

# MinterEllison

3 February 2022

## BY EMAIL ONLY

David Hatfield  
Director | Competition Exemptions  
Australian Competition & Consumer Commission  
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Dear Mr Hatfield

1. We act for the State of South Australia as represented by the Department for Health and Wellbeing (together the **Department**).
2. On 8 December 2021, the Australian Competition and Consumer Commission (**ACCC**) issued a draft determination and interim authorisation in relation to the Department's application for authorisation in respect of the co-ordination of healthcare services in response to the COVID-19 pandemic (**ACCC Draft Determination**).
3. On 6 January 2022, the Australian Society of Orthopaedic Surgeons (**ASOS**) made a submission raising concerns regarding the private healthcare arrangements relating to COVID-19 in place across a number of States and Territories in Australia and the ACCC's draft determinations in relation to those arrangements (the **Submission**). We note that substantially the same submission was made by ASOS in respect of the corresponding re-authorisation processes in a number of other States and Territories.
4. The purpose of this letter is to provide the Department's response to the Submission, specifically in relation to South Australia.
5. The Department notes that South Australia, along with other States and Territories, is currently experiencing COVID-19 peak status (principally due to the prevalence of the Omicron variant). Daily case numbers in South Australia have been between 1,500 – 4,500 during January 2022 and, as at today's date, approximately 230 people are hospitalised with COVID-19.
6. In this context, the Department considers that the conduct for which authorisation is proposed to be granted, is proportionate, necessary and justified.
7. The Department acts in accordance with health advice and bases its decisions on a range of factors including the health advice, evidence-based best practice and associated data and modelling made available to the Department. These arrangements are necessary for the effective and continuous operation of South Australia's health system and to protect the South Australian health system from being overwhelmed as a result of surging COVID-19 cases.
8. The Submission raises a number of allegations that the state health departments are using public-in-private arrangements beyond necessity. Whilst the Submission is not necessarily directed towards any one State or Territory, the Department wishes to note, specifically, that the current public-in-private patient treatment arrangements in South Australia are a necessary response to the current stage of the pandemic.
9. The Department rejects any assertion that utilisation of private hospital capacity for public patients is "*being used for a more permanent change in the balance between public and private hospitals*

to the detriment of patients with private health insurance and to the overall detriment of the growth and resourcing of Australian public hospitals". Specifically:


- (a) The restrictions on elective surgery imposed during the pandemic are as a result of a Ministerial decision under the *Emergency Management Act 2004* (SA), which is outside of the scope of the authorisation application. In any event, the Minister has demonstrated a commitment to winding back these restrictions as and when practicable, as evidenced by the recommencement of paediatric surgery on 29 January 2022, and the staged reinstatement of elective surgery in South Australia announced by Premier Steven Marshall on 1 February 2022 which will commence on 7 February 2022.
- (b) Participation in the proposed conduct by private hospital and day surgery operators is entirely voluntary, and operates independently from the restrictions on elective surgery under the *Emergency Management Act*. At this time, 10 of 19 licensed private hospitals and 7 of 36 licensed day surgery facilities are participating in the authorisation.
- (c) As the ACCC has acknowledged in the Interim Authorisation, even without authorisation there would still be a **contractual** ability for a very similar arrangement to be achieved by the Department:

*"without the Proposed Conduct, the South Australian Government would be likely to enter into bilateral 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 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 Proposed Conduct."* (emphasis added)

10. Given the ongoing presence of COVID-19 in South Australia, and the uncertainty around the potential for surging cases in the future, it is important that the Department has the continued ability to coordinate the State-wide provision of healthcare services, in order to maximise healthcare capacity and ensure the ongoing operation of hospital facilities.
11. In the Department's view, the coordination measures put in place to date have operated as intended and have provided a clear public benefit to the people of South Australia.
12. We note that substantially the same conduct has been authorised by the ACCC in other States and Territories, and we submit such conduct is clearly supported by public health advice.
13. The Department also considers the ACCC has had (and will continue to have) appropriate oversight of these arrangements through the Department's regular reporting obligations to the ACCC. Furthermore, the ACCC has the power under the *Competition and Consumer Act 2010* (Cth) to revoke an authorisation if at a future time the public benefit no longer outweighs the public detriment arising from the authorised conduct.
14. Accordingly, the Department supports the ACCC's Draft Determination in its current form.

Please contact the writer if the ACCC has any queries.

Yours faithfully  
**MinterEllison**



Lisa Jarrett  
Partner

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OUR REF: 1295182 | KMG | LNJ