



Australian
Competition &
Consumer
Commission

20 June 2007

Statement of Issues — Healthscope Limited - proposed acquisition of Symbion Health Limited's pathology, medical centre and imaging businesses

1. Outlined below is the Statement of Issues released by the Australian Competition and Consumer Commission (ACCC) in relation to the proposed acquisition of Symbion Health Limited's (**Symbion**) pathology, medical centre and imaging businesses by Healthscope Limited (**Healthscope**) (**proposed acquisition**).
2. A Statement of Issues published by the ACCC is not a final decision about a proposed acquisition, but provides the ACCC's preliminary views, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.
3. In line with the ACCC's *Merger Review Process Guidelines* (available on the ACCC's website at www.accc.gov.au) the ACCC has established a secondary timeline for further consideration of the issues. The ACCC anticipates completing further market inquiries by **11 July 2007** and anticipates making a final decision on **25 July 2007**. However, the anticipated timeline can change in line with the *Merger Review Process Guidelines*. To keep abreast of possible changes in relation to timing and to find relevant documents, market participants should visit the Mergers Register on the ACCC's website at www.accc.gov.au/mergersregister.
4. A Statement of Issues provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the primary issues identified by the ACCC. It is also intended to provide the merger parties and other interested parties with the basis for making further submissions should they consider it necessary.

Background

5. On 1 May 2007, the ACCC commenced an informal review of the proposed acquisition pursuant to the ACCC's Merger Review Process Guidelines.

The parties

Healthscope Limited

6. Healthscope is a public company listed on the Australian Stock Exchange. Healthscope is involved in the following businesses:
 - The ownership and/ or management of 48 private medical, surgical, rehabilitation and psychiatric hospitals in Australia.
 - The operation of pathology businesses in all Australia states and territories except the Northern Territory. Healthscope's pathology businesses operate under the names General Pathology Laboratories, Cutaneous Pathology and Mount Pathology (Western Australia), Gribbles Pathology (Victoria, Queensland and South Australia), and Davies Campbell de Lambert Pathology (New South Wales and Australian Capital Territory).
 - The operation of specialist skin cancer clinics across Australia
 - A minority, non-controlling, interest in NM&IG Medical Pty Ltd. NM&IG Medical Pty Ltd operates a number of medical centres.

Symbion Health Limited

7. Symbion is a public company listed on the Australian Stock Exchange. Symbion's business units include pathology, medical centres, diagnostic imaging, pharmacy and consumer products.
8. Symbion's pathology business operates under the names Dorevitch Pathology (Victoria, New South Wales), Gippsland Pathology Services (Victoria), Lavery Pathology (New South Wales, Australian Capital Territory), QML Pathology (Queensland and Northern New South Wales) and Western Diagnostic Pathology (Western Australian and Northern Territory).

The transaction

9. Healthscope proposes to acquire all of Symbion by way of a scheme of arrangement. If the scheme is successful, all the shares in Symbion would be acquired by Healthscope.
10. Healthscope has entered into an agreement with Ironbridge Capital and Archer Capital whereby Healthscope will subsequently divest Symbion's pharmacy and consumer businesses to Ironbridge Capital and Archer Capital. Ironbridge Capital and Archer Capital are private equity investors in Australasian markets.
11. Healthscope will retain Symbion's pathology, medical centre and diagnostic imaging businesses.

Areas of Overlap

12. The ACCC understands that the main area of overlap between Healthscope's and Symbion's businesses is in the provision of pathology services. Consequently, the overlap between Healthscope's and Symbion's pathology services is the focus of this Statement of Issues.

Market Background

Pathology services

13. Pathology is the branch of clinical medicine concerned with understanding the causes and processes of diseases and providing scientific analysis which forms an essential basis for medical diagnosis and treatment. Pathology testing is required by patients and doctors in both community and hospital settings and is provided by both private and public pathologists.

Pathology providers

14. Apart from Healthscope and Symbion, other private pathology service providers in Australia include Sonic Healthcare (all states and territories), St John of God Pathology (Victoria and Western Australia), St Vincent's (Victoria and New South Wales), Primary Health Care (New South Wales, Victoria, South Australia and Queensland), Analytical Reference Laboratories (Victoria) and Perth Medical Laboratories (Western Australia). The ACCC also notes that public pathology providers may undertake some private pathology work, for example, services to private patients in public hospitals. Public pathology providers include providers such as Southern Cross Pathology, Network Pathology, Eastern Health, Royal Children's Hospital, and PathWest.

