

Dear Parties,

His Honour has considered the submissions of the parties and the ACCC relating to the Tribunal's jurisdiction and whether the Tribunal should proceed to hear and determine the above applications.

The relevant facts relevant to the unprocessed submissions issue are set out in paragraph [10] to [16] of the ACCC's submissions dated 16 February 2022:

*[10] 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. The ACCC was not aware of, and so did not directly invite submissions from, the authors of any of the other unprocessed submissions. In accordance with its usual process, the ACCC also published the application on its website, together with a generic letter inviting submissions from interested parties.*

*[11] On 21 May 2021, the ACCC published its draft determination pursuant to s 90A(1) of the CCA. On the same day, pursuant to s 90A(2), the ACCC invited interested parties to notify it, by 11 June 2021, whether they wished the ACCC to hold a conference in relation to the draft determination.*

*[12] 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 (although one of the authors attended the predetermination conference on behalf of another invited organisation). In accordance with its usual process, the ACCC also published the invitation to attend the pre-determination conference on its website.*

*[13] The pre-determination conference was held on 8 July 2021.*

*[14] The ACCC received 50 of the unprocessed submissions in the period between 28 May 2021 and 28 July 2021. All of those submissions were received after the ACCC issued its invitations to attend the pre-determination conference. Two were received after the pre-determination conference was held. The ACCC was not aware that the authors of the submissions were interested persons until it received their submissions.*

*[15] Of the 51 unprocessed submissions, 48 are one or two pages long. Fifty address only matters that were addressed in other submissions which the ACCC received and considered prior to making the Determination, namely: (a) concerns about the introduction of US-style managed care; and (b) restricting patients' choice of healthcare provider and/or a potential lessening of competition. Annexed to these submissions is a spreadsheet in which the ACCC has identified the matters the subject of the unprocessed submissions, and other submissions the ACCC received which identify and address the same matters.*

[16] *The remaining unprocessed submission raised various matters which were dealt with by other submissions, and two that were not otherwise raised in submissions before the ACCC, being submissions that:*

- (a) *“It [the conduct proposed to be authorised] interferes with the course of Justice in the Workers Compensation / Motor Accidents Schemes”; and*
- (b) *“[Honeysuckle Health] proposes to manage a baby’s or child’s or adult’s or disabled person’s or vulnerable person’s health care (treatment and surgeon) without any accountability to Health Care Complaints processes or recourse to a course of action in Medical negligence”.*

(Annexure omitted)

The National Association of Practising Psychiatrists (**‘NAPP’**) essentially made the following submissions that the ACCC’s failure to take into account the 51 unprocessed submissions:

- was not in compliance with section 90(6A) of the *Competition and Consumer Act 2010* (Cth) (the **‘Act’**), which requires the ACCC to take into account certain submissions or information for the purposes of its determination;
- deprived those parties from the ability to exercise their rights to actively participate in the pre-determination conference;
- constituted a denial of procedural fairness to the authors of the unprocessed submissions and to other parties who made submissions to the ACCC;
- undermines public confidence in the notion that the determination adequately weighed competing submissions (both in terms of number and substance) in assessing net public benefit; and

- means that the ACCC lacked the power under the Act to make any determination with respect to the application for authorisation.

Therefore, NAPP essentially submitted that the Tribunal should determine that:

- the ACCC has failed to make a valid determination under the Act;
- the ACCC must engage with those 51 parties and, if requested to do so, hold – and invite them to attend – a pre-determination conference;
- the ACCC not make determination until it has considered those 51 submissions and, if relevant, any submissions made at any further pre-determination conference; and
- the Tribunal application is to be dismissed or discontinued.

The Rehabilitation Medicine Society of Australia and New Zealand is not opposed to the Tribunal continuing to hear and determine its application.

I consider that the Tribunal should proceed to hear and determine both applications. I am satisfied that the Tribunal has jurisdiction to hear the proceedings, and it is appropriate that the Tribunal proceed to hear and determine the applications.

