

MinterEllison

3 April 2020

Urgent application for interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010 (Cth)*

Lodged by: The State of Queensland as represented by Queensland Health

Public Version

1. Summary

1.1 Background

This application is made to the Australian Competition and Consumer Commission (**ACCC**) by the State of Queensland as represented by Queensland Health.

This application is made for the benefit of the following parties who are engaged, or propose to become engaged, in the Proposed Conduct (as set out below):

- (a) the State of Queensland as represented by Queensland Health;
- (b) owners or operators of private health facilities in Queensland as listed in Annexure 1 (and their related bodies corporate), as well as any other owners or operators of private health facilities notified to the ACCC from time to time by Queensland Health (the **Private Hospital Operators**); and
- (c) each of Queensland's Hospital and Health Services, as listed in Annexure 1, (together, the **Participating Parties**).

The State of Queensland wishes to ensure the efficient, effective and economic operation of Queensland's hospitals, both public and private, during the COVID-19 pandemic (the **Pandemic**). This requires a collaborative response by public and private health facilities to deliver safe, coordinated care during the response to COVID-19 and during subsequent recovery phases.

On 25 March 2020, it was announced that the National Cabinet was temporarily suspending all non-elective surgery.¹ Only Category 1 and some exceptional Category 2 surgeries (being persons needing treatment within 30 days and 90 days, respectively) were to go ahead until further notice. The intent of the National Cabinet was stated to be a need to act to preserve resources, including protective equipment, to prepare public and private health services for their role in the Pandemic. As announced on 26 March 2020, the suspension commenced at 11:59pm on 1 April 2020.² The National Cabinet has also agreed that states and territories will continue to work with private hospital groups to ensure they can support efforts to protect Australians against coronavirus.

On 30 March 2020, the Minister for Health and the Minister Assisting the Prime Minister for the Public Service and Cabinet wrote to private health facilities in relation to the Australian Government's intention to provide a viability for capacity guarantee for the private hospital sector during the Pandemic. A fundamental principle of this guarantee was stated to be that private hospitals agree to integrate with state and territory health systems for use in the COVID-19 response.

The arrangements the subject of this application include parts of the COVID-19 partnership agreements between Queensland Health and owners or operators of private hospitals in Queensland, and the practical measures necessary to ensure those agreements are effectively implemented.

1.2 Application for urgent interim and final authorisation

This application is made to the ACCC for urgent interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) by Queensland Health.

In light of the Pandemic, and projected increase in the spread of COVID-19, Queensland Health requests the ACCC grant interim authorisation to the Proposed Conduct (defined below in section 3 of this application) on an urgent basis to ensure that the Participating Parties can work together to coordinate their response to the Pandemic as soon as possible to ensure Queensland is well placed to respond to the public health emergency as it continues to unfold.

¹ Prime Minister of Australia, <https://www.pm.gov.au/media/elective-surgery> 25 March 2020.

² Prime Minister of Australia, <https://www.pm.gov.au/media/national-cabinet-update> 26 March 2020

2. Parties to the Proposed Conduct

2.1 Applicant for authorisation

(a) The State of Queensland as represented by Queensland Health

Address (registered address)	Contact person	Description of business activities
147-163 Charlotte Street, Brisbane, Queensland + 61 7 3328 4811 ABN 66 329 169 142	Marcus Payne Chief Legal Counsel [REDACTED] [REDACTED] [REDACTED]	Queensland Health, together with each Hospital and Health Service, is responsible for the provision and management of public health services in Queensland under the <i>Hospital and Health Boards Act 2011</i> (Qld), and as part of those responsibilities it may obtain various services from private providers.

2.2 Email address for service of documents in Australia

Contact: Kathryn Finlayson, Partner, MinterEllison
Email address: [REDACTED]
Telephone: T [REDACTED]
M [REDACTED]

2.3 Details of other persons who are engaged, or proposed to become engaged, in the Proposed Conduct

In addition to Queensland Health, the other persons who are engaged, or who propose to engage in the Proposed Conduct are:

- (a) the Private Hospital Operators, being owners or operators of private health facilities in Queensland as listed in Annexure 1 (and their related bodies corporate), as well as any other owner or operator of a private health facility operating in Queensland as notified to the ACCC by Queensland Health from time to time;
- (b) each of Queensland's Hospital and Health Services, as listed in Annexure 1,

Details of the other persons who are engaged, or proposed to become engaged, in the Proposed Conduct are included in Annexure 1 to this application.

