

Restriction of Publication of Part Claimed – final paragraph of section 1.1, signature on page 9, letter attached to this application

# MinterEllison

1 April 2020

## **Application for interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth)**

**Lodged by: Private Healthcare Australia Limited (PHA)**

on behalf of itself, Members Health Fund Alliance and each of their member health insurers

**Public version**

**1 April 2020**

## 1. Summary

### 1.1 Background

This application is made to the Australian Competition and Consumer Commission (**ACCC**) by Private Healthcare Australia Limited (**PHA**) and on behalf of:

- a) Members Health Fund Alliance (**Members Health**); and
- b) the private health insurers listed in Annexure A which are members of PHA and/or Members Health.

(the **Participating Parties**).

The outbreak of the COVID-19 pandemic has caused distress and uncertainty in our community from a health and economic perspective. In order to support those in the community that are covered by a private health insurance policy (**Members**) during the COVID-19 pandemic, the Participating Parties seek an urgent interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to engage in the conduct described in section 3 of this application, subject to the proposed condition set out in section 3.1 below.

The Participating Parties are seeking to address the following concerns of Members during the COVID-19 pandemic through industry collaboration:

- a) whether Members' health insurance policies will cover hospital treatment in the event they contract COVID-19;
- b) whether Members' health insurance policies will cover hospital treatment received outside of a hospital setting (eg. hospital in the home services) or will cover non-hospital treatment such as physiotherapy or psychology (**general treatment**) if the treatment is not provided through face-to-face interaction such as teleconsultations and video conferencing; and
- c) concerns about whether Members can afford to pay premiums for health insurance if they experience job losses or a reduction in their income.

The Participating Parties consider that by addressing Members' concerns through a coordinated response, they will be able to provide certainty and clarity for Members in relation to their private health insurance during the COVID-19 pandemic, regardless of the health insurer that has issued their policy.



### 1.2 Application for urgent interim authorisation

The Participating Parties consider that, in light of the COVID-19 pandemic, immediate steps are required to address their Members' concerns about their private health insurance policies. In order to provide a uniform response as quickly as possible, the Participating Parties request that the ACCC grant interim authorisation urgently.

## 2. Parties to the proposed conduct

### 2.1 Applicant for authorisation:

#### (a) **Private Healthcare Australia Limited (ACN 008 621 994)**

| Address (registered address)                          | Contact person                                                          | Description of business activities                                                                                                           |
|-------------------------------------------------------|-------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| Unit 32, Level 1<br>2 King Street<br>Deakin, ACT 2600 | Ben Harris, Director of Policy and Research<br>[REDACTED]<br>[REDACTED] | Australian private health insurance industry's peak representative body, which represents 97% of people covered by private health insurance. |

### 2.2 Email address for service of documents in Australia

Noelia Boscana, Partner, MinterEllison

[REDACTED]

T [REDACTED] M [REDACTED]

### 2.3 Details of other persons who propose to engage in the Proposed Conduct

In addition to PHA, the other persons who propose to engage in the Proposed Conduct is Members Health and each of the private health insurers listed in Annexure A.

## 3. The Proposed Conduct

### 3.1 Details of Proposed Conduct

*Coordination to address Members' concerns*

The COVID-19 pandemic has created confusion and stress among many Members in relation to the scope of their health insurance cover and affordability of premiums.

The Participating Parties have received queries from Members seeking information about whether they would be covered in a private hospital if they contract COVID-19 and if they are not covered, whether they should be upgrading their hospital cover. The COVID-19 pandemic has, and will continue to place, a significant strain on the Australian public healthcare system and Members are seeking assurance that they would be able to access the private hospital system if they require hospital treatment for COVID-19.

The community efforts to limit the spread of COVID-19 and flatten the curve have also resulted in the physical closure of many health services providing general treatment. Under many health insurance policies, cover for general treatment is limited to face-to-face consultations. This is a condition that is usually set out in each health insurers' fund rules and would prevent the payment of benefits for general treatment that is provided through other remote means. Until now, there had not been a need to contemplate a situation where Members could not travel and attend consulting rooms to obtain treatment. This has caused concern from Members with extras cover about whether their health insurers will pay benefits for general treatment they receive by telephone or videoconferencing.

