BUYER LIABILITY UNDER SECTION 49 OF THE TRADE PRACTICES ACT 1974

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Introduction

Section 49 of the Trade Practices Act 1974 (Cth.) ("the Act") prohibits dicriminatory dealings by sellers and the inducement of, or entry into, discriminatory transactions by purchasers.[1] The keystone of s.49 is sub-s. (1) which prohibits a large, recurring or systematic discrimination by a corporation, between purchasers of goods of like grade and quality, in relation to price or non-price terms of trade, which has, or is likely to have the effect of substantially lessening competition in the market for goods served by the discriminatory seller or in the market where the seller's customers supply goods.

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[1] 49 provides:

(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 goods;
  (c) the provision of services in respect of the goods; or
  (d) the making of payments for services provided in respect of the goods,

  if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or 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).

Two exceptions to this prohibition are contained in s. 49(2), *viz.* discriminations which can be justified in terms of the cost savings attributable to dealings with favoured customers, or discriminations which are made to meet the offers of competitors of the seller. The onus of establishing an exception is placed by s. 49(3) upon the party asserting it.

Liability is imposed upon buyers by s. 49(4) which prohibits a person from inducing or attempting to induce a discrimination which he knows to be prohibited by s. 49(1) and from entering into a transaction which to that persons's knowledge would result in his receiving the benefit of a discrimination prohibited by s. 49(1). A person who reasonably believes a discrimination to be excepted from prohibition by s. 49(2) is given a defence to s. 49(4) proceedings by s. 49(5).

Section 49 is the most controversial of the restrictive trade practice provisions of the Act, being closely modelled upon the equally controversial United States Robinson-Patman amendment to the Clayton Act.[2] At the heart of this controversy is the fact that in many market

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[2] 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 allowances 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 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 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, 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 on 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

situations the presence of discriminatory trading terms is an indicium not of restrictive trade practices, but of vigorous competition, reflecting the different intensities of supply and demand in disparate markets.[3]

The principal concern of supporters of s. 49 and of their counterparts in the United States, is the allegedly anti-competitive effects of the discriminatory trading advantages extorted by large purchasers. Repeal of s. 49 was recommended by the Trade Practices Act Review Committee on the basis that the section had worked to inhibit price flexibility,[4] but the section was retained "in the interests of assisting the competitive position of small businesses".[5] Repeal of the section has again been recommended, this time by the Trade Practices Consultative Committee which was appointed to monitor the effects of the section,[6] and it remains to be seen whether this recommendation will be adopted by the Government of the day.

Given the preponderant concern of supporters of the anti-discrimination law with the prohibition of buyer abuses, it is paradoxical to observe this prohibition relegated to s. 49(4), emulating its insertion as an afterthought in the Robinson-Patman Act.[7] The definition of prohibited buyer abuses as, *inter alia,* the inducement of prohibited

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Footnote 2 (Continued).

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 favour 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.

[3] For useful introductory analyses of the economic concept of price discrimination see: R. A. Bilas, *Micro-economic Theory: a Graphical Analysis* (1967), 195 ff; R. H. Leftwich, *The Price System and Resource Allocation* (6th ed. 1976) 244-248; G. J. Stigler, *The Theory of Price,* 3rd ed., 209 ff; A. W. Stonier and D. C. Hague, *A Textbook of Economic Theory* (1958), at 172-181. Useful introductory surveys of price discrimination in economics and law are contained in F. M. Scherer, *Industrial Market Structure and Economic Performance* (1976) Chs. 10 and 21; J. B. Dirlam and A. Kahn, "Price Discrimination in Law and Economics" (1952) 11 *Am. J. Law & Soc.* 281; L. S. Keyes, "Price Discrimination in Law and Economics" (1961) 27 *S. Econ. J.* 320, and M. Adelman, "Price Discrimination as Treated in the Attorney General's Report" (1955) 104 *U. Pa. L. Rev.* 222.

[4] Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (August, 1976), para. 7.21.

[5] Mr J. Howard, Australia, 30th Parl. 2nd sess., 1st par., H. of R., *Weekly Hansard,* No. 9, 3rd May 1977, 1478.

[6] Trade Practices Consultative Committee, *Small Business and the Trade Practices Act* (1980).

[7] For a comprehensive discussion of the legislative history of the Robinson-Patman Act see F. M. Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), Ch.1.

seller abuses, defined in s. 49(1), resembles the Imperial Chinese edict which sought to abolish kidnapping by making the payment of ransoms a capital offence. A more apposite legislative precedent, which acknowledged the primacy of abusive buyer practices, would have been s. 36(1)(a) of the repealed Trade Practices Act 1965 (Cth.),[8] which made the inducement of favourable trading terms an examinable practice.[9] Being squarely directed at buyers, that provision was said to approximate the ideal anti-discrimination law.[10] Since, however, the legislature has chosen to imitate American precedent, the Robinson-Patman authorities will be useful in indicating the range of problems likely to be raised by the operation of s. 49(4).

Summarized, s. 49(4) prohibits a person either knowingly inducing or attempting to induce a corporation to discriminate in contravention of s. 49(1), or entering into a transaction that to his knowledge would result in his receiving the benefit of a discrimination that is prohibited by s. 49(1).[11] The prohibitions resemble s. 2(f) of the Robinson-Patman Act which provides 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". A buyer has a good defence to a s. 49(4) action if, pursuant to s. 49(5), he reasonably believes that the seller could have relied upon one of the s. 49(2) exceptions which exonerate discrimination that can be justified by reference to cost savings or which represent the meeting of competitors' offers. This defence emulates one which has been grafted, by judicial interpretation, upon s. 2(f) of the Robinson-Patman Act.

"A Person"

Unlike s. 49(1), which for constitutional reasons is addressed to corporations, the primary focus of s. 49(4) is upon the activities of persons.[12] Its survival will depend upon its characterization as a law

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[8] S. 36(1)(a) of the Trade Practices Act 1965 declared to be an examinable practice:

> . . . in or in connection with the acquisition or possible acquisition of goods by the person engaging in the practice from another person inducing or attempting to induce that other person, by any express or implied threat or promise, to accept terms as to price or any other matter or conditions (including collateral conditions) that are more favourable to the person engaging in the practice than those upon or subject to which that other person is willing to supply goods of the same kind and quantity to business competitors generally of the person engaging in the practice, where the more favourable terms or conditions are, or would be, likely substantially to lessen the ability of any person to compete with the person engaging in the practice.

[9] The provision is discussed in G. G. Masterman and E. Solomon, *Australian Trade Practices Law* (1967), 104-126; G. de Q. Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy* (1967), Ch. 10.

[10] Walker, *op. cit. supra* n. 9 at 235.

[11] *Supra* n. 1.

[12] The constitutionality of the Trade Practices Act 1974 (Cth.) is comprehensively surveyed in G. Evans, "The Constitutional Scope and Validity of the Trade Practices Act 1974" (1975) 49 *A.L.J.* 654.

incidental to the regulation of s. 51(xx) corporations[13] or upon the wider operation of the Act envisaged by s. 6, which imports various other placita of the Constitution.

The term "person" is not defined by the Act, although it was defined in the precursor 1973 Bill to include bodies corporate together with non-corporate persons, but was subsequently abandoned, probably because it added little to the definition of "person" in s. 22(a) of the Acts Interpretation Act 1901 (Cth.).[15]

An important application of s. 49(4) will be to the activities of co-operative purchasing organizations established by groups of individual retailers to take advantage of the economies attracted by their aggregated purchases.

