



Operating a Pharmacy? What to look out for

- **Sale of Business**
- **Partnership Agreements**
- **Unfair Dismissal Claims**

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SELLING OR BUYING A PHARMACY?

Issues to consider

Are you considering buying or selling a pharmacy?

- A critical first step is **DUE DILIGENCE**
- Vendors should consider making purchasers sign non-disclosure agreements as the material provided may be commercially sensitive
- Buyers should investigate documents such as financial accounts and leasing agreements

Due Diligence – Employee Remuneration

- Vendors must take care to ensure that their employees are all appropriately remunerated
- In recent years, the Fair Work Ombudsman has been active in pursuing offending companies. The offenders have sometimes been large companies with large HR Departments.
- The financial metrics underpinning a sale may be false if employees have been underpaid.
- Buyers should be especially careful in this regard.
- You do not want to be in a situation where you purchase a business and are underpaying the employees.

The Sale Agreement

- The Sale Agreement must consider a variety of factors:

- Does Due Diligence continue after the contract is signed?

- Is the sale subject to finance?

- Approval from the Pharmacy Authority of the relevant state

- Approval from the Australian Community Pharmacy Authority

- Consent of the Landlord and the Transfer of Lease

- Valuation of the Pharmacy's stock

- Transfer of employees

- Restraints that apply to the vendor regarding working with competing businesses

The Sale Agreement

- Pharmacies typically involve the Sale of Assets. This means that assets, employees and the premises or lease will transfer across to the purchaser, which may be:
 - A pharmacist purchaser themselves
 - A company in which all the shares are owned by pharmacists
 - A service entity of the pharmacist

The Sale Agreement - Employment

- It is important that the Sale Agreement addresses the apportionment of employee entitlements between the Vendor and the Purchaser.
- Examples:
 - Annual and long service leave which has been accrued by employees (typically 100%)
 - The adjustments for long service leave for employees for whom it has not yet accrued (e.g. 5 – 7 years service)
 - Personal leave (typically 25 – 50%)
- In addition to the above adjustments, entitlements should be reduced by 30% as the Purchaser will get a tax deduction for these entitlements when they are paid in the future

Reviewing Leases

- You should also review the lease. Issues to consider include:
 - The term remaining
 - Option terms available
 - Future rent review
 - Make good obligations

Redundancy Pay Issues

- If the business has more than 15 employees, and an employee who has been employed for more than 12 months, does not receive an offer to transfer over, they will need to be paid redundancy payment.
- Also if vendors want to avoid paying redundancy payment in respect of employees who do transfer across, the Purchaser will need to agree to recognise the employees' prior service with the vendor.



Partnership Agreements

Here's a scenario:

- A pharmacy has three partners, Bob, Emma and David.
- Bob works in the day to day operations of the Pharmacy, however Emma and David do not.
- When the partners are remunerated, Bob is feeling dissatisfied as he feels that he is putting in more work than the others.
- A Partnership Agreement would address these issues

Contents of a Partnership Agreement

- Clauses which distinguish between remuneration for efforts as an employee and for those as a partner.
- How often a partner meeting occurs
- How often profits are distributed
- Which decisions require unanimous or majority consent?
For example:
 - Hiring and termination of employees
 - Capital expenditure
 - Entering into Franchise Agreements

Contents of a Partnership Agreement – Cont.

- Restrictions on partners being involved in competing businesses
- Admission of any new partners
- The retirement or exit of a partner ← **IMPORTANT**

The Partnership Act

- According to the s 36 *Partnership Act 1958* (Vic), in the absence of any agreement saying otherwise, a partner may dissolve the partnership.

PARTNERSHIP ACT 1958 - SECT 36

Dissolution by expiration or notice

Subject to any agreement between the partners a partnership is dissolved—

- (a) if entered into for a fixed term by the expiration of that term;
- (b) if entered into for a single adventure or undertaking by the termination of that adventure or undertaking;
- (c) if entered into for an undefined time by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution or if no date is so mentioned as from the date of the communication of the notice.

- Similar provisions can be found in s 32 *Partnership Act 1892* (NSW), s 35 *Partnership Act 1891* (QLD)

Requirements on exit of Partners

- To avoid this legislation being used, it is important that the Partnership Agreement contains notice requirements or procedural processes relating to the exit of a partner.
- For instance this includes provisions for independent valuation of the partnership interest and the opportunity for the other partners to buy the partnership interest and pay over a period of time (e.g. 2 – 3 years).



Terminating Employees

Unfair Dismissal Claims

- As a business owner, you may face unfair dismissal claims.
- If you are a business with less than 15 employees, an employee terminated in their first 12 months cannot bring an unfair dismissal claim.
- If you are a business with more than 15 employees, that time frame is reduced to 6 months.
- Employees who receive remuneration of greater than \$165,000 cannot bring an unfair dismissal claim unless they are covered by a federal award.
- The Pharmacy Industry Award applies to pharmacists, pharmacists in charge and pharmacist managers.
- The General Retail Industry Award will apply to non-pharmacist sales staff.

Unfair Dismissal – Serious Misconduct

If an employee does have access to the unfair dismissal regime, you need a valid reason for dismissal.

- Serious misconduct is a valid reason. This includes theft, fraud, violence, sexual harassment and intoxication at work.
- This does not require any notice or payment in lieu on termination. However, employers must make a careful and detailed investigation and afford the employee procedural fairness.
 - This includes notifying the employee of the allegations in writing
 - Providing the employee the opportunity to respond to the allegations
 - Allowing the employee the opportunity to have a support person present at meetings

Unfair Dismissal – Other reasons

If an employee does have access to the unfair dismissal regime, you need a valid reason for dismissal.

- Employees may also be terminated for minor misconduct or unsatisfactory performance.
- This requires notice and a performance management plan where the employee is monitored. It needs to be made clear that the employee can be terminated if performance does not improve.

Genuine Redundancy

- You may be able to terminate an employee on the basis of genuine redundancy
- This however, requires both written and verbal consultation with the employee making them aware that their position may become redundant
- You would also need to consider whether the employee can be redeployed in another role
- In such instances, if you have more than 15 employees and the employee has worked for more than 12 months they will be entitled to redundancy pay
- This pay is in addition to notice of termination or payment in lieu and any other payments such as accrued but untaken annual or long service leave

General Protection Claims

- This is another stream through which an employee may bring an action.
- It does not have the same eligibility requirements as unfair dismissal claims and can be brought from day 1.
- It can be brought when an employee has experienced adverse action such as being terminated, demoted or overlooked for promotion due to reasons such as:
 - An employee exercising their workplace rights (e.g., taking personal leave)
 - Because of the employee's sex, age, disability or impairment (which includes mental illness) or family responsibilities

General Protection Claims – Cont.

- Employers should be especially careful as there is a reverse onus on the employer to prove that this did not happen.
- Unlike unfair dismissal claims which have a cap on damages (6 months pay), general protection claims have no such cap.

An increase in general protection claims

- In the aftermath of COVID-19, there has been an upsurge of general protection claims due to employee's mental health problems and their failure to attend work often in circumstances where they do not provide a medical certificate.



Any Questions?