



## Private Healthcare Australia Limited– Application for revocation of AA1000487 and the substitution of authorisation AA1000545

### Interim authorisation decision

30 March 2021

#### Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has decided to grant conditional interim authorisation in respect of the application for revocation and substitution, lodged by Private Healthcare Australia Limited (**PHA**) on 3 March 2021. The effect of this decision is to suspend the operation of conditional authorisation AA1000487 (the **First Authorisation**), granted on 17 September 2020.
2. The ACCC has decided to grant conditional interim authorisation for some, but not all, of the proposed conduct for which PHA has applied for interim and final authorisation.
3. The ACCC has decided to grant conditional interim authorisation, subject to the limitation in paragraph 4 to enable PHA, the Members Health Fund Alliance and the 36 named private health insurers set out in Annexure A (together, the **Participating Parties**) to make, and give effect to, any contract, arrangement or understanding between them, and to discuss, engage and share information with each other, in relation to:
  - (a) broadening coverage under health insurance policies to include treatment for Members<sup>1</sup> that contract COVID-19;
  - (b) broadening health insurance cover for treatment received by telephone or videoconferencing or other modes of treatment that substitute for face-to-face interaction;
  - (c) providing treatment in Members' homes as a substitute for an admission to hospital;
  - (d) providing financial relief for Members from paying health insurance premiums such as postponement of premium increases and premium waivers,
  - (e) any other measure formulated directly in response to the COVID-19 crisis, as notified to the ACCC by PHA, excluding any measure to utilise unreleased deferred claims liability<sup>2</sup> that was provisioned for during the COVID-19 pandemic, (the **Interim Authorised Conduct**).
4. The ACCC grants conditional authorisation for the Interim Authorised Conduct only insofar as it is for the sole purpose of addressing concerns that policyholders have, or may reasonably have, in relation to the COVID-19 pandemic.

<sup>1</sup> PHA defines 'Members' as 'those in the community that are covered by a private health insurance policy'.

<sup>2</sup> During the COVID-19 pandemic, health insurers made provision for deferred claims liability due to the reduction in claims for health services during the pandemic.

5. The ACCC has decided not to grant interim authorisation in relation to the Participating Parties making or giving effect to, any contract, arrangement or understanding between them, or to discuss, engage and share information with each other, in relation to:
  - (a) broadening the category of dependants that are able to remain on an adult's health insurance policy;
  - (b) utilising unreleased deferred claims liability<sup>3</sup> that was provisioned for during the COVID-19 pandemic to implement favourable measures for Members;
  - (c) any other measure formulated in response to the COVID-19 crisis or its economic or social effects, as notified by PHA, except for conduct falling within paragraph 3(e).
6. Interim authorisation commences immediately and remains in place until it is revoked; the date the ACCC's final determination comes into effect; or the date on which the application for revocation and substitution is withdrawn.
7. The ACCC grants conditional interim authorisation in relation to Division 1 of Part IV of the Act and section 45 of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
8. Interim authorisation only extends to the Interim Authorised Conduct outlined at paragraph 3. Interim authorisation does not extend to any agreement between the Participating Parties to maintain or increase the price of health insurance premiums. The ACCC has imposed the conditions described at paragraph 34 in relation to the interim authorisation.

#### **The application for revocation and substitution of authorisation**

9. The application for revocation and substitution of authorisation (referred to as **re-authorisation**) was lodged by PHA on behalf of the Participating Parties.<sup>4</sup> PHA also requested urgent interim authorisation.
10. On 17 September 2020, the ACCC granted the First Authorisation to enable the Participating Parties identified in the First Authorisation, to make and give effect to arrangements, and to discuss and share information with each other in relation to private health insurance coverage during the COVID-19 pandemic.<sup>5</sup>
11. The First Authorisation ends on 31 March 2021.
12. PHA seeks re-authorisation and interim authorisation to engage in the conduct currently authorised in the First Authorisation and to engage in expanded conduct. The expanded conduct is highlighted blue in paragraph 13.
13. In its application, PHA seeks re-authorisation, and interim authorisation to enable the Participating Parties to make, and give effect to, any contract, arrangement or understanding between them, and to discuss, engage and share information with each other, in relation to:
  - (a) broadening coverage under health insurance policies to include treatment for Members that contract COVID-19;
  - (b) broadening health insurance cover for treatment received by telephone or videoconferencing or other modes of treatment that substitute for face-to-face interaction;

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<sup>3</sup> During the COVID-19 pandemic, health insurers made provision for deferred claims liability due to the reduction in claims for health services during the pandemic.

