Productivity Commission Inquiry into Competition Policy Arrangements

Submission

of

Australian Friendly Societies Pharmacies Association Inc

(AFSPA)

on

National Competition Policy and Pharmacy Legislation

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The Submission

This submission is made by the Australian Friendly Societies Pharmacies Association Inc on behalf of all friendly society pharmacies. Friendly society pharmacies are mutual not-for-profit organisations. They have been permitted owners of pharmacy in Australia since 1847.

The right of friendly societies to own pharmacy has never been restricted but their ability to grow their pharmacy businesses in competition with pharmacist-owned pharmacies has been restricted by anti-competitive legislation for a significant period of time in a number of jurisdictions, most notably NSW, QLD and WA.

Following a most detailed review process consisting of a National Review, COAG Senior Officers Working Group and an ACCC Inquiry, two core recommendations were put forward for implementations by all governments:

- the restrictions on the number of pharmacies permitted to be owned by a pharmacist should be removed; and
- the restrictions against friendly societies should be removed.

The Pharmacy Guild opposed both those recommendations and proceeded to mount a vigorous campaign against their implication. The campaign claimed the two changes recommended, constituted "deregulation" which if implemented would allow supermarkets to enter the community pharmacy industry. This was duplicitous but successful.

The community agitation was such that the Prime Minister was persuaded to intervene. Against this background it is difficult not to conclude that the intervention and subsequent legislative outcome was for political reasons rather than good policy.

Current Legislative Provisions Regulating Pharmacy

Presently the legislation covering and regulating the ownership and the practice of the profession of pharmacy is complicated by the operation of State provisions being overlaid by Commonwealth provisions covering the same overlapping issues.

Essentially, current provisions can be described as follows:

a) State Legislation under the various Pharmacy Acts provides for the regulation of:

- Registration of those allowed to practice the profession of pharmacy;
- Registration of those allowed to own a business for the purpose of conducting a pharmacy business;
- Registration of, and in relation to Friendly Society Pharmacies the location of premises where the business of pharmacy is allowed to be conducted; and
- Regulates the sale and distribution of drugs and poisons on a uniform scheduling basis coordinated by the National Drugs and Poisons Scheduling Committee; the schedules regulate which drugs and poisons can only be distributed by pharmacists or through pharmacies.

b) Commonwealth Legislation regulates:

- Approval to supply pharmaceutical benefits in accordance with the provisions of the *National Health Act 1953* and the rules determined by the Minister under that Act;
- Approval of the location of premises from which an approved pharmacist may supply pharmaceuticals under the Pharmaceutical Benefits Scheme (PBS);
- Cancellation of that approval in certain circumstances;
- Which drugs are to be supplied under the PBS;
- The amount of patient contribution to be paid for drugs supplied under the PBS and the prohibition of any discounting of that contribution;
- The Pharmaceutical Benefits Remuneration Tribunal (PBRT) and determinations made by it;
- The Australian Community Pharmacy Authority (ACPA), its functions and the rules in accordance with which it must make its recommendations for the approval of the location of pharmacy premises to the Secretary of the Department of Health and Ageing;
- The National Standard for the Uniform Scheduling of Drugs and Poisons; and
- By negotiation/agreement the wholesale price at which PBS medicines are supplied to pharmacists.

National Competition Policy (NCP)

Competition Policy commenced when all governments in Australia signed the 1995 Competition Principles Agreement (CPA). The signing of this Agreement was the culmination of work commenced in 1991 when it was agreed to examine a national approach to competition policy.

The first step in this process was the establishment of the National Policy Review Committee chaired by Professor Fred Hilmer. Next, the recommendations of the Hilmer Report resulted in the enactment of the *Competition Policy Reform Act 1995* (CPRA). The main elements of this Act: enabled the provisions of Part IV of *The Trade Practices Act 1974* to be extended to all jurisdictions and to apply to all businesses and persons carrying on a business whether incorporated or not; established the Australian Competition and Consumer Commission (ACCC) by the merger of the Trade Practices Commission and the Prices Surveillance Authority; and created a new advisory body, the National Competition Council (NCC).

The CPRA is complemented by a number of inter-governmental Agreements including the Conduct Code Agreement (CCA) and the Competition Principles Agreement. This second Agreement sets out the principles governments will follow in relation to prices oversight, structural reform of public monopolies, review of anti-competitive legislation and regulations, access to services provided by essential facilities and the elimination of net competitive advantage enjoyed by government businesses when they compete with the private sector.

All the heads of Australian Governments at the Council of Australian Governments (COAG) meeting in April 1995 signed these Agreements. Collectively, these Agreements make up a package of reforms referred to as the National Competition Policy (NCP).

Broadly, this package of reforms is directed towards ensuring that every business or industry in the Australian economy that is currently sheltered from competition is opened to it *except for those businesses or industries for which it can be demonstrated that there is a net community benefit in restricting competition.*

This provision is referred to as the public benefit or interest test. This test requires that governments, when reviewing various NCP reform options, must objectively weigh up all the pros and cons of competition including, but not restricted to, its effects on matters such as employment, equity, social welfare, community service obligations and the interests of consumers generally or a class of consumers.

