Victorian Healthcare Association

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Graeme Samuel, Chairman

Opinion polls consistently confirm there is no more important issue for Australians than health care.

Political parties, as we have just seen, can commit to any level of expenditure on health and still come under pressure from voters to spend more.

In fact one doctor was prompted to write to the Sydney Morning Herald declaring that in view of how generous both parties had been to his profession, he had no choice but to vote for both of them!

The problem is, that as welcome as this increased attention to, and spending on health is, it will never be enough to keep up with the ever increasing demands for health funding.

Our population is ageing, meaning more and more people will be in need of health care in coming years as fewer and fewer people enter the workforce and pay the taxes needed to fund this higher level of care.

At the same time, we read almost daily about new drugs and new treatments which are not only ensuring we live longer, but have a better quality of life.

These are wonderful developments that have meant diseases once considered terminal or debilitating may now be kept at bay.

And with these discoveries come increased expectations – people are expecting to live longer, and have increased quality of life and rightly demanding they get the best possible treatment to ensure they benefit from these discoveries.

But as we all know, these treatments come at sometimes extraordinary costs.

So the answer is not simply spending more on health.

If we are to maintain in this country a health system we can continue to be proud of, health spending must be as efficient as possible—and deliver the biggest possible bang for the buck.

We must also ensure that the money is spent in the most efficient way possible if we are to afford improved standards of health care.

Now, when people talk about efficiency it's often assumed that what they are talking about is cost cutting.

But when it comes to health, cost can never be the only factor. Another critical factor is to ensure that those who operate health care are trained to very high standards.

The Australian Competition and Consumer Commission recognises that to improve efficiency in the delivery of health care in Australia, we need to work with the medical profession.

NEW FORMS OF COOPERATION

Now, it's fair to say there's been a bit of confusion in recent years about the role of the ACCC and how the Trade Practices Act applies to the medical profession and I'm aware that from time to time, senior members of the profession have had some harsh things to say about the ACCC and the application of the Trade Practices Act to the medical profession.

So I'm delighted to report that over the past 12 months the ACCC has been working closely with key representatives of the profession through the Health Services Advisory Committee (HSAC) in trying to overcome these misunderstandings and misconceptions, culminating in the launch of the *ACCC Info kit for the medical profession*, in August.

Usually when the ACCC begins a campaign targeting certain professions or industries it's prompted by a rash of complaints or court cases which reflect a serious problem in that sector.

This is definitely NOT the case with the medical profession. In fact the ACCC has taken to court just four cases involving doctors—all involving allegations of collective agreements between doctors to engage in boycott activity or to fix prices.

The ACCC has never taken court action claiming that medical rostering arrangements agreed between doctors breach the Trade Practices Act.

Despite this, as I said at the outset, there has been a fair bit of uncertainty about just what the Trade Practices Act requires of doctors and the medical profession in general.

Hilmer and Wilkinson

Since its inception in 1974 the TPA has applied, to a degree, to the business activities of medical professionals. However the level of coverage of this application was quite patchy, as indeed it was for all professions, be they doctors, engineers or architects.

This was altered in 1995, as part of a broad range of competition policy reforms implemented in Australia known as the Hilmer reforms or National Competition Policy, which specifically extended the Trade Practices Act to cover the business activities of all professionals, including the medical profession.

This prompted intensive lobbying by medical profession representative groups during this time to gain an exemption from the operation of the competition provisions of the TPA for doctors. There were claims, for example, that the TPA was exacerbating Australia's doctor shortages, particularly in rural and regional areas.

The Wilkinson Review found this was not the case, but concluded that there was a degree of uncertainty and confusion amongst doctors regarding the application of the law to their profession and recommended steps be taken to improve communication between the ACCC and the medical profession.

This finding prompted the establishment of the Heath Services Advisory Committee (HSAC) in September 2003 to promote consultation and the exchange of information between the ACCC and health professionals on matters relevant to the effective administration of the TPA.

One of the key outcomes from this consultation process was the *ACCC Info kit.*

ACCC INFO KIT FOR THE MEDICAL PROFESSION

The kit has been designed to be a 'ready reference tool' for doctors, medical educators, practice managers, medical administrators, and other health professionals to enable them to better understand the role of the ACCC, and their rights and obligations under the Act.

