

Form B

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of Applicant:
(Refer to direction 2)

A91590

Australian Medical Association (NSW) Limited (hereinafter AMA (NSW)).

- (b) Short description of business carried on by applicant:
(Refer to direction 3)

AMA (NSW) is an independent association representing the State's medical profession. As an organisation of employers AMA (NSW) is a registered organisation under section 271 of the Industrial Relations Act 1996 (NSW). A core component of AMA (NSW)'s role is the provision of industrial representation for all Visiting Medical Officers (hereinafter VMOs) in New South Wales.

- (c) Address in Australia for service of documents on the applicant:

Australian Medical Association (NSW) Limited c/- TressCox Lawyers, GPO Box 7085, Sydney, NSW, 2001.

2. Contract, arrangement or understanding

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:

(Refer to direction 4)

AMA (NSW) seeks authorisation to collectively negotiate the terms and conditions (including but not limited to remuneration) of VMO contracts for the treatment of public patients at the Northern Beaches Hospital.

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:

(Refer to direction 4)

As above.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

As above.

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

5 years.

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Healthscope Limited, Level 1, 312 St Kilda Road, Melbourne, Victoria, 3000.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

(Refer to direction 5)

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4. Public benefit claims

- (a) Arguments in support of authorisation:

(Refer to direction 6)

AMA (NSW) refers to Part 6 of its supporting submission.

- (b) Facts and evidence relied upon in support of these claims:

AMA (NSW) relies on its supporting submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 7)

AMA (NSW) refers to Part 7 of its supporting submission.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

AMA (NSW) refers to Part 6 of its supporting submission.

- (b) Facts and evidence relevant to these detriments:

AMA (NSW) relies on its supporting submission.

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

No.

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

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- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

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- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

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8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

Not applicable.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

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- (c) If so, by whom or on whose behalf are those other applications being made?

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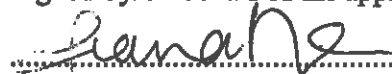
9. Further information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

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Dated.....

Signed by/on behalf of the applicant


.....
(Signature)

Fiona Davies
.....
(Full Name)

CEO
.....
(Position in Organisation)

**Submission to the
Australian Competition
and Consumer
Commission pursuant
to section 91 of the
Australian Competition
and Consumer Act
2010 (Cth)**

Date: 14 July 2017

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1. APPLICATION FOR AUTHORISATION TO COLLECTIVELY NEGOTIATE ON BEHALF OF VISITING MEDICAL OFFICERS IN NEW SOUTH WALES

- 1.1. The Australian Medical Association (NSW) Limited (hereinafter '**AMA(NSW)**') seeks authorisation pursuant to section 91 of the Competition and Consumer Act 2010 (Cth) (**the Act**) to collectively negotiate on behalf of visiting medical officers in New South Wales with Healthscope regarding the terms and conditions (including remuneration) of visiting medical officer contracts at The Northern Beaches Hospital (**the Hospital**).

2. AUSTRALIAN MEDICAL ASSOCIATION (NSW) LIMITED

- 2.1. The mission of the AMA (NSW) is to advance the interests of the medical profession and their patients through effective advocacy; to uphold the integrity and honour of the profession; to provide support and services to its members in an efficient and responsive manner; and to encourage the advancement of the health of the community.
- 2.2. AMA(NSW) is an independent association representing the state's medical profession. As an organisation of employers AMA(NSW) is a registered industrial organisation under section 271 of the *Industrial Relations Act 1996* (NSW).
- 2.3. A core component of AMA(NSW)'s role is the provision of industrial representation for all Visiting Medical Officers (hereinafter '**VMOs**') in New South Wales Public Hospital System. AMA(NSW) makes every effort to ensure the concerns of VMOs are heard and makes representations on their behalf.
- 2.4. In New South Wales the arrangements for the contracting of doctors in state hospitals and facilities are not unilaterally determined by the State Health Department (hereinafter '**NSW Ministry of Health**').
- 2.5. AMA(NSW) has a statutory role under the provisions of the *Health Services Act 1997* (hereinafter '**HSA**') to recommend to the Minister for Health (section 87) and/or seek the appointment of an arbitrator (section 89) to determine the terms and conditions and rates of remuneration for sessional and fee-for-service VMOs.
- 2.6. In any arbitration proceedings under the HSA AMA(NSW) has a right of representation on behalf of all sessional and fee-for-service VMOs (not just those VMOs who are members of AMA(NSW)).
- 2.7. In addition to its statutory role, AMA(NSW) has a well-established collaborative working relationship with NSW Ministry of Health. This relationship is evidenced by the consent position reached regarding the new Fee-for-Service and Sessional Determinations in 2007. The consent position ensured and ensures the ongoing provision of medical services in the New South Wales Public Hospital system across the State, including in

