

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Submissions

File Number: ACT 4 of 2021

File Title: APPLICATION FOR REVIEW OF AUTHORISATION
AA1000542 DETERMINATION MADE ON 21 SEPTEMBER 2021

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Dated: 26/07/2022 3:54 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 4 of 2021
Re: Application for Review of ACCC Authorisation AA1000542, Determination made on 21 September 2021
Applicant: National Association of Practising Psychiatrists

AND

File No: ACT 5 of 2021
Re: Application for Review of ACCC Authorisation AA1000542, Determination made on 21 September 2021
Applicant: Rehabilitation Medicine Society of Australia and New Zealand

ACCC'S SUBMISSION CONCERNING THE APPLICANTS' APPLICATION FOR LEAVE
TO WITHDRAW

A. INTRODUCTION

1. On about 18 July 2022, the Applicants executed a Deed of Settlement and Release (**Deed**) with nib Health Funds Ltd (**nib**) and Honeysuckle Health Pty Ltd (**HH**) (together, the **Authorisation Applicants**) and the Australian Medical Association Limited (**AMA**). Under that Deed, the Authorisation Applicants assume various obligations in exchange for the Applicants obtaining leave to withdraw their applications the subject of this proceeding (**Applications**), and the AMA consenting to the withdrawal.
2. Pursuant to the Deed, the Applicants have sought leave to withdraw the Applications (**leave application**). The Tribunal has directed the Australian Competition and Consumer Commission (**ACCC**) pursuant to s 102(6) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) to assist the Tribunal by acting in the capacity of a contradictor with respect to that

leave application, including by making submissions, adducing evidence or proposing to the Tribunal that information or documents be sought.

3. These submissions are made pursuant to that direction.
4. We first address relevant principles concerning leave to withdraw applications under s 101 of the CCA (**Section B**). In summary, proceedings before the Tribunal are not merely *inter partes*; they involve issues touching upon the public interest. The Tribunal should therefore exercise caution before granting leave, and only grant leave if satisfied that doing so is in the public interest.
5. We then address matters which are relevant to the assessment whether it is in the public interest to grant leave (**Section C**). In summary, there are two matters which, in the ACCC's submission, tilt against the grant of leave.
6. *First*, allowing the application may give rise to a procedural unfairness. A large number of persons opposed the ACCC's authorisation, but did not seek to intervene in this proceeding. Those persons may have acted differently had they appreciated that the Applications may be withdrawn based on a deed to which they are not party and cannot enforce. Further, two interested parties¹ did seek to intervene, and were not permitted to do so partly because their interests would be represented by the Applicants and the AMA.² Allowing the application may not be in those parties' interests.
7. *Secondly*, cl 4 of the Deed imposes various restrictions on the conduct of the Authorisation Applicants, which only take effect if the leave application is allowed. Having regard to the materials that have been presented to the Tribunal, it is unclear whether those restrictions would be likely to lessen competition or cause other detriment. Detailed inquiry is likely to be required to determine whether or not they would do so. An inquiry of that kind is not appropriate on a leave application. The need for it suggests that the Tribunal should not be satisfied that it is in the public interest to allow the application.

¹ The Royal Australian and New Zealand College of Psychiatrists (**RANZCP**) and the Australian Pain Society (**APS**).

² *Applications for review of Honeysuckle Health Buying Group authorisation determination* [2022] ACompT 3 at [29] and [35].

B. PRINCIPLES

8. Principles applicable to the grant of leave to withdraw an application were recently helpfully collected by the Tribunal in *Application by Controlabill Pty Ltd* [2021] ACompT 6 (*Controlabill*). As the Tribunal noted in that case, the CCA does not expressly provide for applications made under s 101 of the CCA to be withdrawn, although s 91(1A) recognises that applications may be withdrawn.³
9. However, as the Tribunal has also observed, applicants do not have an unfettered right to withdraw applications made under s 101 of the CCA.⁴ Leave is required, and the Tribunal should exercise caution before granting leave because proceedings before the Tribunal are not merely *inter partes*; they involve issues relating to the public interest.
10. In *Controlabill* the Tribunal referred with approval to the following statement of Lockhart J in *Re Country Television Services Limited* (1984) 73 FLR 68 at 70:

Rules of court generally provide for the discontinuance of proceedings and they define the circumstances in which a moving party may discontinue as of right or by leave. No such provision appears in the Act or the Trade Practices Regulations governing proceedings before the Tribunal. The withdrawal of applications raises difficult concepts and has been the subject of some discussion by courts in various contexts, including bankruptcy proceedings, where petitioning creditors have sought the court's leave to withdraw petitions to sequestrate a debtor's estate, rather than an order of the court that they be dismissed. ... Although procedures before courts, including bankruptcy petitions, are different in nature to applications for review before the Tribunal, they nevertheless suggest that caution should be exercised before deciding that an applicant for review has a right to withdraw his application so that, upon the withdrawal taking effect according to its terms, the Tribunal's functions and powers thereupon cease. The proceedings before the Tribunal are not merely *inter partes*: they involve the public interest.

