Australian Competition Tribunal

Applications for review of Honeysuckle Health Buying Group authorisation determination [2022] ACompT 3

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| Review from: | Applications by National Association of Practising Psychiatrists and Rehabilitation Medicine Society of Australia and New Zealand Ltd for review of Authorisation Determination AA1000542 made on 21 September 2021 in favour of Honeysuckle Health Pty Ltd and nib health funds limited in respect of the Honeysuckle Health Buying Group |
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| File number: | ACT 5 of 2021 |
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| Determination of: | **O'BRYAN J (Deputy President)** |
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| Date of judgment: | 25 May 2022 |
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| Catchwords: | **COMPETITION –** application for review ofauthorisationdetermination made by the Australian Competition and Consumer Commission under s 101 of the *Competition and Consumer Act* *2010* (Cth) – applications for intervention |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 88(1), 101(1A), 109(2) |
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| Cases cited: | *Application by Flexigroup Limited* [2020] ACompT 1  *Application by Fortescue Metals Group Ltd* [2006] ACompT 6  *Application by Independent Contractors Australia* [2015] ACompT 1  *Application by Sea Swift Pty Limited* [2015] ACompT 5 |
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| Number of paragraphs: | 37 |
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| Date of last submissions: | 24 May 2022 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicants: | P Thiagarajan with J Gray (Pro Bono) |
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**IN THE AUSTRALIAN COMPETITION TRIBUNAL**

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|  | | ACT 4 of 2021  ACT 5 of 2021 |
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| RE: | Applications for review of Authorisation Determination AA1000542 made on 21 September 2021 in favour of Honeysuckle Health Pty Ltd and nib health funds limited in respect of the Honeysuckle Health Buying Group | |
| ApplicantS: | **National Association of Practising Psychiatrists and Rehabilitation Medicine Society of Australia and New Zealand Ltd** | |

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| TRIBUNAL: | O’BRYAN J (DEPUTY PRESIDENT) |
| DATE OF DETERMINATION: | 25 MAY 2022 |

THE TRIBUNAL DETERMINES AND DIRECTS THAT:

1. The Australian Medical Association be granted leave to intervene in the proceeding.
2. The applications by the Royal Australian and New Zealand College of Psychiatrists (**RANZCP**) and by the Australian Pain Society (**APS**) for leave to intervene be refused.
3. Each of the RANZCP and the APS be granted leave to file and serve a written submission (not exceeding 12 pages) on or before 4.00pm on Friday 15 July 2022.

REASONS FOR DETERMINATION

O’BRYAN J:

