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NEXUS PATHOLOGY

FRIDAY, NOVEMBER 11, 2011

NEXUS PATHOLOGY SUBMISSION

EXECUTIVE SUMMARY

We believe there is potentially a large detriment to the broader public well beyond Cabrini if the ACCC finds for Cabrini here and have great concerns that private hospitals nationally with either in house or "joint venture" arrangements with major laboratories will pursue a similar course - in fact we have concerns they will have no choice but to do this to ensure their business is sustained.

We are particularly concerned hospitals with vertically integrated pathology services will embrace a favorable resolution and seek similar notifications.

We believe equality to access of pathology services should be guarded in the interests of all Australians to maintain confidence that Doctors are doing what is right for the patients. We believe the choice of where to refer is purely a decision for a referring specialist to make unaffected by issues relating to third party forcing based on other hospital services such as theatre lists. We believe this reason alone is significant enough to rule against Cabrini and there is clearly a large public benefit not to have doctors referral influenced by business.

We believe granting immunity for Cabrini may force a withdrawal of services by third parties from Cabrini as some would become non viable.

Cabrini has made only a limited argument for public benefit, demonstrated an intent we believe to test the bounds of the Health insurance Act Sect 23DZZIA to procure referrals; conduct which may in fact violate that Act.

The issues with quality relating to multiple providers are exaggerated and collection is largely the responsibility of the Pathology companies who have generally high standards through external accreditation requirements

There is eminent precedent in Queensland that third party providers can and do play an effective role and offer large benefits within and outside the hospitals in maintaining some residual competition in an overly consolidated sector. We see public detriment in facilitating consolidation of the sector further.

The apparent "exceptions" list for referring doctors to refer to a third party service seem broad but only if third party providers remain in business and if granted immunity from prosecution, it is unclear whether Cabrini would take advantage of that position (of immunity) to introduce changes in procedure and policy to make it difficult logistically and bureaucratically for external providers to continue to maintain a competitive presence.

We believe Cabrini clearly has problems in attracting the referrals despite already significant onsite advantages, and while we sympathise with funding issues, we have exactly the same issues.

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Cabrini has failed to indicate their pricing structure, turnaround time and general quality level of their service when compared with their competitors and it would be imprudent to rule without knowing they truly offer a competitive service in the first instance.

We implore the ACCC to deny immunity under this notification and to send a message to hospitals that Medical Practitioners referring to Pathology and Radiology is a Medical Specialist to Medical Specialist referral to be made by the referring doctor at their completely independent discretion and that third party pathology should continue to have equal and competitive access to the private hospital sector.

BACKGROUND:

We are a small pathology provider with 3 pathologists, struggling to compete in a similar funding environment to Cabrini with downward pressure on Medicare rebates and rising costs.

As a third-party pathology provider, we work with hospitals generally on good terms, provide a frozen section service, routinely send copies of pathology reports for inpatients to the wards and the hospital medical records Departments. We are 1 of a number of smaller independent providers servicing hospitals in Queensland, and from time to time we encounter some obstructions to competition, especially where a hospital has a contracted arrangement with a specific pathology service for on-site facilities. Where there is no on-site pathology relationship, we have no problems.

Largely we have no problems with specimen collection from private hospitals, offer a very competitive turnaround time for test results and have a special rapport and a clinical level with the specialists that utilise our services which substantially enhances the quality of care that patients receive. The relationship between the referring surgeon and a histopathologist reporting surgical pathology specimen is very important to a quality service, particularly for inpatient procedures, and on that basis surgeons actively seek to use our service rather than other providers. Our staff participate in clinical meetings in and out of the hospitals.

The referrals we receive are referrals between specialists just as if it was from a surgeon to a physician within the hospital environment. Interference in the ability of medical practitioners to refer to their preferred choice by forcing them and or inducing them to use an on-site or in-house service in preference to us or by introducing procedures which substantially impair our ability to deliver a service in a competitive fashion would potentially destroy our business . Approximately 60% of our workload comes from private hospitals and the billings per case are higher because of the health fund contribution and overall increased complexity of the work (and some of our other small practice colleagues derive their entire referral base from inpatient procedures in private hospitals), and we compete based on quality, price and service. Without the private hospital derived work, the bulk billing revenue from general practice is insufficient to sustain our service and we would be forced to close.

