Presentation to

The Rural Doctors Workforce Agency and The Rural Doctors Association of South Australia

"A Prescription for Good Practice"

Presented by

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Australian Competition and Consumer Commission

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1. INTRODUCTION

I would like to express my thanks to the Rural Doctors Association of South Australia and the Rural Doctors Workforce Agency of South Australia for inviting me to participate in your Annual Conference here in Victor Harbour.

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.

So I'm delighted to be given this opportunity to comment on some of the myths, and give you some of the history of the ACCC's interaction with the medical profession including through a new and important forum: HSAC—the Health Services Advisory Committee.

I will also comment in more detail on the specific application of the TPA to doctors, outlining both the protections and obligations that it creates for doctors, practice managers and other medical professionals in their day to day activities.

The ACCC, in consultation with key stakeholders, has put a lot of effort into this area over the past 12 months, culminating in the launch of the *ACCC Info kit for the medical profession*, in Wagga Wagga in August by ACCC Chairman Graeme Samuel, and Health Services Advisory Committee (HSAC) Chairman Tim Fischer.

I would like to acknowledge that we have been working closely with Dr Ken Mackey, past president of the Rural Doctors Association of Australia, as a member of the Health Services Advisory Committee (HSAC) in the development of the Info kit.

The HSAC process has also led to the ACCC becoming increasingly involved in forums such as this and informal gatherings of medical groups in an open and two way dialogue. I have had the pleasure of attending several of these gatherings. Communication between parties at these gatherings has been frank, and at times quite passionate, but all participants, including the ACCC, have been resolved to move forward in a constructive way.

The seriousness with which we are seeking to improve communication between the ACCC and the medical profession is reflected in the participation in this Conference by two other senior ACCC officers. With me today is Mr Bob Weymouth—Regional Director of the ACCC's Adelaide office, and Ms Elizabeth Davidson—Director of the ACCC's Health and Medical Liaison Compliance Unit.

2. ADRESSING THE ISSUES

Campaigns by the Australian Competition and Consumer Commission (ACCC) targeting certain professions or industries are usually prompted by a rash of complaints or court cases which reflect a serious problem in that sector.

We recently for example launched campaigns in the Real Estate sector to stamp out dummy bidding and clean up property seminars.

I'm pleased to say this is definitely NOT the case with the medical profession. In fact the ACCC has taken to court just four cases involving doctors—all allegations of collective agreements between doctors to either boycott persons or services, 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.

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 extended the Trade Practices Act to cover the business activities of all professionals, including the medical profession.

Following this extension, the ACCC worked hard to inform the community, particularly the professions impacted by these reforms, about what the competition and consumer protection provisions of the TPA meant for them.

However, there was also 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.

This led to considerable debate about exactly what the TPA meant for the medical profession, most particularly in respect of rosters, fee setting and collective negotiations.

Against this background, the Federal Government commissioned a study into the impact of the competition provisions of the TPA on the recruitment and retention of doctors in rural and regional Australia—the Wilkinson Review.

The Wilkinson Review found that the need for doctors to comply with the Act was not hindering the recruitment and retention of doctors in rural and regional Australia, but concluded that there was a degree of uncertainty and confusion amongst doctors regarding the application of the law to their profession. The Wilkinson Review also recommended that the process of communication between the ACCC and the medical profession could be improved in various ways.

3. HSAC – THE VEHICLE FOR CLOSER CONSULTATION

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.

The Committee's mission statement declared that HSAC would act in consultation and liaison between the ACCC, doctors, relevant health professionals and health consumers to aid in achieving a better understanding of, and compliance with, the *Trade Practices Act*.

It would do this by advising doctors and other relevant health professionals on the application of the *Trade Practices Act*, while at the same time advise the ACCC on the environment in which doctors and other health professionals operate.

HSAC was established as a part-time body within the framework of the ACCC, though separate from day-to-day administrative and policy processes.

In this regard HSAC has an independent chairperson, former Deputy Prime Minister Tim Fischer, an ACCC Commissioner (myself), and representatives of the medical profession (including rural practitioners) and consumers.

