



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for authorisation

lodged by

Australian Medical Association (NSW) Limited

in respect of

Collective bargaining with Healthscope Operations  
Pty Limited

Date: 28 September 2017

Authorisation number: A91590

Commissioners:  
Schaper  
Court  
Featherston

## Summary

The ACCC proposes to grant authorisation to the Australian Medical Association (NSW) Limited, acting on behalf of Visiting Medical Officers in NSW, to negotiate with Healthscope Operations Pty Ltd regarding the terms and conditions (including remuneration) of visiting medical officer contracts at the Northern Beaches Hospital. The ACCC proposes to grant authorisation for five years.

The ACCC now seeks submissions on this draft determination before making its final determination.

## The application for authorisation

1. On 19 July 2017 Australian Medical Association (NSW) Limited (the **AMA (NSW)**) (the **Applicant**) lodged an application for authorisation (A91590) with the ACCC. The Applicant is seeking authorisation to collectively negotiate, on behalf of visiting medical officers (**VMOs**), the terms and conditions (including remuneration) of VMO contracts with Healthscope Operations Pty Limited (Healthscope) at the Northern Beaches Hospital (the **Hospital**) (the **Conduct**). The Applicant is seeking authorisation for five years.
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.<sup>1</sup>

## Background

### Australian Medical Association (NSW) Limited

3. The AMA (NSW) is an independent association representing the medical profession in NSW. The AMA (NSW) provides industrial representation for VMOs, as well as a range of advocacy, advice and support services to the wider medical profession in NSW.

### Healthscope

4. Healthscope is a large Australian based provider of private healthcare services. In Australia, Healthscope operates 45 private hospitals and 48 medical centres.
5. On 11 December 2014 the NSW State Government entered into a contract with Healthscope to design, build, operate and maintain the new Northern Beaches Hospital, which is due to open in 2018. There are currently two public hospitals servicing the Northern Beaches area, Manly Hospital (which will close once the Northern Beaches Hospital opens), and Mona Vale hospital (which will continue to

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1 Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website [www.accc.gov.au](http://www.accc.gov.au).

operate but with limited services. Most acute care services will transfer to the Northern Beaches Hospital.

## **VMOs**

6. A VMO is a medical practitioner appointed under a service contract to provide medical services for monetary remuneration for or on behalf of a Public Health Organisation. VMOs typically have their own private practices and work as independent contractors in public hospitals. In NSW, there are approximately 8,000 VMO appointments with some VMOs holding multiple appointments.
7. Under the terms of the agreement between Healthscope and the NSW Government, Healthscope will provide public hospital services for a 20 year period. Healthscope will also be required to offer employment to NSW Health Service employees (such as Junior Medical Officers and Staff Specialists) but it is not required to offer contracts for services to VMOs.

## **Previous ACCC matters**

8. On 4 December 2013, the ACCC granted authorisation (A91383) for AMA (NSW) to collectively bargain with the NSW Ministry of Health and public health organisations regarding the terms and conditions of employment of VMOs within the NSW public health system.
9. In essence, under the current application for authorisation, AMA (NSW) is seeking to extend the scope of its existing collective bargaining arrangement on behalf of VMOs in the NSW public health system to those VMOs employed by Healthscope at the Northern Beaches Hospital.

## **Consultation**

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. The ACCC invited submissions on AMA (NSW)'s application from parties including Healthscope, organisations representing medical practitioners, organisations representing private hospitals, organisations representing consumers and State and Federal healthcare agencies.
11. The ACCC received one submission on the application from the national representative body - the Australian Medical Association (AMA) - which was supportive of the application. Copies of all public submissions are available from the ACCC's public register.<sup>2</sup>

## **ACCC assessment**

12. The ACCC's evaluation of the Conduct is in accordance with the relevant net public benefit tests<sup>3</sup> contained in the Act.
13. In its assessment of the application, the ACCC has taken into account:

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<sup>2</sup> <http://registers.accc.gov.au/content/index.phtml/itemId/1203031/fromItemId/278039>

<sup>3</sup> Subsections 90(6), 90(7), 90(5A) and 90(5B)

- the application and submissions received
- other relevant information available to the ACCC, including information from consideration of previous matters
- the likely future without the Conduct that is the subject of the authorisation. In particular, the ACCC considers that, absent the Conduct, it is likely that VMOs will individually seek to negotiate terms and conditions of their contracts with Healthscope, relating to the Northern Beaches Hospital
- the relevant area of competition – which the ACCC considers to be the provision of VMO 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
- the five year authorisation period requested and
- that VMOs will continue to be able to negotiate with Healthscope on their own behalf; that is, neither the VMOs or Healthscope can be compelled to participate in the collective negotiations as a result of the authorisation.

