26 July 2002

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Ms Rebekah O'Meagher
Australian Competition & Consumer Commission
470 Northbourne Avenue
Dickson ACT 2602

Dear Ms O'Meagher

Application for Authorisation No. A90795

I refer to the draft Determination of the ACCC (Authorisation No. A90795) dated 20 June 2002 concerning the Royal Australian College of General Practitioners application for authorisation relating to a framework arrangement allowing general practitioners in specified business structures to agree on fees.

Enclosed, for your consideration prior to the Pre-Determination Conference, is a Submission by Mayne Medical Centre Operations Pty Limited (a wholly owned subsidiary of Mayne Group Limited).

Phillip Idstein, General Manager Medical Centres, and myself will attend at the ACCC's offices at 2.00 pm Monday, 29 July 2002 to present the Submission at the Conference.

If you wish to discuss beforehand, please do not hesitate to contact me.

Yours sincerely

James Baulderstone
Senior Legal Counsel – Primary Care and Consumer Products

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

DRAFT DETERMINATION IN RELATION TO APPLICATION FOR AUTHORISATION NO. A90795

1 Summary

1.1 General comments

This submission is made by Mayne Medical Centre Operations Pty Limited (ACN 089 995 817) (**Mayne**). Mayne is involved in the primary health care industry as a supplier of services to GPs and an operator of medical centres. Consequently, Mayne has an excellent understanding of common GP business structures and GP concerns about the application of the Trade Practices Act 1974 (Cth) (**the Act**).

As a general comment, Mayne wishes to emphasise that there are many different types of business structures used by GPs in Australia including, but not limited to, sole practitioners, sole practitioners who practise through a medical company, medical companies which employ a number of GPs, partnerships of GPs with or without additional employed associates, groups of independent GPs who each engage a single support service provider and any combination of these.

A determination which provides competitive advantages to some forms of GP business structures compared to others, and/or which encourages inefficient restructuring in order to obtain the benefit of the determination, will not be in the best interests of Australian consumers of primary health care services. GP anxiety about the application of the Act will be most effectively reduced by a determination which has clear application to *all* types of GP business structures.

1.2 Summary of Submission

(a) In its current form, the Draft Determination arguably does not allow collective price setting in GP surgeries where each of the GPs *engages* the same service provider, but the GPs do not *share an interest* in the service provider, or where some, but not all, of the GPs have such an interest.

(This type of business structure is referred to in the submission as an "ineligible associateship" to distinguish it from the "eligible associateships" which are covered by the Draft Determination.)

(b) The submitter is concerned that the exclusion of ineligible associateships means that the benefit of the Draft Determination may not be available to the GPs who practise in the medical centres operated by the submitter, as well as GPs practising in other medical centres, including some smaller medical centres.

(c) The arguments in favour of extending the Draft Determination to cover ineligible associateships, include:

(1) An extension of the Draft Determination to cover ineligible associateships would provide a consistent approach across GP business structures, and would not confer a competitive advantage on any particular GP business structures.

(2) The Draft Determination in its present form may encourage the larger "integrated" health care providers to issue shares to medical practitioners practising in their medical centres. This could have an anti-competitive effect in those industries reliant on GP referrals (eg. pathology, diagnostic imaging, hospitals).

(3) For the reasons outlined in the Draft Determination in relation to eligible associateships, the extension of the Draft Determination to ineligible associateships is likely to have a minimal impact on fee levels.

(4) The ability to set fees collectively will facilitate a "team approach" to health care in GP surgeries which operate as ineligible associateships.

(5) Opportunities to share costs and create administrative efficiencies will be available in all GP surgeries, regardless of the precise nature of the business structure involved.

(d) In some medical centres, the GPs include both independent medical practitioners and medical practitioners who are employed or otherwise engaged by the service entity to provide medical services to patients on behalf of the service entity. The Draft Determination should also deal with this type of business structure.

