

21 November 2012

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Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Attention: Luke Griffin (luke.griffin@accg.gov.au)

Dear Mr Griffin



Australian Dental Association - request for interim authorisation

1. We refer to the application for authorisation pursuant to section 88(1) of the *Competition and Consumer Act 2010 (CCA)* lodged by the Australian Dental Association (the **Applicant**) on 29 October 2012 (A91340 and A91341) in relation to the setting of fees in shared dental practices (the **Application**).
2. As you may be aware, there is an existing authorisation in place for this conduct (authorisations A91094 and A91095). These authorisations were granted on 10 December 2008 and expire on 28 February 2013.
3. In its letter dated 5 November 2012, the ACCC set out its indicative timetable for considering the Application. Under this indicative timetable, the ACCC anticipates a draft determination in February 2013, followed by a final determination in April 2013.
4. In light of the possibility that the existing authorisation may expire before the ACCC makes its final determination on the Application, the Applicant seeks interim authorisation under section 91(2) of the CCA, to take effect from 1 March 2013 until the ACCC's final determination on the Application comes into force.
5. In considering an application for interim authorisation, the Commission has indicated that it will take into account, inter alia, the following factors:¹
 - (a) the extent to which the relevant market will change if interim authorisation is granted;
 - (b) the urgency of the need for interim authorisation;
 - (c) the possible harm, if any, to the applicant or other parties if a grant of interim authorisation is denied; and

¹ ACCC, Guide to Authorisation, January 2011, Page 44.

- (d) any possible benefit or detriment to the public that the Commission could assess at the time of considering the request for interim authorisation.

Our comments on these matters are set out below.

Extent of change in market

6. In the Applicant's view, a grant of interim authorisation will not affect any relevant market. Rather, it will permit a continuation of the authorisation under which dentists practising in shared practice are able to agree on fees to be charged to patients by the dentists and/or dental specialists in the practice. By contrast, the Applicant submits that a refusal to grant interim authorisation is likely to result in a significant alteration of the competitive dynamics with respect to the contracts, arrangements or understandings between two or more dentists and/or dental specialists who practise in a shared practice as to fees to be charged for dental services provided in the practice. In practical terms, interim authorisation would preserve (rather than modify) the status quo.
7. We note, in any event, that the interim authorisation would apply only for a limited period of time (potentially no more than a few weeks). Any change in market conditions that would result from the interim authorisation would be very limited in duration.

Urgency and harm to Applicant

8. We recognise the possibility that interim authorisation may not be necessary. We understand the ACCC's timetable to be indicative only, and note the possibility that a final determination may be made before the existing authorisation expires. However, the ADA requests authorisation at this time so that the ACCC can, if it wishes to, consider this request at the time of its draft determination. At that point in time the issues relating to the Application, as well as the need for interim authorisation, are likely to be clearer.
9. In the absence of interim authorisation, there is a risk that the operation of shared practices may be severely disrupted if there is an interval between the expiry of the existing authorisation and the commencement of a further authorisation. In such a case, there will be significant doubts around the legality of existing shared practice structures in this interval, resulting in unnecessary cost and uncertainty.
10. We recognise the possibility that the ACCC may make a final determination refusing the Application. In such a case, interim authorisation would extend the period for which authorisation applied to fee setting in shared practices (which would otherwise lapse on 28 February 2013). However, this protection would only be extended for a few weeks. The Applicant submits that this would result in little, if any, detriment to the public.

Public benefits and detriments

11. As discussed in detail in the supporting submission, the Applicant submits that the conduct for which authorisation is sought will result in significant public benefits, relating to the:
 - (a) availability and continuity of patient care;²
 - (b) quality of dental services;³

² See Application: paragraphs 5.2 to 5.4.

³ See Application: paragraph 5.5.

- (c) efficiency in the provision of dental services;⁴ and
 - (d) retention of dental practitioners in the workforce.⁵
12. These benefits to the public have been recognised by the ACCC in its decision to grant the existing authorisation.
13. These significant benefits will be forgone not only in any period of interim authorisation but may also be permanently jeopardised if the Applicant is unable to enjoy a smooth transition from the current authorisation to the proposed replacement authorisation contemplated in the Application.
14. The Applicant appreciates that the Commission will be reluctant to authorise conduct that could result in possible competitive detriment or harm to other parties. In this case, however, the Applicant submits that there would be no apparent anti-competitive detriment likely to flow as a result of granting interim authorisation.
15. Accordingly, the Applicants request that the Commission grant interim authorisation in relation to the matters contemplated in the Application.

If you have any questions in relation to this application or require any further information, please contact Justin Oliver on (07) 31196332.

Yours faithfully
MINTER ELLISON



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⁴ See Application: paragraphs 5.6 to 5.8.

⁵ See Application: paragraphs 5.9 to 5.14.