

## THE PORT MACQUARIE AND OTHER CASES

### Case A: The Port Macquarie case

'The Port Macquarie case' was one of the developments associated with the implementation of the pharmaceutical restructuring measures which led to this inquiry being referred to the Committee. It illustrates a number of the features which have been examined in this Report.

#### Chronology of the case

In April 1990, a Sydney pharmacist heard that a new medical centre was being built in Port Macquarie and that the developers were interested in having a pharmacy included in the Centre.

On 18 July 1990, this pharmacist submitted a tender for the lease of the premises reserved for a pharmacy in the Centre still under construction.

On 7 August 1990, the pharmacist and one of the developers met in Sydney and a deal was made verbally over the rental figure and sealed by a handshake. This arrangement was confirmed in writing the following day.

On 10 August 1990, the pharmacist phoned the Queensland Office of the Health Insurance Commission (HIC) requesting an application form for approval (*Transcript of Evidence, p. 595*).

On 8 October 1990, the pharmacist lodged an application with the Queensland HIC to dispense pharmaceutical benefits from the proposed new premises. As restrictions had been imposed on the issue of new approvals since 9 August 1990, the pharmacist had to show that he had made arrangements prior to that date. In support of his application he submitted a number of documents relating to negotiations prior to 8 August 1990.

On 17 October 1990, the pharmacist signed an agreement to lease the premises. On the same day, he contacted the NSW Pharmacy Board regarding approval of the new premises.

On 14 November 1990, the HIC Central Office wrote to the pharmacist advising him that the HIC was satisfied that he had 'met the criteria stated by the Minister for Aged, Family and Community Care and that an approval [would] be allocated to [him]'.

On 18 December 1990, the HIC Queensland State Office issued a tentative approval number to the pharmacist on instructions from HIC Central Office (*Transcript of Evidence*, p. 584).

On 31 January 1991, HIC Central Office requested Queensland State Office to seek proof of prior commitment from the pharmacist so that the application for approval could be considered by the Pharmacy Restructuring Authority (PRA).

On 12 February 1991, a question upon notice was asked in Parliament about the alleged making of false statements on an application for an approval to dispense pharmaceutical benefits and wrongful granting of an approval by the HIC.

On 13 March 1991, an officer from the NSW Pharmacy Board visited and approved the pharmacy premises at Port Macquarie.

On 14 March 1991, an officer from the Queensland HIC, acting as delegate of the Secretary to the Department of Health, Housing and Community Services, formally approved the pharmacist to supply pharmaceutical benefits, confirming the tentative approval number which had been issued on 18 December 1990.

On 13 and 14 March 1991, officers from the investigation unit of the HIC and an officer representing the Australian Government Solicitor visited Port Macquarie and interviewed the protagonists in the Port Macquarie case.

#### Related events and comments

- When the Minister issued a media release on 24 July 1990, he indicated that one of the aims of the restructuring was to rationalise the number of pharmacies. Port Macquarie was considered to be an area overserved with pharmacies (thirteen) and therefore it was assumed by pharmacists already operating in the area that it would be targeted for rationalisation. The opening of another pharmacy in the area when the Government was advocating a reduction in numbers seemed to be contradictory to the aims of the restructuring. A claim was made by some other pharmacists in Port Macquarie that there had to be some sort of fraud for the approval to be granted.
- Between 8 August and 30 November 1990, the term 'commitment' of the Minister's media release of 8 August 1990 became 'legal or financial commitment'. No advice was provided to State Offices of the HIC on 'commitments' and it was clear from evidence that the State Offices' understanding of the possible components of 'legal' or 'financial' commitment was vague (*Transcript of Evidence*, pp. 612-613, 631-632).
- Several Port Macquarie pharmacists assumed that no firm agreement had been made.
- When these pharmacists inquired from the HIC whether any applications had been made to open a new pharmacy in Port Macquarie, they were answered in

the negative, strengthening their later assumption of some irregularity in the approval process. The information from the HIC was misleading in that on 10 August 1990, the pharmacist proposing to open a new pharmacy had requested an application form for approval as stated above. The response of the HIC to other pharmacists could be faulty administration, but it could equally be zealous compliance with the secrecy provisions (section 135A) of the *National Health Act 1953*. In any event, had pharmacists been properly briefed on the initial stage of the restructuring, there would not have been any confusion about the possibility of granting a new approval even in an overserviced area.

- These pharmacists retained a firm of solicitors to act on their behalf and lodge a complaint with the Australian Federal Police. This complaint was referred to the HIC on 6 February 1991.

Allegations of fraud added another dimension to the Port Macquarie case which is worth relating for the additional light it sheds on the manner in which the HIC has dealt with its responsibilities under the restructuring program.

