

Policing Price Fixing in Petroleum Markets

Section 45 of the *Trade Practices Act* 1974 (Cth), together with s45A, is an important provision to stamp out collusive pricing behaviour in Australian markets. Of course, price fixing behaviour is economically inefficient and detrimental to consumer welfare;¹ it has been described as the ‘very antithesis of competition’;² and for that reason is absolutely prohibited by the Act:

It is the aim of restrictive trade practices and anti-trust legislation to nurture and encourage the process of competitive rivalry among firms. When firms attempt to evade that rivalry by means of price agreements or through patterns of price leadership in lieu of an overt agreement, then the competitive process is frustrated and government action called for.³

Such is the seriousness with which it is viewed in the United States, it is prohibited per se without consideration of its reasonableness.⁴

The recent case of *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd*⁵ highlights the difficulties for the regulator in establishing price fixing in petroleum markets, and raises broader issues regarding the interpretation to be given to key aspects of Australia’s competition laws. The case involved an allegation by the Australian Competition and Consumer Commission (ACCC) of illegal price fixing in the Geelong petrol market involving a number of competitors over a lengthy period. Some of the parties allegedly involved in price collaboration made admissions of behaviour that some would consider to be anti-competitive. However, unfortunately for the ACCC, there was no alleged arrangement or understanding involving more than one party that was admitted by all of the alleged parties to it; hence the need for this case to be brought. Price fixing has often been suspected in the oil industry; the ACCC previous to this case had some success in proving price fixing in another Victorian petrol market,⁶ and in some other petrol cases.⁷ Prosecutions have been successful in other countries. However, the ACCC has also failed in other petrol price fixing cases,⁸ and this case represented another failure. Some argue that particular industries have particular dynamics such that prices tend to stabilise at uniform levels, or the prices of some acknowledged price leader almost invariably followed. Petrol is said to be one such market.⁹ Of course, there can be a fine line between

¹ David Round, John Seigfried and Anna Baillie ‘Collusive Markets in Australia: an Assessment of Their Economic Characteristics and Judicial Penalties’ (1996) 24 *Australian Business Law Review* 292; refer also to David Round and Leanne Hanna ‘Curbing Corporate Collusion in Australia: The Role of Section 45A of the *Trade Practices Act* (2005) 29 *Melbourne University Law Review* 242; Sappideen ‘Car Washes, Cartels and the Commerce Act’ (2000) 28 *Australian Business Law Review* 386; David Round ‘Some Thoughts on Price Fixing, Potential Competition and Constraints on Monopoly Power’ (1984) 12 *Australian Business Law Review* 86; Richard Miller and David Round ‘Price Fixing, Price Leadership or Ordinary Commercial Considerations: Guilt Under s45 of the *Trade Practices Act*’ (1982) 10 *Australian Business Law Review* 251; James Jackson ‘Price Fixing Agreements Under s45A(1) of the *Trade Practices Act*’ (1983) 11 *Australian Business Law Review* 310; Stephen Corones ‘Penalties for Price Fixing: A Built in Feature of How we do Business in Australia?’ (1996) 24 *Australian Business Law Review* 160

² David Round ‘Some Thoughts on Price Fixing, Potential Competition and Constraints on Monopoly Power’ (1984) 12 *Australian Business Law Review* 86

³ Richard Miller and David Round ‘Price Fixing, Price Leadership or ‘Ordinary Commercial Considerations’: Guilt Under s45 of the Trade Practices Act’ (1982) 10 *Australian Business Law Review* 251

⁴ *Catalano Inc v Target Sales* (1980) 446 US 643; *Texaco Inc v Dagher* (2006) 547 US

⁵ [2007] FCA 794

⁶ *ACCC v Leahy Petroleum* [2004] FCA 1678 (a partial appeal was successful)

⁷ *ACCC v Ampol Petroleum* (1996) ATPR 41-469; *ACCC v Gullyside Pty Ltd* (2006) ATPR 42-097

⁸ *TPC v Leslievale* (1986) ATPR 40-679; *TPC v J J and Y K Russell Pty Ltd* (1991) ATPR 41-132; *TPC v Service Station Association Pty Ltd* (1992) ATPR 41-179; and *ACCC v Mobil Oil Aust* (1997) ATPR 41-568

⁹ Warren Pengilley ‘What is Required to Prove a ‘Contract, Arrangement or Understanding’?’ (2006) 13 *Competition and Consumer Law Journal* 242, 242. Pengilley identifies these characteristics as including concentrated supply, high barriers to entry, inelastic product demand, a uniform product, multiple and smaller buyers, small variations in production costs, and readily available price information. Refer also to Richard Miller and David Round ‘Price Fixing, Price Leadership or ‘Ordinary Commercial Considerations’: Guilt Under s45 of the *Trade Practices Act* (1982) 10 *Australian Business Law Review* 251, 260

individuals making their own decisions about prices, and an understanding about prices, as the recent case demonstrates.

