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# PHARMACY REGISTRATION BOARD OF WESTERN AUSTRALIA

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## **Guidelines for Franchise Arrangements**

The Pharmacy Registration Board of Western Australia (the Board) is established under the Pharmacy Act 2010 (the Act) and is the successor in law to the Pharmaceutical Council of Western Australia. It is responsible for administration of the Act which provides for the regulation of pharmacy businesses.

The Board provides the following guidelines relating to a proprietary interest in a pharmacy as it applies to franchise arrangements in Western Australia.

### **Proprietary Interest**

The Act defines proprietary interest as a legal *or beneficial interest*, (italics added) and includes an interest as:

- (a) a sole proprietor; or
- (b) a partner; or
- (c) a director, member or shareholder of a company, as defined in the Corporations Act; or
- (d) a trustee or beneficiary of a trust.

and has a meaning affected by subsection (2)

Subsection (2) states:

Without limiting the generality of the expression, a person will be taken to hold a proprietary interest in a pharmacy business if —

- (a) the person is a party to an arrangement of a kind prescribed by the regulations; or
- (b) the person, in the course of carrying on a business, provides a benefit to another for which the person is entitled to receive the profits or income, or a share in the profits or income, of a pharmacy business; or
- (c) the person has, under a franchise or other commercial arrangement, a right to receive consideration that varies according to the profits or income of a pharmacy business.

## **Franchise Arrangements**

Section 54 of the Act states that:

A person must not own, or hold a proprietary interest in, a pharmacy business unless the person is —

- (a) a pharmacist; or
- (b) a person who is a partner in a partnership that carries on the business and in which every partner is either —
  - (i) a pharmacist; or
  - (ii) a close family member of a partner who is a pharmacist;
- or
- (c) a pharmacist controlled company; or
- (d) a friendly society; or
- (e) the preserved company.

The Board considers the intention of the Act is to prohibit companies from becoming involved or participating in the practice of pharmacy by indirect means, specifically by providing assistance to a pharmacist legitimately carrying on practice in his own right. The Board considers this section was intended to ensure that responsibility for carrying on the practice should remain with the pharmacist engaged in the practice, and that he should control every aspect of the practice at all times, free from external influence or direction.

The Board considers any agreement which provides the benefit of assistance to a pharmaceutical chemist, where the kind of assistance, or the terms upon which it is provided, causes some loss of control by the pharmacist over the manner in which he carries on the practice or an aspect of the practice and correspondingly, enables the company or someone other than the pharmacist to exert control in relation to the manner in which the practice, or an aspect of the practice, is carried on, may result in a breach of the Act.

The Board accepts that a company may provide marketing, financial, business advisory or management services to a pharmacy for a fee in circumstances where the pharmacist to whom the services are provided retains the right to choose whether or not he will make use of the services and, if he chooses to make use of them, the extent to which he will do so. On the other hand, if a company provides marketing, financial, business advisory or management services to a pharmacy for a fee in circumstances where the pharmacist is required by the terms of an agreement to accept the services and to act in accordance with the directions or advice given by the company providing the services, or a nominated third party, a breach of the Act may occur. That result would follow notwithstanding that in an objective sense the services may be valuable and of great benefit to the efficient, effective and/or profitable conduct of the practice.

The Board does not consider it is relevant that the assistance may relate only to one particular aspect of the practice of a pharmacist – for example, only the retail sale of goods and provision of services and not the professional dispensing of medicines and drugs.

The Board considers an agreement between a company and a pharmacist where the pharmacist is responsible for and retains control over the day-to-day management of a pharmacy business but the company is responsible for making decisions in relation to the trading policy of the pharmacy and the sources and terms of supply of goods and services to be acquired by the pharmacy, which the pharmacist is required to implement may result in a breach of the Act.

Some contractual arrangements involve a common enterprise between a company as franchisor and a pharmacist as franchisee. An important feature of such an arrangement is that each party is responsible for and has control over the performance of activities constituting its contribution to the overall enterprise. In the context of the business of pharmacy, typically this may involve the pharmacist being responsible for the day-to-day management of the retail side of the business as well as having complete control over the professional or dispensing aspects of the business, and the franchisor being responsible for determining the overall appearance and design of the pharmacy, making stock selections and deciding on stock levels, establishing marketing initiatives, establishing ordering systems and sources and terms of supply, setting staffing policy, establishing staff training regime and making available operating and business management systems to be used in the conduct of the pharmacy business. Typically the pharmacist will be entitled to retain the profits of the business but will be required to pay fees to the franchisor.

