



**The State of Queensland as represented by Queensland Health
Application for authorisation AA1000493
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 AA1000493, lodged by the State of Queensland as represented by Queensland Health on 6 April 2020.
2. Queensland Health has applied for authorisation on behalf of itself and the following parties who are engaged, or proposed to become engaged, in the Proposed Conduct:
 - specified owners or operators of private health facilities in Queensland as listed in **Attachment 1** (and their related bodies corporate) any other owner or operator of a private health facility in Queensland who seeks to engage in conduct the subject of the application providing the ACCC is notified in writing by Queensland Health (the **Private Hospital Operators**)
 - each of Queensland's Hospital and Health Services as listed at **Attachment 1** (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 1.1).
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 COVID-19 Pandemic on the Queensland hospital system, and subject to conditions requiring Queensland Health to provide the ACCC with regular updates regarding measures implemented under the interim authorisation, and to notify the ACCC when any other private hospital providers 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. Queensland Health is seeking authorisation on behalf of itself, specified owners and operators of private hospitals, and each of Queensland's Hospital and Health Services. Queensland Health is also seeking authorisation for any owner or operator of a private health facility who seeks to engage in conduct the subject of the application providing the ACCC is notified in writing by Queensland Health.
7. Authorisation is sought to:
 - (a) negotiate and enter into agreements to ensure ongoing health care capacity and capability in Queensland during the COVID-19 pandemic and alleviate pressure on the public sector health system (**Agreements**, as further defined in paragraphs 8 and 10),

- (b) engage in conduct consistent with the Objectives (as defined in paragraph 9) 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 other 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 (eg 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 Queensland Health or one or more of the Hospital and Health Services,

(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 a viability for capacity guarantee for private hospital providers during the Pandemic. The Australian Government advised private hospital providers that all states and territories will complete private hospital COVID-19 partnership agreements, which will outline integration plans and activity requirements. In return, the Government advised that it will guarantee the viability of private hospitals, on the expectation that all private hospitals retain capacity for responding to Pandemic and non-Pandemic activities and are able to resume operations after the Pandemic. The Proposed Conduct comprises the arrangements required for the Queensland Health and the Private Hospital Operators to enter into these partnership agreements.
9. The Applicants submit that their objectives and guiding principles in entering into the Agreements include:
 - (a) coordinating the response of public and private health facilities in Queensland to deliver safe, coordinated care during the response to the Pandemic and during subsequent recovery phases

- (b) ensuring the ongoing sustainability and operation of the Facilities (including maintenance of beds, workforce and the operations at the Facilities and the health services business conducted at the private health facilities);
- (c) ensuring that the Private Hospital Operators make available their Facilities (including the beds, workforce and the operations of the health services business conducted at those private health facilities) to Queensland Health
- (d) ensuring the equitable procurement, supply and distribution between hospitals of personal protective equipment, medical equipment, medical supplies and other relevant supplies, and
- (e) ensuring that the Private Hospital Operators provide equitable access to hospital services for public patients at a fair and reasonable cost to the State of Queensland and on the basis that the Operator provides the Services on a purely cost recovery and non-profit basis.

(the **Objectives**).

10. The Applicants submit that Queensland Health intends the key features of the Agreements to include that:

- (a) Queensland Health will provide funding to the Private Hospital Operators on condition that they provide certain services to public patients, including:
 - (i) any services which the Private Hospital Operators performs or is authorised to perform immediately prior to the commencement of the Agreement
 - (i) each Private Hospital Operator making available to Queensland Health its specified healthcare facilities (including beds, healthcare and other services required to support the operation of each of its healthcare facilities), and
 - (ii) 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 Private Hospital Operator will continue to hold operational control and operate their respective healthcare facilities
- (c) each Private Hospital Operator will be permitted to continue to provide healthcare services to private patients but only to the extent permitted by the Agreement or by Queensland Health, and only where this will not diminish the Private Hospital Operator's ability to perform the services under the Agreement
- (d) Queensland Health will oversee and direct a 'Private Health Facility Coordination Group' which is a group which will have a representative from some or all of the Private Hospital Operators and which will be the forum for coordinating resources between the Private Hospital Operators and one or more of the Hospital and Health Services
- (e) each Private Hospital Operator 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 Private Hospital Operator will provide services under the Agreement in return for specified payments from Queensland Health, which will not include an allowance for profit

- (g) public patients treated by a Private Hospital Operator will not be required to pay any out of pocket expenses except to the extent those expenses would be charged to the patient in the public system, and
- (h) the Private Hospital Operators will cooperate in respect of the procurement and supply of medical equipment and supplies.

11. The Applicants are seeking authorisation for 12 months from the ACCC's grant of final authorisation.

The authorisation process

12. 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

- 13. 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.
- 14. Queensland Health requested urgent interim authorisation for the Proposed Conduct to allow the Applicants to start coordinating their response to the Pandemic as soon as possible to ensure Queensland is well placed to respond to the public health emergency as it continues to unfold.

Consultation

- 15. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation in light of the urgent need for Queensland Health and the Private Hospital Operators to coordinate their response to the Pandemic as soon as possible to ensure Queensland is well placed to respond to the public health emergency as it continues to unfold and the compelling nature of the public benefits likely to result from the request for interim authorisation.
- 16. 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

- 17. Queensland Health submits that it does not consider it appropriate that authorisation be conditional upon a formal notification arrangement where it is involved in and/or has oversight and direction of the Proposed Conduct. Queensland Health 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 Queensland.
- 18. 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 two conditions on Queensland Health in the terms below, given its role as party to the Agreements, provides Queensland Health with adequate flexibility regarding the structure of reporting

and would not be unduly burdensome. 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

19. Queensland Health must provide regular updates to the ACCC at a frequency agreed between the parties, and provide any additional information reasonably requested by the ACCC.

