

MinterEllison

15 June 2020

Isabelle Mauleon-Wells
Analyst, Merger and Authorisation Review Division
Australian Competition and Consumer Commission
Level 25, 32 Turbot Street
Brisbane QLD 4000

Dear Isabelle

PHA Authorisation Application AA1000487 – Response to Submissions

We refer to your email on Thursday 4 June 2020 regarding the nine submissions received by the ACCC during the initial public consultation process for the application for authorisation (**Application**) submitted by Private Healthcare Australia Limited's (**PHA**), Members Health Fund Alliance and each of their member health funds (**Participating Parties**). The ACCC has sought our client's response to the concerns raised in the submissions.

This letter sets out our client's comments on those submissions, particularly regarding the concerns or questions raised by CHOICE, the Consumers' Federation of Australia, the Consumers Health Forum of Australia and the Australian Private Hospitals Association.

1. General comments

- 1.1 Our client notes that the majority of submissions were positive and supportive of the Application. Consistent in several submissions was the substantial appreciation for the introduction of, and clarity around, telehealth rebates from organisation such as Speech Pathology Australia and the Australian Psychological Society.
- 1.2 The key concerns raised about the Application were in the submissions of CHOICE and Consumers' Federation of Australia whose views were that:
 - (a) PHA is only required to notify the ACCC after any new measures were implemented;
 - (b) the definition of 'Proposed Conduct' in the interim authorisation was broad in scope and open ended in nature; and
 - (c) the six month period of the authorisation that has been sought by PHA in the Application is too long.

2. Notification to ACCC of new measures

- 2.1 The Consumers' Federation of Australia claims that the obligation to notify the ACCC of a new measures of Proposed Conduct in the interim authorisation is an '*after the fact notification*' and '*not satisfactory*'. PHA submits that under the 'Notification of Proposed Conduct' condition in the interim authorisation, PHA must notify the ACCC of the Particular Conduct at least 24 hours *before* it is implemented and not '*after the fact*'.
- 2.2 PHA appreciates that the time period is short and it would be agreeable to lengthening this period to give the ACCC a better opportunity to consider the new measure and notify the PHA if it has any concerns. PHA suggests that the condition in paragraph 18 of the interim authorisation could



be amended to provide for *'at least 7 days' notice before the Particular Conduct is implemented, or otherwise given effect to, unless there are special circumstances that require urgent implementation in which case it must provide not less than 24 hours' notice before the Particular Conduct is implemented, or otherwise given effect to'*.

- 2.3 We note that the ACCC also has the opportunity to raise any concerns that arise from new measures that are being discussed at meetings well in advance of those measure being implemented. PHA has fortnightly reporting obligations, which will provide ACCC with continual insight into the Participating Parties' discussions and developments. The ACCC can also require PHA to produce further information or documents relating to the Proposed Conduct.

3. Breadth of scope of 'Proposed Conduct'

- 3.1 CHOICE and the Consumers' Federation of Australia argue that the final limb of the definition of 'Proposed Conduct' in the Application, being *'any other measure formulated in response to the COVID-19 situation...'* is too broad and could allow insurers to agree on *'almost anything related to the current COVID-19 environment'*, even if detrimental to the public. In their submissions, CHOICE and Consumers' Federation of Australia request that this final limb of the definition of 'Proposed Conduct' be omitted and if the Participating Parties seek to implement any measure not already permitted by the first four categories of Proposed Conduct, they should seek a variation of the Application.
- 3.2 PHA acknowledges the concerns expressed however PHA and the Participating Parties have no intention to agree on any measure that would be detrimental to its members during the COVID-19 situation. To that end, PHA is also agreeable to the narrowing of this limb of the definition of 'Proposed Conduct' in the ACCC's final determination so that it reads *'any other measure formulated in response to the COVID-19 situation that will assist or benefit a Member, as notified to the ACCC by PHA'*.
- 3.3 Our client submits that the 'catch-all' limb of the definition should be retained in this amended form. Due to the unpredictability of the COVID-19 situation, the Participating Parties require flexibility to be able to develop new measures that address challenges that cannot be foreseen at this stage. These new measures may not be captured in the first four categories of the definition Proposed Conduct and would require PHA to apply to the ACCC to revoke its determination and make a new determination that includes the new measure. This would unnecessarily delay the implementation of the COVID-19 response which often require urgent and fast action. PHA submits that the general category in the definition of Proposed Conduct should not be omitted.

4. Non-exhaustive definition of 'Proposed Conduct'

- 4.1 The Consumers' Federation of Australia also considers that the introductory words describing Proposed Conduct *'to discuss and implement a coordinated response regarding COVID-19 to provide to people covered by a health insurance policy'* is very broad and there is no requirement that there be a public benefit. They consider this drafting to be non-exhaustive, in that conduct could constitute Proposed Conduct even if it doesn't fall within the five categories of conduct.
- 4.2 Our client and the ACCC understand the definition of Proposed Conduct to be exhaustive as it stipulates that the Participating Parties are only able to discuss and implement a coordinated response *'in relation to'* the five listed measures.

5. Six month period

- 5.1 While the majority of submissions consider that a six month period of authorisation is an appropriate length of time, CHOICE and the Consumers Health Forum of Australia have questioned the need for the full six months. Our client considers that a six month interim authorisation is an appropriate and necessary timeframe because the COVID-19 situation and implications arising from COVID-19 are expected to last at least six months. While several measures have already been announced and are unlikely to change, there may be a need to implement additional measures in the event of increased uncertainty, such as if there is a second wave of the virus.
- 5.2 PHA is mindful, as the Australian Psychological Society has pointed out, that the mental health repercussions of the COVID-19 pandemic *'will be widespread and long-lasting'*. It is important to authorise the Proposed Conduct for six months to account for the mental health consequences that have arisen and will perpetuate during this time.

6. Individual action

- 6.1 Lastly, our client wishes to address the Australian Private Hospital Association submission, which questions whether health insurers are still able to reach their own agreements with individual providers or whether the authorisation has *'resulted in insurers adopting identical terms across the industry as a whole'*. Our client emphasises that the Participating Parties have retained complete discretion and the ability to liaise with individual providers to make their own decisions about the appropriate measures to take.
- 6.2 The interim authorisation expressly states that Participating Parties can still compete on price and coverage and offer coverage and relief measures beyond what is outlined in the Proposed Conduct.

Please contact us if you wish to discuss any aspect of this letter.

Yours faithfully

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