

A COMMENT ON "AN AMERICAN LAWYER'S VIEWS OF
SECTION 49 OF THE TRADE PRACTICES ACT"

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I have nothing but praise, and by that I mean respectful praise, for the admirable paper prepared by Professor Mnookin. In a sense he has made my task very easy because, being relieved from any embarrassing necessity to differ from him, I am set at liberty to amplify some of his remarks and to deal briefly with paragraphs 49(1)(b), (c) and (d) which he expressly excludes from his paper.

Introduction

Professor Mnookin describes the provisions of the Robinson-Patman Act as "the most unpopular, most widely criticized, and most troublesome provisions found in the American anti-trust laws" and another commentator says:

There is a real danger that an account of the case law under the Robinson-Patman Act - particularly an account intended primarily for readers outside the United States - will be met with frank unbelief. The idea that a manufacturer may break the law by granting a wholesaler's discount to a wholesaler who also runs retail shops, . . . or by beating an offer made to an important customer by a rival manufacturer or even by matching that offer unless he is satisfied that his rival can justify his low price by cost savings - all this may simply seem incredible; and not least because the ostensible purpose of an anti trust policy is to preserve a system of free competitive bargaining.

At this stage the reader can only be assured that these things are so. Whether they square with other aspects of the policy of maintaining competition; how it happens that they draw in large measure on the sources of political vitality which sustain that policy; whether and how apparently divergent elements of the general policy can continue to cohabit in harmony the same body of law - these are questions of interpretation and assessment . . . ¹

In the early days of the Trade Practices Act a disproportionate quantum (if that is the right word) of the instructions I received related to section 49 and, like the American anti-trust lawyers to whom Professor Mnookin refers, I anguished more about how to advise clients on price discrimination than on other trade practices problems. I think it would be the experience of most of us that section 49 presents some of the most difficult, if interesting, legal and economic issues whilst at the same time presenting some of the greatest practical problems to companies wishing to act within the law. Not only are there difficulties of interpretation but many laymen find it hard to understand the economic policy that underlies the law. They say for example, "Will not section 49 have the effect of raising prices?" and "How does that square with the rest of the Act?"

In one way section 49 can easily be squared with the remainder of Part IV because price discrimination is not made unlawful unless it is likely to have a substantial

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1. A.D. Neale, *The Antitrust Laws of the U.S.A.* (2nd ed., 1970) 262.

anti-competitive effect but the businessman's practical objection that section 49 will cause prices to rise in the short run requires a more careful answer. I understand that the economist's answer is that in the longer run competition will bring prices down again and (it is hoped) below the level at which they started, at least in real terms. But other economists refer to a "theory of the second best" which suggests that attempts to legislate for some only of the features of the perfectly competitive market may conceivably produce greater distortions than there would be without any enactment.

I am not a trained economist, beyond a few years light relaxation in the course of reading law, and I raise these matters not in order to suggest political or economic answers but for the purpose of widening the scope of discussion if there are any who would like to speculate on the economic repercussions of our revised borrowing of the Robinson-Patman Act.

Anti-Competitiveness

For, as Professor Mnookin says, section 49 is closely modelled on the American legislation and yet with important changes.

Perhaps the most important change is in the test of anti-competitiveness adopted in the Australian and American statutes. The three non-cumulative American tests for unlawful price discrimination were quoted by Professor Mnookin as follows:²

. . . where the effect of discrimination may be [1] substantially to lessen competition or [2] tend to create a monopoly in any line of commerce, or [3] 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 . . .

In Australia it is always necessary to show that a discrimination in trade or commerce is of such magnitude or of such a recurring or systematic character that it is likely to have the effect of substantially lessening competition in a market, that is, a first-line or second-line market for goods in Australia.

