



Draft Determination

Application for authorisation

lodged by

Australia New Zealand Industrial Gas Association

in respect of

coordinating the supply of medical oxygen in response to the COVID-19 pandemic

Authorisation number: AA1000516

Date: 2 September 2020

Commissioners: Sims

Keogh

Court

Ridgeway

Summary

The ACCC proposes to grant conditional authorisation to the Australia New Zealand Industrial Gas Association (ANZIGA) and its current and future members and other suppliers of medical oxygen to hospitals and similar medical facilities notified to the ACCC from time to time (together, the Parties), to enable the Parties to exchange information and make and give effect to contracts, arrangements or understandings required to ensure security of supply of medical oxygen to hospitals and similar medical facilities in the event of significant demand increases or supply constraints during the COVID-19 pandemic (the Proposed Conduct).

On 9 June 2020, the ACCC granted conditional interim authorisation to enable the Parties to engage in the Proposed Conduct, if needed, while the ACCC considers the substantive application for authorisation.

The Parties currently have sufficient production capacities to meet substantial increases in demand for medical oxygen and to date the Parties have not needed to engage in the Proposed Conduct. The ACCC considers that, should the Proposed Conduct be necessary, it is likely to result in public benefits by allowing the Parties to ensure the continuity and security of supply of medical oxygen to hospitals and similar medical facilities, including by ensuring efficient and timely distribution of medical oxygen for the benefit of patients.

Generally, competitors sharing information and coordinating supply of goods and/or services has the potential to lessen competition and result in consumer detriment by restricting supply and increasing prices, stifling innovation and preventing other businesses from entering the market. However, in this case, the ACCC considers that, should it be necessary, the Proposed Conduct is unlikely to significantly reduce competition beyond the period of the COVID-19 pandemic.

The ACCC proposes to authorise the Parties to engage in the Proposed Conduct subject to notification and reporting conditions (similar to those operating under the interim authorisation granted by the ACCC on 9 June 2020). Under the proposed conditions, the Parties must provide written notice to the ACCC prior to engaging in the Proposed Conduct, including (where a threat relates to the public health system) confirmation that the relevant state or territory health authority has been notified of the specified threat. The proposed conditions provide transparency and certainty that the Proposed Conduct will only be engaged in when necessary and, therefore, that the opportunities for information sharing among the Parties will be limited.

In response to interested party feedback, the ACCC proposes to clarify the detail to be provided in the written notice required by the current conditions of interim authorisation. The clarification requires the Parties to include a brief explanation for their view that bilateral arrangements are unable to manage the identified threat and the Proposed Conduct is therefore necessary. The ACCC considers the additional information required does not impede the Parties' ability to respond rapidly in the event of a threat to the continuity of supply of medical oxygen but welcomes submissions on this point.

Based on the available information, and subject to the proposed conditions, the ACCC considers that the likely public benefits would outweigh the public detriments likely to result from the Proposed Conduct, including any lessening of competition.

The ACCC proposes to grant conditional authorisation until 30 September 2021.

1. The application for authorisation

- 1.1. On 21 May 2020, the Australia New Zealand Industrial Gas Association (**ANZIGA**) lodged application for authorisation AA1000516 with the Australian Competition and Consumer Commission (the **ACCC**). ANZIGA is seeking authorisation to share information and make and give effect to contracts, arrangements or understandings necessary to ensure security of supply of medical oxygen to hospitals and similar medical facilities during the COVID-19 pandemic.
- 1.2. ANZIGA is seeking authorisation on behalf of its current and future members and their related bodies corporate and other suppliers of medical oxygen that are notified to the ACCC by ANZIGA (together, the **Parties**) for 12 months from the date the ACCC's final determination comes into force.
- 1.3. This application for authorisation AA1000516 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. ANZIGA also requested interim authorisation to enable the Parties to engage in the proposed conduct, if it becomes necessary, while the ACCC is considering the substantive application. On 9 June 2020, the ACCC granted conditional interim authorisation under subsection 91(2) of the Act. The conditional interim authorisation remains in place until it is revoked or the date the ACCC's final determination comes into force.

