



The Pharmacy
Guild of Australia

Submission to the Treasury
in response to
Competition Policy Review Final Report March 2015

May 2015

National Secretariat

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1. Introduction

The Pharmacy Guild of Australia (the Guild) is the national peak pharmacy organisation representing community pharmacy. It strives to promote, maintain and support community pharmacies as the most appropriate primary providers of health care to the community through optimum therapeutic use of medicines, medicines management and related services.

The Guild welcomes the opportunity to provide a submission to the Treasury to assist the Government in formulating its response to *the Final Report of the Competition Policy Review (the Harper Review)*.

The Guild's comments relate to the following recommendations and specific areas set out in the Final Report.

- Recommendation 14 – Pharmacy
- Recommendation 43 – Australian Council for Competition Policy – Establishment
- Recommendation 44 – Australian Council for competition Policy – Role (Competition law and procurement)
- Recommendation 1 – Competition principles (The public interest test)
- Recommendation 51 – ACCC governance
- Recommendation 53 & 54 – Small Business access to Remedies and Collective Bargaining

2. Summary of Guild Recommendations

Guild Recommendation 1

That recommendation 14 of the Harper Review not be accepted.

The Guild looks forward to its comprehensive evidence being fully and properly taken into account, and participating in the review announced in the House of Representatives by the Minister for Health which will cover pharmacy remuneration, pharmacy Location Rules and wholesaler arrangements.

The Guild is of the view that any review should be composed of people independent of any Government department or agency, including the Productivity Commission.

Guild Recommendation 2

That the Australian Council of Competition Policy should not be formed and therefore not be referred to in legislation.

Guild Recommendation 3

The *Competition and Consumer Act 2010* should not apply to government procurement decisions.

Guild Recommendation 4

The ‘public interest’ test, used to determine whether legislation that is said to ‘restrict’ competition, should be amended so it requires considering whether:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- that restricting competition is the *most efficient (or least inefficient)* of all feasible ways of achieving the policy objectives.

Guild Recommendation 5

The Harper Review’s recommendation 51 abolishing the requirement that one Commissioner has knowledge or experience of small business should not be accepted.

As such, the requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) should *be retained*.

Guild Recommendation 6

The remedial steps will assist in correcting the imbalance and therefore, recommendations 53 and 54 of the Harper Review Final Report should be implemented and be given effect as soon as possible.

3. Final Report Recommendation 14 – Pharmacy

The Harper Review’s final report repeated the view expressed in the draft report that the current laws relating to the ownership and location of pharmacies, that have served Australians well over the years, should nevertheless be repealed.

Issues relating to ownership are a matter for the States and Territories and not the Commonwealth.

With respect to Location Rules, on 27 May 2015 the Minister for Health told the House of Representatives:

Pharmacy Location Rules have been reviewed in the past and have been updated several times as a result. Whether they should remain in their current form or be updated in the future will be considered as part of the independent review of Pharmacy Location Rules and remuneration.

This comprehensive and publicly accountable review will be conducted over the next 18 months, and its findings published within two years of the 6CPA commencing. It will cover pharmacy remuneration, Pharmacy Location Rules and wholesaler arrangements. The review will allow the government to be better informed about components of the PBS supply chain and to ensure distribution and supply of medicines is cost-effective, and regulations are appropriate to their purpose.¹

That said, the Guild nevertheless has a number of observations on this recommendation relating to pharmacy.

The Guild remains disappointed that the Review Panel did not take into account the comprehensive evidence to demonstrate the benefits of the tried, tested and trusted pharmacy model outlined in our submission².

The Guild, however, is pleased that the Minister for Small Business Bruce Billson recognised that *pharmacies cannot be treated like any other retail operation as they are a channel to the market place to deliver pharmaceuticals and other primary healthcare services*, adding:

We don’t want all of them clustered around Manuka, for instance in the nice part of Canberra, and then have no capacity to meet that primary health need out in the regions.³

The evidence presented by the Guild to the Harper Review amply justifies this view.

It is regrettable that Panel has put ideology and unsubstantiated opinions before the strong empirical evidence provided by the Guild and quoted selectively from some submissions and reports ignoring the full picture.

Accordingly, the Guild wishes to clarify/ refute some of the key points raised in the final report.

¹ *Hansard* House of Representatives 27 May 2015:8

² The Guild’s submission to the Harper Review, containing full evidence for the support of the current regulatory structure: http://competitionpolicyreview.gov.au/files/2014/12/Pharmacy_Guild.pdf

³ *The Australian* 2 April 2015: <http://www.theaustralian.com.au/national-affairs/health/harper-review-second-opinion-at-odds-over-pharmacy-treatment/story-fn59nokw-1227288415127>

The Guild's compelling evidence on access and public benefit below was completely ignored by the Review Panel.

