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2 October 2007

Ms Isabelle Arnaud
Director, Adjudication
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Ms Arnaud

**Notification CB 00004 for Latrobe Regional Hospital**

We refer to your letter of 1 October, in which the ACCC requests further information from AMA Victoria in relation to submissions by interested parties.

We have read with interest the following submissions:

- Latrobe Regional Hospital ("**LRH**") dated 24 September 2007 ("**LRH Submission**");
- Record of Meeting dated 21 September 2007 as between the ACCC and LRH ("**Meeting**");
- Department of Human Services submission ("**DHS Submission**");
- Rural Doctors Association submission ("**RDAV Submission**");
- Australian Healthcare and Hospitals Association submission ("**AHHA Submission**");
- Department of Health and Ageing submission ("**DHA Submission**"); and
- Further submission of LRH ("**LRH Further Submission**") (Together the "**Submissions**")

Please find our comment below:

1. **General Comment**

    a. AMA Victoria is pleased to note that, with the exception the DHS Submission, all Submissions are in qualified support of or ambivalent to the notification.
    b. Specifically, AMA Victoria is pleased that LRH, despite its reservations, supports the notification.
    c. All Submissions concede that, at least to some extent, there is an efficiency to be gained through the collective bargaining arrangements.

2. **Comments in relation to the LRH Submission, Meeting and LRH Further Submission**

    a. Our intent is, and has always been, to seek immunity under the notification provisions of the *Trade Practices Act* ("Act") to collectively bargain independent contractor arrangements with LRH. Whilst we concede some language in the notification may have caused VHIA some confusion, it is clear that section 51(2)(a) of the Act provides that any act done in relation to an employee contract, arrangement or understanding will be outside the

operation of the Act. Therefore, AMA Victoria need not seek immunity for conduct already excluded from the operation of the relevant parts of the Act.

b. At paragraph 30 of the LRH Submission, the Target states that if AMA Victoria accepts that "budgetary restriction of a Target is by far the biggest determinative factor of wages", the "target's objection to this application would largely dissipate". As the Target has acknowledged, AMA Victoria has specifically conceded the importance of LRH's budgetary restriction. Given that, the Target can hardly state that this issue is a key factor in the negotiations. It can therefore be inferred that the Target has a largely dissipated objection to the notification.

## 3. Comments in relation to the DHS Submission

a. In the "Public Detriments" section of the DHS Submission, DHS notes that collective negotiations will eliminate the competitive tension between medical practitioners in a craft group. AMA Victoria notes that the Target operates in a designated "Area of workforce shortage". As such, competitive tension is negligible, especially as compared to the collaboration and collegiality required by doctors in achieving satisfactory patient outcomes. Further proof of the lack of competitive tension is provided by LRH's submission in the Meeting, in which it states that "there is no difference in the price paid for doctors from the same craft group".

b. DHS further submits that the substitution between particular craft groups will be lost through collective negotiations. AMA Victoria submits that this contention misunderstands the nature of the conduct permitted by immunity under this notification. Notification serves simply to allow collective bargaining. It does not replace individual contracts with a collective agreement. As such, it is open to Applicants and the Target to agree any fees with members of a craft group, and there is certainly no restriction on different rates being offered to different substitutes from a craft group.

## 4. ACCC question relating to a possible "lack of commonality in the bargaining group"

The ACCC raised with AMA Victoria the possibility that the Applicants have a lack of commonality. AMA Victoria submits that there is a clear commonality in the goal of all Applicants; namely, to achieve better health outcomes for patients and a sustainable working relationship with LRH.

However, to ensure that different craft groups are adequately represented, AMA Victoria proposes that a Reference Group be established by the Applicants which comprises an elected member of each participant craft group. Further, AMA Victoria refers to its submission at 3(b) of this letter that the ultimate contractual arrangements will remain individual.

The LRH Further Submission states, "There is no doubt that different specialists receive different process for their services. This is apparent in both the Commonwealth Medical Benefits Schedules...". In light of this recognition, AMA Victoria fails to understand the relevance of concerns that different craft groups attract different prices. Such factors are already taken into account in the market, and medical practitioners deal with that market reality every day.

## 5. Dispute Resolution Procedure ("Procedure")

A number of submissions express either reservations, or request further information, about the Procedure. AMA Victoria notes that the Procedure is agreed between the Applicant and the Target. This contention is reinforced by the LRH Submission, which states that "the Applicant has amended the Notification as a result of our correspondence in relation to its proposed dispute settlement procedure".

## 6. Counterfactual

Due to conduct by the Target since 17 September 2007, the date on which the notification was made public to the Target, AMA Victoria would like to enhance its submission in relation to the counter-factual. As set out recently in *Application by Medicines Australia Inc* [2007] ACompT 4 (27 June 2007) the counterfactual test "is to appraise the future, were the acquisition to take place, in light of the alternative outcome, were the acquisition not to take place: the 'future with-and-without test'."

Conduct of the Target since receiving the list of Applicants under the notification has been to approach a number of the Applicants with a new contract, and require acceptance of such agreement within an unreasonably short timeframe. This conduct is being engaged in notwithstanding both verbal and written undertakings by LRH that it supports the notification. In addition, Applicants are being written to directly rather than through their representative.

In one particular case, the Target wrote to a specialist (on 17 September 2007) who has been working at LRH for 20 years, the last 8 of which without a written contract, demanding that he sign a new (and previously unsighted) contract by 21 September 2007. After failing to sign by the unilaterally nominated date, the specialist received a letter on 26 September 2007 stating that the specialist is "out of contract", which "poses an unacceptable risk to the organisation".

AMA Victoria finds this intimidatory behaviour unacceptable. It has resulted in a letter being sent to the Victorian Minister for Health on behalf of the aggrieved specialist. Should the specialist choose to leave LRH, it will undoubtedly result in detrimental patient outcomes and result in public detriment.

AMA Victoria submits that such conduct demonstrates for the purposes of the "future with-and-without test" the nature of the market and negotiations without the immunity provided by the notification.

This conduct further illustrates the existing power imbalance in relation to contract negotiations of VMO doctors and the Target.

Yours sincerely,

**David Goldberg**
Solicitor/Senior Advisor
AMA Victoria