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

8 October 2004

By email: registrar@comcom.govt.nz

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

SOUTHERN CROSS OXFORD HOSPITAL LIMITED: OXFORD CLINIC

Pursuant to section 66(1) of the Commerce Act 1986 notice is hereby given seeking **clearance** of a proposed business acquisition.

PART I: TRANSACTION DETAILS

1. The business acquisition

1.1 Clearance is sought for the proposed acquisition by Southern Cross Oxford Hospital Limited ("Company") of the assets of the Oxford Clinic business in Christchurch. (The Company is not proposing to acquire the Oxford Clinic business operated at Queenstown). In this application those assets are referred to as "Oxford Clinic".

1.2 Please see section 5 and Annex A for further details of the proposed transaction. Annex B provides a diagrammatical representation of the proposed transaction.

2. The person giving notice

2.1 This notice is given by:

Southern Cross Oxford Hospital Limited
181 Grafton Road
Newmarket
Private Bag 99934
Auckland

Attention: Terry Moore
Telephone: (09) 356 0917
Facsimile: (09) 366 1423

2.2 Correspondence and inquiries should in the first instance be addressed to:

Minter Ellison Rudd Watts
Lawyers
Bank of New Zealand Tower
125 Queen Street
PO Box 3798
Auckland

Attention: Andrew Matthews / Cathy Quinn
Telephone: (09) 353 9700
Direct dial: (09) 353 9847 / (09) 353 9951
Facsimile: (09) 353 9701
Email: andrew.matthews@minterellison.co.nz
cathy.quinn@minterellison.co.nz

3. Confidentiality

3.1 Confidentiality is not claimed for the fact this notice is made.

3.2 Confidentiality is sought for that information included in square brackets. A copy of this notice with the confidential information deleted is provided for the Commission's assistance.

3.3 Confidentiality is sought until the confidentiality request is withdrawn.

3.4 This request is made because the information is commercially sensitive and disclosure would be likely unreasonably to prejudice the commercial position of the parties. This request is made initially under section 100 of the Commerce Act 1986 and subsequently under section 9 of the Official Information Act 1982.

4. Details of the participants

4.1 The acquirer is Southern Cross Oxford Hospital Limited. Contact details are set out in paragraph 2.1.

4.2 The target:

The Oxford Clinic
C/- David Barker & Co
52 Cashel Street
Christchurch

Attention: David Barker
Telephone: (03) 374 4220
Facsimile: (03) 374 4230

4.3 Correspondence and inquiries should in the first instance be addressed to:

Kensington Swan
Lawyers
89 The Terrace
PO Box 10246
Wellington

Attention: Tim Clarke
Telephone: (04) 472 7877
Direct dial: (04) 498 0881
Facsimile: (04) 472 2291
Email: tim.clarke@kensingtonswan.com

5. Parties interconnected to or associated with each participant

5.1 Acquirer group/associates:

(a) The Company is the acquirer.

(b) The Company will be the agent for a 50/50 partnership between Southern Cross Hospitals Oxford Partnership Limited ("SCHOPL") and Oxford Clinic Holdings Limited ("OCHL") as described in Annex A.

(c) At settlement, 50% of the shares in the Company will be held by SCHOPL, a wholly-owned subsidiary of The Southern Cross Health Trust ("The Trust"). The other 50% of the shares in the Company will be held by OCHL.

(d) The shareholders in OCHL will be John Doig, Michael East, Paul Fogarty, Michael Laney and Richard Perry, together with their associates. (These individuals represent five of the six shareholders in the vendor companies described in 5.2.)

(e) The Trust is a charitable trust, established for the purposes of providing hospital care to the general public, the beneficiaries of which are effectively all New Zealanders. The Trustees of The Trust are registered as a Board under the Charitable Trusts Act 1957. The Trust owns nine hospitals[1] and has partnerships in another three[2]. These are used by independent surgeons to provide a range of surgical services (including otolaryngology, ophthalmology, general surgery, gynaecology, orthopaedic, plastic, urology and endoscopy). The Trust is licensed to use the Southern Cross brand by The Southern Cross Medical Care Society ("The Society"). The Society is a separate legal entity. As the Commission has previously noted: *"There is no legal connection between it* [The Trust] *and the Society, but there is a close working relationship."*[3] (The Society is incorporated as a friendly society under the Friendly Society and Credit Unions Act 1982 and as such is a body corporate[4]).

