

Pharmacy Council of New South Wales

Guideline in relation to financial interests

1. Background

- 1.1. In New South Wales, a person may only have a *financial interest* in a pharmacy business if they are a pharmacist (or defined body related to a pharmacist), subject to limited exceptions.¹
- 1.2. The purpose of this guideline is to assist pharmacists and other persons who enter into arrangements with pharmacists concerning the operation a pharmacy business (or proposed pharmacy business) to understand how the Pharmacy Council of New South Wales (**Council**) is likely to apply these requirements when exercising its functions under Schedule 5F of the *Health Practitioner Regulation National Law (NSW)* (**National Law**). Relevantly, those functions include:
 - 1.2.1. maintaining Register of Pharmacies; and
 - 1.2.2. approving the registration of any new financial interest in a pharmacy business.
- 1.3. This guideline is of particular relevance to pharmacists who intend to purchase or acquire an interest in a new or existing pharmacy business, and are seeking approval from the Council for registration of that interest.²
- 1.4. Where the terms of any proposed arrangements would result in a person who is not a pharmacist or other eligible person/entity (herein, a “**non-pharmacist**”) acquiring a financial interest in the pharmacy business, then the Council will refuse the application on the basis that approving the application would result in a contravention of the National Law.
- 1.5. Carrying on a pharmacy business where all holders of financial interests in the business are not registered on the Register of Pharmacies is an offence,³ and may constitute unsatisfactory professional conduct on the part of a pharmacist.⁴

2. Financial interest in a Pharmacy Business

What is a pharmacy business?

- 2.1. For the purposes of the National Law, a ‘pharmacy business’ is a business of a pharmacist or a pharmaceutical chemist in which the dispensing and compounding of prescriptions for any substance under section 8 of the *Poisons and Therapeutic Goods Act 1966* (NSW)

¹ National Law, Schedule 5F, cl 5, 6.

² National Law, Schedule 5F, cl 12.

³ National Law, Schedule 5F, cl 3.

⁴ National Law, ss 139B(1)(b) and 139D.

occurs.⁵ The 'pharmacy business' is not limited to the dispensing or compounding function. Rather, the 'pharmacy business' will include the entire operation of the business that is carried on by the pharmacist in the business including the sale of any non-pharmaceutical goods.⁶

Who can hold a financial interest in a pharmacy business in New South Wales?

- 2.2. The law in New South Wales requires that only certain persons may have a financial interest in the business of a pharmacist carried out in a pharmacy.⁷ This requirement is found in the National Law which provides that a holder of a financial interest in a Pharmacy Business may only be:
- 2.2.1. a pharmacist;
 - 2.2.2. a partner in a pharmacists' partnership;
 - 2.2.3. a pharmacists' body corporate or a member of a pharmacists' body corporate; or
 - 2.2.4. a friendly society with a prior written approval from the Minister of Health.⁸
- 2.3. There are limited exceptions to this rule.⁹ Any person seeking to rely on the exemptions should carefully consider the terms of the exemptions as contained in the National Law, as they are subject to specific conditions and may only last for a limited duration of time.
- 2.4. All holders of a financial interest must be registered with the Council on the Register of Pharmacies.¹⁰ The National Law also provides that a pharmacist must not own or otherwise have a financial interest in more than five pharmacy businesses in New South Wales, with a pharmacy business and associated personal service rooms counted as one pharmacy business for the purpose of this prohibition.¹¹

What is a financial interest?

- 2.5. A financial interest means any direct or indirect monetary or financial interest in the pharmacy business.¹²
- 2.6. This includes the proprietary interest of a partner, shareholder, trustee or beneficiary in a pharmacy business.¹³ It also includes non-proprietary interests in a pharmacy business that may be created by contractual arrangements between the pharmacist and a non-pharmacist, depending on the terms of those arrangements.¹⁴

⁵ National Law, Schedule 5F, cl 1.

⁶ See *White v District Court of New South Wales* (1998) 45 NSWLR 313 at 317, 321-322.

⁷ See *Pham v Doan* (2005) 63 NSWLR 370 at [90]-[91].

⁸ National Law, Schedule 5F, cl 5, 6.

⁹ National Law, Schedule 5F, s 5(2)-(4); *Health Practitioner Regulation (New South Wales) Regulation 2016* (NSW), cl 15A.

¹⁰ National Law, Schedule 5F, cl 3.

¹¹ National Law, Schedule 5F, cl 9.

