AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Determination

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

25 February 2022

Commissioners: Keogh
Rickard
Brakey

Summary

The ACCC has authorised WA Primary Health Alliance Ltd (WAPHA) and a group of organisations managing other Primary Health Networks (PHNs) to jointly develop their own data extraction software tool.

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 tools from third-party suppliers and provide these tools at no cost to GP clinics to enable the data extraction.

The application for authorisation is intended to result in the Participating PHNs owning their own data extraction software tool (Primary Sense 2) as an alternative to the existing third-party tools. If the development of Primary Sense 2 is successful, the Participating PHNs 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 licence for any other data extraction tools.

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 Participating 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. In response to potential detriments raised in submissions, the ACCC's views are:

- **The risk that Participating PHNs will use government money inappropriately/inefficiently or undertake activities beyond their remit when undertaking the Proposed Conduct 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 a data extraction software tool. The ACCC considers that the Participating PHNs switching to self-supply of a data extraction software tool is not anti-competitive.**
- **No Participating PHNs will be required to use Primary Sense 2 exclusively. Participating PHNs can choose to continue purchasing licences for third-party data extraction software tools instead of, or in addition to, using Primary Sense 2.**
- **There is no restriction on existing third-party data extraction tool suppliers (or any other parties) from directly supplying data extraction (or any other medical software) tools to the 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 has granted authorisation until 19 March 2027.

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 the other Participating PHNs to jointly up-scale and develop the 'Primary Sense 2'[2] data extraction tool for their own use and to provide 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. On 17 December 2021, the ACCC granted interim authorisation[3] under subsection 91(2) of the Act. Interim authorisation will remain in place until it is revoked or the date the ACCC's determination comes into effect.

The Proposed Conduct

1.4. WAPHA seeks authorisation for WAPHA and the other Participating PHNs to:

(a) give effect to an agreement[4] to up-scale and develop Primary Sense 2 at a national level, and integrate Primary Sense 2 to work within Primary Health Insights,[5] 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:

- deliver on PHNs' objectives to increase the efficiency and effectiveness of primary health care services

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1 The current Participating PHNs are comprised of: 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 software tool built by the Gold Coast PHN in 2016-2017 (see paragraph 2.5 below).

3 See the ACCC's draft determination and interim authorisation decision of 17 December 2021, available from the ACCC's authorisations public register.

4 WAPHA and the other current Participating PHNs have entered into an unincorporated joint venture to jointly fund the work to up-scale and develop Primary Sense 2, and integrate Primary Sense 2 to work within the Primary Health Insights platform (see application by WAPHA (14 September 2021), paragraph 2.1.7).

5 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).

- 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 Health[6] to coordinate primary health care in the regions that they are responsible for. There are 31 PHNs (operated by 29 PHN organisations[7]) across Australia working to increase the effectiveness and coordination of primary health care services in their regions.[8]

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 care 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 Commonwealth Department of Health. Under this scheme, GP clinics receive an incentive payment from the Commonwealth Government if they participate in quality improvement activities with their local PHN and submit a set of de-identified data to their PHN quarterly.[9] The PHNs share this data with the Commonwealth Government [10] and with states and territories to inform insights into population health services usage.

Data extraction software tools

2.4. GP clinics can currently provide PIP QI data to PHNs in different ways, including:[11]

- entering into a data sharing agreement with their PHN, who engages a third party to extract data from the clinic's Practice Management Software (**PMS**). The PHN purchases a licence for the data extraction software tool and provides the tool to the clinic to use at no cost to the clinic (according to WAPHA, this practice represents 70% of all GP clinics nationally)

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

7 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).

8 PHNs operate under the PHN Program 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 (ACNC).

9 The data set consists of 10 Improvement Measures and must comply with the PIP Eligible Data Set Data Governance Framework set out by the Commonwealth Department of Health.

10 Via the Australian Institute of Health and Welfare.

11 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 software tool supplier, 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.[12]

2.5. In Australia, there are currently 2 main data extraction software tool suppliers, Pen CS[13] and Outcome Health.[14] Currently all PHNs purchase data extraction software tool licences from one of these companies, with Pen CS supplying 85% of PHNs. In 2016-2017, using funding from the Commonwealth Department of Health, the Gold Coast PHN developed its own data extraction software tool, Primary Sense 1. Gold Coast PHN currently supplies Primary Sense 1 to over 80 GP clinics on the Gold Coast, as well as continuing to purchase data extraction software tool licences from Pen CS for supply to GP clinics that wish to use Pen CS' tool.[15]

2.6. The data extraction software tools developed by Pen CS, Outcome Health and Gold Coast PHN have numerous additional functions for GP clinics, including auditing, clinical decision support, and alerts and notifications. The tools are also used by PHNs to view and analyse population health data.

Primary Sense Project

2.7. Gold Coast PHN has assigned its intellectual property rights in Primary Sense 1 to the 14 other 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 (using money from existing PHN funding provided by the Commonwealth Government)[16] 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 who elect to use Primary Sense 2 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 6 months' notice and bearing 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.[17]

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[12] 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. See for instance, Submission by Best Practice (6 October 2021), page 2.

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

[14] Outcome Health's POLAR data extraction tool is used by approximately 1,300 GP clinics and 6 PHNs. It also operates the AURORA platform to support primary care research. Outcome Health is a not-for-profit organisation.

[15] Gold Coast PHN offers its affiliated GP clinics the choice of using Primary Sense 1 or Pen CS' data extraction tool.

[16] Submission by WAPHA – response to MSIA submission (10 February 2022), paragraph 2.3.

[17] 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.

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, at no cost to the GP clinics. They may also continue to offer any other data extraction tools to GP clinics if they wish to do so. WAPHA submits that the Participating PHNs may choose to support more than one data extraction software tool for various reasons, including a desire to offer choice to GP clinics,[18] a need to support programmes tied to functionality delivered by a specific tool or to use or make available different functionalities provided by the tools.

