AN AMERICAN LAWYER'S VIEWS OF SECTION 49 OF THE TRADE PRACTICES ACT

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Introduction

When I first learned that Australia's Trade Practices Act 1974 included a section that was based on the American Robinson-Patman Act,[1] my impulse was to sit down and write a letter of condolence to my Australian brethren. With the possible exception of the provisons in the American anti-trust laws allowing the States to permit retail price maintenance, I suspect the Robinson-Patman provisions are the most unpopular, most widely criticized and most troublesome provisions found in the American anti-trust laws.

The purposes of your section 49, like the purposes of the Robinson-Patman Act, are laudable in the abstract. Each represents an attempt to prohibit price discrimination where it may cause competitive injury to a seller's competitors or to its customers. While the man on the street may believe that common fairness makes laudable any prohibition against price discrimination, the Robinson-Patman Act causes nightmares for the American bench, Bar and business community. Its statutory provisions are extremely difficult to interpret, a very wide range of commercial activities is called into question under its provisions; and many academics believe that the statute has been counter-productive – that it has inhibited rather than augmented competition. My own limited experience suggests that American anti-trust lawyers anguish more about how to advise their clients on Robinson-Patman issues than about other anti-trust problems. Companies today often have very complicated distribution systems, sell numerous different products and change prices frequently. And yet whenever a firm charges different prices for the same product, there may be a possible violation. Significantly, it now appears in America that the Government is bringing relatively few suits under the Robinson-Patman Act. But the spectre of private damage action keeps many businessmen (and their lawyers) awake at night. In short, I do not envy you the next few years while you learn to live with section 49.

There are many basic similarities between section 49 and the Robinson-Patman Act. Each prohibits companies from discriminating in price. Neither defines discrimination. Both Acts apply to discriminatory discounts or rebates, payments for services, or provisions of services, as well as to discriminatory prices. The two Acts seem to have similar defences or "exceptions": meeting competition in good faith; and cost justification. Both provide for buyer liability, as well as seller liability.

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1. 38 Stat. 730-31 (1914), 15 U.S.C. §§ 13-13(c) (1958).

But there are also important differences in phrasing between the statutes: some may prove to be important. In particular, I think that section 49 may well require a more substantial showing of competitive injury than the Robinson-Patman Act – this may prove especially important for such injury is essential for any violation under section 49. It seems clear that the Robinson-Patman provisions about payment for and provision of services impose a more stringent duty on sellers, for the American statute does not require a showing of competitive injury for these forms of discrimination. Finally, there are many small differences in language. Despite some differences, the basic similarities between the Robinson-Patman Act and the Trade Practices Act section 49 are striking. These similarities make the American experience relevant to you for two reasons. First, it may be that Robinson-Patman decisions will influence the construction of the Trade Practices Act section 49. Second, the American experience may allow you to avoid some of the mistakes that have been made under the Robinson-Patman Act.

In what follows, I propose to address myself to your statute and analyse it in light of relevant Robinson-Patman experience. My analysis is divided into three parts. First, I will discuss what I see as the seven basic requirements for a violation under Trade Practices Act section 49. Next, I will discuss the two important exceptions or defences to a violation – cost justification and meeting competition. Finally, I will briefly discuss buyers' liability. Nearly all of my discussion will be in terms of discrimination in relation to prices (section 49 (1) (a)), and not discrimination with regard to the provision of, or payment for services or facilities (section 49 (1) (b)-(d)). Nevertheless, the analysis provided should prove relevant to both issues.

Requisites for a Violation of Section 49

Like the Robinson-Patman Act, section 49 requires the following seven elements for any violation:[2]

(a) Price discrimination
(b) By the same seller
(c) On contemporarneous sales
(d) To different purchasers
(e) Of goods
(f) Of like grade and quality
(g) Producing competitive injury.

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2. S. 49 provides in full:

49. (1) A corporation shall not, in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to –

(a) the prices charged for the goods;
(b) any discounts, allowances, rebates or credits given in relation to the supply of the goods;
(c) the provision of services or facilities in respect of the goods; or
(d) the making of payments for services or facilities provided in respect of the goods,

if the discrimination is of such magnitude or is of such a recurring or systematic character *(a) Price discrimination*

One must not confuse price discrimination for purposes of section 49 or the Robinson-Patman Act with price discrimination in economics. Economic price discrimination occurs "whenever differentials in price for a single product are not related to differentials in incremental costs."[3] There can be economic price discrimination when two buyers are charged the *same* price if the seller's costs for

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that it is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods.

(2) Sub-section (1) does not apply in relation to a discrimination if–

(a) the discrimination makes only reasonable allowance for differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from the differing places to which, methods by which or quantities in which the goods are supplied to the purchasers; or

(b) the discrimination is constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.

(3) In any proceeding for a contravention of sub-section (1), the onus of establishing that that sub-section does not apply in relation to a discrimination by reason of sub-section (2) is on the party asserting that sub-section (1) does not so apply.

(4) A person shall not, in trade or commerce–

(a) knowingly induce or attempt to induce a corporation to discriminate in a manner prohibited by sub-section (1); or

(b) enter into any transaction that to his knowledge would result in his receiving the benefit of a discrimination that is prohibited by that sub-section.

(5) In any proceeding against a person for a contravention of sub-section (4), it is a defence if that person establishes that he reasonably believed that, by reason of sub-section (2), the discrimination concerned was not prohibited by sub-section (1).

