

# COAG SENIOR OFFICIALS WORKING GROUP COMMENTARY ON THE NATIONAL COMPETITION POLICY REVIEW OF PHARMACY

## Introduction

On 9 February 2000, the Prime Minister wrote to Premiers and Chief Ministers suggesting the Council of Australian Governments (COAG) provide a coordinated response to the Final Report of the National Competition Policy Review of Pharmacy (the Review) in order to provide national consistency in pharmacy regulation.

COAG subsequently referred the Report to Senior Officials for consideration by a Working Group of Commonwealth, State and Territory Officers. Mr David Borthwick, Deputy Secretary, Commonwealth Department of Health and Aged Care chaired the Working Group. The cost of participating in the Working Group was met by each jurisdiction with secretariat services being provided by the Department of Health and Aged Care, at the Commonwealth's expense. Members of the Working Group are listed in Attachment A.

## Background

In 1997 the Commonwealth, States and Territories agreed to meet their individual National Competition Policy (NCP) obligations consistently through a single national review of pharmacy legislation to commence in 1999. This is the first national review of a profession commissioned under the NCP systematic legislative review process. All States and Territories participated in the Review. However, Queensland limited their involvement in the Review to ownership provisions only as they already had a separate process under way to meet National Competition Policy (NCP) requirements to review the registration provisions of their *Pharmacy Act*. Also, the Tasmanian legislation reviewed did not include the registration provisions of the Tasmanian *Pharmacy Act 1908*.

As with the Review, Queensland limited its involvement in the Senior Officers Working Group discussions to ownership provisions. The Queensland *Pharmacists Registration Act 2001* has now been passed by the Queensland Parliament.

The Review, chaired by Mr Warwick Wilkinson AM, reported to COAG on 8 February 2000. The Review examined legislative restrictions in three specific areas of pharmacy practice and the commercial operation of the pharmacy industry. These were:

- Ownership of pharmacies;
- Location of pharmacies to dispense benefits under the Commonwealth Pharmaceutical Benefits Scheme (PBS); and
- The registration of pharmacists.

A list of the specific legislation examined by the review is at Attachment B.

## **Terms of Reference**

On 10 August 2000, COAG Senior Officials endorsed the Terms of Reference for address by the Working Group. The Terms of Reference are listed in Attachment C.

## **Factors Unique to the Practice and Regulation of Pharmacy in Australia**

The Terms of Reference require the Working Group to consider the Report mindful of factors unique to the practice and regulation of pharmacy in Australia.

The Review noted that pharmacy is practised in a highly regulated environment. State, Territory and Commonwealth legislation controls or influences virtually every aspect of pharmacy, including who is able to provide pharmacy services, who can profit from them and where they can be provided.

Pharmacy as a profession and as an industry has long enjoyed shelter from the full force of market competition. Competition between pharmacies and pharmacists is within a relatively homogenous, conservative and stable professional market.

There are two distinct streams of pharmacy in Australia; clinical (or hospital) pharmacy and community pharmacy.

Clinical pharmacy is the provision of pharmacy and dispensary services in public and private hospitals, laboratories, and other clinical and research facilities. Clinical pharmacists are often assisted by technician-level staff who perform a range of administrative, preparation and related tasks under a pharmacist's direction. A recent Australian Institute of Health and Welfare study indicates that about 15 percent of Australia's 14,000 practising registered pharmacists work in the clinical sector and another 6 percent work in industry (mainly with pharmaceutical manufacturers), administration and research.

Community pharmacy consists of a network of shopfront pharmacies (approximately 5,000) that provide a network for the delivery of pharmacy services to the Australian community. Community pharmacies are the principal distribution points for prescription medicines and for scheduled over-the-counter medicines. The sale of other medicines, such as aspirin and paracetamol products, are shared with general retailers.

As far as legislative restrictions in relation to pharmacy ownership are concerned, the Review focussed only on community pharmacy and not on clinical (or hospital) pharmacy. The arguments for restricting ownership of community pharmacies (such as protecting independent pharmacy businesses from perceived "unfair competition" and market dominance from large pharmacy-owning corporations) are not relevant for hospital pharmacies. Indeed, some States' legislation specifically excludes hospital (and other clinical) pharmacies from provisions regarding pharmacy ownership, whilst other States' legislation is silent on the matter. For these reasons, legislative

restrictions on ownership for hospital pharmacies are not necessary, and were not addressed during the course of the Review.

Other factors impacting on the regulatory environment are:

- State and Territory drugs and poisons legislation;
- The Commonwealth's Pharmaceutical Benefits Scheme (PBS) and associated Australian Community Pharmacy Agreement (ACPA);
- The regulatory framework of pharmacy has been relatively static for many years and professionals within it, in general, are comfortable with traditions of regulation and control; and
- The high level of interdependence between retail pharmacy and pharmaceutical wholesalers.

### ***State and Territory Drugs and Poisons Legislation***

In responding to the Review recommendations, the Working Group was cognisant of the NCP Review of Drugs, Poisons and Controlled Substances Legislation. Reference has been made to the Review of Drugs, Poisons and Controlled Substances final report while commenting on the Review recommendations.

### ***The Commonwealth's Pharmaceutical Benefits Scheme and the Australian Community Pharmacy Agreement***

As part of the administration of the PBS the Commonwealth manages pharmacists remuneration for dispensing PBS drugs and imposes rules on where new pharmacies can open and existing ones can locate through the ACPA. The objective of these restrictions is to contain PBS costs and ensure reasonable access to pharmacy services.

The greater part of community pharmacies' income (about 60%) is underpinned by government funded remuneration and the fixed retail prices of subsidised medicines dispensed on the PBS.

Since the Review reported in February 2000, the Commonwealth has entered into the third ACPA with the Pharmacy Guild of Australia for the period 1 July 2000 to 30 June 2005. The Commonwealth, while accepting that the Review's recommendations on location rules may well offer real alternatives to the existing approach, has opted for an incremental and targeted easing of existing regulations in the third ACPA with an opportunity to discuss these arrangements in the lead up to the next agreement.

The Working Group notes that as the location restrictions have such a significant impact on community pharmacy, the third ACPA severely limits the scope for reform over the next 5 years. The efficacy of the location rules will need to be reconsidered in the lead up to the next agreement.

## **Overview of the Pharmacy Review Report**

The Review Report is divided into three distinct sections consistent with the Review's references on pharmacy ownership, pharmacy location and pharmacist registration. The Working Group commentary follows the layout to the Review's report.

The Working Group has been asked to advise whether a coordinated response can be made by COAG on behalf of all jurisdictions to each recommendation and if not, advise on an appropriate response by either COAG or individual jurisdictions.

### ***Pharmacy Ownership***

Of the recommendations, those relating to pharmacy ownership are the most sensitive and analytically complex. Accordingly, the Working Group has given most attention to these recommendations and suggests a COAG response to each recommendation. These suggestions have been arrived at consensually on the basis of agreeing the principle and allowing jurisdictions to manage the implementation. This approach acknowledges that jurisdictions may implement the recommendations differently to suit their individual regulatory environments.

The Review Report noted that State and Territory legislation contain a number of specific inter-related restrictions on the conduct and operation of pharmacies as businesses. These include:

- Restrictions on who can own pharmacies;
- Restrictions on the number of pharmacies in which a registered pharmacist may have a propriety interest;
- Restrictions on the ownership structures of pharmacy businesses; and
- Pecuniary interest measures to prevent persons and corporations other than registered pharmacists having a pecuniary or proprietary interest in a pharmacy business.

These are in addition to the requirement that a trained pharmacist must be on duty at all times that a pharmacy is open.

The Review examined these collectively and concluded that the current level of regulation restricts competition between existing pharmacies, effectively prevents the expansion of retail pharmacy holdings and acts to prevent new players entering the market. Whilst identifying legislative restrictions, such as, pharmacist only ownership of pharmacies and noting the detrimental effect of such constraints, the Review found that 'on-balance' jurisdictions' current ownership rules provide a net public benefit and should remain largely unchanged.

However, the Review's recommendations on removing the limits on the number of pharmacies a pharmacist can own and freeing up restrictions on commercial activities of pharmacists provide opportunities for significant reform in this sector.

### ***Pharmacy Location***

The Review presents a generally sound evaluation of the regulation of pharmacy location and the related cost-plus approach to PBS subsidies and PBS price fixing. The Review applied the principles of National Competition Policy and concluded that the PBS location rules, then in force under the second ACPA, are inherently anti-

competitive in their operation and effects. Noting that while they have helped rein in Commonwealth PBS outlays, they represent heavy government intervention in the market for pharmacy services, while generally protecting pharmacy's established catchment areas from new competition.

The Review considered a number of alternative pharmacist remuneration mechanisms and suggests that more competitive models could better control PBS costs and remove the need for the location restrictions.

As noted above, the Review's recommendations on pharmacy location have largely been superseded by the Commonwealth's resolution of the third ACPA with the Pharmacy Guild of Australia. While this does severely limit the scope for reform over the next 5 years, it does provide an avenue for discussion on location rules in the lead up to the next agreement. The Working Group considered the Review's recommendations in this context and, where appropriate, make observations for consideration in that review.

### ***Registration of Pharmacists***

The Review noted that the prime objective of regulation in any professional area should be the safe and competent practice of that profession. The Review supported a legislative model of regulation that:

- Makes regulatory authorities clearly accountable to government and separate from any professional representative body, and sets out clearly their constitutions and powers;
- Makes government responsible for promulgating standards and practices enforceable under *Pharmacy Acts*, and regulatory authorities responsible for administering and enforcing promulgated regulations and standards;
- Sets out clearly the professional responsibilities of pharmacists for the safe and competent provision of pharmacy services; and
- Sets out clearly complaints, disciplinary and review mechanisms and the grounds on which these may operate.

These Review recommendations are the least contentious and the most readily applied in the current environment. There will, however, be significant flow on effects for States and Territories in refining and maintaining such a framework of regulation.

### **Compliance with the Competition Principles Agreement**

Clause 5 (6) of the 1995 *Competition Principles Agreement* requires that any retained regulation be reviewed within 10 years. The Commonwealth and the Pharmacy Guild of Australia have agreed to a joint review of pharmacy location rules in 2004, in the lead up to renegotiating the ACPA.

### **Specific Assessment of State and Territory *Pharmacy and Pharmacists Acts***

Where the Review Report has highlighted points of commonality and inconsistencies across jurisdictions, the Working Group considered these. However, under the NCP, each jurisdiction has the responsibility to assess its own legislation against the terms of the National Competition Principles Agreement.

# PHARMACY OWNERSHIP

## **Recommendation 1: Pharmacist-Only Ownership of Pharmacies**

**The Review recommended that:**

- (a) Legislative restrictions on who may own and operate community pharmacies are retained; and**
- (b) With existing exceptions, the ownership and control of community pharmacies continues to be confined to registered pharmacists.**

The Review concluded that ‘on-balance’ pharmacist ownership of pharmacies provided a net public benefit to the community through improved professional conduct of pharmacy practice. The Review suggested, however, that ongoing ownership privileges are dependent on continued industry participation in recent self-regulation activity, and the further development and adherence to professional standards and industry quality assurance benchmarks.

### ***Working Group Comments***

The Review found that although the ownership rules impose restrictions on competition, nevertheless, ‘on-balance’ the restrictions conferred a net public benefit. The stated objective of these restrictions (page 47) is to promote involvement and supervision by the pharmacy owner and ensure a line of accountability from customer to regulatory authority.

In coming to this conclusion it seems that the Review was hampered by the lack of evidence and did not seem to examine:

- The regulatory environment for allied health and other professions in Australia or a comparative consideration of the different regulatory treatment of ownership in the context of other Australian professions;
- Comparative consideration of the regulatory environment overseas, such as the United Kingdom and the United States, in which pharmacy ownership is not confined to pharmacists;
- Why pharmacy ownership needs to be treated in a manner distinct from other regulated professions, including in the medical arena; and
- The relative performance of non-pharmacist owned pharmacies in Australia (such as those run by friendly societies).

### ***Impact on Jurisdictions***

If the Review’s recommendation is accepted the status quo in all States is maintained. The Review concluded that the Australian Capital Territory and Northern Territory *Pharmacy Acts* are ambiguous on the pharmacy ownership question. The Review suggested, however, that the Territories’ legislation falls within the boundary of acceptable regulation as set out in Recommendation 1 and therefore do not require amendment to conform with the Recommendation. The Working Group notes that

there is nothing in the Review's analysis that would suggest a need for increased regulation by the Territories.

### ***Industry Response***

Industry groups are divided on this issue. Existing pharmacy proprietors strongly support continuation of the principle of pharmacist-only ownership of pharmacies. Some employee pharmacists question whether pharmacy ownership restrictions deliver the benefits identified by the Review.

