



Draft Determination

Application for authorisation

lodged by

Private Healthcare Australia Limited

in respect of

discussing, implementing and giving effect to arrangements in relation to private health insurance coverage during the COVID-19 pandemic

Authorisation number: AA1000487

Date 15 July 2020

Commissioners: Rod Sims, Mick Keogh, Delia Rickard and Stephen Ridgeway

Summary

The ACCC proposes to grant conditional authorisation to Private Healthcare Australia (PHA), its members, and Members Health Fund Alliance and its members (the Participating Parties), to make and give effect to arrangements, and to discuss and share information with each other in relation to private health insurance coverage during the COVID-19 pandemic.

On 2 June 2020, the ACCC granted conditional interim authorisation to enable the proposed conduct to commence while the ACCC is considering the substantive application. This interim authorisation remains in place until it is revoked, or the final authorisation comes into force, or until the application is withdrawn.

The ACCC is proposing to grant conditional authorisation for six months from the date on which final authorisation is granted.

The proposed conditions require PHA to notify the ACCC of measures formulated by the Participating Parties as part of the proposed conduct, to continue to provide fortnightly reports to the ACCC and to provide information relating to the proposed conduct to the ACCC upon request.

The proposed authorisation does not prevent the Participating Parties from individually deciding to offer more favourable terms to policyholders.

The ACCC invites submissions in relation to this draft determination by 5 August 2020 before making its final decision.

1. The application for authorisation

- 1.1. On 1 April 2020, Private Healthcare Australia Limited (**PHA**), on behalf of itself and its members, and Members Health Fund Alliance (**MHFA**) and its members (the **Participating Parties**) (listed in **Attachment A**), lodged application for authorisation AA1000487 (the **Application**) with the Australian Competition and Consumer Commission (the **ACCC**). The Participating Parties seek authorisation to make, and give effect to, arrangements, and to discuss and share information with each other in relation to private health insurance coverage during the COVID-19 pandemic. PHA seeks authorisation for six months from the date on which final authorisation is granted.
- 1.2. The Application was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. PHA also requested that the ACCC grant interim authorisation to commence engaging in the conduct while the ACCC considers the substantive application.

The Applicants

- 1.5. The Application was made by PHA on behalf of itself, MHFA and the private health funds listed at Attachment A, which are member funds of PHA and/or MHFA. PHA has

advised that it does not intend to add any additional Participating Parties to the Application.¹

- 1.6. PHA is the Australian private health insurance industry's peak representative body. PHA represents 24 registered private health funds, which provide health insurance to approximately 13 million Australians. MHFA is group of 27 not-for-profit and member-owned private health funds.

The Proposed Conduct

- 1.7. 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 policyholders 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 policyholders' homes as a substitute for an admission to hospital;
- d) providing financial relief for policyholders from paying health insurance premiums such as postponement of premium increases and premium waivers; and
- e) any other measure formulated in response to the COVID-19 crisis as notified to the ACCC by PHA,

(the **Proposed Conduct**).

Interim authorisation

- 1.8. PHA requested interim authorisation to enable the Participating Parties to engage in the Proposed Conduct, in particular to provide a uniform response to addressing policyholders' concerns, while the ACCC is considering the substantive application.

- 1.9. On 8 April 2020, the ACCC granted interim authorisation.²

- 1.10. On 2 June 2020, the ACCC revoked the interim authorisation granted on 8 April 2020 and substituted it with conditional interim authorisation for the Proposed Conduct.³ The conditional interim authorisation requires PHA to:

- notify the ACCC of any measure formulated as part of the Proposed Conduct at least 24 hours before the measure is implemented or otherwise given effect to;
- provide detailed fortnightly reports to the ACCC regarding any meetings, discussions, developments and decisions in relation to the Proposed Conduct; and
- provide any further information or documents relating to the Proposed Conduct that the ACCC requests.

¹ Email to the ACCC from MinterEllison, on behalf of PHA, dated 29 May 2020.

² ACCC, [Private Healthcare Australia – Interim Authorisation Decision Statement of Reasons](#), 8 April 2020 (revoked).

³ ACCC, [Private Healthcare Australia – Conditional Interim Authorisation Decision Statement of Reasons](#), 2 June 2020.

