

RESTRICTION OF PUBLICATION OF PART CLAIMED

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23 November 2011

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

By email: marie.dalins@accc.gov.au

Dear Ms Dalins,

Exclusive dealing notification N95607 – Cabrini Health Limited

I refer to your letter of 28 October 2011 (your reference N95607) addressed to our former General Counsel (Ms Justine Halloran) and inviting comment on behalf of Medibank Private Limited (**Medibank**) and Australian Health Management Group Pty Limited (**AHM**) in respect of the exclusive dealing notification that you have received from Cabrini Health Limited (**Cabrini**).

2. We thank you for the invitation to comment and provide the information and observations below in response.

Cabrini's operations

3. Cabrini operates four private hospitals in south east Melbourne and supplies diagnostic services in respect of both in-patients and out-patients through its business units 'Cabrini Pathology' and 'Cabrini Medical Imaging'.

4. Two of these hospitals (located at Malvern and Brighton) provide acute care, including ICU, surgical services and emergency care services, all of which typically require pathology and radiology support.

5. Cabrini's other two hospital campuses provide sub-acute care, whose patients are typically low (or at least lower) users of diagnostic support services.

Medibank and AHM data

6. There were approximately **DELETED** admissions to Cabrini's hospitals last year involving persons insured under private health insurance policies issued by Medibank or by AHM. Of these, some **DELETED** involved the Malvern and Brighton campuses.

7. All four hospital facilities operated by Cabrini are the subject of a hospital purchaser-provider agreement (HPPA) with Medibank and AHM. Under this HPPA, Medibank and AHM would typically expend **DELETED** annually in the payment of benefits in respect of their policyholders and in relation to charges raised by Cabrini for their hospital treatment. (This covers charges in respect of nursing and accommodation care as well as the cost of surgically-implanted prostheses and theatre fees.)

8. Medibank and AHM also have medical purchaser-provider agreements (MPPAs) in place with Cabrini Pathology and Cabrini Medical Imaging. Under the former, **DELETED** was paid by Medibank and AHM in FY 2011 in respect of approximately **DELETED** pathology services rendered to Medibank and AHM members. In respect of the latter, the amount is **DELETED** for approximately **DELETED** services in the same period. These MPPAs cover diagnostic services provided in respect of Medibank and AHM policyholders while admitted patients (i.e., 'inpatients') at any of the four Cabrini campuses. They also cover services performed by Cabrini Pathology and Cabrini Medical Imaging for Medibank and AHM policyholders who are admitted patients at other hospital facilities if the required diagnostic services have been referred to Cabrini Pathology and Cabrini Medical Imaging to be performed. They do not cover services in respect of persons who are not admitted hospital patients.

9. A review of the hospital casemix protocol data that we hold shows that **DELETED** of all pathology services performed in respect of Medibank's policyholders who are inpatients in Cabrini's 4 hospitals are performed and billed by Cabrini Pathology. Similarly, Cabrini Medical Imaging performed **DELETED** of all radiology services provided to Medibank policyholders who were admitted patients in Cabrini hospitals in FY 2011.

Comments

10. Medibank interprets these high percentages to referring physicians being well-informed regarding the availability of Cabrini Pathology and Cabrini Medical Imaging to undertake the required diagnostic services and to the performance of those providers in relation to the accuracy, speed and quality of such services.

11. The confirmation of an exclusive dealing arrangement as proposed would formalise these already high ordering practices through those providers. There is a potential detrimental impact in the possibility of the closed market environment giving rise to a level of complacency and a reduction in the efficiency and rigour associated with the provision of these specialist diagnostic services.

12. The creation of an exclusive arrangement as proposed may encourage Cabrini to approach private health insurers with a view to compelling agreement by those insurers to higher rates in MPPAs than currently apply and that they might otherwise be able to negotiate if there remained an 'open market'. If an insurer rejects such proposals and the result is that there is no MPPA in place between itself and Cabrini Pathology and/or Cabrini Medical Imaging, then there will very likely be an adverse experience for those insured persons. MPPAs commonly have the effects that:

- (a) the provider agrees not to charge for a particular service above the amount agreed with the insurer;
- (b) the insurer agrees to pay the whole of that charge, leaving no out-of-pocket cost for the insured/patient; and

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- (c) the provider bills the insurer directly, relieving the patient/insured of any responsibility for managing payment of invoices and then claiming from Medicare and from his or her insurer.

