



# Draft Determination and interim authorisation

Application for revocation of A91276 and the substitution of  
authorisation AA1000602

lodged by

CALMS Ltd

in respect of

a 'not to exceed' fee schedule in the provision of after-hours primary  
medical care in the Australian Capital Territory

Authorisation number: AA1000602

24 February 2022

Commissioners: Keogh  
Rickard  
Brakey

## Summary

The ACCC proposes to grant re-authorisation to enable CALMS to continue to use its 'not to exceed' fee schedule in the provision of after-hours primary medical care in the ACT. This conduct has been authorised by the ACCC since 2005 and is not significantly different in the current application.

The locums that provide medical services to CALMS' patients are engaged as independent contractors. Rather than allowing doctors to set their own fees with complete freedom, CALMS sets a maximum fee scale for the provision of certain services that locums are not able to charge above.

The ACCC considers the conduct is likely to continue to provide public benefits in the form of increased transparency and certainty regarding fees for patients seeking after hours primary medical care in the ACT. This affords greater certainty to CALMS' patients with respect to the maximum fee for out-of-hours medical services. It may also assist patients in the ACT to make better informed decisions when choosing between the CALMS service, other extended hours clinics and hospital emergency services.

The ACCC considers the conduct is likely to result in limited public detriment as participation by locums is voluntary and the arrangement imposes a fee cap rather than a fee floor.

The ACCC proposes to grant authorisation for 10 years.

Given the current authorisation expires on 20 March 2022, the ACCC has also granted interim authorisation to enable the arrangements to continue while the ACCC considers the substantive application.

The ACCC invites submissions in relation to this draft determination by 10 March 2022 before making its final decision.

## 1. The application for authorisation revocation and substitution

- 1.1. On 19 January 2022, CALMS Ltd (**CALMS**) lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation A91276 and substitute authorisation AA1000602 for the one revoked (**re-authorisation**).
- 1.2. CALMS is seeking re-authorisation to continue the use of a 'not to exceed' fee schedule for locum practitioners working on the CALMS roster in the provision of after-hours primary medical care in the Australian Capital Territory (**ACT**) for 10 years. CALMS also requests the ability to make reasonable increases to the fee cap from time to time, if necessary (the **Conduct**).
- 1.3. This application for re-authorisation AA1000602 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. Since the existing authorisation expires on 20 March 2022, CALMS requested interim authorisation to enable it to continue to engage in the Conduct while the ACCC is

considering the application for re-authorisation. Granting interim authorisation prior to the expiry of the existing authorisation will have the effect of suspending its operation and substituting it with the interim authorisation such that the ACCC can consider the application for re-authorisation. The request for interim authorisation is discussed further in section 6.

## 2. Background

- 2.1. CALMS describes itself as a medical deputising service that provides after-hours primary medical care in the ACT. There is no restriction on who can access CALMS' services: it is available to all patients who contact the call centre to book an appointment, regardless of whether their regular medical practitioner works with CALMS.
- 2.2. The locum medical practitioners working with CALMS are parties to the Conduct. While their services overlap to some extent, the structure of CALMS limits the extent to which they compete in the provision of after-hours primary care. Notably, there is only one locum rostered on at each clinic location at any given time, and all patient appointments are made through a central hub in which the patient's preferred location (rather than the locum on duty) determines which clinic they attend.<sup>1</sup>
- 2.3. CALMS currently has 80 general practices that are members. These practices rely on CALMS to provide after-hours medical care for their patients. When one of their patients is seen by a CALMS locum, the practice receives a copy of the locum's clinical notes. This provides the patient's regular doctor the opportunity to review the service provided and ensure that a high standard of patient care is maintained.<sup>2</sup>
- 2.4. CALMS has a contractual obligation to ACT Health (as its funding provider) to use such a fee schedule. However, CALMS notes that if authorisation were not granted, the contract would be amended to enable operation without a schedule in place.
- 2.5. CALMS submits that there are a number of extended hours clinics in the ACT and CALMS is no longer the majority provider of this service. CALMS estimates it provides approximately 15-20% of the after-hours medical services in the ACT, with 55% provided by extended hours clinics and 20-25% provided by emergency departments and walk-in-clinics.<sup>3</sup>
- 2.6. CALMS considers its main competitors are:
  - the National Home Doctor Service – which provides bulk billed home visits by a GP throughout the after-hours period across Canberra
  - Emergency Departments at Calvary and Canberra Hospitals – available at all hours
  - Walk-in Clinics – located in Belconnen, Dickson, Gungahlin, Tuggeranong and Weston Creek. Open from 7:30am until 10pm and offering free health care, they provide some after-hours coverage
  - Extended hours clinics – a number of general practices in Canberra operate into the after-hours period (often until 10pm), and
  - Health Direct – a 24-hour medical advice service either by phone or online.<sup>4</sup>

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<sup>1</sup> CALMS Ltd, Application by for re-authorisation (19 January 2022), page 3.

