

Restriction of Publication of Part Claimed – final sentence of paragraph 1.4, paragraph 1.6, second sentence of paragraph 1.8, last sentence of paragraph 5.2, first sentence of paragraph 5.6, last sentence of paragraph 6.12

# MinterEllison

## **Application for revocation of authorisation and substitution of a replacement under section 91C(1) of the *Competition and Consumer Act 2010* (Cth)**

**Lodged by: Private Healthcare Australia Limited (PHA)**

on behalf of itself, Members Health Fund Alliance and the participating member health insurers

**3 March 2021**

1. **Summary**

Background

1.1 This application is made to the Australian Competition and Consumer Commission (**ACCC**) by Private Healthcare Australia Limited (**PHA**) in its own right and on behalf of:

- a) Members Health Fund Alliance (**Members Health**); and
- b) the private health insurers listed in Annexure A which are members of PHA and/or Members Health.

(the **Participating Parties**).

1.2 The outbreak of the COVID-19 pandemic has caused protracted distress and uncertainty in our community from a health and economic perspective. In order to support those in the community that are covered by a private health insurance policy (**Members**) during the COVID-19 pandemic, the Participating Parties sought urgent interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to engage in the conduct described in section 3 of the application dated 1 April 2020 (**First Application**). The ACCC granted interim and then final authorisation (**First Authorisation**), subject to the conditions set out in section 3.1 of the First Authorisation.

1.3 In order to continue to support Members during the ongoing effects of the COVID-19 pandemic and its uncertainties, the Participating Parties seek interim and final authorisation under section 91C(1) of the CCA to engage in the conduct described in section 5 of this application.

1.4 Members' concerns arising from the COVID-19 pandemic as set out in section 1.1 of the First Application continue to subsist. The economic implications of the COVID-19 pandemic have created ongoing financial pressures for Members and affordability of health insurance continues to be of concern particularly for younger Australians who are more likely to suffer the long term impacts of unemployment. There is also an expectation from Members that health insurers will use surplus funds from unclaimed treatments during the COVID-19 pandemic for the benefit of Members during 2021. [REDACTED]

1.5 The Participating Parties consider that by addressing Members' concerns and responding to government initiatives through a coordinated response, they will be able to offer an industry baseline of favourable measures for Members and encourage engagement from all Participating Parties to implement these measures.

1.6 [REDACTED]

1.7 Given the ongoing economic and social impacts of COVID-19, the Participating Parties consider that it is important for the industry to continue to work collaboratively in response to matters arising as a result of the pandemic to develop and implement strategies that to address ongoing Member concerns with the sector.

Application for urgent interim authorisation

1.8 The Participating Parties consider that, immediate steps are required to ensure Participating Parties are able to continue to discuss and collaborate on measures after the expiry of the First Authorisation on 31 March 2021. [REDACTED]

[REDACTED] In order to continue to provide this coordinated response, the Participating Parties request that the ACCC grant interim authorisation urgently.

2. **Parties to the proposed conduct**

2.1 Applicant for authorisation:

**(a) Private Healthcare Australia Limited (ACN 008 621 994)**

Address (registered address)	Contact person	Description of business activities
Unit 32, Level 1 2 King Street Deakin, ACT 2600  Postal address: Level 36, 1 Farrer Place Sydney, NSW 2000	Camilla Milazzo, Company Secretary and Director of Governance and Regulator Relations  [REDACTED] [REDACTED]	Australian private health insurance industry's peak representative body, which represents 97% of people covered by private health insurance.

2.2 Email address for service of documents in Australia

Noelia Boscana, Partner, MinterEllison

[REDACTED]

T [REDACTED] M [REDACTED]

2.3 Details of other persons who propose to engage in the Proposed Conduct

In addition to PHA, the other persons who propose to engage in the Proposed Conduct is Members Health and each of the private health insurers listed in Annexure A.

**3. Authorisation to be revoked**

3.1 Details of the authorisation to be revoked

Revocation is sought in respect of Authorisation no AA1000487 granted on 17 September 2020.

The First Authorisation was granted to allow PHA, its members and Members Health Fund Alliance and its members to make and give effect to arrangements, and to discuss and share information with each other in relation to:

- (a) broadening coverage under health insurance policies to include treatment for policyholders that contract COVID-19;
- (b) broadening health insurance cover for treatment received by telephone or videoconferencing or other models of treatment that substitute for face-to-face interaction;
- (c) providing treatment in policyholders' homes as a substitute for an admission to hospital;
- (d) providing financial relief for policyholders from paying health insurance premiums such as postponement of premium increases and premium waivers; and
- (e) any other measures formulated in response to the COVID-19 crisis as notified to the ACCC by PHA.