Many of you may be familiar with the course of litigation in *Tampa Electric Co. v. Nashville Coal Co.*³ ultimately decided by the United States Supreme Court in 1961. Although that case was decided under section 3 of the Clayton Act, it is useful in practice because it illustrates so well that the likelihood of substantially lessening competition in a market varies with the size of the product and the geographic markets. It seems to me that, by analogous reasoning, a competitor who occupied a tiny corner of a large market might be wiped out by means of discrimination and yet that discrimination would not be likely to have the effect of substantially lessening competition in the whole of that relevant market. If this is so, it is a very significant difference indeed between the Australian and American provisions and I infer from

2. Quoted *supra* p. 131. Notwithstanding passages in E.W. Kintner, *A Robinson-Patman Primer* (1970) 21, 78, I suspect that "[1]" should come after the word "substantially". That suspicion derives, first, from the paragraph in Professor Mnookin's paper following the above quotation, when he quotes the Act as follows: "The effect . . . may be substantially . . . to injure, destroy or prevent competition"; and secondly, from the following passage in Kintner (at 101, italics in original): "The word substantially, which was carried over from section 2 of the original Clayton Act, also limits the words added by the Robinson-Patman Act. Thus, the discrimination involved must not only be a kind of effect of which 'may be substantially to lessen competition', it must [alternatively] have a capacity for *substantially* injuring, destroying, or preventing competition."

3. 365 U.S. 320 (1961).

Professor Mnookin's paper that, at least in broad outline, he would agree with this analysis.

The Australian section is confined to markets in which the seller supplies, or a favoured and at least one disfavoured purchaser possibly with other persons supply, goods.

Not having a copy of Professor Rowe's *Price Discrimination under the Robinson-Patman Act* available to me at the time of dictating this comment, I was puzzled by Professor Mnookin's comment that it is extremely doubtful whether third-line injury will now support a violation in the United States except perhaps in most unusual circumstances.⁴ At first I thought that the extension of the Robinson-Patman Act to third-line anti-competitive effects⁵ explained why the situation illustrated in Diagram 2⁵ would be covered in the United States but not in Australia. I had thought of the first line as being the supplier's line, the second line as being the purchasers' line and the third line as being the purchasers' customers' line but including competition between a purchaser and another purchaser's customer.

The way section 49 is drafted,⁶ I think that that is a useful way to use those terms but on closer examination I realize that in the United States it is probably more convenient to confine third-line competition between purchaser's customers. In the two diagrams therefore, if I have understood the American usage correctly, the incipient anti-competitive effects between R1 and R2 are at the second line because R1 is in each case a person who "knowingly receives the benefit of . . . discrimination" and it is R2's competition with him that may be injured, destroyed or prevented. There is no need to appeal to the final words: "or with customers of either of them."⁷

If W is independent of M and R1 in Diagram 1, I should have thought that our courts would find difficulty in applying the "indirect purchaser" doctrine to make R1 and R2 purchasers between whom M was discriminating. I respectfully agree with Professor Mnookin that section 49 cannot apply to Diagram 2 because there is no market in which R1 and W ("those persons") supply goods. If, in either case, W were an agent or an alter ego of M or R1 or (possibly) if sub-section 84(2) applied, the position might be different.

In dealing with clients it is important to be able to give them relatively simple rules of practice to apply. I have found that two rules are quite useful:

- (1) If a supplier is discriminating between customers who do not compete with one another the discrimination is probably not illegal because, subject to the first of the two exceptions mentioned below, the discrimination cannot be likely to cause a substantial lessening of competition at the second line.⁸ The first exception is where the customers are likely to begin competing in the future. The second exception is, of course, where there is a likelihood of a substantial lessening of competition at the first line.
- (2) There are considerable practical difficulties in asking for weekly or monthly returns from integrated wholesaler/retailers and making the required adjustments but-if

4. *Supra* p. 132.

5. *Supra* p. 128.

6. S. 49: "a market in which the corporation supplies, or those persons supply, goods".

7. S. 2(a): "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".

8. Cf. Professor Mnookin's comments, *supra* pp. 134-135.

a bona fide estimate of the proportion of goods resold by wholesale and the proportion of goods resold by retail is made and adjusted (say) every six months the remaining discrimination is unlikely to be of such magnitude as to be likely to cause a substantial lessening of competition.⁹

Discrimination

An issue which occupied a great deal of attention in the early days of section 49 was whether long term contracts were effectively outlawed. I refer, of course, to the proposition that in the course of time the purchaser under a long term contract would be purchasing at such a low price comparatively speaking that there would be illegal discrimination between him and purchasers under subsequent contractual arrangements – although, in my submission, if the underlying reasoning were correct the true effect would be that the supplier could not raise his prices to other customers.