## Public benefit

14. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>4</sup>

## Submissions

15. Broadly, AMA (NSW) submits that allowing it to collectively negotiate with Healthscope on behalf of VMOs seeking service contracts at the Northern Beaches Hospital will ensure that medical services provided at the Northern Beaches Hospital are delivered on a cost effective basis. More specifically, the Applicant submits that:

- in its role as the collective negotiator of rates of remuneration and the terms and conditions for service delivery for VMOs, it is able to objectively balance the needs and wants of VMOs against the collective public interest in the provision of high quality medical services in the NSW public health system
- individual negotiations between VMOs and Healthscope would lead to an increase in the cost of the provision of public healthcare in NSW, in terms of the cost and time involved in individual negotiations
- should authorisation not be granted, individual negotiation may lead to an increase in the disparity of remuneration for different specialities and/or VMOs, and the potential for some specialities and/or VMOs to elect not to participate in the provision of VMO services at the Northern Beaches Hospital.

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<sup>4</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

16. The AMA submits that approval of AMA (NSW)'s application will support consistency in the terms and conditions offered to VMOs across public health services. The AMA further submits that:
- a level playing field will support recruitment and retention at the Northern Beaches Hospital, without disadvantaging or favouring other parts of the public hospital system in NSW
  - many of the VMOs who will contract with the Northern Beaches Hospital are likely to be currently employed at the Manly and Mona Vale hospitals under terms and conditions established under a collective bargaining agreement. The AMA submits that these VMOs will expect similar terms and conditions regarding their employment at the Northern Beaches Hospital
  - a collective approach to negotiations between the VMOs and Healthscope offers the most efficient means of reaching agreement with a significant number of different specialty areas.

### **ACCC View**

17. The ACCC considers that allowing AMA (NSW) to collectively bargain with Healthscope regarding the terms and conditions of VMOs at Northern Beaches Hospital is likely to result in the following public benefits.

#### **Reduced transaction times and costs**

18. 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.
19. In this instance, allowing the Applicant to negotiate with Healthscope on behalf of individual VMOs from a number of different medical specialities is likely to result in lower transaction costs relative to Healthscope negotiating with each of the VMOs individually.
20. The ACCC considers that collective bargaining allows parties to share these costs, which may lead to more efficient negotiating outcomes.

#### **Greater input into contracts**

21. The ACCC accepts that when negotiating with large businesses, small businesses can be at a disadvantage, in terms of resources and experience of negotiating in complex commercial environments. One way in which a small business can seek to redress such disadvantage is to bargain collectively. Collective bargaining may allow for more effective negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect the circumstances of VMOs and medical specialties, in relation to common issues.

#### **Recruitment and retention of VMOs at Northern Beaches Hospital**

22. The ACCC considers that the collective bargaining arrangements may, to some extent, ensure that Healthscope is able to recruit and retain sufficient VMOs and medical

specialists to enable it to provide the full range of public health services that it is contracted to provide at the Northern Beaches Hospital.

## Public detriment

23. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>5</sup>

## Submissions

24. The Applicant submits that the Conduct results in no readily identifiable public detriment. Specifically, the Applicant submits that:

- there will not be an associated push to increase rates over and above those currently in place in the NSW Public Health System.
- in the future, it will continue to negotiate in good faith to ensure the ongoing provision of public health services to the public of NSW.

25. The AMA notes that AMA (NSW) is not seeking authorisation for collective boycott activity and individuals remain free to negotiate directly with Healthscope if they choose. The AMA considers that this, coupled with the history of VMO negotiations in NSW, illustrates that there is not likely to be any detriment from the Conduct.

## ACCC View

26. The ACCC considers that the Conduct is likely to result in little, if any, public detriment because:

- Participation in the collective bargaining is voluntary, with no collective boycott. VMOs remain free to negotiate directly with Healthscope to provide services at the Northern Beaches Hospital. Healthscope also remains free to negotiate directly with VMOs
- The Conduct effectively extends the current authorisation (which enables collective bargaining between VMOs and the NSW Public Health system) to one further hospital which provides public health services, albeit one operated by a private healthcare provider. Accordingly, it is unlikely to significantly increase the risk of harm to competition through coordinated conduct between VMOs.

## Balance of public benefit and detriment

27. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

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<sup>5</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

28. For the reasons outlined in this draft determination the ACCC 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.

29. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

## Length of authorisation

30. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>6</sup> This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

31. In this instance, AMA (NSW) seeks authorisation for five years.

32. Given the ACCC's conclusion on the balance of public benefits and public detriments, the ACCC is proposing to grant authorisation for a period of five years.

## Draft determination

### The application

33. On 19 July 2017, AMA(NSW) lodged an application for authorisation A91590 with the ACCC. Application A91590 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1 and 1A) of the Act to:

- Collectively negotiate the terms and conditions (including but not limited to remuneration) of VMO contracts with Healthscope Operations Pty Limited for the treatment of public patients at the Northern Beaches Hospital.

34. The AMA (NSW) seeks authorisation of the Conduct as it may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.

35. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

36. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the Conduct is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

37. The ACCC therefore **proposes to grant** authorisation to application A91590.

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<sup>6</sup> Subsection 91(1).

## **Conduct for which the ACCC proposes to grant authorisation**

38. The ACCC proposes to grant authorisation to AMA (NSW) to collectively negotiate the terms and conditions (including but not limited remuneration) of VMO contracts for the treatment of public patients at the Northern Beaches Hospital for a period of five years.

39. This draft determination is made on 28 September 2017.

## **Further submissions**

40. The ACCC will now seek further submissions from interested parties. In addition, the Applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.