Draft Determination

Application for authorisation

lodged by

Hospitals Contribution Fund of Australia Limited

in respect of

its Dental Clinic Network and More For Teeth program providers

Date: 5 March 2018

Authorisation number: AA1000402

Commissioners: Schaper
Court
Featherson

Summary

The ACCC proposes to grant authorisation to HCF and dentists who voluntarily participate in HCF's More for Teeth program, to allow them to agree about the maximum price for certain services supplied by those dentists to HCF members.

Dentists who participate in the More for Teeth (MFT) program agree to cap fees to HCF members for a limited number of basic preventative dental services at rates set by HCF. This enables HCF to offer its members 'no gap' arrangements for More for Teeth dental services.

HCF proposes to establish a number of new HCF operated dental clinics to provide those basic dental services to its members and to charge the same fees.

By setting prices at its own clinics and agreeing price caps with dentists under its More For Teeth program, HCF may be in breach of competition laws if it did not obtain ACCC authorisation.

The proposed conduct is likely to lower the cost and increase the use of preventative dental services. The ACCC considers that the proposed conduct is likely to result in a net public benefit and proposes to grant authorisation for 10 years.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. On 20 October 2017 the Hospitals Contribution Fund of Australia Limited (**HCF**) lodged an application for authorisation[1] (AA1000402) with the ACCC. HCF seeks authorisation for itself, and dentists who voluntarily participate in its More For Teeth program (**MFT Providers**), to agree on the maximum price that MFT Providers can charge for certain basic routine and preventative dental services (**MFT Services**) to HCF members (the **Conduct**).

2. HCF plans to open Dental Clinic Network (**DCN**) clinics in some Australian cities where there are also currently MFT Providers, and HCF's DCN Clinics may therefore be in competition with dentists that are MFT Providers. HCF proposes to charge the same fees for MFT Services supplied to HCF members at these new DCN clinic locations.

3. HCF seeks authorisation of the arrangements because it considers that there is a risk that establishing HCF DCN clinics in the same geographic areas as MFT Providers may give rise to concerns of an agreement between competitors containing provisions which fix or control the maximum price to be charged for certain dental services.

4. Authorisation is sought for a period of 10 years.

[1] Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at **www.accc.gov.au/publications/authorisation-guidelines-2013**

Background

Health insurance and HCF

5. In Australia, the majority of dental services are delivered privately. Medicare does not cover most dental care, dental procedures or supplies. Some public dental services are provided by state and federal governments, generally only to concession card holders and children, or for emergency treatments.

6. Approximately half of the Australian population over the age of 5 report having some level of private health insurance cover for dental expenses. People eligible for public dental care had lower reported rates of insurance than those who were not eligible (30.6 and 57.9 per cent respectively). [2]

7. HCF is a private health insurer, offering private health insurance policies under which HCF may pay benefits to its members to cover the cost of general medical treatment, including dental treatments.

8. In Australia, the top five health insurers provide cover to over 80 per cent of those Australian consumers who hold private health insurance (that is, approximately 40% of the Australian population hold insurance with the largest five insurers, out of a total of 50% who are insured). Medibank and Bupa account for over half of the market, with similar market shares of around 27 per cent. The next three largest insurers are HCF, NIB and HBF, and they have a combined market share equivalent to one of the market leaders. HCF has a national market share of around 11 per cent.[3] In New South Wales HCF has a higher market share of just less than 20 per cent, but still has a smaller share than Bupa and Medibank (around 26 and 24 per cent respectively).[4]

HCF/HBF proposed merger

9. On Monday 19 February 2018, HCF and Western Australian insurer HBF issued a media release announcing they were planning to merge.[5] HBF operates almost entirely in Western Australia and has just over 50% share of private health insurance cover there (compared to HCF's current 2% share in WA).[6] If combined, the ACCC understands the merged entity would have a market share of about 18% of private health insurance nationally – but substantially higher in WA.

