

Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of person giving notice:

^{N99870} Trustees of the Sisters of Charity of Australia as trustee of the St Vincent's Private Hospital Sydney Trust (ABN 22 923 524 800) (TSCA).

TSCA leases the premises of St Vincent's Private Hospital Sydney (**Hospital**) from St Vincent's Healthcare Ltd (ABN 46 095 382 791) (**SVHCL**). TSCA holds that lease for the beneficiary, being St Vincent's Private Hospital Sydney (ABN 99 269 630 262) as conducted by The Congregation of the Sisters of Charity of Australia (**SVPHS**). SVPHS operates the Hospital.

(b) Short description of business carried on by that person:

The Hospital is an acute medical and surgical hospital located in Darlinghurst, New South Wales. It provides a range of general and specialised medical and surgical services to private patients including, but not limited to, breast surgery, cardiology, cardiothoracic surgery, gastroenterology, geriatric medicine, head and neck reconstructive surgery, ophthalmology, orthopaedic surgery, neurosurgery, urology, colorectal surgery, gastroenterology, immunology, pathology, psychiatry and psychological services and vascular surgery. Other key services include inpatient facilities, day surgeries, cardiac catheter laboratory, acute stroke service and a lithotripsy suite.

(c) Address in Australia for service of documents on that person:

Ronit Olovitz
Legal Counsel
St Vincent's Health Australia, NSW Facilities
8 Leichhardt Street
Darlinghurst NSW 2010
Ph: (02) 8382 3747
Email: ronit.olvitz@svha.org.au

2. Notified arrangement

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

This notice relates to the supply of:

- leases of medical consulting premises located within the Hospital; and
- associated fitout construction services.

(b) Description of the conduct or proposed conduct:

Background – Corporate Structure

TSCA holds the property as trustee for the beneficiary, being St Vincent's Private Hospital Sydney (ABN 99 269 630 262) as conducted by The Congregation of the Sisters of Charity of Australia. The Congregation of the Sisters of Charity of Australia (**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. The Trustees of the Sisters of Charity is a statutory body corporate formed under the *Roman Catholic Church Communities' Lands Act 1942 (NSW)* to conduct the business of the Sisters of Charity.

The hospital entities relevant to the proposed conduct are as follows:

- SVHCL, as the landowner and head-lessor of the Hospital;
- TSCA, as the lessee of the Hospital property from SVHCL; and
- SVPHS, as the operator of the Hospital.

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

SVHA has a number of wholly owned subsidiaries which operate public hospitals, private hospitals and aged care facilities.

Background – SVPHS Redevelopment Project

The Hospital is currently being redeveloped, including the construction of a new 13-storey building (the **East Wing**) (the **SVPHS Redevelopment Project**). The East Wing will have one storey underground, a new ambulatory care centre, four inpatient levels, additional consulting suites, additional operating theatres and a new rehabilitation unit. The additional 10 consulting suites in the East Wing (the **Premises**) are intended to be leased to medical practitioner, healthcare providers, or entities under their effective control (the **Tenants**).

¹ The Trustees of Mary Aikenhead Ministries (ARBN 141 274 866) were granted the stewardship and governance of the health and aged care facilities previously operated by the Sisters of Charity from 1 July 2009. The critical exception to this was the operation of the Hospital under SVPHS.

The SVPHS Redevelopment Project also involves the refurbishment of the existing main hospital building, which will include enlarging patient bedrooms and en-suites, and a renovation of the entrance foyer.

The new-build phase is scheduled to run from December 2015 to December 2017 and the refurbishment phase is scheduled to run from November 2017 to April 2019. Buildcorp Group Pty Limited (ABN 85 091 336 168) (**Buildcorp**) is the contractor for the SVPHS Redevelopment Project.

Proposed Conduct

Within the East Wing, levels 2 – 12 will be occupied by SVPHS and levels 13 – 14 will be made up of the Premises. The fitout of the Premises is to be undertaken in a relatively short time period between November 2017 and March 2018, in order to minimise the impact on the Hospital operations on the floors below. To maximise the prospect of this occurring, TSCA wishes to have a single contractor – Buildcorp, as the existing redevelopment contractor – undertake the works for the Premises fitouts concurrently. It would also minimise the impact of the fitouts on the ongoing SVPHS Redevelopment Project works that will be carried out by Buildcorp at the same time.

The proposed conduct is likely to involve the following contractual arrangements:

- a construction contract between the hospital entities (SVPHS, SVHCL and TSCA) and Buildcorp under which Buildcorp will undertake the fitout construction works for each of the Premises, based on a design submitted by the relevant Tenant and approved by TSCA;
- an agreement for lease (with a lease to commence on completion of the fitout construction works or on another date) between TSCA and each Tenant under which (among other things):
 - the process as between TSCA and the Tenant for the undertaking of the fitout will be set out;
 - the Tenant will indemnify and release the hospital entities for and from any liability in relation to the fitout construction works (as they will receive a direct warranty as set out below); and
 - the Tenant will reimburse to TSCA Buildcorp's costs for undertaking the fitout construction works for their Premises²; and
- a builder's side deed / warranty between each Tenant and Buildcorp under which Buildcorp provides contractual warranties to the Tenant in respect of the fitout construction works and Buildcorp will provide the Tenant with a bank guarantee that may be called upon during the defects liability period if Buildcorp fails to fulfil its defects obligation.

