NAPP Submission Concerning the Tribunal's Jurisdiction

The Honorable Justice Middleton
President Australian Competition Tribunal

Dear Justice Middleton,

Thank you for asking the National Association of Practising Psychiatrists (NAPP) to provide a note concerning whether the Tribunal has jurisdiction to continue to hear the Review of the ACCC Authorisation AA1000542 Determination made on 21 September 2021.

We have read the note of the lawyers for the ACCC, which was sent to parties to these proceedings on 16 February 2022.

We are not persuaded by this note that claims the ACCC should be excused for not carrying out its important responsibility to undertake the determination of the Honeysuckle Health (HH) application according to proper principles of public policy decision-making and procedural fairness.

On the contrary, we note the following.

The ACCC failed to acknowledge or review 51 submissions sent to it in good faith after submissions on the HH application were sought by the ACCC. This is a denial of procedural fairness.

The ACCC failed to invite or inform 50 of the authors of the overlooked submissions of their right to attend a pre-determination conference.

This ACCC failure to acknowledge the overlooked submissions made it unlikely that the authors of these submissions would make submissions commenting on the draft ACCC determination.

This ACCC failure prevented other individuals and parties who made submissions to the ACCC from seeing the overlooked submissions and therefore raising matters of relevance to the determination at the pre-determination conference or in submissions commenting on the draft determination.

The ACCC failure to acknowledge the overlooked submissions made it unlikely that the authors of these submissions would take the opportunity of asking for a review of the ACCC authorisation.

The ACCC failure to include the 51 overlooked submissions in the determination process means that the ACCC has not adequately assessed the public benefit or detriment of the HH application.

The ACCC deprived the 51 parties who made the overlooked submissions and the other parties who made submissions the ability to exercise their rights to actively and fully participate in the determination process.

The ACCC did not take into account all the submissions made to it. The ACCC failed to take into account the overlooked submissions when determining net public benefit.

As a result, we consider that the ACCC did not comply with its statutory obligations and to provide a procedurally fair decision-making process. The ACCC undertook a significantly flawed determination process that produced an invalid result.

With regard to the points made in the note of the lawyers for the ACCC we make the following remarks.

At paragraph 6 the lawyers note:

Section 90(6A) provides that, in making a determination in respect of an authorisation application, the ACCC must take into account, inter alia, any submissions or information it receives under s 90(6)(a) within the period specified in the notice mentioned in that paragraph.

We would agree that the ACCC has this responsibility under s 90(6)(a). But the ACCC did not take into account all the submissions made to it. The ACCC failed in this responsibility.

At paragraph 10 the lawyers note:

On 12 January 2021, the ACCC invited persons that appeared to be interested, to make submissions to it by 5 February 2021, pursuant to s 90(6)(a) of the CCA. At the time, the ACCC was aware of the author of only one of the unprocessed submissions. That entity was invited to make a submission.

And in paragraph 12 the lawyers note:

At that time, the ACCC was still only aware of the author of one of the unprocessed submissions. That entity was invited to indicate if it wished the ACCC to hold a predetermination conference, and was subsequently invited to attend the pre-determination conference which was requested by other parties. The authors of the other unprocessed submissions were not invited to the conference..

In our view, this shows just how much the parties of the overlooked submission were at a disadvantage compared to the author of a submission the ACCC recognized and specifically invited to participate in the determination proceedings. Not only were the overlooked submissions not reviewed by the ACCC, the authors were not invited to participate in the pre-determination conference.

At paragraph 19 the lawyers note interested parties overlooked in the ACCC earlier determination process can make submissions to, or intervene in the Tribunal proceedings.

Any point that was sought to be made by any interested party to the ACCC can be made to, and considered by, this Tribunal.

