

13 February 2014

DHB
Address

Email:

Dear Sir/Madam

Commerce Act 1986: Warning

1. The purpose of this letter is to warn (name of DHB) that it has likely breached section 27 of the Commerce Act 1986 (the Act) by entering into the 2012 Community Pharmacy Services Agreement (CPSA) with individual community pharmacies.
2. We have reached this view after investigating the 'no discounting' provisions in the District Health Boards (DHBs) 2012 CPSA with individual community pharmacies. Our view is that provisions M1.3 and H4.4 of the CPSA (the 'no discounting' provisions) had the likely effect of substantially lessening competition for the dispensing of prescription medication.
3. In making a decision to warn rather than to take some other enforcement action, we have taken into account that the extent of the detriment was limited. Following our intervention and the DHBs' prompt response to our concerns, the provisions were not enforced by DHBs from December 2012 and the provisions were removed from the CPSA with effect from 1 March 2013.

Commission warning

4. Section 27 of the Act prohibits contracts arrangements or understandings containing a provision that has the purpose, effect or likely effect of substantially lessening competition in a market in New Zealand.
5. In our view, the 'no discounting' provisions were drafted to ensure that pharmacies did not discount the co-payment or try to encourage customers with some other form of inducement to obtain prescriptions from their pharmacy.
6. In the Commission's view, pharmacies compete with each other in localised markets and the no discounting provisions had the likely effect of substantially lessening competition during the time they were in force.

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7. Before the CPSA was signed, some pharmacies competed on the price of prescription medication, typically by discounting the patient co-payment. This competition was in our view beneficial, especially to those customers in low-income communities.
8. Following the signing of the CPSA, some pharmacies who had discounted, observed a decline in prescriptions dispensed while the no discounting provisions were in operation.

Commission view

9. Competition between firms typically derives from rivalry on price, quality, service, choice and other offerings. Conduct which substantially lessens competition can be detrimental to consumers.
10. To avoid breaching the Act in future, we recommend that (name of DHB) review its current practices and policies that affect competition. We urge you to carefully consider, before entering into such agreements, whether there are any provisions that may have the effect of substantially lessening competition. If in doubt, you should always seek advice.
11. We remind you that pharmacies are in competition with other pharmacies in their local area for dispensing and for non-prescription products. Each pharmacy needs to reach independent pricing decisions to avoid the risk of breaching the Act.
12. We also encourage you to take an interest in what member associations or pharmacy groups may be advocating in consultation processes with DHBs. If a member delegates to an association to reach terms on their behalf, that member may be bound into an agreement that breaches the Act.

Further action by the Commission and other parties

13. Only the courts can decide whether the Act has been breached or not. This warning letter does not represent a ruling of law.
14. The Commission does not intend to take any further action against (name of DHB) for this conduct. However, 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. We may draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against (name of DHB).
15. 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 a manager of a company. A body corporate can be fined the greater of \$10 million, or three times the commercial gain from the breach (if this cannot be easily established, 10% of turnover). Every separate breach of the Act may incur a penalty.

16. The Commission will also be warning all other DHBs and individual pharmacies who entered into the 2012 CPSA that they have likely breached the Act. The Pharmacy Guild of New Zealand will also be warned for aiding, abetting, counselling or procuring DHBs and/or its members to include the provisions.

Publication

17. The warning letters are public information and a generic version of the letter to DHBs, pharmacies and the letter to the Guild will be published on our website. We also intend to make public comment including issuing a media release and making comment to media.

Yours sincerely

A handwritten signature in black ink, consisting of a stylized capital letter 'R' followed by a horizontal line extending to the right.

Ritchie Hutton
Head of Investigations
Commerce Commission