Mr Mark Basile
Adjudication Branch
Australian Competition and Consumer Commission

8 November 2012

By email

Dear Mr Basile

Re: Exclusive dealing notification N95495 – More for Muscles Program (the "**Program**")

We refer to your email to Valerie Kirby dated 15 October 2012.

You asked if CSC had any further submissions to make to the ACCC as a result of the submissions received from the Hospitals Contribution Fund of Australia Ltd ("**HCF**") dated 17 August 2012 ("**August letter**") and 5 October 2012 ("**October letter**").

CSC wishes to make the further submissions set out in this letter. CSC has adopted the numbering and defined terms set out in those letters for ease of reference.

In summary, CSC's key concerns are as follows:

- HCF is seeking to rely on the fact that HICAPS is currently the only electronic claims provider with Code Capability to justify exclusive conduct. Yet HCF itself brought about that result by choosing to brief and engage HICAPS to incorporate Code Capability, to the exclusion of CSC.
- Despite launch of the Program, and pro-active efforts by CSC through appropriate channels, CSC has not yet received settled business requirements from HCF, and is therefore unable to commence development work to incorporate Code Capability into CSC HealthPoint.
- The requirements listed in the October letter as being the minimum requirements for a service provider to be allowed by HCF to offer services under the Program differ in a very significant aspect from those communicated to CSC by the HCF business.
- CSC will be unable to incorporate Code Capability unless HCF provides settled business requirements, appropriate cooperation and timely response, a test environment, and HCF internal business case approval to proceed with the development project. HCF has also mentioned that CSC would need to provide the Code Capability on "reasonable commercial terms" (the meaning of which is not clear in the context of Code Capability because CSC was not aware that any

money was to change hands). Based on all of these factors, CSC is concerned that HCF will have the power to, effectively, delay CSC's provision of service to the Program indefinitely.

- HCF makes clear that the notified conduct relates to initial physiotherapy consultations only. HCF's website advertising states that initial physiotherapy consultations are "No Gap". HCF's justification for the notified conduct is that it requires the additional information delivered through Code Capability to ensure correct payment is made. As there is no additional data required (above the currently used item number for initial consultations and the date) for HCF to be made aware that the consultation requires a full rebate, the underlying justification for the notified conduct is questionable.
- The notified conduct will have the likely impact of influencing participating physiotherapists to choose HICAPS and its associated NAB EFTPOS provider. Arguments that physiotherapists are free to use other EFTPOS providers and CSC HealthPoint, as well as HICAPS, do not reflect commercial reality.
- It is self-evident that physiotherapists initially deciding on an electronic claims provider will be influenced to choose HICAPS in order to participate in the Program. In addition to that impact upon CSC HealthPoint's future business, existing CSC HealthPoint customers have informed CSC that when they contacted HCF about the codes they would need to claim for a patient under the Program, they were advised by HCF to contact HICAPS. This referral of CSC's customers to HICAPS is likely to impact CSC HealthPoint's current customer base.

August letter paras 1.2 and 1.6 – Participation by others

i) CSC respectfully suggests that the course of events indicate that HCF intended only to deal with HICAPS in connection with the Program, or at least to deal only with HICAPS during the launch and establishment of the Program.

ii) To explain further, as stated in paragraph 1.6 of the August letter, the first mention of the Program to CSC was an agenda item in a meeting on 16 May 2012 at HCF's premises. The agenda item was as follows:

> HCF 'More for' programs
> - More for Eyes
> - More for Muscles

As noted in paragraph 1.6, the item was not discussed. It follows that this does not amount to notice to CSC of the features of the content of the Program or, more importantly, a requirement for Code Capability.

iii) A short telephone call occurred on 29 May between HCF and CSC which briefly touched on the requirement for additional data to be submitted with chiropractic claims (without mention of physiotherapy). On 30 May, CSC sent a business requirements definition document to HCF in relation to the chiropractic claims query.

iv) On 8 June, HCF lodged the Notification with the ACCC. The Notification is a detailed document, which would presumably have taken some time to draft and review. One could assume HCF's decision to make a notification to exclusively deal with HICAPS was made around the same time as, or even earlier than, the first notice given to CSC about any Code Capability requirement.

v) Considering the above chronology, CSC suggests that the claim by HCF, that it did not intend to deal only with HICAPS in respect of the Program, cannot be sustained. HCF was aware that:

a. HICAPS has only one competitor, CSC HealthPoint,
b. at the time of lodging the Notification, CSC had only just been made aware of the requirement for any Code Capability,
c. CSC had not yet received the business requirements from HCF that would allow CSC to incorporate the functionality, and
d. CSC would need appropriate development time.

