



Determination

Application for revocation of AA1000507 and the substitution of authorisation AA1000573 lodged by the State of New South Wales as represented by the Ministry of Health in respect of co-ordination of healthcare services in response to COVID-19

Date: 2 December 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC has decided to grant conditional re-authorisation to the State of New South Wales, as represented by the Ministry of Health (the Ministry), and relevant healthcare providers in relation to arrangements for the purpose of maximising healthcare capacity and ensuring New South Wales-wide coordination of healthcare services while responding to issues arising from COVID-19.

In broad terms, the arrangements involve the Ministry, participating private healthcare providers, and public hospitals in New South Wales sharing information about capacity and resources and, under the oversight and direction of the Ministry, 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 was sought are the same as those previously authorised by the ACCC on 13 August 2020. The previous authorisation was to expire on 30 September 2021.

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

The Ministry sought re-authorisation for a further two years. The ACCC notes there is inherent uncertainty as to the period of time COVID-19 will continue to impact the health system. Given the ACCC's consideration of the balance of public benefits and detriments likely to result from the Conduct, and the potential benefits in having certainty of ongoing authorisation, the ACCC has decided to grant re-authorisation of the Conduct until 24 June 2023.

Re-authorisation is granted with a condition which requires reporting of conduct engaged in under the authorisation, similar to the requirements of the previous authorisation.

1. The application for authorisation

- 1.1. On 8 September 2021, the State of New South Wales as represented by the Ministry of Health (the **Ministry**) lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation AA1000507 and substitute authorisation AA1000573 for the one revoked (referred to as re-authorisation). The Ministry seeks re-authorisation for a further two years on behalf of itself and the following parties who are engaged, or propose to become engaged, in the Conduct:
 - specified private healthcare providers operating in New South Wales as listed in **Attachment 1** (and their related bodies corporate), as well as any other private healthcare providers notified to the ACCC by the Ministry from time to time (the **Participating Providers**), and
 - all public hospitals operating in New South Wales, as listed in **Attachment 2**, and any other healthcare facility owned or operated by New South Wales or an authority of the state of New South Wales (**the New South Wales Public Providers**).
- 1.2. This application for re-authorisation 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 Ministry seeks re-authorisation for the broad purpose of maximising healthcare capacity and ensuring the New South Wales -wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare services while responding to issues arising from COVID-19. To achieve this purpose, the Ministry 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 1.7 below.
- 1.5. The Ministry is seeking to continue the arrangements put in place under the previous authorisation AA1000507, which the ACCC granted on 13 August 2020. The previous authorisation was to expire on 30 September 2021. As such, the Ministry requested the ACCC grant interim authorisation to enable the parties to continue to engage in the Conduct while the ACCC was considering the substantive application for re-authorisation.
- 1.6. On 28 September 2021, the ACCC suspended the operation of the previous authorisation and granted interim authorisation in substitution for that suspended authorisation, under subsection 91(2) of the Act.¹ The interim authorisation remains in place until it is revoked, the date the ACCC's final determination comes into effect, or when the application for authorisation is withdrawn.

The Conduct

- 1.7. The Ministry's objectives include to:
 - (a) integrate the Participating Providers with the Ministry's and the New South Wales Public Providers' response to the COVID-19 pandemic to provide health services in accordance with their individual capabilities and capacities;
 - (b) ensure the viability of Participating Providers during the pandemic so that they are able to resume operations once it ends;
 - (c) ensure that Participating Providers make available sufficient capacity and resources and provide the healthcare services that are required by the Ministry or the New South Wales Public Providers to respond to the COVID-19 pandemic;
 - (d) ensure that the Participating Providers provide healthcare services in accordance with standards of safety, quality and timeliness, including that patients are treated in the most appropriate setting to optimise health outcomes;
 - (e) coordinate equipment, medical supplies and staffing resources to support the Ministry's and the New South Wales Public Providers' responses to the COVID-19 pandemic;
 - (f) ensure that the Ministry and the New South Wales Public Providers obtain healthcare services and access to Participating Providers' facilities, equipment and workforce in an efficient, cost-effective and flexible manner; and,
 - (g) collaborate in an environment that fosters innovation, continuous improvement, cost efficiency, transparency and open, honest and timely communication.(the **Objectives**).

¹ See ACCC decision of 28 September 2021 available on the ACCC's Public Register.

