

# National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004 No 52

[2004-52]



New South Wales

## Status Information

### Currency of version

Repealed version for 6 July 2004 to 19 June 2006 (accessed 23 December 2024 at 8:08)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Repeal**

The Act was repealed by Sch 4 to the [Statute Law \(Miscellaneous Provisions\) Act 2006 No 58](#) with effect from 20.6.2006.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 20 June 2006

# National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004 No 52



New South Wales

## Contents

<b>Long title</b> .....	3
1 Name of Act .....	3
2 Commencement .....	3
3 Amendment of Acts .....	3
4 Explanatory notes .....	3
<b>Schedule 1 Amendment of Dentists Act 1989 No 139</b> .....	3
<b>Schedule 2 Amendment of Dental Practice Act 2001 No 64</b> .....	6
<b>Schedule 3 Amendment of Optometrists Act 2002 No 30</b> .....	13
<b>Schedule 4 Amendment of Pharmacy Act 1964 No 48</b> .....	20
<b>Schedule 5 Amendment of Farm Debt Mediation Act 1994 No 91</b> .....	21

# National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004 No 52



New South Wales

An Act to amend various Acts in connection with Commonwealth financial penalties arising from National Competition Policy reviews.

## 1 Name of Act

This Act is the *National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004*.

## 2 Commencement

- (1) This Act commences on the date of assent, except as provided by subsection (2).
- (2) Schedules 1–3 commence on a day or days to be appointed by proclamation.

## 3 Amendment of Acts

The Acts specified in Schedules 1–5 are amended as set out in those Schedules.

## 4 Explanatory notes

The matter appearing under the heading “Explanatory note” in each of the Schedules does not form part of this Act.

## Schedule 1 Amendment of **Dentists Act 1989 No 139**

(Section 3)

### [1] Section 3 Definitions

Omit the definition of *incorporated practice* from section 3 (1).

### [2] Section 3 (3)

Insert after section 3 (2):

(3) Notes included in this Act do not form part of this Act.

**[3] Section 5 Professional misconduct**

Insert after section 5 (1) (a):

(a1) engaging in overservicing as provided by subsection (2), and

**[4] Section 5 (1) (d)-(f)**

Omit the paragraphs.

**[5] Section 5 (2)**

Omit section 5 (2)-(6). Insert instead:

(2) A dentist engages in overservicing if the dentist, in the course of professional practice:

(a) provides a service in circumstances in which provision of the service is unnecessary, not reasonably required or excessive, or

(b) engages in conduct that is prescribed by the regulations as constituting overservicing.

**[6] Section 28 Application of Part to incorporated practices**

Omit the section.

**[7] Sections 53 and 54**

Omit the sections. Insert instead:

**53 Ownership of dental practices**

Nothing in this Act prevents a registered dentist from practising dentistry as the director or employee of any corporation or in the course of employment by, or in association with, any body or person.

**Note—**

Under section 137D of the *Dental Practice Act 2001* (which applies as a provision of this Act by virtue of section 54) a dentist can be prohibited from operating a business that provides dental services.

**54 Prohibition against directing or inciting misconduct**

The provisions of Part 11A (Prohibition against directing or inciting misconduct) of the *Dental Practice Act 2001* have effect as provisions of this Act, subject to any necessary modification.

**Note—**

The general effect of Part 11A of the *Dental Practice Act 2001* is as follows:

- (a) to make it an offence for a person who employs a registered dentist to direct or incite the dentist to engage in conduct in the course of professional practice that would constitute unsatisfactory professional conduct or professional misconduct,
- (b) to enable the Director-General to prohibit persons who have been convicted of or made the subject of a criminal finding for such an offence from operating a business that provides dental services. (Such a prohibition has an extended operation. For example, it will prohibit the person from having a management role or substantial interest in a corporation that operates such a business or from having a substantial interest in a trust under which such a business is operated.)

**[8] Section 67 Regulations**

Omit “society, council, body or corporation referred to in section 5 (4) (c), (d), (e) or (f)” from section 67 (2) (c).

Insert instead “person or body”.

**[9] Section 67 (2) (l) and (m)**

Omit the paragraphs.

**[10] Schedule 4 Savings, transitional and other provisions**

Insert “, and the *National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004* to the extent that it amends this Act” after “this Act” in clause 15 (1).

**[11] Schedule 4, clause 15 (2)**

Omit “this Act”. Insert instead “the Act concerned”.

