

Interested Party Submission concerning Notified Conduct: Exclusive Dealing Notification N95607

1. We refer to your letter of 28 October 2011 to interested parties concerning Exclusive Dealing Notification N95607 (**Notification**) lodged by Cabrini Health Limited (**Cabrini**).
2. The Notification should be rejected by the Australian Competition and Consumer Commission (**ACCC**) on the basis that the proposed exclusive dealing conduct will result in a public detriment that will outweigh the potential public benefit of the proposed conduct.
3. The Notification seems to seek to align the position of Cabrini with the position of public hospitals and in that way to seek to rely on the decisions of the Australian Competition Tribunal in *Re Australian Association of Pathology Practices Incorporated* [2004] ACompT4 and the ACCC's decision in respect of notifications lodged by public health organisations in New South Wales dated 27 May 2010. These decisions considered notifications lodged by the NSW Department of Health which required that pathology services for private in-patients in NSW *public* hospitals be supplied by pathology practitioners appointed by Public Health Organisations, unless it was not in the best interests of the patient.
4. In both decisions, the Tribunal and the ACCC recognised the conduct as giving rise to a net public benefit, in that it promoted the efficient provision of pathology services in NSW public hospitals, and would result in efficiency gains and funding for education and research (most common in large public teaching hospitals, the product on which the private sector could ultimately "free ride"). Both the Tribunal and ACCC placed significant weight on the benefit of funding to "a service which has been identified through the political process as being a public good and worthy of funding".¹ The Tribunal viewed public pathology services as "public goods", as the knowledge that such a service exists to provide services when required provides the community with a "safety net" and sense of security².
5. It follows that aligning Cabrini's position, as a private sector party, with the position of public hospitals is inappropriate, as the balance of public benefits and detriments is evidently quite different where the relevant providers (both of the hospital services and the pathology services) are private sector parties.
6. A key factor where the provider is a public provider is maintaining the efficient funding of public pathology services. As noted by the Tribunal³, this issue is quite different in the context of a private provider, and the fact that Cabrini is operated on a not for profit basis does not change this position.
7. The Notification makes clear that, in substance, the reason for the Notification is to improve Cabrini's financial position. In essence, Cabrini is acknowledging that it is not currently operating as efficiently as other private providers. Mandating the use of a particular pathology provider to overcome inefficiencies is inconsistent with the public interest.
8. The following specific concerns arise in allowing the Notification to stand:
 - (a) the notified conduct restricts the choice of service provider for consumers and practitioners, which is not in the overall best interests of the patient;

¹ *Re Australian Association of Pathology Practices Incorporated* [2004] ACompT4 at para 202; and ACCC's decision in respect of notifications lodged by public health organisations in New South Wales dated 27 May 2010, at para 4.16

² *Re Australian Association of Pathology Practices Incorporated* [2004] ACompT4 at para 35.

³ Paras 184-202 for public funding

- (b) the conduct places obligations on practitioners which go beyond their role as a medical health service provider to consumers and requires them, if they are to seek to use a different pathology service provider, not just to "turn his or her mind" to whether one of the conditions which might warrant not using the specified third party provider apply, but to have evidence to support that decision;
 - (c) the claim that the conduct will reduce transaction costs is not supported by any evidence and given the onerous nature of the requirements imposed on the medical practitioners is likely to increase rather than reduce transaction costs;
 - (d) the Notification claims that the notified conduct is in the best interests of patients, but this claim is in direct conflict with the proposed objectives of the conduct, which are stated to be to:
 - (i) limit the potential competition to Cabrini which is provided by third party service providers who may provide more limited services than Cabrini; and
 - (ii) improve the financial health of Cabrini.
9. Each of these matters is considered in more detail below.
10. In addition, the conduct provides an advantage to hospitals which are vertically integrated and also provide pathology services.

Restriction of choice for consumers and practitioners

11. The proposed conduct purports to ensure that patients are not referred to third party service providers "for any reason other than considerations of the patient's best interests"(at 2(b), 4(a) and 6(a)).
12. However, the notified conduct:
- (a) appears to restrict the ability of the consumer to choose a pathology and/or medical imaging service;
 - (b) does not take into account the patient's best interests (a matter for the patient and the practitioner); and
 - (c) incidentally encroaches on medical practitioners' ability to form routine professional opinions in relation to choice of medical service.
13. This is because the Notification specifies that the patient must be referred to the Cabrini Services "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...**" of:
- the unavailability of service;
 - a lower price offering by a third party;
 - the need to maintain continuity of treatment because of a particular condition; **and**
 - faster turnaround time offered by an alternative service provider (together **the exceptions**).
14. This formulation confines the consideration of "best interests" of the patient by the practitioner to four specific factors only.