rural areas, and avoided the parties needing to expend considerable financial resources (as were expended in the early 1990s) on a contested arbitration process.

3. VISITING MEDICAL OFFICERS IN NEW SOUTH WALES

- 3.1. Other than the Australian Capital Territory, (and limited numbers in Victoria) New South Wales is the only State or Territory in which VMOs in the Public Hospital System are independent contractors.
- 3.2. There are approximately 8,000 VMO appointments in the NSW Public Hospital System. Approximately 5,711 of VMOs are appointed under sessional contracts, 3,000 are appointed under fee-for-service contracts and 1,000 are appointed under fee-for-service contracts at facilities covered by the Rural Doctors Settlement Package (hereinafter '**RDASP**') (see below). Some VMOs hold multiple appointments.

The Health Services Act 1997 (NSW)

- 3.3. Chapter 8 of the HSA governs the appointment of VMOs and the services contracts under which VMOs provide services in NSW public hospitals.
- 3.4. Part 1 of Chapter 8 defines who is a VMO for the purposes of the HSA; Part 2 regulates VMOs service contracts with Public Health Organisations ('**PHOs**'); Part 3 concerns the reporting of criminal and disciplinary matters; and Part 4 provides VMOs with a right of appeal following certain appointment decisions made by PHOs.
- 3.5. A VMO is a medical practitioner appointed under a service contract to provide medical services for monetary remuneration for or on behalf of a PHO (section 78).
- 3.6. A service contract is defined to include fee-for-service contracts, sessional contracts and honorary contracts (section 81). A service contract must be reduced to writing setting out the terms and conditions of the VMO's appointment (section 86(1)). An appointment made in contravention of section 86(1) is void (section 86(2)). That is, in order for a VMO to hold a valid appointment he/she must have a written service contract giving effect to that appointment.
- 3.7. Briefly, VMOs appointed under sessional contracts are remunerated on the basis of an hourly rate. VMOs appointed under fee-for service contracts are remunerated for services provided – a determined percentage of the Commonwealth Medicare Benefits Schedule. VMOs who provide services at facilities covered by the RDASP are remunerated on a fee-for-service basis.
- 3.8. The Minister for Health may approve sets of conditions recommended by the Australian Medical Association (NSW) Limited for inclusion in service contracts (section 87).

- 3.9. The Minister or the Australian Medical Association (NSW) Limited may (jointly or individually) apply to the Minister for Industrial Relations for the appointment of an arbitrator to determine the terms and conditions of work, the amounts or rates of remuneration and the bases upon which those amounts or rates are applicable for VMOs appointed under sessional or fee-for-service contracts (or both) (section 89).
- 3.10. An arbitrator is bound to have regard to the economic consequences of a proposed Determination (section 92(2)).
- 3.11. Part 2 goes on to stipulate the functions and duties of the arbitrator. One of those duties is to bring the parties to agreement (section 91(2)).
- 3.12. A Determination made by an arbitrator appointed under Part 2 is final and binding and forms part of the terms and conditions of the contract. Any provision of a service contract which is inconsistent with a Determination is, to the extent of the inconsistency, of no effect (Section 98).
- 3.13. Variations to standard service contracts are not uncommon and accommodate the particular circumstances and needs of individual VMOs (or small groups of VMOs) and individual PHOs.

