

MinterEllison

15 April 2020

Urgent application for interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010 (Cth)*

Lodged by: The State of South Australia as represented by the Department for Health and Wellbeing

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1. Summary

1.1 Background

This application is made to the Australian Competition and Consumer Commission (**ACCC**) by the State of South Australia as represented by the Department for Health and Wellbeing (**Department**). The Proposed Conduct (as set out below) that is the subject of this request for authorisation is substantively similar to the coordinated healthcare arrangements being implemented in Victoria and Queensland, in respect of which the ACCC has already granted interim authorisation.¹

This application is made for the benefit of the following parties, who are engaged, or propose to become engaged, in the Proposed Conduct:

- (a) the State of South Australia as represented by the Department;
- (b) specified private hospital and healthcare operators in the State of South Australia as listed in Schedule 1 (and their related bodies corporate), as well as any other private healthcare providers operating in the State of South Australia which are notified to the ACCC from time to time by the Department (the **Participating Operators**); and
- (c) all public hospitals operating in the State of South Australia, as listed in Schedule 1, and the operator of any other healthcare facility ultimately owned or operated by the State of South Australia or an authority of the State of South Australia (the **SA Public Operators**),

(together, the **Participating Parties**).

As part of the national response to the COVID-19 pandemic (the **Pandemic**), the Australian Government imposed temporary restrictions on the ability of private healthcare providers to perform certain categories of non-urgent surgeries, with the aim of increasing the capacity of Australian healthcare providers to provide care to patients suffering from COVID-19 related health issues. On 30 March 2020, the Australian Government also announced viability for capacity guarantee arrangements for the private hospital and healthcare sector to support private healthcare operators retain capacity for responding to the Pandemic and to secure capacity and services from private healthcare operators to support the public hospital systems in each State and Territory. The South Australian Government is in the process of implementing those arrangements (described in more detail below) which are in part funded by the Australian Government pursuant to the viability for capacity guarantee arrangements referred to above. Without intervention and assistance from the South Australian Government (with funding assistance from the Australian Government) it is possible that many private South Australian hospital operators will have to cease, suspend or reduce operations and stand down staff and other resources.

The South Australian Government is expecting a significant increase in the number of patients that will require hospital treatment, including treatment in intensive care units, as a result of the Pandemic. In a number of overseas countries, hospitals and healthcare services have been quickly overwhelmed as a result of rapid increases in patients requiring treatment for COVID-19 related health issues, which has generated unprecedented levels of demand for hospital care and potentially resulted in greater mortality rates in patients presenting with otherwise treatable conditions. To avoid a closure of health services within the private healthcare sector and mitigate the risk of a similar situation occurring in South Australia, the Department has agreed to provide an amount of funding to the Participating Operators in consideration of those parties agreeing to provide certain services and give certain undertakings in relation to the operation of their healthcare facilities (which will include a degree of coordination). The ultimate objective of these arrangements is maximising hospital capacity and ensuring the State-wide coordination of hospital and healthcare services to facilitate the most efficient and effective allocation of these resources and services during the period of the Pandemic.

As one of the Participating Parties, the South Australian Government is strongly supportive of this application for urgent authorisation.

¹ See <https://www.accc.gov.au/media-release/private-and-public-hospitals-to-cooperate-on-covid-19-in-victoria-and-queensland>.

1.2 Application for urgent interim and final authorisation

This application is made to the ACCC for urgent interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) by the Department.

The Department considers that, in light of the restrictions on the performance of non-urgent surgeries by private healthcare operators, and the speed with which the Pandemic is evolving in South Australia, the provision of funding to the Participating Operators and the associated coordination of the Participating Parties' services should commence immediately.

To ensure that this can occur as quickly as possible, the Department requests that the ACCC grant interim authorisation to the proposed conduct (defined below in section 3 of this application) as a matter of urgency.

2. **Parties to the proposed conduct**

2.1 Applicant for authorisation

- (a) State of South Australia as represented by the Department for Health and Wellbeing (**Department**):

Address (registered address)	Contact person	Description of business activities
11 Hindmarsh Square, Adelaide, 5000, South Australia	Julienne TePohe Deputy Chief Executive Department for Health and Wellbeing Mobile: [REDACTED] Email: [REDACTED]	The State of South Australia, as represented by the Department for Health and Wellbeing, is responsible for (amongst other things) the administration of hospital and other health services in South Australia under the <i>Health Care Act 2008 (SA)</i> , including all of South Australia's public hospitals and the licensing of private hospitals in South Australia.