<sup>4</sup> HBF Health Limited was a participating party to authorisation AA1000487 but does not wish to be a participating party to the application for re-authorisation AA1000545.

<sup>5</sup> See the ACCC's Final Determination on AA1000487 for further details - <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/private-healthcare-australia-limited>

- (c) providing treatment in Members' homes as a substitute for an admission to hospital;
- (d) providing financial relief for Members from paying health insurance premiums such as postponement of premium increases and premium waivers, and broadening the category of dependents that are able to remain on an adult's health insurance policy;
- (e) utilising unreleased deferred claims liability that was provisioned for during the COVID-19 pandemic to implement favourable measures for Members;
- (f) any other measure formulated in response to the COVID-19 crisis or its economic or social effects, as notified to the ACCC by PHA,

**(PHA's Proposed Conduct).**

14. PHA proposes that interim and final authorisation be granted subject to the same conditions imposed in the First Authorisation.
15. PHA requests interim authorisation until the ACCC grants final authorisation and requests re-authorisation be granted for a period of 6 months from the date of the final determination.
16. PHA seeks re-authorisation for PHA's Proposed Conduct to devise a supportive, consistent and comprehensive response to the ongoing effects of the COVID-19 pandemic for the benefit of Members. PHA states that authorisation AA1000487 has allowed the Participating Parties to enter into discussions about how to assist Members during the COVID-19 pandemic.
17. PHA submits that the evolution and impact of the COVID-19 pandemic has been, and will continue to be, highly unpredictable. PHA submits that the ability to engage in a coordinated approach in response to Member concerns provided the flexibility to ensure that when new matters arose the Participating Parties were able to collaborate with each other. PHA provided the following examples of what the Participating Parties collaborated on under the First Authorisation:
  - The Participating Parties discussed whether they would further postpone premium increases expected on 1 October 2020. A decision was made that each fund would consider the impact of a further premium deferral and would make an individual decision on this issue; and
  - The Participating Parties discussed whether to extend cover for telehealth services beyond 30 September 2020. Due to the differential restrictions across States and Territories and the particular impact for Members in Victoria, it was decided that this would be handled on a fund by fund basis depending on their membership base.
18. PHA submits that although discussions between the funds did not result in any agreements to undertake particular measures during the period of the First Authorisation, there has been public benefits resulting from the funds being able to initiate these discussions and to create opportunity for measures to be agreed by the funds.
19. PHA submits that there has been no detriment to the public as a result of the funds engaging in discussions in accordance with the First Authorisation. PHA submits the purpose of the First Authorisation was to enable funds to discuss how best to benefit their Members during and as a result of the COVID-19 pandemic, which in no way has reduced competition in the private health insurance industry.

**The authorisation process**

20. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Act. Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs

any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

### Interim authorisation

21. Section 91 of the Act allows the ACCC to grant interim authorisation where it considers it appropriate to do so, including for the purpose of enabling due consideration to be given to an application for the revocation of an authorisation and the substitution of a new one (re-authorisation). In this case the ACCC may suspend the operation of the authorisation sought to be revoked and grant an interim authorisation in substitution for the authorisation suspended. This allows the parties to engage in the proposed conduct while the ACCC is considering the substantive application for re-authorisation.
22. PHA requested interim authorisation so that they can continue and expand collaboration, and enter into arrangements as necessary following expiration of the First Authorisation on 31 March 2021. In addition, PHA submit that interim authorisation will enable them to provide a consistent industry response to COVID-19 related events.

