

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 2/09/2019 4:05:00 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Concise Statement  
File Number: VID942/2019  
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v  
MEDIBANK PRIVATE LIMITED  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in black ink, appearing to read 'Warwick Soden'.

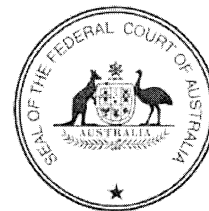
Dated: 2/09/2019 4:29:40 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form NCF1

**Concise Statement**

No. of 2019

Federal Court of Australia  
District Registry: Victoria  
Division: General

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Applicant

**MEDIBANK PRIVATE LIMITED (ACN 080 890 259)**

Respondent

**INTRODUCTION**

- 1 The Applicant (the **ACCC**) alleges that the Respondent (**Medibank**) falsely represented that some of its customers were not entitled to health insurance cover for certain joint investigations and reconstructions when in fact the customers' policies did cover joint investigations and reconstructions. The ACCC further alleges that Medibank wrongfully accepted payment from its customers for health insurance cover that Medibank did not supply.

**IMPORTANT FACTS GIVING RISE TO THE CLAIM**

- 2 Medibank carries on a business of marketing and supplying private health insurance services to consumers in Australia, including under the brand "ahm".
- 3 Between 28 February 2013 and 25 July 2018 (the **Relevant Period**), Medibank, under the ahm brand, offered to supply health insurance cover under various private health insurance policies described as "lite" and "boost" (the **Policies**), including:
- (a) from 28 February 2013, "lite", "lite cover plus", "black and white lite", "black and white lite flexi", "white lite" and/or "white lite saver" (the **Lite Policies**); and
  - (b) from 15 February 2017, "boost", "black and white boost", "black and white boost flexi" and/or "white boost" (the **Boost Policies**).

Filed on behalf of:	The Australian Competition and Consumer Commission		
Prepared by:	Alex Wolff		
Law firm:	Baker McKenzie		
Tel:	(03) 9617 4286	Fax:	
Email:	Alex.wolff@bakermckenzie.com		
Address for service:	Level 19, CBW, 181 William Street, Melbourne		

- 4 During the Relevant Period, Medibank in trade or commerce accepted payment from consumers to supply health insurance cover to persons covered by the Policies (**Members**).
- 5 The Policies entitled Members to health insurance cover for joint investigations and reconstructions. That was confirmed on the ahm website (see examples in **Annexure A**), and in guides such as product guides, quick guides and brochures (the **Guides**) (see examples in **Annexure B**).
- 6 "Joint investigations and reconstructions" were defined in Medibank's Member Guide (which it provided to all new members) as "surgery to investigate and repair damage to a joint as a result of injury or illness. This may include an arthroscopy, repair of ligaments and tendons, removal of loose bodies, repair of the joint surface, meniscus or other joint structures. Includes medication such as visco-supplemental injections".
- 7 All hospital services subsidised by the Australian Government are listed in the Medicare Benefits Schedule. Each hospital service listed in the Medicare Benefit Schedule is assigned a code (the **MBS Codes**). During the Relevant Period, Medibank used a computer system known as "WHICS" (the **Claiming System**) to determine whether it would supply health insurance cover under a Policy to a Member for each particular hospital service, by reference to the MBS Codes. Medibank used the Claiming System to:
  - (a) determine whether it would supply health insurance cover for particular hospital services, in response to claims for health insurance cover made by, or on behalf of, Members under the Policies (**Claims**); and
  - (b) respond to enquiries made by, or on behalf of, Members about whether they were entitled under the Policies to health insurance cover for particular hospital services (**Eligibility Enquiries**).
- 8 In about mid-2017, Medibank became aware that certain MBS Codes associated with joint investigations and reconstructions were excluded from, or not included in, the Claiming System for the Policies.
- 9 In December 2017, Medibank identified approximately 220 MBS Codes that a reasonable health insurance provider and/or consumer would associate with the

descriptor “joint investigations and reconstructions” and in around July 2018, Medibank identified approximately a further 54 such MBS Codes (**MBS Joints Codes**).

- 10 From the commencement of the Policies, Medibank had excluded, or failed to include, in the Claiming System 186 of the 274 MBS Joints Codes for the Lite Policies and 26 of the 274 MBS Joints Codes for the Boost Policies (the **Excluded MBS Joints Codes**).
- 11 Medibank continued to exclude, or failed to include, in the Claiming System:
  - (a) all of the Excluded MBS Joints Codes until 27 April 2018; and
  - (b) some of the Excluded MBS Joints Codes (54 for the Lite Policies and 16 for the Boost Policies) until 26 July 2018.
- 12 As a result, during the Relevant Period, in response to Claims or Eligibility Enquiries under the Policies for joint investigations or reconstructions associated with the Excluded MBS Joints Codes, Medibank made statements to Members (the **Affected Members**) directly, or to persons making Claims or Eligibility Enquiries on their behalf, to the effect that:
  - (a) the joint investigations or reconstructions were not included, were excluded, or were not covered under the Policies (in whole or in part); and/or
  - (b) Medibank would not pay a benefit for or towards, pay a claim for, or cover or contribute to, the joint investigations or reconstructions (in whole or in part).