In the absence of an applicable MPPA, there is little restriction on a provider from charging any amount it wishes to a patient, and in such situations, insurers typically revert to paying 'fund gap' benefits, which is to say (at least in relation to persons who are eligible for full Medicare benefits) that the insurer will make a contribution of 25% of the Medicare Benefit Schedule (MBS) Fee for the service, and Medicare is expected to make a benefit payment of 75% of that MBS Fee. Charges above the level of that Fee are the responsibility of the patient to meet. While such a patient ought in fairness and in line with consumer protection principles to be made sufficiently aware of the expected out-of-pocket costs that he or she will then incur, and thus give properly informed financial consent, this may not always occur. And if the need for the diagnostic services does not become apparent until after the patient has consented to admission at a Cabrini hospital, the exclusive dealing arrangement then seems significantly to affect his or her capacity to seek to have those diagnostic services performed by a different provider such as one with which his or her own insurer does have an MPPA in place and in respect of which the patient can expect not to have any out-of-pocket expense at all.

13. Insurers typically wish to have MPPAs in place so as to minimise the prospect of their policyholders incurring out-of-pocket costs for in-patient diagnostic services, and also in order to relieve those persons of the administrative burden of managing invoices for those services. It may therefore be that an insurer feels itself compelled to agree to an MPPA at higher rates than a freer market would dictate, and that would invariably lead to health insurance premium increases.

14. In a similar way to how the exclusive dealing arrangement may enable Cabrini to negotiate a better deal on MPPAs, it may also seek to exploit the situation for the purposes of obtaining a better deal on HPPAs by bundling the negotiations. As the expenditure figures given previously for Medibank and AHM HPPAs with Cabrini would indicate, the potential adverse effect for insureds and insurers could be very significant – either through the loss of HPPAs (with administrative and financial burdens ensuing for patients) or through increased benefit outlays for insurers that must subsequently have an effect on health insurance premiums.

15. Medibank and AHM are keenly interested in any proposed mechanisms for restraining Cabrini from insisting on above market or otherwise unreasonable MPPA rates and terms and how a collective renewal of HPPAs and MPPAs would not adversely affect insured persons.

16. Medibank would encourage the ACCC to consult on this proposal with the Australian Medical Association, particularly with respect to that organisation's views regarding the appropriate autonomy of its members with respect to clinical practice. The proposed conduct that is being notified appears to be expressed in such a way that the choices of both admitted patients and also private medical practitioners who practice at Cabrini's hospitals will be heavily circumscribed. To the extent that there are exceptions mentioned in the description of the notified conduct, we hope that the ACCC will be considering whether those exceptions are considered suitably broad by those medical practitioners (or by the body or bodies that represent them as professional persons), and also what steps will be taken by Cabrini to ensure that both patients and practitioners are properly informed as to the existence of those exceptions and of their proper extent.

17. Finally, with respect to those exceptions that are described in section 2(b) of the notification document, we query the appropriateness of the use of "and" as the connector between them. It implies that they are cumulative and not alternative; whereas towards the end of page 3 of the Form G notification document, the actual text uses language that implies

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that they should be considered to be alternatives, any one of which is sufficient to justify the referral to a different provider. (See the 5th dot point appearing on page 3 of the notification document where there is a reference to an alternative referral being "...in the best interests of the patient for one or more of the above reasons" [emphasis added].) If patients and or practitioners are to be informed of their rights to have services performed elsewhere, then we would like to be confident that that is being communicated to them in a way that is entirely clear and devoid of inherent contradiction such as currently manifests given the use of "and" as the connector between the elements of each of the two sets of dot points in section 2(b) of the document yet with the reference to "one or more" appearing in the dot point from which the quotation given above is taken.

18. If you have any questions in relation to aspects of this submission, please contact me in the first instance, and I shall be able to refer those questions to my colleagues in our hospital and medical purchasing area for their attention and a further response to you.

19. Finally, I extend our thanks to your colleague Ms Clare McGinness for her assistance with respect to an extension of time for this submission.

Yours faithfully,



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cc: Ms Clare McGinness, ACCC
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