



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Applications for authorisation

lodged by

St Vincent's Health Australia Limited

The Congregation of Religious Sisters of Charity of Australia trading as  
St Vincent's Private Hospital Sydney

Trustees of Mary Aikenhead Ministries

The Holy Spirit Northside Private Hospital Limited

in respect of

the Applicants acting as a group in order to engage in conduct including  
collective bargaining with health insurers and suppliers of other goods  
and services to the group, collective boycott activity, and exclusive  
dealing arrangements.

Date: 31 July 2012

Authorisation numbers: A91295 - A91297

Commissioners: Sims  
Rickard  
Court  
Dimasi  
Willett

## Summary

The ACCC proposes to grant authorisation to St Vincent's Health Australia Ltd & Ors to act collectively as a group in order to engage in conduct including collective bargaining with health insurers and suppliers of other goods and services to the group, collective boycott activity, and exclusive dealing arrangements. The ACCC proposes to grant authorisation for ten years.

The Applicants are St Vincent's Health Australia Limited (**SVHA**), the Congregation of Religious Sisters of Charity of Australia trading as St Vincent's Private Hospital Sydney (**SVPHS**), Trustees of Mary Aikenhead Ministries, and The Holy Spirit Northside Private Hospital Limited (the **Applicants** or the **SVHA Group**). The Applicants own and operate health and aged care facilities around Australia.

The Applicants seek authorisation to allow SVPHS to join with the rest of the SVHA Group in the negotiation of commercial arrangements with third party acquirers and suppliers of services to and from the SVHA Group. The application arises out of the anomalous structure of SVPHS.

Except for SVPHS, the Applicants are related bodies corporate. Therefore, the Applicants, other than SVPHS, can legally engage in collective and joint activity without the need for authorisation.

Under a bequest, which is a significant source of funding to SVPHS, it is a requirement that the Sisters of Charity continue to conduct the operations of the SVPHS. Although SVPHS is not in a legal sense a related body corporate in substance its functions, other than in relation to the conduct the subject of the current application, are part of the same economic entity as the other facilities in the SVHA Group. However, because SVPHS is not a related body corporate to the other members of the SVHA Group it is not currently able to legally engage in collective and joint activities undertaken by the Group in relation to their dealings with other businesses. The Applicants seek authorisation to address this.

The ACCC considers that addressing the legal impediment to SVPHS being included in the SVHA Group's negotiations of commercial arrangements with third party acquirers and suppliers of services that arises from the anomalous structure of SVPHS is likely to result in public benefits arising from:

- costs savings to SVPHS and potentially suppliers and acquirers of its services through not having to negotiate agreements separately from the SVHA Group
- uniformity of operations between SVPHS and other members of the SVHA Group, and
- improved input by SVPHS into negotiating processes.

The ACCC considers that any public detriment that may arise from the authorised conduct is likely to be limited having regard to the following:

- Members of the SVHA Group, other than SVPHS, are currently able to legally engage in collective and joint activity, therefore the scope of the proposed arrangements under the authorisation is limited to the addition of SVPHS. The addition of SVPHS to the bargaining group will not materially affect the SVHA Group's market share in any relevant market and will not significantly increase either the bargaining power of the SVHA Group as a whole or the extent of any

disruption to any business that may be affected if the Group were to decide not to deal with a business.

- If it were not for the anomalous structure of SVPHS, SVPHS would be able to collectively bargain, and agree to refuse to deal with other businesses in conjunction with the other members of the SVHA Group without requiring authorisation. In substance SVPHS already functions as part of the SVHA Group other than in respect of the conduct the subject of the applications for authorisation.

On balance, the ACCC considers the public benefits that are likely to result from the conduct will outweigh any public detriments, including any lessening of competition that would be likely to result.

### **Next steps**

The ACCC will now seek further submissions from the Applicants and interested parties in relation to this draft determination prior to making a final decision. The Applicants or interested parties may also request a conference to be held to make oral submissions on the draft determination.

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# 1. The Applications for Authorisation

- 1.1. Authorisation is a transparent process whereby the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (Cth) (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.
- 1.2. On 23 March 2012, St Vincent's Health Australia Limited (**SVHA**), the Congregation of Religious Sisters of Charity of Australia trading as St Vincent's Private Hospital Sydney (**SVPHS**), Trustees of Mary Aikenhead Ministries, and The Holy Spirit Northside Private Hospital Limited (the **Applicants**) lodged applications for authorisation A91295 - A91297 with the ACCC. Other than SVPHS, the Applicants are all related bodies corporate.
- 1.3. The Applicants seek authorisation, pursuant to ss88(1A), 88(1) and 88(8) of the Act for the following conduct:
  - joint negotiations by any or all of the SVHA Group (including SVPHS) with health and aged care funders, the Repatriation Commission and third party payers/compensable organisations (collectively referred to as **Funding Organisations**) of Hospital Purchaser Provider Agreements (HPPAs) or other forms of revenue and/or funding agreements, which will include sharing data among the SVHA Group (such as cost or price information) at any time and reaching arrangements or understandings on the terms and conditions, including prices, for the supply of goods or services by any or all of these hospitals
  - joint negotiations by any or all of the SVHA Group with suppliers of goods or services, which will include sharing data among the SVHA Group (such as cost or price information) at any time and reaching arrangements or understandings on the terms and conditions, including prices, for the acquisition of goods or services by any or all of these hospitals
  - preventing, restricting or limiting the supply of goods or services (i.e. collective boycotts) to Funding Organisations or the acquisition of goods or services from other suppliers of goods or services by any or all of the SVHA Group
  - arrangements or understandings fixing, controlling or maintaining prices for, and discounts, allowances, rebates and credits in relation to goods or services supplied or acquired by any or all of the entities in the SVHA Group, including any associated sharing of data at any time, and
  - tying or bundling of goods or services in such a way that the supply of goods or services at one entity may be conditional on a third person's acquiring goods or services from another entity in the SVHA Group, where the third person is a Funding Organisation.

- 1.4. With respect to the tying and bundling of goods and services, authorisation was initially sought to tie or bundle services supplied to patients, medical practitioners and health and aged care funders (Funding Organisations). On 26 June 2012, the Applicants amended their application such that authorisation is now sought only for the tying or bundling of goods or services supplied to health and aged care funders.
- 1.5. The Applicants submit that authorisation is sought in order to operate all entities within the SVHA Group as if they were a single economic entity. The Applicants submit that the scope of the applications for authorisation are very limited as with the exception of SVPHS, the remaining members of the SVHA Group are related bodies corporate and can already legally engage in collective or joint activity, including information sharing, collective bargaining and agreements not to deal with a particular party.
- 1.6. The Applicants have made these authorisation applications due to the risk that group dealings, if made and given effect to, may otherwise contravene ss 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, 45 and 47 of the Act.
- 1.7. The Applicants seek authorisation for as long as the Applicants are related bodies corporate or are directly or indirectly owned and controlled by the Sisters of Charity or Trustees of Mary Aikenhead Ministries.

## **2. Background to the Applications**

### ***Health Sector***

- 2.1. Australia's health system is complex, with many types and providers of services and a range of funding and regulatory mechanisms. Those who provide services include medical practitioners, other health professionals, hospitals, and other government and non-government agencies. Funding is provided by the Australian Government, state and territory governments, health insurers, individual Australians and a range of other sources.<sup>1</sup>

### ***Private Health Care***

- 2.2. Private hospitals are privately owned and operated institutions, catering for patients who are treated by a doctor of their own choice. Patients are charged fees for accommodation and other services provided by private hospitals and relevant medical and paramedical practitioners. Private hospitals exist in response to patients' willingness-to-pay for a choice of doctor, private ward facilities and relatively faster access to hospital services.<sup>2</sup>
- 2.3. Recent data shows that there are 556 private hospitals in Australia, of which 285 are acute<sup>3</sup> or psychiatric hospitals and 271 are freestanding day hospitals.<sup>4</sup> Of the private acute and psychiatric hospitals in Australia in 2007, 165 were run on a for-profit basis and 124 were not-for-profit.<sup>5</sup> Not-for-profit hospitals must qualify with the Australian Taxation Office or the Australian Securities and Investments

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<sup>1</sup> Australian Institute of Health and Welfare, 2004, Australia's Health 2004.