Background Facts and Evidence

The background to the case will now be summarised. This was a complex case involving 18 respondents and the judgment runs to more than 200 pages, so only the aspects of the facts considered most important will be discussed. However, as these cases do very much turn on the facts, it is necessary to go into the facts in some detail. It was eventually agreed by the parties that for the purposes of the exercise, the relevant 'market' was for petroleum products in the Geelong metropolitan area. The players in the market involved the four multinational companies BP, Shell, Mobil and Caltex ('majors'). A number of independent operators also sold fuel in the market; some of these were independently branded; others were branded under the banner of the multinational that supplied them.

Leahy, one of the respondents to the case, sold fuel through sites it operated and others. All of the fuels were sold and sites branded as BP sites. Leahy also sold fuels under BP brand through outlets in Ballarat. The ACCC had recently successfully prosecuted companies, including Leahy, for price fixing in the Ballarat market.¹⁰ Apco sold fuels under its own brand at a number of outlets. It too had been successfully prosecuted for price fixing in Ballarat, although it had later successfully appealed against its guilt.¹¹ Shell sites in Geelong were operated by Brumar and United Fuels, which became United Retail. Other players in the market included Mobil, whose outlets were owned by three separate entities, and Caltex who retailed through Chisholm. One director and one manager from Chisholm was not a party to these proceedings because they co-operated fully with the ACCC and gave evidence on the Commission's behalf in this case. Seven-Eleven also operated two outlets in Geelong. As with other petroleum markets, the Geelong market exhibited signs of a 'sawtooth pattern' of pricing, with sudden price hikes followed by gradual price decreases. The major oil companies operated 'price support schemes', whereby they would provide their outlets with the ability to aggressively compete on price by indirectly subsidising their sales, at least to some extent. The withdrawal of price support by a major could lead to sharp increases in the pump price of fuel. Fuel was often sold at low profit margins and customers were very price sensitive. Prices were rarely static for long.

A number of witnesses gave evidence that from time to time, a retailer in the market would, it was said, decide to increase prices in the market by raising its own prices. Of course, the higher the price, the higher the likely profit margin that the seller would make. Sometimes, the others would not follow suit; in the parlance of the market, the rise would not 'stick'. If that occurred, the retailer that had increased their prices would be forced to lower them again in order not to go out of business. Most witnesses agreed that in order for price rises to 'stick', most if not all retailers in the Geelong market would need to increase their prices. The witnesses testified it was not necessary that the prices would rise at exactly the same time, or to exactly the same price.¹² However, problems could arise where even one significant market participant failed to increase its prices during this period. This might cause the price rise not to stick, and other nearby outlets would then start discounting prices in order to retain market share. As the judge found

There was a perceived need to ensure that all of the significant market participants were aware of an increase, to monitor the board prices of competitors to see if they had also increased, and to endeavour to persuade them to increase if they had not done so, in order for a price rise to stick¹³

The ACCC in this case alleged a number of interlocking arrangements or understandings, all but one involving two parties, the other involving three parties, as follows:

- (a) between Leahy and Apco to communicate proposed price increases, and endeavour to increase them at about the same time; to advise others of the amount and timing of proposed increases,

