



**Australian Capital Territory as represented by the ACT Health
Directorate –
Application for authorisation AA1000513
Interim authorisation decision
19 May 2020**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of application for authorisation AA1000513, lodged by the Australian Capital Territory as represented by the ACT Health Directorate (the **Directorate**) on 15 May 2020.
2. The ACCC has granted conditional interim authorisation to the following Participating Parties who are engaged, or propose to become engaged, in the Proposed Conduct:
 - the Directorate
 - Directorate public hospitals listed in **Attachment A (Territory Public Hospitals)**, and
 - specified private hospital and healthcare operators in the Australian Capital Territory (**ACT**) as listed in **Attachment A** (and their related bodies corporate), as well as any other private healthcare providers operating in the ACT which are notified to the ACCC from time to time by the Directorate (the **Participating Operators**)(together, the **Participating Parties**).
3. The Directorate seeks authorisation for the broad objective of maximising hospital capacity and ensuring ACT-wide coordination of hospital and healthcare services to facilitate the most efficient and effective allocation of these resources and services during the period of the COVID-19 pandemic (the **Pandemic**) (see application for authorisation section 3.1).
4. The ACCC has granted conditional interim authorisation for the Participating Parties to engage in the conduct described at paragraph 7 below, solely for the purpose of dealing with the effects of the Pandemic in the ACT, and subject to conditions requiring the Directorate to provide the ACCC with regular updates regarding measures implemented under the interim authorisation, and to notify the ACCC of any other person who seeks to engage in the conduct.
5. Interim authorisation commences immediately and remains in place until it is revoked, the date on which the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.

The application for authorisation

6. The Directorate has applied for authorisation to extend to itself and the Territory Public Hospitals and private hospital and healthcare operators in the ACT listed in **Attachment A**. The Directorate is also seeking authorisation for any other healthcare operators on the basis that it may enter into similar arrangements with such operators as the Pandemic evolves. The Directorate submits that it will promptly notify the ACCC of any

additional private healthcare operators that enter, or are expected to enter, into any such agreements.

7. The Directorate seeks ACCC authorisation for it and the Participating Operators to:
 - (a) negotiate and enter into agreements between the Directorate and each of the Participating Operators under which the Directorate will provide funding to the Participating Operators and those parties will make available to the Directorate resources and services to the overall response to the Pandemic in the ACT being coordinated by the Directorate (the **Agreements**, as further defined in paragraph 10)
 - (b) engage in conduct consistent with the Objectives (as defined in paragraph 11) to give effect to the Agreements, including (without limitation) by:
 - (i) engaging in coordinated group discussions regarding healthcare operations, capacity and other matters required or contemplated by the Agreements and sharing any information required or contemplated by the Agreements or otherwise reasonably necessary to facilitate the Objectives, including but not limited to:
 - (A) information about the capacity or expected capacity of a hospital to provide care to patients or patients with particular conditions; and
 - (B) information about the availability of resources required to treat patients (including, but not limited to, hospital beds, staff, medicines and equipment);
 - (ii) coordinating the following activities:
 - (A) allocation of the provision of certain services or certain patients to particular healthcare providers and / or between certain healthcare facilities (e.g. designating specific categories of patients to particular hospitals);
 - (B) restriction of certain services that can be provided at particular healthcare facilities;
 - (C) sharing of resources (including staff and medical supplies and equipment) to meet demand at particular healthcare facilities; and
 - (D) procurement and supply of medical equipment and supplies in order to minimise supply chain disruption and ensure these resources are available to healthcare facilities on an as-needs basis; and
 - (iii) engaging in any other conduct that is necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the Directorate
- (the **Proposed Conduct**).
8. In response to the Pandemic, the Australian Government imposed temporary measures restricting private healthcare providers from performing certain non-urgent elective surgeries to increase Australian healthcare providers' capacity for the expected significant increase in COVID-19 patients. Subsequently, the Australian Government announced viability for capacity guarantee arrangements to support private healthcare operators to retain capacity for responding to the Pandemic, and to secure capacity and services from private healthcare operators to support the public healthcare systems in each State and Territory.
9. Although the Federal Government announced that the restriction on certain non-urgent elective surgeries would be lifted from 27 April 2020 to allow category 2 and some important category 3 procedures to recommence across the public and private hospital

sectors,¹ private healthcare providers will still be required to make their infrastructure, equipment and services available to the public sector.

