



New South Wales

National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The National Competition Policy (*NCP*) reform program was established on 11 April 1995 under the auspices of the Council of Australian Governments. The NCP is implemented through three agreements:

- (a) the *Conduct Code Agreement*,
- (b) the *Competition Principles Agreement*,
- (c) the *Agreement to Implement the National Competition Policy and Related Reforms (Implementation Agreement)*.

Under the *Competition Principles Agreement*, all governments agreed to put in place a range of structural reforms, including the review and reform of all legislation that restricts competition. Reform of legislation is required unless the benefits of restrictions to the community as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.

Explanatory note

In return for complying with the obligations set out in the three NCP agreements, including legislation review and reform, the Commonwealth agreed to provide annual competition payments to the States and Territories. The NCP agreements recognised that while the States and Territories have responsibility for implementing the major competition reforms, much of the financial dividend from the economic growth arising out of NCP reforms accrues to the Commonwealth rather than the States and Territories through higher income tax receipts. Competition payments to the States and Territories represent their share of the financial benefits arising from the NCP reforms. In 2003–2004, New South Wales' maximum competition payment entitlement is \$254.4 million.

The National Competition Council (*NCC*) has assessed New South Wales as having fulfilled all of its obligations under the three NCP agreements, with the exclusion of certain legislation review and reform activity. Among other areas, the Council has expressed dissatisfaction in relation to the degree of reform undertaken in the regulation of farm debt mediation and the dentistry, optometry and pharmacy professions.

The Commonwealth has accepted the *NCC*'s recommendation to impose a penalty for New South Wales' 2003–04 competition payments of \$50.8 million. The legislative amendments made by this Bill seek to ensure that this penalty is not imposed in future years and, subject to the *NCC*'s assessment and recommendation, may enable New South Wales to earn back a portion of this penalty.

The Bill effects the following amendments:

- (a) the *Dentists Act 1989* and the *Dental Practice Act 2001* are amended to remove restrictions on the persons or bodies who may employ dentists or in association with whom dentists may practise, and to prohibit employers of dentists from directing or inciting them to engage in misconduct,
- (b) the *Optometrists Act 2002* is amended to remove restrictions on the persons or bodies who may carry on the business of optometry, and to prohibit employers of optometrists from directing or inciting them to engage in misconduct,
- (c) the *Pharmacy Act 1964* is amended:
 - (i) to remove restrictions on who may have a pecuniary interest in a pharmacy business, on the number of such businesses that pharmacists may carry on or in which they may have a pecuniary interest and on the ability of friendly societies to carry on such businesses, and

Explanatory note

- (ii) to allow an incorporated practice of pharmacists to carry on a pharmacy business (rather than just pharmacists or partnerships of pharmacists) and to allow any person to participate in (but not control) the carrying on of a pharmacy business, and
 - (iii) to prohibit persons who have a pecuniary interest or who participate in carrying on the business of a pharmacist from directing or inciting the pharmacist to engage in misconduct,
- (d) the *Farm Debt Mediation Act 1994* is amended:
- (i) to remove a provision that prohibits action under the Act being taken within the 12 months following the Rural Assistance Authority's refusal of an application for a certificate declaring that the Act does not apply to a particular farm mortgage, and
 - (ii) to remove a provision that makes certain decisions of the Rural Assistance Authority reviewable by the Administrative Decisions Tribunal.

The Bill also makes ancillary and consequential amendments to the Acts referred to in paragraphs (a)–(d) above.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent.

Clause 3 is a formal provision that gives effect to the Schedules to the proposed Act containing the amendments.

Clause 4 makes it clear that the explanatory notes contained in the Schedules do not form part of the proposed Act.

Schedules 1–5 amend the *Dentists Act 1989*, the *Dental Practice Act 2001*, the *Optometrists Act 2002*, the *Pharmacy Act 1964* and the *Farm Debt Mediation Act 1994*. The amendments made by each Schedule are explained in detail in the explanatory note contained in the Schedule concerned.