¹⁰ *ACCC v Leahy Petroleum* [2004] FCA 1678

¹¹ *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 161

¹² Para 105

¹³ Para 105

- knowing that others were likely to accede to their requests; and to follow up any failures to comply;
- (b) between Leahy and Chisholm, that Leahy would tell Chisholm about the amount and timing of proposed increases in price, knowing or intending that Leahy would advise other participants of the amount and timing of such increases, and other market participants would in the ordinary course be likely, on being so advised, to increase their prices at or about the same time; that Chisholm would tell Seven-Eleven about the amount and timing of the proposed increases, and Leahy and Chisholm would increase prices at the agreed times on their sites;
 - (c) between Leahy and United Fuels to similar effect as (b), substituting United for Chisholm, and Brumar for Seven-Eleven;
 - (d) between Leahy and Primmer, manager of a BP site, with similar effect to (b), substituting Primmer for Chisholm and United Convenience for Seven-Eleven;
 - (e) between Apco, Liberty and Mr A (manager of a BP site) that Apco would advise Liberty and/or Mr A (who would then advise each other) of the amount and timing of proposed increases in price at Apco sites, knowing or intending that Apco or others would advise some or all of the other market participants of the amount and timing of the proposed increases, and other market participants would likely increase their prices at around the relevant time; and that each of them would at or about the advised time increase prices at their sites to the amount agreed

The Evidence

The ACCC sought to infer the existence of an illegal arrangement through the timing of phone conversations involving players in the market and price increases. However, its information was incomplete. It did not have evidence of precise times at which prices increased at some outlets. After some phone calls between players in the market, prices did not change. There may have been legitimate reasons for one retailer in the market to contact others, though admittedly there were a large number of calls.¹⁴ Direct evidence from participants in the market was weak because it did not refer to events on specific dates; it more generally described evolutions of arrangements over time.¹⁵ There was no immediacy between calls between participants in the market and price rises.¹⁶

Ian Carmichael gave evidence that he would obtain information about Melbourne prices from Leahy's transport drivers, and sometimes from competitors in the Geelong petrol market with contacts in Melbourne. If he became aware of a price rise in Melbourne, he admitted he would 'try to get the price up' in Geelong. He would advise Leahy sites to increase their prices, and at what time. Carmichael testified that 'that was also the agreed time with some of our other competitors when we were going to move' (on price).¹⁷ It became more difficult to influence prices when Safeway, Liberty and United entered the market. Carmichael would speak with Heikkila (from United) about 'any moves they knew of, and would nominate a time for such moves'.¹⁸ At least once a fortnight, he would contact a BP outlet and tell them the price to which Leahy was intending to move.¹⁹ Carmichael admitted that he regularly contacted Geelong representatives from Caltex, United, Mobil and Apco to find out what was happening in Melbourne.

During 1998 and 1999, Carmichael spoke with United, agreeing to tell each other about any price moves they knew of, and would nominate a time for such moves.²⁰ Carmichael testified that a typical call pattern involved a call from Peter Anderson, General Manager of Apco. Anderson would tell him the Melbourne market had moved, and nominate a price for fuel. One or both of them would nominate a time. Sometimes, Anderson would suggest that Carmichael ring his contacts. The nominated time would usually be an hour later, to allow Carmichael time to contact the others.²¹ Apco's prices did not

¹⁴ Para 145

¹⁵ Para 131

¹⁶ Paras 322-869 consider this issue over the 1999-2000 period

¹⁷ Para 179

¹⁸ Para 181

¹⁹ Para 181

²⁰ Para 181

²¹ Para 182

always rise at the times mentioned or to the price mentioned. However, it was found that during 1999 and 2000, about 70% of telephone calls between Anderson and Carmichael resulted in price rises in the Geelong market.

Carmichael would contact Chisholm and tell them the price and time of an increase. Chisholm's response would tend to be that they would pass it on. Sometimes, Chisholm would contact Carmichael, and tell him that Melbourne had moved, and that Chisholm would also be moving. Carmichael did not regularly call Heikkila from United but, when he did, the conversation would be about price and time.²² He would contact Williamson and tell him of any price increases of which he was aware. Williamson agreed to pass the information on. Carmichael also contacted Primmer and told him of price movements that had occurred, or movements which would occur. Carmichael would nominate a time and a price.²³ Conversations would also take place about occasions where an outlet had not increased prices, with follow up calls to that particular outlet.

