

Mr Richard Chadwick
General Manager
Adjudication Branch
GPO 3131
CANBERRA ACT 2601

Dear Mr Chadwick

Re: ADIA submission on Exclusive Dealing Notification N95607 lodged by Cabrini Health Limited - interested party consultation

This submission is in response to the exclusive dealing notification lodged by Cabrini Health on 19 October 2011 in relation to its pathology and diagnostic imaging services.

Substantial lessening of competition

- ❖ ADIA submits that Cabrini Health's full line forcing of diagnostic imaging services at Malvern and Brighton Private Hospitals will substantially lessen competition within the market.
- ❖ At present medical practitioners operating out of these Cabrini hospitals can refer patients to the diagnostic imaging services which best suit their patients' needs, taking into account the quality of both the diagnostic imaging experience and their assessment of the quality of clinical input by diagnostic imaging medical professionals.
- ❖ While the terms of the notified arrangements do allow medical practitioners to refer to third party diagnostic imaging providers in particular circumstances, these circumstances are highly constrained (see attachment A) and the penalty for failing to refer a sufficient (undefined) number of services to Cabrini Medical Imaging is significant and unfair to patients – i.e., constraints on access for that medical practitioner's patients to other services provided by the hospital.
- ❖ We note that under the ACCC's Exclusive Dealing Guidelines:

“As a general guide, the more exclusive the product and the more powerful the supplier, the more likely it is that competition will be affected.”
<http://www.accc.gov.au/content/index.phtml/itemId/816377>

 - There can be little doubt that hospitals are able to exert extensive influence with respect to their patients and the medical practitioners who work within them compared, for example, to other models of medical practice. With

respect to admitted patients they have, in effect, a captive market for their services.

- ❖ The consequences of this lessening of competition will include:
 - A deterioration in consumer choice, both for referrers and for patients.
 - A reduction in the incentive for Cabrini Medical Imaging to invest in quality services with the removal of competition from third party quality practices.

Public benefit test

- ❖ ADIA can identify no public benefit from the exclusive dealing arrangements proposed. (We note that nearly all the public benefits listed by Cabrini Health are, in fact, benefits to Cabrini Health).
- ❖ These arrangements:
 - Undermine the right and responsibility of medical practitioners to send their patients to diagnostic imaging practices which they believe offer the level of quality required to best serve their patients' needs.
 - They may well place unacceptable pressure for high patient turnover on the Cabrini Medical Imaging practices, resulting in delays and the inevitable mistakes that occur in diagnosis under these conditions.
 - They do not take into account patient choice (see patient choice provisions in government regulations relating to diagnostic imaging referrals below).
 - They are unlikely to reduce the cost of services to patients (bearing in mind that only 44% of private hospital diagnostic imaging services are bulk billed compared to 75% of private practice services). We note that, unlike many private hospitals, Cabrini Health's website has no information with respect to its billing policies.

Other considerations

Conflict with the Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Act 2007.

- ❖ Object b) under Part IIBA of the Act is: *"to protect requesters of pathology services and diagnostic imaging services from (either directly or indirectly) being threatened in order to induce the requesters to request the services from providers of those services"*.

- ❖ Notification Arrangement 2B (Description of the conduct or proposed conduct) in Form G of Cabrini Health's Notification of Exclusive Dealing includes the following provision.

"If the medical practitioner chooses to use a third party pathology provider or medical imaging provider, he or she must be prepared to provide justification, when requested, to Cabrini Health and demonstrate that the decision was consistent with the above requirements. While the proposed conduct encompasses an ability to impose a requirement on practitioners to use Cabrini Pathology and Cabrini Medical Imaging for out-patients, Cabrini Health's immediate plan is just to encourage its accredited medical staff to utilise Cabrini Pathology and Cabrini Medical Imaging for out-patient services and may choose to make decisions regarding access to its resources such as operating theatres, cardiac catheter laboratory, consulting rooms and delivery suites based in part on the said usage" (emphasis added).