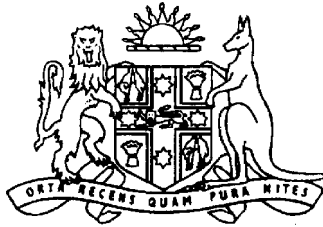


New South Wales

National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Bill 2004

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New South Wales

National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Bill 2004

No. , 2004

A Bill for

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

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004</i> .	3 4
2 Commencement	5
This Act commences on the date of assent.	6
3 Amendment of Acts	7
The Acts specified in Schedules 1–5 are amended as set out in those Schedules.	8 9
4 Explanatory notes	10
The matter appearing under the heading “Explanatory note” in each of the Schedules does not form part of this Act.	11 12

Schedule 1 Amendment of Dentists Act 1989 No 139	1
(Section 3)	2
[1] Section 3 Definitions	3
Omit the definition of <i>incorporated practice</i> from section 3 (1).	4
[2] Section 3 (3)	5
Insert after section 3 (2):	6
(3) Notes included in this Act do not form part of this Act.	7
[3] Section 5 Professional misconduct	8
Insert after section 5 (1) (a):	9
(a1) engaging in overservicing as provided by subsection (2), and	10 11
[4] Section 5 (1) (d)–(f)	12
Omit the paragraphs.	13
[5] Section 5 (2)	14
Omit section 5 (2)–(6). Insert instead:	15
(2) A dentist engages in overservicing if the dentist, in the course of professional practice:	16 17
(a) provides a service in circumstances in which provision of the service is unnecessary, not reasonably required or excessive, or	18 19 20
(b) engages in conduct that is prescribed by the regulations as constituting overservicing.	21 22
[6] Section 28 Application of Part to incorporated practices	23
Omit the section.	24

[7] Sections 53 and 54	1
Omit the sections. Insert instead:	2
53 Ownership of dental practices	3
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.	4 5 6 7
Note. Under section 137D of the <i>Dental Practice Act 2001</i> (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.	8 9 10
54 Prohibition against directing or inciting misconduct	11
The provisions of Part 11A (Prohibition against directing or inciting misconduct) of the <i>Dental Practice Act 2001</i> have effect as provisions of this Act, subject to any necessary modification.	12 13 14 15
Note. The general effect of Part 11A of the <i>Dental Practice Act 2001</i> is as follows:	16 17
(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,	18 19 20 21
(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.)	22 23 24 25 26 27 28 29
[8] Section 67 Regulations	30
Omit “society, council, body or corporation referred to in section 5 (4) (c), (d), (e) or (f)” from section 67 (2) (c).	31 32
Insert instead “person or body”.	33
[9] Section 67 (2) (l) and (m)	34
Omit the paragraphs.	35

[10] Schedule 4 Savings, transitional and other provisions	1
Insert “, and the <i>National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004</i> to the extent that it amends this Act” after “this Act” in clause 15 (1).	2 3 4
[11] Schedule 4, clause 15 (2)	5
Omit “this Act”. Insert instead “the Act concerned”.	6
Explanatory note	7
Section 5 of the <i>Dentists Act 1989</i> (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.	8 9 10 11 12 13 14
Section 53 of the <i>Principal Act</i> 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.	15 16 17 18 19 20 21
Schedule 1 [7] also inserts new sections 53 and 54 into the <i>Principal Act</i> . 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 <i>Principal Act</i> , subject to any necessary modification, the provisions of Part 11A of the <i>Dental Practice Act 2001</i> (which is yet to be commenced) that are proposed to be inserted by Schedule 2 [7].	22 23 24 25 26 27 28
Schedule 1 [2] inserts a formal provision relating to notes.	29
Schedule 1 [3] includes a dentist’s engaging in overservicing in the definition of professional misconduct in section 5 of the <i>Principal Act</i> .	30 31
Schedule 1 [5] makes amendments consequential on the amendments made by Schedule 1 [3] and [4] .	32 33
Schedule 1 [10] provides for the making of savings and transitional regulations as a consequence of the proposed amendments to the <i>Principal Act</i> . Schedule 1 [11] makes a consequential amendment.	34 35 36

