel behaviour that cannot be explained except by the existence of an ‘arrangement or understanding’; and
- the parties seemingly acting against their own economic interests (that is, each firm would not benefit from the conduct unless its competitors behaved in the same way).⁴²

Respondents’ justifications for certain actions can be critical to rebutting an allegation of price-fixing by showing that independent action was taken, that there was no communication with other parties, or that no ‘commitment’ to other parties was incurred.⁴³

III Developments in the Law

A *The Petrol Cases*

1 *The Ballarat Petrol Case*

(a) *Federal Court*

The *Ballarat Petrol Case* commenced when the ACCC instituted proceedings against sixteen respondents (eight corporations and eight individuals) for price-fixing conduct in the Ballarat retail petrol market over the eighteen-month period from June 1999 to December 2000. A number of the respondents (four corporations and five individuals) either admitted or did not contest the ACCC’s claims and proceeded to penalty hearings before Goldberg J in the Federal Court.⁴⁴ The remaining respondents (four corporations and three individuals) proceeded to trial before Merkel J.

The ACCC’s case against the contesting respondents relied heavily on circumstantial evidence involving records of telephone conversations between the parties, and correlations between these calls and the timing of petrol price rises. In finding that this evidence established a price-fixing understanding (which had been put into effect on 69 occasions), Merkel J accepted that there was a ‘meeting of minds’ between the respondents giving rise to the expectation in each of them that the others would engage in price-fixing behaviour.⁴⁵ As a result, all 16 respondents in this case were initially found to have breached the then *Trade Practices*

⁴² See also Warren Pengilly, ‘What is Required to Prove a “Contract, Arrangement or Understanding”?’ (2006) 13 *Competition & Consumer Law Journal* 241, 244.

⁴³ *Ibid* 263.

⁴⁴ *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301.

⁴⁵ *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183, 220.

Act 1974 (Cth) ('*TPA*') and were ordered to pay penalties totalling \$23.3 million.⁴⁶

(b) Full Federal Court

Two of the 17 parties found to have breached the *TPA*, Apco Service Stations Pty Ltd ('Apco') and its managing director, Peter Anderson, appealed to the Full Federal Court.⁴⁷ Apco and Anderson contended that they were not a party to any price-fixing understanding because there had been no *commitment* on their part to increase prices following discussions about prospective price rises. On the contrary, the appellants claimed that Anderson made independent decisions about whether or not Apco should increase its petrol prices based on his own assessment of the Ballarat petrol market, pointing out that Apco only increased its prices on 29 of the 69 occasions under consideration and not on the other 40.⁴⁸

The Full Federal Court (Heerey, Hely and Gyles JJ) accepted this contention.⁴⁹ Their Honours held that a mere hope or expectation that a party will act in a certain way is insufficient to constitute an 'arrangement or understanding'.⁵⁰ Instead, one party must assume an obligation or give an assurance or undertaking that it will act in a certain way.⁵¹ Therefore, *commitment* to a course of action was necessary to establish a contravention of *TPA* s 45(2).⁵² Their Honours then remarked that if:

Apco and Anderson were not committed to increase prices, the fact that sometimes they did so is consistent with them exercising their own judgment on those occasions. Unilaterally taking advantage of a commercial opportunity presented is not to arrive at or give effect to an understanding in breach of the Act.⁵³

The ACCC sought special leave to appeal to the High Court. However, in June 2006, the High Court rejected the ACCC's leave to appeal application on the basis that the Full Federal Court's decision did not raise any serious issues of interpretation of the *TPA*.⁵⁴

As it stands, the Full Federal Court's judgment in the *Ballarat Petrol Case* sets a high evidentiary standard in price-fixing cases under s 45(2). In particular, it must be shown that the parties to an alleged price-fixing

⁴⁶ *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 2)* (2005) 215 ALR 281; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301.

⁴⁷ Apco had been fined \$3 million and Anderson \$200,000.

⁴⁸ *Ballarat Petrol Case* (2005) 159 FCR 452, 454 [3].

⁴⁹ *Ibid* 465–6 [53].

⁵⁰ *Ibid* 464–5 [47].

⁵¹ *Ibid* 464 [45].

⁵² *Ibid*.

⁵³ *Ibid* 466 [56].

⁵⁴ Transcript of Proceedings, *Australian Competition and Consumer Commission v Apco Service Stations Pty Ltd* [2006] HCATrans 272 (2 June 2006).

‘arrangement or understanding’ are committed or morally bound to the agreement.

2 *The Geelong Petrol Case*

(a) *Background*

In the *Geelong Petrol Case*, the ACCC accused 18 respondents (eight corporations and ten individuals) of fixing prices in the Geelong retail petrol market during the two-year period from the beginning of 1999 to the end of 2000. In the Federal Court, Gray J dismissed the case against all respondents, despite several of them having admitted to the ACCC’s allegations.⁵⁵

It was not disputed by the respondents that they regularly telephoned each other to discuss the price of petrol, and the amount and timing of petrol price rises. What was at issue was whether these communications constituted an ‘arrangement or understanding’ about how the parties would price their petrol.

