ISSN 1178–2560
Decision Series
Project no. 11.04/15416

PUBLIC version

Determination

Evolution Healthcare (NZ) Pty Limited and Austron Limited [2015] NZCC 22

The Commission:	Dr Mark Berry Sue Begg Anna Rawlings
Summary of application:	Evolution Healthcare (NZ) Pty Limited seeks clearance to acquire all of the shares in Austron Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance for Evolution Healthcare (NZ) Pty Limited to acquire all of the shares in Austron Limited subject to the divestment undertaking dated 17 September 2015 provided by Evolution Healthcare (NZ) Pty Limited under section 69A of the Commerce Act 1986.
Date of determination:	21 September 2015

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

The proposal

1. On 19 August 2015, we registered an application from Evolution Healthcare (NZ) Pty Ltd (Evolution) seeking clearance to acquire all of the shares in Austron Limited (Austron). As a result of the acquisition, Evolution would own three of the four private hospitals in the Wellington region.

2. Evolution has provided the Commission with a divestment undertaking (the Undertaking, see Attachment 1), which the applicant submits will remedy any substantial lessening of competition arising from the acquisition.

3. The Undertaking provides that Evolution will divest the business and assets of Boulcott Hospital in Lower Hutt, within six months from the date on which Evolution's acquisition of the shares in Austron closes.

The decision – clearance granted

4. The Commission gives clearance to the proposed acquisition, subject to the Undertaking, as it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Our framework

5. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.[1]

The substantial lessening of competition test

6. As required by the Commerce Act 1986, we assess acquisitions using the substantial lessening of competition test.

7. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).[2]

8. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market,[3] or reduce non-price factors such as quality or service below competitive levels.

9. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.

10. We define markets in the way that we consider best isolates the key competition issues that arise from the acquisition. In many cases this may not require us to

---

1 Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

2 *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

3 Or below competitive levels in a merger between buyers.

precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.[4]

When a lessening of competition is substantial

11. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[5] Some courts have used the word 'material' to describe a lessening of competition that is substantial.[6]

12. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

13. A substantial lessening of competition is 'likely' if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.[7]

The clearance test

14. We must clear an acquisition if we are satisfied that the acquisition would not be likely to substantially lessen competition in any market.[8] If we are not satisfied – including if we are left in doubt – we must decline to clear the acquisition.[9]

15. As set out in our divestment guidelines,[10] upon receiving a divestment undertaking, we will consider whether the proposed divestment is sufficient to remedy any substantial lessening of competition that would otherwise arise. [11]

16. If divestment undertakings are accepted by us, they are deemed to form part of the clearance.

---

4 Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

5 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

6 Ibid at [129].

7 Ibid at [111].

8 Commerce Act 1986, s 66(1) of the Commerce Act 1986.

9 In *Commerce Commission v Woolworths Limited* (CA), above n 4 at [98], the Court held that "the existence of a 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition". However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

10 Commerce Commission, *Mergers and Acquisitions Guidelines*, Attachment F, July 2013.

11 Under s 69A(2) of the Commerce Act 1986 we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

Parties

The Acquirer - Evolution Healthcare (NZ) Pty Ltd (Evolution)

17. Evolution is an Australia-based owner of private hospitals. In New Zealand, Evolution owns Boulcott Hospital in Lower Hutt through a limited partnership, Evolution Healthcare (NZ) LP. Currently, Evolution owns 11.7% of Connor Healthcare Limited (Connor). Connor owns Acurity Health Group Limited (Acurity) which is the current owner of Wakefield and Bowen Private Hospitals. [12]

