NSW HEALTH

Ms Joanne Palisi
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Dear Ms Palisi

Application for authorisation A91088 lodged by the Australian Medical Association (NSW) Limited ("AMA (NSW)")

I refer to your letter dated 29 April 2008 enclosing a copy of the AMA (NSW)'s application for authorisation, and inviting the NSW Health Department to make a submission on the likely public benefits and effect on competition, or any other detriment, from the proposed arrangements.

Generally, subject to the qualifications set out below, the Department does not oppose the AMA (NSW)'s application.

The NSW Health Department wishes to make a number of specific comments in respect of the application:

1) **The application seeks authorisation to permit the AMA to collectively negotiate on behalf of visiting medical officers in New South Wales with the NSW Health Department *and* public health organisations.**

   The Department has prepared a brief summary of the current arrangements in place for the determination of the terms and conditions of VMOs in NSW. This document is a slightly modified version of a different document submitted by the Department to the ACCC in respect of the previous application by the Rural Doctors Association of Australia Limited. It can be seen from this document that currently in NSW standard rates and conditions for VMOs working under both fee-for-service and sessional arrangements can be established and varied from time to time in one of three ways:

   (a) by the NSW Health Minister, by order in writing, approving sets of conditions recommended by the AMA (NSW) for inclusion in service contracts pursuant to s87(1) of the *Health Services Act* 1997;
   (b) by determination of an arbitrator under s89 of the *Health Services Act*, following an application by the NSW Health Minister and/or the AMA (NSW) for the appointment of an arbitrator under the *Health Services Act*; or

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(c) by the Department issuing Policy Directives to public health organisations concerning the standard terms and conditions applicable to VMOs following consultation with the AMA (NSW) (or, with respect to facilities covered by the Rural Doctors Settlement Package, with the Rural Doctors Association (NSW)). The terms of any such directives could not be incompatible with any operative order or determination under (a) or (b) above.

In none of these situations is the AMA (NSW) directly involved in negotiating terms and conditions of VMO appointments with public health organisations.

In paragraph 3.13 the AMA (NSW) states: "*Variations to standard service contracts are not uncommon and accommodate the particular circumstances and needs of individuals VMOs (or small groups of VMOs) and individual PHOs*". The Department does not accept this statement. At present, terms and conditions of VMO contracts are determined centrally, in one of the three methods described in (a) to (c) above. Clause 3.18 of the *Accounts and Audit Determination for Public Health Organisations* provides that "*A public health organisation shall not, without the specific approval of the Director-General or authorised delegate, provide to any Visiting Medical officer ... remuneration or conditions of service other than in accordance with the rates and conditions specified in Policy Directives or Information Bulletins issued by the Department*". (Relevant Ministerial orders or determinations of an arbitrator would be notified though Departmental Information Bulletins.)

From time to time the Department will approve specific non-standard VMO arrangements, but such approvals are small in number and usually are prompted by approaches from the relevant public health organisation. The AMA (NSW) may make representations to public health organisations about local VMO issues, but public health organisations are not authorised to approve or provide non-standard VMO conditions.

The AMA (NSW)'s application states that its object is to "*preserve the current status quo*" (AMA (NSW) application, paragraph 5.1). The Department does not object to the AMA (NSW)'s application so long as it seeks to preserve the current arrangements. However, as it is presently drafted, the AMA (NSW)'s application appears to suggest a role in collectively negotiating with public health organisations, which would be a departure from current arrangements and inconsistent with the manner in which VMO conditions are determined.

The Department submits that the ACCC should seek clarification from the AMA (NSW) in respect of this aspect of its application. If the AMA (NSW) is seeking to depart in any way from the limited and peripheral role of public health organisations in determining the terms and

conditions of VMOs in NSW at present, then the Department would oppose the application on the basis that it is likely to have anti-competitive effects and would not be in the public interest. More detailed submissions by the Department on this issue can be made, if necessary.

