Australian
Competition &
Consumer
Commission

Determination

Application for Authorisation

Lodged by

The NSW Department of Health

In respect of

Its policy that public pathologists exclusively provide pathology services to private in-patients in NSW public hospitals

Date: 27 June 2003

Authorisation no:	A90754 A90755	**Commissioners:**	Bhojani Martin McNeill Willett
Public Register Number:	C2000/1680		

Executive Summary

The New South Wales Department of Health (NSW Health) sought authorisation for its policy of requiring private in-patients in NSW public hospitals to obtain pathology services from NSW Health pathologists. The Commission issued a draft determination on 21 October 2002.

In its final determination, the Commission has concluded that NSW Health's pathology policy generates significant public detriment as its policy enables it to charge a significantly higher price for pathology services to private in-patients in its hospitals. Given that the price rise would be covered by private health insurance in most cases, this detriment would manifest itself in higher costs for insurance companies and therefore ultimately higher insurance premiums for consumers.

The Commission received conflicting views on whether NSW Health's pathology policy improves or reduces the quality of service provided by its pathology laboratories. Broadly, public pathologists support the former view and private pathologists the latter.

Generally, the Commission is inclined to the view that competition improves quality. However, it recognises that a conclusion that private in-patients and public patients - as they are all served by the same pathology service – are currently receiving a poorer service because they are confined to NSW Health pathology would be one of considerable significance, and not one to be reached lightly. The Commission is not satisfied that, on the evidence before it, it could reach this conclusion. It is also not satisfied that it can safely conclude that NSW Health's pathology policy results in private in-patients receiving a higher quality of service than they would if there were multiple pathology providers. Ultimately, the Commission concluded that the quality of service provided to private in-patients in NSW Health is largely unaffected by NSW Health's pathology policy.

NSW Health submitted that its pathology policy generated a public benefit by providing substantial funding for its pathology service. The Commission considers it appropriate, as a regulatory body, for it to primarily focus its analysis of anti-competitive conduct generating financial benefits on economic efficiency considerations. Consequently, it concludes that the transfer of funds from private pathology businesses to NSW Health, in itself, is not a public benefit. However, the Commission considers that NSW Health's pathology policy is likely to generate a small benefit from administrative cost savings, essentially arising from the simpler nature of a single pathology provider system.

Overall, the Commission has concluded that NSW Health's pathology policy generates significant public detriment and a small public benefit. However, it is possible to grant authorisation in this situation if appropriate conditions can be imposed that will ensure that the public benefit does outweigh the public detriment. In this case, the Commission considers this is possible. The Commission therefore grants authorisation subject to the following conditions.

> **C1: Public Health Organisations shall allow referring Salaried Senior Medical Practitioners and Visiting Medical Officers to seek second opinions from private pathology laboratories on pathology test results initially provided by Public Health Organisation pathology laboratories where referring doctors:**

- **state in writing to the Public Health Organisation that this is in the best interests of the patient; and**
- **unless impractical for medical reasons, obtain the patient's consent in writing if the fee charged by the private pathology business will be above the relevant Medicare benefit payable to the patient.**

C2: Public Health Organisations shall ensure that the fee charged to private in-patients treated by Salaried Senior Medical Practitioners and Visiting Medical Officers is no more than the relevant Medicare benefit payable to the patient for the pathology service.

Authorisation is granted for a period of five years.

Contents

Glossary

AHO – Affiliated Health Organisation

AHS – Area Health Service

AAPP- Australian Association of Pathology Practices

HCCC - Health Care Complaints Commission

HCF – Hospital Contributions Fund of Australia

In-patient - These comprise public and private patients who are admitted to a hospital.

NATA – National Association of Testing Authorities

NCPP – National Coalition of Public Pathology

Non-inpatient - These are patients who are not admitted to a hospital. Non-inpatients include emergency department patients, outpatients and persons attending community/outreach services run by hospitals.

NSW Health pathology – pathology service administered by a PHO.

NSW Health pathology policy – The policy for which NSW Health has sought authorisation

Out-patient – These are patients who attend a clinic at a hospital without being admitted, for example psychiatric, dental and alcohol and drug clinics.

Pathologist – Person who carries out tests on various tissues including blood, body secretions and samples of tissues in order to understand what is causing an illness.

PHO – Public Health Organisation

Privately referred non-inpatients - These are patients who are referred to a salaried medical practitioner by name by a doctor in private practice.

SMP – Salaried Senior Medical Practitioners

SHC – Statutory Health Corporation

The Act – The *Trade Practices Act 1974 (Cth)*

VMO – Visiting Medical Officer

1. Introduction

Authorisations

1.1 The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

1.2 The Act, however, recognises that competition may not always be consistent with the most efficient outcome. It therefore allows the Commission to grant immunity from the Act for anti-competitive conduct in certain circumstances.

1.3 One way businesses may obtain immunity is to apply for what is known as an 'authorisation' from the Commission. Broadly, the Commission may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

1.4 The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

1.5 Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

1.6 The Commission then issues a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.

1.7 Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.

1.8 The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the Commission may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

Application

1.9 On 1 November 2000, the New South Wales Department of Health (NSW Health) lodged two applications for authorisation. Broadly, these applications seek authorisation for NSW Health's policy of requiring private in-patients in NSW public hospitals to obtain pathology services from NSW Health pathologists. This policy is referred to as the 'NSW Health pathology policy' in the determination.

1.10 Below is a chronology of the Commission's consideration of these applications.

DATE	ACTION
1 November 2000	Applications for authorisation received.
8 November 2000	Letters seeking submissions sent to interested parties
12 January 2001	Closing date for receipt of submissions from interested parties.
19 January 2001	Applicant provided with copies of all submissions received by Commission.
9 February 2001	Commission wrote to Health Insurance Commission (HIC) and the Commonwealth Department of Health and Ageing (DHA) seeking advice as to whether the NSW Health's policy breaches the Health Insurance Act (1973) (HIA)
22 February 2001	NSW Health advises that it will respond to the issues raised by interested parties once the matters under the HIA are resolved.
3 April 2001	HIC advises that it does not consider that the conduct raises issues under the HIA.
23 April 2001	NSW Health provided with a copy of the letter from HIC and asked for additional information.
26 October 2001	Commission receives response to its request for further information.
18 December 2001	Commission receives letter from NSW Health clarifying information contained in the original and supporting submission.
21 October 2002	Draft Determination issued.
13 November 2002	Letter sent to interested parties requesting submissions in response the final determination.
6 December 2002	Closing date for submissions from interested parties.
31 December 2002	Closing date for submission from NSW Health
27 June 2003	Final Determination issued

Draft Determination

1.11 On 21 October 2002, the Commission released a draft determination.

1.12 Generally, the Commission reached the view that the public benefits from NSW Health's policy were unlikely to outweigh its anti-competitive effects. The Commission proposed not to grant authorisation to NSW Health's policy for the longer term.

1.13 However, the Commission recognised that there would be significant benefit for private in-patients in allowing the policy to apply for a finite period to allow public hospitals to plan for and implement the orderly transition from a single pathologist supplied system to a multiple supplied system.

1.14 Accordingly, the Commission proposed to grant authorisation in relation to the applications for a period of one year to provide a transition period for removal of the policy.

1.15 The Commission wrote to interested parties and NSW Health on 22 October 2002 inviting them to call a pre-decision conference. The Commission did not receive a request to hold a pre-decision conference in relation to the draft determination.

1.16 Subsequently, the Commission wrote to interested parties on 13 November 2002, inviting submissions on the draft determination (see Chapter 5).

2. The Applicant

The public health system in NSW

2.1 The public health system in NSW comprises the NSW Department of Health (NSW Health) and a group of public health organisations (PHOs).[1] PHOs include area health services, statutory health corporations and affiliated health organisations.

NSW Health

2.2 Among other things, NSW Health is the overarching policy, planning and performance assessment body for the public health organisations (see below) in NSW.

Public health organisations

2.3 Among other things, an Area Health Service (AHS) conducts and manages public hospitals in its geographic region. A list of AHSs is provided at Attachment A.

