



Draft Determination

Application for authorisation lodged by
The Australian Medical Association (NSW) Limited
in respect of
VMO collective bargaining in response to COVID-19
Authorisation number: A1000511

5 August 2020

Commissioners: Rod Sims, Delia Rickard, Mick Keogh, Sarah Court, and Stephen Ridgeway

Summary

The Australian Medical Association (NSW) (AMA NSW) is seeking authorisation for itself and any participating visiting medical officer (VMO) to collectively negotiate with private hospitals and day surgeries licensed in New South Wales. The collective negotiations relate to the terms and conditions (including remuneration) for VMOs engaged to provide medical services to public patients in the NSW private hospital system in responding to the COVID-19 pandemic.

The ACCC considers that the arrangements are likely to result in public benefits by reducing transaction costs, reducing information asymmetries, and facilitating other contracting efficiencies. It may also support greater participation by VMOs in delivering services to public patients in private hospitals and it may support the continuation of training for junior doctors.

The ACCC is proposing to grant conditional authorisation until 30 September 2021.

The interim authorisation granted by the ACCC on 8 May 2020 remains in place.

The ACCC invites submissions in relation to this draft determination by 20 August 2020; and will consider all such submissions before making its final decision in this matter.

The AMA NSW and interested parties may also request the ACCC to hold a conference to allow oral submissions on the draft determination.

1. The application for authorisation

- 1.1. On 5 May 2020, the Australian Medical Association (NSW) Limited (**AMA NSW**) lodged application for authorisation AA1000511 with the Australian Competition and Consumer Commission (the **ACCC**) under subsection 88(1) of the Competition and Consumer Act 2010 (Cth) (the **Act**).
- 1.2. The AMA NSW is seeking authorisation for itself and participating Visiting Medical Officers (**VMOs**) to collectively negotiate with Private Hospital Operators¹ regarding the terms and conditions (including remuneration) for VMOs engaged to provide medical services to public patients in the New South Wales (**NSW**) private hospital system in responding to the COVID-19 pandemic (the **Pandemic**) (the **Proposed Conduct**).
- 1.3. The AMA NSW seeks authorisation of the Proposed Conduct for the purpose of ensuring the provision of medical services to public patients in private facilities in responding to the Pandemic. The AMA NSW notes that it is seeking to largely replicate the arrangements that are currently in place in the public hospital system for any public work undertaken in the private hospital system. The AMA considers that the existing framework in the public hospital system provides an effective means of ensuring the continuing provision of medical services to public patients in NSW.
- 1.4. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

¹ Being Ramsay Health Care Australia Pty Limited, Healthscope Operations Pty Limited, Health Care Australia Pty Limited, Adventist Healthcare Limited, St Vincent's Health Australia Limited and other private hospitals and day surgeries licensed in NSW.

Interim authorisation

- 1.5. The AMA NSW also requested that the ACCC grant interim authorisation to enable it to engage in the Proposed Conduct while the ACCC considered the substantive application (the **Interim Authorisation**).
- 1.6. On 8 May 2020, the ACCC granted interim authorisation, subject to notification and reporting conditions, under subsection 91(2) of the Act. The ACCC granted the interim authorisation solely for the purpose of dealing with the effects of the Pandemic in NSW.
- 1.7. The Interim Authorisation will remain in place until it is revoked, or the date on which the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.

2. Background

- 2.1. The ACCC recognises the significant challenges occurring as a result of the Pandemic. The Pandemic has caused a major disruption to society and the economy, with social distancing measures and travel bans affecting various sectors across the economy. There is risk that Australia's health services may be put under significant stress in responding to the Pandemic. The identification of this risk gave rise to applications for authorisation such as the one from the AMA NSW.
- 2.2. In March 2020 the Australian Government and State and Territory Governments implemented a range of measures to support a co-ordinated healthcare response to the Pandemic. This included measures under which Private Hospital Operators agreed to make available their facilities, including beds, workforce, and the operations of the health services business conducted at those private health facilities².
- 2.3. In June 2020 the NSW Government announced additional funding to allow public patients to be treated in private hospitals. These measures were in response to the delay in the treatment of certain public patients caused by the suspension of certain elective surgeries during April 2020.³

The AMA NSW

- 2.4. The AMA NSW is an independent association representing the medical profession in NSW. It provides industrial representation for VMOs, as well as a range of advocacy, advice and support services to the wider profession in NSW.
- 2.5. A VMO is a medical practitioner appointed under a service contract to provide medical services for monetary remuneration. VMOs can hold appointments to public hospitals, private hospitals, or both.⁴ VMOs typically have their own private practices and also work as independent contractors in public hospitals. In NSW, there are approximately 8,000 VMO appointments in the public hospital system.

