

Pharmacies

Prohibitions against providing sales figures and paying percentage rent

July 2020



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| State | Relevant pharmacy legislation | Relevant retail tenancies legislation | Summary of position |
|-------|--|---|---|
| VIC | <i>Pharmacy Regulation Act 2010</i> (Vic) (PRA) | <i>Retail Leases Act 2003</i> (Vic) (RLA) | <p>Sales figures</p> <p>No prohibition on the provision of sales figures under retail legislation.</p> <p>Arguable that section 11(b) of the <i>PRA</i> makes void a provision in a lease that gives a party (other than the person licensed to carry on the pharmacy business) the right of access to books of account kept in respect of a pharmacy business unless the right is for the purpose of determining whether or not the conditions of the lease are being complied with. Our view is that this does not prohibit sales figures being provided to the Lessor [NB. The <i>PRA</i> makes void the provision, so all that occurs is the Lessor is unable to enforce].</p> <p>Percentage rent</p> <p>Percentage rent cannot be charged.</p> <p>A Lessor is prohibited under section 11(c) of the <i>PRA</i> from claiming percentage rent from a Lessee of a pharmacy business with respect to profit or takings of the business. Section 11(c) makes void a provision in a lease or other commercial arrangement in respect of a pharmacy or pharmacy business. Specifically a term that provides “<i>the right to receive any consideration that varies according to the profits or takings in respect of the business</i>” is void.</p> <p>Pharmacy business means a business carried on at a pharmacy and includes the business of providing pharmacy services and that part of the business where goods of any kind are sold or offered to be sold but does not include a pharmacy departments of pharmacy depot.</p> <p>Pharmacy services includes –</p> <ul style="list-style-type: none"> (a) the supply, compounding or dispensing of medicines; and (b) advice and counselling on the effective and safe use of medicines. |
| NSW | <i>Health Practitioner Regulation (Adoption of National Law) Act 2009</i> (HPRA) | <i>Retail Leases Act 1994</i> (Nsw) (RLA) | <p>Sales figures</p> <p>Our view is that provided the lease requires a tenant to keep books of account, the right to review those account is necessary to ensure those records are being kept and accordingly is not void.</p> <p>No prohibition on the provision of sales figures in retail leasing legislation.</p> <p>Schedule 5F, Section 10(1) of the <i>HPRA</i> provides that “<i>any of the following provisions in a lease or a licence... in respect of a pharmacy business are void...</i></p> <p><i>(c) a provision that gives to the lessor... access to the books of account for the business, other than for the purposes of determining whether or not the lessee... is complying with the terms and conditions of the lease...</i>”</p> <p>Percentage rent</p> <p>In our view details of sales of prescription items cannot be used for the purposes of calculating percentage rent, however there is a grey area as to whether a Lessor is entitled to the payment of percentage rent with regard to the sale of ancillary services which do not relate to the supply of prescription medicines or advice. Conservative approach is that the Lessor cannot charge percentage rent on these amounts.</p> <p>Schedule 5F, section 10(1) of the <i>HPRA</i> provides that “<i>any of the following provisions in a lease or a licence... in respect of a pharmacy business are void...</i></p> <p><i>(d) a provision that provides that the lessor, licensor or the grantee is to receive consideration that varies according to the profits or takings of the business.</i>”</p> <p>Pharmacy business is defined to be “<i>the business of a pharmacist or pharmaceutical chemist in which the dispensing and compounding of prescriptions for any substance specified in the Poisons List...</i>”</p> |

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| QLD | <i>Section 139I Pharmacy Business Ownership Act 2001 (Qld) (PBOA)</i> | *No relevant restrictions in the <i>Retail Shop Leases Act 1994 (Qld) (RSLA)</i> | <p>Sales figures</p> <p>No prohibition on the provision of sales figures.</p> <p>Percentage rent</p> <p>Conservative interpretation is that Lessors are not permitted to charge percentage rent.</p> <p>Section 139I PBOA – “(1) A ... lease ...or commercial arrangement for a pharmacy business is void to the extent it –</p> <p>(a) gives to a person, other than the owner of the business...</p> <p>(ii) the right to receive any consideration that varies according to the profits or takings of the business...”</p> <p>For these purposes, pharmacy business means a business providing pharmacy services.</p> <p>“Pharmacy service” is not defined in the <i>PBOA</i>. Accordingly, the conservative approach is to interpret the provision broadly to include all goods or services from a pharmacy.</p> |
| WA | <i>Pharmacy Act 2010 (WA) (PA)</i> | <i>Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) (CTAA)</i> | <p>Sales figures</p> <p>Turnover provisions will be void unless the tenant has given prior agreement in writing in the prescribed form (s7(1) CTAA). A provision requiring the tenant to provide turnover figures to the landlord is void unless the rent requires turnover figures in whole or in part (s8 CTAA).</p> <p>However, please refer to the <i>PA</i> provisions below which effectively mean no turnover rent can be paid, which in turn means no turnover figures can be obtained.</p> <p>Percentage rent</p> <p>We believe the conservative approach would be to interpret the <i>PA</i> provisions broadly and as such no turnover rent can be charged in relation to goods or services from a pharmacy.</p> <p>Section 54 of the <i>PA</i> provides that a person must not own, or hold a proprietary interest in a pharmacy business unless the person is:</p> <ul style="list-style-type: none"> • a pharmacist; • a person who is a partner in a partnership that carries on a business and in which every partner is either a pharmacist or a close family member of a partner who is a pharmacist; • a pharmacist controlled company, being a company in which at least one director is a pharmacist and every director is a pharmacist or a close family member of a pharmacist; or • the preserved company. <p>Section 3(2) of the <i>PA</i> provides that a person will be taken to hold a proprietary interest in a pharmacy business if the person:</p> <ul style="list-style-type: none"> • in the course of carrying on a business, provides a benefit to another for which the person is entitled to receive a share in the profits or income of a pharmacy business ; or • 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. <p>Pharmacy business is defined in the <i>PA</i> to be a business:</p> <ul style="list-style-type: none"> • consisting of the provision of pharmaceutical services; and • from which goods and services relating to the provision of pharmaceutical services may be available. <p>The <i>PA</i> does not contain a definition of “pharmaceutical services”.</p> |

