

Professor Ian Harper
Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600
Contact@CompetitionPolicyReview.gov.au

Dear Professor Harper

Thank you for the opportunity to make a response to the Competition Policy Review's Draft Report released in September 2014.

The Australian Private Hospitals Association (APHA) welcomes the specific attention given by the Review to the potential of further competition reform to contribute to increased productivity in the health sector and the support expressed for extension of competitive neutrality.

The APHA also welcomes many of the Panel's proposals with respect to the reform of competition policy, regulation and governance structures. Detailed comments are outlined in the attached document.

Yours sincerely



Michael Roff
Chief Executive Officer
The Australian Private Hospitals Association
17 November 2014



APHA Response to the Draft Report (Sept 2014)

The Competition Policy Review - 2014



Executive Summary

The Australian Private Hospitals Association is grateful for the opportunity to respond to the September 2014 Draft Report of the Competition Policy Review.

APHA welcomes the specific focus given by the review to the role of competition policy in addressing growing demands of health and aged care services.

The APHA agrees with the view expressed that, well managed competition policy can empower consumers and improve productivity. APHA believes that this has been demonstrated through the growth and maturation of the private hospital sector over several decades.

APHA gives support to the Panel's recommendations with respect to human services.

In the area of human services, the Panel recommends that:

- User choice be placed at the heart of service delivery;
- Funding, regulation and service delivery be separate;
- A diversity of providers be encouraged, while not crowding out community and voluntary services; and
- Innovation in service provision be stimulated, while ensuring access to high-quality human services.

APHA agrees with these recommendations. With respect to the second recommendation however, there is one particular constraint that needs to be taken into account and that is that a significant proportion of funding and a major part of regulation in the health sector are controlled by States and Territories.

APHA welcomes review of competitive neutrality policies and the improvement of associated complaints handling and monitoring processes.

APHA welcomes broadening of the application of competitive neutrality policies to all government activities "which have a trading or commercial character" and the widening in scope of competition policy to "encompass the provision of government services more generally".

APHA welcomes the recommendation that regulations restricting competition with respect to pharmacy should be reviewed.

APHA welcomes review of regulations regarding the licencing of pharmacy services. It is important to ensure that consumers have access to the professional support of pharmacists and that innovation is encouraged so that new models of care and delivery emerge to efficiently meet changing health needs.

APHA supports the principle that regulation ought to be subjected to a public benefit test.

Competition policy needs, as the Panel repeatedly stated, to place consumer choice at its centre. This principle is of crucial importance in the health sector where consumers face significant asymmetries in information and power. Furthermore regulation of one aspect of the health sector almost invariably impacts the sector as a whole. Consequently both the direct and indirect implications of any regulation must be taken into account in any public interest test.



The APHA welcomes the proposal to change provisions to competition law specifically:

- **Section 46 – Misuse of Market Power:** APHA welcomes the proposal to reformulate the concept of “taking advantage of market power” to target “anti-competitive conduct that has the purpose, effect or likely effect of substantially lessening competition.”
- **Merger Approval Processes:** APHA welcomes the streamlining of merger approval processes.
- **Collective Bargaining:** APHA welcomes moves to reduce the cost of approval processes for authorisations and notifications regarding collective bargaining arrangements.
- **Dispute resolution Scheme for Small Business:** APHA welcomes the establishment of a dispute resolution scheme for small business.

The APHA welcomes proposal to establish the Australian Council for Competition Policy.

The APHA welcomes the inclusion of the roles of advocate and educator within scope of this proposed body and in particular the recommendation that both governments and market participants might put forward for consideration requests for market studies.



Competition Review and the Human Services

APHA welcomes the strong emphasis within the Panel's discussion paper on the need to deepen and extend competition policy in the human services sectors.

APHA is welcoming of the Panel's support for competitive neutrality as "a key mechanism for strengthening competition in sectors where government is a major provider of services" and of the Panel's support for extending competitive neutrality principles to the human services.