2.12. If the Participating PHNs elect to leave the unincorporated joint venture, they can continue to use Primary Sense 2 for their own purposes.[19] 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 the Proposed Conduct will not impede the ability of GP clinics to also use other data extraction software tools or any other tools (including those provided by the clinics' PMS providers).

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 software tool suppliers, adjacent software and services providers, relevant industry associations or peak bodies, consumer groups, state and federal government and relevant regulatory bodies.[20]

Submissions prior to the draft determination

3.3. The ACCC received 17 submissions from 12 interested parties in relation to the application.

3.4. The Consumer Health Forum of Australia supported the application. It considered the Proposed Conduct will allow Participating PHNs to ultimately achieve better health outcomes for the community rather than result in any detriment to consumers. The Commonwealth Department of Health considered that efficiency and security control benefits may arise from the Proposed Conduct and noted that there is no requirement for GP clinics and Participating PHNs to use Primary Sense 2, or to do so exclusively.

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[18] WAPHA states that, in its view, a Participating PHN may provide each GP clinic a choice as to which data extraction tool they use, however the PHN is unlikely to choose to fund the use of more than one data extraction tool per GP clinic as that would not be an efficient use of funding. See Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), page 5, clauses B2.2-B2.3.

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

[20] A list of the parties consulted and the public submissions received are available from the ACCC's public register.

3.5. Submissions opposing the application were received from the following interested parties:

- medical software companies, including the Medical Software Industry Association (**MSIA**) and its member companies
- existing data extraction tool suppliers, and
- research institutions (a university, and a representative body for academic and researchers working in primary care).

3.6. These interested parties strongly oppose 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 4.9-4.76 below).

3.7. Interested parties also raised other issues relating to the application. These are discussed in paragraphs 3.8-3.12 below.

Lack of consultation by WAPHA

3.8. Many interested parties indicated 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 submitted 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 it as potentially having an interest in the matter and given them an opportunity to comment. Interested parties have also had a further opportunity to comment following the release of the draft determination.

Commercial agreement between Gold Coast PHN and Best Practice Software

3.10. On 6 October 2021, Best Practice Software[21] 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. In response, WAPHA submitted that the current agreement between Gold Coast PHN and Best Practice Software does not extend to any other party. WAPHA submitted that while Gold Coast PHN has assigned its intellectual property rights in Primary Sense 1 to the other Participating PHNs, that does not include transfer of any agreement to access Best Practice Software's systems.

3.12. The ACCC considered that this issue was unlikely to be relevant to its consideration of the public benefits and detriments arising from the Proposed Conduct. Accordingly, the ACCC did not further discuss this issue in its draft determination.

[21] 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.

Submissions following the draft determination

3.13. On 17 December 2021, the ACCC issued a draft determination proposing to grant authorisation.[22] The ACCC received 3 submissions in response to the draft determination.[23]

3.14. Dr de Wet from Gold Coast Health[24] supported the application for authorisation and agreed with the public benefits claimed by WAPHA as being likely to arise from the Proposed Conduct.

3.15. MSIA and Outcome Health each provided a submission raising objections to the ACCC's views in the draft determination regarding the public benefit and detriment that would result from the Proposed Conduct (this is discussed within paragraphs 4.9-4.76 below) and the proposed length of authorisation period (this is discussed within paragraphs 4.78-4.84 below).

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.[25] Consistent with 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 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.

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 the Aboriginal Medical Services clinics 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.

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22 See the ACCC's draft determination and interim authorisation decision of 17 December 2021, available from the ACCC's authorisations public register.

23 In addition, the Commonwealth Department of Health also provided an email to the ACCC on 11 February 2022, in response to certain issues raised in MSIA's submission (dated 4 February 2022) and Outcome Health's submission (dated 9 February 2022). The email is available on the ACCC's authorisations public register.

24 Dr de Wet was previously the Clinical Lead for the Gold Coast PHN and has been involved in the development of Primary Sense 1. He is a practising GP, and is currently the Clinical Director, Specialist Medical Services at Gold Coast Health. His submission is dated 18 November 2021. As Dr de Wet's submission was received after the end of the submission period in relation to the application, the ACCC did not take it into account in its draft determination but has treated it as a submission received after the draft determination.

25 WAPHA has not sought authorisation for Proposed Conduct in respect of other provisions of the Act as suggested by MSIA, namely provisions relating to resale price maintenance, misuse of market power and exclusive dealing, and there is currently insufficient information before the ACCC to support MSIA's contention that the Applicants would, through the Proposed Conduct, breach these other provisions of the Act in the future (see Submission by MSIA (1 November 2021), page 5; and Submission by WAPHA – response to interested party submissions (12 November 2021), page 7, paragraphs 4.1-4.9).

4.5. The ACCC notes MSIA's submission that the ACCC should also consider the "acquisition side of the market for data extraction tools to GP clinics".[26] MSIA submits that the ACCC should consider how GP clinics would likely make decisions regarding which data extraction software tools to use, if the Proposed Conduct was authorised. The ACCC considers the issues raised by MSIA are more properly characterised as issues relevant to the "supply of data extraction software tools to GP clinics" and has discussed these issues in paragraphs 4.50-4.60 below.

Future with and without the Proposed Conduct

4.6. 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.

4.7. WAPHA submits that the Participating PHNs would be unlikely to proceed with the Primary Sense Project without authorisation being granted by the ACCC.

4.8. The ACCC considers that in the likely future without the Proposed Conduct, Participating PHNs will continue to procure licences for the use of data extraction software tools from existing suppliers, and Gold Coast PHN will also use Primary Sense 1.[27]

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*.[28]

4.10. 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

4.11. 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.[29] It submits that the forecast costs to operate Primary Sense 2 are significantly lower than the licensing costs Participating PHNs currently pay for the data extraction software tools from existing third-party suppliers, with modelling showing a potential full return on investment in the Primary Sense Project within 2

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[26] Submission by MSIA (4 February 2022), paragraphs 18-19.

[27] As mentioned in paragraph 2.5 above, Gold Coast PHN is currently continuing to purchase licence to use and supply Pen CS' data extraction tool to its affiliated GP clinics, even after having developed Primary Sense 1.

