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Dear Dr Woollard

VMO FFS CONTRACTS AND PAYMENT TO PRACTICE COMPANIES

Thank you for your telephone calls and email seeking my advice on problems being experienced by rural doctors and practice companies in relation to the current NSW arrangements for payment for VMO services in rural hospitals.

As we discussed, the problems arise from the inter-relationship of the Health Services Act 1997, the standard VMO FFS contract, the VMO Contract of Liability Coverage, tax law, GST law and for some doctors, immigration law.

It is my understanding that these problems are also a concern for rural Area Health Services and that there is a mutual desire by the RDA and the Areas to find a practical solution to these problems.

An important contextual factor is the change in practice models for rural medical practices. In many small towns, all of the doctors will practice from the one medical practice. In other towns the doctors also work from a group practice but there is more than one group practice in the town. Provision of staff, premises, billing and associated practice management for the group practice is undertaken by one practice company.

The nature of the contractual relations between the medical practitioner and the group practice company vary. Options include the medical practitioner being an employee, an independent contractor, contracting with the group practice company through another company and partner in a partnership.

Due to the continuing need to recruit doctors from overseas, immigration regulations are also playing a role. For a growing number of overseas doctors permitted to enter Australia, their visa does not permit them to work for themselves or conduct their own practice as the visa restricts them to working for the sponsoring group practice company.

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This presents a unique problem as the current NSW Health framework does not permit Areas to contract with such doctors using the rural VMO FFS standard service contract if the contracting party is the group practice company and the doctor is not permitted to contract as an individual or through a special purpose practice company established by them due to their visa condition.

Key questions

Based on our telephone discussions and my discussion with an Area manager, it appears that the key questions you are asking are:

1 Does a VMO or a VMO's practice company have to have an ABN?

The standard VMO FFS contract requires that the VMO is registered for GST purposes and has an ABN (clause 5.3 of the standard contract).

The standard contract with a practice company also contains the same wording, even though the introduction and clauses 3.2 and 8 of the contract make it clear that it is the practice company that renders the account and is remunerated for the services supplied by the VMO.

It is my understanding that Area Health Services accept accounts rendered by practice companies and tax invoices quoting the ABN of the practice company, even though the wording of clause 5 of the standard contract with a practice company states that the VMO must have the ABN.

2 Can the Area withhold part of the payment if no ABN is supplied?

If an ABN is not supplied, the Area is required to withhold a proportion of the payment and remit this to the ATO. This is a requirement of the tax law. The current percentage is 46.5%. While there are a number of exemptions in the tax law, VMO services do not fall within the exemptions to this withholding rule.

3 Does the ABN have to be the ABN of the contracting party under the VMO FFS contract?

The Areas are entitled to require that the accounts submitted are a tax invoice for the purposes of GST law and therefore contain the ABN of the contracting party. Accordingly, where the contract is with an individual medical practitioner, that practitioner will have to register for GST purposes and have an ABN.

Where the contract is with a practice company, the practice company will need to be registered for GST and have an ABN.

The assignment of income by the VMO or practice company to another entity (eg the group practice's company) does not change this rule. The supplier to the Area under the VMO FFS contract remains the individual VMO or the practice company.

Assignment of the income received from the Area to another entity may also create another taxable supply and require appropriate accounting and GST reporting treatment. I understand that a number of your members have received accounting advice on this aspect.

4 Can a group medical practice's company be a "practice company" under the Health Services Act 1997?

Due to the wording of the Health Services Act 1997 (**Act**) and the terms of the delegation given by the Director-General of the NSW Department of Health to Area Health Services, Areas can only enter into the rural VMO FFS standard service contracts with either the individual medical practitioner or with a "practice company" as defined in the Act.

Practice company is defined in the Act as follows:

practice company means a corporation (however incorporated) that is controlled or conducted by a medical practitioner and by means of which the medical practitioner conducts his or her medical practice.

The NSW Department of Health has, similarly, determined that the liability coverage offered through the NSW Treasury Managed Fund under the Contract of Liability Coverage signed with the Area Health Service is only offered to the VMO as an individual or to their practice company. The Contract of Liability Coverage uses the same definition of "practice company" in the Act.

As the Contract of Liability Coverage requires that the indemnified VMO has a rural VMO FFS standard contract, the Areas are again only permitted to enter into a Contract of Liability Coverage with either the individual VMO or their practice company.

This means that the parties to both the rural VMO FFS standard contract and the Contract of Liability Coverage must be the same.

What is a "practice company"?

There are two limbs to the definition used in the Health Services Act 1997:

- (a) a corporation controlled or conducted by the medical practitioner; and
- (b) the corporation is the means by which the medical practitioner conducts their practice.

Both limbs must be satisfied.

The definition in the Act uses the words "...controlled or conducted (my emphasis) by a medical practitioner". There is no definition of the meaning of the word "conducted".

