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Competing Explanations for Parallel Conduct: Lessons from the Australian Detergent Case (Colgate-Palmolive)

George A Hay and E Jane Murdoch¹

I. Introduction

Parallel conduct by competing firms is an almost unavoidable phenomenon in the real world. Of course, parallel conduct can be the result of completely independent and uncontroversial behaviour, such as when all suppliers are affected by and respond unilaterally to an identical increase in costs. Few would suggest that, in such circumstances, the firms' conduct should be subject to sanctions. At the other extreme, parallel conduct can be the result of interdependent and deliberately coordinated behaviour, such as when all suppliers meet in the proverbial smoke-filled room and agree to fix prices. Few would hesitate to condemn such conduct under antitrust law or competition policy. But as economists have been telling us for decades, there is a vast middle ground, where the parallel conduct stems from some degree of interdependence and some behaviour short of the hard-core cartel described above. This is especially likely to be the case when the industry is relatively concentrated or oligopolistic in structure and firms have a history of interacting in the marketplace. Understanding the reasons for the parallel behaviour and deciding what to do about it is a central element of modern antitrust law and policy. New forces at work will increase the challenge of distinguishing acceptable and unacceptable parallel conduct. For example, the likely effect of the 2017 revisions to Australia's Competition and Consumer Act that were intended to increase deterrence of coordinated behaviour will be to bring additional behaviour under antitrust scrutiny and may broaden the grey area of what is permitted and what is not. In addition, use of artificial intelligence such as algorithmic models used in decision making may reinforce interdependence among firms and thus introduce new sources of coordinated behaviour to be evaluated through an antitrust lens. At the end of the day, an understanding of how interdependence and conduct interact will be an essential part of the exercise. This paper is intended to assist in understanding that interaction.

Under the competition laws of both Australia and the United States, price fixing and related "agreements" among competitors are generally unlawful, and the same is true among the vast majority of nations that have competition laws.² Moreover, over time there has generally been a consensus that such agreements should be unlawful; that is, the law gets it right as a matter of public policy. But the tricky operational problem is in defining exactly what counts as an "agreement" and what evidence can be relied on to establish the existence of one.

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² We are using "agreement" in this paragraph as a placeholder. In what follows we try to spell out more precisely the kinds of horizontal cooperation that may have been unlawful according to the law in place at the time of the laundry detergent events. We briefly discuss the impact of the new concerted practices law toward the end of this paper.

Ironically, in the United States, the word “agreement” does not appear in the relevant statute at all. Rather Section 1 of the Sherman Act refers to “contract, combination in the form of trust or otherwise, or conspiracy” in restraint of trade or commerce, and contains no definition of those terms or examples of what they mean. Indeed, US courts have rarely if ever attempted to distinguish among contract, combination and conspiracy, and generations of antitrust lawyers have grown used to the shorthand version of the statute to the effect that “agreements in restraint of trade” are unlawful. But the operational problem remains the same: what do we mean by agreement and how do we prove there is one?

The situation in Australia is slightly more nuanced. The statute as it existed prior to the 2010 revision referred to “contracts, arrangements, or understandings,” and unlike the situation in the US, Australian courts have attempted to distinguish among those three terms, with “contracts” being seen as the most formal of the three and “understandings” as the least formal. Nevertheless, the operational problem in Australia has been similar: what conduct rises at least to the level of an understanding, and how do we prove that such an understanding (or arrangement or contract) exists? The addition of “concerted practices” to the Australian equivalent of the Sherman Act in 2010 will affect where the line is drawn but the guidance offered for the new law is vague, pointing to behaviour likely to promote cooperation in the place of competition. One might reasonably ask, what degree of cooperation and relative to what degree of competition?

In both jurisdictions it is reasonably clear that, for the conduct to be covered, it need not rise to the level of a legally binding contract, enforceable in a court of law. To hold otherwise would emasculate the law, as few if any of the most blatant and anticompetitive cartels imaginable would be considered as constituting a legally enforceable contract. But past that end point, the clarity dissipates and the most challenging questions arise: a) how far from a legally enforceable contract can the conduct be and still be covered; and b) what kind of evidence will permit a finding that the conduct does in fact satisfy the legal standard for what is covered?

There are daunting questions about which much has been written in both countries.³ Our goal in this paper is not to attempt to provide a definitive answer to these questions. Rather we hope to make some incremental progress by coming at the problem from the other end, exploring, in the Australian context, how a firm can escape the allegation that it has been a party to a contract, arrangement or understanding even when its conduct in the marketplace appears to be roughly parallel to that of its competitors. Our vehicle for this approach is the decision of the trial judge in the laundry detergent case, upheld by the Full Federal Court, to dismiss the ACCC’s case against Cussons, the one producer of detergent that actually went to trial, determining that the Commission had not succeeded in proving that Cussons was a party to any collusive arrangement or understanding with its competitors (Colgate

³ One recent effort appeared in this Journal, Lindsay Foster and Hanna Kaci, “Concerted practices: A contravention without a definition” (2018) 26 *Competition and Consumer Law Journal* 1. Professor Hay has been writing about this topic for many years, including “Anticompetitive Agreements: the meaning of “agreement,” in Duns, Sweeney and Duke (eds.), *Comparative Competition Law*, Edward Elgar 2015, “Horizontal Agreements: Concept and Proof,” in 51 *The Antitrust Bulletin*, 2006, “The Meaning of ‘Agreement’ Under the Sherman Act: Thoughts From the ‘Facilitating Practices’ Experience,” 16 *Review of Industrial Organization*, 2000, and “Oligopoly, Shared Monopoly, and Antitrust Law,” 67 *Cornell Law Review*, 1982.

and Unilever) or with one of its major customers (Woolworths).⁴ It is our hope that an analysis of the evidence in the case and the claims that were made (and either accepted or rejected) based on that evidence will assist in framing the ongoing debate about where the boundary between lawful and unlawful conduct lies (or should lie) and highlighting the kinds of economic evidence that advance the debate. While we think the outcome of the debate will be affected by the changes in the language of the governing law (such as the inclusion of “concerted practices”) and by developments in how firms interact in the real world (such as competing firms’ use of artificial intelligence to guide strategic decisions), understanding interdependence and how it interacts with behaviour will be a necessary part of the process.

II. Allegations and Prima Facie Evidence

The alleged collusive arrangement or understanding

In March 2009 “standard” powder laundry detergent manufactured by the three largest suppliers in Australia, Unilever, Colgate, and Cussons, was removed from shelves of Woolworths and Coles grocery stores and largely no longer supplied through Metcash, Australia’s major wholesaler to independent grocery stores and was replaced with “2x concentrated” formulations.⁵ According to the ACCC’s statement of claim, the major detergent suppliers and Woolworths reached an arrangement or understanding between April 2008 and January 2009 to coordinate this largely simultaneous, discrete, and thoroughgoing transition from standard to 2x concentrated (or “ultra”) detergent in March 2009.⁶

The ACCC made two similar but alternative claims about the nature of the arrangements between detergent suppliers.⁷ The first alleged a Withhold Supply Arrangement, which was said to restrict the supply of concentrated detergent before March 2009, to restrict the supply of standard detergent after

⁴ The decisions, in order, were *Australian Competition and Consumer Commission v Colgate-Palmolive Ltd* (No 4) [2017] FCA 1590 (“Detergent Case”) and *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* [2019] FCAFC 83 (“Detergent Case, Full Court”).

⁵ Throughout the following discussion references are to powder detergent unless otherwise specified. Powder laundry detergent accounted for roughly two thirds of total laundry detergent sales in Australia in the relevant period. Detergent Case, [87]. In fact, the timing of the transition was not perfectly precise. Some 2x concentrated Cussons products were available to Woolworths, Coles, and Metcash retail customers beginning in February 2009, and Metcash continued buying a standard concentrate stock keeping unit from Cussons for some time after February. *Ibid.*, [373]-[374].

⁶ The original complaint brought by the ACCC was against Colgate, Cussons, and Woolworths. Unilever had immunity protection as an informer and was cooperating with the ACCC. Colgate and Woolworths reached settlement agreements with the ACCC before the trial commenced and paid penalties set by the Federal Court of \$18 million and \$9 million respectively. See, Michael Janda, “Colgate-Palmolive to pay \$18m penalty for laundry detergent cartel,” ABC News, 28 April, 2016 at <https://www.abc.net.au/news/2016-04-28/colgate-palmolive-penalised-for-laundry-detergent-cartel/7367394> and Michael Janda, “Woolworths penalised \$9m by Federal Court over involvement with laundry detergent cartel,” ABC News, 3 June, 2016 at <https://www.abc.net.au/news/2016-06-03/woolworths-penalised-9m-dollars-over-laundry-detergent-cartel/7475838>. Documentary evidence from all of the original respondents and Unilever and Accord (the trade association to which Australian suppliers of laundry detergent belonged) was considered at trial. However lay witnesses from only Unilever and Cussons were called to testify.

⁷ The ACCC’s third allegation, that suppliers priced the new products at parity with the old product on a per-wash basis, was eventually dropped from the proceedings.

