



Draft Determination

Application for revocation of AA1000402 and the substitution of
authorisation AA1000639

lodged by

The Hospitals Contribution Fund of Australia Limited

in respect of

certain pricing provisions in agreements with dental clinics who
participate in its More For Teeth Program in the same local catchment
areas as its dental clinics

Authorisation number: AA1000639

20 October 2023

Commissioners: Keogh
Lowe
Brakey

Summary

The ACCC proposes to revoke authorisation AA1000402 and substitute it with authorisation AA1000639. The proposed substitute authorisation is to enable HCF to enter into and give effect to certain price capping provisions in agreements that it enters into with dentists who participate in its 'More For Teeth Program' in the same local catchment areas that it owns and operates dental clinics. This conduct has been previously authorised by the ACCC in some form since 2018.

HCF is a private health insurance provider that also currently operates dental practices across Australia. HCF also runs a preferred provider program, the More For Teeth Program, and contracts with dentists to provide no-gap services to its members. Some of HCF's dental clinics are in the same geographic locations as dentists who participate in its preferred provider program.

The pricing arrangement provisions in the More For Teeth Program's agreements with dentists include provisions which require these dentists to place a cap on the maximum price charged for certain routine dental services provided to HCF's members. The provisions also require that these dentists must ensure that HCF's members are charged no more than the practice participating in the program charges other patients.

The ACCC considers that HCF entering into and giving effect to these pricing arrangements with HCF's preferred dental providers in the same areas as its Dental Centre Network is likely to result in a public benefit of increased access to price certainty for preventive and diagnostic dental services, but notes that this benefit would flow only to HCF members in those areas.

In these particular circumstances, based on the information available to it at present, the ACCC considers the Proposed Conduct is likely to result in limited public detriment in the form of reduced competition, noting in particular HCF's relatively small market shares in respect of private health insurance and dental services. On balance, the ACCC is satisfied that the likely public benefit resulting from the Proposed Conduct would outweigh any public detriment.

In these circumstances, the ACCC proposes to grant authorisation for 5 years.

The ACCC invites submissions in relation to this draft determination, by 3 November 2023, before the ACCC makes its final decision.

1. The application for authorisation revocation and substitution

- 1.1. On 23 March 2023, The Hospitals Contribution Fund of Australia Limited (**HCF**) lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation AA1000402 and substitute authorisation AA1000639 for the one revoked. HCF is seeking authorisation to enter into and give effect to certain price capping provisions in agreements that it enters into with dentists who participate in its 'More For Teeth Program' in the same local catchment areas that it owns and operates its own dental clinics (**Dental Centre Network**).
- 1.2. The geographical location of 3 Dental Centre Network clinics owned by HCF currently overlap with the More For Teeth Program. HCF is seeking authorisation for 10 years.

- 1.3. This application for revocation and substitution was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions in Part IV of the Act in respect of the specified conduct. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would or is likely to result in benefit to the public that would outweigh any likely public detriment (subsections 90(7) and 90(8) of the Act (the **authorisation test**)).
- 1.4. HCF also requested interim authorisation to enable it to engage in the proposed conduct while the ACCC is considering the substantive application. On 26 May 2023, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act to enable HCF and current and future dentists who are members of HCF's More For Teeth Program to enter into and give effect to contracts between them which contain provisions specifying the maximum prices for preventive and diagnostic dental services to be provided by dentists to HCF members as part of the More For Teeth Program. The interim authorisation was provided for the same conduct that was authorised under authorisation AA1000402.¹ Interim authorisation will remain in place until the date the ACCC's final determination comes into effect, the application is withdrawn or until the ACCC decides to revoke interim authorisation.

HCF

- 1.5. HCF is a private health insurer registered under the *Private Health Insurance (Prudential Supervision) Act 2015* (Cth). HCF's website claims it is Australia's largest not-for-profit health fund with 1.8 million members.²
- 1.6. HCF offers private health insurance policies under which it may pay benefits to its members to cover, in whole or in part, the cost of general treatment which is supplied by healthcare providers. HCF also provides other insurance cover such as life, travel and pet insurance.
- 1.7. HCF also operates its own eyecare and dental centres (see section below titled 'Dental Centre Network'). The dental professionals who operate and work in HCF's dental centres are all employees of HCF.
- 1.8. In addition, HCF operates the More For Teeth Program where it enters into agreements with More For Teeth Program providers, who are private dentists who have agreed to certain pricing requirements (**Participating Providers**). The agreements between HCF and Participating Providers (**More For Teeth Agreements**) include specified maximum prices and other provisions which facilitate 'no-gap' arrangements for HCF's members.

The Proposed Conduct

- 1.9. HCF is seeking authorisation for itself and the Participating Providers to enter into and give effect to the specified provisions in the More For Teeth Agreements in the same local catchment areas as HCF's Dental Centre Network centres (including any future HCF dental centres). HCF currently operates 16 Dental Centre Network centres: 13 in metropolitan and greater Sydney, and one in each of Belconnen (ACT), Melbourne CBD (Victoria) and Chermside (Queensland). The relevant provisions in the More For Teeth Agreements are extracted in **Annexure A (Relevant Provisions)** and

¹ ACCC, [Interim authorisation decision – The Hospitals Contribution Fund of Australia Limited – Application for revocation of AA1000402 and the substitution of authorisation AA1000639](#), Commonwealth of Australia, 26 May 2023, p 1.

² HCF, [About HCF](#), HCF website, 2023, accessed 18 September 2023.

authorisation is sought for the Relevant Provisions and any variations to them that have the same or a substantially similar effect (the **Proposed Conduct**).

- 1.10. On 14 September 2023, HCF advised that it had reviewed its More For Teeth Agreements to take into account relevant regulatory developments and had put in place updated More For Teeth Agreements which took effect on 1 September 2023. HCF submits the updated More For Teeth Agreements do not materially alter the Relevant Provisions and provided an updated Annexure A which contains the current versions of the Relevant Provisions of the More For Teeth Agreements.³
- 1.11. HCF submits that it does not provide any form of volume commitment to Participating Providers and participation in the More For Teeth Program is on a voluntary and non-exclusive basis. HCF submits that this means, among other things, the dental practitioners:
 - (a) can choose not to participate in HCF's More For Teeth Program
 - (b) can also participate in competitor programs as well as in HCF's More For Teeth Program
 - (c) can participate in HCF's More For Teeth Program at one clinic but can also work at another clinic at which they do not participate in HCF's More For Teeth Program.

More For Teeth Program⁴

- 1.12. The More For Teeth Program is one of HCF's 'preferred provider' programs. HCF submits the program was launched as the Regional and Rural Oral Health Program in October 2001 – initially as a pilot – in regional and rural NSW with the purpose of improving access to oral health, thereby improving overall health.
- 1.13. The More For Teeth Program has since expanded in NSW and to the ACT in 2001, Victoria and Queensland in 2006, South Australia in 2008, Western Australia in 2013, and Tasmania and Northern Territory in 2018. The More For Teeth Program does not currently operate in Sydney. In NSW, the More For Teeth Program operates north of the Central Coast, west of the Blue Mountains and south of Wollongong.
- 1.14. The 10 preventive and diagnostic services covered by the More For Teeth Program are:
 1. comprehensive oral examination
 2. periodic oral examination
 3. oral examination – limited
 4. intraoral periapical or bitewing radiograph – per exposure
 5. panoramic radiograph – per exposure
 6. removal of plaque and/or stain
 7. removal of calculus – 1st visit
 8. removal of calculus – subsequent visit

³ [HCF's letter to ACCC enclosing updated Annexure A](#), 14 September 2023, pp 1–2.