Queensland Health anticipates that as the Pandemic evolves, the State may enter into similar arrangements to those contemplated by this application with additional owners or operators of private health facilities in Queensland. Queensland Health will promptly notify the ACCC of any additional owners or operators of private health facilities that enter, or are expected to enter into, any such agreements and should therefore be added to Annexure 1 as parties who may also be engaged, or become engaged, in the Proposed Conduct.

3. The Proposed Conduct

3.1 Description of and rationale for the Proposed Conduct

The State of Queensland considers an urgent and coordinated response is required to deal with the Pandemic. Queensland Health expects that during the Pandemic there will be an increased demand for hospital care in Queensland.

In Queensland, Queensland Health is responsible for the overall management of public sector health services, including State-wide planning, monitoring performance of the Hospital and Health Services and issuing binding health services directions to the Hospital and Health Services.

To achieve this objective, Queensland Health is seeking to enter into separate agreements with each of the Private Hospital Operators in respect of certain facilities owned or operated by each Private Hospital Operator in Queensland (**Facilities**) to:

- (a) ensure ongoing health care capacity and capability in Queensland during the Pandemic; and
 - (b) alleviate pressure on the public sector health system,
- (the **Agreements**).

It is intended that implementation of the agreements will be managed by Queensland's Hospital and Health Services, which are statutory bodies established by the *Hospital and Health Boards Act 2011* (Qld) as the principal providers of public sector health services. A Hospital and Health Service represents the State and has all the privileges and immunities of the State.³ Each Hospital and Health Service is independently and locally controlled by a Hospital and Health Board and exercises significant responsibilities at a local level including controlling financial management of the Service and the management of the Service's land and buildings.

The Hospital and Health Services set out in Annexure 1 to this application are involved in Queensland's response to the Pandemic and will be involved in implementation of the agreements between Queensland Health and the Private Hospital Operators.

Queensland Health's objectives and guiding principles in entering into the Agreements include:

- (a) coordinating the response of public and private health facilities in Queensland to deliver safe, coordinated care during the response to the Pandemic and during subsequent recovery phases;
 - (b) ensuring the ongoing sustainability and operation of the Facilities (including maintenance of beds, workforce and the operations at the Facilities and the health services business conducted at the private health facilities);
 - (c) ensuring that the Private Hospital Operators make available their Facilities (including the beds, workforce and the operations of the health services business conducted at those private health facilities) to Queensland Health;
 - (d) ensuring the equitable procurement, supply and distribution between hospitals of personal protective equipment, medical equipment, medical supplies and other relevant supplies;
 - (e) ensuring that the Private Hospital Operators provide equitable access to hospital services for public patients at a fair and reasonable cost to the State of Queensland and on the basis that the Operator provides the Services on a purely cost recovery and non-profit basis,
- (the **Objectives**).

Queensland Health intends the key features of the Agreements to include that:

- (a) Queensland Health will provide funding to the Private Hospital Operators on condition that they provide certain services to public patients, including:
 - (i) any services which the Private Hospital Operators performs or is authorised to perform immediately prior to the commencement of the Agreement;
 - (i) each Private Hospital Operator making available to Queensland Health its specified healthcare facilities (including beds, healthcare and other services required to support the operation of each of its healthcare facilities); and

³ *Hospital and Health Boards Act 2011* (Qld), section 18.

- (ii) 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 Private Hospital Operator will continue to hold operational control and operate their respective healthcare facilities;
- (c) each Private Hospital Operator will be permitted to continue to provide healthcare services to private patients but only to the extent permitted by the Agreement or by Queensland Health, and only where this will not diminish the Private Hospital Operator's ability to perform the services under the Agreement;
- (d) Queensland Health will oversee and direct a 'Private Health Facility Coordination Group' which is a group which will have a representative from some or all of the Private Hospital Operators and which will be the forum for coordinating resources between the Private Hospital Operators and one or more of the Hospital and Health Services;
- (e) each Private Hospital 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;
- (f) each Private Hospital Operator will provide services under the Agreement in return for specified payments from Queensland Health, which will not include an allowance for profit;
- (g) public patients treated by a Private Hospital Operator will not be required to pay any out of pocket expenses except to the extent those expenses would be charged to the patient in the public system; and
- (h) the Private Hospital Operators will cooperate in respect of the procurement and supply of medical equipment and supplies.

The Agreements are not intended to, and do not extend to, coordination or any agreement between Private Hospital Operators other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of Queensland Health or one or more of the Hospital and Health Services. Similarly, to the extent that Private Hospital 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, Queensland Health will seek to wind back the arrangements with the Private Hospital Operators to enable each of the Private Hospital Operators to resume providing business as usual services to private patients.