The better view now seems to be, and this is consistent with what Professor Mnookin says,¹⁰ that the time at which a price is charged is the time at which the seller commits himself to a price and that delivery of goods in 1976 at a standard price fixed in 1975 and considerably lower than the current price in 1976 does not involve price discrimination. A wider question is whether it is possible to compare prices in any case where a supplier makes a bona fide across-the-board change in his price list.

Turning to paragraphs 49(1)(b), (c) and (d) I shall set out a series of submissions in point form to facilitate discussion:

1. My first submission is really a pair of questions. Quære why the expression “given or allowed” is not used in paragraph (b) in order to be consistent with paragraph 47(2)(c) and quære whether a discount allowance rebate or credit, in the strict sense of those words, can be given by any person other than the supplier or to any person other than the purchaser. What about a person who, although not an agent, acts by arrangement with the seller? (compare sub-section 84(2)).
2. Paragraph (c) should be understood as referring to the provision of services or facilities by the supplier – or by its agent or a person acting by arrangement with it. Typical services or facilities are promotional services or facilities, for example advertising or advertising allowances or demonstrators. It is submitted that probably neither this paragraph nor any other paragraph of section 49 extends to differential “credit facilities” in the form of different times for payment, although it would extend to delivery services.
3. Although the Australian section does not refer to “proportionally equal terms” as in sub-section 2(e) – and sub-section 2(d) – of the Robinson-Patman Act, if the services or facilities are provided in direct proportion to the quantity of the goods purchased so that the services or facilities per unit are the same in the case of all purchasers it is submitted that there is no discrimination.
4. Paragraph (d) should be understood as referring to the making of payments by the supplier, or by its agent or a person acting by arrangement with it, for services or facilities provided by the purchaser or his agent or a person acting by arrangement with him. If the payments are reasonable and proportionate to the services or facilities provided it is submitted that there is no discrimination.
5. Notice the difference between proportional equality under paragraph (d) and

9. *Id.*, p.136.

10. *Id.*, 125; and see also the comment (at p.126) that the execution of a contract for transfer of goods has been interpreted as “a sale”, even though delivery and payment have not yet occurred.

proportional equality under paragraph (c). In the first place, the latter is more akin to a discount in kind and, secondly, although it may be necessary to provide various qualitatively different but proportionally equal services or facilities in order not to discriminate under paragraph (c) it is almost certainly unnecessary to engage services that are not required or find services that fall within the capacity of each of the customers who purchase from a supplier in order not to discriminate under paragraph (d).

Defences and Buyer's Liability

In relation to cost justification there are three points that I should like to make and those briefly for the purposes of discussion. First, the discrimination must make only reasonable allowance. Paragraph 49(2)(a) does not say "no more than reasonable allowance". Although it is not my own view and I am sure it would not be Professor Mnookin's, the Australian courts may conceivably hold that the whole of the chosen cost savings must be passed on to the purchaser. I do think that the same percentage of the chosen savings must be passed on at each level of, for example, a quantity discount scale.

Secondly, there has been some controversy over the meaning of the word "supplied" in that paragraph. I should think, subject to the comments of others, that "supplied" refers to the whole process from the making to the performance of the contract and is not synonymous with "delivered". Comparison should be made with the reference to "delivery" in paragraph 49(2)(a) itself and the use of "supply" in Division 2 of Part V. The definition in sub-section 4(1) is inconclusive. Thirdly, my understanding of the American authorities is that when one or more of the prescribed costs is used to justify a price to a particular customer his competitors are entitled to a similar cost justified difference if they qualify.

In relation to the meeting competition defence I have again only three comments and again I shall make them briefly. First, I should have thought it was correct that the prices or benefits referred to were lawful prices or benefits but that a person can act in good faith to meet an unlawful price or benefit if he does not know of its illegality.

Secondly, and this is a point arising out of my first comment, the normal meaning of good faith in Anglo-Australian and I expect American law is honesty however foolish that honesty may be. But, as a matter of evidence, the more foolish an alleged belief the less likely it is that a court will accept that it was honestly held.¹¹ Thirdly, it is at least arguable (and probably the tentative orthodoxy) that in a tender situation where the tenderers are acting not to meet their competitors' prices but to beat them by the smallest possible material margin, paragraph 49 (2)(b) is not applicable.