The restrictions on the ability of private hospitals to provide non-urgent hospital treatment during the COVID-19 crisis has created a need to provide hospital treatment outside a hospital such as in Members' homes or through videoconferencing. There are many variables in determining whether benefits would be payable currently such as the policy terms, insurer's fund rules and the terms of the agreements between insurers and private hospitals. This has also led to confusion



for Members about whether they will be covered by health insurers for hospital treatment received outside a hospital.

The Participating Parties consider that a coordinated response to alleviate their Members' concerns is preferable to each individual health insurer responding in different ways in order to provide Members with clarity and certainty about coverage. Industry leadership on the COVID-19 response raises the bar for the sector and provides a baseline expectation of how health insurers should respond to the crisis. The Participating Parties submit that it will be beneficial for their Members if all insurers respond to COVID-19 in a consistent way and deliver the same message about Members' cover. The Proposed Conduct will not involve requiring or encouraging Members to change products or upgrade their cover but rather to provide Members with broader cover under their existing policies. Collaboration and clear communication by PHA can provide Members with assurance that they are not required to upgrade their policies to be covered for COVID-19.

In relation to providing remote access to treatment, coordination between the Participating Parties provides a consistent approach to the payment of alternative forms of treatment such as teleconsultations. It also allows PHA to engage with hospitals and various health professional associations to formulate a framework, which would set out what will be covered and in what circumstances. As these types of remote treatment are generally not covered by health insurers, paying benefits requires the parties to determine the rules for payment such as requiring teleconsultations to be one-on-one and to apply to certain conditions. Consensus on this framework is pressing and important to expedite the payment of benefits by insurers and ease their Members' concerns about their private health cover. Providing industry leadership on these issues also accelerates the funding of alternative modes of treatment and creates efficiencies as the PHA can engage with various stakeholders in the health industry and government on behalf of the health funds.

#### *Scope of the Proposed Conduct*

The Participating Parties seek authorisation to make, and give effect to, any contract, arrangement or understanding between them, and to discuss, engage and share information with each other, in relation to:

- (a) broadening coverage under health insurance policies to include treatment for Members that contract COVID-19;
- (b) broadening health insurance cover for treatment received by telephone or videoconferencing or other modes of treatment that substitute for face-to-face interaction;
- (c) providing treatment in Members' homes as a substitute for an admission to hospital;
- (d) providing financial relief for Members from paying health insurance premiums such as postponement of premium increases and premium waivers; and
- (e) any other measure formulated to respond to the COVID-19 crisis as notified to the ACCC by PHA,

#### **(the Proposed Conduct).**

The Participating Parties propose that the interim and final authorisation be granted subject to the condition that PHA undertakes, on behalf of the Participating Parties, to notify the ACCC of any new measures formulated by the Participating Parties as described in paragraph (e) above before they are implemented or given effect to.

The Participating Parties intend on working together to facilitate and implement the Proposed Conduct in response to COVID-19 but each health insurer will retain its discretion to opt out of any proposed collaboration or to implement additional or more comprehensive measures. Some health insurers have already independently announced measures they intend to take to respond to the COVID-19 crisis, which will be supplemented and enhanced by the measures flowing from the Proposed Conduct.

The Proposed Conduct is a temporary measure to deal with the significant impact that COVID-19 has had on the Australian healthcare system. The Proposed Conduct is not intended to alter the ordinary competition between the Participating Parties' outside of the COVID-19 context.

### 3.2 Provisions of the CCA which may apply to the Proposed Conduct

Member health funds of both PHA and Members Health compete in relation to the provision of private health insurance. The Proposed Conduct of the Participating Parties, in the absence of an authorisation from the ACCC, gives rise to a risk that the Participating Parties may contravene one or more of s45AF, s45AG, s45AJ, s45AK or s45 of the CCA.

### 3.3 Rationale for the Proposed Conduct

Authorisation is sought to assist the Participating Parties devise a supportive, consistent and comprehensive response to the COVID-19 pandemic for the collective benefit of Members.

