

MEETING COMPETITION UNDER SECTION 49(2)(b) OF THE TRADE PRACTICES ACT 1974

BY MICHAEL BLAKENEY*

Discriminatory trading which has the effect or likely effect of substantially lessening competition in a market for goods, is prohibited by section 49(1) of the Trade Practices Act 1974. Among the many criticisms of this provision is the allegation that it ignores the commercial realities of the market place by imposing a strait-jacket of price uniformity. This rigidity is said to frustrate any exploration of the market by a seller through selective price variations and to frustrate a flexible response to differing intensities of supply and demand that may exist in the market. These criticisms are to some extent met by the hitherto neglected "Meeting Competition" exception contained in section 49(2)(b) of the Act. This exception permits a good faith response by a seller to meet a price or benefit offered by a competitor. The dimensions of this exception are examined in this article by posing a number of the questions that have been raised by decisions under the analogous United States Robinson-Patman Act and by examining their relevance for Australian practice. Also, given the criticism of section 49 by both the Swanson Committee and the Trade Practices Consultative Committee, this article attempts to locate the Meeting Competition exception within the general pro-competitive thrust of the Trade Practices Act as a whole.

I INTRODUCTION

Probably the most controversial provision of the Trade Practices Act 1974 (Cth) (as amended) ("the Act") is section 49¹ which prohibits discriminatory trading by sellers and the inducement of discriminatory

* B.A., LL.M. (Syd.); Senior Lecturer in Law, University of New South Wales.

¹ Section 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 or allowed 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.

advantages by purchasers.² The section is closely modelled upon the scheme and language of the Robinson-Patman Act 1936,³ an Act which has been described as "possibly the most maligned and confusing statute in the history of U.S. antitrust".⁴

At the heart of this controversy is the fact that in many market situations the presence of discriminatory trading terms is an indicium not of restrictive trade practices, but of vigorous competition. Competition is a dynamic process and discriminatory transactions will inevitably occur as sellers compete for customers and those customers seek to obtain the best possible terms for themselves. Discriminations between markets occur when the cost of servicing those markets differ, or where suppliers are confronted with differing intensities of demand and supply in those markets. A law which prevents suppliers from offering a range of trading terms, or which prevents buyers from seeking the best possible prices will distort the competitive process, producing a misallocation of resources between markets and within markets, as well as chilling the vigour of price competition. However, where a market is dominated by one seller or by a powerful purchaser, discriminatory conduct by the former, or the extortion of favourable treatment by the latter, may significantly impair competition causing an even greater concentration of market power in the hands of the already dominant enterprise. Thus, the

-
- (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).

² Repeal of s. 49 was recommended by the Trade Practices Act Review Committee (the Swanson Committee) on the basis that the section had worked to inhibit price flexibility (see *Report to the Minister for Business and Consumer Affairs* (August 1976) para. 7.21). However, the section was retained by the Minister "in the interests of assisting the competitive position of small business" (H.R. Deb., 3 May 1977, 1478). Repeal of the section was again recommended, this time by the Trade Practice Consultative Committee which was appointed to monitor to the effect of the section, (*Small Business and the Trade Practices Act* (1979) vol. 1 ch. 10) although against the recommendation of the Trade Practices Commission which urged its retention (*id.*, vol. 2 pp. 525-552). It remains to be seen which of these recommendations will be followed by the Government of the day.

³ 15 U.S.C. §§13-13(c) (1973).

⁴ J. Levine, "Aspects of the Trade Practices Bill 1973" (1973) 47 *A.L.J.* 679, 699.

prohibition of discriminatory practices which involve an abuse of market dominance will be pro-competitive.

Section 49 undertakes the difficult task of preserving the beneficial effects of pro-competitive discriminations, whilst prohibiting those dealings which are destructive of, or are likely to distort the competitive structure of the market. The section prohibits only those discriminations which are "of such magnitude or . . . of such a recurring or systematic character" that they have or are likely to have "the effect of substantially lessening competition in a market for goods".

The fundamental problem confronting the legislative draftsmen was whether a legal formulation could be capable of securing the benefits of the rigorous competition engendered by pricing flexibility, while at the same time eradicating the distortions to competition resulting from abusive discriminations. A complicating factor was that price discrimination in its economic sense may involve no differential trading terms.⁵ The solution adopted was to allow by way of exception from prohibition, first, those discriminations which represented the passing on to favoured customers of the cost savings attributable to dealings with those customers⁶ and secondly, those discriminations that constitute a meeting of the offers of competitors.⁷

The United States experience with cost justification under the analogous Robinson-Patman defence is cited as evidence of the likely futility and impracticability of the first exception.⁸ The slight difference in wording between the two statutes might produce greater success in Australia for cost justification. However, the American experience has also shown that cost data are notoriously elusive and the defence has proved to be time consuming and expensive even in the instances where it has proved successful.⁹ In view of these limitations, the "meeting competition"

⁵ For useful introductory analyses of the economic concept of price discrimination see: R. Bilas, *Micro economic Theory* (2nd ed. 1971) 212-220; R. Leftwich, *The Price System and Resource Allocation* (6th ed. 1976) 244-248; G. Stigler, *The Theory of Price* (3rd ed. 1966) 209 ff.; A. Stonier and D. Hague, *A Text-book of Economic Theory* (4th ed. 1973) 203-210. Useful introductory surveys of price discrimination in economics and law are contained in F. Scherer, *Industrial Market Structure and Economic Performance* (1970) chs 10 and 21; J. Dirlam and A. Kahn, "Price Discrimination in Law and Economics" (1952) 11 *Am. J. Law & Soc.* 281; L. 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.

