



Amended Application for Revocation of an Authorisation for proposed conduct and substitution of a replacement

Australian Medical Association (NSW) Limited Application for Revocation and Substitution of Authorisation A91383

1. Applicant:

Australian Medical Association (NSW) Limited

ACN:

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T: (02) 9439 8822

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Contact Person:

Ms Fiona Davies

Chief Executive Officer

T: [REDACTED]

E: [REDACTED]

See attached Submission for description of the business activities of the Association.

2. Authorisation to be revoked:

The Authorisation to be revoked is A91383 issued 4 December 2013 on the basis it is due to expire on 30 December 2023.

3. Authorisation to be substituted:

Substitution of the existing Authorisation with new Authorisation on the same terms is sought by the Applicant. Authorisation is sought for a period of 10 years.

Australian Medical Association (NSW) Ltd

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4. **The Proposed Conduct:**

Please see attached submission for details of the proposed conduct for which Authorisation is sought. The relevant provisions of the *Competition and Consumer Act 2010 (Cth)* which may apply are:

- Making or giving effect to a contract, arrangement or understanding that may include a cartel provision (Division 1 Part IV);
- Making and / or giving effect to a contract, arrangement or understanding that has the purpose or would have the effect, or likely effect, of substantially lessening competition (section 45(1)(a) and (b));
- Engaging with one or more persons in a concerned practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition (section 45(1)(c));
- A corporation that has a substantial degree of power in a market engaging in conduct that has the purpose, or has or is likely to have the effect, or substantially lessening competition (section 46(1)).

Authorisation is not sought to engage in boycott activities.

5. **Names and classes of person who may be directly impacted:**

The parties who may be directly affected are the NSW Ministry of Health and Local Health Districts and Networks (*Public Health Organisations*) in New South Wales.

In relation to negotiations with the Ministry of Health, AMA(NSW) seeks to negotiate the standard terms and conditions, including rates of remuneration for inclusion in contracts for Visiting Medical Officers in the NSW Public Hospital System.

In relation to negotiations with Public Health Organisations, AMA(NSW) seeks to negotiate on issues relevant to the engagement of Visiting Medical Officers by Public Health Organisations other than standard terms and conditions and remuneration.

Australian Medical Association (NSW) Ltd

Visiting Medical Officers in New South Wales who wish to be a party to those negotiations and / or contracts which ultimately result from those negotiations would also be parties to the proposed arrangement.

6. to 9. **Market Information and Concentration:**

Please see attached submission for details of the market.

10. **Public Benefit:**

Please see attached submission for details of the public benefit.

11. **Public Detriment:**

Please see attached submission for details of the public benefit.


12. Contact information can be provided on request.

Declaration by Applicant

The undersigned declares that, to the best of their knowledge and belief, the information given in response to questions of the Commission are true, correct and complete, and complete copies of documents required by the form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all opinions expressed are sincere.

The undersigned undertakes to advise the ACCC immediately of any material changes in circumstances relating to the application.

The undersigned is aware that giving false or misleading information is a serious offence and is aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).



Signature of Fiona Davies
Chief Executive Officer
AMA(NSW) Limited

20 November 2023

Australian Medical Association (NSW) Ltd



**AUSTRALIAN MEDICAL ASSOCIATION
(NSW) LIMITED**

**SUBMISSION IN SUPPORT OF
APPLICATION FOR REVOCATION AND
SUBSTITUTION OF AUTHORISATION
A91383**

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 a revocation and substitution of Authorisation A91383 pursuant to section 91(1C) of the *Competition and Consumer Act 2010* (Cth).

1.2 On 4 December 2013 the Australian Competition and Consumer Commission (hereinafter the '**ACCC**') issued a final Determination granting authorisation for a period of 10 years to AMA(NSW) to collectively negotiate with:

- NSW Ministry of Health the standard terms and conditions, including rates of remuneration, of contracts for Visiting Medical Officers (hereinafter '**VMOs**') engaged in the New South Wales Public Hospital system; and
- Public Health Organisations (hereinafter '**PHOs**') in New South Wales on issues relevant to the engagement of Visiting Medical Officers by PHOs excluding standard Visiting Medical Officer contract terms and conditions and rates of remuneration.