March 2009, and to restrict the supply of concentrated detergent to products meeting particular concentration levels, box sizes, on-pack communications, and the like.⁸ The second claim concerned an Aligned Transition Arrangement, which alleged effectively the same anticompetitive behaviour, with additional claims of anticompetitive purpose and effect or likely effect.⁹

Either alleged Arrangement would have had the effect of ensuring that Coles and Woolworths (the major retailers) and Metcash (the wholesale supplier of independent and smaller chain grocery stores) would not be offering both standard and concentrated detergent simultaneously. The Commission alleged that in a world without the Arrangements, one or more of the suppliers would continue to supply standard concentrate detergent.¹⁰ Thus, consumers would be faced with 2x concentrated boxes that would be half the size of a wash load-equivalent standard concentrate detergent box but offered at the same price. If some consumers failed to recognise that different-sized but equivalently-priced boxes offered an equivalent number of washes, they would be drawn to purchase the larger boxes. This customer confusion would cause suppliers to cut prices on the concentrated detergent to gain sales of the lower-cost new product.¹¹ Thus, according to the ACCC, a new source of price competition would be injected by a non-uniform or staggered product transition, which, the Commission claimed, would surely have occurred in the absence of an arrangement or understanding to coordinate the transition.¹²

The ACCC alleged that arrangements or understandings concerning the supply of detergent were reached through a number of meetings and communications between the detergent suppliers and/or through bilateral meetings between Woolworths and suppliers. At trial, the ACCC described hub-and-spoke arrangements whereby first Accord, the Australasian industry association for laundry detergent and other products, and then Woolworths communicated to each major supplier or facilitated communication between the major suppliers such that each learned the plans of its competitors concerning the timing of their product line transition and the new level of detergent concentration.¹³ In its closing submission the ACCC referred to an alternative structure, involving a series of parallel vertical arrangements between Woolworths and suppliers and a horizontal understanding among suppliers to coordinate through this mechanism. This second alleged arrangement appears to have been

⁸ The in-store transition date was said to have been originally set for February 2009 but changed, before that date, to March 2009.

⁹ Ibid, [642]. The judge postulated that the Withhold Supply formulation, if proven, would have allowed the ACCC to claim exclusionary provisions without having to prove that the participants had a purpose of substantially lessening competition or that the provisions would have had, or would have been likely to have had, the effect of significantly lessening competition. The Aligned Transition formulation of the claims required that these other elements be proven. Ibid, [643]. The separate provision on exclusionary practices in the Competition and Consumer Act 2010 was repealed in the 2017 amendments flowing from the Competition Policy Review.

¹⁰ A supplier supplying standard concentrate detergent in 2009 might also have supplied 2x concentrated detergent under the ACCC's theory. Ibid, [16].

¹¹ Ibid, [661]-[662].

¹² The ACCC alleged that the suppliers and Woolworths gave effect to their arrangement or understanding from January through December 2009. Ibid, [17]. The Commission did not quantify the expected price decrease absent the alleged collusion. As will be discussed below, powder detergent prices fell in the months following the transition.

¹³ Ibid, [30], [448], [507].

distinguished from a hub-and-spoke structure by a more developed arrangement or understanding among suppliers (a “horizontal arrangement”) to communicate and coordinate through Woolworths.¹⁴

There was no “smoking gun” evidence of an explicit agreement to coordinate behaviour. Therefore the particular question before the judge at trial was whether the third supplier, Cussons, had entered into any arrangement or understanding to participate in a coordinated transition to concentrated detergent.

Parallel behaviour occurred

There was no question that the major suppliers changed their product offerings in a strongly similar manner and largely at the same time. In the week beginning May 9, 2009 Woolworths stores around Australia introduced an almost complete array of “2x concentrated” or “ultra” powder detergent supplied by Unilever, Colgate, and Cussons in place of the formerly available “standard” detergent from each of these suppliers. A similar changeover began at Coles stores within a week.

Among the elements of parallel behaviour that were claimed by the ACCC at the outset, three were largely undisputed: the major suppliers all concentrated their standard detergents by factor of 2x; the changeover from standard to ultra powder detergents occurred (in very large part) in Woolworths and Coles stores and in the Metcash wholesale supply chain in March 2009; and, the transition from the supply of standard to 2x concentrated detergent was largely simultaneous and largely a complete switchover.¹⁵

Of these three elements of parallel behaviour, the first appeared to be mainly an artefact of technological limitations. For technical and production cost reasons, each supplier ultimately hit a limit of 2x the concentration of its standard powder detergent.¹⁶ Cussons alone appeared to have considered a choice between 2x concentrate and a weaker concentration of 1.5x, but concluded in a feasibility study in early 2008 (well before the first Accord meeting or any communications from Woolworths indicating what Cussons’ rivals were doing) that any non-integer change in concentration would be too confusing for consumers.¹⁷ No supplier was able to achieve a workable 3x concentrated powder detergent.¹⁸

Other elements of parallel behaviour claimed by the Commission, those describing certain marketing details, were either not borne out or not established at trial. The suppliers did not adopt similar pack sizes.¹⁹ The claim of prescribed parameters concerning advertising, communication and product claims

¹⁴ Ibid, [30], [514]. The case law that the ACCC cited was from *British Basic Slag* and the *Super League Case*. Ibid, [450], [507]-[508].

¹⁵ In fact, there was evidence that some Woolworths, Coles and Metcash stores began selling some of Cussons’ new 2x concentrated versions of its laundry detergent brands in February 2009. Ibid, [373], [605]. The ACCC claimed the volumes were not material, but the judge rejected that submission, finding that “[T]he supplies were of a size and scale that was inconsistent with the existence of any arrangement or understanding including provisions of the sort alleged by the Commission.” Ibid, [606]. In addition, Cussons did continue to sell some standard concentrates to Metcash after March 2009. Ibid, [374]. The judge considered this supply inconsistent with the relevant provision of the alleged Withhold Supply Arrangements. Ibid, [632].

¹⁶ Ibid, [611]-[612].

¹⁷ Ibid, [611].

¹⁸ Ibid, [611], [612].

¹⁹ Ibid, [377]-[378], [617].

on packaging received little attention at trial and the judge found no evidence of illegal coordination.²⁰ And the allegation of parity pricing such that the wholesale list price per wash would be the same for standard and 2x concentrated detergent packs offering the same number of washes ultimately was not pressed.²¹

Thus, the two focal points of the trial were the single date for a transition, particularly as it moved from an originally planned date three weeks earlier, and the fact that all suppliers abruptly and completely cut over to supplying the new concentration and ceased offering the old.

III. Laundry Detergent Supply

The economic incentives to supply concentrated laundry detergent

The context of the laundry detergent market in Australia and elsewhere in the world is important for understanding actions taken by the market participants. By 2008, the retail market for laundry detergent in Australia was mature and highly concentrated. The three largest suppliers, Unilever, Colgate, and Cussons accounted for approximately 80 percent of detergent sales.²² The buying side of the market was even more concentrated consisting mainly of Woolworths, Coles, and the wholesale grocery supplier, Metcash. In 2008, more than half of detergent retail sales were made at promotional or discounted prices.²³ Supplier margins were thin and below corporate targets, in spite of the fact that retailers subsidised promotional pricing for laundry detergent more than for many other products sold in grocery stores. No party in the supply chain was getting rich selling detergent.²⁴

By early 2008 oil prices denominated in US dollars were rising, and the cost increase in Australia was exacerbated by a weakening Australian dollar. This trend was relevant to laundry detergent suppliers because petroleum-based products were an important cost component of the filler in standard concentration detergent. Compaction would reduce filler ingredients and was expected to lead to very significant savings on inputs, packaging, storage, and logistic costs.

Each of the major detergent suppliers in Australia belonged to a global corporate family and was well aware that transitions to 2x concentrated detergent had already occurred in Europe and the United States. The move to more concentrated laundry detergent in Australia seemed inevitable, for cost and environmental reasons. However, because each supplier produced its own array of branded products at plants in Australia or New Zealand, it fell to the Australian suppliers to develop the science and processes for compacting their detergents. Each supplier sought an integer change in concentration that would be easy to communicate to consumers, whether 2x or 3x, and each supplier also aimed for its scientists to formulate a new product that could be promoted to consumers as offering the same

²⁰ Ibid, [618]. There were some discussions of messaging to consumers in industry meetings, but no agreement was reached. There were also some in-store communications the cost of which was shared by suppliers and Woolworths. The judge found that these discussions and cost-sharing did not rise to the level of an illegal arrangement or understanding. Ibid, [619].

²¹ Ibid, [18]. In fact, Cussons changed its per-wash wholesale pricing on a number of stock keeping units at the time of the transition.

²² Ibid, [94].

²³ Ibid, [98].

²⁴ Ibid, [99].

cleaning performance for a fraction of the detergent used. For reasons of technology and production costs, each supplier ultimately hit a limit of 2x the concentration of standard detergent.

