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Executive Summary

- 1. This submission by the Australian Friendly Societies Pharmacies Association Inc. is made on behalf of all Friendly Society Pharmacies. It strongly advocates that the present restrictive legislative provisions that either prohibits outright or stringently restricts the ability of Friendly Society Pharmacies to open new pharmacies or relocate to new locations be repealed.**
- 2. Friendly Society Pharmacies have been operating in Australia since 1847 when the first Friendly Society Dispensary was established.¹ Since that time they have continued to be an important and vital part of community based pharmacy. Their numbers and their membership have varied in different States in accordance with changing societal attitudes and legislative restrictions preventing them from competing in the open market. But they have survived, and under the Competition Principles Agreement no good argument under the Public Benefit Test can be sustained to continue the legislative restrictions against their fair operation.**
- 3. The present legislative provisions relating to Friendly Society Pharmacies are unfair and anti-competitive; but they are reflective of attitudes and policies of an era long gone. This review should now recognise the very significant changes that have occurred and ensure that changes in the legislative provisions that emanate from it do not continue to discriminate against Friendly Society Pharmacies.**
- 4. This submission strongly opposes a level of deregulation of the present ownership regulation such that it would allow conglomerates entry into the pharmacy industry in Australia. The only entities that should be allowed to own pharmacies in Australia are those whose primary purpose of business is pharmacy and related primary health care services. The entry of such powerful conglomerates would, in this Association's belief, quickly dominate the present community based pharmacy structure to the detriment of the Australian consumers**
- 5. AFSPA strongly recommends to this Review that Friendly Society Pharmacies should have consistent legislative provisions applied to them across all States and Territories. And further, that those legislative provisions should mirror current provisions in Victoria and Tasmania whereby there are no State based legislative restrictions applying to them in regard to the relocation of pharmacies, the establishment of new pharmacies, or to the purchase of an existing pharmacy.**

¹ Oldfellows Medical Institute & Dispensary, Sydney est. 1847.
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- 6. However, whilst opposing the entry of conglomerates into the pharmacy industry in Australia it does not oppose the introduction of limited corporate ownership. A change to allow limited corporate ownership would reflect the extension of the Corporations Law to professionals and provide the necessary flexibility required to meet the emerging trends in the delivery of health services generally and the need for pharmacy to meet those changes and improve its competitive position.**

1. Background to the Review

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 (CPA). 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). It is under the provisions of the second Agreement, the CPA, which this Review is being held.

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.

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.*²

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.*³

There are of course many other issues that these reforms raise. Not least of these is the issue of market power and whether the changes introduced enhance the scope for systematic anti-competitive behaviour by large retailers. This and other issues are matters for reviews such as this one to examine and 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.

3. Current Legislative Provisions Regulating Pharmacy

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

² Graeme Samuel, President NCC, speech to Economics Society Qld 25 November 1998.

³ Graeme Samuel, President NCC, speech to Australian Retailers Association 30 May 1998

Essentially, current provisions can be described as follows:

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

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

4. The Review

The purpose of this review is to examine State/Territory legislation in relation to the ownership of pharmacy, premises approved for the conduct of the business of pharmacy and registration of pharmacists; and Commonwealth legislation insofar as it relates to the regulation of the location of premises from which pharmacists may dispense pharmaceutical benefits and to identify restrictive or anti-competitive provisions the retention of which are not justified under the public benefit provisions of the NCP.

The specific items of legislation to be reviewed are as follows:

- *Western Australia Pharmacy Act 1964*
- *New South Wales Pharmacy Act 1964*
- *Victoria Pharmacists Act 1974*
- *South Australia Pharmacists Act 1991*
- *Queensland Pharmacy Act 1976 **
- *Tasmania Pharmacy Act 1996 **

(*not including those parts relating to the registration of pharmacists)

- *Northern Territory Pharmacy Act 1996*
- *Australian Capital Territory Pharmacy Act 1931* and
- *The National Health Act 1953* Section 99L(1) Ministerial Determination relating to "Approval to Supply Pharmaceutical Benefits"

5. The Objectives and Scope of the Review

- Clarify the objectives of the legislation to be reviewed.
- Identify the nature of any restrictions on competition arising from the legislation.
- Analyse the nature of any restrictions on competition and on the economy generally.
- Assess and balance the costs and benefits of the restrictions and assess whether the objectives of the legislation can be achieved only by restricting competition.
- Consider alternative means for achieving the objectives, including non-legislative approaches.

6. The Submission

This submission is being made to argue as cogently as it can to satisfy this Review that the present legislative provisions currently regulating the pharmacy industry are inherently wrong and unfair in the manner by which they restrict Friendly Society Pharmacies from competing in the pharmacy industry.

It is the belief of the Friendly Society Pharmacies, on whose behalf this submission is made, that this Review will now give them relief from these restrictive provisions in accordance with what the new legislative arrangements now agreed to by all governments genuinely envisaged. What has not been able to be achieved by persuasion in the past should now be achieved by due process and the proper application of the Competition Principles Agreement.