- The involvement of HIC officers in an investigation of allegations against the HIC is questionable.
- The manner in which an officer from the Australian Government Solicitor's Office was engaged and briefed to accompany the HIC investigators 'as an adviser' (*Transcript of Evidence*, p. 648) illustrates the casual attitude of the HIC. This officer was co-opted to participate in the Port Macquarie investigation by an officer from the NSW HIC Office, during a morning tea break at a court hearing (*Transcript of Evidence*, p. 950-51). This was not followed by any formal request to the Solicitor-General. In addition, his only written brief was a copy of the October 1990 issue of the *Pharmacy Review*, a Pharmacy Guild publication which contained some information on the scope of the restructuring measures contained in the yet-unsigned Agreement, publicly mentioning for the first time the 'legal' and 'financial' parameters of 'commitment'. But, by March 1991, the time of the HIC investigation, the Agreement had been signed as had as Ministerial Guideline No PB1 of 1991, both of which contained more details about documentation considered to show 'legal' or 'financial' commitment. It is possible that the HIC wished to place its 14 November 1990 decision to grant a tentative approval to the pharmacist in the perspective of what was known concerning 'commitment' at that date. The fact that a journal article was seen as providing the basis for decision-making by the HIC during the transition period is an indication of the unsatisfactory situation then prevailing.
- The evidence given to the Committee by this officer was unsatisfactory and the Committee was unable to obtain from him the answers it wanted (*Transcript of Evidence*, pp. 643-660).

Adequate dissemination of information on the nature of the changes which were to be made from 9 August 1990 in the issue of approvals would have prevented

erroneous assumptions being made about 'prior commitments' and may have prevented allegations of fraud. As has been considered in the main body of this Report, the HIC had little information to disseminate in the first instance.

The Committee has made no decision on the nature of the 'commitment' entered into in this case. It is not possible to prove or disprove the alleged handshake at Sydney airport or what it represented; in any case, this agreement was confirmed in writing the following day. In respect of the interest held in the property, the Committee has been advised by the Deputy Solicitor-General that the persons purporting to hold an interest in the land had both a sufficient interest in the land and in the proposed building to be able to offer a lease on a building yet to be constructed. On the subject of continuing to call for tenders after apparently settling with one individual, the Committee was advised by the Deputy Solicitor-General that, although this practice could be considered unethical, it was not illegal and would not invalidate the arrangement entered into by the pharmacist. In short, most of the factors which led other pharmacists in the area to consider there would be no further competition, or that fraud could have occurred, were based on false premises.

#### **Case B**

In late August 1990 a pharmacist inquired about an approval to open a new pharmacy in an area already well serviced by pharmacies.

On 23 October 1990, this pharmacist lodged an application for approval with the Queensland HIC.

On 29 October 1990, the Qld HIC was asked by HIC Central Office to seek supporting documentation from the pharmacist showing pre 9 August 1990 arrangements. The pharmacist supplied a bank statement and a receipt for a sum paid to secure a lease on one of five sites within a new building complex.

On 14 November 1990, the pharmacist was verbally advised by the Qld HIC that a tentative approval was granted to him.

On 4 February 1991, the pharmacist began operating his new pharmacy and dispense pharmaceutical benefits, although his application was now under consideration by the Pharmacy Restructuring Authority.

There were some similarities between this case and the Port Macquarie case, but there were also some differences which show the inconsistent approach which resulted from 'the case by case' approach announced in the Minister's media release of 8 August 1990. In this instance the matter was further complicated by the fact that the pharmacist not only opened without an approval but also dispensed pharmaceutical benefits. The Committee was told that the HIC 'counselled' the pharmacist about dispensing without an approval to do so, but took no action similar to that described under Case F below when it considered that a pharmacist was dispensing pharmaceutical benefits without an approval number.

Other aspects of this case are the failure by the HIC to authenticate the documentation presented in support of an application claiming pre 9 August 1990 arrangements, and its failure to check whether the pharmacist was lodging claims for the prescriptions he dispensed while not approved. This case illustrates the inconsistent approach followed by the HIC in granting approvals. It also further illustrates the complications which arose from lack of information for pharmacists about the initial stages of the restructuring.

#### Case C

In this case, the HIC took the word of a pharmacist that he intended to open a pharmacy without supporting documentation; this action was later defended by the HIC on the grounds that the pharmacist must have made arrangements to open a pharmacy, otherwise he would not have come to the New South Wales HIC Office on 9 August 1990 to further his application. In this case, the applicant had no documentation to demonstrate *commitment* (*Transcript of Evidence*, pp. 636-7) as opposed to demonstrating an *interest* in opening a pharmacy, but his application was approved. Indeed, the information provided by the party's solicitor to the HIC confirmed that by 7 September 1990 the applicant had no lease of the premises. Thus there was no evidence of commitment.

