THE COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

CASE NO: 72/CR/Dec03

In the matter between:

Nationwide Poles **Complainant**

And

Sasol (Oil) Pty Ltd **Respondent**

DECISION AND ORDER

Background

1. The complainant, Nationwide Poles CC ('Nationwide'), is a small producer of treated wooden poles based in the Eastern Cape province. It procures supplies of untreated pine poles from the sawmills and then impregnates the poles with a wood preservative. In the case of Nationwide the preservative employed is creosote, or, to be more specific, SAK K, the brand name of a wax-additive creosote produced by Sasol. Although the Nationwide plant is based in the Eastern Cape the bulk of its customers are vineyards in the Western Cape.

2. The respondent, Sasol Oil (Pty) Ltd ('Sasol'), a major subsidiary of the Sasol group of companies, is responsible for the marketing of Sasol's liquid fuels and lubricants. The process of producing synthetic fuel releases a tar by-product which is then utilised as the feedstock for the production of a range of other products manufactured through Sasol's carbo-tar division. The carbo-tar division comprises a number of business units corresponding to the range of products generated from the tar feedstock these being wood preservatives, DIY and black disinfectants and surface coatings. The wood preservative, creosote, produced by Sasol is utilised by its customers for a range of different uses including the treatment of poles.

3. Nationwide Poles was acquired by Mr. Jim Foot on the 31st May 2002 at a time when its business was ailing. Mr Foot brings this complaint on behalf of Nationwide Poles.

4. In about August 2002 Foot became aware that Sasol was charging him a

higher price for his purchases of creosote than that charged to his competitors. Foot approached Sasol for a price list which, after some apparent reluctance on Sasol's part, was furnished. The price list confirmed that the price charged by Sasol for creosote supplied to Nationwide was notably higher than that levied on Woodline, a very large pole manufacturer in the Eastern and Western Cape and Nationwide's most important competitor. It is, indeed, common cause that Sasol's price schedule for the sale of creosote allows for discounts based on purchase volumes, with its largest customers receiving the most preferred prices while its smallest customers, of whom the complainant is one, charged the highest price on Sasol's price schedule.

5. On 30 April 2003 Nationwide lodged a complaint against the respondent with the Competition Commission. It alleged contravention of sections 4(1)(b) and 9(1) of the Competition Act ('the Act'). It received a Notice of Non-referral from the Commission on the 12 November 2003. Nationwide then elected to approach the Tribunal directly. In the present proceedings Nationwide is only pursuing a claim in terms of Section 9 of the Act, the section that proscribes 'prohibited price discrimination'. In essence, alleges that the discount structure utilised in the pricing of Sasol's wood preservative, creosote, meets the test of prohibited price discrimination and it requests that the Tribunal makes a finding to this effect. Nationwide also asks the Tribunal to order Sasol to supply it on the same price terms as those available to its competitors.

Section 9 of the Competition Act

6. Section 9 provides:

20. The customers consulted apparently preferred the latter option.

What we have to determine

21. We will examine each of the constituent elements of Section 9. We will commence the analysis by identifying the relevant market. As commonly occurs in anti-trust litigation, this requires us to decide major factual and analytical disputes between the parties. Nationwide prefers a narrow relevant market – indeed it argues that the relevant market is that for the product named SAK K, a particular wax-additive creosote produced by Sasol alone. On this version of the relevant market Sasol is a monopolist. Sasol, for its part, contends for a significantly wider market. It insists that the market is that for wood preservatives, and that this market, far from being confined to SAK K, includes not only all creosote but also a product called CCA or 'copper chrome arsenate', a product that, alleges Sasol, is directly substitutable for creosote. This involves an examination of certain of the technical characteristics of the products concerned. Having determined the relevant market we then ask whether, in that market, the respondent, Sasol, meets the Act's definition of a dominant firm.

22. Because, as we elaborate below, we do find that the respondent is indeed a dominant firm, we then go on to ask whether the complainant has successfully established that the practice in question conforms to the elements of prohibited price discrimination provided for in Sections 9(1)(a), (b) and (c). Sasol has made much of the proper interpretation of Section 9(1)(a), in particular the nature and extent of the evidential burden that the complainant has to discharge to show that the price discrimination is 'likely to have the effect of substantially preventing or lessening competition'.

23. Because we do conclude that Sasol is engaged in the practice of prohibited price discrimination, we then proceed to examine whether or not the respondent has successfully invoked the defences provided for in Section 9(2).

24. The matter was heard on the 4-6 August , 22nd, 23rd, 31st August and 1st December 2004. The following witnesses testified:

25. For the complainant

i. Mr. Jim Foot, owner, Nationwide Poles
ii. Ms. Tammy Bruno, Botar Enterprises CC
iii. Mr. Angus Currie, CEO, South African Wood Preserver's Association ("SAWPA")
iv. Dr. Simon Roberts, Wits University, expert for Nationwide Poles

26. For the respondent

v. Mr AB Stears, from South African Timber Auditing Services

vi. Mr Fanie Van Wyk, Sasol Manager
vii. Mr. Stephan Malherbe, Genesis, expert for Sasol

The relevant market

27. Three possible relevant product markets have been proposed. As already indicated, Nationwide has proposed that wax-additive creosote be considered the relevant market, alternatively creosote. Sasol is the only manufacturer of wax-additive creosote in South Africa, the relevant geographic market. There is only one other producer of creosote in South Africa, this being Suprachem/ICC, part of the large iron and steel producer, ISPAT/ISCOR (Iscor), now named Mittal Steel. Suprachem and refines crude tar, which is a by-product of Iscor's coke production, and manufactures and markets coke, tar and related by-products. The company is engaged in the distilling of tar and crude benzol into 40 different industrial chemicals.

28. Sasol, for its part, insists that the relevant market is that for wood preservatives. This market, avers Sasol, essentially comprises two substitutable products, creosote and copper-chrome-arsenate or CCA. There are other products employed as wood preservatives but their share is marginal and does not affect our conclusions. If CCA is part of the relevant market then it is common cause that Sasol's share would fall below 35% and, in order to establish dominance, the complainant would have to prove market power.

29. We do not accept the narrower of the market definitions proposed by Nationwide. This is the market for wax-additive creosote. It appears that there is only one such product, that being SAK K, which is produced by Sasol. Accepting this definition of the relevant market would effectively render Sasol a monopolist in the market in question. While we have no reason to doubt Mr. Foot's stated preference for SAK K or even the superior quality of his preferred product – indeed it seems reasonably clear that the wax additive confers certain advantages on SAK K - we have not been presented with any evidence that suggests that it cannot be relatively easily substituted by other creosote products or that the addition of a wax additive is beyond the capacity of creosote users like Nationwide.[1]

30. However, Nationwide is on considerably firmer ground when it argues for a creosote market in opposition to Sasol's insistence that the market be defined as that for wood preservatives. As noted, Sasol's broader definition would incorporate the second product, CCA, into the relevant market. We must then consider the substitutability of CCA for creosote.

31. It is instructive to note at the outset that Sasol did not initially argue for the substitutability of CCA for creosote. There is no mention of CCA in the Commission's notice of non-referral.[2] When this omission was put to Mr. van

1 There is a range of testimony from Foot and from other witnesses extolling the particular virtues of wax-additive creosote. See transcript pages 55, 291

2 Commission's Referral is at page 23 of Record: *"We found no evidence to suggest that Sasol is price*

Wyk, the Sasol executive who testified at the hearing and who had, in the relevant period, headed the Sasol division producing creosote, he could not offer an explanation short of insisting that the Commission had been provided with a full exposition of the market.[3] More telling is the omission of any reference to CCA in Sasol's answering affidavit filed in the present proceedings. Again van Wyk could offer no explanation for this omission. Indeed the first mention of CCA is made in *Nationwide's* replying affidavit.[4] However the existence of CCA loomed large in the oral evidence presented by Sasol's witnesses at the hearing. In this belated fashion, the substitutability of CCA for creosote, by providing the basis for Sasol's denial of dominance, emerged as one of the two main pillars of Sasol's defence, the other being Sasol's insistence that its opponent had not established that the complained of price differentiation had compromised competition.

32. Given the extent to which the alleged substitutability of CCA and creosote has subsequently been relied upon by Sasol, its failure even to make mention of CCA in its initial pleadings is nothing short of startling. It certainly tends to support the inferences sought to be drawn by Mr. Foot from persistent reference in Sasol's internal documents to a 'creosote market' as well as to the marked absence of reference to CCA in these documents. While ordinarily we are prepared to accept that the term 'market' is frequently used in everyday commerce in a manner that is not intended to identify a relevant market for anti-trust purposes, the fact is that *even for anti-trust purposes* the respondent appears to have decided only belatedly to incorporate CCA into its own definition of the relevant market. On the other hand, Foot's testimony denying the substitutability of CCA for creosote was consistent with his earlier filed affidavits and, in this important matter, certainly, he emerges as a significantly more reliable witness than van Wyk.[5]

33. The relevant South African Bureau of Standards (SABS) regulations stipulate the use of either CCA and creosote for preservation of the wood of products in contact with the ground.[6] Vineyard poles have to comply with the H4 SABS specification, which will therefore be fulfilled by the use of either CCA or creosote. As far as creosote is concerned, the standard does not differentiate

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discriminating against NWP and other small treatment plants with its policy of granting volume discounts on large sales of creosote."

