

## Guidance: Loan Agreements and Security Agreements

It is very common for persons purchasing or operating a pharmacy business to finance the purchase or operation through a loan.

A loan can be given on a secured or unsecured basis.

If you are borrowing money on a secured basis, you will usually need to enter into a separate security agreement (in addition to the loan agreement).

Usually:

- the loan agreement will set out the terms on which money is lent by the lender and repaid by the borrower (including the amount, the interest rate and repayment terms); and
- the security agreement will give the lender an interest in a particular asset or property, that is pledged by the borrower as security for the money lent to the borrower. In the event that the borrower defaults, the security can be seized and sold by the lender.

The *Pharmacy Regulation Act 2010 (Vic)* (**the Act**) places restrictions on who can own or have a proprietary interest in a pharmacy business. In particular, s 5(1) of the Act provides that:

- (1) A person must not own or have a proprietary interest in a pharmacy business unless the person is
  - a) a registered pharmacist; or
  - b) a company registered under the Corporations Act-
    - i. whose directors are all registered pharmacists; and
    - ii. in which all of the beneficial and legal interests in those shares are held by registered pharmacists.<sup>1</sup>

However, the Act makes a specific provision for security agreements.

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<sup>1</sup> Section 5(c) of the Act sets out some limited exceptions to this requirement (including for former Friendly Societies and wholly owned subsidiaries), which are beyond the scope of this Guidance.

## Security Agreements and proprietary interests

Section 6(2) of the Act provides that nothing in section 5(1) or section 5(2)<sup>2</sup> applies to an interest created when a person gives a mortgage or security interest in respect of that person's pharmacy business, **if** the mortgage or document creating the security interest does not contravene section 11.

## Loan Agreements, Security Agreements and undue influence

Section 11 of the Act makes void any provision of a 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.

Pharmacy business licensees should be wary of certain contractual provisions that may be used by money lenders or creditors.

In particular, pharmacy business licensees are urged to be wary of clauses that:

- allow the lender or security holder to dictate or control the way the business is operated;
- provide that any payment made pursuant to the loan or security agreement (including interest or loan fees) increases or decrease in accordance with the profits of the pharmacy business;
- give the lender or security provider a right to access the records and accounts of the pharmacy business (extending beyond that required to ascertain whether the terms of the loan or security agreement are being complied with- for example whether the pharmacy business is solvent or has not restructured).

### **Important Note – Trust or other commercial arrangement assessment:**

*All Loan Agreements and Security 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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<sup>2</sup> Section 5(2) imposes a limit on the number of pharmacy businesses a person may hold or have a proprietary interest in.