

# **THE PHARMACY GUILD OF AUSTRALIA**

**SUBMISSION TO THE**

**REVIEW OF THE  
TRADE PRACTICES ACT**

**JULY 2002**



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## Summary and Recommendations

1. The Pharmacy Guild of Australia represents 1,5000 community pharmacies in the small business sector across Australia. Guild members employ 15,000 salaried pharmacists and 25,000 pharmacy assistants.
2. The Pharmacy Guild is a member of the Fair Trading Coalition which represents small business associations and which argues for reform of the competition provisions of the Trade Practices Act to enhance competition for the welfare of all Australians. The Pharmacy Guild strongly supports the following reforms:
  - (1) It was the original intention of National Competition Policy that the public interest must be the sole determining factor in any decision relating to national competition policy. The Coalition believes that a formal restatement of that imperative is absolutely essential.
  - (2) It is recommended that the TPA should be amended to include a provision within the Act to allow small business operators and/or their representatives to collectively negotiate with their suppliers/buyers, including the right of small business to collectively refuse to do so (that is, a permissible boycott arrangement for small business).
  - (3) It is recommended that section 46(1) of the Trade Practices Act be amended to add an effects test. It is also recommended that the Act be amended to allow for authorisation of conduct which might otherwise breach s46.
  - (4) It is recommended that section 46 of the Trade Practices Act be specifically amended to proscribe selling at unreasonably low prices.
  - (5) It is recommended that section 46 of the Trade Practices Act be amended to provide the Australian Competition and Consumer Commission with the power to issue a 'cease and desist' order in circumstances where corporations are thought to have misused their market power.
  - (6) It is recommended that the Trade Practices Act be amended to provide the Australian Competition and Consumer Commission with the power to seek a divestiture order where a corporation has misused its market power.
  - (7) It is recommended that:
    - there be no change to the substantial lessening of competition test in section 50 of the Trade Practices Act;

- the merger authorisation process and the subsequent appeal process be amended as outlined in section 4.7.1;
  - the Trade Practices Act should clearly recognise the voluntary notification system and also provide that where a merger is found to breach the Act and wasn't notified to the Commission additional mandatory penalties should apply in respect of the breach of s50;
  - the process for accepting s87B undertakings should be made more transparent, with the Commission being required to consult with all interested parties about the nature of the proposed undertakings before those undertakings are accepted by the Courts;
  - the Federal Minister with responsibility for the ACCC be given the power to refer to the ACCC for an authorisation assessment proposed or possible industry-wide structural reform matters; and
  - where market concentration has passed a nominated threshold, for example, CR4, the Act should be amended to allow the ACCC to take into consideration previous mergers and acquisitions by an acquirer and to aggregate the effect of previous mergers and assess the resultant state of competition in any relevant market; and
  - there should also be an amendment to the Trade Practices Act so as to provide that where a company reaches a certain market share, any further acquisition must be notified to ACCC and assessed under the proposed amended merger authorisation test.
- (8) It is recommended that the Government ensure, if necessary by legislative amendment, that the Trade Practices Act apply to all Government agencies' commercial dealings.
- (9) It is recommended that the current penalty regime in the Act be amended as follows:
- criminal penalties (jail terms) should be available to the Courts to apply to individuals for breaches, by big businesses, of s45 of the Act. The current civil prosecution regime should be maintained, and the ACCC would therefore have the option of commencing legal action under a civil or criminal regime;
  - corporations should not be able to indemnify their employees in relation to any penalties that might be imposed on them by the Courts for breaches of Part IV of the Trade Practices Act and those penalties must be paid by the individuals concerned;
  - corporate and individual parole to be available to the Courts as a specific remedy; and
  - the Act should also be amended to provide for pecuniary penalties in relation to breaches of Parts IVA and IVB.

These are currently not able to be sought by the ACCC in its enforcement of the law.

- (10) It is recommended that section 51AC of the Trade Practices Act should be amended to proscribe as per se offences the following conduct:
- unilateral variation of contract or associated documents;
  - the termination of contracts by one party without just cause or due process (*see earlier comments on repudiation*);
  - the bringing into existence of documents or policies after the signing of the contract which are then binding and which can also be used to vary the original agreement or contract; and
  - the presentation of 'take it or leave it' contracts or agreements.
- It is also recommended that misuse of market power should be listed as one of the 'allowable' matters under s51AC.
- (11) It is recommended that the Government should make use of the current provisions in the Trade Practices Act relating to codes of conduct to regulate sectors of the economy which have specific problems which cannot, or should not be addressed through generic legislation.
- (12) It is recommended that a joint standing committee of the Parliament be established to oversight the Australian Competition and Consumer Commission. That committee should assume the current review activities of the House of Representatives Standing Committee on Economics, Finance and Public Administration in relation to the ACCC.
- (13) It is recommended that the ACCC's role in relation to small business should be strengthened as follows:
- the Trade Practices Act should be amended to specifically provide that the ACCC handle complaints and take action on systemic issues;
  - to provide for the appointment of a second small business commissioner to the Commission. It would be appropriate that the Deputy Chairman be one of the two small business Commissioners;
  - to establish within the Commission a Small Business as Consumers Division.
- (14) It is recommended that the Government appoint an adequately resourced Small Business Ombudsman.