Queensland Health seeks ACCC authorisation for it and the other persons who propose to engage in the Proposed Conduct to:

- (i) negotiate and enter into the Agreements;
- (j) engage in conduct consistent with the Objectives to give effect to the Agreements, including (without limitation) by:
 - (ii) 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 other equipment);

- (iii) 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 (eg 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
 - (iv) 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 Queensland Health or one or more of the Hospital and Health Services,
- (the **Proposed Conduct**).

Queensland Health and the Hospital and Health Services wish to have an open and collaborative working relationship with the Private Hospital Operators based on mutual respect and cooperation, and in an environment that fosters cost efficiency, transparency and open, honest and timely communication.

The applicant appreciates that the nature of this application, and the urgency with which it is made means that the ACCC may wish to understand or receive further information about the implementation of the Proposed Conduct from time to time. The applicant does not consider it appropriate that authorisation be granted conditional upon a formal notification arrangement in circumstances where Queensland Health will be involved in, and / or have oversight and direction of the Proposed Conduct.

The applicant is willing to provide updates to the ACCC on the implementation of the Proposed Conduct from time to time upon request, consistent with its role as a public body responsible for the provision and management of public health services in Queensland.

3.2 Provisions of the CCA which might apply to the Proposed Conduct

The relevant provisions of the CCA which may apply to the Proposed Conduct include:

- (a) making and or giving effect to a contract, arrangement or understanding that may include a cartel provision (Division 1 of Part IV);
- (b) making and or giving effect to a contract, arrangement or understanding that has the purpose or would have the effect, or likely effect, of substantially lessening competition (section 45(1)(a) and (b));
- (c) engaging with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition (section 45(1)(c));
- (d) a corporation that has a substantial degree of power in a market engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition (section 46(1)); and / or
- (e) engaging in the practice of exclusive dealing (section 47(1)).

3.3 Term for which authorisation sought and reasons for seeking this period of time

Queensland Health seeks authorisation for a period of 12 months from the date of final determination of the application by the ACCC, being its best present estimate of the time

necessary to deliver safe, coordinated care during the response to the Pandemic and during subsequent recovery phases.

Queensland Health notes that the ACCC has power to revoke the authorisation under section 91B of the CCA should there be a material change in circumstances prior to that time.

3.4 Names of persons or classes of persons who may be impacted by the Proposed Conduct and details of how / why they might be impacted

The following classes of persons may be impacted by the Proposed Conduct:

- (a) persons in Queensland who require medical care during the COVID-19 pandemic;
- (b) Private Hospital Operators' staff, who may be:
 - (i) seconded to a public hospital, depending on demand at particular hospitals from time to time; and
 - (ii) re-deployed to different organisations, locations and roles within the healthcare sector for the purpose of assisting with Australia's response to the COVID-19 pandemic;
- (c) suppliers and potential suppliers of medical equipment and medical supplies and services to one or more of the Hospital and Health Services and / or the Private Hospital Operators.

4. Public benefit

ACCC authorisation permitting Queensland Health, the Private Hospital Operators, the Hospital and Health Services and other relevant parties to engage in the Proposed Conduct will facilitate a coordinated response to the Pandemic.

Queensland Health considers that the Proposed Conduct will result in significant public benefits, including, in particular, to:

- (a) enable Queensland Health, the Hospital and Health Services and the Private Hospital Operators to work together to coordinate the medical response to the Pandemic in Queensland as effectively, efficiently and economically as possible;
- (b) reduce the likelihood that Private Hospital Operators operating in Queensland will have to partially or fully suspend or cease operations as a result of funding issues caused by the Commonwealth Government's restrictions on their ability to provide certain surgeries;
- (c) provide Queensland Health service capacity oversight to allow distribution of service delivery to meet periods of peak demand and minimise patient transfers between Facilities which will allow patients to receive the best possible care available at the time;
- (d) allow the Private Hospital Operators to be responsive to the needs of the overall health system and coordinate with the relevant local Hospital and Health Services based on clinical priorities, recognising the need for continuity and quality patient care;
- (e) allow the Private Hospital Operators to work in synchronisation with the public health system and each other and prioritise capacity for COVID-19 patients, urgent care and other health services;
- (f) ensure medical equipment (including ventilators), personal protective equipment, medical supplies and other relevant supplies are, to the extent possible, available where needed to respond to the Pandemic;
- (g) ensuring provision of additional intensive care facilities in response to the Pandemic;
- (h) ensure Private Hospital Operators can remain operational, and retain staff under existing industrial arrangements during the Pandemic; and
- (i) ensure the viability of Private Hospital Operators which will help ensure that following the Pandemic consumers will continue to have a choice of private or public care.