- 1.11. Additionally, in order to be covered by the interim authorisation, any contracts, arrangements or understandings arising from the Proposed Conduct must not have the effect of increasing health insurance premiums to consumers and must provide for immediate termination when no longer authorised by conditional interim authorisation or final authorisation.
- 1.12. A register of notifications made under the interim authorisation is available on the [Public Register for this matter](#). The interim authorisation remains in place until it is revoked, or the date the final determination comes into force, or the date the application for authorisation is withdrawn.

2. Background

- 2.1. On 11 March 2020 the World Health Organisation announced that COVID-19 is a pandemic.
- 2.2. The ACCC recognises the significant challenges being faced by businesses and the economy more broadly as a result of the COVID-19 pandemic. The pandemic has caused a major disruption to society and the economy, with social distancing measures and travel bans affecting various sectors across the economy. In that context, the ACCC has received a large number of applications for authorisation, including interim authorisation, aimed at providing financial relief to businesses and individuals, facilitating the supply of goods and services (including health services) and managing the financial impact of a significant economic shock.
- 2.3. PHA submits that the COVID-19 pandemic has caused distress and uncertainty in the community from health and economic perspectives. More than fifty per cent of Australians have private health insurance and the COVID-19 pandemic has created uncertainty for policyholders in relation to the scope of their cover and affordability of premiums. PHA submits that the Participating Parties are seeking to address policyholders' concerns relating to whether health insurance policies will cover hospital treatment received outside of a hospital setting ('hospital in the home' services) or will cover non-hospital treatment such as physiotherapy or psychology if treatment is unable to be provided through face-to-face interaction. PHA also submits that the Participating Parties are seeking authorisation to address concerns about whether policyholders can afford to pay premiums for health insurance if they experience job losses or a reduction in their income. PHA submits that by addressing policyholders' concerns through a coordinated response, they will be able to provide certainty and clarity for policyholders in relation to their private health insurance during the COVID-19 pandemic.
- 2.4. PHA also submits that coordination between the Participating Parties allows it to engage with hospitals and health professional associations to formulate a framework, which would set out what will be covered and in what circumstances. PHA submits that authorisation of the Proposed Conduct will assist the Participating Parties to devise a supportive, consistent and comprehensive response to the COVID-19 pandemic for the collective benefit of policyholders.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

- 3.2. The ACCC invited submissions from a range of potentially interested parties including Federal government and relevant regulatory bodies, consumer groups and relevant industry associations.⁴
- 3.3. The ACCC received nine submissions from interested parties. The majority of submissions were generally supportive of the Application, particularly with regard to the broadening of insurance coverage to include telehealth consultations. However, submissions also raised concerns about the scope of the Proposed Conduct, questioned whether continued coordination between the Participating Parties is necessary and noted that the ACCC should monitor the impact of interim authorisation.
- 3.4. Public submissions by PHA and interested parties are summarised below and are available on the [Public Register for this matter](#).

Interested party submissions

- 3.5. The Consumers' Federation of Australia (**CFA**) is generally supportive of the Application, but submits that the definition of the Proposed Conduct as 'to discuss and implement a coordinated response regarding the COVID-19 pandemic to provide to people covered by a health insurance policy', is too broad and there is no requirement that there be a public benefit. The CFA submits that, as a result of this wording, conduct falling within these introductory words will constitute Proposed Conduct whether or not it falls within one of the five specific limbs of the Proposed Conduct. CFA submits that these introductory words should be omitted. The CFA also submits that an authorisation to coordinate on 'any other measure formulated to respond to the COVID-19 pandemic as notified to the ACCC by PHA' is too broad and should be omitted.
- 3.6. CHOICE does not object to the Application, but submits that the objectives have largely been achieved under interim authorisation and there is therefore no need for a further six months of coordination between the Participating Parties. CHOICE notes that arrangements put in place between all Australian governments and the private hospital in each state and territory have streamlined the hospitalisation of patients with COVID-19. CHOICE submits that these arrangements mean the ability for policyholders with hospital insurance to benefit from broader insurance coverage is limited. CHOICE further submits that Participating Parties no longer need to engage in the Proposed Conduct to provide alternatives to face-to-face treatments, as this measure was only required while physical distancing restrictions were in place. CHOICE strongly supports the provision of financial relief to policyholders who have lost their job or income as a result of the COVID-19 pandemic, but submits that the Participating Parties have now made public statements about financial relief available to policyholders. CHOICE advises that it is calling on individual health funds to match the measures implemented by sector leaders. CHOICE considers the fifth limb of the Proposed Conduct is too broad in scope and could allow Participating Parties to agree on almost any COVID-19 related measure even if detrimental to the public.
- 3.7. The Australian Psychological Society (**APS**) supports the Application and submits that the Proposed Conduct has played a critical role in alleviating psychologists' and their clients' concerns regarding insurance coverage for consultations and potential premium increases. APS also supports the proposed length of authorisation, noting evidence (from other pandemics) which suggests that mental health repercussions, as a result of COVID-19, will be widespread and long-lasting.

