

9th February 2022

Mr. Darrell Channing
Director, Competition Exemption
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By email: exemptions@acc.gov.au

Melbourne East General Practice Network Limited (Outcome Health) – Response to the draft determination of the ACCC dated 17 December 2021

Dear Mr Channing,

Outcome Health wishes to make the following submissions in response to the draft determination of the ACCC dated 17 December 2021 in application for authorisation AA1000577 (**Draft Determination**).

Market Failure

The Australian Competition and Consumer Commission (**ACCC**) and WA Primary Health Alliance Ltd and the Participating Primary Health Networks (the **Applicant**)¹ noted the possibility of vendors moving to a direct to general practitioner (**GP**) market model.²

It is understood that Primary Health Networks (**PHNs**) that join the Primary Sense Project will be able to provide the data extraction tool to their affiliated GP clinics on a no cost licence.³ It is also understood that that in respect of any other data extraction tools that GP Clinics within the Participating PHNs would be expected to pay for the use of that other tool.⁴

Outcome Health does not expect a consumer to choose a product which it must acquire at a price when there is a free product which may accomplish the same objective. Accordingly, Outcome Health expects that the only way it will be able to compete for GP Clinics that are affiliated with a PHN under this action is if it reduces its prices to zero.

The data extraction tools provided by Outcome Health have little value outside of the relationship between Outcome Health and the PHNs. The tools and reports are built specifically for PHN needs; the PHNs choose the tool, not the GP clinics. Therefore, the benefit identified by the ACCC⁵ is in fact a hold-up issue for Outcome Health. It is accepted that hold-up issues are a form of market failure.⁶ Consequentially, if the proposed conduct is authorised, one of the benefits upon which the ACCC presently relies is, in fact, a form of market failure.

¹ The Application dated 14 September 2021 (**Application**) at paragraph 2.1.7 and Schedule 1, Part A.

² Draft Determination at paragraphs 2.4, 4.32, 4.45, 4.50, 4.61; Application at paragraph 5.2.

³ Draft Determination, at paragraph 2.11 and Application at paragraph 2.1.17.

⁴ Draft Determination, at paragraph 4.48.

⁵ Draft Determination at paragraph 4.43.

⁶ *Re Fortescue Metals Group Ltd* (2010) 242 FLR 136 at [798] to [802].

Outcome Health submits that there is no value for money where the Applicant utilises public funds to replace products already in existence and produced without public funds. Further, it is illusory to conceive that the provision of a new product enhances choice⁷ within a consumer base (being the PHNs) when the owner of that new product is that consumer base.

Innovation is irrelevant

Outcome Health notes that it is the ACCC's position that market participants should have a commercial incentive to improve their products.⁸ In Outcome Health's view, there is no commercial incentive to innovate if the only way for it to compete for the largest segment of the market (being to GP clinics affiliated with PHNs) is to reduce the price of its product to zero.

As the Royal Australian College of General Practitioners observed, 'a practice may be familiar with operating extraction tool A but will no longer be able to afford to use this tool when the local PHN stops offering it for free, because they prefer and provide tool B'.⁹ If this is the case then the market may be more sensitive to price than quality which will heighten the anti-competitive effects of a product that is owned by PHNs, and is subsidised entirely by the Federal Government. Therefore, the level of innovation may become irrelevant if all products are not provided for free.¹⁰ Therefore, Outcome Health's product will remain uncompetitive on price regardless of the level of innovation.

Outcome Health expects that in order to sell the POLAR product directly to these GP Clinics, it will require significant re-work of the core product which is currently based upon the needs and requirements of what a PHN would like a GP to see from a data presentation perspective to one which focuses on the specific requirements of individual GPs and practices from their perspective.

Cost Benefit Analysis

The Applicant submits that:

- (a) the forecast ongoing costs to operate Primary Sense 2 are considerably less than the current costs incurred by the PHNs for using other data extraction tools;¹¹
- (b) the costs incurred by the Participating PHNs for the use of data extraction tools will decrease;¹² and

⁷ Draft Determination at paragraph 2.11.