2) **The application seeks authorisation to permit the AMA to "collectively negotiate" on behalf of VMOs.**

The Department understands that the AMA (NSW)'s application is restricted to an application to collectively bargain on behalf of VMOs, but does not include any ability to engage in collective boycott activities. However, this is not expressly stated anywhere in the AMA (NSW)'s application. The Department requests that this be clarified by the ACCC with the AMA (NSW). Further, the Department requests that the exclusion of the ability to engage in collective boycott activities should be expressly set out in any determination issued by the ACCC, as was the case in the determination which was recently made by the ACCC in respect of the Rural Doctors Association of Australia.

3) **The Independent Contractors Act 2006 (Cth) ("the ICA") and its likely impact on the arrangements of determining VMO terms and conditions in NSW.**

There are certain respects in which the Department does not agree with the AMA (NSW)'s description, at a factual level, of the ICA and its impact on the current arrangements in NSW. These are set out below:

(a) In paragraph 3.33, the AMA (NSW)'s application states: "*Part 2 of Chapter 8 of the [Health Services Act] has no application to new VMO service contracts entered into on or after 1 March 2007, and will have no application to current and continuing VMO service contracts after 28 February 2010.*" The Department's understanding of the impact of the ICA on the *Health Services Act* is that Part 2 of Chapter 8 of the *Health Services Act* will no longer have effect only to the extent that it would infringe s 7(1) of the ICA – that is, to the extent that Part 2 of Chapter 8 deals with "workplace relations matters", as that term is defined in the ICA. The Department accepts that s87 and ss89-98 of the *Health Services Act* deal with "workplace relations matters" in the relevant sense. However, the Department considers there are other provisions in Part 2 of Chapter 8 of the *Health Services Act* (such as those, for instance, permitting VMOs to contract through their practice companies, or requiring service contracts to be in writing) that do not deal with "workplace relations matters", and therefore will not cease to have effect as a result of s 7(1) of the ICA.

(b) In paragraph 3.36, the AMA (NSW)'s application states: "*Furthermore, the only option available to VMOs to opt in to the Federal system is likely to create uncertainty for both VMOs and*

public health organisations at which those VMOs are providing, or wish to provide, services." The "opt-in" provisions of the ICA require the consent of all contracting parties to opt-in to the Federal scheme. As described above, public health organisations have no role in the determination of VMO terms and conditions. Further, the Department has no intention of opting-in to the Federal scheme, which would involve terminating the legal effectiveness of the relevant NSW legislative provisions earlier than would otherwise be the case. Accordingly, there is no basis for the AMA (NSW)'s suggestion that the availability of the "opt-in" scheme is likely to be confusing to VMOs and public health organisations.

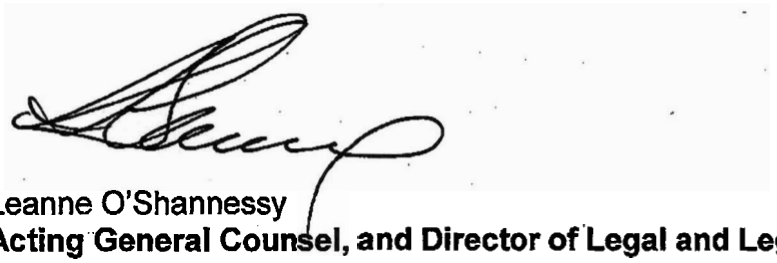
(c) In paragraph 3.37, the AMA (NSW)'s application states: "*Following the expiry of the three year period during which the transitional provisions apply, there will be no regulation of VMO service contracts in the New South Wales hospital system.*" This is not correct. As set out above, the Department considers there are provisions in Part 2 of Chapter 8 of the *Health Services Act* regulating VMO service contracts that will continue to operate on the basis that they do not deal with "workplace relations matters". Further, and more significantly, even in the absence of ss.87 and 89-98 of the *Health Services Act*, as described above, the Department will still have the ability to centrally determine terms and conditions of VMOs (and to issue Policy Directives requiring public health organisations to provide VMOs with such terms and conditions) following consultation with relevant bodies, including the AMA (NSW). The ability of the Department to centrally determine the terms and conditions of VMOs in the NSW public health system will not be affected by the ICA. It is therefore incorrect of the AMA (NSW) to suggest there will be "*no regulation*" of VMO service contracts in the NSW public health system.