With reference to the health sector in particular, the APHA would offer the following comments:

APHA market research strongly supports the view that consumers place a high value on choice with regard to health care


- However, consumers of health services continue to face a significant challenge in accessing relevant information. Current regulations require health providers to obtain informed financial consent prior to treatment. Regulations regarding the use of testimonials may require review in order to address the current information asymmetry in the way suggested by the Panel.
- It is essential that the incentives of purchase advisers and other intermediaries are aligned with consumers. The importance of the role of government in this regard has been demonstrated in the regulation of private health insurance where the Federal government has played an essential role in mandating minimum levels of coverage and in providing an independent information service and complaints and mediation process through the Private Health Insurance Ombudsman.

APHA supports the separation of government roles in funding, regulation and provision while noting the complex nature of government roles in the health sector.

- Creation of independent bodies such as the Australian Commission on Safety and Quality in Healthcare have been helpful in establishing a basis for clear and consistent regulation across a diversity of health services however it should be noted that there remains significant overlap and duplication in the roles of multiple regulators at both State and national level.
- In the past, regulation within the health sector has often been designed and implemented within the public sector and only later applied to the private sector. Frequently the assumption is made that regulatory frameworks and processes designed for the public sector can be readily applied to the private sector without further change. This is almost never the case because of the significantly different legal frameworks and business models used in the private sector. Consequently moves to further open up competition in the health sector are likely to require further review and reframing of regulation.
- Stringent private hospital licencing requirements are imposed by several states on private hospitals however no such licensing requirements are imposed on public hospitals run by these same jurisdictions.

APHA supports the emphasis given by the Panel to careful commissioning.

- Commissioning and call for tender processes must be designed to deliver the best outcomes for consumers taking into account both short and long term objectives.
- While short term objectives may include rapid response to fluctuations in demand and purchase of services at a competitive price, long term objectives need to include the



attraction of long term investment and establishment of a capacity to meet future service needs.

- Australian experience in the health sector with public-private-partnerships has included some outstanding successes but also some significant failures which have been costly to both governments and the private sector partners involved.

It is noted that the Panel recommends that each jurisdiction should be asked to develop an implementation plan to open up human services to increased competition. While this proposal respects jurisdictional autonomy and avoids the problem of needing to achieve multilateral agreement, jurisdictional variations and the involvement of both Federal and State/Territory governments in health sector funding, regulation and policy create a complex environment for health services providers.

There is currently a significant degree of variation between jurisdictions in the regulation of the private hospital sector, the standards imposed and associated licensing and reporting processes. The burden of reporting and compliance is significant in most jurisdictions and this is further multiplied for hospital groups operating across more than one jurisdiction and individual health services in cross-border communities. A recent project undertaken by the Australian Commission on Safety and Quality in Health Care sought to identify scope for “harmonisation” of safety and quality requirements across jurisdictions and at the national level but this work has yet to result in meaningful change. When developing their implementation plans, jurisdictions should be encouraged not only to reform regulations that limit competition but also to consider opportunities to reduce duplication and achieve harmonisation with requirements at other levels of government and in other jurisdictions.

APHA is welcoming of the Panel’s support for government procurement processes that focus on outcomes rather than outputs and processes that encourage diversity, choice and innovation. APHA would add that further to this, procurement processes that foster longer term relationships between procuring agencies and providers are more likely to encourage long term investment in capacity building and innovation.


Competition Laws

APHA welcomes the proposal that the prohibition on the misuse of market power should be broadened to include a prohibition on conducts that, “would have or be likely to have the effect, of substantially lessening competition”.

On the question of a justifiable defence, the Panel has proposed that the corporation in question might argue that the conduct:

- “would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and
- “the effect or likely effect on the conduct is to benefit the long-term interests of consumers.”