3 Transcript page 453

4 See page 57-58 of the record

5 This is by no means the only example of glaring inconsistency in Sasol's evidence and argument. Others are elaborated below. Note, for example, that another key Sasol argument – namely that the price differentiation constituted a risk reduction mechanism - is also not mentioned in its answering affidavit and surfaces for the first time in its expert's report. There are both very important elements of Sasol's case and their omission from Sasol's affidavits is, in our view, a telling comment on the reliability and credibility of their key witness and of the argument presented by their expert.

6 SABS 457 part 2. The standard for the production of softwood preservative treated poles and again explaining the different hazard classes with the different chemicals. Hazard Class 4, Exposure Class, Ground Contact . This is a typical pole that is used in fencing or in vineyards or any type of ground contact ˙ Transcript page 453.

between SAK 100 and SAK K.[7]

34. However, it appears that, notwithstanding the SABS regulation, the actual degree of substitutability between creosote and CCA is largely dependent upon the intended end use of the wood product that is subject to the treatment. It is clear that the possibility of substituting CCA-treated poles for creosote-treated poles for use in telephone or electricity transmission is highly limited – the former are unable to withstand veldt fires as successfully as the latter and this is the major reason for the well-nigh exclusive use of creosote treated poles by these important consumers.[8] It was suggested that there is some recent evidence of CCA-treated poles being used in these applications, but it appears to be common cause that this remains limited and that the purchasers of poles for these uses will continue to insist on creosote-treated poles.

35. Sasol has made rather more of the fact that the complainant does not produce poles for use in telephone and electricity transmission, and, hence, that the lack of substitutability of CCA for creosote in this use has no bearing on the selection of the relevant market. We reject this argument. This appears to be the largest segment of the poles market and we have little doubt that any pole manufacturer wishing to expand its business would want to bid for a slice of this market segment. Nationwide avers that the reason why the electricity transmission and telephone poles market is effectively reserved for the larger pole manufacturers is because the wood suppliers refuse to provide the complainant and other smaller pole manufacturers with the wood input that would allow them to produce poles for these purposes. Leaving aside this limitation – itself a prima facie contravention of the Competition Act[9] – there seems to be no reason why Nationwide or any other pole manufacturer would not wish to contest this important market segment and, should this happen, there would be no effective substitute for creosote in the treatment process.

36. Creosote-treated poles have also been favoured for use in vineyards, the market segment in which Nationwide is active. It appears that the reason why creosote- treated poles have historically been favoured in this segment is because the superior moisture retention capacity of creosote poles renders them less brittle than CCA- treated poles and so better able to withstand the pressure exerted by the mechanical grape-harvesting process. However Sasol avers that this consideration – and hence the non-substitutability of CCA for creosote in this application – only applies to the limited number of vineyard poles that are at the end of the line and that must accordingly bear most of the pressure of mechanical harvesting. Moreover, insists Sasol, technological developments have enhanced the moisture retention capacity of CCA- treated

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7 Transcript page 99

8 This is widely accepted by the range of witnesses at the hearings. See transcript pages 12, 99-101, 206-8-

9 This demands the attention of the Competition Commission. Woodline, one of the largest players in the poles market, is one of Nationwide's strongest competitor in the agricultural poles segment and a major supplier of poles for use in telephone and electricity transmission. Woodline, we are told, is part of the Steinhoff group a large producer and consumer of a range of wood products. Transcript page 30

poles, rendering them less brittle and more suitable for vineyard use. Sasol avers that major wine-producing vineyards have switched from creosote to CCA-treated poles.

37. However, issues related to the toxicity of the respective products appear to resolve this debate in favour of the narrower definition of the relevant market. Although both creosote and CCA clearly have toxic qualities, it appears that relevant EU regulations are moving decisively in the direction of prohibiting the importation of wines from vineyards that utilise CCA-treated poles. Several witnesses insisted that this was a purely protectionist measure, that, in other words, CCA-treated poles had no substantive impact on the safety of the vineyard's product and that the regulation prohibiting this wood preservative was cynically designed as a protectionist measure. This is certainly the view of Mr. Angus Currie, the head of the South African Wood Preservers Association ("SAWPA") who testified at the hearing, but he nevertheless conceded that continued use of CCA-treated poles in vineyards are likely to be used as an environmental barrier to the entry of South African wines into export markets. He referred to the case of the Nederberg estate which, he averred, was told not to use CCA-treated timber any longer.[10] Another of Sasol's witnesses, Mr Stears, from South African Timber Auditing Services, while insisting that the issue of CCA toxicity was based on 'emotional issues' conceded that CCA-treated poles were likely to be phased out of use in South African vineyards within the next six to eight years.[11]

38. It appears that CCA's toxic qualities are an issue in other areas of treated pole usage as well. Ms.Tammy Bruno of Botar Enterprises, who also testified at the hearing, averred that the World Bank has refused to fund projects that use CCA-treated transmission poles because of the arsenic content of the preservative, a requirement that had effectively precluded CCA poles from being used in Zambia.[12]

39. Certainly it would be wholly unreasonable to expect a producer in the position of Nationwide to incur any cost of switching from the use of creosote to CCA if it is accepted in the segments of the market that serve the telephone and electricity providers and also the agricultural sector that creosote-treated poles are, for one reason or another, the preferred product, particularly when it appears certain that regulatory requirements will protect and extend creosote use in the immediate future.[13]

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10 Transcript pages 252, 267

11 Transcript page 298

12 Transcript page 130

13 The dilemma confronting a small producer is clearly articulated by Foot at page 151 of the transcript: **"***We've seen in the World Trade Organisation talks, we've seen what's been happening with Dohar that the European agricultural subsidies are going to be substantially cut. The way I figure where things are going is that round about the year 2005 and I believe there might be a phasing period here of 5 years, I am not sure. I haven't been able to find the original directive. By the year 2005 I would suggest that it is probably going to be necessary to have a CCA free certificate if one wants to export wines into the European Union…. I believe that a substantial amount of the wines and the grape products which are produced in South Africa from the Western Cape, ultimately end up in the*

40. We should add here that we heard lengthy submissions concerning the cost of switching between CCA and creosote in the pole treatment process. In essence Nationwide insisted that because it operated a creosote treatment plant, the fact that CCA was technically substitutable for creosote was of little relevance to it and to the definition of the relevant product market with which it engaged. Nationwide, at any rate, was stuck with creosote - its reality was that of a purchaser in a market for creosote. Sasol argued that switching a pole treatment plant from creosote to CCA was a technically simple and relatively costless exercise. Nationwide, for its part, insisted that switching involved considerable expense and downtime. This debate generated significantly more heat than light. However we are able to conclude that while the larger firms generally operate parallel CCA and creosote treatment facilities in their plants, and while there appears to be some evidence of firms switching permanently from one wood preserver to another, there is no evidence of a firm alternating a single treatment facility between creosote use and CCA use.

41. However, Sasol has, in order to support its contention that creosote and CCA belong in the same relevant market, placed considerable reliance on data which, it insists, demonstrate that when it increased the price of creosote, demand for its product fell off significantly and purchases of CCA increased concomitantly. However, the data relied upon are open to question.

42. It is common cause that the price of creosote has increased, relative to the price of CCA. Sasol insists that in consequence of this movement in relative prices it has lost market share to CCA.[14] Sasol contends that evidence of the two products being substitutes is found in the SAWPA statistics, which reflect that the use of CCA increased relative to that of creosote.[15] Its expert, Mr. Malherbe of Genesis, produced a table entitled "Changes in Sales" which is reproduced and discussed below. Sasol also claims to have lost market share to Suprachem, the other producer of creosote. The reliability of these data is open to question for various reasons:

    i. There is evidence that the SAWPA data relied on by Genesis may include export figures, therefore we do not know what the extent of local demand actually was.

    ii. We have to rely on estimates by Genesis as to Suprachem/ICC's sales volumes for 2000 and 2001 because no evidence of this was submitted.

    iii. The CCA volumes are also derived estimates and are open to question.

43. Sasol produced at the hearing a handout prepared by its experts, Genesis,

European Union. Is it reasonable for me to suggest to my clients that CCA is an appropriate product knowing full well that this is coming?"

14 Final Argument Transcript page 47

15 Sasol's first set of Heads page 36

based on SAWPA and Suprachem sales volumes, documenting changes in sales for creosote, CCA and a third product, Boron, between 2001 and 2003. This is reproduced below:

Sasol's Changes in Sales Figures (in 000 m^3)

	CCA	Boron	Suprachem	Sasol
2001	133	2	163	210
2003	190	7	184	152
Absolute Change	57	5	21	-58
Percentage Change	43%	250%	13%	-28%

GenesisTable produced at hearing sourced from SAWPA data (shaded areas represent creosote sales)

44. Sasol utilises this in an attempt to show that during the period documented in the table, Sasol's sales losses were taken up by both Suprachem and CCA. It contends that over the period 2001 to 2003, there was a rise in the demand for CCA of 43%; further that there was a rise in demand for the creosote offered by Suprachem of 13%, while Sasol's creosote product suffered a 28% decline over the same period.[16]

45. It is common cause that the SAWPA data include pole volumes for domestic and export sales.[17] Nationwide contended that insofar as the SAWPA data included pole volumes for both domestic and export purposes, they could not be considered a reliable indicator of local demand for creosote: in other words, that the figures were flawed.[18]

46. At the second set of hearings Mr. Footcross-examined Sasol's expert, Mr Malherbe, on Sasol's sales figures. He asked whether Sasol had extracted export orders from its analysis.[19] Malherbe indicated that the figures on which Sasol relied did not include export orders.[20] He confirmed then and later, in response to a question from the Tribunal, that Sasol's figures had extracted export sales which had been stripped out by his team.[21] However, it was later put to him by the Tribunal that in the earlier hearings, Mr. Currie, the SAWPA representative, in response to a question from the panel as to whether the SAWPA sales figures reflected sales in South Africa or whether they were sales by South African producers for export as well, had confirmed that the

