

Feedback on the Competition Policy Review
Issues Paper, 14 April 2014

Presented to the Competition Policy Review

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Australian Physiotherapy Association

The Australian Physiotherapy Association (APA) is the peak body representing the interests of Australian physiotherapists and their patients. The APA is a national organisation with state and territory branches and specialty subgroups. The APA corporate structure is one of a company limited by guarantee. The organisation has approximately 16,000 members, some 70 staff and over 300 members in volunteer positions on committees and working parties. The APA is governed by a Board of Directors elected by representatives of all stakeholder groups within the Association.

The APA vision is that all Australians will have access to quality physiotherapy, when and where required, to optimise health and wellbeing. The APA has a Platform and Vision for Physiotherapy 2020 and its current submissions are publicly available via the APA website www.physiotherapy.asn.au.

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Background

The APA understands that in 1993, the initial National Competition Policy Review (the Hilmer Review) was carried out. This review underpinned the development of the National Competition Policy, which contributed to a surge in productivity, lowered prices in some important consumer product and service markets and stimulated business innovation. The APA understands that this second stage of review will examine the broader competition framework, including competition policies and laws.

The APA purports to comment on:

- regulatory impediments that affect competition but are not covered by the competition laws (Chapter 2); and
- the effectiveness of Australia's competition laws (Chapter 5).

The APA's main concern is preferred provider arrangements.

Physiotherapists who join preferred providers networks through a private health insurer, such as BUPA or Medibank, usually have to accept restrictions on fees for service as a condition of joining. The APA is concerned that contractual arrangements between small Australian physiotherapy clinics and private health insurers create an imbalance of power, especially in negotiating fees for service. The APA is also concerned that rebates to consumers who visit preferred providers are significantly higher than rebates to consumers who visit other providers - this can disadvantage consumers who require specialist or expert treatment, as such consumers have to incur significant out-of-pocket costs to visit non-preferred providers.

The APA submits that:

- **the current competition laws do not serve the interests of consumers of privately insured ancillary health services as preferred provider schemes discourage competition and restrict consumer choice of health services;**
- **Section 46 of the *Competition and Consumer Act 2010* (CCA) prohibits a corporation with a substantial degree of power in a market from taking advantage of that power for one or more prohibited anti-competitive purposes. The APA submits that preferred provider schemes encourage a misuse of market power, as demonstrated by BUPA's market saturation in South Australia;**
- **existing unfair and unconscionable conduct provisions of the CCA should be strengthened to provide a more efficient and equitable basis upon which the forces of competition can operate; and**
- **the experience of small businesses is that most small physiotherapy practices are reluctant to engage the Australian Competition and Consumer Commission (ACCC) for fear of damaging their relationship with private health funds.**

1.1 Misleading consumer perceptions of preferred providers

There is no clinically justifiable reason for assigning a higher benefit to preferred providers, as these providers are not assessed for clinical capability such as a higher level of training, additional qualifications or better value than non-preferred providers. The APA is concerned however that some private health insurers misleadingly represent that preferred network providers are in some way screened by the fund. This is simply not the case, as preferred provider schemes operate as 'opt-in, opt-out' schemes and a physiotherapists can elect to join the scheme, subject to acceptance of the fund policies and billing practices.

1.2 Rebates to consumers and annual limits on benefits

The APA believes that, to increase a rebate available to one consumer who chooses to use a health insurer preferred provider discriminates financially against the member who chooses to maintain their relationship with a non-preferred physiotherapist. In many instances, a patient may have had a long-standing relationship with their physiotherapist for several years prior to joining the fund. The APA considers that health insurers who provide higher rebates to members who visit preferred providers disadvantage consumers who have an established therapeutic relationship with a non-contracted provider, as well as those who require specialist or expert treatment or who do not have a local preferred provider.

If there are insufficient specialists or expert preferred providers in a customer's local area, the customer may miss out on valuable treatment or be forced to travel long distances (particularly if living in rural or remote locations) to visit a specialist preferred provider in another area. This will in turn likely impede the customer's recovery. This could be an issue especially for customers living in rural areas, where there are high rates of hospitalisation and a high incidence of chronic disease¹.