Co-operative Purchasing Associations

Typically, co-operative purchasing groups establish a trade association or co-operative which operates at a higher functional level in the chain of distribution than its constituent members, in order to obtain supplies at a lower cost. The functions performed by the association on behalf of its members invariably include warehousing, invoicing, distribution and payment, thereby qualifying for functional discounts which are passed on to its members.[16] In addition to the purchasing economies effected by a retailers' association, the large volume of purchases secured by the association usually qualifies it for promotional assistance not otherwise available for its constituent members as individuals. For example, the association's purchases might qualify it for television advertising allowances which provide an opportunity for the group to promote one or more lines of goods bearing the group's private label.[17]

The favourable prices or benefits received by a co-operative purchasing association, although passed on to its retailer members, would not contravene s. 49(4) if the threshold absence of a s. 49(1) contravention can be argued. Two related arguments may be raised to negative the existence of a seller-level offence: first, that the competitors of a co-operative purchasing association are other wholesalers and jobbers and not competitors of its retailer members and, secondly, that the compeitive advantages enjoyed by the association's members are

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[13] See *Commissioner of Trade Practices* v. *Caltex Oil (Australia) Pty. Ltd.* (1974) 23 F.L.R. 457 at 485.

[14] See *Re Judges of the Australian Industrial Court; Ex parte C.L.M. Holdings Pty. Ltd.* (1976-1977) 13 A.L.R. 273 at 279.

[15] Section 22 (a) of the Acts Interpretation Act 1901 (Cth.) provides that "person" and "party shall include a body politic or corporate as well as an individual".

[16] See T. Calvani, "Functional Discounts under the Robinson-Patman Act" (1976) 17 *Bost. Coll. Ind. & Comm. L. Rev.* 543 at 567-575.

[17] See E. W. Kintner, S. A. Romano and J. C. Filippini, "Co-operative Buying and Antitrust Policy: The Search for Competitive Equality" (1973) 41 *Geo. Wash. L. Rev.* 971 at 972.

irrelevant to s. 49(1) because those members are beyond the two levels of competition envisaged by the sub-section.[18] These arguments would break down in the case of unincorporated purchasing associations because it is trite law that an unincorporated association has no existence apart from its members.[19]

The argument that a co-operative buying organization performs distributive functions which distinguishes it from the competitive identity of its membership was rejected in a number of Robinson-Patman decisions where the co-operative buying medium was a mere "book-keeping device". For example, in *Standard Motor Products, Inc.* v. *F.T.C.*[20] a number of motor vehicle parts jobbers organized two buying groups to obtain cumulative volume discounts. Individual members sent their orders direct to the seller or through the buying group. Orders were not aggregated and shipments were sent direct to individual members. The appeal court sustained the Federal Trade Commission's order invalidating the discounts on the basis that "the buying groups brought into being by the widespread use of these discounts make no improvement in the efficiency or real cost of distributing auto parts to the public, but . . . function entirely through their aggregate buying power".[21]

For a purchasing co-operative to be validly interposed between its members and a seller, it must either perform sufficient distributive functions to place it in a separate competitive stratum from its members, or the performance by it of distributive functions should attract cost savings which justify the discriminations in its favour under s. 49(2)(a) of the Act.[22] Where a seller delivers direct to members of a co-operative its functional justification is obviously absent, as will be any distribution economies which could have been attracted by bulk purchases.[23]

In assessing the validity of the distribution functions performed by co-operative purchasing associations, the courts applying the Robinson-Patman Act have insisted that the association performs functions similar or identical to those performed by independent distributors.[24] An indication of the rigour of this approach is given in *General Auto Supplies, Inc.* v. *F.T.C.*[25] which concerned the activities of a purchasing

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[18] That is, competition between the supplier and its competitors and that between the customers of the supplier.

[19] *Williams* v. *Hursey* (1959) 103 C.L.R. 30 at 55-56 *per* Fullager, J., see also the authorities referred to in D. Lloyd, *The Law Relating to Unincorporated Associations* (1938); H. A. J. Ford, *Unincorporated Non-Profit Associations* (1959); R. Baxt, "The Dilemma of the Unincorporated Associations" (1973) 47 *A.L.J.* 305.

[20] 265 F. 2d 674, *cert. den.*, 361 U.S. 826 (1959).

[21] *Id.* at 676; similarly see *American Motor Specialities Co.* v. *F.T.C.* 278 F. 2d 225, *cert. den.*, 364 U.S. 884 (1960); *Mid-South Distributors* v. *F.T.C.* 287 F. 2d 512 at 518-519, *cert. den.*, 368 U.S. 838 (1961).

[22] *Supra* n. 1.

[23] E.g. *National Dairy Products Corp.* v. *F.T.C.* 395 F. 2d 517 at 525-526, *cert. den.*, 393 U.S. 977 (1968).

[24] E.g. *Alhambra Motor Parts* v. *F.T.C.* 309 F. 2d 213 (1962).

[25] 346 F. 2d 311, *cert. dismissed*, 382 U.S. 923 (1965).

group consisting of more than fifty jobber members. The group, National Parts Warehouse (N.P.W.), undertook ordering and invoicing functions as well as purchasing on its own account, its warehoused goods, and invoiced its members and settled suppliers' accounts on a monthly basis. The court found, however, that N.P.W. did not perform a significant selling function, neither did it perform a complete distribution function for its members because approximately twenty per cent of its dollar volume of purchases for the year in question was accounted for by shipments direct from suppliers to its members,[26] thus its warehousing discount simply constituted a discriminatory price reduction in favour of its members.

The functional independence of a purchasing association from its membership is also important for the purpose of identifying the "persons" who induce or are the recipients of discriminatory trading terms. Obviously this is really another aspect of the same question because if an association performs no significant functions, the seller must be dealing direct with its members, who become the relevant persons. This view was articulated in *Joseph A. Kaplan & Sons, Inc.* v. *F.T.C.*,[27] which concerned sales of shower curtains and accessories to a buying association which was the wholly owned subsidiary of another corporation owned by twenty-six large retail department stores. Orders from member stores were placed either directly with the seller or through the purchasing intermediary. In all cases the seller would deliver the order direct to member stores. Rebates received by the association from sellers were distributed to the members according to the number of purchases made by them. The court found it proper for the Federal Trade Commission to have regarded the individual members as "purchasers" or "customers" for the purposes of the Robinson-Patman Act, since the seller dealt directly with the member stores as though the intermediary "did not exist".[28]

In piercing the corporate facade of incorporated co-operative purchasing associations, the courts applying the Robinson-Patman Act have focused upon the control by purchaser members of the intermediary association to impose liability upon the individual members of such associations.

If a similar approach is taken to the interpretation of s. 49(4), then the members of a co-operative purchasing association established as a book-keeping device in order to obtain the preferential benefits attracted at higher distributional levels, will be the relevant "persons" for the purposes of s. 49(4) and the relevant purchasers for the purposes of s. 49(1).

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[26] *Id.* at 316-318.
[27] 347 F. 2d 785 (1965).
[28] *Id.* at 787-788.

Knowledge of the Buyer

1. *Content*

The offences created by both paragraphs of s. 49(4) involve "guilty" knowledge on the part of the impugned buyer. Paragraph (a) provides that a person shall not "knowingly induce or attempt to induce" a discrimination prohibited by s. 49(1) and paragraph (b) prohibits a person entering into a transaction "that to his knowledge" would result in the receipt, by him, of a discrimination prohibited by s. 49(1).