S. 2 of the Robinson-Patman Act provides in part:

2(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States ... and 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: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* . . . That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided,*

3. Dam, "The Economics and Law of Price Discrimination: Herein of Three Regulatory Schemes" (1963) 31 U. Chicago L. Rev. 1, 7.

selling to each are different. For purposes of the Robinson-Patman Act, however, price discrimination refers to charging customers *different prices* for the same product.

In construing the Robinson-Patman Act, the United States Supreme Court has held that "a price discrimination within the meaning of [Robinson-Patman] is merely a price difference", thus rejecting the interpretation of Congressman Utterback (House manager of the Conference Bill which became the Robinson-Patman Act) who had said that "a discrimination is more than a mere difference."[4] While American law suggests that a mere difference in price can be discrimination, several American cases have held that a seller *cannot* be held to have discriminated where he charges the same price to different purchasers even though the costs involved in the two sales are different.[5] This of course illustrates the difference between a legal and an economic definition of price discrimination. My strong hunch is that section 49 will be interpreted in similar fashion, if only to avoid the nearly impossible proof problems of an economic test that would always require comparing price-cost differentials.

(b) By the same seller

If two unrelated firms charge different prices, that can hardly be price discrimination, for section 49 provides that "*a* corporation shall not . . . discriminate."

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however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale, by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

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4. *FTC* v. *Anheuser Busch, Inc.*, 363 U.S. 536, 549 (1960).

5. *E.Q., Sano Petroleum Corp.* v. *American Oil Co.*, 187 F. Supp. 345, 353-354 (E.D.N.Y. 1960).

The Robinson-Patman Act has been interpreted to prohibit *the same seller* from selling at different prices. Normally the identification of the seller poses no problems. But in the context of related entities, the question can arise whether discrimination has occurred. Suppose, for example, a parent corporation and a subsidiary corporation (or two subsidiaries) sell the same product for different prices. Is this discrimination?

Under the Robinson-Patman Act, sales by a subsidiary corporation are not normally attributed to its parent, or through the parent to another subsidiary, even though the corporations have common ownership and the same officers and directors. Indeed, the separate corporate existence of related corporations is respected unless they are mere shams. One American circuit court stated the test as follows:

> [T]here must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.[6]

The language of section 49 relating to "*a* corporation" at least suggests that the same result would be reached under your law, although I must say that I see little reason why form should be so controlling.

(c) Contemporaneous sales

Proof of discrimination requires more than evidence of sales by a single seller at different prices. The sales must be reasonably contemporaneous. This does not mean that the sales must take place at exactly the same point in time. Such a reading would emasculate the statute. How long a period can elapse between purchases depends on the industry involved and on market conditions. In some industries, the passage of several months between sales may make no appreciable difference because prices might normally fluctuate very little, and market conditions may be unchanging. In markets with rapidly changing conditions, however, sales at different prices occurring only a few hours apart may not be sufficient to show discrimination. As a practical matter this means that proof of discrimination is much more difficult where conditions normally fluctuate with rapidity.

There are relatively few cases under the Robinson-Patman Act dealing with the question of whether purchases were sufficiently contemporaneous to show discrimination. One circuit court held that sales six months apart were sufficiently contemporaneous in the retail food industry.[7] But there are other cases relating to the meat products industry and to the automotive industry where courts held that sales six months apart were not sufficiently contemporaneous.[8]

(d) To different purchasers

(i) *Preliminary observations*. Section 49 requires that the discrimination be "between purchasers". The Robinson-Patman Act has been interpreted to require that there be

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6. *National Lead Co.* v. *FTC,* 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds,* 352 U.S. 419 (1957).

7. *Fred Meyer, Inc.* v. *FTC,* 3579, F.2d 351, 357 (9th Cir. 1966) *rev'd in part on other grounds and remanded,* 390 U.S. 341 (1968).

8. *Atlanta Trading Corp.* v. *FTC,* 258 F.2d 365 (2d Cir. 1958); and *Valley Plymouth* v. *Studebaker-Packard Corp.,* 219 F. Supp. 608 (S.D. Cal. 1963).

at least two purchasers. Merely charging the same buyer different prices for different orders does not violate Robinson-Patman and would not violate section 49. The requirement that there be at least two *purchasers* would also exclude situations where one individual receives the goods by reason of a lease, loan or consignment. American law has been so interpreted. Moreover, there are American cases that have held that a mere quotation of a discriminatory price is not sufficient: there must be an actual sale. However, the execution of a contract for transfer of goods has been interpreted as "a sale" for purposes of the statute, even though delivery and payment had not yet occurred. The requirement that there be two purchasers also means that a refusal to sell to a party on the same terms as a sale to someone else would not itself violate section 49: the person refused would not be a "purchaser". The Robinson-Patman Act expressly provides that a firm has a right to select its own customers. There are numerous American opinions that have upheld the Federal Trade Commission's early determination that a seller "may discriminate in the choice of his customers . . . not until there is a discrimination in price among those chosen does Section 2(a) of the Act have any application."

(ii) *Intra-corporate transfers.* Suppose a corporation "sells" a good to its distributing division for a price different from that to which it sells to outsiders. Can the division be a "purchaser" for purposes of the Act? What if a sale is to a wholly-owned subsidiary? Is the subsidiary a separate purchaser? *In Raines Distributors, Inc.* v. *Admiral Corp.*[9] it was held that a distributing division that is *not* a separate corporation will not be treated as a separate entity to make it one of two required purchasers. But in the same case it was suggested that a wholly-owned corporate subsidiary could be a "purchaser", although the Court refused to so hold in that case, where the subsidiary had no independence and the parent had dominion and control.

