Senate Economics Legislation Committee
Inquiry into the Price of Petrol in Australia

Tabled Document

By: ACCC

Date: 3 August 2006

COMPARISON OF AUTOMOTIVE GASOLINE PRICES IN OECD COUNTRIES

Date of Information March Quarter 2006

		Local Currency/Litre			Exchange	Australian Cents/Litre			
		Price	Tax	% Tax	Rate	Price=P	Tax=T	P-T	
Mexico		6.493	0.9502	14.6	7.84264	82.8	12.1	70.7	unleaded regular, 92
USA		0.622	0.104	16.7	0.73976	84.1	14.1	70.0	unleaded regular, 91
Canada		0.927	0.313	33.8	0.85445	108.5	36.6	71.9	unleaded regular, 92
Australia		1.197	0.490	40.9		119.7	49.0	70.7	unleaded regular, 91
New Zealand		1.464	0.639	43.6	1.11202	131.7	57.5	74.2	unleaded regular, 91-93
Gr e	*^	0.92	0.477	51.8	0.61539	149.5	77.5	72.0	unleaded premium, 95
Japan		129.7	60	46.3	86.47477	150.0	69.4	80.6	unleaded regular, 91
Poland		3.724	2.068	55.5	2.35927	157.8	87.7	70.2	unleaded premium, 95
Czech Republic		28.18	16.34	58.0	17.62287	159.9	92.7	67.2	unleaded premium, 95
Spain	*	0.987	0.532	53.9	0.61539	160.4	86.4	73.9	unleaded premium, 95
Switzerland		1.59	0.847	53.3	0.95942	165.7	88.3	77.4	unleaded premium, 95
Hungary		262.65	150.31	57.2	156.6973	167.6	95.9	71.7	unleaded regular
Austria	*	1.041	0.599	57.5	0.61539	169.2	97.3	71.8	unleaded regular, 91
Slovak Republic	^	39.08	21.74	55.6	23.07804	169.3	94.2	75.1	unleaded premium, 96
Luxembourg	*	1.056	0.58	54.9	0.61539	171.6	94.2	77.3	unleaded premium, 95
Ireland	*	1.081	0.63	58.3	0.61539	175.7	102.4	73.3	premium unleaded, 95
Sweden		11.186	7.227	64.6	5.75318	194.4	125.6	68.8	premium unleaded, 95
France	*	1.212	0.788	65.0	0.61539	196.9	128.0	68.9	unleaded premium 92
Finland	*	1.212	0.788	65.0	0.61539	196.9	128.0	68.9	unleaded regular, 95
Portugal	*	1.224	0.765	62.5	0.61539	198.9	124.3	74.6	unleaded premium, 95
Denmark		9.169	5.864	64.0	4.59147	199.7	127.7	72.0	unleaded regular, 92
Korea		1470.9	877.37	59.6	734.3393	200.3	119.5	80.8	unleaded premium, 92
Germany	*	1.242	0.826	66.5	0.61539	201.8	134.2	67.6	unleaded regular, 91
Ita	*	1.251	0.772	61.7	0.61539	203.3	125.4	77.8	unleaded premium, 95
Uk	^	0.889	0.603	67.8	0.42223	210.5	142.8	67.7	unleaded premium, 95
Belgium	*	1.321	0.822	62.2	0.61539	214.7	133.6	81.1	premium unleaded, 95
Netherlands	*	1.385	0.897	64.8	0.61539	225.1	145.8	79.3	unleaded premium, 95
Norway		11.14	7.118	63.9	4.94043	225.5	144.1	81.4	unleaded premium, 95
Turkey		2.603	1.76	67.6	0.98855	263.3	178.0	85.3	unleaded premium, 95
Average				54.7		174.3	100.4	73.9	

^ Previous quarter
* Country now reporting in Euro currency

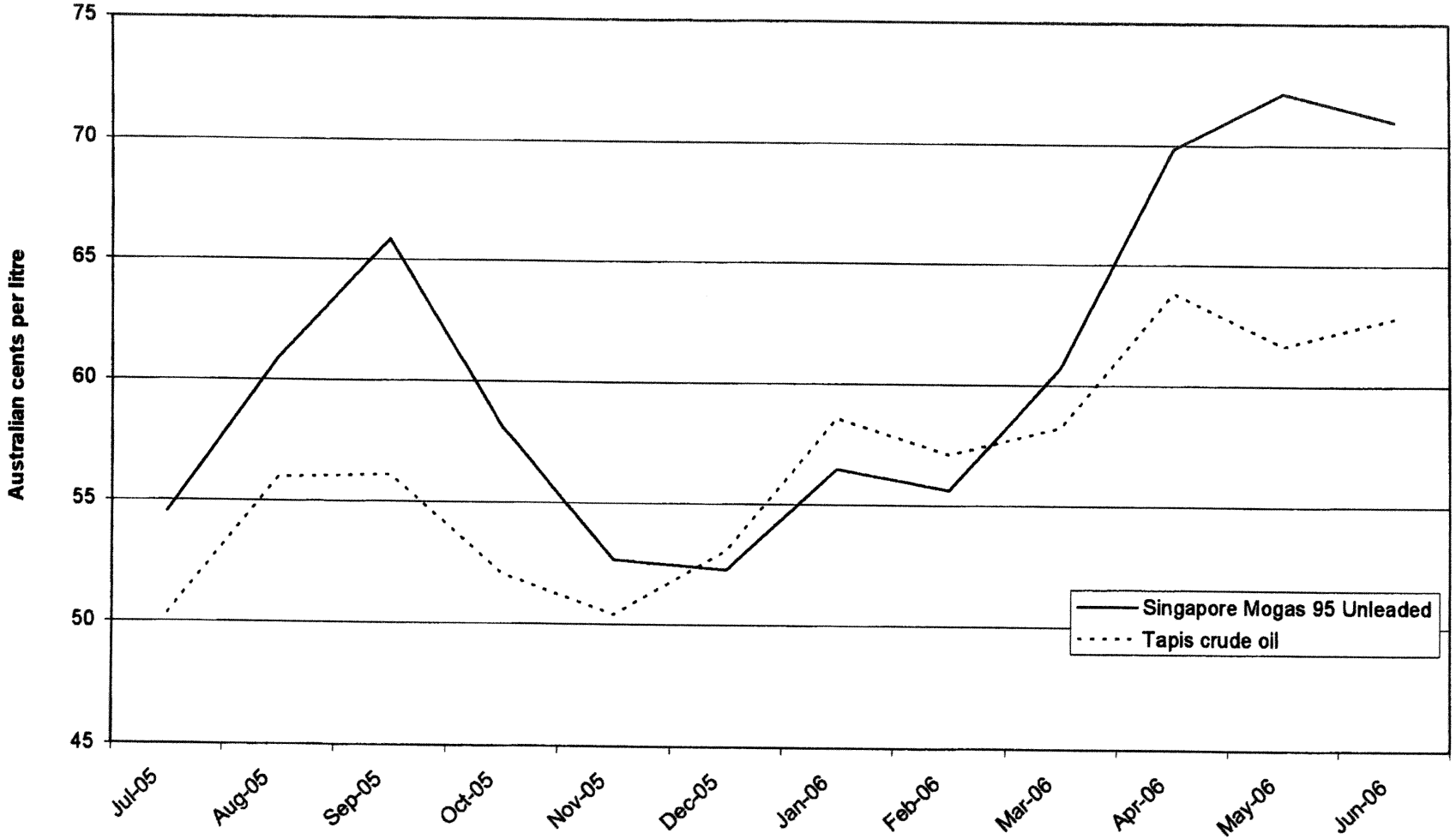
Exchange rates: Average of daily interbank rate for quarter, source OANDA currency converter (www.oanda.com)

