



Draft determination and interim authorisation

Application for authorisation AA1000577
lodged by
WA Primary Health Alliance Ltd
in respect of
the Primary Sense Project
Authorisation number: AA1000577

17 December 2021

Commissioners: Keogh
Richard
Brakey
Ridgeway

Summary

The ACCC proposes to authorise WA Primary Health Alliance Ltd (WAPHA) and a group of organisations managing other Primary Health Networks (PHNs, collectively, the Participating PHNs) to jointly develop their own data extraction software (the Proposed Conduct).

PHNs are independent, not-for-profit entities funded by the Commonwealth Government to coordinate primary health care services in the regions that they are responsible for. PHNs are required to collect and analyse a range of population and health data, specifically including de-identified General Practice (GP) data. Currently, most PHNs procure data extraction software from third party suppliers and provide this software at no charge to GP clinics to enable the data extraction.

The Proposed Conduct is intended to result in the Participating PHNs owning their own data extraction tool (Primary Sense 2) as an alternative to the existing third-party tools. If the development of Primary Sense 2 is successful, the Participating PHN will decide whether to use and offer Primary Sense 2 (at no cost) to the GP clinics in their region. GP clinics are not required to use Primary Sense 2; they can choose to use or purchase an existing (or alternative) data extraction tool.

The ACCC considers the Proposed Conduct is likely to result in a public benefit primarily in the form of cost savings, which in turn, are likely to allow PHNs to more effectively achieve their objective of improving public health.

The ACCC acknowledges that concerns have been raised by a number of interested parties whose businesses may be impacted by the Proposed Conduct. The ACCC has carefully considered these concerns but has reached the preliminary view that the Proposed Conduct is unlikely to result in any significant public detriment. In response to potential detriments raised in submissions, the ACCC's preliminary views are:

- The risk that PHNs will use government money inappropriately/inefficiently or undertake activities beyond their remit is mitigated by the oversight of the Commonwealth Department of Health.
- The Proposed Conduct may provide Participating PHNs with an alternative and potentially more efficient means of obtaining data extraction software. The ACCC considers that the PHNs switching to self-supply of a data extraction tool is not anti-competitive.
- No Participating PHNs will be required to use Primary Sense 2 exclusively and PHNs may continue purchasing licences for third-party data extraction tools instead of, or in addition to, Primary Sense 2.
- There is no restriction on existing data extraction tool providers (or any other party) from directly supplying data extraction tools (or any other medical software tools) to GP clinics.

Overall the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh any public detriment.

The ACCC proposes to grant authorisation for 5 years.

The ACCC has also granted interim authorisation to enable WAPHA and the Participating PHNs to jointly fund the upscaling and development of Primary Sense 2 and integrate it with the Primary Health Insights (PHN-run data storage and analytics platform), while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 28 January 2022, before making its final decision.

1. The application for authorisation

- 1.1. On 14 September 2021, WA Primary Health Alliance Ltd (**WAPHA**) lodged an application for authorisation AA1000577 with the ACCC on behalf of itself and other organisations responsible for the Primary Health Networks (**PHNs**) that are currently participating, or may in future participate, in the Primary Sense Project (**Participating PHNs**)¹. WAPHA seeks authorisation for itself and Participating PHNs to jointly up-scale and develop the 'Primary Sense 2'² data extraction tool for their own use and for providing the tool to their affiliated General Practice (**GP**) clinics. WAPHA seeks authorisation for 10 years. This application for authorisation AA1000577 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. WAPHA also requested interim authorisation to facilitate the joint funding and development of Primary Sense 2, while the ACCC is considering the substantive application. The request for interim authorisation is discussed further in section 6.

The Proposed Conduct

- 1.4. WAPHA seeks authorisation for WAPHA and the Participating PHNs to:
 - a) give effect to an agreement to up-scale and develop Primary Sense 2 at a national level, and integrate Primary Sense 2 to work within Primary Health Insights,³ and
 - b) enter into and give effect to bilateral agreements, under which WAPHA will provide services to the Participating PHNs to enable them to use Primary Sense 2 to extract data from GP clinics in their region, transition and on-board GP clinics in each PHN region that wish to use Primary Sense 2, and provide associated management and support services.

(the **Proposed Conduct**, and also referred to as the 'Primary Sense Project')

The rationale

- 1.5. WAPHA submits that the rationale for the Proposed Conduct is to:

¹ The current Participating PHNs are: the following 3 PHNs in Western Australia managed by WAPHA – Perth North, Country WA and Perth South; the following 5 PHNs in New South Wales – Hunter New England and Central Coast, South Eastern NSW, Northern Sydney, Nepean Blue Mountains and North Coast; the Northern Territory PHN; the following 7 PHNs in Queensland – Central Queensland, Wide Bay and Sunshine Coast, Gold Coast, Western Queensland, Darling Downs and West Moreton, Northern Queensland, Brisbane North and Brisbane South; and the Tasmania PHN. The PHNs that are eligible to join the Primary Sense Project in the future are: the Australian Capital Territory PHN; the following 5 PHNs in New South Wales – Western NSW, Murrumbidgee, South Western Sydney, Central and Eastern Sydney and Western Sydney; the following 2 PHNs in South Australia – Adelaide and Country SA; and the following 6 PHNs in Victoria – North Western Melbourne, Eastern Melbourne, South Eastern Melbourne, Murray, Western Victoria and Gippsland.

² Primary Sense 2 will be developed based on Primary Sense 1, a data extraction tool built by the Gold Coast PHN in 2016-2017 (see paragraph 2.5 below).

³ Primary Health Insights is a national data storage and analytics platform established by WAPHA on behalf of all PHNs, using Commonwealth Department of Health funding; and is jointly owned by 27 PHNs (out of a total of 31 PHNs).

- deliver on PHNs' objectives to increase the efficiency and effectiveness of primary health services
- achieve long-term cost savings and better efficiencies for PHNs
- improve health outcomes through more collaborative health planning
- enable PHNs access to more insights and improved data analytics, and
- increase PHN control over data security and prevent data being used for commercial gain or purpose

2. Background

PHNs

- 2.1. PHNs are independent not-for-profit entities funded through the Commonwealth Department of Health⁴ to coordinate primary health care in the regions that they are responsible for. There are 31 PHNs (operated by 29 PHN organisations⁵) across Australia working to increase the effectiveness and coordination of primary health care services in their regions.⁶
- 2.2. PHNs collect a range of population and health data, including de-identified patient data from GP clinics. They analyse the data to better understand the gaps in primary health services, which in turn enables them to undertake population health planning and commission services to meet the health needs of the local population. They also provide training and support to GP clinics to build their capacity and deliver high quality care.
- 2.3. PHNs also work with GP clinics under a voluntary Practice Incentive Program Quality Improvement Initiative (**PIP QI**) established by the Department of Health. Under this scheme, GP clinics receive an incentive payment if they participate in quality improvement activities with their local PHN and submit a set of de-identified data to their PHN quarterly.⁷ The PHNs share this data with the Commonwealth Government⁸ and with states and territories to inform insights into population health services usage.

Data extraction tools

- 2.4. GP clinics can provide PIP QI data to their PHNs in different ways, including:⁹
 - entering into a data sharing agreement with their PHN, who engage a third party to extract data from the clinics' Practice Management Software (**PMS**). The PHNs purchase a licence for the data extraction tool and provide the tool to the clinics to use at no cost (according to WAPHA, this represents 70% of GP clinics nationally)

⁴ With an annual total investment of more than \$1.2 billion.