⁴ Unless otherwise noted, information in this section is taken from the HCF submission in support of the application for authorisation.

9. topical application of remineralizing and/or cariostatic agents, one treatment
10. provision of a mouthguard – indirect.

(More For Teeth Services)

- 1.15. The More For Teeth Agreements includes a provision which relates to ‘maximum charge’ that Participating Providers agree to charge for each More For Teeth Services (**Maximum Charge**). Whilst the fee is charged to a consumer, this amount is provided in the form of a rebate by HCF and thus is the maximum charge that HCF will pay. The same fees are charged at HCF’s Dental Centre Network locations as are specified in the More For Teeth Agreements with Participating Providers.
- 1.16. The More For Teeth Agreements include a provision which relates to the amount received for a service provided to a non-HCF member in rebates from other health insurers plus any gap payments made by the non-member (**Usual Charge**).⁵ HCF submits the intention of the Usual Charge provision is to prevent a Participating Provider from charging HCF members (and indirectly HCF) more than it charges non-HCF members for the same service.⁶
- 1.17. Specifically, the More For Teeth Agreements specify that a Participating Provider agrees to (amongst other requirements⁷):
 - charge no more than the Maximum Charge amounts specified in the More For Teeth Agreements for the 10 More For Teeth Services provided to HCF members (clause 3.1(a) of the Relevant Provisions), and
 - charge HCF members a fee for a service that is equal to or less than:
 - a. the Participating Provider’s Usual Charge; and
 - b. the Participating Provider’s Usual Charge that other dentists and dental professionals that are not participating in the program within the same private practice receive for that service, including when any special or discounted fees are offered to patients (whether HCF members or not) – including when any special or discounted fees are offered to patients (whether HCF members or not) at the practice (clause 3.1(b) of the Relevant Provisions).
- 1.18. Subject to the HCF member’s entitlement to a benefit under their health insurance policy, HCF’s fund rules and all applicable laws, HCF will provide a rebate up to or equivalent to the Maximum Charges for the More For Teeth Services. This facilitates a ‘no-gap’ arrangement for the HCF member (further information on ‘no-gap’ arrangements are discussed in paragraphs 2.7 and 2.8 below). HCF submits that an HCF member would receive the same rebate in relation to non-More For Teeth Services at any dental practice they choose to visit.⁸
- 1.19. The More For Teeth Agreements also specify that, during any period the Participating Provider offers patients (whether HCF members or not) a ‘no-gap’ promotion for any of its More For Teeth Services, the Participating Provider’s rights to receive the program

⁵ HCF, [Terms and Conditions for HCF Recognised Providers of Extras Services](#), HCF, 1 September 2023, accessed 18 September 2023, p 1.

⁶ [HCF’s response to ACCC request for further information](#), 9 August 2023, p 4.

⁷ Refer to Annexure A of this draft determination for a full list of the Relevant Provisions of the More For Teeth Agreements.

⁸ [HCF’s response to ACCC request for further information](#), 9 August 2023, p 4.

benefits will be suspended for those services and the Participating Provider must reduce the fees it charges to HCF members for those services to the amount of rebates payable under the terms and conditions or its Usual Charge, whichever is the lesser amount. The Participating Provider must not charge HCF members a gap for the services included in the promotion and must notify HCF at least 7 days prior to the commencement of a promotion and prior to the termination of a promotion.

- 1.20. HCF advises the Participating Provider is free to charge as per its existing practices for services not described as More For Teeth Services and HCF may vary the program rebates for the More For Teeth Services on 1 January each year. The terms and conditions of the More For Teeth Agreement vary slightly by state and territory, to reflect, among other things, that the agreed More For Teeth benefits differ by state.⁹
- 1.21. HCF advises that the number of dentists participating in the More For Teeth Program is constantly changing. As of 7 December 2022, around 7,942 dentists (by individual dentist head count) were operating under the More For Teeth Program across Australia of approximately 19,350 dentists registered in total in Australia (as at September 2022).

Dental Centre Network¹⁰

- 1.22. HCF advises it operates its own dental centres in its 'Dental Centre Network'. These centres are primarily used by HCF's members, but are also open (albeit not actively marketed) to members of the public. The dental professionals who operate and work in HCF's dental centres are all employees of HCF.
- 1.23. HCF currently operates 16 Dental Centre Network clinics:
- 13 in metropolitan and greater Sydney in New South Wales
 - one in Belconnen in the Australian Capital Territory (opened May 2017)
 - one in Melbourne CBD in Victoria (opened February 2018)
 - one in Chermside (greater Brisbane) in Queensland (opened March 2019).
- 1.24. HCF's Dental Centre Network also provides More For Teeth Services where the same fees are charged as those specified in the More For Teeth Agreements with Participating Providers. HCF's members with eligible extras cover can attend the Dental Centre Network clinics to:
- claim 100% back through HCF for More For Teeth Services depending on their annual limits and level of cover
 - obtain dental services other than those covered under the More For Teeth Program, such as surgical and restorative procedures.

⁹ HCF provided copies of the More For Teeth Agreement for each state and territory that are effective as from 6 April 2021 on a confidential basis. HCF recently reviewed its More For Teeth Agreements to take into account relevant regulatory developments, and provided an updated copy of its agreement that took effect on 1 September 2023 to the ACCC on a confidential basis.

¹⁰ Unless otherwise noted, information in this section is taken from the HCF' submission in support of the application for authorisation.

2. Background

Rationale for the Proposed Conduct

- 2.1. HCF submits that it is seeking authorisation because the More For Teeth Program is a very important benefit for its members and HCF has also made considerable investment in its Dental Centre Network clinics and it requires continued confidence from authorisation to continue its business and investment plans.¹¹
- 2.2. HCF submits that the More For Teeth Program is intended to assist its members to take preventive measures to better protect their teeth and gum health and the focus of the program remains ensuring that HCF's members are able to readily access preventive and diagnostic services.¹²

The dental services industry

- 2.1. There are 26,692 total dental practitioners registered in Australia according to June 2023 data, 19,892 recorded as dentists. Medicare does not cover most dental care, dental procedures or supplies. Some public dental services are provided by state and federal governments, generally only to concession card holders and children, or for emergency treatments.
- 2.2. Many Australians rely on their private health insurance to cover the cost of dental, with data published by the Australian Government's Australian Institute of Health and Welfare suggesting that more than half of Australians aged 5 years and over have some level of private health insurance cover for dental expenses.¹³ Most insured Australians hold combined policies that provide cover for both hospital and extras services.¹⁴
- 2.3. Even with private health insurance, consumers may still be required to make an out-of-pocket payment. In 2017–18, around 76% of adults aged 18 years and over reported that their insurance paid some of the dental expenses of their last visit, 12% reported that their insurance paid all the dental expenses.¹⁵
- 2.4. HCF did not precisely quantify its market share for dental services in Australia, except that it owns 16 dental practices in specified locations across Australia.