10. At this preliminary stage the ACCC is still considering whether the proposed merger would have any implications in relation to its assessment of this application for authorisation. The ACCC invites submissions on the potential impacts of the proposed merger on the benefits and detriments likely to result from the conduct for which authorisation is sought.

[2] Australian Institute of Health and Welfare, *Oral health and dental care in Australia: key facts and figures*, 2015, p 59.

[3] ACCC, *Report to the Australian Senate on anti-competitive and other practices by health insurers and providers in relation to private health insurance for the period 1 July 2015 to 30 June 2016*, 2017.

[4] Private Health Insurance Ombudsman, *State of the Health Funds Report 2016*, p28.

[5] HBF media release, "HBF and HCF plan to merge", 19 February 2018.

[6] Private Health Insurance Ombudsman, *State of the Health Funds Report 2016*, p32.

More For Teeth program

11. HCF contracts with MFT Providers. MFT Providers are private dentists who agree to charge HCF members at or below maximum fees (set by HCF) for MFT Services, such as check-ups and x-rays. This makes it possible for HCF members (depending on their level of cover and annual limits) to obtain MFT Services on a 'no gap' basis.

12. HCF advises that MFT Services currently comprise ten diagnostic and preventative services, and are a small subset of all dental services offered by dental practitioners. MFT Services do not include surgical and restorative procedures. The Australian Dental Association (**ADA)** reports that its Dental Fees Survey shows that only three of the services currently covered under the MFT program are within Australian dentists' 13 most commonly performed procedures.[7] HCF seeks to be able to make adjustments to the MFT program over time to include additional diagnostic and preventative items in order to reflect any relevant changes made to the ADA Items Glossary[8] or clinical practice.

13. The MFT Program currently covers the following services:

    - comprehensive oral examination
    - periodic oral examination
    - oral examination – limited
    - intraoral periapical or bitewing radiograph – per exposure
    - panoramic radiograph – per exposure
    - removal of plaque and/or stain
    - removal of calculus – 1st visit
    - removal of calculus – subsequent visit
    - topical application of remineralizing and/or cariostatic agents, one treatment
    - provision of a mouthguard - indirect

14. The ACCC understands that access to the MFT program is open to any dentist (outside Sydney) who wishes to participate and is prepared to agree not to charge HCF members more than the maximum price (set by HCF) for each of the MFT services. MFT Providers remain free to set their own prices in relation to non-MFT services provided to HCF members, and in relation to any services provided to non-HCF members. MFT Providers are also free to participate in any other competing health insurance program. MFT Providers who participate in the MFT program at one clinic are free to choose not to participate in the MFT program at any other clinics at which they provide dental services. HCF advises it does not provide any form of volume commitment to participating MFT Providers. As at May 2017,

[7] Australian Dental Association, *Submission to the ACCC*, 13 November 2017.

[8] The Australian Schedule of Dental Services and Glossary is a coding system for items and clinical procedures in relation to dental treatments, developed by the ADA.

around 6,400 dentists (by individual dentist headcount) across Australia were MFT Providers (of almost 15,000 dentists registered in Australia in total[9]).

Dental Clinic Network

15. HCF's Dental Clinic Network (**DCN**) comprises dental clinics which are owned and operated by HCF and only provide dental services to HCF members. HCF's DCN currently comprises nine HCF DCN clinics across metropolitan Sydney, and one HCF DCN clinic in Belconnen in the Australian Capital Territory. DCN clinics offer MFT Services as well as a range of other dental services. Eligible HCF members can claim back the entire fee for MFT Services depending on their level of cover.

16. HCF currently has a relatively small number of dental clinics (10) compared to other corporate providers of dental services including the Dental Corporation (owned by Bupa) (191 centres), Dental Partners (76 centres), Primary Dental (56 centres), Pacific Smiles Group (54 centres), National Dental Care (36 centres) and 1300SMILES (23 centres).[10]

17. HCF advises that it employs the majority of dentists at its DCN clinics, but also has a number of contracted dentists. DCN dentists are not restricted from working at other private practices, but are required to only treat HCF members when working at an HCF dental clinic.