ANZIGA

- 1.6. ANZIGA is the peak industry body representing companies that produce and distribute industrial gases, including bulk and compressed gas, to industrial, medical, food, scientific and hospitality users in Australia and New Zealand.
- 1.7. ANZIGA's current full members are Air Liquide Australia Limited, BOC Limited and Coregas Pty Ltd. Together, ANZIGA estimates that its members supply more than 90 per cent of oxygen to end users in Australia and would account for the supply of nearly all medical oxygen in Australia. ANZIGA estimates that medical oxygen generally accounts for around 10 to 15 per cent of total oxygen demand.

The Proposed Conduct

- 1.8. ANZIGA is seeking authorisation for the Parties to, in the event of a threat to the supply of medical oxygen:
 - (a) exchange information in relation to each Party's:
 - (i) available stock of
 - (ii) anticipated demand for, and ability to supply

medical oxygen in either bulk liquid or gas cylinder form. This may include, for example, disclosing the identity, location and immediate requirements for medical oxygen of particular customers, and

- (b) make and give effect to contracts, arrangements or understandings as the Parties reasonably consider necessary to ensure the continuity and security of supply of medical oxygen to hospitals and similar medical facilities during the COVID-19 pandemic (other than contracts, arrangements or understandings in relation to the price of the supply of medical oxygen), including:
 - (i) restricting the supply of oxygen to customers other than hospitals and similar medical facilities
 - (ii) determining who should supply particular hospitals or similar medical facilities
 - (iii) coordinating the delivery of medical oxygen to particular areas or to particular hospitals or medical facilities, and
 - (iv) otherwise coordinating between the Parties to ensure that medical oxygen can be supplied in the most efficient manner possible so as to reduce the risk of an inability to supply any hospital or similar medical facility

(the **Proposed Conduct**).

- 1.9. In addition, ANZIGA advises that any confidential or competitively sensitive information exchanged pursuant to the authorisation will be used solely for the purposes of ensuring the supply of medical oxygen to hospitals and similar medical facilities that might otherwise be at risk of disruption as a result of the impacts of COVID-19.
- 1.10. Further, the ACCC notes the Proposed Conduct does not extend to information sharing or agreements in relation to longer-term supply arrangements such as supply agreements with State and Territory health authorities. Under the Proposed Conduct, the Parties would be discussing and agreeing to short-term arrangements to respond effectively to shortfalls in supply or excess demand of medical oxygen as a result of the COVID-19 pandemic.

Interim authorisation

- 1.11. ANZIGA requested urgent interim authorisation to enable the Parties to engage in the Proposed Conduct, should it be necessary, while the ACCC considers the substantive application. ANZIGA has noted that if Australia continues to contain COVID-19 infection rates at the current low level, the need to engage in the Proposed Conduct may not arise. Nevertheless, the Parties considered it prudent to seek authorisation (including interim authorisation) by reason of the risk of a 'second wave' of infections.
- 1.12. On 9 June 2020, the ACCC granted conditional interim authorisation in respect of the Proposed Conduct.¹ In granting conditional interim authorisation, the ACCC recognised the need for the Parties to be in a position to respond to the potential impact of a demand increase for, or supply constraint on the distribution of, medical oxygen to hospitals and medical facilities during the COVID-19 pandemic.
- 1.13. Interim authorisation was granted subject to conditions of authorisation similar to those set out at paragraph 5.11 of this draft determination. The conditions of interim authorisation include a requirement on ANZIGA to provide regular reports to the ACCC and to notify the ACCC prior to the Parties engaging in the Proposed Conduct.

¹ ACCC, [Australia New Zealand Industrial Gas Association – Interim Authorisation Decision](#), 9 June 2020.

