Australian
Private Hospitals
Association

Mr Elton Humphery
Secretary
Senate Community Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Elton

At the public hearing of the Senate Community Affairs Committee's inquiry into the Private Health Insurance Bill 2006 and cognate Bills held on 2 February, Senators requested representatives of the Australian Private Hospitals Association (APHA) to provide further information to assist the Committee's inquiry.

On behalf of APHA I have attached additional information that may assist the Committee's inquiry. At the time of writing, the transcript of the proceedings on 2 February 2007 is not yet available. In these circumstances, APHA would request that the Committee permit APHA to provide further information, when the Hansard record becomes available.

Please contact me if APHA can be of further assistance in the Committee's inquiry.

Yours sincerely

Michael Roff
Executive Director
9 February 2007

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ADDITIONAL INFORMATION REQUESTED BY THE SENATE COMMUNITY AFFAIRS COMMITTEE DURING EVIDENCE BY THE AUSTRALIAN PRIVATE HOSPITALS ASSOCIATION ON 2 FEBRUARY 2007

1. Advice on amendments to the Private Health Insurance Bill 2006

In its submission to the Committee's inquiry, APHA argued that the Bill required several amendments. APHA has sought legal advice to inform its proposed amendments, which is attached. The legal advice supports APHA's arguments in relation to the narrow definition of hospital treatment in clause 121-5(1); the lack of safety and quality provisions applying to general treatment (clause 121-10); and the need to widen the protection of clinical discretion in the Bill (clause 172-5).

APHA's attached legal advice also includes suggested wording of amendments to the Bill in each of the above areas.

2. Further information on the issue raised by APHA in relation to a health insurance fund writing to patients under the care of psychiatrist and proposing that the patients participate in a telephone counselling program.

This issue was canvassed in the *Sydney Morning Herald* of 3 February 2007. A copy of the article is attached.

3. APHA's views on the draft Rules to underpin the Private Health Insurance Bill 2006 and cognate Bills.

Private Health Insurance (Health Insurance Business) Rules 2007

APHA is concerned at several elements of clause 7 in these Rules **(Matters to which the Minister is to have regard in declaring that a facility is a hospital)**. Subclause 7(f) states that:

If the facility is a private facility that provides triage and early treatment to a person in a situation of emergency – whether the facility subsequently:

(i) provides reasonable access to an appropriate range of services for the treatment of the person; or
(ii) has arrangements for the transfer of the person, within a reasonable time, to a hospital where such services are available

APHA contends that the requirements of this subclause are totally unnecessary as specific prescriptive requirements for the establishment of emergency departments are contained in State licensing requirements for private hospitals. It is unclear to APHA

why one stream of service provision should be singled out for consideration in relation to a declaration under this clause.

APHA is also concerned at the use of terms such as 'reasonable' and 'appropriate' in this subclause, which are highly subjective. It is also unclear as to who would make such an assessment in the first instance to enable the Minister to make such a determination. It is also unclear which benchmarks would be used to measure the hospital's performance and thereby inform the assessment and, whether such benchmarks would be transparent to operators of private hospitals.

APHA is also very concerned at the use of similarly subjective language in clause 8 **(Matters to which the Minister is to have regard in revoking a declaration that a facility is a hospital)**

On APHA's reading of the Rules, subclause 8(d) would enable the Minister to put a private hospital out of business and threaten the employment of its medical, nursing and allied health staff. This could occur because while the facility would still be licensed by the relevant State or Territory Health Department, health insurance benefits could not be paid for any services provided in the facility if the Minister revoked a declaration that a facility is a hospital, rendering it effectively inoperable.

This appears to APHA to be an extraordinary situation that the livelihood of many individuals and access to essential services could be threatened by the application of such subjective conditions.

It is also unclear as to why these particular provisions would apply only to private facilities. APHA is unaware, for example, of similar provisions in the Australian Health Care Agreements that would impact in a similar manner on public hospitals.

APHA believes that a primary purpose of legislation is to provide prescriptive guidance rather than be open to subjective interpretation and recommends that subclauses 7(f) and 8(d) therefore should be deleted from the draft Private Health Insurance (Health Insurance Business) Rules 2007.

