



13 August 2007

Commerce Act Review
Ministry of Economic Development
PO Box 1473
WELLINGTON

**Submission on review of the clearance and authorisation provisions under
Commerce Act 1986**

Introduction

1. New Zealand Society of Physiotherapists Incorporated ("NZSP") is the professional society for physiotherapists in New Zealand. The Society represents over 75% of the more than 3,300 physiotherapists practicing in this country.
2. The context of NZSP's interest in this review is the difficulty which faces the profession in securing fair remuneration. On average, more than 80% of the income of a physiotherapy practice is derived from treatments fully or partially funded by ACC. The comprehensive nature of ACC as a statutory insurance scheme means that this reliance is a fact of life for the profession.
3. The effect of this statutory scheme is that ACC is a monopsonist purchaser of physiotherapy services. There is a massive power imbalance between ACC and individual physiotherapy practices, with whom ACC contracts, in the course of price and other contractual negotiations. In effect, physiotherapists are forced to accept what is offered by ACC, as there is no alternative purchaser of their service, they have little market power, and any collective bargaining or other conduct would breach the anticompetitive behaviour provisions of the Commerce Act.
4. NZSP believes that there must be true contestability in the price setting and price advice provided by ACC. We are carefully considering whether we can identify a form of arbitration which does not breach the Act, or whether to seek authorisation for some form of collective bargaining, due to the market power of ACC, and the way that it has been exercised over recent years.
5. To this end, NZSP provides this brief submission on the Ministry's discussion document. We comment only on specific issues where we have a view, leaving other issues to those who are more involved in those areas. We acknowledge that this submission is a high level one, as we are not overly familiar with the detail of the Commerce Commission's practice. This submission is therefore made on behalf of a profession heavily affected by a monopsonist purchaser, in respect of clearance and approval processes in which they may have to become involved in future.

Initial Comment – The Issues Facing NZSP and Physiotherapy

6. NZSP and ACC are currently involved in an independent Ministerial Review of the Manner in which ACC funds and accredits physiotherapists. In NZSP's view the draft report of the Review indicates that ACC, as a monopsonist purchaser, has been underpaying and/or undercontributing to physiotherapy over a long period. The Society considers that this is in significant measure due to the inability of the profession to properly bargain or arbitrate fair contribution or full-payment levels.
7. The Review has been the first opportunity to effectively arbitrate the "sustainable price of physiotherapy services" in an independent manner. Previous price setting has been mere consultation with ACC making ultimate determinations of what they considered to be appropriate price.
8. The facts are that ACC's advisors, following consultation, entered the review with a proposed price of just over \$103 per hour (ex gst). That was gained with the benefit of extensive submissions made on behalf of NZSP. Following consideration of very similar submissions, the draft report has placed the sustainable price at circa \$134 per hour (ex gst).
9. NZSP considers that this shows the adverse effect that a monopsonist can have on the marketplace. Independent reviews are not a suitable or realistic method of price setting in the long term. However, in their absence, the review indicates that physiotherapists would be receiving unsustainably low remuneration from the monopsonist. This would be against the public interest, as the public relies on physiotherapy as the predominant provider (2.6M visits per annum) of ACC-funded treatments.
10. NZSP therefore wishes to seek an ongoing process whereby they can effectively arbitrate ACC's policy advice or price setting decisions, or otherwise engage in collective bargaining.
11. NZSP places this scenario before the Ministry as a practical example of a sector caught between monopsony and possible Commerce Act issues. Our interest is as follows:
 - 11.1. to identify a Commerce Act compliant method for making ACC's funding advice and decisions contestable – a process which would be helped by a clearance mechanism; and / or;
 - 11.2. if 10.1 cannot be achieved, to ensure that authorisation criteria and quantification methods actually allow deserving cases like this to undertake collective bargaining or such other conduct as is required to make those decisions genuinely contestable.
12. NZSP is particularly concerned that price increases (as per above) may be seen as disbenefits of collective bargaining. However, they are identified in the review as being necessary and beneficial in the public interest to maintain a viable and appropriately skilled and sized profession to meet the treatment needs of the New Zealand public.
13. As the Ministry is better aware of the quantification process than we are at this time, we simply ask you to take this example into account in your consideration. If this concern is unfounded, then so much the better. However, we clearly believe that the public interest is strongly served by collective bargaining with

monopsonists, and wish to be assured that the Act and its procedures do recognise this. The Ministry may wish to secure copies of the Reviewer's draft and final reports to fully inform itself of this example.

Responses to Selected Questions

Q 7 – 9

14. NZSP supports the proposed clearance system for trade practices and the notification system. The society agrees that the proposed interaction between the two systems as outlined would be appropriate.
15. Such enhancement to Part 5 of the Act would allow the Society, or indeed smaller groups of physiotherapy practices, to assure themselves that any steps which they took were within the Act by use of a clearance system. The Society is responsible and risk averse and considers that clearance is very worthwhile where complex and quite public sanctions may otherwise be inadvertently triggered.
16. In relation to questions 7 & 8 of the discussion paper, NZSP's answers are yes. NZSP prefers not to make specific comment in relation to the questions asked under question 9, although the ability to vary or revoke any such clearance should be strictly limited if available at all.

