

Marie Dalins

Director Adjudication Branch

ACCC

Your Reference: N95607

Exclusive Dealing Notification Lodged by Cabrini Health Limited

Please find below my submission against the exclusive dealing notification lodged by Cabrini Health as pertains to forcing inpatients and outpatients of Cabrini Hospitals to be only serviced by Cabrini Pathology.

Public Detriment associated with Exclusive Dealing at Cabrini Pathology

1. Cost or potential cost to Patient is Higher

The absence of competition would enable Cabrini Pathology to levy “above normal” pathology charges on “captured” patients.

In my considerable experience, where competition to service a private hospital is rigorous, pathology providers have full no-gap agreements with nearly all insurers (whereby the pathology provider and the insurer agree to a rebate level that ensures the patient makes no gap payments whilst in hospital).

The only leverage that creates an incentive for a pathology provider to enter into and maintain such no gap insurance undertakings with the insurers (whereby the pathology provider undertakes to charge the patient a lesser amount in return for the insurer itself making up the gap difference between the medicare rebate and pathology charge), is competition. If pathologist A does not provide and pathologist B does provide a no-gap agreement with an insurer, then pathologist B will get the referral if all other things are equal.

This option of utilizing a pathology provider who has no-gap arrangements in place, is not readily available to a treating specialist and patient when an exclusive dealing arrangement is in place.

Furthermore, even though there may currently be no-gap agreements in place now between Cabrini Pathology and some of the health insurers, there is no guarantee that these no-gap agreements will continue to be in place going forward (especially since Cabrini has no real need to have such no-gap agreements for its patients - because patient choice and options have in reality been removed).

No-gap agreements between pathology providers and insurers typically are limited to 24 month terms.

I am aware that Cabrini Pathology has historically charged a standard gap of between \$90 and \$400 for histopathology even if the patient has top level private insurance.

In contrast, elsewhere in other private hospitals eg Ramsay Health Care where there is clear and open competition, patients in the vast majority of cases have the option of using a pathology provider who has no gap charges with private insurers. Indeed in my experience nearly all histopathology performed by most major pathology providers is provided on a no-gap basis in all major private hospitals throughout Australia.

2. New Testing Innovations not adopted as readily

The absence of competition enables Cabrini Pathology to be able to be a laggard in terms of offering doctors of Cabrini Hospital and their patients the latest (and more expensive) innovations in testing methodologies and systems.

Generally speaking, new tests and advanced technologies are very expensive for pathology laboratories to offer and are generally performed as a loss leading activity for pathology providers in the early years of that product's development life cycle. However over time as competitor suppliers (eg reagent suppliers or equipment manufacturers) of those testing methodologies come into the market, costs for pathology providers come down and pathology providers' profits go up.

If there is no competition within the closed Cabrini network, then those doctors within the Cabrini system are firstly unlikely to be made aware of these new tests by Cabrini Pathology, secondly unlikely to be educated and detailed about the new tests by Cabrini and as a result their patients will not be afforded the benefit of such new and more insightful testing methodologies.

3. Pathology is typically a hidden extra

The threat of higher costs to patient and real possibility of limited no-gap agreements is all the more exacerbated because pathology is normally a hidden extra that the patient only becomes fully cognizant of the extent of the charges at the back end of the patient's stay.

Unlike surgeon charges and procedure charges etc, pathology is a service whose need is not known and quantified until after the patient has been admitted into the hospital.

As such the patient has little or no control over the charges he or she will get levied for pathology.

Thus in summary, under such an exclusive dealing arrangement, the pathology provider has the ability to levy higher than normal charges and gap payments and offer a lower technologically advanced service to what is essentially a "captive" patient. That is the patient is already in a weak position (that is admitted into hospital), and secondly as he or she has no real choice on where

pathology is performed there will be the resultant increase in fees charged to the patient or decrease in services provided.

Detriment to Fair Competition

The creation of an exclusive dealing arrangement enables cross subsidization and distortion of competition not only inside the hospital but just as importantly, outside the hospital itself.

1. Cross Subsidization

In my considerable experience, the financial returns from providing private hospital based pathology are roughly double what can be achieved in ex-hospital based pathology ie. community collection centre based pathology (fees received are nearly double for the same tests). Cabrini Pathology is able to use the significant returns generated from the hospital work to cross-subsidize loss making activities in the external market – that is the community collection work market.

It needs to be noted that Cabrini Pathology's activities are not limited to the hospital environment. Rather they have a substantial suite of pathology collection centres serving community patients and doctors throughout Melbourne.

Accordingly, substantial "above normal" profits made from the exclusive dealing hospital environment can be utilized to subsidize losses from community collection centres .

That is Cabrini Pathology can expand its network of community collection centres at unprofitable rates (i.e. pay higher rents for better collection centre sites) at the expense of other pathologists and pathology providers who do not have a similarly unfairly protected goldmine to cross subsidise those activities (i.e an exclusive dealing arrangement with a major private hospital network).

