

GMHBA SUBMISSION RE THE AFLPA / MEDIBANK THIRD LINE FORCING

The AFLPA/Medibank arrangement should not be endorsed by the ACCC because of the:

- 1) Absence of any proven broad public benefit,*
- 2) Vital need to uphold the principle of Community Rating, and the*
- 3) Importance of preserving the future sustainability of the health insurance industry.*

The Trade Practices Act 1974 (the Act) prohibits corporations outright from engaging in exclusive dealing conduct. Generally speaking, exclusive dealing involves a corporation imposing restrictions on another's freedom to choose with whom, or in what, it deals. Subsections 47(6) and (7) of the Act prohibit exclusive dealing of the type known as third line forcing. Third line forcing occurs where a corporation supplies goods or services on condition the customer acquires other goods or services from another business or refuses to supply because the customer will not agree to that condition.

Both the AFL Players Association (AFLPA) and Medibank Private (Medibank) have conceded their business arrangement breaches the Trade Practices Act. That is why they have sought immunity from the ACCC. The degree to which competition is compromised by the application of market power via third line forcing is not relevant. Third line forcing is illegal regardless of the number of people impacted, whether the business is small or the sport involved is a local suburban sporting club. In this case, the entities requesting they be exempt from the Trade Practices Act are Australia's largest health insurer (Medibank) and a union representing professional footballers (the AFLPA).

Importantly, our submission is not about the use or abuse of market power and the impact on competition. It is primarily about whether or not it is in the 'public interest' to let Medibank and the AFLPA operate outside the Trade Practices Act. Unlike some other provisions in the Trade Practices Act, third-line forcing per se is prohibited. This means both Medibank and the AFLPA are in breach of the Trade Practices Act by engaging in their conduct, even if Medibank's intent was not based on a sponsorship objective of increasing sales and creating barriers to entry in a segment of young professional sportspeople. The only legal argument available to both Medibank and the AFLPA is that allowing such a breach of the Trade Practices Act to continue is "in the public interest".

By way of background, before the announcement of this arrangement, more than 80 current AFL players had their health insurance needs met by GMHBA. If Medibank's national market share is reflected in that segment of the market represented by the AFL, approximately thirty to forty percent of AFL player health insurance policies in 2006 may have been shared between GMHBA and Medibank. With the offer of 'free' health insurance for AFL players from the AFLPA (conditional on it being from Medibank) it is likely that 100 percent of this influential segment will be 'owned' by Medibank when a public policy objective of privatising Medibank is to promote competition.

THE NARROW FOCUS

The legal argument of the AFLPA and Medibank ⁽¹⁾ defines 'public interest' as 'AFL footballers'. The public beneficiaries of this 'free' health insurance are estimated to be "More than 600". The AFLPA is on the public record of stating one of their strategic objectives is to: "Secure optimal taxation, and superannuation arrangements for AFL players and the AFLPA."

⁽²⁾ GMHBA believes the health of our AFL members is equally as important as their taxation arrangements and we note that the health of AFL players does not appear to be a stated strategic objective of the AFLPA.

THE BROADER FOCUS

What is not mentioned in the AFLPA and Medibank submissions is that more than 20 million members of the 'paying public' are expressly excluded from being advantaged by this third line forcing arrangement. The GMHBA health insurance products previously chosen by AFL footballers are the same as those available to the general public. ⁽³⁾ Medibank's health insurance products being made available to AFL players via the AFLPA are a nil excess 'Priority Gold Hospital' cover and a 'Priority Gold Extras' cover. These exclusive and discounted covers are NOT available to the general public.

Under the auspices of the National Health Act 1953 (the Health Act), it is clearly not in the public interest of 20 million Australians to ignore the third line provisions of the Trade Practices Act. Taking a public policy stance, GMHBA's primary responsibility, and that of all registered health funds, is to operate within the requirements of the Health Act. The primary purpose 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 primary purpose of the Health Act is to uphold the principle of "Community Rating" meaning people are not discriminated against when purchasing health insurance because of their age, occupation or level of fitness and health. According to the Federal Department of Health and Aging,

Community Rating is the fundamental regulatory requirement on the operation of health funds. The intent of community rating is to facilitate affordable access to private health care for all Australians. It Means that everyone pays the same premium for their health insurance. ⁽⁴⁾

Clearly around 20 million Australians are being discriminated against. Not only are they excluded from this 'free health insurance' arrangement; they cannot even buy the product.