7. 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 registered under relevant legislation within the Commonwealth of Australia.

The objects of the Association include:

- Provide a not-for-profit Association of Friendly Societies Pharmacies which are registered under relevant legislation;
- Promoting community pharmacy and the interests of affiliated Pharmacy Societies and their members;
- Monitor and closely consider all matters emanating from Federal legislation that has or may have an effect on the Association or its affiliated pharmacies or their members; and
- Make representations and submissions where deemed necessary or desirable to the appropriate persons, entities or authorities in respect of any matter affecting the interests of affiliated pharmacies or their members.

The Association presently has 30 Friendly Society members operating a total of 109 not-for-profit Friendly Society Pharmacies representing 2.2% of the total 4,952 approved pharmacies as at June 1998⁴. They have family memberships of approximately 395,000 representing some 800,000 individuals. At **Appendix A** is a list of all existing Friendly Society Pharmacies, the number of pharmacies each operates and their geographic locations (It is worth noting that 41 of the total of 113 Friendly Society Pharmacies are located in regional or rural areas).

In the year 1997/98 Friendly Society Pharmacies dispensed a total of 4,724,091 prescriptions or 2.6% of the approximate total of 181,744,500 dispensed⁵.

8. 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 drugs⁶.

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 survival 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

⁴ Department of Health and Aged Care figures as reported in the 1999 Pharmacy Trade Report

⁵ Department of Health and Aged Care figures as reported in the 1999 Pharmacy Trade Report

⁶ *Mutual Aid or Welfare State* Australia's Friendly Societies David Green & Lawrence Cromwell ISBN 086861 6567

Friendly Society Pharmacies from opening new pharmacies and significantly restricts their ability to relocate existing ones.

Notwithstanding these immense difficulties, Friendly Society Pharmacies continue to operate 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.

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 pharmacy.

◆ **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 the Prime Minister 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 or co-operatives under the "principle of mutuality" in accordance with the provisions of Division 9 of the *Income 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

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

⁸ Federation Address "The Australian Way" delivered by Prime Minister, 28 January 1999
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income is excluded as a taxable deduction. But when applied to Friendly Society Pharmacies all income received under the PBS is excluded and is fully taxable in the same manner as other pharmacies.

It has long been believed that this provision gives Friendly Society Pharmacies an unfair trading advantage. This is not a valid belief and in reality the total of the taxes paid by Friendly Society Pharmacies is likely to be as much or more than commercial pharmacies. Fuller details of this issue are provided at **Appendix B**.

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 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 (ASIC).

9. Objectives of Present Legislation

◆ Commonwealth Legislation

Commonwealth Ministerial Determination under s 99L(1) of the *National Health Act 1953*; that part relating to "Approval to Supply Pharmaceutical Benefits".

To examine the purpose of the provisions of this particular section that is being reviewed, it is first necessary to set out its inter-relationship with other relevant sections of the Act as summarised below:

- Section 90(1) provides that the Secretary (of the Department of Health and Aged Care) may upon application by a (approved) pharmacist.....approve that pharmacist for the purpose of supplying pharmaceutical benefits at or from particular premises and s 90(3A) provides that an application under s 90(1) must be referred to the Authority (Australian Community Pharmacy Authority);
- Section 99J establishes the Australian Community Pharmacy Authority (the Authority);

- Section 99K(1) sets out the functions of the Authority which include:
 - (a) to consider applications (for approval to supply pharmaceutical benefits) made under section 90; and
 - (b) to make, in respect of an application under section 90(1) a recommendation whether or not the applicant should be approved under that section in respect of particular premises (for the supply of pharmaceutical benefits);
- Section 99K(3) provides that all recommendations of the Authority are to be made to the Secretary; and
- Section 99L(1)(a) provides that the Minister must, by writing determine the rules subject to which the Authority is to make recommendations under sub section 99K(1).

➤ **Location of Pharmacies**

The essence of the rules currently determined by the (Federal) Minister in accordance with the provisions of s 99L is to ensure that a new pharmacy is not able to open within a specified proximity of an existing pharmacy (currently 2 kilometres) and that an existing pharmacy can only relocate to new premises within 1 kilometre from its existing premises measured door to door to by the shortest access route, or within 2 kilometres only in exceptional circumstances.

These legislative arrangements, relating to approval of the location of premises for the supply of pharmaceutical benefits, first came into operation in 1990 when amendments made to the *National Health Act 1953* reflected fully the terms of an Agreement between the then Minister and the Pharmacy Guild of Australia (the Guild).

The background to the Agreement was the resolution of a long running dispute between the Guild and the Government over remuneration for pharmacists dispensing prescriptions under the Pharmaceutical Benefits Scheme (PBS).

