



HERBERT
SMITH
FREEHILLS

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

Lodged by:

The Crown in Right of Tasmania (acting through the
Department of Health)

24 April 2020



1 Application for authorisation

1.1 Background

This application is made to the Australian Competition and Consumer Commission (**ACCC**) by the Crown in Right of Tasmania (acting through the Department of Health) (the **Department**).¹

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

- 1 the Department, on behalf of the State of Tasmania; and
 - 2 all public hospitals and healthcare facilities owned or operated by the Department or an authority of the Department (**Public Facilities**);
 - 3 the private healthcare operators (**Private Operators**) identified in **Annexure 1**; and
 - 4 any other person notified to the ACCC as intending to engage in the Proposed Conduct
- (together, the **Parties**).

As the ACCC is aware, the Commonwealth Government has put in place a range of temporary measures to increase the capacity of public and private health services to respond to the COVID-19 pandemic (the **Pandemic**). These temporary measures require private healthcare providers to integrate with state and territory healthcare facilities as part of the response to the Pandemic, and also restrict them from performing some non-urgent elective surgeries. In return for this integration, the Commonwealth Government has guaranteed the viability of private healthcare providers.

To facilitate the integration, private healthcare providers will enter into partnership agreements with state and territory governments to make infrastructure, medical equipment and supplies, workforce and additional resources fully available to those governments (**Agreements**).

The Department is seeking authorisation to implement this integration of health services in Tasmania by:

- entering and giving effect to **Agreements** with private healthcare providers; and
- coordinating the provision of healthcare services and the sharing and procurement of resources (including medical equipment, supplies and staff) across private and public healthcare facilities.

We note that the ACCC has already granted interim authorisation to a number of states and the Northern Territory for the integration and coordination of public and private healthcare facilities through substantially similar partnership arrangements.² As is the case in those jurisdictions, the implementation of this integrated and coordinated health response to the Pandemic will result in significant public benefits in Tasmania.

¹ A reference to the Crown also includes a separate reference to the State of Tasmania and the Tasmanian Health Service.

² Authorisations AA1000491-1, AA1000493-1, AA1000498-1, and AA1000499-1



1.2 Application for urgent interim authorisation and final authorisation

The Department is applying for urgent interim authorisation and final authorisation under section 88(1) of the *Competition and Consumer Act 2010 (Cth) (CCA)*.

To implement the Commonwealth Government’s integration requirements as soon as possible and ensure that the Department can continue to efficiently and effectively respond to the Pandemic, the Department requests that interim authorisation be granted as a matter of urgency.

2 Parties to the Proposed Conduct

2.1 Applicant

The Crown in Right of Tasmania (acting through the Department of Health) (the **Department**).

Address	Contact	Description of business activities
Level 7 22 Elizabeth Street HOBART TAS 7000	<p>[Redacted] Ross Smith</p> <p>Deputy Secretary, Policy, Purchasing, Performance and Reform, Department of Health</p> <p>T: [Redacted]</p> <p>E: [Redacted]</p>	The Department is the Tasmanian Government department responsible for the management and oversight of the State’s public health system, including public hospitals, community health and other public health services, as well as the registration of private hospitals in Tasmania.

2.2 Email address for service of documents in Australia

Contact: Sarah Benbow (Partner, Herbert Smith Freehills)

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 are likely to engage in the Proposed Conduct are identified in **Annexure 1**.

The Department may enter into Agreements with each of the Private Operators listed in Annex 1.



3 Agreements with Private Operators

The Commonwealth Government measures requiring the integration of public and private healthcare facilities and guaranteeing the viability of private healthcare providers are critical to ensuring that each state and territory is in the best position to manage the increased demand for health care expected to result from the Pandemic and can provide the highest level of care to patients. These measures maximise the resources available to state and territory governments to meet the potential demand for healthcare during the Pandemic.

It is also possible that many private healthcare providers could have to reduce operations and stand down staff and resources, which would threaten their ongoing viability. This could be the case even when the present restrictions on non-urgent elective surgeries are eased on 27 April 2020,³ as private healthcare providers will still be required to make their infrastructure, equipment and services available to the public sector and they are unlikely to return to normal (pre-Pandemic) operations while the Pandemic's effects are being felt.

The integration of private and public healthcare facilities will enable the Department to:

- maximise the capacity and resources of the Tasmanian healthcare system, thereby minimising the risk that there will be insufficient capacity and resources to respond to the healthcare needs of patients during the Pandemic;
- provide healthcare services and manage equipment, medical supplies and staff in an efficient and effective manner; and
- support the viability of private healthcare providers in Tasmania (the Private Operators) to ensure that they can maintain their operations during, and following, the Pandemic.