### ***Conclusion***

The Review's recommendation to continue restricting ownership to pharmacists (with minor exceptions, such as friendly society pharmacies) was reached "on balance". The Review considered a complex mix of quantitative, qualitative and strategic issues in making this judgement. The Working Group notes this judgement. The Working Group considers that in the context of the significant nature of the other proposed reforms, especially the Review's recommendations 4 and 6, the impact of opening up the ownership of pharmacies could be too disruptive for the industry in the short term. Accordingly, the Working Group proposes that these recommendations be accepted.

### ***Suggested COAG response to the Recommendation***

- **Accept Recommendation 1 (a) and (b) noting that the impact of opening up the ownership of pharmacies could be too disruptive in the short term. This does not imply an obligation on the ACT and NT to amend their legislation as the Territories' legislation falls within the boundary of acceptable regulation as set out in Recommendation 1.**

## **Recommendation 2: Residential and Local Registration Requirements**

**The Review recommended that:**

- (a) Any State or Territory's residential requirements for pharmacy ownership are removed; and**
- (b) Any State or Territory's requirements that a pharmacist be registered in that jurisdiction to own a pharmacy are retained, pending any consistent national arrangements that may be adopted.**

In the context of removing as many restrictions as possible from ownership related matters, the Review found that legislation requiring a proprietor to be resident of a given State or Territory is an unnecessary restriction.

On a related matter the Review found that it is reasonable to require pharmacist owners to be registered in the jurisdiction that the pharmacy is located to ensure the proprietor is conversant with the laws and professional requirements of the local jurisdiction and accountable to local authorities.

### ***Working Group Comments***

The Working Group's Western Australian representative accepts the Review's argument that there is no public benefit in retaining its unique residency requirement and accordingly supports the Recommendation to bring Western Australia's law into line with other jurisdictions by removing the requirement.

The Working Group endorses the principle of pharmacist ownership registration established by the Review. It is appropriate that as the ownership regulatory framework is managed at the State or Territory level pharmacy owners register with local authorities.

The second point in Recommendation 2(b) reflects the Review's desire that jurisdictions move to recognise each other's registration for pharmacy ownership purposes. An important element of the COAG micro-economic reform agenda is the 1993 COAG Mutual Recognition Agreement. Under the *Mutual Recognition Acts* a pharmacist registered to practice pharmacy in one jurisdiction can be registered in the other States and Territories. Although these provisions do not apply to ownership registration, they go some way towards satisfying the Review's concerns.

### ***Impact on Jurisdictions***

WA is the only jurisdiction affected by Recommendation 2(a).

### ***Suggested COAG Response to the Recommendation***

- **Accept Recommendations 2(a) and (b).**

## **Recommendation 3: Ownership Structures**

**The Review recommended that:**

- (a) Pharmacy ownership structures permitted by various State and Territory *Pharmacy Acts* be retained as being consistent with the defined principle of pharmacist ownership and effective control of pharmacy businesses;**
- (b) *Pharmacy Acts* recognise, in addition to sole trading pharmacists and pharmacist partnerships, corporations with shareholders who are:
  - (1) All registered pharmacists; and**
  - (2) Registered pharmacists and prescribed relatives of those pharmacists; and****
- (c) Due to the risk of conflicts of interest of shareholders, and the difficulties in determining the extent to which the minority shareholdings of non-pharmacists may compromise pharmacist control of a pharmacy, operating companies with minority shareholdings held by non-pharmacists are not considered to be appropriate ownership structures for pharmacy businesses.**

State and Territories have a range of permitted pharmacy ownership structures. The States restrict ownership to sole traders, partnerships or incorporated bodies comprising registered pharmacists. South Australia also permits an incorporated body with non-pharmacists who are immediate family members. The Australian Capital

Territory and Northern Territory legislation is ambiguous on permitted ownership structures.

The Review, in considering appropriate ownership structures, did so with the principle of maintaining effective and undisputed pharmacist control of pharmacy businesses in mind. In this context the Review noted that existing restrictions met these requirements. However, the Review did see merit in permitting a corporate structure that allowed for non-pharmacist ownership, albeit for immediate family members only, in all jurisdictions.

Recommendation 3(c) reflects the Review's concern about potential conflicts of interest among shareholders and for determining at which point a minority shareholding might dispute the effective pharmacist control of the pharmacy business. Consequently, the Review found that the potential difficulties outweigh the benefits of opening up minority shareholdings in pharmacy operating companies.

### ***Working Group Comments***

Recommendation 3(a) is consistent with and supports Recommendation 1.

Recommendation 3(b) introduces a limited form of incorporation that allows pharmacists to take advantage of corporate structures and the tax and other benefits that these bring. The Review points to the advantages in having consistent permitted ownership structures across States and Territories that do not obstruct cross-border competition and occupational mobility. The Review and industry groups suggest using the South Australian model. The Working Group considers that this is a positive, but relatively minor, step towards allowing more commercially realistic structures to emerge.

The South Australian model is set out in Subsection 18(2) of the South Australian *Pharmacy Act 1991*. It requires a company registered as a pharmacist to have satisfied the Board that its memorandum and articles of association provide that:

- The sole object of a company must be to practise as a pharmacist;
- The directors must be persons who are registered pharmacists or, if there are only two directors, one may be a prescribed relative (parent, spouse, de facto partner, child or grandchild);
- Shares are owned by a registered pharmacist director or a prescribed relative of that pharmacist;
- Total voting rights in the company are held by registered pharmacists who are directors or employees of the company;
- The directors are not directors of any other company registered as a pharmacist without the Board's approval;
- Shares in the company cannot be transferred beyond the company and members of the company; and
- Shares held by a spouse or de facto partner must be redeemed by the company on the dissolution of the marriage or the ending of cohabitation.

The Review is constrained in its consideration of non-pharmacist shareholdings in pharmacy businesses. Having accepted the pharmacist only ownership principle in Recommendation 1 the Review is effectively precluded from a broader consideration

of non-pharmacist ownership structures here. The Review's analysis appears to focus on the workability of new corporate structures to support the principle of effective pharmacist ownership and control rather than their public benefits.

### *Suggested COAG Response to the Recommendation*

- **Accept Recommendation 3(a);**
- **Accept Recommendation 3(b) where jurisdictions' legislation requires pharmacist- only pharmacy ownership; and**
- **Accept Recommendation 3(c) where jurisdictions' legislation requires pharmacist- only pharmacy ownership.**

## **Recommendation 4: Number of Pharmacies Owned by Proprietors and Pharmacist Supervision of Pharmacies**

**The Review recommended that:**

- (a) State and Territory restrictions on the number of pharmacies that a person may own, or in which they may have an interest, are lifted;**
- (b) The effects of lifting the restrictions be monitored to ensure that they do not lead to undue market dominance or other inappropriate market behaviour; and**
- (c) Legislative requirements that the operations of any pharmacy must be in the charge, or under the direct personal supervision, of a registered pharmacist are retained.**

The Review accepted that a basic principle underpinning the development of the community pharmacy network has been pharmacist only ownership of pharmacies. This is on the assumption that a net benefit accrues to the public from a proprietor that has both a commercial and professional interest in the safe and competent provision of pharmacy services. This has often been interpreted to mean that a pharmacist owner would need to personally supervise the operations of the pharmacy and has led to the imposition of various limits on the number of pharmacies a pharmacist can own. (Qld, SA: 4; NSW, Vic: 3; WA, Tas: 2) (Whereas there is no restriction on the number of pharmacies a friendly society can own in Victoria and the limit in South Australia is 31.)

However, the Review found that jurisdictions' limitations on pharmacies owned by a pharmacist are arbitrary, artificial, are in practice easy to breach by a determined proprietor, and are difficult for regulatory authorities to enforce and accordingly recommends their removal.

While lifting this restriction may appear inconsistent with Recommendation 1, the Review noted that a pharmacist owner could, by taking advantage of modern communication and information technology, develop and implement contemporary business management systems that ensure consistent practice across numerous and widespread individual pharmacies.

### *Working Group Comments*

The removal of restrictions on the number of pharmacies an owner can operate is one of the most far-reaching reforms contemplated by the Review. This reform has the capacity to significantly change the nature of community pharmacy. It provides the industry with the opportunity to develop more efficient pharmacy businesses.

This Recommendation illustrates the problem with Recommendation 1. If a person, using modern communication and information technology, can own a business controlling, say, 10 pharmacies without compromising the quality of community care those pharmacies deliver it is difficult to see why the owner needs to be a pharmacist. Friendly societies have already demonstrated that they can operate a large number of pharmacies at a high standard.

Industry representatives suggest several options to restrict the number of pharmacies that a pharmacist may own, including: raising the number to one slightly higher than the current highest (4) as a stepped process and monitoring the resultant behaviour; adoption of the pharmacist-owner-manager structure set out in Appendix 4 to the Review Report; or a cap on market percentage an owner controls. However, the Working Group accepts the evidence presented to the Review that any limits imposed in this way are impractical to enforce and inherently anti-competitive. The Report 'Fair Market or Market Failure? A Review of Australia's Retailing Sector' by the Commonwealth Parliament's Joint Select Committee on the Retailing Sector, August 1999 found that there are significant problems with introducing market caps.

The Working Group, whilst noting the apparent tension between this Recommendation and Recommendation 1, support adopting the reform.

### ***Monitoring of Market Dominance or Inappropriate Market Conduct***

The Review recommended that any deregulation of pharmacy numbers be monitored, with a focus on what it describes as "market dominance or other inappropriate market behaviour".

Industry representatives have suggested that the Commonwealth's Australian Community Pharmacy Authority, or the Guild-affiliated Australian Institute of Pharmacy Management, could undertake a monitoring role. The Review suggested that regulatory authorities and particularly professional and industry organisations could assist proprietors with guidelines, or even a code of good practice, on personal supervision and professional liability issues rather than monitoring market behaviour.

The Review envisaged lifting the location restrictions in the ACPA to allow other practitioners to easily enter the market and act as an efficient and natural deterrent to market domination. However, retaining the location restrictions has the capacity to create situations where small pockets of market dominance could occur. This may be a particular concern in some regional areas.

In its commentary, the Review noted that the *Trade Practices Act* (TPA) and its creation, the Australian Competition and Consumer Commission (ACCC), is a mechanism outside *Pharmacy Acts* to protect the public from market dominance or inappropriate market conduct. However, the ACCC advised that it is very difficult for them to monitor the effect of lifting restrictions on pharmacy numbers. The ACCC

must show a substantial lessening of competition and this is particularly difficult to do if there was a gradual acquisition of pharmacies.

The ACCC is able to effectively monitor areas of market collusion and franchising arrangements.

If isolated pockets of market domination did develop the potential for raising prices and making large profits is very limited. Most prescription drug prices are controlled through the Commonwealth's PBS. Pharmacists compete with many other retailers on their general merchandise. Of the remaining areas, an analysis of pharmacy revenues indicates that, in the order of, 15% of total pharmacy revenue is derived from sale of goods restricted to pharmacies or pharmacists only (see Attachment D). Other areas of competition that will counterbalance the risk of local area market domination are the advent of Internet and mail order pharmacy. Both provide competition to pharmacies that is not affected by the ACPA location restrictions.

On balance, the Working Group considers there are appropriate mechanisms already in place in the broader community to safeguard against the ill effects of market dominance. The ACPA location restrictions have the effect of slowing down movements by existing players so areas of market dominance are not likely to rapidly develop, if at all. Therefore, rather than introduce another layer of regulation to monitor the impact of freeing up restrictions on pharmacy numbers a better approach is to assess the impact of these reforms in discussions in the lead up to the next agreement between the Commonwealth and the Pharmacy Guild of Australia.

The Working Group's New South Wales representative, however, remained concerned as to the potential for the development of monopolies in regional areas, and indicated that as part of the implementation process for this recommendation, the State would need to further assess the impact of the proposal on competition within New South Wales.

### ***Personal Supervision of a Pharmacy by a Pharmacist***

Existing legislation in each jurisdiction requires that each pharmacy operate at all times with a registered pharmacist in attendance. The Review's recognition that this rule ensures safe and competent pharmacy services raises the question of whether superimposing a rule requiring pharmacist ownership, let alone a further rule that limits the number of pharmacies owned, adds anything.

### ***Suggested COAG Response to the Recommendation***

- **Accept Recommendation 4 (a), noting that NSW remains concerned as to the potential for the development of monopolies in regional areas, and as such, as part of the implementation process for this recommendation, the State will further assess the impact of the proposal on competition within New South Wales.**
- **Accept Recommendation 4(b) noting that the effects of lifting the restrictions on the number of pharmacies that a person can own will be assessed in discussions on the Australian Community Pharmacy Agreement in 2004; and**

that some jurisdictions, concerned about the impact of this proposal on regional areas, will further assess its impact during implementation.

