



Review of the *Pharmacy Act 1964*

Western Australia

NCP Review of Pharmacy

Submission

of

**Australian Friendly Societies Pharmacies
Association Inc.**

(AFSPA)

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Executive Summary

1. **This submission is made by the Australian Friendly Society Pharmacies Association Inc. (AFSPA). It is made on behalf of all Friendly Society Pharmacies. It strongly submits that the *Pharmacy Act 1964* should be amended to recognise Friendly Society Pharmacies as the legitimate alternate model to the owner-operator so that competition can be brought to the community pharmacy market.**

Since the signing of the National Competition Agreement there have been four major reviews which have specifically examined friendly societies and their role in the community pharmacy industry and they conclusively found that friendly societies have demonstrated that they provide community pharmacy services at a high standard and they do not have any significant competitive advantages.

2. **This submission strongly opposes the recommendation of the National Review that Friendly Society Pharmacies should in the future be restricted to owning pharmacies only in those jurisdictions they operated in at the time. Instead it agrees with the COAG conclusion that such a provision would be anti-competitive and there was no public benefit identified to justify such a restriction.**
3. **This submission strongly supports the recommendation of the National Review and endorsed by COAG that the present restrictions on the number of pharmacies allowed to be owned should be repealed. Such restrictions are in fact artificial barriers to entry to an industry and as such are anti-competitive. The National Review found the restrictions are in practice easy to breach by a determined proprietor and extremely difficult to enforce by regulatory authorities.**
4. **This Association's members believe that the standard of premises is a key factor in ensuring excellent general pharmacy practices and agree that those premises should continue to be subject to overview by the relevant regulatory authority. This submission does not support the recommendation for the repeal of such provisions.**
5. **AFSPA supports the principle that the Pharmaceutical Council of Western Australia should not be an elected representative body of registered pharmacists; instead, as a regulatory body it should be an independent statutory board and membership rights should not accrue to any particular group.**

1. Background to the Review of the *Pharmacy Act 1964*

This Review is being held as a direct consequence of commitments entered into by all governments in Australia when they signed the 1995 Competition Principles Agreement (CPA). The signing of this Agreement was the culmination of work commenced in 1991 when it was agreed to examine a national approach to competition policy.

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

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

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

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

That review was conducted by Mr Warwick Wilkinson (the National Review) and his recommendations were released in his Final Report in February 2000. Subsequently the Prime Minister wrote to all Premiers and Chief Ministers proposing that COAG provide a coordinated response to the recommendations of the National Review to promote a nationally consistent approach to pharmacy legislation.

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

The COAG Senior Officials Working Group Report was released by the PM on 2 August 2002. It recommended that COAG accept most of the National Review's recommendations and highlighted some significant parts of those recommendations that it recommended to COAG not to accept. That report is now referred to as the COAG

response and the implementation of its recommendations is endorsed by the Prime Minister¹

In regard to Friendly Societies COAG recommended that any present legislation preventing a new friendly society entering a market where it doesn't currently operate should be removed, that all current restrictions relating to their ability to open a new pharmacy and relocate an existing one that don't also apply to a pharmacist-owner be removed and that no new restrictions against them be introduced.

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

The Treasurer referred this matter to the ACCC as follows:

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

The ACCC concluded its review and reported to the Treasurer in October 2002. Its conclusion was that Friendly Societies do not have significant competitive advantages over pharmacist-owned pharmacies, particularly given that there is no competitive advantage accruing to them as a result of their income tax treatment.²

The ACCC prepared its report in consultation with interested parties, relevant Government bodies and after receiving expert advice. The Treasurer has now advised on 31 January 2003 that as a consequence of the Report's findings the Government does not intend to make any changes to the tax laws as they apply to friendly society dispensaries and pharmacist-owned pharmacies.

2. About National Competition Policy (NCP)

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

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

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

¹ Media Release Office of the Prime Minister 2 August 2002

² ACCC Report to the Treasurer on the relative financial and corporate differences between friendly society dispensaries and pharmacist owned pharmacies. October 2002.

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

Competition policy also provides a greater element of public scrutiny *and makes it more difficult for governments to provide favours for "friendly" business groups or to strike deals behind closed doors.*³

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

Whilst many sectors of the economy are exposed on a daily basis to the true rigours of a competitive marketplace, some groups are not subject to the same disciplines. As a matter of equity it is right to question the incomes and conditions enjoyed by all special groups *to the extent that those incomes and conditions derive from unwarranted restrictions on competition.*⁴

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

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

It is against this background and within the context of the NCP that the *Pharmacy Act 1964* is now being reviewed and the Department of Health has advised in open advertisement that it is intended that a range of recommendations from the COAG response will be implemented in Western Australia. Submissions or comments were invited.

This submission is now made on behalf of all Friendly Society Pharmacies.

3. The Association

The Australian Friendly Societies Pharmacies Association Inc. (AFSPA) is a national body representing the interests of its members who are not-for-profit Friendly Society Pharmacies recognised by relevant legislation within the Commonwealth of Australia.

AFSPA members operate some 126 not-for-profit Friendly Society Pharmacies throughout Australia representing around 2.6% of the total approved pharmacies. They have family memberships of approximately 400,000 representing some 800,000 individuals and in 2001/02 dispensed over 7 million prescriptions.

At **Appendix A** is a list of all existing Friendly Society Pharmacies and the number of pharmacies each operates.

³ Graeme Samuel, President NCC, speech to Economics Society Qld 25 November 1998.

⁴ Graeme Samuel, President NCC, speech to Australian Retailers Association 30 May 1998

4. Friendly Society Pharmacies

A History

Friendly Society Dispensaries were first established in Australia by Friendly Societies in the 1840's. Their establishment then was in direct response to two significant problems of the day:

- The high cost of medicines for their, mainly poor, members; and
- The fact that many chemists commonly adulterated their drugs⁵.