<sup>2</sup> Australian Institute of Health and Welfare, *Australian Hospital Statistics 2007-08*, Health Services Series no. 33 Cat. no. HSE 71, Canberra

<sup>3</sup> Acute hospitals provide at least some medical, surgical or obstetric care for admitted patients and provide round-the-clock comprehensive qualified nursing services, as well as other necessary professional services.

<sup>4</sup> Freestanding day hospital facilities provide investigation and treatment for acute conditions on a day-only basis:

<sup>5</sup> Productivity Commission, 2009, Public and Private Hospitals – Productivity Commission Research Report

Commission as a non-profit organisation. Non-profit organisations are classified as 'religious or charitable' or 'other'.

- 2.4. Private hospitals source their revenue largely from use of their operating theatres and bed facilities, and a number provide a broad range of services such as diagnostics, chemotherapy and sub-acute care that also generate revenue from patients. Private hospitals generally order and pay for prostheses and then recoup the cost from health insurance funds and, in some instances, patients. Medical fees are usually billed separately and direct to the patient from the medical provider, as opposed to being directed via hospital accounts.<sup>6</sup>
- 2.5. Health funds and private hospitals negotiate agreements to establish the level of cover, for services such as accommodation, for health fund members at the particular hospital.
- 2.6. In the absence of a negotiated agreement, second tier benefits guarantee a minimum payment for accredited private hospitals. Under the second tier benefit system, the level of benefit payable to a default benefit hospital that does not have a contract with a health insurer is set at 85 per cent of the average benefits currently paid by that health insurer for that episode of care in comparable private hospital facilities with which the health insurer has contracts. Treatment at a hospital where there is no agreement will mean higher out of pocket costs for the patient.
- 2.7. Agreements between health funds and hospitals do not apply to fees charged by private specialist doctors for in-hospital treatment. The difference between the fee charged by the doctor(s) who treat a fund member and the benefit paid by the member's fund is referred to as 'the gap'. Consumers can choose from a range of health fund schemes, some of which cover the gap in its entirety (no gap) and some of which require consumers to meet part of the gap but inform them in advance of the amount that they will be required to pay (known gap). Doctors are free to decide, for each individual patient, whether or not to use a particular fund's gap cover arrangements.

## ***Repatriation Commission***<sup>7</sup>

- 2.8. The Repatriation Commission (**RC**) is responsible under the *Veterans' Entitlements Act 1986* (VEA) for granting pensions, allowances and other benefits, and providing treatment and other services through its hospitals and institutions or through community facilities to veterans, their dependants and other eligible persons.
- 2.9. The RC currently provides services under the VEA to around 353,000 veterans and members of the Australian Defence Force, their partners, widows, widowers and children.
- 2.10. Under the Repatriation Private Patient Scheme (**RPPS**) the RC provides hospital care for eligible veterans, war widow(er)s and their dependants in local facilities at no cost to the patient.
- 2.11. Whilst the aim of the RPPS is to use public hospitals, former Repatriation Hospitals or Veteran Partnering private hospitals to treat patients wherever possible, the

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<sup>6</sup> Ibid.

<sup>7</sup> Unless otherwise stated, information in this section has been sourced from the Repatriation Commission's website at <http://www.vvaa.org.au/repatriation.htm>

RPPS provides a safety net of contracted private hospitals and Day Procedure Centres.<sup>8</sup>

### ***The Applicants<sup>9</sup> - the SVHA Group***

- 2.12. The Applicants are SVHA and its related bodies corporate including the Holy Spirit Northside Private Hospital Limited and Trustees of Mary Aikenhead Ministries. The applications also include SVPHS which is a related entity but not a legally related body corporate to the other applicants. These entities form the SVHA Group. Further information on these entities is set out below and a diagram of the relationship between these entities is at Appendix B.

#### **The Sisters of Charity/Mary Aikenhead Ministries**

- 2.13. The Sisters of Charity represent a congregation of religious women formed within the Roman Catholic Church, governed by a constitution and the code of Canon Law. In civil law terms, the Sisters of Charity would be considered a voluntary, unincorporated association. The Sisters of Charity are governed by a Congregational Leader and Council (CL&C) who are responsible for the administration of the congregation.
- 2.14. The Trustees of the Sisters of Charity of Australia (**TSCA**) is a statutory body corporate formed under the *Roman Catholic Church Communities' Lands Act 1942* (NSW), whose members are the CL&C of the Sisters of Charity. The Applicants advise that the TSCA is a corporate entity through which the business of the Sisters of Charity can be conducted.
- 2.15. SVHA advise that in response to the ageing of the Sisters of Charity congregation a process was initiated to ensure the long term viability of their health and aged care ministries, in anticipation of the time when the Sisters of Charity would be unable to conduct the facilities. This involved the transfer of all stewardship and governance of the health and aged care facilities (with the exception of SVPHS) from the Sisters of Charity to Mary Aikenhead Ministries from 1 July 2009.
- 2.16. Under Mary Aikenhead Ministries, the many ministries developed by the Sisters of Charity (including the health, aged care and education facilities) are governed by a group of six trustees, currently made up of one member of the Sisters of Charity and five lay colleagues. The Trustees of Mary Aikenhead Ministries (**TMAM**) is a body corporate formed under the *Roman Catholic Church Communities' Lands Act 1942* (NSW).
- 2.17. The trustees are the Canon Law and Civil Stewards of the ministries. Whilst Mary Aikenhead Ministries is essentially a Church entity and in civil law terms would be considered a voluntary, unincorporated association, the trustees must also operate in the civil arena. This has been facilitated through the establishment of the Trustees of Mary Aikenhead Ministries (TMAM) as a body corporate formed under the *Roman Catholic Church Communities' Lands Act 1942* (NSW), whose members are the six trustees of Mary Aikenhead Ministries.

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<sup>8</sup> Departments of Veteran Affairs response to National Competition Policy Inquiry Productivity Commission, 2005.

<sup>9</sup> Unless otherwise stated, information in this section has been sourced from the Applicants' supporting submission.

## **St Vincent's Health Australia**

- 2.18. As a result of an extensive review of the structure of all the Sisters of Charity health and aged care facilities in 1996, Sisters of Charity Health Service Limited (**SCHS**) was incorporated to further strengthen the governance of all of the Sisters of Charity health and aged care facilities throughout Australia. The TSCA was the only *Corporations Act 2001*(Cth) member of SCHS. As a company limited by guarantee, SCHS did not have share capital.
- 2.19. In 2008 the name of the SCHS was changed to St Vincent's Health Australia Limited (SVHA) and following the establishment of Mary Aikenhead Ministries and TMAM in 2009, TMAM is now the sole *Corporations Act* member of SVHA. SVHA operates under the direction of TMAM.
- 2.20. SVHA is an incorporated not-for-profit organisation acts as the parent company for the majority of charitable health and aged care services previously operated by the Sisters of Charity.
- 2.21. SVHA holds 50 per cent ownership in The Holy Spirit Northside Private Hospital Limited which operates Holy Spirit Northside, a private, not-for-profit hospital located in Chermside, Brisbane and provides comprehensive acute care services across a broad range of medical and surgical specialities.
- 2.22. St Vincent's & Mater Health Sydney Ltd (**SVMHS**) is a wholly owned subsidiary of SVHA and operates the Mater Hospital, North Sydney.
- 2.23. Through its health and aged care services, in the 2010/11 financial year SVHA operated approximately 2,541 hospital beds, 1,069 aged care places, employed 15,693 staff, worked with over 2,500 medical practitioners, and 1,300 volunteers. In 2010/11 SVHA cared for 246,548 inpatients and provided 887,146 episodes of ambulatory care.

