

**PUBLIC VERSION**

**COMMERCE ACT 1986: BUSINESS ACQUISITION SECTION 66: NOTICE SEEKING  
CLEARANCE**

29 February 2012

The Registrar  
Business Acquisitions and Authorisations  
Commerce Commission  
PO Box 2351  
WELLINGTON

Pursuant to s66(1) of the Commerce Act 1986 notice is hereby given seeking **clearance** of a proposed business acquisition.

## 0. SUMMARY OF APPLICATION

- 0.1 Southern Community Laboratories, through its 100% subsidiary Canterbury SCL Limited, (the "**Applicant**") proposes to acquire 100% of the shares in MedLab South Limited ("**MedLab South**") from the Sonic Group ("**Sonic**") ("**the Acquisition**").
- 0.2 MedLab South's non-exclusive supply contract with the Canterbury District Health Board ("**DHB**") for community pathology testing (under which it conducted approximately 60% of community pathology tests in the Canterbury region) expires on 31 March 2012. Canterbury DHB announced on 12 December 2011 that, following a competitive tender process, Healthscope will be the exclusive provider of community pathology services in Canterbury for the next 5 years (with a potential further 5 year extension at Canterbury DHB's discretion) and Canterbury DHB will exclusively self-supply its own hospital pathology requirements.
- 0.3 The primary driver of the Acquisition is to allow job continuity for the large majority of MedLab South staff who would be otherwise affected by the loss of the Canterbury DHB community testing contract to Healthscope owned SCL, effective 1 April 2012. To that end, it not only avoids SCL needing to newly recruit and contract with employees to staff its new Christchurch laboratory but also facilitates the transition for the benefit of the Canterbury DHB, the relevant technical staff, and the broader health professional and consumer communities in Canterbury.
- 0.4 MedLab South is also the exclusive provider of community and hospital pathology services to the South Canterbury DHB and to the Nelson-Marlborough DHB. Those contracts both expire in 2016. MedLab South is one of six competing providers of cervical screening tests to the National Screening Unit (the "**NSU**"). This contract expires in June 2013.
- 0.5 The effect of the Acquisition will therefore be that after 1 April 2012, MedLab South's key technical staff will be able to continue to provide community testing services in the Canterbury region as they did prior to 1 April 2012. At the time of the Acquisition there will also be a bare transfer of exclusive contracts in the Nelson-Marlborough and South Canterbury DHB regions, but no change to the services provided, price, or the people engaged in delivering those services, and no effect on competition in those markets. Indeed, the Acquisition will enhance confidence in those supply arrangements by securing in MedLab South the continuation of an effective service provider to the DHBs in those regions.
- 0.6 There is also no difference between the Factual and the Counterfactual with respect to the likely degree of competition in the Nelson-Marlborough and South Canterbury DHB community pathology services markets when those contracts come up for renewal in 2016. Regardless of whether the Acquisition occurs, Sonic, Canterbury Health Laboratories ("**CHL**"), Abano Healthcare Group Limited ("**Abano**") and Pathology Associates Limited ("**Pathology Associates**") are likely to tender for those contracts. In Sonic's case, any tender would always be at a price that did not involve use of a Sonic-owned Canterbury based laboratory, because the loss of the Canterbury DHB contract would always have resulted in Sonic not maintaining a laboratory in Canterbury after 1 April 2012. In addition:
- (a) Sonic will retain its significant New Zealand presence, as the current incumbent community testing services provider, alone or in a joint venture, to the Hutt/Capital and Coast, Wairarapa, MidCentral, Whanganui, Tairāwhiti, and Auckland/Wāitēmatā/Counties Manukau (private specialist referrals) DHBs. It is, and will remain, the second largest pathology services provider in New Zealand, the largest in Australia and Europe and the third largest in the USA.

- (b) Pathology Associates, Abano, and/or CHL are likely to submit tenders for these contracts in 2016 - as they commonly do during almost all other DHB tender rounds. The likelihood of this occurring is not changed by the Acquisition.
- (c) Another international competitor could choose to enter the New Zealand market and tender for these contracts in 2016. The likelihood of this occurring is not changed by the Acquisition.
- (d) The South Canterbury and Nelson-Marlborough DHBs, each as the sole purchaser of pathology services in their region, will have countervailing power to play these competing providers off against each other (the Commission found such countervailing power existed in Decision No. 599 ("**NZDG / Sonic**"). The Acquisition does not lessen the ability of the DHBs to exercise this countervailing power in 2016. DHBs hold, and can provide through the tender process, essentially all relevant information to enable bidders to submit a fully informed bid in competition with the existing provider [ ]. Indeed, the history of non-incumbent providers winning pathology contracts from the incumbent private provider, for example Healthscope in Auckland (from Sonic), MedLab South in Nelson-Marlborough (from Abano), Pathology Associates in Hamilton (from the larger provider NZDG), and Healthscope in Canterbury (from the larger provider Sonic) demonstrates the ability of DHBs to play new entrants off against their existing supplier.
- (e) There is also the possibility that one or more of the South Island DHBs will combine to provide the purchasing entity with greater countervailing negotiating power when a number of South Island contracts come up for renewal in 2016 and 2017. Initiatives such as Health Benefits Limited encourage DHBs to consider collective acquisitions of services where that can generate cost savings and improvements in service delivery.
- 0.7 Accordingly, Healthscope is of the view that the degree of competition for the provision of community testing services to the South Canterbury and Nelson-Marlborough DHBs when those contracts come up for renewal in 2016 is the same in the Factual and Counterfactual.
- 0.8 In respect of cervical screening services, in *NZDG / Sonic* the Commission found there was a national market for the provision of cervical screening tests. There are 6 competing providers in this national market: Sonic (46.1% market share by number of samples tested), Healthscope (24.3%), Aotea Pathology Limited ("**Aotea Pathology**") (10.4%), Pathology Associates (9.3%), CHL (5.6%) and Labplus (4.2%).<sup>1</sup> Of these national market shares, MedLab South accounts for 7.1%.
- 0.9 It is not yet clear how much, if any, of MedLab South's existing cervical testing volumes will transfer to Healthscope as part of the Acquisition. However, even if all of MedLab South's volumes transfer, the Acquisition will simply result in a decrease in the market share of the largest provider, Sonic, and a corresponding increase in the market share of the second largest provider, Healthscope, in a market where the NSU is a monopoly "price setter".<sup>2</sup>
- 0.10 Accordingly, the Acquisition will not lessen the competitive dynamic between these two providers, or any of the other providers in the market. There will continue to be the same "considerable existing competition in the national market for the provision of cervical screening tests" that the Commission observed in *NZDG / Sonic*.<sup>3</sup> The NSU will

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<sup>1</sup> National Cervical Screening Programme. Monitoring Report Number 32 1 July – 31 December 2009. Available at: [http://www.nsu.govt.nz/files/NCSP/NCSP\\_Monitoring\\_Report\\_32\\_FINAL.pdf](http://www.nsu.govt.nz/files/NCSP/NCSP_Monitoring_Report_32_FINAL.pdf)

<sup>2</sup> Decision No. 559 *New Zealand Diagnostic Group Ltd / Sonic Healthcare (New Zealand) Ltd* (29 September 2005) at paragraph 626.

<sup>3</sup> *Ibid* at paragraph 625.

retain its existing "substantial degree of countervailing power" as a price setter and it could, as found by the Commission in *NZDG / Sonic*, continue to credibly threaten to use the two DHB owned laboratories for all cervical testing in New Zealand.<sup>4</sup>

- 0.11 Similarly, the transfer of MedLab South's laboratory training contract, if it is transferred, will not have a material effect on competition. This is a small contract, worth approximately [ ] per year, and any existing supplier of cervical screening tests could easily continue to supply these services to the NSU.
- 0.12 Accordingly, Healthscope is of the view that the degree of competition in this market is the same in the Factual and Counterfactual.

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<sup>4</sup> Ibid at paragraph 626.