### Consultation

23. The ACCC conducted a limited consultation process on the request for interim authorisation in light of the First Authorisation imminently expiring. The ACCC received the following three submissions:
  - In providing broad support for re-authorisation, the Consumers' Federation of Australia (**CFA**) queries whether ongoing authorisations are required to deal with the COVID-19 pandemic, given that Australia is now in the recovery stage of the pandemic. The CFA is concerned that authorising '*...any measure formulated in response to the COVID-19 crisis or its economic or social effects, as notified to the ACCC*', may allow health insurers to coordinate on almost anything related to the COVID-19 pandemic, after advising the ACCC. The CFA supports imposing similar conditions to those in the First Authorisation and submits that the conditions could be strengthened to prevent any coordinated conduct that seeks to get policyholders to upgrade their cover.
  - The Lactation Consultants of Australia and New Zealand (**LCANZ**) supports extending the currently authorised conduct. LCANZ submits there is benefit in broadening health insurance cover for treatment received by telephone or videoconferencing or other models of treatment that substitute for face-to-face interaction.
  - A submission from a third party who stated that PHA should be required to demonstrate what the Participating Parties have done under the First Authorisation in relation to broadening health insurance cover for the treatment received by telephone or videoconferencing and the need for these services to continue. The third party submitted there was little benefit in allowing the Participating Parties to engage in the Proposed Conduct which relates to providing financial relief to members or broadening the category of dependants that are able to remain on an adult's health insurance policy. For the deferred claims liability the third party submits that it is unclear how this aspect of the conduct would be beneficial. The third party notes that HBF<sup>6</sup> has already committed to returning surplus funds to members without the need for authorisation. The third party submits that if interim authorisation is granted, there is potential for significant public detriment if health funds agree to limit the amount of deferred claims liability to be returned or to defer or delay returning these funds to members. The third party submits this is particularly the case as the largest health insurers with the largest deferred claims

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<sup>6</sup> See HBF media release 3 March 2021 - <https://www.hbf.com.au/media-releases/hbf-returning-surplus-funds-from-covid-19-to-members>

liabilities would be covered by the authorisation. The third party opposes authorisation to any measure formulated in response to the COVID-19 crisis or its economic or social effects, as this seems very open ended and would allow the Participating Parties to engage in a wide range of measures after notifying the ACCC.

24. PHA provided a response to submissions received from interested parties and its views are summarised below.

#### *Telehealth treatments*

25. PHA submits that the broadening of health insurance cover for telehealth treatment has contributed to the protection of many vulnerable members of society, and continues to do so during the COVID-19 pandemic. The authorisation has enabled the Participating Parties to have open and regular discussions about the expansion of health cover to include various forms of telehealth treatment. PHA submits that during the upcoming winter months, additional outbreaks of COVID-19 may require the funds to collaborate again on telehealth treatment to provide options for vulnerable people.

#### *Deferred claims liability*

26. PHA notes that although HBF has committed to returning surplus funds to Members, this does not mean that the other health insurers who are Participating Parties will make the same individual decision. PHA submits that competition amongst funds will not necessarily generate the greatest return of surplus funds to Members and some may decide to use surplus funds for other purposes. Some health funds may decide to use the surplus funds to drive premium increases down in 2022 and improve their competitive position. PHA also recognises that there may be a competitive advantage of returning surplus funds to Members through various initiatives and PHA submits interim authorisation would not discourage insurers from exceeding any agreed approach by industry. However, PHA notes that competition alone would not be sufficient to drive a baseline response from all insurers. This is because the measures would result in short term gains from Members rather than ongoing improvements in products, services or prices that would be driven by competition.
27. PHA submits that the scope of the Proposed Conduct, together with the proposed conditions (which are the same as for the First Authorisation) will ensure that the Participating Parties will not be able to agree on a limit to the amount of deferred claims liability to be returned to Members or to any measure that would cause a detriment to Members.