The other members of the Committee are:

- Dr Ken Mackey—Rural Doctors Association of Australia
- Dr David Thompson—The Royal Australian College of General Practitioners
- Dr Rob Walters—Australian Divisions of General Practice
- Professor Kerryn Phelps—Australian Medical Association
- Mr Chris Field—Australian Consumers' Association
- Ms Lesley Fitzpatrick—National Rural Health Alliance
- Professor Ian Wronski—Australian College of Rural and Remote Medicine
- Mr Alan Limbury—Trade practices solicitor and barrister

It was made clear at the outset that HSAC's role was advisory and focused on dissemination of information. It is not an investigative body, nor a source of advice to the ACCC on specific matters under investigation (or in litigation).

I am pleased to say that HSAC has, to this stage, been an effective and constructive mechanism to enhance dialogue between the ACCC and medical profession.

One of the key outcomes from this consultation process to date is the *ACCC Info kit for the medical profession*, which brings together information that has been specifically drafted for doctors, drawing on the advice and assistance of doctors and other professional members of the Health Services Advisory Committee.

Complementary to this has been involvement by myself and senior ACCC staff in a series of discussions with various medical groups, such as the rural doctors. As mentioned in my introduction, we see this as a two way process where the medical profession hears from us and we get unfiltered feedback from you.

4. ACCC INFO KIT FOR THE MEDICAL PROFESSION

The kit has been designed to be a 'ready reference tool' for doctors, medical educators, practice managers and other health professionals to enable them to better understand the role of the ACCC, and their rights and obligations under the Trade Practices 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 competition law to collective bargaining and agreements between doctors.

The *Medical roster checkup* is the first ACCC document of its kind. It is a two page quick reference guide which sets out a series of short questions that doctors can follow to ensure their roster complies with the Act. This roster checkup is supported by a more detailed leaflet on medical rosters for those requiring more specific information.

Setting your fees straight tells you that it's OK to be aware of what other doctors' charge, but makes clear that competing doctors are not allowed to reach agreements 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, how you can obtain more information, make a complaint, and what to do if you aren't happy with an ACCC decision or how it was made.

And finally, *Straight talking with your patients* explains how doctors can avoid the misleading their patients. This includes being careful to avoid jargon and ambiguous statements and ensure that the overall impression you create is not misleading.

In the process of developing these guides we have received useful input from HSAC members and the wider medical fraternity, especially in important areas like rosters. This process enabled us to address issues revised by interested stakeholders.

As part of this we have engaged closely with the AMA and its President Bill Glasson and new CEO Robyn Mason. As all will be aware, there had been a push from some medical quarters for changes to the Trade Practices Act to exempt doctors. While this is a matter for policy makers – not the ACCC – we have made the point that much of the concern appears to be based on a small number of unusual scenarios and some misconceptions.

Our objective has been to re-assure doctors at all levels by demonstrating that the TPA does not restrict their activities unless arrangements go outside certain competitive norms. Importantly, a roster which has the purpose of facilitating patient access to medical services and which does not restrict doctors from working **does not** raise problems under the Act—I will speak more on this later. We are working with the AMA, RDA and other stakeholders to identify what work sharing or negotiation arrangements may create competition concerns and ways these may be addressed by collective notification or authorisation.

This process is now underway and the ACCC is now analysing some of the areas identified in a recent AMA paper discussed just this week by HSAC.

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.

5. COLLECTIVE BARGAINING

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

The medical profession has a collegiate ethos and a long history of cooperation between practitioners in providing medical services to patients.

Compliance with the Act does not undermine this practice.

The ACCC encourages doctors to preserve these collegiate values and to cooperate in developing arrangements that better serve their patients.

But what is more problematic is collective conduct that is anti-competitive. Collective negotiations by doctors practising as separate entities can run a significant risk of breaching the Act, although there are ways that such arrangements, under appropriate circumstances and where there are net public benefits, can be "approved" by the ACCC.

Doctors usually operate under the following types of business (practice) structure, which are all separate legal entities:

- company (private or public)
- sole natural person
- legal partnership with no corporate partners
- legal partnership with at least one corporate partner
- a trust.