(d) The comments in (c) above also apply to paragraph 5.9 of the AMA (NSW)'s application, which suggests that following the full commencement of the ICA contracts with VMOs in the NSW public health system will be "*individually negotiated*", and that this will "*add to increases in the cost of public health care*".

In the light of the above comments, particularly the lack of clarity in respect of certain critical aspects of the arrangements proposed by the AMA (NSW), in the event the ACCC was to issue a draft determination, the Department would wish to have the opportunity to make submissions on the draft determination.

If you have any questions, or wish to discuss further, please contact Dean Bell, Principal Legal Officer, on (02) 9391 9601.

Yours sincerely



Leanne O'Shannessy
Acting General Counsel, and Director of Legal and Legislation

Attachment 1

Framework for visiting medical officer (VMO) appointments in NSW

Chapter 8 of the *Health Services Act* 1997 (NSW) regulates VMO appointments within the NSW public health system. VMOs are, by statutory definition, independent contractors and are remunerated on the basis of:

- sessional hourly rates in teaching hospitals;
- sessional hourly rates or fee for service arrangements in metropolitan district hospitals and regional base hospitals; and
- special fee for service arrangements in smaller rural hospitals under the Rural Doctors Settlement Package first negotiated in 1988/89.

A VMO is defined in the *Health Services Act* as a medical practitioner appointed under a service contract (whether the practitioner or his or her practice company is a party to the contract) to provide services as a visiting practitioner for monetary remuneration for or on behalf of a relevant public health organisation.

Under the Health Services Regulation 2003, VMO appointments are for a term of up to 5 years (or 10 years with the approval of the Director-General of the NSW Health Department). Merit selection processes are applied to VMO appointments that are made for longer than six months. There is no automatic entitlement to an appointment or reappointment, although there is a statutory appeal process for failure to reappoint in some circumstances.

A service contract is defined in s.80 of the Act so as to embrace both agreements between a public health organisation and a medical practitioner, and a public health organisation and a medical practitioner's individual practice company. The service contracts include fee for service contracts, sessional contracts and honorary contracts (see s.81).

For a VMO to be validly appointed the terms and conditions of their service contracts are required to be in writing (s.86).

Depending on the nature of the appointment, the requirement to provide on-call services in accordance with a roster established by the relevant area health service is part of the medical services required to be provided by a VMO under his/her service contract.

The NSW Health Minister may, by order in writing, approve of sets of conditions (including remuneration) recommended by the Australian Medical Association (NSW) (**AMA (NSW)**) for inclusion in service contracts (s.87(1)). Section 87(2) provides for a "standard service contract" in relation to the various types of service contracts, such standard service contract containing the set of conditions approved for the time being under s.87(1). Where a standard service contract for sessional or fee-for-service arrangements has

been established, section 88 mandates its use. However, standard service contract provisions do not have retrospective effect (s.87(1)).

Division 3 within Part 2 of Chapter 8 provides for arbitrations concerning VMOs working under fee for service or sessional contracts (see sections 89-98). Section 89(1) provides that the Minister or the AMA (NSW) can apply for the appointment of an arbitrator to determine, inter alia:

> "(a) the terms and conditions of work, the amounts or rates of remuneration and the bases on which those amounts or rates are applicable, in respect of medical services provided by visiting medical officers under fee for service contracts or sessional contracts (or both)."

Any provision of a service contract that is inconsistent with a determination under Part 2 of Chapter 8 is, to the extent of the inconsistency, of no effect (s.98).

The NSW Health Department accepts that *Independent Contractors Act* 2006 (Cth), the substantive provisions of which commenced on 1 March 2007, impacts on the *Health Services Act* so as to render the arbitration arrangements described above inapplicable following the three year transition period from the date of commencement of the IC Act.

Regardless of whether the arbitration provisions of the *Health Services Act* continue to exist, there is no current intention to depart from the position whereby the types, and terms and conditions, of service contracts that public health organisations may offer to VMOs are regulated by the NSW Health Department.

In NSW standard rates and conditions for fee-for-service and sessional service contracts have been established and are varied by the NSW Health Department from time to time following consultation with the AMA (NSW) or, with respect to facilities covered by the Rural Doctors Settlement Package, with the Rural Doctors Association (NSW).