NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged:	Submissions
File Number:	ACT 5 of 2021
File Title:	RMSANZ APPLICATION FOR REVIEW OF AUTHORISATION AA1000542 DETERMINATION MADE ON 21 SEPTEMBER 2021
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL

REGISTRAR

Dated: 24/05/2022 3:27 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 4 of 2021 and ACT 5 of 2021

Re: Application for review of authorisation AA1000542 lodged by nib Health Funds Ltd and Honeysuckle Health Pty Ltd and the determination made by ACCC on 21 September 2021.

Applicants: National Association of Practising Psychiatrists and Rehabilitation Medicine Society of Australia and New Zealand

SUBMISSIONS OF NIB HEALTH FUNDS LTD AND HONEYSUCKLE HEALTH PTY LTD IN RESPONSE TO APPLICATIONS FOR LEAVE TO INTERVENE

1. These submissions by nib Health Funds Ltd and Honeysuckle Health Pty Ltd (the **Authorisation Applicants**) respond to the applications made by the Australian Medical Association (**AMA**), the Royal Australian and New Zealand College of Psychiatrists (**RANZCP**) and the Australian Pain Society (**APS**) for leave to intervene in the proceedings.

2. The Authorisation Applicants do not oppose the application made by the AMA. The AMA's application indicates that it has a sufficient interest and will make submissions or adduce evidence which could relevantly add to, or supplement, the submissions and evidence of the parties.

3. For the reasons set out below, the Authorisation Applicants submit that the applications by RANZCP and APS for leave to intervene should be refused.

4. The Authorisation Applicants do not request a hearing of the applications.

Applicable principles

5. Section 109(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) provides that the Tribunal may, upon such conditions as it sees fit, permit a person to intervene in proceedings before the Tribunal.

6. Section 109(2) of the CCA has been considered by the Tribunal on a number of occasions.

7. Recently, in *Application by Flexigroup Limited* [2020] ACompT 1 (***Flexigroup***), the Tribunal summarised the principles to be derived from those earlier decisions, in the following terms.

> [9] 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):
>
> > [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.
>
> [10] In *Application by Independent Contractors Austral*ia [2015] ACompT 1 (***Independent Contractors***) at [28] 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.

8. The Tribunal has the power to attach conditions to the grant of leave to intervene, in particular to ensure there is no unnecessary duplication of submissions and evidentiary material: see *Flexigroup* at [12]-[13], referring to the approach adopted in *Fortescue* at [78] and *Application by Sea Swift Pty Limited* [2015] ACompT 5 (***Seaswift***) at [5]. In *Flexigroup, Fortescue* and *Seaswift*, the Tribunal granted intervention subject to the Tribunal's power to direct the nature and extent of their participation, or further participation, in the proceedings.

9. Alternatively, as the Tribunal recognised in *Flexigroup,* interested third parties may be able sufficiently to advance their interests by the making of submissions without being granted the rights of an intervenor: see, *Flexigroup* at [14], referring to *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]).

RANZCP's and APS's applications for leave to intervene should be refused

10. The Authorisation Applicants do not dispute that RANZCP and APS, as professional bodies representing medical specialists, each have an interest in the proceedings beyond that of an officious bystander. However, the Tribunal cannot be satisfied that either RANZCP or APS 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, for the following reasons.

11. ***First***, neither applicant for leave has identified any evidence that it intends to file at all, let alone evidence that can usefully add to, or supplement, the evidence likely to be filed by the parties. Neither party has filed any affidavit material with its application, nor indicated an intention to do so if granted leave.

12. ***Second***, neither applicant for leave has identified with any particularity the submissions it proposes to make to the Tribunal and how, if at all, those submissions could usefully

add to, or supplement, the submissions likely to be made by the parties (or the submissions already before the Tribunal). In particular:

(a) RANZCP's application does no more than identify that it proposes to make a submission to the Tribunal, without identifying at all what the content of that submission might be. To the extent that 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 CCA.

(b) APS's application does no more than reiterate the brief two-page submission it made to the ACCC. That submission expressly relied on, and agreed with, the submissions made to the ACCC by RMSANZ and the AMA (amongst others). It is already before the Tribunal, and the Tribunal may take it into account: see subparagraph (a) above.

13. ***Third***, to the extent the interests of RANZCP or APS in these proceedings can be discerned, the Tribunal should be satisfied that those interests can be protected by existing parties.

(a) RANZCP is 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 the AMA is granted leave to intervene) as the peak body representing medical practitioners.

(b) APS is a medical professional body representing pain specialists. There is no reason to believe their interests will not be capable of being protected by the Applicants, and by the AMA (if the AMA is granted leave to intervene). That is particularly so in circumstances where the APS's limited submission to the ACCC indicated that it shared the concerns of the AMA and RMSANZ and did not raise for consideration any specific issues peculiar to the APS.

14. ***Fourth***, the intervention of a further two parties (in addition to the AMA, to whose intervention the Authorisation Applicants do not object) is likely to increase the risk of duplication and consequently the time and cost of the proceedings. The intervention of RANZCP in particular is also likely unnecessarily to disrupt the timetable, given RANZCP seeks an extension of time to file submissions.

15. Having regard to the matters identified above, the Authorisation Applicants submit that RANZCP's and APS's applications should be refused.

16. Alternatively, if the Tribunal were not minded simply to dismiss the applications, the Authorisation Applicants would submit that RANZCP and APS could be permitted to file submissions with the Tribunal, without being granted the rights of an intervenor. Such a course is open to the Tribunal (see paragraph 9 above) and would be sufficient in this case to protect the asserted interests of RANZCP and APS, given the limited scope of their applications and the likely participation of the Applicants and the AMA.

24 May 2022

M Borsky

A Lord