5.2 Target group/associates:

(a) This application relates to the Oxford Clinic as defined in 1.1. The Oxford Clinic is owned by two companies: The Oxford Clinic Limited ("OCL") and The Oxford Clinic Day Hospital Limited ("OCDHL") (together, the "Vendors"). The Oxford Clinic's business assets include a lease of premises of which the Oxford hospital is part, and the lease of an adjacent building, various assets (including stock), business contracts, intellectual property and goodwill.

(b) OCL and OCDHL each have the same shareholding structure. Each company has 600 shares, held as follows: John Doig (100); Michael East (100); Paul Fogarty (100); Michael Laney (100); Suzanne Suckling (100); and Richard Perry, Julia Perry, and Graeme Davey (together 100). Each of the shareholders is also a director, except Julia Perry and Graeme Davey.

(c) With the exception of Suzanne Suckling, following the proposed acquisition the shareholders will retain equity interests in the Oxford Clinic through their shareholding in OCHL. The shareholdings in OCHL will be as follows:

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[1] Brightside, Christchurch, Hamilton, Invercargill, New Plymouth, North Harbour, Palmerston North, Rotorua and Wellington. These were previously owned by The Southern Cross Medical Care Society.

[2] Gillies Hospital (Auckland), Mercy Angiography Unit (Auckland), and Norfolk Southern Cross Hospital (Tauranga).

[3] Memo of 18 December 1997: Termination Report: Southern Cross Healthcare/Aetna to Jane Lyon from Adam Parker/Gwen Keel: ENF/RT P-S: WN 1488 ("Termination Report") at para 6.

[4] See *The Southern Cross Medical Care Society and Aetna Health (NZ) Limited*, Decision 399, 25 August 2000.

"A" Shareholders	No. of "A" Class Shares	"B" Shareholders	No. of "B" Class Shares
John Doig	[ ]	John Doig & Susan Doig	[ ]
Michael East	[ ]	Michael East, Jane East & Ingrid Taylor	[ ]
Paul Fogarty	[ ]	Paul Fogarty, Richard Gray & Martin Hadlee	[ ]
Michael Laney	[ ]	Michael Laney & Geoffrey Brodie	[ ]
Richard Perry	[ ]	Julia Perry, Richard Perry & Graeme Davey	[ ]
Total	[ ]		[ ]

"A" shares carry voting rights and limited dividend rights. The "B" shares carry no voting rights, but do give dividend rights. The "B" shareholders are family trusts. The "A" shares and corresponding "B" shares may only be transferred or otherwise dealt with together except in some limited circumstances.

6. Inter-participant interests

6.1 Five of the existing shareholders (including their associates) in the Vendors (OCL and OCDHL) will continue to have an interest in Oxford Clinic. Those shareholders will both directly, and through their family trusts, be shareholders in OCHL, which will have a 50% shareholding in the Company.

6.2 The effect of the acquisition will be to dilute their respective equity stakes in Oxford Clinic from [ ] each[5], to [ ] each.[6] However, these parties will collectively, through OCHL's 50% shareholding in the Company, and through the Partnership Agreement and related documents, exercise joint control over the Company.

7. Inter-participants links

The links between the participants are identified above and in Annex A.

8. Common directorships

8.1 There are currently no formal or informal links between The Trust and the Vendors or the Vendors' shareholders (ie there are no common directorships, contracts or arrangements between them).

8.2 The board of the Company will comprise two directors appointed by SCHOPL and two appointed by OCHL.

9. Business activities

The Company, OCHL, and SCHOPL

9.1 The Company is incorporated for the purpose of owning and operating the Oxford Clinic business.

9.2 OCHL is the vehicle for holding the clinicians' (and their associates) 50% stake in the company.

9.3 SCHOPL is a special purpose company, incorporated for the purpose of holding The

[5] [ ] shares is [ ]%

[6] [

]

Trust's 50% stake in the Company.

The Trust

9.4 The Trust's Christchurch facility (branded Southern Cross Hospital, Christchurch) is primarily an in-patient facility providing facilities for the provision of secondary elective healthcare services. The Christchurch facility has 7 operating theatres and 91 beds. The Christchurch facility is used to carry out all type of surgery (except cardiac), ranging from general surgery to neurosurgery. Around half of the procedures performed at the facility are orthopaedic procedures. The balance is general surgery, urology, eye surgery, ear, nose & throat surgery ("ENT") and plastic surgery. The Trust does not provide any surgical services, nor does it contract surgeons to do so.[7]

The Oxford Clinic

9.5 The Oxford Clinic Day Hospital provides facilities for the provision of secondary elective healthcare services, primarily on a day stay basis (it also offers 6 in-patient rooms). The procedures performed at the Oxford Clinic are mostly gynaecology, with a small amount of general surgery (including some colorectal surgery) and endoscopy.