⁵ 29 not-for-profit organisations were appointed by the Commonwealth Government to operate 31 PHNs (with WAPHA allocated 3 PHNs and the remaining organisations allocated one PHN each).

⁶ PHNs operate under the [PHN Performance and Quality Framework](#) as a condition of being funded under the [PHN Grant Programme Guidelines](#), as well as under the reporting and other obligations inherent in being a not-for-profit organisation registered with the Australian Charities and Not for profits Commission.

⁷ The data set consists of 10 Improvement Measures, and must comply with the [PIP Eligible Data Set Data Governance Framework](#).

⁸ Via the Australian Institute of Health and Welfare.

⁹ There are also GP clinics that do not participate in continuous quality improvement activities with their PHNs nor participate in the PIP QI scheme.

- purchasing their own licence directly from a third-party data extraction vendor, who extracts the relevant data from the clinics' PMS and submits it to the PHNs, or
 - using the software tool in their PMS to extract the data for submission to PHNs.¹⁰
- 2.5. In Australia, there are currently 2 main data extraction vendors, Pen CS¹¹ and Outcome Health.¹² Currently all PHNs (beside the Gold Coast PHN) use data extraction tools provided by one of these companies, with Pen CS supplying 85% of PHNs. In 2016-2017, using funding from the Department of Health, the Gold Coast PHN developed its own data extraction tool, Primary Sense 1. This tool is used by Gold Coast PHN itself and by over 80 GP clinics on the Gold Coast.¹³
- 2.6. The data extraction tools developed by Pen CS, Outcome Health and Gold Coast PHN also have numerous additional functions for GP clinics, including auditing, clinical decision support, and alerts and notifications.

Primary Sense Project

- 2.7. Gold Coast PHN has assigned its intellectual property rights in Primary Sense 1 to 15 current Participating PHNs to enable them to proceed with the Proposed Conduct.
- 2.8. WAPHA will procure vendors to undertake the development work referred to in paragraph 1.4(a) above. The 15 current Participating PHNs (and any future Participating PHNs) will share the costs and risks of the development and be equal tenants-in-common owners of Primary Sense 2. If the development is successful and the Participating PHNs elect to proceed to use Primary Sense 2, they will each enter into a service agreement with WAPHA, under which WAPHA will provide the services referred to in paragraph 1.4(b) above.
- 2.9. The Participating PHNs will pay WAPHA for the costs of the onboarding and use of Primary Sense 2 through annual fees. The fees charged by WAPHA to the Participating PHNs will be on a cost-recovery basis, and WAPHA will not make a profit from providing services to the Participating PHNs. The Participating PHNs may choose to retire from the Primary Sense Project by giving a 6-month notice and bear any reasonable costs associated with the retirement.
- 2.10. WAPHA will only offer Primary Sense 2 to the Participating PHNs, rather than any other customers in the broader market.¹⁴

Licensing and use of Primary Sense 2

- 2.11. The Participating PHNs will be able to provide Primary Sense 2 to any affiliated GP clinics that wish to use the tool (under a 'no cost' licence). They can also continue to offer any other data extraction tools to GP clinics if they wish to do so. WAPHA

¹⁰ The ACCC understands that some of the major PMS providers currently have tools that allow GP clinics to extract PIP QI data for submission to PHNs.

¹¹ Pen CS owns and operates a suite of tools with data extraction, auditing and clinical decision functions. Pen CS' products are used in 5,600 GP clinics around Australia.

¹² Outcome Health's POLAR data extraction tool is used by approximately 1,300 GP clinics and six PHNs. It also operates the AURORA platform to support primary care research. Outcome Health is registered charity.

¹³ Gold Coast PHN has also continued to purchase licence to use Pen CS' data extraction tool and offer the tool to its affiliated GP clinics that wish to use it.

¹⁴ See Application by WAPHA (14 September 2021), paragraph 3.1.2: health clinics owned by corporations, clinic that are not part of a PHN or corporation, and Aboriginal Medical Services clinics.

submits that the Participating PHNs may choose to support more than one data extraction tool for various reasons, including a desire to offer choice to GP clinics¹⁵ and to use or make available different functionalities provided by the tools.

- 2.12. If the Participating PHNs elect to leave the Primary Sense Project, they can continue to use Primary Sense 2 for their own purposes.¹⁶ However, it is proposed that they cannot provide Primary Sense 2 or set up a separate data platform to provide Primary Sense 2 to other PHNs in competition with the Primary Sense Project. WAPHA explains that this is intended to enable Participating PHNs to maintain the ongoing viability of their shared intellectual property in Primary Sense 2 and prevent misuse of the tool by the outgoing Participating PHNs.

Implication for GP clinics

- 2.13. WAPHA submits that GP clinics will not be required to adopt or use Primary Sense 2, and Primary Sense 2 will not impede the ability of GP clinics to also use other data extraction tools.

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 potentially interested parties including data extraction suppliers, adjacent software and services providers, relevant industry associations or peak bodies, consumer groups, state and federal government and relevant regulatory bodies.¹⁷
- 3.3. The ACCC received 17 submissions from 12 interested parties in relation to the application.
- 3.4. The Consumer Health Forum of Australia is supportive of the application. It considers the Proposed Conduct will allow PHNs to ultimately achieve better health outcomes for the community rather than result in any detriment to consumers. The Commonwealth Department of Health also supports the application, noting that efficiency and security control benefits may arise from the Proposed Conduct and that there is no requirement for GP clinics and Participating PHNs to use Primary Sense 2 (or do so exclusively).
- 3.5. Submissions opposing the application were received from the following interested parties:
 - medical software companies, including Medical Software Industry Association (**MSIA**) and its member companies
 - existing data extraction services providers, and
 - research institutions (a university, and a representative body for academic and researchers working in primary care).

¹⁵ WAPHA clarifies that, in its view, a PHN may provide each GP clinic a choice as to which tool they use, rather than providing two tools to the GP clinic to use at the same time. See Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), page 5, sections B2.1-B2.2.

¹⁶ WAPHA explains that this includes the Outgoing Participating PHNs setting up an independent copy of the system within their own infrastructure.

¹⁷ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 3.6. These interested parties have strongly opposed the application on numerous grounds, disputing the claimed public benefits and raising concerns regarding the impact of the Proposed Conduct on competition (these issues are discussed in paragraphs 4.8-4.66 below).
- 3.7. Interested parties also raised other issues relating to the application. These are discussed below.

Lack of consultation by WAPHA

- 3.8. Many interested parties indicate that WAPHA had not engaged with them prior to submitting the application and failed to identify them as interested parties in the application. In response, WAPHA submits that it only identified those entities it believed were most likely to be directly impacted by the Proposed Conduct, rather than every possible stakeholder.
- 3.9. The ACCC has contacted all parties identified by and to it as potentially having an interest in the matter and given them an opportunity to comment. Interested parties will have a further opportunity to comment following the release of this draft determination.