## Introduction

1. On 8 October 2021, each of the National Association of Practising Psychiatrists (**NAPP**) and Rehabilitation Medicine Society of Australia and New Zealand Ltd (**RMSANZ**) (collectively, the **Review Applicants**) filed an application pursuant to s 101 of the *Competition and Consumer Act* *2010* (Cth) (**Act**) for a review of authorisation determination number AA1000542 granted by the Australian Competition and Consumer Commission (**ACCC**) on 21 September 2021 under s 88(1) of the Act in favour of Honeysuckle Health Pty Ltd (**Honeysuckle Health**) and nib health funds limited (**nib**) (collectively, the **Authorisation Applicants**) in respect of the Honeysuckle Health Buying Group (**HH Buying Group**).
2. By its determination, the ACCC authorised the Authorisation Applicants to form and operate a buying group to collectively negotiate and manage contracts with healthcare providers (including hospitals and medical specialists) on behalf of private health insurers (**PHIs**), medical insurance providers and other payers of healthcare services for a period of five years until 13 October 2026. Authorisation was granted with a condition that the Authorisation Applicants must not supply services to the following PHIs which were described as “**Major PHIs**” in the determination: Medibank, Bupa, HCF and HBF (in Western Australia).
3. On 17 December 2021, the Tribunal made directions for the preparation of the proceeding for hearing by the Tribunal. Relevantly, the Tribunal directed the ACCC to give written notice of the application for review to all persons who made submissions to the ACCC in connection with its authorisation determination and to advise them that any application for leave to intervene in these proceedings, and any material relied on in support of any application, must be filed and served on or before Tuesday, 1 February 2022. No applications to intervene were made in response to that notification. The ACCC subsequently discovered that a number of submissions to the ACCC had been overlooked, and a further notice was given to the persons who made those submissions. Again, though, no applications to intervene were made in response to that notification.
4. The review has been set down for hearing by the Tribunal on Monday, 1 August 2022 for 5 days. In accordance with the Tribunal’s directions, on 20 April 2022 the Authorisation Applicants filed and served their Statement of Facts, Issues and Contentions. By that document, the Authorisation Applicants notified the Review Applicants and the Tribunal that, at the hearing of the review, they will contend that the Tribunal should affirm the ACCC decision to grant the authorisation and otherwise amend the authorisation such that:
5. the period of authorisation is extended from five to ten years; and
6. the condition preventing Major PHIs from joining the HH Buying Group is removed in respect of medical specialist contracting.
7. A review of the ACCC’s determination by the Tribunal is a *de novo* review and the Tribunal must reach its own decision whether authorisation should be granted and for what period and on what conditions. It follows that it is open to the Authorisation Applicants, on this review, to seek to persuade the Tribunal that authorisation should be granted on the basis originally sought from the ACCC and, specifically, that the period of authorisation should be ten years and the ACCC’s condition of authorisation concerning Major PHIs should be removed. That is so even though the Authorisation Applicants did not themselves apply to review the ACCC’s authorisation determination.
8. Nevertheless, at a directions hearing held on 12 May 2022, the Tribunal concluded that persons who made submissions to the ACCC in connection with its authorisation determination may not have been aware that the Authorisation Applicants may seek to vary the authorisation to extend its duration and to remove the condition concerning Major PHIs. To ensure procedural fairness, the Tribunal directed the ACCC to give a further written notice to all persons who made submissions to the ACCC in connection with its authorisation determination advising them:
9. that in these proceedings, the Authorisation Applicants will contend that the Tribunal should affirm the ACCC decision to grant authorisation but vary the authorisation such that:
   1. the period of authorisation is extended from five to ten years; and
   2. the condition preventing Major PHIs from joining the HH Buying Group is removed in respect of medical specialist contracting; and
10. that they may apply for leave to intervene by 4.00pm on Thursday, 19 May 2022.
11. In response to that notice, applications for leave to intervene were received by the Tribunal from the Australian Medical Association (**AMA**), the Royal Australian and New Zealand College of Psychiatrists (**RANZCP**) and the Australian Pain Society Limited (**APS**).
12. For the reasons that follow, the Tribunal grants the AMA leave to intervene but does not grant the RANZCP or the APS leave to intervene.

## The Authorisation

1. In the ACCC’s determination, the formal terms of the authorisation were stated as follows:

**Conduct authorised**

5.6. The ACCC grants authorisation AA1000542 to the following entities:

(a) Honeysuckle Health Pty Ltd and nib Health Funds Ltd (collectively, the **Applicants**);

(b) PHIs registered under the *Private Health Insurance (Prudential Supervision) Act 2015* (Cth) except for the following specified entities, and any related body corporate (within the meaning of s4A of the Act), acquirer or successor entity of any of these specified entities:

* Medibank Private Limited,
* Bupa HI Pty Ltd,
* Hospitals Contribution Fund of Australia Limited, and
* HBF Health Limited, with respect to its operations within Western Australia (for clarity, HBF Health Limited is authorised with respect to its operations outside of Western Australia),

(collectively, **Excluded Entities**);

(c) international medical and travel insurance companies;

(d) government and semi-government payers of healthcare services such as workers’ compensation and transport accident scheme operators, and the Department of Veterans Affairs scheme (DVA); and

(e) any other payer of health services or goods other than an Excluded Entity, as notified by HH to the ACCC,

(collectively, **Authorised Entities**).

5.7. Authorisation AA1000542 applies in relation to the following conduct:

(a) the formation and operation of the HH Buying Group by HH, including the BCPP, involving the provision of services to Authorised Entities; and

(b) the acquisition of contracting services by Authorised Entities from HH.

