

17 August 2012

FILE No:
DOC:
MARS/PRISM:

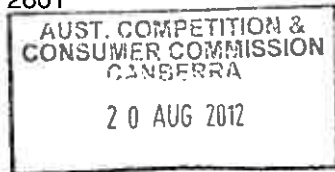
NORTON ROSE

Norton Rose Australia
ABN 32 720 868 049
Level 18, Grosvenor Place
225 George Street
SYDNEY NSW 2000
AUSTRALIA

Attention: Mr Mark Basile

Ms Imogen Hartcher-O'Brien
Director
Adjudication Branch
Australian Competition & Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Tel +61 2 9330 8000
Fax +61 2 9330 8111
GPO Box 3872, Sydney NSW 2001
DX 368 Sydney
nortonrose.com



Your reference
48964

Direct line
+61 2 9330 8361

Our reference
2778664

Email
andrew.sorensen@nortonrose.com

Dear Ms Hartcher-O'Brien

The Hospitals Contribution Fund of Australia Limited (HCF) exclusive dealing notification N95495 - submission

We refer to the notification made by HCF on 8 June 2012 (**Notification**) and your letter dated 6 August 2012.

We are instructed by HCF to provide the following submission in support of the Notification and to respond to issues raised in submissions by iSoft Australia Pty Limited (**CSC**), Westpac Banking Corporation (**Westpac**) and Commonwealth Bank of Australia (**CBA**). This letter adopts the terminology defined in the Notification.

HCF's central proposition is that, in order to implement a beneficial "no gap" claiming program for its members in relation to initial physiotherapy consultations, physiotherapists who participate in the Program will be required to utilise an electronic point of sale payment system that exhibits certain capabilities, as further described in paragraph 2(b) of the Notification.

HCF confirms its position that the notified conduct will have no substantive impact on competition or other public detriment, and that the public benefits of the notified conduct are clear and substantial. Accordingly, HCF requests that the Australian Competition and Consumer Commission (**ACCC**) allow the Notification to stand.

HCF is concerned that the submissions of CSC and Westpac in particular contain a number of factual inaccuracies, unsubstantiated assertions and irrelevant observations concerning the notified conduct. In order to assist the ACCC in its consideration of the Notification, HCF provides the following clarifications and additional information concerning certain matters raised in the CSC, Westpac and CBA submissions.

1 CSC and other providers of electronic claims and payments systems are able to provide Program claims services to participating physiotherapists in competition with HICAPS

1.1 HCF wishes to clarify the following:

- (1) the types of electronic payments systems that physiotherapists who choose to participate in the Program may use to process claims under the Program is not closed;
- (2) HCF will, subject to agreement on reasonable commercial terms, include for use in the Program any other electronic claims and payments system, in addition to HICAPS, which enables submission by physiotherapists of the required ICD-10-AM diagnostic codes (**Code Capability**); and

