



# Draft Determination and interim authorisation

Application for revocation of A91383 and the substitution of  
authorisation AA1000652

lodged by

Australian Medical Association (NSW) Limited

in respect of

Collective bargaining on behalf of visiting medical officers with NSW  
Ministry of Health and public health organisations

Authorisation number: AA1000652

13 December 2023

Commissioners: Keogh  
Lowe  
Brakey

## Summary

The ACCC proposes to grant authorisation to the Australian Medical Association (NSW) Limited to enable it to continue to collectively bargain on behalf of visiting medical officers engaged in the New South Wales public hospital system, with the NSW Ministry of Health and public health organisations.

The ACCC previously granted authorisation to AMA NSW in 2013 for the same conduct. This authorisation is due to expire on 30 December 2023.

The ACCC considers the conduct will continue to result in some public benefits, including reduced transaction times and costs, and more effective representation and retention of visiting medical officers in New South Wales. The ACCC considers the conduct is likely to result in minimal, if any, public detriments.

The ACCC proposes to grant authorisation for 10 years.

The ACCC has also granted interim authorisation to enable the AMA NSW to continue engaging in the conduct while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination before making its final decision.

### 1. The application for authorisation revocation and substitution

- 1.1. On 20 November 2023, the Australian Medical Association (NSW) Limited (**AMA NSW**) lodged with the Australian Competition and Consumer Commission (the **ACCC**) an application to revoke authorisation A91383 and substitute authorisation AA1000652 for the one revoked. The AMA NSW is seeking authorisation to enable it to continue to collectively bargain on behalf of visiting medical officers (**Visiting Doctors**)<sup>1</sup> engaged in the New South Wales public hospital system, with NSW Ministry of Health (**NSW Health**) and public health organisations,<sup>2</sup> for 10 years.
- 1.2. The application for revocation and substitution was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation, provides businesses with protection from legal action under the competition provisions in Part IV of the Act. The ACCC has a discretion to grant authorisation but must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).
- 1.3. The AMA NSW also requested interim authorisation to enable it to continue to engage in the conduct while the ACCC is considering the substantive application. Granting interim authorisation prior to the expiry of the current authorisation will have the effect of suspending its operation and substituting it with the interim authorisation such that the ACCC can consider the application for revocation and substitution. The request for interim authorisation is discussed further in section 6.

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<sup>1</sup> A 'Visiting Medical Officer' is defined in the *Health Services Act 1997 (NSW)* as a medical practitioner appointed under a service contract to provide services as a visiting practitioner for monetary remuneration for or on behalf of the public health organisation concerned.

<sup>2</sup> A 'Public Health Organisation' is defined in the *Health Services Act 1997 (NSW)* as a local health district, statutory health corporation or an affiliated health organisation in respect of its recognised establishments and recognised services.

## The Conduct

- 1.4. The AMA NSW is seeking authorisation to continue to collectively bargain on behalf of Visiting Doctors engaged in the NSW public hospital system with:
- NSW Health regarding the standard terms and conditions of contracts for Visiting Doctors, including rates of remuneration, and
  - public health organisations regarding issues relevant to the engagement of Visiting Doctors by public health organisations, excluding standard Visiting Doctor contract terms and conditions and rates of remuneration
- (the **Conduct**).
- 1.5. The AMA NSW has not sought authorisation to engage in collective boycott activity.

## 2. Background

- 2.1. The AMA NSW is an independent association representing the medical profession in NSW. It provides industrial representation for Visiting Doctors,<sup>3</sup> as well as a range of advocacy, advice and support services to the wider profession in NSW.
- 2.2. The AMA NSW has a statutory role under the *Health Services Act 1997 (NSW)* (**Health Services Act**) to recommend to the Minister for Health and/or seek the appointment of an arbitrator to determine the standard terms and conditions and rates of remuneration for Visiting Doctors.
- 2.3. Under the Health Services Act, individual Visiting Doctors cannot negotiate their standard terms and conditions of engagement or rates of remuneration with NSW Health, and legislation prohibits Visiting Doctors from negotiating with public health organisations to vary the terms and conditions or rates of pay set by NSW Health. However, Visiting Doctors can negotiate some components with public health organisations such as on call hours, issues with equipment and staffing.
- 2.4. Public health organisations are not individual hospitals but rather area health services which manage the operation of a number of hospitals within a region.
- 2.5. In 2008, uncertainty relating to the contractual arrangements of Visiting Doctors in NSW because of changes to legislation<sup>4</sup> prompted the AMA NSW to first lodge an application for authorisation. While some clarity was provided through further legislative changes,<sup>5</sup> the AMA NSW submits that should the regulation be amended in the future, there would again be uncertainty regarding its role in negotiating on behalf of Visiting Doctors in NSW.
- 2.6. Moreover, while it appears that the Health Services Act currently enables the AMA NSW to represent Visiting Doctors in determining the level of fees and associated terms and conditions with NSW Health, it does not provide for the AMA NSW to do so with public health organisations.
- 2.7. The AMA NSW submits that granting authorisation will provide certainty to Visiting Doctors in NSW, NSW Health and public health organisations about the framework for negotiation of the arrangements under which Visiting Doctors provide services.

