



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of authorisation A90954

and its substitution by authorisation A91011

lodged by

Canberra After Hours Medical Locum Service

in relation to

a capped fee structure in the provision of after house primary medical care in the ACT

Date: 4 October 2006

Commissioners:

Samuel
Sylvan
McNeill
King
Martin
Smith
Willett

Authorisation no. A91011

Public register no. C2006/1733

Summary

CALMS currently has authorisation to use a capped fee structure in its provision of after hours medical care in the Australian Capital Territory. CALMS has lodged an application for revocation and substitution because it proposes to amend its capped fee structure to reflect changes to the Medicare Benefits Schedule.

The ACCC has considered CALMS application for revocation and substitution and based on the information provided by CALMS the ACCC proposes to grant authorisation until 30 June 2008.

The ACCC is now seeking submissions from interested parties on its draft determination. Any submissions received will be taken into account by the ACCC in making its final assessment of the application for authorisation.

1. Application

Introduction

- 1.1 On 12 September 2006 the Canberra After Hours Medical Locum Service (CALMS) lodged an application for revocation of authorisation A90954 and substitution of new authorisation A91011. The application concerns the substitution of a revised capped fee structure used in the provision of after hours primary medical care in the ACT.
- 1.2 The ACCC is the Australian Government agency responsible for administering the *Trade Practices Act (1974)* (TPA). A key objective of the TPA is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.3 The authorisation process in the TPA, however, allows businesses to obtain protection for anti-competitive arrangements where it can be demonstrated that the public benefits flowing from an arrangement will outweigh the anti-competitive detriments.
- 1.4 The TPA also allows a party to apply to the ACCC to have its existing authorisation revoked and to have a substitute authorisation granted in its place.

CALMS

- 1.5 CALMS is a medical deputising service owned and operated by Canberra doctors. Each member doctor in CALMS has agreed to participate on a roster to look after every other member doctor's patients so their patients have appropriate medical care available after hours.

- 1.6 CALMS provides a home visiting service (which includes visits to nursing homes and other institutions) and operates three 'after hours' clinics located at The Canberra Hospital (Woden), Calvary Hospital (Belconnen) and Erindale Centre (Tuggeranong).
- 1.7 Remuneration for the doctors on the CALMS roster consists of the fees paid by the patients they treat during their shift (less a 10% levy collected by CALMS) and an overnight on call allowance provided by ACT Health which amounts to \$357 per overnight shift.
- 1.8 On 28 April 2005, CALMS entered into a contract for services with ACT Health to operate an after hours service. This contract had an initial term until 30 June 2006 but may be extended twice for a one year period each time (it may remain in force for a total of three years). A capped fee structure is a requirement of the contract.

Authorisation A90954

- 1.9 In 2005, the ACCC granted authorisation for CALMS to use a capped fee structure in its provision of after hours primary medical care in the ACT. The capped fee structure is established in a contract between CALMS and ACT Health and set out in the table at paragraph 2.17 of the ACCC's final determination regarding A90954. A copy of the ACCC's final determination is available from the ACCC's website: www.accc.gov.au (by following the public Registers and Authorisations links).
- 1.10 Authorisation was granted until 30 June 2008 or until the contract between ACT Health and CALMS ceases to be in force, whichever occurs earlier.

Changes to the Medicare Benefits Schedule

- 1.11 CALMS submits that the Australian Government has recent made some clarifications and changes to some item numbers within the Medicare Benefits Schedule (MBS) which are relevant to the services provided by CALMS.
- 1.12 Each service listed in the MBS is allocated a unique item number as well as a Schedule fee and Medicare benefit. This information is used by practitioners when billing patients. When Medical services are provided outside hospital, Medicare usually pays 85 per cent of the Schedule fee. The patient pays the difference between the Schedule fee and the rebate (known as the 'gap'), plus the difference between the Schedule fee and the practitioner's charge (if the practitioner decides to charge above the schedule fee).
- 1.13 CALMS submits that clarifications and changes have been made to item numbers which apply to emergency consultations and emergency after-hours attendances. The definition of 'emergency' has been clarified and emergency services are defined to be those that are provided outside a practice's normal hours.