(hereinafter '**the Authorisation**')

1.3 AMA(NSW) seeks to have the Authorisation substituted with a new Authorisation authorising it to collectively negotiate on the same basis as the above on behalf of VMOs in New South Wales with the NSW Ministry of Health and PHOs regarding the terms and conditions of engagement for VMOs in the New South Wales Public Hospital System.

1.4 Should the current Authorisation A19383 expires before a decision has been made in relation to this Application, AMA(NSW) seeks an urgent interim Authorisation.

2. AUSTRALIAN MEDICAL ASSOCIATION (NSW) LIMITED

2.1. AMA(NSW) is an independent association representing the State's medical profession. 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. 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 New South Wales Public 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 and 2014. 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 and Queensland) New South Wales is the only State or Territory in which VMOs in the Public Hospital System are independent contractors.
- 3.2. While updated figures have been sought from the NSW Ministry of Health¹, based on the New South Wales Auditor General's Report, *Visiting Medical Officers and Staff Specialists 2012* (hereinafter '**the Auditor General's Report**') states that there are 7,012 VMO appointments in the New South Wales Public Hospital System, and a total number of 4,594 individual VMOs

¹ Correspondence was sent to the Ministry of Health on 16 October 2023 seeking updated numbers. No response has been received. If updated information is provided, we will provide same to the ACCC.

in New South Wales Public Hospitals (the difference in the two figures is due to the fact that many VMOs have more than one VMO appointment). Of the 7,012 appointments, 4,645 are appointments under Sessional Contracts, and 2,367 are appointments under Fee-For-Service Contracts (some of these VMOs are appointed under fee-for-service contracts at facilities covered by the Rural Doctors Settlement Package hereinafter '**RDASP**').

- 3.3. There have been no amendments to the relevant legislative provisions or NSW Health Policies since the granting of the Authorisation in 2013. For completeness we have set out the relevant provisions below.

The Health Services Act 1997 (NSW)

- 3.4. Chapter 8 of the HSA governs the appointment of VMOs and the services contracts under which VMOs provide services in NSW public hospitals.
- 3.5. 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.
- 3.6. A VMO is a medical practitioner appointed under a service contract to provide medical services for monetary remuneration for or on behalf of a PHO (section 78).
- 3.7. 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, for a VMO to hold a valid appointment he/she must have a written service contract giving effect to that appointment.
- 3.8. Briefly, VMOs appointed under Sessional Contracts are remunerated based on an hourly rate. VMOs appointed under Fee-for-Service Contracts are remunerated for services provided by reference to 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.
- 3.9. The Minister for Health may approve sets of conditions recommended by the Australian Medical Association (NSW) Limited for inclusion in service contracts (section 87).
- 3.10. 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).

- 3.11. An arbitrator is bound to have regard to the economic consequences of a proposed Determination (section 92(2)).
- 3.12. 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)).
- 3.13. 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).
- 3.14. Variations to standard service contracts are not uncommon and accommodate the circumstances and needs of individual VMOs (or small groups of VMOs) and individual PHOs.
- 3.15. The current Visiting Medical Officer Determinations in place are the *Public Hospitals (Visiting Medical Officers Sessional Contracts Determination 2014*² and the *Public Hospitals (Visiting Medical Officers Fee-for-Service Contracts) Determination 2014*.³

Independent Contractors Act 2006 (Cth) and VMO Contracts in NSW

- 3.14. The status of VMOs in New South Wales as independent contractors is enshrined in section 76 of the HSA.
- 3.16. Services contracts between VMOs and PHOs are contracts for the performance of work. The NSW Ministry of Health issues both a Model Sessional VMO Service Contract and a Model Fee-for-Service VMO Service Contract.⁴

² *Public Hospitals (Visiting Medical Officers Sessional Contracts) Determination 2014*

<https://www.health.nsw.gov.au/careers/conditions/Awards/sessionaldetermination.pdf>