## **Holy Spirit Northside Private Hospital Limited**

- 2.24. Holy Spirit Northside Private Hospital Limited operates Holy Spirit Northside Private Hospital (**HSN**) which opened in July 2001 and is located in Chermside, Brisbane.
- 2.25. HSN has a total of 195 inpatient beds, 8 operating theatres, a 15 bed ICU, a 10 bed acute care cardiac unit, 2 cardiac catheter laboratories, a day procedural and endoscopy unit, a day oncology service and a 24 hour private emergency centre. Allied health, diagnostic and pharmacy services are also available onsite, complementing these hospital services.
- 2.26. HSN was developed by the Sisters of Charity and the Holy Spirit Missionary Sisters and associated entities of each (namely, SVHA and the Mission Congregation of the Servants of the Holy Spirit) and each hold a 50% ownership stake.

## **St Vincent's Private Hospital Sydney**

- 2.27. St Vincent's Private Hospital Sydney (SVPHS) is a 250 bed private acute care medical and surgical hospital located in Darlinghurst, Sydney. It is managed by SVMHS.
- 2.28. SVPHS provides overnight and day care across a broad range of specialities with services provided in major fields of medicine and surgery with the exception of

obstetrics and paediatrics. SVPHS claims to be a leader in many areas including cardiac care, cancer, neurosurgery, orthopaedics, head, neck, reconstructive surgery, laser and laparoscopic surgery.

- 2.29. Since 1996, SVPHS has operated under a constitution promulgated by the Sisters of Charity. It has a body of responsible officers comprising the same persons as the board of SVHA and its subsidiaries.
- 2.30. SVPHS is conducted directly by the Sisters of Charity. The terms of the Resch bequest,<sup>10</sup> a significant source of funding for SVPHS, requires that Sisters of Charity continue to conduct SVPHS.
- 2.31. While SVPHS is not in a legal sense a related body corporate of the other facilities controlled by SVHA the Applicants claim it functions as part of the same economic entity.

## ***Previous Authorisations***

- 2.32. There are a number of authorisations involving the Applicants, and other entities, since 2000. See Appendix A for further information about these authorisations, or to view the ACCC's public decision documents see **[www.accc.gov.au/Authorisationsregister](http://www.accc.gov.au/Authorisationsregister)**.
- 2.33. Current authorisations that involve the Applicants are as follows:
- In 2002, the ACCC granted authorisations A90770-A90772 in perpetuity which enable Mater Hospital, SVPHS, Trustees of Sisters of Charity and Sisters of Charity Healthcare Australia to operate as a single economic entity and to engage in collective negotiations, and exclusive dealing conduct.
  - In 2009, the ACCC granted authorisation A91099 for 5 years which enables the SVHA Group and related bodies, and other non-related Catholic private hospitals (including SVPHS), to form a collective bargaining group to negotiate with health funds and suppliers for medical and non-medical goods and services used by hospitals. Authorisation was also sought to engage in collective boycotts, however the ACCC did not grant authorisation to the proposed collective boycott arrangements.
- 2.34. There is some overlap in membership between the group authorised to engage in collective and joint activity in 2009 and the currently proposed bargaining group.
- 2.35. The Applicants advise that the 2009 Authorisation has primarily been used by the relevant Catholic hospitals for information sharing for the purpose of benchmarking in relation to private hospitals. The Applicants state that it has proved difficult to make use of the authorised arrangements for joint procurement and joint negotiations because of the difficulties of having multiple different boards and executives approve contract terms, and because the 2009 Authorisation

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<sup>10</sup> In October 1963 Mr Edmund Resch bequeathed two thirds of the income from his £61/2 million estate to St Vincent's Private Hospital for 200 years, in appreciation of the services given by Sr Mary Loyola of St Vincent's Private hospital to his family. The bequest resulted in a court case to resolve the question of the Private Hospital's charitable status, as under law only gifts to charity could go on in perpetuity. After the case had gone all the way to the Privy Council in London the matter was decided in favour of St Vincent's Private Hospital.  
(<http://www.stvincents.com.au/assets/files/pdf/D/pe%20%20mar08.pdf>)

arrangements are voluntary for suppliers who can choose whether or not to deal with the hospitals as a group or on an individual basis.

- 2.36. Furthermore, the Applicants submit that the 2009 Authorisation is not used for information sharing for the purpose of benchmarking for public hospitals and aged care facilities; and joint procurement between SVPHS and other members of the SVHA Group that are public hospitals and aged care providers and are not covered in the 2009 Authorisation.
- 2.37. That Applicants state that there will not be overlap between the activities of the 2009 group and currently proposed arrangements, and that future negotiations by the SVHA Group will fall under the process subject to the current application.

### 3. Submissions Received by the ACCC

- 3.1. The ACCC invited submissions from seventy five interested parties potentially affected by the applications, including other hospitals, medical and surgical suppliers and manufacturers, pharmaceutical companies, health funds, government agencies and industry bodies.
- 3.2. Public submissions were received from the following interested parties:
- The Royal College of Pathologists of Australia (**RCPA**) - the peak organisation relating to the professional standards in the practice of pathology in Australia.
  - Bespoke Pathology Pty Ltd trading as Tissupath (**Tissupath**) - three partner pathology practice operating in Mt Waverley, Victoria and specialising in anatomical pathology.
  - Medibank Private Limited, wholly owned by Australian Health Management Group Pty Ltd, (**Medibank**) - an integrated private health insurance and health services group.
  - Bupa Australia Pty Ltd (**Bupa Australia**) - operating the Bupa Australia Group's consolidated private health insurance business through a single health fund.
- 3.3. In brief, the RCPA and Tissupath opposed any tying or bundling arrangement that would restrict doctors and patients to using the pathology provider identified by the Applicants. As noted (at paragraph 1.4), the Applicants subsequently amended their exclusive dealing application for authorisation so that tying and bundling arrangements will only apply to services supplied to Funding Organisations.
- 3.4. Both Medibank and Bupa Australia raised concerns regarding the ability for the SVHA Group to engage in collective bargaining and boycotts.
- 3.5. Bupa Australia submits that the collective boycott would increase costs to the fund and to members. Bupa Australia also argues that it may be forced, by threat of a collective boycott to deal with a particular facility which does not meet its required quality standards, or at a price which does not reflect the current market price.
- 3.6. The Applicants provided a submission responding to the issues raised by interested parties.

- 3.7. A copy of the interested party submissions and the response by the Applicants can be found on the ACCC's Public Register at [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister) and are detailed further in Chapter 4.

## 4. ACCC Assessment

- 4.1. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests<sup>11</sup> contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC will assess the likely public benefit and public detriment, including any lessening of competition that would be likely to result. If the public benefits outweigh the public detriments the ACCC may grant authorisation.
- 4.2. In order to measure and assess the effect of the proposed conduct and the public benefits and detriments likely to result the ACCC identifies the relevant area of competition and the likely counterfactual which will apply in the future should authorisation not be granted.

### *The Relevant Area of Competition*

- 4.3. The Applicants submit that the markets likely to be affected by the proposed conduct are:
- (i) the national market (or at least state based markets) for the acquisition of health care goods and services (e.g. hospital services, pathology, radiology etc) from private hospitals by relevant Funding Organisations (the **Health Services Market**) and
  - (ii) various markets for medical and non-medical supplies jointly purchased by the SVHA Group (the **Joint Purchasing Market**).

### **Health Services Market**

- 4.4. The Applicants submit that the Health Services Market essentially involves the negotiation of the terms and conditions (including price) by which customers of relevant Funding Organisations are able to obtain access to health care goods and services from private hospitals, or other health providers such as public hospitals.
- 4.5. The Applicants note the ACCC's view in its 2009 Authorisation decision<sup>12</sup> (see paragraph 2.33) where the ACCC concluded *the relevant area of competition to be the state markets for the acquisition of private hospital services by Funding Organisations* and submits that Funding Organisations largely operate on at least a state-wide, if not national, basis both in terms of marketing their health insurance products and negotiating with hospitals. This is also consistent with the ACCC's consideration of other SVHA applications for authorisation.
- 4.6. SVHA submits that health fund negotiation team members are allocated responsibility on a state by state basis although in some instances, funds also operate at a national level, and a negotiation team member is then allocated to negotiate on a national level with health services provider groups, particularly those with a multi-state presence such as Ramsay Health Care or Healthscope.

