



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for authorisation**

**lodged by**

**CALMS Ltd**

**in respect of**

**a 'not to exceed' fee schedule in the provision of  
after hours primary medical care in the ACT**

**Date: 11 September 2008**

**Authorisation no.: A91092**

**Public Register no.: C2008/1030**

**Commissioners:** Samuel  
Kell  
Court  
King  
Martin  
Willett

# Summary

The ACCC proposes to grant authorisation to CALMS Ltd for the use of a ‘*not to exceed*’ fee schedule (capped fee arrangement) for the provision of after hours primary medical care in the ACT for a period of three years.

## The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

## The application for authorisation

On 30 June 2008, CALMS Ltd lodged an application for authorisation A91092 in relation to a ‘*not to exceed*’ fee schedule (capped fee arrangement) for the provision of after hours primary medical care (AHPMC) in the ACT.

## Background

This current application has been lodged because CALMS’ previous authorisation A91011 expired on 30 June 2008.

Authorisation A91011 was granted in January 2007 following an application for revocation and substitution of a previous authorisation granted in 2005. The application was lodged for a revised capped fee arrangement that included fees for ‘in hours’ visits to homes, nursing homes and institutions that were not included in the original fee structure.

## Public detriment

In respect of CALMS’ current application for authorisation, the ACCC considers that some anti-competitive detriment may be generated by the proposed capped fee arrangement. In particular, fees for consultations with doctors both within and outside of the CALMS practice may be influenced by the capped fee arrangement. However, the ACCC considers that a number of factors limit the level of likely detriment. In particular:

- the price agreement relates to a price cap rather than a price floor
- doctors on the CALMS roster will remain able to engage in price competition with doctors engaged by other after hours services
- with or without the capped fee arrangement, price competition in relation to the provision of AHPMC services is limited due to the nature of the demand for such services.

## **Public benefit**

The ACCC considers that the proposed capped fee arrangement will generate some public benefits particularly in respect of providing patients of the CALMS service certainty as to the maximum fees for the medical services they acquire.

## **Balance of public benefit and detriment**

Overall, the ACCC considers that in all the circumstances, the likely public benefit generated by the capped fee arrangement will outweigh the likely public detriment.

## **Length of authorisation**

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

CALMS Ltd has a contract with ACT Health for their services which is due to expire on 30 June 2009. The future of CALMS' capped fee arrangement depends on the renewal of the contract with ACT Health beyond 30 June 2009.

Should a new contract with ACT Health be entered into, CALMS considers a capped fee arrangement would likely form a part of this. To the extent that it does CALMS would require authorisation for arrangements beyond 30 June 2009.

In this instance, the ACCC considers it appropriate to grant authorisation to CALMS for the use of a capped fee arrangement for three years.

The ACCC notes that authorisation does not compel a party to continue with the arrangements until the expiry of an authorisation, it simply provides immunity for the arrangement until the date of expiry should the party require it.

## **Interim authorisation**

CALMS sought interim authorisation to recommence engaging in the previously authorised conduct while the application for authorisation was being considered. CALMS advised that whilst temporary measures would be put in place to avoid breaching the Act during the initial period without authorisation, this would be difficult to implement in practical terms for a longer period.

On 9 July 2008 the ACCC decided to grant interim authorisation to the arrangements while the application is being considered.

## **The next steps**

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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# 1. Introduction

## Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## 2. The application

### The application for authorisation

2.1 On 30 June 2008 CALMS Ltd lodged application for authorisation A91092 with the ACCC.

2.2 CALMS Ltd applied for authorisation of a ‘*not to exceed*’ fee schedule (capped fee arrangement) for the provision of after hours primary medical care (AHPMC) in the ACT. AHPMC is defined as:

*Primary medical care delivered during non-business hours, or during the hours that GP practices are not operational. The provision of primary medical care outside normal practice opening hours should complement routine general practice and reflect the principles of a primary health care approach.<sup>1</sup>*

2.3 CALMS advise that it is a requirement of its accreditation to provide a transparent schedule of fees to enable patients to make informed decisions when determining choice of service. Further, CALMS advise that contractual obligations in the funding agreement with ACT Health require the provision of a ‘*not to exceed*’ fee schedule.