#### *Broadening the category of the age of dependants*

28. PHA submits that while the legislation regarding the broadening of the category of dependants is currently before Parliament and likely to pass, this does not mean the Participating Parties will choose to implement this legislation as it is not mandatory. PHA submits that there are potential benefits for Members in the funds collaborating on how and when they will implement changes in law which broaden the category of dependants. PHA notes that competition alone between funds will not necessarily generate a response from the industry to legislative changes that would result in the best outcome for Members. PHA notes that the changes required to implement the reform will lead to a reduction in premiums income as dependants will be paying less in premiums for their health insurance policy. To remain price competitive some insurers may decide not to implement changes to their policies in response to the legislative reform in the short term or not at all.
29. In contrast, PHA submits that insurers may also see this as an opportunity to create a competitive advantage in attracting more families to their fund. PHA submits that the approach of insurers will vary based on the nature of their membership base, the nature of the fund and their own commercial drives. PHA submits that collaboration between funds will provide the opportunity for a baseline industry approach and provide Members with more certainty and transparency about this legislative reform.

30. In the absence of an industry approach PHA submits there may be confusion and uncertainty for young people about the proposed changes. PHA submits that competition alone will not necessarily drive a quick response to the legislative change and there is a broad expectation among young people that they will be able to take advantage of the reform and stay on their family policies from the date of the legislative change.

*Broadening conduct to include social or economic impact of the COVID-19 pandemic*

31. PHA acknowledges that the last aspect of the conduct which relates to any measure formulated in response to the COVID-19 crisis or its economic or social effects is broad but it provides flexibility to enable the Participating Parties to discuss how best to benefit their Members as different needs or issues arise as a consequence of the COVID-19 pandemic. PHA notes that this limb of PHA's Proposed Conduct could be constrained by the same requirement in the First Authorisation which provides that the Proposed Conduct be '*for the sole purpose of addressing concerns that policyholders have, or may reasonably have, in relation to the COVID-19 pandemic*'.<sup>7</sup>

32. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website [www.accc.gov.au/authorisations](http://www.accc.gov.au/authorisations).

**Granting of conditional interim authorisation**

33. The ACCC has decided to grant conditional interim authorisation to the Interim Authorised Conduct set out in paragraph 3.

34. Conditional interim authorisation is subject to the following conditions:

**(1) Notification Condition**

- PHA must notify the ACCC of any measure formulated by the Participating Parties as part of the Interim Authorised Conduct (the **Particular Conduct**), prior to implementing or otherwise giving effect to the Particular Conduct.
- For the avoidance of doubt, this condition requires PHA to notify the ACCC of any contract, arrangement or understanding arising from the Interim Authorised Conduct. PHA must provide notification to the ACCC as soon as practical after the Participating Parties have reached agreement on the nature of the Particular Conduct, but not less than 24 hours before the Particular Conduct is implemented, or otherwise given effect to.
- The notification of any Particular Conduct to the ACCC must include at a minimum:
  - a description of the Particular Conduct, including:
    - identifying any aspect of the Particular Conduct on which the Participating Parties will have a common position; and
    - a description of the groups of policyholders and, where applicable, private health service provider/s, related to, or who may be affected by the Particular conduct;
  - a description of the issues arising from the COVID-19 pandemic that the Particular Conduct seeks to address and how they will be addressed through the Particular Conduct;
  - the Participating Parties that, at the time of the notification, have agreed to implement the Particular Conduct; and

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<sup>7</sup> See paragraph 5.8 of the Final Determination of the First Authorisation.



- when the Particular Conduct is intended to be implemented, or otherwise given effect to.
- The ACCC will publish a non-confidential version of the notification on the [ACCC's authorisations public register](#).

