



Draft Determination

Application for revocation of AA1000516 and the substitution of
authorisation AA1000576

lodged by

Australia New Zealand Industrial Gas Association

in respect of

coordinating the supply of medical oxygen in response to the COVID-19
pandemic

Authorisation number: AA1000576

Date: 17 November 2021

Commissioners: Keogh
Brakey
Ridgeway

Summary

The ACCC proposes to grant re-authorisation with conditions to the Australia New Zealand Industrial Gas Association (ANZIGA), its current and future members and other suppliers of medical oxygen notified to the ACCC from time to time (together, the Parties). The authorisation enables the Parties to exchange information and make and give effect to contracts, arrangements or understandings required to ensure security of supply of medical oxygen to hospitals and similar medical facilities in the event of significant demand increases or supply constraints during the COVID-19 pandemic (the Conduct).

The Conduct has been authorised since June 2020 and is unchanged in the current application. The re-authorisation is proposed to continue existing notification and reporting conditions. To date, the Parties have not engaged in the Conduct, but its continued authorisation will enable them to be in a position to ensure the urgent supply of medical oxygen if necessary.

The conditions require that the Parties provide written notice to the ACCC prior to engaging in the Conduct, including (where a threat relates to the public health system) confirmation that the relevant state or territory health authority has been notified of the specified threat. The conditions provide transparency and certainty that the Conduct will only be engaged in when necessary and, therefore, that the opportunities for information sharing among the Parties will be limited.

The ACCC considers that there are a number of factors that mitigate the risk of longer-term competitive detriment arising from the Conduct. These include that the Conduct must only be engaged in, where necessary, for the purpose of ensuring the continuity and security of supply of medical oxygen; does not extend to agreements relating to prices; is a temporary measure linked to the effects of the COVID-19 pandemic; and the conditions of authorisation that the ACCC has continued.

The ACCC proposes to grant authorisation until 30 September 2022.

This draft determination follows interim authorisation granted by the ACCC on 29 September 2021.

The ACCC invites submissions in relation to this draft determination by 2 December 2021 before making its final decision.

1. The application for authorisation revocation and substitution

- 1.1. On 14 September 2021, the Australia New Zealand Industrial Gas Association (**ANZIGA**) lodged an application to revoke authorisation AA1000516 and substitute authorisation AA1000576 for the one revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). ANZIGA is seeking re-authorisation to share information and make and give effect to contracts, arrangements or understandings necessary to ensure security of supply of medical oxygen to hospitals and similar medical facilities during the COVID-19 pandemic.
- 1.2. ANZIGA is seeking re-authorisation on behalf of its current and future members and their related bodies corporate and other suppliers of medical oxygen that are notified to the ACCC by ANZIGA (together, the **Parties**) for 12 months from the date of the ACCC's final determination.

- 1.3. This application for re-authorisation AA1000576 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.4. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.5. ANZIGA also requested interim authorisation with conditions to enable the Parties to engage in the Conduct, if it becomes necessary, while the ACCC is considering the substantive application. The existing authorisation was due to expire on 30 September 2021. On 29 September 2021, in accordance with subsection 91(2) of the Act, in order to enable due consideration to be given to the application for re-authorisation, the ACCC suspended the operation of authorisation AA1000516 and granted interim authorisation in substitution for that suspended authorisation. The interim authorisation was granted with the same conditions as the existing authorisation. The interim authorisation remains in place until the ACCC's final determination comes into force, or if it is revoked or the application is withdrawn by ANZIGA.

ANZIGA

- 1.6. ANZIGA is the peak industry body representing companies that produce and distribute industrial gases, including bulk and compressed gas, to industrial, medical, food, scientific and hospitality users in Australia and New Zealand.
- 1.7. ANZIGA's current full members are Air Liquide Australia Limited, BOC Limited and Coregas Pty Ltd. Together, ANZIGA estimates that its members supply more than 90 per cent of oxygen to end users in Australia and would account for the supply of nearly all medical oxygen in Australia. ANZIGA estimates that medical oxygen generally accounts for around 10 to 15 per cent of total oxygen demand.

