



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Draft Determination

Application for authorisation AA1000507

lodged by

the State of New South Wales as represented by
the Ministry of Health

in respect of

co-ordination of healthcare services in response
to the COVID-19 pandemic

Authorisation number: AA1000507

9 July 2020

Commissioners: Rod Sims, Delia Rickard, Mick Keogh, Sarah Court, and Stephen Ridgeway

Summary

The State of New South Wales, as represented by the Ministry of Health (the **Ministry**), is seeking authorisation of arrangements which have the broad purpose of maximising healthcare capacity and ensuring State-wide coordination of healthcare services during the COVID-19 pandemic.

In broad terms, the Ministry, participating private and public hospitals in New South Wales and specified representative bodies will share information about capacity and resources and coordinate their activities in relation to the provision of certain medical services or the treatment of particular groups of patients at particular hospitals. They also propose to coordinate the procurement of medical equipment and supplies and share resources to meet demand.

The ACCC is proposing to grant conditional authorisation until 30 September 2021.

The ACCC considers that the arrangements are likely to deliver significant public benefit through the enhanced coordination and improved responsiveness of the New South Wales healthcare system to respond to the COVID-19 pandemic.

The conditional interim authorisation already granted by the ACCC on 1 May 2020 will continue while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination and will consider all such submissions before making its final decision in this matter.

The Ministry and interested parties may also request the ACCC to hold a conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 30 April 2020, the State of New South Wales, as represented by the Ministry of Health (the **Ministry**), lodged application for authorisation AA1000507 with the Australian Competition and Consumer Commission (the **ACCC**). The Ministry made the application on behalf of itself and the following parties who are engaged, or propose to become engaged, in the Proposed Conduct:
 - the private healthcare operators identified in **Attachment 1 (Private Operators)**;
 - New South Wales Public Health Organisations, in respect of public hospitals and healthcare facilities in the New South Wales public health system listed in **Attachment 2 (Public Health Organisations)**;
 - the Australian Private Hospitals Association and Day Hospitals Australia (**Representative Bodies**); and
 - any other person notified by the Ministry to the ACCC as intending to engage in the Proposed Conduct.
2. The Ministry seeks authorisation for the broad purpose of maximising healthcare capacity and ensuring the State-wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare services during the period of the COVID-19 pandemic (the **Pandemic**). To achieve this purpose, the Ministry will enter into separate but substantially similar agreements with the Private Operators (the **Partnership Agreements**). The Partnership Agreements are made in order to achieve the Objectives defined at paragraph 5 below.

3. The Ministry seeks authorisation for 12 months from the date of the ACCC's final determination.
4. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

The Proposed Conduct

5. The Ministry's objectives include:
 - (a) integrating the Private Operators with the Ministry's and the Public Health Organisations' response to the Pandemic to provide health services in accordance with their individual capabilities and capacities;
 - (b) ensuring the viability of Private Operators during the Pandemic so that they are able to resume operations once it ends;
 - (c) ensuring that Private Operators make available sufficient capacity and resources and provide the healthcare services that are required by the Ministry or the Public Health Organisations to respond to the Pandemic;
 - (d) ensuring that the Private Operators provide healthcare services in accordance with standards of safety, quality and timeliness, including that patients are treated in the most appropriate setting to optimise health outcomes;
 - (e) coordinating equipment, medical supplies and staffing resources to support the Ministry's and the Public Health Organisations' responses to the Pandemic;
 - (f) ensuring that the Ministry and the Public Health Organisations obtain healthcare services and access to Private Operators' facilities, equipment and workforce in an efficient, cost-effective and flexible manner; and
 - (g) collaborating in an environment that fosters innovation, continuous improvement, cost efficiency, transparency and open, honest and timely communication.

(the **Objectives**).

6. The Ministry is seeking authorisation for it, the Private Operators, Public Health Organisations and the Representative Bodies to cooperate in implementing and giving effect to the integrated provision of healthcare across New South Wales, in accordance with the Partnership Agreements.

This will involve the following Proposed Conduct:

- (a) negotiating and entering into Partnership Agreements with the Private Operators;
- (b) consistent with the Objectives, coordinating:
 - (i) service and patient allocation between the Private Operators and Public Health Organisations;
 - (ii) the restriction of the type of services provided by the Private Operators, or their capacity to provide services;
 - (iii) the sharing, and allocation of resources, including staff and medical supplies and equipment, between the Private Operators and Public Health Organisations;

- (c) where it is necessary to facilitate the efficient integration and coordination of healthcare services across New South Wales and give effect to the Partnership Agreements, engage in coordinated group discussions and sharing information with some or all of the Private Operators, Public Health Organisations and the Representative Bodies; and
- (d) engaging in any other conduct that is necessary to facilitate the efficient integration of healthcare services across New South Wales and give effect to the Partnership Agreements, at the request or direction of the Ministry or Public Health Organisations.