ANZIGA has commenced providing regular reports to the ACCC in compliance with the conditions of authorisation. These will continue to be 'nil' reports unless or until the Parties notify the ACCC of a relevant threat to the supply of medical oxygen that they believe makes it reasonably necessary to engage in the Proposed Conduct.

- 1.14. The interim authorisation remains in place until the ACCC's final determination comes into force, it is revoked by the ACCC or the application is withdrawn by ANZIGA.

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. In this context, the ACCC has received a 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 this application from ANZIGA.
- 2.3. ANZIGA submits that, while COVID-19 infection rates in Australia have been well controlled to date, there remains potential for a large increase in demand for medical oxygen as a result of the pandemic, primarily due to the potential for a significant increase in the number of patients requiring ventilation support in hospitals and healthcare facilities. ANZIGA submits that this is particularly demonstrated by overseas experience.
- 2.4. While ANZIGA anticipates that the demand for medical oxygen will not exceed Australia's overall production or supply capacities, ANZIGA submits that there remains potential for the COVID-19 pandemic to result in both:
 - (a) rapid increases in demand for oxygen in localised geographic areas that cannot be predicted with certainty, and
 - (b) disruptions to elements of the supply chain.

Rationale for the Proposed Conduct

- 2.5. ANZIGA submits that the COVID-19 pandemic has the potential to result in changes to the nature of demand for medical oxygen, including:
 - *Localised/regional spikes*—by reference to overseas experience, ANZIGA anticipates that COVID-19 and related demand increases for medical oxygen are likely to be concentrated in particular areas.
 - *Shifts from bulk liquid to gas cylinder form*—should a temporary medical facility be set up to handle large patient numbers for a particular area, ANZIGA anticipates that the dominant demand for medical oxygen in that area will switch from bulk liquid to gas cylinder form.
- 2.6. ANZIGA submits that the potential threats to the supply of medical oxygen to hospitals and medical facilities include, for example:

- *Production constraints at a particular facility*—medical oxygen in bulk liquid form is produced by liquefying air in Air Separation Units (**ASUs**). Each Party has a limited number of ASUs. ASUs represent large investments that are typically supported by major customers who contract significant proportions of product capacity. In addition, some ASUs are co-located and operationally interdependent with their major customer. The operation of an ASU may be jeopardised in the event that, due to COVID-19 or otherwise, its major customer or co-located business shuts down.
- *Limited numbers of cylinders*—a Party may need assistance from the other Parties to meet demand in a particular area for medical oxygen supplied in gas cylinders. In addition to bulk liquid form, medical oxygen can be supplied in reusable gas cylinders. Each Party has limited cylinders in circulation, which require thorough sanitisation before being returned into circulation. While there are sufficient cylinders to meet current demand, there are no domestic manufacturing capabilities.
- *Transportation and logistics issues*—the Parties may need to discuss and agree on logistical arrangements to cover distribution routes that have increased in volume, complexity and/or frequency due to a demand increase in a particular area or changes in demand due to the creation of temporary medical facilities. Each Party has a limited number of specially designed trucks with qualified drivers that transport medical oxygen to hospitals and medical facilities in a particular area in bulk liquid form. ANZIGA anticipates that the majority of COVID-19 patients will be treated within the public hospital system. Contracts for the supply of medical oxygen to public hospitals are typically held by a single Party for a large geographic location. ANZIGA advises that:
 - South Australia, Western Australia, Northern Territory, Australian Capital Territory and Tasmania each have a single contracted supplier of medical oxygen for all public hospitals in that State/Territory;
 - Queensland’s public hospitals are divided between two suppliers;
 - New South Wales has a single supplier for each Local Health District; and
 - Victorian public hospitals each arrange supply with individual suppliers pursuant to an overarching state head agreement.
- *Workforce debilitation*—the distribution of medical oxygen may be disrupted in the event any significant portion of the workforce of the Parties, including workers at ASUs, drivers and other operational workers, contracts COVID-19, is quarantined or is otherwise unable to work.