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<sup>11</sup> Sections 90(5A), 90(5B), 90(6), 90(7) and 90(8). Please see Appendix C for the relevant tests.

<sup>12</sup> A91099 – St Vincent's Health Australia Limited authorisation dated 29 January 2009.

## ACCC View

4.7. The ACCC has previously considered that there are factors which impact the ability of health funds to adopt a wholly national approach to their businesses. Such factors include:

- risk equalisation liabilities which are calculated on a state/territory basis
- varying costs of medical specialist services per state
- varying costs of private hospital services per state
- distinctly different market share of private health insurance providers in each state/territory
- difficulties private health insurance providers have in gaining significant market
- share of customers outside their 'home' states
- the tendency for a state-based approach to marketing by private health insurance providers, and
- the use by some private health insurance providers of different brand names in different states.<sup>13</sup>

4.8. Therefore, for the purpose of assessing these applications for authorisation the ACCC considers the relevant area of competition to be the state markets for the acquisition of private hospital services by Funding Organisations (referred to as the hospital services market). This is consistent with the ACCC's assessment of previous SVHA applications for authorisation.

## Joint Purchasing Market

4.9. The Applicants submit that the SVHA Group wishes to jointly acquire goods and services which will include but is not limited to:

- medical and surgical supplies
- general supplies, including stationery and furniture
- capital equipment, including diagnostic equipment
- pharmaceuticals and pharmacy services
- diagnostic supplies and services
- hotel services such as cleaning, catering and linen services
- security and maintenance services
- banking services

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<sup>13</sup> Public Competition Assessment – proposed merger of BUPA and MBF – 16 November 2007.

- insurance services
  - construction services
  - energy and other utilities
  - pathology supplies and services
  - telecommunications services, and
  - management, consultancy and legal services.
- 4.10. The Applicants state that hospital supplies (medical and surgical), pharmaceuticals and diagnostic supplies are supplied to both private and public health care providers across not only hospitals, but a broader health market that includes at least hospitals, day hospitals and medical centres. In some instances it will also incorporate aged care facilities.
- 4.11. The Applicants submit that the suppliers in these markets are multinational organisations that manufacture and distribute their products globally. For example the Applicants' top three suppliers in 2010 were Symbion Pharmacy Services Pty Ltd (national), Medtronic Australasia Pty Ltd (global), and Johnson & Johnson Medical Pty Ltd (global).
- 4.12. The Applicants submit that the other goods and services, such as general supplies (i.e. stationery and furniture), hotel services or banking/insurance services are not specific to hospitals, or even a broader health market, and are thus likely to form part of an acquisition market that incorporates a range of non-hospital, non-health consumers.

#### *ACCC View*

- 4.13. Given the diverse nature of the goods and services the SVHA Group wishes to acquire jointly, ranging from medical supplies to banking and telecommunication services, the scope of the relevant areas of competition will vary depending on the characteristics of the particular goods and services of the third line force.
- 4.14. Generally, the ACCC considers that the relevant area of competition for the purpose of the current Applications for authorisation to be the national or state markets for the various goods and services purchased by the Applicants.
- 4.15. The ACCC does not consider it necessary to comprehensively define these areas of competition as its assessment will not be significantly affected by precise definitions.

#### ***The Counterfactual***

- 4.16. The ACCC applies the 'future with-and-without test' established by the Australian Competition Tribunal (the **Tribunal**) to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.<sup>14</sup>

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<sup>14</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

- 4.17. Under this test, the ACCC compares the public benefit and detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted.
- 4.18. The Applicants submit that if authorisation is not granted, those members of the SVHA Group that are related bodies corporate will continue to act as a single legal and economic entity, including engaging in collective negotiations with Funding Organisations and joint purchasing activity relying on the related bodies corporate exemption in the Act.
- 4.19. The ACCC considers that in the absence of the authorisation, the SVHA Group, excluding SVPHS, will continue to operate as a single entity, able to legally engage in collective or joint activity including information sharing, collective bargaining and agreements not to deal with a particular party. While SVPHS will continue to function as part of the SVHA Group it would be required to negotiate individually with Funding Organisations and suppliers of goods and services.
- 4.20. Accordingly, in the context of the current Applications the ACCC's consideration of the public benefits and detriments of the arrangements is limited to the benefits and detriments associated with the addition of SVPHS participating in the bargaining group.

## **Public Benefits**

- 4.21. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:  
  
...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>15</sup>
- 4.22. Generally, competition can be relied upon to deliver the most efficient market arrangements. In circumstance where there are market failures (for example, high transaction and bargaining costs,<sup>16</sup> market power or information asymmetries),<sup>17</sup> regulation and/or restrictions on competition may deliver efficient outcomes.
- 4.23. The Act recognises that, in certain circumstances, arrangements which restrict competition can deliver public benefits where they address a potential market failure and therefore improve economic efficiency.
- 4.24. The Applicants have sought authorisation for a broad range of conduct including collective bargaining, collective boycotts and exclusive dealing. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

## **Collective Bargaining**

- 4.25. The Applicants propose to engage in collective bargaining conduct with a range of targets that operate in different markets. Specifically, the Applicants propose to negotiate contracts for the purchase of goods and services from suppliers for

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<sup>15</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

<sup>16</sup> Bargaining costs are part of the transaction costs of contracting. If transaction costs are high, markets may not work efficiently.

<sup>17</sup> This refers to a situation where one party has more or better information than another in a transaction. This imbalance can lead to a situation where the party who knows less accepts or offers different terms than they otherwise would, leading to inefficient outcomes.

medical and non-medical goods and services used by hospitals. The SVHA Group also proposes to negotiate contracts with health funds and the Repatriation Commission for funding agreements and prices for the supply of goods and services at hospitals operated by the SVHA Group, including SVPHS.

- 4.26. The SVHA Group submits that collective bargaining would lead to public benefits in the form of:
- transaction costs savings
  - facilitating uniformity of operations
  - improved input into negotiation processes.

### **Transaction Cost Savings**

- 4.27. The Applicants submit that the ability to fully include SVPHS in the general dealings of the SVHA Group will generate transaction cost savings.
- 4.28. Specifically, the Applicants submit that the more clearly centralised negotiations that would take place as a result of the proposed conduct will produce cost savings that are likely to include a decrease in the number of hours spent engaging with Funding Organisations and third party suppliers, a decrease in the costs involved in seeking professional advice (such as legal advice) associated with the negotiations, and the opportunity to develop standard form contracts for the SVHA Group as a whole.
- 4.29. Bupa acknowledges that cost savings are an important public benefit. However Bupa states that in practice it negotiates with the SVHA Group as a whole and is of the opinion that authorisation is not required.

### **ACCC View**

- 4.30. Generally there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is employed, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary.
- 4.31. Currently, the Applicants, other than SVPHS, operate as a single legal entity and are, in effect, already able to negotiate through a single process with suppliers and Funding Organisations.
- 4.32. The ACCC considers that there is likely to be transaction cost savings from including SVPHS in the SVHA Group when dealings with suppliers and Funding Organisations. Participation in the collective bargaining group is likely to reduce SVPHS's negotiation costs and costs incurred in acquiring the information and advice necessary to make informed purchasing decisions. Suppliers and Funding Organisations are also likely to face reduced costs as a result of not having to negotiate with SVPHS separately to the other members of the SVHA Group.

### **Facilitating Uniformity of Operations**

- 4.33. The Applicants submit that as St Vincent's Public Hospital and SVPHS are co-located in Sydney, staff and patients are likely to transition from one facility to the other for various reasons from time to time. In these circumstances, it would be a public benefit for the SVHA Group to be completely free to jointly acquire and use

the same product across the two locations. The Applicants state that these benefits involve reducing the risk of education deficit in the use of the products, which can produce confusion and possible incorrect use, by more efficient and consistent education and training of staff. Some examples of different products currently being used include:

- underwater seal drains - where SVPHS & Mater Hospital, North Sydney are using Covidien and St Vincent's Public is using Atrium
- infusion pumps and giving sets - where SVPHS is using predominantly CareFusion but the Mater Hospital, North Sydney and St Vincent's Public are using some CareFusion and some B Braun.

