



Determination

Application for authorisation

lodged by

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

10 September 2020

Commissioners: Rickard, Keogh, Court and Ridgeway

Summary

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

Competitors working together to share information and coordinate supply of goods/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. However in this case, the ACCC is satisfied that the arrangements, subject to the 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.

The ACCC has decided to grant conditional authorisation until 30 September 2021.

This determination is made on 10 September 2020. If no application for review of the determination is made to the Australian Competition Tribunal, the authorisation will come into effect on 2 October 2020.

1. The application for authorisation

- 1.1. On 24 March 2020, Medical Technology Association of Australia Limited (**MTAA**) lodged application for authorisation AA1000479 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. MTAA sought 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. MTAA also sought authorisation on behalf of future members of 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. MTAA sought authorisation for 12 months from the date of final determination. The application for authorisation AA1000479 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. 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.
- 1.4. MTAA also requested that the ACCC grant urgent interim authorisation to commence engaging in the conduct while the ACCC considers the substantive application. On 17 April 2020 the ACCC granted interim authorisation under subsection 91(2) of the Act subject to the conditions discussed at paragraph 1.11.¹ The interim authorisation remains in place until it is revoked or until the date the ACCC's final determination comes into effect.

¹ ACCC, [Medical Technology Association of Australia – Conditional Interim Authorisation Decision Statement of Reasons](#), 17 April 2020.

The Applicant

- 1.5. MTAA is a national association representing more than 100 companies across the medical technology industry. Members of MTAA include manufacturers and suppliers of medical equipment used in the diagnosis, prevention, treatment and management of disease and disability. 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

- 1.6. MTAA sought authorisation to make and give effect to arrangements, and to exchange information, between 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**).

- 1.7. MTAA submitted 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 MTAA members and non-member businesses rather than those matters being determined or agreed among the Participants.

Interim authorisation

- 1.8. MTAA requested urgent interim authorisation to enable the Participants to engage in the Proposed Conduct while the ACCC is considering the substantive application.
- 1.9. On 25 March 2020, the ACCC granted interim authorisation in respect of the application for authorisation AA1000479 lodged by MTAA on 24 March 2020.²
- 1.10. On 14 April 2020, MTAA amended its application, expanding upon the conduct proposed, and sought interim authorisation for the conduct described in the amended application. On 17 April 2020, the ACCC revoked the interim authorisation granted on 25 March 2020 and substituted it with conditional interim authorisation under section 91(2) of the Act.³
- 1.11. Interim authorisation was granted subject to conditions requiring MTAA to notify the ACCC of any new MTAA members and non-member businesses that may be involved in the Proposed Conduct, and if any of the Participants intend to engage in particular aspects of the Proposed Conduct (the **Conduct Notification Condition**). The conditions also require 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.
- 1.12. The conditional interim authorisation granted on 17 April 2020 remains in place until it is revoked or until the date the ACCC's final determination comes into effect.

Notifications under the conditions of interim authorisation

- 1.13. MTAA has, pursuant to the Conduct Notification Condition, notified the ACCC that two Participants (Grey Innovation Pty Limited and Smiths Medical International Limited) have engaged in the Proposed Conduct. Specifically, these participants have engaged in conduct of the nature described at paragraph 1.6 (b). The agreement to engage in the Proposed Conduct between these participants is part of the Australian Emergency Ventilator Project being conducted by a consortium of 30 companies led by Grey Innovation Pty Limited with backing from the Federal and Victorian governments. In August 2020 the project began delivering on the 2000 ventilators it is engaged to manufacture for the National Medical Stockpile.
- 1.14. Additional notifications for new Participants joining the application for authorisation have been also provided to the ACCC by MTAA. A register of notifications made under the interim authorisation is available on the [Public Register for this matter](#). Under the conditions of the interim authorisation, MTAA has provided the ACCC with updates in relation to the Proposed Conduct at the ACCC's request. This information is discussed in further detail at paragraph 3.18.

² ACCC, [Medical Technology Association of Australia – Interim Authorisation Decision Statement of Reasons](#), 25 March 2020.

³ ACCC, [Medical Technology Association of Australia – Conditional Interim Authorisation Decision Statement of Reasons](#), 17 April 2020.