- Accept Recommendation 4(c).

## **Recommendation 5: Permitted Exceptions to Pharmacist Ownership**

The Review recommended that:

- (a) **Friendly societies may continue to operate pharmacies, but that:**
  - (1) **Regulations specific to the establishment and operation of pharmacies by friendly societies, that do not also apply to other pharmacies and classes of proprietors, should be removed; and**
  - (2) **Any friendly society that did not operate pharmacies in a jurisdiction on 1 July 1999 or any other prescribed date should not own, establish or operate a pharmacy in that jurisdiction in the future, unless it is an entity resulting from an amalgamation of two or more friendly societies operating a pharmacy at that date;**
- (b) **Permitted corporately-owned pharmacies continue to be restricted under grandparenting arrangements where these apply;**
- (c) **The relative financial and corporate arrangements of pharmacist-owned pharmacies and friendly society pharmacies, as these may affect the competitiveness of such pharmacies with each other, could be referred for definitive advice to the Australian Competition and Consumer Commission (ACCC), or another agency or authority of comparable and appropriate standing; and**
- (d) **The findings of any such inquiry may be taken into account as part of legislative reform processes in this regard.**

The Review noted that there are three groups of pharmacy proprietors who are not necessarily registered pharmacists:

- Administrators of deceased estates and bankrupt or insolvent pharmacy businesses;
- Non-pharmacist companies and individuals who were permitted to own pharmacies before existing pharmacist only restrictions came into force; and
- Friendly societies. Currently there are 34 such societies which own 117 pharmacies throughout Australia excluding the Territories.

The review concluded that friendly society pharmacies, as permitted players, should be treated consistently nationally and equitably with other pharmacies.

### ***Working Group Comments***

#### **Deceased Estates and Bankrupt Individuals and Businesses**

In the body of its commentary on Recommendation 5, the Review accepted that transitional provisions whereby non-pharmacists may administer the pharmacy businesses of deceased and insolvent pharmacists should continue.

It appears that not referring to this class of proprietorship in Recommendation 5 was an oversight on the Review's part, and the acceptability of such provisions should be confirmed in any response.

### Grand-Parented Corporately Owned Pharmacies

The Review found that there are a relatively small number of these organisations still operating and that as regulatory provisions relating to them are consistent both across jurisdictions and with pharmacist owned pharmacies there was no need to contemplate changes to them. Any change of treatment would be inconsistent with Recommendation 1 on the principle of pharmacist owned pharmacies.

### Friendly Societies

The Review found that the treatment of friendly society pharmacies varied markedly across States and Territories. The regulatory framework ranges from encouraging in Victoria and South Australia to tightly constrained in Western Australia and New South Wales. The Review recommended (5(a)) that friendly societies continue to be permitted exceptions and, as such, treated consistently with pharmacist owned pharmacies, a view the Working Group accepts.

Preserving some non-pharmacist ownership in community pharmacy will continue to provide useful evidence for the evaluation of claims that only pharmacists should be allowed to own pharmacies.

Recommendation 5(a)(1) ensures that friendly society pharmacies are subject to the same standards and constraints of pharmacist owned pharmacies. This may mean legislative changes to ensure that friendly society pharmacies come within the jurisdiction of Pharmacy Boards and are subject to the same benefits and restrictions as other pharmacy owners.

The Review suggested that the provisions of the Victorian *Pharmacist Act 1974* provide a sound workable model for adoption by all jurisdictions. That Act permits registered societies within the meaning of the *Friendly Societies Act 1986* to own pharmacies. There are no restrictions on friendly society pharmacies in terms of their numbers in the State, the numbers that may be operated by any one society and the conditions under which they are approved, established or relocated.

Recommendation 5(a)(2) if adopted would be a substantial qualification to 5(a)(1) by introducing (or in some States maintaining) restrictions to prevent friendly society pharmacies entering new jurisdictions. This would have the effect of preventing a friendly society pharmacy in one State entering another and restricting the entry of new friendly societies into the pharmacy industry.

The Working Group has some difficulties with the Review's approach to this issue. The Review seeks to impose restrictions on competition but does not show that such restrictions are in the public benefit and hence does not make a case for introducing them. As noted by the Review, friendly society pharmacies are capable of providing safe and competent pharmacy services. Friendly societies have not only survived but flourished.

The Working Group sought advice on whether, if Recommendation 5(a)(2) is rejected, friendly societies could use this opening as an opportunity to dominate community pharmacy or new ones would enter the industry establish themselves, demutualise and operate as ‘for-profit’ corporate bodies. Advice from chartered accountants, Walter and Turnbull, is that, in their opinion, friendly societies do not have a significant comparative competitive advantage over pharmacist owned pharmacies and therefore in a post Wilkinson environment are no more likely to dominate community pharmacy than are pharmacists. As Walter and Turnbull, noted, however, in the conclusion of their report, their findings were subjective due to them only using information from a limited sample of pharmacist owned pharmacies. A copy of the terms of reference for the consultancy and their report are at Attachment E.

On the related concern of how to treat friendly society pharmacies that demutualise and effectively become ‘for-profit’ corporate bodies. The Working Group consider that the feature that distinguishes friendly society pharmacies from ‘for-profit’ corporate bodies is that they are organisations that are primarily concerned with providing a benefit to their members. If this characteristic is lost through demutualising then the new body should no longer be a permitted exception to pharmacist ownership.

The Australian Securities and Investment Commission (ASIC) have recently released Policy Statement PS147 that refines the criteria ASIC use to determine if an organisation has a mutual structure. This is an appropriate test to determine if a friendly society has a mutual structure for the purposes of retaining pharmacies.

### ***Industry Response***

There has been strong industry argument for and against Recommendation 5(a). Some employee pharmacists have argued that friendly society pharmacies should be able to operate without restriction on the basis that:

- Friendly society pharmacies have an important role to play in providing direct competition to pharmacist owned pharmacies; and
- To restrict friendly society pharmacies is anti-competitive in nature, it benefits non-friendly society pharmacies and may reduce savings to consumers.

Pharmacist proprietors have argued that:

- This Recommendation is at odds with Recommendation 1 and 3 which adopts the principle of pharmacist only ownership of pharmacies;
- Friendly societies have an unfair tax advantage over pharmacist owned pharmacies;
- Friendly societies have an unfair competitive advantage because of their corporate structure that allows for economies of scale.

The Working Group considered industry concerns about permitting friendly societies to continue operating pharmacies but found, as did the Review, that friendly society

pharmacies provide a safe and competent pharmacy service and see no reason to restrict their operations.

The Working Group consulted the ACCC on the issue of comparative competitive advantage as recommended by the Review, but the ACCC advised that they were not in a position to provide advice on this issue at that time.

Industry representatives have subsequently approached the Working Group and suggested that if Recommendation 5(a)(1) is adopted provision be introduced to:

- Require a pharmacist be included on the Board of Management of Friendly Societies which operate pharmacies;
- Require the appointment of a pharmacy manager with responsibility for each pharmacy site; and
- Limit the current ownership exemption to friendly societies that remain not-for-profit.

This fallback position also raises difficulties. The first dot point would be resisted by friendly societies as an unreasonable imposition on their ownership and governance structures. The second dot point is reasonable and reflects current legislative provisions for a pharmacist on duty. The third dot point raises the issue of demutualisation of friendly societies, the policy implications of which have been discussed above.

### ***Conclusion***

The Working Group has given careful consideration to the issue of whether there is a sound basis for applying differing laws to friendly society pharmacies compared to pharmacist owned pharmacies. It has concluded that there is not, and therefore that recommendation 5(a)(1) should be supported for the following reasons.

There has been much made of the advantages or otherwise friendly societies receive from their taxation arrangements flowing from their mutuality status. However, this issue has been considered by the Ralph Review and the mutuality provisions retained. The Working Group suggests that jurisdictions take the tax arrangements as a given and not try to compensate for them through administrative means.

Another concern expressed about friendly society pharmacies is that of having an unfair advantage they will dominate the market. Advice commissioned by the Working Group indicates that they do not have a competitive advantage and are no more likely than other players to dominate community pharmacy in Australia. This advice, however, was by its own admission subjective due to the information on pharmacist owned pharmacies only being obtained from a limited sample. It is accordingly considered that recommendation 5(c) relating to referral of the issue to the ACCC for consideration should stand.

The only issue that should determine the extent of friendly society participation in community pharmacy is whether they can run good pharmacies. On this basis the Working Group conclude that friendly society pharmacies, as a sector, should be permitted to operate in the same way as pharmacist proprietors.

Once Recommendation 5(a)(1) is accepted, it is difficult to see why it should be weakened in the manner suggested by 5(a)(2). The Review does not provide any support for 5(a)(2). The Working Group's conclusion is therefore that Recommendation 5(a)(1) should be implemented in full, from which it necessarily follows that 5(a)(2), which significantly qualifies 5(a)(1), should be rejected.

If, however, a friendly society should demutualise and lose that characteristic of primarily providing benefits to its members then it should no longer be a permitted exception to pharmacist ownership as there is little to distinguish it from a for-profit corporate body.

### ***Suggested COAG Response to the Recommendation***

- **Accept Recommendation 5(a)(1) noting the States will ensure that the same benefits, standards and constraints will apply to friendly society pharmacies as apply to pharmacist-owned pharmacies;**
- **Reject Recommendation 5(a)(2) as to accept this would severely limit the scope of Recommendation 5(a)(1). Friendly society pharmacies are a permitted exception to the pharmacist owned pharmacy rule and therefore should be able to operate accordingly;**
- **Accept Recommendation 5(b);**
- **Accept Recommendations 5(c) and (d). The Review noted that a definitive assessment of whether friendly societies pharmacies have unfair tax advantages over pharmacist owned pharmacies has yet to be made, and the issue should be referred to the ACCC for consideration.**
- **Note that there is no change proposed to the current provisions for deceased estates and bankrupt individuals and businesses.**

## **Recommendation 6: Pecuniary Interests in a Pharmacy Business**

The Review recommended that:

- (a) Any statutory prohibition on natural persons or bodies corporate, not being a registered pharmacist, or other permitted entity, having a direct proprietary interest in community pharmacies are retained;**
- (b) "Proprietary interest" be defined clearly in *Pharmacy Acts* as relating to the direct ownership of, or partnership, shareholding or directorship in a pharmacy operating entity;**
- (c) Subject to the proprietor of a pharmacy remaining responsible and accountable for the safe and competent practice of pharmacy services in that pharmacy, provisions in *Pharmacy Acts* relating to and including:**
  - (1) Preventing parties other than a registered pharmacist to have a lawfully permitted association with a pharmacy business, but not including a proprietary interest as defined in Recommendation 6(b);**

- (2) Inserting specific terms in commercial documents relating to those businesses;**
  - (3) Preventing considerations for third parties based on a pharmacy's turnover or profit;**
  - (4) Preventing pharmacies having preferred wholesale suppliers of medicines;**
  - (5) Otherwise preventing pharmacy proprietors from developing lawful business associations with other parties; and**
  - (6) Allowing regulatory authorities to intervene inappropriately in matters of this nature;**
- are removed; and**
- (d) Removed provisions of the types described in Recommendation 6(c) are replaced in each *Pharmacy Act* with a statutory offence, with appropriate and substantial penalties for individuals and corporations, of improper and inappropriate interference with the professional conduct of a pharmacist in the course of his or her practice.**

The Review notes that jurisdictions, in an attempt to restrict ownership and effective control of pharmacies to registered pharmacists and provide some support to pharmacists in their dealings with commercially strong enterprises, have created a complicated regulatory framework that unnecessarily inhibits pharmacists' commercial arrangements. Prohibited commercial arrangements include franchising agreements; conditions on commercial documents and access to commercial records; rent for pharmacy premises; and joint ventures.

The Review took the view that, so long as the proprietor or director of a pharmacy business is a pharmacist or a permitted non-pharmacist and remains responsible and accountable for the professional services delivered under their responsibility, regulatory authority scrutiny generally should not apply to the commercial relationships and transactions of their business.

The only qualification should be that authorities are able to act on matters where safe and competent pharmacy practice has, or appears to have been compromised.

### ***Working Group Comments***

The Review's recommendations appear to be aimed at giving pharmacies as much commercial freedom as possible while protecting the integrity of proprietors' ability to control the planning and delivery of pharmacy goods and services in their pharmacies.

Recommendations 6(a) and (b) narrow the definition of pecuniary interests to proprietary interests only in a pharmacy business. The effect of this is to continue to exclude non-pharmacists from pharmacy ownership but permit a normal range of commercial transactions between pharmacists and non-pharmacists that have been excluded by the current broad-brush legislative provisions. This approach would remove some of the uncertainty inherent in the existing pecuniary interest provisions.

