



Draft Determination and interim authorisation

Application for revocation of AA1000506 and the substitution of authorisation AA1000574 lodged by the Crown in Right of Tasmania acting through the Department of Health in respect of co-ordination of healthcare services in response to the COVID-19 pandemic

Date: 28 September 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC proposes to re-authorise the Crown in Right of Tasmania, acting through the Department of Health (the Department), and relevant healthcare providers, in relation to arrangements for the purpose of maximising healthcare capacity and ensuring Tasmania-wide coordination of healthcare services during the COVID-19 pandemic.

In broad terms, the arrangements involve the Department and participating private healthcare providers in Tasmania sharing information about capacity and resources and, under the oversight and direction of the Department, coordinating their activities in relation to the provision of certain medical services or the treatment of particular groups of patients at particular hospitals. The arrangements also allow the coordination of the procurement of medical equipment and supplies and the sharing of resources to meet demand.

The arrangements for which re-authorisation are sought are the same as those authorised in on 13 August 2020. This existing authorisation will expire on 30 September 2021.

The Department seeks re-authorisation for a further two years. The ACCC notes there is inherent uncertainty as to the period of time the impact of the Pandemic will continue on the health system. Given the ACCC's consideration of the balance of public benefits and detriments and the potential benefits in having certainty of ongoing authorisation, the ACCC proposes to re-authorise the Conduct for 18 months.

The ACCC has also granted interim authorisation to allow the arrangements authorised in 2020 to continue while the ACCC completes its assessment of the application for re-authorisation.

Re-authorisation is proposed to be subject to a condition which requires reporting of conduct engaged in under the authorisation, similar to the requirements of the existing authorisation.

The ACCC invites submissions in relation to this draft determination by 21 October 2021 before making its final decision.

1. The application for authorisation

1.1. On 7 September 2021, the Crown in Right of Tasmania, acting through the Department of Health (the **Department**) lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation AA1000506 and substitute authorisation AA1000574 for the one revoked (referred to as re-authorisation). The Department seeks re-authorisation on behalf of itself and the following parties who are engaged, or propose to become engaged, in the arrangements for a period of two years:

- specified private healthcare providers operating in Tasmania as listed in **Attachment 1** (and their related bodies corporate), as well as any other private healthcare providers notified to the ACCC by the Department from time to time (the **Participating Providers**), and
- all public hospitals operating in Tasmania, as listed in **Attachment 2**, and any other healthcare facility owned or operated by Tasmania or an authority of the state of Tasmania (the **Tasmanian Public Providers**).

- 1.2. This application for revocation and substitution was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. 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 which are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. The Department seeks re-authorisation for the broad purpose of maximising healthcare capacity and ensuring the Tasmania-wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare services during the period of the COVID-19 pandemic (the **Pandemic**). To achieve this purpose, the Department has entered into separate but substantially similar agreements with the Participating Providers, and may enter into further agreements in the future together, (the **Agreements**) in order to achieve the Objectives defined at paragraph 1.6 below.
- 1.5. The Department is seeking to replicate the arrangements that are currently in place under the existing authorisation AA1000506, which the ACCC granted on 13 August 2020. The existing authorisation is due to expire on 30 September 2021. As such, the Department also requests the ACCC grant interim authorisation to enable the parties to continue to engage in the Conduct while the ACCC is considering the substantive application for re-authorisation. The request for interim authorisation is discussed further in section 6.

The Conduct

- 1.6. The Department's objectives include to:
 - (a) implementing the provisions of the National Partnership on COVID-19 Response¹ (the **NPA**) concerning the Pandemic response (described at paragraphs 2.2 -2.4 below)
 - (b) ensuring that Participating Providers are able to provide increased capacity for the Commonwealth Government and the Department to rapidly respond to the Pandemic, and
 - (c) supporting the viability of Participating Providers during the Pandemic to ensure that they can continue operating during, and following, the Pandemic.
(the **Objectives**).
- 1.7. The Department is seeking authorisation to:
 - (a) negotiate and enter into new Agreements with the Participating Providers;
 - (b) consistent with the Objectives, coordinate:
 - a. service and patient allocation between the Participating Providers and Tasmanian Public Providers
 - b. the restriction of the type of services provided by the Participating Providers
 - c. the sharing and allocation of resources, including staff and medical supplies and equipment, between the Participating Providers and Tasmanian Public Providers

¹ See <https://www.coag.gov.au/sites/default/files/communique/covid19-npa.pdf>

- (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, engage in coordinated group discussions and sharing information with some or all of the Participating Providers, and
- (d) engage 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 Tasmanian Public Provider.

