

29 January 2018

Endeavour Consumer Health Limited
C/- Lucy Cooper
Chapman Tripp
Level 17
10 Customhouse Quay
Wellington

Ref: 16094

By email only: Lucy.Cooper@chapmantripp.com

Dear Ms Cooper

Endeavour Consumer Health: Red Seal Pharmacy Range: Warning under the Fair Trading Act 1986

1. As you are aware, the Commerce Commission (**the Commission**) has been investigating Endeavour Consumer Health Limited (**Endeavour**) under the Fair Trading Act 1986 (**the Act**) in relation to its Red Seal Pharmacy Strength range of health supplements (**the Pharmacy Strength range**).
2. We have now completed our investigation and are writing to alert you to our concerns.
3. In summary, the Commission considers that Endeavour's use of the term "Pharmacy Strength" on labels and promotional materials for its Red Seal range of health supplements is likely to breach sections 9, 10, 13(a) and 13(e) of the Act by:
 - 3.1 engaging in conduct that is likely to mislead (section 9);
 - 3.2 engaging in conduct that is liable to mislead the public as to the nature or characteristics of the Pharmacy Strength range (section 10);
 - 3.3 making false or misleading representations that the Pharmacy Strength range is of a particular quality (section 13(a)); and
 - 3.4 making false or misleading representations that the Pharmacy Strength range has any approval or endorsement (section 13(e)).

The investigation

4. During our investigation the Commission considered a complaint which alleged that the term "Pharmacy Strength" implied that the range was associated with regulated pharmacist-only or pharmacy-only medicines and/or supplements.

5. We understand that the Pharmacy Strength range is generally of a higher potency and/or complexity than Red Seal's standard supplement range. We note however, that none of the products in the Pharmacy Strength range contains sufficient quantities of any regulated substance to give it a pharmacy-only or pharmacist-only designation, and that the Pharmacy Strength range is available for general sale in supermarkets.

Endeavour's response to date

6. Endeavour has advised the Commission to date that it does not believe that its use of the term "Pharmacy Strength" on its Red Seal range of health supplements breaches the Act.
7. Despite its view, Endeavour has engaged in discussions with the Commission and it has agreed to make changes to how it markets the Pharmacy Strength range of products sold in supermarkets.

The Commission's view

Warning for likely breaches of the Act

8. The Commission has considered and analysed all of the available evidence in the investigation, including taking into account Endeavour's response to date. It is our view that Endeavour has likely breached sections 9, 10, 13(a) and 13(e) of the Act.
9. After considering the factors set out in our Enforcement Response Guidelines¹, we have decided to formally warn Endeavour for its "Pharmacy Strength" representations.
10. The term "Pharmacy Strength" is a central focus of the range's product labels and has been widely used in the range's promotional material to the public.
11. The Commission is concerned that the use of the term "Pharmacy Strength" is likely to represent to reasonable consumers that products in the range are of a strength, potency or effectiveness that is:
 - 11.1 endorsed or approved for sale in pharmacies, when the product has no such approval or endorsement; and/or is
 - 11.2 not usually or previously available in supermarkets or outside of pharmacies, when this is not the case.
12. The Commission believes that the term "Pharmacy Strength" is confusing, and it is likely to mislead consumers about the potency or effectiveness of the product, or to draw unsound comparisons between this product and competing products.

¹ Available at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

13. In view of Endeavour's decision to make changes to how it markets its Pharmacy Strength range of products sold in supermarkets, the Commission considers it appropriate to finalise its investigation by issuing this warning letter.
14. While we will not be taking any further action against Endeavour at this time, we will take this warning into account if the conduct resumes or if Endeavour engages in similar conduct in the future.

Additional comments

15. This letter is public information and will be published on the Commission's website. A media release will also be issued in conjunction with the letter being published on our website.

The Commission's role

16. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the Act. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the Act

17. Only the courts can decide if there has actually been a breach of the Act. The court can impose severe penalties where it finds the law has been broken. A company that breaches the Act can be fined up to \$600,000 and an individual up to \$200,000 per offence.
18. You should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the courts.

Further information

19. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the Act. You can also view the Act and other legislation at www.legislation.co.nz.
20. Please contact Gemma Coppins on (04) 924 3607 or at gemma.coppins@comcom.govt.nz if you have any questions about this letter in the first instance.

Yours sincerely



Mary-Anne Borrowsdale
General Counsel
Competition and Consumer