



**Australian Medical Association (NSW) Limited –  
Application for authorisation AA10005011  
Interim authorisation decision  
8 May 2020**

**Decision**

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of the application for authorisation AA10005011, lodged by the Australian Medical Association (NSW) Limited (**AMA (NSW)**) on 6 May 2020.
2. The AMA (NSW) has applied for authorisation for itself and participating Visiting Medical Officers (**VMOs**) to collectively negotiate with the Private Hospital Operators defined in paragraph 6 below concerning the terms and conditions upon which the VMOs will be engaged to provide medical services to public patients in the NSW private hospital system during the COVID-19 pandemic (the **Pandemic**) (see application for authorisation 1.1).
3. The ACCC has granted conditional interim authorisation to the AMA (NSW) and VMOs to engage in the Proposed Conduct described at paragraph 6 below, solely for the purpose of dealing with the effects of the Pandemic in New South Wales, and subject to conditions requiring the AMA (NSW) to notify the ACCC of any additional private hospital operators that the AMA (NSW) seeks to negotiate with and to provide regular updates to the ACCC (as described in paragraphs 22 – 23 below).
4. Interim authorisation commences immediately and remains in place until it is revoked, or the date on which the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.

**The application for authorisation**

5. 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.
6. The AMA (NSW) is seeking authorisation for itself and VMOs to collectively negotiate in New South Wales with 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 (**Private Hospital Operators**) regarding the terms and conditions (including remuneration) for VMOs engaged to provide public patient services in NSW private hospitals during the Pandemic (the **Proposed Conduct**).
7. The AMA (NSW) submits that it will promptly notify the ACCC of any additional Private Hospital Operators that are identified by the NSW Government as being facilities where public patient services are to be provided.
8. 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 (**PHO**).<sup>1</sup> Service contracts can be sessional contracts (remunerated at an hourly rate),

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<sup>1</sup> *Health Services Act 1997 (NSW)* section 78.

fee-for-service contracts (remunerated for services provided, being a determined percentage of the Medicare benefits Schedule) and/or honorary contracts. 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.

9. The NSW Minister for Health may approve sets of conditions recommended by the AMA (NSW) for inclusion in service contracts.<sup>2</sup>

10. 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 PHOs under which public patients are treated for free and VMOs are remunerated by the PHO. 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. There is generally no contract for services between the private hospital and medical practitioner, but a contract between the practitioner and the patient (as it is the patient and/or health fund who remunerates them, 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.

11. The AMA (NSW) submits that as part of its COVID-19 pandemic response, the Federal Government has undertaken to guarantee the viability of the private hospital sector under an arrangement which requires private hospitals to support the COVID-19 response through services including hospital services for public patients, Category 1 elective surgery (and now some category 2 and 3 non-urgent elective surgery), utilisation of wards and theatres to expand ICU capacity, and accommodation for quarantine and isolation cases. The ACCC has separately granted interim authorisations to State and Territory health departments enabling them to direct such coordination between public and private hospitals.

12. The AMA (NSW) submits that with the Federal Government's announcement that certain elective surgery will recommence, there will be a need to ensure capacity remains within the public hospital system for the treatment of existing and new cases of COVID-19, and anticipates there will be a level of public work undertaken in private hospitals. It submits that it is important to provide VMOs with the opportunity to continue to undertake public work regardless of whether it is performed in a public or a private hospital. The ACCC understands that:

- VMOs do not currently hold contracts that reflect these new circumstances. VMOs providing public patient services in private hospitals would not hold a contract with either the private hospital (or with the patient, because they are public patients); and any contract they hold with a PHO would only govern services provided in the public hospital system
- the Department of Health does not have an equivalent role in setting terms and conditions as it does for VMO contracts with PHOs, meaning the AMA (NSW) also has no equivalent statutory ability to recommend terms and conditions for such service contracts
- consequently, VMOs providing services to public patients in private hospitals are left to negotiate with private hospitals individually or in groups. The AMA (NSW) submits that without authorisation to collectively negotiate, the likely result of this will be:

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<sup>2</sup> *Health Services Act 1997* section 87.

- an increase in the cost of public health care, both in terms of the time and cost of individual negotiations, and the potential for inflated remuneration rates. Under the terms of the arrangement with Private Hospital Operators, it is the Federal and NSW Government (and ultimately taxpayers) who will have to meet the costs of those services
- increased competition between groups may result in certain specialties withdrawing their services from some hospitals and only offering their services at other hospitals, with the AMA (NSW) already seeing some disparity between different specialties in terms of remuneration, and
- VMOs leaving the public hospital system due to a lack of available work, which will result in a further strain during the current crisis and following.

13. The AMA (NSW) submits that:

- it seeks to replicate the same arrangements that are currently in place in the public hospital system for any public work to be undertaken in the private system
- it is not proposing that medical practitioners must be a party to any agreement it negotiates, and individual VMOs would be entitled to attempt to negotiate on their own behalf, or participate in another arrangement. The AMA (NSW) submits that the existing public hospital framework (with some variations) has sufficient flexibility to accommodate variations in the terms and conditions under which VMOs may be asked to provide public patient services in private hospitals (with provisions covering services provision, teaching and training, remuneration, on-call arrangements, and dispute resolution procedures), and
- while it seeks to negotiate with private hospitals, it unclear which body contracts will be entered into with (i.e. who will be responsible for engaging and remunerating VMOs undertaking this work). The AMA (NSW) notes that it has been advocating for the contracts to be with the State, but neither the NSW Ministry of Health (the Ministry) nor the Federal Government have provided further direction.