10. Reasons and intentions

10.1 The ultimate shareholders in the Company have [

] The practical effect of the acquisition will be that [

] Please see section 11 for further discussion on the effects of the proposal.

10.2 For the Trust, the acquisition offers the prospect of being involved in [ ] gynaecological and colorectal/general surgery, through its equity stake in the Oxford Clinic. [

]

10.3 The Trust also sees the proposal as a means of fostering its relationship with the clinician shareholders, which it considers would be an effective means of developing best practice in the efficient provisions of surgical facilities.

10.4 For the five existing shareholders in OCL and OCDHL, the proposal represents the ability to share in the benefit of [

]

10.5 The proposal also offers those existing shareholders the ability to realise a return on their capital investment.

[7] The only limited exception being some DHB and ACC arrangements.

PART II: IDENTIFICATION OF MARKETS AFFECTED

11. Horizontal Aggregation

11.1 The acquisition will result in aggregation in the provision of hospital facilities and related non-specialist services for elective secondary services in the Christchurch region. There will be no aggregation in the provision of surgical services as The Trust only provides facilities.

11.2 The Company notes that in *Wakefield/Bowen*[8] the Commission concluded that the relevant market was "*the provision of hospital facilities and related non-specialist services for elective secondary surgery to private patients to the Wellington region (excluding the Wairarapa)*".[9]

11.3 This approach was consistent with its earlier decision in *Ascot/Mercy.*[10] However, in *Eastbay Health/Western Bay Health*[11] the Commission concluded that a relevant market was "*the provision of elective secondary healthcare services and/or facilities in the Bay of Plenty region*".[12] The Commission's reason for distinguishing the earlier view was that "*health policy has shifted away from* [the blurring between public and private services and facilities], *with the current* [government health] *policy discouraging the carrying out of private work in the public hospitals*".[13]

11.4 The Company agrees with the categorisation of separate secondary elective and tertiary surgery markets, and that the services provided by hospitals should be treated as one product market, namely the provision of its facilities and related non-specialist services.

11.5 The Company disagrees with the more recent Commission view that the product market is limited to private patients or facilities. It considers that public hospitals are a significant constraint and should be treated as falling within the same market as private hospitals. The Company notes that in the recent Ophthalmologists' case[14], the Court accepted that private and public cataract surgery were in the same market:

> "the relevant market is for cataract surgery ("routine'...elective") including pre-assessment and follow-up, provided to people in the Southland area. I find that cataract surgery is a distinct product market.
>
> **That market includes all of those customers (patients) who require surgery for the eye condition whether they are able to pay for it themselves, personally or through health insurance, so that it may be performed privately, or whether they are required to have the surgery performed in public without cost to them.** If waiting times in the public sector are short, less may be willing to pay for private surgery. If private surgery prices are reduced it is likely that more may opt for that service. ... Private and public routine cataract surgery is in the same market.
>
> The fact that there may be competition for public health funding as between Hospital Boards, does not affect the market definition. The Board simply purchases services on behalf of public patients, as does a private health insurer for private patients. Competition for funding is not the same thing as competition in the market to provide

[8] *Wakefield Hospital Limited and Bowen Hospital Limited*, Decision 492, 19 February 2002.

[9] *Wakefield/Bowen*, at para 80.

[10] The *Ascot Hospital and Clinics Limited and Mercy Hospital Auckland Limited* decision 449, 14 December 2001 at para 74.

[11] *Eastbay Health Limited and Western Bay Health Limited*, Decision 331, 19 November 1998.

[12] *Eastbay/Western Bay*, at para 657.

[13] *Ascot/Mercy*, at para 467.

[14] *The Commerce Commission v The Ophthalmological Society of NZ Ltd, 1/3/2004, Gendall J, Wellington.*

cataract surgery. **I accept Mr Sundakov's analysis that private and public cataract surgery is within the same functional market.**" [emphasis added][15]

11.6 The Company notes that:

(a) all the procedures carried out at St George's, the Oxford Clinic and The Trust's Christchurch facility are conducted at the public hospitals;

(b) many surgeons operate at both the public and private facilities;

(c) while public facilities are "free" and use of private facilities requires payment, this can be regarded as a trade off for shorter queues, and (in some cases) for private rooms – there is a chain of substitution between those patients who will prefer one system or the other, such that private facilities are significantly constrained by public facilities. Other factors patients take into account include the availability of a particular facility, whether the patient has insurance (and the level of cover) and the views of the patient's surgeon (and general practitioner);

(d) nationally, District Health Boards ("DHBs") frequently contract private facilities, particularly when queues are too large, showing that they regard the facilities as a substitute for their own.