Customers

15. The ACCC understands that there are three primary classes of customers for private pathology providers: (i) patients whose tests are ordered by a General Practitioner; (ii) patients whose tests are ordered by a specialist; and (iii) tests for private in-patients in private or public hospitals. Healthscope submits that 70 per cent of pathology tests are ordered by General Practitioners, followed by 20 per cent of tests ordered by specialists and the remainder for private in-patients at public hospitals and private hospitals.
16. Samples from patients referred by a general practitioner can be collected by the general practitioner and picked up by the pathology provider, collected by the patient themselves who provides it to the general practitioner and picked up by the pathology provider or collected at a collection centre of the pathology provider.
17. There is also some demand for commercial and veterinary pathology services. Commercial or industrial pathology services may be provided to pharmaceutical companies requiring clinical trial testing, government and

quasi government tenders (for example, drug testing by public sector agencies of their staff), companies requiring blood alcohol testing of its staff on-site(eg mining companies) etc. Veterinary pathology services may be provided to veterinarians who treat companion animals, or with respect to livestock and production animals.

Regulation

18. The pathology industry is characterised by a high degree of regulation. The regulatory framework covers all aspects of pathology service provision. Some of the key regulatory requirements are outlined below.

Bulkbilling under the Medicare Benefits Scheme and co-payments

19. Under the Medicare Benefits Scheme (MBS), the Commonwealth government is the principal funder of pathology services. Individual patients' Medicare benefit entitlements for pathology services are prescribed by the Health Insurance Act 1973 (HIA Act) and the Health Insurance (Pathology Services Table) Regulations 2005 (PST Regulations).
20. Where a Medicare benefit entitlement arises the eligible patient may assign their right to the Medicare benefit to their pathology service provider through the practice of bulkbilling.
21. Medicare benefits are only payable for 85 per cent of the MBS schedule fee for a pathology test. A pathology service provider can choose to bulkbill a patient whereby the patient will authorise the pathology service provider to receive the 85 per cent Medicare benefit as its fee.
22. Where a pathology service provider elects to bulkbill a patient, the pathology service provider cannot levy a co-payment on the patient. A co-payment is a payment in addition to the Medicare benefit received by the pathology service provider for that service. This is because under the HIA, a pathology service provider who bulkbills must accept assignment of the Medicare benefit from the patient as full payment for the service.
23. Where a pathology service provider does not bulkbill, the provider is not restricted in the price it can charge a patient for pathology services.

Coning

24. Coning legislation was introduced in 1995 in order to limit any incentive for over-servicing. This legislation only applies to pathology services requested by general practitioners outside a hospital. Coning is a process whereby the PST Regulations limits the entitlement to Medicare benefits for pathology services generally as follows:
 - If the pathology service provider bulkbills, it is only paid the Medicare benefit for the three most expensive tests.

- If the pathology service provider does not bulkbill, it is paid for all the tests (by the patient) but the patient can only claim the Medicare benefit for the three most expensive tests. The patient cannot claim any Medicare benefit for any additional tests above the three most expensive tests.

Memorandum of Understanding (MOU) between the Department of Health and Ageing (DHA), Australian Association of Pathology Practices Inc (AAPP), the Royal College of Pathologists of Australasia (RCPA) and the National Coalition of Public Pathology (NCOPP)

25. The MOU is a document signed by the Australian Government, AAPP, RCPA and the NCOPP. The current MOU was signed in 2004 and is valid until 30 June 2009.
26. The MOU seeks to manage growth in government outlays for pathology testing under the MBS arrangements so that annual increases in government outlays for pathology testing do not exceed agreed-upon target levels. The current MOU provides for target growth rates in MBS outlays ranging between 4.6 per cent per annum and 5.8 per cent per annum over the duration of the agreement.
27. The ACCC understands that where pathology service providers elect not to bulkbill, those payments do not go towards expenditures relevant to the MOU targeted expenditure levels.