3. While all of the Fair Trading Coalition's recommendations are strongly supported by the Guild, the following recommendations have priority in terms of Guild members:

- Recommendation 1 - the public interest must be the sole determining factor in any decision relating to national competition policy
- Recommendation 2 - Collective negotiations by small businesses
- Recommendations 3-6 - Abuse of market power
- Recommendation 9 - Criminal penalties
- Recommendation 10 - Unconscionable conduct
- Recommendation 13 & 14 - ACCC's small business role

4. The Pharmacy Guild of Australia also seeks the reinstatement of section 45A(3) which was removed from the Trade Practices Act in 1995 in order to permit trade associations to issue genuine recommended prices where there are at least 50 suppliers or purchasers of goods and where there is no enforcement of such prices.

**45A(3) Sub-section (1) does not apply in relation to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, to the extent that the provision recommends or provides for recommending, or would recommend or provide for recommending, the price for, or a discount, allowance, rebate or credit in relation to, goods or services, where the parties to the contract, arrangement or understanding, or the proposed parties to the proposed contract, arrangement or understanding, include -**

- (a) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who supply, in trade or commerce, goods or services to which the provision applies; or
  - (b) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who acquire, in trade or commerce, goods or services to which the provision applies.
5. The Pharmacy Guild of Australia seeks an amendment to section 51AC of the Trade Practices to change "unconscionable" to "unfair" in order that the section achieves its regulatory objective and at the same time provide the Federal Court with 40 years jurisprudence of the Industrial

Relations Commission of New South Wales in interpreting section 106 and its predecessor provisions based on unfairness.

## 1. Introduction

The Pharmacy Guild is a member of the Fair Trading Coalition (FTC) which represents small business associations which argues for reform of the competition provisions of the Trade Practices Act to enhance competition for the welfare of all Australians. The Guild strongly supports the recommendations contained in the FTC submission to the review of the Trade Practices Act. This submission by the Guild is a separate submission and is complementary to the FTC submission.

While all of the FTC's recommendations are strongly supported by the Guild, the following recommendations have priority in terms of Guild members:

- |                        |   |   |
|------------------------|---|---|
| Recommendation 1       | - | the public interest must be the sole determining factor in any decision relating to national competition policy |
| Recommendation 2       | - | Collective negotiations by small businesses   |
| Recommendations 3-6    | - | Reforms to address abuse of market power  |
| Recommendation 9       | - | Criminal penalties  |
| Recommendation 10      | - | Unconscionable conduct  |
| Recommendation 13 & 14 | - | Strengthening the ACCC's small business role  |

This submission also contains a specific recommendation that section 45A(3) of the Trade Practices Act which was removed in 1995 be reinstated in order that public interest considerations, including public health issues are adequately recognised in the Trade Practices Act albeit in a general provision. It is a disappointing feature of the post Hilmer reforms that small business policy was lacking in circumstances where rapid structural change in the form of micro economic reform and globalisation were accelerating without necessary safeguards for small business. This review of the Trade Practices Act provides an opportunity to address this imbalance.

## 2. Pharmacy Guild

The Pharmacy Guild of Australia was established in 1928, bringing together several small retail pharmacy organisations then operating in various States. The Guild is registered under the *Workplace Relations Act 1996* as a national employers' organisation which functions as a single legal entity rather than a federation. Its members are the pharmacist proprietors of some 4,500

community pharmacies, which are small retail businesses spread 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 development of policy is the responsibility of the Guild's supreme governing body, the National Council, on which all State and the two Territory Branches are represented. Branch activities centre on the day-to-day servicing of members in such fields as industrial relations, marketing, staff training, and product and economic information.

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. The Guild provides a range of services to members including:

- 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;
- to maintain close liaison and negotiation with governments, manufacturers, wholesalers and other organisations involved in the health care delivery system;
- 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
- to provide economic and management information to community pharmacists to assist them in making their pharmacies more efficient

### **3. Pharmacy Wholesaling Landscape**

As small businesses in a retail environment, pharmacies typically deal with suppliers in three main categories: wholesale suppliers of products for resale purposes, landlords and financial institutions. To varying degrees, all three providers may potentially engage in conduct in their relationship with community pharmacists which may be deemed to be a breach of s46 of the Act.

