



File: A1309 ME/SP    **The PHARMACY GUILD of AUSTRALIA**  
**NATIONAL SECRETARIAT**

1 September 2003

The Secretary  
Senate Economics References Committee  
Room SG64  
Parliament House  
Canberra ACT 2600

Dear Sir

**Inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business**

This submission is made by The Pharmacy Guild of Australia (the 'Guild').

The Guild is a national employers' organisation representing some 4,500 community pharmacies, which are small retail businesses operating throughout Australia. The Guild is also a member of the Fair Trading Coalition (the 'FTC'), which was formed by a number of small business representative organisations for the purpose of presenting a small business view to the Dawson Committee in its 'Review of the Competition Provisions of the Trade Practices Act'. The FTC maintains that further amendment to the *Trade Practices Act* (the 'Act') is required to achieve fair competition for the benefit of all Australians and the Guild strongly supports the submission by the FTC in this Inquiry.

However, the Guild also takes this opportunity to make the attached additional submission in relation to section 46 of the Act and present an alternate formulation for legislative amendment to that provision.

In the face of increasing globalisation and market concentration, an effective prohibition on *any* misuse of market power is imperative for ensuring a fair, competitive trading environment that benefits all Australians, consistent with the objectives of the Act. Section 46 of the Act in its current form does not effectively deal with abuses of market power and legislative amendment is required to clarify *when a business has substantial market power* and to delineate specific *anti-competitive behaviour* that falls within the scope of the prohibition.

The proposed amendments to section 46 of the Act will not only improve the competitiveness of the small business sector, but will more generally promote fair competition by all businesses, large and small, for the benefit of all Australians.

Yours sincerely

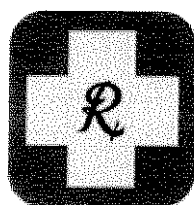
**Stephen Greenwood**  
**Executive Director**

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**Inquiry into the Effectiveness of the  
*Trade Practices Act 1974*  
in Protecting Small Business**

**Submission by**



**The  
PHARMACY  
GUILD of  
AUSTRALIA**

**August 2003**

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## 1. Introduction

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This submission is made by The Pharmacy Guild of Australia (the 'Guild') and addresses section 46 of the *Trade Practices Act* (the 'Act') in terms of paragraphs (a) and (2) of the Terms of Reference.

The Guild is a national employers' organisation representing some 4,500 community pharmacies, which are small retail businesses operating throughout Australia. Further information about the Guild and its members is set out in Appendix 1.

### **Fair Trading Coalition Submission**

The Guild is a member of the Fair Trading Coalition (the 'FTC') which was formed by a number of small business representative organisations for the purpose of presenting a small business view to the Dawson Committee in its 'Review of the Competition Provisions of the Trade Practices Act'. The FTC maintains that further amendment to the *Trade Practices Act* (the 'Act') is required to achieve fair competition for the benefit of all Australians and the Guild strongly supports the submission by the FTC in this Inquiry. The FTC recommends a package of reforms to the Act to enhance competition and fair trading for the welfare of all Australians. Those reforms are:

- (a) an effective misuse of market power provision (section 46);
- (b) an effective and universally applied fair trading provision (section 51AC);
- (c) greater emphasis by Government on the use of mandatory codes of conduct to regulate particular sectors of the economy to raise business standards of conduct;
- (d) an accessible and meaningful notification process for small business collective bargaining; and
- (e) a number of other measures as outlined in sections 5.2 to 5.7 of the FTC submission.

The Guild supports the recommendations of the FTC *but wishes to make additional and separate submissions in relation to section 46 of the Act.*

### **The Guild's Submission**

Section 46 does not effectively prohibit misuses of market power. The FTC in its submission identified a number of weaknesses in the present formulation of section 46. The Guild shares the FTC's concerns, specifically the demonstrable uncertainty in identifying:

- (a) when a business has a substantial degree of power in a market; and
- (b) the scope of anti-competitive behaviour which falls within the ambit of the provision.

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The Guild proposes an alternate formulation to section 46 which it believes will promote an environment in which all businesses, large and small, can compete fairly for the benefit of all Australians.

## 2. Section 46

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Section 46 of the Act presently prohibits a corporation *with a substantial degree of power in a market* from taking advantage of that power for a proscribed anti-competitive purpose.

The legislative history of the present section 46 is important in understanding what the section was intended to achieve, namely:

- restraining misuse of power by major participants in concentrated markets; and
- protection for small business.