The ACCC submitted that the telephone conversations gave rise to eight separate, but interlocking, arrangements, seven of which were bipartite and one tripartite. The arrangements were said to have operated serially, with price information and commitments flowing from one set of petrol retailers to the next.⁵⁶ The retailers were alleged to have given effect to the arrangements on multiple occasions during 1999 and 2000.

Unlike the *Ballarat Petrol Case*, these proceedings did not involve an allegation of a single, multi-party price-fixing arrangement.⁵⁷ Rather, this was a complex, factually-dense case in which a multi-party, multi-transaction arrangement was alleged to exist.

(b) *Evidence*

(i) *Direct evidence*

To support its allegations, the ACCC relied on the oral evidence of 12 witnesses who were participants in the Geelong petrol market. Four of these were also respondents to the instant proceedings who had admitted to the ACCC’s allegations against them.

Gray J was highly critical of the evidence of these witnesses for at least four reasons. First, almost none of the evidence related to events on any specific date. There were no witnesses who could remember a single

⁵⁵ For useful casenotes on this decision, see Ayman Guirguis and Chris Evans, ‘Cartels, Cooperation and Circumstantial Evidence’, *Competition Law News* (Blake Dawson Waldron Lawyers, 19 June 2007) 1–7; Peta Stevenson, ‘Failed ACCC Fixation on Price Fixing Leaves Retailers on a High’, *Australian Trade Practices News*, Issue 589 (CCH Australia Ltd, 4 July 2007) 1–4.

⁵⁶ *Geelong Petrol Case* [2007] FCA 794 [121]–[126].

⁵⁷ *Ibid* [119].

specific conversation concerning the fixing of petrol prices on any particular day. Even allowing for the fact that the hearing took place five years after the alleged events, his Honour found this lack of recollection ‘unusual’.⁵⁸ Second, the evidence did not reveal the origin of any of the alleged arrangements or understandings, or even an agreed general course of conduct indicative of an ‘arrangement or understanding’.⁵⁹ Third, witnesses’ recollections were often inconsistent with the available data, leading to questions of reliability.⁶⁰ Fourth, none of the witnesses stated that they felt constrained to act in any particular way. Consequently, his Honour found that there was no commitment by the parties to any course of action.⁶¹

Elaborating on the fourth reason, Gray J explained that, for an ‘arrangement or understanding’ to exist, there must be an ‘element of commitment, or moral obligation, or obligation binding in honour only’⁶² to observe and adhere to the ‘arrangement or understanding’. The absence of any element of commitment or obligation was therefore ‘fatal to the ACCC’s case’,⁶³ since ‘an “arrangement or understanding” in which each party is free to do as it wishes is a creature unknown to s 45(2)’⁶⁴ of the *TPA*. Consequently, Gray J concluded that the ‘overall effect of the evidence in this case is that it is more probable than not that none of the arrangements ... alleged by the ACCC in fact existed’.⁶⁵

The ACCC’s difficulties in this case suggested that the form in which evidence was adduced was an important issue in cartel conduct cases.⁶⁶ Judges who demanded to *hear* the evidence of those alleged to be parties to an ‘arrangement or understanding’ had to be anticipated. In this regard, Samuel notes that there have:

been moves in the Federal Court toward a preference for oral testimony from witnesses over affidavit evidence ... [This] has the potential to extend enforcement proceedings and introduce more uncertainty into litigation – it is difficult to know how any witnesses will perform in the witness box and what effect this might have on the case.⁶⁷

(ii) *Circumstantial evidence*

The circumstantial evidence in the *Geelong Petrol Case* consisted primarily of a document known as ‘Annexure B’, which contained details

⁵⁸ Ibid [131].

⁵⁹ Ibid [939].

⁶⁰ Ibid [132].

⁶¹ Ibid [948].

⁶² Ibid [940].

⁶³ Ibid [949].

⁶⁴ Ibid [948].

⁶⁵ Ibid [960].

⁶⁶ The ACCC had planned to use written witness statements in this case, but was directed to lead its evidence orally.

⁶⁷ Samuel, above n 39, 85.

of telephone calls between the respondents and subsequent petrol price movements, and which purported to show a correlation between the telephone calls and petrol price increases. However, Gray J found the data in Annexure B to be ‘at best equivocal and in many instances more apt to refute than to support the ACCC’s contentions’.⁶⁸ In some instances, the document suggested that prices changed independently of communications between competitors. In others, it suggested conclusions that were inconsistent with the oral evidence of witnesses.⁶⁹ Gray J accepted that ‘a good deal of information about price increases was passed between competitors in the Geelong petrol market, most of it by means of telephone conversations’.⁷⁰ However, he held that this conduct alone was insufficient to indicate the existence of an ‘arrangement or understanding’ to fix prices in contravention of the *TPA*.⁷¹

One factor in Gray J’s reasoning was the use by most of the respondents of roadside boards to display petrol prices—a practice which, in and of itself, would be expected to ensure a high degree of price uniformity.⁷² In his Honour’s opinion, the only difference between being informed of prospective petrol price changes by telephone and viewing the prices on the display boards was that the telephone notification method gave competitors a slight time advantage when deciding how they would respond, if at all.⁷³

Gray J also considered that the pattern of petrol price rises in Geelong was explicable by reference to factors unrelated to allegations of price-fixing between competitors. These included, for example: that petrol prices in the Geelong market generally followed those in the Melbourne market;⁷⁴ that price increases at the end of a discount cycle could be justified as commercially rational;⁷⁵ and, that petrol retailers in the Geelong market who were not alleged to be involved in any price-fixing arrangement priced similarly to those that were.⁷⁶

(iii) *Admissions*

A controversial aspect of the Federal Court’s judgment in the *Geelong Petrol Case* was the dismissal of the ACCC’s allegations against those respondents who had admitted entering into and giving effect to price-fixing arrangements in breach of the *TPA*. These admissions took the form of admissions made in the admitting respondents’ pleadings,

⁶⁸ *Geelong Petrol Case* [2007] FCA 794.