The presence in s. 49 of sub-section (2) which provides that s. 49(1) does not apply to discriminations which can be cost justified or which constitute the doing of an act in good faith to meet competition, raises the difficult question as to the precise content of a buyer's knowledge which has to be proved by a person bringing an action under s. 49(4). On the one hand it is arguable that a person bringing an action under the sub-section must prove both the knowledge of a contravention of s. 49(1) and knowledge of its indefensibility under s. 49(2). On the other hand, the relevant knowledge could merely be knowledge of a contravention of s. 49(1). The latter interpretation seems to be supported by the clear language of s. 49(4) which makes no reference to a buyer having to have knowledge of the indefensibility of a s. 49(1) discrimination. Also the presence of s. 49(5) which provides a defence to a person who establishes a reasonable belief that a relevant s. 49(2) exception seems to indicate that the question of the defensibility of a discrimination only becomes relevant when raised by a buyer.

The latter interpretation was also argued by the Federal Trade Commission before the Supreme Court in *Automatic Canteen Co. of America* v. *F.T.C.*[29] where the Commission declared that by using the word "knowingly" Congress had in mind those buyers who "affirmatively contributed to obtaining the discriminatory prices by special solicitation, negotiation or other action".[30] The Commission relied for its identification of Congressional intent upon the Conference Report on the Patman Bill[31] which explained the purpose of the word "knowingly" to be to exempt from proscription those buyers "who incidentally received discriminatory prices in the routine course of business without special solicitation, negotiation or other arrangement for them".

These interpretations of the word "knowingly" were rejected by the Supreme Court which held that the Commission was obliged to establish both a buyer's knowledge of the illegality of a discriminatory price and the buyer's *prima facie* knowledge of the unavailability of cost justification to the seller.[32]

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[29] 346 U.S. 61 (1953).
[30] *Id.* at 71, 72, 77.
[31] H. R. Rep. No. 2951, 74th Cong., 2d sess., 5 (1936).
[32] 346 U.S., 68 at 70-71 (1953).

The *Automatic Canteen* holding can, of course, be distinguished as a guide for s. 49(4) practice on the ground that the American statute contains no defence equivalent to s. 49(5), but the policy reasons underlying the Court's finding raise a strong argument in favour of a similar approach to the interpretation of s. 49(4). The legislative target of s. 2(f) of the Robinson-Patman Act was the buyer "who knowing full well that there was little likelihood of a defence for the seller nevertheless proceeded to exert pressure for lower prices".[33] This same buyer should be the legislative target of s. 49(4), otherwise every hard bargaining purchaser would be at risk each time it attempts to obtain the best possible price. To subject buyers to possible prosecution each time bargaining results in a price differential would stifle competition and lead to price rigidity. Finally, since the legislature has taken the view that discriminations which fall within the s. 49 (2) exceptions ought not to be prohibited, if the view is adopted that the relevant knowledge of a buyer is merely that of a s. 49(1) contravention irrespective of its defensibility, there may be situations where a seller who contravenes s. 49(1) may be able to rely on the cost justification exception to avoid liability, whereas a purchaser from that seller, who has no knowledge of its supplier's cost structure, could be successfully prosecuted under s. 49(4).

If the view is accepted that s. 49(4) is concerned with buyers who seek or receive discriminatory benefits with knowledge of their indefensibility under s. 49(2) the prosecution is obliged to demonstrate both that the buyer "is not an unsuspecting recipient of prohibited discriminations"[34] and that those discriminations were indefensible. The Supreme Court in *Automatic Canteen* obliged the prosecution merely to come forward with evidence to establish a "buyer's prima facie knowledge as to the probable inadequacy of cost justification"[35] whereas it conceded that evidence that a price differential met competition "might be available to a buyer more readily even than to a seller".[36] Commenting on the Court's reasoning, the Attorney-General's National Committee to Study the Antitrust Laws noted:

> . . . the Court realized that a buyer charged with accepting a favourable differential could not ordinarily be expected to possess information of the seller's cost data adequate to negativing possible illegality through a "cost justification of the seller's price". Rather, the Court coined a rule of "convenience" and fairness by which the production of evidence as to cost saving wherever appropriate as an element in the buyer's illegality, became the task of the

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[33] *Id.* at 79.
[34] *Id.* at 78.
[35] See *Fred Meyer, Inc.* v. *F.T.C.* 359 F. 2d 351 at 364 (1966), *reversed on other grounds,* 390 U.S. 341 (1968) and *Great Atlantic and Pacific Tea Co., Inc.* v. *F.T.C.* 557 F. 2d 971 at 984 (1977).
[36] 346 U.S., 79 (1953).

Commission which was obviously better equipped than the buyer for investigating his supplier's book of account.[37]

This rule of convenience may well recommend itself for s. 49(4) practice because the s. 49(5) defence available to buyers is of little utility in relation to cost justified discriminations since cost data is usually only within the knowledge of suppliers.

Finally, even if the relevant knowledge which must be proved in a s. 49(4) prosecution is confined to the buyer's knowledge that a discrimination contravenes s. 49 (1), proof that a buyer was aware that the benefits it received could not be justified under s. 49(2)(a) may well be useful evidence of the buyer's knowledge of the threshold discrimination.

In summary, then, the content of the buyer's knowledge that must be demonstrated by a person bringing an action under s. 49(4) will include proof that a buyer is aware that it has induced or received a discriminatory preference in relation to goods of like grade and quality, which has not been induced or received by its competitors; that the effect of the discrimination has been or is likely substantially to lessen competition in either the buyer or the seller's market and, possibly *prima facie* evidence that the seller ought to have known that the discriminations were not defensible under s. 49(2)(a).

A useful illustration of the likely range of a buyer's knowledge that will have to be proved in a s. 49(4) proceeding is provided by the recent decision in *Great Atlantic and Pacific Tea Co., Inc.* v. *F.T.C.*[38] A. & P. in the mid-1960's sought to secure savings in its dairy products business by switching from the sale of brand label milk, under the brand of its supplying dairy, to the sale of private label milk, under A. & P.'s house brand. In 1965 Borden Co. submitted a bid which would have reduced A. & P.'s annual dairy products costs by $410,000. A. & P. then sought and received a lower bid from Bowman, a competitor of Borden. Borden was then informed that its initial offer was not "in the ball park".[39] Pressed for details as to what offer might have the desired location, A. & P.'s buyer informed Borden that a $50,000 improvement "would not be a drop in the pocket".[40] Accordingly Borden offered to double A. & P.'s expected annual savings to $820,000, emphasising that this second bid was made only to meet the rival Bowman bid and that it knew "of no other way to justify this".[41]

The Court held that A. & P. had illegally induced a discriminatory price which it knew could not be justified. The likelihood of anti-competitive effects proceeding from the discriminatory price received

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[37] U.S. Attorney General, *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955), 194-195.
[38] *Supra* n. 35.
[39] *Id.* at 975-976.
[40] *Id.* at 976.
[41] *Ibid.*

by A. & P. was supported by "A. & P.'s admission that fluid milk is one of the most important commodities carried in retail grocery stores and that milk products are 'sometimes used as price leaders' which are tagged below normal market price to draw customers to a store where it is hoped that the customers will purchase additional products".[42]

This, together with A. & P.'s admission that profit margins in the grocery business were "notoriously low" supported a conclusion that A. & P. knew that the price which it received would be likely to lessen competition substantially.[43] The fact that A. &. P. had been informed by Borden that it could not justify its bid, together with other cost data it received from Borden supported the conclusion that A. & P. knew that the price it received could not be cost justified,[44] and its knowledge that the Borden bid substantially undercut the Bowman bid was held to remove the possibility of A. & P.'s reliance upon the belief of a meeting competition defence available to Borden.[45]

In conclusion, enforcement of s. 49(4) should allow vigorous competition for favourable trading terms provided this does not involve the extortion of anti-competitive benefits which cannot be justified under the statute. Realization of this objective can only be accomplished by "a realistic administrative and judicial appraisal of the buyer's actual knowledge of the legality of the prices he receives".[46]

2. *Evidence*

The mere receipt by a buyer of discriminatory benefits will not usually provide evidence of the buyer's knowledge that such benefits contravene s. 49(1). Only in exceptional circumstances, however, will a buyer receive a discriminatory benefit which he has not actively solicited. Thus evidence of solicitation may provide evidence of guilty knowledge.[47] Solicitation alone should not render a buyer liable under s. 49(4) since this would effectively put an end to bargaining in the market place and stultify the price competition which the Act seeks to promote.

