Draft Determination and interim authorisation decision

Application for authorisation AA1000636
lodged by
Health Partners Limited
in respect of
agreements to establish a network of partner dental practices
Authorisation number: AA1000636

13 July 2023

Commissioners: Cass-Gottlieb
Keogh
Lowe
Brakey
Carver
Crone
Ridgeway

Summary

The ACCC proposes to grant authorisation to enable Health Partners Limited to enter into and give effect to certain pricing arrangement provisions in agreements with dentists and dental practices in regional South Australia which form part of its partner network of dental practices.

Health Partners is a private health insurance provider that also currently operates 4 dental practices in the Adelaide metropolitan area. Health Partners has sought authorisation to address what it describes as 'the potential risk that the partner practices could be considered to be in competition with its existing practices'.

The pricing arrangement provisions in the proposed agreements with partner practices for which authorisation is sought include provisions which require partner practices to place a cap on the maximum price charged for certain routine dental services provided to Health Partners' members. The provisions also require that partner practices must ensure that Health Partners' members are charged no more than the partner practice's usual fee schedule for other patients.

The ACCC considers that entering into and giving effect to these pricing arrangement provisions with Health Partners' partner practices is likely to result in public benefits including from providing price certainty for Health Partners' members in regional South Australia and increased competition between health insurance providers. The ACCC considers the proposed conduct is unlikely to result in public detriment.

The ACCC proposes to grant authorisation for 5 years.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for authorisation

1.1. On 16 February 2023, Health Partners Limited (**Health Partners**) lodged an application for authorisation AA1000636 with the Australian Competition and Consumer Commission (the **ACCC**). Health Partners seeks authorisation to enter into and give effect to certain pricing arrangement provisions in agreements with dentists and partner dental practices which form part of its partner network of dental practices (**Partner Practices**).

1.2. Health Partners seeks to establish a network of dental practices (the **Partner Program**) which will allow its health fund members in regional South Australia to receive certain routine dental services on a 'known gap' basis. Health Partners has 4 existing dental practices in the Adelaide metropolitan area and seeks authorisation to address what it describes as 'the potential risk that the partner practices could be considered to be in competition with its existing practices'.

1.3. Health Partners seeks authorisation for 10 years on behalf of itself and the dentists and dental practices it enters into agreements with.

1.4. This application for authorisation AA1000636 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides businesses with protection from legal action under the competition provisions in Part IV of the Act. The ACCC has a discretion to grant authorisation, but

must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).

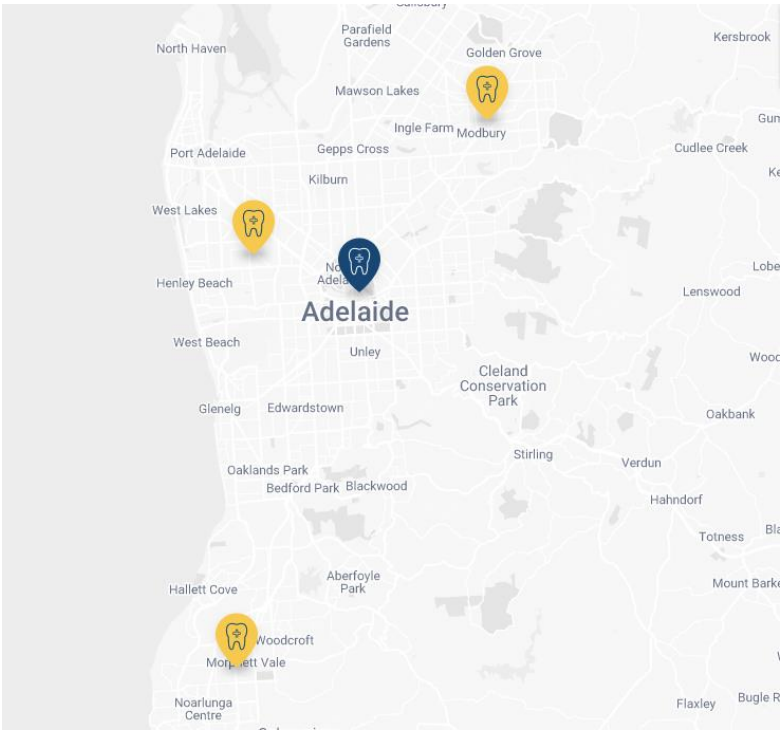
1.5. Health Partners also requested interim authorisation to allow it to progress and conclude negotiations with potential Partner Practices, enter into agreements and have Partner Practices provide Capped Services while the ACCC considers the substantive application. The ACCC has decided not to grant interim authorisation. The request for interim authorisation is discussed in section 6.

Health Partners

1.6. Health Partners is a private health insurer, based and primarily operating in South Australia. Health Partners offers 2 types of health insurance, being hospital cover and/or extras cover. Individuals holding extras cover will be eligible members who can benefit from the Partner Program.

1.7. In addition to health insurance, Health Partners also provides dental services to the broader public through its own physical stores (**Applicant Practices**).

1.8. Currently, Health Partners has 4 dental practices in South Australia in the Adelaide metropolitan area: Adelaide City, Flinders Park, Modbury and Morphett Vale.



The Proposed Conduct

1.9. Health Partners is seeking authorisation to enter into and give effect to certain pricing arrangement provisions in agreements with Partner Practices in regional South Australia; specifically clauses 17-26 and clause 30 of the dental agreement (the **Proposed Conduct**). These clauses are replicated at **Annexure A**.

1.10. Clauses 17-26 and clause 30 require Partner Practices to:

a) Cap the maximum prices for certain routine dental services provided to Health Partners' members, including preventative and diagnostics services (**Capped Services**); and

b) For all services rendered to Health Partners' members, ensure that members are charged no more than the Partner Practice's usual fee schedule for other patients (**Usual Fee Schedule**).

1.11. The Capped Services which will initially form part of the Partner Program are set out in **Annexure B**. The Capped Services are a set of services listed under the item codes set by the Australian Dental Association. Of the current 363 items codes in the Australian Dental Association's Item Glossary, 40 items will form part of the initial set of Capped Services. The arrangements include a provision to expand the Capped Services on 1 July every year.

1.12. Health Partners proposes to enter into preferred provider agreements with Partner Practices. Health Partners has entered into one such agreement with Gawler Dental Clinic in South Australia. Health Partners submits that the agreement entered into with the Gawler Dental Clinic suspends operation of clauses 17-26 and clause 30 (see Annexure A) until Health Partners notifies the clinic that ACCC authorisation has been granted. These clauses will cease to apply immediately in the event that the conduct is not or no longer authorised by the ACCC. While it intends to enter into agreements with other Partner Practices, Health Partners submits that no other agreements are currently under negotiation.