5.8. Authorisation is granted in relation to Division 1 of Part IV of the Act, and sections 45 and 47 of the Act.

5.9. The ACCC grants authorisation with the following condition until 13 October 2026.

**Condition of authorisation**

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

5.11. The ACCC grants this authorisation with the condition that the Applicants must not supply services to any Excluded Entity.

1. The conduct that is authorised is defined by paragraph 5.7, extracted above, as “the formation and operation of the HH Buying Group by HH, including the BCPP, involving the provision of services to Authorised Entities” and “the acquisition of contracting services by Authorised Entities from HH”. The “BCPP” is the Broad Clinical Partners Program which is described in the determination as a program “under which patients would receive a no gap experience for the whole episode of care for a surgical procedure” (at [1.5]).
2. The above definition of the authorised conduct is not informative as to the nature and scope of the authorised conduct. To understand the nature and scope, it is necessary to have regard to other parts of the determination. The determination included the following description of the proposed conduct to be authorised:

**The Proposed Conduct will involve four categories of contracting**

1.24. The four broad categories of contracting intended to be covered by the HH Buying Group are:

(a) *Hospital contracting* – Hospital purchaser provider agreements (**HPPAs**), where hospitals agree not to charge out-of-pocket costs to customers of healthcare payers (**Customers**), and are used by PHIs to provide financial certainty to their customers

(b) *Medical specialist contracting* – Medical purchaser provider agreements (**MPPAs**), used by health insurers to provide financial certainty to Customers in relation to potential out-of-pocket costs for specialist services (e.g. radiologists, pathologists, surgeons)

(c) *Medical gap schemes* – where health insurers pay a set fee for each type of professional service provided to their Customers in hospital, and medical specialists agree not to charge Customers an out-of-pocket amount or agree to limit the amount the Customer is charged at a fixed amount (e.g. $500), and

(d) *General treatment networks* – arrangements with Providers for services that are not provided in hospital (e.g. physiotherapists, dentists, optometrists) that are covered under the 'extras' component of private health insurance products.

**Services provided by HH in each category of contracting**

1.25. For the four types of contracting, the Proposed Conduct will involve HH engaging in the activities outlined below.

***For hospital and medical specialist contracting – data analytics and contract negotiations***

1.26. Initially, HH proposes to engage in collective negotiations with Providers that currently have HPPAs and MPPAs with nib in order to agree to new contracts with Participants based on the Provider's existing agreement with nib.

1.27. HH intends to negotiate new HPPAs and MPPAs on an ongoing basis on behalf of nib and Participants as the nib-based contracts expire or enter into contracts with new Providers. HH intends to act as the lead agent in the negotiations after consultation with the Participants. This will involve:

* aggregation of Participant claims data for the Provider and undertaking data analytics to establish benchmarks relating to quality of service, price and application of services
* conducting collective commercial negotiations on behalf of Participants, and
* once HH receives instructions that a Participant wishes to enter into an HPPA or MPPA on the negotiated terms and conditions, coordinate the execution of the HPPA or MPPA between the Participant and the Provider (or execute the contract if HH has signing authority).

1.28. The HH Buying Group will be voluntary and Participants will individually decide whether to enter into an HPPA or MPPA based on the terms and conditions negotiated by HH.

1.29. If they choose to do so, Participants will execute an agreement with the Provider. HH will not be party to the agreement. HH will then undertake contract administration services for that agreement.

1.30. If a Participant does not wish to enter into an agreement on the negotiated terms, the Applicants submit that Participants can negotiate directly with Providers and enter into agreements independently of the HH Buying Group on their own terms and conditions.

1.31. The Proposed Conduct will not prevent Providers from offering services to other insurers, buying groups or healthcare payers that are not part of the HH Buying Group. Further, it will not restrict the terms and conditions upon which Providers are entitled to enter those agreements. Similarly, Providers will be able to contract with Participants individually or with a different set of Participants to those proposed by the HH Buying Group.