Carmichael testified that when the ACCC commenced investigations into the Ballarat market, he became concerned that his phone calls may be being bugged. He admitted to talking in code, talking to others about an aeroplane of a particular model (eg 939, representing 93.9 cents per litre) about to land at Avalon Airport at a particular time. Carmichael claimed in evidence that there was no agreement among competitors about prices; none had an obligation to move prices, it was more of a hope that this would in fact occur.²⁴ Another employee of Leahy, Warner, verified Carmichael's evidence, agreeing that he would sometimes have to act in Carmichael's position in calling competitors. Warner agreed that on most occasions when Anderson called Carmichael about prices, prices in the market would go to that level. Warner himself got calls from Anderson where Anderson said that 'we are moving to a price of X at such and such a time'.²⁵ After these calls, Apco's prices would increase to the stated level, as would those of Liberty and some BP outlets. However, Warner said there was no commitment to effect a price rise. Warner claimed that his understanding of the calls was that he was merely passing on information as to what the market was going to do. He was not dictating prices.²⁶

Chisholm representatives testified that he regularly had calls with competitors, discussing either price or supply. Many calls were with Carmichael, who would give him a time and a price. Chisholm claimed there was always a call prior to a price going up and there were follow up calls to say they had gone up, and to enquire as to what Chisholm was doing. Again, Chisholm claimed he never felt obligated to move prices when he received calls. He never undertook to do anything. He had never been criticised or threatened by anyone for not increasing prices.²⁷ Generally, after the calls were made, prices moved to the suggested price within a couple of hours.²⁸

Shuvaly from Liberty also claimed he regularly got calls from Peter Anderson talking about prices and what the market was doing. Anderson would ask him whether United would be part of it if prices in the market moved up. Purtell as representative of Brumar testified he regularly got calls from Heikkila which he described as 'to arrange for the pricing in the Geelong area to go up'.²⁹ Heikkila told him what he was going to do, and asked if Purtell could follow. He would usually mention a price and a time. Phil Carmichael operated a Mobil outlet. On one occasion when he discussed his proposed price with his brother Ian, Ian told him he would be 'a shag on a rock because no-one else is moving in Geelong at that time'.³⁰ He would receive calls from his brother or Warner that prices were going to move at a particular time and to a particular level.

²² Para 187

²³ Para 188

²⁴ Para 199

²⁵ Para 207

²⁶ Para 217

²⁷ Para 229

²⁸ Para 252

²⁹ Para 267

³⁰ Para 273

Ian Carmichael, Warner and Leahy admitted that an understanding existed between Anderson on behalf of Apco and themselves that between them they would advise some or all of the market participants of the amount and timing of proposed increases in prices knowing and intending that other market participants would likely increase prices, that they would advise each other of the amount and timing of proposed increases, knowing and intending that the other would likely do the same, and that they would use 'best endeavours' to make sure that other market participants increased their prices. Heikkila, former General Manager of United Fuels, admitted having made an agreement on behalf of United on similar terms; with the concession that he arranged for United's prices to increase after Leahy's had increased. For their part, United denied the allegations. Shuvaly and his employer Liberty also admitted the allegation made against them, noted in (e) above.

Decision

Gray J found there was much communication involving participants in the Geelong petrol market. This did not necessarily mean there was a contravention of s45 of the *Trade Practices Act 1974* (Cth), through s45A. Section 45A relevantly provides that a provision of a contract, arrangement or understanding (or a proposed one) is effectively illegal³¹ if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining or the price for goods or services. The mere sharing of information did not necessarily mean there was such an agreement etc in place. Gray J was prepared to acknowledge that here the parties had discussed changes they had made or intended to make to price, and that this

Private communication of intended price increases, without communication of the intention to potential purchasers, lends itself readily to price fixing (However) it does not constitute price fixing in contravention of s45 without more. Advance notice of the proposed implementation of a decision already made to increase prices would provide a competitor with the advantage of more time, but cannot itself be indicative of the existence of the arrangement or understanding containing a provision to fix prices³²

Price fluctuations were a feature of all petrol markets, and their existence here did not provide evidence of the required understanding. Though in some cases there was broad connection between conversations and price rises,³³ there were times when prices in Geelong increased although there was no evidence of any agreement etc in relation to it.³⁴ The number of calls did not drop after one of the main players, Carmichael, became concerned he was being watched by the ACCC.³⁵ There was no evidence of any obligation or commitment among any of the retailers involved in the case in relation to price fixing.³⁶

Each party to each alleged arrangement or understanding was free to do as it wished on every occasion when information about a prospective price increase was passed to it ... an arrangement or understanding in which each party is free to do as it wishes is a creature unknown to s45(2) of the *Trade Practices Act*.³⁷

The admissions made were general and did not specifically include the required element of commitment or obligation. The communications between retailers reflected mere passage of information in the hope that a general price rise could be achieved.³⁸