HICAPS had been briefed by HCF, had developed the Code Capability and had completed testing by the beginning of July 2012.

vi) Even if HCF was willing to allow others to enter the Program at a later time, HCF appears to have excluded HICAPS' competitor for at least the initial period of the Program. Had CSC been briefed at the same time, and been given the same opportunity as HICAPS was given to incorporate Code Capability, then an exclusive dealing arrangement between HCF and HICAPS would not have been necessary.

vii) CSC also suggests that it appears somewhat disingenuous for HCF to say in paragraph 1.2 that it is currently restricted to using HICAPS because HCF "*understands that HICAPS is the only supplier with [Code Capability]*". HCF engaged HICAPS to deliver Code Capability (no other health fund in Australia requires that capability), and HCF did so without giving the equivalent opportunity to HICAPS's sole competitor to deliver that capability. CSC suggests that HCF has brought about the consequence on which HCF now seeks to rely.

August letter paras 1.4, 1.6 and 1.7 and October letter para 1.1(1)(a) – Participation by CSC in CSC's control and adequate briefing

i) Whether CSC is able to incorporate Code Capability is not entirely within CSC's control. The ability to incorporate the functionality depends as much on receipt of settled business requirements from HCF, the approval of proposed workflow plans by HCF, and HCF internal business case approval, as it does on CSC's willingness to incorporate the functionality. If CSC does not receive these requirements, information and approval from HCF, it is impossible for CSC to incorporate Code Capability.

ii) CSC confirmed its willingness to incorporate Code Capability to HCF on 30 May 2012, and has been pro-actively seeking the requisite

requirements and information from HCF. However, CSC has received from HCF a number of versions of requirements for the number of characters required to support the new data field and the process flow for physiotherapists to submit Program claims. After a verbal request for a three (3) character allocation, HCF stated to CSC in writing that HCF will require seven (7) characters to be allocated for data capture. HCF confirmed its requirement for seven (7) characters in writing on 26 October 2012.

iii) Of significant concern to CSC is that the character requirements set out in the October letter (paragraph 1.1(1)(a)) do not accord with those described above. The October letter states the field must be capable of accepting up to 12 characters.

iv) The number of characters is a significant development issue. There is time invested in validation and scoping of the requirement based on the number of characters. In addition, a change in the character requirement to 12 does not accord with the relevant standard (AS2805) (as the standard does not support alphanumeric data capture at the item level with this number of characters). CSC was also advised in a telephone conversation with HCF on 25 September 2012 that HCF's system currently supports only seven (7) characters.

v) One wonders why CSC may be expected to incorporate greater functionality (i.e. 12 characters rather than seven (7) characters) in order to be allowed to provide services to Program participants, when it appears HICAPS was allowed to provide services to Program participants based on seven (7) characters.

August letter para 1.8 – other providers can enter market

(i) In order to compete with existing electronic claims systems, vendors must individually engage every health fund, and work with them to implement the relevant technical requirements in order to provide the electronic claims service. As there is little advantage for the health fund to do so (that is, it is unlikely the health funds will commit resources to these activities for no direct return on that investment), there is little incentive for a new vendor to attempt to offer electronic claims services.

(ii) As CSC HealthPoint is currently the only competitor to HICAPS (and because of HICAPS and NAB's inter-relationship), involvement of new banking providers would most likely occur through partnership with CSC. Of course, any new banking providers will not be attracted to partnership with CSC if CSC HealthPoint's health fund coverage is diminished by actions such as those of HCF that are at issue.