The MBS changes and CALMS

- 1.14 CALMS submits that the changes to the MBS have had the following impact on its practice:
- the majority of home visits conducted by doctors on the CALMS roster no longer qualify as emergency consultations; and
 - given CALMS clinics are open until 11 pm on most days, it is not appropriate for doctors on the CALMS roster to use emergency item numbers for any service provided prior to 11 pm.¹
- 1.15 In light of these changes, doctors on the CALMS roster will now use different item numbers for home visits prior to 8pm and home visits between 8-11 pm.
- 1.16 Additionally, the ACCC understands that the changes to item numbers have resulted in services that were previously captured under a generic description in CALMS original fee structure being listed individually in the proposed replacement fee structure. For example, nursing home visits (whether short, standard, long or prolonged, or ‘in hours’ or ‘after hours’) which were previously caught within ‘home visits’ are now listed individually.
- 1.17 CALMS submits that it has lodged an application for revocation and substitution because it proposes to amend its capped fee structure to reflect the changes to the MBS.
- 1.18 CALMS also wishes to amend its fee structure by abolishing its separate fee system for non-vocationally registered locums. This amendment reflects the new ability of non-vocationally registered locums to access those item numbers previously reserved for vocationally registered general practitioners.²

The revised capped fee arrangement

- 1.19 CALMS has applied for authorisation of a revised capped fee arrangement as set out in the table below.
- 1.20 The proposed replacement fee structure includes fees for ‘in hours’ visits to homes, nursing home and institutions which were not included in the original fee structure. It appears that while CALMS may have provided these types of ‘in hours’ services previously, fee caps for such services were not included in the original fee structure and therefore were not authorised.

¹ Emergency item numbers may still be used appropriately for home visits after 11 pm which meet the definition of ‘emergency’.

² A vocationally registered GP must be a Fellow of the Royal Australian College of General Practitioners and meet minimum requirements for taking part in continuing medical education and quality assurance programs.

Table 1: CALMS proposed capped fee structure

Vocational Registered Locums							
In Hours	Regular Patients				Concession Card Holders		DVA* Patients
Service	Item No.	CALMS Fee	Medicare rebate	Gap	CALMS Fee	Gap	DVA rebate
<i>Short:</i>							
Clinic consultation	3	40.00	14.10	25.90	25.00	10.90	16.25
Home visit	4	140.00	36.10	103.90	120.00	83.90	41.55
Nursing home visit	20	140.00	36.10	103.90	120.00	83.90	41.55
Institution visit	13	140.00	36.10	103.90	120.00	83.90	41.55
<i>Standard:</i>							
Clinic consultation	23	60.00	31.45	28.55	50.00	18.55	36.20
Home visit	24	140.00	53.45	86.55	120.00	66.55	61.50
Nursing home visit	35	140.00	53.45	86.55	120.00	66.55	61.50
Institution visit	25	140.00	53.45	86.55	120.00	66.55	61.50
<i>Long:</i>							
Clinic consultation	36	90.00	59.70	30.30	80.00	20.30	68.70
Home visit	37	168.00	81.70	86.30	148.00	66.30	94.00
Nursing home visit	43	168.00	81.70	86.30	148.00	66.30	94.00
Institution visit	38	168.00	81.70	86.30	148.00	66.30	94.00
<i>Prolonged:</i>							
Clinic consultation	44	115.00	87.90	27.10	105.00	17.10	101.10
Home visit	47	196.00	109.90	86.10	176.00	66.10	126.40
Nursing home visit	51	196.00	109.90	86.10	176.00	66.10	126.40
Institution visit	48	196.00	109.90	86.10	176.00	66.10	126.40
After Hours** 8 pm – 8 am							
Service	Item No.	CALMS Fee	Medicare rebate	Gap	CALMS Fee	GAP	DVA rebate
<i>Short:</i>							
Clinic consultation	5000	50.00	24.60	25.40	35.00	10.40	28.29
Home visit	5003	140.00	46.60	93.40	120.00	73.40	53.60
Nursing home visit	5010	140.00	46.60	93.40	120.00	73.40	53.60
Institution visit	5007	140.00	46.60	93.40	120.00	73.40	53.60
<i>Standard:</i>							
Clinic consultation	5020	70.00	41.65	28.35	60.00	18.35	47.90
Home visit	5023	140.00	63.65	76.35	120.00	56.35	73.20
Nursing home visit	5028	140.00	63.65	76.35	120.00	56.35	73.20
Institution visit	5026	140.00	63.65	76.35	120.00	56.35	73.20
<i>Long:</i>							
Clinic consultation	5040	100.00	69.90	30.10	90.00	20.10	80.40
Home visit	5043	168.00	91.90	76.19	148.00	56.10	105.70
Nursing home visit	5049	168.00	91.90	76.19	148.00	56.10	105.70
Institution visit	5046	168.00	91.90	76.19	148.00	56.10	105.70
<i>Prolonged:</i>							
Clinic consultation	5060	130.00	98.10	31.90	120.00	21.90	112.85
Home visit	5063	196.00	120.10	75.90	176.00	55.90	138.15
Nursing home visit	5067	196.00	120.10	75.90	176.00	55.90	138.15
Institution visit	5064	196.00	120.10	75.90	176.00	55.90	138.15
11 pm – 8 am							
Service	Item No.	CALMS Fee	Medicare rebate	Gap	CALMS Fee	GAP	DVA rebate
Emergency home visit	601	180.00	129.80	50.20	150.00	20.20	149.30