The fact that sometimes follow up calls were made was said to be inconsistent with the existence of the alleged arrangements or understandings.³⁹ Not all players in the market were involved in the phone call cycle and on some occasions phone calls did not lead to price increases.⁴⁰ There was a lack of evidence

³¹ Technically, s45(2)(a)(ii) makes it illegal; s45A is a deeming provision

³² Para 925

³³ In *David Jones*, the Court was prepared to make inferences regarding price fixing arrangements given a concurrence of 'time, character, direction and result': (1986) 13 FCR 446, 468 (Fisher J); see also for the court's preparedness to draw inferences regarding price fixing *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1983) 68 FLR 70

³⁴ Para 930-934

³⁵ Para 934

³⁶ Para 940-943

³⁷ Para 948

³⁸ Para 960

³⁹ *ibid*

⁴⁰ Para 148

of the specific communication, written or oral, that has alleged to have commenced the contract, arrangement or understanding.⁴¹

*Meaning of Contract, Arrangement or Understanding*⁴²

As indicated, central to the litigation in this case was the question of whether an arrangement or understanding existed among the players in the Geelong petrol market. Clearly, no formal contract existed among them in relation to prices. It is noteworthy that the wording of the section is based on s1 of the *Sherman Act*,⁴³ which phrases the prohibition in terms of a contract, combination or conspiracy.

Perhaps surprisingly given the Australian section has existed for 30 years, there is no definitive answer yet to what is encompassed by the words ‘arrangement’ and ‘understanding’ here.⁴⁴ It seems clear (at least) that more than a mere hope that a party will act in a particular way is required.⁴⁵

Some judges have taken the view that some kind of obligation is necessary in order to meet the requirement. For example, the Full Federal Court in *Rural Press Ltd v ACCC*⁴⁶ endorsed comments⁴⁷ that an obligation was required. A mere expectation that a party would act in a certain way was, the court found, insufficient. Spender and Lee in the *SSA Appeal* concluded it was difficult to imagine circumstances where there could be an understanding without a mutual obligation.⁴⁸ These sentiments were accepted by the Full Federal Court in the recent *Apco* appeal.⁴⁹

On the other hand, there is also evidence of broader views of the nature of an arrangement or understanding. In *ACCC v Amcor Printing Papers Group Ltd*,⁵⁰ Sackville J concluded that an obligation or commitment was not required; expectations could be sufficient. Fox in *TPC v Parkfield Operations Pty Ltd* was of a similar view,⁵¹ as was the Full Federal Court in *TPC v Service Station Association Limited*.⁵² The British court in *Re British Basic Slag Agreements* had also spoken in terms of the intentional arousal of expectations.⁵³ The Privy Council cast it in terms of a ‘meeting of the minds’.⁵⁴ Bowen CJ in *Morphett Arms Hotel Pty Ltd v TPC* agreed that

One could have an understanding between two or more persons restricted to the conduct which one of them will pursue without any element of mutual obligation⁵⁵

Gibbs and Mason JJ (with whom Murphy J agreed) in *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd*⁵⁶ did not require that the parties were committed to it or were required to support it.

⁴¹ Para 150

⁴² This issue is canvassed at some length by Warren Pengilly in ‘What is Required to Prove a ‘Contract, Arrangement or Understanding’? (2006) 13 *Competition and Consumer Law Journal* 241

⁴³ 1890 (US)

⁴⁴ It is assumed that the word ‘contract’ will be given its commonly understood meaning; that of a binding commitment involving mutual obligations on both sides; an agreement recognised by law as being enforceable and binding

⁴⁵ *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* [2005] FCAFC 161, para 47; *TPC v Email Ltd* (1980) 31 ALR 53; although some have argued that the *Email* case could have been seen as an example of tacit collusion: Richard Miller and David Round ‘Price Fixing, Price Leadership or Ordinary Commercial Considerations: Guilt Under s45 of the *Trade Practices Act*’ (1982) 10 *Australian Business Law Review* 251

⁴⁶ (2002) 118 FCR 236 at [79]. The court based this view partly on the fact that the words ‘arrangement’ and ‘understanding’ followed the word ‘contract’ and needed to be interpreted consistently with the earlier word. The High Court did not disagree with this suggestion: (2003) 216 CLR 53