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It could be argued that Cabrini appears unable to compete on the basis of price or service to successfully engender referrals in the absence of ACCC assistance and that this application is a method to compensate for inadequacy in their ability to compete. We have the same funding issues they have. You could argue that we have increased costs of running our pathology service over their service as we don't have the convenience of being on site, black economy of scale, and also offer a quality service out into the general practice community.

We believe our presence is vital to maintain competition in an already very consolidated sector with 3 large national corporate players trading under multiple different names, with extensive lobbying capability and influence. Already, we suffer with very limited access to practices which are vertically integrated.

Our ability to compete on a level playing field in private hospitals with large firms and offer a better service is vital to maintaining effective competition in the pathology sector. Fundamental to that is equality in access to private hospital pathology and access to referring medical practitioners in general practice

Hospitals can make provision of service very difficult should they choose to in many small but effective ways and largely the ACCC and threat of anticompetitive sanctions has controlled their ability to do this. In the past we have had experiences where unexplained disappearance of stores supplied to the hospitals for our specimens and unexplained disappearance of request forms, plus some referring clinicians have indicated that they have had pressure to use other services by the hospital nursing staff within the operating theatres. There is potential to influence where a specimen goes at the time it is collected simply by not having available specimen containers or the appropriate pathology form present. Fortunately for us, the desire to use our service and the persistence of the clinician over rode the hospital pressures and that circumstance passed. This kind of behavior is easily orchestrated within an operating theatre or a day surgery environment, especially if there is immunity from anti-competitive behavior. Simply removing all third-party stores, limiting access for "external" courier staff, and refusing to engage in receiving electronic reports could potentially harm our ability to compete, and these are all things the hospitals can control. Similarly in general practice "effective" barriers are easily erected by vertically integrated practices simply by refusing appointments at a managerial level with outside services and by refusing to install third party electronic results delivery programs. Similarly an even bigger issue excluding us from largely any general practice the presence of a competitors onsite collection license particularly when deployed in GP owned space (rental income engenders loyalty - and a third party histopathology only service does not need/can not justify an onsite collection facility).

Cabrini Submission:

"Cabrini Health proposes to require that any pathology services and medical imaging services for in-patients and out-patients of Cabrini Hospitals be

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supplied by Cabrini Pathology and Cabrini Medical Imaging, business units of Cabrini Health, and not third party pathology or medical imaging providers (the proposed conduct)"

While the proposed conduct encompasses an ability ***to impose a requirement on practitioners*** *to use Cabrini Pathology and Cabrini Medical Imaging for out-patients, Cabrini Health's immediate plan is just to encourage its accredited medical staff to utilise Cabrini Pathology and Cabrini Medical Imaging for out-patient services and* ***may choose to make decisions regarding access to its resources such as operating theatres, cardiac catheter laboratory, consulting rooms and delivery suites based in part on the said usage.***

We would have objection to the ACCC facilitating Cabrini's ability to influence Medical referrals through the provision of significant benefits regarding access to resources by their visiting medical specialists. Further, if Cabrini intends only to "encourage" medical practitioners, the purpose of the exclusive dealings notification seems unclear.

Specialists can be greatly influenced by for example not getting access to operating theatre lists easily, being made low priority for after hours lists, only getting for example Friday afternoon lists. Further, restriction of for example to cardiology suites for some medical practitioners may undermine their ability to deliver a quality service to patients. Even the most loyal of referring specialists would face a dilemma in acting for the patient if access to treatment facilities was predicated upon their pathology referral pattern and we would have to agree with them that in the best interests of the patient better access to the treatment facilities would be a priority over where pathology gets sent or radiology is done. Cabrini seeks to place medical practitioners in a difficult position where there are going to have to choose between on-site facilities and a preferred pathology provider. This should not be allowed to happen. They should be able to have equal access within Cabrini Hospital to treatment facilities irrespective of their referral patterns for other services.

