

Pharmacy Business Ownership Bill 2023

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Committee Secretary
Economics and Governance Committee
Parliament House
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Brisbane QLD 4000

Via email: EGC@parliament.qld.gov.au

Pharmacy Business Ownership Bill 2023

Thank you for the opportunity to submit on the *Pharmacy Business Ownership Bill 2023* (the Bill).

The Shopping Centre Council of Australia (SCCA) is the industry body representing the interests of shopping centre owners and operators in Queensland and across Australia. Our members are landlords for 150+ pharmacies in Queensland shopping centres and so have a fundamental interest in the Bill.

For the Committee's awareness, Queensland Health (the Department) consulted with the SCCA (in October 2022 and March 2023) in preparing the draft Bill. We are grateful for the opportunity to have contributed our experience and perspective to this process.

However, we are unclear as to why the Department has opted not to address our suggested amendments; parts of the Bill with the greatest impact on shopping centre landlords have been left unchanged and no subsequent explanation or discussions with the Department have ensued. We also note that the Department did not acknowledge the SCCA as stakeholder group that it consulted with in its 8 December 2023 correspondence to the Committee. As a major affected stakeholder group, this is deeply disappointing.

Accordingly, we provide this submission as a basis for further consideration by the Committee. We respectfully ask that the Committee test why the Department has elected not to amend the Bill to incorporate our rationalised and reasoned recommendations.

KEY POINTS

We respectfully submit that the Bill as currently drafted overreaches in that:

- it goes beyond issues that are 'genuine' medical / public health / pharmaceutical service issues; and
- could unjustifiably undermine a property owner's legal and commercial rights, and ability to properly manage potential risks.

Of particular concern for our industry is section 22 of the Bill, which prohibits particular activities relating to a licenced pharmacy business. In seeking to limit / prohibit third party control of a pharmacy business, section 22 overreaches and we submit needs to be redrafted in a more limited and nuanced manner to recognise that there are certain instances where third party control is warranted and justified.

Through restricting or voiding certain agreed lease terms and limiting third party control, pharmacy businesses are given a legal and commercial advantage. This could ultimately give rise to adverse impacts on other tenants within shopping centres.

Further, the rights of shopping centre landlords who are the ultimate legal owners of the land / premises on which pharmacy businesses may operate (via a lease) could have their rights infringed and severely limited as pharmacy businesses are given rights to make unilateral decisions that could impose external risks or harm to the shopping centre, surrounding tenants, or the broader community.

Our recommendations seek to ensure that the Bill is focused on regulating core pharmaceutical / health services, along with ensuring an appropriate balance of rights and obligations, including the rights of shopping centre landlords where a pharmacy business operates under a leasehold premises within a shopping centre.

CONTEXT

Our members own, operate or manage >140 shopping centres in the Queensland market, comprising approximately 75 per cent of the total market. These centres comprise more 10,000 retail tenancies (nearly 80 per cent of shopping centre retail tenancies in Queensland).

The majority of our members own, operate, or manage Queensland shopping centres – ranging from one centre to over 30 centres. Approximately 20 per cent are larger ‘regional’ or CBD based centres and the remaining 80 per cent are smaller ‘neighbourhood’ centres or medium-sized ‘sub regional’ centres.

Our members’ >140 shopping centres have 150+ pharmacies; on average of 1.1 per centre and representing about 1.6 per cent of total tenants.

The Bill will have a significant impact on our members and their operations

REASONING

To be clear, we do not seek to inappropriately or unjustifiably affect the business model of pharmacies in the provision of pharmaceutical or health services.

What we seek is for the Bill (in particular section 22) to ensure that third parties (such as shopping centre owners) do not have their rights unjustifiably interfered with, and that section 22 is properly balanced and does not create unintended consequences.

As a general rule, shopping centre owners lease space to tenants for an agreed use for an agreed period of time for an agreed amount. The lease is a legally binding contract that regulates the relationship between landlord and tenant.