*DVA – Department of Veterans' Affairs

2. ACCC's assessment

Statutory test

- 2.1 Application A91011 concerns making and giving effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA.
- 2.2 The relevant test that CALMS must satisfy for authorisation to be granted is outlined in sub-section 90(7) of the TPA. Under sub-section 90(7) of the TPA, the ACCC may grant authorisation if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 2.3 Therefore, in deciding whether it should grant authorisation, the ACCC must examine the anti-competitive aspects of the capped fee arrangement proposed by CALMS and the public benefits arising and weigh the two to determine which is greater.
- 2.4 In assessing the current application for revocation and substitution, the ACCC is mindful that it previously assessed an application for authorisation from CALMS of a capped fee arrangement in 2005. Given the short period of time elapsed since this earlier application for authorisation, the ACCC considers that its analysis of 2005 is relevant to the current application.

The future with and without test (the counterfactual)

- 2.5 The ACCC uses the 'future with-and-without test' established by the Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements and conduct for which authorisation is sought.³
- 2.6 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by the arrangements and conduct in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.
- 2.7 In this instance, the ACCC considers the capped fee arrangement is at risk of breaching the TPA. Given this risk, and given CALMS has sought authorisation for the arrangement previously, the ACCC considers it unlikely that CALMS' capped fee structure would operate in its proposed form in the absence of authorisation.
- 2.8 The contract between CALMS and ACT Health concerning the CALMS model is not conditional upon authorisation. In the course of the ACCC's assessment of CALMS' previous application for authorisation, ACT Health has advised in the event that

³ See, for example, *Re Australasian Performing Rights Association* (1999) A TPR 41-701

authorisation was not granted, it would expect that the proposed CALMS model would be introduced without the proposed fee cap arrangement. The ACCC considers this scenario to be the relevant counterfactual for the assessment of the current application for revocation and substitution.

The anti-competitive detriment

2.9 Price agreements – including fee caps – can raise significant competition concerns. In the event that authorisation is sought for such arrangements, the extent to which the anti-competitive effect of the price agreement is constrained will be a key consideration. Constraining factors may include:

- the nature of the price agreement itself (for example a fee cap rather than a fee floor);
- the relative number of participants to the price agreement;
- the nature of the service to which the price agreement relates;
- the geographic area within which the service is available;
- the extent to which alternative services are available; and
- the extent to which providers of alternative services compete with providers of the service to which the price agreement relates.

2.10 The absence of any constraining factors is likely to result in significant competition concerns and the strong possibility that an application for authorisation will be denied.

2.11 In respect of CALMS' application for authorisation, the ACCC considers that some anti-competitive detriment may be generated by the proposed capped fee structure. This detriment arises from the potential for the capped fee structure to influence the pricing behaviour of doctors both within and outside the CALMS model. Within the model, doctors may charge fees at the level of the cap, rather than competing by pricing below the cap. Outside the model, doctors may charge fees in line with the CALMS fee cap, rather than competing on price with the CALMS service.

2.12 However, the following features of the CALMS proposal are likely to limit any potential anti-competitive detriment arising from the capped fee structure.

- The price agreement relates to a price cap, rather than a price floor. Doctors on the CALMS roster will retain the discretion to charge a lower fee or bulk bill. As a result, doctors on the CALMS roster will have the ability to engage in price competition by setting fees at levels below the cap. Such decisions would appear less likely to be influenced by competitive pressures and more likely to be influenced by an individual doctor's consideration of factors such as a patient's personal circumstances.
- The proposed arrangement is limited in terms of the service to which it applies and the geographic area within which it will apply. The fee cap structure will only apply to services provided by doctors on the CALMS roster and at present, a maximum of three doctors are rostered to work in a CALMS clinic at any one

time. Further, the CALMS service only operates within the ACT, as opposed to being a multi-state or Australia wide service.

- Doctors on the CALMS roster will remain able to engage in price competition with doctors engaged by other after hours services (such as extended hours clinics) or indeed with CALMS doctors who choose to offer after hours services outside of their rostered period.
- It would seem that with or without the fee cap arrangement, price competition in relation to after hours medical services is limited as a result of certain features of demand for such services. For example, patients with urgent medical problems are likely to attend a hospital emergency department regardless of the level of the fee charged by a CALMS doctor. Similarly, the delivery of after hours medical services is often time critical and a patient who is ill on a Monday night is unlikely to wait until Tuesday night to see a doctor because the doctor on duty on Tuesday night might charge a lower fee. To some extent, the location of after hours services relative to the location of the potential patient(s) also limits the extent to which such services compete with each other – again with or without the proposed arrangements.

