

Health series

Professional bodies



This fact sheet is designed to help members, officers and employees of professional health bodies understand how the Commerce Act applies to them so they can work together within the law.

Professional bodies in the health sector play a useful role in allowing both registered and unregistered health professionals to discuss issues and practices, and share knowledge and technical information. Such bodies can include associations, societies, and colleges. Professional bodies can also play a quality assurance role, and set standards of conduct and requirements a person must meet for membership. There is, however, a risk that some of these activities may give rise to concerns under the Commerce Act.

Because of the way professional bodies are treated under the Commerce Act, individual members, officers and employees of professional bodies all need to be aware of how the Act applies to them.

Many people are not aware that they can be liable if their professional body enters into an agreement that breaches the Commerce Act – even if this has occurred without their knowledge. This is because any agreement entered into by a professional body is considered to have been entered into by all its members.

Likewise, any recommendation made by a professional body to its members is considered to be an agreement both between the professional body and its members, and between the individual members.

Even if not all members of a professional body are competitors, if at least two members compete with each other, then any agreement or recommendation made by a professional body to its members will be considered an agreement between competitors.

What activities put professional bodies at risk under the Commerce Act?

Professional bodies are most at risk of breaching the Commerce Act where their activities interfere with how prices are set, restrict the independent conduct of members, and/or exclude others from competing with any of their members.

Caution is therefore required around some activities of such bodies, including:

- entering agreements that could restrict competition
- providing guidance on pricing
- setting rules or codes of conduct
- setting entry requirements
- sharing information.



Who are my competitors?

Your competitors are typically those practitioners who:

- work in different practices or partnerships from you
- and
- can offer goods or services that your customers consider substitutes for your own goods or services.

🔗 You can read more about who your competitors are in our fact sheet *Setting your fees* at www.comcom.govt.nz/health/setting-your-fees

Agreements that restrict competition

As members of professional bodies often include competitors, those bodies should take particular care to avoid agreements that could interfere with how members set fees or prices. Agreements between competitors that interfere with the prices of goods or services are illegal under the Commerce Act as they are considered to be price fixing.

On occasion, professional bodies may seek to recommend what members might charge for goods or services. Pricing recommendations are likely to amount to price fixing because they will usually interfere with the prices that individual competitors charge.

There is an exemption to the price fixing rule for agreements to recommend a price where there are 50 or more parties to the agreement, and it is a genuine recommendation.

Professional bodies should also take care in entering agreements or making recommendations that could harm competition in other ways. For example, an agreement that prevents potential competitors from providing services could be illegal.

EXAMPLE

The Ophthalmological Society of New Zealand and five of its members were convicted under the Commerce Act. They had agreed to not provide the necessary support for two Australian surgeons who were in negotiations with Southland Health to clear a surgery backlog. The court found that the agreement had the purpose of hindering the Australian surgeons from competing with New Zealand surgeons.

🔗 For a full case study of this example, see www.comcom.govt.nz/the-southern-ophthalmologists

If you believe that an agreement, or part of an agreement, that your professional body has entered into is anti-competitive, you can avoid liability by:

- notifying your professional body in writing that you do not want to be party to that agreement

and

- not acting on the agreement.

Guidance on pricing by professional bodies

Professional bodies sometimes wish to give advice to members – especially those who are new and inexperienced – on pricing. They should do so with caution. Any assistance should be limited to providing advice on the factors and cost components members might like to consider in calculating their prices. Members must be free to calculate and decide their own prices or fees.

Professional bodies are also sometimes asked to provide a benchmark price to a funding agency, such as the Ministry of Health. Any benchmark prices should be provided directly to the funding agency as a reference point only. This should not be seen as an opportunity for the professional body to negotiate a price on behalf of its members, or for the professional body to recommend or enforce the benchmark price.

Professional bodies should put appropriate safeguards in place to ensure that any gathering and provision of pricing information does not interfere with members independently setting fees or tendering for contracts.

Rules and codes of conduct

Professional bodies promote quality, consistency, and ethical standards through rules and codes of conduct. While most rules and codes of conduct are in place for good reason, in some circumstances they can restrict the independent conduct of members and risk breaching the Commerce Act.

For example, restrictions on advertising may be anti-competitive if they limit the extent to which health practitioners can compete on quality or price. Some rules can interfere with prices, such as restrictions that limit discounting by members. They are illegal as they control an element of a price.

Professional bodies should ensure that their rules and codes of conduct:

- are clear and transparent
- are designed to promote quality, consistency and ethical standards
- do not include pricing policies
- do not unnecessarily restrict competition.



Guidelines for trade associations

🔗 You can read more about how the Commerce Act applies to professional and trade associations in our *Guidelines for trade associations* at www.comcom.govt.nz/trade-associations.

Entry requirements

Practitioners need to be fully qualified and able to provide their services to a high standard. Registered professions' entry requirements are set by authorities that are established by the Health Practitioners Competence Assurance Act. In the unregistered professions, many professionals belong to professional bodies that play a self-regulatory role. Those bodies can play an important role in protecting consumers by ensuring that practitioners meet entry requirements. Such entry requirements may include:

- educational requirements for certification or licensing
- work experience, apprenticeship or practical training requirements for certification or licensing.

Setting entry requirements in the health sector involves a balance between promoting competition and ensuring service quality and patient safety. Setting standards of entry higher than is necessary to protect patients creates an unnecessary barrier to entry and to the movement of professionals within the health sector. Unreasonable restrictions are likely to limit competition, suppress innovation, and result in higher prices and less choice.

Any entry requirement for a professional body should be reasonable, based on objective criteria, clear and transparent, and genuinely in the interests of patients.

Information sharing

Professional bodies sometimes gather information about their members' activities, services and prices. While this is generally permissible, members, officers and employees of professional bodies should take particular care about this if the information relates to prices.

Sharing information will be illegal where it interferes with members independently setting fees or prices. Exchanging any future pricing plans is very risky. Professional bodies should limit any information exchange to historic information. Before providing it to members, the information should also be sufficiently aggregated so it is not possible to identify any one member's prices or sales.



Want to know more?

🔗 Our health series fact sheets cover a range of topics of particular interest to health professionals: www.comcom.govt.nz/health

🔗 We also have fact sheets for all businesses about their obligations under the Commerce, Fair Trading and Credit Contracts and Consumer Finance Acts: www.comcom.govt.nz

This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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