**PART 1: TRANSACTION DETAILS****1. Provide the name of the acquirer (person giving notice), and the name and position of the individual responsible for the notice.**

1.1 This notice is given by Canterbury SCL Limited:

Plunket House, 472 George Street  
PO Box 6064  
Dunedin 9059  
New Zealand  
Telephone: (64) 3 474 8308  
Fax: (64) 3 479 0983  
Email: [peter.gootjes@sclabs.co.nz](mailto:peter.gootjes@sclabs.co.nz)

Attention: Peter Gootjes

1.2 All correspondence and notices in respect of the application be directed in the first instance to:

Russell McVeagh  
Barristers & Solicitors  
PO Box 8  
**AUCKLAND 1140**

Attention: Sarah Keene, Partner / Troy Pilkington, Senior Solicitor  
Telephone: 09 367 8133 / 09 367 8108  
Fax: 09 367 8595  
Email: [sarah.keene@russellmcveagh.com](mailto:sarah.keene@russellmcveagh.com) /  
[troy.pilkington@russellmcveagh.com](mailto:troy.pilkington@russellmcveagh.com)

**2. Provide the name of the other merger parties, and the name/position of the relevant individual within the relevant merger parties.**

2.1 The other merger party is MedLab South Limited.

2.2 Contact details are as follows:

PO Box 25-091  
Christchurch 8144  
Telephone: (64) 3 363 0824  
Fax: (64) 3 363 0803  
Email: [brian\\_willcox@medlabsouth.co.nz](mailto:brian_willcox@medlabsouth.co.nz)

Attention: Brian Willcox

2.3 All correspondence and notices in respect of the application be directed in the first instance to:

Chapman Tripp  
23 Albert Street  
PO Box 2206  
**AUCKLAND 1140**

Attention: Lindsey Jones, Partner  
Telephone: 09 357 9020  
Fax: 09 357 9099  
Email: [Lindsey.Jones@chapmantripp.com](mailto:Lindsey.Jones@chapmantripp.com)

3. **With respect to the merger parties, list the relevant companies and the person or persons controlling these directly or indirectly. Please use organisational charts or diagrams to show the structure of the ownership and control of the acquirer and participant(s) to the acquisition.**

#### **The Healthscope Group**

- 3.1 The Healthscope Group is ultimately owned by private equity funds advised and managed by The Carlyle Group and TPG Capital, two of the world's leading private equity firms. Both have extensive experience investing in healthcare businesses and are amongst the leading investors in healthcare both in the region and globally. Both firms have supported, and continue to support, a large number of healthcare businesses around the world.
- 3.2 The Healthscope Group is the third largest provider of pathology services in Australia. In New Zealand, Healthscope, through a number of wholly-owned subsidiaries, currently has contracts to supply pathology services to 6 of 17 separate pathology funding regions in New Zealand (see further at Figure 1 below) including to the Southern and Canterbury DHBs in the South Island. The Healthscope Group, through a number of wholly-owned subsidiaries, also provides cervical screening tests to the NSU (see further at Figure 4 below).
- 3.3 The organisational chart at **Appendix 1** sets out the structure of the relevant ownership and control of the Applicant.

#### **Sonic**

- 3.4 Sonic, the owner of MedLab South, is an Australian listed group of companies that operate pathology and radiology laboratories in Australia, New Zealand, the United Kingdom, Germany, Switzerland, Belgium, Ireland and the USA.<sup>5</sup> Sonic is the largest pathology services provider in Australia and Europe and is the third largest private pathology services provider in the USA.<sup>6</sup>
- 3.5 In New Zealand, Sonic, through a number of the wholly-owned subsidiaries and joint venture companies, is the second largest pathology provider and currently has ongoing contracts to supply pathology services to 8 separate pathology funding regions in New Zealand (see further at Figure 1 below) and cervical screening tests to the NSU (see further at Figure 4 below). Through its wholly-owned subsidiary, MedLab South, Sonic currently has ongoing contracts in the South Island to supply pathology services to the Nelson-Marlborough and South Canterbury DHBs.
- 3.6 **Appendix 2** contains an organisational chart illustrating the structure of the relevant ownership and control of MedLab South.

#### **4. Provide details on what is to be acquired.**

- 4.1 The Applicant seeks clearance to acquire 100% of the shares in MedLab South from Sonic Healthcare (New Zealand) Limited.
- 4.2 MedLab South, either directly or through its 100% subsidiary Nelson Diagnostic Laboratory Limited (together referred to as MedLab South), currently has supply contracts with:

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<sup>5</sup> More information about the Sonic Group can be found at: <http://www.sonichealthcare.com/>

<sup>6</sup> See: <http://www.sonichealthcare.ie/about-us/our-parent-company.aspx>

- (a) the Canterbury DHB - this is a non-exclusive contract to supply community pathology testing and MedLab South currently has a market share of approximately 60% for the provision of community pathology tests in the Canterbury region. However, this contract expires on 31 March 2012, and Canterbury DHB has announced that, following a competitive tender process, SCL will be the exclusive provider of community pathology services in Canterbury for the next 5 years (with a potential further 5 year extension at Canterbury DHB's discretion) and Canterbury DHB will exclusively self-supply its own hospital pathology requirements;
  - (b) the South Canterbury DHB, as the exclusive provider of community and pathology services. This contract expires in 2016;
  - (c) the Nelson-Marlborough DHB, as the exclusive provider of community and hospital pathology services. This contract also expires in 2016; and
  - (d) the NSU, as one of six competing providers of cervical screening tests. This contract expires June 2013. (MedLab South also has a contract with NSU to provide training services to other laboratories).
- 4.3 MedLab South also currently operates MLS Envirolab, a laboratory in Invercargill for food and water testing. This is not an industry that the Healthscope Group in New Zealand is currently active in, and MLS Envirolab will not be acquired by Healthscope as part of the Acquisition. For this reason it will not be discussed further in this application.

## **5. Explain the commercial rationale for the proposed merger.**

- 5.1 The primary reason for the Acquisition from SCL's perspective is to facilitate skilled and valuable employees of MedLab South, currently engaged in providing community testing services in Canterbury, to transition seamlessly to servicing the exclusive contract recently won by SCL.
- 5.2 If the Acquisition does not proceed, MedLab South will cease to provide any community pathology services to the Canterbury DHB on 31 March 2012. Therefore the Applicant understands that from Sonic's perspective, Sonic will be obliged to make the majority of its Canterbury staff redundant from 1 April 2012 at significant cost. The South Canterbury DHB and the Nelson-Marlborough DHB contracts were tendered for by MedLab South on a basis that means they are most efficiently serviced if they move with the Canterbury DHB contract.

## **6. Provide copies of the final or most recent versions of any document bringing about the proposed merger.**

- 6.1 The Healthscope Group's indicative offer letter to Sonic is enclosed in **Confidential Appendix 3**.

## **7. If any other jurisdiction's competition agency has been (or will be) notified of the proposed merger, please list each competition agency notified (or to be notified) and the date of the notification.**

- 7.1 Not applicable. This is a transaction that only affects New Zealand.

**PART 2: THE INDUSTRY****8. Describe the relevant goods or services supplied by the merger parties (it is sufficient to refer in general terms to activities in which there will be no aggregation).**

8.1 Healthscope Group and MedLab South offer the following services in various regional geographic markets in New Zealand:

- (a) community testing pathology services;
- (b) hospital testing pathology services; and
- (c) cervical screening tests (MedLab South also has a contract with NSU to provide training services to other laboratories).

8.2 Community and hospital pathology services can broadly be broken down into three types of tests:

- (a) Routine tests that essentially any pathology lab in New Zealand has the equipment and capability to perform ("**Routine Tests**"). By volume, Routine Tests make up approximately 75% of all community and pathology tests performed in New Zealand. The term Routine Tests includes any time critical tests that need to be done on-hospital site as all hospital based pathology labs in New Zealand, both publicly or privately owned, maintain the capability to do such tests.
- (b) Specialised or highly automated tests that require specialised equipment and staff to perform and, therefore, are only profitable to supply if performed in large volumes so that the economies of scale can justify the investment in the necessary equipment ("**Volume Tests**"). By volume, Volume Tests make up approximately 12% of all community and pathology tests performed in New Zealand. Private providers typically have a smaller number of main laboratories around New Zealand that they use to perform Volume Tests. Accordingly, Volume Tests are typically transported inter-region. The economies of scale that can be generated in this industry, and the ability to transport samples, were both recognised by the Commission in *NZDG / Sonic*.<sup>7</sup>

Industry participants advised the Commission that operational scale offers many advantages in the provision of pathology services. Some testing procedures are highly automated, meaning that high volumes can lead to significant economies of scale.