The purpose of Friendly Societies in establishing their own Dispensaries was to ensure the supply to their members of quality medicines as prescribed and at an affordable price. They were able to do this because the Dispensaries were established and operated by the Friendly Societies on a true not-for-profit, co-operative principle.

Throughout their history in Australia from those very early days up to and including the present time the not-for-profit Pharmacies have had to struggle for their continued existence against the powerful vested interests of the commercial chemists. Such interests have over many decades been successful in restricting the growth of Friendly Society Pharmacies by promoting oppressive legislation which still today curtails Friendly Society Pharmacies from opening a new pharmacy anywhere in Australia except in Victoria and significantly restricts their ability to relocate an existing pharmacy especially in Western Australia.

In Western Australia restrictions in the community pharmacy industry were first introduced in 1937 against companies to *"prevent the introduction of chain store operators whose only interest in the field was the prospect of profitable investment"*. Then in 1956 and in 1964 restrictions were placed on friendly societies restricting them to the premises they then operated from and prohibiting the opening of any new dispensaries. At this time the Dispensaries were seen as competing unfairly and endangering the good order and individual management of retail pharmacy.⁶

In 1964 there were 10 Friendly Society owned pharmacies in WA and they were located as follows: Applecross, Boulder, Bunbury, Claremont, Fremantle, Leederville, Perth, Subiaco, Victoria Park, and Willagee. Since then 9 of those pharmacies have been sold on to pharmacist owners or closed. Today only the pharmacy at Victoria Park survives as a friendly society owned pharmacy.

Friendly Society Pharmacies continue to operate in other states and where they do, they have brought more affordable pharmaceuticals to their members and increased competition and professional service to the community⁷. They continually provide the best range and quality of pharmaceutical products at the most affordable prices. For the payment of an annual membership contribution to a Friendly Society Pharmacy a member obtains rebates/discounts on their pharmacy purchases. The pharmacy prices are competitive and available to members of the public.

⁵ *Mutual Aid or Welfare State* Australia's Friendly Societies David Green & Lawrence Cromwell ISBN 086861 6567

⁶ Debate WA Parliament, Pharmacy Act and Friendly Society Act; amending Bills Oct/Nov 1964

⁷ Report to the Pharmacy Board Victoria: The Regulation of Pharmacists and Pharmacy Business August 1998

Friendly Society Pharmacies are the longest, continuous operators of the practice of pharmacy in Australia. They have achieved this with no prosecutions for breaches of professional regulations and they hold a legitimate place in the future of the community pharmacy industry.

Their Role Today

It may be argued that the rise of the welfare state and the provision of Government services in industries where once only charitable and not-for-profit organisations operated means that there is now no longer a role for such entities. Such arguments might have had more validity some decades ago when the costs of such services provided by Government were more balanced against the community's needs for such services. That is certainly not so today.

The ability of Government to continue to meet the rising needs of the community in a range of social welfare areas and particularly in the health care industry is limited. The role of the not-for-profit sector is as important today as it ever was. This was emphasised by Prime Minister Howard in his Federation speech when he outlined the view that traditional state-centred welfare has failed to prevent social problems. The role of community organisations needed to be enhanced and that his Government was committed to promoting a re-engagement with the community and the work performed by the not-for-profit sector.⁸

The value to the community of the work performed by the not-for-profit sector has long been recognised by the taxation system as providing a measure of vertical equity that could not be compensated by government provided services at the same costs. Not-for-profit entities such as Friendly Society Pharmacies do not provide their services for a commercial intent; they provide their services as true co-operatives investing in services for the benefit of the community for the purpose of improving members' better health outcomes at the lowest possible cost.

Friendly Society Pharmacies are taxed as mutuals under the "principle of mutuality" in accordance with the provisions of Division 9 of the *Income Tax Assessment Act 1936*. Simply, this provides that income derived from trading with its members is not taxed and furthermore, the expenses incurred in earning that member income is excluded as a taxable deduction. But when applied to Friendly Society Pharmacies all income received under the Pharmaceutical Benefit Scheme is excluded from the mutuality principle and is fully taxable in the same manner as other pharmacies.

During 1998 the Ralph committee undertook a full review of Australia's tax laws. That committee, in taxation terms, described in a Discussion Paper horizontal equity as being, broadly, taxpayers (including business entities) in similar circumstances should be taxed similarly. Vertical equity was described also broadly, as being that tax burdens should depend on ability to pay and that those more able to pay (should pay) more tax.⁹

That Discussion Paper focused on business taxation policy and to what extent business tax should be based on horizontal equity allowing the personal tax system and social security and related payments systems to reflect vertical equity concerns. It particularly looked at the operation of the mutuality principle as part of the business tax system.

⁸ Federation Address "The Australian Way" delivered by Prime Minister, 28 January 1999

⁹ Review of Business Taxation (RBT) Discussion Paper *A Strong Foundation*. November 1998

The Ralph Review concluded that the mutuality principle should continue to be applied to certain business entities *including friendly societies and their dispensaries* and that this should be given explicit effect to in the tax law¹⁰.

Despite these findings the Guild and the Pharmaceutical Society of Australia (PSA) continue to proclaim that this provision gives Friendly Society Pharmacies an unfair trading advantage. This issue has now, as reported above, been finally concluded by the enquiry most recently conducted by the ACCC which reported that Friendly Societies do not have a significant competitive advantage in relation to pharmacist-owned pharmacies.