16 Respondent's Supplementary Heads p 8, Transcript page 269.
17 Transcript page 262, question put to Angus Currie by the Tribunal.
18 Complainant's Heads para 3.10, Complainant's Supplementary Heads page 7
19 Previously, in a question put to Van Wyk, the latter indicated that certain sales data of Sasol on page 437 of the record included at least two export orders, and did not relate to local sales. Transcript p 414.
20 Transcript page
21 Transcript page 389

SAWPA figures did in fact reflect both local and export sales.[22] This was put to Mr. Malherbe, Sasol's expert witness, and he could not confirm the reliability of either the SAWPA or Sasol sales figures:

> "MR MANOIM: *This is, Mr Currie is in the witness box and I asked him a question, I said: "Sorry, just as a point of clarity on the Sawpa figures that Mr Unterhalter has shown you, are these figures of sales in South Africa, or are those figures of sales by South African producers either in South Africa or for export as well?" and he says: "It's the latter." I say: "The latter?" and he says: "Yes."*
> MR MALHERBE: *So in other words he said it included export sales.*
> MR MANOIM: *Yes that's how I would understand that exchange."*
> MR MALHERBE: *Yes let me just confirm that. Okay I think that the thing to say here is that we believe that our Sasol numbers do not include exports, but it's not exactly the same calculation as we did for ICC.*
> MR MANOIM: *Where did you get the Sasol numbers from? Were they given to you, are they part of the record, or were they given to you under instruction …[end of tape]…*
>
> MR MALHERBE: *Well here is a possible issue. The way that we derived at the Sasol figures for these purposes was from the sulpha* [this should read "SAWPA"] *figures less our ICC figures for domestic market and our understanding from Mr Currie was that the numbers that he provided us did not include exports and on that basis we assumed that that number that we have, effectively was equivalent to Sasol's domestic sales. Now it seems as if our impression from him and what he said in the record might be inconsistent and that might have an impact on the numbers. I'm not sure.*[23]*"* (Our emphasis)

47. Sasol later submitted that while the SAWPA figures reflected sales of creosote-treated poles, they included sales of creosote-treated poles destined for export. However, Sasol argues that this is irrelevant, because even if the poles are exported, they are still an accurate reflection of local demand for creosote.[24] However, apart from the doubt that this unresolved debate casts on the reliability of the data, the question of whether the treated poles are for the domestic market or for export markets has implications for substitutability. For example, we have no knowledge of the use to which the exported poles are put. It is conceivable that they were for use in housing construction where CCA poles may have been favoured for reasons of creosote's odour rather than because of changes in relative price. What is clear is that Mr. Currie of SAWPA conceded that the gain in creosoted poles in 2001 could have been attributed to an increase in exports and that this calls into question the analysis of substitutability and its relationship to movements in the relative prices of

22 Transcript page 262, referred to again at transcript page 390.
23 Transcript pages 388-391
24 Heads page , Supplementary Heads page 7

CCA and creosote.[25]

48. There is similar confusion surrounding the Suprachem/ICC figures. Nall of the Suprachem/ICC figures were disclosed during discovery, and it seems that Sasol estimated the export figures for 2000 and 2001 based on the proportion of creosote that Suprachem/ICC exported in 2002.[26] Sasol argued that export sales were removed from these "estimated" sales figures for 2000 and 2001.[27] We agree with the complainant's contentions that, because we do not have hard evidence of what Suprachem's 2000 and 2001 export creosote figures actually were, there is no way to deduce exactly what Suprachem's local sales of creosote were in 2001.[28]

49. Similarly, we do not know what the CCA volumes in the market were, therefore cannot accurately compute the degree to which creosote sales declines were attributable to rises in sales of CCA.[29]

50. In summary then we must approach with considerable caution the assertion that Sasol's data in the above table indicate substitution from Sasol creosote to CCA or to Suprachem's creosote product, and assertions about the extent by which Sasol's market share was reducing, if at all. Firstly, it is clear that even Sasol's own expert was confused as to what data had been used and on which a fundamental component of Sasol's case was based. Secondly, since the figures included local and exported poles, we have no way of knowing to what extent demand was driven by price or the physical use to which the poles were put. Dr Roberts, Nationwide's expert, pointed out that the demand for the alternative product could have been changing for a host of other reasons unrelated to price.[30] Thirdly, Dr Roberts pointed out that the analysis of switching encompassed a two year period, which was an inappropriately long period in which to assess substitutability, as it would increase the percentage change during that period. He argued it would have been better to assess year-by-year changes over a longer period of time, to get an accurate picture of substitutability.[31]

51. Dr Roberts also pointed out that it is, in this case, particularly difficult to determine whether or not the pre-increase price of creosote was set at the competitive level. In our discussion of market power we will show that Sasol's pricing of creosote has not responded to that of its competitors. In these circumstances it is reasonable to infer that Sasol's price level *prior* to the significant increases was already supra-competitive. An increase from a

25 Transcript page 244
26 ICC figures appear at page 608 of the record. At the request of Mr Foot, we subpoenaed creosote sales figures from ICC for the period 2000 –2004, however ICC only provided figures for 2002-2004. They advised that the export sales data split was not readily available at the time.
27 Respondent's Supplementary Heads page 7
28 Final Argument Transcript page 2
29 Final Argument Transcript page 73
30 Transcript page 288
31 Transcript page 289, 269

supra-competitive price level may well give rise to a sharp decline in demand for the product in question and a concomitant increase in the demand for an alternative without suggesting that at *competitive* price levels the two products are substitutes. This is the well-documented operation of the 'cellophane fallacy'.

52. The technical characteristics of the two products – creosote and CCA – indicate that substitutability is, at best, limited in key applications and, because of regulatory interventions, is being further constrained in favour of creosote use. The evidence of substitutability that Sasol produced based on, inter alia, the SAWPA data is inconclusive and clearly unreliable. ***We conclude then that the relevant market is that for creosote.***

53. We will proceed to examine whether or not Sasol is dominant in that market. We will show that Sasol's market share exceeds 45% and that it is, therefore, presumptively dominant in terms of Section 7(a) of the Act.

Dominance

54. Section 7 of the Act provides:

A firm is dominant in a market if –

a) it has at least 45% of that market;
b) it has at least 35% but less than 45% of that market, unless it can show that it does not have market power; or
c) it has less than 35% of that market, but has market power.

55. The Act defines 'market power' as '..the power of a firm to control prices, or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers.'

The creosote market – market share data establish Sasol's dominance

56. The evidence clearly establishes that Sasol's share of the creosote market exceeds 45% and is therefore presumptively dominant.

i.<u>SAWPA levies</u>

SAWPA extracts levies from the two manufacturers, Suprachem and Sasol, based on a percentage of their sales. Therefore Nationwide contends that the levies represent a reasonable approximation of what their market shares must be. If we assume that the SAWPA levies do represent a reasonable proxy of what the volumes would have been then we must conclude that Sasol had 66% of the creosote market in 2001 and 53% in 2004.[32]

32 Transcript page referring to page 10 Complainant's Supplementary Information bundle ("CSI") extracted from page 592 of record

ii.Iscor/ICC figures :

Nationwide relies on information submitted by Iscor, based on creosote **tonnages sold**, and computes Sasol's market share as follows[33]:

2002 total market:	36,543 tons
Sasol share:	18, 251 tons
Sasol % :	**50%**
2003 total market:	37,644 tons
Sasol share :	19,250 tons
Sasol % :	**51%**

57. In 2004, Sasol's own figures indicate that, as at February 2004, it had 56% of the total creosote market.[34] Furthermore, its own information - once again forming part of the Tribunal record - indicates a South African market share of 56% for the 2003 year.[35] In the business plan of the Sasol Carbo-Tar division it places its own share of the creosote market at 53%.[36] We are satisfied then that Sasol is, by virtue of its market share alone, clearly dominant in the creosote market because all evidence establishes a share in excess of 45% of the market throughout the relevant period up until 2004, that is from April 2001 until August 2004.

58. Although we are satisfied that Sasol's market share establishes that it is presumptively dominant in terms of Section 7(a) of the Act, we will also show that it is has exercised market power in this market insofar as it has, in setting the price of its creosote, 'behave(d) to an appreciable extent independently of its competitors, customers or suppliers'.

