DISCRIMINATION IN PURCHASING AND SELLING

(A commentary on Robert H. Mnookin's paper "An American Lawyer's View of Section 49 of the Trade Practices Act")

By Edward Griffin*

Professor Mnookin has related the American experience of the Robinson-Patman Act to the provisions of section 49 of the Trade Practices Act 1975 (Aust.). He has outlined the basic relevant American law and suggested that such law may influence the construction of section 49. He has also expressed the hope that the American case-law may assist our courts to avoid the mistakes which have been made in the United States in the application of the Robinson-Patman Act. With those two sentiments I heartily concur. We certainly need all the help available when endeavouring to interpret section 49 and we all wish to avoid those legal swamps which surround the Robinson-Patman Act.

Although the legislation is similar, it differs in the fundamental area of anti-competitiveness. I suggest that this difference will guide our courts away from many American price discrimination principles and as a consequence, the ambit of section 49 will be considerably narrower than the Robinson-Patman Act.

This commentary will therefore first consider the anti-competitive tests prescribed by the section. Some of the other requirements of the section will then be considered. The accepted order will not be tampered with any further and the cost justification and meeting competition exceptions will be considered at the end of the commentary.

Anti-competitiveness and Relevant Markets

What principles should be applied when endeavouring to ascertain whether a discrimination is likely to have the effect of substantially lessening competition in a market for goods? The Chairman of the Trade Practices Commission, when addressing a gathering of lawyers,[1] cautioned against attempting to define those words. He suggested, much to the lawyers' relief and to the businessmen's distress, that such questions are best answered by businessmen themselves. Unfortunately businessmen feel (and I think with some cost justification) that their lawyers should be a little more helpful and I therefore make the following observations.

(a) *"is likely to have the effect of"*

Persons seeking to allege that the section has been contravened do not have to wait until the discrimination injures competition in a market; they may succeed where the discrimination is merely likely to have that effect. If the discrimination has already caused the requisite injury, it will not be necessary to prove the element of likelihood, as likelihood will be conclusively presumed when causation is established.[2] Where a plaintiff or prosecutor feels that competition will be injured but does not have sufficient evidence to pass the likelihood test, it may be advantageous to delay instituting proceedings.

However, where the horse has not cleared the barn door, the issue of likelihood will have to be considered. The other sections of the Act do not give much assistance.

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1. Law Society of New South Wales, Solicitors' Luncheon, Sydney 20 March 1975
2. See *National Dairy Products Corp.* v. *FTC,* 412 F.2d 605 (7th Cir. 1969).

Sections 45(4), 47(2) and 50 and their respective clearance sections, 92, 93 and 94, all contain the word "likely." Sections 45(3) and 46 require the actual existence of the requisite effect upon a competitor or competition. Nevertheless, if the requisite effect has not taken place under sections 45(3) or 46 but is likely to take place in the future, the conduct challenged would probably consitute an attempt to contravene Part IV and would be prohibited by section 76(c).

I feel that "likely" will be construed as equivalent to "probably", that is, it will be given its normal meaning. If this interpretation is adopted, the court will have to consider all the possible factual consequences of a discrimination and then select that consequence which is *most* likely to occur. It seems to me that where you have two or more possible consequences, if one consequence is more likely to occur than the others, that consequence will be likely and other consequences will *ipso facto* be unlikely.[3] However, where there are two *equally* likely consequences, the absence of the word "most" from the section will, I suggest, enable a court to regard both as being likely.

The wording of section 49 should be compared with the Robinson-Patman Act which prohibits discrimination – "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them". The words "may be" of Robinson-Patman merely require a possibility[4] of competitive injury whereas the words "is likely" of section 49 require a probability of injury to competition. I suggest that this difference will probably prove to be one of the major differences between section 49 and the Robinson-Patman Act.

(b) *"substantially lessening competition in a market"*

How should those words be interpreted? As a preliminary point, it should be noted that "lessening" is generally accepted as including both a lessening by way of reducing competition and a lessening by way of inhibiting the development of competition.

A comparison with other anti-competitive tests in the Act clearly indicates that the legislation is more concerned with the anti-competitive effects of restraints of trade and monopolization than with the anti-competitive effects of price discrimination.

The tests of anti-competitiveness range from the *per se* prohibitions of section 48 and section 49(3) and (4); to adversely affecting a person's competitive activities (section 46); to having more than an insignificant effect on competition (section 45(3)); to having a significant effect on competition (section 45(4)) and finally to substantially lessening competition (sections 47(2), 49 and 50). Furthermore, whereas section 46 will be infringed if a single competitor is adversely affected and section 45 will be infringed if competition either between two specified persons or between either one of them and other persons is adversely affected, section 49 will only be infringed if competition in a market is adversely affected.

The wording of section 49 should be compared with the wording of the Robinson-Patman Act set out above. The Robinson-Patman Act merely requires that the competition faced by certain persons be injured[5] whereas section 49 refers to

3. For a contrary view in relation to s. 5 of the Defamation Act 1958 (N.S.W.), see *Livingston-Thomas* v. *Associated Newspapers Ltd.*, (1969) 90 W.N. (Pt. 1) (N.S.W.) 223.

4. *FTC* v. *Morton Salt Co.*, 334 U.S. 37,50 (1948): "there is a 'reasonable possibility' that competition may be adversely affected".

5. The word "substantially" in s. 2(a) of the Clayton Act also limits the words "injure", destroy or prevent competition" which were subsequently added by the Robinson-Patman Act amendment of the Clayton Act (E.W. Kinter, *A Robinson-Patman Primer* (1970) 101).

competition in a market. That difference together with the difference between "may be" and "likely" previously discussed, gives the Robinson-Patman Act considerably wider scope than section 49. Consequently, I doubt whether Australian Courts will follow the principle laid down in *Morton Salt*[6] of presuming buyer-line injury whenever the discrimination is substantial.

The remaining questions which I propose to discuss are, what is competition and what constitutes a substantial lessening of competition? I feel that competition need not mean anything more than simply the competitive rivalry which exists between competitors. The problem with this approach is that it calls for an examination of each competitor's own internal decision-making process. You may have to ask why each competitor manufactured a certain article, why he attempted to sell it to a particular customer, why he charged a certain price, and why he advertised, in order to ascertain the constraints placed upon him by the presence of other competitors or the threat of new competitors. While the courts may accept that this is the correct approach, they may well baulk at the task and instead examine the objective market evidence and analyse such evidence in accordance with accepted principles of economics.