The solicitation of preferential promotional benefits was one of the factors considered by the Court in *Fred Meyer, Inc.* v. *F.T.C.*[48] Meyer had solicited assistance from its supplier in a coupon promotion and when its prices were suddenly reduced by one-third the Court held that Meyer should have known "something was amiss".[49] The Court

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[42] *Id.* at 982.
[43] *Id.* at 981.
[44] *Ibid.*
[45] *Id.* at 982.
[46] R. W. Steele, "Caveat Emptor under the Robinson-Patman Act — A Reappraisal of Current Developments in Buyer's Liability" (1966) 27 *Ohio S.L.J.* 19 at 20.
[47] E.g. see *R. H. Macy & Co.* v. *F.T.C.* 326 F. 2d 445 at 449 (1964); *American News Co.* v. *F.T.C.* 300 F. 2d 104 at 110 (1962).
[48] *Supra* n. 35.
[49] *Id.* at 364.

relied for its ruling that Meyer was "not an unsuspecting recipient of prohibited discriminations"[50] upon the findings of the Federal Trade Commission that the assistance had resulted in prices substantially lower than normal, that since the assistance was received only in one month of any year they could not be justified as distribution savings attributable to Meyer's large volume of purchases,[51] and, more importantly, that Meyer possessed a "vigorous intelligence network" which supplied it with detailed information about the pricing policies of its competitors as well as about their profit margins from which the Court concluded that Meyer had reason to know of the possible effects upon competition of its promotional activities.[52]

The decision in *Fred Meyer* has been taken to demonstrate that "both a buyer who knowingly induces an illegal price and a knowledgeable buyer who receives a suspicious price will be found to possess the relevant scienter"[53] or, at least, that a sophisticated buyer has a "duty of inquiry" when offered "a special or unusual deal".[54]

Where a purchaser's competitive endeavours go beyond solicitation of the best possible trading terms to outright misrepresentation of the offers of competitors of the purchaser's supplier, knowledge that a price or benefit contravened the Act is more easily inferred by the Robinson-Patman courts.[55]

Generally, however, the Robinson-Patman cases do not engage in a detailed examination of a buyer's knowledge of a prohibited discrimination, but rather impute that knowledge from the fact of a seller violation.[56] The American authorities are more concerned with the buyer's knowledge of the availability to a contravening seller of one of the affirmative defences. In considering proof of this knowledge the courts have placed much emphasis upon evidence of the knowledge attributable to a buyer through its "trade experience".[57] The genesis of this category of evidence is the Supreme Court decision in Automatic Canteen where the Court observed:

> Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost justified. But trade experience

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[50] *Ibid.*

[51] *Ibid.*

[52] *Id.* at 367.

[53] B. L. Williams, "The Evolving Duty of an Innocent Buyers to Inquire into His Bargain under Section 2(f) of the Robinson-Patman Act" (1974) 49 *Ind. L.J.* 348 at 358.

[54] H. M. Applebaum, "Fundamentals of Buyer Violation under Robinson-Patman Act" (1970) 39 *A.B.A. Antitrust L.J.* 869 at 879.

[55] See *Kroger Co.* v. *F.T.C.* 438 F. 2d 1372, *cert. den.*, 404 U.S. 871 (1971); *Great Atlantic & Pacific Tea Co.* v. *F.T.C.*, *supra* n. 35.

[56] See A. M. Frey, "The Evidentiary Burden on Affirmative Defenses under Section 2(f) of the Robinson-Patman Act: *Automatic Canteen* Revisited" (1967) 36 *Geo. Wash. L. Rev.* 347, 350 citing *D. & N. Auto Parts* 55 F.T.C. 1279 at 1300 (1959).

[57] For a comprehensive survey of "trade experience" in the cases see C. J. Steele and D. T. Coughlin, "Buyer Responsibility before the Federal Trade Commission" (1961) 2 *Bost. Coll. Ind. & Com. L. Rev.* 259.

> in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only price differences, should have known that they could not give rise to sufficient cost savings.[58]

The *Automatic Canteen Case* can, of course, be distinguished on the basis that it was concerned with a buyer's knowledge of the non-cost justifiability of a discriminatory transaction, which may not be relevant for s. 49(4) purposes. Short of confessional evidence, or clairvoyance, a person bringing an action under s. 49(4) will have an extremely difficult task unless trade experience evidence is admissible. Even if it so decided that *prima facie* proof of a buyer's knowledge of the non-justifiable nature of a discrimination is not required in s. 49(4) actions, the Robinson-Patman cases are, nevertheless, a useful source of examples of trade experience evidence.

As was observed in *Fred Meyer, Inc.* v. *F.T.C.*,[59] a sophisticated buyer with a well developed intelligence network is more likely to be imputed the relevant knowledge than a commercial ingénué (if such exist). The employment by a retailer of a purchasing officer may be an important determinant of its trade experience. For example in *Kroger Co.* v. *F.T.C.*,[60] the Court noted that the defendant's purchasing agent "was a man of extremely wide experience in every line of the dairy industry, including the production, processing and retailing of such products. He knew trade discounts, market conditions and cost accounting. . . . In these lights — coupled with the other circumstances surrounding the transaction — it is beyond question that Kroger knew — or should have known — that Beatrice's prices were not cost justified".[61] Also relevant in the *Kroger Case* and the previously dis-

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[58] *Supra* n. 29 at 79-80.

[59] *Supra* n. 48.

[60] *Supra* n. 55, discussed in J. F. McClatchey, "*Beatrice Foods*: Injury to Competition" (1970) 22 *Case W. Res. L. Rev.* 35; A. I. Borowitz, "*Beatrice Foods*: Meeting Competition and Buyer Liability" (1970) 22 *Case W. Res. L. Rev.* 54; F. M. Rowe, "New Developments under the Robinson-Patman Act" (1971) 26 *Bus. Law* 971, 978.

