Presentation to

Australian Health Insurance Association

"The ACCC view of key competition issues impacting on the private health sector"

by

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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 saw in the last election, 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!

There are many good policy reasons for why this industry is the recipient of such a significant amount of government funding, but that dependence also brings with it a responsibility on both the industry, and government, to ensure consumers and taxpayers are getting value for money for the contribution.

The Australian Competition and Consumer Commission is the independent statutory authority responsible for ensuring compliance with and enforcement of the *Trade Practices Act 1974* and its role has an important impact on conduct with the health sector. I have focussed today's discussion on several aspects of the connection between health and the ACCC, including:

- how the Trade Practices Act (TPA) applies
- our monitoring role as reflected in the annual report to the Senate
- broad areas of concern in the health sector, and
- our role in approving mergers and authorisations

2. APPLICATION OF THE TPA TO THE HEALTH SECTOR

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

Since it was enacted in 1974, the TPA has applied to incorporated medical and other health professionals' businesses. Unincorporated medical/health professionals and their associations are also subject to the competition provisions of the Trade Practices Act and the state and territory equivalent, the competition codes.

With regard to consumer protection, unincorporated medical and health professionals' businesses are caught by the operation of the state and territory fair trading acts that substantially mirror the consumer protection provisions of the TPA.

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 as health insurance was considered to be an issue that is concerned more with the health industry than the financial services industry.

The Commission is interested in ensuring that health funds do not mislead their members. There is nothing in the TPA preventing funds from charging whatever price/premium for their products. However, funds should not make misleading statements about these premiums and changes to the premiums. For example, if health funds have made any implicit or explicit representations about the fact that their rates would not rise, and then sought and obtained a rate increase from the Government, then this would still constitute misleading conduct. The Commission will examine any complaints it may receive about health funds' rate increase in this light.

3. MONITORING REPORTS TO THE SENATE

In addition to the economy-wide role the ACCC has in promoting competition and protecting consumers, certain sectors are, from time to time, made the subject of more formal monitoring roles by the Commission.

This can take many forms - for example, all changes to prices for postal services operated exclusively by Australia Post must first be approved by the ACCC. In other industries, such as with the health insurance sector, our specific industry sector role is more one of monitoring role.

As most of you are aware, in 1999 the Senate ordered that the Australian Competition and Consumer 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 tabled its first report on 12 April 2000. Three other reports were tabled in accordance with the original Senate order.

On 18 September 2002 the Australian Senate amended its order to now require the Commission to only report on an annual basis, and we are now in the process of finalising our 7th report in compliance with that amended order.

That latest report updates the Commission's six previous reports and focuses on conduct that has occurred during the period 1 July 2004 until 30 June 2005. Where indicated, relevant developments since the end of the reporting period have also been included.

In compiling that report, the Commission contacted 107 interested parties including:

- private health insurance funds and related associations;
- participants in the private hospitals sector;
- consumer groups;

- medical associations;
- allied health organisations;
- and government agencies.

We received 23 written submissions, including five submissions from private health insurance funds or related associations.

The annual report is based on information contained in the submissions received by the Commission during this consultation process, and information otherwise obtained by the Commission during the normal course of its work.

4. BROAD AREAS OF CONCERN

Now, it's worth noting at this point that the Commission is but one of a number of organisations to which consumers who are concerned about health-related issues may complain. Consumers with complaints or inquiries about private health insurance (or health funds, medical practitioners or hospitals) can also approach the Ombudsman and complaints about health care can be made to the health complaints offices in each state or territory.

With regards to complaints to the ACCC, there does appear this year to have been a big increase in health related complaints and inquiries.

The spike is due almost entirely to the launch in August last year of the *ACCC Info kit for the medical profession*[1]. This publication was a recognition by the Commission that effective communication with the medical profession on how the Trade Practices Act applies to doctors is crucial to ensuring certainty for doctors, particularly those supplying health care in rural and regional Australia.

From its launch on 20 August 2004 to 30 June 2005, the ACCC supplied over 11,000 copies of the *ACCC Info kit for the medical profession* to the public, including approximately 5,500 copies in response to requests through the ACCC Infocentre.

Interest in the Info kit and its associated publications was very high in the health sector, resulting in over 400 requests from members of the medical profession and other relevant parties. When those Info kit requests are allowed for, the number of inquiries and complaints in 2004-05 was actually little changed from the previous year.

As our latest report has not yet been tabled by Parliament, I am not able to release its findings here today and will have to confine more specific remarks to last year's report. However, this year's report will be available on the ACCC website and through the ACCC Publications Unit once it has been tabled in the Senate.

[1] http://www.accc.gov.au/content/index.phtml/itemId/575117

In the 2003-04 report the Commission noted a total of 774 complaints relating to the health sector, of which 143 related to health funds.

The main areas in relation to which complaints are little changed from year to year:

- advertising by health funds, or statements by health fund staff;
- premium increases or benefit changes by health funds (including in relation to inadequate notification of premium increases or benefit changes);
- suspected arrangements between competing health funds, medical practitioners or other providers of health services; and
- inquiries as to why some health service providers (e.g. private hospitals, dental and day surgeries) did or did not have HPPAs with certain health funds.