(the **Conduct**).

1.8. The key features of the Agreements entered into with the Participating Providers are:

- (a) the Department will provide funding to the Participating Providers on a cost-recovery basis on the condition they provide certain services to the Department, including:
 - i) clinical services that are required to treat a patient referred to or transferred to the Participating Provider by the Department or one of the Tasmanian Public Providers
 - ii) the provision of appropriate facilities, resources and 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)
 - iii) making personal protective equipment, medical equipment, supplies and consumables available for a coordinated response by the Department in meeting demand arising from the Pandemic
 - iv) the temporary redeployment of personnel and equipment at the direction of the Department to assist its response to the Pandemic, and
 - v) any other Pandemic support services required by the Department and that the Participating Provider is capable of providing, including temporary influenza and COVID-19 respiratory clinics, tracking services, and accommodation for quarantine and isolation cases.
- b) each Participating Provider 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 Participating Providers and Tasmanian Public Providers by the Department
- c) the Participating Provider must ensure that its facility and full workforce are available as needed by the Department
- d) the Participating Provider will retain operational control of their facilities, however the Participating Provider may only use its facilities for the purposes permitted or required by the Agreement unless the Department provides its consent and the Department's clinicians may perform clinical services at the Participating Provider's facilities, and
- 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.

1.9. The Agreements are not intended to, and do not extend to, coordination or any agreement between Participating Providers 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 Tasmanian Public Providers.

- 1.10. A copy of the application for authorisation is available on the ACCC's [Authorisations public register](#).

2. Background

- 2.1. The ACCC recognises the significant challenges that continue to exist as a result of the ongoing Pandemic. There is risk that Australia's health services may continue to be put under pressure in responding to the ongoing Pandemic, and that there is ongoing uncertainty around the effects of the vaccination roll out and increasing COVID-19 case numbers on the public and private health system.

The National Partnership on COVID-19 Response

- 2.2. On 13 March 2020, the Commonwealth of Australia and each of the states and territories, signed the National Partnership on COVID-19 Response² (the **NPA**). The NPA is a commitment between the Commonwealth and the states and territories to respond to the Pandemic.
- 2.3. The NPA provides that as system managers of public hospitals, each state will enter into agreements with existing private hospitals (including day hospitals) within their jurisdiction, through a consistent agreement, to ensure:
 - (a) increased capacity for the Commonwealth and states to rapidly respond to the COVID-19; and
 - (b) the viability of private hospitals is maintained during the Pandemic and they are able to resume operations once the Pandemic response ends.
- 2.4. The Department advises that the application for re-authorisation forms part of the implementation of the NPA and funding commitments that have been made by the Australian Government and state and territory Governments.

3. Consultation

- 3.1. Given the limited time between lodgement of the application for reauthorisation and the expiration of the current authorisation, and the uncontentious nature of the existing authorisation for the same conduct, the ACCC has not sought the views of interested parties prior to the release of this draft determination and interim authorisation.
- 3.2. The ACCC will now seek the views of interested parties on the application for re-authorisation this draft determination and the interim authorisation. The ACCC will consider any views prior to preparation of its final determination.
- 3.3. Public submissions by the Department and interested parties will be placed on the Public Register for this matter.

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.

