



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD95/2021

**CHIEF EXECUTIVE MEDICARE ON BEHALF OF THE COMMONWEALTH OF AUSTRALIA** and another/others named in the schedule  
Applicant

**SPECIALIST DIAGNOSTIC SERVICES PTY LTD (ACN 007 190 043)**  
Respondent

### ORDER

**JUDGE:** JUSTICE STEWART

**DATE OF ORDER:** 08 October 2021

**WHERE MADE:** Sydney

#### THE COURT NOTES THAT:

On the respondent, by its solicitor, undertaking to the Court:

- (a) not to use the Confidential Information (as defined in paragraph 1(e) of these Orders) other than for the purposes of defending this proceeding; and
- (b) to cause each person in paragraph 2(e)-(f) of these Orders to provide a personal confidentiality undertaking to the Court in the form set out at Annexure B to these Orders.

#### BY CONSENT, THE COURT ORDERS THAT:

1. The following defined terms apply for the purposes of these Orders:
  - (a) **ACC** means approved pathology collection centre.
  - (b) **Confidential Documents** means the documents identified in Annexure A to these Orders which are the subject of the Pathology Third Party Applications.
  - (c) **Conrick Reports** means the two expert reports of Mr John Conrick dated 10 June 2021 emailed to King & Wood Mallesons by the Australian Government Solicitor on 23 June 2021 at 10:58 am and 11:00 am.
  - (d) **Pathology Third Party Applications** means the applications for suppression or non-publication orders pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) filed by:



- (i) Clinical Laboratories Pty Ltd (ACN 006 823 089) on 23 July 2021;
  - (ii) Sonic Healthcare Limited (ACN 004 196 909) on 2 August 2021; and
  - (iii) Firststrax Pty Ltd on 23 July 2021.
- (e) **Confidential Information** means the following items contained in the Confidential Documents and any reproduction of the information identified in items (i) to (xii) below in any other document:
- (i) the rental amount and payment terms for the lease;
  - (ii) the details of any rental reviews contained in the lease;
  - (iii) the term, commencement date, termination date, renewal date, option date and details of the exercise of any option, and any other information which discloses directly or indirectly the end date for the pathology collection centre's lease or the date it is up for renegotiation;
  - (iv) the details of any option to renew the pathology collection centre's lease;
  - (v) the inclusion and details of any exclusivity terms;
  - (vi) the inclusion and details of any change of control provisions (and any termination rights associated with a change in control);
  - (vii) the inclusion and details of any associated service agreement and its interplay with the terms of the lease;
  - (viii) the inclusion and details of any terms which refers to a related lease and its interplay with the terms of the lease;
  - (ix) the details of terms concerning outgoings;
  - (x) the details of any capital contributions (including "fit-out") payable in respect of the leases;
  - (xi) Sonic's site plans, site drawings or floor plans; and
  - (xii) any other information which could reasonably risk revealing the information in items (i) to (xi) above (including when considered in aggregate with other available information).
- (f) **Summary Information** means subject to any disclosure being limited to:
- (i) those portions of the Conrick Reports which do not contain Confidential Information;



- (ii) the range, median and average of rental amounts of the ACCs examined by Mr Conrick, but not the specific rental amounts of any of the ACCs that are the subject of the Pathology Third Party Applications;
  - (iii) the range, median and average of the lettable area / size of the ACCs examined by Mr Conrick, and the specific lettable areas of any of the ACCs that are the subject of the Pathology Third Party Applications;
  - (iv) the number and street addresses of ACCs examined by Mr Conrick and the post codes in which they are situated; and
  - (v) the number of ACCs examined by Mr Conrick that are co-located within a medical facility.
- (g) **Support Staff** means administrative assistants whose role is to provide administrative assistance to a person in the ordinary course of their employment, and excludes any other employee, including, for the avoidance of doubt, any employee involved in leasing activities.

### **Confidentiality Regime**

2. Pursuant to s 37AF(1)(b)(i) of the *Federal Court of Australia Act 1976* (Cth), on the ground that it is necessary to prevent prejudice to the administration of justice, the communication, publication or disclosure of the Confidential Information (contained in the Confidential Documents or the Conrick Reports) be prohibited, other than to:
- (a) Court staff and any other person assisting the Court;
  - (b) the Chief Executive of Medicare;
  - (c) the Commonwealth Department of Health and Services Australia staff;
  - (d) external expert advisors, contractors or proposed expert witnesses retained by the Commonwealth Department of Health and Services Australia or the respondent for the purpose of the proceeding;
  - (e) external legal representatives for the parties retained for the purpose of the proceeding (including, for the avoidance of doubt, solicitors and counsel of the respondent);
  - (f) the following individuals:
    - (i) John McKechnie, Chief Executive Officer of the Respondent;
    - (ii) Alex Ostermann, Chief Financial Officer of the Respondent;