2.2 Email address for service of documents in Australia

Contact: Lisa Jarrett, Partner, MinterEllison

Email address: [REDACTED]

Telephone: T [REDACTED]
M [REDACTED]

2.3 Details of other persons who are engaged, or propose to become engaged, in the Proposed Conduct

In addition to the Department, the other persons who are engaged, or who propose to engage in the Proposed Conduct are:

- (a) the Participating Operators, being specified private hospital and healthcare operators operating in the State of South Australia as set out in Schedule 1 (and their related bodies corporate), as well as any other private healthcare operators notified to the ACCC from time to time by the Department; and
- (b) the SA Public Operators, being the operators of all public hospitals in the State of South Australia, as set out in Schedule 1, and any other healthcare facility ultimately owned or operated by the State of South Australia or an authority of the State of South Australia.

The Department anticipates that as the Pandemic evolves, the State may enter into similar arrangements to those contemplated by this application with additional private healthcare

operators. The Department will promptly notify the ACCC of any additional private operators that enter, or are expected to enter into, any such agreements and should therefore be added to Schedule 1 as parties who may also be engaged, or become engaged, in the Proposed Conduct.

3. The Proposed Conduct

3.1 Description of and rationale for the Proposed Conduct

As a result of the Pandemic, the Department expects that there will be a significantly increased demand for hospital care in South Australia. It is not yet clear how the Pandemic will develop and at what point or in what way COVID-19 may cause demand spikes for hospital treatment in certain regions in South Australia or at a State-wide level.

Regardless of how the spread of COVID-19 develops in South Australia, it is critical to South Australia's response that the maximum resources are available and that all hospitals (both public and private) remain open and have the ability to coordinate their services to facilitate appropriate access to their facilities and the highest possible level of care for each individual patient.

To avoid the closure of health services within the private healthcare sector and maximise the overall capacity of the South Australian healthcare system to respond to the Pandemic, it is intended that the Department will separately enter into one or more substantially similar agreements with each of the Participating Operators (the **Agreements**).

Under the Agreements, the Department will provide funding to the Participating Operators and those parties will provide resources and services to the overall response to the Pandemic in South Australia being coordinated by the Department. By way of example, this will include coordinating future forecasts relating to demand (eg for medical facilities, staff, visiting medical officers, medical supplies and other resources) and the allocation of services to ensure fair access (and in certain cases priority access to certain patients such as elderly or vulnerable or people in rural or remote areas).

The objectives of the Participating Parties under the Agreements include:

- (a) to work cooperatively to ensure that the public and private hospital and healthcare sectors respond successfully to the Pandemic;
- (b) to ensure the ongoing sustainability and operation of the private hospitals across South Australia during the Pandemic and that the hospitals are able to resume operations once the Pandemic response ends;
- (c) to make available to the Department (and South Australian public) the maximum amount of hospital facilities;
- (d) to ensure that hospital services are provided equitably, consistently and in accordance with clear standards (having regard, where applicable, to the circumstances presented by the Pandemic) in order to optimise health outcomes;
- (e) to ensure that the Department obtains access to additional hospital and health services required as a result of the Pandemic at a reasonable cost and in a manner that achieves a cost-efficient solution for the Department; and
- (f) work together through a culture of mutual respect and cooperation, and in an environment that fosters cost efficiency, transparency and open, honest and timely communication,

(the **Objectives**).

The Department intends the key features of the Agreements to include that:

- (a) the Department will provide funding to the Participating Operators on the condition that they provide certain services to public patients, including:
 - (i) any services which the Participating Operator performs or is authorised to perform as at the commencement of the Agreement; and

- (ii) each Participating Operator making available to the Department its specified healthcare facilities (including beds, healthcare and other services required to support the operation of each of its healthcare facilities); and
 - (iii) any other healthcare services reasonably necessary to respond to a patient who has been (or is suspected to have been) infected with the COVID-19 virus;
- (b) each Participating Operator will continue to hold operational control and operate their respective healthcare facilities;
 - (c) each Participating Operator will be permitted to continue to provide healthcare services to private patients but only to the extent permitted by the Agreement or by the Department in accordance with principles to be agreed;
 - (d) the Department will oversee and direct a 'Private Health Facility Coordination Group' which is a group that will have a representative from some or all of the Participating Operators and which will be the forum for coordinating resources between the Participating Operators, each of their facilities and the SA Public Operators;
 - (e) each Participating Operator will continue to maintain all categories of employees in the ordinary course of business with the provision of secondment of staff to public healthcare facilities in certain circumstances;
 - (f) each Participating Operator will provide services under the Agreement on a purely cost recovery and non-profit basis;
 - (g) public patients will not be required to pay any amount arising from or in connection with healthcare treatment by a Participating Operator; and
 - (h) the Participating Parties will cooperate in respect of the procurement and supply of medical equipment.