(e) We suggest that Condition 1 of the Draft Determination be amended to provide as follows:

> *"An eligible associateship must be a group of GPs, each of whom either:*
>
> *(a) has a written agreement with at least one other GP which provides for a shared interest in a service entity;*
>
> *(b) has a written agreement with a service entity; or*
>
> *(c) is employed or otherwise engaged by a service entity to provide medical services on the service entity's behalf,*
>
> *with the relevant service entity being responsible for the management and/or maintenance of a common reception, common fee collection, common bank account, common trading name, common medical records and common policy and procedures for all of the GPs".*

(f) We also suggest that the Commission should take the opportunity to clarify what is meant by "shared interest in a service entity".

(g) The Commission may also wish to clarify that the term "GP" wherever occurring in the Draft Determination also includes any company which provides medical services to patients through one or more employee GPs. Many medical practitioners in Australia practise through a medical company rather than under their own (individual) name.

2 Background

2.1 The Draft Determination

On 20 June 2002, the Australian Competition and Consumer Commission (**the Commission**) released its draft determination in relation to Application for Authorisation No. A90795 (**the Draft Determination**).

Application for Authorisation No. A90795 was made by the Royal Australian College of General Practitioners (**RACGP**) and related to collective price setting by GPs working in medical centres with certain types of business structures. Specifically, the RACGP was concerned with the following types of business structures:

(a) independent GPs collocated in a medical centre who share an interest in a single service company which provides support services to the GPs; and

(b) GPs within a partnership where at least one of the partners practises through a medical company rather than as an individual.

This submission relates to the first business structure. The submitter has no concerns with the aspects of the Draft Determination which relate to the second structure.

2.2 The submitter

The submitter, Mayne, is a wholly owned subsidiary of Mayne Group Limited (ACN 004 073 410) (**MGL**) and is part of the Mayne Health group of companies. Mayne and other subsidiaries of MGL operate 48 medical centres in Australia, each of which currently trades under the name "Mayne Health Medicentre – (name of suburb)" (**the Medicentres**). In excess of 400 GPs practise at the Medicentres.

2.3 Structure of the Medicentres

Mayne does not establish each Medicentre "from scratch", but rather acquires certain assets of an existing medical centre, or in some cases several medical centres from a particular area which are then amalgamated.

The principal element of such acquisitions is that Mayne acquires the right to be the exclusive provider for 5 years of support services to the medical practitioners who practise at the medical centre. To enable this to occur, Mayne also:

(a) acquires the assets of the medical centre used in the provision of support services to the medical practitioners who practise at the medical centre (such as plant and equipment, stock and executory contracts); and

(b) employs the support staff at the medical centre.

Effectively, the medical practitioners outsource or sub-contract to Mayne the provision of the support services and Mayne becomes a service provider to those medical practitioners. The support services include billing, keeping of accounts, medical record management, provision of a serviced consulting room, general administration and provision of support staff such as receptionists and nurses.

Subject to section 2.5 below, Mayne does not acquire an interest in the medical businesses of the medical practitioners who practise at the medical centres. Each

medical practitioner will continue to be a supplier of medical services to patients, with Mayne supplying services to the medical practitioner to enable that medical service to be supplied.

Once a group of medical practitioners chooses to engage Mayne as their support service provider, the medical centre continues to operate on a co-operative basis, similar to any other medical centre. It is a condition of each GP's agreement with Mayne that he or she consult with other GPs at the Medicentre in order to ensure continuity of care for patients.

2.4 Nature of GPs' relationship with Mayne

When Mayne acquires assets of an existing medical centre as outlined above, the consideration paid to the medical practitioners for the practice management rights and other assets does *not* include any shares in Mayne, or any related company of Mayne, including MGL, which is a listed company.

MGL's assets include pathology, diagnostic imaging and hospital businesses. One of the reasons shares are not offered to GPs is that there was concern in the medical community that GPs who held such shares might be inappropriately influenced in their referring behaviour, because they would obtain a financial benefit from the profitability of such related businesses.

The relationship between each GP at a Medicentre and Mayne is a relationship of principal (the GP) and service provider (Mayne). This service provider relationship is set out in a written Practitioner Services Agreement between Mayne and the GP or the GP's medical company (except occasionally where Mayne takes an assignment of an existing oral contract between a GP and the GP's existing support service provider). In return for providing the support services to the GP, Mayne receives a fixed percentage of the GP's revenue as a services fee.