² See <https://www.coag.gov.au/sites/default/files/communique/covid19-npa.pdf>

- 4.2. The Department has sought re-authorisation for the Conduct in relation to Division 1 of Part IV of the Act, and sections 45, 46 and 47 of the Act. Consistent with subsection 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 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 result or be likely to result from the Conduct (the **authorisation test**).
- 4.3. The ACCC's assessment of AA1000567 is made in the context of the ongoing Pandemic. Consistent with the purpose of the Act which is to enhance the welfare of Australians by promoting fair trading and competition, when considering applications for authorisation in response to the Pandemic, the ACCC is seeking to ensure that any changes to the competitive landscape are, wherever possible, temporary.
- 4.4. In making its assessment of the Conduct, the ACCC has considered:
- the relevant areas of competition likely to be affected by the Conduct. These areas of competition include the supply of overnight and day hospital healthcare services to persons in the state of Tasmania, in both the private and public healthcare system. The supply of surgical and other related healthcare services to persons in the state of Tasmania is also likely to be relevant. These areas of competition encompass a diverse range of healthcare services.
 - the likely future with the Conduct that is the subject of the authorisation compared to the likely future in which the Conduct does not occur. In the future without the Conduct the ACCC considers that the Tasmanian Government would be likely to enter into contracts with private healthcare providers on a bilateral basis. These contracts may be on broadly similar terms and would seek still to meet the NPA and other requirements implemented as part of the response to the Pandemic. However, the contracts would not establish the cooperation and coordination mechanisms between private healthcare providers provided for by the Conduct.

Public benefits

- 4.5. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with guidance from 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.*³
- 4.6. The Department submits that the Conduct will continue to result in the same significant public benefits the ACCC recognised in granting the 2020 authorisation. These were:
- supporting the timely deployment of critical resources by facilitating the swift response to any outbreaks that may emerge in Tasmania, and
 - some contracting efficiencies.
- 4.7. The Department advises that, under the existing authorisation, authorised parties have entered into the Agreements with Participating Providers in 2020 as part of its response to the Pandemic. In the future, the Department expects the Conduct will be

³ 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.

critical to ensuring that the Department can continue to maximise the availability of healthcare services in Tasmania in response to the Pandemic in the most efficient and effective manner, as the Pandemic is expected to continue to place high demands on the Australian health care system; in particular as lock-down and other public health measures are eased in accordance with the re-opening strategy in the National Cabinet's plan to transition Australia's National COVID-19 Response.

- 4.8. As noted in paragraph 4.4, the ACCC considers that, without the Conduct, the Tasmanian Government would be likely to enter into contracts with private healthcare providers to facilitate access to the private healthcare system's resources; and that such agreements would be on broadly similar terms and would seek to meet the NPA and other requirements implemented as part of the response to the Pandemic. In these circumstances it is likely that the some of the public benefits arising from the ongoing viability of the private healthcare system could be achieved without the Conduct.
- 4.9. However, the ACCC considers that the Conduct will allow the authorised parties to coordinate the medical response to the Pandemic in Tasmania as efficiently and effectively as possible, including by facilitating the swift response to outbreaks in Tasmania. The ACCC considers that this is likely to contribute to public confidence during the Pandemic. The ACCC considers that the Conduct is likely to result in significant benefits to the public by supporting the timely deployment of critical resources.
- 4.10. In addition, the ACCC considers that there are likely to be some contracting efficiencies resulting from the Conduct, and these may be more difficult to achieve in the future without the Conduct.

Conclusion on public benefits

- 4.11. The ACCC considers that the Conduct is likely to deliver significant public benefit through the enhanced coordination and improved responsiveness of the Tasmanian healthcare system to the Pandemic.

Public detriments

- 4.12. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with guidance from 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.⁴

- 4.13. The Department submits that it considers that no public detriment arose as a result of the 2020 authorisation, and that no public detriments are likely to arise as a result of the same Conduct in the future.
- 4.14. The Conduct includes a number of measures to support the Tasmanian healthcare system's response to the Pandemic, for example:

- (a) discussion of healthcare operations, facility capacity, and resourcing;
- (b) allocation of services, including between healthcare facilities;

