

Guidelines for Ministerial Discretion

Discretionary power under
subsection 90A(2) of the *National Health Act 1953*
to approve a pharmacist
to supply pharmaceutical benefits

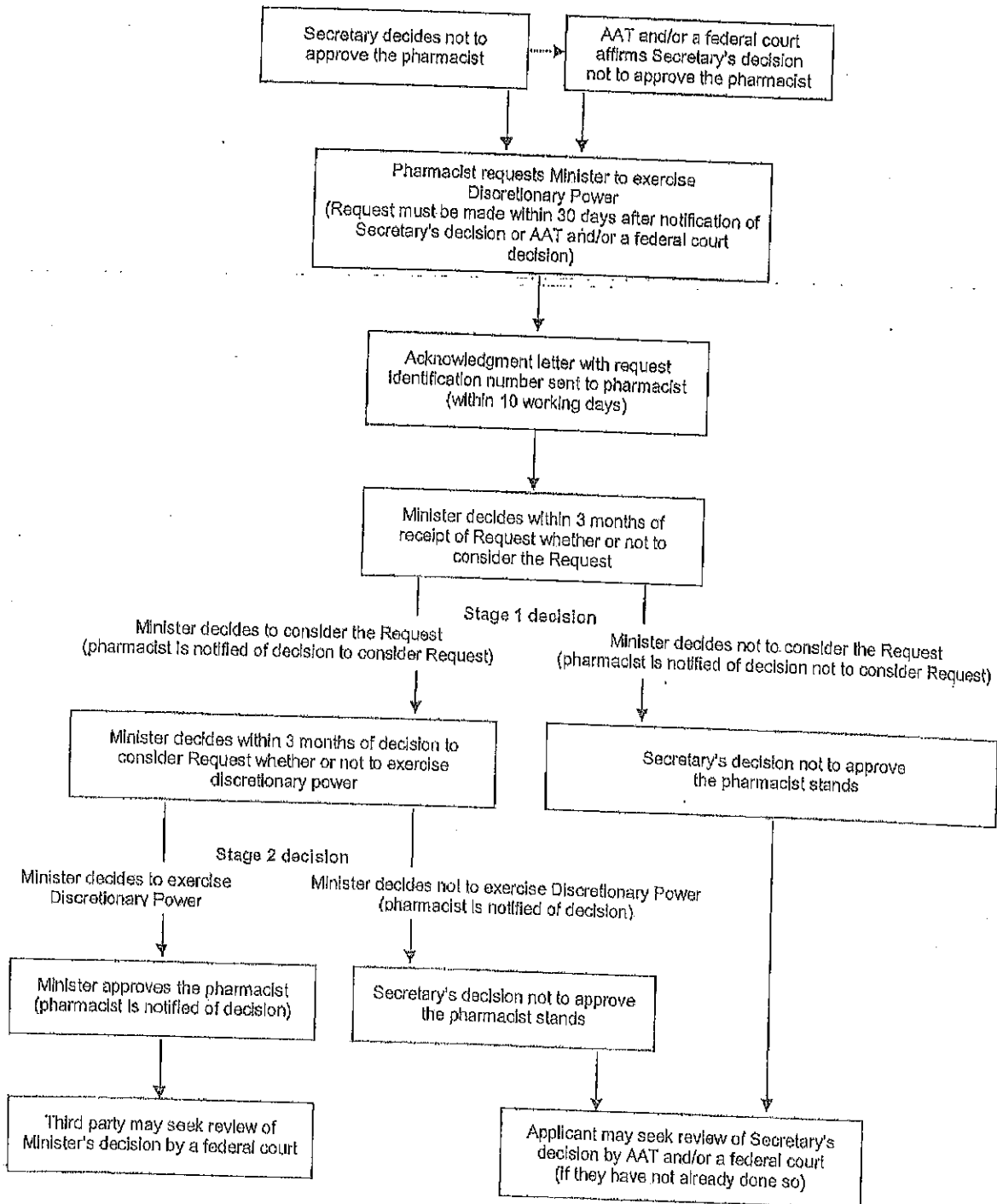
Issued by the Minister for Health and Ageing,

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3. THE DISCRETIONARY POWER

3.1 The process

The following flowchart indicates the process by which the Discretionary Power may be exercised.



