AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Draft Determination

Application for authorisation
lodged by
The Medical Technology Association of Australia Limited
in respect of
coordinating the supply of medical equipment and related supplies in response to the COVID-19 pandemic.
Authorisation number: AA1000479

26 June 2020

Commissioners: Sims
Keogh
Rickard
Cifuentes
Court
Ridgeway

Summary

The ACCC proposes to grant conditional authorisation to the Medical Technology Association of Australia Limited, its members, and relevant non-members in the medical technology industry, to enable them to coordinate the supply of medical equipment and related supplies in response to the COVID-19 pandemic.

While competitors working together to share information and coordinate supply is generally likely to be anti-competitive, the ACCC is satisfied that the arrangements, subject to the proposed reporting conditions, are unlikely to significantly reduce competition beyond the short term and are likely to result in significant public benefits by enabling the participants to exchange information with industry and government and where necessary, coordinate for the supply of medical equipment necessary for the treatment of COVID-19 patients and the resumption of normal health services.

On 17 April 2020, the ACCC granted conditional interim authorisation to enable the participants to commence engaging in the proposed conduct while the ACCC is considering the substantive application. The interim authorisation remains in effect until it is revoked or the ACCC releases its final determination.

The ACCC received submissions from a range of interested parties, all of which were supportive of the proposed conduct. Feedback provided by the participants states that the coordinated conduct engaged in under the interim authorisation has been beneficial in ensuring quick and consolidated responses to government requests.

The ACCC proposes to grant conditional authorisation until 24 March 2021.

Next steps

The ACCC invites submissions on this draft determination by 17 July 2020 before making its final decision. The ACCC is particularly interested to understand the views of interested parties regarding the scope of the proposed conduct and the proposed duration of authorisation.

The Medical Technology Association of Australia Limited and interested parties may also request the ACCC to hold a conference to allow oral submissions on the draft determination.

1. The application for authorisation

1.1. On 24 March 2020, the Medical Technology Association of Australia Limited (the **MTAA**) lodged application for authorisation AA1000479 with the Australian Competition and Consumer Commission (the **ACCC**). The MTAA seeks authorisation on behalf of itself, its members and relevant non-members in the medical technology industry (listed in **Attachment A)** to enable them to implement a coordinated strategy in relation to the supply of medical equipment and supplies in response to the COVID-19 pandemic. The MTAA is also seeking authorisation on behalf of future members of the MTAA and relevant non-member businesses, on the basis that the relevant parties and products may expand as the Federal Government's response to the COVID-19 pandemic evolves and information relating to new medical equipment and related supplies is required.

1.2. The MTAA seeks authorisation for twelve months from the date of final authorisation.

1.3. The application for authorisation AA1000479 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

1.4. 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.

1.5. The MTAA also requested that the ACCC grant urgent interim authorisation to commence engaging in the conduct while the ACCC considers the substantive application.

The Applicant

1.6. The MTAA is a national association representing more than 100 companies across the medical technology industry. Members of the MTAA include manufacturers and suppliers of medical equipment used in the diagnosis, prevention, treatment and management of disease and disability. The MTAA's members distribute a wide range of medical equipment, including intensive care unit (**ICU**) ventilators, COVID-19 testing kits and personal protective equipment (**PPE**).

The Proposed Conduct

1.7. The MTAA seeks authorisation to make and give effect to arrangements, and to exchange information, between the MTAA, its members and non-member businesses (the **Participants**) for the purposes of:

(a) sharing information regarding:

i. available stock and inventory levels, including parts and inputs;

ii. actual or likely quantities of stock, parts and/or inputs that can be obtained through existing supply channels;

iii. new sources of supply and potential orders or quantities;

iv. projected or likely expected demand;

v. potential delays or failures in the services of third party domestic and international transport, freight and logistics providers;

vi. freight costs; and

vii. opportunities to increase domestic manufacturing,

for a range of medical equipment and supplies, being:

viii. initially, ICU ventilators, COVID-19 testing kits and Personal Protective Equipment; and

ix. the full range of medical equipment, consumables and technology used in the treatment of intensive care patients; and

x. other medical equipment and consumables that are required to address the increased demands on the health system arising from the COVID-19 crisis in respect of which there are actual or potential supply constraints because of domestic or global supply shortages or the impact of freight and logistics;