As the ultimate owners of the land on which the tenant operates, the shopping centre landlord is entitled to take certain actions (provided they have made certain disclosures and meet certain conditions) for the benefit of the entire centre, noting that the lease balances the right of the landlord as the ultimate owner of the land with the rights of the tenant, who has the right to operate their premises in accordance with the lease.

Under Queensland retail lease legislation, relevant shopping centre issues and matters would have been disclosed to and agreed by the pharmacy owner at the time they entered into a lease with a shopping centre landlord. The same would have occurred for every other non-pharmacy tenant in the relevant shopping centre.

The Bill could be out of alignment with Queensland retail lease legislation and undermine existing legally agreed retail leases that govern the relationship with a shopping centre landlord and a pharmacy tenant.

As a general principle, legislation should not undermine the legal rights of one business to advantage another, including where, for instance, a pharmacist has entered into a lease in a shopping centre with their ‘eyes wide open’, including with respect to what a shopping centre’s ‘core trading hours’ are.

The Bill should not enable a pharmacy business to needlessly affect well-established legal rights, including under the guise of ‘health services’, noting that the Bill could confer rights to a pharmacy business well beyond the medicines and health services that they provide.

Putting aside the provision of important health services, most pharmacies are predominantly general retail stores. A simple google search will show that pharmacies sell products that go well beyond the core business of selling health / pharmaceutical services.

Pharmacies sell fragrances, skin care, baby products, and many other non-medical products. These are all items that can be purchased at other retailers (not just pharmacies).

As such, if the Bill (in particular section 22) is not limited to pharmaceutical / health services and remains unchanged, the Bill (in our view) would go beyond the remit of its objectives.

The Bill should not provide a competitive advantage on general retailing to pharmacy businesses.

RECOMMENDATIONS

Noting the above, we believe a fairer outcome could be achieved through amendments to the Bill. As such, we suggest the following amendments and provide a mark-up of section 22 of the Bill at **Appendix A**.

Section 22(1)

Section 22(1) should be drafted in a more restrictive manner so that it only relates to the supply of medicines.

As currently drafted, we submit that it could be interpreted to apply beyond just medicines and health services, which are the core of pharmacy businesses.

It is clear from the explanatory memorandum that the intention of section 22(1) is to prohibit third parties from being able to control how a pharmacy business provides services related to medicines and public health (e.g. restricting the medicines that a pharmacy may sell).

As such, section 22(1) should be drafted in a more restrictive manner. We have made a suggested amendment in **Appendix A**.

New section 22(1A)

With respect to the provision of health services, whilst we acknowledge that the provision of these health services is an important part of a pharmacy business, in the shopping centre environment (i.e. where there is a large amount of foot traffic, hundreds of other tenants and businesses, and various other community activities and parties), due consideration should be given to whether or not it is appropriate for these health services to be provided at pharmacies in shopping centres.

In enabling a pharmacy to provide certain health services, our members may have legitimate issues with (for instance) needle exchanges and other services, which could give rise to external risks that can be detrimental to a shopping centre and surrounding areas, along with issues such as waste-disposal and collection, including vehicle parking or access to loading docks.

As such, we have suggested a new section 22(1A) so that a pharmacy business has a right to request from a shopping centre owner the ability to provide those health services from their tenancy, and a shopping centre owner can not unreasonably refuse this request, but could have a right to require certain conditions to be met before they provide these health services.

Section 22(2)(b)(i)

Whilst we acknowledge that the explanatory memorandum contemplates that section 22 will not apply to lessors being able to do a number of things, including imposing requirements as to opening hours, we respectfully submit that the language in this section should be clearer, so as to provide certainty to our members.

As such, we suggest that section 22(2)(b)(i) be amended to '*opening hours, including core trading hours for a retail shopping centre, as provided under the Retail Shop Leases Act 1994*'. This would ensure that the legitimacy of 'core trading hours' will be maintained.

Receive consideration that varies according to profits or takings

We are pleased to see that the subsection related to '*receiving consideration that varies according to the profits or takings of the business*' has been removed from section 22(1) of the Bill, which lists the activities third parties are prohibited from doing (previously set out as section 21(e) of the Draft Bill).