[61] 438 F. 2d 1375-1376 (1971).

cussed *A. & P. Case*[62] was the fact that the respective purchasing officers were informed that the prices they were obtaining could not be cost justified.[63]

The activities of a buyer which are extrinsic to an impugned transaction may also provide evidence of that buyer's knowledge for s. 49(4) purposes. For example, it has been suggested that "buyers who join or create an artificial organization for the purpose of obtaining a lower price will possess the requisite scienter. . . ."[64] An example of this is provided in *American Motor Specialties Co.* v. *F.T.C.*[65] which concerned the activities of a co-operative purchasing organization formed to obtain volume discounts attributed to their aggregate purchases. The Court held:

> Petitioners of course knew that they, as individual firms, were receiving goods in the same quantities and were served by sellers in the same manner as their competitors, and hence organized themselves into a buying group in order to obtain lower than their unorganized competitors. Hence, by the very fact of having combined into a group and having obtained thereby a favourable price differential, they each . . . were charged with notice that this price differential they each enjoyed could not be justified.[66]

Similarly in *Mid-South Distributors* v. *F.T.C.*[67] the Court observed:

> The outstanding factor is that as to a specific purchase order the particular Member-Jobber knew two things. First, the price he was obtaining through the Co-op was substantially lower than his . . . competitors were required to pay. Second, for all practical purposes, the order and shipment were handled exactly the same. It is true that the Member-Jobber forwarded the order to the Supplier on a Co-op order form which ostensibly reflected a purchase of the goods for the Co-op. But this order form showed that shipment was to be made to the specified Member-Jobber. The buyer knew that this procedure represented no real savings in cost to the seller.[68]

Sources of a buyer's knowledge that can be put in evidence to prove the requisite scienter for s. 49(4) purposes will include trade journals, newspapers, advertisements, reported findings of trade associations and

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[62] *Supra* n. 35.

[63] For a useful discussion of the issue of constructive notice imputed to a buyer see Note, "Buyer Responsibility under the Robinson-Patman Act" (1954) 49 *Nw.U.L.Rev.* 273, 276-277.

[64] Williams, *supra* n. 53 at 357, see also R. M. Klein, "Hard Bargaining under s. 2(f) of the Robinson-Patman Act" (1971) 32 *Ohio S.L.J.* 734.

[65] 278 F. 2d 225, *cert. den.*, 364 U.S. 864 (1960).

[66] *Id.* at 228-229.

[67] 287 F. 2d 512, *cert. den.*, 368 U.S. 838 (1961).

[68] *Id.* at 518.

statistical organizations as well as documentation of contacts between buyers and their suppliers and competitors.

In an endeavour to negative knowledge of an illegal discrimination, buyers in the United States sought written statements from their suppliers that the prices which they received did not contravene the Robinson-Patman Act. The courts, however, regarded this device with some suspicion.[69] In *Colonial Stores, Inc.* v. *F.T.C.*[70] the Court was concerned with a statement received from a supplier that, "the same agreement is made available by the Vendor on a proportionally equal basis to all dealers in the competitive area".[71] The Court held:

> [T]he requirement that a supplier sign such a representation is simply not sufficient, by itself, to offset actual knowledge of facts strongly suggesting, if not establishing, that despite disclaimers to the contrary, the supplier is not offering proportionally equal payments to competitors. A written agreement, which by its very nature is to be treated as a substitute for inquiry, cannot take the place of an independent investigation if, as found by the Commission, there are ample grounds for believing that the other party may not be complying with the requirements of the law . . . When the warning signs are so clear, the recipient must either devise some practicable method for allaying its doubts — and thereby satisfying its duty of inquiry — or must forgo entirely the opportunity to solicit a lucrative but highly suspect promotional arrangement.[72]

Such stratagems are likely to be treated with similar suspicion in s. 49(4) proceedings, particularly since the courts have even been reluctant to treat merger clauses as forming the basis of an estoppel between parties in civil proceedings.[73]

3. *Knowledge of Corporate Persons*

For a successful action under s. 49(4) to be maintained against a corporate person, the party bringing the action will have to demonstrate the relevant guilty knowledge on the part of that corporation. The Robinson-Patman authorities seem to attribute to a corporation, knowledge that a discrimination is prohibited, if that knowledge is possessed by the corporation's purchasing agent.[74] Under s. 49(4), however, knowledge of a buying agent will probably only be imputed to a corporation if that agent exercises some part of the management functions of the corporation.

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[69] See the authorities referred to in P. J. Galanti, "Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms and Promotional Allowances: Caveat Emptor in the 1970's" (1974) 7 *Ind.L.Rev.* 962, 993 ff.

[70] 450 F. 2d 733 (1971).

[71] *Id.* at 739 N.11.

[72] *Id.* at 746.

[73] See *Lowe* v. *Lombank Ltd.* [1960] 1 W.L.R. 196.

[74] E.g. *Kroger Co.* v. *F.T.C., supra* n. 35, *Great Atlantic & Pacific Tea Co.* v. *F.T.C., supra* n. 35.

The question of corporate knowledge for the purposes of the Trade Practices Act 1974 (Cth.), was considered by the Federal Court in *Universal Telecasters (Queensland) Ltd.* v. *Guthrie*[75] where the Full Court was concerned with identifying the persons whose lack of knowledge was relevant in ascertaining whether a corporation could avail itself of the defence under s. 85(3) of the Act, that it "did not know and had no reason to suspect" that publication of an advertisement contravened Part V of the Act.[76]

The Court applied the House of Lords decision in *Tesco Supermarkets Ltd.* v. *Nattrass*[77] which, as Bowen, C.J. explained "took the view that what natural persons were to be treated in law as being the corporation, were to be found by identifying those natural persons who, by the memorandum and articles of association, or as a result of action taken by the directors or by the corporation in general meeting pursuant to its articles were entrusted with the exercise of the powers of the corporation".[78]

The Chief Justice went on to point out:

> In that case, the principle was applied in determining whether the company had taken "all reasonable precautions" and exercised "all due diligence". It would seem that the principle would apply equally in determining whether, under our corresponding legislation, a corporation had knowledge of or reason to suspect something.[79]

The specific question which the Federal Court had to consider was whether the knowledge of a sales manager that an advertisement contravened Part V of the Act could be imputed to the defendant corporation. The Court decided by a majority of 2:1 that as the sales manager did not exercise the powers of the corporation his mind could not be the mind of the corporation. The decision in *Universal Telecasters* indicates that the question will ultimately be one of factually identifying the tasks of the person whose knowledge is in question, particularly where that person exercises powers delegated by management. Lord Reid had observed in *Tesco Supermarkets Ltd.* v. *Nattrass*:

> Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the

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[75] (1978) 18 A.L.R. 531, discussed in A. J. Duggan, "Misleading Advertising and the Publishers' Defence — A Critique of *Universal Telecasters (Qld.) Limited* v. *Guthrie*" (1978) 6 *Aust. Bus. L. Rev.* 309.

[76] S. 85(3) of the Trade Practices Act 1974 (Cth.) provides,

> (3) In a proceeding under this Part in relation to a contravention of a provision of Part V committed by the publication of an advertisement, it is a defence if the defendant establishes that he is a person whose business it is to publish or arrange for the publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of that Part.

[77] [1972] A.C. 153.

[78] (1978) A.L.R. 535, footnotes omitted.

[79] *Ibid.*

> functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management, giving to their delegate full discretion to act independently of instruction from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.[80]

Applying this formulation it is probable that the purchasing agent in *Kroger Co.* v. *F.T.C.*[81] had been delegated sufficient autonomy to be acting as the "directing mind and will" of the defendant corporation within the scope of his purchasing activities, but the division in *Universal Telecasters* indicates how finely drawn this distinction may be.

