

Form A

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

EXCLUSIONARY PROVISIONS AND ASSOCIATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Names of Applicants:

A91295

St Vincent's Health Australia Limited (SVHA) ACN 073 503 536 and its subsidiaries;

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

Trustees of Mary Aikenhead Ministries (TMAM) ARBN 141 274 866; and

The Holy Spirit Northside Private Hospital Limited (HSN) ACN 082 189 035.

This application is to be read and determined together with the applications in Forms B and E (together, the **Application**) and the submission supporting the Application (the **Supporting Submission**), which are lodged with this form.

(b) Description of business carried on by Applicants:

The provision of health and aged care services. For more detail, please refer to section 2 of the Supporting Submission.

(c) **Address in Australia for service of documents on the applicant:**

Johnson Winter & Slattery
Level 25, 20 Bond Street
Sydney NSW 2000

Attention:	Aldo Nicotra	Michele Laidlaw
	Tel: 02 8274 9536	Tel: 02 8374 9533
	aldo.nicotra@jws.com.au	michele.laidlaw@jws.com.au

2. **Contract, arrangement or understanding**

(a) **Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:**

The Applicants seek authorisation from the Commission to operate all entities within the SVHA Group (as defined in the Supporting Submission) as if they were a single economic entity or effectively merged. This may involve, but is not restricted to, 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 patient, a doctor or a Funding Organisation.

Further information is set out in the Supporting Submission.

- (b) **Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, exclusionary provisions and (if applicable) are, or would or might be, cartel provisions:**

See response to 2(a) above and the Supporting Submission.

- (c) **Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:**

The provision of health and aged care services and goods or services acquired by one or more of the SVHA Group for the purposes of their health and aged care service businesses.

- (d) **The term for which authorisation of the provision of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:**

The Application is only necessary because, whilst the SVHA Group is in substance and economic terms already a single entity, its anomalous structure means that certain businesses within the group are unlikely to be considered “related bodies corporate” under the *Competition and Consumer Act 2010* (Cth).

In these circumstances, authorisation is sought for as long as SVHA, HSN and SVPHS are related bodies corporate or are directly or indirectly owned or controlled by the Sisters of Charity or TMAM.

3. Parties to the proposed arrangement

- (a) **Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:**

Not applicable.

- (b) **Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:**

Not applicable.

4. Public benefit claims

- (a) **Arguments in support of application for authorisation:**

Please refer to the Supporting Submission.

- (b) **Facts and evidence relied upon in support of these claims:**

Please refer to the Supporting Submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Please refer to the Supporting Submission.

6. Public detriments

- (a) **Detriments to the public resulting or likely to result from the contract arrangement or understanding for which authorisation is sought, in particular the likely effect of the contract arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:**

Please refer to the Supporting Submission.

- (b) **Facts and evidence relevant to these detriments:**

Please refer to the Supporting Submission.

7. Contracts, arrangements or understandings in similar terms

- (a) **This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:**

- (b) **Is this application to be so expressed?**

Yes

- (c) **If so, the following information is to be furnished:**

- (i) **description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:**

Not applicable.

- (ii) **Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:**

Not applicable.

- (iii) **Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:**

See response to 2(a) above and the Supporting Submission.

8. Joint Ventures

- (a) **Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?**

No

- (b) **If so, are any other applications being made simultaneously with this application in relation to that joint venture?**

Not applicable.

- (c) **If so, by whom or on whose behalf are those other applications being made?**

Not applicable.

9. Further information

- (a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:

Johnson Winter & Slattery
Level 25, 20 Bond Street
Sydney NSW 2000

Attention: Aldo Nicotra
Tel: 02 8274 9536
aldo.nicotra@jws.com.au

Michele Laidlaw
Tel: 02 8374 9533
michele.laidlaw@jws.com.au

Dated 8/3/12

Dated 9/3/12

Signed on behalf of **St Vincent's Health
Australia Limited** ACN 073 503 536

Signed on behalf of **St Vincent's Clinic** ACN
003 635 498

T Batten
(Signature)

M E Wilson
(Signature)

Dr Tracey Batten
(Full Name)

Michelle Elizabeth Wilson
(Full Name)

St Vincent's Health Australia
(Organisation)

ST VINCENT'S CLINIC
(Organisation)

Chief Executive Officer
(Position in Organisation)

EXECUTIVE DIRECTOR
(Position in Organisation)

Dated 15/3/2012

Signed on behalf of **The Congregation for Religious Sisters of Charity of Australia** trading as **St Vincent's Private Hospital Sydney**

(Signature) 


Sr Annette Cunliffe
(Full Name)

Congregation of Religious Sisters of Charity
(Organisation) Australia

Congregational leader
(Position in Organisation)

Dated 13/3/12

Signed on behalf of **Trustees of Mary Aikenhead Ministries** ARBN 141 274 866

(Signature) 

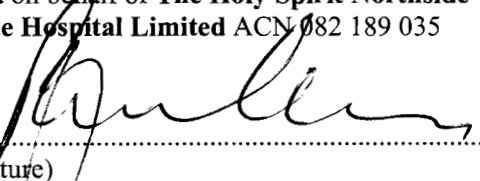
David Robinson
(Full Name)

Trustees of Mary Aikenhead Ministries
(Organisation)

Trustee and Chair
(Position in Organisation)

Dated 16/3/2012

Signed on behalf of **The Holy Spirit Northside Private Hospital Limited** ACN 082 189 035

(Signature) 

PATRICK JAMES MULLINS
(Full Name)

The Holy Spirit Northside
(Organisation) Private Hospital Ltd

Director, Board Chair.
(Position in Organisation)



DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which authorisation is sought.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
 8. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed contract, arrangement or understanding. Provide quantification of those detriments where possible.

9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.
10. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, and descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.



Form B

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of Applicants:

A91296

St Vincent's Health Australia Limited (**SVHA**) ACN 073 503 536 and its subsidiaries;

Congregation of Religious Sisters of Charity of Australia trading as St Vincent's Private Hospital Sydney (**SVPHS**);

Trustees of Mary Aikenhead Ministries (**TMAM**) ARBN 141 274 866; and

The Holy Spirit Northside Private Hospital Limited (**HSN**) ACN 082 189 035.

This application is to be read and determined together with the applications in Forms A and E (together, the **Application**) and the submission supporting the Application (the **Supporting Submission**), which are lodged with this form.

(b) Short description of business carried on by Applicants:

The provision of health and aged care services. For more detail, please refer to section 2 of the Supporting Submission.

(c) **Address in Australia for service of documents on the Applicants:**

Johnson Winter & Slattery
Level 25, 20 Bond Street
Sydney NSW 2000

Attention:	Aldo Nicotra	Michele Laidlaw
	Tel: 02 8274 9536	Tel: 02 8374 9533
	aldo.nicotra@jws.com.au	michele.laidlaw@jws.com.au

2. **Contract, arrangement or understanding**

(a) **Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:**

The Applicants seek authorisation from the Commission to operate all entities within the SVHA Group (as defined in the Supporting Submission) as if they were a single economic entity or effectively merged. This may involve, but is not restricted to, 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 patient, a doctor or a Funding Organisation.

Further information is set out in the Supporting Submission.

- (b) **Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:**

See response to 2(a) above and the Supporting Submission.

- (c) **Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:**

The provision of health and aged care services and goods or services acquired by one or more of the SVHA Group for the purposes of their health and aged care service businesses.

- (d) **The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:**

The Application is only necessary because, whilst the SVHA Group is in substance and economic terms already a single entity, its anomalous structure means that certain businesses within the group are unlikely to be considered “related bodies corporate” under the *Competition and Consumer Act 2010* (Cth).

In these circumstances, authorisation is sought for as long as SVHA, HSN and SVPHS are related bodies corporate or are directly or indirectly owned and controlled by the Sisters of Charity or TMAM.

3. Parties to the proposed arrangement

- (a) **Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:**

Not applicable

- (b) **Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:**

Not applicable

4. Public benefit claims

- (a) **Arguments in support of authorisation:**

Please refer to the Supporting Submission.

- (b) **Facts and evidence relied upon in support of these claims:**

Please refer to the Supporting Submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Please refer to the Supporting Submission.

6. Public detriments

- (a) **Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:**

Please refer to the Supporting Submission.

- (b) **Facts and evidence relevant to these detriments:**

Please refer to the Supporting Submission.

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) **Is this application to be so expressed?**

Yes

- (b) **If so, the following information is to be furnished:**

- (i) **description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:**

Not applicable.

- (ii) **Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:**

Not applicable.

- (iii) **Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:**

See response to 2(a) above and the Supporting Submission.

