



**Fred IT Group Pty Ltd –
Application for authorisation AA1000641
Interim authorisation decision
21 June 2023**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted interim authorisation in respect of the application for authorisation AA1000641, lodged by the Fred IT Group Pty Ltd and its related entities (**Fred IT Group**), including in particular eRx Script Exchange Pty Ltd (**eRx**) on 9 May 2023.
2. Interim authorisation is granted to Fred IT Group to engage in the Proposed Conduct (as defined at paragraph 6) to make, but not give effect to, one or more contracts, arrangements or understandings involving 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.
3. Interim authorisation commences immediately and remains in place until it is revoked, the application for authorisation is withdrawn or the date the ACCC's final determination comes into effect.

Background

4. 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.
5. Following a competitive tender process, the Department of Health and Aged Care (the **Department**) has 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 defined below.

The Proposed Conduct

6. Fred IT Group has requested interim authorisation to make, but not give effect to, one or more contracts, arrangements or understandings involving MediSecure in relation to:
 - a. the following co-operative arrangements to facilitate transition:
 - i. site transition: ensuring all MediSecure end-users are advised of when and how they will need to move to the Fred IT Group system
 - ii. vendor transition:

1. releasing current MediSecure vendors¹ from their contractual obligations with MediSecure
 2. ensuring Fred IT Group has the appropriate details to contact such vendors so it can work directly with them to secure their integration
 3. Fred IT Group undertaking conformance testing in support of vendors (with support from the Australian Digital Health Agency).
- iii. data transition:
1. transferring all current e-prescriptions stored within the MediSecure system to the eRx system
 2. obtaining technical assistance from MediSecure to ensure the eRx system can successfully integrate data from the MediSecure system
 3. obtaining ongoing support from MediSecure to Fred IT Group to identify and resolve technical and data-related issues as they arise.
- b. Fred IT Group negotiating the following matters with MediSecure:
- i. the date or dates by which certain prescriptions and data will pass from the MediSecure Prescription Delivery Service to the eRx Prescription Delivery Service
 - ii. how vendors will transition from MediSecure to eRx (including whether and if so, how historical data relating to such providers will be transferred)
 - iii. when and how the MediSecure Prescription Delivery Service will cease to be used in respect of publicly-funded scripts, such that new prescriptions are no longer created, stored or accessed via this system
 - iv. 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
 - v. the management of milestone payments (which will require defining each relevant milestone, the date by which it should be completed, and the amount to be distributed upon its completion).

(the **Proposed Conduct**).

7. Fred IT Group has narrowed the Proposed Conduct for which it seeks interim authorisation as compared to its substantive application for authorisation, to permit it to engage in specified types of negotiations with MediSecure (and other relevant stakeholders such as the Department) to establish the work program necessary to complete transition. Fred IT Group seeks interim authorisation to make (but not give effect to) one or more contracts, arrangements or understandings involving MediSecure regarding the Proposed Conduct. Fred IT Group considers interim authorisation on this basis would address many of the concerns raised by interested parties in submissions as outlined at paragraphs 11-23 of this interim authorisation decision; and enable Fred IT Group, MediSecure and the Department to establish the foundation by which transition can progress if and when the ACCC were to grant authorisation for the Proposed Conduct in its entirety.

¹ Vendors include prescribers and prescribing software providers, dispensers and dispensing software providers, and mobile intermediaries.

The authorisation process

8. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (Cth) (the **Act**). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Interim authorisation

9. Section 91 of the Act allows the ACCC, where it considers it appropriate, to grant interim authorisation. Interim authorisation enables the parties to engage in the Proposed Conduct while the ACCC is considering the substantive application.
10. Fred IT Group requested interim authorisation on the basis that:
 - The Department wishes to have the transition to the sole provider model commence on 1 July 2023, and to be largely complete within 5 months.
 - The exact timing of full transition is dependent upon several factors, including many third parties such as individual vendors and MediSecure itself.
 - Completing the transition process as soon as possible will enable any cost savings for the Department of Health to be brought forward.
 - Interim authorisation will enable the parties to progress the transition as much as possible pending a final decision being made by the ACCC.
 - Due to the anticipated timeframe for transition, it is extremely unlikely that MediSecure would cease providing a Prescription Delivery Service in respect of publicly-funded scripts prior to any final determination by the ACCC. As such, granting interim authorisation will not give rise to any conduct that cannot be “undone”.
 - Interim authorisation will not give rise to any public detriment as it will not give rise to any anti-competitive effects, and it is highly unlikely to alter the competitive dynamics of any relevant market.