If this course of action is not possible, APHA recommends that the Rules provide for a transparent administrative process that would include a mechanism to advise a facility that the Minister is considering revoking a declaration and also enable the provision of input and advice by the facility prior to the Minister's decision.

<u>Conditions of registration of a health insurance fund</u>

At present, Schedule 1 to the *National Health Act 1953* sets out detailed conditions of registration for health insurance funds. These conditions include such key consumer protections as portability of their health insurance cover. APHA has been assured previously by the Department of Health and Ageing that these conditions would largely be mirrored in either the Bill or in the Rules. In some cases, such as the portability provisions, this has occurred. However, it is apparent that not all current conditions of registration have been accommodated in the Bill or in the Rules drafted to date.

One very important omission in the regulatory regime that has been drafted to date is paragraph (n) of Schedule 1 which establishes a maximum period (2 months) for payment of claims by health insurance funds. As APHA is aware of many instances of health insurers flouting this requirement, APHA wishes to ensure that it is included within the regulatory regime under the private health Insurance Bill 2006 and its associated Rules.

ATTACHMENT A

Ebsworth & Ebsworth LAWYERS

9 February 2007

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Dear Paul

The Commonwealth Private Health Insurance Bill 2006

We refer to our discussion and to your email correspondence of 7 February 2007 in relation to the Commonwealth *Private Health Insurance Bill 2006* (***the Bill***).

You have provided to us a copy of the submission of the Australian Private Hospital Association (**APHA**) to the Senate Community Affairs Committee of 25 January 2007 and have requested our urgent advice on specific issues in relation to the above Bill.

As you are aware, Ebsworth & Ebsworth have a specialist health industry practice and act for a number of private and public hospitals, medical practitioners and private health insurers.

1. Background

The APHA seeks advice on the following issues:

1.1 Interpretation of clauses 121-5, 121-10 and 172-5 with respect to the definitions of "hospital treatment", "general treatment", and Agreements with medical practitioners/professional freedom, in general, and with regard to concerns raised in your submission specifically;

1.2 Suggested amendments to clause 121-5(1) so as to address or at least ameliorate APHA's concerns with respect to the definition of "hospital treatment";

1.3 Suggested amendments to clause 121-10 so as to impose certain requirements (such as accreditation, and compliance or reporting obligations) on health care providers who provide "general treatment"; and

1.4 Suggested amendments to clause 172-5 so as to ensure the protection of professional freedom/clinical discretion.

2. Executive Summary

2.1 In general, we agree that the APHA has raised valid concerns with respect to the Bill.

2.2 We agree that there must be safeguards and requirements in relation to accreditation and reporting requirements of all health care service providers of the Broader Health Services (including in relation to the interim period between 1 April 2007 to 30 June 2008). This is particularly a concern in light of recent issues, such as the Dr Patel inquiry. We understand that there are in place current accreditation arrangements which are able to cater for variety of health services, that is, full hospital accreditation may not be required for certain services, however, there are a number of different accreditation "levels".

2.3 The Broader Health Service arrangements should enable services to be provided by multidisciplinary programs, including by private hospitals operators, who are well placed to provide such services.

2.4 Finally, the provision of health care services must be determined according to the clinical requirements of the individual patient, as determined by the health care professions who care for that patient, and should not be subject to undue influence by a health fund focusing on financial considerations.

3. Detailed Analysis

3.1 Hospital Treatment

3.2 Clause 121-5 – Meaning of "Hospital Treatment"

(a) You have raised a concern with respect to the narrowness of the definition of "Hospital Treatment" in section 121-5.

(b) As you are aware, with legislative interpretation of both the definition and the context within its use are relevant.

(c) The Act makes the distinction between "hospital treatment" and "general treatment" in a number of ways, for example, in clause 23-5 the incentives differ between a policy which covers hospital treatment but not general treatment and general treatment but not hospital treatment. In clause 34-15 "hospital cover" is defined as a complying health insurance policy which covers "hospital treatment".