2.7. ANZIGA advises that, should there be threats to supply of medical oxygen, the Parties’ first response will be to:

- (a) in the case of the public health system—inform and consult with the relevant State Health Department; and/or
- (b) seek to negotiate bilaterally with another Party to purchase more oxygen.

2.8. Alternatively, ANZIGA notes that, in the event of supply challenges faced by one Party, it is possible that the affected customer or State Health Department may approach an alternative supplier directly.

2.9. However, ANZIGA submits that not all issues may be able to be resolved through bilateral discussions. For example, if there was an inability to supply medical oxygen in a particular area due to an outbreak, it may be necessary for the Parties to engage in

discussions to determine the most efficient way to secure supply. Similarly, if supplies of medical oxygen were threatened, it may be necessary for the Parties to agree that they should prioritise supply of oxygen to hospitals or similar facilities over industrial and commercial customers.

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 relevant industry associations or peak bodies, government departments and private businesses.
- 3.3. The ACCC received five submissions from interested parties.
- 3.4. The ACCC received submissions from Supagas Pty Ltd (associate member of ANZIGA), the Victorian Department of Health and Human Services, NSW Ministry of Health, WA Department of Health and GFG Alliance. Public submissions are available on the [public register](#) for this matter. Broadly, the submissions received from interested parties did not oppose the Proposed Conduct, although some did raise issues in relation to its scope and limits.
- 3.5. The Victorian Department of Health and Supagas were broadly supportive of the Proposed Conduct, although Supagas' submission was subject to the Proposed Conduct being extended to include Supagas' medical gas business. The ACCC notes that Supagas has expressed interest in engaging in the Proposed Conduct as a supplier of medical oxygen, but that it could not do so without ANZIGA first notifying the ACCC. The ACCC has not received a notification in this regard.
- 3.6. The NSW Ministry of Health submitted that, as a preliminary view, there would be limited benefit from authorising the Parties to exchange information because the suppliers were able to confirm, in response to NSW Health's forecasts, that they are able to produce the required quantities to meet needs for medical oxygen under the worst-case forecasted scenario.
- 3.7. The WA Department of Health submitted that the primary condition of authorisation should be to ensure the Parties do not unfairly inflate the price of medical oxygen. The Department of Health noted that, in WA, pricing, terms and conditions are constrained by the Common Use Arrangement established by the WA Department of Finance.
- 3.8. GFG Alliance operates steel manufacturing facilities in NSW, Victoria and South Australia. While GFG Alliance does not acquire medical oxygen, it has an interest in ensuring there is no impact on the competitive market for industrial gases generally as it is a large consumer of industrial gases, including non-medical oxygen. In GFG Alliance's view, it seems extremely unlikely that supply issues would not be able to be resolved through bilateral negotiations for new supply agreements.
- 3.9. GFG Alliance submitted that, to limit the opportunities for sharing information between the Parties as much as possible, there could be an additional step in the process before the Parties can engage in the Proposed Conduct. GFG Alliance submitted that this could involve the ACCC or another independent third party having a role in determining whether bilateral discussions and supply arrangements are insufficient and the Proposed Conduct is therefore necessary to manage an identified threat.

- 3.10. GFG Alliance submitted that, alternatively, the Parties could be required to provide justification for their view that bilateral negotiations are insufficient as well as the information that is shared between the Parties, which would create an onus on the Parties to be more transparent around any decision to engage in the Proposed Conduct.
- 3.11. In response, ANZIGA submits that the Proposed Conduct could not have an impact on the competitive market for industrial gases as suggested by GFG Alliance. ANZIGA submits that this is because the information sharing would only be in relation to the Parties' current stocks of oxygen in a particular region and would tell the Parties little or nothing about each other's longer term ability to supply industrial oxygen or other industrial gases. ANZIGA notes that the Proposed Conduct would only be engaged in where demand for medical oxygen does not reflect 'normal' levels, and therefore, information exchanged during these circumstances will not tell the Parties about their overall longer term demand for industrial oxygen or gases more generally. Further, ANZIGA submits that the information sharing would likely relate only to transport logistics in relation to trucks, rather than bulk deliveries or the supply of large scale industrial oxygen customers.

