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**Consumer Issues in Private Health 2001**

***Advertising and disclosure: false, misleading and deceptive conduct***
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## The role of the Commission in consumer protection in health insurance

The Commission is the independent statutory authority responsible for, among other functions, ensuring compliance with and enforcement of the *Trade Practices Act 1974* (the Act).

The statutory objective of the Act is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. The Act proscribes certain anti-competitive conduct and unconscionable, misleading, deceptive or false trading practices.

In 1998 health insurance, technically became subject to the consumer protection provisions of the *Australian Securities and Investments Commission Act 1989* (the ASIC Act). Those provisions are largely a mirror of the equivalent consumer protection provisions of the Act. ASIC has delegated its responsibilities in relation to private health insurance back to the Commission. Health insurance was considered to be an issue that is concerned more with the health industry than the financial services industry. Whilst discussion in this paper and cases may focus on provisions in the Act – it is suggested the same principles would apply to the mirror provisions of the ASIC Act.

The Commission's stated objectives are to:

- secure compliance with the Act by responding to complaints and inquiries and by observing market conduct and initiating legal action when required;
- foster competition, fair trading and protection of consumers by taking initiatives to overcome market problems; and
- inform the community at large about the Act and its specific implications for business and consumers.

For the purposes of this paper and topic the Commission is primarily a law enforcement agency that upholds the right of consumers to participate in the marketplace based on accurate information. This enforcement role ultimately takes place in the Australian court system. The Commission does not have powers to impose fines or other penalties for contravention of the law. It also does not make the law. Finally, especially in relation to the consumer

protection provisions of the Act, it is important to remember that the Commission shares its right to take legal action under the Act with private parties. In the health sector, for example, professional associations, professionals, health funds, hospitals, patients and others could also take legal action under the Act.

## Enforcement objectives and priorities

Referring back to the objective of the Act, ('to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection') and the first objective of the Commission - to gain broad compliance with the Act, the Commission is selective in the matters that it seeks to pursue. The Commission takes the view that consumer protection matters should be selected according to circumstances that may render them of particular public interest. Broadly, the Commission selects to pursue matters that involve one or more of the following:

- Apparent blatant disregard of the law;
- A history of previous contraventions of the law, including overseas contraventions;
- Significant public detriment and/or a significant number of complaints;
- The potential for action to have a worthwhile educative or deterrent effect;
- A significant new market issue; and
- A likely outcome that would justify the use of resources.

In relation to the consumer protection provisions, the Commission selects its enforcement priorities by taking into account whether or not:

- the conduct in question is multi-state, national or international;
- significant consumer detriment is involved;
- Commission involvement has the potential to have a worthwhile national educative or deterrent effect;and
- a significant new market issue, for example resulting from economic or technological change, has arisen.

When undertaking enforcement action the objectives of the Commission include:

- stopping the unlawful conduct;
- obtaining compensation/restitution for the victim;
- undoing the effects of the contravention;
- deterring/preventing future unlawful conduct (either repetition by the same person or first contravention by another who might be tempted to breach); and
- Punishing the wrongdoer.

## The public interest nature of the Commission's enforcement work

The Commission is also very conscious of the 'public interest' nature of the litigation it is involved in. For example, consider the application by the Commission (under its former identity as the Trade Practices Commission (TPC)) to prevent *Rank Commercial Ltd and Coles Myer Ltd and others* from acquiring shares in the capital, or assets of, Foodland Associated Limited as constituting a breach of the merger provision (s. 50) of the Act. The Federal Court said in the context of an application by the Commission for an interim injunction:

> (ii) The balance of convenience
>
> I have found this the more difficult aspect of the present motion, especially having regard to the circumstance that, by reason of provisions of s. 80(6) of the Act that where the minister, or the TPC, applies for an injunction under s. 80(6), the Court shall not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking to pay damages, if, for instance, final relief is not granted.
>
> and
>
> It is to be borne in mind ... that the shares in FAL are reasonably widely held, so that undesirable complications arising in a bid now proceeding could impact adversely upon a significant section of the public. Their interests, in my view, should be accorded substantial weight in judging where the balance of convenience presently lies.
>
> and
>
> [s]ince the final hearing of this case is urgent, the case should be accorded priority usually given to litigation in a take-over context, that is, to direct that all steps be taken to bring about a final determination by the Court within say, two months. A resolution of this kind of dispute in this time frame would, I believe, be reasonable, in terms of timing, from the standpoint of all concerned. On the one hand, it would not unduly prolong the making of the bid; on the other, with the benefit of knowing the outcome of this litigation, any present uncertainty or confusion in Shareholders' minds should by then have been removed. At the same time, all of the parties have at their disposal the resources capable of preparing and conducting litigation of this kind urgently.