⁴ The public submissions received is available from the [ACCC's public register](#).

- 3.8. Consumers Health Forum of Australia (**CHFA**) supports the Application and submits that the public benefits resulting from the Proposed Conduct will outweigh the risk of detriments. CHFA submits that a consistent approach to issues related to the insurance coverage of COVID-19 and the provision of financial relief to customers, will help protect consumers' interests, particularly those facing hardship and those whose benefits have been reduced due to restrictions on certain health services. CHFA also submits that the coordinated approach to returning unexpected profits from the COVID-19 restrictions will benefit policy holders. CHFA supports the proposed length of authorisation, but submits that the Proposed Conduct may only be required for a shorter period, unless Australia experiences a strong second wave of COVID-19 infections.
- 3.9. Allied Health Professions Australia (**AHPA**) is supportive of the Application, in particular, for the provision of health services via telehealth practice. AHPA notes that the interim authorisation has been of substantial benefit as it allows them to deal with a central agency (PHA). AHPA also supports PHA's proposed length of authorisation.
- 3.10. Speech Pathology Australia (**SPA**) supports the broadening of private health insurance coverage to include modes of treatment that substitute for face-to-face interaction or admission to hospital.
- 3.11. Exercise & Sports Science Australia (**ESSA**) supports the Application, and its proposed length. ESSA notes the detrimental impact the COVID-19 pandemic is having on its policyholders' activity and financial standing, and advises that the Proposed Conduct has allowed its policyholders to provide telehealth consultations during the pandemic and continue assisting clients. ESSA submits that this mode of treatment has been particularly beneficial to vulnerable populations and clients based in rural and remote locations.
- 3.12. The Australian Private Hospitals Association (**APHA**) acknowledges that the onset of the COVID-19 pandemic required a quick response from the private health insurance industry. However, the APHA submits that in assessing the public benefits resulting from the Proposed Conduct, the ACCC should monitor whether:
- consumers have been provided with information on the choices available to them and their ability to access private health care in the medium and longer term;
 - insurers ensured that the value and utility of private health insurance is maintained despite the changes in service were delivery due to the COVID-19 pandemic;
 - insurers agreed to fund modified hospital services to ensure continuity of care for patients; and
 - the extent to which interim authorisation allowed insurers to reach their own agreements with individual providers to meet specific local needs and commercial requirements, rather than adopting standard terms across the industry.
- 3.13. The Australian Acupuncture and Chinese Medicine Association (**AACMA**) supports the Application, particularly in relation to the inclusion of telehealth consultations.

PHA's response to submissions

- 3.14. The PHA responded to interested party submissions on 15 June 2020.
- 3.15. In response to submissions stating that the definition of the Proposed Conduct was broad in scope, PHA submits that the broad scope was due to the unpredictability of

the COVID-19 situation. PHA submits that the fifth limb of the Proposed Conduct is a 'catch-all' for the definition and should be retained due to the need for flexibility to respond to the unpredictability of the situation.

3.16. PHA submits that the ACCC has consistent oversight of the Participating Parties' discussions through PHA's reporting conditions and that it can also require PHA to provide further information or documents relating to the Proposed Conduct.