⁴ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- (c) restriction of services, including determining services that can be provided at particular healthcare facilities; and
 - (d) sharing of resources, including staff and medical supplies and equipment, to meet demand at particular healthcare facilities.
- 4.15. While providing a mechanism for the healthcare system to coordinate its response to the Pandemic, these measures may restrict competition. For example, private patients with non-COVID-19 conditions may experience fewer options or longer wait times for healthcare services during these interventions, including because COVID-19 patients are prioritised over other patients. To a large extent, however, many of these detriments would be likely to arise due to increased demand on healthcare resources as a result of the Pandemic, and by public policy decisions in response to it. In that sense, many of these detriments would occur with and without the Conduct.
- 4.16. The Conduct also allows for increased cooperation and coordination between competitors. Agreements between competitors can give rise to competition concerns if the horizontal agreement makes coordination (rather than competition) between firms beyond the terms of the authorised agreement more likely and also across the market more generally. In general, coordination between competitors can cause significant detriment to the public.
- 4.17. However, the ACCC considers that, in the current circumstances, the likely public detriment from the Conduct is limited by a number of factors:
- (a) to the extent that Participating Providers retain the capacity to do so, nothing in the Agreements is intended to affect the normal competitive process vis-à-vis the provision of healthcare services to private patients;
 - (b) the Conduct does not extend to any price agreements between private hospitals for non-COVID-19 services;
 - (c) the Conduct does not extend to any coordination or agreement between Participating Providers or between Participating Providers and the Tasmanian Public Providers other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives. Coordination between the participating parties can only occur at the request or direction of the Department or one or more of the Tasmanian Public Providers;
 - (d) there will be continued transparency around the Conduct as the Department is required under the Conduct to notify the ACCC of additional Participating Providers, and the ACCC's proposed condition requires the Department to provide regular updates to the ACCC;
 - (e) any information shared under the Conduct is likely to lose relevance following the cessation of the Conduct; and
 - (f) the Conduct provides a temporary response to the Pandemic, the measures are not designed or intended to provide a permanent restriction on competition.

Conclusion on public detriments

- 4.18. The ACCC considers that the Conduct is likely to result in some public detriment in the short term because it will reduce competition, including in the supply of overnight and day hospital healthcare services to particular patients in Tasmania. However, there are a number of factors that mean the ACCC considers it unlikely that the Conduct will significantly impact competition in the long term, including oversight by the Department and as a result of the transparency provided by the proposed conditions.

Balance of public benefit and detriment

- 4.19. The ACCC considers that the Conduct is likely to result in significant public benefits through the enhanced coordination and improved responsiveness of the Tasmanian healthcare system to the Pandemic.
- 4.20. The ACCC also considers that the Conduct is likely to result in some public detriment over the short term because it is likely to reduce competition in the supply of hospital healthcare services to certain patients in Tasmania. In the circumstances, the ACCC considers that the reduction in competition is limited (see paragraph 4.17 above) and is not likely to continue in the long term.
- 4.21. Overall, the ACCC considers that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

- 4.22. The Act allows the ACCC to grant authorisation for a limited period of time.⁵ 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.
- 4.23. In this instance, the Department seeks re-authorisation for a further two year period from the date of the expiration of the 2020 authorisation.
- 4.24. The ACCC notes that there is inherent uncertainty as to the period of time the impact of the Pandemic will continue on the health system, and that this impact is likely to differ from that on other sectors of the economy. Given the ACCC's conclusion on the balance of public benefits and detriments and the potential benefits in having certainty of ongoing authorisation, the ACCC proposes to re-authorise the Conduct for 18 months.

5. Draft determination

The application

- 5.1. On 7 September 2021, the Department lodged an application to revoke authorisation AA1000506 and substitute authorisation AA1000574 with a later expiry date for the one revoked (referred to as re-authorisation). This application for re-authorisation was made under subsection 91C(1) of the Act.
- 5.2. The Department seeks re-authorisation for the Conduct described at paragraph 1.7, on behalf of itself, Participating Providers and Tasmanian Public Providers, for the broad purpose of maximising healthcare capacity and ensuring the Tasmania -wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare during the period of the Pandemic. As part of these arrangements, the Department will enter into Agreements with Participating Providers and form Cluster Groups to plan for and, if necessary, respond to outbreaks of COVID-19 in particular geographic regions in Tasmania.