***For the medical gap scheme and general treatment networks – management and administration of the schemes***

1.32. HH intends to engage with Providers registered in nib’s existing medical gap schemes and general treatment network to notify them of the extension of these schemes to Participants.

1.33. On an ongoing basis, HH will manage the medical gap scheme and general treatment networks, review the schedules of rates and terms and conditions, and actively manage the registered Providers of the schemes and networks. This includes ensuring adherence to requirements around registration, qualification and other terms and conditions of the schemes and networks.

***For all categories – contract administration, dispute resolution and ongoing data analytics***

1.34. HH intends to provide contract administration and management services, and dispute resolution services to Participants for the contracting services that they have engaged HH to undertake.

1.35. HH will also provide Participants with data analytic services as part of contract negotiations but also on an ongoing basis to assess the performance of each Provider and benchmark their performance for each Participant against the aggregated data for the HH Buying Group. This would include an assessment of the following:

* provider quality
* provider compliance
* benefits paid to the Provider by Participants
* access to the Provider’s services, and
* efficiency and value of treatment provided by the Provider.

1.36. Subject to confidentiality and privacy obligations, HH would also share information concerning one Participant with the HH Buying Group to the extent the information is related to agreements facilitated by HH or services provided by HH to the Participants. This could include information such as contract breaches by a Provider, or the discovery of fraudulent claims made by a Provider in relation to an agreement with one Participant, which would therefore be relevant to other Participants who contract with that Provider.

**The Proposed Conduct involves ‘value-based’ contracting**

1.37. The Proposed Conduct involves a value-based contracting model, which HH describes as comparing health outcomes with the costs of providing services to determine the value of the service from the healthcare payer’s perspective.

1.38. Under this model, HH would initially compare the value of services from a particular Provider against peers in the local region, State or Territory and nationally. Based on the outcomes and quality of care achieved by the Provider, the cost of the services would be adjusted (either through price or structure) to match the value being delivered by the Provider.

1.39. Information sharing and data analytics between members of the HH Buying Group will provide the necessary information to assess the performance of Providers and benchmark their performance for each Participant against the aggregated data for the HH Buying Group.

1.40. The Applicants state the BCPP, which provides a no gap experience to consumers for the suite of services involved in knee and hip replacements with certain medical specialists, is an example of value-based contracting.

…

1. Although not included as a condition of the authorisation, the determination stated (at [1.23]) that the Authorisation Applicants had not sought authorisation for the HH Buying Group to engage in the collective boycott of any services of a healthcare provider and that, as a consequence, the HH Buying Group is not permitted to boycott any healthcare providers that refuse to deal with the group. The determination did not describe or define the expression “boycott” and what conduct might be included within that expression.

## Relevant principles concerning intervention

1. Section 109(2) of the Act provides that the Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal. The section has been considered by the Tribunal on a number of occasions.
2. In *Application by Fortescue Metals Group Ltd* [2006] ACompT 6 (***Fortescue***) (also reported as *Re Fortescue Metals Group Ltd* (2006) 203 FLR 28), the Tribunal made the following observations about s 109(2) (at [30], [35] and [43]):

[30] There is no “sufficient” or “real and substantial” interest requirement found in s 109(2) and the discretion to grant leave to intervene reposed in that subsection is not limited by the connotation of such expressions. The discretion is not constrained by any limitation and it is not easy, nor is it appropriate, to define or delimit the categories of persons who may be given leave to intervene under s 109(2). It does not follow that in exercising its discretion pursuant to s 109(2) of the Act, there are no limitations or restrictions on the persons who wish to intervene or participate in reviews by the Tribunal.

…

[35] … an applicant for leave to intervene or participate under s 109(2) … must, as a minimum, be able to establish some connection with, or interest in, the subject matter of the proceeding which discloses that it is not merely an officious bystander. What the nature of that connection or interest must be, will vary from case to case. It is not necessary that an applicant be required to establish that its business interests or business activities or prospects may be detrimentally affected by the subject matter of the proceeding or its outcome. … However the connection should usually be one that discloses that the applicant for leave to intervene has some interest which is ignited by the proceeding, which is an interest other than that found in members of the general community.