² For further detail please see <https://www.coag.gov.au/sites/default/files/communique/covid19-nga.pdf>; <https://www.pm.gov.au/media/elective-surgery>; <https://www.health.gov.au/news/australian-health-protection-principal-committee-ahppc-statement-on-restoration-of-elective-surgery>; <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/australian-government-partnership-with-private-health-sector-secures-30000-hospital-beds-and-105000-nurses-and-staff-to-help-fight-covid-19-pandemic>.

³ See <https://www.health.nsw.gov.au/news/>.

⁴ Section 78 of the *Health Services Act 1997* (NSW).

- 2.6. In NSW, the establishment of standard rates and conditions for VMOs is regulated by the *Health Services Act 1997* (NSW). The legislation prescribes that standard rates and conditions (for both fee-for service and sessional arrangements) can be established and varied from time to time in a number of ways, including:
- by the NSW Health Minister, by order in writing, approving sets of conditions recommended by AMA NSW for inclusion in service contracts;⁵ or
 - by determination of an arbitrator, following an application to the relevant Minister by the NSW Health Minister and/or AMA NSW for the appointment of an arbitrator.⁶
- 2.7. For many VMOs there is no contract for services between the Private Hospital Operator and the VMO, but a contract between the practitioner and the patient (in the majority of arrangements it is the patient and/or health fund who remunerates the VMO, not the hospital). 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(s) at which the medical practitioner is appointed.
- 2.8. As such, the AMA NSW has the following roles:
- a statutory role in representing VMOs in the public hospital system, where there are detailed contractual arrangements between VMOs and Public Hospital Organisations (now known as Local Health Districts, **LHDs**) under which public patients are treated for free and VMOs are remunerated by the LHD. The AMA NSW recommends to the Minister for Health the terms and conditions and rates of remuneration for inclusion in VMOs' service contracts, and
 - advocating for the rights and interests of medical practitioners in the private hospital system.
- 2.9. There are currently two other authorisations granted by the ACCC to the AMA NSW, being:
- A91590, granted on 24 November 2017 for five years. Authorisation to collectively negotiate the terms and conditions (including but not limited to remuneration) of visiting medical officer contracts for the treatment of public patients at the Northern Beaches Hospital.
 - A91383, granted 4 December 2013 until 30 December 2023. Re-authorisation to collectively bargain on behalf of VMOs in the NSW public hospital system with:
 - NSW Ministry of Health (**Ministry**) regarding the standard terms and conditions of contracts, including but not limited to remuneration; and
 - LHDs regarding issues relevant to the engagement of VMOs by LHDs, excluding standard VMO contract terms and conditions and rates of remuneration.

⁵ Sections 85 – 87 of the *Health Services Act 1997* (NSW).

⁶ Section 89 of the *Health Services Act 1997* (NSW).

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including Private Hospital Operators, medical doctor organisations, industry organisations, and patient advocacy groups.⁷
- 3.3. The ACCC received one submission from the Australian Medical Association (**AMA**) in support of the AMA NSW's application. The AMA submitted the conduct would: support the uninterrupted supply of clinical services during the Pandemic; enable the AMA NSW to seek fair remuneration between VMOs and Private Hospital Operators; and transactional costs would be avoided compared to individual negotiations between VMOs and Private Hospital Operators.
- 3.4. In its submissions, the AMA NSW noted that in collectively bargaining with Private Hospital Operators, it is seeking to largely replicate the terms and conditions of the Public Hospital Determinations 2014 (**2014 Determinations**) that are in place between VMOs and the Ministry.⁸ The AMA NSW considers that the framework of the 2014 Determinations provides a cost-effective means of ensuring the continued provision of medical services to public patients in NSW. The AMA NSW notes that VMOs have already provided services to public patients in private hospitals as part of the health system's response to the Pandemic. These services have been provided pursuant to a contract between the VMO and the Private Hospital Operators or pursuant to an agreement between the VMO and the LHD to apply the terms of 2014 Determinations.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The AMA NSW has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of sections 45 or 46 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the conduct (**authorisation test**).
- 4.3. The ACCC's assessment of the Proposed Conduct is made in the context of the Pandemic. The Pandemic is impacting Australian consumers and businesses, with many businesses facing severe disruption. Maintaining competition in the long term will be critical to benefit both consumers and the economy.
- 4.4. In making its assessment of the Proposed Conduct, the ACCC has considered:
 - The application and other relevant information available to the ACCC; this has included information provided by parties on a confidential basis and information

⁷ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

⁸ *Public Hospitals (Visiting Medical Officer Sessional Contracts) Determination 2014* and *Public Hospitals (Visiting Medical Officer Fee-for-Service Contracts) Determination 2014*. Copies of the 2014 Determinations are included in the AMA NSW's application and are available from the ACCC's Public Register.

published by the Australian Government and State and Territory Governments about the management of the healthcare system during the Pandemic.