³ *Public Hospitals (Visiting Medical Officers Fee-for-Service Contracts) Determination 2014*

<https://www.health.nsw.gov.au/careers/conditions/Awards/feeforservedetermination.pdf>

⁴ NSW Health Policy Directive, Model Service Contracts – VMO and HMO

https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2014_008.pdf

- 3.17. The terms and conditions referred to in sections 87 and 89 of the HSA include workplace relations matters within the meaning of section 8 of the *Independent Contractors Act*.
- 3.18. Previously, Clause 4 of the *Independent Contractors Regulations 2007* preserved the provisions of Parts 1, 3 and 4 of Chapter 8 of the HSA. In 2011 the *Independent Contractors Amendment Regulations 2011 (No 1)* was passed by Parliament, preserving Parts 1 to 4 of Chapter 8 of the HSA.
- 3.19. In the 2008 AMA (NSW) submission to the ACCC seeking an authorisation, AMA (NSW) was concerned that because of the partial preservation of the provisions of the HSA, a dual system would be in operation. Whilst there is not, at the present time, a dual system operating in New South Wales, due to the preservation of Parts 1 to 4 of the HSA, AMA (NSW) nonetheless remains concerned that should the regulation be amended in the future, there would again be uncertainty regarding the contractual arrangements of VMOs in New South Wales. It is submitted that the substitution of the Authorisation, as AMA (NSW) is seeking, provides certainty to both VMOs in New South Wales, the NSW Ministry of Health and PHOs in New South Wales about the framework for negotiation of the arrangements under which VMOs provide services.
- 3.20. The Auditor General's Report states that 35.8% of public hospital doctors in New South Wales are VMOs. The remuneration paid to Sessional VMOs and Fee-for-Service VMOs reflects same: \$345 million and \$200 million respectively in 2009-2010.
- 3.21. New South Wales has a unique and important history of reliance on independent contractor specialists and general practitioners and this reliance provides the State with a flexible, highly qualified, and diverse specialist and general practitioner medical service.
- 3.22. The existing system under the HSA provides an efficient mechanism for managing contract terms for such large numbers of doctors and is particularly effective in retaining and recruiting specialist medical practitioners to provide services in rural communities.

4. AMA(NSW) VMO NEGOTIATIONS 2013 - 2023

- 4.1 During the ten years since the Authorisation was granted, AMA (NSW) has negotiated directly with several PHOs in relation to the terms and conditions of VMO arrangements at the Local level. Examples include:
- a. AMA(NSW) has assisted and negotiated on behalf of VMO Anaesthetists at Tamworth Rural Referral Hospital regarding their terms and conditions of engagement.

- b. AMA(NSW) negotiated with the Western Sydney Local Health District on behalf of VMOs at Westmead and Blacktown Hospitals regarding the inclusion of proposed additional terms and conditions by the Local Health District at the time of the quinquennial reappointment process in 2022.
- c. AMA(NSW) negotiated with the Nepean Blue Mountains Local Health District on behalf of VMOs regarding the District's attempt to include additional terms of appointment in the letter of appointment forwarded to VMOs.
- d. AMA(NSW) is currently representing VMOs in the Northern NSW Local Health District in negotiations with the District regarding rostering and remuneration arrangements.
- e. AMA(NSW) has been and is continuing to negotiate with the Western Sydney Local Health District regarding billing arrangement for VMOs.
- f. AMA(NSW) represented VMOs in negotiations with Blacktown Hospital in a dispute regarding out-patient billings.
- g. AMA(NSW) has represented VMOs in negotiations with Prince of Wales Hospital regarding service provision. VMOs at the Hospital had been raising concerns with the Hospital about inadequate resourcing. Again, as individuals, the VMOs were not being heard and unable to have the Hospital agree to provide the required resources to ensure ongoing service provision. AMA(NSW) was able to assist the VMOs to present their case and secure agreement.
- h. AMA(NSW) has represented VMOs in negotiations with Prince of Wales Hospital regarding on-call arrangements.
- i. AMA(NSW) represented and negotiated on behalf of VMOs at Wollongong Hospital as the Hospital changed from Fee-for-Service to Sessional Contracts.
- j. AMA(NSW) assisted and negotiated on behalf of VMOs at the Mid North Coast Local Health District regarding billing arrangements for services.

