Submission to the Trade Practices Review
by R K Evans LLM (UTS); FCPA
21 June 2002

This submission is made in response to the call for submissions in to the inquiry into the *Trade Practices Act 1974* being conducted under the chairmanship of Sir Daryl Dawson AC, KBE, CB.

My submissions stem from concerns arising from calls for imprisonment of persons found to have contravened certain provisions of the *Trade Practices Act 1974*. In summary, I am of the opinion that the use of pecuniary penalties and banning orders is preferable to the incarceration of executives for contraventions of Part IV of that Act. Further, I consider that more attention ought to be paid to the educating of executives as to their obligations under the Act and that this may be aided by redrafting some of the provisions within Part IV. I suggest the use of banning orders for executives found to have engaged in serious or repeated contraventions of Part IV. Finally, I make some observations concerning the imposition of penalties upon corporations, in relation to the gains made from contravening conduct and in relation to corporate groups.

1. The calls for imprisonment for Part IV contraventions

Particularly over the last 12 months or so there have been calls for the *Trade Practices Act 1974* ("the Act") to be amended to provide courts with the power to imprison persons who contravene a provision within Part IV of the Act.

So far as I am aware these calls appear to have come almost exclusively from persons within the Australian Competition and Consumer Commission ("ACCC"). In what appears to be the first significant statement by an officer of the ACCC on this subject, its Chairman, Professor Allan Fels, called for increased penalties, including imprisonment, for contraventions of certain provisions within Pt IV of the Act while delivering a speech on 9 June 2001 to an Australian Law Reform Commission conference on "*Penalties: Policy, Principles & Practices in Government Regulation"* held at Darling Harbour in Sydney. A summary of Professor Fels speech accompanied an ACCC Media Release issued on 8 June 2001 (see ACCC Media Release MR 131/01). In that media release the ACCC stated that it was not proposing that the criminal sanctions apply across the board to all breaches of the Act but just to defined acts of collusion. The ACCC specifically instanced conduct that is caught by s 45A (contracts, arrangements or understandings in relation to prices) and s 4D (exclusionary provisions). The ACCC stated that its call for stronger sanctions would not apply to small business or trade unions — it would be aimed at major business engaging in practices such as price fixing or market sharing.

It is my submission that the Act should not be amended to provide for imprisonment of any contraventions of Pt IV of the Act. I am of the view that more innovative approaches need to be developed to increase the level of compliance with the Act, rather than resorting to the use of gaols.

2. Imprisonment for price fixing or market sharing - the thin edge of the wedge.

The calls to date by the ACCC for imprisonment have been limited to price fixing and market sharing. Further, they have been limited to situations where such conduct is engaged in "*at the larger end of the economy*" (Fels, speech, 9 June 2001).

Such calls by the regulator must be seen as the thin edge of the wedge. If the calls by the ACCC for imprisonment were to succeed in respect to price fixing and market sharing by big business, it is not hard to envisage the making of subsequent calls for expanding the courts ability to imprison persons who engage in other contraventions of Part IV of the Act.

First it needs to be recognised that price fixing and market sharing are forms of conduct embodied in, but not exclusively encompassing all of the purview of s 45 and s 4D of the Act. Accordingly, to meet a call to provide for imprisonment would require those specific forms of conduct to be carved out of the existing provisions and placed in their own distinct sections of the Act. Not to do so would lead to a situation where the evidential burden which needed to be met so as to imprison an executive would become clouded by principals intended purely to meet a civil standard of proof.

Secondly, complications would arise in defining who was to fit within the concept of "*the larger end of the economy*". It would appear that such a criteria would inevitably lead to a need for the courts to apply subjective assessments of the size of a business within "*the economy"* (or maybe a particular participant within the relevant sector of the economy (ie the "relevant market")). The application of such subjective assessments could lead to a situation where a person is exposed to imprisonment based on the size of the company he or she works for as that company exists at a particular point in time, but not as it exists a month later. One only has to look at the definition of the "small proprietary company" in the *Corporations Act 200*1 and the observations made by commentators on that provision to appreciate the difficulties that would ensue. There can be no case in our society for incarceration to be based on such subjective measures.

It would be a nonsense to assume that the ACCC would not later call for an expansion of an ability to imprison those who contravene Part IV of the Act. The seeds of such thinking are already evident in the speech given by Professor Fels on 9 June 2001 where he called the extension of the civil penalties in Part IV to apply in Part V on the basis that "*The arguments that justified the application of civil penalties to Part IV are equally compelling in relation to Part V*." Regulators have a habit of calling for a change in one area, then later pushing for its application to other areas on the basis of uniformity of approach. It is not difficult to envisage subsequent calls for the courts ability to imprison being expanded to all contraventions of Part IV and for that to apply to all who contravene — irrespective of their size; or whether they are a trade union, professional person or otherwise.

