



Statement of Issues

11 June 2015

Health Care Corporation Pty Ltd (Ramsay) - proposed acquisition of Wollongong Day Surgery

Purpose

1. This Statement of Issues aims to:
 - provide the Australian Competition and Consumer Commission's (**ACCC's**) preliminary views on competition issues arising from Health Care Corporation Pty Ltd (**Ramsay**)'s proposed acquisition of Wollongong Day Surgery;
 - identify areas of further inquiry;
 - provide all interested parties an opportunity to comment; and
 - invite interested parties to submit information to assist the ACCC in its assessment of the issues.

Overview of ACCC's preliminary views

2. The legal test which the ACCC applies in considering the proposed acquisition is in section 50 of the *Competition and Consumer Act 2010*. Section 50 prohibits acquisitions that substantially lessen competition in a market, or are likely to do so.
3. The ACCC has received submissions from interested parties expressing concerns about the impact the proposed acquisition would have on competition for the supply of day surgery services.
4. The ACCC divides its preliminary views into three categories, 'issues of concern', 'issues that may raise concerns' and 'issues unlikely to raise concerns'.
5. This Statement of Issues (**SoI**) identifies two "issues of concern".

Issues of concern

- The ACCC considers that the proposed acquisition would be likely to lead to significant rate (price) increases for the supply of day surgery services to private health insurance funds (**health funds**) and the Department of Veterans Affairs (**DVA**). The ACCC considers that this market has local and national dimensions.
- The ACCC considers that the proposed acquisition would be likely to lead to significant rate (price) increases for, and/or reduce Ramsay's incentive to invest in and improve, the supply of day surgery services to patients (and doctors) in Wollongong, NSW and its surrounding areas (the **Wollongong area**).

Making a submission

6. The ACCC is seeking submissions from interested parties, particularly on the following key issues:
 - whether it is likely that the proposed acquisition would allow Ramsay to raise rates for day surgery services (**day surgery rates**) to health funds and the DVA; and
 - whether it is likely that the proposed acquisition would allow Ramsay to raise day surgery rates (prices), and/or reduce Ramsay's incentive to invest in and improve services, to patients (and doctors) in the Wollongong area.
7. Detailed discussion of these and other issues, along with specific questions, is contained in this Sol.
8. Interested parties should provide submissions by no later than **5pm on 2 July 2015**. Submissions may be emailed to mergers@acc.gov.au with the title: *Submission re: Ramsay's proposed acquisition of Wollongong day surgery-attention Ayesha Budd/Serena Wong*. If you would like to discuss the matter with ACCC officers over the telephone or in person please contact Ayesha Budd on (02) 9230 3834 or Serena Wong on (02) 9230 9188.
9. The ACCC anticipates making a final decision by **27 August 2015**. However, this timeline may be updated. To keep abreast of possible changes in relation to timing and to find relevant documents, interested parties should visit the Mergers Register on the ACCC's website at www.accc.gov.au/mergersregister.

Confidentiality of submissions

10. The ACCC will not publish submissions regarding the proposed acquisition. We will not disclose submissions to third parties (except our advisors/consultants) unless compelled by law (for example, under freedom of information legislation or during court proceedings) or in accordance with s155AAA of the *Competition and Consumer Act 2010*. Where the ACCC is required to disclose confidential information, the ACCC will notify you in advance where possible so that you may have an opportunity to be heard. Therefore, if the information provided to the ACCC is of a confidential nature, please indicate as such. Our [Informal Merger Review Process Guidelines](#) contain more information.

About ACCC 'Statements of Issues'

11. A Statement of Issues published by the ACCC is not a final decision about a proposed acquisition, but provides the ACCC's preliminary views, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.
12. A Statement of Issues provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the primary issues identified by the ACCC. It is also intended to provide the merger parties and other interested parties with the basis for making further submissions should they consider it necessary.

Timeline

Date	Event
16 March 2015	ACCC commenced public review
2 April 2015	Closing date for submissions from interested parties. ACCC assessing information provided during market inquiries and consulting with merger parties on any relevant issues or concerns arising
15 April 2015	ACCC requested further information from the merger parties
23 April 2015	Former proposed decision date of 7 May delayed to allow receipt of further information from Ramsay and WDS
13 May 2015	ACCC received further information from the merger parties
11 June 2015	ACCC published a Statement of Issues outlining preliminary competition concerns
2 July 2015	Closing date for submissions from interested parties in response to Statement of Issues
27 August 2015	Proposed date for announcement of ACCC's final decision

The merger parties

Wollongong Day Surgery

13. Wollongong Day Surgery (**WDS**) is a day procedure centre at 354 Crown Street, Wollongong, NSW. WDS is located directly opposite the Wollongong Public Hospital and immediately adjacent to the location of the new Wollongong Private Hospital. It is currently owned by a group of 14 local anaesthetists and doctors.

14. WDS has 11 recovery beds and 3 pre-operation beds. It deals with simple and uncomplicated *day only* procedures. WDS has 2 operating theatres and one procedure room.
15. WDS's main specialisations are: endoscopy, facio-maxillary, ophthalmology, IVF, orthopaedic, dental, ENT, general surgery and gynaecology. Its minor specialisations are plastics and hand surgery.