1.13. Health Partners submits that it is not proposing to:

a) impose Capped Services for high-cost services such as crowns, dentures, dental implants or orthodontics

b) restrict fees for services outside of the Capped Services, except to ensure that Partner Practices do not charge members higher than the Usual Fee Schedules offered to other patients

c) restrict the amount charged to non-members for the Capped Services, or limit the ability to offer services to non-members

d) dictate the precise fees charged to members for the Capped Services, or any other service

e) set a minimum fee to be charged to members for the Capped Services, or any other service

f) require that the Partner Practice only engages in the Partner Program (therefore allowing the Partner Practice to engage with other health insurers)

g) require all dentists or dental practices in a group to be a part of the Partner Program

h) require any form of volume commitment from Partner Practices.

1.14. Health Partners seeks to be able to make adjustments to the Capped Services over time to include additional or substitute routine dental service items as the Partner Program evolves, or in order to reflect any relevant changes made to the Australian Dental Association's Items Glossary or clinical practice. Health Partners proposes that the relevant contractual arrangements would allow the Capped Services and applicable fees to be revised from 1 July each financial year, but no more frequently (see clause 24 of Annexure A).

1.15. Health Partners submits that it recognises, in complex or unusual cases, a service may involve higher costs for the Partner Practice than the applicable Capped Service price or Usual Fee Schedule. The agreement allows the Partner Practice to charge above the applicable cap (whether the Capped Service price or the Partner Practice's Usual Fee Schedule), but only where there are unexpected costs for the provision of the services to an individual member.

1.16. Health Partners submits that its policies are such that members typically receive a fixed percentage of costs associated with dental treatments, up to an annual policy limit.

1.17. Health Partners has several extras policies, where each policy offers a different rebate depending on the level of cover. Health Partners submits that each policy sets the rebate a member will receive depending on whether the member attends an Applicant Practice, a Partner Practice or another provider. Where a member attends an Applicant Practice or Partner Practice, the member will typically receive a higher rebate than if the member attended another practice.

1.18. Health Partners submits that it operates a similar preferred provider model to what it is proposing in respect to physiotherapy practices, however Health Partners submits that because it does not operate any of its own physiotherapy practices, the need for authorisation does not arise.

2. Background

Rationale for the Proposed Conduct

2.1. Health Partners submits there are several motivations for the Partner Program.

2.2. Health Partners submits that, as it is a not-for-profit organisation, its primary motivation in all activities is to provide beneficial health outcomes for its members.

2.3. Health Partners submits that it also seeks to instigate the Partner Program with Capped Services to provide a competitive offering in the health insurance market, as similar programs are offered by other private health insurance providers. Health Partners considers the Proposed Conduct assists it to remain competitive, which will likely result in cost savings and more advantageous terms for its members.

The dental services industry

2.4. In 2020, there were 16,153 total employed dentists in Australia, where 1,153 of those dentists were employed in South Australia.[1] Medicare does not cover most dental care, dental procedures or supplies. Some public dental services are provided by state and federal governments, generally only to concession card holders and children, or for emergency treatments.

2.5. Many Australians rely on their private health insurance to help cover the cost of dental services, with data published by the Australian Government's Australian Institute of Health and Welfare suggesting that more than half of Australians aged 5 years and over have some level of private health insurance cover for dental

[1] Australian Institute of Health and Welfare, *Oral health and dental care in Australia – dental workforce*, Australian Government, 17 March 2023, accessed 22 March 2023.

expenses.[2] Most Australians hold combined policies that provide cover for both hospital and extras services. In South Australia, approximately 60% of the population holds extras insurance.[3]

2.6. Even with private health insurance, consumers may be required to make an out-of-pocket payment. In 2017-18, around 76% of adults aged 18 years and over reported that their insurance paid some of the dental expenses of their last visit and 12% reported that their insurance paid all the dental expenses.[4]

2.7. Health Partners submits that it is unable to precisely quantify its market share for dental services in South Australia but submits, with Health Partners owning only 4 dental practices, that share is likely not significant. Health Partners' analysis of its private health fund claims data suggests that its South Australian market share could be between 4–5%. However, Health Partners submits that its claim data is likely to overrepresent Applicant Practices, and underrepresent practices closely aligned with other health fund brands.

The private health insurance industry

2.8. In Australia, the 5 largest health insurers provide cover for over 80% of Australian consumers with private health insurance. Medibank and Bupa represent over half of the Australian private health insurance market, with market shares of 26.3% and 25.5% respectively. The next 3 largest insurers – The Hospitals Contribution Fund of Australia Limited (**HCF**), NIB Health Funds Limited and HBF Health Limited – have a combined market share of around 29%.[5]

2.9. In South Australia, Health Partners submits it is the fourth largest private health insurer. Health Partners provided the below table summarising the private health insurance market share in South Australia for each of the 5 largest funds, based on data from the Australian Prudential Regulation Authority. These market shares are based on the total number of membership policies held in each fund. Health Partners has a similar market share of 7.2% when considering extras treatment-only policies.

Table 1: Private health insurance market share in South Australia[6]

Health Fund	SA Market Share PHI Policies
BUPA	44.1%
Medibank	23.3%
HCF	9.2%
Health Partners	**7.4%**
NIB	4.5%

[2] Australian Institute of Health and Welfare, *Oral health and dental care in Australia – private health insurance*, Commonwealth of Australia, 17 March 2023, accessed 28 March 2023.

[3] Australian Prudential Regulation Authority, *Statistics: Private health insurance membership trends June 2022*, 24 August 2022, viewed 29 June 2022

[4] Australian Institute of Health and Welfare, *Oral health and dental care in Australia – private health insurance*, Commonwealth of Australia, 17 March 2023, accessed 28 March 2023.

[5] ACCC, *Private Health Insurance Report 2021-22*, Commonwealth of Australia, 2022, p. 9.

[6] Australian Prudential Regulation Authority, *Operations of Private Health Insurers Annual Report*, 26 October 2022.

2.10. It is not uncommon for health insurers to enter into contractual arrangements with selected health care service providers (**preferred providers**), in part, to minimise the out-of-pocket expenses incurred by their members. A reason for a health care service provider to enter into such arrangements with a private health insurer is to increase patient numbers at their practice.

2.11. Insurers negotiate set fees and other terms with preferred providers in exchange for the right to participate in their 'preferred provider' networks or 'no gap' and 'known gap' schemes.

2.12. In the case of a 'known gap' arrangement, the preferred provider can charge an amount beyond the amount the health insurer will cover, but it is restricted to a capped maximum set by the health insurer.[7] The percentage of the charge covered by the insurer and the gap remaining is dependent on the applicable policy held, but holders of that policy will have known out-of-pocket costs for the relevant services. A 'no gap' arrangement also provides known costs to health insurance members, with no out-of-pocket costs. In a 'no gap' arrangement, the participating health care service provider agrees to charge a certain amount for services and the health insurer will fully cover the cost of the relevant medical procedure performed by the preferred provider.

2.13. Australia's 5 largest health insurance providers (Bupa, HBF, HCF, Medibank and NIB) all have an extensive network of preferred dental providers. Other health insurance providers with a network of preferred dental providers include Australian Unity, Geelong Medical and Hospital Benefits Association, Peoplecare and Teachers Union Health Fund. The below table demonstrates the number of dental preferred providers in Australia for the 5 largest health insurance providers.

