



Health

Simon Bell
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Review Division
Australian Competition and Consumer Commission

By email: adjudication@acc.gov.au

Our ref H20/44197

Dear Mr Bell

AA1000486 – Medicines Australia – Submission

I refer to the ACCC's Draft Determination dated 26 June 2020 in respect of the application for authorisation lodged by Medicines Australia.

In or about the second quarter of 2021, NSW Health will commence a competitive tender process for the procurement of medicines, including prescription-only medicines, and associated devices and services ("the NSW Health 2021 Tender").

The NSW Health 2021 Tender is the major procurement process for NSW Health in respect of prescription-only medicines and related devices. The NSW Health 2021 Tender is not directed towards the COVID-19 pandemic. This competitive process is intended to enable NSW Health to facilitate the procurement of competitively priced medicines and devices for the NSW public health system.

NSW Health anticipates that the annual expenditure on products likely to be covered by the NSW Health 2021 Tender will be of the order of \$200 million in the period until July 2024 and possibly until 2026. In other words, the total expenditure affected by the NSW Health 2021 Tender may be of the order of \$1 billion.

In the Draft Determination the ACCC states that, "...in making its final determination the ACCC will seek to ensure that the Proposed Conduct is no broader than necessary to address supply issues arising from the COVID-19 pandemic."

NSW Health is concerned that the Proposed Conduct as described in the Draft Determination is:

- considerably broader than is necessary to address supply issues arising from the COVID-19 pandemic; and
- is likely to have a materially adverse impact on the NSW Health 2021 Tender process.

The Proposed Conduct is described as the implementation of a coordinated strategy in relation to the supply of "prescription-only medicines that are critical to patient health (Critical Medicines)" and devices or services that are supplied or administered with Critical Medicines (Critical Devices).

The Critical Medicines are likely, in practice, to be all or almost all prescription-only medicines. They are not, in any way, limited to medicines used to treat patients suffering from symptoms of COVID-19. NSW Health considers it likely that the Critical Medicines, which are intended to be the subject of the authorised conduct, will comprise a substantial proportion of the prescription-only medicines which will be the subject of the NSW Health 2021 Tender.

The conduct, which is proposed to be authorised includes "working together to respond to tenders or requests for supply (including sharing information or joint tenders) of Critical Medicines and Critical Devices." This apparently will not encompass making or giving effect to agreements or arrangement or exchanging information on the pricing aspect of such tenders.

The authorised conduct in its current form could enable all authorised suppliers of prescription-only medicines, which are the subject of the NSW Health 2021 Tender to work together to respond to that tender, subject only to not agreeing or disclosing information concerning prices. NSW Health is very concerned that essentially all respondents to the NSW Health 2021 Tender in respect of prescription-

only medicines and related devices could coordinate their responses to the tender and, in theory, submit a single joint tender response.

Authorisation of the Proposed Conduct risks effectively eliminating competitive tension in the tender process in respect of the products described as Critical Medicines and Critical Devices.

NSW Health requests that the final determination expressly excludes "responding to the NSW Health 2021 tender" from the authorised conduct. In other words, the parties to the authorisation should not be authorised to share information, participate in joint tender responses or otherwise work together in any way to respond to the NSW Health 2021 Tender.

Yours sincerely



LS

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

17/07/2020