(b) coordinating procurement of inputs, manufacturing and coordinating and allocating the fulfilment of orders and supply requests between suppliers;

(c) prioritising certain requests for supply as nominated by the Federal Government, State and Territory Governments and relevant health authorities; and

(d) working together to respond to tenders or requests for supply (including sharing information or joint tenders),

(together, the **Proposed Conduct**).

1.8. The MTAA submits that it anticipates that State, Territory and Federal health authorities will determine the manner in which they require supplies of necessary medical equipment and related medical supplies to be made by the MTAA members and non-member businesses rather than those matters being determined or agreed among the Participants.

1.9. The ACCC considers that the Proposed Conduct is broad in nature and is seeking submissions on the breadth of the Proposed Conduct prior to releasing its final determination. In making its final determination the ACCC will seek to ensure that the Proposed Conduct is no broader than necessary to address supply issues arising from the COVID-19 pandemic.

Interim authorisation

1.10. The MTAA requested urgent interim authorisation to enable the Participants to engage in the Proposed Conduct while the ACCC is considering the substantive application.

1.11. On 25 March 2020, the ACCC granted interim authorisation in respect of the application for authorisation AA1000479 lodged by the MTAA on 24 March 2020.[1]

1.12. On 14 April 2020, the MTAA amended its application, expanding upon the conduct proposed, and sought interim authorisation for the conduct described in the amended application. The ACCC revoked the interim authorisation granted on 25 March 2020 and substituted it with conditional interim authorisation on 17 April 2020.[2]

1.13. Interim authorisation was granted subject to conditions requiring the MTAA to notify the ACCC of any new MTAA members and non-member businesses that may be

[1] ACCC, Medical Technology Association of Australia – Interim Authorisation Decision Statement of Reasons, 25 March 2020.

[2] ACCC, Medical Technology Association of Australia – Conditional Interim Authorisation Decision Statement of Reasons, 17 April 2020.

involved in the Proposed Conduct and if any of the Participants intend to engage in particular aspects of the Proposed Conduct. The conditions also require the MTAA to provide regular updates to the ACCC regarding any material decisions and developments in relation to the Proposed Conduct and to provide further information on request by the ACCC.

1.14. A register of notifications made under the interim authorisation is available on the Public Register for this matter. The interim authorisation remains in effect until it is revoked or the ACCC releases its final determination.

2. Background

2.1. On 11 March 2020 the World Health Organisation announced that COVID-19 is a pandemic.

2.2. The ACCC recognises the significant challenges occurring as a result of the COVID-19 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, that 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 through the unavailability of sufficient supplies of certain medical products. The identification of this risk and the need for collective and coordinated action by competitors gave rise to the need for applications for authorisation such as the one from MTAA.

2.3. The MTAA submits that as the COVID-19 pandemic increasingly impacts Australia's health system and global supply chains, and with the majority of medical equipment imported into Australia, it is expected that the ongoing supply of medical equipment will be severely constrained. The Federal Government advised the MTAA that, due to the impact of COVID-19, it is seeking to secure adequate supply of medical equipment necessary for the treatment of COVID-19 patients. The Commonwealth Department of Health requested that the MTAA coordinate with its member medical equipment suppliers and other non-member businesses to identify sources of supply and to also provide advice regarding any constraints or obstacles in securing supply. The Federal Government has also requested the MTAA provide advice as to any emerging issues that may constrain the supply of medical equipment.