4.2 AMA(NSW) has also negotiated with the Ministry during this period:

- a. Consent amendments to the VMO Determinations made in 2014.⁵
- b. Remuneration increases for Sessional and Fee-for-Service VMOs throughout the period 2013 - 2023.⁶
- c. Negotiations to amend the Fee-for-Service Determination commenced in late 2022 and have continued in 2023 following expiry of the Fee-for-Service Remuneration agreement and the lifting of the NSW Government Wages Cap.
- d. Participation in negotiations with the NSW Ministry of Health (and the Rural Doctors Association (NSW)) regarding contracts for VMOs working in rural hospitals.

5. PUBLIC BENEFIT AND PUBLIC DETRIMENT ARGUMENTS

- 5.1. AMA(NSW) is seeking the revocation and substitution of the Authorisation to preserve the current status quo. The experience of the past 10 years, and 5 years before that, while Authorisation has been in place have demonstrated that there is public benefit to the further granting of authorisation and no demonstrated public detriment.
- 5.2. AMA (NSW), by assisting in negotiations at the local level, and with the NSW Ministry of Health, allows VMOs to continue to provide services while negotiations about issues that may otherwise compromise service delivery are undertaken. This is not a suggestion that boycotts are contemplated, but the time associated with negotiations about terms and conditions are necessarily time consuming and can take the VMOs away from clinical responsibilities.
- 5.3. The restrictive New South Wales Government Wages Policy in place for the last 10 years has significantly undermined the remuneration arrangements and the terms and conditions under which VMOs are providing services in New South Wales Public Hospitals. The challenge is to now negotiate with the Government, NSW Ministry of Health and PHOs to

⁵ *Minister for Health v Australian Medical Association (NSW) Limited* [2014] NSWIRComm 59
<https://www.caselaw.nsw.gov.au/decision/54a640003004de94513dca87>

⁶ The latest agreements are reflected in the following documents:

- a. Remuneration Rates for Sessional Visiting Medical Officers (NSW Health Information Bulletin IB2021_055) https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/IB2022_053.pdf;
- b. Remuneration Rates for Fee-for-Service Visiting Medical Officers (NSW Health Information Bulletin IB2019_026) https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/IB2021_054.pdf

ensure an increase in remuneration and terms and conditions to ensure VMOs remain in the New South Wales Public Hospital System.

- 5.5. The framework under the HSA has the requisite degree of flexibility to accommodate local variations in the terms and conditions under which VMOs provide services. To recruit and retain VMOs within the Public Hospital System, local negotiations and variations are often key.
- 5.6. Recruitment and retention of VMOs in regional and rural areas continues to be difficult, and AMA(NSW) has been a key participant in negotiations with the PHOs and NSW Ministry of Health for appropriate terms and conditions to try to ensure a VMO workforce in these areas.
- 5.7. The existing framework in the Public Hospital System provides an efficient 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.
- 5.8. 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.
- 5.9. AMA(NSW) has also developed strong working relationships with specialist craft groups. AMA(NSW) regularly meets with those groups and consults with them regarding issues confronting VMOs, including the VMO Determinations and Contracts. 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, Fee-For-Service 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.
- 5.10. Similarly, Sessional VMOs are classified according to their training and experience: VMOs are classified under the 2014 Determination based on 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.

- 5.11. 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.
- 5.12. Whilst individually negotiated contracts may be consistent with the philosophy behind independent contacting 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 any arrangement, it is the NSW Government (and ultimately the NSW taxpayers) who will have to meet the costs of those services.
- 5.13. 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.
- 5.14. Should the ACCC decide not to grant authorisation to AMA(NSW) to collectively negotiate the with PHOs and the NSW Ministry of Health this most likely will result in:
- (a) Increased costs as individuals and/or groups of medical practitioners attempt to negotiate their fees with the NSW Ministry of Health and / or PHOs.
 - (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 Staff Specialists, Career Medical Officers, junior doctors, and other doctors in the Public Hospital System.