For-profit entities provide services for which the profit margins are within commercial benchmarks in order to provide a return on capital invested. In contrast the emphasis of not-for-profit entities is to return surpluses to the business to fund services, reinvest in and replace assets and in improving services to their members and the public that would be unlikely to be undertaken by the for-profit entity.

The election of office holders and members of the Board and attendance at annual and general meetings vest ownership of these pharmacies in their members who participate in the policy development of their pharmacy by the normal manner of such Societies whilst the management of the pharmacy is in the control of the pharmacist superintendent. Ownership is transparent, accountable and not a tradable commodity.

Friendly Society Pharmacies as mutual co-operatives have been stringently controlled under State legislation for financial and other probity matters and as of 1 July 1999, as a result of Financial Sector Reform legislative changes, are fully corporatised under the Commonwealth Corporations legislation and under regulation of the Australian Securities and Investments Commission.

5. Issues For Comment

The following comments are provided against the Recommendations of the National Review. The COAG response is that taken from the document issued by the Prime Minister and which this Association has been assured by the Office of the Prime Minister is the official position of COAG¹¹.

Recommendation 1: Pharmacist-Only Ownership

The Review recommended that:

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

COAG Response

- **Accept Recommendation 1(a) & (b)**

¹⁰ RBT *A Tax System Redesigned* Report, July 1999 (the Ralph Report).

¹¹ Meeting with Prime Minister's Senior Adviser (Social Policy) Mr John Perrin on Friday 23 May 2003

AFSPA Submission

This recommendation was arrived at by the Review after careful consideration of all the factors needed to be considered in accordance with all the criteria under the Competition Principles.

The Review concluded, on balance, that there was a net public benefit in retaining the existing ownership rules and not permitting any new category of owners to enter the community pharmacy industry. Existing permitted owners include Friendly Societies.

Since the release of the Review, the Guild and PSA have stated in public forums and made submissions to a number of jurisdictions that Recommendation 1 confirms their long held belief that only pharmacists should be permitted to own pharmacy and proposed new pharmacy legislation which continues to permit Friendly Society pharmacy ownership is or would be in contradiction of this Recommendation.

It is also claimed that the Recommendation is in conflict with another recommendation, namely Recommendation 5.

This is a manifestly wrong understanding of both the meaning and the full intention of Recommendation 1. It ignores the reasoning followed by the Review in arriving at its stated conclusions and it fails to acknowledge that this recommendation is but one of a suite of recommendations that the Review intended to form a package of required reforms in order for each jurisdiction to meet its obligations as required under the Competition Principles.

As stated above the essence of the recommendation, and its purpose, which is to preserve the status quo by not permitting any new owners to enter the industry.

AFSPA supports the recommendation and the reasons for it as set out by the Review reflect the submissions made by AFSPA at the time.

Recommendation 2: Registration Requirements

The Review recommends 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.**

COAG Response

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

AFSPA Submission

This submission supports the recommendations of the National Review as endorsed by COAG.

Presently Western Australia is the only jurisdiction that requires residency as a criterion to be met for registration purposes. This requirement applies for registration as either a pharmacist owner or an employee pharmacist.

The guiding principle of the NCP is that legislation should not restrict competition unless it can be demonstrated to be to the net benefit of the public. AFSPA agrees with the Review's findings that residential requirements of a given State or Territory clearly restricts competition between owners and is contrary to the established national principles of mutual recognition and occupational mobility.

Recommendation 3: Ownership Structures

The Review recommends 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 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.**

COAG Response

- **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.**

AFSPA Submission

Presently the provisions of the *Pharmacy Act 1964* relating to both permitted owners of pharmacies and ownership structures generally are covered in Part V (Miscellaneous Provisions) of the Act. These provisions express ownership in terms of describing "persons entitled to carry on business as chemists" as being a pharmaceutical chemist (as defined by s5 of the Act), and a company or friendly society within the restrictions set out. The restrictions include the provisions that only companies and friendly societies that were carrying on the business of a pharmaceutical chemist at the time of the Act's commencement (1964) are permitted to own pharmacy.

It is AFSPA's submission that the new pharmacy legislation should be structured in a manner that clearly specifies the entities and ownership structures permitted to own pharmacies and the specific rules pertaining to each permitted entity should be stated.

● Permitted Entities should be as follows:

1. Pharmacists;
2. Friendly Societies;
3. Historical Companies;
4. Pharmacist Owned Companies; and
5. Deceased Estates and Bankrupt Individuals and Businesses

● Rules for Permitted Entities

1. Pharmacists

AFSPA submits that the number of pharmacies able to be owned by a pharmacist either solely or in partnership should not be restricted. It makes no submissions on any other Rules that may be considered appropriate for pharmacist owners either as sole owners or in partnership.

2. Friendly Societies

AFSPA submits that the present provisions of the *Pharmacy Act 1964* that restricts the ownership of pharmacy to only those friendly societies that owned pharmacies at the time of the commencement of the Act and restricts the location of their pharmacies to the premises that they occupied then or, if approved by the Minister, to alternate premises of close proximity, should be removed.

Instead the Rules for friendly societies should be replaced with provisions relating only to:

- Definition of a friendly society;
- Amalgamating friendly societies; and
- Demutualisation.

● Definition of Friendly Society

Presently the *Pharmacy Act 1964* at Part 1, Section 5(1) provides that a "friendly society" means a corporation that is a friendly society within the meaning of section 16c of the *Life Insurance Act 1995* (Commonwealth).

To the best of AFSPA's knowledge there is no Friendly Society that presently owns a pharmacy anywhere in Australia that is a friendly society as presently defined.

The definition of a friendly society for the purpose of new or prospective legislation is, frankly, quite complex because first, neither the early (now repealed) Friendly Society Acts, or the replacement Friendly Society Codes and now, the present (Commonwealth) Corporations Law, provided or now provides an actual definition. A detailed Background to this issue is provided at **Appendix B**.