[28] *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

[29] Application by WAPHA (14 September 2021), pages 13-14, paragraph 4.1.1.

years.[30] 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 some components of the Primary Sense 2 application can be replaced with a pre-existing service provided by Primary Health Insights.[31] It also submits that Participating PHNs could utilise the existing data platform within Primary Health Insights to host Primary Sense 2, rather than paying for any additional software storage capacity utilised by third-party data extraction tool suppliers.[32]

4.12. Interested parties submit that cost savings are unlikely or are unsubstantiated.[33] Pen CS submits that 28 PHN organisations are already receiving the benefit of economies of scale by utilising a common data collection platform and patient to population health informatics platform.[34] 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.[35]

4.13. Following the draft determination, Outcome Health submits that it considers WAPHA has not provided material to substantiate its claims in relation to cost savings, and that it is unclear whether WAPHA has accounted for the full costs of using the Primary Health Insights platform, which will be used for hosting Primary Sense 2, including the likely increase in the costs of Primary Health Insights as more data extracted using Primary Sense 2 is accessed within the platform.[36] In response, WAPHA states that it has provided sufficient materials, including commercial-in-confidence information, to the ACCC to demonstrate its claims.[37] WAPHA submits that the majority of PHNs (including all 15 current Participating PHNs) are already using Primary Health Insights to store and analyse GP clinics data from their current data extraction software tools and pay the relevant data storage and processing costs, and as such, adopting Primary Sense 2 will not result in those PHNs incurring any significant additional costs.[38] WAPHA states that the costs to store and analyse data within the Primary Health Insights platform are in proportion to the amount of data stored and analysed, and these costs will apply whether the Participating PHNs use Primary Sense 2 or a third-party data extraction software tool. WAPHA submits that in the event the Participating PHNs decide to extract and store more data using Primary Sense 2 and analyse it within the Primary Health Insights platform (because they consider it would be worthwhile), the additional storage and processing costs would be marginal.[39]

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30 Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), page 5, clause B3.3. WAPHA also submits that as the initial on-boarding process will take time, the initial data volume and processing costs for the Participating PHNs will be lower than estimated (see Submission by WAPHA – response to Outcome Health submission (15 February 2022), paragraph 3.11).

31 Submission by WAPHA – response to ACCC request for information (12 November 2021), page 5, clause 4.6.

32 Ibid, clauses 4.3 and 4.5.

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

34 Submission by Pen CS (29 September 2021), page 8, paragraph 9.4(b). Pen CS also submits that PHNs are 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.

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

36 Submission by Outcome Health (9 February 2022), page 3.

37 Submission by WAPHA – response to Outcome Health submission (15 February 2022), paragraphs 3.1-3.4. See also Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), clause B3.3; and Submission by WAPHA – response to interested party submissions (12 November 2021), paragraph 1.9.

38 WAPHA submits that there are 4 PHNs that do not currently use Primary Health Insights, and none of them has expressed interests in adopting Primary Sense 2. WAPHA submits that if these PHNs decided to adopt Primary Sense 2, they would have to join the Primary Health Insights and pay the relevant costs; however this would also entail a cost saving as they would no longer need to pay for a separate data storage or analytics tool (see Submission by WAPHA – response to Outcome Health submission (15 February 2022), paragraphs 3.12-3.14).

39 Submission by WAPHA – response to Outcome Health submission (15 February 2022), paragraphs 3.15-3.17.

4.14. The ACCC considers that the Participating PHNs, as present purchasers of data extraction software 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 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.

4.15. Given that Participating PHNs are likely to redeploy cost savings from the acquisition of data extraction tools into their other primary health care 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

4.16. WAPHA submits that PHNs currently have a limited ability to influence the ongoing development or design of third-party data extraction software 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.

4.17. 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.[40]

4.18. The Commonwealth Department of Health released the *General Practice Data and Electronic Clinical Decision Support* Issues Paper (the **Issues Paper**) in November 2021.[41] In the Issues Paper, the Department 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.[42]

4.19. 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.[43] The University of Melbourne also considers the development of a tool that better unifies data extraction in GP clinics is a worthwhile initiative.[44]

4.20. MediSecure considers the Participating PHNs could already achieve the claimed benefit through the management of service level agreements with the existing data extraction software tool suppliers, or by undertaking performance improvements within

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[40] 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 (see Submission by WAPHA – response to ACCC request for information (12 November 2021), page 3, clause 2.5).

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

[42] Ibid, pages 8-9.

[43] Submission by the RACGP (3 November 2021).

[44] Submission by the University of Melbourne (12 October 2021), page 1.

Primary Health Insights.[45] 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.[46]

4.21. 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.[47] Outcome Health submits that its PHN customers have been able to contribute to the co-design, governance, building and implementation of its data extraction software tool.[48]

4.22. The ACCC understands that there are similarities and differences between each of the data extraction software 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 software tool suppliers, 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. However, on balance, the ACCC does not consider there is sufficient information for it to comment on the extent or likelihood of this claimed public benefit.

Improved data governance and privacy

4.23. WAPHA submits that the Proposed Conduct is intended to and will reduce the risk of commercialisation of primary health care data, for instance, data being sold to third parties without the express consent or knowledge of GP clinics or PHNs.[49] It submits the Proposed Conduct will improve privacy and transparency of the data flow, and Participating PHNs will not sell or provide data extracted using Primary Sense 2 for commercial gain or purposes.[50]

4.24. Interested parties do not agree that there is a risk of inappropriate commercialisation of primary health care data.[51] Pen CS indicates that it does not hold data and is not a data custodian.[52] Outcome Health submits that it does not sell or commercialise any data extracted from GP clinics.[53] MSIA considers that there is a lack of transparency around how data will be held or stored by Participating PHNs, and seeks to cast doubt on the PHNs' ability to adequately manage data security and patient privacy as well as their historical data collection practices.[54]

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45 Submission by MediSecure (29 October 2021), page 2.

46 Submission by WAPHA – response to interested party submissions (12 November 2021), page 5, clauses G5.1-G5.2.

47 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.

