

MinterEllison

5 June 2020

BY EMAIL ONLY

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Dear Ms Philp

State of South Australia as represented by the Department of Health and Wellbeing for authorisation AA1000498 – response to request for further information

1. On 17 April 2020, the Australian Competition and Consumer Commission (**ACCC**) granted interim authorisation to the State of South Australia as represented by the Department of Health and Wellbeing (together the **Department**), together with specified private healthcare providers and public hospitals and healthcare facilities operating in the State of South Australia (together, the **Applicants**) to discuss, enter into and give effect to contracts, arrangements or understandings (**Agreement(s)**) which have the broad purpose of maximising healthcare capacity and ensuring the State-wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare during the period of the COVID-19 pandemic (the **Proposed Conduct**), (the **ACCC Interim Authorisation Decision**).
2. We refer to the ACCC's email dated 1 June 2020, setting out a request for further information.
3. The purpose of this letter is to provide a response to this request, which is set out in the **Annexure** to this letter.
4. The Annexure does not contain information that is confidential to the Department. The Department does not request any redactions from this document prior to publication on the ACCC's public register.

Please let us know if the ACCC has any questions.

Yours faithfully
MinterEllison



Kent Grey
Partner

Contact: Lisa Jarrett T: 

OUR REF: 1299572 | KMG | LNJ

Annexure 1 – Response to request for further information

1. ACCC request for further information

1.1 The ACCC has requested that the Department explain how the approach to directing Participating Operators' capacity aligns with the announcement of the Australian Health Protection Principal Committee on 15 May 2020 in relation to the restoration of elective surgery and hospital activity (the **Statement**), including in relation to the Department's determination of:

- (a) what phase a Participating Operator is in; and
- (b) the healthcare services that can be provided by Participating Operators to private patients in each phase.

2. Response to request for further information

Application of the Statement to the Department's approach

2.1 The implementation of the principles in the Statement and related guidance from the National Cabinet are being implemented in South Australia in a manner that does not differentiate between healthcare providers that have an Agreement with the Department or not. All healthcare operators are required to follow the guidance of the State in implementing the objectives of the Statement. The restoration of elective surgery in South Australia is the same for every public and private hospital and the Department is monitoring and implementing the restoration based on the principles set out in the Statement, including:

- (a) equity of access for all patients determined by clinical decision making and safety;
- (b) preservation and appropriate use of PPE;
- (c) restoration of elective surgery being consistently applied in both public and private settings; and
- (d) decisions on elective surgery being subject to local hospital capacity, jurisdiction capacity, transport availability and any other relevant quarantine arrangements in place.

2.2 Nothing in the Agreements, including the potential application of the phases to Participating Operators, restricts the implementation of the principles set out in the Statement or the restoration of elective surgery. The phases were always intended to be a fluid concept and provide guidance to the provision of services under the Agreements (and so could be applied in a way that is compatible with the Statement).

2.3 In any event, as the COVID-19 infection curve (and demand for COVID-19 related healthcare) has remained relatively flat, there has not been a need to specifically use the phases in practice.

2.4 A more detailed overview of the phases under the Agreements and their application to Participating Operators (both intended as at the time of the drafting of the Agreements and how it has played out in practice) is provided in the following section below.

Overview of the application of phases to Participating Operators

2.5 At the time the Agreements were drafted, the phases were intended to be a fluid concept and act as a guide in relation to which services may need to be provided by the Participating Operators at each stage of the COVID-19 pandemic, based on expected demand for COVID-19 related healthcare. Demand, in a worst case scenario, was expected to develop in the form of a bell curve, with each phase applying to a different section of the curve, as follows:

- (a) the maintenance phase was intended to apply to the period before any significant increase in demand;
- (b) the escalation phase was intended to apply as demand increased up the curve;

- (c) the peak/surge phase was intended to apply during the period that demand was at its highest (ie: the top of the curve); and
 - (d) the de-escalation phase was intended to apply as demand decreased.
- 2.6 The guidelines of the services at each stage also followed a bell curve approach, and were indicative of increased direction from the State during the escalation and the peak/surge phases, with a focus on servicing the healthcare backlog in the de-escalation phase. The services listed for each stage are not prescriptive and, generally speaking, covered anything that was seen as appropriate for potentially supporting the South Australian healthcare system in order to appropriately manage demand at each stage, as directed by the State.
- 2.7 Due to the fluid nature of the phases, there are no clear or set triggers which would mean that a Participating Operator would transition from one phase to another. Indeed, given the success in flattening the COVID-19 infection curve in South Australia, at no stage has a Participating Operator in practice received official notification of what phase they are in or whether they have transitioned into another phase. Rather, communications to Participating Operators have taken the form of sector teleconferences, discussions with peak bodies, contract meetings and individual phone calls and meetings as required, which provide a high level overview of the status of the demand curve and details of the planned resumptions for elective surgery in line with the requirements in the Statement.