Q 10 - 12

17. A notification process would also allow for groups of physiotherapists to potentially come together and secure approval under the Act in an expedient manner. However, the upper value threshold for the notification process requires careful consideration. The society considers that a threshold of \$10,000,000 or higher would be appropriate.
18. In regard to question 10 we say that physiotherapy businesses are SMEs and are inhibited from effectively engaging in efficient collective bargaining.
19. We accept that the notification system would be of limited value to the profession, as a national approach to collective bargaining is justified. This would be outside of the thresholds contemplated for notification. However, there is at least a possibility that groups of practices could form under a notification system to take advantage of a slightly enhanced level of bargaining power to deal with ACC.
20. The real question is a matter of practice - whether the Commission would take a proactive approach to objecting to all potential notifications under this option, or whether they would accept that some smaller notifications should be let run. If they constantly objected, then the value of such a notification system may well be illusory.
21. That said, the provision of this jurisdiction is seen to enhance the options for SMEs. Even if the jurisdiction were not used, this would not be a negative, as it would create an option, without creating significant budgetary issues for the Commission. Caution should be used in assessing Australian experience, as the procedure may well be one which takes time to bed down, or which provides a useful but infrequent enhancement to the anticompetitive behaviour regime.

22. In answer to question 11, NZSP believes that a collective bargaining notification system should be introduced, and would support the introduction of this system in tandem with a clearance system.
23. Regarding question 12, we strongly agree that nominated representatives should be able to lodge a notification. We particularly believe that the upper value threshold of \$3,000,000 would be too low for the New Zealand situation, and should be raised to perhaps \$10,000,000 as a minimum, with other thresholds being available by regulation. We otherwise generally agree with the features of table 5, though believe any revocation would have to be strictly regulated. We strongly support the relatively low application fees.

Q 13 - 14

24. We simply say that there should be a clearance system for trade practices, which would deal with the lessening of competition jurisdiction issue.

Q 16 - 17

25. We agree that there should be a discretionary provision regarding the halting of pre-existing conduct which is being considered under an application for authorisation. Either the absence of this power, or the mandatory requirement for cessation, would be too harsh in the Society's view.

Q 18 - 19

26. Whilst it may be appropriate for only the Commission to be able to call conferences in regard to authorisation and clearance applications, there should be ample scope for parties to themselves seek that a conference be held, and for any such request to be treated as an application determined by the Commission according to an appropriate set of criteria.

Q 20

27. We strongly agree that the statutory time frames for holding a conference do appear to be rigid, and may cause significant difficulty, particularly in the case of busy experts and parties, and complex cases requiring significant analysis.

Q 26, 28

28. The issue addressed under question 26 is, from NZSP's perspective, a question which also relates to that posed in question 28, assessment of costs and benefits under a strict quantification approach.
29. As noted, NZSP is concerned about the quantification approach taken to costs and benefits. We ask the Ministry to carefully consider whether the benefits inherent in a professional group being able to effectively bargain with a monopsonist are brought out in strict quantification. Particularly, is a consequent price rise regarded as a disbenefit, and if so why, when the monopsonist may be artificially retarding price? If a price rise is seen as a disbenefit, we query whether there is any likelihood of being able to show equivalent benefits to outweigh that.
30. The Society tends to believe that a strict numerical approach has difficulty in dealing with situations like that of NZSP. The public benefit to be derived from a collective bargaining approach for physiotherapy practices with ACC would be the

maintenance and enhancement of physiotherapy services at a quality and in a quantity which will meet the rehabilitation needs of injured New Zealanders. Even in the context of the ACC legislation scheme itself, such a quantification exercise is not undertaken.

31. Further, just as there is public benefit in preventing monopoly behaviour in the market place, so there is public benefit in preventing monopsonist behaviour from unduly depressing the price payable to the wide range of suppliers from who that monopsonist may purchase. It is difficult to identify dollar equivalents for these issues.

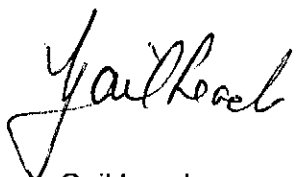
Q29

32. We agree that there must be flexibility in the timeframe under which assessment occurs. Again, the independent review referred to above considers the long term and sustainability interests of the physiotherapy profession as a whole in assessing price. It is considered that such an approach is necessary where public benefit is involved.

Conclusion

33. We hope that this submission will assist the Ministry in its consideration of the issues at hand. We believe that a clearance process is highly desirable, and ask the Ministry to turn its mind to quantification of benefits in the case of bargaining against monopsonists, where we believe issues may arise.
34. Please contact me if you wish to discuss this submission.

Yours faithfully



Gail Leach
Executive Director