



# Determination

Application for authorisation

lodged by

Australian Medical Association (NSW) Limited

in respect of

Collective bargaining with Healthscope Operations  
Pty Limited

Date: 24 November 2017

Authorisation number: A91590

Commissioners:

Schaper  
Court  
Featherston

# Summary

The ACCC has decided to grant authorisation to the Australian Medical Association (NSW) Limited, acting on behalf of Visiting Medical Officers in NSW, to negotiate with Healthscope Operations Pty Ltd regarding the terms and conditions (including remuneration) of visiting medical officer contracts at the Northern Beaches Hospital.

The ACCC grants authorisation for five years until 16 December 2022.

## The application for authorisation

1. On 19 July 2017 Australian Medical Association (NSW) Limited (the **AMA (NSW)**) (the **Applicant**), acting on behalf of Visiting Medical Officers (**VMOs**) in NSW, applied for authorisation (A91590) under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010 (CCA)* to engage in conduct that may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
2. Authorisation provides statutory protection from legal action for conduct that may contravene cartel provisions or section 45 of the Competition and Consumer Act 2010.
3. The Applicant is seeking authorisation to collectively negotiate, on behalf of VMOs in NSW, the terms and conditions (including remuneration) of VMO contracts with Healthscope Operations Pty Limited (Healthscope) at the Northern Beaches Hospital (the **Hospital**) (the **Conduct**). The Applicant is seeking authorisation for five years.
4. On 28 September 2017, the ACCC issued a draft determination proposing to grant authorisation for the Conduct for five years. A conference was not requested following the draft determination.

## Background

### Australian Medical Association (NSW) Limited

5. The AMA (NSW) is an independent association representing the medical profession in NSW. The AMA (NSW) provides industrial representation for VMOs, as well as a range of advocacy, advice and support services to the wider medical profession in NSW.

### Healthscope

6. Healthscope is a large Australian based provider of private healthcare services. In Australia, Healthscope operates 45 private hospitals and 48 medical centres.
7. On 11 December 2014 the NSW State Government entered into a contract with Healthscope to design, build, operate and maintain the new Northern Beaches Hospital, which is due to open in 2018. There are currently two public hospitals servicing the Northern Beaches area, Manly Hospital (which will close once the Northern Beaches Hospital opens), and Mona Vale hospital (which will continue to operate but with limited services. Most acute care services will transfer to the Northern Beaches Hospital.

## **VMOs**

8. A VMO is a medical practitioner appointed under a service contract to provide medical services for monetary remuneration for or on behalf of a Public Health Organisation. VMOs typically have their own private practices and work as independent contractors in public hospitals. In NSW, there are approximately 8,000 VMO appointments with some VMOs holding multiple appointments.
9. Under the terms of the agreement between Healthscope and the NSW Government, Healthscope will provide public hospital services for a 20 year period. Healthscope will also be required to offer employment to NSW Health Service employees (such as Junior Medical Officers and Staff Specialists) but it is not required to offer contracts for services to VMOs.

## **Previous ACCC matters**

10. On 4 December 2013, the ACCC granted authorisation (A91383) for AMA (NSW) to collectively bargain with the NSW Ministry of Health and public health organisations regarding the terms and conditions of employment of VMOs within the NSW public health system.
11. In essence, under the current application for authorisation, AMA (NSW) is seeking to extend the scope of its existing collective bargaining arrangement on behalf of VMOs in the NSW public health system to those VMOs employed by Healthscope at the Northern Beaches Hospital.

## **Consultation**

12. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC invited submissions on AMA (NSW)'s application from parties including Healthscope, organisations representing medical practitioners, organisations representing private hospitals, organisations representing consumers and State and Federal healthcare agencies.
13. The ACCC received one submission prior to the release of the draft determination from the national representative body - the Australian Medical Association (AMA) - which was supportive of the application. Copies of all public submissions are available from the ACCC's public register.<sup>1</sup>
14. No submissions were received following the draft determination proposing to grant authorisation, which the ACCC issued on 28 September 2017.