Turning to buyer's liability and the requirement of knowledge, I should think that it would have to be proven that the buyer knew all the material facts of the contravention by the seller including the facts showing that there was likely to be a substantial lessening of competition. That does not require brain surgery, for knowledge may be inferred from outward circumstances. Wilful blindness is unlikely to deceive a court and where a reasonable person in the position of the defendant would have known of the material facts the defendant will have to adduce very convincing evidence to persuade a court that he did not in fact know of the material facts.

Miscellaneous

The only other appropriate written comments that I can think of to supplement Professor Mnookin's paper are briefly to refer to the constitutional issues and to paragraph 23(b) of the Acts Interpretation Act 1901-1974 (Aust.).

11. Cf. *R. v. Nundah* (1916) 16 S.R. (N.S.W.) 482.

It will be convenient to take the latter first. It seems to me that there are considerable difficulties in reading the singular "A corporation" as including the plural in sub-section 49(1) except perhaps in relation to partnerships of corporations. On the other hand, it may be that the reference to "A person" in sub-section 49(4) can more readily be construed as including a reference to several persons.¹²

Turning to constitutional issues, you will all be aware of the extended operation of section 49 by virtue of section 6 and of the uncertainty of the question to what extent section 49 is a valid exercise of the legislative power of the Federal Parliament with respect to corporations (section 51(xx.)) or with respect to international and interstate trade and commerce (51(i.)). It is clear that, to the extent that section 49 depends upon the territories power (section 122), it is valid.

My own view, and I am very willing to defer to those more knowledgeable in constitutional law, is that section 49 is probably a valid exercise of the power conferred by paragraph 51(xx.) and that section 49 read with section 6 is a valid exercise primarily of the power conferred by paragraph 51(i.). I am more doubtful of the validity of section 49, and indeed other provisions of the Trade Practices Act where they fall to be considered under section 92 of the Constitution.

In its most extreme form — in relation to section 45 — is it a derogation from the absolute freedom of interstate trade and commerce protected by section 92 that a person should be prohibited from entering into or giving effect to a contract in restraint of that trade or commerce? I should have thought that it was strongly arguable that such a law is a derogation from that absolute freedom notwithstanding the doctrine sometimes referred to for convenience as "reasonable regulation".¹³ In any event, the concept of reasonableness in that doctrine is a broken reed likely to break in the hands of those who rely on it, for did not the Judicial Committee say in *The Commonwealth v. Bank of New South Wales*:

it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free?¹⁴

A Proposed Amendment

It is submitted that it may be desirable to amend section 49 by adding after sub-section (5):

(6) For the purposes of this Section each of two or more bodies corporate that are related to each other shall be deemed to be a division of the other or others of them without separate legal personality.

First, that would prevent a corporation from discriminating by arranging that a related body corporate give or allow a discount allowance rebate or credit, provide services or facilities in respect of goods supplied by the corporation or make payments for services or facilities provided by a purchaser from the corporation.

12. A reason for the different tests of anti-competitiveness in sub-ss 45 (3) and (4) on the one hand and ss 47 and 49 on the other hand may be that each individual contract arrangement or understanding is to be taken separately whereas in the case of ss 49 and 47, although one must look at each supplier separately if the singular does not include the plural, one should look at all that supplier's exclusive dealing or all that supplier's price discrimination.

13. Cf. *Harper v. Victoria* (1966) 114 C.L.R. 361, 374-375 per Barwick C.J. dissenting.

14. (1949) 79 C.L.R. 497, 641.

Secondly, where a body corporate entered into a transaction that to its knowledge would result in a related body corporate receiving the benefit of a discrimination prohibited by sub-section 49(1) the body corporate entering into the transaction would itself be deemed to be receiving that benefit.

Thirdly, section 49 would extend to the situation in Professor Mnookin's Diagram 2¹⁵ if W were a related corporation of R2. This seems to me to be a desirable extension.

Finally, by removing the anomaly common to section 49 and the Robinson-Patman Act that subsidiaries and divisions are treated differently, the amendment would permit a corporation to discriminate in favour of a related body corporate.

Possibly the amendment would give rise to other anomalies or to undue restrictions on legitimate business activity. If so, it is to be hoped that our discussion will bring out the deficiencies of the amendment and show how it can be improved.

I conclude as I began by expressing my appreciation of Professor Mnookin's exposition of the Australian section in the light of American experience and by repeating that what I have principally set out to do is not to correct (for no correction is necessary) but to supplement his analysis.

15. *Supra* p. 128.