⁴⁷ Lindgren J in *ACCC v CC (NSW) Pty Ltd* (1999) 92 FCR 373 at [141]

⁴⁸ *SSA Appeal* (1993) 44 FCR 206, 238

⁴⁹ *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161; similarly the New Zealand decision in *Commerce Commission v Caltex New Zealand Ltd* (1999) 9 TCLR 305

⁵⁰ (2000) 169 ALR 344, 359-360, though he said that reciprocity of obligation was usually present

⁵¹ (1985) 5 FCR 140, 144; see also the *Parkfield* appeal (1985) 7 FCR 534, 540 (Bowen CJ, Smithers and Morling JJ)

⁵² (1993) 44 FCR 206

⁵³ [1963] 1 WLR 727, 746; in terms with which the Federal Court agreed in *TPC v Nicholas Enterprises Pty Ltd* (No 2)(1979) ATPR 40-126

⁵⁴ *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] NZLR 257, 261

⁵⁵ (1980) ATPR 40-157, 42,234

⁵⁶ (1978) 140 CLR 434, 444

In their view, an arrangement could be informal and the parties free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it. Further, Merkel J at first instance in the *Apco* case concluded that an understanding need not involve any reciprocity of obligation.⁵⁷

The United States equivalent, on which the Australian provision was based,⁵⁸ includes the words 'combination' and 'conspiracy'. The author accepts that the wording differs. However, vertical price fixing, the equivalent to the combined effect of ss45 and s45A in Australia, are subject to a *per se* prohibition in the United States of similar nature to the Australian provisions;⁵⁹ hence it is submitted that the United States authorities on point are of some guidance in interpreting the Australian price fixing provision. They have been referred to by Australian courts in interpreting our Act.⁶⁰ The United States Supreme Court in the leading case *United States v Socony-Vacuum Oil Co Inc*⁶¹ found that voluntary agreements could be caught by the prohibition. There was no need for a binding commitment.

In other comments thought to be particularly pertinent to the interpretation in Australia of s45 and s45A, the Supreme Court also noted that:

- (a) it was not necessary to record the exact point of crystallisation of the restrictive agreement;⁶²
- (b) the fact that the market was still competitive did not matter, as long as there was some curtailment of competition; and
- (c) price fixing was not limited to prices that were uniform and inflexible⁶³

Given that the Australian provisions were based on the American equivalents, it is submitted that the above comments might have been applied (or at least considered) in the *Leahy* case. Some of the findings are at least arguably at odds with the above statements. For example, Gray J was conscious of the fact that there was no specific evidence as to when the alleged understanding commenced;⁶⁴ however the view of the United States Supreme Court has been that this does not matter. Gray J relied on the fact that phone calls involved only some of the players in the market;⁶⁵ the United States Supreme Court has not required complete market participation in price fixing.

Given the nature of these provisions, seeking to remedy market failure and curb anti-competitive behaviour, it is submitted they should be read broadly, and not in a narrow or pedantic fashion.⁶⁶ There is a range of opinion on the precise meaning of contract, arrangement or understanding; and whether an obligation is necessary. There is at least a respectable amount of authority denying that an obligation is required. The United States Supreme Court, interpreting the provision on which the Australian section is based, has read the prohibition broadly. Here, we do not have merely parallel behaviour.⁶⁷ On one

⁵⁷ *ACCC v Leahy Petroleum* (2004) 141 FCR 183, 200. This broader view is described as the 'better view' by Stephen Corones in *Restrictive Trade Practices in Australia* (1994) p153

⁵⁸ James Jackson 'Price Fixing Agreements and Section 45A(1) of the *Trade Practices Act* 1974 (Cth)' (1983) *Australian Business Law Review* 310, 323-324: 'it would seem that s45A is really attempting to achieve the per se illegality test found in the judges' interpretation of s1 of the *Sherman Act*'.