This appears to conflict with the Health insurance Act Sect 23DZZIA and in either case is unethical and not in the best interests of the public at large to encourage use of any particular hospital service based on anything other than appropriate medical decisions. We fear it would usher in a scramble for other hospitals to enact similar forcing tactics and broadly undermine public confidence in the impartiality of medical practitioners conduct regarding their treatment and diagnosis when in hospital.

We do not understand why this is not a form of third line forcing "involving the supply of goods or services (enhanced or "special priority" access to hospital services) on condition that the purchaser acquires goods or

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services from a particular third party (Cabrini Pathology) , or a refusal to supply(certain access to services) because the purchaser will not agree to that condition."

The section of the health insurance act below is specific and designed to prevent inducements between Doctors and Providers for the provision of services, the public benefit of which is maintaining the public expectation that Medical practitioners make decisions on diagnosis and treatment on the basis of service and quality not influenced by a business case. eral public benefit of maintaining confidence in the impartiality of medical practioners with respect to diagnosis and treatment choices should be a core ethical value supported by government for the greater good of the public cannot be overemphasised.

HEALTH INSURANCE ACT 1973 - SECT 23DZZIA

Objects of Part

(1) The objects of this Part are:

(a) to prevent requesters of pathology services and diagnostic imaging services from (either directly or indirectly) asking for or accepting, or being offered or provided, any benefits (other than permitted benefits) in order to induce the requesters to request the services from providers of those services; and

(b) to protect requesters of pathology services and diagnostic imaging services from (either directly or indirectly) being threatened in order to induce the requesters to request the services from providers of those services.

(2) The prohibitions under this Part relating to benefits are not intended to prohibit competition between providers on the basis of the quality or the cost of service they provide.

Cabrini "Purported public benefits"

"maintenance of efficient funding and financial viability of the health services model"

The downward pressure on Medicare rebates within the pathology sector affects not only Cabrini pathology but also the third-party firms they are seeking to exclude and should not be used as a justification for permitting exclusivity in order to support them in a difficult business environment without consideration for their competitors in similar positions but without the added benefit that Cabrini already has of position in relation to the work in the 1st place. Cabrini already has a competitive advantage through location and through internal integration of its hospital systems with pathology and radiology in house. Again, it seems they are unable to capitalise on that without forcing referrals.

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"addressing inefficiencies from potential cherry picking (quoted example is third party doing routine tissue pathology analagous to us)"

In Queens land, a multitude of third-party pathology firm's provide the majority of frozen section cover for the private hospital sector, and there is no reason why, given suitable access to operating theatres, third-party pathology firm's visiting Cabrini Hospital would not be able to provide the same service. In fact, I believe third-party pathology firm's already perform frozen sections from time to time at Cabrini. Furthermore, the cost of provision of frozen section cover after hours is greatly over emphasized in Cabrini's submission and likely to be trivial in comparison to the full operating budget of any pathology laboratory and again is a cost borne by the third party providers in kind. After hours frozen sections are likely to be very infrequent, and utilise an on call pathologist and technician for an hour or 2. In Queensland the machines involved in frozen sections are supplied cost free by the pathology labs to the hospitals and access is shared.

"funding support for activities and services provided by Cabrini health"

while Cabrini's ethos and social programs are laudable and of public benefit, the loss of often less expensive third party pathology potentially will affect a much larger and broader sector of the population and ultimately is not in the best interests of a much larger proportion of the public at large. For example, loss of the smaller firms services at a "no gap" level of billing in Qld will affect not only our large hospital work but will affect a number of smaller day facilities referrals and may result in a rise in price (leaving again Queensland largely 2 national firms).

If Cabrini's exclusivity is granted and a precedent is set in the private sector we are greatly concerned the resultant actions will usher in anticompetitive practices and precipitate the demise of a substantial number of the smaller firms who have established a niche market based on price, service and quality and who offer services directly to the community outside the hospital sector as well as within the hospital sector.

