

JOHNSON WINTER & SLATTERY
LAWYERS

Partner: Michele Laidlaw +61 2 8274 9533
Email: michele.laidlaw@jws.com.au
Senior Associate: Johanna Croser +61 2 8247 9606
Email: johanna.croser@jws.com.au
Our Ref: A9650
Doc ID: 65904467.2

3 July 2014

Adjudication Branch
Enforcement & Compliance Division
Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

BY EMAIL

Attn: David Hatfield / Gina D'Ettorre

Dear Mr Hatfield and Ms D'Ettore

RE: St Vincent's Health Australia Limited – Application for Reauthorisation A91400

We refer to your email of 24 June 2014 and the attached third party submissions.

Our client's submission in response to the matters raised by the interested parties is set out below. Terms have the same meanings as in the submission accompanying the Applicants' reauthorisation application lodged with the Commission on 9 December 2013 (**Original Submission**).

We confirm that this submission can be placed on the ACCC's Public Register.

Please do not hesitate to contact Michele Laidlaw or Johanna Croser on the numbers above if you would like to discuss any aspect of this submission.

Yours faithfully

Johnson Winter & Slattery

Level 25, 20 Bond Street
SYDNEY NSW 2000
T +61 2 8274 9555 | F +61 2 8274 9500

www.jws.com.au
SYDNEY | PERTH | MELBOURNE | BRISBANE | ADELAIDE
Liability limited by a scheme approved under Professional Standards Legislation

RESPONSES TO INTERESTED PARTY SUBMISSIONS

3 July 2014

1. Introduction

1.1 The Further Submissions in this document are made in response to materials supplied to the Commission by the following parties (**Third Party Submissions**):

- Symbion Pty Ltd, in a letter dated 20 June 2014; and
- the Medical Technology Association of Australia (**MTAA**), in a letter dated 18 June 2014.

1.2 These Further Submissions should be read in conjunction with all material supplied to date by the Applicant including, in particular, the additional submissions to the Commission dated 15 May and the letter from JWS dated 5 June 2014, the latter setting out a revised description of the conduct for which authorisation is sought (the **Proposed Conduct**).

2. Joint Purchasing Network (JPN) – Exclusionary Behaviour

2.1 Symbion asserts that “... collective boycott conduct of any kind risks tipping the balance of bargaining power strongly in favour of JPN members” and “that those JPN members could refuse to acquire any goods or services from that supplier until it accedes to the terms demanded by the JPN members”. These assertions are misconceived.

2.2 The Proposed Conduct will not substantially alter the existing balance of bargaining power between the JPN and its suppliers for the reasons set out at length in the Applicant’s submissions of 15 May 2014. This is principally because the JPN is (and will remain) a relatively small acquirer of the relevant goods and services – with a market share of approx. 6% - meaning there is little likelihood prices could be driven below their competitive level. These submissions can now be made with even greater force, given the further limitations now placed upon any proposed JPN exclusionary behaviour under the Proposed Conduct.

2.3 It is also simply incorrect to suggest that JPN members could refuse to acquire “any goods or services” from a supplier until it accedes to JPN member terms. The Proposed Conduct is explicit in limiting any proposed exclusionary activity to the specific product category or categories that are the subject of the attempted collective negotiation. Moreover, any such proposed activity can only take place while the collective negotiation is in progress. In the event that a good faith collective negotiation results in no agreement, all parties are freely able to transact on an individual basis, just as they were prior to the commencement of the collective process.

2.4 Furthermore, Symbion asserts that “no additional efficiency benefits arise from the proposed amended conduct” and that there is no explanation as to “how efficiency would be enhanced by precluding bilateral negotiations”.

2.5 In contrast to these assertions, the Proposed Conduct does nothing whatsoever to preclude bilateral negotiations. The proposed JPN exclusionary activity is intentionally highly targeted. It is made explicit that it could only be applied to suppliers that have agreed to participate in a joint negotiation and there is no mechanism to compel such

suppliers to remain in a joint negotiation, if it becomes clear bilateral negotiations are more suited to their commercial interests. In such circumstances, and when one considers both the status of the JPN as a relatively small acquirer and the fact any exclusionary conduct can only be applied to companies with annual revenues above a significant threshold, any suggestion that the proposed JPN exclusionary activity is a threat to the public benefits of genuine joint negotiation should be dismissed.

