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: 11 May 2018

Authorisation number: AA1000402

Commissioners: Sims
Rickard
Court
Featherston

Summary

The ACCC has decided to grant authorisation to HCF and dentists who voluntarily participate in HCF's More for Teeth (MFT) 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 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 MFT 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 MFT program, HCF may be in breach of competition laws if it did not obtain ACCC authorisation.

The conduct is likely to lower the cost and increase the use of preventative dental services by HCF members. The conduct is likely to result in minimal, if any, public detriment.

The ACCC considers that the conduct is likely to result in a net public benefit.

The ACCC grants authorisation for five years, until 1 June 2023.

1. On 20 October 2017, the Hospitals Contribution Fund of Australia Limited (**HCF**) lodged an application for authorisation[1] (AA1000402) with the ACCC. HCF sought 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 sought 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 was sought for a period of 10 years.

5. On 5 March 2018, the ACCC issued a draft determination proposing to grant authorisation for 10 years. At the request of the Australian Dental Association (**ADA),** a pre-decision conference was held on 10 April 2018.

[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 **https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger**

Background

Health insurance and HCF

6. 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.

7. Approximately half of the Australian population over the age of five 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]

8. 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.

9. 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 per cent of the Australian population hold insurance with the largest five insurers, out of a total of 50 per cent 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

10. 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 per cent share of private health insurance cover there (compared to HCF's current 2 per cent share in WA).[6] If combined, the ACCC understands the merged entity would have a market share of about 18 per cent of private health insurance nationally – but substantially higher in WA.

11. The ACCC is not aware of any further public announcements about the proposed HCF/HBF merger. As specific details of any merger have not been made public, it is difficult to assess the impact of any merger and the ACCC has not considered the likely effect of a merger on the public benefits and public detriments of authorisation. Any merger will be assessed by the ACCC via a public review at the appropriate

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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*, p. 28.
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*, p. 32.

time. A merger between HCF and HBF may constitute a material change of circumstances and may result in a review of the authorisation.[7]

More For Teeth program

12. 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.

13. HCF advises that MFT Services currently comprise 10 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. 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.[8] 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[9] or clinical practice. [10]

14. 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.

15. 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

[7] A 'material' change of circumstances is one that has a significant impact or likely impact upon public benefit and/or detriment.
[8] Australian Dental Association, *Submission to the ACCC*, 13 November 2017.
[9] The Australian Schedule of Dental Services and Glossary (ADA Items Glossary) is a coding system for items and clinical procedures in relation to dental treatments, developed by the ADA.
[10] HCF, *Submission in support of application for authorisation of HCF's More for Teeth program*, 20 October 2017, p. 9.

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, around 6,400 dentists (by individual dentist headcount) across Australia were MFT Providers (of almost 15,000 dentists registered in Australia in total[11]).

Dental Clinic Network

16. HCF's 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.

17. 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).[12]

18. 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.

19. 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.

20. HCF opened a DCN clinic in Melbourne's central business district in early 2018 and HCF submits that there are no other existing substantive plans in place to open any additional clinics.

Consultation

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

Application for authorisation

22. Upon receiving the application, the ACCC invited submissions from a range of potentially interested parties including insurers, industry and consumer associations, and government departments.[13]

23. The ACCC received five submissions.

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

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

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

[13] 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. Bupa support the application and considers it to be pro-competitive and beneficial to consumers.

26. Northern Territory Department of Health submits 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.

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 ADA opposes authorisation 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 Providers and DCN dentists for MFT services.

Draft determination

29. The ACCC invited submissions in response to its draft determination.

30. The ADA restated its opposition to authorisation. The ADA opposes a private health insurance framework where different rebates apply for different dentists for the same service, in this case, MFT Services. The ADA stated that authorisation will exacerbate the detriments arising from this framework.

31. The ADA submits that the proposed merger between HCF and HBF, if completed, would considerably consolidate HCF and HBF's market power, which increases the likelihood that the existing public detriments will be exacerbated even further.