Pharmacies stock products sourced from approximately three hundred manufacturers and agents nationwide, ranging from prescription products



covered by the Commonwealth Pharmaceutical Benefits Scheme (PBS) to cosmetics and personal care products. Around fifty per cent of pharmacy turnover comprises government outlays on the PBS. While at first glance such a large number may not indicate any significant concentration of market power, in reality the market is somewhat less competitive, for instance, in respect of PBS medications for which there are no generic substitutes. Once such a prescription drug has been approved for listing with no generic substitutes, concentration is substantially increased within that specific market space.

Nor is such concentration limited to prescription drugs. Well established cosmetic brands sometimes exploit their market power when dealing with smaller pharmacies.

The vast majority of manufacturers supply to pharmacies through wholesalers. Approximately eight five percent of products distributed through pharmacies are sourced through wholesalers. Very few suppliers listed on the PBS supply direct to pharmacy.

There are essentially three main supply alternatives to community pharmacy: full line wholesaling, short line wholesaling and direct distribution. Each provide a distinct range of services to pharmacies and each are utilised to a greater to lesser extent by pharmacists depending on location, convenience and trading terms.

The three major full line wholesalers in Australia – Mayne/Faulding, Sigma and API – all stock and supply the full range of PBS items and provide a range of essential services to community pharmacies to ensure timely and efficient distribution of PBS medications. As part of this service, twice daily deliveries are not uncommon. Moreover, for urgent ethical supplies, orders are arranged either by courier or by direct pharmacist pick-up. A variety of other services are also provided by the full line wholesalers including financial guarantees and banner memberships such as AMCAL, Guardian, Chemmart and Soul Pattinson.

Short line wholesalers, on the other hand, typically stock and supply a more limited range of PBS items, focusing in particular on the high turnover items. Deliveries are certainly less frequent than full line wholesalers (often monthly) and more generous trading terms can be offered. It is not uncommon for pharmaceutical manufacturers to deal directly with short line wholesalers if they wish them to stock a particular item. Generous trading terms are offered to encourage this practice which allows the short line wholesalers to offer commensurate terms to pharmacists. Manufacturers rarely enter into such arrangements with full line wholesalers.

Direct distributors is the term used to describe manufacturers who distribute some or all of their products direct to pharmacies. These are generally the four major generic manufacturers, although two brand manufacturers also supply direct. As with short line wholesalers, direct distributors supply product in bulk, and less frequently than full line wholesalers. Neither short line

wholesalers nor direct distributors supply pharmaceuticals 'on demand' i.e. same day delivery. This service is unique to full line wholesalers.

The ability to supply the limited range of fast moving items and the lower overheads, which follow as a result, allow short line wholesalers and direct distributors to offer significantly more generous trading terms to pharmacists than full line wholesalers.

#### 4. Problem Areas for Pharmacists

The microeconomic reforms policies of successive Federal Governments and increasing globalisation of the world economy has resulted in increasing levels of concentration in certain industries in the Australian economy. In addition, the privatisation of Government monopolies while allowing for private sector competitors, often leaves competition in an environment where there are substantial barriers to entry having regard to infrastructure requirements and competition to a dominant entity with substantial market share with a small number of others seeking to compete. The traditional argument by representatives of big business is that higher concentration leads to economies of scale leading firms particularly those which are large in absolute size to reduce costs of production and to therefore compete better in international markets and to provide lower consumer prices. It must be recognised however, that in the absence of effective competition, there is no guarantee that this will occur or that any benefits that are derived are passed on to the community.

While the existence of a higher degree of concentration in an industry does not necessarily result in anti-competitive practices, it does create possibilities for anti-competitive conduct including collusion and abuse of market power. It is accepted competition policy in international terms that monopolistic and monopsonistic practices are more likely and competitive behaviour less likely, where a few large firms account for the major share of an industries output, compared to a situation where even the largest firms are relatively unimportant. In its 1979 report entitled "*Concentration and Competition Policy*" the OECD's report of the Committee of Experts on Restrictive Business Practices stated:

***"Market concentration, on the other hand, refers to the share possessed by relatively small number of the largest firms in an individual market or industry. It is the latter which is of primary importance in competition theory and for the enforcement of competition legislation. In addition, concentration has both static and dynamic aspects. The static aspect refers, for example, to the market share of a small number of the largest firms at a specific point in time, while the dynamic aspect relates to the manner in which this market share has increased or decreased over time.***

...

***It has been recognised that the expression "competition" is multi-dimensional and includes not only factors such as the number of firms, and price and output levels, but also others such as inequality of firm sizes, innovation and barriers to entry of new firms. Thus the measurement of market concentration is just the first step, though an essential one, in evaluating the state of competition.***

...