The Attorney-General's Report on the American Anti-trust Laws, and other commentators, have been quite critical of American court interpretations that treat a parent and subsidiary as separate entities for anti-trust purposes: "to demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare."[10] And I must say that in the area of price discrimination, it strikes me as nonsensical to require a corporation to sell to its own subsidiary at the same price as it sells to outsiders, if in fact a different rule would apply were they divisions within the same corporation. Nevertheless, given the separate legal existence of a corporate subsidiary, caution is essential.

(iii) *Indirect purchasers.* Perhaps the most vexing issue that will face lawyers and judges alike in interpreting section 49 is whether "purchasers" refers only to those buyers dealing directly or contractually with the seller, as opposed to those further down the chain of distribution who may deal in the goods but who do not purchase

9. 256 F.Supp. 581, 583-584 (S.D.N.Y. 1966).

10. Report of the Attorney-General's National Committee to Study the Antitrust Laws (1955) 34.

them direct from the seller. The issue can be posed more concretely by the following examples:

(1) Suppose a manufacturer distributes all its goods through a single wholesaler to whom it sells its product. The wholesaler in turn resells to two retailers. If the manufacturer (M in Diagram 1 below) makes different promotional payments to the two retailers, has there been a violation of the Act? Put a different way, are R-1 and R-2 "purchasers"? If they are not, then discriminatory promotional payments would fall outside the Act.

The Robinson-Patman Act has been interpreted to apply to "indirect purchasers". From the beginning, a retailer has been characterised as a purchaser where the seller negotiated the terms of the sale with the retailer although the retailer ultimately purchased from an intermediate source:

> A retailer is nonetheless a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting a sale of his products and exercises control over the terms upon which he buys.[11]

The docrine has also been applied when the seller grants promotional payments to an "indirect customer".[12]

(2) A second problem can be illustrated by Diagram 2 below. Assume S sells directly to some large retailer, but only through wholesalers to small retailers. Assume further that S sells to R-1 for $1.00 a unit. Assume W sells to R-2 for $1.20 a unit. Is there discrimination if S sells to W for $1.05? W and R-1 do not compete in the same market.[13] But competition between R-2 and R-1 can certainly be affected by the difference in price. But is R-2 a "purchaser"? If R-2 is a "purchaser", could R-2 complain if S sold to W for the same price as it sold to R-1? Would there be a discrimination? The United States Supreme Court held in *FTC* v. *Fred Meyer Inc.*[14] that a seller must regard as its "customers" all those who are retail customers of its wholesalers and who compete with direct-buying retailers to whom the seller gives promotional assistance.

Justification for the approach of the Supreme Court can be found in the language of the Robinson-Patman Act, which makes it unlawful for a person "either directly *or indirectly*, to discriminate in price between different purchasers of commodities . . . where either or any of the purchasers involved in such commodities are in commerce". However, a different result might be reached in Australia. The language of section 49 provides some internal support for the notion that "purchaser" refers only to firms buying direct from the selling corporation, and not to those further down the chain. Section 49 provides that "A corporation shall not . . . discriminate between purchasers

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11. *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537, 546 (1937).
12. *E.g.*, *American News Co.* v. *FTC*,300 F.2d 104, 109 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962) (interpreting section 2(d) relating to furnishing services and facilities).
13. The requirement that both purchasers be competing in the same market is discussed *infra*, heading "(g) competitive injury".
14. 390 U.S. 341 (1968).

of goods ... if the discrimination [has] the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or *those persons* supply, goods." "Those persons" would seem to refer to "purchasers". A comparison of the American and Australian provisions shows that the latter is more narrowly drafted. The language is far from clear, however – it could be that the word "purchaser" itself connotes somebody who has bought either directly or indirectly from the seller.

How, then, will "purchaser" in section 49 be interpreted? The word is not defined in the statute, and any guess is hazardous. I would think, however, that a firm which has dealings with the seller and which receives promotional payments or services directly from the seller, would be considered a "purchaser" in respect of transactions covered by those payments or services, even though the goods in question are bought through an intermediary. (This is the example discussed in Diagram 1 below.) To fail to interpret the Act to include such circumstances would be to eviscerate much of the effectiveness of sub-sections (b), (c) and (d) of section 49 (1). But I do not find it so clear that *Fred Meyer* will be followed. In other words, I would guess that R-1 and R-2 would be deemed "purchasers" in Diagram 1, but that R-2 would not be deemed a "purchaser" in Diagram 2.

Diagram 1

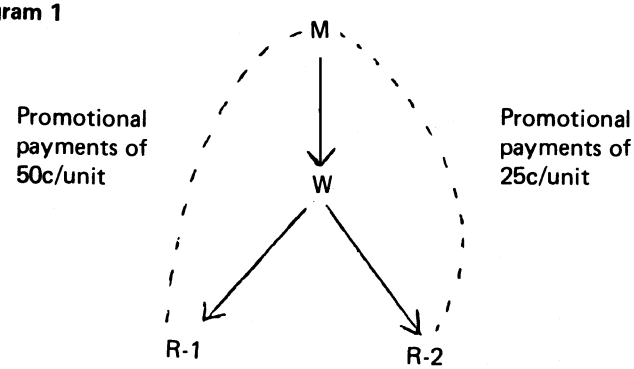
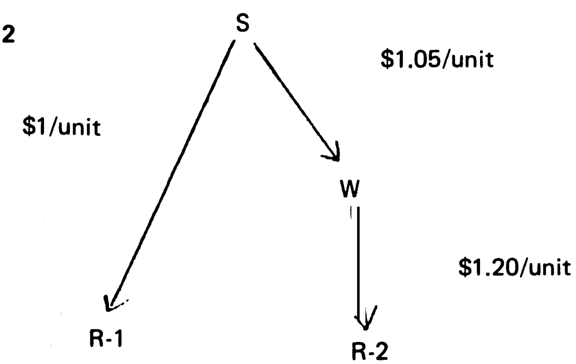