Commercial agreement between Gold Coast PHN and Best Practice

- 3.10. On 6 October 2021, Best Practice Software¹⁸ provided a submission raising its concern that the Proposed Conduct could mean that Gold Coast PHN may be in breach of its agreement with Best Practice Software (which allows Gold Coast PHN's Primary Sense 1 to access Best Practice Software's database). It requested that the ACCC not grant interim authorisation until it had more time to consider the issue.
- 3.11. WAPHA submits that the current agreement between Gold Coast PHN and Best Practice Software does not extend to any other party. WAPHA submits that while Gold Coast PHN has assigned its intellectual property in Primary Sense 1 to the Participating PHNs, that does not include transfer of any agreement to access Best Practice Software's systems.
- 3.12. The ACCC considers that this issue is unlikely to be relevant to its consideration of the public benefits and detriments arising from the Proposed Conduct. Accordingly, this issue is not further discussed in this draft determination.

4. ACCC assessment

- 4.1. WAPHA 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 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

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

¹⁸ Best Practice Software is a supplier of Practice Management Software (PMS) to GP clinics. It also supplies a range of other medical software to the primary health care industry. Best Practice Software's products support over 5,000+ medical clinics and 20,000+ GPs.

- 4.3. WAPHA submits the relevant market is the market for the supply of data extraction software tools that assist with the extraction and analysis of health care data / practices for use in the health sector by PHNs, general practices (both corporately owned and others) and Aboriginal Medical Services in Australia.
- 4.4. The ACCC considers that the relevant areas of competition are likely to be:
- the supply and acquisition of data extraction software tools to and by PHNs
 - the supply of data extraction software tools to GP clinics, and
 - the supply of clinical decision support software tools to GP clinics.

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. WAPHA submits that the Participating PHNs would be unlikely to proceed with the Primary Sense Project without authorisation being granted by the ACCC.
- 4.7. The ACCC considers that in the likely future without the Proposed Conduct, Participating PHNs (except Gold Coast PHN) will continue to procure licences from existing providers for the use of data extraction tools; and Gold Coast PHN will continue to use its own Primary Sense 1 data extraction tool.¹⁹

Public benefits

- 4.8. 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.*²⁰

- 4.9. The ACCC has considered the following public benefits:
- cost savings
 - efficiencies and better data analytics and insights, and
 - improved data governance and privacy

Cost savings

- 4.10. WAPHA submits that the Proposed Conduct will result in cost savings for Participating PHNs and allow them to use the savings in other areas to deliver better health outcomes. It submits that the forecast costs to operate Primary Sense 2 are significantly lower than the licensing costs PHNs currently pay for the other data

¹⁹ However, Gold Coast PHN is also currently continuing to purchase licence to use Pen CS' data extraction tool, even after having developed Primary Sense 1. In the likely future without the Proposed Conduct, it is possible that Gold Coast PHN may also continue to purchase licence to use Pen CS' data extraction tool.

²⁰ *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

extraction tools.²¹ It submits that cost savings can also arise through integrating Primary Sense 2 with Primary Health Insights, because they are designed using similar technologies and PHNs could utilise the existing data platform within Primary Health Insights to host Primary Sense 2 (rather than paying for additional software storage capacity utilised by external data extraction vendors).²²

- 4.11. Interested parties submit that cost savings are unlikely or are unsubstantiated. Pen CS submits that 28 PHNs are already receiving the benefit of economies of scale by utilising a common data collection platform and patient to population health informatics platform.²³ Best Practice Software submits that the Primary Sense 2 tool will likely degrade over time, unless PHNs can commit funding to the ongoing development of the tool.²⁴
- 4.12. The ACCC considers that the Participating PHNs, as present purchasers of data extraction tools, should have some incentive to seek value-for-money in their procurement decisions for these tools. The ACCC understands that PHNs are parties to multi-year funding agreements with the Commonwealth Government that intend to provide PHNs with a substantial degree of financial and operational autonomy in how they undertake their functions. Further, the ACCC understands that if PHNs do not use the funds they receive prudently, they have no automatic recourse to ‘top up’ or receive compensatory funding from the government. Taken together, these arrangements suggest that PHNs should only be incentivised to self-supply data extraction tools through projects such as Primary Sense 2 insofar as doing so would be likely to result in cost savings or other benefits. In these circumstances, the ACCC accepts WAPHA’s claim that cost savings are likely to arise from the Proposed Conduct.
- 4.13. Given that Participating PHNs are likely to redeploy cost savings from the acquisition of data extraction tools into their other primary health activities, the ACCC considers that patients, as the end consumers of PHNs’ services, are likely to be the ultimate beneficiaries of these savings in one form or another. The ACCC considers that whatever form these benefits take would constitute a likely public benefit.

Efficiencies and better data analytics and insights

- 4.14. WAPHA submits that PHNs currently have a limited ability to influence the ongoing development or design of third-party data extraction tools. WAPHA considers that the Proposed Conduct will allow the Participating PHNs to have direct control over the development of Primary Sense 2, so that it will be more responsive to PHNs’ needs and those of GP clinics and other stakeholders.
- 4.15. WAPHA also submits that the Proposed Conduct will give Participating PHNs the ability to determine data mapping standards, which will lead to a richer data set and improved data analytics and insights for the PHNs.²⁵
- 4.16. The Department of Health released the *General Practice Data and Electronic Clinical Decision Support Issues Paper* (the **Issues Paper**) in November 2021.²⁶ In the Issues

²¹ Application by WAPHA (14 September 2021), pages 13-14, paragraph 4.1.1; Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), page 5, section B3.

²² Submission by WAPHA – response to ACCC request for information (12 November 2021), page 5, sections 4.3-4.6.

²³ Submission by Pen CS (29 September 2021), page 8. Pen CS submits that PHNs are already paying 16.3c per patient record for a whole population health management platform including data collection, data standardisation, data analytics, risk stratification, clinical decision support and planned and opportunistic care management.

²⁴ Submission by Best Practice Software (6 October 2021), page 3.

²⁵ WAPHA indicates that the current data extraction tools use proprietary mappings and transformation algorithms which change the data provided to PHNs, and PHNs do not have access to know how the data may have been altered.

Paper, the Department of Health notes that currently, different extraction tools use different proprietary data mapping methods which contributes to a lack of comparability, high data interpretation uncertainty, and a potential for misinterpretation and unreliable insights.²⁷

- 4.17. The Royal Australian College of General Practitioners (**RACGP**) submits that standardisation of data extraction methods would improve accuracy of comparisons and analyses between data sets and contribute to better health planning and outcomes.²⁸ The University of Melbourne also considers the development of a tool that better unifies data extraction in GP clinics is a worthwhile initiative.²⁹
- 4.18. MediSecure considers the Participating PHNs could already achieve the claimed benefit through the management of service level agreements with the existing data extraction vendors, or by undertaking performance improvements within Primary Health Insights. In response, WAPHA submits that Primary Sense 2 will operate very differently to existing products. It also submits that Primary Health Insights has no functionality related to data extraction and cannot improve the quality of any data extracted from GP clinics.
- 4.19. Other interested parties submit that there is no evidence to substantiate the claims that Primary Sense 2 will have better functionality compared to existing products. Pen CS submits that its software and GP data is already stored on Primary Health Insights.³⁰ Outcome Health submits that its PHN customers have been able to contribute to the co-design, governance, building and implementation of its data extraction tools.
- 4.20. The ACCC understands that there are similarities and differences between each of the data extraction tools from Pen CS and Outcome Health and the to-be-developed Primary Sense 2. In a competitive market, Pen CS and Outcome Health should have commercial incentives to improve their product offerings by adopting additional or different functionalities to better meet PHNs' preferences. However, the current market is highly concentrated with only 2 data extraction vendors, and therefore the product innovations of the type sought by PHNs may be unlikely to arise from the incumbents. Under these conditions, the creation of Primary Sense 2 could offer benefits to PHNs that would not otherwise be forthcoming. On balance, however, the ACCC does not consider there is sufficient information for it to comment on the extent or likelihood of this public benefit.