**Moreover, where an industry is highly concentrated, particularly in a situation where barriers to entry exist, the lack of competition is likely to affect adversely the internal efficiency of firms. This is especially likely when profits are securely set at levels which are regarded as satisfactory by management. There may be a reduction in the pressure for continuous improvement of processes and products, and technical backwardness may occur, together with the lack of innovation; all of these may tend to adversely affect international trade. Improvements in managerial efficiency may be discouraged by higher concentration, also adding to costs and prices. If high concentration does weaken the competitive process, then it could also lead to further reductions in economic welfare by increasing profits, thus adversely affecting the distribution of income.**

...

**Another limitation upon the market power of firms in concentrated industries arises from the presence of countervailing power among their suppliers, or among the firms purchasing from them, such as the purchasing power of large retailers or nationalised industries, and their access to other suppliers or their ability to set up plants of their own. Countervailing power, however, does not guarantee more efficient performance in production. In spite of these limitations, the structure of an industry, as characterised by concentration, is likely to be an important determinant of its market behaviour and its economic performance."**

#### **4.1 Abuse of Market Power in Concentrated Industries**

Complaints and surveys of disputes conducted by the Guild reveal that there is a nexus between industry concentration and complaints by pharmacists. The three key problem areas are the provision of finance to pharmacists where there is little competition among finance providers and where the market is concentrated; complaints relating to commercial tenancy arrangements particularly in shopping centres where there is one landlord; and complaints relating to contractual arrangements with suppliers where there is a high degree of concentration among three key suppliers.

In 1995 the Guild conducted a survey of disputes by its members which revealed that:

1. 62.5% of respondents had complaints relating to commercial tenancy arrangements,
2. 28% of respondents had complaints relating to finance arrangements, and

3. 24% of respondents had complaints relating to contractual arrangements with suppliers.

It should be noted that only 69 respondents representing 29% of a total of 234 disputes were satisfactorily resolved. It is significant that less than one third of disputes were resolved which tends to suggest that complaints in these highly concentrated industries are substantially unaddressed. In terms of economic and competition theory, this is not surprising given the lack of countervailing power of pharmacists as small business operators.

The nexus between the role of section 46 in prohibiting abuses of market power and the promotion of fair trading conduct is self evident to small business operators such as pharmacists who are purchasers of goods and services from companies in concentrated industries. The ACCC in its submission recognised this nexus when it stated:

**"Perhaps more so than the other prohibitions in Part IV, s.46 is also directed towards the promotion of fair trading. The precise boundaries of this policy objective are difficult to draw. There continues to be considerable debate about the scope of this policy objective. It has been considered on many occasions in the 100-year history of anti-trust law in the US and has often been discussed in the Australian context. It has been argued that the fair trading objective might include:**

- ◆ the protection of small business from illegitimate competition by large competitors
- ◆ the protection of ease of entry to business or markets
- ◆ a concern about the accumulation of economic power by large corporations
- ◆ the encouragement of fair trading in business

**Despite frequent policy discussion, the fair trading objective has not yet been given definition through judicial analysis. In *Queensland Wire Industries v BHP*, Chief Justice Mason and Justice Wilson stated:**

**The object of s.46 is to protect the interest of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.<sup>99</sup>**

**The Commission believes that a fair trading objective is promoted by both s.46 and the other prohibitions of Part IV and that this is consistent with the competition objectives of Part IV. Smaller and more vulnerable firms are entitled to protection under Part IV from non-competitive conduct of**

**rival firms that is aimed at or has the effect of harming smaller firms. Conduct engaged in by firms that possess substantial market power and that does not conform to the norms of competitive markets is inherently unfair.**

**It is argued in this submission that if the law does not even prohibit large firms with substantial market power from taking advantage of it with the effect of damaging competition – by virtue of such actions as an anti-competitive refusal to supply, anti-competitive predatory behaviour, anti-competitive leveraging of market power in one market to damage competition in another market – the law is not only deficient as a matter of economic policy, but deficient in relation to the above objectives."**

The Guild also points out that since the Queensland Wire case the objectives of the Trade Practices Act were amended to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. The High Court will need to recognise the changed and broader objectives which include fair trading in its further consideration of section 46.

#### **4.2 Unfair Trading Practices**

In recent years the Guild has received a number of complaints in areas where its members are purchasers of goods or services in highly concentrated industries. Examples of such complaints include:

1. terms and conditions of trading offered to pharmacists which are oppressive and where there has been no preparedness to negotiate changes,
2. terms and conditions of supply proposed by a pharmaceutical manufacturer which were oppressive and where there was no preparedness to negotiate changes,
3. terms and conditions imposed on pharmacists which were not subject to any negotiation by a provider of a health care product which pharmacists acquire to provide as part of a Government health care program. The product is supplied in the public interest without any margin being added by pharmacists. Despite representations, the supplier refused to amend any of its terms and conditions, and
4. unreasonable terms of trade imposed by a cosmetic supplier with substantial market power where there was no preparedness to negotiate terms.