11. An important consideration in determining whether or not to grant leave to withdraw an application made under s 101 of the CCA is, therefore, whether the Tribunal is satisfied that it is not in the public interest for the review to be maintained.⁵

³ *Controlabill* at [28]-[33].

⁴ *Controlabill* at [28]-[33].

⁵ See, similarly, *Nursing Agencies Association of Australia* [2003] ACompT2 (*Nursing Agencies*) at [16]; *In the matter of an application for review by Lakes R Us Pty Ltd* [2006] ACompT 3 (*Lakes R Us*) at [37]; *Nestlé Australia Limited* [2007] ACompT 2 (*Nestlé*) at [7]; *Controlabill* at [33].

12. It is also relevant to consider whether any party to or intervenor in the proceeding, or party which indicated an intention to participate in the proceeding, wishes to continue with the review.⁶
13. In *Lakes R Us*, the Tribunal observed that it was unable to compel an applicant to participate in any substantive way in a review application, which in that proceeding could have led to a decision uninformed by all relevant evidence and argument, and which left no practical alternative to granting leave to withdraw the application.⁷

C. RELEVANT CONSIDERATIONS

14. The Applicants submit that, as the only parties that applied to review the ACCC's authorisation wish to withdraw their applications, and no party has opposed that course, there is no reason in the public interest why the Applicants should be prevented from withdrawing their applications for review.⁸ That submission is wrong.
15. The Applicants neglect two matters that are relevant to whether it is in the public interest for leave to withdraw the applications to be allowed:
 - (a) fairness to, and the interests of, persons other than the parties and intervenor; and
 - (b) the potential for the grant of leave to result in harm to competition or other relevant species of harm to the public interest.

C.1 Interests of persons other than the parties and intervenor

16. A significant feature of the conduct the subject of the Applications, is the extent of community interest in, and opposition to, it. The ACCC received 498 separate submissions before making its determination to grant authorisation, by 442 separate parties.⁹ The majority of those parties opposed the conduct being authorised.¹⁰
17. The parties who opposed the authorisation were not all sophisticated litigants. At least some may not have appreciated the potential for applications made under s 101 to be

⁶ *Nursing Agencies* at [16]. See similarly *Controlabill* at [37] and *Nestlé* at [7].

⁷ *Lakes R Us* at [38]-[40]. *Lakes R Us* did not concern an application made under s 101 of the CCA, but rather an application made under Part IIIA for review of a decision to declare a service.

⁸ Applicants' submissions dated 20 July 2022 at [12].

⁹ Statement of Andrew Morrison Riordan made 26 July 2022 (**Riordan statement**) at [22].

¹⁰ Riordan statement at [23].

withdrawn, and chosen not to apply to intervene in this proceeding because they assumed that the Applications would be determined by the Tribunal. Their decision whether to seek to intervene in this proceeding may have been different had they appreciated that the proceeding may be resolved by way of a deed with the Authorisation Applicants, which they would not be involved in negotiating and, in any event, could not enforce.

18. Further, two interested parties (RANZCP and APS) did seek to intervene but were not permitted to do so. Their applications to intervene were refused partly because their interests were likely to have been adequately represented by the Applicants and the AMA.¹¹ Neither RANZCP nor APS is party to the Deed or has the ability to enforce its terms. Allowing leave to discontinue the proceeding may not be in their interests.
19. Accordingly, in the ACCC's submission, this is not a proceeding in which the fact that no party or intervenor opposes leave to withdraw the Applications suggests that there is no public interest in refusing leave. There is a real prospect that granting leave would visit unfairness upon some of the many parties who opposed the authorisation, yet did not seek to intervene; and in particular to the parties who sought, but were refused, leave to intervene, RANZCP and APS.