⁶ S. 49(2)(a) of the Act.

⁷ S. 49(2)(b) of the Act.

⁸ R. Mnookin, "An American Lawyer's Views of Section 49 of the Trade Practices Act" (1975) 1 *U.N.S.W.L.J.* 121, 137; B. Donald and J. Heydon, *Trade Practices Law* (1978) i, 423.

⁹ See the authorities referred to in F. Rowe, "Cost Justification of Price Differentials under the Robinson-Patman Act" (1959) 59 *Colum. L. Rev.* 584; H. Taggart, *Cost Justification* (1959); J. Murray, "Cost Justification under the Robinson-Patman Act: Impossibility Revisited" [1960] *Wisc. L. Rev.* 227; R. Copeland, "Significance of the Cost Justification Defense" (1966) 11 *Antitrust Bull.*

exception contained in section 49(2)(b) of the Act may assume a dominant role in price discrimination litigation. This exception exonerates those discriminations by a supplier that constitute "the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier" and emulates an equivalent defence under the Robinson-Patman Act.¹⁰

The scope, nature and availability of the exception may conveniently be examined by a consideration of the following interrelated questions which have been raised in decisions under the Robinson-Patman defence. First, what is meant by good faith? Secondly, to what extent may a supplier "beat" a price or benefit offered by a competitor? Thirdly, what standard of goods meet an offer of a competitor? Fourthly, is a supplier restricted to defending existing customers? Fifthly, to what extent must an offer of a competitor be verified? Sixthly, must the price or benefit offered by a competitor be lawful before it can be met? Finally, does the exception allow the emulation of the pricing system of a competitor.

II THE MEETING COMPETITION EXCEPTION

1. *The Good Faith Requirement*

The central feature of the meeting competition exception is that it is only available to a seller who acts in "good faith". Thus, the utility of the exception will probably, as in the United States, depend upon the interpretation of this requirement. There is much to recommend the realistic and commonsense interpretation of the good faith requirement by the Federal Trade Commission in *Continental Baking Co.* where the concept of good faith was declared to be

a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity . . . such a standard, whether it be considered "subjective" or "objective", is inherently *ad hoc*. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.¹¹

If the amplitude of the section 49(1)(b) exception is related to a good faith standard, it may be possible to avoid some of the rigidity and

925; I. Black, "A Rational Approach to the Robinson-Patman Cost Justification Defense" (1978) 5 *Jnl. Contemp. Law* 111; L. Standridge, "Analysis of the Cost Justification Defence under Section 2(a) of the Robinson-Patman Act" (1978) 9 *Rutgers Camden L.J.* 219.

¹⁰ 15 U.S.C. §13(b) (1973).

¹¹ 63 F.T.C. 2071, 2163 (1963).

conceptualistic formulary which, prior to *Continental Baking Co.*, characterised American judicial interpretations of the Robinson-Patman defence.¹²

2. To What Extent May a Seller "Beat" a Price or Benefit Offered by a Competitor?

Section 49(2)(b) exonerates discriminations which "meet" offers of competitors. Similarly, the Robinson-Patman Act defence exonerates responsive pricing which is aimed "to meet the equally low price of a competitor".¹³ The elimination of the defensive strategy of undercutting the price of a competitor was one of the major ways in which, by the Robinson-Patman Act, the United States Congress sought to tighten the original meeting competition defence in the Clayton Act.¹⁴ The insistence that the price discriminations of a seller identically emulate those prices or benefits offered by competitors presupposes that the pro-competitive objectives of the section will be effectuated by such means. However, denying a seller the option to shave prices of competitors necessarily stultifies the active price competition which is an indicium of a healthy economy.

The exception can be made to work in harmony with the policy of the section if an evaluation is made of the intent of the seller rather than of the objective effect of the price or benefit offered by the seller. Only by adopting an approach which maintains the good faith of the supplier as central to the operation of the defence is it possible to avoid the mechanical imposition of an objective standard which is unrelated to commercial realities.¹⁵ The United States approach has been to deny the defence to any intentional undercutting of competitors,¹⁶ but to allow the defence in cases of inadvertent undercutting.¹⁷ An obvious example of

¹² R. Kuenzel and H. Schiffres, "Making Sense of Robinson-Patman: The Need to Revitalize its Affirmative Defenses" (1976) 62 *Virg. L. Rev.* 1211, 1237-1238; Note, "Meeting Competition under the Robinson-Patman Act" (1977) 90 *Harv. L. Rev.* 1476, 1494-1499.

¹³ 15 U.S.C. §13(b) (1973).

¹⁴ *Standard Oil Co. v. F.T.C.* 340 U.S. 231, 241-242 (1951).

¹⁵ E. Cohen, "Meeting Competition under the Robinson-Patman Act: Effective Enforcement Through Flexible Interpretation" (1965) 113 *U. Pa. L. Rev.* 715, 722-725.