32. These are discussed in more detail in the Assessment section below.

Pre-decision conference

33. A pre-decision conference to discuss the draft determination was held in Sydney on 10 April 2018, at the request of the ADA. Key issues raised at the conference are set out below. A summary of the issues discussed is also available on the **public register**.

34. The ADA made the following points at the conference:

- HCF's vertical integration results in a conflict of interest. HCF sets the health insurance premium paid by policyholders, the rebate for each procedure and it has the capacity to control the treatment by determining the procedures covered under the MFT program

- inequality in HCF rebates distorts the market by steering consumers to HCF's preferred providers, which substantially lessens competition and impedes HCF policyholders' continuity of care

- the *Health Industry Claims and Payments Service* (HICAPS) provides health insurers with patient data about dental services and there is potential for private health insurers to misuse this data if they are also providing dental services (e.g. HCF may use the data to target advertising or offers to the customers of non-HCF dentists)

- HCF already holds significant market power which will expand (particularly in WA) if HCF's merger with HBF goes ahead

- there will be minimal price certainty for policyholders who attend non MFT/DCN dentists

- HCF's 'gap free' arrangements are limited to 10 items and likely to act as a loss leader mechanism to steer patients towards MFT Providers and DCN clinics

- patients paying the same premium and receiving the same treatment should receive the same rebate regardless of the dentist they choose

- any benefits from authorisation are limited

- authorising the Conduct would exacerbate current pubic detriments that outweigh public benefits.

35. HCF submitted that it agrees with and supports the draft determination.

36. Private Healthcare Australia restated its support for the conduct, noting benefits to consumers in the form of 'no-gap' or 'known-gap' for dental treatment.

37. Following the pre-decision conference, the ADA provided the ACCC with a further submission requesting that, if the ACCC intends to grant authorisation, that it do so for a period of five years and not the 10-year period requested by HCF.

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

ACCC assessment

39. Pursuant to subsections 90(7) and 90(8) of the *Competition and Consumer Act 2010* (the CCA), 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.

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

- the application and submissions received from the applicant and interested parties;[14]

- the matters raised at the pre-decision conference;

[14] The ACCC's Public Register for more details, including a list of parties consulted.

- 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

41. 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.

42. 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.

43. The ADA submits that independent contracted dentists fail the Australian Taxation Office test for contractor status because they have to provide their own equipment and materials.[15] The relevance of this point is that if true, it may call into question the ability of HCF to use the model described at paragraph 42 above.

44. 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.

45. On the basis of the information before it, the ACCC accepts that, without the Conduct, HCF is likely to maintain its network of MFT Providers and open future DCN clinics using a model which does not require authorisation and meets its obligations under the law.

Public benefit

46. 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

[15] Australian Dental Association, submission on the draft determination, 19 March 2018.

- encouraging consumers to take up private health insurance, providing a benefit to public health systems through increased utilisation of private medical services.

47. 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.

48. The ADA challenges HCF's public benefit claims. The ADA submits that for certain preventative dental health procedures, the rebate certainty afforded to policyholders that attend MFT Providers or DCN clinics should also be provided to other policyholders who choose to see non-contracted dentists. Without this rebate equality, HCF's MFT program provides 'more' for some but not all policyholders.[16]

49. The ACCC notes the ADA's concerns regarding different rebates provided to different dentists. However the ACCC is not assessing the general terms on which certain dental services are offered to HCF's policyholders. Rather the focus is on the arrangements whereby HCF and MFT Providers set maximum fees for specific dental services.

50. 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 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.

51. The ACCC notes that some of these public benefits could be achieved by HCF by adopting a different operational model for its dental clinics. 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

52. 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.

53. 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:

[16] Australian Dental Association, Submission on the draft determination, 19 March 2018.

- market consolidation to MFT providers (from non-MFT dentists), by 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.

54. HCF submits that: [17]

- 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.

55. 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:

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

    - HCF members are a relatively small proportion of all consumers of dental services, and

    - DCN clinics are a relatively small proportion of all providers of dental services.

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

- 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.