Schedule 2 Amendment of Dental Practice Act 2001 No 64	1 2 3
(Section 3)	3
[1] Section 4 Definitions	4
Omit the definition of <i>incorporated practice</i> .	5
[2] Section 34	6
Omit the section. Insert instead:	7
34 Ownership of dental practices	8
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.	9 10 11 12
[3] Section 41 Meaning of “unsatisfactory professional conduct”— dentists	13 14
Insert after section 41 (1) (a):	15
(a1) engaging in overservicing as provided by subsection (2),	16 17
[4] Section 41 (1) (c), (f) and (g)	18
Omit the paragraphs.	19
[5] Section 41 (2)	20
Omit the subsection and note. Insert instead:	21
(2) A dentist engages in overservicing if the dentist, in the course of professional practice:	22 23
(a) provides a service in circumstances in which provision of the service is unnecessary, not reasonably required or excessive, or	24 25 26
(b) engages in conduct that is prescribed by the regulations as constituting overservicing.	27 28
[6] Section 43 Application of Part to incorporated practices	29
Omit the section.	30

[7] Part 11A	1
Insert after Part 11:	2
Part 11A Prohibition against directing or inciting misconduct	3
	4
137A Prohibition against directing or inciting misconduct	5
(1) A person (<i>the employer</i>) 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.	6 7 8 9 10
Maximum penalty:	11
(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	12 13 14
(b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.	15 16
(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:	17 18 19
(a) that the employer had no knowledge of those actions, and	20 21
(b) that the employer could not, by the exercise of due diligence, have prevented those actions.	22 23
(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.	24 25 26 27 28 29
(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.	30 31 32 33
(5) This section does not apply in respect of the employment of a dentist by any of the following:	34 35

- (a) a public health organisation within the meaning of the *Health Services Act 1997*, 1
2
 - (b) a private hospital or day procedure centre within the 3
meaning of the *Private Hospitals and Day Procedure* 4
Centres Act 1988, 5
 - (c) a nursing home within the meaning of the *Nursing* 6
Homes Act 1988. 7
- 137B Extended concept of employment** 8
- (1) When a registered dentist engages in the practice of dentistry 9
in the course of the carrying on of a business, any person who 10
owns, manages, controls, conducts or operates that business is 11
for the purposes of this Part taken to employ the dentist (in 12
addition to any person who actually employs the dentist). 13
 - (2) When a registered dentist is employed by a corporation, each 14
of the following persons is for the purposes of this Part also 15
considered to be the employer of the dentist (in addition to the 16
corporation): 17
 - (a) a person who is a director, secretary or executive officer 18
(as defined in the *Corporations Act 2001* of the 19
Commonwealth) of the corporation or is concerned in 20
the management of the corporation, 21
 - (b) any other employee of the corporation in accordance 22
with whose directions the dentist is required or 23
expected to act. 24
- 137C Extended concept of carrying on business** 25
- (1) If a dentist engaged in the practice of dentistry is provided, 26
in the course of the carrying on of a business, with services that 27
facilitate that practice and the operator of the business is 28
entitled, in connection with the provision of those services, to 29
a share or interest in the profits or income arising from the 30
practice of dentistry by the dentist: 31
 - (a) that business is taken for the purposes of this Part to be 32
a business that provides the dental services that are 33
provided by the dentist in the course of that practice, 34
and 35
 - (b) the dentist is taken for the purposes of this Part to be 36
engaged in the practice of dentistry in the course of the 37
carrying on of that business. 38