Ramsay

16. Ramsay is Australia's largest private hospital operator, with 69 hospitals and day surgery units; admitting almost a million patients, and conducting over half a million procedures, in Australia each year.
17. In the Wollongong region, Ramsay currently provides surgical services at Figtree Private Hospital. It also plans to open a new private hospital, Wollongong Private Hospital, in 2016.

Figtree Private Hospital

18. Figtree Private Hospital (**FPH**) is a 100 bed private hospital located in the suburb of Figtree, Wollongong, approximately 5km from WDS.
19. FPH also has 11 recovery beds and 9 pre-op beds for use in the supply of day surgery services.
20. FPH provides the following services:
 - day surgery services: general surgery, ear, nose and throat (**ENT**), orthopaedic, gynaecology, plastic, ophthalmology, colorectal surgery, gastrointestinal, facio-maxillary, dental, dermatology and urology;
 - other surgical services: neurosurgical, paediatric, vascular and bariatric; and
 - other services: acute medical, palliative care and general medical, maternity services, intensive care unit, radiology onsite, endovascular suite and sleep studies.

Wollongong Private Hospital

21. Ramsay is currently building a new private hospital, the Wollongong Private Hospital (**WPH**) at 362 Crown Street, Wollongong, NSW. WPH will be immediately adjacent to WDS.
22. Ramsay intends to open WPH in early 2016, at which point Ramsay will transfer the majority of FPH's services (including both day and overnight hospital services) to WPH. FPH will then be transformed into a 40 bed rehabilitation facility, which will also offer day urology services.
23. When it opens in 2016, WPH will have approximately 151 beds, an intensive care unit and a range of medical, surgical and maternity services. WPH will have nine operating theatres and a day surgery unit.

Other Ramsay facilities

24. Ramsay operates other private hospitals and day surgeries in southern Sydney and southern NSW, including:
 - Southern Highlands Private Hospital in Bowral, provides medical, surgical, rehabilitation, oncology and palliative care services. It has 73 beds and is located approximately 76km from WDS;
 - Nowra Private Hospital in Nowra, provides acute surgical and medical services, rehabilitation, day surgery and day only oncology services. It has 84 beds and is located approximately 81km from WDS;
 - Lawrence Hargrave Private Hospital in Thirroul, is a rehabilitative, medical and palliative care facility hospital with 54 beds located approximately 14km from WDS;
 - Kingsway Day Surgery in Miranda, a day surgery with 2 operating theatres and two specialised treatment rooms, located approximately 59km from WDS;
 - Kareena Private Hospital in Miranda, provides acute care. It has 128 beds and is located approximately 60km from WDS; and
 - St George Private Hospital in Hurstville, is an advanced surgical hospital with 236 beds located approximately 67km from WDS.

Other industry participants

Private hospitals and day surgeries in the Wollongong area

25. Shellharbour Private Hospital (**SPH**) is an acute care facility, located 20km south of Wollongong. It is operated by Evolution Healthcare, a private health care group. SPH has 87 medical, surgical and special care in-patient beds and an 8 bed day surgery unit. SPH provides elective surgical services and its primary focus is on providing rehabilitation services. SPH carries out mainly lower risk general, laparoscopic, gynaecological, ophthalmic, dental and minor orthopaedic surgeries.
26. There are also smaller private day surgery centres in Wollongong providing day surgery services in relation to one or a few specialisations. These providers include:
 - Rosemont Endoscopy Centre, a freestanding endoscopy unit located 100m away from WDS;
 - Southern Medical Day Care Centre at 410 Crown Street, Wollongong, which provides day oncology services to private patients and some public (trial drug) patients; and
 - Confident Healthcare at 22 Underwood Street, Corrimal, located 7km from WDS, which provides oncology, endocrinology, gastroenterology and dental services excluding those that require sedation or a general anaesthetic.

Public hospitals in the Wollongong area

27. The Wollongong and Shellharbour public hospitals also provide day surgery services to uninsured patients and some privately insured patients.
28. Wollongong Hospital (**Wollongong Public**) is a public hospital with more than 500 beds and is currently undergoing \$100 million worth of capital works enhancements which include the construction of the Illawarra Elective Surgical Services Centre. This renovation and extension will include the addition of 60 beds and 7 operating theatres for the purposes of carrying out day surgery services in the future.
29. Shellharbour Hospital, situated in Mt Warrigal, NSW, is a public hospital with 87 medical, surgical and special care in-patient beds, and 69 mental health in-patient beds. It has an 8 bed day surgery unit.

Market inquiries

30. On 16 March 2015 the ACCC commenced a public review of the proposed acquisition. The ACCC directed market inquiries to private health funds, hospital and day surgery operators, surgeons and other specialists (**doctors**), as well as to possible new entrants to the provision of day surgery services in the Wollongong area.
31. As discussed further below, interested parties expressed concerns to the ACCC about how the proposed acquisition would impact health funds and uninsured patients. In particular, health funds and doctors submitted to the ACCC that the proposed acquisition would be likely to lead to higher rates charged to health funds and uninsured patients for day surgery services in the Wollongong area.

