

# Opposition Senators' Report

## Introduction

1.1 Opposition senators are concerned that the Government's stated reasons for selling Medibank Private have been asserted rather than demonstrated or substantiated.

1.2 The Government has asserted that private health insurance members will enjoy 'downward pressure on their premiums'. Until the release of the CRA International Report, the Government had failed to release any evidence to support this claim. It had previously told Labor that a separate scoping study included modelling which came to this conclusion, but has repeatedly refused to release the study, claiming it was not policy to release that documentation in relation to asset sales.

1.3 During estimates hearings for the Department of Health and Ageing, a representative of the Department of health and Ageing dismissed remarks about the sale's impact on premiums as 'pure conjecture and speculation'.<sup>1</sup> Later that afternoon, the Minister for Finance and Administration released the CRA report, which stated that 'Medibank Private's premiums will have to rise irrespective of who owns Medibank Private'.<sup>2</sup> The report also states that, if privatised, Medibank's technical efficiency could be improved and that this could result in lower premiums. However, the report fails to mention that, as a 'for profit' fund, the benefit of any efficiencies would also be directed to shareholders, and not to members, as is currently the case.

1.4 The Government asserts that the sale will increase competition in the private health insurance market. Again, because it is allegedly contained in the scoping study, evidence to support this contention has not been produced.

1.5 For the first five years after the sale, the company will be protected from any international takeover, although this protection ends after this period leaving Medibank open to overseas interests. However, within this period another Australian fund would be at liberty to launch a bid, subject to the likely interest of the Australian Competition and Consumer Commission.

1.6 The Government also asserts that privatisation will liberate the fund from administrative requirements associated with government ownership. Currently, these requirements include an annual corporate plan and statement of intent. A float would not lessen these reporting requirements but require the fund to report to the market

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1 Mr Charles Maskell-Knight, Senate Community Affairs Committee, *Proof Estimates Hansard*, 1 November 2006, p.14.

2 CRA International (commissioned by the Department of Finance and Administration), *The impact of privatisation of Medibank Private on private health insurance premiums*, 31 October 2006, p.1.

rather than the minister. In any case, current reporting requirements do not appear to have had an impact on Medibank's ability to keep its expense ratio below ten per cent, less than MBF, HCF and HBF.

1.7 The Government also asserts that the sale will allow Medibank Private access to other insurance markets. Medibank already offers products in other markets, for example travel insurance, under its own brand. Insurance products not related to private health insurance must be underwritten by another company. This has no bearing on Medibank's ownership. It is a feature of industry regulation.

1.8 Opposition senators also put on record their disappointment at the lack of responsiveness of the Department of Finance and Administration to questions taken on notice. The committee was told early in the inquiry process that DOFA is the lead agency for the sale of Medibank. However, DOFA not only declined to provide a written submission to the inquiry but also failed to provide answers to questions on notice in time to allow consideration of them, despite repeated calls from the secretariat.

1.9 Apart from hampering the committee's examination of the bill, this apparent delaying strategy has merely compounded our concerns that the Government is withholding information relevant to Medibank's sale. The department's failure to provide answers within a reasonable time also highlights the unrealistic timeframe the Government forced upon the committee for considering a bill of major significance to the health insurance market, not to mention the almost 3 million Australians who are Medibank Private members.

### **Ownership of Medibank Private**

1.10 Resolving whether the Commonwealth Government has the legal right to sell Medibank Private is central to the examination of the bill. Contrary to the Government's simplistic analysis of ownership, opposition senators consider the Commonwealth's ability to sell Medibank Private is anything but clear cut.

1.11 The management of Medibank Private was transferred to Medibank Private Limited in March 1998. Two months later the Commonwealth became the sole shareholder in Medibank Private Limited. Further shares were purchased by the Commonwealth in 2005. The Commonwealth is therefore the owner of Medibank Private Limited and can treat that company as its property.

1.12 That is not at issue. What is open to question is whether the Commonwealth has the lawful right to sell Medibank Private Limited's assets.

1.13 The *National Health Act 1953* (Cth) (the Act) allows Medibank Private Limited to apply, invest and manage the assets of Medibank Private.<sup>3</sup> The Act draws a distinction between the two entities. The Commonwealth may be the legal and

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3 Subsection 73AAC(1) *National Health Act 1953* (Cth).