Examples of those statements are contained in **Annexure C**.

- 13 By making the statements outlined in paragraph 12, Medibank in trade or commerce represented that the Affected Members were not entitled to health insurance cover under the Policies for joint investigations and reconstructions associated with the Excluded MBS Joints Codes (the **Representations**).
- 14 Further, Medibank failed to supply health insurance cover to the Affected Members for joint investigations and reconstructions associated with the Excluded MBS Joints Codes,

despite accepting payment from the Affected Members for health insurance cover for joint investigations and reconstructions.

#### **PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

- 15 By making the Representations, when the Affected Members were in fact entitled under the Policies to health insurance cover for joint investigations and reconstructions, Medibank:
- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law (**ACL**), which is Schedule 2 to the Competition and Consumer Act 2010 (Cth) (the **CCA**); and
  - (b) made false or misleading representations concerning the existence or effect of a condition or right in respect of the Policies, in contravention of s 29(1)(m) of the ACL.
- 16 Insofar as the Representations were representations as to future matters, the ACCC relies on s 4 of the ACL.
- 17 Further or alternatively, Medibank accepted payment from Affected Members for health insurance services for joint investigations and reconstructions which it failed to supply within the period specified by Medibank or within a reasonable time, in contravention of s 36(4) of the ACL.

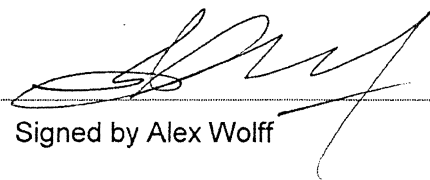
#### **RELIEF SOUGHT FROM THE COURT**

- 18 The ACCC seeks the relief in the accompanying Originating Application, which includes:
- (a) declaratory relief under s 21 of the Federal Court Act 1976 (Cth) (the **FCA**);
  - (b) orders for pecuniary penalties under s 224 of the ACL in respect of the contraventions of s 29(1)(m) and s 36(4) of the ACL;
  - (c) orders for injunctive relief under s 232 of the ACL;
  - (d) consumer redress orders under s 239 of the ACL;
  - (e) non-punitive orders under s 246 of the ACL;
  - (f) adverse publicity orders under s 247(1) of the ACL;
  - (g) an order regarding findings of fact under s 137H of the CCA; and
  - (h) costs under s 43 of the FCA.

## ALLEGED HARM

- 19 As a result of the Representations, Affected Members:
- (a) were misled about the health insurance cover available to them under the Policies;
  - (b) in some cases, incurred out of pocket expenses, including significant out of pocket expenses for major procedures;
  - (c) in some cases, elected to delay, or not to undertake, a joint investigation or reconstruction, leading to additional pain and suffering, and additional out of pocket expenses;
  - (d) in some cases, upgraded to more expensive cover with Medibank, and had to serve additional waiting periods;
  - (e) were denied the opportunity of making a properly informed decision about proceeding with a joint investigation or reconstruction; and
  - (f) were denied the opportunity of making a properly informed decision about whether to increase the level of their health insurance cover with Medibank, or whether to cancel health insurance cover with Medibank and purchase cover from an alternative insurer.

Date: 2 September 2019

  
Signed by Alex Wolff

Lawyer for the Applicant

This concise statement was prepared by Anna Lord of counsel and settled by Michael Borsky QC.

**Certificate of lawyer**

I Alex Wolff certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.


Date: 2 September 2019



---

Signed by Alex Wolff  
Lawyer for the Applicant

# Annexure A


[products](#)
[offers](#)
[contact](#)
[log in](#)

Price is for **Single** cover in **NSW** per **Week**

## black+white boost flexi

### Hospital and extras package

Lots of hospital procedures, with more things 'in' than 'out' and no excess for kids. Enjoy much more than the standard extras and boost your wellbeing with some natural therapies too.