We note, however, that section 13 of the Bill defines a material interest in a pharmacy business to include "*an interest in the business that entitles the person who holds the interest to receive consideration that varies according to the profits or takings of the business.*" Further, section 16 of the Bill prohibits a person from holding a material interest in a pharmacy business unless they are a practicing pharmacist or a close adult relative of a practicing pharmacist who holds an interest in the business.

As a result, section 13 and section 16 have the effect of prohibiting third parties from being able to receive consideration that varies according to the profits or takings of the business.

As we have previously raised, in our submission to the Department, that the limitation of consideration that varies according to the profits or takings of the business should only extend to pharmaceutical services and not general retail items being sold within a pharmacy, such as the sale of beauty products, non-prescription medicines, complementary medicines, skin care products, toys, personal products, and the like.

We therefore submit that the definition of 'material interest' in section 13 of the Bill be amended. Section 13(1)(c) should be amended to read:

"another interest in the business, other than an interest of an owner of the business, that entitles the person who holds the interest to receive consideration that varies according to the profits or takings of the business that relate to the supply and sale of medicines and health services. For the avoidance of doubt, consideration that varies according to the profits or takings of the business that are derived from non-pharmaceutical services will not be considered a material interest."

New section 22(4)

We submit that section 22 should not apply to existing leases (or those in hold-over) between shopping centre landlords and pharmacy tenants. To have this section apply to existing leases would ignore commercial realities, create uncertainty, disregard existing legal agreements that have been freely made between parties, and lead to unintended consequences.

As such, we respectfully submit that section 22 should only apply to new leases entered into or renewed on or after a date that is 6 months after the Bill passes the Queensland Parliament.

This would provide businesses with time to prepare and make any necessary adjustments to standard form arrangements and give businesses greater certainty.

CONTACT

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APPENDIX A

22 Particular activities relating to licensed pharmacy business prohibited

(1) A person, other than an owner of a licensed pharmacy business, must not do or purport to do any of the following—

- (a) control how pharmacy services ~~involving~~ related to the dispensing and supply of medicines are provided to the public by the business;
- (b) restrict the types of medicine ~~or health service~~ the business may provide to the public;

~~Examples of a health service—~~

~~1 Queensland Needle and Syringe Program service~~

~~2 opioid dependency treatment program service~~

~~3 sexual or reproductive health service~~

(c) require medicine for the business to be bought from a particular supplier;

(d) impose a sales target for the business in relation to a particular medicine.

Maximum penalty—200 penalty units.

~~(1A) Where an owner of a licenced pharmacy business seeks to provide a health service in a 'retail shopping centre' (as defined section 5D of the *Retail Shop Leases Act 1994* (Qld)), the licensed pharmacy owner has the right to request from a shopping centre owner the ability to provide the health services from their retail premises. A shopping centre owner can not unreasonably refuse this request but may require certain conditions to be met before the licensed pharmacy owner can begin to provide the health services.~~

~~Examples of a health service—~~

~~1 Queensland Needle and Syringe Program service~~

~~2 opioid dependency treatment program service~~

~~3 sexual or reproductive health service~~

(2) Subsection (1) does not apply to—

- (a) an employee carrying out the duties of an employee of a licensed pharmacy business; or
- (b) a person imposing a requirement about a licensed pharmacy business that is about only 1 or more of the following—

(i) opening hours, ~~including core trading hours for a retail shopping centre, as provided under the *Retail Shop Leases Act 1994*;~~

(ii) advertising, branding, product displays or other marketing activities;

(iii) information technology systems;

(iv) staff training;

(v) staff uniforms.

(3) A provision of a contract, agreement or arrangement is void to the extent it purports to authorise or permit an activity in relation to a licensed pharmacy business that is prohibited under subsection (1).

~~(4) This section 22 will only apply to contracts, agreements or arrangements made 6 months after this Act comes into force. Section 22 will not apply to contracts, agreements or arrangements made prior to this date.~~