Improved data governance and privacy

- 4.21. WAPHA submits that the Proposed Conduct is intended to and will reduce the risk of commercialisation of primary health data, for instance, data being sold to third parties without the express consent or knowledge of GP clinics or PHNs.³¹ It submits the Proposed Conduct will improve privacy and transparency of the data flow, and PHNs will not sell or provide data extracted using Primary Sense 2 for commercial gain or purposes.³²

²⁶ Commonwealth Department of Health, *General Practice Data and Electronic Clinical Decision Support Issues Paper*, November 2021.

²⁷ Ibid, pages 8-9.

²⁸ Submission by the RACGP (14 October 2021).

²⁹ Submission by the University of Melbourne (12 October 2021), page 1.

³⁰ For instance, Pen CS submits that its data extraction tool is highly responsive, agile and cost effective, and already provides real-time data collection for COVID-19 related data from GPs clinics.

³¹ Application by WAPHA (14 September 2021), pages 10, paragraphs 14-15; Submission by WAPHA – response to clarifications requested (12 November 2021), page 2, section A1; Submission by WAPHA – response to interested party submissions (12 November 2021), page 5.

³² Application by WAPHA (14 September 2021), page 10.

- 4.22. Interested parties do not agree that there is a risk of inappropriate commercialisation of primary health data.³³ Pen CS indicates that it does not hold data and is not a data custodian.³⁴ Outcome Health submits that it does not sell or commercialise any data extracted from GP clinics.³⁵ Interested parties also consider that there is a lack of transparency around how data will be held or stored by Participating PHNs, and cast doubt on the PHNs' ability to adequately manage data security and patient privacy.³⁶
- 4.23. Without directly commenting on the claimed benefit, the RACGP submits that patient data collected within GP clinics is enormous, valuable and sensitive. It considers that GPs must be assured that their patient data will be managed securely and in accordance with privacy laws.³⁷
- 4.24. In response to interested party submissions, WAPHA submits that PHNs have been the custodians of significant volumes of de-identified primary health data collected under current arrangements, which have been securely stored on the Primary Health Insights platform.³⁸ It submits that Participating PHNs have and will continue to demonstrate high standards of data security and comply with privacy laws.³⁹ It also submits that Primary Sense 2 will include comprehensive processes for managing patient consent for the use of their data.⁴⁰
- 4.25. In its Issues Paper (referred to in paragraph 4.16 above), the Department of Health raises several issues regarding the current data arrangements for access and use of GP data. These include:
- There are currently multiple stakeholders engaged in various activities using GP data – this complicates the data flow, blurs transparency and accountability.⁴¹ The current lack of transparency raises the potential for GP data to be monetised for commercial research or other purposes without the knowledge of patients and GPs.
 - There is currently a lack of clarity around privacy and consent and the associated responsibilities of different groups.⁴²
- 4.26. The Department of Health is currently consulting with interested parties on these issues, until 18 February 2022.
- 4.27. In response to the application for authorisation, the Department of Health submits that there may be efficiencies and security control benefits for PHNs through Primary Sense 2 being integrated into the existing Primary Health Insights infrastructure. The Department further submits that it does not authorise the commercial use of data

³³ See for instance, Submission by MediSecure (29 October 2021) page 3; Submission by Pen CS (29 September 2021), page 2.

³⁴ Submission by Pen CS (29 September 2021), page 2.

³⁵ Submission by Outcome Health (29 September 2021), page 1.

³⁶ Submission by MSIA (1 November 2021), page 3.

³⁷ Submission by the RACGP (14 October 2021).

³⁸ Submission by WAPHA – response to interested party submissions (12 November 2021), page 5, section 2.1.

³⁹ WAPHA submits that both Primary Sense 2 and the Primary Health Insights platform (which will host Primary Sense 2) are designed to adhere to strict standards of data security and governance; and PHNs have established a National Data Governance Committee to oversee the development and application of consistent and appropriate data governance standards and practices across all PHNs. See Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), page 7, sections B5.1-B5.4.

⁴⁰ Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), page 7, section B5.7.

⁴¹ The Department of Health considers that increased data sharing can have many benefits, however the implications for data flow must be transparent and clearly understood.

⁴² The Department of Health considers that this puts GPs at risk of potential consequences if the de-identified data is re-identified or misused by those to whom GPs have given access.

collected by PHNs and supports the statement in the application that the Participating PHNs will not provide data extracted using Primary Sense 2 for any commercial gain or purpose.⁴³

- 4.28. The ACCC understands that following the start of the PHN Programme in 2015, the PHNs have been collecting data from GP clinics through the current data extraction tools, with the data being stored on the Primary Health Insights platform since April 2021. The ACCC understands that Primary Health Insights operates under strict security standards and is subject to annual independent security reviews (which to date have not found any major security issues).⁴⁴
- 4.29. The ACCC notes that the issues regarding potential commercialisation of data by third parties are still currently the subject of consultation by the Department of Health. There is currently insufficient information for the ACCC to form the view that the Proposed Conduct is likely to result in a public benefit in the form of improved data governance and privacy arrangements.

ACCC conclusion on public benefit

- 4.30. The ACCC considers that the Proposed Conduct is likely to result in a public benefit primarily in the form of cost savings. This public benefit is likely to flow on to consumers through the diversion of PHN spending from data extraction tool licences to the provision of more health and medical services.

Public detriments

- 4.31. 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.*⁴⁵

- 4.32. WAPHA submits that the Proposed Conduct will not give rise to any public detriments and will not substantially lessen competition, because:
- it will further mitigate any risk of commercial exposure by the on-selling of patient data
 - it will not impact on the other identified market segments,⁴⁶ as Primary Sense 2 will only be offered to PHNs rather than participants in the other market segments, and
 - it will in fact increase competition for the direct supply of data extraction tools to GP clinics, as Pen CS and Outcome Health can continue to directly sell their data extraction tools to GP clinics.

⁴³ Submission by Commonwealth Department of Health (27 September 2021), page 2.

⁴⁴ The ACCC also understands that each individual PHN may have a different data governance framework, however most of the PHNs (including the 15 Participating PHNs) are currently involved in the National Data Governance Committee established during the Primary Health Insights project and are therefore likely to continue collaborating on the development of their respective data governance frameworks.

⁴⁵ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

⁴⁶ See Application by WAPHA (14 September 2021), paragraph 3.1.2: health clinics owned by corporations, clinic that are not part of a PHN or corporation, and Aboriginal Medical Services clinics.

4.33. The ACCC has considered the following potential public detriments:

- inappropriate use of government money
- lessening of competition in the supply and acquisition of data extraction tools to and by PHNs
- lessening of competition in the supply of data extraction tools to GP clinics
- lessening of competition in the supply of clinical decision support tools to GP clinics
- change management impacts on GP clinics
- impact on medical software industry, and
- impact on access to data by medical researchers.

