

Simon Bell
Assistant Director
Adjudication Branch, Merger and Authorisation Review Division
Australian Competition & Consumer Commission

By email only

Our ref H20/44197

Dear Mr Bell

Authorisation Application 1000486 – Medicines Australia

Thank you for the opportunity to consider issues raised in the submission from Medicines Australia dated 31 July.

NSW Health has also considered the Medicines Australia submission of 17 July.

NSW Health notes the following:

- NSW Health is generally supportive of the authorisation application, subject to the issues raised below.
- Medicines Australia has requested that the authorisation operate until 27 August 2021. If the ACCC accedes to that request, it heightens the importance of the issues below for NSW Health.
- Medicines Australia places considerable weight on features of its conduct in addressing concerns about the potentially significant anti-competitive consequences of collaboration between all, or substantially all of the suppliers of medicines in Australia, but those features are not reflected in the description of the conduct or conditions imposed by the ACCC.
- Medicines Australia does not directly address the central concern of NSW Health – that the authorisation expressly immunises all the suppliers of medicines in Australia from the prohibitions in the Competition and Consumer Act in relation to NSW Health tenders and could result in a single joint response by all suppliers to a tender.
- The letter from the NSW Minister of Health to Medicines Australia of 5 May 2020 states that NSW Health is supportive of temporarily waiving penalties for out of stocks for pharmaceutical suppliers and that " .. accordingly, NSW Health has suspended business-as-usual tendering activity on its primary pharmaceutical contract ..". NSW Health has not suspended all pharmaceutical tenders and it is likely that re-pricing tenders will be conducted in the next 6-12 months to align with evolving NSW Health priorities as well as reviewing individual pharmaceutical products that are coming off-patent

Medicines Australia addresses, in its submission, the impact of the authorised conduct on what was described previously as the NSW 2021 Tender. It is now unclear whether a single large tender, or a number of smaller tenders, will be conducted by NSW Health. Nonetheless, NSW Health assumes that Medicines Australia's position that it does not consent to the exclusion of the NSW 2021 Tender from the authorised conduct would apply to any pharmaceutical tender conducted by NSW Health while the authorisation is in effect.

NSW Health considers that it is critical for the taxpayers and health consumers in NSW that the outcomes of pharmaceutical tenders are as competitive as possible. For this reason, it considers that any "working together", "information sharing" or "joint tender" responses to a tender for pharmaceuticals would inherently compromise the competitive tension which the tender process is intended to engender, to the detriment of taxpayers and health consumers in NSW. Accordingly, NSW Health submits that the simplest way to address its concerns is to exclude pharmaceutical tenders

issued by NSW Health from the authorised conduct.

If, however, pharmaceutical tenders issued by NSW Health are not excluded from the authorised conduct, NSW Health requests that the authorisation be subject to the following conditions, which are intended to minimise the impact of the authorised conduct on any pharmaceutical tender issued by NSW Health:

- If during the period of authorisation, NSW Health issues a tender in respect of any Critical Medicine:
 - Medicines Australia will give, to NSW Health and the ACCC, prior written notice of at least 14 days of any proposed discussions, information sharing or working together in any way in relation to the tender, including details of each of the participants in the proposed discussions, information sharing or working together in any way and the reasons for engaging in that conduct;
 - NSW Health will, within 10 days of receipt of the notice from Medicines Australia, inform Medicines Australia and the ACCC whether it consents to the proposed conduct; and
 - All such discussions, information sharing and working together in any way in relation to the tender will take place only at a meeting at which at least one representative of the ACCC is present.

Please contact Andrew Mullen, Principal Legal Officer, at [REDACTED] should you require any further assistance.

Yours sincerely

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Leanne O'Shannessy,
Executive Director, Legal and Regulatory Services and General Counsel
Ministry of Health

1 September 2020