## **(2) Fortnightly reporting requirements**

- As imposed by the conditional interim authorisation granted on 2 June 2020 and the First Authorisation on 17 September 2020, PHA must continue to provide a fortnightly report to the ACCC regarding any meetings, discussions, developments and decisions in relation to the Interim Authorised Conduct, including any contracts, arrangements or understandings entered into or given effect to (**the Fortnightly Reports**).
- A fortnightly report must include information regarding any meeting or discussion relating to the Interim Authorised Conduct involving the Participating Parties, including:
  - the attendees at the meeting or discussion;
  - the agenda items of the meeting or discussion that are related to the Interim Authorised Conduct;
  - any minutes of the meeting or discussion relating to the Interim Authorised Conduct; and
  - an overview of topics discussed that related to the Interim Authorised Conduct.
- A non-confidential version of the Fortnightly Report should be provided for publication on the [ACCC's authorisations public register](#).

## **(3) Provision of further information**

- PHA and any Participating Party must on request by the ACCC provide, within a reasonable timeframe, any further information or documents that the ACCC reasonably considers relate to the Interim Authorised Conduct.

## **(4) Pricing condition**

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

## **(5) Termination of contracts condition**

- Any contract, arrangement or understanding between any of the Participating Parties entered into in reliance of ACCC authorisation must provide for immediate termination if the Interim Authorised Conduct is no longer authorised by interim authorisation or final authorisation, and all conduct giving effect to any such contract, arrangement or understanding must cease upon termination, other than any provisions dealing with ongoing confidentiality obligations.
- For the avoidance of doubt, Participating Parties can continue to unilaterally provide any measures that are beneficial to consumers that have been provided during the period of authorisation.

35. The ACCC may authorise the ACCC Competition Exemptions Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under these conditions on its behalf and that authorisation may be subject to any conditions which the ACCC may impose.

## **Reasons for decision**

### Reasons for granting interim authorisation for the Interim Authorised Conduct

36. In granting conditional interim authorisation for the Interim Authorised Conduct described in paragraph 3, the ACCC notes the same factors and public benefits and public detriments which it considered in respect of the First Authorisation are still relevant, despite the circumstances of the COVID-19 pandemic being different now to what existed 12 months ago when the ACCC first considered PHA's request for interim authorisation.
37. In particular, the ACCC:
- (a) recognises the urgency of the request for interim authorisation and the importance of the Participating Parties being able to quickly implement measures to broaden health insurance policies and provide financial relief measures to affected Members, and
  - (b) recognises that there is still a level of ongoing uncertainty for Members due to the pandemic which means there are likely to be benefits in allowing coordination and consistent messaging on health insurance policies to consumers, as well as coordination by health insurers in respect of engagement with government and other stakeholders in responding to COVID-related matters.
38. The ACCC's reasons for granting the First Authorisation are discussed in full in the ACCC's final determination for the [First Authorisation](#).
39. The ACCC notes that there has been limited use to date of the First Authorisation, that no agreements have been entered into as a result of discussions among the Participating Parties, and that some private health insurers have instead acted on an individual basis to respond to COVID-related matters.
40. The ACCC notes PHA's submission that the First Authorisation enabled the Participating Parties to enter into discussions about how to assist Members during COVID-19. The ACCC considers that although these discussions did not result in any agreements to undertake particular measures, there is likely to have been some public benefits in the Participating Parties being able to initiate these discussions and to create the opportunity for measures to be agreed by the Participating Parties.
41. The ACCC notes that Interim Authorised Conduct limits the scope of what the Participating Parties can coordinate discussions or agreements on. The ACCC considers that the Participating Parties are able to continue to compete on price and coverage, and individual insurers are able to offer coverage and relief measures beyond that outlined in the Interim Authorised Conduct. All Participating Parties retain the ability to opt in or out of the Interim Authorised Conduct.
42. The interim authorisation is subject to a condition requiring PHA to notify the ACCC of Particular Conduct before it is implemented. This will continue to provide transparency in relation to the conduct covered by the interim authorisation. The ACCC will place any such notifications on the public register as soon as practicable.
43. It is important that the scope and nature of the relief measures offered under the Interim Authorised Conduct are effectively and accurately communicated to Members, as well as to people who are not currently Members.