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beneficial owner of Medibank Private Limited, however, the beneficial ownership of Medibank Private could be considered a separate issue and would be determined according to who has the right to control Medibank Private and is entitled to its residual earnings.<sup>4</sup>

1.14 Medibank Private Limited manages Medibank Private but it does not have the right to control significant aspects of the fund. Most importantly, the Commonwealth has imposed legislative restrictions on Medibank Private Limited in relation to the selling of assets and distribution of profits. Distribution of profits would only be permissible if Medibank Private Limited had been *established for profit*. Additionally, Medibank Private Limited is obliged to give priority to the interests of members of Medibank Private. These factors indicate that the Commonwealth's right to control the fund is subject to the statutory rights and interests of the members of Medibank Private. In such a case, it would be difficult to maintain that the Commonwealth is the owner of Medibank Private.

1.15 The members of Medibank Private have no apparent right to control the fund. Control of the fund by the members would be impracticable and contrary to standard commercial practice. It would also be unnecessary.

1.16 However, the members of Medibank Private have substantial statutory rights in relation to how Medibank Private is managed by Medibank Private Limited, including the right to benefits, investments being made on behalf of the fund, and for the non-distribution of profits.<sup>5</sup> Members have joined Medibank Private on the understanding that they are entitled to these statutory protections. Medibank Private's assets are undoubtedly protected to provide for members' needs and to prevent Medibank Private Limited from otherwise stripping the fund of its assets. In view of the relevant provisions of the Act, there is an argument that the beneficial owners of Medibank Private are its members.

1.17 Opposition senators are aware of the proposition that Medibank Private is a 'mutual organisation' owned by its members. The test for mutuality is similar to that of beneficial ownership.<sup>6</sup> It is therefore possible that the members of Medibank Private are the legal and not just the beneficial owners of the fund. This is not inconsistent with the classification of Medibank Private as a government controlled 'not for profit' organisation.<sup>7</sup>

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4 *The Proposed Sale of Medibank Private: historical, legal and policy perspectives*, Research Brief, Parliamentary Library, September 2006, p.18, discussing H. Hansmann, *The Ownership of Enterprise*, Harvard University Press, Cambridge, MA, 1996. See also, *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077 cited in *Commissioner of Taxation v Linter Textiles Australia Ltd (in liquidation)* [2003] FCAFC 63.

5 Subsection 73AAD *National Health Act 1953* (Cth).

6 Research Brief, p.21, discussing *Faulconbridge v National Mutual General Insurance Association* [1952]1 Lloyd's List Law Reports 17, cited in *Re NRMA Ltd: Re NRMA Insurance Ltd* [2000] NSWSC 82.

7 Research Brief, p.23.

1.18 Finally, the opposition senators note the attempted equation of Medibank Private to other types of insurance or product.<sup>8</sup> This is arguably ill founded. Members of Medibank Private enjoy statutory rights, which arise through their membership of the fund and which are protective in nature. These rights are not comparable to consumer rights which arise upon breach of alternate statutory or common law.

1.19 At best, this leaves the ownership of Medibank Private unresolved, and the committee has credible evidence that members of the fund may well have a right of claim against its assets. If the sale proceeded as planned, the implications of such a claim being subsequently found to exist would be disastrous. Even if other arguments in favour of sale are accepted, opposition senators plead common sense in calling for the question of ownership to be more thoroughly examined before the sale process proceeds any further.

### **Impact on the industry**

1.20 Opposition senators are keenly aware that the proposed sale of Medibank Private raises a number of critical considerations, not least its impact on members' interests, market competition and industry viability.

### ***The primacy of members***

1.21 The Government asserts that Medibank Private Limited's conversion to a 'for profit' company will not affect contributors because it will still have to comply with its prudential obligations, namely solvency and capital adequacy standards. This argument acknowledges the members' fundamental interest in the asset position of Medibank Private. It also presents a very limited view of members' rights. At the very least, it is questionable whether it is in the members' best interests for Medibank Private Limited to maintain only minimum statutory requirements.

1.22 Medibank Private Limited is obliged, under the National Health Act, to give 'priority to the interests of the contributors to the fund'.<sup>9</sup> The interests of the contributors do not necessarily entail devolving assets belonging to Medibank Private. As Mr Peter Kirby, Chairman of Medibank Private has stated, 'investing in the business ...ensure[s] we are equipped to serve the future needs of our members'.<sup>10</sup> The devolution of assets would likely lead to rising premiums for members, which could never be said to be in their interests.