Firstly, large players may feasibly move samples between regions for non-urgent, routinely performed tests, in order to take advantage of economies of scale. There is evidence of this already occurring, such as samples from the West Coast presently being transported to Christchurch for testing by both Sonic and NZDG.

- (c) Highly specialised tests that require very specialised equipment and staff to perform, and are only performed in a very limited number of highly specialised DHB-owned laboratories nationwide ("**Send Away Tests**"), such as CHL's laboratory in Christchurch. For example, while most community laboratories can perform about 180 different tests, CHL's Christchurch laboratory has the

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<sup>7</sup> Decision No. 559 *New Zealand Diagnostic Group Ltd / Sonic Healthcare (New Zealand) Ltd* (29 September 2005) at paras 202 and 203.



technology and staff expertise to perform 2000 different tests.<sup>8</sup> By volume, Send Away Tests make up approximately 12% of all community and pathology tests performed in New Zealand. The NZCC observed these Send Away Tests in Decision No. 572 ("**Valley Diagnostic / Wellington Pathology**") where it noted that there:<sup>9</sup>

lies a category of complex or rare tests that are performed by only a few specialised laboratories ('reference laboratories') around the country. There are four reference laboratories in New Zealand: LabPLUS, Waikato Hospital Lab, Environmental Science and Research; and CHL. Samples for these tests are collected, either by community or hospital providers, and are sent away to a reference laboratory where an aggregated 'critical mass' of such tests can meaningfully be analysed. Such tests are therefore termed 'send-away tests'.

No private provider in New Zealand self-supplies Send Away Tests, as the small volume of such tests does not justify the necessary high degree of investment in equipment and staff required to perform such tests. Accordingly, private providers typically transport Send Away Tests inter-region for highly specialised DHB laboratories to perform on a fee-per-test basis.

- 8.3 The Applicant adopts the Commission's previous descriptions of the relevant pathology services set out in Decisions 559 and 572 for the purposes of this application.

*MedLab South*

- 8.4 MedLab South provides services to the South Canterbury and Nelson-Marlborough DHBs as follows:

- (a) *South Canterbury DHB (population 56,220):*<sup>10</sup> MedLab South provides all community and hospital pathology services to South Canterbury DHB. It has historically provided these services using the South Canterbury DHB owned premises at Timaru hospital for Routine Tests, its Christchurch laboratory for Volume Tests and by paying CHL, on a fee-per-test basis, to perform Send Away Tests in CHL's highly specialised Christchurch laboratory.
- (b) *Nelson-Marlborough DHB (population 139,605):*<sup>11</sup> MedLab South provides all community and hospital pathology services to Nelson-Marlborough DHB. Again, up until recently it had provided these services using the Nelson-Marlborough DHB owned premises at Blenheim and Nelson hospitals for Routine Tests, its Christchurch laboratory for Volume Tests and by paying CHL, on a fee-per-test basis, to perform Send Away Tests in CHL's highly specialised Christchurch laboratory.

- 8.5 MedLab South does not have the capability to perform Volume or Send Away Tests within the South Canterbury or Nelson-Marlborough DHB regions. [ ]

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<sup>8</sup> More details can be found at: Canterbury Health Laboratories. Info for GPs. Retrieved from: <http://www.bloodtest.co.nz/Info-for-GPs/info-for-gps.htm>

<sup>9</sup> Decision No. 572 *Valley Diagnostic Laboratories Limited / Wellington Pathology Limited* (31 January 2005) at paragraph 65.

<sup>10</sup> Statistics NZ, 2011 DHB population estimate.

<sup>11</sup> *Ibid.*

**9. Describe the industry or industries affected by the proposed acquisition. Where relevant, describe how sales are made, the supply chain(s) of any product(s) or service(s) involved, and the manufacturing process. If relevant, provide a glossary of terms and acronyms.**

9.1 The Applicant also adopts the Commission's previous descriptions of the relevant industry, as set out in Decisions 559 and 572.

**10. Describe the current industry trends and developments including the role of imports and exports, emerging technologies, and/or changes in supply and demand dynamics.**

*Single provider contracts*

10.1 Continuing the trend observed in the Commission's earlier decisions, most of the 20 DHBs in New Zealand have now moved to single provider contracts for the provision of community pathology services in their DHB region (or combined DHB region where neighbouring DHBs collaborate for the purchase of pathology services). The Canterbury DHB was the final large DHB that until 2011 had not moved to a single provider model.

*UFB may facilitate remote testing by 2016*

10.2 The Ministry of Economic Development has earmarked the health sector to have Ultra Fast Broadband by 2015:<sup>12</sup>

The Health sector is a priority for rollout of Ultra Fast Broadband, with a policy goal for all public hospitals and most private health facilities to have access by 2015.

10.3 The prospect of Ultra Fast Broadband being used for telepathology (ie whereby by images of tissue samples are transmitted over a telecommunications network, rather than the samples themselves, to be diagnosed by a remote pathologist) has been specifically envisioned by the MED as part of its fibre rollout.<sup>13</sup> This development may, in time, enable pathology service providers to assess samples remotely without the need to physically transport samples to the pathology laboratory. While it is too early to predict the possible impact and timing of this development, it is certainly at least a possibility for the 2016 tender rounds relevant to this application.

*Amalgamation of DHB regions for pathology services tenders*

10.4 There is a possibility that one or more of the South Island DHBs will combine to provide the purchasing entity with greater countervailing negotiating power when a number of South Island contracts come up for renewal in 2016 and 2017. Initiatives such as Health Benefits Limited encourage DHBs to consider collective acquisitions of services where that can generate cost savings and improvements in service delivery.

**11. Please highlight any relevant mergers that have occurred in this industry over the past three years.**

11.1 The Applicant is not aware of any other transactions that have occurred in the New Zealand industry in the past three years.

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<sup>12</sup> Health. Crown Fibre Holdings. Retrieved from: <http://www.crownfibre.govt.nz/ultra-fast-broadband/who-will-receive-ultra-fast-broadband/health.aspx>

<sup>13</sup> Ibid.

**PART 3: MARKET DEFINITION****Horizontal Aggregation**

- 12. For each area of aggregation of market shares, please define the relevant market(s).**

**Product and geographic markets**

12.1 The Applicant adopts the Commission's earlier market definitions as set out in Decisions 559 and 572 for the purposes of this Application,<sup>14</sup> although it draws the Commission's attention to the practical differences between the ways that each of Routine Tests, Volume Tests and Send Away Tests are delivered in the industry (described at paragraph 8.2 above). Nevertheless, the Applicant does not consider it is necessary for the Commission to depart from its previous market definitions in considering the Acquisition.

12.2 For example, the Commission has in previous decisions not identified Send Away Tests as a relevant separate market for the Commission's analysis for the following reasons:<sup>15</sup>

Sonic and NZDG do not currently perform send-away testing. In order to do so, a pathology provider would need to pool a critical mass of specimens to support the investment in the specialist equipment. Neither Sonic nor NZDG indicated plans to expand to perform this specialised testing in the future. As the proposal did not give rise to any aggregation with respect to send-away testing, and no competition issues relating to this market were identified, send-away testing was not analysed further as a relevant market.

12.3 Consistent with the Commission's findings in *NZDG / Sonic*, neither the Applicant nor MedLab South perform Send Away Tests themselves but rather contract with CHL (or another specialist public provider) to provide them with Send Away Tests on a fee-per-test basis, as they each have been required to submit bids to DHBs inclusive of Send Away Tests. Given that neither the Applicant nor MedLab South provide such services directly themselves, the Applicant does not consider it material to the competition analysis of the Acquisition whether or not Send Away Tests are considered within the broader community and hospital pathology testing markets or within standalone Send Away Testing markets.

12.4 Equally, as neither the Applicant nor MedLab South provide Volume Testing from within the South Canterbury or Nelson-Marlborough DHB regions, the Applicant does not consider it material to the competition analysis of the Acquisition whether or not Volume Tests are considered within the broader community and hospital pathology testing markets or within standalone Volume Testing markets.