In the Minister's 2nd Reading Speech when introducing the Bill into parliament in November 1997, the Minister referred to the expansion of VMO contracts to include practice companies as follows:

"As honourable members will be aware, visiting medical officers make a significant and valued contribution to the effective operation of the New South Wales health system. For a number of years the New South Wales branch of the AMA has sought amendment of the Public Hospitals Act to enable VMOs to use their practice companies to enter into service contracts with health services. Part 2 of chapter 8 of the bill will enable VMOs to contract via their practice companies consistent with their

status as independent contractors. In order to safeguard the public health system and its patients, clause 85 of the bill provides that VMOs who elect to contract via their practice companies must carry public liability and professional indemnity insurance to a level approved by the director-general."¹

The Explanatory Memorandum to the Health Services Bill 1997 does not expand on the meaning of the term "practice company" or the words used to define practice company.

The term "conducted" is not defined in the Act. The term "conduct" or "conducted" in relation to businesses is used in a variety of legislation regulating who may undertake certain businesses or creating offences (eg licensing of certain businesses, gambling control legislation, drug trafficking legislation, tax legislation). The NSW Medical Practice Act 1992 also uses the terminology in Part 8A of the Medical Practice Act in relation to the extended definition of carrying on a business and restrictions on overservicing.

Under the principles of statutory interpretation, all words in a statute are taken to be intended. Where they are not defined, then their ordinary meaning is assumed to be intended, subject to this meaning promoting the object of the Act and being consistent with the context in which the word is used.

As the term used in the Health Services Act 1997 is "controlled or conducted" (my emphasis), conducted must have a different meaning to controlled. Accordingly, it is my view that for the first limb of the definition, a company that is not controlled by the medical practitioner could still come within the definition if the medical practitioner is actively involved in the conduct of that company. This involvement could be as director, senior executive or other role in the decision making and day to day operation of the company.

Accordingly, if the doctor did have that level of involvement in the group practice's company, then that company would meet the first limb of the definition of practice company.

However, the second limb requires that the company is also the means by which the medical practitioner conducts their medical practice.

It is arguable that if the doctor has their own incorporated entity that contracts with the group medical practice company, then it is the doctor's own company and not the group medical practice that is the "means by which" the doctor is conducting their medical practice.

Where the doctor contracts with the group practice's company as an individual and is also actively involved in the conduct of that company then there is a strong argument that the group practice's company is the means by which the doctor is conducting their medical practice and hence meets the definition of practice company under the Act.

In summary, the group practice's company will not meet the test for a 'practice company' under the Act if the doctor has a separate company and that company contracts to receive services from the group practice's company or the doctor is not actively involved in the running of the group practice's company.

¹ Hansard NSW Legislative Assembly 12 November 1997.

5 What is the position where the VMO is not permitted to apply for an ABN and/or not permitted to have their own practice company due to a conflicting obligation (eg DIMA visa restriction)?

I understand that this is a current issue in a rural town in NSW due to the conditions on a visa held by a GP anaesthetist. If the GP is not permitted to work for themselves, the GP cannot then enter into a rural VMO FFS standard service contract with an Area nor can they establish their own practice company and that company enter into the contract.

In addition they are unlikely to be able to obtain an ABN as this may breach their visa condition.

Under the current delegations to Areas from the Director-General of the NSW Department of Health, in this situation it is my view that an Area **cannot** enter into either the rural VMO FFS standard service contract or the Contract of Liability Coverage with that doctor.

Similarly, the Area **cannot** enter into a contract with doctor's employer for the doctor's services and cannot indemnify their employer.

However, subject to agreement with the NSW Treasury Managed Fund, if the Director-General gave an Area approval to do so, an Area could enter into a contract with the doctor's employer and provide a suitably worded indemnity contract. The Area would have to obtain a specific approval to do so in each case.

Recommendations

- 1 The immediate issues with the GP anaesthetist and other overseas rural doctors in a similar position need to be urgently raised with the NSW Department of Health by the RDA and the Area(s) concerned with a view to the Director-General authorising the Area(s) to enter into both a service contract and an indemnity contract with the doctor's employer pending a longer term resolution of the problem through an agreed position on the wording of visa conditions for such doctors agreed between the NSW Department of Health and the Department of Immigration and Multicultural Affairs.
- 2 The RDA explore with the NSW Department of Health the feasibility of Areas being able to contract with group practice companies for the supply of medical services with the group practice's company preparing the tax invoice and the Area paying the group practice company.

This model already occurs where a private company contracts with an Area to supply VMO services.

Under this model, due to tax and GST law, the medical practitioners will still need to ensure that the distribution of this income within the group practice and its accounting treatment comply with the tax and GST law.

Under this model, the Contract of Liability Coverage would also need to be revised to ensure that the exposure of the NSW Government and the Treasury Managed Fund continued to be limited to the services provided by the individual VMOs.

- 3 The RDA and AMA (NSW) consult with a view to recommending to the NSW Department of Health that an amendment to the definition of practice company in the Health Services Act 1997 be considered to better reflect the practice models in rural towns.

Yours sincerely



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