The rationale for competition reform is that, properly harnessed, competition can boost economic performance and enhance consumer welfare. But the reasons go beyond narrow economic efficiency considerations and touch on matters as, for example, business ethics, environmental sustainability and social equity.

It aims to promote economic goals such as a better allocation of resources between industries and greater flexibility to adapt to rapid changes such as external shocks. The reforms to Government businesses allow them to more transparently address their social obligations as well as providing the opportunity for more informed decisions on whether those obligations are best met by in-house providers or otherwise.

Competition policy also provides a greater element of public scrutiny *and makes it more difficult for governments to provide favours for "friendly" business groups or to strike deals behind closed doors.*[1]

The NCP processes do not seek to favour any kind of business over another, nor are they designed to improve the profitability or viability of specific industries themselves. Rather, they are intended to foster conditions in which the businesses that most benefit the community prevail or prosper.

Whilst many sectors of the economy are exposed on a daily basis to the true rigours of a competitive marketplace, some groups are not subject to the same disciplines. As a matter of equity it is right to question the incomes and conditions enjoyed by all special groups *to the extent that those incomes and conditions derive from unwarranted restrictions on competition.*[2]

Under the NCP Agreements the onus of proof is on those groups who want to retain legislative restrictions to prove that they should be retained.

Once a legislative restriction is identified it must go unless it be robustly demonstrated that the benefits of the restrictions outweigh the costs and that the objective of the restrictions cannot be achieved in other ways.

[1] Graeme Samuel, President NCC, speech to Economics Society Qld 25 November 1998.
[2] Graeme Samuel, President NCC, speech to Australian Retailers Association 30 May 1998

National Competition Review of Pharmacy Legislation

Under the provisions of the second Agreement, the CPA, it was agreed that a joint national review of State/Territory pharmacy legislation and certain provisions of Commonwealth legislation relating to the Pharmaceutical Benefits Scheme (PBS) and the *National Health Act 1953* would be conducted.

That review was conducted by Mr Warwick Wilkinson (the National Review) and his recommendations were released in his Final Report in February 2000.

The fundamental recommendation of the National Review was:

Recommendation 1:

- *legislative restrictions on who may own and operate and operate community pharmacy be retained; and*
- *with existing exceptions, the ownership and control of community pharmacies continues to be confined to registered pharmacists.*

In other words, the National Review recommended that no new entities be permitted to own and operate a pharmacy and that the existing permitted entities, including friendly societies, be retained.

Subsequently the Prime Minister wrote to all Premiers and Chief Ministers proposing that COAG provide a coordinated response to the recommendations of the National Review to promote a nationally consistent approach to pharmacy legislation.

COAG referred the recommendations of the National Review to a Senior Officials Working Group for consideration and to advise whether a coordinated response could be made by COAG and to advise on appropriate responses from each jurisdiction.

The COAG Senior Officials Working Group Report was released on 2 August 2002. It recommended that COAG accept most of the National Review's recommendations but highlighted one significant part of those recommendations that it recommended to COAG not to accept.

In regard to friendly societies the Senior Officials Working Group Report recommended against introducing new restrictions that would prevent the entry of a new friendly society into the community pharmacy industry in another jurisdiction where it did not already operate, noting that the National Review did not demonstrate a net public benefit to justify such a restriction.

Additionally, in recognition of an election commitment made by the Prime Minister to the Pharmacy Guild of Australia (the Guild) in October 2001 it agreed that the ACCC should be requested to inquire into the relative financial and corporate differences between friendly society dispensaries (FSDs) and pharmacist-owned community pharmacies and whether these adversely affected competition in the pharmacy industry.

The Treasurer referred this matter to the ACCC as follows:

"(The ACCC) will need to consider whether the tax treatment of FSDs and other competition related factors provide FSDs with significant competitive advantages over pharmacist-owned pharmacies."

The ACCC concluded its review and its report was furnished to the Treasurer in October 2002. The ACCC prepared its report in consultation with interested parties, relevant Government bodies as well as expert advice.

It concluded that friendly societies do not have significant competitive advantages over pharmacist-owned pharmacies.

National Competition Council 2003 Progress Assessment

The 2003 Progress report on the legislative review progress of all governments found that no governments had satisfied their compliance obligations in regard to pharmacy.

For pharmacy, the NCC indicated that to be assessed as having complied with the National Competition Agreement sufficiently to merit full payment of the competition monies, governments were required to implement the following two core COAG recommendations:

- removal of the restriction on the number of pharmacies able to be owned by pharmacist-owners and friendly societies; and
- removal of any discriminatory legislative provisions applying to friendly society owned pharmacies.

In reaching this conclusion the NCC in its report emphasised the extensiveness of the review process that had been undertaken, the detail of the work performed by the COAG Senior Officers Working Group which consisted of senior officials from all jurisdictions and that all governments had signed off on the final recommendations but noting a reservation from NSW.