- 2.13 For those services that are common to both the original and replacement capped fee structures, the levels of CALMS' fee caps have not changed and the gaps for the services have decreased, albeit by relatively small amounts. New fees have been introduced for those services that are now listed individually but these fees are in proportion to existing fees.
- 2.14 The gap for standard home visits (including nursing homes and institutions) between 8 – 11 pm will increase from \$31.95 to \$76.35 for regular patients and from \$21.95 to \$53.35 for concession card holders. This increase results from CALMS' decision to retain the fee for home visits prior to 11 pm even though the Medicare rebates payable for the service under the previous and current item numbers differ in order to maintain the same level of compensation of those doctors who conduct the home visits.
- 2.15 The gaps for those services that were previously captured under a generic description but are now listed individually are in proportion to the gap for standard home visits.
- 2.16 While an agreement to increase the amount paid by consumers for a service may ordinarily raise concerns, in this instance the revised fee structure generally reflects changes made by the Australian Government to the MBS and CALMS' decision to maintain payments received by doctors.
- 2.17 In light of the above, the ACCC considers that while the proposed fee cap arrangement appears to be potentially anti-competitive, a number of factors limit the level of likely detriment.

Public benefits

- 2.18 As it did in 2005, the ACCC considers that the proposed capped fee structure will provide patients of the CALMS service with certainty with respect to maximum fees. This certainty will better assist consumers to make informed decisions when choosing between using the CALMS service, a hospital emergency department or an extended hours clinic (when relevant). The ACCC notes that during its assessment of CALMS' previous application for authorisation, CALMS submitted that uncertainty about fees had been cited as a major barrier to access of after hours primary medical care in the ACT. It is likely that the capped fee structure will make after hours primary medical care in the ACT more accessible and more appealing to consumers.
- 2.19 Increased use of the CALMS service may lessen patient queues and waiting times at hospital emergency departments. Furthermore, the CALMS service allows residents of residential aged care facilities to arrange home visits by CALMS doctors instead of having to call ambulances to be transported to hospital emergency departments. As noted in the ACCC's final determination concerning CALMS' previous application for authorisation:
- the avoidance of transport is a large health benefit for residents of residential aged care facilities, for whom transport can constitute a significant health risk; and
 - any reduction in ambulance transport will result in cost savings for the ACT Government. CALMS submitted that it provides approximately 600 residential aged care facility visits per annum which is estimated to save the ACT Government \$600 000 per annum in ambulance costs.
- 2.20 Consequently, the arrangement for which authorisation is sought would appear to have the potential to generate some public benefit.

Balance of public benefit and public detriment

- 2.21 The ACCC considers that, overall, the public benefits likely to result from the capped fee structure will outweigh the anti-competitive detriment.
- 2.22 The ACCC notes that the previous authorisation granted to CALMS concerned not only capped fees but also fee gaps as set out in the table at paragraph 2.17 of the ACCC's final determination regarding A90954. A feature of such an authorisation is that any changes in government rebates will require some form of re-authorisation. Accordingly, on this occasion, the ACCC proposes to authorisation CALMS to agree the 'CALMS fees' as described in Table 1 of this draft determination. This should lessen the need for re-authorisation if further changes to rebates occur.

3. Draft Determination

The application

- 3.1 On 12 September 2006, CALMS lodged application for revocation of authorisation A90954 and substitution of new authorisation A91011. The application was made under sub-section 88(1) of the TPA in relation to a proposed contract, arrangement or understanding that may have the purpose, or effect of substantially lessening competition within the meaning of section 45 of the TPA. The application sought authorisation for a capped fee arrangement. CALMS applied for authorisation of the capped fee arrangement for an indefinite period.

Statutory test

- 3.2 Having regard to the public benefits and anti-competitive detriments likely to flow from this authorisation, the ACCC is satisfied, pursuant to sub-section 90(7) of the TPA, that the capped fee structure for which authorisation is sought under sub-section 88(1):
- would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

Draft determination

- 3.3 The ACCC therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to application A91011 for CALMS to use a capped fee structure in its provision of after hours primary medical care in the ACT. The 'CALMS fees' are set out in Table 1 of this draft determination.

Term of authorisation

- 3.4 The ACCC proposes to grant authorisation until 30 June 2008.

Further submissions

- 3.5 The ACCC will now seek further submissions from interested parties. In addition, the Applicant or any interested party may request that the ACCC hold a pre-determination conference pursuant to section 90A of the TPA.
- 3.6 In considering this matter to date, the ACCC has very much relied on consultations undertaken with interested parties in 2005 in relation to the original application for authorisation lodged by CALMS (A90954). The ACCC will have close regard to concerns that may be received from interested parties in response to this draft determination.