2.4 CALMS has applied for authorisation of the capped fee arrangement until 30 June 2009 as that is the time their contractual obligations with ACT Health expire. Although CALMS advise that to the extent that a fee cap arrangement forms a part of any new contract, they will require authorisation for the arrangement beyond this period.

2.5 This current application has been lodged because CALMS’ previous authorisation A91011 expired on 30 June 2008.

2.6 Authorisation A91011 was granted in January 2007 following an application for revocation and substitution of a previous authorisation granted by the ACCC in 2005. The application for revocation and substitution was lodged for a revised capped fee arrangement that included fees for ‘in hours’ visits to homes, nursing homes and institutions that were not included in the original fee structure.

### Interim authorisation

2.7 At the time of lodging the application, CALMS sought interim authorisation to recommence engaging in the conduct while the application for authorisation was being considered. CALMS advised that whilst temporary measures would be put in place to avoid breaching the Act during the initial period without authorisation, this would be difficult to implement in practical terms over a longer period.

2.8 CALMS submitted that an important factor in offering AHPMC is the ability to give patients some surety as to the fees they are likely to encounter for a range of

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<sup>1</sup> Royal Australian College of General Practitioners, *Primary Medical Care Outside Normal General Practice Opening Hours Position Statement of the RACGP*, RACGP, 2005, viewed 26 August 2008, <[http://www.racgp.org.au/Content/NavigationMenu/PracticeSupport/StandardsforGeneralPractices/RACGPStandards3rdEdFactSheets/20060116PMCONGPOH\\_pos\\_statement.pdf](http://www.racgp.org.au/Content/NavigationMenu/PracticeSupport/StandardsforGeneralPractices/RACGPStandards3rdEdFactSheets/20060116PMCONGPOH_pos_statement.pdf)>

consultations. With an interim authorisation in place CALMS would be able to continue doing so.

- 2.9 The ACCC granted interim authorisation on 9 July 2008 so that CALMS could continue the use of the capped fees arrangement while the ACCC considered the substantive application.

## Chronology

- 2.10 Table 2.1 provides a chronology of significant dates in the consideration of this application.

**Table 2.1: Chronology of application for authorisation A91092**

DATE	ACTION
30 June 2008	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
9 July 2008	Interim authorisation granted by the ACCC.
10 July 2008	Interested party consultations commence.
31 July 2008	Closing date for submissions from interested parties in relation to the application for authorisation.
19 August 2008	ACCC meeting with CALMS to provide further information regarding the arrangements.
11 September 2008	Draft determination issued.

## The applicant

### CALMS

- 2.11 CALMS Ltd is a medical deputising service established in 1972.<sup>2</sup> CALMS is owned and operated by Canberra General Practitioners (GPs) and governed by a Board of Directors.
- 2.12 CALMS is a not-for-profit company and provides AHPMC in the ACT with the support of the ACT Government and Commonwealth Government.
- 2.13 Each member doctor of CALMS has agreed to participate on a roster to provide appropriate AHPMC in the ACT.
- 2.14 Close to 90 % of GP practices in the ACT are members of CALMS (approximately 80 GP practices).<sup>3</sup>

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<sup>2</sup> A medical deputising service is an organisation which arranges for medical practitioners to provide after hours medical services to patients during after hours periods. The defined after hours periods that must be covered by the medical deputising service are: any time outside 8am - 6pm on weekdays and all day weekends and public holidays.

<sup>3</sup> Record of meeting with CALMS dated 19 August 2008.