¹⁶ *E. B. Muller & Co.* 33 F.T.C. 24 (1941) *affirmed*, 142 F. 2d 511 (1944); *Atlas Bldg Prods Co. v. Diamond Black and Gravel Co.* 269 F. 2d 950 (1959), *cert. den.*, 363 U.S. 843 (1960); *Purolator Products Inc. v. F.T.C.* 352 F. 2d 874 (1965), *cert. den.*, 389 U.S. 1045 (1968); *Hampton v. Graff Vending Co.* 478 F. 2d 527 (1973), *cert. den.*, 414 U.S. 859 (1973).

¹⁷ *F.T.C. v. A. E. Staley Mfg. Co.* 324 U.S. 746 (1946); *Samuel H. Moss Inc. v. F.T.C.* 36 F.T.C. 640 (1943), *affirmed*, 148 F. 2d 378 (1945), *cert. den.*, 326 U.S. 734 (1945), *modified*, 155 F. 2d 1016 (1946); *Balian Ice Cream Co. v. Arden Farms Co.* 231 F. 2d 356 (1955), *cert. den.*, 350 U.S. 991 (1956); *Callaway Mills Co. v. F.T.C.* 362 F. 2d 435 (1966); *International Air Indus. Inc. v. American Excelsior Co.* 517 F. 2d 714 (1975); *cert. den.*, 424 U.S. 943 (1976).

the latter will be where the misrepresentations of a favoured buyer induce the beating of prices of rivals.¹⁸ However, there may even be situations where an intentional beating of offers by competitors ought to be permissible.

A supplier seeking to enter a market may have to do more than imitate the dollar amounts of prices or benefits offered by its more established rivals. The Chairman of the Trade Practices Commission has also indicated that it might be legitimate for sellers to shave prices in the defence of long-standing customers,¹⁹ but the point at which permissible price shaving becomes impermissible undercutting will have to be decided on the facts of each case. As well as imitating the dollar amount of the offer by a competitor a seller may also beat that offer by offering a greater quantity of goods at the price of that competitor. Alternatively, in the case of a benefit such as a discount the offer may be beaten by allowing, for example, discounts on smaller quantities than those allowed in the discount structure of a competitor. Again, as in the case of the shaving of the dollar amount of the price of a competitor there may be instances where the courts may not insist upon an exact emulation of competitive offers provided this is consistent with a standard of good faith.

3. *What Standard of Goods Meet an Offer of a Competitor?*

A supplier may seek to resist the price or benefit of a competitor by offering goods of a superior grade and quality at the met price. In such a case the offer by a competitor may not be sufficiently comparable for the purposes of the exception. A nice question arises as to whether the rival goods contemplated by section 49(2)(b) of the Act are to be comparable under the same standard as that envisaged by section 49(1) which refers to goods "of like grade and quality". The term "like grade and quality" used in section 49(1) of the Act was borrowed from the Robinson-Patman Act. The term was apparently inserted in the American statute for the purpose of "separating out those commercial transactions insufficiently comparable for price regulation by the statute".²⁰ The legal application of this purpose has proved to be confusing in practice where the term has been held to require one or more of the following factors: substantial physical identity,²¹ functional interchangeability,²² and identical performance characteristics.²³

¹⁸ *E.g. Kroger Co. v. F.T.C.* 438 F. 2d 1372 (1971), affirming, *Beatrice Foods Co.* 76 F.T.C. 719 (1969), cert. den., 404 U.S. 871 (1971).

¹⁹ Commercial Law Association, *Record of Proceedings of a Seminar, The Trade Practices Act* (1974), 124.

²⁰ U.S. Attorney-General, *Report of the Attorney-General's National Committee to study the Antitrust Laws* (1955), 157-158.

²¹ *Bruce's Juices Co. v. American Can Co.* 87 F. Supp. 985 (1949).

²² *McWhirter v. Monroe Calculating Machine Co.* 76 F. Supp. 456 (1948).

²³ *Bruce's Juices Co. v. American Can Co.*, note 21 *supra*.

The American courts have been reluctant to import the "like grade and quality" standard into the meeting competition defence, addressing themselves instead, to the consumer preference for the respective goods.²⁴ Thus, in a case involving the meeting of competition by a carpet manufacturer,²⁵ the Court noted that

the public is greatly influenced by such intangibles as colour, design, display, advertising and similar factors. So long as petitioners conclusively show that their products at various price levels generate public demand (or "saleability") substantially equivalent to that of competitors' carpeting at the same price levels, considerations of "grade and quality" become unnecessary and, indeed, superfluous, for the most "grade and quality" can do is tend to show "saleability".²⁶

For the purposes of the meeting competition defence the American courts have held that a seller whose products have premium public acceptance may not lawfully meet the equal price of a competitor who markets products that have a lesser degree of public acceptance.

The "premium product rationale" was enunciated in *Minneapolis-Honeywell Regulator Co.*²⁷ in which the respondent sought to defend low prices given to several large customers for its heating control unit. The Federal Trade Commission found that the respondent had developed large customer demand and public acceptance for its units which enabled it to sell at higher prices than its competitors. The Commission argued that if the defence was allowed "any seller of a commodity which generally sells at a premium price may freely discriminate among its customers so long as it does not undercut the prices of competitors. Such an interpretation would make the Act largely unworkable."²⁸

Similarly, in *Anheuser-Busch Inc.*²⁹ The Federal Trade Commission condemned a price reduction for Budweiser beer in St Louis to match the local price of regional beers observing that

Budweiser could and did successfully command a premium price in the St. Louis market. . . . The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market. Clearly, therefore,

²⁴ E.g. *General Foods Corp.* 52 F.T.C. 798 (1956); *Atlanta Trading Corp. v. F.T.C.* 258 F. 2d 365 (1958); *Fred Meyer Inc. v. F.T.C.* 359 F. 2d 351 (1966), *cert. den.*, 386 U.S. 908 (1967); *Checker Motors Corp. v. Chrysler Corp.* 283 F. Supp. 876 (1968).

