



Determination

Application for revocation of authorisation AA1000511 and the substitution of authorisation AA1000569 lodged by The Australian Medical Association (NSW) Limited

in respect of VMO collective bargaining in response to COVID-19

Authorisation number: A1000569

22 November 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC has decided to re-authorise the Australian Medical Association (NSW) (AMA NSW) to enable it and participating visiting medical officers (VMOs) 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 as part of the response to the COVID-19 pandemic.

This conduct was previously authorised by the ACCC in August 2020 until 30 September 2021. Interim authorisation in relation to the current application was granted on 23 September 2021, suspending the existing authorisation.

Authorisation is granted on the same terms as the existing authorisation.

The COVID-19 pandemic continues to affect the provision of medical services in NSW and the ACCC considers that the arrangements are likely to continue to result in public benefits by reducing transaction costs, reducing information asymmetries, and facilitating other contracting efficiencies. It may also support the continuation of training for junior doctors.

The ACCC grants authorisation until 30 November 2022 with conditions requiring that:

- The AMA NSW must notify the ACCC of the identity of any additional private hospitals or healthcare providers with which it intends to collectively negotiate, at least 24 hours before commencing such negotiations, and
- The AMA NSW must provide regular updates to the ACCC, and provide any additional information requested by the ACCC.

1. The application for authorisation

- 1.1. On 30 August 2021, the Australian Medical Association (NSW) Limited (**AMA NSW**) lodged with the Australian Competition and Consumer Commission (the **ACCC**) an application to revoke authorisation AA1000511 and substitute authorisation AA1000569 in its place (**re-authorisation**) under subsection 91C(1) of the Competition and Consumer Act 2010 (Cth) (the **Act**).
- 1.2. The AMA NSW sought re-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 as part of the response to the COVID-19 pandemic (the **Pandemic**) (the **Conduct**).
- 1.3. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. The AMA NSW is seeking to replicate the arrangements that are currently in place under the existing authorisation AA1000511 (the **Existing Authorisation**), which the ACCC granted on 26 August 2020. The Existing Authorisation was due to expire on 30

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.

September 2021. As such the AMA NSW requested urgent interim authorisation to enable itself and VMOs to continue to engage in the conduct under the Existing Authorisation while the ACCC considered the substantive application for re-authorisation.

- 1.5. The AMA NSW sought re-authorisation for 12 months. While the AMA NSW is hopeful that vaccination rates will see case numbers, hospitalisation rates and the need for ICU admissions decline by early next year, this target remains uncertain. If there is no ongoing need for public patients to be treated in private hospitals, there will be no need for AMA (NSW) to engage in the Conduct.

2. Background

- 2.1. 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 facilities.²
- 2.2. 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
- 2.3. On 26 August 2020, the ACCC granted authorisation to the Conduct with conditions that provided:
 - 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.
 - the AMA NSW must provide regular updates to the ACCC, and provide any additional information requested by the ACCC.
- 2.4. Following the grant of the Existing Authorisation, a variety of contractual arrangements were put into place. At some NSW Private Hospitals VMOs with Public Hospital appointments undertook the work under their Public Hospital contracts. At other NSW Private Hospitals, VMOs contracted with the Private Hospital operator and submitted claims for payment to the Private Hospital Operator. The rates of payment varied depending on the Private Hospital Operator and given that contracts were determined based on the terms of the Private Hospital Operators arrangements with Federal and State governments, AMA NSW did not engage with Private Hospital Operators to collectively negotiate the terms and conditions of the contracts with VMOs.
- 2.5. AMA NSW submits that pursuant to the Existing Authorisation, it did meet with Private Hospital Operators in 2020 and discussed issues of capacity to accept public patients

² For further detail please see <https://www.coag.gov.au/sites/default/files/communique/covid19-npa.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/>.

in their facilities, and the volumes of work being undertaken. There were also discussions about the terms on which facilities had contracted with VMOs.