APAC-#15631792-v3

- (3) HCF has no interest in favouring any particular electronic payment system. Indeed, it is to HCF's benefit to be able to include other systems for use by participating physiotherapists, as this will:
- (a) increase flexibility for the physiotherapists and thereby enhance the attractiveness of participation in the Program; and
 - (b) ensure that HICAPS faces rivalry in respect of its offering to HCF and participating physiotherapists of enhanced functionality for the Program.
- 1.2 It was never and is not HCF's intention only to deal with HICAPS in respect of the Program. Currently HCF is restricted in this sense, as HCF understands that HICAPS is the only supplier with the capability to capture and transmit the ICD-10-AM codes. When CSC adapts its solution to provide that capability, and when other suppliers provide the necessary claims processing capability, and have a suitable commercial offering, it is and has always been HCF's intention to incorporate such competing offerings into the Program as alternative payment systems available to participating physiotherapists. HCF's notification is based on the requirement that participating physiotherapists acquire electronic claims capability (whether that be through HICAPS or another recognised supplier that offers the capability and has a suitable commercial offering). HCF's notification was never premised on an intention to exclusively utilise any one provider. To that end, it appears both CSC and Westpac (and to a lesser extent CBA) have confused the purpose of the notified conduct.
- 1.3 HCF therefore encourages other providers of electronic claims and payments systems to develop the Code Capability and provide alternative offerings to HICAPS in relation to the provision of Program claims services to participating physiotherapists.
- 1.4 The development of the Code Capability is, in HCF's submission, straightforward. The ICD-10-AM codes - full name: International Statistical Classification of Diseases and Related Health Problems, Tenth Revision, Australian Modification - are a nationally accepted standard set of diagnostic codes. The website of the National Casemix and Classification Centre (NCCC) provides that "ICD-10-AM refers to the Australian modification of the WHO ICD-10 base classification system. ICD-10-AM is used to translate diseases and other health problems from words into an alphanumeric code, which permits easy storage, retrieval and analysis of the data." Development of the Code Capability does not present a barrier to participation by other providers.
- 1.5 HCF notes in this respect its understanding that CSC's US parent is in the process of transitioning US health insurance plans from ICD 9 to ICD 10. Its website states "Drawing from its broad knowledge of health plan operations and deep technical bench, CSC has created a clear road map to ensure healthcare organizations transition quickly from ICD 9 to ICD 10." Further in this respect, HCF notes that the CBA (which HCF understands is a partner of CSC) states on page 2 of its submission that it understands there is "no known impediment that would prevent CSC from developing the same capability as HICAPS if granted the opportunity to do so".
- 1.6 CSC has asserted, incorrectly, in point 1 of its submission that it has not been briefed by HCF, or given the opportunity to incorporate diagnostic codes into CSC HealthPoint. On 16 May 2012 HCF representatives met with representatives from CSC, where the Program was an agenda item, although not discussed, and the data available through the CSC electronic claims and payment systems was discussed. The requirements of the Program (in particular, the need for CSC's electronic claims and payment systems to capture the additional diagnostic data) were subsequently discussed on 29 May 2012 at a further meeting of representatives of CSC and HCF. A business requirements template document was then sent by CSC to HCF by email on 30 May 2012, and HCF returned it by email with the relevant system requirements on 4 July 2012. CSC responded on 16 July 2012 with some additional questions, which were answered by HCF on 30 July 2012. HCF received a proposed solution from CSC on 14 August 2012, which HCF is presently assessing.
- 1.7 Whether CSC chooses to develop the Code Capability and provide a service that may be used by participating physiotherapists to process Program claims is entirely within its control. HCF understands that HICAPS and CSC are the only two providers presently offering electronic health claims processing functionality in Australia, hence if CSC chooses to participate in the Program, participating physiotherapists will have the choice of utilising any electronic payment system that is presently available in the market.

- 1.8 In addition to CSC, other providers of electronic claims and payments systems and/or EFTPOS providers are also capable of developing the functionality necessary for the Program. HCF notes in this respect that, according to the Westpac submission (paragraph 3 of the Appendix), National Australia Bank Limited (NAB), an EFTPOS provider, owns HICAPS. HCF is not aware of any barriers that would prevent EFTPOS providers, such as Westpac, from developing their own electronic claims and payment system with Code Capability to offer with their EFTPOS service. HCF would welcome additional participants supplying such electronics claims and payments functionality.
- 1.9 HCF confirms its view that, in light of the above, the notified conduct does not preclude CSC and other providers from providing services to participating physiotherapists. Rather, the conduct has the potential to *promote* competition amongst providers for the offering of enhanced electronic claims and payments processing functionality. As a consequence, HCF submits the notified conduct does not give rise to any lessening of competition in the market for electronic claims and payment systems (if a separate market) or the market for EFTPOS payment systems. See further the comments at section 5 of the Notification regarding market definition.
- 2 No exclusivity – participating physiotherapists are not precluded from using other electronic claims and payments (including EFTPOS) systems**
- 2.1 HCF confirms that the Program condition only requires participating physiotherapist to utilise an electronic payment system provided by HICAPS or another approved provider to process claims by HCF members for Initial Consultations. There is no requirement that the participating physiotherapists use the relevant system exclusively, or for any other claims or payments.
- 2.2 Accordingly, a physiotherapist participating in the Program is free to use other claims processing systems and EFTPOS systems.
- 2.3 HCF notes in this respect that, contrary to the suggestion by CSC in section 4 of its submission, a physiotherapist or other service provider is not required to utilise any particular EFTPOS provider in order to utilise the HICAPS system. It is HCF's understanding that HICAPS terminals are made available either on a standalone basis, or integrated with an EFTPOS credit/debit card processing system provided by NAB. Therefore, a provider may acquire and use a standalone HICAPS facility to make claims on behalf of members directly from the member's health fund, and use a separate EFTPOS terminal of their choice for debit/credit payments (for example, where a gap payment is required from the member). Acquirers of the HICAPS system are not required to obtain the NAB EFTPOS system.
- 2.4 Additionally, in any event, upon CSC or other providers developing the required Code Capability and reaching agreement on reasonable commercial terms (as described in section 1 of this submission above), participating physiotherapists will have a choice of competing electronic claims and payments systems (including any associated EFTPOS systems) to process Program claims for Initial Consultations. To the extent there are any limits on the use of differing EFTPOS systems in conjunction with particular electronic claims and payments systems, this is not a consequence of the notified conduct, rather it is a consequence of the offerings of payment systems providers such as CSC.
- 3 Participation is open to all physiotherapists but is optional**
- 3.1 The Program is not a "preferred provider scheme" as suggested by CSC (see paragraphs 2 and 7 of the CSC submission). The Program is open to all physiotherapists who wish to be involved, provided that they agree to comply with the terms and conditions of the Program Agreement. Unlike "preferred provider schemes", HCF does not restrict the number of participants in a local area and thus the Program encourages competition amongst physiotherapists to provide the enhanced Program services.
- 3.2 At the same time, however, no physiotherapist is obliged to participate in the Program. If a physiotherapist chooses not to participate in the Program, they can continue to provide services to HCF members (and, of course, to members of other health funds and individuals without private health insurance) and HCF will continue to pay benefits associated with services provided to its members in competition with Program participants.