The Agreements are not intended to, and do not extend to, coordination or any agreement between the Participating Operators other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the Department or one or more of the SA Public Operators.

Similarly, to the extent that the Participating Operators retain the capacity to do so, nothing in the Agreements is intended to affect the normal competitive process vis a vis the provision of healthcare services to private patients. It is intended that once the circumstances of the Pandemic permit, the Department will seek to wind back and ultimately terminate the Agreements which would in due course enable each of the Participating Operators to resume providing business as usual services to private sector patients.

The Department seeks ACCC authorisation for it and the other persons who propose to engage in the Proposed Conduct to:

- (a) negotiate and enter into the Agreements;
- (b) engage in conduct consistent with the Objectives to give effect to the Agreements, including (without limitation) by:
 - (i) engaging in coordinated group discussions regarding healthcare operations, capacity and other matters required or contemplated by the Agreements and sharing any information required or contemplated by the Agreements or otherwise reasonably necessary to facilitate the Objectives, including but not limited to:
 - (A) information about the capacity or expected capacity of a hospital to provide care to patients or patients with particular conditions; and
 - (B) information about the availability of resources required to treat patients (including, but not limited to, hospital beds, staff, medicines and equipment);

- (ii) coordinating the following activities:
 - (A) allocation of the provision of certain services or certain patients to particular healthcare providers and / or between certain healthcare facilities (eg designating specific categories of patients to particular hospitals);
 - (B) restriction of certain services that can be provided at particular healthcare facilities;
 - (C) sharing of resources (including staff and medical supplies and equipment) to meet demand at particular healthcare facilities; and
 - (D) procurement and supply of medical equipment and supplies in order to minimise supply chain disruption and ensure these resources are available to healthcare facilities on an as-needs basis; and
- (iii) engaging in any other conduct that is necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the Department or one or more of the SA Public Operators,

(the Proposed Conduct).

The Proposed Conduct is a critical component of South Australia's response to the Pandemic. During a period of unprecedented demand, maximising capacity and the State-wide coordination of healthcare services will facilitate the most efficient and effective allocation of these resources and services, which is clearly in the interests of the South Australian public (and the Australian public more generally). As at the date of this application, the Pandemic remains an epidemic and accordingly the extent of the demand for hospital services in terms of volume and duration is not known.

The Department appreciates that the nature of this application, and the urgency with which it is made means that the ACCC may wish to understand or receive further information about the implementation of the Proposed Conduct from time to time. The Department does not consider it appropriate that authorisation be granted conditional upon a formal notification arrangement in circumstances where the Department will be involved in, and / or have oversight and direction of the Proposed Conduct.

The Department would not object to conditions being imposed of the same kind that the ACCC has imposed in respect of the coordinated healthcare arrangements being implemented in Victoria and Queensland, in respect of which the ACCC has already granted interim authorisation.²

3.2 Provisions of the CCA which may apply to the Proposed Conduct

The relevant provisions of the CCA which may apply to the Proposed Conduct include:

- (a) making and or giving effect to a contract, arrangement or understanding that may include a cartel provision (Division 1 of Part IV);
- (b) making and or giving effect to a contract, arrangement or understanding that has the purpose or would have the effect, or likely effect, of substantially lessening competition (section 45(1)(a) and (b));
- (c) engaging with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition (section 45(1)(c));
- (d) a corporation that has a substantial degree of power in a market engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition (section 46(1)); and / or
- (e) engaging in the practice of exclusive dealing (section 47(1)).

² See <https://www.accc.gov.au/media-release/private-and-public-hospitals-to-cooperate-on-covid-19-in-victoria-and-queensland>.

3.3 Term of authorisation sought and reasons for seeking this period of time

It is not clear how long the Pandemic will last, however authorisation for the Proposed Conduct is sought for a period of 12 months from the date of a final determination by the ACCC. It is possible that if the Pandemic lasts for a longer period of time and this period may need to be extended.

The Department notes that the ACCC has the power to revoke the authorisation under section 91B of the CCA should there be a material change in circumstances prior to that time (eg the effects of the Pandemic subside).