The annual pre-rebate cost of Medibank's nil excess priority gold hospital cover and priority gold extras cover (not available to the general public) for a single membership in Victoria is \$1933.20. ⁽⁵⁾ Should a member of the public wish to purchase an equivalent cover, they will have to purchase a nil excess blue ribbon hospital cover and blue ribbon extras cover at an annual cost of \$2,426.40. Medibank is able to offer this notional discount of 20% only because it selectively targets segments of the community that are less likely to be high claimers throughout the life of the membership. This is clearly a breach of Community Rating.

It could be argued that the provision of 'free' health insurance to AFL players is in the interest of 20 million Australians if women, the sick and the elderly could purchase these 'priority products' at the same price as carefully selected segments of the market. However until such time as Medibank removes all the restrictions relating to these exclusive products and prices in accordance with the requirements of the Health Act, then clearly allowing this third line forcing to continue seriously erodes the principle of Community Rating, which dictates premiums cannot be varied according to gender, age, health or occupation.

The AFLPA and Medibank contend their third line forcing will enhance competition in the relevant markets. ⁽⁶⁾ Arguably no other health fund in Australia could afford to give away health insurance free in such magnitude whether directly or via a sponsorship arrangement. Similarly few competitors have the market power to sustain discounts in the order of 20%. In fact to ensure the financial viability of the health insurance industry, which runs on slender margins, the Health Act actually stipulates that discounts be no more than 12%. ⁽⁷⁾

CONCLUSION

GMHBA argues both the exclusive dealing and selective discounts involved in the AFLPA and Medibank arrangement, not only cannot be in the public interest, but are offers only Medibank with its dominant market share can make. Therefore we believe the 'public interest' argument for exemption from third line forcing is irrelevant as the arrangement breaches the discounting rules and fundamental principles of Community Rating enshrined in the Health Act.

REFERENCES FOR GMHBA SUBMISSION

(1) **Legal argument of the AFLPA and Medibank contained in their submissions to the ACCC**

"The proposed conduct will be of benefit to the public as it will:

- i) Reduce costs for AFLPA members who may be otherwise unable to negotiate comparable discounts or benefits in relation to health insurance services on their own behalf;

[\[back\]](#)

(2) **AFLPA strategic objective**

www.aflpa.com.au/index.cfm?menuid=D2A2485D-D4BF-B74C-A1678873226B4772

[\[back\]](#)

(3) **GMHBA's 'Gold Hospital and Extras' pricing available to the general public**

www.gmhba.com.au/quote/quote.asp

[\[back\]](#)

(4) **The intent of Community Rating enshrined in the National Health Act 1953**

www.health.gov.au/internet/wcms/publishing.nsf/Content/health-privatehealth-consumers-glossary.htm#Community%20rating

[\[back\]](#)

(5) **Medibank's 'Priority Gold Hospital and Extras' pricing not available to the general public**

www.medibank.com.au/medibank_corporate.asp?co=1204608

[\[back\]](#)

(6) **Legal argument of the AFLPA and Medibank contained in their submissions to the ACCC**

"The proposed conduct will be of benefit to the public as it will:

- ii) Promote competition in the relevant markets by encouraging health insurance competitors to offer similar discounts to sporting clubs and other associations."

[\[back\]](#)

(7) **National Health Act Reference**

"The National Health (Maximum Percentage of Discounting of Contributions to Organisations) Determination 1999 made under the old subsection 73BA(4) of the National Health Act 1953 (NHA) (now deemed to be made under the new subsection 73AAG(4)) establishes 12% as the maximum discount."

[\[back\]](#)