- 2.6. Over the course of the Existing Authorisation, the ACCC received update reports from the AMA NSW under the reporting conditions outlined at paragraph 2.3 above.
- 2.7. In August 2021, the call for VMOs to again undertake public patient work in NSW Private Hospitals was made. The AMA NSW understands that some VMOs have been asked to do so under the contracts they signed last year, however, AMA NSW submits it is difficult to know where and how much work will be undertaken in the NSW Private Hospital system, and whether this will be confined to the Sydney Metropolitan area or extended across some or all of the State.
- 2.8. The ACCC recognises the significant challenges that are continuing to occur as a result of the Pandemic. There is risk that Australia's health services may continue to be put under significant stress in responding to the ongoing Pandemic, and that there is ongoing uncertainty around the effects of the vaccination roll out and increasing COVID-19 case numbers in NSW on its public and private health system.

The AMA NSW

- 2.9. 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.
- 2.10. 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.
- 2.11. The *Health Services Act 1997* (NSW) regulates standard rates and conditions for VMOs. 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
- 2.12. Generally, 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.

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

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

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

2.13. 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.

2.14. There are currently two other authorisations granted by the ACCC to the AMA NSW, being:

- A91590, granted on 24 November 2017 until 16 December 2022, 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, and
- A91383, granted on 4 December 2013 until 30 December 2023, 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.

3. Consultation

3.1. The ACCC did not conduct a public consultation process in respect of the AMA NSW's request for re-authorisation and interim authorisation prior to releasing the draft determination and granting interim authorisation, due to the tight timeframe surrounding the request for urgent interim authorisation, the uncontroversial nature of the Existing Authorisation and the similarities of the current application to the Existing Authorisation.

3.2. Following the draft determination issued on 23 September 2021, the ACCC invited submissions on AMA NSW's application for authorisation and the ACCC's draft determination. No submissions were received.

4. ACCC assessment

4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. The AMA NSW seeks authorisation in relation to Division 1 of Part IV of the Act, and sections 45 and 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 (the **authorisation test**).

- 4.3. The ACCC's assessment of the Conduct is made in the context of the COVID-19 pandemic. Maintaining competition in the long term will be critical to benefit both consumers and the economy.
- 4.4. In making its assessment of the Conduct, the ACCC has considered:
- The relevant areas of competition likely to be affected by the Conduct. These areas of competition include the supply of VMO services in NSW in both the private and public healthcare systems, and
 - The likely future with the Conduct that is the subject of the re-authorisation compared to the likely future in which the Conduct does not occur. In the future without the 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.⁷*
- 4.6. The ACCC accepts the AMA NSW's submission that whilst to date there has not been a need for AMA NSW to engage in the negotiation of the terms and conditions of contracts, as the numbers of COVID-19 cases in NSW continue to increase and pressures on the health system increase, there may be the need for arrangements to be collectively negotiated or for existing arrangements to be re-negotiated.
- 4.7. The AMA NSW submits that there are increasing levels of public work undertaken in Private Hospitals given the current COVID-19 infection rates in NSW, which are expected to increase for some time to come. The current suspension of non-urgent Category 2 and Category 3 surgery in the Public Hospital System will mean that even once cases begin to decrease, the waiting list will again be significant and will need to be addressed with some degree of urgency.
- 4.8. 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. The ACCC considers that the Conduct is likely to result in transaction cost savings and improve the input of the AMA NSW and VMOs during any negotiations with Private Hospital Operators in the future.
- 4.9. The Conduct may also help to address information asymmetry. Information asymmetry occurs when one party to a negotiation has access to relevant information

⁷ *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.

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. The ACCC considers that collective bargaining such as that proposed by the AMA NSW can improve the availability and use of information to and by AMA NSW, to the benefit of the VMOs on whose behalf AMA NSW is collectively negotiating, and has the potential to enable more complete and efficient contracts to be negotiated that better reflect the needs of the VMOs as a collective group, compared to a situation in which each VMO would individually negotiate with Public Health Operators. This would be of benefit to the public.