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- (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. 1
2
3
- (3) For the purposes of this Part, a person is considered to operate a business if the person: 4
5
- (a) owns, manages, controls, conducts or operates the business, or 6
7
- (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. 8
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- 137D Convicted offenders may be prohibited from carrying on business** 12
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- (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. 14
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- (2) The prohibition may be expressed to be: 19
- (a) for a fixed period (in which case the prohibition remains in force only for that fixed period), or 20
21
- (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). 22
23
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- (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. 26
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- (4) A prohibition under this section may be limited in its operation in either or both of the following ways: 35
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(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,	1 2 3
(b)	it may be limited to premises within a specified area.	4
(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.	5 6 7 8 9 10 11
137E	Offence of operating business while prohibited	12
(1)	A person who in contravention of a prohibition under this Part operates a business that provides dental services is guilty of an offence.	13 14 15
	Maximum penalty:	16
(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	17 18 19
(b)	in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.	20 21
(2)	If a continuing state of affairs is created by an offence against this section the offender is liable to a maximum penalty of:	22 23
(a)	100 penalty units in the case of a corporation, or	24
(b)	50 penalty units in any other case,	25
	in respect of each day on which that offence continues, in addition to the penalty specified in subsection (1).	26 27
(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.	28 29 30 31
137F	Effect of appeal against conviction	32
	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.	33 34 35

137G Business interests—effect of prohibition	1
(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:	2
(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	3
(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	4
(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).	5
(2) A person is considered to have a management role or substantial interest in a corporation if:	6
(a) the person is a director, secretary or executive officer (as defined in the <i>Corporations Act 2001</i> of the Commonwealth) of the corporation, or	7
(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 <i>Corporations Act 2001</i> of the Commonwealth).	8
(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.	9
(4) The regulations may create exceptions to this section.	10

137H	Power to require information from convicted persons and others	1 2
(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.	3 4 5 6 7 8 9
(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.	10 11 12 13 14
(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:	15 16 17 18 19
(a)	the identity of each corporation in which that person has a management role or substantial interest, or	20 21
(b)	the identity of the trustee and any manager of a trust in which that person has a substantial interest.	22 23
(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.	24 25 26 27 28
(5)	A person who fails without reasonable excuse to comply with a requirement under this section is guilty of an offence.	29 30
	Maximum penalty:	31
(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	32 33 34
(b)	in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.	35 36

(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.	1 2 3 4 5 6
	Maximum penalty:	7
(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	8 9 10
(b)	in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.	11 12
137I	Evidentiary certificate	13
(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.	14 15 16 17
(2)	Such a certificate is evidence of the matters certified.	18
(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.	19 20 21
[8]	Section 139 Approval for employment of dentists by non-dentists	22
	Omit the section.	23
[9]	Section 141 Carrying on practice of deceased dentist	24
	Omit the section.	25
[10]	Section 142 Civil liability of directors of incorporated practices	26
	Omit the section.	27
[11]	Section 158 Regulations	28
	Omit “referred to in section 41 (2) (d)–(g)” from section 158 (2) (n).	29
[12]	Section 158 (2) (v)	30
	Omit the paragraph.	31

[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	1
	No 30	2
	(Section 3)	3
[1]	Section 23	4
	Omit the section. Insert instead:	5
	23 Ownership of optometry practices	6
	Nothing in this Act (except section 120D) prevents a	7
	registered optometrist from practising optometry as the	8
	director or employee of any corporation or in the course of	9
	employment by, or in association with, any body or person.	10
[2]	Section 29 Meaning of “unsatisfactory professional conduct”	11
	Omit section 29 (1) (g) and (h).	12
[3]	Section 29 (3)	13
	Omit the subsection.	14
[4]	Part 10A	15
	Insert after Part 10:	16
	Part 10A Prohibition against directing or inciting	17
	misconduct	18
120A	Prohibition against directing or inciting misconduct	19
	(1) A person (<i>the employer</i>) who employs a registered	20
	optometrist must not direct or incite the optometrist to engage	21
	in conduct in the course of professional practice that would	22
	constitute unsatisfactory professional conduct or professional	23
	misconduct.	24
	Maximum penalty:	25
	(a) in the case of a corporation, 400 penalty units for a first	26
	offence or 800 penalty units for a second or subsequent	27
	offence, or	28
	(b) in any other case, 200 penalty units for a first offence or	29
	400 penalty units for a second or subsequent offence.	30