²⁵ *Callaway Mills Co. v. F.T.C.* 362 F. 2d 435 (1966).

²⁶ *Id.*, 441; see also *Standard Oil Co.* 49 F.T.C. 923, 952 in which the F.T.C. observed that for the purposes of the defence "public acceptance rather than chemical analysis of the product is the important competitive factor".

²⁷ 44 F.T.C. 351 (1948), *reversed*, 191 F. 2d 786 (1951) *cert. dismissed*, 344 U.S. 206 (1952).

²⁸ 44 F.T.C. 351, 396-397 (1948).

²⁹ 54 F.T.C. 277 (1957), *reversed*, 265 F. 2d 677 (1959), *reversed*, 363 U.S. 536 (1960), *reversal upheld on other grounds on remand*, 289 F. 2d 835 (1961).

respondent's reduction from the premium price to match the prices of the regional beers on the market was not a meeting of competition. The effect was to undercut competition.³⁰

Arguably, for the purposes of section 49(2)(b) of the Act, consumer preference is a relevant indicium to be employed in an evaluation of the quality of goods which may be offered by a seller to meet the offer of a competitor. Every pricing decision made by a seller depends to a large extent upon the demand which confronts his product. For a statute purporting to control price discriminations "the concept of consumer preference is crucial and must be interpreted and applied".³¹

4. *Is a Seller Restricted to Defending Existing Customers?*

The Federal Trade Commission attempted to confine the defence to situations where a seller sought to retain existing customers and refused to extend the defence to situations where the seller attempted to acquire new customers.³² This distinction was rejected by the Seventh Circuit Court of Appeals in *Sunshine Biscuits Inc. v. F.T.C.*³³ as being practically unworkable, economically unsound and contrary to the policy of the statute. The reasons given by the Court in rejecting this distinction provide sound arguments against a similar constriction of the section 49(2)(b) exception.

The Court held the distinction to be unworkable because of the practical difficulty of separating old and new customers. The Court asked

[d]oes an "old" customer retain that status forever, regardless of the infrequency or irregularity of his purchases? Suppose an "old" customer transfers his business to another seller offering a lower price, how long a period of grace does the first seller have in which to meet the lower competitive price? If he waits too long will the "old" customer be regarded as a "new" one and hence unapproachable . . . ? If so, how long is too long? And if not, does it suffice that the buyer has at any time in the past, no matter how remote, been a customer of the respondent?³⁴

The distinction was economically unsound because, as the Court observed, an established seller would have a monopoly of his customers.³⁵ Defensive pricing would make it very difficult for a new seller to gain

³⁰ 54 F.T.C. 277, 302 (1957) see also *Porto Rican American Tobacco Co. v. American Tobacco Co.* 30 F. 2d 234 (1929) which held that the meeting competition defence did not apply when the price of "Lucky Strike" cigarettes was dropped to the level of "a poorer grade of cigarette".

³¹ D. Ehman, "The Role of Consumer Preference in the 'Like Grade and Quality' Concept of the Robinson-Patman Amendment" (1974) 23 *Buff. L. Rev.* 709.

³² *Standard Motor Prods. Co. v. F.T.C.* 265 F. 2d 674 (1959), *cert. den.*, 361 U.S. 826 (1959).

³³ 306 F. 2d 48 (1962).

³⁴ *Id.*, 52.

³⁵ *Ibid.*

entry into an established market, because he would be prohibited from discriminatory pricing in order to obtain "new" customers whereas the established sellers would be able to meet any reductions on his part to retain their "old" customers.³⁶ Finally, the distinction would be contrary to the policy of the statute in that it would produce the very price discrimination sought to be proscribed by the enactment. As the Court explained, "the distinction would create a forced price discrimination between a seller's existing customers to whom he had lawfully lowered his prices under section 2(b) and a prospective new customer".³⁷

5. *To What Extent Must the Offer of a Competitor be Verified?*

Since the central element of the section 49(2)(b) exception is the good faith requirement, the absence of any diligent verification by a defendant of a price or benefit offered by a competitor may evidence a lack of good faith. On the other hand, the more information a seller obtains about prices of competitors the more likely he is to fall foul of the prohibitions in the Act against price-fixing.³⁸ In the absence of a verification requirement, the exception might easily degenerate into an *ex post facto* search for a fortuitous meeting of offers of competitors unknown by the seller at the time of the impugned discrimination.³⁹ Similarly, a blind guess as to the offers of a competitor is equally inconsistent with an averment of good faith.⁴⁰ The report of a potential purchaser of low price offers by a competitor "like a witness' testimony in court, takes on increased credibility . . . as detail is added".⁴¹ It is necessary, therefore, to consider the degree of diligence likely to be expected of a supplier in verifying offers of competitors in reliance upon the section 49(2)(b) exception.