11.7 In section 16 below, the Company provides information in regard to the overall market. However, given the Commission's recent focus on the private sector only, it provides more detailed information on that market segment.

11.8 The proposed acquisition will not result in any aggregation of surgical services. However, for completeness, the company provides details of where its shareholders conduct their work in 16.11 below.

Differentiated Product Markets

12. **Characterisation of the relevant products as standardised or differentiated**

12.1 The Company broadly agrees with the Commission's view there is some degree of differentiation.[16] In particular the public and private hospital systems can be differentiated, but the level of differentiation is not so strong to support separate market definitions.

13. **For differentiated product markets**

13.1 All the Christchurch facilities are generally close substitutes for one another. A number of surgeons operate in a number of facilities, both public and private.

13.2 The main differentiation occurs between the operation of public and private facilities. The most obvious differences are that patients in the public sector generally subject to longer waiting times for procedures and do not have the ability to use private rooms, however, they do not have to pay. The same procedures performed in private facilities can always be performed in public hospitals.

13.3 There are some differences between The Trust's facility, which is primarily an in-

[15] The Ophthalmologists' case, at para 192.

[16] In para 59, *Ascot/Mercy*, the Commission noted: "*Provision of surgical services has elements of being a differentiated service. The surgeon, the style and nature of facilities and the location of the hospital are all factors that influence the patient's choice. However, some of these factors are either outside the market (the surgeon) or are already catered for within the proposed market definition (distinction between secondary and tertiary services). It notes, however, that within the market there is some degree of differentiation.*" At para 70 of *Wakefield/Bowen* the Commission followed this approach.

patient facility and the Oxford Clinic's facility which is primarily day stay. St George and the public facilities have a mix of both. The Company notes that some private facilities house both the surgeons' consulting rooms and the operating facilities (as in the case of the St George and the Oxford Clinic facilities but not The Trust's Christchurch facility).

13.4 The Company and The Trust will continue to be constrained by the presence of St George and the public facilities. There is not a sufficient degree of differentiation between the different facilities that the suppliers do not constrain one another.

14. Vertical Integration

14.1 The proposal will not result in new vertical integration. To the extent that the Oxford Clinic is owned by clinician shareholders, this will not change (except that the continuing clinicians' equity interests will be diluted slightly).

15. Previous acquisitions

15.1 The Company has not notified the Commission of any proposed acquisitions, business assets or shares in the last three years.

PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION

16. Existing competitors

16.1 Existing competitors in the Christchurch region comprise three private hospitals and one DHB. Within the DHB structure, there are four main hospitals; three surgical and one medical rehabilitation[17]. Suppliers are:

(a) **The Trust's Southern Cross Hospital:** As noted in 9.2 above, a wide range of surgery is carried out at The Trust's facilities. It has no contractual links with surgeons. It has revenues of approximately [ ].

(b) **St George's Hospital:** St George's Hospital is an Incorporated Society with charitable trust status, so it does not have shareholders. It reinvests any surpluses, or uses them to carry out its charitable objectives. The Hospital opened in 1928 and is registered to care for surgical, medical and maternity patients. It also contracts to provide a range of surgical and obstetric services to public patients funded by Government. Its web site[18] comments that "*. . . the Hospital is one of the largest private hospitals in New Zealand and is one of the most modern in terms of its equipment and technology*". It notes that it is "*. . . one of the best-equipped private hospitals in Australasia offering an extensive range of surgical services*" with "*modern hospital facilities which utilise the very best in today's technology, highly qualified medical, surgical, nursing and midwifery staff, and all the conveniences of a home away from home.*" The following specialities are carried out at its facility: cardiology, cardiothoracic surgery, endoscopy, general surgery, neurosurgery, obstetrics and gynaecology, ophthalmology, oral and maxillofacial surgery, orthopaedic, otolaryngology (ENT – ear, nose and throat), paediatrics, pain management, plastic/reconstructive/cosmetic surgery, and urology.

St George's recently completed significant renovation work and it has eight operating theatres (two day surgery and six inpatients) with 74 beds. The work done at this hospital is similar to The Trust's mix. The Company estimates that

[17] Princess Margaret Hospital: This is an elderly rehabilitation hospital which has no operating theatre facilities.

[18] http://www.stgeorges.org.nz

St George's has revenues of around [ ].