For retailers, the transition to concentrated detergent would mean significantly reduced transport, handling, and storage costs and the freeing up of shelf space that could profitably be used for other products or a larger display of the concentrated powdered detergents, with lower associated stocking and “out of stock” costs. In addition, recognizing that detergent manufacturers would realise important cost savings, retailers looked for their own direct cost savings. For example, Woolworths informed the suppliers that it expected to discontinue its past subsidization of promotional pricing events once concentrated detergent was introduced.²⁵ In this way, Woolworths expected to share directly in some of the suppliers’ cost savings.

Prior transitions to concentrated detergent

By the time Australian detergent suppliers were considering compaction as a cost-reducing measure, they could look to several past experiences of the introduction of reformulated detergent in various markets. Powdered laundry detergent had, in fact, been concentrated once previously in Australia.²⁶ In that effort, both old and new products were available simultaneously on grocery shelves. Colgate considered that the availability of two powder formulations (one appearing to offer more product per dollar spent) had stretched the transition to concentrated powder over a multi-year period.²⁷ Unilever looked with some concern to Turkey, where an agreement had been reached in the context of an industry association about a transition to concentrated product but Procter & Gamble deviated from the agreement and continued to offer its old product while also introducing the new, compacted formulation.²⁸

On the other hand, a smaller-scale natural experiment in Australia lent support for the notion that price competition would not necessarily break out in an “unaligned” product transition. In early 2008, Unilever moved to offering only compacted liquid laundry detergent, Cussons offered both concentrated and standard versions of one of its liquid detergents, and Colgate continued offering only its standard concentration liquids.²⁹ Retail grocery data reflected that Unilever actually gained market share, and Cussons lost share but did not significantly reduce prices in an attempt to maintain share.³⁰ Indeed, Cussons raised its liquid detergent prices.³¹ There was no significant price competition for liquid detergent following this partial transition.³² Thus, the experience of the partial product transition for

²⁵ Ibid, [248].

²⁶ Beginning in the late 1980s, suppliers had compacted low density powder detergent to the formulation that was known as “standard” during the period relevant to the ACCC’s claims.

²⁷ Ibid, [129]. Data were not available to measure any price effects of the previous protracted transition to a more concentrated powder detergent.

²⁸ Ibid, [340], [462].

²⁹ Ibid, [668].

³⁰ Ibid, [668].

³¹ Ibid, [668].

³² Ibid, [668].

liquid detergent ran counter to the Commission's claim that the presence in the market of different detergent formulations would lead to increased price competition.

Colgate and Unilever each considered that the transition to ultra-concentrate laundry detergent in the United States provided a roadmap to a smooth and profitable transition.³³ Walmart was credited with leading the American transition effort by educating consumers that packages of concentrated detergent cost the same on a per-wash basis as the old, larger boxes.³⁴ Moreover, Walmart specified a date beyond which it would no longer carry the old product on its shelves.³⁵ Where Walmart led, the rest of detergent supply in the US followed, and the transition to ultra concentrate detergents in the US was considered to have been accomplished in a short time and with minimal consumer confusion.

Once-per-year "Major Category Reviews" in grocery stores

The role of retailers in accommodating product line transitions is important for understanding how the transition might play out with or without an illegal arrangement to coordinate behaviour.

Woolworths and Coles both had processes by which new product lines were introduced according to a predictable schedule of one major and one minor "category review" per year.³⁶ For major reviews, retailers would reconsider the entire range of product offerings and potentially make broad changes to the category.³⁷ Minor reviews involved modest product changes with minimal in-store impact.³⁸ If a supplier did not meet a retailer's schedule for a major review, then it likely would be unable to change significantly its range of products until the next major review, a year later.³⁹ Woolworths and Coles category reviews generally started and finished at the same time. Once Woolworths set category review dates, typically six to twelve months in advance, it rarely moved them.

Sweeping changes of category stock keeping units, as was contemplated for concentrated laundry detergent, were rare events. They involved significant effort and expenditure by retailers and the potential for considerable disruption in the stores. New "planograms" – detailed drawings of shelf space allotments for each product and stock keeping unit – were drawn for every store configuration, and new shelving to accommodate the new pack sizes was purchased for installation at the changeover date.

For economic reasons, the major retailers would not have wanted a situation in which some suppliers introduced concentrated detergent while others deliberately delayed the introduction. If suppliers transitioned in a staggered fashion, retailers' would need to expend incremental effort and money for each product line change.⁴⁰ Additional planogram revisions, new shelving, and new communications to customers would be necessary for each product line changeover. The need to accommodate different

³³ Ibid, [130], [170], [177].

³⁴ Ibid, [120].

³⁵ Ibid, [120], [130].

³⁶ Ibid, [121]. Woolworths' major and minor category reviews for the laundry category were in or around February and July, respectively.

³⁷ Ibid, [121]-[122], [124].

³⁸ Ibid, [124].

³⁹ Ibid, [125].

⁴⁰ Unilever observed internally in mid-2008 that "Certainly the retailers would prefer to change their layouts once, rather than twice as the costs are quite prohibitive." Ibid, [199].

box sizes in stores and warehouses would also add to retailers' costs. In short, there were significant economies from retailers transitioning all suppliers' detergent lines at the same time.⁴¹ For some of the same reasons, retailers would prefer that each supplier switch its entire product line to the new concentration levels rather than offering old and new concentrations or pack sizes among the suppliers' brands.

The retailers' practice of conducting one major category review per year bore on the timing and the simultaneity of the transition to concentrated detergent. Two of the suppliers, but not Cussons, had technical difficulties maintaining product performance as they eliminated filler. This caused them either to request or to be amenable to a modest deferral of the major category review date. The willingness of the suppliers and Woolworths to agree to a transition date three weeks later than Woolworths originally planned was a major element of the ACCC's allegations of coordinated behaviour.

IV. Communication Among Industry Participants

Two types of meetings occurred in relation to the transition to concentrated powder detergents. The first were meetings in which all the major suppliers were present, occurring under the umbrella of the trade association, Accord. Accord circulated written communications to all detergent suppliers in relation to its meetings. The second type of meetings were bilateral ones in which Woolworths met with detergent suppliers individually to discuss transition plans and logistics. Woolworths also communicated via email to individual suppliers and sometimes to multiple suppliers simultaneously.

Trade association meetings

In March 2008, Colgate presented a proposal to Accord suggesting that the industry body enable a voluntary, industry-wide and non-partisan "sustainability initiative" in relation to higher concentration laundry detergent formulas across Australia and New Zealand.⁴² Colgate subsequently prepared and presented to Accord a written proposal that included the notion of a voluntary agreement (including all manufacturers, wholesalers, and retailers) for a full category transition to ultra concentrates by an agreed date in 2009 led by an industry body such as Accord. Other key terms included an agreement on the definition of sustainable concentration, and a compliance logo that would indicate when a product met agreed standards of concentration.

In April 2008 Accord circulated the Colgate sustainability initiative proposal, without attribution, to detergent suppliers including the three largest, Colgate, Unilever, and Cussons.⁴³ A meeting of suppliers and Accord occurred to discuss the Colgate proposal shortly after it was circulated. The participants agreed that any eventual agreement would need to be cleared by both Accord lawyers and the ACCC. The ACCC alleged that, from the time the Accord proposal was circulated and Accord held the meeting to discuss the proposal, the suppliers reached an agreement in principle in relation to the transition to concentrated detergent, in particular that reformulation would be to 2x concentration and that the

⁴¹ Ibid, [121]-[126] and [591]-[592].

⁴² Ibid, [138].

⁴³ The circulation of this document marked the earliest date from which the ACCC alleged that an arrangement or understanding might have been reached among the largest suppliers. Ibid, [143]-[147].

transition would occur in early 2009.⁴⁴ However, the judge concluded that the evidence did not establish that there was any agreement concerning these issues.⁴⁵

The next Accord-supplier meeting occurred in August 2008.⁴⁶ Acting on legal advice, Cussons refused to agree to any complete transition to detergent of a specific concentration on a specific date. This was the beginning of the end of any potential formal coordination through Accord, although the ACCC argued that the essential elements for the terms of an agreement had been planted. The final nail in the coffin for any action by Accord occurred at an October 2008 meeting at which Colgate withdrew support for the notion of an industry-wide labelling proposal.⁴⁷

Woolworths as Walmart

Past detergent product transitions in Australia and the US led Colgate to conclude that the transition would be accomplished significantly more quickly, with more of the attendant cost-savings realised sooner, if there was an industry-wide hard cutover to the higher-concentration products. Early internal Colgate memos reflected this thinking:

The preferred route is to encourage a paradigm shift towards a total market transition by Jan 2009. Some of this is driven by technical and manufacturing readiness We also believe that it is in the interests of the consumer to present a clear, new Ultra shelf at once without a 'mixed shelf' of Ultra and non-Ultra products. To achieve a category transition we would like to engage [retailers'] support and leadership.⁴⁸

... a staged approach is unlikely to work, full changeover is the fastest and best way to implement and avoid shopper/consumer confusion.⁴⁹

At a meeting with Woolworths in January 2008, Colgate recommended a full category transition at a fixed date led by Woolworths, calling this the "Walmart paradigm."⁵⁰ Woolworths' response to Colgate was that Woolworths was "on the same page" but would not provide retailer leadership in the way that Walmart did.⁵¹ Woolworths' minutes of the meeting describe its response:

We can't influence other vendors, we can only mention them [*sic*] that some vendors go in that direction. We won't do anything against vendors who don't go in that direction.⁵²

Unilever also undertook an effort to persuade Woolworths to direct a hard cutover to concentrated detergents on a date certain.⁵³ Unilever's efforts to bring Woolworths on board included a session

⁴⁴ Ibid, [147], [168].