At the time Western Australia amended its legislation other States likewise amended their legislation similarly but adopted a different approach to the definition of a friendly society for the purpose of their pharmacy Acts. Generally, their approach was to define a friendly society as being¹²

- a corporation that was a friendly society or a foreign society under the Friendly Societies (Queensland) Code immediately before the transfer date; or*
- a corporation –*
 - registered as a company under the Corporations Law under a name that includes the words 'friendly society'; and*
 - declared under a regulation to be a friendly society for this Act*

¹² *Queensland Pharmacy Act 1976*

Since then only Tasmania has specifically amended its pharmacy legislation again after consideration of the recommendations of the Review process and it is recommended that the definition contained in the (Tasmania) *Pharmacists Registration Act 2001* should be the model as follows:

Section 62 (3) (a)

(i) if that body is lawfully permitted to call it self a Friendly Society;

Such a provision would be consistent with COAG's recommendation that new legislation should not restrict Friendly Societies from jurisdictions that they did not operate in at the time of the amendment.

● **Amalgamation and Demutualisation**

The issue of possible demutualisation by a Friendly Society and the effect this should have on it continuing to be a permitted owner of pharmacy was considered comprehensively by the National Review and its conclusions were supported by the COAG.

The National Review reached two conclusions. First, it concluded that if after a process of demutualisation a Friendly Society lost its distinguishing feature of being a not-for-profit entity then its right to own pharmacy should not continue as a Friendly Society. Second, it concluded that if after an amalgamation or corporate change with one or more other Friendly Societies, the Friendly Society still retained its distinguishing feature of being a not-for-profit entity then, its right to own pharmacy should be retained.

In reaching these conclusions the National Review was required to consider the provisions of Schedule 4 of the Corporations Law relating to transferred financial institutions and the regulatory guidelines issued by ASIC. It took into consideration that these provisions do not currently refer to or make provision for possible mergers, amalgamations or transfer of business between two or more mutual organisations without triggering the demutualisation provisions of Part 5 of Schedule 4 of the Corporations Law.

Under these provisions if a mutual, not-for-profit entity seeks to effect a structural change with another similar entity, one entity may need to "demutualise" in order to effect the necessary corporate change to merge or amalgamate with another. This may result in the "demutualised" entity becoming a wholly owned subsidiary of another mutual entity or some other arrangement, but, importantly, the constitution of the "demutualised" entity retains its dominant not-for-profit purpose.

The task of this review in its implementation of the Recommendations as endorsed by COAG, is to understand that whilst all mutuals are (by definition) not-for-profit, not all not-for-profits are mutuals. Thus an entity may "demutualise" but still remain a not-for-profit organisation.

The feature that distinguishes a Friendly Society from for-profit corporate bodies is that they are organisations that are primarily concerned with providing a benefit to their members. That is, the dominant purpose of the company is not of yielding a return on capital.

This submission agrees that if this characteristic is lost through a demutualisation resulting in conversion of the company to one run for the purpose of yielding a return to shareholders, then that body should no longer be a permitted entity able to own pharmacies unrestricted. Instead

it should be considered to be a grandparented non-pharmacist corporation subject to the rules that apply to that group of permitted owners. However, if a technical “demutualisation” takes place in order to effect a corporate change, but the entity still retains its not-for-profit characteristic as its dominant purpose, then its right to own pharmacy as a Friendly Society should continue to be permitted.

The test for determining first, whether a demutualisation has occurred and second, the form and purpose of that demutualisation, should be the ASIC Policy Statement PS 147

3. Historical (and Grandparented) Companies:

AFSPA agrees that should there exist any company or organisation permitted to operate pharmacy under current legislation then these organisations should be permitted to continue to operate under any changed legislation.

4. Pharmacist Owned Companies:

AFSPA supports the recommendation of the Review that ownership structures available to pharmacists be expanded to include corporations with shareholders who are all registered pharmacists or registered pharmacists and other prescribed persons.

However, it submits that if new flexible corporate structures were to be provided for pharmacist owners, all the rules that may be considered appropriate for such a new permitted entity should not be considered to apply to Friendly Societies.

Friendly Societies are, as of 1 July 1999, corporations under the (Commonwealth) Corporations Law and as such are subject to the strict provisions, governing membership of boards, eligibility for election and responsibilities of Directors of Boards, of that Law.

The Pharmacy Guild of Australia has submitted to other Reviews and publicly advocated for a requirement that if Friendly Societies are permitted to continue to own pharmacies then the pharmacist manager should be a member of the Board of the Friendly Society¹³.

Under Corporations Law directors have many specific and direct responsibilities that they can be held, under the Law, personally liable for. The first duty of a director is to look after the welfare of the company.

The Law sees the company as a "person" in its own right. Since the company can only act through the people who direct it and work for it, the company's directors must take responsibility for what the company does. Accordingly, there is no provision for directors to excuse themselves from deliberations of issues that they may consider outside their field of knowledge, experience or expertise.

A key function of the Board of a company is to set, in conjunction with the senior executives, the parameters within which the corporation is to operate and set the internal controls which ensure that it operates within those parameters. It is not the board's role to supervise or involve itself in the day to day management within those parameters or to supervise the implementation of board policy.

¹³ Pharmacy Review April 2000.

It has been stated that there is a fear that a board composed of non-pharmacists will or could routinely, and as a consequence of company policy to maximise profits, or for other unethical purposes, improperly direct a registered pharmacist in the conduct or performance of their professional duties. This was alluded to in debate in the ACT Legislative Assembly whilst debating amendments to that jurisdiction's Pharmacy Act,¹⁴ but such a broad statement is a misrepresentation of both the robustness of the pharmacy profession and the regulatory and supervisory role of the relevant Pharmacy Board.