The Agreement facilitated the restructuring of the retail pharmacy industry by the rationalisation of the number of pharmacies. The aim of the restructuring was to reduce the cost of the PBS by reducing the number of pharmacies in the first instance and to restrict the growth in the numbers of pharmacies for the future. In return the Government guaranteed a share of the savings would be returned to pharmacists in the form of increased remuneration⁹.

The measurement of savings is based on a projected 5% prescription volume growth each year of the term of the Agreement. If volume growth is held to 2.5% or less each year then the fee payable by Government for the pharmacist's dispensing services will be fully indexed. If however the volume growth is more than 2.5% but less than 5% partial indexation only will apply and if volume growth exceeds 5% then a reduction in the fee payable will commence to apply.

⁹ Guild/Government Agreement. Described by Federal Court of Australia in Decision Date 23.7.93
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The first Agreement was signed in 1990 and was for a period of five years during which the restructuring occurred. That first Agreement was followed by a second with substantially the same provisions. The second Agreement expires mid 2000 and preparation for the negotiations for the third Agreement are already well advanced.

The objectives of the restructuring were to:

- Rationalise the number and distribution of pharmacies through the offer of financial incentives to voluntarily close or amalgamate existing pharmacies; and
- To maintain the new distribution pattern by establishing the Authority and empowering it to apply strict criteria for the approval of the location of new premises for the supply of pharmaceutical benefits and to strictly regulate the relocation of existing pharmacies to new premises.

The rules as presently determined by the Minister under s 99L are particularly complex, legalistic and as currently administered by the Authority do not properly reflect commercial realities in either the pharmacy industry or the retail tenancy market. The costs involved in having an application processed through the Authority to finality can be prohibitively high and appear to be creating barriers to what should be straight forward commercial decisions.

Clearly, containment of the costs in the PBS is very much in the community's interest and is supported by this Association. However, it is submitted that if the location of pharmacies is to continue to be a key strategy for the containment of costs of the PBS then the rules as presently determined by the Minister should be reviewed in an open and consultative forum.

The present legislative provisions reflecting as they do the outcomes of negotiations conducted exclusively by the Government with the Guild denies the legitimate interests of potential competitors and lacks that degree of openness and probity required for acceptance of the fairness of decisions resulting in regulatory imposition.

There can arise occasions when an application for approval to dispense from new premises is lodged by a competitor of a member of the only organisation party to the criteria: the Guild. Criteria for new approvals as determined by the Minister under the provisions of s 99L of the *National Health Act 1953* should be determined in a more open and inclusive manner and should involve all the relevant parties particularly the Friendly Society Pharmacies through their National Association ASFPA.

More inclusive negotiations is important to satisfy any perception of exclusive dealings which may be seen as anti-competitive and offensive to the principles of the Trade Practices Act.

◆ State Legislation

The objectives of the various State/Territory Pharmacy Acts are:

- To regulate the registration, qualifications and professional conduct of those registered to practise the profession of pharmacy;
- To regulate the safety and security of the premises from where pharmacy is practised;
- To regulate who can own and operate a pharmacy business and the number of pharmacy businesses an approved person can own; and
- To regulate Friendly Society Pharmacies by restricting their ability to open new pharmacies or to relocate to new premises.

The comprehensive State/Territory Acts have the dual purpose of regulating the professional services provided by the pharmacist and making them accountable for the large quantities of scheduled and controlled drugs required to be kept by them to be readily available for consumers.

The need to control and regulate the safe custody, distribution and sale of dangerous drugs and poisons for the safety of the public has long been recognised in Australia and has been part of governments' public health policies since last century. Pharmacists have been entrusted with this important duty since such legislation was first enacted.

The earliest legislation to set this framework was the *Pharmacy Act 1876* enacted in Victoria, which established a Pharmacy Board and created a class of persons known as pharmaceutical chemists. The Act provided for the registration of pharmacists and that only registered pharmacists could conduct the business of a "chemist and pharmacist".

Other States followed and enacted similar legislation. At the time Friendly Society Dispensaries were well established and highly regarded in their conduct of their Dispensaries and were all included in the new legislation's definition of who could conduct the business of a chemist and druggist.

This submission is not concerned with those parts of current legislation dealing with the registration of pharmacists and the oversight of their professional conduct by Pharmacy Boards and nor is it concerned with those parts relating to the control of premises for the safe custody, storage and sale of drugs. It is this Association's view that these controls are adequate and proper.

But, this submission is particularly concerned with the legislative provisions that have been enacted over time that have progressively restricted the ability of Friendly Society Pharmacies to conduct the business of pharmacy for the benefit of their members and the public generally in competition with owner pharmacists.

➤ Restrictive Provisions

Present restrictive provisions varies between the States and Territories and is in three forms:

- Form of ownership (corporate or pharmacist);
- Number of pharmacies allowed to be owned; and
- Friendly Society Pharmacies.

Legislative restrictions on pharmacy ownership generally and on Friendly Society Pharmacies particularly, first commenced to be imposed mid-century in the 40's and 50's. First company ownership was prohibited, pharmacist owners were restricted in the number of pharmacies they could own and then Friendly Society Pharmacies were restricted in their dealings with non-members, opening new pharmacies or relocating to new premises.