8. Joint Ventures

- (a) **Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?**

No

- (b) **If so, are any other applications being made simultaneously with this application in relation to that joint venture?**

Not applicable

- (c) **If so, by whom or on whose behalf are those other applications being made?**

Not applicable

9. Further information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

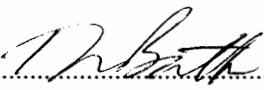
Johnson Winter & Slattery
Level 25, 20 Bond Street
Sydney NSW 2000

Attention: Aldo Nicotra
Tel: 02 8274 9536
aldo.nicotra@jws.com.au

Michele Laidlaw
Tel: 02 8374 9533
michele.laidlaw@jws.com.au

Dated 8/3/12

Signed on behalf of **St Vincent's Health
Australia Limited** ACN 073 503 536


(Signature)

Dr Tracy Batten
(Full Name)

St Vincent's Health Australia
(Organisation)

Chief Executive Officer
(Position in Organisation)

Dated 9/3/12

Signed on behalf of **St Vincent's Clinic** ACN
003 635 498


(Signature)

Michelle Wilson
(Full Name)

St Vincent's Clinic
(Organisation)

EXECUTIVE DIRECTOR
(Position in Organisation)

Dated 15/3/12

Signed on behalf of **The Congregation for Religious Sisters of Charity of Australia** trading as **St Vincent's Private Hospital Sydney**

[Signature]
(Signature)

Sr Annette Cunliffe rsc
(Full Name)
Congregation of Religious Sisters of Charity of Australia
(Organisation)

Congregational Leader
(Position in Organisation)

Dated 13/3/12

Signed on behalf of **Trustees of Mary Aikenhead Ministries** ARBN 141 274 866

[Signature]
(Signature)

David Robinson
(Full Name)

Trustees of Mary Aikenhead Ministries
(Organisation)

Trustee and Chair
(Position in Organisation)

Dated 16-3-2012

Signed on behalf of **The Holy Spirit Northside Private Hospital Limited** ACN 082 189 035

[Signature]
(Signature)

Patrick James Mullins
(Full Name)

The Holy Spirit Northside Private Hospital
(Organisation)

Director, Chair of Board
(Position in Organisation)



DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions. Provide details of those provisions of the contract, arrangement or understanding that do, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
 8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.

9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

Form E

Commonwealth of Australia

Competition and Consumer Act 2010 — subsection 88 (8)

EXCLUSIVE DEALING: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (8) of the *Competition and Consumer Act 2010* for an authorisation under that subsection to engage in conduct that constitutes or may constitute the practice of exclusive dealing.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of Applicants:

A91297

St Vincent's Health Australia Limited (SVHA) ACN 073 503 536 and its subsidiaries;

The Congregation of the Sisters of Charity of Australia, trading as St Vincent's Private Hospital (SVPHS);

Trustees of Mary Aikenhead Ministries (TMAM) ARBN 141 274 866; and

The Holy Spirit Northside Private Hospital Limited (HSN) ACN 082 189 035.

This application is to be read and determined together with the applications in Forms A and B (together, the **Application**) and the submission supporting the Application (the **Supporting Submission**), which are lodged with this form.

(b) Short description of business carried on by Applicants:

The provision of health and aged care services.

For more detail, please refer to section 2 of the Supporting Submission.

(c) Address in Australia for service of documents on the Applicants:

Johnson Winter & Slattery
Level 25, 20 Bond Street
Sydney NSW 2000

Attention: Aldo Nicotra
Tel: 02 8274 9536

Michele Laidlaw
Tel: 02 8374 9533

aldo.nicotra@jws.com.au

michele.laidlaw@jws.com.au

2. Contract, arrangement or understanding

(a) Description of the conduct that would or may constitute the practice of exclusive dealing:

The Applicants seek authorisation from the Commission to operate all entities within the SVHA Group (as defined in the Supporting Submission) as if they were

a single economic entity or effectively merged. This may involve, but is not restricted to, the following relevant conduct:

- tying or bundling of goods or services in such a way that the supply of goods or services at SVPHS be conditional on a third person's acquiring goods or services from another entity in the SVHA Group, where the third person is a patient, a medical practitioner or health and aged care funders, the Repatriation Commission and third party payers / compensable organisations (collectively referred to as **Funding Organisations**); and
- tying or bundling of goods or services in such a way that the supply of goods or services at one entity in the SVHA Group be conditional on a third person's acquiring goods or services from SVPHS, where the third person is a patient, a medical practitioner or a Funding Organisation.

Further information is set out in the Supporting Submission.

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

The provision of health and aged care services and goods or services acquired by one or more of the SVHA Group for the purposes of their health and aged care service businesses.

(c) The term for which authorisation of the conduct is being sought and grounds for supporting this period of authorisation:

The Application is only necessary because, whilst the SVHA Group is in substance and economic terms already a single entity, its anomalous structure means that certain businesses within the group are unlikely to be considered "related bodies corporate" under the *Competition and Consumer Act 2010* (Cth).

In these circumstances, authorisation is sought for as long as SVHA, HSN and SVPHS are related bodies corporate or are directly or indirectly owned and controlled by the Sisters of Charity or TMAM.

3. Parties to the proposed arrangement

(a) Class or classes of persons to which the conduct relates:

Patients, medical practitioners and Funding Organisations that wish to acquire health or aged care services.

(b) Number of those persons:

(i) At present time:

Unknown at this time.

(ii) Estimated within the next year:

Unknown at this time.

(c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Not applicable.

4. Public benefit claims

(a) Arguments in support of authorisation:

Please refer to the Supporting Submission.

(b) Facts and evidence relied upon in support of these claims:

Please refer to the Supporting Submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Please refer to the Supporting Submission.

6. Public detriments

(a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 2 (b) above and the prices of goods or services in other affected markets:

Please refer to the Supporting Submission.

(b) Facts and evidence relevant to these detriments:

Please refer to the Supporting Submission.

7. Joint Ventures

(a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No

(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable

(c) If so, by whom or on whose behalf are those other applications being made?

Not applicable

8. Further Information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Johnson Winter & Slattery
Level 25, 20 Bond Street
Sydney NSW 2000

Attention: Aldo Nicotra
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Michele Laidlaw
Tel: 02 8374 9533
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Dated 2 April

Signed on behalf of St Vincent's Health
Australia Limited ACN 073 503 536


(Signature)


Dr Tracey Leigh Batten
(Full Name)

St Vincent's Health Australia
(Organisation)

C.E.O.
(Position in Organisation)

Dated 4 April 2012

Signed on behalf of St Vincent's Clinic ACN
003 635 498


(Signature)

MICHELE ELIZABETH WILSON
(Full Name)

ST VINCENT'S CLINIC
(Organisation)

EXECUTIVE DIRECTOR
(Position in Organisation)

Dated 2 April 2012

Signed on behalf of **The Congregation for Religious Sisters of Charity of Australia** trading as **St Vincent's Private Hospital Sydney**

Annette Julie Cunliffe
(Signature)

Annette Julie Cunliffe
(Full Name)

Congregation of Religious Sisters of Charity
(Organisation)

Congregational leader
(Position in Organisation)

Dated 4/4/12

Signed on behalf of **Trustees of Mary Aikenhead Ministries** ARBN 141 274 866

David Robinson
(Signature)

David Robinson
(Full Name)

Trustees of Mary Aikenhead Ministries
(Organisation)

Chair of Trustees
(Position in Organisation)

Dated 2 April 2012

Signed on behalf of **The Holy Spirit Northside Private Hospital Limited** ACN 082 189 035

Dr Tracey Leigh Batten
(Signature)

Dr Tracey Leigh Batten
(Full Name)

Holy Spirit Northside Private Hospital
(Organisation)

Board Director
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business in the course of which the conduct is engaged in.
4. Provide details of the conduct (whether proposed or actual) which may constitute the practice of exclusive dealing in respect of which this authorisation is sought.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
 8. Provide details of the detriments to the public which may result from the conduct including quantification of those detriments where possible.

**Submission in support of
Applications for
Authorisation**

Trustees of Mary Aikenhead Ministries

St Vincent's Health Australia Limited

**The Holy Spirit Northside Private Hospital
Limited**

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

March 2012

CONTENTS

1	INTRODUCTION	3
1.1	The SVHA Group	3
1.2	Authorisation Sought	3
1.3	Term	4
1.4	Outline of Submission	4
2	THE APPLICANTS	5
2.1	The Sisters of Charity / Mary Aikenhead Ministries	5
2.2	St Vincent’s Health Australia Limited (SVHA).....	6
2.3	St Vincent’s Private Hospital (SVPHS)	8
2.4	The Holy Spirit Northside Private Hospital Limited (HSN).....	9
3	BACKGROUND	10
3.1	Existing Commission Authorisations	10
3.2	SVHA & HSN: “Related Bodies Corporate”	11
4	PROPOSED CONDUCT & RATIONALE	13
4.1	Proposed Conduct	13
4.2	Commercial Rationale.....	13
5	RELEVANT MARKETS	17
5.1	Overview.....	17
5.2	Health Services Market	17
5.3	Joint Purchasing Markets	18
6	NET PUBLIC BENEFIT TEST	20
6.1	Authorisations	20
6.2	Future With-and-Without Test	20
7	NO ANTI-COMPETITIVE DETRIMENT	21
7.1	Overview.....	21
7.2	Health Services Market(s).....	21
7.3	Joint Purchasing Markets	24
8	PUBLIC BENEFITS	27
8.1	Giving Effect to Existing Authorisations	27
8.2	Cost Savings	27
8.3	Broader Public Benefits	28
9	TIMING OF AUTHORISATION	30
9.1	Authorisation Term.....	30

1 INTRODUCTION

1.1 The SVHA Group

St Vincent's Health Australia Limited ACN 073 503 536 (**SVHA**) is a not-for-profit organisation incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**) and acts as the parent company for the majority of charitable health and aged care services previously operated by the Congregation of Religious Sisters of Charity of Australia (**Sisters of Charity**). SVHA operates under the direction of the Trustees of Mary Aikenhead Ministries ARBN 141 274 866 (**TMAM**).¹

SVHA has a number of wholly owned subsidiaries, which operate public hospitals, private hospitals and/or aged care facilities (see Table 1 for a description of certain relevant SVHA subsidiaries).