3.1 Objectives of Agreements

The Department expects to separately enter into viability and services agreements (**Agreements**) with each of the Private Operators. The objectives of these agreements include:

- (a) implementing the provisions of the National Partnership Agreement between the Commonwealth Government and all Australian State and Territory Governments concerning the Pandemic response;
 - (b) ensuring that Private Operators are able to provide increased capacity for the Commonwealth Government and the Department to rapidly respond to the Pandemic;
 - (c) supporting the viability of Private Operators during the Pandemic to ensure that they can continue operating during, and following, the Pandemic.
- (the **Objectives**).

3.2 Key features of Agreements

The Department expects to enter into substantially similar Agreements with each Private Operator. The key features of these agreements will include:

³ On 21 April 2020, the Prime Minister announced that, from 27 April 2020, category 2 and some important category 3 procedures can recommence across the public and private hospital sectors



- (a) The Department will provide funding to the Private Operator on a cost-recovery basis on the condition that they provide certain services to the Department, including:
 - (1) clinical services that are required to treat a patient referred to or transferred to the Private Operator by the Department or one of the Public Facilities;
 - (2) the provision of appropriate facilities, resources, supplies and other support services ancillary to clinical services provided at its premises (including where the clinical treatment within the private facility is provided by the Department's clinicians);
 - (3) making personal protective equipment, medical equipment, supplies and consumables available for a coordinated response by the Department in meeting demand arising from the Pandemic;
 - (4) the temporary redeployment of personnel and equipment at the direction of the Department to assist its response to the Pandemic; and
 - (5) any other Pandemic support services as required by the Department and that the Private Operator is capable of providing, including temporary influenza and COVID-19 respiratory clinics, tracing services, and accommodation for quarantine and isolation cases.
- (b) the Private Operator may be required to participate in coordination groups established by the Department to facilitate the sharing of information and coordination of healthcare services across the Private Operators and Public Facilities by the Department;
- (c) the Private Operator must ensure that its facility and full workforce are available as needed by the Department;
- (d) the Private Operator will retain operational control of their facilities, however the Private Operator may only use its facilities for the purposes permitted or required by the Contract unless the Department provides its consent and the Department's clinicians may perform clinical services at the Private Operator's facilities;
- (e) public patients will not be required to pay for any cost of treatment by, or using the resources or facilities of, a Private Operator.

4 Conduct to be authorised

4.1 Proposed Conduct

The Department is seeking interim and final authorisation for it, the Private Operators and the Public Facilities to cooperate in implementing and giving effect to the integrated provision of healthcare across Tasmania, in accordance with the Agreements.

This will involve the following Proposed Conduct:

- (a) negotiating and entering into Agreements with the Private Operators;
- (b) consistent with the Objectives, coordinating:
 - (1) service and patient allocation between the Private Operators and Public Facilities;



- (2) the restriction of the type of services provided by the Private Operators, or their capacity to provide services;
- (3) the sharing and allocation of resources, including staff and medical supplies and equipment, between the Private Operators and Public Facilities;
- (c) where the Department believes it is necessary to facilitate the efficient integration and coordination of healthcare services across Tasmania and give effect to the Agreements, engaging in coordinated group discussions and sharing information with some or all of the Private Operators;
- (d) engaging in any other conduct that is necessary to facilitate the efficient integration of healthcare services across Tasmania and give effect to the Agreements, at the request or direction of the Department or a Public Facility.
(the **Proposed Conduct**).

Authorisation is not sought for any coordination or agreement between Private Operators other than as requested or directed by the Department to give effect to the Agreements. The Agreements are not intended to affect any competitive processes concerning the provision of services to private patients by the Private Operators.

As the ACCC is aware from the similar authorisation applications made in other jurisdictions, the Proposed Conduct is necessarily broad to ensure the Department can respond quickly, effectively and efficiently to the rapidly evolving and unknown impacts of the Pandemic, within the parameters of the Agreements. However, the Department recognises the ACCC's desire for there to be sufficient transparency over the integration arrangements in these circumstances and is prepared to provide updates to the ACCC on an agreed basis.

4.2 **Provisions of the *Competition and Consumer Act 2010 (Cth)* that may apply to the Proposed Conduct**

The relevant provisions of the Competition and Consumer Act 2010 (Cth) that may apply to the Proposed Conduct are:

- Division 1 of Part IV (cartel conduct);
- Section 45 (contracts, arrangements or understandings that restrict dealings or affect competition);
- Section 45 (concerted practices);
- Section 46 (misuse of market power); and
- Section 47 (exclusive dealing).

4.3 **Term of authorisation**

Given the present uncertainty concerning the likely duration of the Pandemic and therefore the need for an integrated healthcare response, authorisation is initially sought for 12 months from the date of the ACCC's final determination. If the Pandemic and its effects continue beyond this period, it may be necessary for this term to be extended.