1.8. The Ministry is seeking authorisation to:

- (a) give effect to existing agreements with Participating Providers and to negotiate and enter into further agreements with Participating Providers as required;
- (b) consistent with the Objectives, coordinate:
 - a. service and patient allocation between the Participating Providers and New South Wales Public Providers;
 - b. the restriction of the type of services provided by the Participating Providers, or their capacity to provide services; and
 - c. the sharing, and allocation of resources, including staff and medical supplies and equipment, between the Participating Providers and New South Wales Public Providers;
- (c) where it is necessary to facilitate the efficient integration and coordination of healthcare services across New South Wales and give effect to the agreements with Participating Providers, engage in coordinated group discussions and sharing information with some or all of the Participating Providers, New South Wales Public Providers; and
- (d) engage in any other conduct that is necessary to facilitate the efficient integration of healthcare services across New South Wales and give effect to the agreements with Participating Providers, at the request or direction of the Ministry or New South Wales Public Providers.

(the **Conduct**).

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

- (a) the Ministry will provide funding to the Participating Providers on the condition that they provide certain services to the Ministry and New South Wales Public Providers, including:
 - i) clinical services that are required to treat a patient referred to or transferred to the Participating Providers by or one of the New South Wales Public Providers,
 - ii) the provision of appropriate facilities, resources, supplies and other support services (including where the clinical treatment within the private facility is provided by clinicians from a New South Wales Public Provider); and
 - iii) any other COVID-19 pandemic support services that are required by the Ministry or New South Wales Public Providers and that the Participating Provider is capable of providing;
- b) the Participating Providers must maintain sufficient capacity and resources to meet the likely and anticipated volume of services required by the Ministry or New South Wales Public Providers;
- c) the Ministry or New South Wales Public Providers may require the Participating Providers to participate in service control, integration and continuity groups established by the Ministry to facilitate and share information

about the coordination of healthcare services across the Participating Providers and New South Wales Public Providers;

- d) the Participating Providers will retain operational control of their facilities (except in an emergency or a major default), however clinicians from a New South Wales Public Providers may perform clinical services at private facilities;
- e) subject to its obligations to provide capacity, resources and services to the Ministry and New South Wales Public Providers, the Participating Providers will continue to provide services to private patients in accordance with its normal business practices;
- f) public patients will not be required to pay for any cost of treatment by, or using the resources or facilities of, a Participating Provider; and
- g) to the extent that it is in the control of the Participating Provider, it must maintain the full workforce at each of its facilities and do all things reasonably necessary to ensure that it remains viable during the COVID-19 pandemic and can resume operations when the COVID-19 pandemic ends.

1.10. A copy of the application for re-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 impact of COVID-19. There is risk that Australia's health services may continue to be put under pressure in responding to increasing COVID-19 case numbers, as state and international borders re-open.

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 COVID-19.

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 COVID-19; and
- (b) the viability of private hospitals is maintained and they are able to resume operations once the COVID-19 response ends.

2.4. The Ministry 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.

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

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. On 28 September 2021 the ACCC issued a draft determination proposing to grant authorisation, with a reporting condition, for 18 months.
- 3.3. The ACCC invited submissions in response to the draft determination from a range of potentially interested parties including relevant industry associations or peak bodies, consumer groups and state and federal government.³ Two submissions were received, from the Australian Medical Association (**AMA**) and the Australian Society of Orthopaedic Surgeons (**ASOS**), responding in general terms to issues raised by this application and similar applications lodged by other jurisdictions.
- 3.4. The Australian Medical Association submits that public hospitals, in the absence of adequate funding, may be forced to shift a significant part of their workload to the private sector, which is potentially incentivised under the NPA due to the Commonwealth government's commitment to fund 50% of the costs of transferred patients. The AMA submits that, while it has been appropriate for arrangements to operate that support public hospitals to tap into the resources of the private sector to ensure patients can access care during the pandemic, this has not been without some public detriment. The AMA refers in its submission to detriments including:
 - the loss of access to training opportunities for doctors in training
 - in the case of some specialties in private practice, a significant reduction in procedural work, resulting in some private hospital operators offering contracts for the treatment of public patients that are inadequate
 - potential impacts on the viability of some private medical practices, and
 - the displacement of private patients, growing private elective surgery backlogs, and a diminished value proposition for private health insurance.
- 3.5. The AMA says that despite adverse impacts, the profession has supported the arrangements, recognising the importance of providing surge capacity where it is genuinely required. However, the AMA considers that if the transfer of public patients to the private sector becomes routine because of inadequate public hospital funding, then the public detriment will become more pervasive. The AMA submits that there is potential to significantly distort the market. To the extent that the authorisation is needed, the AMA encourages the ACCC to consider conditions to ensure the authorisation is focused on supporting surge capacity in times of genuine need while also requiring regular reporting on demand for public hospital services, available capacity and what they are doing to satisfy unmet need within their own hospitals.
- 3.6. ASOS also raises concerns regarding the prospect of changes to the balance between private and public hospital sectors. ASOS submits this would be to the detriment of patients with private health insurance, and to the growth and resourcing of Australian public hospitals. ASOS submits that orthopaedic surgeons have accepted the need to ensure plans have been made for a worst-case scenario resulting from COVID-19, but that there is now an imperative to restore the ability of private hospitals to meet the demands of privately insured patients many of whom have had surgery delayed.

³ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationregister.

ASOS is concerned that some public hospitals may have under-utilised elective surgery capacity, and that public-in-private arrangements are being extended beyond necessity. ASOS also submits that there are detriments to medical training, and that the arrangements result in additional detriments to rural specialist practice and patient care through fragmented treatment pathways.

- 3.7. ASOS submits that, should the ACCC decide to grant re-authorisation, that it do so for a further six months only and subject to a condition which provides the ACCC with the ability to revoke the authorisation should the arrangements be used for a purpose other than that sought.
- 3.8. In response, the Ministry submits that:
 - the New South Wales Government has made significant investment in the New South Wales healthcare system in response to the COVID-19 pandemic, and
 - concerns regarding the use of private facilities to treat public patients are not specific to the Conduct, and the New South Wales Government would likely enter into arrangements with private healthcare providers with or without the Conduct.
- 3.9. Public submissions by the Ministry and interested parties are available 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.
- 4.2. The Ministry 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 AA1000573 is made in the context of the ongoing impacts of COVID-19. 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 issues arising from COVID-19, the ACCC is seeking to ensure that any changes to the competitive landscape are, wherever possible, temporary.

Relevant areas of competition

- 4.4. To assess the likely effect of the Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.5. The ACCC considers that the relevant areas of competition are likely to include the supply of overnight and day hospital healthcare services to persons in the state of New South Wales, in both the private and public healthcare system. The supply of surgical and other related healthcare services to persons in the state of New South Wales is also likely to be relevant. These areas of competition encompass a diverse range of healthcare services.

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. In the future without the Conduct the ACCC considers that the New South Wales 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 still seek to meet the NPA and any other requirements implemented as part of the response to COVID-19. However, in the future without the Conduct, the contracts would not establish the cooperation and coordination mechanisms between private healthcare providers provided for by the Conduct.
- 4.8. The ACCC considers that any incentives public hospitals may have to transfer patients to private facilities beyond what is necessary will exist with or without the Conduct.

Public benefits

- 4.9. 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.*⁴

- 4.10. The Ministry submits that the Conduct will continue to result in the following public benefits:
 - enabling the Participating Providers and the New South Wales Public Providers to work together under the oversight and direction of the Ministry, to coordinate the medical response to the COVID-19 pandemic as effectively, efficiently and economically as possible;
 - reducing the likelihood that private healthcare providers operating in the State of New South Wales will have to partially or fully suspend or cease operations as a result of funding issues caused by any Commonwealth Government restrictions on their ability to provide certain surgeries;
 - providing the Ministry 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;
 - allowing the Participating Providers to be responsive to the needs of the overall healthcare system and coordinate with the New South Wales Public Providers based on clinical priorities, recognising the need for continuity and quality patient care;
 - allowing the Participating Providers to work in synchronisation with the public healthcare system and each other and prioritise capacity for COVID-19 patients, urgent care and other healthcare services;

⁴ 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.

- ensuring medical equipment (including ventilators), PPE, medical supplies and other relevant supplies are, to the extent possible, available where needed to respond to the COVID-19 pandemic;
- ensuring provision of additional intensive care facilities in response to the COVID-19 pandemic;
- ensuring the Participating Providers can remain operational, and retain staff under existing industrial arrangements during the COVID-19 pandemic; and
- ensuring the viability of Participating Providers during and following the COVID-19 pandemic which will help ensure that following the COVID-19 pandemic consumers will continue to have a choice of private or public care.

4.11. The Ministry advises that, under the previous authorisation, the authorised parties have entered into and given effect to Agreements and established a Private Hospital Coordination Group. The Ministry submits that it continues to be critical that the Ministry remains in a position to respond to the evolving COVID-19 pandemic effectively and efficiently through the coordination and maximisation of healthcare services across New South Wales, as the COVID-19 pandemic is expected to continue to place high demands on the Australian healthcare 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.

4.12. As noted in paragraphs 4.7-4.8, the ACCC considers that, without the Conduct, the New South Wales 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 issues arising from COVID-19. 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.