Sourced from International Energy Agency "Energy Prices and Taxes"

Tabled: ACCC 3/8/06

In $A

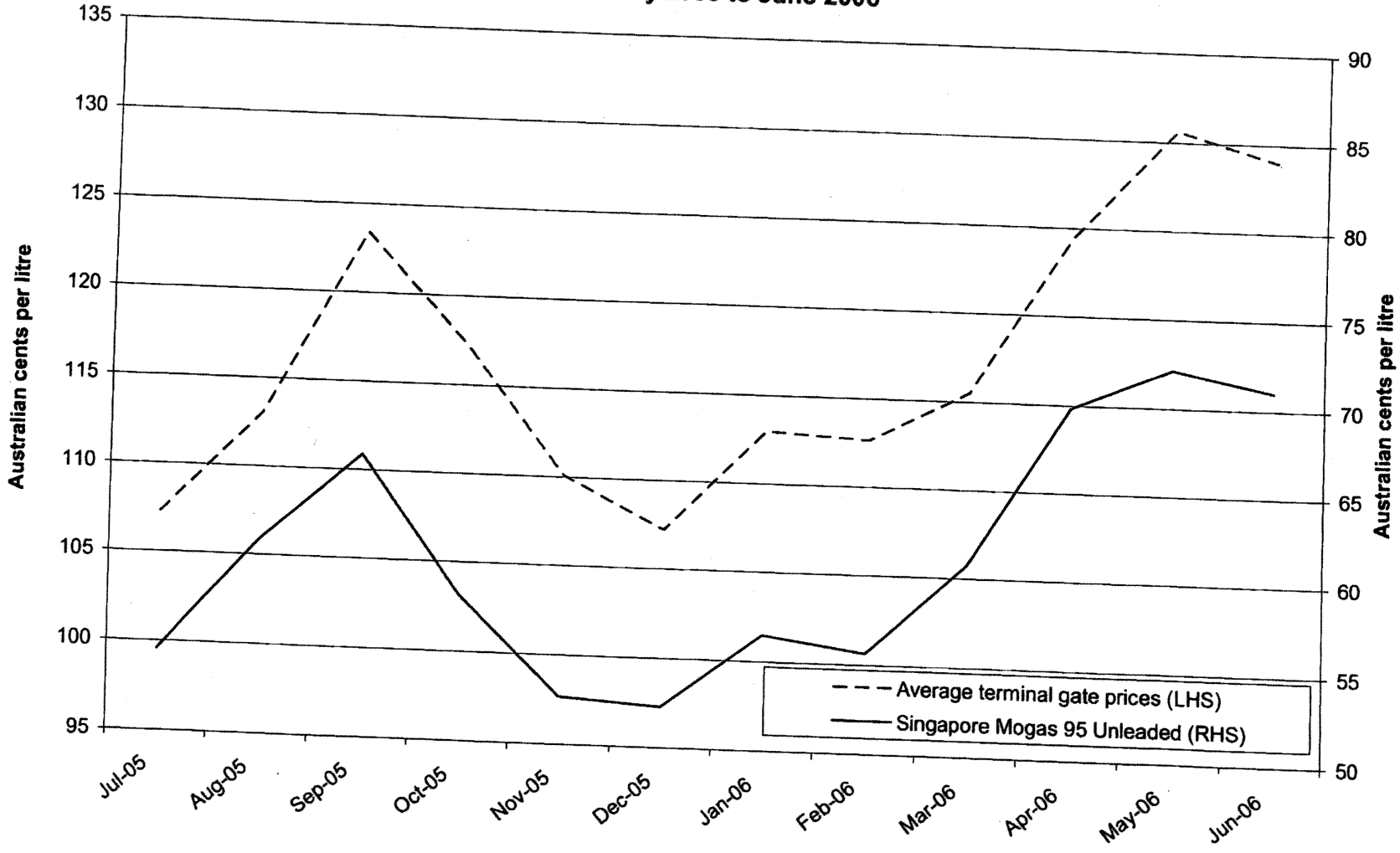
Chart 1:Tapis crude oil and Singapore Mogas 95 Unleaded prices - monthly average - July 2005 to June 2006



Tabled Accc
3/8/06.

Chart 2: Singapore Mogas 95 Unleaded and five-city average terminal gate prices - monthly average - July 2005 to June 2006

