

## **NOTIFICATION OF EXCLUSIVE DEALING: CABRINI HEALTH**

### **RESPONSE on behalf of the Australasian Society of Anatomical Pathologists (ASAP).**

#### **INTRODUCTION:**

The Australasian Society of Anatomical Pathologists represents Anatomical Pathologists.

Anatomical Pathology is a discipline of Pathology dealing with tissues and cells. There are sub-disciplines of Anatomical Pathology:

1. Surgical Pathology: biopsy and resection of tissues for diagnosis, management, prognostication and guidance of therapy;
2. Cytopathology:
  - 2A: Gynaecologic: Pap smears
  - 2B: Non-gynaecologic:
    - 2B.1: Fluid cytology
    - 2B.2: Fine needle aspiration
    - 2B.3: Imprint
    - 2B.4: Intraoperative consultations
3. Forensic Pathology: Mostly post-mortems legally required
4. Molecular Pathology: Utilising molecular techniques which require morphologic assessment

Anatomical Pathologists, mostly, examine biopsies and resection tissue samples, select tissue for microscopic analysis, perform microscopic analysis, order ancillary tests relevant to the request and the condition and write reports pertaining to these assessments. In addition, Anatomical Pathologists perform the necessary supervision of the laboratories performing the processing.

There are other tasks but these are the core functions.

One important characteristic of the work of an Anatomical Pathologist is that we are the machines that generate the reports and the revenue. The work is labour-intensive, risky and stressful. There are few labour-saving devices or strategies and everything we do is reported, in varying detail, with no recourse. There are no economies of scale.

#### **RESPONSE:**

1. Cabrini Health already has exclusivity concerning the on-site placement of a laboratory with all of the competitive benefits that ensue. It is highly likely that that exclusivity is strengthened by procedural and other

requirements that limit the ability of other parties from supplying services to doctors and patients in that hospital.

We are not party to these arrangements but have experience from other localities and we are familiar with some of the practices designed to limit access to outside pathology suppliers namely:

- 1.1 Limit access to cryostats
- 1.2 Limit ability to download results electronically to wards, clinics and, most especially, medical records
- 1.3 Limit physical access (parking bays)
- 1.4 Exclusivity agreements to prevent services being offered

One has to question the ability of Cabrini to service its own requirements. It already has a huge advantage in being the only and exclusive on-site laboratory and yet they require further protection from fair and reasonable competition? What is wrong with them?

- 2. Cabrini Health is not for profit. There is no such thing. There is only profitable or non-profitable. It what they do with the profits that distinguishes them from other commercial enterprises. Cabrini Pathology profits are re-invested in “patient services, facilities and social outreach activities”. If the “not-for-profit” feature is an important issue in determining this notification of exclusivity then it is reasonable to find out exactly where the profits are going.

Ophthalmologists were a classic example of philanthropy used as a weapon when rebates for cataract surgery were threatened. If ever there was a righteous correction as to the true value of a service that was it. Ophthalmologists effectively utilized their charitable work to provide a smokescreen. In short, they could afford to be charitable because they received so much for cataract surgery.

There is no end to the protection charitable organisations might seek if it truly is a just issue.

- 3. The requirements (apparently self-imposed) to exclusivity by Cabrini Health seem reasonable however there are 2 obvious (and other less obvious) unreasonable aspects:

3.1. Results, in our case, written reports, “will be available within the patient’s Cabrini medical record or electronically can access such information as required in the best interests of the patient”. This is NOT a function of the supplying pathology laboratory but a Cabrini function and, based on experience elsewhere, will be used to obstruct such flow of information if it is not already the case. Moreover, Cabrini places the onus

on busy clinical doctors to ensure that an unrelated third party can do so. A significant proportion of doctors will simply take the course of least resistance and use Cabrini and that is precisely the intent (with your co-operation);

3.2. The Cabrini Notification does not set out a procedure for clinical doctors to “provide justification” and fulfill the obligations set out as conditions for using an outside pathology supplier. Needless to say, it is likely to be tedious, onerous and, at the end of day, obstructive (if it isn't already).

4. We commend Cabrini for their honesty in pointing out that clinical doctors will obtain benefits in return for “voluntarily” utilizing Cabrini Pathology for outpatient services. It would be interesting to know how much incentive will be offered for how much utilization. We suspect, however, that this strategy has probably already been implemented but is not working. Perhaps, the addition of exclusivity will be just the thing to make this strategy successful.
5. We are concerned about the standard of services offered by Cabrini Pathology. They have the advantage of on site exclusivity and, clearly, a strategy of incentives for utilization of service but they still require further ACCC endorsed protection. They already have considerable advantage (and possibly others that remain hidden) yet seemingly cannot compete.
6. Cabrini Health are also very thoughtful in that they “would not, at any time, require a patient to travel beyond a reasonable distance to utilize its facilities for out-patient investigations”. Unfortunately, they do not give any guidance on what might be reasonable. Perhaps, the increased revenue will allow them to provide a bus service from Wonthaggi.
7. We would hold that the proposed conduct constitutes exclusive dealing pursuant to sections 47(2) and 47(3) of the Competition and Consumer Act 2010 (Commonwealth) as it is clear, from the previous, that exclusivity would involve Cabrini health supplying hospital services to in-patients and out-patients on condition that the patient will not acquire pathology services (etc) from third party providers.

In any case, the exclusivity arrangement applies to doctors not to patients as it is the doctors who order the tests. The protection sought by Cabrini pursuant to this paragraph is disingenuous because they admit that they apply both advantages to doctors who comply and disadvantages to those who don't.