As to the unprocessed submissions issue, I accept the ACCC's submissions that any failure to consider some submissions (even if 51 in number) or personally to invite their authors to a pre-determination conference conducted pursuant to ss 90A(6) to (10) of the Act does not render an authorisation determination by the ACCC invalid. Further, in my view the ACCC was not required by s 90(6A) to consider 50 of the unprocessed submissions and was not required to invite the authors of those submissions to request or attend a pre-determination conference.

The relevant provisions of s 90 of the Act are as follows:

- (5) Before making a determination in respect of an application for an authorisation other than a merger authorisation the Commission shall comply with the requirements of section 90A.

...

- (6) Before making a determination in respect of an application for an authorisation, the Commission may do any one or more of the following:
- (a) give any persons who appear to the Commission to be interested a written notice inviting submissions in respect of the application within a specified period;
  - (b) give the applicant a written notice requesting the applicant to give the Commission, within a specified period, additional information relevant to making its determination in respect of the application;
  - (c) give a person a written notice requesting the person to give the Commission, within a specified period, particular information relevant to making its determination in respect of the application;
  - (d) consult with such persons as it considers reasonable and appropriate for the purposes of making its determination in respect of the application.
- (6A) In making a determination in respect of an application for an authorisation, the Commission must take into account:
- (a) any submissions or information received under paragraph (6)(a), (b) or (c) within the period specified in the notice mentioned in that paragraph; and
  - (b) any information obtained from consultations under paragraph (6)(d).
- The Commission may, but need not, take into account any submissions or information received after the end of those periods.

I make the following observations:

- As I have indicated, I do not consider that any failure to comply with ss 90(6A), 90(5) and 90A(2) of the Act in the circumstances as set out in the facts extracted above invalidates the authorisation determination.
- I do not accept that the failure to take into account 50 of the unprocessed submissions constituted a failure to comply with s 90(6A) of the Act where those unprocessed submissions were not received by the ACCC within the specified period identified in its 12 January 2021 notice inviting written submissions.
- I do not accept that there was any failure to comply with s 90(5) and 90A(2) of the Act in circumstances where the authors of the 50 unprocessed submissions did not

provide those submissions prior to the ACCC's 21 May 2021 notice inviting interested parties to notify it whether they wished the ACCC to hold a pre-determination conference, and where the ACCC in any case published its invitation to attend the pre-determination conference on its website.

- There was in fact only one failure to comply with of the Act, namely failure to comply with s 90(6A) in respect of one unprocessed submission that the ACCC did "receive" pursuant to s 90(6)(a) within the specified period. The ACCC has shown that the matters raised in that submission were raised in other submissions considered by the ACCC and were taken into account by the ACCC for the purposes of the authorisation determination. In these circumstances, I am not persuaded that this failure to comply was material to the authorisation determination, results in invalidity of the authorisation determination, or is a matter that should interfere with the Tribunal continuing to hear these applications by way of a re-hearing.
- The Tribunal can now take into account all the information provided to the ACCC in the re-hearing of the matter, including the 51 unprocessed submissions.
- Interested parties, including the authors of the unprocessed submissions, can make submissions to the Tribunal if they are given leave to intervene.

Another issue arose relating to the fact that some parties who made submissions that were received after the ACCC's 21 May 2021 notice inviting interested parties to request a pre-determination conference and which were processed, were not directly or personally invited to attend the pre-determination conference. However, these submissions were taken into account by the ACCC and were uploaded onto the ACCC's website. I note that the ACCC had a discretion under s 90A(7)(b) of the Act in relation to inviting interested parties to the conference. Further, in any case the ACCC published its invitation to attend

the pre-determination conference on its website and no request was made by any of those interested parties to attend the conference.

I do not consider that the ACCC's failure to invite those parties involves any invalidity of the ACCC's determination, nor prevents the Tribunal from continuing to hear the applications. The Tribunal can hear any interested party in the re-hearing and any interested person may apply to intervene.

On the basis that the Tribunal has jurisdiction to hear and determine the applications, I consider that the Tribunal should proceed to hear and determine the applications as soon as practicable. This is the statutory function of the Tribunal.

As indicated to the parties previously, the parties should prepare for a hearing in the first two weeks of August 2022.

**Justice Middleton**

**3 March 2022**