Condition 2 – Approval of future parties

20. To the extent that Queensland Health believes it is 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, Queensland Health must notify the ACCC of the identity of those parties.

Reasons for decision

21. In granting interim authorisation, the ACCC recognises the urgency of the request in light of the expected increased demand on the Queensland healthcare system due to the Pandemic.
22. 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. In particular:
 - 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 and the interim authorisation 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 Queensland Government, seeking to implement a directive from the Commonwealth, rather than having arisen as agreements between public and private hospitals themselves.
 - The reporting condition provides transparency in relation to the conduct covered 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 condition requiring Queensland Health to notify the ACCC of other private healthcare providers that it seeks to have participate in the Proposed Conduct provides additional transparency, and allows the ACCC to revoke the authorisation if it has concerns about the number or nature of proposed participants.
 - 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 Proposed Conduct does not extend to private healthcare providers setting or agreeing prices for non-COVID-19 surgeries, which will remain the discretion of each provider.
 - To the extent that the Private Hospital Operators 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, Queensland Health will seek to

wind back and ultimately terminate the Agreements which would in due course enable each of the Private Health 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.

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

- enabling Queensland Health, the Hospital and Health Services and the Private Hospital Operators to work together to coordinate the medical response to the COVID-19 pandemic in Queensland as effectively, efficiently and economically as possible
- reduce the likelihood that Private Hospital Operators operating in Queensland 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;
- providing Queensland Health service capacity oversight to allow distribution of service delivery to meet periods of peak demand and minimise patient transfers between Facilities which will allow patients to receive the best possible care available at the time
- allowing the Private Hospital Operators to be responsive to the needs of the overall health system and coordinate with the relevant local Hospital and Health Services based on clinical priorities, recognising the need for continuity and quality patient care
- allowing the Private Hospital Operators to work in synchronisation with the public health system and each other and prioritise capacity for COVID-19 patients, urgent care and other health services
- ensuring medical equipment (including ventilators), personal protective equipment, medical supplies and other relevant supplies are, to the extent possible, available where needed to respond to the COVID-19 pandemic
- ensuring provision of additional intensive care facilities in response to the COVID-19 pandemic, and
- ensuring Private Hospital Operators can remain operational, and retain staff under existing industrial arrangements during the COVID-19 pandemic.

24. 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

25. 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.

Private Hospital Operators

- Healthscope Operations Pty Ltd
- Ramsay Health Care Investments Pty Ltd
- St Vincent Private Hospital Ltd
- Mater Misericordiae Ltd
- UnitingCare Queensland
- UnitingCare Health
- Healthe Care Specialty Holdings Pty Ltd
- Cura Day Hospitals (Operations) Pty Ltd
- A Chetty Pty Ltd
- Australian Hospital Care (Pindara) Pty. Ltd
- Bhaskar Chakravarty Pty Ltd
- BPDH OPERATING CO. PTY LTD
- Brisbane Endoscopy Services Pty. Ltd.
- Brisbane Medical Pty Ltd
- Bundaberg Friendly Society Medical Institute Limited
- Clifton Co-Op Hospital Ltd
- Eastern Endoscopy Centre Pty Ltd
- Far North Day Hospitals Pty Ltd
- Fresenius Medical care Australia Pty Ltd
- Fresenius Medical care Australia Pty Ltd
- Hervey Bay Surgical Centre Pty Ltd
- Hospital Corporation Australia Pty Ltd
- Integrated Clinical Oncology Network Pty Ltd
- Ipswich Hospice Care Ltd
- Lee Lenton Medical Pty Ltd
- Logan Endoscopy Services Pty Ltd
- Mackay Specialist Day Hospital Pty Limited
- Marie Stopes International AL
- MB Healthcare Pty Ltd
- MB Healthcare Pty Ltd (Montserrat)
- Miami Private Hospital Pty Ltd
- Moreton Eye Group (Renew Vision Pty Ltd)
- N.A. Kratzmann & Sons Pty Ltd
- Nambour Day Surgery Pty Ltd
- Northside Endoscopy Services Pty Ltd
- Pindara Day Procedure Centre Pty Ltd
- Queensland Eye Institute Foundation
- Rehabilitation Medicine Australia Pty Ltd
- Robina Day Surgery Pty Ltd
- Roderick Street Day Hospital Pty Ltd
- South Bank Medical Group Ltd
- South East Queensland Hyperbaric Pty Ltd
- Tasman Health Care Pty Ltd
- The Corporation of the Order of the Canossian Sisters
- The Trustee for Cairns Haematology and Oncology Group Unit Trust
- The Trustee for Southport Day Hospital Unit Trust
- The Trustee for SWC Unit Trust
- Toowoomba Hospice Association Inc.

- Townsville Day Surgery Pty Ltd
- Vei Services Pty Limited
- Vision Centre Day Surgery Pty Ltd
- Wesley Mission Queensland
- Windermere House Pty Ltd
- Other Private Hospital Operators

Each of Queensland's Hospital and Health Services

- Cairns and Hinterland Hospital and Health Service
- Central Queensland Hospital and Health Service
- Central West Hospital and Health Service
- Children's Health Queensland Hospital and Health Service
- Darling Downs Hospital and Health Service
- Gold Coast Hospital and Health Service
- Mackay Hospital and Health Service
- Metro North Hospital and Health Service
- Metro South Hospital and Health Service
- North West Hospital and Health Service
- South West Hospital and Health Service
- Sunshine Coast Hospital and Health Service
- Torres and Cape Hospital and Health Service
- Townsville Hospital and Health Service
- West Moreton Hospital and Health Service
- Wide Bay Hospital and Health Service