unsigned record contained the usual acknowledgment.[43] Street C.J. in *Burke* considered as "offensive and utterly without foundation" the suggestion that police evidence should be corroborated:

> I find this submission is unpalatable and wholly unacceptable. It denigrates absolutely unjustly and unjustifiably, the police force of this state.[44]

As Paul Byrne has recently commented, the courts' vehement support of the police force, salutory though it may be, so that the court will unhesitatingly believe the word of the police against that of the accused, reveals a lack of sensitivity to the real nature of the problem.[45]

Although the court may be thus persuaded by equivocal material to the detriment of the accused, it will not take as conclusive either breaches of the judges rules or other circumstances which either in themselves or in combination (as they were in *Burke's* case) would cast doubt upon the authenticity of the statements, even in circumstances where the entire crown case is built on one alleged confession.

By withdrawing from the stricter approach adopted in *Driscoll* one prevailing concern is to prevent excessive litigation and protracted trials. In view of the competing interests, such an approach only avoids the issue. The repeated exercise of the discretion to exclude from evidence confessions obtained in doubtful circumstances will automatically place restraints on interrogation techniques, so that even without formally adopting the recommendations of the various government inquiries, the challenges to the authenticity of statements would decline as police begin to adopt methods whereby their evidence would be acceptable to the court.

Wendy Amigo

TRADE PRACTICES COMMISSION v. C.S.B.P. & FARMERS LTD

In *Trade Practices Commission* v. *C.S.B.P. & Farmers Ltd*[1] the Trade Practices Commission sought to recover penalties under section 77 of the Trade Practices Act 1974 (Cth) ("the Act") in respect of alleged contraventions of section 45(2)(a) and section 46 of the Act. The action was heard in the Federal Court before Fisher J. at first instance.

The Act is the most recent of a line of Commonwealth legislation dealing with the anti-competitive conduct of corporations.[2] The purpose of the Act is "to control restrictive trade practices and monopolisation"[3]

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[43] *R.* v. *Burke* note 11 *supra.*

[44] *Id.*, 4-5.

[45] P. Byrne, "Disputed Evidence of Confessional Statements" (1979) 2 *Briefnotes* 86, 91.

[1] [1980] A.T.P.R. 42,154.

[2] Australian Industries Preservation Act 1906 (Cth); Trade Practices Act 1965 (Cth); Restrictive Trade Practices Act 1971 (Cth).

[3] The Act also attempts "to protect consumers from unfair commercial conduct": Part V of the Act.

which interfere with competition in the market and discriminate against other sectors of society such as small businesses and which contribute to inflation.[4] The aim of the Act is to achieve regulation by the promotion of workable competition.[5]

Competition is a process manifest as market behaviour.[6] It relates to the structure of a particular market, that is, the environment in which the market operates and to the conduct of the participants in the market. The concept of workable competition recognises that perfect competition in which there are numerous buyers and sellers who act independently, homogeneity of product and plentiful market information is an ideal which does not exist.[7] Workable competition is a modification of this ideal but it nevertheless demands efficiency in the sense that no one is disadvantaged either because of distortions of the market structure or because of the conduct of those participating in the market.[8] Section 45 was inserted into the Act to deal with contracts, arrangements or understandings which interfere with the competitive process.[9] The regulation of competition is central to section 46.[10] Attainment of monopoly power

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[4] Hon. K. Enderby (Minister for Manufacturing Industry) Second Reading speech on Trade Practices Bill 1974, H.R. Deb., 16 July 1974, 225.

[5] This concept was first put forward by J. Clark, "Towards a Concept of Workable Competition" (1940) 30 *Am. Econ. Rev.* 24.

[6] *Re Queensland Co-operative Milling Association Ltd* (1976) 8 A.L.R. 481, 515-516.