On 1 November 2001, Mayne became a signatory to the Code of Conduct for Corporations Involved in the Provision of Management and Administrative Services in Medical Centres in Australia (**the Code**). Mayne is therefore formally committed to respecting the professional ethics and clinical independence of the medical practitioners practising in the Medicentres.

2.5 Employed medical practitioners

In addition to the arrangements outlined above, MGL employs some GPs who practise in the Medicentres, and seconds these GPs to Mayne (ie. Mayne Medical Centre Operations Pty Limited). These are typically more junior GPs who prefer the security of employment. It is a term of each employed GP's employment that he or she co-operates with the other medical practitioners at the relevant Medicentre in order to maintain a high standard of patient care.

2.6 Nature of Mayne's interest in the Draft Determination

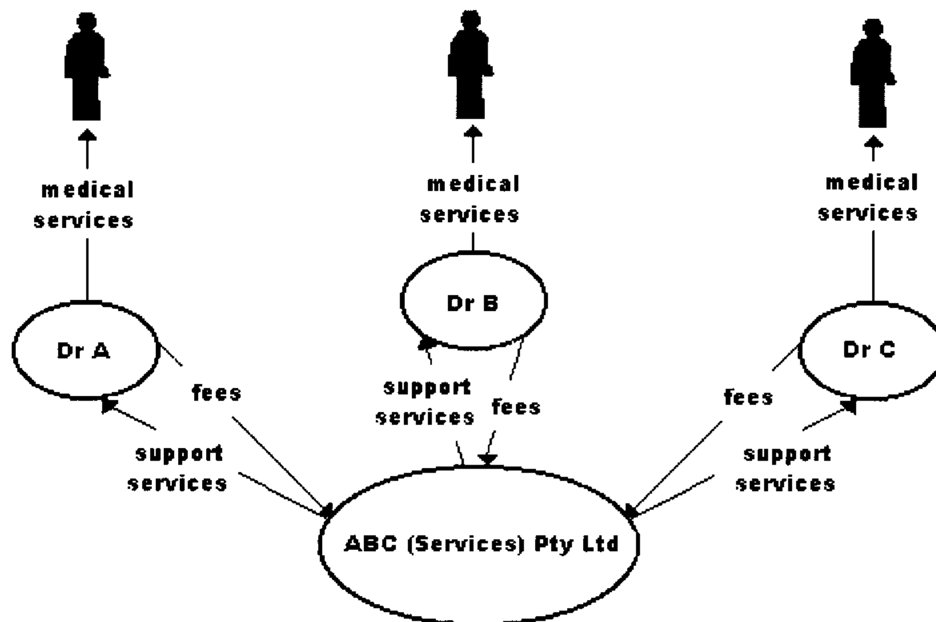
If the Draft Determination ultimately applies to GPs practising in the Medicentres, and a particular Medicentre contains both independent GPs and a GP employed by Mayne, the employed GP will be able to participate in price-setting discussions within that Medicentre in the course of the GP's employment with Mayne.

However, Mayne's primary interest in pursuing amendments to the Draft Determination is the best interests of the independent GPs practising in the Medicentres, so that such GPs can enjoy the same price setting options and sense of certainty as GPs practising within other business structures.

3 Application of the Draft Determination

3.1 Terms of the Draft Determination

As outlined above, our interest is in the application of the Draft Determination to the following business structure:



In relation to this business structure, the RACGP asked the Commission to authorise the following conduct:

> *"that GPs ... within a single practice, may enter an agreement to set, control or maintain the fees charged to patients where that practice is ...... an associateship where two or more doctors, whether incorporated or not incorporated, are co-located and share an interest in a service entity responsible for managing and/or maintaining a common reception, common fee collection, common bank account, common trading name, common medical records, common policy and procedures and the practice is accredited or is registered to be accredited as a single agency".*

This structure is referred to in the Draft Determination as an *eligible associateship.*

The Commission's Draft Determination provides that this conduct is authorised *provided that:*

> *"GPs who operate in an eligible associateship must have a written agreement between them which provides for a shared interest in a service entity responsible for the management and/or maintenance of a common*

reception, common fee collection, common bank account, common trading name, common medical records and common policy and procedures"; and

"GPs in eligible associateships must inform the College in writing within 28 days of the fact that they have commenced agreeing on fees. Further, they must provide the College with a copy of the fee schedule agreed on and indicate whether the fee for a standard consultation is higher than what was previously charged by each or any GP and, if so, the average increase in this fee (ie. the average increase across the GPs). The Commission does not require this information to be provided for subsequent fee schedule changes. The College must establish a register to store this information and provide the Commission with access to the register during normal business hours without cost."