4.13. However, the ACCC considers that the Conduct will allow the authorised parties to coordinate the medical response to COVID-19 in New South Wales as efficiently and effectively as possible, including by facilitating the swift response to outbreaks in New South Wales. The ACCC considers that this is likely to contribute to public confidence in the response to COVID-19. The ACCC considers that the Conduct is likely to result in significant benefits to the public by supporting the timely deployment of critical resources.

4.14. 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

4.15. The ACCC considers that the Conduct is likely to deliver significant public benefit through the enhanced coordination and improved responsiveness of the New South Wales healthcare system to COVID-19.

Public detriments

4.16. 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.⁵

- 4.17. The Ministry 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.
- 4.18. The AMA and ASOS submit that reliance on public-in-private patient treatment arrangements is likely to result in public detriments (outlined at paragraphs 3.4 – 3.7 above), including by reducing opportunities for doctor training, threatening the viability of some private medical practices, and reducing the value proposition of private health insurance.
- 4.19. The ACCC notes that the response to COVID-19 continues to impact medical professionals, including private medical practices and the training of doctors. However, the ACCC notes that public-in-private patient treatment arrangements, along with any incentive which may exist to extend these beyond what is necessary to respond to COVID-19, would be likely to occur in the absence of the Conduct, in the form of bilateral arrangements between the Ministry and private providers. Therefore, any such detriments which may arise would be likely with or without the Conduct, rather than resulting from the Conduct itself.
- 4.20. While providing a mechanism for the healthcare system to coordinate its response to COVID-19, the ACCC considers that measures taken as part of the Conduct 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 COVID-19, and by public policy decisions in response to it. In that sense, many of these detriments would occur with and without the Conduct.
- 4.21. 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.
- 4.22. However, the ACCC considers that, in the current circumstances, the likely public detriment resulting 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;

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

- (c) the Conduct does not extend to any coordination or agreement between Participating Providers or between Participating Providers and the New South Wales 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 Ministry or one or more of the New South Wales Public Providers;
- (d) there will be continued transparency around the Conduct as the Ministry is required under the Conduct to notify the ACCC of additional Participating Providers, and the ACCC's condition requires the Ministry 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;
- (f) the Conduct provides a temporary response to COVID-19, the measures are not designed or intended to provide a permanent restriction on competition; and
- (g) the ACCC has the power to revoke authorisations in certain circumstances set out in s91B of the Act (for example, due to a material change in circumstances since the authorisation was originally granted).

4.23. The ACCC has considered requests by the AMA and ASOS to impose certain additional conditions on the authorisation (described at paragraphs 3.5 and 3.7 above) to ensure the Conduct is not being used beyond what is required for surge capacity in times of genuine need. Given the ACCC's view on the likely future without the Conduct (described at paragraphs 4.7 – 4.8 and 4.19 above), and its existing powers to revoke authorisations in certain circumstances (described at paragraph 4.22(g) above), the ACCC does not consider it necessary to impose these conditions. In particular, the ACCC considers that any incentive which may exist to extend public-in-private patient treatment arrangements beyond what is necessary to respond to COVID-19 would be likely to occur in any event in the absence of the Conduct.

Conclusion on public detriments

4.24. The ACCC considers that the Conduct is likely to result in some public detriment in the short term because it is likely reduce competition, including in the supply of overnight and day hospital healthcare services to particular patients in New South Wales. 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 Ministry and as a result of the transparency provided by the condition.

Balance of public benefit and detriment

4.25. The ACCC considers that the Conduct is likely to result in significant public benefits through the enhanced coordination and improved responsiveness of the New South Wales healthcare system to COVID-19.

4.26. 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 New South Wales. In the circumstances, the ACCC considers that the potential reduction in competition is limited (see paragraph 4.22 above) and is not likely to continue in the long term. The ACCC also considers that the condition will provide important transparency over the arrangements.

4.27. 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

- 4.28. The Act allows the ACCC to grant authorisation for a limited period of time.⁶ 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.
- 4.29. In this instance, the Ministry sought re-authorisation for a further two years following the expiry of the previous authorisation. Following the draft determination, the Ministry submitted it was content for authorisation to be granted for 18 months as proposed in the ACCC's draft determination.
- 4.30. ASOS submits the arrangements should only be re-authorised for six months, given the detriments ASOS considers are likely to result.
- 4.31. The ACCC notes that there is inherent uncertainty as to the period of time COVID-19 will continue to impact the health system, and that this impact is likely to differ from that on other sectors of the economy. Given the ACCC's consideration of the balance of public benefits and detriments likely to result from the Conduct, and the potential benefits in having certainty of ongoing authorisation, the ACCC has decided to re-authorise the Conduct until 24 June 2023.