3.4 Names of persons or classes of persons who may be impacted by the Proposed Conduct and details of how / why they might be impacted

The following classes of persons may be impacted by the Proposed Conduct:

- (a) persons in South Australia who require medical care during the Pandemic;
- (b) healthcare workers, who may be seconded / allocated or contracted to different hospitals from where they normally work, depending on demand at particular hospitals from time to time; and
- (c) suppliers and potential suppliers of medical equipment, medical supplies and / or medical services to the Participating Parties.

4. **Public benefit**

ACCC authorisation permitting the Participating Parties to engage in the Proposed Conduct will facilitate a coordinated response to the Pandemic.

The Department considers that the Proposed Conduct will result in significant public benefits, including, in particular, to:

- (a) enable the Participating Parties to work together to coordinate the medical response to the Pandemic in South Australia as effectively, efficiently and economically as possible;
- (b) reduce the likelihood that private hospitals operating in the State of South Australia will have to partially or fully suspend or cease operations as a result of funding issues caused by the Australian Government's restrictions on their ability to provide certain surgeries;
- (c) provide the Department with service capacity oversight to allow distribution of service delivery to meet periods of peak demand and minimise patient transfers between healthcare facilities which will allow patients to receive the best possible care available at the time;
- (d) allow the Participating Operators to be responsive to the needs of the overall health system and coordinate with the SA Public Operators based on clinical priorities, recognising the need for continuity and quality patient care;
- (e) allow the Participating Operators to work in synchronisation with the public health system and each other and prioritise capacity for COVID-19 patients, urgent care and other health services;
- (f) ensure medical equipment (including ventilators), personal protective equipment, medical supplies and other relevant supplies are, to the extent possible, available where needed to respond to the Pandemic;
- (g) ensuring provision of additional intensive care facilities to public patients in response to the Pandemic;
- (h) ensure the Participating Operators can remain operational, and retain staff under existing industrial arrangements during the Pandemic; and

- (i) ensure the viability of Participating Operators which will help ensure that following the Pandemic consumers will continue to have a choice of private or public care.

5. Public detriment

The Department is not aware of any public detriments.

The Department submits that authorising the Proposed Conduct will result in a significant net public benefit because:

- (a) without the Proposed Conduct, there is a higher chance that the South Australian healthcare system may have insufficient capacity to provide services during the expected peak of the Pandemic;
- (b) the Proposed Conduct will ensure that medical services required to treat COVID-19 and non-COVID-19 related cases are co-ordinated in an efficient and equitable manner and will assist to achieve the Objectives; and
- (c) the Proposed Conduct will not continue beyond the period of the Pandemic, meaning authorisation is unlikely to materially alter the competitive dynamics in any market, and markets will be able to substantially return to their current state once the Pandemic subsides to the extent that the SA Public Operators can manage demand and the Commonwealth lifts the temporary restrictions on the ability of private hospital and healthcare operators to perform certain categories of non-urgent surgeries.

6. Contact details of relevant market participants

Please see section 2 above.

7. Declaration by applicant

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).



Signature of authorised person

Partner, MinterEllison, solicitor for the Department

Office held

Lisa Nicole Jarrett

(Print) Name of authorised person

This 15th day of April 2020

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.

Schedule 1

Participating Operators

1. Specified private hospital and healthcare operators

- ACHA – Ashford Community Hospital
- ACHA - Flinders Private Hospital
- ACHA - Memorial Hospital
- Adelaide Ambulatory Day Surgery
- Adelaide City East Day Hospital
- Adelaide Day Surgery
- Adelaide Eye and Laser Centre
- Adelaide Surgicentre
- Ardrossan Community Hospital
- Bedford Day Surgery
- Brighton Day Surgery
- Burnside War Memorial Hospital
- Calvary Adelaide Hospital
- Calvary Central Districts Hospital
- Calvary North Adelaide Hospital
- Central Day Surgery
- Glenelg Community Hospital
- Glenelg Day Surgery
- Griffith Rehabilitation Hospital
- Hamilton House Day Surgery
- Keith & District Hospital
- McLaren Vale & Districts War Memorial Hospital
- Mount Gambier Private Hospital
- North Eastern Community Hospital
- Northern Endoscopy Centre
- Northern Yorke Private Hospital
- Norwood Day Surgery
- Oromax Day Surgery
- Parkwynd Private Hospital
- Repromed Day Surgery
- Seaford Day Surgery
- Southern Endoscopy Centre
- Sportsmed Hospital
- St Andrew's Hospital
- Stirling District Hospital