⁵⁹ *Catalano Inc v Target Sales* (1980) 446 US 643; *Texaco Inc v Dagher* (2006) 547 US

⁶⁰ One example appears in the judgment of Lockhart J in *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) ATPR 40-318, 43,920. Refer also to James Jackson 's45A is really attempting to achieve the per se illegality test found in the judges' interpretation of s1 of the *Sherman Act*': 'Price Fixing Agreements and Section s45A(1) of the *Trade Practices Act*' (1983) 11 *Australian Business Law Review* 310, 323-324

⁶¹ (1939) 310 US 150, 184

⁶² In similar terms, economist Richard Posner has said that 'tacit collusion' should be caught by the prohibition: *Antitrust Law: An Economic Perspective* (1976) pp40-41

⁶³ A New Zealand court reached the same conclusion in *Commerce Commission v Caltex New Zealand Ltd* (1999) 9 TCLR 305. The Supreme Court recently re-affirmed, however, that mere evidence of parallel behaviour was not sufficient to prove that a conspiracy or combination exists: *Bell Atlantic v Twombly* (United State Supreme Court, 21/5/07)

⁶⁴ Para 150, 938

⁶⁵ Para 148

⁶⁶ The author agrees with similar recent comments by Kirby J in *Rural Press Ltd v ACCC* [2003] HCA 75, para 101

⁶⁷ Parallel behaviour, of itself, being insufficient: eg *TPC v Nicholas Enterprises* [1979] ATPR 40-126

view, when competitors have agreed discussing prices,⁶⁸ asking others to consider price rises, telling others that prices have changed and asking them what they are going to do, and placing follow up calls when prices have not moved as requested, is evidence of dysfunctional and anti-competitive market behaviour. It is behaviour likely to reduce competition for petrol in Geelong and should not be validated by an overly narrow and technical meaning given to words in the section. Whether or not the parties felt there were under an obligation to move prices or not, on one view, is or should be irrelevant because the effect of the conduct was clearly to reduce competition, whatever word might be used to describe it. It is submitted that (at least) the spirit of the provisions has, on the argument the author favours, been breached in this case. We should not, when enforcing the provision, get too caught up with technicalities and perhaps forget the intent and substance.⁶⁹ Miller and Round make a similar point about discussing prices:

There is no reason at all to justify rivals discussing prices ... the appropriate policy stance is the prohibition of any communications between rivals which involve prices. Such discussions can serve only to pollute independent, individual judgments on market conditions with group judgments, resulting in decisions being made which are 'in the interests of all' except the consumers in the economy⁷⁰

Similar Facts in Ballarat

It is interesting to observe that many of the players involved in the Geelong case were also party to a similar case of price fixing in the Ballarat petrol market. The prosecution by the ACCC in the Ballarat case was successful, apart from an appeal by Apco and their representative.⁷¹ In the Ballarat case, the Leahy company and Chisholm admitted entering into a price fixing understanding. Three representatives from Balgee admitted engaging in price fixing. Among others, Brumar was found to have engaged in illegal price fixing. This decision was not appealed. Of course, one observes a degree of overlap between players involved in Ballarat and in Geelong – involving four companies Leahy Petroleum, Chisholm, Brumar and Balgee.⁷²

Of course, each case will turn on its individual facts, and the mere fact that parties were held to be engaged in price fixing in one market does not necessarily mean they were engaged in price fixing in another market. The presumption of innocence must apply. It is interesting that the two cases were decided within a relatively short time – the decision on the appeal in the first case was made as the second was being heard. It is suggested that evidence of at least some of the parties in the second case having been found to have been involved in similar conduct in another market in the same State might have been brought to the attention of the court in the second case, and admissible as evidence of propensity or similar fact evidence. There is precedent suggesting that similar fact evidence can be used in *Trade Practices Act* cases.⁷³ The constraints upon the use of similar fact evidence appear to be less in civil cases than in criminal cases.⁷⁴ It is no more than a factor which, it is submitted, should have been considered.

⁶⁸ Although merely sharing price information was not held to be illegal in *TPC v Email Ltd* (1980) ATPR 40-172, the United States Supreme Court in *US v Container Corp of America* (1969) 393 US 333 was prepared to infer price fixing behaviour from sharing of price information, where price harmonisation often followed after the conversation.

⁶⁹ The author concedes, on the other hand, that the penalties for breach are very serious, with a maximum penalty of up to \$10 million under s76, the value of the benefit attributable to the breach, or 10% of turnover (whichever is greatest), together with personal fines of up to \$500 000, together with the possibility of criminal sanctions in future.

⁷⁰ Richard Miller and David Round 'Price Fixing, Price Leadership or 'Ordinary Commercial Considerations': Guilt Under Section 45 of the *Trade Practices Act*' (1982) 10 *Australian Business Law Review* 251, 264

⁷¹ *ACCC v Leahy Petroleum* (2004) 141 FCR 183

⁷² Balgee was not formally a respondent in the Geelong case but was named as an organisation engaged in conversations about prices.