3.17. PHA also submits that:

- the definition of the Proposed Conduct is exhaustive as the Participating Parties are only able to discuss and implement a coordinated response 'in relation to' the five limbs of the Proposed Conduct;
- the proposed length of authorisation is appropriate and necessary because the COVID-19 situation and implications arising from COVID-19 are expected to last at least six months. While some measures have been announced and are unlikely to change, there may be a need to implement additional measures if the event of increased uncertainty, such as a second wave of infections. PHA also submits that this time period will also account for the mental health consequences that have arisen; and
- Participating Parties have retained complete discretion and the ability to liaise with individual providers to make their own decisions about appropriate measures to take. PHA also notes that the interim authorisation expressly states that Participating Parties are still able to compete on price and insurance coverage, and to individually offer insurance coverage and relief measures beyond what is outlined in the Proposed Conduct.

4. ACCC assessment

4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. PHA has sought authorisation for the Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

Relevant areas of Competition

4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.

4.4. PHA submits that the member health funds of PHA and MHFA compete in relation to the provision of private health insurance.

4.5. The ACCC considers that the relevant area of competition likely to be affected by the authorisation is the provision of private health insurance.

Future with and without the Proposed Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct to the likely future in which the Proposed Conduct does not occur.⁵
- 4.7. The rationale for the Proposed Conduct is closely linked with the impacts of COVID-19 in Australia. The future likelihood and severity of those impacts is uncertain at this point in time.
- 4.8. As the Proposed Conduct is currently occurring subject to conditional interim authorisation, the ACCC has the benefit of observing how the Proposed Conduct is operating in practice and this informs how the likely future with the Proposed Conduct would look if authorisation is granted in a final determination.
- 4.9. The ACCC considers that in the absence of the Proposed Conduct, the Participating Parties would be likely to individually offer premium relief measures to policyholders and to make individual decisions on whether to broaden insurance coverage to include treatment for COVID-19 and alternatives to face-to-face treatment, in response to the COVID-19 pandemic. However, such decisions would not be consistent and possibly not as quick. Furthermore, each Participating Party would be required to independently communicate measures formulated in response to the COVID-19 pandemic, which may result in confusion amongst policyholders, and PHA would not be able to operate as effectively as a centralised industry body in its engagement with stakeholders such as hospitals and health professional associations.
- 4.10. The ACCC recognises that there are significant benefits from broadening insurance coverage to include alternatives to face-to-face treatment and the premium relief measures themselves. However, the ACCC notes that at least some of these benefits may have been achieved without coordination. The ACCC has not considered it necessary in this case to quantify the extent of any such difference. As a result, the ACCC's assessment of the likely public benefits and detriments, set out below, has focussed on those likely to result from the coordination that more clearly would not have arisen absent the Proposed Conduct.
- 4.11. The ACCC also notes that the Proposed Conduct would include discussions between the Participating Parties about measures to address potential windfall gains arising from reduced claims due to COVID-19 restrictions, such as refunds to policyholders. However, the Participating Parties are not permitted to discuss the amount of refunds payable and any implementation of such measures must be done unilaterally by the Participating Parties. Should the Participating Parties elect to engage in discussions regarding refunds and this resulted in policyholders receiving refunds, the ACCC considers this would represent a public benefit.⁶

Public benefits

- 4.12. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

⁵ Re Queensland Independent Wholesalers Ltd (1995) 132 ALR 225; Re Qantas Airways Ltd [2004] ACompT 9; Re VFF Chicken Meat Growers Boycott Authorisation [2006] ACompT 2; Re Application by Medicines Australia Inc [2007] ACompT 4; Re Macquarie Generation and AGL Energy Ltd [2014] ACompT 1.

⁶ PHA notes that the Participating Parties are still assessing the financial impact of the COVID-19 pandemic on the private health insurance industry and will consider if savings need to be returned to policyholders – [PHA media release, 25 June 2020](#). On 12 July 2020 a [PHA media release](#) noted '[i]f the independent regulator's claims data, due to be released in a few months' time, shows more savings need to be returned to members, health funds will do so.'

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁷

4.13. The ACCC has considered the following categories of potential public benefit:

- providing greater certainty for policyholders through a consistent response and industry-wide communications; and
- enabling PHA to engage with the health industry on behalf of the Participating Parties to broaden insurance coverage.