5. Determination

The application

- 5.1. On 8 September 2021, the Ministry lodged an application to revoke authorisation AA1000507 and substitute authorisation AA1000573 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 Ministry seeks re-authorisation for the Conduct described at paragraph 1.8, on behalf of itself, Participating Providers and New South Wales Public Providers, for the broad purpose of maximising healthcare capacity and ensuring the New South Wales - wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare in response to issues arising from COVID-19. As part of these arrangements, the Ministry will enter into Agreements with Participating Providers and , if necessary, respond to outbreaks of COVID-19 in particular geographic regions in New South Wales.

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 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.

⁶ Subsection 91(1)

- 5.4. For the reasons outlined in this 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.
- 5.5. Accordingly, the ACCC has decided to revoke authorisation AA1000507 and substitute authorisation AA1000573 for the one revoked.

Condition of authorisation

- 5.6. The ACCC may specify conditions in an authorisation.⁷ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.⁸
- 5.7. 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.⁹
- 5.8. In this instance, the ACCC has decided to grant authorisation with the following condition:

Reporting Requirements

- (a) Subject to paragraph (b) below, the Ministry 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 Ministry is not required to provide an update.
- 5.9. 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 has decided to authorise

- 5.10. With the condition, the ACCC has decided to revoke authorisation AA1000507 and substitute authorisation AA1000573 to enable the Ministry and Participating Providers and New South Wales Public Providers to coordinate healthcare services to facilitate the most efficient and effective allocation of healthcare while responding to issues arising from COVID-19 as described in paragraph 1.8 and defined as the Conduct. The ACCC has decided to grant authorisation to the Conduct only in so far as it is for the sole purpose of dealing with the effects of COVID-19 in New South Wales.
- 5.11. Authorisation is granted in relation to Division 1 of Part IV of the Act, and sections 45, 46 and 47 of the Act.
- 5.12. The ACCC has decided to grant conditional authorisation AA1000573 until 24 June 2023.

⁷ Section 88(3) of the Act.

⁸ Section 88(3) of the Act.

⁹ Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

6. Date authorisation comes into effect

- 6.1. This determination is made on 2 December 2021. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 24 December 2021.

Attachment 1 – Participating Providers

1. Overnight facilities

- Adventist Healthcare Limited
- Alpha Pacific Hospitals Pty Ltd
- Alpha Westmead Private Hospital Pty Limited
- Alwyn Holdings Pty Ltd
- AME Hospitals Pty Ltd
- AME Properties Pty Ltd
- Armidale Hospital Pty Limited
- Australian Hospital Care (Lady Davidson) Pty Ltd
- Bondi Newco Pty Ltd
- Brisbane Waters Administration Pty Limited
- Calvary Health Care Riverina Limited
- Captia Pty Limited
- Central Coast Private Hospital Pty Ltd
- Central Lakes Hospitals Pty Ltd
- Central West Medical Group Pty Ltd
- Charlestown Private Hospital Pty Ltd
- Delmar Private Hospital Pty Ltd
- East Sydney Day Hospital Pty Ltd
- Eastern Suburbs Private Hospital Pty Ltd
- Forster Private Hospital Pty Ltd
- Gordon Clinic Pty Limited
- HCOA Operations (Australia) Pty Limited
- Health Care Corporation Pty Ltd
- Healthe Care Dubbo Pty Ltd
- Healthe Care Hironnelle Pty Ltd
- Healthe Care Lingard Pty Ltd
- Healthe Care North Gosford Pty Ltd
- Health Care Speciality Holdings Pty Ltd
- Health Care Surgical Holdings Pty Ltd
- Healthscope Operations Pty Ltd
- Herglen Pty Ltd
- Hurstville Private Pty Ltd
- Hyperbaric Health Pty Ltd
- Insight Newco Pty Ltd