We've sought to make these documents as accessible and easy to understand as possible. The kit is therefore a package of information that contains two quick reference guides and six topic specific leaflets.

It begins with *A Prescription for Good Practice*, which is a handy two page guide to the entire kit, providing answers to some of the common questions raised by doctors in relation to the operation of the TPA.

Cutting a deal – what doctors need to know about collective negotiations, explains the relevance of the competition laws to collective bargaining and agreements between doctors.

The *Medical roster checkup* is a two page quick reference guide which sets out a series of simple questions to ensure that medical roster comply with the Act.

Setting your fees straight makes clear that competing doctors are not allowed to reach agreement on what fees they will charge patients.

Diagnosing unconscionable conduct—what does it mean for doctors? explains the difference between *unfair* conduct and unlawful *unconscionable* conduct.

Anatomy of the ACCC, explains how the ACCC operates.

And finally, *Straight talking with your patients* explains how doctors can avoid misleading their patients.

Our objective has been to reassure the medical profession at all levels by demonstrating that the TPA does not restrict their activities unless arrangements go outside certain competitive norms.

Misunderstanding about the application of the Act has largely been confined to three main areas—collective bargaining, fee setting and rosters. So I will now spend a bit more time on each of these topics to provide you with a better idea of how the law operates in respect of these important issues.

COLLECTIVE BARGAINING

The medical profession operates in an environment in which doctors, for example, will often be bargaining and dealing with larger organisations, such as hospitals, insurance companies and health funds.

All doctors practising within a company, legal partnership with no corporate partners or trust are considered part of the same entity and not in competition with each other. They can therefore negotiate as a group, with other parties, without breaching the Act.

However, doctors practising through separate legal entities are considered competitors for the purposes of the Act and collective negotiations by them to set fees or contract terms and conditions risk breaching the Act.

For example, it is illegal for a group of competing doctors to collectively agree to withdraw, or threaten to withdraw, their services. This is commonly known as a 'boycott'.

I should stress here that while a collective decision of this type is not permitted per se under the Act, if it can be demonstrated this agreement is to the benefit of patients, possible protection from court action is available from the ACCC under a process known as authorisation—but ONLY before such an agreement is entered in to.

This arrangement doesn't just apply to doctors.

In March this year we authorised a network of Catholic health facilities to collectively bargain with health funds, the Repatriation Commission and other suppliers.

The healthcare facilities are owned by the Sisters of Charity, Mercy Health and Aged Care and Holy Spirit Care Services and are located in Queensland, New South Wales, Victoria and Tasmania. Some are jointly owned.

Again, we did this, because we were satisfied that allowing the eight private hospitals in the network to negotiate through a common agent would reduce the cost of negotiating agreements with health funds and the Repatriation Commission and that the effect on competition would be minimal.

Significantly, however, we only authorised five private hospitals in the network to collectively boycott health funds and the Repatriation Commission.

Four of these, including the Mater Hospital, North Sydney, are wholly owned by the Sisters of Charity Health Service and therefore, as related companies, are lawfully able to agree to refuse to deal with health funds and the Repatriation Commission anyway.

The fifth hospital – St Vincent's Private Hospital, Sydney – is a Sisters of Charity hospital, although it is not owned by Sisters of Charity Health Service due to historical reasons connected with its initial charitable bequest.
So, as you can see, the Commission imposes a much higher threshold on whether collective boycotts meet the public benefit test, than collective negotiations.

There has also been an important proposed development in respect of collective negotiations. This involves a new notification process for collective bargaining under the TPA which has bipartisan political support. It is anticipated that this process will be a low cost, simple and timely way to obtain protection from the TPA to allow a group of small independent businesses, such as doctors, to negotiate with a bigger party, such as a hospital or health insurance body, where it is in the public interest.

While having many of the same characteristics as authorisation, the proposed new notification process will provide automatic immunity within a statutory period unless the ACCC is satisfied that the proposed collective bargaining arrangements are not in the public interest. It is proposed that the new notification process will also be available for collective boycott arrangements in appropriate circumstances. Amendments to the TPA, including the collective bargaining process, were still going through the Commonwealth Parliament when the federal election was called late August and will now need to be re-introduced.

