

17 November 2011

BY EMAIL clare.mcginness@accc.gov.au; adjudication@accc.gov.au

Ms Clare McGinness
Australian Competition and Consumer Commission

Dear Clare

Submission - Exclusive Dealing Notification N95607 (Cabrini Health Ltd)

We act for Bespoke Pathology Pty Ltd (trading as 'TissuPath').

We attach our client's submission in response to the Exclusive Dealing Notification of Cabrini Health Ltd dated 18 October 2011, for your attention.

We note that although submissions were stated to be due by 15 November, our client was granted an extension to 18 November 2011, given our client received late notice of the Notification.

Please acknowledge receipt of the submission.

Our client would be happy to discuss its submission with the ACCC and/or provide further background to the pathology market, should that be of assistance.

Our client asks that it be notified of the ACCC's decision in this matter.

Yours faithfully
RUSSELL KENNEDY



Solomon Miller
Principal

SUBMISSION IN RESPONSE TO THE EXCLUSIVE DEALING NOTIFICATION OF CABRINI HEALTH LIMITED (N95607)

17 November 2011

Set out below is the submission of Bespoke Pathology Pty Ltd (trading as TissuPath) ("**TissuPath**") in response to the exclusive dealing notification of Cabrini Health Limited ("**Cabrini Health**") dated 18 October 2011 ("**Notification**"). The submission is provided on the understanding that relevant information may form part of the public register.

1 EXECUTIVE SUMMARY

We vehemently oppose Cabrini Health's application for exemption from sections 47(2) to 47(9) of the *Competition and Consumer Act 2010* (Cth) ("**Act**") and call upon the Australian Competition and Consumer Commission ("**ACCC**") to maintain the critical public policy interests supported by section 47 and in turn reject the Notification on the following grounds:

- 1.1 Cabrini Health has misstated its activities and the relevant market(s), such that any asserted benefits are erroneous and misleading and otherwise, not comparable to the considerations outlined in the "Common Decision" for public health in New South Wales cited by and seemingly relied upon by Cabrini Health;
- 1.2 An authority to engage in restrictive practices, in the form of exclusive dealing arrangements, would create an anti-competitive market place with grave potential for an abuse of market power by Cabrini Health and/or preferred pathology contractors engaged by Cabrini Health, use of full-line and third-line forcing, and potential cartel conduct, in contravention of the Act and to the detriment of the public;
- 1.3 Cabrini Health provides no substantive or quantified evidence that "Cabrini Pathology" provides any significant public benefit, let alone a public benefit greater than that provided by any other pathology service providers, including TissuPath. Similarly, Cabrini Health has not provided any substantive evidence to support its contentions that an exemption would benefit the public. In fact, most, if not all the benefits of reducing access to third party providers would accrue to Cabrini Health and to contractors selected by Cabrini Health (in the case of Cabrini Pathology this is currently Sonic Healthcare Limited via Melbourne Pathology Pty Limited). If a benefit does exist, no attempt has been made by Cabrini Health to quantify the benefit;
- 1.4 The assertion that an exemption will result in no public detriment is totally unsubstantiated and inconsistent with the realities of the markets and market forces. We submit that granting this exemption would in fact be to the overall public detriment; this would directly impact on Cabrini Hospital's patients, clinicians and third party pathology/radiology providers (including TissuPath) but could also have significant secondary effects on patients and clinicians elsewhere in Victoria and even in Australia, as well as the pathology profession in those areas.
- 1.5 We feel the proposal is unfair and would be anticompetitive and reiterate our request that the ACCC reject this application for exclusive dealing by Cabrini Health.

- 1.6 Further we request the ACCC investigate and ensure that Cabrini Health (including its officers, agents and employees) immediately cease and desist from actions to pressure and/or oblige specialist doctors associated with Cabrini Health to exclusively utilise Cabrini Health pathology/radiology, allowing them free and unconditional choice of service provider, without implication that their ability to use Cabrini Health's facilities will be reduced.
- 1.7 The activities identified by Cabrini Health may contravene numerous laws, including other sections of the Act and the incorporated Australian Consumer Law, such as the prohibitions against unconscionable conduct, misleading and deceptive conduct, and the conferral of prohibited benefits in return for referrals, warranting separate investigation and review by the ACCC.

Each of the identified points is expanded on below.

2 EXISTING MARKETS

2.1 A brief review of the overall pathology market

Pathology is the medical specialty concerned with the study of the nature and causes of diseases. It underpins every aspect of medicine, from diagnostic testing and monitoring of chronic diseases to cutting-edge genetic research and blood transfusion technologies. The pathology profession encompasses numerous diverse sub-speciality areas including:

- Anatomical pathology - deals with the diagnosis of disease based on examination (by a number of means) of organ, tissue or cellular specimens;
- Haematology - deals with diseases which affect the blood, including clinical treatment;
- Chemical pathology – deals with detecting changes in a wide range of substances in blood and body fluids (electrolytes, enzymes and proteins) in association with many diseases;
- Microbiology - deals with diseases caused by infectious agents;
- Immunology – performance and supervision of tests of the immune system, including clinical treatment;
- Genetic pathology – investigates, interprets and helps treat genetic illnesses (includes cytogenetics and molecular pathology); and
- Forensic pathology - primarily involved identifying the cause of death and reconstructing the circumstances by which the death occurred.

All pathologists are **medically trained doctors** who have undertaken **additional speciality training** in one, or sometimes multiple, sub-speciality areas.

Pathology services play a critical role in the health sector and are essential to the early detection, possible prevention and improved case management of various medical conditions.⁽¹⁾ It has been estimated that pathology and pathologists are responsible for 70% of all diagnoses and virtually 100% of all cancer diagnoses.⁽²⁾

Australia's pathology industry incorporates around 480 laboratories in both the public and private sectors, which employ 11,160 people.⁽³⁾ The Commonwealth Government funds the majority of pathology services, either through the Medicare

Benefits Schedule (MBS) on a fee-for-service basis or through Commonwealth, State and Territory funding of public hospital services through the National Healthcare Agreements.⁽⁴⁾ For private patients, additional funding comes from insurance companies, and there may be out-of-pocket expenses in some instances.

Medicare benefits paid and Medicare services processed, 2010-11*

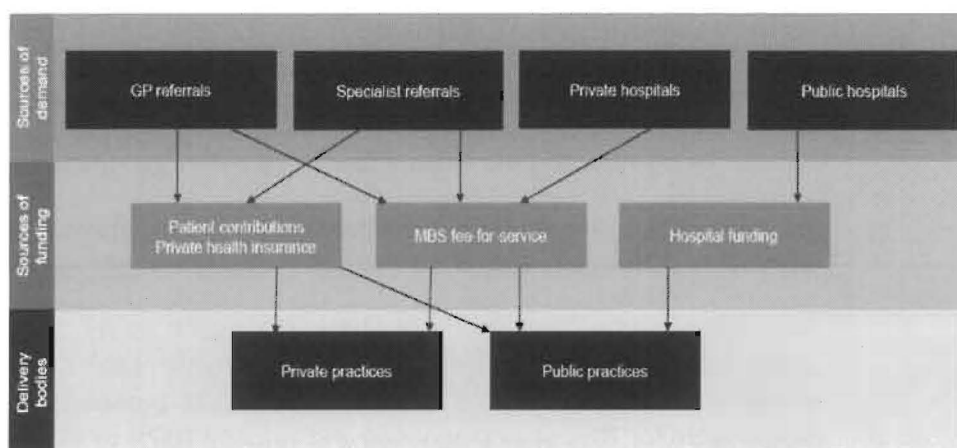
Segment	Benefits paid (\$ million)	Share of total benefits (%)	Share of total services (%)
Haematology	255.9	12.2	14.6
Chemical	843.6	40.2	35.6
Microbiology	306.6	14.6	10.4
Immunology	91.8	4.4	2.7
Tissue pathology	237.9	11.3	2.5
Cytopathology	42.6	2.0	1.8
Cytogenetics	26.1	1.2	0.1
Infer and preg	11.6	0.6	0.5
Patient episode initiation	188.0	9.0	30.9
Bulk billed incent	82.2	3.9	N/A
Other	10.3	0.6	0.9