⁶⁹ *Ibid* [932]–[933].

⁷⁰ *Ibid* [960].

⁷¹ *Ibid*.

⁷² *Ibid* [923].

⁷³ *Ibid* [925].

⁷⁴ *Ibid* [927].

⁷⁵ *Ibid* [928].

⁷⁶ *Ibid* [931].

admissions to the ACCC in the course of interviews or examinations on oath under *TPA* s 155, and admissions made in written statements prepared and signed by those intending to give evidence on behalf of the ACCC.⁷⁷

The ACCC had argued that, before departing from an admission, a court would need to be satisfied that it was ‘plainly incorrect’, advertent to the policy concerns that not acting on admissions would raise such as extending trials unnecessarily.⁷⁸ However, Gray J held that he had discretion to decline to act on admissions where there was ‘reason to doubt their correctness’ or ‘reason to question the correctness of the facts admitted or agreed’.⁷⁹ Moreover, his Honour identified three policy reasons in support of his approach in the present case. First, where admissions are made by parties who lack the resources to conduct lengthy litigation in their own defence (and therefore have a powerful incentive to make admissions in the hope of securing leniency),⁸⁰ courts should be more willing to set aside the admissions if they consider them to be unreliable.⁸¹ Secondly, the requirement that witnesses who obtain more lenient treatment ‘cooperate’ with the ACCC may encourage those witnesses to over-emphasise the role that contesting respondents played in the alleged cartel.⁸² Thirdly, the processes of the court are at risk of being brought into disrepute if an application relating to the same set of allegations is upheld against an admitting party but dismissed against a contesting party.⁸³

(c) *No appeal*

Despite its obvious disappointment at the outcome,⁸⁴ the ACCC decided not to appeal against the Federal Court’s decision in the *Geelong Petrol Case*. The ACCC reasoned that the Full Federal Court would be unlikely to reverse the findings of fact made by the trial judge given the general reluctance of appeal courts to overturn factual findings based on

⁷⁷ Ibid [130].

⁷⁸ Ibid [48].

⁷⁹ Ibid [49], citing Heydon JA in *Damberg v Damberg* (2001) 52 NSWLR 492.

⁸⁰ Under the ACCC’s ‘Immunity Policy for Cartel Conduct’, full immunity may be granted to the *first* party reporting their involvement in a cartel during ACCC investigations. A grant of immunity is subject to stringent conditions, including that the party seeking immunity must not be the ringleader of the cartel, and must give full disclosure and cooperation to the ACCC. The ACCC also has a ‘Cooperation Policy’ that provides for reduced penalties where parties assist the ACCC with its inquiries.

⁸¹ *Geelong Petrol Case* [2007] FCA 794 [50].

⁸² Ibid [135].

⁸³ Ibid [50].

⁸⁴ See David Uren, ‘ACCC Pans Judge’s “Textbook for Price-Fixers”’, *The Australian* (Sydney), 31 May 2007.

oral testimony where the trial judge has had the benefit of assessing the demeanour of the witnesses.⁸⁵

B Implications of the Petrol Cases

The decisions of the Full Federal Court in the *Petrol Cases* demonstrate the difficulties associated with proving price-fixing under the *TPA*. The carriage of such cases — which often involve a series of events over a lengthy period and a large number of parties — can be complicated, even when the parties are willing to cooperate with the ACCC in its investigations, make admissions, and provide direct written and oral evidence. Nevertheless, a number of valuable lessons were learned from the *Petrol Cases*.

First, for there to be a finding that the parties entered into an ‘arrangement or understanding’ within the scope of s 45(2) of the *CCA*, there must be evidence of a *commitment* among the parties to a particular course of action. A mere hope or expectation by one party that another party will act in a certain way is insufficient to establish an ‘arrangement or understanding’ between them. Secondly, direct evidence adduced through the oral examination of witnesses requires *specificity* (for instance, details of what was said in particular conversations alleged to give effect to a price-fixing arrangement) in order for the applicant to make out its allegations. Thirdly, circumstantial evidence used in support of a case must be *consistent* with, and probative of, the applicant’s allegations. Fourthly, parallel behaviour by itself is *not* probative of collusive conduct.

The *Geelong Petrol Case* would also appear to have ramifications for the operation of the ACCC’s ‘Immunity Policy for Cartel Conduct’ and ‘Cooperation Policy’.⁸⁶ It will be recalled that, in this case, the evidence obtained by the ACCC from parties who received immunity and leniency was ultimately inadequate in establishing the ACCC’s allegations, even against those parties who had admitted fixing petrol prices in contravention of the *CCA*. In the light of this, a number of observations may be made.⁸⁷

First, the ACCC must become more cautious about accepting or relying on information obtained through immunity applications without first conducting a detailed investigation into the facts and circumstances underpinning the ‘admissions’. This makes the process of obtaining immunity more complex, expensive and time consuming.