- (iii) Dr Malcolm Parmenter, Chief Executive Officer of Healius Ltd;
  - (iv) Charles Tilley, Group Company Secretary and Senior Legal Counsel for the respondent;
  - (v) James Atkinson, Senior Legal Counsel for the Respondent; and
  - (vi) Matthew Brumby, General Manager of Laverty Pathology;
- (g) Support Staff of the persons listed in sub-paragraphs (e)-(f) above, subject to:
- (h) the respondent providing the corporate confidentiality undertaking to the Court that is set out in the above notation to these Orders;
  - (i) each person in sub-paragraph (f) above providing a direction to their Support Staff that the Confidential Information is confidential and must not be provided to any other person or be dealt with in any manner that would allow another person to gain access;
  - (j) each person in sub-paragraphs (e)-(f) above to be given access to the Confidential Information providing a personal confidentiality undertaking in the form set out at Annexure B to these Orders, including an undertaking by them not to be directly or indirectly involved in, or participate in, the following activities in respect of the leases and premises that are the subject of the Confidential Documents (**the Lease Premises**):
    - (i) communication (whether written or oral, and by any means whatsoever) with landlords regarding the availability of the Lease Premises for lease;
    - (ii) tendering for any lease, or making an offer (whether written or oral) to enter into any lease in relation to the Lease Premises;
    - (iii) the setting of pricing or strategy for the specific purpose of a tender or lease negotiation in relation to the Lease Premises (noting that an overarching pricing approach or strategy may indirectly affect a tender of lease negotiation in relation to the Lease Premises);
    - (iv) the negotiation of any lease pricing or terms in relation to the Lease Premises, extending to the giving of instructions on any of these matters or involvement in the granting of any approvals,but noting that:



- (v) Mr McKechnie is permitted to provide final approval in respect of any lease in relation to the Lease Premises, consistent with the usual business practice of the respondent whereby Mr McKechnie is required to approve all leases entered into by the respondent. Final approval will only be sought from Mr McKechnie once all draft terms of a proposed lease have been exchanged between the respondent and the proposed landlord, subject to final approval of those terms by the respondent.
3. Order 2 shall operate until the earlier of the Court's further order or 31 December 2026, subject to any application by the Pathology Third Party Applicants to extend its operation beyond that date.
4. The legal representatives of the Respondent (including Messrs Tilley and Atkinson) be permitted to communicate the Summary Information to the following persons for the express purpose of providing advice or obtaining instructions in relation to the proceeding:
- (a) the Board of Directors of Healius Ltd;
  - (b) Maxine Jacquet, Chief Financial Officer and Chief Operating Officer of Healius Ltd; and
  - (c) John Natal, General Manager Legal of Healius Ltd.
5. The applicant in the proceedings to give the Pathology Third Party Applicants at least 6 weeks' notice of any hearing, or other application where the Confidential Documents or Confidential Information is proposed to be tendered.

Date that entry is stamped: **8 October 2021**

  
Registrar



**Schedule**

No: NSD95/2021

Federal Court of Australia  
District Registry: New South Wales  
Division: General

Applicant CHIEF EXECUTIVE MEDICARE  
Applicant FIRSTRAX PTY LIMITED  
Interested Person SONIC HEALTHCARE LIMITED (ACN 004 196 909)

**ASSISTED DISPUTE RESOLUTION**

Interested Person FIRSTRAX PTY LIMITED  
Applicant CHIEF EXECUTIVE MEDICARE ON BEHALF OF THE  
COMMONWEALTH OF AUSTRALIA  
Interested Person CLINICAL LABORATORIES PTY LTD  
Interested Person SONIC HEALTHCARE LIMITED (ACN 004 196 909)  
Respondent SPECIALIST DIAGNOSTIC SERVICES PTY LTD (ACN 007  
190 043)