(the **Proposed Conduct**).

7. The key features of the Partnership Agreements are:

- (a) the Ministry will provide funding to the Private Operator on the condition that they provide certain services to the Ministry and Public Health Organisations, including:
 - (i) clinical services that are required to treat a patient referred to or transferred to the Private Operator by one of the Public Health Organisations;
 - (ii) the provision of appropriate facilities, resources, supplies and other support services (including where the clinical treatment within the private facility is provided by clinicians from a Public Health Organisation); and
 - (iii) any other Pandemic support services that are required by the Ministry or Public Health Organisations and that the Private Operator is capable of providing;
- (b) the Private Operator must maintain sufficient capacity and resources to meet the likely and anticipated volume of services required by the Ministry or Public Health Organisations;
- (c) the Ministry or Public Health Organisations may require the Private Operator to participate in service control, integration and continuity groups established by the Ministry to facilitate and share information about the coordination of healthcare services across the Private Operators and Public Health Organisations;
- (d) the Private Operator will retain operational control of their facilities (except in an emergency or a major default), however clinicians from a Public Health Organisation may perform clinical services at private facilities;
- (e) subject to its obligations to provide capacity, resources and services to the Ministry and Public Health Organisations, the Private Operator will continue to provide services to private patients in accordance with its normal business practices;
- (f) public patients will not be required to pay for any cost of treatment by, or using the resources or facilities of, a Private Operator; and
- (g) to the extent that it is in the control of the Private Operator, it must maintain the full workforce at each of its facilities and do all things reasonably necessary to ensure that it remains viable during the Pandemic and can resume operations when the Pandemic ends.

Interim authorisation

8. On 1 May 2020, the ACCC granted conditional interim authorisation under subsection 91(2) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). The conditional interim authorisation allows the Ministry and the participating private and public facilities and representative bodies to commence the Proposed Conduct, including entering into Partnership Agreements, while the ACCC is considering the substantive application.¹
9. The interim authorisation is subject to conditions that require reporting by the Ministry, and the notification of additional parties participating in the Proposed Conduct.
10. The interim authorisation granted on 1 May 2020 will remain in place until it is revoked, or until the date on which the application for authorisation is withdrawn, or until the date the ACCC's final determination comes into effect.

Background

11. The ACCC recognises the significant challenges occurring as a result of the Pandemic. The Pandemic has caused a major disruption to society and the economy, with social distancing measures and travel bans affecting various sectors across the economy. In that context, the ACCC has received a large number of applications for authorisation, including interim authorisation, aimed at providing financial relief to businesses and individuals, facilitating the supply of goods and services (including medical products and services) and managing the financial impact of a significant economic shock. In the early stages of the Pandemic, there was a significant risk of Australia's health services being put under significant stress, including the availability of sufficient hospital capacity. The identification of this risk gave rise to applications for authorisation such as the one from the Ministry.

The National Partnership on COVID-19 Response

12. On 13 March 2020, in response to the Pandemic, the Commonwealth of Australia and each of the States and Territories, signed the National Partnership on COVID-19 Response² (the **NPA**). The NPA is a commitment between the Commonwealth and the States and Territories to respond to the Pandemic.
13. The NPA provides that as system managers of public hospitals, each State will enter into agreements with existing private hospitals (including day hospitals) within their jurisdiction, through a consistent agreement, to ensure:
 - a. increased capacity for the Commonwealth and States to rapidly respond to the COVID-19; and
 - b. the viability of private hospitals is maintained during the Pandemic and they are able to resume operations once the Pandemic response ends.

Restrictions on elective surgery and funding for private healthcare facilities

14. On 25 March 2020³, the National Cabinet announced the temporary suspension of all non-urgent elective surgery. The intent of this decision was to preserve resources, including protective equipment, and to prepare public and private healthcare services for their role in responding to the Pandemic. The ACCC understands that, in the

¹ A list of Private Operators who are party to a Partnership Agreement with the Ministry under interim authorisation is on the ACCC's public register in this matter.

² See <https://www.coag.gov.au/sites/default/files/communique/covid19-npa.pdf>

³ See <https://www.pm.gov.au/media/elective-surgery>.

See also <https://www.health.gov.au/news/australian-health-protection-principal-committee-ahppc-statement-on-restoration-of-elective-surgery>.

absence of other funding measures, the temporary suspension of all non-urgent elective surgery would have had a significant detrimental impact on the ongoing viability of private healthcare facilities.