[7] G. Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy* (1967) Ch. 1; R. Officer, "The Role of Trade Practices Legislation" (1978) 6 *A. Bus. L. Rev.* 2; M. Brunt, "The Trade Practices Bill, Legislation in Search of an Objective" (1965) 41 *Ec. Rec.* 357, 363-377; R. Edwards, *The Treatment of Monopoly in Australia under the 1974 Trade Practices Act* (1976), Unpublished Thesis, Monash University, 6.

[8] R. Officer, *ibid.* Trade Practice Consultative Committee, *Small Business and the Trade Practices Act* (1979) vol. 1 32-35.

[9] The *C.S.B.P.* decision was on s. 45(2)(a) and s. 46 prior to their amendment in 1977. The amendments do not affect the ratio of the case. The relevant sections are set out below:

S. 45(2) provided—

A corporation shall not:

(a) make a contract or arrangement, or enter into an understanding, in restraint of trade or commerce; or

(b) give effect to a contract, arrangement or understanding to the extent that it is in restraint of trade or commerce, whether the contract or arrangement was made or the understanding was entered into before or after the commencement of this sub-section.

S. 45(4) provided:

A contract, arrangement or understanding that is not of the kind referred to in sub-section (3) is not in restraint of trade or commerce for the purposes of this Act unless the restraint has or is likely to have a significant effect on competition between the parties to the contract, arrangement or understanding or on competition between those parties or any of them and other persons.

[10] S. 46 provided:

(1) A corporation that is in a position substantially to control a market for goods or services shall not take advantage of the power in relation to that market that it has by virtue of being in that position—

(a) to eliminate or substantially to damage a competitor in that market or in another market;

(which status is determined not only in terms of market share but also by reference to the corporation's power over resources, prices, distribution and production)[11] is not proscribed.[12] The prohibition is against an abuse by the monopoly of the power in the relevant market which is aimed at eliminating, preventing, or deterring a competitor or potential competitor. The promotion of competition to achieve efficient allocation of resources and reduced inflation is the prime economic objective of the Act.[13] However, the impetus for monopoly legislation is seen partly to be social: the government has a role to maintain a balance between the levels of the community by promoting "equality of opportunity" and the "enterprising spirit".[14] Politically also, the government must ensure that its lack of economic control is not replaced by monopolists, cartelists, trade associations and the like.[15]

The *C.S.B.P.* case concerned the defendant, C.S.B.P. & Farmers Ltd (C.S.B.P.), which was in the business, *inter alia*, of supplying artificial nitrogenous fertilizers in Western Australia.[16] In 1970, C.S.B.P. had been appointed the sole distributor of urea in Western Australia by Austral Pacific, a manufacturer of urea in Australia. Consolidated Fertilizers Ltd (C.F.L.) was formed as the holding company when Austral Pacific merged with some fertilizer companies. The agreement executed in 1972 between C.F.L. and C.S.B.P. was in terms similar to the 1970 agreement. More particularly, the 1972 agreement provided that C.S.B.P. was appointed as sole distributor, in Western Australia south of the Tropic of Capricorn, for fertilizers including urea manufactured and sold by C.F.L. C.S.B.P. agreed to purchase all its requirements of urea from C.F.L. which company agreed not to manufacture or sell fertilizers, directly or indirectly, in that part of Western Australia. According to the evidence of both parties, the agreement was not strictly adhered to.

(b) to prevent the entry of a person into that market or into another market; or

(c) to deter or prevent a person from engaging in competitive behaviour in that market or in another market.

(2) . . .

(3) For the purposes of this section, a reference to a corporation being in a position substantially to control a market for goods or services includes a reference to a corporation which, by reason of its share of the market or of its share of the market combined with availability of technical knowledge, raw materials or capital, has the power to determine the prices, or control the production or distribution, of a substantial part of the goods or services in that market.

[11] This is similar to *Re Continental Can Co. Inc.* (1972) C.M.L.R. D11, D27 a decision of the Commission of the European Communities on art. 86 of the Treaty of Rome.

[12] *Cf.* The Sherman Act 15 U.S.C. §2 (1973).

[13] Note 7 *supra.*

[14] G. Walker, note 7 *supra*, ch. 1.