- Kaizen Hospitals (Holroyd) Pty Limited
- Kaizen Hospitals (Malvern) Pty Limited
- Kogarah Private Hospital Pty Ltd
- Lakeview Private Hospital Pty Ltd
- Lifehouse Australia Limited as Trustee for the Lifehouse Australia Trust
- Macquire Health Corporation Limited
- Macquarie Hospital Services Pty Ltd
- Maitland Private Hospital Pty Ltd
- Mayo Healthcare Group Pty Ltd
- Minchinbury Community Private Hospital Pty Limited
- MQ Health Pty Limited
- Mt Wilga Pty Ltd
- NBH Operator Co Pty Ltd
- Newcastle Private Hospital Pty Limited
- North Shore Private Hospital Pty Limited
- P.O.W. Hospital Pty Limited
- Peninsula Health Care Pty Limited
- Phiroan Pty Ltd
- Pittwater Hospital Services Pty Ltd
- Presbyterian Church (NSW) Property Trust
- President Private Hospital Pty Limited
- Pruinosa Pty Ltd
- Ramsay Health Care Australia Pty Ltd
- Royal Rehabilitation Centre Sydney
- RR Private Limited
- Shellharbour Private Hospital Pty Limited
- Sidbeal Pty Ltd
- South Coast Private Pty Limited
- St John of God Hawkesbury District Health Campus Ltd
- St John of God Health Care Inc
- St Luke's Care
- St Vincent's Private Hospitals Ltd
- Sutherland Heart Clinic Pty Ltd
- Sydney Surgery Centre Pty Ltd
- The Congregation of the Religious Sisters of Charity Australia
- The Hills Clinic Pty Ltd

- The Hunter Valley Private Hospital Pty Ltd
- Trustees of the Roman Catholic Church of Diocese of Lismore
- Vexal Pty Ltd
- Waratah Private Hospital Pty Ltd
- Wesley Community Services Limited
- Westmead Rehabilitation Hospital Pty Ltd
- Wolper Jewish Hospital
- Woodose Pty Ltd

2. Day only facilities

- AAC Norwest Day Surgery Pty Ltd
- Albury Day Surgery Pty Ltd
- AMJO Medial Services Pty Ltd
- Andrew Chang Services Pty Ltd
- Angelo Tsirbas
- B.Braun Avitum Australia Pty Ltd
- Baardon Medical Services Pty Ltd
- Betryan Investments Pty Ltd
- Bredd Pty Limited
- Calvary Health Care Riverina Limited
- Campsie Day Surgery Pty Ltd
- Central Coast Surgery Pty Ltd
- Centre for Digestive Diseases Pty Ltd
- CFC Global Pty Ltd
- City West Day Surgery Pty Ltd
- Coffs Harbour Day Hospital Pty Ltd
- Cosmos Cosmetic Day Surgery Pty Ltd
- Cura Newco 5 Pty Ltd
- Dalmarte Pty Ltd
- Dee Why Endoscopy Pty Ltd
- Dr R Fitzsimons, Jennifer Arnold Pty Ltd, S.T. Chung & Co Pty Ltd, S M D M Pty Ltd, Dev Jyoti Pty Ltd
- Drs S & N Sachdev
- Duer Investments Pty Limited
- Eastern Heart Clinic Pty Limited
- Edward Sun Proprietary Limited, Richard Foster Pty Limited
- Elida Holdings Pty Ltd

- Endoscopy Service Pty Ltd
- Felpet Pty Ltd
- Fresenius Medical Care Australia Pty Ltd
- Galome Pty Ltd
- Genea Limited
- Genesis Cancer Care Victoria Pty Ltd
- Germoline Pty Ltd
- Ghabrial Medical Services Pty Ltd
- Hamilton Day Surgery Pty Ltd
- Hathorn Holdings Pty Ltd
- HCoA Operations (Australia) Pty Limited
- Healthwoods Day Surgery Pty Ltd
- Hereward Pty Ltd
- Hodgkinson, Darryl James
- Idameneo (123) Pty Ltd
- Integrated Clinical Oncology Network Pty Ltd
- IVF Australia Pty Ltd
- Kearns & Smith Eye Services Pty Ltd
- Kogarah Day Surgery Pty Ltd
- Lacular Pty Limited
- Lau, Dr A T S
- Lithgow Community Private Hospital Limited
- Liverpool Day Surgery Pty Ltd
- Luke Hazell Pty Ltd
- Madison Day Surgery Pty Ltd
- Marie Stopes International
- Mark Paul Kohout
- Miranda Day Surgery Pty Limited
- NDH Newco 1 Pty Ltd
- Newcastle Endoscopy Centre Pty Limited
- Newcastle Eye Hospital Pty Limited
- Newland Street Specialist Centre Pty Ltd
- Nexus Day Hospitals Pty Ltd
- Northern Cancer Institute (Frenchs Forest) Pty Limited
- Northern Cancer Institute Pty Ltd
- Oopchar Trading Pty Ltd

