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**PREPARED FOR THE HOSPITAL ASSOCIATION OF  
SOUTH AFRICA**

**SUBMISSIONS TO THE PANEL IN RESPECT OF THE**

**DRAFT GUIDELINES FOR PARTICIPATION IN THE  
MARKET INQUIRY INTO THE PRIVATE HEALTHCARE  
SECTOR**

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**30 JUNE 2014**

## INTRODUCTION

- 1.1 This submission is prepared for the Hospital Association of South Africa (“HASA”) in response to the Draft Guidelines for Participation in the Market Inquiry into the Private Healthcare Sector (the “Administrative Guidelines”) published by the Competition Commission (the “Commission”) on 30 May 2014.
- 1.2 This submission is limited to the Administrative Guidelines and, as such, does not relate to the Draft Statement of Issues that was also published by the Panel on 30 May 2014.
- 1.3 HASA’s submission relates mainly to the draft administrative timetable published under the Administrative Guidelines (the “administrative timetable”). HASA is of the view, as motivated herein, that the administrative timetable should include events specified below and as reflected in the table appearing at paragraph 3.1 below.

## 2. SUPPORT FOR THE SUBMISSIONS

### Working Papers

- 2.1 It is HASA’s view that the Panel should publish working papers that cover issues relating to the theories of harm. The Panel must also publish working papers in respect of the recommended remedies prior to it publishing its recommendations.
- 2.2 Even though the working papers will not be definitive of the Panel’s views on the issues relating to the market inquiry, it will be a reflection of the Panel’s thinking that will guide the inquiry process and the submissions to be received.
- 2.3 Further, the working papers should provide detail in respect of issues raised, the Panel’s concerns in respect of such issues, the analysis employed by the Panel and views that are relevant to the market inquiry. In fact, the working papers should cover the background issues, including, the operation of the market, the

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positions played by the relevant stakeholders in the overall market, market definitions and the analysis of the theories of harm as contemplated in the draft Statement of Issues, and the recommendations relating thereto.

- 2.4 It appears that the Panel relies on the draft Statement of Issues as the basis for providing stakeholders with some information that would guide them with their submissions. In HASA's view, the draft Statement of Issues does not provide sufficient particularity that would be necessary for stakeholders to make submissions that are relevant and properly structured.
- 2.5 Accordingly, in order to enhance the principles of natural justice, particularly those that deal with fairness, it is necessary that the Panel publish working papers and give stakeholders an opportunity to comment on their substance. Such publication will also be beneficial to the Panel, as it will assist the Panel with developing its thinking on the relevant topics.
- 2.6 HASA is of the view that there should be a working paper in respect of each theory of harm and, ultimately, for each recommended remedy to be advanced by the Panel.
- 2.7 Without the publication of the working papers, the current position would lend itself to a variety of complications, such as vagueness, ambiguity and the inclusion of irrelevant factors. This is due to the fact that the Panel, in the draft administrative timetable, calls for submissions from stakeholders without providing them with the kind of information that would assist with making relevant and focussed submissions to the Panel.
- 2.8 In addition, the Panel must publish working papers on technical aspects such as methodology, research and other issues that would be in the interests of justice to disclose to stakeholders by way of working papers.
- 2.9 HASA proposes that the working papers be published prior to public hearings in respect of those that relate to the theories of harm, and prior to recommendations

in respect of those that relate to the recommended remedies, as this will allow for a more structured and an in-depth ventilation of the issues.

- 2.10 Currently, the proposed administrative timetable suggests that parties that wish to make oral submissions must register by 30 October 2014, being the final date on which written submissions are also due. HASA is of the view that it would be more prudent if the closing date for registering oral submissions is a month or so after the working papers have been published, as this will enable stakeholders to make a decision on whether or not they wish to make oral submissions.
- 2.11 In addition, HASA is of the view that once the Panel has received comments from stakeholders, it should publish refined working papers that would take into account stakeholders' submissions.
- 2.12 In circumstances where working papers disclose sensitive information, HASA suggests that the Panel follows the process currently employed by the Competition Tribunal.
- 2.13 Finally, it is HASA's view that the interests of justice would be properly served should the Panel grant access in respect of all written submissions and transcripts made by the participants for comment by other stakeholders, subject to the rules relating to the treatment of sensitive and confidential business information.