**Explanatory note**

Section 5 of the *Dentists Act 1989* (the *Principal Act*) defines *professional misconduct* in relation to a dentist. Under section 5 (1) (f), such conduct includes practising dentistry for fee, salary or other reward in the course of employment by, or in association with, any person other than a registered dentist or an entity specified in section 5 (4) (which includes a body or corporation approved by the Dental Board). **Schedule 1 [4]** removes this restriction on the practice of dentistry and makes consequential amendments. **Schedule 1 [8]** makes a consequential amendment.

Section 53 of the *Principal Act* allows registered dentists to practise dentistry as the director or employee of a corporation only if the corporation is an incorporated practice (that is, if the corporation is controlled by one or more registered dentists, and all the directors and shareholders of the corporation are registered dentists or family members of the registered dentists concerned). **Schedule 1 [7]** removes this restriction on the practice of dentistry and makes a consequential amendment. **Schedule 1 [1], [6] and [9]** make consequential amendments.

**Schedule 1 [7]** also inserts new sections 53 and 54 into the *Principal Act*. New section 53 makes it clear that nothing in the Act prevents a registered dentist from practising dentistry as the director or employee of any corporation or in the course of employment by, or in association with, any body or person. New section 54 incorporates into the *Principal Act*, subject to any necessary modification, the provisions of Part 11A of the *Dental Practice Act 2001* (which is yet to be commenced) that are proposed to be inserted by Schedule 2 [7].

**Schedule 1 [2]** inserts a formal provision relating to notes.

**Schedule 1 [3]** includes a dentist's engaging in overservicing in the definition of **professional misconduct** in section 5 of the Principal Act.

**Schedule 1 [5]** makes amendments consequential on the amendments made by **Schedule 1 [3] and [4]**.

**Schedule 1 [10]** provides for the making of savings and transitional regulations as a consequence of the proposed amendments to the Principal Act. **Schedule 1 [11]** makes a consequential amendment.

## **Schedule 2 Amendment of Dental Practice Act 2001 No 64**

(Section 3)

### **[1] Section 4 Definitions**

Omit the definition of **incorporated practice**.

### **[2] Section 34**

Omit the section. Insert instead:

#### **34 Ownership of dental practices**

Nothing in this Act (except section 137D) prevents a registered dentist from practising dentistry as the director or employee of any corporation or in the course of employment by, or in association with, any body or person.

### **[3] Section 41 Meaning of "unsatisfactory professional conduct"—dentists**

Insert after section 41 (1) (a):

(a1) engaging in overservicing as provided by subsection (2),

### **[4] Section 41 (1) (c), (f) and (g)**

Omit the paragraphs.

### **[5] Section 41 (2)**

Omit the subsection and note. Insert instead:

(2) A dentist engages in overservicing if the dentist, in the course of professional practice:

(a) provides a service in circumstances in which provision of the service is unnecessary, not reasonably required or excessive, or

(b) engages in conduct that is prescribed by the regulations as constituting overservicing.

**[6] Section 43 Application of Part to incorporated practices**

Omit the section.

**[7] Part 11A**

Insert after Part 11:

**Part 11A Prohibition against directing or inciting misconduct**

**137A Prohibition against directing or inciting misconduct**

- (1) A person (***the employer***) who employs a registered dentist must not direct or incite the dentist to engage in conduct in the course of professional practice that would constitute unsatisfactory professional conduct or professional misconduct.

Maximum penalty:

- (a) in the case of a corporation, 800 penalty units for a first offence or 1600 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.
- (2) For the purposes of this section, any actions of an agent or employee of the employer are taken to be actions of the employer unless the employer establishes:
- (a) that the employer had no knowledge of those actions, and
- (b) that the employer could not, by the exercise of due diligence, have prevented those actions.
- (3) If a person is convicted of or made the subject of a criminal finding for an offence against this section in respect of the actions of an agent or employee of the person, the agent or employee is for the purposes of this Part taken to have been convicted of or made the subject of a criminal finding for the offence also.
- (4) When a court convicts or makes a criminal finding against a person for an offence against this section, the registrar or other proper officer of the court must notify the Director-General in writing of the conviction or criminal finding.
- (5) This section does not apply in respect of the employment of a dentist by any of the following:
- (a) a public health organisation within the meaning of the *Health Services Act 1997*,

(b) a private hospital or day procedure centre within the meaning of the *Private Hospitals and Day Procedure Centres Act 1988*,

(c) a nursing home within the meaning of the *Nursing Homes Act 1988*.