Clause 121-5 of the Bill states:

"121-5 Meaning of hospital treatment

(1) Hospital treatment is treatment (including the provision of goods and services) that:

(a) is intended to ***manage*** *a disease, injury or condition; and*

(b) is provided to a person:

> (i) *by a person who is authorised by a hospital to provide the treatment; or*
>
> (ii) *under the management or control of such a person; and*

(c) *either:*

> (i) is provided at a *hospital*; or
>
> (ii) *is provided, or arranged, with the direct involvement of a hospital.*

(2) Without limiting section (1), ***hospital treatment*** *includes any other treatment, or treatment included in a class of treatments, specified in the Private Health Insurance (Health Insurance Business) Rules for the purposes of this section.*

(3) Without limiting subsection (1) and (2), the reference to treatment in those subsections includes a reference to any of, or any combination of, accommodation, nursing, medical, surgical, podiatric surgical, therapeutic, prosthetic, pharmacological, pathology or other services or goods intended to manage a disease, injury or condition.

(4) Despite subsections (1) and (2), treatment is not hospital treatment if it is specified in, or is included in a class of treatments specified in, the Private Health Insurance (Health Insurance Business) Rules for the purpose of this subsection."

(d) The Consultation Draft version of the Private Health Insurance (Health Insurance Business) Rules 2007 (**PHI Business Rules**) (as at 30 January 2007) extends the definition of "hospital treatment" to *"medically necessary ambulance services associated with the provision of hospital treatment"*.

(e) These rules also exclude particular procedures from the definition of "hospital treatment" including:

- treatment which involves a procedure that has an item number that is specified in clause 8 of Schedule 3 of the Private Health Insurance (Complying Product) Rules 2007 (***PHI Complying Product Rules***), if no certificate for that procedure has been provided under clause 7 of that schedule;
- treatment provided to a person at an emergency department of a hospital; and
- treatment provided to a person who is not a "patient" within the meaning of that word in paragraph (b) of the definition of patient in subsection 3 (1) of the *Health Insurance Act 1973* (for example, a newly-born child whose mother also occupies a bed in the hospital).

(f) The Explanatory Memorandum to the Bill comments that the definition *"is intended to cover the provision of elements of an episode of hospital care outside the physical boundary of a hospital as long as a hospital is involved in the delivery of services"*.

(g) As argued in APHA's Submission the definition of "hospital treatment" under the Bill (and under the PHI Business Rules and PHI Complying Product Rules) is too narrow, given the range of services currently provided by hospitals.

(h) We note that the definition of "hospital treatment" in the *National Health Act 1953* (for example in section 67) was not so restrictive.

(i) The APHA has suggested that clause 121-5(1) be amended to read: *"intended to manage* ***or prevent*** *a disease, injury or condition"* so as to capture services that assist in preventing further hospitalisation.

(j) The concern with the use of only the word "manage" in clause 121-5 is that that hospital treatment will only apply to reactive treatment and not proactive treatment (and hospitals are currently involved in proactive treatment)

(k) We consider it appropriate to include the words "or prevent" in clause 121-5. The other requirements in the clause which require that the hospital treatment be provided by a hospital or with the direct involvement of the hospital is sufficient to distinguish between "hospital treatment" and "general treatment".

3.3 Accreditation

(a) Under clause 121-5(7) in deciding whether to declare that a facility is a hospital the Minister is to have regard to whether the accreditation requirements of an appropriate accrediting body have been met.

(b) The APHA is concerned that there is no detailed information available as to the parameters of the anticipated quality and safety regime, in particular in relation to the 15 month period from 1 April 2007.

(c) Accreditation should be required for all facilities, both public and private.

(d) APHA's Submission raises the concern that accreditation is not forthcoming without experience, and as such certification should be considered as an alternative. As the certification bodies proposed in APHA's Submission (that is, ACHS and ISO) are also likely to be the *"appropriate accrediting body"* currently stated in clause 121-5(7), this concern could also be specifically noted in the legislation.

(e) As such, the following change to the wording of clause 121-5(7) could be proposed: *"whether the accreditation* ***or certification*** *requirements of an appropriate accrediting body have been met"*.

(f) APHA's concern is also with the lack of accreditation required for facilities providing general services, as opposed to the requirements for a "hospital" under clause 121-5(7) of the Bill.

(g) The lack of legislative oversight in the Bill over the broad range of facilities that provide "general treatment" is a concern.

