PHIO Annual seminar
Compliance with the TPA in the private health insurance sector
August 15, 2008

ACCC commissioner John Martin

1. INTRODUCTION

I welcome the opportunity to speak to you here today. The ACCC has had an improved working relationship with both the medical and insurance communities over recent years, and events such as this one are a good opportunity to share information and insights into the Commission's views on important issues potentially impacting on the business and consumer stakeholders you represent.

As you will be aware, the ACCC pays close attention to the private health insurance industry including our reporting obligations to the Senate. In conjunction with bodies including the Private Health Insurance Ombudsman, the ACCC has an important job of responding to concerns that members of the public raise with us and monitoring compliance with Australia's competition laws. As a front-line agency dealing directly with concerns from a broad range of Australians, the ACCC is well placed to pick up on emerging trends or concerns relating to a wide range of consumer issues.

Today I'd like to share some of the latest intelligence from the ACCC's database about the issues that are being raised with us in relation to private health insurance, and how those issues fit in to the wider health sector.

The ACCC has taken action in the past against several insurers, and in turn the industry has worked closely with the ACCC to achieve compliance with the Trade Practices Act.

This year marks a decade since the release of important guidance material for the private health insurance industry. Much has been achieved since that time, and standards have improved as a result of a growing understanding of the importance of compliance programs within the insurance sector.

Health sector operators have been moving towards a culture of compliance, and have realised the benefits effective compliance programs can bring. The ACCC for its part has worked to improve consultation, liaison and guidance to health sector stakeholders in dealing with both the responsibilities and the protections conferred by the TPA.

2. ANALYSIS OF COMPLAINTS AND ISSUES

First, I'd like to share with you some analysis of the issues that are being raised with the ACCC in relation to the health care industry, and specifically private health cover providers.

In the first six months of this year the ACCC received a total of 338 complaints and inquiries relating to the health sector.

While the numbers need to be interpreted with some caution, what we have observed over recent years is a slight overall decrease in the number of complaints we are receiving. This includes everything from general questions about services, through to very specific complaints against a particular practitioner. The ACCC's role is to deal with competition and consumer protection issues in this area, such as collusion between service providers, and not all of the calls we receive are competition related or within our consumer protection role.

The greatest number of complaints and inquiries – around 28 percent of all contacts - related to specific medical services. The types of complaints making up the majority of calls were allegations of misleading behaviour by practitioners claiming to cure erectile dysfunction, and complaints against cardiologists and other specialists such as plastic surgeons.

Complaints about health insurance made up the second largest category recorded during the survey period, and related to around 17 per cent of all health-related contacts. The ACCC received more calls about health insurance than it did about general medical practice services, aged care or hospitals.

The numbers of complaints against private health insurers are not large – when inquiries are taken out of the statistics, there were 44 complaints over six months. This is a however a proportionately significant increase on the preceding six month period, from June to December last year, where the ACCC received 30 complaints. It is worth remembering that those making complaints may not consider reporting to the ACCC, they may instead choose to go directly to the ombudsman's office instead, so these cannot be viewed as a complete picture of the level of concern, only that reported to the ACCC.

It is also worth remembering that private health insurance has been in the public eye during the first half of the year, with recent matters such as the Government's budget commitment to make changes to the Medicare levy surcharge thresholds, the merger of MBF and BUPA, and the proposed sell-off of Medibank Private all making the news. This may account for some of the increased interest, and thus complaints, about insurance providers.

Delving into the complaints data, there were several main issues raised by callers to the ACCC. The most prevalent were complaints that a health insurance provider would not give a required rebate or would not cover certain services. Several complaints related to preferred provider schemes, as well as increases in policy premiums.

The ACCC's most recent report to the Senate on anti-competitive and other practices by health funds and providers in relation to private health insurance also noted several longer-term, on-going concerns.

Principal among these were concerns over the amount of consumer information available to health fund members, and issues of contract negotiations between health fund and health service providers.