The three-pronged analysis in the Guild's comprehensive submission to the Review clearly demonstrated that pharmacies are delivering high levels of access, choice, competition, equity and quality for consumers.

Firstly, an independent geo-spatial analysis was conducted to highlight the success of the Location Rules, finding that pharmacies are in almost every case more accessible than the other three essential services studied (supermarkets, banking and medical centres). For example, 87 per cent of Australians live within 2.5km of at least one pharmacy, compared to 80 per cent for medical centres.

Secondly, the results of the qualitative consumer market research conducted for the submission included:

- 89 per cent of consumers trust their local pharmacist either very highly or completely;
- 64 per cent of consumers support the principle that health professionals should own the business they work in; and
- Community pharmacies have a clear advantage over supermarkets in terms of trust and quality of service. The vast majority of consumers were concerned about supermarkets having access to their private health related information.

Thirdly, the cost benefit analysis provided to the Review showed that, despite assumed price reductions by supermarkets, consumers will experience significant welfare losses (in the vicinity of \$700m a year) in the event of pharmacy deregulation.

It also showed that the ownership rules bring substantial benefits. Ownership rules encourage efficiency in the provision of pharmacy services while ensuring that these services are provided to an appropriate quality standard. By contracting with independent owner-pharmacists, the Government preserves the strong efficiency incentives that exist in franchise relationships.

Additionally, the rules limit concentration in the supply of dispensing services. This provides crucial benefits to Government, as it prevents a situation emerging where the Government, to meet its objectives, would have to purchase distribution services from suppliers with substantial market power.

Location Rules

The Report stated:

This would be consistent with the findings of the Post-implementation Review that further targeted easing of the rules could deliver additional benefits.⁴

The panel quoted selectively from this report⁵. In fact, the Post-implementation report (November 2014) concluded that the retention of the Location Rules would maintain a reasonably well-distributed geographical spread of pharmacies in Australia. *“The Rules ensure that an accessible and commercially viable network of pharmacies exists throughout Australia, including (and especially) in rural and remote areas, while also ensuring there is increasing competition between pharmacies in the market place.”*

The Post-implementation report also noted that, if the restrictions imposed by the Rules were relaxed too broadly, there is a distinct possibility that the more rapidly deregulated environment may skew the access to community pharmacy services and could jeopardise the geographical distributional improvements achieved and adversely impact on consumer access to medicines.

Further it added that, on the cost side, there would be a high degree of administrative complexity to overcome. The Government would likely find this alternative highly problematic, particularly from an implementation perspective.

Outcomes of deregulation in overseas markets

The Report stated:

The Panel considers that evidence of the outcomes of partial deregulation in overseas jurisdictions provides useful guidance for policymakers about the gains that may be available.⁶

This statement is based on the submission provided to the Review Panel by Chemist Warehouse that misrepresents an OECD study conducted in 2014.

The Guild disputed in its submission that this summary seriously misrepresented the conclusions of the OECD Review. However, the panel only cited the selective quote from Chemist Warehouse and made no mention of the OECD report’s clear concerns over the resultant industry structure.

In contrast, the overseas evidence shows that:⁷

- Deregulation of the pharmacy sector does not necessarily lead to more competition. In practice, competition has been compromised by the emergence of dominant new actors. In some cases, this has required new regulatory intervention to address competition concerns. (Volger et al. 2012)

⁴ Page 189 or the Final Report

⁵ <http://ris.dpmc.gov.au/2014/11/25/pharmacy-location-rules-post-implementation-review-department-of-health/>

⁶ Page 186 or the Final Report

⁷ http://whocc.goeg.at/Literaturliste/Dokumente/BooksReports/GOeG_FP_PharmacyRegulationDeregulation_Summary_March2012.pdf

- There was no evidence from the studied countries about price competition in non-regulated over-the-counter OTC medicines, and consistent decrease in the prices of OTC medicines was not confirmed. A reduction in overall pharmaceutical expenditure in these countries was therefore found to be unlikely. (Volger et al. (2014)
- Vertical integration distorted competition and impacted the accessibility of medicines.

In summary, the empirical evidence of pharmacy deregulation highlights the complexity of reforms. Unconstrained competition has not delivered cost savings and interventions required to address these concerns have themselves been costly.

The Report quoted:

*...price decreases were observed in many countries – including a dramatic 42 per cent decrease in retail pharmacy prices in Denmark. No country reported increases.*⁸

This statement seriously misrepresents the conclusions of the OECD Review.

- Denmark also reported prices of non-pharmacy OTC medicines increased by 23%. Overall the report concluded that a decrease in the prices of OTC medicines was not confirmed across the European countries studied.⁹
- The report points to no clear benefit to deregulation and highlighted significant risks (i.e. increased market concentration).