Regulatory controls on the quality of pathology services

28. The HIA Act imposes conditions under which a pathology service will attract Medicare benefits. The ACCC understands that these conditions seek to regulate the quality of pathology services. The overlying requirements for a Medicare benefit to be payable in respect of a pathology service include the following:
 - Determined necessary by the treating practitioner.
 - Rendered by or on behalf of an approved pathology practitioner (APP).
 - Rendered in an approved pathology laboratory accredited for that kind of service (APL).
 - Rendered in an APL owned by an approved pathology authority (APA).
29. MBS eligible pathology tests must be performed in a laboratory accredited under the *Health Insurance (Accredited Pathology Laboratories – Approval) Principles 2002*.
30. The National Association of Testing Authorities (NATA) is responsible for accrediting APLs.

Licensing regime for approved collection centres

31. The allocation of collection centres licences is currently regulated under the Health Insurance (Eligible Collection Centres) Approval Principles 2005 (Current ECC Principles). The ACCC understands that these regulations are due to change on 1 July 2007 to regulations under the Health Insurance (Eligible Collection Centres) Approval Principles 2007 (New ECC Principles).
32. Under the current ECC Principles, a new pathology service provider with a suitably accredited laboratory is allocated two licences to set up collection centres whereas under the new ECC Principles, a new entrant will be allocated four such licences.
33. Under the new ECC principles, additional allocation of licences will be calculated based on the existing number of collection centre licences a pathology service provider has and the rate of national population growth.
34. Under the new ECC principles, collection centre licences cannot be traded between APAs.

Statutory independence of medical practitioners

35. The ACCC understands that under the HIA Act, a pathology service provider is prohibited from entering into arrangement with medical practitioners whereby the medical practitioner refers all its patients to the pathology service provider. A pathology service provider is also prevented from inducing referrals from medical practitioners.
36. The ACCC further understands that it is the medical practitioner and not the pathology services provider who decides whether a patient will be bulkbilled or privately billed, as the referral form provided by the medical practitioner to the pathology service provider requires this election to be made.

Market Definition

37. The ACCC has assessed the proposed acquisition in a number of different markets.

Pathology services

38. The most relevant market for the purposes of this Statement of Issues is the market for pathology services.
39. The ACCC considers that pathology services do not form part of a 'cluster market' for hospital services. Pathology services are supplied to customers outside hospitals and can be unbundled from other hospital services relatively easily.
40. The ACCC notes that public hospital in-patients are generally covered by a State based funding system covering all services provided during a hospital

stay. A public hospital patient does not exercise choice between pathology service providers, a patient's choice to use a public hospital generally reflects a choice between the public and private health systems rather than a choice of pathology service provider.

41. In its 2004 consideration of an application for the review of the ACCC's decision with respect to an authorisation application by the Australian Association of Pathology Practices Incorporated and the New South Wales Department of Health, the Australian Competition Tribunal (ACT) considered a market for the provision of pathology services (excluding public hospital in-patients) in the geographic areas no broader than New South Wales. The ACT considered that depending on circumstances, the geographic dimensions could be narrower.
42. The ACCC considers that there are state based markets for the provision of pathology services by public and private pathology service providers (excluding services to public hospital in-patients) (state based pathology services markets).
43. In considering state based markets, the ACCC notes the following factors:
 - Whilst some pathology samples may be transported interstate for testing, in general, the proportion of samples tested interstate appears to be relatively low.
 - The urgent nature of some tests (eg blood matching) requires prompt testing and reporting of results.
 - A state based presence may be necessary to facilitate awareness with general practitioners and develop relationships.

Veterinary pathology services

44. The ACCC considers that there are state based markets for the provision of veterinary pathology services for all types of animals, including companion and livestock (state based markets for veterinary pathology services).
45. In considering state based markets for veterinary pathology services, the ACCC notes the following factors:
 - Veterinary pathology services are provided by specialist veterinarian pathologists.
 - Veterinary pathology service provision is regulated by state governments.

Public hospital pathology services

46. The ACCC considers that there is a national market for the provision of pathology services to public, uninsured in-patients at a public hospital under contract (public hospital pathology services market).