- 4.10. The ACCC accepts the AMA NSW's submission that while it is important that the junior medical workforce is available in the Public Hospital system to assist with the provision of care for COVID-19 patients, the 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 supporting the continued training of junior medical staff is a public benefit that is likely to result from the Conduct.

Public detriments

- 4.11. 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.⁸

- 4.12. The AMA NSW submits there is no readily identifiable public detriment resulting from the Conduct.
- 4.13. The ACCC considers that the 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 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.
- 4.14. However, the ACCC considers these detriments are likely to be limited in this situation as:
- The 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 Conduct is likely to lose relevance following the cessation of the Conduct.

⁸ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- It is unlikely that the 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 Conduct.
- There will be transparency around the Conduct as a result of the reporting conditions that the ACCC proposes to continue as part of the re-authorisation (see paragraphs 5.7 - 5.10 below).

4.15. As such, the ACCC considers that the Conduct is likely to result in limited public detriment.

Balance of public benefit and detriment

4.16. The ACCC considers that the 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, and it is likely to support the continuation of training for junior doctors.

4.17. The ACCC also considers that the Conduct will result in limited public detriment.

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

Length of authorisation

4.19. The Act allows the ACCC to grant authorisation for a limited period of time.⁹ 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.

4.20. In this instance, the AMA NSW seeks re-authorisation for 12 months from when the ACCC's final determination is given.

4.21. Public information to date suggests that the Pandemic can change suddenly, unpredictably, and require rapid responses. Given these uncertainties, and for the reasons outlined in the public benefit and public detriment analysis above, the ACCC considers it is appropriate to grant authorisation until 30 November 2022.

4.22. The legal protection afforded during the period of authorisation does not extend to any collective bargaining conduct engaged in after that time, including giving effect to any

⁹ Subsection 91(1) of the Act.

agreements made within the 12-month period of authorisation after the authorisation ends.

5. Determination

The application

- 5.1. On 30 August 2021, the AMA NSW lodged with the ACCC an application to revoke authorisation AA1000511 and substitute authorisation AA1000569 for the one revoked under subsection 91C(1) of the Act.
- 5.2. The AMA NSW sought re-authorisation for itself and participating Visiting Medical Officers (**VMOs**) to collectively negotiate with Private Hospital Operators¹⁰ 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 authorisation test

- 5.3. The ACCC must not make a determination revoking an authorisation and substituting another authorisation unless satisfied that it would not be prevented under section 90(7) of the Act from making a determination granting the substituted authorisation, if it were a new authorisation sought under section 88.¹¹
- 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 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 Conduct.
- 5.5. For the reasons outlined in this determination, the ACCC is satisfied that, in all the circumstances, the 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 Conduct.
- 5.6. Accordingly, the ACCC has decided to grant authorisation with the conditions at 5.7 to 5.10 below.

Conditions of authorisation

- 5.7. The ACCC may specify conditions in an authorisation.¹² The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.¹³
- 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.¹⁴
- 5.9. In this instance, the ACCC grants authorisation with the following conditions:

Condition 1 – Notification of future targets

¹¹ Section 91C(7) of the Act.

¹² Section 88(3) of the Act.

¹³ Section 88(3) of the Act.

¹⁴ Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

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 conditions are the same as those that currently apply under the Interim Authorisation granted on 23 September 2021 and those which applied under the Existing Authorisation granted by the ACCC on 26 August 2020.

Conduct authorised

5.11. The ACCC has decided to revoke authorisation AA1000511 and grant authorisation AA1000569 in substitution. The ACCC grants Authorisation AA1000569 with conditions 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 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 grants authorisation to the Conduct only in so far as it is for the sole purpose of dealing with the effects of the COVID-19 pandemic in NSW.

5.14. Authorisation AA1000569 will remain in force until 30 November 2022.

Date authorisation comes into effect

5.15. This determination is made on 22 November 2021. If no application for review of this determination is made to the Australian Competition Tribunal, it will come into force on 14 December 2021.