Industry background

Role of private hospitals and day surgeries

32. Day surgery services are supplied by both hospitals and day surgeries. In a day surgery, patients are operated on and recover in a recovery chair or bed and must be discharged before midnight on the same day of their surgery. In other words, day surgeries cannot provide overnight care. In contrast, hospitals may provide day surgery services but also provide surgery services to patients that are admitted overnight.
33. Hospitals are generally significantly larger than day surgeries and typically also offer higher level or more complex procedures and may offer a broader array of specialties, compared to day surgeries. Hospitals may also have more technologically advanced equipment. As a result and due to risks of complication, patients with high acuity requirements or co-morbidity are generally referred to hospitals where they can receive overnight care.
34. To support these higher level and more complicated procedures, hospitals require overnight beds so that patients can recover and receive the required care. This infrastructure and the overnight care of patients significantly add to the cost of operating a hospital.

35. The ACCC understands from interested parties that rates for day surgery services at hospitals are generally higher, by up to 20%, than those for the same services in day only facilities. Industry participants stated that the difference in rates was due to a variety of factors; including the increased costs associated with nursing care in hospitals and the extra level of care provided by a hospital so that where complications arise, the patient may be admitted overnight.
36. When doctors decide whether to refer a patient to a hospital or a day surgery they generally do so based on such factors as whether they are permitted to practise at the facility, whether the patient will require overnight care, health risks including age and co-morbidity issues, and/or the availability or quality of operating theatres and other facilities.

Role of private health funds and HPPAs

37. The vast majority of patients attending private health facilities indirectly fund the medical services they receive by means of membership of a health fund¹. In turn, payments from health funds make up the vast majority of most private hospital and day surgeries' revenue.
38. Health funds and private hospital and day surgery operators therefore negotiate Hospital Purchaser Provider Agreements (**HPPAs**)². HPPAs are agreements under which health funds agree with a day surgery service provider (**day surgery provider**) that, if and when members of the health fund present for treatment at the day surgery, the day surgery provider will provide services to the members to a minimum specified standard and for a specified fee. HPPAs generally cover all the services provided by a day surgery provider which the health fund has agreed to fund. The day surgery provider can then bill the health fund for the service, rather than billing the members.
39. If a patient has private health insurance but is treated at a day surgery that does not have an HPPA with the patient's health fund, the fund is required by legislation to pay at least 'second tier' benefits, provided that the day surgery provider is appropriately registered. If a day surgery provider receives second tier rates from a health fund, it will recoup 85% of the average cost of a procedure (for that particular health fund across the previous financial year) from the health fund. The patient will generally have to pay the difference between what the day surgery provider has charged for a procedure and the remuneration it has received from the health fund. This amount is commonly known as the 'gap' payment.
40. HPPAs help to minimise 'gap' or 'out of pocket' payments for a health fund's members. If a patient attends a day surgery provider which has an HPPA with the patient's health fund, the patient will ordinarily not be required to make any payments for their accommodation, except for any excess or co-payment that the patient is liable to pay under their health insurance membership.
41. The ACCC understands that when an operator of multiple hospitals and/or day surgery facilities (**hospital group**) such as Ramsay negotiates an HPPA with a

¹ Private health insurance premiums are regulated by the Federal Government. Legislation prevents health funds from price discriminating across different geographic regions within a state or territory.

² The ACCC understands from interested parties that private hospitals and day surgeries have equivalent agreements with the Repatriation Commission on behalf of the DVA.

health fund, the hospital group will often seek to negotiate terms on a 'one in, all in' basis. That is, the hospital group negotiates on the basis of having all of its facilities covered under the HPPA, for all of the services those facilities provide.

42. However, rates are not uniform across all of the hospital group's facilities. Rather, day surgery rates are negotiated for each particular facility. A schedule outlining specific rates for each facility (and for specific medical procedures) is negotiated between the hospital group and a health fund, having regard to local competitive dynamics. These competitive dynamics include the presence of rival facilities in the local area.

Role of doctors

43. Demand for day surgery services is generated in large part by doctors recommending, or referring patients to, day surgery providers. Day surgery providers therefore compete to attract doctors and their patients by endeavouring to provide an environment in which doctors are willing to treat their patients.
44. Such competition provides doctors with the opportunity to choose the day surgery provider with the best facilities, equipment, staff (staffing numbers and quality of staff) to allow them to effectively complete their jobs to a high standard. It also allows patients, through their doctor referrals, to be treated at facilities which offer these services as well as convenience and comfort.
45. A key aspect of this competition to attract doctors and their patients is to offer high quality facilities. This typically includes investment in medical staff (for example, nurses and allied health professionals) and investment in physical assets such as operating theatres, consulting rooms, patient accommodation and medical equipment.