3.2 Persons and / or classes of persons who are a party to the authorisation

The persons who are party to the First Authorisation are the same as the Participating Parties of this application, with the exception of HBF Health Limited who no longer wish to be a participant.

3.3 Basis for the revocation

The First Authorisation is due to expire on 31 March 2021. The Participating Parties wish to maintain the legal protection conferred by the First Authorisation by revoking it and substituting a new authorisation, which takes into account the evolving needs of Members as a result of the COVID-19 pandemic.

#### 4. Authorisation to be substituted

- 4.1 The Participating Parties seek an authorisation permitting the Participating Parties 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, and also in relation to ongoing economic and health matters arising from the COVID-19 pandemic in order to continue to address Member concerns.

#### 5. The Proposed Conduct

##### Details of Proposed Conduct

##### *Current Initiatives*

- 5.1 The Participating Parties are currently considering entering into discussions in relation to two initiatives: the use of unreleased deferred claims liability and broadening the category of dependents (**Current Initiatives**).
- 5.2 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. These claims have been realised to some extent since restrictions eased which allowed Members to access elective surgery and other allied health treatment. To the extent that the deferred claims liability has not been fully released as deferred claims, the Participating Parties are considering collaborating in relation to the return of these funds to Members through various initiatives. [REDACTED]
- 5.3 As some Participating Parties have members that are concentrated in particular States or Territories or regional areas, each Participating Party may have different views about the best way to give back to their members based on their members' needs. However, collaboration between the Participating Parties is more likely to result in broad commitments from the industry about the return of unreleased funds to Members rather than agreeing specific measures about how each Participating Party must return funds to Members. In any case, each Participating Party would not be prevented from exceeding any commitments made through the Proposed Conduct.
- 5.4 The second initiative relates to the Federal Government's policy to improve the affordability of private health insurance premiums by allowing older dependants remain on their parents' (or other adult's) family policy and allow persons with a disability to do so regardless of their age. The reform was flagged in the Federal Government's 2020-21 Budget but has been prioritised for speedy implementation due to the tougher economic impact on young people who face a greater risk of unemployment and reduced incomes in the COVID-19 economy. This reform aims to promote access to private healthcare whilst alleviating the economic pressure on young Australians and Australians with a disability still suffering as a result of the sustained economic impact of the COVID-19 pandemic.
- 5.5 This will avoid the current situation where a 25 year old must be removed from a parent's health insurance policy even if they are financially dependent on the parent and they must either take out their own singles policy or opt out of having private health insurance. Although insurers are permitted to charge an additional amount on premiums for some family policies with a dependent between 21 and 24 years of age, this amount would be much lower than the dependent paying premiums for a singles policy. In October 2020, it was announced that the Federal Government will increase the maximum age of dependents for private health insurance policies to 31 years, and remove the age limit for dependants with a disability.<sup>1</sup> On 25 February 2021, an amendment Bill was introduced into Parliament to effect the changes which will commence on 1 April 2021, if the Bill is passed<sup>2</sup>. This will provide health insurers with the option to amend their policy terms to increase the age of dependents and to provide no age limit for persons with disabilities. However, this will not be mandatory. Insurers will be free to increase the age limit to any age between 25 and 31 or to not make any changes to the age limit or to not add persons with a disability as a separate category of dependents.

<sup>1</sup> Department of Health, *Budget 2020-21: Private Health Insurance – increasing the age of dependants*, <<https://www.health.gov.au/resources/publications/budget-2020-21-private-health-insurance-increasing-the-age-of-dependants>>

<sup>2</sup> *Private Health Insurance Legislation Amendment (Age of Dependants) Bill 2021* (Cth)

5.6

The Participating Parties are wishing to engage in discussions with each other with the aim of providing a coordinated approach to responding to the legislative change. This would create an impetus for insurers to make changes to allow older dependents and persons with a disability to remain on their parents' (or other adult's) health insurance policy. The coordination would be focused on the Participating Parties' initial response to legislative reform rather than any ongoing commitment.

5.7 The granting of this authorisation would allow the Participating Parties to continue to have the option to engage in discussions to provide an industry response to issues that continue to emerge as a result of the COVID-19 pandemic.

#### *Scope of the Proposed Conduct*

5.8 The Participating Parties consider that the scope of the Proposed Conduct continues to be relevant to the current environment, with some amendments to specifically recognise the Current Initiatives and to take into account the broader economic and social impacts that the community is experiencing as a result of the COVID-19 pandemic. We have highlighted these changes in blue below.

5.9 The Participating Parties seek authorisation 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;
- (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,

(the **Proposed Conduct**).

5.10 The Participating Parties propose that the interim and final authorisation be granted subject to the same conditions imposed under the First Authorisation.