⁷³ Refer to the s52 case of *D F Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597, 603-607; as well as *Mister Figgins Pty Ltd v Centrepont Freeholds Pty Ltd* (1981) 36 ALR 23; *Gates v City Mutual Life Assurance Society Ltd* (1982) 68 FLR 74; cf *HW Thompson Building Pty Ltd v Allen Property Services Pty Ltd* (1983) 48 ALR 667; *Turner v Jenolan Investments Pty Ltd* (1985) ATPR 40-571

⁷⁴ *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119, 127; Julius Stone 'The Rule of Exclusion of Similar Fact Evidence: England' (1932-33) 46 *Harvard Law Review* 982-983; *Manenti v Melbourne and Metropolitan Tramways Board* [1954] VLR 115

There was economic evidence in the first case from a Professor Williams that it was inherently unlikely that a competitive petrol retailer in a highly competitive market would initiate a significant price increase unless they were confident that the major competitors in the market would match the increase.⁷⁵ This was similar to the evidence in the second case regarding the need for price rises to stick. The court acknowledged in the first case that control did not need to be total – it did not matter that all players in the market were not responding to the attempt to fix prices. The likely effect of the understanding was for price rises to stick, although the parties were at liberty to recommence the discount cycle when they wished.⁷⁶ The court noted here that in many cases there was no business reason for players to be calling each other regularly; when information was shared regarding what was happening in the market, or what was to happen, the implication was that the recipient of the information might increase their prices to those developments, or at the very least to review their prices. It is hard to see how the Geelong case is different, apart from the finding by Gray J that there may have been some business justification for at least some of the calls made between competitors.

The court in the first case noted it was true (as in the second case) that sometimes prices rose without phone calls.⁷⁷ The evidence did not always record when on a particular day prices rose, making it difficult to match price rises with calls at specific times. Sometimes the price increase sought by one or more of the parties did not take effect because the increase was not matched during the day by one or more of the respondents. There was a pattern of extensive phone calls between most, if not all, of the corporate respondents on price increase days, many more than on days on which prices did not rise. The court was prepared to infer that on price increase days, the content of most of the phone calls between the corporate respondents probably related to or included price increases proposed or in progress on that day.⁷⁸ The court concluded that the price fixing understanding was a process for procuring co-ordinated increases, including price increases and phone calls between competitors.⁷⁹ Gray J in the second case was not prepared to make such an inference, although he admitted there was a substantial number of calls between competitors.

Gray J was reluctant to use the admissions obtained in respect of several individuals in the case in relation to the discussion of prices with competitors, and in relation to likely behaviour if some participants in the market had not increased prices. This may lead to a re-assessment by the ACCC of the value of obtaining such admissions, or on which precise issues admission is sought. It will increase the difficulty for the ACCC in succeeding in price fixing and other anti-competition cases.

Conclusion

In conclusion the author accepts that these cases will turn upon the facts and the particular evidence adduced by the ACCC in relation to alleged price fixing. However, there is reason to suggest that the court in the *Leahy* case may have applied the requirement of ‘contract, arrangement or understanding’ in an unduly narrow way, leading to the provision losing some of its potential impact. It may not be consistent with the American position on a provision on which the Australian version is based. There is at least a reasonable view, the author suggests, that the relevant parties in the *Leahy* case were involved in price fixing. Further, the fact that some of these parties had been found to have been involved in price fixing involving the same product in a different part of the state may have some relevance in this case, notwithstanding the presumption of innocence. Perhaps the precise meaning of ‘contract, arrangement or understanding’ needs to be clarified with an amendment to the legislation making it clear that an obligation is not required, and that inferences may be drawn from parallel behaviour, where it is accompanied by other evidence suggesting that an understanding has been reached among competitors. This is justified by the very serious nature of price fixing arrangements.

⁷⁵ Para 36

⁷⁶ Para 53

⁷⁷ Para 285

⁷⁸ Para 289

⁷⁹ Para 300; Apco’s successful appeal was based on the Full Court’s narrower approach to the meaning of arrangement and understanding, and on evidence that while in the case of most respondents, phone calls increased on price move days, in Apco’s case they actually decreased. On many occasions, price rises did not stick, and on some days prices were increased without any calls involving Apco.