56. The ACCC acknowledges the concerns raised by the ADA in its submissions and during the conference, particularly:

    - that private health insurers provide different rebates to different dentists for the same services provided by the dentist, which ultimately affects the price consumers pay for dental services

    - the potential for use of HICAPS data for patients receiving MFT Services from non-contracted dentists to encourage policyholders to use private health insurers' dental providers instead

    - concerns about market consolidation and particularly the proposed merger between HCF and HBF.

57. These are important questions of public policy and the regulation of health insurance and dental services more broadly. In granting authorisation to the proposed conduct, the ACCC is not offering a view on the general terms on which dental services are provided to health insurance members, nor on the operation and use of data under the HICAPS system. Further, any proposed merger would be subject to a separate review under the merger provisions of the Competition and Consumer Act, which prohibit mergers that are likely to substantially lessen competition in a market.

58. In recognising these important issues, the ACCC also notes that they are largely beyond the scope of the ACCC's assessment of this application for authorisation, which relates to HCF and MFT Providers agreeing on the maximum prices that can be charged for MFT Services.

59. In relation to other 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.

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

61. 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

62. 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.

63. For the reasons outlined in this determination, the ACCC is satisfied that the Conduct is likely to 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.

Period of authorisation

64. The CCA allows the ACCC to grant authorisation for a limited period of time.[18] This allows the ACCC to be satisfied that the likely public benefits will outweigh the likely public detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

65. HCF requested authorisation for 10 years. This period is consistent with the length of lease HCF typically secures when it opens new DCN clinics and the average length of employment of HCF dentists. HCF secured 10-year leases for the Belconnen DCN clinic and the two clinics opened in Sydney last year.[19]

66. In the draft determination, the ACCC proposed to grant authorisation for 10 years.

67. The ADA submits that if the ACCC grants authorisation, it should do so for a five year period. It noted several recent changes to the private health insurance market including the privatisation of Medibank, the announced merger of HCF and HBF and the impact to consumers of industry changes as described by the ADA in its written submissions and oral submissions at the conference. Further, that a shorter authorisation period will provide the ACCC and the public with the opportunity to assess whether HCF's conduct results in a net public benefit.[20]

68. While the duration of an authorisation is determined case by case, the ACCC more frequently grants longer authorisations (beyond five years) where it is being asked

[18] Subsection 91(1) of the Act
[19] HCF, *Submission in support of application for authorisation of HCF's More for Teeth program*, 20 October 2017, p. 15.
[20] Australian Dental Association, Submission following the pre-decision conference, 13 April 2018.

to reauthorise previously authorised conduct, there is evidence that anticipated benefits have been delivered, relevant parties continue to support the arrangements and market conditions are stable.

69. The ACCC notes that this is the first time that authorisation has been sought for this conduct, that the ADA raised a number of concerns regarding the granting of a 10-year authorisation, and that the industry is likely to undergo a number of changes in the next five years. The ACCC also notes that the authorisation provides for the possibility that HCF may make changes to the MFT program to include additional diagnostic and preventative items.

70. In light of these factors, the ACCC has determined that it is appropriate to grant authorisation for five years, rather than the 10 years sought by the applicants. This provides the ACCC with an opportunity to assess the benefits and detriments arising from the conduct in light of industry changes and any changes to the MFT program.

71. Accordingly, the ACCC grants authorisation for the Conduct for five years.

Determination

The application

72. On 20 October 2017, HCF lodged an application for authorisation (AA1000402) with the ACCC. HCF sought authorisation for itself and MFT Providers to agree on the maximum price that MFT Providers can charge for certain basic routine and preventative dental services (i.e. MFT Services) to HCF members.

73. The application 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. [21]

74. Authorisation was 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.[22]

The net public benefit test

75. For the reasons outlined in this 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 public benefit that would outweigh any detriment to the public that would result or be likely to result from the Conduct.

Conduct which the ACCC has decided to authorise

76. The ACCC grants authorisation AA1000402 to HCF and to current and future dentists who are members of HCF's 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.

77. The ACCC grants authorisation AA1000402 for five years, until 1 June 2023.

Date determination comes into effect

78. This determination is made on 11 May 2018. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 2 June 2018.

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[21] 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.

[22] 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.