

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**IMPLEMENTATION OF COMMONWEALTH
PHARMACEUTICAL
RESTRUCTURING MEASURES**

**REPORT OF THE SENATE STANDING COMMITTEE
ON COMMUNITY AFFAIRS**

MAY 1992

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LIST OF ACRONYMS USED IN THE REPORT

| | |
|--------|--|
| AAT | Administrative Appeals Tribunal |
| DHH&CS | Department of Health, Housing and Community Services |
| EPA | Essential Pharmacy Allowance |
| HIC | Health Insurance Commission |
| JCPA | Joint Committee of Public Accounts |
| PBRT | Pharmaceutical Benefits Remuneration Tribunal |
| PBS | Pharmaceutical Benefits Scheme |
| PRA | Pharmacy Restructuring Authority |

SUMMARY OF CHRONOLOGICAL TABLE LOCATED AT PARAGRAPH 2.3 OF THIS REPORT

1 July 1981

Issue of departmental procedures in respect of approval of pharmaceutical chemists – still operative at 8 August 1990.

24 July 1990

Joint announcement by Government and Pharmacy Guild of Australia of an Agreement for the restructuring of the retail pharmacy industry.

8 August 1990

The Minister for Aged, Family and Health Services announces immediate restrictions in the granting of new approvals to pharmacists to dispense pharmaceutical benefits.

9 August 1990

The Health Insurance Commission (HIC) begins applying new procedures in respect of certain applications for approval to dispense pharmaceutical benefits received from that date.

20 September 1990

Community Services and Health Legislation Amendment Bill 1990 introduced in the House of Representatives includes provisions for the establishment and functions of the Pharmacy Restructuring Authority (PRA).

10 October 1990

Social Welfare Legislation (Pharmaceutical Benefits) Amendment Bill 1990 introduced in the Senate includes a provision to enable the Pharmaceutical Benefits Remuneration Tribunal (PBRT) to give effect to the remuneration aspects of an Agreement between the Minister and the Pharmacy Guild of Australia.

18 October 1990

Above Bill passed.

30 October 1990

Social Welfare Legislation (Pharmaceutical Benefits) Amendment Act 1990 receives Royal Assent.

23 November 1990

The Commonwealth of Australia and the Pharmacy Guild of Australia sign an Agreement for the restructuring of the retail pharmacy industry. Agreement found to be null and void on a technicality.

6 December 1990

The Minister for Aged, Family and Health Services and the Pharmacy Guild sign an Agreement for the restructuring of the retail pharmacy industry.

18 December 1990

Community Services and Health Legislation Amendment Act 1990 receives Royal Assent.

20 December 1990

PBRT makes a determination giving effect to the Agreement between the Government and the Pharmacy Guild of Australia as from 1 January 1991.

9 January 1991

The Minister for Aged, Family and Health Services signs Determination No PB1 of 1991 required under section 99L of the *National Health Act* for the PRA to carry out its functions.

23 January 1991

Ministerial Determination No PB1 of 1991 is gazetted. The PRA is now fully empowered to begin operations.

8 February 1991

The PRA begins processing applications.

RECOMMENDATIONS

CHAPTER 2

1. That all legislation and subordinate legislation relating to the Pharmaceutical Benefits Scheme and the pharmaceutical restructuring measures be consolidated in one Act and associated Regulations.

Paragraph 2.16

2. That the Government discontinue the practice of relying on press releases to introduce changes in public administration.

Paragraph 2.30

3. That the Government take necessary steps to ensure the elimination of loopholes in the restructuring measures identified by the Committee.

Paragraph 2.64

4. That the development of any national program be supported by an organised strategy.

Paragraph 2.105

CHAPTER 3

5. That negotiations affecting all pharmacists include consultation with representatives of all existing pharmacists' organisations as relevant.

Paragraph 3.40

6. That legislation awareness courses be mandatory for relevant officers of the Australian Public Service whose duties require knowledge of that legislation.

Paragraph 3.69

7. That streamlined procedures be adopted to enable the implementation of restructuring measures to proceed without unnecessary duplication of resources.

Paragraph 3.86

8. That evaluation procedures be set in place immediately to assess the effects of the restructuring on the pharmacy retail industry and on the Australian community.

Paragraph 3.88

9. That the Department of Health, Housing and Community Services establish appropriate liaison units for any program implemented through several agencies.

Paragraph 3.94

CHAPTER 4

10. That the Government consider a possible form of appeal for pharmacists who were financially disadvantaged through being given wrong advice and who are not covered by any appeal rights under the existing legislation.

Paragraph 4.14

11. That the Senate agree that any case not resolved by the time the report is tabled be considered still referred to the Committee for reporting if necessary.

FOREWORD

This Report of the Senate Standing Committee on Community Affairs focuses on the restructuring measures aimed at government control over the number and location of pharmacies approved to dispense prescriptions covered by the Pharmaceutical Benefits Scheme (PBS). These measures were contained in Part Two of an Agreement between the Minister for Aged, Family and Health Services and the Pharmacy Guild of Australia signed on 6 December 1990.

The key features of the restructuring measures proposed by the Guild and accepted by the Government were:

- offer of a payment package for the voluntary closure or amalgamation of existing pharmacies meeting certain criteria;
- introduction of strict criteria for the issue of new approvals to dispense PBS drugs; and
- payment of an Essential Pharmacy Allowance (EPA) to pharmacists in remote and isolated areas who met certain criteria.

The Agreement put an end to the bitter dispute between the Government and the Guild which erupted in 1988-89 over remuneration for pharmacists dispensing PBS prescriptions. The dispute itself arose from the long standing conflict of interest between the two parties over the costs of running the Scheme.

Between 1948, when the Scheme was introduced, and 1984 the number of drugs in respect of which the Government covered the cost to the community increased steadily. In view of the parallel increase in costs, the Government exercised greater control and the number of such drugs has since declined. Despite this, the higher cost of the drugs still listed has kept the cost of the PBS on a rising curve. As far as pharmacists were concerned, calculation of remuneration should take into account the greater number of PBS prescriptions to handle in claiming reimbursement from the Government. Since the early 1960s, the Pharmacy Guild, acting as the pharmacists' advocate in negotiations with the Government, has frequently campaigned against any erosion of pharmacists' income. Similarly, the Government has constantly altered the framework of the Scheme in an attempt to contain costs.

The 1988-89 dispute was precipitated by the lack of cooperation by pharmacists, acting on the recommendation of the Guild, in a survey aimed at updating data on labour costs associated with PBS dispensing. The ensuing confrontation highlighted the need for a reorientation in the running of the PBS and gave a new lease of life to the rationalisation of the pharmacy industry which had first been raised in 1972.

The Agreement was first publicly announced by the Minister as soon as it had been reached, on 24 July 1990, and the introduction of partial restrictions on the granting of approvals to dispense PBS prescriptions was to take effect immediately after the

Minister issued a Media Release on this matter on 8 August 1990. At the time, the Health Insurance Commission (HIC) had carriage of approval procedures for pharmacists. By the time the Agreement was signed, the HIC had therefore been acting on the Minister's Media Releases for four months.

In addition, the legislative instruments constituting and empowering a specific body to administer the restructuring measures, the Pharmacy Restructuring Authority (PRA), were not fully in place until 23 January 1991. This time gap between the announcement that restructuring would take place and the completion of all the necessary legislative and administrative machinery left the HIC to administer a program within a rather ill-defined framework.

The initial implementation of restructuring measures was further weakened by the particular relationship which existed between the Commission and the then Department of Community Services and Health for the running of the PBS and associated procedures: in July 1989, the HIC was given responsibility for the operational aspects of the Scheme while the Department retained control over policy and budgeting. Division of responsibilities, on the ground that greater efficiency in the administration of the PBS would follow, in fact led to greater inefficiency. The HIC, which had not been a party to negotiations on restructuring, was not in a sound position to play a part in administering a program within entirely new parameters. Furthermore, it appears to have received little support or direction from the Department in the wake of the Minister's statements.

A more complex problem became apparent when the operations of the Pharmacy Restructuring Authority (PRA) began on 23 January 1991. Although constituted specifically:

to implement those aspects of the Agreement between the Government and the Guild concerning restructuring the retail pharmacy industry and to administer the Ministerial Guidelines established for that purpose¹

the PRA requires the on-going cooperation of the HIC to obtain all the necessary data concerning pharmacists applying for consideration under the restructuring measures.

On 11 March 1991, two questions on notice were put to the Minister for Community Services and Health regarding alleged irregularities in the implementation of the restructuring arrangements in respect of an approval to open a new pharmacy at Port Macquarie.² On 3 June 1991, the Senate Standing Committee on Community Affairs received a reference to inquire into the implementation of the Commonwealth Government pharmaceutical restructuring measures including:

1. *Transcript of Evidence*, (Pharmacy Restructuring Authority), 15 November 1991, p. 815.

2. Dr. R.L. Woods, M.P., Questions on Notice, No 552 (1) and (2), 11 March 1991.

- (a) the operation of the Pharmacy Restructuring Authority, including the objectives, guidelines and methods used when dealing with the matters placed before it;
- (b) the relationship between the Pharmacy Restructuring Authority and the Health Insurance Commission and the degree of cooperation between both organisations concerning the operation of the Pharmacy Restructuring Scheme: and
- (c) the operation of the Health Insurance Commission in approving applications for new pharmacies subsequent and prior to the setting up of the Pharmacy Restructuring Authority.

The Committee received thirty-five submissions and held public hearings in Canberra on 23 August, 6 September, 15 November and 27 November 1991 and in Sydney on 2 October 1991. Submissions received are listed at Appendix 1 and witnesses heard are listed at Appendix 2.

Evidence received and information gathered point to a wide range of problems which are considered to result primarily from the administrative practices of the then Department of Community Services and Health (now Health, Housing and Community Services), the Health Insurance Commission and the Pharmacy Restructuring Authority, the unique position of the Pharmacy Guild of Australia in restructuring, and problems of administration.

The problems outlined above aggravated inherent weaknesses in the planning of the restructuring as evidenced by the phraseology used in the Minister's statements and in the Agreement, by the unrealistic criteria used to achieve rationalisation, and by the delays in putting in place the necessary legislation.

The Government has already taken remedial action in respect of certain restructuring measures. The Committee has possible explanations for the shortcomings still outstanding in the planning and administration of the PBS restructuring measures and has made a number of recommendations to address these problems.

CHAPTER 1

THE PROTAGONISTS IN THE DEVELOPMENT OF A RESTRUCTURING STRATEGY

1.1 Restructuring of the retail pharmacy industry is the outcome of more than forty years' partnership between the Government and the pharmacy retail industry in the running of the Pharmaceutical Benefits Scheme (PBS). As negotiator for owner pharmacists on remuneration matters¹, the Pharmacy Guild of Australia has been an intrinsic part of that partnership. Over this period, a number of developments have taken place which left their imprint on relations between the parties involved and partly account for the course of the restructuring to date. An examination of developments to 1990 will put the rationalisation of the pharmacy retail industry – the objective of the restructuring measures under consideration – and the role of the Pharmacy Guild in perspective.

1.2 The restructuring measures considered in this Report are primarily those referred to in the Minister for Aged, Family and Health Services' media releases of 24 July and 8 August 1990 which relate to the rationalisation of the pharmacy industry. These measures were part of a wider reform of the PBS undertaken by the Government in 1990.²

1.3 The thrust of the 24 July 1990 media release was to publicise a joint announcement by Ministers in the Community Services and Health portfolio and the Pharmacy Guild of Australia on the broad terms of an Agreement to restructure the pharmacy industry. The major points of the media release were that:

The in principle agreement [would] produce improvements in the structure of the industry through rationalisation of the numbers of pharmacies.

... the Government was willing to accept the Guild's proposals for a major restructuring of community pharmacy.

The Guild welcomed the Government's confirmation that the restructuring would be voluntary with pharmacists wishing to amalgamate or close being assisted to do so.

-
1. *Transcript of Evidence* (Pharmacy Guild of Australia), 15 November 1991, p. 778: 'The Pharmacy Guild of Australia is the registered industrial organisation, under the Industrial Relations Act, to which proprietor pharmacists can only belong'.
 2. *Transcript of Evidence* (Department of Health, Housing and Community Services – DHH&CS), 23 August 1991, p. 9.

In addition, the media release indicated that the Government and the Guild would jointly develop procedures to effect the restructuring so as to:

ensure that community needs are met including most importantly continuing access to the Pharmaceutical Benefits Scheme in less populated areas.³

1.4 Coming after some twenty years' concern about the manner in which the retail pharmacy industry was developing, and at the end of a bitter dispute between the Guild and the Government, the Agreement:

would [according to the then President of the Guild, Mr J. Matthews] restore confidence and stability within the industry and the pharmaceutical profession.⁴

1.5 The Minister's media release of 8 August 1990 was more specific about the rationalisation of the retail pharmacy industry. Essentially the Minister announced that as from the following day, 9 August 1990, applications lodged by pharmacists for approval to dispense PBS drugs would be subject to restrictions. Although 'any applications for approval to dispense PBS prescriptions [were to] be issued in accordance with criteria presently being established', pharmacists who had entered into 'commitments with the expectations that approvals would be issued' were to be treated 'on a case by case basis'. Applications already lodged were not to be affected by the new restrictions.⁵

1.6 Thus, the stated aims of the restructuring were to rationalise the number and distribution of pharmacies throughout Australia through the offer of financial incentives to voluntarily close or amalgamate existing pharmacies, the payment of an essential pharmacy allowance to pharmacists operating in remote areas and the imposition of strict criteria for new approvals to dispense pharmaceutical benefits.

Objectives of the restructuring

1.7 The wording of the Minister's media release of 24 August 1990 makes it clear that both the Government and the Pharmacy Guild agreed to cooperate on the formulation of new designs for the operation of the PBS. Rationalisation in the number and distribution of pharmacies was not an end in itself but a means whereby pharmacists and the Government alike expected to achieve:

3. Minister for Aged, Family and Health Services, Media Release, 24 July 1990. The full text is at Appendix 4.

4. *ibid.*

5. Minister for Aged, Family and Health Services, Media Release, 8 August 1990. The full text is at Appendix 4.

a more efficient structure for the distribution of pharmaceuticals within the framework of community pharmacies, while ensuring a balance between efficiency and access.⁶

1.8 In Australia, the supply to the community of pharmaceutical benefits is a complex process affected by the Government's unique position to exert influence on the wholesale price of prescribed drugs; the prescribing habits of medical practitioners; the prescribing of generic drugs; the dispensing habits of pharmacists; the rigid control over pharmacists exercised under State or Territory legislation; and the expectations of pharmacists and consumers.

The Pharmaceutical Benefits Scheme (PBS)

1.9 The PBS had a rather stormy beginning in the immediate post-war years. A *Pharmaceutical Benefits Act* aiming at making 'every person ordinarily resident in the Commonwealth . . . entitled to receive pharmaceutical benefits' was passed in March 1944 but was challenged by the Australian Branch of the British Medical Association on constitutional grounds. Following a High Court decision that the Act was void, in September 1946 the Chifley Government sought, and obtained by means of a referendum, the powers to legislate on social services matters. A new *Pharmaceutical Benefits Act* was passed in 1947 but was not wholly supported by the medical profession. First Government expenditure in respect of the Scheme was drawn from the National Welfare Fund in the financial year 1948-49.⁷ The Scheme was redesigned in 1950 by the new Menzies Government which reduced its applicability to 139 'life-saving and disease preventing' drugs.

1.10 The Act defined 'pharmaceutical benefits'⁸ and also included provisions covering Commonwealth approval of pharmaceutical chemists registered under a law of a State or Territory to dispense PBS prescriptions; payment for the supply of pharmaceutical benefits to approved pharmacists from the National Welfare Fund; and special arrangements for persons living in isolated areas.⁹

6. *Transcript of Evidence* (DHH&CS), 23 August 1991, p. 18.

7. *Commonwealth Year Book*, No. 38, 1951, p. 780.

8. These were:

(a) uncompounded medicines the names of which, and medicinal compounds the formulae of which, are contained in a prescribed formulary to be known as the Commonwealth Pharmaceutical Formulary; and

(b) material and appliances (not being uncompounded medicines or medicinal compounds) the names of which are contained in a prescribed addendum to the Commonwealth Pharmaceutical Formulary.

9. *Pharmaceutical Benefits Act 1947*, sections 9, 14 and 15.

1.11 Since 1953, the Scheme has been administered under the provisions of Part VII of the *National Health Act 1953*. This legislation, which repealed previous Pharmaceutical Benefits Acts and relevant Regulations and replaced them, also provided for consultation between the Minister for Health and the Federated Pharmaceutical Service Guild of Australia to:

determine the rates at which and the conditions subject to which, payments shall be made in respect of the supply of pharmaceutical benefits.¹⁰

1.12 The continuing role of the Pharmacy Guild in negotiations with the Government to determine the rates of pharmacists' remuneration is examined in detail in paragraphs 1.30 to 1.38 below.

1.13 The framework within which the Scheme has been maintained as an instrument of government social welfare policy has been altered significantly over the years. Aspects of particular relevance to the current restructuring include a significant increase in the number of PBS items: from 139 in 1949, to 436 in 1961 and 620 in 1980.¹¹ In 1990 the Minister for Social Security, introducing the Social Welfare Legislation (Pharmaceutical Benefits) Amendment Bill 1990, told the Senate that:

more than 1,100 drug products are listed on the scheme, ranging from basic medications for common illnesses to the latest advances in drug therapy for cancer, high blood cholesterol and heart disease.¹²

1.14 Increase in the number of PBS drugs has meant a sustained increase to the Government of the cost of maintaining the Scheme. Over the years the Government has adopted a number of measures aimed at containing these rising costs: non-pensioners' contributions were introduced in 1959 and have been regularly increased since then to be now \$15.70 per prescription. Even pensioners were required to make a co-payment (now \$2.60) as part of the PBS reforms introduced in 1990. Since 1986, there have been different categories of concessions for PBS which have significantly added to the administrative tasks required of pharmacists in dispensing pharmaceutical benefits. As successive governments sought to contain the cost of the Scheme, the Pharmacy Guild sought to preserve the remuneration base of pharmacists. The interplay between these formed the basis for the planning and administration of the restructuring measures under consideration in this Report.

10. The *National Health Act 1953*, section 99.

11. The Parliament of the Commonwealth of Australia - Joint Committee of Public Accounts: *One hundred and eighty-second Report - Pharmaceutical Benefits Scheme - Chemists Remuneration. Parliamentary Paper No 233/1980* (henceforth PP 233/1980), p. 5.

12. Hansard, Senate, 10 October 1990, p. 2753.

– pharmacists' remuneration

1.15 Pharmacists could claim remuneration for dispensing PBS prescriptions according to a formula which included:

- the wholesale cost of ingredients or of manufactured products;
- a markup on wholesale cost calculated at different percentages for ready prepared and extemporaneously prepared medications;
- a container allowance where applicable;
- a dispensing fee; and
- miscellaneous allowances.¹³

1.16 This formula remained the basis for pharmacists' remuneration until 1989. It was integral not only to the intrinsic cost of the PBS to the Government but also to agitation by both protagonists: the Government eager to negotiate with wholesalers on the cost of pharmaceuticals, the Guild equally eager to prevent any erosion in returns from the markup. Dissension between the two parties also arose about the calculation of the dispensing fee as a component of pharmacists' labour costs. The significance of this debate to the rationalisation of the pharmacy industry will be examined later in this chapter.

Escalation of costs

1.17 Given the formula adopted for remunerating pharmacists, any movement in the wholesale cost of pharmaceutical products and in the number of items covered by the Scheme inevitably affected government expenditure. Between 1979 and 1990, the annual cost of the PBS rose from \$275 million¹⁴ to \$1,219,341 million.¹⁵

1.18 This rise cannot be attributed simply to an increase in the number of drugs covered by the PBS. The advent of more refined and often more costly drugs, the promotional efforts of the pharmaceutical manufacturing industry, changes in prescribing habits of medical practitioners and increase in the number of practitioners, ageing of the population requiring larger amount of medications, changes in the dispensing habits of pharmacists and in patients' expectations, increase in medical litigations, all added to the effects of a natural increase in population and intensified the scope and cost of the PBS.

13. PP 233/1980, *op.cit.*, p. 8.

14. *ibid.*, p. 6.

15. *Program Performance Statements 1991-92 – Health, Housing and Community Services Portfolio* (Department of Health, Housing and Community Services) Budget Related Paper No 8.4A, p. 203.

– increase in the number of pharmacies

1.19 Another element considered to have contributed to the ever-rising cost of maintaining the PBS has been the proliferation of pharmacies. Between 1960 and 1972, the number rose from 4,696 to 5,912, but over the following fifteen years had stabilised at around 5,600¹⁶. This development was firstly a natural sequel to the population growth of Australia in the post war years. There has, however, been a disconcerting aspect to this increase which has been marked by a concentration of pharmacies in certain areas, with wide variations in the number of prescriptions dispensed and ensuing fluctuations in PBS related costs.

– economies of scale

1.20 An Inquiry into Pharmacy Earnings, Costs and Profits conducted in 1977 by the Joint Committee on Pharmaceutical Benefits Pricing Arrangements found that pharmacies with lower dispensing rates – which constituted 70 per cent of all pharmacies – dispensed half of the total prescription volume; the other half was dispensed by the remaining 30 per cent of total pharmacies. The Joint Committee concluded that:

the average cost of dispensing a PBS prescription declines as the size (as measured by the number of prescriptions handled) of the pharmacy increases.¹⁷

1.21 The Joint Committee found that the average cost of dispensing a PBS prescription was 161.1 cents, with costs ranging between 214.8 cents for the smallest pharmacies and 123 cents for the largest.¹⁸

1.22 The findings of this Committee were referred to by the Joint Committee of Public Accounts (JCPA) when it inquired into pharmacists' remuneration in 1980. Although the initial reference to the JCPA was concerned with alleged excess payments made under the PBS¹⁹, the Committee adopted further terms of reference and made recommendations on the future of the retail pharmacy industry. The question of economies of scale associated with dispensing large volumes of PBS prescriptions led to the conclusion that there was a need to rationalise the retail pharmacy industry – the linchpin of the current restructuring measures.

1.23 Although the number of pharmacies has decreased since 1972, Deloitte Consulting Services found in 1987, in the course of a survey it undertook on behalf of the Pharmaceutical Benefits Remuneration Tribunal, 'that 25 percent of pharmacies had a competitor within 100 metres and 62 percent had a competitor

16. PP 233/1980, *op.cit.*, p. 77.

17. *ibid.*, p. 80.

18. *ibid.*, p. 80.

19. PP 233/1980, *op. cit.*, p. 1.

within 1 kilometre'.²⁰ There seems to have been a consensus both at Government level and within the pharmacy industry that this situation was far from satisfactory. Consequently, the pharmaceutical measures are aiming at rationalisation in the distribution of pharmacies to ensure that both accessibility and efficiency become hallmarks of the industry.

Containment of costs

1.24 Whilst the current restructuring of the retail pharmacy is the latest step in cost containment, attention is here focused on the impact of the pre-1990 measures.

– the community

1.25 The first of the measures taken by the Government in an attempt to contain costs, while at the same time ensuring the community had some degree of protection from onerous pharmaceutical expenses, dates from 1959. The introduction of a contribution by non-pensioners heralded the slow erosion of the initial concept of the Scheme – that it be free. By 1986, even holders of certain Health Benefits cards were required to make a contribution towards the cost of each prescription they obtained. By 1990, the Government introduced a co-payment of \$2.50 for pensioners, but adjusted the pension rate. All these measures have tended to shift the cost of the Scheme to the community rather than reduce it and have contributed to increasing confusion among the community not only in terms of the Government's social welfare policies, but also in terms of individual eligibility for one or another concession.

– the retail pharmacy industry

1.26 Some of the measures adopted by the Government have produced difficulties for the retail pharmacy industry, quite apart from the widely different views held in respect of the PBS. As the largest buyer of pharmaceutical products, the Government has always been in a negotiating position with manufacturers and has 'continuously exerted downwards pressure on all prices'.²¹ This had the effect of pushing a number of manufacturers to operate offshore, and also affected relations between the Government and the Guild. As the markup paid to pharmacists as part of their remuneration package was a percentage of the wholesale cost of drugs, any attempt by the Government to keep the price of manufactured products down impacted on the returns to the retail pharmacy industry. This conflict of interest between the two parties led to antagonism and the holding of opposite viewpoints over the determination of the dispensing fee, the Government favouring a flat dispensing fee, a move long opposed by the Guild. The abandonment of the markup

20. As cited in Pharmaceutical Benefits Remuneration Tribunal, *Data Base Inquiry – Final Report*, 28 August 1989 - Decision, p. 18.

21. The Parliament of the Commonwealth of Australia, *Pharmaceutical Benefits – Report from the House of Representatives Select Committee*, 1972 – Parliamentary Paper No. 73 (henceforth PP 73/1972), p. 23.

as a component of pharmacists' remuneration was part of the Pharmaceutical Benefits Remuneration Tribunal's 1989 decision regarding a new fee structure.

1.27 The Guild increasingly argued that participation in the Scheme was an onerous burden for pharmacists: the greater the number of PBS prescriptions to handle, the greater the demands the Scheme made on pharmacists, for counselling, checking, as well as lodging claims with the Department of Health, (later the Department of Community Services and Health, and then Health, Housing and Community Services). However, as the responsibilities of pharmacists are well defined by legislation, both at the Federal and State level, as well as by their professional bodies, they cannot be disregarded.

1.28 The introduction of non-pensioner contributions and of different categories of concessions has complicated the task of dispensing and associated administrative procedures for pharmacists. The increasing complexity of the Scheme from a patient's point of view called for greater need to explain and counsel on the part of pharmacists.²² The Pharmacy Guild has continually argued that in view of the changes made to the Scheme, there should be no erosion of the profitability margins associated with dispensing PBS prescriptions.

1.29 Another side effect of the broadening scope of the PBS has been the pharmacists' increasing reliance for their profits on the remuneration levels determined under the Scheme.²³ The greater the number of drugs on the PBS Schedule, the fewer could be dispensed on the private market. It has been estimated that the private dispensing market dropped from 50 percent prior to 1959 to less than 10 percent after the expansion of the Scheme.²⁴

The Pharmacy Guild and the Government: from co-operation to confrontation – The 1988-89 dispute

– the role of the Pharmacy Guild

1.30 Between 1953 and 1976, the role of the Pharmacy Guild of Australia in relations with the Government regarding the PBS was enshrined in subsection 99(1) of the *National Health Act 1953* which provided that the Minister [for Health] consult with the Guild prior to determining rates of remuneration for pharmacists.

1.31 The Guild's position as negotiator on behalf of pharmacists was confirmed when a Joint Committee on Pharmaceutical Benefits Pricing Arrangements was

22. For an overview of the changes in non-pensioner contributions and categorisation of beneficiaries, see P. Mackey, *Pharmaceutical Benefits Scheme and the Pharmaceutical Industry – 1990 Update*, Department of the Parliamentary Library, 1990, pp. 3 and 4.

23. Bureau of Industry Economics, Research Report 17: *Retail Pharmacy in Australia – An Economic Appraisal*, Canberra 1985, p. 32.

24. *ibid.*, p. 32.

constituted in 1964. The Joint Committee was equally constituted of Commonwealth Public Service and Pharmacy Guild representatives.²⁵ The Guild's dominant position remained entrenched when the legislation was amended in 1976 to provide for the Chairman of the Joint Committee on Pharmaceutical Benefits Pricing Arrangements to take over from the Minister the responsibility determine the rate of remuneration of pharmacists dispensing pharmaceutical benefits. The Guild remained the pharmacists' representative in the negotiations.

1.32 This seemingly privileged position was largely due to the lack of other pharmacists' organisations: the Pharmaceutical Society of Australia, now representing a larger number of pharmacists than the Guild, was founded in 1977.²⁶ Despite the formation of this organisation, the Guild remained the negotiating body on behalf of pharmacists until the establishment of the Pharmaceutical Benefits Remuneration Tribunal (PBRT) in 1980.

1.33 Throughout the 1970s, the Guild and the Government were frequently engaged in acrimonious negotiations over the manner in which remuneration for pharmacists supplying pharmaceutical benefits should be calculated. As a Joint Committee of Public Accounts commented in 1980:

The Guild has largely based its claims for higher remuneration on arguments that average costs of dispensing in the industry have risen . . . Governments on the other hand have been reluctant to accept any formulations of existing costs as a basis for fee setting, although attention has been directed to the costs of best-practice pharmacies.²⁷

1.34 With the responsibility for determining pharmacists' fees in the hands of an independent Tribunal from 1981, the Guild's former position was eclipsed somewhat. The Tribunal immediately consulted with:

a number of other parties, who, as a consequence of the legislation [amendment of the *National Health Act 1953* to provide for the establishment of the PBRT] had, for the first time, become entitled to participate in the fee setting procedures.²⁸

1.35 The Friendly Societies Pharmacies Association of Australia, the Pharmaceutical Society of Australia and the Extended Hours Pharmacy Association, as well as a number of individual pharmacists, availed themselves of the opportunity of presenting submissions to the PBRT.²⁹

25. PP 233/1980, p. 10.

26. *Transcript of Evidence* (Pharmaceutical Society of Australia), 23 August 1991, p. 276.

27. Bureau of Industry Economics, *op. cit.*, p. 33.

28. Pharmaceutical Benefits Remuneration Tribunal, *op. cit.*, **Decision**, p. 4.

29. *ibid.*, Appendix 6, Attachment II.

1.36 Until 1987, the Tribunal proceeded to determine the pharmacists' fee in line with procedures required by the legislation. By 1987, however, the Tribunal 'considered the appropriateness and accuracy of the data base' on which it had made its determinations to date, and the Commonwealth submitted that '... the data currently available to the Tribunal is outdated and a major review is required urgently in order to determine if the current level of remuneration paid is correct'.³⁰ It is then that the Guild's dominant role resurfaced: when the Tribunal made arrangements for a survey to be conducted and went ahead with its plans, the Guild objected strongly and recommended to its members not to respond.³¹

1.37 Notwithstanding, the Tribunal proceeded with the survey, complemented with material from the then Department of Community Services and Health and the Australian Bureau of Statistics. On 26 April 1989 the Tribunal made its findings public, inviting comments and preparing a public hearing for the following 2 June. On 28 August 1989, the Tribunal issued a determination announcing the new fee, its rate and structure and date of commencement.

1.38 The new fee, as proposed by the Tribunal, should be phased-in in three stages, was based on labour and non-labour costs and would have resulted in a reduction of the fee then paid. The determination was to take effect on 1 October 1989.

1.39 The decision of the Tribunal to arrive at a new formula on the basis of a survey which had been sabotaged by the Pharmacy Guild was challenged by the Guild. Following the Tribunal's release of its determination, there ensued a severe breakdown in communications between Guild and Government. It is during this period that the rationalisation of the pharmacy industry, as set out in the pharmacy restructuring measures which are the subject of this Inquiry, emerged from the obscurity to which it had been relegated for nearly twenty years.

1.40 The seeming truce which characterised relations between the Government and the Guild in the early 1980s was replaced by open confrontation, the question of pharmacists' remuneration eventually becoming embroiled in the pre-1990 election campaign. Negotiations are said to have come to a halt on 31 August 1989.³²

Rationalisation of the pharmacy retail industry

1.41 As the Pharmaceutical Benefits Scheme broadened in scope, increased in costs and resulted in embittered relations between the Pharmacy Guild and the Government, as survey after survey and inquiry after inquiry examined the Scheme and all related matters, the question of the relative efficiency of pharmacies gained momentum. It seems to have first been raised by the Pharmacy Guild itself in 1972

30. *ibid.*, Decision, p. 9.