2.4. The MTAA submits that in order to respond to the Federal Government's requests, it needs to coordinate with the MTAA members and non-members in the medical technology industry to make and give effect to arrangements to "implement a coordinated strategy in relation to the supply of medical equipment and supplies in response to the current COVID-19 crisis".

3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

3.2. The ACCC invited submissions from a range of potentially interested parties including State and Federal government and relevant regulatory bodies, consumer groups and relevant industry associations and peak bodies.[3]

3.3. The ACCC received nine submissions from interested parties, all of which provided general support for the authorisation. Several submissions noted that while there were clear public benefits to flow from the Proposed Conduct, it was important that these measures were temporary to prevent any detrimental impact on competition in the market.

3.4. The ACCC also contacted the 127 Participants to better understand the effect of the interim authorisation and to provide an opportunity for feedback on the authorisation more generally.

3.5. Public submissions by interested parties and responses from the Participants are summarised below and are available on the Public Register for this matter.

Interested party submissions

3.6. The Australian Orthopaedic Association (the **AOA**) supports the MTAA's application for authorisation, noting that industry groups have been formed which include MTAA members and non-member businesses together with Australian government representatives. The AOA submits that these stakeholders are cooperating to secure supply and also increase local production and manufacturing of ventilators, COVID-19 testing kits, PPE and other ancillary ICU equipment.

3.7. The Australian Healthcare and Hospitals Association (the **AHHA**) strongly supports the application and submits that it is critical to the ability to address significant supply constraints in the health sector and to ensure health services are appropriately resourced for the resumption of normal services. The AHHA submits that authorisation is unlikely to have any negative impact on competition in the short to medium term and that the risk of negative impacts in the long term will be mitigated by the ACCC's review processes.

3.8. Medicines Australia (**MA**) supports the application and submits that, in these unprecedented circumstances, suppliers may need to temporarily coordinate arrangements to ensure supply of medical equipment and supplies and in order to provide timely responses and assistance to relevant government bodies. MA submits that the Proposed Conduct is necessary in managing the Federal, State and Territory Governments' response to COVID-19, and accordingly, is in the interest of the Australian public. MA also submits that such a measure is extraordinary and temporary and, as such, any detrimental effect on competition is outweighed by the public benefit of the Proposed Conduct.

3.9. Research Australia submits that the cooperation involved in the Proposed Conduct is essential if the required medical equipment and supplies are to be produced in a timely and efficient manner.

3.10. ARCS Australia submits that the MTAA and its members are playing a vital role in the COVID-19 preparedness and considers it imperative that companies be allowed to coordinate in accordance with the application for authorisation to better meet short term and urgent demand following advice from health agencies.

3.11. The Australian Government Department of Industry, Science, Energy and Resources (**DISER**) supports the application for authorisation, including conditions to regularly

[3] The public submissions received are available from the ACCC's public register.

update the ACCC on specified matters. DISER submits that the public benefits of a temporary coordinated effort across the sector outweigh the short-term risks of sharing information and coordinating supply. DISER also submits that limiting the initial authorisation period to twelve months also substantially reduces possible competition risks.

3.12. The Victorian Department of Health and Human Services (**DHHS**) submits that the COVID-19 pandemic has increased global demand for PPE and medical devices used in the management of patients with COVID-19. Given these global supply chain issues and a rapidly evolving public health emergency, effective collaboration and sharing of knowledge and intelligence within the healthcare industry is critical and necessary during these unprecedented times to support the work led by all State/Territory and Commonwealth Governments in responding to the pandemic.

3.13. MTP Connect supports the application to enable a coordinated strategy to ensure that industry can best meet Australia's medical equipment needs in response to the COVID-19 pandemic. MTP Connect submits that the MTAA has coordinated with its members to identify sources of supply for medical equipment and to provide advice to government regarding constraints and/or obstacles to securing this supply. MTP Connect also submits that the industry groups are playing an essential role in facilitating local manufacturing of these essential items in anticipation of ongoing disruption in global supply chains.