Consultation

11. The ACCC invited submissions from a range of potentially interested parties. To date, the ACCC has received 5 submissions in relation to interim authorisation.
12. MediSecure opposes interim authorisation, and submits that:
 - If the ACCC grants interim authorisation but subsequently determines that final authorisation should not be granted, it will not be possible to undo the consequences which will flow from interim authorisation. Transitioning in advance of a final authorisation forces vendors and clinical end-users to accept new commercial arrangements, execute changed technical workflows, and implement change management processes. MediSecure submits that once vendors incur the costs of transitioning, they will not consider moving back to MediSecure.
 - The implied urgency to achieve an interim authorisation to meet a 1 July 2023 date for commencement of the sole provider model is an artificial construct based solely on a date agreed by the Department and Fred IT Group into which MediSecure or the broader software industry has had no input.
 - Interim authorisation will result in a disorderly transition and disruption to end-user prescribers, dispensers and consumers as it anticipates a rushed development, quality assurance and industry review process for transition plan.

- Interim authorisation will have flow-on anti-competitive effects for non-publicly funded prescriptions that form a significant component of the affected market. MediSecure submits that publicly funded prescriptions do not represent the totality of the electronic prescriptions market. MediSecure submits that while maintaining a publicly articulated scope constrained to publicly funded prescriptions, Schedule 5, Section 5 (a) of the contract between the Department and Fred IT requires all Transacting Entity sites to exclusively use Fred IT's Prescription Delivery System. MediSecure submits that this will shut MediSecure out of part of the market not under the purview of the Department's tender should it wish to and be able to participate in it.
 - Interim authorisation risks a premature exit by MediSecure. MediSecure submits it is in an unacceptable, highly compromised, and dependent position with Fred IT Group. MediSecure further submits that it is without any Commonwealth-controlled governance arrangements that would otherwise protect its interests during a process which MediSecure submits it has sought, in good faith, to facilitate without being unreasonably compromised. MediSecure submits that these concerns, coupled with the fact its revenue stream will cease as soon as the sole-provider model comes into effect, raises a real risk that MediSecure will be unable to agree a suitable fee and timetable for payment for transition services with Fred IT and will be unable to meet the costs associated with provision of those services. MediSecure submits that granting interim authorisation raises the very real risk that MediSecure will be forced to cease trading and shut down the system on which the scripts are currently held.
 - The complexities involved in the transition require the full and complete consideration that the final authorisation process contemplates. Not granting interim authorisation will also provide a more appropriate timeframe for the technical and legal complexities involved to be considered.
 - There is no compelling public benefit argument which supports the grant of interim authorisation. The public benefits are limited to cost savings and the avoidance of disruption by facilitating a smooth and undisruptive move to the sole provider system. MediSecure submits these only arise because of the arbitrary Commencement Date of 1 July 2023. Allowing for an orderly transition will be the only way to ensure that the "vital consequences to [the] overall health" which flow from ability to access prescriptions" and that will not be achieved by the grant of interim authorisation.
 - By its nature, the MediSecure database holds sensitive personal information relating to the patient that is the subject of the care to which the prescription relates. It also contains personal information relating to the doctor prescribing the medication. There are a number of issues which need to be considered in respect of this information in the context of a transition. It is unclear whether MediSecure would be deemed to be in breach of the Privacy Act were it to transfer the sensitive personal information it holds to another party without having first obtained the informed consent of the individuals to whom the information relates.
13. Best Practice Software made a submission opposing interim authorisation. Best Practice Software provides practice management software whose end-user base represents over 6,000 medical practices across Australia, the majority of which are General Practices, and thousands of individual prescribers working within these practices who participate in the ePrescribing ecosystem.
 14. Best Practice Software submits that the Department's intended commencement date for new arrangements under the RFT outcome contribute greatly to concern of irreversible actions under interim approval.
 15. Best Practice Software submits that if interim approval is granted in June, this places pressure upon it, and other software vendors in its position, to expedite the signing of

agreements with Fred IT Group immediately to meet the Department's deadlines. The transition requirements for the new arrangement are expected to be significant from a financial and time perspective for both Best Practice Software, and its impacted end-users nationally.