31. *ibid.*, Report, p. 6.

32. Mackey, *op. cit.*, p. 26.

when it appeared before the House of Representatives Select Committee. It then suggested that the Government:

establish a committee to regulate the number of pharmacies by refusing approvals of new pharmacies to participate in the Scheme in areas where adequate service is already available.³³

1.42 In 1971, the number of pharmacies had risen from 4696 (1960) to 5912, the highest it was to reach, and the ratio of pharmacies to population was high by world standards, i.e. one pharmacy for 2,211 persons, the lowest overseas ratio being around one to 4,000.³⁴ Having heard that the lower 30 percent of pharmacies accounted for only 17 percent of total sales, the House of Representatives Committee concluded:

that the number of pharmacies in Australia is excessive. This prevents optimum economies of scale, reflected in higher costs to the Scheme
...³⁵

1.43 In 1980 and again in 1985, rationalisation of the retail pharmacy industry was mentioned in various reports.³⁶ The recommendation that an inquiry be set up to consider 'the structure of pharmacies, particularly their size and location'³⁷ was again taken up in 1989. The rift which ensued between the Government and the Guild provided the medium on which rationalisation of the pharmacy retail industry was finally to mature.

1.44 Within two days of the Tribunal's determination of 28 August 1989, the Minister made a public announcement on the Government's fruitless efforts to reach an agreement with the Pharmacy Guild on remuneration for pharmacists, and on the Guild's rejection of 'a compromise offer which included a \$50,000 bonus to pharmacies willing to voluntarily amalgamate'.³⁸

1.45 A fortnight later, warning that 'it was not in the interest of individual pharmacists or the community to allow the Pharmacy Guild to continue to delay progress'³⁹, the Minister announced the formation of a panel of experts to advise the Government on:

33. PP 73/1972, *op. cit.*, p. 35.

34. PP 233/1980, *op. cit.*, pp. 77, 78.

35. PP 73/1972, *op. cit.*, p. 36.

36. See PP 233/1980, *op. cit.*, and Bureau of Industry Economics, *op. cit.*

37. Pharmaceutical Benefits Remuneration Tribunal, *Report, op. cit.*, Decision, p. 19.

38. Minister for Housing and Aged Care, Media Release, 28 August 1989.

39. Minister for Housing and Aged Care, Media Release, 12 September 1989.

- the development of eligibility criteria for the essential pharmacy allowance (EPA)
- the appropriate means of enhancing the professional role of pharmacists and community pharmacy and appropriate remuneration
- restructuring of the retail pharmacy industry including the need for financial incentives.⁴⁰

1.46 The panel reported within a week and criteria for EPA were announced. Finally on 2 November 1989, the Minister announced the establishment of a \$60 million Trust to finance both PBS functions and restructuring.⁴¹

1.47 All the elements underpinning the current restructuring of the pharmacy retail industry, some of which had first been suggested in 1972, were thus known by late 1989. Under the pressure of a variety of forces, not least the complete breakdown of negotiations between Guild and Government in the second part of 1989, the formulation of a rationalisation of the industry gained momentum. The pharmacists' essential role in the supply of pharmaceutical benefits could not be ignored.

1.48 When the PBRT announced its readiness to undertake a new survey on the understanding that pharmacists would cooperate, the Guild had little choice but to adopt a more conciliatory attitude. On 4 December 1989, the Tribunal announced that the proposed new fee would be deferred until the results of the new survey were available, thus removing any ground for the Guild's continued antagonism. The path was clear for reconciliation between the Government and the Guild and the formulation of a new framework within which the PBS and the retail pharmacy industry could continue to underpin the Government's social justice policies.

40. *ibid.*

41. Minister for Housing and Aged Care, Media Release, 2 November 1989.

CHAPTER 2

THE IMPLEMENTATION OF THE PHARMACEUTICAL RESTRUCTURING MEASURES – ADMINISTRATIVE AND LEGISLATIVE FRAMEWORK

Introduction

2.1 The administration of the pharmaceutical restructuring measures was significantly affected by the framework within which it operated. The Committee found that delay in putting in place all the necessary legislative instruments was a problem which exacerbated those arising from the administration of the measures. Some of the components of the restructuring measures as designed were flawed and brought about a number of unforeseen and unintended consequences which diminished the impact of the rationalisation program, and, in some instances, even ran counter to its objectives.

The time frame

2.2 The administrative and legislative arrangements which were to enable the implementation of the pharmaceutical restructuring measures spanned a period of six months, from the time of the Minister's first announcement that the Government and the Pharmacy Guild of Australia had come to an agreement about restructuring the pharmacy retail industry, to the gazettal of Ministerial Determination No. PB1 on 23 January 1991.

2.3 The following chronological table highlights the protracted steps through which the restructuring arrangements moved before all the measures proposed could be implemented. For convenience, in this chapter and the following ones, this period will be referred to as the transition period.

1 July 1981

(Departmental procedures in respect of approval of pharmaceutical chemists become effective – still operative at 8 August 1990).

24 July 1990

The Minister for Aged, Family and Health Services announces that an Agreement has been reached with the Pharmacy Guild of Australia for the restructuring of the pharmacy retail industry.

8 August 1990

The Minister announces that restrictions in the granting of new approvals to dispense Pharmaceutical Benefits Scheme (PBS) prescriptions will take effect immediately.

9 August 1990

The Health Insurance Commission (HIC) begins applying new procedures in respect of applications for approval received from that date.

20 September 1990

Community Services and Health Legislation Amendment Bill 1990 introduced in the House of Representatives. The Bill provided for the establishment and functions of the Pharmacy Restructuring Authority (PRA) and for guidelines to be determined by the Minister before the Authority can discharge its functions.

10 October 1990

Social Welfare Legislation (Pharmaceutical Benefits) Amendment Bill 1990 introduced in the Senate; contained a provision enabling the Pharmaceutical Benefits Remuneration Tribunal (PBRT) to make a determination giving effect to an agreement between the Government and the Pharmacy Guild or another pharmacists' organisation (new section 98BAA).

18 October 1990

Above Bill passed.

30 October 1990

Social Welfare Legislation (Pharmaceutical Benefits) Amendment Act 1990 is given Royal Assent.

23 November 1990

Agreement between the Commonwealth of Australia and the Pharmacy Guild of Australia for the restructuring of the retail pharmacy industry. Subsequently declared null and void on the technicality that section 98BAA of the *National Health Act* requires an Agreement with a Minister of State, not the Commonwealth.

6 December 1990

Signature of an Agreement between the Minister for Aged, Family and Health Services and the Pharmacy Guild – Date of effect subject to a determination by the Pharmaceutical Benefits Remuneration Tribunal (PBRT).

18 December 1990

Community Services and Health Legislation Amendment Act 1990 is given Royal Assent – The PRA is legally established. The HIC ceases being the decision-maker in respect of approvals to supply pharmaceutical benefits although the Authority is

not fully empowered to operate – the legislation provides that the PRA must comply with a Ministerial determination yet to be signed and gazetted.

20 December 1990

PBRT determination giving effect to the Agreement between the Government and the Pharmacy Guild as from 1 January 1991.

9 January 1991

Determination No PB1 of 1991 required under section 99L of the *National Health Act* signed by the Minister.

23 January 1991

Gazetted of Ministerial Determination No PB1 of 1991. The PRA is now fully empowered to begin operations.

8 February 1991

The PRA begins processing applications.

Consequences of the time frame

1. Ministerial media releases

2.4 In view of the six months' lapse of time between the Minister's media releases and the beginning of operations by the PRA, and of the complete absence of supporting documentation on the restructuring, the timing of the Minister's statements was questioned by the Committee.

2.5 Evidence submitted to the Committee revealed that the restructuring operations were begun without adequate guidelines or instructions. DHH&CS justified the commencement of restrictions despite 'the absence of detailed operational guidelines' by the following statement:

... The Government and the Guild were negotiating a settlement package which involved remuneration and restructuring. The remuneration aspect of that was to save the taxpayers \$14 million per month, and priority was given to putting that agreement in place.¹

2.6 The Department has stressed frequently in evidence that the anticipated economies to be achieved on the remuneration front justified the absence of guidelines on the restructuring at the time of the Minister's media release. In a communication to the Committee, it stated:

1. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 994.

The Department does not believe in the circumstances that the decision to make an early announcement . . . was inappropriate. For each month's delay in implementing the agreement would have resulted in a cost of \$14 million of foregone savings.²

2.7 The Committee noted, however, that the latest savings projections provided by the Department show a loss of \$3.4 million for the relevant part of the 1990-91 financial year³ as opposed to an estimated net savings for the same period of \$19.7 million⁴ as estimated at 30 June 1991. The Committee presumes that in the long term, some savings will be made through the restructuring.

2.8 Announcing the restructuring of the pharmacy retail industry was an inevitable sequel of announcing progress on the remuneration question which, over the previous year, had been at the centre of the confrontation between the Government and the Pharmacy Guild.

2.9 In evidence submitted to the Committee, a representative of the Pharmacy Guild acknowledged that:

a lot of the problems stemmed from the period when the Minister announced the freezing of approval numbers . . . At that time there were no fixed procedures for anybody to follow.⁵

2. The Government/Guild Agreement

2.10 The Agreement sealed the deal between the Government and the Pharmacy Guild and contained details of all arrangements which, both parties claimed, would 'produce a more efficient community pharmacy structure'.⁶ As long as the Agreement was not finalised, the HIC had the minimum of information on the requirements to determine 'prior commitment'. Yet, this was the period when applicants claiming to have already made arrangements in the expectations that approvals would be granted⁷ were the most numerous.

2.11 Delay in the finalisation of the Agreement left a vacuum for the operations of the HIC. Much uncertainty resulted from decisions made with no back up of any kind. There was a lack of coherence in the interpretation of the Minister's statement and in the manner in which the restrictions were imposed. This caused much

2. DHH&CS to the Committee, 5 February 1992.

3. DHH&CS to the Committee 23 April 1992.

4. *Transcript of Evidence* (DHH&CS), 23 August 1991, p. 66

5. *Transcript of Evidence* (Pharmacy Guild of Australia), 15 November 1991, p. 809.

6. Agreement, 'General objectives', para. 2.1.

7. As per the Minister's media release of 8 August 1990.

confusion among pharmacists and created a lot of ill-feeling. A number of submissions presented to the Committee relate directly to developments which occurred during the transition period. As these are closely linked to the administration of the program, they are discussed in more detail in the following chapter.

2.12 This initial delay was compounded by the fact that the date of effect of the Agreement was subject to the making of a determination by the Pharmaceutical Benefits Remuneration Tribunal as expressed in paragraph 1.6 of the Agreement itself. Finally, the application of the guidelines contained in the Agreement could not take place until 23 January 1991 when the Pharmacy Restructuring Authority was fully empowered to carry out its mandate under the *National Health Act 1953*, as discussed below.

3. *The National Health Act 1953 as amended by the Community Services and Health Legislation Amendment Act 1990*

2.13 For the purposes of this inquiry, the *Community Services and Health Legislation Amendment Act 1990*, which came into force on 18 December 1990, provided for amendments to section 90 of the *National Health Act 1953* by removing the discretionary powers of the Departmental Secretary to grant or reject an application for approval to dispense pharmaceutical benefits, inserting new subsections to enable the Pharmacy Restructuring Authority (PRA) to perform its role in the granting of approvals under this section of the Act, and adding a new Division 4B to Part VII to establish the PRA and detail its functions.⁸ The new provisions only partially transferred functions in respect of approvals to the PRA but removed any previous powers of the HIC to deal with applications for approval. Thus from 18 December 1990 until 23 January 1991, all applications were in limbo.⁹

2.14 Delay in the passage of the necessary legislation for the establishment and functions of the PRA further contributed to the extended transition period. As indicated at paragraph 2.3 above, the amending Act was introduced in the House of Representatives on 20 September 1990. Had the 1990 Autumn Sittings legislative program not been severely shortened on account of the federal election, with a consequent heavy program for the Budget Sittings, it is possible that the Act would have been passed and received Royal Assent at an earlier date.

2.15 But the PRA could not function until the Minister had made a Determination under section 99L of the Act. Given that the relevant provisions of the Act received Royal Assent on 18 December 1990, this provision caused further delay. The end of year is not a particularly propitious period to put in place all the instruments required by a complex set of statutory arrangements.

8. Relevant legislation is at Appendix 5.

9. *Transcript of Evidence* (HIC), 27 November 1991, p. 958.

4. Ministerial Determination No PB1 of 1991 under section 99L of the National Health Act 1953

2.16 'The last piece in the legal jigsaw'¹⁰ was put in place with the gazettal of Ministerial Determination No PB1 of 1991 on 23 January 1991. Between the amendment to the *National Health Act 1953* which brought in new arrangements for the granting of approvals on 18 December 1990 and this gazettal, no applications could be processed. The net result of this was an 'overwhelming' number of applications waiting consideration when the PRA began operations on 8 February 1991. As these could not all be dealt with at once, there were some delays in finalising them. This caused some concern to people who had applied for an Essential Pharmacy Allowance (EPA), as in some instances there was a gap of several months between lodging of an application and receipt of first allowance.

Recommendation

The Committee RECOMMENDS:

1. That all legislation and subordinate legislation relating to the Pharmaceutical Benefits Scheme and the pharmaceutical restructuring measures be consolidated in one Act and associated Regulations.

Ministerial media releases

2.17 The Minister's first media release was primarily concerned with making a public statement on improved relations between the Government and the Pharmacy Guild. It did however make a broad statement on the forthcoming restructuring of the retail pharmacy industry without giving more details about a commencement date or procedures. It was more precise on the remuneration component of the restructuring, referring to the preparation of submissions to the Pharmaceutical Benefits Remuneration Tribunal.¹¹

2.18 By contrast, the second Media Release entitled 'Pharmacy restructuring - Restrictions on approvals' required immediate administrative action in respect of the rationalisation of the pharmacy industry: restrictions in the granting of approvals to dispense pharmaceutical benefits were to be imposed as from the following day, 9 August 1990.¹²

2.19 The Minister's announcement established three categories for the future handling of applications for new approvals:

10. Professor D. Whalan, Report to the Committee, 10 December 1991.

11. Minister for Aged, Family and Health Services, Media Release 24 July 1990. See Appendix 4, *op. cit.*

12. Minister for Aged, Family and Health Services, Media Release, 8 August 1990. See Appendix 4, *op. cit.*

- approvals in respect of applications already lodged [but not finalised] at 9 August were to 'be dealt with in accordance with the rules which currently apply'. In other words, there was to be no change of policy or procedures regarding these applications.
- approvals in respect of applications lodged on 9 August 1990 and thereafter were to be handled in one of two ways:
 - (i) either applicants had 'entered into commitments with the expectations that approvals would be issued'. In these instances the applications were to be dealt with 'on a case by case basis'; or
 - (ii) applicants [had not entered into a 'prior commitment']. In respect of these, approvals to dispense PBS prescriptions were to be 'issued in accordance with criteria presently being established'.

2.20 Several points arise from the Minister's media release. In the absence of accompanying legislation or guidelines of any kind and in view of the immediate departure from the *status quo* regarding granting of approvals that the statement implied, this media release represented a policy change.¹³ The implications deriving from this situation in the domain of public administration have been examined with the assistance of expert legal advice.

2.21 At the time of the Minister's announcement, the Health Insurance Commission (HIC) was responsible for all the operational aspects of the Pharmaceutical Benefits Scheme (PBS) including the issuing of approvals to dispense PBS prescriptions while DHH&CS had responsibility for policy and budgeting. It followed that it was incumbent on the Commission to take all steps necessary for the proper implementation of the Minister's directions of 8 August 1990. It will be shown later in this chapter that the position and role of the HIC in the administration of the PBS was not straightforward. The splitting of functions between two agencies hindered rather than facilitated the introduction of new arrangements in relation to the PBS.

2.22 Other aspects of the media release have also come under scrutiny:

- It was the only information available to the HIC to guide it in carrying out the new measures for the granting of approvals;
- It failed to define 'commitments entered into'; and
- it advocated a 'case by case' approach to decision-making which led to inconsistencies in the administration of the program.

13. *Transcript of Evidence* (HIC), 27 November 1991, pp. 960, 970.

2.23 Evidence provided to the Committee made it quite clear that the Minister's media release of 8 August 1990 was the only 'guideline' available to officers of the Health Insurance Commission for granting new approvals.¹⁴ The departure from existing policies and procedures which the Minister's statement implies therefore raised the question of its appropriateness as a tool of government. The ancillary question was whether the HIC was in any way empowered to participate in the restructuring.

2.24 These questions were examined in the context of the existing legislative and procedural arrangements which governed the granting of approvals for pharmacists to dispense pharmaceutical benefits, because:

The existing state of the law and practice had a crucial bearing on the decisions to be made on applications right up until the time that the restructuring changes became effective.¹⁵

— existing legislation on the approval of pharmacists at 8 August 1990

The National Health Act 1953

2.25 The approval of pharmacists to dispense PBS prescriptions is covered by section 90 of the *National Health Act 1953*. For the purposes of this inquiry, the more significant points of this section provide for the granting of approvals at the discretion of the Secretary or his delegate (subsection 90(1)) and for the subordination of granting such an approval to State or Territory requirements (subsection 90(4)).¹⁶

2.26 Other provisions of the Act are also relevant to our inquiry. Section 6 of the Act provide for the delegation of the Secretary's powers by an instrument of delegation. This had in fact occurred on 12 July 1989 in preparation for the transfer of PBS operations to the HIC on 17 July 1989. This instrument of delegation was revoked and replaced by a new one signed by the Secretary on 26 June 1990.

2.27 A decision to reject an application made under section 90 of the Act was subject to a review under subsection 105AB(7) of the Act. This power of review had rarely, if ever, been invoked as granting of approvals had always been such a mundane affair. However, with the introduction of restrictions, this provision acquired new significance. It will be seen that failure to amend the provision when changes were made to section 90 placed a number of pharmacists whose application was rejected by the PRA in a non-reviewable position.¹⁷

14. *ibid.*

15. Professor D. Whalan, Report to the Committee, 10 December 1991, p. 2.

16. The full text of the section is at Appendix 5.

17. See below, paragraphs 2.90-2.91.

2.28 The legal opinion provided to the Committee on the validity of the Minister's media release of 8 August 1990 was that '[it] was not legally binding on anyone'.¹⁸ However in the light of existing law and practice as examined above, the Committee was advised that:

... Section 90 of the *National Health Act 1953* gave the Secretary a discretion to grant or reject an application made by a pharmacist for approval. As the Secretary's powers had been delegated to the Health Insurance Commission by amendments to the Health Insurance Commission Regulations in 1989, this meant that the Commission had an apparently wide discretion to grant or reject an application.¹⁹

2.29 In response to the comment on the legal limitations of the Minister's Media Release provided by Professor D. Whalan who was appointed as the Committee's legal adviser, the Department of Health, Housing and Community Services drew the Committee's attention to the provision of section 138 of the *National Health Act 1953*. Under this section, the exercise of a power by the Secretary under the Act is subject to the directions (if any) of the Minister. The Department concludes:

it is therefore possible to regard the Minister's announcement of 8 August 1990 as being, in effect, a direction to his delegates on the exercise of their section 90 approval power.²⁰

2.30 The Committee has sought legal advice on this point and has been informed that, unless the Department can provide additional documentation in support of this suggestion, it is unlikely that the Minister's media release became a formal statutory process.²¹

Recommendation

The Committee RECOMMENDS:

2. That the Government discontinue the practice of relying on press releases to introduce changes in public administration.

State requirements

2.31 Until the criteria for the rationalisation of the retail pharmacy industry were finalised and the PRA could exercise its functions under the *National Health Act 1953* as amended, subsection 90(4) contained the only restrictions applicable to the

18. Professor D. Whalan, *op. cit.*, p. 4. A summary of Professor Whalan's advice to the Committee is at Appendix 7.

19. *ibid.*, p. 1.

20. DHH&CS to the Committee, 5 February 1992.

21. Professor D. Whalan, Report to the Committee, 3 March 1992.

granting of an approval under the Act. Compliance with State or Territory requirements prior to approval to dispense pharmaceutical benefits implied that:

- (i) the pharmacist be registered with the State or Territory Pharmacy Board or Council; and
- (ii) the premises at or from which the pharmacist intended operating be approved by the State Board or Council and also be registered.

2.32 These formalities had wider implications. The pharmacist could only be registered if he/she had completed relevant studies, and strict criteria applied for the approval of premises.

Procedure manual

2.33 The only guideline available in respect of this restriction to officers engaged in processing applications for approval was provided by a Departmental Procedure Manual dating from 1 July 1981. Subparagraph 17.2.1.2 reads:

Reasonable care should be exercised to ensure that the intended pharmacy conforms with the requirements of and is approved by State and local authorities before approval action is taken.²²

2.34 Once this requirement had been satisfied, the granting of an approval was a straightforward procedure. As the Health Insurance Commission submitted:

Approval has been automatic upon the Secretary or his delegate being satisfied that the applicant had the relevant State approval to conduct a pharmacy at the premises referred to in the application.²³

2.35 In the eyes of pharmacists, the procedures to obtain approval to dispense pharmaceutical benefits was perceived as quite straightforward. The Committee heard in evidence:

From my understanding, before all this came in [the restrictions], getting an approval number was not more than ringing up and saying "Hey, I am opening a new pharmacy down the street. Can you give me an approval number, please".²⁴

2.36 This informal approach to the granting of approvals to dispense PBS prescriptions made it all the more difficult for HIC officers to implement suddenly a more exacting procedure and for pharmacists to realise that things had radically

22. Department of Health: Procedure manual – Pharmaceutical Benefits – Processing of claims.

23. *Transcript of Evidence* (HIC), 23 August 1991, pp. 330-31.

24. *Transcript of Evidence* (Prowse), 2 October 1991, p. 577.

changed in the procedures for granting approvals. The ramifications of this aspect of the restructuring are examined at paragraphs 3.19 to 3.26 below.

– granting of approvals in line with the Minister's announcement

2.37 The only restructuring operations which the HIC could carry out during the transition period were those relating to granting of approvals as this facet of the PBS was already covered by existing legislation. Furthermore, of the Minister's three categories of applications for approval, the HIC could practically only deal with two: applications already lodged at 8 August 1990 which were to be treated as all applications had been to date; and applications lodged after 8 August 1990 where applicants had already begun making arrangements expecting to receive an automatic approval once State approval had been given. There was nothing the HIC could do about new applications for which criteria were not yet developed.

– applications lodged before 9 August 1990

2.38 These applications were to be dealt with under existing rules as contained in section 90 of the *National Health Act 1953* and in the Procedure Manual (1981). Since there was no change in the criteria applying to these applications, there should not have been any problem. However, the removal of the Secretary's discretion in section 90 of the *National Health Act 1953* and the establishment of the PRA at the same time meant that any applications lodged before 9 August 1990 but not finalised at 18 December 1990 could no longer be dealt with by the HIC. The PRA's incomplete powers to perform its functions under the Act until 23 January 1983 and the omission in Ministerial Determination No. PB1 of 1991 of the provision applicable to these applications meant that, in fact, these applications remained in limbo until 28 May 1991 when a new Ministerial Determination came into force. The confusion which arose in respect of these applications following the gazettal of PB1 are examined in the following chapter.

– applications lodged after 8 August 1990 claiming prior commitment

2.39 The concept of 'prior commitment' soon became, and remains, a controversial aspect of the restructuring arrangements, being the initial reason for this inquiry.²⁵ Although evidence of prior commitment represented the first hurdle at federal level in the granting of approvals and was therefore a major development, no attention was paid to its meaning. On the contrary, the Committee heard that an absence of definitions of some of the essential concepts of the restructuring arrangements was not seen as a problem. In the event, this approach to the program's details caused a multitude of problems.

2.40 The HIC had not been a party to the discussions between the Government and the Pharmacy Guild regarding the restructuring and developed its own definition of 'prior commitment'. The unqualified term 'commitment' of the

25. A summary of this case is at Appendix 3.

Minister's release was first confined to 'an assumption of commitment'²⁶ but soon acquired more precise definition. By 9 September 1990, the HIC was requiring applicants to prove that financial and legal obligations were entered into prior to 9 August 1990. The Committee was told in evidence:

There was nothing in the Minister's press release to indicate the extent of what a commitment should be, so the documentation was viewed purely on the prima facie case of what the documentation should be.²⁷

2.41 The permutations for what constituted 'commitment' were numerous and evidence was given to the Committee on a wide range of situations which have arisen from the application of a new criterion, the first major change in what used to be an unrestricted procedure. The possibility that there could be 'people who feel aggrieved because they perceive that their applications have been judged by different criteria and procedures'²⁸ was of concern to the Committee. These situations are examined below at paragraphs 3.71 to 3.75.

2.42 The 'case by case' approach advocated by the Minister's statement only exacerbated the effects of the HIC having to make decisions on the basis of changing criteria. Information provided to the Committee has highlighted the complications which in some instances have emerged from the handling of these applications by the HIC. The Committee is however of the opinion that poor administrative procedures also played a large part in the complications which arose from the Minister's ill-defined policy statement and these are examined in the following chapter.

Applications lodged after 9 August 1990 to be decided on criteria 'being established'

2.43 The main problem resulting from the Minister's statement in respect of this category of applications has proved to be the failure on the part of the Health Insurance Commission to appreciate the difference between this type of application and those examined in the previous paragraphs. Correspondence with pharmacists and memos to State Offices from HIC Central Office reveal limited understanding of the different components/stages of the pharmaceutical restructuring measures and demonstrate careless use of terminology. The following sentence was included in a pro forma response to pharmacists who applied for approval between 9 August and 18 December 1990:

The Minister for Aged, Family and Health Services announced on 8 August 1990 that temporary restrictions would be placed on the issuing of new approvals to dispense PBS prescriptions. Pharmacists who have entered into commitments with the expectations that

26. *Transcript of Evidence* (HIC), 2 October 1991, p. 636.

27. *Transcript of Evidence* (HIC), 27 November 1991, p. 971.

28. *Transcript of Evidence* (DHH&CS), 23 August 1991, p. 114.

approvals would be issued will have their expectations deal[t] with on a case by case basis.²⁹

2.44 It could be argued that failure on the part of the Minister or the Department to issue further instructions regarding the introduction of new procedures and properly identify the different categories of restrictions which were to apply is the source of the problems affecting the implementation of the restructuring measures. The HIC has told the Committee that it had not been involved in the negotiations prior to the media release. Its position as the administrator of the first restructuring measures was not a sound one.

2.45 It could conversely be advanced that an agency with statutory powers should be in a position to devise a coherent administrative strategy and take the necessary steps to implement a national program efficiently.

Guild/Government Agreement

2.46 The criteria announced by the Minister on 8 August 1990 as 'presently being established' were contained in Part II of the Agreement between the Minister and the Pharmacy Guild. Part I of the Agreement, referred to as the Section 98BAA [of the *National Health Act 1953*] Agreement, is concerned exclusively with the new remuneration arrangements for pharmacists dispensing PBS prescriptions. This Part of the Agreement is the one on which the attention of both the Government and the Guild focused, to the detriment of the second Part of the Agreement which consists mainly of the arrangements put in place for the rationalisation of the pharmacy retail industry.

2.47 The arrangements consisted of:

- (i) closure and amalgamation payments for those pharmacists prepared to relinquish their approval number to dispense PBS prescriptions;
- (ii) payment of an additional allowance to pharmacists operating in remote or isolated areas to ensure continued community access to PBS dispensing; and
- (iii) conditions to be met for the granting of a new approval to dispense PBS drugs.

2.48 Evidence tendered in the course of this inquiry has shown that in many respects, the criteria established 'were grossly deficient'.³⁰ A number of details have come under criticism from a wide cross section of interested parties. Even the architects of the Agreement acknowledged that there was a lack of precision in the Agreement and that the criteria adopted would need reviewing.

29. Health Insurance Commission to pharmacists, August-November 1990, HIC Correspondence.

30. *Transcript of Evidence (Mrs Mihulka)* 6 September 1991, p. 364.

Those who negotiated the Agreement recognised that there were certain problems and that there would be changes to criteria from time to time . . . When the agreement was formulated, those who negotiated it believed that there would be a mechanism that would be put in place in the early stages.³¹

2.49 Such statements indicate that notwithstanding the fact that the arrangements were incomplete, the restructuring went ahead regardless of the consequences. Yet neither the Government nor the Guild expressed any reservations about the implications of launching a national program which had not been adequately designed. In the light of the long feud between Government and Guild over remuneration and the arrangements finally agreed to in order to obtain a resolution of the impasse, it is perhaps understandable that remuneration was the top priority. The Committee was told time and again about the anticipated savings to be made from an early introduction of the new remuneration arrangements. The restructuring, on the other hand, was to be solely financed by the Government for the first eighteen months.

2.50 Failure of the architects of the Agreement to pay proper attention to the finer details of the rationalisation arrangements is evidenced in:

- the loose terminology of certain provisions;
- the lack of a clear definition of some of the key concepts of the restructuring; and
- the inflexibility of some of the criteria set.

2.51 The effects of these factors have ranged from confusion about the parameters and even the aims of the restructuring to inconsistencies in the application of the criteria set and in some cases to results contrary to the aims of the rationalisation.

– loose terminology

'Guidelines'

2.52 The Committee noted the multiple uses of this term in documentation relating to the restructuring.

2.53 The 'criteria being presently established' represented a first category of guidelines, directions which were to facilitate the implementation of restructuring measures. Thus, when on 30 November 1990, the HIC advised State Office staff that new 'guidelines' were now operational, the reference was to an extract from the Agreement as first signed on 23 November 1990. This was done notwithstanding the fact that this document was subsequently declared null and void, was not signed again until 6 December 1990 and could not become effective until the

31. *Transcript of Evidence* (Pharmacy Guild of Australia) 23 August 1991, p. 259.

Pharmaceutical Benefits Remuneration Tribunal made a determination in respect of Part I of the Agreement.

2.54 Nevertheless, the Agreement gave the first full scale indication of the scope of the restructuring arrangements – some of which had been under way since August 1990. Its eventual release as ‘guidelines’ should have been problem-free, had it not contained references to yet another type of guidelines.

2.55 Paragraphs 6.1 relating to the closure and amalgamation payments, 7.3 dealing with the Essential Pharmacy Allowance (EPA) and 8.5 on the granting of approvals all contain provisions which are subject to ‘guidelines issued under the [National Health] Act’. Thus a new set of guidelines appears in the documentation: those ‘determined in writing’ by the Minister under section 99L of the Act ‘subject to which the Authority is to make recommendations under subsection 99K(1)’.

2.56 Although the two sets of ‘guidelines’, with one or two critical exceptions, covered the same arrangements with respect to EPA, closure/amalgamation payments and guidelines on the granting of approvals, there is a vast difference between them: one only having a legal status by virtue of the link between Part I (‘the section 98BAA [of the *National Health Act 1953* Agreement’]) and Part II as expressed in paragraph 1.6; and the other being a mandatory requirement under delegated legislation.

2.57 While the Agreement may have been justly perceived as ‘guidelines’ by those who, for four months, had nothing to back up their understanding of the restructuring, the use of the term with two different parameters in the Agreement itself had nothing to do with the HIC, but with those who drafted the document.