- Parramatta Eye Centre Pty Ltd
- PDS Investment Holdings Pty Limited
- Peter Anthony Martin Pty Ltd
- Port Macquarie Ophthalmic Surgery Pty Ltd
- Poruby Pty Limited
- Presmed Australia Pty Ltd
- Radiation Oncology Associates Pty Limited
- Ramsay Health Care Australia Pty Ltd
- Ranchbelt Pty Limited
- Randwick Endoscopy Centre Pty Ltd
- Regional Imaging Limited
- Riverina Cancer Care Centre Pty Ltd
- Shewhing Pty Limited
- Sight for Life Foundation
- Skin & Cancer Foundation Australia
- SMDCC Pty Limited
- South Medical Pty Ltd
- South Western Day Surgical Centre Pty Ltd
- Southern Suburbs Day Procedure Centre Pty Limited
- Southside Cancer Care Centre Pty Ltd
- Sydney Day Surgery Prince Alfred Pty Limited
- Sydney Vision Services Pty Ltd
- Takirosavi Pty Ltd
- The Eye Institute Pty Ltd
- The Surgical Chamber Pty Ltd
- The Trustees of the Roman Catholic Church for the Diocese of Lismore (St Vincent's Hospital)
- Trustee of the Baydoor Trust
- Tweed Surgicentre Pty Ltd
- VEI Services Pty limited
- Votrant No 604 Pty Ltd
- Wollongong Day Surgery Pty Ltd

3. Representative bodies

- The Australian Private Hospitals Association and
- Day Hospitals Australia.

4. **Any other person notified to the ACCC from time to time as intending to engage in the Proposed Conduct.**

Attachment 2: New South Wales Public Providers

New South Wales Public Health Organisations as defined in the *Health Services Act 1997* (NSW). This covers public health facilities, including the following:

- Albury Wodonga Health - Albury Campus
- Armidale Rural Referral Hospital
- Auburn Hospital & Community Health Services
- Ballina District Hospital
- Balmain Hospital
- Balranald Multi Purpose Service
- Bankstown-Lidcombe Hospital
- Baradine Multi Purpose Service
- Barham Koondrook Soldiers Memorial Hospital
- Barraba Multi Purpose Service
- Batemans Bay Hospital
- Bathurst Base Hospital
- Batlow/Adelong Multi Purpose Service
- Bellinger River District Hospital
- Belmont Hospital
- Berrigan War Memorial Hospital/Multi Purpose Service
- Bingara Multipurpose Service
- Blacktown Hospital
- Blayney Multipurpose Service
- Blue Mountains District Anzac Memorial Hospital
- Boggabri Multi Purpose Service
- Bombala Multi Purpose Service
- Bonalbo Hospital
- Boorowa Multi Purpose Service Hospital
- Bourke Multi Purpose Service
- Bourke Street Health Service Goulburn
- Bowral Hospital
- Braeside Hospital
- Braidwood Multi Purpose Service
- Brewarrina Multi Purpose Service
- Broken Hill Base Hospital
- Bulahdelah Community Hospital
- Bulli Hospital

- Byron Central Hospital
- Calvary Health Care Sydney Ltd
- Calvary Mater Newcastle
- Camden Hospital
- Campbelltown Hospital
- Canowindra Soldiers Memorial Hospital
- Canterbury Hospital
- Casino And District Memorial Hospital
- Cessnock District Hospital
- Cobar District Hospital
- Coffs Harbour Base Hospital
- Coledale Hospital
- Collarenebri Multi Purpose Service
- Concord Repatriation Hospital
- Condobolin District Hospital
- Condobolin Retirement Village
- Coolah Multi Purpose Service
- Coolamon-Ganmain Multi Purpose Service Hospital
- Cooma Hospital & Health Service
- Coonabarabran District Hospital
- Coonamble Health Service
- Cootamundra District Hospital
- Corowa Health Service
- Cowra District Hospital
- Crookwell District Hospital
- Culcairn Multi Purpose Service Hospital
- Cumberland Hospital
- David Berry Hospital
- Delegate Multi Purpose Service
- Deniliquin Hospital
- Denman Multi Purpose Service
- Dorrigo Multi Purpose Service
- Dubbo Base Hospital
- Dunedoo Multi Purpose Service
- Dungog Community Hospital
- Emmaville - Vegetable Creek Residential Aged Care