15. On 30 March 2020, the Australian Government announced measures to introduce the viability for capacity guarantee⁴. The viability for capacity guarantee provides funding to allow private hospitals to stay open and to provide services as required to help manage the response to the Pandemic and also continue to deal with other urgent medical needs. State and Territory Governments have also provided funding to private healthcare providers as part of their participation in the response to the Pandemic.
16. The application for authorisation forms part of the implementation of the NPA and funding commitments that have been made by the Australian Government and State and Territory Governments.
17. The restrictions on elective surgery were eased in April 2020, allowing for the phased reintroduction of certain elective surgeries to commence. The Australian Health Protection Principal Committee (**AHPPC**) has established principles to guide the reintroduction of hospital activity, these include:
 - a. equity of access for all patients determined by clinical decision making and safety;
 - b. preservation and appropriate use of personal protective equipment (**PPE**);
 - c. restoration of elective surgery to be consistently applied in both public and private settings;
 - d. decisions on elective surgery are subject to local hospital capacity, jurisdiction capacity, transport availability and any other relevant quarantine arrangements in place; and
 - e. restrictions on non-urgent elective surgery may be reintroduced depending on whole of system demand constraints related to COVID-19, including at a hospital or regional level in the event of an outbreak.
18. The AHPPC's principles provided that the restoration of elective surgery activity will be guided by avoiding harm and mitigating risk of deferral of procedure or services in line with clinical guidelines, and appropriate use and supply of PPE.

Consultation

19. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
20. The ACCC invited submissions from potentially interested parties including relevant industry associations.⁵
21. The ACCC did not receive any submissions from interested parties.

⁴ See <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/australian-government-partnership-with-private-health-sector-secures-30000-hospital-beds-and-105000-nurses-and-staff-to-help-fight-covid-19-pandemic>.

⁵ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

ACCC assessment

22. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
23. The Ministry has sought authorisation for conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of sections 45, 46 and 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation in relation to the Ministry's application unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the conduct (**authorisation test**).
24. Authorisation is prospective, the ACCC may grant authorisation allowing parties to make and give effect to arrangements entered into from the date its determination takes effect and to give effect to arrangements entered into under the terms of any interim authorisation that has been granted.
25. The ACCC's assessment of AA1000507 is made in the context of the Pandemic. The Pandemic is impacting Australian consumers and businesses, with many businesses facing severe disruption. Maintaining competition in the long term will be critical to benefit both consumers and the economy. When considering applications for authorisation responding to the Pandemic, the ACCC is seeking to ensure that changes to the competitive landscape are, wherever possible, temporary.
26. In making its assessment of the Proposed Conduct, the ACCC has considered:
 - The application and other relevant information available to the ACCC; this has included information provided by the Ministry on a confidential basis and information published by the Australian Government and State and Territory Governments about the management of the healthcare system during the Pandemic.
 - The relevant areas of competition likely to be affected by the Proposed Conduct. These areas of competition include the supply of overnight and day hospital healthcare services to persons in the State of New South Wales, in both the private and public healthcare system. The supply of surgical and other related healthcare services to persons in the State of New South Wales is also likely to be relevant. These areas of competition encompass a diverse range of healthcare services.
 - The likely future with the Proposed Conduct that is the subject of the authorisation compared to the likely future in which the Proposed Conduct does not occur. In the future without the Proposed Conduct the ACCC considers that the New South Wales Government would be likely to enter into contracts with private healthcare operators on a bilateral basis. These contracts may be on broadly similar terms and would seek still to meet the NPA and other requirements implemented as part of the response to the Pandemic. However, the contracts would not establish the cooperation and coordination mechanisms between private healthcare operators provided for by the Proposed Conduct.

Public benefits

27. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁶

28. The Ministry submits that the Proposed Conduct will result in significant public benefits, including:
- enabling an effective and efficient integrated medical response to the Pandemic in New South Wales;
 - reducing the likelihood that Private Operators will have to reduce their operations as a result of funding issues caused by the impact of the Pandemic or Federal Government restrictions;
 - ensuring that there is sufficient healthcare available in New South Wales to respond to the anticipated clinical needs of patients during the Pandemic, so that all New South Wales patients will receive appropriate healthcare;
 - providing the Ministry and Public Health Organisations with service capacity oversight to distribute service delivery to meet periods of peak demand and minimise patient transfers between healthcare facilities, which will allow patients to receive the best possible care available at the time, including by ensuring there are adequate intensive care facilities available;
 - ensuring, to the extent possible, that medical and protective equipment and relevant supplies are available where needed to respond to the Pandemic;
 - Supporting Private Operators to continue operations and retain staff during and after the Pandemic, to ensure competition for the provision of private health services is preserved and consumers will continue to have a choice of private or public care.
29. The ACCC considers that, without the Proposed Conduct, the New South Wales Government would be likely to enter into contracts with private healthcare operators to facilitate access to the private healthcare system's resources; and that such agreements would be on broadly similar terms and would seek to meet the NPA and other requirements implemented as part of the response to the Pandemic. In these circumstances it is likely that the public benefits arising from the continuing operation of the private healthcare system could be achieved without the Proposed Conduct.
30. The ACCC considers that the Proposed Conduct will allow the participating parties to coordinate the medical response to the Pandemic in New South Wales as efficiently and effectively as possible, including by facilitating the swift response to any outbreaks that may emerge in New South Wales. The ACCC considers that this is likely to contribute to public confidence during the Pandemic. The ACCC considers that the Proposed Conduct is likely to result in significant benefits to the public by supporting the timely deployment of critical resources.
31. In addition, the ACCC considers that there are likely to be some contracting efficiencies resulting from the Proposed Conduct, and these may be more difficult to achieve without authorisation.