The private health insurance industry

- 2.5. In Australia, the 5 largest health insurers provide cover to over 80% of Australian consumers with private health insurance. Medibank Private Limited (**Medibank**) and Bupa HI Pty Ltd (**Bupa**) represent just over half of the Australian private health insurance market, with market shares of 27% and 25% respectively. The next 3 largest

¹¹ [HCF's submission in support for application for authorisation](#), 23 March 2023, p 21.

¹² [HCF's submission in support for application for authorisation](#), 23 March 2023, p 16.

¹³ Australian Institute of Health and Welfare, [Oral health and dental care in Australia – private health insurance](#), Commonwealth of Australia, 17 March 2023, accessed 18 September 2023.

¹⁴ Australian Prudential Regulation Authority, [Statistics: Private health insurance membership trends June 2023](#), 23 August 2023, accessed 18 September 2022.

¹⁵ Australian Institute of Health and Welfare, [Oral health and dental care in Australia – private health insurance](#), Commonwealth of Australia, 17 March 2023, accessed 18 September 2023.

insurers – HCF, NIB Health Funds Limited (**NIB**) and HBF Health Limited (**HBF**) – have a combined market share of around 29%.¹⁶

- 2.6. HCF is the third largest private health insurer in Australia. HCF did not provide market share data for, nor did it precisely define, the 3 geographic areas where its More For Teeth Program and Dental Centre Network currently overlap in Belconnen (the Australian Capital Territory), Chermside (Queensland) and Melbourne CBD (Victoria). The ACCC has instead considered the relative market shares of the 5 largest health insurers across the relevant states/territories and nationally as a proxy (see Table 1 below). HCF has a market share for the provision of health insurance policies that ranges from about 8–16% in the Australian Capital Territory, Queensland and Victoria (i.e. the areas where HCF’s More For Teeth Program and Dental Centre Network currently overlap).

Table 1: Market shares for health insurance policies in the Australian Capital Territory, Queensland and Victoria¹⁷

Health Fund	ACT	QLD	VIC	Australia
Medibank	28.2%	32.2%	33.2%	27.4%
Bupa	20.9%	29.7%	22.6%	24.7%
HCF	16.2%	9.4%	8.3%	12.4%
NIB	14.7%	7.2%	8.9%	9.4%
HBF	1.1%	1.1%	1.5%	7.3%

- 2.7. It is not uncommon for health insurers to enter into contractual arrangements with selected healthcare service providers (preferred providers), like the More For Teeth Program, in part, to minimise the out-of-pocket expenses incurred by their members. A reason for a healthcare service provider to enter into such arrangements with a private health insurer is to increase patient numbers at their practice. Insurers negotiate set fees and other terms with preferred providers in exchange for the right to participate in their ‘preferred provider’ networks or ‘no-gap’ and ‘known-gap’ schemes.
- 2.8. A ‘no-gap’ arrangement provides known costs to health insurance members, with no out-of-pocket costs. In a ‘no-gap’ arrangement, the participating healthcare service provider agrees to charge a certain amount for services and the health insurer will fully cover the cost of the relevant medical procedure performed by the preferred provider.¹⁸
- 2.9. Australia’s 5 largest health insurance providers (Bupa, Medibank, HCF, HBF and NIB) all have an extensive network of preferred dental providers. Other health insurance providers with a network of preferred dental providers include Australian Unity, Geelong Medical and Hospital Benefits Association, Peoplecare and Teachers Union Health Fund. The below table demonstrates the number of dental preferred providers in Australia for Bupa, Medibank, HBF and NIB.

¹⁶ Australian Prudential Regulation Authority, [Operations of Private Health Insurers Annual Report data](#), 26 October 2022.

¹⁷ Australian Prudential Regulation Authority, [Operations of Private Health Insurers Annual Report data](#), 26 October 2022.

¹⁸ ACCC, [Private Health Insurance Report 2021-22](#), Commonwealth of Australia, 2022, p. 25.

Table 2: Dental preferred provider arrangements Australia-wide¹⁹

<i>Health insurer</i>	<i>Number of preferred dental providers</i>
Bupa	>7,000
HBF	Approximately 450 in Western Australia
Medibank	>10,000
NIB	Approximately 2,000

Relevant authorisations

HCF's previous authorisation

- 2.10. On 11 May 2018, the ACCC granted authorisation for 5 years to HCF and to current and future dentists who are members of HCF's More For Teeth Program, to enter into and give effect to contracts between them which contain provisions specifying the maximum prices for preventive and diagnostic dental services to be provided by dentists to HCF members as part of the More For Teeth Program (**Previous Authorisation**).²⁰
- 2.11. Since the Previous Authorisation was granted, HCF has opened 2 dental centres as part of its Dental Centre Network in Brisbane and Melbourne, with the Belconnen centre having opened earlier in May 2017 (refer to paragraph 1.23 above). These are the 3 areas of overlap currently between HCF's Dental Centre Network and where its Participating Providers also operate. In addition, HCF operates 13 Dental Centre Network clinics in Sydney, where the More For Teeth Program does not currently operate and therefore there is no overlap in Sydney.
- 2.12. HCF has also previously lodged exclusive dealing notifications to the ACCC regarding its participating provider programs with extras providers, which have been allowed to stand.²¹

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties including major competitors, relevant industry associations or peak bodies, consumer groups, and state and federal government.
- 3.2. The ACCC received 6 submissions from 3 interested parties in relation to the application and further information provided by HCF. HCF provided further information on 11 May, 17 May, 9 August, 6 September and 14 September 2023.
- 3.3. The Members Health Fund Alliance, the peak body for 25 not-for-profit and member-owned health funds, provided a submission on 11 April 2023 in support of HCF's application for authorisation. The Members Health Fund Alliance submits that it does not see competition issues arising from the Proposed Conduct and believes that the program provides choice and certainty in pricing for preventive and diagnostic dental services to consumers. The Members Health Fund Alliance noted that provider participation in the More For Teeth program is on a voluntary and non-exclusive basis.
- 3.4. Private Healthcare Australia Limited, the Australian private health insurance industry's peak representative body, provided submissions on 17 April and 22 August 2023 in

¹⁹ CHOICE, [How much does the dentist cost?](#), CHOICE website, last updated 9 March 2023, accessed 18 September 2023.

²⁰ See [Authorisation AA1000402](#).

²¹ See [N99179](#), [N96637](#) and [N95945](#).

support of the application for authorisation, noting that it does not have any concerns regarding the Proposed Conduct and that it will result in significant public benefit.