### **137B Extended concept of employment**

- (1) When a registered dentist engages in the practice of dentistry in the course of the carrying on of a business, any person who owns, manages, controls, conducts or operates that business is for the purposes of this Part taken to employ the dentist (in addition to any person who actually employs the dentist).
- (2) When a registered dentist is employed by a corporation, each of the following persons is for the purposes of this Part also considered to be the employer of the dentist (in addition to the corporation):
  - (a) a person who is a director, secretary or executive officer (as defined in the *Corporations Act 2001* of the Commonwealth) of the corporation or is concerned in the management of the corporation,
  - (b) any other employee of the corporation in accordance with whose directions the dentist is required or expected to act.

### **137C Extended concept of carrying on business**

- (1) If a dentist engaged in the practice of dentistry is provided, in the course of the carrying on of a business, with services that facilitate that practice and the operator of the business is entitled, in connection with the provision of those services, to a share or interest in the profits or income arising from the practice of dentistry by the dentist:
  - (a) that business is taken for the purposes of this Part to be a business that provides the dental services that are provided by the dentist in the course of that practice, and
  - (b) the dentist is taken for the purposes of this Part to be engaged in the practice of dentistry in the course of the carrying on of that business.
- (2) Subsection (1) does not apply in respect of the practice of dentistry by a dentist in such circumstances as may be prescribed by the regulations as exempt from that subsection.
- (3) For the purposes of this Part, a person is considered to operate a business if the person:
  - (a) owns, manages, controls, conducts or operates the business, or
  - (b) has (within the meaning of section 137G) a management role or substantial



interest in a corporation that operates the business or a substantial interest in a trust under which the business is operated.

**137D Convicted offenders may be prohibited from carrying on business**

- (1) The Director-General may, by notice in writing given to a person who has been convicted of or made the subject of a criminal finding for an offence against this Part, prohibit the person from operating a business that provides dental services.
- (2) The prohibition may be expressed to be:
  - (a) for a fixed period (in which case the prohibition remains in force only for that fixed period), or
  - (b) for an unlimited period subject to an entitlement to apply after a specified time for the lifting of the prohibition (in which case the prohibition remains in force until it is lifted).
- (3) A prohibition may not be imposed under this section unless the Director-General is of the opinion that the person is not a fit and proper person to operate a business that provides dental services. The Director-General is entitled to presume, in the absence of evidence to the contrary, that a person who has been convicted of or made the subject of a criminal finding for an offence against this Part on 2 or more occasions in any period of 10 years is not a fit and proper person to operate such a business.
- (4) A prohibition under this section may be limited in its operation in either or both of the following ways:
  - (a) it may be limited to specified premises, but only where the person concerned operates a business that provides dental services at those premises and at other premises,
  - (b) it may be limited to premises within a specified area.
- (5) If a prohibition under this section is subject to an entitlement to apply after a specified time for the prohibition to be lifted, such an application may be made to the Director-General after that time. The Director-General may lift the prohibition or confirm the prohibition and set a further period after which an application for the prohibition to be lifted can be made under this subsection.

**137E Offence of operating business while prohibited**

- (1) A person who in contravention of a prohibition under this Part operates a business that provides dental services is guilty of an offence.

Maximum penalty:

- (a) in the case of a corporation, 800 penalty units for a first offence or 1600 penalty units for a second or subsequent offence, or
  - (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.
- (2) If a continuing state of affairs is created by an offence against this section the offender is liable to a maximum penalty of:
- (a) 200 penalty units in the case of a corporation, or
  - (b) 50 penalty units in any other case,
- in respect of each day on which that offence continues, in addition to the penalty specified in subsection (1).
- (3) If dental services are provided on premises on which a business is carried on, it is to be presumed for the purposes of this section, unless the contrary is established, that the business provides those dental services.

### **137F Effect of appeal against conviction**

A prohibition under this Part has no effect while an appeal is pending against the conviction or criminal finding for the offence on which the prohibition is based.

