MSIA
MEDICAL SOFTWARE INDUSTRY ASSOCIATION

MSIA and ACCC MEETING
30 SEPTEMBER 2021

The following points made by MSIA member companies on the call are for the record

ACCC Representatives: Gemma Smith, David Hatfield and Caylie McDonald

MSIA points raised for the record

- It is vital that the ACCC is aware, and it is on the record, that in healthcare when providers adopt a product which has impact on their workflow or service it is a major impost as there are many connected systems and changes can have a cascading effect. Examples of reluctance to change is evident in the time it takes for primary care providers in particular to upgrade or apply patches even when requested by Services Australia which processes the Medicare and PBS.

- During COVID-19 the pressures on General Practice have never been greater. and Unnecessary or unessential change is undesirable. It will impact the chain of healthcare and could necessitate other software configurations or security and UX issues. It will mean a huge impost on existing general Practice software systems. If for instance the Applicant started promoting a product, or providing it on terms which were anti-competitive, then once adopted on the they procure something or change the workflow it's very difficult for General Practice to go back on that because there's so much pressure on everything. If General Practice feel they are being compelled to use a product promoted by a PHN (fully funded by the Government) it is a concerning scenario because it could be committing people to a course of action or a new product with less incentive to change or to go back to their previous providers. It's a very unusual situation.

  It appears from the interim Application that the Applicant is asking can we spend the money? While this is Government money that they're asking to spend, is that considered? How does industry respond to the fact that it actually federal funding that the Applicant is asking to spend which clearly has a strong competitive impact on industry that has invested in innovation and market product. It will immediately reduce appetite for investment and innovation.

- We'd like to put on the record in respect of the development of software by the Applicant, the development money that is being used by these PHN's is taxpayer money that they've been granted to *commission not* to develop product themselves. If their product doesn't get sold or doesn't succeed, it doesn't really matter to their survival. The PHNs continue to get funded, so that in itself raises interesting competitive conundrum.

- Evidence of permanent harm to the market appears to be required for the grant of the interim application. There seems to be a sort of dichotomy between those two things, where's the balance? Is there a requirement on the applicant to demonstrate that there would not be permanent? It almost feels weighted in the applicants favour from an interim perspective. Health providers are conservative and if they have the impression that a government funded entity is recommending/selling a product, it may pressure them into change. There is a real risk to competition if this occurs.

MSIA SUMMARY: A number of companies on the call are not currently affected, but they have software under development, or are looking at ways to innovate and make digital health more available and data to flow more freely as a result of COVID in particular.

The grant of an interim Application which will affect competition could immediately cause such development to cease. This will limit consumer choice in a key sensitive area, namely the management of Australians' healthcare data.

MSIA SUMMARY: Almost everyone on this call in some shape or form does provide a software service to a PHN and, obviously, not all the PHN's are joined in this application. However, they do meet as a group and communicate with each other. This in itself could prejudice companies' ability to provide full frank disclosure of information, particularly in the tight timeframe proposed by the interim Application which in itself provides a great advantage to the Applicant without a corollary benefit to GPs, consumers or competition in digital health.

- The ACCC can see the number of member companies on the call and the concerns raised around this interim application. There seems to be no urgent need for this interim authorisation and a real possibility of permanent harm to competition in the marketplace.

- Given the nature of this particular Applicant would an urgent need be categorised as something like they may feel they could lose funding for a particular initiative if it wasn't approved at the interim stage? The MSIA is keen to note that the use of funds for software development by the PHNs is inconsistent with the founding principles of the PHNs, which is to commission. As such it is hardly appropriate to exempt them from competition rules to do something which they ought not do doing.

- How relevant is it that the use of the funding may /may not be within the Applicants legal remit? For the PHN's their commissioning duties mean an obligation to make sure they have responsibilities to develop the private sector providers rather than eliminating them. The competition factors are not simply competition between the PHN's, but the actual direct impact on private commercial providers which obviously need to charge for the services. The PHNs however, can

provide product they don't need to charge for. This creates market distortion and may reduce the quality and quantity of options available to GPs.

- Essentially what we are seeing with the Application is a government funded organisation stepping in to develop and provide something for free. That is not a competitive environment. There is a responsibility on the ACCC to make sure as far as possible that there is a thriving provision of services to the health sector. This interim Application would clearly impact the market negatively.

- The PHN network is complex. Its complexity comes from the structure, because in an open market, it seems quite natural that there'd be a competitor there's competition etc But with PHN's, they're federally funded independent not-for-profit organizations that the Government use to support health initiatives. And so there's funds that flows through these independent third party contracts with flow on to GP's and so that is where the tension comes in. it's a little bit more complicated than free choice because the doctor might want X, but then he's saying well if I choose this, I lose this grant, because the PHN has told me, I must use Y. "you've got choice, but if you don't use this, you'll lose the grant". Those are the sort of things that we've seen historically.

- Some of the data extraction tools in question may breach software licensing warranties and IP. For instance, if an interim exemption was given, it is possible that the product being promoted by the Applicant would not satisfy the licensing terms of the GP clinical information systems which they need to connect to extract data. In that situation, the end user could be left without an effective tool to do this work. It is very complex and without appropriate time to consider the technical, legal privacy and commercial impacts, there is a huge risk in allowing an Application for exemption before full exploration of likely and possible risks.

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