<sup>2</sup> CALMS Ltd, Application by for re-authorisation (19 January 2022), page 5.

<sup>3</sup> CALMS Ltd, Application by for re-authorisation (19 January 2022), page 4.

<sup>4</sup> CALMS Ltd, Application by for re-authorisation (19 January 2022), page 4.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including the ACT and Commonwealth Departments of Health, medical service providers and doctor representative bodies.
- 3.3. The ACCC received two submissions in relation to the application. Both submissions – from the Commonwealth Department of Health and Canberra Health Services – are supportive of the application.<sup>5</sup>

### 4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. CALMS seeks 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 section 45 of the Act.<sup>6</sup> Consistent with 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 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 (the **authorisation test**).
- 4.3. To assist with the assessment of the Conduct, the ACCC considers:
  - the likely future without the Conduct is that the CALMS service will still be in operation, but locums will independently set their own fees for patient consultations, and
  - the relevant area of competition likely to be affected by the Conduct is the provision of after-hours primary health care medical services to patients within the ACT.
- 4.4. The ACCC considers the Conduct is unlikely to affect the daytime operation of GP services as:
  - the fee cap only applies to locums working with CALMS and therefore does not apply to any daytime general practices (including CALMS members), and
  - CALMS provides written clinical handover notes back to the usual treating GP following these services.<sup>7</sup>

### Public benefits

- 4.5. 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 in considering public benefits:

*... we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the*

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<sup>5</sup> Public submissions by interested parties are on the Public Register for this matter. See <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/calms-ltd>

<sup>6</sup> See subsection 91C(7) of the Act.

<sup>7</sup> Submission by Canberra Health Services (11 February 2022).

*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.*<sup>8</sup>

- 4.6. CALMS submits that a 'not to exceed' fee schedule provides patients with some certainty as to the cost of the service. This allows patients to make better informed health decisions, as it increases the likelihood that patients will consider CALMS when investigating potential healthcare options outside of regular opening hours. CALMS submits that patients view cost as a determining factor when deciding whether or not to utilise a healthcare service, therefore, without transparent fee information, a significant number of patients who are willing to use the service (and would benefit from it) may choose not to because of the uncertainty of the cost.
- 4.7. In support of its claim, CALMS provided data obtained from a recent patient survey which shows that 92% of respondents rated CALMS' "information on fees" as being either "Very Good" or "Excellent".<sup>9</sup>
- 4.8. The Commonwealth Department of Health submits that CALMS plays an important role in ensuring patients have access to after-hours primary care services. The Conduct keeps the cost of primary care services affordable for patients and reduces the likelihood that patients will present to emergency departments due to cost.
- 4.9. The Canberra Health Service submits that CALMS provides an effective and excellent after-hours GP medical service to the ACT community.
- 4.10. The ACCC considers that providing upfront, transparent fee information is likely to result in public benefits from providing greater certainty to CALMS' patients with respect to the maximum fee for obtaining out-of-hours medical services. This may assist patients in the ACT to make better informed decisions when choosing between the CALMS service, another extended hours clinic or hospital emergency services.

## Public detriments

- 4.11. 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.*<sup>10</sup>

- 4.12. CALMS submits that the potential public detriments are minimal because:
  - it is limited to locums working with CALMS in the provision of after-hours care, therefore being limited to the pool of 12 CALMS locums covering 64 shifts a month
  - the fee schedule does not apply to all CALMS services: CALMS also provides triaging and medical advice over the phone free of charge, and
  - the fee schedule being a cap allows CALMS locums to retain some degree of flexibility to charge a lower fee.
- 4.13. The Commonwealth Department of Health supports these claims, submitting that there are alternative after-hours providers in the ACT and participation in the CALMS

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<sup>8</sup> 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.

<sup>9</sup> CALMS Ltd, Application by for re-authorisation (19 January 2022), Attachment B.

<sup>10</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

arrangements by locums is voluntary. Therefore, the Commonwealth Department of Health considers that the Conduct does not prevent competition in the sector.