Whether a discrimination will substantially lessen competition in a market will of course depend, in both seller-line and buyer-line cases, upon the extent to which competitors will be affected by the discrimination and the extent to which the consequences of the discrimination constitute a reduction of the constraints on competitors in the market.[7] For example, where buyer-line injury is at issue and a competitor with only a small market share is favoured, competition at the buyer level will probably be enhanced. Conversely, where a competitor with a fairly large market share is favoured and as a consequence smaller competitors are forced out of the market, the constraints imposed upon those larger competitors will disappear.[8] The absence of those constraints could be viewed as constituting a substantial lessening of competition. However, if the market contains a large number of competitors, the departure of a few small competitors will not necessarily constitute a substantial lessening of competition, particularly if those competitors did not, and were unlikely to impose any constraints on the other competitors in the market.[9]

Although the section suggests that one must compare the before and likely after effects of the discrimination, I feel that a court would consider both the quantum of lessening of competition and the level to which competition is likely to be reduced. In other words, I feel that a particular quantum of lessening of competition could be viewed as being substantial if it occurred in a non-competitive market and as being not substantial if it occurred in a highly competive market.[10]

There appears to be no good reason why the quantum of lessening of competition prohibited by section 49 should not be interpreted as being the same as that prohibited by sections 47(2) and 50. In fact, mergers and price discrimination both

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6. 334 U.S. 37 (1948).

7. *Anheuser-Busch, Inc.* v. *FTC*, 289 F.2d 835 (7th Cir. 1961).

8. *National Dairy Products Corp.*, FTC Dkt. 7018, CCH Trade Reg. Rep. ¶ 17,656 (1966), *aff'd* 395 F.2d 577 (7th Cir. 1968).

9. *Dean Milk Co.* FTC Dkt. 8032, CCH Trade Reg. Rep. ¶ 17,357 (1965), *rev'd* 395 F.2d 696 (7th Cir. 1968).

10. This should be distinguished from the separate issue of whether the discrimination is likely to *cause* a substantial lessening of competition. Where competition is intense, some competitors will almost certainly be adversely affected by discrimination. Compare *Frank G. Shattuck Co. (W. F. Schrafft & Sons Corp.)* FTC Dkt. 7743, CCH Trade Reg. Rep. ¶ 16,882 (1964) with *Fred Bronner Corp.*, FTC Dkt. 7068, 57 F.T.C. 766 (1960).

affect competition by concentrating the market. In a merger, the whole of the target corporation's market share is transferred to the acquiring corporation. In price discrimination, the injured corporation's market share may be picked up by any of the competitors in the market. From a practical viewpoint, the fate of merger clearance notices under section 94(1) should be of assistance in assessing the Commission's view as to what constitutes a substantial lessening of competition.

(c) *"being a market in which the corporation supplies, or those persons supply, goods"*

The section is only concerned with competitive injury in one or more of the following two types of market: any market in which the corporation supplies goods (primary or seller-line injury), or any market in which *both* the favoured and the disfavoured purchaser supply goods (secondary or buyer-line injury).

It has been suggested that the word "in" means "into" and that the primary-line market is the market into which the corporation supplies goods; for example, where a corporation supplies goods to a wholesaler the relevant primary-line market is the wholesaling market. It follows from such an interpretation that the secondary-line market consists of the market into which the purchasers (that is, the wholesalers) supply goods, namely, the retail market. The problems with such an interpretation are two-fold. Firstly, it appears to be completely inconsistent with the language of the section; and secondly, a competitor of the corporation could not complain of seller-line injury as the seller's market would no longer be a relevant market within section 49!

(i) *Seller-line markets.* The difficult problems of ascertaining who are purchasers and deciding whether a discrimination may flow through the distribution chain do not generally arise in seller-line injury cases. However the facts in *Secatores, Inc.* v. *Esso Standard Oil Co.*[11] illustrate a common seller-line factual situation which is often mistakenly considered as a buyer-line problem.

Esso sold petrol direct to a taxi-cab company at prices below those which Esso charged its jobber. The jobber proposed to sell petrol to the taxi-cab company but was unable to compete with Esso. Competition had not been injured in the favoured purchaser's market (that is, the taxi market) and therefore the Court only had to consider seller-line injury. The Court held that as petrol was such a price sensitive commodity, a refiner could not face any effective competition from his own jobber and therefore competition was not likely to be injured at the seller level.

It should be noted that in some markets price is not always paramount and a reseller may be able effectively to compete with his supplier. The possibility of a supplier being held liable for seller-line injury *vis à vis* his own reseller should therefore be considered.

(ii) Buyer-line markets. The secondary markets referred to in the section should not be read as being the markets in which those persons "or any of them" supply goods.[12] The words "those persons" are plural and refer to "purchasers", also plural. The

11. 171 F. Supp. 665 (1959), CCH Trade Reg. Rep. ¶ 67,315 (1959) This case should be compared with *Esso Standard Oil Co.* v. *Secatores, Inc.*, 2146 F.2d 17 (1st Cir. 1957) *cert. denied* 355 U.S. 834 (1957) where the Court held that the parties were "corporations in competition with each other" within the statutory intendment of the Miller-Tydings amendment of s. 1 of the Sherman Act and the McGuire amendment of s. 5(a) of the FTC Act. See also *Bolick-Gillman Co.* v. *Continental Baking Co.*, 206 F. Supp. 151, 155 (D. Nev. 1961).

12. The wording of s. 49(1) should be compared with the provisions of s. 45(3) and (4) in this respect.

wording of the section clearly requires that both the favoured and the disfavoured purchaser be present in the same market before buyer-line injury may arise. Of course, not only does the section require that both purchasers be present in the same market, it also requires that injury to competition must take place in that market.

The difficult problems of ascertaining who are purchasers and whether a corporation can be held to have discriminated between them will be considered in this commentary under "Relevant Discriminations".

(iii) *Different effects in different markets.* A small manufacturer may discriminate in favour of the largest reseller in the market. The effect of that discrimination may well be to increase competition in the seller's market and to reduce competition in the reseller's market.[13] Assuming that the pro and anti-competitive effects cancel out – has section 49 been contravened?

Unfortunately for the small manufacturer, I feel that the answer is yes.[14] The section accepts that competition may be affected in more than one market but prohibits discrimination if it is likely to lessen competition in "a" market. The pro-competitive effects in other markets are not relevant for the purposes of section 49.[15]

The small reseller is, however, in a better position. If he extracts a discriminatory benefit from a large supplier, seller-line injury is unlikely to arise and of course competiton will probably be enhanced at the reseller level.

(iv) *Market definition.* The question of market definition is of fundamental importance in any determination under section 49. Markets may be defined with reference to the competing goods and the customers to whom the goods are sold. The customer classification may be divided into the functions which the customers perform (for example, wholesalers or retailers) and the geographic areas in which such customers are located.

I do not propose to canvass market definition other than to mention the significance of the market definition adopted in the *Top Performance Motors* case[16] in relation to section 49. By defining the product market as Datsun motor vehicles, the Australian Industrial Court has left the way open for section 49 to be given the same legislative effect as the Robinson-Patman Act.

(d) Market control

Before considering the further requirements of section 49, I wish to mention the degree of market control which one of the parties to the transaction must have in order to be able substantially to lessen competition by way of price discrimination.