Diagram 2



(e) The goods requirement

Section 49 only applies to discrimination with regard to "goods". Similarly, the Robinson-Patman Act applies only to price discrimination with regard to "commodities", which has been interpreted by American courts to include goods, wares, merchandise, machinery and supplies, but not services or intangibles. My hunch is that "goods" is at least as restrictive as "commodity" and would plainly exclude services and intangibles.[15]

A number of litigated American cases have involved questions relating to discrimination with regard to prices for advertising. American courts have decided that "commodity" does not include the sale of television time, the sale of news report services, the sale of radio advertising, the leasing of real estate, or a contract for the loan of money secured by real estate mortgages. Where there is a sale of intangibles that entails some tangible evidence of the subject-matter of the transaction the test appears to be to look for the "dominant nature of the transaction". Thus, in *Tri-State Broadcasting Co.* v. *United Press International, Inc.*[16] it was held that the sale of a news report service did not fall within the statutory definition of a commodity, even though news items were provided in printed form, because these "at best represent tangible incidents of appellant's contractual right to utilize [the] services."

(f) Of like grade and quality

Like the Robinson-Patman Act, section 49 declares unlawful only discriminations in price between purchasers of "*goods of like grade and quality*". Obviously, there is no discrimination if a seller charges different prices for completely different products that are made up of different ingredients, appear differently and serve different uses. In such circumstances, there is no reason to think that they should be sold for the same price. And even where the same product is sold at different prices, if there are substantial differences with regard to the condition of the products there will be no discrimination, because the goods will not be of like quality. Thus, in *United Banana Co., Inc.* v. *United Fruit Co.*[17] a court held that it did not violate the Robinson-Patman Act for a seller to sell bananas at a lower price to the plaintiff's competitors where the bananas in question were in poorer condition than those sold to the plaintiff.

The difficult questions with regard to the meaning of "like grade and quality" have to do with circumstances:

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15. The definition of "goods" in s.4 of the Act provides no indication on this issue. The definition is as follows:

"goods" includes –

(a) ships, aircraft and other vehicles;
(b) animals, including fish;
(c) minerals, trees and crops, whether on, under or attached to land or not; and
(d) gas and electricity;

16. 369 F.2d 268, 270 (5th Cir. 1966).

17. 362 F.2d 849 (2d Cir. 1966).

(i) where there are physical differences between the "goods" in question but those differences may not be substantial; or
(ii) where the "goods" are physically identical, but there are brand differences that may lead consumers to think of them as different products. I will discuss these two separately.

(i) *Physical differences.* There are a substantial number of Robinson-Patman cases where it has been held that goods were of "like grade and quality" despite physical differences. The Federal Trade Commission has held, for example, that coffee sold to institutions was of "like grade and quality" as coffee sold to markets, even though the institutional coffee had an additonal kind of bean added, was sold in larger containers, and had a different appearance. Similarly, difference in size did not prevent cans from being of "like grade and quality" since they "were all of commercial grade and quality and gave substantially identical performance . . . [and] were adapted to the function for which they were sold and purchased, to wit, as containers of juice."[18]

There are no hard and fast rules for determining when physical differences will be ignored. The FTC's view now appears to be that products will not be deemed of "like grade and quality" where there are "bona fide physical differences *affecting marketability* – even though small and having no effect on the seller's costs."[19] In the words of one American court, "cross-elasticity of demand, substitutability, physical appearance, and identity of performance, are factors to be considered".[20]

(ii) *Brand differences.* What about the sale at different prices of products that are physically identical, but that carry different brand names. If consumers in fact are prepared to pay more for a particular branded product, is that product of "like grade and quality"? For several years debate raged in American legal circles about this question. Commentators were divided over the wisdom of the FTC's position that physically identical goods were of "like grade and quality" for purposes of the Robinson-Patman Act, irrespective of consumer brand preferences. And in 1966, the Supreme Court vindicated the FTC's claims in *FTC* v. *Borden Co.*[21] Borden sold evaporated milk under various brand names owned by its customers at lower prices than it marketed the identical evaporated milk under its own brand name. The Circuit Court held that while a difference in brand name alone would not justify a finding of difference in "grade", such a finding was justified where there was substantial customer preference for one brand over another that led to a willingness to pay a premium. The Supreme Court reversed this finding, determining that irrespective of brand-name differences, the evaporated milk was of "like grade and quality". The Court said

18. *Bruce's Juices, Inc.* v. *American Can Co.*, 87 F. Supp. 985, 987 (S.D. Flo. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951), *modified* 190 F.2d 73 (5th Cir. 1951), *cert. dismissed* 342 U.S. 875 (1951).

19. See *Antitrust Law Developments* (1975) 115.

20. *Checker Motors Corp.* v. *Chrysler Corp.*, 283 F. Supp. 876, 888-889 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Circ. 1969), *cert. denied*, 394 U.S. 999 (1969).

21. 383 U.S. 637 (1966).