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. ANZIGA 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 section 45 and 47 of the Act. 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 (**authorisation test**).

Relevant areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. ANZIGA did not specifically identify the relevant areas of competition but its application is focused on the supply of medical oxygen to medical facilities.
- 4.5. The ACCC considers that the relevant areas of competition are likely to be for the supply of medical oxygen and related services. The relevant market may be broader where industrial gas manufacturers are able to readily switch from producing non-medical oxygen and other gases to producing medical oxygen. However, 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.²

² 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.

- 4.7. The rationale for the Proposed Conduct is closely linked with the impacts of COVID-19 in Australia. The future likelihood and severity of those impacts is largely unknown at this point in time. The ACCC notes that the demand for medical oxygen in Australia does not appear to have been significantly impacted to date. Accordingly, the Parties have not yet engaged in the Proposed Conduct.
- 4.8. The ACCC considers that, in the future with the Proposed Conduct, the Parties will, if reasonably required to address a threat to the supply of medical oxygen in Australia of a kind identified in paragraph 2.6 above, be able to exchange information and make agreements to ensure the supply of medical oxygen to hospitals and similar medical facilities.
- 4.9. The ACCC understands that, in the future without the Proposed Conduct, the Parties would likely rely on bilaterally negotiated agreements to address threats of the kind identified in paragraph 2.6 above to the supply of medical oxygen during the COVID-19 pandemic. Alternatively, the ACCC understands that in the event of supply challenges faced by one Party, it is possible that an affected customer or State Health Department may approach an alternative supplier directly.
- 4.10. Absent the Proposed Conduct, in circumstances where they are unable to address the threats by these means, the Parties may be less able to quickly and effectively address those threats and ensure the continuity and security of supply of medical oxygen to hospitals and similar medical institutions.
- 4.11. In particular, while the ACCC considers that bilateral agreements would, in the majority of cases, be sufficient to ensure the continued supply of medical oxygen in the event of these threats, absent the Proposed Conduct, any process requiring multiple and potentially overlapping bilateral agreements between the Parties may delay or hinder the Parties taking steps to address threats to the supply of medical oxygen to patients requiring it.

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.*³
- 4.13. ANZIGA submits that the Proposed Conduct has the sole purpose of ensuring that the Parties are able to ensure supply of medical oxygen to hospitals and healthcare facilities during the COVID-19 pandemic. ANZIGA submits that this ensures that those hospitals and similar facilities are able to provide life-saving treatments that depend on the availability of medical oxygen.
- 4.14. The ACCC considers that the Proposed Conduct, should it become necessary, is likely to result in public benefits by increasing the security of supply of medical oxygen and related equipment such as gas cylinders used to contain medical oxygen as well as delivery vehicles and suitably qualified drivers to transport the oxygen, to hospitals and similar medical facilities. This may include increased distribution efficiency by enabling

³ 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.

coordination on distribution routes, and a lower likelihood of shortfalls in the supply of oxygen to patients who may rely on medical oxygen for their treatment.