10. The Directorate is therefore in the process of implementing the above arrangements. The Directorate expects to separately enter into one or more substantially similar Agreements with each of the Private Operators. The Directorate intends the key features of the Agreements to include that:

- (a) the Directorate will provide funding to the Participating Operators on the condition that they provide, if requested, certain services to public patients, including:
 - (i) any services which the Participating Operator performs or is authorised to perform as at the commencement of the Agreement
 - (ii) each Participating Operator making available to the Directorate its specified healthcare facilities (including beds, healthcare and other services required to support the operation of each of its healthcare facilities), and
 - (iii) any other healthcare services reasonably necessary to respond to a patient who has been (or is suspected to have been) infected with the COVID-19 virus
- (b) each Participating Operator will continue to hold operational control and operate their respective healthcare facilities
- (c) each Participating Operator will be permitted to continue to provide healthcare services to private patients but only to the extent permitted by the Agreement or by the Directorate in accordance with principles to be agreed
- (d) each Participating Operator will continue to maintain all categories of employees in the ordinary course of business with the provision of secondment of staff to public healthcare facilities in certain circumstances
- (e) each Participating Operator will provide services under the Agreement on a minimum viability basis and will not be permitted to use financial viability payments to contribute to a profit, loan or debt repayments
- (f) public patients will not be required to pay any amount arising from or in connection with healthcare treatment by a Participating Operator, and
- (g) the Participating Parties will cooperate in respect of the procurement and supply of medical equipment as they relate to the services outlined in the Agreement.

11. The Directorate submits that the Objectives of the Participating Parties under the Agreements include:

- (a) to work cooperatively to ensure that the public and private hospital and healthcare sectors respond successfully to the Pandemic
- (b) to ensure the ongoing sustainability and operation of the private hospitals across the ACT during the Pandemic and that the hospitals are able to resume operations once the Pandemic response ends
- (c) to make available to the Directorate (and ACT public) the maximum amount of hospital facilities

¹ On 21 April 2020, the Prime Minister announced that, from 27 April 2020, category 2 and some important category 3 procedures can recommence across the public and private hospital sectors, please see: <https://www.health.gov.au/news/government-eases-elective-surgery-restrictions>

- (d) to ensure that hospital services are provided equitably, consistently and in accordance with clear standards (having regard, where applicable, to the circumstances presented by the Pandemic) in order to optimise health outcomes
- (e) to ensure that the Directorate obtains access to additional hospital and health services required as a result of the Pandemic at a reasonable cost and in a manner that achieves a cost-efficient solution for the Directorate, and
- (f) work together through a culture of mutual respect and cooperation, and in an environment that fosters cost efficiency, transparency and open, honest and timely communication

(the **Objectives**)

12. The Directorate further submits that:

- the Agreements are not intended to, and do not extend to, coordination or any agreement between the Participating Operators other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the Directorate, and
- to the extent that the Participating Operators retain the capacity to do so, nothing in the Agreements is intended to affect the normal competitive process vis a vis the provision of healthcare services to private patients. It is intended that once the circumstances of the Pandemic permit, the Directorate will seek to wind back and ultimately terminate the Agreements which would in due course enable each of the Participating Operators to resume providing business as usual services to private sector patients.

13. The Directorate seeks authorisation for 12 months from the date of a final determination by the ACCC, and notes that this period may need to be extended if the Pandemic and its effects continue beyond this period.

The authorisation process

14. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (Cth) (the **Act**). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether proposed conduct results in a net public benefit.

Interim authorisation

15. The ACCC may, where it considers it appropriate, grant an interim authorisation which allows Participating Parties to engage in proposed conduct while the ACCC is considering the substantive application.

16. The Directorate has requested urgent interim authorisation because it considers that in light of the restrictions on the performance of certain categories of non-urgent elective surgeries by private healthcare operators, and the planning being undertaken to prepare the ACT to respond to any increase in the Pandemic, the provision of funding to the Participating Operators and the associated coordination of the Participating Parties' services should commence immediately.

Consultation

17. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation in light of the urgent need for the Participating Parties to coordinate their response to the Pandemic as soon as possible to ensure the ACT is well placed to

respond to the public health emergency as it continues to unfold, and the compelling nature of the public benefits likely to result from the request for interim authorisation.

18. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the [ACCC's Public Register](#). Submissions on the substantive application are due by **9 June 2020**.

Conditional interim authorisation

Transparency and reporting

19. The Directorate submits that it does not consider it appropriate that authorisation be conditional upon a formal notification arrangement where the Directorate is involved in and/or has oversight and direction of the Proposed Conduct. However, the Directorate submits that it would not object to conditions being imposed of the same kind that the ACCC has imposed in respect of the coordinated healthcare arrangements being implemented in Victoria, South Australia, Queensland, Western Australia, Tasmania, New South Wales and the Northern Territory, in respect of which the ACCC has already granted conditional interim authorisation.
20. The ACCC considers that, given the breadth of the Proposed Conduct, it is appropriate for there to be sufficient transparency over the various agreements reached, strategies implemented and information shared.
21. As a result, the ACCC grants interim authorisation for the Participating Parties to engage in the Proposed Conduct (described at paragraph 7 in above) subject to the following conditions:

Condition 1 – Reporting requirements

22. The Directorate must provide regular updates to the ACCC at a frequency agreed between the Directorate and the ACCC, and provide any additional information requested by the ACCC.