⁸⁵ Australian Competition and Consumer Commission, ‘No Appeal Against Geelong Petrol Decision’ (Media Release, MR 148/07, 19 June 2007) <<https://www.accc.gov.au/media-release/no-appeal-against-geelong-petrol-decision>>.

⁸⁶ See above n 80.

⁸⁷ See also Guirguis and Evans, above n 55, 2–3; Stevenson, above n 55, 3.

Second, the ACCC's need for admissible direct evidence of cartel conduct could lead it to grant immunity to the cartel participant who offered the 'best' direct evidence rather than the one who came forward 'first'. It could also make the ACCC more prepared to revoke conditional immunity in the event that the cooperating party did not provide accurate and comprehensive information.

Third, following the *Geelong Petrol Case*, trial judges may be more willing to exercise their discretion to decline to act on an admission, thus the totality of the ACCC's evidence in a given case needs to be such that the correctness of the facts in the admission are not doubted by the court. This is likely to be a difficult onus to discharge.

Additionally, conditions attached to grants of immunity or leniency (for example, that the immunity or leniency applicant not be the ringleader of the conduct) would have to be reconsidered by the ACCC in order to combat judicial perception that such conditions provided an incentive for cooperating parties to 'give evidence maximising the role of persons other than themselves as ringleaders or originators of any relevant conduct'.⁸⁸

C Woollam

1 Background

Woollam signalled a departure from the *Petrol Cases* in the Court's interpretation of what signified an 'arrangement or understanding'. The ACCC alleged that the respondents engaged in or were a party to conduct that contravened *TPA* s 45(2)(a)(ii) and 45(2)(b)(ii), and further or alternatively *TPA* s 52, in relation to five tenders submitted to the Queensland Government for public works. The ACCC contended that the respondents had engaged in collusion prior to submitting their tenders. The alleged contraventions of the *TPA* were said to result from arrangements or understandings in relation to a practice known as 'cover pricing'.⁸⁹

It is generally understood by builders and tenderers in the Central Queensland and South East Queensland markets for building services to government that 'cover pricing' takes place as follows:

- Builder A wishes to be seen to be tendering for a project it does not want to secure;
- Builder A seeks a cover price from builder B who is known by builder A to be hoping to secure the project;

⁸⁸ *Geelong Petrol Case* [2007] FCA 794 (29 May 2007) [135].

⁸⁹ *Woollam* (2011) 196 FCR 212, 214–5.

- Both know or believe that builder B will tender for less than the cover price and that Builder A will tender for the cover price or greater, if at all;
- Builder A then tenders for no less than the cover price; and
- Builder B then tenders for less than the cover price.⁹⁰

The Court found that the term was well understood within the building industry.⁹¹ In this instance, the parties (Woollam and Kelly) admitted that their representatives had communicated about the provision of a cover price and set an amount agreed on as the cover price. The issue thus arose whether the provision of a cover price amounted to a contract, ‘arrangement or understanding’ in terms of *TPA* s 45 with respect to the relevant projects.⁹²

2 *Arguments*

The ACCC argued that the knowledge of the parties regarding the issue of cover pricing, together with their admitted communications, amounted to an ‘arrangement or understanding’ that (1) should Kelly decide to tender on the project, its tender price would be no less than the cover price, and that (2) Woollam’s tender price for that project would be less than the cover price.⁹³

The respondents, however, submitted that the ACCC had failed to prove that (1) the parties had reached an ‘arrangement or understanding’; (2) that the purpose of the provisions of the alleged ‘arrangement or understanding’ was to fix, maintain or control prices of the proposed services; (3) that the provisions of the alleged ‘arrangement or understanding’ had or were likely to have the effect of fixing, maintaining or controlling prices of the proposed services; and (4) that they were in competition with each other in relation to that project.⁹⁴

3 *Findings*

Logan J rejected the respondents’ arguments, finding that, on a balance of probabilities, the corporate respondents had come to an ‘arrangement or understanding’.⁹⁵ He noted the requirement that an ‘arrangement or understanding’ ‘must be consensual and carry with it an element of obligation rather than a mere expectation’.⁹⁶ He further

⁹⁰ Ibid 222 [29].

⁹¹ Ibid 223 [38].

⁹² Ibid 224–5 [40].

⁹³ Ibid 225 [41].

⁹⁴ Ibid 225 [43].

⁹⁵ Ibid 226 [49].

⁹⁶ *Trade Practices Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375.

referred to the joint judgment of French CJ and Kiefel J in *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd*,⁹⁷ where it was stated:

An arrangement or understanding ordinarily involves an element of reciprocal commitment even though it may not be legally enforceable. It involves more than a mere hope or expectation that each party will act in accordance with its terms.⁹⁸

The Court's approach in this case echoed that of the Full Federal Court in the *Ballarat Petrol Case*, but the findings differed as the Court found in this instance that, although the arrangements in this case had been informal and by way of telephone conversations between subordinate staff members, the request for and giving of a cover price 'engendered more than just mere expectations'⁹⁹ and amounted to an 'arrangement or understanding'.