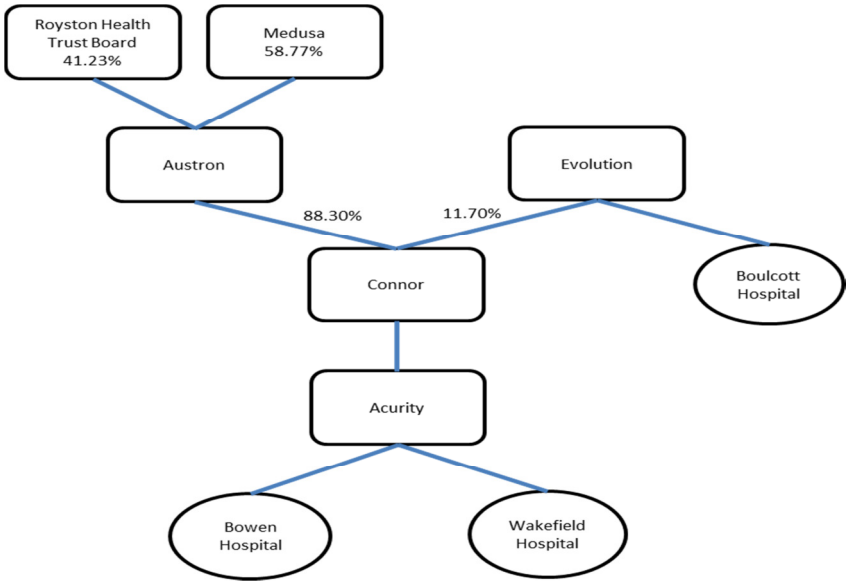
The Target – Austron Limited

18. Austron Limited (Austron) owns the remaining 88.3% of Connor. Austron is part owned by the Royston Health Trust Board (41.23%) and Medusa Limited (58.77%). In addition to its part ownership in Wakefield and Bowen Hospitals, Austron owns the Royston Private Hospital in Hastings.

Relevant ownership links

19. Diagram 1: outlines the current ownership of Bowen, Boulcott, and Wakefield private hospitals in Wellington.

Diagram 1: relevant ownership links



Previous Decisions

20. On 11 December 2014, we declined to give Connor clearance to acquire all the shares in Acurity that it did not already own. We were not satisfied that the proposed acquisition would not have, or be likely to have, the effect of substantially lessening competition in a market in New Zealand.[13]

---

12 In addition, Acurity has a 60% shareholding in Grace Hospital (Tauranga), a 40% shareholding in Endoscopy Auckland (Auckland) and a 40% shareholding in Laparoscopy Auckland (Auckland).

13 Connor Healthcare Limited and Acurity Healthcare Limited [2014] NZCC 39 (the Connor Decision).

21. Prior to the Connor Decision, the Bowen and Wakefield Hospitals were owned by Acurity. Connor (which was 100% owned by Evolution, which in turn owned Boulcott), owned 11.7% of Acurity, and sought to increase its shareholding. As a result of the proposed acquisition, Acurity would have continued to own Bowen and Wakefield hospitals, Connor would wholly own Acurity and Evolution would hold a 25% interest in Connor.

22. In that Decision, we considered the relevant markets to be the provision of groups of elective secondary surgical procedures for:

    22.1 patients funded by the ACC wider than the Wellington region;

    22.2 patients funded by a DHB in the Wellington region;

    22.3 patients funded by health insurance companies in the Wellington region; and

    22.4 self-funded patients in the Wellington region.

23. We considered that in respect of the ACC and DHB funded markets, the proposed acquisition was unlikely to give rise to a substantial lessening of competition.

24. However, in respect of the markets funded by health insurance companies and self-funded by patients, we were not satisfied that the proposed acquisition would not give rise to, or be likely to give rise to, a substantial lessening of competition.

25. Our reasons for declining the application included:

    25.1 for many procedures in the orthopaedics, otolaryngology, general surgery, oral and maxillofacial and plastic surgery specialties the proposed acquisition would have reduced the number of providers from two to one as Southern Cross Hospital either does not provide these procedures or does so on a limited basis;

    25.2 for the remaining procedures in those specialties and in urology, ophthalmology and gynaecology while the acquisition would remove the competition between Boulcott and Bowen / Wakefield, Southern Cross Hospital would remain as an option and so the number of providers would reduce from three to two;

    25.3 Southern Cross Hospital faces barriers to entry and expansion, in particular, the ability to attract surgeons – a new entrant would also face this barrier;

    25.4 while ACC and the DHBs have options other than the Wellington private hospitals available to them, private health insurance companies and self-funded patients do not; and

    25.5 the bargaining power of health insurers would be reduced and would likely be insufficient to constrain the merged firm.

