Article Information

Authors: Tom Griffith, Nisha Pereira
Service: Competition & Trade

Medibank Private Limited successfully defends claims of misleading or deceptive conduct and unconscionable conduct

Justice O'Callaghan of the Federal Court of Australia delivered his judgment in the case of Australian Competition and Consumer Commission (ACCC) v Medibank Private Limited (Medibank) [2017] FCA 1006 on 30 August 2017.

*Justice O'Callaghan of the Federal Court of Australia delivered his judgment in the case of Australian Competition and Consumer Commission (**ACCC**) v Medibank Private Limited (**Medibank**) [2017] FCA 1006 on 30 August 2017. The Court found that Medibank did not engage in misleading or deceptive conduct, nor did it act unconscionably.*

In his judgment, Justice O'Callaghan set out the statutory framework against which Medicare payments are applied in respect of pathology and radiology services. These services were collectively described as in-hospital diagnostic services and when a consumer with private health insurance receives, and submits a claim for, in-hospital diagnostic services, Medicare pays 75% of the Medicare Benefits Schedule fee (**MBS fee**) for this service.

If a consumer elects to take out private health insurance, legislation requires the private insurer to pay the balance of the MBS fee after the Medicare payment, which is 25% of that fee. The private health insurer may agree to provide cover for more than 100% of the MBS fee in those cases where a provider charges more than the MBS fee. This amount is referred to as a "gap payment". To the extent that the private health insurer does not cover the gap payment, the member must bear that cost which is referred to as an "out of pocket" expense.

Since about 2010, Medibank met the out of pocket expenses incurred by some of its members in respect of in-hospital diagnostic services. It had agreements with certain providers (hospitals) called "Medical Purchaser Provider Agreements" (MPPAs). Consumers weren't aware of the terms of the **MPPAs** as these were not publicised. At the end of 2011, about 25% of radiology services and nearly 60% of pathology services for which Medibank paid benefits to members were paid under a MPPA.

In mid to late 2013, Medibank conducted a "diagnostic funding review" of the economic feasibility of the MPPA arrangements. As a result of that review, Medibank terminated all but two MPPAs as part of its overall efforts to restrict increases in costs in order to constrain premium increases. This was a concern for Medibank and other private health insurers competing in a highly regulated market.

In its misleading or deceptive conduct case, the ACCC alleged that Medibank made two representations as follows:

1. Under the terms of its private health insurance policies, members would not incur any out of pocket expenses for "in hospital diagnostic services" (the diagnostic representation); and
2. That Medibank would tell members in writing if it proposed to make any "detrimental changes" to the benefits it offered, and that it failed to provide such notice when it abolished the MPPAs on 1 September 2014 and, as a result, no longer provided cover for out of pocket expenses in those cases were diagnostic providers charged more than the schedule fee for in-hospital diagnostic services (the notice representation).

The ACCC's complaint was not that Medibank terminated the MPPAs, rather it was that Medibank did not inform consumers that it had done so and therefore did not explain the effect that the termination would have on their ability to recoup out of pocket expenses as they were incurred. The ACCC argued that as a result of these two representations, members:

(a) were misled about the ongoing benefits available to them under the policies;

(b) incurred out of pocket expenses; and

(c) were denied opportunities to change their level of insurance, cancel their policy or avoid incurring out of pocket expenses.

The basis of the ACCC's allegations of unconscionable conduct was that Medibank executed a strategy whereby it terminated most of the MPPAs with in-hospital pathology and radiology providers without giving written notice of the effect of doing so to all of its members. The benefit said to be obtained by Medibank by not revealing the termination of the MPPAs was that it retained members who otherwise may have cancelled their policy, or changed to another policy with a new insurance provider.

Justice O'Callaghan found that Medibank did not make the representation that its members would be indemnified for all costs. Medibank successfully established that it clearly and repeatedly stated in its documentation that it paid benefits *towards* the cost of medical services and hospital charges and that members were exposed to out of pocket expenses for medical services.

The Court agreed that Medibank had told its members that it would give them prior notice of any change to Medibank's Fund Rules that was detrimental to the member. However it also agreed that the abolition of the MPPAs did not effect a change to those Fund Rules. Moreover, it was held that the termination of the MPPAs did not alter the benefits applicable to any of Medibank's policies. The benefits payable, both before and after such termination, were 25% of the MBS fees, plus any further benefits under the GapCover scheme, if applicable, plus any additional benefit payable to a member in circumstances where she or he received diagnostic treatment from a provider who was a party to the two remaining MPPAs in place after 1 September 2014.

Dr Wilson, Group Executive – Health Care & Strategy at Medibank gave compelling and unchallenged evidence in respect of the notice requirements and business judgment exercised by Medibank. He deposed that before the decision was taken to terminate the MPPAs, the gross potential savings estimated for the diagnostic component of the Medical Funding Review in April 2014 were $6 million in the financial year ending June 2017 (on the assumption the remaining two MPPAs were not terminated).

The ACCC's allegation of unconscionability could not survive without the misleading and deceptive conduct allegations. Justice O'Callaghan stated that Medibank's business judgment not to disclose the termination of the MPPAs to its members did not even remotely constitute unconscionability.

The onus to check the amount of benefit applicable to a member's policy appears to have been placed on the member. This was evident from Medibank's documentation which contained statements conveying this. The lesson learned for consumers is that to help understand their potential out of pocket expenses they should contact their health care insurance provider prior to any hospital admission and confirm any out of pocket expenses that may be incurred.

The Court dismissed the proceedings and ordered the ACCC to pay Medibank's costs. The ACCC has stated that it is carefully considering the judgment.

On 21 September 2017 the ACCC announced that it has lodged an appeal of this decision to the Full Federal Court.