For health fund members, the on-going concerns seem to relate to benefit entitlements, gap payment liabilities, exclusions and limitations on benefits, such as for pre-existing medical conditions, and portability of cover between funds.

Increasing transparency in negotiations between health funds and service providers has seen many funds operate on a much more commercial basis than might have been the case in the past. It has not been a totally smooth transition for some funds, and allegations of anti-competitive conduct have been received by the ACCC. However, investigations by the ACCC during the 2006-2007 report period did not find evidence of the *Trade Practices Act* being breached in this regard.

3. CONSUMER INFORMATION AND INFORMED FINANCIALCONSENT

The Commonwealth Department of Health and Ageing noted in its submission to our most recent Senate report that:

> … the aim of Informed Financial Consent is to ensure that consumers have access to all the information they need prior to a procedure as a private patient. This information includes any likely costs and out-of-pocket (gap) expenses that may be incurred as a result of the procedure.

Clearly, the ACCC sees it as an important consumer issue for patients to have a reasonable idea of the likely costs of any treatment before they elect to take it.

Obviously it is not always possible to predict complications that arise during surgery or other unforeseen issues that can affect the final cost of treatment. However, the ACCC believes it is reasonable, with these caveats in mind, for patients to request an estimate of costs associated with medical procedures.

The ACCC also considers that health service providers have a duty to inform consumers about the cost of health services. This places a corresponding duty on health insurance funds to ensure their members have access to important information that will affect the amount they will pay for particular services normally referred to as the ‘gap’ or out-of-pocket expense. As I have shown from our Senate report and analysis of calls to the ACCC, this is clearly an important issue for the public, as medical costs can be quite high in some circumstances.

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

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

Consequently, health funds should provide clear, straightforward information about health insurance products, particularly those products subject to restrictions and exclusions. This information can help prevent consumers misunderstanding the details of their coverage and reduce disputes between members and funds.

In most non-emergency situations, informed financial consent should be possible, but it requires some effort on the part of everyone –health funds, health service providers, and in some cases patients.

In recent years there have been a number of activities by various organisations or groups intended to enhance informed financial consent.

The Department of Health and Ageing commissioned a consumer survey in November to December 2006 to measure the level of informed financial obtained by doctors from private patients. A similar survey in 2004 had established a baseline for measuring improvements.

Without wanting to reproduce the entire findings here, the 2006 survey showed a five per cent reduction in the proportion of consumers facing a surprise 'gap' as part of an episode of hospital treatment.

CHOICE's submission to our Senate report noted a recent Ipsos report (Consumer Survey–Informed Financial Consent 2006), showing that informed financial consent has improved since 2004 – 16 per cent of all private patients experienced a gap and were not informed beforehand versus 21 per cent in 2004. CHOICE also noted that this figure still needs improvement.

We are encouraged by the strong support health funds gave to the need for informed financial consent in their submissions to our latest Senate report. Increasing access to information about the likely costs of procedures is important to your members, and assisting them with improved information will also address some of the complaints members make to the ACCC and the funds directly.

4. RECENT MERGER DEVELOPMENTS

Many of you will be aware that this week the ACCC decided not to oppose Medibank's proposed acquisition of Australian Health Management Group Limited.

As with all our merger assessments, the ACCC conducted a thorough investigation of the impacts the proposed merger would have on both the industry and private health insurance consumers.

The ACCC decided not to oppose the merger on the basis that there were likely to be alternative providers of health management services currently operating or capable of expanding to form an alternative to the merged entity.

This follows the ACCC's assessment last year of the proposed merger of BUPA Australia and MBF Australia. In that assessment, the ACCC found allowing the merger to go through would remove a significant competitive constraint in South Australia. However, competition from existing providers including Medibank and Health partners would constrain the merged firm.

Smaller insurance providers would also provide an alternative to consumers. There was also deemed to be insufficient evidence that BUPA's increased size would give it the ability to push up the costs of its rivals by negotiating more favourable conditions for itself with private hospitals.