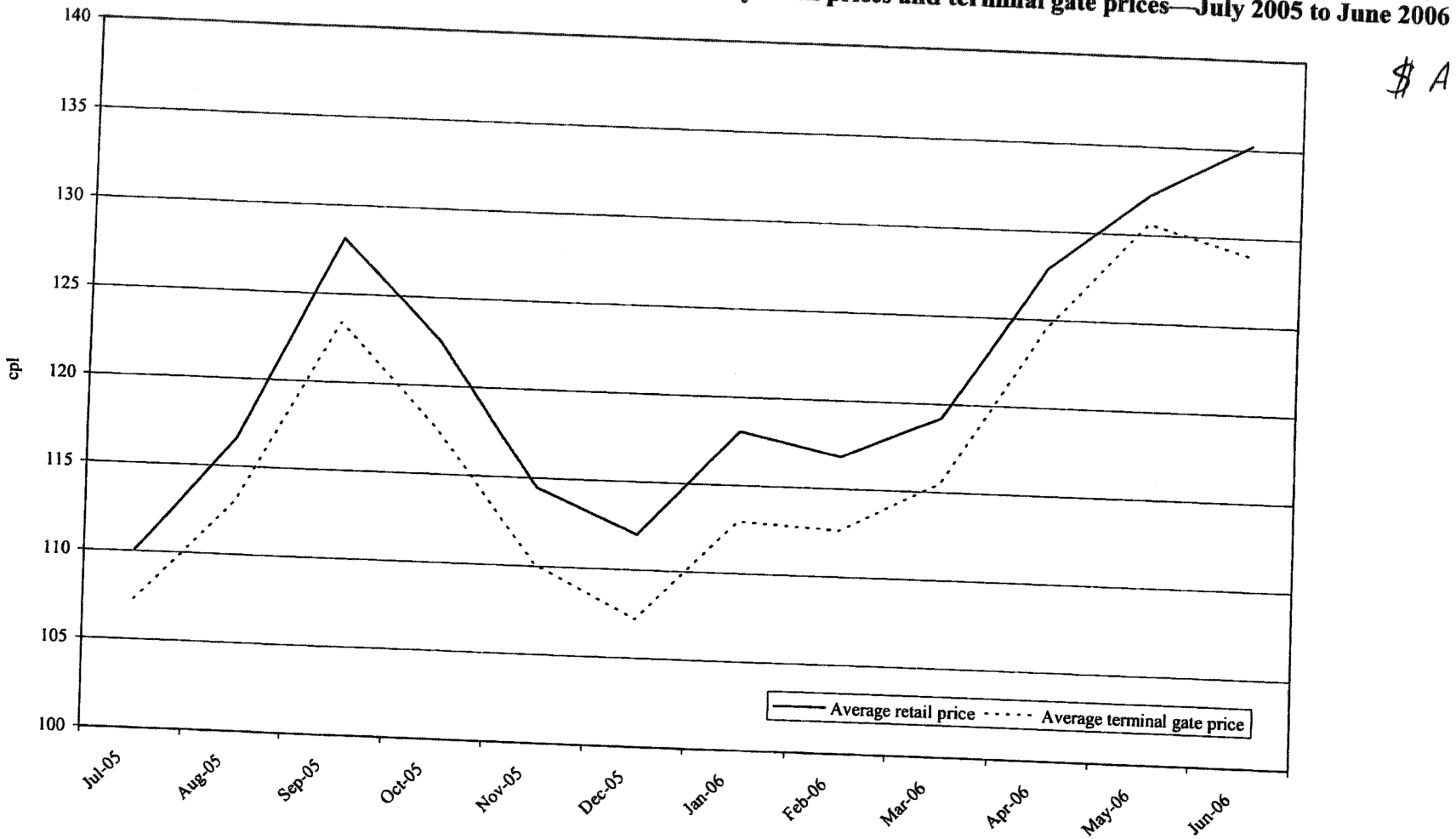
$A



Tabled Accc 3/6/06

Chart 3 **Five largest metropolitan cities—average monthly retail prices and terminal gate prices—July 2005 to June 2006**

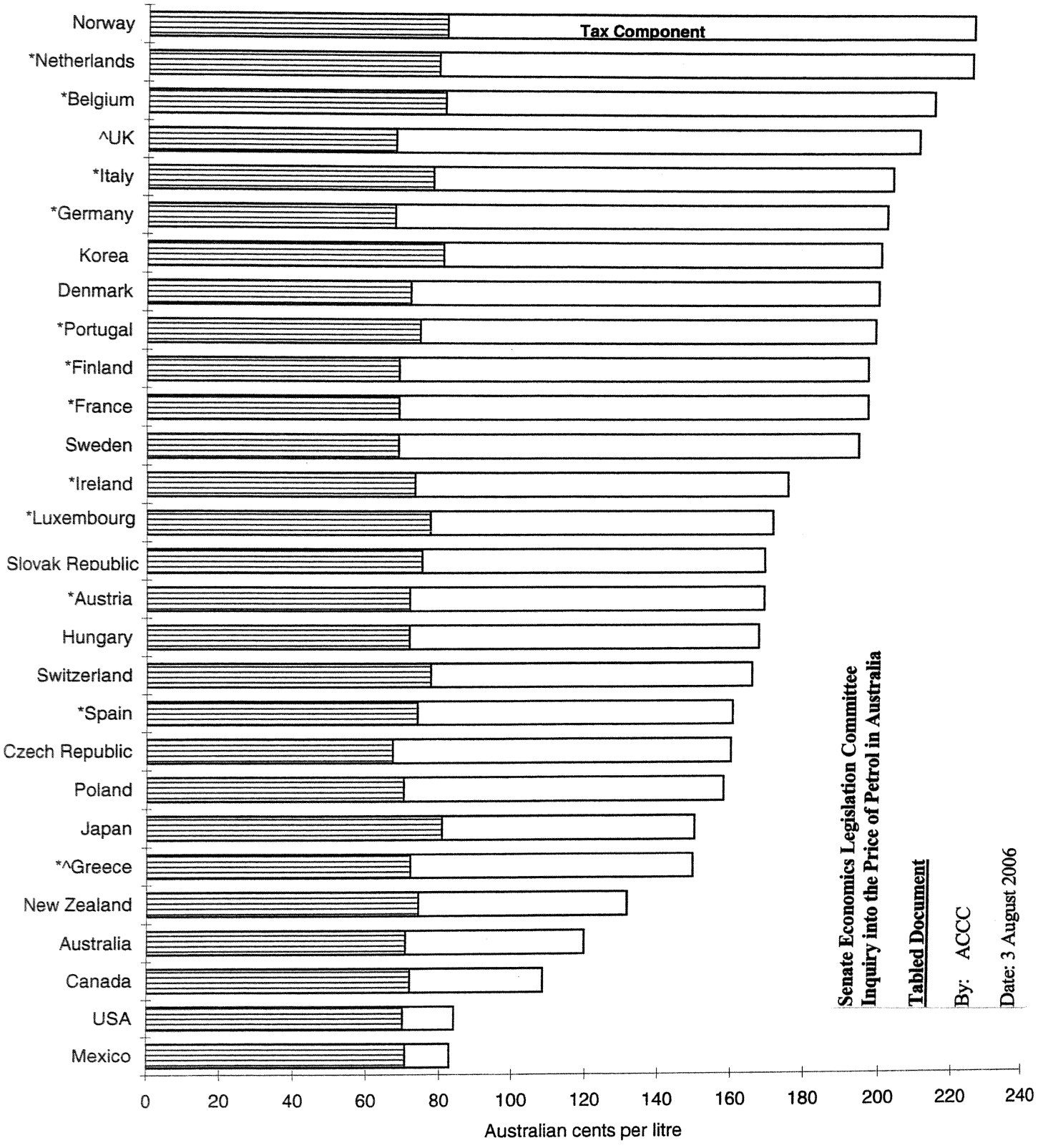
$A



Tabled: ACCC 3/8/06

CHART 8A

Petrol Prices and Taxes in OECD Countries
March Quarter 2006



Sourced from International Energy Agency "Energy Prices and Taxes"

Tabled: Acce 3/8/06

29 out of 69 – What Understanding??