12.5 Accordingly, the Applicant proceeds on the basis that:

- (a) the relevant product markets are:
- (i) the provision of community testing pathology services - 'community testing';
  - (ii) the provision of hospital testing pathological services - 'hospital testing'; and

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<sup>14</sup> Decision No. 559, *New Zealand Diagnostic Group Ltd/Sonic Healthcare (New Zealand) Ltd* (29 September 2005) and Decision No. 572 *Valley Diagnostic Laboratories Limited / Wellington Pathology Limited* (31 January 2005)

<sup>15</sup> Decision No. 559, *New Zealand Diagnostic Group Ltd/Sonic Healthcare (New Zealand) Ltd* (29 September 2005) at para 120.

- (iii) the provision of cervical screening tests - 'cervical testing'.
- (b) the relevant geographic markets for community testing and hospital testing are the regional markets for each DHB (or a combined market encompassing more than one DHB where two or more DHBs collaborate together);<sup>16</sup> and
- (c) the relevant geographic market for cervical screening tests is a national market.<sup>17</sup>

### Customer dimension and timeframe

12.6 In *Sonic / NZDG*, the Commission stated that:<sup>18</sup>

The Commission typically adopts a two year time horizon over which to analyse the likely future competition effects of a proposed merger. However, where a market is characterised by infrequent transactions, the Commission may define a time dimension for the market that deviates from this two year horizon. Time considerations are important where there are long-term contracts, as in the markets considered for this application, where the exclusive right to provide community and/or hospital testing is conferred for between three and ten years.

As discussed in the Market Mechanism section above, there has been a shift in the way the majority of DHBs purchase pathology services. Many DHBs are moving towards a single-provider, bulk-funded model, via tender. Under such winner-takes-all contracting arrangements, **competition for the market only occurs at infrequent contracting rounds, not day-to-day.**

**The Commission therefore considered the impact of the proposed mergers at the point in time at which they would have effect, which is when pathology contracts are next awarded.** The proposed term of each contract varies by region, and in some regions the term is uncertain. [Emphasis added]

- 12.7 The Acquisition relates to regions in which the DHBs have moved to a single-provider, bulk-funded model, via tender.
- 12.8 On this basis, it is necessary to consider the effect of the Proposed Acquisition on the South Canterbury and Nelson-Marlborough markets when those contracts are next up for tender, which is 2016, not at the time of transaction - at the time of the transaction the Proposed Acquisition will simply effect a bare transfer of monopoly contracts. The Court of Appeal observed, in *Power New Zealand Ltd v Mercury Energy Ltd*,<sup>19</sup> that the bare transfer of a monopoly itself could have no effect on competition.

### Relevant market definitions

- 12.9 Based on the approach to market definition set out above, the relevant markets for considering the impact of the Acquisition are as follows:
- (a) competition for the market(s) (depending on how that tender is ultimately structured) to provide the South Canterbury DHB with community and hospital pathology services in 2016;

<sup>16</sup> Decision No. 572 *Valley Diagnostic Laboratories Limited / Wellington Pathology Limited* (31 January 2005) at 75.

<sup>17</sup> *Ibid* at 78.

<sup>18</sup> Decision No. 559, *New Zealand Diagnostic Group Ltd/Sonic Healthcare (New Zealand) Ltd* (29 September 2005) at paras 153 and 154.

<sup>19</sup> [1997] 2 NZLR 669.

- (b) competition for the market(s) (depending on how that tender is ultimately structured) to provide the Nelson-Marlborough DHB with community and hospital pathology services in 2016;
  - (c) competition in the national market for the provision of cervical screening tests.
- 12.10 As expanded upon further below, it is expected that any provider tendering for the Nelson-Marlborough or South Canterbury DHB contracts in 2016 would expect to be able to provide all community and hospital Routine Tests (ie approximately 75% of the volumes processed) out of the premises owned by each of those DHBs as MedLab South currently does (as noted above at paragraph 8.4), use CHL for Send Away Tests, (as MedLab South does) and it would likely need to send Volume Tests out of the region to wherever that provider's New Zealand specialised lab(s) is/are located (as MedLab South does).

### **Aggregation**

- 12.11 The Acquisition does not give rise to any aggregation between the parties in the pathology services markets, because at the time of the transaction the Proposed Acquisition will simply effect a bare transfer of monopoly contracts.
- 12.12 In cervical testing, the Acquisition may result in a small level of aggregation, but the aggregation, if any, is insignificant and will not result in any lessening of competition for the reasons set out below.

### **13. Where relevant, please explain how products or services are differentiated within the market(s).**

- 13.1 As set out in Decisions 559 and 572, typically competitors will have the same general forms of testing available, and DHBs will decide between providers based on the competing provider's respective abilities to demonstrate their ability to meet the DHB's stated requirements (including the speed of turnaround, and the quality of assessment and reporting) and their ability to demonstrate that they can provide long-term cost-efficiency to the DHB to manage the DHB's costs.

### **VERTICAL INTEGRATION**

#### **14. Provide details of any creation or strengthening of vertical integration that would result from the proposed merger. Please use organisational charts or diagrams to illustrate the structure of the ownership and/or control of the participants and the vertical relationships in question.**

- 14.1 There will not be any strengthening of vertical integration arising from the Acquisition. Both the Applicant and MedLab South currently provide community testing and hospital testing to DHBs and cervical testing to the NSU.

### **PART 4: COUNTERFACTUAL**

#### **15. In the event that the proposed merger does not take place, describe what is likely to happen to the business operations of the merger parties and the market/industry.**

- 15.1 If the Acquisition does not proceed, Sonic will be obliged to make the vast majority of its Canterbury-based MedLab South staff redundant and not replace its Christchurch laboratory. [ ]

15.2 Healthscope may not be able to re-employ valuable staff, [ ].

### Comparison with the Factual

15.3 There is no difference between the degree of competition for the pathology services market in the Factual and the Counterfactual.

15.4 It is equally likely, regardless of whether the Acquisition occurs, that Sonic will tender for the Nelson-Marlborough and South Canterbury regions at a price that does not involve use of a Sonic-owned Canterbury based laboratory, because the loss of the Canterbury contract, from 1 April 2012, has already determined that Sonic Group will not maintain such a laboratory after 1 April 2012.

15.5 However, Sonic would likely base its tender, in both the Factual and the Counterfactual, on a business case that uses:

- (a) the laboratories in the DHB owned hospital premises in each DHB region as the main premises through which it provides Routine Tests. Indeed, the arrangements with the DHBs in these regions allow this to occur relatively seamlessly. The premises will remain DHB owned regardless of the Proposed Acquisition, typically any outgoing provider will look to sell its equipment in such laboratories to a newly appointed provider and [ ]; and
- (b) (likely) its main national laboratory in Palmerston North as the primary premises for providing Volume Tests for each DHB (enabling it to use the specialised testing equipment and economies of scale at that location to provide such services profitably and as a good value proposition for the respective DHBs); and
- (c) CHL's services in its Christchurch laboratory, on a fee-per-test basis, to provide Send Away Tests.

15.6 The Commission, in *NZDG / Sonic*, recognised the ability of community pathology providers to transport non-urgent samples (which are the vast bulk of Volume and Send Away Tests) to centralised laboratories in other regions.<sup>20</sup>

As discussed later, some community tests require relatively swift turnaround times, and so necessitate the provider to be located within the region in order to perform them. In the case of such tests, there may be no substitute for within-region supply. Non-urgent community testing though may be provided from outside the region, and there is evidence that some providers, such as NZDG and Sonic, have in the past been able to transport samples for such procedures between regions to centralised testing facilities.

15.7 Indeed, the transportation of samples is a common occurrence in New Zealand's community pathology services markets today. For example, Healthscope has a network of bins that by land, or air courier, transfer samples between all of its sites. Healthscope's Dunedin laboratory receives samples on daily basis from its operations in Northland, Auckland, Hamilton, Hastings, Taupo, New Plymouth, Christchurch, Ashburton, Oamaru, Queenstown, Balclutha, Gore, Clyde and Invercargill.

