circumstances the services were acquired by the appellant not by the retailer . . . Certainly there was no condition that it should acquire (even in the sense of accept) those services."

Brennan J. (with whom Deane J. agreed) gave his reasons as follows (at p. 383):

"The sale of beer by the brewer to the licensees is a supply by way of sale. The supply by way of sale occurs at a licensee's premises when the beer is delivered. There is no supply by the brewer to a licensee at the brewery door in Milton. When QRX picks up the beer at the brewery door, there is no sale; no appropriation of beer to an agreement for sale; no transfer of property in the beer. QRX takes possession of the beer under its contract with the brewer; the brewer is the bailor, the carrier its bailee. Once it is appreciated that the beer transported by QRX is supplied by the brewer to a licensee only at the licensee's premises, it is impossible to suppose that the transport services rendered by QRX are acquired by the licensee. The beer supplied at the licensed premises may be described as "delivered beer" to distinguish it from beer at the brewery door, but the delivery services supplied by QRX are acquired by the brewery, not by the licensee. The licensee acquires only delivered beer."

This decision has unfortunate consequences for competition in Australia. It is possible to envisage numerous situations in which a supplier of goods or services with "power or leverage in its primary market" (to borrow the phrase of Lockhart J.) will now be able to force a customer to acquire unwanted goods or services from a third person. Thus, for example, a motor vehicle insurer upon whom a claim is made, can now stipulate that a repairer will acquire his spare parts from a particular spare parts supplier even though the repairer may have an alternative source of supply in mind. So long as there is no contractual relationship between the supplier of the spare parts and the repairer, subs. 47(6) is not applicable. One would have thought that the existing language of subs. 47(6) was sufficiently clear to catch the anti-competitive conduct challenged in the *Castlemaine Tooheys case,* especially the words ". . . acquire . . . directly or indirectly from another person." As Wilcox J. remarked (at p. 46,921): "The critical question in this case may be paraphrased by asking: does the respondent supply, or offer to supply, beer on the condition that the relevant retailer will accept transport services directly or indirectly from QRX?" All the judges of the High Court answered this question in the negative. If subs. 47(6) is to catch this sort of undesirable third line forcing, its language will have to be amended to provide that it applies whether or not there is a contract or arrangement between the person acquiring the goods and the third person.

One possible argument which does not appear to have been raised in the *Castlemaine Tooheys case* is that the contract or arrangement between Castlemaine and QRX may have substantially lessened competition and been prohibited by subs. 45(2). Subsection 47(10) provides that it is not necessary to consider whether conduct substantially lessens competition when one is considering subss. 47(6) and (7); nevertheless, Wilcox J. observed (at p. 46,919): ". . . the respondent does not contend that its conduct does not have the effect of substantially lessening competition; *nor, upon the evidence, could it do so."* (Emphasis added). It is clear from his Honour's judgment how he defined the relevant market in reaching this conclusion. The market would appear to have been that for transport services for beer, wine and spirits to north Queensland which constituted some 30% of the inward freight to each of the six centres in question. Assuming this to be a discrete market, Williams & Hodgson may have succeeded in having the contract or arrangement between Castlemaine and QRX impugned under subs. 45(2). Even so, it is submitted that this is not a satisfactory way of dealing with conduct which Parliament clearly intended to be prohibited *per se.*

Standards of Proof in Trade Practices Proceedings

by S. G. Corones

The normal rules regarding onus of proof which governs all statutory offences apply to proceedings under the *Trade Practices Act* 1974 (the Act). The burden of proof rests on the party alleging a breach of the provision. In two recent decisions of the Federal Court an issue that arose was the correct standard of proof to be applied in such proceedings. They are *The Heating Centre Pty. Ltd. v. Trade Practices Commission* (1986) ATPR 40-674, a decision of the Full Federal Court in relation to proceedings for a contravention of Part IV of the Act and *Latella & Anor. v. L. J. Hooker Ltd.* (1985) ATPR 40-555, a decision of Franki J. in relation to proceedings for a contravention of Part V.