The courts may insist upon the objective standard of diligence adopted in the United States, where a seller discharges his obligations under the defence seized of "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor".⁴² Alternatively, the courts may accept the subjective satisfaction of a supplier that the price or benefit of a competitor is being met. One of the problems with a

³⁶ *Ibid.*; see also J. May, "Meeting Competition under Robinson-Patman" (1970) 38 *Tenn. L. Rev.* 56, 71-72.

³⁷ 306 F. 2d 52 (1962) followed in *National Dairy Products Corp. v. F.T.C.* 395 F. 2d 517 (1968), *cert. den.*, 393 U.S. 977 (1968); *Jones v. Borden Co.* 430 F. 2d 568 (1970); *McCaskill v. Texaco Inc.* 351 F. Supp. 1332 (1972); *Hanson v. Pittsburgh Plate Glass Indus. Inc.* 482 F. 2d 220 (1973), *cert. den.*, 414 U.S. 1136 (1974); *Cadigan v. Texaco Inc.* 492 F. 2d 383 (1974).

³⁸ *I.e.* sections 45 and 45A Trade Practices Act 1974 (Cth).

³⁹ *Exquisite Form Brassiere, Inc.* 64 F.T.C. 271 (1964), *affirmed*, 360 F. 2d 492 (1963), *cert. den.*, 384 U.S. 959 (1966).

⁴⁰ *Forster Mfg Co. Inc.* 68 F.T.C. 191 (1965); *Viviano Macaroni Co. v. F.T.C.* 411 F. 2d 255, 258-259.

⁴¹ 68 F.T.C. 191, 204-205 (1965).

⁴² *F.T.C. v. A. E. Staley Mfg Co.* 324 U.S. 746, 759-760 (1945).

subjective standard is that the courts may additionally have to explore a standard of reasonableness with which the subjective belief may be held. The subjects for verification by a seller to the accepted standard of belief may include: first, the identity of competitors; secondly, the nature of the prices or benefits offered by competitors; and finally, the extent to which the defined offers of competitors were made to the relevant purchasers from the seller, in favour of whom the seller was discriminated.

One of the obvious problems with the verification requirement is that of evidencing diligent investigation by the defendant. The exact correspondence of the price of a supplier with that of a competitor may be persuasive circumstantial evidence of diligent verification or of price fixing.⁴³ For section 49(2)(b) purposes, the court may insist a seller ascertain both the identity of the competitor offering the relevant price or benefit and the content of that offer, although the Robinson-Patman courts have not insisted upon these in meeting the reasonableness standard of *Staley*.⁴⁴

The principal source of information available to a seller for the verification of an offer made by a competitor to a buyer will be the buyer itself. The Federal Trade Commission insisted that a seller ascertain both the competitor offering a lower price and the amount of that offer. It assumed that buyers would willingly divulge the relevant information. This was criticised as "unrealistic" by the First Circuit Court in *Forster Manufacturing Co. Inc. v. F.T.C.*⁴⁵ which observed:

[W]e would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and, to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place.

The general standard of verification insisted upon by the courts in applying the section 49(2)(b) exception, would have to take cognisance of these difficulties faced by a seller in learning offers of competitors. Extrinsic data may evidence a diligent verification by a seller of information tendered by a buyer. Most persuasive would be copies of the

⁴³ However, parallel business behaviour without more has usually been considered a neutral factor. See the authorities referred to in D. Turner, "The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal" (1962) 75 *Harv. L. Rev.* 655 and W. Stanbury and G. Reschentaler, "Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases" (1977) 15 *Osg. H.L. Jnl.* 617.

⁴⁴ E.g. *National Dairy Prods Corp. v. F.T.C.* 395 F. 2d 517, 523, *cert. den.*, 393 U.S. 977 (1968); *Forster Mfg Co. v. F.T.C.* 335 F. 2d 47, 55-56 (1964), *cert. den.*, 380 U.S. 906 (1965).

⁴⁵ 335 F. 2d 47, 55-56 (1964).

invoices or bills of a competitor. Next would be written quotations or tenders received by a customer of the seller from competitors of that seller. Another useful source of comparative information are price lists of competitors. However, the utility of price lists will be proportional to the extent that competitors offer discounts from the list prices. Statements by a buyer describing the offers of competitors will obviously be useful, particularly if in writing and containing detailed information on those offers.⁴⁶ The knowledge of a seller of the previous buying policies of its customers will be an additional piece of information that can be adduced towards establishing diligent verification. Similarly, a general knowledge of the trade possessed by a seller may contribute towards a good faith evaluation of the prices of competitors.⁴⁷

A problem associated with the meeting competition exception in section 49(2)(b) is the extent to which price verification is characterisable as price fixing prohibited by the Trade Practices Act 1974.⁴⁸ The more diligent a seller is in verifying the price of a competitor the more likely is the price of the seller to replicate the price of a competitor in every respect. This price identity is indicative equally of price fixing and there is, indeed, a very real danger that purported price verification for the purposes of section 49(2)(b) might be used as a cloak for price fixing.⁴⁹ There is an analogous problem in the United States where the prohibition of price-fixing by the Sherman Act⁵⁰ overlaps the Robinson-Patman Act meeting competition defence.⁵¹ The Supreme Court decision in *United States v. Container Corporation*⁵² threatened "complete irreconcilability"⁵³ between the two statutes. In that case, the Supreme Court proscribed an industry-wide agreement to exchange price information. Justice Douglas, delivering the opinion of the Court, observed that "knowledge of a competitor's price meant matching that price".⁵⁴ He

⁴⁶ For a checklist of relevant information see H. Vogel, "Meeting Competition" (1969) 25 *Bus. Law* 199, 204-209.