3.14. The Consumers Health Forum of Australia (the **CHF**) supports the application for authorisation on the understanding that the authorisation is limited for the duration of the COVID-19 pandemic and that the MTAA will provide regular updates to the ACCC on activities that fit into the Proposed Conduct. The CHF notes that it makes sense for suppliers to be able to communicate with others so as not to waste valuable resources and time duplicating efforts and not filling gaps. The CHF submits that the overall benefits to consumers outweigh risks of loss of competition and its potential impact on price.

Submissions on the impact of interim authorisation

3.15. The ACCC received 18 public responses to the request for updates[4] on activities under the interim authorisation. Of these responses, 13 Participants advised that they are not currently engaging in the Proposed Conduct.

3.16. Five Participants advised that they are engaging in the Proposed Conduct and made the following comments and claims:

- The main public benefit is to government stakeholders, in that they get a consolidated source of information on a regular basis from all major suppliers, which is an efficient means of gathering information.
- There is a natural tendency for suppliers to not share information even if allowed to under this authorisation.
- Exchanging information has allowed companies to use limited time and resources more effectively, focussing on the gaps – both current and anticipated – rather than over-servicing an area that is already well met.
- The market for PPE was quite concentrated and certain suppliers had market power that makes it difficult for entrants. The sharing of information at an industry

[4] The public submissions received are available from the ACCC's public register.

level has made it easier for a wider array of companies to assist with PPE supply. It is claimed that this has made the market more competitive by lowering the barriers to entrants.

- Being able to share information regarding trends in purchasing, challenges with freight suppliers and preparedness of different health boards has been extremely valuable.

- The industry was facing a situation where hospitals or laboratories were looking for supplies at the same time, in unprecedented quantities. The market left to its own would not have fulfilled that demand in an efficient manner. The interim authorisation has created visibility of relevant supply and demand and enabled suppliers to meet an urgent need.

4. ACCC assessment

4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. The MTAA has sought authorisation for Proposed 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 section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation 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 be likely to result (**authorisation test**).

Relevant areas of Competition

4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.

4.4. The MTAA did not specifically describe the relevant areas of competition.

4.5. The ACCC considers that the relevant areas of competition are likely to be for the supply of medical equipment and related medical supplies relevant to the treatment of COVID-19, including ICU ventilators, COVID-19 testing kits and PPE. The ACCC does not consider that a precise definition of the market is necessary for the assessment of the Proposed Conduct.

Future with and without the Proposed Conduct

4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.[5]

4.7. As the Proposed Conduct is currently occurring subject to interim authorisation the ACCC has the benefit of observing how the Proposed Conduct is operating in practice and this is likely to be of relevance to a view of how the likely future with the Proposed Conduct would look if authorisation is granted in a final determination.

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[5] Re Queensland Independent Wholesalers Ltd (1995) 132 ALR 225; Re Qantas Airways Ltd [2004] ACompT 9;; Re VFF Chicken Meat Growers Boycott Authorisation [2006] ACompT 2; Re Application by Medicines Australia Inc [2007] ACompT 4; Re Macquarie Generation and AGL Energy Ltd [2014] ACompT 1.

4.8. The rationale for Proposed Conduct is closely linked with the impacts of COVID-19 in Australia. The future likelihood and severity of those impacts is uncertain at this point in time.

4.9. The ACCC notes that, currently, COVID-19 infection rates in Australia are low and the demand for medical equipment and related supplies has largely stabilised since peaks in March and April 2020. However, as noted by the MTAA in its application, the majority of medical equipment is imported into Australia. Consequently, the continued increase of infection rates internationally is likely to influence the availability of supply of medical equipment and related medical supplies in Australia. Accordingly the future with and without the Proposed Conduct is more difficult to predict compared to applications for authorisation that are not related to the COVID-19 pandemic, or those where the Australian circumstances are more insulated from global factors.