The Government's package of fair trading reforms which were implemented in 1998, provided for the first time, significant protections for small business

operators. The package was comprehensive and included a prohibition against unconscionable conduct in small business transactions, a mandatory Franchising Code of Conduct, appointment to the ACCC of a new Small Business Commissioner, and the appointment of a Mediation Adviser to assist in the resolution of franchising disputes. Some three and a half years later, it is timely to assess the progress of these reforms. In doing so, it should be noted that the reforms did not include any amendments to the abuse of market power provision of the TP Act although there is a strong relationship between anti-competitive conduct in concentrated industries and exploitive conduct in relation to small business suppliers or purchasers.

As stated in the explanatory memorandum of the **Trade Practices Amendment (Fair Trading) Act 1998**, the regulatory objective is to address the affect on small business of:

- information asymmetries in negotiation of contracts (inadequate or unclear disclosure),
- inability to understand documents,
- unfair contract terms, and
- unfair conduct within commercial relationships.

While the Reid Committee had recommended that the TP Act prohibit "unfair" conduct, the Government took a more conservative approach and introduced a provision which prohibited "unconscionable" conduct. Despite this conservative approach, some large business interests criticised the legislation and expressed concerns about lack of commercial certainty and questioned the ability of the courts to interpret the new unconscionable conduct provision. In the *Australian Financial Review* of 1 December 1998 where a partner of Gadens Lawyers is reported as stating that section 51AC "could disrupt most commercial contracts if the courts decided to interpret it in a strict manner". Such concerns have proved to be unfounded, as for more than forty years, the Industrial Relations Commission in New South Wales has set aside contracts which are "unfair, harsh or unconscionable".

Not surprisingly, since the introduction of section 51AC, the sky has not fallen in and the ACCC has been forced to take a number of actions against landlords and franchisors who have not complied with the new standards. For example, in *ACCC v Simply No-Knead (Franchising) Pty Ltd*, Sundberg J. held that the conduct of a franchisor towards its franchisees was unreasonable, unfair, bullying and thuggish and was unconscionable in terms of section 51AC.

Despite the passage of three and a half years since the new section's introduction, small business does not have the advantage of clear statements from the Federal Court as to what constitutes unconscionability. This lack of certainty is demonstrated in the Legal Advisers' Guide to Franchising published by CCH which in the absence of numerous section 51AC cases is forced to refer to the equitable common law doctrine as well as the other unconscionable conduct provisions contained in the TP Act. In addition, a Sydney barrister has stated that the *Simply No-Knead* case is illustrative of

the seriousness of the conduct that needs to be established before a Court will provide relief pursuant to section 51AC.

In addition, the Cheap As Chips franchise case also demonstrates the seriousness of the conduct that needs to be established before a court will provide relief pursuant to section 51AC. In that case, three franchisees of the Cheap As Chips franchise system were awarded damages as compensation for unconscionable conduct.

In addition, there is a debate as to whether section 51AC applies to substantive unconscionability referring to unfair contract terms and unfair results arising from a transaction as well as procedural unconscionability referring to the unfairness involved in the bargaining process or in the manner in which an agreement is enforced.

In the Gary Rodgers' Motors case, the Federal Court considered that behaviour amounting to unfair conduct was also considered to amount to unconscionable conduct in terms of section 51AC. In these circumstances, and to provide a greater legal and business certainty, the Guild suggests that section 51AC should be amended to adopt the Reid Committee's recommendation that the provision refer to unfair conduct. Such an amendment would better reflect the Reid Committee's recommendations while at the same time it would provide the Federal Court with forty years' of jurisprudence of the Industrial Relations Commission in New South Wales in determining what constitutes unfairness.

In a media release dated 7 February 2002, the ACCC advised that it has lost its appeal in *ACCC v Samton Holdings Pty Ltd and Ors*. The ACCC had originally argued that Samton Holdings was in breach of section 51AA of the TP Act but it failed at first instance. The facts were that following the failure of a tenant to exercise an option to extend the term of a lease, the tenant was required to pay \$70,000 to the landlord to obtain an assignment for 7 years so that the tenant could sell its business. The Federal Court said while the landlord's conduct was avaricious, opportunistic and struck a hard bargain, it fell short of being unconscionable under section 51AA. Although the ACCC says that section 51AC provides an improved level of legal protection, it is still based on unconscionability and doubt remains over its application.