C.2 Potential harm to competition

20. The conduct the ACCC authorised includes the formation and operation of a buying group (the **HH Buying Group**) to collectively negotiate and manage contracts with medical specialists and others on behalf of private health insurers (**PHIs**) and other healthcare payers.¹²
21. A purpose of the Deed appears to be to restrict or modify behaviour that the Authorisation Applicants would or may engage in by reason of the ACCC's authorisation.
22. The Deed applies to activities of the HH Buying Group for the period covered by the authorisation¹³ and provides, *inter alia*, for HH to make available to the HH Buying Group

¹¹ Applications for review of Honeysuckle Health Buying Group authorisation determination [2022] ACompT 3 at [29] and [35].

¹² ACCC Determination, p 1.

¹³ Clause 4.1(b).

(including PHIs¹⁴) a medical gap scheme that must meet certain criteria. The ACCC's authorisation is not subject to a condition or limitation of that kind.

23. When considering whether to grant authorisation, the ACCC did not consider whether the proposed conduct, with conditions or limitations of that kind, should be authorised. It conducted no analysis as to whether those conditions or limitations might lessen competition, or add to or detract from the benefits that it found would result from the authorised conduct. It received a copy of the Deed only three days (including a weekend) before it was executed.¹⁵ The Authorisation Applicants have not foreshadowed applying to vary¹⁶ or substitute¹⁷ the ACCC's authorisation in the light of the obligations in the Deed.
24. Further, the key obligations in the Deed, in cl 4, only arise if the leave application is allowed.¹⁸ Any detriment that would result from those obligations would therefore also only arise if the application were allowed.
25. In those circumstances, in the ACCC's submission, the obligations in the Deed are relevant to the Tribunal's decision whether to grant leave. If the Tribunal considers that giving effect to any of those obligations would be likely to, or may, result in a lessening of competition or other detriment, it is unlikely to be satisfied that it is in the public interest for leave to be granted.
26. In the ACCC's submission, there is (at least) a question as to whether certain obligations in cl 4 would, if given effect, be likely to lessen competition. For example, cl 4.2 provides that nib or HH must, *inter alia*, make available to all Participants of the HH Buying Group a medical gap scheme which meets certain requirements. Some of those requirements appear to be intended to provide certain minimum benefits to medical specialists, and

¹⁴ Participants in the HH Buying Group are defined in cl 1 of the Deed and include HH and nib, PHIs except for "Major PHIs" (as defined in the ACCC's Determination), international medical and travel insurance companies, government and semi-government payers of healthcare services, and any other payer of health services of goods other than a Major PHI as notified by HH to the ACCC.

¹⁵ Riordan statement at [12].

¹⁶ Under ss 90B(1B) and 91(1) of the CCA.

¹⁷ Under s 91(1C) of the CCA.

¹⁸ Clause cl 4.1(a) provides that the Authorisation Applicants have agreed to the obligations in cl 4 "[i]n exchange for the Review Applicants obtaining leave from the Tribunal to withdraw their Review Applications and withdrawing their Applications".

appear capable of leading to a lessening of competition amongst medical specialists with respect to those benefits. For example:

- (a) cl 4.2(a) provides that the medical gap scheme must offer, to medical specialists, fees that are above a particular level. There is a question as to whether this would be likely to have the effect of setting a floor for or otherwise controlling the fees that Participants in the HH Buying Group offer to medical specialists, and therefore limiting competition amongst medical specialists based on the fees they receive; and
- (b) cl 4.2(b) provides that the medical gap scheme must offer medical specialists terms and conditions at least as favourable as the terms and conditions offered to medical specialists by the nib MediGap schemes as at 1 March 2022, unless the term or condition is consistent with general industry terms and conditions for medical gap schemes. There is a question as to whether this would be likely to have the effect of setting minimum terms and conditions that medical specialists will receive, and therefore limiting competition amongst medical specialists on those terms and conditions.

27. Other provisions also appear to restrict the prices that members of the HH Buying Group may offer to medical specialists. In particular:

- (a) cl 4.2(e) provides that the medical gap scheme must not vary the fees paid to medical specialists based on whether or not nib or HH has a contract with the facility; and
- (b) cl 4.2(g) provides that the medical gap scheme must, apart from published fees being paid under the medical gap scheme, not include any additional incentive (financial or otherwise) for performance or patient outcomes.

28. It is unclear whether, or the extent to which, these provisions would also restrict competition that might otherwise occur with respect to fees (and, in the case of cl 4.2(g), other incentives).