47. A pathology service provider to a public hospital typically has a laboratory on-site with the bulk of the testing done at the laboratory. This is due to the rapid turnaround times associated with many of the services (including emergency) provided at a public hospital.
48. In considering a national market for public hospital pathology services, the ACCC notes that interstate pathology service providers can tender for contracts to provide pathology services at a public hospital. If successful, a pathology service provider can establish its laboratory at a public hospital and commence its operations.

Market Inquiries

49. On 1 May 2007 the ACCC commenced market inquiries regarding the proposed acquisition. A range of interested parties provided responses, including other private pathology service providers, public pathology service providers and industry bodies.

Statement of Issues

50. For the purposes of this Statement of Issues, the issues in this matter are divided into three categories: 'Issues of concern', 'Issues that may raise concerns' and 'Issues unlikely to raise concerns'. The ACCC is inviting information from interested parties (preferably supported by examples and quantitative data) in relation to all issues.

Issues of concern

51. The ACCC's preliminary view is that the proposed acquisition is likely to raise competition concerns in the Victorian pathology services market given that the merged entity will be the largest pathology services provider in a market that is characterised by high barriers to entry and expansion and few substitute pathology service providers. The ACCC considers that smaller, niche pathology service providers are unlikely to provide a competitive constraint on the merged entity.
52. Further, the ACCC's preliminary view is that post acquisition, market structures in Victoria, Queensland and Western Australia are likely to increase the ability and incentive for coordinated conduct between the merged entity and Sonic.

Pathology services markets

53. Healthscope has provided figures which the ACCC has reproduced in tabular format below showing the market concentrations of the largest national pathology service providers in Australia, namely Sonic Healthcare Limited (Sonic), Healthscope and Symbion:

State	Symbion	Healthscope	Sonic	Others
Northern Territory	64%	NIL	27%	9%
Queensland	45%	5%	46%	4%
New South Wales and the Australian Capital Territory	28%	4%	42%	26%
Tasmania	NIL	13%	83%	4%
Victoria	33%	21%	20%	26%
Western Australia	32%	10%	24%	34%

(Reproduced with the permission of Healthscope)

54. Healthscope has derived the above estimated market shares based on the number of collection centres each pathology service provider has in each state/ territory.
55. According to the market share data provided by Healthscope, the proposed acquisition will result in the greatest accretion of market share to the merged entity in Victoria and Western Australia.
56. The ACCC notes that the proposed acquisition will result in an increased concentration in the already concentrated Queensland market for the provision of pathology services.
57. Further, the proposed acquisition will result in the largest two pathology service providers accounting for more than 70 per cent of pathology service provision in Australia.
58. Different market share data has been received from market participants, drawn from Medicare Benefit Schedule estimates.
59. The ACCC seeks information on the most appropriate means by which market shares in the provision of pathology services should be calculated.

Victorian market for the provision of pathology services

60. The ACCC understands that the proposed acquisition will increase market concentration in Victoria, resulting in the merger of the largest player (Symbion) and the second largest player (Healthscope). The merged entity will account for 54 per cent (309 collection centres) of all collection centres in Victoria. Sonic will account for 20 per cent (116 collection centres) of all collection centres in Victoria.
61. The ACCC considers that the merged entity is likely to possess sufficient market power in the Victorian market for the provision of pathology services either by unilaterally raising prices for the provision of pathology services by

moving away from bulkbilling patients or by decreasing the quality of pathology service provision to the minimum levels required by regulation.

62. The ACCC notes that the proposed acquisition also raises the likelihood of coordinated conduct between the merged entity and Sonic, which is discussed below.
63. The ACCC notes that the remaining players in this market are small/medium sized in comparison and include players such as St John of God, St Vincent's Pathology, ARL Group and Pathlab. The ACCC considers that smaller, niche pathology service providers are unlikely to provide a competitive constraint on the merged entity.
64. The following table, reproduced from information provided by Healthscope, lists the market participants in the Victorian pathology services market:

VICTORIA – Number of collection centres allocated to pathology service providers	
Symbion	186
Healthscope	123
Sonic	116
St John of God/ PathCare	47
St Vincents Pathology	30
ARL Group	18
Pathlab	16
Cabrini Pathology	10
Southern Cross Pathology	6
Network Pathology	5
Eastern Health	4
Tissupath	3
Monash Reproductive Path	2
SDS Pathology	2
Alfred Pathology	1
Jolimont Pathology	1
Royal Children's Hospital	1
Skinpath Pathology	1
Vic Clinical Genetics Serv	1
VTIS	1