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

49 Submission by WAPHA – response to clarifications requested (12 November 2021), page 2, clause A1; Submission by WAPHA – response to interested party submissions (12 November 2021), clause 2.6.

50 Ibid. See also Application by WAPHA (14 September 2021), paragraphs 2.3(g) and 4.1.7.

51 See for instance, Submission by MediSecure (29 October 2021) pages 2-3; Submission by Pen CS (29 September 2021), paragraph 2.3.

52 Submission by Pen CS (29 September 2021), paragraph 2.3.

53 Submission by Outcome Health (29 September 2021), page 1. See also Submission by Best Practice Software (6 October 2021), page 2.

54 Submission by MSIA (1 November 2021), page 2; Submission by MSIA (4 February 2022), paragraphs 11-12.

4.25. 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.[55]

4.26. In response to interested party submissions, WAPHA submits that PHNs have been the custodians of significant volumes of de-identified primary health care data collected under current arrangements with the consent of GP clinics, which have been securely stored on the Primary Health Insights platform.[56] It submits that Participating PHNs have and will continue to demonstrate high standards of data security and comply with privacy laws.[57] It also submits that Primary Sense 2 will include comprehensive processes for managing patient consent for the use of their data.[58]

4.27. In its Issues Paper (referred to in paragraph 4.18 above), the Commonwealth Department of Health raises several issues regarding the current arrangements for access and use of GP data. These issues include:

- There are currently multiple stakeholders engaged in various activities using GP data – this complicates the data flow, blurs transparency and accountability.[59] 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.[60]

4.28. At the time of this determination, the Department is still considering submissions from interested parties on these issues.

4.29. In response to the application for authorisation, the Department 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 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.[61]

4.30. The ACCC understands that following the start of the PHN Programme[62] in 2015, the PHNs have been collecting data from consenting GP clinics through the current third-party data extraction software tools, with the data being stored on the Primary Health Insights platform since April 2021. The ACCC understands that Primary Health

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55 Submission by the RACGP (14 October 2021).

56 Submission by WAPHA – response to interested party submissions (12 November 2021), page 5, paragraph 2.1; Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), page 6, clause B5.5; Submission by WAPHA – response to MSIA submission (10 February 2022), paragraphs 1.7-1.8.

57 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 6, clauses B5.1-B5.4.

58 Submission by WAPHA – response to clarifications requested by ACCC (12 November 2021), page 6, clause B5.7.

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

60 The Department 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.

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

62 The Commonwealth Department of Health's PHN Grant Programme Guidelines sets out the PHN Programme objectives, and the process and criteria by which PHNs are granted funding.

Insights operates under strict security standards and is subject to annual independent security reviews, which to date have not found any major security issues.[63]

4.31. The ACCC notes that the issues regarding potential commercialisation of data by third parties are still currently being considered by the Commonwealth 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

4.32. 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 on data extraction tool licences to other ways of improving the provision of health and medical services.

Public detriments

4.33. 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.*[64]

4.34. 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,[65] as Primary Sense 2 will only be offered to Participating 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 the GP clinics, as Pen CS and Outcome Health can continue to directly sell their data extraction software tools to the GP clinics.

4.35. 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

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

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

[65] 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.

- 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

4.36. Prior to the issuing of the draft determination, several interested parties submitted that it is not appropriate for the Participating PHNs to engage in the Proposed Conduct using government money. Specifically, they considered that:

- it is unfair for Participating PHNs to use government money to develop a product to compete with private sector suppliers, and this distorts the competitive process[66]
- the Proposed Conduct will duplicate functionality provided by existing data extraction software tools (and hence result in wasteful spending)[67], and duplicate the data collection function provided by My Health Record[68]
- 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 process[69]
- Primary Sense 1 is not a good product, and was not accepted by PHNs when Gold Coast PHN offered it to those PHNs in 2019[70]
- the Proposed Conduct conflicts with and/or falls outside of the PHNs' remit,[71] and
- the Proposed Conduct has a high risk of failure and will cost taxpayers.[72]

4.37. In contrast, the Consumer Health Forum of Australia submitted that the Primary Sense Project is exactly the sort of activity the PHNs should be pursuing to achieve better health outcomes for the community.[73]

4.38. WAPHA submitted that:

- the Proposed Conduct relates to a core role of the Participating PHNs,[74] and will enable them to better deliver their functions[75]

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66 Submission by MSIA (1 November 2021), pages 6-7; Submission by Outcome Health (29 September 2021), page 1.

67 Submission by Outcome Health (29 September 2021), page 2; Submission by MediSecure (1 October 2021), page 1; Submission by Outcome Health (9 February 2022), page 2; Submission by Pen CS (29 September 2021), page 3.

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

69 Submission by Pen CS (29 September 2021), page 6; Submission by Outcome Health (29 September 2021), page 2.

70 Submission by Pen CS (29 September 2021), page 2, paragraph 2.3; Submission by MSIA (1 November 2021), page 6.

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

72 Submission by MSIA (1 November 2021), pages 4 and 6; Submission by Pen CS (29 September 2021), page 2.

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

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

75 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.

- the funds expended by PHNs on data extraction or any other software or technology projects are part of their administrative overheads, which PHNs have an obligation to minimise.[76] The Proposed Conduct does not distort competition, because the existing data extraction tools were also largely paid for by the PHNs[77]

- 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 Project[78]

- 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[79]

- 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),[80] and

- the data collected via Primary Sense 2 does not duplicate the context or purpose of the My Health Record.[81]

4.39. The Commonwealth Department of Health considered 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 care services. The Department submitted that 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.[82]

4.40. In its draft determination, the ACCC noted that PHNs are not-for-profit entities and their activities are funded by the Commonwealth Government through the Commonwealth Department of Health. PHNs' performance is periodically assessed against a published performance framework by the Department. The ACCC therefore considered the Department's oversight reduces the risk that PHNs will use government money inappropriately/inefficiently or undertake activities beyond their remit.