Table 2: Dental preferred provider arrangements Australia-wide[8]

Health insurer	**Number of preferred dental providers**
Bupa	>7,000
HBF	Approximately 450 in Western Australia
HCF	>10,000
Medibank	>10,000
NIB	Approximately 2,000

Relevant authorisation

2.14. The ACCC has previously authorised (AA1000402) HCF and current and future dentists who are members of HCF's More For Teeth program, to enter into and give effect to contracts between them which contain provisions specifying the maximum prices for preventative and diagnostic dental services to be provided by partner dentists to HCF members.

[7] ACCC, *Private Health Insurance Report 2021-22*, Commonwealth of Australia, 2022, p. 25.

[8] CHOICE, *How much does the dentist cost?*, CHOICE website, last updated 9 March 2023, accessed 31 May 2023.

3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

3.2. The ACCC invited submissions from a range of potentially interested parties including major health insurers, consumer groups, and relevant industry associations or peak bodies.

3.3. The ACCC received 5 submissions from 3 parties in relation to the application. Health Partners provided further information on 28 February, 28 March, 27 April, 11 May, 7 June and 3 July 2023.[9]

3.4. Private Healthcare Australia Limited, the Australian private health insurance industry's peak representative body, provided submissions on 7 March and 18 May 2023, and HCF provided a submission on 22 May 2023. Private Healthcare Australia and HCF both support the application for authorisation.

3.5. HCF submits that:

- The Proposed Conduct will result in price certainty for preventative and diagnostic dental services, where uncertainty in pricing is an impediment to visiting dentists for check-ups.
- Insured individuals with coverage for dental services are more likely to visit dentists for check-ups than uninsured individuals without such coverage.
- More frequent visits to the dentist for a check-up are likely to result in earlier detection and treatment of dental problems, thereby reducing the likelihood of requiring more extensive and costly services in the future.

3.6. Private Healthcare Australia Limited also submits the Proposed Conduct will result in significant public benefit, specifically:

- The likely public benefits would increase in proportion to the number of agreements Health Partners enter into with South Australian dental practices and the greater the geographic coverage of those practices.
- The new information provided by Health Partners (including in relation to 'minimum standards') will provide Health Partners' members greater confidence in the quality of services provided by Partner Practices.

3.7. The Australian Dental Association (**ADA**) is the peak body for dentists in Australia and provided submissions on 17 March and 1 May 2023. The ADA submits:

- The ACCC should adopt a cautious approach by:
    - granting authorisation for a short term only, so impacts can be monitored and tested more frequently
    - limiting the scope of authorisation to the application of Division 1 of Part IV of the Act in so far as Health Partner practices are in competition with the third-party dental practices with whom it has such arrangements.

[9] The public submissions received are available from the ACCC's public register.

- The ACCC should conduct a more comprehensive review of price-capping arrangements between private health insurers and dental practices.
- There appears to be an assumption that if an insurer does not operate its own practices in geographic proximity to any dental practices that are subject to its price-capping arrangements, authorisation is not required. The ADA submits that this has resulted in an ad hoc position with respect to authorisation of price-capping arrangements.
- The ADA has raised its long-standing concerns about the overall impact of price-capping arrangements and whether they are genuinely in the public interest.
- Insurers have reached into the healthcare relationship in a way that risks influencing both treatment decisions and the basis on which patients choose a dentist.
- There is a question as to whether the benefits arising from the arrangements are for the community as a whole and questions whether the choices insurers make do not mean higher prices for patients who are not insured and/or higher prices for other services.
- The focus in authorisations has been on the market/s in which insurers compete, rather than the market/s in which dental practices compete.
- The ADA questions how voluntary price-capping arrangements are and whether the reality of how these arrangements operate means that once enough insurers are doing this, dental practices need to participate in someone's program.
- Concerns that consumers are unable to meaningfully compare price / service offerings of different dental practices and that consumers may be influenced by the best rebate rather than assessing which dental practice may be most appropriate for their needs.
- The ADA queries whether benefits claimed by insurers are actually benefits when the total picture is considered and suggests language about cost and price should be scrutinised carefully.

3.8. Health Partners provided responses to the ADA's submissions on 28 March and 7 June 2023. In particular, Health Partners submits that the ADA raises a number of concerns that are general in nature and relate to issues associated with the administration of health insurance in Australia, rather than the application for authorisation itself. Health Partners:

- highlights that it is seeking to provide a broader range of dental services to its members and there is no purpose to affect competition or obtain any competitive advantage. Health Partners is seeking to ensure members can access dental services with greater certainty regarding price, where price certainty is key to encouraging regular dental check-ups.
- submits that it is seeking authorisation to avoid any risk of contravening Part IV Division 1 of the Act, should there be any suggestion that it is in competition with the relevant dental practices despite the geographic distance between them.

- submits that the pricing of the Capped Services is based on the prices at its own dental practices, which ensures that pricing is based on market rates which capture actual costs rather than attempting to impose unsustainable pricing. Health Partners submits that the conduct for which authorisation is sought does not allow or permit Health Partners to direct or otherwise determine what treatment the member receives.

4. ACCC assessment

4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. Health Partners has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.

4.3. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

4.4. The ACCC's power to grant authorisation is limited to future conduct. The Act does not allow the ACCC to grant authorisation for conduct engaged in before the ACCC makes a decision on the application for authorisation.[10]

Relevant areas of Competition

4.5. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.

4.6. Health Partners submits the relevant areas of competition are the provision of private health insurance in South Australia and the provision of dental services in South Australia.

4.7. The ACCC is of the view that it is not necessary to precisely define relevant markets for the purpose of assessing this application for authorisation. The ACCC considers that the relevant areas of competition that could be affected by the Proposed Conduct are:

- the supply of private health insurance in South Australia, and
- the supply of dental services in South Australia, noting that the Proposed Conduct is focused on routine dental services including preventative and diagnostic services in regional South Australia.

Future with and without the Proposed Conduct

4.8. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.

[10] See the ACCC's Guidelines for Authorisation of conduct (non-merger), December 2022, p 7.

4.9. Health Partners submits that, in a future without the Proposed Conduct, there are 2 potential options it may consider.

Counterfactual 1

4.10. Health Partners could restructure its business and divest ownership and control of its existing Applicant Practices to achieve similar benefits to the Proposed Conduct. However, Health Partners submits that this is not its preference for a number of reasons, including:

- Implementing this model would be a significant undertaking and involve a large amount of cost.
- It would leave the Applicant Practices under a very different structure than the balance of Health Partners' business, including its optical practices (which themselves are often co-located with the dental Applicant Practices).
- Health Partners is yet to give consideration as to how such a divestment would be effectively achieved in the context of its not-for-profit model, which may leave less scope to consider commercial models adopted by other insurance providers.
- Complicating the corporate structure through such a divestment could introduce greater costs, which, in the context of a not-for-profit, would be at the expense of benefits provided to members.
- Health Partners would lose a degree of control and oversight over the Applicant Practices. For example, currently it can closely monitor the Applicant Practices to ensure that minimum standards are exceeded and ensure the businesses interact with its members and the public to a high standard consistent with Health Partners' brand and reputation.
- Ultimately, the divestment of the Applicant Practices would be an artificial step to technically avoid operation of the relevant provisions of the Act, putting Health Partners to greater cost, without resulting in any better outcomes for its members.

