

MinterEllison

15 March 2021

BY EMAIL

Danielle Staltari
Director | Competition Exemptions
Australian Competition & Consumer Commission

Dear Danielle

Private Healthcare Australia | Application for revocation and substitution

We refer to your email dated 10 March 2021 in which you requested that Private Healthcare Australia (**PHA**) provide additional information to the Australian Competition & Consumer Commission (**ACCC**) in relation to its application for revocation and substitution (**Application**) of authorisation AA1000542-1 (**First Authorisation**).

To assist the ACCC in considering the Application for an interim, and replacement authorisation, we set out our clients' responses to the additional information sought from the ACCC below. Capitalised terms used in this letter are defined in the Application.

1. **Please outline what public benefits have resulted under the current authorisation (particularly in light of the circumstances that no measures have been implemented by PHA members). Please provide specific examples.**
 - 1.1 PHA submits that there has been a net benefit to the public as a result of the First Authorisation, notwithstanding that the discussions between the Participating Parties did not result in any agreement to adopt particular measures. It provided the funds with the opportunity to meet and discuss possible responses to COVID-19 related events as they arose during the pandemic. The funds were able to discuss and consider the needs of their member bases and determine whether an industry response was possible and desirable in the interests of all of their members, with the assurance that they would not be at risk of engaging in cartel conduct.
 - 1.2 Some specific examples are:
 - (a) the funds discussed whether they would further postpone premium increases expected on 1 October 2020. A decision was made that each fund would consider the impact of a further premium deferral and would make an individual decision on this issue; and
 - (b) the funds discussed whether to extend cover for telehealth services beyond 30 September 2020. Due to the differential restrictions across the States and Territories and the particular impact for Members in Victoria, it was decided that this would be handled on a fund by fund basis depending on the impact to their membership base.
 - 1.3 While PHA acknowledges that there was no consensus from the funds on the above issues, the discussions between the funds would not have been possible. This provided the opportunity for the funds to consider the most appropriate course of action to meet the interests of their members during the pandemic.
 - 1.4 PHA maintains that there has been no detriment to the public as a result of the funds engaging in discussions in accordance with the First Authorisation. The purpose of this First Authorisation has



been to enable funds to discuss how best to benefit their Members during and as a result of the COVID-19 pandemic, which in no way has reduced competition in the private health insurance industry.

2. What would happen if industry was not able to coordinate a response? What effect would there be if authorisation lapsed (i.e. we didn't grant interim) e.g. are there any coordinated measures currently being discussed or contemplated under the existing authorisation that would have to stop or wouldn't go ahead.

2.1 The overarching focus of the First Authorisation, and for the replacement authorisation sought, is for Participating Parties to collaborate in an effort to provide a baseline response for the benefit of members during the COVID-19 pandemic, including by providing them with financial relief. The Department of Health (**Department**) and Australian Prudential Regulation Authority (**APRA**) rely on PHA to facilitate collaboration and discussion between the funds regarding COVID-19 related issues. [REDACTED]

[REDACTED] If these discussions are unable to take place in an efficient and swift manner, there is a risk that Government and regulatory initiatives would be established that may not be viable to implement. This could be detrimental both politically and to Members.

2.2 The core business of PHA is to provide a medium through which opinions of Members may be ascertained or expressed and to consult and liaise with relevant institutional authorities and the Australian Government to ensure they are fully informed on policies relating to private health insurance.

2.3 PHA submits that if the First Authorisation lapsed, and if the funds were not able to coordinate a response to a COVID-19 related event, each insurer would individually decide on measures to assist Members [REDACTED]

[REDACTED] Individual insurers will consider a range of factors in determining how to respond to a COVID-19 related situation to remain competitive with other insurers. For example, some insurers may consider that keeping premiums low may be a preferable strategy to effectively compete with other insurers [REDACTED]

2.4 PHA submits that there is a need for industry coordination as funds are hesitant to collaborate on these issues and other issues pertaining to COVID-19 responses if there is any risk of engaging in cartel conduct. This is especially so in this context because the Current Initiatives and any other need that may arise for collaboration during the pandemic, relate to measures that may not necessarily result in a commercial or competitive advantage for insurers.

Surplus funds

2.5 As articulated in the Application, there are two Current Initiatives being contemplated by insurers that would not proceed from 31 March 2021 if interim authorisation is not granted. The first being industry collaboration on the insurers' use of surplus funds from unclaimed treatments during the COVID-19 pandemic. We refer to paragraphs 5.2 to 5.3 of the Application.


2.6 Competition among the funds will not necessarily generate the greatest return of surplus funds to Members as it may lead to the fund being less competitive on other aspects such as price. PHA considers that if the First Authorisation ceased on 31 March 2021, the funds would make an individual decision about their use of their surplus funds. Some funds may decide to use its surplus funds to drive premium increases down in 2022 and improve their competitive position in the market with respect to price. Premium price is a significant determinant for competition in the health insurance industry, particularly because the mandatory product tiers of hospital cover render it difficult for funds to differentiate between each other based on product alone.

2.7 On the other hand, PHA recognises that there may be competitive advantages of returning surplus funds to Members through various initiatives and PHA submits that interim authorisation would not discourage insurers from exceeding any agreed approach by the industry. However, PHA submits that competition alone would not be sufficient to drive a baseline response from all insurers. This is because the measures would result in short term gains for Members rather than ongoing improvements in products, service or prices that would be driven by competition.