Leaving aside the legal interpretation of section 51AC, it is appropriate to consider whether section 51AC is adequately addressing the problems identified by the Reid Committee and accepted by the Federal Government. The Guild's observations of significant small business concerns over the last three and a half years is that section 51AC is not adequately addressing the following conduct:

- the imposition by one party of unfair contract terms,
- terminations of agreements where no default is in existence,
- contracts which are provided on a "take it or leave it" basis, and
- unfair conduct within commercial relationships.



The table below sets out the number of complaints received by the ACCC since the commencement of section 51AC in July 1998. It should be noted that while the introduction of the new provision has no doubt restrained the incidence of unconscionable conduct, a significant number of complaints relating to such conduct have been received by the ACCC. It should also be noted that these figures understate the actual number of complaints in that several complaints have been made by business organisations on behalf of hundreds if not thousands of members.

A comparison of the number of complaints received by the ACCC and the small number of legal proceedings finalised or commenced suggests there is a very low ratio between complaints and legal action. The Guild suggests that the reason for this is that the majority of complaints had not met the high threshold test required by section 51AC and small businesses have been denied an effective remedy as a result. Unfortunately, the ACCC does not have figures which show the number of complaints that have been subject to administrative settlement following intervention by the ACCC.

### Section 51AC Complaints

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
2001	32	19	15	13	32	29	36	33	34				**243
2000	27	30	29	32	41	42	53	91	32	30	56	24	487
1999	37	35	42	40	53	53	47	33	29	31	35	24	460
1998	n/a	n/a	n/a	n/a	n/a	n/a	47	43	34	28	48	45	*245

\*6 months \*\*not a full year

The following table shows the complaints received by the ACCC relating to unconscionable conduct under section 51AA of the TP Act.

### Section 51AA Complaints

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
2001	9	8	7	8	12	16	15	6	7				**88
2000	10	17	21	32	41	42	30	57	13	19	28	8	318
1999	3	10	2	5	15	21	27	9	7	9	12	13	133
1998	15	16	17	16	25	21	20	14	12	24	22	7	209

\*\* not a full year

Courtesy of the ACCC

Complaints to the ACCC should not merely be measured against the number of legal proceedings taken by the Commission. It needs to be acknowledged that the Commission can achieve satisfactory outcomes through administrative action. However, such outcomes can only be achieved if the Commission acts on complaints which it receives. Some evidence has emerged over the last three years that there is an inadequate small business culture within the Commission. In such circumstances, the Commission has a conflict of interest between its obligations to protect consumer interests and its obligations to protect small business operators against unconscionable conduct. This can be addressed by the appointment of a second Small

Business Commission and by establishing a separate Small Business Division within the ACCC.

### **4.3 Recommended Prices**

For many years, the Pharmacy Guild did assist its professional small business members across Australia by issuing genuine recommendations relating to:

- ◆ fees for dispensing items in Schedule 4 of the Standard for the Uniforms Scheduling Drugs and Poisons,
- ◆ items listed in Schedules 2, 3, 4 and 8 of the Standard for the Uniform Scheduling of Drugs and Poisons, and
- ◆ fees for pharmacy services charged in delivering government and private health programs such as the Methadone and Needle Exchange programs.

In the past the Guild issued such recommendations solely for the purpose of assisting its members to operate their small businesses more efficiently and allow them more time to focus on their work as health care professionals. The recommended prices for Schedule 2 and Schedule 3 and professional fees were issued as genuine recommendations and there has never been any obligation upon any pharmacist to comply with any such recommendation. This has been made clear on the recommendation lists provided to members. In many instances, there is not just one recommended price by the Guild has issued a series of recommendations based on different percentage mark-ups. In this way, Guild members are free to choose their own percentage mark up and pharmacists vigorously compete against each other in a highly competitive marketplace notwithstanding that certain significant areas of it are subject to pricing controls by the Federal Government to ensure that costs to the consumer are kept to a minimum.

In terms of pricing, State and Territory Governments set maximum prices in relation to certain health programs such as the Methadone and Needle Exchange in some States/Territories. The purpose of these programs is to deliver important health services across Australia at a reasonable price.

Prior to August 1995, section 45A(3) of the Trade Practices Act allowed trade associations to issue genuine recommended prices where there were at least 50 suppliers or purchasers of goods and where there was no enforcement of such prices. In August 1995, the Competition Policy Reform Act removed section 45A(3) from the Trade Practices Act. As a result of this amendment, recommended price agreement which have the purpose, effect, or likely effect of fixing, controlling or maintaining prices are deemed by subsection 45A(1) to substantially lessen competition, and are thus prohibited by section 45 of the Trade Practices Act.