⁶ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

Conclusion on public benefits

32. The ACCC considers that the Proposed Conduct is likely to deliver significant public benefit through the enhanced coordination and improved responsiveness of the New South Wales healthcare system to the Pandemic.

Public detriments

33. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...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.⁷

34. The Ministry submits that it is not aware of any public detriments that may result from authorisation of the Proposed Conduct.
35. The Proposed Conduct introduces a number of measures to support the New South Wales healthcare system's response to the Pandemic, for example:
- a. discussion of healthcare operations, facility capacity, and resourcing;
 - b. allocation of services, including between healthcare facilities;
 - c. restriction of services, including determining services that can be provided at particular healthcare facilities; and
 - d. sharing of resources, including staff and medical supplies and equipment, to meet demand at particular healthcare facilities.
36. While providing a mechanism for the healthcare system to respond to the Pandemic, these measures may restrict competition. For example, private patients with non-COVID-19 conditions may experience fewer options or longer wait times for healthcare services during these interventions, including because COVID-19 patients are prioritised over other patients. To a large extent, however, many of these detriments would be likely to arise due to increased demand on healthcare resources as a result of the Pandemic, and by public policy decisions in response to it. In that sense, many of these detriments would occur with and without the Proposed Conduct.
37. The Proposed Conduct also allows for increased cooperation and coordination between competitors. Agreements between competitors can give rise to competition concerns if the horizontal agreement makes coordination (rather than competition) between firms beyond the terms of the authorised agreement more likely and also across the market more generally.
38. The ACCC considers that in the absence of the extraordinary circumstances created by the Pandemic, the detriment to the public from the Proposed Conduct could be significant.
39. However, the ACCC considers that, in the current circumstances, the likely public detriment from the Proposed Conduct is limited by a number of factors:
- a. the direction of capacity in the public and private healthcare system is in accordance with the AHPPC's principles on the reintroduction of hospital activity. These in part provide that restoration of elective surgery will be consistently applied in both public and private settings;

⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- b. to the extent that Private Operators retain the capacity to do so, nothing in the Partnership Agreements is intended to affect the normal competitive process vis-à-vis the provision of healthcare services to private patients;
- c. the Proposed Conduct does not extend to any price agreements between private hospitals for non-COVID-19 services;
- d. the Proposed Conduct does not extend to any coordination or agreement between Private Operators or between Private Operators and the Public Health Organisations other than as necessary or desirable to give effect to the Partnership Agreements and facilitate the Objectives. Coordination between the participating parties can only occur at the request or direction of the Ministry or one or more of the Public Health Organisations;
- e. any information shared under the Proposed Conduct is likely to lose relevance following the cessation of the Proposed Conduct; and
- f. the Proposed Conduct provides a temporary response to the Pandemic, the measures are not designed or intended to provide a permanent restriction on competition. The Proposed Conduct can be discontinued during the period of authorisation in the event that the effects of the Pandemic subside.

Conclusion on public detriments

- 40. The ACCC considers that the Proposed Conduct is likely to result in some public detriment in the short term because it will reduce competition, including in the supply of overnight and day hospital healthcare services to particular patients in New South Wales. However, there are a number of factors that mean the ACCC considers it unlikely that the Proposed Conduct will significantly impact competition in the long term.

Balance of public benefit and detriment

- 41. The ACCC considers that the Proposed Conduct is likely to result in significant public benefits through the enhanced coordination and improved responsiveness of the New South Wales healthcare system to the Pandemic.
- 42. The ACCC also considers that the Proposed Conduct is likely to result in some public detriment over the short term because it is likely to reduce competition in the supply of hospital healthcare services to certain patients in New South Wales. In the circumstances it considers that the reduction in competition is limited by a number of factors and is not likely to continue in the long term. In the absence of the extraordinary circumstances created by the Pandemic, the detriment to the public from the Proposed Conduct could be significant.
- 43. As discussed below, the ACCC is proposing to specify conditions in the proposed authorisation. By providing for transparency, the conditions provide confidence that any conduct falling outside of the conduct that is authorised would be unlikely.
- 44. Overall, and subject to the proposed conditions, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Proposed conditions of authorisation

45. The ACCC may specify conditions in an authorisation.⁸ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.⁹
46. In its May 2020 interim authorisation, the ACCC imposed conditions requiring the Ministry to provide reports to the ACCC and to notify the ACCC of additional participating parties. These conditions provide important transparency in relation to the Proposed Conduct and the parties protected by the interim authorisation.
47. As noted above, in the absence of the extraordinary circumstances of the Pandemic, the Proposed Conduct could lead to significant public detriment. The ACCC considers that the transparency gained through the conditions provides confidence that any conduct falling outside of the conduct that is authorised would be unlikely. The ACCC considers that the conditions imposed under the interim authorisation have been effective. Therefore, the ACCC proposes to continue these conditions as part of the substantive authorisation (see paragraphs 57 - 60).

