

SYDNEY | MELBOURNE | BRISBANE

Our ref DME 80566  
Your ref C2008/628

1 July 2008

**Attention: Ms Sharon Clancy**  
Australian Competition and Consumer Commission  
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Dear Ms Clancy

**Application for Authorisation A91088 lodged by the Australian Medical Association (NSW) Limited**

We refer to Ms Randall's email dated 25 June 2008 forwarding a copy of NSW Health's letter of 25 June 2008.

We are instructed to make the following submission in relation to NSW Health's submissions, particularly the submission that any authorisation should be limited to permitting AMA(NSW) to negotiate with NSW Health only.

AMA(NSW) seeks authorisation to negotiate with NSW Health and public health organisations (PHOs) – that is, to preserve the current status quo.

**Negotiations at the local level**

While AMA(NSW) does have a role in assisting individual VMOs negotiate with PHOs (as acknowledged by NSW Health), AMA(NSW) also assists groups of VMOs negotiating with PHOs regarding matters arising under the terms of their VMO contracts. Two examples are as follows:



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## 1. **Negotiations with the Greater Southern Area Health Service (Albury Base Hospital)**

In or about 2005 AMA(NSW), on behalf of VMOs at Albury Base Hospital, negotiated with the Greater Southern Area Health Service a Schedule to be annexed to the standard form service contracts for VMOs providing services at Albury Base Hospital.

The issues covered in the agreed schedule do not amount to a departure from the terms and conditions of the standard form contract. Both parties were mindful of the need to ensure that the Schedule remained consistent with the standard form contracts. The Schedule addressed matters relevant at that particular hospital and which, in order to ensure ongoing service delivery, needed to be addressed in the contract.

The issues addressed in the schedule included provision for regular bi-monthly meetings between each VMO and administration, rights of termination consistent with clause 15(1)(a) of the standard form contract, and the requirement for the delivery of certain services under clause 4(10) of the standard form contract (including but not limited to the provision of adequate numbers of ward clerks and nursing staff, quarantining of funds to ensure the provision of appropriate theatre equipment and developing clinical services plans).

The ability of AMA(NSW) to represent the diversity of interests amongst the VMOs and assist the VMOs reach an agreed approach that would accommodate the needs of all VMOs (and would be workable for the hospital), and present this to, and negotiate this with, Albury Base Hospital and the Area is an example of the efficiency and expediency of AMA(NSW)'s involvement at the local level – AMA(NSW) was able to encourage VMOs to continue providing services at Albury Base Hospital thereby preventing a possible crisis in health delivery in Albury and the surrounding area.

AMA(NSW) is currently in the process of renegotiating the Schedule on behalf of VMOs.

## 2. **Bankstown Hospital**

In or about 2004 AMA(NSW) assisted a group of VMOs at Bankstown Hospital in negotiations with the then South Western Sydney Area Health Service regarding their contractual arrangements.



Briefly, the VMOs concerned had, in 1999 applied for fee-for-service contract positions which were advertised as being of five years duration. At the interviews for those positions the VMOs were informed that the appointments would be of two years duration only because the future of the relevant department at the Hospital was to be reviewed.

At the end of 2001, the Area informed members of the relevant department that they would be offered sessional contracts of 2 years duration. Members of the Department threatened to withdraw their services, and were told that they were welcome to do so as there were many other ophthalmologists who would be prepared to take their places. Having little alternative, members of the Department signed the sessional contracts and sought the assistance of AMA(NSW). The provision of services under sessional arrangements meant that the VMOs suffered financially.

AMA(NSW) assisted the VMOs concerned in their negotiations with the Area and the Hospital regarding the form of their contractual arrangements and the term of same.

### **3. Campbelltown Hospital**

AMA(NSW) is currently assisting VMOs at Campbelltown Hospital negotiate with the Sydney South West Area Health Service regarding the terms of their VMO contracts in circumstances where the VMOs have been asked to enter into collateral contracts with the Area Health Service for the provision of services to privately referred in-patients.

These are only three examples of many instances where AMA(NSW) has assisted groups of VMOs negotiate variations to the terms of their arrangements with PHOs or assisted them in instances where an imbalance of bargaining power has left the VMOs in a position where they cannot effectively negotiate with the PHO concerned without the assistance of AMA(NSW).

While the role of PHOs may be limited in comparison to that of NSW Health, PHOs play an important role in giving effect to VMO contracts and negotiating variations at the local level.

### **Doctrine of Derivative Crown Immunity**

As noted in Part 4 of AMA(NSW)'s submission dated 18 April 2008, there is no certainty that the protections of the doctrine of derivative Crown immunity extend to AMA(NSW),



its directors and officers, or to VMOs, when negotiating regarding a contract or future contract.

In *Bradken Consolidated Limited v BHP* (1979) 145 CLR 107 the High Court held that the *Trade Practices Act 1974* (Cth) could not operate so as to frustrate transactions into which the Crown entered where that operation would prejudice the interests of the Crown.

The High Court in the decision of *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited & Others* [2007] HCA 38 looked to concluded legal, equitable or statutory rights of parties when determining whether the doctrine applied.

While the parties to the VMO Determinations are effectively the Minister for Health and AMA(NSW), VMO contracts are contracts between the VMO and the PHO, not NSW Health. While it is arguable that those contracts are contracts with the Crown, this has never been tested. Section 22 of the *Health Services Act 1997* specifically provides that area health services do not represent the Crown.

Legal opinions have been obtained by NSW Health and AMA(NSW) in the past regarding the doctrine of derivative Crown immunity. While the arbitration system under the *Health Services Act 1997* (NSW) confers statutory rights on the parties to collectively negotiate and on the basis High Court authority, Crown immunity and derivative Crown immunity protects the participants in that process, there is no certainty that negotiations which occur outside the arbitration system are so protected. The decision of the High Court in *Baxter Healthcare* does not allay the concerns of AMA(NSW) in this regard.

## Conclusion

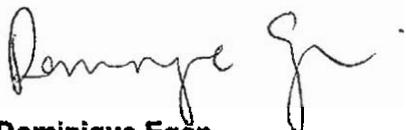
AMA(NSW) seeks authorisation to negotiate with NSW Health and PHOs.

The inability to enter into discussions and negotiations at the local level regarding the operation of VMO contracts will result in inefficiencies in the system as VMOs will have to approach PHOs on an individual basis, inevitably resulting in individual VMOs promoting their individual interests at the expense of those of the group and the public.



Should you have any queries or wish to discuss, please contact Dominique Egan.

Yours faithfully  
**TressCox**

A handwritten signature in black ink, appearing to read 'Dominique Egan', with a stylized flourish at the end.

**Dominique Egan**  
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