The Board considers contractual arrangements between the parties which give rise to a common enterprise of this kind, may result in a breach of the Act because the right to control the manner in which the practice is carried on does not rest exclusively with the pharmacist, but rather is allocated on a functional basis between the pharmacist and the company according to the terms of the particular arrangement.

The Board considers that it does not matter that under the terms of the arrangement the pharmacist would retain responsibility for managing the day-to-day running of the business, because he would be obliged to operate within boundaries established by the franchisor and subject to its direction in relation to the manner in which the retail aspects of the business should be carried on.

### ***Clauses in typical franchise arrangements***

*Some common clauses in franchise agreements which could result in a breach of section 54(1) include clauses which enable a company to exert control in relation to the following:*

- A clause where the franchisor agrees to provide the pharmacist with advice, information and assistance with respect to the sales promotion, merchandising and marketing of products including methods and techniques of retail marketing and promotion and implementation of strategies, programs and systems in connection with those methods and techniques, and also with respect to the general management and administration of the pharmacists business, and
- A clause where the franchisor conducts various advertising and promotional activities as it considers necessary for the purposes of the marketing, distribution and sale to customers of any of the products sold in the pharmacy and the advertising and promotion of pharmacists within the franchise group.
- A clause which contains:

- (a) A requirement to ensure that the pharmacy is fitted out in accordance with franchisor's requirements (including colour schemes and combinations of colour, mode of decoration, general décor, get up, signage, appearance and layout requirements of the franchisor for the pharmacy from time to time during the term of the agreement).
- (b) A requirement to comply with any other requirements that the franchisor may reasonably require with respect to carrying on business as a member of the franchise group.
- (c) A requirement to promote categories or items of products and services marketed, distributed or offered for sale by the franchisor and have in stock and display for sale the combination, categories and mix of products that the franchisor may require.
- (d) A requirement to accept and display for sale a predetermined quantity of product.
- (e) A requirement to make freely available to customers and prospective customers of the pharmacy, any brochure, pamphlet, leaflet, manual, visual display, point of sale material, in-store promotional materials and aids or other items prepared by or for the franchisor in connection with the advertising and promotion of specified products and services.
- (f) A requirement that the pharmacist must not engage in any conduct that, inter- alia, has the purpose or effect of damaging the business, reputation or goodwill of another member of the franchise group.
- (g) A requirement that the pharmacist must otherwise observe and comply with any reasonable guidance, note, or recommendation given by the franchisor to the pharmacist.
- (h) A requirement that the pharmacist support the franchisor's advertising and promotional activities.
- (i) A requirement that the pharmacist install computer hardware and/or software approved by the franchisor for use in the business and to maintain systems, which include retail operations systems and human resource programs and to enter such contracts and arrangements with other persons as are necessary to perform those obligations.
- (j) A requirement to provide the franchisor with sales and product transaction information.
- (k) A requirement to permit authorised representatives of the franchisor to enter the pharmacy to verify compliance with the agreement.
- (l) A requirement to give the franchisor access to the records or accounts of the business.
- (m) A requirement to support, promote and participate in the franchisor's customer loyalty programs.
- A clause by which the franchisor reserves the right to negotiate and reach agreement directly with suppliers for them to make product available at favourable product pricing and trading terms to the pharmacist.

- A clause which requires a franchisor to act as the pharmacist's agent, undertaking to co-ordinate the fit out of the pharmacy and to do all work necessary to ensure that the premises are completed and ready for the conduct of the pharmacy. This may include not only the work of designing and managing fitting out the pharmacy but also establishing all systems, operations and procedures for the operation of the business, developing and implementing the initial marketing and advertising of the pharmacy, providing initial orientation training for staff, determining the opening core inventory and product range and co-ordinating the product suppliers for the purchase by the pharmacist of the core opening inventory.
- A clause which requires the pharmacist to comply with an operations manual which may regulate the day to day activities of the pharmacy.

### **Business Name**

The Board does not consider the licensing of a pharmacist to use a business name or trade mark belonging to a company, of itself, results in the company assisting in carrying on the pharmacist's practice in breach of the Act.