Condition 2 – Notification of future Participating Parties

23. To the extent that Directorate believes it necessary or desirable for any other private healthcare operators (other than the private healthcare operators listed in **Attachment A**) to participate in the Proposed Conduct, the Directorate must notify the ACCC of the identity of those private healthcare operators.

Reasons for decision

24. In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the potentially significant increased demand on the ACT hospital system due to the Pandemic.
25. The ACCC notes that granting interim authorisation is likely to materially reduce competition in the supply of hospital services to patients whose elective surgeries are no longer subject to restrictions. However, due to the following factors, the ACCC considers it unlikely that the arrangements will significantly impact competition in the long term:
- The Proposed Conduct, and interim authorisation itself, is a temporary measure. Authorisation is only sought for 12 months from the date of the ACCC's final determination and the Proposed Conduct can be discontinued in the event that the effects of the Pandemic subside at an earlier date.
 - The Proposed Conduct is a proposal by the ACT Government, seeking to implement a directive from the Federal Government, rather than having arisen as agreements between public and private hospitals themselves.

- The reporting and notification conditions provide transparency in relation to the conduct and Participating Parties protected by the interim authorisation, and if major concerns are identified, the ACCC is able to revoke the authorisation (including substituting a new authorisation with narrower authorised conduct or imposing different conditions) or seek changes to the measures being implemented under it.
- The information that will be shared under the Proposed Conduct will predominantly be time-limited, so will lose relevance following the cessation of the Proposed Conduct.
- The interim authorisation does not extend to any price agreements between Private Operators for non-COVID-19 services.
- The Proposed Conduct does not extend to any coordination or agreement between Private Operators other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the Directorate.
- To the extent that the Participating Operators retain the capacity to do so, nothing in the Agreements is intended to affect the normal competitive process vis a vis the provision of healthcare services to private patients. Private patients with non-COVID-19 conditions, and those whose surgeries are no longer subject to restrictions may, nevertheless, have fewer options for healthcare services during the Pandemic, resulting in less competition for those services. However, it is intended that once the circumstances of the Pandemic permit, the Directorate will seek to wind back and ultimately terminate the Agreements which would in due course enable each of the Participating Operators to resume providing business as usual services to private sector patients.
- The ACCC may review its decision to grant interim authorisation at any time, including in response to feedback as the Proposed Conduct is implemented. If relevant industry participants have concerns regarding the Proposed Conduct during interim authorisation, they are encouraged to advise the ACCC.

26. There are likely to be significant public benefits in the current emergency circumstances, including:

- enabling the Participating Parties to coordinate the medical response to the Pandemic in the ACT as effectively, efficiently and economically as possible
- reducing the likelihood that private hospitals operating in the ACT will have to partially or fully suspend or cease operations as a result of funding issues caused by the Australian Government's restrictions on their ability to provide certain surgeries
- provide the Directorate 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 Operators to be responsive to the needs of the overall health system, and coordinate and work in synchronisation with the Directorate and with each other based on clinical priorities
- ensure intensive care facilities, medical equipment (including ventilators), personal protective equipment, medical supplies and other relevant supplies are available to respond to the Pandemic, and
- ensuring Participating Operators can remain operational and retain staff both during the Pandemic and following the Pandemic, to help ensure consumers will continue to have a choice of private or public care.

27. The ACCC is satisfied that the extraordinary circumstances of the COVID-19 crisis and the importance of co-ordinating the supply of healthcare services to address the crisis warrant the granting of interim authorisation.

Reconsideration of interim authorisation

28. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

Attachment A

Participating Operators

1. Specified private hospitals and healthcare operators engaged, or propose to become engaged, in the Proposed Conduct.

- (a) ACT Endoscopy
- (b) Barton Private Hospital
- (c) Brindabella Endoscopy Centre
- (d) Calvary Bruce Private Hospital
- (e) Calvary John James Hospital
- (f) Canberra Imaging Group
- (g) Canberra Microsurgery
- (h) Canberra Private Hospital
- (i) Canberra Surgicentre
- (j) Genea Canberra
- (k) Icon Cancer Centre Canberra
- (l) Marie Stopes International Canberra
- (m) Mugga Wara Endoscopy Centre
- (n) National Capital Private Hospital
- (o) The Caps Clinic
- (p) Calvary Health Care ACT Limited

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

Territory Public Hospitals

- (a) The Canberra Hospital
- (b) Calvary Public Hospital
- (c) University of Canberra Hospital