While a relatively small market share, these third party services *no doubt* contribute to a more competitive environment in an already consolidated Pathology sector. Pathology is consolidated nationally as the ACCC knows in 3 large companies. The emergence of smaller firms reflects dissatisfaction with the quality and service offered by these services and is ultimately the consequence of reduced competition. Ultimately if this application becomes a "precedent case" we fear it could substantially lessen competition at a National level.

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We would argue that Cabrini needs to make a much stronger case that their service is in fact competitive with third party providers in its service quality and turnaround time because if that is not the case, then the ACCC has no role in permitting exclusivity as a means of compensating for a noncompetitive service.

"Additional public benefit of avoiding a multiplicity of providers in the inpatient environment:, increased risk of lost, misplaced and misallocated specimens"

It is extremely rare for a (tissue) pathology specimen to be lost, and as part of accreditation for all pathology enterprises there are detailed processes and procedures in place to ensure that specimens are not misplaced or lost and that if they are then substantial corrective investigation and action is taken to avoid a repeat of the circumstance. Lost or missing specimens in the hospital setting in our experience generally relate to the specimens being left in the operating theatre (misplaced internally) by nursing staff (clearly a hospital issue not a pathology issue). All the specimens coming out of operating theatres are logged, collected and signed for by third-party pathology companies as well as onsite hospital service providers as part of hospital and pathology accreditation requirements. The chances of specimens failing this process are equal for external and on-site/in house providers and in either case quite low. Only in circumstances where the hospital is failing in its quality procedures would the mere presence of multiple providers effect a substantially increased risk of specimen loss. Specimen collection is provided by the third party providers, not the hospital staff.

"an increased complexity in the interpretation of laboratory test results in the clinical environment due to non-standard reference ranges between different laboratory analyses"

It is granted that comparison between pathology firm's reference ranges is a problem, but clearly the clinicians are well aware of these variations and have been working with them successfully for years, not only at Cabrini but across the whole medical sector in the broader setting of their private practices - and the decision to accommodate variation is a medical practitioner not hospital decision.

Also on this point and omitted by Cabrini's submission is that even within a single laboratory with time and from time to time there may be adjustments to instrumentation/ test methodology and reference range values which therefore are not completely avoided by forcing use of the onsite lab.

"an increased clinical risk and financial cost of providing a system of dealing with the processing handling of specimens for multiple providers; an increased cost and supporting the filing of results when provided as there is no capacity for Cabrini to provide electronic storage for third-party results as it does for its own"

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At Cabrini hospitals a certain amount of pathology and radiology are performed which would generate a certain volume of data to be stored. Currently this data is managed offsite and Cabrini claim they cannot cope with storing it. It should be apparent that if exclusivity is approved by the ACCC then that data would be expected to be coming into their system in house and obviously they would then have to store it. Clearly they are unprepared to receive data from external providers but happy to store it for themselves. This this indicates that if they held patient care as highly as proposed they would have already solved the issues relating to external reports coming into their systems. They appear to be misleading the ACCC on their ability to support the volume of data associated with care of all of the patients at their hospitals to the advantage of their submission.

On external data for Pathology: at a national level the Federal Government and the College of Pathologists strongly support interoperability for results electronically between entities and Cabrini's failure to participate in this process should not be justification for granting of exclusivity arrangements.

The Queensland experience as a small third-party pathology provider is that we are and always have been very willing to send electronic copies of results in industry-standard HL7 format (a standard agreed upon by all Pathology laboratories and NEHTA) for inclusion in the electronic medical record, but the majority of hospitals refuse to allow suitable small software programs to be deployed in the hospital to facilitate this and there is clearly a choice the hospitals have made. It is possible for a simple workstation to have software installed locally at the hospital and at a very basic level receive electronic reports and print them out. Most hospitals here have steadfastly refused to embrace this and the technology and software to do this is freely available within the pathology sector and there is no reason why Cabrini could not quite easily have efficient permanent electronic records of any outside pathology easily interfaced to the hospital system (aside from choosing not to for business or political reasons). Pathology results delivered electronically in industry standard format are very compact, textual reports which consume very little storage space, are deliverable in an industry standard format with a multitude of software tools to facilitate integration.