> [L]abels do not differentiate products for the purpose of determining grade or quality, even though the label may have more customer appeal and command a higher price in the marketplace from a substantial segment of the public.[22]

The *Borden* doctrine was later applied by the Supreme Court to hold that two brands of automobile muffler that were physically identical were of "like grade and quality" where a manufacturer priced them differently because one brand had a lifetime guarantee.[23]

Borden may be a Pyrrhic victory for plaintiffs, however, because of their great difficulty in proving competitive injury resulting from price discrimination for products with different brands, at least where the *lower* priced brand has difficulty competing with the higher priced brand because of customer preferences. Thus, on remand, the Circuit Court in *Borden* itself found no evidence to support a finding that the price differential created a competitive advantage by which competition could be injured; the price differential was nothing more than a reflection of consumer preferences.[24]

(g) *Competitive Injury*

(i) *Comparison of the Acts.* Both section 49 and the Robinson-Patman Act make a price discrimination illegal only if there is some demonstration of competitive injury. But there are significant differences in the statutory language of section 49 and Robinson-Patman. Section 49 makes a price discrimination unlawful.

> If the discrimination is of such magnitude or is of such a recurring or systematic character that it is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply goods.

The Robinson-Patman Act makes a price discrimination unlawful 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 . . .

I think section 49 will be more restricted in operation in this regard than the Robinson-Patman Act. While both statutes have language relating to "substantially lessening competition", section 49 lacks the broader provison of the Robinson-Patman Act allowing a violation where "the effect . . . may be substantially . . . to injure, destroy or prevent competition". Moreover, section 49 uses the words "is likely to have" whereas the Robinson-Patman Act declares discrimination illegal where "the effect of such discrimination *may be* . . . ". Finally, section 49 has language relating to

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22. *Id.*, 640.
23. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 376 F.2d 692 (7th Cir. 1967).
24. *Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967).

the "magnitude" or the "recurring or systematic character" of the discrimination; similar restrictive language is not found in the Robinson-Patman Act. These differences of language strongly suggest to me that a more persuasive showing of competitive injury may well be required under section 49 than is required under the Robinson-Patman Act.

Under the Robinson-Patman Act, three principal categories of injury have been distinguished: (1) injury to competition among the seller and his competitors *(primary-line injury);* (2) injury to competition among the favoured purchaser and his competitors (*secondary-line injury*); and (3) injury to competition among the customers of the favoured buyers and those customers' competitors (*tertiary-line injury*). It is extremely doubtful whether tertiary-line injury will now support a violation under the Robinson-Patman Act except perhaps in rather unusual circumstances.[25] The express language of section 49 would seem to allow for proof of competitive injury in only the primary-line market ("a market in which the corporation supplies") or the secondary-line market ("a market in which . . . those persons supply goods."). In what follows, I therefore will ignore tertiary-line injury altogether.

(ii) *Primary-line Injury.* Primary-line injury is most frequently alleged where a seller charges different prices for the same product in different geographic markets. Under the Robinson-Patman Act, courts have required much more substantial proof for a primary-line injury than is true for a secondary-line injury. The American cases make clear that the mere demonstration that a firm has sold for different prices in different geographic markets does not establish a primary-line injury. Instead there must be a showing of (a) a competitive relationship; and either (b-1) predatory pricing; or (b-2) a substantial market dislocation attributable to discrimination by a dominant seller.

(a) In a primary-line injury case, the plaintiff must show that there is some *competitive relationship* between the defendant and the sellers allegedly adversely affected by a discriminatory pricing. The competitive relationship is established by showing that the other sellers were marketing the same product in the geographic area in which the price discrimination by the defendant occurred.

But what are the same products? The test applied by American courts appears to be, on the one hand, less stringent than the "like grade and quality" test used to determine whether there has been a discrimination at all. That latter test is relevant when deciding whether a corporation discriminated in price by supplying the same goods to different people and at different prices; it is not relevant when deciding whether this discrimination has affected competition between the supplier and those of his competitors who market that same product. But the test applied is also less broad than the "functionally interchangeable" test often applied in merger or monopolization cases. A leading American commentator has suggested that the most appropriate test is one which asks whether there is "competition between sellers of the

25. See F. M. Rowe, *Price Discrimination under the Robinson-Patman Act* (1962) 195-205.

same product, viewed *in a realistic marketing sense*".[26] A demonstration that the alleged violator and other sellers are competing for the same customers suffices to show that they compete in the same geographic market in respect of the same product.

(b-1) *Predatory pricing is strictly prohibited.* The most straightforward proof of primary-line injury occurs where it can be shown that the discriminating seller has a predatory purpose and has discriminated in price in order to eliminate a competitor from the market. This predatory purpose may be established by the seller's own statements or letters. For example, in *Forster Mfg Co.* v. *FTC*[27] the FTC found that the defendant had stated to one of its smaller competitors: "Don't try to follow me. If you do, we will put you out of business." Usually there is no direct evidence of a predatory intent. Instead, predation is demonstrated by proof that the seller offered its goods in a particular locality at a price below its own "cost". The Supreme Court has stated that "a price reduction below cost tends to establish [predatory] intent".[28]

The now infamous *Utah Pie* case[29] involved a further elaboration of what may be predatory. There one pie company brought suit against three national competitors alleging that each had engaged in price discrimination in Salt Lake City, Utah. The Supreme Court reinstated a jury verdict in the plaintiff's favour which had been reversed by a Circuit Court decision. As to one defendant, the Supreme Court held that "a jury would be free to ascertain a seller's [predatory] intent from surrounding economic circumstances, which would include persistent unprofitable sales below cost and drastic price cuts themselves discriminatory."[30] A finding of predation against another of the defendants was justified on the grounds that it had sold for a price "less than its direct cost plus an allocation for overhead",[31] and for the third defendant because its price was "admittedly well below its costs, and well below the other prices prevailing in the market."[32]