In 1986, the government took deliberate steps to lower the threshold of section 46 and to extend its application beyond monopolists who substantially controlled a market. Essentially the amendment to the legislation imposed prohibitions on corporations with a 'substantial degree of power in a market'. The Attorney General at the time, Mr Lionel Bowen, in his second reading speech to the House said:

*'As well as monopolists, section 46 will now apply to major participants in an oligopolistic market and in some cases, to a leading firm in a less concentrated market.'*

The Government clearly intended that *small business* would benefit from these amendments. The Attorney General specifically said in his second reading speech:

*'Accordingly, an effective provision controlling the misuse of market power is most important to ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors.'*

Nevertheless, while section 46 is about protection of competitors, size is not intended to be the overwhelming consideration; the concern is 'market power' and the misuse of that market power. Any business with a substantial degree of power in a market, regardless of whether it is characterised as a large firm or a small firm, which misuses that power in a manner prohibited under the Act, should be restrained. The intention of the government in 1986 is entirely consistent with this proposition and this is reflected in the comments of the Attorney General, Mr Bowen, in his second reading speech:

*'Section 46 in its proposed form, which will be described as misuse of market power rather than monopolisation, is not aimed at size or at competitive behaviour as such of strong businesses. What is being aimed at is the misuse by a business of its market power.'* (emphasis added)

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The Explanatory Memorandum for the Trade Practices Revision Bill 1986 contained the following statement:

*'A corporation having the requisite degree of market power is not prohibited from engaging in any conduct directed to one or other of the objectives set out in paras. 46(1)(a), (b) and (c). Such a prohibition would unduly inhibit competitive activity in the market-place. This section is not directed at size as such, nor as competitive behaviour as such. What is prohibited, rather, is the misuse by a corporation of its market power.'* (original emphasis) (para 47)

The Guild endorses these comments but contends that the application of section 46 by the courts has proved to be of limited effectiveness in achieving the protection intended by government.

There are two fundamental difficulties with the present formulation of section 46:

- identifying when a business has a substantial degree of power in a market; and
- identifying the scope of anti-competitive behaviour that falls within section 46.

The first difficulty was highlighted in the recent High Court decision in *Boral Besser Masonry Limited v ACCC* [2003] HCA 5 ('Boral decision'). This case emphasises the difficulty in establishing the *threshold of market power* that a firm must possess in order to fall within the scope of the provision.

As to the second, there is acknowledged evidentiary difficulty in proving, in courts of law, that a particular corporation did something for a particular *purpose*.

The Guild's alternate formulation of section 46 [**set out in Box 1**] introduces certainty in identifying when a firm falls within the ambit of section 46:

- by *deeming the existence of market power* in certain well recognised circumstances; and
- *proscribing conduct* which, if engaged in, will give rise to a rebuttable presumption that the corporation has taken advantage of its market power for a prohibited purpose.

## 2.1 Substantial degree of market power

The Guild supports the introduction of a structural definition of when a corporation has a 'substantial degree of power in a market'. This formulation will provide certainty as to when a business has a substantial degree of power in a market for the purposes of section 46.

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The Guild's formulation introduces a deeming provision, as set out in sub-section 46(1AA) in **Box 1**, which utilises market share or concentration thresholds adapted from the ACCC Merger Guidelines. The Merger Guidelines are well understood and have been widely applied in the merger context.

Essentially the deeming provision has the effect that if a firm has an identified market share (15%) and the top four firms in that market have 75% or more of the relevant market the firm has a *substantial degree of power*. The second limb deems a firm which has a 30% share of the market to have the requisite *substantial degree of power*.

The second limb (sub-section 46(1AA)(b)) diverges slightly from the merger guidelines, adopting a 30% share of the market as the relevant threshold. This threshold is appropriate to enliven section 46 where the market is diversified and not concentrated in the sense contemplated in sub-section 46(1AA)(a).

The deeming provision suggested by the Guild is not exhaustive and operates without limiting the generality of section 46. Regard can still be had to the body of case law identifying factors relevant to determining market power, such as barriers to entry and the extent of vertical integration; it follows that a corporation with market share below the deemed thresholds could still be found to have a substantial degree of power in a market.

*Essentially though the Guild's formulation introduces certainty to the threshold test which must be satisfied to enliven the application of section 46.*

## 2.2 Taking advantage of power for a purpose

Certain predatory and discriminatory conduct when engaged in by a firm with a substantial degree of market power should reasonably be taken to be motivated by one of the purposes proscribed under sub-section 46(1). The well known and clearly identified instances of such conduct are 'predatory pricing' or more precisely *pricing below avoidable costs* and *refusal to supply*.

Nevertheless, as recognised by the High Court in the Boral decision, there may be rational or legitimate business reasons for engaging in conduct that would otherwise contravene the Act, such as benefits to a wider company group or bearing short term losses while waiting for market conditions to improve. Accordingly, the Guild supports proscribing conduct in a new sub-section 46(8) which, if engaged in, will give rise to a rebuttable presumption that the corporation has taken advantage of its market power for a prohibited purpose.

The approach in sub-section 46(8)<sup>1</sup>, provides that a corporation is taken to have *taken advantage of its power* for a purpose referred to in sub-section 46(1) *if the corporation supplies goods or services at a price less than the avoidable cost of supply* of those goods or services by that corporation, *unless a contrary purpose is established*.