The rationale at the time was a real concern at the possibility of large overseas corporations establishing their chain pharmacies in Australia and seriously threatening the continued viability of the traditional pharmacist owned small business.¹⁰

Ownership of pharmacy by conglomerate corporations has become the dominant form of the pharmacy industry in the USA and it was a model of ownership that was strongly opposed by the Guild then, and it continues to day to oppose such a model. Equally, this Association and its members do not advocate such a model.

However, it was wrong to include Friendly Society Pharmacies within the ambit of the legislative restrictions supposedly designed to exclude foreign company interests.

Friendly Society Pharmacies were subjected to increasingly restrictive regulations in their ability to dispense medicines to both their members and members of the public. The restrictions took the form of discriminatory tax provisions, opening new pharmacies, or moving to new premises. Reasons at the time were variously stated as:

"Basically, it is necessary to protect the practice of pharmacy from the inroads of company interests and chain store dispensaries and to retain the individuality of the pharmacy retail business" and

"It was never anticipated that these dispensaries would be used to compete unfairly with the good order and individual management of retail pharmacy"¹¹.

¹⁰ In 1936 the Pharmaceutical Service Guild of NSW asked Friendly Society Pharmacies for their support in a campaign to resist the plans of *Boots* (a large British company operating a chain of chemist shops) to open a series of retail outlets in Australia. The Guild argued that *Boots* would put not only some chemists but also the FS dispensaries out of business. To induce the FSP in joining the Guild in lobbying the Government the Guild offered representation on their Branch committee, recognition of the Dispensaries' right to trade with the non members on the condition that the FS Dispensaries observed the Guild's pricing system. The FS Dispensaries declined to join with the Guild believing that to do so at the cost of increased prices to their members would be to betray their commitment to their members even if it might be at the eventual cost of the very existence of the FS Dispensaries. (*Mutual Aid or Welfare State, Australia's Friendly Societies* 1984)

¹¹ Debate WA Parliament, Pharmacy Act and Friendly Society Act; amending Bills. Oct/Nov 1964
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In Western Australia in 1956 when legislative restrictions first restrained them to trading only from those premises they then operated unless there were special circumstances, there were six Friendly Society Pharmacies operating. In 1964 when the restrictions were tightened further there were 10 Pharmacies operating. Now today there is only one.

In NSW prior to 1945 Friendly Society Dispensaries were not subject to restrictions on the number of pharmacies they could operate or their location. In response to pressure from non friendly society pharmacists, legislation was enacted which restricted them to operating only from premises where they were located as at 6 September 1948. In lieu of those premises they are, still today, restricted to only being able to relocate within 1.6 kilometres from their original premises.

Consequently, the opening of a new pharmacy by a Friendly Society Pharmacy in NSW is only possible with Ministerial approval. Such approval is dependent on certain criteria being met and applications being subject to the complex bureaucratic processes required to obtain Ministerial approval. Such processes are exceedingly time consuming and the lengthy delays they generate constitute real restrictions in the commercial world of guaranteeing contracts.

Similarly in Queensland. Since 1976 Friendly Society Pharmacies have been restricted from opening a new pharmacy or relocating an existing pharmacy to new premises unless the Minister, acting on advice from the Queensland Pharmacy Board, approves. Approval under this provision has been granted only rarely.

The legislation includes the provision that to obtain Ministerial approval to open a new pharmacy it needs to be demonstrated that there is an established need for the establishment of a pharmacy. The Queensland Supreme Court has ruled that this requires a prospective interpretation:

*“On the evidence before me, the vendors of the pharmacy established the pharmacy before the applicant bought it. That pharmacy is not one to which sub-s 30(7) can apply because on reading s 30 as a whole, if the Minister were to approve the establishment of a pharmacy by an applicant duly registered as a friendly society, that approval must be prospective in the sense that the establishment of the pharmacy will occur in the future. In my opinion this application must fail.”*¹²

This means that in Queensland a Friendly Society Pharmacy cannot open a new pharmacy by purchasing an existing pharmacy.

In South Australia the Friendly Society Medical Association Limited was first restricted in 1947 to the total of 26 pharmacies it then operated. Today it is restricted to a total of 31. A new pharmacy can be opened but if by doing so the total of 31 would be exceeded than an existing pharmacy is required to be closed or sold.

¹²Queensland Supreme Court Shepardson, J. 1992 Appeal against Minister's decision not to grant approval.

In contrast, in Victoria and Tasmania Friendly Society Pharmacies have not been restricted in either the number of pharmacies able to be operated or where they are located.

There are no Friendly Society Pharmacies operating in either of the Territories and it has always been understood that the provisions of the Pharmacy Acts in those jurisdictions do not allow Friendly Society Pharmacies to own a pharmacy. Details of the present legislative ownership provisions applying in the various jurisdictions are set out at **Appendix C**.

