



**Northern Territory of Australia as represented by the Department
for Health –
Application for authorisation AA1000499
Interim authorisation decision
17 April 2020**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of the application for authorisation AA1000499, lodged by the Northern Territory of Australia as represented by the Department of Health (the **Department**) on 15 April 2020.
2. The Department has applied for authorisation to extend to itself and the following parties who are engaged, or propose to become engaged, in the Proposed Conduct:
 - the specified private healthcare provider operating in the Northern Territory as listed in **Attachment 1** (and its related bodies corporate), as well as any other private healthcare providers notified to the ACCC from time to time by the Department (**the Participating Provider(s)**); and
 - all public hospitals operating in the Northern Territory, as listed in **Attachment 2**, and any other healthcare facility owned or operated by the Northern Territory or an authority of the Northern Territory (**the Northern Territory Public Providers**),
(together, the **Participating Parties**).
3. The Department seeks authorisation for the Participating Parties for the broad purpose of maximising healthcare capacity and ensuring Territory-wide coordination of healthcare services in the Northern Territory to facilitate the most efficient and effective allocation of healthcare services 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 in the Northern Territory, and subject to conditions requiring the Department to provide the ACCC with regular updates regarding measures implemented under the interim authorisation, and to notify the ACCC of other private healthcare 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 Department is seeking authorisation to extend to itself, the specified private healthcare provider and any other private healthcare providers notified to the ACCC from time to time by the Department, all public hospitals, and any other healthcare facility owned or operated by the Northern Territory or an authority of it. The Department 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 Department 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 for the Participating Parties to:
- (a) negotiate and enter into the agreements between the Department and Participating Provider(s) under which the Department will provide funding to the Participating Provider(s) and those parties will provide resources and services to the overall response to the Pandemic in the Northern Territory being coordinated by the Department. (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 Department or one or more of the Northern Territory 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 healthcare operators to support the public healthcare systems in each State and Territory.
9. The Northern Territory Government is in the process of implementing those arrangements. The Department submits that it may separately enter into one or more substantially similar Agreements with each of the Participating Provider(s) (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 Department submits that without intervention and assistance from the Northern Territory Government (with funding assistance from the Australian Government), it is possible that Northern Territory private healthcare providers will have to cease, suspend or reduce operations and stand down staff and other resources.
11. The Department submits that key features of the Agreements include that:
 - (a) the Department will provide funding to the Participating Provider(s) 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 Department 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 Department in accordance with principles to be agreed;
 - (d) 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;
 - (e) each Participating Provider will provide services under the Agreement on a purely cost recovery and non-profit basis;
 - (f) public patients will not be required to pay any amount arising from or in connection with healthcare treatment by a Participating Provider; and
 - (g) the Participating Parties will cooperate in respect of the procurement and supply of medical equipment.
12. The Department submits that the Objectives under the Agreements include to:
 - (a) work cooperatively to ensure that the public and private healthcare sector responds successfully to the Pandemic;
 - (b) ensure the ongoing sustainability and operation of hospital facilities across the Northern Territory;
 - (c) to make available to the Department (and Northern Territory public) the maximum amount of hospital facilities;
 - (d) to 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) to ensure that the Department 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 Department; 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 Department further submits that:

- the Agreements are not intended to, and do not extend to, coordination or any agreement between Participating Provider(s) other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the Department or one or more of the Northern Territory Public Providers, and
- to the extent that Participating Provider(s) 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 Department will seek to wind back and ultimately terminate the Agreements which would in due course enable each of the Participating Provider(s) to resume providing business as usual services to private sector patients.

14. The Department seeks authorisation for 12 months from the date of a final determination by the ACCC, 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 Department requested urgent interim authorisation for the Participating Parties to engage in the Proposed Conduct because they consider that, in light of the speed at which the Pandemic is evolving globally, the provision of funding to the Participating Provider(s) 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 urgent need for the Participating Parties to coordinate their response to the Pandemic as soon as possible to ensure the Northern Territory 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.

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 8 May 2020.

