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16th November 2011

Attn: Claire McGinness
Australian Competition &
Consumer Commission
GPO Box 3131
Canberra ACT 2601

Dear Ms McGinness,

RE: Exclusive Dealing Notification N95607 – Response from Interested Party

Please find attached our submission in relation to the above Exclusive Dealing Notification.

I understand that email submission is satisfactory, however I am able to supply the original hard copy, if required.

Yours sincerely,

Paul Schneider
Director

1.0 Background

Cabrini Health intend to restrict doctors and patients in their choice of pathology service provider unless the patient's Medical Practitioner forms the opinion in line with a set of scenarios defined by Cabrini Health, that it is in the best interests of the patient for them to be referred to an external pathology provider.

Perth Pathology is an independent pathology service provider operating in Western Australia and seeks to comment on the Exclusive Dealing Notification N95607. We contend that the Notification affects the rights and choices of Doctors and Patients for their pathology service and that it has significant potential implications for the practice of independent pathology throughout Australia.

2.0 Current situation

We understand that currently Medical Practitioners at Cabrini Health can freely and without prejudicing their access to hospital facilities and resources, refer both inpatient and outpatient pathology to any accredited pathology provider of their choosing. The choice for the pathology provider currently may be based on cost, turnaround time, quality of results, methods used, access to specialist/sub-specialist advice, the patient's own choice, or a combination of these factors. Medical Practitioners choosing to use an external pathology provider may currently do so without fear of restriction of access to Cabrini Health's "...resources such as operating theatres, cardiac catheter laboratory, consulting rooms and delivery suites" (Reference Page 4 Para 2).

3.0 Proposed situation

According to the Notification, the Medical Practitioner will be "encouraged" (Reference: Page 4 Para 2) to direct pathology referrals to Cabrini Health unless the Medical Practitioner forms an opinion that it is in the "best interests of the patient" for them to be referred to an external pathology provider. This opinion may be based on 4 scenarios defined by Cabrini Health. In the instance of a referral made to an external pathology provider, the Medical Practitioner "must be prepared to provide justification, when requested, to Cabrini Health...". Further, in the instance where a Medical Practitioner has referred to an external pathology provider, Cabrini Health "may choose to make decisions regarding [the Medical Practitioner's] access to its resources such as operating theatres, cardiac catheter laboratory, consulting rooms and delivery suites based in part by the said usage."

4.0 Response to Notification

4.1 Anticompetitive and Coercive

We contend that the Notification is designed to be anticompetitive and may result in detrimental health outcomes to the patient. In addition to the Notification being anticompetitive it may also be seen as coercive. The requirements on the Medical Practitioner to provide justification (Page 4 Para 1) to Cabrini Health regarding any external pathology referral at the risk of loss or reduction in access to hospital services may prejudice the Medical Practitioner's independent ability "...to form an opinion that it is in the best interest of the patient".

Cabrini Health make no submission or comment regarding why Medical Practitioners operating at Cabrini Health currently choose external pathology providers. It is highly likely that this currently occurs because the level of service, price or access to specialist/sub-specialists in pathology is better for the patient from an external pathology provider than that provided by Cabrini Health's pathology service. Instead of addressing these aspects, Cabrini Health seeks to significantly reduce competition between pathology service providers and hamper Medical Practitioners in referring to a third party pathology service. We contend that this is a coercive, anticompetitive practice.

Further, we contend that the Notification subverts the Pathology Funding Agreement signed in April 2011 between all major pathology stakeholders in Australia – the Federal Government, Australian Association of Pathology Practices (AAPP), Royal College of Pathologists of Australia (RCPA) and the National Coalition of Public Pathology (NCOPP). The agreement sets out that *"the Parties agree to work cooperatively to achieve the key objectives which include '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'"*.

4.2 Inducement for Pathology Services

We contend that Cabrini Health, by linking a Medical Practitioner's number of external pathology referrals directly to their individual ability to access Hospital services, and therefore their ability to undertake and obtain financial benefit from their individual medical practice business (Pg 4 Para 2), may be construed as a "Benefit", as described under the *Health Insurance Act (1973)* and its amendments (*Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Act 2007.*). We contend that this may constitute an inducement for pathology services by Cabrini Health to the Medical Practitioner.