[15] G. Walker, note 7 *supra*; W. Hogan, "The General Outline and Economic Implications of the Trade Practices Act", *Commercial Law Association, Seminar: The Trade Practices Act* (1974).

[16] Note 1 *supra*, 42,158-42,168.

Misgivings on the part of C.F.L. as to the strict obligations of the agreement and the subsequent pressure on the market for urea led that company to terminate the agreement on 23 October 1975, the expressed reason being the effect of the amendments to the Act. To supply the April-August 1975 season, C.S.B.P. was compelled to import at a cost of three and one half times the price it had obtained from C.F.L.

A new agreement drafted by C.S.B.P. on 9 May 1975 which deleted both the sole distributor clause (by giving C.S.B.P. rights to purchase elsewhere if C.F.L. could not supply all the urea sought, or could not supply at a competitive price) and the restriction on C.F.L. (to manufacture and sell urea in Western Australia) was rejected by Wilkins the chief executive of C.F.L. Also about that time, Rural Traders' Cooperative (R.T.C.), a body formed by the Farmers Union of Western Australia (Incorporated) to benefit farmers sought a distributorship from C.S.B.P. R.T.C. was refused on the ground that there were enough distributors.

With respect to section 45(2)(a), the Commission alleged in its statement of claim and particulars, that C.S.B.P. (through Phillips, its general manager) made an arrangement or entered into an understanding on or about 11 June 1975 with Wilkins at a meeting of fertilizer companies, that C.F.L. would supply urea only to C.S.B.P. in Western Australia, or in that State south of the Tropic of Capricorn. It was further pleaded that on or about the same date at the same place, an arrangement was made on an understanding entered into by the same parties to the effect that C.F.L. would not, directly or indirectly, engage in the manufacturer or sale (except to C.S.B.P.) of urea in Western Australia or in that State south of the Tropic of Capricorn. The Commission alleged that each of the said arrangements or understandings ("the arrangement") was, and continued to be, in restraint of trade and commerce as prohibited by section 45.[17]

After being refused a distributorship from C.S.B.P. a further time, Anderson of R.T.C. commenced negotiations to import urea from Italy. R.T.C. also sought urea from C.F.L. at prices matching the overseas quotes. An assurance having been obtained from C.S.B.P. that it would supply R.T.C., C.F.L. refused the request on the ground that it intended to continue distribution through C.S.B.P. On 13 October 1975 when R.T.C.'s negotiations seemed to be proceeding satisfactorily, 15,000 tonnes of bagged urea at $180 per tonne being available from Italy, R.T.C. arranged to advertise its sale of urea at $145.00 per tonne ex Fremantle. (The lower retail price was due to a Government subsidy the benefit of which an importer or producer was obliged to pass on to the farmer.)

Phillips returned from overseas on 12 October 1975 and was offered about 8,000 tonnes of urea from C.F.L. at $74.54 per tonne. On 16 October 1975, C.S.B.P. published its new price of $144.60 per tonne ex Kwinana a reduction of $34.10 per tonne. Later in the same day, and as a result of this statement, R.T.C. cancelled its order from Italy.

[17] *Id.*, 42,156.

In the next month, R.T.C. made new arrangements to import which fell through. However, it sold imported urea at $127.00 per tonne in March 1976 without price challenge from C.S.B.P.

The alleged contravention of section 46 was that C.S.B.P., a corporation in a position substantially to control the market for the supply of artificial fertilizer in Western Australia or in that State south of the Tropic of Capricorn, took advantage of that power to eliminate or substantially damage R.T.C. or to prevent the entry of R.T.C., or to deter R.T.C. from engaging in competitive behaviour, in either or both of those markets.[18]

The preliminary hurdle in section 45 action is to establish the existence of a contract, arrangement or understanding. The case of the Commission on section 45(2)(a) relied upon a diary entry made by Phillips after the meeting of fertilizer companies at which he was alleged to have made the new arrangement with C.F.L. The sentence relied on as direct evidence read:

> In this situation C.F.L. does not want to restore an agreement with us but J.V.W. (Wilkins) was ready to assure us that the old arrangements were not disbursed by this.[19]

The only other reference to the meeting was made in a letter from Wilkins to Phillips. The Commission also relied on circumstantial evidence arising out of the conduct of C.F.L. and C.S.B.P. when R.T.C. sought to enter the urea market in Western Australia.[20]

Counsel for C.S.B.P. denying that a new arrangement was made on the day in question, disputed the alleged effect of the diary note. It was contended that the Commission could succeed in establishing an arrangement or understanding only if the evidence of Phillips and Wilkins was disbelieved and if there was sufficient acceptable circumstantial evidence of the events after June 11 to enable the inference to be drawn.

Counsel for C.S.B.P. did not strongly contest that C.S.B.P. was in a position substantially to control the market for urea in Western Australia. The evidence indicated not only that C.S.B.P. was in a position of control in relation to that market in terms of market share, but that it also had power over its prices and over distribution, both factors which are relevant by virtue of section 46(3).[21] The fact that the position of C.S.B.P. was gained because of its earlier arrangement with Austral Pacific, a position which could in fact (whatever the finding on section 45) be jeopardised by action on the part of C.F.L. was not relevant.[22]

In establishing the second element of the contravention, namely that C.S.B.P. took advantage of this power, counsel for the Commission

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[18] *Ibid.*

[19] *Id.*, 42,163.

[20] *Id.*, 42,164.

[21] Note 10 *supra.*

[22] Also the position in *Top Performance Motors Pty Ltd* v. *Ira Berk (Queensland) Pty Ltd* (1975) 5 A.L.R. 465; See H. Schreiber, "Monopolisation—section 46", *The University of Sydney Committee for Postgraduate Studies in the Department of Law; The Trade Practices Act 1974* (1974).

argued that both motive and effect were present.[23] The wording of section 46 prior to 1977 did not indicate that "purpose" was an element. However, counsel for the Commission conceded that this was necessary for a contravention. It was claimed that the timing of the announcement by C.S.B.P., which company had previously set high prices, came earlier than usual and must be referable to its awareness of R.T.C.'s proposals and directed at R.T.C. Counsel pointed to the method of calculating the price and alleged that the normal margin for the company was considerably undercut. Finally, the Commission alleged that R.T.C. was harmed in at least one of the ways specified in section 46(1)(a)(b) and (c) as a result of the reduction in price. Counsel for C.S.B.P. contended that there was no evidence to support a finding that C.S.B.P. had taken advantage of its power to injure R.T.C. by reducing its selling price of urea.

In respect of the section 45(2)(a) allegation, Fisher J. held that the question for him to consider was whether:

> the Commission has established to the required degree of satisfaction[24] that Phillips and Wilkins[25] made the arrangement alleged . . . in Melbourne on or about 11 June 1975.[26]

His Honour refused to find that an arrangement had been made for several reasons.[27] The sentence relied on from the diary of Phillips did not unequivocally point to a new arrangement. The contention of the Commission could only have been upheld had "old arrangements" referred to the sole distributorship and to the covenant restricting the right of C.F.L. to manufacture or sell urea in Western Australia. Fisher J. held there was a possible, not a necessary, meaning of the words and that it was more likely in the context of the entire note that the sentence referred to their agreement to continue liaison on the urea situation. The construction was supported by Wilkin's letter mentioned above.

Although the testimony of Phillips and Wilkins was accepted overall, Fisher J. did not find satisfactory Wilkins' explanation of the conduct of the officers of C.F.L. at the time when R.T.C. sought to enter the urea market. He felt that the conduct and the terminology used by the officers was referable to the existence of a sole distributorship agreement. However, lack of evidence rendered the conduct suspicious but not confirmatory.[28] The behaviour of C.F.L. in its negotiations with R.T.C., also relied on as circumstantial evidence, was consistent with an arrange-

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[23] Counsel cited B. Donald and J. Heydon, *Trade Practices Law* (1978) Vol. 1, 229.

