



Australian
Competition &
Consumer
Commission

Determination

Application for revocation of authorisation
A91088 and substitution with A91383

lodged by

Australian Medical Association of Australia
(NSW) Limited

in respect of

Collective bargaining with NSW Ministry of
Health and public health organisations

Date: 4 December 2013

Commissioners: Sims
Schaper
Cifuentes
Court
Walker

The ACCC revokes authorisation A91088 and grants authorisation A91383 to the Australian Medical Association (NSW) Limited to continue to collectively bargain on behalf of Visiting Medical Officers (VMOs) engaged in the New South Wales public hospital system with:

- the NSW Ministry of Health regarding the standard terms and conditions of contracts, including rates of remuneration, and
- public health organisations (PHOs) regarding issues relevant to the engagement of VMOs by PHOs, excluding standard VMO contract terms and conditions and rates of remuneration.

Authorisation is granted for 10 years.

The application for authorisation

1. On 6 September 2013 the Australian Medical Association (NSW) Limited (**the AMA (NSW)**) lodged an application with the ACCC to revoke authorisation A91088 and grant a substitute authorisation A91383 (re-authorisation) under section 91C(1) of the *Competition and Consumer Act 2010* (the **Act**).
2. The AMA (NSW) sought re-authorisation to continue to collectively bargain on behalf of visiting medical officers (VMOs) engaged in the New South Wales (NSW) public hospital system with:
 - the NSW Ministry of Health (NSW Health) regarding the standard terms and conditions of contracts, including rates of remuneration, and
 - public health organisations (PHOs) regarding issues relevant to the engagement of VMOs by PHOs, excluding standard VMO contract terms and conditions and rates of remuneration.
3. A PHO is defined by the *Health Services Act 1997 (NSW)* (Health Services Act) as a local health district, statutory health corporation or an affiliated health organisation in respect of its recognised establishments and recognised services. Schedule 1 to the Health Services Act provides the names and areas of local health districts.
4. The ACCC notes that NSW local health districts are also designated as Local Hospital Networks under the Federal Government's National Health Reform Agreement.

Background

5. The ACCC previously granted authorisation to the AMA (NSW) for this conduct on 13 August 2008 until 31 December 2013.
6. Under the Health Services Act in NSW, individual VMOs cannot negotiate their standard terms and conditions of engagement or rates of remuneration with NSW Health, and legislation prohibits VMOs from negotiating with PHOs to vary the terms and conditions or rates of pay set by NSW Health. However, VMOs can negotiate some components with PHOs such as on call hours, issues with equipment and staffing.

7. The AMA (NSW) represents the medical profession in NSW and is a registered industrial organisation.¹ The AMA (NSW) submits that a core component of its role is the provision of industrial representation for all VMOs in NSW, not just its members.
8. In 2008, uncertainty relating to the contractual arrangements of VMOs in NSW because of changes to legislation² prompted the AMA (NSW) to lodge an application for authorisation. While some clarity was provided through further legislative changes³ the AMA (NSW) submits that some legislative uncertainty remains with regard to its role in negotiating on behalf of VMOs.
9. Moreover, while it appears that the NSW legislation currently enables the AMA (NSW) to represent VMOs in determining the level of fees and associated terms and conditions with NSW Health, it does not provide for the AMA (NSW) to do so with PHOs.

Submissions received by the ACCC

10. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
11. The ACCC sought submissions from 50 interested parties potentially affected by the application, including industry associations, consumer organisations and NSW government departments prior to the draft determination and also undertook further consultation following the draft determination.
12. Prior to the draft determination, the ACCC received one submission from the Australian Medical Association in support of the application and a letter from NSW Health addressed to the AMA (NSW) advising that it did not object to the arrangements.
13. The ACCC did not receive any submissions following the draft determination.

ACCC evaluation

14. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests⁴ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result, and that the conduct is likely to result in such a benefit to the public that it should be allowed to take place.
15. In its evaluation of the effect of the proposed arrangements, and the public benefits and detriments likely to result, the ACCC has taken into account:

¹ Section 271, *Industrial Relations Act 1996 (NSW)*

² Introduction of the *Independent Contractors Act 2006 (NSW)*

³ *Independent Contractors Amendment Regulations 2011 (No. 1) (NSW)* - preserved Parts 1 to 4 of Chapter 8 of the Health Services Act.

⁴ Subsections 90(5A), 90(5B), 90(6) and 90(7). The relevant tests are set out in Attachment A.

- the submission in support of the application from the AMA and a letter from NSW Health to the AMA (NSW) advising that it does not object to the application
- information provided by the AMA (NSW)
- the likely alternative future without the conduct. In particular, the ACCC considers that without the proposed conduct there may be some legislative uncertainty with regard to the ability of the AMA (NSW) to represent VMOs in negotiations with NSW Health and PHOs
- that the Health Services Act and the *Independent Contractors Act 2006 (NSW)* (and associated regulations) set the framework for determining the terms and conditions, including remuneration, for VMOs and limit the scope of negotiations between VMOs and PHOs
- the relevant area of competition - which the ACCC considers relates to the provision of medical services to public hospitals in NSW. However, the ACCC does not consider that it is necessary to precisely identify the relevant areas of competition in this instance as the outcome of the assessment will not be affected.