Proving an 'arrangement or understanding' relying on indirect evidence

Ayman Guirguis and Chris Evans

The Full Federal Court's decision in *Apco Service Station Pty Ltd v ACCC*[1] (**Apco case**), and the High Court's recent rejection of the ACCC's application for special leave to appeal against this decision[2], have:

- reaffirmed that there has been certainty in Australia, for the last 25 years or so, as to the elements that must exist for there to be an "arrangement or understanding" for the purposes of s 45 of the *Trade Practices Act 1974* (Cth) (**TPA**), namely that:
  - at least one party must assume an obligation or commitment, or give an assurance, to act in a particular way; and
  - it is not sufficient for there to be a mere hope or expectation of what is to be done; and
- together with proceedings currently awaiting judgment by Gray J in the Federal Court (**the Geelong petrol case**)[3], again demonstrated the potential limitations and difficulties of heavy reliance on indirect evidence in proving an alleged "arrangement or understanding".

It has been argued, for example by the ACCC, that Australian Courts have taken an overly restrictive approach as to the existence of an "arrangement or understanding" for the purposes of s 45 of the TPA and that a consensus, something more than an expectation but falling short of a commitment to undertake certain acts, should be all that is required[4] (this approach appears to be the direction in which New Zealand may be heading – we refer to this further below).

This paper posits that instead of seeking to make changes to the elements necessary for a finding of an arrangement or understanding (or lowering the 'threshold' for finding an understanding), so as to accommodate circumstances where the only evidence may be indirect, perhaps a different approach could be taken in respect of the evidence adduced before the court. In particular, more emphasis could be placed on establishing market structure and dynamics which, together with the 'circumstantial' evidence available to the applicant, it can then seek to establish the 'irresistible' inferences of an 'understanding' that contravenes the TPA. Such an approach however would require a marked change to the manner in which proceedings alleging per se contraventions are run and is likely to bring with it greater complexity in proceedings for per se contraventions.

The remainder of this paper will:

---

[1] (2005) ATPR 42-078

[2] *ACCC v Apco Service Stations Pty Ltd and Peter Joseph Anderson* [2006] HCA Trans 272

[3] *ACCC v Leahy Petroleum Pty Ltd and Ors* No V 1012 of 2003 – please note that the authors acted for the third respondent, Pegasus Retail Pty Ltd in that proceeding.

[4] See discussion of arguments in ACCC's application to the High Court for special leave to appeal against the Full Federal Court's in the Apco case below.

- briefly discuss the principles established by Australian courts with respect to the elements that are necessary for there to be an arrangement or understanding, with a particular emphasis on the Apco case;

- consider the evidentiary issues that to date appear to have arisen where the ACCC has sought to rely on indirect evidence in seeking to prove that the necessary elements of an arrangement or understanding exist; and

- pose a number of questions about the role of indirect evidence in proving an understanding.

Elements of an arrangement or understanding

Basic position

Section 45 (2)of the TPA states, relevantly, that:

A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or

(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition...

The elements that must exist for there to be an arrangement or understanding for the purposes of s 45 of the TPA, that were summarised above, have been considered on several occasions by both the Federal Court and the Full Federal Court. These principles were usefully summarised in the following passage from the judgment of Lindgren J in *Australian Competition & Consumer Commission v CC (NSW) Pty Ltd (1999)* 92 FCR 375 (at 408) that was cited by the Full Federal Court in *Rural Press Ltd v ACCC*[5] and most recently in the Apco case (at 43,234 to 43,235)

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

An early Australian decision, by Fisher J in *TPC v Nicholas Enterprises Pty Ltd (No 2)* (the **Adelaide Beer Case**)[6] considered that there needed to be a mutual obligation between the parties to an alleged arrangement or understanding. However, on appeal from Fisher J's decision, in

---

[5] (2002) 118 FCR 236 at 257

[6] 1979 ATPR 40-141

Morphett Arms Hotel Pty Ltd v TPC[7] the Full Federal Court noted that it is not be necessary for there to be a reciprocity of commitment (a number of subsequent decisions have affirmed this position, as identified above, although a number state that, in practice, cases without a reciprocity of commitment would be rare[8]).

Apco case

The Apco case provides a useful practical illustration of the approach that has been taken by Australian courts to determining the existence of an arrangement or understanding.

Background

In brief, the ACCC alleged in the Apco case that:

- an arrangement or understanding evolved from the early 1990s onwards in the Ballarat retail petrol market whereby operators would inform each other (through phone calls) as to the timing and amount of prospective price increases;
- there was a meeting in June 1999 where it was agreed to implement this arrangement on a more frequent and efficient basis, and that there were 2 subsequent meetings in 2000; and
- the alleged arrangement was given effect to on 69 occasions between June 1999 and December 2000.

The ACCC joined 8 corporations who participated in the Ballarat retail petrol market as respondents, and also joined 8 individuals on the basis that they were knowingly concerned with the alleged arrangement (ie. individuals who had pricing responsibilities with the corporate respondents).

The ACCC sought to prove its allegations through:

- written and oral testimony, including from persons who admitted to the allegations; and
- indirect evidence, being a document listing a series of phone calls between competitors and increases in the retail price of petrol by the competitors and purporting to evidence a correlation between the phone calls and price movements (direct evidence of the fact that phone calls took place and retail prices 'moved', from which inferences were sought to be drawn).

All of the respondents, apart from Apco and Mr Peter Anderson, Apco's managing director, were ultimately held to have engaged in price fixing in contravention of s 45 of the TPA.