⁴⁵ Ibid, [168].

⁴⁶ Accord circulated a revised sustainability initiative proposal in advance of the meeting. Ibid, [302].

⁴⁷ Ibid, [341]-[342].

⁴⁸ Ibid, [119].

⁴⁹ Ibid, [129].

⁵⁰ Ibid, [130].

⁵¹ Ibid, [132].

⁵² Ibid, [133].

⁵³ Ibid, [225].

discussing Walmart's role in the laundry detergent transition during a North American study tour organised by Unilever and Woolworths.⁵⁴ But Unilever's appeal to Woolworths to take on the role filled by Walmart in the US, like Colgate's proposal, was declined.⁵⁵

Ultimately, Woolworths did have a central role in determining that the major detergent suppliers would transition all their brands in Woolworths stores at a time set by Woolworths. However, this coordination came after it was clear that all the major suppliers were planning a transition, and Cussons argued that it was consistent with Woolworths' long-held practice of staging one major category review per year. As is discussed below, Woolworths departed from its standard practice when it delayed the planned in-store transition date by three weeks. This change appears to have been driven primarily by the fact that Unilever was unable to meet the February in-store deadline due to difficulties reformulating certain of its brands.⁵⁶ Colgate may have facilitated Woolworths' decision to delay by letting Woolworths know that Colgate could make a smoother transition if given more time.⁵⁷ For some weeks, Woolworths resisted moving the category review date, in keeping with its usual resistance to category review scheduling changes. The ACCC claimed that the major suppliers combined their supply-side market power to impose a three-week delay for the detergent changeover at Woolworths. Absent this exercise of market power, said the Commission, the product transition would have begun in February 2009 and, importantly for competitive effects, it would have been drawn out over time and across brands, resulting in a mix of ultra and standard detergents being on the grocery shelf simultaneously.

Woolworths planning communications

The rate of communications between Woolworths and suppliers increased from around August 2008, consistent with the normal window for planning a major category review. Notable examples of communications from Woolworths in August included an update to Cussons providing some detail about Unilever's and Colgate's thinking about package and scoop size and also an indication that each was developing 2x concentrations.⁵⁸ Woolworths also sent a "generic" email to all suppliers indicating an understanding at Woolworths that all suppliers would be changing over at the category review date and seeking to confirm that understanding.⁵⁹ In yet another August email, Woolworths expressed to suppliers an expectation that there would be parity pricing between old and new product (i.e., the per-wash wholesale price would be equal for boxes offering the same number of washes) and announced that future promotions would need to be fully funded by the detergent suppliers.⁶⁰ The ACCC claimed these emails constituted intentional signalling by Woolworths.⁶¹

⁵⁴ Ibid, [169].

⁵⁵ Ibid, [177].

⁵⁶ Ibid, [262].

⁵⁷ Ibid, [263]-[270].

⁵⁸ Ibid, [231].

⁵⁹ Ibid, [239].

⁶⁰ Ibid, [248].

⁶¹ Ibid, [239].

V. Expert Economists' Different Paradigms

The main legal issue was whether the parallel conduct was the result of an arrangement or understanding among the parties. Given the absence of a "smoking gun," the issue would have to be resolved on the basis of circumstantial evidence. In that context, economic evidence often plays a prominent role and that was true in this case as well.

While the language used in articulating the economic approach is often more technical, the concept is fairly straightforward. There are essentially two competing hypotheses to explain the parallel conduct. The first is that the conduct is the result of unlawful conduct – here, an agreement, arrangement or understanding. The second is that the parallel conduct results from lawful conduct. The applicant (or plaintiff) wants to argue that the first hypothesis is more plausible than the second; the respondent (or defendant) wants to argue the opposite. As a general, rule, in most civil law jurisdictions, the burden of persuasion is on the plaintiff; viz., the agreement hypothesis has to be more plausible than the lawful, conduct hypothesis, so that all the defendant has to show is that there is an equally plausible hypothesis involving lawful conduct adequate to explain the conduct.

A few simple examples may illustrate the point. Assume that Melbourne University wants a new classroom building and puts the project out for bids. Since the construction business has numerous competitors, there are many bids (say, 10) but they all come back identical to the dollar. The plaintiff's basic argument is that this outcome is implausible without hypothesising a prior agreement among the competitors not to compete and to submit identical bids, or at least that the agreement hypothesis is far more plausible than the hypothesis that the outcome was the result of lawful, competitive conduct.⁶² Of course defendants may come up with some context-specific explanation that affects the balance, but absent that, the plaintiff is likely to succeed.

Contrast the previous example with an alternative. In the week before Christmas, all the holiday-area hotels and campsites near Barwon Heads increase prices. Of course it is possible they conspired and it is difficult or impossible in such circumstances to prove a negative. But you don't need the conspiracy hypothesis to explain the outcome. It seems more plausible (or at the very least, no less plausible), that the higher prices are what happens in a competitive market when sharply increased demand comes up against a relatively fixed supply. So you simply don't need the conspiracy hypothesis to satisfactorily explain the outcome.

The key to the process is articulating the competing hypotheses with a sufficient degree of precision to fit the context of the case. In the detergent case there were two complications. The first is that, under the statute at the time, illegal conduct could include an agreement, an arrangement or an understanding and, while these are often ill-defined, it was widely agreed that they are not all the same. The second complication is that, in contrast to the examples above, no one would have described the detergent industry in Australia as structurally competitive. The market on the supply side was highly concentrated with three major suppliers. Moreover it was highly concentrated on the buying side as well, with Coles and Woolworths being the dominant buyers. In addition, the industry was mature with

⁶² Of course in criminal cases, the plaintiff's burden is more substantial; the conspiracy hypothesis has to be far more plausible than the alternative hypothesis. (Again, the language used may be more technical.)

the same suppliers and the same buyers having played their respective roles for some period of time prior to the alleged unlawful behaviour.

These issues were addressed by the economic experts, Professor Philip Williams for the ACCC and Professor George Hay for Cussons, but they chose different ways to frame the competing hypotheses. Each economist specified that one hypothesis was that the parties were acting pursuant to an unlawful agreement, arrangement or understanding. Professor Williams framed the competing hypothesis as whether the actions of the detergent suppliers and Woolworths were consistent with a notion of unilateral profit-maximising behaviour, but, as we will discuss, with a very narrow view of what counted as “unilateral.” Professor Hay, on the other hand, framed the competing hypothesis as whether the parties were acting unilaterally and lawfully in an oligopolistic and therefore interdependent environment.

Characterizations of interdependence and unilateral behaviour

Both economists agreed that in an oligopoly firms recognise their interdependence. That is, firms recognise that economic outcomes in the market depend not only on their own actions, but also on the actions of their competitors.⁶³ In addition, both experts agreed that in concentrated markets where firms interact repeatedly over time, they learn about rival firms’ behaviour in the marketplace. Through this mechanism, firms’ unilateral behaviour may become coordinated without the firms entering into an agreement, arrangement or understanding that the courts would find to be illegal. Economists describe this outcome as conscious parallelism or tacit collusion. The experts agreed that in a setting with conscious parallelism or tacit collusion, rivals might unilaterally react to their competitors’ market behaviour without any words being conveyed between the parties and that this behaviour would not be proscribed by antitrust laws.⁶⁴ However, when the economic experts turned to describe the unilateral behaviour they would envision in a hypothetical setting without anticompetitive communication, their views differed sharply.

Professor Williams’ concept of unilateral behaviour was distinguished by an absence of *any* communication among players in the marketplace.⁶⁵ This “no communication” standard excluded even

⁶³ In a related but ultimately not determinative discussion, the economists debated the usefulness of certain oligopoly models for describing how a recognition of interdependence might shape firms’ actions. Professor Williams proposed as useful a Bertrand model with differentiated products. Professor Hay argued that such a “static” model does not adequately capture the learning and behavioural changes that can occur when firms in concentrated markets compete against each other over time. Ibid, [392]-[394]. The judge concluded that a resolution of this difference of opinion was not directly relevant for the detergent matter. However, he clearly preferred an approach that recognised that some sharing of information would occur in the natural course of detergent suppliers and Woolworths planning a transition, and that firms might base decisions, in part, on information gleaned through the planning process. Ibid, [657]-[660].

⁶⁴ Ibid, [389]-[391]. Whether, or to what degree, courts will tolerate conscious parallelism under the new law relating to concerted practices is an important question that was not an issue in the detergent matter. We discuss it briefly toward the end of this paper.