4.10. The ACCC considers that in the future with the Proposed Conduct, where necessary, the Participants will advise and share information through three working groups that have been established (ICU consumables, ventilators and PPE) with State, Territory and Federal government departments. The Participants will be able to coordinate activities relating to the supply of medical equipment. As has occurred under interim authorisation, the extent to which the Participants can engage in the Proposed Conduct will continue to be influenced by State, Territory and Federal health authorities who will determine the manner in which they require supplies of necessary medical equipment and related medical supplies to be made.

4.11. The ACCC considers that in the future without the Proposed Conduct the Participants and State, Territory and Federal government departments may be less able to quickly and effectively respond to any increase in the rate of COVID-19 infection in Australia or internationally and so the supply of medical equipment and related medical supplies may not be able to meet demand.

Public benefits

4.12. 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]

The MTAA's submission

4.13. The MTAA submits that the Proposed Conduct will allow the Participants to coordinate their manufacturing and supply activities and exchange information so that areas of supply shortage and constraint can be addressed more quickly and effectively to assist governments to respond more effectively to COVID-19.

4.14. The MTAA further submits that the Proposed Conduct will allow the Participants to more effectively advise the State, Territory and Federal governments and relevant health agencies in relation to the supply of medical equipment. The MTAA claims this is essential to ensuring a coordinated and effective response to an unprecedented public health crisis.

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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.

Interested party submissions

4.15. The AHHA, MA, Research Australia support the Proposed Conduct as a means of addressing significant supply constraints in the health sector bought about by the COVID-19 pandemic in a timely and efficient manner. The AHHA also notes that the Proposed Conduct will ensure health services are appropriately resourced for the resumption of normal health services. DHHS and MA further submit that the Proposed Conduct will be beneficial in supporting work led by State, Territory and Federal Governments in responding to the COVID-19 pandemic.

4.16. MTP Connect and DHHS noted that the COVID-19 pandemic has seriously impacted the global supply chain for medical equipment and related supplies and that the coordinated efforts of the Participants, through the working groups, are playing a key role in facilitating a domestic response in anticipation of ongoing disruptions.

The ACCC's views

4.17. Subject to its ongoing assessment, including submissions made in response to this draft determination, the ACCC considers there are likely to be significant public benefits from the Proposed Conduct, including:

- ensuring a sufficient supply of medical equipment and related medical supplies through the coordination of manufacturing and supply activities both in response to the COVID-19 pandemic and for the resumption of normal health services; and
- providing effective and transparent advice to the State, Territory and Federal governments on the supply of medical equipment and related medical supplies which is essential to ensuring a coordinated and effective response to the COVID-19 situation.

4.18. Those public benefits arise to the extent to which there are, or there are risks of, significant numbers of COVID-19 infections in Australia (and, as noted at paragraph 4.9, overseas due to Australia's reliance on imported medical equipment). The ACCC notes that COVID-19 infection rates in Australia have not been as high as initially projected and therefore the demand for relevant medical equipment and related medical supplies (and in turn, the need for the Proposed Conduct) has not been as great as may have been anticipated. However, the risk of increased infection rates in Australia (and overseas) remains and therefore there remains a threat to the supply of relevant medical equipment and related medical supplies.

4.19. The ACCC acknowledges that to the extent infection rates in Australia remain low, and there are no associated critical issues in the supply and/or demand of relevant medical equipment and supplies, the actual reliance by the Participants on the Proposed Conduct may be limited. However, given the uncertain environment, in which delays and inefficiencies may have significant public health consequences, the Proposed Conduct is likely to mitigate these risks to a significant extent by enabling urgent action if the need arises and this is a public benefit.

Public detriments

4.20. 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]

4.21. The MTAA submits that the Proposed Conduct would include the exchanging of information around pricing and quantities, and the coordination of supply, however it does not extend to setting or agreeing prices for medical equipment and related medical supplies (which will remain at the discretion of each Participant). Accordingly, the MTAA submits that there are not any significant public detriments associated with the Proposed Conduct.