(Reproduced with permission from Healthscope)

Barriers to entry and expansion

65. The ACCC considers that barriers to entry and expansion are high. The ACCC has received some contradictory submissions during its market inquiries on a number of issues pertaining to barriers to entry and expansion. The ACCC seeks further information and evidence to resolve these issues. In particular, the ACCC seeks information on the following issues:

Costs of establishment

66. What are the approximate costs associated with establishing a general pathology provision business capable of providing all sub-specialty pathology testing?
67. Can a new entrant source reliable second-hand equipment or lease equipment from a reagent supplier with relative ease?
68. What are the cost differences in setting up a laboratory capable of testing all sub-specialties and a smaller laboratory which may conduct tests associated with a specific sub-specialty, eg histopathology?
69. What is the cost to establish a general pathology service business of sufficient scale to compete with medium to large pathology service providers such as Saint John of God and Healthscope?

Importance of collection centres

70. Smaller pathology providers have relatively fewer collection centres in comparison to the larger players. The ACCC notes that there are some smaller players who may not provide the full range of pathology services (eg chemical, haematology, microbiology, histopathology, immunology, cytopathology etc), but rather focus on a specific area (eg Tissupath in Victoria focuses on skin histopathology and fungal identification).
71. Smaller players also face some barriers to expansion that may limit their ability to compete on a larger scale and effectively constrain the merged entity. In particular, licensing arrangements for collection centres may limit the speed at which smaller players may expand, and that the industry may be facing a shortage of pathologists in Australia.
72. The ACCC seeks further information on the level of competitive constraint that smaller or niche players currently pose on larger players and the ability of such smaller and niche players to expand their service offering to compete effectively against the merged entity. In particular, the ACCC seeks information on the following:
 - (i) The number of collection centres and locations of those collection centres that would be necessary in order to compete effectively with the merged entity (please provide reasons).
 - (ii) The importance of collection centres in providing a pathology service – in particular, the viability of deriving samples without the use of collection centres (eg through doctor collect).
 - (iii) The importance of collection centres in competing for referrals from general practitioners or specialists.
 - (iv) The extent to which it is the presence (laboratory and/ or collection centre) in a particular region (metropolitan or country area) that is

necessary for the development and maintenance of customer relationships (eg with general practitioners or specialists).

- (v) The importance of economies of scale to a niche, smaller pathology service provider when expanding into the provision of general pathology services.
73. The ACCC also seeks to understand the effect collection centres have on the costs of providing pathology services in a particular area. Could a pathology provider offer services in a particular area in a cost efficient manner if it does not have a collection centre in that area? If not, why not?
74. The ACCC also seeks further information from pathology service providers on the percentage of samples derived outside the collection centre system.

Interstate pathology providers ability to expand into Victoria

75. The ACCC also seeks further information on the likelihood of new entry by interstate pathology providers with sufficient scale to compete effectively against the merged entity in Victoria. In particular, the ACCC seeks information on the following:
- (i) The importance of branding and marketing on a state/ territory level.
 - (ii) The ease with which interstate providers can secure referrals in another state/ territory without establishing collection centre/s and/ or laboratories.
 - (iii) Evidence of any interstate provider who has successfully entered the Victorian pathology services market and captured market share.

Merged entity's vertical links acting as barriers to entry and expansion

76. The ACCC's preliminary view based on market inquiries to date is that vertical integration by the parties to the proposed acquisition, namely through the ownership of medical centres and private hospitals, are likely to represent a barrier to expansion. The ACCC seeks further information on whether this barrier is significant or can be otherwise overcome. In particular, the ACCC seeks information on the following:
- (i) The time and cost for a new entrant to establish a network of collection centres and/ or a collection courier service which would provide comparable scale to a network of co-located collection centres at medical centres.
 - (ii) The availability of alternative medical centres where pathology service providers other than the merged entity can co-locate collection centres in Victoria.
 - (iii) The extent to which the HIA Act's provisions prohibiting inducements or incentives for doctors to refer patients to pathology service providers

lessens any advantage there is in co-locating collection centres at a medical centre.

