Presentation to

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ACCC Interface with the Medical Profession—A Prescription for Good Practice

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1. INTRODUCTION

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 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!

But 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, spending must be efficient as possible—and deliver the biggest possible bang for the buck.

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. Other critical factors are flexibility, innovation, synergies and transparency in delivery systems and ensuring that those who operate health care are trained to very high standards.

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

Discourse between the ACCC and the health sector has been raised to new levels and is producing good outcomes.

2. 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 Wagga Wagga in August.

HSAC is chaired by The Hon. Mr Tim Fischer, and membership of the Committee is as follows:

- Australian College of Rural and Remote Medicine—Professor Ian Wronski

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

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.

But I'm very 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 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.

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 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.

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.

I am pleased to say that HSAC has, and continues to be, 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 and the broader medical community.

Just as important as the Info kit product has been this process of getting views and feedback from the medical community. Graeme Samuel, the ACCC Chairman, or I have spoken to groups in most States. In addition the ACCC's dedicated Health and Medical Compliance Liaison Unit, headed up by Elizabeth Davidson, has had a friendly presence at medical conferences throughout the country.

3. 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 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 the first ACCC document of its kind. It is a two page quick reference guide which sets out a series of simple 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 doctors that it's OK to be aware of what other doctors' charge, but 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.

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

And finally, *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.

Our objective has been to reassure doctors 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.

4. 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.

And while the ACCC encourages doctors to preserve their collegiate values and to cooperate in developing arrangements that better serve their patients, it is important to do so in a way that does not breach the Trade Practices Act.

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.

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.

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 bi-partisan 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.

5. 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 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. 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 must set their fees independently.

Bulk billing

Doctors practising as separate entities must individually decide whether or not to bulk bill their patients.

As the Federal Court made clear in the Berwick Springs case noted 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.

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.

6. 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.

Despite this, there has been a fair bit of misunderstanding 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 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 facilitate safe and sustainable working hours for doctors, then the ACCC is unlikely to have any concerns.

7. MEDICAL COLLEGES

Over the next 12 months, the ACCC and the Australian Health Workforce Officials Committee will be reviewing the selection and training arrangements of all specialist medical colleges. This review has been endorsed by the Health Ministers.

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 Health Workforce Officials Committee, jurisdictions 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 other specialist medical colleges is to explore the extent to which these colleges are already operating in accordance with the principles drawn from the original RACS authorisation, recognising that a number of other 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 interested in hearing from colleges the areas where this may be the case.

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 look forward to working cooperatively with colleges and the wider medical profession to minimise the likelihood of such contraventions. The publication of the *ACCC Info Kit for the medical profession* was an important first step in this process. Now, the review offers a unique opportunity for tailored, targeted and consultative change in college processes where a need for change is identified.

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 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 a balance is struck between maintaining high standards of medical care in Australia and ensuring access to medical care.

Process of review

The ACCC has requested that colleges provide it with information about selection, training and accreditation processes. This information will be reviewed against the principles of transparency, procedural fairness, stakeholder participation and accountability.

At a practical level the 5 key areas for colleges to address are:

1. Accreditation of hospitals and training programs:
    - criteria for assessment should be readily available;

- results of assessments should be publicly available;
- jurisdictions should have the opportunity to propose training posts and participate on accreditation assessment panels

2. Trainee selection process:
   - selection criteria should be publicly available and procedurally fair;
   - information about numbers of trainees should be publicly available;
   - information about training requirements and results should be publicly available

3. Assessment of overseas trained practitioners:
   - should be consistent, transparent and fair;
   - assessment criteria should be available to applicants;
   - assessment processes should be publicly available;
   - jurisdictions should have the opportunity to nominate persons to be included on assessment panels

4. Appeals processes:
   - should be available for training, accreditation and selection processes;
   - criteria for, and results of, appeal processes should be publicly available;
   - jurisdictions or ministers should have the opportunity to nominate persons for Appeals Committees

5. Stakeholder involvement in college processes:
   - mechanisms should exist to facilitate stakeholder involvement from jurisdictions, consumer and user groups, where appropriate, in decision making processes regarding trainee numbers, accreditation of training facilities and assessment of overseas trained practitioners.

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.

Ultimately, the ACCC will prepare a report on the outcomes of the review, along with recommendations, for consideration by the 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.

8. GOING FORWARD

Some actions we have taken in recent years have not been greeted with universal acclaim by doctors. When the ACCC recently took out an exhibition stand at an association conference, staff fielded questions about whether the ACCC was “really

brave or really stupid", given the ACCC had previously taken action against several of the association members.

Pleasingly, staff members have reported that at the end of this conference, several detractors, who had been talked into taking away a copy of the ACCC Info kit, actually came back and said that the information was useful and they appreciated receiving the information they needed to keep the ACCC away!

In the lead up to, and most particularly since the launch of the Info kit in August, the ACCC has been actively involved in a range of conference events around the country.

Feedback from delegates at all of these conferences has generally been very positive. Delegates appreciate the ACCC's involvement in such medical events, but more importantly have provided valuable feedback on the *ACCC Info kit*. It is timely and provides clear and straight forward guidance to doctors on exactly what the TPA means for them. They have also welcomed the opportunity to be able to discuss specific scenarios and concerns with ACCC staff in a non threatening environment.

At one conference a doctor was seen come rushing up to the stand, pointing and stating excitedly to his wife: "There it is! That's the kit I was looking for!", He'd written the name of the Info kit on his hand so he wouldn't forget to get a copy.

Since the launch of the Info kit in August, the ACCC has received requests for around 5,000 copies of the kit, with requests continuing to come in every day. We have also distributed around 30,000 copies of the summary sheet which gives a two page snap shot of the issues covered in the Info kit.

We have copies of the Info kit available at this conference. It is also available, free of charge, by phoning the ACCC Infocentre on 1300 302 502 or by visiting our website: www.accc.gov.au.

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 committed to continuing work with the medical profession so that doctors 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 don't breach the competition and fair trading laws.