The Conduct

- 1.8. ANZIGA seeks re-authorisation for the Parties to, in the event of a threat to the supply of medical oxygen:
 - (a) exchange information in relation to each Party's:
 - (i) available stock of
 - (ii) anticipated demand for, and ability to supplymedical oxygen in either bulk liquid or gas cylinder form. This may include, for example, disclosing the identity, location and immediate requirements for medical oxygen of particular customers, and
 - (b) make and give effect to contracts, arrangements or understandings as the Parties reasonably consider necessary to ensure the continuity and security of supply of medical oxygen to hospitals and similar medical facilities during the COVID-19 pandemic (other than contracts, arrangements or understandings in relation to the price of the supply of medical oxygen), including:
 - (i) restricting the supply of oxygen to customers other than hospitals and similar medical facilities
 - (ii) determining who should supply particular hospitals or similar medical facilities

- (iii) coordinating the delivery of medical oxygen to particular areas or to particular hospitals or medical facilities, and
- (iv) otherwise coordinating between the Parties to ensure that medical oxygen can be supplied in the most efficient manner possible so as to reduce the risk of an inability to supply any hospital or similar medical facility

(the **Conduct**)

- 1.9. ANZIGA advises that any confidential or competitively sensitive information exchanged pursuant to the authorisation will be used solely for the purposes of ensuring the supply of medical oxygen to hospitals and similar medical facilities that might otherwise be at risk of disruption as a result of the impacts of COVID-19.
- 1.10. The ACCC notes the Conduct does not extend to information sharing or agreements in relation to longer-term supply arrangements such as supply agreements with State and Territory health authorities. Under the Conduct, the Parties would be discussing and agreeing to short-term arrangements to respond effectively to shortfalls in supply or excess demand of medical oxygen as a result of the COVID-19 pandemic.

2. Background

- 2.1. In May 2020, ANZIGA sought the existing authorisation on behalf of its current and future members due to the potential effect of the COVID-19 Pandemic. The ACCC granted interim authorisation with conditions in June 2020 and granted final authorisation with conditions in October 2020 until 30 September 2021. ANZIGA submits that while Australia has managed, to date, to limit COVID-19 infection rates to a level where security of medical oxygen supply has not been threatened, there continues to be a potential for a large increase in demand for medical oxygen as a result of the pandemic, primarily due to the potential for increase of patients requiring ventilation support in hospital and healthcare facilities.
- 2.2. While ANZIGA anticipates that the demand for medical oxygen will not exceed Australia's overall production or supply capabilities, ANZIGA submits that there remains potential for the COVID-19 pandemic to result in both:
 - (a) rapid increases in demand for oxygen in localised geographic areas that cannot be predicted with certainty, and
 - (b) disruptions to elements of the supply chain.

Rationale for the Conduct

- 2.3. ANZIGA submits that the COVID-19 pandemic has the potential to result in changes to the nature of demand for medical oxygen, including:
 - Localised/regional spikes—by reference to overseas experience, ANZIGA anticipates that COVID-19 and related demand increases for medical oxygen are likely to be concentrated in particular areas.
 - Shifts from bulk liquid to gas cylinder form—should a temporary medical facility be set up to handle large patient numbers for a particular area, ANZIGA anticipates that the dominant demand for medical oxygen in that area will switch from bulk liquid to gas cylinder form.

2.4. ANZIGA submits that the potential threats to the supply of medical oxygen to hospitals and medical facilities include, for example:

- Production constraints at a particular facility—medical oxygen in bulk liquid form is produced by liquefying air in Air Separation Units (ASUs). Each Party has a limited number of ASUs. ASUs represent large investments that are typically supported by major customers who contract significant proportions of product capacity. In addition, some ASUs are co-located and operationally interdependent with their major customer. The operation of an ASU may be jeopardised in the event that, due to COVID-19 or otherwise, its major customer or co-located business shuts down.
- Limited numbers of cylinders—a Party may need assistance from the other Parties to meet demand in a particular area for medical oxygen supplied in gas cylinders. In addition to bulk liquid form, medical oxygen can be supplied in reusable gas cylinders. Each Party has limited cylinders in circulation, which require thorough sanitisation before being returned into circulation. While there are sufficient cylinders to meet current demand, there are no domestic manufacturing capabilities.
- Transportation and logistics issues—the Parties may need to discuss and agree on logistical arrangements to cover distribution routes that have increased in volume, complexity and/or frequency due to a demand increase in a particular area or changes in demand due to the creation of temporary medical facilities. Each Party has a limited number of specially designed trucks with qualified drivers that transport medical oxygen to hospitals and medical facilities in a particular area in bulk liquid form. ANZIGA anticipates that the majority of COVID-19 patients will be treated within the public hospital system. Contracts for the supply of medical oxygen to public hospitals are typically held by a single Party for a large geographic location. ANZIGA advises that:
 - South Australia, Western Australia, Northern Territory, Australian Capital Territory and Tasmania each have a single contracted supplier of medical oxygen for all public hospitals in that State/Territory;
 - Queensland’s public hospitals are divided between two suppliers;
 - New South Wales has a single supplier for each Local Health District; and
 - Victorian public hospitals each arrange supply with individual suppliers pursuant to an overarching state head agreement.
- Workforce debilitation—the distribution of medical oxygen may be disrupted in the event any significant portion of the workforce of the Parties, including workers at ASUs, drivers and other operational workers, contracts COVID-19, is quarantined or is otherwise unable to work.

2.5. ANZIGA advises that, should there be threats to supply of medical oxygen, the Parties’ first response will be to:

- (a) in the case of the public health system—inform and consult with the relevant State Health Department; and/or
- (b) seek to negotiate bilaterally with another Party to purchase more oxygen.

- 2.6. Alternatively, ANZIGA notes that, in the event of supply challenges faced by one Party, it is possible that the affected customer or State Health Department may approach an alternative supplier directly.
- 2.7. However, ANZIGA submits that not all issues may be able to be resolved through bilateral discussions. For example, if there was an inability to supply medical oxygen in a particular area due to an outbreak, it may be necessary for the Parties to engage in discussions to determine the most efficient way to secure supply. Similarly, if supplies of medical oxygen were threatened, it may be necessary for the Parties to agree that they should prioritise supply of oxygen to hospitals or similar facilities over industrial and commercial customers.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including relevant industry associations or peak bodies, government departments and private businesses. The ACCC did not receive any submissions from interested parties in relation to the application.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. ANZIGA has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 and 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act¹, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

Relevant areas of Competition

- 4.3. To assess the likely effect of the Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.4. ANZIGA did not specifically identify the relevant areas of competition but its application is focused on the supply of medical oxygen to medical facilities.
- 4.5. The ACCC considers that the relevant areas of competition are likely to be for the supply of medical oxygen and related services. The relevant market may be broader where industrial gas manufacturers are able to readily switch from producing nonmedical oxygen and other gases to producing medical oxygen. However, the ACCC does not consider that a precise definition of the market is necessary for the assessment of the Conduct.

¹ See subsection 91C(7).

Future with and without the Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 4.7. The rationale for the Conduct is closely linked with the impacts of COVID-19 in Australia. The future likelihood and severity of those impacts is largely unknown at this time. The ACCC notes that the demand for medical oxygen in Australia does not appear to have been significantly affected to date. Accordingly, the Parties have not yet engaged in the Conduct.
- 4.8. The ACCC considers that, in the future with the Conduct, the Parties will, if reasonably required to address a threat to the supply of medical oxygen in Australia of a kind identified in paragraph 2.4 above, be able to exchange information and make agreements to ensure the supply of medical oxygen to hospitals and similar medical facilities.
- 4.9. The ACCC understands that, in the future without the Conduct, the Parties would likely rely on bilaterally negotiated agreements to address threats of the kind identified in paragraph 2.4 above to the supply of medical oxygen during the COVID19 pandemic. Alternatively, the ACCC understands that in the event of supply challenges faced by one Party, it is possible that an affected customer or State Health Department may approach an alternative supplier directly.
- 4.10. Absent the Conduct, in circumstances where they are unable to address the threats by these means, the Parties may be less able to quickly and effectively address those threats and ensure the continuity and security of supply of medical oxygen to hospitals and similar medical institutions.
- 4.11. In particular, while the ACCC considers that bilateral agreements would, in the majority of cases, be sufficient to ensure the continued supply of medical oxygen in the event of these threats, absent the Conduct, any process requiring multiple and potentially overlapping bilateral agreements between the Parties may delay or hinder the Parties taking steps to address threats to the supply of medical oxygen to patients requiring it.