Counterfactual 2

4.11. Health Partners submits that it could decline to establish a dental partner network. Health Partners submits that this would result in less ideal outcomes for its members located outside of suburban Adelaide, given the claimed public benefits of the Partner Program. Health Partners submits that this scenario would also leave Health Partners less able to compete with other health insurance providers operating similar networks.

ACCC assessment

4.12. The ACCC considers that, in the future without the Proposed Conduct, it is likely Health Partners would pursue one of these options. With the information before it, the ACCC is uncertain which option is more likely. The ACCC considers both counterfactuals in its assessment of the public benefits and detriments as outlined below.

Public benefits

4.13. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that in considering public benefits:

> *…we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.*[11]

4.14. Health Partners submits that the public benefits which will or are likely to arise from the Proposed Conduct include:

- increased choice for its members as consumers may be more inclined to visit new Partner Practices where they can receive price certainty
- increased competition between health insurance providers as Health Partners will be in a stronger position to compete more vigorously in the market
- increased business for dental practices as Partner Practices can better attract or retain patients by offering lower out of pocket costs via the known gap arrangement
- supporting dental clinical best practice as Health Partners can monitor relevant dental standards and ensure Partner Practices are operating at a high standard.

4.15. The ACCC has considered these public benefits under the following headings:

- Increased access to price certainty for preventative and diagnostic dental services for Health Partners' members in regional South Australia.
- Increased competition between health insurance providers in South Australia.
- Supporting dental clinical best practice through Health Partners' preferred organisation model.

Increased access to price certainty for preventative and diagnostic dental services for Health Partners' members in regional South Australia

4.16. Health Partners submits that the Proposed Conduct via Capped Services with Partner Practices in regional South Australia will provide price certainty for its members. Health Partners submits that, by providing this certainty, it is likely that its members will be encouraged to increase the frequency of routine dental visits and that, over the longer term, these measures will result in a reduction in the need for surgical and major restorative dental procedures.

4.17. Health Partners submits that its Partner Program will be focussed on regional South Australia, and that this will ensure South Australians living outside of Adelaide have easy access to dental care, with the Partner Program to assist in this respect.

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[11] Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

Further, it submits that the Proposed Conduct provides consumers with greater choice of dental service providers and that consumers may be more inclined to visit a new dental practice where they are able to receive price certainty on certain services.

4.18. Health Partners also submits that the Proposed Conduct is likely to result in the public benefit of increased business for dental practices, by allowing Partner Practices to attract or retain patients by advertising that they have lower out of pocket costs via the known gap arrangement with Health Partners. The ACCC considers this is likely a private benefit however acknowledges that a public benefit flows from any increased competitive pressures on other dental practices.

4.19. The ACCC acknowledges that price is a factor influencing consumers' ability and willingness to access dental services. The Australian Institute of Health and Welfare found that, in 2017-2018, 39% of people aged 15 years and over avoided or delayed visiting a dentist due to price.[12]

4.20. The ACCC considers price certainty benefits Health Partners members by allowing them to better account for expenditures which may minimise the avoidance or delay of dental care due to price uncertainty, which in turn is likely to result in a reduced need for more serious dental intervention caused by lack of routine dental care.

4.21. Health Partners' members in the Adelaide metropolitan area currently have access to 4 Applicant Practices who offer Capped Services, giving those members price certainty. The ACCC considers that the Proposed Conduct will similarly provide members in regional South Australia improved access to Capped Services and access to price certainty.

4.22. The ACCC acknowledges that the benefit of price certainty and improved access will be limited to those consumers who are Health Partners' members and who are close enough to the dental practices which will form part of the Partner Program in regional South Australia to access those practices.

4.23. Whilst the overall number of dental providers that a member may choose from remains unchanged, the ACCC recognises that members may be more inclined to visit a dental practice where they will be able to receive price certainty on services.

4.24. The ACCC considers that the Proposed Conduct is likely to increase the choice of known gap service providers for Health Partners' members in regional areas of South Australia in relation to routine dental services, which keeps prices lower for consumers and potentially creates increased competition between dental service providers. This is compared to the counterfactual where Health Partners does not establish a dental partner network at all. When compared to the counterfactual where Health Partners potentially adopts a different model for the provision of known gap dental services, and taking into account the uncertainties associated with this counterfactual, the ACCC considers these public benefits are more likely to occur, and earlier, in the factual.

Increased competition between health insurance providers in South Australia

4.25. Health Partners submits that the Proposed Conduct would promote competition between health insurance providers in South Australia. Health Partners submits that

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[12] Australian Institute of Health and Welfare, *Oral health and dental care in Australia – dental workforce*, Australian Government, 17 March 2023, accessed 29 June 2023.

it needs to have a dental program to be able to compete more vigorously with other health insurance providers that already have their own arrangements with dentists which reduce or cap fees.

4.26. Health Partners submits that increased competition in the provision of private health insurance under the Proposed Conduct will likely result in cost savings and more advantageous terms for consumers and encourage consumers to take up private health insurance, as they can see how the insurance will benefit them. Health Partners submits that, ultimately, this provides a public benefit to healthcare systems by encouraging the utilisation of private medical services (including outside of dental services).

4.27. The ACCC notes that Health Partners supplies approximately 7.4% of private health insurance in South Australia. The ACCC considers that the Proposed Conduct could allow Health Partners, as a relatively smaller health insurance provider, to better compete with some of the larger providers of private health insurance in South Australia (see Table 2). The ACCC considers that known gap services are of value to consumers and that private health insurers seek to provide these services to compete to supply private health insurance. Each of the major private health insurers (Bupa, Medibank, HCF and NIB) offer similar preferred provider agreements for their members.

4.28. The ACCC considers the Proposed Conduct will enhance competition between health insurance providers in regional South Australia, in particular by enabling Health Partners to offer its members access to competitive known gap or no gap dental services, which are currently offered by other private health insurers. The ACCC considers this public benefit would not arise to the same extent in the counterfactual where Health Partners potentially adopts an alternative model noting the uncertainties associated with that counterfactual, and that this public benefit is unlikely to arise at all in the counterfactual where Health Partners does not establish a dental partner network.

Supporting dental clinical best practice through Health Partners' preferred organisation model

4.29. Health Partners' preferred organisation model is for it to enter into agreements with Partner Practices which contain the pricing provisions while also enabling it to have some oversight over the conduct of Partner Practices in treating its members. In this way, Health Partners submits that the Proposed Conduct will support dental clinical best practice. Health Partners submits that the agreements with Partner Practices allow Health Partners to monitor and enforce, relevant standards, rather than impose additional standards to ensure that the providers are operating at a high standard and that relevant standards continue to be met.

4.30. Specifically, Health Partners submits:

- In some instances, the relevant standards are in the nature of 'guidelines' that would otherwise be non-binding, with the agreement making compliance with those guidelines mandatory.
- The agreements also contain provisions regarding the manner in which Health Partners deals with members, to ensure that customer service is consistent, predictable and appropriate.