- (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 <i>Corporations Act 2001</i> of the Commonwealth) of the corporation or is concerned in the management of the corporation,	1 2 3 4
(b)	any other employee of the corporation in accordance with whose directions the optometrist is required or expected to act.	5 6 7
120C	Extended concept of carrying on business	8
(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:	9 10 11 12 13 14
(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	15 16 17 18
(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.	19 20 21
(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.	22 23 24
(3)	For the purposes of this Part, a person is considered to operate a business if the person:	25 26
(a)	owns, manages, controls, conducts or operates the business, or	27 28
(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.	29 30 31 32
120D	Convicted offenders may be prohibited from carrying on business	33 34
(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.	35 36 37 38 39

- (2) The prohibition may be expressed to be: 1
- (a) for a fixed period (in which case the prohibition remains in force only for that fixed period), or 2
 - (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
- (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
- (4) A prohibition under this section may be limited in its operation in either or both of the following ways: 5
- (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, 6
 - (b) it may be limited to premises within a specified area. 7
- (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. 8
- 120E Offence of operating business while prohibited** 9
- (1) A person who in contravention of a prohibition under this Part operates a business that provides optometrical services is guilty of an offence. 10
- Maximum penalty: 11
- (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 12

(b)	in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.	1 2
(2)	If a continuing state of affairs is created by an offence against this section the offender is liable to a maximum penalty of:	3 4
(a)	100 penalty units in the case of a corporation, or	5
(b)	50 penalty units in any other case,	6
	in respect of each day on which that offence continues, in addition to the penalty specified in subsection (1).	7 8
(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.	9 10 11 12
120F	Effect of appeal against conviction	13
	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.	14 15 16
120G	Business interests—effect of prohibition	17
(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:	18 19 20
(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	21 22 23 24
(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	25 26 27 28 29 30
(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).	31 32 33 34 35
(2)	A person is considered to have a management role or substantial interest in a corporation if:	36 37

- (a) the person is a director, secretary or executive officer (as defined in the *Corporations Act 2001* of the Commonwealth) of the corporation, or 1
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 - (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). 4
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 - (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. 10
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 - (4) The regulations may create exceptions to this section. 14
- 120H Power to require information from convicted persons and others** 15
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- (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. 17
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 - (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. 24
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 - (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: 29
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 - (a) the identity of each corporation in which that person has a management role or substantial interest, or 34
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 - (b) the identity of the trustee and any manager of a trust in which that person has a substantial interest. 36
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- (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. 1
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- (5) A person who fails without reasonable excuse to comply with a requirement under this section is guilty of an offence. 6
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- Maximum penalty: 8
- (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 9
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- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence. 12
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- (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. 14
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- Maximum penalty: 20
- (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 21
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- (b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence. 24
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- 120I Evidentiary certificate** 26
- (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. 27
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- (2) Such a certificate is evidence of the matters certified. 31
- (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. 32
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[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 1
(Section 3) 2

[1] Section 19A Definitions 3

Omit paragraph (e) of the definition of *professional misconduct*. 4

Insert instead: 5

- (e) (except as provided by section 25 (2) (d)) the 6
pharmacist's carrying on the business of a pharmacist 7
for or on behalf of, or in association with, an individual, 8
a body corporate or an unincorporated body that is not 9
entitled to carry on that business, and 10

**[2] Section 25 Persons other than pharmacists not to carry on 11
pharmacists' businesses** 12

Omit section 25 (1), (1A) and (2). Insert instead: 13

- (1) An individual, a body corporate or an unincorporated body 14
must not carry on, as owner or otherwise, the business of a 15
pharmacist in a pharmacy unless as one of the following: 16
 - (a) a pharmacist (being an individual), 17
 - (b) a partnership consisting only of pharmacists and 18
formed for the purpose of carrying on the business of a 19
pharmacist in a pharmacy, 20
 - (c) an incorporated practice. 21
- (1A) In subsection (1), *incorporated practice* means a body 22
corporate: 23
 - (a) all the shareholders and directors of which are 24
pharmacists, and 25
 - (b) formed for the purpose of carrying on the business of a 26
pharmacist in a pharmacy. 27
- (2) Subsection (1) does not prevent: 28
 - (a) an individual from being employed in the carrying on of 29
the business of a pharmacist, or 30
 - (b) an individual, a body corporate or an unincorporated 31
body from having a pecuniary interest in the business of 32
a pharmacist, or 33