- 2.15 CALMS has 11 regular locums rostered on for the month with member practices providing ‘shadow’ services – for instance where a locum cannot make the shift the principal of the member practice would make arrangements for that shift to be covered.<sup>4</sup>
- 2.16 CALMS provides consultations at clinics located at The Canberra Hospital, Calvary Health Care ACT and Tuggeranong Health Centre. Surgery hours are every evening on week days and during the day on weekends and public holidays.
- 2.17 While patients are generally encouraged to make an appointment to see a CALMS doctor, CALMS also accommodates walk-in patients.
- 2.18 CALMS also provides a home visiting service which includes visits to nursing homes and other institutions.
- 2.19 Access to CALMS services at clinics is universal, however, there are geographic limitations to home and aged care facility visits, as CALMS operates solely in the ACT.
- 2.20 CALMS collects an administrative levy on fees paid by patients to the doctors on the CALMS roster. Other funding is provided by ACT Health (for an on-call allowance and security services) and the Commonwealth Department of Health and Ageing (for IT infrastructure improvement).
- 2.21 Remuneration for the doctors on the CALMS roster consists of the fees paid by the patients they treat during their shift (less the levy collected by CALMS) and an overnight on call allowance provided by ACT Health.

### **Capped fee schedule**

- 2.22 CALMS is a private billing surgery and patients using the service will be billed according to the CALMS fee schedule. While doctors may opt to charge less than the fee cap, or bulk bill, the ACCC understands the majority of patients attending clinic consultations are charged at the fee cap.
- 2.23 Table 2.2 is CALMS capped fee schedule as at May 2008.

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<sup>4</sup> File note of meeting with CALMS date 19 August 2008.

**Table 2.2: Capped Fee Schedule May 2008**

**CALMS AFTER HOURS FEE SCHEDULE-May 2008**

The CALMS Board of Directors advises Locums they may charge a fee not to exceed the fee in this fee schedule.

<b>Vocational Registered Locums</b>							
<b>IN HOURS</b>	<b>Regular Patients</b>				<b>Concession Card Holders</b>		<b>DVA Patients</b>
<b>Service</b>	<b>Item No</b>	<b>CALMS Fee</b>	<b>Medicare Rebate</b>	<b>Gap</b>	<b>CALMS Fee</b>	<b>Gap</b>	<b>DVA Rebate</b>
Short Clinic Consultation	3	40	15.00	25.00	25	10.00	17.25
Short Home Visit	4	140	37.95	102.05	120	82.05	43.65
Short NH Consultation	20	140	56.35	83.65	120	63.65	64.80
Short Institution Consultation	13	140	37.95	102.05	120	82.05	43.65
Standard Clinic Consultation	23	60	32.80	27.20	50	17.20	37.72
Standard Home	24	140	55.75	84.25	120	64.25	64.10
Standard NH Consultation	35	140	74.15	65.85	120	45.85	85.27
Standard Institution Consult.	25	140	55.75	84.25	120	64.25	64.10
Long Clinic Consultation	36	90	62.30	27.70	80	17.70	71.65
Long Home Visit	37	168	85.25	82.75	148	62.75	98.05
Long NH Consultation	43	168	103.65	64.35	148	44.35	119.20
Long Institution Consultation	38	168	85.25	82.75	148	62.75	98.05
Prolonged Clinic Consultation	44	115	91.70	23.30	105	13.30	105.46
Prolonged Home Visit	47	196	114.65	81.35	176	61.35	131.85
Prolonged NH Consultation	51	196	133.05	62.95	176	42.95	153.00
Prolonged Institution Consult.	48	196	114.65	81.35	176	61.35	131.85
<b>After Hours</b>							
A/H Short Consultation	5000	50	25.65	24.35	35	9.35	29.50
A/H short Home visit	5003	140	48.60	91.40	120	71.40	55.90
A/H short Nursing Home Visit	5010	140	67.00	73.00	120	53.00	77.05
A/H short Institution visit	5007	140	48.60	91.40	120	71.40	55.90
A/H Standard Consultation	5020	70	43.45	26.55	60	16.55	49.95
A/H standard home visit	5023	140	66.40	73.60	120	53.60	76.35
A/H standard NH visit	5028	140	84.80	55.20	120	35.20	97.50
A/H standard institution	5026	140	66.40	73.60	120	53.60	76.35
A/H Long Consultation	5040	100	72.90	27.10	90	17.10	83.85
A/H Long Home visit	5043	168	95.75	72.25	148	52.25	110.10
A/H Long NH visit	5049	168	114.15	53.85	148	33.85	131.25
A/H Long visit to institution	5046	168	95.75	72.25	148	52.25	110.15
A/H Prolonged Cons	5060	130	102.35	27.65	120	17.65	117.70
A/H prolonged Home Visit	5063	196	125.30	70.70	176	50.70	144.10
A/H prolonged NH visit	5067	196	143.70	52.30	176	32.30	165.25
A/H prolonged institution visit	5064	196	125.30	70.70	176	50.70	144.10
Urgent AH Home Visit 0700-2300	1	160	114.95	45.05	140	25.05	132.20
Urgent AH Home Visit 2300-0700	601	180	135.45	44.55	150	14.55	155.75