59. Sasol has traditionally manufactured petrol and diesel from coal. This process involves converting coal into a gas stream which is converted into liquid fuel. This process leaves both ash and tar as by-products. The tar stream is then utilised to produce a bouquet of products which are, in turn, utilised in a variety of applications.[37] These products make up Sasol's carbo-tar business which produces a range of value-added tar and carbon products at both its Secunda and Sasolburg plants and is a relatively small business unit within the entire Sasol group. As indicated earlier the product categories in the carbo-tar division are creosote, a wood preservative, a product for the raw tar market, DIY and black disinfectants, and surface coatings, mainly comprising primers

33 See page10 CSI and page 26 Transcript. Note these figures differentiate export sales from local. Iscor figures were derived from Iscor creosote sales found at page 608 of record.
34 Exhibit 1, Creosote Monthly Sales by Volume, handed up by Sasol at hearing on 4 August 2004.
35 Record page 324. This is also confirmed in Sasol's Heads of Argument page 50 footnote 77: "There is a range because there is a difference in estimate of the Respondent's share of the creosote segment: Respondent's estimate is 56% (Tribunal bundle p 324)."
36 Transcript closing argument, pages 5 and 12.
37 Transcript 6 August 2004 p 309

for road bases and the binder pitch which is sold to aluminium smelters.[38]

60. The Sasolburg plant has the capacity to produce approximately 50 000 tons of the tar feedstock each year. Of that raw feedstock, between 20% and 40% could be converted to creosote. In 2002 and 2003, Sasol produced between 20 000 and 23 000 tons of creosote per annum.[39]

61. Mr. van Wyk's testimony revealed an important distinction between the economic drivers of the Sasolburg and Secunda plants, a distinction that critically influences Sasol's pricing behaviour. The Sasolburg plant was designed to produce petrol and diesel from the **gas stream** only and *not* from the **raw tar stream**. As indicated the Sasolburg production process generates some 50 000 tons of the tar feedstock annually. By contrast, Secunda was later designed so that the total tar stream could also be converted to a diesel stream – hence although Secunda produces an annual tar stream of 500 000 tons all of it was intended to be utilised in the production of liquid fuel. Two important consequences flow from this:

62. Firstly, although there is considerable tar feedstock available at Secunda, the plant is not set up to utilise this feedstock in the production of the tar based products such as creosote. The Secunda feedstock has to be transported to Sasolburg to produce the various tar products.

63. Secondly, because Secunda was designed, and the capital was invested, to produce liquid fuel from its tar stream by-product, the alternative value of the Secunda tar stream is the value of petrol and diesel. Therefore the opportunity cost of using that supply is the international dollar price of petrol or diesel referred to as the 'fuel equivalent price'. Moreover, a key element of Sasol's strategic plans is the importation of natural gas from Mozambique through a pipeline, the construction of which is to be completed 3 or 4 years hence. One of the core business units which is to utilise the gas is the Sasolburg plant. The end result is to be the elimination of the gasifiers because the plant will no longer be coal-based, hence the by-product of raw tar would fall away. Therefore Sasol predicted that in 3 or 4 years' time Secunda would be the only source of tar feedstock all of which would be priced at the fuel equivalent price. It was this set of factors that underpinned Sasol's decision to hike massively the price of its feedstock and, hence, the price of creosote and the other products emanating from this feedstock.

64. Mr. Foot avers that there is no semblance of negotiation between Sasol and its customers over the price of its creosote. The price is laid down – for a year at a time – in a schedule supplied by Sasol. Customers are then informed of Sasol's decision and they either adhere to Sasol's price or they purchase their product elsewhere. There is evidence in Van Wyk's testimony on how prices

38 Transcript 22 November 2004 page 24

39 Van Wyk confirms that they make 30-40% creosote from the 50 000 tons of raw tar feedstock at page 310 of transcript.

are determined year-by-year. Sasol determines an overall price increase, which is then allocated between the different price categories, and they are enforced in that manner, with little room for negotiation.[40]

65. In similar vein, Mr. Foot has made much of Sasol's ability – demonstrated in the substantial price hikes flowing from the anticipated changes in the source and price of Sasol's feedstock – to massively increase prices and, although presented as a concession to accommodate the wishes of its customers, then to announce a price increase well in advance of its actual implementation and then to pre-announce a series of price increases over a period of several years, well in advance of the implementation of the increase in the price of the feedstock.[41] This is certainly a pattern and mechanism of price-setting that indicates a comprehensive disregard for the responses of both customers and competitors.

66. Indeed Sasol's witnesses insisted that they had no knowledge of the prices charged by their competitors, even by Suprachem, the only competing producer of creosote. It appears that this was presented in an effort to gainsay allegations of collusion with Suprachem. However it seems extraordinary that Sasol should not know the price of its only competing producer of creosote – it is extraordinary that, in the process of setting its prices with its customers, it was never told by them what price Suprachem was charging for its creosote. We must either conclude that Sasol's witnesses were not telling the truth, or we must regard this as bearing out Mr. Foot's contention that prices were set independently of any interaction with customers and without regard for the price-setting behaviour of competitors.

67. Indeed Mr. Van clearly conceded that the pricing of creosote is not influenced by its competitors.[42] He averred that customers are visited and "informed" of price increases, but insisted that this did not allow for the negotiation of the price but was rather as an opportunity to explain the rationale for the price increase.[43] Note the following exchange between the tribunal panel and Van Wyk:[44]

"MR MANOIM*: So if a customer says Suprachem has given me a better price; can you beat it, what do you say then?*
MR VAN WYK: We don't deviate from this price, because we feel it's not ethical because it's an open policy. We are transparent. So it's a choice for the customer.
MR MANOIM: Okay, so that stays from year-to-year.
MR VAN WYK: We don't negotiate any of these prices."

68. In his closing argument, Sasol's counsel attempted to mitigate this by arguing that in fact, Sasol is influenced by lower prices of competitors, insofar as

40 Transcript page 428
41 Transcript page 21
42 Transcript page 430 's Heads page 55
43 Transcript page 318
44 Transcript page 429.

prices are adjusted after negotiations with customers. In other words, according to him, Sasol's prices are *indirectly referenced,* its customers.[45] However, we find the above-mentioned references to the fact that no comparison is made with Suprachem's prices overwhelmingly strong evidence that Sasol sets its prices independently of competitors and does not negotiate with any of its customers in this regard.

69. The range of factors and practices outlined above lead Mr. Foot to characterise Sasol's price-setting as reflecting a 'take it or leave it' attitude. Indeed so flagrantly does Sasol's price-setting behaviour depart from the practice associated with price determination in competitive markets, that it appeared to defy explanation by the learned experts retained on both sides of this matter. Both suggested that the Sasol approach appeared to reflect a 'bureaucratic' style of management where successive price levels were simply derived from the last prevailing price. It was even suggested that Sasol's behaviour is 'irrational'.

70. However, in our view, Sasol's price setting behaviour is not rooted in 'arrogance' or some other attitudinal pre-disposition. Neither is it irrational or bureaucratic. It rather reflects Sasol's decision to price at fuel equivalent prices or, conversely, to price without regard to conditions in the wood preservative market. In short, the price of creosote and the other tar-based products is determined in the liquid fuels market. Indeed in the course of the hearings it became clear that the fuel equivalent price is not the only exogenous determinant of Sasol's creosote price although it is the most important factor and it does set the price framework. It appears that, with the fuel-alternative price as the framework, Sasol attempts to optimise the composition and prices of the bouquet of products (of which creosote is one) produced from the tar feedstock and this process also influences the price of creosote. What is clear, though, is that whether it is bureaucratic inertia or irrational whim or a highly rational optimisation exercise – and the evidence strongly favours the latter – that drives Sasol's determination of the price of creosote, its decision in regard to the pricing of creosote is not influenced by the competitive behaviour of its customers or competitors, and this fact alone is sufficient to sustain an allegation of market power.

71. We conclude therefore that by dint of a market share in excess of 45% Sasol is dominant in the market for creosote, the relevant market *in casu*. Although this is sufficient to sustain a finding of dominance, we have gone further and shown that Sasol has evidenced its dominance by its exercise of market power in setting the price of its creosote. As already noted, we should add that this not only bolsters our finding on dominance, but it also supports our finding on the relevant market. That is, Sasol would not be able to exercise market power in the pricing of creosote if the boundaries of the relevant market extended beyond the creosote market.

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45 Final Argument Transcript page 53.

The elements of price discrimination – Section 9(1)

72. As already noted, having established the respondent's dominance, we must now examine the elements of price discrimination each of which must be present in order to sustain a finding of prohibited price discrimination. We must be satisfied:

i. that the practice complained of 'is likely to have the effect of substantially preventing or lessening competition'.
ii. that the transactions in respect of which price discrimination is alleged are 'equivalent' transactions.
iii. that the discriminatory action in question must relate to price, discounts provided, services provided or to payment for those services.

73. If the first pillar of Sasol's defence may be characterised as its denial that it is dominant, then the second pillar is its insistence that Nationwide has not discharged its onus to establish all of the elements of Section 9(1). In particular, argues Sasol, the provisions of Section 9(1)(a) which requires evidence of a likely prevention or lessening of competition have not been satisfied. It rests its defence primarily on these two pillars.

74. We have established that the first of Sasol's pillars of its defence - its denial of dominance – is without merit. We turn then to sections 9(1) (a), 9 (1) (b) and 9 (1) (c). However, a purposive interpretation of section Section 9(1) requires that we step back and examine the place of price discrimination in anti-trust generally and in our Act in particular.

Price Discrimination – its place in anti-trust

75. Much of the argument in this matter centres upon the impact of price discrimination on competition and, in particular, on the nature of the test mandated by Section 9(1)(a) which provides that in order for an action by a dominant firm to constitute prohibited price discrimination, it must be shown that such action 'is likely to have the effect of substantially preventing or lessening competition'. Before turning to a detailed examination of Section 9(1)(a) some prefatory remarks regarding the place of price discrimination in anti-trust are in order.

76. Whilst some contemporary anti-trust scholars are highly sceptical of the negative impact of price discrimination on competition, lawmakers, on the other hand, have generally held – and still do hold – that price discrimination offends the principles and objectives of anti-trust and so have proscribed certain forms of its practice in terms of anti-trust law. This is because price discrimination is viewed as a threat to the underlying competitive structure of the market in which it is perpetrated, in other words it is viewed as promoting a market structure conducive to anti-competitive conduct. We will show that our Act mandates this broad interpretation of anti-trust's mandate and that this

conclusion is powerfully bolstered by the policy context within which the Competition Act is located.

