

MinterEllison

27 August 2021

Application for interim authorisation and revocation and substitution under section 91C(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**).

It seeks revocation of Authorisation number AA1000493-1 (**Existing Authorisation**) granted by the ACCC effective 30 September 2020, and substitution of the authorisation described below in sections 4 and 5 of this application (**New Authorisation**).

The State of Queensland wishes to ensure the efficient, effective and economic operation of Queensland's hospitals, both public and private, during the continued 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.

At the outset of the Pandemic in 2020, the National Cabinet agreed that states and territories would work with private hospital groups to ensure they could 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.

Over a year later as the Pandemic continues to unfold, the State of Queensland considers that the integration of private hospitals with the State's health system is still a vital element of its response to COVID-19. In particular, Queensland Health is conscious that novel threats and challenges may keep arising as new variants of COVID-19 emerge, necessitating urgent responses and disrupting the delivery of health services. This is evidenced by the five lockdowns that have taken place in Queensland since the beginning of the Pandemic, particularly the most recent 'snap' lockdown in south east Queensland that resulted after one case of the Delta variant caused multiple clusters and resulted in approximately 12,000 people in quarantine. Despite the effectiveness of the lockdown in containing the spread of the Delta variant, the applicant notes that the Queensland health system nevertheless experienced appreciable strain due to the quarantining of a significant proportion of the surgical community, nursing and other medical staff.

To this end, 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 authorisation and revocation and substitution

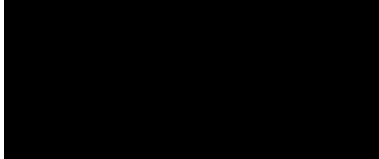
This application is made to the ACCC for interim authorisation and revocation and substitution under section 91C(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) by Queensland Health.

In light of the continuation of the Pandemic, and the sustained threat posed by COVID-19, Queensland Health requests the ACCC grant interim authorisation to the Proposed Conduct (defined below in section 5 of this application) on an urgent basis to ensure that the Participating Parties can continue to work together to coordinate their response to the Pandemic to ensure Queensland remains well placed to respond to the public health emergency as it continues to unfold.




2. Details of the applicants for revocation and substitution

2.1 Applicant for authorisation

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

Address (registered address)	Contact person	Description of business activities
33 Charlotte Street, Brisbane, Queensland + 61 7 3328 4811 ABN 66 329 169 142	Marcus Payne Chief Legal Counsel 	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: 
 Telephone: T 
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3. Authorisation to be revoked (Existing Authorisation)

Registration number and date	Other persons and/or classes of persons who are a party to the Existing Authorisation	The basis for seeking revocation
Registration number: AA1000493-1	In addition to Queensland Health, the other persons who are a party to the Existing Authorisation are: (a) the Private Hospital Operators, being owners or operators of private health facilities in Queensland (and their related bodies corporate); and (b) each of Queensland's Hospital and Health Services, as listed in Annexure 2.	The Existing Authorisation expires on 30 September 2021. Queensland Health wishes to revoke the Existing Authorisation so that it may be substituted for an authorisation that is effective for a further period.

4. Authorisation to be substituted (New Authorisation)

In addition to Queensland Health, the other persons who are engaged in the Proposed Conduct and on whose behalf authorisation is sought 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; and
- (b) each of Queensland's Hospital and Health Services, as listed in Annexure 1.

Details of the other persons who are engaged in the Proposed Conduct are included in Annexure 1 to this application. The number of persons is less than the Existing Authorisation for two reasons. First, some of the entities who were included in the Existing Authorisation did not ultimately enter into arrangements with Queensland Health and second, some arrangements initially entered into by Queensland Health in reliance on the Existing Authorisation have expired and not been renewed. This reflects the refined approach to management of coronavirus taken by Queensland Health following its experiences over the past 18 months.

5. The Proposed Conduct

5.1 Description of and rationale for the Proposed Conduct

The State of Queensland considers a coordinated response is still required to deal with the Pandemic. Queensland Health expects that there will continue to be an increased demand for hospital care in Queensland as the Pandemic continues to unfold.

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, in or about mid-2020, Queensland Health entered into separate agreements with each of the Private Hospital Operators in Annexure 2 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**).

Some of those Agreements have now expired and not been renewed. Others have, in effect, been suspended pending further outbreaks of coronavirus in Queensland. For those Agreements which remain active, implementation has been and will continue to 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.¹ 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 have been and will continue to be 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.

¹ *Hospital and Health Boards Act 2011* (Qld), section 18.

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

- (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**).

From Queensland Health's perspective, the key features of the Agreements included 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;
 - (ii) 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
 - (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 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 were 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.

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:
 - (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 other 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 (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
 - (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 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 retain their 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 is content to continue providing regular updates to the ACCC regarding measures implemented under the New Authorisation, consistent with the first condition imposed on the Existing Authorisation. However, the applicant does not anticipate that it will be necessary or desirable for any additional owners or operators of private health facilities in Queensland (other

than those listed in Annexure 1) to participate in the Proposed Conduct in the New Authorisation. Therefore, the applicant suggests that the second condition on the Existing Authorisation, requiring Queensland Health to notify the ACCC of the identity any additional participating parties, is not necessary for the purposes of the New Authorisation.