4.22. A number of submissions from interested parties noted that the temporary duration of the authorisation was important to ensuring that there was limited public detriment, particularly to prevent long term impact on competition.

4.23. The ACCC considers that the Proposed Conduct risks removing or reducing competition in the manufacture and supply of medical equipment and related medical supplies by enabling competitors to share information, coordinate procurement and work together to respond to tenders or requests for supply. The ACCC notes that conduct of this type normally gives rise to significant concerns regarding the extent to which it might significantly impact competition.

4.24. Although the long-term effects of the COVID-19 pandemic are somewhat uncertain, the ACCC considers that there are a number of factors that mitigate any significant public detriment, including as a result of any lessening of competition:

- The Proposed Conduct, and authorisation itself, is a temporary measure.
- Authorisation is subject to reporting conditions requiring the MTAA to provide regular updates to the ACCC regarding any material developments in relation to the Proposed Conduct.
- Engaging in the Proposed Conduct is voluntary and the authorisation enables both new MTAA members and non-member businesses to join at any stage.
- The Proposed Conduct will be influenced by what State, Territory and Federal health authorities determine is required in terms of the supply of medical equipment and related supplies in response to the COVID-19 pandemic.
- The information shared under the Proposed Conduct will predominantly be time-limited, so will lose relevance following the end of the Proposed Conduct and authorisation.

Potential to facilitate unauthorised information sharing and coordination

4.25. Agreements among competitors increase the potential for anticompetitive coordination beyond the scope of the application. While the Proposed Conduct is limited to coordination in relation to the supply of medical equipment and related medical supplies in response to the COVID-19 pandemic, these discussions may give rise to opportunities to discuss other matters. This could lead, either explicitly or tacitly, to agreements in relation to the supply of equipment, devices and other products not relevant to the COVID-19 pandemic. Such conduct could significantly reduce competition in relation to these products.

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

4.26. Agreements in relation to the supply of equipment, devices and other products not relevant to the COVID-19 pandemic would not be protected under the proposed authorisation. Any such agreements would be subject to investigation by the ACCC and, as appropriate, prosecution under the Act. On this basis, the ACCC considers that the risk of coordination more broadly is limited.

Balance of public benefit and detriment

4.27. The ACCC considers that the Proposed Conduct is likely to result in significant public benefits by enabling the Participants to exchange information with industry and government and where necessary, coordinate the supply of medical equipment necessary for the treatment of COVID-19 patients and the resumption of normal health services following any period of increased demand during the pandemic.

4.28. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriments, including as a result of any lessening of competition.

4.29. Further, it remains the case that the extent to which the Proposed Conduct is engaged in will be influenced by State, Territory and Federal health authorities who will determine the manner in which they require supplies of necessary medical equipment to be made available by the Participants.

4.30. For the reasons outlined in this draft determination, 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.

Length of authorisation

4.31. The Act allows the ACCC to grant authorisation for a limited period of time.[8] 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.

4.32. In this instance, the MTAA seeks authorisation for twelve months from the date of final authorisation.

4.33. A number of submissions from interested parties and Participants highlighted the temporary nature of the authorisation as helpful in ensuring that the public benefits outweighed potential public detriment.

4.34. Taking these submissions into account and in the context of the evolving nature of the current COVID-19 situation, the ACCC proposes to grant authorisation until 24 March 2021.

4.35. The ACCC seeks submissions relating to the proposed length of authorisation.

[8] Subsection 91(1) of the Act.

5. Draft determination

The application

5.1. On 24 March 2020, the MTAA lodged application AA1000479 with the ACCC, seeking authorisation under subsection 88(1) of the Act. The application was amended on 14 April 2020.

5.2. The MTAA seeks authorisation to enable Participants to implement what it refers to as a coordinated strategy in relation to the supply of medical equipment and related medical supplies in response to the COVID-19 pandemic.