15. While at 6(b) the Notification states that there is "no restriction of choice where the patient's best interests are concerned", in considering whether it is in the best interests of their patient to be referred to a third party, a medical practitioner may only consider these four exceptions, despite any professional opinion they may hold. Accordingly:
 - (a) the patient's choice of service provider cannot be considered by the medical practitioner - for example, a practitioner would be unable to refer a patient to a third party service provider merely because it was convenient to the patient, or if the patient had a preferred service provider; and
 - (b) a practitioner may not refer a patient to a service provider they know will be able to offer a particular service, quality of service, or expertise unless one (or all) of the exceptions apply (see more on this point below).
16. The limitation on the consideration of a patient's best interests to these four factors only, cannot be in the best interests of patients who otherwise receive medical services from Cabrini.
17. Whilst the first and third exceptions are matters which a medical practitioner will readily know, requiring the referring practitioner to have an evidentiary basis for the second and fourth exceptions imposes an ongoing administrative burden on the referring practitioner (see further below). This issue was identified by the ACCC in its consideration of the Public Health Organisations: see para 4.32. At that point, the ACCC did not have enough data to reach a concluded view.
18. Like other professions, a medical practitioner's practice is often built on the establishment of a close rapport with other practitioners, giving rise to an understanding of their style and methods of practice. It is through such relationships that a practitioner will inevitably develop a sense of the competence and abilities of other practitioners or medical service providers, as well as a confidence in referring patients to them. Referral by practitioners to "preferred" service providers is therefore often a consequence of these relationships. It follows that not only does the proposed conduct dramatically confine the factors of which a practitioner may consider to be in a patient's best interests, but it intrudes on the practitioner's discretion to use and apply their own knowledge and understanding as to the competence and appropriateness of other practitioners, in this case pathologists and imaging service providers.
19. It is therefore submitted that placing these kinds of restraints on practitioners at the outset, before they have even undergone a consultation with their patient, is neither in a patient's best interest, or of benefit to the public.

Obligations imposed on practitioners

20. Part 2(b) of the Notification places certain obligations on a medical practitioner who refers a patient to a third party, stating that such a referral may be made provided that:
 - (a) the referral is in the best interests of the patient "for one or more of the above reasons" (i.e. the exceptions);
 - (b) the practitioner is satisfied regarding the capacity of the third party provider to provide safe, timely and high quality services; *and*
 - (c) the practitioner has taken steps to ensure the results are accessible to other Cabrini medical practitioners.
21. A medical practitioner who provides a referral to a third party service provider must also "be prepared to provide justification, when requested, to Cabrini Health and demonstrate that the decision was consistent with the above requirements" (see 2(b)).
22. As is the reality of the medical profession, quite often medical services are required urgently. While the theory behind the proposed conduct may be plausible, in reality, that any

practitioner would have the time, patience or interest in, for example, retrieving a quote from a third party provider, or enquiring as to a service provider's turnaround (presumably subject to frequent change), is illusory.

Increased transaction costs

23. An obvious offshoot of the onerous obligations placed on practitioners is the inevitable increase that will occur in transaction costs.
24. A medical practitioner cannot be expected to intrinsically know whether, for example, a third party provider charges a lower price or provides a faster turnaround time. The proposed conduct therefore puts the practitioner in a position whereby they are required to seek this information out for themselves, an inevitably slower and more complex task which will, in every case, add to transaction costs.
25. In reality, that a practitioner would actually have the time to dedicate to undertaking additional tasks such as these is most unlikely. Coupled with the potential obligation for practitioners to justify a third party referral, and the costs associated with doing this, it is an overstatement to say that the proposal permits referral where it is in the best interests of the patient.
26. Further, the obligation to justify the referral, or the potential threat of being required to provide justification, may provide practitioners with a disincentive to refer patients to a third party, which could have the result that the patient's best interests, so far as pathology and imaging services are concerned, are overlooked by practitioners at a more general level.