Age limit for dependents

- 2.8 The second of the Current Initiatives is to collaborate in response to implementation of the Federal Government's legislative reform which will allow older dependents aged up to 31 to remain on their family policy and allow persons with a disability to do so regardless of their age. We refer to paragraphs 5.4 to 5.6 of the Application.
- 2.9 Similarly to the first initiative, competition alone between insurers will not necessarily generate a response from the industry to the legislative changes that would result in the most favourable outcome for Members. The changes required to implement the reform will lead to a reduction in premium income for insurers as dependents will be paying less in premiums for their health insurance policies. As mentioned above, to remain price competitive some insurers may decide not to implement changes to their policies in response to the legislative reform in the short term or at all. On the other hand, PHA recognises that insurers may also see this as an opportunity to create a competitive advantage in attracting more families to their fund by increasing the age limit for dependents. The approach of insurers will vary based on the nature of their membership base, the nature of the fund and their own commercial drivers. Collaboration will provide the opportunity for a baseline industry approach.
- 2.10 The need for industry coordination is important to provide Members with more certainty and transparency about this change. There is an expectation among young people aged up to 31 that they may be able to maintain or resume their status as dependents on their family policies from as soon as 1 April 2021. In the absence of an industry approach, there may be confusion and uncertainty for these young people. PHA considers it is important to be consistent with messaging regarding the implementation of these legislative reforms, and a uniform response from PHA on behalf of the Participating Parties will help to relieve confusion about how the reforms will be implemented. This is especially important considering the detrimental impact that COVID-19 has had on young people, including increased rates of unemployment.

Timing

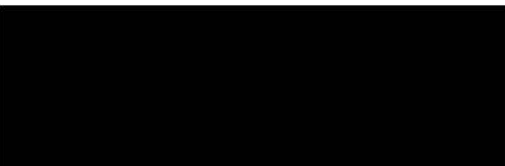
- 2.11 The other important advantage of collaboration is providing the opportunity for consistency from the industry in relation to timing for the introduction of changes to policies to increase the age limit for dependents. This is of particular significance due to the financial impact of COVID-19 on young people and people with disabilities. In order for the community to obtain the benefits of this legislative reform, it is beneficial for insurers to be able to collaborate on the timing of the reform in order to encourage early implementation from insurers. Competition alone will not necessarily drive a quick response to the legislative changes that is expected to come into effect on 1 April 2021. There is a broad expectation among young people that they will be able to take advantage of the reform and stay on their family policies from that date or soon thereafter. PHA is not seeking collaboration between insurers for all types of legislative reform but in relation to COVID-19 related reforms such as this one that is addressing to the financial need of the community arising from the economic impact of COVID-19.
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- 2.13 PHA requests that the ACCC give due consideration to the factor of timing, when considering whether to grant the Application. The Current Initiatives require immediate industry collaboration and in the months after the First Authorisation expires.
- 2.14 Additionally, PHA submits that the authorisation is vital for Participating Parties in responding to any Member issues or needs if there are future outbreaks of COVID-19. The modelling strongly suggests that COVID-19 is a seasonal condition and as such, it is expected that additional outbreaks may occur in the upcoming Winter months. The authorisation would provide the assurance to the funds that it would be able to collectively discuss and strategise on appropriate, Member-centric measures to respond to the detrimental effects of the pandemic at an industry-wide level. Again, this would require the authorisation to continue after 31 March 2021 and continue through the Winter season. Without the authorisation, there would not be an opportunity for insurers to collaborate on Member initiatives arising from COVID-19.

3. Why is there a need for industry coordination on the broadening the category of dependants that are to remain on an adult's health insurance policy and for utilising unreleased deferred claims liability that was provided for during the COVID-19 pandemic. What are the likely public benefits to arise from coordination on these measures? Is it possible to unwind these elements of the Proposed Conduct should the ACCC decide not to grant final authorisation?

- 3.1 As discussed in the response to question 2 and in section 6 of the Application, the likely public benefits arising from coordination on the Current Initiatives are providing better outcomes for Members by raising the bar for the industry, enabling clear communication to the community about the minimum industry response and encouraging insurers to provide timely responses to the Current Initiatives.
- 3.2 If final authorisation is not granted, there would not be any difficulty in unwinding any arrangement that is entered into in relation to the Current Initiatives. If an industry response is agreed to, the funds would not be entering into a formal agreement to take certain actions or make specific payments; rather, the funds would make a general commitment or agreed statement about the industry response to the Current Initiatives. This would then enable PHA to make statements to the community about the industry's baseline response to those issues. The funds would in turn decide whether to meet or exceed the industry response and would communicate their specific response to Members. Ultimately, this is a decision of the individual fund which will take into consideration the minimum industry response. If final authorisation is not granted, this would not require the insurers to terminate any formal agreement but would allow the insurers to change their response to the Current Initiatives to fall below the agreed industry response.
- 3.3 Interim authorisation would allow the funds to collaborate on the minimum industry response which would otherwise raise cartel conduct risks for the funds.

Please let us know if you would like to discuss any aspect of this letter.



Yours faithfully
MinterEllison

Contact: Noelia Boscana

OUR REF: 1176162