

Australian Competition and Consumer Commission
Level 5, The Tower
360 Elizabeth Street
Melbourne VIC 3000



Reference: N95607.
Contact Officer: Claire McGinness

Tuesday, 8 November 2011

Dear Ms McGinness

FILE No:
DOC: D11/2341304
MARS/PRISM:

Re: Exclusive dealing notification N95607 lodged by Cabrini Health Ltd

I would like to make a submission regarding the Cabrini application for exclusive rights to pathology within their hospital group. I make this submission as a specialist anatomical pathologist to provide further information regarding the implication of a decision regarding exclusivity of provision of pathology services within a private hospital.

Pathology is a broad discipline covering many areas including chemical pathology, haematology, microbiology, anatomical pathology and molecular biology. Anatomical pathology is a specialist discipline within the broader speciality of pathology and covers tissue samples with assessment by cytology and histology. This is a very labour intensive discipline within the field of pathology, with very little scope for automation. Scientists and pathologists are required for the handling of specimens and preparation of slides and every slide needs to be reported by a specialist pathologist with a medical degree and 5 years specialty training and who must be a fellow of the Royal College of Pathologists of Australia. Anatomical Pathology is an interpretative specialty, and the pathology report generated is the interpretation of the histology or cytology slides in the clinical context by the pathologists. Thus sending a tissue sample to an anatomical pathology laboratory is the same as any other specialist referral.

The large pathology practices including Melbourne Pathology, Dorevitch, Healthscope and Cabrini Pathology offer testing across all disciplines within pathology. Within the discipline of anatomical pathology, these pathology companies employ experienced anatomical pathologists who report most of the different types of specimens and may not necessarily choose to become a specialist pathologist within the field of anatomical pathology. In the last 20 years there has been amalgamation of many of the smaller pathology practices to form the large pathology practices we see today.

However, at the same time, small niche specialist pathology practices have been established due to a need for more specialised anatomical pathology services. These smaller practices are generally more sub specialised, providing diagnostic anatomical pathology services in subspecialties such as gastro-intestinal pathology, gynaecologic pathology, dermatopathology, uropathology and breast pathology. The development of expertise in the subspecialised areas of Anatomical Pathology requires the flow of specimens from multiple clinicians and institutions to provide sufficient volume

for the development of expertise and depth of experience to deal with rare cases as well as the more routine specimens. Usually these smaller practices are formed as the pathologists in these practices choose to sub specialise and develop a close working relationship with the referring clinicians who are usually specialists.

Focus Pathology is a boutique specialist anatomical pathology practice established in Melbourne in 2009 and offering high quality diagnostic services in uropathology and breast pathology. The practice is very small with only two pathologists, but we offer a high level of expertise. I am currently the Victorian representative on the Expert Committee appointed by the RCPA for structured reporting guideline development for uropathology and Dr Elena Provenzano is the representative from Victoria for the structured reporting guideline development for breast pathology.

Focus Pathology is not involved in diagnostic services for clinicians at Cabrini Hospital. However, by establishing an exclusive agreement to pathology within the Cabrini Hospital groups, it denies the patients and their treating medical practitioners the opportunity to refer cases to the experienced pathologists who are not employed by Cabrini Pathology.

Further, the awarding of exclusive rights to Cabrini Pathology has a wider implication, in that other hospitals may choose to apply for exclusive rights to pathology which would similarly deny patients and their treating clinicians the right of access to experienced and specialist anatomical pathology diagnostic services outside the pathology practices affiliated with the hospital (s).

I have no legal training or background, but review of the Competition and Consumer Act 2010 raises several concerns:

1. The awarding of exclusive rights to Cabrini Pathology may permit full-line forcing, where Cabrini Hospital will provide hospital services such as theatre time to surgeons only on condition that they refer their pathology to Cabrini Pathology, even if the clinicians would prefer to refer the pathology to outside providers.

2. The exclusivity agreement appears to be anticompetitive as the health care professionals have their referrals restricted to Cabrini Pathology and cannot refer to other pathology providers.

3. Finally, this application for exclusivity may represent a misuse of market power, as Cabrini Pathology and Melbourne Pathology have a very close working partnership, and the pathologists at Cabrini Pathology are employees of Melbourne Pathology (part of the Sonic Health Group). By providing an exclusivity agreement, Melbourne Pathology and Cabrini Pathology together will be preventing other pathologists who are not employed by Melbourne Pathology from engaging in competitive conduct in their market.

I ask that you consider this application in coming to a decision about the exclusivity rights to pathology at Cabrini Hospital, and take into account the wider potential implications of your decision.