SVHA also holds a 50% ownership stake in The Holy Spirit Northside Private Hospital Limited ACN 082 189 035 (**HSN**), which operates Holy Spirit Northside, a private, not-for-profit tertiary hospital located in Chermside, Brisbane that provides comprehensive acute care services across a broad range of medical and surgical specialities. For reasons set out in detail below, it is submitted that HSN is also a “related body corporate” of SVHA and its wholly owned subsidiaries (as defined in the *Competition & Consumer Act 2010* (Cth) (the CCA)).

Finally, a wholly owned subsidiary of SVHA – St Vincents & Mater Health Sydney Ltd ACN 054 594 375 (**SVMHS**) – operates the Mater Hospital, North Sydney and also manages St Vincent's Private Hospital Sydney (**SVPHS**), a world-class medical and surgical facility that provides overnight and day only care across a broad spectrum of specialties. SVMHS manages SVPHS under a management agreement with the Sisters of Charity, who conduct the business.

Collectively, these entities are referred to as the SVHA Group. A flowchart of the relevant entities and relationships is attached as **Annexure A**.

1.2 Authorisation Sought

TMAM, SVHA, HSN and the Sisters of Charity trading as SVPHS (the **Applicants**) seek a very limited authorisation under s.88 of the CCA to operate all entities within the SVHA Group as if they were a single economic entity or merged.

This authorisation is only necessary because, whilst the SVHA Group is in substance and economic terms already a single entity, its anomalous structure means that certain businesses within the group are unlikely to be considered “related bodies corporate” under the CCA. Specifically SVPHS is unlikely to be a related party of SVHA or its subsidiaries because it is owned and operated by the Sisters of Charity, which is not a body corporate. Whilst the Australian Competition & Consumer Commission (the **Commission**) has already authorised SVPHS and SVMHS to act as a single commercial entity², it is not clear that the remaining

¹ TMAM is a body corporate whose members are the seven trustees of Mary Aikenhead Ministries, which in turn is an entity formed by the Sisters of Charity to ensure the long term viability of their health and aged care ministries. Further details are provided in section 2 below.

² *ACCC Determination – St Vincent's Private Hospital, Mater Misericordiae Hospital, Trustees of the Sisters of Charity of Australia and Sisters of Charity Healthcare Australia Ltd* (A90770 – A90772), 13 June 2002

SVHA subsidiaries and SVPHS can technically rely on the related bodies corporate exemptions under ss.44ZZRN, 45(8) and 47(12) of the CCA in their direct dealings with one another.

The scope of this authorisation application is very limited and for absolute certainty given:

- (a) 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;
- (b) SVPHS has existing Commission clearance to engage in the proposed conduct with the SVHA private hospital subsidiary that is most proximate to it, namely the Mater Hospital, North Sydney; and
- (c) the operation of an existing authorisation for the Catholic Negotiating Alliance (CNA), which was granted in 2009 for a period of five years (see section 3.1 for further details).

1.3 Term

The Applicants seek an authorisation for as long as SVHA, HSN and SVPHS are related bodies corporate or are directly or indirectly owned and controlled by the Sisters of Charity or TMAM (see section 2 for further details).

1.4 Outline of Submission

This submission is organised as follows:

- (a) section 2 outlines the entities that make up the SVHA Group and the details of the group structure;
- (b) section 3 describes the proposed conduct and the commercial rationale for the application;
- (c) section 4 provides relevant background relating to previous and existing Commission authorisations and the relationship between HSN and SVHA;
- (d) section 5 - 6 addresses the relevant markets in which the SVHA Group members operate and the net public benefit test the Commission will apply;
- (e) section 7 contains a competition assessment explaining why the proposed conduct does not give rise to any anti-competitive detriment;
- (f) section 8 outlines the public benefits associated with the proposed conduct; and
- (g) section 9 deals with the Applicants' proposed term.

2 THE APPLICANTS

2.1 The Sisters of Charity / Mary Aikenhead Ministries

The Sisters of Charity were founded in Ireland in 1815. The first five Sisters of Charity arrived in Sydney in 1838 and were the first religious women in Australia. Their earliest work was with convict women and children at the 'Female Factory' in Parramatta. Their work subsequently expanded to providing education and health and aged care facilities in the four eastern States of Australia.

The Sisters of Charity hold five core values:

- (a) **Compassion** – accepting people as they are, bring to each the love and tenderness of Christ;
- (b) **Justice** – acting with integrity and respecting the rights of all;
- (c) **Human dignity** – respecting the uniqueness of each person created in the image and likeness of God;
- (d) **Excellence** – excelling in all aspects of their healing ministry; and
- (e) **Unity** – creating a community characterised by harmony and collaboration.

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 her Council (**CL&C**) who are responsible for the administration of the congregation. The Trustees of the Sisters of Charity of Australia ARBN 007 502 945 (**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. Essentially, the TSCA is a corporate entity through which the business of the Sisters of Charity can be conducted.

Until the early 1990's, all of the health, aged care and education facilities of the Sisters of Charity were conducted directly by the Sisters of Charity. From 1990, the operations of most facilities were transferred to corporations limited by guarantee incorporated under the Corporations Law. One example of this is SVHA and its subsidiaries (see section 2.2 below for further details). The TSCA was the only Corporations Act member of most of these companies.

As the Sisters of Charity congregation is aging they initiated a process 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 2009.³ 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

³ Mary Aikenhead Ministries was granted canonical status as a public juridic person of pontifical right by the Roman Catholic Church's Congregation for Institutes of Consecrated Life and Societies for Apostolic Life on 25 April 2008.

trustees, currently made up of one member of the Sisters of Charity and five lay colleagues. 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 ARBN 141 274 866 (**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. A copy of the *Roman Catholic Church Communities' Lands Act 1942* (NSW) is attached as **Annexure B**.

2.2 St Vincent's Health Australia Limited (SVHA)

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 ACN 073 503 536 (**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 member of SCHS. As a company limited by guarantee, SCHS did not have share capital.

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.

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 drew on the talents of over 1,300 volunteers. In 2010/11 SVHA cared for 246,548 inpatients and provided 887,146 episodes of ambulatory care.⁴ Further details regarding SVHA, its operations and governance structure is available at <http://www.svha.org.au> and <http://www.maryaikenheadministries.com.au/>.

Following a review of its governance arrangements in 2010, SVHA has also adopted a new leadership model to further efforts in health and aged care in the coming years. Historically, SVHA was served by a state-based operational model with independent boards in each region. However, building on this foundation, SVHA has now established a single board with fiduciary responsibilities across most of its wholly owned subsidiaries and an enhanced group executive team to lead its operations.⁵ This means SVHA is well placed to meet emerging needs in health care, ensure robust governance, deliver excellence in clinical services and take advantage of operational efficiencies arising from greater collaboration and cooperation across the regions.

SVHA's new leadership model means the board of SVHA concurrently meets as the board of nearly all the relevant wholly owned subsidiaries set out in **Table 1** below, with only one fiduciary board remaining (see St Vincent's Clinic at (12)).