15.8 This is also a feature of community pathology markets across the world. For example, Laboratory Corporation of America ("**LabCorp**"), the largest provider of pathology testing services in the USA, has 1,600 collection facilities in the USA but only seven

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<sup>20</sup> Decision No. 559, *New Zealand Diagnostic Group Ltd/Sonic Healthcare (New Zealand) Ltd* (29 September 2005) at para 132.

specialist laboratories across the USA that it uses, by transporting samples inter-State, to perform Volume or Send Away Tests.<sup>21</sup>

## **PART 5: COMPETITION ANALYSIS**

### **EXISTING COMPETITORS**

- 16. Identify all of the relevant competitors in the market(s), including near competitors and importers in the market(s), and describe how they all compete in the market(s).**

#### **Pathology Associates**

- 16.1 Pathology Associates has 55 collection facilities throughout the North Island, and operates from four centrally located laboratory facilities in Hamilton, Tauranga, Rotorua and Whakatane. Pathology Associates has been providing laboratory services to the Bay of Plenty and Waikato regions for more than 40 years and Rotorua for approximately 15 years. Pathology Associates currently contracts with:
- (a) the Bay of Plenty DHB, for community and hospital pathology services;
  - (b) the Waikato DHB for community pathology services; and
  - (c) the Lakes DHB (as part of a joint venture with the DHB), for community and hospital pathology services, in the Rotorua region only.
- 16.2 During the 2011 tender round Pathology Associates bid for the Canterbury DHB contract to provide community pathology services, and previously has bid for various other DHB contracts around New Zealand

#### **Abano**

- 16.3 Abano is a publicly-listed company, and currently has full or part ownership of a range of businesses in various healthcare and medical industries. Abano has a 55% shareholding in Aotea Pathology, a joint venture with Sonic, which provides community pathology services to the Hutt and Capital Coast DHBs. Abano has been active in the pathology services industry for many years, and is a former incumbent in the Nelson-Marlborough region, through Nelson Diagnostic Laboratory Limited, before it lost this contract to MedLab South in 2006.<sup>22</sup>

#### **CHL**

- 16.4 CHL, a division of the Canterbury DHB, has repeatedly demonstrated that it has ambitions to expand into other DHB regions (unlike some other DHB owned laboratories). CHL has competed in the most recent tender rounds in the Nelson-Marlborough and South Canterbury DHBs. With its ability to self-supply Send Away Tests, CHL has a unique offering that it is able to offer in DHB tender rounds in comparison to private providers.

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<sup>21</sup> Further details on LabCorp can be found at: [https://www.labcorp.com/wps/portal/!ut/p/c/0/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os\\_hACzO\\_QCM\\_lwMLo1ALAY\\_Nj1yBnQxNfAwMDY\\_2CbEdFANq6iRAI/](https://www.labcorp.com/wps/portal/!ut/p/c/0/04_SB8K8xLLM9MSSzPy8xBz9CP0os_hACzO_QCM_lwMLo1ALAY_Nj1yBnQxNfAwMDY_2CbEdFANq6iRAI/)

<sup>22</sup> For more information see: <http://www.abanohealthcare.co.nz/news/a6bdd83e-b39c-4ebe-b0ab-5db983abfc48.html?PathId=3ee9a4f4-4c86-412f-aaf0-28a5842cb21a>

### Primary Health Care Limited

16.5 Primary Health Care Limited ("**Primary**") is Australia's second largest pathology testing provider, with 87 laboratories and 782 collection centres (making it the largest pathology business in Australia based on number of collection sites) and has a market capitalisation of AUD\$1,552,411,728.

17. **Outline the estimated market shares in terms of sales, and, where relevant, volume and productive capacity, of the merger parties and competitors identified above. Please include the estimated total value of the domestic market; and the source of the data provided.**

*Figure 1 - Providers by DHB funding region pre-Acquisition and estimated contract value*

Pathology Funding Region	Estimated population 2011 (Statistics NZ)	Community pathology provider	Estimated annual value of community contract (\$M)	Expiry of community contract	Hospital pathology provider	Estimated annual value of hospital contract (\$M)
<b>North Island</b>						
Northland	159,100	Healthscope	[ ]	[ ]	DHB	[ ]
Auckland / Waitemata / Counties Manukau	1,506,450	GP & Midwife referrals: Healthscope	[ ]	[ ]	DHB	[ ]
		Private specialist referrals: Sonic	[ ]	[ ]		
Bay of Plenty	213,970	Pathology Associates	[ ]	not known	Pathology Associates	[ ]
Waikato	368,500	Pathology Associates	[ ]	not known	DHB	[ ]
Lakes	103,600	Rotorua: Pathology Associates / DHB JV	[ ]	not known	Rotorua: Pathology Associates / DHB JV	[ ]
		Taupo: Healthscope	[ ]	[ ]	Taupo: Healthscope	[ ]
Tairāwhiti	46,835	Sonic / DHB JV	[ ]	not known	Sonic / DHB JV	[ ]
Taranaki	109,750	Taranaki MedLab	[ ]	not known	DHB	[ ]
Whanganui	63,520	Sonic	[ ]	not known	Sonic	[ ]
Hawkes Bay	155,750	Healthscope	[ ]	[ ]	DHB	[ ]
MidCentral	169,320	Sonic	[ ]	not known	Sonic	[ ]
Wairarapa	40,295	Sonic	[ ]	not known	Sonic	[ ]
Hutt / Capital and Coast	440,710	Aotea (JV: 55% Abano, 45% Sonic)	[ ]	not known	DHB	[ ]
<b>South Island</b>						
Nelson Marlborough	139,605	Sonic	[ ]	2016	Sonic	[ ]
West Coast	33,010	DHB	[ ]	n/a	DHB	[ ]
Canterbury	513,960	Healthscope	[ ]	2017	DHB	[ ]
South Canterbury	56,220	Sonic	[ ]	2016	Sonic	[ ]
Southern	304,185	Healthscope	[ ]	2016	Healthscope	[ ]

Source: Healthscope market intelligence and estimates.



Figure 2 - Estimated national market shares for community pathology testing pre-Acquisition

Provider	Estimated annual national revenue (\$M)	Estimated national share
Healthscope	[ ]	[ ]
Sonic (including JVs)	[ ]	[ ]
Pathology Associates (including JVs)	[ ]	[ ]
Others	[ ]	[ ]
<b>TOTAL</b>	<b>[ ]</b>	<b>100.0%</b>

Source: Healthscope market intelligence and estimates.

Figure 3 - Estimated national market shares for hospital pathology testing pre-Acquisition

Provider	Estimated annual national revenue (\$M)	Estimated national share
DHBs	[ ]	[ ]
Healthscope	[ ]	[ ]
Sonic (including JVs)	[ ]	[ ]
Pathology Associates (including JVs)	[ ]	[ ]
<b>TOTAL</b>	<b>[ ]</b>	<b>100.0%</b>

Source: Healthscope market intelligence and estimates.

Figure 4 - Market shares by number of samples tested in the national cervical screening tests market

	Number of samples	Proportion of samples
Diagnostic MedLab Limited (Sonic)	66,690	30.5%
MedLab Central (Sonic)	18,484	8.5%
MedLab South (Sonic)	15,498	7.1%
Aotea Pathology (JV: 55% Abano, 45% Sonic)	22,761	10.4%
Southern Community Labs (Healthscope)	53,052	24.3%
Pathlab (Pathology Associates)	20,306	9.3%
Auckland LabPLUS (DHB)	9,227	4.2%
Canterbury Health Laboratories (DHB)	12,332	5.6%
<b>TOTAL</b>	<b>218,350</b>	<b>100.0%</b>

Source: National Cervical Screening Programme. Monitoring Report Number 32 1 July – 31 December 2009.

**18. To what extent do you consider that the merged entity would be constrained in its actions by the conduct of existing competitors in the markets affected?**

**Nelson-Marlborough and South Canterbury**

*Pathology services*

- 18.1 The Commission has previously observed that in relation to bidding markets, the key determinant of competition is whether or not the incumbent faces at least one well matched and aggressive challenger.<sup>23</sup>
- 18.2 At least Sonic, CHL, Abano and Pathology Associates are likely to compete for the South Canterbury DHB and Nelson-Marlborough DHB markets in 2016.
- 18.3 For the reasons set out at paragraphs 12.10 and 15.5 above, the Acquisition will not change the competitive constraint that Sonic will be able to exert on Healthscope in competing for the relevant markets in 2016 and, therefore, these contracts will be vigorously competed for by Sonic and Healthscope in 2016.
- 18.4 Similarly, the Acquisition does not alter the other competitive constraints that will exist when these contracts are re-tendered in 2016:
- (a) Pathology Associates, as it did for the Canterbury DHB contract, is likely to submit tenders for the three South Island DHB pathology contracts that expire in 2016 (ie the Southern, Nelson-Marlborough and South Canterbury DHB contracts). Indeed, in Healthscope's experience there has been at least three to four competing bids in most DHB contracts that have come up for tender. This is particularly likely given that:
- (i) the DHB owned laboratory premises in all three DHB regions will be available to whichever party wins the contract;
  - (ii) [ ];
  - (iii) [ ]; and

<sup>23</sup> Decision No. 569, *Energy Market Services Limited and the Marketplace Company Limited* (20 December 2005) at para 87.