2.4 Statutory Health Corporations (SHCs) enable certain health services and health support services to be provided within NSW other than on an area basis. A list of SHCs is provided at Attachment B.

2.5 Each AHS and SHC is controlled by a board appointed by the Minister.[2] The Chief Executive Officer of each AHC and SHC is appointed by the Governor. The Minister may determine the role, functions and activities of any public hospital, health institution, health service or support service under the control of an AHS or SHC. They are also able to make by-laws subject to the approval of the Minister in relation to matters such as the management of public hospitals, health institutions or health service under its control and the provision of health services to patients.

2.6 Affiliated Health Organisations (AHOs) include non-profit, religious, charitable or other non-government organisations which provide certain health services or health support services which facilitate the operation of the public health system.[3] A list of AHOs is provided at Attachment C. The Minister is able to determine the role, functions and activities of an affiliated health organisation. Before determining the role or functions of an AHO the Minister is to consult with the AHO having regard to the health care philosophy of the organisation.[4] An AHO is able to make by-laws on matters similar to that described above for AHS and statutory health corporations.

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[1] NSW Department of Health 2001-02 Annual Report.
[2] See Chapter 3 and Chapter 4 of the *Health Services Act 1997.*
[3] See Chapter 5 of the *Health Services Act 1997.*
[4] *Section 65(2) of the Health* Services Act 1997.

Public hospitals in NSW[5]

2.7 In NSW there are 219 public hospitals of which 210 are public acute hospitals and 9 are psychiatric hospitals. In total there are 17,534 beds available in NSW public hospitals.

NSW Health Pathology Services

2.8 NSW Health provides pathology services to in-patients and non-inpatients. NSW Health pathology services are funded by:

- Public funding (see paragraphs 3.5 to 3.6); and
- Fees received from private in-patients.

2.9 Most public pathology laboratories are departments of public hospitals.

2.10 NSW Health charges no more than the Medicare Benefits Schedule (MBS) fee for pathology services provided to private in-patients.[6]

NSW Health medical practitioners

Salaried Senior Medical Practitioners (SMPs)

2.11 SMPs are salaried employees of an AHS, SHC or AFO. In addition to treating public hospital patients, they may also exercise what are known as 'rights of private practice', under which they may treat private in-patients and privately referred non-inpatients. The Salaried Senior Medical Practitioners Determination (for NSW) sets out the rights of private practice. A SMP may also seek agreement from an AHS, SHC or AFO to permit him/her to engage in practice outside his/her normal duties.[7] When the SMP is engaging in outside practice they are not an employee of the relevant public health organisation.[8]

2.12 Fees received from private patients seen by SMPs are paid into a trust fund known as the No. 1 Account.[9] From the fees deposited into the trust for each AHS an amount is deducted by each AHS to compensate for the provision of services and the use of facilities used in generating private practice fees.

2.13 SMPs are entitled to draw funds from the trust fund to supplement their salaries. The different levels of drawing rights for SMPs exercising a right of private practice are outlined in the determination.[10] The income paid to SMPs consists of a base salary, an allowance and drawing rights from the trust fund. Broadly, the base salary and allowance paid to SMPs decrease if they choose to increase the level of drawing rights from the trust fund.

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[5] Australian Hospital Statistics 2000-01, Australian Institute of Health and Welfare, Table 2.2.
[6] NSW Health submission, 18 December 2001, p.2.
[7] Clause 9 Salaried Senior Medical Practitioners (State) Award.
[8] Clause 2e of the Salaried Senior Medical Practitioners Determination.
[9] Clause 3 of the Salaried Senior Medical Practitioners Determination.
No. 1 Account replaces the former term Private Practice Trust Fund.
[10] Clause 2 of the Salaried Senior Medical Practitioners Determination.

2.14 Any remaining fees received from private in-patients are paid into trust funds controlled by each AHS and are available for spending on items such as conference and study leave, educational materials and equipment and staffing.

2.15 Income generated by SMPs while engaged in outside practice (that is, not as an employee of a PHO) is retained by the SMP, ie this type of income is not deposited into the trust fund.[11]

SMPs employees or not?

2.16 It is not entirely clear whether SMPs remain NSW Health employees when exercising rights of private practice.

2.17 On one hand, NSW Health sets the fee SMPs are to charge private patients (equal to the Medicare Fee) and requires their income to be paid into a trust fund.

2.18 In addition, the Salaried Senior Medical Practitioners Award specifically states that SMPs engaging in 'outside practice' – where they may set and retain their fees but may not use NSW Health facilities they use during their normal duties – are not NSW Health employees.[12] No such statement is made about SMPs exercising rights of private practice.

2.19 On the other hand, the Australian Health Care Agreement between the Commonwealth and NSW governments provides that a patient who has been referred to an SMP exercising a right of private practice is not a patient of the NSW Health hospital.[13] The Salaried Senior Medical Practitioners Determination provides that private patients' accounts are to be issued by PHOs on behalf of SMPs. PAYE deductions are not made from SMP drawings from the trust fund, and these drawings are not taken into account for superannuation purposes.

2.20 The Commission is not required to resolve this issue for the purposes of this determination.

Visiting Medical Officers

2.21 A Visiting Medical Officer (VMO) is a medical practitioner appointed under a service contract to provide services as a visiting practitioner for monetary remuneration for or on behalf of a PHO.[14] In addition to treating public patients, most VMOs also have admitting privileges for private patients.[15]

2.22 VMOs are able to charge directly for services provided to private patients. These fees are therefore not paid into the private practice trust account.[16]

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[11] Clause 2e of the Salaried Senior Medical Practitioners Determination.
[12] Clause 9 of the Salaried Senior Medical Practitioners (State) Award.
[13] Australian Health Care Agreement 1998-2003, New South Wales, Schedule A, p. 21.
[14] Section 78 of the *Health Services Act 1997.*
[15] NSW Health submission, 2 November 200, p. 8.
[16] NSW Health submission, 26 October 2001, p. 4

NSW Health pathologists

2.23 The majority of NSW Health pathologists are SMPs. A small number of VMOs are contracted by AHS's to provide pathology services.[17]

[17] NSW Health submission, 26 October 2001, p. 4.

3 Background

Public and private hospital patients

3.1 Patients[18] may choose to be treated for free as public patients in public hospitals. Public patients are treated by doctors chosen by the hospital.

3.2 Alternatively, patients may choose to be treated as private patients, either in private hospitals or public hospitals. Patients might choose to do this, for example, to avoid waiting lists for treatment in public hospitals, to choose the doctors that will treat them or to obtain what they consider to be better conditions (for example, a private hospital room, better meals, newspapers etc).

3.3 Private patients are required to pay for the treatment they receive. However, they would normally be able to claim a Medicare rebate from the Commonwealth for part or all of the fee charged by their doctor(s). If doctors charge a fee equal to the Medicare rebate, they may also choose to bulk-bill patients. Patients who are bulk-billed do not pay doctors directly. Instead, doctors are paid the Medicare rebate directly by the Commonwealth.[19]

3.4 Patients who receive medical services and are involved in a hospital stay (inpatients) are eligible to be reimbursed at 75 per cent of the Medicare Schedule fee. Private health insurers offer Medicare eligible patients insurance for:

- the difference between 75 per cent and 100 per cent of the Schedule fee;
- any additional amount above the Schedule fee where applicable; and
- additional benefits for hospital accommodation and other hospital charges depending on the level of health insurance coverage of the patient.

Funding of the public hospital system

3.5 The Commonwealth and state and territory governments each provide approximately 50 per cent of public hospital funding.[20]

3.6 Commonwealth funding is provided to the states and territories specifically for public hospitals in accordance with Australian Health Care Agreements between the Commonwealth and each state and territory. Current agreements run from 1 July 1998 to 30 June 2003.

Medicare and pathology services

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[18] That is, persons who reside in Australia, hold Australian citizenship, have been issued with a permanent visa, hold New Zealand citizenship or have applied for a permanent visa.

[19] The Commonwealth Government recently announced proposed forms to arrangements governing Medicare; 'A fairer Medicare – Better Access More Affordable', Senator the Hon Kay Patterson, Minister for Health and Ageing, Media Release, 28 April 2003.