Public benefit

Submissions

16. Broadly, the AMA (NSW) submits that it is seeking re-authorisation to maintain the status quo. The AMA (NSW) also submits that the experience of the past five years demonstrates that there is public benefit in re-authorising the arrangements.
17. In particular, the AMA (NSW) submits that allowing it to negotiate on behalf of VMOs with NSW Health and PHOs has had a positive effect on the retention of VMOs and ensures that there is on-going provision of high quality medical services with minimal or no interruptions to service delivery. As an example, the AMA (NSW) submits that, notwithstanding the levels of discontent amongst VMOs in relation to their work within the NSW public health system, the AMA (NSW) has been able to successfully negotiate with NSW Health and PHOs in circumstances where, in some instances, VMOs were considering resigning from the public health system.
18. The AMA (NSW) submits that it has endeavoured to negotiate rates of remuneration in the best interests of VMOs while objectively balancing this with the collective public interest. The AMA (NSW) provided examples of successful negotiations it has engaged in with both NSW Health and PHOs over the last five years.
19. The Australian Medical Association (the national association – the AMA) acknowledges the concerns of the AMA (NSW) that legislative amendments to the Health Services Act and the Independent Contractors Regulations could add to the legislative uncertainty that has arisen since the Independent Contractors Act (NSW) was passed in relation to whether the AMA (NSW) can lawfully represent VMOs. The AMA submits that authorisation provides clarity and certainty for VMOs.
20. The AMA submits that the AMA (NSW) has consistently ensured that the views of VMOs are effectively taken into account in the determination of remuneration

and conditions for VMOs in NSW. In this regard, the AMA submits that the collective negotiation of VMO contracts has led to sustainable VMO arrangements that support the delivery of high quality medical care in NSW hospitals.

21. The AMA also submits that the success of the collective bargaining arrangements is demonstrated by the higher proportion of VMOs operating in NSW as independent contractors compared to other jurisdictions.

ACCC View

22. The ACCC considers that the collective bargaining arrangements are likely to continue to result in some public benefit from:

- Reduced transaction times and costs

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.

The ACCC considers that collective bargaining allows parties to share these costs which in turn may improve the level of input into negotiations with state and territory health departments and result in more efficient outcomes.

Sharing costs may also enable more effective representation of VMOs in negotiations with NSW Health and PHOs and therefore potentially provide a positive influence on the attraction and retention of VMOs in the NSW health system.

- More effective representation and retention of VMOs in NSW

The collective bargaining arrangements may, to some extent, enhance the effective representation of VMOs in dealings with NSW Health and PHOs which may in itself provide VMOs with greater confidence with respect to the stability and development of medical services in NSW. This in turn may have a positive influence on the attraction and retention of VMOs in the NSW health system.

Public detriment

Submissions

23. The AMA (NSW) submits that there is no readily identifiable public detriment should the collective bargaining arrangements be re-authorised. The AMA (NSW) notes the framework for negotiations under the Health Services Act and VMO Determinations in NSW limit any potential detriment.
24. The AMA submits that collective bargaining has not resulted in adverse outcomes or rising costs in the NSW health care system, rather, increases in remuneration for VMOs has been limited by the 2.5 per cent public sector wages cap which is enshrined in legislation that applies to VMO determinations.

ACCC View

25. The ACCC considers that the collective bargaining arrangements are likely to result in little, if any, public detriments because:

- the level of negotiations between individual VMOs and NSW Health and PHOs is likely to be low without collective bargaining
- while the coverage and composition of the bargaining group is extensive, the legislative requirements of the NSW public health system limit any potential anti-competitive effect
- participation in the collective bargaining arrangements is voluntary - there is no collective boycott.

Balance of public benefit and detriment

26. For the reasons outlined in this determination, the ACCC is satisfied that in all the circumstances the collective bargaining arrangements are likely to result in a benefit to the public and that the benefit would outweigh any public detriment constituted by any lessening of competition that would be likely to result.

27. Accordingly, the ACCC is satisfied that the relevant public benefit tests are met.

Length of authorisation

28. The ACCC considers it is appropriate to grant authorisation to the AMA (NSW) for ten years rather than the five years requested by the applicant, given that the conduct has previously been authorised and no concerns have been raised in respect of this application.

Determination

29. For the reasons set out in this draft determination, the ACCC is satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) are met.⁵ Accordingly, the ACCC revokes authorisation A91088 and grants authorisation A91383 to the AMA (NSW) Limited to collectively bargain on behalf of visiting medical officers (VMOs) engaged in the New South Wales public hospital system with:

- NSW Ministry of Health (NSW Health) regarding the standard terms and conditions of contracts, including rates of remuneration, and
- public health organisations (PHOs) in New South Wales regarding issues relevant to the engagement of VMOs by PHOs, excluding standard VMO contract terms and conditions and rates of remuneration.

30. Authorisation is granted until 30 December 2023.

⁵ See Attachment A to this Draft Determination A91383.

Date authorisation comes into effect

31. This determination is made on 4 December 2013. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 30 December 2013.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.