⁴ A copy of the SVHA Annual Report 2010/11 is at **Annexure C**

⁵ The SVHA Board also sits as the body of responsible officers for SVPHS – see section 2.3

Table 1: Relevant SVHA Subsidiary Companies

No.	Subsidiary	Operating Facilities	Location
PUBLIC HOSPITALS⁶			
1.	St Vincent's Hospital Sydney Ltd (ACN 054 038 872)	St Vincent's Hospital	Sydney, NSW
2.	Sacred Heart Hospice Ltd (ACN 053 439 820)	Sacred Heart Hospice	Sydney, NSW
3.	St Joseph's Hospital Ltd (ACN 053 439 848)	St Joseph's Hospital	Sydney, NSW
4.	St Vincent's Hospital Melbourne Ltd (ACN 052 110 755)	<ul style="list-style-type: none"> • St Vincent's Hospital • St George's Health Service (including Normanby House; Auburn House; Riverside House; Cambridge House) • Caritas Christi • Prague House 	Melbourne, Victoria
PRIVATE HOSPITALS & AGED CARE			
5.	St Vincents & Mater Health Sydney Ltd (SVMHS) (ACN 054 594 375)	<ul style="list-style-type: none"> • Mater Hospital, North Sydney • SVPHS (managed under agreement with Sisters of Charity, who conduct the business) 	Sydney, NSW
6.	Trustees of St Vincents & Mater Health Sydney Ltd (ACN 139 652 109)	Deregistered on 10 August 2011	
7.	St Joseph's Village Ltd (ACN 052 435 711)	St Joseph's Village (an aged care / retirement facility)	Sydney, NSW
8.	St Vincent's Private Hospital Melbourne Limited ⁷ (ACN 083 645 505)	<ul style="list-style-type: none"> • St Vincent's Private Hospital, Fitzroy • St Vincent's Private Hospital, East Melbourne • St Vincent's Private Hospital, Kew⁸ 	Melbourne, Victoria
9.	St Vincent's Health & Aged Care Ltd (ACN 055 210 378)	<ul style="list-style-type: none"> • St Vincent's Hospital • Caritas Care (a number of aged care campuses) 	Brisbane, Queensland

⁶ In NSW, the SVHA subsidiaries listed in (1) – (3) operate public hospitals because their facilities are recognised establishments of “affiliated health organisations”, as per Schedule 3 of the *Health Services Act 1997* (NSW). In Victoria, St Vincent's Hospital Melbourne Ltd is listed as a denominational hospital in Schedule 2 of the *Health Services Act 1988* (Vic).

⁷ This corporate entity was previously known as St Vincents & Mercy Private Hospital Ltd, with the name change registered on 23 November 2011.

⁸ For the avoidance of doubt, the prior names of these facilities were St Vincents Private Hospital, Mercy Private Hospital and Vimy Private Hospital respectively.

No.	Subsidiary	Operating Facilities	Location
10.	St Vincent's Hospital Toowoomba Ltd (ACN 055 196 533)	St Vincent's Hospital	Toowoomba, Queensland
OTHER			
11.	St Vincent's Healthcare Ltd (ACN 095 382 791)	Nil – an asset owning company	
12.	St Vincent's Clinic (ACN 003 635 498) NB: Retains own fiduciary board	St Vincent's Clinic (provides an extension of diagnostic and treatment services, including St Vincent's Private Hospital Day Surgery Unit)	Sydney, NSW

2.3 St Vincent's Private Hospital (SVPHS)

St Vincent's Private Hospital (**SVPHS**) is a 250 bed private acute-care medical and surgical hospital located in Darlinghurst, Sydney. It is collocated with St Vincent's (Public) Hospital, the Sacred Heart Hospice and St Vincent's Clinic and offers an integrated range of services for patients seeking private healthcare.

SVPHS provides overnight and day only care across a broad range of specialties with services provided in major fields of medicine and surgery with the exception of obstetrics and paediatrics. With the support of over 300 specialists that are accredited to admit patients, and through continuous investment in modern facilities, the latest technological advances and specialised staff, SVPHS has become a leader in many areas including cardiac care, cancer, neurosurgery, orthopaedics, head, neck, and reconstructive surgery, laser and laparoscopic surgery.⁹

SVPHS is conducted directly by the Sisters of Charity and not by a company incorporated under the Corporations Act or any other statute. The terms of the Resch bequest, a significant source of funding for SVPHS, require that the Sisters of Charity themselves continue to conduct SVPHS. **[RESTRICTION OF PUBLICATION OF PART CLAIMED]**

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.

Though SVPHS is arguably not, in a strict legal sense, a related body corporate of the other facilities controlled by SVHA (as defined in the CCA), in substance it functions as part of the same economic entity. This was readily acknowledged by the Commission in June 2002, when SVPHS, SVMHS, TSCA and SVHA¹⁰ were granted an authorisation allowing SVPHS and the Mater Hospital North Sydney to be operated as a single economic entity. This authorisation was granted “.. for as long as the applicants are directly or indirectly owned and controlled by the Sisters of Charity.”¹¹

⁹ See <http://www.stvincentsprivatehospital.com.au/about> for further details.

¹⁰ At that time, SVMHS was termed Mater Misericordiae Hospital Ltd and SVHA was termed Sisters of Charity Healthcare Australia Limited.

¹¹ Ibid. n2 at [8.31].

2.4 The Holy Spirit Northside Private Hospital Limited (HSN)

The Holy Spirit Northside Private Hospital Limited ACN 082 189 035 (**HSN**) operates Holy Spirit Northside hospital, which opened in July 2001 and is located in Chermside, Brisbane. Holy Spirit Northside hospital is a private, acute care tertiary hospital providing comprehensive inpatient and day services across a broad range of medical and surgical specialities. It is also co-located with The Prince Charles Hospital, contributing significantly to the teaching and research roles in cardiology, general surgery and orthopaedic treatments.

Holy Spirit Northside hospital 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.¹²

HSN was developed by the Sisters of Charity and the Holy Spirit Missionary Sisters¹³ and associated entities of each (namely, SVHA (previously SCHS) and the Mission Congregation of the Servants of the Holy Spirit – previously Holy Spirit Services) each hold a 50% ownership stake. HSN is operated in accordance with the HSN Members Agreement (first entered into in March 1999) and pursuant to a Constitution. A copy of the HSN Members Agreement (along with relevant Deeds of Amendment) and the HSN Constitution are attached as **Confidential Annexure D**.

¹² See <http://www.holyspiritnorthside.org.au/home.html>

¹³ The Holy Spirit Missionary Sisters are a congregation of religious women founded in the Netherlands in 1889. They established a presence in Brisbane in 1944. In June 2000, Holy Spirit Care Services Limited ACN 093 214 085 (**Holy Spirit Services**) was established to facilitate management of the Holy Spirit Sisters' health facilities and to progress partnership arrangements with the Sisters of Charity.

3 BACKGROUND

3.1 Existing Commission Authorisations

Authorisation A90770 – A90772: SVPHS / SVMHS

Using the current corporate names, in 2001 SVHA on behalf of the Sisters of Charity acquired SVMHS, which operated the Mater Hospital North Sydney. SVHA also entered into an agreement with the Sisters of Charity to manage SVPHS via SVMHS whilst the Sisters of Charity continued to conduct the business. Authorisation applications were lodged to allow the relevant entities within the post-acquisition hospital group to operate as if they were a single economic entity. This was because those entities, namely SVPHS (owned and operated by the Sisters of Charity, which is not a body corporate) and SVMHS, were not “related bodies corporate” under the CCA.

On 13 June 2002 the Commission issued a final determination granting an authorisation that allows SVPHS and Mater Hospital, North Sydney to act as a single commercial entity for as long as SVHA, SVMHS and SVPHS are directly or indirectly owned and controlled by the Sisters of Charity (the **2002 Authorisation**).

The Commission noted the unique circumstances concerning the application, in that in the absence of the “anomalous group structure” they faced, the parties would not have needed to seek authorisation because they would have been related parties under the CCA.

The Commission also considered that there would be minimal anti-competitive detriment flowing from any co-ordinated conduct between SVPHS and Mater Hospital, North Sydney. In reaching this conclusion, the Commission noted that there were “... *a number of large private hospitals operating in North Sydney and South East Sydney*” that would constrain an attempt by the parties to sustain a price increase and furthermore, “... *there appeared to be only marginal competition between the Mater Hospital and St Vincent’s [Private]*”.¹⁴ This assessment remains accurate today.

Authorisation A91099: SVHA

In 2008 SVHA sought reauthorisation for a network of Catholic health facilities, represented by the Catholic Negotiating Alliance (CNA) to:

- (a) collectively bargain with health funds and the Repatriation Commission and collectively boycott health funds and the Repatriation Commission in the event that collective negotiations fail;
- (b) share particular information for the purposes of benchmarking and collectively boycott health funds if they do not agree to facilitate the information sharing arrangements; and
- (c) collectively bargain with suppliers of various goods and services.

Most relevantly for present purposes one proposed network included a limited suite of interrelated private hospital operators, namely wholly owned subsidiaries of SVHA, SVPHS

¹⁴ Ibid. n2 at [8.16] – [8.17]

and two shared ownership entities (known as the **Partner Hospitals Group**).¹⁵ On 29 January 2009, the Commission granted an authorisation for a period of five years that allowed the Partner Hospitals Group to “*jointly negotiate Hospital Purchaser Provider Agreements and other forms of revenue agreements with health funds and the Repatriation Commission*” (the **2009 Authorisation**).¹⁶

The 2009 Authorisation also allowed:¹⁷

- (a) a network of Catholic private hospital operators (including the SVHA Group’s private hospitals, including SVPHS), referred to as the CNA Revenue Negotiation Network (**RNN**) to:
 - (i) jointly negotiate Hospital Purchaser Provider Agreements and other forms of revenue agreements with health funds and the Repatriation Commission; and
 - (ii) exchange aggregated and benchmark revenue data, and to share activity, costs and efficiency data for the purposes of benchmarking.
- (b) a network of healthcare facility operators (including the SVHA Group’s wholly owned subsidiaries – including public hospitals – and SVPHS), referred to as the CNA Joint Purchasing Network (**JPN**) to jointly negotiate the acquisition of goods and services from suppliers.