- 5.15. It is AMA(NSW)'s submission that there is no readily identifiable public detriment should re-authorisation be granted. In relation to requests for remuneration 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. AMA(NSW) will have VMOs and the patients of the Public Health System in mind in any negotiations with the NSW Ministry of Health. There is also, if needed, the safeguard of the arbitration system under the HSA.
- 5.16. While the Arbitrator is required under the HSA to decide to make orders for the Determinations, the proceedings in 2007 were conducted cooperatively by AMA(NSW) and NSW Health with the parties negotiating and reaching agreement on many of the matters presented to the Arbitrator. The Arbitrator noted the capacity of the parties in 2007 to negotiate a consent position was highly desirable, allowing the parties to tailor outcomes which are closest to their respective needs.⁷⁷
- 5.17. The last VMO Arbitrations were in 2014 and resulted in minor amendments to the provisions regarding timeframes for the submission and payment of claims in both the Sessional and Fee-for-Service Determinations, again negotiated by AMA(NSW) and the NSW Ministry of Health for a cost-effective and expedient outcome.
- 5.18. 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.
- 5.19. The benefit of the experience of the past 15 years it has been demonstrated that the Authorisation has ensured VMO terms and conditions have remains centrally negotiated with the involvement of AMA(NSW) which provides significant benefit to the New South Wales Public Health System in terms of continuity medical services and fiscal stability. No readily identifiable public detriment can be shown from the last 15 years when Authorisation has been in place.

⁷⁷ *Australian Medical Association (NSW) Limited v Minister for Health* [2007] NSWIRComm 263
<https://www.caselaw.nsw.gov.au/decision/549f7ac33004262463a970bc>

6. THE MARKET

- 6.1. Authorisation is sought to negotiate on the part of all VMOs in the New South Wales Public Hospital System providing services to public patients.
- 6.2. Individual VMOs would be entitled to attempt to negotiate on their own behalf or seek approval to do so collectively under the Act (as they are now).
- 6.3. There has not been significant change to the market in the ten years since the current Authorisation was granted.
- 6.4. During and following the COVID-19 Pandemic we have seen medical practitioners, including VMOs, seeking to ensure a better work-life balance which has meant that many choosing to reduce their working hours across the public and private sectors. This does bring with it challenges in terms of filling rosters and so forth. This was exacerbated by border closures during the height of the Pandemic restricting the usual supply of overseas trained doctors seeking experience in Australia. As documented in the Deloitte White Paper, *Medical Workforce Pressures in New South Wales* it is predicted that the health workforce will be overwhelmed by demand in the coming years.⁸

7. DOCTRINE OF DERIVATIVE CROWN IMMUNITY

- 6.1. In its 2008 and 2013 submissions, AMA (NSW) raised its concerns regarding the doctrine of derivative crown immunity. Those concerns remain, as there has been no further clarity provided by case law or statute since 2008.
- 6.2. The High Court, in the decision of *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited & Others* [2007] HCA 38 (hereinafter '**Baxter Healthcare**'), found that the former Trade Practices Act may be enforceable against parties dealing with a non-business crown entity while exempting that Crown entity.
- 6.3. The question of whether PHOs are to be regarded as are carrying on a business in so far as entering into agreements with VMOs, AMA(NSW) and others, has not yet been tested.

⁸ https://www.amansw.com.au/wp-content/uploads/2023/02/240223_Deloitte_-NSW-Workforce-Pressures-Whitepaper-1.pdf

- 6.4. Regardless of whether PHOs are carrying on a business or not, the decision in Baxter Healthcare does not allay the concerns of AMA(NSW) when negotiating with PHOs and the NSW Ministry of Health on behalf of VMOs.
- 6.5. The High Court, in Baxter, confined the doctrine of derivative Crown immunity to legal, equitable or statutory rights. In the context of negotiations between AMA (NSW) and a PHO or the NSW Ministry of Health regarding a contract, or a future, contract, there are no concluded legal rights and as such, based on the decision in Baxter Healthcare, the protections of derivative Crown Immunity may not extend to those negotiations.