Corporations Law requires directors to be elected. If a person is appointed as a director to fill a vacancy they must present themselves for election within a specified period if they wish to continue to serve as a director. This is in accordance with the principles of good corporate governance and democratic principles.

A specification that an appointment to a position of pharmacist manager for a Friendly Society includes mandatory appointment to the Board is likely to be in many cases either a disincentive to appointment to an otherwise very rewarding position or be, overall, a burden of responsibility on the pharmacist manager quite disproportionate to the reasons for the provision in the first instance.

5 Deceased Estates and Bankrupt Individuals and Businesses

AFSPA sees a need to permit ownership in these categories albeit for a short or reasonable time frame to permit winding up and asset disposal processes to occur.

Recommendation 4: Number of Pharmacies Owned

The Review recommends 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.**

COAG Response

- **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).**

AFSPA Submission

Presently in Australia all State Pharmacy Acts restrict the number of pharmacies allowed to be owned by a pharmacist owner. These restrictions vary from 3 in NSW and VIC to 4 in QLD and SA to 2 in TAS and WA.

There are no such restrictions in either of the Territories and no restrictions on the number of pharmacies able to be owned by a Friendly Society in VIC, NSW and QLD (however there are

¹⁴ Hansard ACT Legislative Assembly week 08/2527

other significant location related restrictions for Friendly Societies in WA, NSW and QLD). In SA National Pharmacies (Friendly Society Medical Association Limited) is restricted to the ownership of 31.

The National Review examined the issue of numerical restrictions in detail and found no compelling evidence that the retention of such restrictions was necessary for the delivery of a highly professional health service and that there was no net public benefit in the existing restrictions.

The Review also reported that these restrictions are easily able to be circumvented by the use of various lawful means and thus the true size of a pharmacist's holdings can be masked. Additionally, it reported that as there are already in existence many examples of a large number of pharmacies owned by a single owner providing pharmacy services at the highest professional standards the retention of such restrictions could not be justified on professional grounds.

This issue was also considered in detail by COAG and it also concluded that the restrictions are arbitrary, artificial and should be lifted. In reaching its conclusions COAG also noted that the number of pharmacies allowed to be owned is not relevant to the issue of delivering quality pharmacy services and noted that friendly societies have already demonstrated that they can operate a large number of pharmacies at a high standard.

This submission agrees with the recommendation that the restrictions on the number of pharmacies able to be owned by a proprietor should be removed. It also strongly agrees with the retention of the requirement for a registered pharmacist to be in attendance at all times the pharmacy is open for business.

The Guild and the PSA strongly oppose this recommendation. They advance a number of reasons for their concerns if this recommendation were to be implemented and chief among these is a claimed possible detriment to the public by inappropriate professional practice and lack of ethics¹⁵.

AFSPA submits that such claims by the Guild and PSA disguise their real reasons for opposing the implementation of this recommendation. The Guild and the PSA are committed to their long term goal of shutting friendly society pharmacies down and out of the community pharmacy industry.

Maintaining the restrictions on the number of pharmacies allowed to be owned by a pharmacist and having that restriction also applied to a friendly society will freeze those societies and prevent any future growth or competition. Such an outcome would be to the benefit of pharmacist owners but to the great detriment of the community.

It would also be to the detriment of the more than 60% of registered pharmacists in WA who are employee pharmacists¹⁶, and who will not benefit from the potential new employment and career opportunities that could emerge with the development of larger and better resourced pharmacy entities as envisaged by the Review and COAG.

AFSPA submits that in the consideration of this recommendation it must always be remembered that the original reasons for the numerical restrictions were for the purpose of protecting the pharmacist owner from the chain store style retailers. And the first restrictions

¹⁵ Guild/ PSA Victorian Branch joint submission Victoria Nov. 2002 page 21

¹⁶ Pharmaceutical Council Annual Report Pharmaceutical Register as at 01/01/2003

were not applied to friendly societies. The present restrictions applying to them came at a later time when it was believed that their not-for-profit status and their practice of discounting the price of medicines to their members gave them an unfair trading advantage¹⁷.

If however, notwithstanding all the evidence supporting the lifting of the restriction on the number of pharmacies permitted to be owned, it is decided to retain the restriction as it is or to apply some other number, AFSPA strongly submits that no such restriction should be applied to Friendly Societies.

Recommendation 5: Exceptions to Pharmacist Ownership

The Review recommends that:

- (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 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.**

COAG Response

- **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.**

AFSPA Submission

Friendly Society Pharmacies believe strongly in the soundness of the present policy of community based pharmacies being central to a nationally focused system for the delivery of high quality and effective medicines in the most cost efficient way by a fully accountable health professional: the Pharmacist.

As an example of this commitment to professionalism, the Quality Care Pharmacy Program (QCPP) has been taken up by all our members and 121 of the total 127 pharmacies are now QCPP accredited. Additionally, Friendly Society Pharmacies are at the leading edge of health

¹⁷ Debate WA Parliament, Pharmacy Act and Friendly Society Act; amending Bills Oct/Nov 1964

care delivery with the majority of new pharmacies being specifically designed for forward counseling.

Friendly Society Pharmacies are a major supporter of country pharmacy with some 43 of Friendly Societies owning pharmacies located in regional and rural areas. Some country areas are experiencing great difficulty in retaining pharmacy services and the existing Friendly Society Pharmacies are contributing to an essential part of the delivery of health care services in these communities.