- 4.34. The Applicants submit that collective dealings will also provide better access to volume discounts in the joint purchasing market that will arise from utilising the same products across all hospitals in the SVHA Group.

#### *ACCC View*

- 4.35. The ACCC accepts that collective negotiations are likely to create efficiencies through assisting in facilitating uniformity of operations between SVPHS and the SVHA Group which may assist in providing greater access to facilities and services for patients, also providing greater resources and sharing of expertise across the SVHA Group when required.
- 4.36. While the same outcome could be achieved by SVPHS deciding to purchase the same goods and services as the SVHA Group without the need for them to collectively negotiate for the acquisition of these goods and services, collective negotiations are likely to provide administrative efficiencies in achieving this outcome.

#### **Improved Input to Negotiation Processes**

- 4.37. The Applicants submit that the countervailing power of Funding Organisations, and suppliers of medical and non-medical products and services is an important factor in support of the SVHA Group's desire to operate as a single economic entity.
- 4.38. The Applicants submit that the industry concentration of Funding Organisations has increased with the consolidation of multiple health funds including the merger of Bupa Australia Health Pty Ltd and MBF in 2007, Medibank Private Limited's acquisition of Australia Health Management in 2008, and Hospital's Contribution Fund of Australia Limited's acquisition of Manchester Unity Australia Limited in 2008. This has contributed to a reduction in the overall number of private health insurers, which has fallen from 49 in 1995 to 35 in July 2010. The Applicants estimate that the top five private health insurers now account for approximately 84% of the national industry.
- 4.39. The Applicants also submit that the top suppliers of medical and non-medical supplies are typically large companies, most being multinational organisations, with countervailing power.

#### *ACCC View*

- 4.40. Collective bargaining can result in benefits to the public by facilitating improvements in the level of input participants have in contractual negotiations. Generally, if

buyers or sellers are constrained in their ability to provide input into terms and conditions of supply or acquisition, the most efficient outcome may not be achieved.

- 4.41. Collective bargaining may help businesses by providing a mechanism through which they can achieve greater input into contracts and be more commercially efficient. The enhanced level of input into the negotiation process results from:
- the relatively greater bargaining power of the collective (achieved through the aggregation of their influence in the negotiation)
  - improving individual members of the bargaining groups access to information and resources
  - providing a mechanism through which productive contractual discussions between hospitals and potential targets can take place.
- 4.42. In this case members of the SVHA Group, other than SVPHS, will continue to be able to negotiate collectively with Funding Organisations and suppliers of goods and services even if authorisation is not granted. Any bargaining power of the SVHA Group is unlikely to be significantly enhanced by the addition of SVPHS to the bargaining group.
- 4.43. However, the addition of SVPHS to the bargaining group would be likely to increase SVPHS's bargaining power in negotiations. To the extent that SVPHS may be in a weaker bargaining position relative to some suppliers this may allow SVPHS to benefit from the improved input into contract terms the SVHA Group may be able to achieve.
- 4.44. Improving the input into terms and conditions of contracts through collective negotiations is likely to assist SVPHS to identify and achieve greater efficiencies for its business and/or share in the benefits currently being realised by members of the SVHA Group, for example, by addressing common contractual issues in a more streamlined and effective manner. This is likely to further improve the transparency and availability of information to SVPHS about market conditions, particularly in relation to items that are purchased less frequently, since individual hospitals are less likely to be well informed about market conditions for the acquisition of such items.

### **Collective Boycott**

- 4.45. The Applicants did not identify any specific public benefits arising from the proposed collective boycott over and above those identified and discussed in relation to the proposed collective bargaining arrangements.

### **ACCC View**

- 4.46. The ACCC notes that due to the Resch bequest, which requires the Sisters of Charity themselves to continue to operate SVPHS, that SVPHS is not a related body corporate to the remaining SVHA Group members. If it were a related body corporate, it could rely on the related body's corporate exemption under the Act in collectively agreeing with other members of the group about which parties to supply to and/or acquire goods and services from.
- 4.47. Notwithstanding that SVPHS is not a related body corporate to SVHA Group members, other than in relation to the proposed collective or joint activity including

information sharing, collective bargaining and agreements not to deal with a particular party, in substance it functions as part of the SVHA Group. In particular, SVPHS is managed by SVMHS which is a wholly owned subsidiary of SVHA.

- 4.48. In this context, granting authorisation will assist in enabling the same co-ordinated approach as is adopted in relation to the remainder of the SVHA Group and SVPHS's operations to be applied to negotiations with third party acquirers and suppliers of services to and from the SVHA Group.

### **Exclusive Dealing**

- 4.49. SVHA submits that the proposed exclusive dealing conduct, whereby the supply of some goods and services to Funding Organisations by members of the SVHA Group will be conditional on the party acquiring goods or services from SVPHS and vice versa, will lead to public benefits in the form of increased bargaining power due to improved input to negotiation processes, economic efficiencies and improved transaction costs, as discussed in relation to the proposed collective bargaining arrangements.

### **ACCC View**

- 4.50. The ACCC notes that members of the SVHA Group, except SVPHS, are currently able to engage in conduct analogous to that the subject of the exclusive dealing application for authorisation. That is, members of the SVHA Group, except SVPHS, may supply goods or services on condition that Funding Organisations also acquire stipulated goods and services from other members of the SVHA Group. The applications for authorisation seek to extend the scope of these arrangements to also include SVPHS.
- 4.51. The ACCC considers that SVPHS being granted authorisation to participate in such arrangements, by allowing uniformity of arrangements between SVHA and SVPHS, is likely to provide administrative efficiencies, improved utilisation of infrastructure and synergies across the SVHA Group. In this respect, the ACCC particularly notes the Applicant's submission that St Vincent's Public Hospital and SVPHS are co-located and that staff and patients transition from one facility to the other for various reasons from time to time.

### **Broader Public Benefits – Applicants' Charitable Works**

- 4.52. The Applicants submit that improving their operations supports a range of other public benefits by virtue of the charitable work they undertake.
- 4.53. The Applicants submit that the Catholic health sector comprises many providers of high quality health services, ranging from acute care to community based services. The Applicants state that importantly, Catholic hospitals do not operate for profit; they are charitable organisations returning earnings from their businesses to the communities they serve. The Applicants state that this charitable nature also means that the SVHA Group, including SVPHS, is committed to providing services required in communities, whether those services are profitable or not.
- 4.54. The Applicants claim that the not-for-profit ethos means that any surpluses generated by the SVHA Group are used for the betterment of the community. The SVHA Group provides a wide range of charitable services with an emphasis on meeting the needs of the poor and disadvantaged.

## *ACCC View*

- 4.55. As noted, the ACCC accepts that cost and administrative efficiencies are likely to result from the collective and joint activity by the Applicants. This will assist the Applicants in maintaining their charitable efforts. Although, the ACCC also notes that if authorisation is not granted the Applicants will continue to conduct their respective hospitals and charitable works, albeit without the SVPHS involved in any collective or joint activity in relation to negotiation with other businesses.

## **Public Detriments**

- 4.56. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>18</sup>

- 4.57. The Applicants submit that there will be little or no public detriment resulting from the proposed conduct. They submit that the treatment of SVPHS as a “related body corporate” of SVHA, its subsidiaries and HSN, will not lessen competition in any relevant market but rather, will simply reflect the commercial reality that SVPHS essentially already functions as part of the SVHA Group.