As a member of the CNA, SVHA will engage its services from time to time.

3.2 SVHA & HSN: “Related Bodies Corporate”

HSN Members Agreement

At the time of the 2009 Authorisation, as a joint venture of SVHA and the Holy Spirit Missionary Sisters, HSN was not considered a ‘related body corporate’ of SVHA. Instead, it was termed a ‘shared ownership entity’.

Since that time there have been some critical amendments to the HSN Members Agreement between SVHA and the Holy Spirit Missionary Sisters that, in conjunction with the Constitution, governs the operation of HSN. By Deed of Amendment (2) dated September 2010 and Deed of Amendment (3) dated October 2011, clause 3 of the HSN Members Agreement was deleted and replaced with the following (our emphasis):

3.1 *The Company shall have 5 directors.*

3.2 *SVHA will nominate, and the Trustees of Mary Aikenhead Ministries will appoint, 3 suitable persons to be directors of the Company pursuant to the Constitution PROVIDED HOWEVER that SVHA will ensure that the appointment of any prospective directors of the Company will be subject to consultation with The Holy Spirit Missionary Sisters.*

¹⁵ The shared ownership entities were HSN and St Vincents & Mercy Private Hospital Limited (now known as St Vincent’s Private Hospital Melbourne Limited). SVHA held a 50% stake in both at the time. In March 2011 the SVHA Group acquired the remaining 50% of St Vincents & Mercy Private Hospital Limited, making it a wholly owned subsidiary of SVHA.

¹⁶ *ACCC Determination – St Vincent’s Health Australia* (A91099), 29 January 2009 at [10.9] – the ability to engage in collective boycotts with the shared ownership entities was denied.

¹⁷ *Ibid.* n16 at [10.9].

- 3.3 *The Holy Spirit Missionary Sisters will appoint 2 suitable persons to be directors of the Company pursuant to the Constitution PROVIDED HOWEVER that The Holy Spirit Missionary Sisters will ensure that the appointment of any prospective directors of the Company will be subject to consultation with SVHA.*
- 3.4 *Either Member may, on reasonable grounds, remove from office any director nominated and appointed by that Member, following consultation with the other Member.*
- 3.5 *Either Member may request the other Member to consider removing any director nominated and appointed by that other Member, identified as not acting in the best interests of the Company.*

The Applicants submit that these amendments to the HSN Members Agreement result in circumstances where SVHA and HSN are related body corporates within the meaning of s.4A of the CCA, because SVHA operates under the direction of the Trustees of Mary Aikenhead Ministries (or **TMAM**) and TMAM appoint the majority of the directors of HSN.

4 PROPOSED CONDUCT & RATIONALE

4.1 Proposed Conduct

The Applicants seek authorisation under s.88 of the CCA to operate all entities within the SVHA Group (and particularly the relevant entities listed in Table 1) as if they were a single economic entity or effectively merged. This may involve, but is not restricted to, the following conduct:

- (a) 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 entities;
- (b) joint negotiations by any or all of the SVHA Group with suppliers of goods or services (including issuing joint tenders), 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 entities;
- (c) 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;
- (d) 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
- (e) tying or bundling of goods or services in such a way that the supply of goods or services at one entity (such as SVPHS) 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 patient, a doctor or a Funding Organisation.

In this regard, the Applicants have lodged three applications under ss. 88(1), 88(1A) and 88(8) of the CCA. The applications cover the above listed conduct, which the Applicants propose to engage in, in order to truly operate the SVHA Group as one entity.

4.2 Commercial Rationale

As outlined in SVHA's submission in support of its authorisation application for the Catholic Negotiating Alliance (CNA) in August 2008, the Catholic health sector forms the largest non-government grouping of health, community and aged care services in Australia. It plays a critical role in the overall health care industry, accounting for:¹⁸

¹⁸ Catholic Health Sector Information Report 2010: <http://cha.org.au/site.php?id=858>

- (a) around 8,500 hospital beds across 66 hospitals – 20 publicly and 46 privately funded hospitals (covering around 74 service locations);
- (b) 7 teaching hospitals and 8 dedicated hospices and palliative care facilities;
- (c) 550 aged care service locations with 180,000 aged care beds (high and low care);
- (d) around 10% of all public and private hospital beds in Australia; and
- (e) the employment of approximately 35,000 people.

It remains a matter of significance that this important sector within the national health system (and the SVHA Group, as one part of that sector) should operate as effectively and efficiently as possible. In this case, this involves ensuring that the SVHA Group hospitals (who are in substance and economic terms already a single entity) feel secure in fully coordinating with each other as well as SVPHS in order to access efficiencies equivalent to those able to be achieved in the ‘for profit’ health sector, which does not face the same ‘anomalous’ corporate structures and where there has been a significant degree of consolidation over past 5 – 6 years. This includes:

- (f) the acquisition of Affinity Health Limited by Ramsay Healthcare Limited (**Ramsay**) in 2005, and the associated divestment of certain hospitals in NSW, Western Australia and Victoria to Healthscope Limited (**Healthscope**); and
- (g) the various acquisitions made by Healthe Care Australia Pty Ltd (the **Healthe Care Group**) since its entry into the supply of private hospital services in late 2005.

The SVHA Group’s ability to operate as a single entity is also increasing in importance in circumstances where there are now multiple health funds operating in most Australian states with market shares that mean private hospitals must reach a revenue agreement with them in order to remain viable. This industry concentration has only deepened in the recent past with the following consolidations:

- (a) the merger of BUPA Australia Health Pty Ltd (**BUPA**) and MBF in 2007;
- (b) Medibank Private Limited’s (**Medibank**) acquisition of Australian Health Management (**AHM**) in mid to late 2008; and
- (c) Hospitals’ Contribution Fund of Australia Limited’s (**HCF**) acquisition of Manchester Unity Australia Limited in late 2008.

The significant industry consolidation is highlighted by the reduction in the overall number of private health insurers, which has fallen from 49 in 1995 to 35 as of 1 July 2010.¹⁹ Moreover, the top five private health insurers (or insurer groups) now account for approximately 84% of the national industry. National market shares for these insurers for 2010 and 2011 are set out in **Table 2** below by way of illustration.

¹⁹ A complete list of the private health insurers currently registered under the *Private Health Insurance Act 2007* is at **Annexure E**.

Table 2: Private Health Insurers – National Market Shares

No.	Insurer	National Market Share (Total Policies)	
		30 Jun 2010	30 Jun 2011
1.	Medibank / AHM	31.3%	30.6%
2.	BUPA / MBF Alliances	27.1%	26.9%
3.	HCF / Manchester Unity	10.3%	10.5%
4.	HBF / Healthguard	8.1%	8.2%
5.	NIB	7.3%	7.5%
Sub Total		84.1%	83.7%
	Other funds (approx. 27 insurers)	15.9%	16.3%
Total		100.0%	100.0%

Source: Private Health Insurance Administration Council (PHIAC), Operations of the Private Health Insurers – Annual Reports 2009/10, 2010/11

The PHIAC “... expects that this trend of consolidation within the industry will continue in the future”.²⁰ This expectation is supported by recent comments from BUPA’s managing director that “... the insurer had been buoyed by the MBF integration and was now “very much open” for further acquisitions”.²¹

In parallel with this consolidation trend, the private health insurance industry has become increasingly commercially aggressive, having evolved from a sector where “for profit” operators held a market share of approximately 15.9% in 2005 to a share of approximately 68.6% in 2011. This transition has also been recognised by PHIAC, which noted in its Annual Report 2010/11 that “.. the traditional emphasis on not-for-profit operations and strong mutual ethos shifted as the number of for-profit insurers has increased from four to seven — 68.6% of policyholders are now covered by a for-profit health insurer.”

Furthermore, smaller health funds are able to participate in collective negotiations with hospital service providers through negotiating alliances such as the following:

- (a) the Australian Health Services Alliance (AHSA), which represents approximately 24 small to medium private health funds and has been, negotiating contracts with hospital service providers on behalf of all its members for over 15 years;²² and
- (b) the Australian Regional Health Group (ARHG), which is a collaboration of approximately 4 private health funds that engages in joint negotiation of HPPAs and other forms of revenue agreements.²³

Indeed, apart from the top five private health insurers listed in Table 2 above, every remaining insurer listed in Annexure E is a member of either AHSA or ARHG.

²⁰ PHIAC, Operations of the Private Health Insurers – Annual Report 2009/10 at p.10

²¹ “Bumper health harvest for Bupa”, BusinessDay – The Age, 22.10.2011 at p.6

²² See <https://www.ahsa.com.au/web> for further details

²³ See <https://www.arhg.com.au/> for further details

The end result is that individual private hospitals or groups of hospitals can face a substantial imbalance in power when seeking to negotiate the revenue agreements on which their viability and ability to invest in staff and facilities depends. In this context, it has become vital for the SVHA Group to at least be able to meet any such power imbalance with a genuine group approach that fully incorporates HSN and SVPHS.

