



Determination

Application for authorisation AA1000641

lodged by

Fred IT Group Pty Ltd

in respect of

transitional arrangements with MediSecure Ltd

Authorisation number: AA1000641

18 October 2023

Commissioners: Keogh

Lowe

Brakey

Summary

The ACCC has decided to grant authorisation to Fred IT Group and MediSecure for them to coordinate to facilitate the transition to a sole provider model for prescription delivery systems for publicly-funded electronic scripts. Prescription delivery systems are used to communicate electronic prescription information between doctors and pharmacies. eRx (a wholly-owned subsidiary of Fred IT) and MediSecure operate the only 2 prescription delivery services that currently operate in Australia.

The Commonwealth, represented by the Department of Health and Aged Care, has run a tender process, and made the decision to move to a sole provider of prescription delivery services. Authorisation was sought to enable some coordination between the existing providers to give effect to this decision. Regardless of the ACCC's authorisation, the transition to a sole provider model is likely.

The ACCC has decided to grant authorisation until 9 May 2025.

The ACCC considers that the Proposed Conduct is likely to result in public benefits by enabling a smooth transition to the Department's preferred sole provider model for Prescription Delivery Systems and supporting continuity in the supply of prescription medication to the Australian public. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment.

The application for authorisation

- 1.1. On 9 May 2023, Fred IT Group Pty Ltd lodged application for authorisation AA1000641 with the Australian Competition and Consumer Commission (the **ACCC**). On 9 August 2023, Fred IT Group varied the Proposed Conduct for which it sought authorisation. Fred IT Group is now seeking authorisation to engage in the Proposed Conduct (as defined at paragraph 1.9) to coordinate with MediSecure Ltd and its related bodies corporate (**MediSecure**) to facilitate a smooth transition to a sole provider model for prescription delivery systems for publicly-funded electronic scripts.
- 1.2. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions in Part IV of the Act in respect of the specified conduct. 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 or is likely to 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**)).
- 1.3. Fred IT Group also requested interim authorisation to make, but not give effect to, the contracts, arrangements or understandings involving MediSecure in relation to the Proposed Conduct while the ACCC considered the substantive application. On 21 June 2023 the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act. On 14 September 2023, the ACCC revoked the interim authorisation granted on 21 June 2023 and granted a new interim authorisation to narrow the conduct to reflect a change in the conduct for which authorisation was sought.

Background

- 1.4. This application is made by Fred IT Group Pty Ltd and its related entities (**Fred IT Group**), including in particular eRx Script Exchange Pty Ltd (**eRx**). eRx is a wholly

owned subsidiary of Fred IT Group and operates an electronic pharmacy prescription exchange system, sometimes known as a PES or Prescription Delivery Service.

- 1.5. eRx and MediSecure operate the only 2 Prescription Delivery Services that currently operate in Australia. Prescription Delivery Services are computer systems, programs and equipment which are used to communicate electronic prescription information between doctors and pharmacies.
- 1.6. Following a competitive tender process, the Commonwealth, represented by the Department of Health and Aged Care (the **Department**) appointed Fred IT Group to be the sole provider of Prescription Delivery Services for publicly-funded electronic prescriptions. Fred IT Group submits that publicly-funded electronic prescriptions comprise the vast majority of scripts issued in Australia. Fred IT Group submits that moving to a sole provider requires the transitioning of existing users of the Prescription Delivery Services provided by MediSecure to Fred IT Group. Fred IT Group submits that the Department has expressed a desire for Fred IT Group and MediSecure to work together to ensure this transition occurs as smoothly and efficiently as possible, and that these transition arrangements form the basis of the Proposed Conduct. The ACCC understands that the Department is also working with the parties and vendors to achieve this transition.
- 1.7. On 9 August 2023, Fred IT Group varied the Proposed Conduct for which it seeks authorisation. Previously, Fred IT Group sought authorisation to cooperate with MediSecure in relation to site transition, vendor transition and data transition. Fred IT Group also sought to negotiate a number of items with MediSecure to effect transition, which the ACCC understands will now be managed by the Department.
- 1.8. Since making its application for authorisation on 9 May 2023, the scope of the Proposed Conduct which Fred IT Group seeks authorisation for has been reduced as a result of the Department settling some matters to do with the transition directly with MediSecure. Fred IT Group now seeks authorisation only in relation to data transition. Fred IT Group submits that a smooth transition to a single provider model in respect of publicly-funded electronic prescriptions will still be best achieved if data stored on the MediSecure system can be transferred to the eRx Prescription Delivery Service.