### **137G Business interests—effect of prohibition**

- (1) When a corporation or the trustee of a trust is the subject of a prohibition under this Part in connection with the operation of a business operated by the corporation or under the trust:
- (a) each person who has a management role or substantial interest in the corporation or a substantial interest in the trust is for the purposes of this Part taken to be the subject of that prohibition also, and
  - (b) each corporation in which a person referred to in paragraph (a) has a management role or substantial interest is for the purposes of this Part taken to be the subject of that prohibition also (whether or not the corporation was in existence at the time of the relevant offence), and
  - (c) the trustee and any manager of a trust in which a person referred to in paragraph (a) has a substantial interest are for the purposes of this Part taken to be the subject of that prohibition also (whether or not the trust was in existence at the time of the relevant offence).
- (2) A person is considered to have a management role or substantial interest in a corporation if:
- (a) the person is a director, secretary or executive officer (as defined in the

*Corporations Act 2001* of the Commonwealth) of the corporation, or

- (b) the person is entitled to more than 10% of the issued share capital of the corporation (with the shares to which a person is entitled including shares in which the person or an associate of the person has a relevant interest within the meaning of the *Corporations Act 2001* of the Commonwealth).
- (3) A person is considered to have a substantial interest in a trust if the person (whether or not as the trustee of another trust) is the beneficiary in respect of more than 10% of the value of the interests in the trust.
- (4) The regulations may create exceptions to this section.

### **137H Power to require information from convicted persons and others**

- (1) When a corporation or the trustee of a trust is convicted of or made the subject of a criminal finding for an offence against this Part in connection with the operation of a business operated by the corporation or under the trust, the Director-General may require certain persons to provide specified information to the Director-General, as provided by this section.
- (2) The corporation or trustee may be required to provide information that the Director-General may reasonably require to ascertain the identity of each person who has a management role or substantial interest in the corporation or a substantial interest in the trust.
- (3) A person whom the Director-General reasonably believes has a management role or substantial interest in the corporation or a substantial interest in the trust may be required to provide information that the Director-General may reasonably require to ascertain:
  - (a) the identity of each corporation in which that person has a management role or substantial interest, or
  - (b) the identity of the trustee and any manager of a trust in which that person has a substantial interest.
- (4) A requirement to provide information is to be imposed by a direction in writing served on the person, corporation or trustee concerned. The direction must specify a period of not less than 7 days as the period within which the required information must be provided.
- (5) A person who fails without reasonable excuse to comply with a requirement under this section is guilty of an offence.

Maximum penalty:

- (a) in the case of a corporation, 800 penalty units for a first offence or 1600

penalty units for a second or subsequent offence, or

(b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

(6) A person who in purported compliance with a requirement under this section provides information that is false or misleading in a material particular is guilty of an offence unless the person satisfies the court that the person did not know and could not reasonably be expected to have known that the information was false or misleading.

Maximum penalty:

(a) in the case of a corporation, 800 penalty units for a first offence or 1600 penalty units for a second or subsequent offence, or

(b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

### **1371 Evidentiary certificate**

- (1) The Director-General may issue a certificate to the effect that a person specified in the certificate is or was prohibited under this Part from operating a business that provides dental services during a period specified in the certificate.
- (2) Such a certificate is evidence of the matters certified.
- (3) A certificate purporting to be a certificate issued by the Director-General under this section is presumed to have been so issued unless the contrary is established.

### **[8] Section 139 Approval for employment of dentists by non-dentists**

Omit the section.

### **[9] Section 141 Carrying on practice of deceased dentist**

Omit the section.

### **[10] Section 142 Civil liability of directors of incorporated practices**

Omit the section.

### **[11] Section 158 Regulations**

Omit "referred to in section 41 (2) (d)-(g)" from section 158 (2) (n).

### **[12] Section 158 (2) (v)**

Omit the paragraph.

## [13] Schedule 7 Savings and transitional provisions

Insert at the end of clause 2 (1):

*National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004*, to the extent that it amends this Act

### Explanatory note

The *Dental Practice Act 2001* (the **Principal Act**) was enacted to replace the existing *Dentists Act 1989* as a result of a National Competition Policy review of that Act. Section 41 of the Principal Act defines **unsatisfactory professional conduct** in relation to a dentist. Under section 41 (1) (c) of that Act (which continues a restriction under the existing Act), such conduct includes practising dentistry for remuneration in the course of employment by, or in association with, a non-dentist (being any person or body who is not a registered dentist other than certain specified entities, or persons or bodies approved by the Dental Board). **Schedule 2 [4]** removes this restriction on the practice of dentistry and makes consequential amendments. **Schedule 2 [8] and [11]** also make consequential amendments.

