

13 February 2014

Lee Hohaia
Chief Executive Officer
Pharmacy Guild of New Zealand Incorporated
PO Box 27139
Marion Square
Wellington 6141

Dear Ms Hohaia

Commerce Act 1986: Warning

1. The purpose of this letter is to warn the New Zealand Pharmacy Guild (Incorporated) (the Guild) that it has likely breached the Commerce Act 1986 (the Act) during the consultation process for the 2012 Community Pharmacy Services Agreement (CPSA).
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 (the 'no discounting' provisions) had the likely effect of substantially lessening competition for the dispensing of prescription medication and that the Guild aided, abetted, counselled and/or procured DHBs and/or its members to include these provisions in breach of the Act.
3. In making a decision to warn rather than 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. Under s 80(1)(c) of the Act a court may order persons who aid, abet, counsel, or procure any other person to contravene a provision in Part 2 of the Act to pay a penalty. We have reached the view that the Guild aided, abetted, counselled, or procured DHBs and/or Guild members to likely breach s 27 of the Commerce Act.

AUCKLAND

L19, ASB Building
135 Albert Street
P.O. Box 105-222
AUCKLAND 1143, NEW ZEALAND
1632875.6

WELLINGTON

L6, 44 The Terrace
P.O. Box 2351
WELLINGTON 6140, NEW ZEALAND
Tel: (04) 924 3600 Fax: (04) 924 3700
Main Office

CHRISTCHURCH

9 Radley Street
Woolston
P.O. Box 10-199
CHRISTCHURCH 8145, NEW ZEALAND

6. The Guild submitted that it had no direct role in the drafting of the CPSA and that the Ministry of Health and DHBs retained sole decision-making authority as to the content of the 2012 CPSA.
7. However, based on evidence we obtained during our investigation, our view is that during the 2012 CPSA consultation process, the Guild assisted or encouraged DHBs and/or Guild members to include, in addition to other suggestions, 'no discounting' provisions in the 2012 CPSA.
8. In our view, the 'no discounting' provisions ensured 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.
9. In the Commission's view, pharmacies compete with each other in localised markets and by including no discounting provisions in the 2012 CPSA, this had the likely effect of substantially lessening competition during the time they were in force.

Commission view

10. 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.
11. To avoid breaching the Act in future, we recommend that the Guild seek legal advice as soon as any potential competition concerns arise. We also encourage the Guild to review its current practices and policies to ensure that the Guild does not risk breaching the Act again. If in doubt, seek advice.
12. As a representative body, the Guild plays a useful role in negotiating agreements, advocating and consulting on behalf of its members. However, the Guild needs to be mindful of the prohibitions in the Act against price fixing and anti-competitive agreements.
13. We urge you to remind your members that their pharmacy is 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. The Guild plays an important role in informing and reminding members of this fact.

Further action by the Commission and other parties

14. Only the courts can decide whether the Act has been breached or not. This warning letter does not represent a ruling of law.
15. The Commission does not intend to take any further action against you 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 the Guild.

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 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.
17. The Commission will also be warning all DHBs and all individual pharmacies who entered into the 2012 CPSA that they have likely breached the Act.

Publication

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

Yours sincerely



Ritchie Hutton
Head of Investigations
Commerce Commission