#### Case D

A pharmacist applied for an approval in mid-August 1990, and provided documentation that demonstrated an intention to lease. The relevant correspondence includes a letter which states (in July 1990) that 'this offer should not be deemed to create a contractual relationship until the lease is executed'. (*Correspondence, HIC NSW Office to Committee*.) It had not been executed by 14 August 1990. Nonetheless, approval was granted.

#### Case E

It is apparent from another case, which was also dealt with by the New South Wales HIC that some applicants were seriously disadvantaged by different material being required by State Offices or by Central Office, of the HIC.

Two applicants in partnership had begun negotiating in January 1990; by the third week of May 1990 the applicants had obtained approval for a bank loan, lodged applications for the registration of a business name, and organised shop-fitters, uniforms, etc. They lodged an application for approval to the New South Wales HIC on 26 September 1990. Contrary to instructions received earlier from Central Office that all applications for new approvals be forwarded to the HIC Central Office in Canberra, the State Office set the application aside advising the applicants that it would be forwarded when the lease agreement was signed. It is highly likely that if the application had been forwarded, it would have been dealt with in the same way as similar applications and approval would have been granted.

The application was not forwarded to the HIC Central Office by the time the HIC had to relinquish its approval powers. The application was then considered by the PRA which imposed considerably more rigorous standards of 'financial' commitment (according to the PRA's interpretation of the Ministerial guidelines, PB1) than the HIC had imposed during the transition period. It was only after considerable delay and expense that their application was approved late in 1991.

In these instances, the disorganisation and lack of clear guidelines clearly disadvantaged at least one applicant, and there may be others who withdrew, or did not proceed with, applications because of decisions taken by State Offices. While the Committee considers that the type of evidence considered acceptable by Central Office HIC was often of dubious value as to commitment (as opposed to an interest in opening a pharmacy), it was essential that the same standards be applied to all evidence. No acceptable explanation has yet been provided as to why one application was held by the State Office (in October 1990) when the State Office itself stated in evidence that applications were dealt with on a case by case basis and 'referred to Central Office' (*Transcript of Evidence*, p. 620).

#### **Failure to provide information on changed procedures**

##### **Case F**

In this instance, the Committee notes the carelessness of the NSW HIC State Office in failing to advise pharmacists that relocating a pharmacy across the road required a new approval number, a procedure which had never been enforced prior to the restructuring, but should have been so according to the strict letter of the law — particularly State legislation, which required the registration of specific premises.

In one case in particular, the applicant stated in evidence that he had been advised that he would be able to keep the same approval number, and consequently ordered new stationery with the new address and the old approval number (*Submission No. 32*). It appeared from later information that the applicant was only advised early in September 1991 that this situation had changed, because the PRA was now the relevant authority.

A more serious concern in this case was the apparent attempt by the HIC to obscure the details of the case. The applicant stated (*Transcript of Evidence*, p. 383) he had been asked to repay monies paid by the HIC for dispensing PBS scripts during 1 May to 16 August 1991 (when technically he was not approved since he had moved to a new address without approval from the PRA). This is supported by correspondence received by the applicant from the HIC Central Office which states:

In view of the above, I am taking action to suspend the processing of claims submitted by you in respect of pharmaceutical benefits dispensed from the premises . . . between 1 May 1991, the date from which you began operating from these premises without approval under section 90, and the date from which this approval is granted. Our NSW Office will be contacting you

shortly regarding the recovery of monies already paid in respect of claims already processed relating to this period.

In later discussion with the Central Office HIC, from which the above letter emanated, it was suggested that the Committee misunderstood the issues, and that no attempt had been made to have the monies repaid. The above letter is a clear indication otherwise. The pharmacist also wrote to the Committee stating that on the day before giving evidence to the Committee (i.e. 6 September 1991) he had been visited by the New South Wales HIC and that they discussed two unpaid claims, and one claim that had to be 're-done and re-submitted so that scripts dispensed by me before that date of approval . . . were excluded'. (*Correspondence from the pharmacist to the Committee.*) At that time no solution to the situation existed since the legislation had made no provision for this eventuality.

In this case, there appears to have been a clear attempt by the HIC officer concerned to minimise the problem and mislead the Committee.

In all, nine similar cases came to the attention of the Commission and in each instance, monies were withheld pending formal approval. Yet in Case B discussed above, this course of action was not adopted, despite evidence that pharmaceutical benefits were dispensed. In self-justification the HIC claimed that the pharmacist in question did not submit claims for reimbursement, and therefore was not in breach of the legislation.