26. On 19 December 2014, we granted clearance for Connor Healthcare Limited to acquire, by way of a takeover offer, all of the shares in Acurity Health Group Limited that Connor Healthcare Limited did not already own.[14] That decision was subject to an undertaking under which Evolution would hold a maximum of 11.7% of the shares in Connor Healthcare Limited.

Market Definition

27. This application concerns the same markets as those considered in the Connor decision (see paragraph 22 above). For this reason, and due the proximity in time of the Connor Decision to this one, this Decision should be read in conjunction with the Connor decision.

With and without scenarios

With the acquisition

28. With the acquisition, Evolution would acquire all of the shares in Austron, giving it ownership of three of the four private hospitals in the Wellington region.

Without the acquisition

29. For the purposes of this application we consider that without the acquisition, the likely scenario is the status quo. Evolution will retain ownership of Boulcott Hospital, and a partial ownership stake in Wakefield and Bowen Hospitals (through its 11.7% ownership of Connor). The remaining 88.3% of Connor Healthcare would continue to be owned by Austron Limited.

Competition analysis

30. For reasons similar to those expressed in the Connor Decision, absent the Undertaking, we are not satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the markets identified in the Connor Decision.

The Divestment Undertaking

31. On 17 September 2015 we received an undertaking from Evolution under s 69A of the Act (the Undertaking), that Evolution would divest the business and assets of Boulcott Hospital Limited.

32. The analysis of this application turns on the Divestment Undertaking. It follows that if we are satisfied that the proposed divestment contains no significant levels of purchaser, asset or composition risk, it will improve competition as compared to the current market situation, rather than reduce it as both Southern Cross and Boulcott Hospitals will be independent of Bowen and Wakefield Hospitals (and of each other).

[14] Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 43.

The proposed divestment

Introduction

33. As set out in our Divestment Guidelines,[15] where we consider that a proposed acquisition is likely to result in a substantial lessening of competition in a relevant market, we consider whether an applicant's proposed divestment undertaking would remedy the identified competition concerns. To do this we assess the composition, asset and purchaser risks associated with the divestment proposal.

34. We consider whether or not the assets of the divestment package will deteriorate prior to the completion of the divestment, whether a purchaser acceptable to the Commission is likely to be available, and whether the composition of the divestment package is sufficient to ensure that the divestment business will be a viable and competitive entity.

The divestment offer

35. Evolution is proposing to divest:

    35.1 [

    35.2

    35.3

    35.4

    35.5

    35.6]

36. [

    36.1

    36.2

37.]

Asset risks

38. Asset risk is the risk that the competitiveness of a divested business will deteriorate prior to completion of the divestment.

39. Under the Undertaking:

[15] Commerce Commission, *Mergers and Acquisitions Guidelines*, Attachment F, July 2013.

39.1 [

39.2

39.3] and

39.4 Evolution has undertaken to divest the Boulcott business within six months of acquiring Austron.

40. We consider that there is little risk of asset deterioration prior to divestment.

Composition risks

41. Composition risk is the risk that a divestment proposal may be too limited in scope, or not appropriately configured, to attract either a suitable purchaser or to allow a successful business to be operated in competition with the merged entity.

42. We consider that the scope of the proposed divestment is wide and covers almost the entirety of the Boulcott business and assets.
[
].

43. [

43.1

43.2

43.3

43.4

43.5

43.6

43.7

43.8

44.

45.

46.

]

47. We consider that the scope of the divestment undertaking is such that it is likely to enable the purchaser to effectively compete with the merged entity in the relevant markets. We do not consider that the proposed divestment presents any significant level of composition risk.

Purchaser risks

48. In assessing purchaser risk, the key factors we consider are:

    48.1 whether there will be a purchaser that is acceptable to us ; and

    48.2 whether the applicant has an incentive to sell to a party who would not be a strong competitor.

49. In some cases there may be little or no interest from potential purchasers. This might indicate that the assets are unattractive to potential purchasers and this may cast doubt on the effectiveness of the undertaking.