---

[7] (1980) 30 ALR 88

[8] See for example the comments of Lockhart J in *TPC v Email Ltd* (1980) 31 ALR 53 at 66, and the Full Federal Court in *TPC v Service Stations Association Ltd* (1993) 44 FCR 206 at 230

Evidentiary findings against Apco

The evidentiary findings against Apco differed from those against other parties in important respects, for example:

- Mr Anderson did not attend the meetings described above (and nor did any other Apco representative);
- while there was evidence that Mr Anderson received phone calls from parties to the arrangement who informed him of actual price increases (not prospective price increases), and was aware that the purpose of these calls was to facilitate price increases, the callers were unsure of whether Apco would increase its prices (ie. Mr Anderson never committed to increasing Apco's prices (making statements such as, *I will look at it*, when asked by competitors as to what action he would take following the receipt of the price information);
- Apco's pricing behaviour following the phone calls was unpredictable. In particular, Apco did not necessarily increase its prices following calls from competitors. In fact, of the 69 occasions alleged by the ACCC that the parties allegedly gave effect to the arrangement by increasing their prices to similar amounts at similar times, Apco increased its prices only 29 times, and, on some occasions, it in fact decreased its prices at about the same time;
- on some of the 'price increase days' there was no evidence of phone calls between Apco and its competitors, and, on other days where there were no allegations of giving effect to the alleged arrangement, there was evidence of phone calls between Apco and its competitors; and
- there was scant evidence of 'complaints' made by Apco's competitors on the occasions when Apco did not increase its prices following the receipt of the relevant phone call.

First instance judgment against Apco

Notwithstanding the above incongruities, Merkel J held at first instance that Apco was party to a price fixing understanding. The basis for this was that Mr Anderson's conduct aroused an expectation in those competitors calling him that:

- Mr Anderson, on behalf of Apco, was prepared to receive calls from competitors;
- Mr Anderson would act upon the calls by monitoring price increases of the other alleged participants in the price fix, and would decide whether to participate in the coordinated price increases being sought; and
- Mr Anderson's receipt of the phone calls made it more likely that he would increase Apco's price than if he had not received the calls[9].

Merkel J also noted that Mr Anderson was aware that the increasing of prices by Apco made it more likely that the price increase being sought by the participants to the price fix would be maintained.

---

[9] *ACCC v Leahy Petroleum Pty Ltd*(2004) 141 FCR 183 at 230 [2004] FCA 1678 at para 370

In light of this, Merkel J was prepared to infer that Mr Anderson expected that the participants in the *collusive process* would maintain their price increases while Mr Anderson was considering whether to increase Apco's prices[10].

In essence, Merkel J found that, despite there being evidence of only a 'hope' by Apco's competitors that it would increase its prices following the receipt of a phone call, the continued receipt of calls by Mr Anderson in circumstances where he was aware of the purpose of the calls, together with the fact that Apco's prices increased on 29 occasions, constituted the *requisite meeting of the minds and consensus.*[11]

Judgment of the Full Federal Court

Apco and Mr Anderson appealed the decision of Merkel J, and the Full Federal Court upheld the appeal stating that:

> *...these findings (at first instance) lead to the unavoidable conclusion that Apco was not a party to any understanding that it would fix its prices at the same time as the other respondents or at any particular level or even that it would fix its prices at all...*[12]

In its judgment, the Full Federal Court specifically noted that:

- if it could be inferred that Mr Anderson had expected Apco's competitors to maintain their price increases while Apco was considering whether to follow this increase, this represented no more than a 'factual expectation' that fell short of an understanding. That is, Mr Anderson had received no assurance that Apco's competitors would act in that manner[13];
- Mr Anderson made decisions to increase Apco's prices based on his own assessment of the market[14], and that unilaterally taking advantage of commercial opportunity is not to arrive at, or to give effect to, a price fixing understanding[15];
- the persons calling Mr Anderson, at most, hoped that Apco's prices would increase following such calls[16]; and
- *...the desired increase by Apco only occurred on 29 out of the 69 occasions when, on the theory of the ACCC's case, it should have.*[17]

---

[10] Ibid

[11] Ibid

[12] (2005) ATPR 42-078 at 43,234

[13] Ibid at 43,235

[14] Ibid at 43,236

[15] Ibid

[16] Ibid at 43,235 to 43,236

[17] Ibid at 43,236

The ACCC had sought to address the finding that Apco's competitors had no expectation that calls to Mr Anderson would result in Apco increasing its price by arguing that an understanding could relate to something that set up a *process* to enable persons to be notified of price increases. The ACCC relied on the language of s 45A of the TPA in making this argument, namely, when this provision refers to the understanding 'providing for' the fixing, maintaining or controlling of price[18].

However, the Full Federal rejected this argument, stating that:

> *....'providing for' must be a means to the end of price fixing...*[19]

The ACCC, in the alternative, sought to argue that each of the 29 instances of price increases amounted to separate ad hoc understandings. However, the Full Federal Court found such an assertion to be...*a quite unreal and artificial view of the evidence.*[20]

Application for special leave to the High Court

The ACCC sought special leave to appeal to the High Court on several bases, including that, for the purposes of s 45 of the TPA:

- the element of commitment should not superimposed onto the meaning of understanding, and that an understanding exists if coordinated conduct arises from a meeting of the minds, even if parties to the arrangement feel free to act independently as it suits them[21], such that there is more than mere expectation but less than commitment[22];

- that 'understanding' must have a separate meaning to 'arrangement'[23].

However, the High Court (Gleeson CJ and Hayne J) dismissed the ACCC's application for special leave to appeal on the basis that the Full Federal Court's decision did not turn on any controversial issue of law. In particular, their Honours focused on the hearing of the application on the issue of whether there was 'commitment' in respect of Apco's future conduct (following Apco receiving information about where the competitors' prices had already moved)[24].

It appears to us that the 2 vital pieces of evidence so far as the Full Federal Court and High Court were concerned were:

- the lack of expectation on the part of Apco's competitors about how Apco would act – rather a mere hope; and

---

[18] Ibid at 43,235.

[19] Ibid at 43,235

[20] Ibid at 43,236

[21] See para 38 of the ACCC's Summary of Argument

[22] Ibid at para 44

[23] Ibid at para 41

[24] For example, see comments at lines 294 to 346

- that Apco increased its prices on only 29 of the 69 alleged occasions.

Evidentiary issue in making out necessary elements

Clearly, the major challenge for an applicant seeking to make out an alleged s 45 contravention is having sufficient evidence to prove that the required elements of an 'arrangement or understanding' exist.