Providing greater certainty for policyholders through a consistent response and industry-wide communications

4.14. The Proposed Conduct has enabled the Participating Parties to provide a supportive, urgent and consistent response to policyholders on insurance coverage and premium relief. The ACCC considers that, while there remains a risk of increased COVID-19 infection rates in Australia as well as ongoing economic impacts, there are public benefits from enabling the Participating Parties to be in a state of readiness to respond to issues that may arise in both the private health insurance industry and broader health system.

4.15. The Proposed Conduct also allows PHA to communicate on behalf of the Participating Parties and deliver clear and consistent messaging in relation to the measures being taken to assist policyholders during the COVID-19 pandemic.

4.16. The ACCC considers that PHA facilitating consistent, industry-wide communications will provide policyholders with a better understanding of available premium relief and the broadening of insurance coverage to include COVID-19 treatment and alternatives to face-to-face interaction. Almost all health funds in Australia are Participating Parties and while Participating Parties are still able to unilaterally implement measures, there is benefit in a significant proportion of policyholders receiving greater certainty through industry-wide communications.

Enabling PHA to engage with the health industry on behalf of the Participating Parties to broaden insurance coverage

4.17. The Proposed Conduct allows PHA to more effectively and efficiently engage with health professional associations on behalf of the Participating Parties to determine the types of treatment that can be provided by telehealth (or other remote modes of treatment) and agree on a base set of conditions and requirements for the payment of benefits for that treatment. As the requirements vary depending on each modality (for example, requirements for psychology teleconsultations differ to tele-physiotherapy), PHA submits that this creates efficiencies compared with individual health funds dealing with the same issues.

4.18. PHA submits that a coordinated approach also expedites the process of enabling benefits to become payable to policyholders for telehealth and other remote modes of treatment under health insurance policies.

4.19. PHA further submits that through the industry collaboration anticipated in the Proposed Conduct, PHA can facilitate and lead to innovative ways to provide treatment during COVID-19 restrictions and enable the funding of health services such as 'hospital in

⁷ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

the home' by health funds. 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.

4.20. The ACCC considers there is a significant public benefit from enabling PHA to engage with the broader health industry on behalf of the Participating Parties and this is supported by submissions from interested parties. The AHPA particularly noted the substantial efficiencies from dealing with one central agency, while SPA, ESSA and AACMA, noted the benefits from PHA facilitating the expansion of insurance coverage to include alternatives to face-to-face treatment, such as telehealth.

ACCC conclusion on public benefit

4.21. Subject to its ongoing assessment, including submissions made in response to this draft determination, the ACCC considers there are likely to be significant public benefits from the Proposed Conduct, including:

- providing certainty to policyholders through a coordinated and consistent approach to broadening insurance coverage and premium relief in response to the COVID-19 pandemic, as well as enabling PHA to communicate on behalf of the Participating Parties to deliver clear messaging; and
- enabling PHA to efficiently and effectively engage with the health industry on behalf of the Participating Parties to broaden insurance coverage, particularly in relation to including treatment for policyholders that contract COVID-19, as well as alternatives to face-to-face treatments such as telehealth.

4.22. The ACCC notes the continuing uncertainty around the impact of the COVID-19 pandemic and government measures intended to address the pandemic. In addition to the benefits stated above, a further benefit arising from the Proposed Conduct is that the Participating Parties will be ready to respond quickly to any new developments during the course of the pandemic.

Public detriments

4.23. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁸

4.24. The majority of submissions received in response to the Proposed Conduct, which has been operating under the interim authorisation, did not identify public detriments from the Proposed Conduct to date.

4.25. In their submissions, both the CFA and CHOICE submitted that the fifth limb of the Proposed Conduct (relating to any other measure formulated to respond to the COVID-19 crisis as notified to the ACCC by PHA) is too broad and could result in the Participating Parties agreeing on COVID-19 related measures even if those measures were detrimental to the public. However, given the uncertainty of the COVID-19 situation, the ACCC considers this limb of the Proposed Conduct provides some flexibility to implement measures in response to the changing circumstances (following

8 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

notification to the ACCC). The ACCC notes that any activities under this limb must be for the purpose of responding to the COVID-19 pandemic and must be specifically notified to the ACCC as a condition of authorisation. The ACCC considers that notification will provide the ACCC with oversight of any activities pertaining to this limb and will mitigate risk arising from the breadth of the conduct under this limb.