1.23 Opposition senators note that any public interest test or ministerial discretion over the change in profit status has been excluded by the bill. Were it not excluded by the bill, section 78 of the National Health Act provides that a change in profit status shall be a disallowable instrument, and subject to parliamentary scrutiny. The

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8 Medibank Private Sale Bill 2006, Bills Digest No. 47, Parliamentary Library, 30 October 2006, p.3.

9 Subsection 73AAC(1) National Health Act 1953 (Cth).

10 Medibank Private, *Annual Report 2006*, Melbourne, 2006, p.4.

provision also entitles the Minister for Health to disallow the change on public interest grounds. This means that Medibank's change in status from a 'not for profit' to a 'for profit' will occur without the checks and balances which would normally apply.

### ***The level of premiums***

1.24 The Australian Medical Association, for one, considers premiums will rise in the event of a sale.<sup>11</sup> Opposition senators agree increases are likely. No-one can predict with any certainty what members' future needs would entail. Based on an examination of industry wide trends, it is highly likely that Medibank Private will increasingly require the benefit of its assets. The Act maintains the assets of Medibank Private for this very purpose.<sup>12</sup> If the assets were no longer available, then alternative funds would need to be sourced. A scenario of this kind would threaten Medibank Private's viability as an efficient and competitive private health insurance provider.

1.25 One important variable in this regard is the level of membership. It is difficult to predict how many members will remain with Medibank Private on completion of the sale. The bill provides for members of Medibank Private to 'opt out' of the fund but the Commonwealth is undoubtedly relying upon existing members to remain with Medibank Private. There is no guarantee that current membership levels will be maintained. If a significant number of members did choose to transfer their membership to another health insurance organisation, then Medibank Private would lose its dominant market position and the industry wide influence that position entails.

1.26 Mr Tim Morphy, representing Medibank Private, confirmed that premium levels were determined by the cost of health services, and not by ownership. He also confirmed that there was no guarantee the sale would lower premiums.<sup>13</sup> The representative of the Department of Health and Ageing was similarly unable to offer the committee any assurances, saying that predictions about premiums after the sale were mere speculation.<sup>14</sup>

### ***Value for money and the broader role of Medibank Private***

1.27 The impact of sale will extend further than rising premiums. Medibank Private has traditionally played a role in promoting broader community interests in addition to those of its members. This has included support for 'community rating', as opposed to 'risk rating', to achieve a balance between social justice and community need. In that role Medibank Private has also provided informed analysis and advocacy based on the principles of universality and equity. Medibank Private appears to play an instrumental and possibly otherwise overlooked moral role as the 'conscience of the

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11 Australian Medical Association, *Submission 8*, p.3.

12 Subsections 68(2)(b)(ii) and 73AAAC(2) *National Health Act 1953* (Cth).

13 Mr Tim Morphy, *Committee Hansard*, Friday 3 November 2006, Canberra, p.61.

14 Mr Charles Maskell-Knight, *Committee Hansard*, Friday 3 November 2006, Canberra, p.11.

industry'.<sup>15</sup> If Medibank Private is privatised, then this voice will be lost. In the absence of further regulation, private health insurers might then conduct private health funds with less regard to consumers' interests. This was at the heart of one argument put by the Community and Public Sector Union:

We do not believe that Medibank Private is just another asset for a government to sell. We believe it is a living part of our own health system. We believe it provides very important ballast in that system and, if you like, it helps keep the whole system balanced and afloat. If there is a change to Medibank Private, which is envisaged at the moment by this government, then the whole system is going to change. I think the evidence that you are starting to hear from various experts is starting to show you that other pressures will start to emerge once there is a change in the way that Medibank Private operates in the market.<sup>16</sup>

1.28 The Government's argument that there is no public policy basis upon which to retain ownership of a private health insurer does not stand up to even rudimentary analysis. This government has regulated private health like no other. Formerly a Health Insurance Commissioner and eminent health economist, Dr John Deeble's comments in relation to this are worth noting at length:

In fact, the policy interest in private health insurance is now far greater than ever before. Why would this not include a public presence in the private insurance market? There are at least two major arguments for that presence. The first is the conventional one that it that it would not only be a competitor in financial terms but could also lead in developing products of benefit to its members in terms of healthcare outcomes, not simply money. The present government has actually gone much further in controlling the financial affairs of private insurers than was ever contemplated through Medibank Private's presence. However, its proposals have still placed great emphasis on the competitive advantages of a privatised, profit seeking [Medibank Private], although that seems to reflect more ideology than evidence.