[24] *Briginshaw* v. *Briginshaw* (1938) 60 C.L.R. 336, 361.

[25] Acts of a corporation may be performed by their officers who have a controlling mind and will, *Tesco Supermarkets Ltd* v. *Nattrass* [1972] A.C. 153, applied by the High Court in *Smorgan* v. *The Commissioner for Taxation* (1976) 13 A.L.R. 481, 491; see s. 84(2) of the Act, applied *Universal Telecasters (Qld) Ltd* v. *Guthrie* (1978) 18 A.L.R. 531.

[26] Note 1 *supra*, 42,162.

[27] *Id.*, 42,163-42,165.

[28] *Id.*, 42,164.

ment that C.F.L. could provide C.S.B.P. with urea in times of short supply or with the old arrangements.

Fisher J. also considered the inherent unlikelihood of C.F.L. accepting restrictions at that time. In addition to the lack of evidence, His Honour had regard to the limited supplies of C.F.L. and its preference to supply the Eastern states and the necessity for C.S.B.P. to ensure supplies as further reasons for his unwillingness to make the inference sought by the Commission.

In the *C.S.B.P.* case, both counsel accepted an earlier decision of Fisher J. as authority for the essential elements of an arrangement. In *Trade Practices Commission* v. *Nicholas Enterprises Pty Ltd*,[29] His Honour had found that the essential feature of a section 45 arrangement was a meeting of minds, the elements of which were communication between the parties and an expectation and an obligation raised by each party in the mind of the other. His Honour primarily relied on the English Court of Appeal decision in *Re British Basic Slag Ltd's Agreement*[30] the test from which had been adopted in relation to section 45 in *Top Performance Motors Pty Ltd* v. *Ira Berk (Queensland) Pty Ltd*[31] and also in some taxation cases.[32] The *Basic Slag* test was formulated by reference to section 6 of the United Kingdom Restrictive Trade Practices Act[33] which required an arrangement "between two or more people . . . under which restrictions are accepted".

Apart from the *Top Performance* case[34] and some taxation cases, the sole support for the definition of arrangement in the *C.S.B.P.* case was that of Fisher J. himself. It is submitted that for these reasons and on the wording of our Act, there was room for argument on the elements of an arrangement.

Fisher J. found that the case for the Commission lacked a submission indicating that C.S.B.P. accepted any obligations under the arrangements alleged. He was not prepared to make such an assumption about an element necessary to the proof of an arrangement.[35] In *Morphett Arms Hotel Pty Ltd* v. *Trade Practices Commission*,[36] an appeal from the *Nicholas* case, decided after the *C.S.B.P.* case, the Full Court of the Federal Court agreed, with one qualification, with the decision of Fisher J. at first instance. Their obiter view that mutuality might not be necessary was accepted later by Lockhart J. in *Trade Practices Commission* v. *Email Ltd*[37] a case in which an understanding was alleged. His

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[29] (1979) 26 A.L.R. 609, 627-629.

[30] [1963] 2 All E.R. 807, 819-820; [1963] 1 W.L.R. 727, 747-748 *per* Diplock L.J.

[31] Note 22 *supra*, 469-470 *per* Smithers J.

[32] *Federal Commissioner of Taxation* v. *Lutovi Investments Pty Ltd* (1978) 22 A.L.R. 519, 525 *per* Gibbs and Mason JJ. (Murphy J. concurring); *Newton* v. *Federal Commissioner of Taxation* [1958] A.C. 450 (P.C.); *Federal Commissioner of Taxation* v. *Students World (Australia) Pty Ltd* (1978) 18 A.L.R. 599; *K. Porter & Co. Pty Ltd* v. *Federal Commissioner of Taxation* (1974) 74 A.T.C. 4093, 4100.

[33] Restrictive Trade Practices Act 1956 (U.K.).

[34] Note the critical commentary upon this decision in (1976) 50 *A.L.J.* 89.