4. VISITING MEDICAL PRACTITIONERS IN THE PRIVATE SECTOR

- 4.1. In addition to its statutory role representing the rights and interests of VMOs in the Public Hospital System, AMA(NSW) also advocates for the rights and interests of medical practitioners in the Private Hospital System.
- 4.2. In the Private Health System there is, more often than not, no contract for services between the private hospital and medical practitioners who provide care and treatment to patients.¹ Rather the contact for services is between the medical practitioner and the patient. The medical practitioner is remunerated by the patient not the Hospital.
- 4.3. The terms and conditions of a medical practitioner's appointment at a private hospital are governed under the By-Laws and relevant policies and procedures at the hospital or hospitals at which the medical practitioner is appointed..
- 4.4. In the recent NSW Supreme Court decision of *Page v Healthscope Operations Pty Ltd* [2016] NSWSC 1608 the Court found that the re-accreditation agreement whereby Dr Page was accredited to provide services at the hospital in question was an agreement in the nature of a conditional license granted by Healthscope Operations Pty Ltd to Dr Page. The conditional licence entitled Dr Page to enter the hospital and provide medical

¹ There are some medical practitioners who may be employed by the private hospital system and thereby provide services to the private hospital (and patient) as in the public system.

services within his area of expertise. The accreditation did not give rise to a contract between Dr Page and Healthscope.

5. THE NOTHERN BEACHES HOSPITAL

- 5.1. On 11 December 2014 the New South Wales State Government entered into a contract with Healthscope to design, build, operate and maintain the new Northern Beaches Hospital. The Northern Sydney Local Health District has entered into a long-term partnership with Healthscope to provide public patient services over the next 20 years.
- 5.2. The Northern Beaches Hospital is scheduled to open its doors to the public in 2018.
- 5.3. Manly Hospital will close when the Northern Beaches Hospital opens. Mona Vale Hospital will continue to operate but with limited services including rehabilitation, aged care, palliative care and community health and most acute care services will transfer to the Northern Beaches Hospital.
- 5.4. Under the terms of the agreement between the State Government and Healthscope:
 - (a) Public patients will not be required to pay for treatment; and
 - (b) The State will purchase services for public patients from Healthscope on an annual volume basis.
- 5.5. The Project Deed sets out, inter alia, the roles and responsibilities of Healthscope.
- 5.6. Healthscope is solely responsible for the management of all workforce matters and Industrial Relations matters. Save for some exceptions, Healthscope is entirely responsible for the engagement of all Personnel (clause 59.1 of the Project Deed).
- 5.7. Junior Medical Officers (**JMOs**) will be employed by the NSW Government and will be provided to Healthscope on a rotation basis. Healthscope must ensure that the JMO Minimum Numbers (the number of JMO teaching and training positions as determined by the State acting reasonably and having regard to the numbers of JMOs engaged at other public hospitals within the Northern Sydney Local Health District) of teaching and training position for JMOs employed by the NSW Health Service are provided and available at the Facility. The positions must be directly associated with the treatment of Public Patients. Healthscope must provide the JMOs with appropriate and adequate supervision at all times. (clause 59.5 of the Project Deed)
- 5.8. Healthscope must offer employment to NSW Health Service Employees. It is not required to offer contracts for services to VMOs. (clause 36.11 of the Project Deed)

- 5.9. Staff specialists, who are employed senior medical staff in the NSW Public Health System, in addition to having their terms and conditions of employment guaranteed also have their current entitlements and allowances preserved under the Project Deed. Staff Specialists must be engaged on a comparable, and no less favourable basis than under the Staff Specialists State Award which applies in the NSW Public Hospital System. (clause 36.5 of the Project Deed)
- 5.10. Healthscope is required to make its own arrangements with all VMOs performing the Services. (clause 59.6 of the Project Deed)