Relevant Markets

46. The ACCC's starting point for delineating relevant markets and assessing the competitive effects of the proposed acquisition involves identifying the services actually or potentially supplied by the merger parties. The ACCC will then consider what other services constitute sufficiently close substitutes to provide a significant source of competitive constraint on the merged entity.
47. As discussed below, the ACCC's preliminary view is that the markets relevant for assessing the likely competition effects of the proposed acquisition are markets for the supply of:
 - day surgery services to private health funds and the DVA. The ACCC considers that this market has local and national dimensions; and
 - day surgery services to patients, both directly and through the doctors who refer them, in the Wollongong area.

Product markets

48. Ramsay and WDS overlap in the supply of day surgery services. Ramsay and WDS utilise their infrastructure to supply day surgery services in relation to a range of medical specialties. Operating theatres, recovery areas, nursing staff and support staff can generally be substituted between different specialties.

49. Specifically, FPH and WDS currently both provide day surgery services in relation to: breast surgery; dental; ear, nose and throat surgery; facio-maxillary; general surgery; gynaecology; haematology; head and neck surgery; immunology; medical oncology; ophthalmology; orthopaedics; and plastic surgery.
50. The ACCC's competition assessment is therefore proceeding on the basis of product markets that encompass all relevant specialties for which the merger parties provide day surgery services. However, the ACCC will consider whether there are significant discontinuities in substitution between day surgery services in relation to any specific surgery specialisation, such that the likely competition effects of the proposed acquisition should be considered on the basis of a distinct product market. For example, the ACCC is assessing whether there are any particular obstacles to commencing supply of day surgery services in relation to ophthalmic surgery (for which there are no other current day surgery providers in the Wollongong area).

Substitution to public hospitals

51. The ACCC at this stage considers that *public* hospitals such as Wollongong Public are not a close substitute for the day surgery services provided by Ramsay and WDS. This preliminary view is consistent with the ACCC's decisions in previous merger matters involving private health facilities.
52. Ramsay and WDS derive the great majority of their day surgery revenue from health funds and, in turn, from patients that are health fund members. For these insured patients, public hospitals are a weak substitute.
53. Health fund members seeking day surgery services generally utilise a private facility such as that offered by Ramsay or WDS, rather than a public hospital. The willingness of insured patients to pay health insurance premiums and/or pay an 'excess' fee for day surgery services at a private facility, rather than accessing a public hospital at little or no financial cost, is indicative of public hospitals being a weak substitute for insured patients seeking day surgery services.
54. Consistent with this pattern of demand by insured patients, the ACCC's market inquiries identified that doctors in the Wollongong area generally considered public hospitals to be unrealistic or poor alternative sources of day surgery for insured patients. Relevant factors in this regard include the longer waiting lists in public hospitals, and perceptions among patients of a superior quality of care in private versus public facilities. The ACCC understands that, as a result of these factors, only a very small proportion of Wollongong Public's day surgery patients are currently admitted as private patients.
55. As a consequence of the public hospital system being a weak substitute to private facilities for health fund members, the presence of public hospitals is unlikely to have a material influence on day surgery rates negotiated between private day surgery providers and health funds. In other words, Wollongong Public's provision of day surgery services will not constrain Ramsay's pricing to health funds.
56. *Uninsured* patients are generally likely to have a greater incentive than insured patients to substitute away to a public hospital. However, to the extent that some

uninsured patients are prepared to pay to access day surgery services at private facilities such as FPH and WDS, public hospitals such as Wollongong Public are likely to be weak substitutes.

57. The ACCC notes that Wollongong Public intends to complete renovations and extensions by the end of 2015, which will add approximately 7 theatres for day surgery services. The ACCC at this stage understands that this extension is not expected to materially change current day surgery waiting lists in the Wollongong region. This extension therefore does not change the ACCC's preliminary conclusion in relation to substitution by patients. In particular, the ACCC's preliminary view based on its market inquiries to date is that the extension to Wollongong Public will not create a greater competitive constraint on Ramsay's supply of day surgery services.

Geographic markets

58. Competition for the supply of day surgery services has different geographic boundaries depending on the type of customer. Competition between day surgery providers for patients (and doctors) occurs at the local level. Competition to supply health funds and the DVA has both local dimensions and broader, potentially national, geographic dimensions. These markets are discussed below.

Geographic substitution by patients

59. Market inquiries identified the importance of location in choice of day surgery facility by patients and doctors. While there are a number of factors relevant to the choice of day surgery provider (including the relevant procedure, surgeon availability and the patient's preferred timing for the procedure), the convenience to a patient of attending a nearby surgery is considered to be one of the main factors.
60. Doctors practising in the Wollongong area generally identified to the ACCC that they will refer a patient to a day surgery provider located close to the patient's place of residence and that most day patients are generally unwilling to travel outside the Wollongong area for surgery. The ACCC received mixed information from doctors and other interested parties in relation to the preparedness of patients to travel to SPH, which is located approximately 20km south of Wollongong, instead of having day surgery at WDS or a Ramsay facility in Wollongong.
61. The ACCC reviewed confidential information provided by WDS, Ramsay and Evolution Healthcare in relation to the postcodes from which WDS, FPH and SPH draw their patients. This identified that WDS and FPH have relatively wide catchments and draw significant proportions of their patients from Shellharbour and nearby areas, from which SPH also draws its patients. However, SPH does not draw significant proportions of its patients from areas in closer proximity to WDS and FPH. Other information and internal documents provided to the ACCC by Ramsay and Evolution Healthcare confirmed that they are in competition with each other to attract doctors and patients in the Wollongong area.
62. At this stage of its investigation and for the purposes of this Sol, the ACCC considers that SPH is likely to be included in the market for the supply of day surgery services to patients; but notes SPH is unlikely to provide as close a constraint as Ramsay and WDS provide to each other in the Wollongong area,

as discussed below. The ACCC is currently seeking further information from interested parties to test this view.