Negotiations by doctors practising within the same legal entity
All doctors practising within a company, legal partnership with no corporate partners, or within a trust—either as directors, employees or partners—are considered part of the same entity.

They are therefore not in competition with each other for the purposes of the Act and are able to negotiate as a group, with other parties, without breaching the Act.

For example, doctors working within a partnership with no corporate partners are able to collectively negotiate contract terms with a hospital, under which the partnership will provide services to the hospital.

It is also relevant to note that conduct relating to industrial agreements about conditions of employment, as negotiated between employers and employees, is exempt from the Act. For example, doctors employed on a salaried basis are permitted to collectively negotiate terms and conditions of employment with their employer.

Negotiations by doctors practising through separate entities
However, doctors practising through separate legal entities are considered competitors for the purposes of the Act. This includes doctors:

- who are members of a legal partnership where one or more of the partners is a corporate entity
- working as part of an associateship
- who are contracted to (but not employed on a salary by) a hospital.

Collective negotiations by doctors practising through separate entities to set fees or contract terms and conditions risk breaching the Act if they give rise to contracts, arrangements or understandings that:

- substantially lessen competition (section 45)
- contain an exclusionary provision (sections 45/4D)
- fix prices (section 45A).

Whether an arrangement has substantially lessened competition is determined by the degree of competition that existed in the market prior to the arrangement, and contrasted with the level of competition that exists or is likely to exist following the formation of the arrangement, including competition hindered or prevented by the arrangement.

In the context of a market for medical services, these factors may include:

- the nature of the market (e.g. general or specialist medical services)

- the number of professionals competing in the market
- barriers to entering the market; and
- the ability of patients to access alternative sources of medical services, such as whether there is a local hospital, and the distance and cost of going to another town.

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

A group of competing doctors for example, would risk breaching the Act if they agreed that, unless their local hospital was willing to pay them certain fees for emergency and after hours attendances, all or any of them would not supply their services to the hospital.

Doctors practising through separate entities also must not agree to divide up a market or patients between them.

Examples of these types of illegal agreements include those which:

- set the types of services each doctor will or will not provide
- allocate patients between the doctor involved in the arrangement with an understanding that they will not 'poach' each other's patients
- restrict the ability of doctors to offer or supply their services outside a specified area
- share patients or services so that income levels are maintained between the doctors involved.

An example of this could involve five doctors in a country town making a collective decision that only two of them will continue to provide obstetric services, as they don't consider it to be commercially viable for all five doctors to continue to practise obstetrics.

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.

Role of Authorisation

Under this process, the ACCC has the power to authorise protection from court action for otherwise anti-competitive conduct where those proposing to engage in that conduct can demonstrate that there is a net public benefit.

Historically, authorisation has been regarded as a costly and complex process. Over recent years, and certainly since the previous authorisation application by the SA rural doctors, we have improved the informal side of the process for applicants. As a prelude to submitting a formal application staff at the Commission are able to help

applicants through the steps involved and identify the relevant information needed to include in an application. This informal guidance can be achieved without the applicants bringing in lawyers or economists.

With the consent of their members, representative organisations can also apply for authorisation on behalf of their members.

I am pleased to say the Commission has in recent months had constructive discussion with the SA Rural Doctors Association, AMA SA, College of Rural and Remote Medicine and Rural Doctor Workforce Agency in relation to dealings on terms and condition with SA public hospitals. We look forward to advancing the dialogue on these matters started with Peter Rischbieth, James McLennan, Steve Holmes and Karen Sumner along with Duncan Wood of the AMA SA.

Proposed Collective Negotiation Notification

There has also been an important proposed development in respect of collective negotiations. This involves a new notification provision for collective negotiations under the TPA which has bi-partisan political support. It is anticipated that this provision will be a low cost, simple and rapid 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.

While having many of the same characteristics as authorisation, the proposed new notification process reverses the onus of proof and also makes provision for boycott action in appropriate circumstances. Amendments to the TPA, including the Collective Negotiation provision, were still going through the Commonwealth Parliament when the Federal election was called late August. However given the bipartisan support it is anticipated that this particular part of the new legislation should be passed by Parliament after the election.