- (iv) any newly appointed provider, for example Pathology Associates, would be able to use its North Island laboratories to provide Volume Tests.

The likelihood of Pathology Associates, or any other domestic competitor such as Abano (either directly or through Aotea Pathology), submitting tenders for these contracts is not changed by the Acquisition;

- (b) Primary Health Care Limited, Australia's second largest pathology testing provider, or another large international competitor, could choose to enter the New Zealand market and tender for these contracts in 2016. The likelihood of this occurring is not changed by the Acquisition;
- (c) CHL, as it has done in the most recent tender rounds in the Nelson-Marlborough and South Canterbury DHBs, is likely to submit tenders for the three South Island DHB pathology contracts that expire in 2016. CHL, unlike some other DHB owned laboratories, has repeatedly demonstrated that it has ambitions to expand into other DHB regions. The likelihood of this occurring is not changed by the Acquisition;
- (d) In *NZDG / Sonic* the Commission recognised that a DHB, as the sole purchaser of pathology services in its region, will have countervailing power where it has two competing private bidders, such as Sonic and Healthscope. The Commission concluded that where a DHB:<sup>24</sup>

Maintain[s] the choice of two private providers... [it] would be able to play these providers off against each other.

The Acquisition does not lessen the DHB's countervailing power as the DHBs will be able to play off against each other, at least, Sonic and Healthscope. DHBs hold, and can provide through the tender process, essentially all relevant information to enable bidders to submit a fully informed bid in competition with the existing provider [ ]. Indeed, the history of non-incumbent providers winning pathology contracts from the incumbent private provider, for example Healthscope in Auckland (from Sonic), MedLab South in Nelson-Marlborough (from Abano), Pathology Associates in Hamilton (from the larger provider NZDG), and Healthscope in Canterbury (from the larger provider Sonic) demonstrates the ability of DHBs to play new entrants off against their existing supplier.

### *Cervical screening*

- 18.5 The Acquisition will not lessen the competitive dynamic between providers in the cervical screening market. There will continue to be the same "considerable existing competition in the national market for the provision of cervical screening tests" that the Commission observed in *NZDG / Sonic*.<sup>25</sup> The NSU will retain its existing "substantial degree of countervailing power" as a price setter and it could, as found by the Commission in *NZDG / Sonic*, continue to credibly threaten to use the two DHB owned laboratories for all cervical testing in New Zealand.<sup>26</sup>

<sup>24</sup> Decision No. 559, *New Zealand Diagnostic Group Ltd/Sonic Healthcare (New Zealand) Ltd* (29 September 2005) at para 571.

<sup>25</sup> *Ibid* at para 625.

<sup>26</sup> *Ibid* at para 626.

**Other South Island contracts***Pathology services*

- 18.6 Each of Sonic Group, CHL, Abano and Pathology Associates is also likely to submit tenders for the three South Island DHB pathology contracts that expire in 2016 (ie the Southern, Nelson-Marlborough and South Canterbury DHB contracts), and the Canterbury DHB contract that expires in 2017. This is particularly likely given that:
- (a) the DHB owned laboratory premises in all three DHB regions will be available to whichever party wins the contract,
  - (b) the [ ]; and
  - (c) any newly appointed provider, for example Pathology Associates or Sonic, would be able to use its North Island laboratories to provide Volume Tests.
- 18.7 The likelihood of Sonic or Pathology Associates, or any other domestic competitor such as Abano, submitting tenders for these contracts is not changed by the Acquisition.
- 18.8 There is also the possibility that one or more of these DHBs will combine to provide greater countervailing negotiating power in 2016.

**POTENTIAL COMPETITION****Conditions of Entry****19. Please explain the requirements for new entry and/or importers in the relevant market(s).***Pathology services*

- 19.1 The Applicant adopts the Commission's earlier analysis of conditions of entry into pathology services markets, as set out in Decisions 559 and 572, for the purposes of this Application. As applied to the relevant South Island DHB contracts, where Sonic Group, CHL, Abano and Pathology Associates would be the tenderer(s), any possible impediments to entry are overcome through the provisions in the current DHB contracts and the availability of DHB premises, as described at paragraphs 12.10, 15.5 18.4, and 18.6 above.

*Cervical screening*

- 19.2 The Applicant adopts the Commission's earlier analysis of conditions of entry into cervical screening markets, as set out in Decisions 559 and 572, for the purposes of this Application.<sup>27</sup> It notes that the Commission has in the past concluded that there is "considerable existing competition".<sup>28</sup> The degree of existing competition is not affected by the Acquisition.

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<sup>27</sup> For example, see Decision No. 559 *New Zealand Diagnostic Group Ltd/Sonic Healthcare (New Zealand) Ltd* (29 September 2005) at para 149.

<sup>28</sup> *Ibid* at para 625.

- 20. Include a full discussion on any factors that could impede entry; and what might prompt new entry post-merger.**

*Pathology services*

- 20.1 For the reasons set out at paragraphs 12.10, 15.5, 18.4, and 18.6 above there are no material factors impeding entry or expansion by all, or any of, Sonic Group, CHL, Abano and Pathology Associates arising as a consequence of this Acquisition.

**LIKELIHOOD, EXTENT AND TIMELINESS OF ENTRY (THE LET TEST)**

- 21. Please name any likely businesses (including overseas businesses) you are aware of that do not currently supply the market but which you consider could supply each of the relevant market(s). Discuss the likelihood of such entry.**

*Pathology services*

- 21.1 For the reasons set out at paragraphs 12.10, 15.5, 18.4, and 18.6 above, the Applicant considers it likely that each of the following will vigorously compete for the Nelson-Marlborough and South Canterbury pathology services markets in 2016:

- (a) Sonic;
- (b) Pathology Associates;
- (c) CHL; and
- (d) Abano.

- 21.2 Furthermore, the likelihood of Primary Health Care Limited, looking to compete for these markets in 2016 is not changed by the Acquisition.

*Cervical screening*

- 21.3 Irrespective of new entry, there will continue to be the same "considerable existing competition in the national market for the provision of cervical screening tests" that the Commission observed in *NZDG / Sonic*.<sup>29</sup> This will be unchanged by the Acquisition.

- 22. To what extent do you consider that potential entry would be sufficient to constrain the merged entity in the markets affected?**

*Pathology services*

- 22.1 The continued presence of vigorous competitors such as Sonic, Abano and Pathology Associates will continue to be the main source of constraint on the merged entity in competing for these markets.

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<sup>29</sup> Ibid.

**23. How long would you expect it to take for entry to occur, and for market supply to increase, in respect of each of the potential entrants named in question 21 above?**

*Pathology services*

- 23.1 As this Acquisition relates to markets in which there is competition "for" a monopoly contract, full scale market entry will occur immediately should either Nelson-Marlborough or South Canterbury DHB award their pathology services contract to a new provider in 2016. For the reasons set out at paragraphs 12.10, 15.5, 18.4, and 18.6 above, the new provider would be able to replicate the Applicant's offering from the date of the contract handover.

**COUNTERVAILING POWER OF BUYERS**

**24. To what extent do you consider that the merged entity would be constrained in its actions by the conduct of buyers in the markets affected?**

*Pathology services*

- 24.1 In *NZDG / Sonic* the Commission recognised that a DHB, as the sole purchaser of pathology services in its region, will have countervailing power where it has two competing private bidders, such as Sonic and Healthscope.
- 24.2 The Acquisition does not lessen the DHB's countervailing power as the DHBs will be able to play off against each other, at least, Sonic and Healthscope. DHBs hold, and can provide through the tender process, essentially all relevant information to enable bidders to submit a fully informed bid in competition with the existing provider.
- 24.3 Furthermore, as described at paragraph 18.4 above, the contracts with the relevant DHBs provide specifically for switching between providers.
- 24.4 Indeed, the history of non-incumbent providers winning pathology contracts from the incumbent private provider, for example Healthscope in Auckland (from Sonic), MedLab South in Nelson-Marlborough (from Abano), Pathology Associates in Hamilton (from the larger provider NZDG), and Healthscope in Canterbury (from the larger provider Sonic) demonstrates the ability of DHBs to play new entrants off against their existing supplier.

