Pharmacy Business Ownership Bill 2023

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Submitter Comments:

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To: Economics and Governance Committee
Subject: Submission on the Pharmacist Business Ownership Bill - Retrospective Nature, Moral Concerns, and Stamp Duty Implications
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Dear Sir/Madam

I am writing to express my profound concern regarding the Pharmacist Business Ownership Bill currently under review by the Economics and Governance Committee. While the intent of the bill may be to enhance regulatory control, its retrospective nature, certain provisions, and the introduction of stamp duty implications raise significant moral, practical, and financial issues that warrant reconsideration.

Specific areas of concern:

1. **Failure to address the need to grandfather business ownership structures created lawfully after having sought both accounting and legal advice and in compliance with the Pharmacy Business Ownership Act 2001.**

   The changes proposed interfere with the rights of pharmacists and will make unlawful the way pharmacists structured how they now own their pharmacy despite it being lawful at the time. Current laws do not prohibit the use of discretionary family trusts as part of a pharmacist ownership structure and do not restrict the beneficiaries of such discretionary trusts to a practising pharmacist or to close adult relatives of practising pharmacists. More than 50% of pharmacists in Queensland who have acquired their pharmacy or pharmacy interest over the past 20 years, particularly over the past 10 years, have done so with a discretionary family trust and have done so on the advice of their accountant or lawyer.

   Pharmacists who, over the last two decades, have organised their ownership through a discretionary trust, based on the existing legal framework, will need to reconsider their financial arrangements. For myself and many of the LiveLife Pharmacy business partners this will involve either the elimination of an existing discretionary trust or resettling an existing one. All at a considerable cost, not only stamp duty and CGT but the legal and accounting costs required to facilitate these changes on businesses they essentially already possess.
   If there is to be a change to existing laws upon which pharmacists have ordered their affairs, exercised their rights and incurred liabilities and obligations, then the laws should not apply retrospectively. For as long as a pharmacist continues to hold their pharmacy or pharmacy interest in the ownership structure that was permitted by law at the time the interest was acquired, then that should be allowed to continue until the pharmacist stops holding the interest in that structure. Pharmacists should not be forced to have to restructure and re-organise their affairs at significant personal expense and cost.

   Retrospective legislation is unjust, unfair and discriminatory. Successive governments both State and Federal have avoided retrospective legislation in the main, and with good reason, with very few exceptions.

   Put simply existing ownership structures that are compliant with the law today should be

allowed to continue and be 'grandfathered'.

2. **Restriction on use of common trust ownership structure and insufficient time to restructure business affairs prior to or after the Act becomes law in certain circumstances.**

   The persons who may benefit from a trust are restricted to the practising pharmacist, their spouse and a child who is an adult.

   A discretionary trust is a common ownership structure because it offers flexibility and taxation advantages. Pharmacists have for over 20 years under the legislation to be repealed, on the advice of their accountants and legal advisers, acquired pharmacies using a discretionary trust. This bill denies to pharmacists what is a common taxation and succession ownership structure and prevents pharmacists from having the same taxation and succession benefits as any other business owner.

   The restrictions are also discriminatory. A high number of pharmacy owners have very diverse ethnic backgrounds. Many are relatively young pharmacists in terms of pharmacy ownership who have entered pharmacy and been able to achieve pharmacy ownership only with extended family support, often from as early as education right through to pharmacy ownership. The trust structure has enabled pharmacists compelled or obligated by their culture and family values to support their extended families. Through the flexibility of a trust ownership structure, these pharmacists are able to reciprocate the support of their families. This capacity will be denied by beneficiaries being restricted to practising pharmacists or their close adult relatives.

   There are numerous pharmacists in Queensland who currently own their pharmacies through a trust structure which they were advised to set up by their solicitor or accountant who will be completely oblivious to the effect and impact the Pharmacist Business Ownership Bill will have on them, if and when it becomes law. They will be justified in feeling aggrieved. Especially given the highest judicial authority has cautioned against retrospective legislation which may interfere with vested rights or make unlawful, conduct which was lawful when done.

