



**Australia New Zealand Industrial Gas Association –  
Application for authorisation AA1000516  
Interim authorisation decision  
9 June 2020**

**Decision**

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of the application for authorisation AA1000516, lodged by the Australia New Zealand Industrial Gas Association (**ANZIGA**) on 21 May 2020.
2. ANZIGA has applied for authorisation on behalf of itself, its members and their related bodies corporate and other suppliers of medical oxygen to hospitals and similar medical facilities in Australia (the **Parties**) to enable them to exchange information and make and give effect to contracts, arrangements or understandings 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.
3. The ACCC has granted interim authorisation for the conduct set out in paragraph 14 of this decision document, solely for the purpose of dealing with the effects of the pandemic on the supply of medical oxygen to hospitals and medical facilities, and subject to the conditions set out in paragraph 22.
4. Interim authorisation commences immediately and remains in place until it is revoked, or the date on which the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.

**The application for authorisation**

***Background***

5. 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. 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.
6. 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.
7. 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.
8. 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.
9. 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 production 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.

10. 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.
11. 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.
12. 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.

### ***The Proposed Conduct***

13. ANZIGA submits that significant demand increases or supply constraints may require the Parties to coordinate in order to ensure adequate and secure supply of oxygen to hospitals and other medical facilities. Should such a situation arise, the Parties wish to be in a position to respond without concern that a coordinated response may contravene competition laws.
14. ANZIGA is therefore seeking authorisation, in the event of a threat to the supply of medical oxygen, for the Parties to:
  - (a) exchange information in relation to each Party's:
    - (i) available stocks of
    - (ii) anticipated demand for, and ability to supplymedical 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**).
15. 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.

16. ANZIGA is seeking authorisation for 12 months from the ACCC's grant of final authorisation.

### **The authorisation process**

17. 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**

18. 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.

19. ANZIGA has requested urgent interim authorisation to enable the Parties to be prepared in the event that demand for medical oxygen increases or a supply constraint eventuates before such time as the ACCC has the opportunity to complete its usual authorisation process.

20. In doing so, 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 consider it prudent to seek authorisation (including interim authorisation) by reason of the risk of a 'second wave' of infections.

### **Consultation**

21. The ACCC has conducted a limited initial public consultation process in respect of the request for interim authorisation. The ACCC will conduct a public consultation process on the substantive application for authorisation, and how the proposed conduct is operating under the Interim Authorisation. Details about how to make a submission will be available on the [ACCC's authorisations public register](#).

### **Conditions of interim authorisation**

22. The ACCC grants interim authorisation for the Proposed Conduct at paragraph 14 of this decision document subject to the following conditions:

(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, and
- (iii) confirms that:
  - (1) where the threat affects the public health system—the relevant State or Territory health authority has been informed of the threat
  - (2) the identified threat is unable to be managed by way of bi-lateral 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
  - (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.

### **Reasons for decision**

23. The ACCC has granted conditional interim authorisation to the Proposed Conduct described at paragraph 14 of this decision document solely for the purposes of ensuring supply of medical oxygen to hospitals and medical facilities that are impacted by the COVID-19 pandemic, and subject to ANZIGA complying with the conditions described at paragraph 22.

24. In granting conditional interim authorisation, the ACCC recognises the need for the Parties to be in a position to respond to the potential impact of a demand increase or supply constraint on the distribution of medical oxygen to hospitals and medical facilities during the COVID-19 pandemic.

25. While the nature of the Proposed Conduct might normally give rise to concerns regarding the extent to which information sharing and coordination by competitors might substantially lessen competition, the ACCC considers:

- The Proposed Conduct, and interim authorisation, is a temporary arrangement that will only come into effect if, and for as long as, it is necessary to secure supply of medical oxygen during the COVID-19 pandemic. Authorisation is only sought for 12 months from the date of the ACCC's final determination and the Proposed Conduct will not occur if the effects of the COVID-19 pandemic subside at an earlier date.
- The Proposed Conduct, and interim authorisation, only apply to arrangements made or information exchanged for the purpose of ensuring that the Parties are able to ensure supply of medical oxygen to hospitals and healthcare facilities during the COVID-19 crisis.
- While the Proposed Conduct may have some potential to result in public detriments in the form of reduced competition between the Parties due to them working collectively to share information and come to agreements, the extent of such detriment is likely to be limited by the fact that:
  - The Parties intend to rely on the Proposed Conduct, and interim authorisation, only where other arrangements, such as bilaterally negotiated supply agreements between the Parties, appear unlikely to be adequate to address the perceived supply constraints and/or demand increases.
  - The conditions of Interim Authorisation enable the ACCC to monitor the Proposed Conduct as the Parties, via ANZIGA, will keep the ACCC updated of any contracts, arrangements or understandings agreed pursuant to the Proposed Conduct.
- The conditions of authorisation set out at paragraph 22 of this decision document regarding notification requirements, provision of regular updates and enabling ACCC information requests, provide transparency and ACCC oversight of the conduct being engaged in under the interim authorisation. 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 agreements being implemented under the authorisation.

- 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.

26. The ACCC further considers that the Proposed Conduct, if it becomes necessary, is likely to have significant public benefits, including by enabling the Parties to ensure supply of medical oxygen to hospitals and healthcare facilities during the COVID-19 pandemic.

#### **Reconsideration of conditional interim authorisation**

27. 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.