## **ACCC assessment**

15. On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the

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<sup>1</sup> <http://registers.accc.gov.au/content/index.phtml/itemId/1203031/fromItemId/278039>

amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

16. Pursuant to subsections 90(7) and 90(8), the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the conduct.<sup>2</sup>

17. In its assessment of the likely public benefits and detriments of the Conduct, the ACCC has taken into account:

- the application and submissions received
- other relevant information available to the ACCC, including information from consideration of previous matters
- the likely future without the Conduct that is the subject of the authorisation. The ACCC compares the public benefits and detriments likely to arise in the future if the proposed conduct occurs, against the future in which the proposed conduct does not occur. In particular, the ACCC considers that, absent the Conduct, it is likely that VMOs will individually seek to negotiate terms and conditions of their contracts with Healthscope, relating to the Northern Beaches Hospital
- the relevant area of competition – which the ACCC considers to be the provision of VMO services to public hospitals in NSW. However, the ACCC does not consider that it is necessary to precisely identify the relevant areas of competition for the purposes of assessing the application for authorisation, as the outcome of the assessment will not be affected
- the five year authorisation period requested, and
- that VMOs will continue to be able to negotiate with Healthscope on their own behalf: that is, neither the VMOs or Healthscope can be compelled to participate in the collective negotiations as a result of the authorisation.

## Public benefit

18. Public benefit is not defined in the CCA. However, the Australian Competition Tribunal (the Tribunal) has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>3</sup>

## Submissions

19. The Applicant submits that the Conduct will result in various public benefits. Broadly, AMA (NSW) submits that allowing it to collectively negotiate with Healthscope on behalf of

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<sup>2</sup> As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

<sup>3</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

VMOs seeking service contracts at the Northern Beaches Hospital will ensure that medical services provided at the Northern Beaches Hospital are delivered on a cost effective basis. More specifically, the Applicant submits that:

- in its role as the collective negotiator of rates of remuneration and the terms and conditions for service delivery for VMOs, it is able to objectively balance the needs and wants of VMOs against the collective public interest in the provision of high quality medical services in the NSW public health system
- individual negotiations between VMOs and Healthscope would lead to an increase in the cost of the provision of public healthcare in NSW, in terms of the cost and time involved in individual negotiations
- should authorisation not be granted, individual negotiations may lead to an increase in the disparity of remuneration for different specialities and/or VMOs, and the potential for some specialities and/or VMOs to elect not to participate in the provision of VMO services at the Northern Beaches Hospital.

20. The AMA submits that approval of AMA (NSW)'s application will support consistency in the terms and conditions offered to VMOs across public health services. The AMA further submits that:

- a level playing field will support recruitment and retention at the Northern Beaches Hospital, without disadvantaging or favouring other parts of the public hospital system in NSW
- many of the VMOs who will contract with the Northern Beaches Hospital are likely to be currently employed at the Manly and Mona Vale hospitals under terms and conditions established under a collective bargaining agreement. The AMA submits that these VMOs will expect similar terms and conditions regarding their employment at the Northern Beaches Hospital
- a collective approach to negotiations between the VMOs and Healthscope offers the most efficient means of reaching agreement with a significant number of different specialty areas.

### **ACCC view**

21. The ACCC considers that allowing AMA (NSW) to collectively bargain with Healthscope regarding the terms and conditions of VMOs at Northern Beaches Hospital is likely to result in the following public benefits.

#### **Reduced transaction times and costs**

22. The ACCC has previously recognised that there are transaction costs associated with contracting and these transaction costs can be lower where a single negotiation process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary.

23. In this instance, allowing the Applicant to negotiate with Healthscope on behalf of individual VMOs from a number of different medical specialities is likely to result in lower transaction costs relative to Healthscope negotiating with each of the VMOs individually.

24. The ACCC considers that collective bargaining allows parties to share these costs, which may lead to more efficient negotiating outcomes.

### **Greater input into contracts**

25. The ACCC accepts that when negotiating with large businesses, small businesses can be at a disadvantage, in terms of resources and experience of negotiating in complex commercial environments. One way in which a small business can seek to redress such disadvantage is to bargain collectively. Collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of VMOs and medical specialties, in relation to common issues.