Section 34 of the Principal Act (also continuing an existing provision) allows registered dentists to practise dentistry as the director or employee of a corporation only if the corporation is an incorporated practice (that is, if the corporation is controlled by one or more registered dentists, and all the directors and shareholders of the corporation are registered dentists or family members of the registered dentists concerned). **Schedule 2 [2]** removes this restriction on the practice of dentistry. **Schedule 2 [1], [6], [10] and [12]** make consequential amendments.

**Schedule 2 [2]** also inserts a new section 34 into the Principal Act to make it clear that nothing in the Act prevents a registered dentist from practising dentistry as the director or employee of any corporation or in the course of employment by, or in association with, any body or person.

**Schedule 2 [7]** inserts a new Part 11A (sections 137A–137I) into the Principal Act. Under proposed section 137A, it will be an offence for a person who employs a registered dentist to direct or incite the dentist to engage in conduct in the course of professional practice that would constitute unsatisfactory professional conduct (which, under the amendment proposed to be made by **Schedule 2 [3]**, will include overservicing) or professional misconduct. Under proposed section 137D, the Director-General of the Department of Health will be able to prohibit persons who have been convicted of or made the subject of a criminal finding for such an offence from operating a business that provides dental services. Such a prohibition has an extended operation. For example, it will prohibit the person from having a management role or substantial interest in a corporation that operates such a business or from having a substantial interest in a trust under which such a business is operated.

**Schedule 2 [9]** makes an amendment consequential on the amendments made by **Schedule 2 [2] and [4]**.

**Schedule 2 [5]** substitutes a provision consequential on the amendments made by **Schedule 2 [3] and [4]**.

**Schedule 2 [13]** provides for the making of savings and transitional regulations as a consequence of the proposed amendments to the Principal Act.

## Schedule 3 Amendment of *Optometrists Act 2002 No 30*

(Section 3)

### [1] Section 23

Omit the section. Insert instead:

#### **23 Ownership of optometry practices**

Nothing in this Act (except section 120D) prevents a registered optometrist from practising optometry as the director or employee of any corporation or in the course

of employment by, or in association with, any body or person.

**[2] Section 29 Meaning of “unsatisfactory professional conduct”**

Omit section 29 (1) (g) and (h).

**[3] Section 29 (3)**

Omit the subsection.

**[4] Part 10A**

Insert after Part 10:

## **Part 10A Prohibition against directing or inciting misconduct**

### **120A Prohibition against directing or inciting misconduct**

- (1) A person (***the employer***) who employs a registered optometrist must not direct or incite the optometrist to engage in conduct in the course of professional practice that would constitute unsatisfactory professional conduct or professional misconduct.

Maximum penalty:

- (a) in the case of a corporation, 400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.
- (2) For the purposes of this section, any actions of an agent or employee of the employer are taken to be actions of the employer unless the employer establishes:
- (a) that the employer had no knowledge of those actions, and
- (b) that the employer could not, by the exercise of due diligence, have prevented those actions.
- (3) If a person is convicted of or made the subject of a criminal finding for an offence against this section in respect of the actions of an agent or employee of the person, the agent or employee is for the purposes of this Part taken to have been convicted of or made the subject of a criminal finding for the offence also.
- (4) When a court convicts or makes a criminal finding against a person for an offence against this section, the registrar or other proper officer of the court

must notify the Director-General in writing of the conviction or criminal finding.

- (5) This section does not apply in respect of the employment of an optometrist by any of the following:
- (a) a public health organisation within the meaning of the *Health Services Act 1997*,
  - (b) a private hospital or day procedure centre within the meaning of the *Private Hospitals and Day Procedure Centres Act 1988*,
  - (c) a nursing home within the meaning of the *Nursing Homes Act 1988*.

#### **120B Extended concept of employment**

- (1) When a registered optometrist engages in the practice of optometry in the course of the carrying on of a business, any person who owns, manages, controls, conducts or operates that business is for the purposes of this Part taken to employ the optometrist (in addition to any person who actually employs the optometrist).
- (2) When a registered optometrist is employed by a corporation, each of the following persons is for the purposes of this Part also considered to be the employer of the optometrist (in addition to the corporation):
- (a) a person who is a director, secretary or executive officer (as defined in the *Corporations Act 2001* of the Commonwealth) of the corporation or is concerned in the management of the corporation,
  - (b) any other employee of the corporation in accordance with whose directions the optometrist is required or expected to act.