A further clear example of judicial recognition of the 'public interest' nature of litigation under the Act is the appeal by *ICI Australia Operations Pty Ltd v TPC* against the grant of injunctions in addition to the imposition of pecuniary penalties totalling $250 000 for four contraventions by ICI of the resale price maintenance provisions of the Act. Members of the Full Court of the Federal Court made the following comments in concluding that the grant of the injunction in addition to the penalties against ICI was entirely appropriate:

> Section 80 [of the TPA] is essentially a public interest provision. Conduct of the kind proscribed by both Part IV and V may be detrimental to the public interest because many persons can be affected and considerable loss or damage may be sustained by them. The public nature of the injunctive powers conferred upon the Court by s. 80 is exemplified also by the provision in subsection (2) as to the persons who may seek an injunction. This right is conferred upon the Minister, the Commission or 'any other person' (subject to one exception in the case of an injunction in respect of s. 50 conduct). The traditional rules which enable a person who seeks to restrain the contravention of a statute by obtaining a fiat from the Attorney-General do not apply

to s. 80 because no proprietary right or interest need be established to confer status upon the applicant to seek the injunction; but the Court's powers do not extend to answering hypothetical questions.

and

The public interest character of s. 80 is also exemplified by the provision of sub-s. (6) of s. 80 that where the Minister or the Commission seeks an interim injunction the Court shall not require any undertaking as to damages.

and

Sub-sections (4) and (5) of s. 80 are novel because they empower the court to grant injunctive relief notwithstanding that the defendant has not previously engaged in the prohibited conduct or does not intend to engage in it again or to continue to engage in it or there is no imminent danger of substantial damage. Yet these are the traditional requirements for equitable injunctive relief.

and

In my opinion sub-ss (4) and (5) are designed to ensure that once the condition precedent to the exercise of injunctive relief has been satisfied (i.e. contraventions or proposed contraventions of Parts IV or V of the Act), the Court should be given the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly.

and

Injunctions are traditionally employed to restrain repetition of conduct. A statutory provision that enables an injunction to be granted to prevent the commission of conduct that has never been done before and is not likely to be done again is a statutory enlargement of traditional equitable principles. But this is because traditional doctrine surrounding the grant of injunctive relief was developed primarily for the protection of private proprietary rights. Public interest injunctions are different. Parts IV and V of the Act involve matters of high public policy. Parts IV and V relate to practices and conduct that legislatures throughout the world in different forms, and to different degrees, have decided are contrary to the public interest (contracts, arrangements or understandings affecting competition adversely (s. 45), the misuse of market power (s. 46), the practice of exclusive dealing (s. 47), resale price maintenance (s. 48), price discrimination (s. 49), anti-competitive mergers (s. 50) and unfair practices with respect to consumers (Part V)). These are legislative enactments of matters vital to the presence of free competition and enterprise and a just society. This does not mean that the traditional equitable doctrines are irrelevant. For example, it must be relevant to consider questions of repetition of conduct or whether it has ever occurred before or whether imminent substantial damage is likely, but the absence of these elements is not fatal to the granting of an injunction under s. 80. That is the effect of sub-ss (4) and (5) (sub-s. (4) in relation to the prevention of conduct and sub-s. (5) in relation to a mandatory injunction). Their presence is not an indication of a new statutory house, rather an old house with some modern extensions.

and

*The Trade Practices Act 1974* is concerned primarily with the protection of the public interest in the prevention of anti-competitive conduct in markets within Australia (Pt. IV) and the fair treatment of consumers (Pt. V). Section 80 is a widely drawn remedial provision available to restrain conduct which may infringe upon the public interest by contraventions of provisions of the Act in Pt. IV and Pt. V. The standing of persons, other than those whose proprietary interests may be affected by such conduct, to

> obtain injunctive relief is an indication of the regulatory function of this statutory remedy. The special standing of the Minister and the Commission lends emphasis to that characterisation.