Recommendation 6(c) lists a series of commercial activities currently prohibited by State *Pharmacy Acts* with, what the Review believes are, little or no justification in terms of safeguarding the public interest. The Working Group supports this proposal to repeal and replace the existing patchwork of attempts to circumscribe commercial arrangements. However, the Recommendation should more clearly draw on the distinction made in the Report between the aspects of a pharmacy business that make up pharmacy services (working definition on page 21) and the non-pharmacy aspects (eg banking, general goods retail, cosmetics and lotteries). Regulation should only be concerned with the former aspects.

The present pecuniary interest provisions are not effective in ensuring that the practice of pharmacy can occur without undue or improper interference from third parties. Recommendation 6(d) attempts to provide pharmacists with some support in their dealings with commercially strong enterprises by introducing a statutory offence to deter third parties exerting improper influence over the conduct of a pharmacy. This could also include inappropriate direction of an employed pharmacist by a proprietor, whether or not the proprietor is a registered pharmacist.

Concerns have been raised by industry representatives about whether a criminal sanction is appropriate, especially for its pharmacist members. Doubts have been expressed about the practicality of prosecuting such an offence and obtaining convictions on the basis of a criminal burden of proof. Industry representatives argue strongly against introducing a statutory offence and suggest an alternative approach, discussed below.

The Working Group looked at a number of options in relation to Recommendation 6(d), including:

- The application of the *Trade Practices Act*. The Working Group sought advice from the ACCC on their role in this area. The ACCC advised that the unconscionable conduct provisions under the *Trade Practices Act* relate to this issue. However, it is very early for this legislation and there is not a large body of case law to rely on yet;
- The possible development of an industry Code of Conduct. The Working Group concluded that this may have limited application as it may not bring in third parties, such as wholesalers;
- The Pharmacy Guild suggestion of a new legislative provision that renders unenforceable any provisions of a contract or other agreement between a pharmacy business and another party if they purport to influence or direct the professional control of a pharmacist of his or her business.

This proposal has merit in that it makes it clear that it is directed to third parties and makes clear the importance of the independence of pharmacists and their obligation to maintain the standard of professional services. It does, however, give rise to uncertainty in respect of the factual matters that may or may not result in a declaration of unenforceability.

The Guild hints at a role for Pharmacy Boards in adjudicating on such clauses. The Working Group considers that it is not appropriate for Boards to be regulating the day to day transactions of a practitioner's business. They do not have the legal expertise and investigative resources and would be drawn into similar difficulties as they are with the current pecuniary interest provisions; and

- Other legislative provisions in New South Wales and proposed in Queensland, establishing offences where a person incites, aids, abets (and so on) improper practice. The attractiveness of this approach is that it removes the focus from suspicion of all commercial arrangements, towards the real concern that is improper practice on the part of the pharmacist. Copies of relevant provisions in the New South Wales *Medical Practice Act 1992* and the *Queensland Pharmacy Registration Act 2001* are at Attachments F and G respectively.

Of these options, the Working Group concluded that the relevant provisions of either the New South Wales *Medical Practice Act 1992* or the *Queensland Pharmacy Registration Act 2001* offer an appropriate model to address this issue.

#### ***Suggested COAG Response to the Recommendation***

- **Accept Recommendations 6(a), (b), (c) and (d);**

### **Recommendation 7: Registration of Pharmacy Premises and Pharmacy Businesses**

The Review recommended that:

- (a) Requirements for the registration of pharmacy premises be removed provided that:**
- (1) Acts, regulations and related guidelines can continue to require pharmacy proprietors and managers to ensure that their premises are of a minimum standard of fitness for the safe and competent delivery of pharmacy services;**
  - (2) The responsibilities of pharmacy proprietors and managers, and of registered pharmacists, under State and Territory drugs and poisons legislation are not compromised;**
  - (3) Acts or regulations may require the proprietor of a pharmacy to notify a regulatory authority, in writing, of the location or relocation of a pharmacy; and**
  - (4) Regulatory authorities, their employees or agents may enter and inspect pharmacy premises to investigate complaints, conduct spot checks, or act on the reasonable suspicion of guidelines being breached; and**
- (b) Regulations requiring the registration of pharmacy businesses by regulatory authorities are removed, given that pharmacists are already registered in each State and Territory, and that business registration is not connected to the safe and competent practice of pharmacy.**

The Review established the principle that *Pharmacy Acts* and regulatory authorities should focus their regulatory attention exclusively on the safe and competent practice of pharmacy. This means that regulations of commercial aspects of pharmacy

practices should be wound back, or removed, wherever possible to ensure that pharmacy businesses can make their own commercial judgements without undue interference from professional regulatory authorities.

However, most States and Territories require the registration of pharmacy premises by their regulatory authority. Some also require the registration of pharmacy businesses. This is in addition to personal pharmacist registration under *Pharmacy Acts* and the business registration requirements of corporate law.

The Review took the view that, so long as pharmacy premises are accessible and conform to any requirements laid down to facilitate the safe and competent practice of pharmacy there is no need to register either the premises or the business entities that operate them.

It also noted that premises' registration requirements are highly prescriptive in some jurisdictions, and may operate, or be interpreted, to frustrate the professional or commercial development of pharmacy service delivery. This might include developments such as co-locating a pharmacy within a supermarket, department store, or other general retail business, or placing excessive limitations on the conduct of mail order or Internet pharmacy services.

The Review assumed that regulatory authorities would still have a role in assuring the quality and suitability of pharmacies, and would continue to have rights of inspection and entry for standards compliance purposes.

### ***Working Group Comments***

The Working Group endorses the principle of pharmacy boards focusing on professional practice and not commercial aspects of pharmacy established by the Review. In this context the recommendation to limit obligations to register pharmacy premises and businesses is appropriate. In addition, the Working Group is concerned to ensure that the current broad ranging business and premises regulation is not retained as a convenient way to raise revenue.

This Recommendation ventures into areas that overlap with the NCP Review of Drugs, Poisons and Controlled Substances currently under-way. The Review rightly points to jurisdictions' poisons legislation as the appropriate vehicle for ensuring safe storage and handling of drugs, poisons and so on. It does not consider in detail the question of whether, and if so how, poisons laws would need to be adapted to ensure they adequately cover the field of safety matters currently addressed jointly by the poisons and pharmacy registration laws. Jurisdictions could consider this following the Drugs, Poisons and Controlled Substances Review.

Industry representatives have raised concerns with the Working Group to ensure that Australia meets its obligations under relevant United Nations Conventions – the *Single Convention on Narcotic Drugs 1961* and the *Psychotropic Substances Convention 1971*. The Drugs, Poisons and Controlled Substances Review has addressed this issue. In any event, these conventions do not require people who are authorised to perform therapeutic functions to be either licensed nor have their premises licensed.

### ***Impact on Jurisdictions***

It is notable that Queensland and the Territories have no requirements for premises or business registration, there is no clear evidence that this lack of registration has affected pharmacy or pharmacist standards in those jurisdictions.

### ***Suggested COAG Response to the Recommendation***

- **Accept Recommendations 7(a) and (b).**

### **Recommendation 8: Miscellaneous**

**The Review recommended that Commonwealth, State and Territory governments ensure that legislation and agreements for the delivery of professional pharmacy and health care services negotiated with pharmacy proprietors and their representatives, require:**

- **An acceptable range of services to be provided; and**
- **Appropriate quality assurance and professional practice standards to be adopted by community pharmacies covered by the agreements.**

In the context of there being a net public benefit that accrues to the community from pharmacy ownership regulation currently in place. The Review makes the point that the quid quo pro for the community is high and consistent quality provision of pharmacy services at a reasonable cost.

The Review suggests that it is reasonable for Governments, in the public interest, to intervene to ensure that community pharmacies provide, at an enforceable high standard, a range of relevant health services for which there is demonstrable community need. This may not only include “core” programs like the PBS. It could include public health and other less commercially attractive programs, such as methadone supply and providing access to needles and syringes for people with drug dependency.

### ***Working Group Comments***

The Working Group considers that there is no need to take any action on this Recommendation other than note it. Jurisdictions will take appropriate action if and when a specific need arises.

### ***Suggested COAG Response to the Recommendation***

**Note Recommendation 8.**

## **LOCATION OF PHARMACIES**

### **Recommendation 9: New Pharmacy Approvals**

The Review recommended that:

- (a) Some form of restriction on the number of pharmacies as outlets for the Pharmaceutical Benefits Scheme (PBS) is retained;
- (b) The parties to the Australian Community Pharmacy Agreement consider, in the interests of greater competition in community pharmacy, a remuneration system for PBS services that restricts the overall number of pharmacies by rewarding more efficient pharmacy businesses and practices, and providing incentives for less efficient pharmacy business to merge or close; but
- (c) If remuneration arrangements consistent with Recommendation 9(b) are not practical, controls on the number of pharmacies through restricting new pharmacies' eligibility for approval to supply pharmaceutical benefits could be retained but if so, any "definite community need" criteria for those approvals should be made more relevant to the needs of underserved communities, particularly in rural and remote areas.

### **Recommendation 10: Relocation of Existing Pharmacies**

The Review recommended that Pharmaceutical Benefits Scheme (PBS) related restrictions on the relocation of pharmacies from one site to another are phased out.

### **Recommendation 11: Timing of Proposed Changes**

The Review recommended that, consistent with Recommendations 9 and 10, the current Pharmaceutical Benefits Scheme (PBS) new pharmacy and relocated pharmacy approval restrictions be reformed and/or phased out from 1 July 2001.

#### *Working Group Comments*

The Working Group notes that the Commonwealth's rules on locating new and existing pharmacies have the most impact of all the restrictions on pharmacy businesses. The rules are inherently anti-competitive in their operation and effects. The rules are contained in the Australian Community Pharmacy Agreement and, therefore, are effectively locked in for the period July 2000 to June 2005.

Recommendation 9(a) should be read together with the Review's finding that the restrictions on new pharmacies should be replaced by incentive-based mechanisms in the ACPA (page 88). The Review concluded that there are more direct and competition-friendly avenues to encourage pharmacists to manage the overall number of PBS-subsidised pharmacies in Australia, such as changing the cost calculation

basis for PBS remuneration to reflect best practice rather than the current industry average.

The Review identifies benefits that might ensue from a revision of the regulation of pharmacy location rules. Thorough examination of these issues over the next five years would prepare the way for revised arrangements to be implemented through the next ACPA.

### ***Suggested COAG Response to Recommendations 9-13***

**The Working Group notes that the Commonwealth's rules on locating new and existing pharmacies have the most impact of all the restrictions on pharmacy businesses. The rules are inherently anti-competitive in their operation and effects. Since the Review reported in February 2000, the Commonwealth has entered into the third Australian Community Pharmacy Agreement (ACPA) with the Pharmacy Guild of Australia for the period 1 July 2000 to 30 June 2005. The Commonwealth, while accepting that the Review's recommendations on location rules may well offer real alternatives to the existing approach, has opted for an incremental and targeted easing of existing regulations in the third ACPA with an opportunity to review these arrangements in the lead up to the next agreement. Recommendations 9-13 will be considered as part of that review.**

## **Recommendation 12: Rural and Remote Pharmacies**

**The Review recommended that:**

- (a) Legislation to support specific programs and initiatives to assist the retaining and enhancing of pharmacy services in rural and remote areas is considered to be of a net public benefit; and**
- (b) Non-transferable approvals to supply pharmaceutical benefits conferred, in limited circumstances, on a specific rural or remote locality are considered to be a justifiable restriction on competition in the public interest.**

### ***Working Group Comments***

The Working Group notes that the third ACPA contains a set of initiatives, costing \$76m over five years, to improve access to pharmacy services in rural and remote areas, and to encourage pharmacists to work in these areas.

These initiatives may need to be revisited to ensure their impact is not lost in any future move to incentive based remuneration arrangements for pharmacists.

### ***Suggested COAG Response to the Recommendation***

**The Working Group notes that the third ACPA contains a set of initiatives, costing \$76m over five years, to improve access to pharmacy services in rural and remote areas, and to encourage pharmacists to work in these areas.**

## **Recommendation 13: Medical Centres and Aged Care Facilities**

The Review recommended that, should new pharmacy and relocated pharmacy approval restrictions continue after 1 July 2001, that:

- (a) Approvals, for Pharmaceutical Benefits Scheme (PBS) purposes, of pharmacies located in eligible medical centres, private hospitals and aged care facilities, and intended to serve those facilities, are considered without reference to the distance of a given facility's site from the nearest existing pharmacy; and
- (b) Measures as proposed in Recommendation 13(a) are incorporated in any transitional or ongoing regulatory measures concerning the approval of new and relocated pharmacies to supply PBS benefits.