6. PUBLIC BENEFIT AND PUBLIC DETRIMENT ARGUMENTS

- 6.1. AMA(NSW) is seeking authorisation to negotiate with Healthscope on behalf of medical practitioners in New South Wales seeking appointment at the Northern Beaches Hospital to provide services to Public Patients.
- 6.2. As set out above, in the Public Health System in New South Wales there are detailed contractual arrangements between VMOs and public health organisations. Under those arrangements, public patients are treated at no charge and the VMOs are remunerated by the public health organisation for the services they provide to patients.
- 6.3. Under existing contracts in the Public Hospital System, VMOs are also remunerated for teaching, training and committee work,² in addition to remuneration for the medical services they provide to patients.
- 6.4. The majority of junior medical staff in New South Wales undertake their training in the Public Hospital System.
- 6.5. The number of interns in the New South Wales Public Hospital System in June 2016 was approximately 950.
- 6.6. The existing framework in the Public Hospital System provides an effective and cost effective means of ensuring the continuing provision of medical services to public patients in NSW. That framework includes VMO contracts which make provision for:
- (a) Services provision;
 - (b) Teaching and training;
 - (c) Remuneration;
 - (d) On-call arrangements; and
 - (e) Dispute resolution procedures.

² Clause 4(6) Sessional Determination 2014; clause 4(6) Fee-for-Service Determination 2014.

- 6.7. There is nothing to prevent an individual or a particular craft group attempting to negotiate an arrangement. To the extent required to retain VMOs within the public hospital system, the existing framework has the requisite degree of flexibility to accommodate variations in the terms and conditions under which VMOs provide services.
- 6.8. AMA(NSW) well understands the current framework which is a sophisticated system that accommodates variances between craft groups and recognises that the value to be attributed certain services is greater than that which may be attributed to others. For example, FFS VMOs are remunerated by reference to the Commonwealth Medicare Benefits Schedule which recognises that medical practitioners providing specialist services should be remunerated at higher rates than those providing general medical services.
- 6.9. Similarly, sessional VMOs are classified according to their training and experience: VMOs are classified under the 2014 Determination on the basis of whether they are a general practitioner with less or more than 5 years' experience, or whether they are a specialist or senior specialist and remunerated accordingly. Even within those classifications recognition is made of the variances between craft groups. For example, the background practice costs paid to anaesthetists, physicians and general practitioners are less than those paid to surgeons to reflect the differences between the overheads borne by different craft groups.
- 6.10. AMA(NSW) has also developed relationships with other craft groups. AMA(NSW) regularly meets with those groups and consults with them regarding issues confronting VMOs, and in particular VMO contracts.
- 6.11. The role of AMA(NSW) as the collective negotiator of rates of remuneration, and the terms and conditions for service delivery to public patients for VMOs, ensures that, while endeavouring to act in the best interest of its members, and VMOs more generally, it can objectively balance the needs (and wants) of VMOs against the collective public interest in:
- (a) The continuing provision of medical services of the highest quality in the NSW public health system; and
 - (b) The provision of those services on a cost effective basis.
- 6.12. Whilst individually negotiated contracts may be consistent with the philosophy behind independent contracting arrangements, such negotiations will, without doubt, add to increases in the cost of public health care, both in terms of the time and cost of administrators having to negotiate with individuals, and the potential for inflated remuneration rates. Under the terms of the arrangement with Healthscope, it is the NSW

Government (and ultimately the NSW taxpayers) who will have to meet the costs of those services.