(b-2) *Primary-line effects without predation.* Absent a showing of predation, American courts have been reluctant to find primary-line injury. Early cases under the Robinson-Patman Act suggested that "diversion" of sales – that is, a shift of sales from one competitor to another with adverse competitive effects on the former – would be sufficient. But with the exception of one circuit court, the diversion theory has not been generally accepted. Instead, absent predation, injury to competition on the seller level is now generally thought to presuppose some "substantial dislocation in the market attributable to discriminatory pricing manoeuvres on the part of a monopolistic or dominant seller."[33]

I trust section 49 will be interpreted to require more than "diversion of business",

26. *Id.*, 144 (italics added).
27. 335 F.2d 47 (1st Cir. 1964).
28. *FTC* v. *Anheuser Busch, Inc.*, 363 U.S. 536, 552 (1960).
29. *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967).
30. *Id.*, 696n.
31. *Id.*, 698.
32. *Id.*, 701.
33. Rowe, note 25 *supra*, 153.

for such a test for competitive injury is inconsistent with the primary purposes of anti-trust. The essence of competition, after all, is the diversion of business; to prohibit price cuts, other than those across the board, which result in the diversion of business would be to eliminate an important feature of competition.

In analysing what (apart from predation) may be sufficient under section 49, the experience of American courts may be relevant. Professor Rowe has usefully extracted criteria which American cases suggest either *dispel* the existence of adverse competitive effects, or *confirm* their existence. While I shall not elaborate at length about the various American cases that have found primary-line injury absent predation, Professor Rowe's criteria are useful to set out:

> Several indicia appear in the cases to *dispel* the existence of adverse competitive effects attributed to the seller's prices:
> (a) Decline in the seller's own percentage share of the market, notwithstanding his price differentials.
> (b) Minor over-all market position of the seller.
> (c) Growth of the seller's competitors, in terms of their market shares, their absolute sales volume, or simply by their sales to full capacity.
> (d) Prevalence of comparable price variations on the part of competitors.
> (e) Inroads by sellers on each other's customers and/or customer switches among sellers.
> (f) Ease of entry by competing sellers into the pertinent market.
> (g) Keenness of competition among the sellers, or over-all dynamism in the market.
> (h) Competition by seller against strongly entrenched regional competitors.
> (i) Aim by seller to improve his deteriorating market position, or temporary price experimentation to this end.
>
> Conversely, key indicia to *confirm* the existence of probable competitive impairment are:
> (a) Monopoly or overpowering position of the seller in wider markets.
> (b) Aggressive objectives toward smaller and weaker rivals.
> (c) Deep, sustained undercutting of rivals' prices, or elimination of an *established* price spread between a "premium" and a lesser product.
> (d) Persistent sales below the seller's "cost."
> (e) Actual or impending demise of a seller's sole rival in a particular market.[34]

(iii) *Secondary-line injury*. A principal concern of the Robinson-Patman Act was to prevent adverse competitive effects from price discrimination on the customer level. Indeed, the United States Supreme Court has stated that

> the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores.[35]

In the best populist tradition, the Act sought

> to curb and prohibit all devices by which large buyers gain discriminatory preferences over smaller ones by virtue of their greater purchasing power.[36]

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34. *Id.*, 160-162 (footnotes omitted).
35. *FTC* v. *Anheuser Busch, Inc.*, 363 U.S. 536, 543-544 (1960).
36. *FTC* v. *Henry Broch and Co.*, 363 U.S. 166, 168 (1960).

The American experience suggests that the proscribed competitive effects on the *customer* level are evaluated by reference to two different elements: (a) whether there has been sufficient competitive contact between the recipients of the higher and lower prices and (b) criteria used to evaluate the adverse competitive effect in the market where these customers compete.

(a) *The requisite competitive contact.* The proof of secondary-line injury requires that the plaintiff "show that the favoured and the unfavoured competitors are in actual competition, or that they would probably be in actual competition if the discrimination were not made."[37] If the favoured and unfavoured buyers do not compete against one another in resale markets, either geographically or functionally, the adverse effects cannot be found.

Under the Robinson-Patman Act, several cases have held that price differentials among customers in different *geographic* areas have no adverse competitive effects on the customer level. Even where there was some cross-selling over territorial boundaries, if such sales were slight in relation to the magnitude of overall sales, decisions have held that geographic price differentials did not injure secondary-line competition.

It is more difficult to generalize about pricing schemes that charge different classes of customers different prices. "Functional discounts" – where the price is based on the classification of the customer with respect to how he disposes of the seller's products – have been justified under the Robinson-Patman Act on the ground that they lack injury to competiton; for instance, a different price may be charged to each of retailers, wholesalers, consumers, and other manufacturers which use the good in the manufacture of different goods. The argument here is not that differences in price necessarily reflect cost savings to the seller. Rather, the notion is that if buyers in different functional classes do not compete, then price differentials cannot injure the recipient of the higher price. But competitive injury can arise from price differentials among distributors who employ different marketing techniques if in fact they do compete for sales.