The Report further stated:

*Chemist Warehouse also submits that evidence from European countries, where similar pharmacy location rules have been reformed, shows that pharmacies, particularly those in regional locations, are unlikely to close if regulation is relaxed to allow competitive entry of new pharmacies.*¹⁰

This is a disingenuous statement. An analysis of the situation in certain European countries, following the deregulation of ownership, found that a relaxation of location rules did cause an increase in the number of pharmacies, but that **these pharmacies were clustered in metropolitan areas**. With the clustering of pharmacies in economically attractive urban areas, there is concern of inadequate provision of pharmacies in the rural areas.

For example, even though more than 130 new pharmacies have been established in Norway since the liberalisation act of March 2001, only 9 of them were opened in municipalities without a pharmacy or a branch pharmacy. In the summer of 2005, pharmacy services were still not available in 199 out of 434 municipalities (46%).¹¹

⁸ Page 186 or the Final Report

⁹ [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2014\)6&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)6&docLanguage=En)

¹⁰ Page 183 or the Final Report

¹¹ http://whocc.goeg.at/Literaturliste/Dokumente/BooksReports/%C3%96BIG%20Report%20Community%20Pharmacy%20in%20Europe%203_06.pdf

Cost to consumers

The Report stated:

...current regulations preventing pharmacists from choosing freely where to locate their pharmacies, and limiting ownership to pharmacists and friendly societies, impose costs on consumers.¹²

This is not substantiated by any evidence. The results of the Guild's cost-benefit analysis show that consumers (particularly concession card holders) would consistently suffer a loss in consumer welfare and would therefore be worse off as a result of the Panel's proposed changes.

There is ample evidence of competition among Australia's 5450 community pharmacies. Where prices are not fixed under the PBS, there is strong competition and consumers are able to take advantage of this. Pharmacy regulation has not prevented the proliferation of discount model pharmacies. The current arrangements have also not prevented a growth in the number of pharmacies, in line with growth in population.

An analysis from PharmaDispatch (published 8 April 2015)¹³ shows that in relation to the pricing of prescription medicines, regardless of location and ownership restrictions pharmacies are engaging in fierce price competition, with consumers the big winners. It reported that while prices of an increasing number of PBS-listed medicines are falling below the non-concessional co-payment, direct competition is driving down private market prices even further. It stated that the aggregate private market price of ten commonly dispensed medicines is around 50 per cent of the PBS price, as measured by the published maximum PBS price to the consumer, down from 55 per cent in August 2014.

GP practices (no ownership or location rules)

The Report stated:

There is also a clearer understanding of how well other primary healthcare providers operate without anti-competitive location and ownership restrictions. For example, ownership of medical practices is not limited to GPs, nor are GP practices prevented from locating in close proximity to one another.¹⁴

This statement by the Review Panel has not been based on careful analysis of the evidence. Had the Panel undertaken such an analysis, it would have found that **the absence of location restrictions on GPs has not resulted in more equitable access** to medical services for Australians in regional and remote regions.

Despite a range of costly interventions, the lack of success of different incentive programs in encouraging medical professionals to move to regional, rural and remote Australia suggests that devising effective mechanisms to achieve this objective is problematic. Recent data compiled by the Australian Institute of Health and Welfare (AIHW, 2014) shows that the supply of medical practitioners remains significantly lower in regional and remote areas of Australia than in major cities.

¹² ¹² Page 189 or the Final Report

¹³ <https://pharmadispatch.com/news/no-competition>

¹⁴ ¹⁴ Page 185 or the Final Report

In regard to the **ownership restrictions**, the Guild fully supports health professionals owning their own businesses, and independent research has confirmed that **most consumers support this view**.

Australia has also seen a rise in the number of large scale general practice “super clinics” and the decline in smaller independently run practices which reflects the trend that generally occurs in a deregulated environment.¹⁵

There is evidence emerging from the general practice sector whereby the independence of qualified health practitioners (GPs) is being jeopardised by corporate practices and directives aimed at maximising profit for shareholders.¹⁶

A survey conducted by Australian Doctor in 2012 found two-thirds of doctors believed corporate ownership of medical centres has damaged the corporate medicine. A loss of professional autonomy is an often cited drawback of working in a large corporate run medical centre and patients are less likely to see the same doctor on each visit in these types of environments.¹⁷

The pharmacy ownership legislative structure is designed to provide a patient focussed service rather than one oriented to maximising volumes and profit and to prevent outcomes where a greater emphasis is placed on maximising volumes and profit. For example, changes to the primary healthcare – including GP superclinics – has seen more medical services co-located, prompting Medicare Australia¹⁸ to warn that if referrals were kept in house, doctors might ‘not act as an agent of their patient, but of a corporation whose main concern is profits’.