Public benefits

- 4.12. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*²
- 4.13. ANZIGA submits that the Conduct has the sole purpose of ensuring that the Parties are able to ensure supply of medical oxygen to hospitals and healthcare facilities during the COVID-19 pandemic. ANZIGA submits that this ensures that those hospitals and similar facilities are able to provide life-saving treatments that depend on the availability of medical oxygen.

² Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- 4.14. The ACCC considers that the Conduct, should it become necessary, is likely to result in public benefits by increasing the security of supply of medical oxygen and related equipment such as gas cylinders used to contain medical oxygen as well as delivery vehicles and suitably qualified drivers to transport the oxygen, to hospitals and similar medical facilities. This may include increased distribution efficiency by enabling coordination on distribution routes, and a lower likelihood of shortfalls in the supply of oxygen to patients who may rely on medical oxygen for their treatment.
- 4.15. The ACCC understands that the Parties have sufficient production capacities to meet substantial increases in demand for medical oxygen and that this is the case with or without the Conduct. However, in assessing this application for re-authorisation, the ACCC has considered the public benefits and public detriments likely to arise from the Conduct, assuming that there is a threat to the supply of medical oxygen as a result of the COVID-19 pandemic that the Parties with the relevant Departments of Health are not able to resolve through bilateral negotiations and which therefore necessitates the Conduct.
- 4.16. In these circumstances, the ACCC considers the Conduct, including information sharing, is likely to produce significant benefits by enabling the efficient distribution of medical oxygen to hospitals and similar medical facilities. For example, the Parties may need to coordinate on distribution routes where temporary medical facilities have been established to cope with large patient numbers in a particular area. Further, the ACCC notes that the Conduct would also enable the Parties to make short-term agreements to prioritise the supply of medical oxygen towards medical facilities and away from other customers, which may not be possible through bilateral arrangements.
- 4.17. The ACCC acknowledges that, to the extent hospitalisation rates in Australia remain relatively low, and there are no associated significant disruptions to the supply and/or demand for medical oxygen, the Parties may not need to engage in the Conduct. The Parties have not to date needed to engage in the Conduct.

Public detriments

- 4.18. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.³*
- 4.19. The Conduct would allow suppliers of medical oxygen to coordinate their response to spikes in demand for medical oxygen, rather than competing to supply hospitals and other medical facilities in respect of this additional demand. Competitors sharing information and coordinating supply of goods and/or services has the potential to lessen competition and result in consumer detriment by restricting supply and increasing prices, stifling innovation and preventing businesses from entering the market. The ACCC would expect such impacts to be heightened in circumstances where the Parties account for more than 90 per cent of the market for the production and supply of oxygen, and the supply of nearly all medical oxygen.
- 4.20. ANZIGA submits that the Conduct is unlikely to result in any public detriment, and notes that:

3 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- the Conduct will not extend to arrangements or understandings in relation to the prices of supply of affected products, and will not extend to, or have any impact on, the Parties' terms of supply after the COVID-19 pandemic ends
- the Conduct is unlikely to materially alter the competitive dynamics in any market and, to the extent that there are any short-term competitive effects, those effects will not extend beyond the period of any COVID-19 related supply shortages
- the Parties intend only to rely on the ability to make contracts, arrangements or understandings pursuant to the authorisation where other arrangements, such as bilaterally negotiated supply agreements between the Parties, appear likely to be inadequate to address the perceived threat to supply, and
- the ACCC will be in a position to exercise oversight of the Conduct as the Parties will keep it updated of contracts, arrangements or understandings that are reached pursuant to the authorisation and the reasons for those contracts, arrangements or understandings.

4.21. The ACCC agrees that any short term-competitive effects arising from the exchange of information and coordination by suppliers of medical oxygen in the circumstances of the COVID-19 pandemic are likely to be temporary and limited in scope. Nonetheless, the ACCC recognises that these effects may potentially extend beyond the short-term because each Party may gain an increased understanding of the other Parties' pricing and stocking strategies.