16. The Medical Software Industry Association Ltd (the **MSIA**) made a submission opposing interim authorisation. The MSIA 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.
17. The MSIA submits that the proposed interim arrangements are irreversible, and that the ACCC assessment should be completed in full before vendors and care providers are forced to adopt new commercial terms, technical settings and data flows. The MSIA submits that for some, the 'interim' arrangements will necessitate investment in technical development, data surrender, new commercial terms and change management, and for others their businesses may cease to exist with merely 6 weeks' notice. The MSIA submits that the ACCC's consideration of the substantive application cannot be meaningful if interim arrangements are already in place.
18. The MSIA submits that the competition impacts of the Proposed Conduct have not been sufficiently understood and addressed. This includes a number of issues which the MSIA submits are inappropriate, being:
 - the framing of the impact to competition as being confined to Fred IT Group's relationship with MediSecure
 - direct competitors being forced to contract with Fred IT Group
 - proposed exclusivity embedded in contracts between healthcare providers and Fred IT Group
 - the contracts are not available for consideration by parties expected to contract with Fred IT Group under the new model within weeks. The MSIA submits that withholding these contracts until after the irreversible 'interim' arrangements are in place is coercive and does not demonstrate good faith.
19. The MSIA submits that allowing more time for transition will not result in the negative patient safety or prescription access consequences claimed in the application. On the contrary, maintenance of the status quo for a reasonable period will allow for greater continuity of service.
20. Z Software Pty Limited (**Z Software**) made a submission opposing interim authorisation. Z Software provides dispense and point of sale solutions to community pharmacies throughout Australia.
21. Z Software submits that the Department's Request for Tender process has been allowed to run for over 13 months with only a recent announcement that Fred IT Group will have sole responsibility from 1 July 2023. Z Software submits that this effectively removes MediSecure from the market without any sensible consideration of the impact on vendors and the necessary changes that would need to be made to ensure continuity of services that has been enjoyed for some time. Z Software submits that the urgency created by providing industry with 6 weeks' notice to prepare for a transition the Application states is expected to take 12 months does not align with the urgency that has driven RFT progress to date.
22. Z Software submits that the request to grant interim authorisation to support a transition period to speed up to meet the 1 July 2023 deadline is hazardous as there are many moving parts to the electronic prescribing ecosystem. The inappropriate rush to implementation creates uncertainty, confusion and risk to patient care. Z Software further submits that it is coercive and unacceptable to push to initiate an interim transition before vendors like Z Software have had an opportunity to review the commercial terms they are being compelled to sign up to, with what is in many cases,

their principal market competitor or the controlling interest of their principal market competitor.

23. Z Software further submits that it is being asked to carry the cost and effort of transition while simultaneously being forced to accept a reduced level of rebate. In these circumstances, Z Software submits it is commercially unviable to support a return to their clients' pre-transition preferences if there is a change of circumstances. This is a competitive disadvantage for those vendors and pharmacies that make a change. Z Software submits that an interim authorisation is, therefore, a de facto final authorisation.
24. The ACCC notes that a number of the issues raised relate to the Department's decision to appoint a sole provider of Prescription Delivery Services. To the extent interested parties have concerns regarding that decision, the ACCC considers these concerns are best directed to the Department.

Response from Fred IT Group and the Department of Health and Aged Care

25. On 9 June 2023, Fred IT Group made a submission to the ACCC which:

- a. clarified the scope of its request for interim authorisation (as outlined at paragraph 7 above)
- b. responded to interested party submissions received to date
- c. amended the application to remove the request made in paragraph 40 of its application, in light of the withdrawal of eRx's request for revocation and substitution of AA1000472.

26. In response to interested party submissions, Fred IT Group submitted:

- a. **Concerns that interim authorisation would result in conduct that cannot be undone:** Fred IT Group submits that this concern significantly overestimates the speed at which transition can be effected. Fred IT Group submits that it is not the case that all, or even most, vendors could be transitioned prior to finalisation of the ACCC's consideration. Fred IT Group considers that the narrower basis for interim authorisation (outlined at paragraph 7 above) will likely address the concerns raised by some parties. Fred IT Group further submits that the narrowed interim authorisation sought also allows time for private negotiations between MediSecure and the Department to play out, such that Fred IT Group can form a better understanding as to the extent to which it will need to engage with MediSecure to advance transition. Transition can then be implemented if and when the ACCC grants final authorisation.
- b. **The impact of interim authorisation on non-publicly funded prescriptions:** Fred IT Group submits that the impact of interim authorisation on scripts falling within this broader market is not material. Fred IT Group submits that the transition steps outlined in Schedule 5 of the contract are confined by the context established by the contract and the tender process. Fred IT Group submits that it does not currently impose exclusivity on its Vendors and will not seek to do so in future, except as regards publicly-funded scripts as per the Department's requirements.
- c. **Privacy issues:** Fred IT Group submits that while these issues are real concerns, there may be some means to achieve data transfer, in whole or in part, which enable a smoother transfer to the single provider model. Fred IT Group submits that in order to address these concerns, MediSecure and Fred IT Group will need to discuss their own privacy arrangements (particularly as regards to consent), their understanding of the limitations imposed by the law, and what data (if any) can be transferred and how. Fred IT Group submits that these discussions cannot take place without authorisation, and that these concerns support, rather than counter, the need for interim authorisation.