APHA regards it is essential that long-term interests of consumers remain the primary consideration. Furthermore consumer interests must include not only considerations of price but also of availability and fitness-for-purpose. Many times in the past the private hospital sector has expressed concern at the market power exerted by major health funds and their impact on the market for private hospital services and patient access to health care. While consumers may benefit in the short term from cheaper health insurance premiums they will lose in the longer term if the value of the insurance products they purchase is also eroded such that it is no longer fit for purpose or if private hospitals are driven out of the market to the point where services are difficult to access.



The Review's discussion of the issue of "third line forcing" highlights the importance of two of the key principles informing the review: regulatory simplification and primacy of consumer interests. From APHA's point of view it is imperative that the consumer's interests remain paramount particularly in the three-way relationship between consumer, hospital and health fund. It ought not to be acceptable for one business to impose costs and obligations on another without delivering a benefit to the end-consumer that both businesses purport to serve. For example, if a health fund were to demand that a hospital participate in an audit program run by that same health fund which delivered benefits to the health fund (revenue, branding and reputation as an upholder of quality) but which did not in fact support the hospital in enhancing quality of care, then the efficiency of the market in meeting the consumer's requirement for the best possible care at the price they are willing to pay will have been compromised. The information and power asymmetries which confront health sector consumers make it all the more imperative for all stakeholders to have recourse to call out behaviour which is not in consumers' interests.

APHA also welcomes the streamlining of merger approval processes. It is crucial that such processes operate in an efficient and timely manner.

Institutions and Governance

APHA welcomes the proposal to establish the Australian Council for Competition Policy as an advocate for competition policy and as an independent assessor of progress on reform provided it could be ensured that the work of such a body did not duplicate that of other bodies already established, such as the Productivity Commission. It is important that governments be held accountable for maintaining the momentum of reform processes once these are agreed.

The APHA does not support the use of mandatory information-gathering powers particularly as an effective market study would require analysis of commercially sensitive material. Private organisations would need to be satisfied that such material would be handled in an appropriate manner. Such processes would require establishment of trust and agreement of clear safeguards against inappropriate use or disclosure.

Small Business

APHA welcomes the recommendation that the ACCC should take "a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement".

The Australian private hospital sector includes many small and medium sized businesses including small hospitals and day surgeries. These are often established as small partnerships providing services in a single location. Many are highly specialised in the range of services they provide. They often provide a high level of clinical expertise, and the capacity to respond to specific niche requirements. As such they can be highly vulnerable in negotiations with funders who typically contract with a wide diversity of providers across a wide range of services.

Collective Bargaining

APHA welcomes moves to reduce the cost of approval processes for authorisations and notifications regarding collective bargaining arrangements. APHA is supportive of the recommendation that greater flexibility be introduced for notifications of collective bargaining and greater emphasis on promoting awareness of these processes.



Dispute resolution Scheme for Small Business

APHA is also supportive of greater promotion of the range of dispute resolutions options available to small business. The utilisation and effectiveness of these options should also be reviewed in order to identify gaps in provision and/or awareness.

Within the private health sector, the Private Health Insurance Ombudsman (PHIO) is able, in some circumstances to mediate between parties however this process is complaints based and primarily concerned with the resolution of complaints in respect of individual consumers and breaches of private health insurance regulations. The Private Health Insurance Administrative Council (PHIAC) and the Federal Minister for Health are also able to impose enforceable undertakings on private health insurers when regulations are breached. However these provisions are of only limited effect when negotiations between health funds and hospitals break down or punitive terms are imposed.

The availability of such supports and services will also require careful attention in light of the Federal Government's decision to merge functions hither-to carried out by PHIAC and PHIO with other entities as announced in the 2013/14 Federal Budget.

Regulatory Restrictions

APHA notes the Panel's view that all "regulations with an anti-competitive effect should be subject to a public benefit test and the need to demonstrate that no other way of achieving their purpose exists that is less damaging to competition." APHA also notes in particular the Panel's specific observations with respect to retail pharmacy (pages 109-111) and private health insurance (pages 112-113).

