Complying with the Commerce Act: Guide for PHOs

This guide, revised in May 2010, outlines the areas of the Commerce Act that are most relevant to PHOs. PHOs need to be aware of the Act and comply with its provisions.

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.

This means that the Commerce Act has implications for the way PHOs and their member providers structure their organisations and do business. Areas where they may be at greatest risk of breaching the Act are covered below.

In brief ...

The Commerce Act prohibits PHOs from:

- acquiring the assets of a business or shares if the acquisition would, or would be likely to, have the effect of substantially lessening competition in a market
- entering into an arrangement that has the purpose, or effect, or likely effect of substantially lessening competition in a market
- agreeing with competitors to exclude another competitor from the market
- 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

Mergers and Acquisitions

The Commerce Act prohibits a person (including a PHO or a member provider, for example a general practice entity) from acquiring the assets of a business or shares (for example, by merging) if it would, or would be likely to, substantially lessen competition in a market (section 47).

Will a merger lessen competition?

Determining whether a merger (or other acquisition) is likely to substantially lessen competition in a market is complex and requires careful consideration of the particular facts of the proposed merger. Relevant issues include:

- defining the relevant market(s) for goods or services that are affected by the merger
- defining the relevant parties in the market and their market shares
- defining what the market will look like in the future if the merger occurs and if it does not (the ‘factual’ and the ‘counterfactual’)
- assessing whether the ‘factual’ will mean less competition in the market than the ‘counterfactual’

PHOs that are considering mergers or other arrangements that may affect the level of competition in a market (either between PHOs or their member general practices) need to carefully assess whether the proposal is likely to substantially lessen competition.
If you think that a proposal might substantially lessen competition, you should seek independent legal advice.

You may also wish to consider whether there are alternatives to merging that would achieve the same benefits or whether it would be appropriate to seek a clearance or an authorisation from the Commerce Commission for the merger.

**Alternatives to merging**

It may be possible to achieve many of the benefits from amalgamating without breaching the Act. One option may be to set up a service company to provide combined administration support or (in the case of general practice) a joint venture company to jointly provide after hours services.

**Clearance and Authorisation**

The Commerce Act allows the Commerce Commission to grant a clearance or authorisation for mergers that might breach the Act. A clearance or authorisation provides protection against legal challenges to the merger under the Act.

The Commerce Commission is able to grant:

- clearance for a merger, if the Commission is satisfied that the merger would not result in a substantial lessening of competition in the market
- authorisation for a merger that will result, or will be likely to result, in a substantial lessening of competition in a market, if the Commission finds that the public benefit directly attributable to the transaction outweighs any detriment.

The Commerce Commission website [www.comcom.govt.nz](http://www.comcom.govt.nz) provides detailed information about the clearance and authorisation processes.

**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.

A member provider (ie, a practice) will breach the Commerce Act if it 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.

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 issues, particularly pricing issues, that could involve contraventions of the Act if member providers are involved.

**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.

**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 percent of the turnover of the relevant entity, for an organisation that breaches the Act (or up to $5 million in the case of illegal mergers and acquisitions).

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 you are uncertain whether any proposal or practice might breach the Commerce Act, you should contact a lawyer for specialist legal advice.