[35] Note 1 *supra* 42,162.

[36] [1980] A.T.P.R. 42,231, 42,234.

[37] [1980] A.T.P.R. 42,367, 42,377.

Honour referred to the *British Basic Slag* case and the particular legislation on which it is based. Although Lockhart J. held that there was no necessity for mutuality of commitment under section 45, he was inclined to believe that the element would usually be present in a contravention. He also distinguished the basis of the taxation cases which had been relied upon, particularly the *Federal Commissioner of Taxation* v. *Lutovi Investments Pty Ltd.*[38]

Under the present law it would not be necessary for Fisher J. to refer to a lack of obligation on the part of C.S.B.P. However his Honour was also not prepared to find that C.F.L. had accepted any restrictions, this finding being influenced by the current market situation.

The result on this aspect of the case illustrates the importance of acceptable direct evidence. This factor may be particularly vital where, as here, a vertical arrangement is alleged. For in the more usual case of horizontal agreement,[39] typically industry trade associations,[40] evidence of parallel business behaviour may contribute to the establishment of the inference that an arrangement was made.[41]

The *C.S.B.P.* case also shows that an inference arising from alleged circumstantial evidence is unlikely to be drawn where the economic conditions and the state of the market support the denials of the defendant and thus negate the desired effect of the circumstantial evidence. The availability for the defendants of credible witnesses may also be crucial. In fact these factors may assume such importance that the objective of the Act, in promoting workable competition, may founder. It is probable that this was the situation here.

In the *C.S.B.P.* case, Fisher J. uses the word "arrangement" although it is clear from his judgment that he was considering both an arrangement and an understanding.[42] In Australia there appears to be little real difference between the two concepts in fact. Both are unenforceable at common law. However, an understanding may only be inferred from conduct, while an agreement suggests that the parties have expressed agreement.[43] Once Fisher J. denied the effect of the direct evidence relied upon, thus negating express agreement, the alternative finding of an understanding from the conduct of the parties should have been a possibility. However his Honour did not advert to any difference between the two concepts.

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[38] Note 32 *supra.*

[39] *Trade Practices Commission* v. *Nicholas Enterprises Pty Ltd* note 29 *supra; Tradestock Pty Ltd* v. *T.N.T. (Management) Pty Ltd* [1978] A.T.P.R. 17,563; *cf. Trade Practices Commission* v. *Email Ltd* note 37 *supra.*

[40] M. Blakeney, "The Impact Upon Trade Associations of section 45 of the Trade Practices Act 1974" (1976) 50 *A.L.J.* 57.

[41] See also S. Breyer, "Five Questions about Australian Anti-Trust Law" (1977) 51 *A.L.J.* 28, 63-65; M. Pfeifer, "Uniform Pricing in Concentrated Markets: Is Conscious Parallelism Prohibited by Article 85(1) of the Treaty of Rome" (1974) 7 *Cornell Int. L.J.* 112; W. Stanberg and G. Reschenthaler, "Oligopoly and Conscious Parallelism; Theory, Policy and the Canadian Cases" (1977) 15 *Osgoode Hall L.J.* 617.

[42] Note 1 *supra* 42,162.

[43] J. Heydon, "Trade Practices Act 1974; section 45 Agreements in Restraint of Trade" (1975) 3 *Aus. Bus. L.R.* 262, 292.

The Commission limited its submissions with respect to section 45(2)(a) to establishing that a new arrangement was made on or about a particular day. The Commission may have unduly limited its case as it may have been open on these facts to plead section 45(2)(b), namely that the parties had given effect to the old agreement or understanding.

