

26 April 2018

Scott Fry
Fry's Pharmacy Limited
Unit 3, Ground Floor
355 Lower Queen Street
Richmond 7020
Nelson

Dear Mr Fry

Commerce Act 1986: Warning

1. As you are aware, the Commission has been investigating Fry's Pharmacy Limited (Fry's Pharmacy) concerning allegations of anti-competitive conduct involving certain pharmacies in the Nelson region.

Commission's view

2. The Commission considers that Fry's Pharmacy is likely to have breached the price fixing prohibitions in the Commerce Act 1986 (the Act) by agreeing with competing pharmacy owners to introduce a \$1 margin charge in addition to any co-payment on fully funded new prescription items during May 2016 (the Understanding).
3. The Commission has exercised its enforcement discretion to issue a warning to Fry's Pharmacy rather than to commence proceedings. In reaching a decision to warn and not commence proceedings, we have taken into account the extent of your involvement in facilitating and implementing the margin charge.
4. While the Commission does not intend to take any further action against Fry's Pharmacy, the Commission has filed civil proceedings in the High Court at Nelson against Prices Pharmacy 2011 Limited and its Directors for alleged price-fixing. The Commission is seeking a declaration that Prices Pharmacy 2011 Limited and its Directors contravened the Act, financial penalties and costs.

Price fixing prohibited by the Act

5. Section 27, via section 30, of the Act prohibits contracts, arrangements or understandings between competitors that have the purpose, effect, or likely effect, of fixing, controlling or maintain the prices charged for goods or services.¹

¹ The conduct in this letter is subject to the price fixing provisions in force prior to the amendments to section 30 of the Act made by the Commerce (Cartels and Other Matters) Amendment Act 2017 on 15 August 2017.

6. A contract, arrangement or understanding need not be formal, written or signed. All that is required is for parties to reach a consensus which creates an expectation as to how at least one of them will act, or not act.

Basis for the Commission's view

7. The Commission is of the view that Fry's Pharmacy entered into and gave effect to the Understanding in breach of section 27 via section 30 of the Act.
8. The Commission considers that Fry's Pharmacy attended a Nelson pharmacy owners proprietors meeting on 26 April 2016 at which attendees agreed to raise the total price of fully funded prescription items, in most cases from \$5 to \$6.
9. The Commission considers that Fry's Pharmacy gave effect to the Understanding by introducing a \$1 margin charge on fully funded new prescription items during May 2016.
10. Fry's Pharmacy subsequently withdrew the margin charge, as in June 2016 pharmacy owners received additional taxpayer funding from the Nelson Marlborough District Health Board.

Commission guidance

11. Competition between firms typically derives from rivalry on price, quality, service, choice and other offerings. Conducts which fixes, controls or maintains prices reduces competition and can be detrimental to consumers.
12. To avoid breaching the Act in future, we recommend that you are mindful of the Act when attending meetings and/or otherwise interacting with competing pharmacies, particularly where the communications involved may interfere with an independent decision about a price or component of a price.
13. This same care is required when attending industry or professional association meetings where competitors or potential competitors are involved. This is not to say that proprietors are not able to meet to discuss issues in an industry. Professional bodies in the health sector play a useful role in allowing health professionals to discuss issues and practices, and share knowledge and technical information. However, caution is required when providing guidance on pricing as individuals must be free to calculate and decide their own prices.
14. If in doubt, you should seek legal advice from a lawyer experienced in dealing with the Act.

Further action by the Commission and other parties

15. Only the courts can decide whether the Act has been breached or not. This warning letter does not represent a ruling of law.

16. The court can impose penalties where it finds the law has been broken. An individual can be fined a maximum of \$500,000 and/or be prohibited from being a company director or manager of a company. A body corporate can be fined the greater of \$10 million or three times the commercial gain from the breach (or if this cannot be easily established then 10% of turnover). Every separate breach of the Act may incur a penalty.
17. While the Commission does not intend to take any further action against Fry's Pharmacy for this conduct, you should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking a private action for damages under section 82 of the Act.
18. We may draw this warning to the attention of a court in any future proceedings brought by the Commission against Fry's Pharmacy for other conduct in breach of the Act. Previous warnings may be considered an aggravating factor in sentencing by the court for any future conduct.
19. This warning letter to Fry's Pharmacy will be published on our website. We will also refer to this warning letter in a media release that will be published.

Further information

20. We have published a series of fact sheets and other resources to help businesses comply with the Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act.
21. You can also view the Act and other legislation at www.legislation.govt.nz.
22. Thank you for your assistance with this investigation. Please contact me by email at katie.rusbatch@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Katie Rusbatch
Head of Competition
Competition and Consumer Branch