FEE SETTING
As I mentioned earlier the only times the ACCC has ever had cause to take action against doctors was when conduct involved price fixing.

These four cases were:

- The ***Australian Society of Anaesthetists*** case, where the ACCC alleged anaesthetists breached the Trade Practices Act by agreeing on the fee they would charge for emergency and after hours attendances under on-call rostering arrangements and, at one hospital, threatening not to provide emergency and after hours services if payment of the agreed fee was not forthcoming.

  The matter was settled by consent when the anaesthetists gave undertakings to the court not to engage in price fixing and boycott conduct in the future.

- In the ***Rockhampton obstetricians*** case the ACCC alleged that one obstetrician pressured two colleagues to enter an agreement to abandon no-gap billing for their obstetric services.

  The Federal Court issued injunctive and corrective orders by consent of the parties (involving refunds for affected patients). But in the public interest, the ACCC did not seek civil penalties against any of the obstetricians involved in this matter.

- The ***AMA (WA) and the Mayne Group Ltd*** case, where the ACCC alleged the parties had agreed on the fees at which visiting medical practitioners would supply medical services to the Joondalup Health Campus for the treatment of public patients.

  In 2001 orders were made by the Federal Court with the consent of the AMA (WA), for the payment of penalties and costs by the AMA (WA). In 2003, after a contested trial, the Federal Court dismissed the ACCC's claims against Mayne.

- In the ***Berwick Springs Case*** the Federal Court declared that a doctor tried to induce an illegal boycott by requiring other GPs leasing rooms at the medical centre to restrict bulk billing and out of hours services.

Price fixing is an absolute prohibition. The Act prohibits competing doctors from collectively agreeing on the fees they will charge patients. This includes agreements which claim to recommend prices but which in reality fix prices by agreement.

Informed financial consent

Patients should be given accurate details of the fees and any additional costs they are likely to incur. Whenever possible, and recognising that this may not always be feasible or appropriate in emergency situations, information on costs should be provided before treatment begins to enable patients to give informed financial consent.

This should include not only fees, but also all other likely charges and costs, such as specialist charges and rehabilitation costs.

Doctors who exchange fee information with competing entities to facilitate obtaining informed financial consent from patients, but who do not agree on what fees will be charged to patients, will not breach the Act.

ROSTERS

As I mentioned earlier, the ACCC has NEVER taken action against doctors over rostering arrangements.

Like most Australians, we see rosters as an important part of providing sustainable health services to the community, particularly in rural and regional Australia.

They are also necessary for doctors to balance professional and personal commitments, thereby enabling them to provide a sustainable level of medical services to the community. The ACCC is therefore satisfied that a medical roster developed to facilitate patient access to medical services does not raise concerns under the Trade Practices Act.

A hospital can arrange and run an internal roster to provide medical services using doctors engaged by the hospital without raising any issues under the Act.

Rosters arranged by competing doctors only raise issues if there is some anti-competitive purpose. The general rule is that where the purpose of a roster is to facilitate patient access to medical services, by ensuring a minimum level of service to the community, the ACCC is satisfied that such a roster will not breach the competition laws.

It is again important to mention that competing doctors who are working together on a roster must independently set their own fees. Being on a roster together does not change this.

Similarly, if a hospital works with a group of competing doctors to establish a roster, care must be taken that doctors do not collectively agree on the fees they will charge patients seen pursuant to the roster. While they can exchange fee information to obtain informed financial consent from patients, each doctor must independently set their own fees.

MEDICAL COLLEGES

The ACCC and the Australian Health Workforce Officials Committee (AHWOC) are reviewing the selection and training arrangements of all specialist medical colleges. This review has been endorsed by Health ministers and is expected to report in mid 2005.

Specifically, the review is considering how key elements of the ACCC's authorisation decision for the Royal Australasian College of Surgeons of 30 June 2003 might be applied to other specialist medical colleges.

It is anticipated that the joint Health Workforce Officials Committee and ACCC process will bring complementary perspectives to the review. The Committee's involvement brings a focus on health workforce planning and policy issues. The ACCC's key interest is in securing compliance with Australia's competition laws in the public interest.