50. A buyer acceptable to us needs to have certain attributes that enable it to be an effective competitor in the relevant market. Examples of attributes that may make a buyer acceptable are set out below:

    50.1 It is independent of the merged entity;

    50.2 It possesses or has access to the necessary expertise, experience and resources to be an effective long term competitor in the market; and

    50.3 The acquisition of the divested shares or assets by the proposed buyer does not raise competition concerns.

51. Evolution has engaged [ ] to find a suitable buyer for the divestment business and Evolution have informed us that [ ] been selected to carry out due diligence. Evolution considers that [ ] are credible purchasers of the divestment business.

52. [
] must be independent of Evolution or Acurity, or any of their associated or interconnected body corporates.

Is a purchaser acceptable to us likely to be available?

The Boulcott business

53. The Undertaking provided to us does not preclude Evolution selling the divestment business to [

54.

55.
].

56. [ ] [ ].

57. [
].

58. [
].

59. [
]
.

60. [[16]
].

[16] [
]

61. [
]. [
].

62. We consider that [ ] would be likely to have the necessary skills, experience and resources to be an effective competitor in private hospital markets in Wellington.

63. At this stage, Evolution [ ][ ][ ].

64. As with any divestment proposal where there is no confirmed upfront purchaser, we consider that the package presented by Evolution carries a level of purchaser risk. However, we note that [ ] [ ]

65. We consider that the level of purchaser risk identified is not sufficient to outweigh our conclusion that the Undertaking is likely to remedy the competition concerns in Wellington private hospital markets

Overall conclusion

66. Having considered the proposed divestment, we consider that the divestment is likely to remedy the competition concerns identified in the Connor Decision.

67. We consider that the divestment will return the market to the structure which existed prior to the Commission's consideration of the proposed acquisition. We have found no significant risks associated with the divestment.

68. Accordingly, we are satisfied that the proposed acquisition with the divestment, will not have, or would not be likely to have, the effect of substantially lessening competition.

Determination on notice of clearance

69. Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Evolution Healthcare (NZ) Pty Ltd to acquire all of the shares in Austron Limited, subject to the divestment undertaking dated 17 September 2015 provided by Evolution Healthcare (NZ) Pty Ltd under s 69A of the Commerce Act 1986.

Dated this 21st day of September 2015

Dr Mark Berry
Chairman

Attachment 1 – The Undertaking

Date: 17th September 2015

Divestment undertaking

1 Evolution undertakes to the Commission that, if the Proposed Acquisition settles, Evolution will carry out the Divestment within the Divestment Period (***Undertaking***).

2 Evolution acknowledges that the Undertaking:

2.1 forms part of any clearance given by the Commission for the Acquisition under section 66(3)(a) of the Commerce Act 1986; and

2.2 imposes legal obligations on Evolution under the Commerce Act 1986.

Commencement and term

3 The Undertaking comes into effect when it is signed by Evolution and accepted by the Commission under section 69A of the Commerce Act 1986.

4 The obligations contained in this Undertaking are discharged when the transaction(s) contemplated by the Divestment is completed.

Definitions

5 In the Undertaking:

5.1 the ***Acquisition*** means Evolution's proposed acquisition of all of the shares in Austron Limited, as described in Evolution's notice seeking clearance dated 17 August 2015.

5.2 ***Acurity*** means Acurity Health Group Limited;

5.3 ***Commission*** means the New Zealand Commerce Commission;

5.4 ***Evolution*** means Evolution Healthcare (NZ) Pty Limited;

5.5 the ***Divestment*** means entry into a final binding agreement(s) for the unreserved divestment(s) as a going concern of the Divestment Business and the Site to a Purchaser(s);

5.6 **[**

(a)

(b)

(c)

(d)

(e) **]**

5.7 the ***Divestment Manager*** means the present Hospital Manager of Boulcott Hospital Limited;

5.8 the ***Divestment Period*** means 6 months from the Acquisition Settlement Date;

5.9 **[**

5.10

]

5.11 a ***Purchaser*** means a party that is approved by the Commission pursuant to clauses [11] – [14] below;

5.12 the ***Site*** means the land and buildings at 666 and 678 High Street, Lower Hutt being:
LOTS 1 & 2 DP 43902, PT LOT 2 DP 13964, PT LOT 1 DP 11770, LOTS 2 DP 13854, LOTS 1 & 2 DP 31171, LOT 3 DP 13964, PT LOT 5 DP 8011 and PT LOT 2 DP 17165 876/40.