Length of authorisation

48. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁰ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
49. In this instance, the Ministry seeks authorisation for 12 months from the date of the final determination.
50. The ACCC proposes to grant authorisation until 30 September 2021.

Draft determination

The application

51. On 30 April 2020, the Ministry lodged application AA1000507 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
52. The Ministry seeks authorisation, on behalf of itself, Private Operators, Public Health Organisations, and the Representative Bodies for the broad purpose of maximising healthcare capacity and ensuring the State-wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare during the period of the Pandemic.
53. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

54. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation in relation to the Ministry's application unless it is satisfied in all the circumstances that the Proposed Conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.

⁸ Section 88(3).

⁹ Section 88(3).

¹⁰ Subsection 91(1).

55. For the reasons outlined in this draft determination, and subject to the proposed conditions, the ACCC considers that, in all the circumstances, the Proposed Conduct would result in a benefit to the public, and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
56. Accordingly, the ACCC proposes to grant authorisation.

Proposed conditions of authorisation

57. The ACCC may specify conditions in an authorisation.¹¹ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.¹²
58. The ACCC may specify conditions in circumstances where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of the authorisation.¹³
59. In this instance, the ACCC proposes to grant authorisation subject to the following conditions:

Condition 1 – Reporting Requirements

The Ministry must provide regular updates to the ACCC at a frequency agreed between the Ministry and the ACCC, and provide any additional information reasonably requested by the ACCC.

Condition 2 – Notification of future parties

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

60. These proposed conditions are the same as those that currently apply under the Interim Authorisation granted on 1 May 2020.

Conduct which the ACCC proposes to authorise

61. Subject to the proposed conditions, the ACCC proposes to grant authorisation AA1000507 to enable the Ministry, Private Operators, Public Health Organisations, and Representative Bodies to coordinate healthcare services to facilitate the most efficient and effective allocation of healthcare during the period of the COVID-19 pandemic as described in paragraph 6 and defined as the Proposed Conduct.
62. The Proposed Conduct may involve:
- a cartel provision within the meaning of Division 1 of Part IV of the Act, or
 - a substantial lessening of competition within the meaning of section 45 of the Act, including by engaging with one or more persons in a concert practice, or
 - a corporation that has a substantial degree of market power in a market engaging in conduct that has the purpose, or has or is likely to have the effect of substantially lessening competition within the meaning of section 46 of the Act, or
 - may constitute exclusive dealing within the meaning of section 47 of the Act.

¹¹ Section 88(3) of the Act.

¹² Section 88(3) of the Act.

¹³ Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

63. The ACCC proposes to grant authorisation to the Proposed Conduct only in so far as it is for the sole purpose of dealing with the effects of the Pandemic in New South Wales.
64. The ACCC proposes to grant conditional authorisation AA1000507 until 30 September 2021.
65. This draft determination is made on 9 July 2020.

Next steps

66. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

Attachment 1 – Private Operators

Overnight facilities

- Adventist Healthcare Limited
- Alpha Pacific Hospitals Pty Ltd
- Alpha Westmead Private Hospital Pty Limited
- Alwyn Holdings Pty Ltd
- AME Hospitals Pty Ltd
- AME Properties Pty Ltd
- Armidale Hospital Pty Limited
- Australian Hospital Care (Lady Davidson) Pty Ltd
- Bondi Newco Pty Ltd
- Brisbane Waters Administration Pty Limited
- Calvary Health Care Riverina Limited
- Captia Pty Limited
- Central Coast Private Hospital Pty Ltd
- Central Lakes Hospitals Pty Ltd
- Central West Medical Group Pty Ltd
- Charlestown Private Hospital Pty Ltd
- Delmar Private Hospital Pty Ltd
- East Sydney Day Hospital Pty Ltd
- Eastern Suburbs Private Hospital Pty Ltd
- Forster Private Hospital Pty Ltd
- Gordon Clinic Pty Limited
- HCOA Operations (Australia) Pty Limited
- Health Care Corporation Pty Ltd
- Healthe Care Dubbo Pty Ltd
- Healthe Care Hironnelle Pty Ltd
- Healthe Care Lingard Pty Ltd
- Healthe Care North Gosford Pty Ltd
- Health Care Speciality Holdings Pty Ltd
- Health Care Surgical Holdings Pty Ltd
- Healthscope Operations Pty Ltd
- Herglen Pty Ltd
- Hurstville Private Pty Ltd
- Hyperbaric Health Pty Ltd
- Insight Newco Pty Ltd
- Kaizen Hospitals (Holroyd) Pty Limited