[20] *Health Expenditure Australia, 2000-01*, Australian Institute of Health and Welfare, September 2002, p. 2.

3.7 Under the *Health Insurance Act 1997* (HIA) Medicare benefits are only payable for pathology services if :

- The treating practitioner requesting the service is a registered treating medical (or dental) practitioner, and a clinical need is identified for that service;
- The specimen is collected at a collection centre, then the centre must be an Approved Collection Centre;
- The proprietor of the pathology laboratory is an Approved Pathology Authority (APA);
- The pathologist performing the test is an Approved Pathology Practitioner (APP); and
- The test is performed by an Accredited Pathology Laboratory (APL).[21]

Approved Pathology Authorities (APA) and Approved Pathology Practitioners (APP)[22]

3.8 To receive APA status the applicant must lodge an undertaking for approval by the Commonwealth Minister for Health and Ageing. The Minister may refuse an undertaking on a number of grounds; for example, if the person who controls the laboratory is not fit and proper.

3.9 APPs must be medical practitioners but need not be pathologists. To be accepted as an APP the practitioner must complete an application for acceptance of an APP undertaking and must also provide details about their qualifications etc.

Approved Pathology Laboratories (APL)[23]

3.10 To be eligible for approval as an APL, a laboratory must be jointly assessed by the National Association of Testing Authorities and the Royal College of Pathologists of Australasia against criteria established by the National Pathology Accreditation Advisory Council.

Distribution of Medicare Benefits

3.11 Table 3.1 shows the distribution of Medicare benefits for pathology services and the number of APAs and APLs between the private and public sectors.

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[21] Final report of the review of Commonwealth legislation for pathology arrangements under Medicare, December 2002, p. 16.
[22] Ibid at p. 21-24.
[23] Ibid at p. 25-26.

Table 3.1: Distribution of Medicare benefits for pathology services, APAs and APLs between private and public sectors in Australia.[24]

1999-2000	Private sector	Public Sector
Medicare eligible services (m)	56.1	2.6
Medicare benefits ($m)	1,027.0	60.2
APAs (nos)	163	56
APLs (nos)	365	159

Health Insurance (Eligible Collection Centres) Approval Principles 2001

3.12 As part of the second Pathology Quality and Outlays Agreement between the Commonwealth Government and the two professional bodies – the Australian Association of Pathology Practices and the Royal College of Pathologists of Australasia - it was decided that new arrangements for pathology collection centres would be introduced.[25] Under the previous arrangements Approved Pathology Authorities constituted by a State or Territory government body were prevented from operating collection centres.

3.13 From 1 December 2001, public Approved Pathology Authorities are eligible to apply for approval to operate Approved Pathology Collection Centres. These new arrangements are being phased in over four years.

3.14 These new arrangements allow public pathology providers to compete with private pathology businesses for private patients in private hospitals and in the general community.

Private Pathology[26]

3.15 The trend towards corporatisation in the pathology industry has significantly changed the way in which diagnostic services such as pathology are provided. Over the past few years, corporate owners of APAs have been active in acquiring APAs and acquisition and consolidation in the industry has resulted in a significant increase in concentration at the ownership level.

3.16 Prior to 1986 most private pathology practices were owned and operated by specialist pathologists who provided the majority of pathology services. The late 1980s and early 1990s saw a number of voluntary pathology practice mergers, sales and takeovers. The majority of pathology services are now provided by a small number of large corporate entities.

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[24] Review of Commonwealth legislation for pathology arrangements under Medicare, Background, Department of Health and Ageing, July 2002, p. 161.
[25] Pathology Quality and Outlays Agreement, pg 8.
[26] Information in this section is obtained from the Final report of the Review of Commonwealth legislation for pathology arrangements under Medicare and the Background Report to this Review published by the Department of Health and Ageing.

3.17 In NSW the main private pathology providers include Douglass Hanly-Moir Pathology who has 47 laboratories and collection centres, Barratt and Smith Pathology who has 47 pathology laboratories and collection centres and Southern Pathology who has 47 laboratories and collection centres. These three pathology practices are all owned by Sonic Health Care. Laverty Pathology is another large pathology provider which has a total of 130 laboratories and collection centres and is part of Mayne Health.[27]

Charitable sector

3.18 In October 2001, there existed 11 charitable sector pathology providers.[28] For the purposes of pathology arrangements under Medicare these organisations are regarded as private providers.

Patient Episode Initiation (PEI) fee

3.19 Patient Episode Initiation (PEI) fees are payable to private pathology providers to cover costs including specimen collection, storage and transportation associated with specimen collection services.[29]

3.20 The Commonwealth Department of Health and Ageing has stated that the PEI fee operates on the basis that the Commonwealth Government already contributes to overhead type costs of public pathologists via the Australian Health Care Agreements, with any private patient work done by a public provider being at marginal, not average cost.[30] NSW Health submits that this assumption is wrong and considers that 'policy rationales given by Commonwealth Departments are not a substitute for facts'.[31]

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[27] These figures are based on an internet survey completed by ACCC staff.
[28] Review of the Commonwealth legislation for pathology arrangements under Medicare Background, July 2002, pg 163.
[29] Review of the Commonwealth legislation for pathology arrangements under Medicare Background, July 2002, pg 19.
[30] Public and Private – In Partnership for Australia's Health, Department of Health and Aged Care, 1999, Pg 117
[31] NSW Health submission, 24 December 2002, p. 3.

4 . The Application

4.1. Application A90754 was lodged under subsection 88(1) of the Act for authorisation to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.[32] Specifically the conduct for which authorisation is sought relates to the following:

- contracts, arrangements or understandings between each public health organisation and its private in-patients that the patient's pathology service requirements will be supplied by a pathology practitioner appointed by the public health organisation; and

- contracts, arrangements or understandings between each public health organisation and SMPs exercising the right of private practice as well as VMOs that such practitioners should refer pathology service requirements for private in-patients treated by them to a pathology practitioner appointed by a public health organisation.

4.2. Application A90755 was lodged under subsection 88(8) of the Act for authorisation of conduct which may or would constitute exclusive dealing.[33] Specifically the conduct for which authorisation is sought relates to the following:

- The supply of non-pathology medical services by a public health organisation to private in-patients of public hospitals in NSW on condition that patients acquire pathology services from a pathology practitioner appointed by a public health organisation.

- Public health organisations requiring SMPs exercising a right of private practice and VMOs to refer private in-patients in public hospitals in NSW to a pathology practitioner appointed by a public health organisation.

4.3. These arrangements implement Circular 89/1 'Policy on Provision of Pathology Services in public hospitals issued by NSW Health on 4 January 1989'.

4.4. The policy does not apply to patients who are non-inpatients who are treated by senior medical practitioners exercising their rights of private practice (privately referred non-inpatients). These patients may choose to send their pathology to a private provider.[34] The policy only applies to private in-patients.[35]

4.5. Both applications sought to extend the authorisation to:

- Future parties to the arrangements pursuant to section 88(10); and
- Other arrangements in similar terms, pursuant to section 88(13).

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[32] This application has been considered as an application under the Competition Code.
[33] Ibid.
[34] NSW Health submission, 2 November 2000, p. 20.
[35] NSW Health submission, 26 October 2001, p. 11.

5. Submissions by Interested Parties

5.1. This chapter briefly outlines submissions provided by interested parties. Submissions, where relevant, are described in more detail in Chapter 7. A list of submissions received by the Commission is provided at Attachment D.

5.2. Each of the 17 area health services as well as the National Coalition of Public Pathology (NCPP) and the Australian Institute of Medical Scientists support the applications.

5.3. The Private Health Insurance Administration Council, AXA, Hospital Contributions Fund of Australia (HCF), Australian Medical Association and the Australian Association of Pathology Practices (AAPP) representing private pathology providers oppose NSW Health's applications.

5.4. The Royal College of Pathologists of Australasia did not express a view on whether authorisation should be granted. Its submission provides background to the College and outlines the existing arrangements within the profession in relation to pathology practice. The College supports a level playing field for the provision of pathology services and submits that this is difficult to achieve with two different sources of pathology funding within the public and private settings. It would support the development of a model that would allow all pathology to be funded under a common fee for service arrangement for both public and private sector operators.