Following this amendment of the Trade Practices Act, the key question for the Guild has been whether its recommended prices have the purpose, effect, or likely effect of fixing, controlling or maintaining prices. While the purpose of issuing recommended prices is to assist pharmacists in the pricing of certain pharmaceuticals rather than to fix, control or maintain prices, it would nevertheless be a contravention of section 45 if the effect of issuing recommended prices was to have the effect of controlling maintaining prices. In other words, the Guild could be in breach of the Trade Practices Act notwithstanding that it has no intention to control prices if its purely recommended prices are actually reflected in the marketplace. In such circumstances, the Pharmacy Guild decided not to issue recommended prices as the conduct of its members may ultimately determine whether the Guild itself is in breach of the Act even where such recommendations may be to reduce the price to consumers.

*Following such concerns the Guild sought advice from a leading Trade Practices barrister who advised the Guild as follows:*

**"In my view, the practice of the Guild if it were to continue would expose the Guild to a high risk of a finding that it had the effect of fixing and, even more clearly, maintaining prices. Given the level of penalties which now prevails, any significant risk would be unacceptable, much less the high risk which in my view would apply in the present circumstances"**

The Pharmacy Guild has sought legal advice that it could make an authorisation application to the Australian Competition Consumer Commission in relation to its conduct regarding the issuing of recommended prices and dispensing fees. The Guild has been advised that over the last 20 years or so of the operation of the Trade Practices Authorisation has only been granted in a few instances. *Further, senior counsel has advised the Guild that the prospects of success in such an application are not good when he stated:*

**"There may be seen in some of the recent decisions of the Commission in relation to section 45A a shifting away from a more literalist approach than what the section prohibits to a much more expansive approach of treating, prima facie, as price fixing any conduct which affects or distorts the pricing behaviour which would prevail in a competitive market. This change of approach does not bode well for parties seeking authorisation ....."**

In view of the inability of the Guild to gain authorisation for its conduct in recommending prices and dispensing fees, the Guild recommends that the former section 45A(3) be reinstated into the Trade Practices Act as follows:

#### **4.4 Collective Negotiation**

In addition to changes to section 46, small business also needs to be permitted to negotiate collectively in order to redress the imbalance that often exists when tenancy, franchise agreements or other commercial agreements are being entered into. Of course, some limitations need to be put in place to prevent anti-competitive behaviour.

It should be noted that Japan and the United Kingdom allow collective action by small business in certain circumstances. Also, Part X of the TP Act dealing with liner shipping exempts collective action by Australian shippers when dealing with powerful shipping companies. Even in the United States, the desirability of allowing certain forms of collective action by small business to overcome the gradual concentration of markets into a few mega players facing a lot of little players, both as buyers and sellers (article by Warren S. Grimes in the *Anti Trust Law Journal*, Volume 69 Issue 1, 2001 at page 1955 entitled "The Shermans Act's Unintended Bias Against Lilliputians; Small Players' Collective Action as a Counter to Relational Market Power").

### **5. Reforms to Enhance Competition**

1. The Pharmacy Guild is a member of the Fair Trading Coalition which represents small business associations and which argues for reform of the competition provisions of the Trade Practices Act to enhance competition for the welfare of all Australians. The Pharmacy Guild strongly supports the following reforms:

- (1) It was the original intention of National Competition Policy that the public interest must be the sole determining factor in any decision relating to national competition policy. The Coalition believes that a formal restatement of that imperative is absolutely essential.

- (2) It is recommended that the TPA should be amended to include a provision within the Act to allow small business operators and/or their representatives to collectively negotiate with their suppliers/buyers, including the right of small business to collectively refuse to do so (that is, a permissible boycott arrangement for small business).
- (3) It is recommended that section 46(1) of the Trade Practices Act be amended to add an effects test. It is also recommended that the Act be amended to allow for authorisation of conduct which might otherwise breach s46.
- (4) It is recommended that section 46 of the Trade Practices Act be specifically amended to proscribe selling at unreasonably low prices.
- (5) It is recommended that section 46 of the Trade Practices Act be amended to provide the Australian Competition and Consumer Commission with the power to issue a 'cease and desist' order in circumstances where corporations are thought to have misused their market power.
- (6) It is recommended that the Trade Practices Act be amended to provide the Australian Competition and Consumer Commission with the power to seek a divestiture order where a corporation has misused its market power.
- (7) It is recommended that:
  - there be no change to the substantial lessening of competition test in section 50 of the Trade Practices Act;
  - the merger authorisation process and the subsequent appeal process be amended as outlined in section 4.7.1;
  - the Trade Practices Act should clearly recognise the voluntary notification system and also provide that where a merger is found to breach the Act and wasn't notified to the Commission additional mandatory penalties should apply in respect of the breach of s50;
  - the process for accepting s87B undertakings should be made more transparent, with the Commission being required to consult with all interested parties about the nature of the proposed undertakings before those undertakings are accepted by the Courts;
  - the Federal Minister with responsibility for the ACCC be given the power to refer to the ACCC for an authorisation assessment proposed or possible industry-wide structural reform matters; and
  - where market concentration has passed a nominated threshold, for example, CR4, the Act should be amended to allow the ACCC to take into consideration previous mergers and acquisitions by an acquirer and to

