



25 September 2024

Naomi Menon
Director Competition Exemptions
Australian Competition and Consumer Commission

Dear Naomi

Draft determination and interim authorisation re application AA1000671 lodged by St. Luke's Medical and Hospital Benefits Association

The Australian Dental Association (ADA) would like to comment on the ACCC's 12 September 2024 draft determination and interim authorisation relating to application AA1000671, which was lodged by St. Luke's Medical and Hospital Benefits Association (St Luke's).

Background

The ACCC proposes to grant authorisation to enable St Luke's and participating dentists to enter into and give effect to specified price capping provisions in agreements with dentists who participate in its dental partner provider network and who are in the same local catchment areas as St Luke's' own dental practices in Tasmania, and to issue metrics reports to dentists in its dental partner provider network regarding their services delivery and billing to St Luke's members.

Context

By way of context to the ADA's comments on the ACCC's draft determination, the ADA notes that:

- There are wider issues relating to the impact of private health insurer (PHI) arrangements in terms of both competition in dental services and consumer harms. The ADA's position remains that these wider issues must be addressed by the ACCC.
- However, individual authorisations (such as this authorisation and the two other PHI arrangements authorised by the ACCC in 2023) cannot fix wider issues, because the role of the ACCC in each individual authorisation is to assess whether the specific application before it meets the statutory test for authorisation.

General comments

The ACCC has proposed a 5 year authorisation in the draft determination, which would provide it with an opportunity to assess what happens in Tasmania over that time, noting variables such as St Luke's projections of increased market share in Tasmania, uncertainty regarding how many owned dental practices it will open and how many Participating Providers there will be, and the possibility that St Luke's may make changes to both the maximum fee and the relevant services to which the authorisation applies.

The ADA agrees that, if the ACCC's final determination is that the statutory test for authorisation is met, a 5-year term would be appropriate. This would allow the ACCC sufficient time to examine, and develop a considered position on, the wider issues that the ADA and others have raised, ahead of this and the two other PHI arrangements authorised by the ACCC in 2023 becoming due for re-authorisation.

In terms of whether this application meets the statutory test for authorisation:

- The ACCC has recognised two public benefits in the draft determination, being:
 - *‘increased access to price certainty for routine and preventative dental services’*, and
 - *‘increased competition between health insurance providers in Tasmania’*.
- The public detriment the ACCC has assessed against those public benefits in the draft determination is the potential for:
 - *‘reduced competition or reduced standard of patient care and consumer autonomy’*.
- The ACCC’s draft assessment is that the statutory test is met because it believes the risk of that public detriment is low, primarily based on:
 - the unlimited nature of the St Luke’s arrangements as currently proposed (being voluntary and non-exclusive, and without any geographic limitations),
 - the fact that the price capping as currently proposed only affects a relatively small proportion of all dental services offered,
 - the current position of St Luke’s with respect to not applying differential rebates¹, and
 - the ACCC’s view that the existence of large nationwide insurers (Bupa and Medibank) would limit the risk that price capping by St Luke’s would compel dental practices in Tasmania to either accept capped charges that make them unviable or force them to reduce quantity or quality of services, notwithstanding St Luke’s’ current and projected Tasmanian market share in health insurance.²

To ensure that the ACCC’s draft assessment with respect to public detriment is robust and continues to hold good during the term of the authorisation, the ADA submits that it would be appropriate for the ACCC to consider the conditions outlined below.

No limitations on the network

It would be appropriate to consider a condition ensuring that St Luke’s stated position on not having limitations on joining the network continues to apply during the term of the authorisation. Specifically, St Luke’s has said that the network will be voluntary, non-exclusive and that any suitable dental provider may join regardless of whether there are other Participating Providers or its own dental practices in the same geographic area.

Differential rebates

It would be appropriate to consider a condition ensuring that St Luke’s stated position with respect to differential rebates continues to apply during the term of the authorisation. Specifically, the rebates provided to members should not differentiate between whether the services were performed by a member of the St Luke’s network (a St Luke’s practice or a Participating Provider) or by any other qualified dental provider.

MFN clause

The relevant provisions for which St Luke’s is seeking authorisation include a requirement that, where a Participating Provider’s normal business practice is to offer discounts or benefits to its patients, it must provide discounts or benefits or an equivalent amount of the discount or benefit to St Luke’s members.

¹ such that patients who are insured with St Lukes would continue to receive the same rebate regardless of whether the dental practice they choose to use is part of the St Luke’s network.

² St Lukes is the second largest PHI in Tasmania by market share and St Lukes’ own projections indicate it is on track to be the largest by 2025.

The ACCC analysed the potential impact of such ‘most favoured nation’ (or MFN) clauses in the HCF authorisation, noting that its concerns were tempered by the relatively small market share of the PHI in that case. Given the ACCC’s comments in that authorisation about the potential for serious concerns where the PHI has a larger market share, it would be appropriate to consider a condition that links the operation of this MFN clause to St Luke’s’ market share (and prevents it operating if St Luke’s market share increases beyond a particular level).

Existing competition between dental practices

To preserve assumptions regarding existing competition between dental practices, it would be appropriate to consider conditions aimed at ensuring that, outside the conduct that the ACCC has assessed (i.e. compliance with the contractual obligation on Participating Providers to charge St Luke’s members at or below the specified maximum fee for the specified routine services, and the issuing/receipt of the metrics reports for the stated purpose) this authorisation cannot be used to facilitate price setting between unrelated dental practices.

For example, Participating Providers must provide St Luke’s, upon request, with a copy of their usual fee schedule for St Luke’s members. It may be appropriate to include a condition ensuring that the exchange of this information is not used to facilitate price setting between practices, including via ‘hub and spoke’ co-ordination.

Thank you for your time and consideration. Should you wish to discuss further any matters raised in this submission, please contact Ms Eithne Irving, Interim Chief Executive Officer at ceo@ada.org.au.

Yours sincerely



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Chief Executive Officer (Interim)
Australian Dental Association Ltd