- 4.15. The ACCC notes the point raised by the NSW Ministry of Health about the limited benefits that may arise where the Parties' production capacities are sufficient to meet demand for medical oxygen even in the worst-case scenario. Similarly, GFG Alliance expressed the view that it is unlikely that the circumstances in which the Proposed Conduct may be required will actually arise because it is extremely unlikely that supply issues would not be able to be resolved through bilateral negotiations.
- 4.16. The ACCC understands that the Parties have sufficient production capacities to meet substantial increases in demand for medical oxygen and that this is the case with or without the Proposed Conduct. However, in assessing this application for authorisation, the ACCC has considered the public benefits and public detriments likely to arise from the Proposed Conduct, assuming that there is a threat to the supply of medical oxygen as a result of the COVID-19 pandemic that the Parties with the relevant Departments of Health are not able to resolve through bilateral negotiations and which therefore necessitates the Proposed Conduct.
- 4.17. In these circumstances, the ACCC considers the Proposed Conduct, including information sharing, is likely to produce significant benefits by enabling the efficient distribution of medical oxygen to hospitals and similar medical facilities. For example, the Parties may need to coordinate on distribution routes where temporary medical facilities have been established to cope with large patient numbers in a particular area. Further, the ACCC notes that the Proposed Conduct would also enable the Parties to make short-term agreements to prioritise the supply of medical oxygen towards medical facilities and away from other customers, which may not be possible through bilateral arrangements.
- 4.18. The ACCC acknowledges that, to the extent infection rates in Australia remain relatively low, and there are no associated significant disruptions to the supply and/or demand for medical oxygen, the Parties may not need to engage in the Proposed Conduct.

Public detriments

- 4.19. 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.⁴

- 4.20. The Proposed Conduct would allow suppliers of medical oxygen to coordinate their response to spikes in demand for medical oxygen, rather than competing to supply hospitals and other medical facilities in respect of this additional demand. Competitors sharing information and coordinating supply of goods and/or services has the potential to lessen competition and result in consumer detriment by restricting supply and increasing prices, stifling innovation and preventing businesses from entering the market. The ACCC would expect such impacts to be heightened in circumstances where the Parties account for more than 90 per cent of the market for the production and supply of oxygen, and the supply of nearly all medical oxygen.

⁴ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.21. ANZIGA submits that the Proposed Conduct is unlikely to result in any public detriment, and notes that:
- the Proposed Conduct will not extend to arrangements or understandings in relation to the prices of supply of affected products, and will not extend to, or have any impact on, the Parties' terms of supply after the COVID-19 pandemic ends
 - the Proposed Conduct is unlikely to materially alter the competitive dynamics in any market and, to the extent that there are any short-term competitive effects, those effects will not extend beyond the period of any COVID-19 related supply shortages
 - the Parties intend only to rely on the ability to make contracts, arrangements or understandings pursuant to the authorisation where other arrangements, such as bilaterally negotiated supply agreements between the Parties, appear likely to be inadequate to address the perceived threat to supply, and
 - the ACCC will be in a position to exercise oversight of the Proposed Conduct as the Parties will keep it updated of contracts, arrangements or understandings that are reached pursuant to the authorisation and the reasons for those contracts, arrangements or understandings.
- 4.22. The ACCC agrees that any short term-competitive effects arising from the exchange of information and coordination by suppliers of medical oxygen in the circumstances of the COVID-19 pandemic are likely to be temporary and limited in scope. Nonetheless, the ACCC recognises that these effects may potentially extend beyond the short-term because each Party may gain an increased understanding of the other Parties' pricing and stocking strategies.
- 4.23. The ACCC has considered whether the Proposed Conduct has the potential to facilitate unauthorised information sharing and coordination. In this respect, the ACCC notes that, while the Proposed Conduct is limited to coordination in relation to the supply of medical oxygen in response to the COVID-19 pandemic, information sharing and discussions between competitors may give rise to opportunities for coordination beyond the scope of the Proposed Conduct, including in relation to the supply of medical oxygen or other industrial gases supplied by the Parties. Such conduct could significantly reduce competition in relevant markets.
- 4.24. The ACCC notes GFG Alliance's submission about the risk of competitive harm to industrial gas markets arising from information sharing or coordination by the Parties beyond the scope of the Proposed Conduct. The ACCC considers that this risk will be sufficiently addressed by the conditions imposed upon authorisation, which include that the Parties must provide the ACCC a written notice prior to engaging in the Proposed Conduct that includes a brief submission outlining the reasons why bilateral arrangements are unable to manage an identified threat and the Proposed Conduct is therefore necessary.
- 4.25. The ACCC also notes the importance of balancing measures that are intended to reduce the risk of competitive detriment with the need to avoid undue delays to the Parties' response to any significant threat to the supply of medical oxygen during the COVID-19 pandemic. The ACCC considers that such a requirement would not impede the Parties' ability to respond in a timely manner to a threat to the continuity of supply of medical oxygen but would welcome submissions on this point.
- 4.26. In addition, the protection conferred by authorisation does not extend to conduct outside the scope of the Proposed Conduct. Accordingly, the Parties will not be protected by the authorisation in respect of conduct not engaged in for the purpose of