18. HCF applied for authorisation because it seeks to extend its own network of DCN clinics in "a very small number of geographic locations across Australia" into areas where MFT Providers also operate.

19. HCF advises that it is currently seeking to open a DCN clinic in Melbourne's central business district in early 2018, but that there are no other existing substantive plans in place to open any additional clinics.

Consultation

20. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.

21. The ACCC invited submissions from a range of potentially interested parties including insurers, industry and consumer associations, and government departments.[11]

22. The ACCC received five submissions.

23. Private Healthcare Australia supports HCF's application on the basis that the Conduct is likely to be pro-competitive, and to deliver public benefits including reduced out-of-pocket costs and improved access to dental care for consumers.

24. Bupa support the application and considers it to be pro-competitive and beneficial to consumers.

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[9] Dental Board of Australia, Registration Table Data – December 2018: **www.dentalboard.gov.au/About-the-Board/Statistics.aspx**.

[10] HCF, *Supplementary submission in support of application for authorisation of HCF's More for Teeth program*, 8 December 2017, p 3.

[11] A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

25. Northern Territory Department of Health commented that, while it believes the benefits of the arrangements may have been overstated in the application, it is possible the Conduct could bolster the dental workforce and provide opportunities for increased access to dental services for the Northern Territory public. The Department described concerns with dental clinic networks and preferred provider arrangements which it had identified amongst some Northern Territory stakeholders, and said that increased market presence and overlapping services raise important considerations regarding the potential for price manipulation, particularly in smaller workforces of regional and remote areas.

26. The Australian Dental Association (ADA) opposes the application on the basis that the Conduct would exacerbate existing public detriments caused by the existence of insurer-owned dental clinics and preferred provider programmes, including that HCF can and will use the Conduct to funnel members towards clinics it owns itself to the detriment of non-DCN dentists, and that the DCN clinics will undermine continuity of care as patients choose cheaper MFT Provider and DCN dentists for MFT services.

27. Dr Sam Rogers of Northbridge Dental Clinic objected to HCF operating dental practices because he believes that HCF removes rebate items on some of the preventative procedures, causing harm to patients. He also noted that HCF could be taken over by another entity with a different motivation.

28. The submissions by HCF and interested parties are considered as part of the ACCC's assessment of the application for authorisation.

ACCC assessment

29. Pursuant to subsections 90(7) and 90(8), the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the conduct.[12]

30. In its assessment of the application the ACCC has taken into account:

    - the application and submissions received from the applicant and interested parties;[13]
    - the relevant areas of competition likely to be affected by the Conduct, particularly competition between health insurers, and between dentists to provide preventative and diagnostic dental services; and
    - the 10 year authorisation period requested.

Future without the conduct

31. To assist in its assessment of the Conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.

[12] As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

[13] Please see the ACCC's Public Register for more details, including a list of parties consulted.

32. HCF submits that, if it were not to receive authorisation in relation to the Conduct, it would still likely open dental clinics but using a different operational model. Specifically, HCF submits that it would engage dentists as independent contractors to provide services at its DCN clinics.

33. The ACCC considers that, without the Conduct, HCF may choose to:

    - open more DCN clinics but end its agreements with MFT Providers in these geographic areas
    - continue to operate its network of MFT Providers and not extend its network of DCN clinics, or
    - maintain its network of MFT Providers and open its DCN clinics as planned, but use a model for operating its DCN clinics which does not require authorisation.

34. On the basis of the information currently before it, the ACCC accepts that, without the Conduct, HCF is likely to maintain its network of MFT Providers and to choose to open DCN clinics using a model which does not require authorisation.