Logan J also found that there had been the requisite meeting of minds for there to be an 'arrangement or understanding' between Woollam and Kelly in relation to the projects.¹⁰⁰ In coming to this conclusion, he referred to the prior decision in *Trade Practices Commission v Email Ltd*, where Lockhart J stated:

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. In some cases this may be inferred from circumstantial evidence. There must be a consensus as to what is to be done and not a mere hope as to what might be done or happen. Independently held beliefs are not enough.¹⁰¹

The Court found it unnecessary to consider whether there were mutual obligations, but not before citing the decision in *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd*, in which Sackville J commented:

There is no necessity for an element of mutual commitment between the parties to an arrangement or understanding, although in practice such an arrangement or understanding would ordinarily involve reciprocity of obligation.¹⁰²

His Honour concluded that the two provisions (the requesting and giving of the cover price) conveyed a mutual commitment between the

⁹⁷ (2009) 239 CLR 305.

⁹⁸ *Ibid* 322.

⁹⁹ (2011) 196 FCR 212, 227 [53].

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* 226 [50], quoting Lockhart J in *Trade Practices Commission v Email Ltd* (1980) 43 FLR 383, 385.

¹⁰² *Woollam* (2011) 196 FCR 212, 227 [55], quoting Sackville J in *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344, 359–60 [75].

parties.¹⁰³ Consequently, it was held that the parties were in breach of *TPA* ss 45(2)(b)(i), (ii).¹⁰⁴

4 *A Departure From the Petrol Cases*

In *Woollam*, the Court took a different view of admissions by respondents from that taken by Gray J in the *Geelong Petrol Case*. As previously discussed, the Court in that instance declined to act on the admissions made by some of the respondents in their pleadings by relying, inter alia, on policy reasons and questioning the correctness of the admissions or ‘correctness of the facts admitted or agreed’.¹⁰⁵ Conversely, in *Woollam*, the Court regarded the admissions by the parties of entering into a ‘cover pricing’ agreement as direct evidence of an ‘arrangement or understanding’ constituting a breach of s 45(2), notwithstanding evidence demonstrating that these types of arrangements were common in the building industry. While it is acknowledged that the case dealt with a different subject matter (the building industry), which may have impacted on the Court’s treatment of admissions in the context of the relationships between the parties, the Court nevertheless took a broader approach to the interpretation of the ‘arrangement or understanding’ requirement, as explained below.

In relation to the issue of ‘commitment’, the Full Federal Court in the *Ballarat Petrol Case* set a high evidentiary standard for proving that a respondent’s actions amounted to a commitment to an ‘arrangement or understanding’. Although the appellants had engaged in a course of action consistent with a commitment to increase petrol prices on 29 of the 69 occasions, this was not regarded as sufficient to constitute an ‘arrangement or understanding’. However, in *Woollam* the Court rejected the respondents’ arguments that they had no more than an expectation as to how the other party would behave, despite evidence that the cover pricing arrangement was done at the request of one party for that party’s benefit and with no apparent sanctions should the other party fail to comply after agreeing to the request. Instead it found the arrangement between the parties to contain the requisite element of ‘obligation’ identified in previous cases as an essential element of an ‘arrangement or understanding’¹⁰⁶ ‘even though it may not be legally enforceable’.¹⁰⁷

The Court’s apparent willingness to place reliance on admissions by the parties, and additionally allow a wider interpretation of the ‘arrangement or understanding’ requirement based on the acceptance by

¹⁰³ *Woollam* (2011) 196 FCR 212, 227–8 [55].

¹⁰⁴ *Ibid* 238 [91].

¹⁰⁵ (2007) 160 FCR 321, 338 [48].

¹⁰⁶ *Trade Practices Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375.

¹⁰⁷ *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305, 322 [48].

the parties that an ‘obligation’ existed between them, augurs well for future actions to be brought by the ACCC.

IV International Competition Law

A *The European Standard of ‘Concerted Practices’*

The concept of ‘concerted practice’ has been firmly entrenched in European competition law since 1993.¹⁰⁸ In Australia, as noted above, the Harper Review panel recently recommended that CCA s 45 be extended to cover ‘concerted practices’ that have the purpose, or would be likely to have the effect, of substantially lessening competition.¹⁰⁹ This would include the regular disclosure or exchange of price information between firms, whether or not it is possible to show that the firms reached an understanding about the disclosure or exchange.¹¹⁰ The issue of ‘concerted practices’ is therefore a significant consideration in predicting future developments in this area of the law. It has previously been suggested that the concept of ‘understanding’ is not substantively different from the concept of ‘concerted practice’, and that the key difference is procedural.¹¹¹

In European law, practices that may affect trade between Member States of the European Union (‘EU’) and which have as their object or effect the ‘prevention, restriction or distortion of competition within the internal market’, are dealt with in *The Treaty on the Functioning of the European Union* (‘*The Treaty*’).¹¹² Article 101(1) of this Treaty prohibits ‘agreements’ and ‘concerted practices’ which may affect trade in this manner. An ‘agreement’ in this context has been held to require a ‘concurrence of wills’ between at least two parties.¹¹³ However, a ‘concerted practice’ does not require the same commitment and need only reflect a coordinated course of action by participants.¹¹⁴ A ‘concerted practice’ is merely a facilitating device, the economic effect of which is to

¹⁰⁸ *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) art 101(1).

