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3 July 2002

Secretary,
Trade Practices Act Review,
Dept. of the Treasury,
Langton Crescent,
Parkes ACT 2600

Dear Sir,

FURTHER SUBMISSION TO THE TRADE PRACTICES ACT REVIEW

I have already made a submission to you dated 1 June 2002.

I have today sent to the Canberra Times, in response to press reports of the ACCC seeking to have some of the conduct covered by the Act made the subject of criminal sanctions including jail sentences, a letter in the following terms :-

TEXT OF LETTER TO THE CANBERRA TIMES, 3 JULY 2002

"COMPETITION AND JAIL SENTENCES

The ACCC advocates that some conduct outlawed by the Trade Practices Act be the subject of criminal proceedings, involving jail sentences (CT 3 July, p.1 & editorial p.12)

For the kind of law the Trade Practices Act is, criminal sanctions and jail sentences are really "way over the top". Unlike most criminal law, the Trade Practices Act is very broad and vague legislation, with the question whether any particular conduct is unlawful very much a matter of individual opinion or theory, not something provable by hard facts or evidence. Also, the line between pro and anti-competitive conduct is very fine. Conduct that is obviously simply part of the competitive process often also lessens competition - because competition involves both winners *and losers*. And some conduct that appears anti-competitive actually enhances competition.

Also, the Act itself recognises that there could be 'public benefit' factors outweighing 'anti-competitive' conduct. And sometimes the furtherance of competition would be against the public interest - as much with price agreements and boycotts as other kinds of business activity.

All this means that some ACCC 'decisions' made under the Act are very debatable. And it would be bad to have very debatable jail sentences.

If anything, the existing large penalty for breach of the Act, \$ 10 million, should be reduced. It discourages businesses from having their proposed dealings considered by the Court, leaving the ACCC as the effective "decision-maker" about legality. And that isn't good public administration.

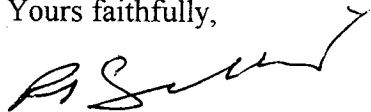
R.S.Gilbert, 28 Watson St, Turner (tele 62486057)"

I think the letter is self-explanatory. In relation to the final paragraph pointing to concerns about the ACCC's powers (real or perceived) arising from the existence of a \$10 million penalty, the threat of jail sentences would, of course, act as an even greater deterrent and make the ACCC more of an effective "decision-maker" than it is now.

However, there could be less objection to the continuance of the \$10 million penalty, or even the introduction of criminal sanctions for some kinds of conduct, if there were to be some process under the Act whereby businesses could seek declarations from the Court as to the legality or otherwise of proposed conduct, agreements or mergers. And I suggest that such a process would be reasonable (even desirable) in legislation that is as broad and uncertain as is the Trade Practices Act.

I would like this letter to be regarded as an addendum to my submission of 1 June, or as a further submission.

Yours faithfully,



(R. S. GILBERT)