- The relevant areas of competition likely to be affected by the Proposed Conduct. These areas of competition include the supply of VMO services in NSW in both the private and public healthcare systems.
- The likely future with the Proposed Conduct that is the subject of the authorisation compared to the likely future in which the Proposed Conduct does not occur. In the future without the Proposed Conduct the ACCC considers it likely that services provided by a VMO to public patients in private hospitals will be pursuant to either an agreement reached between the individual VMO and the Private Hospital Operator or to an agreement between the individual VMO and a LHD.

Public benefits

- 4.5. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁹

- 4.6. The ACCC notes the public benefits submitted by the AMA NSW in its application, and the AMA in its submission.
- 4.7. The ACCC has previously recognised that there are transaction costs associated with contracting and that 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. Collective bargaining also allows for transaction costs to be shared between those parties collectively negotiating. This in turn may allow for an increased level of input into negotiations and result in more efficient outcomes.
- 4.8. Negotiations by individual VMOs with Private Hospital Operators are likely to be more costly and take longer than is desirable in the context of the Pandemic. The Proposed Conduct is likely to result in transaction cost savings and improve the input of the AMA NSW and VMOs during negotiations with Private Hospital Operators.
- 4.9. The Proposed Conduct may also help to address information asymmetry. Information asymmetry occurs when one party to a negotiation has access to relevant information that the other party does not. Where there is information asymmetry, the party lacking information may accept or contemplate different terms than it would if more information were available to it. Under these circumstances, the outcomes of the negotiation may not capture many of the available efficiencies. Information asymmetry can often be addressed by improving the transparency of market information. If collective bargaining such as that proposed by the AMA NSW improves the availability and use of information, it has the potential to enable more complete and efficient contracts to be negotiated that better reflect the needs of members of the bargaining group. This would be of benefit to the public.

⁹ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

- 4.10. The AMA NSW has submitted that without the Proposed Conduct, higher transaction costs and contractual uncertainty may reduce the willingness of some VMOs to provide services to public patients in private hospitals. The ACCC considers that by improving the contracting process for VMOs, the Proposed Conduct may support VMO participation in providing services to public patients in private hospitals.
- 4.11. The AMA NSW has also submitted that the Proposed Conduct, by facilitating VMO services for public patients in private hospitals, will also support the ongoing provision of training for junior medical staff by allowing them to continue to be involved in the delivery of services to public patients. The ACCC considers that by supporting the continued training of junior medical staff, the Proposed Conduct is likely to result in public benefit.

Conclusion on public benefits

- 4.12. The ACCC considers that the Proposed Conduct is likely to result in public benefit through transaction cost savings and by improving the input of the AMA NSW and VMOs during negotiations with Private Hospital Operators. It is also likely to help to address information asymmetries and to facilitate other contracting efficiencies. It may also support greater participation by VMOs in delivering services to public patients in private hospitals and it may support the continuation of training for junior doctors.

Public detriments

- 4.13. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:
- ...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.¹⁰*
- 4.14. The AMA NSW submits there is no readily identifiable public detriment resulting from the Proposed Conduct.
- 4.15. The ACCC considers that the Proposed Conduct is likely to result in some public detriment as it reduces the potential for competition between VMOs to supply services to public patients in private hospitals. To the extent that VMOs negotiate collectively with private hospitals and day surgeries, they will not be able to compete with each other on the terms on which they supply those services. In addition, collective activity (including the sharing of commercial information) between competitors can give rise to additional competitive detriments increasing the likelihood of coordinated conduct (rather than competition) beyond the terms of the authorised agreement.
- 4.16. However, the ACCC considers these detriments are likely to be limited in this instance as:
- The Proposed Conduct is for a narrow purpose. It can only occur in respect of arrangements where VMOs are to be engaged by Private Hospital Operators to provide medical services to public patients in the NSW private hospital system in responding to the Pandemic.
 - Any information shared between VMOs under the Proposed Conduct is likely to lose relevance following the cessation of the Proposed Conduct.

¹⁰ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- It is unlikely that the Proposed Conduct will materially affect fees charged by VMOs for the services they provide to private patients.
- Participation in the collective bargaining is voluntary for VMOs, they remain free to negotiate their own individual arrangements with a Private Hospital Operator, or participate in another arrangement. Similarly, Private Hospital Operators also remain free to negotiate directly with VMOs on an individual basis, and need not enter into any agreements that may undermine their operational capabilities.
- Absent the Pandemic, VMOs will on occasion provide services to public patients in private hospitals at the request of the LHD. Contractual arrangements for such services are not affected by the Proposed Conduct.