I suggest that seller-line injury could only arise if the seller is in a position substantially to control the relevant market. Buyer-line injury is unlikely to arise

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13. The size of the seller is relevant when determining whether the discrimination may cause competitive injury: *Whitaker Cable Corp.* v. *FTC,* 239 F.2d 253 (7th Cir. 1956).

14. *Ibid.*

15. This fact and the absence of any authorization machinery under s. 49 may partially explain the presence of the meeting competition exception with s. 49. See *"Meeting competition" supra* p. 000.

16. *Top Performance Motors Pty Ltd* v. *Ira Berk (Queensland) Pty Ltd,* (the Full Court of the Australian Industrial Court, unreported).

unless the favoured buyer enjoys a high degree of market control. Dealing with each in turn.:

(i) *Seller-line-injury.* Seller-line injury may arise when a seller forces a competitor out of one geographic market by dropping his price in that market while maintaining his prices elsewhere. If the departure of that competitor from the market is viewed as causing a substantial lessening of competition, one is tempted to conclude that the discriminator must have been in a position substantially to control that market. Conversely, if the competitor is able to match the discriminatory prices and stay in business, the discriminatory conduct would not have lessened competition which would tend to indicate that either the discriminator did not substantially control the market or did not fully exercise his market control.[17]

I suggest that the American approach of inferring a violation whenever a seller engages in predatory discriminatory pricing is merely an evidentiary method of establishing that the seller had the requisite market control.[18] I imagine that if a seller could establish that its predatory conduct was based upon a delusion of its own market power, an Australian court could hold that competition was unlikely to be lessened substantially at the seller level.

I doubt therefore whether section 49 adds anything to the provisions of section 46 where the issue is seller-line injury. Indeed, in view of the wider ambit of the anti-competitive test of section 46, some discriminatory conduct will not be caught by section 49 but will fall within section 46. In view of the complexities of section 49, it may well have been better for the seller-line injury to have been left exclusively in the province of section 46.

Before leaving seller-line injury, a few thoughts should be spared for the purchasers, whether big or small, who knowingly receive the benefit of a prohibited seller-line discrimination. Although such purchasers are only too happy to receive the unexpected low price, the discrimination is instigated by the seller, not the purchasers. I suggest that the law should not penalize such purchasers, particularly when the disfavoured purchasers could be situated thousands of miles away in completely different markets.[19]

(ii) *Buyer-line injury.* Favoured resellers must enjoy a high degree of market control in order to be able to obtain preferential treatment. Where a reseller has been disfavoured he will tend to look for another supplier.[20] If all suppliers are favouring the large reseller, one is forced to conclude that the large reseller enjoys a high degree of market control. However, it is not essential that all competing suppliers should favour the large reseller. Various factors inhibit disfavoured resellers from changing suppliers. For example, where the disfavoured reseller has a large investment in the promotion of a particular brand or needs to have all the competing brands in stock,[21] it may not be feasible for him to drop the offending supplier.

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17. See *Borden Co.* v. *FTC*, 339 F.2d 953 (7th Cir. 1964) in which the principles of primary-line injury and secondary-line injury are compared.

18. See Areeda and Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" (1975) 88 Harv. L. Rev. 697.

19. Of course the favoured purchasers will only be liable under s. 49(2)(b) if they have actual knowledge or ought to have such knowledge. One wonders if the legislature intended to inhibit businessmen from broadening their horizons.

20. See *Tri-Valley Packing Assn* v. *FTC*, 329 F.2d 694 (9th Cir. 1964) where the availability of goods from another source at the lower price negated causation of injury; *cf. Purolator Products, Inc.* v. *FTC*, 3523 F.2d 874 (7th Cir. 1965).

21. See *Tri-Valley Packing Assn*, FTC Dkts 7225 and 7496, CCH Trade Reg. Rep. ¶ 17,657 (1966).

In view of those factors, and in view of the fact that section 49 seeks to prevent monopsony at its incipiency, the provisions of section 46 (as presently drafted) may not cover all the anti-competitive buyer-line cases presently covered by section 49. Nevertheless, I am not convinced that section 49 is the answer. Perhaps the answer lies in amending section 46 so as to encompass the activities of monopsonists and others who are able to cause substantial injury to competition at buyer levels.

As a dominant seller and a dominant buyer are essential participants in seller and buyer-line injury respectively, my subsequent comments will be based upon the assumption that such persons enjoy and exercise that dominance. Before leaving this section of the commentary I ask you to shed another tear – this time for the small supplier who is put through the wringer by the large reseller. The small supplier may be forced to discriminate merely to stay in business.[22] The favoured purchaser is the instigator of buyer-line injury and I suggest that the law should not penalize the unwilling seller.

Discrimination

(a) *"discriminate"*

This is the key word of section 49. The *Shorter Oxford Dictionary* defines "discriminate" as: "To make or constitute a difference in or between; to differentiate." That definition suggests that discrimination is more than a mere difference and that in order to discriminate one must deliberately treat one purchaser more favourably than another, that is, one must engage in economic price discrimination as described by Professor Mnookin.

The concept of geographic seller-line injury supports such an interpretation. For example, if a Sydney based manufacturer sold his goods at uniform prices in Sydney and Townsville and by doing so forced a locally based Townsville manufacturer out of the market, one could be forgiven for assuming that such activity was intended to be prohibited by section 49. Conversely, if the Sydney based manufacturer charged Townsville purchasers the Sydney prices plus freight to Townsville, one would be reluctant to conclude that the manufacturer had discriminated between the Sydney and Townsville purchasers.

However, such an interpretation is not completely consistent with section 49(2) which provides:

> Sub-section (1) does not apply in relation to a discrimination if – (a) the discrimination makes only reasonable allowances . . . .

Those words presuppose that cost justified differences are nevertheless discriminatory. If either section 49(2)(a) had not been included in the Act or the sub-section had provided that cost justifiable differences shall not constitute discriminatory conduct, discrimination would probably have been interpreted as being economic discrimination. However, the presence and wording of section 49(2) strongly suggests that discrimination may only arise if different prices are charged. Our Townsville manufacturer will therefore have to seek relief under section 46.[23]

There appear to be very few reasons why the legislature, which apparently wanted to prohibit anti-competitive price discrimination, should limit the prohibition to

22. Of course a supplier with a very small market share may be incapable of causing any injury at the buyer level. See note 13 *supra.*

23. See *Clay Products Assn*, FTC Dkt. 5483, 47 F.T.C. 1256 (1951).

discriminations which are brought about by actual differences. Admittedly, if discrimination were not so limited, every anti-competitive discrimination would have to be examined on a price/cost basis along the lines set out in the cost justification exception. The effect of limiting the operation of section 49 is that only those anti-competitive discriminations which also constitute actual difference will have to be cost justified. Perhaps the legislature actually intended to give the business community some relief from the burdens of cost justification.