   S216 purports to provide a 2 year amnesty for pharmacists with trusts to organise their affairs however that amnesty likely to apply to very few. S216 only applies to corporations that are deemed eligible persons under s214. In order for s214 to apply to trusts (s214(2)(c)), the beneficiaries of the trust must have been limited to the practising pharmacist, their spouse or adult children immediately before the new laws commence. As the majority of discretionary trusts have classes of potential beneficiaries that extend much broader than just the practising pharmacist, their spouse or adult children, if the council takes the position that a beneficiary of a trust is anyone within the classes of potential beneficiaries, then pharmacists wanting to take advantage of the amnesty and not wanting to contest the council's position, will have to make changes to their trust deed before the new laws commence.

   The transitional provisions in Part 14 purport to allow 2 years for change. However, for corporations, s214 has the effect of forcing compliance even before the new laws commence.

   For a corporation to be a *deemed eligible person* so as to have 2 years to become compliant, they have to meet the criteria in s214(2) before the new laws commence. For those that don't, for example for those that might have the parents or grandparents as shareholders of the corporation or underlying company, or beneficiaries of a trust, they only have until the new laws commence to make any changes that need to be made to become a deemed eligible person and have the 2 year amnesty. Otherwise, as they will have to obtain a pharmacy licence within 1 year of when the new laws commence, they will have to reorganise their ownership structures before applying for a pharmacy licence.

3. **Control**

   S22 will prohibit certain activities by anyone other than the owner (third parties). There is a limited carve out for ordinary business activities common to landlords, supplier arrangements and franchises. The provision is comparable to s139I of the current legislation.

   While limited by having a connection with medicines, which s139I wasn't, s22 extends the voiding consequence by providing that a third party must not do *or purport to do* and then makes void the provision to the extent it *purports to authorise or permit* the activity. While s139I made void a provision that gave a right to control, s22 will void a provision if control is found to be intended, even if not enforceable as a right.

4. **Fit and proper person**

   The council is given power to determine who is a fit and proper person and must have regard to a number of matters (s72), one of which (s72(e)) is whether the person is a party to a contract or agreement that contains a provision that has been made void by s22(3). I have commented on s22(3) in the section below on control.

   First, if s22(3) applies, the contravening provision has been made void so is no longer enforceable. Second, whether a provision comes within s22(3) may be, and will likely be, a matter of contention. Third, by specifically making s72(e) a matter to have regard to, suggests that a pharmacist by seeking to organise how they carry on their pharmacy business in a way that may be contentious or at least contrary to the opinion of a reviewer (s74), somehow opens the pharmacist up to not being a fit and proper person. A pharmacist might be a party to a franchise agreement containing a provision which in eyes of the council or a reviewer contravenes s22(3). By s72, that is to be taken into account when considering if the pharmacist is a fit and proper person.

5. The transformation of the 'council' from an advisory entity to a regulatory body has introduced an unwarranted regulatory burden, the impost of substantial costs with a number of fees and will cause considerable delays in the processing of the numerous applications necessitating approval from the council, such as pharmacy business licenses, license renewals, modifications to license holders (e.g., partners, directors, shareholders), changes in premises, addition or removal of material interest holders, alterations in business or holder names. Further to this an obscene amount of $2,500 will be imposed by way of an additional fee on each and every occasion the regulatory body is in two minds as to whether or not an agreement between parties is contrary to application of the guidelines of the Act.
   Of particular concern is the council is not obligated to respond or make decisions in a timely manner. The absence of mandated approval or refusal by the council, if non-responsive, leads to pervasive uncertainty in sales and purchases, as well as the implementation of new partnerships and internal structural changes.

   Pharmacists should not have to suffer the delays, uncertainty, or termination of commercial transactions and increased transaction costs, which will be inevitable, without having recourse either against the regulatory body or government.

   I'm advised a regulatory body cannot be compelled by a court to make decisions if the legislation lacks stipulations for timely determinations. The current bill does not impose any specific timeframe, be it 14 days (as imposed on pharmacists for notice or response to council requests) or any other duration, requiring the council to reach decisions. Consequently, it's my opinion that unless the council responds within a set period of time, say 30 days, advising as to whether the application has been approved or rejected the application is deemed to have been approved and parties involved can get on with business.