⁶⁵ Ibid, [655]-[657].

conscious parallelism or tacit collusion and would preclude, for example, the suppliers learning even benign market intelligence as they worked with Woolworths to plan for the detergent transition.⁶⁶

Professor Hay's standard for "unilateral" behaviour disallowed only illegal communications among market participants.⁶⁷ He asked whether actions taken by the suppliers and/or Woolworths were consistent with their independent economic incentives in a mature oligopolistic market with the kinds of information flows that one would expect in such a setting. As Professor Hay noted, while his test could not disprove the existence of collusive behaviour, it could test the validity of a competing theory of lawful behaviour.⁶⁸

The judge found that there was no evidence supporting the notion that the counterfactual world that Professor Williams was asked to assume would have existed in the absence of the Aligned Transition Arrangement.

Indeed, the evidence relied on by the Commission suggested that indirect and implicit communications and other forms of "coordinated interaction", which did not without more constitute or comprise the proscribed arrangements or understandings, were, and were likely to continue to be, commonplace in the laundry detergent market. It was, for example, highly likely that in the counterfactual world, each of the Suppliers would continue to have the incentive and means to seek out and obtain market intelligence from the major retailers, Woolworths and Coles, about the plans and decisions of their competitors. The counterfactual world that Professor Williams was asked to assume permitted no such forms of indirect communication or coordinated interaction. It was, in that respect, artificial and unrealistic.⁶⁹

The judge observed that, even if Professor Williams' counterfactual was anchored in economic models as the ACCC claimed, that "does not mean that it was a relevant or appropriate counterfactual."⁷⁰ The suppliers were "never likely to operate in a hermetically sealed chamber."⁷¹

[Professor Williams'] opinions left open the possibility that the simultaneous transition and cessation of the supply of standard concentrates in March 2009 was the result of direct or indirect communications between the Suppliers of a sort that could not be characterised as an

⁶⁶ Ibid, [655]. The ACCC submitted that Professor Williams' counterfactual did not exclude benign communications but would exclude retailers passing on commercially sensitive information from one supplier to another. However, at trial, Professor Williams again ruled out all communication, direct or indirect, between rival detergent suppliers and between suppliers and third parties such as retailers. Ibid, [659].

⁶⁷ Professor Hay argued that by now the notion that oligopolistic interdependence can lead to cartel-like outcomes without any agreement has been widely accepted in the economics literature and has been accepted by US Courts.

⁶⁸ In a case where each firm was behaving in a way that was individually rational, the existence of a collusive agreement, arrangement, or understanding would not be necessary to explain the observed behaviour of the firms, but the existence of such an agreement, arrangement, or understanding would still be possible. In other words, there is not a risk of a Type I error (assuming collusion where there is none), but there is a possibility of a Type II error (assuming no collusion, even though it did occur). If a benign explanation of the observed behaviour were established, any conclusion regarding legality would necessarily fall back on the strength of the evidence about the extent and nature of the communications between industry players.

⁶⁹ Ibid, [657].

⁷⁰ Ibid, [659].

⁷¹ Ibid, [659].

agreement, arrangement or understanding. His opinions left open the possibility that the parallel conduct was the product of, for example, market intelligence obtained from Woolworths and Coles, or the Suppliers otherwise unintentionally signalling their plans and progress via their discussions with the retailers.⁷²

The focus then of the economic analysis was Professor Hay's contention that the parties' conduct (or at least that of Cussons) could be satisfactorily viewed as consistent with unilateral profit-maximising behaviour in the context of a mature oligopoly. In that sense it would not be necessary to hypothesise an agreement, arrangement or understanding to explain the observed conduct.

VI. Economic Analysis Addressing the Two Central Questions

The change in the transition date – evidence bearing on Woolworths' independent incentives

The importance of the precise definition of unilaterally rational behaviour is illustrated by the economists' approach to the question of the timing of the detergent transition in the retail stores. This was one of the two key questions before the judge. Professor Williams considered that, because Woolworths strongly wished to adhere to its scheduled date for the detergent changeover to avoid knock-on effects for other category reviews, the change of the in-store review date from February to March 2009 was more likely due to some form of coordinated conduct between the major detergent suppliers to influence Woolworths than due to unilateral conduct by the suppliers.⁷³ Professor Hay considered that the delay was consistent with a rational outcome of independent behaviour informed by lawful communications.

As discussed above, Woolworths declined invitations from Colgate and Unilever to direct a detergent transition in the "Walmart style." Nonetheless, by virtue of a need to coordinate the product line changes in its stores, Woolworths eventually took on a *de facto* coordinating role. Woolworths had strong unilateral incentives to conduct a single product changeover and thereby minimise costs and in-store disruptions. This logic had been institutionalised in the grocery retail business, with major product line changes occurring only once per year for the laundry category. Because major category reviews could be disruptive in stores, Woolworths coordinated them carefully across all categories. Changing a major review date was a rare occurrence.

Woolworths' central role in the supply chain required the communication of information to suppliers, with increasing frequency and detail as the time approached for nailing down plans.⁷⁴ These communications mostly took the form of bilateral meetings or emails between Woolworths and a single supplier. Sometimes in these communications Woolworths would inform a supplier of other suppliers'

⁷² Ibid, [402].

⁷³ Ibid, [404].

⁷⁴ Coles' incentives and views about scheduling were similar to Woolworths', as were its communications with suppliers. Ibid, [191], [500]. Coles expressed the same preference as Woolworths that the transition happen at the same time for all suppliers. Ibid, [194], [626]. However, Coles had more flexibility on the timing of its laundry category review, preferring primarily to introduce the new detergents at the same time as its competitors. Ibid, [250]. Coles was not named in any pleadings. The judge observed that Coles appeared to take "a very similar approach to Woolworths in its dealings with the Suppliers concerning the proposed transition" and noted that it was "unclear why Coles was, or should be considered to be, in any different position to Woolworths." Ibid, [501].

plans in broad terms. For example, as concerned suppliers' preparedness, Woolworths told Unilever that Unilever's plans were too conceptual compared to its major competitor and likewise told Colgate that Colgate was better prepared than its competition.⁷⁵ In this way, a supplier might learn how its own readiness to introduce ultra detergents compared to the readiness of the other major suppliers. Woolworths also occasionally sent emails to a broad group of detergent suppliers with summary references as to when and how the planned transition would take place.⁷⁶

In August 2008 Unilever determined that it would not be ready to transition all its detergents by the February 2009 laundry launch date originally set by Woolworths. An internal Unilever email stressed that it wasn't a question of resources, there simply was not enough time.⁷⁷ Colgate was having some technical difficulties of its own, and welcomed more slack in the launch schedule for a smoother execution of the transition.⁷⁸ Cussons appeared to be the supplier best prepared for a February 2009 launch of ultra detergents and it did not appear to engage in discussions about moving the launch date, except to try to clarify the retailers' expected timing.⁷⁹

During the month of August 2008, Unilever and Colgate each let Woolworths know that their firm would be able to more completely and successfully transition to ultra concentrated detergent if the transition date could be delayed until March. The Woolworths Business Manager directing the transition was unwilling to change the scheduled launch date and told both Unilever and Colgate that any products that could not be compacted to ultra concentration would be "de-ranged," that is, not carried on store shelves.⁸⁰ Unilever and Colgate each took the discussion of the launch date to the Business Manager's superiors, who backed the Manager but remained open to discussion with each supplier. Woolworths finalised the delayed launch date of March 2 2009 and communicated it to Unilever and Colgate at the end of August 2008.⁸¹ Cussons learned of Woolworths' decision a number of weeks after Colgate and Unilever.⁸²

In the background of Unilever's and Colgate's bilateral discussions with Woolworths, an internal Unilever email in mid-August said "I believe we require a joint approach from all manufacturers in order to push for a delay to March."⁸³ It did appear that Colgate and Unilever were aware of a common preference for a delayed transition date and used this argument in their attempts to sway

⁷⁵ Ibid, [226], [229].

⁷⁶ For example, in August 2008 (before the transition date was postponed), Mr. Fuchs of Woolworths sent an email to all the major suppliers, seeking to confirm his expectation that all suppliers would transition products to concentrated versions to be in stores on February 11, 2009. The judge considered this communication had not been shown to be anything other than "a unilateral communication from Mr. Fuchs seeking to confirm what he had learnt from his individual meetings with the Suppliers so that he could plan for the changeover from Woolworths' perspective." Ibid, [245].

⁷⁷ Ibid, [256].

⁷⁸ Ibid, [202], [263]-[264], [268], [270].

⁷⁹ Ibid, [105], [204], [217].

⁸⁰ Ibid, [626], [629].

⁸¹ Ibid, [316], [318].

⁸² Cussons' uncertainty about the review date extended to at least around mid-October. Ibid, [330]-[331], [334]-[335], [347].

⁸³ Ibid, [255].

Woolworths.⁸⁴ Whether Unilever and Colgate formed their beliefs based on information shared by Woolworths or on conversations between employees of the two firms was not a topic of inquiry addressed by the judge, though it is not clear that either mechanism would be allowed under Professor Williams' definition of unilateral behaviour.