- 3.5. The Australian Dental Association (**ADA**) is the peak body for dentists in Australia and provided submissions on 21 April, 1 May and 25 August 2023. The ADA submits:
- The claims data presented by HCF seems to relate to a period that is of limited relevance to the authorisation period and, therefore, relying on this data as the key evidence of public benefit could be questioned.
 - The ACCC should adopt a cautious approach by:
 - granting authorisation for a short term only, so impacts can be monitored and tested more frequently.
 - limiting the scope of authorisation to the application of Division 1 of Part IV of the Act in so far as HCF practices are in competition with the third-party dental practices with whom it has such arrangements.
 - The ACCC should conduct a more comprehensive review of price-capping arrangements between private health insurers and dental practices.
 - There appears to be an assumption that if an insurer does not operate its own practices in geographic proximity to any dental practices that are subject to its price-capping arrangements, authorisation is not required. The ADA submits that this has resulted in an ad hoc position with respect to authorisation of price-capping arrangements.
 - The ADA has raised its long-standing concerns about the overall impact of price-capping arrangements and whether they are genuinely in the public interest.
 - Insurers have reached into the healthcare relationship in a way that risks influencing both treatment decisions and the basis on which patients choose a dentist.
 - There is a question as to whether the benefits arising from the arrangements are for the community as a whole and questions whether the choices insurers make do not mean higher prices for patients who are not insured and/or higher prices for other services.
 - The focus in authorisations has been on the market/s in which insurers compete, rather than the market/s in which dental practices compete.
 - The ADA questions how voluntary price-capping arrangements are and whether the reality of how these arrangements operate means that once enough insurers are doing this, dental practices need to participate in someone's program.
 - The ADA raised concerns that consumers are unable to meaningfully compare price / service offerings of different dental practices and that consumers may be influenced by the best rebate rather than assessing which dental practice may be most appropriate for their needs.
 - The ADA queries whether benefits claimed by insurers are actually benefits when the total picture is considered and suggests language about cost and price should be scrutinised carefully.
 - In assessing whether the public benefits claimed by HCF in 2018 did materialise, and whether (as claimed by HCF) there has been no reduction in competition in the

provision of dental services to patients, the ACCC should have regard to the issues discussed above.

3.6. HCF provided responses to the ADA's submissions on 8 May and 6 September. In particular:

- HCF provided a summary of the public benefits and claims data for the calendar years 2018 to 2022.
- HCF submits the ADA's suggestion that authorisation should be limited to the price capping effect of the specified contractual provisions only and limited to the cartel conduct provisions under Division 1 of Part IV of the Act are misconceived. HCF submits it seeks authorisation for the specified provisions and the certainty of the protection afforded by authorisation from any possible contraventions of Division 1 of Part IV and section 45 by engaging in the Proposed Conduct.
- HCF submits the Proposed Conduct should be authorised for a period of 10 years, as it has engaged in conduct substantially the same as the Proposed Conduct since May 2018 and the absence of any impact on competition and the benefit to the public resulting from that conduct can be objectively observed. HCF also submits the establishment and operation of the Dental Centre Network centres involves long-term planning and long-term certainty.

3.7. Public submissions by HCF and interested parties are on the [public register](#) for this matter.

4. ACCC assessment

4.1. HCF has sought authorisation for 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 subsections 90(7) and 90(8) of the Act,²² 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.

Relevant areas of Competition

4.2. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.

4.3. HCF submits that the following areas of competition may be affected by the arrangements sought to be authorised:

- the provision of private health insurance services to dental practitioners nationally
- the provision of dental services to patients in localised geographic areas
- the provision of extras health insurance services to customers nationally.

4.4. The ACCC is of the view that it is not necessary to precisely define the relevant markets for the purpose of assessing this application for authorisation. The ACCC considers that the relevant areas of competition that could be affected by the Proposed Conduct are:

²² See subsection 91C(7).

- the supply of private health insurance services and extras health insurance services to consumers nationally
- the supply of dental services to patients in localised geographic areas.

Future with and without the Proposed Conduct

- 4.5. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.6. HCF submits that, in a future without the Proposed Conduct, HCF would take action to remove the geographic overlaps between Participating Providers and Dental Centre Network clinics. HCF submits it has made no decision as to how it would remove the overlaps but there is a real chance that it would, following analysis on a case-by-case basis, either:
- divest ownership and/or control of (or close) the overlapping HCF Dental Centre Network clinics, or
 - terminate the More For Teeth Agreements with Participating Providers in the areas of overlap.
- 4.7. The ACCC considers that, in the future without the Proposed Conduct, HCF will likely remove the geographic overlap between Participating Providers and Dental Centre Network clinics.
- 4.8. The ACCC considers that, in a future with the Proposed Conduct, HCF may expand its Dental Centre Network or More For Teeth Program in other areas of overlap (such as Sydney, New South Wales). The ACCC also considers HCF may make adjustments to the More For Teeth Services to include additional preventive and diagnostic items or remove them, noting HCF does not have any plans to change the items covered by the More For Teeth Program in the foreseeable future.²³

Public benefits

- 4.9. 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 in considering public benefits:
- ... we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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.*²⁴
- 4.10. HCF submits that the More For Teeth Program facilitates better dental health for its members because the 'no-gap' and price certainty outcomes for the 10 basic dental More For Teeth Services encourage regular check-ups and scale and clean, which result in material oral health benefits.

²³ [HCF's submission in support for application for authorisation](#), 23 March 2023, p 17.

²⁴ 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.

4.11. The ACCC has considered this public benefit under the heading of increased access to price certainty for preventive and diagnostic dental service for HCF members in areas of overlap.

Increased access to price certainty for preventive and diagnostic dental services for HCF members in areas of overlap

HCF submissions

4.12. HCF submits that:

- More frequent visits to a dentist for a check-up are likely to result in earlier detection and treatment of dental problems.
- Uncertainty in pricing is an impediment to visiting dentists for check-ups.
- Insured individuals are more likely to visit dentists for check-ups than uninsured individuals.
- Individuals with general treatment insurance with HCF are more likely to visit Participating Providers than non-More For Teeth dentists (i.e. non-participating providers).

4.13. HCF submits that the co-existence of a Dental Centre Network clinic in the same catchment areas as Participating Providers does not diminish the effectiveness of the More For Teeth Program.

4.14. HCF submits that the University of Adelaide's National Study of Adult Oral Health 2017–18 supports the proposition that insured individuals are more likely to visit dentists for check-ups than uninsured individuals.²⁵ The study indicates that, of the two-thirds of survey participants who reported their usual dental visit was for a check-up (which, in HCF's experience, includes the preventive and diagnostic dental services offered as More For Teeth Services under the More For Teeth Program), adults with dental insurance visited a dental professional for a check-up more frequently than uninsured individuals.²⁶

4.15. HCF submits that its claims data also supports the proposition that individuals with general treatment insurance with HCF are more likely to visit Participating Providers than non-participating providers for preventive services. HCF provided claims data that indicated, over the 2018 to 2022 period, on average 55% of HCF members saw a Participating Provider, whereas 45% visited a non-participating provider.²⁷

4.16. Additionally, HCF provided data on the number of its members who visited Participating Providers compared to non-participating providers, where the members received at least one preventive dental service, over the years 2018 to 2022.²⁸ HCF submits that, despite the substantial changes made to HCF's dental business to prevent the spread of COVID-19 in line with government direction, those HCF members who saw a Participating Provider continued to represent a higher percentage of members who sought preventive and diagnostic treatment than those members who

²⁵ [HCF's submission in support for application for authorisation](#), 23 March 2023, p 5; [HCF's supplementary submission](#), 17 May 2023, p 3.

²⁶ [HCF's submission in support for application for authorisation](#), 23 March 2023, p 22.

²⁷ [HCF's supplementary submission](#), 17 May 2023, pp 4–6.

²⁸ See Figure 1, [HCF's supplementary submission](#), 17 May 2023, p 5.

visited non-participating providers for each calendar year between 2018 and 2022, including throughout the COVID-19-impacted years of 2020 and 2021.