Geographic substitution by health funds and DVA

63. Health funds submitted to the ACCC that competition between day surgery providers on a local level is a key factor in determining day surgery rates for specific facilities. The ACCC understands that if a day surgery provider has a particularly strong position in a local area, a health fund that wishes to insure services to fund members in that area may have no choice other than to deal with that day surgery provider.
64. Market inquiries suggest that because of the 'one in, all in' approach taken by some hospital groups in negotiating HPPAs with health funds, hospital groups can utilise a strong presence in a local area to influence HPPA negotiations for other facilities irrespective of their location. Local competitive dynamics between day surgery providers in a particular geographic area/s can thus influence day surgery rates on a wider geographic basis³.

Preliminary view on relevant markets

65. Based on information received to date, the ACCC's preliminary view is that the relevant markets for assessing the likely competition effects of the proposed acquisition are the supply of:
 - day surgery services to health funds and the DVA. The ACCC considers that this market has local and national dimensions; and
 - day surgery services to patients in the Wollongong area.

The ACCC invites comments from interested parties on its preliminary views about the scope of the relevant market/s. In particular, interested parties may wish to address:

- the extent to which doctors currently utilising FPH or WDS would be likely to increase their use of SPH in the event the proposed acquisition proceeds and Ramsay attempts to increase day surgery rates by 5-10%;
- the ability for SPH and other competing day surgery providers to commence supplying services in relation to ophthalmic surgery;
- specific examples of how competition between WDS and Ramsay has enabled health funds to secure competitive day surgery rates in the Wollongong area;
- specific examples of how competition between day surgery providers in particular local areas has enabled health funds to secure competitive rates at facilities in those locations;
- specific examples of how competition between day surgery providers in local geographic areas influences day surgery rates paid by health funds for day surgery services in *other locations*; and

³ The ACCC understands that day surgery rates are negotiated in a similar way with the DVA.

- whether the new day surgery wing of Wollongong Public will materially reduce its waiting lists and is likely to increase substitution by health fund members away from Ramsay facilities.

Competition issues of concern:

1. Ramsay's ability to raise rates for day surgery services to health funds and the DVA

66. The ACCC's preliminary view is that the proposed acquisition is likely to substantially lessen competition for the supply of day surgery services to health funds and the DVA. Based on its market inquiries to date, the ACCC is concerned that Ramsay would have the ability to unilaterally raise rates for day surgery services in the Wollongong area. Further, based on information provided to the ACCC by health funds, the ACCC considers that Ramsay would have the ability to leverage its strong market presence in the Wollongong area to increase rates at other locations in Ramsay's national hospital network.

Local unilateral effects

Reducing three suppliers to two

67. At the local level, the removal of WDS as an independent supplier of day surgery services would reduce the number of main suppliers from three to two – Ramsay and SPH. This reduction in competition is likely to result in Ramsay having the ability to unilaterally increase rates for day surgery services in the Wollongong area and may also give it the ability to diminish some non-price aspects of its offer.
68. Several large health funds submitted to the ACCC that the presence of alternative day surgery providers at the local level is a significant factor in HPPA negotiations between health funds and providers of day surgery services. These health funds submitted that the proposed acquisition would materially reduce the options for health funds seeking to negotiate HPPAs for day surgery services in the Wollongong area.
69. Specifically, health funds submitted to the ACCC that the increase in concentration of Ramsay's ownership of day surgery providers in the Wollongong area would provide it with the ability to impose higher rates for WDS's services. WDS's rates are currently constrained by competition from both Ramsay and, to a lesser extent, SPH. If the proposed acquisition proceeds, resulting in health funds having only one alternative supplier in the Wollongong area, health funds would have a significantly reduced ability to negotiate competitive rates for day surgery services.
70. Furthermore, as explained above under 'industry background', WDS appears to have lower overheads than Ramsay. This means WDS has the ability to act as a significant competitive constraint on Ramsay in terms of pricing of day surgery services. The proposed acquisition would remove a supplier from the market that is operating at a lower price point than Ramsay.