The second and in my view much more important argument, is that [Medibank Private's] presence affirms the broader public interest in private health insurance. I have always believed that Medicare is a national system of health care financing which includes the private sector and its insurers, not just a Commonwealth scheme of benefits for medical care and public hospital treatment. The two parts are complementary in ways which go beyond the market place, although there are vested interests with a reason to argue otherwise.<sup>17</sup>

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15 Dr John Deeble quoted in *Sale time for Medibank Private?*-Business Sunday, transcript, television broadcast, Nine Network, 23 October 2006.

16 Ms Gillespie, *Proof Committee Hansard*, Friday 3 November 2006, Canberra, p.39.

17 Dr John Deeble, *Submission 5*, pp.5-6.

1.29 Dr Deeble went on to argue that comparisons between Medibank Private and BUPA, the largest 'for profit' fund in Australia, do nothing to demonstrate the good sense in selling Medibank, particularly from the consumer's perspective. A critical factor is the change in tax status which is part and parcel of becoming a 'for profit' entity. Dr Deeble argued that:

BUPA is an efficient organisation and a commercially successful one, although if profitability as measured by 'net margin' is the test, MBF was even better. However maximising size, profits or return on funds are surely not the major public interest criteria for a publicly-supported health insurance fund. Value-for-money must count more. BUPA charges higher premiums and pays a lower proportion of its revenue as benefits than MPL. Its administrative expenses are a little lower but they have to be because BUPA has a tax liability which MPL does not. Its pre-tax profit margin was therefore nearly 60% higher than that for MPL, for a very similar post-tax result. How could this outcome be seen as more in the public interest than the present? The Treasury would certainly gain from the privatisation of MPL but the customer would not. In fact, the import of these figures is actually the opposite of what is often claimed. The only logical conclusion is that it is the tax-exempt status of the non-profit funds which has held premiums down, not the incentives of for-profit operation.<sup>18</sup>

1.30 The AMA views the devolution of assets, as well as the increased tax payable by a 'for profit' entity, as creating a financial hole which would require filling from other sources; most likely members' pockets, through increased premiums or reduced member benefits:

It is obvious that a buyer would have to put up equity funds and that this equity will have to be serviced (dividends paid). There is market speculation that Medibank Private could attract bids of between \$1 billion and \$2 billion. The AMA is not in a position to independently assess whether this is a likely range but it serves to illustrate the point. If it is assumed that a buyer will seek a rate of return of 15 per cent per annum EBITA (earnings before interest, tax and amortization), then it follows that Medibank Private would have to generate an extra \$150 million to \$300 million [per annum] in net revenues to service the equity. Where would this extra money come from?<sup>19</sup>

1.31 Proponents of the sale argue that privatisation of Medibank Private Limited will enhance Medibank Private's competitive edge. One of Medibank Private's most competitive advantages is that it is managed by the Commonwealth. Members have the comfort of knowing that their interests will be advanced as part of broader policy objectives. This is quite different to 'for profit' health insurers, which are normally motivated primarily by profit. Medibank Private offers its members a distinguishable choice of insurer, which makes it a real competitor within the industry.

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18 Dr John Deeble, *Submission 5*, p.11.

19 AMA, *Submission 8*, p.3.

1.32 The Commonwealth's unique position also works to its advantage. As the owner of Medibank Private, the Commonwealth has substantial influence within the industry, including in relation to premium levels and contract bargaining, and independent of its regulatory abilities. The private health industry is already complex and highly regulated, which is sometimes said to stymie innovation and competition.<sup>20</sup>

1.33 The Government has argued privatisation will reduce administrative requirements, boosting competition. This is not necessarily true. While Government Business Enterprises reporting requirements would no longer be relevant, as with all publicly listed companies Medibank Private Limited would instead have to regularly report to its numerous shareholders. It could be argued this will simply put Medibank Private on the same footing with other private health insurers, rather than provide a competitive advantage.