⁴⁷ R. Steele, "Section 2(b) of the Robinson-Patman Act—Rules for Meeting Competition in the Past and Present" (1968) 13 *Antitrust Bull.* 1223, 1254-1269.

⁴⁸ B. Donald, "Anti-competitive Arrangements and Exclusive Dealing", in Commercial Law Association Seminar, *Living with the New Trade Practices Act* (1977).

⁴⁹ M. Blakeney, "The Impact Upon Trade Associations of Section 45 of the Trade Practices Act" (1976) 50 *A.L.J.* 57, 64-65.

⁵⁰ 15 U.S.C. §1 (1973).

⁵¹ S. Brannan, "The Robinson-Patman Meeting of Competition Defense as used in a Sherman, Section 1, Conspiracy Action" (1973) 25 *Baylor L. Rev.* 357; M. Eaton, "The Robinson-Patman Act: Reconciling the Meeting Competition Defence with the Sherman Act" (1973) 18 *Antitrust Bull.* 411, 424.

⁵² 393 U.S. 333 (1969); discussed in Note, "Antitrust Implications of the Exchange of Price Information Among Competitors: The *Container Corporation* Case" (1970) 68 *Mich. L. Rev.* 720; J. Kefauver, "The Legality of Dissemination of Market Data by Trade Associations: What Does *Container* Hold?" (1972) 57 *Corn. L. Rev.* 777.

⁵³ M. Eaton, note 51 *supra*, 424.

⁵⁴ 393 U.S. 333, 336-337 (1969).

characterised as “irresistible” the inference that the exchange of price information “had an anti-competitive effect in the industry, chilling the vigor of price competition”.⁵⁵ This emphasis upon the effect of the exchange of price information marked a departure from the previous emphasis of the Court upon the purpose of price information agreements.⁵⁶

Section 45A(1) of the Trade Practices Act 1974 (Cth) defines as contracts, arrangements or understandings “likely to have the effect of substantially lessening competition” (in contravention of section 45(2) of the Act) those agreements containing a provision that “has the purpose, or had or is likely to have the effect”, *inter alia*, of “fixing controlling or maintaining” prices. Thus the Act contains language which appears to emulate the Supreme Court decision in the *Container Corporation* case. However, the emasculation of the United States meeting competition defence, threatened by the *Container Corporation* case has been overcome by a line of decisions which have exonerated from Sherman Act prosecution price verification schemes under the Robinson-Patman Act.⁵⁷ A similar approach ought to be adopted under the Trade Practices Act since there is only a very limited availability under the Act for authorisation of price fixing agreements.⁵⁸

Another reason for allowing this exception would be to enable suppliers to protect themselves from the fraudulent misrepresentations of untruthful buyers.⁵⁹ Prospects for abuse of the exception would be removed if the fundamental principle of good faith is borne in mind. A practical safeguard could be the insistence of the courts that suppliers communicate with competitors only after exhausting all other means of verification.⁶⁰

6. Does the Met Price or Benefit of a Competitor Have to be Lawful?

A view taken in United States decisions is that the good faith requirement of the meeting competition defence disallows the emulation by a seller of the illegal price of a competitor.⁶¹ A practical argument in

⁵⁵ *Ibid.*

⁵⁶ *E.g. Maple Flooring Mfrs Assoc. v. U.S.* 268 U.S. 563, 583-584 (1925); *Cement Mfrs Protective Assoc. v. U.S.* 268 U.S. 588, 606 (1925).

⁵⁷ *Wall Products Co. v. National Gypsum Co.* 326 F. Supp. 295 (1971); *Webster v. Sinclair Refining Co.* 338 F. Supp. 248 (1971); *Belliston v. Texaco Inc.* 455 F. 2d 175 cert. den., 408 U.S. 928 (1972); *Gray v. Shell Oil Co.* 469 F. 2d 742 (1972), cert. den., 412 U.S. 943 (1973); *Treasure Valley Potato Bargaining Assoc. v. Ore-Ida Foods Inc.* 497 F. 2d 203 cert. den., 419 U.S. 999 (1974); *U.S. v. United States Gypsum Co.* 550 F. 2d 115 (1977).

⁵⁸ See ss. 88(2), (3) and (4) Trade Practices Act 1974.

⁵⁹ *E.g. Wall Products Co. v. National Gypsum Co.* note 57 *supra*, 328.

⁶⁰ *E.g. Gray v. Shell Oil Co.* note 57 *supra*, 747.