¹⁰⁹ Harper et al, above n 11, 60. ‘Recommendation 29 — Price signalling: The ‘price signalling’ provisions of Division 1A of the CCA are not fit for purpose in their current form and should be repealed. Part 45 should be extended to cover concerted practices which have the purpose, or would have or be likely to have the effect, of substantially lessening competition’.

¹¹⁰ *Ibid.*

¹¹¹ Sarah Brooks, ‘Regulation of Anticompetitive “Understandings” and Price Signalling in Australia: A European Perspective’ (2011) 39 *Australian Business Law Review* 309, 330.

¹¹² *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) art 101(1).

¹¹³ Brooks, above n 111, 313; *Bayer v Commission of the European Communities* (T-41/96) [2000] ECR II-3383, II-3409 [69].

¹¹⁴ Caron Beaton-Wells and Brent Fisse, ‘Broadening the Definition of Collusion? A Call For Caution’ (2008) 38(1) *Federal Law Review* 71, 80.

enable competitors 'to determine a coordinated course of action ... and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action'.¹¹⁵ Under European law, a 'concerted practice' requires: (1) a direct or indirect contact between the parties;¹¹⁶ (2) the substitution of competition by cooperation;¹¹⁷ and (3) a causal link between the consensus and the 'concerted practice'.¹¹⁸

The contact between the parties may include meetings, discussions and participation at conferences,¹¹⁹ and a single meeting may be enough to meet the requirement.¹²⁰ Statements of intention made to a competitor clearly indicating the commercial conduct that will follow may be regarded as a 'concerted practice'.¹²¹ In *Cimenteries CBR v Commission of the European Communities* ('*Cimenteries*'), the Court of First Instance of the European Communities held it to be 'at least sufficient that, by its statement of intention, the competitor should have eliminated, or, at the very least substantially reduced uncertainty as to the conduct to expect of the other on the market'.¹²²

There must also be a relationship between cause and effect.¹²³ That is to say, the concerted conduct must result in altered conduct by the parties.¹²⁴ Significantly, in applying the 'concerted practice' provision, once the first two elements are proven a rebuttable presumption arises that concertation was followed in the market.¹²⁵ Thus, the presumption that the concertation was put into practice follows from the first two elements and the defendant has the onus of proving the contrary.¹²⁶

Brooks has expressed the view that, if the EU rebuttable presumption had been adopted in Australia, the outcomes in the *Petrol Cases* may have been different. In the *Ballarat Petrol Case*,¹²⁷ Anderson and Apco may

¹¹⁵ *Ibid*; *Imperial Chemical Industries Ltd v Commission of the European Communities* (C-48/69) [1972] ECR 619, 660–1 [118].

¹¹⁶ *Cimenteries CBR v Commission of the European Communities* (T-25/95) [2000] ECR II-491.

¹¹⁷ *Tate and Lyle Plc v Commission of the European Communities* (T-202/98) [2001] ECR II-2035.

¹¹⁸ P M Roth (ed), *Bellamy & Child: European Community Law of Competition* (Sweet & Maxwell, 5th ed, 2001) [2.043]; Brooks, above n 111, 313.

¹¹⁹ Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013) 86; *Cimenteries CBR v Commission of the European Communities* (T-25/95) [2000] ECR II-491.

¹²⁰ *T-Mobile Netherlands and Others* (C-8/08) [2009] ECR I-4529 [61].

¹²¹ *Cimenteries CBR v Commission of the European Communities* (T-25/95) [2000] ECR [2000] II-491, II-958-9.

¹²² *Ibid*.

¹²³ Beaton-Wells and Fisse, above n 114, 82.

¹²⁴ *Ibid*.

¹²⁵ *Huls AG v Commission of the European Communities* (C-199/92P) [1999] ECR I-4287 [160].

¹²⁶ Brooks, above n 111, 315–16.

¹²⁷ *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301.

have found it difficult to rebut the presumption, as under the European test Anderson's equivocal statements and the fact that he viewed himself as an independent would most likely not have amounted to 'public distancing'. In the *Geelong Petrol Case*,¹²⁸ it is likely that repeated communications of petrol retailers would have amounted to the presumption of a 'concerted practice' and it would have been difficult for the defendant to rebut this presumption.¹²⁹

The difference in the onus of proof between the current Australian provisions and the EU 'concerted practice' provision is therefore a significant issue when considering the Harper Review recommendation that s 45 be extended to include a 'concerted practice' provision. If the proposed provision follows the EU form, it may have a drastic effect on the ability of the ACCC to prove breaches of these provisions. Significantly, European law does not contain a per se prohibition on price-signalling,¹³⁰ which would further align the Australian competition law landscape with European law.

B *The Canadian Approach*

In Canada, offences related to competition are regulated by the *Competition Act*, RSC 1985, c C-34 s 45 ('*The Canadian Act*'). Part 45(1) provides that:

Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

The penalty for a breach of the part is imprisonment for a term not exceeding 14 years or a fine not exceeding \$25 million, or both, with limited defences pursuant to ss 45(5) and (6). Unlike Australian law, the sanction is a purely criminal one and the evidence required in a prosecution by the Canadian Government is specified in s 45(3) as follows:

¹²⁸ Transcript of Proceedings, *Australian Competition and Consumer Commission v Apco Service Stations Pty Ltd* [2006] HCATrans 272 (2 June 2006).