Pharmacy

While the majority of pharmacy services are provided in a retail setting, APHA estimates that a quarter of expenditure under the Pharmaceutical Benefits Scheme, occurs through hospital based pharmacy services. The current regulatory regime does not reflect innovations clinical and business practices which include services targeted to meeting the needs of patients as they move across primary care and hospital care settings.

Current pharmacy licencing rules provide a classic illustration of the way in which government regulation has designed a market. The resultant "community pharmacy" network has a number of strengths as a distribution network but it also has some inherent weaknesses. Current regulatory and funding models actively discriminate against the integrated care models characteristic of the private hospital sector in which pharmacists work closely with other health professionals to meet the needs of an ageing population with increasingly complex health needs.

Rigid distinctions in regulation and funding between "community pharmacy" and "hospital based pharmacy" are at odds with the needs of consumers as they move between primary care and hospital care. Consumers living with chronic and complex conditions often require services that are best delivered by multi-disciplinary teams of professionals. They value continuity of care and the opportunity to maintain contact with those caring for them and they move in and out of hospital, their own homes and/or residential aged-care.

Current regulatory frameworks, and the funding mechanisms that adhere to them, actively prevent private hospitals from developing viable business models that would support such



innovations. Moreover, by preventing such innovation, current regulations perpetuate inefficiencies in the wider health sector.

Private Health Insurance

Private health insurance in a market where regulations impact not only directly on the market for health insurance products but also on the market for health services purchased by health fund members and financed through claims on those same insurance products. For this reason, the APHA emphasises the need to take account of both direct and indirect factors when assessing public benefit. For example, relaxation of regulations to enhance competition in the private health insurance market is likely to have flow on impacts in the markets for provision of health services. Similarly, changes in one part of the health sector frequently impact on other health service providers.

For this reason, regulations regarding the scope of services that health funds are obliged to cover have been particularly important in ensuring that consumers assisted in accessing products that are fit for purpose. As in other areas of insurance it is of vital importance that product information is clear and transparent and here again the work of the Private Health Insurance Ombudsman has been valuable in providing an independent source of information and complaint handling. The relevance of these regulations and associated supports is evidenced by the steady stream of inquiries to the Ombudsman's website privatehealth.gov.au and utilisation of the Ombudsman to resolve complaints.

Conclusion

The broad sweep of issues canvassed in the Competition Review's Draft Report, and the historical context in which many of the Review's proposals are placed highlight progress must be sustained over a significant period of time in order to achieve the benefits envisaged.

As all governments continue to look for increased efficiencies in the health sector, it is essential that competitive neutrality be established in the provision of hospital services.

The APHA looks forward to the Panel's Final Report and the establishment of a strong commitment to further competition reform by all governments and a stronger collaboration between governments and the private sector in meeting the health needs of all Australians.

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For this reason, regulations regarding the scope of services that health funds are obliged to cover have been particularly important in ensuring that consumers assisted in accessing products that are fit for purpose. As in other areas of insurance it is of vital importance that product information is clear and transparent and here again the work of the Private Health Insurance Ombudsman has been valuable in providing an independent source of information and complaint handling. The relevance of these regulations and associated supports is evidenced by the steady stream of inquiries to the Ombudsman’s website privatehealth.gov.au and utilisation of the Ombudsman to resolve complaints.

Conclusion

The broad sweep of issues canvassed in the Competition Review’s Draft Report, and the historical context in which many of the Review’s proposals are placed highlight progress must be sustained over a significant period of time in order to achieve the benefits envisaged.

As all governments continue to look for increased efficiencies in the health sector, it is essential that competitive neutrality be established in the provision of hospital services.

The APHA looks forward to the Panel’s Final Report and the establishment of a strong commitment to further competition reform by all governments and a stronger collaboration between governments and the private sector in meeting the health needs of all Australians.