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| SA | <i>Health Practitioner Regulation National Law (SA) Act 2010 (HPRNLA)</i> | <i>Retail and Commercial Leases Act 1995 (SA) (RCL)</i> | <p>Sales figures</p> <p>Under section 24(5) of the <i>RCL</i> sales figures cannot be required unless rent is calculated by reference to turnover.</p> <p>Turnover includes gross takings, gross receipts, gross income and similar concepts.</p> <p>Percentage rent</p> <p>A Lessor cannot charge pharmacists percentage rent:</p> <p>S 26(1) HPRNLA – pharmacy services or pharmacy means –</p> <p>(a) restricted pharmacy services; or</p> <p>(b) other health services (including the supply of goods and the provision of advice) provided in the course of practice by a pharmacist or a person who holds himself or herself out, or is held out by another, as a pharmacist.</p> <p>Restricted pharmacy services means –</p> <p>(a) dispensing drugs or medicines on the prescription of a medical practitioner, dentist, veterinary surgeon or other person authorised to prescribe the drugs or medicines; or</p> <p>(b) other services declared by the regulations to be restricted pharmacy services.</p> <p>S26(2) HPRNLA – Without limiting the generality of the expression, a person will be taken to provide pharmacy services or restricted pharmacy services if –</p> <p>...(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.</p> <p>S 51(1) HPRNLA – In order to provide restricted pharmacy services:</p> <ul style="list-style-type: none"> • a person must hold a current authorisation to practise in the pharmacy profession; • a body corporate must be a corporate pharmacy services provider, being a body corporate of which all directors are registered in the pharmacy profession or where there are only two directors, one director is a pharmacist and the other is a prescribed relative of that pharmacist; or • a trust must be a trustee pharmacy services provider, being a trust where each trustee and beneficiary must be registered in the pharmacy profession or a prescribed relative of a pharmacist. |
| TAS | <i>Part 6 – Offences Division 1 – Pharmacy Control Act 2001, Section 62 (Tas) (PCA)</i> | <i>Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (made under section 43 of the Fair Trading Act 1990) (Retail Legislation)</i> | <p>Sales figures</p> <p>S 10(6) Retail Legislation – In accordance with this section Lessors are unable to require turnover figures unless part of the rent is calculated on the basis of the turnover of the tenant’s business.</p> <p>S 15(2) Retail Legislation – A property owner may require that the turnover figures provided by the tenant be audited.</p> <p>There is an argument to the contrary, as the <i>PCA</i> prohibits turnover rent, Lessors are not legally entitled to require turnover figures and cannot insist on a provision in a lease which requires the supply of turnover figures.</p> <p>Percentage rent</p> <p>There is no express mention of percentage rent in the <i>PCA</i> although we believe the more conservative interpretation that may be inferred is that Lessors are not able to charge percentage rent due to the <i>PCA</i>.</p> <p>Turnover rent provisions breach the ownership restrictions in the <i>PCA</i>. Calculating rent based on turnover or profits arguably means that the Lessor has an interest in the pharmacy business, as they receive a percentage of income from it. Relevant provisions are the following:</p> |