- ❖ It is ADIA's view that auditing a medical practitioner's referrals for outpatient diagnostic services and subjecting them to detailed interrogation in relation to individual referrals and general referral patterns on penalty of denying that practitioner's patients access to other services provided by the hospitals constitutes both a direct and an indirect threat to induce requesters to use the services of Cabrini Medical Imaging.

Overriding of patient choice provisions in government regulations relating to diagnostic imaging referrals

- ❖ In the 2009/10 Federal Budget the Government introduced a measure to promote competition and improve patient choice by:
 - removing the legislative restrictions on a patient taking a pathology request form to a different provider; and
 - introducing a mandatory statement on both pathology and diagnostic imaging request forms, advising patients of their right to take a request to any provider.
- ❖ The mandatory statement on diagnostic imaging request reforms will come into effect on 1 July 2012 (the requirement for pathology came into effect on 1 July 2010).
- ❖ The proposed Cabrini Health arrangements for referral to Cabrini Medical Imaging undermine both the spirit and intent of patient choice enshrined in these regulations.

In view of the considerations of a substantial reduction of competition and consumer choice, restrictions on the capacity of medical practitioners to independently exercise their best judgment in relation to their patients, and the conflict of these notification arrangements with other legislation pertaining to the provision of diagnostic imaging,

ADIA strongly urges the Mergers & Adjudication Group of the ACCC to issue a draft notice to revoke the notification.

If you wish to discuss this submission further, please contact me on (03) 98675070 or by email pbeerens@bconsulting.net.au.

With kind regards



Pattie Beerens
Chief Executive Officer
Australian Diagnostic Imaging Association (ADIA)

ADIA represents private diagnostic imaging practices in Australia. They diagnose and treat 50,000 patients every day and operate 80% of the comprehensive practices providing services to patients in rural and regional Australia. ADIA members are both for-profit and charitable and operate practices in the community and in public and private hospitals in Australia

**Attachment – Extract from Cabrini Health's Exclusive Dealing Notification
(Form G) – 18 October 2011**

Notified arrangement

(a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

The notified arrangement relates to the provision of pathology services and medical imaging services to private in-patients and out-patients of Cabrini Health's hospitals in Malvern and Brighton (together, Cabrini Hospitals).

(b) Description of the conduct or proposed conduct:

Cabrini Health proposes to require that any pathology services and medical imaging services for in-patients and out-patients of Cabrini Hospitals be supplied by Cabrini Pathology and Cabrini Medical Imaging, business units of Cabrini Health, and not third party pathology or medical imaging providers (the proposed conduct). These requirements would pertain, unless the patient's medical practitioner forms the opinion that it is in the best interests of the patient for them to be referred to a third party provider because:

- the specific pathology service / medical imaging service is unavailable at Cabrini Pathology or Cabrini Medical Imaging;
- lower price is charged by a third party provider;
- there is a need to maintain the continuity of the patient's non-Cabrini Hospital pathology testing / medical imaging history because of the patient's particular condition; and
- third party provider is able to provide a faster turnaround time for the service than Cabrini Pathology or Cabrini Medical Imaging.

Where a referring medical practitioner seeks to have an in-patient or outpatient of a Cabrini Hospital referred to a third party provider they can do so providing that:

- the referral of the test or imaging to a third party provider is in the best interests of the patient for one or more of the above reasons;
- the referring doctor has satisfied himself or herself regarding the capacity of the third party provider to provide safe, timely, high quality pathology services or medical imaging services; and
- the medical practitioner has taken steps to ensure that the results of the investigations and images where applicable will be available within the patient's Cabrini Medical Record or electronically to ensure that other Cabrini medical practitioners can access such information as required in the best interests of the patient.

If the medical practitioner chooses to use a third party pathology provider or medical imaging provider, he or she must be prepared to provide

justification, when requested, to Cabrini Health and demonstrate that the decision was consistent with the above requirements.

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