

Legal update - Health competition and consumer law guidance for the health sector

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2014 is set to be an important year for competition and consumer law in the health sector.

The Commerce Commission's focus on the health sector, which included the release of a health series of fact sheets in late 2013, means that professionals and organisations in the health sector will be expected to have a greater level of understanding of the Commerce Act and Fair Trading Act, and how they apply to the sector. The Commission's recent warning that provisions of the 2012 Community Pharmacy Services Agreement were likely to substantially lessen competition also highlights the importance of considering competition law issues when negotiating and entering into arrangements - including funding arrangements - in the sector.

The Commission's health fact sheets (available [here](#)) are largely focused on health professionals. There is specific guidance on setting fees and promoting services, with key messages including:

- Agreements between competing health professionals that set the price of a good or service or interfere with how that price is reached (for example, agreements to increase or maintain fees, or set a minimum fee) are price fixing agreements and are illegal under the Commerce Act, unless an exemption applies
- Agreements about fees between roster participants (eg for after-hours services) may not breach the Act, but caution should be exercised and advice sought before any such agreements are entered into
- Health professionals should ensure that any claims made (eg in conversations with patients about fees or the need for a service or product) are accurate and can be substantiated, as it is illegal under the Fair Trading Act to mislead consumers, make false representations, or use certain unfair trading practices.

There is also guidance for professional bodies, and the Commerce Act risks that such bodies (and their members) should be aware of. The Commission recognises the useful role that such bodies play, but cautions that activities such as the following may raise Commerce Act issues:

- Entering into agreements that could restrict competition (such as agreements that could interfere with how members set fees or prices, or agreements that prevent potential competitors from providing services)
- Providing guidance on pricing or pricing recommendations
- Setting rules or codes of conduct that restrict the independent conduct of members (eg restrictions on advertising) or entry requirements that create unnecessary barriers to entry
- Information sharing (particularly in relation to pricing information).

Such guidance is also likely to be useful for District Health Boards (DHBs). Although the functions of DHBs include developing cooperative and collaborative arrangements with persons in the health and disability sector, the Commerce Act applies to DHBs to the extent that they are "engaged in trade". Care must therefore be taken to ensure that DHBs do not facilitate anti-competitive agreements between health professionals, or themselves become a party to such agreements.

Significant proposed changes to competition and consumer law in 2014 further emphasise the importance of greater awareness of such law. In particular:

- A proposed new prohibition on cartel conduct such as price fixing and market allocating (to replace the current price fixing prohibition) is likely to be passed into law this year. The proposal includes the introduction of criminal sanctions for cartel conduct, including possible imprisonment for up to seven years for individuals.
- A new prohibition on unsubstantiated representations under the Fair Trading Act will come into force in June 2014, which will reinforce the Commission's guidance that health professionals should ensure that any claims made can be substantiated.

If you have any questions about the issues raised in this update or would like to discuss how competition and consumer law applies to you, please contact a member of our health or competition law teams.

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