

# Urgent application for interim, and revocation and substitution, under section 88(1) of the *Competition and Consumer Act 2010 (Cth)*

## 1. Applicants

The Australian Capital Territory, the body politic established by section 7 of the Australian Capital Territory (Self-Government) Act 1988 (Cth), as represented by the ACT Health Directorate

### 1.1 Contact person's name, position, telephone number, and email address

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### 1.2 Business activities

The ACT Health Directorate and Canberra Health Services provides a range of health services to the people of the Australian Capital Territory. The ACT Health Directorate sets health policy; plans the delivery of health services and manages the ACT Local Hospital Network; while ensuring these services meet community needs. The ACT Health Directorate also funds a range of non-Government organisations to provide vital healthcare services to the people of the ACT and surrounding region.

## 2. Background

This application applies to the following parties, who are engaged, or propose to become engaged, in the Proposed Conduct:

- (a) the Territory;
- (b) Territory public hospitals listed in Schedule 1 (**Territory Public Hospitals**); and
- (c) specified private hospital and healthcare operators in the Australian Capital Territory (**ACT**) as listed in Schedule 1 (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 Territory (the **Participating Operators**),

(together, the **Participating Parties**).

The existing authorisation is due to expire 30 September 2021.

### 2.1 Application for revocation and substitution of a replacement authorisation

Authorisation number: AA1000513

Expiry of AA1000513: 30 September 2021

Conditional authorisation is granted until 30 September 2021. The Territory is requesting interim authorisation while the application is being processed.

In addition to the Territory, the other persons who are engaged, or who propose to engage in the Proposed Conduct are the Participating Operators, being specified private hospital and healthcare operators operating in the ACT as set out in Schedule 1 (and their related bodies corporate), as well as any other private healthcare operators notified to the ACCC from time to time by the Territory.

The Territory anticipates that as the Pandemic evolves, the Territory may enter into similar arrangements to those contemplated by this application with additional private healthcare operators.

The Territory will promptly notify the ACCC of any additional private operators that enter, or are expected to enter into, any such agreements and should therefore be added to Schedule 1 as parties who may also be engaged, or become engaged, in the Proposed Conduct.

## 2.2 Request for interim authorisation

The ACT understands that the ACCC will not likely be in a position to issue a Final Determination in relation to this application prior to the expiration of the Existing Authorisation on 30 September 2021. Accordingly, the ACT seeks interim authorisation to ensure it has uninterrupted legal protection to engage in the proposed conduct (defined below in section 3.3 of this application) prior to the Final Determination being handed down by the ACCC.

The ACT considers that interim authorisation is required to ensure Participating Parties are able to continue to discuss and collaborate as required after the expiry of the Existing Authorisation to enable the Participating Parties to respond expeditiously to evolving situations that may arise as a result of the ongoing Pandemic.

The need for an Interim Determination is critical given the current COVID outbreak in the ACT. An Interim Determination will allow the ACT to continue to provide this coordinated response, the Participating Parties request that the ACCC grant interim authorisation prior to 30 September 2021.

## 3. **The Proposed Conduct**

The National Partnership on COVID-19 Response (NPCR) was agreed to on Friday, 13 March 2020. The NPCR was subsequently amended and agreed to on Tuesday, 14 April 2020 incorporating private hospital viability assistance.

The objective of the NPCR is to provide financial assistance for the additional costs incurred by state health services in responding to COVID-19 as well as to ensure the financial viability of private hospitals during the COVID-19 pandemic. In addition to the NPCR, the ACT Health Directorate (ACTHD) continued to engage private hospital providers to retain capacity of these facilities to respond to the COVID-19 pandemic, as required.

The NPCR, and related guidance from the Administrator of the National Health Funding Pool (the Administrator), outlines the engagement of private hospitals by state and territory governments to ensure public and private health sectors work together to respond to

COVID-19 by sharing resources. It also assists private hospitals to maintain the viability of the private health sector during the Pandemic.

Whilst not the intention of the NPCR, in 2020 it was determined that the NPCR arrangements had the potential to force a price that could be seen to promote anticompetitive behaviour. Accordingly, the ACTHD applied to ACCC to undertake this engagement with private hospital providers without the behaviour being anticompetitive, and this authorisation was granted and remains in place until 30 September 2021. ACTHD undertook this in line with all states and territories submitting applications to ACCC.

ACTHD is now applying to ACCC for revocation and substitution so that the authorisation can be extended for 12 months from the date of ACCC's final determination. This is necessary considering the growing COVID-19 outbreak in the ACT. The ACT was declared a COVID-19 hot spot by the Australian Government on 12 August 2021.

The Territory needs to prepare for any potential, significant increase in the number of patients that will require hospital treatment, including treatment in intensive care units, because of the current COVID-19 outbreak in the ACT.

As a result of the Pandemic, the Territory expects that there will be an increased demand for hospital care in the ACT. It is not yet clear how the Pandemic will develop and at what point or in what way COVID-19 may cause demand spikes for hospital treatment in the ACT.