*Current prices

SOURCE: MEDICARE AUSTRALIA

Patients referred for pathology testing come from general practices, public hospitals and private specialists (working within their rooms and in accredited private operating theatres). Although the majority of referrals for pathology services of all types come from general practitioners (70%), specialists and public hospitals order approximately 50% more tests than general practitioners, with those tests representing an average additional expenditure of approximately \$4 per service. A patient contribution is more likely to be sought if a pathology service is requested by a specialist, and co-payments are most commonly sought for schedule P5 tests (Tissue Pathology).

The chart below provides an overview of the supply, demand and funding of pathology services in Australia.



2.2 Service provision at Cabrini Health

TissuPath currently provides services to specialist clinicians who utilise rooms at Cabrini Health (further particulars of which are set out at section 2.6 below). Although specialist clinicians practice from Cabrini Health, they are independent contractors to Cabrini Health, utilising space under a contract with Cabrini Health (such as a licence agreement or lease). As such, specialist clinicians are not employees of Cabrini Health and individuals who visit clinicians at Cabrini Health may not have any direct interaction with personnel of Cabrini Health or consider themselves 'patients' of Cabrini Health.

Specialist clinicians may select a service provider (in consultation with their patient), which may be "Cabrini Pathology", TissuPath or another provider. Selection is driven by numerous factors and market forces, some of which are observed in section 2.4 below (similar considerations apply to radiology services).

Accordingly, although the notification from Cabrini Health appears to be confined to describing a market made up of patients, there is a clear market consisting of specialist clinicians.

Further, although the notification of Cabrini Health refers to the offerings of "Cabrini Pathology" and "Cabrini Medical Imaging" as "business units within Cabrini Health", they are not separate entities, but trade or brand names used by Cabrini Health and/or contractors selected by Cabrini Health.

In the case of pathology services, it is understood that Sonic Healthcare Limited and/or its subsidiary Melbourne Pathology Pty Limited has some form of contract to provide pathology services from premises controlled by Cabrini Health and/or contribute to the functioning of "Cabrini Pathology", and in turn derives some financial, or other, benefit from doing so. Although the specifics of the arrangement between Cabrini Health and Sonic Healthcare Limited (Melbourne Pathology Pty Limited) are not known, it is our understanding that specialist pathologists providing pathology services from premises controlled by Cabrini Health are salaried employees of Melbourne Pathology Pty Limited. That is, there is no independent service offering by Cabrini Health and the name "Cabrini Pathology" is associated with service offerings under private contractual arrangements (which would not be apparent to the general public). The reference on page 2 of the Notification to Cabrini Health employing "130 highly qualified, dedicated staff..." appears intended to convey a position whereby Cabrini Health is employing pathologists and in turn, deriving all associated benefits. That is not believed to be the case, as a commercial operator has been selected and offered at least partial benefit from the access to a market consisting of individuals who interface with Cabrini Health (ie, patients and specialist clinicians) and who may well be controlled or influenced by Cabrini Health. For example, specialist clinicians may be obliged or required to use "Cabrini Pathology", and in so doing, generate returns for Sonic Healthcare Limited and/or Cabrini Health. The same issues apply to medical imaging services.

The seemingly misleading suggestion of independent service offerings is reinforced by the "market analysis" submitted by Cabrini Health, which in no way mentions or

details the arrangement between Cabrini Health and Sonic Healthcare Limited. The lack of transparency suggests that consumers and even specialist doctors at Cabrini Health may also be unaware of the relationship between Cabrini Health and Sonic Healthcare Limited and moreover, the financial arrangement that exists between the two entities.

Based on the above, it appears to TissuPath that the existing markets and associated service arrangements have been misstated or insufficiently disclosed by Cabrini Health, such that the true impact of the actions proposed by Cabrini Health are not fully disclosed, explained, considered or substantiated.

Moreover, the motives behind the proposed arrangements and the role of the interested parties, including the potential benefits to be derived by the contractor selected by Cabrini Health (currently Sonic Healthcare Limited), do not appear to have been stated or considered by Cabrini Health. It appears to TissuPath that the approval sought by Cabrini Health will advance the market position of the contractor selected by Cabrini Health, so as to give the contractor substantial, if not exclusive, market control and power, of a secured or closed market.

2.3 TissuPath – an overview

TissuPath is a partnership pathology practice located at 96 Ricketts Road, Mount Waverley, Victoria.

Originally established in 2004, with one part-time pathologist and 2 laboratory staff, the practice has grown to employ over 30 staff, processing over 15,000 specimens per annum.

The growth of TissuPath's laboratory is part of the growing move towards 'niche' or 'boutique' laboratories that provide a specialised service for a subset of pathology services. Stand-alone 'boutique' anatomical pathology providers appear to be flourishing, with 32 APAs in 2009/10 just claiming anatomical pathology services, and another 8 APAs just claiming anatomical pathology (group P5) and cytology (group P6) – up from 26 and 7 respectively in 2007/08 – out of a total of 197 APAs.

As our name suggests, TissuPath specializes in the diagnosis of disease through examination of organ, tissue or cellular specimens; this branch of pathology is often referred to as Anatomical Pathology or Surgical Pathology.

To provide suitable anatomical pathology services, Anatomical Pathologists need a broad-based knowledge and understanding of the pathological and clinical aspects of many diseases.

The diagnostic specimens examined by Anatomical Pathologists include tissue or organ biopsies suspected of being diseased, surgically-resected tissue or organ specimens known to be diseased (often as the result of prior review of a biopsy), fluid or cell preparations to be examined directly from a slide (cytology), or multiple tissues and organs obtained post-mortem by an autopsy.

However, the vast majority of reviews conducted by most Anatomical Pathologists are on cells, tissues or organs from living patients, many of which relate to confirming or excluding a diagnosis of cancer. The opinion of an Anatomic Pathologist is sought to give a diagnosis (or confirm a previous diagnosis), to advise of important clinical features of a tumour or disease process and to assess the adequacy of the removal of the tumour or affected tissue or organ.

The main 'tool of the trade' of an anatomical pathologist is a microscope but numerous other ancillary tests are also performed to provide the most accurate and useful information to the requesting clinician; some of these are routine but others are unique and provided by only small numbers of practices.

Anatomical Pathology differs from some other branches of pathology in that the results are a professional interpretation and opinion. As a consequence, every case requires direct input by an expert pathologist. This is in comparison to many of the more automated pathology tests, e.g. a "full blood examination" or a blood glucose concentration, where most of the "analysis" is in fact conducted by a high-throughput, robotic analyzer and a normal range for that test is provided with the results but no additional pathologist interpretation is required.

It should be evident from this summary that the work of Anatomic Pathologists must be extremely accurate and must be based on expert knowledge and experience, as missing a diagnosis of cancer, or mis-diagnosing a lesion as cancer when it is not, could have disastrous consequences.