Public benefit

35. HCF claims the operation of the MFT program results in public benefits by:

    - providing consumers with choice and greater certainty in pricing for diagnostic and preventative dental services, which is likely to lead to more frequent visits to the dentist which will in turn result in earlier detection of dental problems and reduction in the need for surgical and restorative dental procedures
    - promoting competition between health insurance providers to offer similar benefits, and
    - encouraging consumers to take up private health insurance, providing a benefit to public health systems through increased utilisation of private medical services.

36. HCF claims that employing, rather than contracting, dentists in its dental clinics has benefits in the form of assisting HCF to maintain clinical standards, manage quality issues, engage in training with dentists, provide team building activities, and exert a level of control over how dental services are provided to HCF members.

37. The ACCC accepts that the operation of the MFT program and the opening of new HCF DCN clinics is likely to result in public benefit by providing consumers with greater access to 'no-gap' or 'known-gap' preventative dental services, and hence at lower cost to those consumers. This is likely to encourage the increased take up of these services resulting in a reduced need for more serious dental intervention in the future. The ACCC considers that the proposed conduct will facilitate the expansion by HCF of the MFT program and the opening of new HCF DCN clinics and therefore result in a public benefit.

38. The ACCC notes that some of these public benefits could be achieved by HCF through a different operational model for its dental clinics that would or may not contravene provisions of Part IV of the CCA. However, the operational model proposed by HCF in its application for authorisation – that is, employing dentists at its DCN clinics - is its preferred model. The ACCC considers the proposed model is

likely to result in public benefit in the form of improved quality of services to members at HCF's DCN clinics, by providing HCF with an improved ability to monitor and regulate dental services at its clinics, and to provide better support and services to staff and members.

Public detriment

39. The Applicants submit that the Conduct will not result in any public detriment, because HCF will remain subject to competitive pressure from:

    - similar initiatives by other health insurance providers, and
    - aggressive promotional initiatives by competing dental centres for low cost services.

40. The ADA submits that the existence of health fund owned and operated dental clinics alongside preferred provider networks (such as MFT) already causes considerable public detriments which would be exacerbated were the application to be approved. These include harm to consumers of dental services and to dentists, in the form of:

    - market consolidation to MFT providers (from non-MFT dentists), through offering lower rebates to HCF members who choose to obtain MFT services from non-MFT dentists, and through 'funnelling' of HCF members to MFT providers, who will attend MFT providers initially for no-gap MFT services but are more likely to return to the MFT provider for more complex procedures
    - market consolidation to DCN clinics (from MFT providers), as MFT providers in an area with a DCN clinic will, over time, have their patients steered by HCF to its own clinics, through referrals by HCF made to its members, and through withdrawal of marketing support from MFT providers
    - impacts on the consumer's ability to maintain continuity of care with the practitioner of their choice and other negative outcomes for consumers (such as over-servicing, seriously compromised standards and ethics of care, and compromised professional development for dental graduates), as a result of the inherent conflict of interest of dental clinics which are owned and run by health insurers which lead to attempts to rein in costs and maximise profitability.

41. In response, HCF submitted that:

    - it seeks authorisation for its agreements with MFT program dentists in locations that overlap with its DCN clinics; not for the operation of the MFT program generally, or for the operation of its dental clinics
    - any dentist (outside Sydney) who wishes to do so can join the MFT program, if they are prepared to agree to cap their fees for the MFT services for HCF members at the no-gap level set by HCF
    - many of the issues raised by the ADA reflect its institutional views on matters such as corporate dentistry, and are not relevant to the application
    - it has a number of quality control and professional development measures in place to ensure the quality of the dental services provided by its clinics. It also

notes that self-employed dentists have very similar incentives to insurer-owned clinics, in relation to increasing revenue by increasing the number of patients seen per day.