(c)	an individual, a body corporate or an unincorporated body from carrying on the business of a pharmacist in circumstances prescribed by the regulations, or	1 2 3
(d)	an individual, a body corporate or an unincorporated body from participating in the carrying on of the business of a pharmacist, so long as the individual, body corporate or unincorporated body authorised by or under this Act to carry on the business has control over the carrying on of the business.	4 5 6 7 8 9
[3]	Section 25 (3)	10
	Omit “corporation”. Insert instead “body corporate”.	11
[4]	Section 26 Restrictions on carrying on business of a pharmacist in pharmacies	12 13
	Omit the section.	14
[5]	Sections 27A and 27B	15
	Omit section 27A. Insert instead:	16
27A	Exemption for friendly societies	17
(1)	Section 25 does not operate to prevent any friendly society from carrying on the business of a pharmacist.	18 19
(2)	In this section:	20
	<i>friendly society</i> includes any society exempted from the operation of sections 24C, 25 and 26 under section 27A (as in force immediately before the commencement of the <i>National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004</i>).	21 22 23 24 25
27B	Prohibition against directing or inciting misconduct	26
(1)	A person (<i>the interested person</i>) who has a direct or an indirect pecuniary interest in, or who participates in the carrying on of, the business of a pharmacist in a pharmacy must not direct or incite the pharmacist to engage in conduct in the course of professional practice that would constitute professional misconduct.	27 28 29 30 31 32

Maximum penalty:	1
(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	2 3 4
(b) in any other case, 200 penalty units for a first offence or 400 penalty units for a second or subsequent offence.	5 6
(2) For the purposes of this section, any actions of an agent or employee of the interested person are taken to be actions of the interested person unless the interested person establishes:	7 8 9
(a) that the interested person had no knowledge of those actions, and	10 11
(b) that the interested person could not, by the exercise of due diligence, have prevented those actions.	12 13
[6] Section 29 Business of deceased pharmacist may be carried on temporarily	14 15
Omit “, or from having, as such executor, administrator, trustee or person entitled, a pecuniary interest, direct or indirect, in such business,”.	16 17
[7] Section 34	18
Insert after section 33:	19
34 Offences by corporations	20
(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.	21 22 23 24 25 26
(2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or has been convicted under the provision.	27 28 29 30
(3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.	31 32 33

[8] Section 38 Regulations	1
Omit “the formation of partnerships for the purposes of establishing such pharmacies, the admission of additional partners, the holding and transfer of shares in such partnerships, the provisions to be included in agreements for the formation of such partnerships and any other matters relating to such partnerships,” from section 38 (1) (h1).	2 3 4 5 6
[9] Section 38 (1) (h3)	7
Insert after section 38 (1) (h2):	8
(h3) providing for the application of the provisions of this Act to incorporated practices (within the meaning of section 25 (1A)) and the modification of those provisions in their application,	9 10 11 12
[10] Sections 40 and 41	13
Insert after section 39:	14
40 Savings and transitional regulations	15
(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:	16 17 18
<i>National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004</i> , to the extent that it amends this Act	19 20 21
(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.	22 23 24
(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:	25 26 27
(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	28 29 30
(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.	31 32 33

41 Saving of regulation

(1) To the extent that a regulation made under section 25 (as in force immediately before the commencement of the amending Act) exempts a matter from the operation of a provision of section 25, the regulation is taken to be an exemption made under section 25 (2) (c) (as substituted by the amending Act).