5 RELEVANT MARKETS

5.1 Overview

The Applicants believe that the markets most likely to be affected by the proposed conduct could be characterised as follows:

- (a) 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**);²⁴ and
- (b) various markets for inputs jointly purchased by the SVHA Group (the **Joint Purchasing Markets**).

Though the Applicants submit that it is not necessary to comprehensively define the relevant markets in this case, their product and geographic dimensions are addressed in some further detail below.

5.2 Health Services Market

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.

From a product perspective, the Applicants submit that the Health Services Market should properly include services from health providers in addition to private hospitals, such as private beds in public hospitals. This is reflected in the fact that boundaries between public hospitals and private hospitals and the services provided within each sector are becoming increasingly blurred.²⁵

In relation to the geographic dimension of the Health Services Market, the Applicants note that the Commission's most recent consideration of these markets (the 2009 Authorisation) again expressed the view that it "... considers the relevant area of competition to be the state markets for the acquisition of private hospital services by Funding Organisations."²⁶

The Applicants acknowledge the Commission's view and submit 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. For example, to SVHA's knowledge, health fund negotiation team members are allocated responsibility on a state by state basis and in some instances, funds also operate at a national level, with a negotiation team member 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 (who are "for profit" organisations). Indeed, the SVHA Group understands that both Ramsay

²⁴ It may be the case that a separate product market exists for the acquisition of aged care goods and services by Funding Organisations, but SVHA submits that the competitive dynamic of any such market will be unaffected by this application, given the conduct in question relates only to confirming the inclusion of SVPHS in the dealings of the other related bodies corporate that make up the SVHA Group and SVPHS does not supply aged care services.

²⁵ For example, see Commonwealth Department of Health and Ageing Submission to Productivity Commission, Hospital Performance Study, July 2009 at p.12

²⁶ Ibid. n16 at [6.8]

Health Care and Healthscope typically conduct their negotiations with Funding Organisations on a national basis.

However, without conceding a narrower market definition, for the avoidance of doubt the Applicants have conducted their assessment of the Health Services Market in this case based upon:

- (a) market shares estimates derived from the number of available private hospital beds alone; and
- (b) a geographic scope that is limited to the state-based markets of NSW, Victoria and Queensland, where the SVHA Group operates.

Even on this conservative basis, the full incorporation of SVPHS into the SVHA Group has minimal (if any) impact on the competitive structure of the industry.

5.3 Joint Purchasing Markets

The SVHA Group wishes to jointly acquire goods and services on behalf of all its relevant entities (including its public and private hospitals), which will include but is not limited to:

- (a) medical and surgical supplies;
- (b) general supplies, including stationery and furniture;
- (c) capital equipment, including diagnostic equipment;
- (d) pharmaceuticals and pharmacy services;
- (e) diagnostic supplies and services;
- (f) “hotel” services such as cleaning, catering and linen services;
- (g) security and maintenance services;
- (h) banking services;
- (i) insurance services;
- (j) construction services;
- (k) energy and other utilities;
- (l) pathology supplies and services;
- (m) telecommunications services; and
- (n) management, consultancy and legal services.

Hospital (i.e. medical and surgical) supplies, 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. Most suppliers in these markets

are multinational organisations that manufacture and distribute their products globally and have significant countervailing power. By way of example, the top suppliers to the SVHA Group for FY2010 are exclusively large suppliers of these services set out in **Table 3** below.

Table 3: Top SVHA Suppliers –FYE 2010

No.	Supplier	Product Category	Geographic Scope
1	Symbion Pharmacy Services Pty Ltd	Pharmaceutical & pharmacy services	National
2	Medtronic Australasia Pty Ltd	Medical & surgical supplies	Global
3	Johnson & Johnson Medical Pty Ltd	Medical & surgical supplies	Global
4	Clifford Hallam Healthcare	Medical & surgical supplies	National
5	Stryker Australia Pty Ltd	Medical & surgical supplies	Global
6	Boston Scientific Pty Ltd	Medical & surgical supplies	Global
7	Covidien / Tyco Healthcare Pty Ltd	Medical & surgical supplies	Global
8	Smith & Nephew Surgical Pty Limited	Medical & surgical supplies	Global
9	Baxter Healthcare Pty Ltd	Medical & surgical supplies	Global
10	Gilead Sciences	Medical & surgical supplies	North America, Europe & Aust
11	Device Technologies Australia	Medical & surgical supplies	Australia / NZ
12	Abbott Vascular	Medical & surgical supplies	Global

Source: SVHA Group, websites of major groups, DoHA

The Applicants therefore believe that the geographic market for these products is, in most cases, at least national and often international.

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. Once again, the suppliers of these products are typically large companies with significant countervailing power.

6 NET PUBLIC BENEFIT TEST

6.1 Authorisations

SVHA is seeking an authorisation under ss. 88(1) and 88(1A) of the CCA to make or give effect to a cartel provision or a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect of, substantially lessening competition within the meaning of the CCA.

The relevant tests for this application are found in ss. 90(6) and 90(7) of the CCA, which state that the Commission shall not grant an authorisation unless it is satisfied in all the circumstances that:²⁷

- (a) the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
- (b) this benefit 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 concerned was given effect to.

The term “public benefit” is not defined in the CCA, but the Applicants submit it should be given its widest possible meaning, in accordance with the approach advocated by the Australian Competition Tribunal.²⁸

6.2 Future With-and-Without Test

In identifying and analysing the public benefit and public detriment generated by arrangements such as the proposed conduct, the Commission applies the 'future with or without test'. This involves an examination of the *counterfactual* (likely future state of competition without the arrangement) with the *factual* (likely future state of competition with the arrangement).

Factual

The factual involves the Applicants engaging in the proposed conduct and acting in all circumstances as if they were a single economic entity.

Counterfactual

If authorisation is not granted, those members of the SVHA Group that are related bodies corporate for the purposes of the CCA will lawfully act as a single economic entity, including engaging in collective negotiations with Funding Organisations and joint purchasing activity. This conduct will encompass all the SVHA Group members with the exception of SVPHS.

Moreover, SVPHS and Mater Hospital, North Sydney will continue to act collectively, as authorised by the Commission under the terms of the 2002 Authorisation.

²⁷ The Applicants are also seeking authorisation in relation to potential exclusionary provisions. The test in this regard is set out in s.90(8) of the CCA in slightly different wording, but it is submitted the application is broadly the same.

²⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677

7 NO ANTI-COMPETITIVE DETRIMENT

7.1 Overview

The factual and counterfactual scenarios proposed by the Applicants in section 6 highlights the absence of any potential competition concerns associated with this authorisation application. It is difficult to envisage that there could be any detriment, in the form of lessening of competition, arising from the inclusion of SVPHS in the general commercial dealings of the SVHA Group in circumstances where SVPHS is already authorised to enter arrangements with at least one member of that Group (namely Mater Hospital, North Sydney).

The Applicants submit the treatment of SVPHS as a “related body corporate” of SVHA, its subsidiaries and HSN will not lessen competition in any relevant market.

7.2 Health Services Market(s)

The full inclusion of SVPHS within the SVHA Group’s collective dealings (and potential boycotts) with Funding Organisations will not alter the competitive landscape of any state health services market in any meaningful sense. Rather, allowing the authorisation will simply reflect the commercial reality that SVPHS essentially already functions as part of the SVHA Group.

Indeed, given the location of SVPHS and the adoption of a state-based health services market, the proposed conduct cannot affect competition in any health services market outside NSW and within NSW the proposed conduct (inclusive of collective boycott rights) will have no effect on competition for the following reasons:

- (a) Existing authorisations mean the current application cannot result in anti-competitive detriment.

Apart from SVPHS, the only SVHA Group private hospital operating in NSW is Mater Hospital, North Sydney. Currently there is no competition between these entities in the health services market as SVPHS and Mater Hospital, North Sydney already have an authorisation to act as a single economic entity (the 2002 Authorisation). This will not change going forward.

Essentially, this authorisation application produces a situation akin to that addressed by the Commission in a previous iteration of the 2009 Authorisation²⁹, where it considered the “... *public detriment arising from permitting SVPHS participating in collective boycott with the four hospitals owned by the Sisters of Charity Health Service*”³⁰. In that instance, where the market in question was a local/regional or statewide market for the acquisition of health services from private hospitals, the Commission concluded:³¹

“... the only hospital (of the four relevant hospitals) that could possibly be in the same market as SVPHS is Mater, North Sydney. As the two hospitals have already been authorised to act as one commercial entity, granting the current application would generate no additional anti-competitive detriment.” (our emphasis)

²⁹ ACCC Determination – Sisters of Charity Health Services Limited (A30216 & A30219), 5 March 2004 (the **2004 Authorisation**)

³⁰ Ibid. n29 at [9.64]

³¹ Ibid. n29 at [9.66]

The Applicants submit that the same conclusion applies in this case, namely there can be no additional anti-competitive detriment arising from allowing SVPHS to fully participate in the collective activities of SVHA Group in circumstances where it already has a sanctioned ability to act as a single economic entity with its only possible SVHA Group competitor in the Health Services Market (i.e. Mater Hospital, North Sydney).