5.11 The Proposed Conduct will not prevent the Participating Parties from individually deciding to offer more favourable measures to Members than may be agreed by the Participating Parties.

#### Provisions of the CCA which may apply to the Proposed Conduct

5.12 Member health funds of both PHA and Members Health compete in relation to the provision of private health insurance. The Proposed Conduct of the Participating Parties, in the absence of an authorisation from the ACCC, gives rise to a risk that the Participating Parties may contravene one of more of s45AF, s45AG, s45AJ, s45AK or s45 of the CCA.

#### Rationale for the Proposed Conduct

5.13 Authorisation is sought to assist the Participating Parties devise a supportive, consistent and comprehensive response to the ongoing effects of the COVID-19 pandemic for the collective benefit of Members.

#### Term of authorisation sought and reasons for seeking this period of time

- 5.14 The Participating Parties request interim authorisation for the period until the ACCC grants final authorisation and for a period of 6 months from the date on which final authorisation is granted.

Persons who may be impacted by the Proposed Conduct

- 5.15 The persons who may be impacted by the Proposed Conduct include all Members, private hospitals and health service providers.

**6. Public benefit**

- 6.1 As recognised in the ACCC's final determination on the First Application, the public benefits likely to be realised from the Proposed Conduct include greater certainty for policyholders through a coordinated and consistent approach by the health insurance industry to concerns facing the sector. Significantly, the ACCC noted in its final determination the "*continuing uncertainty around the impact of the COVID-19 pandemic and government measures intended to address the pandemic.*" The ACCC concluded that in addition to the public benefits referred to above a further benefit is that the "*Participating Parties will be ready to respond quickly to any new developments during the course of the pandemic.*" The Participating Parties submit that authorisation will allow the Participating Parties to continue to respond to new developments and concerns of Members occurring as a result of the pandemic and its ongoing social and economic impacts.
- 6.2 The ACCC recognised in its final determination that decisions by individual Participating Parties "*would not be consistent and possibly not as quick. Furthermore, each Participating Party would be required to independently communicate measures formulated in response to the COVID-19 pandemic, which may result in confusion amongst policyholders, and PHA would not be able to operate as effectively as a centralised industry body in its engagement with stakeholders.*" The Participating Parties submit that this benefit continues to apply and PHA continues to have an important role in engaging with stakeholders and providing leadership in the sector's response to COVID-19 related matters.
- 6.3 PHA considers that there has been continued value in having the First Authorisation that allowed PHA and the Participating Parties to enter into discussions about how to assist Members during COVID-19. The evolution and impact of the COVID-19 pandemic in Australia has been, and will continue to be, highly unpredictable and the ability to engage in a coordinated approach in response to Member concerns provided the flexibility to ensure that when new matters arose (such as measures that could be adopted to address mental health concerns, particularly in Victoria) the funds were able to collaborate with each other. Although the discussions between the funds did not result in any agreements to undertake particular measures during the period of the First Authorisation, PHA submits there have been public benefits in the funds being able to initiate these discussions and to create the opportunity for measures to be agreed by the funds. PHA submits that in light of this and given the Proposed Conduct has not resulted in any competitive detriments, there has been a net benefit to the public as a result of the First Authorisation. Accordingly, given the ongoing detrimental impact of COVID-19 on the economy, and the fact that new COVID-related matters and government-led initiatives may require the funds to develop a uniform approach (such as changes to the maximum age of dependants on a policy) PHA considers that it is advantageous for the funds to be able to continue to collectively discuss and potentially agree on industry-wide approaches to COVID-19 related matters.
- 6.4 The Participating Parties consider that a coordinated response to alleviate their Members' concerns is preferable to each individual health insurer responding in different ways in order to provide Members with clarity about how health insurers are responding to government reform driven by the impact of COVID-19 or how they will respond to any other developing needs of their Members arising from the pandemic. The Participating Parties submit that it will be beneficial for their Members if PHA is able to provide a leadership role.
- 6.5 Industry leadership also raises the bar for the sector and provides a baseline expectation of how health insurers should respond to government-led reform and initiatives, and other Member concerns. Providing industry leadership also accelerates the response of Participating Parties and creates efficiencies with the PHA engaging with government and other stakeholders on behalf of the health funds.
- 6.6 The Current Initiatives are examples of developments where Members would benefit from collaboration between the Participating Parties by allowing Participating Parties to respond cohesively to government-led initiatives. An industry led response to unreleased deferred claims liability is more likely to accelerate a response from Participating Parties, require the Participating

Parties to engage on the issue and provide a minimum industry commitment from the Participating Parties about the use of these funds (which the Participating Parties are at liberty to exceed).