RACS authorisation

The Royal Australasian College of Surgeons authorisation was granted, subject to a number of important conditions, in respect of processes for the selection, training and examination of surgical trainees (including overseas trained practitioners) and accreditation for training. These processes can now essentially continue, subject to compliance with the requisite conditions, with

immunity from legal action under the competition provisions of the Act. Through the Australian Health Workforce Officials Committee, governments have been working with the College to implement these conditions.

The ACCC authorisation of the College demonstrated that specialist medical colleges play an important role in accrediting, assessing and training medical specialists and maintaining high standards of patient care in Australia. The College's review process also highlighted that greater public benefit can be derived from increased transparency, procedural fairness, clarity around accountability and participation of jurisdictions in the process.

The aim of the review of remaining specialist medical colleges is to explore the extent to which other colleges are already operating in accordance with the principles drawn from the RACS authorisation, recognising that a number of colleges have introduced reforms to increase transparency, stakeholder participation and accountability. An example of such a reform is the formation of stakeholder consultation groups like the Royal Australasian College of Physicians national trainees' committee. We commend these types of initiatives. We also recognise that there may be circumstances where some of the reforms required of the surgeons will not be applicable to particular colleges and the ACCC is working with each of the colleges to explore how each of them operate.

ACCC role

It is the ACCC's preference that any potential contraventions of competition laws by colleges be dealt with as part of the review and we are working cooperatively with colleges and the wider medical profession to minimise the likelihood of such contraventions.

There is some potential for the selection, training and accreditation processes of specialist medical colleges to give rise to competition concerns if they unduly restrict entry into specialist medical practice. Opening up selection, accreditation and assessment processes of colleges as part of the review both minimises the likelihood of a breach of competition laws and will affect, in a positive way, the public benefit associated with college processes. It also gives the Health Ministers and Australian Health Workforce Officials Committee an enhanced ability to understand and contribute to Australian health workforce development and education.

The ACCC appreciates that ensuring that there are enough specialist medical practitioners to meet patient service needs is crucial to the ongoing health and well-being of the Australian community, and the existence of shortages in many specialities is now evident. The ACCC also recognises that specialist medical colleges play an important role in the accreditation and training of medical specialists, the provision of ongoing education and training to recognised specialists and the maintenance of high standards of medical care in Australia. As such, it is important that high standards of medical care in Australia are maintained while also ensuring access to medical care.

Process of review

The ACCC has requested that colleges provide it with information about their selection, training and accreditation processes. This information is being reviewed against the principles of transparency, procedural fairness, stakeholder participation and accountability established in the RACS decision.

Jurisdictions will also be asked to identify those areas of college processes and policies where they consider that joint action by colleges and jurisdictions can most effectively contribute to implementation of outcomes sought through applying the Royal Australasian College of Surgeons principles.

A working group has been established with members from the ACCC and jurisdictions to review information provided by colleges as part of this process and a high level steering committee has been established to guide the work of the working group.

Ultimately, the ACCC will prepare a report on the outcomes of the review, along with recommendations, for consideration by the working group and steering committee. The steering committee will consider the report and provide advice to health ministers about the outcomes of the review.

It is expected that the review will be finalised in mid-2005.

Conclusion

I'm sure I don't have to tell this audience about the stresses in health care, the ever growing demands for extra funds and the fact that growth in hospital admissions and the cost of treatment shows no signs of slackening.

It is therefore incumbent on all of us involved in health care - those running health facilities, those who practice in them, government and regulators - to ensure society gets the most efficient use out of the resources we put into the health system.

For the Australian Competition and Consumer Commission that means ensuring that where regulations exist which shield certain professions from the full disciplines of competition policy, those regulations are in the best interest of all Australian consumers.

To this end any regulations over the manner in which health care is provided - including restrictions on who can practice, or operate in a certain sector, or the manner in which they can provide their services - must always be focussed on what is in the best interests of all Australians and not just the vested interests who might benefit from a regulation.

This is the fundamental mandate of the Australian Competition and Consumer Commission - to ensure that all businesses big, medium or small and the professions operate in an environment of honesty, fair dealing and appropriate competitive disciplines in the interests of the welfare of all Australians.