"Utilising the on-site services also enhances quality of care by limiting the time it takes to perform tests/imaging services, limiting the time it takes to receive and analyse results, ensuring that all results are available to all current and future clinicians."

Cabrini fail to note that the most important clinician for a patient is the treating clinician and in many cases they have an easy and established method of accessing results from their preferred pathology provider for all the patients in their practice in and out of hospital, often at their practice, and even while mobile making it easier, safer and more efficient for them to treat patients and use a third party service rather than use Cabrini pathology.

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In Queens land, turnaround time for some of the smaller firms for tissue pathology exceeds and is at least equivalent to on-site/in-house providers despite being offsite. Further its widespread practice in Pathology delivered by large national firms to send tissue pathology specimens intra city or even interstate for processing and reporting elsewhere.

Electronic delivery of results is nearly instantaneous once the case is authorised and in these modern times with advanced logistics, the need for onsite tissue pathology services is largely archaic especially when frozen section covers urgent diagnostic needs.

I submit that Cabrini has a choice to spend relatively little time and money to enable external pathology results to come into their system in digitial format and be stored as per their own pathology departments electronic results - the technology to enable this is widespread with practically all general practices and specialists in the country able to receive pathology results electronically even on their mobile phones - why not Cabrini? no doubt they have the HL7 IT resources available for their own laboratory systems.

If Cabrini truly were concerned about making external pathology results available for the benefit of the clinicians and patients inside the facility, it would be relatively easy to add this to their system and their choice not to interoperate is no justification for exclusivity.

"Acceptable Exceptions to use external providers" :

the specific pathology service is unavailable at Cabrini pathology; lower price charged by a third-party provider; need to maintain continuity of patients testing history because of the patient's condition; a third-party provider is able to provide a faster turnaround time for the service

Use of an external provider is considered acceptable providing that referring medical practitioner has taken steps to ensure that the results of investigations will be available within the patient's Cabrini medical record. Clearly they don't want interoperability and may use this to force onsite use.

Finally, in the section where Cabrini discusses potential detriments, they point out that there is no restriction of choice where the patient's best interests are concerned and that referral to third-party providers based on price, service and quality would continue as long as the clinician could justified in the best interests of the patient.

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This notably contradicts a number arguments supporting their claims, specifically it would be presumed that the systems in place currently to handle a multitude of providers would have to remain and not be limited if exclusivity was granted, ergo the risk of lost or misplaced specimens, complexity in interpretation of laboratory test results, financial costs of providing a system to deal with multiple providers and filing multiple results would continue to be a problem for Cabrini (though arguably somewhat diminished - but certainly not financially removed); unless of course Cabrini's real intentions are to dismantle these systems upon a favourable ACCC finding. I would encourage the ACCC if finding in Cabrini's favour, to make an addendum ensuring that the systems handling third-party providers remain in place and accessible downstream.

SUMMARY:

We believe there is potentially a large detriment to the broader public well beyond Cabrini if the ACCC finds for Cabrini here and have great concerns that private hospitals nationally with either in house or "joint venture" arrangements with major laboratories will pursue a similar course - in fact we have concerns they will have no choice but to do this to ensure their business is sustained.

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We believe granting immunity for Cabrini may force a withdrawal of services by third parties from Cabrini as some would become non viable.

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Their arguments on data storage issues are contradictory with the outcome they seek (where they would need to store the data anyway) and reflect a choice not to interoperate with the rest of the medical community .

The issues with quality relating to multiple providers are exaggerated and collection is largely the responsibility of the Pathology companies who have generally high standards through external accreditation requirements

There is eminent precedent in Queensland that third party providers can and do play an effective role and offer large benefits within and outside the hospitals in maintaining some residual competition in an overly consolidated sector. We see public detriment in facilitating consolidation of the sector further.

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We implore the ACCC to deny immunity under this notification and to send a message to hospitals that Medical Practitioners referring to Pathology and Radiology is a Medical Specialist to Medical Specialist referral to be made by the referring doctor at their discretion in the interests of the patient and not to be forced or clouded by exclusive dealing arrangements, induced or procured by restricting access to other care related services for the business benefit of the hospital.

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