- 2.24 CALMS advise that although the fee schedule has not increased since 2005, changes to the Medicare Benefit Schedule (MBS) have increased the Medicare Rebate for most services and has resulted in a reduced ‘gap’ for patients for most CALMS services.
- 2.25 CALMS fees are determined by the CALMS Board.<sup>5</sup> See paragraphs 5.48 to 5.54 for further information on fee setting and fee variation.

### **3. Submissions received by the ACCC**

- 3.1 CALMS provided a supporting submission with its application for authorisation and has since provided further clarifying information.
- 3.2 The ACCC also sought submissions from around 30 interested parties potentially affected by the application, including hospitals, government agencies, consumer groups and other providers of health care in the ACT. The ACCC received public submissions from:
- the ACT Branch of the Australian Medical Association
  - the ACT Division of General Practice
  - ACT Health
  - ACT Office for Ageing.
- 3.3 The views of CALMS and interested parties are outlined in the ACCC’s evaluation of the capped fee arrangement in Chapter 5 of this draft determination. Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the ‘Public Registers’ and ‘Authorisations Public Registers’ links.

### **4. The net public benefit test**

- 4.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

#### **Application A91092**

- 4.2 CALMS lodged application for authorisation A91092 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.

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<sup>5</sup> File note of meeting with CALMS dated 19 August 2008.

- 4.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or 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 result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

### **Application of the tests**

- 4.4 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.<sup>6</sup>
- 4.5 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>7</sup>
- 4.6 Consequently, given the similarity of wording between section 90(6) and (90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

### **Definition of public benefit and public detriment**

- 4.7 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>8</sup>
- 4.8 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>9</sup>

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<sup>6</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>7</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>8</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

## **Future with-and-without test**

- 4.9 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>10</sup>
- 4.10 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

## **Length of authorisation**

- 4.11 The ACCC can grant authorisation for a limited period of time.<sup>11</sup>

## **Conditions**

- 4.12 The Act also allows the ACCC to grant authorisation subject to conditions.<sup>12</sup>

## **Future and other parties**

- 4.13 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:
- persons who become party to the contract, arrangement or understanding at some time in the future<sup>13</sup>
  - persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>14</sup>

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<sup>9</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>10</sup> Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

<sup>11</sup> Section 91(1).

<sup>12</sup> Section 91(3).

<sup>13</sup> Section 88(10).

<sup>14</sup> Section 88(6).

## 5. ACCC evaluation

- 5.1 The ACCC's evaluation of the application for authorisation is in accordance with the net public benefit test outlined in Chapter 4 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the capped fee arrangement.

### The market

- 5.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 5.3 The application concerns the provision by CALMS of after hours primary medical care in the ACT.
- 5.4 CALMS provided information relating to the features of the relevant market.

### After hours primary medical care in the ACT

- 5.5 CALMS advise that as an accredited medical deputising service, it must provide a service for the entire after hours period i.e. 6pm-8.30am<sup>15</sup> on weekdays and on weekends from 6pm Friday until 8.30am Monday. The phone lines are open for the duration of this time and phones are staffed by registered nurses. Clinic appointments are available from 7.30pm/8.00pm until demand runs out, usually around 11pm. Outside of these clinic hours home visits are available.
- 5.6 Patients have access to alternate extended hours medical facilities in the ACT, though not all of these facilities operate in the same way or for the same opening hours as CALMS. The fees for these services are varied with some providing private or bulk billing services or both.
- 5.7 Other extended hours medical facilities in the ACT include:
- Gungahlin General Practice – open seven days
  - Florey Medical Centre – open seven days
  - Philip Health Centre – open seven days
  - Tuggeranong Square Medical Practice – open seven days
- 5.8 Patients may also access after hours primary health care through the emergency departments of both The Canberra Hospital and Calvary Health Care ACT. However, the services provided by hospital emergency departments differ in that care is prioritised for genuine emergencies whereas CALMS and other after hours clinics are directed towards non-emergency primary care during the after hours period.