2.4 TissuePath – what we do

The TissuePath Specialist Pathology laboratory provides a full range of Anatomical Pathology services including;

- Histopathology; and
- Cytopathology,

along with numerous 'ancillary tests' including;

- Special histochemical staining;
- Immunohistochemistry (IHC); and
- Chromogenic *in situ* hybridization (CISH).

TissuePath is an Approved Pathology Authority (APA No. No. 1108) and the TissuePath laboratory is an Accredited Pathology Laboratory (APL No. 039017). We are fully accredited by NATA (National Association of Testing Authorities) and all pathologists are accredited Fellows of the Royal College of Pathologists of Australasia (RCPA). We have affiliations with several large public laboratories.

TissuePath also has an ongoing, significant commitment to research and development through our associated company, TissuePath Research Pty Limited.

TissuPath's referrals come from specialist clinicians operating either from their private stand-alone rooms, rented accommodation at various private hospitals in Melbourne or from accredited stand-alone or hospital-affiliated operating theatres. At present we have over 100 referring clinicians accessing our services from their consulting rooms and from operating theatres at a range of hospitals including Epworth Private, Mercy Private, Freemasons Private, Epworth Eastern Hospital, Warringal Private, Northpark Private Hospital, Knox Private, South Eastern Private Hospital, The Valley Private Hospital, St John of God (Berwick), Monash Medical Centre, Como Private, Cabrini Brighton, Cabrini Malvern, Masada Private, The Avenue, Linacre Private, Western Private Hospital, John Fawkner Hospital, The Bays Private Hospital, Beleura Private, Peninsula Private, Portland District Hospital, as well various day procedures centers located throughout Melbourne metropolitan area.

TissuPath is a specialist provider of pathology services and our main focus is on ensuring that we provide speciality expertise and quality, accurate and timely service provision, tailored to the needs of individual clinicians, with flexible access to specimen reports (including web-based access via computer or smartphone).

Despite offering a "bespoke" service, TissuPath is highly competitive in the pathology market; private patients with health insurance, or patients who are bulk-billed at the request of the referring specialist, account for 85% of our work and incur no out-of-pocket expenses when they receive an account from TissuPath. The remainder are self-insured patients who are charged a percentage of the AMA fee, but are also entitled to a Medicare rebate on those fees.

Anecdotally, specialist physicians or surgeons who choose to send their anatomical pathology work to TissuPath invariably do so for one or more of the following reasons:

- (i) Reliability – these specialists are confident that TissuPath has the expertise to provide completely accurate diagnoses or diagnoses superior than that provided by other providers, including providers who offer general pathology services but not the specialist services offered by TissuPath;
- (ii) Detail – they are of the opinion that TissuPath's reports are more thorough than those provided by the majority of other Anatomical Pathologists;
- (iii) Unique offering – TissuPath provides a range of special tests not offered by many other Anatomic Pathology practitioners;
- (iv) Promptness – TissuPath has the ability to achieve extremely rapid "turn-around times" (the interval between receipt of a specimen and when the anatomic pathology results are provided to the referring doctor), due in part to specimens being collected by our in-house couriers; in country areas we use other intra-state courier services;
- (v) Use of technology – our results are conveniently available via electronic download or the via the Web, either on computers or on "smartphones" via web browsers; and

- (vi) Independence – TissuPath offers services free of any undue influence or conflict of interest.

TissuPath's service is enhanced over time by the creation of a strong clinical relationship and additional professional engagement including participation at clinical multidisciplinary meetings, collaborative research activities and educational activities including participation at specialty conferences.

TissuPath neither offers nor provides any financial or other unlawful inducement to clinicians.

2.5 TissuPath has provided, and continues to provide, substantial public benefit

On top of providing a unique and quality pathology service, TissuPath also provides public benefit through its research activities, funded from its surplus as well as by grants (including government grants). TissuPath has published 18 papers in international peer-reviewed journals (list appended) since its founding in 2004 and presently has 9 active research projects with public (Peter MacCallum Cancer Centre), not-for-profit (Cancer Council Victoria; Burnet Institute for Medical Research) and commercial (national and international biotechnology companies) sectors. This is in stark contrast to the apparent minimal participation in research by members of the Cabrini Pathology department (including the outside contracted pathologists); as far as we can ascertain Cabrini Health's Anatomic Pathology laboratory has published only one paper in the 2004-2011 time frame.

TissuPath is a member of the Victorian Prostate Cancer Research Consortium, the Victorian Cancer BioBank and the Australian-Canadian Prostate Cancer Research Alliance, and has numerous research collaborators as a result of these memberships.

TissuPath staff have also provided significant, *pro bono* public benefit through a wide range of activities. TissuPath pathologists, because of their expertise, are in demand and heavily involved in teaching in a number of contexts including lectures to students and registrars (the latter in the fields of pathology, urology, plastic surgery, radiology and general surgery), as well as presentations at national and international conferences. In addition in 2009 TissuPath hosted a pathologist from Malaysia for three months who wished to become an expert uropathologist; as such TissuPath was accredited by the Commonwealth Department of Immigration and Citizenship for "occupational training". TissuPath provided the pathology cancer module used for teaching Monash University medical students.

Dr. Andrew Ryan (a Director of TissuPath) is currently a member of the RCPA Victorian State Committee, the organizer of the RCPA Victorian Anatomical Pathology Registrar Education Program, and a co-coordinator of the RCPA Specialist Training Program project to develop on-line access to educational material.

A/Prof John Pedersen (also a Director of TissuPath), a uropathologist and gastrointestinal pathologist with an international reputation, is a Consulting Pathologist for the Cancer Council, Victoria; a member of the prostate and bladder

sub-committees of the Australian and New Zealand Urogenital and Prostate Cancer Trials Group (ANZUP), a member of the Urology Committee of the Victorian Cooperative Oncology Group (VCOG), and a consulting pathologist to the Urologic Pathology Group of the Malaysian College of Pathology (part of the Academy of Medicine of Malaysia).

Prof John Mills is the Director of Research and Development at TissuPath, and was one of the three founders of the practice (with Dr Michael Cohen & A/Prof John Pedersen). He is not a pathologist but is widely known internationally as a physician-scientist with vast business and institutional experience. He is a non-executive director of the Prostate Cancer Foundation of Australia, and Chairs the PCFA Research Program and Research Committee. He has honorary professorial appointments at the University of California, San Francisco, Monash University and RMIT, where he is actively engaged in teaching, and he is a Member of the Walter and Eliza Hall Institute for Medical Research and the Burnet Institute for Medical Research and Public Health. Prof Mills was one of the founding members of the Scientific Advisory Committee to the Movember Global Action Plan (a major supporter of research on prostate cancer) and he is on the Editorial Boards of the professional journals *Sexual Health* and *Scientific World Journal*.

2.6 TissuPath's Relationship(s) with Cabrini Health (Cabrini Hospital – Brighton and Malvern Hospitals & Day Procedure Centres)

Many of TissuPath's past and current referring clinicians consult and/or operate out of Cabrini Health, at either the Brighton or Malvern rooms or a Day Procedure Centre (DPC); their referrals are significant for TissuPath.