Conditional interim authorisation

Transparency and reporting

20. The Department submits that it does not consider it appropriate that authorisation be conditional upon a formal notification arrangement where the Department is involved in and/or has oversight and direction of the Proposed Conduct. The Department submits, however, that it would not object to conditions being imposed of the same kind that the ACCC has imposed in respect of the coordinated healthcare arrangements being implemented in Victoria and Queensland, in respect of which the ACCC has already granted interim authorisation.¹
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.
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 Department must provide regular updates to the ACCC at a frequency agreed between the Department and the ACCC, and provide any additional information reasonably requested by the ACCC.

Condition 2 – Notification of future parties

24. To the extent that Department believes it necessary or desirable for any other private healthcare providers (other than the private healthcare provider listed in **Attachment 1**) to participate in the Proposed Conduct, the Department 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 Northern Territory 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 Northern Territory 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.

¹ See <https://www.accc.gov.au/media-release/private-and-public-hospitals-to-cooperate-on-covid-19-in-victoria-and-queensland>

- 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 Provider(s) other than as necessary or desirable to give effect to the Agreements and facilitate the Objectives at the request or direction of the Department or one or more of the Northern Territory Public Providers. The ACCC also notes that currently there is only one private healthcare provider in the Northern Territory.
- To the extent that Participating Provider(s) 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 Department 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 the Northern Territory as effectively, efficiently and economically as possible. The ACCC notes that there is only one private healthcare provider in the Northern Territory. This means there is likely to be less benefit from co-ordination between private and public hospitals than in other jurisdictions, but we still consider there is likely to be significant benefits
- reducing the likelihood that private healthcare providers operating in the Northern Territory 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 Department 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 Provider(s) to be responsive to the needs of the overall health system, and coordinate and work in synchronisation with the Northern Territory Public Providers and with 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 healthcare providers can remain operational and retain staff during the Pandemic, as well as following the Pandemic to help 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 Provider

- 1. Specified private healthcare provider**
 - Darwin Private Hospital Pty Ltd ACN 009 653 712
- 2. Any other private healthcare operator in the Northern Territory who seeks to engage in conduct the subject of this application provided the ACCC is notified by the Department.**

Attachment 2 – The Northern Territory Public Providers

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

- The Central Australia Health Service encompassing Alice Springs Hospital, Tennant Creek Hospital and various other health services.
- The Top End Health Service, including the following facilities:

Major facilities

- the Royal Darwin Hospital
- Palmerston Regional Hospital
- Katherine Hospital
- Gove Hospital

Regional health clinics²

Top End

- Adelaide River
- Alyangula
- Angurugu
- Batchelor
- Belyuen
- Bickerton Island
- Borroloola
- Casuarina
- Gapuwiyak
- Gunbalanya (Oenpelli)
- Jabiru
- Minjalang
- Nauiyu Nambiyu (Daly River)
- Wurrumiyanga
- Numbulwar
- Palmerston
- Palumpa
- Peppimenarti
- Pine Creek
- Pirlangimpi
- Ramingining
- Robinson River
- Umbakumba
- Wadeye (Port Keats)
- Wagait Beach
- Waruwi

Barkly

- Ali Curung
- Barkly mobile

² Listed by location – further details available at <https://nt.gov.au/wellbeing/remote-health/remote-health-services>.

- Canteen Creek
- Epenarra
- Lake Nash
- Elliot

Central Australia

- Alcoota
- Aputula (Finke)
- Bonya
- Docker River (Kaltukatjara)
- Haasts Bluff (Ikuntji)
- Harts Range (Atitjere)
- Hermannsburg (Ntaria)
- Imanpa (Mt Ebenezer)
- Kings Canyon (Watarrka)
- Laramba (Napperby)
- Mt Liebig (Amunturrngu)
- Nyirripi
- Papunya
- Tara (Neutral Junction)
- Ti Tree
- 6 Mile
- Titjikala (Maryvale)
- Wallace Rockhole
- Wilora (Stirling)
- Willowra
- Yuelamu (Mt Allen)
- Yuendumu
- Yulara (Ayers Rock)