¹² National Law, Schedule 5F, cl 2. There are limited exclusions from the definition of 'financial interest'. For example, an interest that a person has in the profits of a pharmacy business because they are an employee of that business (other than an interest in shares) does not constitute a financial interest for the purposes of the National Law:

National Law, Schedule 5F, cl 2(2).

¹³ National Law, Schedule 5F, cl 2.

¹⁴ See, e.g., *Chappius v Filo* (1990) 19 NSWLR 490 at 510.

- 2.7. When an application for registration of a financial interest in a pharmacy business is made to the Council, the applicant will need to provide, as part of the application, copies of any material contracts or arrangements that the applicant has entered into, or proposes to enter into, concerning the operation of the pharmacy business so that the Council can assess whether any of those arrangements, either alone or taken together, give rise to a prohibited financial interest. This includes, for example, franchise agreements, management agreements, lease/licence agreements, loan agreements, buyers' group arrangements and supply agreements for pharmaceutical or non-pharmaceutical goods.
- 2.8. Whether a particular contract or arrangement with a pharmacy business creates a financial interest is a question of fact and degree having regard to all aspects of the relationship between the pharmacy business and the other party to the transaction.¹⁵ The following features of a contract or arrangement are examples of what may be relevant on the particular facts (either standing alone or when considered together):
- 2.8.1. whether the arrangement allows the non-pharmacist to share in, or receive benefit from, the profits or turnover of the pharmacy business or a part thereof;¹⁶
 - 2.8.2. whether the pharmacy business is required to make payments to the non-pharmacist (which may be in the form of franchise fees, management fees, licence fees, interest payments, rent, or other forms of payment) which reflect the turnover, profits or financial performance of the pharmacy business or any part of the pharmacy business;¹⁷
 - 2.8.3. whether the contract or arrangement represents a normal contractual arrangement for the supply or purchase of the particular good or service;¹⁸
 - 2.8.4. whether the pharmacy business is required to -- or there is an understanding or effective commercial imperative that the pharmacy business should -- purchase certain goods and services from the non-pharmacist, and whether or not those goods and services are being supplied at trade prices (including whether the supplier receives rebates or other financial benefits associated with the supply);¹⁹
 - 2.8.5. whether a supplier has an interest (either direct or indirect) in the pharmacy business beyond the ordinary interest that every creditor has in the solvency of its debtor;²⁰
 - 2.8.6. whether the non-pharmacist has the capacity to control or significantly influence the operation of the pharmacy business or any part of the pharmacy business for their own financial gain (including, for example, controlling or restricting how the pharmacy business may be operated, how the premises may be used or the circumstances in which the pharmacy business may be disposed of).²¹
- 2.9. The above list is not intended to be exhaustive.

¹⁵ See *Attorney General for the State of NSW v Now.com.au Pty Ltd* [2008] NSWSC 276 at [54], [69].

¹⁶ See *Chappius v Filo* (1990) 19 NSWLR 490 at 510; *White v District Court of NSW* (1998) 45 NSWLR 313 at 322; *Redwood Anti-Ageing Pty Limited & Anor v Knowles & Ors* [2013] NSWSC 508 at [3]-[4], [26], [107]-[109].

¹⁷ See *Chappius v Filo* (1990) 19 NSWLR 490 at 510; *White v District Court of New South Wales* (1998) 45 NSWLR 313 at 322; *Attorney General for the State of NSW v Now.com.au Pty Ltd* [2008] NSWSC 276 at [52]-[59].

¹⁸ See *White v District Court of New South Wales* [1999] NSWCA 406 at [10]; *Chappius v Filo* (1990) 19 NSWLR 490 at 510.

¹⁹ See *White v District Court of New South Wales* (1998) 45 NSWLR 313 at 318-319.

²⁰ See *Chappius v Filo* (1990) 19 NSWLR 490 at 510; *White v District Court of New South Wales* (1998) 45 NSWLR 313 at 318-322; *White v District Court of New South Wales* [1999] NSWCA 406 at [10].

²¹ See *Attorney General for the State of NSW v Now.com.au Pty Ltd* [2008] NSWSC 276 at [43]-[47], [69]-[72].

- 2.10. This guideline is published in order to assist potential applicants to understand how the Council is likely to exercise its functions under Schedule 5F. In this respect, as part of making an application under Schedule 5F, an applicant may include with the application, any submission it wishes to make as to whether an aspect of this guideline applies to the application or not, or any submission that an aspect of this guideline is said not to reflect the terms of Schedule 5F.
- 2.11. The Council will make an independent assessment of the merits of each particular application by reference to the terms of the National Law, with the provisions of the National Law having primacy of the terms of this guideline.

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