We are of the opinion that this application for exemption from critical controls around exclusive dealing arrangements would further enhance Cabrini Health's ability to influence specialist referral patterns through anti-competitive practices including full-line and third-line forcing. Should this activity be endorsed by granting this exemption, or in fact no action be taken to force Cabrini Health to stop any current unlawful behaviour, it is anticipated that TissuPath can expect to have a significant reduction in gross revenue, with consequent losses in positions throughout the organisation, including pathologist, administrative, and laboratory staff and contractors engaged by TissuPath, including couriers.

Of course the consequences to this exemption are not limited to TissuPath but would likely also influence the viability of other smaller boutique specialist pathology laboratories and medical imaging practices elsewhere in Victoria and Australia (further details in Section 3 below).

3 FUTURE MARKET(S) ENVISAGED BY CABRINI HEALTH

If the Notification of exclusive dealing is accepted by the ACCC, there will be a huge decrease, if not a 100% decrease, in the "external" pathology and medical requests now originating from Cabrini Health, of course with the concurrent decrease in revenues for the external entities currently providing those services, including TissuPath, and a removal of usual market forces, including competition and pricing (both short and long term).

However, the implications are very, very much greater and wider than just the relationship between Cabrini Health and TissuPath. If Cabrini Health is permitted to engage in exclusive dealing with 'internal' and contracted pathology and medical imaging providers, it could be reasonably presumed that other private hospitals in Victoria and Australia would make similar applications for Notification of Exclusive Dealing (this may account for a lack of objections from other large corporate pathology providers, many of whom also have significant interests in private hospitals and other medical practices and who will be waiting with baited breath to see the result of this application and moreover, the commercial returns and protections afforded by a limited or restricted market endorsed by the ACCC).

The implications of this change would potentially alter the entire Australian pathology and medical imaging landscapes and it is not difficult to envisage that pathology and medical imaging services will be virtually 'owned' by private hospitals and medical clinics, and will be either run in-house with components contracted out (as is the current case with "Cabrini Pathology"), or sold by tender to the highest bidder, with potential decreased regard for quality or expertise. This landscape would be inimical to smaller boutique practices, many who provide a unique specialised service; the capacity for pathologists or radiologists to work in these independent and specialised practices would be removed, along with the public's access to the services they provide. Further, reduction in number of alternative pathology may well see prices rise because of increased market power by large entities.

For these reasons we are of the opinion that Cabrini Health's request to engage in exclusive dealing will have catastrophic effects on the entire Australian landscape of pathology and medical imaging.

Clearly this outcome represents loss of benefit to the Australian public and loss of competition. Taken to the end of an anticipated progression, it is very likely that the overall quality of pathology and medical imaging in the country will deteriorate and prices will rise.

4 RESPONSE AND CORRECTIONS TO CABRINI HEALTH'S ASSERTIONS

4.1 Revenue automatically gives rise to a benefit (page 2 of the Notification)

Cabrini Assertion:

"As Cabrini Health is a not-for-profit health care service, revenue earned by Cabrini Pathology is reinvested in Cabrini Health's patient services, facilities and social outreach activities."

TissuPath Response:

In their application to the ACCC, Cabrini Health has not provided full information about the structure of their pathology and medical imaging services. Investigation of the detail of those structures may demonstrate that not all of Cabrini Health's activities are providing "public benefit", nor is all the revenue earned by Cabrini Pathology "reinvested in patient services, facilities and social outreach facilities".

It is our understanding that although Cabrini Health owns or leases the equipment in the pathology laboratory and the medical imaging suites, and hire the non-medical staff in those areas, the pathologists are salaried employees of a share-holder

owned, private pathology company, Melbourne Pathology Pty Limited (a wholly-owned subsidiary of Sonic Healthcare Limited), and the radiologists are employees of Medical Imaging Australia (MIA). It is also our understanding that there is a “surplus” sharing arrangement between Cabrini Health’s pathology and medical imaging services and these two commercial, for-profit entities. In their review of this submission, the ACCC may wish to learn of the financial and administrative details of these relationships. It is our view that these arrangements are using the not-for-profit status of Cabrini Health to provide an unfair advantage to for-profit entities.

4.2 Access to hospital facilities (page 4 of the Notification)

Cabrini Assertion:

“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.”

TissuPath Response:

It would appear to TissuPath that Cabrini Health has all but admitted that the treatment of practitioners and their entitlements will vary depending upon the number of purchase orders submitted to Cabrini Pathology, which seems an inevitable consequence of the policy communicated by Cabrini Health.

TissuPath notes that to the extent that the arrangements represent the conferral of a “benefit” on practitioners in return for the referral of pathology services, the arrangement contravenes the prohibitions on the provision of an inducement for pathology services, as prescribed in the Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Act 2007 (Cth). TissuPath submits that practices contrary to law should neither be endorsed nor encouraged.

4.3 Best interests standard and exercising choice (page 5 of the Notification)

Cabrini Assertion:

“The Applicant submits that the object of the proposed conduct is to require medical practitioners treating private in-patients and to encourage its accredited medical practitioners treating out-patients who need pathology services or medical imaging services to have regard to the best interests of the patient in selecting the pathologist or radiologist.”

TissuPath Response:

Cabrini Health has not identified that a problem exists, let alone that the asserted problem warrants the requested response.

Practitioners already have numerous duties, including a duty of care and fiduciary duties. It is seemingly artificial for Cabrini Health to assert that a restricted market is concerned with monitoring and/or enforcing the professional standards owed by practitioners, particularly when it is borne in mind that regulatory bodies, such as the Australian Health Practitioner Regulation Agency, are concerned with enforcing professional standards, not Cabrini Health.

It is also submitted that it is erroneous for Cabrini Health to assert that arrangements are solely concerned with the best interests of patients.

Firstly, there is seemingly no disclosure to patients or concerns raised by patients warranting a response by Cabrini Health, let alone a response seemingly driven by financial motives. Similarly, no government or regulatory body has identified the problem relied upon by Cabrini Health, let alone sought a response in the form of that proposed by Cabrini Health.

Secondly, if the issue warranting a response is a failure to have regard to the “best interests” of patients there are presumably other options available to Cabrini Health, such as education. Further, there is seemingly no justification for Cabrini Health to impose requirements other than a simple need to have regard to the best interests of patients. For example, there is no need to require practitioners to justify their decisions, and a process for justification may be used to discourage or prevent practitioners from utilising third party providers. Similarly, there is no need for Cabrini Health to prescribe that the use of a third party provider is conditional upon that provider being able to guarantee that results will be available within the “Cabrini Medical Record” (which no practitioner will seemingly ever be able to do given such matters are within the control of Cabrini Health).

The cited requirement seems to be designed to allow Cabrini Health an unfettered ability to control purchasing decisions by way of making it uncommercial and/or impractical for practitioners and/or competitors, such as TissuPath, to offer or provide competing services. To that end, notwithstanding that the electronic access and transportability demanded by Cabrini Health may not always be necessary or desirable or even mandated by the patient, another barrier is imposed, such that it becomes impossible or uncommercial for third parties to compete, particularly if an electronic records requirement is in addition to and/or inconsistent with the national e-health policies and procedures of government and subject to a fee (it being noted that government is currently taking steps to develop electronic health records systems, in which case, a separate electronic health record system of Cabrini Health not only imposes an unnecessary barrier, but also gives Cabrini Health further control, as well as the ability to impose requirements that may conflict with the health models espoused by government and moreover, the individual decision making rights of patients).