- 6.13. At the same time it is also foreseeable that without a level playing field many VMOs may well elect not to participate in the provision of public health services at the Northern Beaches Hospital.
- 6.14. Should the ACCC decide not to grant authorisation to AMA(NSW) to collectively negotiate the terms and conditions of VMO contracts with Healthscope this most likely will result in:
- (a) Increased costs as individuals and/or groups of medical practitioners attempt to negotiate their fees with the Healthscope and / or the State Government.
 - (b) Increased competition between craft groups may result in certain specialties withdrawing their services from some hospitals and only offering their services at other hospitals.
 - (c) VMOs leaving the Public Hospital System which will result in a further strain on the those staff specialists, Career Medical Officers, junior doctors and other doctors remaining in the Public Hospital System.
- 6.15. AMA(NSW), as the peak industrial organisation representing medical practitioners in New South Wales, has a unique understanding of the Public Hospital System and the issues confronting VMOs working within the system.
- 6.16. In a climate where VMOs consider that their contributions to the Public Health System are not recognised, ensuring terms and conditions are maintained and improved is fundamental to retaining (and recruiting) VMOs. While VMOs can negotiate individual variations with Healthscope, AMA(NSW)'s role will help to ensure reliable service provision to those members of the public seeking treatment as public patients at the Northern Beaches Hospital.
- 6.17. Craft groups may negotiate in the interests of their members. That said, it is in the Healthscope must, under the terms of the project Deed, provide a full range of services in all areas in a cost effective manner.
- 6.18. It is AMA(NSW)'s submission that there is no readily identifiable public detriment should authorisation be granted. There will not be an associated push to increase fees over and above those currently in place in the New South Wales Public Health System. In relation to increases in the future, AMA(NSW) will continue to negotiate in good faith with to ensure the ongoing provision of public health services to the public of New South Wales.

- 6.19. An example of the role of AMA(NSW) to ensure the ongoing provision of services yet at the same time representing the interests of VMOs was its role in obtaining Treasury Managed Fund professional indemnity cover for VMOs providing services to public patients in New South Wales public hospitals in 2001. At that time the medical profession in New South Wales was facing a medical indemnity crisis – soaring medical indemnity premiums were placing many VMOs in a position whereby they considered they had no choice but to withdraw their services (from both the public and private sectors) – particularly those practising in obstetrics and neurosurgery. AMA(NSW) engaged NSW Health in discussions which ultimately resulted in the extension of TMF cover to VMOs treating public patients in public hospitals and ensured the ongoing provision of services to public patients in New South Wales.
- 6.20. When seeking to negotiate with Healthscope, AMA(NSW) will not be seeking to draw a distinction between those seeking appointment at the Northern Beaches Hospital and those VMOs providing services at Public Hospitals in New South Wales. AMA(NSW) will be advocating for a system that ensure a fair and equitable allocation of resources across the State.

7. THE MARKET

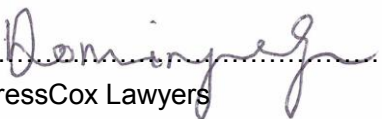
- 7.1. AMA(NSW) seeks authorisation to collectively negotiate on the part of all medical practitioners in New South Wales seeking appointment at the Northern Beaches Hospital to provide services to patient patients. It is not proposed that the practitioners must be a party to any agreement negotiated by AMA(NSW) with Healthscope. Individual VMOs would be entitled to attempt to negotiate on their own behalf, or participate in another arrangement (as they are now). Initially it is envisaged that a large number of the medical practitioners AMA(NSW) would be representing would be those appointed as VMOs at Mona Vale and Manly Hospitals.
- 7.2. AMA(NSW) currently represents the interests of VMOs in metropolitan hospitals, both specialists and general practitioners. While there are differences in the interests of different groups, there are also interests common to all VMOs. To the extent that there are differing interests, AMA(NSW) has the necessary experience, knowledge and resources to ensure that those differing interests are heard and represented.

8. CONCLUSION

- 8.1. AMA(NSW) seeks authorisation to collectively negotiate with Healthscope concerning the terms and conditions upon which medical practitioners will be engaged as visiting practitioners to provide medical services to public patients at the Northern Beaches Hospital.. Authorisation is sought to ensure that the rights and interests of the public (to access quality public health services), the rights and interests of those seeking appointment, and the rights and interests of JMOs to have access to teaching, training and mentoring.

- 8.2. The existing public health system in which AMA(NSW) represents the rights and interest of VMOs has ensured that the rights and interests of VMOs are represented and protected while the rights and interests of the New South Wales public in the ongoing delivery of health services of the highest quality in a cost effective manner are also protected.
- 8.3. AMA(NSW) seeks to preserve the current status quo which is history, both recently and in the past, reflects has operated to ensure the efficient, effective and cost effective delivery of health services in the New South Wales Public Health System.

Dated: 14July 2017


TressCox Lawyers
Per: Dominique Egan