



**State of Victoria as represented by the Department of Health and  
Human Services –  
Application for authorisation AA1000491  
Interim authorisation decision  
7 April 2020**

**Decision**

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of the application for authorisation AA1000491, lodged by the State of Victoria as represented by the Department of Health and Human Services (the **DHHS**) on 3 April 2020.
2. The DHHS has applied for authorisation on behalf of itself and the following parties who are engaged, or propose to become engaged, in the Proposed Conduct:
  - specified private healthcare providers operating in the State of Victoria as listed in **Attachment 1** (and their related bodies corporate), as well as any other private healthcare providers notified to the ACCC from time to time by DHHS (the **Participating Providers**), and
  - all public hospitals operating in the State of Victoria, as listed in **Attachment 2**, and any other healthcare facility owned or operated by the State of Victoria or an authority of the State of Victoria (the **Victorian Public Providers**)(together, the **Applicants**).
3. The Applicants seek authorisation for the broad purpose of maximising healthcare capacity and ensuring the State-wide coordination of healthcare services to facilitate the most efficient and effective allocation of healthcare during the period of the COVID-19 pandemic (the **Pandemic**) (see application for authorisation section 3.1).
4. The ACCC has granted conditional interim authorisation for the conduct described at paragraph 7 below, solely for the purpose of dealing with the effects of the Pandemic on the Victorian hospital system, and subject to conditions requiring the DHHS to provide the ACCC with regular updates regarding measures implemented under the interim authorisation, and to notify the ACCC of other private hospital providers who seek to engage in the conduct.
5. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.

**The application for authorisation**

6. The DHHS is seeking authorisation on behalf of itself and the specified private healthcare providers, all listed public hospitals and any other State-owned/operated healthcare facility owned. The DHHS is also seeking authorisation for any other private healthcare providers on the basis that the State may enter into similar arrangements with such providers as the Pandemic evolves. The DHHS submits that it will promptly notify the ACCC of any additional private healthcare providers that enter, or are expected to enter, into any such agreements.

7. Authorisation is sought to:

- (a) negotiate and enter into the agreements between the DHHS and each of the Participating Providers under which the DHHS will provide funding to the Participating Providers, and those parties will provide resources and services to the overall response to the Pandemic being coordinated by the DHHS (the **Agreements**, as further defined in paragraphs 9 and 11), and
- (b) engage in conduct consistent with the Objectives (as defined in paragraph 12) to give effect to the Agreements, including (without limitation) by:
  - (i) engaging in coordinated group discussions regarding healthcare operations, capacity and other matters required or contemplated by the Agreements and sharing any information required or contemplated by the Agreements or otherwise reasonably necessary to facilitate the Objectives, including but not limited to:
    - (A) information about the capacity or expected capacity of a hospital to provide care to patients or patients with particular conditions, and
    - (B) information about the availability of resources required to treat patients (including, but not limited to, hospital beds, staff, medicines and equipment)
  - (ii) coordinating the following activities:
    - (A) allocation of the provision of certain services or certain patients to particular healthcare providers and/or between certain healthcare facilities (for example, designating specific categories of patients to particular hospitals)
    - (B) restriction of certain services that can be provided at particular healthcare facilities
    - (C) sharing of resources (including staff and medical supplies and equipment) to meet demand at particular healthcare facilities, and
    - (D) procurement and supply of medical equipment and supplies in order to minimise supply chain disruption and ensure these resources are available to healthcare facilities on an as-needs basis, and
  - (iii) engaging in any other conduct that is necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the DHHS or one or more of the Victorian Public Providers

(the **Proposed Conduct**).

- 8. In response to the Pandemic, the Australian Government imposed temporary measures restricting private healthcare providers from performing certain non-urgent surgeries to increase healthcare providers' capacity for the expected significant increase in COVID-19 patients. Subsequently, the Australian Government announced viability for capacity guarantee arrangements to support private healthcare providers to retain capacity for responding to the Pandemic, and secure capacity and services from private sector operators to support the public healthcare systems in each State and Territory.
- 9. The Victorian Government is in the process of implementing those arrangements. The Applicants submit that it is intended that DHHS will separately enter into one or more substantially similar Agreements with each of the Participating Providers (as detailed in paragraph 11). For example, this will include coordinating future forecasts relating to demand for medical facilities, staff, visiting medical officers, medical supplies and other resources, and allocating services to ensure fair access (and in certain cases priority access to certain patients such as elderly or vulnerable or people in rural or remote areas).