(b) *"of goods of like grade and quality"*

This is another unusual provision to find in a section which seeks to prohibit anti-competitive price discrimination. A seller may discriminate by selling 16oz jars of, say, coffee, for $1.00 to a large retailer and selling 8 oz jars to both the large retailer and the small competing retailers for 95c. You would expect that such a discrimination would be allowable only if it were cost justifiable; but if the United States cases are followed, the "like grade and quality" requirement would render such cost justification unnecessary.[24]

It is surprising that the legislature did not classify the goods in question by reference to competition. As "competing" goods may cause injury to competition, the like grade and quality requirement appears to be unduly restrictive. On the other hand, perhaps the legislature intended to reduce the role of the cost justification exception and along with it, the section itself.

(c) *"is of such a magnitude or is of such a recurring or systematic character"*

Although the Robinson-Patman Act does not contain this phrase, I doubt whether it adds anything to the meaning of section 49. It is difficult to envisage competition being lessened substantially unless the discrimination was of some magnitude or of a recurring or systematic character.

If the phrase had not been included in section 49, perhaps a defendant could have argued that the court should examine the effect of each discrimination individually and not take an overall view of the likely effect of his recurring conduct.

(d) *Practical availability*

Discounts for large individual orders are a very common feature of Australian business. Do such discounts constitute discriminatory conduct? This question introduces the principle of practical availability. If the quantity discounts are offered to all purchasers and if it is reasonably feasible for all purchasers to take advantage of the most favourable discount, such discounts will not constitute discriminatory conduct.[25] The key issue is whether it is reasonably feasible for the small purchaser to order at the maximum rate.[26] The storage facilities available and the capital outlay involved are obviously relevant.

Relevant Discriminations

Not all anti-competitive discriminations involving goods of like grade and quality are prohibited by section 49. Such discriminations are only prohibited if they are made "between purchasers" of such goods "in relation to" any one of the matters set out in

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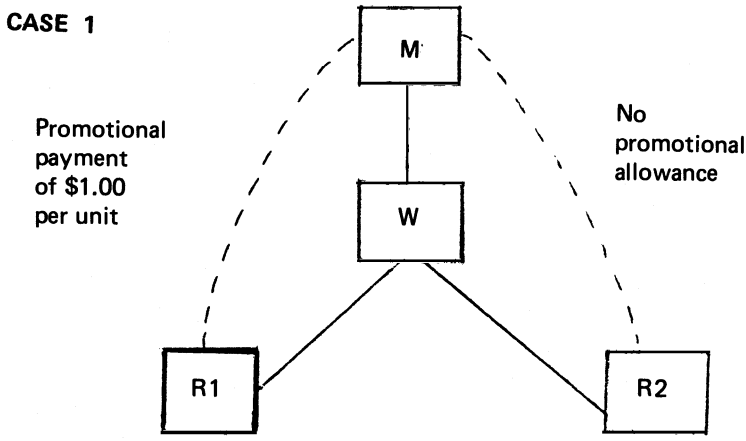
24. See *Universal-Rundle Corp.*, FTC Dkt. 8070, CCH Trade Reg. Rep. ¶16,948 (1964), *order set aside on other grounds*, 382 F.2d 285 (7th Cir. 1967).

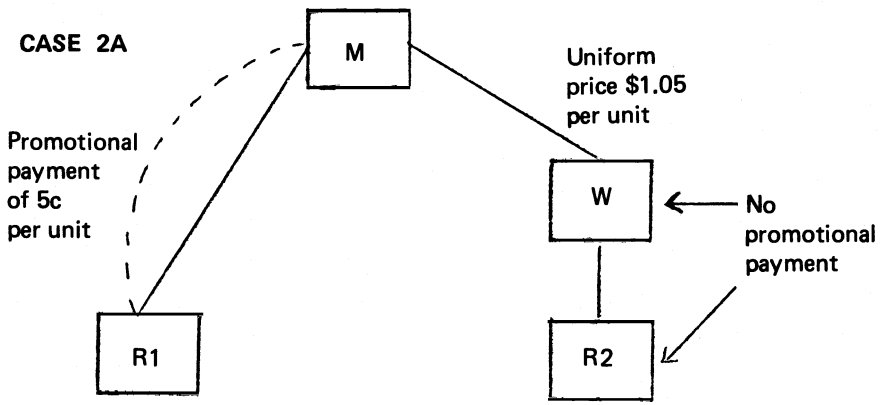
25. *Borden and Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967).

26. See note 24 *supra*.

paragraphs (a) to (d) of section 49(1). When discussing those requirements, I will refer to some common methods of distribution which could fall within the ambit of section 49. The methods of distribution are set out below and are discussed by Professor Mnookin.[27]



In Case 1, the manufacturer (M) has sold all his goods to a wholesaler (W) and the wholesaler has resold the goods to a large retailer (R1) and to a small retailer (R2) who compete with one another. The manufacturer has made a promotional payment of $1 per unit direct to R1 but has not made a promotional payment to either R2 or W.[28]

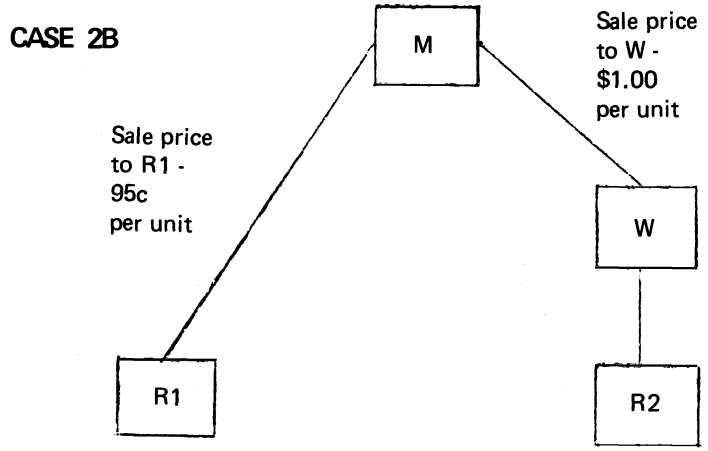


In Case 2A, the manufacturer has sold goods to a large retailer (R1) at $1.05 per unit and to a wholesaler (W) at $1.05 per unit. The wholesaler has resold the goods to R2 who competes with R1. The manufacturer has subsequently made a promotional

27. *Supra* pp.127-128.

28. This example is similar to the facts of *American News Co.* v. *FTC*, 300 F.2d 104 (2nd Cir. 1962) *cert. denied* 371 U.S. 824 (1962), where the discrimination was prohibited on the grounds that R1 and R2 were customers within s. 2(d) as M exercised control over their method of purchasing.

payment of 5c a unit to R1 but has not made a promotional payment to either R2 or W.[29]



In Case 2B, the distribution chain is the same as in Case 2A, with the exception that the manufacturer has sold goods to R1 at 95c a unit and to W at $1 a unit and has not made any promotional payments.[30]

All cases are examples of fairly common distribution methods and have the capacity substantially to lessen competition at the retail level. The goods in question are of like grade and quality and for the purposes of the subsequent analysis it is assumed that the differences in promotional payments and price are likely substantially to lessen competition in the market in which R1 and R2 compete. The questions raised are whether those differences are prohibited by section 49. The answers to those questions will depend upon whether R1 and R2 are purchasers and if so, whether M has discriminated between them in relation to any of the matters set out in paragraphs (a) to (d) of section 49(1).