4.22. The ACCC has considered whether the Conduct has the potential to facilitate unauthorised information sharing and coordination. In this respect, the ACCC notes that, while the Conduct is limited to coordination in relation to the supply of medical oxygen in response to the COVID-19 pandemic, information sharing and discussions between competitors may give rise to opportunities for coordination beyond the scope of the Conduct, including in relation to the supply of medical oxygen or other industrial gases supplied by the Parties. Such conduct could significantly reduce competition in relevant markets.

4.23. The ACCC considers that risk of information sharing or coordination by the Parties beyond the scope of the Conduct will be sufficiently addressed by the proposed conditions, which include that the Parties must provide the ACCC a written notice prior to engaging in the Conduct that includes a brief submission outlining the reasons why bilateral arrangements are unable to manage an identified threat and the Conduct is therefore necessary.

4.24. The ACCC also notes the importance of balancing measures that are intended to reduce the risk of competitive detriment with the need to avoid undue delays to the Parties' response to any significant threat to the supply of medical oxygen during the COVID-19 pandemic. The ACCC considers that such a requirement would not impede the Parties' ability to respond in a timely manner to a threat to the continuity of supply of medical oxygen

4.25. In addition, the protection conferred by authorisation does not extend to conduct outside the scope of the Conduct. Accordingly, the Parties will not be protected by the authorisation in respect of conduct not engaged in for the purpose of ensuring that the Parties can respond to threats to the supply of medical oxygen in Australia due to the COVID-19 pandemic and to ensure continuity and security of supply of medical oxygen to hospitals and similar medical facilities. The competition and cartel provisions in Part IV of the Act would continue to apply to conduct outside this scope.

4.26. While the long-term effects of the COVID-19 pandemic are somewhat uncertain, the ACCC considers that there are a number of factors that mean it is unlikely that the Conduct will significantly impact competition beyond the period of the pandemic, including that the Conduct:

- will only be engaged in by the Parties where considered reasonably necessary for the Parties to address an identified threat to the supply of medical oxygen, and where the identified threat is unable to be managed by way of bilateral negotiations
- is only in relation to circumstances where there is excess demand or an inability of an existing supplier to supply sufficient medical oxygen in particular situations caused by the pandemic. The Conduct does not apply to long-term contracts between suppliers and purchasers of medical oxygen such as health authorities.
- will be confined to particular regions or geographic areas where there are rapid increases in demand or disruptions to the supply of medical oxygen
- does not extend to setting or agreeing prices, and
- is a temporary measure in response to the COVID-19 pandemic, which is proposed to be limited to a further 12 months and which may be shortened further if the effects of the COVID-19 pandemic subside at an earlier date

4.27. The ACCC notes that, while the Conduct does not extend to making agreements in relation to the price of medical oxygen, through the Conduct, the parties may restrict or limit supply of medical oxygen, which may have a similar effect. For the reasons set out at paragraph 4.26, the ACCC considers that the risk of the Parties unfairly inflating prices is low. The ACCC also proposes to impose conditions to provide some transparency over the Conduct engaged in by the Parties for the duration of authorisation.

Conditions of authorisation

4.28. The ACCC may specify conditions in an authorisation.⁴ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.⁵

4.29. The ACCC may specify conditions in circumstances where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of authorisation.⁶

4.30. The ACCC proposes to impose conditions that aim to provide transparency and certainty that the Conduct will only be engaged in when necessary and, therefore, that the opportunities for information sharing among the Parties will be limited. The wording of the proposed conditions is at paragraphs 5.6 and 5.7. The proposed conditions are the same as those applying under the authorisation AA1000516 granted on 1 October 2020 and interim authorisation granted on 29 September 2021 under the current application AA1000576. The ACCC has received regular reports from ANZIGA over the period of authorisation advising that it has no activity to report as it has not needed to engage in the authorised conduct.