The American experience with regard to price differentials among classes of customers is too complicated to briefly summarize. Two generalizations may be helpful in advising companies about their own practices, however. First, normally no problem is created if wholesalers or jobbers receive greater discounts or lower prices than retailers or dealers. Charging those higher in the distributive hierarchy (that is, closer to the manufacturer) a lower price has not been thought to violate the Robinson-Patman Act. Conversely, since a seller may charge distributors and consumers (particularly commercial users) the *same* price, it would seem that a distributor cannot complain about the size of a differential in his favour. But charging those lower on the hierarchy (that is, closer to the ultimate customer) a lower price than someone higher up on the hierarchy is viewed with great suspicion. Indeed, a classic Robinson-Patman case involved sales to a large retail customer at a lower price

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37. W. Patman, *Complete Guide to the Robinson-Patman Act* (1963) 60.

than to a wholesaler or jobber; the practice was held to be an illegal price discrimination.[38]

Exceedingly complicated problems have arisen under the Robinson-Patman Act with regard to secondary-line injury because of the increasing integration of functions within the distribution process. Some buyers today act as both wholesaler and retailer. For the most part, the FTC and American courts have taken the view that such buyers are entitled to a wholesaler's discount only on the merchandise purchased for wholesale resale. In *FTC* v. *Ruberoid Co.*,[39] the Supreme Court affirmed a determination by the FTC that prohibited an asbestos and asphalt roofing manufacturer from giving a discount to a wholesaler that did some applicating work himself. Moreover, on the facts of the case, the Court was not prepared to differentiate between the purchaser's wholesaling and retailing functions and allow a price differential in respect of the wholesaling function. The decision has been substantially criticized as creating inefficiency in the distribution process and thwarting competition. If a wholesaler-retailer performs a wholesaler's function on all his bulk purchases, why shouldn't he obtain a functional discount covering the entire purchase regardless of how he disposes of items within that bulk? The protection of smaller competitors, not the protection of the competitive process, provides the only answer.

For safety's sake, sellers often want to ensure that a wholesaler-retailer is granted a functional discount only on those goods resold at wholesale. What evidence will protect the seller? The best evidence would of course be the customer's own sales invoices, showing how he disposed of the goods. But many customers would object to this. Periodic written statements from a buyer stating what percentage of his purchases were resold at retail and what percentage were resold at wholesale should adequately protect the seller, if discounts are based on these percentages.

(b) *Criteria for inimical competitive effects.* Assume that it can be shown that the favoured and disfavoured customers in fact compete against one another. By what criteria will it be determined that the "discrimination is of such magnitude or is of such a recurring or systematic character that it is likely to have the effect of substantially lessening competition"? For secondary-line injury, American courts have applied a notoriously loose standard for measuring the sufficiency of the causal connection between the price differential and the alleged injury among customers. In the famed Morton Salt case, the Supreme Court stated that it is

> self-evident . . . that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.[40]

For a time this *Morton Salt* "self-evident" test evolved to the point where the mere demonstration that competing customers had been charged different prices provided the requisite likelihood of competitive injury. Indeed, one circuit court held that

38. *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).
39. 343 U.S. 470 (1952).
40. *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948).

> injury may be inferred even if the favoured customer did not undersell his rivals, for a substantial price advantage can enlarge the favoured buyer's profit margin or enable him to offer attractive services to his customers.... [A] ny substantial, sustained differential between competing sellers is *prima facie* injurious. 'Mini-injury' is the test.[41]

While some commentators see in very recent judicial decisions a more detailed inquiry into whether a particular discrimination does in fact impair the unfavoured customer's ability to compete, the present state of American law is far from clear. In all events, I think section 49, because of its language, should be interpreted to require a more substantial showing that competitive injury has occurred or is likely to occur. Indeed, section 49's requirement that the discrimination be of "*such magnitude*" or "of such a recurring or *systematic character*" can be seen as a quite purposeful attempt at providing a test with more rigour than Robinson-Patman's. Temporary price differentials, or small price differentials might be excused under section 49, at least absent a showing of actual competitive effect. If a more powerful showing of secondary-line injury is required under section 49, the legality of a discrimination may turn on an evaluation of the profit margins in a particular market, the importance of a particular product to the customers, and the size of the differential and its duration. Insofar as a reasonable forecast of the actual or likely competitive effects is necessary for legal advice, it will be essential that advisors make a careful analysis of the market in question.

The Exceptions

If a plaintiff proves the seven necessary elements a *prima facie* violation is made out under section 49. But the defendant still has a chance. Section 49(2) provides two exceptions if the defendant shows either (1) that the price differential is cost-justified or (2) that the price differential was granted in good faith to meet competition. Each exception is quite similar in language to Robinson-Patman Act provisions.

(a) *Cost justification*

Section 49(2)(a) provides that section 49(1) does not apply to a discrimination if

> The discrimination makes only reasonable allowances for differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from the differing places to which, methods by which, or quantities in which goods are supplied to the purchasers.

The purpose of a cost justification exception is clear: it allows sellers to pass on to their customers various kinds of cost saving. To prohibit price differentials that reflected such cost savings would be to stifle competition, not protect it, for the primary goal of the competitive market is to give customers the advantage of efficiencies achieved by a seller.

Based on the American experience, there is little justification for great hope based on the cost justification exception. In the words of the Attorney-General's Report:

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41. *National Dairy Products Corp.* v. *FTC*, 395 F.2d 517, 521-522 (7th Cir. 1968), *cert. denied*, 393 U.S. 977 (1968).

"The cost defense has proved largely illusory in practice."[42] It has been raised in very few price discrimination cases.

Commentators have suggested several reasons for its infrequent use. Firstly, cost data is notoriously elusive. The FTC has not been content simply to accept a company's estimates of its own costs, but instead challenges allocations. Section 49 allows for "reasonable allowances". If your Trade Practices Tribunal and Commission allow some leeway based on the word "reasonable" then cost justification may prove more important here. But if the seller lacks good data at the time it establishes prices, even with a more flexible approach the defence may often not be useful. Section 49(2) allows "*only* reasonable allowance" for costs.