10. The Applicants submit that without intervention and assistance from the Victorian Government (with funding assistance from the Australian Government), it is possible that many private Victorian healthcare providers will have to cease, suspend or reduce operations and stand down staff and other resources.
11. The Applicants submit that the key features of the Agreements include that:
- (a) the DHHS will provide funding to the Participating Providers on condition they provide certain services to public patients, being:
    - (i) any services which the Participating Provider performs or is authorised to perform immediately prior to the commencement of the Agreement
    - (ii) each Participating Provider making available to the DHHS its specified healthcare facilities (including beds, healthcare and other services required to support the operation of each of its healthcare facilities), and
    - (iii) any other healthcare services reasonably necessary to respond to a patient who has been (or is suspected to have been) infected with the COVID-19 virus
  - (b) each Participating Provider will continue to hold operational control and operate their respective healthcare facilities
  - (c) each Participating Provider will be permitted to continue to provide healthcare services to private patients but only to the extent permitted by the Agreement or by the DHHS in accordance with principles to be agreed
  - (d) the DHHS will oversee and direct a 'Private Hospital Coordination Group' which is a group that will have a representative from some or all of the Participating Providers and which will be the forum for coordinating resources between the Participating Providers, each of their facilities and the Victorian Public Providers
  - (e) each Participating Provider will continue to maintain all categories of employees in the ordinary course of business with the provision of secondment of staff to public healthcare facilities in certain circumstances
  - (f) each Participating Provider will provide services under the Agreement on a purely cost recovery and non-profit basis
  - (g) public patients will not be required to pay any amount arising from or in connection with healthcare treatment by a Participating Provider, and
  - (h) the Participating Parties will cooperate in respect of the procurement and supply of medical equipment.
12. The Applicants submit that the Objectives of the Participating Parties under the Agreements include to:
- (a) work cooperatively to ensure that the public and private healthcare sectors respond successfully to the Pandemic
  - (b) ensure the ongoing sustainability and operation of hospital facilities across Victoria
  - (c) make available to the DHHS (and Victorian public) the maximum amount of hospital facilities
  - (d) ensure that hospital services are provided equitably, consistently and in accordance with clear standards (having regard, where applicable, to the circumstances presented by the Pandemic) in order to optimise health outcomes
  - (e) ensure that the DHHS obtains access to additional hospital services required as a result of the Pandemic at a reasonable cost and in a manner that achieves a cost-efficient solution for the DHHS, and

- (f) work together through a culture of mutual respect and cooperation and in an environment that fosters cost-efficiency, transparency and open, honest and timely communication

(the **Objectives**).

13. The Applicants further submit that:

- the Agreements do not extend to coordination or any agreement between Participating Providers other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the DHHS or one or more of the Victorian Public Providers, and
- to the extent that Participating Providers retain the capacity to do so, nothing in the Agreements is intended to affect the normal competitive process vis a vis the provision of healthcare services to private patients. It is intended that once the circumstances of the Pandemic permit, the DHHS will seek to wind back and ultimately terminate the Agreements which would in due course enable each of the Participating Providers to resume providing business as usual services to private sector patients.

14. The DHHS is seeking authorisation for 12 months from the ACCC's grant of final authorisation, and notes that this period may need to be extended if the Pandemic lasts for a longer period of time.

### **The authorisation process**

15. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (Cth) (the **Act**). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether proposed conduct results in a net public benefit.

### **Interim authorisation**

16. The ACCC may, where it considers it appropriate, grant an interim authorisation which allows parties to engage in proposed conduct while the ACCC is considering the substantive application.

17. The Applicants requested urgent interim authorisation for the Proposed Conduct because they consider that, in light of the speed with which the Pandemic is evolving in Victoria, the provision of funding to the Participating Providers and the associated coordination of the Participating Parties' services should commence immediately.

### **Consultation**

18. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation in light of the compelling nature of the public benefits likely to result from the request for interim authorisation.

19. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the [ACCC's Public Register](#). Submissions on the substantive application are due by 1 May 2020.

### **Conditional interim authorisation**

#### ***Transparency and reporting***

20. The DHHS submits that it does not consider it appropriate that authorisation be conditional upon a formal notification arrangement where the DHHS is involved in and/or has oversight and direction of the Proposed Conduct. The DHHS submits, however, that

it is willing to provide updates to the ACCC on the implementation of the Proposed Conduct from time to time upon request consistent with its role as a public body responsible for the provision and management of public health services in Victoria.