2.58 The possibility that the multiple usages of the term may have added to the overall confusion which characterised the progress of the restructuring cannot be dismissed. The references in paragraphs 6.1, 7.3 and 8.5 of the Agreement did not facilitate the implementation of the pharmaceutical restructuring measures.³²

‘Freeze period’ /Freezing of approval numbers

2.59 Paragraph 3.1 of Part II of the Agreement provides details relevant to funding of closure and amalgamation packages. Within that context, there is a reference to the ‘freeze period’ as defined in Part I of the Agreement – that is a period of 18 months from the coming into effect of the agreement during which the dispensing fee will be frozen.

2.60 Throughout the inquiry the Committee has heard references to the ‘freezing of approval numbers’ announced by the Minister on 8 August 1990. Both the Guild³³, and the HIC³⁴, as well as various witnesses have used this expression.

32. See paragraph 3.25 and footnote 21 above on Guidelines. See also Appendix 7.

33. *Transcript of Evidence* (Pharmacy Guild), 15 November 1991, p. 809.

The use of the expression is inaccurate: the only applications which could not be processed were those relating to approvals to dispense PBS prescriptions from new premises, lodged after 9 August 1990 and not claiming 'prior commitment'. All other applications could be dealt with as they were received. There was therefore no freeze. In view of the fact that the term is precisely defined in Part I of the Agreement as it applies to the dispensing fee, this is another illustration of the confusion which obtained in relation to the restructuring arrangements.

– lack of definitions

Closure and amalgamation payments

2.61 Financial incentives in the form of lump sum payments were to encourage pharmacists to choose either to close or amalgamate their existing pharmacies. This aspect of the restructuring has badly backfired. The offer of sums ranging from \$45,000 to \$80,000 without any proper parameters was almost bound to become open to abuse.

2.62 Under paragraphs 6.2 and 6.3 of the Agreement, the longer the number of continuous years an approved pharmacist has dispensed PBS prescriptions from particular premises, the higher the lump sum payment s/he can receive in respect of the closing pharmacy. The Committee heard of a couple of instances where a pharmacist owning two or more pharmacies in close proximity of each other applied for a closure package in respect of the oldest pharmacy – often the most viable – and received a large payment. The pharmacist then proceeded to move the other not so viable pharmacy into the premises of the now 'closed' pharmacy. The Committee has been concerned by this development and raised the issue during the Inquiry.

2.63 When questioned on the loophole, the Department expressed the opinion that the aim of the restructuring had been met in that there had been a reduction in the number of pharmacies. The Committee was further told that there had also been a benefit to the taxpayer.³⁵ The Guild at first expressed the view that this was a regrettable loophole which should not be³⁶, but later changed its mind and considered that there would be so few pharmacists in a position to exploit the loophole that it was not a cause for concern. In addition, the Guild expressed the opinion that it was 'perfectly legitimate for any person to maximise his income if the guidelines allow that to happen'.³⁷

2.64 The Committee was told of a pharmacist who retained a non-viable second pharmacy and incurred serious losses while waiting for the Authority to begin operations. As soon as it did, he applied for a closure package in respect of his older

34. *Transcript of Evidence* (HIC), 2 October 1991, p. 585.

35. *Transcript of Evidence* (DHH&CS), 23 August 1991, pp. 110, 111.

36. *Transcript of Evidence* (Pharmacy Guild of Australia), 23 August 1991, p. 254.

37. *Transcript of Evidence* (Pharmacy Guild of Australia), 15 November 1991, pp. 798-99.

pharmacy and immediately relocated the newer pharmacy to the site of the old one. As the witness concluded: 'a door never closed'.³⁸ It needs to be stressed that the use of the term 'closure' is in most cases a misnomer: what it really means is relinquishing approval to dispense PBS prescriptions.³⁹

Recommendation

The Committee RECOMMENDS:

3. That the Government take necessary steps to ensure the elimination of loopholes in the restructuring measures identified by the Committee.

2.65 This development is an aberration of the intent of the restructuring, although the Department has argued that whatever the means, the end of reducing the number of pharmacies has been achieved and furthermore it brings about benefits to the taxpayers:

The taxpayers benefit from the restructuring substantially through the reduction in remuneration that was part and parcel of the restructuring agreement with the Guild.⁴⁰

2.66 Nevertheless, the Committee is concerned at the manner in which this practice represents additional expense on the taxpayer. Furthermore, this development has created an atmosphere of antagonism among groups of local pharmacists and has not enhanced the integrity of the restructuring in the eyes of a number of pharmacists.

'Prior Commitment'

2.67 The absence of definitions has also been noticeable in respect of the guidelines relating to the granting of an approval pursuant to section 90 of the *National Health Act 1953* - paragraphs 8.1 to 8.6 of the Agreement. The issue of 'prior commitment' has already been mentioned. The Committee was given ample evidence of the repercussions which flowed from the lack of guidelines. In particular, the Committee noted the wide range of documentation which was accepted or required as evidence of prior commitment. In one particular instance, a handshake over a verbal agreement was considered adequate⁴¹, in another a signed lease had to be presented.⁴² The failure to authenticate some of the documentation submitted

38. *Transcript of Evidence*, (Mrs Mihulka), 6 September 1991, pp. 366-67. On this point, see also pp. 110, 117, 254, 257.

39. *Transcript of Evidence* (PRA), 15 November 1991, p. 868.

40. *Transcript of Evidence*, (DHH&CS) 23 August 1991, p. 111.

41. See Appendix 3.

42. *ibid.*

in support of applications has led to a number of difficulties in the early days of the restructuring.

2.68 Given that the introduction of this restriction was to be immediate, the lack of definition or parameters was all the more significant. In the event, the HIC devised its own definition as it went along.

2.69 In its submission to the Committee, the HIC detailed its requirements in respect of 'prior commitment' as consisting of:

- documentation of deposits made for lease/rent of premises;
- documentation of funds paid for a lease or rent of premises;
- tender documentation to show construction of premises to house a pharmacy;
- statutory declarations from vendor, solicitor, or accountant confirming commitment to establish a pharmacy;
- copies of bank statements evidencing funds paid;
- a signed legal document committing a pharmacist to acquire premises for a pharmacy.⁴³

2.70 This submission was prepared on 23 July 1991, long after the HIC had ceased being the decision-maker in respect of the granting of new approvals. Evidence presented to the Committee in the course of the inquiry and correspondence sighted on HIC files do not reveal such clear parameters to the 'financial and legal' requirements during the transition period when clarity was necessary.

2.71 The development of definitions as the program progresses has had a number of implications for pharmacists. Thus a pharmacist claiming prior commitment on 9 August 1991 was given immediate approval⁴⁴ on the assumption of prior commitment. On the other hand, a pharmacist whose application was considered by the PRA had to meet much stricter criteria as a result of the definition adopted by the Authority at its meeting of 10 May 1991. The operative base of each authority was quite different: the HIC could almost do as it pleased with these applications; the PRA was bound by a Ministerial determination.

2.72 Financial commitment was defined to mean:

a commitment as a duty or responsibility on the part of an applicant pharmacist . . .

43. *Transcript of Evidence* (HIC), 23 August 1991, p. 333.

44. *Transcript of Evidence* (HIC) 2 October 1991, p. 636.

that the commitment is ongoing and binding

... it is of a binding and irrevocable nature in the form of an agreement which means that the consequences of failing to honour the commitment [leads to] the existence of a substantial penalty.⁴⁵

2.73 The Committee has been concerned at the ensuing injustices which may have occurred when applications have been judged by different criteria.⁴⁶ This arose partly from the fact that the guidelines were enshrined in delegated legislation and the PRA had a mandatory obligation to abide by these, partly from the fact that more definite parameters to the requirements for 'prior commitment' had finally been formulated. Between 'an assumed prior commitment' on 9 August 1990 and the hard and fast requirement of providing evidence and affidavits, there was the whole gamut of requirements which operated while the HIC dealt primarily with these types of application. The situation was aggravated by the fact that the largest number of these applications were received during the transition period when guidelines were vague or non-existent and applications were dealt with on 'a case by case' basis. This was yet another source of confusion and frustration among pharmacists and has been the source of several submissions to the Committee. The Committee also noted the confusion which arose in some instances as a result of the incorrect advice provided to pharmacists. These issues are covered in more detail in the following chapter.

'Unmet public need'

2.74 The wording of paragraph 8.4 of the Agreement seems to indicate that 'demonstrated community need' was to be the overriding consideration in dealing with an application for approval. Yet no definition was attached to the use of the term in the Agreement. The Committee was told that:

There has been no guidance given to the PRA beyond that [the reference in the agreement], and there was no guidance coming out of discussions between the Guild and the Government about how you would go about defining unmet community need.⁴⁷

2.75 In March 1991, the PRA issued a Newsletter in which it informed pharmacists that the onus was on any applicant to demonstrate 'unmet public need'. The only guideline provided was that any application claiming 'unmet public need' should 'show the demographics of the area and also indicate other health services available

45. *Transcript of Evidence* (PRA), 15 November 1991, p. 841.

46. *Transcript of Evidence* (DHH&CS), 23 August 1991, pp. 113-14.

47. *Transcript of Evidence* (DHH&CS), 23 August 1991, p. 94.

to the population'.⁴⁸ The PRA itself had no parameters within which it could assess whether an applicant had in fact demonstrated unmet public need.⁴⁹

2.76 The Committee was told that up to one hundred applications for Essential Pharmacy Allowance were rejected because of the lack of a clear definition of unmet need.⁵⁰ By August 1991, the PRA had not yet granted one new approval to dispense PBS medications on this criterion.⁵¹ Besides having difficulties defining what equated to 'community need' the PRA was of the view that it had no authority under the legislation to set criteria.⁵²

2.77 The disregard of this criterion has produced outcomes in conflict with the stated aims of the restructuring as far as continued access to the PBS is concerned. Rejection of applications for EPA without due regard to public need has led to a large number of closures in remote areas which were not intended.

2.78 The Committee has now been told that the:

[the definite unmet need] would override any other limitations and, in association with that, the PRA would not be able to recommend the approval of a closure or an amalgamation grant to a pharmacist where there were no competitors within 10 kilometres . . . This will mean that all pharmacies with no competitor within 10 kilometres will be automatically eligible for EPA.⁵³

2.79 This may represent an improvement in the operations of the restructuring measures and assist in overcoming earlier deleterious consequences of flawed measures in the Agreement. The Committee has been advised that seven applications for approvals have now been granted on the 'unmet public need' criterion, two of which have resulted from the new distance factor mentioned in the paragraph above.

— inflexibility

Essential Pharmacy Allowance (EPA)

2.80 Paragraphs 7.1 to 7.8 of the Agreement cover arrangements which were applied to the granting of an EPA, some of which have been found to be so flawed

48. Transcript of Evidence, (PRA), 15 November 1991, p. 835.

49. *Transcript of Evidence*, (DHH&CS, PRA), 23 August 1991, pp. 94-99, 115-6, 198-9, 258.

50. *Transcript of Evidence*, (Ms Mihulka), 6 September 1991, p. 374.

51. *Transcript of Evidence*, (PRA), 23 August 1991, p. 301.

52. *ibid.*, pp. 301-02.

53. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 988.

that remedial action has already been taken by the Government as described at Chapter 4, Part 2. The aim of the allowance is to retain pharmacy community services in areas where, if these were not available, the community would be severely disadvantaged. The allowance is based on an additional payment per prescription up to 1,000 prescriptions in a month.

2.81 To qualify for the EPA, a pharmacist had to fulfil three requirements:

- be at least 10 kms from the nearest pharmacy;
- dispense less than 1,250 prescriptions a month on an average; and
- be open to the public for at least 20 hours a week.

2.82 All these criteria have been considered by witnesses appearing before the Committee as unsound.

- What constituted the 'nearest pharmacy' in a remote area could well and truly be far more than 10 kms away;
- The volume of prescriptions is subject to variations which are beyond the control of pharmacists, i.e. a change of medical practitioner may mean change in prescribing habits; and
- A pharmacist could very well manipulate the opening hours to become ineligible for an EPA and therefore eligible for a closure payment.

2.83 The Committee was also concerned by the proviso that there were to be annual reviews of the criteria for EPA, as a result of which the Agreement stipulated that pharmacists in receipt of EPA would have to reapply annually for the allowance. In the opinion of the Committee, these pharmacies were particularly vulnerable.⁵⁴ Annual reviews of the criteria meant that eligibility for EPA would change from year to year and could lead to some pharmacists losing eligibility under different criteria. This issue has now been resolved in the manner described at paragraph 4.15 of this report.

2.84 The arrangements as formulated have in fact created a category of pharmacists who were themselves placed in a disadvantageous position vis-a-vis their city brethren. Their exclusion from closure/amalgamation payouts did not exclude them from the arrangements contained in other parts of the Agreement whereby pharmacists were to begin contributing to the cost of the restructuring by accepting a reduction in the dispensing fee. The Essential and Isolated Pharmacy Association claimed that the flow of prescriptions was often determined by factors beyond the control of the pharmacist, i.e. a change of doctor and ensuing prescribing

54. *Transcript of Evidence*, (DHH&CS), 23 August 1991, pp. 106-109.

habits. The vulnerability of pharmacists in isolated areas on account of the proposed annual review of criteria was seen as unsatisfactory.⁵⁵

2.85 Since the restructuring has been under way, a number of developments have taken place to highlight other shortcomings in the application of the guidelines established to achieve a rationalisation of the pharmacy retail industry. Thus, the Committee has been told of the immediate and long term effects of closure of a pharmacy in low socio-economic areas where 'a disadvantaged group' is exposed to further disadvantages: the credit which may have been formerly available is no longer possible, nor is the counselling; lack of private transport accentuates the difficulty of getting to a more distant pharmacy; shortage of cash also makes the process of getting prescriptions filled more difficult; friendly neighbours cannot help with transport to the nearest pharmacy; disabled people are often not able to deal with public transport.⁵⁶ Yet the guidelines preclude a new approval being granted within five kilometres of this site for five years.

2.86 Similar situations have arisen in one-pharmacy towns where resident pharmacists have applied for and been given closure packages, thus leaving the area without a pharmacist for the next five years. The Committee has received two submissions from concerned residents of small country towns at either end of the country.⁵⁷ In each instance the pharmacy servicing the town and surrounding areas has closed, leaving the population without ready access to PBS facilities. As one of the submissions pointed out:

If people have to go out of the region to obtain prescriptions, there is a real danger that they will stop using the local doctor also and eventually this valuable service would be lost to rural people.⁵⁸

2.87 The Committee was told that in the case of Bowraville, arrangements have been made for the prescriptions to be faxed to the nearest town and an elderly retired chemist brings the prescriptions to the Bowraville Medical Centre where they are collected by the patients. There is much added inconvenience for the local population which the Committee notes does not fit in well with the stated aim of the restructuring.⁵⁹

2.88 The plight of one-pharmacy towns under the restructuring arrangements of the Agreement are partially linked to the handling of applications for Essential Pharmacy Allowance. In evidence to the Committee, the Isolated and Essential

55. *Transcript of Evidence*, 23 August 1991, pp. 106, 109, 262-3, 213-4, 195-6, 122.

56. *Transcript of Evidence* (Dr Kable), 6 September 1991, p. 391ff.

57. Koorda Shire Council, (Submission No. 1) and Bowraville Senior Citizens Club (Submission No. 25).

58. Koorda Shire Council, *op. cit.*

59. Bowraville Senior Citizens Club, *op.cit.*

Pharmacy Association highlighted the inequity faced by pharmacies in rural areas. The reference to the number of scripts dispensed – less than 1,200 per month on average – placed the eligibility for EPA at the mercy of factors such as a change in medical practitioner and ensuing changes in prescribing habits.⁶⁰ The adoption of the ‘unmet community need’ as the overriding criterion, as mentioned at paragraph 2.78 above, should put an end to this regrettable consequence of the restructuring as implemented in its first year of operations.

The National Health Act 1953

2.89 Decisions of the Secretary or his delegate under subsection 90(1) of the *National Health Act 1953* were subject to review by the Administrative Appeals Tribunal (AAT) under subsection 105AB(7). When the Act was amended to give the PRA responsibility for granting or rejecting an application for approval to dispense PBS drugs, the Secretary's powers under subsection 90(1) ‘were circumscribed by subsection 90(3)’ transferring the decision-making to the PRA. As no accompanying amendment was made to subsection 105AB(7), the AAT determined that its powers to review a decision were equally circumscribed.⁶¹

2.90 The absence of adequate appeal mechanisms for pharmacists directly affected by an adverse decision under the new restructuring arrangements was a major – though unintended – defect of the amended legislation. The legislation has now been amended. The Committee noted, however, that the matter was not suspected until an aggrieved pharmacist took his case to the Tribunal only to be told that the Tribunal was not empowered to deal with his case. In the meantime, the pharmacist in question has sustained not only unnecessary expenses but also much inconvenience.

Ministerial Determination No. PB1 of 1991

2.91 The restructuring had been in progress for more than six months, and the new remuneration arrangements effective as from 1 January 1991, when Ministerial Determination No. PB1 of 1991 was signed by the Minister. This document was to provide the guidelines which the PRA had a mandatory obligation to follow under subsection 99K(2) of the Act. The omission from these guidelines of a provision in respect of applications lodged prior to 9 August 1990 meant that these could not be processed by the PRA. Nor could the HIC continue to deal with these since it was no longer empowered to grant approvals. In the event, this led to misinterpretation of the legislation by the HIC which is examined at paragraph 3.31 below.

2.92 In respect of eligibility for an EPA, the determination specifies that a closure or amalgamation payment shall not be recommended in respect of premises which would qualify for an EPA. This is far more restrictive than the provision in the

60. *Transcript of Evidence* (Isolated and Essential Pharmacy Association), 23 August 1991, pp. 192-194.

61. Administrative Appeals Tribunal, Decision No NS1/290, 21 June 1991.

Agreement which limits the exclusion to the acceptance of an EPA. According to a witness, a number of pharmacists in remote areas have been denied the availability of a closure payment on the ground that they met the criteria for an EPA.⁶²

2.93 The gazettal of Ministerial Determination No. PB1 of 1991 officially brought to an end the transition period of the restructuring and opened the way for the PRA to take over all the restructuring operations. To accomplish its mandate, it was given a range of legislation which, while being an improvement on what the HIC had to operate the first stage of the restructuring, was still open to criticism and led to new problems. While the Committee acknowledges that the negotiating parties may not have had any inkling of the time frame which would be required to lay the foundations of the restructuring, it is nevertheless concerned at the laxity with which the framework was assembled and the numerous side-effects which have been revealed so far.

2.94 A number of the initial weaknesses have now been redressed and the current situation is examined in chapter four. To a certain extent this remedial action pre-empts some of the recommendations of the Committee, but may have been clarified by the inquiry. The Minister's announcement of 24 July 1990 must be seen in the context of the negotiations then in progress regarding the adoption of a new remuneration formula about to be submitted to the Pharmaceutical Benefits Remuneration Tribunal for its ratification. In all likelihood, the negotiations must have been intense given the impasse at which relations had come a few months previously. Yet the repeated claim that progress on the remuneration question necessitated the beginning of an ill-prepared restructuring must raise questions. The Committee has been told that:

There was common knowledge that the discussion was taking place between the Government and the Guild. There was concern about pharmacists putting [in] applications on a speculative basis ahead of any announcement being made. So the view of both the Government and the Guild was that there had to be an early announcement.⁶³

2.95 It would appear that the thrust of the media release of 8 August 1990 was to contain the speculative possibilities referred above until the restructuring could go fully ahead. The lack of proper attention to all facets of the restructuring ensured that in the initial stages there was considerable chaos and confusion about the program. Inevitably these flowed to the latter stages when the Pharmacy Restructuring Authority took over.

The key players

2.96 Evidence gathered during the proceedings of this inquiry indicates that the involvement of first two and then three government agencies in the restructuring

62. *Transcript of Evidence (Ms Mihulka)*, 6 September 1991, p. 373.

63. *Transcript of Evidence (DHH&CS)*, 27 November 1991, p. 996.

operations has played a part in the manner in which the program has progressed to date. A brief examination of each major party to the restructuring will throw more light on the course of the program and the background against which restructuring evolved.

– The Department of Health, Housing and Community Services (DHH&CS)

2.97 When the restructuring measures were first applied on 9 August 1990, the then Department of Community Services and Health (now DHH&CS) was still responsible for two PBS functions: policy and budgeting. It has been shown in this chapter the extent to which the importance attached to the cost saving aspect of the restructuring diverted attention from the finer points of the rationalisation component.

2.98 Both the HIC and the PRA perceived the policy function of the Department as hindering their freedom of action or as explaining their not being responsible for the lack of clear guidelines. The Committee was told more than once that ‘It is the responsibility of the Department to look at policy issues’.⁶⁴ On the other hand the Department expressed the view that:

It was not the Department's responsibility to provide directions to the Health Insurance Commission. Clearly the Department was involved in establishing the agreement with the Pharmacy Guild. That flowed through to the restructuring arrangements, putting restrictions on new approvals as an interim measure. The delegation that the Commission was exercising was the Secretary's delegation in relation to approvals . . . The person who has a delegation given him cannot have that delegation fettered.⁶⁵

2.99 This lack of consensus between all parties about their respective roles did not help the course of the restructuring, since it precluded some firm definition being given to the initial stages of the restructuring and created a situation leading to an uneven and unequal treatment of the measures adopted. Given that the Department was involved in the negotiations with the Guild, as stated above, it would have seemed reasonable to provide the HIC with some modicum of advice. There is no indication whatsoever that the HIC was at any time privy to some of the ideas about the restructuring being considered. On the contrary, witnesses have told the Committee that the first inkling they had of the details of the restructuring came with the release of an extract of the Agreement on 30 November.

2.100 The Committee has further been told that ‘there is no functional relationship between the Commission and the Department’ but that there are on-going

64. *Transcript of Evidence* (HIC), 27 November 1991, p. 949.

65. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 993.

discussions.⁶⁶ The ramifications of this situation for the on-going course of the restructuring belong to the administration arena and are highlighted at paragraphs 3.90 to 3.94 below.

– The Health Insurance Commission (HIC)

2.101 Although the HIC is a statutory body established under the *Health Insurance Commission Act 1973*, as far as the PBS is concerned its relationship with DHH&CS has up to a point fettered its independence. Thus the PBS functions were split between the two agencies upon the transfer of PBS operations to the HIC. In fact what occurred was that all departmental personnel engaged in PBS operations were transferred to the HIC which took over the physical features such as buildings, but the data base remained with the Department for several months while the HIC was establishing a new system.⁶⁷ The transfer was not finalised until June 1990, less than two months prior to the commencement of restructuring operations.

2.102 Evidence before the Committee indicates that the Pharmaceutical Benefits Branch of the HIC was not able to make the adjustments required during the restructuring transition period. This is examined in the following chapter.

– The Pharmacy Restructuring Authority (PRA)

2.103 With regard to its position in the restructuring arena, the PRA has its own set of problems. Although a statutory body, it reports to the Minister and the Department provides secretariat support. But it is also dependent on the assistance of the HIC for a number of processes relating to granting or rejecting applications. This leads to rather convoluted procedures. In addition, its operations are sanctioned by Ministerial Determinations and within the context of the restructuring and the criticisms which have been made, it has very little flexibility in dealing with the applications before it. In the event, its powers 'to redress defects' are limited⁶⁸.

Recommendation

The Committee RECOMMENDS:

4. That the development of any national program be supported by an organised strategy.

2.104 The guidelines on which the PRA had to make recommendations were incomplete, particularly with regard to the EPA for which neither effective date nor rate of allowance had been determined. Consequently it felt obliged 'to interpret certain aspects of the guidelines'. The Committee heard that neither the rate set

66. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 1012.

67. Health Insurance Commission: *Annual Report 1989-1990*, AGPS, p. 21.

68. *Transcript of Evidence* (PRA), 6 August 1991, pp. 254, 302.

nor the date of effect adopted by the PRA were in keeping with the intended terms of the agreement between the Minister and the Guild.⁶⁹

2.105 A PRA witness stated in evidence that:

On a number of occasions and in a number of instances, the PRA has expressed dismay that the guidelines it was forced to use allowed for some difficult situations.⁷⁰

It nevertheless unwittingly, through lack of consultation or support, added to these difficult situations.

2.106 The weaknesses and anomalies in the framework of the pharmaceutical restructuring measures which have been highlighted in this chapter did not make the task easy for the people who had to administer provisions and arrangements put together with a minimum of regard to the likely implications. The next chapter of this Report looks at the way in which administrators have handled this situation.

69. *Transcript of Evidence* (Pharmacy Guild), 23 August 1991, p. 251.

70. *Transcript of Evidence* (PRA), 15 November 1991, p. 881.

CHAPTER 3

THE IMPLEMENTATION OF PHARMACEUTICAL RESTRUCTURING MEASURES – ADMINISTRATION

3.1 Following the Minister's media release of 8 August 1990, the Health Insurance Commission (HIC) saw its Pharmaceutical Benefits Scheme (PBS)-related operations as affected in one respect only: any application for approval to dispense PBS prescriptions from new premises lodged after that date and claiming 'prior commitment' would require checking that arrangements had already been made prior to 8 August.

3.2 Evidence provided to the Committee indicates that the HIC failed to grasp the exact extent of its role in the restructuring arrangements. Its misunderstanding of that role, and the existing laxity of procedures in the granting of approvals, meant that the transition period of the restructuring was characterised by carelessness in relations with State Offices and pharmacists, provision of conflicting advice and implementation of contradictory procedures, confusion and inefficiency.

3.3 The Pharmacy Restructuring Authority (PRA) had a more demanding task on its hands when it took over the restructuring functions. Its operations were marred by lack of preparation time, a large number of applications awaiting consideration, unsatisfactory or incomplete information for its decision-making and limited discretion. Its part-time function, the interpretation it gave to some of the guidelines as examined at paragraphs 3.70 to 3.74 below, and the procedural complexities it was obliged to follow, all led to administrative delays, continued confusion among pharmacists and the emergence of injustices in the application of the restructuring arrangements.

3.4 The performances of both the HIC and the PRA were also affected by the views each held about their respective relationship with the Department of Health, Housing and Community Services (DHH&CS) and about their place in the restructuring program. The situation at 3 June 1991, the date of the present reference to the Committee, was still marked by confusion, contradictions and inflexibility.

The Health Insurance Commission (HIC)

3.5 Until 9 August 1990, the Health Insurance Commission had little to do with the negotiations between the Government and the Pharmacy Guild which had led to the Minister's media releases of 23 July and 8 August 1990. In evidence, HIC witnesses claimed to have had little knowledge of the thrust of the immediate restrictions being imposed and frequently told the Committee that the Minister's statement was the only 'guideline' available to them until early November.

3.6 In its submission to the Committee, the HIC wrote:

The Minister's statement concerning approval arrangements prior to the establishment of the Pharmacy Restructuring Authority was seen as limiting the number of new approvals except where a commitment had been entered into. In exercising the Secretary's delegation the Commission was required to give consideration to whether a commitment had been made but not to the impact of that decision on the number or distribution of pharmacies, issues which were intended to be the focus of the Pharmacy Restructuring Authority. The statement was not seen as limiting the relocation of pharmacies or changes in ownership of pharmacies. In both cases the overall number of pharmacies is not affected.¹

3.7 Evidence given to the Committee confirms the stance taken by the HIC that its operations were not essentially part of the restructuring: 'Our responsibility is to administer the Scheme'² said one of its officers in response to questions on the Commission's concerns about the broader ambit of the restructuring. At most, the imposition of a criterion in connection with the consideration of applications received after 8 August 1990 which claimed a prior commitment was an administrative complication.

3.8 Failure to grasp that the immediate restrictions were a stepping stone towards the intended rationalisation of the retail pharmacy industry may have resulted from the lack of directions the HIC received from DHH&CS. The Committee was told that the Commission asked the Department to assist it in defining 'prior commitment' and in determining what documentation could be useful as proof of commitment. The Department has said in evidence that it indicated to the HIC that 'the Minister wanted to provide grandfather protection to those people who had made prior commitments'³ and that the HIC had to develop criteria in the light of this.⁴

3.9 Given the standard procedures then operative, the search for a new *modus operandi* was severely handicapped. The transition period may have been envisaged as brief, preparatory to the full restructuring once the Pharmacy Restructuring Authority came into operations. But the transition period was not brief and the HIC's approach to the new arrangements prevailed long enough to leave its mark on the course of the program.

1. *Transcript of Evidence* (HIC) 23 August 1991, p. 332.

2. *Transcript of Evidence* (HIC), 27 November 1991, p. 949.

3. *Transcript of Evidence* (DHH&CS), 27 November 1991, pp. 996-97.

4. *Transcript of Evidence* (DHH&CS), *ibid.*, p. 996; (HIC), *ibid.*, p. 978.

— procedural laxity: (a) accommodating the pharmacists

3.10 Until 8 August 1990, the granting of approvals had been handled in a very flexible manner, with a minimum of bureaucratic procedures by either the relevant Department of State or the HIC.⁵ The only requirement was approached in a similar way, the guidelines giving vague instructions and stipulating only that:

Reasonable care should be taken to ensure that the intended pharmacy conforms with the requirements of and is approved by State and Local authorities before approval action is taken.⁶

3.11 In its submission to the Committee, the HIC confirmed that 'there were no special guidelines developed to handle the approval of applications'.⁷ There is no evidence that any documentation was required by the HIC in support of the application meeting State requirements. The relevant State Pharmacy Board or Council would be contacted for verification that the pharmacist and the premises were on the relevant register.

3.12 Information provided to the Committee reveals that State legislation was not always strictly enforced by the relevant Pharmacy Board, nor was there any consistency between the various States. When the Pharmacy Board of New South Wales wrote to all pharmacists in the State on 29 August 1990 to inform them of amendments to the *Pharmacy Act 1964*, it pointed out that it had 'noted that some pharmacists have not informed the Board of earlier changes to ownership, changes to trading name or relocation of premises'.

3.13 These circumstances may have enabled a pharmacist to begin dispensing PBS prescriptions on 6 September 1990 from premises which had not been approved by the relevant State Pharmacy Board. The case was the cause of a submission to the Committee by a concerned and aggrieved witness who concluded that 'the HIC operated with a blind trust of authenticity without investigation'.⁸

3.14 The Committee has heard and read much evidence which indicates that laxity continued to be the hallmark of approval operations. It may well be that this was a flow on of a long standing approach to the granting of approvals. A witness told the Committee that:

the arrangements were set to make life as simple as possible for pharmacists.⁹

5. *Transcript of Evidence* (HIC), 23 August 1991, p. 331, paragraph 2.4.

6. Department of Health, Procedure Manual, 1 July 1981, subparagraph 17.2.1.2.

7. *Transcript of Evidence* (HIC), 23 August 1991, p. 331.

8. *Transcript of Evidence* (Ms Cathro), 15 November 1991, p. 745.

9. *Transcript of Evidence* (DHH&CS), 27 November 1991 p. 1015.