ensuring that the Parties can respond to threats to the supply of medical oxygen in Australia due to the COVID-19 pandemic and to ensure continuity and security of supply of medical oxygen to hospitals and similar medical facilities. The competition and cartel provisions in Part IV of the Act would continue to apply to conduct outside this scope.

- 4.27. While the long-term effects of the COVID-19 pandemic are somewhat uncertain, the ACCC considers that there are a number of factors that mean it is unlikely that the Proposed Conduct will significantly impact competition beyond the period of the pandemic, including that the Proposed Conduct:
- will only be engaged in by the Parties where considered reasonably necessary for the Parties to address an identified threat to the supply of medical oxygen, and where the identified threat is unable to be managed by way of bilateral negotiations
 - is only in relation to circumstances where there is excess demand or an inability of an existing supplier to supply sufficient medical oxygen in particular situations caused by the pandemic. The Proposed Conduct does not apply to long-term contracts between suppliers and purchasers of medical oxygen such as health authorities.
 - will be confined to particular regions or geographic areas where there are rapid increases in demand or disruptions to the supply of medical oxygen
 - does not extend to setting or agreeing prices, and
 - is a temporary measure in response to the COVID-19 pandemic, which is limited to 30 September 2021 and which may be shortened further if the effects of the COVID-19 pandemic subside at an earlier date.
- 4.28. The ACCC notes the concerns raised by the WA Department of Health about the potential for the Proposed Conduct to result in unfair inflation of prices. The ACCC notes that, while the Proposed Conduct does not extend to making agreements in relation to the price of medical oxygen, through the Proposed Conduct, the parties may restrict or limit supply of medical oxygen, which may have a similar effect.
- 4.29. For the reasons set out at paragraph 4.27, the ACCC considers that the risk of the Parties unfairly inflating prices is low. Further, in the event prices rise as a result of the Proposed Conduct, the ACCC considers that the benefits of the Proposed Conduct would still likely outweigh any detriment. Supply restrictions may potentially lead to increased prices, but may also be a necessary part of certain agreements that ensure adequate supply of medical oxygen to higher priority customers, which are likely to have significant public benefits. The ACCC also proposes to impose conditions to provide some transparency over the Proposed Conduct engaged in by the Parties for the duration of the authorisation.

Conditions of authorisation

- 4.30. The ACCC may specify conditions in an authorisation.⁵ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.⁶
- 4.31. 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 authorisation.⁷

⁵ Subsection 88(3) of the Act.

⁶ Subsection 88(3) of the Act.

⁷ Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

4.32. The proposed conditions provide transparency and certainty that the Proposed Conduct will only be engaged in when necessary and, therefore, that the opportunities for information sharing among the Parties will be limited.

Balance of public benefit and detriment

4.33. The ACCC considers that, if the Proposed Conduct becomes necessary, it is likely to result in significant public benefits by ensuring the supply of medical oxygen to hospitals and similar medical facilities for the benefit of patients during the COVID-19 pandemic.