The same warning would equally apply to other corporate entities wishing to enter the pharmacy sector.

Ownership rules

The Guild contends that ownership rules requiring pharmacies to be owned by pharmacists and limiting the number of pharmacies each pharmacist can own, ensure a decentralised and diverse ownership structure. These rules ensure that pharmacies maintain a strong focus, which is inherent to their high levels of consumer satisfaction. It also means that the Commonwealth, as the monopsony purchaser, does not have to negotiate with providers with a high degree of market power (e.g. the Coles/Woolworths duopoly).

¹⁵ <http://www.dailytelegraph.com.au/family-doctors-bowing-out-as-multi-doctor-medical-centres-and-super-clinics-grow/story-e6freuy9-1226514385964>

¹⁶ <http://www.australiandoctor.com.au/news/latest-news/corporate-under-fire-over-gp-supervision>

¹⁷ <http://www.australiandoctor.com.au/news/latest-news/gps-divided-over-corporate-culture>

¹⁸ Original source *The Australian*, 11 June 2014 “Nine doctors face panel for ‘over-servicing’” <http://www.theaustralian.com.au/national-affairs/health/nine-doctors-face-panel-for-overservicing/story-fn59nokw-1226950005607>

Similar concerns to GP superclinics as mentioned previously can also be posed if supermarkets were able to control pharmacies, noting that in finding that Coles Supermarkets had engaged in unconscionable conduct towards its suppliers during 2014, the Federal Court said:

Coles is the second largest retailer of grocery products in Australia. Coles engaged in unconscionable conduct in its dealings with a number of suppliers of products that it sold. Coles' misconduct was serious, deliberate and repeated. Coles misused its bargaining power. Its conduct was "not done in good conscience". It was contrary to conscience. Coles treated its suppliers in a manner not consistent with acceptable business and social standards which apply to commercial dealings. Coles demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply with the demand. Coles withheld money from suppliers it had no right to withhold. Coles now admits that its conduct was contrary to law and involved serious breaches of s 22 of the Australian Consumer Law (**ACL**) as it then stood in Sch 2 to the [Competition and Consumer Act 2010](#) (Cth) (**Act**), meriting serious punishment.¹⁹

It would be disturbing if this form of behaviour was to apply to the management of a pharmacy operation.

The current pharmacy ownership structure goes a long way towards assuring Australians that patient care is the focus of a pharmacy practice.

The Guild is therefore disappointed that on 23 April 2014 the Productivity Commission published a research paper entitled *Efficiency in Health*. The Paper publishes selective quotes asserting that the current regulation is unsatisfactory, without any original research on its behalf as well as a complete failure to even advert to the evidence provided by the Guild to the Harper Review.²⁰

In conclusion:

The Guild has long observed that the Treasury and the Productivity Commission see the changes to the pharmacy laws that have served Australia's consumers so well as being 'unfinished business', without providing any positive evidence to justify change.

The Harper Review is a continuation of this policy position.

Rather than trying to find a solution to a non-existent problem, the Guild recommends that no formal action be taken to change Location Rules and (to the extent that it is of any policy concern of the Australian Government) ownership rules.

As part of its comprehensive evidence, the Guild's submission to the Harper Review showed that the current community pharmacy model provides an enviably high level of access to consumers irrespective of their location, as well as ensuring access to older consumers and to consumers in areas of socio-economic disadvantage.

¹⁹ *Australian Competition and Consumer Commission v. Coles Supermarkets Pty. Ltd and ors.* [2014] FCA 1405 22 December 2014 per Gordon J. para 1

²⁰ <http://www.pc.gov.au/research/completed/efficiency-health>. See pages 50-55

The Guild looks forward to its comprehensive evidence being fully and properly taken into account in the review recently announced by the Minister for Health, which must be undertaken by reviewers who are independent of any Government Department or agency, including the Productivity Commission.

Guild Recommendation 1

That recommendation 14 of the Harper Review not be accepted.

The Guild looks forward to its comprehensive evidence being fully and properly taken into account, and participating in the review announced in the House of Representatives by the Minister for Health which will cover pharmacy remuneration, pharmacy Location Rules and wholesaler arrangements.

The Guild is of the view that any review should be composed of people independent of any Government department or agency, including the Productivity Commission.