- There is also provision in the agreement to allow Health Partners to have oversight over Partner Practices to ensure that they are maintaining best practice, and audit provisions also give Health Partners the ability to monitor compliance.

4.31. Health Partners submits the agreement will not necessarily require practices already operating at a high level to go above and beyond its existing levels of operation, but will give Health Partners contractual mechanisms to uphold those standards which do not exist in the case of other practices more broadly. Health Partners notes that, while the Proposed Conduct would provide some level of oversight over the conduct of Partner Practices, it would not be to the same degree as in its own Applicant Practices.

4.32. The ACCC notes that dentists are subject to standards of practice imposed by regulatory bodies (such as the National Safety and Quality Health Service Standards – as administered by the Australian Commission on Safety and Quality) and the Dental Board of Australia's registration standard. Dentists must meet these standards with or without the Proposed Conduct.

4.33. The ACCC understands that by virtue of the contractual arrangements with Partner Practices, Health Partners will monitor the relevant dental services provided to its members at Partner Practices.

4.34. The ACCC notes that the contractual arrangements might give Health Partners greater oversight of the conduct of Partner Practices in providing dental services to its members than would be the case where the dental practice does not have an agreement with Health Partners.

4.35. However, the ACCC is not satisfied that there is an inadequacy or deficiency in the current regulation of dentists, such that a higher standard is required. Further, the ACCC is not satisfied that Health Partners has the expertise and incentive to use any additional control to rectify such an issue if it were to exist. The ACCC also notes that the Proposed Conduct the authorisation has been sought for does not relate to the clauses mentioned at paragraph 4.30. The ACCC therefore has not placed any weight on this claim.

ACCC conclusion on public benefit

4.36. The ACCC considers that the Proposed Conduct is likely to result in public benefits from:

- increased access through price certainty for Health Partners' members in regional South Australia by providing increased access to known gap services for members.
- increased competition between health insurance providers, by enabling Health Partners, a relatively smaller health insurance provider, to better compete with larger providers of private health insurance in South Australia, which offer similar preferred provider agreements for their members.

4.37. ACCC notes that the Proposed Conduct is likely to result in the private benefit of increased business for dental practices, but acknowledges that a public benefit flows from any increased competitive pressures on other dental practices.

4.38. The ACCC notes that the public benefits at paragraph 4.36 could be achieved, to some extent, under the counterfactual where Health Partners adopts a different operational model for its dental clinics.

4.39. However, the operational model proposed by Health Partners in its application for authorisation – that is, keeping Applicant Practices within its not-for-profit entity - is its preferred model and there is significant uncertainty as to whether, and how, Health Partners could implement the alternative model to achieve the same public benefits to the same extent. In this regard, the ACCC notes Health Partners' claims that this alternative model would be a significant and costly undertaking for Health Partners, which may result in these costs being borne by its members and a material delay in any public benefits arising out from the implementation of the Partner Program.

4.40. The ACCC also considers that in the second counterfactual where Health Partners does not establish the Partner Program at all, the public benefits which are likely to arise as a result of the Proposed Conduct would not materialise.

Public detriments

4.41. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

…any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.[13]

4.42. The ADA raised a number of issues relating to private health insurance arrangements more broadly. A number of the matters considered by the ADA as potential public detriments would not be, in the ACCC's assessment, causally connected to the Proposed Conduct in that they would be likely to exist or not be materially different in the future with, as against the future without, the Proposed Conduct. In particular:

a) consumers being influenced by insurers' rebates and being unable to meaningfully compare prices and service offerings of different dental practices to select the most appropriate service for their needs, as this relates to the general practice of health insurers offering differing rebates

b) insurers reaching into the healthcare relationship in a way that risks influencing treatment decisions and the basis on which patients choose dentists, as this relates to general issues of private health insurers' involvement in healthcare arrangements

c) the necessity of undertaking a comprehensive review of all price-capping arrangements between private health insurers and dental practices, including whether all arrangements should be submitted for authorisation (regardless of proximity) and the overall impact of price-capping arrangements

d) how preferred provider arrangements in general may not be as voluntary as they appear

e) preferred provider arrangements being about reducing prices charged for particular services and not the cost of providing those services.

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[13] Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

4.43. The ACCC considers that, because these issues lack a causal connection to the Proposed Conduct, they are unlikely to materially affect whether the ACCC is satisfied that the authorisation test is met.

4.44. However, the ACCC has considered specific elements of these issues where they are relevant to the Proposed Conduct in the assessment of potential public detriments below. In its submissions, the ADA also raised concerns regarding potential public detriments in the form of reduced competition in dental services and from 'waterbed effects' resulting from the Proposed Conduct, which are discussed further below.

4.45. The ACCC has considered the following public detriments:

- potential for reduced competition in the provision of dental services
- potential detriment from 'waterbed effects'.

Potential for reduced competition in the provision of dental services

4.46. The ADA raised concerns regarding the potential public detriment in the form of reduced competition in the provision of dental services. In its submissions, the ADA:

- queries how, without proper analysis of competition in dental services (with and without such arrangements), the ACCC can be comfortable that these arrangements are not reducing competition in dental services to suit competition between insurers
- queries whether such arrangements may lead to stabilisation of price or de facto locational rules
- submits that the choices insurers make about which dental services they want to be cheaper, and what they want the price of those dental services to be, is not being driven by competition between dental practices
- submits that the scope of authorisation granted should be limited to the application of Division 1 of Part IV of the Act, in so far as Health Partners is in competition with third-party dental practices with whom it has such arrangements.

4.47. Health Partners submits that the Proposed Conduct is not likely to result in public detriment as it will continue to face competitive market pressures from other health insurance providers and dental practices. Health Partners submits that the potential public detriment is also mitigated by:

- restrictions on location of the Proposed Conduct to South Australia and that Partner Practices will not be located within 20km of an existing Applicant Practice
- it will be voluntary for dental practices to sign agreements to become Partner Practices
- Health Partners will not offer Partner Practices exclusivity in an area, and it may appoint multiple Partner Practices in close proximity to each other
- Health Partners will not require all dental practices owned by one group to be part of the Partner Program, where individual dentists operating across multiple

dental practices could elect to only participate in the Partner Program at one or a limited number of their relevant locations

- if a Partner Practice no longer wants to participate in the Partner Program, the Partner Practice will be able to terminate the associated agreement without cause by providing at least 60 days' notice
- only 'routine' services are being capped as these services tend to be offered more regularly and therefore have more certainty as to price, and there are exceptions to allow fees to be charged over the cap when actual operating costs are higher
- pricing of the Capped Services is based on the prices at Health Partners' own dental practices, which Health Partners claims will ensure that pricing is based on market rates which capture actual costs rather than attempting to impose unsustainable pricing
- the agreements with Partner Practices will require the Capped Services to be offered at or below the price offered at Applicant Practices, and the arrangements will accordingly increase competitive pressure on those Applicant Practices
- the agreements do not propose to otherwise set the fees for other dental services, except to ensure that Health Partners' members are not charged more than a Partner Practice's Usual Fee Schedule offered to other patients
- Health Partners is not a dominant health insurer in South Australia, and any ability it might have to influence the market for dental services is severely limited
- the competitive dynamics of the health insurance provider and dental services markets will not significantly change as a result of whether the Partner Program's Capped Services are introduced and whether authorisation is granted.