### **Recruitment and retention of VMOs at Northern Beaches Hospital**

26. The ACCC considers that the collective bargaining arrangements will, to some extent, ensure that Healthscope is able to recruit and retain sufficient VMOs and medical specialists to enable it to provide the full range of public health services that it is contracted to provide at the Northern Beaches Hospital.

### **Public detriment**

27. Public detriment is also not defined in the CCA but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>4</sup>

### **Submissions**

28. The Applicant submits that the Conduct results in no readily identifiable public detriment. Specifically, the Applicant submits that:

- there will not be an associated push to increase rates over and above those currently in place in the NSW Public Health System.
- in the future, it will continue to negotiate in good faith to ensure the ongoing provision of public health services to the public of NSW.

29. The AMA notes that AMA (NSW) is not seeking authorisation for collective boycott activity and individuals remain free to negotiate directly with Healthscope if they choose. The AMA considers that this, coupled with the history of VMO negotiations in NSW, illustrates that there is not likely to be any detriment from the Conduct.

### **ACCC view**

30. The ACCC considers that the Conduct is likely to result in little, if any, public detriment because:

- Participation in the collective bargaining is voluntary, with no collective boycott. VMOs remain free to negotiate directly with Healthscope to provide services at the

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<sup>4</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

Northern Beaches Hospital. Healthscope also remains free to negotiate directly with VMOs

- The Conduct effectively extends authorisation A91383 (which enables collective bargaining between VMOs and the NSW Public Health system) to one further hospital which provides public health services, albeit one operated by a private healthcare provider. Accordingly, it is unlikely to significantly increase any risk of harm to competition through coordinated conduct between VMOs.

## Balance of public benefit and detriment

31. Broadly, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct for which authorisation is sought is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
32. For the reasons outlined in this determination, the ACCC considers that the AMA (NSW) acting on behalf of VMOs in NSW to negotiate with Healthscope Operations Pty Ltd regarding the terms and conditions (including remuneration) of their contracts at the Northern Beaches Hospital is likely to result in public benefits, and that these would outweigh any detriment to the public, including from any lessening of competition. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

## Determination

### The application

33. On 19 July 2017, AMA (NSW) lodged application A91590 for authorisation with the ACCC using a Form B, under sections 88(1) and 88(1A) of the CCA, seeking to engage in conduct to which certain provisions of Part IV of the CCA would or might apply.<sup>5</sup> That is, the Conduct (described at paragraph 35 below) may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

### The net public benefit test

34. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to sections 90(7) and 90(8) of the CCA, that in all the circumstances the Conduct for which authorisation is sought would result or be likely to result in a public benefit that would

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<sup>5</sup> As noted in paragraph 15, changes to the authorisation provisions of the Act came into effect on 6 November 2017, a number of amendments to the CCA came into effect, which apply to applications for authorisation under consideration at or after that date, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are, which is treated as an applications for authorisation under subsection 88(1) of the CCA as amended

outweigh the detriment to the public that would result or be likely to result from the Conduct.<sup>6</sup>

## **Conduct for which the ACCC grants authorisation**

35. The ACCC grants authorisation A91590 to AMA (NSW) to engage in the Conduct, being to collectively negotiate on behalf of VMOs the terms and conditions (including but not limited to remuneration) of VMO contracts for the treatment of public patients at the Northern Beaches Hospital.
36. The Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.<sup>7</sup>

## **Length of authorisation**

37. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>8</sup> This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
38. In this instance, AMA (NSW) seeks authorisation for five years.
39. Given the ACCC's conclusion on the balance of public benefits and public detriments, the ACCC considers five years to be an appropriate period of time for authorisation.

## **Date authorisation comes into effect**

40. This determination is made on 24 November 2017. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 16 December 2017

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<sup>6</sup> As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

<sup>7</sup> The reference to "within the meaning of section 45 of the CCA" includes the making and/or giving effect to a provision of a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect or likely effect of substantially lessening competition.

<sup>8</sup> Section 91(1).