Professor Williams did not discuss that Colgate's preference for a delay may have been for technical reasons similar to, if more muted than, Unilever's reasons. Without recognition of Colgate's compacting challenges and with a narrow characterization of unilateral behaviour, Professor Williams concluded that some coordinated conduct among Unilever, Colgate and Cussons, most likely shifted the balance of bargaining power away from Woolworths and caused Woolworths to agree to delay the launch date.⁸⁵

Professor Hay allowed the possibility of lawful communications between firms in his hypothetical world. Thus, upon learning of the technical difficulties that Unilever in particular was having, Woolworths would have been open to exploring with Colgate and Cussons the possibility of a later date. In doing so, Woolworths would have learned that Colgate considered that its own transition would be smoother with more slack in the launch schedule. Woolworths would have known that staggered product introductions would raise Woolworths' storage and logistics costs, require duplicative transition costs at a later date, and impede clear communication to consumers about the benefit of the transition. Professor Hay concluded that, choosing between an on-schedule but incomplete transition or a delayed full transition, Woolworths would have unilaterally chosen to delay by three weeks.

The judge concluded that with lawfully gained information about timing issues for Unilever and Colgate, it could be economically and independently rational for Woolworths to delay the launch date until a time when the change could be made for all suppliers at once.⁸⁶ Further, the judge concluded that "[w]hatever information may have been conveyed to Woolworths by Unilever in relation to the preferences of the Suppliers, there is no evidence that Woolworths treated it as an exercise of the combined bargaining power of the suppliers."⁸⁷

Other evidence from contemporaneous documents and from testimony was relevant to the question of whether Cussons had entered into any arrangement or understanding to delay the launch date. That evidence, according to the judge, showed Cussons was aware that Woolworths was in discussions regarding the possibility of a date being moved but was not an active participant in those discussions.⁸⁸ While Unilever and Colgate pressed for a delay, it appeared that Cussons was less concerned and waited for directives from Woolworths.⁸⁹ In fact, Cussons was unsure of Woolworths' decision on timing until a number of weeks after Woolworths had informed Unilever and Colgate that the in-store launch date would be delayed a few weeks, to March 2009. The judge concluded that there was no evidence that

⁸⁴ Internal emails suggested that Colgate believed that the competition also preferred a delay and Unilever suggested to Woolworths "it seems a delay of the review would be beneficial for everyone." Ibid, [259], [264].

⁸⁵ Ibid, [404].

⁸⁶ Ibid, [398]-[405], [533], [665].

⁸⁷ Ibid, [405].

⁸⁸ Ibid, [321]-[322].

⁸⁹ Ibid, [300]-[301], [405], [602]-[606], [649]-[650].

Cussons engaged in any coordinated conduct that was intended to, or did, cause Woolworths to weaken and agree to delay the launch date.⁹⁰

Full or partial transition – evidence bearing on the prisoner’s dilemma question

The second prong of the ACCC’s complaint concerned the fact that all the major suppliers transitioned sharply from standard to concentrated powder detergent at the category review date. On this question, the source of the difference between the economists was primarily a difference in the interpretation of the economic evidence.

According to Professor Williams, the major detergent suppliers faced what economists call a “prisoner’s dilemma.” In general terms, the firms would be better off individually and collectively if they could coordinate their behaviour, but, in the absence of an ability to commit to a coordinated plan, the best feasible outcome for each supplier would be to follow a different strategy than the more profitable coordinated one. In the context of the laundry detergent transition, cost-savings from eliminating costly filler would be maximised and the risk of losing market share minimised for each supplier if all three could commit to fully transitioning simultaneously to the same new level of detergent concentration. This would be the best possible outcome for all three suppliers individually and collectively. Professor Williams claimed that an individual supplier acting alone would be uncertain about the actions its rivals might take and would choose to maximise its expected profits by continuing to offer at least some standard formulation detergent to customers who were resistant to change or failed to understand the value proposition of the ultra detergent. Therefore, in the absence of an ability to commit to an agreement, arrangement, or understanding, each supplier would rationally and unilaterally choose either to delay its transition or to offer both standard and 2x concentrated detergent. The outcome of this independent behaviour would be less profitable than a coordinated outcome for the suppliers, both individually and as a group. Further, under the ACCC’s theory, the uncoordinated outcome would be made even worse by new price competition arising due to the availability of both old and new detergent formulations on grocery store shelves. Professor Williams alleged that it was the wish to avoid the less profitable outcome associated with suppliers transitioning incompletely or not at all that led the detergent suppliers to reach an arrangement or understanding to each fully transition each detergent brand to a 2x concentrated formulation at the same time.

Unsurprisingly, the documents and evidence at trial reflected that each of the three major suppliers recognised that the ultimate market outcome depended on not only its own transition strategy but also that of its rivals. Each supplier considered that a supplier that continued to offer standard detergent while its rivals transitioned fully to 2x concentrated formulations might gain some additional market share, at least in the short run.⁹¹ But documents related to decision-making by Colgate and Unilever also reflected that these two suppliers calculated that they had economic incentives to proceed with a full transition to concentrated detergent regardless of what their rivals might do. This was due to the very large per-unit cost savings from supplying concentrated detergent and the very thin margins

⁹⁰ There was evidence that employees of Unilever reached out to Cussons employees about their preferred timing for the transition, but the judge concluded that Unilever obtained little information and no commitment from Cussons. *Ibid*, [271]-[276]. The judge also noted that while Unilever did refer to Cussons’ preferences concerning the launch date in its communications with Woolworths, the evidence as a whole indicates that this was done without the consent or knowledge of Cussons. *Ibid*, [405].

⁹¹ *Ibid*, [108]-[112], [420].

earned on sales of standard detergent.⁹² The gains from selling concentrated detergent would more than offset any reasonably foreseeable sales lost to a competitor or competitors still offering standard detergent.⁹³ Colgate and Unilever each ranked the three relevant outcomes, from most to least profitable, as follows: transition fully while other suppliers also transition fully, transition fully while one or more rival suppliers do not transition fully, transition partially.⁹⁴

Professor Hay concluded that neither Colgate nor Unilever faced what would be considered a prisoner's dilemma situation. For them, the strategy of a complete transition would have been profit-maximizing whether through coordinated or independent behaviour. On his reading of the evidence, Unilever and Colgate would proceed with as full a transition as soon as technically feasible even in the absence of an arrangement or understanding to coordinate with other detergent suppliers.⁹⁵

Cussons conducted internal workshops into June 2008 in which it weighed (in qualitative terms) the risks and potential payoffs of its own product mix strategy in the face of the range of possible strategies rivals might adopt. Cussons considered that transitioning only a sub-range of its powders would mitigate the risk of lost sales but would be unlikely to convert consumers. Moreover, an offering of standard detergent might be given less shelf space, would confuse messaging to consumers, and might cause Cussons to miss out on the consumer transition to green products. Thus, over the long run, Cussons might lose market share by delaying its transition to ultra concentrates relative to the other major suppliers. A decision by Cussons was never clearly articulated, but the product line decision appears to have been resolved for the supplier by late July 2008, when Cussons reported internally that retailers were requiring a complete changeover to ultra concentrated detergent.⁹⁶

Of course, even a supplier whose independent economic incentive was to transition fully to 2x concentrated detergent might be still better off if other suppliers would do the same. In this case, even suppliers with an independent incentive to fully transition might wish to enter an agreement, arrangement, or understanding that all suppliers would fully transition. As Professor Hay acknowledged in his report, his analysis could identify whether firms' behaviour would be any different without an agreement but it could not prove the non-existence of an agreement, arrangement, or understanding.

Reviewing the evidence describing the detergent suppliers' and retailers' views of their independent economic incentives, the Judge was unconvinced of the ACCC's claims that it was rational for a Supplier

⁹² Ibid, [180], [201]-[202], [407].

⁹³ Furthermore, the suppliers understood that there would be significant costs from the complexity of simultaneously manufacturing detergents of two different concentrations. Ibid, [407].

⁹⁴ It is not surprising, however, that even having concluded its independent interests were to fully transition to ultra concentrated detergents, a supplier would seek to anticipate rivals' strategies and explore risk-mitigation strategies in advance of the transition. Thus, suppliers tried to glean information, including from Woolworths, about competitors' plans. Ibid, [598]. Suppliers also explored with their production staff the possibility and cost of restarting standard detergent production lines in the event consumers resisted purchasing the new products and rivals threatened to steal significant market share. Ibid, [323], [505].

⁹⁵ It happened, too, that a complete transition was preferable to the retailers because it would avoid the costly complexity of carrying two concentrations of the same detergent brand.

⁹⁶ The document reporting this information contained wording that the ACCC claimed was evidence of coordination by the retailers through Accord, at least on the timing of the transition. The judge rejected this claim. Ibid, [217]-[218], [288]-[297].

acting independently to delay its transition or only partially change its product line and irrational to transition at the same time as the other Suppliers.