## **Collective Bargaining and Collective Boycott**

- 4.58. The Applicants submit that within the joint purchasing market the SVHA Group (inclusive of its public hospitals and SVPHS) will be a very small purchaser of goods and services. The Applicants state that even if the only purchasers of the various goods and services they wish to jointly acquire were hospitals the SVHA Group has only a 5.5% (approx.) share of private hospital beds nationally.
- 4.59. Moreover, the Applicants submit that they simply seek to ensure SVPHS is able to be fully included in the collective dealings of the SVHA Group. The Applicants state that SVPHS has approximately 0.3% of national hospital beds and that the inclusion of SVPHS is essentially neutral with respect to any additional bargaining power it delivers the SVHA Group when it comes to the acquisition of medical goods or services.
- 4.60. In these circumstances, the Applicants argue that it is highly unlikely any supplier will be particularly vulnerable to increased pressure to accept the terms and conditions, including price negotiated by the SVHA Group (regardless of the ability to engage in collective boycotts).
- 4.61. The Applicants submit that this conclusion is strengthened by the following:
- The suppliers of medical goods or services are generally large (often multi-national) corporations with significant countervailing power such that the SVHA Group is likely to represent only one of many actual or potential customers that need to deal with them.

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<sup>18</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- The significant local buyers, in particular the public health purchasing authorities (e.g. Health Purchasing Victoria), will continue to operate unimpeded by the proposed conduct.
  - In the private sector, the preferences of visiting medical officers (or VMOs) are also a major influencing factor as to what clinical consumables (in particular prostheses and clinical supplies) are used in theatres/procedure suites and vendors will typically market directly to VMOs. In a number of circumstances this can impose a practical limit on the extent to which the SVHA Group can apply what little aggregate buying power it argues it may have.
- 4.62. With respect to the health services market the Applicants submit that any anti-competitive detriment arising from the inclusion of SVPHS in the collective dealings of the SVHA Group would be ameliorated by the genuine countervailing power that is and can be exercised by Funding Organisations in the negotiation of HPPAs or other forms of revenue agreements.
- 4.63. The Applicants state that there exists competitive alternatives for Funding Organisations and estimate the total share of private hospital beds accounted for by the SVHA Group (including SVPHS) in NSW is 6.7%. Further, the Applicants argue that even on a localised basis there are a number of proximate substitutable private hospital operators in metropolitan Sydney that currently provide a competitive constraint on the SVHA Group in both its dealings with Funding Organisations and in its provision of services to end consumers. The Applicants submit that in no way is SVPHS a sole operator or provider of unique services in the region in which it operates.
- 4.64. Medibank submits that the proposed joint negotiations should not be authorised unless the Applicants specify an acceptable, clear and transparent process as to how the SVHA Group intends to co-ordinate joint negotiations (specific to each relevant Funding Organisation). Further, Medibank argues that the SVHA Group should specify the delegations assigned to the SVHA Group representative to authorise a collective agreement in full and how such group negotiation will be co-ordinated.
- 4.65. Medibank opposes the proposed collective boycott arrangements. It argues that any proposed collective boycott has the potential to disrupt the availability of private hospitals to health fund members and result in significant unrest among private health members in the regions of Melbourne, Sydney, Brisbane and Toowoomba should an out-of-contract position eventuate.
- 4.66. Medibank submits that a collective boycott of Funding Organisations would also have a significant impact on those Funding Organisations' negotiating positions and could in fact create a significant power imbalance in favour of the SVHA Group. Further, Medibank argues that this is likely to have a significant detrimental impact on members of each Funding Organisation and the public as a whole. Medibank states that Funding Organisations, as part of the value proposition for members to access private hospital services with little or no out-of-pocket expenses, may have to foster other agreements with alternative private hospitals at perhaps above-commercial rates or enter into agreements with public facilities to in part accommodate Medibank members. Medibank states that the former would lead to inflationary pressures on health insurance premiums while the later may lead to increased pressure on the public health system. Medibank submits that in any case, higher premiums with a reduced private hospital service offering may eventuate.

- 4.67. Medibank submits that the proposed collective boycott arrangements are particularly concerning as the SVHA Group consists mainly of acute overnight beds and services and in this area of competition SVHA comprises 11.4% of private hospital beds, as opposed to the 5.5% national private beds of all types which the applicants claim they represent. Medibank claims that the Applicants' 5.5% figure is based on the total national private bed count which includes same day, psychiatric and rehabilitation and nonmetropolitan private beds that are not 'core' to SVHA group hospital type.
- 4.68. Bupa states that its contracts are designed to ensure that members have access to quality services that are delivered in an efficient and cost effective manner. Bupa states that it has serious concerns that it may be forced, by threat of a collective boycott, to deal with a particular facility which does not meet the required quality standards, or at a price which does not reflect the current market.
- 4.69. In response to interested party submissions the Applicants reiterate that all members of the SVHA Group with the exception of SVPHS can lawfully act as a single economic entity, including engaging in collective negotiations with Funding Organisations and joint purchasing activity. The Applicants state that the proposed conduct would simply allow all members of the SVHA Group, including SVPHS, to lawfully act as a single economic entity in circumstances where SVPHS, in substance, functions as part of the same economic entity already.

#### *ACCC View*

- 4.70. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to inefficiencies.
- 4.71. The potential for collective agreements to negotiate terms and conditions leading to inefficiencies can be exacerbated when the collective bargaining group is also able to engage in boycott activity. Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because the target, faced with the threat of withdrawal of supply, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 4.72. Collective boycotts can also significantly disrupt downstream and upstream businesses. The Tribunal has found that collective boycotts have the potential to inflict significant damage upon the target of the boycott, its employees, consumers and, also, the boycotters themselves.<sup>19</sup> The Tribunal considered that the threat of a boycott – even without it ultimately being engaged in – is likely to come at a high cost to society.
- 4.73. However, the extent of the detriment and the impact on competition of the collective agreement, and the ability to engage in collective boycotts, will depend upon the specific circumstances involved.
- 4.74. With respect to the arrangements the subject of the current Applications, with the exception of SVPHS the remaining members of the SVHA Group are related bodies

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<sup>19</sup> *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 442.

corporate and as such are lawfully able to collectively bargain and refuse to deal with Funding Organisations and suppliers of goods and services.

- 4.75. In relation to SVPHS, the ACCC notes the unique set of circumstances regarding the structure of the SVHA Group and SVPHS. The Resch bequest requiring that Sisters of Charity continue to conduct SVPHS has created an anomalous structure where SVPHS is part of the SVHA Group but is a legally separate entity. In effect, authorisation is sought to address this anomalous structure absent which SVPHS would be able to legally join with the other members of the SVHA Group in negotiations with other businesses without the need for authorisation.
- 4.76. The ACCC also notes that given the other members of the SVHA Group are already able to collectively bargain and agree to refuse to deal with businesses adding SVPHS to the bargaining group, will not significantly increase the bargaining power of the SVHA Group as a whole. However the ACCC recognises that authorisation will likely increase SVPHS's bargaining power compared to the situation without authorisation where SVPHS would not be able to reach agreement with other members of the SVHA Group to refuse to deal with counterparties to negotiations.
- 4.77. Similarly, if the SVHA Group did decide to refuse to deal with any business, the inclusion of SVPHS in the group would not significantly affect the extent of any disruption to downstream or upstream businesses.
- 4.78. The ACCC notes the concerns raised by interested parties that the ability to collectively bargain and engage in collective boycotts could create a significant power imbalance in favour of the SVHA Group potentially leading to higher prices and disruption of services. However, these concerns appear to be primarily based on views about the potential impact of the SVHA Group as a whole collectively bargaining and/or engaging in collective boycotts.
- 4.79. As noted, absent authorisation all members of the SVHA Group other than SVPHS can already lawfully engage in collective negotiations and collective boycotts. Therefore the ACCC's consideration of the current applications for authorisation is limited to assessing the benefits and detriments of addressing the legal impediment to SVPHS joining other members of the SVHA Group participating in the negotiations with other businesses that arises from the anomalous structure of SVPHS.
- 4.80. In these circumstances the ACCC is satisfied that allowing SVPHS to participate in collective bargaining and potentially collective boycotts with the remainder of the SVHA Group would not generate a significant public detriment.