² Also included in the Lease will be processes for the Tenant to submit design for approval by the hospital, to request variations, to inspect the fitout construction works and provide feedback regarding process and defects.

On one view, the proposed conduct could be characterised as TSCA offering to supply Tenants with leases for the Premises on condition that those Tenants directly or indirectly acquire fitout construction services from Buildcorp.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

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

Tenants entering into, or proposing to enter into, a lease for any of the Premises within the East Wing. As stated above, the tenants will mostly be medical practitioners, healthcare providers, or entities under their effective control.

(b) Number of those persons:

(i) At present time:

10

(ii) Estimated within the next year:

10

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

The identities of the Tenants that will enter into the proposed arrangements are not yet known, as expressions of interest are still being finalised as at the date of this notification.

4. Public benefit claims

(a) Arguments in support of notification:

The construction services for the SVPHS Redevelopment Project, which includes the construction of the East Wing, are being provided by Buildcorp. The notified conduct will result in the fitout construction works for each of the Premises being provided by the same contractor, which will result in the following public benefits:

- **Time savings / increased efficiencies:** The proposed conduct will enable the Tenants to save time and costs associated with searching for an alternative contractor because Buildcorp will have detailed knowledge of the site conditions and other requirements and circumstances specific to construction of the East Wing and the SVPHS Redevelopment Project generally. Furthermore:
 - consistent management and consolidation of the fitout construction works will reduce contractor presence and foot traffic in the East Wing as compared to having multiple contractors on site simultaneously, and this in turn will also contribute to increased site safety; and
 - site access and site establishment at street level will be reduced through the ability to use the SVPHS Redevelopment Project works zone and site access, thus providing less disruption to traffic.

- **Cost savings:** By being able to consolidate the undertaking of the fitout construction works with the SVPHS Redevelopment Project, it is anticipated that Buildcorp will be able to take advantage of efficiencies of scale in order to obtain discounts on materials and reduce overall labour and mobilisation costs. It is anticipated that the Tenants will benefit from these savings.
- **Prevention of delay:** As it is likely that the fitout construction works for each of the Premises will be proceeding concurrently, consistent management of those works by the one contractor, Buildcorp, will increase efficiencies and ensure completion of the East Wing (including the fitout construction works for the Premises) will occur within the intended timeframes. This will in turn prevent delaying the Tenants' access to their premises and the availability of the East Wing's facilities to medical practitioners and patients.
- **Quality consistency:** Whilst the Tenants will be able to propose their own design for the fitout of their Premises (subject to SVPHS's approval), they will have greater certainty that the quality and standard of the fitout construction works will be consistent with the quality and standard of the East Wing's construction as a whole.

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

See above.

5. **Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (a) 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):

The relevant markets are the markets for:

- the acquisition of commercial leases for medical practices; and
- the supply of construction (or fitout) services.

6. **Public detriments**

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

On the basis of the below factors, the applicant submits that the proposed conduct will have little, if any, public detriment.

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

- Tenants will, prior to entering into an agreement for lease for the Premises, be made aware of the requirement to have Buildcorp undertake the fitout construction works.

- The agreement for lease will provide the Tenants with a process to submit fitout plans for approval, request variations, conduct inspections and ensure construction meets their requirements.
- Once Buildcorp has determined the price for a Tenant's fitout construction works, the price will be subject to review by an independent surveyor before being approved by the Tenant.
- Pursuant to a Builder's Side Deed / Warranty between each Tenant and Buildcorp, the Tenant will have the benefit of contractual warranties for the fitout construction works directly from Buildcorp as well as a process for remedying defects directly with Buildcorp during a defects liability period.
- There is nothing to prevent potential Tenants from seeking to acquire leases for medical consulting suites in locations near the Hospital that are not within the East Wing.
- The limited nature of the SVPHS Redevelopment Project means there will be little, if any, impact on the supply of construction or fitout services in Sydney.


7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:**

Michele Laidlaw
 Partner
 Johnson Winter & Slattery
 Level 25, 20 Bond Street
 Sydney NSW 2000
 Ph: (02) 8274 9533
 Email: michele.laidlaw@jws.com.au

Dated: 4 September 2017

Signed on behalf of the applicant



 Michele Laidlaw
 Partner
 Johnson Winter & Slattery

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 notification.

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. If the notice is given 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 notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Competition and Consumer Act 2010* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. 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.
8. Provide details of the market(s) likely to be affected by the notified 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 notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.