4. Final Report Recommendation 43 – Australian Council for Competition Policy – Establishment

The Harper Review proposes an Australian Council for Competition Policy which is designed to ‘provide leadership and drive implementation of the evolving competition policy agenda.’²¹

The functions that could be undertaken by the proposed Council, as set out in various parts of the final report, include:

- identifying potential areas of competition reform across all levels of government;
- reviewing legislation that is said to restrict competition and determine (if payments are available) to determine whether states and territories should receive compensation payments;
- publishing an annual report on the progress of reviews of regulatory restrictions;
- reporting on progress on the way government commercial policies relating to privatisation and other commercial processes incorporate competition principles;
- making recommendations to governments on specific market design issues, regulatory reforms, procurement policies and proposed privatisations;
- undertaking competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation, or to the ACCC for investigation of potential breaches of the CCA;
- conducting advocacy, education and promotion of collaboration in competition policy;
- undertaking research into competition policy developments in Australia and overseas;

²¹ Page 75 of the Final Report

- reviewing some ex-post evaluation of some merger decisions made by the ACCC;
- undertaking an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention;
- working with States and Territories to oversee incorporation of competition policy principles in planning and zoning rules;
- establishing a working group to develop a partnership agreement that both allows people to access and use their own data for their own purposes and enables new markets for personal information services;
- reviewing competitive neutrality policies;
- reporting on the experiences and lessons learned from the different jurisdictions when applying competitive neutrality policy to human services markets; and
- reporting on the number of competition neutrality complaints received and investigations undertaken.

This body would obviously require significant resources if it was to perform the myriad of roles suggested in the Report.

It is difficult to support the establishment of such a body for a number of reasons.

Duplication

The role that competition can play in the efficient provision of goods and services can hardly be said to be unknown to government.

A prime example can be found in the *Energy White Paper*, published by the Government on 8 April 2015, in which the Minister for Industry and Science said in the forward:

Our guiding principle is that markets should be left to operate freely, without unnecessary government intervention. Competition, productivity and investment will deliver reliable and cost competitive energy to households and business.

Through the Council of Australian Governments Energy Council, the Australian Government will continue to lead work with the states and territories on a consistent national energy market that promotes consumer choice and encourages investment in energy resources development.²²

The elements of the current COAG structure therefore clearly understand the role competition can play in policy development.

Therefore, it would appear that adding an additional body to Australia's public administration structure (particularly one just to 'champion' competition reform or to 'educate' on the benefits of competition) would be curious, given that many of these bodies are being rationalised.

For example, the COAG Reform Council had as one of its roles, the monitoring of COAG reform agenda outcomes. It was abolished in 2014, in part as it was characterised as being 'red tape'.

²² Page i

There is no specific advantage to start re-adding red tape just to consider ‘competition issues’. More generally, a proposal that:

- the Council should review commercial policies and procurement practices appears to duplicate the legitimate role of Auditors-General; whilst
- undertaking competition studies of markets in Australia would appear to duplicate the role of the Productivity Commission.

Regulator capture

The Guild is concerned that vesting the proposed responsibilities in an unelected technocratic body – particularly a responsibility to recommend compensation payments to the States to give effect to ‘reforms’ - that possesses only one set of professional skills and a fixed agenda could give rise to regulatory failure.

This is of particular concern where a wish for competition perfection may lead to outcomes that do not provide net public benefit – particularly if the proposed public interest test contains an arm providing that legislation containing ‘restrictions’ on competition can only be supported if it is the ‘only’ way to deliver the objectives of the legislation.

The Guild simply does not presume that Council officers are best qualified to determine whether particular laws in areas ranging from pharmacy to town planning are in the public interest, or that the existing legislation is **not** the ‘only’ practical way to deliver the legislative objective.

Pre-emption of the policy choices of States and Territories

Finally, in proposing a top down mechanism to persuade (or force) amendments to legislation that is the responsibility of the Australian States and Territories, the Harper Review appears to pre-empt the proposed review of the structure of the Australian Federation to be conducted through the White Paper process, in which the States are supposed to be ‘sovereign’ in their own sphere, through the promotion of recommendations requiring States and Territories to have to prove to a technocratic body the design of regulations considered to be the most appropriate for the residents of the jurisdiction.

States and Territories should be allowed to continue to develop and maintain a system that best suits the circumstances of their communities, with intergovernmental agreements developed in areas where a co-ordinated outcome is in the best interests of citizens (e.g. mutual recognition of qualifications). This structure is a far better structure than a proposal to use ‘competition payments’ to ‘persuade’ jurisdictions to change laws to satisfy the theoretical policy desires of one area of central government that could lead to unintended and undesirable consequences for the Australian community if applied unthinkingly in a mechanical fashion.

The Guild reiterates the arguments contained in Appendix A of its submission to the Harper Review.²³

²³ http://competitionpolicyreview.gov.au/files/2014/12/Pharmacy_Guild.pdf

Jurisdictions are satisfied with the manner by which Australia's pharmacies are regulated – there is no reason for change for changes sake. Given the rationale for the development of the Federation White Paper, the Guild believes it would not be appropriate to create a mechanism to pay States and Territories 'compensation payments' for amending legislative schemes considered by the Parliament of that jurisdiction as being appropriate – particularly one managed by a technocratic body such as the proposed Council.