21. The ACCC considers that, given the breadth of the Proposed Conduct, it is appropriate for there to be sufficient transparency over the various agreements reached, strategies implemented and information shared. The ACCC considers that imposing a condition on the DHHS in the terms below, given its role as party to the Agreements, provides the DHHS with adequate flexibility regarding the structure of reporting and would not be unduly burdensome.
22. As a result, the ACCC grants interim authorisation for the Proposed Conduct (described at paragraph 7 in this Interim authorisation decision document) subject to the following conditions:

### ***Condition 1 – Reporting requirements***

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

### ***Condition 2 – Notification of future parties***

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

### **Reasons for decision**

25. In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the expected increased demand on the Victorian hospital system due to the Pandemic (as outlined in paragraph 7 above).
26. The ACCC notes that granting interim authorisation will materially reduce competition in the supply of hospital services to particular types of patients. However, due to the following factors, the ACCC considers it unlikely that the arrangements will significantly impact competition in the long term:
  - The Proposed Conduct, and interim authorisation itself, is a temporary measure. Authorisation is only sought for 12 months from the date of the ACCC's final determination and the Proposed Conduct can be discontinued in the event that the effects of the pandemic subside at an earlier date.
  - The Proposed Conduct is a proposal by the Victorian Government, seeking to implement a directive from the Commonwealth, rather than having arisen as agreements between public and private hospitals themselves.
  - The reporting and notification conditions provide transparency in relation to the conduct and parties protected by the interim authorisation, and if major concerns are identified, the ACCC is able to revoke the authorisation (including substituting a new authorisation with narrower authorised conduct or imposing different conditions) or seek changes to the measures being implemented under it.
  - The information that will be shared under the Proposed Conduct will predominantly be time-limited, so will lose relevance following the cessation of the Proposed Conduct.
  - The interim authorisation does not extend to any price agreements between private hospitals for non-COVID-19 services.

- The Proposed Conduct does not extend to any coordination or agreement between Participating Providers other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the DHHS or one or more of the Victorian Public Providers.
- To the extent that Participating Providers retain the capacity to do so, nothing in the Agreements is intended to affect the normal competitive process vis a vis the provision of healthcare services to private patients. Private patients with non-COVID-19 conditions may, nevertheless, have fewer options for healthcare services during the Pandemic, resulting in less competition for those services. However, it is intended that once the circumstances of the Pandemic permit, the DHHS will seek to wind back and ultimately terminate the Agreements which would in due course enable each of the Participating Providers to resume providing business as usual services to private sector patients.
- The ACCC may review its decision to grant interim authorisation at any time, including in response to feedback as the Proposed Conduct is implemented. If relevant industry participants have concerns regarding the Proposed Conduct during interim authorisation, they are encouraged to advise the ACCC.

27. There are likely to be significant public benefits in the current emergency circumstances, including:

- enabling the Participating Parties to coordinate the medical response to the Pandemic in Victoria as effectively, efficiently and economically as possible
- reducing the likelihood that private healthcare providers will have to partially or fully suspend or cease operations as a result of funding issues caused by the Commonwealth Government's restrictions on their ability to provide certain surgeries
- provide the DHHS with service capacity oversight to allow distribution of service delivery to meet periods of peak demand and minimise patient transfers between healthcare facilities, which will allow patients to receive the best possible care available at the time
- allowing the Participating Providers to be responsive to the needs of the overall health system, and coordinate and work in synchronisation with the Victorian Public Providers and each other based on clinical priorities
- ensuring medical equipment, personal protective equipment, medical and other relevant supplies, and additional intensive care facilities are available to respond to the Pandemic, and
- ensuring Private Hospital Operators can remain operational and retain staff during the Pandemic, as well as following the Pandemic to ensure consumers will continue to have a choice of private or public care.

28. The ACCC is satisfied that the extraordinary circumstances of the COVID-19 crisis and the importance of co-ordinating the supply of healthcare services to address the crisis warrant the granting of interim authorisation.