5. PREFERRED PROVIDER SCHEMES

Another important issue for patients who are members of private health funds is that of preferred providers for certain procedures.

Questions have been asked about the arrangements that health funds make with particular service providers. The main issue as far as consumers are concerned, is that of choice, ie not being bound to a certain facility when seeking treatment.

Where customers, or members in this case, are forced by one business to use the services of another business, they are subjected to what is known as third-line forcing. Third-line forcing is only deemed to be illegal under the Trade Practices Act where it represents a substantial lessening of competition in a particular market.

Third-line forcing can involve a business refusing to sell a product unless the customer agrees to deal with a third party as well, for example selling a car on the basis that it must be serviced at a particular garage.

It can also involve financial incentives for using a particular business, for example a good price on a car that is only available if the customer agrees to take finance from a company specified by the dealer.

In the area of private health insurance, concerns about third-line forcing come from both consumers and providers.

Concerns from a consumer view point relate to customers potentially suffering a financial penalty if they decide not to seek treatment with a preferred provider that the fund has arrangements with.

The ACCC has considered this issue in some detail. While it is true that fund members may receive a greater rebate or better deal when choosing to have treatment at a fund's preferred provider, they are still free to seek treatment elsewhere if they wish – they simply receive less of a rebate. Therefore any concerns about third-line forcing are unlikely to raise concerns, as those patients are not being forced to use a particular provider.

Some providers that are excluded from such schemes have at times complained to the ACCC but the Commission has found the arrangements are pro-competitive rather than anti-competitive.

If however, a fund refused to pay for treatment unless it was provided by one of its preferred facilities, that would be more likely to raise concerns with the ACCC.

6. THE BENEFITS OF COMPLIANCE

I mentioned at the outset the importance of instilling a culture of compliance, and the positive effect this can have on a business.

It may come as a surprise to some of you to hear that there is no legal requirement for companies to implement a Trade Practices Compliance Program. However, it is no coincidence that many of the most successful businesses in Australia are those with a strong track record of compliance training and recognised compliance programs.

The most obvious and immediate benefit to a business in having a strong culture of compliance is the reduced risk of breaching the Trade Practices Act and therefore coming to the attention of the ACCC.

Such a mechanism will both identify those areas of the law that a firm is most exposed to and implement specific measures to minimise the likelihood of contravening those laws. It thereby enables a company to secure consumer confidence while competing vigorously in the market confident that it is playing within the rules of the game.

The ACCC believes compliance programs are an important element of the various measures offered by firms as means to resolve trade practices concerns.

As many of you here will recall, in 2003 and 2004 the ACCC took issue with several private health insurers in relation to advertising which the ACCC held to be potentially misleading.

This advertising involved claims of waiting periods being waived, while the fine print stated that for a number of services, waiting lists would still apply. The Federal Court found the insurers had not sufficiently explained that their offers to waive waiting periods did not cover all services.

Those familiar with the Trade Practices Act would be aware of the broad range of provisions designed to protect consumers from being misled. The ACCC provides a range of advice to businesses wishing to advertise their services about issues such as fine-print disclaimers that may risk misleading the public.

Of course these insurers are not alone, there are many businesses in many industries that have been taken to task over fine print disclaimers and advertising that has the potential to mislead. Given changes to the Medicare surcharge levy raised recently by the Federal Government, many insurers may be looking to increase their advertising in the coming months. It is important not to forget the mistakes that were made in the past, and the ACCC can assist those businesses to ensure their advertising remains within the acceptable parameters of the law.

The point is, this is exactly the kind of costly issue that businesses can avoid through implementing a strong TPA compliance program. Corrective notices, withdrawal of advertising campaigns and other measures to address such concerns are embarrassing for businesses, can damage a firm’s good reputation, and can be expensive. These are all good reasons for businesses

to be aware of such risks and take active steps to prevent such mistakes from happening in the first place.

In Australia compliance programs are often introduced by companies as a result of ACCC action resulting in a legally binding undertaking, or a court order requiring the company to implement a compliance program.