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<sup>15</sup> File note of meeting with CALMS dated 19 August 2008.

- 5.9 In respect of home visit based services, patients have some choice between the CALMS service or a non-CALMS affiliated GP who makes home visits. It is understood that the number of non-CALMS affiliated GPs who provide a home visit service is small. The provision of home visit services is also an important distinction between the services provided by CALMS and hospital emergency departments.

#### **ACCC view**

- 5.10 The ACCC considers that in broad terms, the relevant area of competition relates to the provision of after hours primary health care medical services to patients within the ACT.

### **The counterfactual**

- 5.11 As noted in Chapter 4 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.
- 5.12 CALMS submits that the future without the conduct would be that consumers would still have access to the CALMS service, though without the certainty of fees for the service as each doctor would set their fees independently. CALMS submit that this is likely to result in less consumers using the service than would be the case with the capped fee arrangement in place.
- 5.13 Further, CALMS notes that, should authorisation not be granted, the contract with ACT Health, for the provision of the medical deputising service may be amended.
- 5.14 The ACCC considers the capped fee arrangement is at risk of breaching the Act. 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.
- 5.15 On this basis, the ACCC considers that without authorisation the CALMS service may still be in operation, with doctors still responsible for setting their own fees for consultation but without the cap limiting the amount they can charge.

### **Anti-competitive detriment**

#### **CALMS’ submission**

- 5.16 CALMS acknowledges that imposing a schedule of fees affects the ability of practitioners to set their own fees with complete freedom. However, CALMS considers the transparency of the fee structure for patients is of more significance.
- 5.17 CALMS submits this transparency in fees allows a patient to be able to make a more informed decision when choosing between attending CALMS or another AHPMC facility such as other extended hours clinics or the emergency departments of the two public hospitals.
- 5.18 Further, CALMS submits that the arrangement is for a fee cap, not a fee floor and as such, practitioners are free to choose to charge less than the fee cap or even bulk bill.

CALMS submits that this has proven to be a genuine choice for practitioners as greater than 80% of nursing home visits are bulk billed by CALMS practitioners. However, CALMS does concede that for most clinic consultations, practitioners do charge at the fee cap.

#### **ACCC view**

- 5.19 Agreements between competitors which influence the pricing decisions of market participants have the potential to result in allocative inefficiencies. That is, they can move prices away from levels that would be set in a competitive market. This can result in higher prices for consumers and send market signals which direct resources away from their most efficient use.
- 5.20 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 services are 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.
- 5.21 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.
- 5.22 In respect of CALMS' application for authorisation, the ACCC considers that some anti-competitive detriment may be generated by the proposed capped fee structure. In particular, doctors both within and outside of CALMS may be influenced by the capped fee arrangement in the setting of their fees. Doctors within CALMS may charge fees at the level of the cap rather than compete on price. Similarly, doctors outside of CALMS may charge fees in line with the fee cap rather than competing on price with the CALMS service.
- 5.23 However, the ACCC considers there are a number of factors associated with the CALMS proposal that are likely to limit the potential anti-competitive detriment.
- 5.24 The ACCC notes the submission by CALMS that as the price setting relates to a price cap rather than a price floor, it is likely to have less anti-competitive detriment than a fee floor. Doctors on the CALMS roster retain the discretion to charge a lower fee or bulk bill. While it appears for most clinic consultations the fee cap is charged, the ACCC notes the submission by ACT Health that CALMS locums bulk bill the majority of home visits to nursing homes. This supports the view that doctors on the CALMS roster do not universally charge fees at the level of the cap.
- 5.25 However, the ACCC notes that decisions to bulk bill or to charge less than the cap 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.
- 5.26 The ACCC also notes that with or without the fee cap arrangement, to the extent there is price competition in relation to AHPMC, factors other than price appear more

relevant to 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 AHPMC 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.