¹²⁹ Brooks, above n 111, 320.

¹³⁰ In Australia, *CCA* s 44ZZW (the per se prohibition) specifically prohibits the private disclosure of pricing information to one or more actual or potential competitors where the disclosure does not occur 'in the ordinary course of business'. See also Brooks, above n 111, 330.

In a prosecution under subpart (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

While the Canadian provisions are similar to the price-fixing prohibitions of the *CCA*, the Australian provisions in *CCA* ss 44ZZW, 44ZZX have amplified the ACCC's enforcement capabilities significantly by prohibiting unilateral disclosures, as discussed above. For present purposes, it is instructive to observe the approach of the Canadian courts as demonstrated by that of the Superior Court of Quebec in *R v Darby* ('*Darby*'),¹³¹ which dealt with price-fixing in the petrol industry.

1 Darby

Darby was the director, president and majority shareholder of Service Autogarde DD Inc, a company that operated two service stations under the Shell banner in Sherbrooke. It was common cause that he was responsible for setting the price of gas sold at these service stations. In 2011, Darby pleaded guilty to an indictment stating that he had conspired with several people in order to unduly prevent or lessen competition in the retail sale of regular gasoline in the Sherbrooke market by price-fixing, thereby committing the criminal offence provided in the *Canadian Act* s 45(1)(c). Of the 66 service stations in Sherbrooke, 54 took part in the offence as conspirators.¹³²

The investigation showed that one of the instigators of the price increases in the Sherbrooke and Magog markets was Bourassa, a representative for Global Fuels Inc, who set the price of gas sold at Olco service stations. In general, Bourassa would contact Bonin, Aubut or Bonami, representatives at the Centre de prix de Couche-Tard Inc, in order to determine the time of the price increase and the new price after the increase. Once he had received assent, Bourassa continued his calls to service stations controlled by Global Fuels Inc in Sherbrooke and Magog as well as to some of his competitors and collaborators who in turn passed on the information.¹³³

This decision comprises the sentencing stage in Darby's guilty plea, in consequence of which he sought an absolute discharge and offered to donate an amount of at least \$10 000 to charity.¹³⁴ However, the Court found that the penalties for similar offences committed during virtually identical time periods and involving either businesses or individuals ranged from 12-month terms of imprisonment to be served in the

¹³¹ [2012] CarswellQue 9301.

¹³² *Ibid* [5] (1)–(4).

¹³³ *Ibid* [5] (18)–(20).

¹³⁴ *Ibid* [3].

community together with fines or donations from \$10 000 to \$50 000 for individuals.¹³⁵ Taking into account all the circumstances of the case, including the fact that Darby had derived a personal benefit from higher fuel prices set with his co-conspirators,¹³⁶ Darby was convicted and fined \$10 000 — the maximum penalty recommended by the prosecution.

Darby did not deal with substantive issues as the offender had entered a guilty plea. On its facts, the case shared many similarities with the *Petrol Cases* as it dealt with the issue of one dealer conspiring with others in order to prevent or lessen competition in the retail sale of gasoline by price-fixing. However, it is worth noting that Australian transgressors are also subject to civil penalties, which require the lesser burden of proof of ‘on the balance of probabilities’, thereby increasing the risk of penalty for potential offenders in the petrol industry.

V Analysis and Conclusion

In the past there was a fine line between what did and did not constitute a price-fixing ‘contract, arrangement or understanding’. Despite the Court’s approach in the *Geelong Petrol Case*, the question still remains as to why the respondent petrol retailers would continue to advantage their competitors by providing them with prospective pricing information. An economist might suggest, for instance, that the sharing of this information reassures competitors that they will not be on their own if they raise their prices, that such behaviour over a lengthy period amounts to a course of conduct suggestive of an ‘arrangement or understanding’, or both.¹³⁷

Woollam may have foreshadowed a departure from the previously stringent interpretation of these requirements by allowing a wider interpretation of the ‘arrangement or understanding’ requirement. The later price-signalling provisions took a leap forward by including private price-disclosures to competitors made outside the ordinary course of business and disclosures made for the purpose of substantially lessening competition in the market.¹³⁸ These prohibitions are still currently restricted to the banking sector and no measures have been taken to extend the provisions to other sectors. However, if the Harper Review recommendations are implemented it will obviate the need for the later

¹³⁵ See *R v Drouin* [2009] CarswellQue 8683 (Superior Court of Québec), where the accused, who was responsible for fixing gas prices at three service stations in the Victoriaville area, was granted an absolute discharge. He had no criminal record, pleaded guilty and had similar duties within the conspiracy as in *Darby*. He did not, however, derive any personal benefit from the offence. See also *R v Lapointe-Cabana* [2011] CarswellQue 6349 (Superior Court of Québec), where Moulin J ordered the accused to pay a fine of \$10,000. In that case the accused had no criminal record, pleaded guilty, had similar duties within the conspiracy as in *Darby*, and also did not derive any personal benefit from the offence.