- Eugowra Memorial Multi Purpose Service
- Fairfield Hospital
- Finley Hospital & Community Health Care
- Forbes District Hospital
- Gilgandra Multi Purpose Service
- Glen Innes District Hospital
- Gloucester Soldiers Memorial Hospital
- Goodooga Hospital
- Gosford Hospital
- Goulburn Base Hospital
- Gower Wilson Multi Purpose Service
- Grafton Base Hospital
- Greenwich Hospital
- Grenfell Multi Purpose Service
- Griffith Base Hospital
- Gulargambone Multi Purpose Service
- Gulgong Health Service
- Gundagai District Hospital
- Gunnedah District Hospital
- Guyra Multi Purpose Service
- Hay District Hospital
- Henty Multi Purpose Service
- Hillston District Hospital
- Holbrook District Hospital
- Hornsby Ku-Ring-Gai Hospital
- Hunter New England Mental Health Service
- Inverell District Hospital
- Ivanhoe Health Service
- Jerilderie Multi Purpose Service
- John Hunter Hospital Royal Newcastle Centre
- Junee Multi Purpose Service
- Karitane
- Kempsey District Hospital
- Kurri Kurri District Hospital
- Kyogle Memorial Multi Purpose Service
- Lake Cargelligo Multi Purpose Service

- Leeton District Hospital
- Lightning Ridge Multipurpose Health Service
- Lismore Base Hospital
- Lismore Base Hospital - Riverlands Drug & Alcohol Service
- Lithgow Hospital
- Liverpool Hospital
- Lockhart & District Hospital
- Long Jetty Health Care Facility
- Lourdes Hospital & Community Services
- Macksville District Hospital
- Maclean District Hospital
- Macquarie Hospital
- Manilla Health Service
- Manning Rural Referral Hospital (Taree)
- Mercy Care Hospital - Young
- Mercy Health Service
- Merriwa Multi Purpose Service
- Milton Ulladulla Hospital
- Molong Health Service
- Mona Vale Hospital
- Moree District Hospital
- Moruya District Hospital
- Mount Druitt Hospital
- Mudgee Health Service
- Murrumbah-Harden Hospital
- Murwillumbah District Hospital
- Muswellbrook Hospital
- Narrabri District Hospital
- Narrandera Hospital
- Narromine Hospital & Community Health
- Nepean Hospital
- Neringah Hospital
- Nimbin Multi Purpose Service
- Nyngan Multi Purpose Service
- Oberon Multi Purpose Service
- Orange Health Service

- Pambula District Hospital
- Parkes District Hospital
- Peak Hill Health Service
- Port Kembla Hospital
- Port Macquarie Base Hospital
- Portland Tabulam Health Centre
- Prince Albert Tenterfield
- Prince Of Wales Hospital
- Queanbeyan District Hospital
- Quirindi Community Hospital
- Royal Hospital For Women
- Royal North Shore Hospital
- Royal Prince Alfred Hospital
- Royal Rehabilitation Hospital - Coorabel/Moorong
- Ryde Hospital
- Rylstone District Hospital
- Sacred Heart Health Service
- Scott Memorial Hospital, Scone
- Shellharbour Hospital
- Shoalhaven District Memorial Hospital
- Singleton District Hospital
- South East Regional Hospital
- Springwood Hospital
- St George Hospital
- St Joseph's Hospital
- St Vincent's Hospital (Darlinghurst)
- St Vincent's Hospital (Lismore)
- Sydney Children's Hospital
- Sydney Hospital And Sydney Eye Hospital
- Tamworth Rural Referral Hospital
- Temora Hospital
- The Children's Hospital At Westmead
- The Forensic Hospital
- The Maitland Hospital
- The Sutherland Hospital
- The Tweed Hospital

- Tibooburra Health Service
- Tingha Multipurpose Service
- Tocumwal Hospital
- Tomaree Community Hospital
- Tottenham Hospital
- Trangie Multi Purpose Health Service
- Tresillian Family Care Centre - Belmore
- Tresillian Family Care Centre - Willoughby
- Tresillian Family Care Centre - Wollstonecraft
- Trundle Multi Purpose Service
- Tullamore Multi Purpose Health Service
- Tumbarumba Multi Purpose Service
- Tumut District Hospital
- Urana Health Service
- Urbenville Health Service
- Wagga Wagga Rural Referral Hospital
- Walcha Multipurpose Service
- Walgett Health Service
- War Memorial Hospital
- Warialda Multipurpose Service
- Warren Multi Purpose Health Service
- Wauchope District Memorial Hospital
- Wee Waa Community Hospital
- Wellington Health Service
- Wentworth District Hospital
- Werris Creek Community Hospital
- Westmead Hospital
- Wilcannia Health Service
- Wilson Memorial Community Hospital
- Wingham Community Hospital
- Wollongong Hospital
- Woy Woy Public Hospital
- Wyalong Hospital
- Wyong Public Hospital
- Yass District Hospital
- Young District Hospital