The High Court of Australia has recently confirmed the 'public interest' nature of the consumer protection and remedies provisions of the Act in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) ATPR 41-757.

In that case the respondent ("Macquarie") was the manager of two unit trusts. One of the assets of those trusts was a toll road project in Sydney known as the "Eastern Distributor". In November 1996, Macquarie issued a prospectus inviting members of the public to buy units in the trusts. The prospectus made a statement about the likely future volume of traffic on the Eastern Distributor.

The applicant Truth About Motorways commenced proceedings in the Federal Court of Australia, claiming that Macquarie had contravened sec52, 53(aa) and 53(c) of the Act by making the above statement. The basis of the claim was that the statement was misleading or deceptive commercial conduct and sec 53(aa) and (c) forbade various types of false representations. Truth About Mortorways sought:

- an order that Macquarie publish corrective advertising so as to provide an accurate estimation of likely future traffic volumes on the Eastern Distributor; and
- a declaration that Macquarie had engaged in misleading or deceptive conduct breaching sec 52.

Truth About Motorways did not profess to have suffered any loss or damage as a result of the conduct in question. It also admitted that it had no special interest in the subject matter of the proceedings. Truth About Motorways nevertheless claimed that it had standing to bring the proceedings by reason of sec 80 and 163A of the Act.

Section 80 stated that the Federal Court might grant injunctive relief where, on the application of the Commission or "any other person", it was satisfied that a person had engaged, or was proposing to engage in, conduct including misleading or deceptive conduct or false representations. Section 163A provided that "a person may institute a proceeding in the Court seeking, in relation to a matter arising under this Act, the making of ...a declaration in relation to the operation or effect of (provisions including sections 52, 53(aa) and 53 (c) of the Act) ...and the Court has jurisdiction to hear and determine the proceeding".

The primary question for the High Court was whether sec 80 and 163A ("the sections") were constitutionally valid insofar as they purported to confer standing on Truth About Motorways.

Macquarie argued that the sections were invalid because they purported to authorise the institution of proceedings by persons who had neither a direct

nor special interest in the subject matter of the proceedings. It argued that the sections should be invalidated or read down because, without a direct or special interest, there was no justiciable controversy with respect to which jurisdiction could be conferred on a court pursuant to Chapter III of the Constitution.

Chapter III stated the jurisdiction of the High and Federal Courts. Sections 76 and 77 of the Constitution were relevant. Section 76(ii) empowered Parliament to make laws conferring original jurisdiction on the High Court in any "matter" arising under any laws made by the Parliament, while sec 77 enabled the same jurisdiction to be conferred on another federal court. Macquarie basically argued that, as there was no "matter" in the present case, the purported conferment of jurisdiction was invalid.

The seven judges of the High Court unanimously held sec 80 and 163A of the Act were valid insofar as they purported to confer standing on Truth About Motorways to bring the Federal Court proceedings.

In so holding the following comments by some of the High Court judges are very instructive in the present context:

Chief Justice Gleeson and Justice McHugh said:

> ‘As Bowen CJ observed in *Phelps v Western Mining Corporation Ltd*, the purpose of s 52 is to protect the public from being misled or deceived. An application for injunctive relief under s 80 is, in its nature, one for the protection of the public interest. The same may be said of s 163A. Any public protection of the applicant's own business or other interests is incidental or collateral. What is sought to be established by the determination of a court is a violation by the respondent of a statutory norm of conduct, and the existence of a duty or liability.’

Justice Gummow set out with approval the following passage from a judgment of the Full Court of the Federal Court (para 78, page 40, 844)

> *In Tobacco Institue of Australia Ltd v Australian Federation of Consumer Organisations Inc*[(1983) ATPR 40-916 at 49,846], the Full Court of the Federal Court analysed the operation of s 52 as follows:
>
>> "Section 52 does not purport to create liability, nor does it vest in any party any cause of action in the ordinary sense of that term; rather, s 52 establishes a norm of conduct, and failure, by the corporations and individuals to whom it is addressed in its various operations, to observe that norm has consequences provided for elsewhere in the Act". [*Brown v Jam Factory Pty Ltd* (1981) ATPR 40-213 at 42,928].