The Commission regularly seeks court orders that companies implement or upgrade Trade Practices Compliance Programs as a preventive measure reducing the risk of future compliance failures.

The existence and quality of compliance programs are well recognised factors in mitigating penalties for breaches of the TPA.

But implementing a truly effective compliance program is not a one-off activity, it is an on-going process or reassessment and refinement.

The ACCC has sought to make this journey easier for companies by developing templates that help guide them through this process.

7. COMPLIANCE TEMPLATES

In 2005, the ACCC developed a series of compliance program template undertakings which provide firms both with an example of what the ACCC considers advisable in compliance programs generally and with an indication of what the ACCC is likely to accept by way of administrative resolution.

Commitment

The company's governing body and top management must be committed to effective compliance and this commitment should spread throughout the organisation. This can both be made explicit and easier to implement by aligning the compliance policy to the company's strategy and business objectives. Commitment ***always*** means the allocation of appropriate resources – without them, the program courts almost certain failure and future avoidable trade practices risk.

Implementation

The company must clearly assign responsibility for compliant outcomes within the organisation. This includes the assessing and where necessary the development of the required competencies to enable employees to fulfil their compliance obligations. Behaviours that create and support compliance should be encouraged and behaviours that compromise compliance should not be tolerated. Controls must be put in place to identify compliance obligations, manage them and achieve desired behaviours.

Monitoring and Measuring

The compliance program's implementation should be monitored, measured and reported – this allows the company to demonstrate its compliance program through documentation and practice. I will provide some examples shortly to illustrate how well this can serve companies in practice.

Continual Improvement

The compliance program must be regularly reviewed and continually improved. Continual improvement must be a byword for the operation of any compliance program, as it is with any corporate process that is essential to the company's competitiveness.

8. CONSULTATION AND REVIEW

The ACCC has over recent years emphasised the importance of improved consultations with the health sector. The Health Services Advisory Committee was established in 2003 to overcome misunderstandings and misconceptions and culminated in the launch of the ACCC Info kit the medical profession.

Subsequently the ACCC has established a wider group, the Health Sector Consultative Committee that includes medical, dental; optometry, physiotherapy, private hospital and health insured representatives.

In addition health sector stakeholders have potentially benefited from an important review of the medical specialist colleges' key areas of operation conducted jointly by the ACCC and the Australian Health Workforce Officials' Committee (AHWOC). The recommendations of the joint ACCC/AHWOC Report on the Colleges were approved by Australian Heath Ministers in July 2005.

The Report covered selecting and training specialist doctors, accrediting hospitals for training and assessing overseas trained specialists seeking employment in Australia. The agreed approach mirrored the key principles underlying the ACCC's conditional authorisation in 2003 of the processes of the Royal Australasian College of Surgeons – transparency; accountability; stakeholder participation; and procedural fairness.

The cooperation and positive participation of colleges was a major factor in producing a report aimed at creating fair and transparent processes and establishing a dialogue between colleges and key stakeholders.

Implementation of the recommendations should lead to training programs for specialist doctors that are based on sound educational evidence and produce the type of doctors required to provide services that meet the needs of the community. In addition, the recommendations seek to ensure each college has in place an efficient and transparent process for the assessment of overseas trained doctors.

9. CONCLUSION

It is pleasing to come and speak to an industry where there is an obvious desire to improve compliance with the Trade Practices Act. The private health insurance sector does still receive a certain number of complaints every year, and our reports into the industry show there are issues that remain of concern to health fund members.

Increased efforts within the industry over the years to improve compliance have yielded benefits for the industry but continuing vigilance is essential.

A TPA compliance program will not work if it is just lip-service. It must be a cornerstone of a business's philosophy, an on-going commitment that is constantly revisited.

The pay-off for the business that makes a strong commitment to TPA compliance goes well beyond avoiding running foul of the regulator. It allows businesses to push the limits, knowing they are acting within the law, and to promote their businesses with the confidence that their claims to customers or members are valid.

These are recipes for success. I'd be happy to take questions.