4.41. Following the issuing of the draft determination, MSIA and Outcome Health each provided a submission querying whether, and to what extent, the Participating PHNs' use of government funding for the Proposed Conduct would be within the Department's oversight.[83] MSIA did not consider there was sufficient information to show that the Department's oversight was sufficient to mitigate the risk of inappropriate or inefficient use of public money by the Participating PHNs. It observed that the Australian Charities and Not-for-profits Commission (**ACNC**) had not been consulted

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76 Submission by WAPHA – response to interested party submissions (12 November 2021), clause 5.7.

77 Submission by WAPHA – response to interested party submissions (12 November 2021), clause B1.1.

78 Submission by WAPHA – response to interested party submissions (12 November 2021), clauses G4.2. 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), clauses 9.7-9.8).

79 Submission by WAPHA – response to interested party submissions (12 November 2021), clause 11.3.

80 Submission by WAPHA – response to interested party submissions (12 November 2021), clauses 9.1-9.2.

81 WAPHA indicates that the former is de-identified data and is generally used for population health analysis and policy, whereas the latter is data that is only used for the purpose of providing healthcare services to the patients (see Submission by WAPHA – response to interested party submissions (12 November 2021), page 26, clauses H3.1-H3.3).

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

83 Submission by MSIA (4 February 2022), paragraphs 5-8; submission by Outcome Health (9 February 2022), pages 3-4.

before the ACCC reached its views in the draft determination although considered that even ACNC oversight may not be sufficient to mitigate the risks of potential financial mismanagement by the Participating PHNs.[84]

4.42. In response to these submissions, WAPHA stated that any use of funding by the Participating PHNs (including expenditure on the Primary Sense Project) can be subject to audit or review by the Department.[85] It further indicated that PHNs are required to have an audited financial report and an unqualified financial statement, which is an effective mechanism to mitigate financial management risks.[86]

4.43. The Department submitted that it provides funding to PHNs in accordance with the Commonwealth Grants Rules and Guidelines 2017, which are issued by the Finance Minister under section 105C of the *Public Governance, Performance and Accountability Act 2013* (Cth). The Department also submitted that it has implemented practices and procedures to help ensure grant funding it provides to PHNs is being used appropriately in accordance with the purposes for which funding is provided. [87]

4.44. Based on the information received, the ACCC considers that it is not inappropriate or unfair for Participating PHNs to use their funding to jointly develop their own data extraction tool, noting that the existing data extraction tools are also being paid for by PHNs from their receipt of government funding. As noted by the Commonwealth Department of Health, PHNs are free to make their own software procurement decisions. The ACCC also considers that the development of a new data extraction software tool by the Participating PHNs would create more choice (rather than result in wasteful duplication), and that there is no evidence Primary Sense 2 duplicates the purpose or function of My Health Record. Furthermore, consistent with its views in the draft determination, the ACCC considers that the Department's oversight of the PHNs will reduce the risk that the Participating PHNs will use government money inappropriately/inefficiently or undertake activities beyond their remit when undertaking the Proposed Conduct. The ACCC also considers that the ACNC has and will continue to regulate the conduct of the Participating PHNs (as they are not-for-profit entities) pursuant to the *Australian Charities and Not-for-profits Commission Act 2012* (Cth); and this role will not be affected by the Proposed Conduct. The ACCC has not been provided with any evidence that the current regulatory oversight mechanisms in respect of the Participating PHNs are insufficient. 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.

Lessening of competition

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

4.45. Numerous interested parties have raised concerns that the Proposed Conduct will significantly lessen competition in the supply and acquisition of data extraction

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84 Submission by MSIA (4 February 2022), paragraphs 9-10.

85 Submission by WAPHA – response to Outcome Health submission (15 February 2022), paragraphs 3.26. WAPHA also clarified, in response to Outcome Health's query, that the use of Participating PHNs' funding (as an unincorporated joint venture) for the Primary Sense Project is within the usual PHNs funding structure (see Submission by WAPHA – response to Outcome Health submission (15 February 2022), paragraphs 3.16).

86 Submission by WAPHA – response to MSIA submission (10 February 2022), paragraph 1.5. WAPHA also noted that the Australian National Audit Office has published a notice of a potential audit of 'Department of Health's performance management of Primary Health Networks' as part of its regular cycle of performance audits across Federal Government departments and programs. WAPHA considered that this demonstrates another oversight mechanism for the PHN Performance and Quality Framework.

87 Submission by Commonwealth Department of Health (11 February 2022).

software tools to and by PHNs.[88] MSIA[89] and MediSecure[90] consider that if the Proposed Conduct was authorised, Participating PHNs would be unlikely to procure any data extraction tools from third-party suppliers. WAPHA does not agree with interested parties that the Proposed Conduct will significantly lessen competition;[91] and considers that Participating PHNs may continue to acquire third-party data extraction tools even if the Proposed Conduct is authorised.[92]

4.46. 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 (including WAPHA) will make a profit from the Project
- no Participating PHNs will be required to use Primary Sense 2 or use it exclusively, and it would be open to them to continue purchasing licences for third-party data extraction software tools
- 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
- Participating PHNs can retire from the Primary Sense Project by giving 6 months' notice and paying reasonable costs associated with the retirement, if they consider an alternative data extraction software tool offers better value in terms of functionality and/or costs, and
- the Proposed Conduct will not affect other market segments,[93] and third-party suppliers can continue to sell data extraction software tools to customers in those segments.[94]

4.47. Given the above, the ACCC considers the Proposed Conduct is intended to provide Participating PHNs with an alternative and potentially more efficient means, through vertical integration, of obtaining data extraction services. To the extent the Proposed Conduct enables Participating PHNs to obtain a lower cost and more tailored data extraction software 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.