The issues of 'key features guides,' exclusions and restrictions, health insurance intermediaries, portability and contracting between hospitals and health funds were of greatest concern. I would like now to examine each of these areas, and the specific concerns about them, individually.

Key features guide

As you know, the purpose of key features guides is to provide consumers with an outline of the products offered by a particular health fund so they have a simple basis on which to compare the benefits of various funds. However, many of the health funds which made submissions to the report indicated the production of the guides is both an onerous burden on them and of little benefit to consumers.

However, others, such as the Department of Health and Ageing maintained that a review of consumer documentation was needed. From the ACCC's perspective, if it can be shown the key features guides are not an effective means of informing consumers, the Commission would support the development of an alternative.

Exclusions and restrictions

In relation to exclusions and restrictions, the Ombudsman submitted that complaints to the Ombudsman's office indicated funds need to do more to ensure their members understand the product they have purchased. The ACCC considers that the provision of clear, straightforward information about health insurance products protects consumers against potentially costly misunderstandings on the nature and extent of their coverage and minimises the likelihood of a dispute between members and funds. Given this, the ACCC supports the Ombudsman's suggestion that funds advise members of any restrictions or inclusions in the annual statements they provide.

Intermediaries

The ACCC has also become concerned about the conduct of some health insurance intermediaries, particularly where those intermediaries represent to provide independent or impartial advice but do not disclose that the advice they provide is confined only to those health funds that provide a financial benefit to an intermediary.

There is potential for such conduct to raise concerns under the Act, particularly its provisions prohibiting misleading or deceptive conduct, as consumers may be under the misapprehension that the intermediary who is providing their advice has reviewed the policies of every health fund, rather than just the policies of a very small number of funds. This is an issue about which the ACCC has written to the intermediaries, their industry association and health funds, and which the ACCC will continue to monitor in this regard.

Portability

The issue of portability of health fund membership is another significant issue. While the ACCC supports the principle of portability and considers it to be an essential feature of the private health insurance system, a number of submissions indicated the operation of portability can be problematic in some situations. An example given to support this argument was that of members of a fund in a contractual dispute with a hospital began transferring to other funds, but in doing so put pressure on the smaller funds, which may find it hard to accommodate a large number of transferring members who may be already booked in for treatments. The smaller funds might then try to impose restrictions on transferring members to correct this problem. Given the potential for such a situation to cause detriment to health fund members, the ACCC has indicated its support for the Private Health Insurance Industry Ombudsman's attempts to resolve the issue through a co-operative approach within the industry.

Contracts between hospitals and health funds

Ongoing difficulties in the contracting environment between hospitals and health funds remain a concern for many stakeholders. Key problems identified included delays in commencement of negotiations, inappropriate negotiating tactics and the use of a 'take it or leave it' offer rather than any genuine negotiation.

From the ACCC's perspective, there is recognition that relativities in bargaining power may affect the outcome of HPPA negotiations and that this in itself is not unlawful. However, there will be some instances where the outcome of negotiations may indicate that the Act has been breached, particularly where no legitimate commercial reason for certain outcomes is apparent. In such situations, concerned parties are welcome to contact the ACCC.

Purchase Provider Code of Conduct

The efficacy and coverage of the Code of Practice continues to be questioned by some stakeholders. It appears that a significant number of private hospitals are still not signatories to the Code.

There is a belief by some private hospital representatives that the Code is not a useful tool in contract negotiations and needs to be reviewed. There have even been suggestions that compliance with the Codes provisions should be mandatory.

5. MERGERS AND AUTHORISATIONS

The Trade Practices Act prohibits mergers that substantially lessen competition. However, companies proposing to merge are not required to obtain the ACCC's approval. Rather, there exists a long-standing practice for companies to approach the ACCC asking whether it would commence legal action if they proceed with the merger. This is known as the informal clearance process.

In most cases, mergers do not raise competition issues. But if the ACCC concludes that a merger would be likely to breach the Trade Practices Act, then the companies involved generally opt not to proceed with the merger. However, in some cases, it is possible to give an undertaking to the ACCC addressing the competition concerns – for example, an undertaking to sell the part of the company raising these concerns. In a very small number of cases, parties choose to proceed with a merger despite ACCC opposition and the matter needs to be resolved in court.

It is also possible for mergers to be authorised by the ACCC. Authorisation provides merger parties with immunity from prosecution under the Trade Practices Act if they can show that their merger satisfies a public interest test. ACCC decisions are appealable to the Australian Competition Tribunal.

I should add that legislation is before the Commonwealth Parliament to significantly change the processes used to assess mergers under the Trade Practices Act. In particular, if passed, the legislation would establish a formal process for the ACCC's consideration of whether a merger substantially lessens competition, which would include the ability for merger parties to appeal ACCC decisions to the Competition Tribunal. The legislation would also send merger authorisations straight to the Competition Tribunal, although the ACCC would still play a role.