Although further comments on electronic records are included at section 4.10 below, TissuPath’s client doctors can access their patients’ results on the TissuPath web site (by going to the TissuPath Home Page, <http://www.TissuPath.com.au> and then clicking on the prominent “Doctors Results Portal” button). Alternately, in keeping with modern practices, they can be accessed via smartphones or tablet

computers (e.g. the Ipad™) using web browsers. Taken together, this allows TissuPath's client doctors to access their results anywhere in the world, not just at Cabrini Health. TissuPath also has the capability to download results to hospital medical information systems, and would be pleased to do so at the request of Cabrini Health, subject to any terms and conditions imposed by Cabrini Health (there being insufficient detail in the Notification to allow TissuPath to assess the workings and in turn implications of the envisaged arrangements).

Thirdly, Cabrini Health is not seemingly able to make determinations as to what is in the best interest of a patient given the clear conflict of interest and lack of authority (Cabrini Health is not able to make decisions for doctors or patients and is certainly not a regulatory authority charged with the responsibility of determining and enforcing professional standards). Moreover, the assessment totally ignores a key decision maker, the patient.

Fourthly, there would be no need for Cabrini Health to note that pathology purchasing decisions will be tied to access to resources, such as operating theatres (page 4). If the decision is solely concerned with the best interests of patients, practitioners should not be pressured to use "Cabrini Pathology", on the basis that "usage" of Cabrini Pathology will dictate whether other activities within hospitals are permissible. The scenario depicted by Cabrini Health seemingly flies in the face of a genuine best interests test, by way of enshrining an incentive or punishment based approach, which will almost certainly result in practitioners having regard to factors other than what is in the best interests of patients. Or put another way, the system seemingly enshrines the problem Cabrini Health has stated that it is trying to address.

Fifthly, elements of the test mandated by Cabrini Health are unverifiable, meaning that the true default position is that no third party will ever be able to compete. For example, Cabrini Health has asserted that a "best interests" test can only be met if a faster turn around time can be provide. TissuPath questions how a practitioner could ever know, let alone guarantee, turnaround times in advance, particularly if there are no service guarantees by Cabrini Health. If there are no service guarantees by Cabrini Health, a third party provider can never offer a quicker turnaround time, as there is no benchmark.

What is more, TissuPath questions why services need to be quicker, and not merely comparable. TissuPath also questions how a third party provider could be faster when they need to meet requirements of Cabrini Health, such as availability within the "Cabrini Medical Record" and providing "justification"; being requirements which appear to be designed to delay or frustrate, and in turn, ensure that third parties can never be used. In the case of "justifications", Cabrini Health reserves the right to receive a justification at any time, with no detail as to how long Cabrini Health has to make a decision, nor whether any right of appeal exists. As such, if the justification is sought before services are ordered (as anticipated) a third party may never be able to provide a faster turnaround time as the time taken to justify third party procurement erodes or nullifies competitive offerings. Moreover, the test fails to address what occurs if a patient forms a conflicting view. The complex framework for permitting external requests (multiple conditions), is unnecessarily burdensome

to practitioners (with the apparent aim of nullifying any requests) and could be readily abused or manipulated by Cabrini Health to achieve a desired outcome, such as discouraging or rejecting requests.

Finally, on asserting that decisions are driven by a “best interests” standard Cabrini Health appoints itself to impose and regulate an exhaustive and definitive best interests test, despite: the underlying conflict of interest; there being no reference to standards and duties at law; ignoring the patient; and the lack of standing to prescribe what is in the best interests of a patient, which is seemingly a decision for the patient, government, courts and/or regulatory bodies. It is illusory to assert that a best interests test can be fixed, let alone that a best interests test can be broken down into four fixed criteria which if all met mean that the service is in the best interests of the patient.

To highlight the points made, it is noted that Cabrini Health asserts that best interests are determined by price. As such, a practitioner is bound not to use a third party who is more expensive, even if the speciality service offered by a third party is better. Equally, even if there is a need to maintain continuity of services, a practitioner must decide on price given the test requires all four points to be satisfied. Furthermore, the test ignores other factors, such as proximity, patient choice, the quality of the required services and the expertise of the provider in comparison to that offered by Cabrini Health. The test is solely focussed on cost to the potential detriment of quality and/or the expertise of the pathologist or radiologist (who would often be providing the service at the same cost as Cabrini Health, but who is excluded because price parity or matching is still not sufficient to meet the “best interests” test prescribed by Cabrini Health).

Accordingly, the test would appear to be designed to all but stop practitioners from using third parties, such as TissuPath, on the basis that even if specialist expertise is sought, required or preferred by the patient, they cannot be procured. If the intention truly is to encourage reflection by practitioners, is it submitted that other and better options exist.

It is understood that in the case of the “Common Decision” in New South Wales, the New South Wales government simply noted that as part of public health, in the public health system, public health workers would take into account factors such as price, service and quality. That is, the test in New South Wales is not prescriptive or exhaustive, in contrast to the model espoused by Cabrini Health.

It is also understood that a system which ignores or defies patient choice is completely at odds with government policy, including the “patient choice” policies recently articulated in the *Health Insurance Amendment (Pathology Requests) Bill 2010* (Cth). It is difficult to reconcile the requirements of Cabrini Health with the envisaged aims of the Commonwealth Government, being to promote competition and allow patients a clear choice. TissuPath submits that practices contrary to government and public policy should neither be endorsed nor encouraged.

4.4 Transactions cost savings (page 5 of the Notification)

Cabrini Assertion:

The public benefits include "transaction cost savings".

TissuPath Response:

There appears to be little or no detail on: the extent of the transaction cost savings; the period over which the savings will apply; or how the savings will be generated or sustained.

In addition, TissuPath submits that the Notification is designed to and/or has the effect of subverting the Pathology Funding Agreement dated 13 April 2011 between the federal government, the Australian Association of Pathology Practices (AAPP), Royal College of Pathologists of Australia (RCPA) and the National Coalition of Public Pathology (NCOPP).

The Pathology Funding Agreements states, amongst other things, that the parties agree to work cooperatively to achieve the key objectives, including "Maximizing competition in the pathology sector" and "Recognizing the diversity of private, public not-for-profit pathology, small and large, metropolitan and regional providers, ensuring the sustainability of the pathology sector" (see clause 2).

The arrangement proposed by Cabrini Health seems entirely inconsistent with the aims of the Commonwealth Government, as communicated by the Department of Health and Ageing.

4.5 Funding - Medicare (page 6 of the Notification)

Cabrini Assertion:

"Medicare rebates are the primary basis for the recovery of costs associated with Cabrini Pathology and Cabrini Medical Imaging. In Victoria, there has been a decline in the average Medicare rates for pathology services. With respect to medical imaging, Medicare rates for diagnostic imaging (which accounts for approximately 50% of all medical imaging services provided in Australia by volume) have stagnated, with there being no substantial increases in diagnostic imaging Medicare rates during the past ten years. These Medicare rate pressures threaten the future financial health and viability of both Cabrini Pathology and Cabrini Medical Imaging."

TissuPath response:

These competitive pressures are encountered by all participants in the pathology area.