### *Working Group Comments*

The Working Group notes that the third ACPA provides for a pharmacy to relocate, without reference to distance criteria, to a private hospital with more than 150 beds (about 10% of all private hospitals).

### *Suggested COAG Response to the Recommendation*

**The Working Group notes that the third ACPA provides for pharmacy to relocate, without reference to distance criteria, to a private hospital with more than 150 beds (about 10% of all private hospitals).**

## **PHARMACIST REGISTRATION**

The Review noted that the prime objective of regulation in any professional area should be the safe and competent practice of that profession. The Review supported a balanced model of legislative regulation of pharmacists and pharmacy services that:

- Makes regulatory authorities clearly accountable to governments and separate from any professional representative body, and sets out clearly their constitutions and powers;
- Makes government responsible for promulgating standards and practices enforceable under *Pharmacy Acts*, and regulatory authorities responsible for administering and enforcing promulgated regulations and standards;
- Sets out clearly the professional responsibilities of pharmacists for the safe and competent provision of pharmacy services; and
- Sets out clearly complaints, disciplinary and review mechanisms and the grounds on which these may operate.

The Working Group endorses this framework.

The Working Group notes that some jurisdictions have regulatory frameworks that could be regarded as going beyond what is required to ensure the safe and competent delivery of pharmacy services. Implementing these recommendations may require

each jurisdiction to review its legislation and repeal those parts that do not meet this criterion.

Some recommendations are contentious. The Working Group agreed that harmonising the regulation of all health professionals within a jurisdiction may be an important objective which will need to be weighed, in addition to getting consistency in regulatory approaches to pharmacy across jurisdictions. This may mean that in some areas even though there is agreement in principle within the Working Group on the direction of pharmacy reform, the precise nature of how that is to be implemented at jurisdictional level may vary. It is within this context that comments on each recommendation are provided (whilst being in accordance with the agreed principles).

## **Recommendation 14: General Regulatory Principles**

**The Review recommended that:**

- (a) *Pharmacy Acts*, delegated legislation and statutory instruments concentrate on setting out the minimum regulatory requirements for the safe and competent delivery of pharmacy services by, or under the supervision of, pharmacists;**
- (b) Legislation sets out clearly the roles, responsibilities and powers of decision-making, regulatory and reviewing authorities in administering that legislation; and**
- (c) *Pharmacy Acts* distinguish between the responsibilities of governments to approve and formally set professional practice standards, professional instructions and procedural guidelines, and those of regulatory authorities to implement and enforce those standards, instructions and guidelines.**

### ***Working Group Comments***

Recommendation 14 deals with the distinction between the responsibilities of government in setting policy and making regulations and the responsibilities of a regulatory authority in implementing regulations.

In practice what this means is that the overall policy framework and, to the extent that is relevant, the rules and regulations governing the practice of pharmacy are matters for decision by governments and not the pharmacy regulatory body. Legislation should provide law-making power to the Government, usually the responsible Minister. The principle is that there should preferably be a separation of policy from the detailed regulation/application. Such a separation of roles is likely to offer the best prospect for regulatory authorities effectively not exceeding their remit and, in some instances, not risking running into subjective, distorted or prejudicial application of the laws.

However, this need not prevent the regulatory body having some involvement in the preparation of statutory instruments, but legislation should make clear that any role it has as an advisory body is subordinate to the law-making powers of government.

The Review discussion leading to Recommendation 14(c) emphasises the importance of central government, rather than professional bodies or regulatory authorities,

retaining responsibility for making laws. The Recommendation goes on to refer to the need for separation between government and regulatory authority, but unfortunately fails to express the conclusion about the need for separation between government and professional bodies. However, this is in practice not a significant problem as the need to maintain the separation is implicitly recommended by Recommendation 15(b) below.

### *Implications for Jurisdictions*

The Recommendation is more significant for Western Australia where the Review explains that the Pharmaceutical Council is both the executive body of the pharmacist's professional association as well as being the regulatory body. The Working Group's Western Australian representative accepts the Review's argument about the desirability of separating these roles and accepts that adoption of this Recommendation will involve legislative amendments to replace the Council with a Pharmacy Board established on the principles set out in Recommendation 15.

### *Suggested COAG Response to the Recommendation*

- **Accept Recommendations 14(a), (b) and (c).**

## **Recommendation 15: Regulatory Authorities**

**The Review recommended that:**

- (a) The appointment, composition, functions and charter of regulatory authorities should be set out clearly in legislation and should not unduly restrict or hamper competitive and commercial activity in the pharmacy industry by the way they operate; and**
- (b) Regulatory authorities are appointed, composed and structured so that they are accountable to the community through government, and focus at all times on promoting and safeguarding the interests of the public.**

### *Working Group Comments*

Recommendation 15(a) refers to the need not to unduly hamper commercial activity. The discussion leading to this Recommendation makes clear that the Review is concerned with two things.

- The subject matter of regulations should be professional matters, not commercial judgments and activity; and
- Implicit in the recommendation, but explicit in the text, is that discretion given to a regulatory body should not be so broad as to allow it to scrutinise matters other than professional activity.

The Working Group endorses this approach.

Recommendation 15(b) recommends how regulatory bodies should be constituted, using the words "accountable to the community through government". While the Recommendation itself is quite broad, the Working Group notes that the Report's

discussion was far more specific, stating on page 109 that “The best way of ensuring such accountability is to ensure that all regulatory authority members are appointed by the responsible minister, with the advice of professional, industry and consumer interests.”

This recommendation means for most jurisdictions a move away from having a Board that is partly appointed and partly elected or nominated by pharmacists, towards a Board that is majority or wholly appointed (and dismissed) by the Minister. The critical issue is whether the intent of the recommendation, to ensure regulatory authorities are "accountable to the community through government", can be achieved in models where that authority remains partly elected. On the one hand, there are good reasons why the Minister would need to have the power to appoint/dismiss at least a majority of the Board before it could begin to be regarded as accountable in this way.

On the other hand, it could be said that a mix of board members (elected and appointed) can meet the criteria of the recommendation. There are other mechanisms that ensure accountability, such as, requiring elected representatives to act in the Board’s best interests rather than the organisation they represent. Indeed some jurisdictions indicated they consider a mix of appointed and elected members as being the best way to maintain accountability and professional involvement and commitment to the process.

The Working Group therefore accepts Recommendation 15(b), noting that the means of achieving its intent, whether by establishing a system for direct appointment of all board members, or relying on a mix of appointed and elected members, are matters for the States to consider in implementation.

### ***Implications for Jurisdictions***

The recommendation is more significant for Western Australia. The Review describes the Pharmaceutical Council of Western Australia as both the executive body of pharmacist’s professional association, as well as, the regulatory body.

The Working Group’s Western Australian representative accepts the Review's argument that this arrangement has the potential to raise conflicts of interest, Western Australia also notes the Review’s more specific comments on page 159 of the Report.

### ***Suggested COAG Response***

- **Accept Recommendation 15(a) and**
- **Accept Recommendation 15(b) noting that the means of achieving this, whether by establishing a system for direct appointment of all board members or relying on a mix of appointed or elected members, are matters for the States to consider in implementation.**

## **Recommendation 16: Registration of Pharmacists**

**The Review recommended that:**

- (a) Pharmacy remains a registrable profession, and that legislation governing registration should be the minimum necessary to protect the public interest by promoting the safe and competent practice of pharmacy;**
- (b) Legislative requirements restricting the practice of pharmacy, with limited exceptions, to registered pharmacists are retained;**
- (c) Legislative limitations on the use of the title “pharmacist” and other appropriate synonyms for professional purposes are retained;**
- (d) Legislative requirements for a registered pharmacist to have particular personal qualities, other than appropriate proficiency in written and spoken English, and good character, are removed;**
- (e) Legislative requirements that membership of a professional association or society is being necessary for registration as a pharmacist are removed;**
- (f) Legislative requirements specifying qualifications, training and professional experience needed for initial registration as a pharmacist are retained; but**
- (g) States and Territories should move towards replacing qualifications-based criteria with solely competency-based registration requirements if and as appropriate workable assessment mechanisms can be adopted and applied.**

The Review found, on balance, that legislative regulation of the profession based on registering a pharmacist as competent to a minimum level of proficiency for unsupervised practice is justifiable in the public interest.

### ***Working Group Comments***

The requirements for registration of individual pharmacists are a matter of serious consideration for the Working Group. Whilst supporting the underlying principles expressed in Recommendation 16, the Working Group is mindful of the need to regulate only those aspects of professional pharmacy practice which ensure the health and well-being of the wider community.

Whilst supporting Recommendations 16(a) and 16(c), the Working Group notes that the Review Report does not define the practice of pharmacy nor make it clear why it should be restricted. The Working Group has reservations about the desirability of reserving the practice of pharmacy generally to registered pharmacists without having a workable definition of what activities are reserved. Simply protecting “pharmacy” appears so open-ended as to defeat the purpose of offering certainty to the general public. It also leaves related practices (homoeopathy, herbal medicine, eastern medicine and any other profession that provides health treatments) at risk of undue restriction.

The other disadvantage of setting out practice protections in the pharmacy laws under consideration is that these laws should be primarily concerned with registration matters, not establishing safety standards – that is the role of drugs and poisons laws, health regulations and the like. For example, rules establishing what drugs must be obtained through a qualified pharmacist are appropriately contained in the drugs and poisons laws. It must be questioned whether there is any need for an additional layer of regulation of practices in these pharmacy laws.

The Working Group therefore proposes that Recommendation 16(b) be supported only as an interim measure and revisited at the same time as other retained legislation. The only practices that should be considered for protection are those that (1) cannot be controlled by other legislation, and (2) pose a substantially higher risk of significant harm to the public if they are carried out by a person other than a qualified pharmacist. If no acceptable set of protected practices can be agreed upon according to these criteria, general practice protection for pharmacists should be removed.

The Working Group is of the view that both proficiency in written and spoken English as well as being of good character are important personal characteristics for pharmacy registrants. For this reason, Recommendation 16(d) should be accepted.

The Working Group can find no basis for the requirement that a pharmacy registrant be a member of a professional association and therefore supports the removal of any such requirements as per Recommendation 16(e).

Whilst supporting the maintenance of current legislative requirements for initial registration as a pharmacist as per Recommendation 16(f), the Working Group has reservations about a move to solely competency-based assessment for either new registrants or re-registrants as outlined in Recommendations 16(g) and 18. Whilst wishing to encourage continuing education for pharmacists, the Working Group does not consider that there is sufficient industry support nor suitable mechanisms available for the effective implementation of either Recommendation. States and Territories will give further consideration to the use of competency-based assessment as and when suitable mechanisms are developed.

#### ***Suggested COAG Response to the Recommendation***

- **Accept Recommendations 16(a), (c), (d), (e) and (f).**
- **Accept Recommendation 16(b) as an interim measure and revisit at the same time as other retained legislation. The only practices that should be considered for protection are those that (1) cannot be controlled by other legislation, and (2) pose a substantially higher risk of significant harm to the public.**
- **Accept Recommendation 16(g) noting that jurisdictions will give further consideration to the implementation of competency-based assessment as and when suitable mechanisms are developed.**

#### **Recommendation 17: Ongoing Practice as a Pharmacist**

**The Review recommended that:**

- (a) Existing re-registration requirements for pharmacists re-entering the profession following a period out of practice are retained; and**
- (b) Regulations enabling regulatory authorities to impose conditional registration, or supervised or restricted practice prior to re-registration, for pharmacists returning to practice or constricted in their abilities to practice, are retained.**

#### ***Suggested COAG Response to the Recommendation***

- **Accept Recommendation 17.**

## **Recommendation 18**

**The Review recommended that, within three to five years, States and Territories should implement competency-based mechanisms as part of re-registration processes for all registered pharmacists.**

Refer to comments on Recommendation 16(g).