There are 2 types of evidence that may be used to prove the existence of an 'understanding' for the purposes of s 45 of the TPA:

- evidence that may 'directly' prove the existence of an understanding in contravention of s 45 (ie. testimony from a participant in such an understanding as to his/her dealings with another person and his/her state of mind and subsequent conduct); or

- evidence that does not directly prove the existence of an understanding, but from which an understanding may be inferred, for example:

  - evidence of 'parallel' price behaviour (ie. competitors increasing their prices to the same amount at the same time); and/or

  - evidence of the opportunity to engage in collusive conduct (ie. phone calls between competitors, or a meeting involving a number of competitors).

This section of the paper will particularly focus on the approach that Australian Courts have taken in drawing inferences from indirect evidence. Conduct may be ambiguous. For example, parallel pricing behaviour may be the result of an understanding as to prices or it may be unilaterally rational commercial behaviour.

This discussion will look at a number of cases that have dealt with this issue, and will consider 2 recent matters where there have been comments as to the probative value of indirect evidence in respect of allegations of price fixing in the retail petrol industry, namely:

- the comments, both at first instance and on appeal, in the Apco case as to the probative value of the indirect evidence that had been led; and

- comments that have been made in the Geelong petrol case by Gray J in the course of hearing as to the indirect evidence that was tendered in that matter. However, given that Gray J is yet to hand down a judgment in this matter, these observations are necessarily limited.

Standard of proof

As contraventions of s 45 of the TPA can, currently, only result in the imposition of civil penalties the standard of proof for such contraventions is the civil standard, that is, whether there has been a contravention of s 45 on the balance of probabilities.

However, courts are also required to take into account the gravity of the allegation in applying the civil standard of proof[25]. Therefore, if large civil penalties can be applied, the higher the level of proof that is likely to be required by courts. This principle of is often relevant in the context of alleged contraventions of s 45 of the TPA where there are potentially large penalties for such contraventions[26].

This requirement as to the necessary standard of proof explains, to a certain extent, why it is very difficult to rely solely on indirect evidence as the basis for a successful action alleging an arrangement or understanding in contravention of the TPA. This issue may be exacerbated in a case involving a multiplicity of respondents, where the evidence is more often than not likely to be stronger against some of the respondents, and invariably gives rise to a variety of inferences that may be drawn from the conduct in question.

The result is that indirect evidence will in almost all cases require 'support' by some level of direct evidence (or, more properly, indirect evidence will be needed to assist the applicant in the face of contested direct evidence) in order for the applicant to have a prospect of success in Australian Courts. An alternative may be a very rigorous analysis of the data or information that forms the basis of the indirect evidence at issue. Such an approach may then lead to a greater degree of precision and certainty as to the correlations that can be disclosed by such evidence.

General position in case law

Recent petrol cases

The Apco and Geelong petrol case referred to above are but the most recent and stark examples of such difficulties.

The Apco case

As discussed above, the evidence led by the ACCC in the Apco case involved both direct evidence and indirect evidence purporting show parallel price increases, and a correlation between such increases and calls between competitors.

In respect of those respondents who were held to have entered into a price fixing understanding, this indirect evidence was certainly an important adjunct to the direct evidence of the understanding. However, it seems unlikely that the indirect evidence that was led would, of itself, have been sufficient to prove the alleged arrangement given Merkel J's comment that:

> *....If the two documents (ie. showing phone calls and proximate price-increases) were offered as the only evidence, the lack of specificity and precision concerning the correlation may have been fatal to the ACCC's claims in respect of the price-fixing understanding. However, the information in the documents supplements direct evidence about price-increase and follow-up calls between the corporate respondents, and justifies the inference that I am prepared to draw, that on price-increase days the content of most of the telephone communications between the corporate*

---

[25] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[26] Up to $10 million for each contravention – s 76 of the TPA

respondents probably related to or included the price-increases proposed or in progress on that day...[27]

In relation to Apco and Mr Anderson, the issue was not so much that the indirect evidence was not sufficient to make out the ACCC's allegations. More fundamentally, the indirect evidence was not consistent with the allegations that the ACCC was seeking to make as it demonstrated that Apco would not necessarily increase prices following phone calls from competitors. Namely, it did not demonstrate that Apco had engaged in parallel pricing behaviour.

The Geelong petrol case

The ACCC's case was that a number of petrol wholesalers and retailers in the Geelong metropolitan area and surrounds (8 corporate respondents and 10 individuals who were principals or employees of the corporate respondents) were variously parties to 8 separate alleged arrangements or understandings providing for the fixing of petrol prices at various times to various amounts.

Interestingly:

- the respondents were not alleged to be parties to an overarching arrangement or understanding. Instead, the respondents were alleged to be parties to a number of arrangements each involving only 2 or 3 market participants; and
- quite a number of the other retailers in what is a relatively small geographic region were not alleged to be parties to the alleged arrangements or understandings.

Judgment in the Geelong matter is pending and accordingly, the comments on this matter will be limited.

However, it is possible to say that:

- indirect evidence of a similar nature to the Apco case was led in the Geelong matter; and
- Gray J made comments[28] in the course of the hearing which reflect the possible limitations of this type of evidence without clearly corroborating direct evidence.

The perceived difficulty or low likelihood of success in this proceeding where the allegation relied solely on indirect evidence may also have been reflected in the ACCC's decision to discontinue the proceedings after 6 hearing days in respect of the arrangement alleged solely against Pegasus Retail Pty Ltd (and its employees, Gallucci and Pitman) and Apco (and Mr Anderson). Unlike a number of the other alleged arrangements, there was no evidence led in the proceeding that was directly probative of the alleged arrangement between Pegasus and Apco (the case against these parties relied solely on data showing phone calls and price movements).

---

[27] *ACCC v Leahy Petroleum Pty Ltd* [2004] FCA 1678 at para 289 (this section of the of the judgment was not set out in FCR)

[28] See page 2604 of the transcript of the hearing

While the facts and indirect material may be very different in cases relating to the petroleum industry as opposed to other proceedings (for example, the retail petrol industry may well have a much larger level of 'chatter', significantly more transparency of pricing, and more individual transactions than other industries), the position of the Australian Courts has not been dissimilar in other cases that were based primarily on indirect evidence, a number of which we refer to below.[29]

The Adelaide Beer Case

The Adelaide Beer case was an early example of the Federal Court considering the application of indirect evidence to an alleged contravention of s 45.

