



UROPATH

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18 November 2011

Ms Marie Dalins
Director
Adjudication Branch
Australian Competition and Consumer Council
Level 35 The Tower
360 Elizabeth Street
MELBOURNE VIC 3000

Dear Ms Dalins

Submission Regarding Exclusive Dealing Notification N 95607, Cabrini Health Limited

We refer to your letter of 28 October 2011, which was provided to us by one of the parties on the list accompanying your letter.

We are enclosing a submission in respect of the Notification and look forward to participating in any public consultation about it.

Yours sincerely

Phillip Golding
Director
Uropath

EXCLUSIVE DEALING NOTIFICATION OF CABRINI HEALTH LIMITED
REFERENCE: N95607

SUBMISSION BY UROPATH PTY LTD
ABN 44 080 844 006

Uropath Pty Ltd ('Uropath') makes the following submission in response to the Exclusive Dealing Notification by Cabrini Health Limited ('Cabrini') on 18 October 2011.

1. Summary

- 1.1 The conduct proposed by Cabrini is clearly anti-competitive as it seeks to limit the choice of doctors and patients regarding the provision of a key diagnostic tool, pathology.
- 1.2 The submission by Cabrini focuses primarily on unquantified financial outcomes and fails to demonstrate any significant public benefit. The key consideration in requesting diagnostic services is patient interest and that is not considered in any depth in the Notification.
- 1.3 The proposed conduct coerces doctors into using the Cabrini provided pathology service by threatening to withdraw hospital resources from those who do not comply. This coercion removes the essential independence of doctors and patients.
- 1.4 The proposal would obstruct doctors and patients who wish to exercise independent choice by imposing a series of subjective tests on their ability to do so.
- 1.5 The proposal is misleading in that it does not describe any relationship between Cabrini and third party providers of pathology services to it. The submission by Cabrini is entirely self serving.

2. About Uropath

- 2.1 Uropath is a Perth based provider of specialist histopathology services, predominantly in the field of urology. Although not directly affected by the Cabrini proposal, Uropath does provide pathology services to doctors and patients being treated at private hospitals in Perth in a similar situation to the subject of the Cabrini proposal.
- 2.2 Uropath employs 3 pathologists (one of whom is presently on a fellowship in the US) and 12 staff. Its Director of Pathology, Professor Ronald Cohen, is an internationally recognised expert in urological pathology and is widely awarded and published. The accompanying curriculum vitae of Professor Cohen demonstrates his experience and credentials in this field.
- 2.3 It will be noted from the curriculum vitae of Professor Cohen that he is accredited at a range of private hospitals in Western Australia. In all cases Uropath provides a highly regarded pathology service to doctors and patients of those hospitals.

3. Preliminary Comments

- 3.1 The submission by Cabrini (at page 9) notes that there has been substantial concentration in the market for provision of pathology services in Australia. This concentration, which has largely come about by mergers and acquisitions, has of itself had the result of lessening competition. Uropath, which has been in existence since 1998, provides a specialised service at a level that is not available from the major pathology operators, as evidenced by support from doctors and patients.
- 3.2 Most private hospitals outsource at least some of their pathology services as it is typically not viable for them to provide the service themselves. Given that fact, the issue of choice of pathology services for Cabrini and others becomes solely a commercial issue with no bearing on public benefit.
- 3.3 The sole consideration in choice of a pathology service should be patient care and doctors are best equipped to make that decision.
- 3.4 We note that the Royal College of Pathologists of Australia ('RCPA') is opposed to vertical integration in medical practice. In its policy number 1/2001, RCPA states that it is "adamant that the clinical independence of medical practitioners must be maintained when requesting other clinical services, such as pathology, for their patients" and further, RCPA is "totally opposed to any situation whereby instructions by any related parties direct a practitioner to refer to specific pathology providers". Pathologists employed by Cabrini and/or its service providers are members of RCPA and bound to comply with its policies.

4. Specific Claims by Cabrini

- 4.1 At page 4, Cabrini submits that the object of its proposed conduct is to require doctors to have regard to the best interests of the patient in selecting the pathologist. No justification is provided for the implicit assumption that use of a tied pathology service provided by Cabrini will be in the best interest of patients.
- 4.2 The "Medicate rate pressures" referred to in page 6 of the proposal are felt by all participants in the pathology sector. Although Cabrini is a not for profit organisation (contrasted with its third party pathology provider), the scale of its hospital and health care activities compel it to function in the same manner as, and compete with, for profit providers of services. Financial imperatives are therefore not relevant to any decision regarding anti-competitive conduct.
- 4.3 The proposal (pages 6 and 7) refers to so called cherry picking of pathology services. The reason cherry picking occurs is that pathology operators (notably the large operators) are unable to provide an adequate service in certain fields, particularly where specialist pathologist skill is required as compared to high volume automated testing. It is open to any pathology operator to enhance its service in a particular field and therefore cherry picking has no relevance.

- 4.4 Cabrini asserts that challenges to its financial viability may ultimately be borne by the public (page 7.) As noted above, Cabrini is in no different position to any other provider of health care services with regard to the need to remain viable. It cannot expect to rely on non-competitive conduct to sustain its viability.
- 4.5 The Notification (pages 7 and 8) attempts to show that avoiding multiple service providers is a public benefit. Uropath, together with other pathology providers, has shown itself to be capable of working within hospital procedures which tend to function independently of any particular service provider. Cabrini provides no evidence to support its claims about the potential adverse consequences of multiple service providers.
- 4.6 Cabrini asserts (page 8) that use of its service enhances quality of care by limiting the time taken to perform and report pathology. Again, it provides no evidence to support this assertion; experience at Uropath is that it can provide a better service (including faster turn around) than all the major pathology providers. Indeed, this is one of the major reasons why clinicians use Uropath.
- 4.7 The Notification refers in several places to the fact that Cabrini is a not for profit organisation which provides funding for community benefit. As described in the CV of Professor Cohen, Uropath invests considerable amounts in medical research and Professor Cohen is widely published. Activities undertaken by Cabrini (for which no financial information is provided) are arguably no more than might be expected of a significant hospital operator.

5. Conclusions

- 5.1 The Notification fails to show any demonstrable public benefit from the proposed anti competitive conduct and should therefore be rejected.
- 5.2 The predominant basis for selecting a pathology service must be patient interest and clinicians must be able to exercise independence in doing so, and in fact have an obligation to do so.