Additionally, community based pharmacies in Australia play a very important role in promoting, participating in and providing professional health advice in a large range of public health programs for the different groups in society. These programs range from universally supported ones such as child and maternal health through to programs that may not have full community support.

The Pharmacy Guild of Australia and the Pharmaceutical Society of Australia continue to vehemently oppose the recommendations of the National Review and COAG. Their reasons for their opposition have varied from review to review. For example, in their joint submission to the NSW review of that State's Pharmacy Act it was claimed that Friendly Societies are "expanding aggressively" interstate.

In fact, no expansion has occurred in any State or Territory except Victoria and as the table below demonstrates the increase in numbers in that State reflects the revitalisation of the Friendly Society Pharmacy movement only to levels it enjoyed decades ago when by 1982 after 27 years of the oppressive 10% turnover tax regime¹⁸ had had its effect and decimated the Friendly Society Pharmacies movement throughout Australia.

State	Year	Friendly Societies	Pharmacies
Victoria	1968	34	53
	1978	24	48
	1981	23	31
	2002	14	59
NSW	1969	31	48
	2002	4	9
QLD	1982	12	23
	2002	12	24
SA	1983	2	32
	2002	2	32
WA	1973	3	10
	2002	1	1
TAS	1981	2	3
	2002	2	3

¹⁸ The present taxation arrangements only came into effect in the income year 1982-83 These changes repealed the then existing special taxation arrangements that applied only to Friendly Society Pharmacies. The special basis taxation referred to in the Budget Speech was an unfair and onerous effective 10% turnover tax regardless of positive earnings or otherwise. Income Tax Laws Amendment Bill (No 3) 14 October 1981 Senate Hansard Page 1199

Both the Review and COAG considered the issue of the continuing presence of friendly societies in the community pharmacy industry in significant detail. In determining the extent of friendly societies' continued participation into the future two key issues emerged:

First, whether friendly societies can run good pharmacies; and second, do they have an unfair tax advantage arising from their not-for-profit status?

On the first issue both the Review and COAG concluded firmly that friendly societies can and do operate pharmacies of a high standard and accordingly should continue to be permitted owners.

On the second issue, as reported earlier in this submission, the ACCC has now concluded its inquiry into the relative financial and corporate differences between friendly society dispensaries and pharmacist owned pharmacies. That inquiry concluded that:

".... friendly societies do not have significant competitive advantages over pharmacist-owned pharmacies, particularly given that there is no competitive advantage accruing to FSDs as a result of their income treatment"

This review should now consider that all the issues relating to friendly societies are resolved and the COAG recommendations should be implemented.

Recommendation 6: Pecuniary Interests

The Review recommends 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 a 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 professional services in that pharmacy, provisions in *Pharmacy Acts* relating to:
 - (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 of 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.**

COAG Response

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

AFSPA Submission

Presently the Act at sub-sections 23(5), 28(1) and (3) prohibits generally persons other than pharmacists from having a direct or indirect proprietary or pecuniary interest in a pharmacy practice and prohibits pharmacists either solely or in partnership from owning or having a proprietary or pecuniary interest in more than 2 pharmacy practices.

The purposes of these provisions are first, to ensure the integrity of the “pharmacist only” general ownership provisions and second, to ensure that the practice of pharmacy can occur without undue or improper influence from third parties and third, to ensure the restriction on the number of pharmacies permitted to be owned is not breached.

The Review recommended generally, that regulation of the commercial aspects of pharmacy practice be wound back or removed and in relation to the *Pharmacy Act 1964* recommended replacing the pecuniary interests provisions in these sub-sections with clear definitions of the meaning of “proprietary and pecuniary interests” and a provision making it an offence to apply improper or inappropriate interference on the professional conduct of a pharmacist. It also recommended making a pharmacist acting under such influence a ground for professional misconduct.

This submission is generally supportive of the recommendation. However, AFSPA is concerned that the proposal would only capture the prohibited undue influence behaviour but it would not capture the other current prohibited pecuniary interests especially that relating to the number of pharmacies in which a pecuniary interest is permitted.

Accordingly, it is submitted that if the number of pharmacies allowed to be owned by either a pharmacist or a Friendly Society is not to be restricted then implementation of the recommendation in full would be supported.

However, if as a result of this review it was decided that restrictions on the number of pharmacies able to be owned by a pharmacist was to be retained, then in those circumstances this submission would not support the proposed changes to the pecuniary interest rules.

Recommendation 7: Registration of Premises and Businesses

The Review recommends that:

- (a) Legislative 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.**

COAG Response

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

AFSPA Submission

This submission does not support the recommendation that pharmacy premises should no longer be registered with the relevant regulatory authority (currently the Pharmaceutical Council) and instead supports the retention of the core provision requiring that pharmacy premises should continue to be subject to overview by the regulatory authority.

Recommendations 8 14: Various

AFSPA has no comments to offer with regard to these recommendations.

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.**

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.**

AFSPA Submission

AFSPA strongly supports the principle that a regulatory body such as the Pharmaceutical Council should be an independent statutory body and that membership rights do not accrue to particular bodies.

In keeping with this principle nominations for appointment should be made in a manner that recognises that there are many diverse stakeholders in any industry including the community pharmacy industry and consultation on appointments should be broad based and not restricted to a narrow interest group

Recommendations 16-20: Various

AFSPA has no comments to offer with regard to these recommendations.

6. Other Issues

Community Pharmacy Services in Rural and Isolated Areas

It has been recognised for some time that the provision of community pharmacy services in these areas is emerging as a significant problem. Friendly Societies in other states have some experience in providing such services. However the best outcomes have been able to be achieved when the Friendly Society providing the service is able to do this through utilisation

of its larger resources that are available to it from a significant sized urban or metropolitan based operation.