- Kaizen Hospitals (Malvern) Pty Limited
- Kogarah Private Hospital Pty Ltd
- Lakeview Private Hospital Pty Ltd
- Lifehouse Australia Limited as Trustee for the Lifehouse Australia Trust
- Macquire Health Corporation Corporation Limited
- Macquarie Hospital Services Pty Ltd
- Maitland Private Hospital Pty Ltd
- Mayo Healthcare Group Pty Ltd
- Minchinbury Community Private Hospital Pty Limited
- MQ Health Pty Limited
- Mt Wilga Pty Ltd
- NBH Operator Co Pty Ltd
- Newcastle Private Hospital Pty Limited
- North Shore Private Hospital Pty Limited
- P.O.W. Hospital Pty Limited
- Peninsula Health Care Pty Limited
- Phiroan Pty Ltd
- Pittwater Hospital Services Pty Ltd
- Presbyterian Church (NSW) Property Trust
- President Private Hospital Pty Limited
- Pruinosa Pty Ltd
- Ramsay Health Care Australia Pty Ltd
- Royal Rehabilitation Centre Sydney
- RR Private Limited
- Shellharbour Private Hospital Pty Limited
- Sidbeal Pty Ltd
- South Coast Private Pty Limited
- St John of God Hawkesbury District Health Campus Ltd
- St John of God Health Care Inc
- St Luke's Care
- St Vincent's Private Hospitals Ltd
- Sutherland Heart Clinic Pty Ltd
- Sydney Surgery Centre Pty Ltd
- The Congregation of the Religious Sisters of Charity Australia
- The Hills Clinic Pty Ltd
- The Hunter Valley Private Hospital Pty Ltd
- Trustees of the Roman Catholic Church of Diocese of Lismore

- Vexal Pty Ltd
- Waratah Private Hospital Pty Ltd
- Wesley Community Services Limited
- Westmead Rehabilitation Hospital Pty Ltd
- Wolper Jewish Hospital
- Woodose Pty Ltd

Day only facilities

- AAC Norwest Day Surgery Pty Ltd
- Albury Day Surgery Pty Ltd
- AMJO Medial Services Pty Ltd
- Andrew Chang Services Pty Ltd
- Angelo Tsirbas
- B. Braun Avitum Australia Pty Ltd
- Baardon Medical Services Pty Ltd
- Betryan Investments Pty Ltd
- Bredd Pty Limited
- Calvary Health Care Riverina Limited
- Campsie Day Surgery Pty Ltd
- Central Coast Surgery Pty Ltd
- Centre for Digestive Diseases Pty Ltd
- CFC Global Pty Ltd
- City West Day Surgery Pty Ltd
- Coffs Harbour Day Hospital Pty Ltd
- Cosmos Cosmetic Day Surgery Pty Ltd
- Cura Newco 5 Pty Ltd
- Dalmarte Pty Ltd
- Dee Why Endoscopy Pty Ltd
- Dr R Fitzsimons, Jennifer Arnold Pty Ltd, S.T. Chung & Co Pty Ltd, S M D M Pty Ltd, Dev Jyoti Pty Ltd
- Drs S & N Sachdev
- Duer Investments Pty Limited
- Eastern Heart Clinic Pty Limited
- Edward Sun Proprietary Limited, Richard Foster Pty Limited
- Elida Holdings Pty Ltd
- Endoscopy Service Pty Ltd
- Felpet Pty Ltd

- Fresenius Medical Care Australia Pty Ltd
- Galome Pty Ltd
- Genea Limited
- Genesis Cancer Care Victoria Pty Ltd
- Germoline Pty Ltd
- Ghabrial Medical Services Pty Ltd
- Hamilton Day Surgery Pty Ltd
- Hathorn Holdings Pty Ltd
- HCoA Operations (Australia) Pty Limited
- Healthwoods Day Surgery Pty Ltd
- Hereward Pty Ltd
- Hodgkinson, Darryl James
- Idameneo (123) Pty Ltd
- Integrated Clinical Oncology Network Pty Ltd
- IVF Australia Pty Ltd
- Kearns & Smith Eye Services Pty Ltd
- Kogarah Day Surgery Pty Ltd
- Lacular Pty Limited
- Lau, Dr A T S
- Lithgow Community Private Hospital Limited
- Liverpool Day Surgery Pty Ltd
- Luke Hazell Pty Ltd
- Madison Day Surgery Pty Ltd
- Marie Stopes International
- Mark Paul Kohout
- Miranda Day Surgery Pty Limited
- NDH Newco 1 Pty Ltd
- Newcastle Endoscopy Centre Pty Limited
- Newcastle Eye Hospital Pty Limited
- Newland Street Specialist Centre Pty Ltd
- Nexus Day Hospitals Pty Ltd
- Northern Cancer Institute (Frenchs Forest) Pty Limited
- Northern Cancer Institute Pty Ltd
- Oopchar Trading Pty Ltd
- Parramatta Eye Centre Pty Ltd
- PDS Investment Holdings Pty Limited
- Peter Anthony Martin Pty Ltd