The finding of Fisher J. that there was no arrangement or understanding eliminated the need to decide whether the arrangement was in restraint of trade and whether it had a significant effect on competition within section 45(4). The Act has now been substantially amended[44] so that arrangements containing exclusionary provisions (section 4D) are prohibited as are those arrangements where there is, or would be, an effect of a substantial lessening of competition (section 45(2)). Also the section has now been expanded so that price agreements are regulated by section 45A, covenants affecting competition by section 45B, price covenants by section 45C, secondary boycotts by section 45D and agreements to effect such boycotts by section 45E. If the facts of this case were to be decided under the amended legislation section 45(2)(b)(ii) which is substantially similar to section 45(2)(a) as it stood prior to 1977 would be relevant. Section 42(2)(b)(i) relating to exclusionary provisions (defined in section 4D) would be relevant only if it could be shown that C.S.B.P. and C.F.L., the parties to the alleged understanding, were likely to be in competition together.

Fisher J. held that he had to decide in relation to the section 46 allegation "whether C.S.B.P. took 'advantage' of its power substantially to control a market for goods" to the detriment of R.T.C.[45] His Honour found that although C.S.B.P. was in the necessary position of market power, the second element of the offence was not established. There was no proof that the decision, although accelerated, was made with the requisite predatory intention.

The doing of an injurious act by a corporation, taking advantage of its position of power in a market, will only constitute an offence under section 46 if it occurs with an element of conscious predatory behaviour.[46] This element was conceded by both counsel in the *C.S.B.P.* case. In relation to price cutting, Fisher J. held that conscious predatory behaviour was proven where the conduct of the corporation does not accord with its normal business practices and occurs with an intent to harm the aggrieved party.[47] In *C.S.B.P.*, although the conduct had the actual

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[44] Partly as a result of the narrow common law interpretation by the High Court of restraint of trade: *Quadramain Pty Ltd* v. *Sevastapol Investments Pty Ltd* (1976) 8 A.L.R. 555; see J. Heydon, "Restraint of Trade in the High Court" (1976) 50 *A.L.J.* 290; J. Livermore, "Section 45 of the Trade Practices Act, Quadramain and the New Market Test of Competition" (1978) 52 *A.L.J.* 290.

[45] Note 1 *supra*, 42,162.

[46] *Cf.* the U.S. position under Sherman Act note 12 *supra*; R. Baxt, "Monopolisation and Secondary Boycotts", *Monash University Trade Practices Lectures* (1977).

[47] H. Schreiber, note 22 *supra*, 9. He cites the U.S. cases on this position: *United States* v. *United Shoe Machinery Corp* 110 F. Supp. 295, 315; *aff'd* 347 U.S. 521 (1954); *Otter Tail Power Co.* v. *United States* 410 U.S. 366 (1973);

effect of deterring R.T.C. the action failed because the practices of the corporation were not shown to be predatory. Counsel for *C.S.B.P.* succeeded in demonstrating that review of prices usually took place at that time and that the calculation was made on the same basis as the estimates made during the year and disclosed a normal margin.

In this case the price announced undercut by only 40 cents that which R.T.C. alleged it had announced to the farming community only three days earlier. Fisher J. was not convinced that C.S.B.P. had the extent of knowledge of R.T.C.'s proposed activities as alleged by the Commission. In the light of the knowledge which he accepted C.S.B.P. possessed, namely that R.T.C. contemplated importation and subsequent sale of urea at $140-$150 per tonne, he held that the timing of C.S.B.P.'s decision was even more understandable. Thus performance in the witness box by the defendant's officers may be critical to the success of the case. Another factor influencing Fisher J. was his belief that the arrangements of R.T.C. which it alleged were cancelled because of C.S.B.P.'s conduct, were by no means final. It is submitted that this was not a relevant factor because the question was whether one or more of the effects listed in section 46(a)(b) and (c) were achieved. Although the timing and quantum of C.S.B.P.'s price reduction may appear in the circumstances more than coincidental and also consistent with the temporary purpose associated with predatory behaviour,[48] the establishment by C.S.B.P. that its conduct accorded with normal business practices was sufficient to negate these inferences.