- (b) The inclusion of SVPHS in the collective dealings of the SVHA Group, including the negotiation of HPPAs and other revenue and/or funding arrangements with Funding Organisations, will not deliver the SVHA Group any excess of bargaining power. Multiple alternatives exist within NSW (or even metropolitan Sydney) with respect to services and location.

The existence of competitive alternatives for Funding Organisations is highlighted in **Table 4** below which estimates the total share of private hospital beds accounted for by the SVHA Group (including SVPHS) in NSW is only 6.7%. Quite clearly, there are many other substantive alternate hospitals and hospital groups.

Table 4: Private Hospital Bed Shares – NSW

Hospital Group	Market Share (%)
Ramsay	31.0%
Healthscope	15.0%
HealtheCare	6.4%
Others	30.6%
<u>SVHA Group</u>	6.7%
- Mater Hospital, North Sydney	
- SVPHS	
<u>Little Company of Mary</u>	6.4%
<u>St John of God</u>	2.6%
<u>St Vincents Lismore</u>	1.3%
Total	100%

Source: SVHA Group, websites of major groups, DoHA

Moreover, 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 SVHA Group in both its dealings with Funding Organisations and in its provision of services to end consumers. In no way is SVPHS a sole operator or provider of unique services in its region. A sample of these competing private hospitals and the health services they provide are set out in **Table 5** below by way of illustration only.

Table 5: Private Hospital Competitors – Metropolitan Sydney

Private Hospital	Health Services	Beds
Prince of Wales Private (Healthscope)³² <ul style="list-style-type: none"> ➤ 6.5 kms (13 mins) from SVPHS ➤ 13 kms (17 mins) from Mater Hospital, North Sydney 	Specialties include: cardiology, cardiac surgery, neurosurgery, orthopaedics, general surgery, maternity and paediatrics	168
North Shore Private Hospital (Ramsay)³³ <ul style="list-style-type: none"> ➤ 11 kms (16 mins) from SVPHS ➤ 2 kms (5 mins) from Mater Hospital, North Sydney 	Specialties include: intensive care, coronary care, cardiac surgery, cardiology, orthopaedics, maternity, neurosurgery, day and general surgery, oncology	241
Sydney Adventist Hospital (Seventh Day Adventist Church)³⁴ <ul style="list-style-type: none"> ➤ 25 kms (33 mins) from SVPHS ➤ 18 kms (27 mins) from Mater Hospital, North Sydney 	Specialties include: cardiac care, oncology, maternity, orthopaedics, urology, emergency care and general surgery	358
St George Private (Ramsay)³⁵ <ul style="list-style-type: none"> ➤ 18 kms (23 mins) from SVPHS ➤ 20 kms (27 mins) from Mater Hospital, North Sydney 	Specialties include: cardiac services, neurosurgery, oncology, orthopaedics, maternity, general surgery, colorectal services and urology	236
Castlecrag Private (Ramsay)³⁶ <ul style="list-style-type: none"> ➤ 12 kms (17 mins) from SVPHS ➤ 5 kms (10 mins) from Mater Hospital, North Sydney 	Specialties include: orthopaedic surgery, plastic and cosmetic surgery, general surgery and palliative care	40

- (c) Any hypothetical anti-competitive detriment arising from the inclusion of SVPHS in the collective dealings of the SVHA Group would also 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

There are a number of Funding Organisations operating in NSW with sizeable market shares or operating within their own collective bargaining structure such as the AHSA and ARHG alliances. This is illustrated in **Table 6** below.

³² See: <http://www.healthscopehospitals.com.au/info/general/HospitalHome/get/221/hospitalId/>

³³ See: <http://www.northshoreprivate.com.au>

³⁴ See: <http://www.sah.org.au/>

³⁵ See: <http://www.stgeorgeprivate.com.au>

³⁶ See: <http://www.castlecragprivate.com.au>

Table 6: PHIAC Health Fund Market Shares – NSW, 2010/11

Health Fund	NSW Market Share (Benefits Paid)	National Market Share (Benefits Paid)	National Market Share (Total Policies) ³⁷
Medibank / AHM	24.81%	30.17%	30.6%
HCF / Manchester Unity	24.16%	11.13%	10.5%
BUPA / MBF Alliances	23.29%	27.99%	26.9%
AHSA (alliance)	13.76%	15.96%	
NIB	13.50%	6.18%	7.5%
ARHG (alliance)	0.34%	1.33%	
HBF / Healthguard	0.14%	7.25%	8.2%
Total	100%	100%	

Source: PHIAC

In its submission in support of the 2009 Authorisation, the SVHA Group has noted that “... (t)he experience of private hospitals is that any health fund with a market share of 20% or more in a relevant market, such as a state market, possesses a disproportionate bargaining power in relation to individual hospitals.”³⁸ This submission arises from the fact such funds are therefore likely to account for a substantial proportion of the revenue of each private hospital. In simple terms, Funding Organisations are significant and important buyers of the health services being offered by private hospitals and other providers, such as the SVHA Group, particularly in circumstances where those providers face particularly high fixed costs (in the order of approximately 40 – 50% of overall costs). In other words, private hospitals are not viable in the current market unless they have contracts with the major Funding Organisations.

In relation to the SVHA Group specifically, the fact that a relatively small number of health funds account for a substantial portion of its revenue in NSW is highlighted in **Table 7** below, which shows the percentage breakdown of total SVHA Group private hospital revenue in NSW by source.

[RESTRICTION OF PUBLICATION OF PART CLAIMED]

Combined with the capital intensive nature of hospital operations and the associated reliance by private hospitals on a steady revenue stream, the importance of Funding Organisations as key buyers of health services means that most private hospitals (including those operated by the SVHA Group in NSW) simply cannot afford to go out of contract with most of the Funding Organisations (or alliances) operating in the NSW market for health services.

7.3 Joint Purchasing Markets

The joint acquisition activity proposed in this submission is restricted to members of SVHA Group, most of which are already legally entitled to engage in such collective activity. The

³⁷ Data drawn from Table 2 (PHIAC Annual Report 2010/11) by way of comparison

³⁸ See SVHA submission in support of its application for the 2009 Authorisation at p.30:

<http://www.accc.gov.au/content/index.phtml/itemId/839348/fromItemId/401858/display/application>

full inclusion of SVPHS in any such joint acquisition would not alter the competitive landscape in any way.

Purchasing Markets – Medical Goods or Services

As outlined in section 5.3 above, hospital (i.e. medical and surgical) supplies, pharmaceuticals and diagnostic supplies (broadly, medical goods or services) are supplied to both private and public health care providers across not only hospitals, but a broader national health market that includes at least hospitals, day hospitals and medical centres. Indeed, in relation to some products this spectrum is even broader and extends to supermarkets and pharmacies (for example, paracetamol).

Within this market, the SVHA Group (inclusive of its public hospitals³⁹ and SVPHS) will represent a very small buyer, despite its well known brand. This is illustrated in **Table 8** below, which shows that even where the most conservative assumption is made, namely that the purchaser market for medical goods or services consists only of hospitals, the SVHA Group has only a 3.2% (approx.) share of the beds in the market.⁴⁰

Table 8: SVHA – National Share of Hospital Beds

	National Private Beds		National Public Beds		Total National Beds	
SVPHS	250	0.9%	Nil		250	0.3%
SVHA Group (excl SVH Private)	1,175	4.6%	1,142	2.1%	2,317	2.9%
Total SVHA Group	1,425	5.5%	1,142	2.1%	2,567⁴¹	3.2%
Non SVHA Group	24,353	94.5%	53,670	97.9%	78,023	96.8%
Total	25,778	100%	54,812	100%	80,590	100%

Source: SVHA Group; AIHW, Australian Hospital Statistics 2009 – 2010 (April 2011)

Moreover, this particular application simply seeks to ensure SVPHS is able to be fully included in the otherwise legitimate collective dealings of the SVHA Group. It is clear from Table 8, which illustrates that SVPHS has approximately 0.3% of national hospital beds, 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.

In these circumstances, the Applicants believe that it is highly unlikely any supplier will be particularly vulnerable to increased pressure to accept the terms and conditions, including

³⁹ The Applicants note that though the SVHA Group public hospitals are included here, these hospitals can also access the relevant state public health purchasing authority, or can chose to purchase via other means.

⁴⁰ In this regard, we note that the 2009 Authorisation already permits a larger number healthcare facility operators (including the SVHA Group's wholly owned subsidiaries – including public hospitals – and SVPHS) to jointly negotiate the acquisition of goods and services from suppliers (known as the CNA JPN) but its scope is carefully demarcated (see [10.9] – [10.13]).

⁴¹ We note that this total bed number for the SVHA Group is an estimate derived from a number of sources and is in accordance with, though not precisely the same as, the total bed number of 2,541 reported in the SVHA Annual Report, 2010/11 (see Annexure B).

price, dictated by the SVHA Group (regardless of the ability to engage in collective boycotts). This conclusion is strengthened by the following market factors:

- (a) 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 – examples include Johnson & Johnson, Baxter Healthcare and GE Medical Systems;
- (b) the significant local buyers, namely the public health purchasing authorities (e.g. Health Purchasing Victoria), will continue to operate unimpeded by this authorisation application; and
- (c) in the private sector, the preferences of visiting medical officers (or **VMOs**) is 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 may have.