- 4.26. The ACCC notes that arrangements involving competitors in relation to the services they provide inherently carry a risk of lessening competition compared to a situation where each business makes its own decisions. The ACCC also notes that the fact almost all health insurers are Participating Parties means that there is a risk of competitive distortion to the extent that contracts or arrangements negotiated between PHA and hospitals or health service providers may influence future contracts and arrangements entered into after authorisation has ceased. The ACCC therefore proposes to impose conditions to address that risk and the risk that the effect of agreements carries beyond the authorised timeframe. The proposed conditions are the same as those imposed on the interim authorisation granted on 2 June 2020. The proposed conditions broadly require PHA to notify the ACCC of any measure formulated as part of the Proposed Conduct prior to its implementation, continue to provide detailed fortnightly reports regarding activities occurring in relation to the Proposed Conduct and provide any further information or documents relating to the Proposed Conduct that the ACCC requests. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.
- 4.27. Overall, any likely public detriments are limited by the fact that the Proposed Conduct:
- is a temporary measure;
 - does not enable the Participating Parties to discuss or share information that is not for the purpose of broadening health insurance coverage to include COVID-19 treatments and providing financial relief due to difficulties arising from the COVID-19 pandemic;
 - does not prevent the Participating Parties from individually deciding to offer more favourable terms to policyholders;
 - is subject to notification conditions which enable the ACCC to have regular oversight over activities occurring pursuant to the authorisation.

Balance of public benefit and detriment

- 4.28. The ACCC considers that the Proposed Conduct is likely to result in significant public benefits by providing certainty to policyholders in respect of insurance coverage and premium relief during the COVID-19 pandemic and enabling PHA to effectively engage with the broader health industry on behalf of the Participating Parties to facilitate the broadening of insurance coverage.
- 4.29. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriments, as it is for a short time while the effects of COVID-19 are in place and is only for the purpose of broadening health insurance coverage to include COVID-19 treatments and providing financial relief due to difficulties arising from the pandemic. Further, the proposed conditions reduce the risk of public detriments arising by enabling the ACCC to have continued oversight of the Proposed Conduct.
- 4.30. For the reasons outlined in this draft determination, and subject to the proposed conditions, the ACCC considers that the Proposed Conduct is likely to result in a public

benefit and that this public benefit would outweigh any likely detriment to the Public from the Proposed Conduct.

Length of authorisation

- 4.31. The Act allows the ACCC to grant authorisation for a limited period of time.⁹ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.32. In this instance, PHA seeks authorisation for six months from the date on which final authorisation is granted.
- 4.33. The majority of submissions from interested parties support the ACCC granting authorisation for six months as requested by the PHA, although several submit that the Proposed Conduct may only be needed for a shorter period.
- 4.34. The ACCC proposes to grant conditional authorisation for six months from the date on which final authorisation is granted.

5. Draft determination

The application

- 5.1. On 1 April 2020, PHA lodged application AA1000487 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. PHA, on behalf of the Participating parties, seeks authorisation to discuss and implement what it refers to as a coordinated response regarding the COVID-19 pandemic to provide to policyholders.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct, restricted to the purpose for which the authorisation was sought, would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant conditional authorisation, subject to the conditions at paragraph 5.13.

⁹ Subsection 91(1) of the Act.

Conduct which the ACCC proposes to authorise

- 5.7. Subject to the proposed conditions outlined at paragraph 5.13, the ACCC proposes to grant conditional authorisation to enable the Participating Parties to continue to engage in the Proposed Conduct, as described at paragraph 1.7, for six months from the date on which final authorisation is granted.
- 5.8. Consistent with the reasons stated by PHA for seeking to engage in the Proposed Conduct, the ACCC proposes to grant the conditional authorisation for the Proposed Conduct only insofar as it is for the sole purpose of addressing concerns that policyholders have, or may reasonably have, in relation to the COVID-19 pandemic.
- 5.9. The Proposed Conduct does not prevent the Participating Parties from individually deciding to offer more favourable terms to policyholders.
- 5.10. This draft determination is made on 15 July 2020.