77. Anti-trust decision makers in other jurisdictions – notably the US and European courts – have generally and, we shall argue, appropriately, taken their lead from the legislation that they are required to uphold. Accordingly, the misgivings of some eminent scholars notwithstanding, the courts and other anti-trust decision makers have continued to uphold the legislative proscription of price discrimination. While the Department of Justice in the US has prosecuted few price discrimination actions, private access to the US courts has ensured a continuing trickle of price discrimination litigation. In those instances where private action has afforded the US courts the opportunity of pronouncing on the legality of price discrimination, they have honoured the express wishes of their legislators by continuing to enforce the prohibition on price discrimination.

78. Significantly, though, in key anti-trust jurisdictions – notably the United States – legislators have carved out a special place for price discrimination in the armoury of anti-trust legislation. Hence, as already noted, in the United States price discrimination is not enforced through the Sherman Act, the general anti-trust statute of that country, but rather through the Robinson-Patman Act, a statute dedicated to dealing with price discrimination. Clearly price discrimination is, in US anti-trust history, regarded as a particular species of anti-trust offence, one not adequately accommodated even within the very broad umbrella of the Sherman Act.

79. In this regard the South African competition statute, the Competition Act, embodies an approach to price discrimination not entirely dissimilar to that of the United States. While our legislature has not created a statute dedicated to dealing with price discrimination alone it has nevertheless chosen to distinguish the treatment of price discrimination from the standard approach adopted in the Act for dealing with conduct contraventions. As noted, the Act treats price discrimination as a species of abuse of dominance, and, as such, accommodates it within Part B ('Abuse of a Dominant Position') of Chapter 2 ('Prohibited Practices'). However, it has not been accommodated within the very broad ambit of Section 8 of the Act, that section of the Act detailing the variety of instances of abuse of dominance. Section 8 manages to provide for the prohibition of a wide-ranging set of practices construed to abuse market dominance, a section that manages to effectively capture both specific practices and general practices, that provides for the adoption of a rule of reason approach to certain conduct while proscribing other forms of conduct *per se*, and that tailors the operation of onuses in an effort to fine-tune the treatment of the multitude of potential offences that arise under the broad rubric of an abuse of a dominant position, or, in US parlance, monopolisation. And yet the legislature did not see fit to extend the coverage of this already very broad provision to include reference to price discrimination. It rather chose to create a section of the Act – Section 9 – dedicated to dealing with price discrimination.

80. Why is price discrimination accorded this special treatment? We would venture to suggest, even at the risk of some simplification, that, regardless of the very different conditions underlying the anti-trust legislative histories of each of these divergent economies and societies, the particularity of treatment accorded price discrimination has strikingly similar roots.

81. It is our view that the proscription of price discrimination reflects the legislature's concern to maintain accessible, competitively structured markets, markets which accommodate new entrants and which enable them to compete effectively against larger and well-established incumbents. This set of concerns points directly to problems confronting small and medium sized enterprises (SMEs) which, in the absence of a 'level playing field', or, what is the same thing, in the presence of discrimination, may well find it difficult to enter new markets and even more difficult to thrive, to compete effectively 'on the merits'. The influence of SME-related considerations in the legislative history of the Robinson-Patman Act is absolutely clear. Equally clear is our own Act's concern with the development of small business – it is telling that one of the stated purposes of our Act is to ensure the 'equitable' treatment of small and medium-sized enterprises.[46]

82. There are, to be sure, considerations of 'fairness' that underlie this bid to ensure 'equitable treatment' for small and large business. It is manifestly clear that the drafters of the Robinson-Patman Act also responded to the perceived inequity embodied in the inability of small traders to acquire stock at the same prices as those available to their larger competitors.

83. While incorporating considerations of equity into anti-trust analysis may be anathema to an anti-trust approach that insists on the sole claim of a 'pure' consumer welfare standard, one that is solely referenced by a reduction in output or an increase in price, the utilisation, in selected, though important, instances of a fairness standard is not alien to our Act and practice. Certainly, in merger analysis, considerations of public interest – which are partly, if not entirely, driven by considerations of 'equity'– are explicitly present and the needs of small business find expression in the definition of public interest. Moreover, SMEs are specifically given consideration in exemption proceedings, whereby they are afforded immunity from prosecution under the exemption provisions under Section 10 of the Act. The mere fact that equity considerations sit uncomfortably in competition economics orthodoxy is no warrant for ignoring our legislature's express desire that they play a role in our decisions.

84. However, the element of equity that underpins certain of the Act's concerns to protect small business – and it is precisely the element of 'protection' that most offends anti-trust orthodoxy – should not detract from the substantive

46 see Section 2(e) ('purpose of Act'). Additional indications of the importance accorded by the drafters to the development of SMEs are contained in Section 10(3)(b)(ii) ('exemptions') and Section 12A(3)(c) '(consideration of mergers')

competition considerations that accord small business a special place in anti-trust history and in its contemporary practice.

85. It is the oft-proclaimed mantra 'protect competition, not competitors' that is usually invoked by those seeking to deny small business a special place in anti-trust considerations. As with many frequently repeated pieces of rhetoric, this one contains more than a grain of truth and serves as a valuable cautionary for anti-trust authorities who are regularly confronted by competitors opportunistically seeking to invoke competition legislation to advance their own narrow interests even when the conduct of their opponents is manifestly pro-competitive or pro-consumers.

86. It is however often a feature of even good pieces of rhetoric that they camouflage at least as much as they reveal. In this instance, the obvious rejoinder to the 'protect competition, not competitors' mantra, is one that insists 'no competitors, no competition'. And just as those who adhere to the better-known mantra can claim a solid intellectual foundation for their views – one that rests on a narrow, focused view of the meaning of competition – so too can those more anxious to secure the underpinnings for a robust population of SMEs find support in anti-trust history and in its contemporary practice. In short, those who deem anti-trust's mandate to extend to the securing of pro-competitive market *structures,* may be less troubled at using competition enforcement to secure conditions favourable to the entry and strengthening of SMEs, particularly when the practices that disfavour the latter are themselves not practices that promote competition on the merits.

87. In our view the relevant, that is, the *South African*, legal and political economy context favours competition enforcement that is concerned to protect the market mechanism from conduct that has the effect of undermining it. The expressed concerns of the South African lawmakers and the policy planners support this finding. This is powerfully manifest, inter alia, in an industrial policy that places the development of SMEs at the centre of attempts to improve the workings of the market mechanism. This conclusion is grounded not only in an examination of the general industrial policy context in which concern for SME development looms large but also in an examination of the Act itself.

88. The Competition Act is, itself, punctuated with references to the legislature's desire that the statute should promote market access and equality of opportunity particularly, in this field, where small enterprise is concerned. As noted references to equality of opportunity are to be found in the Preamble to the Act, and the promotion of small business is specifically provided for in Section 2(e), which expresses one of the 'purposes' of the Act, as well as in the consideration of applications for exemption (Section 10(3)(b)(ii)) and the evaluation of mergers (Section 12A(3)(c). In fact the Explanatory Memorandum which accompanied the publication of the draft Competition Bill explicitly notes the intention of the policy-makers to support SME

developments through the instrumentality of the Competition Act.[47] The Department of Trade and Industry has recently released a report surveying SME development in South Africa and it concludes that while entry barriers for SMEs are relatively low, the long-term success rates of these entrants is markedly low.[48] Even the President's address at the opening of Parliament in 2005 saw fit to record the urgency with which Government viewed support for SME development.[49]

89. The Act is clearly concerned to promote market access for SMEs and an important mechanism by which it seeks to do so is by ensuring 'equitable treatment'. Price discrimination – conduct that is, per definition, inequitable - is explicitly proscribed by the Act, it is not, in other words part of a general category of exclusionary practices. In short, the legislature proscribed price discrimination perpetrated by dominant firms because of the threat it poses to its victims, these being a competitive and accessible market structure and the small firms that animate it, potentially robust, though still slender, saplings that will not take root in the face of treatment that is manifestly inequitable relative to that accorded their better resourced competitors. This then is why Section 9 has been carved out of the general abuse of dominance provisions: it is uniquely concerned with the structural impact of abuse of dominance and it is recognised that its victims are most likely to be small customers.

90. However, in the Act's formulation of the prohibition of price discrimination, certain limiting principles are embodied. There is, in other words, no basis to conclude that Section 9 constitutes a blanket prohibition on price differentiation or on the commercially important and widespread practice of discounting even when these pricing practices explicitly favour large firms over small firms. Hence, and in significant contrast with the Robinson-Patman Act, in our Act the offence of price discrimination is limited to dominant firms. Moreover, Section 9(1) specifies certain elements to which any act of price differentiation must conform if it is to constitute prohibited price discrimination. And then a series of defences, many of which were developed piece-meal over the course of many years of US and European jurisprudence, are explicitly provided for in Section 9(2). Section 9 cannot therefore be read as an omnibus prohibition of the practice of differentiating on price. Rather, proscription of the practice of price differentiation is confined to particular, specified circumstances.

Section 9(1)(a) - A substantial lessening of competition

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47 At page 63*: "The overriding objective of competition policy and its associated instruments is the promotion of competition in order to underpin economic efficency and adaptability; international competitiveness; the market access of SMMEs…"*

48 DTI - Annual Review of Small Business 2003

49 Address of the President of South Africa, Thabo Mbeki, at the Second Joint Sitting of the Third Democratic Parliament Cape Town: February 11, 2005 at page 8 where reference is made to 'progress made in setting up the Small Enterprise Development Agency, to improve our government's performance in the critical area of the development of small and medium enterprises.'