**ANNEXURE A – CONFIDENTIAL DOCUMENTS**

<b>Confidential Documents</b>		
<b>No.</b>	<b>Document ID</b>	<b>Third Party Applicant</b>
1.	HEA.0001.0001.0266	ACL
2.	HEA.0001.0001.0271	ACL
3.	HEA.0001.0001.0272	ACL, Firststrax
4.	HEA.0001.0001.0278	ACL, Firststrax
5.	HEA.0001.0001.0281	ACL
6.	HEA.0001.0001.0308	ACL
7.	HEA.0001.0001.0334	ACL
8.	HEA.0001.0001.0340	ACL
9.	HEA.0001.0001.0346	ACL
10.	HEA.0001.0001.0371	ACL
11.	HEA.0001.0001.0376	ACL
12.	HEA.0002.0001.0101	ACL
13.	HEA.0002.0001.0137	ACL
14.	HEA.0002.0001.0144	ACL
15.	HEA.0001.0001.0377	Sonic
16.	HEA.0001.0001.0427	Sonic
17.	HEA.0001.0001.0521, pages HEA.0001.0001.0521 and HEA.0001.0001.0539 only	Sonic
18.	HEA.0001.0001.0540, pages HEA.0001.0001.0557 and HEA.0001.0001.0558 only	Sonic



<b>Confidential Documents</b>		
<b>No.</b>	<b>Document ID</b>	<b>Third Party Applicant</b>
19.	HEA.0001.0001.0569	Sonic
20.	HEA.0001.0001.0592	Sonic
21.	HEA.0001.0001.0613	Sonic
22.	HEA.0001.0001.0614, pages HEA.0001.0001.0636 and HEA.0001.0001.0637 only	Sonic
23.	HEA.0001.0001.0641	Sonic
24.	HEA.0001.0001.0669	Sonic
25.	HEA.0001.0001.0670	Sonic
26.	HEA.0001.0001.0774	Sonic
27.	HEA.0001.0001.0775	Sonic
28.	HEA.0001.0001.0776, page HEA.0001.0001.0776 only	Sonic
	HEA.0001.0001.0789	Sonic
29.	HEA.0001.0001.0803	Sonic
30.	HEA.0001.0001.0804	Sonic
31.	HEA.0002.0001.0154, page HEA.0002.0001.0175 only	Sonic
32.	HEA.0002.0001.0225	Sonic
33.	HEA.0002.0001.0226	Sonic
34.	HEA.0002.0001.0235	Sonic
35.	HEA.0002.0001.0236	Sonic



<b>Confidential Documents</b>		
<b>No.</b>	<b>Document ID</b>	<b>Third Party Applicant</b>
36.	HEA.0002.0001.0244	Sonic
37.	HEA.0002.0001.0246	Sonic
38.	HEA.0002.0001.0247	Sonic
39.	HEA.0002.0001.0255	Sonic
40.	HEA.0002.0001.0256	Sonic
41.	HEA.0002.0001.0319	Sonic
42.	HEA.0002.0001.0327	Sonic
43.	HEA.0002.0001.0331	Sonic
44.	HEA.0002.0001.0363, page HEA.0002.0001.0363 only	Sonic
45.	HEA.0002.0001.0368, page HEA.0002.0001.0408 only	Sonic
46.	HEA.0002.0001.0409	Sonic
47.	HEA.0002.0001.0150	Sonic
48.	HEA.0002.0001.0151	Sonic



## ANNEXURE B – FORM OF PERSONAL CONFIDENTIALITY UNDERTAKING

I, [name], [occupation], of [address], on [date] hereby undertake to the Court as follows:

1. In this undertaking:

- (a) **Confidentiality Orders** means the orders of the Court in the Proceeding dated 8 October 2021, a copy of which is annexed to this undertaking.
- (b) **Confidential Documents** means the documents identified in Annexure A to the Confidentiality Orders which are the subject of the Pathology Third Party Applications.
- (c) **Conrick Reports** means the two expert reports of Mr John Conrick dated 10 June 2021 emailed to King & Wood Mallesons by the AGS on 23 June 2021 at 10:58 am and 11:00 am.
- (d) **Court** means the Federal Court of Australia.
- (e) **Confidential Information** means the following items contained in the Confidential Documents and any reproduction of the information identified in items (i) to (xii) below in any other document:
  - (i) the rental amount and payment terms for the lease;
  - (ii) the details of any rental reviews contained in the lease;
  - (iii) the term, commencement date, termination date, renewal date, option date and details of the exercise of any option, and any other information which discloses directly or indirectly the end date for the pathology collection centre's lease or the date it is up for renegotiation;
  - (iv) the details of any option to renew the pathology collection centre's lease;
  - (v) the inclusion and details of any exclusivity terms;
  - (vi) the inclusion and details of any change of control provisions (and any termination rights associated with a change in control);
  - (vii) the inclusion and details of any associated service agreement and its interplay with the terms of the lease;
  - (viii) the inclusion and details of any terms which refers to a related lease and its interplay with the terms of the lease;