The NCC went on to report that against this background it expected governments to expedite progress in the pharmacy area and that it would scrutinise reforms to ensure that they did not discriminate against friendly societies in those jurisdictions where they are located currently, or in jurisdictions where they do not currently have a presence (ACT & NT).

Legislative Developments

New South Wales

On the first sitting day for 2004 of the NSW Parliament the Premier introduced the National Competition Amendments (Commonwealth Financial Penalties) Bill. Amongst other things this Bill proposed to amend the Pharmacy Act in that State to remove the cap on the number of pharmacies that a pharmacist is permitted to own and remove all the restrictions against friendly societies including permitting the entry of new friendly societies into NSW.

Those proposed amendments were exactly in accordance with the COAG recommendations and as a subsequence, as required to be implemented by the NCC.

The Pharmacy Guild objected vociferously to these reforms and mounted a significant community and media campaign against them by claiming that the amendments would lead to the ownership of pharmacies by non-pharmacists or corporations such as supermarkets, would cause the closure of many pharmacies and lead to lower standards of services.[3]

The political response to this campaign culminated in the Prime Minister's direct intervention. On the 5 May he wrote to the NSW Premier advising that after consultation with the Pharmacy Guild he had agreed that if NSW amended its legislation to increase the maximum number of pharmacies from 3 to 5 and restrict friendly societies to own and operate 6 pharmacists, then NSW would not incur any penalties under the NCPs.

No reference in the Prime Minister's letter was made about the long standing existing restrictions that applied to friendly societies and which would have been removed under the Bill. Those restrictions prohibit a friendly society pharmacy that operated as at 1945 from moving further then 1.6k from the premises it occupied then (there are 6 such pharmacies), no new pharmacy can be acquired without Ministerial approval which can only be granted if specified criteria are met and no new or interstate based friendly society is permitted to own a pharmacy in NSW.

Consequently a new Bill was tabled and enacted on 23 June that made only the two minimum changes as referred to in the Prime Minster's letter.

The new pharmacy legislation retains all the restrictions against friendly societies and now adds a new restriction that no friendly society is permitted to own more then 6 pharmacies. It is claimed that these provisions will now meet its obligations under the Competition Principles and NSW will receive its full competition payments.

Victoria

The Government of Victoria tabled a Bill on the 13 May to amend its pharmacy legislation as recommended by COAG and following its own very lengthy and detailed review conducted after the release of the COAG recommendations.

In Victoria pharmacists are restricted to the ownership of 3 pharmacies and friendly societies are unrestricted. The Bill proposed amendments that would have allowed registered pharmacists, in partnership or incorporated, to own 5 pharmacies (based on the new NSW model), continuation of the unrestricted provision for friendly societies and included a definition of a friendly society to ensure that only mutual not-for-profit friendly societies were permitted to own and operate a pharmacy. (This provision was particularly welcomed by all friendly society pharmacies.)

On the 2 June the Prime Minister advised the Premier that his Government was prepared to accept pharmacy ownership arrangements in Victoria similar to those he had proposed for NSW and if implemented Victoria would also not incur any financial penalties. In regard to friendly societies the Prime Minister has proposed that those friendly societies which already

[3] Pharmacy Guild Petition to the NSW Parliament distributed from website jacko@nsw.guild.org.au

owned more then 6 pharmacies should be "grandfathered" and not permitted to increase their holdings.

The Victorian Government in negotiations with the Pharmacy Guild advised (as AFSPA understands) that whilst it was not prepared to implement the Prime Minister's proposal as it stands, it was also not prepared to continue with the amendments at that time and the Bill was withdrawn on the evening of 1 June.

In response, the Pharmacy Guild on 1 June submitted to the Government a compromise position for consideration. The Guild has now proposed that each friendly society in Victoria be permitted to increase their numbers by 30% over a five year period after which they would then be "grandfathered" at their final numbers.

Submissions on the proposal have now been requested.

Other Jurisdictions

Every other Premier and Chief Minister is now seeking urgent clarification from the Prime Minister as to their position in regard to his new mandated minimum legislative requirement sufficient for their jurisdiction to be assessed as having fulfilled their obligations under the Competition Principles.

Conclusion

In conclusion, AFSPA submits that these outcomes are both a perversity and an injustice to friendly societies. How this outcome was achieved is disturbing for the future integrity of competition policy. The review of pharmacy legislation under the Competition Principles was one of the most far-reaching and in depth reviews, carried out at a number of levels including a formal inquiry by the ACCC to expertly test specific claims.

At every level the findings supported the recommendation that the restrictions against friendly society pharmacies were anti-competitive and that there was no public benefit to justify their retention. In fact, the contrary applied. But against all the evidence, the more powerful political lobbyist succeeded in winning even more restrictions against its only competitor. The very thing that the Competition Principles were designed to protect against.

What the Pharmacy Guild could not win by evidence, due process and careful consideration of the veracity of its claims, it won by a disingenuous campaign and sheer brute political force.