*Cervical screening*

- 24.5 The Applicant will be strongly constrained by the countervailing power of the NSU in respect of cervical screening services. This accords with the Commission's conclusion in *NZDG / Sonic*.<sup>30</sup>

In addition, the Commission considers that the NSU has a substantial degree of countervailing power. It decides who to contract with, and can cancel any providers' contract if it is not satisfied with the level of service provided. The Commission considers that the NSU is a price-setter. The fee per test is set across all providers. The NSU seemed particularly willing to maintain contracts with the two hospital laboratories and stated that it would be possible for these laboratories to undertake all cervical screening testing in New Zealand.

**25. If you consider that there is a constraint from buyers, identify the top five buyers by sale and/or volume (including overseas companies/importers) in the relevant**

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<sup>30</sup> Ibid at para 626.

**market(s). Where there are significant differences in the size of buyers please provide details for five medium and five small buyers.**

*Pathology services*

- 25.1 The buyers of pathology services are the various DHBs around New Zealand. The size of a DHB as a buyer depends on the population within its region. The estimated annual value of each DHB contract in New Zealand is set out in Figure 1.

*Cervical screening*

- 25.2 The sole purchaser in New Zealand of cervical screening services is the NSU.

**COORDINATED MARKET POWER**

**26. Identify and discuss the various characteristics of the market that, post-merger, you consider would either facilitate or impede coordination.**

- 26.1 The risk of coordinated effects post-Acquisition is low. Both the pathology and cervical screening industries are characterised by a number of features that condition against prospects for coordinated effects, by reference to the tests in the Commission's Guidelines:

- (a) the high level of competition between Sonic and Healthscope and other private providers such as Pathology Associates, CHL and Abano that are all able and willing to expand capacity readily;
- (b) the asymmetry of market shares and costs between the various competitors, in particular, between private providers and publicly owned providers; and
- (c) the countervailing power of customers, such as the various DHBs and the NSU, undermines any potential for co-ordinated market power.

- 26.2 For all the reasons set out above, the application of the tests in the Commission's Guidelines reveal that there would not be scope for the exercise of co-ordinated market power in this market.

- 26.3 In summary, the Applicant, Sonic and their domestic competitors currently compete vigorously in the industry. The Acquisition will not impact on this intense competition.

**EFFICIENCIES**

**27. If applicable, provide a description of any efficiencies that you believe the acquisition could bring. Would such efficiencies enhance rivalry, or offset the impact of a lessening of competition?**

- 27.1 Cost savings will arise from the Acquisition:

- (a) [ ]; and
- (b) [ ]; and
- (c) [ ].

**OTHER FACTORS**

- 28. Where relevant, provide a description of any other features of the market(s) that should be taken into account in considering the effect of the proposed merger.**

**No scope for the Applicant to attempt to exercise market power in respect of suppliers**

- 28.1 The Applicant does not have, nor will it have post-Acquisition, any market power in relation to its suppliers. Inputs are acquired from large overseas based suppliers, including the pharmaceutical companies Roche, Thermo Fisher and Bayer, who supply equipment. These are multi-national companies. The Applicant, as a result of the Acquisition, will not enjoy pricing that is materially more favourable than those of its competitors or that which either of the Applicant or Sonic currently enjoys.



**PART 6: FURTHER INFORMATION AND SUPPORTING DOCUMENTATION**

29. Provide the contact details of relevant competitors, buyers and suppliers and any other relevant market participants in the form of the example table shown below.

	Name of Company (both legal and trading names)	Contact details (postal and physical address, telephone, fax and website)	Relevant contact person (name, position, and contact details)
<b>COMPETITORS</b>	Pathology Associates Limited	PO Box 130 Tauranga 3114  Ph: 07 578 7073	Dianne McQueen
	Abano Healthcare Limited	16 Floor, West Plaza Building 3 - 7 Albert St, Auckland P O Box 106 514 Auckland 1143  Tel: 64 9 300 1410 Fax: 64 9 300 1419	Alan Clarke
	Aotea Pathology Limited	Level 6 CMC Building 89 Courtenay Place Wellington 6011  Ph: 04 381 5900 Fax: 04 381 5948	Karen Wood <a href="mailto:kwood@apath.co.nz">kwood@apath.co.nz</a>
	Canterbury Health Laboratories	P O Box 151 Christchurch 8140 New Zealand  Ph: 03 364 0300 Fax: 03 364 0750	Trevor English  <a href="mailto:trevor.english@cdhb.health.nz">trevor.english@cdhb.health.nz</a>
<b>BUYERS</b>	Canterbury District Health Board	Level 2 H Block The Princess Margaret Hospital Cashmere Road Cashmere PO Box 1600 Christchurch  Ph: 03 364 4106 Fax: 03 364 4101	David Meates
	Nelson-Marlborough District Health Board	Private Bag 18 Nelson  Ph: 03 546 1800 Fax: 03 546 1811 <a href="mailto:enquiries.corporate@nmdhb.govt.nz">enquiries.corporate@nmdhb.govt.nz</a>	John Peters
	South Canterbury District Health Board	Private Bag 911 High Street Timaru  Ph: 03 687 2100 Fax: 03 688 0238	Chris Fleming  <a href="mailto:ceo@scdhb.health.nz">ceo@scdhb.health.nz</a>

	Southern District Health Board	Private Bag 1921 Dunedin 9054 New Zealand  Ph: 03 474 0999 Fax: 03 474 7025	Lexie O'Shea  <a href="mailto:lexie.oshea@southerndhb.govt.nz">lexie.oshea@southerndhb.govt.nz</a>
	Northland District Health Board	Maunu Road, Private Bag 9742, Whangarei, 0148  Ph: 09 470 0000 Fax: 09 470 0001	Nick Chamberlain
	Auckland / Waitemata / Counties Manukau District Health Board	<b>Auckland DHB</b> Private Bag 92189 Auckland Mail Centre Auckland 1142  09 367 0000  <b>Waitemata DHB</b> Private Bag 93-503 Takapuna Auckland  Ph: 09 486 8900  <b>Counties Manukau DHB</b> Private Bag 94052 South Auckland Mail Centre Manukau 2240  Ph: 09 262 9500 Fax: 09 262 9501	Garry Smith   Lester Levy   Geraint Martin
	Bay of Plenty District Health Board	Corner of Clarke St and 20 <sup>th</sup> Ave Private Bag 12024 Tuaranga 3143  Ph: 07 579 8363	Phil Cammish
	Waikato District Health Board	Hockin Building Waikato Hospital Campus Selwyn Street PO Box 934 Hamilton 3240  Ph: 07 839 4679 Fax: 07 839 8799 <a href="mailto:info@waikatodhb.health.nz">info@waikatodhb.health.nz</a>	Craig Climo
	Lakes District Health Board	Rotorua Hospital Private Bag 3023 Rotorua Mail Centre Rotorua 3046  Ph: 07 348 1199	Cathy Cooney
	Tairāwhiti District Health Board	421 Ormond Rd Private Bag 7001 Gisborne 4040  Ph: 06 869 0500	Jim Green  <a href="mailto:Jim.green@tdh.org.nz">Jim.green@tdh.org.nz</a>
	Taranaki District Health Board	Private Bag 2016 New Plymouth 4342  Ph: 06 753 6139 <a href="mailto:corporate.contacts@tdhb.org.nz">corporate.contacts@tdhb.org.nz</a>	Tony Foulkes