It should be noted that in the cases set out above, W is the only wholesaler. As M has not discriminated between two or more wholesalers, W will be unable to base a buyer-line action against M for injury to competition at the wholesale level. However, if M's conduct is prohibited on the grounds that it consitutes discrimination between R1 and R2, W may recover from M any loss or damage suffered as a consequence of the contravention of section 49.[31]

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29. This example is similar to the facts of *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968) where the Supreme Court held that all competitors of the favoured purchaser who sold M's goods were customers within s. 2(d). Although the Court did not have to decide if W was a customer, the Court indicated that s. 2(d) did not necessarily require that W be classified as a customer.

30. This example is similar to the facts of *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

31. The position is similar in the United States. In *Krug* v. *International Telephone and Telegraphic Corp*, 142 F. Supp. 230 (D.N.J. 1956), the District Court held that W could maintain an action for treble damages against M under s. 4 of the Clayton Act. The discrimination was prohibited as it injured competiton at the retail level and W's loss of sales to R2 was a direct consequence of the illegal discrimination. If s. 49 is given a restrictive interpretation the discrimination in Case 2B (and possibly in Case 2A) would not be prohibited and consequently W could not recover damages from M under s. 82 based upon a contravention of s. 49. (W would not suffer damages in Case 1.)

Although the analysis will be limited to buyer-line injury, the possibility of seller-line injury should also be considered. A competitor of M may be unable to sell to R1 as a consequence of the discrimination. In Case 2B M's competitor may be able to maintain an action on the basis of the price discrimination between R1 and W. Whether M's competitor could recover in Cases 1 and 2A raises the same problems of interpretation as are discussed below in relation to buyer-line injury. The possibility of W maintaining a seller-line action against M (assuming the principles of *Secatores* v. *Esso*[32] are not applicable) should also be considered.

The problem of identifying purchasers should not be confused with the separate problems of determining whether the corporation has discriminated between them and whether the discrimination is in respect of any one of the matters set out in paragraphs (a) to (d) of section 49(1). Those separate problems often appear to be considered as the one problem in the United States. Of course, if the corporation has not discriminated either in favour of or against a particular person, the question of whether that person is a purchaser need not be considered. However, one has to start somewhere and I will commence by considering who are purchasers.

(a) *"purchasers"*

One approach ("View 1") is to interpret "purchasers" as only including those persons who have purchased goods direct from the corporation which has allegedly engaged in discriminatory conduct. The effect of such an interpretation is that in Case 1, W is the only purchaser and as R1 and R2 are not purchasers, M's conduct is not prohibited. In Cases 2A and 2B, R1 and W are the only purchasers and as R1 does not compete with W, M's conduct is not prohibited.

The strict wording of the section does not require that "purchasers" be given such a limited meaning and my own view ("View 2") is that "purchasers" should be interpreted so as to include all those persons who have either directly or indirectly purchased the corporation's goods. It should be noted that paragraphs (c) and (d) of section 49(1) appear to assume that a discrimination may take place between persons who have not been directly supplied by the corporation. Those paragraphs refer to the provision of services or facilities "in respect of the goods" and may be compared with paragraph (b) which refers to discounts and so forth given "in relation to the supply of the goods". If the word "purchasers" was intended to be limited to direct purchasers there would appear to be little point in wording paragraphs (c) and (d) so as to be capable of including discriminations between persons who are not purchasers.

View 2 may be criticized on the grounds that it could widen the operation of the section so as to affect corporations who supply services for goods where such corporations have had no connection with the corporation which has supplied the goods. I do not feel that the courts will consider that the adoption of View 2 will oblige them to reach that conclusion. The section contemplates some nexus between the goods and the corporation and I suggest that "goods" should refer to those goods which have at some stage been the property of either the corporation or possibly of a corporation related to the corporation.

View 2 will not of itself bring all anti-competitive effects in the distribution chain within the ambit of section 49. However, the adoption of that view will enable the courts at least to consider whether the corporation has discriminated between "indirect" purchasers and whether the discrimination is in relation to any of the

32. Discussed *supra*, text to note 11.

matters set out in paragraphs (a) to (d) of section 49(1). Thus in the cases set out above, a court could go on to consider whether M had discriminated between R1 and R2.

Another approach ("View 3") is to interpret "purchasers" as only including those persons who have had direct contact with the corporation by way of purchase, or in the case where promotional allowances have been made, are situated at the same functional level as the recipients of the promotional allowance. While this approach may correctly limit the discriminations prohibited by the section it is not a satisfactory interpretation of "purchasers". The words "purchasers of goods" designate the members of a particular class of persons. Why should R1 in Case 1 (a non-purchaser at the date of purchase from W) subsequently achieve the status of purchaser when a promotional payment is made? Similarly, why should M's promotional payment to R1 change R2 from a non-purchaser to a purchaser? Professor Mnookin's conclusions could indicate that he favours such an approach. I suggest that his view reflects the decisions under the Robinson-Patman Act which, as I have mentioned, tend to blur the distinction between purchasers and discrimination.

Having ascertained who are purchasers, one then has to consider whether the corporation has discriminated between them and, if so, whether that discrimination is in relation to any one of the matters set out in paragraphs (a) to (d) of section 49(1).

(b) *"discriminate between purchasers . . . in relation to" any one of matters set out in paragraphs (a) to (d) of section 49(1).*

The question to be considered is whether the wording of those paragraphs limits the extent to which discrimination may flow through the distribution chain. Of course, if "purchasers" is given a restricted meaning along the lines set out in View 1 or View 3 above, the question of whether discrimination may flow beyond those purchasers will only be of academic interest. For the purposes of the subsequent discussion it will therefore be assumed that View 2 is correct and that "purchasers" includes all purchasers in the distribution chain.

Paragraphs (a), (b), (c) and (d) could be interpreted so as to limit discrimination to discrimination between direct purchasers in relation to price and incidents of sale and between favoured and disfavoured purchasers in relation to promotional payments. If such an interpretation is correct, the question of whether discrimination may flow beyond such purchasers and constitute discriminatory conduct *vis à vis* subsequent purchasers need not be considered. However, if such interpretation is not correct, the question of whether discrimination may flow through the distribution chain will determine the ambit of section 49.

I will firstly consider whether paragraphs (a) and (b) impose any limitation upon the word discrimination and, if not, the extent to which discrimination could possibly be held to flow. I will then briefly consider the same problems in relation to paragraphs (c) and (d).