Contraventions of Part IV of the Act

Although s.78 provides that criminal proceedings do not lie for contraventions of Part IV, doubt has been expressed in a number of cases as to the correct standard of proof because of the heavy pecuniary penalties that can be imposed pursuant to s.76. In *Trade Practices*

Commission v. Ansett Transport Industries (Operations) Pty. Ltd. (1978) ATPR 40-071, for example, Northrop J. referred to the submission on behalf of Avis that a strict standard of proof was required in relation to a contravention of s.50 of the Act. His Honour commented (at p. 17,720) that:

> "In the present case the civil standard of proof is to be applied, but I keep in mind the gravity of the consequences resulting from a finding that the acquisition of the shares constitutes a contravention of sec. 50 of the Act."

Similarly, in *Trade Practices Commission v. Nicholas Enterprises Pty. Ltd. & Ors.* (1979) ATPR 40-126, Fisher J. applied the civil standard of proof in drawing an inference that an understanding existed for the purposes of s.45 of the Act. The High Court's decision in *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336 was cited in support of the proposition that although the civil standard was the appropriate one, the Court should have regard to the gravity of the matters in issue because ". . . the graver the allegation the greater should be the strictness of proof required" (at p. 18,352).

Despite these and other similar findings of single judges of the Federal Court, counsel for the respondent in *Trade Practices Commission v. The Heating Centre Pty. Ltd.* (1985) ATPR 40-516, submitted that in respect of an alleged contravention of s.48 the criminal standard of proof was appropriate. Beaumont J. dealt with this submission (at p. 46,172) as follows:

> "I accept that, although the civil standard of the balance of probabilities is appropriate, in reaching conclusions and drawing inferences, the Court should be mindful of the seriousness of the allegations, having regard to the penalties involved . . ."

On appeal, it was asserted that Beaumont J. had not applied the proper standard of proof. It was emphasised that although Parliament had elected to avoid attaching the stigma of criminality to contraventions of Part IV, proceedings under that Part were in substance criminal proceedings. The Full Court disagreed. Pincus J. observed (at p. 47,431) that:

> "Whatever may be the reason for the distinction, the position is that the Act clearly characterises proceedings under sec. 76 as civil: see sec. 78 and contrast with sec. 79, while equally clearly characterising proceedings for a penalty in respect of a breach of Part V of the Act as criminal proceedings. In so doing Parliament must be taken to have intended that the Court would apply the respective standards of proof applicable to each category. It is, of course, an attribute of civil proceedings that the necessary facts must be proved on the balance of probabilities but, of course, taking into account the gravity of the matters alleged . . ."

It was further submitted by counsel for the appellant that if the criminal standard was not applicable, then in view of the pecuniary penalties that could be imposed, the civil standard should have been modified in favour of the appellant as to be very little different from the criminal standard. This submission was rejected as being inconsistent with the decision of the High Court in *Rejfek v. McElroy* (1965) 112 C.L.R. 517.

Contraventions of Part V of the Act

Section 79 provides that proceedings for a penalty in respect of a breach of Part V of the Act (other than ss.52, 52A, 65Q, 65R or subs. 65F(9)), are criminal and that the criminal standard of proof applies: see, e.g., *Ballard v. Sperry Rand Australia Ltd.* (1974-77) ATPR 40-006 (at p. 17,129), and *Given v. C. V. Holland (Holdings) Pty. Ltd.* (1974-77) ATPR 40-029 (at p. 17,338). It has not been finally decided, however, which standard of proof applies in private actions for the recovery of damages and for other orders in respect of a breach of Part V. In *Latella & Anor. v. L. J. Hooker Ltd.* (1985) ATPR 40-555, an action for damages under s.82 for an alleged contravention of s.53A, Franki J. expressed the view (at p. 46,483) that:

> "Most of the cases seem to deal with sec. 52 and not with the breach of a section such as sec. 53A, where the criminal onus of proof must be satisfied before a contravention is established."

With respect, it is unlikely that Parliament intended that the Courts would apply a higher standard of proof in respect of a private action for a contravention of s.53A than applies under the common law for misrepresentation. The object of Part V is to provide consumers with greater protection than exists under the common law; it would be illogical to make it more difficult for consumers who have been misled or deceived to recover damages for a contravention of Part V than to recover damages under the common law.

Two classes of proceedings can be brought for contraventions of Part V: s.79 clearly characterises proceedings for a penalty in respect of a breach of Part V as criminal proceedings and the criminal standard of proof applies; however, in all other proceedings for relief in respect of a contravention of Part V the civil standard should be applicable. If the same set of facts gives rise to both civil and criminal proceedings, they cannot be joined in the one action and must be brought separately.