Justice Gaudron said (para 35, pages 40, 836-40,837)

> "In context, ss 52 and 53 impose a public duty on corporations not to engage in conduct of the kind proscribed by those sections. This is achieved by effecting a general prohibition upon that conduct, short, only, of rendering conduct in contraventions of s 52 a criminal offence.

Her Honour then said (para 79, page 40, 844)

> "Section 52 thus is an exercise by the Parliament of its powers to create new norms of conduct and require their observance by specified sections of the community".

In the same case Justice Kirby states of ss 80 and 163A (at para 141 pages 40,855-40,856)

> 'By contrast with other expressions in the Commonwealth's statute book, it must be accepted that the Parliament deliberately chose here a wide standing provision. By inference, it did so, both in ss 80 and 163A of the Act for the purpose of furthering the achievement of the public policy which the Act is designed to implement. It is a public policy larger than the protection of particular consumers. Relevantly, it is one aimed at promoting a culture of honesty in the representations made by trading corporations and the elimination of misleading and deceptive conduct from their dealings.'

The most recent pronouncement confirming the public interest nature of ACCC enforcement work is in the judgment of Justice Carr in *ACCC v Goldy Motors Pty Ltd* [2000] FCA 1885.

This case concerned representations about opportunity to purchase motor vehicles free of Goods and Services Tax and a representation that no finance application would be refused. There was an obscure qualification in small print concerning prior approval of purchasers to whom finance would be granted. Goldy Motors admitted that its conduct breached the misleading and deceptive conduct provision (s52) of the Act and also contravened s.53(e) of the Act which prohibits the making of a false or misleading representation with respect to the price of goods. However, Goldy Motors denied having breached s.53(g) of the Act which proscribes false or misleading representations as to "the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy".

There were three unresolved issues for the Court to determine: (a) whether, in addition to committing three admitted contraventions of certain provisions in Part V of the act, by engaging in the same conduct the respondent committed two further contraventions of another provision in that Part; (b) if so, whether the Court should, in addition to making three declarations concerning the admitted contraventions upon which the parties are agreed, make two further declarations; and (c) what costs order should be made.

In a judgment delivered on 20 December 2000 his Honour: (a) upheld the Commission's claim that Goldy Motors' conduct also constituted a breach of s53(g) of the Act; (b) rejected submissions on behalf of Goldy Motors that no practical consequences would be served by making some "extra" declarations about Goldy Motors' conduct and so the court should not make such declarations as a matter of discretion; and (c) ordered Goldy Motors to pay the Commission's costs.

I especially note Carr J's comments (at paras 30-34) that;

? "the [ACCC] is entitled to have the Court resolve the issue" and

? "...I think the [ACCC], having proved its case against the respondent, should be granted a declaration vindicating its claim" and

- "I do not think that conduct which is to be the subject of agreed declarations and which, at the same time, constituted further contraventions of other provisions of the Act, needs to be dishonest or flagrant before a court may, in its discretion, grant further declarations of such further contraventions" and
- "[The declarations]…may be of some assistance to the [ACCC] in future in carrying out the duties which are conferred upon it by the Act" and
- "There is some degree of public interest in the determination and declaration that the Respondent by its conduct has contravened this further provision" and
- "The declarations may also, perhaps in a small way, assist in clarifying the law-…"

The public interest nature of the Commission's activities, including its litigation activities, is at the top of the relevant factors guiding its direction.

### ***Some General principles worth remembering:***

To meet the basic requirement of the Act there are several principles that health funds, their agents and employees should keep in mind.

*Intent*

Health insurance products are necessarily complex so the principles of accurate and truthful information necessarily require more attention. Health insurers should be aware that in proving a breach of the Act, intent is not relevant. That means that if a fund or one of its agents (including call centre operators) unintentionally makes a false or misleading representation, depending on the circumstances, the fund may be in breach of the Act.

