



Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins

**SUBMISSION – INQUIRY INTO TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW)
BILL 2009**

Introduction

The AHIA welcomes the opportunity to make a submission to the Senate Economics Legislation Committee Inquiry into the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*.

The Australian Health Insurance Association (AHIA) is the Australian private health industry's peak representative body that represents 23 health insurers throughout Australia and collectively covers approximately 94 per cent of the private health insurance industry.

According to March 2009 quarterly statistics released by the Private Health Insurance Administration Council – the regulator of the private health insurance sector – 9.7 million persons, or 44.6 per cent of the Australian population had some form of private hospital cover, and 11.1 million or 51.3 per cent of the Australian population had some form of general treatment cover.

The relationships between a private health insurer and its customers, through the insurer's products and services, are governed by standard form policy terms and conditions (i.e. contracts), and therefore, fall within the ambit of the proposed legislation.

The AHIA is concerned about the unintended adverse consequences this legislation will have on the private health insurance industry if enacted in its present form. For reasons given below, the AHIA submits that contracts between private health insurers and their customers that relate to products or services provided by insurers under the *Private Health Insurance Act 2007* (the PHI Act) should be exempted from the operation of the proposed legislation. An exemption from this legislation to private health funds would be consistent with that included for contracts of insurance covered by the *Insurance Contracts Act 1984*.



Background

The PHI Act permits private health insurers to conduct two types of business:

1. Health Insurance Business; and
2. Health Related Business.

The former is essentially the undertaking of liability, by way of insurance, that relates to hospital treatment and general treatment (dental, physiotherapy, and chiropractic and similar services). The latter relates to other products and services, such as the provision of insurance cover to persons who are residents of other countries who are visiting or working in Australia.

The terms and conditions that govern the relationship between private health insurers and their customers (referred to as “members”) are essentially contained in the following documents:

1. the rules established by the insurer for the day-to-day operation of its private health insurance and related businesses;
2. where an insurer has them, terms and conditions of a policy; and
3. the application form for the particular policy.

It is likely that these documents together form, as between the insurer and a member, a “standard form contract” within the meaning of that phrase in the legislation. It is also important to note that given the logistical impracticability of negotiating these standard terms and changes with each member, the PHI Act permits insurers to establish and change unilaterally the policy terms, subject to regulatory approval and/or meeting member and/or regulator notification requirements.

Given this backdrop, it is not unforeseeable that the private health insurance industry will be significantly impacted by the operation of this legislation.

The legislation

The AHIA has a number of concerns about the application of the legislation to the private health insurance industry, including:

- the additional compliance burden the legislation will impose on the already heavily regulated private health insurance industry;
- the potential for complainants to challenge health fund rules (including changes) notwithstanding the legislative rigor behind the private health insurance industry’s policy change processes, as well as strict regulation regarding the content of products and conduct of insurers through the principle of community rating; and
- the overall uncertainty the legislation will place over the operations of the industry.

This proposed additional regulatory layer is, in the AHIA’s view, unnecessary. The legislation has the potential to introduce significant uncertainty in regarding what contracts/terms across the industry are potentially impacted and what measures should be taken to mitigate the risk of invalidity/penalties. This is likely to result in a significantly increased administrative burden and cost in establishing new processes around demonstrating contracts are not unfair or standard form (such as ensuring all contracts are negotiated, with the assistance of legal representation on both sides to



reduce the risk that a contract may be considered standard, death by recital and increased 'try on' litigation).