5.5. The NSW Health Funds Association supports NSW Health's applications for authorisation on condition that private in-patients are not charged an amount which exceeds the Medicare rebate for the pathology service. It considers that NSW Health's policy has assisted in keeping private health insurance affordable, compared with charges that could have been applicable in the private sector.

5.6. The Health Insurance Commission submits that NSW Health's applications will have no impact on the operation of the *Health Insurance Act 1973,* and as a result it has no comment to make in relation to the applications.

Submission received after the draft determination

5.7. The Commission received submissions from NSW Health, NCPP, AAPP, Health Care Complaints Commission (HCCC), Dr George Watson and Mr Richard de Lambert. These submissions are briefly outlined below. Submissions where relevant are described in Chapter 7.

5.8. NSW Health and the NCPP raised several concerns about the draft determination. Dr Geoff Watson supports granting authorisation to NSW Health and suggests that authorisation should be reviewed following the next Commonwealth Pathology Agreement.

5.9. The HCCC did not express a view in relation to the draft determination. However, it did note that the more complex a service system the greater the possibility for error, which may have a detrimental impact on the care of patients. The HCCC stated that it

would monitor complaints after the removal of the policy (as proposed in the draft determination).

5.10. The AAPP supports the draft determination and suggests that the transition period should be reduced to three months. Mr Richard de Lambert also supports the draft determination issued by the Commission.

6. The public benefit test

6.1. The Commission may only grant authorisation where the public benefit test in section 90 of the Act is satisfied.

6.2. NSW Health lodged two applications for authorisation. Application A90754 was made under subsection 88(1) of the Act to make and give effect to contracts, arrangements or understandings, provision of which may have the effect of substantially lessening competition within the meaning of section 45 of the Act.

6.3. The relevant formulation of the public benefit to *make a contract*, arrangement or understanding which may have the effect of substantially lessening competition within the meaning of the Act is found in sub-section 90(6) of the Act, which provides that the Commission shall not grant authorisation unless it is satisfied in all circumstances that:

- the provision of the proposed contract, arrangement, or understanding would result, or be likely to result, in a benefit to the public; and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, from the proposed contract, arrangement or understanding.

6.4. The relevant formulation of the public benefit test to *give effect* to a contract arrangement or understanding which may have the effect of substantially lessening competition within the meaning of section 45 of the Act is found in sub-section 90(7) which provides that the Commission shall not grant authorisation unless it is satisfied in all circumstances that the:

- provision of the contract, arrangement or understanding has resulted, or is likely to result, in a benefit to the public; and
- that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

6.5. Application A90755 was made under section 88(8) of the Act in respect of conduct that would or may constitute exclusive dealing. The Commission understands that the application has been made in relation to exclusive dealing that does not constitute third line forcing.

6.6. The relevant formulation of the public benefit test for application A90755 is also found in sub-section 90(6) of the Act.

6.7. The Commission adopts the view that in practice the tests are essentially the same. Accordingly, the Commission will assess the likely public benefit and public detriment resulting from the proposed arrangements.

Definition of public benefit and anti-competitive detriment

6.8. Public benefit is not defined by the Act. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

> 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.[36]

6.9. Similarly, anti-competitive detriment is not defined in the Act but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public constituted by a lessening of competition includes:

> 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...[37]

Future with-and-without test

6.10. The Commission also applies the 'future with-and-without test' established by the Australian Competition Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.

6.11. Under this test, the Commission compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the Commission to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Whether arrangements breach the Act

6.12. In assessing an application for authorisation, the Commission does not form a view about whether NSW Health's policy breaches the Act (in this case, section 45 or 47). It only determines whether the public benefit test has been satisfied.

Term of authorisation

6.13. Section 91(1) of the Act allows the Commission to grant authorisation for a specific period of time.

6.14. The Commission may authorise different aspects of conduct for which authorisation is sought for different periods.

Conditions

6.15. Section 91(3) allows the Commission to grant authorisation subject to conditions.

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[36] *Victorian Newsagency (1994) ATPR 41-357 at 42,677.*
[37] Ibid.

7. Commission consideration

7.1. As discussed in paragraphs 6.2 and 6.5 NSW Health lodged two applications for authorisation. The Commission will discuss each application separately where necessary.

Future with and without test

7.2. As set out in paragraph 6.10, the Commission applies the 'future with-and-without test' when assessing an arrangement for which authorisation has been sought. This involves identifying a counterfactual; that is, making a prediction as to what will happen if authorisation is denied. The Commission will use the same counterfactual for each application for authorisation lodged by NSW Health.

7.3. NSW submits that if authorisation is denied and the policy is removed, it will lose up to $10 million in revenue previously earned from providing private in-patients with pathology services.[38] In making this estimate NSW Health states:

> Some Area Pathology Services have only been able to guesstimate the likely impact. Other Area Pathology Services, with more sophisticated IT infrastructure, have made estimates based on referral patterns of doctors where they are not subject to the Policy. By way of example, PALMS has indicated that approximately 50% of the revenue for private in-patients would be likely to be lost following the removal of the Policy.[39]
>
> An example of the consequences of loss of private patient revenue has been provided to the Department by Wentworth Area Health Services (WAHS)...Approximately $700,000 or $800,000 of the private revenue is attributable to billing private in-patients within the public hospital and it is estimated that potentially all this money could be lost.[40]

Referral patterns of non-inpatients

7.4. The claim by NSW Health that $10 million will be lost if its policy is removed is partly based on the referral of patterns, presumably, of private non-inpatients. However, it is possible that a distinction exists between the referral patterns of doctors for private inpatients and private non-inpatients. For example, it may be inconvenient for non-inpatients to travel back to a hospital for a pathology test if the test is not required immediately after the consultation. Further, a non-inpatient may not need to see a specialist again if the pathology test result dispels the potential concern. In such situations it may be more convenient for private non-inpatients to have the test performed by a private pathology laboratory nearer where they live. These possibilities cast doubt on using referral patterns of private non-patients as an indicator of what may happen to referral patterns for private in-patients if the policy is removed.

Why would in-patients be referred to private pathologists?

7.5. NSW Health's submission raises the issue of why doctors would refer private in-patients to private pathologists if allowed to. Possible reasons include that they consider patients

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[38] NSW Health Submission, 24 December 2002, p. 1.
[39] NSW Health Submission, 24 December 2002, paragraph 4.3.
[40] NSW Health Submission, 24 December 2002, paragraph 3.5.

would receive a higher quality of service or pay a lower price.

7.6. NSW Health argues that its policy improves the quality of care provided to patients. It is presumed that NSW Health is not arguing that without its policy, the quality of service provided by NSW Health pathologists would fall below that provided by private pathologists. Consequently, doctors would seem unlikely to switch in-patients to private pathologists for this reason.

7.7. The Australian Association of Pathology Practices (AAPP) also submitted that NSW Health pathology has a number of advantages including geographic proximity, ease of access to patients, ease of access to the referring doctors and a collection service. It argued that in a competitive environment NSW Health pathology public hospital sector is likely to win against a competing private pathology practice in providing pathology services to private in-patients.[41] These broader 'quality-type' considerations support the conclusion above.

7.8. NSW Health currently charges the MBS fee for pathology services provided to private in-patients. Private in-patients therefore incur no out of pocket expenses as 75% of the fee payable for a pathology service is met by making a claim under Medicare and 25% is payable from private health insurance (assuming they have insurance).

7.9. Over 85% of pathology services were bulk-billed in NSW in 2001-02.[42] If NSW Health continued to charge the MBS fee without its pathology policy, doctors might choose to refer private inpatients, particularly for non-urgent tests, to a private pathology provider who bulk bills if they consider convenience of the patient an important factor. Private inpatients referred to private pathology providers who bulk bill would not face the inconvenience of having to make a claim through Medicare and private health insurance.

7.10. Furthermore, not all private in-patients have private health insurance. As an indication, self-paying patients account for 9% of separations in private acute care and psychiatric hospitals.[43] These in-patients would seem likely to prefer to be referred to a private pathology provider who bulk bills.