If a corporation is alleged to have contravened the consumer protection provisions of the Act by making a statement of past or present fact, the corporation's state of mind is immaterial unless the statement involved the state of the corporation's mind. In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197, Gibbs CJ said:

> "There is nothing in the section that would confine it to conduct which was engaged in as a result of a failure to take reasonable care. A corporation which has acted honestly and reasonably may therefore nevertheless be rendered liable to be restrained by injunction and to pay damages if its conduct has in fact misled or deceived or is likely to mislead or deceive…"

*Target audience*

The promoter should have regard for their target audience. The target audience does not just include the 'average' consumer', but all consumers that are likely to be receptive to the promotion. For example in the environment leading up to Lifetime Health Cover the target audience for health insurance products was very broad.

The representation should be considered from a consumer's perspective. Promoters should consider whether statements that are very clear for the fund agents or employees may not be so for consumers with limited knowledge about the industry.

*The overall impression created*

Whilst there is some duty on the consumer to take reasonable care, regard must be had for the overall impression created by the promotion. An approach that seems clear and well structured to its designers may be lost, in whole or in part on the target audience. Even technically accurate information may create a different impression if not considered from the target audience's point of view.

*Case Law on Some Key Words and Phrases*

In *ACCC v On-Clinic Australia Pty Ltd & Others* the Court held that the Commission had made out its case that five groups of representations made by On Clinic were misleading and deceptive on a fair and reasonable reading. The representations were made in newspaper advertisements and related to the efficiency, costs, comparative advantages of treatment, and advice preferred by the respondents' clinics for men suffering from impotence. The representations were as follows:

(a) (i) "The ONLY Impotence Treatment Ever Proven to Work!"; or

(ii) "improve your SEX LIFE with the ONLY impotency treatment EVER proven to work";

(b) (i) "Bulk Billing. (No charge to you only medicare)"; or

i. "All visits 100% Bulk Billed. Medicare (No cost to you)";

(c) (i) "4 treatment programmes with GUARANTEED RESULTS, in just 2 visits ..."; or

i. "... can be diagnosed and treated by medical doctors in only 2 consultations.";

(d) (i) "4 treatment programmes with GUARANTEED RESULTS ..."; or

i. "PROVEN AND GUARANTEED to work"; and

e. "Diagnosis using unique medical equipment."

In reaching the conclusion that the respondents' conduct was misleading and deceptive Justice Tamberlin made the following comments which are instructive: -

> "The words "only" and "ever" are quiet unequivocal and admit no exceptions"

and as to costs for the patient and to the efficiency or speed of outcome:

> "In relation to the representation concerning bulk bulling, it was said that if the representation was read as relating to the cost of consultations only, then it was correct, but if it was read to include the costs of the course of treatment, in addition to consultations, then it was false.

In my view, a reasonable and indeed the more likely construction of the words "without any charge to the patient" or "at no cost" would be that the total treatment is at no costs to the patient. There is no suggestion that the clinics' services are **partly** "at no costs". The words "no costs" like the word "free" have a certain allure and will almost always attract a strong favourable attention to a product or service. It is said the same observations apply in relation to the claims that impotence is capable of effective treatment in just four programs; with guaranteed results after only two visits; and the further claims that it could be **successfully** treated by medical doctors in only two consultations." (emphasis in original)

and as to the "guarantee" claim:

"The reference to "guaranteed" strongly connotes the certainty of a positive result and the assertion that successful treatment can be effected in "**only** " two consultations reinforces this message. While there is a large component of truth in these assertions, they are nevertheless capable of being read in such a way as to be misleading and deceptive.

The evidence indicates that in a high percentage of cases, the treatment is successful. Nevertheless, the reference to the treatment being "guaranteed" travels beyond the truth and is therefore false and likely to deceive or mislead." (emphasis in original)

and as to the use of the expression "**unique** medical equipment":

"The final representation relates to the use by the first respondent of the expression "**unique** medical equipment". It is pointed out that if this is read to mean unique medical equipment in an unqualified sense, then it is false because the equipment known as the "duplex doppler" is to be found in most radiology practices or vascular diagnostic laboratories to which patients may be referred for testing. However, if it is construed to mean "unique" to impotency clinics, then it is said that the representation is true.

The word "**unique**" on its ordinary meaning denotes exclusivity and, in my view, it is therefore likely to deceive or mislead if read in a fair and reasonable manner. Although the statement appears in an advertisement concerning impotency clinics, nevertheless it asserts that these clinics have some equipment which is not otherwise available. There is no qualification nor is there anything in the language used to vary the literal meaning. It would have been a simple matter to qualify the advertisement but, no doubt, this would detract from its efficiency in attracting attention.