5.2 Use of the Existing Authorisation

Queensland Health and the other parties to the Existing Authorisation relied on the authorisation to:

- (a) negotiate and enter into the Agreements; and
- (b) engage in coordinated group discussions and sharing of information through the Private Health Facility Coordination Group regarding healthcare operations, capacity and other matters required or contemplated by the Agreements, as reported to the ACCC on the following dates:
 - (i) 11 August 2021;
 - (ii) 21 September 2020;
 - (iii) 21 August 2020;
 - (iv) 7 August 2020;
 - (v) 24 July 2020;
 - (vi) 14 July 2020;
 - (vii) 26 June 2020;
 - (viii) 12 June 2020;
 - (ix) 29 May 2020; and
 - (x) 15 May 2020.

5.3 Changes to the conduct between the Existing Authorisation and the New Authorisation

The conduct authorised in the Existing Authorisation is the same as the Proposed Conduct for which authorisation is sought in the New Authorisation. The applicant considers that the conduct in the Existing Authorisation remains appropriate to assist Queensland Health to coordinate Queensland's health response to the Pandemic.

5.4 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)).

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

Queensland Health seeks authorisation for a period of 12 months from 30 September 2021, 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.

Based on its experience with coronavirus to date, Queensland Health considers it necessary that the Proposed Conduct be authorised until such time as the COVID-19 vaccine rollout is well advanced in Queensland. Its request for a 12 month authorisation is based on its currently projected timeframes for community vaccination against COVID-19 in Queensland. It expects that sufficiently high rates of vaccination will minimise the serious threat of COVID-19 to the health of the community and minimise the risk of the Queensland health system been overloaded with patients.

If the current vaccination rates continue, Queensland Health anticipates that approximately 70 per cent of adults resident in Queensland will be vaccinated by the end of 2021, with adult vaccination rates to rise to approximately 80 per cent in the first quarter of 2022. While it is difficult to estimate the timeframe for the vaccination of children given the number of variables, Queensland Health presently expects this to be substantially achieved by June 2022.

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.

5.6 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.

6. **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 continued 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, if the Commonwealth Government reintroduces 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.

Queensland Health considers that public benefits have flowed from the Existing Authorisation by allowing the State of Queensland to be prepared for a significant coronavirus event.

7. 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.

8. Contact details of relevant market participants and potentially interested parties

Please see sections 2, 3 and 4 above.

9. 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

Partner, MinterEllison, solicitor for Queensland Health

Office held

Kathryn Finlayson

(Print) Name of authorised person

This 27th day of August 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.

Annexure 1

Participating Parties to the New Authorisation

1. Owners or operators of private health facilities in Queensland

- Bundaberg Friendly Society Medical Institute Limited
- Healthe Care Specialty Holdings Pty Ltd
- Healthscope Operations Pty Ltd
- Hervey Bay Surgical Centre Pty Ltd
- LBPOCH Pty Ltd
- Macquarie Cosmetic Institute Pty Ltd
- Mater Misericordiae Ltd
- Renew Vision Pty Ltd
- OzCare
- Ramsay Health Care Investments Pty Ltd
- Snippy Snape Service Pty Ltd
- South East Queensland Hyperbaric Pty Ltd
- St Andrew's Toowoomba Hospital
- St Vincent Private Hospital Ltd
- UnitingCare Health

2. 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

Annexure 2

Participating Parties to the Existing Authorisation

1. Owners or operators of private health facilities in Queensland

- 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
- Buderim Gastro Pty Ltd
- Bundaberg Friendly Society Medical Institute Limited
- Cairns Haematology and Oncology Services Pty Ltd
- Clifton Co-Op Hospital Ltd
- Cura Day Hospitals (Operations) Pty Ltd
- Dermatology & Cosmetic Surgery Services Pty Ltd
- Eastern Endoscopy Centre Pty Ltd
- Far North Day Hospital Pty Ltd
- Fresenius Medical care Australia Pty Ltd
- Healthe Care Specialty Holdings Pty Ltd
- Healthscope Operations Pty Ltd
- Hervey Bay Surgical Centre Pty Ltd
- Hospital Corporation Australia Pty Ltd
- Integrated Clinical Oncology Network Pty Ltd
- Ipswich Hospice Care Ltd
- John Francis Lancaster
- Lee Lenton Medical Pty Ltd
- Logan Day Surgery Pty Ltd
- Logan Endoscopy Services Pty Ltd
- LBPOCH Pty Ltd
- Mackay Specialist Day Hospital Pty Limited
- Macquarie Cosmetic Institute Pty Ltd
- Marie Stopes International
- Mater Misericordiae Ltd
- MB Healthcare Pty Ltd
- MB Healthcare Pty Ltd (Montserrat)
- Miami Private Hospital Pty Ltd
- Renew Vision Pty Ltd
- N.A. Kratzmann & Sons Pty Ltd
- Nambour Day Surgery Pty Ltd
- Northside Endoscopy Services Pty Ltd
- OzCare
- Pacific Day Surgery Pty Ltd
- Pindara Day Procedure Centre Pty Ltd
- Queensland Eye Institute Foundation
- Ramsay Health Care Investments Pty Ltd
- Rehabilitation Medicine Australia Pty Ltd
- Robina Day Surgery Pty Ltd
- Roderick Street Day Hospital Pty Ltd
- Snippy Snape Service Pty Ltd
- South Bank Day Hospital Pty Ltd
- South Bank Medical Group Ltd
- South East Queensland Hyperbaric Pty Ltd
- St Andrew's Toowoomba Hospital
- St Vincent Private Hospital 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
- UnitingCare Health
- UnitingCare Queensland
- Vei Services Pty Limited
- Virtus Health Limited
- Vision Centre Day Surgery Pty Ltd
- Wesley Mission Queensland
- Windermere House Pty Ltd

2. 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