**Join now**

Price **Before** 1 April premium change

Superann Government Rebate 25.951%  
 GST  
 Lifetime Health Cover Loading 0%

Australian Government Rebate 25.951%  
 GST  
 Lifetime Health Cover Loading 0%

## Hospital

### What's included

 No excess for kids	 Accident	 Ambulance	 Removal of lenses & contacts
 Removal of appendix	 Wisdom teeth	 Joint replacements & reconstructions	 Minor gynaecology
 Grommets in ears	 Brain surgery	 Cancer therapies	 Colonoscopies
 Bowel surgery	 TENS machine hire/purchase	 All services covered by Medicare*	

\* This does not include services that are partially covered or excluded from this product.

Although these services are included, there still may be some out-of-pocket expenses as some doctors and medical practitioners charge more than what is set out in the Medicare Benefits Schedule (MBS).

[More about out-of-pocket](#) >

A note on ambulance. Tasmania and Queensland have state schemes that cover ambulance services for residents of those states.

### What's partially covered

 Dentist	 Psych	 Rehabilitation	 Palliative care
--	--	---	--

We'll cover some of the costs of the above items but not all, so you will end up with out of pocket expenses if you go to a private hospital or are in a private room in a public hospital.

[More about out-of-pocket](#) >

### What's excluded

For these excluded services the cost of treatment won't be covered at all. This won't stop you from going to a public hospital as a public patient for treatment.

 Reproductive services	 Heart	 Major eye surgery	 All joint replacements
 Major & reconstructive surgery	 Venous and varicose vein surgery	 Nerve pain treatment	 Colorectal procedures and gastroscopy
 Hysterectomy	 Spinal Fusion	 Weight loss surgery	 Dialysis





products

help

contact

log in

Price is for

Single

cover in

NSW

per

Week

# black+white lite flexi

Hospital and extras cover with a bit more peace of mind.

Are you the sporty type? Want more than just the basics? Do you wear glasses or contacts? Or simply want a little more \$\$ in your flexi extras limit? Introducing black+white lite flexi with more of all.

Australian Government Rebate 25.934%  
 Change  
 Lifetime Health Cover Loading 0%

**Get covered**

## Hospital

### What's included



Accident



Ambulance



Removal of tonsils



Removal of appendix



Wisdom teeth



Joint investigations & reconstructions



Minor gynaecology



Grommets in ears

Although these services are included, there still may be some out-of-pocket expenses as some doctors and medical practitioners charge more than what is set out in the Medicare Benefits Schedule (MBS).

[More about out-of-pockets >](#)

A note on ambulance: Tasmania and Queensland have state schemes that cover ambulance services for residents of those states.

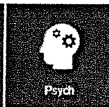
### What's partially covered



Rehabilitation



Palliative care



Psych

We'll cover some of the costs of the above items but not all, so you might have large out-of-pocket expenses.

[More about out-of-pockets >](#)

### What's excluded

For these excluded services the cost of treatment won't be covered at all. This won't stop you from going to a public hospital as a public patient for treatment.



**Annexure B**

No.	Date	Document ID	Policy	Type	Cover
1.	February 2013	MED.018.003.0529	Lite	Product guide	<ul style="list-style-type: none"> <li>• 'Introducing a/m Lite cover' - 'Hospital' - 'Joint reconstructions and investigations' (pg 3)</li> <li>• 'What are you covered for?' - 'Joint reconstructions and investigations' (pg 4)</li> </ul>
2:	June 2013	MED.018.003.0448	Lite Cover Plus	Brochure	<ul style="list-style-type: none"> <li>• 'What's covered, how much and when' - 'What's covered?' - 'All joint investigations and reconstructions (not replacements)' (pg 1)</li> </ul>
3.	April 2014	MED.018.003.0509	Lite	Quick Guide	<ul style="list-style-type: none"> <li>• 'Hospital' - 'What's covered?' - 'All joint investigations and reconstructions (not replacements)' (pg 1)</li> </ul>
4.	January 2015	MED.018.003.0767	Lite	Quick Guide	<ul style="list-style-type: none"> <li>• 'Hospital' - 'What's covered?' - 'All joint investigations and reconstructions (not replacements)' (pg 1)</li> </ul>
5.	February 2016	MED.018.003.0439; MED.018.003.0590	White Lite	Quick Guide	<ul style="list-style-type: none"> <li>• 'What's covered and when' - 'Hospital' - 'What's covered?' - 'All joint investigations and reconstructions' (pg 1)</li> </ul>
6.	February 2017	MED.018.003.0458; MED.018.003.0630	Black + White Boost Flexi	Product Guide	<ul style="list-style-type: none"> <li>• 'Hospital' - 'What's covered?' - 'All joint investigations and reconstructions' (pg 2)</li> </ul>
7.	April 2018	MED.004.002.2465	Black + White Boost	Product Guide	<ul style="list-style-type: none"> <li>• 'Hospital' - 'What's covered?' - 'All joint investigations and reconstructions' (pg 2)</li> </ul>