## **Information Sharing**

- 4.81. Medibank submits that the disclosure of price information particular to each or all of the SVHA Group hospitals specific to a Funding Organisations is detrimental to the public interest. Medibank claims that the fee differentials between hospitals are determined by many 'hospital specific' aspects. Therefore price customisation is a considerable part of the contracting process between a private health insurer and private hospital.
- 4.82. Medibank submits that the ability to share among the SVHA Group actual prices in HPPAs will artificially inflate the rates afforded to SVHA Group hospitals. This would in turn place additional pressure on health insurance premiums in a climate where

members may downgrade their cover or resort to the public health system should private health premiums become unaffordable.

#### *ACCC View*

- 4.83. The exchange of certain information among competitors, particularly in relation to prices, fees and costs, may facilitate collusion or otherwise reduce competition, resulting in increased prices or reduced quality and availability of goods or services. Outcomes of this nature are associated with significant public detriment.
- 4.84. Nonetheless, to some degree, information sharing is an inherent aspect of collective bargaining because in order to collectively negotiate terms and conditions with a supplier or customer, the members of the collective bargaining group must discuss their desired outcomes from negotiations and how these can best be achieved. It is difficult to imagine a collective bargaining arrangement that does not involve some form of information sharing between the members of the collective bargaining group.
- 4.85. However, while the sharing of information may influence a hospital's desired outcome from a negotiation process, it is not clear that the sharing of information in itself enhances the ability of the hospital to achieve its desired negotiation outcome. Rather, this is more dependent on the hospitals bargaining position in negotiations.
- 4.86. In respect of the arrangements the subject of the current Applications, as with their comments in relation to the proposed collective bargaining and boycott activity, the concerns raised by Medibank about information sharing appear to relate to the more general exchange of information within the SVHA Group, conduct which the group, other than SVPHS, can engage in whether or not authorisation is granted.
- 4.87. The ACCC also understands that Funding Organisations have the ability to impose confidentiality obligations which impede or prevent information sharing. The ACCC understands that SVHA's attempts to implement the information sharing arrangements the subject of their 2004 authorisations were frustrated by Funding Organisations' ability to do so. This suggests that Funding Organisations are genuinely able to choose whether to facilitate the proposed information sharing arrangements or not.
- 4.88. The ACCC considers that the anti-competitive detriment associated with SVPHS being granted authorisation to participate in the information sharing arrangements that the remaining members of the SVHA Group will otherwise engage in is limited.

#### **Exclusive Dealing**

- 4.89. The RCPA and Tissupath opposed any tying or bundling arrangement that would restrict doctors and patients to using the Applicants' hospitals choice of pathology provider.

#### *ACCC View*

- 4.90. While authorisation was initially sought to tie or bundle services supplied to patients, medical practitioners and Funding Organisations, on 26 June 2012 the Applicants amended their application such that authorisation is now sought only for the tying or bundling of goods or services supplied to Funding Organisations.

- 4.91. Accordingly, the exclusive dealing conduct the subject of the current application is now limited to SVPHS tying the supply of goods or services to Funding Organisations to the health or aged care facility acquiring goods and services from other members of the SVHA Group and other members of the SVHA Group similarly tying supply of goods or services to the purchase of goods or services from SVPHS.
- 4.92. The proposed arrangements, as amended, will not restrict doctors or patients using the SVHA Group's hospitals choice of pathology and other service provider.
- 4.93. In general tying arrangements can distort both demand for, and supply of, the product which consumers are forced to purchase. However, in this case the competitive detriment is limited by both the scope of the conduct, and the unique circumstances of the proposed arrangements whereby it is only because of the anomalous structure of SVPHS not being legally related to the other members of the SVHA Group that it is un-able to engage in such conduct.

### ***Balance of Public Benefit and Detriment***

- 4.94. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including from any lessening of competition.
- 4.95. In the context of applying the net public benefit test in section 90(8)<sup>20</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>21</sup>
- 4.96. Other than in relation to the arrangements the subject of the current Applications for authorisation in substance SVPHS functions as part of the SVHA Group. The effect of granting authorisation would be to address the legal impediment to SVPHS being included in the SVHA Group's negotiations of commercial arrangements with third party acquirers and suppliers of services to and from the SVHA Group that arises from the anomalous structure of SVPHS.
- 4.97. This is likely to result in public benefits arising from:
- costs savings to SVPHS and potentially suppliers and acquirers of its services through not having to negotiate agreements separately from the SVHA Group
  - facilitation of uniform operations between SVPHS and other members of the SVHA Group; and
  - improved input by SVPHS into negotiating processes.
- 4.98. The ACCC considers that the public detriments likely to be generated by the authorised conduct is likely to be limited having regard to following:

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<sup>20</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>21</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

- As members of the SVHA Group, other than SVPHS, are related bodies corporate, they are able to act as a single economic entity, including engaging in the conduct the subject of the applications for authorisation. Accordingly, the scope of the proposed arrangements is limited to SVPHS participating in the arrangements. The addition of SVPHS to the bargaining group will not materially affect the SVHA Group's market share in any relevant market and will not significantly increase either the bargaining power of the SVHA Group as a whole or the extent of any disruption to any business that may be affected if the Group were to decide not to deal with a business.
- If it were not for the anomalous structure of SVPHS, SVPHS would also be able to collectively bargain, and agree to refuse to deal with Funding Organisations and suppliers of goods and services in conjunction with the other members of the SVHA Group without requiring authorisation. In substance SVPHS already functions as part of the SVHA Group other than in respect of the conduct the subject of the current applicants for authorisation.

4.99. Accordingly, the ACCC considers the public benefits that are likely to result from the authorised conduct will outweigh any likely public detriments, including any detriment from a lessening of competition that may result. The ACCC is therefore satisfied that the relevant authorisation tests are met.

### ***Length of Authorisation***

- 4.100. In this instance, the Applicants seek authorisation for as long as the Applicants are related bodies corporate or are directly or indirectly owned and controlled by the Congregation of Religious Sisters of Charity of Australia or the Trustees of Mary Aikenhead Ministries.
- 4.101. The ACCC generally authorises arrangements for a limited period. Amongst other things, this practice allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 4.102. The ACCC may also review an authorisation prior to its expiry if there has been a material change in circumstances since the authorisation was granted.
- 4.103. Given the circumstances surround the authorisation, that is, the anomalous structure of the group, absent which SVPHS would be able to collectively bargain, and agree to refuse to deal with Funding Organisations and suppliers of goods and services in conjunction with the other members of the SVHA Group without requiring authorisation, the ACCC proposes that granting authorisation for an extended period is appropriate.
- 4.104. Therefore, the ACCC proposes to grant authorisation for a period of ten years.
- 4.105. It would be open to the Applicants to reapply for authorisation at the expiration of the current authorisation.

## 5. Draft determination

### *The Applications*

- 5.1. On 23 March 2012, the following parties lodged applications for authorisation with the ACCC:
- St Vincent's Health Australia Limited
  - The Congregation of Religious Sisters of Charity of Australia trading as St Vincent's Private Hospital Sydney
  - Trustees of Mary Aikenhead Ministries
  - The Holy Spirit Northside Private Hospital Limited.
- 5.2. Applications A91295 - A91297 were made using Form A, B, and E Schedule 1, of the *Competition and Consumer Regulations 2010*. The applications were made under subsections 88(1A), 88(1) and 88(8) of the Act for the following conduct:
- joint negotiations by any or all of the SVHA Group (including SVPHS) with health and aged care funders, the Repatriation Commission and third party payers/compensable organisations (collectively referred to as Funding Organisations) of Hospital Purchaser Provider Agreements (HPPAs) or other forms of revenue and/or funding agreements, which will include sharing data among the SVHA Group (such as cost or price information) at any time and reaching arrangements or understandings on the terms and conditions, including prices, for the supply of goods or services by any or all of these hospitals
  - joint negotiations by any or all of the SVHA Group with suppliers of goods or services, which will include sharing data among the SVHA Group (such as cost or price information) at any time and reaching arrangements or understandings on the terms and conditions, including prices, for the acquisition of goods or services by any or all of these hospitals
  - preventing, restricting or limiting the supply of goods or services (i.e. collective boycotts) to Funding Organisations or the acquisition of goods or services from other suppliers of goods or services by any or all of the SVHA Group
  - arrangements or understandings fixing, controlling or maintaining prices for, and discounts, allowances, rebates and credits in relation to goods or services supplied or acquired by any or all of the entities in the SVHA Group, including any associated sharing of data at any time, and
  - tying or bundling of goods or services in such a way that the supply of goods or services at one entity may be conditional on a third person's acquiring goods or services from another entity in the SVHA Group, where the third person is a Funding Organisation.
- 5.3. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

## ***The Net Public Benefit Test***

- 5.4. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the conduct for which authorisation is sought is likely to result in public benefits that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
- 5.5. In addition, the ACCC is satisfied that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.6. The ACCC therefore proposes to **grant** authorisation to applications A91295 - A91297.
- 5.7. For more information about the tests for authorisation and relevant provisions of the Act, please see the ACCC's Guide to Authorisation by following the links at [www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister).