Removal of closest competitor

71. WDS's range of day surgery services and geographic location make it Ramsay's closest competitor in the Wollongong area. WDS and Ramsay each provide a broad range of day surgery services encompassing many diverse medical specialisations. Moreover, their day surgery facilities in Wollongong will be located immediately adjacent to each other in central Wollongong. Indeed, WDS and Ramsay are the only suppliers of a wide range of day surgery services in central Wollongong.
72. In light of the importance of the *location* of day surgery facilities to both patients and their referring doctors, as discussed above, the ACCC considers WDS to be the closest source of competition to Ramsay's current and future day surgery facilities in Wollongong. The proposed acquisition would therefore remove Ramsay's *closest* competitor for supply of day surgery services in the Wollongong area.
73. Health funds submitted to the ACCC that their ability to negotiate day surgery rates with Ramsay for WPH would be significantly undermined by the removal of WDS as an independent competitor. Health funds submitted that, without an independent competitor to Ramsay in central Wollongong, Ramsay would have a significantly increased ability to seek higher rates for day surgery services at WPH than would otherwise be the case.
74. The ACCC received submissions from health funds identifying that Ramsay has significantly increased rates charged to health funds for the supply of day surgery services following previous acquisitions of day surgery facilities in other areas of Australia. Health funds submitted to the ACCC that this experience is indicative of the likely outcome for pricing of WDS's services if the proposed acquisition proceeds.
75. Potential competitive constraints that may prevent an attempted increase in day surgery rates by Ramsay include new market entry, expansion by SPH, or any countervailing power of health funds and the DVA. These are discussed below.

Potential expansion by SPH

76. The ACCC's preliminary view is that SPH currently is not a significant competitive restraint on Ramsay and WDS. SPH appears unlikely to have the ability or incentive to effectively constrain an attempted increase in day surgery rates by Ramsay, post-acquisition.
77. SPH's focus on providing rehabilitation services and its location approximately 20km south of Wollongong appear to significantly limit the competitive constraint that SPH currently exercises on the supply of day surgery services in the Wollongong area. SPH also appears to focus on rehabilitation services.
78. Further, SPH already has spare day surgery capacity despite high demand by patients in the Wollongong area, and despite Wollongong doctors having sought significant additional theatre time from Ramsay. This is consistent with the ACCC's market inquiries, which indicated that SPH has had difficulty attracting doctors and patients away from FPH and WDS. It therefore appears unlikely that an attempted exercise of market power by Ramsay at WDS and/or WPH would be defeated by doctors and patients switching their demand from Ramsay to

SPH, or that SPH would significantly expand its supply of day surgery services in response to Ramsay attempting to increase day surgery rates at WDS and/or WPH.

Likelihood of new entry

79. Although there has been some speculation about new entry and certain approvals granted to possible entrants, the ACCC's market inquiries to date suggest that there is no credible threat of new entry to the supply of private day surgery services in the Wollongong area within the foreseeable future.
80. Interested parties have indicated that 'greenfield' development of a new day surgery is very difficult and, in particular, takes a long time. New entry that would be sufficiently timely to constrain Ramsay's pricing and service levels is therefore very unlikely.
81. Market inquiries with existing hospital operators and possible new entrants have identified the following main obstacles to new entry:
 - attracting doctors;
 - securing HPPAs with private health funds;
 - obtaining necessary certifications and approvals from relevant planning and health authorities;
 - high capital investment;
 - locating an appropriate site; and
 - how the incumbent, Ramsay, may respond to a threat of entry, such as by securing doctors on exclusive terms or expanding capacity.
82. Some interested parties anticipated that, post-acquisition, Ramsay's market presence in the Wollongong area would afford it the ability to secure doctors on terms which would prevent or restrict those doctors from working at rivals' day surgery facilities. Such arrangements would increase barriers to entry and expansion by rivals. The ACCC notes that, based on information provided by Ramsay, there are no arrangements between Ramsay and any doctors currently working at FPH that would prevent those doctors from working at other facilities.
83. Interested parties, including possible entrants, identified to the ACCC that it is very difficult to secure commitments from doctors to work at newly proposed facilities and this creates significant uncertainty and risk for possible entrants. Consistent with the experience of these possible entrants, the ACCC's market inquiries identified that doctors are generally unwilling to make these commitments to future possible entrants.
84. Possible new entrants to the Wollongong market described health funds as generally being unwilling to enter into an HPPA with a new facility owner unless there was a demonstrated need for the new capacity. The ACCC invites further information as to whether health funds would be likely to enter into HPPAs with any new or expanded private facilities in the Wollongong area.

85. Some possible new entrants indicated to the ACCC that they have put their plans on hold, pending the development of WPH and its impact on demand for day surgery services by patients and their referring doctors in the Wollongong area. Finally, the ACCC notes that there has been speculation that a new private hospital would be built on the former ATO site in central Wollongong. The ACCC's market inquiries identified that this is very unlikely to occur.
86. Thus, while future entry is possible, *timely* entry on a scale that would constrain Ramsay's pricing and service levels is very unlikely.