⁶¹ *F.T.C. v. A. E. Staley Mfg Co.* 324 U.S. 746, 753-754 (1945); *F.T.C. v. Standard Oil Co.* 355 U.S. 396, 399 (1958); *National Dairy Prods. Corp.* 395 F. 2d 517, 524, cert. den., 393 U.S. 977 (1968).

favour of this view is the fact that if sellers were allowed to meet unlawful prices without limitation, a spiralling system of discrimination on an industry-wide pattern would result. The Trade Practices Commission or a civil litigant pleading a contravention of section 49 of the Act would then be confronted with the difficult task of identifying the initiator of the discrimination. A problem confronting a seller seeking to rely upon the meeting competition exception is that the illegality of the price of a competitor is often unclear. For example, the competitor may be able to justify its prices under section 49(2)(a) of the Act, or may itself be meeting competition under section 49(2)(b). The judgement of a seller as to the legality of the price of a competitor may be extremely difficult because the relevant cost information will be in the possession only of the competitor. The courts will have to select a standard of knowledge of the legality of the price of a competitor to be imposed upon sellers seeking to rely upon the meeting competition defence. The standard adopted in the United States is that the defendant bears the burden of showing "the existence of facts which would lead a reasonable and prudent person to believe that the price he was meeting was lawful".⁶² An alternative standard which had been insisted upon in earlier cases was the requirement that the seller prove that a met price was actually lawful.⁶³

However, arguments may be raised against any insistence upon a lawful price requirement. Apart from the difficulty of ascertaining the legality of the price of a competitor even if illegality was clear, it is probably unrealistic to preclude a seller from competing effectively when "meeting the worst kind of competitive assault".⁶⁴ It is apposite to note that the criminal law does not expect a man in physical danger to reach a personal verdict as to the possible exculpation of his assailant by intricate legal factors of capacity.

7. Does the Exception Allow the Emulation of the Pricing System of a Competitor?

A final problem for consideration by the courts is whether the exception is restricted to specific responses to individual competitive situations, or whether it extends to the emulation by a seller of the pricing system or discount structure of a competitor.

⁶² *E.g. American Oil Co.* 60 F.T.C. 1786, 1812 (1962), *reversed on other grounds*, 325 F. 2d 101 (1963), *cert. den.*, 377 U.S. 954 (1964); see also *Tri-Valley Packing Assoc.* 60 F.T.C. 1134, 1173 (1962), *reversed on other grounds*, 329 F. 2d 694 (1964), *opinion on remand*, 70 F.T.C. 223 (1966), *affirmed, sub. nom. Tri-Valley Growers v. F.T.C.* 411 F. 2d 985 (1969) *cert. den.*, 396 U.S. 929 (1969).

⁶³ *Standard Motor Products* 54 F.T.C. 814 (1947), *affirmed*, 265 F. 2d 674 (1959).

⁶⁴ *White House Task Force Report on Antitrust Policy* (1969), C-5.

Accepted as the general rule in the United States is the statement of the Supreme Court in *F.T.C. v. A.E. Staley Manufacturing Co.*⁶⁵ that the Robinson-Patman Act "places emphasis on individual competitive situations, rather than upon a general system of competition".⁶⁶ At issue in that case was the claim by Staley that it had adopted an industry-wide basing point system⁶⁷ in order to meet competition. However, the Supreme Court found that Staley and the entire industry had collusively adopted the system to reduce price competition. Thus, the Supreme Court sustained a price-fixing prosecution under the Sherman Act. The decision in *Staley* has been criticised for the confusion between the strict attitude of the Sherman Act towards price fixing and the totally different question of whether competition has been met in good faith.⁶⁸ The real question in cases where a price system has been adopted by a seller is whether that adoption is a good faith response to offers of competitors.

The view taken by the Supreme Court has been that "discrimination pursuant to a price system would preclude a finding of 'good faith' "⁶⁹ because it is not specifically responsive.⁷⁰ However, good faith and systematic response are not necessarily synonymous. For example, where an industry has evolved a common system of pricing, it would be reasonable for a seller to predicate its entrance into the market on the basis of meeting the prevailing price system. Matching of prices of competitors may often be the easiest way for a seller to compete.⁷¹ One reason why the simple act of adopting the pricing or discount structure of a competitor might be inconsistent with "good faith" is that most pricing or discount schedules are usually guides and bear only a loose resemblance to the prices or discounts actually offered by a competitor. The likelihood of frequent departure by sellers from published discount schedules has usually been nominated as the reason for the refusal of the courts to sustain the Robinson-Patman Act defence.⁷² The emulation of the pricing system of a competitor may be construed, not as a good

⁶⁵ 324 U.S. 746 (1945).

⁶⁶ *Id.*, 753.

⁶⁷ See L. Cooper, "Pricing Systems and the Meeting Competition Defense" (1963) 49 *Virg. L. Rev.* 1325; R. Klein, "Meeting Competition by Price Systems under s. 2(b) of the Robinson-Patman Act: Problems and Prospects" (1971) 16 *Antitrust Bull.* 213.

⁶⁸ R. Klein, *id.*, 220.

⁶⁹ *F.T.C. v. Standard Oil Co.* 355 U.S. 396, 401 (1958).

⁷⁰ *Moog Industries, Inc.* 51 F.T.C. 931, 941-942 (1955); *Whitaker Cable Corp. v. F.T.C.* 239 F. 2d 253, 255; *C. E. Niehoff & Co. v. F.T.C.* 241 F. 2d 37, 41 (1957); *Standard Motor Prods Inc. v. F.T.C.* note 32 *supra*, 677.

⁷¹ *Samuel H. Moss Inc. v. F.C.T.* note 17 *supra*.