We believe that the Tribunal process is markedly different to the ACCC determination process, which involves initial submissions, a predetermination conference, a draft determination and then draft determination submissions. Parties that would be comfortable entering into the ACCC determination process are unlikely to be willing to enter the legal setting of this Tribunal. As a result, the two approaches are not the same and the failure of the ACCC to comply with its statutory requirements cannot be overcome by the Tribunal replacing an invalid determination of the HH application.

At paragraph 22 and 23 the lawyers note:

If failure to comply fully with ss 90(6A), 90(5) and/or 90A(2) were to invalidate a grant of authorisation, the conduct could become automatically authorised, absent any of those conditions. That follows from the fact that, if the ACCC does not determine an application for authorisation within a prescribed period, it is taken to have granted the application (s 90(10)) and that period could have (and in this case has) expired by the time any failure fully to comply with ss 90(6A), 90(5) and/or 90A(2) is identified.3
23. As a result, if the determination is invalid, the present application would be deemed to have been granted, authorising the conduct for a period of 10 years without the conditions imposed by the ACCC.

The lawyers at this point appear to be proposing that the ACCC determination cannot be considered invalid no matter how much the ACCC has not complied with its statutory obligations to provide a procedurally fair and valid determination. They claim if the determination process was flawed and resulted in an invalid decision, then the HH application would be authorized without any conditions. We find this an unacceptable, in fact perverse, consequence were that to be an accurate interpretation of the ACCC's statutory obligations.

We argue that the ACCC determination decision is invalid and therefore the ACCC should be asked to rerun the process of determination in the manner required by its statutory obligations.

At paragraph 24 and 25 the lawyers claim:

Thirdly, there could be considerable public inconvenience if any failure fully to comply with ss 90(6A), 90(5) and/or 90A(2) were to invalidate an ACCC authorisation determination.

We argue that an assessment of the validity of the ACCC decision regarding the HH authorization should be based on how it has met its statutory obligations and whether it has conducted a procedurally fair determination process, and not based on what public inconvenience might result. The ACCC has a potential conflict of interest in suggesting there could be considerable public inconvenience because it is in the ACCC's interest for the authorization decision to not be declared invalid.

Even if the ACCC lawyers' argument was to be seriously considered, we would argue that the public inconvenience would be minimal should the ACCC be required to rerun the process of determination.

The public inconvenience would be minimal since there has been no implementation of the authorization decision because the review process in this Tribunal stopped any implementation of the HH authorization, and private health insured patients continue to be treated under current arrangements, and specialist doctors and private hospitals continue to operate under current contracts with private health insurers. Any claimed savings in the HH application are speculative and not established.

At paragraph 26 the lawyers claim that for an ACCC determination to be invalidated by failure to comply with its statutory obligations the failure must be material. We argue that if the ACCC had conducted the determination correctly, the decision might have been different.

The ACCC lawyers claim in paragraph 27 that in their view the 51 overlooked submissions were of little relevance or significance, and so would not have been material. However, there has been no public transparency regarding the content of the 51 overlooked submissions and therefore there has been no opportunity for any independent examination and assessment about how substantial they are in terms of raising issues for the ACCC or other parties who made submissions to the ACCC and if that would have resulted in a different authorization determination result. Until that is done, the ACCC lawyers' view of the submissions has not been tested and their claim that the submissions are not material should be put to one side.

At paragraph 30 the lawyers note:

As noted above, s 90(6) provides that the ACCC may invite persons, who appear to be interested, to provide submissions within a specified period, and s 90(6A) provides that, in making a determination, the ACCC must take into account submissions or information it ***"received under" s 90(6)(a). For a submission to be "received under" s 90(6)(a), the ACCC*** *must have invited the submission. The ACCC did not invite 50 of the 51 unprocessed submissions. Accordingly, failure to consider those submissions does not constitute a failure to comply with s 90(6A), having regard to its terms.*

The lawyers seem to be arguing that only specifically invited persons are the ones who the ACCC has to take note of during its determination process. In other words, only individuals or parties who the ACCC considers appropriate or interested are to be taken into account. This goes against the principle of inviting participation by all interested parties, irrespective of whether the ACCC thinks they should be invited or not. The lawyers are arguing for a very narrow interpretation of 'invite' as well. Most of the initial submissions to the ACCC came from parties who were not specifically invited to participate by the ACCC. They, like NAPP, made submissions in response to the public notices asking for submissions from the public. The claim by the ACCC lawyers that unless an individual or organization received a specific invitation from the ACCC, then the ACCC had no obligation to consider their submission is totally unacceptable.