- 4.17. HCF also provided claims data for the years 2016 to 2019 to illustrate that HCF members who visited Participating Providers were less likely to require complex treatment. HCF submits, of the HCF members who received diagnostic and preventive dental services in each of the years 2016 to 2019, the cohort who saw a non-participating provider was more likely to receive complex dental treatment than the cohort who saw a Participating Provider.²⁹
- 4.18. HCF also submits that, for the years 2016 to 2019, HCF members who accessed and utilised the More For Teeth Program and visited a Participating Provider were almost twice as likely to return year on year for their diagnostic and preventive dental work than members who visited a non-participating provider over the same period.³⁰

ACCC view

- 4.19. The ACCC acknowledges that price is a factor influencing consumers' ability and willingness to access dental services. The Australian Institute of Health and Welfare found that, in 2017–18, 39% of people aged 15 years and over avoided or delayed visiting a dentist due to price.³¹ The ACCC acknowledges that these findings are likely influenced by a number of factors, including consumers' income and whether they have private health insurance. The ACCC notes the Proposed Conduct relates to providing no-gap arrangements to consumers who are insured with HCF in the areas of overlap where the More For Teeth Program operates in geographic proximity to HCF's Dental Centre Network clinics in Belconnen, Chermanside and Melbourne CBD (and any future areas of overlap). Therefore, the ACCC only attributes the weight of the claimed public benefit of increased access to price certainty in this limited respect.
- 4.20. HCF members in the overlapping areas currently have access to price certainty at both HCF's Dental Centre Network clinics and at Participating Providers (under the Previous Authorisation and interim authorisation). The ACCC considers this provides increased access to price certainty for these services for HCF members which is more than in the future without the Proposed Conduct if only the Dental Centre Network clinic or only the More For Teeth Program operated. For example, HCF members may choose to access 'no-gap' services at the Chermanside Dental Centre Network clinic, or at other dentists in Chermanside who are Participating Providers, thus providing increased access to price certainty for HCF members in the areas of overlap as they are not restricted to either a Dental Centre Network clinic or the Participating Providers.
- 4.21. The ACCC therefore accepts that the Proposed Conduct is likely to result in a public benefit by providing HCF members with increased access to price certainty by providing more locations to access no-gap preventive and diagnostic dental services. The ACCC notes that the public benefit in these circumstances flows only to HCF members located in areas of overlap, and has weighted this benefit accordingly.

²⁹ [HCF's submission in support for application for authorisation](#), 23 March 2023, p 23.

³⁰ [HCF's submission in support for application for authorisation](#), 23 March 2023, p 23.

³¹ Australian Institute of Health and Welfare, [Oral health and dental care in Australia – private health insurance](#), Commonwealth of Australia, 17 March 2023, accessed 18 September 2023.

Public detriments

4.22. 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.*³²

4.23. The ADA raised a number of issues relating to private health insurance arrangements more broadly. A number of the matters considered by the ADA as potential public detriments would not be, in the ACCC's assessment, causally connected to the Proposed Conduct in that they would be likely to exist or not be materially different in the future with, as against the future without, the Proposed Conduct. In particular:

- (a) consumers being influenced by insurers' rebates and being unable to meaningfully compare prices and service offerings of different dental practices to select the most appropriate service for their needs, as this relates to the general practice of health insurers offering differing rebates
- (b) insurers reaching into the healthcare relationship in a way that risks influencing treatment decisions and the basis on which patients choose dentists, as this relates to general issues of private health insurers' involvement in healthcare arrangements
- (c) the necessity of undertaking a comprehensive review of all price-capping arrangements between private health insurers and dental practices, including whether all arrangements should be submitted for authorisation (regardless of proximity) and the overall impact of price-capping arrangements
- (d) how preferred provider arrangements in general may not be as voluntary as they appear
- (e) preferred provider arrangements being about reducing prices charged for particular services and not the cost of providing those services.

4.24. However, the ACCC has considered specific elements of these issues where they are relevant to the Proposed Conduct in the assessment of potential public detriments below. In its submissions, the ADA also raised concerns regarding potential public detriments in the form of reduced competition in dental services resulting from the Proposed Conduct, which is discussed further below.

4.25. The ACCC has considered the following public detriments:

- potential for reduced competition in the provision of dental services
- potential for reduced competition in provision of private health insurance.

Potential for reduced competition in the provision of dental services

4.26. The ADA raised concerns regarding the potential public detriment in the form of reduced competition in the provision of dental services. In its submissions, the ADA:

- queries how, without proper analysis of competition in dental services (with and without such arrangements), the ACCC can be comfortable that these

³² Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

arrangements are not reducing competition in dental services to suit competition between insurers

- queries whether such arrangements may lead to stabilisation of price or de facto locational rules
- submits that the choices insurers make about which dental services they want to be cheaper, and what they want the price of those dental services to be, is not being driven by competition between dental practices
- submits that the scope of authorisation granted should be limited to the application of Division 1 of Part IV of the Act, in so far as HCF is in competition with third-party dental practices with whom it has such arrangements
- submits that conduct driven by private health insurers competing in an insurance market may impact competition in healthcare services, and what may benefit particular consumers of a particular insurance product could come at a cost to consumers of healthcare services more generally.

4.27. HCF submits that there are no anti-competitive or other detriments associated with the More For Teeth Program, due to:

- the supply of private health insurance services to dentists (such as preferred provider arrangements) being highly competitive
- participation in the More For Teeth Program is voluntary
- participation in the More For Teeth Program is not necessary to compete effectively as a dentist and participation in the program is voluntary, given the number of other similar programs offered by competing health funds and HCF's relatively lower market share
- HCF has no market power in its dealings with dentists, who are free to choose whether or not to apply to participate in the More For Teeth Program and if they do elect to participate in the program at one clinic, they are not restricted from working at another dental practice at which they do not participate in the More For Teeth Program
- the voluntary participation by some dentists in the More For Teeth Program does not prevent or deter them from competing in the supply of dental services to consumers, whether those consumers are members of other health funds or are uninsured for extras services
- in each of the 3 catchment areas, it is clear HCF pays a very significant proportion of benefits to Participating Providers, and consumers can benefit from and utilise all options in each respective catchment area.

ACCC view

4.28. The ACCC considers the Proposed Conduct is unlikely to reduce competition for the provision of dental services, largely due to HCF's relatively small market share in the provision of private health extras insurance and dental services in the overlap areas, where HCF has a market share which ranges from 8–16% in the Australian Capital Territory, Queensland and Victoria (see Table 1 above). However, the ACCC has considered factors that could increase the likelihood of this public detriment arising in light of the concerns raised by the ADA.