- 2.6 The MTAA claims that “the proposed JPN action, if applied to the Prostheses List (PL), could jeopardise clinician choice and patient access to medical technology, which these arrangements¹ were intended to provide.” The Applicant submits this claim is simply not correct.
- 2.7 As the Applicant outlined in its submission of 26 February 2014, in the private hospital sector clinician choice (i.e. the preferences of visiting medical officers) is recognised as the major influencing factor as to what clinical consumables are used in a particular hospital. This is particularly true with respect to prostheses and is demonstrated by the fact that vendors will typically market directly to clinicians and, in some instances, will charge private hospitals above the PL rate.² If JPN members genuinely had the ability to dictate prostheses selection now, it would be rational to anticipate they would only be using items that are fully rebateable but they are not able to do this.
- 2.8 For reasons already canvassed at length in previous submissions and summarised in paragraphs 2.2 – 2.3 and 2.5 above, the Applicant strongly submits the proposed JPN exclusionary activity will not alter this state of affairs. In particular, the exclusionary activity is:
- strictly limited to the duration of a joint negotiation;
 - only applies to the specific goods or services that are the subject of the joint negotiation and does not apply to pre-existing supply arrangements between individual JPN members and the nominated supplier; and
 - completely voluntary for all JPN members (i.e. they are free to choose not to participate).

3. Further Clarifications

- 3.1 The Applicant wishes to make the following additional comments in relation to certain points raised by Symbion and the MTAA:
- *“Symbion requests that the ACCC make it clear in any final authorisation of collective boycott conduct that it is strictly limited to the period during which an active joint negotiation is in progress, and not for any further period” (p. 2)*³

The Applicant believes the Proposed Conduct already makes it clear that the period of any proposed JPN exclusionary conduct must be limited to the duration of any joint negotiation. As a result, no further clarification is necessary.

¹ The “arrangements’ refer to the PL list, which now contains over 10,000 products that are reimbursable by private health insurance funds in respect to private patients.

² The PL dictates health fund rebate payments for prostheses, not the price at which they are sold to hospitals: see MTAA submission of 24 January 2014 at p. 2.

³ See also MTAA submission at p.1: “MTAA has difficulty understanding how such conduct varies from that of a collective boycott of the suppliers’ products noting the open ended duration for which it may apply” (our emphasis)

- *“Symbion assumes that, if it has agreed to enter into joint negotiations with JPN members then it would be able to give notice that it wishes to terminate those joint negotiations, in which case any collective boycott activity already on foot would need to immediately cease”* (pp. 2 – 3)

The Applicant notes that Symbion’s assumptions appear self-evident, given the Proposed Conduct cannot prevent a supplier from terminating joint negotiations. In such a case the JPN would need to notify its members that any exclusionary conduct must also cease. As a result, no further clarification is necessary.

- *“Symbion submits ... (there should be) disclosure of the fact that participation in collective negotiation may trigger boycott powers”* (p. 3)

If the JPN wishes to utilise an ability to engage in exclusionary conduct, it will clearly disclose to the supplier – who has indicated a wish to participate in joint negotiations – that it expects those joint negotiations will be genuine and that the JPN members will not be dealing with that supplier on an individual basis in relation to the particular goods or services for the duration of those discussions.

- *“MTAA does not support the application of turnover benchmarks to identify the eligibility of companies to be identified as ‘nominated suppliers’”* (p. 2)

Earlier third party submissions, including from the MTAA, expressed concern that any JPN exclusionary conduct might adversely impact small or medium suppliers. In its submission of 26 February 2014, in order to protect small to medium suppliers, the Applicant confirmed that it would limit application of any exclusionary conduct to suppliers with particular turnover thresholds. These thresholds were reflective of the fact the NAB quarterly survey of small to medium enterprises (SMEs) captures firms with annual turnovers between \$2 million and \$10 million.

The Applicant notes the MTAA has not offered an alternative approach and instead has stated “... the proposed amended conduct would potentially capture most multinational companies, including those of Australian origin”. This was the intended effect of the nominated thresholds.

- *“MTAA proposes that it (any authorisation) should only apply for a period of five years”* (p.2)

The Applicant continues to submit that the proposed authorisation term of 10 years is appropriate for all the reasons given in previous submissions.