Cabrini Health's notion that the only way to ensure the continued financial viability for their pathology and medical imaging services is to stifle competition is, in our view, fanciful, given their business already enjoys an enormous competitive advantage by virtue of its not-for-profit status (such as FBT, payroll tax and income

tax exemptions) which other industry participants, including TissuPath are denied. In addition, there appears to be an underlying assumption that as a matter of public policy support should or must be afforded to Cabrini Health, so as to maintain “efficient funding and financial viability of the health services model” (page 5 of the Notification). Although Cabrini Health has failed to articulate what an “efficient funding model” would look like, or what “health services model” benefits are alleged to be concerned with, TissuPath submits that:

- The conferring of an isolated exemption and associated market advantage on the operator selected by Cabrini Health is not a funding model, let alone an “efficient” funding model. Funding is a matter for government, whilst exclusive dealing arrangements may actually enshrine or promote inefficiencies;
- funding should be open and transparent, which are principles which would not appear to be supported by the actions of Cabrini Health (as noted above, the underlying financial arrangements with contractors are not disclosed, and there is no reason to believe that patients are aware of the underlying commercial arrangements); and
- the primary health services model is the public health system. Cabrini Health is neither a public hospital nor a denominational hospital within the meaning of the *Health Services Act 1988* (Vic), such that Cabrini Health is not recognised as being a primary participant in the public health system (it being noted that other not-for-profit hospitals are recognised, reinforcing the distinction made by government on defining health systems for Victoria).

We also note that Cabrini Health's assertions are also without foundation because small, for-profit entities such as TissuPath remain financially viable in this operating environment, and have continued to grow despite the actions of large entities like Cabrini Health.

It also noted that despite the “Medicare rate pressures threatening the future financial health and viability” of “Cabrini Pathology”, the 2010 Cabrini Health Annual Report (attached appendix to the Notification, page 30, last paragraph under Cabrini Pathology) states: “We increased our productivity, which helped to offset the effects of funding cuts and achieved an increased surplus”. Clearly Cabrini Health are already aware of other ways of maintaining financial viability and in fact thriving, without the need to create an anti-competitive environment.

If funding models are to change, including Medicare, a whole of government approach would be required, not simply Cabrini Health initiatives.

4.6 Cherry Picking (page 6 of the Notification)

Cabrini Assertion:

“Another threat to the continued financial health of Cabrini Pathology and Cabrini Medical Imaging comes in the form of the potential for cherry picking [stet]. As

Cabrini Hospitals provide a full range of health services, including emergency services, they must offer a full range of pathology services and medical imaging services 24 hours a day and 7 days a week. The ability for third party providers to cherry pick pathology and medical imaging services undermines Cabrini Hospitals' ability to operate Cabrini Pathology and Cabrini Medical Imaging in a financially viable way."

TissuPath Response:

Small business entities trade on their own competitive advantage. TissuPath's strength lies in its business model which emphasises the role of specialist clinicians, their freedom to seek the best advice, wherever it is, and our delivery of superior diagnostic services through specialist pathologists. Although claimed by Cabrini Health in their application, the concept of "cherry picking" is not applicable in this instance. For one, anatomical pathology work is at the complex and labour intensive end of the pathology spectrum, and the work that TissuPath undertakes is within a highly-specialised, labour-intensive and complex subdomain of pathology, not the "low-lying fruit", highly-profitable and easy work that Cabrini Health portrays.

If action is required, surely the preferable solution is for Cabrini Health to upgrade their own services and the skill sets of their scientists, pathologists and radiologists to compete with those external services, rather than attempting to circumvent the prohibitions to exclusive dealing (including full-line forcing and third-line forcing), and abuse of market power contained in the Act?

4.7 Benefits to the public at large (numerous references within the Notification)

Cabrini Assertion:

Cabrini claims that as a non-profit hospital, benefits to Cabrini are effectively equivalent to benefits to the public at large.

TissuPath Response:

This assertion is patently absurd.

Cabrini Health is a private entity, it is considered a private entity by the government (not recognised as part of the public health system), and in the last fiscal year (despite a proportion of its pathology and medical imaging requests being referred to third party providers) it achieved a surplus, and a surplus evidently larger than the prior year's. Similarly, entities of this nature are recognised as private practices under Commonwealth pathology legislation despite being owned and operated by their founding charitable or religious body. For the purposes of government funding therefore, *these practices are treated in the same way as other private practices*, being funded on a fee-for-service basis via the Medicare Benefits Schedule. However, *for the purpose of taxation, not-for-profit organisations are treated like public practices and are exempt from most taxes, such as income tax*. Not-for-profit pathology (and in some instances, radiology) practices in Australia include St John of God Pathology (a business unit of St John of God Health) and SydPath Pathology (a business unit of St Vincent's Hospital in Sydney).

Cabrini Health claims that it provides some societal benefits beyond reimbursed health care, but the source of the funds for those activities, the amount of funds expended, and the exact nature, funding, scope and timing of past activities and planned future activities has not been specified. That is, there is no verifiable or quantitative analysis and all interested parties should be entitled to properly consider the effects of the actions proposed by Cabrini Health.

Cabrini Health's proposal mentions several entities associated with Cabrini including the "Cabrini Institute" and the "Cabrini Foundation", with the apparent intention of creating a perception of a high profile, broad based and significant research and/or public benefit profile. It is unclear whether these are legal entities in their own right, but based on the fact that the ABN quoted on the Cabrini Foundation web site is that of Cabrini Health, it would appear that some, perhaps all, are merely administrative divisions of Cabrini Health (it being understood that there are no separate annual returns for those entities, identifying research activities or financial contributions). If that is the case, TissuPath questions whether roles, functions and importance are misstated or misconstrued.

Cabrini Health also alleges that it engages in activities outside of medical care which benefit local and overseas entities. The full extent of these activities is not provided, and a dollar figure is not attached to any of them, and as such the importance of these activities is impossible to quantify. And further, it is unclear whether the funding for these activities comes from the surplus achieved by Cabrini (at least in the last fiscal year) or from separate fundraising, for example through the Cabrini Foundation – which of course is unrelated to Cabrini Health's income and surpluses from providing medical care.

Taken together, these facts make it entirely possible that Cabrini Health's receipts for pathology or medical imaging have little or no relationship with the "public benefit" activities that they claim they have, and are, undertaking.

In addition, there is no guarantee that any increase in revenue will be available to be applied in the manner suggested by Cabrini Health, whether because of cost arrangements with selected contractors, additional expenditure in other areas (such as administering and/or enforcing the new model proposed by Cabrini Health) or otherwise.

4.8 Reliance placed on the Common Decision (page 6 of the Notification)

Cabrini Assertion:

"Public benefits of this kind have been recognised in....the Common Decision."

TissuPath Response:

The Common Decision is distinguishable on any number of grounds.

The Common Decision arose out of a statewide policy of the New South Wales state government, in response to the demands identified by government at a State level.

The Common Decision is concerned with government policy, not the policy of a private operator. TissuPath has no reason to believe that the Victorian government has sought or endorsed the practices proposed by Cabrini Health.

The policy identified in the Common Decision is a policy for the public health system. As already noted, Cabrini Health is not recognised as being part of the Victorian public health system.

The Common Decision did not appear to have regard to the circumstances of Cabrini Health and more particularly, procurement arrangements of Cabrini Health with selected pathology providers.

The Common Decision must be viewed in the context of current government policy and applicable legal restrictions, including the Pathology Funding Agreement and the *Health Insurance Amendment (Pathology Requests) Bill 2010* (Cth).

As such, it is erroneous to assert that the public benefits cited in the Common Decision are transferrable or applicable.

4.9 Threats to financial health (page 7 of the Notification)

Cabrini Assertion:

"Threats to its financial health and viability may lead to reduced service offerings in some areas, increased prices for health care services or a diminution in the quality of care."

TissuPath Response:

Cabrini Health has not identified the threat, the source of the threats, nor in what manner the proposed action addresses the threat, whether in the short or long term.