- 4.29. The ACCC has considered the likelihood for price fixing outside of the More For Teeth Program in the provision of dental services, for example by price fixing of non-More For Teeth Services between Participating Providers, which could impact both insured and non-insured consumers. The ACCC has also considered whether HCF would have the ability to force the closure of competing dental practices by using market power to favour its Dental Centre Network centres over competing operators, which would likely result in reduced competition in the provision of dental services. Further, the ACCC has considered the likelihood for the Usual Charge clause and clause 3.2 of the Relevant Provisions to result in public detriment in the form of reduced competition in the provision of dental services.
- 4.30. The ACCC considers the likelihood for price fixing to occur outside of the More For Teeth Program is low, given HCF and private practice dentists will continue to face competitive pressure in the provision of private health insurance and dental services due to:
- HCF's relatively small market share in the areas of overlap, with HCF supplying between 8–16% of health insurance policies in the Australian Capital Territory, Queensland and Victoria compared to much larger providers like NIB and Bupa supplying a combined 60%.³³
 - Dentists are not required to enter into the agreements and are free to enter into agreements with other health insurers and service non-members. This choice can be demonstrated by numerous dentists across Australia and in the overlap areas opting to be preferred providers for more than one health insurer in existing programs, or that have opted not to be preferred providers for any health insurer.³⁴
 - The Proposed Conduct affects a relatively small proportion of all dental services offered, in that it relates only to preventive and diagnostic dental services (i.e. the 10 More For Teeth Services).
 - The Dental Centre Network makes up a relatively small proportion of all providers of dental services in the overlap areas.
 - HCF will not require all dental practices owned by one group to be part of the More For Teeth Program. Individual dentists operating across multiple dental practices could elect to only participate in the More For Teeth Program at one or a limited number of their relevant locations. If they do elect to participate in HCF's More For Teeth Program at one clinic, they are not restricted from working at another dental practice at which they do not participate in the program.

³³ The market share figures available are state-wide figures which have been used as proxies to apply to the areas of overlap.

³⁴ Various dentists across Australia have explained their choice not to become a preferred provider, such as [Dr Martin Jest](#) (Qld), [Today's Dentistry](#) (Qld), [Belconnen Dental Centre](#) (ACT), [Dimos Dental](#) (Vic), [Diamond Creek Dental Clinic](#) (Vic), [DBay Dental](#) (Qld) and [Tooth Dental](#) (Qld).

Alternatively, there are also dentists who opt to be preferred providers for multiple private health insurers, such as [Chermside Dental Care](#), [Chermside Family Dental](#), [Dental Reflections](#), [Chermside West Dental](#), [The Dental Surgery in Belconnen](#), [Primary Dental Belconnen](#), [Holistic Dental Melbourne CBD](#), [Dental on Flinders](#) and [Era Health Dental](#).

Examples taken from websites as at 20 September 2023. These examples are based on desk research undertaken by the ACCC, which assessed selected dental practices' websites that operate across Australia and in the approximate geographic areas as HCF's Dental Centre Network clinics in Belconnen, Chermside and Melbourne CBD, however we note that the ACCC has not conducted a comprehensive analysis of dentists participating in preferred provider programs across Australia.

- 4.31. The ACCC also considers that related forms of indirect price fixing such as stabilisation of price for dental services under the Proposed Conduct are unlikely due to the competitive pressures outlined above, as well as the fact that the Maximum Charges are based on the same fees that are charged at HCF's Dental Centre Network locations, which face strong competitive pressure in the overlap areas.
- 4.32. In relation to the likelihood for the Proposed Conduct to result in HCF being able to force the closure of competing dental practices from HCF using market power to favour its Dental Centre Network centres over competing operators, the ACCC considers there is minimal likelihood this would occur. Firstly, the ACCC considers it is likely HCF would not have sufficient market power in the overlap areas, further noting that just over half of Australians hold private health insurance. The ACCC also considers HCF would have limited incentive to do so, as it would result in a decrease in choice and access to dental services for its members in those areas. The ACCC also notes HCF members are free to choose whichever dental practice they wish to visit, whether it is to obtain a 'no-gap' arrangement with an HCF Dental Centre Network clinic or Participating Provider, or still receive rebates from HCF if they choose to attend to a non-participating dentist.
- 4.33. In relation to the Usual Charge and clause 3.2 of the Relevant Provisions, the ACCC considers that these provisions could have the potential to result in public detriment in the form of reduced competition in the provision of dental services by limiting Participating Providers' ability or incentive to offer any promotions to non-HCF member patients (including uninsured patients) that would be more beneficial than those offered to HCF members. The Usual Charge provision (described in paragraphs 1.16 and 1.17 above), in conjunction with clause 3.2 of the Relevant Provisions, appear to constitute what is often colloquially referred to as a 'most favoured nation' clause, which in essence is a contract clause that seeks to impose an obligation on signatories to offer the same terms (e.g. price) to its customers. In this case, pursuant to clause 3.2, Participating Providers must agree to charge HCF members no more than the Maximum Charge (or the Usual Charge if that is lesser) they offer to a non-HCF member, including when the Participating Provider offers promotions to non-HCF members (including other health fund members).
- 4.34. Put simply, Participating Providers must match their lowest price charged to all their other patients to HCF members, whether a non-HCF member from another health fund (which could have its own no-gap program) or a self-funded, non-insured customer. Clause 3.2 of the Relevant Provisions also specifies a penalty for Participating Providers who wish to offer its customers (whether HCF members or not) a no-gap promotion for the More For Teeth Services, including suspended benefits (i.e. rebates) and reduced charges to the HCF members. For example, a new insurer could offer a promotion for its members with a dentist who also is a Participating Provider in HCF's More For Teeth Program. If that new insurer's promotion with the dentist has a lower fee charged to that insurer's members, compared to what is offered to HCF members for those services, the dentist must reduce the fees charged to HCF members to the same amount. The dentist will also have its rights suspended to receive the rebates for the More For Teeth Services from HCF during the promotion period. This would also apply to the other dentists in the same practice, whether they are participating in the More For Teeth Program or not.
- 4.35. The ACCC's concern is that the 'most favoured nation' clauses could limit dentists' incentives to offer lower prices to non-HCF members (i.e. to uninsured consumers or those who are insured with other private health insurers), or more generally if there are similar clauses in other insurers' arrangements. The ACCC notes that, while HCF's goal with these clauses is to prevent Participating Providers from charging HCF and its members more than any other insurer, the potential consequence instead could be that it establishes an artificial price floor in the market resulting in higher charges than without the 'most favoured nation' clause. This could also lead to an increase in

premiums for consumers as insurers may look to pass on any increase in service charges to consumers.

- 4.36. The ACCC also considers that the 'most favoured nation' clauses could potentially limit mobility for dentists, as Participating Providers would be required to offer less or the same charges than other dentists in the same practice, including those that do not participate in the More For Teeth Program, offer to their patients. The ACCC is concerned that, even if the Proposed Conduct is non-exclusive, if a Participating Provider were to set up an additional, more competitive promotion with another insurer that overlaps with the More For Teeth Program, the Participating Provider could lose the right to the benefits of the More For Teeth Program during the promotion period. This could in effect operate to maintain exclusivity even if the Proposed Conduct is technically non-exclusive, which could also result in limiting dentists' ability to move across different dental practices as the Usual Charge provision applies to non-participating dentists in the same practice as a Participating Provider.
- 4.37. However, based on the information available to it at present, the ACCC considers the 'most favoured nation' clauses are likely to result in limited public detriment in the form of reduced competition in the provision of dental services in these particular circumstances. As noted above, HCF is a smaller provider of private health insurance in Australia and HCF's relatively small market share limits the impact the 'most favoured nation' clauses may have on competition in the provision of dental services, as it is unlikely the provision covers a sufficient share of the market to limit incentives for dentists to compete on price. The ACCC may have more serious concerns regarding the 'most favoured nation' clauses if HCF had a more significant market share.
- 4.38. The ACCC also notes that, as outlined at paragraph 4.30 above, HCF will not require all dental practices owned by one group to be part of the More For Teeth Program and individual dentists operating across multiple dental practices could elect to only participate in the More For Teeth Program at one or a limited number of their relevant locations. The ACCC also considers this would mitigate against limitations on mobility for dentists as noted at paragraph 4.36 above.
- 4.39. Given HCF's relatively small market share and that HCF, its Dental Centre Network, More For Teeth Program, Participating Providers and other dentists will continue to face competitive pressures in the dental services market under the Proposed Conduct, based on the information available to it at present the ACCC considers that the Proposed Conduct is likely to result in limited public detriment in the form of reduced competition in dental services.

