

MinterEllison

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BY EMAIL

Michael Pappa
Analyst, Competition Exemptions
Australian Competition & Consumer Commission
Level 17 | 2 Lonsdale Street
MELBOURNE VIC 3000

Dear Michael

Application for authorisation AA1000542-1: Response to AHSA submission

We refer to your email of 22 April 2021, in which you notified us of the recent submission by the Australian Health Service Alliance (**AHSA**) in response to a Request for Information from the ACCC (**AHSA Submission**). We set out below the response from nib health funds limited (**nib**) and Honeysuckle Health Ltd (**HH**) (together, the **Applicants**) to the issues raised in the AHSA Submission.

Capitalised terms used in this letter are defined in the amended application for authorisation submitted by the Applicants on 21 April 2021 (**Application**).

On a general note, the Applicants wish to express their disappointment in the AHSA Submission. They consider that the language used was inflammatory and unprofessional and that the AHSA Submission contained unfounded and unfair allegations. The Applicants acknowledge that the tone of the AHSA Submission may be in response to the threat of having HH Buying Group as the AHSA's first legitimate competitor in the buying group market, however this does not justify the AHSA's baseless allegations that HH will be engaging in anti-competitive, illegal or unethical conduct. The decision made by the Applicants to seek authorisation to engage in the Proposed Conduct from the ACCC demonstrates the strong compliance culture of the Applicants and the importance attached to ensuring that the HH Buying Group operates in a lawful and transparent manner.

We have set out below the Applicants' response to each of the issues in the AHSA Submission.

1. Issue 1: The provision of independent services

- 1.1 AHSA submits that due to nib's 50% stake in HH, it is not independent of nib and that HH would preference nib's interests over those of other Participants in the conduct of the HH Buying Group. The Applicants strongly dispute this allegation. HH is a joint venture company between nib and Cigna Corporation and operates independently of both of its shareholders. This is a common joint venture structure and there is nothing inherently flawed about this structure that would raise any doubts about the independence of HH as a separate legal company. The directors of HH are subject to fiduciary and statutory duties to act in the best interests of HH, regardless of the ownership structure of that company. AHSA's allegations suggest that HH's directors would be breaching their legal duties by preferencing nib's interests over the other Participants, without providing any basis for that allegation.
- 1.2 The Applicants also submit that the AHSA's assertion that the shared company directors between nib and HH create a conflict of duty is a hypocritical claim. The directors of the AHSA board are predominantly Chief Executive Officers of competing private health insurers and therefore, it would follow from AHSA's argument that the AHSA board would be favouring the interests of the insurers that have AHSA board members over the insurers that do not have a seat at the board. If this is not correct, then it is not clear why the AHSA board members are capable of managing their separate director / executive responsibilities and conflicts, but the shared directors between nib and HH are not able to do so. The directors of HH, and the AHSA alike, are required to act in



the best interests of their buying group and are able to manage any conflicts that may arise appropriately and in accordance with the *Corporations Act 2001* (Cth) and with law.

- 1.3 In addition to HH's legal obligations, it would not be in HH's commercial interests to act in accordance with nib's best interests and neglect the interests of the Participants. Being an independent service provider is critical to HH's business model and to attract healthcare payers to join the HH Buying Group. HH's governance structures for the HH Buying Group will ensure that the views of all Participants are heard and taken into account in the decision-making processes of HH. HH will also be making contractual promises to Participants under their participation agreement about the way it will conduct itself and if it prioritised nib's interests, it would also be breaching the participation agreement.
- 1.4 There are also current structures in place that ensure that HH remains independent of nib more generally including:
 - (a) arm's length contractual agreements between HH and nib that govern the relationship including the imposition of stringent privacy and confidentiality obligations in the handling of nib's member information;
 - (b) Data Governance and Privacy Governance frameworks managed independently by HH and nib;
 - (c) compliance with the Information Security and Management Systems (**ISMS**) (HH maintains an ISO 27001 compliant ISMS and received ISO 27001 certification in November 2020); and
 - (d) compliance training for employees and directors on their legal obligations.
- 1.5 In summary, AHSA is alleging that HH and its directors will breach their legal obligations and act unethically in the conduct of the HH Buying Group. There is no basis for these allegations.
- 1.6 The Applicants submit that the allegations about the lack of independence by HH do not relate to the question posed by the ACCC as Issue 1, being the differences between the Proposed Conduct of the HH Buying Group and the conduct in which AHSA currently engages. The allegations also bear no relevance to the question of whether the Proposed Conduct will generate net public benefits. Rather, they relate to the likelihood of whether potential healthcare payers will join the HH Buying Group which is more relevant to the impact of the HH Buying Group on the AHSA and not the general public.