The restrictive nature of the present provisions as described are a reflection of the era when they were introduced. They are particularly reflective of the highly protective regulatory and selective nature of trading laws in most industries at that time. The protection of the owner/pharmacist small business from non-pharmacist entities was consistent with many trading laws that provided protection from the competition of other same service providers. The continuation of these restrictive practices would be in contradiction of the NCP and cannot be justified under the public benefit test.

The commencement of the PBS by the Commonwealth in 1953 was an important development in the pharmacy industry generally and for Friendly Society Pharmacies in particular. The tradition of the Friendly Society Pharmacies of providing medicines to their members at a rebated price was always a point of contention with the commercial pharmacists. And importantly, anyone can become a member and be entitled to rebates on their pharmaceutical purchases.

The PBS is defined by the National Health Act 1953 and the National Health Pharmaceutical Benefits Regulations. Under this legislation Approved Pharmacists and Friendly Society Pharmacies cannot discount PBS items where the PBS dispensed price is greater than \$20.30 for General patients and \$3.20 for Pension, Concessional and Department of Veterans Affairs (DVA) patients. (With the exception that Friendly Society Pharmacies' members who joined prior to 23 April 1964 can receive a benefit or discount).

In addition, Approved Pharmacists and Friendly Society Pharmacies cannot discount PBS charges such as Brand Price Premiums and Therapeutic Group Premiums which are compulsory PBS charges and which cannot be entered on the Patient Record Form (PRF).

What Approved Pharmacists and Friendly Society Pharmacy are allowed to discount under the legislation is limited to those PBS items where the dispensed price is equal to or less than \$20.30 for General patients (included in the price of which is the Additional fee for agreed price benefits (Safety Net fee) and the Allowable extra fee, both of which are voluntary fees). These PBS items represent approximately 30% of PBS prescriptions.

Friendly Societies Pharmacies, as previously mentioned, can also discount the PBS patient contributions (\$20.30 for General and \$3.20 for Concessional patients) for its members who joined before 23 April 1964.

The fact that all Friendly Society Pharmacies do actually discount PBS items where legislation allows discounting has provided and promoted competition in the market place.

Friendly Society Pharmacies were part of the beginnings of the establishment of and the promotion of pharmacy as a qualified occupation and then as a profession. Friendly Society Pharmacies were in the forefront of recognising the need for medicines and drugs to be dispensed and sold ethically and at the lowest possible prices. Collectively these restrictive legislative provisions at the State and Commonwealth levels effectively blocked Friendly Society Pharmacies from competing in the pharmacy industry to their full capacity.

Many of the arguments voiced at the time as the reasons for the need for restrictive provisions were in fact designed for the protection of the owner/managed small business pharmacist from competition from the Friendly Society Pharmacies. Such restrictions should not have been applied to them then and their continued application cannot be justified for the future.

10. Pharmacy Ownership

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 has been taken up by all our members with over 50% having made a significant start on its implementation and a number already being accredited. Additionally, Friendly Society Pharmacies are at the leading edge of health care delivery with the majority of new pharmacies being specifically designed for forward counselling.

Friendly Society Pharmacies are a major supporter of country pharmacy with some 41 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:

- Blood sugar levels, cholesterol and blood pressure monitoring;
- Infant/baby health care;
- Safe sex information; and
- Methadone treatment and needle exchange.

Friendly Society Pharmacies have taken these services further and generally engaged in a broader range of community health care services which include:

- Wound Care Clinics;
- Asthma Clinics;
- Sports Medicine Services;
- Industrial First Aid Services;
- Medication Review Services;
- Optical Services;
- Incontinence Clinics;
- Blood Glucose Testing;
- Dietetics Clinics;
- Occupational Therapy Services;
- Naturopathy;
- Enteral Nutrition Services;
- Intravenous Therapy Services; and
- Hospital Services.

Some of the genuine concerns that were expressed in the earlier years referring to the detrimental effect corporate pharmacy may have on the community based pharmacy industry are as valid today as they were then. Studies of the pharmacy industry in the United States and Great Britain show that large supermarket and department store chains that include pharmacy as only one of their many products are first, in contrast to community pharmacies in Australia, not good participants in free public health programs.¹³

And second, on the evidence available from the USA such entities could not be expected to join with government and in partnership with it work actively to pursue strategies to reduce and contain the growth in prescription volume. In fact contrary to that, growth in prescription volume is viewed positively and is pursued vigorously as a market strategy to increase profits and market share.