- 6.7 This coordinated response on deferred claims liability can then be communicated clearly to all Members through PHA. This provides greater certainty to Members in response to their expectations that the Participating Parties will be returning funds for any unreleased deferred claims liability. A coordinated approach will also create efficiencies in PHA leading the response and engaging with APRA rather than APRA engaging with each individual health fund. It will also create efficiencies in allowing PHA and Members Health to have discussions with their member funds as a collective about the issue rather than engaging with each individual insurer. This is particularly important given the rapid pace at which the industry is expected to respond to COVID-19 related matters such as this one.
- 6.8 Similarly with the broadening of the dependents category, a coordinated approach by the Participating Parties would engage insurers to consider their response to legislative reform and accelerate the timing of that response. It would provide a minimum commitment by the Participating Parties about the changes that they will make to their health insurance policies in order to implement the legislative changes. This would provide Members with greater clarity about the changes to the dependents category and ensure concise messaging by PHA on behalf of the Participating Parties to provide greater transparency.
- 6.9 As mentioned above, a coordinated response will also create efficiencies through PHA's engagement with the Department and other stakeholders. It would also enable PHA and Members Health to engage more swiftly with its member funds on a collective basis which is particularly important for this initiative as the legislative changes are due to commence on 1 April 2021.
- 6.10 The Participating Parties submit that a coordinated approach to the Current Initiatives and other COVID-19 related measures will generate a number of public benefits.

#### Counterfactual

- 6.11 In the absence of the authorisation, the Participating Parties would make individual decisions relating to their response to matters arising as a result of the COVID-19 pandemic. There would be no consistent industry response to these issues or discussion or collaboration among the Participating Parties about COVID-19 related measures.
- 6.12 In relation to the Current Initiatives, without the authorisation, the Participating Parties would cease any discussions or collaboration with each other in relation to deferred claims liability or the broadening of the dependents category. The Participating Parties would not be able to give effect to any arrangement that may be discussed or agreed by the Participating Parties with respect to the Current Initiatives after 31 March 2021. [REDACTED]  
[REDACTED]  
[REDACTED]
- 6.13 Without an industry approach, there will not be a minimum baseline response from the Participating Parties about its use of deferred claims liability or the take up of the option to broaden the dependents category. The response to both issues is likely vary from insurer to insurer.

#### **7. Public detriment**

- 7.1 The Participating Parties submit that the Proposed Conduct will not have any competitive detriments as it will not reduce the level of competition between the Participating Parties in the supply of private health insurance. The Proposed Conduct will not prevent health insurers from competing with each other by taking additional measures in response to COVID-19 than that agreed through collaboration between the Participating Parties. They will have complete discretion to provide additional or more comprehensive measures in relation to COVID-19.
- 7.2 The Proposed Conduct will not affect competition between health insurers in relation to any business activities that do not relate to COVID-19 or the economic and social impact of COVID-19. The Participating Parties' adherence to the conditions imposed by the ACCC under the First

Authorisation evidences the bona fide nature of the Proposed Conduct and the Participating Parties' willingness to comply and be transparent with the ACCC.

- 7.3 Similarly, as stated by the ACCC in the First Authorisation, the temporary nature of this application, as well as the fact that the Participating Parties will still compete on price and coverage and relief measures beyond that suggested in the Proposed Conduct can still be offered by individual insurers, mitigates the risk of any competitive detriment. Furthermore, the conditions imposed by the ACCC to ensure transparency also mitigate against any risk of competitive detriment. Authorisation will allow the market to continue to respond appropriately to the circumstances and ongoing effects presented by COVID-19 to the benefit of Members.
- 7.4 The Current Initiatives are examples of responses that are temporary in nature. The use of unreleased deferred claims liability is a temporary matter that will be resolved once the funds are distributed. Collaboration on the broadening the dependents category will deal with how the Participating Parties will initially respond to legislative reform, after which insurers will individually decide any changes to the dependents category.
- 7.5 The Participating Parties submit that the Proposed Conduct will not have any detrimental impact on Members as the measures have the purpose of providing favourable outcomes for Members and do not restrict the Participating Parties from offering measures over and above those agreed through the Proposed Conduct.
- 7.6 For the reasons set out in this application, the Participating Parties consider that the Proposed Conduct will result in a net public benefit.



## **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

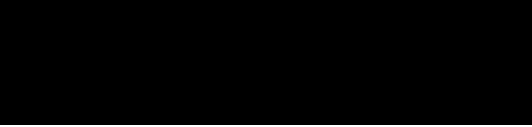
33. The Doctors' Health Fund Pty Ltd
34. The Hospitals Contribution Fund of Australia Ltd
35. Transport Health
36. Westfund Limited

**Declaration by applicant**

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware the giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



Camilla Milazzo

Company Secretary and Director of Governance and Regulator Relations

This 3rd day of March 2021