The TPC alleged that some Adelaide hoteliers (8 defendants in total) had entered into an arrangement or understanding whereby the allowance offered on the purchase of package beer would be reduced (ie. fixing the allowance on a package of 12 bottles of beer to 2 bottles, when common practice had been to allow 3 bottles). In summary the principal evidence that went to the alleged arrangement was:

- 2 lunches involving various hoteliers, where there was evidence that at least some hoteliers discussed the need to reduce the allowance allowed on packaged beer. Fisher J was of the view that this evidence was insufficient to prove the existence of an arrangement or understanding[30], although he noted that it reflected a desire, in the case of at least one defendant, to influence persons to reduce the allowance[31]; and
- 'parallel behaviour' of the defendants in reducing their allowances on the same day.

In relation to inferring the existence of an arrangement from an understanding, Fisher J noted that:

> *....as doubtless is true with all circumstantial evidence, the drawing of the relevant inference is seldom irresistible. As is the case here, it is frequently possible for another explanation of the facts to be given in evidence, for example that the reduction in the allowance was dictated not by commitment to an understanding but by ordinary commercial considerations. However, failure to explain the reasons for and circumstances of the parallel reduction encourages the tribunal to feel that it is 'less unsafe to make' the requisite finding....*

Ultimately, Fisher J did hold that a number of the defendants had entered into an understanding in contravention of s 45 on the basis of the above evidence. However, 2 of the defendants were found not to have contravened s 45. Essentially, Fisher J did not draw an inference that these persons were parties to an understanding on the basis of their evidence that:

- they did not arouse an expectation in the minds of their competitors that they would reduce the allowance; and

---

[29] For a more detailed analysis of Australia decisions, there is a recent article by Pengilley, *What is required to prove a 'contract, arrangement or understanding'?* (2006) 13 Competition & Consumer Law Journal 241

[30] Ibid at 90

[31] Ibid at 95

- they reduced the allowance based on commercial considerations, and not because of an understanding with competitors[32].

That is, where an alternative explanation was provided for the parallel conduct (i.e., that it was based on commercial considerations), Fisher J was not prepared to find that the relevant defendant had been party to an understanding in contravention of s 45.

TPC v Email Ltd[33]

This was another case addressed the issue of indirect evidence shortly after the commencement of the TPA. It involved allegations of price fixing between Email and Warburton Franki, 2 manufacturers of electricity meters. In brief, the principal allegations of the TPC were that:

- Email and Warburton Franki exchanged price lists;
- prior to changing its price, Email would issue a new price list; and
- upon receipt of Email's price lists, Warburton Franki would issue an identical price list[34].

The TPC conceded there was no direct evidence of the alleged arrangement and that it relied on indirect evidence[35].

Lockhart J noted that parallel conduct may constitute indirect evidence from which an arrangement or understanding may be inferred[36]. However Lockhart went on to state that:

> *....Plainly, when a credible explanation is given by a defendant it may be sufficient to negate the inference of an arrangement or understanding: see Trade Practices Commission v Nicholas Enterprises Pty Ltd (No. 2).*
>
> *In the United States there is powerful authority for the proposition that, while parallel business conduct may provide circumstantial evidence from which an inference as to the existence of an unlawful agreement may be drawn, it is not sufficient by itself to support an allegation of conspiracy under the Sherman Act and it may be the result of independent decisions of competitors or other economic forces....*[37]

Lockhart J held that the TPC's allegations had not been made out based on:

---

[32] See for example Fisher J's discussion at 98

[33] (1980) 43 FLR 383

[34] 43 FLR 383 at 385

[35] Ibid

[36] Ibid at 386

[37] Ibid

- lay evidence led by the respondents that denied the allegations of an arrangement or understanding, and provided a credible explanation that the parallel behaviour was the result of rational commercial behaviour[38]; and

- expert economic evidence that suggested that in an oligopolistic market (which existed in this case) prices cannot diverge for more than short periods[39].

TPC v JJ an YK Russell Pty Limited[40] (**Russell**)

In Russell the TPC alleged that there had been a meeting between service station proprietors where prospective price increases were discussed and that prices rose to the stated price. In separate proceedings a number of persons admitted to the allegations[41]. However, another respondent, Mr Russell, contested the allegations and, despite the fact that Mr Russell had helped to organise the meeting, and that Mr Russell's company increased its price to the stated amount, the court held that the allegation against this respondent had not been made out. The main issues that the TPC faced in this regard were that:

- there was not reliable direct evidence that Mr Russell had participated in discussions as to the fixing of price[42], and Mr Russell denied he had been party to such discussions[43]; and

- consequently, the evidence of parallel conduct (increasing prices to the stated amount) was not probative of the allegations as the price increase could have been motivated by legitimate commercial considerations[44].

ACCC v Mobil Oil Australia Ltd[45] (**Mobil**)

In Mobil, the ACCC alleged that Mobil, BP and Shell had entered into a price fixing arrangements. There were issues as to the particularising of the pleadings, particularly as to alleged communications (that were said to have formed part of the alleged arrangement or understanding), and Heerey J struck out the action. In doing so, Heerey J noted that:

> *...The retail petroleum products market, with its highly visible board prices and mobile customers, is one where a trader's prices and fluctuations thereof are as readily apparent to competitors as they are to customers. Therefore, parallel pricing in itself, in this particular market, is as likely to*

---

[38] Ibid at 389

[39] Ibid at 391

[40] (1991) ATPR 41-132

[41] *Trade Practices Commission v JJ & YK Russell Pty Ltd* (1991) ATPR 41-090

[42] (1991) ATPR 41-132 at 52941

[43] Ibid at 52940

[44] Ibid at 52942

[45] (1997) ATPR 41-568

follow from the observation and independent decision of rival traders as from prior arrangement...[46]

ACCC v Amcor Printing Papers Group Ltd[47] (**Amcor**)

In Amcor, the ACCC alleged that Amcor had withdrawn an offer to acquire waste paper and cardboard from a supplier as a result of arrangement or understanding with Visy (who competed with Amcor in the acquisition of paper and cardboard) in contravention of s 45. Flagstaff, the supplier at issue, had been supplying all of its waste cardboard to Visy. There was evidence that upon Visy being provided with a copy of Amcor's draft offer (by Flagstaff) Visy called Amcor in relation to its offer to acquire paper and cardboard from Flagstaff, and also faxed to Amcor a copy of its offer (as received from Flagstaff). However, Sackville J held that the ACCC's evidence fell *well short* of establishing to the required standard that Visy and Amcor made the alleged understanding - and noted that there were alternative explanations for the conduct (ie. Visy getting confirmation that an offer had been made)[48].