Another argument raised in *Universal Telecasters* was that the knowledge of the sales manager could be imputed to the defendant corporation by virtue of s. 84 of the Act.[82] But this was rejected by the Court, as Bowen, C.J. observed:

> It would seem that s. 84 does alter the position as was discussed in *Tesco's Case* in two respects, first, so far as the intention of the corporation is concerned, and, secondly, so far as conduct engaged in on behalf of a corporation is concerned. It does not touch the question of knowledge or reason to suspect. . . .[83]

An interesting question where the defendant person is a member of a partnership, is whether the knowledge of one partner can be attributed to co-partners. It is probable that because s. 49(4), although a quasi-criminal provision, does not impose strict liability, a partner will not be held liable for the knowledge of his co-partners.[84]

Conduct Prohibited by s. 49(4)

1. *Inducing Contraventions of s.* 49(1)

Paragraph (1) of s. 49(4) provides that a person shall not, in

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[80] *Supra* n. 77 at 171.
[81] *Supra* n. 48.
[82] S. 84 of the Trade Practices Act 1974 (Cth.) provides,
(1) Where, in a proceeding under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which a provision of Part V applies, it is necessary to establish the intention of the body corporate, it is sufficient to show that a servant or agent of the body corporate by whom the conduct was engaged in had that intention.
(2) Any conduct engaged in on behalf of a body corporate by a director, agent or servant of the body corporate or by any other person at the direction or with the consent or agreement (whether express or implied) of a director, agent or servant of the body corporate shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.
[83] *Supra* n. 78 at 536.
[84] *Cf.* authorities referred to in *Collins* v. *Poole* (1977) 2 T.P.C. 173, particularly *Clode* v. *Barnes* [1974] 1 W.L.R. 544 and *R.* v. *Hammerton's Cars Ltd.* [1976] 1 W.L.R. 1243.

trade or commerce, "knowingly induce or attempt to induce" a contravention of s. 49(1).

The inducement of favourable trading terms was previously an examinable practice under s. 36(1)(a) of the Trade Practices Act 1965, although that provision was more obviously situated within the general law concept of inducement,[85] in that it made examinable inducements or attempts to induce "by any express or implied threat or promise". Paragraph 49(4)(a) provides no similar guidance as to the sort of conduct which would constitute an inducement or an attempt.

In *R.* v. *Bodsworth*[86] it was suggested that the "ordinary sense" of inducement is "persuasion aimed at producing some willing action, as opposed to compulsion by force or fear of force".[87] In its non-criminal sense, the word is used interchangeably with "procure",[88] "entice" and "persuade".[89]

It is probable that an inducement does not have to be successful to contravene s. 49(4),[90] but in any event, the inclusion, within the prohibition, of attempts to induce, eliminates any uncertainty which might otherwise have been raised on this point.

As to which acts constitute attempts, the "proximity rule",[91] developed in the criminal context, suggest that an attempt is complete if a person, "does an act which is a step towards the commission of the respective offence which is immediately and not remotely connected with the doing of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific offence".[92] The expression of hope, request, recommendation, argument or advice have been suggested as examples of attempts to induce resale price maintenance,[93] examples which would be equally relevant to price discrimination.

Although it is clear that a contravening inducement must be "knowing", a syntactic ambiguity raised by the organization of s. 49(4)(a) is the question of whether or not an attempt to induce also has to be made with guilty knowledge. Knowing attempts to induce are probably already envisaged by s. 76(1)(b) of the Act and the subject of injunctive relief under s. 80(1)(e). The criminal lawyers

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[85] See the authorities referred to in *Greig* v. *Insole* [1978] 3 All E.R. 449 at 484-493.

[86] (1968) 87 W.N. (Pt. I) (N.S.W.) 290 at 297-298.

[87] See also *McDermott* v. *The King* (1946) 76 C.L.R. 501.

[88] *Greig* v. *Insole* [1978] 3 All E.R., 484-5, 486; *J. T. Stratford & Son.* v. *Lindley* [1965] A.C. 269, 328, 332, 334, 338, 342.

[89] *Winsmoore* v. *Greenbank* (1745) Willes 579 at 582-583.

[90] Raised but not decided in *Grand Union Co.* v. *F.T.C.* 300 F. 2d 92 at 96 n. 4 (1962).

[91] See *R.* v. *Eagleton* (1855) 6 Cox 559 at 571.

[92] R. Watson and H. Purnell, *Criminal Law in N.S.W.*, vol. I at 61 n.9 (1971).

[93] H. S. Schreiber, J. L. Taylor and B. G. Donald, *Resale Price Maintenance* (1972) at 21.

hold different views as to the scope or purpose which much be demonstrated for an attempt,[94] although Howard[95] considers that no problem arises where the principal offence requires advertence to every material element, which is the case here. An interesting question, probably inadvertently raised by the combined operation of s. 49(4)(a) and the enforcement provisions of the Act, is what facts constitute an attempt to attempt.

In practice, unsuccessful inducements or attempts to induce are not likely to form the basis of s. 76 prosecutions or actions for damages under s. 82 since the injuries resulting from such activities are likely only to be nominal. Also, where an inducement has been successfully consummated, evidential problems can be avoided if actions are brought under s. 49(4)(b) which prohibits entry into transactions involving the receipt of a prohibited discrimination. Inducements, or attempts to induce prohibited discriminations, will more usefully form the basis of actions for injunctions under s. 80 and ancillary orders under s. 87, sought by persons seeking to escape from agreements which have turned out to be bad bargains.

An example of such an action is *Texas Gulf Sulphur Co.* v. *J. R. Simplot Co.*[96] in which Texas Gulf sought to escape from a long-term supply contract which had turned out to be unprofitable because of a market upturn. In seeking rescission, Texas Gulf alleged that Simplot had unlawfully induced the contract in contravention of s. 2(f) of the Robinson-Patman Act. In refusing to grant rescission the appeal court noted the trial court's findings:

> (a) that Simplot did not request or suggest, nor did Texas Gulf state or suggest that Texas Gulf should or would not give similar or as favourable a transaction to any other customer or prospective customer . . .; (b) that there was no express or implied agreement that Texas Gulf would not extend to any of its customers any of the terms negotiated between Texas Gulf and Simplot or that anyone else would receive any less favourable transactions . . .; (c) that Simplot merely attempted to obtain the best deal it could consistent with market conditions, and did not directly or indirectly attempt to obtain any advantage over any of its fertilizer competitors, or any more favourable deal than its competitors . . .; (d) that Simplot had no reasons to believe that Texas Gulf would give less favourable terms to any customer or would discriminate against any customers; . . . (e) that there was no reason why Texas Gulf could not have granted the same terms and conditions to other customers and that Texas Gulf was under no restraint with respect thereto; . . . (f) that the transactions in

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[94] See the authorities referred to in C. Howard, *Criminal Law* (3rd ed. 1977) at 302.
[95] *Op. cit. supra* n. 94 at 303.
[96] 418 F. 2d 793 (1969).

> issue, including those with the alleged disfavoured customers were isolated and non-recurring transactions, each negotiated in the light of the particular needs of the parties and in response to market conditions existing at the time each was negotiated and executed.[97]

As has already been observed, the inducement of favourable trading terms is an integral part of the market process and that interference with competitive bargaining could produce the stultification of prices at higher than the most competitive levels. The Robinson-Patman authorities try to draw a distinction between permissible "hard bargaining" and impermissible "misrepresentation". Probably the best illustration of this distinction was the controversial decision in *Kroger Co.* v. *F.T.C.*[98]

In that case, Kroger, a grocery chain, sought bids from a number of dairies for a supply of milk and dairy products to be sold under the Kroger private label. It appointed a bargaining agent, a Mr Casserly, mentioned above, who was familiar with private label merchandising, to negotiate with the dairies. During the course of negotiations with Beatrice Foods Co., Casserly rejected an offer of 15 per cent discount, stating that a competitor of Beatrice's had already submitted a bid containing a 20 per cent discount, whereas the relevant discount had only been about 11 per cent.[99] The Court's decision against Kroger was principally based upon the Federal Trade Commission's finding that Casserly had misrepresented Broughton's bid, where the commission had observed:

> Kroger bargained too hard . . . Normally the seller must bear the responsibility for seeing that Robinson-Patman requirements are complied with. At some point, however, if the buyer continues to push, he must become liable if Robinson-Patman bounds are exceeded.[100]

Although the commercial consequences of this decision have prompted much criticism, the ethical implications of the decision are probably consistent with the objectives of "commercial probity and honesty" which were declared in *Ransley* v. *Spare Parts and Reconditioning Co. Pty Ltd.*[101] to animate the Trade Practices Act 1974 (Cth.).