2. Background

- 2.1. 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. At some stages of the pandemic there has been a significant risk of Australia's health services being put under substantial 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 MTAA.
- 2.2. MTAA submitted that as the COVID-19 pandemic continues to impact 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. MTAA notes that:
 - the Federal Government advised 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 MTAA coordinate with its member medical equipment suppliers and other non-member business to identify sources of supply and to also provide advice regarding any constraints or obstacles in securing supply; and
 - the Federal Government has also requested MTAA provide advice as to any emerging issues that may constrain the supply of medical equipment.
- 2.3. MTAA submitted that in order to respond to the Federal Government's requests, it needs to coordinate with 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. Prior to issuing its draft determination, the ACCC invited submissions from a range of potentially interested parties including State and Federal governments and relevant regulatory bodies, consumer groups and relevant industry associations and peak bodies.⁴
- 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.

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

- 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**) supported 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 submitted 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 supported the application and submitted 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 submitted 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**) supported the application and submitted 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 submitted 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 submitted 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 submitted 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 submitted that 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**) supported the application for authorisation, including conditions to regularly update the ACCC on specified matters. DISER submitted 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 submitted that limiting the initial authorisation period to 12 months also substantially reduces possible competition risks.
- 3.12. The Victorian Department of Health and Human Services (**VDHHS**) submitted that the COVID-19 pandemic has increased global demand for PPE and medical devices used in the management of patients with COVID-19. VDHHS submitted that, 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 supported 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 submitted that 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 submitted 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**) supported the application for authorisation on the understanding that the authorisation is limited for the duration of the COVID-19 pandemic and that MTAA will provide regular updates to the ACCC on activities that fit into the Proposed Conduct. The CHF noted 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 submitted 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 updates⁵ on activities carried out under the interim authorisation. Of these responses, 13 Participants advised that they were not engaging in the Proposed Conduct.
- 3.16. Five Participants advised that they were 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 new entrants. The sharing of information at an industry 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 new 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

⁵ The public submissions received are available from the [ACCC's public register](#).

authorisation has created visibility of relevant supply and demand and enabled suppliers to meet an urgent need.

Submissions on the draft determination

- 3.17. On 26 June 2020 the ACCC issued a draft determination proposing to grant authorisation until 24 March 2021.⁶ A pre-decision conference was not requested and the ACCC did not receive any submissions following the draft determination.
- 3.18. Under the conditions of the interim authorisation, MTAA has provided the ACCC with updates in relation to the Proposed Conduct at the ACCC's request. As of 5 August 2020, MTAA has advised that the Participants are not currently engaging in the Proposed Conduct (beyond continuing to give effect to the arrangements discussed at paragraph 1.13). However, MTAA continues to monitor supply issues for medical equipment, particularly stocks of PPE. MTAA notes that the COVID-19 situation is continuing to evolve in Australia, particularly in Victoria, and there remains a high risk of the virus spreading across state borders as well as a persistent risk of increased community transmission. Additionally, MTAA states that demand on state health departments to supply PPE, COVID-19 testing kits, and ventilator consumables to hospital organisations and health services remains high and if required, MTAA will reconvene the working groups (discussed further at paragraph 4.9) to share relevant information and provide updates to governments.

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. MTAA 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. 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.⁷

⁶ ACCC, Medical Technology Association of Australia – [Draft Determination](#), 26 June 2020.

- 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 uncertain at this point in time.
- 4.8. The ACCC notes that COVID-19 infection rates in Australia are relatively low and the demand for medical equipment and related supplies has largely stabilised since peaks in March and April 2020, even with recent increases in infections in some states. However, as noted by 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.
- 4.9. 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 as required. 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.
- 4.10. 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

- 4.11. 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.*⁸

MTAA's submission

- 4.12. MTAA submitted 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.
- 4.13. MTAA further submitted that the Proposed Conduct will allow the Participants to more effectively advise the State, Territory and Federal governments and relevant health

⁷ 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.

⁸ 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.

agencies in relation to the supply of medical equipment. MTAA claimed this is essential to ensuring a coordinated and effective response to an unprecedented public health crisis.