91. Sasol's case, as we have already noted, rests heavily on disposing of Nationwide's case on the interpretive hurdle of section 9(1)(a) of the Act. Sasol advances an interpretation of section 9(1)(a) that would require the complainant to prove actual harm to consumer welfare. Granted Sasol does not say so in so many words, but its critique of this lacuna in the complainant's evidence amounts to exactly this. Because, on this standard, because Nationwide cannot demonstrate that the increased production costs incurred in consequence of Sasol's discrimination harm the market for treated poles, it must fail.

92. Mr Foot for his part concedes that he has not been able to show that the price discrimination has led to higher prices or lower output in the market for treated poles. But he does not concede Sasol's interpretation of Section 9(1)(a).

93. Mr. Foot's rejection of Sasol's interpretation of Section 9(1)(a) finds support in the entire architecture of the Act. Chapter 2 deals with prohibited practices in four categories. Section 4 deals with restrictive horizontal practices, Section 5 with restrictive vertical practices, Section 8 with abuse of dominance and Section 9 with price discrimination – as we have already stated, the act of prohibited price discrimination can only be committed by a firm that is dominant as defined in Section 7 of the Act. Each of sections 4, 5 and 8 define two types of prohibited practices. On the one hand there are a number of clearly identified acts that are prohibited – hence Section 4(1)(b) prohibits a number of specified horizontal agreements; Section 5(2) specifically prohibits the practice of minimum resale price maintenance; Sections 8(a), (b) and (d) prohibit a number of identified abuses of dominance. Section 9 which specifically prohibits price discrimination by a dominant firm belongs to this genus of restrictive practice. For convenience we refer to these as the 'named anti-competitive acts'.

94. On the other hand each of sections 4,5 and 8 also prohibits a general category of acts whose effect is to undermine competition – these are to be found in Sections 4(1)(a), 5(1) and 8(c). We will refer to these as the 'general anti-competitive acts'.

95. Note the difference in the way that these two categories of anti-competitive acts are treated. Where the general anti-competitive acts are concerned the complainant has, in order to secure a conviction, to establish that the act complained of is anti-competitive in its effect. This is the complainant's onus – it does not avail him to simply describe the elements of the act, he must establish the anti-competitive consequences that flow from it.

96. However where the named anti-competitive acts are concerned the onus imposed upon the complainant is simply to establish the elements of the act. In respect of Sections 4(1)(b), 5(2) and 8(a) and (b) this alone is sufficient to secure a conviction. In respect of the named anti-competitive acts in the sub-sections of Section 8(d), should the complainant successfully establish the

elements of the acts there named, the respondent is entitled to defend itself by showing that the anti-competitive effect which is presumed by the acts named in sections 8(d)(i)-(v) is outweighed by 'technological, efficiency or other pro-competitive gains'. However in respect of each of these acts named in 8(d)(i)-(v) the anti-competitive effect is presumed once the elements of the act have been established although it is contemplated that countervailing pro-competitive gains may lead to a net pro-competitive effect and so the respondent is invited to prove these countervailing gains if he can.

97. Section 9 is a clear example of a named anti-competitive act – it is price discrimination that is so named. Section 9(1)(a)-(c) establishes the elements, all of which have to be established in order for the act of price discrimination to constitute *prohibited* price discrimination, in much the same way as Section 4(b)(i)-(iii) specifies the elements, one of which must be established, for a horizontal practice to constitute a *prohibited* horizontal practice. In short the architecture of the act suggests strongly that Section 9(1)(a) is not structured to constitute the demanding hurdle that Sasol contends for. Certainly the other two elements that must be established – 'equivalence' in Section (9)(1)(b) and the subject matter of the discrimination in Section (9)(1)(c) – cannot, at the wildest stretch of the imagination, be construed as similarly onerous hurdles as that contended for in respect of 9(1)(a).. There can be no doubt about their status as simply elements of the act and it would be peculiar, to say the least, to incorporate under a single subheading two elements and a defence – this is completely at odds with the rest of the architecture of the Act.

98. However, it is the presence and the contents of Section 9(2) that, in our view, puts this matter to rest. This is the sub-section of Section 9 in which the defences are specifically incorporated. They are defences interestingly distinct from the countervailing pro-competitive gains contemplated in the defence made available to Section 8(d) defendants. The defences in 9(2) relate to cost-based justifications and several incidental phenomena – in other words our Act does not even contemplate the prospect of pro-competitive consequences flowing from price discrimination. Once the dominance of the perpetrator and the elements of the act are established it is prohibited price discrimination unless one of the justifications listed in 9(2) can be proven.

99. Why, though, was it thought necessary to create a special section of the act to deal with price discrimination? There were undoubtedly practical considerations. It is a long and cumbersone section and the elements of the act and the defences are specified in considerable detail – this was done, we will argue, precisely to limit the instances of price differentiation that are proscribed. But, in our view, the overriding reason for the separation is given by the policy context that accounts for the legislature's concern with price discrimination in the first place and provides further reason for why the legislature could not have intended the complainant to establish the anti-competitive effect of price discrimination. Mr. Foot has clearly articulated this argument and, in so doing, is on all fours with the legislature's concern with the prospects of small business.

100. Mr. Foot argues that a small business is the most likely complainant in a price discrimination case. Foot points out that on a consumer welfare test small business will always fail, precisely because it is not able to correlate harm that is inflicted upon it to harm that is inflicted on the broader market. A small firm will always be met with the response that its troubles are, in relation to the market as a whole, *de minimus*, that is, that they have little, if any, effect on competition in the market as a whole.

101. We agree. It is unlikely that a discriminator will discriminate against a large customer unless that customer is also a competitor. However were such an instance of discrimination to occur it is more likely to be met by a claim based upon section 8(c), one of the category of general restrictive practices where an anti-competitive effect has to be established by the complainant. This is why we have a separate section 9. The legislature indeed contemplated that complainants under section 9 – who will generally be small enterprises - would not be able to show the sort of consumer welfare harms that Sasol contends are contemplated as the test, but who nevertheless need to have a remedy against conduct that might exclude them from access to markets or limit their ability to compete in those markets on the merits. Thus Section 9 was enacted.

102. In short, what the legislature wanted in section 9(1)(a) was to create a threshold, but a low one that related not to competitive *harm* but to competitive *relevance*. The legislature in availing small firms to bring cases and to switch the onus to the dominant firm did not want them faced with an evidential burden they could never meet. It did not want them to become non-suited at the very next hurdle after establishing dominance by the discriminator.

103. Had Section 9(1)(a) been omitted in its entirety, that is if it had not been included as one of the elements of the act of prohibited price discrimination, then Section 9 would have been consumer protection legislation pure and simple. A mere act of discrimination that met the tests in Sections (9)(1)(b) and (c) but not that in Section 9(1)(a) would be unlawful even if the complainant was not itself a player in a market but just an ultimate consumer of the products of the dominant firm. Thus subsection 9(1)(a) invites a complainant to establish a competition relevance to his complaint but does not require proof of some standard of harm as contended for by Sasol. When the legislature asks is it 'likely' it is asking us to situate the complaint as one relevant to competition. When it asks is it 'substantial' it invites us to distinguish the trivial effect from the weightier.

104. Mr Foot effectively responds by demonstrating that he is not merely an individual consumer of creosote who purchases it to coat his fence on the weekend. If that were the case he would have no basis for approaching the Tribunal, he would found no cause of action under the Competition Act. What distinguishes Foot from that individual consumer is that he is a competing

producer of goods, treated poles, in which the subject-matter of the discrimination, creosote, is a crucial input in his production process and thus Sasol's quantitatively substantial discrimination, persisting year after year, places and other small customers at an ongoing disadvantage relative to other competing producers of treated poles. Hence he has established the *relevance* of the act of discrimination to *competition* and meets the element of *likely*. If something is not relevant to competition – as would be the case of the individual consumer cited above - it is for that reason not *likely* to have an effect on it. This lack of 'relevance' is also likely to apply in respect of discrimination between consumers in separate markets.

105. Moreover, the sub- section also requires *substantiality* as an element. Thus if Mr Foot was being discriminated against by the Post Office in the price of his stamps for his envelopes that accompany the invoices to his customers this would not be considered a *substantial* input cost, albeit an input cost. In contrast a more significant input cost that might put him at a competitive disadvantage to those of his competitors who benefit from the discrimination may meet the standard of substantiality.

106. Does this interpretation embody the danger that the absence of a harm test may make competitively neutral price discrimination an offence?

107. We say that it does not. In the first place such an argument would ignore the fact that the legislature has required the complainant to clear some still considerable hurdles of proof as provided for in Section 9(1). And it would also ignore the fact that, after all is said and done, Section 9(2) leaves the discriminator with some important defences, those most commonly invoked in justification of price discrimination, albeit confined, in terms of Section 9(2), to a closed list.

108. It is noteworthy as well that despite its *per se* elements – that is despite belonging to that category of acts in which the complainant does not have to establish an anti-competitive effect - section 9 is not one of those for which a first offender would be liable to a fine. This points as well to its unique treatment in the Act, as a hybrid of antitrust and public interests, when compared to the other per se or quasi per se prohibitions where fines are levelled as in sections 4 (1)(b), 5(2) and 8(a), (b) and(d).