3.2 When is the Discretionary Power available

The Minister can only consider a Request if:

- i. the Secretary has made a decision not to approve a pharmacist under section 90 of the NHA;
- ii. the Secretary's decision is in respect of an application for approval lodged on or after 1 July 2006; and
- iii. the Secretary's decision was made on the basis that application did not meet the requirements of the Pharmacy Location Rules.

The Minister can also consider a Request if the Secretary has made a decision (as described in paragraph 3.2(i) above), and the AAT and/or a federal court has affirmed that decision.

3.3 When is the Discretionary Power not available

The Minister cannot consider exercising the Discretionary Power if the Secretary has:

- i. not made a decision regarding an application under section 90 of the NHA;
- ii. decided to approve a pharmacist under section 90 of the NHA;
- iii. decided not to approve a pharmacist under section 90 of the NHA, on the basis that the pharmacist is not permitted under State or Territory law to operate a pharmacy (subsection 90(4) of the NHA refers);
- iv. decided not to approve a pharmacist under section 90 of the NHA in relation to an application made before 1 July 2006;
- v. decided not to approve a pharmacist under section 90 of the NHA, and that decision is the subject of a proceeding before the AAT or a federal court; or
- vi. decided not to approve a pharmacist under section 90 of the NHA, but that decision has been overturned, or set aside by the AAT or a federal court.

The Minister also cannot exercise the Discretionary Power if:

- i. no Request has been made to the Minister;
- ii. the Request is made more than 30 days after the pharmacist is notified of the Secretary's decision not to approve the pharmacist under section 90 of the NHA; or
- iii. the Request is not made in the form determined by the Minister.

3.4 Under what circumstances may the Discretionary Power be exercised

The aim of the Discretionary Power is to address unintended consequences of the application of the Pharmacy Location Rules. Accordingly, the Minister may only exercise the Discretionary Power if he or she is satisfied that:

- i. as a result of the Secretary's decision, a community will not have reasonable access to the supply of Pharmaceutical Benefits by an approved pharmacist; and
- ii. approving the pharmacist is in the public interest.

For each Request, it will be up to the Minister to determine the community that is relevant to that Request, and what constitutes reasonable access to the supply of Pharmaceutical Benefits by an approved pharmacist.

3.5 Matters to which the Minister may have regard

In deciding whether a community has reasonable access to the supply of Pharmaceutical Benefits by an approved pharmacist, and if the approval of a pharmacist is in the public interest, the Minister may take into account the following factors:

- i. the objectives of the Pharmacy Location Rules, as provided in the Fourth Community Pharmacy Agreement, and the policy underlying the Pharmacy Location Rules (see Appendix 1);
- ii. the reasons why the pharmacist's application did not meet the requirements of the Pharmacy Location Rules;
- iii. the characteristics and demographics of the community to which the pharmacist proposes to supply Pharmaceutical Benefits;
- iv. the community's current level of access to the supply of Pharmaceutical Benefits by an approved pharmacist; and
- v. any other factors the Minister considers to be relevant.

3.6 Matters to which the Minister may not have regard

In deciding whether a community has reasonable access to the supply of Pharmaceutical Benefits by an approved pharmacist, and if the approval of a pharmacist is in the public interest, the commercial interests of the pharmacist making the Request, or of any other party, are not generally considered to be relevant.

3.7 Persons who can exercise the Discretionary Power

Any decision regarding the exercise of the Discretionary Power must be made by the Minister personally.

Paragraph 6(1)(ab) of the NHA provides that the Discretionary Power under section 90A and section 90B of the NHA cannot be delegated to another person.