#### **120C Extended concept of carrying on business**

- (1) If an optometrist engaged in the practice of optometry is provided, in the course of the carrying on of a business, with services that facilitate that practice and the operator of the business is entitled, in connection with the provision of those services, to a share or interest in the profits or income arising from the practice of optometry by the optometrist:
- (a) that business is taken for the purposes of this Part to be a business that provides the optometrical services that are provided by the optometrist in the course of that practice, and
  - (b) the optometrist is taken for the purposes of this Part to be engaged in the practice of optometry in the course of the carrying on of that business.
- (2) Subsection (1) does not apply in respect of the practice of optometry by an

optometrist in such circumstances as may be prescribed by the regulations as exempt from that subsection.

- (3) For the purposes of this Part, a person is considered to operate a business if the person:
  - (a) owns, manages, controls, conducts or operates the business, or
  - (b) has (within the meaning of section 120G) a management role or substantial interest in a corporation that operates the business or a substantial interest in a trust under which the business is operated.

### **120D Convicted offenders may be prohibited from carrying on business**

- (1) The Director-General may, by notice in writing given to a person who has been convicted of or made the subject of a criminal finding for an offence against this Part, prohibit the person from operating a business that provides optometrical services.
- (2) The prohibition may be expressed to be:
  - (a) for a fixed period (in which case the prohibition remains in force only for that fixed period), or
  - (b) for an unlimited period subject to an entitlement to apply after a specified time for the lifting of the prohibition (in which case the prohibition remains in force until it is lifted).
- (3) A prohibition may not be imposed under this section unless the Director-General is of the opinion that the person is not a fit and proper person to operate a business that provides optometrical services. The Director-General is entitled to presume, in the absence of evidence to the contrary, that a person who has been convicted of or made the subject of a criminal finding for an offence against this Part on 2 or more occasions in any period of 10 years is not a fit and proper person to operate such a business.
- (4) A prohibition under this section may be limited in its operation in either or both of the following ways:
  - (a) it may be limited to specified premises, but only where the person concerned operates a business that provides optometrical services at those premises and at other premises,
  - (b) it may be limited to premises within a specified area.
- (5) If a prohibition under this section is subject to an entitlement to apply after a specified time for the prohibition to be lifted, such an application may be made to the Director-General after that time. The Director-General may lift the



prohibition or confirm the prohibition and set a further period after which an application for the prohibition to be lifted can be made under this subsection.

### **120E Offence of operating business while prohibited**

- (1) A person who in contravention of a prohibition under this Part operates a business that provides optometrical services is guilty of an offence.

Maximum penalty:

- (a) in the case of a corporation, 400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

- (2) If a continuing state of affairs is created by an offence against this section the offender is liable to a maximum penalty of:

- (a) 100 penalty units in the case of a corporation, or
- (b) 50 penalty units in any other case,

in respect of each day on which that offence continues, in addition to the penalty specified in subsection (1).

- (3) If optometrical services are provided on premises on which a business is carried on, it is to be presumed for the purposes of this section, unless the contrary is established, that the business provides those optometrical services.

### **120F Effect of appeal against conviction**

A prohibition under this Part has no effect while an appeal is pending against the conviction or criminal finding for the offence on which the prohibition is based.

### **120G Business interests—effect of prohibition**

- (1) When a corporation or the trustee of a trust is the subject of a prohibition under this Part in connection with the operation of a business operated by the corporation or under the trust:

- (a) each person who has a management role or substantial interest in the corporation or a substantial interest in the trust is for the purposes of this Part taken to be the subject of that prohibition also, and
- (b) each corporation in which a person referred to in paragraph (a) has a management role or substantial interest is for the purposes of this Part taken to be the subject of that prohibition also (whether or not the corporation was in existence at the time of the relevant offence), and

- (c) the trustee and any manager of a trust in which a person referred to in paragraph (a) has a substantial interest are for the purposes of this Part taken to be the subject of that prohibition also (whether or not the trust was in existence at the time of the relevant offence).
- (2) A person is considered to have a management role or substantial interest in a corporation if:
  - (a) the person is a director, secretary or executive officer (as defined in the *Corporations Act 2001* of the Commonwealth) of the corporation, or
  - (b) the person is entitled to more than 10% of the issued share capital of the corporation (with the shares to which a person is entitled including shares in which the person or an associate of the person has a relevant interest within the meaning of the *Corporations Act 2001* of the Commonwealth).
- (3) A person is considered to have a substantial interest in a trust if the person (whether or not as the trustee of another trust) is the beneficiary in respect of more than 10% of the value of the interests in the trust.
- (4) The regulations may create exceptions to this section.