4 **Assertions of potential for expansion**

- 4.1 CSC has included in its reasons for opposing the Notification, the assertion in point 2 of its submission that it is likely that HCF will in due course operate “preferred provider networks” for other health service providers, such as chiropractors, dentists and optometrists. Similar statements have also been made in the Westpac and CBA submissions (see paragraph 2 of the Appendix of the Westpac submission, and page 3 of the CBA submission) regarding the possibility of expanding the notified arrangements to other health service providers.
- 4.2 We submit that these assertions are speculative, inappropriate and irrelevant. HCF presently operates other health service provider programs, each with its own set of requirements. The existence of any other health service provider programs operated by HCF, either presently or in the future, is not the subject of the Notification and is not relevant to the ACCC’s assessment of the Notification. The Condition is only applicable to participating physiotherapists.

5 **The importance of the Condition and Code Capability**

- 5.1 CSC has asserted in point 3, point 7 and elsewhere in its submission, that other health funds are able to operate “preferred provider networks” and provide “on the spot” claiming using “item numbers” and without requiring additional data, namely the ICD-10-AM codes. Points 3 and 7 of the CSC submission also allege that other health funds do so with out the need for “exclusive dealing.” A similar suggestion appears to be made in the Westpac submission (see, for example, the first sentence in the final paragraph of that submission)
- 5.2 This submission by CSC is misconceived in a number of respects, and represents a failure to understand the purpose and effect of the Condition.
- 5.3 Whilst health funds are able to offer “on the spot” claiming to their members, they can only do so in circumstances where a service provider (such as a physiotherapist) utilises an electronic claims system that is compatible with the health fund’s own systems. A health fund cannot *ensure* that “on the spot” claiming will be available to its members in respect of any particular health services, without *requiring* the health service providers to utilise the relevant system(s). HCF has imposed the Condition to ensure that its members can be certain of enjoying the benefit of “on the spot” claiming in respect of eligible treatments by participating physiotherapists.
- 5.4 Regarding the use of ICD-10-AM codes, “item numbers” that have been agreed with the Australian Physiotherapists Association and used by health insurance providers and HICAPS and CSC will continue to be used by HCF for general classification, including in the Program. However, as noted at paragraph 1.4 above, the ICD-10-AM codes are used to translate diseases and other health problems from words into an alphanumeric code, which permits easy storage, retrieval and analysis of the data. The ICD-10-AM diagnostic codes provide information to enable identification of particular conditions with a precision that is not available through the item numbers. Item numbers are imprecise categorisations; for example, ‘Long consultation’.
- 5.5 For this reason, the ICD-10-AM Code Capability enables HCF to identify the particular consultations which are eligible for the payment of additional benefits that result in “no-gap” treatment.
- 5.6 As noted by HCF in the Notification, the particular benefit of a “no gap” treatment offering is that members can expect that eligible treatments will be paid for “on the spot” by HCF, and the member will not have to incur any out-of-pocket expenses. Both the Code Capability and the Condition are necessary to achieve this outcome. The Code Capability in conjunction with the Condition mean that HCF can ensure that:
- (1) participating physiotherapists will submit the ICD-10-AM Code electronically, enabling HCF to identify an eligible “no gap” treatment at the time of treatment; and
 - (2) HCF is able to electronically process and pay the participating physiotherapist the “no gap” benefit for eligible treatments “on the spot”.
- 5.7 If the service provider does not use an electronic claims and payment system, or submits the relevant ICD-10-AM code to HCF in some other way, this will not permit a simultaneous submission,

assessment and payment of that benefit. As a result, a paper-based or other less-instantaneous process is not a satisfactory substitute for Code Capability and the Condition.