This characteristic of relations between the HIC and pharmacists was corroborated by a number of witnesses. A witness placed the pre-9 August 1990 arrangements in perspective when she told the Committee that the Department to 1989 and then the HIC had always tried to accommodate the pharmacists.¹⁰

3.15 Procedural laxity relating to State requirements did not cease with the beginnings of the restructuring. Thus on 14 February 1991, HIC Central Office wrote to the PRA suggesting that:

it would be unwise to insist on Pharmacy Board approval until the time comes for formal granting of the Pharmaceutical Benefits approval.¹¹

The ground given for this was that seeking State approval was a costly undertaking which no pharmacist should be expected to face until he/she was certain of being granted an approval.¹²

3.16 A concern for the pharmacists is a recurrent theme in correspondence from HIC Central Office, even at the risk of running counter to established principles. Information provided to the Committee shows, for example, that the HIC Central Office, concerned at the delays likely to occur when the PRA would begin operations, particularly when a sale/purchase of existing premises was involved, advised its officers in State Offices in the following terms:

Inevitably situations will arise, as they already have, where an existing pharmacy transfers ownership in expectation of instant approval by the Commission. In order to deal with these cases, the following procedure should be adopted:

. . . Finally, an applicant should come to a formal agreement with the existing approved pharmacist relating to the transfer of monies paid by the Commission. One method of doing this would be by the approved pharmacist authorising the applicant's bank to accept these cheques directly. For their own protection, the parties should make an agreement in a legally binding way, although of course that is a matter for their own discretion.¹³

3.17 Evidence provided to the Committee in this regard did not confirm the part played by the HIC in initiating this practice, but noted its existence:

10. *Transcript of Evidence (Ms Mihulka)*, 6 September 1991, p. 379.

11. HIC, Policy and Compliance Section to the PRA, 14 February 1991, HIC Correspondence.

12. *ibid.*

13. HIC Policy and Compliance Section to Manager Pharmaceutical Benefits, All States, 3 January 1991. HIC Correspondence.

What has happened is that sometimes pharmacies change hands; there is a sale and a purchase takes place which precedes the formal approval under the Act. In that situation, a pharmacist will say to the other pharmacist "Look, to make sure I get the right amount of money, would you please change your bank account details so that when I lodge my claim the Health Insurance Commission will pay the monies into my bank account, that is the purchaser rather than the vendor".¹⁴

3.18 The memo quoted at paragraph 3.16 above raises several questions:

- (i) had the pharmacists been properly briefed they would have known that there were new rules in place and that delays may occur;
- (ii) it is doubtful whether the advice given is legally acceptable; and
- (iii) it shows the point to which the HIC was prepared to bend the rules, albeit to 'accommodate the pharmacists'.

— procedural laxity (b): tentative approvals

3.19 One of the common practices followed for many years to accommodate pharmacists was to issue a 'tentative approval number' to any pharmacist who expressed the intention of opening a pharmacy from which he/she wished to dispense PBS prescriptions so as to facilitate the beginning of operations¹⁵. This practice became one of the controversial side issues of the restructuring. For that reason it will be examined in detail.

3.20 Neither the legislation nor the Procedure Manual in use contained any directions/instructions on the issue of tentative approvals. In evidence to the Committee, the HIC confirmed that:

it has been common practice to issue the approval number to a pharmacist in anticipation of State approval so that the pharmacist can organise stationary etc. prior to beginning operations. This is then followed up by a letter of approval once State approval has been given.¹⁶

3.21 This practice was adhered to in some of the applications which the HIC considered 'on a case by case basis'. Evidence given to the Committee shows that, in three instances, pharmacists who had applied for an approval were told that:

14. *Transcript of Evidence* (HIC), 27 November 1991, p. 954.

15. *ibid.*, p. 963.

16. *Transcript of Evidence* (HIC), 23 August 1991, p. 331, paragraph 2.7.

From the information supplied I have determined that you have met the criteria stated by the Minister for Aged, Family and Community Care/Health Services and an approval number will be issued to you.¹⁷

Similar advice provided orally to another pharmacist led to even more protracted processing of an application for approval.¹⁸

3.22 This practice should not have posed any problem as long as the HIC was responsible for the issue of both the tentative and the final approval. Because the practice:

was based on automatic approvals . . . no one was ever challenging whether the provisional number was valid or not, because it did not have any purpose or meaning in the same way that it had when the rules were changed.¹⁹

3.23 Complications arose when a pharmacist was given a tentative approval number on 14 November 1990. His application for approval was not finalised by the time that the HIC could no longer handle these applications, and the PRA was preparing to consider it. The PRA was not certain whether the letter advising that an approval number would be allocated meant that approval had been granted. The departmental legal section expressed the opinion that the wording used in the letter meant that an approval had indeed been given, effective from the date of the letter.²⁰

3.24 The Committee noted that information gathered during the inquiry revealed that this advice could raise the issue of the validity of an approval which had been granted before the relevant Pharmacy Board's approval had been obtained. Yet, as explained above, this practice was well entrenched in the procedures associated with the granting of approvals.

3.25 On 30 November 1990, the HIC Central Office wrote to its State Offices requesting that tentative approvals issued after 1 November 1990 be reviewed and cancelled as new guidelines were coming into effect on 3 December 1990. Yet, on 5 December 1990 the HIC Central Office itself issued a tentative approval to each of two pharmacists claiming prior commitment. It would appear that the availability of guidelines²¹ – notwithstanding the fact that these would in fact not be operative

17. HIC Correspondence.

18. See Appendix 3, Case F.

19. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 1015.

20. See Appendix 3 – The Port Macquarie case.

21. See examination of this term at paragraphs 2.52 to 2.58 above.

until 1 January 1991²² – was of consequence to State Offices but not for Central Office. Yet, the Committee has been told several times that, during the transition period, all applications for approval to dispense PBS prescriptions from new premises were to be referred to Central Office.²³ State Offices continued to provide information to pharmacists and continued to ensure that applicants provided the correct information.

3.26 The issue of tentative approval numbers by the HIC became incompatible with new arrangements for the granting of approvals when the PRA began operations, since an approval could only be granted upon a recommendation of the PRA. To have issued a 'tentative approval' would have pre-empted the decision of the PRA. The HIC was aware of this fact when it advised its State Offices to cease the practice:

Now that new approval arrangements have been put in place, and as these are largely dependent upon the determination of an outside agency (the Pharmacy Restructuring Authority), this practice is causing difficulties. The problem is that some applicants are assuming, notwithstanding clear explanations to the contrary, that the issue of a tentative approval number is the same as granting approval. This has the potential to cause embarrassment to the Pharmacy Restructuring Authority. Accordingly it has been agreed between the Pharmacy Restructuring Authority Secretariat and this Branch that no new tentative approval numbers are to be granted.²⁴

– procedural laxity (c): careless communication style

3.27 Correspondence from the Central Office with State Offices and with pharmacists was deficient both in form and content. On 9 August 1990, HIC Central Office advised its State Office managers of the new arrangements in the following terms:

As from this morning any application to dispense pharmaceutical benefits will be in accordance with criteria presently being developed. Applications already(sic) lodged will be approved on current procedures. Pharmacists who have entered into commitments with the expectation that approval would be dealt with on a case by case basis(sic).

22. These 'guidelines' were in fact an extract from the Agreement which, on 20 December 1990, the Pharmaceutical Benefits Remuneration Tribunal determined would take effect on 1 January 1991. The Guidelines referred to in section 99L of the *National Health Act* did not come into effect until 23 January 1991.

23. *Transcript of Evidence* (HIC Qld), 2 October 1991, p. 585; (HIC NSW), *ibid*, p. 621.

24. HIC Central Office to State Offices, 25 February 1991, HIC Correspondence.

... For those pharmacists who have entered into commitments to open/buy/develop a pharmacy they should lodge with you documentation to support that activity. This is merely designed to let us know what's happening at the present time.²⁵

3.28 This was the only written advice distributed to HIC officers Australia-wide until 30 November 1990. The Committee has been told that during the transition period, 'the delegation and decision-making process in relation to approvals had been taken over by [HIC Central Office]'.²⁶ But State Offices remained the first point of contact for pharmacists seeking information on the restructuring.²⁷ Although there were numerous telephone conversations between Central Office and State Offices²⁸, there is abundant evidence that poor communications marred the course of the restructuring operations during the transition phase.

3.29 The Committee heard with some concern evidence that:

- Directions provided to State Office personnel on the restructuring between 9 August and 30 November 1990 were almost entirely by telephone, but it was not common practice among HIC personnel to keep records of telephone conversations or inquiries.²⁹
- Consequently, in a number of instances incorrect or contradictory advice was given to pharmacists on a number of critical points (e.g. whether or not a new approval number was required when relocating or whether there had been any inquiry about opening a new pharmacy in a given area).³⁰

The absence of written records of conversation meant that there was a gap in the gathering and distribution of information by the HIC.

3.30 The Commission's resistance to seeing itself as part of the restructuring only added to the general confusion. Letters sent to pharmacists inquiring about the restructuring were ambiguously worded:

The Minister for Aged, Family and Health Services announced on 8 August 1990 that temporary restrictions would be placed on the issuing of approvals to dispense PBS prescriptions. Pharmacists who have entered into commitments with the expectations that approvals

25. HIC Central Office to State managers, 9 August 1990, HIC Correspondence.

26. *Transcript of Evidence* (HIC Qld), 2 October 1991, p. 585.

27. *ibid.*, p. 585. See also *Transcript of Evidence* (HIC NSW), 2 October 1991, p. 612.

28. *ibid.*, p. 618.

29. *Transcript of Evidence* (HIC), 27 November 1991, p. 968.

30. See Appendix 3.

would be issued will have their expectations deal[t] with on a case by case basis . . .³¹

3.31 The message was neither well presented nor clear and failed to highlight the distinction between the three categories of applications of the Minister's announcement. This failure was of more consequence when it affected the manner in which the HIC dealt with applications. There is evidence, for example, that applications lodged before 9 August 1990 were treated as if lodged after 9 August.³² This development was formalised when HIC Central Office advised that, in view of the omission of a provision covering pre-9 August 1990 applications in Ministerial Determination No. PB1 of 1991, such applications had to be dealt with on the basis of prior commitment.³³ This point is covered at paragraph 3.66 below.

– lack of training

3.32 Because the HIC had a rather limited perception of its role in the restructuring process, it also had a limited and at times even confused understanding of the whole program. On both accounts, it failed to find it necessary to put in place a strategy which would enlighten either staff or pharmacists. Failure on the part of the HIC to devise procedures which would have ensured that the new arrangements were understood by all relevant persons and that the program run smoothly soon gave rise to a number of contradictions compounded by carelessness.

3.33 When restructuring operations began on 9 August 1990, State Office personnel who had always handled applications for approvals did not receive a briefing which would have ensured a co-ordinated approach to applications for approvals received from that date. On the contrary, the memo which State Offices managers received from Central Office on that day did not even correctly refer to the distinction which had to be made between applications at hand or applications received from that day in line with the Minister's statement.³⁴

3.34 This memo was not an accurate rendering of the Minister's announcement, already imperfect as the basis of new administration practices as highlighted at paragraph 2.19 above, nor was it providing any directions for the new procedures expected. The position in which the HIC was placed has also been highlighted. In the circumstances, it is not surprising that personnel in the operating areas were not better prepared for the new procedures.

3.35 At no time were any seminars or workshops organised to ensure that officers responsible for passing on information on the new arrangements were adequately

31. HIC Correspondence.

32. State Office to Central Office, 17 January 1991, HIC Correspondence.

33. HIC Central Office to State Offices, 21 January 1991, HIC Correspondence.

34. See paragraph 3.27 above for extract from memo, and paragraph 2.19 above for different categories of applications.

briefed.³⁵ The Committee was concerned to hear that officers held the view that such training was inappropriate until the PRA was established³⁶, a statement which revealed the extent to which the administration of the restructuring was poorly understood.

3.36 The memo sent to State Offices on 9 August merely reflected the brevity of the Minister's announcement of the previous day and the lack of light it shed on the program. Considering that the responsibility for the first stage of the restructuring fell to the HIC, the Committee was concerned to find out how little was done to ensure that this first stage operated efficiently.³⁷ Evidence on file suggests that during the transition phase, the HIC was flooded with complaints about almost every new approval which was granted.³⁸ It would have become obvious that steps needed to be taken to fully inform pharmacists.

– lack of briefing

3.37 The Committee heard that the HIC made no attempt to inform pharmacists who had expressed interest prior to 9 August 1990 that the rules for granting approval had changed.³⁹ As a result some pharmacists who had been in contact with the HIC before that date remained unaware that the rules had indeed changed. The fact that there was often inconsistency in the information provided to pharmacists was an added cause of confusion and frustration.

3.38 In a particular instance, summarised at Appendix 3 (Case E), the giving of incomplete information led to protracted negotiations between the pharmacist and the PRA and significant loss of revenue due to the delay encountered in the finalisation of the application.

3.39 The Pharmacy Guild distributed some information on the 'criteria being established' in the September and October 1990 issues of its monthly journal, the *Pharmacy Review*, but this was made available only to its members. On 12 December 1990 approved pharmacists were sent a copy of the Agreement signed a few days before by the Minister for Aged, Family and Health Services and the Pharmacy Guild. On 20 December 1990, the recently appointed Secretary to the yet-unconstituted PRA wrote to pharmacists outlining the new arrangements. Pharmacists were made aware of some procedural arrangements regarding lodgement of applications and eligibility:

35. *Transcript of Evidence* (HIC NSW), 2 October 1991, p. 619.

36. *ibid.*

37. *Transcript of Evidence* (HIC), 27 November 1991, p. 972-73, 979.

38. HIC Correspondence.

39. *Transcript of Evidence* (HIC NSW), 2 October 1991, p. 630.

- applications for approvals to supply pharmaceutical benefits were to be obtained from and returned to the HIC;
- applications for EPA and closure/amalgamation payments were to be obtained from, and returned to, the PRA;
- applications for EPA and closure/amalgamation could only be made in respect of pharmacies trading at the time of application.⁴⁰

3.40 In view of the joint nature of the Agreement, the Government relied on the Guild for distribution of material on the restructuring. Even as late as March 1991, the PRA issued its first Newsletter through the Guild. The prominence given to Guild members has been a cause of concern to the Committee⁴¹ as well as to a number of pharmacy organisations and individual pharmacists.⁴² The Isolated and Essential Pharmacy Association (IEPA) and the Extended Hours Pharmacy Association in particular have voiced their objection to the partisan nature of the Agreement, the latter successfully challenging in the Federal Court the validity of the Pharmaceutical Benefits Remuneration Tribunal's determination ratifying the Agreement. The IEPA argued that the ratification of the Agreement had been carried out without due and proper consultation with interested groups other than the Guild. The Government and the Guild are challenging the finding of the Court and the appeal against the decision setting aside the determination by the PBRT, which gave effect to the Agreement, is set down to be heard in June 1992.

Recommendation

The Committee RECOMMENDS:

5. That negotiations affecting all approved pharmacists include consultation with representatives of all existing pharmacists' organisations as relevant.

-- conflicting or inadequate advice

3.41 Lack of proper briefing and misunderstanding of the new arrangements had a number of repercussions on pharmacists. The lack of preparedness of officers in HIC State Offices led to a number of instances where advice given was not in line with the new restructuring arrangements or even with internal arrangements proposed by HIC Central Office. In one instance, for example, an aggrieved pharmacist, one member of a joint application, told the Committee that when she lodged an application on 26 September 1990, claiming that initial arrangements had been made prior to 9 August 1990, she was advised that her application would be

40. PRA to pharmacists, 21 December 1990, PRA Correspondence.

41. *Transcript of Evidence* (PRA), 23 August 1991 p. 300.

42. See Submissions No 2 (Isolated and Essential Pharmacy Association), No 8 (Natoli) and No. 9 (Manley).

set aside until the lease for the new premises had been signed. On 4 March 1991, she was informed by another officer that:

it would now be possible to have [your] approval application considered without actually having signed the lease agreement.⁴³

3.42 The Committee noted that the application should have been referred to Central Office, as all similar applications were supposed to be. It is likely that if the pharmacist's application had been forwarded to Central Office, it would have been treated as a number of similar applications, some of which had not even the same convincing documentation showing prior commitment: a tentative approval number would have been issued pending approval by the State Pharmacy Board.⁴⁴

3.43 By March 1991, the PRA was handling all applications under the restructuring program and had adopted new definitions with regard to 'prior commitment'. This was an added complication for pharmacists whose applications lodged between 9 August and 18 December 1990 had not been finalised by the time the PRA took over from the HIC.

3.44 In another instance, the Committee has noted that HIC Central Office and HIC NSW Office each wrote on the same day to a pharmacist giving contradictory advice regarding his dispensing of PBS prescriptions pending issue of a new approval number.⁴⁵

– relocation of premises and unauthorised dispensing

3.45 The issue of inadequate advice acquired new dimensions when it was compounded by the cumulative effects of the laxity of long established procedures, lack of precision regarding the HIC's role in the restructuring, lack of precision in the Agreement, and the adoption of strict guidelines by the Pharmacy Restructuring Authority.

3.46 Guidelines in place prior to the restructuring of the retail pharmacy industry for the relocation of premises reflected the casual approach taken to the granting of approvals to dispense pharmaceutical benefits.

Normally the approval number should be changed in all cases where a variation occurs in either the name of the approved person(s) or the approved premises. However, in cases where the change in location is of a relatively minor nature e.g. next door or across the road, it may be considered frivolous to vary the approval number.⁴⁶

43. *Transcript of Evidence* (HIC NSW), 2 October 1991, p. 633.

44. A summary of the case is at Appendix 3 – see Case E.

45. HIC Correspondence. See Appendix 3, Case F.

46. Department of Health, Procedure Manual, *op.cit.*, subsubparagraph 17.2.3.2.

3.47 This was not strictly in line with the legislative requirements of subsection 90(4) of the *National Health Act 1953* as amended by the *Community Services and Health Legislation Amendment Act 1990* (henceforth the Act), but was the accepted practice. The issue of a tentative approval number became a confused issue in the context of the restructuring arrangements.

3.48 In its submission to the Committee, the HIC described its understanding of the role it had to play in the early days of the restructuring:

The [Minister's] statement was not seen as limiting the relocation of pharmacies or changes in the ownership of pharmacies.⁴⁷

3.49 The relaxed approach which had characterised several aspects of the administration of the PBS by a Government agency – be it Department of State or the HIC – continued during the transition period. Pharmacists were not properly briefed about the impact of the new arrangements in respect of relocation. In addition, the new arrangements lacked clarity. Thus paragraph 8.5(d) of the Government/ Guild agreement states that:

existing approvals can be relocated within their business centre, which is defined as the area within 500 metres of the existing approved site;

and paragraph 8.5(e) states that:

existing approvals can be relocated to a new business centre where the new location is between 500 metres and 5 kilometres of the original site and a closure or amalgamation payment has not been made for a site within 5 kilometres of the new site and a public need can be demonstrated.

3.50 Nowhere in the provisions is there a reference to the need to obtain a new approval number in these instances. In the event, the PRA took the view that any relocation required a new approval number. A particular problem soon became evident: a number of pharmacists had relocated their premises over the last few years and not advised the HIC. In addition a few pharmacists who relocated in 1990-91 who were not given clear instructions about the need to apply for a new approval number or had been given out of date advice, relocated and carried on business as usual with the old approval number.

3.51 When a number of these pharmacists, becoming aware of the new requirements, applied for a new approval number they were advised that:

any pharmaceutical benefits purportedly dispensed from these [relocated] premises prior to the date of approval was without authority. Under the Act, the Commission is not authorised to pay claims submitted in respect of this period and, accordingly, the

47. *Transcript of Evidence* (HIC), 23 August 1991, p. 332, paragraph 3.2.

payment of such claims received since we became aware of your relocation has been suspended.⁴⁸

3.52 In one instance it was even proposed to recover monies paid between the relocation and the issue of a new approval number as having 'been made outside the Act'.⁴⁹ This development caused much embarrassment and confusion among pharmacists. It also reflected badly on the previous administration of the Scheme, since some of the pharmacists affected had in fact relocated long before 9 August 1990.

3.53 The suspension of payments and threatened recovery of monies already paid because there had not been a strict adherence to legislative requirements in pre-restructuring days, and pharmacists had not been properly briefed on the new arrangements, were not sustainable actions. In order to overcome the impasse, discussions were held with the DHH&CS and the Pharmacy Guild. As a result, the Minister for Finance was approached so that monies owed by the Commonwealth could be paid as *ex gratia* payments to all pharmacists unduly affected by the confusion between old and new procedures and the involvement of two authorities in the administration of the PBS.

— absence of remedial action

3.54 Failure on the part of the HIC to identify its operations regarding the granting of new approvals as part of the restructuring meant that the Authority was oblivious of any untoward effect the granting of approvals was having on the anticipated aims of the restructuring. The consequence was that pharmacists became perturbed when confronted with, for example, the opening of a fifth pharmacy where four were already struggling.⁵⁰ Again, failure to brief the pharmacists on the exact nature of the first stage of the restructuring created some backlash among the pharmacists and ensuing complaints clogged up the administrative channels of the Commission.

3.55 In summary, the Committee has found that the activities of the HIC during the transition stage of the restructuring were adversely affected by its failure to perceive that the initial restrictions were part of the restructuring, by the casual approach it had followed in the granting of approvals, and by its failure to brief pharmacists and staff members and to maintain clear communication with all concerned. At the end of the four months' interregnum beginning with the Minister's statement on 8 August 1990, the pharmacy retail industry was in a state of confusion and perplexity.

48. HIC Correspondence.

49. Various HIC correspondence. See also, *Transcript of Evidence* (HIC), 27 November 1991, and Appendix 3, Case F.

50. HIC Correspondence.

The Pharmacy Restructuring Authority (PRA)

3.56 Provisions for the constitution and functions of the Pharmacy Restructuring Authority were contained in the Community Services and Health Legislation Amendment Bill 1990, introduced in the House of Representatives on 20 September 1990. Had the legislative program not been affected by a Federal election earlier in the year, it is likely that the transition period would have been shorter. The Bill was passed by the Senate on 17 December 1990 and received Royal Assent the following day. In the intervening period, a minimum of preparation was made for the Authority to take over the restructuring functions allocated to it under the Bill. The Authority was not finally constituted until it was about to begin operations in February 1991.

– the membership and mode of operations of the PRA

3.57 Subsection 99N(1) of the Act provides that:

The Authority shall consist of:

- (a) a Chairperson;
- (b) 2 persons who are to be chosen from 4 persons nominated by the Pharmacy Guild of Australia;
- (c) one person (other than the 2 persons chosen under paragraph (b)) having experience in matters relating to the pharmacy industry;
- (d) 3 other persons.

Subsection 99N(2) provides that all the members be appointed by the Minister.

3.58 All these persons' involvement with the PRA is on a part-time basis. The Authority meets usually once a month, although on occasions it has held additional meetings. Nevertheless, the Committee is concerned at the working foundations of the Authority itself, which seems to place undue responsibility on the Secretary.

3.59 The duties of the Chairperson under subsection 99N(1) were to 'convene such meetings of the Authority as [he/she] considers necessary for the efficient performance of the Authority's functions'. The Committee noted that the Authority's first Chairman resigned from his position within a few months of his appointment and a second Chairman has now been appointed.

3.60 The Committee was very concerned by the attitude adopted by the present Chairman of the PRA and by the narrow view of his responsibilities as head of the Authority:

I have been asked to be Chairman, I am Chairman and I have no views whatsoever about its [the PRA] need or otherwise . . .

I have no idea about the authority of officers . . .

I have no idea about the lines of communication and who amongst the staff is given authority to look at documents and who is not . . .

It is not my function to work out what goes on within the office . . .

The Act makes it clear that my responsibility is to make sure that meetings are conducted in an efficient manner. That is what the Act says and I stick to it strictly.⁵¹

3.61 In brief, the Committee was given the strong impression that the Chairman of the PRA was not in the least concerned to give a sense of purpose and direction to the activities of the Authority, nor was he interested in bringing to the attention of the Minister any matter which may need rectifying.

3.62 The Authority's functions were to make recommendations whether or not an applicant:

- (i) would be granted a new approval number;
- (ii) would be eligible for an Essential Pharmacy Allowance;
- (iii) would be eligible for a closure payment; or
- (iv) would be eligible for an amalgamation payment.

The legislation stipulated that in making its recommendations, the PRA would have to comply with the relevant guidelines determined by the Minister under section 99L [of the Act].

3.63 The Committee received a Progress Report of the PRA's activities to 31 August 1991. Between February and August, the Authority met ten times. Of the 971 applications received, it considered 933 or 92.6 per cent. This represents an average of ninety applications per meeting. Such a ratio makes it difficult to accept that each application is thoroughly examined and would seem to indicate that the PRA may be rubber stamping the data it is given by the HIC. It is arguable whether this manner of operating is consistent with quality performance. In addition, it is evident that some major aspects of the restructuring, particularly those touching the rationalisation in the distribution of pharmacies and continued public access to pharmaceutical benefits, have not been prime considerations in determining the outcome of an application.⁵²

51. *Transcript of Evidence* (PRA), 15 November 1991, pp. 849-850.

52. *Transcript of Evidence* (PRA), 23 August 1991, p. 302. See also paragraphs 2.75-2.80 above and 3.88 below.

3.64 Although the PRA and the HIC operated within a totally different framework and with quite different tools, they both faced common problems in the administration of the restructuring. The Agreement and the Ministerial Guideline No. PB1 of 1991 were, relatively speaking, as deficient as the Minister's statement. A new dimension arose from the legislative limitations imposed on the PRA, as opposed to the HIC history of *laissez-faire*. Whilst the HIC had only one criterion to struggle with – prior commitment – the PRA had to fill in a number of gaps and ‘interpret various aspects of the guidelines’.⁵³ The limited accuracy of these interpretations within the wider ambit of the restructuring may be a measure of the lack of briefing the PRA received on assuming the functions allocated to it. The Committee is nevertheless concerned that the presence on the Authority of a Pharmacy Guild member who had been involved in the negotiations drafting the restructuring agreement did nothing to prevent some distortions in the implementation of the restructuring measures by the PRA.

– misreading of guidelines

3.65 On 8 February 1991, with limited knowledge of its tasks and the means of fulfilling them, the PRA held its first meeting. It was immediately faced with a significant backlog of applications for approval to move into new premises or to relocate, for Essential Pharmacy Allowance and for closure/amalgamation payments.

3.66 Evidence given to the Committee showed that the Authority operated under a number of misconceptions. The following statement is revealing on this subject:

The PRA applied the Minister's PB1 guidelines of January 1991 to all applications. Applications received after 9 August were handled as new applications by the PRA. The applications received prior to 9 August [1990] were handled according to the guidelines with prior commitment. There was no distinction.⁵⁴

3.67 The Minister's guidelines were quite different: applications received prior to 9 August were to be dealt with according to the rules which applied at that time; and there were two ways of handling applications received after 9 August.⁵⁵

– disregard of legislation

3.68 The PRA seems to have been oblivious of the fact that no provisions for applications received before 9 August 1990 were included in Ministerial Determination No. PB1 of 1991⁵⁶ and that therefore they could not handle them until Ministerial Determination No. PB4 of 1991 corrected the omission. Evidence

53. *Transcript of Evidence* (PRA), 15 November 1991, p. 816.

54. *Transcript of Evidence* (HIC) 27 November 1991, p. 981.

55. See paragraph 2.19 above. See also paragraph 3.31.

56. See paragraph 2.91 above.

on file suggests that these applications were in fact dealt with as if having to meet the 'prior commitment' criterion. All applications which proceeded were recommended for approval, but a number of applicants withdrew.⁵⁷ The Committee is concerned that the inappropriate application of the 'prior commitment' criterion to these applicants may have disadvantaged at least one of them who did not proceed after he was asked for additional information.

3.69 In another statement, lack of knowledge of the parameters within which the PRA was working was illustrated when the former PRA Chairman told the Committee

that all applications lodged before a certain date will be considered by the HIC and not by the Authority.⁵⁸

The Committee considers this statement to be contrary to the legislative provisions, since once the PRA was legally empowered to fill its functions, it had a mandatory obligation to deal with all applications which had not yet been finalised by the HIC.

Recommendation

The Committee RECOMMENDS:

6. That legislation awareness courses be mandatory for officers of the Australian Public Service whose duties require a knowledge of that legislation.

– guidelines

3.70 The Committee has highlighted in the previous chapter the various deficiencies of the restructuring arrangements in legislation, Agreement and guidelines. Some of these are re-examined to highlight the consequences of the manner in which the PRA administered the restructuring program.

– changed definition of criteria: prior commitment

3.71 Although the bulk of applications claiming prior commitment were received in the early days of the restructuring, some of these had not been finalised by the time the PRA began operations. The HIC had dealt with these applications in a rather informal and at times inconsistent manner. The PRA not only operated within more rigid boundaries set by the legislation but also had to improvise in the light of certain developments. Its decision-making was not always in line with the terms and/or intent of the restructuring agreement.

3.72 The 'guidelines' specified that in order to substantiate 'prior commitment', an applicant needed to provide:

57. HIC to the Committee, December 1991.

58. *Transcript of Evidence (PRA)*, 23 August 1991, p. 306.

- (i) a bank statement, supported if necessary by an affidavit by the pharmacist's solicitor or accountant; or
- (ii) details of any contractual arrangements together with an affidavit by the pharmacist's solicitor or accountant attesting to the correctness of the date that commitment was entered into.⁵⁹

3.73 The Committee was told that the orderly administration of the restructuring was being affected by the unscrupulous actions of a variety of persons: in particular developers were prepared to provide such documents in return for an undertaking to lease, particularly in a new development.⁶⁰ As early as November 1990, the Pharmacy Guild advised the Department that:

The Guild has received many calls from developers and other parties who request details of the criteria and advice on "how to get around them".

Anecdotal evidence has been received since the criteria were announced that some applicants have been attempting to obtain approval outside the agreed conditions. The main loophole being exploited is in the production of 'evidence' of a financial commitment which existed before 9 August 1990. Cheque butts and receipts can be backdated and some statutory declarations have been refuted by other statutory declarations.⁶¹

3.74 Whether this development played a part in the subsequent redefinition of 'prior commitment' or not is not relevant to this inquiry. What has concerned the Committee is the number of injustices which have flowed from the definition adopted by the PRA on 10 May 1991 that 'financial commitment':

is of a binding and irrevocable nature in the form of an agreement which means that the economic consequences of failing to honour the commitment leaves the enterprise with little, if any, discretion to avoid outflow of resources, eg - the existence of a substantial penalty.⁶²

3.75 This represents an interpretation which goes beyond the intent of the Minister's statement and is seen by the Committee as having seriously disadvantaged a number of pharmacists whose applications lodged with one authority have had a decision made by another authority under different guidelines, with the result that serious discrepancies have been evident in the treatment of

59. Ministerial Determination No. PB1 of 1991, paragraph 3(g).

60. *Transcript of Evidence* (HIC Central Office), 27 November 1991, p. 971.

61. Executive Director, Pharmacy Guild of Australia to DHH&CS, 29 November 1990, HIC Correspondence.

62. *Transcript of Evidence* (Mrs James), 15 November 1991, p. 723.

pharmacists.⁶³ In one particular instance, it led to protracted legal proceedings and the possibility of an appeal to the Federal Court to determine whether the PRA had, or had not, acted in accordance with law.⁶⁴ In this instance, the application has dragged on for more than one year before being finalised. These cases are related in more detail at Appendix 3.

– inadequate decision-making and administrative delays

3.76 The backlog created by the complete standstill of restructuring operations between 18 December 1990 and 8 February 1991 affected all applicants, but had particular after-effects in respect of applications for the Essential Pharmacy Allowance (EPA).