4 Subsection 88(3) of the Act.

5 Subsection 88(3) of the Act.

6 Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

Balance of public benefit and detriment

- 4.31. The ACCC considers that, if the Conduct becomes necessary, it is likely to result in significant public benefits by ensuring the supply of medical oxygen to hospitals and similar medical facilities for the benefit of patients during the COVID-19 pandemic.
- 4.32. The ACCC considers that the Conduct, if engaged in, is likely to result in some public detriments because it is likely to reduce competition in the short term as suppliers of medical oxygen will be coordinating their response to spikes in demand or disruptions to supply, rather than competing for this supply. However, the ACCC considers that these potential public detriments are mitigated by the factors outlined above, including that the Conduct must only be engaged in, where necessary, for the purpose of ensuring the continuity and security of supply of medical oxygen, does not extend to agreements relating to prices and is a temporary measure linked to the effects of the COVID-19 pandemic.
- 4.33. The ACCC proposes to impose conditions that require the Parties to notify the ACCC prior to engaging in the Conduct. The written notice must include a brief submission outlining the basis for the Parties' view that an identified threat to the supply of medical oxygen is unable to be managed by way of bilateral supply arrangements.
- 4.34. For the reasons outlined in this draft determination, including the proposed conditions the ACCC is satisfied that the Conduct would be likely to result in public benefits and that these public benefits would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

- 4.35. The Act allows the ACCC to grant authorisation for a limited period of time.⁷ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.36. In this instance, ANZIGA sought authorisation for a 12-month period from the date of the ACCC's final determination.
- 4.37. In the context of the evolving and uncertain nature of the COVID-19 pandemic, as well as changes in hospitalisation levels, the ACCC proposes to grant re-authorisation until 30 September 2022.

5. Draft determination

The application

- 5.1. On 13 September 2021 ANZIGA lodged an application to revoke authorisation AA1000516 and substitute authorisation AA1000576 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000576 was made under subsection 91C(1) of the Act.
- 5.2. ANZIGA seeks authorisation for Conduct. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

⁷ Subsection 91(1)

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, including the proposed conditions, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant re-authorisation with conditions.

Proposed conditions of authorisation

- 5.6. The ACCC proposes to impose the following conditions that are the same as those of the existing authorisation AA1000516.
- (c) After identifying a particular threat to the supply of medical oxygen and prior to engaging in the Conduct in relation to that threat, the Parties must give the ACCC written notice that:
- (i) states that they have identified a threat to the supply of medical oxygen
 - (ii) describes, in general terms, the nature of that threat and the geographic area affected
 - (iii) states whether:
 - (1) where the threat affects the public health system—the relevant State or Territory health authority has been informed of the threat
 - (2) the Parties consider that the identified threat is unable to be managed by way of bilateral supply arrangements for the supply of medical oxygen to either the relevant State or Territory health authority or one or more of the Parties and, if so, a brief submission outlining the basis for this view including substantiating information, and
 - (3) the Parties consider it reasonably necessary to engage in the Conduct for the purpose of addressing the threat identified.
- (d) The Parties must:
- (i) provide regular updates to the ACCC in a form and at a frequency agreed between the Parties and the ACCC, and
 - (ii) provide to the ACCC, within a reasonable time period, all information and documents requested by the ACCC.
- 5.7. All confidential or competitively sensitive information exchanged pursuant to the authorisation shall be used by the Party to whom it was provided solely for the purposes of ensuring the supply of medical oxygen to hospitals and similar medical facilities that might otherwise be at risk of disruption as a result of the impacts of COVID-19.

Conduct which the ACCC proposes to authorise

- 5.8. The ACCC proposes to revoke authorisation AA1000516 and grant authorisation AA1000576 in substitution. Authorisation AA1000576 enables the Parties to engage in the Conduct as defined at paragraph 1.8 solely for the purpose of ensuring the supply of medical oxygen to hospitals and similar medical facilities that might otherwise be at risk of disruption as a result of the impacts of COVID-19. The Conduct may only be engaged in in the event of a threat to the supply of medical oxygen for the purpose of ensuring the security and continuity of supply of medical oxygen to hospitals and similar facilities during the COVID-19 pandemic.
- 5.9. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 and 47 of the Act.
- 5.10. The ACCC proposes to grant authorisation AA1000576 until 30 September 2022.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 2 December 2021. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.