4.48. The ACCC considers there is limited scope for the Proposed Conduct to reduce competition for the provision of dental services in South Australia.

4.49. Health Partners is a smaller provider of private health insurance in South Australia, supplying approximately 7.4%. The 3 largest health insurers in South Australia (Bupa, Medibank and HCF) collectively supply 77%, noting that just under half of Australians hold some level of private health insurance cover for dental expenses. This limits any impact the Proposed Conduct may have on competition in the provision of dental services.

4.50. The ACCC also notes Health Partners is a very small provider of dental services in South Australia, owning only 4 practices in metropolitan Adelaide. Health Partners proposes to enter into less than 10 agreements with practices in regional South Australia and not in geographic proximity to its own practices. The ACCC considers there is limited ability and incentive for Health Partners to reduce competition for dental services in regional South Australia, as it does not own practices in these areas. The ACCC considers it would therefore be unlikely Health Partners could 'funnel' members to its own practices.

4.51. The ACCC also considers that any reduction in the number or quality of dental services would lead to poorer outcomes for its members at no benefit of increased market power in regional areas, as Health Partners does not own dental practices in geographic proximity that could likely be considered substitutes for its members.

4.52. The ACCC considers that stabilisation of price or de facto locational rules for dental services under the Proposed Conduct are unlikely as the Capped Services' prices are set based on Health Partners' own practices' prices, which face strong competitive pressure in metropolitan Adelaide.

4.53. Further, the ACCC considers the voluntary and non-exclusive nature of the arrangements limit the impact on competition, as dentists are not required to enter into agreements with Health Partners and remain free to enter into agreements with other health insurers (who are likely to have a larger membership base) as well as continue to provide services to non-members. The ACCC notes that there are numerous dentists across Australia and in South Australia that have opted to be preferred providers for more than one health insurer in existing programs, or that have opted not to be preferred providers for any health insurer.[14]

4.54. The ACCC also notes that Partner Practices are free to terminate agreements without cause by providing at least 60 days' notice, Health Partners will not require all dental practices owned by one group to be part of the Partner Program and individual dentists operating across multiple dental practices could elect to only participate in the Partner Program at one or a limited number of their relevant locations.

4.55. The ACCC notes that Health Partners' members would remain free to choose whether to obtain known gap dental services from a Health Partners' clinic or a Partner Practice, or receive a comparatively lower rebate from Health Partners if they attend another provider.

4.56. The ACCC has previously considered similar preferred provider arrangements in its Private Health Insurance reports and found that such arrangements were unlikely to raise competition issues under the Act and that there will likely be minimal public detriment, as preferred provider clinics would remain subject to competitive pressure from other health insurers and dental providers.[15]

4.57. In summary, the ACCC does not consider that the Proposed Conduct is likely to result in public detriment in the form of reduced competition in the provision of dental services.

Potential detriment from 'waterbed effects'

4.58. In its submissions, the ADA requests the ACCC to consider the potential for public detriments such as 'waterbed effects'. In this context, the ACCC understands the

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[14] Various dentists across Australia state have explained their choice not to become a preferred provider, such as Flagstaff Hill Dental Care (SA), North Adelaide Dental Care (SA), VC Dental (NSW), Diamond Creek Dental Clinic (Vic), DBay Dental (Qld) and Tooth Dental (Qld).

Alternatively, there are also dentists who opt to be preferred providers for multiple private health insurers, such as Preventive Dentistry (SA), Burnside Dental (SA), Perfect Smile (SA), SO Dental Chatswood (NSW), Cannon Hill Smiles (Qld), Unity Dental Advanced Dentistry (Vic), Dentists of Tas (Tas) and Riverside No Gap Dental (Tas).

Examples taken from websites as at 31 May 2023.

[15] ACCC, *ACCC Private Health Insurance Report 2015–16*, Commonwealth of Australia, 2017, p. 29.
ACCC, *ACCC Private Health Insurance Report 2016–17*, Commonwealth of Australia, 2018, p.14-15.

ADA's concern is referencing a potential outcome from when price caps are set too low and may cause Partner Practices to increase prices for other services or for other customers (for example, non-insured customers or patients seeking services outside the Capped Services).

4.59. The ADA submits that the prices health insurers want dental practices to charge have not been set by consideration of the cost of providing those services or the impact on other services that patients may need.

4.60. As outlined in paragraph 4.47, Health Partners submits that the Proposed Conduct is not likely to result in public detriment as it will continue to face competitive market pressures and that potential public detriment is also mitigated by a number of factors.

4.61. The ADA did not provide evidence to support its submission that waterbed effects occur as a result of preferred provider arrangements. The ACCC considers that waterbed effects are unlikely to arise under the Proposed Conduct because Partner Practices will continue to face competition in the supply of dental services and will therefore be limited in their ability to increase prices for non-members or for other dental services as a result of the Proposed Conduct. In particular, the ACCC notes:

- There are many providers of dental services. For example, there are 13 dental practices and individual practitioners in the vicinity of Gawler Dental Clinic, with the furthest distance between 2 practices being approximately 1.5 km. Of these 13 practices, some are individual practitioners, while others are slightly larger practices with numerous dentists to choose from, such as Adelaide Road Dental Practice and Gawler & Districts Dental.
- Dental practices compete on price, location and quality of care, where patients may choose which practice to attend based on their preferences. For example, as mentioned in paragraph 4.19, around 39% of Australians in 2017-2018 avoided or delayed visiting a dentist due to price. Customers are also free to choose whether to acquire private health insurance and to include coverage for dental services if that also suits their preferences.

4.62. The ACCC also notes Health Partners' relatively small market share for private health insurance in South Australia compared to other health insurers, and also the overall large proportion of Australians without private health insurance for dental services. The ACCC considers Partner Practices will continue to provide services and compete for non-Health Partners members.

4.63. The ACCC notes the Usual Fee Schedule requirement, which is aimed at ensuring Health Partners' members are charged no more than the Partner Practice's Usual Fee Schedule for other patients, will ensure Partner Practices cannot charge higher prices to Health Partners' members. The ACCC also considers that Partner Practices will be limited in their ability to increase prices for other patients to meet this provision given that the Partner Practices will continue to face competitive market pressures as outlined in paragraph 4.61. Further, the ACCC notes the Usual Fee Schedule relates to the usual fees for uninsured patients (as defined in Annexure A) and therefore does not limit Partner Practices from offering discounts or known gap treatments to other patients.