6 Impact on EFTPOS providers

- 6.1 HCF refers to the comments in section 1 and 2 of this submission regarding the impact of the notified conduct on EFTPOS providers.
- 6.2 HCF also notes in this respect that the CBA (in the second paragraph and following paragraphs on page 2 of its submission) has only expressed concern regarding the effect of the notified conduct on competition for provision of EFTPOS payment systems for health service providers, *if* other suppliers are willing to enable the same functionality as HICAPS on suitable commercial terms and HCF unreasonably withholds their inclusion as a service provider. HCF has expressly addressed this concern in section 1 of this submission.
- 6.3 Because competition for the provision of electronic claims payment systems to health service providers is not in HCF's submission lessened by the notified conduct (as to which see further section 1 of this submission, and in particular the conclusion in paragraph 1.9), there can be no effect from the conduct on competition for the supply of EFTPOS systems generally. Competition in the market for supply of EFTPOS system will remain the same following implementation of the notified conduct. HCF submits that this has been recognised by CBA, as evidenced by the contents of page 2 of its submission.
- 6.4 For the sake of completeness, HCF further notes that, in any event, the market for EFTPOS systems is far broader than that for the supply of EFTPOS systems to health service providers. In that broader market, any possible effect on competition for supply of systems can only be inconsequential.

7 The program has clear public benefits

- 7.1 For the reasons set out in the Notification and those set out below, the Program has clear and tangible benefits that would outweigh any possible public detriment.
- 7.2 **"No gap" benefit and health benefits:** HCF has designed the Program so as to deliver a benefit to members of no out-of-pocket expense for eligible claims under the Program, as the entire cost of the consultation is paid to the healthcare provider at the time of the member's consultation. One of the biggest out-of-pocket expenses experienced by customers is the cost of an initial consultation. HCF asserts its program will have positive health impacts insofar as it removes a key consideration deterring members from accessing early intervention.
- 7.3 However, as discussed in detail in section 5 of this submission, the Program relies on physiotherapists using an electronic payment system and submitting electronically a relevant diagnostic code, along with the normal claim details, for the relevant benefit to be paid in this immediate way. The underlying purpose and public benefit of the "no gap" program would be fundamentally undermined if this were not the case.
- 7.4 HCF refers to point 7 of the CSC submission, in which CSC has alleged that other health funds are able to operate "preferred provider networks" and provide "on the spot" claiming using "item numbers" and without requiring additional data, namely the ICD-10-AM codes. Point 7 of the CSC submission also alleges that other health funds do so with out the need for "exclusive dealing." For the reasons set out in detail in section 5 of this submission, HCF considers that CSC's submission in this regard is incorrect and misconceived.
- 7.5 **Customer convenience and cost:** As referred to in paragraph 7.2 above, the Program allows HCF members to avoid the inconvenience and cost of paying for their treatment first and then claiming reimbursement (including postage or travel to a branch to submit their claim forms, and the requirement to incur the expense in the first instance until the benefit is paid).
- 7.6 **HCF costs reduced:** By automating physiotherapy claims, and especially those where additional information is required, HCF management expenses will be lower than they would be if members sent in paper claims and claim forms. Reduced management expenses means less pressure on

members' health insurance premiums. The provision of the ICD-10-AM diagnostic code enables HCF, as a prudent insurer, to ensure payment of the correct benefit which will help to ensure sustainability of the Program. CSC has asserted in its submission that it is unclear how HCF's actions will lower administrative costs. As described in more detail in section 5 of this submission, HCF submits that CSC has failed to understand in this respect the purpose and effect of the Condition. A health fund cannot *ensure* that compatible electronic claiming and payment processing will be utilised by service providers, without *requiring* the service providers to utilise relevant system(s). By imposing the Condition, HCF can ensure that compatible electronic claiming and payment processing is employed by participating physiotherapists, and that ICD-10-AM codes are submitted electronically, thus lowering HCF's administrative costs and increasing the efficiency and accuracy of benefit allocation.