Accordingly, the applicant has made out its case that each of the misrepresentations is misleading and deceptive on a fair and reasonable reading." (emphasis in original)

In defending the case the respondents had argued to the Court that the representations set out at (b)-(e) above were ambiguous and that if they were "read one way they were true, but if read in another way, although they had a 'core of truth', they had 'a misleading aspect to them'." As to the defence argument of ambiguity Justice Tamberlin said as follows:

"Language which can reasonably suggest either a true proposition or a false one can come within the ambit of misleading conduct. It has been held, for example, that a statement that a product will relieve pain will be misleading if it relieves only one type of pain but not another: see *Grove Laboratories v Federal Trade Commissioner (1969) 418 F2d 489*

> See also the remarks of Hill J in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations* (1993) ATPR ¶41-199 at 40,793; (1992) 38 FCR 1 at 50, where his Honour said:
>
> > 'Where, as in the present case, the advertisement is capable of more than one meaning, the question of whether the conduct of placing the advertisement in a newspaper is misleading or deceptive conduct, must be tested against each meaning which is reasonably open. This is perhaps but another way of saying that the advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error*: Keehn v Medical Benefits Fund of Australia Ltd* (1977) ATPR ¶40-047 at 17,523; ...' "

Justice Tamberlin also made a general statement which is well worth bearing in mind:

> "If it is sought to attract public attention and custom by the use of **unqualified** assertions of fact, then such assertions should be true as a matter of fact, if they are not to mislead and contravene the norms of conduct prescribed by the Act."
> (emphasis in original)

*Silence as misleading or deceptive conduct*

It should be appreciated that silence can also amount to misleading or deceptive conduct for the purposes of the Act. A useful summary of the instances in which silence can amount to misleading or deceptive conduct is set out as follows in a recent judgment of Justice Merkel:

> "Silence, without more, would not normally constitute conduct. However, putting to one side the vexed question of a duty to disclose, silence has been recognised as justifying a claim of misleading and deceptive conduct in two situations. The first situation is where it is an element, in all the circumstances of a case, which renders the conduct in question misleading or deceptive: see *Commonwealth Bank of Australia v Mehta* (1991) ATPR ¶41-103 at p52,601; (1991) 23 NSWLR 84 at 88 per Samuels JA and *Demagogue Pty Ltd v Ramensky* (1993) ATPR ¶41-203 at p 40,844; (1992) 39 FCR 31 at 32 per Black CJ and at 40-41 per Gummow J. For example, where the relevant conduct involves the supply of goods or services in circumstances where there is an omission to impart information relating to a particular quality or aspect of the goods or services, silence may be the element which renders the conduct in question misleading or deceptive. Such an omission might occur where a product is supplied to a consumer who, to the knowledge of the supplier, dedicates its manufacturing process to that supply on the basis of its continuity, and the supplier fails to inform the consumer that it cannot provide continuity of supply. The conduct in question in that example is not silence alone; it is supply of the product in circumstances in which the failure to inform might render the supplier's conduct misleading and deceptive. The example given is of conduct, involving silence, which is capable of, and therefore may be properly pleaded as, constituting misleading and deceptive conduct.
>
> The second situation is where silence alone constitutes misleading and deceptive conduct. That situation arises by reason of the extended definition of "conduct" in s.4(2) of the Act which provides that, for the purposes of the Act, "conduct" includes a refusal to do any act and refraining from doing that act otherwise than where the refraining was inadvertent. However, in this situation there must be an element of intent in the refusal to do, or the refraining from doing, the act in question: see *Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd* (1998) 155 ALR 714 at 722 per Finkelstein J and the authorities there cited. In substance, the authorities referred to by his Honour require that the silence be intentional or deliberate."

## Guidance provided to health insurance sector by the Commission

In the mid 1990's the Commission and the then Private Health Insurance Complaints Commissioner (PHICC) (now the Private Health Insurance Ombudsman) decided to address a growing number of complaints about health funds. Rather than pursue these matters in the courts (which was seriously under consideration), the Commission decided to work with the industry and the Ombudsman to clarify what was considered to be suitable conduct in the promotion of private health insurance in relation to the Act. After a protracted period of consultation of more than two years, in April 1998 this culminated in a publication of the *Guide to the Trade Practices Act for the promotion of private health insurance.* The Guide was launched at the ACCC's Sydney office on 15 April, 1998 with many health insurance industry representatives present. It was subsequently distributed throughout the industry. It has also been placed on the Commisison's website [http://www,accc.gov.au].