6. The composition of the council membership as it is currently stated is unacceptable. The council is an industry body that has the potential to be weighted inappropriately, where pharmacy industry experts and retail pharmacy owners may be significantly outnumbered by persons who really have no understanding of the complexity of pharmacy operations, any knowledge whatsoever regarding the complexities of dispensing prescription medications and nuances of pharmacy practice. There must be a majority of pharmacy business owner members to ensure that the council is able to function as intended making informed decisions in a timely manner without the need to defer to outside "advisors" at the cost to applicants of $2,500 on each and every occasion.

   In order to foster a modern and inclusive council, it is essential to establish constraints on the number of terms that a member can serve. Given that the membership term exceeds that of councils in other states and territories by one year, it becomes imperative to set a maximum limit of two terms.

7. The current version of the Bill does not adequately define what a pharmacy service is.

The definition is too narrow and is limited to dispensing and compounding of medicines only. This is not an accurate reflection of the services that a pharmacist provides and means that, for example, where the dispensing of a medicine is considered a pharmacy service, the provision of advice about that medicine, is not.

By having a narrow definition of pharmacy services, it limits how the Bill is able to deal with the concept of external control of how pharmacy services are delivered to the public (clause 22). If control of pharmacy services is linked to the definition of core pharmacy services then there is a risk that a number of relevant pharmacy services will be left outside the regulatory control of the Bill.

Where the intent of the Bill is to describe who may own a pharmacy business, a robust definition of what constitutes a pharmacy business (through definition of the services that business provides) must be offered as part of the Bill.

Change as proposed by the Pharmacy Guild: To adopt a broader definition of 'core pharmacy services' as 'pharmacy services': pharmacy services means –

(a) health services (including dispensing, supply, prescribing, selling, administering, repackaging, compounding, possessing, disposing of medicines and the provision of clinical service or advice (either at or from a licensed premises or through digital platforms) provided in the course of practice by a pharmacist or a person who holds themself out, or is held out by another, as a pharmacist;

8. The definition of a supermarket (Clause 11(3))

   Issue: The definition of a supermarket is not broad enough to capture the likely increase in online supermarket businesses in the future.

   By inclusion of the word 'premises' in the definition, it ties the concept of a supermarket to a bricks and mortar place, and it is not able to capture the growing online marketplace.

   To ensure that the policy objective of the Bill to 'prohibit the council from issuing a licence if the pharmacy business is located in a supermarket' is met, the Bill must have application to pharmacy businesses and supermarkets whether they are online or physical locations.

9. Pharmacists with non-practising registration will no longer be able to own or have an interest in a pharmacy. That is despite the majority of pharmacists holding non-practising registration having practised pharmacy for many years and as required by s21, there having to be an authorised pharmacist, being a practising pharmacist, present in the pharmacy at all times.

   It might be expected that a pharmacist with non-practising registration, more often than not with many years practising pharmacy, having a practising pharmacist present at all times, is able to provide safe, professional and competent provision of pharmacy services (purpose of the bill s3). Pharmacists with non-practising registration can own pharmacies in Victoria, South Australia and WA and should be able to in Queensland.

10. Stamp Duty and CGT impost:

    I respectfully request that the government seek a Private Ruling from the Commissioner of

Taxation *before* the legislation is passed so that current Pharmacy owners understand their taxation liability and the approach the Commission would take to valuation.

The CGT impost, for many of the pharmacists who have to restructure their business, will be that great that they will be forced to sell. This may well deprive them of a carefully planned retirement, but also deprive communities, they may have served for many years, the ongoing benefit of the close relationship, trust and support of their local pharmacist. Some communities might well lose their only readily accessible health provider, the pharmacist, all together.

The proposed law does not set out a manageable or affordable transition path from the previous permitted ownership structures to the new permitted structure. This creates uncertainty, will reduce productivity and negatively impact services offered to pharmacy consumers. The cashflow impost of stamp duty and CGT for those that can manage it whether with cash reserves or finance will be such that any plans for investment in pharmacy fit-outs, purchase of a dispense robot for increased efficiencies or commitments to hire more team members and deliver full scope of practice professional health services will be shelved.

A private ruling would create certainty for the government, pharmacy owners and pharmacy consumers and would clarify the economic and financial impost as a result new law.

Kind Regards,
Sam Harbion B.Pharm,

Sam Harbison
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Pharmacy Owner
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LiveLife Pharmacies acknowledge the Traditional Custodians of the land on which we operate, live and gather as employees, and recognise their continuing connection to land, water and community. We pay respect to Elders past, present and emerging.

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