3.77 The legislation required the PRA, when recommending an approval for EPA, to set out the rate at which the allowance is payable and any conditions subject to which the allowance is payable.⁶⁵ But Ministerial Determination No. PB1 of 1991 contained no directions regarding the rate of allowance payable, nor did it indicate the date of effect of this allowance. The PRA determined that payment of this allowance where granted would be 10 per cent of the new dispensing fee and would begin from the first day of the month following the recommendation that the pharmacist was eligible for EPA. There are two issues of concern to the Committee: one relating to delayed advice that the allowance would be payable, the other relating to the intent of the allowance.

3.78 Given the limited information concerning the restructuring which was made available to pharmacists in the wake of the Minister's announcement, the Committee considers that the undue delay placed pharmacists in isolated areas at a disadvantage. Although there had been an Isolated Pharmacy Allowance in place, the EPA's criteria were quite new, as were the arrangements for its allocation. The number of applications received by 21 January 1991 – 173 – shows a significant response to the availability of the allowance. The undue delay must have added to the climate of uncertainty among pharmacists in the light of the unexpected developments which were occurring under the restructuring banner.

3.79 The reason advanced by the PRA for the delays incurred is not convincing:

The absence of lead times normally available for the establishment of application based funding programs did lead to some initial delays in the processing of applications and the offering of payment.⁶⁶

63. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 994.

64. *Transcript of Evidence* (Ms James), 15 November 1991, p. 726.

65. *National Health Act 1953*, subsection 99ZA(4).

66. *Transcript of Evidence* (Pharmacy Guild of Australia), 23 August 1991, p. 245.

3.80 With regard to the intent of the allowance as agreed between the Minister and the Guild, the Committee was told that payment of the allowance was meant to have commenced at the same time as the new remuneration arrangements which became operative on 1 January 1991.⁶⁷ The PRA was therefore not respecting the intent of the Minister/Guild Agreement by making payments operative from a date subsequent to its decision to grant an allowance. Although it must be acknowledged that this intention was nowhere clearly spelt out, the Committee is concerned at the evident lack of communication between the architects of the Agreement and the PRA.

– procedural complexities

3.81 From the moment the PRA became a key player in the restructuring, the procedures followed became quite complex and involved both the PRA and the HIC. When considering each application whether for approval, EPA or closure/amalgamation payments, the PRA needed detailed information on the applicant, his/her number of years as approved pharmacist, the relative location of his/her pharmacy within a 10 kms radius, etc. Much of this information was readily available on the HIC data bases. Implementation of the restructuring measures came to depend on two sets of administration instead of one and on the cooperation and coordination between these two sets.

3.82 In some instances, applications go directly to the PRA, in others they go first to the HIC; in all instances, at some stage of the procedures there is a need to check against data already available. There are also movements of applications between State Offices and Central Office of the HIC as well as between HIC Central Office and the PRA. In some instances, applicants are advised by the PRA, in others by the HIC; depending on the outcome of applications for new approvals, it is either the State Office or Central Office of the HIC which contacts the applicant. It is no wonder that pharmacists could not keep track of the movements of applications.

3.83 In its submission to the Committee, the DHH&CS has presented a detailed flow chart which reveals the intricacies of the processing of applications under the restructuring.⁶⁸ A briefer outline of movements of applications, given by the PRA, is reproduced here and illustrates the procedural maze involved.

– closure/amalgamation payments:

- application is received [by the PRA], date stamped and checked for signatures and completeness;

[If application is incomplete, it is sent back to the pharmacist. Application is also checked for a redundancy agreement and amalgamation agreement (if

67. *ibid*, p. 227, 228; also see p. 251.

68. *Transcript of Evidence* (DHH&CS), 23 August 1991, pp. 32-38.

applicable), if there is no agreement attached, a redundancy agreement form is sent for applicants' signatures, and an amalgamation requested.]

- application is given a reference number and manually registered;
- returned applications are checked for completeness and relevant paperwork, if still incomplete the applicant is contacted (by phone or mail) and requested to send information;
- acknowledgment card is sent to applicant with reference number;
- application is keyed into computer;
- application is photocopied and sent to the HIC for verification of number of pharmacies within a 5 kilometre radius, number of years in operation and years of approval;
- photocopied applications are sent by HIC to relevant State offices for verification in those cases where the information is not available in Central Office – this process can take anything from 1 week to 6 weeks;
- verified copies are returned from HIC; any alterations made to applications by HIC are keyed into computer;
- once verified, application is scheduled for the next meeting [of the PRA];
- decision is made by PRA on application;
- approval of the Secretary or delegate is requested;
- letter advising applicant whether application was approved or rejected is sent to applicant;
- applicant is required to apply to the HIC for a revocation of approval number or send proof that the approval number has been revoked;
- where necessary, a letter is sent requesting a forwarding address for cheques, as applicants may have only submitted a pharmacy address which by this stage is no longer open;
- once HIC's revocation notice is received, a claim for payment is raised:
 - Secretariat raise Claim for Payment only when the Secretary of the Department (or the delegate) has approved and the Secretariat has proof that the pharmacist has revoked his/her approval;
- claim for payment form is sent on to Department of Finance officers who send cheque to applicant;

- applications, when complete, are filed with copies of all correspondence etc.⁶⁹
- approval to supply
- application is lodged at [HIC] State Office;
- State Offices prepare the summary sheets, issue an identifying number, check that all information is provided and verify all factual data;
- application is then sent to HIC head office in Canberra;
- application is registered, checked, HIC Canberra keep a copy of application and then send the file to the PRA;
- content of application is again checked, then application is given a reference number and keyed into the computer;
- application is scheduled for the next meeting;
- decision is made by the PRA on application;
- letter of approval or rejection is prepared for the file by the PRA Secretary and the file is returned to HIC Canberra;
- applications that have been recommended are returned to the respective State Office where approval by HIC's delegate is granted only after State Pharmacy Board approval is granted;
- the delegate of the Secretary in HIC Canberra exercises that delegation where the application is not recommended by the PRA and State Offices are notified;
- State Offices notify applicants as to whether application was approved or rejected.⁷⁰

3.84 The Committee has been concerned at the PRA's lack of consistence in describing the procedures associated with its functions. Evidence presented to the Committee is somewhat at variance with this outline. The Committee was told that once it has verified the data relating to an application, the HIC 'does not get involved any further in that application for closure payment'.⁷¹ This evidence is also at variance with information provided to pharmacists in the PRA Newsletter No. 2 of August 1991.⁷²

69. *Transcript of Evidence* (PRA), 15 November 1991, pp. 830-31.

70. *ibid*, p.832.

71. *ibid*, p. 872.

72. *ibid*, p. 845.

3.85 Before a closure payment can be initiated, the PRA must be certain that the approval number has been relinquished, and this is done by the HIC as the PRA clearly explains in its Newsletter No 2. The contradictory information given to the Committee is further indication of the poor management of the restructuring and poor understanding of its functions by the PRA.

3.86 The Committee is also concerned at the lack of efficiency which appears to result from these complex procedures. There have been unnecessary delays in finalising applications, particularly those relating to sale and purchase, with resulting difficulties for the pharmacists involved; this situation has led to the adoption of unsound practices as described at paragraphs 3.16 and 3.17 above. In some instances, applications have gone astray and have not surfaced for long period; there is much duplication in paper work as each movement of files from one agency to the other involves copies.

Recommendation

The Committee RECOMMENDS:

7. That streamlined procedures be adopted to enable the implementation of restructuring measures to proceed without unnecessary duplication of resources.

– lack of monitoring

3.37 Evidence presented to the Committee shows that neither the HIC, the PRA or the DHH&CS have been concerned to monitor the impact of the restructuring measures. As argued above, the HIC did not see its operations as fitting within the restructuring. Consequently, it did not consider the immediate or long term impact of its decisions granting new approvals. This was stated clearly in its submission:

... the Secretary's power under section 90(1) is discretionary and has not been exercised in a way intended to limit the number or location of pharmacies.⁷³

This attitude was confirmed in a number of statements to the Committee: for example, 'we are not required to monitor at all'.⁷⁴

– lack of evaluation

3.88 The PRA has not put in place any systematic evaluation process. The Authority is advised on a monthly basis of the number of applications finalised, but no attempts have yet been made to assess the impact of these on the rationalisation of the retail pharmacy industry. The Committee has noted on several occasions that

73. *Transcript of Evidence* (HIC), 23 August 1991, p. 330.

74. *ibid*, p. 339.

there is a tendency on the part of the key players to place the ball in someone else's court.

Recommendation

The Committee RECOMMENDS:

8. That evaluation procedures be set in place immediately to assess the effects of the restructuring on the pharmacy retail industry and on the Australian community.

3.89 In summary, the Committee considers that, in a number of instances, the operations of the PRA have created unnecessary hardship to pharmacists as a result of the imprecise notion it has of its position, the inadequate exercise of its functions and the complex procedures it follows.

The Department of Health, Housing and Community Services (DHH&CS)

3.90 The exercise of their respective functions by both the HIC and the PRA have been affected by the notion each entertains about their relationship with the DHH&CS.

3.91 Although the HIC is a statutory authority established by the *Health Insurance Commission Act 1973*, its initial independence was eroded when it was given responsibility to perform certain functions on behalf of the Secretary of the DHH&CS under the *National Health Act 1953*. The advent of the restructuring of the retail pharmacy industry placed it in an even more ambiguous position. The HIC viewed itself as 'administering the Scheme' with no input in policy-making. This accentuated the effect of the perception it had of its role in the restructuring. It did not consider that it was its place to advise anyone, Department or Minister, of any early signs of problems in the implementation of the restructuring measures.⁷⁵

3.92 The PRA's position as a statutory authority was even more ambiguous, since its secretariat is provided by the Department and some of its members are departmental officers. The Committee has been told that these persons are not on the Authority as departmental representatives. The PRA stated in evidence that DHH&CS 'was the instructing department'.⁷⁶ In both instances, the attitude taken was seen as exonerating the agency from making authoritative decisions about the restructuring. This situation was exacerbated by the attitude of the Department itself towards each agency.

75. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 998.

76. *Transcript of Evidence* (PRA), 27 November 1991, p. 986.

3.93 DHH&CS stated in evidence that 'the Department cannot issue instructions to the HIC. The HIC is a separate statutory authority reporting to the Minister'.⁷⁷ Yet, in another statement, the Committee has been told that the HIC:

was not directly involved in negotiations over the Government/Guild Agreement because it was policy development, not processing issues.⁷⁸

3.94 Such a statement acknowledges the existence of a nexus between the HIC and the Department. In another statement to the Committee, DHH&CS expressed the opinion that:

the HIC was administering the requirements in relation to approvals at that point in time. One could take the view that the HIC should have looked at the criteria.⁷⁹

Recommendation

The Committee RECOMMENDS:

9. That the Department of Health, Housing and Community Services establish appropriate liaison units for any program implemented through several agencies.

3.95 Evidence given to the Committee shows that when the Pharmacy Guild complained about the level of approvals granted, it was the Department which directed the HIC not to issue further approvals.⁸⁰ The overall impression of these conflicting statements is that neither the HIC nor the Department have a clear view of their relative position, a situation which naturally impinges on the HIC's performance of its functions.

3.96 DHH&CS' view of its relations with the PRA was given to the Committee at the conclusion of its public hearings:

There is nothing to stop the PRA making representations to the Minister about any problem they perceive with the guidelines they are operating under . . . Because the PRA has no resources of its own the Department provided the Secretariat service and the Department also provides the legal assistance.⁸¹

77. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 992ff.

78. DHH&CS to the Committee, 18 December 1991.

79. *Transcript of Evidence, op.cit.*, p. 996.

80. DHH&CS to the Committee, 18 December 1991.

81. *Transcript of Evidence* (DHH&CS), 27 November 1991, p. 1017.

3.97 The conflicting perceptions prevented proper communication between the key players and may be seen as having contributed to the particular course which the implementation of the pharmaceutical restructuring measures followed. Opening channels of communications – a process which the Committee believes has been assisted by this Inquiry, has enabled some remedial measures to be taken where necessary.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

Part 1

4.1 The Committee's Terms of Reference for the conduct of an inquiry into the implementation of pharmaceutical restructuring measures related specifically to three government agencies: the Health Insurance Commission (HIC), the Pharmacy Restructuring Authority (PRA), and the Department of Health, Housing and Community Services (DHH&CS) and their respective contribution to the program of restructure.

4.2 The first element which affected the course of the program was the use of media releases for the adoption of new procedures in public administration. The absence of an adequate legislative framework during the initial stage of the restructuring meant that confusion existed during the transition period about the obligations associated with the implementation of the program.

4.3 The Committee found that the implementation process itself was inadequate and that this placed the agencies in a difficult position even before operations began. This was particularly the case for the operations of the PRA, the main administrator of the restructuring.

4.4 In the opinion of the Committee, the dominant part played by the Pharmacy Guild of Australia on behalf of pharmacists in negotiations with the Government for a two-pronged agreement was fraught with potential difficulties in that the Guild, representing only 43 per cent of pharmacists, and only owner pharmacists at that, appeared to ignore the interests of a number of more specialised pharmacists' organisations such as the After Hours Pharmacy Association and the Isolated and Essential Pharmacy Association.

4.5 Another major problem which the Committee identified was the priority given to the 'remuneration agreement' over the 'restructuring agreement'. The emphasis placed on finalisation of the former meant that the latter was inadequately designed and, as examined in the second chapter, comprised some inappropriate provisions, incompletely and inadequately expressed. In this regard, the agencies were at a disadvantage from the start, due to factors quite unrelated to their performance. The Committee considers that the faulty nature of the restructuring framework may have influenced the manner in which the agencies dealt with the program.

4.6 The Committee has noted that, after the enactment of relevant legislation, there were several instances of disregard and ignorance of the legislative basis of their operations by the HIC and the PRA.

4.7 The interrelationship between the three agencies involved did not simplify the task of attributing responsibility. This interweaving of several administrative strands has had a significant impact on the course of the restructuring.

4.8 The time lag between the July 1990 announcement on the restructuring and the finalisation of all the legislation necessary for the full implementation of the program prolonged the transition period and accentuated the effects of the tenuous foundations on which operations were based at that time. The compounded effects of these two elements were a backlog of applications awaiting the establishment of the PRA and a general state of uncertainty among the pharmacists affected which further complicated the administration of the program.

4.9 Besides weaknesses in the framework of the restructuring, the Inquiry revealed a number of inadequacies in the agencies' performance of their functions which further accentuated the consequences of a poorly designed program.

4.10 The most noticeable aspect of the agencies' performance which has impacted on the course of the restructuring revealed by the inquiry is poor communication within and between agencies and the Department. While the Committee acknowledges that the involvement of several agencies has had a deleterious effect on communications – each considering one of the other responsible for communication with either pharmacists or the Minister – there is ample evidence to show that there were gross deficiencies in areas not related to this factor.

- The HIC was not properly briefed on the new procedures it was to apply in the granting of certain approvals and had a minimum of information to disseminate on that aspect of the restructuring which it handled during the transition period;
- Pharmacists were not advised that new rules were operative from 9 August 1990, remained ignorant of the requirements they had to meet and were subjected to unnecessary difficulties and embarrassments;
- HIC State Offices were inadequately informed about new procedures to be adopted, and so provided conflicting advice to pharmacists and were not certain of their new responsibilities;
- The PRA was not told and did not inquire about the conditions applicable to the payment of an Essential Pharmacy Allowance so leading to incorrect decisions;
- As neither the HIC nor the PRA was prepared to take the initiative and discuss the loopholes which soon appeared in the restructuring arrangements, a number of unsatisfactory developments occurred within the restructuring to further confuse pharmacists.

4.11 The Committee considers that the informal manner in which the HIC had traditionally approached the question of approvals had created a casual attitude both at agency and pharmacy levels. Neither the HIC nor the pharmacists found it easy to make a relatively sudden transition to more formal and demanding procedures.

4.12 The Committee found that the attitude prevalent at the HIC is impacting on the operations of the PRA. Since all the data required by the latter is provided or checked by the former, the persisting informal approach of the HIC has undermined the soundness of some decision-making. For example, the relative position of pharmacy 'A' which applies for an approval, to pharmacy 'B' which has just received a closure package is only available through postcode identification. The Committee considers that this procedure is quite inadequate in relation to the aims of the restructuring.

Part 2

4.13 Since the beginning of the inquiry, the Government has adopted a number of measures which aim at overcoming some of the difficulties identified by the Committee.

Appeal mechanism

4.14 The Committee's attention was drawn to the absence of appeal mechanisms to the Administrative Appeals Tribunal (AAT) for pharmacists whose application had not been recommended, that is, had been rejected, by the PRA. Subsection 105AB(7) of the Act provided for appeals to the AAT in respect of decisions made by the Secretary of the Department and was not amended to reflect new procedures in decision-making. This drafting oversight has now been remedied by the necessary amendment to the Act, and all pharmacists whose appeal could not proceed for lack of legislative provisions have now been notified of their rights. However, the Committee noted that some pharmacists who have been aggrieved by the inadequate decision-making of the HIC or the PRA have no appeal rights.

The Committee RECOMMENDS:

10. That the government consider a possible form of appeal for pharmacists who were financially disadvantaged through being given wrong advice and who are not covered by any appeal rights under the existing legislation.

Essential Pharmacy Allowance (EPA)

4.15 The Committee found that the criteria for EPA eligibility were relatively vague and unreliable: the number of prescriptions could be affected by a change in a medical practitioner's prescribing habits or a sudden change in local population; the number of hours of opening could be reduced so as to preclude eligibility for EPA, but ensure eligibility for the more lucrative closure payment. These criteria have now been removed from the Ministerial Guidelines and ceased to be applicable on 1 January 1992. Whilst the Committee considers this is a step in the right direction to enhance the credibility of the restructuring program, it remains nevertheless concerned at the developments which occurred during the first year of operations of the PRA, where a number of pharmacists were refused EPA but applied for and received a more costly closure package.

4.16 The provisions relating to the review of these eligibility criteria have now become redundant. Consequently, there is no need for pharmacists in receipt of EPA to apply annually for the allowance and this provision has also been removed from the Guidelines.

4.17 The Inquiry revealed that payments of EPA were intended to have taken effect on 1 January 1991. This was not the arrangement arrived at by the PRA. The matter has now been settled with all payments begun prior to 30 June 1991 adjusted retrospectively to 1 January 1991 and all payments approved after 30 June 1991 taking effect from 1 January 1991.

4.18 Another problem relating to the payment of EPA raised during the Inquiry was the rate of payment of the allowance. The Committee was told that the rate adopted by the PRA did not meet the intended purpose of ensuring that pharmacists in isolated areas were not disadvantaged by the new fee structure. The Government has now issued a new Ministerial Determination No. PB10 of 1991 which brings the rate of payment in line with the intended aim. The new rate came into effect on 1 January 1992.

Unmet public need

4.19 The Committee noted the difficulties which arose from the inability or unwillingness of the agency concerned to define 'unmet public need' and the consequent failure to take this important criterion into consideration when making a recommendation in respect of an approval. Ministerial Determination No. PB4 of 1991 amended by PB10 of 1991, has been further amended by the insertion of a new provision ensuring that demonstration of an unmet public need by the pharmacist is the only criterion to apply for the granting of an approval where there is no approved pharmacist within a 10 kilometre radius. The demonstration of an 'unmet public need' remains, nevertheless, an ill-defined concept in processing procedures.

4.20 The relative ease with which a pharmacist could qualify for a closure payment has been of concern to the Committee which noted, that in a number of instances, this had left some communities without access to pharmaceutical benefits, a development which was counter to one of the aims of the restructuring. The Government has amended Ministerial Determination No. PB4 as amended by PB10 of 1991 to remove the link between the EPA and closure eligibility and ensure that where there is no approved pharmacist within a radius of 10 kilometres, no closure package payment will be made. In other words, payment of an EPA will also be automatic where there is no pharmacy within a 10 kilometre radius. The Committee notes that this should considerably simplify procedures for granting of EPA, providing that there is reliable data against which to match the only requirement.

Part 3

The Committee RECOMMENDS:

1. That all legislation and subordinate legislation relating to the Pharmaceutical Benefits Scheme and the pharmaceutical restructuring measures be consolidated in one Act and associated Regulations.

Paragraph 2.16

2. That the Government discontinue the practice of relying on press releases to introduce changes in public administration.

Paragraph 2.30

3. That the Government take necessary steps to ensure the elimination of loopholes in the restructuring measures identified by the Committee.

Paragraph 2.65

4. That the development of any national program be supported by an organised strategy.

Paragraph 2.104

5. That negotiations affecting all pharmacists include consultation with representatives of all existing pharmacists' organisations as relevant.

Paragraph 3.39

6. That legislation awareness courses be mandatory for relevant officers of the Australian Public Service whose duties require knowledge of that legislation.

Paragraph 3.67

7. That streamlined procedures be adopted to enable the implementation of restructuring measures to proceed without unnecessary duplication of resources.

Paragraph 3.84

8. That evaluation procedures be set in place immediately to assess the effects of the restructuring on the pharmacy retail industry and on the Australian community.

Paragraph 3.87

9. That the Department of Health, Housing and Community Services establish appropriate liaison units for any program implemented through several agencies.

Paragraph 3.93

10. That the Government consider a possible form of appeal for pharmacists who were financially disadvantaged through being given wrong advice and who are not covered by any appeal rights under the existing legislation.

Paragraph 4.14

11. That the Senate agree that any case not resolved by the time the report is tabled be considered still referred to the Committee for reporting if necessary.

A. Olive Zakharov

Senator A. Olive Zakharov
Chairperson

May 1992

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 - Division 4B of the *National Health Act 1953* — Pharmacy Restructuring Authority
 - Health Insurance Commission Regulations (Amendment) Statutory Rules 1989 No. 195
 - Determination under s.99L of the *National Health Act 1953* No. PB1 of 1991
 - Determination under s.99L of the *National Health Act 1953* No. PB4 of 1991
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**ORGANISATIONS AND INDIVIDUALS WHO PRESENTED
WRITTEN SUBMISSIONS TO THE INQUIRY**

Aliprandi, Mr S., Narrabundah ACT
Baker, Mr K., Port Macquarie NSW
Barrington, Mr M., Gooseberry Hill WA
Bowraville Senior Citizens Club, Bowraville NSW
Cathro, Ms B., Granville NSW
Cullen, Mr T., Flemington NSW
Department of Health, Housing and Community Services, Canberra ACT
Feros Riley and Associates, Willoughby NSW
Garrett & Walmsley, Port Macquarie NSW
Health Insurance Commission, Tuggeranong ACT
Isolated and Essential Pharmacy Association, Manilla NSW
James, Ms J. and Thompson, Ms V., Glenorie NSW
Kable, Dr B., Mt Gravatt Qld
Koorda Shire Council, Koorda WA
Kozanoglu, Mr A., Coburg Vic
Manley, Ms J., Elanora Qld
Mediclean - S.W.A.S.P., Cloverdale WA
Milhulka, Ms A., Canberra ACT
Mitchell, Mr B., Wakely NSW
Murphy, Mr J., Port Macquarie NSW
Natoli, Mr R., Doonside NSW
Neilson, Mr J. and Ms G., Morayfield Qld
Ortiz, Dr M., Louisiana USA
Pharmaceutical Society of Australia, Curtin ACT
Pharmacy Restructuring Authority, Canberra ACT
Prowse, Mr B., Port Macquarie NSW
Smith, Mr R., Heidelberg Vic
Still, Mr C., Hillston NSW

The Pharmaceutical Council of Western Australia, West Perth WA
The Pharmacy Guild of Australia, Deakin ACT
Wallace, Mr M., Eastwood SA

APPENDIX 2

WITNESSES WHO APPEARED AT PUBLIC HEARINGS

| | |
|-----------------|---|
| Baker, Mr K. | Pharmacist Port Macquarie |
| Bugden, Mr G. | Pharmacist Epping |
| Candy, Mr R. | Acting Secretary Pharmacy Restructuring Authority |
| Carnell, Mrs K. | National Vice-President Pharmacy Guild of Australia |
| Cathro, Mrs B. | Pharmacist Granville |
| Cohen, Mr R. | Chairman Health Economics Pharmacy Guild of Australia |
| Dawson, Mr S. | Manager Policy and Compliance Pharmaceutical Benefits Branch Health Insurance Commission |
| Dean, Mr I. | Registrar Pharmacy Board of New South Wales |
| Duffus, Mr G. | Acting Pharmaceutical Benefits Manager Health Insurance Commission Queensland Branch |
| Ford, Ms M. | Department of Health, Housing and Community Services |
| Green, Mr A. | Pharmaceutical Benefits Manager Health Insurance Commission Queensland Branch |
| Hazell, Mr K. | Assistant General Manager Health Benefits Division Health Insurance Commission |

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|---------------------|---|
| Hickey, Mr J. | Manager Pharmaceutical Benefits Branch Health Insurance Commission New South Wales Branch |
| Howarth, Ms F. | Principal Adviser Pharmaceutical Benefits Branch Department of Health, Housing and Community Services |
| James, Mrs J. | Pharmacist Glenorie |
| Johns, Mr C. | National President Pharmacy Guild of Australia |
| Kable, Dr R. | R.S.B. Kable Medical Pty Ltd |
| Lamb, Mr A. | Former Chairman Pharmacy Restructuring Authority |
| Mahony, Mr P. | Vice-President Isolated and Essential Pharmacy Association |
| McBride, Mr D. | Chairman Pharmacy Restructuring Authority |
| McCorquodale, Dr J. | Deputy Government Solicitor (Commercial) Attorney General's Department |
| McNeil, Mr I. | First Assistant Secretary Pharmaceutical Benefits Branch Department of Health, Housing and Community Services |
| Melrose, Mr A. | Senior Solicitor Australian Government Solicitor's Office New South Wales Branch |
| Mihulka, Ms A. | Pharmacy Consultant Canberra City |
| Mitchell, Mr B. | Pharmacist Wakeley |
| Murphy, Mr J. | Pharmacist Port Macquarie |

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|------------------|--|
| Natoli, Mr R. | Vice-President New South Wales Branch Pharmaceutical Society of Australia |
| Plunkett, Mr W. | Vice-President Pharmaceutical Society of Australia |
| Powell, Mr C. | President Isolated and Essential Pharmacy Association |
| Prowse, Mr B. | Pharmacist Port Macquarie |
| Stock, Dr B. | National Director Pharmaceutical Society of Australia |
| Stuart, Mr D. | Senior Investigation Officer Health Insurance Commission New South Wales Branch |
| Swift, Ms D. | Director Pharmaceutical Benefits Branch Department of Health, Housing and Community Services |
| Tatchell, Dr P. | Director Health Economics Pharmacy Guild of Australia |
| Thompson, Mrs V. | Pharmacist Oakville |
| Trayhurn, Mr G. | Investigation officer Health Insurance Commission New South Wales Branch |
| Tucker, Mr J. | Duty Pharmacist Health Insurance Commission New South Wales Branch |
| Turk, Mr W. | Manager Pharmaceutical Benefits Division Health Insurance Commission |
| Wong, Ms D. | Administrative Officer Health Insurance Commission New South Wales |

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.

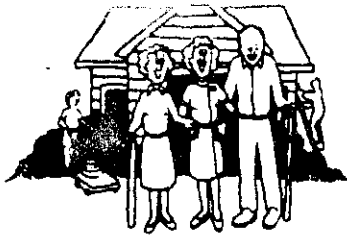
In later discussion with the Central Office HIC, from which the above letter emanated, it was suggested that the Committee misunderstood the issues, and that no attempt had been made to have the monies repaid. The above letter is a clear indication otherwise. The pharmacist also wrote to the Committee 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.

APPENDIX 4

**MINISTER FOR AGED, FAMILY AND HEALTH SERVICES:
MEDIA RELEASES OF 24 JULY AND 8 AUGUST 1990**



Minister for Aged, Family and Health Services
Hon. Peter Staples M.P.

MEDIA RELEASE

Parliament House, Canberra Phone (06) 277 7220 Fax (06) 273 4146

PS174/90

PHARMACY RESTRUCTURING

24 July 1990

A major agreement on pharmacy restructuring has been reached between the Federal Government and the Pharmacy Guild of Australia.

The in principle agreement, announced today by Ministers in the Community Services and Health portfolio, Mr Brian Howe and Mr Peter Staples, and by Mr Jim Matthews for the Pharmacy Guild, will produce improvements in the structure of the industry through rationalisation of the numbers of pharmacies and associated Micro Economic Reform measures proposed by the Guild.

They also announced that the Guild and the Government would be putting complementary submissions on remuneration to the Pharmaceutical Benefits Remuneration Tribunal by mid August.

The Ministers said the Government was willing to accept the Guild's proposal for a major restructuring of community pharmacy. They said it was essential that people have ready access to necessary medication delivered in a more cost effective manner.

The Guild welcomed the Government's confirmation that the restructuring would be voluntary with pharmacists wishing to amalgamate or close being assisted to do so. This assistance for financing of redundancy packages and amalgamations of pharmacies will be jointly financed by the Government and pharmacists.

The Guild confirmed its willingness to work closely with the Government on restructuring.

Guild President, Mr J P Matthews stated that the agreement would restore confidence and stability within the industry and the pharmaceutical profession and would thus allow pharmacists to continue to deliver their excellent service to the community.

The Government and the Guild believe that consumers and taxpayers will benefit from having a more efficient pharmacy structure. Pharmacists will benefit from the market being distributed over fewer pharmacies enabling them to achieve economies of scale. The restructuring will reduce the costs of the Pharmaceutical Benefits Scheme.



The procedures to effect the restructuring will be developed by the Guild and the Government. This will ensure that community needs are met including most importantly continuing access to the Pharmaceutical Benefits Scheme in less populated areas. The Government will also support the continuation of essential pharmacies.

They said that the restructuring would be welcomed by those many pharmacists who had approached the Government seeking rationalisation. They said that the restructuring and agreement on a joint submission to the PBRT would remove uncertainty and put pharmacy on a more stable footing.

The Ministers and the Guild said that they looked forward to working together to ensure that high quality services were maintained. The complementary submissions to the PBRT would recommend:

- . a gross margin of \$4.25 per script from 1 October 1990;
- . a reduction in the mark-up of 25% to 10% with an increase in the dispensing fee to produce the \$4.25 gross margin;
- . the resultant dispensing fee be frozen until March 1992;
- . the dispensing fee would then be indexed every six months with a further review by the PBRT after three years. This would provide sufficient time for restructuring to occur;
- . the current PBRT review be terminated.

CONTACT: Howard Conkey (06) 277 7220 (Peter Staples' office)
Robert Davies (06) 281 0911 (Pharmacy Guild)



Hon. Peter Staples M.P.

MEDIA RELEASE

Parliament House, Canberra Phone (06) 277 7220 Fax (06) 273 4146

PS182/90

PHARMACY RESTRUCTURING - RESTRICTIONS ON APPROVALS

The Minister for Aged, Family and Health Services, Peter Staples, today detailed new arrangements concerning pharmacy restructuring which had been agreed to by the Pharmacy Guild of Australia and the Federal Government on 24 July 1990.

Mr Staples said the restructuring program included assistance for encouraging amalgamation and closure of pharmacies to be jointly financed by the Government and pharmacists.

"To facilitate this program it is necessary that temporary restrictions be placed on the issuing of approvals to dispense PBS prescriptions," Mr Staples said.

"As from tomorrow any applications for approval to dispense PBS prescriptions will be issued in accordance with criteria presently being established.