## Current observations about private health insurance

### *Australian Consumers' Association study*

The Australian Consumers' Association (ACA) conducted a study of call centres in the lead up to the introduction of the Federal Government's Lifetime Health Cover to ascertain the quality of information being provided to consumers in an environment of such enormous uptake of private health insurance. The ACA asked about participating hospitals, suitable policies for older people, objective advice on the benefits of Medicare as opposed to private health insurance, waiting periods, excesses, pre-existing ailments and actual coverage.

The survey found that the call centre operators were able to give accurate details on simple matters such as which regional hospitals their fund had agreements with or waiting periods.

The ACA also found that there was a great deal of confusion amongst operators about what the products actually covered when asked general questions. The ACA found that:

> 'Close to a third of the 41 operators said or strongly implied that private hospital cover would meet all expenses by using statements such as "all costs are covered", "you are fully covered", "100 per cent of costs are covered".'

These findings indicate that consumers could have been mislead if they had made a decision to purchase on the basis of these responses and later find that there is a gap, or that some treatment/ service is excluded.

### *Senate report and recommendations*

As most of you are aware on 25 March 1999 the Australian Senate ordered that the Commission provide an assessment at 6 month intervals on the 'anti-competitive or other practices by health funds or providers which reduce the

extent of health cover for consumers and increase their out-of-pocket medical and other expenses.'.

The Commission made its first report in April 2000 and its second in October 2000. The reports are based on the views of stakeholders and information obtained in the normal course of the Commission's work. I would like to record my appreciation to all those in the private health sector who have contributed material to assist the Commission in responding to the Senate Order.

The second report covers the six month period to June 2000, in the lead up to the implementation of the Federal Government's Lifetime Health Cover. It highlights ongoing matters of concern in the private health insurance industry as well as new issues that have been intensified in the rush for private health insurance:

Both reports detail material on consumer protection issues which go beyond the topic of this presentation. I would urge all health fund representatives to familiarise themselves with that material and where necessary to take action to ensure consumer's interests regarding private health insurance are accorded a high priority.

## Recent ACCC enforcement action

The introduction of the Lifetime Health Cover has resulted in unprecedented numbers of new members for health insurance funds. A range of considerations has put pressure on consumers to take up private health insurance. Despite the previous commitments of the industry to comply with the Act, and despite significant, specific guidance provided by the Commission on how to comply with the Act, several funds have drawn the attention of the Commission. The Commission is concerned that some of the current issues being considered by the Commission suggest the co-operative, educational message sent by the Commission is being ignored or that compliance mechanisms are in serious need for revision and upgrading.

### *National Mutual Health Insurance Pty Ltd*

In June 2000 National Mutual Health Insurance Pty Ltd (NMHI) provided a court enforceable undertaking to the Commission regarding a series of advertisements that misrepresented the need for private health insurance in Victoria. This was due to the existence of the Transport Accident Commission's (TAC) Scheme that provides comprehensive benefits. The Commission was concerned that the use of an accident scenario, without mentioning the scheme, may mislead consumers about most traffic accidents.

NMHI acted quickly to remove the commercials from broadcast and address the Commission's concerns.

As part of enforceable undertakings, NMHI undertook to provide more information about the TAC scheme through revised television commercials,

the NMHI newsletter and a leaflet for the public. It also agreed to provide refunds to consumers that were mislead by the commercials.

### *ACCC v Medibank Private Ltd*

In October 2000 the Commission instituted proceedings against Medibank Private Limited in the Federal Court, Melbourne, alleging false, misleading and deceptive conduct in relation to two advertising and promotion campaigns.

In one campaign, the Commission alleges Medibank Private advertised 'no rate increase in 2000 in relation to its Package Plus insurance products when the rates for those products increased on 1 July 2000. The ACCC further alleges that Medibank Private's call centre staff made representations to consumers that the rates for its Package Plus products:

- would not increase for the year 2000; and
- failed to adequately disclose that the rate would increase on 1 July 2000.