Referrals

Doctors are free to individually decide who, in their opinion, is the best qualified specialist to provide care to their patients, and they are free to refer or recommend this specialist to their patients.

However, competing doctors practising through separate entities, who collectively agree on which specialists should and should not have patients referred to them, risk breaching the Act.

For example, it is illegal for a group of doctors practising through separate entities in a town to collectively agree to refer patients requiring paediatric care services to only one particular specialist in the town,

While there may be a soundly based opinion among the doctors in town that one particular specialist is better than others, each doctor must make his or her own decision regarding referrals based on an individual assessment of their patient’s needs.

6. FEE SETTING

As I mentioned earlier—the only times the ACCC has ever had cause to take action again 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 ACCC's case was directed not at the roster itself, but at the attempt to fix fees under the roster.

  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 because he was dissatisfied with the remuneration he received for attending the patients of the other two obstetricians on weekends and out of hours when each obstetrician took turns to be 'on-call'.

  Again our concern was not the roster, but the attempt to fix fees under the roster.

  The Federal Court made injunction 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 practising as AK Freund Pty Ltd had tried to induce an illegal boycott by including in its lease of rooms in medical centre premises, a set of rules.

> The rules required other GPs leasing rooms at the medical centre to not bulk bill anyone except pensioners, health care card holders or members of the GP's immediate family, and to not supply services outside certain hours.

Price fixing is an absolute prohibition. This means that it is not necessary for the ACCC to show that price fixing harms competition, competitors or consumers before it is found to breach the Act. Because of its very nature it is deemed to be anti-competitive and unlawful and harmful to consumers.

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.

As mentioned before, a single company, sole natural person, legal partnership with no corporate partners, or trust is a single legal entity. All doctors practising within a single legal entity in any of these forms are not in competition with each other for the purposes of the Act and are able to agree on the fees to be charged by that entity, without breaching the Act.

Fee setting in this situation is therefore not illegal price fixing, but an internal management decision about prices, made by the individual entity.

However, once again, doctors practising through separate legal entities, or within a legal partnership with at least one corporate partner, are considered competitors for the purposes of the Act.

And a doctor who practises as a single entity must not fix, control or maintain prices with any competitors. Each entity must independently determine the fees charged to its patients.

Under an ACCC authorisation granted to the RACGP, general practitioners who are members of the same associateship, or the same partnership with at least one corporate partner, can agree on fees charged to patients under certain conditions. The present authorisation applies until 10 January 2007.

Bulk billing examples

Doctors practising as separate entities must individually decide whether or not to bulk bill their patients. If separate entities seek to collectively agree on whether or not to bulk bill patients, they risk breaching the Act.

As the Federal Court made clear in the Berwick Springs case I mentioned earlier, doctors practising through separate entities who collectively agree not to bulk bill all or certain patients run a severe risk of breaching the Act.

It should be remembered that an agreement between doctors, practising through separate entities, to bulk bill all patients may also be considered price fixing. Even though it is an agreement to charge the lowest likely price, it is still an agreement between competitors on the fee to be charged and is therefore technically a breach of the Act.

The ACCC, however, has discretion over when it will take matters to court. The ACCC considers that an agreement between doctors to bulk bill all patients would be unlikely to result in any harm to patients, as the bulk billed rate is the lowest fee that a doctor is likely to charge for their services.

The ACCC would therefore not take action against agreements to bulk bill.

However, it should be noted that other people still have a right of private action under the Act. In such a case other doctors (including those that do not want to be part of an agreement to bulk bill), could take court action against such an arrangement.

To ensure that there is no risk of breaching the price fixing law, even regarding collective agreements to bulk bill, each separate entity should independently decide on what fees to charge its patients.

As with the example I cited regarding obstetrics in a small town, protection from court action on such matters as bulk billing could be sought from the ACCC under the authorisation process if it can be proven the conduct is in the public interest.

There are also certain circumstances in which it may be legal for competing doctors to discuss fees.