- 7.7 **The Australian Physiotherapy Association and Consumers Health Forum have no concerns:** The Consumers Health Forum of Australia has indicated in its submission that it has no concerns about the Program and sees it as being beneficial in that it has the potential to reduce out of pocket costs and increase affordability. The Australian Physiotherapy Association has also not objected or identified any public detriments caused by the Program. Accordingly, HCF submits that any unsubstantiated speculation, including that in the Westpac submission, about the possible impact of the Program on physiotherapists, their treatments, and health services at large should be read in the context of the submissions of these peak industry groups.
- 8 **Collection of data**
- 8.1 CSC has stated in point 8 of its submission, that HCF will capture clinical data through the use of the ICD-10-AM code, and that other health funds operate similar preferred provider network schemes without the need to capture additional clinical data. HCF refers to its comments in section 5 of this submission, as to why the ICD-10-AM codes are utilised in the Program.
- 8.2 Although it is unclear from CSC's submission, it appears that CSC may be asserting that this collection of data by HCF is somehow detrimental. If so, no reasons are offered and the allegation is entirely unsubstantiated. HCF submits that there is no inherent detriment arising from the collection by HCF of ICD-10-AM codes, which are being collected by HCF lawfully and for a legitimate purpose, as described in the Notification and this submission. HCF submits that an argument that data collection enabling identification of 'episodes of care' should not occur is fundamentally flawed. HCF notes in this respect that such data collection is central to a number of success stories that feature on www.csc.com, so it is difficult for HCF to understand why CSC's US parent espouses the importance of collection of such data and yet seeks to stop it in Australia.
- 8.3 HCF (in the same manner as other health funds) collects clinical data as a matter of course in a variety of contexts, for the purposes of administering its business and tailoring and improving its products and services. HCF has specifically obtained a licence from the NCCC to use the ICD-10-AM convention for this Program, as approved by the Commonwealth Department of Health and Ageing. In addition to enabling the functioning of the Program (as described in section 5 of this submission), the collection of ICD-10-AM codes enables HCF to improve its understanding of its members health service requirements and provide more tailored products and services, for the benefit of members.
- 9 **No inappropriate treatments**
- 9.1 The Westpac submission appears to suggest that the Program may lead to physiotherapists failing to make proper clinical assessments and offering only those treatments for which a "no gap" benefit is payable (see, for example, points 1 and 5 of the Westpac submission).
- 9.2 HCF rejects this assertion, which is misconceived and reflects a failure to understand the health services industry and the proposition of the Program. To the extent that the Program involves the offering of differing benefits for differing treatments, it simply reflects current industry practice regarding the reimbursement by health funds (and Medicare) of fees for the provision of health services. The offering of "no gap" treatments is common in the context of the provision of other health services, such as hospital treatment. HCF and other health funds have in place effective contractual and auditing mechanisms to ensure that treatments provided to members are at all times appropriate. In HCF's experience, such programs do not give rise to inappropriate treatments or

assessments, and there is no reason to expect that they would do so specifically in the context of physiotherapists.

- 9.3 It is also important to note that the Program does not restrict or dictate the charges for, or number of, subsequent treatments. The notified conduct relates only to the initial consultation, where an assessment of the condition is undertaken and a treatment plan developed. The Program in no way restricts or controls the physiotherapist in this regard.

10 Classification of conduct as third line forcing

- 10.1 As discussed in part 2 of the Notification, there is arguably no "service" being provided by HCF to physiotherapists on which the condition to acquire specified electronic point of sale payment system services rests. HCF confirms its position that it is arguable that this is the correct construction of the Condition.
- 10.2 HCF further notes in this respect that, in Authorisation Determinations A50019 and A90679, the ACCC reached the view that the health sector included the following markets:
- (1) the sale of private hospital services to health insurers (Hospital Purchaser Provider Agreements (**HPPAs**)); and
 - (2) the sale of private medical services to health insurers (Medical Purchaser Provider Agreements (**MPPAs**)).
- 10.3 In the more recent Authorisation Determination A30216/30219, the ACCC characterised the HPPA market as the market for the acquisition by health funds of the contractual right for their members to be charged at specific rates for particular hospital services.
- 10.4 We note that these Determinations characterise HPPAs and MPPAs (which are similar in nature to the Program Agreement) as constituting acquisitions of services/rights by health insurers, as opposed to the provision of services by the health insurers. By way of analogy, the Program Agreement could be characterised as the acquisition by HCF of particular physiotherapists' services, or the acquisition by HCF of the contractual right for its members to be charged at specific rates for particular physiotherapist services. In such circumstances, the better view would be that the Condition is not conditional upon the supply of services by HCF, but rather the acquisition of services by HCF, in which case it follows that there is no third line forcing conduct within the meaning of section 47 of the *Competition and Consumer Act 2010*.

11 Notification relied upon

- 11.1 HCF repeats the submissions contained in its original Notification in support of its Notification and in responding to matters raised during the public consultation.

If there is any additional information which the ACCC would like to assist in its assessment of the Notification, please do not hesitate to contact us.

Yours sincerely



Tim Woodforde
Partner
Norton Rose Australia
Contact: Andrew Sorensen