Yours sincerely,



Dr David Clouston MBBS PhD FRCPA

FOCUS PATHOLOGY: PRACTICE PROFILE

Focus Pathology is a specialist anatomical pathology practice in Victoria. The areas of specialty are breast pathology and uropathology. The practice was established in 2009 by Dr David Clouston, and in 2011 Dr Elena Provenzano joined the practice.

Dr David Clouston is an Anatomical Pathologist who became a fellow of the Royal College of Pathologists Australia (RCPA) in 1993 and completed a PhD through the University of Melbourne in 2000. He is a member of the RCPA Expert Committee for structured pathology reporting of tumours for the Urogenital system.

Dr Elena Provenzano became a fellow of the RCPA in 2005 and during this time completed a PhD through the University of Melbourne. Since then, she has been working at Addenbrookes Hospital in Cambridge, UK, initially with Dr Sarah Pinder and subsequently appointed lead breast pathologist. She is a member of the RCPA Expert Committee for structured pathology reporting of breast carcinoma.

The practice is a specialist anatomical pathology practice and handles approximately 4,000 specimens a year in histology and breast cytology. Focus Pathology is one of the few laboratories in Australia accredited for HER2 SISH reporting. It is estimated that approximately 10% of breast cancer in Victoria (on biopsy or excision), 15% of kidney cancer and 5% of prostate cancer in Victoria is reported by this laboratory. Using figures from Medicare Australia, it is estimated that approximately 10 to 15% of complexity 7 cases (highest complexity cases in AP) reported in private practice in Victoria are handled by this laboratory.

PATHOLOGIST PROFILES

Dr David Clouston MBBS PhD FRCPA

Dr David Clouston is an Anatomical Pathologist specialising in breast pathology and uropathology. Dr Clouston graduated from Medicine at the University of Queensland in 1985 and was awarded first class honours and was the recipient of the University Medal. He became a Fellow of the College of Pathologists, Australia in 1993, and was awarded a PhD by the University of Melbourne in 2000, for his thesis examining transcription factors regulating globin gene expression.

Dr Clouston established Focus Pathology to provide high quality diagnostic services in Anatomical Pathology and to foster research and education links with the medical and wider community. Recognising that education is an important facet of the practice of medicine, Dr Clouston has taught pathology throughout his career, including a position as a senior lecturer in Pathology at Monash University from 1998 to 2001. He lectures widely across all levels of the medical profession, including medical students, registrars in pathology and surgery, and presents locally at clinical conferences and multidisciplinary meetings for urologists and breast surgeons. He has presented on several occasions at meetings of the Victorian branch of the Urological Society of Australia and New Zealand (USANZ) and was an invited speaker at the Queensland branch of the USANZ in 2009.

In other roles, he has presented at and chaired sessions at national and international pathology meetings, including the Australian Branch of the International Academy of Pathologists (IAP) since 1998, and the International meeting of the IAP in Brisbane in 2004. He was a co-convenor of the Australian Dermatological Society national meeting in Melbourne 2008.

Currently, Dr Clouston is a member of the RCPA Expert Committee for structured pathology reporting of tumours for the Urogenital system. He is leading a group of pathologists in a pilot study offering support to regional pathologists in the reporting of kidney and testicular tumours in the Hume region.

Dr Elena Provenzano MBBS PhD FRCPA

Dr Elena Provenzano graduated in Medicine from Melbourne University in 1993, and completed her Pathology Fellowship in Melbourne in 2005. During this time she completed a Ph.D. examining prognostic factors including molecular markers in DCIS under the supervision of Jane Armes and Deon Venter as part of the Victorian Breast Cancer Research Consortium.

In 2005 Dr Provenzano undertook a specialist fellowship in Breast Pathology at Addenbrookes Hospital in Cambridge with Sarah Pinder, extending her clinical experience and pursuing further research into the molecular biology of breast cancer. Upon Sarah's departure in 2007 she assumed the role of Lead Breast Pathologist for the Cambridge Breast

Unit at Addenbrookes Hospital which treats around 600 new breast cancers a year, overseeing histopathology services including the regional HER2 testing service. She was also the histopathology lead for several breast cancer research studies being conducted at the Cambridge NIH Biomedical Research Centre, including the population-based SEARCH and MetaBric studies and the translational research component of several clinical trials including NEAT, neo-tAnGo and Persephone trials. The main aim of this research is to evaluate tumour response to chemotherapy and identify markers of response to better tailor chemotherapy to the molecular characteristics of the individual patient's tumour. She has ongoing research connections with Cambridge, and is looking to continue her research interests by establishing new collaborations here in Melbourne.

Dr Provenzano is a member of the RCPA Expert Committee for structured pathology reporting of breast carcinoma. She brings a wealth of subspecialist Breast Pathology experience to Focus Pathology, and is looking forward to working closely with the Breast surgeons and clinicians in both a one-to-one and multidisciplinary context.