⁷² *Minneapolis-Honeywell Regulator Co.* note 27 *supra*; *International Salt Co.* 49 F.T.C. 138 (1952); *E. Edelmenn & Co.* 51 F.T.C. 978 (1955), *affirmed*, 239 F. 2d 152 (1956), *cert. den.*, 355 U.S. 941 (1958), *Tri-Valley Packing Assoc.* note 62 *supra*; *Purolator Products Inc. v. F.T.C.* note 16 *supra*; *Ingram v. Phillips Petroleum Co.* 395 F. Supp. 176 (1966); *Checker Motors Corp. v. Chrysler Corp.* note 24 *supra*.

faith meeting of competition, but as the clairvoyant prediction of future competition.⁷³

However, the impossibility of individual competitive responses in certain industry situations was conceded by the Fifth Circuit Court in *Callaway Mills Company v. F.T.C.*⁷⁴ That case concerned two small carpet manufacturers who, in attempting to enter a new market, felt obliged to adopt the cumulative volume discount system prevailing among their established competitors. The Court set aside the Federal Trade Commission denial of the meeting competition defence explaining that

[t]o price each style of its carpeting with specific reference to all the different styles of every competitive line as suggested by the Commission, would require the petitioners to engage in *exhaustive* cost studies on the multitude of carpets on the market *before they are actually sold and before any discounts are given*. Such a procedure would be burdensome, unreasonable and practically unfeasible.⁷⁵

The same Court refused to apply its reasoning in *Callaway Mills* in a subsequent case involving the adoption by a seller of the promotional allowance scheme of a competitor because that company was not confronted with an industry-wide competitive practice.⁷⁶ Thus, the *Callaway Mills* principle must be confined to allowing the adoption of the pricing structures of competitors as a good faith meeting of competition if this is the only reasonable strategy under the particular market circumstances. The reasoning in *Callaway Mills* reiterates the point that the real issue is not the question of whether competitive prices met are individual or systematic, but whether that response accords with the paramount standard of good faith.

III CONCLUSION

The meeting competition exception may be criticised as unnecessary, principally upon the basis that the meeting of the offers of a competitor will always be pro-competitive in the long run and hence not in contravention of section 49(1). This is because all the customers of the discriminatory seller will either demand the lower price or transfer their custom to the competitor who is offering the more favourable trading terms. More fundamentally, the competitive endeavours of a seller will inevitably involve the meeting of offers of competitors in the market place as this is precisely how firms compete. Consequently, "[i]f the exception is construed widely, section 49 will only encompass discriminations which are effected by those corporations which are not subject to

⁷³ *E.g. E. Edelmann & Co. id.*, 1006-1007.

⁷⁴ 362 F. 2d 435 (1966).

⁷⁵ *Id.*, 441-442.

⁷⁶ *Surprise Brassiere Co.* 71 F.T.C. 868 (1967), *affirmed*, 406 F. 2d 711 (1969).

the constraints of competition".⁷⁷ These corporations will obviously be in a position of market dominance and already subject to regulation by section 46 of the Act.

However, the function of the exception is to exonerate large sellers from being obliged to reduce all their prices, or equalise all the non-price benefits offered by them each time they seek to meet competition in a small segment of their markets. This objective is best understood by a consideration of the minority report of the United States House Judiciary Committee on the original proposals for the prohibition of price discrimination by section 2 of the Clayton Act 1914.⁷⁸ The report explained:

This section would seem to expose a manufacturer or jobber, whose business extended over a wide area, to a new and unjust risk. If confronted with competition at one point, and he lowers his price at such point merely and does so to meet the competitor's price in an endeavour . . . to keep the customers he has won in a successful business career, it would seem to require him to lower his price all over the vaster area in which he sells his product . . .

A competitor who attacks at a single point and is in business only at that point might sell a small quantity of goods at lower prices, and to him this would be a negligible quantity, while the man whose business is assailed must, in order to avoid . . . the risk of litigation or prosecution, reduce his prices all over the country and suffer a great loss . . .

On the other hand, a concern trying to enter a new territory and seek new business would be equally cruelly dealt with. It could not make any reductions in the new territory without at the same time reducing its prices everywhere else.

An independent trying to acquire additional business would thus be dangerously handicapped; he would, in fact, be denied the right of competition.⁷⁹

The misgivings expressed in the minority report about the problems created by an unqualified legal prohibition of price discrimination led the Senate Judiciary Committee to insert a meeting competition proviso to the prohibition.⁸⁰

The American position may, be distinguished on the ground that the Clayton Act, as amended by the Robinson-Patman Act,⁸¹ prohibits three different categories of injury to competition and that the meeting competition defence is primarily a qualification of the prohibition of

⁷⁷ E. Griffin, "Discrimination in Purchasing and Selling" (1975) 1 *U.N.S.W.L.J.* 141, 158.

⁷⁸ H.R. Rep. No. 627, 63d Cong., 2d sess. (1914).

⁷⁹ *Id.*, pt 2, 2-3 quoted in F. Rowe, *Price Discrimination under the Robinson-Patman Act* (1962) 208-209.

⁸⁰ S. Rep. No. 698, 63d Cong., 2d sess., 43-44.

⁸¹ Note 3 *supra*.

discriminations tending to "injure, destroy or prevent competition with any person". On the other hand, section 49(1) only prohibits discriminations affecting competition at large.⁸² Whichever view of the exception is adopted there is much to be said for the suggestion that

[p]erhaps the principal virtue of the exception is that corporations may possibly have less trouble in ascertaining whether they have complied with the requirements of the exception than ascertaining whether the discrimination is likely substantially to lessen competition.⁸³

⁸² Note 1 *supra*.

⁸³ E. Griffin, note 77 *supra*, 159.