(2) In this section:

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

Explanatory note

Section 25 of the *Pharmacy Act 1964* (the *Principal Act*) currently provides that (subject to certain exceptions) only registered pharmacists or partnerships consisting solely of registered pharmacists may carry on a pharmacy business or otherwise have a pecuniary interest in such a business. **Schedule 4 [2]** amends section 25 to remove the restriction on who may have a pecuniary interest in a pharmacy business and to restate the offence of unauthorised carrying on of a pharmacy business to allow such a business to be carried on also by an *incorporated practice* (being a body corporate formed for the purpose of carrying on such a business, all the shareholders and directors of which are registered pharmacists). **Schedule 4 [2]** also creates a new exemption from that offence (in addition to restating, with some modification, 2 existing exemptions), namely, that the offence does not prevent a person or body from participating in the carrying on of a pharmacy business so long as the person or body authorised by or under the *Principal Act* to carry on the business has control over the carrying on of the business.

Section 26 of the *Principal Act* currently limits to 3 the number of pharmacy businesses that pharmacists may carry on or in which they may have a pecuniary interest. (The restriction does not apply to certain friendly societies or certain established pharmacy businesses.) The section also prohibits pharmacists from carrying on a pharmacy business or having a pecuniary interest in such a business as a member of more than 3 partnerships of pharmacists. **Schedule 4 [4]** removes these restrictions on the practice of pharmacy.

Section 27A of the *Principal Act* currently allows certain friendly societies to operate their established pharmacy businesses by exempting the conduct of such pharmacies from section 25 of the Act (discussed above). Section 27A also exempts the conduct of such pharmacies from sections 24C (which requires pharmacy premises to be approved and owners registered) and 26 (discussed above). However, the conduct of other friendly society pharmacies is only exempted from these sections (and so such pharmacies may only operate) subject to the approval of the Minister for Health. **Schedule 4 [5]** removes the restriction on the ability of friendly societies to open and operate new pharmacies by applying the exemption from section 25 to the conduct of a pharmacy business by any friendly society. (In substituting section 27A, the item also removes a restriction on the ability of the established friendly society pharmacies to relocate, and removes the exemption from sections 26 (to be repealed by **Schedule 4 [4]**) and 24C.)

Schedule 4 [5] also inserts new section 27B into the *Principal Act* which makes it an offence for a person who has a pecuniary interest in the business of a pharmacist or who participates in the carrying on of such a business (*the interested person*) to direct

National Competition Policy Health and Other Amendments
(Commonwealth Financial Penalties) Bill 2004

Schedule 4 Amendment of Pharmacy Act 1964 No 48

or incite the pharmacist to engage in conduct in the course of professional practice that would constitute professional misconduct. (For the purposes of the offence, any actions of an agent or employee of the interested person are taken to be actions of the interested person unless the interested person establishes certain matters.)

Schedule 4 [1] modifies an existing category of misconduct in the definition of *professional misconduct* in section 19A of the Principal Act consequent on the amendments made by **Schedule 4 [2]**. **Schedule 4 [3], [6], [8] and [9]** also make amendments consequential on the amendments made by that item.

Schedule 4 [7] inserts a procedural provision dealing with offences by corporations.

Schedule 4 [10] provides for the making of savings and transitional regulations as a consequence of the proposed amendments to the Principal Act. The item also deems a regulation made under section 25 of the Principal Act (before its amendment by the proposed Act) that exempts a matter from the operation of section 25 to be made under section 25 (2) (c) of the Principal Act (as substituted by the proposed Act).

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Schedule 5 Amendment of Farm Debt Mediation Act 1994 No 91	1
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(Section 3)	3
[1] Section 11 Certificate that Act does not apply to farm mortgage	4
Omit section 11 (3) and the note at the end of that subsection.	5
[2] Section 29A Reviews by Administrative Decisions Tribunal	6
Omit the section.	7
[3] Schedule 1 Savings and transitional provisions	8
Insert at the end of clause 1 (1):	9
the <i>National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004</i> ,	10
to the extent that it amends this Act	11
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[4] Schedule 1, clause 8	13
Insert after clause 7:	14
8 Application of 2004 amending Act	15
(1) In this clause, <i>the 2004 amending Act</i> means the <i>National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Act 2004</i> .	16
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(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.	19
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(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.	24
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Explanatory note	30
The <i>Farm Debt Mediation Act 1994</i> 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.	31
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Schedule 5 Amendment of Farm Debt Mediation Act 1994 No 91

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.

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