3.2 "Shared interest"

Our concern with this aspect of the Draft Determination is the requirement that the GPs must have a "shared interest in a service entity". "Shared interest" is not defined, but might ultimately be interpreted by the courts to mean some form of ownership interest, such as an interest as a shareholder or unitholder.

In other words, it is arguable that for the business structure set out in section 3.1 above to be covered by the Draft Determination Dr A, Dr B and Dr C will need to be shareholders or unitholders in ABC (Services) Pty Ltd. If, for example:

(a) each of Dr A, Dr B and Dr C has a service agreement with ABC (Services) Pty Ltd but no ownership interest in ABC (Services) Pty Ltd; or

(b) Dr A and Dr B but not Dr C are shareholders or unitholders in ABC (Services) Pty Ltd,

the Draft Determination arguably will not apply to Dr A, Dr B and Dr C and they will be prohibited from setting prices collectively.

Our concern is that in its current form, the Draft Determination may not allow collective price setting in GP surgeries where each of the GPs *engages* the same service provider, but the GPs do not *share an interest* in the service provider, or where some, but not all, of the GPs have such an interest.

3.3 Application to employed GPs

We consider it likely that the term "GPs" in the draft determination would include a company which employs or engages one or more GPs (although we suggest that this be clarified – see section 4).

However, the Draft Determination may not apply in relation to a GP who:

(a) is employed or engaged by a company which is also a "service entity" within the meaning of the Draft Determination; and

(b) practises in a medical centre with independent (non-employee) medical practitioners.

This is because the employee GP may not have an ownership interest in the service entity. As outlined above, some of the Medicentres include employed GPs as well as independent GPs.

In our view, the Draft Determination should also apply to GPs who are employed by service entities.

4 Suggested amendment

We suggest that Condition 1 of the Draft Determination be amended to instead provide as follows:

> *"An eligible associateship must be a group of GPs, each of whom either:*
>
> *(a) has a written agreement with at least one other GP which provides for a shared interest in a service entity;*
>
> *(b) has a written agreement with a service entity; or*
>
> *(c) is employed or otherwise engaged by a service entity to provide medical services on the service entity's behalf,*
>
> *with the relevant service entity being responsible for the management and/or maintenance of a common reception, common fee collection, common bank account, common trading name, common medical records and common policy and procedures for all of the GPs".*

We also suggest that the Commission should take the opportunity to clarify what is meant by "shared interest in a service entity". This will not directly affect the Medicentres (if our suggested amendment is made), but in our view would minimise confusion amongst GPs practising in other business structures.

Also, in light of the fact that the use of medical companies by medical practitioners is common in Australia (for taxation and other reasons), we suggest that the Commission clarify that references to "GPs" in the Draft Determination include any company which provides medical services to patients through one or more employee GPs.

5 Arguments in support of our suggested amendment

5.1 Consistent approach across GP business structures

Under the law at present (including the Draft Determination in its present form), GPs within each of the following business structures can set fees collectively:

(a) individual GPs employed by a single company;

(b) individual GPs within a partnership where all the partners are natural persons;

(c) a "principal" GP and any GPs employed or engaged by the principal to provide medical services to patients on behalf of the principal;

(d) individual GPs collocated in a medical centre who "share an interest in a service entity" which provides support services; and

(e) individual GPs within a partnership where at least one of the partners practises through a medical company rather than as an individual.

However, GPs within an ineligible associateship are arguably excluded.

This exclusion may arguably apply to the GPs practising in the Medicentres, but it will also potentially exclude many other GPs. Mayne has familiarised itself with the business structures of a large number of medical centres during its acquisition program for the Medicentres project. In our experience, it is not at all uncommon to find a GP surgery where all of the GPs *engage* a single service provider, but where only a small number of more senior GPs are actually *shareholders* in the service provider.