August letter para 1.9 – CSC is not precluded

(i) CSC has been precluded from providing services to participating physiotherapists by HCF's actions, and remains so precluded until the Code Capability can be incorporated. As mentioned above, the

Program has commenced, yet CSC is concerned that it does not yet have firm business requirements or proposed solution approval from HCF.

(ii) From the time of confirmation by HCF to CSC of its settled business requirements and approval, CSC needs approximately 12 weeks to deploy the functionality. One would assume that a significant portion of the likely take up of the Program would occur during the initial launch and marketing phase. It seems likely that any physiotherapists currently deciding whether to choose HICAPS or CSC HealthPoint, and making that decision anytime until CSC is able to incorporate the Code Capability, would be likely to choose HICAPS in case the physiotherapist wishes to participate in the Program. It is, therefore, difficult to understand how the notified conduct will promote competition.

(iii) The CSC HealthPoint helpdesk has already received queries from CSC HealthPoint customers about the Program. The CSC HealthPoint customers say that, when they have contacted HCF about the Program, they have been advised by HCF to contact HICAPS. Referral of existing CSC HealthPoint users to HICAPS by HCF is likely to impact CSC's existing customer base, in addition to the influence upon choice of electronic claims provider for new users mentioned in paragraph (ii) above.

August letter paras 2.1 through to 2.4 – only need HICAPS for initial consultation

(i) If we understand correctly, HCF states that the exclusive arrangement with HICAPS only applies with respect to a patient's initial consultation. The physiotherapist is then free to use CSC HealthPoint (being the only alternative to HICAPS) for subsequent transactions with that same patient (and/or to use CSC HealthPoint for initial and subsequent consultations for with other patients unrelated to the Program). HCF also states that the physiotherapist is free to use any EFTPOS service provider, whether for initial consultations or otherwise.

(ii) CSC made the point in its submission of 29 June that the idea that a physiotherapist would use more than one electronic claims provider and/or EFTPOS provider is commercially unrealistic. [redacted]

(iii) [redacted]

[redacted] as CSC has not had a fair opportunity to incorporate Code Capability as yet, physiotherapists joining the Program will not have the benefit of [redacted]

(iv) CSC notes that the August letter does not address the significant issue of the flow-on effect of the choice by a physiotherapist in a multi-modality medical practice wishing to use HICAPS in order to participate in the Program. Other providers in the practice are likely to go along with the physiotherapist's need to use HICAPS, otherwise the practice will incur multiple rental fees and face the logistical issue of multiple terminals on the practice's reception desk.

August letter paras 1.1(2) and 2.4 – reasonable commercial terms

CSC is unclear what HCF means by "reasonable commercial terms". CSC is not aware of an expectation of money changing hands, and is concerned that HCF may have terms in mind of which CSC is not yet aware.

August letter para 3.1 – open to all physiotherapists but is optional

(i) CSC suggests that the fact the Program is open to all physiotherapists, rather than a limited number in an area, makes the likely adverse impact upon competition even greater. More physiotherapists are likely to take up HICAPS on the basis of wishing to participate in the Program, and will, therefore, not have the option of choosing their electronic claims provider on the basis of the most competitive price. The comments, above, about the flow-on impact of physiotherapists in multi-modality practices using HICAPS is also exacerbated.

(ii) Whilst participation by physiotherapists in the Program may be optional, in practice, if a physiotherapist does not participate, the impact is that out of pocket expenses for the patient are greater. This suggests that physiotherapists may lose business if they do not participate in the Program, which in turn means the physiotherapists are more likely to choose HICAPS so that they can participate in the Program.

August letter para 4.2 – potential for expansion

It is clear that CSC HealthPoint is the sole competitor to HICAPS. Should HCF (or any other health fund) be permitted to exclude CSC HealthPoint from any programs of the nature of the Program, or delay its access to functional requirements so that CSC HealthPoint is precluded from the take up in the first months or year of the program, then the longer term impact may be the non-viability of CSC HealthPoint as a product. As such, CSC suggests that it is appropriate and relevant for the ACCC to consider the likely combined impact of programs of the nature of the Program on electronic claims competition, and any likelihood that HICAPS will be engaged well ahead of CSC HealthPoint to provide any requisite additional functionality as has occurred with the Program.