Interested party submissions

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

- 4.16. 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.
- 4.17. 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 4.8, overseas due to Australia's reliance on imported medical equipment). The ACCC notes that, even with recent increases in some states, 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 continued increases in infection rates in Australia (and overseas) remains and therefore there remains a threat to the supply of relevant medical equipment and related medical supplies.
- 4.18. The ACCC acknowledges that to the extent infection rates in Australia remain relatively 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 in itself is a public benefit.

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.*⁹

- 4.20. MTAA submitted 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, MTAA submitted that there are not any significant public detriments associated with the Proposed Conduct.
- 4.21. 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.
- 4.22. 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.
- 4.23. 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 MTAA to provide fortnightly updates to the ACCC regarding any meetings, discussions, developments and decisions 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

- 4.24. 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.

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

4.25. Agreements in relation to the supply of equipment, devices and other products not relevant to the COVID-19 pandemic are not protected under the 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.

Conditions

4.26. The interim authorisation was granted subject to four conditions, briefly discussed at paragraph 1.11.

4.27. The ACCC has amended the condition requiring MTAA to provide regular updates to the ACCC regarding material decisions to instead require MTAA to provide fortnightly reports to the ACCC to be published on the ACCC's public register (subject to the ACCC deciding to exclude material from the register). The amended condition is stated in full at paragraph 5.13.

4.28. The ACCC considers the amendment to this condition is appropriate to assist in the efficient monitoring of the Proposed Conduct for the duration of the authorised period.

Balance of public benefit and detriment

4.29. 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.

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

4.31. 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.

4.32. For the reasons outlined in this determination, and subject to the 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

4.33. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁰ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriments 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.

4.34. In this instance, MTAA seeks authorisation for 12 months from the date of final authorisation.

4.35. The ACCC grants conditional authorisation until 30 September 2021.

¹⁰ Subsection 91(1) of the Act.

5. Determination

The application

- 5.1. On 24 March 2020, 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. MTAA sought 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. A draft determination was made on 26 June 2020.

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 determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct is 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 has decided to grant authorisation subject to the reporting conditions at paragraph 5.13.

Conduct which the ACCC proposes to authorise

- 5.7. Subject to the conditions outlined at paragraph 5.13, the ACCC has decided to grant authorisation AA1000479 to enable the Participants to engage in the Proposed Conduct. However, the ACCC grants authorisation for the Proposed Conduct only insofar as it is directed to ensuring the supply of medical equipment and related medical supplies in response to the COVID-19 pandemic.
- 5.8. The ACCC grants conditional authorisation AA1000479 until 30 September 2021.
- 5.9. This determination is made on 10 September 2020.

Conditions of authorisation

- 5.10. The ACCC may specify conditions in an authorisation.¹¹ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.¹²
- 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.¹³

¹¹ Section 88(3) of the Act.

¹² Section 88(3) of the Act.

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

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 grants authorisation subject to the following conditions:

(1) Reporting requirements

- MTAA will provide fortnightly updates to the ACCC to be published on the ACCC's public register, subject to the ACCC deciding to exclude material from the register (the **Fortnightly Report**). The Fortnightly Report shall report on any meetings, discussions, developments and decisions in relation to the Proposed Conduct as the COVID-19 pandemic evolves. The Fortnightly Report must include, insofar as the following information has not already been provided in a previous Fortnightly Report:
 - information regarding any meeting or discussion between two or more of the Participants relating to the Proposed Conduct, including:
 - the attendees at the meeting or discussion;
 - the agenda items of the meeting or discussion that are related to the Proposed Conduct;
 - any minutes of the meeting or discussion relating to the Proposed Conduct;
 - a brief description of any of the Proposed Conduct engaged in together with a brief explanation of how it is directed to ensuring the supply of medical equipment and related medical supplies in response to the COVID-19 pandemic; and
 - any changes to the Participant group.

(2) Provision of any further information

- MTAA and any Participant must on request by the ACCC provide, within a reasonable timeframe, all information requested by the ACCC in relation to the Proposed Conduct.

6. Date authorisation comes into effect

6.1. This determination is made on 10 September 2020. If no application for review of the determination is made to the Australian Competition Tribunal, the authorisation will come into effect on 2 October 2020.

Attachment A – List of Participants.

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