1.34 It is mere supposition that administrative requirements, and hence operating costs, will be reduced upon sale leading to greater efficiency within Medibank Private and enhancing industry competition. Administrative costs do not represent a significant proportion of health fund expenditure in any event. Opposition senators particularly note that Medibank Private is already highly competitive and has the lowest management expenses of its three main competitors.<sup>21</sup> The highly respected ratings agency, Standard and Poor's, attributes this success to 'strategies that deliver long term profitability and efficiencies', *not* Medibank Private's form of ownership.<sup>22</sup>

1.35 Instead, as with all other private health insurance organisations, Medibank Private's 'creditworthiness is constrained by the highly regulated private health insurance industry, with limited growth prospects, and restrictions on selecting and pricing risk'.<sup>23</sup> There is therefore no reason to believe that private ownership of Medibank Private will increase its efficiency, innovation, expansion and competition any more than is now the case. The AMA submitted that the opposite could be true:

Sale to another significant extant private health fund would mean a substantial reduction in competition, a reduction in choice of fund and a reduction in the availability of choice of products. The outcome could be even worse if Medibank Private were broken up and sold off to players with dominance in particular markets.<sup>24</sup>

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20 Dr Ken Harvey, *Submission 1*, p. 8. This point was also made by CHOICE, *Submission 11*, p.1.

21 Private Health Insurance Ombudsman, *State of the Funds Report*, Standard and Poor's, 2005.

22 Private Health Insurance Ombudsman, *State of the Funds Report*, Standard and Poor's 2006, p. 24.

23 Standard and Poor's.

24 Australian Medical Association, *Submission 8*, p.5.



1.36 Dr Deeble put paid to the suggestion large savings can be made from insurers such as Medibank negotiating with health providers to obtain bulk discounts. Dr Deeble said that:

The health funds pay out about between 84 and 86 per cent or thereabouts, depending on what their gross margins are, of their income as benefits. That is determined by two things: the price of the service and the volume. They cannot do much about the volume, because that is predetermined; people have used the service. Actually, they are precluded from running managed care because the government has got a provision that stops the funds managing care too much. But they can affect the price, and that is bargain down the business. But, again, it is not the doctors; they cannot do that with the doctors. But they can do that with the hospitals. Basically the only way that they can push costs down is to try and push the hospital costs down. At some point that will run into quality problems. Since private insurance is sold on the basis of quality and access, you cannot push the producers down to a level where quality and access start to decline.<sup>25</sup>

1.37 The Government is unable to point to any robust evidence that privatisation will bring about efficiency gains, and any argument that competition will be enhanced by the sale consequently rests on unstable foundations. Indeed, it was submitted competition will almost certainly suffer from the sale. The added possibility the Government may proceed with the sale other than through a 'float' adds weight to such concerns, and leads opposition senators to express grave fears for levels of competition within the PHI industry post-sale and following the expiration of the five year limit on foreign ownership. This means that consolidation in the sector could occur via a takeover by a local or foreign entity, such as BUPA. This would lead to greater concentration, and arguably less competition.

1.38 Little comfort can be derived from the report from CRA International, commissioned by the Department of Finance and Administration in an attempt to give weight to its argument that efficiencies are possible. While the report concluded that potential savings could be made, at least one significant submitter questioned the reliability of its conclusions. Dr Yong, AMA Vice President, told the committee that:

We were not sure whether the methodology takes full account of the finite structures of the fund memberships. In other words the demographics of membership of some of the funds could differ quite significantly, but we are not sure if that has been taken into account. That has a big bearing on the premiums that they are charging and what return on the premiums they are getting. There is no evidence that CRA International has taken account of the fact that there are significant variations in the various health insurance products offered by the funds. There are vast differences.<sup>26</sup>

1.39 Dr Yong added that:

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25 *Committee Hansard*, Friday 3 November 2006, Canberra, p.32. See also Australian Medical Association, *Supplementary Submission 8A*, pp.2-3.

26 *Committee Hansard*, Friday 3 November 2006, Canberra, p.15.