Are the Australian Courts taking an 'extreme' position?

This paper does not seek to undertake an in depth analysis of the position taken by courts overseas. However, it is useful to make a couple of brief observations.

The position of our closest neighbour, New Zealand, was in essence the same as Australia until the recent decision by the New Zealand Court of Appeal in *Giltrap City Ltd v Commerce Commission* (**Giltrap**)[49]

The New Zealand Commerce Commission commenced proceedings under s 27 of the *Commerce Act* (essentially the same provision as s 45 of the TPA) alleging that 8 Auckland car dealers met together and entered into a price fixing arrangement or understanding (regarding the discounting of new cars). All of the parties to the arrangement, apart from Giltrap (and its principal, Mackenzie) agreed to pay a penalty.

The New Zealand Court of Appeal, in considering an appeal by Giltrap and Mackenzie (against a judgment that Giltrap had been party to a price fixing arrangement) stated:

> *...We do not consider it appropriate to be tied in any determinative way to the concepts of mutuality, obligation and duty. While the concept of moral obligation is helpful in that it will often reflect the effect of an arrangement or understanding under s 27, the flexible purpose of the section is such that it is best to focus the ultimate enquiry on the concepts of consensus and expectation. A finding that there was a consensus giving rise to an expectation that the parties would act in a certain way necessarily involves communications among the parties of the assumption of a moral obligation.....We therefore consider that the question whether a particular person entered into an arrangement or arrived at an understanding under s 27 should be answered by asking whether that*

---

[46] Ibid at 43,896

[47] (2000) 169 ALR 344

[48] Ibid at 362

[49] [2004] 1 NZLR 608

person was a part of a consensus giving rise to an expectation that some proscribed action or inaction take place..[50]

These statements appear to suggest the possibility that there may be a lower threshold in New Zealand for a finding of an understanding to something 'below an obligation' (perhaps similar to the position taken by the ACCC in the Apco case). It will be interesting to observe how the above words are interpreted in the future, particularly in circumstances where indirect evidence is being used to allege a contravention (in Giltrap the other parties to the arrangement made admissions).

The Australian position appears quite congruous with that in the US where it appears that, in order for it to be shown that a person was involved in an unlawful conspiracy, it must be shown by a preponderance of evidence that the person shares with the other alleged conspirators 'a common commitment to a common scheme designed to achieve an unlawful objective'[51].

US Courts have also held that of itself, parallel conduct is not probative of the existence of an unlawful arrangement or understanding[52]. Rather, the courts have required additional factors to demonstrate that parallel behaviour amounts to a conspiracy. These are often referred to as 'plus factors'[53].

The plus often include evidence demonstrating that the defendants:

- acted in a manner contrary to their economic interests; and
- were motivated to enter into a price fixing conspiracy[54].

Australian Courts have not adopted the explicit wording of 'plus factors'. However, their approach in practice is arguably analogous. For example, in finding that an arrangement or understanding does not exist where there is evidence to support the view that respondents took a commercially rational decision in their own economic interest (both the Full Federal Court and the High Court commented on this issue in the Apco case).

Should indirect evidence ever be sufficient to prove an understanding?

Our reading of the judgments in the Apco case led us to consider whether an alternate set of facts may have led to a different conclusion, for example, if:

- Apco had increased its prices to same amount as it competitors, at approximately the same time, on each of the 69 alleged occasions, or on the predominant number of these occasions; and

---

[50] Ibid at para 15 and 18

[51] *Edward J Sweeney & Sons Inc v Texaco Inc* 637 F2d 105, 111 (3d Circ 1980)

[52] See for example the decision of the Supreme Court in *Theatre Enterprises Inc v Paramount Film Distributing Corp* 346 US 537, 540-541 (1954).

[53] See for example *In Re Baby Food Antitrust* 166 F3d 112, 122 (3rd Cir, 1999)

[54] Ibid.

- there had also been a consistent pattern of calls between Apco and its competitors prior to Apco's prices increases, providing evidence of an 'opportunity' to collude (although not of collusion itself).

Would such evidence have justified the drawing of an inference as to the existence of an understanding. It seems to us that evidence of 'parallel' pricing behaviour of the type set out above would not be sufficient to draw an inference of Apco's participation in an 'understanding' in contravention of s 45 of the TPA (as 'matching' price increases may be equally consistent with independent and rational commercial conduct in a retail petrol market).

An important issue, yet to be considered by the courts is whether the inference of a proscribed understanding could be drawn from evidence of communications and price movements if that evidence was supplemented by evidence as to market conditions conducive to collusion.

These dilemmas also appear to us to raise a broader policy issue (than being posed by the ACCC in seeking to lower the 'expectation threshold') namely whether s 45, should 'capture 'tacit collusion', where there is likely to be clear expectations as to future conduct based on a pattern of conduct, but there is no communication between competitors. Some economists consider that tacit collusion may be as harmful as explicit collusion.

Conclusion

It is clear that indirect evidence can be probative of an arrangement or understanding in contravention of s 45 of the TPA.

However, in general, to date Australian Courts have been reluctant to rely solely on such evidence to prove an arrangement or understanding. A particular problem with the application of such evidence is that (particularly in oligopolistic markets) it can often be explained as being consistent with rational commercial conduct as opposed to an illegal arrangement. For example, parallel pricing behaviour in a retail petrol market is to be expected given the nature of that industry. The Adelaide Beer case is arguably an exception to this trend. However, again, where respondents in that case were able to explain their conduct on the basis of being a rational and independent commercial decision, the regulator was not able to make out the allegation.

This approach is appropriate given, amongst other things:

- that the purpose of s 45, and the TPA more generally, is to prohibit conduct that is clearly anti-competitive, rather than to capture unilateral decisions that are commercially rational;
- the large penalties that potentially attach to contraventions of s 45; and
- perhaps the Courts are not provided with sufficient evidence about the structure and dynamics of the relevant market, and general 'plus factors', to assist them to draw the inferences being sought to be drawn by the ACCC.

The approach that has been taken by Australian Courts would not appear to 'close the door' on a finding that parallel conduct can imply an arrangement or understanding if 'plus factors' of the type applied by US Courts apply.

Given the judgments to date in Australia, the challenge for applicants will be whether to seek to pursue the 'less than a commitment' approach in future cases or seek to broaden the evidentiary matrix from which they seeks to draw inferences.