Guild recommendation 2

The Australian Council of Competition Policy should not be formed and therefore not be referred to in legislation.

5. Final Report Recommendation 44 – Australian Council for Competition Policy – Role (Competition law and procurement)

The Harper Review proposes extending the application of the 'public interest' test to government procurement provisions²⁴ and that one of the roles for the proposed Australian Council for Competition Policy would be to make recommendations to governments on procurement policies.

The NSW Government said at page 10 of its submission to the Review's Draft Report²⁵:

Government play a unique role which involves public policy influencing the considerations taken into account to achieve the greatest public benefit. Governments are accountable to all citizens and as such, decisions will necessarily involve equity and access considerations. Government are also obliged to provide social, cultural, security and other services which are important to citizens by may not be adequately provided by the market – for example, cultural and sporting venues, and policing and defence. In many cases, the commercial activities are integrated with non-commercial activities.

Careful consideration is necessary to understand the costs and benefits of further extending the CCA to government activities particularly where it is difficult to separate commercial from non-commercial activities, and whether there may be alternative approaches to achieving the same policy goal at a lower cost.

and at page 11:

NSW has four major concerns. First, governments undertake a broad range of commercial activities that vary in nature and scale; many of these activities are not necessarily significant and are generally intertwined with government policy functions, for example, procurement for schools. In contrast, the provisions of the CCA are designed for businesses which predominantly undertake commercial activities risks compromising the policy functions of government. Potentially an independent regulator, such as the ACCC, or the Courts could be adjudicating government policy decisions and weighing up competition and public benefit objectives.

²⁴ See Recommendation 1, amongst others

²⁵ http://competitionpolicyreview.gov.au/files/2014/12/NSW_Government.pdf

The NSW submission then details in an information box the way in which the UK Competition Commission prohibited the proposed merger of the Royal Bournemouth and Christchurch Hospitals and the Poole Hospital Trust, on the grounds of the a substantial lessening of competition in inpatient and outpatient services and despite arguments that there would be consumer benefits accruing from the merger including lower prices, higher quality services, greater choice or increased innovation.

The Guild agrees that extending a principle that may be appropriate when related to regulating behaviour in trade and commerce is far less relevant when dealing with government procuring services for citizens, particularly in the health and allied services area. It is for Parliaments and ultimately electors to adjudge whether taxpayer funds have been used efficiently in the provision of health and social services.

The Guild believes therefore that recommendations that propose extending competition laws to procurement decisions should not proceed.

Guild Recommendation 3

The *Competition and Consumer Act 2010* should not apply to government procurement decisions.

6. Final Report Recommendation 1 – Competition principles (The public interest test)

The Harper Review considered the existing ‘test’ used under National Competition Policy to determine whether legislation that is said to ‘restrict’ competition (called a ‘public interest’ test) should be retained or amended.

The test proposed in the draft report suggested that legislation or government policy restricting competition must demonstrate the proposal:

- it is in the public interest; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.²⁶

However, in the final report the Harper review published a revised test which provides clearer direction when applying the balancing exercise, so that a particular proposal must show that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.²⁷

²⁶ Draft recommendation 11

²⁷ Recommendation 8. This is a reversion back to the original National Competition Policy test.

Page 97 of the Harper Review said:

Submissions from Marsden Jacob Associates (DR sub, page 1) and the Pharmacy Guild of Australia (DR sub, page 11) take issue with the public interest test set out in the Draft Report, which reflects that negotiated as part of the 1995 Council of Australian Governments (COAG) Competition Principles Agreement under the NCP.

Marsden Jacob Associates submits that the second limb of the test should not be applied literally, and did not appear in the NCC's 2005 report 'Identifying a framework for regulation in packaged liquor'.⁴⁰ Instead, the submission suggests the test should be re-worded to substitute the word 'best' for the word 'only' in the second limb. The Pharmacy Guild of Australia similarly proposes that the second limb should be changed so that the words 'most efficient' replace the word 'only'.

The existing public interest test does not put competition above all other considerations, and nor should it. However, it does require that the effect on competition always be carefully considered as part of the overall assessment of the net public interest, and that the costs of anti-competitive regulation should be properly assessed in any cost-benefit analysis.

In its Identifying a framework for regulation in packaged liquor report, the NCC notes 'regulation that successfully addresses the public interest but also restricts competition can be justified, so long as the impact on competition is minimised'⁴¹ — illustrating that the test is flexible. The 1995 formulation of the public interest test was also subsequently re-endorsed by COAG in 2007.

