

Guidance: Intellectual Property Licence Agreements

Some pharmacies in Australia operate under the brand name of a larger company but are owned by the pharmacy business licensee. In those circumstances the pharmacy may operate pursuant to an intellectual property licence agreement, which provides the pharmacy business owner with the rights to use or display the intellectual property (usually the branding) of the larger company (**the Licensor**), both in-store and/or online (**Licence Agreement**).

The “Intellectual Property” of a company may include its brand name, trademarks, patents, visual imagery, slogans, advertising text, marketing flyers and collateral, video content, computer software, or even music. Intellectual Property is generally owned by the creator or producer of the material and permission must be granted for its use, either expressly or through a Licence Agreement.

On occasion, the products that are sold in pharmacies are offered to the pharmacy business licensee with an accompanying intellectual property Licence Agreement which provides the pharmacy business with rights to use or display the intellectual property of the product owner, both in-store and online.

Before entering in to any intellectual property Licence Agreement, it is very important to be aware of the undue influence provisions of the *Pharmacy Regulation Act 2010 (Vic)* (**the Act**).

Undue influence

Section 11 of the Act makes void any provision of a Licence Agreement (or any other commercial arrangement) 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 intellectual property Licence Agreements:

- clauses which provide that the fee for use of the Intellectual Property or accompanying products, will increase or decrease, if the profits of the business increase or decrease - either a result of the increased sale of products or otherwise (for example: a licence fee that is a base amount plus a % of profits from product sales, or simply a % of profits);

- clauses which provide the Licensor with unfettered (i.e. unlimited) discretion to make decisions with respect to the business;
- clauses which provide that amounts contributed by the pharmacy business to such things as Licensor marketing funds or training are calculated by reference to the profit of the business; and
- clauses which provide a Licensor 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 licensee having the **option** to provide certain information to the Licensor so that the Intellectual Property and/or product can be provided.

Important Note – Trust or other commercial arrangement assessment:

*All Intellectual Property Licence 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).*

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