In a second campaign, the ACCC alleges that Medibank Private's advertised an offer to consumers who switched from another fund to Medibank Private of 'any waiting periods waived' and 'get 30 days free if you change to Medibank Private' in newspaper advertisements in August 2000 but:

- failed to disclose, or adequately disclose, that only the 2-month general waiting period and the 6-month optical waiting period were waived; and
- failed to disclose, or adequately disclose, that conditions applied to the offer of 30 days free health insurance.

The ACCC further alleges that the Medibank website fails to disclose, or adequately disclose that the rate quoted would increase on 1 July 2000.

### *ACCC v MBF Limited and John Bevins Pty Ltd*

This week the Commission has instituted legal proceedings against Medical Benefits Fund of Australia Limited in the Federal Court, Sydney alleging false, misleading and deceptive advertising of its health insurance products.

John Bevins Pty Ltd, the advertising agency involved in formulating MBF's campaign, has been joined in this action as it is alleged that the agency was knowingly concerned in the contraventions.

The ACCC alleges, MBF print and television advertisements contained pregnancy related images in an endeavour to entice consumers to transfer to or join MBF private health insurance. The ACCC alleges that the advertisements contained representations to the effect that pregnant women joining or transferring to MBF would be covered for medical and hospital expenses arising from the pregnancy. In fact, pregnant women joining or

transferring to MBF would not be covered because of a twelve month waiting period for pregnancy related services. It alleges the twelve month waiting period was referred to in the advertisements in fine print disclaimers. The ACCC alleges the disclaimers were inadequate and unlikely to come to the attention of consumers. The ACCC alleges that readers and viewers of the advertisements were unlikely to appreciate that a twelve month waiting period applied to pregnancy related medical and hospital expenses.

The ACCC is seeking court orders including:

? declarations that MBF has contravened the relevant provisions of the Australian Securities and Investment Commission Act 1989*;
? publication and broadcast of corrective advertisements in the same newspapers and on the same television stations as the original advertisements appeared;
? waiver of the 12 month waiting period for pregnancy related services for women or families who transferred or joined MBF in the period 28 May 2000 to 16 September 2000;
? restraining the making of similar misrepresentations in the future;
? an order requiring MBF to review its compliance program.

The ACCC is also seeking similar orders against the advertising agency.

## Conclusion

Both competition and consumer protection issues in the health sector are a high priority for the Commission. The Commission urges health funds to review, and upgrade their internal systems or programs to ensure that their conduct complies with the Act. This includes appropriate training of staff that are making representations to the public. Australian Standard AS3806 on Compliance Programs is one useful measure of the quality of your firm's compliance program. In addition health funds should develop effective complaints handling mechanisms in accordance with the Australian Standard on Complaints Handling (AS4269).

To minimise the risk of legal action it is essential that health insurance funds properly understand their legal obligations regrading their advertising or other promotional activities. Apart from being at risk of being taken to court by private parties, where there is evidence to establish a serious breach of the relevant consumer protection provisions health insurance funds are at risk of facing any one or more of the following non exhaustive consequences through legal proceedings by the Commission (or other relevant agency):

? Court orders restraining the health insurance fund from engaging in specified conduct;
? Court orders requiring the health insurance fund to do specified things, for example, place corrective advertisements or notices;
? Court orders declaring that specified conduct of a health insurance fund is in breach of the law;

- Court orders recording findings of fact for use as prima facie evidence in subsequent litigation (for example for compensation by private parties);
- Court orders requiring the advertising, offering or payment of refunds and/or compensation;
- Court orders recording a criminal conviction against the health insurance fund for breach of some of the consumer protection provisions;
- Court orders requiring the health insurance fund or individuals to pay a fine (currently a maximum of 2000 penalty units (i.e $220,000) for a body corporate or 400 penalty units (i.e $44,000) for an individual); or
- Court orders requiring the health insurance fund to pay the Commission's costs.

In addition there would be the time, stress, embarrassment and the insurance fund's own legal expense associated with the legal proceedings.

The Commission remains committed to assisting all participants in the health sector understanding the rights, benefits and obligations – from the application of the Act. The Commission also remains committed to taking action without fear or favour, to achieve its enforcement objectives, where it considers there has been a breach of the law.