109. Thus to recap, the complainant, apart from what is required under 9(1)(a), has not only to establish dominance but also discrimination and equivalence. Subsection 9(1)(a) is about removing the irrelevant and the trivial; it is not about placing in front of the complainant a hurdle that it can never hope to clear if it is a small firm.

110. Moreover, in this case, as we will show when we discuss the evidence, in addition to the elements of relevance ('likely') and substantiality, Mr Foot has also demonstrated a theory explaining why Sasol has engaged in the discrimination, one that suggests that the purpose of the price discrimination in

which it is engaged is anti-competitive. This evidence of intention bolsters the notion of likelihood. We do not need to decide whether evidence of this nature will always be required to meet section 9(1)(a), but it certainly bolsters the showing of likelihood.

111. In summary then Mr Foot's rejection of Sasol's approach to Section 9(1)(a) has both textual and contextual support. If one has regard to the policy to which the legislature gave expression in the Act generally and in the enactment of a stand-alone provision dealing with price discrimination, we see that Mr. Foot's approach is also consonant with a purposive approach to the interpretation of the Act.

112. Having now determined the appropriate contextual and purposive approach to Section 9(1)(a) we proceed to examine the evidence that has been led in relation to this section.

Section 9(1)(a) – the evidence

113. Nationwide has provided evidence that purports to establish that the price differential under which it labours substantially impairs its ability to compete effectively with its larger and, by dint of the price regime, more privileged competitors. It is common cause that creosote purchases constitute a significant portion of Nationwide's costs of production.

114. Nationwide claims that the price discrimination – the difference between the price at which it procures creosote compared to price charged to its larger rivals - adds between 3% and 4% to Nationwide's total cost structure.[50] Creosote accounts for about 25% of Nationwide's total costs.[51] Nationwide argues that the higher cost it pays for its inputs lessens its ability to compete in that market because of the higher variable costs of production that it imposes.[52] We should add that in a market characterised by low margins the imposition of an additional 3-4% on a firm's cost structure should not be construed as inconsequential.[53]

115. Mr. Malherbe, the respondent's expert witness, calculates that at the present differential between the price at which Nationwide purchases creosote and that at which its largest competitors receive creosote – the level of discount between the purchasers amounting to some 14,3% - were Nationwide to receive the discounted price, its cost of production would reduce by some 3,6%.[54] Therefore Nationwide has an overall increased cost, according to

50 Transcript page 318 second set of hearings on 23/11/04

51 Final transcript page 20, Complainant's heads page 20.

52 First Set Heads of Argument page 19

53 There was disagreement regarding Nationwide's margins. Mr. Foot **states** it has an average gross delivered margin of about 16% and net ex-mill gross margin is 8%. (final argument transcript page 20). Sasol stated it could not determine complainant's net margin but believed it had improved substantially over the past 2-3 years. Transcript page 318

54 Page 450 and 499

Sasol's expert of between 3.6% and 3.8%.[55]

116. Sasol attempts to counter the implication of this evidence by pointing out that, despite this disadvantage Nationwide is able to compete successfully on the price of its poles with its larger competitors, that, indeed, having acquired a failed firm, Mr. Foot has managed to establish his company on a sound footing. Thus competition, even assuming that its maintenance requires the continued existence of Nationwide Poles, has not been impaired because, avers Sasol, Nationwide has remained an active competitive force. We heard considerable argument on this point. Mr. Foot insists that he is, in consequence of the price discrimination and the competitive poles market, obliged to accept lower margins than his more privileged larger competitors. Mr. Foot argues, quite persuasively, and points to his audited accounts as evidence, that he as the owner/manager of the business has little to show for the alleged success of his efforts, indeed that it is only sacrifices of this nature that have enabled the business to continue functioning.

117. It has not been possible to arrive at any firm conclusion on the basis of this evidence and argument. Nor, given our interpretation of 9(1)(a), do we believe that much turns on it. But it does indicate the absurdities of Sasol's interpretation. It is simply impossible to even identify the appropriate counterfactual. Would Mr. Foot have to show that his business was failing in order to establish that its competitiveness had been impaired by the price disadvantage under which he laboured? Does the fact that he has managed to keep a very small enterprise going indicate that Nationwide Poles has suffered no competitive harm? Is his manifest failure to grow from a struggling small enterprise into a stable medium sized enterprise, capable of challenging the largest players in the market, evidence of competitive harm? We are persuaded that price discrimination clearly disadvantages Nationwide relative to its major competitors.

118. We have already rejected as a matter of law Sasol's argument that the complainant must prove harm to consumer welfare. However Sasol goes further, and argues that the impact of the price discrimination was so trivial that it could not have had an adverse effect on the competitive structure of the market. That is, it argues that even if the price discrimination reduced the ability of Nationwide and other small producers to compete, indeed even if it caused their demise, the intensity of competition in the market for poles would not be substantially lessened. Sasol points out that only a small number of its customers are in the highest price band, the band occupied by Nationwide, and that competition is adequately secured by those pole manufacturers who are not disadvantaged by the price discrimination. Here is where the 'protect competition, not competitors' mantra referred to above comes into play: the Tribunal's concern, insists Sasol, should not be with the fortunes of a few competitors, but rather with the intensity of competition in the pole market. Sasol attempts to bolster its argument by insisting that it, as a supplier, would

55 Transcript page 450

have no interest in reducing the level of competition in the market of its customers. Note however, and we will return to this later, Sasol has not argued that its price discrimination actually promotes competition, that it is an instance of 'competition on the merits'.

119. Sasol has raised the question of its own interest in impairing competition in a downstream market in which it has no interest other than as a seller. Indeed Sasol asserts that as a seller of an input it is positively interested in maintaining competition in the downstream market. Recall, however, that Sasol has previously asserted that competition in the downstream pole market will not be diminished by the demise of the small producers and so the interest it asserts in a competitive downstream market is, on its own estimation, not compromised by action that diminishes the competitiveness or even causes the demise of the small players in the downstream market. Be that as it may, we are of the view that certain of the evidence submitted to us does indeed establish Sasol's interest in discriminating against its smaller customers and favouring its larger customers.

120. Monopolists – or, in the parlance of our Act, dominant firms – extract their rents in one of two forms: supra-competitive profits or, as the eminent British economist, Sir John Hicks, famously termed it, the 'quiet life'. In this case we have a very large producer of petroleum and chemical products seeking to dispose of a product – creosote - that is marginal relative to the firm's total output. It has no particular interest in expanding output of this product. In fact it appears that technical considerations limit this option. As we have shown, the commercial considerations of the greater Sasol subordinate decisions regarding the pricing and output of creosote to far weightier issues, namely the fuel equivalent price of the feedstock and the need to optimise the composition of the bouquet of products derived from the feedstock. Sasol's primary interest is in disposing of its variable output of creosote, the variances being driven by exogenous factors.

121. These considerations, apart from dictating a low level of interest on Sasol's part in its smaller customers, also dictate that its focus is on satisfying its larger customers. To some extent this latter purpose is achieved by giving these larger customers a preferential price relative to the smaller players in the pole market. In a market – the poles market – in which entry barriers are, it is common cause, low, the price differential assists in limiting the entry of new and small entrants and their ability to thrive. This is borne out by evidence presented above on the impact of the price differential on the competitiveness of small firms. It is also starkly confirmed by Sasol's treatment of 'twilight treaters'.

122. 'Twilight treaters' are very small players who are not able to purchase their creosote requirements by the lorry load, as in the case of the complainant and the larger customers, but rather in drums supplied by retailers who are, in turn, supplied by Sasol. It appears – and this is conceded by Sasol – Sasol's larger customers requested that Sasol increase the price of drum loads in order to

limit access and growth on the part of these micro-producers. Sasol readily acceded to this demand. Mr. Van Wyk's evidence in this regard was instructive. Though he averred that the industry association (SAWPA) had advised Sasol to increase prices to the micro treaters to ensure the integrity and safety of the product chain downstream, Sasol's other motives are apparent:[56]

> *"VAN WYK:…..So they are trying to get those guys out of the industry, but then the industry came to us and said but you're promoting the twilight treaters, because you're selling in drums to the co-ops. So the twilight treater can come back and buy from the co-op and treat, if you can call it treat it or dip it or whatever, and sell it against our customers. And they requested us to increase the price drastically so that it doesn't make it economical for that guy to buy creosote. It's too expensive for him to do his twilight treating. So that's one reason the market requirement or they asked us to do it. It is to prevent the twilight treaters to be active in your market."*

123. If Sasol's large customers fear of new entry is sufficiently great for them to have demanded Sasol's assistance in deterring the entry of micro-treaters, we readily infer that their interest in suppressing competition from established small producers such as the complainant, is even greater. This, bolstered by the evidence elaborated above that establishes the competitive harm that accrues to small producers as a result of the price differential, exposes Sasol's interest in maintaining a discriminatory pricing structure.

124. Our conclusions are underpinned by Sasol's failure to assert a pro-competitive argument in favour of price discrimination.[57] While we concede that Sasol is not required to prove a pro-competitive effect – in fact, as already elaborated, the Act does not admit of a pro-competitive defence – we are certain that had there been a pro-competitive effect we would have been told of this. Certainly the competitive position of the larger poles producers is enhanced but this is done by way of a practice – price discrimination – that is not competition on the merits but rather that excludes small operators from the market or that, at the very least, compromises their ability to compete effectively.