Inappropriate use of government money

4.34. Several interested parties submit that it is not appropriate for the Participating PHNs to engage in the Proposed Conduct using government money. Their arguments include the following:

- it is unfair for Participating PHNs to use government money to develop a product to compete with private sector vendors⁴⁷
- the Participating PHNs are proposing to underwrite the development of a data extraction tool created by the Gold Coast PHN (Primary Sense 1) without going through a tender process⁴⁸
- Primary Sense 1 is not a good product, and was not accepted by PHNs when Gold Coast PHN offered it to those PHNs in 2019⁴⁹
- the Proposed Conduct will duplicate functionality provided by existing data extraction tools⁵⁰
- the Proposed Conduct conflicts with and/or falls outside of the PHNs' remit,⁵¹ and
- the Proposed Conduct has a high risk of failure and will cost taxpayers.⁵²

4.35. In contrast, the Consumer Health Forum of Australia submits that the Primary Sense Project is exactly the sort of activity the PHNs should be pursuing to achieve better health outcomes for the community.⁵³

4.36. WAPHA submits that:

⁴⁷ Submission by MSIA (1 November 2021), pages 7 and 8; Submission by Outcome Health (29 September 2021), page 1.

⁴⁸ Submission by Pen CS (29 September 2021), page 6.

⁴⁹ Submission by Pen CS (29 September 2021), page 2.

⁵⁰ Submission by Outcome Health (29 September 2021), page 2.

⁵¹ Submission by Best Practice Software (6 October 2021) page 2; Submission by MSIA (1 October 2021), page 2; Submission by MSIA (8 October 2021), page 2; Submission by MSIA (1 November 2021), page 3; Submission by Outcome Health (29 September 2021) page 2; Submission by Pen CS (29 September 2021), pages 3 and 4.

⁵² Submission by Best Practice (6 October 2021), page 2; Submission by MSIA (1 November 2021), page 3; Submission by Outcome Health (29 September 2021), page 3; Submission by Pen CS (29 September 2021), page 2.

⁵³ Submission by Consumer Health Forum (9 November 2021).

- The Proposed Conduct relates to a core role of the Participating PHNs,⁵⁴ and will enable them to better deliver their functions⁵⁵
- PHNs have an obligation to minimise the costs of data extraction services (or any other software services)⁵⁶
- Gold Coast PHN has not received any payment from other PHNs for participating in or assigning its intellectual property in Primary Sense 1 to the Primary Sense Project⁵⁷
- while a tender process has not been used, the Participating PHNs have developed a business case and consider that Primary Sense 2 will deliver value for money and assist them to meet their objectives,⁵⁸ and
- PHNs have successfully demonstrated ability to develop software (for instance, Gold Coast PHN in developing Primary Sense 1, and multiple PHNs in supporting the development of the Primary Health Insights platform).

4.37. The Department of Health considers that PHNs play a critical role in collecting and analysing a range of population and health data (including de-identified GP clinics data) for the purposes of improving primary health services. The Department considers in performing that role, PHNs are free to make software procurement decisions independently that best meet their individual needs, and that it is agnostic towards how PHNs collect data from GP clinics.⁵⁹

4.38. The ACCC notes that PHNs are not-for-profit entities and their activities are funded by the Commonwealth Government through the Department of Health. PHNs' performance is periodically assessed against a published performance framework by the Department of Health. The ACCC considers the Department's oversight reduces the risk that PHNs will use government money inappropriately/ inefficiently or undertake activities beyond their remit.

4.39. The ACCC therefore considers that a public detriment in the form of inappropriate use of government money is unlikely to arise from the Proposed Conduct.

⁵⁴ Submission by WAPHA – response to interested party submissions (12 November 2021), sections 5.1 and 9.2.

⁵⁵ Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), section G7.1. WAPHA also states that a core function of PHNs is to gather, securely store and use data for purposes connected with their functions on behalf of the Australian Government (Application by WAPHA (14 September 2021), paragraphs 1.3.8-1.3.9). WAPHA also states that the PHN Programme Funding Guidelines do not prevent PHNs from developing their own capability to provide the software services to themselves: Submission by WAPHA – response to interested party submissions (12 November 2021), page 8.

⁵⁶ Submission by WAPHA – response to interested party submissions (12 November 2021), page 4.

⁵⁷ Submission by WAPHA – response to interested party submissions (12 November 2021), page 23, sections G4.2-G4.4. WAPHA also states that, in 2019, the Gold Coast PHN approached other PHNs to gauge their interest in using Primary Sense 1 for their own purposes and at their own costs, but did not intend to be a software supplier to other PHNs. WAPHA submits that the current Primary Sense Project is based on a different technical and collaborative approach (Submission by WAPHA - response to interested party submissions (12 November 2021), page 12, section 9.7).

⁵⁸ Submission by WAPHA – response to interested party submissions (12 November 2021), page 13, sections 11.1-11.3.

⁵⁹ Submission by Commonwealth Department of Health (27 September 2021), page 2.

Lessening of competition

The supply and acquisition of data extraction tools to and by PHNs

4.40. Numerous interested parties have raised concerns that the Proposed Conduct will significantly lessen competition through the Participating PHNs self-supplying data-extraction tools.⁶⁰

4.41. The ACCC understands that:

- all Participating PHNs in the Primary Sense Project will pay for the costs of the Project and provision of services by WAPHA on an 'at cost' basis, and no participant in the Project (including WAPHA) will make a profit from Primary Sense 2
- no Participating PHNs will be required to use Primary Sense 2 (or use it exclusively), and PHNs may decide to continue purchasing licences for third-party data extraction tools⁶¹
- Participating PHNs can retire from the Primary Sense Project by giving a 6 month notice and paying reasonable costs associated with the retirement, and
- the Proposed Conduct will not affect other segments,⁶² and third-party vendors can continue to sell data extraction tools to customers in these segments.⁶³

4.42. Given the above, the ACCC considers the Proposed Conduct is intended to provide Participating PHNs with an alternative and potentially more efficient means of obtaining data extraction tool services (through vertical integration). To the extent the Proposed Conduct enables Participating PHNs to obtain a lower cost and more tailored data extraction tool, those PHNs' use of such a tool is likely to increase rather than decrease – whereas reductions in competition are normally associated with declines in quality-adjusted output.

4.43. While not discussed in submissions or the application, the ACCC has also considered the possibility that WAPHA and/or the Participating PHNs individually using the Primary Sense 2 tool as leverage to seek more favourable terms and conditions from existing suppliers. This strategy may reduce suppliers' willingness and/or ability to continue to provide their data extraction tools to Participating PHNs. However, even if this occurred, the Participating PHNs would still be able to use Primary Sense 2. Given that Primary Sense 2 may offer a more cost effective option for obtaining data extraction services than acquiring them from the incumbent suppliers, the Participating PHNs' use of these services may increase with the adoption of Primary Sense 2. As discussed in paragraph 4.42 above, reductions in competition are normally associated with decline (rather than increase) in quality-adjusted output. This suggests that even if the Primary Sense Project is ultimately used to enhance Participating PHNs' bargaining power, this is unlikely to harm overall economic welfare.

The supply of data extraction tools to GP clinics

⁶⁰ Submission by MediSecure (29 October 2021) page 1; Submission by MSIA (1 November 2021), page 6.

⁶¹ See also footnote 13. WAPHA submits that Gold Coast PHN has continued to procure Pen CS' data extraction services for 4 years even after having developed Primary Sense 1, and there are currently other PHNs that currently offer GP clinics a choice of more than one data extraction tool to use.

⁶² See Application by WAPHA (14 September 2021), paragraph 3.1.2: health clinics owned by corporations, clinic that are not part of a PHN or corporation, and Aboriginal Medical Services clinics.