8. It becomes more obvious as the Notification proceeds that the purpose of this strategy is to improve the utilization of out-patient services where they don't have as great a benefit of being on-site.

9. The “public benefits” listed are ALL Cabrini benefits. The ASAP sees absolutely no benefit to the public accruing from increasing the exclusivity arrangements concerning pathology services at Cabrini Health OR the purported public benefit does not or will not accrue namely “transaction cost savings” which will not accrue any benefit to the patient and enhanced quality of care as, we have established, they just are not very good.

Moreover, AAPP recognition of public benefits comes about because it is largely an organization controlled by Sonic Pty Ltd who are the pathology partners of Cabrini Pathology.

10. There has been a decline in average Medicare rates for Pathology services largely because of over-servicing by the industry at large and because efficiencies pertaining to automation of testing (non-Anatomical Pathology services) have decreased costs (but you won't hear Sonic or Cabrini or any other non-Anatomical pathology provider admitting this). In any event, this effects everyone not just Cabrini Health.
11. We support Cabrini Health in identifying 24 hour comprehensive services as a public benefit. We agree that it is onerous and expensive but they are in the hospital business and this is expected as a reasonable service for the type of business they are in. Properly applied, 24 hour servicing should be a marketing advantage for Cabrini Pathology so again we ask – what are they doing wrong? Seriously, we think that there may be issues of quality or pricing which is preventing Cabrini Pathology from leveraging off its privileged position.
12. “Cherry picking” of histopathology services: You do not “cherry pick” in patient surgical pathology or cytopathology services. The return is poor with some specimens actually costing you money to process and report.

Surgical Pathology items, in the Medicare benefits Schedule, are rated by complexity essentially 2 – 7 with 7 being the most complex. Most services are subject to “coning” – a device used by the department of Human Services to limit outlays. By and large, this is accepted by the pathology industry because automated blood tests are relatively over-remunerated and it is doesn't matter if Anatomical Pathology departments are more of a cost centre than a profit centre – certainly not to the degree of blood tests. Coning are arbitrary rules pertaining to rebates for Surgical pathology and Cytopathology items which effect, especially, inpatient services. Some items are more effected than others but the most lucrative, if you could it that, Anatomical Pathology item are out patient skins then in patient gastroenterology because at least they supply volume revenue. Most

other hospital Anatomical Pathology services are more complex, more time consuming, more risk and more effected by coning rules.

It is true, as with other 24 hour services, that supplying a 24 hour frozen section service might be onerous without getting the benefit of routine referrals except for the following:

12.1: I supply Anatomical Pathology service which is 99% hospital based (I'm stupid) and I have done 2 after hours frozen sections in 3.5 years neither after 10 pm and I do them myself without the need for on call staff; frozen sections are rare after hours;

12.2: It is highly likely that third party suppliers would be happy to do after hours frozen sections hence relieving the Cabrini of this onerous cost, if they were allowed, by Cabrini, to have an on site cryostat. We suspect that they are not afforded this opportunity based on other exclusivities and strategies by Cabrini (and others).

13. Multiplicity of providers does not lead any of the disadvantages listed by the Notification. We would argue that exclusivity and absence of competition could lead to a complacency that could be dangerous. In particular, we draw your attention to (e) page 8: "an increased cost in supporting the filing of results (when provided) as there is no capacity for Cabrini to provide electronic storage of third party results as it does for its own". There are only 2 health IT languages – PIT and HL7 – and a multitude of data transmitters who are only too happy to convert one to the other. There is no reason that any self respecting IT or medical records department could not handle html, pdf, PIT or HL7 files as a routine unless they are useless or lying. Unfortunately, we have seen this tactic used successfully in other places. This is not an inability; this is strategy.
14. The Notification of Exclusivity has the potential for harm in the same manner that any monopoly does and that really requires no embellishment.
15. Cabrini does not wish to have any outside referrals "for any reason other than considerations of the patient's best interests". I wish that the clinicians using Cabrini's services could see this. What do they expect is driving their clinician's referral practices now – self interest? Back-handers? Perhaps a better pathology service?.
16. "There is no restriction of choice where the patient's best interests are concerned". There are restrictions now and Cabrini wish to apply more.
17. "Third party pathology providers (etc) can compete freely on price". I cannot think of the last time a monopoly had to compete on price.

## **SUMMARY:**

1. Cabrini Pathology already have and should benefit from an exclusivity of on site Pathology services;
2. "Not for profit" is not a reason to obtain an advantage;
3. The reasons that Cabrini Health seek further protection when already in a privileged position requires further investigation;
4. Cabrini Health admit that they give advantage to conforming clinicians and disadvantage to non-conforming clinicians yet wish to claim exemption to *exclusive dealing* and to be exempted from relevant parts of the Competition and Consumer Act;
5. Patient benefits listed are ALL Cabrini benefits;
6. No one "cherry-picks" complex in-patient Anatomical Pathology;
7. Third party Anatomical Pathologists may actually be excluded from performing frozen sections at Cabrini; this should be checked before accepting Cabrini's assertions;
8. Lastly, obstructions to non-preferred third party providers in providing reports (and images) to hospitals and their medical records departments should be investigated. It is a disgusting tactic used to restrict access by non-preferred providers for crass commercial reasons which is at variance with the health industries (alleged) commitment to patient interest.

**Dr Lloyd McGuire FRCPA, FIAC, FHKAM (Pathology)**  
**Helix Pathology**  
**Secretary, Australasian Society of Anatomical Pathologists.**

0438 383166  
admin@helixpathology.com.au