4.64. The ACCC notes that waterbed effects may be more prevalent in a regulatory context where firms are compelled to raise prices for certain services to compensate the loss in revenue in another area. The ACCC considers it unlikely Partner Practices would anticipate a loss of revenue leading to waterbed effects, in particular:

- A Partner Practice is unlikely to anticipate a loss in profit by entering into an agreement with Health Partners, it would unlikely choose to voluntarily enter into the agreement if it would lose profit.
- The Capped Services' prices may limit a Partner Practice's ability to raise prices for some dental services (i.e., the 40 services included as the Capped Services), however a Partner Practice may not be concerned by this as it may anticipate entering into the agreement would provide it more business from Health Partners members.
- Where actual operating costs are higher, Partner Practices are able to charge above the applicable cap to reflect such costs (whether the Capped Service price or the Partner Practice's Usual Fee Schedule), which is provided by clause 18 of the dental agreement (at Annexure A).
- It is unlikely Partner Practices would be able to raise prices for the non-Capped Services, as it would continue to face competition from other dental practices.

4.65. Given the voluntary nature of the proposed arrangements and the competitive constraints on Health Partners in the health insurance and dental services market in South Australia, the ACCC considers it is unlikely Partner Practices would anticipate a loss of revenue, and even if that is the case, there is limited pressure for Partner Practices to join or pass on any price reductions to other services or customers. The ACCC therefore does not consider that the Proposed Conduct is likely to result in public detriment in the form of waterbed effects.

ACCC conclusion on public detriment

4.66. Overall, the ACCC considers that the Proposed Conduct is likely to result in minimal, if any, detriment as Health Partners, Applicant Practices and Partner Practices will remain subject to competitive market pressures.

4.67. The ACCC notes that Health Partners seeks to be able to make adjustments to the Capped Services over time to include additional or substitute routine dental service items as the Partner Program evolves, or in order to reflect any relevant changes made to the ADA Items Glossary or clinical practice. The ACCC accepts that there is merit in allowing Health Partners to alter the list of Capped Services and applicable fees over time. The ACCC notes that the relevant contractual arrangements (see clause 24 of Annexure A) would allow the Capped Services and applicable fees to be revised no more frequently than from 1 July each financial year. Given the limited frequency of future changes and limited likelihood of public detriment, the ACCC will reconsider this aspect of the arrangement if re-authorisation is later sought. Further, the ACCC may review an authorisation and possibly revoke the authorisation if, among other things, there has been a material change of circumstances since the authorisation was granted.

Balance of public benefit and detriment

4.68. The ACCC's assessment of whether it is satisfied that the likely public benefits of the Proposed Conduct would outweigh the likely public detriments requires a balancing exercise.[16]

4.69. The ACCC considers that the Proposed Conduct is likely to result in public benefits from:

- increased access through price certainty for Health Partners' members in regional South Australia by providing increased access to known gap services for members.
- increased competition between health insurance providers, by enabling Health Partners, a relatively smaller health insurance provider, to better compete with larger providers of private health insurance in South Australia, which offer similar preferred provider agreements for their members.

4.70. The ACCC considers that the Proposed Conduct is likely to result in minimal, if any, detriment in the form of reduced competition and waterbed effects as discussed at paragraphs 4.56 and 4.65.

4.71. The ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.72. The Act allows the ACCC to grant authorisation for a limited period of time.[17] This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.73. Health Partners seeks authorisation for 10 years to allow it to build its partner network over time. Health Partners submits that this will allow it to ensure that it is engaging with appropriate dental providers and building a thoughtful network.

4.74. The ADA submits that, if the ACCC grants authorisation, it should do so for a shorter term to allow the ACCC to conduct a more comprehensive review of price capping between private health insurers and dental practices.

4.75. While the duration of an authorisation is determined case by case, the ACCC more frequently grants longer authorisations (beyond 5 years) where it is being asked to re-authorise previously authorised conduct, there is evidence that anticipated benefits have been delivered, relevant parties continue to support the arrangements and market conditions are stable.

4.76. The ACCC notes that this is the first time that authorisation has been sought for this conduct by Health Partners.

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[16] Australian Competition and Consumer Commission v Australian Competition Tribunal (2017) 254 FCR 341, at [7] (Besanko, Perram and Robertson JJ).

[17] Subsection 91(1).

4.77. The ACCC also notes that the authorisation provides for the possibility that Health Partners may make changes to the 40 preventative and diagnostic service items that will form the Capped Services to include additional or substitute routine dental service items. Given future changes are unlikely to be frequent, and the net public benefit of the Proposed Conduct, the ACCC will consider any adjustments made to the Capped Services at the end of the authorisation period (if re-authorisation is sought).

4.78. In light of these factors, the ACCC considers that it is appropriate to grant authorisation for 5 years, rather than the 10 years sought by Health Partners. This provides the ACCC with an opportunity to assess the benefits and detriments arising from the conduct in light of industry changes and implementation of the Partner Program.

4.79. Accordingly, the ACCC proposes to grant authorisation for 5 years.

5. Draft determination

The application

5.1. On 16 February 2023, Health Partners lodged application AA1000636 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

5.2. Health Partners seeks authorisation for the Proposed Conduct as defined at paragraph 1.9. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.

5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

5.6. The ACCC proposes to grant authorisation AA1000636 to enable Health Partners to enter into and give effect to certain pricing arrangement provisions in agreements with Partner Practices in regional South Australia; specifically clauses 17-26 and clause 30 of the dental agreement (the **Proposed Conduct**). These clauses are replicated at **Annexure A**.

5.7. The ACCC proposes to also grant authorisation for the Proposed Conduct to the dentists and dental practices who enter into agreements with Health Partners to form part of its Partner Practices.

5.8. The ACCC proposes to grant authorisation AA1000636 in respect of Division 1 of Part IV of the Act and section 45 of the Act.

5.9. In respect of the ADA's request that the ACCC limit authorisation to Division 1 of Part IV of the Act, the ACCC considers section 45 would or might apply to the Proposed Conduct and does not consider there are reasons why it would be appropriate to exclude section 45 from the authorisation proposed to be granted in this instance.

5.10. The ACCC proposes to grant authorisation AA1000636 for 5 years.

5.11. The proposed authorisation is in respect of wording of clauses 17-26 and 30 as specified in Annexure A. Any amendments to the terms of these clauses would not be covered by the proposed authorisation.

5.12. This draft determination is made on 13 July 2023.

6. Interim authorisation

6.1. At the time of lodging the application, Health Partners requested interim authorisation to allow it to progress and conclude its negotiations with potential providers, specifically to enter into agreements and have Partner Practices provide 'Capped Services' prior to the ACCC's final decision.

6.2. Health Partners submits that it has requested interim authorisation on the basis that:

- There is a need to encourage Health Partners' members to continue to receive regular dental care. In particular, Health Partners has seen a drop in access to dental services as a result of the COVID-19 pandemic and considers that it is important to allow Partner Practices to provide Capped Services as a matter of priority.
- There is limited risk in granting an interim authorisation as this model has already been adopted by other health insurance providers.
- The same considerations set out in the application for final authorisation apply in relation to the request for interim authorisation, and it requests that the ACCC grants interim and final authorisation under section 88(1) of the Act in respect of the Proposed Conduct.
- Interim authorisation will not give rise to permanent changes which would prevent the market returning to its pre-authorisation state if final authorisation is not granted.