#### **120H Power to require information from convicted persons and others**

- (1) When a corporation or the trustee of a trust is convicted of or made the subject of a criminal finding for an offence against this Part in connection with the operation of a business operated by the corporation or under the trust, the Director-General may require certain persons to provide specified information to the Director-General, as provided by this section.
- (2) The corporation or trustee may be required to provide information that the Director-General may reasonably require to ascertain the identity of each person who has a management role or substantial interest in the corporation or a substantial interest in the trust.
- (3) A person whom the Director-General reasonably believes has a management role or substantial interest in the corporation or a substantial interest in the trust may be required to provide information that the Director-General may reasonably require to ascertain:
  - (a) the identity of each corporation in which that person has a management role or substantial interest, or
  - (b) the identity of the trustee and any manager of a trust in which that person has a substantial interest.
- (4) A requirement to provide information is to be imposed by a direction in writing

served on the person, corporation or trustee concerned. The direction must specify a period of not less than 7 days as the period within which the required information must be provided.

- (5) A person who fails without reasonable excuse to comply with a requirement under this section is guilty of an offence.

Maximum penalty:

- (a) in the case of a corporation, 400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

- (6) A person who in purported compliance with a requirement under this section provides information that is false or misleading in a material particular is guilty of an offence unless the person satisfies the court that the person did not know and could not reasonably be expected to have known that the information was false or misleading.

Maximum penalty:

- (a) in the case of a corporation, 400 penalty units for a first offence or 800 penalty units for a second or subsequent offence, or
- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.

### **120I Evidentiary certificate**

- (1) The Director-General may issue a certificate to the effect that a person specified in the certificate is or was prohibited under this Part from operating a business that provides optometrical services during a period specified in the certificate.
- (2) Such a certificate is evidence of the matters certified.
- (3) A certificate purporting to be a certificate issued by the Director-General under this section is presumed to have been so issued unless the contrary is established.

### **[5] Schedule 7 Savings and transitional provisions**

Insert at the end of clause 2 (1):

*National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004*, to the extent that it amends this Act

#### **Explanatory note**

The *Optometrists Act 2002* (the **Principal Act**) was enacted to replace the existing *Optometrists Act 1930* as a result of a National Competition Policy review of that Act. Section 23 of the Principal Act (continuing a similar restriction under the existing Act) restricts the carrying on of the business of the practice of optometry to registered optometrists, incorporated practices, existing optometry businesses, persons approved by the Minister for Health, persons carrying on the business of a deceased optometrist for a limited period and others as permitted by the regulations. **Schedule 3 [1]** removes this restriction on the practice of optometry.

**Schedule 3 [1]** also inserts a new section 23 into the Principal Act to make it clear that nothing in the Act prevents a registered optometrist from practising optometry as the director or employee of any corporation or in the course of employment by, or in association with, any body or person.

**Schedule 3 [4]** inserts a new Part 10A (sections 120A–120I) into the Principal Act. Under proposed section 120A, it will be an offence for a person who employs a registered optometrist to direct or incite the optometrist to engage in conduct in the course of professional practice that would constitute unsatisfactory professional conduct (which, under the current definition of that term in the Principal Act, includes overservicing) or professional misconduct. Under proposed section 120D, the Director-General of the Department of Health will be able to prohibit persons who have been convicted of or made the subject of a criminal finding for such an offence from operating a business that provides optometrical services. Such a prohibition has an extended operation. For example, it will prohibit the person from having a management role or substantial interest in a corporation that operates such a business or from having a substantial interest in a trust under which such a business is operated.

**Schedule 3 [2] and [3]** make amendments consequential on the amendments made by **Schedule 3 [1]**.

**Schedule 3 [5]** provides for the making of savings and transitional regulations as a consequence of the proposed amendments to the Principal Act.

## Schedule 4 Amendment of **Pharmacy Act 1964 No 48**

(Section 3)

### **[1] Section 26 Restrictions on carrying on business of a pharmacist in pharmacies**

Omit “3” wherever occurring in section 26 (1) and (2). Insert instead “5”.