2. Dumping of Excess Capacity

Pathology laboratories are typically high fixed cost, low variable cost businesses. That is the marginal cost is generally lower than the average cost. Accordingly, if Cabrini has exclusive dealing arrangements within its hospital facilities, it can then utilize its spare capacity to effectively "dump" the excess capacity of its instruments, analysers, staff and laboratory facilities onto the community market. In effect, Cabrini Pathology can bid for external community work at rates that other providers cannot compete against.

This introduction of unfair competition is exacerbated by the deregulation of collection centre licences which mean that Cabrini Pathology can effectively outbid for all community pathology work (that is bid in terms of offering higher and higher rentals for the best sites located within doctor practices) as they are able to utilize their high average returns from their exclusive dealing hospital to undercut all other competition at an unfair rate.

3. Using Exclusive Dealing in the Hospital creates Exclusive Dealing outside of the Hospital

The creation of an exclusive dealing arrangement in a large hospital, creates in effect exclusive dealing arrangements outside the hospital.

In my experience, specialist doctors generally prefer to utilize a single pathology provider for all of their pathology work. That is the doctor will utilize the same pathology provider for hospital work as they utilize for their consulting work in their offices in the community. This is because of the advantage for such doctors of having continuity of pathology results pre-admittance, in hospital and post admittance. These advantages include ease of administration, ease of management, familiarity with key pathology personnel etc. So if exclusive dealing is enacted within the hospital, it is effectively enacted outside the hospital for all specialists that utilize that hospital.

Falsity of Typical Arguments FOR Exclusive Dealing in Hospitals

Historically arguments have been made by typical “inhouse” providers about the clinical benefit of having pathology provided by an inhouse pathology provider only.

1. Largest Private Hospitals have Proven to operate successfully with multiple providers

Many large private hospitals are able to operate with multiple providers successfully.

At one extreme, some large private hospitals have multiple laboratories from different providers on-site providing pathology services. So for instance Knox Private Hospital in Melbourne and John Flynn Private Hospital in Brisbane have multiple pathologists and laboratories servicing them.

Both of these hospitals are large complex hospitals. Both have doctors and patients able to access different pathology providers. The competition at such hospitals ensures patients receive a competitive price (generally no gaps) and high level of service.

2. Information Technology Reasons

Technology has evolved to enable full interoperability of results from different pathology providers. That is pathology providers are able to feed electronic results in an atomic way into all formats in any format to any medical record as required by the hospital.

That is the electronic integration that was historically argued can only be achieved by an inhouse pathology provider is a falsehood. Same electronic integration with multiple pathology provider can be achieved.

3. Comparability of Results

Historically, arguments by wholly owned inhouse pathology providers for exclusive dealing arrangements relate around something like – *pathology results are not comparable from different providers*. This argument is very weak, with all pathology providers having over 99% compliance with standardized reporting formats and reporting units. This is standardized under NATA requirements.

4. “Unless in best interests of the Patient”

The inclusion of such an “out-clause” where the doctor can refer to a third party provider if in the best interests of the patient seems fair in theory however does not work in practice in my significant experience. That is the doctor has to make an adverse finding over the quality of the service provided by Cabrini Pathology to make the decision to send the pathology to another provider.

This type of clause does not work for a number of reasons:

- a) The referring doctor has no basis upon which (s)he can compare the service quality of Cabrini Pathology (that is there is no second laboratory or second collection centre on site). So it is actually impossible for the specialist to make a proper comparison.
- b) The presence of an “exclusive dealing” arrangement ensures that third party pathology providers are not willing to commit any resources such as laboratories, collection centres or similar to support the inpatients and outpatients of the hospital – and hence as a result – they will always get a second rate service from the third party pathology providers. That is the exclusive dealing arrangement makes it un-financial for rival competitors to compete for these patients – and hence the exclusive dealing arrangement becomes self fulfilling.
- c) For a treating specialist to make a positive decision to send pathology to a third party in the presence of an exclusive dealing arrangement requires the treating specialist to go against the establishment (ie Cabrini Health). This professionally and operationally risky for a medical specialist that is reliant upon Cabrini Health for a large factor in their success (eg operating times, operating equipment available to them etc).

5. “Not for Profit” status and “greater good” arguments

As the ACCC is no doubt aware, Cabrini Pathology is a for profit corporation that operates within the not for profit wider Cabrini Health group.

However, in addition it is not widely known, but I understand that Cabrini Pathology has historically had in effect a joint venture with Sonic Healthcare Ltd (a top 100 ASX listed company) where Sonic Healthcare Ltd via its “Melbourne Pathology” business provides certain services including pathologists, information technology etc to Cabrini Pathology in return for a percentage of the pathology revenue generated by Cabrini Pathology.

That is, Cabrini Pathology has effectively been a joint venture between Sonic Healthcare Ltd and Cabrini Health.

Such being the case, the exclusive dealing arrangement is in effect guaranteeing maximum profit to Sonic Healthcare Ltd.

Thus arguments about the importance of not-for-profit status and greater public good as a result are offset by the true historical nature of this for-profit joint venture.