"Applications already lodged will be dealt with in accordance with the rules which currently apply.

"Pharmacists who have entered into commitments with the expectations that approvals would be issued will have their applications dealt with on a case by case basis."

Arrangements for the administration of the foreshadowed industry restructuring and incentive payments will be developed over the next few weeks.

While precise details will not be decided until the consultations between the Government and the Guild are completed, it is likely that any financial assistance will be restricted to pharmacies that opened before 1 July 1989.

"The possibility of rationalisation has been known since then and it would not be appropriate to pay people who opened with that knowledge," Mr Staples said.

Contact: Howard Conkey (06) 2777220
Margaret Ford (DCS&H) (06) 2897085
Robert Davies (Pharmacy Guild of Aust) (06) 2810911

Date: 8 August 1990

RELEVANT LEGISLATION

- Section 90 of the *National Health Act 1953* before and after being amended by the *Community Services and Health Legislation (Amendment) Act 1990* on 18 December 1990
- Division 4B of the *National Health Act 1953*
- Pharmacy Restructuring Authority
- Health Insurance Commission Regulations (Amendment) Statutory Rules 1989 No. 195
- Determination under s.99L of the *National Health Act 1953* No. PB1 of 1991
- Determination under s.99L of the *National Health Act 1953* No. PB4 of 1991
- Determination under s.99L of the *National Health Act 1953* No. PB10 of 1991
- Determination under s.99L of the *National Health Act 1953* No. PB14 of 1991

Community Services and Health

COMMONWEALTH OF AUSTRALIA
NATIONAL HEALTH ACT 1953
PHARMACEUTICAL BENEFITS
DETERMINATION UNDER SECTION 99L

No. PB 1 of 1991

I, PETER RICHARD STAPLES, Minister of State for Aged, Family and Health Services, pursuant to section 99L of the National Health Act 1953, hereby make the following Determination:

Commencement

1. This Determination shall come into operation on the date on which it is notified in the Commonwealth of Australia Gazette.

Interpretation

2. In this Determination:

"the Act" means the National Health Act 1953;

"the Regulations" means the National Health (Pharmaceutical Benefits) Regulations;

"the Authority" means the Pharmacy Restructuring Authority established under section 99J of the Act;

"pharmacist" has the same meaning as in subsection 4(1) of the Act;

"approved pharmacist" has the same meaning as in subsection 84(1) of the Act;

"PBS prescription" means a prescription for a pharmaceutical benefit supplied in accordance with the Act, the Regulations and the declarations and determinations made under the Act and the Regulations, and includes -

- (a) a prescription written on an authority form pursuant to regulation 13 of the Regulations, subparagraph 14(d) of the declaration made under subsection 85(2) of the Act or subparagraph 10(d) of the determinations made under sections 85, 85A and 88 of the Act; and
- (b) a repeat authorization under regulation 26 of the Regulations; and
- (c) a deferred supply authorization under regulation 26A of the Regulations; and
- (d) an order form under regulation 16 of the Regulations for the supply of a pharmaceutical benefit to a medical practitioner for the purpose of section 93 of the Act;

"RPBS prescription" means a prescription for a pharmaceutical benefit supplied in accordance with a scheme given effect to by an instrument made pursuant to section 91 of the Veterans' Entitlement Act 1986 and includes -

- (a) a prescription written on a prior approval form; and
- (b) a repeat authorization; and
- (c) a deferred supply authorization.

Applications for Approval to Supply Pharmaceutical Benefits

3. For the purposes of paragraph 99K(1)(b) of the Act, the following are guidelines with which the Authority must comply in making a recommendation on an application by a pharmacist under section 90 of the Act:
- (a) approval of a pharmacist shall not be recommended in respect of premises located within 5 kilometres by normal access routes from other premises in respect of which a pharmacist is already approved;
 - (b) approval of a pharmacist in respect of particular premises shall not be recommended unless the pharmacist demonstrates to the Authority that there is a definite unmet public need for that approval;
 - (c) approval of a pharmacist in respect of particular premises shall not be recommended (except in the circumstances provided for in subparagraph (d)) if those premises are situated within 5 kilometres by normal access routes of other premises in respect of which there has been granted financial assistance under section 99ZD or 99ZE of the Act;
 - (d) approval of a pharmacist in respect of particular premises shall be recommended where those premises are located not more than 500 metres from other premises in respect of which that pharmacist is already approved under section 90 of the Act and from which the pharmacist proposes to cease supplying pharmaceutical benefits;
 - (e) approval of a pharmacist in respect of particular premises shall be recommended where those premises are located more than 500 metres but not more than 5 kilometres by normal access routes from other premises in respect of which that pharmacist is already approved under section 90 of the Act and from which the pharmacist proposes to cease supplying pharmaceutical benefits, provided that -
 - (i) there has been no grant of financial assistance made under section 99ZD or 99ZE of the Act in respect of any other premises situated within 5 kilometres by normal access routes from the first-named premises; and
 - (ii) the pharmacist demonstrates to the Authority that there is a definite unmet public need for that approval;
 - (f) approval of a pharmacist in respect of particular premises shall be recommended where a pharmacist is approved under section 90 of the Act in respect of those premises and where that approval is to be cancelled immediately prior to the granting of the first-named approval, as a consequence of a change of ownership arrangements of the premises;

- (g) notwithstanding anything contained in subparagraphs (a) to (f), approval of a pharmacist in respect of particular premises shall be recommended where the pharmacist entered into a financial commitment prior to 9 August 1990 (being the date on which the granting by the Secretary of approvals to pharmacists under section 90 of the Act was restricted pending the passage of legislation for pharmacy restructuring) in the expectation that an approval would be granted in respect of those premises, provided that the Authority is satisfied that there was such a prior commitment and the pharmacist produces to the Authority either -
- (i) a bank statement, supported if necessary by an affidavit by the pharmacist's solicitor or accountant; or
 - (ii) details of any contractual arrangements together with an affidavit by the pharmacist's solicitor or accountant attesting to the correctness of the date that commitment was entered into.

Applications for Essential Pharmacy Allowance

4. For the purposes of paragraph 99K(1)(c) of the Act, the following are guidelines with which the Authority must comply in making a recommendation on an application by an approved pharmacist for the payment of an essential pharmacy allowance under section 99ZB of the Act:
- (a) payment of an essential pharmacy allowance to an approved pharmacist shall be recommended in respect of approved premises -
 - (i) for which the average monthly prescription volume was not more than 1,250 during the year commencing on 1 July 1989 and ending on 30 June 1990; and
 - (ii) at which services for the supply of pharmaceutical benefits are available for not less than 20 hours per week; and
 - (iii) which are situated not less than 10 kilometres by normal access routes from the nearest other premises in respect of which a pharmacist is approved;
 - (b) for the purposes of subparagraph (a)(i) "prescription volume" means the aggregate of the number of PBS prescriptions and the number of RPBS prescriptions processed by the Health Insurance Commission on behalf of the Commonwealth during the relevant period, but excludes any prescription for a pharmaceutical benefit the supply and receipt of which is deemed, by virtue of subsection 99(2A), (2AB) or (2B) of the Act, to be a supply and receipt otherwise than under Part VII of the Act (except for the purposes of Division 1A of that Part);
 - (c) the provisions of subparagraph (a) shall be subject to annual review by the Minister and the Pharmacy Guild of Australia;
 - (d) an approved pharmacist to whom the payment of an essential pharmacy allowance has been approved shall be required to make an annual application under subsection 99ZB(1) of the Act for the continued payment of the allowance;
 - (e) the payment of an essential pharmacy allowance may be recommended to be made to an approved pharmacist who is also receiving an isolated pharmacy allowance under section 100 of the Act in respect of the same premises;

- (f) an approved pharmacist who receives an essential pharmacy allowance under section 99ZB of the Act shall not be eligible for a grant of financial assistance under section 99ZD or 99ZE of the Act;
- (g) notwithstanding the provisions of subparagraph (a), the Authority may take special circumstances into account in considering an application under subsection 99ZB(1) of the Act.

Applications for Amalgamation and Closure Payments

- 5. For the purposes of paragraph 99K(1)(d) of the Act, the following are guidelines with which the Authority must comply in making a recommendation on an application by approved pharmacists for financial assistance under section 99ZD of the Act in consequence of an agreement for the amalgamation of the premises in respect of which they are approved, or on an application by an approved pharmacist for financial assistance under section 99ZE of the Act in consequence of a proposal to cease supplying pharmaceutical benefits from the premises in respect of which the pharmacist is approved:
 - (a) a grant of financial assistance under section 99ZD or 99ZE of the Act shall be recommended only in respect of each cancellation of approval of a pharmacist resulting in a reduction in the number of premises in respect of which pharmacists are approved under section 90 of the Act;
 - (b) a grant of financial assistance under section 99ZD or 99ZE of the Act shall not be recommended to be made to an approved pharmacist unless the pharmacist agrees in writing to make redundancy payments to staff in accordance with the staff redundancy arrangements agreed to by the Minister and the Pharmacy Guild of Australia and advised to the Australian Council of Trade Unions;
 - (c) a grant of financial assistance under section 99ZD or 99ZE of the Act shall not be recommended where the pharmacist approved in respect of the premises was granted that approval after 30 June 1989;
 - (d) a grant of financial assistance under section 99ZD or 99ZE of the Act shall not be recommended in respect of premises for which an essential pharmacy allowance has been approved under section 99ZB of the Act;
 - (e) a grant of financial assistance under section 99ZD or 99ZE of the Act shall not be recommended in respect of premises which would qualify, in accordance with subparagraph 4(a) of this determination, for the payment of an essential pharmacy allowance under section 99ZB of the Act;
 - (f) the grant of financial assistance under section 99ZD or 99ZE of the Act will be made to the pharmacist approved in respect of the premises from which pharmaceutical benefits will no longer be supplied;

- (g) the amount of a grant of financial assistance under section 99ZD or 99ZE of the Act, from which any staff redundancy payments referred to in subparagraph (b) shall be made, shall be ascertained in accordance with the following table:

| <u>Years</u> | <u>Amount of Grant</u> |
|--------------|------------------------|
| 1 - 3 | \$45,000 |
| 4 - 5 | \$50,000 |
| 6 - 7 | \$55,000 |
| 8 - 9 | \$60,000 |
| 10 - 11 | \$65,000 |
| 12 - 13 | \$70,000 |
| 14 - 15 | \$75,000 |
| more than 15 | \$80,000 |

- (h) for the purposes of subparagraph (g), "years" means the number of continuous completed years as at 1 January 1991 that the pharmacist has been approved in respect of particular premises or other premises situated not more than 500 metres by normal access routes from the premises in respect of which the pharmacist is approved at that date;
- (i) for the purposes of subparagraph (g), "years" in relation to premises in respect of which the approved pharmacist is a partnership means the number of continuous completed years during which the longest serving current member of the partnership has been approved in respect of the premises;
- (j) consistent with the procedures of the Authority, the grant of financial assistance under section 99ZD or 99ZE of the Act shall be made within 30 days of the date on which the approval of the pharmacist is cancelled.

Dated this *twelfth*

day of *January*

1991.


PETER STAPLES
MINISTER OF STATE FOR AGED, FAMILY AND HEALTH SERVICES

9115304

Community Services and Health

COMMONWEALTH OF AUSTRALIA

National Health Act 1953

PHARMACEUTICAL BENEFITS

DETERMINATION UNDER SECTION 99L

No. PB 4 of 1991

I, PETER RICHARD STAPLES, Minister of State for Aged, Family and Health Services, pursuant to section 99L of the *National Health Act 1953*, hereby make the following Determination:

Commencement

1. (a) This Determination shall come into operation on the date on which it is notified in the *Commonwealth of Australia Gazette*.
- (b) The Determination under section 99L of the *National Health Act 1953* made on 9 January 1991 with effect from 23 January 1991 is hereby revoked.

Interpretation

2. In this Determination:

"the Act" means the *National Health Act 1953*;

"the Regulations" means the *National Health (Pharmaceutical Benefits) Regulations*;

"the Authority" means the Pharmacy Restructuring Authority established under section 99J of the Act;

"pharmacist" has the same meaning as in subsection 4(1) of the Act;

"approved pharmacist" has the same meaning as in subsection 84(1) of the Act;

"ready-prepared pharmaceutical benefit" means a pharmaceutical benefit in respect of which there is in force a determination under subsection 85(6) of the Act;

"PBS prescription" means a prescription for a pharmaceutical benefit supplied in accordance with the Act, the Regulations and the declarations and determinations made under the Act and the Regulations, and includes—

- (a) a prescription written on an authority form pursuant to regulation 13 of the Regulations, subparagraph 14(d) of the declaration made under subsection 85(2) of the Act or subparagraph 10(d) of the determinations made under sections 85, 85A and 88 of the Act; and
- (b) a repeat authorization under regulation 26 of the Regulations; and
- (c) a deferred supply authorization under regulation 26A of the Regulations; and
- (d) an order form under regulation 16 of the Regulations for the supply of a pharmaceutical benefit to a medical practitioner for the purpose of section 93 of the Act;

"RPBS prescription" means a prescription for a pharmaceutical benefit supplied in accordance with a scheme given effect to by an instrument made pursuant to section 91 of the *Veterans' Entitlements Act 1986* and includes—

- (a) a prescription written on a prior approval form; and
- (b) a repeat authorization; and
- (c) a deferred supply authorization.

Applications for Approval to Supply Pharmaceutical Benefits

3. For the purposes of paragraph 99K(1)(b) of the Act, the following are guidelines with which the Authority must comply in making a recommendation on an application by a pharmacist under section 90 of the Act:
- (a) approval of a pharmacist shall not be recommended in respect of premises located within 5 kilometres by normal access routes from other premises in respect of which a pharmacist is already approved;
 - (b) approval of a pharmacist in respect of particular premises shall not be recommended unless the pharmacist demonstrates to the Authority that there is a definite unmet public need for that approval;
 - (c) approval of a pharmacist in respect of particular premises shall not be recommended (except in the circumstances provided for in subparagraph (d)) if those premises are situated within 5 kilometres by normal access routes of other premises in respect of which there has been granted financial assistance under section 99ZC or 99ZD of the Act;
 - (d) approval of a pharmacist in respect of particular premises shall be recommended where those premises are located not more than 500 metres from other premises in respect of which that pharmacist is already approved under section 90 of the Act and from which the pharmacist proposes to cease supplying pharmaceutical benefits;
 - (e) approval of a pharmacist in respect of particular premises shall be recommended where those premises are located more than 500 metres but not more than 5 kilometres by normal access routes from other premises in respect of which that pharmacist is already approved under section 90 of the Act and from which the pharmacist proposes to cease supplying pharmaceutical benefits, provided that—
 - (i) there has been no grant of financial assistance made under section 99ZC or 99ZD of the Act in respect of any other premises situated within 5 kilometres by normal access routes from the first-named premises; and
 - (ii) the pharmacist demonstrates to the Authority that there is a definite unmet public need for that approval;
 - (f) approval of a pharmacist in respect of particular premises shall be recommended where a pharmacist is approved under section 90 of the Act in respect of those premises and where that approval is to be cancelled immediately prior to the granting of the first-named approval, as a consequence of a change of ownership arrangements of the premises;
 - (g) notwithstanding anything contained in subparagraphs (a) to (f), approval of a pharmacist in respect of particular premises shall be recommended where the pharmacist entered into a financial commitment prior to 9 August 1990 (being the date on which the granting by the Secretary of approvals to pharmacists under section 90 of the Act was restricted pending the passage of legislation for pharmacy restructuring) in the expectation that an approval would be granted in respect of those premises, provided that the Authority is satisfied that there was such a prior commitment and the pharmacist produces to the Authority either—
 - (i) a bank statement, supported if necessary by an affidavit by the pharmacist's solicitor or accountant; or
 - (ii) details of any contractual arrangements together with an affidavit by the pharmacist's solicitor or accountant attesting to the correctness of the date that commitment was entered into.
 - (h) notwithstanding anything contained in subparagraphs (a) to (g), approval of a pharmacist in respect of particular premises shall be recommended where the application for approval of the pharmacist in respect of those premises was made prior to 9 August 1990 (being the date on which the granting by the Secretary of approvals to pharmacists under section 90 of the Act was restricted pending the passage of legislation for pharmacy restructuring).

Applications for Essential Pharmacy Allowance

4. For the purposes of paragraph 99K(1)(c) of the Act, the following are guidelines with which the Authority must comply in making a recommendation on an application by an approved pharmacist for the payment of an essential pharmacy allowance under section 99ZA of the Act:
- (a) payment of an essential pharmacy allowance to an approved pharmacist shall be recommended in respect of approved premises—
 - (i) for which the average monthly prescription volume was not more than 1,250 during the year commencing on 1 July 1989 and ending on 30 June 1990; and
 - (ii) at which services for the supply of pharmaceutical benefits are available for not less than 20 hours per week; and
 - (iii) which are situated not less than 10 kilometres by normal access routes from the nearest other premises in respect of which a pharmacist is approved;
 - (b) for the purposes of subparagraph (a)(i) "prescription volume" means the aggregate of the number of PBS prescriptions and the number of RPBS prescriptions processed by the Health Insurance Commission on behalf of the Commonwealth during the relevant period, but excludes any prescription for a pharmaceutical benefit the supply and receipt of which is deemed, by virtue of subsection 99(2A), (2AB) or (2B) of the Act, to be a supply and receipt otherwise than under Part VII of the Act (except for the purposes of Division 1A of that Part);
 - (c) the provisions of subparagraph (a) shall be subject to annual review by the Minister and the Pharmacy Guild of Australia;
 - (d) subject to subparagraph (e), payment of the essential pharmacy allowance shall be made at a rate per PBS prescription and RPBS prescription equal to 10 per cent of the amount determined from time to time under subsection 98B(1) of the Act to be the fee for dispensing a ready-prepared pharmaceutical benefit, rounded to the nearest cent, one half cent being taken to be one cent;
 - (e) payment of the essential pharmacy allowance shall be made in respect of a total of not more than 1,000 PBS prescriptions and RPBS prescriptions supplied in any calendar month;
 - (f) an approved pharmacist to whom the payment of an essential pharmacy allowance has been approved shall be required to make an annual application under subsection 99ZA(1) of the Act for the continued payment of the allowance;
 - (g) the payment of an essential pharmacy allowance may be recommended to be made to an approved pharmacist who is also receiving an isolated pharmacy allowance under section 100 of the Act in respect of the same premises;
 - (h) an approved pharmacist who receives an essential pharmacy allowance under section 99ZA of the Act shall not be eligible for a grant of financial assistance under section 99ZC or 99ZD of the Act;
 - (i) notwithstanding the provisions of subparagraph (a), the Authority may take special circumstances into account in considering an application under subsection 99ZA(1) of the Act.

Applications for Amalgamation and Closure Payments

5. For the purposes of paragraph 99K(1)(d) of the Act, the following are guidelines with which the Authority must comply in making a recommendation on an application by approved pharmacists for financial assistance under section 99ZC of the Act in consequence of an agreement for the amalgamation of the premises in respect of which they are approved, or on an application by an approved pharmacist for financial assistance under section 99ZD of the Act in consequence of a proposal to cease supplying pharmaceutical benefits from the premises in respect of which the pharmacist is approved:
- (a) a grant of financial assistance under section 99ZC or 99ZD of the Act shall be recommended only in respect of each cancellation of approval of a pharmacist resulting in a reduction in the number of premises in respect of which pharmacists are approved under section 90 of the Act;

- (b) a grant of financial assistance under section 99ZC or 99ZD of the Act shall not be recommended to be made to an approved pharmacist unless the pharmacist agrees in writing to make redundancy payments to staff in accordance with the staff redundancy arrangements agreed to by the Minister and the Pharmacy Guild of Australia and advised to the Australian Council of Trade Unions;
- (c) a grant of financial assistance under section 99ZC or 99ZD of the Act shall not be recommended where the pharmacist approved in respect of the premises was granted that approval after 30 June 1989;
- (d) a grant of financial assistance under section 99ZC or 99ZD of the Act shall not be recommended in respect of premises for which an essential pharmacy allowance has been approved under section 99ZA of the Act;
- (e) a grant of financial assistance under section 99ZC or 99ZD of the Act shall not be recommended in respect of premises which would qualify, in accordance with subparagraph 4(a) of this determination, for the payment of an essential pharmacy allowance under section 99ZA of the Act;
- (f) the grant of financial assistance under section 99ZC or 99ZD of the Act will be made to the pharmacist approved in respect of the premises from which pharmaceutical benefits will no longer be supplied;
- (g) the amount of a grant of financial assistance under section 99ZC or 99ZD of the Act, from which any staff redundancy payments referred to in subparagraph (b) shall be made, shall be ascertained in accordance with the following table:

| <u>Years</u> | <u>Amount of Grant</u> |
|--------------|------------------------|
| 1 — 3 | \$45,000 |
| 4 — 5 | \$50,000 |
| 6 — 7 | \$55,000 |
| 8 — 9 | \$60,000 |
| 10 — 11 | \$65,000 |
| 12 — 13 | \$70,000 |
| 14 — 15 | \$75,000 |
| more than 15 | \$80,000 |

- (h) for the purposes of subparagraph (g), "years" means the number of continuous completed years as at 1 January 1991 that the pharmacist has been approved in respect of particular premises or other premises situated not more than 500 metres by normal access routes from the premises in respect of which the pharmacist is approved at that date;
- (i) for the purposes of subparagraph (g), "years" in relation to premises in respect of which the approved pharmacist is a partnership means the number of continuous completed years during which the longest serving current member of the partnership has been approved in respect of the premises;
- (j) consistent with the procedures of the Authority, the grant of financial assistance under section 99ZC or 99ZD of the Act shall be made within 30 days of the date on which the approval of the pharmacist is cancelled.

Dated this Sixteenth day of May 1991.



PETER STAPLES
Minister of State for Aged, Family and Health Services

3808 Government departments

COMMONWEALTH OF AUSTRALIA
National Health Act 1953
PHARMACEUTICAL BENEFITS
DETERMINATION UNDER SECTION 99L

No. PB 10 of 1991

I, PETER RICHARD STAPLES, Minister of State for Aged, Family and Health Services, pursuant to section 99L of the *National Health Act 1953*, hereby make the following Determination:

1. (a) Subject to subparagraph (b), this Determination shall come into operation on the day on which it is published in the *Commonwealth of Australia Gazette*.

(b) Paragraph 3 of this Determination shall come into operation on 1 January 1992.

2. Determination No. PB 4 of 1991 under section 99L of the *National Health Act 1953* made on 16 May 1991 with effect from 29 May 1991 is, in this Determination, referred to as the Principal Determination.

3. Subparagraph 4 (d) of the Principal Determination is amended by omitting "10" and substituting "20".

4. Paragraph 4 of the Principal Determination is further amended by inserting, after subparagraph (e), the following subparagraphs:

"(ea) subject to subparagraph (eb), payment of the essential pharmacy allowance shall be made in respect of PBS prescriptions and RPBS prescriptions supplied on and from the first day of the calendar month following the day on which the payment of the allowance was approved;

(eb) where an application for the payment of an essential pharmacy allowance was made before 1 July 1991 and has been approved, payment of the allowance shall be made in respect of PBS prescriptions and RPBS prescriptions supplied on and from 1 January 1991;"

5. Paragraph 4 of the Principal Determination is further amended by omitting subparagraph (f) and substituting the following subparagraph:

"(f) an approved pharmacist to whom the payment of an essential pharmacy allowance has been approved shall not be required to make an annual application for the continued payment of the allowance, but shall be required to notify the Authority of any change of circumstances in relation to any of the matters specified in subparagraph (a)."


Dated this

twelfth

day of

November

1991.



PETER STAPLES
Minister for Aged, Family and Health Services

91.52724

COMMONWEALTH OF AUSTRALIA
National Health Act 1953
PHARMACEUTICAL BENEFITS
DETERMINATION UNDER SECTION 99L

No. PB 14 of 1991

I, PETER RICHARD STAPLES, Minister of State for Aged, Family and Health Services, pursuant to section 99L of the *National Health Act 1953*, hereby make the following Determination:

1. (a) Subject to paragraph (b), this Determination shall come into operation on the day on which it is published in the *Commonwealth of Australia Gazette*.

(b) Paragraphs 5 and 6 of this Determination shall come into operation on 1 January 1992.

2. Determination No. PB 4 of 1991 under section 99L of the *National Health Act 1953* made on 16 May 1991 with effect from 29 May 1991, as amended by Determination No. PB 10 of 1991 under section 99L of the *National Health Act 1953* made on 12 November 1991 with effect from 4 December 1991, is, in this Determination, referred to as the Principal Determination.

3. Paragraph 3 of the Principal Determination is amended by omitting "(except in the circumstances provided for in subparagraph (d))" from subparagraph (c) and substituting "(except as provided by subparagraph (d) or (ea))".

4. Paragraph 3 of the Principal Determination is further amended by inserting, after subparagraph (c), the following subparagraph:

"(ea) notwithstanding anything contained in subparagraph (c) or (e), approval of a pharmacist shall be recommended in respect of premises situated not less than 10 kilometres by normal access routes from the nearest other premises in respect of which a pharmacist is approved, provided that the pharmacist demonstrates to the Authority that there is a definite unmet public need for that approval."

5. Paragraph 4 of the Principal Determination is amended by omitting subsubparagraphs (a) (i) and (ii) and subparagraph (b).

6. Paragraph 4 of the Principal Determination is further amended by omitting "any of the matters" from subparagraph (f) and substituting "the manner".

7. Paragraph 5 of the Principal Determination is amended by omitting subparagraphs (d) and (e) and substituting the following subparagraph:

"(d) a grant of financial assistance under section 99ZC or 99ZD of the Act shall not be recommended in respect of premises if the cancellation of the approval of the pharmacist approved in respect of those premises would result in there being no premises in respect of which a pharmacist is approved within 10 kilometres by normal access routes of the first-named premises;"

Dated this

fourth

day of

December

1991.



PETER STAPLES
Minister of State for Aged, Family and Health Services

9153215

COMMONWEALTH OF AUSTRALIA
National Health Act 1953
PHARMACEUTICAL BENEFITS
DETERMINATION UNDER SECTION 99L

No. PB 10 of 1991

I, PETER RICHARD STAPLES, Minister for Aged, Family and Health Services, pursuant to section 99L of the *National Health Act 1953*, hereby make the following Determination:

1. (a) Subject to subparagraph (b), this Determination shall come into operation on the day on which it is published in the *Commonwealth of Australia Gazette*.

(b) Paragraph 3 of this Determination shall come into operation on 1 January 1992.
2. Determination No. PB 4 of 1991 under section 99L of the *National Health Act 1953* made on 16 May 1991 with effect from 29 May 1991 is, in this Determination, referred to as the Principal Determination.
3. Subparagraph 4 (d) of the Principal Determination is amended by omitting "10" and substituting "20".
4. Paragraph 4 of the Principal Determination is further amended by inserting, after subparagraph (e), the following subparagraphs:

"(ea) subject to subparagraph (eb), payment of the essential pharmacy allowance shall be made in respect of PBS prescriptions and RPBS prescriptions supplied on and from the first day of the calendar month following the day on which the payment of the allowance was approved;

(eb) where an application for the payment of an essential pharmacy allowance was made before 1 July 1991 and has been approved, payment of the allowance shall be made in respect of PBS prescriptions and RPBS prescriptions supplied on and from 1 January 1991;"
5. Paragraph 4 of the Principal Determination is further amended by omitting subparagraph (f) and substituting the following subparagraph:

"(f) an approved pharmacist to whom the payment of an essential pharmacy allowance has been approved shall not be required to make an annual application for the continued payment of the allowance, but shall be required to notify the Authority of any change of circumstances in relation to any of the matters specified in subparagraph (a);".

Dated this

twelfth

day of

November

1991.


PETER STAPLES
Minister for Aged, Family and Health Services

9152724

COMMONWEALTH OF AUSTRALIA
National Health Act 1953
PHARMACEUTICAL BENEFITS
DETERMINATION UNDER SECTION 99L

No. PB 14 of 1991

I, PETER RICHARD STAPLES, Minister of State for Aged, Family and Health Services, pursuant to section 99L of the *National Health Act 1953*, hereby make the following Determination:

1. (a) Subject to paragraph (b), this Determination shall come into operation on the day on which it is published in the *Commonwealth of Australia Gazette*.

(b) Paragraphs 5 and 6 of this Determination shall come into operation on 1 January 1992.

2. Determination No. PB 4 of 1991 under section 99L of the *National Health Act 1953* made on 16 May 1991 with effect from 29 May 1991, as amended by Determination No. PB 10 of 1991 under section 99L of the *National Health Act 1953* made on 12 November 1991 with effect from 4 December 1991, is, in this Determination, referred to as the Principal Determination.

3. Paragraph 3 of the Principal Determination is amended by omitting "(except in the circumstances provided for in subparagraph (d))" from subparagraph (c) and substituting "(except as provided by subparagraph (d) or (ea))".

4. Paragraph 3 of the Principal Determination is further amended by inserting, after subparagraph (e), the following subparagraph:

"(ea) notwithstanding anything contained in subparagraph (c) or (e), approval of a pharmacist shall be recommended in respect of premises situated not less than 10 kilometres by normal access routes from the nearest other premises in respect of which a pharmacist is approved, provided that the pharmacist demonstrates to the Authority that there is a definite unmet public need for that approval;"

5. Paragraph 4 of the Principal Determination is amended by omitting subparagraphs (a) (i) and (ii) and subparagraph (b).

6. Paragraph 4 of the Principal Determination is further amended by omitting "any of the matters" from subparagraph (f) and substituting "the matter".

7. Paragraph 5 of the Principal Determination is amended by omitting subparagraphs (d) and (e) and substituting the following subparagraph:

"(d) a grant of financial assistance under section 99ZC or 99ZD of the Act shall not be recommended in respect of premises if the cancellation of the approval of the pharmacist approved in respect of those premises would result in there being no premises in respect of which a pharmacist is approved within 10 kilometres by normal access routes of the first-named premises;"


Dated this

fourth

day of

December

1991.



PETER STAPLES
Minister of State for Aged, Family and Health Services

9153215

NATIONAL HEALTH ACT 1953

(prior to 18 December 1990)

Approved pharmacists

90 (1) The Secretary may, in the Secretary's discretion, upon application by a pharmacist who is willing to supply pharmaceutical benefits on demand at particular premises, approve the pharmacist for the purpose of supplying pharmaceutical benefits at or from these premises.

(2) Where a pharmacist desires to supply pharmaceutical benefits at or from several premises (being premises at which he or she carries on, or is about to carry on, business as a pharmacist) a separate application shall be made in respect of each of the premises and, where approval is granted in respect of 2 or more premises, a separate approval shall be granted in respect of each of the premises.

(3) Where an approved pharmacist desires to supply pharmaceutical benefits at or from premises (being premises at which the pharmacist carries on, or is about to carry on, business as a pharmacist) other than premises in respect of which approval has been granted, the Secretary may, in the Secretary's discretion, on application by the approved pharmacist, grant approval in respect of these premises.

(4) Nothing in this section authorises the Secretary to grant approval to a pharmacist in respect of premises at which that pharmacist is not permitted, under the law of the State or Territory in which the premises are situated, to carry on business.

(5) Where the Secretary makes a decision granting or rejecting an application made by a pharmacist under this section, the Secretary shall cause to be served on the pharmacist, notice in writing of that decision.