4.48. While not discussed in submissions or the application, the ACCC has also considered the possibility of WAPHA and/or the Participating PHNs individually using the Primary

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

89 Submissions by MSIA (4 February 2022), paragraphs 24-25.

90 Submission by MediSecure (1 October 2021), page 2.

91 See paragraph 4.34 above.

92 WAPHA submits that the Proposed Conduct does not prevent Participating PHNs from continuing to acquire data extraction tools from external suppliers (see Application by WAPHA (14 September 2021), paragraph 2.1.16). WAPHA submits that Participating PHNs may choose to support more than one data extraction tool for various reasons, including a desire to offer choice to GP clinics, a need to support programmes tied to functionality delivered by a specific tool or to use or make available different functionalities provided by the tools (see paragraph 2.11 above). WAPHA states 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 other PHNs that currently offer GP clinics a choice of more than one data extraction tool to use. However, WAPHA also submits that in the future, while Participating PHNs may provide GP clinics a choice as to which data extraction tool to use, they are unlikely to choose to fund the use of more than one data extraction tool per GP clinic as that would not be an efficient use of funding.

93 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.

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

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 4.47 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.

4.49. In response to the draft determination, Outcome Health submits that the benefits described by the ACCC in paragraph 4.48 above are in fact a 'hold-up' issue for Outcome Health as well as a form of market failure. Outcome Health submits that its data extraction tool was developed specifically for PHNs (rather than the GP clinics) and will fail if the PHNs do not continue to support it.[95] WAPHA considers that it is up to Outcome Health to demonstrate the value of its products to its customers, noting that customers are not required to support its products. WAPHA also submits that the Proposed Conduct (if authorised) will not directly affect Outcome Health as the 15 current Participating PHNs are all customers of Pen CS rather than Outcome Health.[96] The ACCC considers that the issue described by Outcome Health should not be characterised as a market failure. Rather, it is a possible consequence of a purchaser choosing to self-supply rather than acquire a product from an existing supplier. The Proposed Conduct does not prevent Outcome Health from demonstrating its product value against the self-supply option of Primary Sense 2, or otherwise competing to supply its products to the PHNs.

The supply of data extraction software tools to GP clinics

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

- Existing suppliers will not be able to compete to supply a data extraction software tool to GP clinics. This is because Participating PHNs will provide Primary Sense 2 to the GP clinics to use for free, and GP clinics will switch to using Primary Sense 2 rather than pay a licence fee to Pen CS or Outcome Health to continue using their data extraction tools.[97] The Proposed Conduct will reduce existing suppliers' market share and revenue, such that they may need to increase their pricing.[98] The Proposed Conduct may also ultimately cause existing suppliers Pen CS and/or Outcome Health to cease supplying to GP clinics (or other market segments).[99]

- GP clinics will feel compelled to switch to using Primary Sense 2 (even though it may be an inferior product), out of fear that if they do not, PHNs will not accept their data sets as compliant with PIP QI requirements and they will

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95 Submission by Outcome Health (9 February 2021), page 1.

96 Submission by WAPHA – response to Outcome Health submission (15 February 2022), paragraphs 1.8-1.11.

97 Submission by MediSecure (29 October 2021), pages 1-2; Submission from MSIA (4 February 2022), paragraph 27.

98 Submission by Pen CS (29 September 2021), page 3, section 2.3; Submission by Best Practice Software (6 October 2021), page 2.

99 Submission by MSIA (1 November 2021), page 5; Submission by MSIA (4 February 2022), paragraphs 42-51.

cease to be eligible for the PIP QI incentive payment.[100] Once GP clinics started using Primary Sense 2, it will be very difficult for them to switch back to other data extraction tools.[101]

- 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.[102]

- 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.[103]

4.51. 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 suppliers 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.[104]

- 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 supplier.

- Based on publicly available information, the cost of a third-party data extraction licence is low and should not be a barrier for GP clinics purchasing the licence.

- The Proposed Conduct will not require GP clinics to use Primary Sense 2 at all or exclusively. There is no requirement for GP clinics to use any particular tool to provide data to PHNs for the PIP QI scheme, and the suggestion that PHNs can or have ever discriminated against GP clinics on the basis of the tools they used to produce or submit data is refuted.[105]

- 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).[106] 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.

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100 Submission by MSIA (1 November 2021) pages 4-5; Submission by MSIA (4 February 2022), paragraph 28-33; Submission by Best Practice Software (6 October 2021), page 5.

101 Submission by MSIA (1 November 2021), page 4.

102 Submission by RACGP (3 November 2021), page 1.

103 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.

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

105 WAPHA submits that the Commonwealth Department of Health sets the requirements of what constitute an eligible PIP QI data set, and that the Department has made clear that GP clinics are not required to use any particular tool or software to produce the data set (see Submission by WAPHA – response to MSIA submission (10 February 2022), paragraphs 2.12-2.14). See also Commonwealth Department of Health, PIP QI Fact Sheet: What practices need to know, August 2019.

106 WAPHA submits that 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 (see Submission from WAPHA – response to interested party submissions (12 November 2021), page 18, clause C7.3).

- 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.[107]

4.52. The Commonwealth 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.[108]

4.53. 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.[109] 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.[110]

4.54. The ACCC accepts that the Proposed Conduct is likely to result in a major shift in how data extraction software 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 cost to them (under licence from PHNs) are likely to lose free access to these tools if their affiliated PHNs decide to no longer acquire the tools from Pen CS or Outcome Health. The GP clinics will then need to decide whether to accept the free Primary Sense 2 tool developed by the Participating 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 software tool at all, as they could instead continue to use the software tools in their PMS to obtain the relevant data for submission to PHNs,[111] and this will not change through the Proposed Conduct.

4.55. The ACCC acknowledges that the Proposed Conduct will likely result in disruption to the established business models of Pen CS and Outcome Health, whereby they currently predominantly supply data extraction software tools to PHNs (who in turn provide the tools to GP clinics to use) rather than supplying directly to GP clinics.

4.56. The ACCC notes Outcome Health's submission that its current data extraction tool was built based on what PHNs would like GP clinics to experience when using the tool, and therefore the product may require significant re-work to suit GP clinics' requirements if it is to be sold directly to them. The ACCC also notes concerns from MSIA and Outcome Health that existing data extraction tool suppliers may find it difficult (or have no incentive) to transition to supplying their tools directly to GP clinics. They consider this is because the GP clinics will not want to pay for Pen CS' or Outcome Health's tools (despite any innovation or improvement suppliers may make to the products), and that it would be uncommercial for these suppliers to provide their tools to GP clinics to use for free.[112]

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107 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.