Total US retail sales for prescription drugs for all classes of retail pharmacies for 1998 were expected to surpass \$102.5 billion, representing a 15% increase on 1997's sales of \$89.1 billion. Chain pharmacies - including traditional chain drug stores, mass merchants and supermarkets - accounted for 61% or \$62 billion in prescription drug sales. This represents a 16% increase over total chain store prescription sales in 1997 of \$53.9 billion¹⁴

¹³ Report to the Pharmacy Board, Victoria: The Regulation of Pharmacists and Pharmacy Business August 1998

¹⁴ Report by President and CEO Ronald L. Ziegler, National Association of Chain Drug Stores (NACDS) Executive Newsletter 21 December 1998
AFSPA Submission NCPR of Pharmacy July 1999

Presently in Australia a number of conglomerates including supermarkets, chain stores, wholesalers and manufacturers in the pharmaceutical industry have indicated that they would like to own or be part of delivering pharmacy services. Currently they do not have that right and this submission advocates strongly that that position should not change.

Such organisations are typically dominant retail or wholesaler oligopolies, within the Australian market. The three largest food retailers, Coles, Woolworths and Franklins are reputed to control 75% of all food retailing in Australia to the claimed detriment of the smaller, independently owned supermarkets. These companies have already made large inroads into the Over the Counter (OTC) market of pharmacy and are now keen to be allowed to supply all dispensary items.¹⁵

Similarly the Australian pharmaceutical wholesalers market is dominated by three companies API, Sigma, and Faulding and it is estimated that these companies control 95% of the wholesale market.

Total deregulation of the ownership of pharmacy in Australia could be expected to produce partnerships and alliances of these interests that could, very quickly, become powerful enough to dominate the pharmacy industry and subsume the present community based pharmacies. Such an outcome would be very decidedly not in the public interest.

In considering these matters the importance of the role of the Commonwealth Government in financing a nationally based subsidised medicines system with a co-payment and safety net system through the PBS for all Australians cannot be underestimated.

This contrasts significantly with, for example, the USA which has a complex mix of employer sponsored health care insurance plans largely regulated by State legislation; State medicaid programs funded by matching Federal grants and Medicare which is a federally administered health insurance program for persons over 65 years that does not include the provision of pharmaceuticals outside of hospitals unless supplementary insurance is taken out by the payment of a premium.

These differences in the two systems highlight some key reasons why in Australia the containment of the prescription volume growth is an imperative for the Federal Government in Australia but is not a high cost component of the USA State and Federal Governments' health programs. Here, the costs of prescription medicines are a cost to the Government's health budget, which is funded by taxes. In the USA it is largely a cost met through a multiplicity of health care programs funded by insurance premiums collected by health insurance providers.

¹⁵ Recent Parliamentary Committee Inquiry into the Retail Industry
AFSPA Submission NCPR of Pharmacy July 1999

11. Future Industry Environment

However, it is the submission of this Association that corporate ownership should not be totally prohibited as it presently is in all jurisdictions except South Australia. The position in the two Territories is unclear. All jurisdictions should make provision for a limited form of corporate ownership of pharmacies and the practice of pharmacy.

In considering pharmacy ownership issues the most important one is that pharmacy and its related primary health care delivery services must be the primary purpose of the entity's business. Multi-purpose business entities (conglomerates) should continue to be excluded from the business of pharmacy.

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.¹⁶

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 costs of entering pharmacy as an owner/operator have risen dramatically since the era of the 60's when it was still a realistic aspiration for a graduate pharmacist to own their own pharmacy or enter a family business and buy out their parent owner.

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

¹⁶ Pew Report CriticalChallenges: Revitalising the Health Professions for the Twenty-First Century. Pew Health Professions Commission, 1995

made up almost exclusively of single operator businesses. The reality is that only 47.2% of registered pharmacists currently practise as either sole proprietors or partner proprietor. Thus the majority of registered pharmacists already work as pharmacists in charge or as relieving pharmacists (ie employees).¹⁷

12. Conclusion

Since legislation was first introduced in Australia to register pharmacists and to regulate the practice of pharmacy, the overriding purpose of such legislation has been to protect the public by ensuring that persons dispensing medicines and selling dangerous drugs and poisons are properly qualified.

The need for such protection of the public's interest is as valid today as it was yesterday; perhaps even more so given the potency of modern pharmaceuticals. The outcomes of this Review should not have the effect of lessening these important safeguards to public and patient safeguards.

Nor should it help to create an environment of deregulation which, whether intentionally or otherwise, puts at risk the community based pharmacy structure that characterises Australia's pharmacy industry by providing an opportunity for inappropriate corporate entities to enter the pharmacy industry.

Friendly Society Pharmacies were delivering safe, ethical and community based pharmacy services in Australia before pharmacists were first registered. They continue to provide today, where they are allowed to operate, a proper competitive alternative in the pharmacy industry. If the present restrictive provisions applying to them were to be removed it would enable them to revitalise and grow such as to be a very acceptable new competitive dynamic in the industry.

AFSPA strongly recommends to this Review that Friendly Society Pharmacies should have consistent legislative provisions applied to them across all States and Territories, and further, that those legislative provisions should mirror current provisions in Victoria and Tasmania whereby there are no State based legislative restrictions applying to them in regard to the relocation of pharmacies, the establishment of new pharmacies, or to the purchase of an existing pharmacy.