At paragraph 33 the lawyers note:

Of course, as part of its usual process, the ACCC:
a. actively seeks submissions from the public via its website, and reviews and considers all submissions received;
b. invites to the pre-determination conference all of the authors of submissions submitted before the conference is held, and after invitations are issued; and
c. publishes details of the pre-determination conference on its website and invites anyone who is interested to attend.

We agree that the ACCC should have undertaken the determination process in this way. However, the ACCC failed on all three counts.

At paragraph 34 the lawyers note:

The fact that these authors and submissions were overlooked in this instance is highly regrettable and exceptional.

We agree that the ACCC determination process was flawed and highly regrettable and exceptional. It has resulted in a invalid authorization of the HH application. In our view the only solution is for the decision concerning the HH application to be returned back to the ACCC to rerun from the beginning. The proceedings in the Tribunal should be discontinued.

Finally, if the Tribunal proceedings continue, with respect to the email of Ms Alix Friedman (Minter Ellison for HH/nib), NAPP opposes the request to block "such significant extensions to the timeframes for filing of statements of facts and evidence" and is agreeable to the 3-week extension suggested by the ACCC to the Tribunal.

NAPP reserves the right to make further submissions on this matter.

Yours sincerely,

Philip Morris

Prof Philip Morris AM
President NAPP

23 February 2022

26 February

Our initial response is as follows.

This revelation by the ACCC just adds further evidence supporting our contention that the ACCC determination process was flawed and resulted in an invalid authorization of the Honeysuckle Health application.

In our view the only solution is for the decision concerning the Honeysuckle Health application to be returned back to the ACCC to rerun from the beginning. The proceedings in the Tribunal should be discontinued.

The ACCC lawyers mention at paragraph 33 of their earlier note to Justice Middleton:

"Of course, as part of its usual process, the ACCC:

a. actively seeks submissions from the public via its website, and reviews and considers

all submissions received;

b. invites to the pre-determination conference all of the authors of submissions

submitted before the conference is held, and after invitations are issued; and

c. publishes details of the pre-determination conference on its website and invites

anyone who is interested to attend."

It is now clear that the ACCC did not review and consider all submissions received. Nor did the ACCC invite to the pre-determination conference all of the authors of submissions.

In our view the ACCC failed in its duty to conduct the determination process in accordance with its statutory responsibilities and to provide all parties with procedural fairness.

A number of important questions are raised by the ACCC supplementary note.

1. Who were the parties who were not invited to the pre-determination conference? On what basis did the ACCC decide to not invite these parties to the pre-determination conference?

2. Why is a government funded body like the ACCC not able to have a version of Microsoft Teams that would allow the full compliment of parties to attend a pre-determination conference?

3. Why did the ACCC not consider running a second (or additional) pre-determination conference to cater for all parties if they could not fit all parties onto one Microsoft Teams meeting?

These questions raise a much broader issue. The ACCC does not seem to be resourced well enough to be able to run a determination decision that attracts a high number of submissions in the field of medical practice.

The problems identified that (1) the ACCC overlooked 51 submissions and, now, (2) did not invite authors of submissions to the pre-determination conference support our view the only solution is for the decision concerning the Honeysuckle Health application to be returned back to the ACCC to rerun from the beginning. The proceedings in the Tribunal should be discontinued.

NAPP reserves the right to make further submissions on this matter up until the Tuesday 1 March deadline given by Justice Middleton.

Yours sincerely, Philip.

Prof Philip Morris AM
President NAPP