⁶³ However, the PHNs are currently likely to be the largest customers of data extraction tools (by volume and value).

4.44. Several interested parties have expressed significant concerns about the impact of the Proposed Conduct on the supply of data extraction tools to GP clinics. They consider that:

- Existing providers will not be able to compete to supply a data extraction tool to GP clinics, as Participating PHNs will provide Primary Sense 2 to the clinics to use for free.⁶⁴ The Proposed Conduct will reduce existing providers' market share and revenue, such that they may need to increase their pricing.⁶⁵ The Proposed Conduct may also ultimately cause existing providers Pen CS and/or Outcome Health to cease supplying to GP clinics (or other market segments).⁶⁶
- GP clinics will feel compelled to switch to using Primary Sense 2 (even though it may be an inferior product), out of fear that they will cease to be eligible for the PIP QI payment.⁶⁷ Once GP clinics started using Primary Sense 2, it would be very difficult for them to switch back to other data extraction tools.⁶⁸
- GP clinics may not be able to afford to buy a Pen CS or Outcome Health data extraction licence (if PHNs no longer pay for it), and this may mean less choices for GP clinics.⁶⁹
- If PHNs were to disband in the future due to policy shifts, there would be no supplier of data extraction tools to GP clinics as Pen CS and Outcome Health would have left the market.⁷⁰

4.45. In response, WAPHA submits that:

- The Proposed Conduct will not prevent Pen CS or Outcome Health from supplying tools to GP clinics on their merits. While the existing providers currently appear to largely rely on PHNs to pay for data extraction licences that are used for free by GP clinics, they are free to directly market and sell licences to GP clinics. This will not change through the Proposed Conduct.⁷¹
- While many GP clinics currently use one of the 3 data extraction tools (from Pen CS or Outcome Health, or Primary Sense 1) provided by their PHN for free, there are clinics that choose to purchase their own licence directly from their preferred provider (for instance, from Pen CS).
- Based on publicly available information, the cost of a commercial data extraction licence is low and should not be a barrier for GP clinics purchasing the licence of an alternative tool.
- The Proposed Conduct will not require GP clinics to use Primary Sense 2 at all nor exclusively. There is no requirement for GP clinics to use any particular tool for the purposes of the PIP QI scheme.⁷²

⁶⁴ Submission by MediSecure (29 October 2021), pages 1-2.

⁶⁵ Submission by Pen CS (29 September 2021), page 3 section 2.3.

⁶⁶ Submission by MSIA (1 November 2021), page 6.

⁶⁷ Submission by Best Practice Software (6 October 2021), page 5; Submission by MSIA (1 November 2021) page 5.

⁶⁸ Submission by MSIA (1 November 2021), page 5.

⁶⁹ Submission by RACGP (14 October 2021), page 1.

⁷⁰ Submission by MediSecure (29 October 2021), page 3. The submission refers to the abolishment of Medicare Locals, PHNs' predecessors, due to a decision of the Commonwealth Government.

⁷¹ Submission by WAPHA – response to interested party submissions (12 November 2021), page 16, section C2.1.

⁷² This is because PHNs must accept any eligible PIP QI data set provided by the GP clinics, regardless of what tool or software systems the clinics use. Some clinics use their PMS to extract the relevant data, rather than using any one of the 3 existing data extraction tools.

- Some GP clinics may choose to pay to continue to use their existing data extraction tools (instead of or in addition to using Primary Sense 2), because these tools offer a range of additional functionalities which may be useful for GP clinics (for instance, clinical audit, reporting and alerts, and clinical decision support).⁷³ Some clinics may also keep their existing tools if they consider the process of transitioning to Primary Sense 2 would be too significant for them.
- PHNs are not the only customers, and Pen CS and Outcome Health may continue to market and sell products to customers in other market segments.⁷⁴

4.46. The Department of Health considers that the ability of GP clinics to choose the data extraction tool that best suits their needs will incentivise innovation and not adversely impact competition in the delivery of data extraction services to GP clinics.

4.47. The University of Melbourne submits that GP clinics will exclusively implement Primary Sense 2, which will disadvantage GPs and detrimentally affect general practice research and innovation.⁷⁵ In response, WAPHA submits that the Participating PHNs do not currently use any tools developed by the University, and the University can continue to promote its products to GP clinics.⁷⁶

4.48. The ACCC accepts that the Proposed Conduct is likely to result in a major shift in how data extraction tools are provided to the majority of GP clinics affiliated with PHNs. In particular, GP clinics that currently use the Pen CS or Outcome Health data extraction tools at no charge (under licence from PHNs) are likely to lose free access to these tools if their PHNs decide to no longer acquire tools from those suppliers. The GP clinics will then need to decide whether to accept the free Primary Sense 2 tool developed by PHNs or pay Pen CS or Outcome Health so that they can continue using their tools. However, for the purposes of the PIP QI scheme, some GP clinics may not need to use any data extraction tool at all, as they could instead use the software tools in their PMS to obtain the relevant data for submission to PHNs,⁷⁷ and this will not change through the Proposed Conduct.

4.49. The ACCC acknowledges that the Proposed Conduct will likely result in disruption to the established business model of Pen CS and Outcome Health, whereby they currently predominantly supply data extraction tools to PHNs rather than directly to GP clinics. The Proposed Conduct may provide an incentive for them to increase their efforts to innovate, differentiate and market their tools more actively to GP clinics. However, it is also possible that they may reduce investment in the further development of their data extraction tools, if they consider insufficient number of GP clinics are likely to pay for a license to continue using their tools. It is difficult to predict in future how many GP clinics will prefer to use Primary Sense 2 provided by the Participating PHNs, or independently acquire their own data extraction tools from Pen CS and Outcome Health, as this is an individual business decision for GP clinics.

4.50. Despite this, based on current information, the ACCC's preliminary view is that the Proposed Conduct is unlikely to result in any significant competitive detriment in the supply of data extraction tools to GPs for the following reasons:

⁷³ Some PHNs may not currently purchase Pen CS' Topbar (a clinical decision support tool) for GP clinics to use, and GP clinics would need to pay a licensing fee to Pen CS if they wish to use Topbar.

⁷⁴ See Application by WAPHA (14 September 2021), paragraph 3.1.2: health clinics owned by corporations, clinic that are not part of a PHN or corporation, and Aboriginal Medical Services clinics.

⁷⁵ Submission by the University of Melbourne (1 October 2021), pages 1 and 2.

⁷⁶ Submission by WAPHA – response to interested party submissions (12 November 2021), page 26, sections I1.1-I1.2.

⁷⁷ The ACCC understands that some of the major PMS providers currently have software tools that allow GP clinics to extract PIP QI data for submission to PHNs.