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<sup>1</sup> modelled on the existing sub-section 46(7)

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The pricing point is 'avoidable cost'. Prima facie, corporations that supply goods or services below the marginal or avoidable cost of those goods or services, would have articulated in business plans or other documents a conscious reason for adopting that particular pricing strategy. Normally, corporations would seek to recover the costs of production plus at least a reasonable rate of return and normally a rate of return dictated by both the opportunities in the market and the constraints of competition. Clearly, a corporation will sometimes price below marginal cost so as to preserve market share, particularly in the face of a price war. The imperatives of the particular circumstances of market conduct might well provide a corporation, with substantial market power, with a legitimate commercial purpose for that conduct.

Nevertheless, one might legitimately start from the position that supplying goods or services below avoidable cost is uncommercial. When the corporation also enjoys a substantial degree of market power, the *combination of that* market power and *that* conduct should reasonably be taken to be motivated by one of the purposes already recited in section 46(1). The corporation should then have an opportunity, consistent with many existing statutory models, of *rebutting* that initial statutory position, by demonstrating a contrary purpose.

Similar considerations apply to refusal to supply by a firm which has a substantial degree of power in a market.

The Guild's formulation essentially provides that if either of these species of conduct is engaged in by a firm with a substantial degree of power in a market, such conduct amounts to taking advantage of that power for a prohibited purpose under section 46, unless a contrary purpose is established.

### **3. Conclusion**

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The Guild supports strengthening section 46 of the Act to ensure it effectively prohibits *any* misuse of market power. This can be achieved by deeming when a business has a substantial degree of power in a market, and proscribing conduct which, if engaged in, will give rise to a rebuttable presumption that the corporation has taken advantage of its market power for a prohibited purpose.

The Guild submits that its suggested amendments will not only improve the competitiveness of the small business sector, but will promote fair competition by all businesses, large and small, for the benefit of all Australians.

## **Box 1: Suggested amendments to section 46**

### **Existing section 46(1):**

*A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:*

- (a) *eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
- (b) *preventing the entry of a person into that or any other market; or*
- (c) *detrerring or preventing a person from engaging in competitive conduct in that or any other market.*

### **Proposed new sub-section 46(1AA):**

*Without limiting the generality of this section, a corporation shall be deemed to have a substantial degree of power in a market in circumstances where:*

- (a) *the combined market share of the four (or fewer) largest firms is 75% or more and the corporation supplies at least 15% of the relevant market; or*
- (b) *the corporation supplies 30% or more of the market.*

### **Proposed new sub-section 46(8):**

*Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation shall be taken to have taken advantage of its power for a purpose referred to in sub-section (1), if:*

- (a) *the corporation supplies goods or services at a price less than the avoidable cost of supply of those goods or services by that corporation; or*
- (b) *the corporation refuses to supply goods or services,*

*unless a contrary purpose is established.*

### **Proposed new sub-section 46(9):**

*For the purposes of sub-section (8), a corporation is taken to have priced goods or services below avoidable cost if the revenues it obtains, or could reasonably expect to obtain, from the supply of those goods or services is less than the costs it could have saved, or could reasonably have expected to save, had it not supplied those goods or services.*



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## APPENDIX 1

### THE PHARMACY GUILD OF AUSTRALIA

The Guild is a national employers' organisation registered under the *Workplace Relations Act 1996*, which functions as a single legal entity rather than a federation. It was first established in 1928 and currently has branches in every State and Territory. The Guild's members are the pharmacist proprietors of some 4,500 community pharmacies, which are small retail businesses operating throughout Australia. Almost 90% of all pharmacist proprietors are Guild members.

Community pharmacy makes a significant contribution to the Australian economy with an annual turnover of \$8 billion and \$200 million in tax revenue, employing some 15,000 salaried pharmacists and 25,000 pharmacy assistants. Through the Pharmacy Assistant Training Scheme, the Pharmacy Guild provides a significant career path for young Australians, particularly young Australian women.

The Guild's mission is to service the needs of proprietors of independent community pharmacies. The Guild aims to maintain community pharmacies as the most appropriate primary providers of health care to the community through optimum therapeutic use of medicines, medicine management and related services. A range of services are provided to members including:

- (c) to negotiate an ongoing Agreement between the Government and the Guild to facilitate suitable conditions for approved pharmacies to dispense under the PBS, including an appropriate level of remuneration;
- (d) to maintain close liaison and negotiation with governments, manufacturers, wholesalers and other organisations involved in the health care delivery system;
- (e) to implement strategies to enhance the professional role of pharmacists and to assist community pharmacists practising in rural and regional areas of Australia to ensure that the current network of community pharmacies in Australia is maintained; and
- (f) to provide economic and management information to community pharmacists to assist them in making their pharmacies more efficient