Countervailing power of health funds and the DVA

87. Ramsay submits that private health funds dictate day surgery rates charged by Ramsay. The ACCC's market inquiries in this matter and previous merger matters involving private hospitals and day surgeries do not support this submission. Further, while some large health funds account for significant proportions of Ramsay's revenue in Wollongong and nationally, this would not afford those health funds with countervailing power to defeat an attempted increase by Ramsay in day surgery rates in the Wollongong area.
88. In the ACCC's view, countervailing power exists when customers have special characteristics that enable them to defeat a supplier's attempted exercise of market power by credibly threatening to bypass the merged firm by vertically integrating into the upstream market, sponsoring new entry, or establishing importing arrangements (in certain product markets) ⁴.
89. The ACCC invites further submissions as to whether large health funds would be willing and able to undertake capital investment in a new provider of day surgery services or significant expansion in capacity of an existing provider of day surgery services. The ACCC's review to date has not identified any health funds sponsoring entry or expansion by a provider of day surgery services.
90. The ACCC notes that to the extent that there is an option for a health fund to go 'out of contract' with Ramsay, this would not be to the benefit of ultimate consumers, being health fund members. If health funds cannot come to an agreement with Ramsay in response to Ramsay seeking higher day surgery rates in the Wollongong area, those members' only alternative would be SPH and the likely result for many members would be higher costs in the form of a 'gap' payment to Ramsay.
91. Further, this ability for a health fund to go 'out of contract' with Ramsay would be significantly restrained by competition between health funds. This is because a health fund without 'no gap' arrangements with the major Wollongong day surgery provider risks reputational damage and would risk losing members to rival health funds over time.
92. In the absence of health funds having countervailing power or another effective competitive constraint/s on Ramsay's pricing, the ACCC considers that the removal of Ramsay's closest local competitor and consequent reduction from three to two main suppliers of day surgery services in the Wollongong area is likely to substantially lessen competition.

⁴ ACCC Merger Guidelines 2008, 7.48.

National network effects

93. Ramsay currently operates approximately 69 hospital and/or day surgery facilities nation-wide. The proposed acquisition of WDS would therefore, by itself, be an incremental addition to Ramsay's national presence.
94. However, some large health funds submitted to the ACCC that Ramsay's 'one in, all in' approach to negotiating HPPAs enables it to leverage market power in one geographic area to seek higher rates in other areas⁵. Health funds submitted that they may therefore be obliged to accept higher rates at other locations or risk not securing 'no gap' arrangements with Ramsay for its Wollongong health facilities.
95. The ACCC is therefore concerned that Ramsay could leverage its strong post-acquisition market presence in the Wollongong area to demand higher day surgery rates from health funds at other locations in Australia.

ACCC's preliminary view - day surgery services to health funds and the DVA

96. In summary, the ACCC is concerned that the proposed acquisition would be likely to substantially lessen competition for the supply of day surgery services to health funds and the DVA, resulting in:
 - rate increases for the supply of these services by WDS and FPH/WPH and/or a reduction in the non-price aspects of their offers; and
 - Ramsay having the ability to leverage its strong market presence in the Wollongong area to increase rates at other locations in Ramsay's national hospital network.

The ACCC invites comments from interested parties on its concerns in relation to the impact of the proposed acquisition on the supply of private day surgery services to health funds and the DVA. In particular, interested parties may wish to address:

- specific examples of HPPA negotiations between Ramsay and health funds in which competition between WDS and Ramsay influenced negotiations or outcomes;
- any progress or changes in plans by possible new entrants to supply day surgery services in the Wollongong area, and the reasons for these possible new developments not having been significantly progressed to date;
- specific examples of HPPA negotiations between Ramsay and health funds in which Ramsay successfully negotiated on a 'one in, all in' basis, and how this affected HPPA outcomes;
- specific examples of HPPA negotiations between Ramsay and health funds in which Ramsay unsuccessfully attempted to negotiate on a 'one in, all in' basis, and how this affected HPPA outcomes (for example, to have second tier arrangements); and

⁵ Large health funds submitted to the ACCC that Ramsay seeks to negotiate on the basis that unless all services at all Ramsay facilities are covered, it will not agree to an HPPA with a health fund at all.

- specific examples of HPPA negotiations between Ramsay and health funds in which Ramsay leveraged its market presence in one location to secure higher rates at another location.