### **[2] Section 27A Exemptions for certain friendly societies**

Insert after section 27A (5):

(6) A friendly society to which subclause (1) or (2) applies must not:

- (a) carry on the business of a pharmacist in more than 6 pharmacies, or
- (b) have a direct or indirect pecuniary interest in the business of a pharmacist carried on in more than 6 pharmacies, or
- (c) carry on such a business in one or more pharmacies and have such an interest in one or more pharmacies so that the total number of pharmacies involved exceeds 6.

(7) A friendly society that contravenes subsection (6) is guilty of an offence against this Act.

### **[3] Section 40**

Insert after section 39:

## 40 Savings and transitional regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

*National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004*, to the extent that it amends this Act

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### Explanatory note

**Schedule 4 [1]** amends section 26 of the *Pharmacy Act 1964* (the **Principal Act**) to increase (from 3 to 5) the number of pharmacy businesses that a pharmacist may carry on or in which the pharmacist may have a direct or indirect pecuniary interest, and the number of partnerships carrying on such a business or having such a pecuniary interest of which a pharmacist may be a member.

Section 27A of the Principal Act allows certain friendly societies to carry on pharmacy businesses. **Schedule 4 [2]** amends section 27A of the Principal Act to limit to 6 the number of pharmacy businesses that such friendly societies may carry on or in which they may have a direct or indirect pecuniary interest.

**Schedule 4 [3]** provides for the making of savings and transitional regulations as a consequence of the proposed amendments to the Principal Act.

## Schedule 5 Amendment of *Farm Debt Mediation Act 1994 No 91*

(Section 3)

### [1] Section 11 Certificate that Act does not apply to farm mortgage

Omit section 11 (3) and the note at the end of that subsection.

### [2] Section 29A Reviews by Administrative Decisions Tribunal

Omit the section.

**[3] Schedule 1 Savings and transitional provisions**

Insert at the end of clause 1 (1):

the *National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004*, to the extent that it amends this Act

**[4] Schedule 1, clause 8**

Insert after clause 7:

**8 Application of 2004 amending Act**

- (1) In this clause, **the 2004 amending Act** means the *National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004*.
- (2) Section 11 (3) continues to apply to the farmer and the creditor under a farm mortgage in respect of which the Authority had, before the repeal of that subsection by the 2004 amending Act, failed to issue a certificate under section 11 as if that subsection had not been repealed.
- (3) An application to the Administrative Decisions Tribunal that had been made under section 29A before the repeal of that section by the 2004 amending Act is to be heard and determined, and the decision of the Administrative Decisions Tribunal on the application is to be given effect to, as if that section had not been repealed.

**Explanatory note**

The *Farm Debt Mediation Act 1994* prohibits the creditor under a farm debt from taking enforcement action in relation to the associated farm mortgage without first giving the farmer an opportunity to seek mediation of the matters giving rise to the creditor's right to take such action.

Section 11 of the Act allows the Rural Assistance Authority to issue a certificate to the creditor to the effect that the Act does not apply to the farm mortgage. Section 11 (3) provides that, if the Authority fails to issue such a certificate because it is not satisfied that the creditor has attempted to mediate in good faith, the creditor is prohibited from attempting further mediation, and therefore from enforcing the farm debt, for the next 12 months. **Schedule 5 [1]** omits section 11 (3). Proposed clause 8 (2) of Schedule 1 (to be inserted by **Schedule 5 [4]**) continues the effect of section 11 (3) with respect to past decisions of the Authority to refuse a certificate.

Section 29A of the Act confers on the farmer and the creditor a right to apply to the Administrative Decisions Tribunal for a review of a decision by the Rural Assistance Authority with respect to a certificate under section 9B or 11 of the Act and on mediators the right to apply to the Tribunal for a review of the Authority's decision to refuse or withdraw accreditation under section 12 of the Act. **Schedule 5 [2]** omits section 29A. Proposed clause 8 (3) of Schedule 1 (to be inserted by **Schedule 5 [4]**) allows existing applications to the Tribunal to be dealt with, and the Tribunal's decision on such an application to be given effect to.

**Schedule 5 [3]** amends clause 1 of Schedule 1 to the Act to enable the regulations under the Act to make further provision of a savings or transitional nature.