7.11. Overall, it seems likely that NSW Health would lose some private in-patients if it maintains the price for pathology services provided to private in-patients at the MBS fee.

7.12. However, NSW Health has not indicated whether, without its pathology policy, it would continue to charge the MBS fee for pathology services provided to private in-patients.

7.13. On one hand, the Commission considers that it is reasonable to assume that, in reaching the estimate of the revenue it would lose if its pathology policy was removed, NSW Health would have indicated that this was based on, for example, it commencing bulk billing to private in-patients, if this was going to be the case. NSW Health did not indicate this.

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[41] AAPP submission, 14 December 2000, p. 7.
[42] Medicare statistics, 2001-02 financial year, Department of Health and Ageing, http://www.health.gov.au/haf/medstats/index.htm#Table%20A
[43] *Private Hospitals in Australia*, Research Paper, Productivity Commission, 1999. p. 22.

7.14. In addition, it might be the case that NSW Health's competitive advantage as regard to locality etc (see paragraph 7.7) would mean that:

- the lost revenue from continuing to charge the MBS fee to a reduced number of patients;
- would be less than the lost revenue from commencing bulk billing to an unchanged number of patients.

7.15. On the other hand, NSW Health has submitted that it would lose 50% of its private in-patient revenue if authorisation is denied and its policy is removed.

7.16. However, if NSW Health decided to bulk bill private in-patients for pathology services it would be unlikely to lose many (if any) private in-patients given that the:

- price charged would be the same as that generally charged by private pathology providers; and
- quality of service provided by NSW Health pathology would be comparable to the quality of services provided by private pathology providers.

Therefore, it would seem likely that NSW Health would lose around 25% of its total revenue received from its pathology policy from the 25% reduction in the fee charged for pathology services provided to private in-patients.

7.17. This analysis suggests that NSW Health would, if authorisation was denied, have a significant incentive to commence bulk billing; that is, it would only lose 25% rather than 50% of its revenue. However, this conclusion assumes that the 50% estimate is correct (which depends on how many in-patients would be referred to private pathologists for the reasons indicated at paragraphs 7.9 and 7.10).

7.18. NSW Health also submitted that, despite its official policy of charging the schedule fee, most Area Health Services bulk bill privately referred non-inpatients (to whom its pathology policy does not apply).[44] This might support an argument that NSW Health would commence bulk billing if authorisation is denied. However, unlike private in-patients, non-inpatients are unable to obtain private health insurance for the gap over the Medicare benefit they would receive. Market forces are therefore likely to have driven Area Health Services to bulk bill. Consequently, the ability of in-patients to obtain insurance for the gap is likely to distinguish them from non-inpatients.

7.19. Overall, the Commission considers that, based on the information before it, the safest conclusion is that NSW Health would commence bulk-billing in the absence of its pathology policy. NSW Health has estimated that it would lose 50 per cent of its revenue without the policy. This would need to be a substantial over-estimate to render the Commission's conclusion on this matter incorrect.

7.20. This conclusion would mean that, rather than losing $10 million if authorisation is denied, NSW Health would only lose around $5 million.

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[44] NSW Health submission, 18 December 2001, p. 2.

Would NSW Health establish collection centres?

7.21. The AAPP submitted that under the Pathology Quality and Outlays Agreement, public pathology providers have been given comprehensive competitive access to community based pathology through the Approved Pathology Collection Centre scheme on the same basis as private pathology providers (see paragraphs 3.12 to 3.14). The AAPP considers that this will provide NSW Health with an additional income stream from Medicare which they have not been able to access up to this point in time.[45]

7.22. However, NSW Health submits:

> Area Pathology Services are not funded by the Department to engage in speculative and uncertain entrepreneurial activities. The outlays required for the establishment of collection centres are not justified by the uncertain returns which may be derived from providing those services...free access to the private non-inpatient market is also constrained by the Health Insurance Commission's treatment of fee for service payments. Specifically, the availability of the PEI fees.[46]

7.23. Clearly, it would be possible for NSW Health to attempt to significantly increase the number of private patients it treats by establishing collection centres in the community. The issue is how likely, in practice, this is to happen if authorisation is denied. On balance, the Commission considers this unlikely. In particular:

- it seems consistent with NSW Health's status as a government agency primarily reliant on public funding for it to make up revenue losses with public funding; and

- given that most pathology businesses bulk-bill, it is not clear why significant numbers of, for example, general practitioners would choose NSW Health pathology over private pathology businesses.

Increased taxation

7.24. NSW Health submitted:

> [T]he only way in which this revenue, which is necessary for the proper functioning of the public pathology services in New South Wales, can be replaced is by additional taxpayer funds... [T]here is a real likelihood that the taxpayers of New South Wales will be required to contribute up to an additional $10 million for the continued provision of public pathology services.[47]

7.25. The Commission considers it reasonable to interpret NSW Health's submission to mean that sufficient public funding would become available to make up the revenue shortfall arising in NSW Health pathology if authorisation is denied. Consequently NSW Health pathology itself would not be affected by denying authorisation. For simplicity, the Commission assumes that all other NSW government programs are, like pathology, 'necessary'. Given this assumption, NSW Health is effectively submitting that, if authorisation is denied, NSW government taxes would need to be increased to cover the shortfall of around $5 million.

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[45] AAPP submission, 14 December 2000, p. 2.
[46] NSW Health submission, 24 December 2002, p. 5-6.
[47] Ibid at p. 1

Application A90755 – exclusive dealing

7.26. This application relates to the supply of non-pathology medical services by NSW Health on condition that private in-patients acquire pathology services from NSW Health pathologists.

Effect on competition

7.27. Generally if a firm *proposes* to offer to supply a good or service to consumers on condition that they do not purchase a second good or service from anyone but it, then the question is to what extent this offer reduces competition in the second market. A threshold issue is whether the firm would lose customers by imposing the condition to the point where it would be forced to remove the condition. If so, its proposal would be likely to simply result in it losing business, with negligible effect on the second market.

7.28. In assessing this authorisation application the Commission notes that the conduct being assessed is not a new proposal. It has been in existence since 1989. The introduction of the policy does not appear to have resulted in a significant loss of private inpatient business for NSW Health hospitals – or at least not such a loss as to make it remove the policy. A contributing factor may be the Medicare rule that benefits are only payable if the patient attends the pathologist nominated by the referring doctor.[48] The Royal College of Pathologists of Australasia also has a policy which reinforces this rule. The RCPA's policy provides:

> When a patient presents at a particular pathology practice in Australia with a request form for a different practice, the patient should be notified immediately that the request slip is for a different practice.
>
> The patient should be encouraged to attend the practice specified on the request slip. Should the patient not wish to attend the practice specified and prefers to have the test performed at the practice they have attended, that practice is obliged to ring the referring doctor to inform them of the patient's decision. If the referring doctor accepts the patient's decision, it is then necessary to obtain confirmation of the new request in writing.
>
> Confirmation of the new request within 14 days is essential for Medicare rebate purposes.
>
> If the referring doctor refuses to provide written confirmation, then it is unethical to proceed with the request.
>
> In addition the patient should be informed that if the tests were performed benefits cannot be claimed from the Health Insurance Commission (HIC).[49]

7.29. Consequently, private patients appear to have little choice concerning which pathology practice provides them with pathology services. If private in-patients have little effective choice over who provides their pathology service, little incentive exists for them to switch hospitals because of the existence of NSW Health's policy (unless they believe that the quality of service provided by NSW Health pathology is clearly inferior to private pathology).

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[48] 16A(3) of the *Health Insurance Act 1973*.
[49] RCPA Policy 1/1994, Request Slip Impropriety in Australia.

7.30. Given this conclusion, it is only necessary to consider the effect of its policy on competition in the 'pathology' market. The definition of the pathology market and the extent to which the policy may lessen competition in this market is discussed in considering authorisation application A90754.

Application A90754 – agreements lessening competition

7.31. This application relates to arrangements between NSW Health and its private in-patients, SMPs and VMOs under which private in-patients will have their pathology service requirements supplied by NSW Health pathologists.

Effect on competition

7.32. A key issue is the extent to which these arrangements lessen competition in the relevant market.

7.33. In this case arguably, there might be separate markets for pathology services provided to:

- public patients and private patients; and
- in-patients and non-inpatients.