### **Reconsideration of interim authorisation**

29. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

## **Attachment 1 – Participating Providers**

### **1. Specified private healthcare providers**

- Cabrini Health Ltd
- Epworth Foundation t/a Epworth Health Care
- Health Care Specialty Holdings Pty Ltd
- Healthscope Operations Pty Ltd
- Ramsay Health Care Investments
- St John of God Health Care Inc
- St Vincent Private Hospital Ltd

**2. Any other private healthcare operator in Victoria who seeks to engage in conduct the subject of this application providing the ACCC is notified by the DHHS.**

## **Attachment 2 – Victorian Public Providers**

The Victorian Public Providers, being those providers listed below and any other healthcare facility owned or operated by the State of Victoria or an authority of the State of Victoria.

### Metropolitan

- Alfred Health
- Angliss Hospital
- Austin and Repatriation Hospitals
- Austin Health
- Austin Health - Austin Hospital
- Austin Health - Heidelberg Repatriation Hospital
- Box Hill Hospital
- Broadmeadows Health Service
- Bundoora Extended Care Centre
- Calvary Health Care Bethlehem Ltd.
- Caritas Christi Hospice Ltd
- Casey Hospital
- Caulfield Hospital
- Craigieburn Health Service
- Cranbourne Integrated Care Centre
- Dandenong Hospital
- Dental Health Services Victoria
- Eastern Health
- Frankston Hospital
- Healesville and District Hospital
- Kingston Centre
- Maroondah Hospital
- Melbourne Health
- Mercy Health - O'Connell Family Centre
- Mercy Hospital for Women
- Mercy Public Hospitals Inc.
- Monash Health
- Monash Medical Centre, Clayton Campus
- Monash Medical Centre, Moorabbin Campus
- Mount Eliza Rehabilitation, Aged and Palliative Care
- Northern Health
- PANCH Health Service
- Peninsula Health
- Peter James Centre
- Peter MacCallum Cancer Centre
- Queen Elizabeth Centre
- Rosebud Hospital
- Royal Melbourne Hospital - City Campus
- Royal Melbourne Hospital - Royal Park Campus
- Royal Talbot Rehabilitation Centre
- Sandringham Hospital
- St George's Health Service
- St Vincent's Health
- St Vincent's Hospital (Melbourne) Ltd
- Sunshine Hospital
- The Alfred
- The Northern Hospital

- The Royal Children's Hospital
- The Royal Victorian Eye and Ear Hospital
- The Royal Women's Hospital
- Tweddle Child and Family Health Service
- Wantirna Health
- Werribee Mercy Hospital
- Western Health
- Western Hospital
- Williamstown Hospital
- Yarra Ranges Health

### Rural

- Albury Wodonga Health
- Alexandra District Hospital
- Alpine Health
- Bairnsdale Regional Health Service
- Ballarat Health Services
- Barwon Health
- Bass Coast Health
- Beaufort and Skipton Health Service
- Beechworth Health Service
- Benalla Health
- Bendigo Health Care Group
- Boort District Health
- Casterton Memorial Hospital
- Castlemaine Health
- Central Gippsland Health Service
- Cobram District Health
- Cohuna District Hospital
- Colac Area Health
- Djerriwarrh Health Services
- Dunmunkle Health Services
- East Grampians Health Service
- East Wimmera Health Service
- Echuca Regional Health
- Edenhope and District Hospital
- Gippsland Southern Health Service
- Goulburn Valley Health
- Heathcote Health
- Hepburn Health Service
- Hesse Rural Health Service
- Heywood Rural Health
- Inglewood and District Health Service
- Kerang District Health
- Kilmore and District Hospital
- Kooweerup Regional Health Service
- Kyabram and District Health Service
- Kyneton District Health Service
- Latrobe Regional Hospital
- Lorne Community Hospital
- Maldon Hospital
- Maryborough District Health Service
- Melton Health

- Mildura Base Hospital
- Moyne Health Services
- Nathalia District Hospital
- Northeast Health Wangaratta
- Numurkah District Health Service
- Omeo District Health
- Orbost Regional Health
- Otway Health and Community Services
- Portland District Health
- Robinvale District Health Services
- Rochester and Elmore District Health Service
- Rural Northwest Health
- Seymour Health
- South Gippsland Hospital
- South West Healthcare
- Stawell Regional Health
- Swan Hill District Health
- Tallangatta Health Service
- Terang and Mortlake Health Service
- Timboon and District Healthcare Service
- Upper Murray Health and Community Services
- West Gippsland Healthcare Group
- West Wimmera Health Service
- Western District Health Service
- Wimmera Health Care Group
- Yarram and District Health Service
- Yarrawonga Health
- Yea and District Memorial Hospital