Recent Health Mergers

The ACCC has looked at three hospital mergers this year. In April, Ramsay Health Care approached the ACCC seeking informal clearance to acquire Affinity Health. Briefly, Ramsay gave the ACCC an undertaking at the outset to sell several specified Affinity hospitals, as well as any further hospitals identified by the ACCC as raising competition concerns. In August, the ACCC identified further such hospitals, resulting in Ramsay needing to sell 19 hospitals overall.

Healthscope then proposed to acquire 14 of these hospitals, and the ACCC announced it would not oppose this acquisition in September. Ramsay is now in the process of selling off the remaining five hospitals.

Earlier, in March, the ACCC granted authorisation to the Little Company of Mary, which owns St Luke's Hospital in Launceston, to acquire the only other private hospital in Launceston, St Vincent's, from the Sisters of Charity. The ACCC accepted that the acquisition would generate cost savings that would be used to improve the quality of service provided to patients in northern Tasmania. It also accepted that the merger would not significantly impact on competition as without the acquisition one of the hospitals was likely to close within a few years anyway. Overall, the benefits to the public of the merger outweighed the detriments.

How Mergers Are Assessed

Hospital mergers are inherently complex. This is because the health system is complex, and hospital mergers must be assessed against this backdrop. Consequently, it is not really practical, within the confines of this speech, to give you a comprehensive picture of how the ACCC assesses hospital mergers. Rather, I will try to illuminate some of the key issues. Anyone who is interested could look at the ACCC's website, on which they will find more detailed explanations of its decisions in the Launceston, Ramsay-Affinity and Healthscope acquisitions.

Generally, when assessing hospital mergers, the ACCC has focused on local markets for the supply of hospital services to health fund members. This reflects the fact that health funds, in effect, collectively negotiate with hospitals on behalf of their members. Of course, health funds also spread the cost of healthcare across their members.

The markets are local because health funds, when negotiating with a hospital, are effectively negotiating on behalf of their members who might wish to use that hospital. And patients tend to wish to use hospitals close to where they live so as to be close to family and friends.

The advantage of looking at health fund-hospital markets is that they illuminate issues relating to both price and consumer choice. In particular, the ACCC looks to see if, post-merger, health funds would be able to resist a price rise sought by the merged hospital. This is essentially a question of whether health funds could viably forgo a contract with the merged hospital. This, in turn, depends on whether health funds could be confident that their members would consider that the remaining hospitals in the relevant local market constituted a satisfactory offering.

In the Ramsay matter, the ACCC identified three markets where it considered that health funds would be unable to resist a price rise. Perhaps the clearest example was in Gosford, New South Wales. There are three private hospitals in the area. Pre-merger, one was owned by Ramsay, one by Affinity and one by Healthscope. Post-merger, a health fund going out of contract with Ramsay would therefore have left its members with access to only one of three private hospitals in the Gosford area. The ACCC judged that health fund members would be more likely to switch funds than accept this limitation on their choice – and more particularly their doctor's choice – of hospital. Knowing this, health funds would have little choice but to pay Ramsay higher reimbursements. Consequently, the ACCC did not allow Ramsay to acquire a second hospital in the Gosford area.

When considering a matter under section 50, the ACCC's role is to ensure that hospital mergers do not substantially lessen competition, causing higher prices – in this case, higher health fund premiums – or a lower quality of service for patients.

Even in situations where a hospital merger was likely to lead to a substantial lessening of competition then the possibility that the merger could result in lower prices could be relevant to an authorisation application. In an authorisation, it might well be argued that allowing hospitals to merge would lower costs, and that at least some of

these savings would be passed on to consumers through a reduction in their health fund premiums.

Alternatively, it might be argued that consumers would benefit from a merger by an improvement in the quality of service. For example, in the Little Company of Mary authorisation, the ACCC accepted that the merger of St Vincent's and St Luke's in Launceston would reduce costs. In particular, the merger would have allowed duplication between the hospitals to be minimised. The ACCC was satisfied that these benefits would be passed on to the community generally through an improvement in the range and quality of services available to private patients in northern Tasmania.

However, this is just one case and, like any merger, whether a hospital merger would lower prices for consumers would depend heavily on its own facts and circumstances.

On final point on this issue - the ACCC is aware of media reports suggesting that certain health funds might be interested in acquiring at least part of Medibank Private. If true, then there is some potential for the sale of Medibank Private to raise competition issues. However, it is probably too soon to make any predictions. The ACCC will be following progress of this matter carefully.

6. GOING FORWARD

Given the importance of health services to consumer interests ACCC's role permeates the private health sector. I regret that this speech was timed such that I could not provide details of our imminent report to the Senate. However I can say there are not likely to be many surprises.

Some issues are being dealt with in a more satisfactory manner by health funds while others such as exclusions and restrictions, portability and contracts between hospitals and health funds remain on the ACCC's radar screen.

Thank you for the opportunity to speak with you today. I welcome any comments or questions.