Annexure C

No.	Date	Relevant statement by ahm officer	Relevant MBS Code/s	Mode of Communication	Member Number	Relevant Policy Type	Document ID
1.	13/02/2014	"We're sorry, but we can't pay benefits towards the following hospital stay because your health insurance doesn't cover this service."	47963	Letter	26311401	Lite Cover Plus	MED.018.005.0022
2.	17/12/2015	"We're sorry, but we can't pay benefits towards the following hospital stay because your health insurance doesn't cover this service."	48424	Letter	26995115	Lite Cover Plus	MED.018.005.0029
3.	20/05/2016	"We're sorry, but we can't pay benefits towards the following hospital stay because your health insurance doesn't cover this service."	46345	Letter	29391470	Lite Cover	MED.018.005.0038
4.	12/12/2017	<b>ahm:</b> "Now all of the item numbers that have been provided, all of those are actually excluded under this Black and White Lite Flexi... If you were looking at being covered for these particular items, you would need to look at upgrading your level of cover. However, you would be subject to the applicable waiting periods. So it's two months for anything not deemed pre-existing and 12 months for anything that is deemed pre-existing. I guess in this case you would probably expect that it would be classed as a pre-existing condition, so you would be looking at the 12 month waiting period." <b>member:</b> "Is there any way of not waiting for the waiting period? There's no way in hell I'm going to be able to wait 12 months because the pain is absolutely excruciating."	40300 40301 40303	Phone call	30534696	Black+White Lite Flexi	MED.018.007.0094

No.	Date	Relevant statement by ahm officer	Relevant MBS Code/s	Mode of Communication	Member Number	Relevant Policy Type	Document ID
		<p>ahm: "Unfortunately no health fund waives the hospital waiting periods, because if we do it for one we have to do it for everyone."</p> <p>Member: "I need the surgery to be done asap, at this stage I can't even walk which means I'm not at work. The pain is absolutely excruciating so the surgery needs to be done in the next couple of weeks."</p> <p>ahm: "If the cover doesn't include those particular things and you are looking at going up to a different level, the waiting periods apply to everyone not just yourself. As I said, we can't waive the waiting periods there for hospital. They are applicable for all health funds and we can't waive them."</p>					
5.	3/01/2018	<p>"Unfortunately, I've checked both of those item numbers and it's showing that both of them are not included on your Lite Cover. Now with the Lite Cover, it is just a very bare minimal cover and the cover is only for a handful of different procedures."</p> <p>"Keep in mind there would be a 12 month waiting period for pre-existing medical conditions, so we wouldn't assist at all in the first 12 months."</p>	39013	Phone call	30316090	Lite Cover	MED.018.007.0091
6.	3/01/2018	<p>"Nothing, we can't come into it at all. Because the surgical numbers aren't covered, the doctor's bills, the anaesthetist's bills, the assistant surgeon, the theatre and accommodation – nothing is covered. Because the surgical items</p>	40300 40301	Phone call	32621471	Lite Cover Plus	MED.018.007.0115

No.	Date	Relevant statement by ahm officer	Relevant MBS Code/s	Mode of Communication	Member Number	Relevant Policy Type	Document ID
		aren't covered, nothing is covered. It's as though you have no health insurance. It will be a cost all borne by yourself." "Lite Cover Plus is a very, very limited level of cover. There are only a handful of procedures that are covered."					
7.	26/01/2018	"If a service is excluded on your cover it means that we are unable to pay any benefit towards it and you'll be significantly out of pocket. For these services, unfortunately you won't receive anything from us towards the costs of treatment so you would have to pay all costs yourself."	40306	Live Chat	32780867	White Lite	MED.018.007.0010 MED.018.005.0048
8.	17/05/2018	"You have got White Lite, there are only a handful of procedures that will cover. As I'm entering it, 48406 is excluded, which means it's not covered at all." "When you took out the cover, it would have explained that it's not a very high level of cover. If you were to upgrade it, you wouldn't unfortunately be able to claim straight away as waiting periods do apply."	48406	Phone call	2797062	White Lite	MED.018.007.0063
9.	28/08/2018	"Unfortunately item numbers 40303 [and other MBS Codes] are excluded under your cover I'm sorry. If a service is excluded on your cover it means that we are unable to pay any benefit towards the admission and you'll be significantly out of pocket." "Since the primary item numbers for the procedure are excluded we would not be	40303	Live Chat	26920695	White Lite	MED.018.005.0026



No.	Date	Relevant statement by ahm officer	Relevant MBS Code/s	Mode of Communication	Member Number	Relevant Policy Type	Document ID
		<p>able to pay towards the anaesthetist's account either, I am sorry."</p> <p>"We cannot pay towards hospital either."</p>					