…

[43] Although s 109(2) is not couched in terms of any particular “interest” being required to be demonstrated before leave should be granted, I consider that it is necessary for some connection with the subject matter of the application for review to be demonstrated. Obviously an officious bystander would not be given leave to intervene, but it is necessary to show some particular interest in the subject matter of the application. I do not consider that it is necessary for an applicant for intervention to go as far as to show that it may be affected in some way by the declaration but it is necessary, as I have noted earlier, to show that some interest touching and concerning it can be demonstrated.

1. Similarly, in *Application by Independent Contractors Australia* [2015] ACompT 1 (also reported as *Re Independent Contractors Australia* (2015) 292 FLR 80), the Tribunal proceeded on the basis that there is no “sufficient” or “real and substantial” interest requirement, and that the discretion to grant leave to intervene is not limited by the introduction or application of such expressions. However, the Tribunal recognised that (at [28]):

… it is important to consider the extent to which the proposed intervenor has indicated that it can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the application or the submissions to be made by them, as well as considering how the proposed intervenor might be affected by the Authorisation or the outcome of the application to the Tribunal.

1. It should also be noted that, under s 109(2), the Tribunal may permit intervention upon such conditions as the Tribunal thinks fit. In *Fortescue*, the Tribunal exercised that power in relation to Rio Tinto’s intervention, explaining (at [78]):

Rio Tinto will therefore be given leave to participate in the proceeding and the review but not on the basis that it will be at large as to its participation in the review or as to the submissions it may make or as to the material it may place before the Tribunal. The Tribunal wishes to ensure that there is no unnecessary duplication of submissions and evidentiary material placed before it. The order will be that subject to the Tribunal’s power to direct the nature and extent of its participation in the proceeding and the review, Rio Tinto be granted leave to intervene in the proceeding and participate in the review.

1. Similarly, in *Application by Sea Swift Pty Limited* [2015] ACompT 5, the Tribunal limited the intervention of the Maritime Union of Australia to one issue only and to making written and oral submissions only, with the right to apply to the Tribunal to adduce evidence and to cross‑examine (at [5]).
2. Interested third parties may be able to advance their interests sufficiently by making submissions to the Tribunal, without being granted the rights of an intervener: see *Application by Flexigroup Limited* [2020] ACompT 1 (***Flexigroup***) at [14], citing *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1 (at [151], [272] and [392]) and *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 (at [53]).
3. In *Flexigroup* at [20], the Tribunal observed that it would be wrong to refuse permission to a person to intervene for the reason that the ACCC is able to represent that person’s interests in the proceeding. Such an approach would be to misapprehend the role of the ACCC in the proceeding. The ACCC is not a party or protagonist in the proceeding. Its role is to assist the Tribunal in an impartial manner, regardless of any conclusions it may have drawn from its earlier analysis in the matter. In the absence of a contradictor, the ACCC may be required to test the evidence of the applicant, present contrary material and make submissions putting forward an opposing point of view. In the presence of a contradictor, however, the role of the ACCC should properly be more confined.

## Application for intervention by the AMA

1. The AMA is the peak professional body for doctors in Australia, advocating on behalf of doctors and the healthcare needs of patients and communities, as well as working with Federal and State governments to develop and influence health policy to provide the best outcomes for doctors, their patients, and the community. By its application to intervene, the AMA submitted that the conduct the subject of the authorisation application will, if authorised, have a direct and immediate impact on the commercial arrangements underpinning the provision of inpatient and day patient services by specialist medical practitioners in private and public hospitals in Australia. As the peak lobby body representing the national medical profession, the AMA is best placed to address the potential implications of the proposed conduct across the medical profession.
2. The AMA further submitted that it is intimately familiar with the operation of the private health insurance regime, having been centrally involved in representing the views of its members in the course of the development and introduction of the *Private Health Insurance Act 2007* (Cth) and the *Health Legislation Amendment (Gap Cover Schemes) Act 2000* (Cth), both Acts being central to the issues raised by the application for authorisation. The AMA is also able to address the broader question raised by the authorisation application with respect to the participation of Major PHIs in the conduct sought to be authorised. The AMA made multiple submissions to the ACCC expressing concern at the level of market power that would flow from including the Major PHIs in the HH Buying Group and its opinion on the public detriment that would result.
3. The AMA submitted that it is able to add to, and supplement, any evidence led by the Review Applicants, which evidence is likely to include material in relation to:
4. the structure of the differing markets (geographic and functional) likely to be affected by the proposed conduct;
5. the appropriate weight attributable to the public benefits asserted by the Authorisation Applicants;
6. the role and importance of no gap and known gap arrangements between private health insurers and specialist medical practitioners; and
7. the impact of the Major PHIs participating in the proposed conduct.
8. The AMA’s application was not opposed by any party to the proceeding.
9. The Tribunal accepts the AMA’s submissions and will grant leave to the AMA to intervene in the proceeding.