4.34. The ACCC considers that the Proposed Conduct, if engaged in, is likely to result in some public detriments because it is likely to reduce competition in the short term as suppliers of medical oxygen will be coordinating their response to spikes in demand or disruptions to supply, rather than competing for this supply. However, the ACCC considers that these potential public detriments are mitigated by the factors outlined above, including that the Proposed Conduct must only be engaged in, where necessary, for the purpose of ensuring the continuity and security of supply of medical oxygen, does not extend to agreements relating to prices and is a temporary measure linked to the effects of the COVID-19 pandemic.

4.35. The ACCC also proposes to impose conditions that require the Parties to notify the ACCC prior to engaging in the Proposed Conduct. The written notice must include a brief submission outlining the basis for the Parties' view that an identified threat to the supply of medical oxygen is unable to be managed by way of bilateral supply arrangements.

4.36. Overall, subject to the proposed conditions, the ACCC considers that the Proposed Conduct would be likely to result in public benefits and that these public benefits would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.37. 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 from the authorised conduct, after an appropriate period.

4.38. In this instance, ANZIGA seeks authorisation for a 12-month period from the date on which the final authorisation comes into force.

4.39. In the context of the evolving and uncertain nature of the COVID-19 pandemic, as well as changes in infection levels, the ACCC proposes to grant authorisation until 30 September 2021. The ACCC's view on the length of authorisation may change prior to making a final determination.

5. Draft determination

The application

5.1. On 21 May 2020, ANZIGA lodged application AA1000516 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

⁸ Subsection 91(1) of the Act.

- 5.2. ANZIGA seeks authorisation on behalf of its current and future members and their related bodies corporate and other suppliers of medical oxygen notified in advance to the ACCC to engage in the Proposed Conduct.
- 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, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct, restricted to the purpose for which authorisation was sought, 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 conditional authorisation.

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to grant authorisation AA1000516 to enable the Parties to engage in the Proposed Conduct as defined at paragraph 1.8 solely for the purpose of ensuring the supply of medical oxygen to hospitals and similar medical facilities that might otherwise be at risk of disruption as a result of the impacts of COVID-19. As made clear in the description of the Proposed Conduct in paragraph 1.8, the Proposed Conduct is limited to conduct engaged in, in the event of a threat to the supply of medical oxygen for the purpose of ensuring the security and continuity of supply of medical oxygen to hospitals and similar facilities during the COVID-19 pandemic.
- 5.8. The Proposed 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 and 47 of the Act.
- 5.9. The ACCC proposes to grant authorisation AA1000516 until 30 September 2021, subject to the proposed conditions at paragraph 5.11.
- 5.10. This draft determination is made on 2 September 2020.

Proposed conditions of authorisation

- 5.11. The ACCC proposes to impose the following conditions, which are substantially the same as those imposed in the interim authorisation:
 - (a) After identifying a particular threat to the supply of medical oxygen and prior to engaging in the Proposed Conduct in relation to that threat, the Parties must give the ACCC written notice that:
 - (i) states that they have identified a threat to the supply of medical oxygen
 - (ii) describes, in general terms, the nature of that threat and the geographic area affected

- (iii) states whether:
 - (1) where the threat affects the public health system—the relevant State or Territory health authority has been informed of the threat
 - (2) the Parties consider that the identified threat is unable to be managed by way of bilateral supply arrangements for the supply of medical oxygen to either the relevant State or Territory health authority or one or more of the Parties and, if so, a brief submission outlining the basis for this view including substantiating information, and
 - (3) the Parties consider it reasonably necessary to engage in the Proposed Conduct for the purpose of addressing the threat identified.
- (b) The Parties must:
 - (i) provide regular updates to the ACCC in a form and at a frequency agreed between the Parties and the ACCC, and
 - (ii) provide to the ACCC, within a reasonable time period, all information and documents requested by the ACCC.
- (c) All confidential or competitively sensitive information exchanged pursuant to the authorisation shall be used by the Party to whom it was provided solely for the purposes of ensuring the supply of medical oxygen to hospitals and similar medical facilities that might otherwise be at risk of disruption as a result of the impacts of COVID-19.

6. Next steps

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