A second reason for the infrequent use in America of the cost justification defence is that its preparation is tremendously expensive. This would no doubt be true in Australia as well. In the best of all worlds, counsel would prefer having a cost justification prepared before the prices are set. As a practical matter, clients may often be unwilling to do this. Moreover, even at the time of litigation, the expense of preparing a cost justification may in many cases outweigh its usefulness, particularly if early decisions are unduly stringent with regard to what is "reasonable".

What costs can be taken into account for purposes of this justification? Section 49(2)(a) provides that the costs of "manufacture, distribution, sale or delivery" may be considered if these costs differ because of the methods by which or quantities in which or places to which the goods are sold or delivered. Cases under the Robinson-Patman Act early established that incremental costs may *not* be used to justify price discrimination. Differential granted a particular customer must be traceable to some difference between him and other customers.[43] This means that economies of scale due to an increased level of production cannot be attributed to a single customer to justify price discrimination. To put it another way, a firm cannot justify a lower price to one customer simply by showing the differences in total costs with or without that particular customer's business.

A final word should be added about cost justifications related to the grouping of customers. As a short cut for calculating cost differences, sellers sometimes group buyers together. The Supreme Court stated in *U.S.* v. *Borden Co.*[44] that a customer group

> [must be] composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indictum of the cost of dealing with any specific group member . . . the classifications . . . [must be] shown to be of sufficient homogeneity.

In other words, the actual cost of doing business with each of the members of the group must be reasonably comparable in order to use the grouping for cost justification purposes. The same holds true for product-line groupings.

42. Attorney-General's Committee Report, note 10 *supra*, 176.
43. Rowe, note 25 *supra*.
44. 370 U.S. 460, 469 (1962).

(b) *Meeting competition in good faith*

The second exception is provided by section 49(2)(b), which excuses discrimination if

> the discrimination is constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.

Once again, the defendant has the burden of asserting and establishing this exception. It too has a closely analogous counterpart in the Robinson-Patman Act.

The United States Supreme Court indicated in an early case that meeting competition in good faith was a defence even if the resulting price discrimination injured competition (*Standard Oil Co.* v. *FTC*).[45] The purpose of the exception is to allow a seller to protect his competitive position: in the Supreme Court's words, a seller has a "substantial right to self-defense against a price raid by a competitor."[46]

In actual operation, the "meeting competition" defence has not been much more successful in the U.S. than the cost justification defence. This is largely due to the fact that the FTC has interpreted the "good faith" requirement very stringently. While the American courts have not accepted all the limitations described below, a brief outline of the restrictions the FTC has at times asserted will give you some idea of possible limitations that may arise here. The FTC has claimed that good faith is lacking if:[47]

1. The price reduction is used aggressively rather than defensively.
2. A reasonable man would know the competitor's price was unlawful.
3. The price cut is a facet of a general price system rather than an ad hoc grant of a lower price to meet a specific competitive situation.
4. The seller's goods are not of like grade and quality to the goods of the competitor.

My own view is that the FTC's position on many of these issues is nonsense. Allowing the defence, for example, to retain old customers, but not to get a new customer, is certainly unsound. The underlying purpose of anti-trust is to foster competition. New customers as well as old customers should be given the benefit of competition. While space does not permit a detailed examination of the vagaries of American opinion relating to the meeting competition defence, some practical advice is in order.

The best proof for this defence is a contemporaneous *written* report prepared by a salesman on the scene that explains why a lower price was necessary to meet a competitive price. If a firm wishes to made ad hoc price reductions in order to get a particular sale, the sales force must be trained to document in writing the competitor's lower price offer. Section 49(2) only allows a firm "to meet" a competitor's price. It cannot justify a price discrimination that undercuts a competitor. Moreover, records should show that the competitor's product competed in the same general market as the good whose price is cut.

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45. 340 U.S. 231 (1951).
46. *Id.*. 249.
47. See, generally, Hills, Antitrust Adviser (1971) 314-317.

Buyer's Liability

In closing, I add a few words about the possible liability of a buyer who is the beneficiary of a discriminatory price. Candour requires that I acknowledge that I'm quite out of sympathy with Robinson-Patman Act section 13(f), which provides for an analogous offence. A buyer should not have to concern itself with the prices charged its competitors, but instead should be free to bargain for the best price possible.

If anything, section 49(4) is broader than its Robinson-Patman counterpart. It makes it an offence for a person to "attempt to induce" a discrimination. Presumably, evidence of a mere request for a lower price would not be sufficient. Instead, there would have to be proof that the buyer knew that the requested price would be discriminatory under section 49(1). Section 49(4)(b) suggests that even if the buyer has not purposefully induced the discrimination, the acceptance of the discriminatory benefit is a violation if it is shown that the buyer had knowledge that he would be receiving such a benefit.

In the United States, the FTC has held that a buyer is not "entitled to any benefit of [seller's] good faith defenses."[48] Section 49(5), however, provides that a person against whom proceedings are taken under sub-section (4) has a defence if he reasonably believes "that, by reason of sub-section(2), the discrimination concerned was not prohibited by sub-section (1)."

The absence of such a limitation would have meant that a buyer could not accept a favourable price offered to him by the seller because of cost savings.

48. *Beatrice Foods Co.*, 76 F.T.C. 719 (1969), aff'd in *Kroger Co.* v. *F.T.C.*, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971).