## ***Conduct for Which the ACCC Proposes to Grant Authorisation***

- 5.8. The ACCC proposes to grant authorisation to the Applicants to engage in conduct the subject of the applications for ten years.
- 5.9. This draft determination is made on 31 July 2012.

## ***Further Submissions***

- 5.10. The ACCC will now seek further submissions from interested parties. In addition, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

# APPENDIX A

## ***Previous Authorisations***

### **2002 Authorisation (A90770-A90772)**

On 13 June 2002, the ACCC granted authorisation to Mater Hospital, SVPHS, Trustees of Sisters of Charity and Sisters of Charity Healthcare Australia (SCHS) to operate the merged entities within the group as a single economic entity, which involved:

- (1) Negotiating jointly with health funds and health insurers, which may include preventing, restricting or limiting the supply of goods or services by either or both St Vincent's and the Mater Hospital by way of Hospital Purchase Provider Agreement (HPPAs);
- (2) Otherwise jointly negotiating with suppliers and purchasers of goods or services which may include preventing, restricting or limiting the supply or acquisition of goods or services by any or all of the entities in the group;
- (3) Fixing, controlling or maintaining prices for, and discounts, allowances, rebates and credits in relations to goods or services supplied or acquired by any or all of the entities in the group; and
- (4) Tying or bundling goods and services across the St Vincent's Darlinghurst and the Mater North Sydney campuses in such a way that supply of goods or services at one hospital may be conditional on a patient, doctor, health fund or health insurer acquiring goods or services from another hospital in the group.

Authorisation was granted by the ACCC for as long as the applicants were directly or indirectly owned and controlled by the Sisters of Charity.

### **2004 Authorisation (A30216 & A30219)**

On 5 March 2004, the ACCC granted authorisation to SCHS, Mercy Health and Aged Care and the Holy Spirit Care Services in order to engage in the following conduct:

- (1) the HPPA network to collectively negotiate with health funds and the Repatriation Commission;
- (2) the four private hospitals owned by the Sisters of Charity Health Service and St Vincent's Private Hospital, Sydney to collectively boycott health funds and the Repatriation Commission;
- (3) the joint purchasing network to collectively negotiate with (and collectively boycott) their suppliers;
- (4) the HPPA and joint purchasing networks to be expanded, subject to certain conditions (for example, that the network not comprise more than 40 per cent of a relevant market). This did not allow the number of private hospitals able to collectively boycott health funds and the Repatriation Commission to increase; and
- (5) for the members of the HPPA and joint purchasing networks to exchange fee, cost, price and other information.

Authorisation was granted by the ACCC for 5 years.

## **2009 Authorisation (A91099)**

On 29 January 2009, the ACCC granted authorisation to a network of Catholic health facilities, represented by the Catholic Negotiating Alliance, to:

- collectively bargain with health funds and the Repatriation Commission
- collectively bargain with suppliers of various goods and services; and
- share particular information for the purpose of benchmarking.

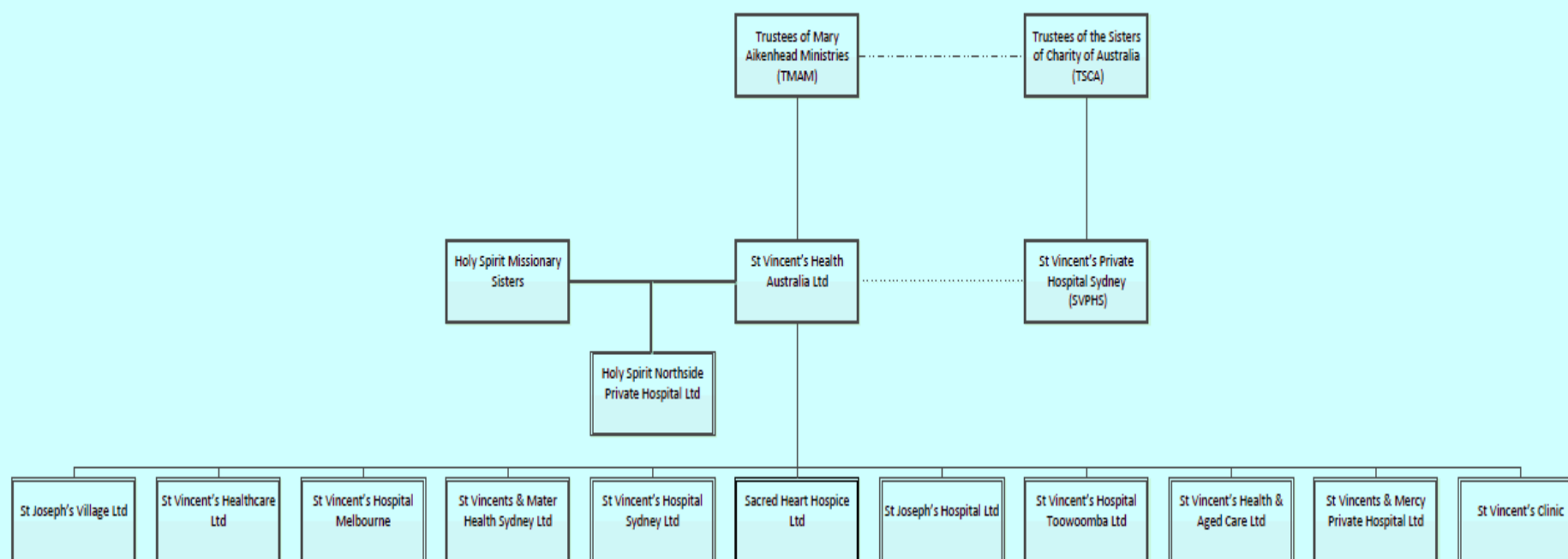
The ACCC denied authorisation to the network of Catholic health facilities to collectively boycott health funds and the Repatriation Commission in the event that collective negotiations failed, or if the health funds did not agree to participate in the information sharing arrangements.

The ACCC also denied authorisation to the network of Catholic health facilities to collectively boycott suppliers in the event that collective negotiations failed.

Authorisation was granted for five years.

## APPENDIX B

### *Governance structure for St Vincent's Health Australia Group*



1. TSCA is the sole member of the Trustees of Mary Aikenhead Ministries
2. SVPHS is owned and conducted by the Trustees of the Sisters of Charity of Australia
3. SVPHS is managed by SVHA for the Trustees of the Sisters of Charity of Australia
4. Holy Spirit Northside Private Hospital Ltd is a joint venture between SVHA and HSM and is operated by SVHA under a management agreement. TMAM appoints three of the five Directors.

## Appendix C

### *Relevant Statutory Tests and Provisions*

**Sections 90(5A) and 90(5B)** state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

**Sections 90(6) and 90(7)** state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.

**Section 90(8)** states that the ACCC shall not:

- make a determination granting:
  - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
  - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
  - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
  - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is

likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.