Confidentiality obligations preclude us from providing details of actual business structures, but the point may be illustrated by the following hypothetical example:

> Dr A established his own medical practice. He set up a company – Medical Centre Pty Ltd – with Dr A and his wife as the sole shareholders. Medical Centre Pty Ltd is the lessee of the premises occupied by the medical centre and employs the receptionist. The practice expands over the years, and by 2002 includes three other GPs, Dr B, Dr C and Dr D each of whom has a written agreement with Medical Centre Pty Ltd under which they each pay a proportion of their revenue to Medical Centre Pty Ltd in return for the provision of support services. However, the GPs have seen no reason to alter the ownership of Medical Centre Pty Ltd, which continues to be owned by Dr A and his wife.

As currently drafted, the Draft Determination may not allow Dr A, Dr B, Dr C and Dr D to set fees collectively.

The Draft Determination may also exclude some, but not all, of the GPs practising in medical centres owned by listed companies (other than MGL/Mayne). It may cover GPs associated with companies such as Foundation Healthcare Limited, which we understand has a policy of issuing shares to some GPs who practise in its medical centres.

As outlined below, the public interest arguments which the Commission accepts support collective price setting in eligible associateships apply equally to ineligible associateships. There is no public interest reason for excluding such ineligible associateships from the benefit of the determination.

Furthermore, it is arguable that being able to set fees collectively provides eligible associateships with a competitive advantage over ineligible associateships which cannot set fees collectively. For example, GP surgeries covered by the Draft Determination can advertise their fees as the standard fees for the relevant medical centre, whereas those excluded by the Draft Determination cannot. Arguably, an ineligible associateship cannot advertise itself on an ongoing basis (for example in a Yellow Pages advertisement covering a calendar year) as a "Bulk Billing Practice" because that would require some kind of arrangement between the GPs as to fees. The Draft Determination in its present form is therefore not competitively neutral.

5.2 Does not encourage ownership of shares in "integrated" providers

We also submit that the Draft Determination in its present form might have the unintended effect of encouraging large integrated health care providers to issue shares to GPs practising in their medical centres. This may raise ethical concerns, and may also be anti-competitive.

Where a GP holds shares in a company that has business interest in "referral" services such as pathology, diagnostic imaging or hospitals, the GP receives a financial benefit from the profitability of such referral businesses.

The Commission itself has expressed the view that a medical practitioner who fails to tell a patient that the medical practitioner has a financial interest in another health care business to which they refer the patient may be engaging in misleading and deceptive conduct (*Australian*, 18 June 2001).

In our view, the Commission should not make a determination which has the effect of encouraging this type of business arrangement. Instead, efforts to preserve medical practitioners' professional ethics and clinical independence – such as the Code – should be encouraged.

5.3 Likely minimal impact on fee levels

Mayne notes the Commission's observation (on page 19 of the Draft Determination) that "with and without authorisation, in most cases a common fee is likely to be charged by GPs in eligible associateships": in the former case because of an arrangement between the GPs, and in the latter case because of the effect of competitive forces within the medical centre.

In our experience, these comments apply equally to ineligible associateships. That is, competitive forces within a medical centre tend to discourage any particular GP from raising his or her fees above the level charged by other GPs at the medical centre. As the Commission notes, this means that the effect on fee levels of allowing collective price-setting is likely to be minimal.

In addition, the Commission's comments on competitive forces external to the particular medical centre (page 20 of the Draft Determination) also apply equally to ineligible associateships, that is:

(a) GPs practising in ineligible associateships in under-serviced rural areas are now, and would remain after authorisation, subject to limited price competition; and

(b) GPs practising in ineligible associateships in over-serviced urban areas are now, and would remain after authorisation, subject to significant price competition from other medical practices in the same market.

5.4 Incentives for inefficient restructuring

We also note the Commission's comment that, if the authorisation were not granted, GPs within a particular medical centre can engage in collective price setting simply by shifting to a business structure which allows such conduct (for example a company which employs all of the medical practitioners).