## Application for intervention by the RANZCP

1. The RANZCP is a membership organisation that prepares doctors to become psychiatrists, supports and enhances clinical practice, provides advocacy for patients, and advises governments on mental health care. By its application to intervene, the RANZCP expressed concern about the variations to the authorisation that will be sought by the Authorisation Applicants, but noted that it must consult with its members. The RANZCP did not otherwise indicate whether and to what extent the RANZCP intends to adduce evidence in the proceeding or otherwise add to the information and material before the Tribunal.
2. The Tribunal notes that the RANZCP made a submission to the ACCC on 26 July 2021. The submission was relatively brief, but expressed concerns that:
3. the formation of the HH Buying Group facilitates the concentration of the market power of up to 60% of PHIs to enter into selective contracting with healthcare providers, which the RANZCP argues reduces competition;
4. the central concept of the proposal includes elements that will reduce access to care and treatment; and
5. the approval of the HH Buying Group proposal will allow PHIs and payers to exert immense market force to selectively contract healthcare providers and thus promulgate managed-care that will significantly disadvantage patients with mental disorders in accessing their choice of psychiatrist, hospital and type of care.
6. The Authorisation Applicants opposed the grant of leave to intervene to the RANZCP, submitting that the Tribunal cannot be satisfied that the RANZCP can usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the proceeding or the submissions to be made by them. In that regard, the Authorisation Applicants submitted that:
7. The RANZCP has not identified any evidence that it intends to file, let alone any evidence that could usefully add to, or supplement, the evidence likely to be filed by the parties.
8. The RANZCP’s application does no more than state that it proposes to make a submission to the Tribunal. It does not identify with any particularity the submissions it proposes to make and how, if at all, those submissions could usefully add to, or supplement, the submissions likely to be made by the parties, or those submissions that are already before the Tribunal. The Authorisation Applicants argued that, to the extent the RANZCP proposes to reiterate the submission it made to the ACCC, that submission is already before the Tribunal; leave to intervene is not required for the Tribunal to take that submission into account, pursuant to s 107(2) of the Act.
9. To the extent that the interests of RANZCP in these proceedings can be discerned, the Tribunal should be satisfied that those interests can be protected by existing parties. As a professional body representing psychiatrists, there is no reason to believe that its interests in the proceeding are any different from, or not capable of being protected by, the NAPP (as an existing party representing psychiatrists) and by the AMA (if it is granted leave to intervene) as the peak body representing medical practitioners.
10. The intervention of RANZCP is likely to increase the risk of duplication and consequently the time and cost of the proceedings, noting in particular that RANZCP seeks an extension of time to file submissions.
11. The Authorisation Applicants submitted that the RANZCP’s application to intervene should be refused or, alternatively, the Tribunal should only permit RANZCP to file submissions with the Tribunal and should not grant RANZCP the rights of an intervener.
12. The Tribunal accepts that the RANZCP is a membership organisation that represents doctors (psychiatrists) that will be directly affected by the conduct the subject of the authorisation. The Tribunal also accepts that the RANZCP may have information and knowledge about the operation of the health system, specifically as it relates to mental health, that may be relevant to the issues that arise in this proceeding. However, the Tribunal accepts the Authorisation Applicants’ submission that the role that the RANZCP seeks to take in this proceeding has not been articulated in its application for intervention. On the material before it, the Tribunal is unable to form any view as to whether the RANZCP will usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the proceeding. Furthermore, the Tribunal is satisfied that the RANZCP’s interests in these proceedings will be adequately represented by the NAPP and the AMA as intervener.
13. Having regard to the foregoing matters, and to minimise duplication in the proceeding, the Tribunal will not permit the RANZCP to intervene in the proceeding. The Tribunal will, however, make a direction permitting the RANZCP to file a submission (as a third party) to which the Tribunal may have regard in making its decision.