The predicted change in the demographics of the pharmacy workforce associated with the feminisation and the aging of proprietors in community pharmacies is predicted to exacerbate this already recognised problem. It is unlikely that solutions to the problem will come from community pharmacy industry as presently structured unless the key COAG recommendations are implemented allowing structural changes in the industry to emerge.

Future Industry Environment

The delivery of health care services is changing rapidly in all areas but particularly within the organisational, financial and legal frameworks. The health care industry is moving to systems of integrated care that combines primary, specialty and hospital services. These systems aim to manage the care delivered to patients in such a manner as to achieve some combination of cost reduction, enhanced patient and consumer satisfaction and an improvement in health care outcomes.

It is predicted that these changes will interact in such a way as to produce a health care system that is: managed with better integration of services and financing; more accountable to those who purchase and use health services; more aware of and responsive to the needs of patients; use fewer resources more effectively; more concerned with education, prevention and care management and less focused on treatment; and more reliant on outcomes data and evidence.¹⁹

These changes are or will affect all health care professionals including pharmacists and the pharmacy industry must be positioned to be a full participant, not an onlooker. Additionally, the pharmacy industry itself is changing and has become more complex, consumer oriented and, in an increasingly litigious environment, the vital professional advisory role needs to be delivered with even greater care and caution than ever before. Pharmacists as part of the health care profession must adapt to these changes.

The need for increasing numbers of extended hours pharmacies will continue to grow in line with the deregulation of trading hours in other industries as the community generally moves to expect and demand more and more services being available on a seven day extended hours basis.

The introduction of limited corporate ownership would seem to be a logical step forward if the benefits of the restructuring exercise are to be maintained. The necessary efficiencies and economies of scale required for pharmacy operations for the future will not be able to be achieved by an industry presumed, wrongly, to be made up almost exclusively of single operator businesses.

The Pharmacy Guild of Australia

In considering submissions to this review it should be mindful of the fact that the above organisation is in fact the registered employer organisation whose members are pharmacist proprietors and in WA its eligible membership represents a maximum of 30% of the total of registered pharmacists²⁰.

¹⁹ Pew Report Critical Challenges: Revitalising the Health Professions for the Twenty-First Century. Pew Health Professions Commission, 1995

²⁰ Pharmaceutical Council Annual Report Pharmaceutical Register as at 01/01/2003

7. Conclusion

Friendly Societies are not-for-profit mutual organisations and have been delivering safe, ethical and community based pharmacy services in Australia since 1847. As mutuals, all the assets belong to members and the profits are re-invested to provide benefits and improved services to their members and the community.

Friendly Societies provide an alternative model of pharmacy to the conventional owner-operated model. Their presence helps to safeguard community health outcomes and benefits consumers by providing lower prices and high quality services. As not-for-profit organisations, they can operate in outer metropolitan and rural areas which may not be economically attractive to a profit-seeking owner operator.

Since the signing of the National Competition Agreement and the commencement of the Review process of the community pharmacy industry, there have now been four major reviews which have specifically examined friendly societies and their role in the community pharmacy industry, their tax status as mutual organisations and the relative financial and corporate differences between them and pharmacist-owned pharmacies.

As a result of these reviews it has been conclusively found that friendly societies have demonstrated that they:

- provide community pharmacy services at a high standard;
- they do not have any significant competitive advantages resulting from their corporate structure; and
- there is no competitive advantage accruing to them as a result of their income tax treatment.

Accordingly, AFSPA recommends that this review should now agree to implement the COAG recommendations to remove the present restrictions thereby enabling Friendly Societies to compete within the community pharmacy industry.

**FRIENDLY SOCIETY PHARMACIES
SUMMARY BY NUMBER AND STATE
(as at July 2003)**

	Pharmacies
New South Wales	
# Auburn & Lidcombe United Friendly Society Pharmacy Board Ltd	0
Combined Dispensaries Friendly Society Ltd (Sydney)	6
Friendly Societies Pharmacy Limited (Grafton)	1
# Lismore & District Pharmacy Ltd	1
Friendly Society Medical Association Limited (National Pharmacies)	1
Western Australia	
Victoria Park & Districts United Friendly Societies' Council Limited	1
Tasmania	
Hobart Friendly Society Dispensary Ltd	2
Launceston Friendly Society Pharmacy Limited	1
Queenstown Medical Union Friendly Society Limited	...1
Queensland	
Friendly Care Chemists Friendly Society (Australia) Ltd (Brisbane)	5
Ayr Friendly Society Pharmacy Ltd	1
Bundaberg Associated Friendly Society Medical Institute Limited	1
The Dalby and District Friendly Society Dispensary Ltd	1
The United Friendly Society Association of Gympie & District Ltd.	1
The Ipswich & West Moreton United Friendly Society Dispensary Ltd	2
Mackay Assoc. Friendly Societies Pharmacy Limited	2
Maryborough/Hervey Bay Friendly Society Chemists Ltd	2
CQ Friendly Society Ltd (Rockhampton)	3
The Toowoomba Friendly Society Dispensary Ltd	1
The Townsville Associated Friendly Society Pharmacy Ltd	2
The Warwick Friendly Society Association Limited	1
South Australia	
Friendly Society Medical Association Limited (National Pharmacies)	31
The Mount Gambier UFS Dispensary Limited	1
Victoria	
Australian Unity Dispensaries Friendly Society Limited (Melbourne)	13
UFS Dispensaries Ltd (Ballarat)	7
Friendly Societies Dispensary Ltd (Bentleigh)	0
Bendigo United Friendly Societies Dispensaries Limited	2
Bentleigh UFS Pharmacy Limited	0
Box Hill Pharmacist Advice Friendly Society Ltd	1
Friendly Pharmacy (Vic) Ltd (Coburg/Brunswick)	4
Cheltenham Friendly Society Dispensary Ltd	2
Community Pharmacy Friendly Society Ltd (Elsternwick)	5
Eaglehawk United Friendly Societies Dispensary Ltd	1
Community Care Chemist Friendly Society Ltd (Geelong)	3
Friendly Society Medical Association Limited (National Pharmacies)	12
North West Dispensaries Friendly Society Ltd (Fairfield/Sunshine)	3
Wonthaggi Miners Friendly Societies Dispensary Ltd	1
Yallourn Friendly Society Limited	4
TOTAL	126