However, the Department does not intend that the Proposed Conduct will extend beyond the period necessary to respond to the Pandemic.



4.4 Persons who may be impacted by the Proposed Conduct

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

- public and private hospitals;
- individuals in Tasmania who may require healthcare services;
- healthcare workers in both public and private hospitals; and
- suppliers and potential suppliers of medical equipment, supplies or services.

5 Significant net public benefits

5.1 Substantial public benefits

As recognised by the ACCC in previous interim authorisation decisions relating to substantially similar conduct,⁴ the Proposed Conduct will give rise to significant public benefits, including:

- (a) enabling an effective and efficient integrated medical response to the Pandemic in Tasmania;
- (b) reducing the likelihood that Private Operators will have to reduce their operations as a result of funding issues caused by the impact of the Pandemic or Commonwealth Government restrictions;
- (c) ensuring that there is sufficient healthcare available in Tasmania to respond to the anticipated clinical needs of patients during the Pandemic, so that all Tasmanian patients will receive appropriate healthcare;
- (d) providing the Department with service capacity oversight to distribute 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, including by ensuring there are adequate intensive care facilities available;
- (e) ensuring, to the extent possible, that medical and protective equipment and relevant supplies are available where needed to respond to the Pandemic; and
- (f) supporting Private Operators to continue operations and retain staff during and after the Pandemic, to ensure competition for the provision of private health services is preserved and consumers continue to have a choice of private or public care.

5.2 Net public benefits

The Department considers that no public detriments will arise from the Proposed Conduct and that it will create significant net public benefits.

The Proposed Conduct is unlikely to materially reduce competition in the supply of private hospital services given usual operations of Private Operators have been impacted by the Pandemic (including the Commonwealth Government measures). As described in this application, an Objective of the Agreements and the Proposed Conduct is to support the

⁴ See Authorisations AA1000491-1, AA1000493-1, AA1000498-1, and AA1000499-1.



Private Operators in remaining viable during and following the Pandemic, thereby preserving competition between them for the future.

Given the exceptional circumstances brought about by the Pandemic, the proposed coordination of services across the Private Operators, and any sharing of information between them to facilitate this, is unlikely to be meaningful when the Pandemic ends and ordinary operations resume.

In these circumstances, the Proposed Conduct will lead to significant net public benefits.

6 Conclusion

For the reasons set out above, the Department applies for:

- Authorisation of the Proposed Conduct for a period of 12 months from the date on which authorisation is granted.
- Urgent interim authorisation, until the final authorisation commences.



Annexure 1 – Details of other persons who are engaged, or propose to become engaged, in the Proposed Conduct

In addition to the Department, the persons who are engaged or who are proposed to become engaged in the Proposed Conduct are:

- 1 The following Tasmanian private healthcare operators (and their related bodies corporate) (**Private Operators**):
 - Calvary Health Care Tasmania - Lenah Valley Campus
 - Calvary Health Care Tasmania - St Johns Campus - Private Hospital
 - Calvary Health Care Tasmania - St Luke's Campus
 - Calvary Health Care Tasmania - St Vincent's Campus
 - Devonport Eye Hospital
 - Fertility Tasmania
 - Hobart Day Surgery Pty Ltd
 - Hobart Eye Surgeons
 - Hobart Private Hospital
 - Hobart Specialist Day Hospital
 - Icon Cancer Care
 - M.H. Ghali Pty Ltd
 - North Tas Day Hospital
 - North West Private Hospital
 - Specialist Care Australia
 - St Helen's Private Hospital
 - Steele Street Clinic Private Hospital
 - TASIVF - Hobart Clinic
 - The Eye Hospital
 - The Hobart Clinic

- 2 The Department in respect of all public hospitals operating in Tasmania and any other healthcare facility owned or operated by the Department or an authority of the Department, including the Tasmanian Health Service (**Public Facilities**).
 - Beaconsfield District Health Service
 - Campbell Town Health and Community Services
 - Deloraine Hospital
 - Flinders Island Multipurpose Centre
 - George Town Hospital and Community Health Centre
 - King Island Hospital and Community Health Centre
 - Launceston General Hospital
 - Mersey Community Hospital



- Midlands Multi-Purpose Health Centre
 - New Norfolk District Hospital
 - North East Soldiers' Memorial Hospital and Community Service Centre
 - North West Regional Hospital
 - Royal Hobart Hospital
 - Smithton District Hospital
 - St Helens District Hospital and Community Services Centre
 - St Marys Community Health Centre
 - West Coast District Hospital
- 3 Any other person notified to the ACCC from time to time as intending to engage in the Proposed Conduct.



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).



Ross Smith

Deputy Secretary, Policy, Purchasing, Performance and Reform, Department of Health

This 24th day of April 2020