August letter paras 5.1 through to 5.7 – importance of Code Capability and para 9.3

(i) HCF states in advertising at clinics, on its website (http://www.hcf.com.au/health-and-wellbeing/more-for-muscles/) and in communications to its membership that all initial consultations for their members at a participating physiotherapist performed under the Program will be a "No Gap" arrangement.

(ii) If this is the case, then CSC cannot understand the requirement to use Code Capability to record special diagnostic item codes against these initial consultation claims. Initial consultations already have an APA item code of 500, which has been used for many years by both HICAPS and CSC to process HCF claims. If there is no eligibility requirement for the "No Gap" claim under the Program other than the visit being an initial consultation, no more than once a year, and the provider being a Program participant, then instantaneous submission of item number 500, and date of transaction, would seem to contain all of the qualifying information that HCF needs to identify the transaction of a "No Gap" transaction.

(iii) As HCF stated that the exclusive arrangement with HICAPS is required only for initial consultations (para 2.1 of the August letter), and additional information above the item number 500 and date does not appear to be necessary in order to alert HCF that the visit is an initial consultation, then the underlying justification for the exclusive dealing arrangement with HICAPS is not sustained.

August letter para 6.2 – impact on EFTPOS providers

(i) CSC argues that HCF has unreasonably withheld, or at least unreasonably and substantially delayed, CSC HealthPoint's inclusion as a service provider to the Program. CSC is not aware of any reason advanced by HCF, whether reasonable or otherwise, explaining the delay in engaging CSC to incorporate Code Capability as compared to the time at which HICAPS was engaged.

(ii) As noted by HCF in para 6.2 of the August letter, HCF unreasonably withholding access to the Program by an electronic claims provider is precisely the conduct about which CBA expressed concern.

(iii) CBA and Suncorp partner with CSC in the delivery of electronic claiming solutions and EFTPOS. It follows that an impact of CSC HealthPoint's exclusion from the initial roll out of the Program will be that CBA and Suncorp will also be excluded from take up of their EFTPOS offerings.

(iv) As mentioned in the comments above about paras 2.1 through to 2.4 of the August letter, arguments that Program participants are free to choose any EFTPOS provider, despite having to use HICAPS in order to participate in the Program (which charges the same rental whether the NAB EFTPOS is used or not), are not based in commercial reality.

August letter para 7 - clear public benefits

(i) Whilst the Program itself may benefit HCF's members, there is no necessity that Code Capability be introduced to support the notified conduct (please see the comments made in relation to paras 5.1 - 5.7). The benefit can be achieved through the use of item number 500, which identifies the visit as an initial consultation (which is automatically a "No Gap" consultation according to HCF's advertising). No further "qualifier" is required in order for HCF to be aware that the consultation is "No Gap".

(ii) It is clear is that there is a negative impact on physiotherapists who operate small businesses and who, in order to avoid having patients go elsewhere to a Program participant, must utilise HICAPS to join the Program. If HCF had given CSC the same opportunity and time frame to adopt Code Capability (or if it is acknowledged that Code Capability is not essential to initial consultations under the Program), physiotherapists would have had their usual "free market" choice of HICAPS or CSC HealthPoint, under which they could choose the less expensive option. As mentioned before, the suggestion that participating physiotherapists are free to adopt CSC HealthPoint as well as HICAPS, and/or alternative EFTPOS to the NAB EFTPOS already included in the HICAPS rental, is not commercially realistic.

(iii) In para 7.6, HCF states that "*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*". We do not understand this proposition. How can additional data be required in order to ensure "payment of the correct benefit", when HCF's proposition is that the full cost of the initial consultation is rebated (hence "No Gap")? All data required to support this assessment such as date of transaction (to support once per year eligibility), and item code (500 – initial consultation), is already submitted in the current format of electronic claiming.

CSC would be pleased to answer any questions the ACCC may have about this submission, or to provide further information. Please contact our legal counsel, Valerie Kirby, on 9034 3182 should this be necessary.

Yours faithfully

James Rice
Managing Director, APAC
CSC HealthCare