¹³⁶ *Darby* [2012] CarswellQue 9301 (Superior Court of Québec) [66].

¹³⁷ See also Guirguis and Evans, above n 55, 6.

¹³⁸ CCA ss 44ZZW, 44ZZX.

price-signalling provisions, as the extension of s 45 to include a ‘concerted practice’ provision will significantly improve the ability of the ACCC to prove breaches of these provisions.

There are clearly similarities between the ‘concerted practice’ requirement under European law and the ‘understanding’ requirement under the Australian legislation, as both are characterised by three constituent elements that are broadly similar in nature. A ‘concerted practice’ requires direct or indirect contact between the parties, the substitution of competition by cooperation, and a causal link between the consensus and the ‘concerted practice.’¹³⁹ Similarly, in order to prove an ‘understanding’ under Australian law, it is necessary to show communication between the parties, a meeting of the minds or consensus about the conduct to be engaged in, and a commitment by at least one party to engage in the conduct.¹⁴⁰ One factor that distinguishes these requirements is that, in order to meet the elements of ‘concerted practice’, no ‘commitment’ to engage in the practice is required.¹⁴¹ However, some form of *reciprocity* is necessary.¹⁴² This includes a situation whereby one party discloses information and ‘another passively receives or accepts it’.¹⁴³ As suggested by Brooks, when one compares the requirements of the European and Australian provisions, the concept of ‘understanding’ does not appear to be substantively different from the concept of ‘concerted practice’. The key difference appears to be procedural.¹⁴⁴ Given these similarities, the Harper Review recommendations for changes to the Act are pertinent and timely.

Furthermore, as noted above, the difference in the onus of proof between the current Australian provisions and the EU ‘concerted practice’ provision would be addressed by the Harper Review’s extension of s 45 to include a ‘concerted practice’ provision. From a practical perspective, this may improve the ability of the ACCC to prove breaches of these provisions. Significantly, European law does not contain a *per se* prohibition on price-signalling (seen as a sub-category of price-fixing),¹⁴⁵ which will further align the Australian competition law landscape with European law.

¹³⁹ Above n 127–9.

¹⁴⁰ *Geelong Petrol Case* (2007) 160 FCR 321, 331–3 [26]–[30].

¹⁴¹ Beaton-Wells and Fisse, above n 114.

¹⁴² In *Cimenteries* (T-25/95) [2000] ECR [2000] II-491, it was held that it may be inferred that the contacts between the parties were motivated by the element of reciprocity essential to find a concerted practice.

¹⁴³ Beaton-Wells and Fisse, above n 114, 82.

¹⁴⁴ Brooks, above n 111, 330.

¹⁴⁵ In Australia, *CCA* s 44ZZW (the *per se* prohibition) specifically prohibits the private disclosure of pricing information to one or more actual or potential competitors where the disclosure does not occur ‘in the ordinary course of business’. See also Brooks, above n 111, 330.

The Harper Review panel recognised that the current prohibitions against price-signalling in the *CCA* do not accurately address the distinction between anti-competitive and pro-competitive conduct, and that they are also deficient in their limited application to the banking industry.¹⁴⁶ The Harper Review also cautioned that a per se prohibition has the potential to overreach, and has proposed that anti-competitive price-signalling be included in s 45.¹⁴⁷

In his covering letter to the Final Report, Ian Harper proposes that the implementation of the proposed changes to s 45 (in conjunction with other recommendations of the Review Panel) will 'reinvigorate competition' and 'help to raise Australia's productivity levels and living standards'.¹⁴⁸ It will also markedly improve the ability of the ACCC to prove instances of price-fixing in the petrol industry and more broadly. Rod Sims, Chair of the ACCC, had previously expressed regret at the sector-specific focus of the later provisions, stating that 'competition laws should apply economy-wide and not be sector-specific'.¹⁴⁹ In the implementation of the Harper Review recommendations, the price-signalling provisions should be replaced by an extended s 45 (which currently governs contracts, arrangements and understandings that affect competition) that includes 'concerted practices', which 'have the purpose, effect or likely effect of substantially lessening competition'.¹⁵⁰ This extension of s 45 will provide the necessary inclusion for instances of price-signalling and simultaneously ease the burden on the ACCC in proving breaches of the *CCA*.

The ACCC has consistently vowed to remain 'extremely vigilant' in dealing with collusion and potential price-fixing cartels,¹⁵¹ and prosecuting conduct which lessens competition with vigour.¹⁵² The implementation of the Harper Review price-fixing recommendations in respect of s 45 will support these objectives, and assist the ACCC in its quest to eliminate price-fixing in the petrol industry, along with the banking industry and other sectors in general.

¹⁴⁶ Harper et al, above n 11, 59.

¹⁴⁷ Ibid 60. In its recommendations the Harper Review panel states unequivocally: 'The "price signalling" provisions of Part IV, Division 1A of the *CCA* are not fit for purpose in their current form and should be repealed'.

¹⁴⁸ Ibid 8.

¹⁴⁹ Sims, above n 5.

¹⁵⁰ Harr et al, above n 11, 60.

¹⁵¹ 'ACCC Loss in Petrol Price-Fixing Case', *CCH News Headlines*, 29 May 2007, quoting Graeme Samuel.

¹⁵² Sims, above n 5.