(i) *Paragraphs (a) and (b).* The problem is whether the words "the prices charged for the goods" are limited to the prices charged to the purchasers in question or whether they refer to all prices charged by the corporation whether charged to the purchasers in question or to their intermediate suppliers. The restrictive approach is to construe paragraphs (a) and (b) as –

> (a) the prices charged [*to the purchasers*] for the goods;
> (b) any discounts, allowances, rebates or credits given [*to the purchasers*] in relation to the supply of the goods;

If this approach is adopted, paragraphs (a) and (b) limited discrimination to discrimination between direct purchasers (assuming that all the matters referred to in paragraph (b) are incidents of sale) and accordingly in Case 2B, R2 will be left without a remedy. M has not charged a price to R2 and although M has discriminated between R1 and W in relation to price, R1 does not compete with W and therefore competition between them cannot be injured.

This approach gives rise to a serious anomaly, namely that M may disfavour R2 by charging a higher price to W than R1, but may not disfavour R2 by giving a promotional payment to R1. The wording of the section does not require that such a restrictive approach be taken and I suggest that it is open for the courts to adopt another approach.

The less restrictive approach is to construe paragraphs (a) and (b) as though the words "to any persons" could be added after both "charged" and "given" without altering the intended meaning of the paragraphs. In relation to Case 2B this approach will allow a court to consider whether M's conduct constitutes discrimination between R1 and R2. As M was no doubt aware that R1's competitors were forced to buy from W, M should similarly be aware that R1's competitors will be disadvantaged if M should sell to R1 for less than W. I would therefore expect that a court would have little difficulty in concluding that M had discriminated between R1 and R2.

If this less restrictive approach and View 2 of "purchasers" is adopted, all the indirect effects of discrimination throughout the distribution chain may be considered under section 49. The words "being a market in which ... those persons supply, goods" will not impose any limitation upon how far a discrimination may flow through the chain. Those words will merely require that both the favoured and disfavoured purchasers compete in the same market.

The courts will be obliged to make a factual determination of whether the corporation's conduct constitutes a discrimination between purchasers situated further down the distribution chain. Where third or fourth line (in the American terminology) injury are at issue, courts will probably be reluctant to find that a corporation's discriminatory conduct between the original purchasers constitutes a discrimination between purchasers at subsequent levels. On the other hand, where the effects of a favoured price could reasonably be expected to flow through the distribution chain and lessen substantially competition at subsequent levels, I suggest that a court could hold that a corporation had discriminated between the subsequent purchasers.[33]

(ii) *Paragraphs (c) and (d).* The different interpretations which may be placed upon these paragraphs do not give rise to the serious problems mentioned above. A discrimination in relation to the provision of services or facilities may be made

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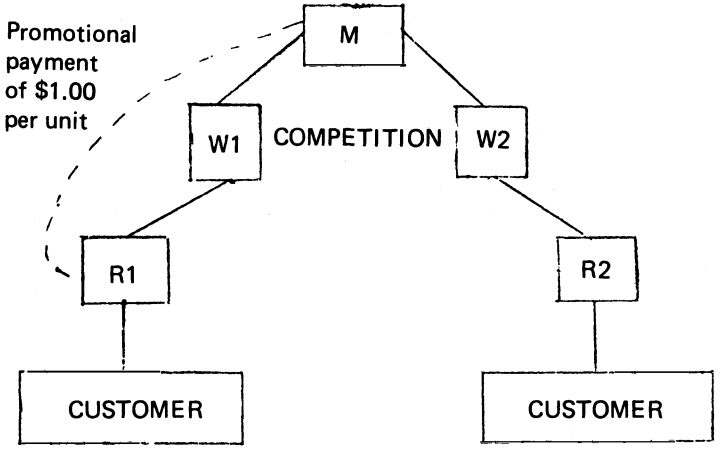
33. Although the courts in the United States require that the favoured and disfavoured purchasers be in competition where buyer-line injury is at issue, the courts appear to be very willing to find that a person is a disfavoured purchaser if that person is in some way adversely affected by the discrimination. (See *Fred Meyer, Morton Salt* and *Krug*, notes 29, 30 and 31 *supra*.) It is submitted that the U.S. courts' willingness in this regard may be explained (at least in part) by the wording of s. 2(a) which (unlike s. 49) does not specifically require that the favoured and disfavoured purchaser compete in the same market.

S. 2(a) prohibits those discriminations which may have the effect of injuring competition with the favoured customer. Discrimination may injure competition in the favoured customer's market notwithstanding that the disfavoured customers do not compete in the same market or resupply the goods to that market. It is arguable that s. 2(a) requires that the discrimination injure competition in the favoured customer's market by both favouring the favoured customer and by

between any purchasers in the distribution chain, there being no necessity for the corporation to have actually sold the goods to the purchasers in question. Thus in Cases 1 and 2A, the corporation will have discriminated between R1 and R2.

Whether discrimination may flow forwards (or backwards) throughout the distribution chain could nevertheless be important. Take the following example:



W1 and W2 compete in selling to R1 and R2. M unilaterally decides to give a promotional payment to W1's customers but does not make any promotional payment to either R2 or W2. Competition is not substantially lessened at the retail level but is substantially lessened at the wholesale level and W2 wishes to sue M. If the view is taken that the words "to the purchasers" may safely be inserted after "provided" in paragraph (c), it is arguable that W2 will be left without a remedy. The difference in relation to the provision of the promotional payment is constituted between R1 and R2, R1 and W1, and between R1 and W2. Competition is not substantially lessened between R1 and R2 and R1 does not compete with either W1 or W2. The difference is not constituted between W1 and W2 and if the restrictive approach is adopted, W2 will be unable to recover under section 49.

However, if the less restrictive approach is adopted, the fact that no difference in relation to promotional payments has been constituted between W1 and W2 will not necessarily prevent W2 from recovering from M. A difference has certainly been constituted between R1 and R2 and that difference could be construed as constituting a discrimination between W1 and W2. W1 and W2 are purchasers, compete in the same market and W2 could therefore possibly recover from M.

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disfavouring his competitors. However, the courts in the United States have gone one stage further and interpreted s. 2(a) as requiring that both the favoured and disfavoured customers be in competition with one another. The introduction of the indirect purchaser doctrine has enable the courts to clear their own obstacle in this respect. Thus in Case 2B the discrimination would be prohibited and both R2 and W could recover from M. Although the principle of requiring that the favoured and disfavoured purchasers be in competition has also been adopted in s. 49, it is similarly open for our courts to examine all the anti-competitive effects throughout the distribution chain.

Whether section 49 limits discrimination to those differences constituted by direct contact with the purchasers or whether indirect contact is sufficient, is I submit, an ambiguity of the section.

I feel that upon the wording of the section, "purchasers" includes all indirect purchasers. However, if the wording does not allow such a positive interpretation to be adopted, then I submit that whether purchasers means direct or indirect purchasers is another ambiguity of section 49.