Generally speaking, the following would not be considered by the ACCC to be likely to breach the Act:

- Merely being aware of the fees that other doctors charge—it is normal commercial behaviour to know what your competitors charge

- Informing other doctors of the fees being charged for the purpose of obtaining informed financial consent from patients

- Doctors discussing economic factors, information or formulae that have been or will be used in independently determining their fees. This type of discussion may sometimes occur at professional association meetings or conferences, in the context of discussions about the factors affecting an industry or profession.

The best example of this would be the fuel prices displayed in front of service stations to enable motorists to make easy price comparisons between different suppliers.

Often when one petrol retailer sees the price at the retailer across the road go up or down, he or she will adjust his or her price board to match the others' increased or decreased price,

This is quite legal, even when the price goes up. However, the price fixing line is crossed if the two retailers reach any sort of agreement that if one raises or lowers prices the other will follow, the price at which they will sell, or how much the price will rise or fall.

So the ACCC considers that doctors would risk breaching the Act if a decision is made between doctors practising through separate entities to:

- charge the same fee
- charge different fees
- increase or decrease fees

It is also important to note that the line is crossed when an agreement is reached, regardless of whether the agreement is actually put into effect.

This should be taken as a general guide only. It is very difficult to determine in advance at what point fee discussions will cross the line and become illegal price fixing behaviour. Doctors should therefore exercise caution when discussing fees with competing doctors.

Informed financial consent
Patients should be given accurate details of the fees and any additional costs they are likely to incur. Whenever possible, 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.

It is again important to stress that mere awareness of what others charge does not breach the Act.

Illegal price fixing will only occur when an agreement, arrangement or understanding has been reached between competing entities, on what fees will be charged.

Recommended fee schedules
The Act prohibits 'recommended' fee schedules when they are likely to constitute an agreement, arrangement or understanding between separate entities to fix, control or maintain prices.

For example, if a 'recommended' fee schedule is in fact understood to be the fee that everyone will charge, this is likely to be considered price fixing.

Doctors and their various representative organisations should therefore exercise serious caution when considering the use of recommended fee schedules.

7. ROSTERS

The *ACCC Info kit for the medical profession* contains the following quote from Chairman Graeme Samuel on the issues of rosters

Rosters that have the purpose of facilitating patient access to medical services are an integral part of delivering health care to the community, especially in rural and regional Australia. By ensuring a minimum level of service to the community such rosters do not breach the competition laws.

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. 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.

Despite this, there has been a fair bit of misunderstanding about this since the introduction of the Hilmer reforms in 1995, and it's why we have devoted a substantial part of the Info kit to this issue, including a first for us—the two page quick reference guide for doctors to clear up any confusion about what you can, and can't do with a roster.

As with fees, the first point to note here is that when a roster is arranged between doctors practising solely within a single legal entity—either as directors, employees or partners—you are not in competition and therefore roster arrangements do not raise any issues under the Act.

Similarly, 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 intent. The general rule is that where the genuine intent of a roster is to improve patient care and working hours for doctors, then the ACCC is unlikely to have any concerns,

To ensure doctors do not run the risk of breaching the act, they should follow this simple checklist:

- A key purpose of the roster must be to facilitate patient access to medical services.

- Doctors on the roster must be able to practise, even when not rostered on.

  While a rostering arrangement may specify the minimum hours that each doctor will work under the roster, it must not restrict when a doctor may practise. Each doctor must be able to practise at any time he/she chooses or accept additional hours of work, if offered. The ACCC recognises that most doctors will not want to work when they aren't rostered on, but they must be free to make this choice for themselves, and not be forced not to work when not rostered on.

- Doctors on the roster must be able to see any patients they choose.

  Similarly, a rostering arrangement may specify the patients that each doctor will see but must not restrict doctors from also seeing their own patients or any other patients if they so choose.

If a rostering arrangement meets all three of these criteria then the ACCC is satisfied that it does not breach the Act.

Now, of course, it may be that the practical effect of a roster is that doctors are restricted from providing their services to the hospital when not rostered on. It may also be that doctors are restricted from providing their services to particular patients while working in the hospital, such as if they are rostered on to casualty patients only.