7.34. There might also be separate markets for each of the seven pathology specialties[50] and for urgent and routine tests.

7.35. These markets might be state-wide or they might be regional (arguably, a pathologist in Albury is not competing in any significant way with a pathologist in Lismore).

7.36. On the other hand, as NSW Health submits there might be a single pathology market in NSW.

7.37. Using this market definition, NSW Health estimated that its pathology policy affected less than 7% of total pathology services provided to private patients in NSW.[51] The AAPP appears to agree with this estimate.[52] This estimate provided by NSW Health was calculated based on Health Insurance Commission data.[53] However, the Commission understands that the complex rules which govern the payment of Medicare benefits for pathology services make it difficult to use this data to accurately determine the percentage of pathology services provided to private patients by NSW Health.

7.38. Having noted this, the Commission is prepared to accept, in the absence of any more clearly accurate data and methodology, that NSW Health's estimate is likely to be in the region of the actual figure.

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[50] Haematology, Chemical, Microbiology, Immunology, Tissue Pathology, Cytopathology and Cytogenetics Genetics.
[51] NSW Health submission, 24 December 2002, paragraph 2.5.
[52] AAPP submission, 14 December 2000, p. 3.
[53] See www.hic.gov.au, Medicare Benefits Schedule Group Statistics.

7.39. Alternatively, it might be argued that the market should be restricted to, for example, the market for private in-patients in New South Wales. It does not appear that data exists that would allow an accurate calculation of the share of the market lost to private pathologists if this definition is used. However, if the share of the market for private in-patients is a proxy for the share of private pathology in-patients[54], then the share of the latter market lost to private pathologists would be around 25%.[55]

7.40. In this instance, it is not necessary to conclusively define the relevant market(s), as the Commission's conclusion on public detriment (see paragraph 7.64) is likely to be the same regardless of the market definition chosen.

Public detriment from lessening of competition

7.41. Typically, competition encourages producers (for example, manufacturers, primary producers, wholesalers, distributors, retailers, professionals, tradespersons, and so on) to work to ensure that the goods and services that they offer for sale meet consumers' needs. In particular, competition typically encourages producers to supply goods and services at the levels of quality desired by consumers at the lowest prices possible, while still achieving an appropriate profit (that is, a profit sufficient to provide an appropriate rate of return on funds invested in the producer).

7.42. Exclusive dealing arrangements that reduce the intensity of competition in a market typically weaken the pressure on producers to improve the quality and minimise the price of the goods or services they supply, resulting in a loss of economic efficiency. This efficiency loss may be represented in practice by: an increase in the cost of producing goods and services; a reduction in the extent to which the range of goods and services produced matches consumers' desires; and a slowing in technological advances.

7.43. Exclusive dealing arrangements will also inevitably be accompanied by an increase in the relevant producer's profitability (or else the producer would not engage in exclusive dealing).

7.44. However, particular markets may have characteristics – for example, government regulation – that lessen the public detriment generated by anti-competitive conduct.

7.45. In this case, two regulatory initiatives are relevant. First, as discussed at paragraphs 7.28 and 7.29, patients do not choose their pathologist – their doctors do. Second, the Medicare rebate is effectively a floor price for the provision of pathology services. It is highly unlikely that a pathology practice would charge below the Medicare rebate as this would not provide the consumer with a price advantage – they would still pay nothing.

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[54] NSW Health appears to suggest it isn't; NSW Health submission, 24 December 2002, paragraph 2.4.

[55] Derived from Australian Hospital Statistics 2000-01, Australian Institute of Health and Welfare, Table 6.1.

7.46. Over 85 per cent of pathology services were bulk-billed in NSW in 2001-02.[56] HCF explains that technological innovation has brought about significant improvements in efficiency and the cost of delivering pathology services. Efficient transport arrangements have also allowed a marked reduction in duplication of services. The downward movement in the Medicare rebate has not kept pace with this change.[57]

Price charged by NSW Health for pathology services

7.47. NSW Health charges private in-patients the MBS fee for pathology services and has proposed that, if authorisation were to be granted, it would continue to charge the MBS fee throughout the term of the authorisation.[58] As concluded at paragraph 7.19, market forces would seem likely to force NSW Health to significantly reduce its price – that is, to commence bulk-billing – if authorisation is denied.

7.48. The conclusion therefore follows that NSW Health's pathology policy is enabling it to charge a significantly higher price for pathology services to private in-patients in its hospitals. This generates significant public detriment. Given that the price rise would be covered by private health insurance in most cases, this detriment would largely manifest itself in higher costs for insurance companies and therefore ultimately higher private health insurance premiums for consumers.

Effect on Patient Care

7.49. On one hand, NSW Health has submitted that removing its policy would reduce the quality of patient care. In particular, it has submitted that:

- the risk that specimens will be lost or contaminated is increased where there is more than one pathology practice in a hospital;
- the storage of routine specimens off site at the premises of a private provider means that access to them is hampered by the location of those premises and the hours of operation of the supplier;
- private laboratories are often not equipped to store "parallel" testing samples. For example, serums taken early in a pregnancy need to be stored and compared with a later test;
- it may be difficult to compare tests done in different laboratories with different technologies and reference ranges; and
- the storage and maintenance of results for several years is of importance to patients suffering chronic illnesses. AHS's provide secure and accessible records for long period of time whereas the ability of private pathology providers to offer this facility may be hampered by location, changes of ownership, moving premises and other such factors.[59]

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[56] Medicare statistics, 2001-02 financial year, Department of Health and Ageing, http://www.health.gov.au/haf/medstats/index.htm#Table%20A

[57] HCF submission, 15 December 2000, p. 3.

[58] NSW Health submission, 24 December 2002, p.1.

[59] NSW Health submission, 2 November 2000, p. 28-29.

7.50. The NCPP submitted that:

- failure to ensure that serial measurements on the one patients are all performed with the same pathology service will result in pathology requests not being directly comparable or applicable, necessitating repeat testing, delays in diagnosis and treatment and a wastage of resources; and
- problems arise with the interpretation of results from different pathology providers. In particular, if different pathology providers define a 'normal' differently, errors in clinical judgement particularly by junior doctors may occur, which could cause danger, with potentially fatal consequences for patients; and
- the NATA does not assess or accredit the delivery of results across the laboratory/hospital interface.[60]

7.51. The AIMS submitted that public pathology was at least as efficient and of a high standard as private pathology. In particular, it submitted that by processing the pathology tests of private in-patients at public hospitals through the hospital pathology service there are less likely to be communication gaps and logistical difficulties which could adversely impact on the patient's welfare.[61]

7.52. The HCCC noted that the more complex a service system the greater the possibility for error, which may have a detrimental impact on the care of patients.[62]

7.53. On the other hand, the AAPP submitted that:

- no private pathology practice would achieve NATA accreditation or Approved Pathology Laboratory status if the service it provided was prone to the errors, inefficiencies and concerns raised in NSW Health's submission. The objective of the huge burden of regulation, supervision and certification that private pathology laboratories are subjected to is to prevent this from happening in the first place;
- private hospitals do not have problems with the presence of more than one competing private pathology provider within their campuses; and
- an AAPP member had identified a case where NSW Health's pathology policy had adversely affected the management of a patient (it did not provide details). The AAPP stated that the treating doctor's wishes were overruled.[63]

7.54. The AMA submitted that:

> Pathology laboratories through competition continue to strive for excellence in standards and service levels in order to attract referrals from individual practitioners. This competition provides a patient benefit that will only deteriorate if there is an authorisation allowing the requirement of a closed shop monopoly provider. The authorisation as sought by New South Wales Health will not allow a public pathology versus private pathology test of service and quality to be maintained now transparent [sic] through the established referral patterns of doctors. The comments of the AMA should not be taken as criticism of the service provided by hospital pathology laboratories but intended to illustrate that a

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[60] NCPP submission, 21 December 2000, p. 2 and NCPP submission, 20 January 2003, p. 6.
[61] AIMS submission, 29 November 2000, p. 1-2.
[62] HCCC submission, 25 November 2002, p. 1.
[63] AAPP submission, 14 December 2000, p. 6 and AAPP submission, 17 January 2003, p.1.

striving for excellence is enhanced by the competition between private and public pathology facilities whilst under the continuing scrutiny of referring doctors.[64]

7.55. The AMA also submits that NSW Health's pathology policy prevents doctors seeking second opinions from alternative pathology providers where they doubt the results of initial tests.