National Health Act 1953

(since .18 December 1990)

Approved pharmacists

90. (1) Subject to this section, the Secretary may, upon application by a pharmacist who is willing to supply pharmaceutical benefits on demand at particular premises, approve that pharmacist for the purpose of supplying pharmaceutical benefits at or from those premises.
- (2) Where a pharmacist desires to supply pharmaceutical benefits at or from several premises (being premises at which he or she carries on, or is about to carry on, business as a pharmacist) a separate application shall be made in respect of each of the premises and, where approval is granted in respect of 2 or more premises, a separate approval shall be granted in respect of each of the premises.
- (3) Subject to this section, where an approved pharmacist desires to supply pharmaceutical benefits at or from premises (being premises at which the pharmacist carries on, or is about to carry on, business as a pharmacist) other than premises in respect of which approval has been granted, the Secretary may on application by the approved pharmacist, grant approval in respect of those other premises.
- (3A) An application under this section must be referred to the Authority.
- (3B) An approval may be granted under this section only if the Authority has recommended the grant of the approval, but the Secretary may refuse to grant an approval even if the grant has been recommended by the Authority.
- (3C) Unless sooner repealed, subsections (3A) and (3B) cease to have effect at the end of 31 March 1995.
- (4) Nothing in this section authorizes the Secretary to grant approval to a pharmacist in respect of premises at which that pharmacist is not permitted, under the law of the State or Territory in which the premises are situated, to carry on business.
- (5) Where the Secretary makes a decision granting or rejecting an application made by a pharmacist under this section, the Secretary shall cause to be served on the pharmacist, notice in writing of that decision.

s. 99L

- (ii) if a grant of financial assistance is recommended—recommendations in respect of the amount of the grant and the conditions (if any) subject to which the grant should be made; and
 - (e) to advise the Minister upon any matter concerning the operation of Division 4C of this Part that is referred to it by the Minister.
- (2) In making a recommendation under subsection (1), the Authority must comply with the relevant guidelines determined by the Minister under section 99L.
- (3) All recommendations of the Authority under subsection (1) are to be made to the Secretary.

Determination of guidelines by Minister

99L. (1) The Minister must determine in writing the guidelines subject to which the Authority is to make recommendations under subsection 99K (1).

(2) A determination under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Powers

99M. The Authority has power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.

Membership

99N. (1) The Authority consists of the following members:

- (a) a Chairperson;
 - (b) 2 persons who are to be chosen from 4 persons nominated by the Pharmacy Guild of Australia;
 - (c) one person (other than the 2 persons chosen under paragraph (b)) having experience in matters relating to the pharmacy industry;
 - (d) 3 other persons.
- (2) All members are to be appointed by the Minister on a part-time basis.

Terms and conditions not provided for by this Act

99P. A member holds office on such terms and conditions (if any), in respect of matters not provided for by this Act, as are determined in writing by the Minister.

Defective appointment not invalid

99Q. The appointment of a person as a member is not invalid because of a defect or irregularity in connection with the appointment.

Remuneration and allowances

99R. (1) A member is to be paid such remuneration as is determined by the Remuneration Tribunal, but, if no determination of that remuneration by the Tribunal is in operation, a member is to be paid such remuneration as is prescribed.

(2) A member is to be paid such allowances as are prescribed.

(3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973*.

Leave of absence

99S. The Minister may grant to a member leave of absence on such terms and conditions as to remuneration or otherwise as the Minister determines.

Disclosure of interests

99T. (1) A member who has a direct or indirect pecuniary interest in a matter being considered by the Authority must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Authority.

(2) A disclosure under subsection (1) must be recorded in the minutes of the meeting of the Authority and the member may not, unless the Minister otherwise determines:

- (a) be present during any deliberation of the Authority with respect to that matter; or
- (b) take any part in any decision of the Authority with respect to that matter.

Resignation

99U. A member may resign by writing signed and delivered to the Minister.

s. 99V

Termination of appointment

99V. (1) The Minister may terminate the appointment of a member for misbehaviour or physical or mental incapacity.

(2) If a member:

- (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for the benefit of those creditors;
- (b) fails, without reasonable excuse, to comply with an obligation imposed by section 99T; or
- (c) is absent, except on leave of absence granted under section 99S, from 3 consecutive meetings of the Authority;

the Minister may terminate the appointment of the member.

Meetings

99W. (1) The Chairperson may convene such meetings of the Authority as the Chairperson considers necessary for the efficient performance of the Authority's functions.

(2) Meetings are to be held at such places as the Chairperson determines.

(3) The Chairperson presides at all meetings at which he or she is present.

(4) Where the Chairperson is not present at a meeting, the members present must appoint one of their number to preside at the meeting.

(5) Subject to this Act, the person presiding at a meeting may give directions regarding the procedure to be followed at or in connection with that meeting.

(6) At a meeting:

- (a) 4 members constitute a quorum; and
- (b) all questions are to be decided by a majority of votes of the members present and voting; and
- (c) the person presiding has a deliberative vote and, if necessary, also has a casting vote.

(7) The Authority must keep records of its meetings.

Committees

99X. (1) The Authority:

- (a) may, with the approval in writing of the Minister, establish committees to assist it in performing its functions; and

- (b) must, if the Minister so requires in writing, establish a committee to assist it in advising the Minister on a particular matter referred to it by the Minister.
- (2) A committee consists of the persons (whether or not members of the Authority) appointed by the Minister to be its members.
- (3) An appointment under subsection (2) is on a part-time basis.
- (4) For the purposes of section 99R, the members of a committee who are not members of the Authority are taken to be members of the Authority.

Cessation of operation

99Y.⁵ Unless sooner repealed, this Division ceases to have effect at the end of 31 March 1995.

Division 4C—Financial assistance for restructuring of pharmacy industry

Interpretation

99Z. In this Division:
“amalgamation agreement” means an agreement of the kind referred to in section 99ZB.

Essential pharmacy allowance

99ZA. (1) Subject to this section, the Secretary may, upon application by the pharmacist or pharmacists approved under section 90 in respect of particular premises, approve the payment to the pharmacist or pharmacists of an essential pharmacy allowance in respect of the premises.

(2) An application under subsection (1) must be referred to the Authority.

(3) The payment of an allowance may be approved under this section only if the Authority has recommended the making of the payment, but the Secretary may refuse to approve a payment even if it has been recommended by the Authority.

(4) An approval must be in writing and set out the following details in accordance with the recommendations of the Authority:

- (a) the rate at which the allowance is payable;
- (b) any conditions subject to which the allowance is payable.

s. 99ZB

Amalgamation agreement

99ZB. (1) An amalgamation agreement is an agreement the purpose of which is to reduce the number of premises from which pharmaceutical benefits are supplied.

(2) The agreement may be in respect of 2 or more such premises in an area.

(3) The agreement is to the effect that:

- (a)** pharmaceutical benefits are to be supplied at or from one of those premises; and
- (b)** pharmaceutical benefits will cease to be supplied at or from the other premises.

(4) The parties to the agreement are the pharmacist or pharmacists (as the case may be) approved under section 90 in respect of each of the premises to which the agreement relates.

Financial assistance—amalgamation of pharmacies

99ZC. (1) All pharmacists who are parties to a particular amalgamation agreement may together make an application to the Secretary for financial assistance under this section.

(2) An application under subsection (1) must be referred to the Authority.

(3) Subject to this section, the Secretary may approve the grant of financial assistance to the pharmacists who have made an application under subsection (1).

(4) A grant may be approved under this section only if the Authority has recommended the making of the grant, but the Secretary may refuse to approve a grant even if it has been recommended by the Authority.

(5) An approval must be in writing and set out the following details in accordance with the recommendations of the Authority:

- (a)** the amount of the grant;
- (b)** any conditions subject to which the grant is made.

Financial assistance—closure of pharmacies

99ZD. (1) Subject to subsection (2), where the pharmacist or pharmacists approved under section 90 in respect of particular premises propose to cease supplying pharmaceutical benefits at or from those premises, the pharmacist, or the pharmacists together, may make an application to the Secretary for financial assistance under this section.

(2) The pharmacist or pharmacists may not make an application under subsection (1) if the supply of pharmaceutical benefits at or from the premises is to cease because the pharmacist or pharmacists have agreed to do so under an amalgamation agreement.

(3) An application under subsection (1) must be referred to the Authority.

(4) Subject to this section, the Secretary may approve the grant of financial assistance to the pharmacist or pharmacists who have made an application under subsection (1).

(5) A grant may be approved under this section only if the Authority has recommended the making of the grant, but the Secretary may refuse to approve a grant even if it has been recommended by the Authority.

(6) An approval must be in writing and set out the following details in accordance with the recommendations of the Authority:

- (a) the amount of the grant;
- (b) any conditions subject to which the grant is made.

Time limit for making applications

99ZE. An application may not be made under this Division after 28 February 1995.

Appropriation

99ZF. Payments approved under this Division are to be made out of money appropriated by Parliament for the purposes of this Division.

Cessation of operation

99ZG. Unless sooner repealed, this Division ceases to have effect at the end of 6 months after the day on which the first determination that the Tribunal makes after 31 March 1995 comes into operation.



Statutory Rules 1989 No. 195¹

Health Insurance Commission Regulations² (Amendment)

Additional functions of the Commission: provision of pharmaceutical benefits

"3E. For the purposes of subsection 8E (1) of the Act, the following functions are prescribed:

- (a) on behalf of the Secretary to the Department, to perform the functions conferred on the Secretary by Part VII of the National Health Act, other than:
 - (i) to make appointments under paragraph 101 (1) (a) of that Act; and
 - (ii) to make arrangements for the testing or analysis of pharmaceutical benefits or drugs that may be used as pharmaceutical benefits under section 102 of that Act;
- (b) on behalf of the Minister, to perform the following functions conferred on the Minister by Part VII of the National Health Act:
 - (i) to approve hospital authorities and hospitals under section 94 of that Act;
 - (ii) to vary, suspend or revoke approvals under subsection 94 (5A) of that Act;
 - (iii) to determine periods of suspension under subsection 94 (5B) of that Act;
 - (iv) to cancel approvals under subsection 98AA (1) of that Act;
 - (v) to make special arrangements for the availability of pharmaceutical services under subsection 100 (1) of that Act;
- (c) on behalf of the Minister, to perform the functions conferred on the Minister by Part VIII or IX of the National Health Act in relation to the provision of pharmaceutical benefits;
- (d) on behalf of the Secretary to the Department, to perform the functions conferred on the Secretary by Part VIII or IX of the National Health Act in relation to the provision of pharmaceutical benefits;

- (e) on behalf of the Secretary to the Department, to perform the functions conferred on the Secretary by the National Health (Pharmaceutical Benefits) Regulations;
 - (f) on behalf of the Minister, to perform the functions conferred on the Minister by the National Health (Pharmaceutical Benefits) Regulations, other than the function of determining the rate at which, and the conditions subject to which, payments of pharmaceutical benefits are to be made under regulation 18 of those Regulations;
 - (g) for the purposes of Part VII of the National Health Act, to process claims for payment relating to the provision of pharmaceutical benefits and to make payments of those claims;
 - (h) to process, on behalf of the Repatriation Commission, claims for payment relating to the provision of pharmaceutical benefits under section 91 of the *Veterans' Entitlements Act 1986* and to make payments of those claims;
 - (i) to devise and implement measures intended to prevent, or facilitate the detection of, contraventions of Part VII of the National Health Act or the National Health (Pharmaceutical Benefits) Regulations;
 - (j) to investigate cases where there are reasonable grounds to suspect that an act done by a person in relation to the provision of a pharmaceutical benefit may constitute an offence under the National Health Act, the *Crimes Act 1914* or the National Health (Pharmaceutical Benefits) Regulations and, where an investigation discloses that there is sufficient evidence to warrant a prosecution, to refer the case investigated and the information obtained in the course of the investigation to the Australian Federal Police or the Director of Public Prosecutions;
 - (k) to undertake, on behalf of the Commonwealth, action (including the institution of legal proceedings) to recover from a person an amount in respect of a pharmaceutical benefit that is recoverable by the Commonwealth from that person under the National Health Act, the National Health (Pharmaceutical Benefits) Regulations or otherwise;
 - (l) on behalf of the Secretary to the Department, to certify in accordance with section 139A of the National Health Act in relation to medical practitioners, dental practitioners, pharmacists and hospital authorities.”.
6. Regulation 4A of the Principal Regulations is repealed and the following regulation substituted:

APPENDIX 6

**AGREEMENT DATED 6 DECEMBER 1990 BETWEEN THE MINISTER
OF STATE FOR AGED, FAMILY AND HEALTH SERVICES AND
THE PHARMACY GUILD OF AUSTRALIA**

1.

THIS AGREEMENT is made the *sixth* day of *December* 1990

BETWEEN

THE HONOURABLE PETER STAPLES, MINISTER OF STATE FOR AGED,
FAMILY AND HEALTH SERVICES of the one part

AND

THE PHARMACY GUILD OF AUSTRALIA of 14 Thesiger Court, Deakin
in the Australian Capital Territory ("the Guild") of the
other part.

WHEREAS:

- A. Section 98 BAA of the National Health Act 1953 provides that where the Minister and The Pharmacy Guild of Australia or another pharmacists' organisation that represents a majority of approved pharmacists have entered into an agreement in relation to the manner in which the Commonwealth price of all or any pharmaceutical benefits is to be ascertained for the purpose of payments to approved pharmacists in respect of the supply by them of pharmaceutical benefits, the Tribunal in making a determination under section 98B of the Act while the agreement is in force, must give effect to the terms of that agreement.
- B. By letter dated 22 July 1990 to the Minister for Community Services and Health and the Minister for Aged, Family and Health Services the Guild made proposals in relation to a remuneration package for approved pharmacists in respect of the supply by them of pharmaceutical benefits.
- C. The Minister accepted those proposals in principle, orally on 24 July 1990 and in writing by letter dated 6 August 1990.

PS
DR

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DR

D. The exchange of letters contemplated that a formal written agreement would be executed by the parties.

NOW THIS AGREEMENT WITNESSES THAT:

INTERPRETATION

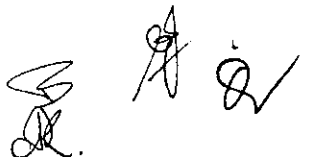
1.1 In this Agreement, unless the contrary intention appears-

"approved pharmacist" means a pharmacist for the time being approved, or deemed to be approved, under section 90 of the Act;

"approved price to pharmacists" means -

(a) in relation to a pharmaceutical benefit that is not a special pharmaceutical benefit or a form of a drug or medicinal preparation referred to in sub-paragraph 98B(2)(a)(ii) of the Act - the amount that the manufacturer of the pharmaceutical benefit and the Minister agree, from time to time, is to be taken to be, for the purposes of Part VII of the Act, the appropriate maximum price for sales of the pharmaceutical benefit to approved pharmacists;

(b) in relation to a pharmaceutical benefit that is a special pharmaceutical benefit, but is not a form of a drug or medicinal preparation referred to in sub-paragraph 98B(2)(a)(ii) of the Act - the amount determined, from time to time, under section 85B of the Act to be the amount that is, for the purposes of Part VII of the Act, to be taken to be the manufacturer's price for sales of the pharmaceutical benefit to approved pharmacists;



- (c) in relation to a pharmaceutical benefit that is a form of a drug or medicinal preparation referred to in sub-paragraph 98B(2)(a)(ii) of the Act, but is not a special pharmaceutical benefit - the amount that the manufacturer of the form of the drug or medicinal preparation and the Minister agree, from time to time, is to be taken to be, for the purposes of Part VII of the Act, the appropriate maximum price for sales of the form of the drug or medicinal preparation to approved pharmacists; or
- (d) in relation to a pharmaceutical benefit that is a form of a drug or medicinal preparation referred to in sub-paragraph 98B(2)(a)(ii) of the Act and also a special pharmaceutical benefit - the amount determined, from time to time, under section 85B of the Act to be the amount that is, for the purposes of Part VII of the Act, to be taken to be the manufacturer's price for sales of the form of the drug or medicinal preparation to approved pharmacists;

"basic wholesale price" in relation to an ingredient in a pharmaceutical benefit, means the amount that The Pharmacy Guild of Australia and the Minister agree from time to time is to be taken to be, for the purposes of Part VII of the Act, the appropriate price for sales of that ingredient to approved pharmacists;

"Commonwealth price" means the Commonwealth price referred to in section 99 of the Act in relation to the supply of pharmaceutical benefits;

"pharmaceutical benefit" means a drug or medicinal preparation in relation to which, by virtue of section 85 of the Act, Part VII of the Act applies;

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"PBS" means the Pharmaceutical Benefits Scheme under Part VII of the Act;

"the Act" means the National Health Act 1953; and

"the Commonwealth" means the Commonwealth of Australia;

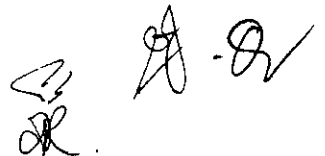
"the Minister" means the Minister of State responsible for the administration of Part VII of the Act pursuant to the Administrative Arrangements Order; and

"Tribunal" means the Pharmaceutical Benefits Remuneration Tribunal established under section 98A of the Act and includes any successors to the Tribunal or any body that performs generally the functions of the Tribunal whether in substitution for or in addition to it.

1.2 In this Agreement,

- (a) words importing a gender include any other gender; and
- (b) words in the singular number include the plural and words in the plural number include the singular.

1.3 Paragraph headings in this Agreement are for convenient reference only and have no effect in limiting or extending the language of the provisions to which they refer.

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MANNER IN WHICH THE COMMONWEALTH PRICE IS TO BE DETERMINED

2.1 The manner in which the Commonwealth price of pharmaceutical benefits is to be ascertained for the purpose of payments to approved pharmacists in respect of the supply by them of pharmaceutical benefits will be calculated as follows:

From the first day of the month following the making of a determination by the Tribunal pursuant to section 98B of the Act giving effect to this Agreement the Commonwealth price of:

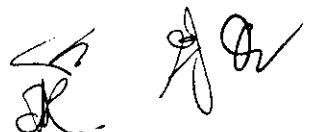
(a) ready prepared ("RP") items will comprise:

(i) a dispensing fee of \$3.43 per prescription item ("the RP dispensing fee"); and

(ii) a separate mark-up of 10% on the approved price to pharmacists for RP items ("the mark-up component"), provided however, that where the approved price to pharmacists is \$180.00 or more the mark-up component will be \$18.00 per RP item until the approved price to pharmacists reaches \$360.00 in which case the mark-up component will be 5% of the approved price to pharmacists.

(b) extemporaneously prepared and related ("EP") items will comprise:

(i) a dispensing fee of \$4.96 per prescription item ("the EP dispensing fee"); and



- (ii) a separate mark-up of 10% on the basic wholesale price for EP items ("the mark-up component"), provided however, that where the basic wholesale price is \$180.00 or more the mark-up component will be \$18.00 per EP item until the basic wholesale price reaches \$360.00 in which case the mark-up component will be 5% of the basic wholesale price.
- (c) other fees and allowances as currently determined by the Tribunal will continue to apply. The dangerous drug fee and the freight allowance in Western Australia will not be altered during the freeze period as referred to in paragraph 5.

PROVISION FOR WAGE ADJUSTMENT

- 3. For the purposes of this Agreement the Commonwealth's estimated projection for award wage movements for the first twelve months of the freeze period is 5.5%. Where on the basis of information produced to the Tribunal by either or both of the parties that the wage parameters included in the Commonwealth's estimated projection for award wage movements over a relevant period vary by more than 5 percentage points from actual award wage movements for pharmacists and pharmacy assistants in the same period, adjustments shall be determined by the Tribunal in the following manner:

The labour component (75%) of the RP and EP dispensing fees for any given period will be adjusted for the amount by which actual wages for that same period vary by more than 5 percentage points from the Commonwealth's estimated projections for wage movements for that same period.



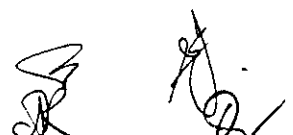
4. The parties acknowledge that the mark-up component for each of RP and EP items is directly referable to the approved price to pharmacists and the basic wholesale price respectively and changes as these elements change. It is a separate component from the RP and EP dispensing fees and will not be taken into account in the indexation referred to in paragraph 6 hereof.

5. The dispensing fees for RP and EP items will remain constant for 18 months following the date of effect of a determination by the Tribunal pursuant to section 98B of the Act giving effect to this Agreement ("the freeze period"), provided however, that the mark-up component will change as the approved price to pharmacists and the basic wholesale price change.

6. At the end of the freeze period:
 - (a) the RP and EP dispensing fees will be indexed to take account of movements in labour and non-labour cost increases ("the indexation").

The indexation of RP and EP dispensing fees to take account of movements in labour cost increases will be based on movements in award wages in accordance with principles laid down from time to time by the Australian Industrial Relations Commission during the 6 month period ending one month prior to the end of the freeze period.

The indexation of RP and EP dispensing fees to take account of movements in non-labour cost increases will be based on movements in the Consumer Price Index for the last 2 quarters for which statistics are available immediately prior to the end of the freeze period;



8.

(b) The indexation will be carried out by the Tribunal. Adjustments to the RP and EP dispensing fees will be based on the following:

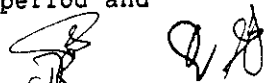
- (i) the criteria already approved by the Tribunal pursuant to sub-section 98B(4) of the Act as at the date of this Agreement, but excluding the application of criteria relating to economies of scale and adjustments on account of the mark-up effect; and
 - (ii) the latest available statistics on labour and non-labour cost increases as specified in paragraph (a) above;
- (c) the indexation will take place at half yearly intervals from the date of the first increase following the freeze period. Indexation will continue for 6 half yearly intervals after the date of the first increase;
- (d) the indexation will be effective upon a determination being made by the Tribunal pursuant to section 98B of the Act.

CONDITION PRECEDENT AND DURATION

7. This Agreement is conditional upon a determination being made by the Tribunal pursuant to section 98B of the Act giving effect to it. This Agreement will commence on the date that such a determination is made ("the commencement date") and will enure for a period of 4½ years from the commencement date.

RESTRUCTURING REDUCTIONS

8. It is agreed between the parties that in relation to a determination by the Tribunal there shall be a reduction in the respective RP and EP dispensing fees of one cent at the end of the freeze period and



an additional one cent reduction at each half yearly increase in the RP and EP dispensing fees ("the reductions"). The reductions will continue until such time as the Tribunal is advised promptly by both parties that they are to cease.

9. The Tribunal will not take the reductions into account for the purposes of indexation referred to in paragraph 6 hereof.

10. In calculating the effect of the indexation at the end of the freeze period, the Tribunal will index the RP and EP dispensing fees as outlined in paragraph 6 to arrive at 'notional' RP and EP dispensing fees ("the notional dispensing fees"). It will then subtract one cent per RP and per EP item to arrive at the actual RP and EP dispensing fees which will then be the subject of a determination to be made by the Tribunal pursuant to section 98B of the Act.

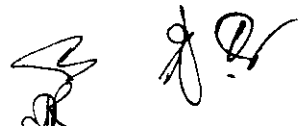
In subsequent half yearly indexations the indexation will apply to the notional dispensing fees for the preceding six month period to arrive at new notional dispensing fees.

The actual RP and EP dispensing fees for any given period will then be determined by the Tribunal based on:

(i) the notional dispensing fees for that same period;

Less

(ii) one cent multiplied by the number of half yearly indexation events (including that immediately following the freeze period).



When the Tribunal is advised by the parties that the reductions are to cease, the latest notional dispensing fees will become the new actual RP and EP dispensing fees by virtue of a determination to be made by the Tribunal pursuant to section 98B of the Act.

11. Immediately upon the execution of this Agreement by both parties the parties shall provide a copy of it to the Tribunal for a determination to be made by the Tribunal pursuant to section 98B of the Act (and in accordance with section 98BAA of the Act) giving effect to it.

WAIVER

12. A waiver by the Guild or the Minister in respect of any breach of a condition or provision of this Agreement shall not be deemed to be a waiver in respect of any other breach or of any subsequent similar breach.

SEVERANCE

13. If any provision of this Agreement is for whatever reason void, voidable by any party, unenforceable or illegal, it shall be read down so as to be valid and enforceable or, if it cannot be read down, the provision (or where possible, the offending words) shall be severed from this Agreement without affecting the validity, legality or enforceability of the remaining provisions (or parts of those provisions) of this Agreement which shall continue in full force and effect.

ENTIRE AGREEMENT AND VARIATION

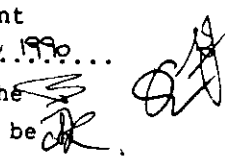
- 14.1 This Agreement constitutes the entire agreement between the parties for the purposes of section 98BAA of the Act and supersedes all communications,

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negotiations, arrangements and agreements, either oral or written, between the parties with respect to the subject matter of this Agreement.

14.2 No agreement or understanding varying or extending this Agreement, shall be legally binding upon either party unless in writing and signed by both parties.

14.3 Notwithstanding the provisions of sub-paragraphs 14.1 and 14.2 hereof this Agreement is interdependent with and collateral to and should be read in conjunction with the written agreement between the same parties dated ... 6th December 1990 ... and which relates to matters extraneous to the manner in which the Commonwealth price is to be ascertained.



APPLICABLE LAW

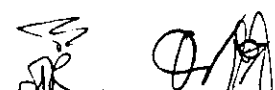
15. This Agreement shall be governed by and construed in accordance with the law for the time being in force in the Australian Capital Territory.

NOTICES

16.1 Any notice, request or other communication to be given or served pursuant to this Agreement shall be in writing and:

- (a) if given to the Minister, signed by the National President of the Guild and forwarded to the Minister;
- (b) if given to the Guild, signed by the Minister and forwarded to the National President of the Guild.

16.2 Any such notice, request or other communication shall be delivered by hand or sent by pre-paid post, facsimile or telex, to the address of the party to which it is sent.



IN WITNESS HEREOF the parties have hereunto affixed their hands and seals the day and year herein before mentioned.

SIGNED by the Minister of State)
)
for Aged, Family and Health Services,)
)
the Honourable Peter Staples)
)
in the presence of:)

.....*Angela Reidy*.....

THE SEAL of THE PHARMACY)
)
GUILD OF AUSTRALIA was hereunto)
)
affixed in pursuance of a)
)
resolution of its National)
)
Executive and in the presence of:)

.....*[Signature]*.....

National President

.....*Robert P. Davies*.....

Executive Director

THIS AGREEMENT is made the *sixth* day of *December* 1990

BETWEEN

THE HONOURABLE PETER STAPLES, MINISTER OF STATE FOR AGED,
FAMILY AND HEALTH SERVICES, of the one part

AND

THE PHARMACY GUILD OF AUSTRALIA of 14 Thesiger Court, Deakin,
ACT ("the Guild") of the other part.

WHEREAS:

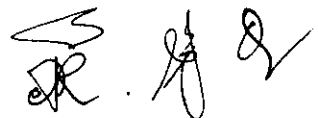
- A. The Minister and the Guild have reached agreement in relation to the implementation of a restructure package for approved pharmacists in Australia.
- B. A statutory body (Pharmacy Restructuring Authority) is to be established under the National Health Act 1953 to make recommendations to the Secretary to the Department of Community Services and Health based on guidelines determined by the Minister for the closure and amalgamation packages, essential pharmacy allowances and for the approval of pharmacists ("the Authority").

NOW THIS AGREEMENT WITNESSES THAT:

1. INTERPRETATION

- 1.1 In this Agreement, unless the contrary intention appears-

"approved pharmacist" means a pharmacist for the time being approved, or deemed to be approved, under section 90 of the Act;



"Commonwealth price" means the Commonwealth price referred to in section 99 of the Act in relation to the supply of pharmaceutical benefits;

"PBS" means the Pharmaceutical Benefits Scheme under Part VII of the Act;

"pharmaceutical benefit" means a drug or medicinal preparation in relation to which, by virtue of section 85 of the Act, Part VII of the Act applies;

"RPBS" means the Repatriation Pharmaceutical Benefits Scheme;

"the Act" means the National Health Act 1953;

"the Commonwealth" means the Commonwealth of Australia;

"the Minister" means the Minister of State responsible for the administration of Part VII of the Act pursuant to the Administrative Arrangements Order; and

"Tribunal" means the Pharmaceutical Benefits Remuneration Tribunal established under section 98A of the Act and includes any successor to the Tribunal or any body which performs generally the function of the Tribunal in substitution for or in addition to it.

1.2 In this Agreement

(a) words importing a gender include any other gender; and



(b) words in the singular number include the plural and words in the plural number include the singular.

1.3 Paragraph headings in this Agreement are for convenient reference only and have no effect in limiting or extending the language of the provisions to which they refer.

1.4 Notwithstanding any other provision in this Agreement, this Agreement is interdependent with and collateral to and shall be read in conjunction with the written agreement between the same parties dated 6th December 1990 being an agreement for the purposes of section 98BAA of the Act ("the section 98BAA Agreement"). Any words or phrases not otherwise defined in this Agreement will have the same meaning as is ascribed to them in the section 98BAA Agreement.

[Handwritten initials and signature]

1.5 This Agreement does not fall within the provisions of section 98BAA of the Act for the reason that it does not deal with matters appropriate for determination by the Tribunal pursuant to section 98B of the Act.

1.6 This Agreement will only come into effect immediately upon a determination being made by the Tribunal giving effect to the section 98BAA Agreement. The commencement date for the section 98BAA Agreement (as defined in that Agreement) will be the commencement date for this Agreement. This Agreement will enure for a period of 4½ years from the date on which it comes into effect.

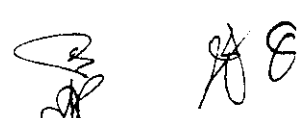
GENERAL OBJECTIVES

2.1 The parties record that it is their intention that the terms of this Agreement will produce a more efficient community pharmacy structure in Australia, resulting in benefits to both parties ("the structural reform").

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- 2.2 The structural reform includes the closure and/or amalgamation of a number of community pharmacies in Australia. Payments for pharmacy closures and amalgamations will be in the form of a package available to pharmacists whose businesses were operational prior to 1 July 1989 ("the closure and amalgamation packages").
- 2.3 The parties agree that the costs of the structural reform will be financed equally by the Commonwealth and approved pharmacists ("the restructuring costs") subject to any formula adjustments as per paragraphs 12 and 13.

RESTRUCTURING

- 3.1 Initially, the cost of the closure and amalgamation packages will be fully funded by the Commonwealth. Approved pharmacists will commence to bear part of the burden of the funding of these packages following the end of the freeze period (as defined in the section 98BAA Agreement) in the form of a reduction in the dispensing fee for each PBS processed prescription from what it would otherwise be. There will be a one cent cumulative reduction ("the reduction") from the respective RP and EP dispensing fees at each half yearly review of those fees as part of the indexation process provided for in the section 98BAA Agreement. The reduction will continue until the total cumulative amount equals the approved pharmacists' share of the restructuring costs. The process by which the reduction is taken into account in determining RP and EP dispensing fees is set out in paragraph 10 of the section 98BAA Agreement.
- 

- 3.2 The dollar amount of the approved pharmacists' share of the restructuring costs can only be ascertained once all applications by eligible approved pharmacists have been lodged with the Authority and processed by the Commonwealth. The Minister will, as soon as possible after the precise amount of the approved pharmacists' share of the restructuring costs has been calculated, advise the Guild in writing of the amount and how exactly it has been calculated.
- 3.3 The reduction will not be subject to interest or indexation and for the purposes of the indexation the Tribunal will not take the reduction into account in making any determination whilst the pharmacists' share of the restructuring costs has yet to be recouped by the Commonwealth.