DEFINITION OF FRIENDLY SOCIETY

BACKGROUND

Prior to 1 July 1999 all Friendly Societies including Friendly Societies (Pharmacies) operated under State and Territory Friendly Society Codes.

Section 22 of the Corporations Act 1989 empowers the Governor General to make regulations prescribing, among other things matters which are required to be prescribed by regulations for carrying out or giving effect to the Corporations Law. In June 1990 the Ministers of the States, the Northern Territory and the Commonwealth agreed to the Corporations Agreement, which formed the political compact on which the national companies and securities scheme was subsequently based.

Based on that Agreement the Financial Sector Reform (Amendments and Transitional Provisions) Act 1999 ("the FSR(A & TP)Act") added a new Schedule 4 into the Corporations Law that had the effect of deeming entities under the Financial Institutions Code and the Friendly Societies Code of the States and the Territories to be registered under the Corporations Law.

At the same time the States and Territories enacted enabling legislation for the transfer of jurisdiction of the specified entities.

Schedule 4 of the Corporations Law transferred the specified entities from their previous State or Territory based governing Codes to the jurisdiction of the (Commonwealth) Corporations Law. The transferred entities were variously defined and were, upon transfer, collectively defined as a "transferring financial institution" and included:

(i) a friendly society of this jurisdiction(that is a body that is registered as a friendly society under the Friendly Societies Code of this jurisdiction immediately before the transfer date).

Other transferred entities included building societies, credit unions and other friendly societies (financial). Transfer date was 1 July 1999.

Upon the transfer date all registrations under the previous governing Codes were cancelled and no new registrations were allowed to be accepted.

THE ISSUE

The legislation prohibits the use of certain words in the name of entities without approval.

Under the Banking Act this means, no entity can use the words "authorised deposit taking institution (ADI)", "bank", "banker", "banking", "building society" or "credit union". And under the Life Insurance Act 1995 the use of the expression "friendly society" is prohibited in relation to a financial business if the body is not a friendly society. Section 16C of that Act defines the expression "friendly society". Broadly a body is a friendly society if it is a company registered under the corporations Law and is either taken to be registered under the Life Insurance Act or has been determined by APRA to be friendly society. (See attachment)

When these provisions of the Regulations made under the Corporations Law as described above commenced on 1 July 1999 no friendly society was determined by APRA under the provisions of subsection 66A(1) of the Banking Act, to be an ADI. And no friendly society that only carries on the business of pharmacy is registered under the Life Insurance Act 1995.

Consequently, the current definition of a friendly society as set out in the *Pharmacy Act 1964* excludes the single friendly society in Western Australia currently permitted to own a pharmacy in that State namely the Victoria Park and Districts United Friendly Societies Council Limited.

The problem has arisen because of the mistaken belief that the definitions for the use of certain expressions including "friendly society" as set out in the FSR(A & TP)Act is a definition of a body which replaces provisions of now repealed legislation and that it can therefore be used in new legislation for other purposes, which, as described above, it clearly cannot.

NEW FRIENDLY SOCIETIES

Since 1 July 1999 no new body is allowed to use the words "*friendly society*" in its name without approval. The Corporations Law makes two provisions for obtaining approval. The first provision is at Part 4 Schedule 6 of the Regulations where Ministerial consent is required for *other than in relation to a financial business*. The second provision is at Part 5 of Schedule 6 where APRA consent is required *in relation to the conduct of a financial business*

CONCLUSION

In the context of current legislation there is now no specific definition for those Friendly Society Pharmacies that own pharmacies. They can only be described as *a transferring financial institution* in accordance with the provisions of Schedule 4 of the Corporations Law which, at the date of transfer, were allowed to operate the business of a pharmacy in accordance with the provisions of the various Pharmacy Acts at the time.

Definition of a Friendly Society from *Life Insurance Act 1995*

16(C)

- (1) For the purposes of this Act, a friendly society is a body:
 - (a) that is registered as a company under the Corporations Law of a State or an internal Territory; and
 - (b) that is either:
 - (i) taken to be registered under this Act because of item 11 of Schedule 8 to the Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999; or
 - (ii) covered by a determination under subsection (2).
- (2) APRA may, in writing, determine that a specified body that is registered as a company under the Corporations Law of a State or an internal Territory is a friendly society for the purposes of this Act.

Note: A company may be specified by name, by inclusion in a specified class or in some other way.
- (3) APRA may, in writing, vary or revoke a determination made under subsection (2).
- (4) APRA must comply with any applicable requirements in Prudential Rules relating to the circumstances in which the powers under subsections (2) and (3) may be exercised.
- (5) If APRA:
 - (a) makes a determination under subsection (2); or
 - (b) varies or revokes a determination under subsection (3);APRA must cause notice of that action to be published in the Gazette. If the action relates to a particular company, otherwise than because the company is included in a specified class of companies, APRA must also give the company written notice of the action.
- (6) If APRA:
 - (a) makes a determination under subsection (2); or
 - (b) varies or revokes a determination under subsection (3);APRA must also give notice of that action to ASIC.