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<sup>3</sup> Section 271, Industrial Relations Act 1996 (NSW).

<sup>4</sup> Introduction of the *Independent Contractors Act 2006 (NSW)*.

<sup>5</sup> Independent Contractors Amendment Regulations 2011 (No.1) (NSW) which preserved Parts 1 to 4 of Chapter 8 of the Health Services Act.

### 3. Consultation

- 3.1. Given that the application for revocation and substitution involves the same Conduct that has previously been authorised in 2008 and 2013, and that there has been no objections from NSW Health or public health organisations with respect to the previous authorisations, the ACCC did not invite initial submissions from potentially interested parties prior to issuing this draft determination.
- 3.2. The ACCC now invites submissions in response to this draft determination by 31 January 2024.

### 4. ACCC assessment

- 4.1. The AMA NSW has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act,<sup>6</sup> 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 be likely to result.
- 4.2. To assist with the assessment of the Conduct, the ACCC considers:
  - the relevant area of competition likely to be affected is the provision of medical services to public health organisations in NSW; and
  - that the likely future without the Conduct would involve some legislative uncertainty with regard to the ability of the AMA NSW to represent Visiting Doctors in negotiations with NSW Health and public health organisations.

#### Public benefits

- 4.3. 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 in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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.<sup>7</sup>*

- 4.4. The AMA NSW submits that the experience of the past 15 years demonstrates that there is a public benefit to the further granting of authorisation.
- 4.5. The ACCC has considered the following claimed benefits:
  - reduced transaction times and costs
  - effective representation and retention of Visiting Doctors in NSW.

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<sup>6</sup> See subsection 91C(7).

<sup>7</sup> 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.

## **Reduced transaction times and costs**

- 4.6. The AMA NSW submits that the Conduct is likely to reduce the transaction times and costs for NSW Health and public health organisations associated with negotiations undertaken with individual Visiting Doctors. Further, this will allow Visiting Doctors to continue to provide services while negotiations about issues that may otherwise compromise service delivery are undertaken on their behalf.
- 4.7. In support of this, the AMA NSW provided examples (including on a confidential basis) of successful negotiations it has engaged in with NSW Health and public health organisations over the last 10 years where collective negotiations have resulted in an expedited negotiation process.
- 4.8. The ACCC has previously recognised that there are transaction costs associated with contracting and these transaction costs can be lower where a single negotiation process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. Collective bargaining also allows for transaction costs to be shared between those parties collectively negotiating which in turn may allow for an increased level of input into negotiations and result in more efficient outcomes.
- 4.9. The ACCC considers that the Conduct is likely to result in a small public benefit in the form of reduced transaction times and costs relative to a situation where there is individual negotiations. However, the ACCC considers that this benefit is likely to be small in comparison to a future without authorisation where NSW Health continues to set standard terms and conditions.