5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

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

5.5. For the reasons outlined in this draft determination, and subject to the proposed conditions and the ACCC's further assessment, the ACCC considers, in all the circumstances, that the Proposed Conduct would be likely to 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, including any lessening of competition.

5.6. Accordingly, the ACCC proposes to grant authorisation subject to the reporting conditions at paragraph 5.13.

Conduct which the ACCC proposes to authorise

5.7. Subject to the proposed conditions, the ACCC proposes to grant authorisation AA1000479 to enable the Participants[9] to engage in the Proposed Conduct. However the ACCC proposes to grant authorisation for the Proposed Conduct only insofar as it is for the sole purpose of ensuring the supply of medical equipment and related medical supplies in response to the COVID-19 pandemic.

5.8. The ACCC proposes to grant authorisation AA1000479 until 24 March 2021.

5.9. This draft determination is made on 26 June 2020.

Proposed conditions of authorisation

5.10. The ACCC may specify conditions in an authorisation.[10] The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.[11]

5.11. The ACCC may specify conditions 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.[12]

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9 Section 88(2) of the Act.
10 Section 88(3) of the Act.
11 Section 88(3) of the Act.

5.12. In this instance, the ACCC has considered the possible circumstance where the COVID-19 pandemic, or the risks of the pandemic, do not significantly worsen in Australia, and the demand for medical equipment and related supplies remains relatively stable. In that circumstance the Proposed Conduct may result in less public benefit. Given the uncertainties, the ACCC considers it appropriate to specify reporting conditions in order to maintain an appropriate level of oversight.

5.13. The ACCC proposes the following conditions:

(1) Notification of future parties

- The MTAA must promptly notify the ACCC of any new members or non-member businesses that will be involved in the Proposed Conduct.

(2) Reporting requirements

- The MTAA must provide regular updates regarding any material decisions and developments in relation to the Proposed Conduct, including but not limited to any material contracts, arrangements made or understandings entered into as part of the Proposed Conduct.
- The ACCC will publish a non-confidential version of these updates on the Public Register for this matter.

(3) Provision of any further information

- The MTAA, any MTAA member and any non-member business involved in the Proposed Conduct which is authorised must promptly provide any further information about the conduct being engaged in under the authorisation that the ACCC requests from time to time.

6. Next steps

6.1. The interim authorisation granted on 17 April 2020 remains in place until it is revoked or the date the ACCC's final determination comes into effect.

6.2. The ACCC now invites submissions in response to this draft determination by 17 July 2020, particularly relating to the broad nature of the Proposed Conduct and the proposed length of authorisation. 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 A – List of Participants.

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

Attachment A

List of MTAA members and non-members

MTAA members
3D-Matrix Medical Technology Pty Ltd
3DMEDiTech
3DMorphic Pty Ltd
3M Australia Pty Ltd
Abbott [Vascular] Australasia
Abbott Medical Australia Pty Ltd
Alcon Laboratories (Australia) Pty Ltd
Allergan Australia Pty Ltd
AlphaXRT Ltd
Amplifon Australia
Analytica Pty Ltd
APNE Surgical Pty Ltd
Australasian Medical & Scientific Ltd
Australian Dermatology Equipment
Avanos Medical Australia Pty Ltd
B Braun Australia Pty Ltd
Bard Australia Pty Ltd
Bausch & Lomb (Australia) Pty Limited
Baxter Healthcare Pty Ltd
Biotronik Australia Pty Ltd
Boston Scientific Pty Ltd
Brainlab Australia Pty Ltd
ConMed Australia
Cook Australia Pty Ltd
Corin (Australia) Pty Ltd
Culpan Medical Australia Pty Ltd
Device Technologies Australia Pty Ltd
Edwards Lifesciences Pty Ltd
Elekta Pty Ltd
Exactech Australia
Fresenius Kabi Australia Pty Ltd
Fresenius Medical Care Australia Pty Ltd
Gamma Gurus Gel Works Pty Ltd
Getz Healthcare Pty Ltd
Grey Innovation
Hemideina Hillrom PTY LTD
Hologic (Australia) Pty Ltd
Horten Medical
Johnson & Johnson Medical Pty Ltd
KLS Martin Australia Pty Ltd
Laminar Air Flow Pty Ltd