### *Suggested COAG Response to the Recommendation*

- **Accept Recommendation 18 noting that jurisdictions will give further consideration to the implementation of competency-based assessment as and when suitable mechanisms are developed.**

## **Recommendation 19: Disciplinary Processes**

**The Review recommended that:**

- (a) Complaints and disciplinary processes are set out clearly in *Pharmacy Acts* and delegated legislation;**
- (b) Grounds for the incompetence to practise of, and professional misconduct by a pharmacist, are defined clearly in legislation; and**
- (c) Complaints investigation, disciplinary processes, and penalties imposed by regulatory authorities are accessible, public, transparent and subject to the principles of natural justice and external review.**

### *Suggested COAG Response to the Recommendation*

- **Accept Recommendation 19.**

## **Recommendation 20: National Consistency of Pharmacy Regulation**

**The Review recommended that, in the interests of promoting occupational and commercial mobility, the Commonwealth, States and Territories explore and consider adopting nationally consistent or uniform legislation, or specific legislative provisions, on pharmacy ownership, pharmacist registration and the regulation of pharmacy professional practice.**

### *Working Group Comments*

The Working Group endorses the Review's desire to add to the momentum for consistency across jurisdictions but not through model legislation. The desirability of moving from applying a consistent approach to pharmacy across jurisdictions (based on the application of the recommendations in the Review and in this commentary), to

a system based on model legislation is far from clear. There can be good reasons for some differences in emphasis between jurisdictions, for example in order to ensure a consistent approach to the regulation of all health professionals within a jurisdiction.

*Suggested COAG Response to the Recommendation*

- **The Council of Australian Governments has provided a whole-of-government response to this and all other Recommendations arising from the National Competition Policy Review of Pharmacy.**

## **COAG SENIOR OFFICIALS WORKING GROUP**

The Working Group comprised representatives of each jurisdiction and was chaired by the Commonwealth.

- Mr David Borthwick (Chair, Commonwealth);
- Ms Leanne O'Shannessy (New South Wales);
- Mr Paul Myers (Victoria);
- Mr Keith Moyle (Victoria);
- Mr Bruce McCallum (Queensland);
- Mr Paul Sheehy (Queensland);
- Mr Michael Coleman (Western Australia);
- Dr Rosemary Ince (South Australia);
- Mr Chris Lock (Tasmania);
- Ms Julie Campbell (Tasmania);
- Mr Greg Clark (Australian Capital Territory);
- Mr Andrew Hahn (Northern Territory, until 15 August 2000); and
- Mr Stephen Fowler (Northern Territory, from 15 August 2000).

Secretariat support was provided by:

- Mr Charles Maskell-Knight;
- Mr Paul McGlew; and
- Ms Kaye Sperling.

## **LEGISLATION TO BE REVIEWED**

### **State and Territory Legislation**

The relevant instruments relating to pharmacy ownership and registration of pharmacists for the States and Territories are as follows:

Western Australia, *Pharmacy Act 1964*

New South Wales, *Pharmacy Act 1964*

Victoria, *Pharmacists Act 1974*

South Australia, *Pharmacy Act 1991*

Queensland, *Pharmacy Act 1976*, Part 4

Tasmania, *Pharmacy Act 1908*, (not including those parts relating to the registration of pharmacists)

Northern Territory, *Pharmacy Act 1996*

Australian Capital Territory *Pharmacy Act 1931*

### **Commonwealth Legislation**

There is one instrument involved:

Commonwealth Ministerial Determination under section 99L (1) of the *National Health Act 1953*: that part relating to “Approval to Supply Pharmaceutical Benefits”.

## TERMS OF REFERENCE

1. With reference to factors that may be unique to the practice and regulation of pharmacy in Australia, the Working Group should:
  - Examine and comment on each recommendation of the Review, and advise whether a coordinated response to that recommendation can be made by COAG on behalf of all jurisdictions;
  - If a coordinated response to a recommendation is not appropriate, advise on the most appropriate response either by COAG, or by individual jurisdictions; and
  - Assess the extent to which the coverage of legislation relating to the matters referred to the Review can be made consistent between jurisdictions.
2. Under the National Competition Policy, each jurisdiction has the responsibility to assess its own legislation against the terms of the *Competition Principles Agreement* and with regard to their commitments under the *Agreement to Implement National Competition Policy and Related Reforms*.
3. In addition to making broad recommendations on the ownership of pharmacies, the location of pharmacies to supply pharmaceutical benefits, and the registration of pharmacists, the Review made specific assessments of each State and Territory *Pharmacy* or *Pharmacists Acts*. The Working Group should take note of these assessments.
4. In addition to the Review Report, the Working Group would need to consider the implications of the Review for other legislation reviews currently being, or still to be, conducted under National Competition Policy.
5. The Working Group would also need to take into account factors unique to the regulation of pharmacy in Australia that may distinguish its operation from other health professions. These factors may include the operation of the third Australian Community Pharmacy Agreement between the Commonwealth and the Pharmacy Guild of Australia.

## COMMUNITY PHARMACY INCOME

The following information has been extrapolated from information published in the *1999 Pharmacy Trade Report* and data collected by the Commonwealth Department of Health and Aged Care. All figures are indicative approximations only.

### Community Pharmacy Income Distribution for Calendar Year 1998

		\$m	% Dispensary Income	% Total Income
<b>Dispensary</b>	PBS			
	Concessional	\$ 2016	53.4	33.9
	General	\$ 510	13.5	8.6
	Total PBS	\$ 2541	67.3	42.8
	PBS Co-Payment and Private (Non-PBS)	\$ 617	16.4	10.4
	Total Prescription	\$ 3158	83.7	53.1
	Schedule 2 – Pharmacist Only	\$ 615	16.3	10.4
<b>Total Dispensary</b>		\$ 3773		63.5
<b>Retail</b>		\$ 2169		36.5
<b>Total Income</b>		\$ 5942		100.0

*Department of Health and Aged Care*

**Comment  
On Issues in Respect to Competitive  
Position of Friendly Society  
Pharmacies**

REPORT

*September 2000*

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## **1. Background**

In October 1997, the recommendations of the Wallis inquiry saw Friendly Societies move from state based Friendly Society Acts to adopt the federal Australian Financial Institutions Code for prudential regulation of all Friendly Societies. Further, on 1 July 1999 the Federal Government moved Friendly Societies into Corporations Law under the Australian Securities Investment Commission (ASIC) and the prudential regulation of benefit fund Friendly Societies to the Australian Prudential Regulatory Authority (APRA). Friendly Society Pharmacies are now Friendly Societies under Corporations Law.

The National Competition Policy (NCP) Review of Pharmacy Regulation was announced in June 1999. The Council of Australian Governments (COAG) commissioned Warwick J. Wilkinson to examine specified Acts and regulations relating to pharmacy.

A key component of this review was to determine whether these acts and regulations imposed restrictions on competition, and if so, whether any such restrictions were of net public benefit and, if not, whether they should be removed.

Of particular relevance to this report are recommendations three, four and five that were raised in the Wilkinson Review (see Appendix A). These recommendations will be addressed in section 3 of this report in light of the objectives and scope outlined in the section below.

### **1.1 Objectives and Scope of the Report**

Walter & Turnbull have been engaged to provide a report focused on the following objectives:

- To provide advice on whether the financial and corporate basis of friendly society pharmacies (including the treatment of member generated income under mutuality rules), creates an unfair competitive advantage for a small sector of the community pharmacy industry;
- To comment on the relative advantage, if any, that friendly society corporate structures may provide them in the new post Wilkinson review environment; and
- To Comment on the relative advantages and disadvantages of the commercial situation of pharmacist owned pharmacies envisaged by Wilkinson and Friendly Society Pharmacies with respect to, capital raising ability, taxation, profit distribution, legal liability and commercial attractiveness or otherwise of Friendly Society status.

### **1.2 Sources of Information**

In order to complete the tasks required to meet the objectives of our engagement we have reviewed the following sources of information:

- National Competition Policy Review of Pharmacy – February 2000
- Australian Friendly Societies Pharmacies Association Inc, letter from Jim Howard, President, to David Borthwick, dated 22 August 2000
- National Competition Policy Review of Pharmacy, Submission of Australian Friendly Societies Pharmacies Association Inc dated July 1999
- Australian Securities & Investment Commission release in respect to Mutuality, dated 12 September 2000
- The Pharmacy Guild of Australia Submission to the National Competition Policy Review of Legislation, dated July 1999
- Income Tax Assessment Act 97, section 995-1 “taxation of Friendly Society Dispensaries
- Various State Payroll Tax legislation
- Various Sections of Taxation Legislation in respect to Fringe Benefits Tax and Capital Gains Taxation
- Reviewed Audited Financial Statements for the Year ended 30 June 1999 for Friendly Society Pharmacy Dispensaries to quantify taxation savings achieved by Friendly Society Pharmacies for the following Friendly Society Dispensaries
  1. Ballarat United Friendly Societies Dispensaries Limited.
  2. Combined Dispensaries Friendly Society Limited.
  3. Community Care Chemist Friendly Society Ltd.
  4. Community Pharmacy Friendly Society Ltd.
  5. QC Friendly Society Ltd
  6. Dispensary Friendly Society.
  7. Friendly Care Chemists Friendly Society (Australia) Ltd.
  8. Hobart Friendly Society Dispensary Ltd.
  9. Ipswich and West Moreton United Friendly Society Dispensary Ltd.
  10. Launceston Friendly Society Pharmacy Limited.
  11. Maryborough/Hervey Bay Friendly Society Chemists Ltd.
  12. National Pharmacies.
  13. North West Dispensaries Friendly Society Ltd.
  14. Toowoomba Friendly Society Dispensary Ltd.
  15. Townsville Associated Friendly Society Pharmacy Ltd.
  16. United Friendly Societies Associations of Gympie & District.
  17. Victoria Park & Districts United Friendly Societies Council.
  18. Wonthaggi Miners Friendly Society’s Dispensary Ltd.
  19. Yallourn Friendly Society.
- Reviewed taxation savings, if any, in light of representations made by the Australian Friendly Societies Pharmacies Association Inc; and
- Discussions with representatives of the Department of Health and Aged Care.

## 2 Findings

### 2.1 Competitive Advantages and Disadvantages

*"provide advice on whether the financial and corporate basis of friendly society pharmacies (including the treatment of member generated income under mutuality rules), creates an unfair competitive advantage for a small sector of the community pharmacy industry"*

#### 2.1.1 Financial - Taxation

In order to determine the extent (if any) of the financial competitive advantage obtained by Friendly Society Dispensaries (resulting from the application of the concept of mutuality for taxation purposes), we reviewed a sample of Audited Financial Statements of Friendly Society Dispensaries for the year ended 30 June 1999 (refer appendix B).

The sample reviewed indicated the following:

Total Revenue of sample	\$212m
Operating profit of sample	\$6m
Tax effect of the mutuality concept	\$2.95m

The sales that friendly society pharmacies generate from its members are not subject to taxation under the concept of mutuality. This illustrates tax savings to friendly society pharmacies, and consequently demonstrates an advantage over privately owned pharmacies. However the saving is small (ie \$2.95m) when compared to the overall total revenue of the sample tested (\$212m).

Small to Medium Enterprises (SME's) operate under many different structures with the different types of structures attempting to simultaneously meet the commercial (limitation of liability) and taxation objectives of the owners. Most privately operated SME's allocate resources to taxation planning in an attempt to defer and or minimise these taxation liabilities.

Because of the differing structures and circumstances that SME's face, similar levels of taxable profits within the same industry, generate different taxation liabilities. Consequently, most privately owned and operated SME's are structured differently as each SME tailors their structure to suit their specific requirements. A structure that may be adopted to operate a Pharmacist owned and operated Pharmacy may be as follows:

Individual or Partnership of individuals operates the "prescription" dispensary.

Discretionary Trust – Leases premises, undertakes all non-prescription sales.

The beneficiaries of the discretionary trust would usually be the family members of the Pharmacist "owning and operating" the Pharmacy.

As such, the greater the number of adult (ie 18 years old or older) family members associated with the Pharmacist, the better off the structure is to minimise the taxation paid on the income generated by the consolidated results of the Pharmacy.

Taxation is a charge on profit that reduces a business entity's ability to pay a "dividend" or "distribution of profits" along with a business entity's ability to "reinvest" in the development of the business. Attempts will be made to arbitrage the rates so as to give the best outcome (given taxation system adopts a number of different taxation rates).

Any comparison, that does not include the financial results for all pharmacies, (whether owned by a friendly society or not) will be somewhat subjective. However, based on the application of the concept of mutuality for taxation purposes, there appears to be an advantage for friendly society dispensaries in relation to taxation paid by friendly society pharmacies. Despite this, the advantage is not significant, and the application of mutuality for taxation may not be, in itself, a competitive advantage.

Given the impact of pricing in a not for profit environment, along with the taxation structuring opportunities available to pharmacist owned pharmacies, we do not consider the taxation saving from mutuality for taxation purposes, to provide the friendly society pharmacies a competitive advantage.

### ***2.1.2 Mutuality***

The concept of Mutuality applies as follows:

A friendly society dispensary is taxed in accordance with the mutuality principle. This principle excludes from tax all receipts from members but leaves subject to tax, the profit (taxable income) arising from the following classes of receipts:

1. all amounts received from the Commonwealth for the supply of pharmaceutical benefits, whether to members or non-members;
2. Any charges paid by non members for supply of those benefits;
3. Proceeds of the sale or supply of pharmaceutical products and other goods and services to persons who are not members of the friendly society dispensary; and
4. Investment income.