## Application for intervention by the APS

1. The APS was established in 1979 by members of a multidisciplinary team of pain management professionals and currently has 800 members. It is the Australian Chapter of the International Association for the Study of Pain. By its application to intervene, the APS expressed concern about the variations to the authorisation that will be sought by the Authorisation Applicants and stated that it supported the ACCC determination. The APS did not otherwise indicate whether and to what extent it intended to adduce evidence in the proceeding or otherwise add to the information and material before the Tribunal.
2. The Tribunal notes that the APS made a submission to the ACCC on 8 June 2021. The submission was brief and stated that the APA shares the concerns raised by groups such as the Australian Orthopaedic Association, the RMSANZ, the Australian Dental Association, Occupational Therapy Australia, the AMA, Catholic Health and the Australian Society of Anaesthetists that the use of a value-base contracting model will:
3. prevent parties from being able to choose their source of primary care;
4. lead to a concentration of allied health services and create *de facto* panels of approved providers, further reducing health carer and patient choice and access to care;
5. create a vertically integrated managed care arrangement; and
6. result in the imposition of penalties on health care providers and hospitals who are deemed not to have met predetermined outcomes.
7. The Authorisation Applicants made largely the same submissions against the APS’s application to intervene that they made in respect of the RANZCP’s application. In short, the Authorisation Applicants submitted that:
8. the Tribunal cannot be satisfied that the APS could usefully or relevantly add to, or supplement, the evidence and submissions of the parties to the proceeding;
9. like the RANZCP, the APS’s application to intervene did not identify any evidence that it proposes to file and its application to intervene does no more than reiterate the brief two page submission that it made to the ACCC (and which is already before the Tribunal), and which expressly relied on, and agreed with, the submissions made to the ACCC by the RMSANZ and the AMA (amongst others); and
10. there is no reason to believe that the APS’s interests as a medical professional body representing pain specialists will not be capable of being protected by the Review Applicants and by the AMA, if joined.
11. The Authorisation Applicants submitted that the APS’s application to intervene should be refused, or, alternatively, the Tribunal should only permit APS to file submissions with the Tribunal, without being granted the rights of an intervener.
12. The Tribunal’s conclusions with respect to the application by the APS are the same as with respect to the RANZCP. The Tribunal accepts that the APS is an organisation that represents medical professionals that will be directly affected by the conduct the subject of the authorisation. The Tribunal also accepts that the APS may have information and knowledge about the operation of the health system, specifically as it relates to the management of chronic pain, that may be relevant to the issues that arise in this proceeding. However, the role that the APS seeks to take in this proceeding has not been articulated in its application for intervention and the Tribunal is unable to form any view as to whether the APS will usefully or relevantly add to, or supplement, evidence proposed to be led by the parties to the proceeding. The Tribunal is satisfied that the APS’s interests will be adequately represented by the Review Applicants and the AMA.
13. Having regard to the foregoing matters, and to minimise duplication in the proceeding, the Tribunal will not permit the APS to intervene in the proceeding. The Tribunal will, however, make a direction permitting the APS to file a submission (as a third party) to which the Tribunal may have regard in making its decision.

## Conclusion

1. In conclusion, the Tribunal permits intervention by the AMA, but does not permit intervention by the RANZCP and APS. The RANZCP and APS will be permitted to file a submission that the Tribunal may have regard to in considering the application for review.

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| I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Determination of the Honourable Justice O'Bryan. |

Associate:

Dated: 25 May 2022