- (ix) the details of terms concerning outgoings;
  - (x) the details of any capital contributions (including “fit-out”) payable in respect of the leases;
  - (xi) Sonic’s site plans, site drawings or floor plans; and
  - (xii) any other information which could reasonably risk revealing the information in items (i) to (xi) above (including when considered in aggregate with other available information).
- (f) **Lease Premises** means the leases and premises that are the subject of the Confidential Documents;
- (g) **Pathology Third Party Applications** means the applications for suppression or non-publication orders pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) filed by:
- (i) Clinical Laboratories Pty Ltd (ACN 006 823 089) on 23 July 2021;
  - (ii) Sonic Healthcare Limited (ACN 004 196 909) on 2 August 2021; and
  - (iii) Firstrax Pty Ltd on 23 July 2021.
- (h) **Proceeding** means NSD 95 of 2021 brought by the applicant against the respondent (and any appeals from a decision of the Court in NSD 95 of 2021).
2. ***[The following clause is to be excluded from undertakings signed by the Applicant’s legal representatives.]*** I will not access the Confidential Information until I have signed this undertaking.
3. I will not use the Confidential Information for any purpose other than my work in respect of the Proceeding.
4. I will keep the Confidential Information confidential and will not disclose the Confidential Information directly or indirectly to any person, other than the persons permitted to access such information pursuant to the Confidentiality Orders or pursuant to any other order of the Court in the Proceeding.
5. To the extent that I have Confidential Information, I will:
- (a) establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access or use, which will include at a minimum:
    - i. ***[The following clause is to be excluded from undertakings signed by the Applicant’s legal representatives.]*** ensuring password



- protection for all electronic copies of any document disclosing the Confidential Information (including when saved on email systems or emailed internally or externally but excluding any copies of the Conrick Reports already saved on email systems as at the date of this undertaking that are incapable of permanent deletion); and
- ii. ensuring all hard copies of documents disclosing the Confidential Information are kept in a locked location, and the relevant key or code is appropriately protected from unauthorized access;
- (b) keep the Confidential Information under my effective control; and
  - (c) immediately notify the relevant Pathology Third Party Applicant(s), in writing of any suspected or actual unauthorised use, copying or disclosure of the Confidential Information, of which I become aware and provide any reasonable assistance requested by the Pathology Third Party Applicant(s) in relation to any action against any person for such unauthorised use or disclosure.
6. I will not be directly or indirectly involved in, or participate in, the following activities in respect of the Lease Premises:
- (a) communication (whether written or oral, and by any means whatsoever) with landlords regarding the availability of the Lease Premises for lease;
  - (b) tendering for any lease, or making an offer (whether written or oral) to enter into any lease in relation to the Lease Premises;
  - (c) the setting of pricing or strategy for the specific purpose of a tender or lease negotiation in relation to the Lease Premises (noting that an overarching pricing approach or strategy may indirectly affect a tender of lease negotiation in relation to the Lease Premises); and
  - (d) the negotiation of any lease pricing or terms in relation to the Lease Premises, extending to the giving of instructions on any of these matters or involvement in the granting of any approvals.
7. ***[The following clause is to be included exclusively in the undertaking provided by Mr John McKechnie.]*** Notwithstanding clause 6(d) above, I understand that pursuant to the Confidentiality Orders I am permitted to provide final approval in respect of any lease in relation to the Lease Premises, consistent with the usual business practice of the respondent whereby I am required to approve all leases entered into by the respondent. I understand that final approval will only be sought from me once all draft terms of a



proposed lease have been exchanged between the respondent and the proposed landlord, subject to final approval of those terms by the respondent.

8. If I am someone referred to in paragraph 2(e) of the Confidentiality Orders (external legal representative), I will ensure that, within 7 days of the Proceedings having been finally determined, dismissed, or discontinued, each person referred to in paragraph 2(d) of the Confidentiality Orders (external expert advisor) is notified that the Proceeding has been finally determined, dismissed, or discontinued, as the case may be.
9. Within 14 days of being notified of the final determination, dismissal or discontinuation of the Proceeding, subject to any professional obligations I have to retain any of the Confidential Information, I will destroy the Confidential Information in my possession, custody or control.
10. I acknowledge that my obligations set out in this undertaking will continue until 31 December 2026 or until the Court's further order.
11. [*The following clause is to be excluded from undertakings signed by the Applicant's legal representatives.*] I acknowledge that damages are not an adequate remedy for the breach of my obligations in this undertaking and that the Pathology Third Party Applicants may be entitled to equitable relief (including, without limitation, injunctive relief) in respect of any threatened or actual breach of my obligations in this undertaking.

**SIGNED** by [name] in the presence of:

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Signature of witness  
Name of witness:  
Address of witness:

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Signature of [name]