29. There are also provisions that could undermine the public benefits identified by the ACCC in its Determination. In particular:

- (a) cl 4.3(g) limits the ability of participating PHIs to require medical specialists to provide patient data, which could undermine the public benefits of improved access to information for smaller PHIs; and
 - (b) cl 4.3(k) prevents participating PHIs from including targets or consequences for failing to meet targets in contracts with medical specialists, which could undermine the public benefits of increased availability of no gap experience for consumers.
30. Significant inquiry is likely to be required to determine whether or not these obligations would be likely to lessen competition. By way of example, in relation to cl 4.2(a) of the Deed, it may be necessary to understand matters such as:
- (a) the number of entities that are likely to form part of the HH Buying Group and their market shares;
 - (b) whether they will be required to use the medical gap scheme made available by HH and, if not, the likelihood of them using it;
 - (c) the extent to which medical specialists are likely to register for the medical gap schemes made available by HH to the HH Buying Group;
 - (d) whether (and, if so, in what ways) medical specialists may compete based on the fees offered to them in medical gap schemes; and
 - (e) the fees that members of the HH Buying Groups are likely to offer in their medical gap schemes if not for the Deed.
31. It is also possible that some of the obligations in the Deed would result in public benefits. For example, in the ACCC's Determination it stated:¹⁹
- the ACCC is mindful that if HH attracted a large enough group of specialists to participate in the BCPP, then HH buying group insurers (including nib) might have incentives to abolish or reduce the generosity of their no and known gap scheme payments. This is because if insurers reduced their gap scheme payments, specialists will be constrained from raising out-of-pocket fees to customers because customers will have access to a large pool of other specialists who are committed to a no gap experience for customers. Those specialists who are not members of the BCPP and are unwilling to join it may raise their gap fees, but perform fewer procedures. Reduced insurer gap scheme payments could thereby result in a

¹⁹ ACCC Determination at [4.112].

contraction in the supply of medical specialists' services, which would likely be a public detriment.

32. If such a detriment were likely to result from the ACCC's authorisation, it is possible that obligations in cl 4 would ameliorate or reduce it and, in that sense, mitigates a potential anti-competitive detriment of the conduct, and therefore, potentially results in a better outcome for Australian consumers than the Determination alone would produce.
33. Determining whether or not giving effect to the obligations in the Deed would be in the public interest is therefore likely to be complex and time consuming. A leave application on the eve of a hearing is not a suitable vehicle for a determination of that kind. It requires inquiries of the kind that would, if properly identified with adequate notice, be ventilated and resolved on the hearing of the Applications. In the ACCC's submission, the need for such inquiries suggests that the Tribunal should not be satisfied that it is in the public interest to allow the leave application.
34. If the leave application were allowed and the deed comes into effect, the deed will not be authorised and so its effect may be investigated by the ACCC at a later stage. In addition, the making and/or implementation of the Deed may constitute a "material change of circumstances" within the meaning of s 91B(3) of the CCA so as to enable the ACCC to commence a process that could lead to revocation of the ACCC's authorisation under s 91B(4) of the CCA (though the outcome of this process cannot be known in advance).
35. There is an adjunct consideration. Sections 103(1)(a) and (b) of the CCA provide that the procedure of the Tribunal is, subject to the CCA and the regulations, within the discretion of the Tribunal and that the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of the CCA and a proper consideration of the matters before the Tribunal permit. That provision contemplates that the Tribunal, as a Commonwealth statutory administrative organ, will proceed in a manner that is flexible and expeditious, but subject to the requirements of the CCA itself and the matters before the Tribunal. Those two limits underscore the importance of the Tribunal preserving its own processes, the objects of the CCA, and ensuring that it determines competition issues in a considered way. Those limits become acute where the Tribunal is asked to grant leave to withdraw an application concerning an authorisation, which application has been resolved by entry into a separate instrument that may have

competition law implications, but which implications have not been considered by the ACCC, to which initial consideration of such matters falls. And it is still more acute, where the Tribunal is asked to do so just days before the hearing of the application is to commence.

C.3 Practicality of refusing leave

36. As noted above, in *Lakes R Us*, the Tribunal observed that it was unable to compel an applicant to participate in any substantive way in a review application, which in the circumstances of that case led to it considering that it had no practical alternative but to grant leave to withdraw the relevant application.²⁰
37. That difficulty does not appear to arise in this application. The Applicants have not suggested any unwillingness to continue with the proceeding if the leave application is refused. Their desire to withdraw the Applications seems to be predicated on the promises of the Authorisation Applicants in cl 4 of the Deed, which only arise if leave is granted.

Date: 26 July 2022



Ruth C A Higgins SC

Andrew Barraclough

²⁰ *Lakes R Us* at [38]-[40].