- Port Macquarie Ophthalmic Surgery Pty Ltd
- Poruby Pty Limited
- Presmed Australia Pty Ltd
- Radiation Oncology Associates Pty Limited
- Ramsay Health Care Australia Pty Ltd
- Ranchbelt Pty Limited
- Randwick Endoscopy Centre Pty Ltd
- Regional Imaging Limited
- Riverina Cancer Care Centre Pty Ltd
- Shewhing Pty Limited
- Sight for Life Foundation
- Skin & Cancer Foundation Australia
- SMDCC Pty Limited
- South Medical Pty Ltd
- South Western Day Surgical Centre Pty Ltd
- Southern Suburbs Day Procedure Centre Pty Limited
- Southside Cancer Care Centre Pty Ltd
- Sydney Day Surgery Prince Alfred Pty Limited
- Sydney Vision Services Pty Ltd
- Takirosavi Pty Ltd
- The Eye Institute Pty Ltd
- The Surgical Chamber Pty Ltd
- The Trustees of the Roman Catholic Church for the Diocese of Lismore (St Vincent's Hospital)
- Trustee of the Baydoor Trust
- Tweed Surgicentre Pty Ltd
- VEI Services Pty limited
- Votraint No 604 Pty Ltd
- Wollongong Day Surgery Pty Ltd

Attachment 2 – Public Health Organisations

New South Wales Public Health Organisations, as defined in the Health Services Act 1997 (NSW) (Public Health Organisations). This covers public health facilities, including the following:

- Albury Wodonga Health - Albury Campus
- Armidale Rural Referral Hospital
- Auburn Hospital & Community Health Services
- Ballina District Hospital
- Balmain Hospital
- Balranald Multi Purpose Service
- Bankstown-Lidcombe Hospital
- Baradine Multi Purpose Service
- Barham Koondrook Soldiers Memorial Hospital
- Barraba Multi Purpose Service
- Batemans Bay Hospital
- Bathurst Base Hospital
- Batlow/Adelong Multi Purpose Service
- Bellinger River District Hospital
- Belmont Hospital
- Berrigan War Memorial Hospital/Multi Purpose Service
- Bingara Multipurpose Service
- Blacktown Hospital
- Blayney Multipurpose Service
- Blue Mountains District Anzac Memorial Hospital
- Boggabri Multi Purpose Service
- Bombala Multi Purpose Service
- Bonalbo Hospital
- Boorowa Multi Purpose Service Hospital
- Bourke Multi Purpose Service
- Bourke Street Health Service Goulburn
- Bowral Hospital
- Braeside Hospital
- Braidwood Multi Purpose Service
- Brewarrina Multi Purpose Service
- Broken Hill Base Hospital

- Bulahdelah Community Hospital
- Bulli Hospital
- Byron Central Hospital
- Calvary Health Care Sydney Ltd
- Calvary Mater Newcastle
- Camden Hospital
- Campbelltown Hospital
- Canowindra Soldiers Memorial Hospital
- Canterbury Hospital
- Casino And District Memorial Hospital
- Cessnock District Hospital
- Cobar District Hospital
- Coffs Harbour Base Hospital
- Coledale Hospital
- Collarenebri Multi Purpose Service
- Concord Repatriation Hospital
- Condobolin District Hospital
- Condobolin Retirement Village
- Coolah Multi Purpose Service
- Coolamon-Ganmain Multi Purpose Service Hospital
- Cooma Hospital & Health Service
- Coonabarabran District Hospital
- Coonamble Health Service
- Cootamundra District Hospital
- Corowa Health Service
- Cowra District Hospital
- Crookwell District Hospital
- Culcairn Multi Purpose Service Hospital
- Cumberland Hospital
- David Berry Hospital
- Delegate Multi Purpose Service
- Deniliquin Hospital
- Denman Multi Purpose Service
- Dorrigo Multi Purpose Service