2. Issue 2: Authorisation would reduce competition

- 2.1 The Applicants categorically dispute the AHSA's claims that nib is trying to gain an anti-competitive advantage through HH, and that nib will have access to the commercially sensitive information of the Participants of the HH Buying Group. Shareholders of a company are not legally entitled to a company's confidential information and therefore, the AHSA is alleging that HH will act illegally and unethically by disclosing Participants' commercially sensitive information to nib. The Applicants emphasise that nib will have access to the same Participant information as any other Participant (eg. deidentified, aggregated data). Again, the AHSA's allegation that the Applicants will act unlawfully are unfounded.
- 2.2 The Applicants submit that they have been transparent to the ACCC and the public about the arrangements regarding the sharing of, and the confidentiality of, information of Participants. HH employees understand, and have received training, about the strict treatment of personal information and confidential information of Participants. HH will also be subject to contractual obligations of confidentiality and privacy to Participants upon their entry in the HH Buying Group. In addition to HH's legal obligations, it is also critical to the HH Buying Group business model that HH handles the information of Participants strictly in accordance with its governance and security frameworks, in order to drive participation in the HH Buying Group. The Applicants submit that it would be completely contrary to HH's commercial interests for HH to disclose commercially sensitive information of Participants to nib.
- 2.3 AHSA alleges that nib will use confidential information it illegally obtains from HH about Participants in order to acquire small funds and reduce competition in the private health insurance market. The Applicants strongly refute this allegation. HH has absolutely no intention to assist nib to acquire small funds and the Proposed Conduct will not lead to a reduction in the number of

private health insurers in the market. Commercially, it would not be an attractive proposition for healthcare payers to join the HH Buying Group if they will then become takeover targets of nib. Again, there is no evidence to support this allegation. In fact, it could be argued that providing access for small funds to the HH Buying Group will improve the competitive position of the participating funds and reduce their attractiveness to larger funds as takeover targets.

- 2.4 The purpose of the HH Buying Group is to engage in collective bargaining and purchase contracting services from Providers, which will create transaction costs savings and efficiencies for Participants and contribute to better health outcomes for consumers at a lower cost. The Applicants are focused on generating public benefits in excess of, and diverse from, the benefits available under existing buying groups.
- 2.5 Further, the Applicants submit that the claim in the AHSA Submission that the Proposed Conduct would result in increased member out-of-pocket costs is factually incorrect and not supported by any evidence. The Applicants refer to its value-based Clinical Partners Program, which has already demonstrated significantly improved consumer protections and access to zero-gap experiences for Customers. The Applicants are already delivering and progressively developing innovative programs that improve choice and protections for consumers in the marketplace.

3. Issue 3: AHSA's membership rules

- 3.1 The Applicants submit that the information provided about the conduct of AHSA with its member funds was based on nib's direct experience with the AHSA. When nib acquired GU Health in 2017, the AHSA required the rapid transfer of all contracts (as GU Health was transferring from the AHSA) within six months. The Applicants consider that this was an aggressive timeframe to adhere to, given the demanding requirements to assess the potential for any detrimental impacts to consumers, mitigate these impacts where possible, and communicate any detrimental impacts to members where mitigation was not possible.
- 3.2 Due to the lack of transparency over the operations of the AHSA, it is difficult for the Applicants to comment on the content of the AHSA's membership rules or structure. The Applicants do know from its recent experience with GU Health that the AHSA is a party to the HPPAs with Providers in its own right, with its own termination rights which provides it with leverage to dictate a range of issues when a member leaves the AHSA such as the transition of HPPAs.
- 3.3 The Applicants submit that the AHSA has not adequately addressed the third question posed by the ACCC, which is to explain the basis on which AHSA does not require authorisation to ensure compliance with the CCA, and whether this basis would apply to the Proposed Conduct.
- 3.4 In any event, these matters are not relevant to the Application or the net public benefits that will be created through the Proposed Conduct.

4. Issue 4: Correction of misleading statement

- 4.1 The statements made at the Day Hospitals Australia Member Webinar by a member of the AHSA's senior management refer to the issue of obtaining data on outcomes as being the most challenging aspect of value-based contracting. Although the AHSA claims to support value-based contracting, the AHSA has failed to explain how they are overcoming the data challenges raised during the webinar and importantly, they have not provided any evidence or examples of the *'meaningful and effective value based contracting outcomes'* it claims it has achieved.
- 4.2 By contrast, the Applicants are strong proponents of value-based contracting, and submit that the HH Buying Group will provide a differentiated model of funding from other buying groups that are currently in the market. The provision of value-based contracting, including through the broadening of the already successful Clinical Partners Program, will generate significant public benefits that are highlighted in this letter, the Application, and other responses to the ACCC.

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

Yours faithfully
MinterEllison



Contact: Noelia Boscana

OUR REF: 1313530