42. The ACCC considers that the operation of the MFT program, and DCN clinics, are likely to continue to be subject to competition from other health insurance providers and dental service providers in the various regions in which they operate, because:

    - the Conduct affects a relatively small proportion of all dental services, in that:

        i. it relates only to preventative and diagnostic dental services (currently 10, although the number of services may increase or decrease over time)

        ii. HCF members are a relatively small proportion of all consumers of dental services (at about 5% of the general population)

        iii. DCN clinics are a relatively small proportion of all providers of dental services (currently with 10 clinics nationally)

    - the Conduct is not likely to have any significant impact in relation to non-MFT dental services, or in relation to any dental services offered to non-HCF members

    - in relation to MFT Services, HCF members remain free to choose whether to obtain no-gap dental services from a DCN clinic or an MFT Provider, or receive a lower rebate from HCF if they attend a non-MFT provider

    - in relation to non-MFT dental services, HCF members will receive the same rebate regardless of which dentist they choose

    - dentists remain free to choose whether or not to participate in the MFT program (and cap prices for MFT Services)

    - dentists employed at DCN clinics remain free to also work at other clinics, and they are not obligated to participate in the MFT program when working in these clinics

43. In relation to concerns raised by the ADA, the ACCC notes that:

    - without the Conduct, HCF will likely continue to operate its MFT program and open DCN clinics in areas with MFT providers, albeit it under a contractor rather than employee model

    - as businesses, all dentists face similar pressures as DCN clinics, including to rein in costs and increase profitability.

44. The ACCC notes that HCF intends to add to the list of services covered under the MFT Program over time. The ACCC accepts that there is merit in allowing HCF to alter the list of MFT Services over time as dental practices change, but wishes to ensure that this does not lead to changes so significant that they fundamentally alter the nature of the scheme from its current form. The ACCC expects that HCF will notify it of future changes to the list of MFT Services. The ACCC understands that future changes are unlikely to be frequent, but notes that should changes

increase the likelihood of public detriment it is open to the ACCC to reconsider the authorisation at that time.

45. Overall, the ACCC considers that the Conduct is likely to result in minimal, if any detriment to competition between dentists or between health insurers, since HCF and its clinics will remain subject to competitive pressure from other insurers and providers of dental services.

Balance of public benefit and detriment

46. In general, the ACCC may not grant authorisation unless it is satisfied that, in all the circumstances, the Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

47. For the reasons outlined in this draft determination the ACCC is satisfied that the Conduct is likely result in public benefit that would outweigh the likely minimal public detriment, including the detriment constituted by any lessening of competition that would be likely to result.

Draft determination

The application

48. Application AA1000402 was made using a Form B, under subsections 88(1) and 88(1A) of the CCA seeking authorisation to engage in conduct to which certain provisions of Part IV of the CCA would or might apply. [14]

49. Authorisation is sought to make and give effect to contracts between HCF and various dentists, which contain provisions specifying the maximum prices for specified dental services to be charged to HCF members by those dentists who voluntarily participate in HCF's More For Teeth program (the Conduct).

50. Authorisation is sought as the Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.[15]

51. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

52. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to subsections 90(7) and 90(8) of the CCA, that in all the circumstances the Conduct for which authorisation is sought would result or be likely to result in a

[14] On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

[15] The reference to "within the meaning of section 45 of the CCA" includes the making and/or giving effect to a provision of a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect or likely effect of substantially lessening competition.

public benefit that would outweigh any detriment to the public that would result or be likely to result from the Conduct. [16]

Conduct which the ACCC proposes to authorise

53. The ACCC proposes to grant authorisation AA1000402 to Hospitals Contribution Fund of Australia Limited and current and future dentists who are members of its More For Teeth program to enter into and give effect to contracts between them, which contain provisions specifying the maximum prices for preventative and diagnostic dental services to be provided by dentists to HCF members as part of the More For Teeth program.

54. The ACCC proposes to grant authorisation AA1000402 for 10 years.

55. This draft determination is made on 5 March 2018.

Next steps

56. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

[16] As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).