- aggregate the effect of previous mergers and assess the resultant state of competition in any relevant market; and
  - there should also be an amendment to the Trade Practices Act so as to provide that where a company reaches a certain market share, any further acquisition must be notified to ACCC and assessed under the proposed amended merger authorisation test.
- (8) It is recommended that the Government ensure, if necessary by legislative amendment, that the Trade Practices Act apply to all Government agencies' commercial dealings.
- (9) It is recommended that the current penalty regime in the Act be amended as follows:
- criminal penalties (jail terms) should be available to the Courts to apply to individuals for breaches, by big businesses, of s45 of the Act. The current civil prosecution regime should be maintained, and the ACCC would therefore have the option of commencing legal action under a civil or criminal regime;
  - corporations should not be able to indemnify their employees in relation to any penalties that might be imposed on them by the Courts for breaches of Part IV of the Trade Practices Act and those penalties must be paid by the individuals concerned;
  - corporate and individual parole to be available to the Courts as a specific remedy; and
  - the Act should also be amended to provide for pecuniary penalties in relation to breaches of Parts IVA and IVB. These are currently not able to be sought by the ACCC in its enforcement of the law.
- (10) It is recommended that section 51AC of the Trade Practices Act should be amended to proscribe as per se offences the following conduct:
- unilateral variation of contract or associated documents;
  - the termination of contracts by one party without just cause or due process (*see earlier comments on repudiation*);
  - the bringing into existence of documents or policies after the signing of the contract which are then binding and which can also be used to vary the original agreement or contract; and
  - the presentation of 'take it or leave it' contracts or agreements.
- It is also recommended that misuse of market power should be listed as one of the 'allowable' matters under s51AC.

- (11) It is recommended that the Government should make use of the current provisions in the Trade Practices Act relating to codes of conduct to regulate sectors of the economy which have specific problems which cannot, or should not be addressed through generic legislation.
- (12) It is recommended that a joint standing committee of the Parliament be established to oversight the Australian Competition and Consumer Commission. That committee should assume the current review activities of the House of Representatives Standing Committee on Economics, Finance and Public Administration in relation to the ACCC.
- (13) It is recommended that the ACCC's role in relation to small business should be strengthened as follows:
- the Trade Practices Act should be amended to specifically provide that the ACCC handle complaints and take action on systemic issues;
  - to provide for the appointment of a second small business commissioner to the Commission. It would be appropriate that the Deputy Chairman be one of the two small business Commissioners;
  - to establish within the Commission a Small Business as Consumers Division.
- (14) It is recommended that the Government appoint an adequately resourced Small Business Ombudsman.
2. While all of the Fair Trading Coalition's recommendations are strongly supported by the Guild, the following recommendations have priority in terms of Guild members:
- |                        |   |   |
|------------------------|---|---|
| Recommendation 1       | - | the public interest must be the sole determining factor in any decision relating to national competition policy |
| Recommendation 2       | - | Collective negotiations by small businesses   |
| Recommendations 3-6    | - | Abuse of market power   |
| Recommendation 9       | - | Criminal penalties  |
| Recommendation 10      | - | Unconscionable conduct  |
| Recommendation 13 & 14 | - | An enhanced small business role for the ACCC  |
3. The Pharmacy Guild of Australia also seeks the reinstatement of section 45A(3) which was removed from the Trade Practices Act in 1995 in order to permit trade associations to issue genuine

recommended prices where there are at least 50 suppliers or purchasers of goods and where there is no enforcement of such prices.

**45A(3) Sub-section (1) does not apply in relation to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, to the extent that the provision recommends or provides for recommending, or would recommend or provide for recommending, the price for, or a discount, allowance, rebate or credit in relation to, goods or services, where the parties to the contract, arrangement or understanding, or the proposed parties to the proposed contract, arrangement or understanding, include -**

- (a) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who supply, in trade or commerce, goods or services to which the provision applies; or**
  - (b) not less than 50 persons (bodies corporate that are related to one another being counted as a single person) who acquire, in trade or commerce, goods or services to which the provision applies.**
4. The Pharmacy Guild of Australia seeks an amendment to section 51AC of the Trade Practices to change "unconscionable" to "unfair" in order that the section achieves its regulatory objective and at the same time provides the Federal Court with 40 years jurisprudence of the Industrial Relations Commission of New South Wales in interpreting section 106 and its predecessor provisions based on unfairness.