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| | | | <p>S 62(1) PCA – A person must not hold <i>an interest in a pharmacy business</i> unless the person holds an eligibility certificate or the person is an exempt person under section 61D of the <i>PCA</i>.</p> <p>S 3A PCA – “pharmacy business” means a business that <u>involves any or any combination of the following activities</u>:</p> <p>(a) the compounding or dispensing of narcotic substances and restricted substances, within the meaning of the <i>Poisons Act 1971 (Poisons Act)</i>, by a pharmacist on the prescription or lawful request of a medical practitioner or other health professional; and</p> <p>(b) the sale or supply of potent substances, within the meaning of the <i>Poisons Act</i>, by a pharmacist; and</p> <p>(c) the sale or supply of medicinal poisons, within the meaning of the <i>Poisons Act</i>, by a pharmacist or by an employee of that pharmacist under his or her supervision, that are in the custody or control of that or another pharmacist.</p> <p>S 3B PCA – “interest in a pharmacy business” means any legal or beneficial interest in the business.</p> <p>S 61B PCA – A person that intends to hold an interest in a pharmacy business must apply to the Authority for an eligibility certificate under s 61B of the <i>PCA</i>.</p> <p>S 61B(6) – The Authority must issue an eligibility certificate to the applicant if:</p> <p>(a) the applicant is an eligible person;</p> <p>(b) the applicant is a fit and proper person to hold an interest in a pharmacy business; and</p> <p>(c) the application is made in the approved form and in the way prescribed under ss 61B(2) and (3) of the <i>PCA</i>.</p> <p>S 61C PCA – provides that an eligible person includes:</p> <ul style="list-style-type: none"> • individuals who are pharmacists, whether or not that pharmacist has had his or her registration suspended within the meaning of the Health Practitioner Regulation National Law (Tasmania); • a partnership where each member of the partnership is a pharmacist whether or not one or more of those pharmacists has had his or her registration suspended within the meaning of the Health Practitioner Regulation National Law (Tasmania); • a body corporate where each director of the body corporate is a pharmacist and each other member of the body corporate is a pharmacist or a close relative of a pharmacist. |
| NT | <p><i>Health Practitioners Act 2004 (NT) (HPA)</i></p> | <p><i>Business Tenancies (Fair Dealings) Act 2003 (NT)</i></p> | <p>Sales figures</p> <p>No prohibition on the provision of sales figures.</p> <p>Percentage rent</p> <p>Section 32(1) of the <i>BTFDA</i> provide a list of exclusions for turnover rent for a retail shop lease when determining rent or a component of rent by reference to turnover.</p> <p>There is no express mention of percentage rent in the <i>HPA</i> although it is our view (albeit conservative) that the legislation infers that Lessors are not able to charge percentage rent under a lease.</p> <p>S 2 of Schedule 7 HPA – states the law in relation to Ownership of a pharmacy:</p> <p>“(1) A person must not -</p> <p>(a) own; or</p> <p>(b) exercise any control over the conduct of,</p> <p>a pharmacy business unless the person-</p> <p>(c) is an authorised pharmacy business owner; or</p> <p>(d) has been granted an exemption”</p> <p>Pharmacy business means a business that includes the custody of drugs and medicines, the dispensing of medicines on prescription and the supply of schedule drugs and poisons to consumers by retail.</p> |

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| | | | <p>Authorised pharmacy business owner means:</p> <p>(a) a pharmacist; or</p> <p>(b) a partnership of which all partners are pharmacists; or</p> <p>(c) a corporation of which all shareholders and directors are pharmacists.</p> |
| ACT | <i>Public Health Act 1997 (ACT) (PHA)</i> | <i>Leases (Commercial and Retail) Act 2001 (ACT) (LCRA)</i> | <p>Sales figures</p> <p>Section 129 of the <i>LCRA</i> provides that periodic turnover figures must not be requested from a tenant unless the lease provides that rent is to be worked out by reference to turnover.</p> <p>A lessor must keep the periodic figures confidential except for the list of exceptions in section 129(2) of the <i>LCRA</i>.</p> <p>Percentage rent</p> <p>Section 64 of the <i>LCRA</i> outlines how to work out turnover rent under a lease including various exclusions for items that cannot be included as part of turnover.</p> <p>In our view details of sales of prescription items cannot be used for the purposes of calculating percentage rent, however there is a grey area as to whether a Lessor is entitled to the payment of percentage rent with regard to the sale of ancillary services which do not relate to the supply of prescription medicines or advice. Conservative approach is that the Lessor cannot charge percentage rent on these amounts.</p> <p>S 66V PHA – governs the ownership of a pharmacy business in the ACT. A person must not own a pharmacy business unless the person is:</p> <ul style="list-style-type: none"> • a pharmacist; • a complying pharmacy corporation; or • a former corporate pharmacist. <p>Pharmacy business means a business providing pharmacy services at a community pharmacy.</p> <p>Pharmacy services includes:</p> <p>(a) the supply, compounding or dispensing of a medicine; and</p> <p>(b) advice and counselling on the effective use of a medicine.</p> |

Notes

1. This advice is general in nature only and does not take into account the specific circumstances of a particular lease or any restrictions that may be imposed in practice by the relevant pharmacy guilds / registration boards.
2. This advice relates to Leases that have come into existence after the commencement of the relevant retail tenancies and pharmacy/health professionals legislation. This advice may not be correct in relation to leases entered into prior to this date.

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