Price

27. Part 6(b) acknowledges that the treating doctor may have regard to the price charged by a third party provider as one of the expressly identified factors relevant to the patient's best interests. It is further submitted that, on this basis, third party providers are therefore able to compete freely on price in relation to services for in-patients and out-patients of Cabrini and that the proposed conduct would therefore not result in a lessening of competition.
28. This conclusion is practically flawed, given the obligations on practitioners to seek out competitor pricing in order to justify a decision to refer a patient based on the price of a third party provider. As a result, third party providers will be unable to compete in *any* instance whereby a practitioner elects not to undertake the burdensome task of investigating prices on the market.

Public benefit claims

29. Part 4(a) states that the object of the proposed conduct is to require and encourage medical practitioners to have regard to the best interests of the patient.
30. However, in developing arguments in support of the notification, the purported public benefits that would arise from the notified conduct are (at 4(b)):
 - (a) removal of the "threat to the continued financial health of the Cabrini Pathology and Cabrini Medical Imaging"; by
 - (b) eliminating the potential for third party providers to "cherry pick" as to the services they will provide, which has a financial impact on Cabrini's provision of services, such impact ultimately being borne by the public, should it result in Cabrini's inability to continue to provide comprehensive onsite services.
31. These reasons appear to be aimed at ensuring that Cabrini receives a financial benefit through the removal of its competitors for the supply of these services.

32. Furthermore, quality of service is a major competitive factor for medical service providers in Australia. With the existence of insurance, both private and through Medicare, patients are less sensitive to the price of medical services, hence such services are left to compete largely on service standards, as opposed to price. Therefore, in order to compete, service providers in this field must offer comprehensive services to treating practitioners.
33. If Cabrini's objective is to expose its in-house pathology and medical imaging services to the high standards applicable in the market place, insulating itself from competitive third party service providers will effectively eliminate, or at least inhibit, its ability to improve its services by driving off the competitive market standards. It is therefore submitted that Cabrini's proposed conduct effectively treats third party service providers as commodities, capable of garnering revenue streams, and is further evidence that its objectives are financially fuelled, and not, therefore, of public benefit.
34. It follows that the elimination of competition for the supply of these services cannot be in the overall public interest as:
 - (a) competition among service providers ensures that the consumers of services, including the consumers who access the services through Cabrini, are able to access the relevant services at the most competitive prices; and
 - (b) the removal of competitors to Cabrini may mean there is a lack of third party service providers available to provide services to people who otherwise are not using, and do not intend to use, Cabrini's services at any time.
35. The proposed conduct is aimed merely at assisting Cabrini to compete in circumstances of market-wide pressures. The interest is solely that of Cabrini's. The elimination of competition for the supply of these services cannot, therefore, on this basis be justified as being in the public interest.

Ambiguity in drafting of the notified conduct

36. The drafting of the Notification and in particular, the exceptions, is ambiguous and contradictory and therefore may lead to a more restrictive interpretation of the patient's best interests than intended.
37. For example, the inclusion of "and" - not "or" - in the exceptions can be interpreted as requiring that the medical practitioner be satisfied that *all* categories of exception are satisfied before a patient may be referred to a third party provider. This is inconsistent with the statement that there is "no restriction of choice where the patient's best interests are concerned" (at 6(b)), and also with the requirements placed on referring medical practitioners, whose referral to a third party may be in the best interests of the patient for "one or more of the reasons above" i.e. the exceptions. Accordingly, each practitioner may apply the exceptions in a different manner (either by reference to one or all of the exceptions) resulting in inconsistencies in conduct. Should the interpretation which is in fact being proposed by Cabrini be that all of the exceptions must apply before a referral to a third party service provider may be made, it seems unlikely that any third party referrals would be made.
38. Further, Part 3(a) of the Notification states that Cabrini Health "would not, at any time, require a patient to travel beyond a reasonable distance to utilise its facilities for out-patient investigations". This particular factor is not expressly provided for by the exceptions, which means that it may not be taken into consideration by a practitioner at the point of referral.
39. Lastly, Part 6(b) of the Notification states that a treating doctor may have regard to the "quality (continuity and comprehensiveness) as some of the expressly identified factors relevant to a patient's interests", however factors which might go to "quality" of service are not expressly considered in the exceptions, other than in the context of continuity of a patient's care. Overall

quality of the service provided is therefore not a factor which may be taken into consideration by the practitioner at the point of referral (see comments above).

40. We hope that this submission assists you in your consideration of the notified conduct.