The Proposed Conduct

- 1.9. Fred IT Group seeks authorisation to:
 - a. co-operate with MediSecure in relation to data transition by:
 - i. transferring all current publicly-funded e-prescriptions stored within the MediSecure system to the eRx system
 - ii. obtaining (to the extent required) technical assistance from MediSecure to ensure the eRx system can successfully integrate data from the MediSecure system
 - iii. obtaining (to the extent required) ongoing support from MediSecure to Fred IT Group to identify and resolve technical and data-related issues as they arise.
 - b. make and give effect to one or more contracts, arrangements or understandings with MediSecure in relation to:
 - i. the date or dates by which certain prescriptions and related data will transfer from the MediSecure Prescription Delivery Service to the eRx Prescription Delivery Service and the process for how such data will be transferred
 - ii. when and how the MediSecure Prescription Delivery Service will cease to be used in respect of publicly-funded scripts, such that new publicly-funded prescriptions are no longer created, stored or accessed via this system

- iii. subject to reasonable commercial efforts, MediSecure's ongoing operation of its Prescription Delivery Service for the duration of the transition period (and possibly longer) to ensure the integrity of all data stored on its system is maintained

(the **Proposed Conduct**).

Interim authorisation

- 1.10. Fred IT Group also requested interim authorisation to enable it to make, but not give effect to, one or more contracts, arrangements or understandings involving MediSecure to facilitate a smooth transition to a sole provider model for prescription delivery systems for publicly-funded electronic scripts while the ACCC considers the substantive application.
- 1.11. On 21 June 2023, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act.¹ On 14 September 2023, the ACCC revoked the interim authorisation granted on 21 June 2023 and granted a new interim authorisation to allow the parties to make, but not give effect, to the relevant contracts under the narrowed Proposed Conduct. This interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke it.

2. Consultation

- 2.1. The ACCC invited submissions from a range of potentially interested parties.
- 2.2. The ACCC received 6 submissions from interested parties in relation to the application.
- 2.3. The Pharmacy Guild of Australia made a submission supporting the application for authorisation. The Pharmacy Guild of Australia represents community pharmacies across Australia. The Guild's interest in this matter is also as partial owner of Fred IT Group through its Victorian Branch subsidiary, Pharmacy Computers Australia.
- 2.4. The Pharmacy Guild of Australia submits that the Proposed Conduct will provide significant public benefit by:
 - enabling the continuity of important clinical services provided by community pharmacies across Australia
 - continuing to generate significant volumes of prescription and dispensed medicines data to the Australian Government's Pharmaceutical Benefits Scheme and My Health Record systems
 - recognising that electronic prescriptions are now widely embedded into the community GP and pharmacy sectors, supporting quality use of medicines through the more efficient and safer prescribing and dispensing of prescription medicines.
- 2.5. On 23 June 2023, the Medical Software Industry Association made a submission supporting the application for authorisation. The Medical Software Industry Association is a member-based industry association which represents over 165 health software companies, many of which participate in the ePrescribing ecosystem, including members Fred IT Group and MediSecure.

¹ See ACCC decision of 21 June 2023 available on the ACCC's [public register](#).

- 2.6. The Medical Software Industry Association supports authorisation of the Proposed Conduct so that all the issues affecting the electronic prescribing ecosystem can be openly discussed between relevant parties. The Medical Software Industry Association submits that the Proposed Conduct will enable the parties to discuss, and potentially resolve, the issues affecting the electronic prescribing ecosystem. The Medical Software Industry Association submits that these discussions may avoid unintended consequences on patient privacy, safety, and security, as well as the productivity and efficiency of key national health infrastructure.

Submissions regarding the Department's decision

- 2.7. A number of the interested party submissions received by the ACCC raised issues relating to the Department's decision to appoint a sole provider of Prescription Delivery Services. The Department's procurement decision on the provision of prescription delivery services is not an issue for consideration by the ACCC as part of this application for authorisation. To the extent interested parties have concerns regarding that decision, the ACCC considers these concerns are best directed to the Department.
- 2.8. Public submissions by Fred IT Group and interested parties are on the Public Register for this matter.