5. Public detriment

Queensland Health is not aware of any public detriments.

The Applicant submits that authorising the Proposed Conduct will result in a significant net public benefit because:

- (a) the Proposed Conduct will ensure that medical services required to treat COVID-19 and non-COVID-19 related cases are co-ordinated in an efficient and equitable manner and will assist to achieve the Objectives; and
- (b) the Proposed Conduct will not continue beyond the period of the Pandemic, meaning any anti-competitive impacts of the Proposed Conduct will cease in the event that the effects of the Pandemic subside.

6. Contact details of relevant market participants

Please see section 2.3 above.

7. Declaration by Applicant

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).



Signature of authorised person

Director-General, Queensland Health

Office held

Dr John Wakefield PSM

(Print) Name of authorised person

This 3rd day of April 2020

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.

Schedule 1

Participating Parties

1. Owners or operators of private health facilities in Queensland

- Healthscope Operations Pty Ltd
- Ramsay Health Care Investments Pty Ltd
- St Vincent Private Hospital Ltd
- Mater Misericordiae Ltd
- UnitingCare Queensland
- UnitingCare Health
- Healthe Care Specialty Holdings Pty Ltd
- Cura Day Hospitals (Operations) Pty Ltd
- A Chetty Pty Ltd
- Australian Hospital Care (Pindara) Pty. Ltd
- Bhaskar Chakravarty Pty Ltd
- BPDH OPERATING CO. PTY LTD
- Brisbane Endoscopy Services Pty. Ltd.
- Brisbane Medical Pty Ltd
- Bundaberg Friendly Society Medical Institute Limited
- Clifton Co-Op Hospital Ltd
- Eastern Endoscopy Centre Pty Ltd
- Far North Day Hospitals Pty Ltd
- Fresenius Medical care Australia Pty Ltd
- Fresenius Medical care Australia Pty Ltd
- Hervey Bay Surgical Centre Pty Ltd
- Hospital Corporation Australia Pty Ltd
- Integrated Clinical Oncology Network Pty Ltd
- Ipswich Hospice Care Ltd
- Lee Lenton Medical Pty Ltd
- Logan Endoscopy Services Pty Ltd
- Mackay Specialist Day Hospital Pty Limited
- Marie Stopes International AL
- MB Healthcare Pty Ltd
- MB Healthcare Pty Ltd (Montserrat)
- Miami Private Hospital Pty Ltd
- Moreton Eye Group (Renew Vision Pty Ltd)
- N.A. Kratzmann & Sons Pty Ltd
- Nambour Day Surgery Pty Ltd
- Northside Endoscopy Services Pty Ltd
- Pindara Day Procedure Centre Pty Ltd
- Queensland Eye Institute Foundation
- Rehabilitation Medicine Australia Pty Ltd
- Robina Day Surgery Pty Ltd
- Roderick Street Day Hospital Pty Ltd
- South Bank Medical Group Ltd
- South East Queensland Hyperbaric Pty Ltd
- Tasman Health Care Pty Ltd
- The Corporation of the Order of the Canossian Sisters
- The Trustee for Cairns Haematology and Oncology Group Unit Trust
- The Trustee for Southport Day Hospital Unit Trust
- The Trustee for SWC Unit Trust
- Toowoomba Hospice Association Inc.
- Townsville Day Surgery Pty Ltd

- Vei Services Pty Limited
 - Vision Centre Day Surgery Pty Ltd
 - Wesley Mission Queensland
 - Windermere House Pty Ltd
 - Other Private Hospital Operators
- 2. Any other owner or operator of a private health facility in Queensland who seeks to engage in conduct the subject of the application providing the ACCC is notified in writing by Queensland Health**
- 3. Each of Queensland's Hospital and Health Services**
- Cairns and Hinterland Hospital and Health Service
 - Central Queensland Hospital and Health Service
 - Central West Hospital and Health Service
 - Children's Health Queensland Hospital and Health Service
 - Darling Downs Hospital and Health Service
 - Gold Coast Hospital and Health Service
 - Mackay Hospital and Health Service
 - Metro North Hospital and Health Service
 - Metro South Hospital and Health Service
 - North West Hospital and Health Service
 - South West Hospital and Health Service
 - Sunshine Coast Hospital and Health Service
 - Torres and Cape Hospital and Health Service
 - Townsville Hospital and Health Service
 - West Moreton Hospital and Health Service
 - Wide Bay Hospital and Health Service