Proposed conditions of authorisation

- 5.11. The ACCC may specify conditions in an authorisation.¹⁰ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.¹¹
- 5.12. The ACCC may specify conditions where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of the authorisation.¹²
- 5.13. The ACCC proposes to grant authorisation subject to the following:

(1) Notification of Proposed Conduct Condition

- PHA must notify the ACCC of any measure formulated by the Participating Parties as part of the Proposed Conduct (the **Particular Conduct**), prior to implementing or otherwise giving effect to the Particular Conduct.
- For the avoidance of doubt, this condition requires PHA to notify the ACCC of any contract, arrangement or understanding arising from the Proposed Conduct. PHA must provide notification to the ACCC as soon as practical after the Participating Parties have reached agreement on the nature of the Particular Conduct, but not less than 24 hours before the Particular Conduct is implemented, or otherwise given effect to.
- The notification of any Particular Conduct to the ACCC must include at a minimum:
 - a description of the Particular Conduct, including:
 - identifying any aspect of the Particular Conduct on which the Participating Parties will have a common position; and
 - a description of the groups of policyholders and, where applicable, private health service provider/s, related to, or who may be affected by the Particular conduct;

¹⁰ Section 88(3) of the Act.

¹¹ Section 88(3) of the Act.

¹² Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

- a description of the issues arising from the COVID-19 pandemic that the Particular Conduct seeks to address and how they will be addressed through the Particular Conduct;
 - the Participating Parties that, at the time of the notification, have agreed to implement the Particular Conduct; and
 - when the Particular Conduct is intended to be implemented, or otherwise given effect to.
- The ACCC will publish a non-confidential version of the notification on the [ACCC's authorisations public register](#).

(2) Fortnightly reporting requirements

- As imposed by the conditional interim authorisation granted on 2 June 2020, PHA must continue to provide a fortnightly report to the ACCC regarding any meetings, discussions, developments and decisions in relation to the Proposed Conduct, including any contracts, arrangements or understandings entered into or given effect to (**the Fortnightly Reports**).
- A fortnightly report must include information regarding any meeting or discussion relating to the Proposed Conduct involving the Participating Parties, including:
 - the attendees at the meeting or discussion;
 - the agenda items of the meeting or discussion that are related to the Proposed Conduct;
 - any minutes of the meeting or discussion relating to the Proposed Conduct; and
 - an overview of topics discussed that related to the Proposed Conduct.
- A non-confidential version of the Fortnightly Report should be provided for publication on the [ACCC's authorisations public register](#).

(3) Provision of further information

- PHA and any Participating Party must on request by the ACCC provide, within 2 business days (unless the ACCC allows longer in writing), any further information or documents that the ACCC reasonably considers relate to the Proposed Conduct.

(4) Pricing condition

- Any contract, arrangement or understanding arising from the Proposed Conduct must not have the purpose of increasing, and must not directly or indirectly provide for an increase in, health insurance premiums to consumers.
- This condition does not apply to any contract, arrangement or understanding relating to premium relief.

(5) Termination of contracts condition

- Any contract, arrangement or understanding between any of the Participating Parties entered into in reliance of ACCC authorisation must provide for immediate termination if the Proposed Conduct is no longer authorised by interim

authorisation or final authorisation, and all conduct giving effect to any such contract, arrangement or understanding must cease upon termination, other than any provisions dealing with ongoing confidentiality obligations.

- For the avoidance of doubt, Participating Parties can continue to unilaterally provide any measures that are beneficial to consumers that have been provided during the period of authorisation.

6. Next steps

- 6.1. The conditional interim authorisation granted on 2 June 2020 remains in place until it is revoked, or the date the ACCC's final determination comes into effect or the date the application for authorisation is withdrawn.
- 6.2. The ACCC now invites submissions in response to this draft determination by **5 August 2020**. In addition, consistent with section 90A of the Act, PHA or an interested party may request that the ACCC hold a conference to discuss the draft determination.

Attachment A – List of Participating Parties

List of Participating Parties

1. ACA Health Benefits Fund Limited
2. ahm Health Insurance
3. Australian Unity Health Limited
4. BUPA GI 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