- 5.27 To some extent, the location of after hours services relative to the location of the potential patient(s) may also limit the extent to which such services compete with each other – again with or without the proposed arrangements. While CALMS operates throughout the ACT with practices in Belconnen, Tuggeranong and Woden, there are other providers of AHPMC in the ACT in both the north and south of Canberra.

## **Public benefit**

### **CALMS' supporting submission**

- 5.28 CALMS submits that a capped fee arrangement provides a public benefit in that it gives prospective patients of CALMS some surety as to the fees they are likely to encounter for a range of consultations. Without such a schedule, the lack of certainty about the fee structure used by CALMS could mean that a significant number of patients who are willing to use the service may choose not to.
- 5.29 CALMS submits that a capped fee arrangement will ensure that service charges are transparent, improving access to the service by consumers. The capped fee structure will also ensure that no medical practitioner will charge above the agreed amount, while still being able to charge less or bulk bill.
- 5.30 CALMS submits that it continues to offer the same valued service in an environment of decreased access to General Practice services in and out of hours. CALMS submits that currently in the ACT region there is a shortage of at least 60 full time practitioners. CALMS continues to provide in excess of 600 nursing home visits a year with the resultant cost savings to ACT health in provision of both ambulance transport and hospital admission.

### **Submissions from interested parties**

- 5.31 ACT Health submits that it agrees with CALMS that the circumstances that led the ACCC to grant authorisation in 2005 still exist today. A not to exceed fee schedule provides a public benefit as it gives prospective clients of CALMS some certainty as to the maximum fees that will be charged for a particular consultation. Without a structure such as this, some clients may be dissuaded from utilising the CALMS service due to uncertainty as to potential fees.
- 5.32 The ACT Division of General Practice (ACT DGP) submits a major benefit of the proposed conduct will be ensuring reasonably priced AHPMC services for all ACT residents. ACT DGP considers that without such a not to exceed clause, it would be possible for some locums on some days to charge much more than others on other days. ACT DGP submits that people do not choose when they need the services of CALMS so it is fair to all that a not to exceed fee is set. Transparency of charges is ensured

through the continuation of this existing CALMS policy and an affordable service is more likely to be assured given the very reasonable rates proposed.

- 5.33 The ACT Branch of the Australian Medical Association supported CALMS arrangement and endorsed the case presented by CALMS for the authorisation.

#### **ACCC view**

- 5.34 The ACCC continues to consider that the proposed capped fee arrangement will provide patients of the CALMS service with certainty with respect to maximum fees. This certainty may better assist patients to make informed decisions when choosing between using the CALMS service, a hospital emergency department or another extended hours clinic. To the extent that uncertainty about fees is a major barrier to access of AHPMC in the ACT, the CALMS capped fee arrangement has and will continue to make AHPMC in the ACT more accessible and more appealing to consumers.
- 5.35 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 previously noted by the ACCC, the avoidance of the need to travel is a large health benefit for residents of residential aged care facilities, for whom travel can constitute a significant health risk.<sup>16</sup> Further, any subsequent reduction in ambulance transport will result in cost savings for the ACT Government. These may be benefits from the conduct to the extent that the fee cap provides certainty for patients and facilitates use of the CALMS service.
- 5.36 Overall, the ACCC considers there is public benefit, particularly from the certainty provided by a capped fee arrangement.

### **Balance of public benefit and detriment**

- 5.37 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the capped fee arrangement is likely to result in a public benefit that will outweigh any public detriment.
- 5.38 In the context of applying the net public benefit test at section 90(8)<sup>17</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>18</sup>
- 5.39 The ACCC considers that while the proposed capped fee arrangement may potentially generate some anti-competitive detriment by influencing the pricing behaviour of

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<sup>16</sup> See *CALMS Authorisation A90954* [2005] and *CALMS Revocation and Substitution of Authorisation A91011* [2007]

<sup>17</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>18</sup> Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

doctors within and outside of the CALMS service, there are many factors that limit the level of likely detriment.