Draft determination

- 2.9. On 14 September 2023, the ACCC issued a draft determination proposing to grant authorisation for 2 years. A pre-decision conference was not requested following the draft determination.
- 2.10. The ACCC received 1 submission after the draft determination. On 19 September 2023, the Pharmacy Guild of Australia made a submission reiterating its support for the Proposed Conduct and the ACCC's interim authorisation.

3. ACCC assessment

- 3.1. Fred IT Group 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 sections 45 and 46 of the Act. 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.

Relevant areas of Competition

- 3.2. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 3.3. The ACCC considers that the area of competition likely to be affected by the Proposed Conduct is the supply of Prescription Delivery Services in respect of publicly-funded scripts to Australian pharmacies and doctors.

Future with and without the Proposed Conduct

- 3.4. 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.
- 3.5. The ACCC considers that:

- In the future with the Proposed Conduct, Fred IT Group is likely to coordinate with MediSecure to transfer data from MediSecure's Prescription Delivery Service to eRx's Prescription Delivery Service as part of the transition to a sole provider model. Fred IT Group would seek support from MediSecure as necessary to address any technical and/or data issues.
 - In the future without the Proposed Conduct, the Department would direct the transition process to the extent possible. Fred IT Group and MediSecure would not coordinate to facilitate data migration, which may impact the supply of prescriptions and medications to the Australian public.
- 3.6. The ACCC considers that in both the future with and without the Proposed Conduct, the transition to a sole provider model is likely. Following a procurement process, the Department has decided to fund a single provider of electronic prescription services, Fred IT Group. If authorisation is not granted, it is likely the Department would seek an alternative method to engage the parties to affect the transition.

Public benefits

- 3.7. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (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.²

Smooth transition to the Department's preferred outcome

- 3.8. Fred IT Group submits that the Proposed Conduct will result in public benefits through supporting a smooth transition to the Department's preferred model for operating the electronic prescribing eco-system. Fred IT Group submits that this in turn will enhance the prospects of individuals accessing their prescriptions, some of which may be of vital consequence to their overall health, in a timely and accurate fashion. Fred IT Group submits that given the potential for adverse consequences, continuity of supply is critical, and the Proposed Conduct will allow the best chance to ensure such continuity.
- 3.9. Fred IT Group submits that in the absence of an orderly transition, electronic scripts stored on the MediSecure servers would be at risk of not being available to the patient to whom they were issued. A smooth transition to a single provider model in respect of publicly-funded electronic prescriptions will, according to Fred IT Group, still be best achieved if data stored on the MediSecure system can be transferred to the eRx Prescription Delivery Service.
- 3.10. Fred IT Group submits that, following the interim authorisation granted by the ACCC on 21 June 2023, the parties have been negotiating the extent to which such transfer is permitted, taking into account their respective privacy obligations, and the consents which were granted at the time the data was collected. Accordingly, Fred IT Group submits that the Proposed Conduct will contribute to as smooth a transition as possible to a single provider model for publicly-funded electronic prescriptions.

² *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.*

- 3.11. The ACCC acknowledges privacy concerns in relation to the transition and notes that the Proposed Conduct does not reduce or affect any privacy issues related to the transition. However, discussions between the parties may allow them to comply with their privacy requirements more efficiently.
- 3.12. The ACCC understands that MediSecure providing Fred IT Group technical assistance and ongoing support to identify and resolve technical and data-related issues as they arise is likely to substantially reduce the risk of data loss as a result of migrating MediSecure's data to eRx's database and in turn reduce the risk of loss of consumer prescriptions. The ACCC notes the Proposed Conduct includes MediSecure continuing to operate its Prescription Delivery Service for the duration of the transition period to ensure the integrity of all data stored on its system is maintained, which may further prevent data loss.
- 3.13. The ACCC considers that the Proposed Conduct is likely to result in public benefits by enabling a smooth transition to the Department's preferred sole provider model for Prescription Delivery Systems for publicly-funded electronic scripts and supporting continuity in the supply of prescription medication to the Australian public.