A final point to note about s. 49(4)(a) is that it is not only addressed to the activities of purchasers but to any person who knowingly induces or attempts to induce a prohibited discrimination. It will thus affect those persons who act as intermediaries between suppliers and purchasers such as brokers and purchasing agents. Although, as we

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[97] *Id.* at 804.
[98] *Supra* n. 35, discussed in I. Scher, "New Directions in Buyer's Liability under the Robinson-Patman Act" (1970) 39 *A.B.A.Law Jnl.* 884.
[99] *Beatrice Foods Co.* 76 F.T.C. 719 at 755-756 (1969).
[100] *Id.* at 818.
[101] (1975) 1 T.P.C. 219.

have seen, the knowledge of these intermediaries will not be imputed to their corporate principals, s. 84(2) of the Act will attribute their conduct to the corporations for which they act as agent.[102]

2. *Entering Into a Discriminatory Transaction*

Paragraph (b) of s. 49(4) prohibits a person entering into "any transaction that to his knowledge would result in his receiving the benefit" of a discrimination prohibited by s. 49(1).

Taperell, Vermeesch and Harland suggest that "the offence . . . will only be committed by persons who are both parties to the transaction and who receive all or part of the benefit of the transaction".[103] This is, with respect, incorrect because the paragraph requires only entry into the relevant transaction. The transaction may never be consummated. The use of the proleptical word "would" in fact suggests a transaction which would, if consummated, result in receipt of a prohibited discrimination; had a consummated transaction been envisaged the word "does" might have been employed. Furthermore, it is arguable that the relevant transaction does not have to contravene s. 49(1) but only be believed by a purchaser to be prohibited by that sub-section. This is probably an unintended effect of s. 49(4)(b) and should be eliminated by requiring that the discriminations envisaged by the paragraph actually contravene s. 49(1). If it is thought desirable to penalize buyers with defective knowledge this could have been left to the aiding and abetting or inducing provisions of s. 76 of the Act.

A question which is left open is whether the "discrimination that is prohibited by that sub-section" is one which is not defensible under s. 49(2). For the purposes of establishing a "reasonable belief" defence under s. 49 (5), a buyer who receives a discriminatory price or benefit from a seller which he knows substantially undercuts offers made by competitors of that seller, may be obliged to inform the seller that the discrimination does not meet competition under s. 49(2)(b).[104] The unreality of this obligation is tempered by the fact that a buyer is unlikely to receive a favourable discrimination which he does not induce in the first place.

The transactions envisaged by s. 49(4)(b), being those prohibited by s. 49(1) are thus sales transactions. The paragraph is unclear as to whether the sale must be consummated by delivery before liability ensues. Without a consummated sale it is arguable that there would be no discrimination between "purchasers" envisaged by s. 49(1). The

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[102] The operation of s. 84(2) is discussed in *Ballard* v. *Sperry Rand Australia* (1975) 6 A.L.R. 696 and *Given* v. *C. V. Holland (Holdings) Pty. Ltd.* (1977) 29 F.L.R. 212.

[103] In G. Q. Taperell, R. B. Vermeesch and D. J. Harland, *Trade Practices and Consumer Protection* (2nd ed., 1978) at 356-357.

[104] If the reasoning in *Great Atlantic & Pacific Tea Co. supra* n. 35 at 982 is followed.

view taken in *Aluminum Co. of America* v. *Tandet*[105] is that the relationship of buyer and seller arises upon the execution of a binding contract. If this is followed in the application of s. 49, buyers may be successfully prosecuted in respect of transactions which are discriminatory at the time of contract but which may subsequently be innocuous at the time of delivery. Conversely s. 49(4)(b) will not affect the receipt of discriminations which although innocently induced, subsequently contravene s. (49(1) by the time of delivery. The actual likelihood of these situations arising is small because the market dominance of both a buyer and a seller, which is required before a transaction is likely to have a substantial effect upon competition, is not likely to change between negotiation and completion of a contract. A purchaser seized of the requisite degree of market dominance is hardly likely to be in ignorance of its purchasing power or the effect upon the market of its favourable treatment by suppliers.

Availability of S. 49(2) Exceptions

The cost justification and meeting competition exceptions, if "reasonably believed" by a person to be applicable to a discrimination otherwise in contravention of s. 49 (1), provide a defence to a person in any proceeding for a contravention of s. 49(4). This defence is provided in s. 49(5).[106]

The obviously crucial question is: what grounds will be considered adequate to establish a person's reasonable belief of the defensibility of a discrimination contravening s. 49(4)? A related question, which is raised by a couple of recent decisions under the Robinson-Patman Act, is whether a person can be found liable under s. 49(4) if unable to demonstrate a reasonable belief in the defensibility of a seller's discrimination even though by reason of s. 49(2) that discrimination does not, in fact, contravene s. 49 (1).

The Robinson-Patman authorities indicate that the more information a person has at his disposal, the less likely will he be able to demonstrate a reasonable belief in the defensibility of a seller's indefensible prices. In both *Fred Meyer, Inc.* v. *F.T.C.*[107] and *Kroger Co.* v. *F.T.C.*[108] the employment by the defendant buyers of experienced purchasing officers was held to provide them with detailed knowledge considered by the respective courts to be inconsistent with an ignorant but reasonable belief in the defensibility of their suppliers' prices. This "trade experience" evidence will probably be important in negotiating s. 49(5) defences raised by defendant buyers. The *A. & P. Co. Case*[109] provides a useful example of the range of evidence that may be adduced in negativing a s. 49(5) defence. The Court observed,

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[105] 235 F. Supp. 111 at 114 (1964).
[106] See n.1 *supra.*
[107] *Supra* n. 35.
[108] *Supra* n. 55.
[109] *Supra* n. 35.

first, that "A. & P. was no novice in the dairy industry"[110] then, more specifically, that it "had discussed pricing patterns in the Chicago area with Borden officials", next, that its supplier had provided it with cost data indicating that it could not cost justify its prices, finally, Borden had expressly informed A. & P. that it could not justify its prices, other than on a meeting competition basis.[111]

The Robinson-Patman cases can be distinguished on the much wider basis of the buyer's defence to s. 2(f) actions. As the Supreme Court ruled in *Automatic Canteen Co. of America* v. *F.T.C.* "a buyer is not liable under s. 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses".[112] The second limb of this defence would appear to be wider than the positive requirement of s. 49(5) that a person reasonably believes a discrimination to be defensible. Taking the Supreme Court's ruling to its logical conclusion, a buyer could simply avail itself of the defence by deliberately refraining from inquiry and avoiding discussion of the legality of the trading terms it induces or receives. Notwithstanding this basis of distinction the Robinson-Patman authorities contain useful examples of the sort of trade experience evidence which will be relied upon in s. 49(5) decisions.