- (iv) The factors which general practitioners and specialists at hospitals take into consideration when referring their patients to a pathology service provider.
- (v) The ease with which a pathology service provider can supply a private hospital without establishing a laboratory or collection centre on-site.

Shortage of pathologists

77. The ACCC seeks further information and evidence on the importance of securing pathologists when seeking to expand a pathology service business. In particular, the ACCC seeks further information on the following:
- (i) The ability to expand through the purchase of equipment and employment of medical scientist staff in some highly automated sub-specialties, for example chemical testing.
 - (ii) A pathology service provider's ability to expand by employing scientific staff who can work under the oversight of a pathologist.
 - (iii) The ease with which overseas pathologists can commence practice in Australia.
 - (iv) Whether a pathology provider can seek to engage the services of a pathologist working for another business, on a full-time or a part-time basis, through offering higher remuneration.

Regulatory framework for public state government funded pathology providers, including patient episode initiation (PEI) fees

78. The ACCC seeks further information on the differences between the PEI fees a public, state government funded provider receives compared to a private provider. The ACCC also seeks information on the proportion of revenues of a private provider that PEI fees normally provide.
79. The ACCC seeks any other information on the regulatory requirements faced by a public state government funded provider, particularly with respect to the resources available to public pathology providers for expansion and whether public pathology providers have any control over the types of tests they provide to best utilise their resources.

Price and non-price competition

Price competition

80. The ACCC understands that where pathology services are not bulkbilled a pathology service provider seeking co-payments can set its own prices.

81. Further information is sought on the incentives for a pathology service provider to bulkbill. In particular, the ACCC seeks information on the following:
- (i) The administrative and other costs associated with defaults on payments and in establishing systems to manage individual billing.
 - (ii) The preference of a referring General Practitioner for pathology service providers to bulkbill. The options available to a General Practitioner if a pathology service provider refuses to bulkbill.
 - (iii) The preference of a referring Specialist for pathology service providers to bulkbill. The options available to a Specialist if a pathology service provider refuses to bulkbill. Any circumstances in which a Specialist is restricted to using a pathology service provider on-site at a private hospital.
 - (iv) The influence, if any, of health funds and the Repatriation Commission on the referral choices doctors make in private hospitals.
 - (v) The influence, if any, of health funds and the Repatriation Commission on the decision of pathology providers to bulkbill, and the size of any gap payments.
82. Do pathology providers decide to bulkbill (or not bulkbill) on a:
- (i) Patient-by-patient basis?
 - (ii) Test by test basis?
 - (iii) Region by region basis?
 - (iv) General Practitioner's personal preference?
 - (v) Specialist's personal preference?
 - (vi) Some other basis?
83. Where a pathology service provider chooses not to bulkbill, what constrains the provider's pricing?
84. What proportion of pathology tests are not covered by the Medicare Schedule? Of these 'non-bulkbilled' tests, how often are they typically ordered by referring doctors? Which pathology service providers tend to offer such tests? Are volumes of these tests likely to vary by region or by state?
85. The following graph, reproduced from the Medicare Annual Report 2005-2006, shows the level of bulkbilling for pathology services in each state and territory:

State	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
Bulkbilling rate	87%	84%	85%	88%	86%	76%	88%	96%

86. The ACCC seeks information on why bulkbilling rates differ between states and territories. The ACCC notes that bulkbilling rates may differ between regions in states and territories and seeks evidence of such differences and information on why these differences exist.

Non-price competition

87. The ACCC also understands that whilst the NATA accreditation regime provides for a minimum standard in the quality of pathology service provision, pathology service providers compete above this standard, eg speed of service, responsiveness to doctor inquiries, provision of telephone advice, frequency of courier visits etc.
88. The ACCC seeks further information on the extent to which pathology service providers compete through developing relationships with referring doctors and how such relationships may be affected post-acquisition.
89. The ACCC invites comment on the ability and incentive for the merged entity to increase its profit margins through a corresponding decrease in its services.
90. In particular, the ACCC invites comments on the ability and incentives for the merged entity to decrease its rate of bulkbilling and the ability and incentives for the merged entity to decrease the quality of services that may not be subject to NATA approval.