125. In summary we are satisfied that –

- The discount structures for the sale of creosote exhibit a material differentiation as between the most and least favoured customers;
- Creosote is a significant input cost of firms such as the complainant who compete in the treated poles market against rivals who benefit from the price discrimination;
- That it is 'likely' that the complainant and firms similarly situated presently in the market and new entrants, will be less effective competitors as a result of

56 Argument Transcript page 34.

57 It is not clear whether or not Sasol intends the theory of 'risk reduction' that was espoused by its expert witness, Mr. Malherbe, to represent a pro-competitive argument in favour of price discrimination. If This argument is examined below in our analysis of the question of 'equivalence'.

the discrimination;

- This is a market where small firms, absent price discrimination, can be effective competitors to their larger rivals.

126. It follows that if firms such as the complainant are rendered less effective competitors that this will have an effect on the competitive structure of the market and so it is likely that this will substantially lessen or prevent competition in the market, in the sense understood by the legislature for the purpose of section 9 (1) (a).

Section 9(1)(b) - Equivalent transactions

127. The concept of equivalence is not found in the Robinson Patman Act. It appears that the requirement of 'equivalence' was introduced into the legislation during the Parliamentary process - sub-section 9(1)(b) was not in the original Bill.[58] Clearly the legislature sought to limit the ambit of price discrimination by introducing another limiting feature to price discrimination, one not found in the United States legislation.

128. 'Equivalence' is not defined in the Act and must be interpreted by the adjudicator from its ordinary meaning and its purpose in the Act.

129. The Concise Oxford Dictionary provides several meanings for the word equivalent. We will consider only the two that might be relevant here:

1. *equal in value, amount, function, meaning etc*. 2. ***(equivalent to)*** *having the same or similar effect* "

130. We would suggest that this second definition is the more useful as it also fits the purpose of the sub-section.

131. Translating the dictionary meaning into the purpose of this subsection, we would suggest that transactions are equivalent if they have the same or similar economic effect.

132. Thus transactions may be functionally <u>equal</u> – one business class seat or one telephone call between Cape Town and Johannesburg may be functionally equal to another business class seat or telephone call, but they may not be <u>equivalent</u> (a call or a flight made in a peak time as opposed to one made during a non-peak period) in the sense that their economic effect is different and hence the legislature, recognising this, chose not to bring 'non-equivalent' transactions under the rubric of prohibited price discrimination despite the fact that in other respects they may be regarded as equal.

133. Sasol seems to accept this approach. Certainly its expert, in attempting to explain the basis for the price gradations, appears to argue that sales to large

58 See the Bill dated 22 May 1998 No. 18913.

customers are not the business equivalent of sales to small customers.

> "I would say at a general level this would refer or reflect the change in value to the seller or the firm of moving from smaller to larger customers. Now exactly what that curve of additional value looks like, it will depend on a few things. I mean it will depend on their perception of risk, of the relative level or risk of the smaller and the larger customers, the risk to them of losing a smaller versus a larger customer."[59]

134. The problem for Sasol is that this has been a post hoc argument by its economist and is not supported either by way of any direct evidence of Sasol or by the way the discrimination in question actually operates. If Sasol reflected the reduction of value to it of the loss of the large customer by way of a long term contract, as opposed to spot market transactions, this might make transactions not equivalent even if they were equal (sales of creosote effected by truckload) and so justify a price discrimination in favour of the long-term contract customer. Here the non-equivalence is reflected by the value of the future legal obligation imposed on the long-term customer to which the spot customer is not subject. Sasol's present discount structure rewards the customer for past purchases, as we have seen in the previous section, not its future purchases as would a long-term contract. Having enjoyed a past benefit the customer is free at any stage to switch to a rival, indeed since it receives its discount determination in advance of a three month period, if it does not resume business it could even commence negotiations with a new rival of Sasol whilst enjoying the last quarter of its discounts with Sasol.

135. So the economist's theory of distinctiveness or non-equivalence is not supported by the manner in which the discrimination is practised . Indeed the alternative theory for its existence as posited in the previous discussions of 9(1)(a) is the more plausible, namely that it serves to protect large customers against the threat of smaller entrants expanding in the market at their expense.

136. When pressed Mr Malherbe was frank enough to concede that:

> "To what extent the intermediate levels or thresholds and indeed discounts were determined on the same basis, I don't know. But what also seems to appear from his evidence is that they've basically taken the structure that was designed 5 or 6 years ago or even more and they've just, in a quite mechanical year, updated it every year."[60]

Section 9(1)(c)- The content of the discriminatory action

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59 Transcript page 458
60 Transcript page 461

137. It is common cause that the discrimination in question relates to the price differential engendered by differential discounts based on past sales volumes. Different prices are charged to small and large customers, by dint of the volume of their purchases from Sasol. This is sufficient to bring Sasol's conduct within the ambit of Section 9(1)(c).

Defences – Section 9(2)

138. Sasol has chosen not to avail itself of the defences provided for in Sections 9(2)(a)-(c). Some of Sasol's earlier submissions suggested that such a defence would be forthcoming.[61] However this does not appear to have materialised – certainly Sasol's Heads of Argument make no mention of Section 9(2). In fact, Sasol's expert, specifically denied any relationship between the lower price charged to the larger customers and the costs of that provision:

> "So we needed to try to understand what really lay behind this and the first possibility was that this simply reflected the costs of transacting with different sizes of customers in an administrative sense. And it became quite clear from our interviews with management that this was not the case; that although this is a factor, as we heard today, these price differences weren't based on cost, on differences, in invoicing cost, in market costs and so on."[62]

139. There was some discussion regarding scale economies in distribution. Mr. Foot insisted that there were no scale economies in distribution because creosote was delivered in standard 32-ton truckloads and that a purchaser was required to purchase at least a single truck load. In other words, he argued that there were no economies to be gleaned in dispatching, say, ten 32-ton trucks to a large customer over a single 32 ton truck to a small customer as might exist were Sasol to able to utilise larger trucks for delivering to its larger customers. While this argument appears to have been rejected by Sasol, no attempt was made to present evidence of actual scale economies in distribution.

Finding and remedies

140. We find that in the period in question Sasol was a dominant firm whose conduct meets the test required in establishing prohibited price discrimination. Sasol has not provided a justification for its conduct that meets the requirements of Section 9(2). Sasol has thus contravened Section 9 of the Competition Act. From the evidence placed before us we are able to conclude

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61 See answering affidavit, record page 33, 42-43. In particular at paragraph 26.1, in responding to Nationwide's allegation that Sasol is required to prove elements of section 9(2), Sasol suggests that there are efficiency benefits to be derived from higher volume sales, and that large volume purchasers provide Sasol with security with respect to uptake of its product. They indicate that further evidence of this would be lead at the hearing. Whatever the merits of these arguments, they were never formulated to meet the defences that are explicitly set out in section 9(2). In his closing argument Sasol's counsel explicitly states: 'We are not seeking to suggest that the differentiation in price is cost related'.

62 Page 451 first set of hearings.

that the prohibited price discrimination occurred between April 2001 and August 2004.

141. We re-iterate our view that Section 9 should not be construed as imposing a blanket prohibition of price differentiation. We underline that a finding that price differentiation constitutes prohibited price discrimination requires, firstly, a finding of dominance. In this case, we have found that, in the relevant period, Sasol is dominant in the market for creosote by virtue of a market share that exceeds 45%. We have also shown, although not strictly speaking necessary, that it has market power in this market. Once a finding of dominance has been made the three threshold elements provided for in Section 9(1) have to be present. While, in our view, this threshold is not intended to impose a full rule of reason test, nor are the requirements of Section 9(1) inconsequential. Finally there are the Section 9(2) defences. These were not invoked by Sasol and we believe that the absence of scale economies in serving large as opposed to small customers – for this is what we must infer from Sasol's failure to make a case for scale economies – is exceptional. If proven, such a case would serve as a defence to most instances of price discrimination.

142. We also note again that this section of the Act is a hybrid of public interest and anti-trust. The poles market appears to be a market with unusually low entry barriers: it is a market in which small players could easily enter and thrive. As such it seems to be a powerful example of the sort of sector that the legislature had in mind when it outlawed price discrimination the better to realise one of the express purposes of the Act, namely 'to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy'.

Remedies

143. Nationwide has asked for two forms of relief. In the first place it seeks a declaration that ' a prohibited practice has occurred as is contemplated in terms of section 65(6)(b).'

144. Given the finding that we have made we have no hesitation granting this prayer for relief. This declaration allows Nationwide, should it so elect, to found a claim for damages in the High Court.

145. The second prayer for relief is in the form of an interdict. Nationwide seeks an order 'Respondent be ordered to supply it with SAK K at the same price afforded to Respondent's most favoured customer.'

146. What this means in effect it that we have also been asked to instruct Sasol to place Nationwide on a footing identical, in relation to the price of creosote, as that of its largest competitors. This we cannot do. Our decision is derived from the facts relevant to a particular period. Similar facts – notably as to the question of dominance - would have to pertain into the future to justify the granting of an interdict. However, should Sasol be found to be to be in

continuing contravention of the Act, its conduct, were it once more to be proved before this Tribunal, would lay it open to the imposition of an administrative penalty.

Costs

147. In proceedings between private litigants we have generally followed the practice of awarding costs to the successful party. We see no reason to depart from that practice in this instance. Mr. Foot alone has represented Nationwide, undoubtedly at considerable direct as well as indirect cost. It seems only just that Nationwide be awarded costs on the basis that Mr Foot is treated on taxation as if his services had been those of a qualified professional legal representative. We accordingly order Sasol to pay Nationwide's costs of the cause on that basis.

_____ 31 March 2005

D.H. Lewis Date

Concurring: N. Manoim, L. Reyburn