Public detriments

- 3.14. 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.³

- 3.15. Fred IT Group submits that the Proposed Conduct does not give rise to any public detriments because:
- While it may be considered that a transition from 2 Prescription Delivery Service providers to 1 constitutes a lessening of competition, this could not be correctly characterised as a market outcome, nor would it result from the Proposed Conduct. Rather it would be a product of the Department's decision with respect to the tender.
 - The Proposed Conduct seeks only to give effect to the Department's decision regarding the most efficient and effective manner by which to deploy taxpayer funds. The Department's approach indicates that it considers competition for the market is likely to achieve better outcomes as opposed to competition within the market.
- 3.16. The ACCC considers that the Proposed Conduct is likely to result in minimal, if any public detriment, because:
- It only relates to coordination between the parties to ensure data is properly migrated from MediSecure's Prescription Delivery Service to eRx's Prescription Delivery Service.
 - The 2 parties will not be competitors in providing publicly-funded electronic prescription services going forward because of the decision by the Department of Health to appoint Fred IT Group as the sole provider following a competitive tender process.

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

Balance of public benefit and detriment

- 3.17. The ACCC considers that the Proposed Conduct is likely to result in public benefits by enabling a smooth transition to the Department's preferred sole provider model for Prescription Delivery Systems for publicly-funded electronic scripts and supporting continuity in the supply of prescription medication to the Australian public.
- 3.18. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment.
- 3.19. Therefore, for the reasons outlined in this determination, 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

- 3.20. The Act allows the ACCC to grant authorisation for a limited period of time.⁴ 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.
- 3.21. In this instance, Fred IT Group seeks authorisation for 3 years. Fred IT Group submits that complete transition may take in the order of 12 months, with MediSecure being asked to maintain all data stored via its Prescription Delivery Service for a longer period in case of any problems with data that are not identified until after the point of transfer. In order to accommodate unexpected developments, Fred IT Group submits it is prudent to incorporate significant allowance for slippage, particularly in relation to MediSecure's ongoing operation of its Prescription Delivery Service to ensure the integrity of all data stored on its system is maintained.
- 3.22. The ACCC recognises the need for Fred IT Group to continue to work with MediSecure after the transition to mitigate the risk of inadvertent data loss during and after the transition period. However, the ACCC notes that transition is expected to take 12 months. While there may be some delays in completing the transition, the ACCC considers it is likely that the transition would be complete in 2 years, and that any problems with data integrity would be resolved by this time. As such, the ACCC has decided to grant authorisation for 2 years from the date the application was lodged, until 9 May 2025.

4. Determination

The application

- 4.1. On 9 May 2023, Fred IT Group lodged application AA1000641 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 4.2. Fred IT Group seeks authorisation for the Proposed Conduct outlined at paragraph 1.9.

⁴ Subsection 91(1).

The authorisation test

- 4.3. 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.
- 4.4. For the reasons outlined in this 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.
- 4.5. Accordingly, the ACCC has decided to grant authorisation.

Conduct which the ACCC has decided to authorise

- 4.6. The ACCC has decided to grant authorisation AA1000641 to Fred IT Group and MediSecure to:
 - a. co-operate with each other in relation to data transition by:
 - i. transferring all current publicly-funded electronic prescriptions stored within the MediSecure system to the eRx system
 - ii. Fred IT Group obtaining (to the extent required) technical assistance from MediSecure to ensure the eRx system can successfully integrate data from the MediSecure system
 - iii. Fred IT Group obtaining (to the extent required) ongoing support from MediSecure to identify and resolve technical and data-related issues as related to the data transition as they arise.
 - b. make and give effect to one or more contracts, arrangements or understandings only with each other in relation to:
 - i. the date or dates by which certain prescriptions and related data will transfer from the MediSecure Prescription Delivery Service to the eRx Prescription Delivery Service and the process for how such data will be transferred
 - ii. when and how the MediSecure Prescription Delivery Service will cease to be used in respect of publicly-funded scripts, such that new publicly-funded prescriptions are no longer created, stored or accessed via this system
 - iii. subject to reasonable commercial efforts, MediSecure's ongoing operation of its Prescription Delivery Service for the duration of the transition period (and possibly longer) to ensure the integrity of all data stored on its system is maintained.
- 4.7. The ACCC has decided to grant authorisation to both Fred IT Group and MediSecure, given that both parties will be involved in the Proposed Conduct.
- 4.8. The ACCC has decided to grant authorisation in relation to Division 1 of Part IV of the Act, and sections 45 and 46 of the Act.
- 4.9. The ACCC has decided to grant authorisation AA1000641 until 9 May 2025.
- 4.10. This determination is made on 18 October 2023.

5. Date authorisation comes into effect

- 5.1. This determination is made on 18 October 2023. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 9 November 2023.