It is noted that in respect of "*small business, the rural sector and the professions*" and the unions, Professor Fels said in his 9 June 2001 speech that "*The continuing dialogue on civil remedies will be of the utmost relevance to these sectors of the economy, but the debate on the need for imprisonment should not be side-tracked by baseless fears of heavy handed intervention in these areas.*" If continuing dialogue is seen by the ACCC as having a worthwhile role in those sectors, one must severely question why the same conclusion should no be drawn in respect of the players in all sectors of our economy.

3. Economic law

It must always be borne in mind that the provisions in Part IV of the Act are what is termed economic law. Unlike the conduct proscribed in other legislation, the conduct here mostly depends on the application of economic theory to arrive at conclusions as to things such what is the relevant market and what amounts to a substantial lessening of competition. Such assessments become the subject of lengthy submissions by counsel and expert witnesses before the court. One only has to consider the fact that the economists who give evidence in such cases often have widely differing views as to the proper conclusion to be drawn in any given circumstance. The time, effort and monetary resources spent in preparing for a trial which will turn on such considerations well and truly exceeds that which is typically available to an executive faced with the need to make a business decision.

4. Educative effect

A real problem comes then from the fact that the findings of a court in any given instance may not necessarily be instructive to other executives; as the economic considerations in a given case will rarely be mirrored in a subsequent situation in which an executive finds himself or herself. In other words, it may well lack the desired educative effect. One reason for that is that these executives rarely will see the market in the same terms as an economist (or a trade practices lawyer). They tend to see "the market" as a much wider concept; often as one which embraces all demand for goods and services within the country, a state or wide area (such as the metropolitan area of a capital city). In such circumstances, one must query what would be the "general deterrent" effect of potential imprisonment.

To have an effective deterrent effect, the outcome in a case must provide a descriptive message relating to a circumstance which is capable of ready recognition by an executive faced with an analogous fact situation. We can all identify with concepts like murder, manslaughter and causing grievous bodily harm. We all can get a clear mental image of the conduct in question when such things are mentioned. The outcome of a trade practices matter involving a contravention of Pt IV of the Act will frequently not result in the same clear mental image. It will thus not have the same educative effect, particularly where the decision appears to hinge on subjective assessments of a relevant market or a what amounts to a substantial lessening of competition.

The position is made harder by the fact that concepts which could be likely to conjure up a relevant mental picture are not described in the Act using the very terms which would have that effect. For example, the Act does not refer to "collusion", "price fixing", "market sharing", "market rigging" or "predatory pricing". Yet, these are the very appellations which are more likely to stick in the mind of the target audience.

Perhaps part of the solution to induce better compliance would be to recast the wording of the Act. It could be recast so that it suits its intended target audience, using of terminology which paints a picture in terms which match the fact situations in which they are likely to find themselves.

It appears that the ACCC could be suffering from a degree of frustration arising from an expectation of a greater level of compliance from "big business" compared to what is feels it is achieving. The regulator must recognise that those who comprise the class of persons who are likely to engage in contravening conduct change constantly, and so it becomes a never-ending quest to achieve compliance. Just because one's parents learnt how to read and write does not result in their offspring being borne with that ability. They have to learn those skills for themselves. So to is it necessary to educate new executives about trade practices compliance; it is a never-ending process. The frustration of the regulator in undertaking that task should not be vented through calls for imprisonment.

To that end, it is noted that, in a Treasury discussion paper released in August 2001, called for a clarification of the ACCC's research and education powers. In discussing proposals to amend the Act, the paper observed:

> *"Under paragraphs 28(1)(c) and (d), the ACCC can conduct research and disseminate information in relation to 'matters affecting the interests of consumers'. There is a concern that these words provide the ACCC with research and education powers that are not as broad as its investigative and enforcement powers and functions. An amendment is therefore being considered to replace these words with 'matters in relation to which the Commission has a power or function under this or any other Act'."*

It is submitted that an increased, and continuing, focus on education is a better option than that of considering imprisonment.

5. Banning orders for executives found to have engaged in contraventions

In my view, the Act should be amended to provide that a court, on the application of the ACCC, has the power to make an order banning a person from being involved in the management of any corporation generally or involved in the management of a company beyond a certain level of seniority. Such an order could be made for a specified period of time or for life.

Such an order should be able to be made where there has been a single contravention of Part IV of the Act in respect of which the court imposes a pecuniary penalty in excess of (say) $10,000. However, where a person is before the court for a second time (even if the person was merely injuncted), a banning order should be imposed by the court for a minimum period of (say) 3 years unless the court is satisfied that there are compelling reasons not to impose such an order.