- There is no restriction on Pen CS or Outcome Health (or any other party) to supply data extraction tools to GP clinics directly. The ACCC understands each of Pen CS and Outcome Health currently directly supplies data extraction tools to a small number of GP clinics. Pen CS also supplies additional software to GP clinics that some PHNs may not pay for, for instance a clinical decision tool called Topbar.⁷⁸
- GP clinics are not required to use Primary Sense 2 (if offered by PHNs). They can and should continue to be able to buy data extraction tool licences directly from Pen CS and Outcome Health.
- Pen CS and Outcome Health are not prevented from supplying their products to customers in other segments. For instance, Pen CS currently supplies the majority of Aboriginal Medical Services clinics.⁷⁹
- The extent to which Participating PHNs will switch away from offering tools developed by Pen CS or Outcome Health to offering Primary Sense 2 to GP clinics is not clear.⁸⁰
- The Proposed Conduct does not prevent any Participating PHNs from working with Pen CS or Outcome Health (or any other third parties) to use or develop a different tool, provided that the intellectual property in Primary Sense 2 is not used or disclosed to third parties.⁸¹
- Both Pen CS and Outcome Health have been operating for a long time (28 years and 20 years, respectively) and were able to operate during periods of change.⁸² Both companies have product offerings beyond data extraction tools.⁸³
- There are other data extraction tools in use at GP clinics that have been developed independently of PHNs support and for purposes unrelated to PHNs' activities.⁸⁴ The ACCC also understands there are numerous private sector companies who have expressed interest in creating new data extraction tools.⁸⁵
- There is currently no information to suggest that PHNs are likely to be disbanded in the future.

4.51. The ACCC has also considered the possibility that the Proposed Conduct may affect the future development of data extraction tools to address GP clinics' needs. In particular, Participating PHNs may not have as much incentive to tailor the

⁷⁸ Submission by WAPHA – response to interested party submissions (12 November 2021), page 24, section C7.3.

⁷⁹ Application by WAPHA (14 September 2021), paragraph 3.1.6(c).

⁸⁰ It is possible that some of the 15 current Participating PHNs may decide to continue purchasing data extraction licences from Pen CS (even if the Primary Sense Project is successful), and it is not certain whether the remaining 14 PHNs will become Participating PHNs and participate in the Proposed Conduct. The 15 current Participating PHNs are all Pen CS customers. As there is uncertainty as to whether the remaining PHNs will join the Primary Sense Project, the impact of the Proposed Conduct on Outcome Health is not yet clear.

⁸¹ Submission by WAPHA – response to ACCC request for information (12 November 2021), page 7, section 6.6.

⁸² For instance, both suppliers predated the establishment (and subsequent abolition) of Medicare Locals and the establishment of PHNs, as well as the introduction of the PIP QI scheme in 2019.

⁸³ For instance, Pen CS offers communication services to patients on behalf of GP clinics and offers clinical decision support tools to GP clinics (sometimes as a standalone product).⁸³ It is also exploring new technology solutions in conjunction with GPs, for instance at home patient monitoring. Outcome Health offers mental health clinics across Victoria and in Aged Care, Diabetes and Asthma clinics in GP clinics and a range of mental health services to Ambulance Victoria.

⁸⁴ For instance, the University of Melbourne has developed the GRHANITE data extraction tool for medical research purposes.

⁸⁵ Submission by Best Practice Software (6 October 2021), pages 2 and 4.

development of Primary Sense 2 to make it suitable for GPs to use, compared to the existing incumbent suppliers with respect to the development of their data extraction tools. The ACCC considers this is unlikely, given Participating PHNs will wish GP clinics to adopt (and continue to use) Primary Sense 2 and continue to work with their PHNs on measures to improve patient outcomes. The ACCC also notes a stated reason for the Proposed Conduct is to provide a fit-for-purpose data extraction tool (with clinical decision support and other functions) for GPs to use, and this tool, Primary Sense 2, will be developed in consultation with GPs (as well as the RACGP) and researchers. However, to the extent that current (or future) external suppliers of data extraction tools wish to develop improved or additional functionalities for GPs to use, the ACCC considers that the Proposed Conduct would not prevent them from doing so.

The supply of clinical decision support tools to GP clinics

- 4.52. MediSecure and the University of Melbourne consider that the Proposed Conduct will negatively affect competition for the supply of clinical decision support tools to GP clinics. WAPHA disagrees with this claim, as it considers that all 3 current data extraction tools have clinical decision support functions.
- 4.53. The ACCC considers that the Proposed Conduct is unlikely to affect the supply of clinical decision support tools to GP clinics. The ACCC notes that there are currently many different types of clinical decision support tools available to GPs. While Primary Sense 2 will include some clinical decision support function, the Proposed Conduct will not restrict GP clinics from using other clinical decision support tools nor preclude any suppliers from selling their clinical decision support tools to GPs.

Change management impact on GP clinics

- 4.54. The RACGP submits that the Proposed Conduct will change the status quo for many of the approximately 6,300 GP clinics that currently use a data extraction tool provided by their PHN, and therefore consultation must be undertaken with GP clinics. The RACGP further submits that it will take time for GP clinics to be comfortable with transitioning to Primary Sense 2, and unfamiliarity with operating that tool may affect their quality improvement activities.
- 4.55. MSIA submits that the Proposed Conduct will lead to significant change management costs for GP clinics.⁸⁶ MSIA also considers that Primary Sense 2 may not be interoperable with or satisfy the licensing terms of the PMS which it needs to connect to for the data extraction, which means GPs would not be able to use Primary Sense 2.⁸⁷
- 4.56. WAPHA submits that:
- Primary Sense 2 will be developed in consultation with GPs, universities, the RACGP and other health bodies.⁸⁸ Participating PHNs who wish to offer Primary Sense 2 to their GP clinics will also consult with GP clinics in advance⁸⁹

⁸⁶ MSIA considers this includes staff training costs. See Submission by MSIA (1 November 2021), page 8.

⁸⁷ Pen CS and Best Practice Software also made similar submissions.

⁸⁸ Submission by WAPHA – response to interested party submissions (12 November 2021), page 27, paragraph J1.4.

⁸⁹ Ibid. WAPHA indicates that this process for developing Primary Sense 2 will be similar to that used to develop Primary Sense 1.

- the installation process for Primary Sense 2 at GP clinics will be simple and quick,⁹⁰ and
- WAPHA will negotiate the appropriate commercial agreements with Best Practice Software and other PMS providers.

4.57. As mentioned in paragraph 4.50 above, the extent to which Participating PHNs will switch away from offering the existing data extraction tools to offering only Primary Sense 2 to GP clinics is not clear. Nonetheless, to the extent this occurs, the ACCC considers it is unlikely to impose an undue change management burden on GP clinics. The change that will likely result from the Proposed Conduct is no different to the current situation, where PHNs may decide to switch to a different data extraction tool provider and offer a different tool to GP clinics. While GP clinics are generally provided a data extraction tool to use by their PHN at no cost, they can elect to purchase alternative or additional data extraction tools. The ACCC understands that some GPs do this already to have access to extra software that some PHNs may not pay for, such as Pen CS' Topbar.⁹¹ All 3 current data extraction tools appear to have a relatively straightforward installation process. Some GP clinics may also choose to not use any data extraction tool offered by PHNs, instead using their PMS to generate the required PIP QI data set for submission to PHNs.

Impact on medical software industry

4.58. Several interested parties submit that authorisation will have a strong chilling effect on private sector investment in medical software and stifle innovation.⁹²

4.59. The ACCC does not consider the Proposed Conduct is likely to affect the broader medical software market, as no software providers are prevented from developing and marketing their products to the Participating PHNs, GP clinics or any other customers.

Impact on access to data by medical researchers

4.60. The University of Melbourne submits that the Proposed Conduct will negatively affect general practice research and quality improvement.⁹³ The Australasian Association for Academic Primary Care considers the Proposed Conduct will result in Participating PHNs having a monopoly or significant control over general practice data.⁹⁴ It considers that WAPHA should provide clarity on data governance, including processes for external researchers to access data for research.