- Tennyson Centre Day Hospital
- Victor Harbor Private Hospital
- Vista Day Surgery
- Western Hospital
- Windsor Gardens Day Surgery

2. Any other private healthcare operator in South Australia who seeks to engage in conduct the subject of this application providing the ACCC is notified by the Department

The SA Public Operators

3. The SA Public Operators, being those operators listed below and the operator of any other hospital facility ultimately owned or operated by the State of South Australia or an authority of the State of South Australia

- The following hospital facilities of the Barossa Hills Fleurieu Local Health Network
 - Angaston District Hospital (previously Barossa Area Health Services)
 - Eudunda Hospital
 - Gawler Health Service
 - Gumeracha District Soldiers' Memorial Hospital
 - Kangaroo Island Health Service
 - Kapunda Hospital
 - Mt Barker District Soldiers' Memorial Hospital
 - Mt Pleasant District Hospital
 - South Coast District Hospital (Victor Harbor)
 - Southern Fleurieu Health Service
 - Strathalbyn & District Health Service
 - Tanunda War Memorial Hospital (previously Barossa Area Health Service)
- The following hospital facilities of the Central Adelaide Local Health Network
 - Royal Adelaide Hospital
 - The Queen Elizabeth Hospital
- The following hospital facilities of the Eyre and Far North Local Health Network
 - Ceduna District Health Services
 - Cleve District Hospital and Aged Care
 - Coober Pedy Hospital and Health Services
 - Cowell District Hospital and Aged Care
 - Cummins and District Memorial Hospital
 - Elliston Hospital (also known as Mid-West Health, Elliston)
 - Kimba District Hospital and Aged Care
 - Lock Health Centre
 - Oodnadatta Health Service
 - Port Lincoln Hospital and Health Service

- Streaky Bay Hospital
- Tumby Bay Hospital and Health Services
- Wudinna Hospital (also known as Mid-West Health, Wudinna)
- The following hospital facilities of the Flinders and Upper North Local Health Network
 - Hawker Memorial Hospital
 - Leigh Creek Health Service
 - Port Augusta Hospital and Regional Health Service
 - Quorn Health Service
 - Roxby Downs Health Service
 - Whyalla Hospital and Health Service
- The following hospital facilities of the Limestone Coast Local Health Network
 - Bordertown Memorial Hospital
 - Kingston Soldiers Memorial Hospital
 - Millicent and Districts Hospital and Health Services
 - Mt Gambier and Districts Health Service
 - Naracoorte Health Service
 - Penola War Memorial Hospital
- The following hospital facilities of the Northern Adelaide Local Health Network
 - Lyell McEwin Health Service
 - Modbury Hospital
- The following hospital facilities of the Riverland Mallee Coorong Local Health Network
 - Barmera Health Service
 - Karoonda and District Soldiers' Memorial Hospital
 - Lameroo District Health Services
 - Loxton Hospital Complex
 - Mannum District Hospital
 - Meningie and Districts Memorial Hospital and Health Services
 - Murray Bridge Soldiers' Memorial Hospital
 - Pinnaroo Soldiers' Memorial Hospital
 - Renmark Paringa District Hospital
 - Riverland General Hospital
 - Tailem Bend District Hospital
 - Waikerie Health Service
- The following hospital facilities of the Southern Adelaide Local Health Network
 - Flinders Medical Centre
 - Repatriation General Hospital
 - Noarlunga Health Service
- The following hospital facilities of the Women's and Children's Health Network
 - Women's and Children's Hospital

- The following hospital facilities of the Yorke and Northern Local Health Network
 - Balaklava Soldiers' Memorial District Hospital
 - Booleroo Centre District Hospital and Health Services
 - Burra Hospital
 - Maitland Hospital and Health Services (previously Central Yorke Peninsula Hospital)
 - Clare Hospital and Health Services
 - Crystal Brook and District Hospital
 - Jamestown Hospital and Health Service
 - Laura and District Hospital
 - Minlaton Health Service
 - Wallaroo Hospital and Health Service (previously Northern Yorke Peninsula Health Service)
 - Orroroo and District Health Service
 - Peterborough Soldiers' Memorial Hospital and Health Service
 - Port Broughton and District Hospital and Health Service
 - Port Pirie Regional Health Service
 - Riverton District Soldiers' Memorial Hospital
 - Snowtown Hospital
 - Yorketown Health Service (previously Southern Yorke Peninsula Health Service)