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(h) Clause 121-10 should also refer a requirement for the provider of general treatment to have met appropriate accreditation and certification requirements (to be specified either in the Bill or accompanying rules) - to take effect from the commencement of the Bill.

3.4 Clinical discretion

3.5 Clause 172-5 – Agreements/Clinical Discretion

(a) A medical practitioner's clinical freedom or discretion is legislatively protected under clause 172-5 for situations where the medical practitioner has entered into an agreement with a private health insurer.

(b) To provide broader protection, clause 172-5 could be amended to state:

"A medical practitioner and other health care service providers must have professional freedom, within the scope of accepted clinical practice, to identify and provide appropriate treatments. If a private health insurer enters into an agreement with a medical practitioner for the provision of treatment to persons insured by the insurer, the agreement must not limit the medical practitioner's professional freedom."

Should you have any questions in relation to the above please contact Alison Choy Flannigan on 9234 2389.

Yours faithfully
EBSWORTH & EBSWORTH

Alison Choy Flannigan
Partner

ATTACHMENT B

Health fund leaking patient medical files

Ruth Pollard Health Reporter
February 3, 2007

THE intimate medical history of hundreds of people has been provided by one of the country's largest private health funds to a company that uses it to sell its services to vulnerable patients.

HCF has handed over to McKesson Asia Pacific the contact details, gender, age, the broad type of mental illness, and the recent number of hospital admissions for 370 people without their consent.

The Office of the Federal Privacy Commissioner is so concerned that it contacted HCF yesterday seeking an explanation. The acting NSW Privacy Commissioner, John Dickie, described HCF's conduct as "very suspicious".

HCF's Helping Hands Program, described as complementing a person's treatment plan, involves staff from McKesson Asia Pacific calling the patient to offer further medical care once they have been discharged from hospital.

Outraged ... Dr Margaret Sheridan.
Photo: *Quentin Jones*

A psychiatrist, Margaret Sheridan, has had two of her patients contacted by the company. She is horrified their privacy has been breached so blatantly.

"These are extremely vulnerable young women," Dr Sheridan said. "They are people with mental health issues - there is no way I want my patients involved in this."

She complained to the company about its tactics, but has received no response.

The company refused to back down with her patients, later calling one of the young women, telling her to ignore her doctor's advice and sign up to their program.

"I am absolutely outraged by this. I have never seen anything like it," Dr Sheridan said. "A patient's confidentiality is utmost, you do not give out information to other people, it is the essence of being a doctor."

McKesson Asia Pacific recently won the tender to run the Federal Government's "pregnancy support line", and provides other telephone-based health services in Australia and New Zealand.

Its director, Matthew Cullen, said the program filled a gap in mental health services in the public and private sector, providing care to a group of people with significant mental illness.

Denying the exchange of information between HCF and McKesson was in breach of privacy legislation, Dr Cullen said he had received "extremely positive feedback" about the program.

HCF also rejected the claim that it was in breach of privacy laws, although it admitted that it was providing McKesson Asia Pacific with patients' contact details, sex, age, a broad mental health category, and the number of recent admissions.

All legislative requirements regarding privacy and the use of the medical information had been met, a spokesman said.

However, HCF's chief executive officer, Terry Smith, said yesterday that if patients had concerns or felt harassed they should complain. "I would be concerned about the tactics they [McKesson] are using if people feel like that ... I will undertake to have that investigated."

For one of the patients, a 20-year-old woman from Sydney who has a mental illness, the experience was both invasive and disconcerting.

Although she rejected the offer from McKesson Asia Pacific to join the Helping Hands Program, the company wrote to her doctor seeking her clinical information.

The letter, signed by the company's medical adviser in psychiatry, states incorrectly that the woman had given her permission for information to be shared.

"I feel let down by the private health company," said the woman, who did not wish to be identified. "My parents and I are quite astounded that HCF could have done what they have done.

"At first I found it quite invasive ... then I felt really pressured into something that I didn't want to do, and it really started to unsettle me - I have been seeing my doctor for three years and to have someone in there trying to undercut that bond shook me up."

The Australian Medical Association also expressed grave concerns about HCF's practice.

"They ought to be put on notice that they are not being given carte blanche to interfere with medical or clinical care or override their client's privacy or confidentiality," it said.

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