Regardless of how the spread of COVID-19 develops in the ACT, it is critical to the Territory's response that the maximum resources (both workforce and physical infrastructure) are available, and that all hospitals (both public and private) remain open and can coordinate their services to facilitate appropriate access to their facilities and the highest possible level of care for each individual patient.

To maximise the overall capacity of the ACT healthcare system to respond to the Pandemic, it is intended that the Territory will separately enter into one or more substantially similar agreements with each of the Participating Operators (the Agreements).

Under the Agreements, the Territory will provide funding to the Participating Operators and those parties will make available to the Territory resources and services to the overall response to the Pandemic in the ACT being coordinated by the Territory. By way of example, this will include coordinating future forecasts relating to demand (e.g. for medical facilities, staff, visiting medical officers, medical supplies and other resources) and the allocation of services to ensure fair access (and in certain cases priority access to certain patients such as elderly or vulnerable or people in rural or remote areas).

Additionally, the Agreements will also enable those private hospitals to access a financial viability guarantee payment, funded by the Commonwealth, should the Territory's call on their resources have an adverse impact on them financially. The financial viability payment (FVP) is subject to eligibility requirements determined by the Commonwealth under the NPCR. Particularly only facilities that remain critical to COVID-19 response planning are eligible to access the FVP.

### 3.1 The Objectives

The objectives of the Territory and the Operator in entering into this Agreement are (Objectives):

- (a) to work cooperatively to ensure the continued successful response to the COVID-19 pandemic;
- (b) to ensure the ongoing sustainability and operation of the Facility (including maintenance of the Facility, beds, workforce and the operations at the Facility and the health services business conducted at the Facility) during the COVID-19 pandemic;
- (c) for the Operator to make available during the Term, the Facility (including the beds, workforce, assets and/or resources, and the operations of the health services business conducted at the Facility) to the Territory, the Territory's health services and patients nominated by the Territory or the Territory's health services in priority to admitting its own patients, in each case in exchange for payment by the Territory of amounts set out in this Agreement;
- (d) to ensure that the Operator provides the Services in accordance with the applicable Standards (having regard, where applicable, to the circumstances presented by the COVID-19 pandemic), that will facilitate the provision of equitable access to the Services for Public Patients, including:
  - (i) that where possible Public Patients are treated in the most appropriate clinical setting to optimise health outcomes; and
  - (ii) subject to availability of staff, Medical Officers and appropriate resources, provision of a 24 hours a day, 7 days a week, referral service for acutely sick patients or patients with complicated healthcare requirements;
- (e) to ensure that the Territory obtains the Services at a fair and reasonable cost to the Territory, in a manner which achieves a value for money solution for the Territory and on the basis that the Operator provides the Services on a purely cost recovery and non-profit basis; and
- (f) to achieve the above-mentioned Objectives through a culture of mutual respect and cooperation, and in an environment that fosters cost efficiency, transparency, and open, honest, and timely communication.

### 3.2 The Agreements

The Territory intends the key features of the Agreements to include that:

- (a) the Territory 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; and
  - (ii) each Participating Operator making available to the Territory 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 Territory 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.

In addition to the above key features, the Agreements will include eligibility criteria for the FVP, including responsibilities as outlined in the NPCR. In particular, the Participating Operator must perform its obligations arising from or in connection with this Agreement or the Facility in accordance with the Operator's normal business practices and in a manner which is bona fide, non-speculative, on arm's length terms and reflects customary market practices.

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 Territory.

Similarly, 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 Territory 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.

### 3.3 The Proposed Conduct

The Territory seeks ACCC authorisation for it and the Participating Operators to:

- (a) negotiate and enter into the Agreements; and
- (b) engage in conduct consistent with the Objectives 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 Territory, (the **Proposed Conduct**).

(iv)  
3.4 Changes to the conduct between the Existing Authorisation and the New Authorisation

There are no changes to the conduct between the existing authorisation and the new authorisation.

The application for revocation and substitution is only being made to allow the prompt re-authorisation of the current conduct, to ensure the conduct is authorised for another 12 month period from the date re-authorisation is granted.

The relevant provisions of the Competition and Consumer Act 2010 (Cth) (the Act) which might apply to the proposed conduct, ie:

- cartel conduct (Division 1 of Part IV)
- contracts, arrangements or understandings that restrict dealings or affect competition (s. 45)
- concerted practices (s. 45)
- secondary boycotts (sections 45D, 45DA, 45DB, 45E, 45EA)
- misuse of market power (s. 46)
- exclusive dealing (s.47)
- resale price maintenance (s. 48) and/or
- a dual listed company arrangement (s. 49)

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)).

### 3.5 The rationale for the proposed conduct

The Proposed Conduct is a critical component of the Territory's response to the Pandemic. During a period of unprecedented demand, maximising capacity and the Territory-wide coordination of healthcare services will facilitate the most efficient and effective allocation of these resources and services, which is clearly in the interests of the ACT public (and the Australian public more generally).