6.3. The ACCC will determine whether to grant interim authorisation on a case-by-case basis taking into account relevant factors including the extent to which the relevant market will change if interim authorisation is granted.[18] Interim authorisation is more likely to be granted when it will maintain the market status quo. Interim authorisation is unlikely to be granted if doing so would permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied.

[18] A number of these factors were described by the Tribunal in Re Queensland Timber Board (1975), ATPR 40-005 at 17,122– 123

6.4. The ACCC's power to grant authorisation is limited to future conduct. The Act does not allow the ACCC to grant authorisation for conduct engaged in before the ACCC makes a decision on the application for the authorisation.

6.5. The ACCC notes that Health Partners has already entered into an agreement with Gawler Dental Clinic. Health Partners submits that the agreement contains provisions which are contingent on the ACCC's authorisation and that the relevant clauses of the Proposed Conduct have no effect unless and until authorisation is granted.

6.6. Health Partners submits it is awaiting ACCC authorisation to give effect to that agreement and any future agreements. Giving effect to these agreements would allow for the implementation of Capped Services to Health Partners' members, which may result in communications from Health Partners or the dental practice to consumers about such changes.

6.7. The ACCC is of the view that granting interim authorisation would likely change the status quo, as Health Partners would be able to enter into and give effect to new pricing arrangements with dentists and dental practices and make associated communications to consumers. The ACCC is not satisfied of the urgency of the need for interim authorisation prior to making a final determination. The ACCC also considers that there would be limited harm, if any, to Health Partners if a grant of interim authorisation is denied at this time, as the current status quo would continue. As such, the ACCC considers that it would not be appropriate to grant interim authorisation at this time.

7. Next steps

7.1. The ACCC invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, Health Partners or an interested party may request that the ACCC hold a conference to discuss the draft determination.

Annexure A – Relevant clauses of the Partner Program dental agreement for which authorisation is proposed to be granted

In the clauses in this Annexure:

- *Operator* refers to the counterparty to the agreement, the operator of the Partner Practice;
- *Practice* refers to the Partner Practice operated by the Operator;
- *Premises* refers to the premises from which the Partner Practice is operated;
- *Agreed Fees* refers to fees for dental services set out in a Schedule to the agreement, as varied in accordance with clauses 23 and 24;
- *Usual Fee Schedule* means the Operator's schedule of usual fees for uninsured patients treated at the Partner Practice;
- *Benefits* means an amount payable by Health Partners to or for a Member, in respect of expenses incurred by a Member for treatment, in accordance with the terms and conditions of the Health Partners Fund Rules, and *Participating Dental Benefits* refers to the Benefits payable for services provided by Partner Practices, as distinct from the 'Default Dental Benefits' payable in other instances; and
- *Qualifying Dental Practitioner* means a person who is an AHPRA registered Dental Practitioner, with no conditions or registration requirements on their AHPRA registration.

Clauses:

17. Without limiting the application of clause 22, and subject to ACCC Authorisation, the Operator will ensure Members are charged no more than the lesser of:

    17.1. any applicable Agreed Fee; or

    17.2. the relevant amount from its Usual Fee Schedule,

    for the provision of the services provided by it in connection with this Agreement, except as provided by clause 18.

18. Where clause 17 applies, the only exception to that clause will be where there are unexpectedly higher costs associated with the provision of the service to an individual Member (for example higher than normal lab cost or material costs). In those circumstances, the amounts charged by the Operator to the Member may be increased to cover these additional costs, but only by an amount directly referrable to the underlying cost increase, and only on a case-by-case basis. Where requested by Health Partners, the Operator will provide relevant information to support each exception where higher fees have been charged. Where higher costs are applicable to all instances of a service provided by the Operator, those costs should be factored into the Usual Fee Schedule and must not be used as the basis charge increased amounts pursuant to this clause 18.

19. Health Partners will only pay the Participating Dental Benefits to the Operator for treatment provided to Members by Qualifying Dental Practitioners.

20. The Operator will ensure that Members are not charged for treatment until after the treatment has been provided.
21. Members will be responsible for any difference between the Agreed Fees and the Benefits relevant to the Members' level of cover.
22. Where it is the Operator's normal business practice to provide any discounts or benefits to its patients, the Operator will also provide such discounts or benefits or an equivalent amount of the discount or benefits to Members.
23. Health Partners will review the Agreed Fees each financial year. Health Partners may vary the services to which the Agreed Fees apply and/or the applicable Agreed Fees for those services.
24. In the event that the Agreed Fees are varied, Health Partners must provide the Operator with notice of such variation at least 60 days prior to the end of the financial year, and the change will take effect from the commencement of the following financial year on 1 July.
25. The Operator is required to provide Health Partners with a copy of their Usual Fee Schedule.
26. In the event that the Operator varies their Usual Fee Schedule, the Operator must provide Health Partners with a copy of the revised Usual Fee Schedule at least 60 days prior to the revised Usual Fee Schedule taking effect.

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30. The Agreed Fees will not apply to billing and services provided by the Operator from any practice other than the Practice, or any location other than the Premises

Annexure B – Capped Services

Item number	Item description
011	Comprehensive oral examination
012	Periodic oral examination
013	Oral examination - limited
014	Consultation
016	Consultation by referral
022	Intraoral radiograph (bitewing or periapical) - 1 film
061	Pulp testing - per visit
072	Photographic records - intraoral
111	Removal of plaque and/or stain
114	Removal of calculus - first visit
115	Removal of calculus - subsequent visit
121	Topical application of remineralizing and/or cariostatic age
151	Provision of a mouthguard - indirect
221	Clinical periodontal analysis and recording
222	Root planing and subgingival curettage - per tooth
311	Removal of a tooth or part(s) thereof
314	Sectional removal of a tooth
324	Surgical removal of tooth, complete bone
415	Complete preparation of root canal - one canal
416	Complete preparation of root canal - each addt canal
417	Root canal obturation - one canal
418	Root canal obturation - each addt canal
419	Extirpation of pulp - emergency or palliative

455	Add visit for irrigation/dressing of root canal - per tooth
512	Metallic restoration - two surfaces - direct
521	Adhesive restoration - 1 surface - anterior tooth - direct
522	Adhesive restoration - 2 surfaces - anterior tooth - direct
523	Adhesive restoration - 3 surfaces - anterior tooth - direct
524	Adhesive restoration - 4 surfaces - anterior tooth - direct
525	Adhesive restoration - 5 surfaces - anterior tooth - direct
526	Adhesive restoration veneer anterior tooth direct
531	Adhesive restoration - 1 surfposterior tooth - direct
532	Adhesive restoration - 2 surf - posterior tooth - direct
533	Adhesive restoration - 3 surf - posterior tooth - direct
534	Adhesive restoration - 4 surf - posterior tooth - direct
535	Adhesive restoration - 5 surf - posterior tooth - direct
555	Tooth-coloured restoration - 5 surfaces - indirect
572	Provisional (intermediate/temporary) restoration
577	Cusp capping - per cusp
965	Occlusal splint