The Panel sees no reason for change and recommends that the test continue to be expressed in the same way to ensure that regulatory reviews continue to focus on avoiding any restrictions on competition. The long-standing COAG test enshrines the correct principle — that competition should not be impeded unless it must be, in order to secure the public interest. It also acknowledges the fact that competition is not an end in itself — the test should continue to be applied by assessing the costs and benefits of the regulation overall (including any impact on competition) in order to meet the policy objective. (Emphasis added)

The Guild welcomes the Harper Review's change to the first arm of the public interest test.

This is because the term 'public interest' is a term of art which (according to the High Court) 'imports a discretionary value judgement to be made by reference to undefined factual matters, defined only "in so far as the subject matter and scope of purpose of the statutory instruments may enable..."²⁸

A more specific requirement to consider whether the community benefits as a whole appears to be both a clearer and easier threshold to apply support appropriate laws.

However, the second arm of the test remains unamended, despite the submission of the Guild.

²⁸ From *Water Conservation and Irrigation Commission (NSW) v. Browning* cited in *O'Sullivan v. Farrer* [1989] HCA 61 at para.13.

As the Guild said in pages 12 and 13 of its submission²⁹ to the Harper Review:

However, the Panel does not adopt an approach which considers the relevant test as a whole, instead taking an element of that test out of its broader context. The result is that as formulated by the Panel, the application of the competition principles would not support outcomes that improve the welfare of the Australian community.

This is because the Panel's proposed public benefit test generally fails to recognise the trade-offs and complexities that are inherent in public policy-making.⁵

The Panel's form of words – '*can only be achieved by restricting competition*' – has been carried over into the Review from earlier top-level official documents, but its implications should nonetheless be questioned. An unqualified requirement that any claimed restrictions on competition should be rejected if there is any other way in which policy goals can be achieved allows – and indeed requires – measures to be implemented that achieve the policy objectives at higher cost than restrictions on competition. Put in another way, if the top-level test is a cost-benefit comparison, then a proviso that rules out achieving the policy objective by restricting competition (whenever there is any other way of achieving the objective) either conflicts with the top-level test, or it is redundant.

The broader issue here is that there are usually many ways of achieving policy objectives such as the objective of ensuring an equitable distribution of community pharmacies, from budget-intensive ways through to regulation-intensive ways. Indeed, it is readily seen that a near absolute presumption against restrictions on competition would lead to absurd results, as it would prevent governments, when they procure services on behalf of consumers, from imposing conditions such as location, capacity and so on as conditions of providing service. As a result, the question cannot sensibly be whether restricting competition is the *only* way of achieving the objectives; rather, it must be *that restricting competition is the most efficient (or least inefficient) of all feasible ways of achieving the policy objectives*.⁶ Otherwise, any instrument that can be cast as a restriction on competition would fail the test, quite regardless of whether it did or did not advance the public interest, and quite regardless of whether it did so more efficiently and hence successfully than other options.

Policy choices are more generally complex and are best interpreted as continuous variables, to be thought of in terms of more or less. Although two policies may each separately achieve approximately the same policy objectives, it is unlikely that they would achieve them exactly to the same extent. This is recognised in practical policy making. For example, if one policy achieves fewer objectives than another, but at vastly lower costs to the community, then advisory bodies like the Productivity Commission (PC) may very well recommend the lower cost, lower achievement policy option; and the Government may very well agree that the costs of a fuller achievement are too great. But if the difference in the degree to which two policies achieve the policy objectives is large and the cost difference is relatively small, then it is reasonable for the policy to be accepted that offers a higher achievement at a higher cost. Indeed, this is inherent in the economic concept of opportunity cost, which takes account of the value of foregone benefits.

In contrast, the test endorsed by the Panel would seem to rule out these types of complexities and trade-offs, between objectives, on one hand, and costs or benefits, on the other: for the Panel, restrictions on competition would never be justified if an alternative can be shown to exist.

and at pages 22³⁰:

The current statutory framework for community pharmacies requires that pharmacies be owned and operated by pharmacists, and imposes certain limitation on the location of new pharmacies or the relocation of existing pharmacies.

The Review Panel recommends that location and ownership rules on community pharmacies be removed because the Panel considers that these rules restrict competition. The Panel cites claims that these restrictions limit consumer choice, result in poor health outcomes, and are costly for taxpayers. However, the Panel presents no evidence to suggest that this is the case, and indeed the Panel's own discussion indicates that existing restrictions have not prevented new pharmacy models from evolving.

²⁹ http://competitionpolicyreview.gov.au/files/2014/12/Pharmacy_Guild.pdf

³⁰ http://competitionpolicyreview.gov.au/files/2014/12/Pharmacy_Guild.pdf

The Review Panel's approach raises questions about evidentiary and procedural standards. The Panel appears to rely heavily on information said to be confidential, which it has declined to make available to the Guild. Further concerns arise given that the Panel appears to have come to the view that pharmacy deregulation should be implemented, irrespective of draft nature of this recommendation.