⁸ Draft Determination at paragraph 4.20.

⁹ Draft Determination at paragraph 4.44, see also Submission by RACGP (14 October 2021), page 1.

¹⁰ Draft Determination, at paragraph 4.48.

¹¹ Application at paragraph 2.3.1(b).

¹² Application at paragraph 4.1.1.

- (c) if the authorisation has not been granted, Participating PHNs will continue to incur higher costs for acquiring licences from other data extraction tool providers.¹³

The Application does not contain any material to substantiate these matters, yet the assertions are fundamental to the public benefit which is asserted to be gained.

In Outcome Health's view, the ACCC must consider the following questions:

1. What would be the initial and five-year costing of PHNs operating the full proposed solution, including PHI related changes and costs.
2. What further development costs are expected to implement the proposed solution

In the absence of such information, we are concerned that the cost of providing an end-to-end solution may not be as cost effective. As more data is extracted and accessed within the PHI environment, it is likely that this will increase the computing costs. It is uncertain how this has been considered. We question what cost benefit analysis has been undertaken to substantiate the claim, that this action will result in substantial savings, including the costs for work to date and future forecasted costs.

Outcome Health observes that a purpose of the PHN Grant Program Guidelines is to avoid, wherever practicable, duplicating efforts of other private or public sector entities.¹⁴ The Applicant has failed to demonstrate that there is a present failure in the market that it is addressing. Instead, it identifies that by developing the Primary Sense 2 project itself, it removes expenditure that PHNs already incur.¹⁵ We believe this action will increase expenditure.

The Applicant has formed an Unincorporated Joint Venture.¹⁶ It is unclear what level of oversight government will have over this vehicle since it may sit outside of the usual PHNs funding structure. Nevertheless, the draft determination noted that government would have oversight of PHNs action in this case.¹⁷

Outcome Health is not aware there being any material provided to the ACCC that address the following issues:

1. How does Government oversee the activity in this circumstance?
2. Does the Government consider how funding was used to determine if it was used appropriately or, does Government only consider that the funding was used for the stated purpose?

¹³ Application at paragraph 4.2.2.

¹⁴ Department of Health, Primary Health Networks Grant Programme Guidelines February 2016 – Version 1.2, at paragraph 1.6.1, page 10.

¹⁵ Application at paragraphs 2.3(b), 4.1.1 and 4.1.2.

¹⁶ Application at paragraph 2.1.7.

¹⁷ Draft Determination at paragraph 4.38.

In the absence of this information, it is unclear how the conclusions around government oversight have been reached.

Duration of authorisation

The following paragraphs are submitted on the basis that the ACCC disregards the above submissions and decides to grant the authorisation.

Given the above risks, the ACCC's proposed duration is inappropriate. This is because by the time it returns to reconsider the matter, the detriments may have eventuated such that the only decision available to it is that it should reauthorise the conduct because there is no one else to provide data extraction tools.

The data extraction market in Australia is small; only three providers with one supplying 85% of PHNs.¹⁸ The authorisation of the proposed conduct will, in effect, remove 70% of the market.

Further, the ACCC's proposed duration assumes the funding of PHNs will continue at the same rate and at the same level. If the funding were to change then the operational paradigm will shift such that parts of the Applicant's submission may no longer be correct.¹⁹

Accordingly, Outcome Health considers, that the duration of the authorisation should be limited to the earlier of:

- (d) 6 months from the date that a decision is made by the Federal Government altering the level of funding to PHNs; or
- (e) Two to three years.

The submitted duration will ensure that the ACCC has the opportunity to reconsider this authorisation prior to public detriments that are expected to occur being permanent.

Adam McLeod,

Outcome Health, CEO.

¹⁸ Draft Determination at paragraph 2.5

¹⁹ Such as whether PHN can provide Primary Sense 2 to GP Clinics at no cost.