Likelihood of coordinated conduct –Victoria, Queensland and Western Australia

91. The ACCC considers that post-acquisition, the likelihood of coordinated conduct is increased and notes the following factors in relation to the likelihood of coordinated conduct in Victoria, Queensland and Western Australia post acquisition:
- (i) In Victoria, the acquisition would result in two major players in the market - the merged entity (with approximately 54% market share) followed by Sonic (with 20% market share). The ACCC notes that the remainder of the market is comprised of a number of smaller players with the third largest player holding approximately 8% market share.
 - (ii) In Queensland, the acquisition would also result in two major players in the market - the merged entity (with approximately 50% market share) followed by Sonic (with 46% market share). The remaining players in the market jointly account for approximately 4% of the market. The acquisition may involve the removal of a possibly vigorous and effective competitor.

- (iii) In Western Australia, the acquisition would result in the merged entity (with approximately 42% market share) as the clear market leader followed by Sonic (approximately 24% market share) and St John of God (approximately 18.5% market share).
 - (iv) Post-acquisition, the same two providers (namely the merged entity and Sonic) will be the main two pathology providers in a larger number of states than pre-acquisition. This increased multi-market contact between the same pair of pathology service providers increases the feasibility of coordinated conduct as the merged entity and Sonic will be better able to monitor each other's behaviour and to reciprocate any behaviour in one market in another market.
 - (v) Multi-market contact between the merged entity and Sonic (and St John of God in Western Australia and Victoria) may facilitate tacit coordination between these players.
 - (vi) Licensing arrangements for collection centres may limit the rate at which smaller or fringe players may expand. This may limit the ability of smaller or fringe players to undermine coordinated conduct by the major players in each of Victoria, Queensland and Western Australia.
 - (vii) The ACCC notes that Sonic is of comparable size and scale to the merger parties, with similar service offerings.
 - (viii) The merger parties and Sonic are members of common industry associations (eg Australian Association of Pathology Practices). The ACCC notes that industry associations and forums may facilitate the flow of information on prices and outputs between market participants and/or may facilitate them reaching an agreement.
92. The ACCC invites market participants to provide further information on decreased incentive to compete and increased ability to coordinate conduct by the merged entity and remaining major players in Victoria, Queensland and Western Australia, and if so how. In particular, the ACCC invites further information on:
- (i) The extent to which Healthscope has been a vigorous and effective competitor or has been attempting to raise its market share in Western Australia and in Queensland.
 - (ii) The transparency of pathology prices between the major suppliers.
 - (iii) How the proposed acquisition would affect firm symmetry between the merged entity and Sonic, including symmetry of their market shares, costs and service range.
 - (iv) The existence of any environmental factors that would facilitate or hinder coordination eg increased market transparency through industry reports and inter-firm comparisons, stability of market shares of the major players (eg through regulatory arrangements).

- (v) Whether there is a ‘maverick’ pathology service provider that offers a distinct point of service to distinguish itself in the market to secure more referrals.

Issues that may raise concerns

Victorian veterinary pathology services market

- 93. Both Healthscope and Symbion provide pathology services to veterinarians. Healthscope provides veterinary pathology services primarily in Victoria, South Australia and Tasmania. Symbion provides veterinary services in New South Wales, Western Australia and Victoria.
- 94. The ACCC considers that given the increase in market concentration in the Victorian veterinary pathology services market post-acquisition, competition concerns may arise in the Victorian market for veterinary pathology services if the merged entity is not constrained by substitutes post-acquisition.

Substitutes

- 95. The ACCC seeks further information on the level of competitive constraint state government funded laboratories and commercial university based laboratories pose on private veterinary pathology service providers such as Healthscope and Symbion.
- 96. The ACCC understands that there are some smaller private veterinary pathology providers who do not have NATA accreditation. The ACCC seeks further information on the identities of such smaller private veterinary pathology providers in Victoria and the level of competitive constraint such smaller providers pose to private veterinary pathology service providers such as Healthscope and Symbion.
- 97. The ACCC seeks further information on the ease with which a human pathology service provider can switch to providing veterinary pathology services.
- 98. Further information is also sought on the extent to which interstate veterinary pathology providers constrain veterinary pathology service providers in Victoria. Is the presence (laboratory and/or collection centre) in a particular state and/ or region necessary for the development and maintenance of customer relationships (eg with veterinarians, breeders or farmers)?