⁵ Subsection 91(1)

- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. 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 would or is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would result or be likely to result from the Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, 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.
- 5.6. Accordingly, the ACCC proposes to revoke authorisation AA1000506 and substitute authorisation AA1000574 for the one revoked.

Proposed conditions of authorisation

- 5.7. The ACCC may specify conditions in an authorisation.⁶ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.⁷
- 5.8. 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 the authorisation.⁸
- 5.9. In this instance, the ACCC proposes to grant authorisation with the following condition:

Reporting Requirements

- (a) Subject to paragraph (b) below, the Department must provide updates to the ACCC on a quarterly basis (or as otherwise agreed with the ACCC), describing any conduct engaged in during that quarter in reliance upon this authorisation.
- (b) If no conduct was engaged in during that quarter in reliance upon this authorisation, or if there has been no change in conduct since the last update was provided, the Department is not required to provide an update.
- 5.10. Under the condition, the ACCC may authorise a Committee or Division of the ACCC, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under the conditions of this authorisation on its behalf.

Conduct which the ACCC proposes to authorise

- 5.11. Subject to the proposed condition, the ACCC proposes to revoke authorisation AA1000506 and substitute authorisation AA1000574 to enable the Department and Participating Providers and Tasmanian Public Providers to coordinate healthcare services to facilitate the most efficient and effective allocation of healthcare during the period of the COVID-19 pandemic as described in paragraph 1.7 and defined as the Conduct. The ACCC proposes to grant authorisation to the Conduct only in so far as it is for the sole purpose of dealing with the effects of the Pandemic in Tasmania.

⁶ Section 88(3) of the Act.

⁷ Section 88(3) of the Act.

⁸ Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

5.12. Authorisation is proposed to be granted in relation to Division 1 of Part IV of the Act, and sections 45, 46 and 47 of the Act.

5.13. The ACCC proposes to grant conditional authorisation AA1000574 for a further 18 months.

5.14. This draft determination is made on 28 September 2021.

6. Interim authorisation

6.1. Authorisation AA1000506 is due to expire on 30 September 2021. In order to enable due consideration to be given to the application for re-authorisation, the ACCC has decided to suspend the operation of authorisation AA1000506 and grant interim authorisation in substitution for that suspended authorisation.⁹ The ACCC has decided to grant interim authorisation for the following reasons:

- A. The need for interim authorisation is due to the impending expiry of AA1000506. The possibility of harm to the Department and other interested parties if interim authorisation is not granted may be substantial, because it may reduce the effectiveness and/or efficiency of the Tasmanian health system's response to the ongoing Pandemic.
- B. Interim authorisation will continue to allow the Department and Participating Providers and Tasmanian Public Providers to coordinate healthcare services to facilitate the most efficient and effective allocation of healthcare during the ongoing COVID-19 pandemic, while also minimising uncertainty and disruption that will be experienced if interim authorisation is not granted
- C. for the reasons set out in this draft determination, the ACCC considers the conduct specified in relation to authorisation AA1000506 is likely to result in public benefits, and that these public benefits outweigh the likely limited public detriment as a result of this conduct.

6.2. The ACCC grants interim authorisation in relation to the same conduct and parties, and with the same conditions, as specified in authorisation AA1000506.

6.3. Interim authorisation commences immediately and remains in place until it is revoked, the date the ACCC's final determination comes into effect, or when the application for re-authorisation is withdrawn.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination by 21 October 2021. In addition, consistent with section 90A of the Act, the Department or an interested party may request that the ACCC hold a conference to discuss the draft determination.

⁹ This decision is made under s 91(2)(f) of the CCA.

Attachment 1 – Participating Providers

1. Specified private healthcare providers

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

Attachment 2 - The Tasmanian Public Providers

The Tasmanian Public Providers, being those providers listed below and any other healthcare facility owned or operated by the State of Tasmania or an authority of the State of Tasmania.

- 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
- Restriction of Publication of Part Claimed
- 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