The difficulty with the Commission's economic irrationality submission, however, is that it ignores much of the other evidence that suggested that the Suppliers had strong economic and commercial incentives to transition as early as possible. Those economic incentives, which were again the subject of Professor Hay's unchallenged evidence, included the significant costs savings and the prospect of improved margins from ultra concentrates, the concern at being left behind if other Suppliers transitioned first, the potential of increased sales if consumers were persuaded by the benefits of the new products, and the fact that the retailers also saw considerable economic and commercial benefits in the shift to ultra concentrates and thus were encouraging that to occur.⁹⁷

This reasoning led the judge to conclude that in the absence of an agreement, the suppliers would have transitioned completely, and any agreement would have had no impact on the outcome as it concerned the hard cut-over to concentrated detergent.

VII. Prices of Powder Detergent Fell and Volumes Increased After the Transition

The Commission argued that the major detergent suppliers gave effect to the Withhold Supply Provisions and the Aligned Transition Provisions through 2009. It alleged that, in the absence of these arrangements, price competition between standard and ultra concentrated laundry detergent would have led to lower detergent prices. However the magnitude of the price decreases was not specified.

Professor Hay's analysis of the available data series, commencing 20 months before March 2009 and extending 16 months after, showed that the average net wholesale price per "factored" kilogram (a wash load-equivalent quantity) of powder detergent fell 10.4% while the average net wholesale price per factored litre of liquid detergent fell 4.2%. At the retail level, the average price paid per factored kilogram of powder detergent fell 6.6% while the average price paid per factored litre of liquid detergent rose by 1.9%.⁹⁸ The average monthly factored volume of powder detergent sold at retail increased 12.0%.⁹⁹

Professor Williams preferred to compare detergent prices over shorter periods, 12 months before and after March 2009, but nonetheless reported a 3.0% decrease in the average retail price per factored kilogram of powdered detergent.¹⁰⁰ He did not report the change in the average net wholesale price for powder detergent.¹⁰¹ The ACCC did not make any claims quantifying how much more detergent prices would have fallen but for the alleged arrangements.

⁹⁷ Ibid, [595].

⁹⁸ Ibid, [413], [670].

⁹⁹ Ibid, [413].

¹⁰⁰ Ibid, [670].

¹⁰¹ Ibid, [670].

The judge observed that had it been necessary to determine whether the alleged coordinated behaviour caused a significant lessening of competition he would not have found in favour of the Commission.¹⁰²

VIII. The Decision

The judge found no evidence of Cussons entering into any agreements over any important elements in the draft proposals circulated by Accord.¹⁰³ The judge found that Cussons that did not divulge any information about its transition plans nor did it attempt to signal its plans, and that Cussons remained unclear on its rivals' likely transition plans subsequent to the Accord meetings.¹⁰⁴

The judge also rejected allegations that Woolworths acted as the hub to coordinate the adoption of the Withhold Supply and the Aligned Transition provisions. The judge found the information conveyed and the timing of communications by Woolworths to be of a routine nature one might expect as the retailer planned a sweeping change of all the major powder detergent brands it carried. Moreover, he considered evidence about Cussons' treatment of information not to support, and sometimes to contradict, a conclusion that Cussons was participating in a scheme to share information with the purpose of coordinating behaviour. The judge found that Cussons did not alter its behaviour in light of information about Unilever and Colgate that was passed along by Woolworths and remained uncertain about the exact nature of the other suppliers' plans.¹⁰⁵ In addition, though Cussons might have expected that some information about its own plans might have been shared with the other suppliers, the judge did not consider that Cussons divulged information strategically.¹⁰⁶ The judge concluded that no one at Cussons appeared to interpret Woolworths' communications as other than Woolworths seeking to confirm what it had learned in one-on-one meetings.¹⁰⁷

Discussing Woolworths' role with respect to all the major suppliers, the judge said:

It may generally be accepted that the evidence tended to show that the actions of Woolworths were important, if not critical, in facilitating or causing what appeared to be a largely simultaneous full category transition to ultra concentrates by the major suppliers and the major supermarkets in March 2009. Equally, however, the evidence tended to show that Woolworths acted as it did mainly because it was in its own commercial interests for that to occur. the evidence at its highest revealed no more than that Woolworths entered into or arrived at

¹⁰² Ibid, [674].

¹⁰³ Ibid, [467]-[482]. The salient terms of the proposal that Accord circulated, were, in the Commission's eyes, the plan to transition in 2009 to a detergent that would be 2x concentrated. All three major suppliers had decided to move to concentrated detergent in 2009 before Accord circulated the first draft proposal. The judge found that through 2008, Cussons' planning and decisions concerning the timing and scope of its transition were as much influenced by technical considerations relating to the formulation and manufacture of ultra concentrated versions of their detergents as anything else. Ibid, [471]. The Cussons executive who attended Accord meetings had received legal advice not to agree to any aspect of a proposal.

¹⁰⁴ Ibid, [481]-[482].

¹⁰⁵ Ibid, [522].

¹⁰⁶ Ibid, [519]-[520].

¹⁰⁷ Ibid, [245].

separate vertical understandings or arrangements with each of the suppliers in relation to the transition.

The evidence does not establish that the actions of Woolworths, or the dealings between Woolworths and the Suppliers, and between the Suppliers themselves, gave rise to a horizontal arrangement or understanding between Cussons and the Suppliers.¹⁰⁸

The ACCC appealed the trial judge's decision claiming, among other things, that the he had set too high a bar and had maintained a standard of proof necessary to support the inference of an agreement rather than, at the simplest level, an understanding.¹⁰⁹ The Full Court concluded that the trial judge had not set too high a standard, but rather that the Commission's case was weak. The Court echoed the trial judge in observing, that "[p]arallel conduct is often enough consistent with there being an arrangement or understanding, but by itself is not usually thought to be sufficient to prove such conduct in ordinary markets."¹¹⁰ The Full Court reviewed the two shortcomings the judge identified with the Commission's case. These were that its expert said only that the parallel conduct would not have occurred if the parties had operated without communication of any sort, and that there was strong evidence presented about the economic incentives for market participants to behave as they did even in the absence of an agreement, arrangement, or understanding.¹¹¹ The Full Court dismissed the Commission's appeal.

IX. How Might "Concerted Practices" Law Apply?

In November 2017 an amendment to the Competition and Consumer Act 2010 (*Cth*) gave effect to a new law governing concerted practices undertaken with the purpose, effect, or likely effect of substantially lessening competition.¹¹² The new law does not define a concerted practice, but the Explanatory Memorandum to the Bill describes it as encompassing "any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition."¹¹³ As before, the new law is not intended to punish parallel conduct that results from firms acting independently, for example when competition leads firms to meet competitors' prices.¹¹⁴

Of course, the matter of the industry transition to ultra concentrated detergent in 2009 was not subject to the new concerted practices law. But it is interesting to consider the judge's findings through the lens of the ACCC's views on the application of the new concerted practices law.

¹⁰⁸ *Ibid*, [536]-[537].

¹⁰⁹ Detergent Case, Full Court, [43].

¹¹⁰ *Ibid*, [69] (citation omitted). Detergent Case, [589].

¹¹¹ Detergent Case, Full Court, [72].

¹¹² Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (*Cth*).

¹¹³ Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (*Cth*) 27 ("Explanatory Memorandum"), [3.19]. To add to the limited guidance in the Explanatory Memorandum to the Bill, the ACCC published interim guidelines setting out its views on the application of the new law. Australian Competition and Consumer Commission, *Interim Guidelines on concerted practices* (2017) ("Interim Guidelines").

¹¹⁴ *Ibid*, [3.5]. See also, Explanatory Memorandum, [3.25].

First, the ACCC has noted that the drafters of the Bill amending the CCA intended, and it is generally held where such laws exist, that concerted practices include cooperative behaviour or communication that falls short of a commitment previously required by Australian courts to establish a contract, arrangement or understanding.¹¹⁵ Second, the ACCC has argued that under the new law it may not be necessary for a person to alter their behaviour in response to a communication in order to demonstrate that they are engaging in a concerted practice.¹¹⁶ Third, the Commission has observed that “a concerted practice may arise from a single instance of information being provided,”¹¹⁷ and that “[i]t may not be necessary to identify specific communications to establish the existence of a concerted practice. For example, it may be possible to infer that a specific outcome or behaviour was only possible as a result of communications between parties.”¹¹⁸

Thus, the ACCC likely would claim that if the detergent matter had been tried under the new concerted practices law, at least three of the judge’s main findings would no longer weigh as heavily in defence of Cussons’ behaviour. These findings were that: (1) the evidence failed to establish that Cussons had assumed any obligation, or given any assurance, undertaking, or commitment to the other suppliers in relation to the matters that were the subject of the alleged Arrangements;¹¹⁹ (2) Cussons’ actions did not appear to be influenced by what it heard from Woolworths about Unilever and Colgate plans nor did Cussons appear to expect or intend that its statements to Woolworths would influence Unilever or Colgate actions;¹²⁰ and (3) there was no direct or circumstantial evidence of wrongdoing by Cussons in relation to Accord meetings and communications or dealings with Woolworths or Unilever.¹²¹

The correct characterization of legitimate parallel behaviour

We would not necessarily agree with the ACCC’s implication that the outcome would have been different had the case been tried under the new law. But our main point is to observe that, given the lower evidentiary standard for establishing the existence of a concerted practice, a finding of legitimate parallel behaviour would be even more central to the outcome of the Cussons matter under the new law. A parallel behaviour defence enters at two points in the concerted practices law, as it did under the prior law. It is an element that weighs in the establishment of whether coordination occurred. In addition, if coordination is believed to have occurred, the likelihood and characterization of parallel

¹¹⁵ Prior law in Australia has been interpreted to require that at least one party assume an obligation, or give an assurance or an undertaking, that they will act in a particular way; a mere expectation as a matter of fact that a party will act in a certain way is not enough to establish the existence of an arrangement or understanding. Detergent Case, [52]. Whether some reciprocity of obligations is necessary for an understanding may be less clear. Ibid, [53].

