

Guidance: Franchising

Many pharmacies in Australia are operated by franchisee pharmacists, who operate under the brand name or business systems of the franchisor. In those circumstances, the owners of the pharmacy (**pharmacy business licensee**) have entered into a franchise agreement with the Franchisor (**Franchise Agreements**). Franchise Agreements often provide the pharmacy business licensee with access to trade marks, branding, merchandise, operational and marketing support, and training.

Section 5 of the *Pharmacy Regulation Act 2010 (Vic)* (**the Act**) stipulates that a company or individual must not own or have a proprietary interest in more than 5 separate pharmacy businesses. A proprietary interest is defined under the Act to mean a legal or beneficial interest. This provision restrains any pharmacist or pharmacy company from owning or having a proprietary interest in more than 5 pharmacy businesses.

When negotiating and entering in to a Franchise Agreement it is very important to be aware of the undue influence provisions of the Act. The Act places restrictions on who can control or influence the way in which a pharmacy business is carried on.

For Franchise Agreements, section 11 of the Act makes void any provision of a Franchise Agreement (or any other commercial arrangement concerning a pharmacy) that gives any person other than the person licenced to carry on the pharmacy business:

- a) the right to control the manner in which the pharmacy business is carried on; or
- b) the right to access books of accounts or records kept in respect of that business, otherwise than for the purpose of determining whether or not the conditions of the relevant document are being complied with; or
- c) the right to receive any consideration that varies according to the profits or takings of the business.

For example, pharmacists should be wary of and avoid the following types of clauses in Franchise Agreements:

- clauses that allow the Franchisor to dictate the way in which the business is operated;
- clauses that provide that any amounts payable to the Franchisor increase or decrease in accordance with the profits of the business (for example, a Franchise annual fee that is a base amount plus a % of profits).
- clauses that provide the Franchisor with unfettered (i.e. unlimited) discretion to make decisions with respect to the business;
- clauses that provide that amounts contributed by the pharmacy business to such things as Franchisor marketing funds or training are calculated by reference to the profit of the business;
- clauses that provide a Franchisor with a **right** of access to books of account or records kept in respect of the business (otherwise than for the purpose of determining whether the agreement is being complied with), as opposed to the franchisee having the **option**

to provide certain information to the franchisor so that a specific requested service can be provided (for example, marketing or management services).

The following checklist will assist with the preparation and negotiation of Franchise Agreements. If you answer “yes” to any of the question in the list, we recommend that you seek legal advice before entering into the Franchise Agreement:

Franchise Agreement undue influence indicator checklist	No	Yes
Does the Franchise Agreement provide that any payment is calculated with reference to the profit, turnover or takings of the business (for example, does the agreement provide that pharmacy business pay the Franchisor a % of its profit)?		
Does the Franchise Agreement provide an obligation on the pharmacy business to provide the Franchisor with financial reports, summaries or audits, otherwise than for the purpose of determining whether or not the conditions of the Franchise Agreement are being complied with? (for example: reports as to profits or takings)		
Does the Franchise Agreement give the Franchisor the right to review or access any records of the pharmacy business otherwise than for the purpose of determining whether or not the conditions of the Franchise Agreement are being complied with? (for example: patient or supply records)		
Does the Franchise Agreement give the Franchisor the right to review or access the accounts of the pharmacy business otherwise than for the purpose of determining whether or not the conditions of the Franchise Agreement are being complied with? (for example: income, profit and loss or tax records)		
Does the Franchise Agreement allow the Franchisor to dictate the way in which the business is operated?		
Does the Franchise Agreement give the Franchisor unfettered (i.e. unlimited) discretion to make decisions with respect to the business?		

Important Note – Trust or other commercial arrangement assessment:

*All franchise agreements will be examined by an Authority officer for compliance with the Act. If deemed non-compliant, documents may (with an applicant or licensee’s authorisation) be referred to the Authority’s lawyers for preparation of a schedule of amendments necessary to ensure compliance, and the licensee will incur a fee. The fee for the preparation of these documents is **\$1,900.00 per commercial arrangement** (exempt from GST).*