- 5.40 The ACCC is satisfied that that the capped fee arrangement is likely to give rise to a public benefit, primarily by providing certainty to patients who use the CALMS service with respect to the maximum fee likely to be charged for AHPMC in the ACT.
- 5.41 On balance, the ACCC considers the public benefit is likely to outweigh the anti-competitive detriment.

### **Length of authorisation**

- 5.42 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 5.43 In this instance, CALMS has sought authorisation until 30 June 2009 as this is when the contract with ACT Health is due to expire.
- 5.44 The ACCC notes that the future of CALMS' capped fee arrangement depends on the renewal of the contract with ACT Health beyond 30 June 2009.
- 5.45 Should a new contract with ACT Health be entered into, CALMS considers a capped fee arrangement would likely form a part of this. To the extent that it does CALMS would require authorisation for arrangements beyond 30 June 2009.
- 5.46 As such, the ACCC proposes to grant authorisation to CALMS for the use of a capped fee arrangement for three years.
- 5.47 The ACCC notes that authorisation does not compel a party to continue with the arrangements until the expiry of an authorisation, it simply provides immunity for the arrangement until the date of expiry should the party require it.

### **Variations to the capped fee schedule**

- 5.48 While the fee schedule has not increased since 2005, based on advice from the applicant, the ACCC expects that it may change within the timeframe of the proposed authorisation.
- 5.49 The level of the maximum fee is relevant to the ACCC's assessment of the public benefit and public detriment from the capped fee arrangements. The ACCC must consider whether authorisation should enable future changes to the fee structure or whether any proposed changes should be subject to reauthorisation either by way of a minor variation or application for revocation and substitution, whichever is appropriate.
- 5.50 In this regard, the ACCC notes the fee schedule is set by the CALMS Board after consulting with locums and General Practitioners. While ACT Health does not have a formal role in approving the fee schedule and any increases, it does provide significant funding to CALMS and as such, has an interest in the fees set by the CALMS Board. Further, the ACCC notes that CALMS is a not for profit organisation and is therefore unable to distribute money to shareholders.

- 5.51 In these circumstances the ACCC is minded to grant authorisation for the use of a capped fee arrangement which enables CALMS to make reasonable changes to increase fees. However, the ACCC would be concerned if, having authorised the use of the capped fee arrangement, CALMS was to make changes that increased the fees in the schedule to a level that affected the balance of public benefit and detriment.
- 5.52 The ACCC therefore proposes that as a condition of authorisation, CALMS must advise the ACCC of any proposed change to the fee schedule and provide information about the basis for the proposed change.
- 5.53 The ACCC considers that any increase above what would be considered reasonable is likely to constitute a material change of circumstances and the ACCC may seek to review the authorisation.

## 6. Draft determination

### The application

- 6.1 On 30 June 2008 CALMS Ltd lodged application for authorisation A91092 with the Australian Competition and Consumer Commission (the ACCC).
- 6.2 Application A91092 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to:
- use (impose) a ‘*not to exceed*’ fee schedule (capped fee arrangement) for the provision of after hours primary medical consultations in the ACT.

### The net public benefit test

- 6.3 For the reasons outlined in Chapter 5 of this draft determination, the ACCC considers that, subject to the condition set out below, in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 6.4 The ACCC therefore **proposes to grant** authorisation to application A91092 **on condition that:**
- C1 CALMS advise the ACCC of any change to the fee schedule and provide information about the basis for the change.**
- 6.5 The ACCC seeks comments on the proposed condition.

### Conduct for which the ACCC proposes to grant authorisation

- 6.6 The ACCC proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation for 3 years to application A91092 for CALMS to use a capped fee arrangement in its provision of after hours primary

medical care in the ACT. The current CALMS fees are set out in Table 2.2 of this draft determination.

6.7 This draft determination is made on **11 September 2008**.

### **Interim authorisation**

6.8 At the time of lodging the application, CALMS Ltd requested interim authorisation for the capped fee arrangements while the ACCC proceeded with its assessment of the application. The ACCC granted interim authorisation on 9 July 2008.

6.9 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

### **Further submissions**

6.10 The ACCC will now seek further submissions from CALMS and interested parties as to the ACCC's proposed approach to enable reasonable fee increases under the terms of authorisation. In addition, CALMS or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.