The other concern we have is that the level of benefits paid is influenced by the proportions of policies that are front-end deductible and exclusionary, as well as the proportions of policies that are eligible for no-gap or known-gap. From the analysis that we have seen so far, it looks like all insurance products would have been treated as if they were comparable, but they are not. That is why we concluded that they did not compare like with like.<sup>27</sup>

1.40 The AMA was not alone in expressing misgivings on the CRA methodology. Dr Deeble put it bluntly:

My criticism of the CRA report is the method that they have used, which is dressed up in all sorts of academic gobbledegook, which I know, or should know any way. The methodology they have used there has been misapplied.<sup>28</sup>

1.41 The Government is similarly unable to substantiate its assertion that the sale would avert a conflict of interest which is inherent in it owning a fund which operates in an industry it also regulates. This could only materialise where the Commonwealth enacted laws which gave favourable treatment to its own insurer. No such conflict exists, and the committee heard no evidence that it ever has.<sup>29</sup>

### **Service and quality levels**

1.42 A specific concern regarding the sale of Medibank Private Limited involves the well-known tension between the need to provide a quality service and the need to make a profit. On the one hand, there are the interests of shareholders and on the other hand, the interests of Medibank Private members.

1.43 One of the Commonwealth's arguments for privatisation is the elimination of its conflict of interest as the regulator of the industry and as the owner of the main health fund. If correct, the bill seems to merely substitute one conflict for another. Opposition senators note that the Commonwealth is at least accountable for its actions and, arguably, possesses a greater social conscience than might a commercial entity.

1.44 There is a risk Medibank Private Limited could give priority to its shareholders at the expense of Medibank Private members.<sup>30</sup> For instance, cost cutting measures might be implemented in order to maximise profits and dividends. If the number of services and quality levels were to decline, then this would likely affect the membership base and members' premiums. It would also affect Medibank Private's bargaining position with health providers, which has been credited as one of Medibank Private's greatest innovations and competitive advantages. In this scenario,

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27 *Committee Hansard*, Friday 3 November 2006, Canberra, p.15.

28 *Committee Hansard*, Friday 3 November 2006, Canberra, p.38. Dr Deeble goes on to elaborate on the nature and extent of the erroneous methodology.

29 Opposition senators note that, curiously, averting a conflict of interest does not appear as an objective of the sale in the Explanatory Memorandum.

30 Community & Public Sector Union/Save Medibank Alliance, *Submission 7*, p.3.

neither members' interests nor Medibank Private's industry position would be well served.

### **Fair treatment of employees**

1.45 There is insufficient evidence to assess whether or not the sale process will treat Medibank Private Limited employees in a fair manner. Comment can, however, be made in relation to their position subsequent to the sale.

1.46 The Government is unable to give any assurance that current Medibank Private employees will not lose their jobs. This is a matter of serious concern to opposition senators. The placement of caps on ownership and the requirement for domestic management is time limited. The so-called 'Australianess' provisions provide only limited protection to employees, who will find their employment contingent on the full rigours of commercial practice in five years' time.

1.47 The bill is ambiguous in relation to the ultimate ownership of Medibank Private Limited. There is no permanent restriction on either full or partial foreign ownership. It is conceivable that in the long-term, Medibank Private Limited and all its assets could be owned by overseas interests.

1.48 The bill relies upon a successful domestic share float within a nominated period but there is no certainty in this regard. It is not clear why the nominated time frame is five years. Foreign ownership could result in significant capital being taken off shore and commercial decisions being made with little regard, if any, to local employees or consumers. The latter circumstance could have a substantial impact upon the Australian private health insurance industry and also upon public health resources.

### **Residual risk: the question of compensation**

1.49 A key feature of the bill is to convert Medibank Private to a 'for profit' organisation with the ensuing ability to distribute profits and return capital to shareholders, that is, the Commonwealth. This would include any profits generated prior to the conversion.<sup>31</sup> It would appear iniquitous for capital contributed by members of Medibank Private and retrospective profits generated by those capital contributions to be 'returned' to anyone other than the members of the fund. Some opponents of the sale have used this argument to support their call for mutualisation of Medibank Private.<sup>32</sup>

1.50 Opposition senators are concerned the sale of Medibank Private's assets could represent an unjust acquisition for which the Commonwealth would be liable to pay compensation in accordance with section 51(xxxi) of the Constitution.

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31 Explanatory Memorandum, p.7.

32 Australian Medical Association, Media Release, 5 September 2006 available at: <http://www.ama.com.au/web.nsf/doc/WEEN-6TC8XU>.