It is important to note that the PHI Act already has numerous 'consumer protection' provisions, including:

1. provisions that together provide for minimum coverage requirements as well as circumscribe the scope of coverage offered;
2. industry-wide uniform product disclosure requirements;
3. stringent processes to be followed by insurers before terms of a policy are changed. In particular, Ministerial approval is required before any change to premiums are made. Insurers also need to provide reasonable prior notice to members where a change to rules might be detrimental to the interests of those members, and the Department of Health and Ageing must be notified prior to any change to rules are made (whether or not such changes are detrimental). Moreover, the Minister may direct the insurer not to make the change if the Minister is satisfied that the change might or would result in a breach of the PHI Act;
4. the ability for members to transfer between comparable products between insurers without having to re-serve completed waiting periods (i.e. the "portability" provisions); and
5. in relation to the establishment and operations of the Private Health Insurance Ombudsman (PHIO). The PHIO has broad powers to, amongst other things, investigate the practices and procedures of private health insurers, assist people who have made complaints relating to private health insurance to resolve those complaints and to disseminate information about private health insurance and the rights and obligations of privately insured people.

In addition, where members seek to terminate their policies, it is industry practice to permit immediate termination and allow a refund of all of the unused premium.

Summary

The AHIA submits that the private health insurance industry has existing regulatory and industry mechanisms to adequately protect the interest of persons insured by private health insurers. Imposing a further layer of regulation, in an already highly-regulated industry (please refer to this submission's annexure specific Act and regulations that directly impact the operations of private health insurers), is unjustified and inconsistent with the Australian Government's deregulation agenda.

Further, the AHIA believes that this proposed legislation, if enacted, is likely to have the unintended consequence of placing private health insurers in breach of the PHI Act, which enshrines the principle of community rating - the basis of the Australian private health insurance system. This legislation's requirement that private funds negotiate separate and different terms for each customer challenges the policy of community rating which prohibits the offering of different benefits to different people on the same product.

The AHIA contends that contracts between private health insurers and their customers that relate to products or services provided by insurers under the *Private Health Insurance Act 2007* should be exempted from the operation of the Bill, given the proposed legislation does not apply to contracts of insurance covered by the *Insurance Contracts Act*.



Please feel free to contact me on 02 6202 1000 for any further information.

Yours sincerely

A handwritten signature in blue ink that reads "Michael Armitage". The signature is written in a cursive, flowing style.

HON DR MICHAEL ARMITAGE
CHIEF EXECUTIVE OFFICER

31 July 2009

Annexure



Health Insurance Act 1973
Medicare Levy Act 1986
Private Health Insurance Act 2007
Private Health Insurance Incentives Act 1998
Private Health Insurance (Transitional Provisions and Consequential Amendments) Act 2007
Taxation Laws Amendment (Private Health Insurance) Act 1998
Private Health Insurance (Benefit Requirements) Rules 2007 (No. 2)
Private Health Insurance (Council Administration Levy) Rules 2007
Private Health Insurance (Council) Rules 2007
Private Health Insurance (Complaints Levy) Rules 2007
Private Health Insurance (Complying Product) Rules 2007 (No. 2)
Private Health Insurance (Data Provision) Rules 2007
Private Health Insurance (Health Benefits Fund Administration) Rules 2007
Private Health Insurance (Health Benefits Fund Enforcement) Rules 2007
Private Health Insurance (Health Benefits Fund Policy) Rules 2007 (No. 2)
Private Health Insurance (Health Insurance Business) Rules 2007
Private Health Insurance (Incentives) Rules 2007
Private Health Insurance (Insurer Obligations) Rules 2007
Private Health Insurance (Levy Administration) Rules 2007
Private Health Insurance (Lifetime Health Cover) Rules 2007
Private Health Insurance (Ombudsman) Rules 2007
Private Health Insurance (Prostheses Application and Listing Fee) Rules 2007(No. 2)
Private Health Insurance (Prostheses Application and Listing Fee) Rules 2007(No. 2)
Private Health Insurance (Prostheses) Amendment Rules 2007 (No. 1)
Private Health Insurance (Prostheses) Rules 2007 (No. 3)
Private Health Insurance (Registration) Rules 2007
Private Health Insurance (Risk Equalisation Administration) Rules 2007
Private Health Insurance (Risk Equalisation Levy) Rules 2007
Private Health Insurance (Risk Equalisation Policy) Rules 2007
Private Health Insurance (Transition) Rules 2007