Issues unlikely to raise concerns

Public hospital pathology services market

- 99. The ACCC notes that in Victoria, some regional public hospitals have outsourced their pathology services requirements. Both Healthscope and Symbion have tendered and been successful in obtaining contracts to provide pathology services in some Victorian regional public hospitals.

100. The ACCC considers that the proposed acquisition is unlikely to raise concerns in relation to the national public hospital pathology services market. This opinion reflects information received during market inquiries that suggests that:

- Public hospitals are likely to have significant countervailing power when negotiating contracts with private pathology providers for the provision of pathology services.
- A public hospital can choose to provide its requirements in-house, which public hospitals continue to do across Australia.
- Contracts for public hospital pathology services are long term and can be contested by private providers who do not have a presence in the state where the public hospital is located.

Medical centres

101. Healthscope does not have a controlling interest in any medical centre business in Australia. Healthscope's specialist skin cancer clinics are not medical centres and provide a specialised service in diagnosing skin cancers. Symbion is the third largest medical centre business in Australia, by annual revenue.

102. The ACCC considers that the proposed acquisition is unlikely to raise concerns in relation to medical centres given there is no overlap between Healthscope's businesses and Symbion's medical centres.

Commercial customers

103. The ACCC understands that Healthscope and Symbion do some commercial work.

104. Commercial customers requiring pathology testing include Pharmaceutical companies requiring clinical trial testing, corporate tenders (for example, mining companies requiring blood alcohol testing for its staff on-site) and commercial insurance customers.

105. Commercial customers pathology testing requirements are not covered by Medicare benefit payments. The ACCC understands that commercial customers requirements vary, ranging from common testing through to more specialised testing.

106. The ACCC considers that the proposed acquisition is unlikely to raise concerns in relation to the provision of pathology services to commercial customers. This opinion reflects information received during market inquiries that suggests that:

- Commercial pathology work is contestable by large and medium-sized pathology providers.

- Industrial (non-pathology) laboratories compete for some commercial pathology testing, for example pharmaceutical testing.

Diagnostic Imaging Services

107. Healthscope does not own any diagnostic imaging business. Symbion owns a diagnostic imaging business with operations across Victoria, Queensland and New South Wales.
108. The ACCC notes that given that there is no overlap between Symbion's diagnostic imaging services business and Healthscope's businesses, Healthscope's proposed acquisition of Symbion's diagnostic imaging business is unlikely to result in a substantial lessening of competition in any relevant markets.

Private hospitals

109. Healthscope owns or manages 48 private hospitals. Symbion neither owns nor manages any private hospital.
110. The ACCC considers that the proposed acquisition is unlikely to raise concerns in relation to private hospitals given that there is no overlap between Healthscope's private hospital business and Symbion's businesses.

Northern Territory, South Australian and Tasmanian markets for pathology services

111. At this stage, given that there is no overlap between Healthscope and Symbion's community pathology services businesses in the Northern Territory, South Australia and Tasmania the ACCC considers it unlikely that the proposed acquisition will result in a substantial lessening of competition in any of these markets.

New South Wales (including the Australian Capital Territory) market for pathology services

112. The proposed acquisition will result in an incremental change of less than 5 per cent accruing to the merged entity in the New South Wales market for pathology services. Moreover, there will continue to be other private pathology service providers supplying the relevant market accounting for approximately 26 per cent of the relevant market.

ACCC's future steps

113. The ACCC will finalise its view on this matter after it considers market responses invited by this Statement of Issues.
114. The ACCC now seeks submissions from market participants on each of the issues identified in this Statement of Issues, and on any other issue that may be relevant to the ACCC's assessment of this matter.

115. Submissions are to be received by the ACCC no later than **11 July 2007**. The ACCC will consider the submissions received from the market and the merger parties in light of the issues identified above and will, in conjunction with information and submissions already provided by the parties, come to a final view as to the appropriate course of action to take to resolve any competition concerns that remain.
116. The ACCC intends to publicly announce its final view by **25 July 2007**. However the anticipated timeline may change in line with the *Merger Review Process Guidelines*. A Public Competition Assessment for the purpose of explaining the ACCC's final view may be published following the ACCC's public announcement.