Conclusion on public detriments

4.17. The ACCC considers that the Proposed Conduct is likely to result in limited public detriment.

Balance of public benefit and detriment

4.18. The ACCC considers that the Proposed Conduct is likely to result in public benefit through transaction cost savings and by improving the input of the AMA NSW and VMOs during negotiations with Private Hospital Operators. It is also likely to help to address information asymmetries and to facilitate other contracting efficiencies. It may also support greater participation by VMOs in delivering services to public patients in private hospitals and it may support the continuation of training for junior doctors.

4.19. The ACCC also considers that the Proposed Conduct will result in limited public detriment. As discussed below, the ACCC is proposing to impose conditions that increase transparency regarding the nature and impact of the conduct proposed to be authorised.

4.20. Overall, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Proposed Conditions of authorisation

4.21. The ACCC may specify conditions in an authorisation.¹¹ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.¹²

4.22. In its May 2020 interim authorisation, the ACCC imposed conditions requiring the AMA NSW to notify the ACCC of any additional Private Hospital Operators that it seeks to negotiate with and to provide regular updates to the ACCC. These conditions provide important transparency in relation to the Proposed Conduct and the parties protected by the interim authorisation.

4.23. The ACCC considers that the conditions imposed under the interim authorisation have been effective. Therefore, the ACCC proposes to continue these conditions as part of the substantive authorisation (see 5.7 - 5.10).

¹¹ Section 88(3) of the Act.

¹² Section 88(3) of the Act.

Length of authorisation

- 4.24. The Act allows the ACCC to grant authorisation for a limited period of time.¹³ This enables 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.
- 4.25. In this instance, the AMA NSW seeks authorisation for 12 months from when the ACCC's final determination is given.
- 4.26. Public information to date suggests that the Pandemic can change suddenly, unpredictably, and require rapid responses. Given these substantial uncertainties, and for the reasons outlined in the public benefit and public detriment analysis above, the ACCC considers the period of 12 months from the date of final determination to be appropriate.
- 4.27. The ACCC proposes to grant authorisation until 30 September 2021.
- 4.28. The legal protections afforded during the period of authorisation would not extend to any collective bargaining conduct engaged in after that time, including giving effect to any agreements made within the 12 month period of authorisation after the authorisation ends.

5. Draft determination

The application

- 5.1. On 5 May 2020, the AMA NSW lodged application A1000511 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The AMA NSW is seeking authorisation for itself and participating VMOs to collectively negotiate with Private Hospital Operators regarding the terms and conditions (including remuneration) for VMOs engaged to provide medical services to public patients in the NSW private hospital system in responding to the Pandemic.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct would result or is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC considers that, in all the circumstances, the Proposed Conduct would result in a benefit to the public, and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
- 5.6. Accordingly, the ACCC proposes to grant conditional authorisation.

¹³ Subsection 91(1) of the Act.

Proposed conditions of authorisation

- 5.7. The ACCC may specify conditions in an authorisation.¹⁴ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.¹⁵
- 5.8. The ACCC may specify conditions in circumstances where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of the authorisation.¹⁶
- 5.9. In this instance, the ACCC proposes to grant authorisation subject to the following conditions:

Condition 1 – Notification of future targets

The AMA NSW must notify the ACCC of the identity of any additional private hospitals or healthcare providers (other than Ramsay Health Care Australia Pty Limited, Healthscope Operations Pty Limited, Health Care Australia Pty Limited, Adventist Healthcare Limited and St Vincent's Health Australia Limited) with which it intends to collectively negotiate, at least 24 hours before commencing such negotiations.

Condition 2 – Reporting requirements

The AMA NSW must provide regular updates to the ACCC, and provide any additional information requested by the ACCC.

- 5.10. These proposed conditions are the same as those that currently apply under the Interim Authorisation granted on 8 May 2020.

Conduct which the ACCC proposes to authorise

- 5.11. The ACCC proposes to grant conditional authorisation A1000511 to enable the AMA NSW and any participating VMOs to collectively negotiate with Private Hospital Operators regarding the terms and conditions (including remuneration) for VMOs engaged to provide medical services to public patients in the NSW private hospital system in responding to the Pandemic.
- 5.12. Authorisation is proposed to be granted in relation to the following provisions of the Act:
- Division 1 of Part IV of the Act,
 - section 45 of the Act, and
 - section 46 of the Act.
- 5.13. The ACCC proposes to grant conditional authorisation to the Proposed Conduct only in so far as it is for the sole purpose of dealing with the effects of the Pandemic in NSW.
- 5.14. The ACCC proposes to grant conditional authorisation A1000511 on the basis it will remain in force only until 30 September 2021.
- 5.15. This draft determination is made on 5 August 2020.

¹⁴ Section 88(3) of the Act.

¹⁵ Section 88(3) of the Act.

¹⁶ Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.