### 3.4 Term of authorisation sought and reasons for seeking this period of time

The Participating Parties seek to engage in the Proposed Conduct for the duration of the COVID-19 crisis and request interim authorisation for the period until the ACCC grants final authorisation and for a period of 6 months from the date on which final authorisation is granted.

### 3.5 Persons who may be impacted by the Proposed Conduct

The persons who may be impacted by the Proposed Conduct include all Members, private hospitals and health service providers.

## 4. **Public benefit**

The Participating Parties submit that the Proposed Conduct will have the following public benefits:

- (a) a supportive and consistent response from health insurers on coverage and premium relief allows the PHA to communicate on behalf of the health insurance industry and deliver a clear and consistent message in relation to the measures being taken by the private health insurance industry to assist Members during the COVID-19 pandemic in relation to coverage and premium relief;
- (b) PHA is able to engage with various health professional associations on behalf of health insurers to determine the types of treatment that can be provided by teleconsultation (or other remote modes of treatment) and agree on the base set of conditions and requirements for the payment of benefits for that treatment. As the requirements vary depending on each modality (eg. considerations for psychology teleconsultations differ to tele-physiotherapy), this creates efficiencies compared to individual health funds dealing with the same issues. A coordinated approach also expedites the process of enabling benefits to become payable for teleconsultations and other remote treatment under health insurance policies; and
- (c) through industry collaboration, PHA can facilitate and lead innovative ways to provide treatment during COVID-19 restrictions and enable the funding of health services such as hospital in the home by health insurers. This creates efficiencies by having PHA lead negotiations with private hospitals and other health services regarding the nature and requirements of such services and expedites the provision and funding of hospital in the home services.

## 5. **Public detriment**

The Participating Parties submit that the Proposed Conduct will not have any competitive detriments as it will not prevent health insurers from competing with each other and taking additional measures in response to COVID-19. The Participating Parties intend to work together to implement the Proposed Conduct to support Members but health insurers will retain their discretion to opt out or exceed the measures that form part of the Proposed Conduct. The Proposed Conduct will not affect competition between health insurers in relation to any non-COVID-19 business activities.

The Participating Parties submit that the Proposed Conduct will not have any detrimental impact on Members as the measures will improve coverage in their existing health insurance policies

without any corresponding change in premiums, provide financial relief from the payment of premiums and result in new ways of delivering health care. There is no restriction on each health insurer implementing additional or more comprehensive measures in relation to COVID-19 at its discretion.

For the reasons set out in this application, the Participating Parties consider that the Proposed Conduct will result in a net public benefit.



## **Annexure A – Members – Private health insurers**

1. ACA Health Benefits Fund Limited
2. ahm Health Insurance
3. Australian Unity Health Limited
4. BUPA HI Pty Ltd
5. CBHS Corporate Health Pty Ltd
6. CBHS Health Fund Limited
7. CUA Health Limited
8. Defence Health Limited
9. Emergency Services Health Pty Ltd
10. GMHBA Limited
11. GU Health
12. HBF Health Limited
13. Health Care Insurance Ltd
14. Health Partners Limited
15. HIF Pty Ltd
16. Hunter Health
17. Latrobe Health Services Limited
18. Medibank Private Limited
19. Mildura Health Fund
20. MO Health Pty Ltd
21. Navy Health Ltd
22. nib Health Funds Ltd
23. Nurses and Midwives Health Pty Ltd
24. Peoplecare Health Limited
25. Phoenix Health Fund Limited
26. Police Health Limited
27. Queensland Country Health Fund Ltd
28. Queensland Teachers' Union Health Fund Limited
29. Railway & Transport Health Fund Ltd
30. Reserve Bank Health Society Ltd
31. St. Lukes Health
32. Teachers Health Fund
33. Territory Health Fund

34. The Doctors' Health Fund Pty Ltd
35. The Hospitals Contribution Fund of Australia Ltd
36. Transport Health
37. Westfund Limited



**Declaration by applicant**

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware the giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



Ben Harris  
Director of Policy and Research  
This 1st day of April 2020