On offering services Cabrini Health presumably accepts the risks of participating in the health care market, on the basis that legal obligations apply.

If the threat is that Cabrini Health cannot or does not wish to compete with third party providers and/or that practitioners prefer to deal with third party providers, it is submitted that Cabrini Health should address the source issues rather than seeking to impose purchasing arrangements which are seemingly designed to remove usual market forces and nullify competition.

TissuPath is not aware of any public policy to effect that the activities of private operators, such as Cabrini Health, should be underpinned by anti-competitive practices.

4.10 Multiplicity of providers (pages 7 and 8 of the Notification)

Cabrini Assertion:

"A multiplicity of providers in [the hospital] environment leads to: (a) an increased risk of lost, misplaced and misallocated specimens/ images; (b) an increased

complexity in the interpretation of laboratory test results in the clinical environment due to non-standard reference ranges between different laboratory analysers; (d) an increased clinical risk and financial cost of providing a system of dealing with the processing and handling of specimens for multiple providers; and (e) 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."

TissuPath Response:

These are not realistic public advantages.

Lost, misplaced and/or misallocated specimens can also occur with in-hospital services and these events are prevented by having robust quality systems in place, not by creating a monopoly.

The "normal ranges" for histopathology are set by the Anatomical Pathology community; expert, specialist Anatomical Pathologists are the best individuals to determine where the clinical specimen falls in those ranges.

Cabrini Health wears no cost for "processing and handling" specimens sent to third party pathology providers. In the case of TissuPath, we provide the specimen collection vessels, the Cabrini Health specialist surgeon or physician puts the specimen in them as the usually would; our couriers pick up the specimens wherever they've been left in the hospital.

Cabrini Health's submission provides absolutely no information about the additional costs they might incur for, "filing [external] results" in their medical records. We also wonder whether Cabrini Health's concerns that they have, "no capacity for Cabrini to provide electronic storage of third party results" are truly realistic. So-called electronic 'downloading' of external results is a standard practice in even the smallest of medical practices and also occurs to private hospitals run by several of Cabrini Health's competitors as well as the public hospital system. The absence of a system with adequate capacity for such downloading could be considered a significant failing in internal infrastructure as the external components of this facility are well established in the pathology environment. In addition, Cabrini Health will continue to rely on external, third-party 'esoteric tests' and therefore should have a mechanism for managing these test results electronically.

The comments made by Cabrini Health on the management of electronic health records also appear to disregard the commitments outlined in the Pathology Funding Agreement, of which the Commonwealth Government is a signatory. The Pathology Funding Agreement includes numerous commitments to the implementation of government's broader "e-health agenda" and the implementation of "e-health initiatives". The position outlined by Cabrini Health cannot be reconciled with existing practices or the future endeavours of the Commonwealth Government.

4.11 Enhanced quality of care (page 8 of the Notification)

Cabrini Assertion:

“Utilising the onsite services of Cabrini Pathology and Cabrini Medical Imaging also enhances the quality of care provided to in-patients and out-patients of Cabrini Hospitals...”

TissuPath Response:

The asserted benefit appears to presuppose that “Cabrini Pathology” will always be able to provide a quicker service and that quality of care is solely concerned with time taken to advise of results.

The apparent ability to guarantee that services will always be quicker is consistent with the concerns already identified by TissuPath, namely that systems and processes are being designed to or have the inevitable consequence of delaying or frustrating service delivery by third parties, thereby preventing competition.

More importantly, it is an absolute misnomer to suggest that the only or primary measure of “quality of care” is the time it takes to perform tests. As far as TissuPath is concerned, the focus should be on the quality of the assessment, not simply the time taken to produce a result, particularly when a quick but incorrect or incomplete assessment will have profound and adverse implications.

5 IS THERE A NET PUBLIC BENEFIT?

5.1 Benefits

TissuPath submits that Cabrini Health has failed to quantify the contended “public benefits”. Benefits appear to have been cited by Cabrini Health with a view to replicating the analysis underlying the Common Decision in New South Wales. As noted at section 4.8 above, the Common Decision is not considered “transferable” or “transportable”, and even if it were, the circumstances underlying the Common Decision are not comparable.

TissuPath further submits that the asserted benefits are erroneous, with the proposed means of achieving the stated benefits being contrary to the stated aims and policies of government, including the right of patients to make a choice about pathology services, in a competitive market (as stated in the Pathology Funding Agreement and the *Health Insurance Amendment (Pathology Requests) Bill 2010* (Cth) and commented on at sections 4.3 and 4.8 above).

Further, although Cabrini Health asserts that the action is being taken in response to “threats”, Cabrini Health has not identified the asserted threats, the source of the threats or how the proposed action actually addresses those threats, whether in the short or long term. If threats exist they may be nothing more than normal market forces, which Cabrini Health should respond to within the confines of the existing regulatory framework. To that end, there are presumably any number of other non anti-competitive options available to Cabrini Health, which still achieve the stated

aim of promoting the “best interests” of patients, such as education, informed decision making models and up-skilling.

If benefits exist, they are financial benefits to Cabrini Health and/or the contractors selected by Cabrini Health to provide “in house” services (which could well be for-profit entities). It cannot be assumed that any financial benefits arising from the arrangements will result in direct or indirect benefits to the public and even if some benefits do arise, there is no guarantee that the benefits will be proportional to the financial gains realised by Cabrini Health and/or the selected contractor.

5.2 No detriment?

TissuPath notes that Cabrini Health has asserted that “no public detriment will result from the proposed conduct.” The contention is implausible and the correct consideration would appear to be whether the actual and inevitable detriment is outweighed by tangible and quantifiable benefits.

Some of the detriments resulting from the proposed conduct are outlined below.

5.3 Direct detriment

(i) Cabrini patients and clinicians

- Removes patient choice
- Infers that patient choice, and therefore informed decision making, is not important to Cabrini Health
- Removes/impairs doctor choice/independent practice
- Impedes access to speciality services
- Removes competitive incentives to improve/maintain Cabrini Health services and billing procedures
- Costs are set by and/or controlled by Cabrini Health, in the absence of normal market forces

The model espoused by Cabrini Health is paternalistic and represents a substituted decision making model, which presupposes that the interests and aims of patients are the same as those of Cabrini Health, which is not only implausible, but also completely at odds with current laws and associated health initiatives, as reflected in the aims and actions of government. In addition to losing the ability to make a choice, patients may not be fully informed of their right to have their anatomic pathology specimen sent to alternative pathology practice, or to be referred to an alternative medical imaging practice, practices which in at least some cases may be the patient's preference, and practices which may offer faster, more expert, better, more specialised, and/or less expensive

services. Nothing contained in the Notification clarifies how Cabrini Health will adequately address such issues.

The need identified by Cabrini Health to justify the proposed action – namely to generate revenue by way of shoring up business going to its internal medical and imaging services – is not a need recognised by government, either as part of government funding models or as part of broader health policy. As already noted, Cabrini Health is neither a public resource nor a public hospital. Further, the practices identified by Cabrini Health appear to be inconsistent with the aims of government, including reinforcing competition (particularly for the pathology sector) and developing consistent electronic records platforms. TissuPath submits that the market should determine whether service offerings are viable.

The proposed model also obliges practitioners to make decisions which may directly disadvantage their own independent practice. To that end, Cabrini Health's proposal fails to distinguish between "outpatients" who are visiting doctors who lease rooms based at Cabrini Health, from "inpatients" who are occupying a Cabrini Health hospital bed. It is not clear to us that Cabrini Health should have any influence whatsoever over the decisions that an outpatient doctor based at Cabrini Health makes in regards to pathology or medical imaging procedures for their patient. With respect to inpatients, our objections are as already detailed.