## **Effective representation and retention of Visiting Doctors in NSW**

- 4.10. The AMA NSW submits that recruitment and retention of Visiting Doctors in regional and rural areas continues to be difficult. In this respect, the AMA NSW submits that its collective negotiations with NSW Health and public health organisations for appropriate terms and conditions has had a positive impact on the retention and recruitment of Visiting Doctors in these areas.
- 4.11. The AMA NSW submits that it endeavours to negotiate terms and conditions, and rates of remuneration, in the best interests of all Visiting Doctors while objectively balancing this with the collective public interest. In support of this, the AMA NSW provided examples (including on a confidential basis) of successful negotiations where it was able to effectively raise concerns on behalf of a group of Visiting Doctors and secure agreement which, in turn, has had a positive influence on the retention of Visiting Doctors in the region.
- 4.12. The ACCC has previously identified that individual businesses, in this case contractors, may have a limited degree of input into their contracts and these circumstances do not always lead to the most efficient contracts. The ACCC has often accepted that collective bargaining arrangements can provide participants with an opportunity for greater input into contracts and accordingly deliver the opportunity for more efficient outcomes.
- 4.13. The ACCC considers that the Conduct may, to some extent, enhance the effective representation of Visiting Doctors in dealings with NSW Health and public health organisations. In turn, this is likely to lead to more efficient bargaining outcomes and have a positive influence on the attraction and retention of Visiting Doctors in the NSW health system.

## Public detriments

4.14. 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.*<sup>8</sup>

4.15. The AMA NSW submits there is no readily identifiable public detriment should the Conduct be authorised.

4.16. The ACCC considers that the Conduct is likely to result in minimal, if any, public detriments because:

- The level of individual negotiations between Visiting Doctors and NSW Health and public health organisations is likely to be low without collective bargaining. Therefore, the difference between the level of competition in the provision of medical services to public health organisations in NSW with or without the Conduct is also likely to be low.
- While the coverage and composition of the bargaining group is extensive, the legislative requirements of the NSW public health system limit any potential anti-competitive effect.
- Participation in the collective bargaining is voluntary and there is no collective boycott activity.

## Balance of public benefit and detriment

4.17. For the reasons outlined in this draft determination, and on the information currently available, the ACCC is satisfied 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

4.18. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>9</sup> 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.

4.19. In this instance, the AMA NSW seeks authorisation for 10 years.

4.20. Given that the Conduct has previously been authorised in 2008 and 2013, including most recently for 10 years, the ACCC considers that the time period sought is appropriate.

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

<sup>9</sup> Subsection 91(1)

## 5. Draft determination

### The application

- 5.1. On 20 November 2023, the AMA NSW lodged an application to revoke authorisation A91383 and substitute authorisation AA1000652 for the one revoked. This application for authorisation AA1000652 was made under subsection 91C(1) of the Act.
- 5.2. The AMA NSW seeks authorisation to enable it to continue to collectively bargain on behalf of Visiting Doctors engaged in the NSW public hospital system with:
  - NSW Health regarding the standard terms and conditions of contracts for Visiting Doctors, including rates of remuneration, and
  - public health organisations regarding issues relevant to the engagement of Visiting Doctors by public health organisations, excluding standard Visiting Doctor contract terms and conditions and rates of remuneration(the **Conduct**).
- 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 Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to 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, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisation A91383 and grant authorisation AA1000652 in substitution. Authorisation AA1000652 is for the Conduct, as defined in paragraph 5.2.
- 5.8. For the avoidance of doubt, authorisation AA1000652 does not extend to any collective boycott activity.
- 5.9. The ACCC proposes to grant authorisation AA1000652 in relation to Division 1 of Part IV of the Act and section 45 of the Act for 10 years.
- 5.10. This draft determination is made on 13 December 2023.

## 6. Interim authorisation

- 6.1. The ACCC has decided to suspend the operation of authorisation A91383 and has granted interim authorisation in substitution for the authorisation suspended.

- 6.2. The AMA NSW is seeking interim authorisation to enable it to continue to engage in the Conduct while the ACCC is considering the substantive application, where the current authorisation (A91383) expires on 30 December 2023.
- 6.3. The ACCC has decided to suspend the operation of A91383 and grant interim authorisation in its place for the following reasons:
- Interim authorisation will maintain the status quo, allowing the AMA NSW to continue to collectively bargain on behalf of Visiting Doctors engaged in the NSW public hospital system, with NSW Health and public health organisations, while the ACCC is considering the substantive application.
  - The competition in the relevant area of competition is unlikely to be altered if interim authorisation is granted due to the Conduct being in place and authorised since 2008.
  - For the reasons set out in this draft determination, the ACCC considers the Conduct for which interim authorisation is sought is likely to result in public benefits, which would outweigh the likely limited public detriment.
- 6.4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for revocation and substitution is withdrawn.

## 7. Next steps

- 7.1. 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.