14. The AMA (NSW) is seeking authorisation for 12 months from the ACCC's grant of final authorisation. The AMA (NSW) proposes to negotiate contracts with three-month terms with an option to renew for a further three-month term if required.

### **The authorisation process**

15. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (Cth) (the **Act**). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether proposed conduct results in a net public benefit.

### **Interim authorisation**

16. The ACCC may, where it considers it appropriate, grant an interim authorisation which allows parties to engage in specified conduct while the ACCC is considering the substantive application.

17. The AMA (NSW) requests urgent interim authorisation to enable it to collectively negotiate with private hospitals for the following reasons:

- the AMA (NSW) commenced discussions with the Ministry about the arrangements for VMOs in relation to the transfer of surgery to private hospitals on 11 March 2020
- the private hospitals viability package was announced by the Federal Government on 31 March 2020

- the shut down of elective surgery occurred on 1 April 2020 in NSW
- on 5 April 2020, the AMA (NSW) put a written proposal for arrangements for VMOs to undertake public patient work transferred from public hospitals to private hospitals in NSW
- there is some public work being undertaken in private hospitals. The AMA (NSW) understands some VMOs are being paid more than they would be under public hospital arrangements and others are being paid less creating inequity and concern amongst VMOs
- on 21 April 2020, the Federal Government announced that the suspension of non-urgent elective surgery will be gradually lifted from 27 April 2020. As such, arrangements for public patients to be treated in private hospitals will need to be determined as soon as possible, and
- while the efforts to flatten the curve have to date meant that capacity remains in the Public Health System and it may not be necessary to send public work to Private Hospitals at this time, that may change, and change on relatively short notice.

### **Consultation**

18. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation.
19. The ACCC will conduct a public consultation process on the substantive application for authorisation, and how the proposed conduct is operating under the Interim Authorisation. Details about how to make a submission will be available on the [ACCC's authorisations public register](#).

### **Conditional interim authorisation**

20. The ACCC considers that it is appropriate for there to be transparency over the various agreements reached and information shared under the interim authorisation.
21. As a result, the ACCC grants interim authorisation for the AMA (NSW) and VMOs to engage in the Proposed Conduct (described at paragraph 6 of this Interim authorisation decision document) subject to the following conditions:

#### ***Condition 1 – Notification of future targets***

22. 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***

23. The AMA (NSW) must provide regular updates to the ACCC at a frequency agreed between the AMA (NSW) and the ACCC, and provide any additional information requested by the ACCC.

### **Reasons for decision to grant Interim Authorisation**

24. The ACCC has granted Interim Authorisation to the Proposed Conduct described at paragraph 6 of this Interim Authorisation decision document.
25. In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation given the NSW Ministry is currently establishing arrangements between public and private hospitals to respond to the COVID-19 pandemic.

26. The ACCC notes that granting interim authorisation may result in a small level of competitive detriment in the form of reduced competition between VMOs in supplying services to public patients in private hospitals, or increased potential for coordination between VMOs more generally. The ACCC considers that it is unlikely that the Proposed Conduct will significantly impact competition in the long term, due to the following factors:
- The Proposed Conduct is temporary. The AMA (NSW) submits that it has no intention for these arrangements to extend beyond the period necessary to ensure the provision of public patient services at private facilities during the current pandemic, nor to interfere in the existing arrangements whereby medical practitioners treat private patients in the private system.
  - The AMA (NSW) is seeking to replicate the same arrangements that are currently in place in the public hospital system. In particular, while terms of remuneration will be part of negotiations, there will not be an associated push to increase fees over and above those currently in place in the public health system.
  - Participation in the collective bargaining is voluntary for VMOs, with no collective boycott. VMOs remain free to negotiate their own individual arrangements with a private hospital, or participate in another arrangement. Private hospitals also remain free to negotiate directly with VMOs on an individual basis.
27. The ACCC considers that there are likely to be significant public benefits from the proposed conduct in the current circumstances.
28. The ACCC considers that the Proposed Conduct is likely to result in transaction cost savings and a more timely outcome for both VMOs and private hospitals. Negotiations by individuals and/or groups of VMOs with private hospitals are likely to be costly and take longer than is desirable if an urgent response is needed to a sudden spike in COVID-19 cases.
29. The ACCC also considers that by reducing the transaction costs of negotiation and providing VMOs with certainty around the terms and remuneration of their engagement, the Proposed Conduct may help ensure that there are sufficient VMOs to provide public patient services in private hospitals (including COVID-19 patients where required). The ACCC considers that the transaction costs involved in (and uncertainty associated with) individual negotiations might discourage some VMOs from seeking to set up new service contracts with private hospitals for what is expected to be a relatively short-term arrangement during the Pandemic period, and therefore from undertaking public hospital work in private hospitals.
30. The ACCC also notes the AMA (NSW)'s submission that it is important for the training of junior medical staff (the majority of whom train in public hospitals) to ensure that they are able to continue to be involved in the delivery of elective surgery for public patients where it may be undertaken in private hospitals. The ACCC considers that to the extent that public patient elective surgery is transferred to private hospitals, then providing junior staff with the opportunity to continue such training would constitute an additional benefit.

### **Reconsideration of interim authorisation**

31. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.