LifeHealthcare Pty Ltd
LivaNova Australia Pty Ltd
Materialise Australia Pty Ltd
Medacta Australia Pty Ltd
MED-EL Implant Systems Australasia Pty Ltd
Medical Specialties Australia Pty Ltd
Medigroup Australia Pty Ltd
Medi Press Medtronic Australasia Pty Ltd
MicroPort CRM Pty Ltd
Molnlycke Healthcare
NeedleCalm Pty Ltd
Nevro Medical Pty Ltd
NL-Tec Pty Ltd
Olympus Australia Pty Ltd
Paragon Therapeutic Technologies
Prism Surgical Designs Pty Ltd
Roche Diabetes Care Australia Pty Ltd
Smiths Medical Australasia Pty Ltd
Spectrum Surgical Pty Ltd
Stryker Australia Pty Ltd
Teleflex Medical Australia Pty Ltd
Terumo Australia Pty Ltd
Tomi Australia Pty Ltd
Tresmine Pty Ltd t/a Circuitwise
Tunstall Australasia Pty Ltd
Varian Medical Systems Australasia Pty Ltd
Vision RT Australia Pty Ltd
W. L. Gore and Associates (Aust) Pty Ltd
Wright Medical Australia
Zimmer Biomet
Non-member participants
ResMed Pty Ltd
Draeger Australia Pty Ltd
GE Healthcare Australia Pty Limited
Philips Healthcare Australia
Australian Business Mobiles (NSW) Pty Ltd
Whiteley Corporation Pty Ltd
Mo Milling Pty Ltd
Multigate Medical Products Pty Ltd
Mun Australia Pty Limited
Australian Safety Wholesalers Pty Ltd
Enztec
iSmile Group
Vapotherm Inc.
Fisher & Paykel Healthcare
ZOLL Medical Australia

Arjo Australia Pty Ltd
Mosaic Medical (Asia Pacific) Pty Ltd
Abbott Rapid Diagnostics Pty Ltd
Getinge Australia Pty Ltd
PD Medical
Members of Pathology Technology Australia (not MTAA members)
Pathology Technology
MP Biomedicals Australasia Pty Ltd
Paragon Therapeutic Technologies Pty Ltd
Pro-Health Asia Pacific Pty Ltd
SJ Alder Pty Ltd SpeeDx Pty Ltd
Astral Scientific Pty Ltd
Agilent Technologies Australia Pty Ltd
Illumina Australia Pty Ltd
Integrated Sciences Pty Ltd
Merck Millipore Australia Pty Ltd
PerkinElmer Pty Ltd
Sysmex Australia Pty Ltd
Tecan Australia Pty Ltd
Cepheid Holdings Pty Ltd
ESL Biosciences Australia (2012) Pty Ltd
QIAGEN Pty Ltd
Becton Dickinson Pty Ltd
bioMérieux Australia Pty Ltd
Bio-Rad Laboratories Pty Ltd
Grifols Australia Pty Ltd
ThermoFisher Scientific Australia Pty Ltd
Abbott Australasia Pty Ltd
Roche Diagnostics Australia Pty Ltd
Siemens Healthcare Pty Ltd
Ascencia Pty Ltd
Lumos Diagnostics Holdings Pty Ltd
Genetic Signatures Limited Life Bioscience Pty Ltd
Radiometer Pacific Pty Ltd
Binding Site Pty Ltd
Diagnostica Stago Pty Ltd
Abacus dx Pty Ltd
Australasian Medical and Scientific Ltd
Hologic (Australia) Pty Ltd
SpeeDx Pty Ltd
Werfen Australia Pty Ltd
Trajan Scientific Australia Pty Ltd