STATEMENT OF ACCOUNT

- 4.1 The Minister will provide to the Guild at half yearly intervals a Statement of Account showing the total of the pharmacists' share of the restructuring costs less the cumulative effect of reductions from RP and EP dispensing fees, leaving the unrecouped balance of the approved pharmacists' share of the restructuring costs as at the end of that half yearly period ("a Statement of Account").
- 4.2 When the approved pharmacists' share of the restructuring costs first falls below \$500,000, the Minister will provide a Statement of Account to the Guild on a monthly basis or more frequently as may be agreed between the parties.



FRESH DETERMINATION

5. Upon the recoupment by the Commonwealth of the approved pharmacists' share of the restructuring costs, the parties will request the Tribunal to make a fresh determination in respect of the RP and EP dispensing fees from the first day of the next month to automatically restore them to the level they would have been had the reductions not been made. The reduction (as accumulated) will therefore be added back to the applicable RP and EP dispensing fees at that time.

CLOSURE AND AMALGAMATION PAYMENTS

- 6.1 Subject to the guidelines issued under the Act not being disallowed by the Federal Parliament, the Authority, in considering applications for closure and amalgamation packages, will first give priority to amalgamations over closures. Secondly, priority will also be given to applications from pharmacists in high density areas in terms of numbers of pharmacies, and finally to applications from pharmacists with low prescription volume pharmacies (less than 15,000 processed PBS prescriptions per annum).



6.2 The total lump sum payment for any closure and/or amalgamation (from which sum, all staff redundancy payments will be met) is calculated as follows:

| <u>Years</u> | <u>Payment</u> |
|--------------|----------------|
| 0 - 3 | \$45,000 |
| 4 - 5 | \$50,000 |
| 6 - 7 | \$55,000 |
| 8 - 9 | \$60,000 |
| 10 - 11 | \$65,000 |
| 12 - 13 | \$70,000 |
| 14 - 15 | \$75,000 |
| More than 15 | \$80,000 |

6.3 "Years" means the number of continuous years prior to 1 January 1991 that an approved pharmacist has completed with the same approval number or with different approval numbers over a continuous period of years in the same premises or reasonably proximate premises. Approved pharmacists who opened pharmacy premises after 30 June 1989 will not be eligible for the closure and amalgamation packages. In relation to partnerships, "years" means the number of continuous years of association with the pharmacy of the longest serving current member of the partnership.

6.4 Payments will be made to the approved pharmacist in respect of the closing pharmacy and only made for each net reduction in approval numbers. Payment will be made within 30 days of cancellation of the approval, consistent with the procedures of the Authority.



- 6.5 A closure or amalgamation payment will not be made to an approved pharmacist unless that pharmacist agrees to make redundancy payments in accordance with the staff redundancy arrangements agreed between the Minister and the Guild and advised to the ACTU (as set out in Schedule 1 hereto).

ESSENTIAL PHARMACY ALLOWANCE

- 7.1 An allowance known as the Essential Pharmacy Allowance ("EPA") will be payable by the Commonwealth to approved pharmacists to maintain an essential pharmacy service and to maintain access to pharmaceutical benefits.
- 7.2 The EPA will be 10% of the R.P. dispensing fee, currently \$3.43, and will be paid for each processed PBS and RPBS prescription up to 1,000 prescriptions in any month.
- 7.3 Subject to the guidelines issued under the Act not being disallowed by Federal Parliament, the guidelines for payment of the EPA are:
- (a) (i) if the pharmacy was trading for the entire 1989/90 period, an annual prescription volume of 15,000 or less based on processed PBS and RPBS prescriptions for that period, or
- (ii) if the pharmacy was not trading for the entire 1989/90 period the average monthly prescription volume for that pharmacy must be equal to or less than 1250 processed PBS and RPBS prescriptions;



(b) The distance from the nearest pharmacy by reasonable road route is to be greater than 10 kilometres; and

(c) The pharmacy is open to the public for at least 20 hours per week.

7.4 Notwithstanding anything in these guidelines special circumstances will be considered by the Authority.

7.5 Pharmacies accepting the EPA will not be eligible for the closure and amalgamation package.

7.6 Pharmacists receiving the Isolated Pharmacy Allowance ("IPA") will be eligible to apply for the EPA.

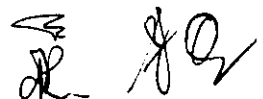
7.7 The guidelines set out in sub-paragraph 7.3 will be reviewed by the parties annually.

7.8 Applicants for the EPA will submit applications for the allowance each year.


GUIDELINES RELATING TO THE GRANTING OF AN APPROVAL PURSUANT TO SECTION 90 OF THE ACT

8.1 To assist in the restructuring process, restrictions will apply from 9 August 1990 to 31 March 1995 on the issue of new approvals.

8.2 Persons who applied for an approval before 9 August 1990 will have their applications dealt with in accordance with procedures in place at the time of application.



- 8.3 Pharmacists who have entered into financial commitments with the expectation of being granted an approval will have their applications dealt with on a case by case basis.
- 8.4 New approvals will only be issued where there is a demonstrated community need.
- 8.5 Subject to the guidelines issued under the Act not being disallowed by the Federal Parliament, the Authority will consider applications for approval based on the following guidelines:
- (a) a new approval will not be granted where there is an existing approved pharmacy operating within 5 kilometres by normal access routes from the proposed site;
 - (b) a new approval will require the demonstration of a definite unmet public need;
 - (c) a new approval will not be granted if a closure or amalgamation payment has been made with respect to a previous approved site within 5 kilometres of the proposed new pharmacy;
 - (d) existing approvals can be relocated within their business centre, which is defined as the area within 500 metres of the existing approved site;
 - (e) existing approvals can be relocated to a new business centre where the new location is between 500 metres and 5 kilometres of the original site and a closure or amalgamation payment has not been made for a site within 5 kilometres of the new site and a definite unmet public need can be demonstrated.



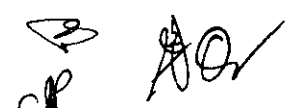
8.6 Nothing in this Agreement will prevent the granting of a new approval number to a pharmacy which continues to operate on the occasion of or following its sale, amalgamation or change in ownership arrangements.

ADDITIONAL CHARGES

9.1 For RP and EP items priced below the maximum general patient contribution as defined in the Act pharmacists will be able to charge:

- (a) the Commonwealth price;
- (b) an additional patient charge (currently 72 cents) which when combined with the Commonwealth price will equal the list or agreed price as referred to in subsection 84C(7) of the Act ("the list price"); and
- (c) a further additional patient charge referable to the maximum general patient contribution applying at the time and in accordance with the following table:

| <u>Maximum</u> <u>General</u> <u>Patient</u> <u>Contribution</u> | <u>Additional</u> <u>Patient</u> <u>Charge</u> |
|---|--|
| \$15 | \$2.00 |
| \$16 | \$2.10 |
| \$17 | \$2.20 |
| \$18 | \$2.30 |
| \$19 | \$2.40 |
| \$20 | \$2.50 |



- 9.2 If the maximum general patient contribution exceeds \$20 the additional patient charge will be determined by negotiations between the Guild and the Minister.
- 9.3 This further additional patient charge cannot be recorded on the Prescription Record Form ("PRF") to accumulate towards the Safety Net Entitlement limit as defined in Section 87 of the Act ("the Safety Net Limit").
- 9.4 Approved pharmacists will be free to discount these items below the list price.
- 9.5 The Minister will not move to amend existing legislative provisions in relation to discounting of the patient contribution.

CONSUMER INFORMATION

- 10.1 The amount eligible for the Safety Net Limit is to be entered on the PRF for general patients as defined in the Act. The Guild undertakes to recommend to its members that the price charged is to be entered on the prescription label.
- 10.2 The Guild will recommend to its members that they display, for the information of the public, a price book or information sheets showing the actual price to be charged for all items listed on the PBS priced at less than the level of the maximum general patient contribution.
- 10.3 The intention of sub-paragraphs 10.1 and 10.2 is to allow patients to be able to readily compare what the pharmacist charges with the list price.

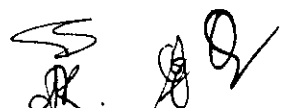


LEGAL ACTIONS

11. The Guild will withdraw its legal actions in train and pending against the Tribunal and/or the Minister subject to the Tribunal making a determination pursuant to section 98B of the Act giving effect to the section 98BAA agreement on the basis that the parties pay their own legal costs.

ADJUSTMENT TO THE SHARE OF RESTRUCTURING COSTS

- 12.1 Adjustment to the parties' shares of the restructuring costs will apply if on the basis of information produced by the Guild to the Minister, the actual number of processed prescriptions varies by more than 5% from the Commonwealth's estimate of total processed PBS prescriptions (as set out in paragraph 14). For this purpose, any volume variation must be based on genuine changes rather than any shifts between categories e.g. any adjustment to patient contributions which moves prescriptions in and out of subsidised areas.
- 12.2 The general PBS prescription volumes for the financial year 1989/90 for items with a Commonwealth price in the range \$11.00 to \$15.00 are set out in Schedule 2 hereto. These volumes are to be indexed by the parties each financial year by a growth factor of 2% which the parties agree is the long term underlying increase in general PBS prescription volumes. Changes in the general PBS prescription volumes resulting from future increases in the general patient contribution and increases in the Commonwealth price of individual pharmaceutical benefits are deemed to balance each other.



13.1 For the purposes of calculating the adjustment to each party's share of the restructuring costs the following formula will apply:-

A - Actual number of processed PBS prescriptions

B - Commonwealth's estimate of total processed PBS prescriptions

T - Actual processed PBS prescriptions which fall below the Commonwealth's estimate of total processed PBS prescriptions adjusted by the agreed 5%

T₁ - Actual processed PBS prescriptions which exceed the Commonwealth's estimate of total processed PBS prescriptions adjusted by the agreed 5%

(i) Where Actual Processed PBS Prescriptions Fall Below The Commonwealth's Estimate:

$$(B \times .95) - A = T$$

The resultant figure T is multiplied by the average gross margin for that year, calculated by adding the average RP dispensing fee and the average mark-up component for that same year. This amount will then be added to the Commonwealth's share of the restructuring costs as defined in paragraph 3 hereof.

(ii) Where Actual Processed PBS Prescriptions Exceed The Commonwealth's Estimate:

$$A - (B \times 1.05) = T_1$$



The resultant figure T_1 is multiplied by the average gross margin for that year as calculated by adding the average RP dispensing fee and the average mark-up component for that same year. This amount will then be deducted from the Commonwealth's share of the restructuring costs as defined in paragraph 3 hereof.

- 14.1 For the purposes of this Agreement the Commonwealth's estimate of processed PBS prescriptions for each of the years set out below is that specified opposite that year:

| Year | Estimate in millions |
|---------|----------------------|
| 1990/91 | 115.579 |
| 1991/92 | 128.936 |
| 1992/93 | 143.042 |
| 1993/94 | 157.546 |

- 14.2 The parties agree that these statistics represent the Commonwealth's estimates of processed PBS prescriptions prior to the 1990/91 PBS Budget changes.
- 15.1 Subject to sub-paragraph 15.2 hereof, the maximum liability of each party to bear part of the burden of the restructuring costs pursuant to paragraph 3 hereof is limited to the extent of the other party's share of the restructuring costs.
- 15.2 If (i) at any point in time the Commonwealth's share of the burden of the restructuring costs exceeds the total restructuring

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costs as a result of the operation of paragraph 13 hereof, the Essential Pharmacy Allowance referred to in sub-paragraph 7.2 will be increased from 10 per cent to a maximum of 20 per cent of the RP dispensing fee applicable at that time; and

(ii) as a result of the operation of paragraph 13 the amount calculated there exceeds the distribution referred to in sub-paragraph 15.2(i) hereof, the Guild and the Minister will consider whether any further adjustment is appropriate.

16. For the purposes of this Agreement, the average approved price to pharmacists for processed PBS prescriptions dispensed between 1 January 1990 and 30 June 1990, will be the basis for calculating the mark-up component for RP and EP items.

The average approved price to pharmacists for any given period is calculated in accordance with the formula:

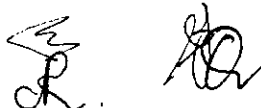
A divided by B equals C

where: -

A = Ingredient and container cost of processed PBS prescriptions

B = Number of processed PBS prescriptions

C = Average approved price to pharmacists



For the 6 month period ending 30 June 1990 the following figures apply:

A - \$412,589,260

B - 50,148,449 and

C - \$8.227

17.1 For the purposes of this Agreement, the basis for calculating the RP dispensing fee is the average approved price to pharmacists for the period 1 January 1990 to 30 June 1990, namely \$8.227.

17.2 The RP dispensing fee is calculated by subtracting the mark-up component from the gross margin, that is:

$$\$4.25 - (10\% \text{ of } \$8.227) = \$3.43.$$

The EP dispensing fee is calculated by applying a multiplier of 1.446 to the RP dispensing fee, that is:

$$\$3.43 \times 1.446 = \$4.96.$$

18.1 Following the automatic indexation period the Guild and the Minister may come to an agreement revising and reviewing the manner of determining the Commonwealth price of pharmaceutical benefits. In the event that such an agreement is reached and executed by the parties, it will be submitted to the Tribunal and the Tribunal will insofar as it is empowered to do so under the Act, give effect to any such agreement by making a determination pursuant to section 98B of the Act.



- 18.2 If no agreement is reached prior to the expiration of the automatic indexation period referred to in the section 98BAA Agreement for the purposes of a determination by the Tribunal pursuant to section 98B of the Act, the Guild or the Minister may request the Tribunal to conduct a review to determine whether the then existing manner of determining the Commonwealth price of pharmaceutical benefits dispensed by approved pharmacists requires revision. The parties acknowledge and agree that the review as proposed, will be designed to set fair and reasonable remuneration for pharmacists based on a reasonably efficient pharmacy structure ("the review").

PROVISION OF PHARMACEUTICALS

19. The Minister will not seek to have pharmaceutical benefits supplied through arrangements other than retail pharmacy solely on cost grounds. Where the Minister believes it is appropriate on non-cost grounds to make alternative arrangements the Guild will be genuinely consulted to the maximum extent possible.

WHOLESALE SURCHARGES

20. In discussions with wholesalers, the issue of wholesaler surcharges (so that purchases made within the wholesalers' normal trading terms are obtained at the approved price to pharmacists) will be resolved to the satisfaction of the parties.

PHARMACY OWNERSHIP

21. The Minister will not initiate or promote action to seek to change pharmacy ownership laws.



CHANGES TO THE PBS

22. The Minister will genuinely consult with the Guild at an early stage to the maximum extent possible on PBS matters affecting retail pharmacy.

WAIVER

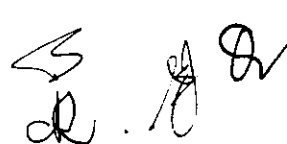
23. A waiver by the Minister or by the Guild in respect of any breach of a condition or provision of this Agreement shall not be deemed to be a waiver in respect of any other breach or of any subsequent similar breach.

SEVERANCE

24. If any provision of this Agreement is for whatever reason void, voidable by any party, unenforceable or illegal, it shall be read down so as to be valid and enforceable or, if it cannot be read down, the provision (or where possible, the offending words) shall be severed from this Agreement without affecting the validity, legality or enforceability of the remaining provisions (or parts of those provisions) of this Agreement which shall continue in full force and effect.

ENTIRE AGREEMENT AND VARIATION

- 25.1 This Agreement and the section 98BAA Agreement constitute the entire agreement between the parties and supersede all communications, negotiations, arrangements and agreements, either oral or written, between the parties with respect to the subject matter of these Agreements.



25.2 No agreement or understanding varying or extending this Agreement, shall be legally binding upon either party unless in writing and signed by both parties.

APPLICABLE LAW

26. This Agreement shall be governed by and construed in accordance with the law for the time being in force in the Australian Capital Territory.

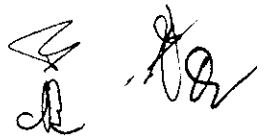
NOTICES

27.1 Any notice, request or other communication to be given or served pursuant to this Agreement shall be in writing and:

(a) if given to the Minister, signed by the National President of the Guild and forwarded to the Minister.

(b) if given to the Guild, signed by the Minister and forwarded to the National President of the Guild.

27.2 Any such notice, request or other communication shall be delivered by hand or sent by pre-paid post, facsimile or telex, to the address of the party to which it is sent.

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IN WITNESS HEREOF the parties have hereunto affixed their hands and seals the day and year herein before mentioned.

SIGNED by the Minister of State)
)
for Aged, Family and Health Services,)
)
the Honourable Peter Staples,)
)
in the presence of:)



..... *Angela Perry*

THE SEAL of THE PHARMACY)
)
GUILD OF AUSTRALIA was hereunto)
)
affixed in pursuance of a)
)
resolution of its National)
)
Executive and in the presence of:)

..... *Robert P. Davis*

National President
Executive Director

**STAFF REDUNDANCY ARRANGEMENTS -
AGREEMENT BETWEEN THE GUILD AND THE MINISTER**

General

- 1.1 The following redundancy package represents a national basic compensation to all permanent full-time and part-time staff employed in retail pharmacy that may be displaced as a result of the Agreement between the Minister of State for Aged, Family and Health Services and The Pharmacy Guild of Australia to implement the Government's objectives for micro-economic reform of the retail pharmacy industry.
- 1.2 This national minimum compensation will of course be over-ridden by awards in those States and Territories that provide more generous benefits than are covered by the relevant benefits under these arrangements.
- 1.3 Notwithstanding the benefits available under these arrangements, all employer pharmacists shall be responsible for paying out to redundant employees entitlements in respect of annual leave and long service leave which may accrue under the provisions of a relevant award or legislation.
- 1.4 Notwithstanding the benefits available under these arrangements, it is open to employer pharmacists, at their discretion, to provide benefits in excess of the minimum requirements, including severance pay entitlements, to employees with longer service histories or for other unspecified reasons that warrant special recognition.

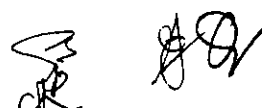


Coverage

- 2.1 This compensation is specifically directed in its application to those affected full-time and part-time employees unable to find on their own behalf, or to be assisted to find through the offices or agents of the Guild, alternative employment.
- 2.2 These arrangements do not apply to displaced staff finding alternative employment either on their own behalf, or through the assistance of the offices or agents of the Guild.
- 2.3 These arrangements apply only to those permanent full-time and part-time employees who were employed immediately prior to the coming into operation of the Community Services and Health Legislation Amendment Bill, 1990, which establishes the Pharmacy Restructuring Authority.

Period of Notice

- 3.1 All employees subject to these arrangements shall be entitled to receive four weeks' notice of termination of employment with one day off during each week of notice to seek other employment, without loss of pay.
- 3.2 In the event that less than four weeks' notice is provided, employees shall be entitled to full payment in lieu of the period of notice falling short of four weeks.



Severance Pay

4.1 Redundant employees shall be entitled to severance pay in accordance with the following scale:

| Years of Service | Payment |
|-------------------------|--------------|
| 1 year but less than 2 | 4 weeks' pay |
| 2 years but less than 3 | 6 weeks' pay |
| 3 years but less than 4 | 7 weeks' pay |
| 4 years or more | 8 weeks' pay |

Weeks' pay means the ordinary time rate of pay.

Assistance with Finding Suitable Alternative Employment

5.1 A committee is to be set up by each Branch of the Guild to facilitate industry restructuring. It is a requirement of these arrangements that the Guild will arrange for each committee to co-ordinate a national industry response to the redeployment, wherever possible, of displaced staff from those pharmacies that choose to amalgamate or close under the terms of the Agreement between the Minister and the Guild dated ... *6th December...1990.....*

5.2 Where possible, staff from pharmacies that choose to amalgamate will be retained on transfer at the same level without loss of benefits or continuity of service, and shall not be entitled to the benefits of these arrangements by reason of their transfer of employment.

5.3 Where staff are retained on transfer to lower paid duties or reduced hours, they shall be entitled to the same period of notice of transfer as they would have been entitled to on termination. However, at the option of the employer, payment in lieu of such notice, or part

of the period of such notice, may be made. The amount of such payment is to be based on the difference between the former ordinary time rate of pay and the new ordinary time rate of pay, for the period of notice still owing.

5.4 Where staff are not retained, every effort will be made to find alternative employment within the industry in nearby pharmacies. Where such employment is secured, the employee shall not be entitled to the benefits of these arrangements by reason of their transfer of employment. Where the alternative employment involves lower paid work, the employee shall be entitled to the application of the provisions of paragraphs 3.1 and 3.2 above.

5.5 Where staff are unable to be satisfactorily redeployed, they shall be entitled to all other benefits as set out above.



SCHEDULE 2

PBS PRESCRIPTION VOLUMES FOR 1989/90 FOR ITEMS WITH A
COMMONWEALTH PRICE IN THE RANGE \$11 TO \$15

| RANGE \$ | VOLUME |
|-------------|------------------|
| 11.01-11.50 | 3,539,562 |
| 11.51-12.00 | 954,290 |
| 12.01-12.50 | 1,056,758 |
| 12.51-13.00 | 709,941 |
| 13.01-13.50 | 1,260,093 |
| 13.51-14.00 | 429,216 |
| 14.01-14.50 | 368,657 |
| 14.51-15.00 | 202,555 |
| TOTAL | <u>8,521,072</u> |



SUMMARY OF THE LEGAL ASPECTS AFFECTING THE PROCESS OF APPROVING PHARMACISTS' APPLICATION TO SUPPLY PHARMACEUTICAL BENEFITS IN THE PERIOD FROM AUGUST 1990 TO JANUARY 1991

1. **The 'Old' Law**

1. When the Minister for Aged, Family and Health Services, the Hon Peter Staples, issued his media release 'Pharmacy Restructuring – Restrictions on Approvals' on 8 August 1990, the main existing provisions for dealing with applications by pharmacists for approval were ss.90 and 105AB(7) of the *National Health Act 1953* and the non-legislative procedures, Approval to Supply Pharmaceutical Benefits, which became effective on 1 July 1981 and were apparently unchanged.
2. Section 90 gave the Secretary a very wide discretion (delegated to the Health Insurance Commission in 1989) to grant or reject a pharmacist's application. Section 105AB(7) imposed limitations on the exercise of that discretion by providing for review by the AAT of a decision under s.90 if an application was rejected. The AAT could ensure that the discretion was exercised consistently and fairly. The Committee was given the procedures, which, apart from restrictions on friendly societies and medical practitioners, dealt mainly with matters such as premises, approval by State authorities, changes of partnerships and similar matters. From these provisions, it appears that, until restructuring commenced, if State and local laws were complied with and a person was professionally qualified, the law of supply and demand virtually took over.
2. **Possible Changed Guidelines under the 'Old' Law**
3. The old form of s.90 gave a wide discretion and it was possible to change the way it was exercised, provided that natural justice and fairness, as interpreted by the Courts and the AAT, were complied with.
4. Was a document called *Guidelines Relating to the Granting of an Approval Pursuant to Section 90 of the Act*, which I am told was to be applied from 3 December 1990, such a change? There is nothing on the document that I have to indicate under what authority these *Guidelines* were formulated or issued. They appear to be almost identical to clauses in the second Agreements of 23 November 1990 and 6 December 1990 referred to below. In one clause the *Guidelines* refer to the disallowance of guidelines under the Act and to the Authority. Neither of these yet existed, so it is unclear how the *Guidelines* were to operate. Their status and operation needs to be clarified.

3. Development of the 'New' Law

(a) The Minister's Media Release of 8 August 1990

5. The Minister's media release of 8 August 1990 spelled out some details of the restructuring process. Of course, the media release was not legally binding on anyone. Indeed, the release is careful to use such phrases as 'in accordance with criteria presently being established' and 'will be developed over the next few weeks'.

(b) Agreements of 23 November 1990

6. The next development was the signing of two inter-related Agreements of 23 November 1990 between the *Commonwealth* and the Pharmacy Guild. These Agreements were not ones to which s.98BAA of the *National Health Act 1953* applied. Such an Agreement had to be made 'between the *Minister* and the Pharmacy Guild of Australia or another pharmacy organisation representing a majority of approved pharmacists'.

(c) Agreements of 6 December 1990

7. Two Agreements that are almost identical with those of 23 November 1990 were entered into between the Minister and the Pharmacy Guild of Australia on 6 December 1990.
8. The first Agreement is a s.98BAA Agreement dealing with pricing and was later given effect to by the Pharmaceutical Benefits Remuneration Tribunal on 20 December 1990 as required by s.98BAA. It has little relevance to our issues, but the second Agreement of 6 December deals with approvals in some detail in paragraphs that were also in the Agreement of 23 November 1990 and in the 3 December 1990 *Guidelines*. It specifically states that it is not a s.98BAA Agreement, so it does not directly impact on individual approved pharmacists through the Tribunal's Determinations. Indeed, unless there are special rules, the Agreement could not bind individual pharmacists as they are not parties to it. It provided that it did not come into effect until the Remuneration Tribunal made its Determination under the first Agreement and that occurred on 20 December 1990. In addition, the paragraph containing the new rules for approvals provided that that part was not to be effective until there was an Authority and the guidelines had not been disallowed by Parliament. This takes us well into 1991.

(d) Changes to the National Health Act 1953

9. A new regime was set in place as from 18 December 1990 by the *Community Services and Health Legislation Amendment Act 1990*. Henceforth, a s.90 approval required both a recommendation from the Authority and approval by the Secretary. However, s.99K(2) provides that, in recommending under s.99K(1), the Authority 'must comply with the relevant guidelines determined

by the Minister under section 99L'. Section. 99L(1) states that the 'Minister must determine in writing the guidelines subject to which the Authority is to make recommendations under subsection 99K(1)'.

10. Until the Minister had determined guidelines, the new machinery could not operate. The guidelines became effective on 23 January 1991.

(e) **The New Guidelines**

11. The s.99L Ministerial guidelines in *Determination No. PB 1 of 1991* came into operation on 23 January 1991 and were amended by correcting two statutory references and adding paragraph 3(h), by *Determination No. PB 4 of 1991*, on 29 May 1991. They bear very little relation to the statements in the Minister's media release of 8 August 1990, but are similar to, but not identical with, those in paragraph 8 of the second Agreement of 6 December 1990 between the Minister and the Pharmacy Guild.
12. I quote clause 3, Applications for Approval to Supply Pharmaceutical Benefits, of *Determination No. PB 4 of 1991*:

'For the purposes of paragraph 99K(1)(b) of the Act, the following are guidelines with which the Authority must comply in making a recommendation on an application by a pharmacist under section 90 of the Act:

- (a) approval of a pharmacist shall not be recommended in respect of premises located within 5 kilometres by normal access routes from other premises in respect of which a pharmacist is already approved;
- (b) approval of a pharmacist in respect of particular premises shall not be recommended unless the pharmacist demonstrates to the Authority that there is a definite unmet public need for that approval;
- (c) approval of a pharmacist in respect of particular premises shall not be recommended (except in the circumstances provided for in subparagraph (d) if those premises are situated within 5 kilometres by normal access routes of other premises in respect of which there has been granted financial assistance under section 99ZC or 99ZD of the Act;
- (d) approval of a pharmacist in respect of particular premises shall be recommended where those premises are located not more than 500 metres from other premises in respect of which that pharmacist is already approved under section 90 of the Act and from which the pharmacist proposes to cease supplying pharmaceutical benefits;

- (e) approval of a pharmacist in respect of particular premises shall be recommended where those premises are located more than 500 metres but not more than 5 kilometres by normal access routes from other premises in respect of which that pharmacist is already approved under section 90 of the Act and from which the pharmacist proposes to cease supplying pharmaceutical benefits, provided that –
 - (i) there has been no grant of financial assistance made under section 99ZC or 99ZD of the Act in respect of any other premises situated within 5 kilometres by normal access routes from the first-named premises; and
 - (ii) the pharmacist demonstrates to the Authority that there was a definite unmet public need for that approval;
- (f) approval of a pharmacist in respect of particular premises shall be recommended where a pharmacist is approved under section 90 of the Act in respect of those premises and where that approval is to be cancelled immediately prior to the granting of the first-named approval, as a consequence of a change of ownership arrangements of the premises;
- (g) notwithstanding anything contained in subparagraphs (a) to (f), approval of a pharmacist in respect of particular premises shall be recommended where the pharmacist entered into a financial commitment prior to 9 August 1990 (being the date on which the granting by the Secretary of approvals to pharmacists under section 90 of the Act was restricted pending passage of legislation for pharmacy restructuring) in the expectation that an approval would be granted in respect of those premises, provided that the Authority is satisfied that there was such a prior commitment and the pharmacist produces to the Authority either –
 - (i) a bank statement, supported if necessary by an affidavit by the pharmacist's solicitor or accountant; or
 - (ii) details of any contractual arrangements together with an affidavit by the pharmacist's solicitor or accountant attesting to the correctness of the date that commitment was entered into.
- (h) notwithstanding anything contained in subparagraphs (a) to (g), approval of a pharmacist in respect of particular premises shall be recommended where the application for approval of the pharmacist in respect of those premises was made prior to 9 August 1990 (being the date on which the granting by the Secretary of approvals to pharmacists under section 90 of the Act was restricted pending the passage of legislation for pharmacy restructuring).'

13. The gazettal of *Determination No. PB 1 of 1991* on 23 January 1991 put in place the last piece of the legal jigsaw of the new approval process. Thus, in my opinion, the changes effecting pharmacy restructuring and the restrictions on approvals to dispense PBS prescriptions took effect in law on 23 January 1991 and were slightly amended as from 29 May 1991 by *Determination No. PB 4 of 1991*.

4. **Retrospective Effect of Guidelines in PB 1 and PB 4 on Intervening Period Applications**

14. From the gazettal of *Determination No. PB 1 of 1991* on 23 January 1991, there were certainly legally binding guidelines. However, an amendment to s.48 of the *Acts Interpretation Act 1901*, which became law on 21 December 1990, clarified the law and outlawed retrospectivity in specified kinds of delegated legislation that prejudices anyone other than the Commonwealth or an authority of the Commonwealth.

15. This provision applies to *Determinations Nos. PB 1 and PB 4 of 1991*. Those making recommendations or decisions on applications relating to periods before 23 January 1991 would need to bear this mind and compare the 'old' law and the 'new' law to make sure that there is no retrospective prejudice to an applicant. Of course any retrospective aspects beneficial to an applicant would be valid.

5. **Review by the AAT**

16. The point about beneficial retrospectivity is also relevant under my final point. We recall that once the 1990-1991 provisions became effective, there is a two stage process: first, there is recommendation by the Pharmacy Restructuring Authority and then decision by the Secretary. In *Re Shortis and Secretary of Department of Community Services and Health* (Judgment 21 June 1991) the President of the AAT, Justice Deirdre O'Connor, held that she could not review the decision of the Authority under the existing review provision, s.105AB(7), but review only the decision of the Secretary. This gap is being filled by clause 46 of the Health and Community Services Legislation Amendment Bill 1991, which inserts s.105AD to permit the AAT to review decisions of the Authority. The provision is made retrospective to the day these provisions of the *Community Services and Health Legislation Amendment Act 1990* commenced, namely 18 December 1990. So the amendment would allow an applicant who is, or has been, rejected by the Authority to seek review by the AAT.