Potential for reduced competition in provision of private health insurance

- 4.40. The ACCC has considered any potential lessening of competition in the provision of private health insurance as a result of the Proposed Conduct. Interested parties did not raise concerns regarding potential public detriment resulting from the Proposed Conduct in the form of reduced competition in the provision of private health insurance. However, the ACCC considers this potential public detriment in light of the concerns raised above regarding the Usual Charge provision and considers it may also have implications in the market for private health insurance.
- 4.41. As noted above, HCF submits that there are no anti-competitive or other detriments associated with the More For Teeth Program. Further, HCF submits:
- The supply of private health insurance services to consumers is highly competitive, with numerous health insurance providers in Australia offering private health insurance cover and options to consumers.

- The More For Teeth Program is pro-competitive as it continues to encourage other health insurance providers to compete more effectively in similar ways, where the offering of certainty and avoidance of a ‘gap’ to consumers facilitates competition between health insurance providers.
- Authorisation will permit HCF to continue to operate its Dental Centre Network clinics and to offer ‘no-gap’ arrangements for the More For Teeth Services and will assist HCF to compete effectively in the supply of health insurance.

ACCC view

- 4.42. The ACCC considers a ‘most favoured nation’ clause like the Usual Charge and associated clause 3.2 of the Relevant Provisions could have negative impacts on competition in the private health insurance market in certain circumstances. Specifically, it could theoretically limit entries and expansions of smaller private health insurers, where participating dentists are not incentivised to offer lower prices for new health insurance customers or competitive promotions for an expanding insurer.
- 4.43. However, given HCF’s relatively small market shares in the provision of private health insurance and dental services in the areas of overlap and the Proposed Conduct being limited to the areas of overlap, the ACCC considers the Usual Charge provision would likely result in limited public detriment in the form of reduced competition in provision of private health insurance. The ACCC therefore does not consider that the Proposed Conduct is likely to result in public detriment in the form of reduced competition in private health insurance in these particular circumstances.

ACCC conclusion on public detriment

- 4.44. Overall, based on the information available to it at present, the ACCC considers that the Proposed Conduct is likely to result in limited detriment from reduced competition in the dental services and private health insurance markets, given HCF has relatively small shares in the relevant markets, HCF and Participating Providers will remain subject to competitive market pressures, and the Proposed Conduct is limited to the local areas where HCF’s Dental Centre Network overlaps with Participating Providers.

Balance of public benefit and detriment

- 4.45. The ACCC’s assessment of whether it is satisfied that the likely public benefits of the Proposed Conduct would outweigh the likely public detriments requires a balancing exercise.³⁵
- 4.46. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of increased access to price certainty for preventive and diagnostic dental services, which would flow to HCF members in areas of overlap. Acknowledging this represents a limited number of members in the community, the ACCC has weighted this benefit accordingly.
- 4.47. In these particular circumstances, based on the information available to it at present, the ACCC considers that the Proposed Conduct is likely to result in limited detriment in the form of reduced competition as discussed at paragraphs 4.26 to 4.43. In particular, the ACCC notes HCF’s relatively small shares in the relevant markets, the competitive pressures which will continue to apply to HCF and Participating Providers, and that the Proposed Conduct is limited to specific local areas of overlap.

³⁵ ACCC v Australian Competition Tribunal (2017) 254 FCR 341, at [7] (Besanko, Perram and Robertson JJ).

4.48. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied 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

4.49. The Act allows the ACCC to grant authorisation for a limited period of time.³⁶ 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.

4.50. In this instance, HCF seeks authorisation for 10 years. HCF submits this reflects both the tenure of leases that HCF typically secures when it opens a new dental centre, and the typical length of employment of HCF dentists.³⁷ In particular:

- For a Dental Centre Network clinic, HCF typically takes out a long-term lease (with options to renew) because of the significant financial commitment that is required to build a modern dental practice. HCF submits it needs long-term certainty as part of its future business planning, and to provide a level of confidence to its staff and members. HCF submits it currently has 10-year lease agreements over its dental centre in Belconnen, and over 2 new dental centres which were constructed in Sydney this year. HCF submits it also entered into a 10-year lease over its dental centre in Melbourne CBD.
- The period of 10 years reflects the fact that a significant number of HCF's staff maintain employment with HCF for long periods of time. HCF submits it has been operating its Dental Centre Network clinics in Sydney since 1987 and has a number of dentists and staff that have worked with HCF for over 15 years. HCF considers that this is an attraction of its salary plus benefits model, and of working with one company which has a long-term future, valuable training opportunities and modern facilities. HCF submits it currently has 131 dentists and hygienists employed in its dental centres and, of these:
 - a. 42 have been engaged by HCF over the last year
 - b. 21 have been employed by HCF for between 5 to 9 years
 - c. 25 have been employed for more than 10 years (with one in their 28th year of employment with HCF).
- HCF submits this long service and loyalty highlights HCF's long-term approach to employment which seeks to provide its dentists and support staff with a future outlook of 10 years or more. HCF submits this approach also means that there is an expectation of security of tenure from the staff that it employs, which HCF seeks to uphold. HCF submits that to assist its ability to attract and retain dentists and support staff, it requires authorisation of the Proposed Conduct for a period of 10 years.
- Further, HCF expects that it will continue to be able to provide the dental benefits encompassed by the More For Teeth Program and its Dental Centre Network

³⁶ Subsection 91(1)

³⁷ [HCF's submission in support for application for authorisation](#), 23 March 2023, p 27.

clinics for the next 10 years and beyond. HCF submits its philosophy and rationale in respect of the facilitation of better dental health for its members, which is achieved by the More For Teeth Program and the high level of dental services provided at Dental Centre Network clinics, will remain a focus of HCF for the predictable future.

4.51. The ADA submits that, if the ACCC proposes to grant authorisation, it should be limited to no more than 5 years having regard to the fact that:

- HCF is a large insurer engaged in widespread conduct.
- The contractual provisions disclosed in Annexure A may be changed during the term of the authorisation.
- HCF may, during the term of the authorisation, expand its own practices.³⁸

4.52. In response to the ADA's submission, HCF relevantly submits:

- HCF has engaged in conduct substantially the same as the Proposed Conduct since May 2018 and the absence of any impact on competition and the benefit to the public resulting from that conduct can be objectively observed.
- The establishment and operation of the Dental Centre Network clinics involves long-term planning and long-term certainty as outlined in paragraph 4.50 above.³⁹

4.53. While the duration of an authorisation is determined case by case, the ACCC more frequently grants longer authorisations (beyond 5 years) where it is being asked to authorise previously authorised conduct, there is evidence that anticipated benefits have been delivered, relevant parties continue to support the arrangements and market conditions are stable.