108 Submission by Commonwealth Department of Health (27 September 2021).

109 Submission by the University of Melbourne (12 October 2021), pages 1 and 2.

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

111 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. In its submission dated 4 February 2022, MSIA expresses doubts on the prevalence of GP clinics using functionality offered by their PMS providers to extract and submit relevant data to their PHNs. In response, WAPHA states within WA alone, there are at least 50 GP clinics that do this instead of using any third-party data extraction tools (see submission by WAPHA – response to MSIA submission (10 February 2022), paragraph 2.17). In its submission, Best Practice Software (a PMS provider) indicates that currently, more than 20,000 GP clinics can access a free tool provided by it as part of the Best Practice Premier software to extract PIP QI data for submission to their PHNs (see Submission by Best Practice Software (6 October 2021), page 2).

112 Submission by MSIA (4 February 2022), paragraphs 40-41; and Submission by Outcome Health (9 February 2022), pages 1-2.

4.57. To the extent that all or nearly all GP clinics opt to rely on PHNs to provide them a free data extraction software tool to use and not be willing to pay for their own tools independently, this suggests there is no separate market for the supply of data extraction software tool to GP clinics (as distinct from the market for the supply of these tools to PHNs). However, the ACCC also notes that some GP clinics currently choose to procure a data extraction tool licence directly from Pen CS or Outcome Health, rather than accept the free tool provided by their PHNs. If the Proposed Conduct is authorised, it is not clear to the ACCC the proportion of GP clinics that would accept the free data extraction tool provided by their local PHN in the future (Primary Sense 2) rather than procuring their own data extraction licences from Pen CS or Outcome Health would necessarily change. However, if more GP clinics were satisfied with Primary Sense 2 provided to them at no cost by their PHN than they were with the tool their PHN previously provided (either Pen CS' or Outcome Health's tools), and hence fewer GPs chose to purchase licences directly, it would be consistent with a more competitive rather than less competitive market outcome.

4.58. Having considered the information available, the ACCC's view is that, despite the likely disruption to Pen CS' and Outcome Health's business models (as mentioned above), there is nothing in the Proposed Conduct that would prevent Pen CS or Outcome Health from competing to supply their data extraction software tools to GP clinics directly, including on the basis of product functionality and quality to specifically focus on GP clinics' needs.

4.59. The ACCC considers the Proposed Conduct is unlikely to result in any significant competitive detriment in the supply of data extraction software tools to GP clinics for the following reasons:

- There is no restriction on Pen CS or Outcome Health (or any other party) to supply data extraction software tools directly to GP clinics. The ACCC understands each of Pen CS and Outcome Health currently directly supplies data extraction tool 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 support tool called Topbar.[113]

- GP clinics are not required to use Primary Sense 2 (if offered by Participating PHNs). They can and should continue to be able to buy data extraction tool licences directly from Pen CS or Outcome Health.

- 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 – and hence the implications of the Proposed Conduct for the future viability and availability of the incumbents' tools to GP clinics – is not clear.

- Pen CS and Outcome Health are not prevented from supplying their data extraction products to customers in other market segments.[114] For instance, Pen CS currently supplies the majority of Aboriginal Medical Services clinics.[115] The ACCC notes MSIA's concern that the other market segments will be too small to sustain the business of the incumbent third-party data extraction tool suppliers. However, the ACCC does not consider there is evidence provided to support this view. The ACCC also notes that Outcome Health's data extraction

[113] Submission by WAPHA – response to interested party submissions (12 November 2021), page 18, clause C7.3.

[114] 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.

[115] Application by WAPHA (14 September 2021), paragraph 3.1.6(c).

tool business has been operational despite its product being supplied to only a small number of PHNs.[116]

- 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.[117] Both companies have product offerings beyond data extraction tools.[118]

- 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.[119] The ACCC also understands there are numerous private sector companies who have expressed interest in creating new data extraction tools.[120]

- The ACCC notes that MSIA has expressed a concern regarding the barriers to entry for future entrants contemplating the direct supply of data extraction tools to GP clinics.[121] The ACCC considers that the development and potential adoption of a new source of supply of data extraction tools pursuant to the Proposed Conduct – and hence the potential shift in demand away from incumbent firms' data extraction tools – does not represent a barrier to entry. Rather, if this occurred, it would represent the outcome of a competitive process that appears likely to yield benefits to GP clinics.[122]

- In response to the last point mentioned in paragraph 4.50 above, the ACCC considers that there is currently no information to suggest that PHNs are likely to be disbanded in the future.

4.60. 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 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) third-party 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.

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116 As noted in footnote 14 above, Outcome Health's POLAR data extraction tool is supplied to 6 out of 31 PHNs (while Pen CS currently supplies the remaining 25 out of 31 PHNs in Australia).

117 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.

118 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). It is also exploring new technology solutions in conjunction with GPs, for instance, at home patient monitoring. Outcome Health provides mental health clinics across Victoria and in Aged Care, Diabetes and Asthma clinics in General Practice and a range of mental health services to Ambulance Victoria.

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

120 Submission by Best Practice Software (6 October 2021), pages 2 and 4; Submission by MSIA (1 November 2021), page 6.

121 Submission by MSIA (4 February 2022), paragraphs 56-59.

122 The ACCC also notes that MSIA has outlined a number of challenges (including technical and regulatory challenges) a new entrant would face in the future (see Submission by MSIA (4 February 2022), paragraph 55). However, the ACCC consider that these challenges would likely exist in the future regardless of the Proposed Conduct.

The supply of clinical decision support tools to GP clinics

4.61. MediSecure and the University of Melbourne submit that the Proposed Conduct will disrupt or negatively affect competition for the supply of clinical decision support tools to GP clinics. WAPHA disagrees with this claim, as it considers that the data extraction tools from Pen CS and Outcome Health also have clinical decision support functions.