By amendments inserted in 1977, section 46 now includes the element of "purpose",[49] which by section 4F may be one of a number of purposes but must be a substantial purpose. In the *C.S.B.P.* case, it was assumed that "purpose" was necessary for an offence. However, it now appears from the new wording of section 46(1) that a contravention may be established although the proscribed effects have not been achieved. This was not the problem here since R.T.C. was in fact deterred from entering the urea market at that time. However, it follows that if the facts of the *C.S.B.P.* case arose now, it may be possible to find a substantial purpose to hinder, deter or eliminate although actual predatory behaviour is not established.[50] This finding will depend on whether it is held that predatory behaviour forms part of "purpose", and how the courts define the relationship between "purpose" and

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R. v. *Eddy Match Co.* 104 C.C. 39 (1951) 109 C.C. 1 (1953); *United States* v. *Girell Corp.* 384 U.S. 563 (1966).

[48] *Victorian Egg Marketing Board* v. *Parkwood Eggs Pty Ltd* (1978) 20 A.L.R. 129, 147 *per* Brennan J.; *cf.* B. Donald and J. Heydon, note 23 *supra*, 259-267.

[49] S. 46(1) now provides:

> A corporation that is in a position substantially to control a market for goods or services shall not take advantage of the power in relation to that market that it has by virtue of being in that position *for the purpose of*
> (a) eliminating . . .
> (b) preventing . . .
> (c) deterring . . . (emphasis added).

[50] *Victorian Egg* case note 49 *supra*, 137-138 *per* Bowen C.J.

"taking advantage" and particularly whether the latter concept is reduced in meaning to "exercise" or "use".[51]

A further amendment in 1977 relevant to section 46 was section 4E which defines "market" in terms of substitutability thus precluding a one brand market.[52] Due to the concession of counsel for C.S.B.P. there was no need for Fisher J. to discuss the elements of market, although the case does disclose some inconsistency in market definition. The allegation was that C.S.B.P. was in substantial control of the market for the supply of artificial nitrogenous fertilizers in Western Australia. His Honour held that there was control at least over the urea market south of the Tropic of Capricorn in Western Australia. Usually, control will more readily be found where the market is narrowly defined. However, it appears that C.S.B.P. had control in fact in both these markets. Also although urea may be a submarket[53] in the larger product market of artificial nitrogenous fertilizers it appears from related litigation[54] that the only other fertilizers substitutable for this product were a few compound artificial fertilizers which would not affect the dominance of C.S.B.P. even had the section 4E test been applicable.

Finally, it is suggested that the decision on the section 46 aspect is not satisfactory in terms of the policies discussed above. The actual determent of R.T.C. from the urea market because of C.S.B.P.'s timely price reduction indicates that the objectives of the Act have failed. This raises the question of whether there is room for an element of intent in this fact situation[55] particularly where conduct of a witness may tip the balance. Perhaps the place of the monopolist in the workable competition process should be re-examined.

Mary Burke

PREFERENCE FOR MOTHERS IN CUSTODY CASES: GRONOW v. GRONOW

In custody cases, it is now settled that the task of the court is to make whatever order will best promote the child's welfare.[1] But the concept of "welfare" is inherently indeterminate. Actual decisions often require difficult determinations of fact and predication about the future; they

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[51] B. Donald and J. Heydon, note 23 *supra*, 230.

[52] To overcome the narrow, non-economic dictionary definition of Joske J. in the *Top Performance* case note 22 *supra*, 467.

[53] *Re Queensland Co-operative Milling Association Ltd* note 6 *supra*, 516-518.

[54] *In Re Rural Traders Co-operative (W.A.) Ltd* [1979] A.T.P.R. 18,111, 18,120.

[55] R. Officer, *The Swanson Committee Report—Monopolisation, Price Discrimination, Merger and the Termination of Franchises—A Critique* (1976); *cf.* The Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (August 1976) 39, para. 6.4 (The Swanson Committee); The Trade Practices Consultative Committee, note 8 *supra*, para. 9.19.

[1] See *e.g. Barnett* v. *Barnett* (1973) 2 A.L.R. 19; *In the Marriage of Sanders* [1976] F.L.C. 75,363; *A.* v. *C.* [1970] A.C. 668.