(ii) Third party providers

- Unfair financial disadvantage to third party providers
- Inequitable platform from which to attempt to compete
- Impairs ability to develop speciality practices
- Adverse impact on clinical diagnostic work
- Adverse impact on research work

As stated in section 2, Anatomic Pathology is a discipline which is involved in the diagnosis of virtually every cancer in Western societies, including Australia and a thorough review of histopathology material by an expert, experienced, specialised Anatomical Pathologist is critical to the accurate diagnosis, or indeed exclusion. The development of expertise in the subspecialised areas of anatomical pathology – and quite likely in medical imaging – requires a 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.

Taking the example of uropathology, the reality in Victoria is that there are only a very small number of pathologists with real expertise in uropathology, and none practice in hospitals. The vast majority of uropathology in Victoria in the private sector is done by TissuPath (A/Prof John Pedersen; Drs Tim Nottle, Andrew Ryan and Sam Norden) and Focus Pathology (Dr David Clouston) – all of whom are expert uropathologists. A very similar situation exists in Western Australia, where the majority of private sector uropathology is done by Uropath Pty Ltd (Prof Ronnie Cohen and colleagues).

It is not in the public interest for Anatomic Pathology review of urologic specimens to be done by inexpert pathologists. Specialisation is already a reality in most fields (e.g. surgery, medicine), and is now a burgeoning reality in anatomic pathology.

5.4 Indirect detriment

- (i) Non-Cabrini patients and clinicians and general public
 - Loss of speciality services
 - Flow on effects to other hospital or 'resource' providers.
- (ii) Pathology as a profession
 - A further step towards the commoditisation of pathology as a profession, in terms of hospitals 'owning' pathology services and contracting or on-sell to the highest bidder in reliance of a closed or protected market
 - Places this very important medical speciality in the hands of large corporate providers who have vested financial interest in service provision

The actions proposed by Cabrini Health would almost certainly result in enormous changes to the Australian landscape of anatomic pathology and medical imaging that would markedly decrease competition, would reduce quality of service, and might result in price increase (due to increased market power by private hospitals).

6 OTHER PUBLIC POLICY AND COMPETITION CONCERNS

6.1 Misleading and/or deceptive conduct

On having regard to the submission made by Cabrini Health, TissuPath questions whether Cabrini Health has or may engage in misleading and/or deceptive conduct, in breach of section 18 of the Australian Consumer Law, in so far as Cabrini Health has made or will make misleading and/or deceptive representations about service arrangements, such as there being a "business unit" within Cabrini Health, as if it is a genuine in house service exclusively staffed by Cabrini Health.

As noted above, TissuPath is not only concerned about the involvement of patients in decision making (or the lack thereof), but also the disclosures made to patients so that they can make informed purchasing decisions.

6.2 Unconscionable conduct

TissuPath questions whether Cabrini Health has or may engage in unconscionable conduct within the meaning of section 21 and/or 22 of the Australian Consumer Law, in so far as Cabrini is or will use its bargaining position to alter purchasing arrangements and to tie the provision of other services to the use of in house pathology and/or radiology services.

There appears to be a risk that the “encouragement” referred to by Cabrini Health may be construed as “persuasion”, which will have a deleterious impact on the number of doctors and volume of work being referred to third party providers, such as TissuPath, by specialists based at Cabrini Health.

Furthermore, the tone and substance of the Notification may of itself constitute exertion or pressure to utilise “Cabrini Pathology”, given the acknowledgement that in the event that Cabrini Health-based specialists refer pathology or medical imaging tests to external suppliers that “Cabrini Health....may choose to make ‘decisions’ regarding access [presumably of these specialists] to its [Cabrini Health’s] resources such as operating theatres, cardiac catheter laboratory, consulting rooms and delivery suites based on the said usage.” Such conduct would be blatantly anti-competitive, and may also be in breach of other provisions of the Act.

6.3 False and/or misleading representations

On reviewing the Notification, TissuPath has considered whether Cabrini Health has made or may make false and/or misleading representations about the benefits to be derived from utilising Cabrini Health services, in breach of section 29 of the Australian Consumer Law. For example, Cabrini Health appears to assert there are a number of benefits associated with Cabrini Health services, such as “24/7 access”, which do not exist with other service arrangements. Such claims would appear to be incorrect, or if correct, only correct because of the limits and restrictions imposed by Cabrini Health.

Cabrini Health may also be making false and/or misleading representations about pricing and in particular, that Cabrini Health is cheaper.

Cabrini Health may also be making false and/or misleading representations about the entitlement of practitioners to access to services, in so far as Cabrini Health has or will assert that access to other services within Cabrini Health is conditional upon practitioners utilising Cabrini Health pathology and/or radiology services. The stated aims and outcomes of purchasing policies should be clearly stated.

6.4 Misstated characteristics

TissuPath has also considered whether action by Cabrini Health may constitute misleading conduct as to the characteristic of goods and/or services provided by

Cabrini Health, in breach of section 33 and/or 34 of the Australian Consumer Law, in so far as Cabrini appears to be asserting that goods and/or services are of a particular character by reason of them being provided by “business units” of Cabrini Health, when in fact contractors are engaged to provide the goods and/or services.

6.5 Referral selling

TissuPath questions whether Cabrini Health has or may engage in referral selling, in breach of section 49 of the Australian Consumer Law, to the extent that it can be demonstrated that Cabrini Health will induce practitioners to use in house services, by representing that in return practitioners will receive the potential benefit of accessing other Cabrini Health services (which appears to be a stated aim of Cabrini Health).

6.6 Harassment and coercion

In addition to questioning whether unconscionable conduct exists, TissuPath questions whether there has or may be harassment and coercion, in breach of section 50 of the Australian Consumer Law, to the extent that it can be demonstrated that Cabrini Health has used undue harassment or coercion in connection with supply and/or access arrangements.

7 CONCLUSION

TissuPath submits that there is no evidence that authorising the exclusive dealing practices proposed by Cabrini Health would provide benefit to the public. TissuPath further submits that there will be *detrimental effects* on practitioners, patients, external third party pathologists and staff, and subsequently the wider community, which do not outweigh the contended and poorly quantified public benefits. Despite the contention by Cabrini Health that there are “public benefits” to accrue from implementation of the Notification, most if not all of the benefits would accrue to Cabrini Health and its selected contractors, which in at least some instances are for-profit entities. The attempt to alter and seemingly control supply arrangements and in turn markets, appear to be designed to and have the effect of substantially lessening competition, which will give rise to a situation where a small number of large pathology providers have substantial market control and power.

The proposed arrangements benefit Cabrini Health to the detriment of patients, specialist doctors and pathologists and the initiatives of government. If the Notification is granted, it has the potential of driving changes Australia-wide that would be to the detriment of these parties as well and broader health policy in Australia.

In accordance with the expectations of government, pathology markets should not only be free and open, but free of undue influence and “benefits”.

Although it is noted that the ACCC has sought public comment on the Notification, TissuPath understands that not all interested parties have been made aware of the Notification. In particular, it would appear to TissuPath that only a small number of the specialist clinicians at Cabrini Health who make purchasing decisions have been informed of the Notification despite the significant impact it may have on their practice choices. TissuPath encourages the ACCC to further engage with specialist clinicians, as necessary.

APPENDIX

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