Purchasing Markets – Non-Medical Goods or Services

The non-medical goods or services are not specific to the broader health market and are most likely to form part of an acquisition market that incorporates a range of non-hospital, non-health consumers. As a result, the arguments set out above in relation to medical goods or services apply with at least equal force.

8 PUBLIC BENEFITS

In addition to producing no anti-competitive detriment, the proposal to include SVPHS in the general commercial dealings of the SVHA Group, in circumstances where SVPHS is already authorised to enter arrangements with at least one member of that Group, offers a number of limited but demonstrable public benefits.

8.1 Giving Effect to Existing Authorisations

In the 2004 Authorisation the Commission recognised a public benefit associated with allowing five entities to collectively boycott Funding Organisations in circumstances where:

- (a) four of the entities were wholly owned by SVHA – called Group A; and
- (b) the fifth entity (SVPHS) had been authorised to operate as one economic entity, with one of the four entities wholly owned by SVHA – called Group B.

The Commission noted that both Groups A and B could theoretically decide to boycott the same health fund and would be legally able to do so. However, the overlap between the Groups might also result in one Group (say Group B) being unwilling to exercise their legal rights, or feeling restrained in doing so, in order to avoid the appearance of all the entities unlawfully acting as one group. In these very unique circumstances, the ACCC considered it:

“...appropriate to recognise a public benefit in ensuring that a later authorisation decision does not unreasonably hinder the ability of parties to an earlier authorisation to exercise their legal rights under that authorisation. This public benefit arises as regards St. Vincent’s Private Hospital.” [9.62]

In the 2009 Authorisation the Commission noted and endorsed the earlier decision, remarking that “... the initial authorisation was consistent with the lawful ability of the five entities to collectively agree not to deal with a particular party”.⁴²

The Applicants submit that the same reasoning applies equally to the current, equally unique, circumstances and a similar public benefit should be recognised. That is, apart from SVPHS, all entities making up the SVHA Group have the lawful ability to act collectively under the CCA and SVPHS has that same ability with respect to one of those entities (namely, SVMHS). There are no longer any ‘shared ownership entities’ involved in the arrangements.

8.2 Cost Savings

The Applicants submit that the ability to fully include SVPHS in the general commercial dealings of the SVHA Group will generate cost savings, principally resulting from the rationalisation of negotiations, where currently:

- (a) Funding Organisations and the SVHA Group may face costs associated with separate negotiations (and associated support tasks) for revenue contracts with the SVHA Group on one hand and with SVPHS and potentially Mater Hospital, North Sydney

⁴² See n16 at [7.96], which references the 2004 Authorisation

on the other (for example, because the SVHA Group wishes to consider a collective boycott)⁴³; and / or

- (b) the SVHA Group and third party suppliers can potentially face costs associated with at least two separate negotiations – namely, one for the SVHA Group, excluding SVPHS, and one for SVPHS and potentially Mater Hospital, North Sydney.

The more clearly centralised negotiations that could and 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.

The Applicants also consider cost savings may arise from the proposed collective dealings with third party suppliers via access to better volume discounts and the increased prospect of utilising the same product across associated hospitals. For example, 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. 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:

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

8.3 Broader Public Benefits

By improving the operations of the SVHA Group through the cost savings outlined above, the authorised conduct also supports a range of broader public benefits that are delivered via the charitable works engaged in by the SVHA Group. Some of these are described below and have been highlighted in previous SVHA submissions to the Commission.

Not-for-Profit Ethos

The Catholic health sector comprises many providers of high quality health services, ranging from acute care to community based services. Importantly, Catholic hospitals do not operate for profit; they are charitable organisations returning earnings from their businesses to the communities they serve. 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.

⁴³ In this regard we note that the 2009 Authorisation does not permit SVPHS to engage in collective boycott conduct with other SVHA Group members apart from Mater Hospital, North Sydney

Supporting Charitable Works

The not-for-profit ethos outlined above finds representation in the fact 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. As set out in public documents, according to SVHA:⁴⁴

“Taking to heart our mission of service of the poor, SVHA reaches out to some of the most vulnerable people in the Australian community including those from culturally and linguistically diverse communities, Aboriginal and Torres Strait Islanders, people living with mental illness, people experiencing addiction, people who are socially and financially disadvantaged especially those experiencing homelessness, people in prison with respect to their health care needs, refugees and asylum seekers.”

SVHA groups this work into four key areas, being Works of Charity, Community Benefit, Social Accountability and Donations in Kind. These are expanded upon below:

- (a) Works of Charity – these are one-off responses to identified individuals or community needs, rather than a planned service, and involve outreach to the marginalised and disadvantaged. Examples include the charitable write off of medical expenses for particular patients, specifically including asylum seeker patients treated in SVHA emergency departments.
- (b) Community Benefit – services provided in addition to the core SVHA Group services, essentially excess services or benefits that are delivered to the community beyond that for which the health service is funded. Some examples include the St Vincent’s Community Health Service that offers outreach nursing services to people who are homeless or at risk of homelessness and the Sisters of Charity Outreach Program⁴⁵, which receives significant contributions from SVHA Group hospitals.
- (c) Social Accountability – a planned, documented and evaluated approach to core service provision that is beyond the level of funding provided by key funding providers. Some examples include funding shortfalls in providing existing care, opening flexi or over census beds and provision of funding for research.
- (d) Donations in Kind – donations which are given by the SVHA Group but which incur no immediate direct cost to the organisation, such as the donation of equipment, furniture, excess catering etc.

Again, any efficiencies and associate cost savings arising from the proposed conduct will serve to enhance the delivery of these services, particularly those listed in (a) – (c) above, and the welfare of the communities being served.

⁴⁴ See <http://www.svha.org.au/ourmission/Pages/ourmission.aspx>

⁴⁵ See <http://www.sistersofcharityoutreach.com.au/html/services.php>

9 TIMING OF AUTHORISATION

9.1 Authorisation Term

The Applicants seek authorisation for as long as SVHA, HSN and SVPHS are related bodies corporate or are directly or indirectly owned and controlled by the Sisters of Charity or TMAM.

This period reflects the technical legal issues that are driving this application (when in normal circumstances all the relevant parties would be related bodies corporate), the public benefits that will thereby be achieved and the clear lack of detriment associated with the proposed conduct.

ANNEXURE A

SVHA GROUP STRUCTURE

ANNEXURE B

ROMAN CATHOLIC CHURCH COMMUNITIES' LANDS ACT 1942 (NSW)

ANNEXURE C

SVHA ANNUAL REPORT 2010/11

CONFIDENTIAL ANNEXURE D

**HSN CONSTITUTION & MEMBERS' AGREEMENT (WITH
AMENDMENTS)**

ANNEXURE E**PRIVATE HEALTH INSURERS**

Following is a list of health funds registered under the *Private Health Insurance Act 2007* (Cth), via PrivateHealth.gov.au: <http://www.privatehealth.gov.au/dynamic/healthfundlist.aspx>

PrivateHealth.gov.au is an Australian Government initiative, managed by the office of the Private Health Insurance Ombudsman.

Title	Type	States
ACA Health Benefits Fund*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Australian Unity Health Limited*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Bupa Australia Pty Ltd	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
- HBA	Open	ACT, NSW, QLD, TAS, VIC, WA
- MBF	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
- Mutual Community	Open	SA, NT
CBHS Health Fund Limited*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
CDH Benefits Fund [#]	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Central West Health Cover*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
CUA Health Limited*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Defence Health Limited*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
GMF Health*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
GMHBA Limited*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Grand United Corporate Health*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
HBF Health Limited	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
HCF (The Hospitals Contribution Fund of Australia Limited)	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Health Care Insurance Limited*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Health Insurance Fund of Australia Limited*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Health Partners*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Latrobe Health Services [#]	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Medibank Private Limited	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
- Australian Health Management	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Mildura District Hospital Fund Ltd [#]	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
National Health Benefits Australia Pty Ltd (onemedifund)*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Navy Health Ltd*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
NIB Health Funds Ltd	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Peoplecare Health Insurance*	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Phoenix Health Fund Limited*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT

PUBLIC REGISTER VERSION

Title	Type	States
Police Health*	Restricted	QLD, SA, TAS, WA, NT
Queensland Country Health Fund Ltd*	Open	QLD
Railway and Transport Health Fund Limited*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Reserve Bank Health Society Ltd*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
St Lukes Health [#]	Open	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Teachers Health Fund*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Teachers' Union Health*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
The Doctors' Health Fund*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Transport Health Pty Ltd*	Restricted	ACT, NSW, QLD, SA, TAS, VIC, WA, NT
Westfund Ltd*	Open	ACT, NSW, QLD, WA

[#] Members of the Australian Regional Health Group (**ARHG**)

* Members of the Australian Health Services Alliance (**AHSA**)