### **Impact on price competition**

- 4.14. The ACCC notes that, although the arrangement sets a price cap rather than a price floor or prescribed price, and CALMS locums retain the discretion to either charge a lower fee or bulk bill, participating locums are more likely to charge fees at the level of the cap. Additionally, doctors providing after-hours care outside of CALMS may also be more likely to charge fees at or above this level rather than competing on price.
- 4.15. CALMS advises that while most consultations through CALMS are charged at the cap, many locums choose to charge below the fee cap. For example, locums bulk bill:
- 2-3% of clinic consultations
  - 12-13% of home visits, and
  - 95% of Residential Aged Care Facility visits.
- 4.16. The ACCC understands that the capped fee amount is set by the CALMS Board after consulting with locums and GPs. Although ACT Health does not have a formal role in approving the capped fee amount and subsequent increases to the cap, it does provide significant funding to CALMS and as such has an interest in the fees set by the CALMS Board. This is likely to provide some constraint on the ability of CALMS to set the fee cap at inappropriate levels.
- 4.17. The ACCC also notes that CALMS does not change the level of the capped fees regularly. Fee increases have only been made every four to five years in the past and allow CALMS to adjust the prices where necessary, for example to maintain a difference between in-hours and out-of-hours medical care expenses or to better reflect the increased cost of providing the service.
- 4.18. Further, while many of the daytime general practices in Canberra are members of CALMS (and direct their patients to CALMS for after-hours care) there is no obligation for those patients to use the CALMS service. Patients are free to seek after-hours medical care from other service providers if they wish. As such, the increasing presence of competition in the provision of after-hours care in the ACT is likely to similarly constrain CALMS from significantly increasing its fee caps.
- 4.19. For these reasons, the ACCC considers the Conduct is unlikely to result in any significant public detriment.

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

- 4.20. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

### **Length of authorisation**

- 4.21. The Act allows the ACCC to grant authorisation for a limited period.<sup>11</sup> 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

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

authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.22. In this instance, CALMS seeks re-authorisation for 10 years. CALMS submits this is an appropriate period as the existing authorisation was granted for 10 years and it does not expect to change the conduct in the foreseeable future.

4.23. The ACCC proposes to grant authorisation for 10 years.

## 5. Draft determination

### The application

5.1. On 19 January 2022, CALMS lodged an application to revoke authorisation A91276 and substitute authorisation AA1000602 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000602 was made under subsection 91C(1) of the Act.

5.2. CALMS seeks authorisation to continue to use its 'not to exceed' fee schedule for locum practitioners working on the CALMS roster in the provision of after-hours primary medical care in the ACT. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

5.3. 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 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 Conduct.

5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the 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 Conduct, including any lessening of competition.

5.5. Accordingly, the ACCC proposes to grant re-authorisation.

### Conduct which the ACCC proposes to authorise

5.6. The ACCC proposes to revoke authorisation A91276 and grant authorisation AA1000602 in substitution. Authorisation AA1000602 enables CALMS to continue the use of its 'not to exceed' fee schedule for locum practitioners working on the CALMS roster in the provision of after-hours primary medical care in the ACT as described in paragraph 1.2 and defined as the Conduct.

5.7. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

5.8. The ACCC proposes to grant authorisation AA1000602 for 10 years.

5.9. The proposed authorisation is in respect of the arrangement as it stands at the time authorisation is granted. Any changes to the arrangement – other than the fee changes from time to time as described in paragraph 1.2 – during the term of the proposed authorisation would not be covered by the proposed authorisation.



5.10. This draft determination is made on 24 February 2022.

## 6. Interim authorisation

- 6.1. At the time of lodging the application, CALMS requested interim authorisation to continue the Conduct while the ACCC assesses the application for re-authorisation.
- 6.2. Given the existing authorisation expires on 20 March 2022, CALMS requested interim authorisation to ensure it remains covered if the ACCC's consideration of the substantive application goes beyond this date.
- 6.3. To enable due consideration to be given to the application for re-authorisation, the ACCC has decided to suspend the operation of authorisation A91276 and grant interim authorisation in substitution for the suspended authorisation. The ACCC has decided to grant interim authorisation for the following reasons:
  - interim authorisation will maintain the status quo, allowing CALMS to continue to use its fee cap schedule beyond 20 March 2022, and
  - for the reasons set out in this draft determination, the ACCC considers the conduct is likely to result in public benefits which would outweigh any likely public detriment.
- 6.4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for re-authorisation is withdrawn.

## 7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by 10 March 2022. In addition, consistent with section 90A of the Act, CALMS or an interested party may request that the ACCC hold a conference to discuss the draft determination.