4.54. The ACCC notes that the application for authorisation seeks to retain the ability for HCF to make changes to the More For Teeth Agreements (such as to the Relevant Provisions or the 10 preventive and diagnostic service items that will form the More For Teeth Services), expand its Dental Centre Network and/or expand the More For Teeth Program, potentially increasing the areas of overlap. No limitations to any of these elements are proposed. To address any potential for an increase in materiality of public detriment, the ACCC considers it appropriate authorisation is granted for a shorter period than the requested 10 years to allow it to reconsider the authorisation and any changes. The ACCC notes it may also initiate a review of an authorisation if it appears to the ACCC that there has been a material change of circumstances since the authorisation was granted.

4.55. The ACCC has acknowledged the potential for public detriment from the 'most favoured nation' clause, but has concluded that this public detriment is unlikely to arise in this case, given HCF's relatively small market share. The ACCC notes HCF's market share may potentially change over time.

4.56. In light of these factors, the ACCC considers that it is appropriate to grant authorisation for 5 years, rather than the 10 years sought by HCF. This provides the ACCC with an opportunity to assess the benefits and detriments arising from the conduct in light of potential changes in the industry, More For Teeth Agreements or Dental Centre Network.

³⁸ [Australian Dental Association submission](#), 25 August 2023, p 2.

³⁹ [HCF's confirmation of the Proposed Conduct and response to ADA submission](#), 6 September 2023, pp 3–4.

4.57. Accordingly, the ACCC proposes to grant authorisation for 5 years.

5. Draft determination

The application

- 5.1. On 23 March 2023, HCF lodged an application to revoke authorisation AA1000402 and substitute authorisation AA1000639 for the one revoked. This application for revocation and substitution was made under subsection 91C(1) of the Act.
- 5.2. The HCF seeks authorisation to enter into and give effect to the specified provisions in the More For Teeth Agreements (**Relevant Provisions**) in the same local catchment areas as HCF's Dental Centre Network centres (including any future HCF dental centres). The Relevant Provisions in the More For Teeth Agreements are extracted in **Annexure A** and authorisation is sought for the Relevant Provisions and any variations to them that have the same or a substantially similar effect (the **Proposed Conduct**).
- 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 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 authorisation.

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisation AA1000402 and grant authorisation AA1000639 in substitution for it.
- 5.8. The ACCC proposes to grant authorisation AA1000639 for HCF and the Participating Providers to enter into and give effect to the provisions of the More For Teeth Agreements extracted in **Annexure A (Relevant Provisions)** in the same local catchment areas as HCF's Dental Centre Network centres (including any future HCF dental centres). Authorisation is granted for the Relevant Provisions and any variations to them that have the same or a substantially similar effect.
- 5.9. The ACCC proposes to grant authorisation in relation to Division 1 of Part IV of the Act, and section 45 of the Act.
- 5.10. The ACCC proposes to grant authorisation AA1000639 for 5 years.
- 5.11. This draft determination is made on 20 October 2023.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, HCF or an interested party may request that the ACCC hold a conference to discuss the draft determination.

Annexure A – Relevant Provisions of the More For Teeth Agreement for which authorisation is sought

In the provisions of the More For Teeth Agreement in this Annexure:

- **'Benefit'** has the same meaning given to that term in the Fund Rules.
- **'Dental Practitioner'** means an eligible general dentist, paediatric dentist, or Oral Health Practitioner (OHP)
- **'Fund Rules'** means the 'HCF Fund Rules' as published at hcf.com.au/formsand-brochure and as varied by HCF from time to time.
- **'Gap'** means the amount charged by You less a Benefit.
- **'Member'** has the same meaning given to that term in the Fund Rules.
- **'Policy'** has the same meaning given to that term in the Fund Rules.
- **'Private Practice'** has the same meaning given to that term in the Fund Rules.
- **'Program Benefit'** means the amount of Benefits payable to You for the services specified in Schedule A when you are participating in the Program.
- **'Terms and Conditions'** means the 'Terms and Conditions for HCF Recognised Providers of Extras Services' as varied by HCF from time to time. These Terms and Conditions are published on HCF's website at hcf.com.au/pdf/general/Terms_and_Conditions_for_Recognised_Providers_of_Extras_Services.pdf
- **'You'** and **'Your'** mean the Dental Practitioner who signs the Program Application Form and is accepted by HCF into the More for Teeth Program.
- **'Usual Charge'** has the same meaning given to that term in the Terms and Conditions.

Provisions:

3 SERVICES AND CHARGES

3.1 In relation to the services specified in Schedule A, You agree to:

- a) charge no more than the amounts described in the 'Maximum Charge' column of the table in Schedule A for those specific services when provided to Members; and
- b) charge Members a fee for a service that is equal to or less than:
 - (i) Your Usual Charge; and
 - (ii) the Usual Charge that other dentists and dental professionals that are not participating in the Program within the same Private Practice receive for that service, the Usual Charge that other dentists that are not participating in the Program within the same Private Practice receive for that service,

including when any special or discounted fees are offered to patients (whether Members or not) at the Private Practice.

3.2 During any period that You offer patients (whether Members or not) a 'no-gap' promotion for any of Your services specified in Schedule A (**Promotion**), Your rights to receive the Program Benefits will be suspended for those services and you must

reduce the fees you charge to Members for those services to the amount of Benefits payable under the Terms and Conditions or Your Usual Charge, whichever is the lesser amount. You must not charge Members a Gap for the services included in the Promotion.

3.3 You must notify HCF at least 7 days prior to the commencement of a Promotion and prior to the termination of a Promotion.

3.4 The charges that You raise must be accurately reflected on Your invoice or receipt, which must be provided in accordance with the Terms and Conditions and clause 5.

3.5 Subject to compliance with this clause 3, You are free to charge as per Your existing practices for services not described in the 'Service description' column of the table in Schedule A.

4 BENEFITS

4.1 Subject to the Member's entitlement to a Benefit under their Policy, the Fund Rules and all applicable laws, HCF will provide a Program Benefit up to or equivalent to the maximum amounts listed in Schedule A, subject to Indexation and clause 4.2 for the duration of the Program.

4.2 The maximum Program Benefits available to Members in respect of services as at the date of this Agreement are as specified in the table in Schedule A.

4.3 HCF may index the Program Benefits, for the items in Schedule A that it deems appropriate, on 1 January each year, up to any proportionate change in the following formula (**Indexation**):

- The Consumer Price Index (All groups, Index numbers, Sydney*, ABS Catalogue no. 6401.0) x 50% plus the Average Weekly Earnings (NSW* Original, ABS Catalogue no. 6302.0) for persons, full-time adult ordinary time earnings (AWOTE) x 50%.
- For the avoidance of doubt, the Consumer Price Index and the Average Weekly Earnings are measured for the 12 month period ending 30 June of the year prior to the indexation date.
- *For states and Territories other than NSW, Program Benefit rates are set using relevant ABS Catalogue statistics for that State or Territory and its capital city.

4.4 You must not charge Members any additional or ancillary amounts, charges or penalties (for example, an administration fee) in connection with the services covered under this Agreement.

4.5 Services provided by You to a Member that are not described in the table in Schedule A will continue to be the subject of Benefits that HCF determines a Member is entitled to under a Policy with HCF, the Fund Rules, the Terms and Conditions and all applicable laws.

4.6 HCF does not warrant or represent that a Member will be entitled to Benefits in respect of any services provided by You to the Member.