8. CONCLUSION

- 8.1. AMA(NSW) seeks revocation and substitution of the Authorisation to collectively negotiate with PHOs and the NSW Ministry of Health on behalf of VMOs in the New South Wales Public Hospital System.
 - a. NSW Health Ministry of Health the standard terms and conditions, including rates of remuneration, of contractor for VMOs engaged in the New South Wales Public Hospital system; and
 - b. PHOs in New South Wales on issues relevant to the engagement of VMOs by PHOs excluding standard Visiting Medical Officer contract terms and conditions and rates of remuneration.
- 8.2. The previous and current Authorisations which have permitted AMA(NSW) to represent and negotiate on behalf of VMOs in New South Wales 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 has operated to ensure the efficient, effective and cost-effective delivery of health services in the New South Wales Public Health System.

Dated: 15 November 2023



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Fiona Davies

Chief Executive Officer, AMA(NSW) Limited

Contact details for the list of interested parties identified by the ACCC

Local Hospital Networks (or Local Health Districts)	Contact	General Email	General Phone
Far West Local Hospital District	Brad Astill, CE	[REDACTED]	[REDACTED]
Hunter New England	Tracey McCosker, CE	[REDACTED] EA to the CE	[REDACTED]
Northern NSW Local Health District	Tracey Maisey, CE	[REDACTED]	[REDACTED]
Murrumbidgee Local Health District	Jill Ludford, CE	[REDACTED]	[REDACTED]
Western NSW Local Health District	Mark Spittal, CE	[REDACTED]	[REDACTED]
Southern NSW Local Health District	Margaret Bennett, CE	[REDACTED]	[REDACTED]
Mid North Coast Local Hospital District	Stewart Dowrick, CE	[REDACTED]	[REDACTED]
Central Coast Local Health District	Scott McLachlan, CE	[REDACTED]	[REDACTED]
Illawarra Shoalhaven Local Health District	Margot Mains, CE	[REDACTED]	[REDACTED]
Nepean Blue Mountains Local Health District	Lee Gregory, CE	[REDACTED]	[REDACTED]
Northern Sydney Local Health District	Anthony Schembri, CE	[REDACTED]	[REDACTED]
South Eastern Sydney Local Health District	Tobi Wilson, CE	[REDACTED]	[REDACTED]
South Western Sydney Local Health District	Sonia Marshall, CE	[REDACTED]	[REDACTED]
Sydney Local Health District	Teresa Anderson, CE	[REDACTED]	[REDACTED]
Western Sydney Local Health District	Graeme Loy, CE	[REDACTED]	[REDACTED]

Contact details for the list of interested parties identified by the ACCC

Government/ Associations	Contact	General Email	General Phone
Australian College of Rural and Remote Medicine	Ms Marita Cowie, CEO	[REDACTED]	[REDACTED]
Australian Consumers Association	Mr Alan Kirkland, CE	[REDACTED]	[REDACTED]
Australian General Practice Network	Leanne Wells, CEO	[REDACTED]	[REDACTED]
Australian Healthcare and Hospitals Association	Kylie Woolcock, CEO	[REDACTED]	[REDACTED]
Australian Healthcare Reform Alliance	Dr Tim Woodruff, Chair	[REDACTED]	[REDACTED]
Australian Indigenous Doctors' Association	Donna Burns, CEO	[REDACTED]	[REDACTED]
Commonwealth Department of Health and Ageing	The Hon. Mark Butler MP, Minister for Health and Aged Care	[REDACTED]	[REDACTED] Parliament Office)
Consumers Health Forum	Dr Elizabeth Deveny, CEO	[REDACTED]	[REDACTED]
Australian Medical Association	Ms Natalia Centellas, CEO	[REDACTED]	[REDACTED]
Rural Doctors Association of Australia	Peta Rutherford, CEO	[REDACTED]	[REDACTED]