Conduct during the Divestment Period

Preservation obligations

6 Evolution will, during the Divestment Period, use all reasonable endeavours to:

6.1 preserve the reputation and goodwill of the Divestment Business;

6.2 preserve the economic viability, marketability and competitiveness of the Divestment Business;

6.3 maintain the Divestment Business' provision of services in a manner consistent with the provision of services as at the date of the Undertaking;

6.4 maintain a level of staffing at the Divestment Business that is materially the same as at the date of the Undertaking, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel, Medical Personnel, and other hospital staff to remain with the Divestment Business and;

6.5 maintain the economic viability and value of the Site.

Negative obligations

7 Evolution will not:

7.1 carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy of the Divestment Business, or the value of the Site;

7.2 sell or transfer the Divestment Business or Site, or any assets or substantial part of the Divestment Business or Site, to any person other than to a proposed purchaser(s) notified to the Commission in accordance with clause [11] below.

Hold-separate obligations

8 Evolution will, during the Divestment Period, operate the Divestment Business as if it were a separate going concern from the remainder of Evolution's business, including ensuring that:

8.1 the day-to-day operations of the Divestment Business are conducted by the Divestment Manager;

8.2 all employees employed in the Divestment Business report exclusively to the Divestment Manager;

8.3 the Divestment Manager reports directly to Evolution's board of directors (if strictly necessary). Should Evolution receive any information through the reporting process, the information will be subject to clause [9]; and

8.4 the Divestment Manager continues to maximise the value and viability of the Divestment Business on the basis that Bowen and Wakefield are arm's length businesses.

Ring-fencing obligations

9 Evolution will, throughout the Divestment Period:

9.1 ensure that any commercially sensitive information it receives regarding the Divestment Business and/or the Site is:

(a) used only for the purposes of:

(i) assessing the performance of the Divestment Business;

(ii) assessing the value of the Site;

(iii) progressing the Divestment;

(iv) reporting to the Commission pursuant to clause [14]; and

(v) complying with legal and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements); and

(b) disclosed only to those officers, employees, contractors, agents and advisers of Evolution who need to know the information in order to carry out these purposes;

9.2 ensure that the Divestment Business does not obtain any commercially sensitive information relating to Evolution's other businesses and, particularly not the Bowen and Wakefield businesses.

Non-solicitation obligations

10 Evolution undertakes that during the Divestment Period, subject to legal limitations, it will not solicit Key or Medical Personnel of the Divestment Business.

Purchaser approval

11 Evolution will notify the Commission at least 20 business days before the end of the Divestment Period of the identity of:

11.1 the proposed purchaser of the Divestment Business; and

11.2 the proposed purchaser of the Site (if different from the proposed purchaser of the Divestment Business).

12 Evolution must demonstrate to the Commission that the Divestment will be carried out in a manner consistent with the Undertaking and that the proposed purchaser(s):

12.1 will be independent of Evolution or Acurity, or any of their interconnected or associated body corporates;

12.2 has the financial resources, expertise and incentive to operate the Divestment Business as a viable competitor; and

12.3 is not likely to create competition concerns that would result in a contravention of section 47(1) of the Commerce Act 1986.

13 Evolution will ensure that relevant final binding agreements effecting the Divestment are conditional on obtaining the Commission's approval of the proposed purchaser(s) based on the criteria set out in clauses [12] and [13].

Monitoring compliance with the Undertaking

14 At the Commission's request, Evolution will give the Commission any information and documents reasonably required:

14.1 about the Divestment and Evolution's progress towards carrying out the Divestment; and

14.2 demonstrating that Evolution's conduct during the Divestment Period complies with the Undertaking.

15 Nothing in the Undertaking requires Evolution to provide legally privileged information or documents.

Executed as a deed on behalf of **Evolution**

Healthcare (NZ) Pty Limited

_____

Signature of Authorised Representative

_____

Print Name and Title