- Dubbo Base Hospital
- Dunedoo Multi Purpose Service
- Dungog Community Hospital
- Emmaville - Vegetable Creek Residential Aged Care
- Eugowra Memorial Multi Purpose Service
- Fairfield Hospital
- Finley Hospital & Community Health Care
- Forbes District Hospital
- Gilgandra Multi Purpose Service
- Glen Innes District Hospital
- Gloucester Soldiers Memorial Hospital
- Goodooga Hospital
- Gosford Hospital
- Goulburn Base Hospital
- Gower Wilson Multi Purpose Service
- Grafton Base Hospital
- Greenwich Hospital
- Grenfell Multi Purpose Service
- Griffith Base Hospital
- Gulargambone Multi Purpose Service
- Gulgong Health Service
- Gundagai District Hospital
- Gunnedah District Hospital
- Guyra Multi Purpose Service
- Hay District Hospital
- Henty Multi Purpose Service
- Hillston District Hospital
- Holbrook District Hospital
- Hornsby Ku-Ring-Gai Hospital
- Hunter New England Mental Health Service
- Inverell District Hospital
- Ivanhoe Health Service
- Jerilderie Multi Purpose Service
- John Hunter Hospital Royal Newcastle Centre

- Junee Multi Purpose Service
- Karitane
- Kempsey District Hospital
- Kurri Kurri District Hospital
- Kyogle Memorial Multi Purpose Service
- Lake Cargelligo Multi Purpose Service
- Leeton District Hospital
- Lightning Ridge Multipurpose Health Service
- Lismore Base Hospital
- Lismore Base Hospital - Riverlands Drug & Alcohol Service
- Lithgow Hospital
- Liverpool Hospital
- Lockhart & District Hospital
- Long Jetty Health Care Facility
- Lourdes Hospital & Community Services
- Macksville District Hospital
- Maclean District Hospital
- Macquarie Hospital
- Manilla Health Service
- Manning Rural Referral Hospital (Taree)
- Mercy Care Hospital - Young
- Mercy Health Service
- Merriwa Multi Purpose Service
- Milton Ulladulla Hospital
- Molong Health Service
- Mona Vale Hospital
- Moree District Hospital
- Moruya District Hospital
- Mount Druitt Hospital
- Mudgee Health Service
- Murrumbah-Harden Hospital
- Murwillumbah District Hospital
- Muswellbrook Hospital
- Narrabri District Hospital

- Narrandera Hospital
- Narromine Hospital & Community Health
- Nepean Hospital
- Neringah Hospital
- Nimbin Multi Purpose Service
- Nyngan Multi Purpose Service
- Oberon Multi Purpose Service
- Orange Health Service
- Pambula District Hospital
- Parkes District Hospital
- Peak Hill Health Service
- Port Kembla Hospital
- Port Macquarie Base Hospital
- Portland Tabulam Health Centre
- Prince Albert Tenterfield
- Prince Of Wales Hospital
- Queanbeyan District Hospital
- Quirindi Community Hospital
- Royal Hospital For Women
- Royal North Shore Hospital
- Royal Prince Alfred Hospital
- Royal Rehabilitation Hospital - Coorabel/Moorong
- Ryde Hospital
- Rylstone District Hospital
- Sacred Heart Health Service
- Scott Memorial Hospital, Scone
- Shellharbour Hospital
- Shoalhaven District Memorial Hospital
- Singleton District Hospital
- South East Regional Hospital
- Springwood Hospital
- St George Hospital
- St Joseph's Hospital
- St Vincent's Hospital (Darlinghurst)

- St Vincent's Hospital (Lismore)
- Sydney Children's Hospital
- Sydney Hospital And Sydney Eye Hospital
- Tamworth Rural Referral Hospital
- Temora Hospital
- The Children's Hospital At Westmead
- The Forensic Hospital
- The Maitland Hospital
- The Sutherland Hospital
- The Tweed Hospital
- Tibooburra Health Service
- Tingha Multipurpose Service
- Tocumwal Hospital
- Tomaree Community Hospital
- Tottenham Hospital
- Trangie Multi Purpose Health Service
- Tresillian Family Care Centre - Belmore
- Tresillian Family Care Centre - Willoughby
- Tresillian Family Care Centre - Wollstonecraft
- Trundle Multi Purpose Service
- Tullamore Multi Purpose Health Service
- Tumbarumba Multi Purpose Service
- Tumut District Hospital
- Urana Health Service
- Urbenville Health Service
- Wagga Wagga Rural Referral Hospital
- Walcha Multipurpose Service
- Walgett Health Service
- War Memorial Hospital
- Warialda Multipurpose Service
- Warren Multi Purpose Health Service
- Wauchope District Memorial Hospital
- Wee Waa Community Hospital
- Wellington Health Service

- Wentworth District Hospital
- Werris Creek Community Hospital
- Westmead Hospital
- Wilcannia Health Service
- Wilson Memorial Community Hospital
- Wingham Community Hospital
- Wollongong Hospital
- Woy Woy Public Hospital
- Wyalong Hospital
- Wyong Public Hospital
- Yass District Hospital
- Young District Hospital