As at the date of this application<sup>1</sup> for revocation and substitution, there were 94 active cases in the ACT and two in neighbouring Queanbeyan, NSW. The extent of the demand for hospital services in terms of volume and duration is not known.

### 3.6 The term of authorisation sought and reasons for seeking this period.

It is not clear how long the Pandemic will last, however authorisation for the Proposed Conduct is sought for a period of 12 months from the date of a final determination by the ACCC. It is possible that if the Pandemic lasts for a longer period of time this period may need to be extended.

The Territory notes that the ACCC has the power to revoke the authorisation under section 91B of the CCA should there be a material change in circumstances prior to that time (e.g. the effects of the Pandemic subside).

### 3.7 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 the ACT and surrounding regions who require medical care during the Pandemic;
- (b) healthcare workers, who may be seconded / allocated or contracted to different hospitals from where they normally work, depending on demand at particular hospitals from time to time; and
- (c) suppliers and potential suppliers of medical equipment, medical supplies and / or medical services to the Participating Parties.

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<sup>1</sup> <https://www.covid19.act.gov.au/updates/act-covid-19-statistics> as at 12:36pm AEDT, 20 Aug 2021

#### 4. **Public benefit**

In September 2020, ACCC authorisation permitting the Participating Parties to engage in the Proposed Conduct was granted on the basis that it would help facilitate a coordinated response to the Pandemic.

During the period 30 September 2020 to current date, the authorisation resulted in public benefit, as it allowed Participating Operators to remain viable to assist the Territory with undertaking additional elective surgeries in 2020-21, to address patients who had become overdue during earlier restrictions on surgery. Continued viability of the Participating Operators also provided potential capacity to the Territory should there have been an outbreak over the period.

The Territory considers that the Proposed Conduct will continue to result in significant public benefits, including, in particular, to:

- (a) enable the Participating Parties to work together to coordinate the medical response to the Pandemic in the ACT as effectively, efficiently and economically as possible;
- (b) provide the Territory 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;
- (c) allow the Participating Operators to be responsive to the needs of the overall health system and coordinate with the Territory based on clinical priorities, recognising the need for continuity and quality patient care;
- (d) allow the Participating 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;
- (e) 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;
- (f) ensuring provision of additional intensive care facilities to public patients in response to the Pandemic; and
- (g) enable those Participating Operators to access a financial viability guarantee payment, funded by the Commonwealth, should the Territory's call on their resources have an adverse impact on them financially.

## 5. **Public detriment**

The Territory is not aware of any public detriments.

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

- (a) without the Proposed Conduct, there is a higher chance that the ACT healthcare system may have insufficient capacity to provide services during any possible peak periods of the Pandemic;
- (b) 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
- (c) the Proposed Conduct will not continue beyond the period of the Pandemic, meaning authorisation is unlikely to materially alter the competitive dynamics in any market, and markets will be able to substantially return to their current state once the Pandemic subsides, if not before, to the extent that the Territory's public hospitals can manage demand and the Commonwealth lifts the temporary restrictions on the ability of private hospital and healthcare operators to perform certain categories of non-urgent surgeries.

## 6. **Conditions**

On 19 May 2020, the Australian Competition and Consumer Commission (ACCC) granted interim authorisation to the Australian Capital Territory as represented by the ACT Health Directorate (the Directorate). The ACCC Interim Authorisation Decision was subject to the following conditions:

### **Condition 1 – Reporting Requirements**

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 parties**

To the extent that the Directorate believes it necessary or desirable for any other private healthcare operators (other than the private healthcare operators listed in Attachment 1) to participate in the Proposed Conduct, the Directorate must notify the ACCC of the identity of those private healthcare operators.

- (d) ACT Health Directorate reported on Condition 1 on 5 June 2020.
- (e) ACT Health Directorate reported on both Conditions on 19 June 2020.

On 13 August, the ACCC granted authorisation to the ACT subject to the same conditions as those under the Interim Authorisation granted on 19 May 2020.

Upon clarification from ACCC on 28 August 2021 at the request of ACT Health Directorate, ongoing reporting requirements pursuant to Condition 1 of the interim authorisation and final authorisation are that the ACT Health Directorate will provide an update to the ACCC in

the event that it enters into any new Agreements with private hospitals and healthcare operators<sup>2</sup>.

**7. Contact details of relevant market participants**

Please see section 3.7 above.

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<sup>2</sup> We request that this change be noted.

**8. 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 the 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



\_\_\_\_\_  
Rebecca Cross

This 12th day of September 2021

*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 Operators**

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

- (a) Calvary Bruce Private Hospital Limited (Trading as Calvary Bruce Private Hospital)
- (b) Calvary Private Health Care Canberra Limited (Trading as Calvary John James Hospital)
- (c) Canberra Private Hospital Pty Ltd
- (d) Healthscope Operations Pty Ltd (Trading as National Capital Private Hospital)

**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 Territory**

### **Territory Public Hospitals**

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