



**National Pharmaceutical Services Association (NPSA) –  
Application for authorisation AA1000480  
Interim authorisation decision  
31 March 2020**

**Decision**

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of the application for authorisation AA1000480 lodged by the National Pharmaceutical Services Association (**NPSA**) on 27 March 2020.
2. The NPSA has applied for authorisation on behalf of itself and its current and future members (the **Applicants**) and other CSO (Community Service Obligation) Distributors.<sup>1</sup>
3. The ACCC has granted conditional interim authorisation for the conduct described at paragraph 10. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.

**Background**

4. The NPSA is a peak industry body representing pharmaceutical wholesalers in Australia. Its members distribute to all pharmacies and major hospitals in Australia.
5. The NPSA's current members are:
  - Australian Pharmaceutical Industries (**API**);
  - Sigma Healthcare;
  - Symbion; and
  - National Pharmacies.
6. These terms are defined as follows:
  - **Medicines** includes all therapeutic goods (both prescription and non-prescription medicines, medical devices and biologicals);
  - **Pharmacy Products** includes all other goods available for sale at community pharmacies (such as personal protective equipment, face masks, gloves, hand sanitisers and toilet paper);
  - **Customers** means purchasers of the Applicants' products, including pharmacies and hospitals; and
  - **Consumers** means end users of the Applicants' products, such as patients and individuals.

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<sup>1</sup> 'CSO Distributors' refers to the entities that have entered into a deed with the Commonwealth in relation to the CSO Funding Pool and the NDSS (National Diabetes Services Scheme). The Pool and the Scheme were introduced by the Federal Australian Government to assist with the additional costs faced by some pharmaceutical wholesalers in providing the full range of PBS medicines and NDSS products to pharmacies.

## The application for authorisation

7. The NPSA seeks authorisation to enable its members and other CSO Distributors to coordinate activities for the purpose of promoting continual, fair and equitable access to Medicines and Pharmacy Products for all Australians during the COVID-19 pandemic.
8. The NPSA submits that the rapid escalation of issues relating to COVID-19 have resulted in unprecedented demand from Consumers, as well as unusual ordering patterns from some Customers, placing significant pressure on all participants of the Medicines and Pharmacy Products supply chain.
9. The NPSA further notes:
  - recent Government directives to wholesalers to impose appropriate supply restrictions as part of a responsible emergency management strategy;
  - imports account for a significant portion of the Applicants' supply chains, with domestic supply impacted by global disruptions; and
  - the conduct for which authorisation is sought would enable the Applicants to address these concerns in an expeditious manner, in parallel with or to optimise implementation of Government decisions. It would allow the Applicants to optimise their supply chains to better meet the CSO objectives of providing broad access to essential Medicines for all Australians, in the context of the pandemic's unprecedented challenges.

## The Proposed Conduct

10. In light of the above, the NPSA seeks authorisation on behalf of the Applicants to have discussions, enter into or give effect to arrangements between the Applicants, or engage in conduct (excluding the sharing of any price-information):
  - that have the purpose of facilitating the supply of, and access to, Medicines and Pharmacy Products; and/or
  - that have the purpose of facilitating the supply of, and access to, Medicines and Pharmacy Products, including cooperating with any conduct which has been recommended by the Australian Government and/or Working Groups.<sup>2</sup>

In seeking to maintain the integrity of the supply chain, the Applicants propose, if necessary, to engage in activities relating to:

- sustainable coordinated stock acquisition, including liaising with manufacturers/suppliers of Medicines and Pharmacy Products and/or relevant industry peak bodies regarding purchasing arrangements and importing logistics;
- coordinating inventory management strategies, such as stock reservation, including allocation of supplies of Medicines and Pharmacy Products to Customers; and
- facilitating relevant coordinated logistical arrangements to assist in the equitable distribution of Medicines and Pharmacy Products, such as the Applicants may need to consider in coordinating stock transfers between them to pharmacies, using pharmacies as a central delivery point and sharing of distribution centre resources, and, when appropriate, collaborating with Customers and other haulage providers.

Together, the conduct referred to in this paragraph 10 constitutes the **Proposed Conduct**.

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<sup>2</sup> 'Working Groups' includes the TGA coordinated Medicines Shortages Working Group and the Department of Health's Medicine Shortages Working Party.

11. The NPSA submits that it is not possible to envisage all of the types of coordinated conduct that the Applicants may need to engage in to appropriately calibrate their supply chains to respond to consumer demand.
12. The NPSA requests authorisation for 12 months from the date of the ACCC's final determination. However, if the supply chain recovers from COVID-19 disruptions earlier than expected, the Applicants intend to cease the Proposed Conduct at that time and will notify the ACCC accordingly.

### **The authorisation process**

13. 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.
14. The power conferred upon the ACCC to authorise conduct is discretionary. In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.
15. The ACCC may specify conditions in an authorisation. The legal protection provided by an authorisation does not apply if any conditions are not complied with.