- d. **Concerns regarding the terms upon which Fred IT Group will contract with Vendors in future:** Fred IT Group acknowledges the concerns of several interested parties regarding uncertainty over the terms upon which it proposes to contract with Vendors. Fred IT Group submits that it has already committed to setting out its proposed approach, in communications with both Vendors and the ACCC. Fred IT Group submits it is working to create an "access arrangement". Essentially, this would involve devising fair, reasonable and non-discriminatory terms.
 - e. **Concerns about the outcome of the tender itself:** Fred IT Group submits that this application concerns only the best means to effect the decision of the Department in regard to its tender process and that decision itself is not material to the application.
27. The Department of Health and Aged Care (representing the Commonwealth of Australia) supports the application for interim authorisation. The Department is of the view that these arrangements will enable the most seamless and efficient transition of the Department's selected solution which will provide greater value for money to the Australian people, while ensuring the protection of all parties involved as they act in good faith to effect this transition.
28. The Department provided the following responses to interested party submissions:
- a. **The completed procurement process and outcome:** The Department submits that the majority of concerns raised by interested parties are related to procurement matters (i.e. the Department's decision to select a sole supplier and to select Fred IT Group as that supplier, as well as the Department's decision to move to a direct funding model). The Department notes that these decisions have already been made by the Department and are not the subject of Fred IT Group's application for authorisation, which relates to the ability of Fred IT Group and MediSecure to meaningfully work on transition activities with each other.
 - b. **The timing of transition:** The Department submits that any delays to the transition introduce significant risks for industry participants and the ability of the Australian people to access electronic prescribing services. The Department submits that if an interim authorisation is not granted, Fred IT Group and MediSecure are unlikely to be able to engage in meaningful transition discussions and conduct transition activities, and in turn, customers of MediSecure may not receive payments for dispensed prescriptions for a longer period. The Department further submits that if MediSecure does not continue its operations, there is a risk that members of the public may lose access to certain electronic prescriptions.

The Department submits that granting interim authorisation has the advantage of permitting Fred IT Group and MediSecure to discuss transition arrangements, which could expedite the transition of prescriptions to Fred IT Group's system, providing greater certainty to prescription holders in light of those prescriptions being located in the Fred IT Group Prescription Delivery Service.

- c. **The irreversible nature of actions undertaken on the basis of the interim authorisation being granted and then at a later date, a full authorisation not being granted:** Following a procurement process, the Department has decided to fund a single provider of electronic prescription services, Fred IT Group. Irrespective of the outcome of the application for authorisation, the Department's decision will not be reversed. If interim and/or final authorisation is not granted by the ACCC, the Department will seek an alternative method to engage the parties to effect the transition in a way that does not risk them being in breach of competition laws and which ensures the ongoing continuity of the electronic prescribing ecosystem. As the Department will proceed to implement its best value for money

solution regardless of the outcome of this application, the actions taken by industry if an interim determination is granted will not require reversal.

29. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

Reasons for decision

30. To assess whether it is satisfied it can grant interim authorisation, the ACCC has compared the future in which the Proposed Conduct occurs (the factual), as against the future in which the Conduct does not occur (the counterfactual). To the extent that Fred IT Group or interested parties have raised issues that would occur with or without the Proposed Conduct, the ACCC has not included these in its assessment.

31. In granting interim authorisation, the ACCC considers that:

- In both the future with and without the Proposed Conduct, the transition to a sole-provider model is likely to begin on 1 July 2023. Following a procurement process, the Department has decided to fund a single provider of electronic prescription services, Fred IT Group. If interim authorisation is not granted, the Department will seek an alternative method to engage the parties to affect the transition. The Proposed Conduct will enable the parties to discuss the terms of that transition.
- Because Fred IT Group has narrowed the Proposed Conduct to make, but not give effect to the relevant contracts, arrangements or understandings with MediSecure, it is unlikely that granting interim authorisation will result in conduct that cannot be "undone" should authorisation ultimately not be granted.
- Interim authorisation does not extend to moving parties from MediSecure's system to Fred IT Group's system. To the extent that conduct occurs, it may occur with or without interim authorisation.
- If interim authorisation is not granted, MediSecure may not regard itself as having an effective opportunity to negotiate with Fred IT Group before the transition to a sole-provider model begins on 1 July 2023.
- There is some urgency for the parties to begin discussions to facilitate the transition to a sole-provider model on 1 July 2023, to prevent the risk of a disorganised, premature exit by MediSecure in circumstances where its total revenue stream will cease as soon as the sole-provider model comes into effect.
- The conduct for which interim authorisation is sought is likely to result in public benefits in the form of a smooth transition to the Department's preferred sole-provider model for Prescription Delivery Systems. This avoids disruption to the provision of publicly-funded prescribed medicines and substantially reduces the risk of consumer data being lost through the transition.
- The ACCC acknowledges privacy concerns in relation to the transition and notes that this interim authorisation does not reduce or affect any privacy issues related to the Proposed Conduct. However, the discussions enabled by this interim authorisation may allow the parties to comply with their privacy requirements more efficiently.

Reconsideration of interim authorisation

32. The ACCC may review the interim authorisation at any time. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.