

9 June 2023

**Mergers, Exemptions & Digital: Competition Exemptions
Australian Competition & Consumer Commission**

For the attention of:

Mr David Hatfield, Director

Ms Sophie Magliano, Senior Analyst

By email:

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Dear Mr Hatfield and Ms Magliano

Re: AA1000641 - Fred IT Group and Ors – various issues

Further to recent correspondence and discussions, this letter addresses the following matters: (with defined terms used in accordance with the above application):

- a clarification of the applicants' request for interim authorisation;
- a response to submissions received to date; and
- an amendment to the application, given the withdrawal of eRx's request for revocation and substitution of AA1000472 (advised by separate correspondence).

Interim authorisation

As you are aware, there are apparently developments as between the Department and MediSecure, which may mitigate or indeed eliminate the need for authorisation for the Proposed Conduct. Fred IT Group is not privy to discussions between the Department and MediSecure and so is unable to predict their likely impact on the current application. Nonetheless, Fred IT Group considers it appropriate to narrow the basis for its application for urgent interim authorisation. Specifically, Fred IT Group seeks interim authorisation *in order to be able to engage in negotiations with MediSecure (and the Department) to establish the work program necessary to complete transition.*

This would involve authorisation on an interim basis to **make** (but not give effect to) one or more contracts, arrangements or understandings involving MediSecure to implement the Proposed Conduct as explained in paragraphs 27 and 30 of the application.

Fred IT Group considers interim authorisation on this basis would:

- address many of the concerns raised by interested parties in submissions; 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.

Response to submissions

Fred IT Group has reviewed the submissions received from interested parties to date, and observes that concerns largely fall within the following categories:

- the irreversible impact on the market if interim authorisation were to be granted;
- the impact of interim authorisation on non-PBS funded prescriptions;
- privacy concerns which may hinder the transition process;
- concerns regarding the terms upon which Fred IT Group will contract with Vendors in future; and
- concerns regarding the outcome of the tender process and the appointment of Fred IT Group as the Department's sole provider.

Each of these issues is addressed below.

Interim authorisation will result in conduct that cannot be undone

In the view of Fred IT Group, this concern significantly overestimates the speed at which transition can be effected. As indicated in its application, transition will require detailed planning and co-ordination. Indeed, MediSecure states, it will involve “a much more complex and protracted negotiation between MediSecure and Fred IT to agree on the transition contract, with the necessary involvement of the Department” (paragraph 4.10). It is simply not the case that all (or even most) Vendors could be transitioned prior to finalisation of the ACCC's consideration. Although Fred IT Group acknowledges the ambitious timeframe for full transition as stated in the Contract, it is important to understand that key elements of that timeframe are subject to a “best endeavours” clause.

The initial request for interim authorisation was framed in broad terms as transition is unlikely to be a linear process, whereby all participants reach a given milestone before they move as one to the next milestone. Nonetheless, Fred IT Group considers very useful advances towards transition can be made on the narrower basis set out in this letter and acknowledges that such narrowing will likely address the concerns raised by some parties. It also allows time for the 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, by way of the Proposed Conduct, if and when the ACCC grants final authorisation.

The impact of interim authorisation on non-PBS funded prescriptions

Fred IT Group is unsure of the basis upon which MediSecure claims “the non-publicly funded prescription component of the total electronic prescriptions market comprises at least 25 per cent of the total number of prescriptions written in Australia”. Nonetheless, the impact of interim authorisation on scripts falling within this broader market – particularly on the confined basis suggested in this letter – is not material.

The transition steps outlined in Schedule 5 of the Contract are clearly confined by the context established by the Contract and indeed the tender process. Fred IT Group does not interpret Schedule 5 to permit it to assert exclusive use of its PDS for all e-prescriptions – the use of “exclusive” clearly relates only to those e-scripts that the Department has a financial interest in. Fred IT Group is well aware of its obligations under the *Competition and Consumer Act 2010* (Cth) and does not seek to overstep. Indeed, in its application, Fred IT Group explicitly acknowledges that MediSecure may continue to compete in the market: see paragraph 21. Fred IT Group does not currently impose exclusivity on its Vendors – indeed, several already use both PDSs – and will not seek to do so in future, except as regards publicly-funded scripts as per the Department’s requirements.

Privacy issues

The issues regarding privacy raised in MediSecure’s submission are fair ones. Nonetheless, there may be some means to achieve data transfer, in whole or in part, which enable a smoother transfer to the single provider model. It is difficult, however, to reach a view on this issue in a vacuum – that is, 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. Such discussions, of course, cannot properly take place outside the umbrella of authorisation. Indeed, this is a key issue the early resolution of which will assist in implementing the Department’s desired tender outcome in a timely fashion. As such, Fred IT Group considers that the very real concerns raised by MediSecure support, rather than counter, the need for interim authorisation.

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 the terms upon which it proposes to contract with Vendors. For example, MSIA called for a “governance framework”. Fred IT Group has already committed to such an approach, in communications with both Vendors and the ACCC. Indeed, on 6 March 2023, Fred IT Group wrote to you discussing how it would go about creating an ACCC-approved “access arrangement”. Essentially, this involves devising FRAND (Fair, Reasonable and Non-Discriminatory) terms which would be submitted to the ACCC for approval via an authorisation process.

Fred IT Group looks to make this application as soon as possible (hopefully by the end of the month). In an ideal world, this process would be more advanced; nonetheless, Fred IT Group remains a small business with finite resources. As such, the substantial workstreams generated by the Contract itself, the industry response to the tender outcome, and preparing for transition have delayed its progress. Please be assured, this remains an extremely high priority. In the

meantime, Fred IT Group rejects entirely the allegation that it has acted in a manner which is “coercive and does not demonstrate good faith”.

Concerns regarding the tender outcome itself

Several submissions raised concerns regarding the outcome of the tender itself, expressing a desire that the status quo of two PDS providers be preserved. This application concerns only the best means to effect the decision of the Department in regard to its tender process – the decision itself is not material to the Application.

Amendment to the application

In light of eRx’s withdrawal of its application for revocation and substitution in respect of AA1000472 (advised by separate correspondence), please disregard the request made in paragraph 40 of the application the subject of this letter (that is, AA1000641).

I look forward to your response.

Kind regards,



Independent Competition Counsel

*An Australian Legal Practitioner within the meaning of the Legal Profession Uniform Law (Vic).
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