	Whanganui District Health Board	Private Bag 3003, Whanganui 4540  Ph: 06 348 1235	Julie Patterson
	Hawkes Bay District Health Board	Corner Omaha Road and McLeod Street Private Bag 9014 Hastings 4156  Ph: 06 878 8109 Fax: 06 878 1648	Kevin Snee  <a href="mailto:ceo@hawkesbaydhb.govt.nz">ceo@hawkesbaydhb.govt.nz</a>
	MidCentral District Health Board	Gate 2 Heretaunga Street PO Box 2056 Palmerston North 4440  Ph: 06 350 8061 Fax: 06 355 0616 <a href="mailto:communications@midcentraldhb.govt.nz">communications@midcentrald hb.govt.nz</a>	Murray Georgel
	Wairapa District Health Board	P O Box 96 Blair Street Masterton 5840  Ph: 06 946 9800 ext. 5100 Fax: 06 946 9881	Tracey Adamson  <a href="mailto:ceo@wairarapa.dhb.org.nz">ceo@wairarapa.dhb.org.nz</a>
	Hutt / Capital and Coast District Health Board	Wellington Hospital Private Bag 7902 Wellington South  Ph: 04 385 5999 Fax: 04 385 5868	Mary Bonner
	National Screening Unit	133 Molesworth Street Wellington  Phone: 04 496 2000 Fax: 04 496 2040 Postal address: PO Box 5013, Wellington	Jacqui Akuhata-Brown
<b>SUPPLIERS</b>	Thermo Fisher Scientific New Zealand Ltd	244 Bush Road, Albany, North Shore City 0632, Auckland.  Ph: 0800-933-966	
	Roche Diagnostics NZ Limited	15 Rakino Way Mt Wellington Auckland 1060  Ph: 09 276 4157 Fax: 09 276 8917	Lance Little
	Bayer New Zealand Limited	Head Office Bayer New Zealand Ltd PO Box 2825 3 Argus Place Glenfield Auckland  Ph: 09 443 3093 Fax: 09 443 3094	Patricia Anne Castle
<b>OTHER</b>	Primary Health Care Limited	30-38 Short St Leichhardt, NSW 2040  Ph: +61 (2) 9561 3300 Fax: + 61 (2) 9561 3301	James Bateman

	Health Benefits Limited	Level 2, Building 2 Central Park  660 - 670 Great South Road, Penrose, Auckland, 1061  PO Box 11-410 Ellerslie, Auckland 1542  Ph: 09 487 4900	Nigel Wilkinson
	Ministry of Health	Parliament Office Parliament Buildings PO Box 18-041 Wellington	Minister of Health - Hon Tony Ryall

- 30. Please provide a copy of the most recent annual report for each of the merger parties. If an annual report is not available, please provide a copy of the audited financial statements of the merger parties (profit and loss account, showing total turnover and profit before tax, and balance sheet). If the merger only relates to a segment of the business of the merger parties, please also provide a copy of any management accounts for the relevant business segment.**
- 30.1 The accounts for APHG NZ Investments Limited, the ultimate parent of the Applicant, for the year ended 30 June 2011 are enclosed in **Appendix 4**.
- 30.2 The most recent relevant management accounts relating to MedLab South will be provided to the Commission by Sonic in due course.

#### **PART 7: CONFIDENTIALITY**

- 31. If you wish to request confidentiality for specific information contained in or attached to the notice, please state why you consider the information to be confidential and state the reasons for your request in terms of the criteria set out in the Official Information Act 1982.**
- 31.1 Confidentiality is sought in respect of the information in this application that is contained in square brackets. Confidentiality is sought for the purposes of section 9(2)(b) of the Official Information Act 1982 on the grounds that:
- (a) the information is commercially sensitive and valuable information which is confidential to the participants; and
  - (b) disclosure would be likely unreasonably to prejudice the commercial position of the participants, as the parties providing the information.
- 31.2 The Applicant requests that it be notified of any request made to the Commission under the Official Information Act 1982 for release of the confidential information. The Applicant also requests that the Commission seek and consider the Applicant's views as to whether the information remains confidential and commercially sensitive at the time responses to such requests are being considered.
- 31.3 The foregoing equally applies in respect of any additional information provided to the Commission that is expressed to be confidential.

**THIS NOTICE** is given by Peter Gootjes of Canterbury SCL Limited.

I hereby confirm that:

- all information specified by the Commission has been supplied;
- if information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to the applicant which is relevant to the consideration of this application has been supplied; and
- all information supplied is correct as at the date of this application/notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the application/notice.

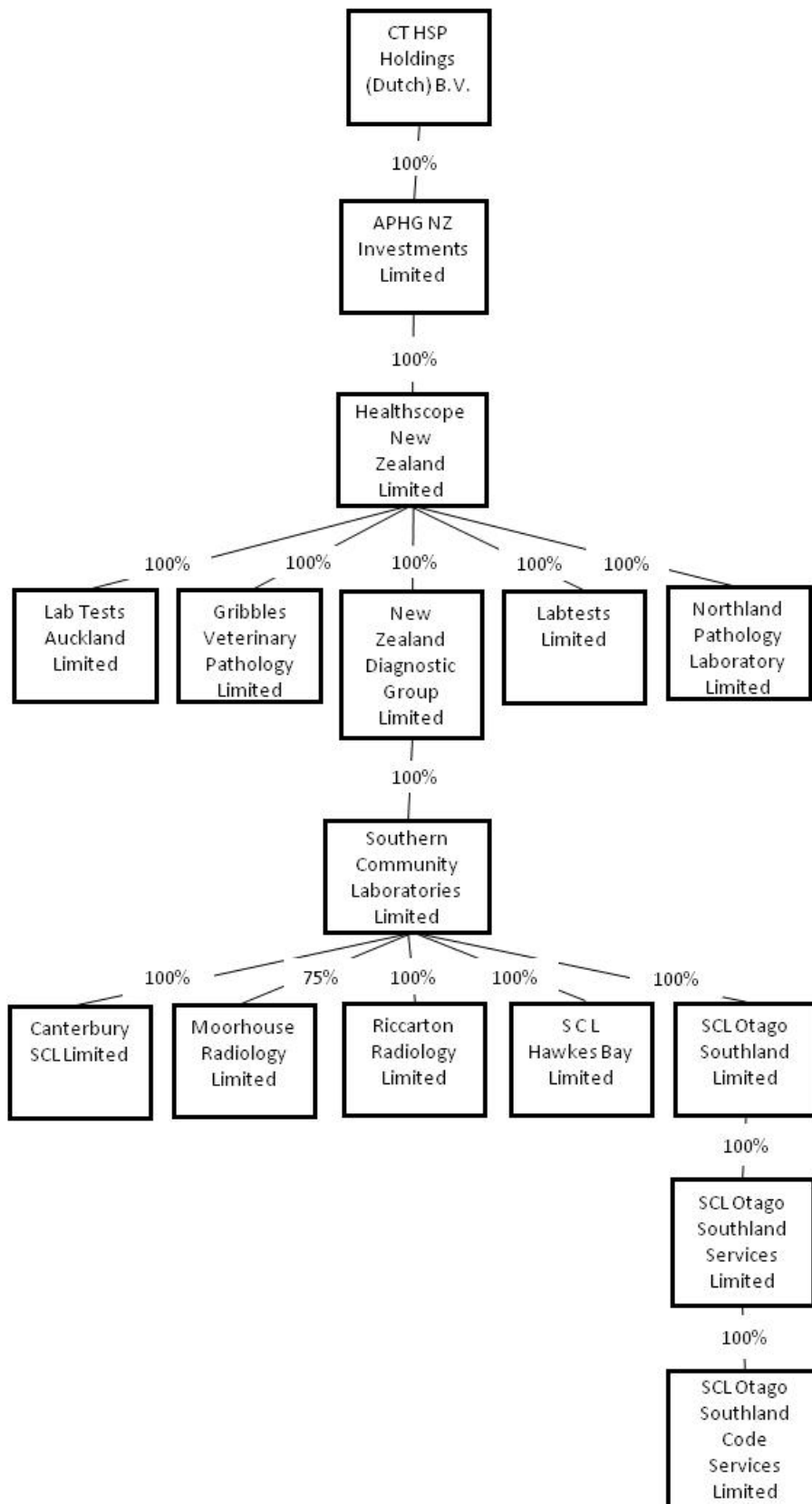
Dated this 29<sup>th</sup> of February 2012

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Peter Gootjes, Canterbury SCL Limited

I am a director/officer of the company and am duly authorised to make this application/notice.

**APPENDIX 1:**  
***The Healthscope Group ownership and control in NZ***



**APPENDIX 2:**  
***The Sonic Group ownership and control in NZ***