2. Ramsay's ability to raise prices, and reduced incentive to improve services, to patients (and doctors)

97. The ACCC's preliminary view is that the proposed acquisition is likely to substantially lessen competition for the supply of day surgery services to patients, both directly and through the doctors who refer them, in the Wollongong area. Based on market inquiries to date, the ACCC is concerned that the proposed acquisition would give Ramsay the ability to unilaterally raise day surgery rates (prices) to *uninsured* patients, and/or reduce Ramsay's incentive to invest in and improve its supply of day surgery services to patients, in the Wollongong area.
98. Uninsured patients account for a minority of the day surgery services supplied by private facilities in the Wollongong area, in terms of episodes and revenues. Accordingly, the market for the supply of day surgery services to uninsured patients in the Wollongong area is relatively small, compared to the market for the supply to health fund members⁶.
99. Most uninsured patients in the Wollongong area utilise the public hospital system, in particular Wollongong Public, rather than utilise the merger parties' private day surgery facilities. However, as mentioned above, the ACCC's preliminary investigation in the Wollongong area shows that a proportion of uninsured patients *do* choose to pay for day surgery services at WDS, FPH or SPH. The proportion of uninsured to insured patients, as well as the prices charged to such patients varies significantly between the three facilities which potentially indicates that currently some competition exists between them.
100. Differences in prices charged to uninsured patients by WDS, FPH and SPH are quite large. For instance, the ACCC's inquiries indicate that the day surgery prices WDS currently charges uninsured patients are well below those charged by FPH and SPH. This price difference may make the offer of WDS particularly attractive to uninsured patients and is consistent with information before the ACCC that indicates WDS treats a relatively higher proportion of uninsured patients. The ACCC's preliminary view is therefore that the proposed acquisition is likely to result in Ramsay having the ability and incentive to charge higher day surgery rates to uninsured patients at both WDS and FPH (and WPH in future).
101. The proposed acquisition may also impact on the future *quality* of day surgery services supplied to both insured and uninsured patients. This potential impact on the standard of care or quality of day surgery facilities would not necessarily involve a reduction in quality compared to current levels. Rather, without competition from WDS, Ramsay may not have sufficient ongoing incentive to improve services over time. This may significantly impact the quality of day surgery services to patients and doctors in the Wollongong area, denying them

⁶ Ramsay's ability to raise the costs to health fund members either via premiums in their health funds, or through having to pay "gap" fees as a result of the proposed acquisition, is discussed above.

access to the improvements to service that Ramsay and WDS might make if they continued to compete with each other to attract patients and doctors.

102. As mentioned above, private health facilities compete to attract doctors to practice at those facilities and to refer patients to those facilities, and an important way that this competition takes place is through providing high quality facilities, equipment, programs and services to patients. In order for this mechanism to function, there must be a realistic threat that doctors will switch to alternative facilities should quality of facilities, equipment, programs and services fail to improve in line with those at other facilities.
103. Post-acquisition, doctors' choices in this regard would be very limited. During the ACCC's preliminary investigation, a number of doctors and existing day surgery providers submitted that doctors are unlikely to practise at SPH because it is perceived to have a lower quality of facilities, compared to FPH and WDS. Furthermore, as mentioned above, for most doctors based in Wollongong, SPH is a 25 minute drive away, meaning that travelling to and from the facility would reduce their time available to practice during the day. Accordingly, the ACCC's preliminary view is that SPH would not generally act as a close alternative for doctors.
104. Without sufficiently effective competition from SPH or other competitive constraints, it is likely that Ramsay would have a reduced incentive to invest in or develop staff, specialists, day surgery facilities or programs. The proposed acquisition therefore removes a competitive constraint on Ramsay to provide quality day surgery services in the future.
105. On the other hand, the ACCC also recognises a possibility that the proposed acquisition could lead to some improvements to aspects of service to patients and doctors in the Wollongong area. In particular, any future development of a physical connection between WDS and WPH may allow these facilities to be better utilised to the benefit of doctors and patients. The ACCC continues to investigate whether these factors will affect the extent to which the proposed acquisition is likely to lead to a substantial lessening of competition.

ACCC's preliminary views - day surgery services to patients (and doctors)

106. In summary, the ACCC is concerned that the proposed acquisition is likely to result in a substantial lessening of competition in the supply of day surgery services to patients in the Wollongong area (both directly and through the doctors who refer them).

The ACCC invites comments from interested parties on its potential concerns in relation to the impact of the proposed acquisition on the supply of private day surgery services to patients. In particular, interested parties may wish to address:

- the extent to which FPH and WDS actively compete for uninsured patients, including any evidence of them seeking to attract uninsured patients or responding to each other's pricing or non-pricing offers to such patients;
- the likelihood of doctors and patients increasing their use of SPH in response to Ramsay attempting to increase day surgery (rates) prices or reducing service;

- specific examples of how, in the absence of independent competition from WDS, Ramsay may have a reduced incentive to invest in or develop its day surgery operations, and how this would be likely to impact the quality of day surgery services to patients and doctors in the Wollongong area over time;
- the extent to which, post-acquisition, the quality of day surgery services in the Wollongong area would be ensured or maintained by the influence of doctors, regulatory standards and/or the importance to Ramsay of protecting its reputation or brand; and
- the likelihood and importance of potential improvements to day surgery services supplied to patients and doctors in the Wollongong area as a result of the proposed acquisition, particularly in the event of any future development of a physical connection between WDS and WPH.

ACCC's future steps

107. The ACCC will finalise its view on this matter after it considers submissions invited by this Statement of Issues.
108. As described above, the ACCC now seeks submissions from interested parties on each of the issues identified in this Statement of Issues and on any other issue that may be relevant to the ACCC's assessment of this matter. Submissions are to be received by the ACCC no later than **2 July 2015** and should be emailed to mergers@acc.gov.au.
109. The ACCC intends to publicly announce its final view by **27 August 2015**. However the anticipated timeline may change in line with the Merger Review Process Guidelines. A Public Competition Assessment for the purpose of explaining the ACCC's final view may be published following the ACCC's public announcement.