Medical Technology Association of Australia – Application for authorisation AA1000479 Interim authorisation decision 25 March 2020

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted interim authorisation in respect of the application for authorisation AA1000479, lodged by the Medical Technology Association of Australia (the **MTAA**) on 24 March 2020.
2. The MTAA has applied for authorisation on behalf of itself, its members (**MTAA members**) and other relevant businesses in the medical technology industry (**relevant non-members**) (together, the **Applicants**), 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.
3. The ACCC has granted interim authorisation for the conduct described at paragraph 7 below.
4. 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

5. The MTAA is the national association representing companies in the medical technology industry, representing manufacturers and suppliers of medical technology used in the diagnosis, prevention, treatment and management of disease and disability.[1] MTAA members distribute a wide range of medical technology, which includes ICU ventilators, COVID-19 testing kits and personal protective equipment.
6. The MTAA is seeking authorisation for its members, as well as businesses that supply or distribute relevant medical equipment who are not MTAA members. A list of these parties is at **Attachment A**. The MTAA is also seeking authorisation for future MTAA members and relevant non-members, on the basis that the relevant parties and products may expand as the Federal Government's response to the crisis evolves and information relating to new medical equipment or products is required.
7. Authorisation is sought to make and give effect to arrangements, and to exchange information, between the MTAA, MTAA members and non-members for the purposes of:
    a) sharing information regarding:
        i. available stock and inventory levels;
        ii. likely quantities that can be obtained through existing supply channels,
        iii. new sources of supply and potential quantities; and
        iv. opportunities to increase domestic manufacturing,

[1] For further discussion on the MTAA's purview, see MTAA webpage.

for a range of medical equipment and supplies, being:

v. initially, ICU ventilators, COVID-19 testing kits and Personal Protective Equipment; and

vi. the full range of medical equipment and technology used in the treatment of intensive care patients; and

vii. other medical equipment that is 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 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;

d) working together to respond to tenders or requests for supply (including sharing information or joint tenders).

(the **Proposed Conduct**).

8. The Federal Government has 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 MTAA submits that the Proposed Conduct is required to respond to the Federal Government Department of Health request that the MTAA coordinate with its members to identify sources of supply for medical equipment and to provide advice to government regarding any constraints or obstacles to securing this supply.

9. The MTAA submits that it anticipates, in the short term, the Proposed Conduct will only include the information sharing conduct outlined in 7(a) above; however it states that, given the fluidity and uncertainty of the current situation and the need to implement any further measures quickly, it is also seeking authorisation of the conduct described at 7 (b)-(d) as it considers that it may have to engage in such conduct as the COVID-19 situation progresses. The MTAA anticipates that State, Territory and Federal health authorities will determine the manner in which they require supplies of necessary medical equipment to be made by the MTAA members and non-members rather than those matters being determined or agreed among suppliers.

10. The MTAA submits that it is seeking authorisation of the conduct described in paragraphs 7 (b)-(d), on the basis that the MTAA will provide notice to the ACCC if they are to engage in these parts of the Proposed Conduct. The MTAA also proposes to provide notice to the ACCC of new MTAA members and non-members that are or that are expected to become involved in the Proposed Conduct as the response to the COVID-19 situation evolves.

11. The MTAA is 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. The MTAA requested urgent interim authorisation for the Proposed Conduct to allow the Applicants to start coordinating to address supply shortages for critical medical supplies and equipment, as well as provide advice to the Federal Government, State and Territory Governments and relevant health agencies relating to supply of medical equipment, including areas of current or anticipated shortage and supply constraints.

Consultation

15. 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.

16. The ACCC will conduct a public consultation process on the substantive application for authorisation in the coming days, and details regarding how to make a submission will be available on the ACCC's authorisations public register.

Reasons for decision

17. In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the increased demand on the health system due to the COVID-19 pandemic.

18. The ACCC notes that the Applicants have advised that the extent to which the conduct is engaged in will be determined by State, Territory and Federal health authorities who will determine the manner in which they require supplies of necessary medical equipment to be made by the MTAA members and non-members rather than those matters being determined or agreed among suppliers.

19. The ACCC also notes that the significant number of participants in the conduct means the ACCC cannot at this time form a view as to the likely long term effects of the conduct to on the competitive dynamics in a market in Australia. However, there are a number of factors which means markets will be able to return to substantially their current state once the emergency circumstances subside. 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 can be discontinued in the event that the effects of the pandemic subside at an earlier date.
    - The Proposed Conduct will be influenced by what Commonwealth and State health authorities need to supply necessary equipment in response to the COVID-19 crisis.
    - 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 setting or agreeing prices which will remain the discretion of each supplier.
    - The ACCC may review its decision to grant interim authorisation at any time, including in response to feedback as the Proposed Conduct is rolled out. If relevant industry participants have concerns regarding the Proposed Conduct during interim authorisation, they are encouraged to advise the ACCC.

20. There are likely to be significant public benefits including by allowing MTAA, its members and non-members to:

    - coordinate their manufacture and supply activities and exchange information so that areas of supply shortage and constraint to be addressed more quickly and effectively to assist Federal, State and Territory governments to respond to the COVID-19 crisis.
    - Effectively advise Federal, State and Territory governments on the supply of medical equipment which is essential to ensuring coordinated and effective response to this unprecedented international public health crisis.

21. The ACCC notes that the Applicants will notify the ACCC if the Applicants engage in the conduct outlined at 7 (b) – (d) and will also notify the ACCC as new MTAA members and non-members engage in the Proposed Conduct.

22. The ACCC is satisfied that the extraordinary circumstances of the COVID-19 crisis and the importance of the supply of medical material to addressing the crisis warrant the granting of interim authorisation.

Reconsideration of interim authorisation

23. 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 A - Current Parties to the Proposed Conduct

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
- Smith & Nephew 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
- 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-Members

- ResMed Pty Ltd
- Draeger Australia Pty Ltd
- GE Healthcare Australia Pty Limited
- Philips Healthcare Australia
- Members of Pathology Technology Australia as at 23 March 2020 (who are not MTAA Members), being:
    - Abacus dx Pty Ltd
    - Abbott Australasia Pty Ltd
    - Agilent Technologies Australia Pty Ltd
    - Ascencia Pty Ltd
    - Astral Scientific Pty Ltd
    - Becton Dickinson Pty Ltd
    - Binding Site Pty Ltd
    - bioMérieux Australia Pty Ltd
    - Bio-Rad Laboratories Pty Ltd
    - Cepheid Holdings Pty Ltd
    - Diagnostica Stago Pty Ltd
    - ESL Biosciences Australia (2012) Pty Ltd
    - Grifols Australia Pty Ltd
    - Illumina Australia Pty Ltd
    - Integrated Sciences Pty Ltd
    - Life Bioscience Pty Ltd
    - Lumos Diagnostics Holdings Pty Ltd
    - Merck Millipore Australia Pty Ltd
    - MP Biomedicals Australasia Pty Ltd
    - Paragon Therapeutic Technologies Pty Ltd
    - PerkinElmer Pty Ltd
    - Pro-Health Asia Pacific Pty Ltd
    - QIAGEN Pty Ltd
    - Radiometer Pacific Pty Ltd
    - Roche Diagnostics Australia Pty Ltd
    - Siemens Healthcare Pty Ltd
    - SJ Alder Pty Ltd
    - SpeeDx Pty Ltd
    - Sysmex Australia Pty Ltd
    - Tecan Australia Pty Ltd
    - ThermoFisher Scientific Australia Pty Ltd
    - Trajan Scientific Australia Pty Ltd
    - Werfen Australia Pty Ltd