4.61. WAPHA submits that PHNs have a long history of working with researchers and have existing processes in place for researchers to request access to data, which will not be changed through the Proposed Conduct.⁹⁵ It also submits that the Proposed Conduct will not impact researchers' ability to access data from other sources, such as directly from GP clinics or from vendors of other software used by GP clinics.⁹⁶

⁹⁰ Submission by WAPHA – response to clarifications requested by ACCC (123 November 2021), page 6, sections B4.1-B4.3. WAPHA also states that if GP clinics install Primary Sense 2, they are not required to uninstall or stop using their existing data extraction tool.

⁹¹ Topbar is a clinical decision support tool.

⁹² Submission by Best Practice Software (6 October 2021), page 1; Submission by MSIA (1 October 2021); Submission by the University of Melbourne (12 October 2021), page 1; Submission by Webstercare (30 September 2021), page 1.

⁹³ Submission by the University of Melbourne (12 October 2021), page 1.

⁹⁴ Submission by the Australasian Association for Academic Primary Care (27 October 2021).

⁹⁵ It submits that those processes are generally consistent between PHNs in that access will only be provided if: researchers have obtained appropriate ethics approval; the research is aligned with the permitted secondary purposes under which the data was provided by the GP clinics to the PHNs; and the data is not going to be used for commercial purposes or gain.

⁹⁶ Submission by WAPHA – response to ACCC request for information (12 November 2021), page 8, section 7.5.

- 4.62. The Department of Health supports the application on the basis that data to be extracted from Primary Sense 2 will not be used by PHNs for any commercial gain or purpose.
- 4.63. The ACCC understands that researchers are already currently able to make a request to PHNs to access data for research purposes. Some researchers that currently have agreements to access data from the existing data extraction providers may lose this access pathway in the future if the Proposed Conduct is authorised. To the extent this occurs, the ACCC considers that researchers should be able to request access to data directly from the Participating PHNs. If there is any disagreement over access to data held by the Participating PHNs, the ACCC considers it is likely that researchers and other interested parties will be able to request guidance or intervention from the Department of Health (which oversees the PHN Programme).
- 4.64. The ACCC also notes that researchers will continue to have other options to access primary health data, for instance, directly from consenting GP clinics or other vendors that hold GP clinics data. Researchers will also continue to be able to apply to the Australian Institute of Health and Welfare for access to de-identified PIP QI data provided by GP clinics to the PHNs.
- 4.65. The ACCC therefore considers the Proposed Conduct is not likely to impede access to primary health data for research purposes.

ACCC conclusion on public detriment

- 4.66. Based on the reasons outlined above, the ACCC considers that the Proposed Conduct is not likely to result in a public detriment.

Balance of public benefit and detriment

- 4.67. For the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and this public benefit would outweigh any detriment to the public from the Proposed Conduct.

Length of authorisation

- 4.68. The Act allows the ACCC to grant authorisation for a limited period of time.⁹⁷ 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.
- 4.69. In this instance, WAPHA seeks authorisation for 10 years. WAPHA submits this period will provide sufficient time for the Participating PHNs to effectively establish, maintain and progress the Proposed Conduct and realise the benefits.⁹⁸ However, WAPHA also acknowledged that if authorisation is provided for a shorter period, the benefits of the Proposed Conduct will still exist, and the project will still proceed.⁹⁹

⁹⁷ Subsection 91(1) of the Act.

⁹⁸ Application by WAPHA (14 September 2021), page 11, paragraph 2.4.2.

⁹⁹ Submission by WAPHA– response to ACCC request for information (12 November 2021), page 2, paragraph 1.7.

- 4.70. Interested parties oppose the length of authorisation period sought by WAPHA. While opposed to the application, MSIA submits that 12 months should be the maximum time allowed for the Proposed Conduct.¹⁰⁰
- 4.71. Given the dynamic nature of information technology and digital health, the ACCC considers that it is appropriate to grant a shorter authorisation period than the 10 years requested. This will allow the ACCC to assess the public benefits and detriments that have resulted from the Proposed Conduct upon any application for re-authorisation.
- 4.72. The ACCC proposes to grant authorisation for 5 years.

5. Draft determination

The application

- 5.1. On 14 September 2021, WAPHA lodged application for authorisation AA1000577, seeking authorisation under subsection 88(1) of the Act.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. 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.
- 5.4. For the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct would be likely to result in a benefit to the public and that 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.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000577 to enable WAPHA and Participating PHNs to jointly up-scale and develop the Primary Sense 2 for their own use and for providing it to their affiliated GP clinics, as set out in paragraph 1.4 and defined as the Proposed Conduct.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000577 for 5 years.
- 5.9. This draft determination is made on 17 December 2021.

¹⁰⁰ Submission by MSIA (1 November 2021), page 6; Submission by Pen CS (29 September 2021), page 7, paragraph 9.4.

6. Interim authorisation

- 6.1. The ACCC has decided to grant interim authorisation for the Proposed Interim Conduct (described below).
- 6.2. At the time of lodging the application, WAPHA requested interim authorisation to enable the development phase (described in paragraph 1.4(a), and from here on referred to as the 'Proposed Interim Conduct') to take place. WAPHA indicated that this would enable the Participating PHNs to undertake the work necessary for Primary Sense 2 to be upscaled into a useable product by more than one PHN and for it to be integrated into the Primary Health Insights platform.
- 6.3. WAPHA is not requesting interim authorisation to enter into and give effect to service agreements with the other Participating PHNs to enable them to use Primary Sense 2 (as described in paragraph 1.4(b) above). It submits that, prior to substantive authorisation being granted, only Gold Coast PHN will use Primary Sense 1, and no other PHN will switch to the product.
- 6.4. WAPHA submits that interim authorisation:
 - is necessary for undertaking and completing this development work to plan and commence the transition of some of the Participating PHNs to Primary Sense 2 at the end of the second quarter in 2022, prior to the Participating PHNs being required to renew their existing data extraction licence agreements with current providers, and
 - will allow the public benefits to be realised more promptly.
- 6.5. WAPHA submits it is unlikely that the Proposed Interim Conduct will substantially lessen competition in the market for data extraction software tools.
- 6.6. Interested parties submit that there is no sufficient urgency to support the request for interim authorisation; no patients will come to harm, and no GP will miss out on core functionality without interim authorisation. They consider that, however, there is a real possibility of permanent harm to competition in the marketplace if interim authorisation is granted.¹⁰¹
- 6.7. The ACCC considers interim authorisation for the Proposed Interim Conduct should be granted for the following reasons:
 - Based on the analysis in this draft determination, the ACCC's preliminary view is that the Proposed Conduct is likely to result in a public benefit which would outweigh any public detriment.
 - No other PHN will begin using the software unless and until substantive authorisation is granted. Allowing the Participating PHNs to develop, but not use, Primary Sense 2 before substantive authorisation may be granted will not irreparably alter the market.
 - Allowing the Proposed Interim Conduct to proceed now will place the Participating PHNs in a better position to decide whether, and for how long, to renew their contracts with existing data extraction tool providers.

¹⁰¹ Submission by MSIA (1 November 2021), page 6; Submission by Outcome Health (29 September 2021), page 3; Submission by Pen CS (9 September 2021), page 2.

6.8. Interim authorisation for the Proposed Interim Conduct commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination by 28 January 2022. In addition, consistent with section 90A of the Act, WAPHA or an interested party may request that the ACCC hold a conference to discuss the draft determination.