That a regime is not too dissimilar to a regime found in the *Corporations Act 2001*. Section 206E of the *Corporations Act* provides that the Court may disqualify a person from managing a corporation for contraventions of that Act. A person may be disqualified under that section where they have at least twice contravened the *Corporations Act* while they were an officer of a body corporate. The Court may make such an order only upon an application being made by the Australian Securities and Investments Commission ("ASIC"). It is to be noted that both contraventions do not have to occur while the person was an officer of the one corporation. That section also allows for the disqualification of an officer where the corporation has twice contravened the *Corporations Act* and that officer had failed to take reasonable steps to prevent the contravention.

A register of banned and disqualified persons is maintained by ASIC in relation to persons banned or disqualified under the Corporations Act. The same register should be used to record the names of persons who have been banned from managing a corporations for reason of one or more contraventions of Part IV of the Act. To facilitate this may require amendments to either or both of the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001.*

In my view, the use of pecuniary penalties and banning orders is preferable to the incarceration of executives for contraventions which may turn on the subjective assessments which comprise economic evidence.

The imposition of pecuniary penalties on corporations

It is submitted that calls by the ACCC for pecuniary penalties to be more closely aligned to "*the unlawful gain or turnover of the offender*" are appropriate. However, recognition of the ability of an offender to pay should continue to be a factor. The rationale for this was considered by *Finkelstein* J in a judgment in which his Honour imposed penalties on some companies and their executives who had engaged in market sharing conduct in the distribution transformer market. In relation to one of the smaller companies, his Honour considered that in arriving at the penalty to be imposed on that company, given its size and profitability, concern was to be had to ensuring that the penalty would not affect its ability to trade. His Honour said it would be incongruous if a penalty imposed for such a violation was to have an anti-competitive effect by precluding the company from trading in that market: see *ACCC v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559.

However, the practical considerations in arriving at an appropriate penalty relative to the unlawful gain, turnover or size of the offender is not without its own difficulties, particularly when the company itself is part of a group.

As to the elements of gain, turnover and size, the decision of *Lindgren* J in *ACCC v Roche Vitamins Australia (2001) ATPR ¶ 41-809 to* demonstrates some of the difficulties that may be experienced in obtaining reliable information upon which to base a decision as to the appropriate penalty. At [34 – 36] of his judgment, his Honour noted that the submissions made by the parties to that case had not addressed by how much each of the three companies was better off as a result of its contraventions and what was the additional amount the market had paid to each company as a result of its contraventions, his Honour sought supplementary submissions on these aspects. Each of the three companies informed the Court that their accounting practices and records did not enable them to precisely answer the questions posited. Each supplied documents containing such information as was available from which inferences could have been drawn.

As to the group issue, in recent times differing views have been expressed. In *ACCC v Universal Music Australia Pty Limited (No. 2) (2002) ATPR ¶41-862*, *Hill* J expressed the following view:

> *"22. On behalf of the ACCC emphasis is placed upon the fact that each of Warner and Universal are wholly owned subsidiaries of multinational companies that are large and have significant overseas operations. That may be so. However, apart from the fact that the financial situation of the group, or for that matter the holding company of the group, is not in evidence, it is difficult to see why the size of a parent company should be relevant in determining the penalty payable by its subsidiary. It is the financial position of the respondent which is relevant, cf* Australian Competition and Consumer Commission v Cromford Pty Ltd (1998) ATPR ¶41-618 *per Lockhart J. It would be different if the conduct complained of involved an international arrangement between and Australian company and its overseas parent as was the case in* Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd (2001) ATPR ¶41-809 *when the relationship would be germane to the actual offence."*

In *ACCC v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559 *Finkelstein* J considered that the size of a parent company could not be ignored when assessing the penalty to be imposed upon its subsidiary; otherwise corporations could easily organise their affairs so that if found guilty of criminal conduct, the penalty could be kept to a minimum.

In my view there can be many legitimate reasons for business operations to be run through subsidiary companies (particularly where operations are conducted in other jurisdictions). Accordingly, the overall size of a group should only become relevant where there is reasonable evidence that the conduct involved more that one part of the group or there was reasonable evidence to suggest that a subsidiary structure had been created for the purpose of minimising potential penalties. With due respect to *Finkelstein* J, in my view a theoretical possibility as to the motive for a structure should not suffice. To adopt the words of *Hill* J, the relationship would be germane to the actual offence.

One difficulty which can arise from amending the Act to allow for pecuniary penalties to be imposed on corporations relative to their unlawful gain, turnover or size is that one can lose some the educative effect which arises from discussing a penalty of $10 million, The figure is large and specific, it therefore tends to stick in the mind. To obtain the best outcome, perhaps a novel approach is needed — the retention of the existing pecuniary penalty of $10 million and the creation of a further penalty, an “exemplary penalty” which can be in addition to the pecuniary penalty and based on evidence of unlawful gain or turnover (not on size *per se*).

R K Evans
21 June 2002