In some instances the very act of attending a preferred provider – and thus receiving a higher rebate – may mean that annual limits on benefits for a particular kind of treatment are actually reached more quickly than would be the case if the member attended a non-preferred provider and received a lower rebate. The APA submits that in such a circumstance, it may be misleading for a fund to promote preferred providers to consumers as being the more cost-effective option in the long run, when in reality attending a non-contracted provider may well give the consumer greater leeway in treatment options before reaching their annual limit for physiotherapy services.

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| Preferred provider schemes provide unfair financial incentives to encourage consumers to break down an existing relationship of trust with a non-contracted provider. |
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1.3 Reduced fees and restricted treatment options under preferred provider contracts

The APA is concerned that preferred provider schemes require physiotherapy practices to place restrictions on fees for service, in return for a higher benefit paid to the client by the health fund than if the client were to visit a non-preferred physiotherapist. Practitioners agree to bring their fees in line with the billing practices of the particular health fund, in return for potentially greater marketing opportunities to fund members through the health fund's website and call center.

The APA is aware that private health funds generally pay below market rates for initial and standard consultations and that some health funds do not allow physiotherapists to charge appropriate fees for more complex or extended consultations.

If a particular health fund refuses to allow a preferred provider physiotherapist to charge an appropriate fee for an extended consultation and a patient presents with multiple injuries or a particularly complex condition, it will not be viable for the physiotherapist to provide additional services free of charge to the patient. The provider therefore has no option but to recommend such a patient to attend twice for two standard consultations. Health funds will understandably not provide benefits for two standard consultations on a single day, so two consultations booked together cannot provide a solution to this problem.

Seeing a patient twice and charging for two standard consultations should not necessarily present a problem specifically if one standard consultation appointment could be booked within a day or two of the next standard consultation. In reality however, a busy practice often does not permit for such neat scheduling and two standard consultations may be spaced quite far apart, creating a hiatus in treatment and impairing early recovery. The APA contends that it is important to treat patients early and to guard against unnecessary lapses in treatment. Early intervention for injured people improves health, social, financial, interpersonal and intrapersonal outcomes by promoting recovery and preventing long-term disability and work loss^{2,3}.

The scenario described in the paragraph above is clearly not ideal, as the patient has to pay twice to attend a physiotherapist's office and incurs further out-of-pocket expenses. The above scenario would apply in the case of an honest practitioner who has no choice but to charge two standard consultations, as the health fund does not permit the physiotherapist to charge for extended consultations. It must be acknowledged however that some practitioners may, in the alternative, over-service clients in an attempt to remain financially viable, despite the restrictive billing practices of private health funds.

A third alternative is that practitioners wary of over-servicing clients may well rush through a course of treatment to ensure that treatment provided fits within the time constraints of a standard consultation, rather than risk being pin-pointed as outliers. As a result, there is a risk that quality of patient care is compromised.

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| Preferred provider schemes may well compromise quality of patient care by restricting the length and types of treatment services that attract rebates. |
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1.4 The problem of 'choice' in joining a preferred provider scheme

An argument is often put forth that practitioners have a choice to partake in a preferred provider scheme, on the proviso that they accept any drawbacks that come with scheme participation. However, there are often competitive and restrictive market forces that operate which make it very difficult to decline scheme membership. For example in rural or remote areas, where possibly two or three practices service an entire community, a decision not to join any of the health funds would make it very difficult for a business to remain financially viable. The situation in metropolitan and central suburban areas is not so different. As more patients elect to join private health funds and private insurers push their preferred provider schemes, practitioners are often left with little or no option but to partake in the scheme or risk losing clients to competitors.

When a small business enters into a contractual relationship with a health fund, there is a significant power imbalance inherent in all transactions. Many health funds do not take advantage of this imbalance, as they prefer to support high quality services for their fund members, but some funds do take advantage of small providers who want to access marketing opportunities through health fund provider networks.