¹⁷ Background Paper National Competition Policy Review
AFSPA Submission NCPR of Pharmacy July 1999

Appendix A

Friendly Society Pharmacies: Number and Location by State

Friendly Society Pharmacies	Number of Pharmacies
<u>Queensland</u> Friendly Care Chemists Friendly Society (Australia) Ltd. 6 Bundaberg Associated Friendly Societies' medical Institute 1 Dalby & District Friendly Societies Dispensary 1 United Friendly Societies Association of Gympie & District 1 Ipswich & West Moreton UFS Dispensary 2 Mackay Associated Friendly Societies Pharmacy 2 Maryborough/Hervey Bay Friendly Societies Chemists Ltd. 2 CQ Friendly Society Ltd.- AFS Dispensaries Rockhampton 3 Toowoomba Associated Friendly Societies Dispensary 1 Warwick Friendly Society Association Limited 1 Ayr Friendly Society Pharmacy Ltd. 1 Townsville Friendlies Chemist 2	
<u>New South Wales</u> Combined Dispensaries Friendly Society Ltd. 6 Friendly Societies Pharmacy Ltd. (Grafton) 1 Friendly Society Medical Association Limited 1 Auburn & Lidcombe UFS Pharmacy 1 Lismore & District Pharmacy Ltd. 1 Friendly Society Medical Association Limited 1	
<u>Victoria</u> Australian Unity United Friendly Society Dispensaries 11 Ballarat United Friendly Societies Dispensaries 7 Bendigo United Friendly Societies Dispensary 2 Friendly Societies Dispensary (Bentleigh) 1 Friendly Societies Dispensary (Box Hill) 1 Brunswick & Coburg Friendly Society Dispensary Ltd. 3 Cheltenham UFS Dispensary 1 Community Pharmacy Friendly Society Ltd. 5 Eaglehawk United Friendly Societies Dispensary 1 Community Care Chemist Friendly Society Ltd. 3 North West Dispensaries Friendly Society Ltd. 2 Wonthaggi Miners Friendly Societies Dispensary 1 Yallourn Friendly Societies Dispensary 3 Friendly Society Medical Association Limited 2	
<u>South Australia</u> Friendly Society Medical Association Limited 31 Mount Gambier UFS Dispensary 1	
<u>Western Australia</u> Victoria Park Friendly Society Pharmacy 1	
<u>Tasmania</u> Hobart UFS Dispensary 2 Launceston Friendly Society Pharmacy Limited 1	

Friendly Society Pharmacies and Taxation

Do Friendly Society Pharmacies Have a Cost Advantage Over Pharmacists?

The Discussion Paper questioned whether Friendly Society Pharmacies had a competitive advantage over pharmacists through either taxation or benefits provided to members.

It is our contention that they do not have such an advantage. The ability of Friendly Society Pharmacies to provide competitive prices and services is related to their mutual status rather than any specific tax advantage. The mutual status of Friendly Society Pharmacies means that their fundamental aim is to provide quality health care standards and to return their profits to members via lower prices and re-investment back into their pharmacies. It is their mutual self-help nature which provides competition rather than any tax advantage.

Benefits paid to members of Friendly Society Pharmacies are in fact an internal competitive neutral factor by the very nature that they are paid out of trading income and thus proportionally reduce the capacity of Friendly Society Pharmacies to retain larger profits earned by commercial chemists.

The member benefits do provide a higher degree of consumer competition but by their very nature, ensure an operational stabiliser within the pharmacy industry that under no test can give Friendly Society Pharmacies an overall advantage to competitors. The benefit that Friendly Society Pharmacies have is that they have accumulated reasonable reserves from trading for over 100 years continuously, and the accumulation of assets are managed in an efficient and proper manner for the benefit of both current and future members.

The following is a brief summary of the tax issues relating to Friendly Society Pharmacies and pharmacists.

Friendly Society Pharmacies

Friendly Society Pharmacies pay income tax on any income earned or received from non-members. Income received from the government for PBS payments is considered by the government as non-member income and is therefore fully taxable, and this is a major part of a pharmacy's income. It is only income directly received from their members which is not taxed under the principle of mutuality. As members of a Society own the Society they cannot be taxed on income they make from themselves.

Due to the discounts given to members, sales to members are usually at a break even or loss level. The non-member income and PBS income, which are fully taxable, are the major "profit" earners of Friendly Society Pharmacies. The taxation of all

Friendly Society Pharmacies in annual accounts for the year ended June 1998 represented a total rate of 21% of their net profit. This will vary by Society depending upon the level of their non-member income. The largest Friendly Society Pharmacy in 1998 reported a net profit of \$3.0 million and income tax of \$0.88 million, an effective rate of 29.45%.

