

Application for urgent interim and final authorisation under s88(1) of the *Competition and Consumer Act 2010* (Cth)

Further submission by the Insurance Council of Australia (ICA) on behalf of itself and certain of its members who issue policies that provide business interruption (BI) cover

4 November 2021

1 **Specific conduct or arrangement that is the basis for the Application**

The specific conduct or arrangement that is the basis for the Application dated 7 October 2021 (**Application**) by the Applicants is the arrangement that will be entered into between the ICA and Participating Members (as defined in the Application) to use the DSpark Tool.

Each Participating Member who wants to use the DSpark Tool will enter into a User Agreement with the ICA (**User Agreement**) which sets out the terms of use and access.

The terms of the User Agreement detail that the use of the tool will assist with the claims handling of COVID-19-related BI claims by enabling insurers to search:

- whether there have been any COVID-19 exposure sites at, or within a specified radius of, an insured premises (by using public health data collated by reference to relevant postcodes and/or other geographic COVID-19 reporting levels); and
- the relevant public health orders issued by State and Territory Governments that apply to a policy holder’s business (if any) based on the location and date of such orders.

One of the considerations that may be relevant to a customer selecting a future BI insurance policy is their prior claims experience with a particular insurer. As set out in the Application, the DSpark Tool is intended to reduce the time and costs that insureds may otherwise expend in seeking to collate information relevant to their claim, and reduce the claim assessment time for a Participating Member by removing the need for a case-by-case analysis of exposure sites and public health orders for each location the subject of a BI claim.

As the DSpark Tool will be used by some, but not all, of the ICA’s members that issue BI policies, there is a possibility that those customers who submit a claim to one of the Participating Members, will have a more positive claims experience as a result of that insurer using the DSpark Tool and this may influence their decision as to which BI product to purchase in future policy years.

The Applicants consider the risk of any substantial lessening of competition in this regard to be very low, particularly given that those insurers who are not initially Participating Members, will be able to become Participating Members at a later date, and use and access of the DSpark Tool will be provided on the same terms as the original Participating Members.

2 **Relevant provisions of the CCA which might apply to that conduct or arrangement**

The Applicants have identified that section 45 of the *Competition and Consumer Act 2001* (Cth) may potentially apply to the conduct or arrangement.

3 **Overview of the User Agreement**

The User Agreement is a commercial agreement between the ICA and each Participating Member. Each User Agreement will contain the following key terms:

- DSpark will retain the title, ownership and intellectual property rights in the DSpark Tool.

- In accordance with the terms of the licence granted to the ICA to use the DSpark Tool, the ICA agrees to allow the User and its Representatives to use and access the DSpark Tool for the Authorised Purpose.
- The Authorised Purpose means for the purpose of obtaining the following information in the context of determining whether to grant indemnity in respect of a specific BI insurance claim in connection with COVID-19:
 - (i) whether there have been any COVID-19 exposure sites at, or within a specified radius of, the insured premises; and
 - (ii) the relevant public health orders issued by State and Territory Governments that apply to an insured premises.
- The User acknowledges and agrees on behalf of itself and its Representatives that it will not:
 - (a) use the DSpark Tool for the benefit of anyone other than the User and its Representatives;
 - (b) adapt or modify all or part of the DSpark Tool (or any output thereof, which for the avoidance of doubt includes any reports derived from the DSpark Tool) for another commercial purpose;
 - (c) sell, rent, lease, sublicense, assign or transfer all or part of the DSpark Tool (or any output thereof);
 - (d) copy, reproduce, disclose or communicate all or part of the DSpark Tool (other than any reports derived from the DSpark Tool), except as reasonably required for the Purpose as specified above;
 - (e) translate, reverse engineer, decompile, disassemble or create derivative works based on the DSpark Tool (or any output thereof);
 - (f) remove any trade mark or trade name or any proprietary or warning legends from the DSpark Tool (or any output thereof);
 - (g) use the DSpark Tool (or any output thereof) for the benefit of any competitor of DSpark; or
 - (h) allow any of its Representatives to transfer or access or use the DSpark Tool in a location outside of Australia; and
 - (i) bring any claim or action against DS in relation to the Data derived from the DSpark Tool.
- The User agrees to pay a fee to the ICA for use of the DSpark Tool by the User and its Representatives.
- The User agrees that ICA will not be liable in relation to any use of, or reliance on, the DSpark Tool by the User, its Representatives or any other party.
- The User will provide an Indemnity to the ICA in respect of any claims that might arise from the acts or omissions of the User or its Representatives in connection with the User Agreement, and for unauthorised use and access of the DSpark Tool.

- The User acknowledges and agrees that the arrangement between the parties is non-exclusive and nothing in the User Agreement prevents the ICA from entering into a similar user agreement with any other member of the ICA.
- If the ICA enters into a user agreement in relation to the use of, and access to, the DSpark Tool with any other member of the ICA it will be on the same terms.