7.56. As indicated at paragraphs 7.41, generally, the Commission's starting point is that competition is likely to benefit quality. This would support a conclusion that private in-patients in NSW Health hospitals are receiving a lower standard level of service than would exist in the absence of NSW Health's pathology policy.

7.57. However, the AMA felt it necessary to note that its comments 'should not be taken as a criticism of the service' provided by NSW Health pathology.[65] The AIMS, a body with members working in the public and private pathology sectors, also considered that standards in each sector were at least equivalent.

7.58. In addition, NSW Health's pathology policy does not apply to private non-inpatients. Despite this, NSW Health pathology appears to attract a significant level of private non-inpatient business. This seems odd if the quality of its service is significantly below that of private pathology businesses.

7.59. Arguably, if the quality of pathology provided to private in-patients in NSW Health hospitals was significantly below that available from private pathologists, then private in-patients might be unlikely to choose to be treated in NSW Health hospitals.[66] Yet NSW Health still appears to attract sufficient private in-patients for private pathologists to express concern about its pathology policy.

7.60. NSW Health and interested parties have provided examples of where they believe NSW Health's pathology policy improves or reduces the quality of service provided to private in-patients in NSW Health hospitals (see paragraphs 7.49 to 7.55). The examples all seem to carry some weight and consequently do not decisively determine the issue.

7.61. Overall, the views and information considered by the Commission do not resolve conclusively whether NSW Health's pathology policy results in a lower standard of pathology being provided to private in-patients in its hospitals or not.

7.62. The Commission remains attracted to the view that competition improves the quality of services available to patients. However, it recognises that a conclusion that private in-patients – and public patients, as they are served by the same pathology service – are currently receiving a poorer service because they are confined to NSW Health pathology would be one of considerable significance, and not one to be reached lightly.

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[64] AMA submission, 11 December 2000, p. 1-2.
[65] AMA submission, 11 December 2000, p.2
[66] While they would not be able to choose their pathologists at a private hospital, they could be confident that it would be unlikely they would be referred to NSW Health pathology.

7.63. In all the circumstances, the Commission is not satisfied that it can safely reach this conclusion on the basis of the information and views before it. It is also not satisfied that it can safely conclude that the NSW Health pathology policy results in private in-patients receiving a higher quality of service than they would if there were multiple pathology providers. Overall, the Commission considers the most appropriate conclusion to be that the quality of service provided to private in-patients in NSW Health hospitals is largely unaffected by NSW Health's pathology policy.

Conclusion

7.64. Overall, the Commission considers that NSW Health's pathology policy does result in significant public detriment. This public detriment largely results from the ablity of NSW Health to charge the MBS fee for pathology services to private in-patients. The Commission considers that this conclusion holds irrespective of whether the market definition proposed by NSW Health is accepted or a narrower definition, such as the one outlined in paragraph 7.39, is accepted.

Public Benefits

Revenue derived from the policy

7.65. NSW Health submits that its policy generates a public benefit by providing Area Health Services with revenue used to provide salary enhancements for pathologists, attract and retain pathology staff, purchase new or replace existing pathology testing equipment, fund education, study and conference leave for pathology and non-pathology staff and fund research activities.

7.66. However, as indicated above, NSW Health also submitted that public funding would be made available to replace the revenue lost to public pathology if authorisation is denied. The Commission has also assumed that funding would be maintained for all other NSW government programs if authorisation is denied. Consequently, NSW Health's public benefit argument is essentially that its pathology policy generates a public benefit by sparing NSW taxpayers higher taxation. The Commission concluded at paragraph 7.20 that this saving is likely to be around $5 million.

7.67. This $5 million saving for NSW taxpayers is effectively a transfer from persons with private health insurance, whose premiums are funding an increased price imposed by NSW Health under its pathology policy.

7.68. The issue is essentially whether it benefits the public for government programs to be funded by specific groups in the community (such as the holders of private health insurance) rather than by taxation.

7.69. This is largely an issue whose resolution depends on what is considered equitable. It is broadly comparable to issues such as whether high marginal income tax rates or taxes on particular sectors of the economy are appropriate.[67] After considerable

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[67] Although these issues also raise economic efficiency issues which, because of the regulated nature of the pathology market, do not arise when assessing NSW Health's pathology policy.

reflection, the Commission does not consider it appropriate in ordinary circumstances for it to make these types of equity judgements, even where taxpayers are the ultimate beneficiary. Rather, it considers it appropriate, for it to focus its analysis of anti-competitive conduct the subject of these authorisation applications on economic efficiency considerations. Consequently, the Commission concludes that the transfer of $5 million from persons with health insurance to taxpayers caused by NSW Health's pathology policy is not a public benefit for the purpose of this authorisation.

Administrative Cost Savings

7.70. The Commission considers it likely that NSW Health's pathology policy generates administrative cost savings because the policy creates a simpler system. For example, it seems likely that NSW Health's pathology policy would save it expenditure on:

- credentialing private pathologists; and
- establishing systems and training staff to deal with any differing request forms, collection policies and procedures, and other characteristics and requirements of different private pathology businesses.

7.71. In addition, the need to operate more complex systems over time would be likely to generate resource costs – for example, in additional staff time.

7.72. The Commission has not been provided with an estimate of the administrative cost savings accruing to NSW Health from its pathology policy. On the basis of the qualitative information available, the Commission is satisfied that, at least initially, the administrative cost savings are likely to be small but possibly significant. However, they seem likely to decrease over time as staff become familiar with any new systems established to deal with multiple pathology providers, and as the systems themselves are refined and made more cost-effective. Ultimately, the Commission considers that NSW Health's pathology policy generates a small public benefit from administrative cost savings.

Improved quality

7.73. As indicated at paragraph 7.63, the Commission is not able to conclude that NSW Health's pathology policy generates a public benefit by improving the quality of patient care.

Conduct is illegal under other legislation

7.74. The Commission notes that if conduct is illegal under other Commonwealth legislation, the conduct is not likely to be in the public benefit. While it is not for the Commission to determine whether the proposed arrangements are in breach of other legislation, it is difficult to see how any benefits claimed to flow from the arrangements, where Parliament has made clear its intention that such arrangements are not to take place, could be regarded as benefits to the public.[68] The Commission sought the views of the Health Insurance Commission (HIC) as to whether any

[68] *The Hospital Benefit Fund of WA Inc v ACCC* 1997 ATPR 41 - 569

provisions of the Health Insurance Act 1973 (HIA) (and in particular ss16A(5A), 129AA or 129AAA) were at risk of being contravened as a result of the conduct. The HIC has advised the Commission that the arrangements the NSW Health are seeking authorisation for do not breach ss16A(5A), 129AA or 129AAA of the HIA.[69]

Conclusion

7.75. The Commission concludes that NSW Health's pathology policy generates a small public benefit arising from administrative cost savings.

Balance of public benefits and detriment

7.76. The Commission may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements will result in a public benefit that will outweigh any anti-competitive detriment.

7.77. In this case, the Commission has concluded that NSW Health's pathology policy generates significant public detriment and a small public benefit. However, it is possible to grant authorisation in this situation if appropriate conditions can be imposed that will ensure that the public benefit does outweigh the public detriment. In this case, the Commission considers this is possible. The Commission therefore grants authorisation subject to the following conditions.

C1: Public Health Organisations shall allow referring Salaried Senior Medical Practitioners and Visiting Medical Officers to seek second opinions from private pathology laboratories on pathology test results initially provided by Public Health Organisations pathology laboratories where referring doctors:

- **state in writing to the Public Health Organisation that this is in the best interests of the patient; and**
- **unless impractical for medical reasons, obtain the patient's consent in writing if the fee charged by the private pathology business will be above the relevant Medicare benefit payable to the patient.**

C2: Public Health Organisations shall ensure that the fee charged to private in-patients treated by Salaried Senior Medical Practitioners and Visiting Medical Officers is no more than the relevant Medicare benefit payable to the patient for the pathology service.