In addition to income tax, Friendly Society Pharmacies are more likely to pay payroll tax than the average pharmacy. The average pharmacist is generally too small for payroll tax to be applicable. The 1998 Pharmacy Guild Digest shows payroll tax paid by an average pharmacy to be \$369 per pharmacy, which represents 0.283% of wages. Considering the average payroll tax rate is 6% in Australia it represents only a very small amount of payroll tax paid.

Friendly Society Pharmacies because of their total reliance on employee pharmacists, generally have relatively higher payrolls resulting in substantial payroll tax being paid. For example the largest of the Friendly Societies pays a combined payroll tax and income tax representing an effective 47.5% of net profit (before income tax and payroll tax). This is a significantly higher level of taxation than the average pharmacist is required to pay.

A Friendly Society Pharmacy is obliged to comply with all other costs and taxes levied by a federal or state government. The only difference between the two is the mutuality principle for Friendly Society Pharmacy on income tax.

The introduction of the Goods and Services Tax (GST) will result in Friendly Society Pharmacies bearing any additional costs that may arise in the same manner as private pharmacists. However, because Friendly Society Pharmacies pay the corporate rate of tax, they will not receive the benefit of personal income tax cuts that will be available to private pharmacists.

Pharmacists

While pharmacists do not receive a reduction from the mutuality principle they have far greater ability to structure their ownership of pharmacy to minimise their taxation. This can be done through split ownership of the "front of shop" in some states, by family trusts, and by family members working in the business. The organisational structure of pharmacists can be quite complex in the establishment of best ownership structures to obtain effective taxation rates.

From the 1998 Pharmacy Guild Digest the average net profit of a pharmacy is \$138,712.

Without considering the multitude of tax advantages available to pharmacists by using trusts or other corporate vehicles, and the use of allowable deductions such as motor vehicles, Superannuation etc, to maximise their tax advantage, an individual will pay the following "base" tax.

\$0-\$5,400	Nil
\$5,400 to \$20,700 @ 20%	\$ 3,060
\$20,701 to \$38,000 @ 34%	\$ 5,882
\$38,001 to \$50,000 @ 43%	\$ 5,160
\$50,001 to \$138,712 @ 47%	\$41,694
total taxation of	\$55,796
represents an average rate of	40.22%
with payroll tax of \$369 added back	40.49%

The maximum rate of a Friendly Society Pharmacy, including payroll and income tax, was 47.5%. This is much higher than the pharmacist rate of 40.49%. Some of the smaller Friendly Society Pharmacies pay lower effective tax rates as their business mix is significantly different, although this also applies to pharmacists who at lower income levels pay tax at the lower incremental levels of tax.

With the introduction of the GST, the above marginal tax rates will decrease giving a further taxation benefit to pharmacists.

Summary

Friendly Society Pharmacies do not achieve a significant taxation advantage over pharmacists, and in a number of cases the additional taxation paid by Friendly Society Pharmacies is far greater than for pharmacists.

State/Territory Restrictive Ownership Comparison

State/ Territory	Friendly Society Pharmacies	Pharmacist Owned Max No.	Corporate Ownership
VIC	No restriction.	3	Prohibited
NSW	Only able to open a new pharmacy with Ministerial approval or move to new premises within a restricted radius of 1.6 kilometres..	3	Prohibited
QLD	Restricted to premises operated at time of Act 1976 unless receives Ministerial approval on the recommendation of the Pharmacy Board, to relocate within same locality or open new pharmacy.	4	Prohibited
SA	The Friendly Societies Medical Association Inc. restricted to number of premises at time of enactment (31). The Mount Gambier UFS Dispensary, no restriction.	4	Allowed with provisions relating to balance of registered pharmacists and non-pharmacists
TAS	No restriction.	2	Prohibited
WA	Restricted to premises as at 1964 and relocation only within immediate locality in exceptional circumstances with Ministerial approval.	2 (residential status required)	Prohibited
ACT	Believed to be excluded.	No restriction	Unclear
NT	Believed to be excluded.	No restriction	Unclear

Glossary of Acronyms, Abbreviations and Definitions

- AFSPA - Australian Friendly Societies Pharmacies Association Inc.
- ACCC - Australian Competition and Consumer Commission
- ACPA - Australian Community Pharmacy Authority
- ASIC - Australian Securities and Investments Commission
- the Act - *National Health Act 1953*
- the Authority - Australian Community Pharmacy Authority
- the Agreement - Agreement between the Pharmacy Guild of Australia and the Minister responsible for the PBS
- Conglomerate - group or corporation formed by merging unrelated firms
- COAG - the Council of Australian Governments
- CPA - Competition Principles Agreement
- CPRA - *Competition Policy Reform Act 1995*
- DVA - Department of Veterans Affairs
- the Guild - the Pharmacy Guild of Australia
- GST - the Goods and Services Tax
- NCC - National Competition Council
- NCP - National Competition Policy
- Oligopoly - state of limited competition between few producers or sellers
- OTC - Over the Counter Sales
- PBS - Pharmaceutical Benefits Scheme
- PBRT - Pharmaceutical Benefits Remuneration Tribunal