A more fundamental concern relates to the competition principles set out in the Draft Report, which guided the Review Panel in its findings in relation to community pharmacies. The 'public interest' test component of the competition principles requires demonstrating that the objectives of the policy or legislation can only be achieved by restricting competition. However, the proposed public interest test would neither enhance public welfare, nor is it consistent with how policy making is conducted in practice:

- An unqualified requirement that the objectives of legislation or policy can 'only' be achieved by means that do not restrict competition would require measures to be implemented that achieve the policy objectives at a higher cost than restrictions on competition. As formulated, the test therefore fails to recognise the trade-offs and choices that arise when comparing different mechanisms for implementing policies, in terms of the effectiveness with which policy objectives can be achieved and the costs of doing so.
- It has also long been the case in the relevant legislation that, and in the practice of Australian microeconomic reform, that the public interest test has involved demonstrating how the objectives of the policy or legislation can best be achieved, taking into account the relevant trade-offs.

The test endorsed by the Panel would seem to rule out these types of complexities and trade-offs, between objectives, on one hand, and costs or benefits, on the other: for the Panel, restrictions on competition would never be justified if an alternative can be shown to exist. The Review Panel's own inconsistent application of the competition principles shows that the proposed public interest test is not workable.

A revised test that is consistent with welfare maximising objectives should instead read: *that restricting competition is the most efficient (or least inefficient) of all feasible ways of achieving the policy objectives.*¹⁰ Otherwise, any instrument that can be cast as a restriction on competition would fail the test, quite regardless of whether it did or did not advance the public interest, and quite regardless of whether it did so more successfully than other options.

The Review Panel suggests that those wishing to retain competitive restrictions are required to demonstrate that their removal would not be in the interests of the broader community. However, this position is not consistent with good governance or policy-making...

Guild Recommendation 4

The 'public interest' test, used to determine whether legislation that is said to 'restrict' competition, should be amended so it requires considering whether:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- that restricting competition is the *most efficient (or least inefficient)* of all feasible ways of achieving the policy objectives.

7. Final Report Recommendation 51 – ACCC governance

The Harper Review noted that current requirement under the section 7 of the Competition and Consumer Act 2010 (the CCA) for the Minister to consider whether nominees have knowledge of, or experience in, consumer protection and small business matters for all potential appointments to the Commission is sufficient to represent sectoral interests in ACCC decision-making.

The Review then recommended that the further requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) be abolished.

The Guild cannot agree to a recommendation abolishing the requirement that one Commissioner has knowledge or experience of small business matters, as the office of Small Business Commissioner is vital in providing the legislative and policy focus on the specific needs of small business.

The Guild notes the increased role that the ACCC will have in enforcing provisions such as the newly revised Franchise Code.

It is also the case that in many other circumstances, the Commission will be considering issues that arise from the operation of large corporations. In these circumstances it is important that the impact that a decision may have on small businesses should be brought to attention as decisions are made, and not afterwards.

Therefore, it is imperative that there is a Commissioner at the heart of Commission decision making that can provide an insight as to the effect decisions could have on small businesses such as community pharmacies.

Finally, such a step would seem counter to the Government's clear recognition of the importance of small business to the Australian economy, as shown in the recent changes to tax laws contained in the Budget.

For these reasons, the Guild believes that this part of Recommendation 51 should not be proceeded with.

Guild Recommendation 5

The Harper Review's recommendation 51 abolishing the requirement that one Commissioner has knowledge or experience of small business should not be accepted.

As such, the requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) should **be retained**.

8. Final Report Recommendation 53 & 54 – Small Business access to Remedies and Collective Bargaining

Recommendations 53 and 54 of the Harper Review suggested (amongst other things):

- resourcing the ACCC to allow it to test (competition) law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour;
- that Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services;
- the endorsement of the [Productivity Commission's Access to Justice Arrangements report](#) to provide access to effective and low cost small business advice and dispute resolution services, as well as to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and
- reform to the *Competition and Consumer Act* to introduce greater flexibility into the notification process for collective bargaining by small business, including (in particular) allowing a notification to cover future (unnamed) members.

For community pharmacies, the concentration of shopping centre ownership means most are dealing with large landlords when negotiating or renegotiating leases. In this relationship there is clear imbalance in the relative bargaining position of the listed companies operating the larger shopping centres and small business tenants such as pharmacies.

There is also information asymmetry between companies specialising in the leasing of commercial properties and small business operators who may only have to consider leasing issues a couple of times during their business career.

Guild Recommendation 6

The remedial steps will assist in correcting the imbalance and therefore, recommendations 53 and 54 of the Harper Review Final Report should be implemented and be given effect as soon as possible.