Friendly society dispensaries are treated as non-profit companies for tax purposes and are taxed in the same way. (Reference CCh 2000 Australian Master Tax Guide - pp 95-96).

Further to the concept of mutuality, the Australian Securities and Investment Commission (ASIC) recently issued Policy Statement 147 (12 September 2000) to address the issue of Mutuality. Section 48 of this section outlines a company's purpose. It states that it does not consider it an issue if a friendly society incorporates and provides a return to shareholders. However, it states that the purpose of the company must be limited, and must not be the dominant purpose of the company.

In addition, the ASIC (under section 147.51) recognises that a limited purpose of returns to shareholders can co-exist with a purpose of services to members, and will

not jeopardise a company's mutual status so long as the distribution of profits is not its dominant purpose.

## **2.2 Advantages and Disadvantages of the two types of Corporate Structures post Wilkinson Report**

*"...comment on the relative advantage, if any, that friendly society corporate structures may provide them in the new post Wilkinson review environment."*

In reference to Recommendation 3 of the Wilkinson Report, the Pharmacy Acts recognise that, in addition to sole trading pharmacists, and pharmacist partnerships, a pharmacy may be incorporated under the Corporation Law. This is on the provision that the pharmacy seeking to be incorporated is wholly owned by other pharmacists and/or their prescribed relatives.

Wilkinson proposes that Pharmacists be permitted to own an unlimited number of pharmacies as their resources allow, and this ownership can be through an appropriately structured corporation.

We are of the opinion that pharmacist owned corporations and friendly societies limited by shares and guarantee are neither competitively advantaged nor competitively disadvantaged.

We are of the opinion that, due to the concessional treatment of Capital Gains Taxation to individuals upon the disposal of a capital asset, as opposed to that of a privately owned corporation (when the capital profit is ultimately distributed to individual shareholders), pharmacies will continue to be owned by individual pharmacists. *This is a complex area of Capital Gains Tax legislation and we can provide a detailed explanation of this opinion if required.*

## **2.3 Relative Advantages/Disadvantages of the two types of Pharmacies Envisaged by Wilkinson.**

*"...comment on the relative advantages and disadvantages of the commercial situation of pharmacist owned pharmacies envisaged by Wilkinson and Friendly Society Pharmacies with respect to, capital raising ability, taxation, profit distribution, legal liability and commercial attractiveness or otherwise of Friendly Society status."*

In recommendation 3(b) of the Wilkinson report, it was recommended that pharmacist owned pharmacies be able to incorporate and that only pharmacist's and their immediate families could own shares in such companies.

The advantages and disadvantages are examined in each of the cases below.

### ***2.3.1 Capital raising Ability***

Under recommendation 3 of the Wilkinson Report, friendly societies and privately owned pharmacies will be able to incorporate under the corporations law. However, only pharmacists and their immediate families may own shares in these corporations.

In accordance with the ASIC's policy statement of 147, it recognises that a friendly society is able to attract investors from outside the pharmacy industry.

The ASIC's policy statement 147 (under section 147.51) recognises that a limited purpose of returns to shareholders can co-exist with a purpose of services to members, and will not jeopardise a company's mutual status so long as the distribution of profits is not its dominant purpose. It goes further and states that it does not consider it an issue if a friendly society incorporates and provides a return to shareholders. However, the purpose of the company must be limited, and must not be the dominant purpose of the company.

Given the fact that friendly societies can incorporate and attract outside investors, the incorporated friendly society is able to have a mixture of mutual members and investor shareholders. Therefore, so long as the dominant purpose of the friendly society pharmacy is not jeopardised (ie to provide benefits to its members), it may have an advantage over privately owned pharmacies when attempting to raise additional capital. A friendly society pharmacy is able to seek investors from outside the pharmacy industry, whereas a privately owned pharmacy must restrict its search for additional capital to those currently within the industry.

Pharmacist owned pharmacies have greater access to borrowing funds than those permitted to Friendly Societies under the Friendly Society code.

The issue of debt verses equity funding is subjective and peculiar to each individual circumstance. Equity is at risk where as borrowed funds are usually secured by charges over assets or directors guarantees.

We are of the opinion that a Friendly Society does not have a competitive advantage over Pharmacist owned Pharmacies in respect to Capital Raising ability.

### **2.3.2 Taxation**

Taxation planning of pharmacist owned pharmacies will be improved by the introduction of incorporation. It provides an additional entity in the planning mix that can be adopted.

Given the Capital Gain Taxation amendments as a result of the “Ralph Taxation Review”, many individual pharmacists may continue to operate as individuals or partnerships due to the concessional CGT treatment on disposal of the business. Whilst the issue is complex, in summary, the disposal of a business by a company is not preferred to the disposal of a business by individuals and as such, the provision of incorporation does not provide a competitive advantage to a pharmacist owned pharmacy.

### **2.3.3 Legal Liability**

Under normal circumstances, incorporation provides the shareholders with liability limited to the share capital provided. However, the position of directors is somewhat more exposed due to the directors being accountable under both criminal and corporations law.

Due to the complexity of the legal issue, it is suggested that comment be obtained from an appropriately qualified lawyer. Given the time constraints of the review, there was limited time to research these issues further. Should the Department feel it necessary to pursue this issue further, an opinion can be sought from persons with the necessary expertise at a later date.

### **2.3.4 Commercial attractiveness**

From a commercial perspective, it is more attractive to be an incorporated entity due to the limited liability it offers to its stakeholders.

However, given the CGT concessions discussed at section 3.2.2 of this report, it would appear in the interests of the privately owned pharmacies not to incorporate and continue operating as a private entity.

### **3 Other**

National Pharmacies is a mutual organisation that provides professional retail community pharmacies and optical dispensing outlets for its members and the public from its 36 pharmacies across Australia.

The Organisation had an after tax operating profit of \$1.63 million for the 1999 financial year end and \$1.64 million for the 2000 financial year end.

Due to the National Pharmacies size, it appears this factor alone creates certain advantages to pharmacies operated by this organisation. Operating as a combined body, the National Pharmacies can use their combined 'forces' to better leverage its position in the pharmacy market place with regard to such things as greater purchasing power, pricing and corporate governance.

It is recognised that these are contributing factors that enable the National Pharmacy to provide concessions to its members, and consequently presents a competitive advantage that is not enjoyed by privately owned pharmacies. Due to the time constraints of this review, no attempt has been made to quantify these factors.

### **4 Conclusion**

Whilst it is subjective to make comparisons without a detailed sample of pharmacist owned pharmacies, based on the recommendations of the Wilkinson review, along with the ASIC release on Mutuality Policy(dated 12 September 2000), it is our opinion that friendly society pharmacies do not have a competitive advantage over pharmacist owned pharmacies.

**Appendix A - Wilkinson Recommendations 3, 4 and 5**

### *Recommendation 3*

- (a) Pharmacy ownership structures permitted by various State and Territory *Pharmacy Acts* be retained as being consistent with the defined principle of pharmacist ownership and effective control of pharmacy businesses;
- (b) *Pharmacy Act* recognise, in addition to sole trading pharmacists and pharmacist partnerships, corporations with shareholders who are:
  - (1) All registered pharmacists; and
  - (2) Registered pharmacists and prescribed relatives of those pharmacists; and
- (c) Due to the risk of conflicts of interest of shareholders, and the difficulties in determining the extent to which minority shareholdings may compromise pharmacist control of a pharmacy, operating companies with minority shareholdings held by non-pharmacists are not considered to be appropriate ownership structures for pharmacy businesses.

### *Recommendation 4*

- (a) State and Territory restrictions on the number of pharmacies that a person may own, or in which they may have a interest, are lifted;
- (b) The effects of lifting the restrictions be monitored to ensure that they do not lead to undue market dominance or other inappropriate market behaviour; and
- (c) Legislative requirements that the operations of any pharmacy must be in the charge, or under the direct personal supervision, of a registered pharmacist are retained.

### *Recommendation 5*

- (a) Friendly societies may continue to operate pharmacies, but that:
  - (1) Regulations specific to the establishment and operation of pharmacies by friendly societies pharmacies, that do not also apply to other pharmacies and classes of proprietors, should be removed; and
  - (2) Any friendly society that did not operate pharmacies in a jurisdiction on 1 July 1999 or any other prescribed date should not own, establish, or operate a pharmacy in that jurisdiction in future, unless it is an entity resulting from an amalgamation of two or more friendly societies operating a pharmacy at that date;
- (b) Permitted corporately-owned pharmacies continue to be restricted under grandparenting arrangements where these apply;
- (c) The relative financial and corporate arrangements of pharmacist-owned pharmacies and friendly society pharmacies, as these may affect the competitiveness of these pharmacies with each other, could be referred to definitive advice to the Australian Competition and Consumer Commission (ACCC), or another agency or authority of comparable and appropriate standing; and
- (d) The findings of any such inquiry may be taken into account as part of legislative reform processes in this regard.

**Appendix B - Financial summary of pharmacies included in our sample**

Pharmacy	Ballarat	Community	Townsville	Friendly Care	CQ Friendly	Community Care
Total Revenue	15,238,332	6,846,886	1,781,945	7,667,685	4,877,058	9,187,888
Operating Profit /(loss) (before Abnc	675,357	265,733	384,732	26,283	(118,281)	523,868
Income tax Expense	62,746	(1,205)	90,575	9,462	42,581	41,369

Pharmacy	Ipswich & West	Toowoomba	Maryborough	United Friendly	Launceston	Ipswich
Total Revenue	9,345,799	4,002,403	5,670,722	932,981	2,379,097	9,345,799
Operating Profit /(loss) (before Abnc	(52,944)	402,753	358,692	100,838	56,061	(31,831)
Income tax Expense	(19,060)	71,979	51,403	(0)	2,394	-

Total Revenue	\$ 212,786,478
Total Tax Effect on Mutual Members	\$ 2,951,816
Tax Effect on Mutual Mem Y as a % c	1%
Total Operating Profit	\$ 6,029,927

## Attachment F

### Medical Practice Amendment Act 2000 Schedule 1 Amendment of Medical Practice Act 1992

#### Part 8A Overservicing and unprofessional conduct

##### 116A Prohibition against directing or inciting overservicing or misconduct

(1) A person (*the employer*) who employs a registered medical practitioner must not direct or incite the practitioner to do either of the following in the course of professional practice:

- (a) engage in overservicing,
- (b) engage in conduct that would constitute unsatisfactory professional conduct or professional misconduct.

Maximum penalty:

- (a) in the case of a corporation, 400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

(2) For the purposes of this section, any actions of an agent or employee of the employer are taken to be actions of the employer unless the employer establishes:

- (a) that the employer had no knowledge of those actions, and
- (b) that the employer could not, by the exercise of due diligence, have prevented those actions.

(3) If a person is convicted of or made the subject of a criminal finding for an offence against this section in respect of the actions of an agent or employee of the person, the agent or employee is for the purposes of this Part taken to have been convicted of or made the subject of a criminal finding for the offence also.

(4) When a court convicts or makes a criminal finding against a person for an offence against this section, the Clerk or other proper officer of the court must notify the Director-General in writing of the conviction or criminal finding.

(5) This section does not apply in respect of the employment of a medical practitioner by any of the following:

- (a) a public health organisation within the meaning of the *Health Services Act 1997*,
- (b) a private hospital or day procedure centre,
- (c) a nursing home within the meaning of the *Nursing Homes Act 1988*.

(6) In this section:

*engage in overservicing* means:

- (a) provide a service in circumstances in which provision of the service is unnecessary, not reasonably required or excessive, or
- (b) engage in conduct prescribed by the regulations as constituting overservicing.

##### 116B Extended concept of employment

(1) When a registered medical practitioner engages in the practice of medicine in the course of the carrying on of a business, any person who owns, manages, controls, conducts or operates that business is for the purposes of this Part taken to employ the practitioner (in addition to any person who actually employs the practitioner).

(2) When a registered medical practitioner is employed by a corporation, each of the following persons is for the purposes of this Part also considered to be the employer of the practitioner (in addition to the corporation):

- (a) a person who is a director, secretary or executive officer (as defined in the *Corporations Law*) of the corporation or is concerned in the management of the corporation, or
- (b) any other employee of the corporation in accordance with whose directions the practitioner is required or expected to act.