### Reasons for not granting interim authorisation for particular aspects of PHA's Proposed Conduct



44. In not granting interim authorisation to the broadening of the category of dependants that can remain on an adult's health insurance policy, the ACCC considers that:
- (a) This aspect of PHA's Proposed Conduct appears to be a longer-term, structural feature of health fund offerings and may become an important feature in relation to how they may compete for new members irrespective of, and beyond, the COVID-19 pandemic.
  - (b) In not granting interim authorisation to this aspect of PHA's Proposed Conduct, the ACCC considers there is likely to be difficulty in unwinding the competitive impact from granting interim authorisation. In this circumstance, the structural change in competitive behaviour is likely to be irreversible.
  - (c) The ACCC also notes that the First Authorisation was intended to deal with urgent responses to the unfolding pandemic. In contrast, the nature of this aspect of PHA's Proposed Conduct is materially different, which focuses on a longer-term policy issue, the genesis of which pre-dates the pandemic.
45. In not granting interim authorisation to releasing the deferred claims liability, the ACCC considers that:
- (a) It has had limited time to consult on and fully consider this aspect of PHA's Proposed Conduct,
  - (b) Based on the information currently available, and the limited opportunity to undertake stakeholder consultation, it is possible that competition among private health insurers in respect of releasing the deferred claims liability and returning excess funds to consumers could be a source of competition and innovation in the way those funds are returned, leading to a range of benefits for consumers.
  - (c) It appears the claimed public benefits can be achieved without the interim authorisation, noting that one private health insurer has announced that it intends to return its deferred claims liability to Members.
46. In not granting interim authorisation to the broadening of the scope of the authorisation to include any other measure formulated in response to the COVID-19 crisis or its economic or social effects (except for conduct falling within paragraph 3(e)), the ACCC considers that:
- (a) the very broad nature of this aspect of PHA's Proposed Conduct could capture effects of the COVID-19 pandemic that persist in the long-term and therefore relate to longer-term policy responses. Any future measures which seek to deal with the economic or social impact of the COVID-19 pandemic would ideally be known and specified and more appropriately dealt with in a separate application for authorisation and not under an authorisation intended to address specific issues arising from the pandemic.
  - (b) In the time available to consider this aspect for interim authorisation, the ACCC is unable to form a view on the impact on the market given the open-ended nature of this aspect of PHA's Proposed Conduct.
47. The ACCC will continue to assess PHA's Proposed Conduct, including the expanded conduct, prior to making a Draft Determination on the substantive application for re-authorisation.

#### **Reconsideration of conditional interim authorisation**

48. The ACCC may review the conditional interim authorisation at any time. The ACCC's decision in relation to the conditional interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted.

## **Annexure A – Private health insurers**

1. ACA Health Benefits Fund Limited
2. ahm Health Insurance
3. Australian Unity Health Limited
4. BUPA HI Pty Ltd
5. CBHS Corporate Health Pty Ltd
6. CBHS Health Fund Limited
7. CUA Health Limited
8. Defence Health Limited
9. Emergency Services Health Pty Ltd
10. GMHBA Limited
11. GU Health
12. Health Care Insurance Ltd
13. Health Partners Limited
14. HIF Pty Ltd
15. Hunter Health
16. Latrobe Health Services Limited
17. Medibank Private Limited
18. Mildura Health Fund
19. MO Health Pty Ltd
20. Navy Health Ltd
21. nib Health Funds Ltd
22. Nurses and Midwives Health Pty Ltd
23. Peoplecare Health Limited
24. Phoenix Health Fund Limited
25. Police Health Limited
26. Queensland Country Health Fund Ltd
27. Queensland Teachers' Union Health Fund Limited
28. Railway & Transport Health Fund Ltd
29. Reserve Bank Health Society Ltd
30. St. Lukes Health
31. Teachers Health Fund

- 32. Territory Health Fund
- 33. The Doctors' Health Fund Pty Ltd
- 34. The Hospitals Contribution Fund of Australia Ltd
- 35. Transport Health
- 36. Westfund Limited