The ACCC considers a consumer contract to be unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;

- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

An example the APA was presented with where terms of a contract were unfair, was a continence and women's health physiotherapist with further qualifications who wanted to ensure that her patients received the highest possible benefit. Women's health physiotherapists provide specialised treatment for stress incontinence, which requires longer consultations with senior practitioners. Women's health physiotherapists cannot and generally will not provide this treatment at the maximum price required under many health insurance contracts. As these physiotherapists are unable to provide effective treatment within the constraints of the contract, they are locked out of preferred provider arrangements – patients are often not aware of this until they seek treatment.

When the physiotherapist in question contacted the health fund to join their network provider scheme so her patients could access higher rebates, the health fund offered the physiotherapist a standard contract, but refused to negotiate on the maximum fee allowable under this contract. The APA believes that this is unfair, and in terms of the criteria listed above:

- the small business would have been required to reduce fees payable by a significant proportion of the business' clients – severely affecting business productivity, while the health fund would not be subject to any increased financial burden. Therefore, the APA believes that there is a significant imbalance in the obligations of the term agreeing to cap prices;
- some health funds claim that caps on maximum fees are necessary to inform fund members about the out-of-pocket costs. The APA believes that this is not a substantive benefit to clients, when compared to the relative value of increased rebates to access more highly trained and experienced physiotherapists. Essentially, the benefit to the client, and thus to the fund, would be far outweighed by the ability to negotiate on this contractual term, and facilitate client access to the most appropriate physiotherapist for their condition; and
- the APA believes that health funds should be protecting the health of their members by ensuring that they do not have increased gaps for specialised practices, such as women's health physiotherapy, where longer appointment times and more advanced qualifications mean that higher charges are needed to ensure the viability of a small business. The client is disadvantaged by this refusal to negotiate on fee caps with highly specialised physiotherapists because they receive reduced health fund rebates for consulting a physiotherapist who elects not to participate in a network provider arrangement.

If health funds fail to recognise treatment services provided by specialist or titled physiotherapists and fail to rebate accordingly, there is a significant disincentive for specialist and titled physiotherapists to join as preferred providers.

The APA understands that fair contracting law applies only to contracts between consumers and businesses and thus is not currently applicable to this scenario. There is also an evidentiary onus of proof on the party who believes that the term of the contract is unfair.

The APA believes that the fair contracting laws should be applicable to all contracts where there is a significant imbalance in the size and market penetration of the parties to the contract and that the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010*) should be amended to include businesses.

1.5 Barriers to entering preferred provider arrangements

The APA acknowledges that certain providers may benefit from their decision to join preferred provider schemes in the short term. However, concern has been raised anecdotally by some APA members about the commercial framework of these arrangements. In particular, some physiotherapists have been prevented from opting in to preferred provider schemes because a

health fund may not want too many providers in the same street or area. This is a significant competitive disadvantage for practitioners who wish to opt into the scheme but are locked out of the opportunity to do so.

1.6 Misuse of market power

South Australia offers an interesting example of market penetration by health funds. The BUPA group has control of a significant proportion of the market in South Australia.

The 2013 State of the Health Funds Report reports that BUPA's market share in South Australia is 53.4%. Medibank is the next closest contender for market share, with a 23.6% of fund market share⁴.

The APA believes that such network provider contracts may well constitute third line forcing and that an 'overall effect test' should be applied where market penetration by an industry detrimentally affects the viability of physiotherapy businesses, such as in South Australia.

The APA is also concerned that some health insurers are starting to restrict the number of physiotherapists on their preferred provider schemes in South Australia. APA members attempting to join a preferred provider scheme have been put on an indefinite waiting list or told that they must be 'invited' to join a scheme. These restrictions may limit the entry of physiotherapists into the South Australian market and inhibit consumer choice of provider.

The contractual terms of a preferred provider arrangement create an imbalance of power between preferred providers and network physiotherapists. The APA contends that consumers are disadvantaged by health funds' refusal to negotiate on fee caps with highly specialised physiotherapists.

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