If the determination were made in the same form as the Draft Determination, integrated health care providers could enable GPs practising in their medical centres to engage in collective price setting simply by issuing shares to such GPs or by establishing alternative arrangements for the purpose of obtaining the benefit of the authorisation. For the reasons outlined above, we consider that the Draft Determination should be indifferent between commercial structures in each case because the practice operates as a single commercial entity.

5.5 "Team approach" to health care

We note the following comments of the Commission (on page 22 of the Draft Determination):

> *"The Commission accepts that a team approach to the provision of health care is likely to have a positive impact on patient health outcomes. Further, it accepts that GPs in eligible associateships, from a medical perspective, operate as a team.*
>
> *The Commission particularly notes that GPs who operate within eligible associateships present themselves to the public as one medical entity. Moreover, they work together on a daily basis to treat the patients of the practice and as such they would be likely to display a significant and ongoing level of collaboration and co-operation that would appear to be on a substantially different scale to, for example, any co-operation between GPs in different general practices.*
>
> *As a result, the Commission considers that enabling GPs in eligible associateships to agree on fees is likely to improve their ability to work closely together as a team, which is likely to improve the quality of healthcare they provide. In particular, enabling fee agreements is likely to promote greater trust and harmony between team members, particularly on potentially divisive financial matters."*

We submit that all of these comments apply equally to ineligible associateships.

In relation to the Medicentres, each Medicentre in fact operates as one "medical entity" for the purposes of its interactions with the public. It is a condition of each GPs agreement with Mayne that he or she co-operates with his or her colleagues at the Medicentre. Patient records are kept centrally and are available to any medical practitioner whom a particular patient chooses to consult. Mayne encourages medical practitioners within each Medicentre to function as a team to ensure the provision of high-quality health care to patients and to provide patients with continuity of care.

Although we cannot comment on the precise nature of the business structures of other ineligible associateships, in our view, the "teamwork" argument will probably apply in practice to any group of GPs who satisfy the other (that is, non-ownership) elements of the Commission's suggested "test" for eligible associateships namely:

(a) the GPs are collocated within a single medical centre;

(b) the relevant service entity is responsible for the management and/or maintenance of a common reception, common fee collection, common bank account, common trading name, common medical records and common policy and procedures; and

(c) the medical centre has been or is registered to be accredited as a single entity.

5.6 Opportunities to share costs and create administrative efficiencies

We note that the Commission has concluded that, because GPs will probably form eligible associateships with or without the benefit of the determination, the availability of administrative efficiencies arising from GPs sharing the cost of

rent, a reception and the maintenance of records will be largely unaffected by the determination. The Commission therefore does not accept that the availability of such efficiencies (and any pass-through benefit to consumers) is a reason supporting the determination.

The "efficiency" argument does have some potential application to Mayne. One of the major benefits to a group of GPs of engaging Mayne as their service provider is that Mayne is able to bring efficiencies to the operation of the medical centre through economies of scale. For example, the GPs have the benefit of Mayne's buying power as the operator of a large number of medical centres. The savings achieved by Mayne have a direct effect on the amount of the services fee payable by the GPs to Mayne. We are not in a position to say definitively whether or not these reductions are passed onto patients, but it seems likely that in markets where there are competing practices there will be some benefit to patients.

If the Commission makes a determination which applies to some, but not all, types of GP associateships, with the effect that GPs who engage larger, more efficient, service providers such as Mayne are excluded, that may discourage some GPs from enjoying the efficiency benefits of engaging such a service provider. For example, under the Draft Determination in its current form, an associateship of GPs which has strong ethical or competitive reasons for maintaining their status as a "bulk billing practice" could not appoint Mayne as their service provider and continue to agree to bulk bill (because that would constitute illegal price fixing).

We also note the Commission's comments (on page 23 of the Draft Determination) that:

> *"The Commission is satisfied that allowing GPs to agree on fees, rather than requiring GPs within a single practice to set fees individually, will result in reduced transaction costs. The Commission accepts that these reductions are likely to be at least partially passed onto patients in markets where there are competing practices. In addition, in all markers, allowing GPs to agree on fees may result in them having more time to focus on patient needs."*

We agree with these comments and submit that they are equally applicable to ineligible associateships as to eligible associateships.