4.62. 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 the GP clinics.

Change management impact on GP clinics

4.63. 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 software 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.[123]

4.64. MSIA submits that the Proposed Conduct will lead to significant change management costs for GP clinics.[124] It 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.[125]

4.65. WAPHA submits that:

- Primary Sense 2 will be developed in consultation with GPs, universities, the RACGP and other health bodies.[126] Participating PHNs who wish to offer Primary Sense 2 to their affiliated GP clinics will also consult with GP clinics in advance[127]
- the installation process for Primary Sense 2 at GP clinics will be simple and quick,[128] and
- WAPHA will negotiate the appropriate commercial agreements with Best Practice Software and other PMS providers.[129]

4.66. Dr de Wet also submits that GP clinics on the Gold Coast found that Primary Sense 1 was easy to install and use. He considered that, should broader adoption of Primary Sense 2 occur, GP clinics would be supported by a change management process.

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123 Submission by RACGP (3 November 2021), page 1.

124 MSIA considers this includes staff training costs. See Submission by MSIA (1 November 2021), pages 7-8.

125 Submission by MSIA (1 November 2021), page 3. See also Submission by Pen CS (29 September 2021), paragraph 5.4.

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

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

128 Submission by WAPHA – response to clarifications requested by ACCC (123 November 2021), page 5, clauses 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.

129 Submission by WAPHA – response to interested party submissions (12 November 2021), page 25, clause H1.1.

4.67. As mentioned in paragraph 4.59 above, the extent to which Participating PHNs will switch away from offering the existing third-party 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 supplier 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.[130] 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 software tool offered by PHNs, instead using the tool in their PMS to generate the required PIP QI data set for submission to PHNs.

Impact on medical software industry

4.68. Several interested parties submit that authorisation will have a strong chilling effect on private sector investment in medical software and stifle innovation.[131]

4.69. 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 PHNs, GP clinics or any other customers.

Impact on access to data by medical researchers

4.70. The University of Melbourne submits that the Proposed Conduct will negatively affect general practice research and quality improvement.[132] 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.[133] It considers that WAPHA should provide clarity on data governance, including processes for external researchers to access data for research.

4.71. 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.[134] 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.[135]

4.72. The Commonwealth Department of Health supports the notion that data to be extracted from Primary Sense 2 will not be used by Participating PHNs for any commercial gain or purpose.[136]

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130 Topbar is a clinical decision support software tool offered by Pen CS.

131 Submission by Best Practice Software (6 October 2021), pages 1-2; Submission by MSIA (8 October 2021), page 2; Submission by the University of Melbourne (12 October 2021), page 1; Submission by Webstercare (30 September 2021), page 1.

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

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

134 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 (see Submission by WAPHA – response to ACCC request for information (12 November 2021), page 8, paragraph 7.2).

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

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

4.73. 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 software tool suppliers 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 Commonwealth Department of Health (which oversees the PHN Programme).

4.74. The ACCC also notes that researchers will continue to have other options to access primary health care 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.

4.75. The ACCC therefore considers the Proposed Conduct is not likely to impede access to primary health care data for research purposes.

ACCC conclusion on public detriment

4.76. 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

4.77. For the reasons outlined in this 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

4.78. The Act allows the ACCC to grant authorisation for a limited period of time.[137] 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.

4.79. 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.[138] However, WAPHA has 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.[139]

4.80. In its draft determination, the ACCC considered that a 5-year authorisation period would be more appropriate than the 10 years requested, given the dynamic nature of information technology and digital health.

4.81. Prior to the draft determination, MSIA was opposed to authorisation being granted but considered that if the ACCC granted authorisation, that 12 months should be the

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137 Subsection 91(1) of the Act.

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

139 Submission by WAPHA– response to ACCC request for information (12 November 2021), page 2, clause 1.4.

maximum time allowed for the Proposed Conduct.[140] Following the draft determination, MSIA submitted that should the ACCC grant authorisation, it should be for a maximum of 2 or 3 years in order to assess the impact of the Proposed Conduct on Pen CS and Outcome Health during this time (for instance, whether one of them will exit the market).[141]

4.82. Outcome Health submitted in response to the draft determination that the ACCC had not considered whether the PHNs' funding will change during the proposed 5-year authorisation period. It considered that any funding change may affect the public benefit claims, for instance, Participating PHNs may no longer be able to provide Primary Sense 2 to the GP clinics to use at no cost to the clinics. It submitted that ACCC should grant authorisation limited to the earlier of: 6 months from the date the Federal Government decides to alter the PHNs' funding, or 2-3 years.[142] In response to MSIA's concern about potential impact on the market, WAPHA submitted that MSIA was confusing maintaining competition with maintaining the market share of a specific provider in the market. In response to the issue raised by Outcome Health, WAPHA submitted that any funding change is an unlikely outcome that has not been proposed or discussed by the Commonwealth Department of Health.

4.83. The ACCC notes there is no current information to indicate that PHNs' funding levels will change during the period of authorisation.

4.84. For the reasons discussed in this determination (see paragraphs 4.45-4.62 above), the ACCC considers that the Proposed Conduct is not likely to result in any significant competitive detriment. In these circumstances, the ACCC remains of the view that it is appropriate to grant authorisation for 5 years. 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.

5. 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. WAPHA seeks authorisation for Proposed Conduct as defined in paragraph 1.4.

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 determination, the ACCC is satisfied 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 has decided to grant authorisation.

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[140] Submission by MSIA (1 November 2021), page 6.

[141] Submission by MSIA (4 February 2022), paragraph 62.

[142] Submission by Outcome Health (9 February 2022), page 4.

Conduct which the ACCC has authorised

5.6. The ACCC has granted authorisation AA1000577 to enable WAPHA and Participating PHNs to jointly up-scale and develop the Primary Sense 2 data extraction software tool 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 has decided to grant authorisation AA1000577 until 19 March 2027.

6. Date authorisation comes into effect

6.1. This determination is made on 25 February 2022. If no application for review of the determination is made to the Australian Competition Tribunal it will come into effect on 19 March 2022.