### **116C Extended concept of carrying on business**

(1) If a medical practitioner engaged in the practice of medicine is provided, in the course of the carrying on of a business, with services that facilitate that practice and the operator of the business is entitled, in connection with the provision of those services, to a share or interest in the profits or income arising from the practice of medicine by the practitioner:

- (a) that business is taken for the purposes of this Part to be a business that provides the medical services that are provided by the practitioner in the course of that practice, and
- (b) the practitioner is taken for the purposes of this Part to be engaged in the practice of medicine in the course of the carrying on of that business.

(2) Subsection (1) does not apply in respect of the practice of medicine by a medical practitioner in such circumstances as may be prescribed by the regulations as exempt from that subsection.

(3) For the purposes of this Part, a person is considered to operate a business if the person:

- (a) owns, manages, controls, conducts or operates the business, or
- (b) has (within the meaning of section 116G) a management role or substantial interest in a corporation that operates the business or a substantial interest in a trust under which the business is operated.

### **116D Convicted offenders may be prohibited from carrying on business**

(1) The Director-General may by notice in writing given to a person who has been convicted of or made the subject of a criminal finding for an offence against this Part prohibit the person from operating a business that provides medical services.

(2) The prohibition may be expressed to be:

- (a) for a fixed period (in which case the prohibition remains in force only for that fixed period), or
- (b) for an unlimited period subject to an entitlement to apply after a specified time for the lifting of the prohibition (in which case the prohibition remains in force until it is lifted).

(3) A prohibition may not be imposed under this section unless the Director-General is of the opinion that the person is not a fit and proper person to operate a business that provides medical services. The Director-General is entitled to presume, in the absence of evidence to the contrary, that a person who has been convicted of or made the subject of a criminal finding for an offence against this Part on 2 or more occasions in any period of 10 years is not a fit and proper person to operate such a business.

(4) A prohibition under this section may be limited in its operation in either or both of the following ways:

- (a) it may be limited to specified premises, but only where the person concerned operates a business that provides medical services at those premises and at other premises,
- (b) it may be limited to premises within a specified area.

(5) If a prohibition under this section is subject to an entitlement to apply after a specified time for the prohibition to be lifted, such an application may be made to the Director-General after that time. The Director-General may lift the prohibition or confirm the prohibition and

set a further period after which an application for the prohibition to be lifted can be made under this subsection.

### **116E Offence of operating business while prohibited**

(1) A person who in contravention of a prohibition under this Part operates a business that provides medical services is guilty of an offence.

Maximum penalty:

- (a) in the case of a corporation, 400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

(2) If a continuing state of affairs is created by an offence against this section the offender is liable to a maximum penalty of:

- (a) 100 penalty units in the case of a corporation, or
- (b) 50 penalty units in any other case,

in respect of each day on which that offence continues, in addition to the penalty specified in subsection (1).

(3) If medical services are provided on premises on which a business is carried on, it is to be presumed for the purposes of this section, unless the contrary is established, that the business provides those medical services.

### **116F Effect of appeal against conviction**

A prohibition under this Part has no effect while an appeal is pending against the conviction or criminal finding for the offence on which the prohibition is based.

### **116G Business interests—effect of prohibition**

(1) When a corporation or the trustee of a trust is the subject of a prohibition under this Part in connection with the operation of a business operated by the corporation or under the trust:

- (a) each person who has a management role or substantial interest in the corporation or a substantial interest in the trust is for the purposes of this Part taken to be the subject of that prohibition also, and
- (b) each corporation in which a person referred to in paragraph (a) has a management role or substantial interest is for the purposes of this Part taken to be the subject of that prohibition also (whether or not the corporation was in existence at the time of the relevant offence), and
- (c) the trustee and any manager of a trust in which a person referred to in paragraph (a) has a substantial interest is for the purposes of this Part taken to be the subject of that prohibition also (whether or not the trust was in existence at the time of the relevant offence).

(2) A person is considered to have a management role or substantial interest in a corporation if:

- (a) the person is a director, secretary or executive officer (as defined in the *Corporations Law*) of the corporation, or
- (b) the person is entitled to more than 10% of the issued share capital of the corporation (with the shares to which a person is entitled including shares in which the person or an associate of the person has a relevant interest within the meaning of the *Corporations Law*).

(3) A person is considered to have a substantial interest in a trust if the person (whether or not as the trustee of another trust) is the beneficiary in respect of more than 10% of the value of the interests in the trust.

(4) The regulations may create exceptions to this section.

#### **116H Power to require information from convicted persons and others**

(1) When a corporation or the trustee of a trust is convicted of or made the subject of a criminal finding for an offence against this Part in connection with the operation of a business operated by the corporation or under the trust the Director-General may require certain persons to provide specified information to the Director-General, as provided by this section.

(2) The corporation or trustee may be required to provide information that the Director-General may reasonably require to ascertain the identity of each person who has a management role or substantial interest in the corporation or a substantial interest in the trust.

(3) A person whom the Director-General reasonably believes has a management role or substantial interest in the corporation or a substantial interest in the trust may be required to provide information that the Director-General may reasonably require to ascertain:

- (a) the identity of each corporation in which that person has a management role or substantial interest, or
- (b) the identity of the trustee and any manager of a trust in which that person has a substantial interest.

(4) A requirement to provide information is to be imposed by direction in writing served on the person, corporation or trustee concerned. The direction must specify a period of not less than 7 days as the period within which the required information must be provided.

(5) A person who fails without reasonable excuse to comply with a requirement under this section is guilty of an offence.

Maximum penalty:

- (a) in the case of a corporation, 400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

(6) A person who in purported compliance with a requirement under this section provides information that is false or misleading in a material particular is guilty of an offence unless the person satisfies the court that he or she did not know and could not reasonably be expected to have known that the information was false or misleading.

Maximum penalty:

- (a) in the case of a corporation, 400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

#### **116I Evidentiary certificate**

(1) The Director-General may issue a certificate to the effect that a person specified in the certificate is or was prohibited under this Part from operating a business that provides medical services during a period specified in the certificate.

(2) Such a certificate is evidence of the matters certified.

(3) A certificate purporting to be a certificate issued by the Director-General under this section is presumed to have been so issued unless the contrary is established.

#### **116J Authorised persons—special provisions**

(1) Despite section 118, an authorised person may, for the purpose of ascertaining whether the provisions of this Part are being complied with, exercise the powers conferred by Part 9 to

enter premises without the consent of the owner or occupier of the premises, and without a search warrant.

(2) However, an authorised person is not entitled to enter a part of premises used for residential purposes, except:

(a) with the consent of the occupier of that part of the premises, or

(b) under the authority of a search warrant granted as referred to in Part 9.

(3) Any information obtained by, or provided to, an authorised person who enters premises for the purpose of ascertaining whether the provisions of this Part are being complied with is not inadmissible in proceedings merely because the proceedings do not relate to a contravention of this Part.

(4) A reference in Part 9 to a function conferred or imposed on, or exercised by, an authorised person under that Part is taken to include a function conferred or imposed on, or exercised by, an authorised person under this section.

**Queensland Pharmacists Registration Act 2001**

*Division 4—Registrants' autonomy*

**Aiding, abetting etc. conduct that is a ground for disciplinary action**

134.(1) A person must not aid, abet, counsel, procure or induce a registrant to engage in conduct that the person is aware, or ought reasonably be aware, is conduct forming the basis for a ground for disciplinary action against a registrant mentioned in the *Health Practitioners (Professional Standards) Act 1999*, section 124(1).<sup>1</sup>

Maximum penalty—1 000 penalty units.

(2) To remove doubt, it is declared that a registrant may be induced by threats or promises.

*Division 5—Court orders and injunctions*

**Persons may be prohibited from supplying health services etc.**

135.(1) This section applies if a person is convicted of an offence against section 125, 126, 127, 132(1)(a), (2) or (3), 134(1) or 138.<sup>2</sup>

(2) The court sentencing the person for the offence may, on its own initiative or the application of the prosecutor, make an order under subsection (3) or (5).

(3) The court may make an order, applying for a period decided by the court—

- (a) prohibiting the person from providing, or carrying on or managing a business providing, a health service; or
- (b) prohibiting the person from having a financial interest in a business providing a health service; or
- (c) if the person is a corporation, prohibiting an executive officer of the corporation, who was in a position to influence the conduct of the corporation in relation to the offence, from managing a corporation that carries on a business providing a health service.

(4) For subsection (3)(c), a person manages a corporation if the person is a director, or is in any way concerned in or takes part in the management of, the corporation.

(5) Also, the court may make an order, applying for a period decided by the court—

- (a) prohibiting the person from entering into commercial arrangements with a person who provides, carries on or manages a business providing, a health service; or
- (b) if the person is a corporation, prohibiting an executive officer of the corporation, who was in a position to influence the conduct of the corporation in relation to the offence, from entering into commercial arrangements with a person who provides, carries on or manages a business providing, a health service.

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<sup>1</sup> Health Practitioners (Professional Standards) Act 1999, section 124 (Grounds for disciplinary action)

<sup>2</sup> Section 125 (Taking of restricted titles etc.), 126 (Claims by persons as to registration), 127 (Claims by persons as to other persons' registration), 132 (Obligations of advertisers), 134 (Aiding, abetting etc. conduct that is a ground for disciplinary action) or 138 (Offence for taking reprisal)

- (6) An order under subsection (3) or (5) may apply generally or be limited in its application by reference to specified conditions, exceptions or factors.
- (7) A reference in subsection (5) to a person entering into commercial arrangements includes the entering into commercial arrangements on behalf of another person.
- (8) A person must not contravene an order under subsection (3) or (5).  
Maximum penalty for subsection (8)—1 000 penalty units.

## **Injunctions**

136.(1) This section applies if—

- (a) a person (the “offending party”)—
    - (i) has engaged, is engaging or is proposing to engage in conduct; or
    - (ii) has failed, is failing or is proposing to fail to do anything; and
  - (b) the conduct or failure constituted, constitutes or would constitute a contravention of section 125, 126, 127, 132(1)(a), (2) or (3) or 134(1).
- (2) Application may be made to the court under this section for an injunction in relation to the conduct or failure.
- (3) The application may be made by the board or a person authorised in writing by the board.
- (4) The court may grant an interim injunction under this section until the application is finally decided.
- (5) On considering the application for the injunction, the court may—
- (a) in a case to which subsection (1)(a)(i) applies—grant an injunction restraining the offending party from engaging in the conduct concerned and, if in the court’s opinion it is desirable to do so, requiring the offending party to do anything; or
  - (b) in a case to which subsection (1)(a)(ii) applies—grant an injunction requiring the offending party to do the thing concerned.
- (6) The court may grant the injunction—
- (a) if the court is satisfied that the offending party has engaged in the conduct, or failed to do the thing, mentioned in subsection (1), whether or not it appears to the court that the offending party intends—
    - (i) to engage again, or continue to engage, in the conduct; or
    - (ii) to again fail, or continue to fail, to do the thing; or
  - (b) if it appears to the court that, if the injunction is not granted, it is likely that the offending party will engage in the conduct, or fail to do the thing, mentioned in subsection (1), whether or not the offending party has previously engaged in the conduct or failed to do the thing.
- (7) The court may grant the injunction on the terms the court considers appropriate.
- (8) Also, the court may grant an injunction requiring the offending party to take stated action (including action to disclose information or publish advertisements) to remedy any adverse effects of the offending party’s conduct or failure.
- (9) The court may discharge an injunction granted under this section at any time.
- (10) The powers conferred on the court by this section are in addition to, and do not limit, any other powers of the court.
- (11) In this section—
- “court” means—
- (a) if proceedings for an offence relating to the conduct or failure are pending in a Magistrates Court—the Magistrates Court; or
  - (b) in any case—the District Court.

## *Division 6—Reprisals*

### **Reprisal and grounds for reprisals**

137.(1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—

(a) anybody has given, or may give, information or assistance to the board or an inspector about a person's alleged contravention of division 1 or section 132(1)(a), (2) or (3) or 134(1);<sup>3</sup> or

(b) anybody has given, or may give, evidence to the court in proceedings for an offence against division 1 or section 132(1)(a), (2) or (3) or 134(1).

(2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.

(3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.

(4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.

(5) For the contravention mentioned in subsection (3) to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.

### **Offence for taking reprisal**

138. A person who takes a reprisal commits an offence.

Maximum penalty—167 penalty units or 2 years imprisonment.

### **Damages entitlement for reprisal**

139.(1) A reprisal is a tort and a person who takes a reprisal is liable in damages to any person who suffers detriment as a result.

(2) Any appropriate remedy that may be granted by a court for a tort may be granted by a court for the taking of a reprisal.

(3) If the claim for damages goes to trial in the Supreme Court or the District Court, it must be decided by a judge sitting without a jury.

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<sup>3</sup> Division 1 (Restricted titles and holding out), section 132 (Obligations of advertisers) or 134 (Aiding, abetting etc. conduct that is a ground for disciplinary action)