However, it is the purpose of the roster arrangement that is relevant. For the arrangement to raise concerns under the Act, it must be established that a key purpose of the doctors arranging the roster was to inhibit a roster doctor from providing their services to the hospital or seeing patients.

8. UNCONSCIONABLE CONDUCT

One final issue that is of concern to all small businesses, which includes most doctors, is the issue of unconscionable conduct.

The unconscionable conduct provisions of the Trade Practices Act recognise that businesses, including professionals, can be subjected to harsh or oppressive behaviour when dealing with another enterprise in a stronger commercial position.

The Act therefore provides protection when a stronger party acts in bad faith, employs unreasonable tactics or attempts to unreasonably extract benefits from the weaker party, by using its size or bargaining power.

The info kit brochure *Diagnosing unconscionable conduct—what does it mean for doctors?* outlines the protection available if you have been subjected to harsh or oppressive commercial conduct.

But there are two important things to remember:

- Not all *unfair* conduct is necessarily unlawful *unconscionable* conduct. Sometimes what may appear unfair or harsh to you is just tough negotiating tactics or strong competition.

- The laws also apply to doctors dealing with their patients

If you are in any doubt, feel free to contact us, but the best advice we can give you is that prevention is the best solution when entering into commercial arrangements—if you don’t understand it or have reservations, don’t sign it. Seek independent advice.

9. REPRESENTATIVE BODIES

Associations and representative organisations can be a very useful source of expertise, information and representation to members.

However, being a member of an association does not exempt you from the provision of the Trade Practices Act. In fact members of an association will usually be considered competitors for the purposes of the Act.

Representative organisations and associations must not therefore be used as a forum for collectively agreeing on fees or for organising any other anti-competitive conduct.

The ACCC considers that while such organisations can provide expert advice to members, on many of the issues outlined in this presentation, dealing with or through these organisations does not provide immunity from the Trade Practices Act.

So, representative organisations should bear in mind that any collective decision made between competing doctors refusing to accept offered contracts is likely to be a boycott in breach of the exclusionary agreement provisions of the Act.

In addition to the competing doctors breaching the Act, involvement of the representative organisation in that collective decision may result in the representative organisation itself also being in breach of the Act.

When representative organisations are providing advice, it should be remembered that doctors must decide individually whether or not to accept a contractual offer.

10. CONCLUSION

All medical professionals need to be aware of their rights and obligations under the Trade Practices Act.

The *ACCC Info kit for the medical profession* aims to assist you to comply with the law, and let you know what action you can take if others don't.

It makes clear that the Trade Practices Act protects you from having restrictions placed on your ability to practise, or having your practice damaged through the illegal actions of others that exclude you, are unconscionable, or mislead you.

The Act also provides the opportunity for redress where you have suffered loss or damage because of this sort of behaviour.

The process of developing this kit and its subsequent release has been helpful to raise the ACCC's awareness of issues, as perceived by some in the medical community, and should aid doctors to better understand the role of the ACCC, and how the Trade Practices Act impacts on the medical profession.

We have brought copies of the Info kit with us today, so please come and see me or an ACCC staff member to obtain a copy and to further discuss any questions you may have.

The *ACCC Info kit for the medical profession* is a free publication and can also be obtained by contacting the ACCC Infocentre on 1300 302 502, from any regional office of the ACCC, or can be accessed and downloaded from the ACCC website www.accc.gov.au.

The ACCC is responsive to complaints and inquiries and staff are available to provide guidance to doctors on their rights and obligations under the Act. We accept that there are areas of concern in relation to the supply of some services particularly in connection with more remote locations, particular mixes of services and arrangements relating to collective negotiations. The Commission has signalled its preparedness to work with interested stakeholders to address these matters effectively and expeditiously.

The ACCC recognises that doctors are very busy and operate in a high pressure environment, often with limited human and financial resources.

The ACCC is keen to work with doctors so that they understand their rights and obligations under the TPA so that they can get on with their important business of practising medicine, confident that their activities aren't in breach of the competition and fair trading laws.

The ACCC looks forward to talking with the medical profession and to working with doctors in the future.

Thank you for the opportunity to speak at this conference.