[69] HIC letter to Commission dated 3 April 2001.

Material Change of Circumstances – establishment of collection centres

7.78. The Commission's analysis has also been undertaken on the basis of NSW Health's statements that it is unlikely to establish collection centres in the community. If NSW Health decided to establish collection centres this may result in a material change of circumstances which may cause the Commission to initiate the review processes contained within 91B or 91C of the Act.

Term of authorisation

7.79. The Commission grants authorisation for five years from the date on which this determination comes into force. This will allow it to review the determination in light of any changed circumstances.

Similar arrangements

7.80. NSW Health has expressed applications for authorisation A90754 and A90755 to cover arrangements in similar terms to its pathology policy.

7.81. Generally, the Commission will consider granting authorisation to cover other similar arrangements if it is satisfied that the similar arrangements raise similar public benefit and public detriment issues to the original arrangement for which authorisation is sought, with the result that similar arrangement would also be likely to generate a net public benefit.

7.82. NSW Health has not provided details of the similar arrangements it has in mind. In particular, it is not clear from its applications if NSW Health wishes to extend the arrangements to other medical specialities.

7.83. Given this lack of information the Commission is unable to conclude that the similar arrangements would result in a public benefit outweighing any public detriment.

7.84. Accordingly, the Commission denies authorisation to both applications to the extent that they are expressed to extend to similar arrangements pursuant to section 88(13) of the Act. The Commission only grants authorisation subject to conditions to NSW Health's pathology policy.

8. Final Determination

The Application

8.1. The New South Wales Department of Health (NSW Health) lodged applications for authorisation A90754 and A90755 with the Australian Competition and Consumer Commission (the Commission) under section 88(1) and 88(8) of the *Trade Practices Act 1974* (the Act) respectively. NSW Health also sought to extend authorisation to:

- future parties to the arrangements pursuant to section 88(10); and
- other arrangements in similar terms, pursuant to section 88(13).

8.2. Broadly, these applications seek authorisation for NSW Health's policy of requiring private in-patients in NSW public hospitals to obtain pathology services from NSW Health pathologists. This policy is referred to as the 'NSW Health pathology policy' in this determination.

8.3. The Commission issued a draft determination on 21 October 2002 proposing to grant authorisation to the applications for a period of one year to provide a transition period for removal of the policy.

Commission's Decision

8.4. In accordance with the test set out in section 90 of the Act, and for the reasons outlined in Chapter 7 of this determination, the Commission is satisfied subject to conditions that, with one exception relating to the extension of the applications to similar arrangements pursuant to section 88(13), the arrangements covered by applications for authorisation A90754 and A90755 are likely to result in public benefits that outweigh the public detriment constituted by any lessening of competition that would be likely to result from the arrangements.

8.5. Accordingly, the Commission grants application for authorisation A90754 - subject to the conditions specified below and except to the extent to which it relates to similar arrangements - to make and give effect to a contracts, arrangements or understandings:

- between public health organisation and its private in-patients that the patient's pathology service requirements will be supplied by a pathology practitioner appointed by the public health organisation; and

- between each public health organisation and SMPs exercising the right of private practice as well as VMOs that such practitioners should refer pathology service requirements for private in-patients treated by them to a pathology practitioner appointed by a public health organisation.

8.6. The Commission grants application for authorisation A90755 - subject to the conditions specified below and except to the extent to which it relates to similar arrangements - for conduct which may or would constitute exclusive dealing for:

- The supply of non-pathology medical services by a public health organisation to private in-patients of public hospitals in NSW on condition that patients acquire pathology services from a pathology practitioner appointed by a public health organisation.

- Public health organisations requiring SMPs exercising a right of private practice and VMOs to refer private in-patients in public hospitals in NSW to a pathology practitioner appointed by a public health organisation.

8.7. Applications for authorisation A90754 and A90755 are granted subject to the following conditions:

C1: Public Health Organisations shall allow referring Salaried Senior Medical Practitioners and Visiting Medical Officers to seek second opinions from private pathology laboratories on pathology test results initially provided by Public Health Organisation pathology laboratories where referring doctors:

- **state in writing to the Public Health Organisation that this is in the best interests of the patient; and**
- **unless impractical for medical reasons, obtain the patient's consent in writing if the fee charged by the private pathology business will be above the relevant Medicare benefit payable to the patient.**

C2: Public Health Organisations shall ensure that the fee charged to private in-patients treated by Salaried Senior Medical Practitioners and Visiting Medical Officers is no more than the relevant Medicare benefit payable to the patient for the pathology service.

8.8. The Commission grants the authorisation under section 88 of the Act for a period of five years from the date on which the authorisation comes into force.

8.9. Authorisations A90754 and A90755 extend to future parties to the arrangements covered by the authorisations pursuant to section 88(10).

8.10. This decision is subject to any application to the Australian Competition Tribunal for its review.

8.11. This determination is made on 27 June 2003. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 19 July 2003. If an application is made to the tribunal, the determination will come into force:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or

- where the application is withdrawn – on the day on which the application is withdrawn.

ATTACHMENT A

List of Area Health Services

Central Coat Area Health Service

Central Sydney Area Health Service

Far West Area Health Service

Greater Murray Area Health Service

Hunter Area Health Service

Illawarra Area Health Service

Macquarie Area Health Service

Mid North Coast Area Health Service

Mid Western Area Health Service

New England Area Health Service

Northern Rivers Area Health Service

North Sydney Area Health Service

South Eastern Sydney Area Health Service

South Western Sydney Area Health Service

Southern Area Health Service

Wentworth Area Health Service

Western Sydney Area Health Service

ATTACHMENT B

Statutory Health Corporations

Corrections Health Service

The Royal Alexandra Hospital for Children

The Stewart House Preventorium

Institute for Clinical Excellence

ATTACHMENT C

Affiliated Health Organisations

Australian Red Cross Society

Benevolent Society of New South Wales

Buckland Convalescent Hospital Ltd

Calvary Health Care Sydney Incorporated

Hope HealthCare Ltd

Karitane

Mercy Care Centre, Young

Mercy Health Service Albury Limited

New South Wales College of Nursing

Royal Flying Doctor Service of Australia (South Eastern Section)

Royal Rehabilitation Centre Sydney

Royal Society for the Welfare of Mothers and Babies

Sacred Heart Hospice Limited

St Anthony's and St Joseph's Centre of Care Ltd

St John of God Health Care System Inc

St Joseph's Hospital Ltd

St Vincent's Hospital Sydney Ltd

The Trustees of the Carrington Centennial Trust

The Trustees of the Daughters of Charity of St Vincent de Paul

The Trustees of the Sisters of Mercy (Singleton)

The Trustees of the Roman Catholic Church for the diocese of Bathurst

The Trustees of the Roman Catholic Church for the diocese of Lismore

Uniting Church in Australia

Attachment D: Submissions received from interested parties

The following is a list of submissions received by the Commission in relation to the applications for authorisation.

- AXA Australia Health Insurance
- The Hospital Contributions Fund of Australia
- The Royal College of Pathologists of Australasia
- Australian Association of Pathology Practices
- Private Health Insurance Administration Council
- Australian Medical Association
- NSW Health Funds Association
- Macquarie Area Health Service
- Health Insurance Commission
- Northern Sydney Health
- Far West Area Health Service
- Illawarra Area Health Service
- Greater Murray Area Health Service
- South Western Sydney Area Health Service
- National Coalition of Public Pathology
- Australian Institute of Medical Scientists
- New England Area Health
- Wentworth Area Health Service
- Mid Western Area Health Service
- Northern Rivers Area Health Service
- Central Coast Health
- Central Sydney Area Health Service
- Southern Area Health Service
- Hunter Health
- Mid North Coast Area Health Service
- South Eastern Sydney Area Health Service
- Western Sydney Health
- Health Care Complaints Commission
- Dr George Watson
- Mr Richard de Lambert

Approved for Public Register and
to be published on the Internet
YES / NO

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30 / 6 / 13