The relevant rules of statutory interpretation are summarized in *Halsbury's*[34] in the following terms:

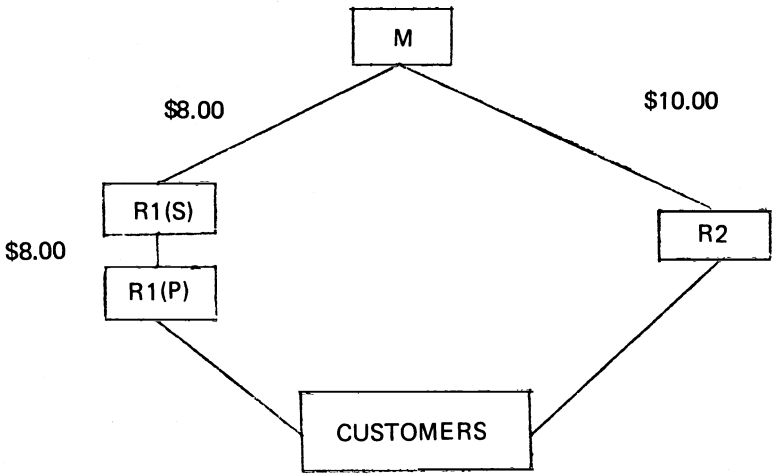
> If the language of a statute is ambiguous and admits of two views, the consequences of the alternative interpretations must be regarded, and that view must not be adopted which leads to . . . inconsistency, unreasonableness, or absurdity . . . If the language of a statute is ambiguous, the policy which dictated the statute may be taken into account.

Cases 1, 2A and 2B illustrate some of the inconsistencies and absurdities which could arise if the provisions of section 49 are interpreted in a restrictive manner. The underlying public policy of section 49 in relation to buyer-line injury appears to be that discrimination should be prohibited which is likely substantially to lessen competition in a market in which the favoured and disfavoured purchasers compete. In view of that policy and the competitive injury which could take place if the provisions of the section were interpreted in a restrictive manner, I suggest that our courts should not interpret the section so as to decrease its effectivness.[35]

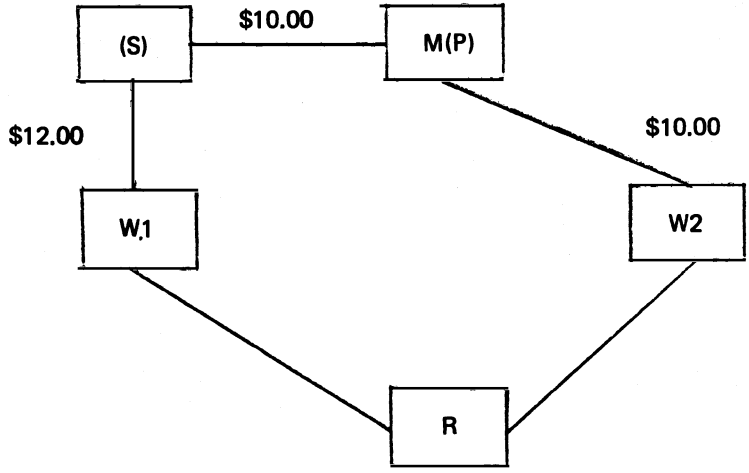
(c) Intra-company transfers

I agree with Professor Mnookin that it is nonsensical to treat parent and subsidiary as separate legal entities for the purposes of section 49. It is surprising in view of sections 45(7) and 47(6) that section 49 does contain a provision deeming parent and subsidiary or perhaps even related corporations to be a single entity for the purposes of price discrimination. It is of course open for our courts to formulate such a principle.

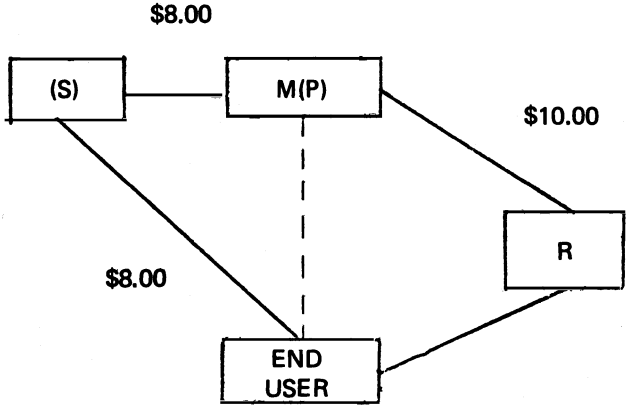
I offer the following examples of the anomalies which could arise:



R1(P) purchases through its wholly-owned subsidiary R1(S). R2 could be injured. R1(S) and R2 do not compete in the same markets and if View 1 is accepted, section 49 will not be contravened. However if View 2 is accepted, R1(P) will be regarded as a purchaser and if M's conduct is held to constitute not only a discrimination between R1(S) and R2 but also a discrimination between R1(P) and R2, section 49 will be contravened.



M has not discriminated although W1 could well be injured.



34. *Halsbury's Laws of England*, 3rd ed. vol. 36, 408 and 409.

35. This principle is given wider scope in the United States. In the *Fred Meyer* litigation (note 29 *supra*, 349) Mr Chief Justice Warren made the following comments: "Conceding that the Robinson-Patman amendments by no means represent an exemplar of legislative clarity, we cannot in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate".

M has discriminated and R could be injured. However, if the principles formulated in *Secatores* v. *Esso*[36] are not applicable, M(P) could have sold direct to End User without infringing section 49. Why, therefore, should M(P) be penalized for selling via its subsidiary?

(d) Two consummated sales

There is no compelling reason why the American doctrine of two consummated sales[37] should be adopted in Australia. Section 49 merely requires that there be two purchasers and I submit that a person becomes a purchaser as soon as the seller agrees to enter into negotiations to sell. The seller may preserve his right to refuse to deal by refusing to enter negotiations. However, once negotiations have been opened, all parties should be subject to the provisions of section 49. The disfavoured purchaser who could not afford to enter the transaction should not have to rely upon the provisions of section 76(b).

The Exceptions

(a) *Cost justification*

I have already mentioned that the cost justification exception would be redundant if discrimination were held to be economic discrimination. If discrimination is held to require an actual difference, it seems that discriminators will be able to obtain the best of both worlds – either they will not have constituted an actual difference or if they have, the cost justification exception may come to their rescue.

However, discriminators may also end up with the worst of both worlds where an actual difference does not constitute an economic discrimination and is not cost justifiable.

Differing terms of credit could well be an example of the latter. Credit for goods would appear to be a facility provided in respect of the goods within section 49(1)(c).[38] Differing credit terms, even when based upon accurate credit ratings, certainly constitute a "difference". A purchaser in financial difficulties will not take very long to explain that good credit ratings are not practically available to all[39] and one could therefore conclude that the giving of different credit terms constitutes discriminatory conduct.

Suppliers claim, with some validity, that their differing credit terms are cost justified on the basis of risk. But does the cost of credit risk fall within section 49(2)(a)? Unless credit risk can be regarded as being a cost or likely cost of the sale resulting from the differing methods by which goods are supplied to the purchasers, the cost justification exception would not appear to be available.