As has been indicated above[113] written statements by suppliers that the trading terms offered to a purchaser do not contravene s. 49(1) will probably not avail that purchaser in a s. 49(5) defence if that statement is used as a substitute for independent inquiry. One of the problems which a buyer faces if unduly diligent in verifying the defensibility of its supplier's prices is the possibility of a degree of co-operation between buyer and purchaser which would not only make arms length dealing difficult but might also lead to a violation of other provisions of the Act. This same problem is faced by sellers in verification for s. 49(2)(b) purposes and may call for a special exemption of such activities.[114]

A difficult question, implied by the language of s. 49(5) is whether a buyer who is unable to demonstrate a reasonable belief in the defensibility, under s. 49(2), of his supplier's discriminatory activities, can be held liable for a contravention of s. 49(4) where the discriminations in question do in fact fall within one of the s. 49(2) exceptions. As was mentioned above, the answer to this question will depend upon the extent of the prosecution's task under s. 49(4). If the prosecution has to prove both that a discrimination contravenes

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[110] *Id.* at 981.
[111] *Id.* at 981-982.
[112] *Supra* n. 29 at 74.
[113] See text accompanying footnotes 69-73.
[114] On the comparable U.S. position see M. M. Eaton, "The Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act" (1978) 18 *Antitrust Bull.* 411.

s. 49(1) and is not defensible under s. 49(2) then a buyer's ignorance of the availability of the s. 49(2) exceptions will not involve him in liability. On the other hand, if a person bringing an action under s. 49(4) merely has to prove a buyer's knowledge of a s. 49(1) discrimination then a buyer's ignorance of its possible defensibility under s. 49(2) will be fatal to the buyer's case.

The punishment of ignorant buyers in this latter situation where a discrimination is in fact defensible does not seem to accord with the policy of the section. This result may be overcome by exonerating a buyer who induces or enters into a transaction to receive discriminations which fall within the s. 49(2) exceptions, or, to mitigate the evidential burden thereby imposed upon persons bringing actions under s. 49(4), such persons should be obliged merely to introduce evidence to demonstrate a *prima facie* absence of a reasonable belief by a buyer in the defensibility of a supplier's trading terms.

A problem raised by two recent Robinson-Patman decisions is whether a buyer can rely upon a seller's erroneous belief that it met competition in circumstances where the buyer knows that competitors' offers were, in fact, substantially undercut. In *Kroger Co.* v. *F.T.C.*[115] it will be recalled that a buyer who misinformed its supplier as to the level of a competitor's offer, was held liable even though the seller could rely upon that misrepresentation as a good faith meeting of competition. This ruling was taken further in *Great Atlantic & Pacific Tea Co.* v. *F.T.C.*[116] which held a buyer liable for a contravention of s. 2(f) of the Robinson-Patman Act for remaining silent when receiving an offer from a seller which substantially undercut that seller's competitor. It is questionable whether the same result would be obtained in s. 49(4) proceedings, although such a result would be consistent with the objective of "commercial probity and honesty" at the heart of the statute.[117] Another situation which may raise problems is where a buyer induces an offer of an illegal discrimination from one supplier and then uses that offer to induce a rival supplier to meet that competition created by the buyer. The original inducement would obviously fall within s. 49(4)(a), but even the second inducement could infringe that paragraph. To borrow the language of the *A. & P. Case*:

> To rule otherwise would emasculate . . . the purpose of s. 2(f) in that large buyers could play off one seller against the other until all bids are below the sellers' costs and then in reliance on the sellers meeting competition defense, vindicate the final price.[118]

Conclusion and Evaluation

In evaluating s. 49(4) two questions must be asked: first, whether a prohibition of purchaser abuses fulfils the pro-competitive objectives

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[115] *Supra* n. 55.
[116] *Supra* n. 35.
[117] *Supra* n. 101.
[118] *Supra* n. 35 at 982.

of the Act and, secondly, whether the sub-section most effectively prohibits such abuses.

The underlying premise of s. 49(4) is the non-justifiability, in the context of competitive health, of the buyer abuses which it describes. Where sellers are competitive, however, there is no way that a large purchaser can extract any discriminatory advantage which is not cost-justifiable, because sellers operating with competitive returns could not sustain any erosion of their returns without operating at less than optimal levels. Where a seller is operating at above competitive levels because of market dominance or collusion with its competitors, the monopsonistic advantage of a dominant purchaser will be an important source of countervailing power to resist anti-competitive abuses by sellers. The recognition of countervailing power as a pro-competitive force[119] was seen by the Attorney General's National Committee to Study the Antitrust Laws as the policy basis of the Supreme Court decision in the *Automatic Canteen Case*.[120] As the Committee explained:

> In markets characterized by sellers enjoying a significant degree of control over price, the exertion of offsetting force by some large and aggressive buyers bargaining for concessions can contribute materially to lower prices for all. Not only is one reduction likely to spread; but each entering wedge enhances the negotiating position of other traders who can insist on equal concessions from the supplier with the ancient gambit of buying elsewhere unless he accedes. And unless competition on the buyer's level is wholly defunct, the ultimate consumer stands to benefit by lower prices. Legal impediments to this normal bargaining process, we think, might well deprive the public of gains that under effective competition it has a right to expect.[121]

A similar view was much more recently expressed by Bork,[122] who adds that sellers would also prevent a buyer from obtaining monopsonistic purchasing leverage by offering other buyers the same advantages.

The economic evaluation of s. 49(4) is probably largely irrelevant, given that the prohibition of chain store abuses and the preservation of small businesses was an important political objective of the section. Although the Robinson-Patman Act was similarly actuated, enforcement of that Act, until recently, largely ignored purchaser abuses. One reason for the non-enforcement of s. 2(f) of the Robinson-Patman Act, which is equally relevant to s. 49(4) enforcement, was the restric-

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[119] See J. K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (1952) at 147-151.

[120] *Supra* n. 29.

[121] *Attorney General's Report, supra* n. 37 at 196.

[122] R. H. Bork, *The Antitrust Paradox, A Policy at War With Itself* (1978) at 390.

tive interpretation of that provision which required a seller violation before there could be a buyer violation. Although this restriction has been removed by the decision in *Kroger Co.* v. *F.T.C.*,[123] a similarly restrictive administration of s. 49(4) is invited by its similar organization, *viz.*, its prefatory prohibition of seller abuses upon which is superimposed the prohibition of buyer abuses. A much more sensible precedent, had the legislature wished primarily to regulate the purchasing activities of grocery chains, would have been to draft a prohibition along the lines of s. 36(1)(a) of the Trade Practices Act 1965,[124] which was unequivocally addressed to the abuse of purchasing leverage to obtain favourable trading terms.

The preservation of the pro-competitive possibilities of the countervailing power exercised by large purchasers will depend to a great extent upon the boundary between permissible "hard bargaining" and impermissible "power buying", drawn in s. 49(4) enforcement. The key to enforcement will be the requirement of guilty knowledge on the part of the impugned purchaser. If the sub-section is to be violated each time a purchaser seeks a lower price than its competitors the beneficial effect of countervailing power will be lost together with the development of scale economies which, but for the prohibition of aggressive bargaining, could have been passed on to consumers.[125] Finally, such enforcement "might give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation".[126] A reasonable application of s. 49(4) ought to prohibit only the inducement of trading terms which are palpably discriminatory and the entry into transactions which are similarly likely to produce a substantial impairment of competition.

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[123] *Supra* n. 55.
[124] *Supra* n. 8.
[125] See A. N. Doherty "Buyer Liability under the Price Discrimination Laws: An Economic Analysis Pt. I" (1967-1968) *1 Antitrust Law & Econ. Rev.* 59 at 84.
[126] *Supra* n. 29 at 63.