4.3 Access to Specialist Pathologists

Cabrini Health claims that its proposed conduct will not in any way affect quality of patient care, because the "treating doctor can have regard to service (e.g. turnaround time) and quality (continuity and comprehensiveness) as some of the expressly identified factors relevant to the patient's best interests" (section 6b; Service and quality). This, however, is contradicted by Cabrini Health's formal description of its proposed conduct (section 2b), which disregards comprehensiveness of the service and which would permit referral to a third party provider in only four strictly defined instances -

- a) the requested service being unavailable at Cabrini Health;
- b) lower price;
- c) need to maintain continuity of care;
- d) faster turnaround time.

Thus, the reputation and specialist skills of the provider's employed pathologists are not considered by Cabrini Health to be relevant to the patient's best interests. We note that the ACCC has previously identified these factors to be important determinants of a treating doctor's choice of pathology

provider (Public Competition Assessment; Healthscope Limited - proposed acquisition of Symbion Health Limited's pathology, medical centre and imaging businesses; section 75). In the same document, the ACCC acknowledged that the factors determining choice of pathology provider vary amongst Practitioners - *"For example, a skin cancer specialist may view the reputation and skill sub-set of the pathologist as critical when making his/her referral"* (section 76). This has particular relevance to the current proposed conduct in view of the fact that most of the referring doctors in a private hospital are likely to be specialists.

Furthermore, it should also be noted that many pathology tests in a private hospital are performed on patients who stay in the hospital for a short time only and are not likely to be re-admitted (e.g. elective surgical procedures, short-stay admission for endoscopy). For these patients, the advantages claimed by Cabrini Health for onsite pathology testing are largely eliminated and the quality aspects discussed above become paramount.

4.4 Patient's Right of Choice

We contend that under the Notification, the Medical Practitioner may jeopardise their access to hospital services to the financial detriment of their own medical practice business by referring to an external pathology provider. As a consequence the patient's right to be fully informed with respect to their choice of pathology service may, at least in part, be compromised and further that this may be to the patient's detriment both in terms of quality of pathology results and cost of the pathology service(s).

We further contend that the Notification gives sole discretion to the Medical Practitioner for the decision of where to send a pathology referral, either inpatient or outpatient, and removes the patient from making their own informed choice. A patient's right to freedom of choice for pathology services is referenced in the legislation passed in December 2010 and will shortly result in all pathology request forms containing a mandatory statement to this effect.

4.5 Cherry-picking

We contend that the Cherry picking argument promoted by Cabrini Health in their Notification is unsupported and self-serving. The premise of cherry-picking assumes that the external pathology provider seeks only to receive referrals on the higher-margin tests. Cabrini Health does not address why pathology tests are referred externally in their Notification. Historically, cherry-picking has been a term that has been used most often in reference to histopathology samples. However, the reasons for considering external referral for histopathology, as highlighted previously, include referring to a specialist pathologist with expertise in the speciality or sub-speciality, quicker turnaround time and/or cheaper cost. In this light, we again reference the previous findings of the ACCC, as detailed in Section 4.3 above.

4.6 Stated Public benefits of the Notification (Page 5)

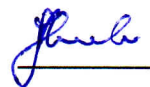
- (a) Cabrini Health asserts that the Notification will *maintain efficient funding and financial viability of Cabrini Health*. While this is clearly of financial benefit to Cabrini Health, we contend that it does not automatically lead to a public benefit and in fact may result in detriment to the patients specifically in terms of access to specialist pathologists, service and cost of testing by removing or at the very least restricting competition. The motive of Cabrini Health in their Notification is clearly designed to capture revenue, not through competition but by linking the Medical Practitioner's ability to carry out their medical business at Cabrini Health.
- (b) *Addressing inefficiencies from Cherry-picking*. We contend that external services are contemplated when internal inefficiencies have affected either the patient or the Medical Practitioner, or if advice from a specialist/sub-specialist pathologist is being sought.
- (c) *Transaction cost savings*. We contend that the Notification does not provide evidence to support this assertion.
- (d) *Enhanced quality of care*. We contend that the Notification provides no evidence to support this and that the purpose of the Notification is to capture revenue.

5.0 Concluding remarks


We contend that the Exclusive Dealing Notification N95607 should be disallowed on the basis that it is anticompetitive, coercive, potentially in breach of the Health Insurance Act 1973, and as a result will likely, in our view, lead to detrimental effects on both Medical Practitioners and their patients. The argument Cabrini Health has used to support their reasons for the Exclusive Dealing Notification is based on capturing increased revenue, not by competing, but by reducing competition.

For Perth Pathology, 16th November 2011:-

Paul Schneider, *Director*



Dr Wayne Smit, *Managing Partner/Pathologist*



Dr Tony Barham, *Histopathologist/Cytopathologist*



Dr Michael Armstrong, *Histopathologist/Cytopathologist*