I feel that a court would be most relectant to find that a corporation had discriminated where the different credit terms were based upon a a bona fide assessment of risk. Perhaps a principle will be developed whereby mere differences which do not fall within the items set out in the cost justification exception will only be regarded as being discriminatory if they also constitute economic discrimination.

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36. See note 11 *supra*.

37. See *Shaw's Inc.* v. *Wilson-Jones Co.*, 105 F.2d 331 (3rd Cir. 1939).

38. See *Viviano Macaroni Co.*, FTC Dkt. 8666, CCH Trade Reg. Rep. ¶ 18,246 (1968) *aff'd* 411 F.2d 255 (3rd Cir. 1969).

39. See note 25 *supra*.

The wording of section 49(2)(a) appears to limit cost justification to the costs which are incurred up to the point of delivery. Thus where a manufacturer gives an allowance under section 49(1)(d) to a retailer for carrying the manufacturer's full range of goods, the allowance will only be in respect of costs of the buyer and not costs of the seller and will therefore not be covered by section 49(2)(a). If the allowance is given to all retailers who carry, say, over $20,000 in stock, the allowance will be discriminatory if it is not feasible for the small retailers to carry such a large quantity of stock. However, the allowance may be unlikely substantially to lessen competition. Although the large retailers will have the benefit of the allowance, they also will have to carry interest charges which may offset such allowance. But retailers who carry a large quantity of stock are likely to have a higher turnover. The increased profits from such turnover could well offset the interest charges and the allowance could be prohibited under section 49. On the other hand, where the holding of additional stock does not significantly increase turnover, a reasonable allowance for the holding of stock will be unlikely to contravene section 49.

There is only one other matter which I wish to mention in relation to cost justification. Where a manufacturer sells at two different prices – the lower price being the ex-mill price and the higher price being the ex-warehouse price and the price differential is cost justified – may the manufacturer rely upon the cost justification exception if he should refuse to sell to certain purchasers on an ex-mill basis? I suggest that the cost justification exception will not be of any assistance to the manufacturer. The discrimination seeking to be cost justified is the administrative decision not to sell at the ex-mill price. The costs of that decision certainly do not fall within section 49(2)(a).

(b) *Meeting competition*

This is certainly a most exceptional exception. Why should anti-competitive discriminations be excused on the grounds of meeting competition when the same excuse is not provided for restraints of trade, exclusive dealing and mergers? The answer may lie in the fact that section 49 prohibits discriminations which have an anti-competitive effect in the purchasers' market notwithstanding that the discrimination may have a pro-competitive effect in the seller's market. Although sections 45, 47 and 50 also prohibit conduct where it adversely affects competition in one market, the pro-competitive effects in other markets may justify the granting of an authorization application under sections 92, 93 or 94.

The exception contains various elements which are not defined and consequently the courts will be responsible for ascertaining the width of the exception. The courts will be faced with the following dilemma: the section will serve little purpose if the exception is construed widely and the exception itself will serve little purpose if it is construed narrowly.

All activity within a competitive market occurs in reaction to the forces of that market and competitors are constantly meeting competition (whether actual or threatened) of their competitors. If the exception is construed widely, section 49 will only encompass discriminations which are effected by those corporations which are not subject to the constraints of competition. The corporations falling within that category are, I suggest, either in a position substantially to control a market or have interlocking directorates with the favoured purchaser. Section 46 adequately caters for the former and I doubt whether the complicated provisions of section 49 were conceived for the sole purpose of catering for the latter.

The meeting competition exception has been construed narrowly in the United

States[40] and the same construction could be given by our courts. Thus the "good faith" requirement may preclude the meeting of an unlawful discrimination;[41] "meet" may preclude narrowly beating[42] and "offer" may preclude meeting anticipated offers.[43]

The exception will of course, only be available if competition is present in the seller's market. I suggest that in view of the presence of competition, the legal effectiveness of the exception will almost be completely negated if a narrow construction is adopted. For example, where a corporation has *uniformly* lowered its prices and discriminations have taken place when competitors have met those prices, the disfavoured purchasers will tend to give their custom to the corporation which is charging uniformly low prices. Competition is unlikely to be lessened substantially during the interim adjustment period. For similar reasons, the exception will probably not be of much assistance in seller-line situations. Where a national seller has lowered its prices to meet (not *beat*) the prices of a local competitor, that action is unlikely to give rise to seller-line injury.

To the extent that the meeting competition exception will allow discriminations which would otherwise be prohibited by the section, the exception represents a limitation upon the ambit of the section. Perhaps the principal virtue of the exception is that corporations may possibly have less trouble in ascertaining whether they have complied with the requirements of the exception than ascertaining whether the discrimination is likely substantially to lessen competition.

Conclusions

The policy of the legislature appears to have been to prohibit anti-competitive discrimination on the one hand and make some allowance for the pressures of competition on the other. The vehicle for implementing such a policy is section 49 and in view of the constant criticism which has been levelled at the Robinson-Patman Act, it is surprising that section 49 has been modelled on that Act. Judge Friendly criticized the Robinson-Patman Act in the following terms:

> From the outset, it was recognized to be a badly drafted statute which would impose serious interpretive problems on industry, the Federal Trade Commission, and the courts. The expectation has been amply fulfilled – Mr Justice Harlan has just called it "a singularly opaque and elusive statute" – but in twenty-six years not a word has been altered. The tiniest fraction of the time spent by lawyers, legal writers, administrators, and judges in an unsuccessful endeavour to elucidate the obscurities of this statue would have sufficed to put the house in order once the problems were revealed; but that time has not been spent.[44]

The translucent qualities of section 49 suggest that the legislature has spent some time improving Robinson-Patman. However, the legislature does not appear to have spent sufficient time in considering the fundamental question – namely whether there was any necessity to include a separate section in the Act solely devoted to price discrimination.

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40. See note 13 *supra*.
41. *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).
42. *Samuel H. Moss, Inc.* v. *FTC*, 148 F.2d 378 (2d Cir. 1945).
43. *Purolator Products, Inc.* v. *FTC*, 352 F.2d 874 (7th Cir. 1965).
44. Friendly, "The Gap in Lawmaking – Judges Who Can't and Legislators Who Won't" (1963) 63 Colum. L. Rev. 787, 793-4.

Price discrimination is nothing more than one of the symptoms of imperfect competition and is instigated by sellers (seller-line injury) and by buyers (buyer-line injury) who enjoy a high degree of market control. Section 46 seeks to prevent such persons from taking advantage of their market power and section 46 would therefore appear to be the proper place to deal with price discrimination.

In view of the possible wide interpretation which could be given to section 46, it is certainly arguable that section 49 adds nothing (other than confusion) to the Act. In any event, section 46 could have been modified without any great difficulty so as to encompass all conduct prohibited by section 49.

However, despite the warnings from across the Pacific, the Australian Government has seen fit to enact section 49. I hope that our courts will have regard to the American experience and thereby (in the words of Professor Mnookin) avoid some of the mistakes that have been made under the Robinson-Patman Act.