



HERBERT
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FREEHILLS

David Hatfield
Director
Competition Exemptions
Australian Competition and Consumer
Commission
23 Marcus Clarke Street
Canberra ACT 2601
exemptions@accc.gov.au

12 November 2021
Matter 82716555
By email

Dear David

AA1000573 Application for re-authorisation – State of New South Wales as represented by the Ministry of Health (Ministry)

We act for the State of New South Wales as represented by the Ministry of Health (**Ministry**).

We refer to the submissions made by the Australian Society of Orthopaedic Surgeons (**ASOS**) dated 21 October 2021 and the Australian Medical Association (**AMA**) dated 21 October 2021 (together, the **Submissions**).

The Ministry of Health welcomes the feedback provided by the AMA and ASOS.

Investment in NSW healthcare system

The pandemic has caused significant disruption to Australian healthcare. The healthcare systems have been required to respond to the direct healthcare needs of COVID-19 patients, as well as other challenges that have arisen as a result of the pandemic disrupting the day-to-day provision of healthcare services.

While the Ministry does not intend to respond to each specific matter identified in the Submissions, the Ministry notes that the NSW Government has made significant investments in the NSW healthcare system in response to the pandemic.

In total, the NSW Government has committed more than \$4 billion to the NSW health system to manage the impacts of the COVID-19 pandemic since March 2020.

Relevance of matters to assessment of public benefits

The Ministry acknowledges, but does not accept, the submissions from the AMA and ASOS.

In any event, the matters described in each of the Submissions are not relevant to the ACCC's assessment of the public benefits of the Proposed Conduct.

In particular, as noted by the ACCC in its Draft Determination:¹

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 other requirements implemented as part of the response to the Pandemic. However, the contracts

¹ Draft Determination and interim Authorisation, AA1000507/AA1000573, dated 28 September 2021 (**Draft Determination**), [4.4].

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would not establish the cooperation and coordination mechanisms between private healthcare providers provided for by the Conduct.

To the extent that each of the Submissions raises concerns regarding the use of private facilities to treat public patients, it is evident from the ACCC's Draft Determination that such concerns are not specific to the Proposed Conduct. In particular, as stated by the ACCC, with or without the Proposed Conduct, it is likely that the NSW Government would enter into arrangements with private healthcare providers.

Duration and conditions of authorisation

The Ministry initially applied for unconditional authorisation for a 24 month period.

The Ministry is content for authorisation to be granted in accordance with the proposed duration and conditions set out in the Draft Determination. However, for the reasons set out above, the Ministry rejects the Submissions from the AMA and/or ASOS to the extent that these relate to a shorter period of authorisation or the imposition of additional conditions.

We note specifically that the ASOS Submission states that any grant of authorisation should be conditional upon the ACCC having the ability to revoke the authorisation should it come to the view that the authorised arrangements are not being used for the specific purposes that gave rise to authorisation. Such a condition is not necessary in circumstances where the power of the ACCC to revoke an authorisation is set out at section 91B of the *Competition and Consumer Act 2010* (Cth).

Yours sincerely

Patrick Gay
Partner
Herbert Smith Freehills

Philip Aitken
Senior Associate
Herbert Smith Freehills

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