1.51 The Commonwealth has received legal advice, which concludes 'the Commonwealth will not be liable to pay compensation'.<sup>33</sup> Opposition senators do not accept this conclusion is necessarily correct. While the issue of compensation attracts divergent opinions, at least one witness criticised the Government's legal advice as 'ridiculously narrow and probably wrong' in its conclusion that rights to compensation do not exist.<sup>34</sup> The Bills Digest prepared by the Parliamentary Library provides an exhaustive analysis of the legal situation of Medibank and its policy holders, and concludes 'it is arguable that members of Medibank Private could be entitled to compensation if the terms of any sale do not adequately account for their right to the benefit of fund assets'.<sup>35</sup> There is no question that, if compensation were found to be payable, the Commonwealth would be liable.<sup>36</sup>

1.52 The Act includes 'safety net' provisions, including an express right to compensation for members of Medibank Private. The Government has committed itself to including some entitlement for existing fund members in the eventual sale plan, but has not committed itself to any further detail.<sup>37</sup> This uncertainty is unhelpful for both Medibank Private and its members, and suggests the Government continues to harbour reservations as to the nature and extent of members' rights and the bill should not attempt to contain the issue so much as resolve it.

1.53 There is also concern as to what effect the granting of entitlements might have on the industry. There is no real indication of precisely which members would receive entitlements. It is therefore possible consumers might base their decision to join a health fund on the expectation of receiving the entitlement. Portability rights might also be exercised in consideration of the entitlement. If the entitlement relates to a shareholding, then it is possible members might remain with Medibank Private until the shareholding attains its optimal value. This membership base will in turn enable Medibank Private to increase its market power and contract bargaining position. 'Locking in' members might work to the competitive advantage of Medibank Private and its members but it will not necessarily enhance competition within the private health insurance industry.

### **Scrutiny of Bills Committee**

1.54 Opposition senators also note that the Scrutiny of Bills committee has raised concerns about the fact that the Parliament is considering the passage of bill which will not be implemented until some time after the next election. This allows for no further parliamentary scrutiny of the impact of the bill on the community or policy

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33 Blake Dawson & Waldron, Legal Advice, Paragraph 5(f) tabled on 4 September 2006.

34 Dr Deeble, *Committee Hansard*, Friday 3 November 2006, Canberra, p.37.

35 Bills Digest, p.11.

36 Mr Staines, Department of Finance and Administration, *Committee Hansard*, Friday 3 November 2006, Canberra, p.71.

37 J Breusch, 'Howard builds roadblock to Medibank takeover', *Australian Financial Review*, 18 October 2006, p.4.

holders in the future and the circumstances which may prevail at that time. Senator Minchin's response to the Scrutiny Committee does nothing to alleviate opposition senators' concerns.

### **Sale proceeds**

1.55 A stated objective of the bill is to maximise the net sale proceeds from the sale of Medibank Private. Distribution of the profits accrued to date is probably designed to attract potential shareholders and increase the price of shares.<sup>38</sup> If the proposal is perceived as an unjust acquisition or a further example of short-term government profiteering, then the opposite effect could be achieved.

1.56 The Government acknowledges the full financial costs and benefits are difficult to quantify at this stage.<sup>39</sup> Most significantly, there is nothing solid to suggest the full sale potential will be realised in the current climate. The bill does not disclose the financial implications of the sale nor estimate the cost of rendering preparatory assistance. The Department of Finance and Administration was unable to advise the committee whether the risks to the Commonwealth have been quantified, in the event of a future claim, but confirmed that the Commonwealth will be liable to pay any claim which may arise.<sup>40</sup>

1.57 Opposition senators are concerned at the cloud which continues to hang over the legalities of the sale and the existence of credible evidence of members' rights to compensation.

1.58 The Government's refusal to publish the scoping study for the sale is also ground for concern about the impact of the sale on the private health insurance market. If the scoping study found the sale would be trouble-free and not adversely affect premiums, then why has the government not released it to support its case? At the very least the Parliament should be able to examine this study to satisfy itself of the *costs* and *benefits* of selling Medibank Private.

1.59 The risk that taxpayers may be required to meet the cost of compensation claims arising from the sale, combined with the uncertainty over the market impact of the sale, makes it untenable to support the sale of Medibank Private at this stage.

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38 Dr Ken Harvey, *Submission 1*, p.6.

39 Explanatory Memorandum, p.8.

40 Mr Andrew Staines, Department of Finance and Administration, *Committee Hansard*, Friday 3 November 2006, Canberra, p.64.

**Recommendation 1**

**1.60 Opposition members urge the Senate to reject the bill.**

**Senator Michael Forshaw  
Deputy Chair**

**Senator Jan McLucas**

**Senator Carol Brown**

**Senator Claire Moore**