¹¹⁶ Interim Guidelines, [3.3]-[3.5]. The government’s Explanatory Memorandum offers support for this claim, noting that a concerted practice may be initiated by a single party and does not require reciprocal or changed conduct by a second party. Explanatory Memorandum, [3.27]. A passive party will be in a more defensible position if it rejects any suggestions to coordinate behaviour and forecloses further communications. Ibid, Example 3.3.

¹¹⁷ Interim Guidelines, [3.8]. See also, Explanatory Memorandum, [3.27].

¹¹⁸ Interim Guidelines, [3.9]. See also, Explanatory Memorandum, [3.24].

¹¹⁹ Detergent Case, [422]-[424], [640]-[642].

¹²⁰ Ibid, [492]-[498], [505]-[506]. See also, Detergent Case, Full Court, [60]-[64].

¹²¹ Detergent Case, [467]-[469].

behaviour are relevant to the question of the effect or likely effect on competition of the concerted action, and possibly also to the question of purpose.¹²²

In the detergent matter, the ACCC failed to identify a credible characterization of likely behaviour in the absence of coordination.¹²³ In part, a weakness of the Commission's case was that it appealed too literally to abstract oligopoly modelling that did not adequately reflect the realities of the detergent supply chain. Perhaps the ACCC was pre-testing an economic theory, one that allows no communication between competitors, for possible use in future concerted practices cases. If that is so, all that we learned is that the ACCC's very high standard for legitimate communication was too high under the old law.

The decision in the detergent matter highlighted the challenges of successfully applying economic models to real market settings. The economic analysis of concentrated markets, where concerted practice charges will be brought, will be highly fact-driven. A very general model of oligopoly may be too abstract to be of assistance to a court, as was the case in the detergent matter. Once economists move beyond the simplest models that are the foundation of oligopoly theory, many variants exist, and care must be taken to adopt a model of behaviour that accommodates key features of the market in question.¹²⁴ In the detergent matter, a simpler and more direct analysis of unilateral profit calculations proved to be of greater assistance to the judge than a generic and abstract oligopoly model.

Equally important, the Commission built its case by ignoring documented economic forces at work in the detergent business, forces that would predictably engender certain legitimate unilateral behaviour by detergent suppliers and retailers. The judge also felt that the Commission strained to interpret contemporaneous statements and documents as evidence of coordinated behaviour where more benign interpretations were more plausible.

There can be no doubt that in some circumstances evidence of parallel conduct may provide circumstantial support for the existence of a collusive arrangement or understanding. The significance or weight to be attached to parallel conduct, however, will depend on all the particular facts and circumstances in which the parallel conduct occurred, including the features of the relevant market and the likelihood of such conduct occurring in the absence of an arrangement or understanding: *Air New Zealand* at [466]. The problem for the Commission is that its submissions concerning the circumstantial significance of the parallel conduct that it

¹²² "Once conduct has been found to be a concerted practice, the central issue, and the determinant of whether the relevant conduct is prohibited under section 45, is whether the concerted practice has the purpose, effect or likely effect of substantially lessening competition." Explanatory Memorandum, [3.28].

¹²³ Detergent Case, [589].

¹²⁴ In his survey article about oligopoly theories, Carl Shapiro observes:

Unlike perfect competition or pure monopoly, there is no single "theory of oligopoly." The rival theories presented below would seem each to have its appropriate application, and none can be considered *the* prevailing theory. Indeed, there has long been doubt about the wisdom of seeking a single, universal theory of oligopoly, and I share this doubt. Only by making special assumptions about the oligopolistic environment - each of which will be appropriate in only a limited set of industries - can we expect to wind up with a specific prediction regarding oligopoly behavior.

Carl Shapiro, "*Theories of Oligopoly Behavior*," in *Handbook of Industrial Organization*, Volume I, R. Schmalensee and R.D. Willig (eds.), Elsevier Science Publishers B.V., 1989, pp. 331 and 332.

asserts occurred in this case are not supported by its own economic evidence and are significantly undermined by the unchallenged economic evidence adduced by Cussons.¹²⁵

Once again, the ACCC may have been pre-testing how readily courts are willing to infer coordination from circumstantial evidence. Here, it seems that the judge's conclusions leave some room for doubt that the courts will aggressively apply concerted practices law in the face of weak evidence.

The chilling effect on efficient behaviour

Even if Cussons might have escaped a finding of liability under concerted practices law, the effect of the new law is to increase the probability that a firms' actions will be construed as anticompetitive. For this reason, upon the adoption of the concerted practices law, lawyers cautioned their clients to review and to consider curtailing interactions with competitors and other industry players such as occur through trade associations.¹²⁶ The ACCC took a dim view of the Accord meetings, some of the detergent suppliers' discussions with their retail customers, and with the suppliers acting on information obtained from their retail customers.

To see the potential for a chilling effect on efficient behaviour from heightened liability risks under the new law, consider Woolworths' situation in the transition to ultra concentrated detergent. If it could not have communicated with its suppliers to find a transition date that worked for all, Woolworths would have incurred higher costs of stocking two formulations of detergent, or certain brands produced only in standard formulation would have been dropped from stores and become unavailable to consumers; Woolworths would have incurred significant additional costs for subsequent product transitions; and consumers might have been slowed in their adoption of lower cost (and cleaner) products. In the case of detergent reformulation, the coordination of the vertical supply chain enhanced logistical efficiency and ultimately lower costs were achieved throughout the supply chain. If firms worry that efficient coordinated behaviour may be construed as anticompetitive behaviour and lead to significant financial penalties, the costs of foregone coordination across vertical levels may be high.

Moreover, in the case of detergent, the alleged harm from Woolworth's coordination was never established. Contrary to the ACCC's theory, average prices of concentrated powder detergent fell after the largely simultaneous and complete changeover. The ACCC failed to demonstrate that consumers would have seen even lower prices than those that transpired had there been a staggered transition to concentrated powder detergent.¹²⁷ Furthermore, the prior experience with a partial liquid detergent

¹²⁵ Detergent Case, [589]. See also, *Ibid*, [655]. The judge characterised the ACCC's case against Cussons as being "... premised on an assumed counterfactual that was unrealistic and contrary to what the evidence suggested would be the likely fate of the laundry detergent market but for the Aligned Transition Provisions."

¹²⁶ See, for example, https://www.allens.com.au/services/comp/pdf/HarperReviewKeyissues_nov17.pdf, p. 3; <https://www.claytonutz.com/knowledge/2017/october/major-shake-ups-to-australian-competition-laws-commence-soon>; <https://www.gtlaw.com.au/insights/harper-review-changes-competition-law-pass-parliament>; <http://www.klgates.com/harper-amendments-to-australias-competition-laws-passed-acc-heralds-a-new-era-in-competition-law-10-20-2017/?nomobile=perm>.

¹²⁷ In the face of evidence that average per-wash detergent prices (wholesale and retail) fell after the transition, the ACCC did not make the argument that prices would have fallen even further but for the alleged coordinated behaviour by the suppliers and Woolworths. Average per-wash wholesale prices fell more for reformulated powder detergent than they did for liquid detergent. Retail prices for liquid detergent actually rose over the period studied.

transition in Australia contradicted the ACCC's theory that incrementally lower prices would necessarily have been the result of a staggered introduction of new products.

In sum, in the detergent matter, fears of running afoul of a too-narrow interpretation of legitimate parallel behaviour might have imposed costs on firms and consumers without a likely offsetting benefit. The chilling effect of an increased probability of false positives in the face of the lower evidentiary standards of the concerted practices law may sometimes result in economic costs for the Australian economy and consumers.

X. Conclusion

The decision in the detergent matter highlighted elements that are important to a credible characterization of legitimate parallel behaviour. First, to be useful to a judge, an economic model cannot be so abstract as to be divorced from realities of the marketplace. Second, a valid analysis will be consistent with an objective interpretation of documents and empirical evidence. The case also highlights that the manner in which concerted practices law is interpreted by the ACCC and the courts could have important implications for Australian businesses and consumers.