#### Recommendations hearing(s)

- 2.14 The administrative timetable as contained in the Administrative Guidelines only allows for a hearing that relates specifically to features that adversely affect competition conditions. In fact, no provision is made that caters for a hearing in respect of the recommendations to be made by the Panel in rectifying such features.
- 2.15 In HASA's view, recommendations, when published for the first time, are merely a starting point for a discussion with the stakeholders to the market inquiry. The

administrative timetable makes the publication of the recommendations final. This is not desirable as it denies –

2.15.1 the Panel the opportunity to test the evidence it relied upon in reaching its recommendations and explore the applicability and viability of such recommendations; and

2.15.2 stakeholders the opportunity to meaningfully exercise their right to be heard on decisions that directly affect their businesses, which could have a profound effect on the existence of such businesses.

2.16 A hearing on recommendations may be helpful to the Panel in distinguishing between recommendations that are effective and those that will serve no purpose. Therefore, by engaging stakeholders on recommendations, the Panel will –

2.16.1 further legitimise the process;

2.16.2 possibly avoid judicial review;

2.16.3 narrow down the recommendations by excluding those that propose unsustainable remedies; and

2.16.4 identify remedies that are proportional to the proposed theories of harm.

#### Publishing Provisional Decisions on Recommendations and Receiving Written Submissions

2.17 It is HASA's view that the Panel should publish its provisional decision on the recommendations, and that stakeholders should automatically be afforded the opportunity to make written submissions in respect thereof. This approach will enhance the stakeholders' rights to free and complete participation in the process, and assist the Panel with –

- 2.17.1 avoiding any misunderstandings that may have occurred during the public hearings; and
- 2.17.2 having the benefit of the kind of detail that could not be achieved during a public hearing.

Final Report

- 2.18 The draft administrative timetable does not make provision for a final report. Without a final report being published by the Panel, the process would be left incomplete, and without a final resolution. In this regard, HASA recommends that a final report be included in the administrative timetable.

**3. PROPOSAL OF AN AMENDED ADMINISTRATIVE TIMETABLE**

- 3.1 Having regard to the above submissions, HASA proposes the following amendments to the administrative timetable, as indicated in red, with adjusted dates to be determined by the Panel –

<b>Date</b>	<b>Event</b>
31 May 2014	Statement of Issues and Guidelines for participation issued for public comment
1 - 30 June 2014	Receive comments on the Statement of Issues and Guidelines for Participation
1 – 31 July 2014	Consider comments on the Statement of Issues and Guidelines for Participation
1 August 2014	Publish Final Statement of Issues and Guidelines for Participation
1 August 2014	Call for submissions on subject matter of the Inquiry
1 August 2014 – 30 October 2014	Receive submissions on subject matter of the inquiry
Panel to determine	Publication of Working Papers on the Theories of Harm

Panel to determine	Analysis of information
Panel to determine	Last day to register for oral submission
Panel to determine	Public hearings in respect of the Theories of Harm
Panel to determine	Publication of refined Working Papers on the Theories of Harm
Panel to determine	Publication of Working Papers on the recommended remedies
Panel to determine	Analysis and targeted public hearings and information requests
Panel to determine	Publish provisional Findings and Recommendations. Call for submissions relating to provisional Findings and Recommendations
Panel to determine	Receiving submissions relating to provisional Findings and Recommendations
Panel to determine	Publication of the Final Report

Timing

3.2 Having regard to the above proposed submissions, it is evident that the Panel will have to allocate more time to the market enquiry so that the process is properly facilitated.

Continuous Consultative Process

3.3 HASA envisages a possibility that written submissions and hearings may not be sufficient to have the issues properly ventilated. In this regard, HASA proposes that the Panel make provision for private consultations with the relevant stakeholders wherein matters could be further discussed.