### **Interim authorisation**

16. The ACCC may, where it considers it appropriate, grant interim authorisation which allows parties to engage in conduct while the ACCC is considering the substantive application.
17. The NPSA requests urgent interim authorisation due to the need for the Applicants to engage in the Proposed Conduct as soon as practicable, noting that Government warnings and directions empowering the Applicants to individually make supply decisions have not been sufficient to address the ongoing pressure on supply chains.
18. Consequently, the NPSA considers that urgent interim authorisation is required to:
  - assist the Applicants to promptly understand any significant changes in respect of the supply of, or demand for, Medicines and Pharmacy Products and addressing such operational challenges in a coordinated manner at both the wholesale and retail level;
  - mitigate or avoid excessive strain on the wholesale Medicines and Pharmacy Products supply chains, including in manufacturing, distribution centres, transport and other logistical arrangements involved in the fulfilment and delivery of orders to Customers;
  - facilitate the Applicants' ongoing efforts to smooth supply chain issues (in terms of matters such as production/inventory volume, frequency of distribution) which may result in stock shortages or outages, and appropriately supporting Customers to maintain sufficient stock levels to meet volatile demand;
  - facilitate the safety of community pharmacy and hospital dispensary staff, including by alleviating staff workload and congestion at community pharmacies (which can assist to limit COVID-19 outbreaks); and
  - alleviate current community concerns about the availability of Medicines and Pharmacy Products.

## Consultation

19. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation. This is due to the urgent need for the Applicants to quickly take steps to ensure supply of Medicines and Pharmacy Products to Consumers during the COVID-19 epidemic and the compelling nature of the public benefits likely to result from the request for interim authorisation.
20. 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.

## Granting of conditional interim authorisation

21. Interim authorisation is granted for the Proposed Conduct subject to the following condition:
  - The NPSA will regularly update the ACCC regarding any material developments in relation to the Proposed Conduct as the COVID-19 position evolves, including:
    - any material recommendations made by the Working Groups;
    - key operational and supply arrangements and material conduct in parallel with, or to enable the optimal implementation of, Government decisions; and
    - any changes to the Applicant group.

## Reasons for decision

22. In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the difficulties that the Applicants and CSO Distributors, and their Customers and Consumers, have been facing due to the unprecedented demand for Medicines and Pharmacy Products resulting from the COVID-19 pandemic.
23. In addition, the ACCC considers that:
  - It is unlikely that interim authorisation will materially alter the competitive dynamics in any market, and markets will be able to return to substantially their current state once the emergency circumstances subside. In particular:
    - The Proposed Conduct is a temporary measure to optimise the Medicines and Pharmacy Products supply chain.
    - The Proposed Conduct, and interim authorisation, only apply to arrangements and conduct for the purposes set out in paragraph 10, which are broadly to assist the Applicants to address the supply chain issues arising from unprecedented consumer demand. This will assist Customers and Consumers to equitably access Medicines and Pharmacy Products.
    - The Proposed Conduct excludes any price coordination behaviour in respect of the sourcing of or arrangements relating to the supply of Medicines and Pharmacy Products.
    - It is not compulsory for the Applicants or other CSO Distributors to participate in the Proposed Conduct. Any Applicant can opt out of the Proposed Conduct at any time, and any future NPSA members and other CSO Distributors can 'opt in' to participate in the coordinated conduct.
    - The ACCC has granted interim authorisation subject to the condition that the NPSA will regularly update the ACCC regarding any material developments in relation to the Proposed Conduct, as discussed in paragraph 21.
    - The Proposed Conduct will be subject to relevant oversight from Government and other regulatory bodies, such as the TGA-coordinated Medicines Shortages

Working Group and the Department of Health's Medicine Shortages Working Party.

- 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 manufacturers, distributors, wholesalers, pharmacies, hospitals, nursing homes, retirement villages and other aged care providers, transport and logistic providers and Consumers have concerns with the way the Applicants are dealing with them during the period of interim authorisation, they are encouraged to advise the ACCC.
- There are likely to be significant public benefits given the current unprecedented circumstances, including:
  - facilitating and promoting a sustainable and strong supply chain to respond to Customers' demand in a responsible manner (especially for critical life-saving Medicines, as well as Pharmacy Products which are in short supply);
  - amplifying the effectiveness of existing and proposed Government and regulatory bodies' responses to COVID-19 in attempting to smooth any strain on the supply chain;
  - facilitating a safe and orderly environment for employees of the Medicines and Pharmacy Products supply chain, such as distribution centres, pharmacies and hospitals, to work in. This can in turn facilitate the enforcement of social distancing rules, limiting further outbreaks of COVID-19 and employment opportunities for the relevant supply chain staff; and
  - promoting continued equitable access to Medicines and Pharmacy Products for all Australians.

### **Reconsideration of interim authorisation**

24. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation.
25. 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.