

Complying with the Commerce Act: Guide for PHOs



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'The Government is making a substantial investment in primary health care in order to make health care more affordable. But in working to reduce the cost of access, you need to take care that you do not breach the Commerce Act.

'This guide outlines the areas of the Commerce Act that are most relevant to PHOs. It is important you are aware of the Act and comply with its provisions.'

Karen O Poutasi (Dr)
Director-General of Health

The Commerce Act 1986

The Commerce Act is designed 'to promote competition in markets for the long term benefit of consumers'.

The Act applies to all individuals and businesses, including PHOs and their member providers.

In brief ...

The Commerce Act prohibits you from:

- agreeing with competitors to fix prices for your services
- if you have a substantial degree of market power, taking advantage of that power to restrict, prevent or eliminate a competitor from a market
- entering into an arrangement that has the effect of substantially lessening competition in a market
- agreeing with competitors to exclude another competitor from the market.

What this means for your PHO

The Commerce Act has implications for your PHO's structure and the way you do business. Areas where your PHO may be at greatest risk of breaching the Act are covered below.

Price fixing

General

A PHO will breach the Commerce Act if it requires, encourages, or allows competing member providers to agree amongst themselves the price (including a minimum, a maximum, or a range) that member providers will charge patients or seek to obtain from the DHB.

A member provider will breach the Commerce Act if he or she agrees with one or more competitors to fix prices. 'Competitors' are other providers, including other member providers.

Care needs to be taken in dealing with competitors, especially if competitors share premises, and in social settings, for example, with former colleagues or friends working for competing providers.

To show price fixing there needs to be evidence that competitors have arrived at an understanding to fix the price. An understanding does not necessarily mean a formal contract is entered into. A 'nod and a wink' may be enough.

PHO executive

If a PHO's executive includes member providers (whether individual member providers or representatives of member providers that are group practices) who compete with each other, or if the PHO executive includes one or more member providers who compete with member providers that are not part of the executive, the member provider(s) on the executive should not be involved in negotiations either with the DHB or other member providers regarding the price that each member provider will charge patients or accept from the DHB.

If they *are* involved, the executive member providers may breach the price-fixing provisions of the Commerce Act.

To avoid this risk, the executive of a PHO should develop decision-making procedures (similar to those commonly used to deal with conflicts of interest) to ensure that they do not share price information in a way that contravenes the Act.

One way of reducing the risk is for the PHO executive to establish a sub-committee that does not include member providers, or appoint an independent individual who is not also a member provider, who will deal with all contracting, particularly pricing issues.

Fees Review Committee

Persons nominated to represent the PHO and its member service providers on a Fees Review Committee must not in any circumstances encourage, suggest, or allow member service providers to collectively agree on the price (whether a maximum, a minimum or a range) member providers will charge for services.

Representatives can reduce the opportunity for member providers to enter into price fixing arrangements by having an independent person or organisation collect pricing information from each member provider separately.

If the Fees Review Committee releases information about its recommendation – for example about the level of fees charged by member providers of the PHO – the risk of breaching the Act will be reduced if the information does not identify individual member providers, and if ranges of maximum fees are used rather than exact fees.

PHO membership criteria

Setting provider membership criteria that restrict membership of a PHO other than for legitimate business reasons may risk breaching the Commerce Act.

A legitimate restriction may be refusing membership to a provider because the provider does not have a good quality record. An illegitimate reason (and one that may breach the Act) would be refusing membership to a provider to force that provider to exit the market.

Penalties for breaching the Commerce Act

Breaching the Commerce Act can be very expensive. The penalties are:

- up to \$500,000 for an individual who breaches the Act
- up to \$10 million, or three times the illegal gain, or 10% of the turnover of the relevant entity, for an organisation that breaches the Act.

If you breach the Act there are other costs as well, including loss of business time, court costs, legal fees, and damage to your reputation.

This is a general guide on core issues only. If your PHO is uncertain whether any of its practices might breach the Commerce Act, you should contact a lawyer for specialist legal advice.