(c) **The Oxford Clinic Day Hospital:** As noted in 9.3 above, this is principally a day-stay clinic. Mostly gynaecology is performed here with a small amount of general surgery (including some colorectal) and endoscopy. The Oxford Clinic Day Hospital has revenues of around [ ].

(d) **Christchurch Hospital:** An acute and elective hospital with 700 beds and 12 operating theatres. This hospital is currently undergoing major expansion programme to include the women's hospital, which will be co-located to this site.

(e) **Christchurch Women's Hospital:** Predominantly an obstetric and gynaecology hospital which is due to be shifted to Christchurch Hospital site. It currently has two operating theatres.

(f) **Burwood Hospital:** An elective orthopaedic hospital and spinal injury rehab centre with three operating theatres.

16.2 Table 1 below sets out estimated market shares for public and private facilities. These are indicative only as the public facilities numbers include tertiary care and secondary non-elective care.

Table 1: Surgical facilities in the Christchurch region: Post-acquisition market shares

	Beds		**Theatres**	
	No	%	No	%
The Trust	91	7.1%	7	20.6%
Oxford	6	0.4%	2[19]	5.9%
Combined	***97***	***7.5%***	***9***	***26.5%***
St George	74	5.8%	8	23.5%
Christchurch	700	54.6%	12	35.3%
Women's	50	3.9%	2	5.9%
Burwood	60	4.7%	3	8.9%
Princess Margaret	300	23.4%	0	0.0%
Total	1281	99.9%[20]	34	100.1%[21]

16.3 The above demonstrates the huge presence of the public sector. As can be seen, the level of aggregation is extremely low.

Hospital facilities for elective secondary services for private patients

16.4 Adopting the Commission's recent narrower market definition (ie "*the provision of hospital facilities and related non-specialist services for elective secondary surgery to private patients*"[22] in the Christchurch region) Table 2 calculates market shares by theatres, beds, and revenues, treating The Trust and the Oxford Clinic as "one head" in the market

[19] Oxford also has a procedure room.

[20] Rounding error.

[21] Rounding error.

[22] *Wakefield/Bowen* at para 80, following *Ascot/Mercy*.

Table 2: Provision of *private* secondary elective surgical facilities in the Christchurch region : Post-acquisition market shares

	Beds		Theatres		Revenue	
	No	%	No	%	**Appr.**	**%**
The Trust	91	53.2%	7	41.2%	[ ]	[ ]
Oxford	6	3.5%	2[23]	11.8%	[ ]	[ ]
Combined	***97***	***56.7%***	***9***	***52.9%***[24]	*[ ]*	*[ ]*
St George	74	43.3%	8	47.1%	[ ]	[ ]
Total	171	100%	17	100.0%	[ ]	[ ]

16.5 The level of aggregation is reasonably low ([ ] to [ ]), with the combined operations accounting for around [ ] to [ ] of the narrowly defined private market, depending on the measure of market share adopted. The Company considers that, in this case, theatre numbers overstate the Oxford Clinic's market share due to the significant under-utilisation of its operating theatres.

16.6 Post-acquisition, the parties will be constrained by a number of factors including:

(a) a strong competitor in St George, which has around half of the private market and a modern facility resulting from its expansion in 2003. It has sufficient land for further expansion and barriers to expansion are low;

(b) the threat of new entry (particularly in day stay), given that the barriers to entry are low.[25] The Commission has concluded that there "*are no structural or regulatory barriers that constitute a material barrier to new entry*", that "*the capital costs of establishing a new hospital are not sufficiently high to constitute a material barrier . . . and that the low return on capital is correctly regarded as a sign of a competitive market*"[26]. The Commission has pointed to the growth of day stay surgery due to technological advances and the particular ease of entry for day stay surgeries.[27] The Commission also noted:

> *"Boulcott considered that a new day surgery could be operational within 6-12 months with capital costs of approximately $1 million. However, facilities and equipment can be leased, thus reducing the capital cost associated with them. The experience of Ascot in Auckland suggests that de novo entry of a significant scale can be accomplished within two years of planning being commenced. Furthermore, the experience in Auckland in the last 6 years where there has been entry by four surgical centres indicates that entry into the secondary surgical market is not slow.*
>
> . . .
>
> *The Commission concludes that the barriers to entry are low and the prospect of entry in the event of the merged entity attempting to exercise market power is sufficiently tangible to be a constraint on the merged entity in the post-acquisition market".*[28]

[23] Oxford also has a procedure room.

[24] This is lower than the sum of the above two figures due to rounding.

[25] *Mercy/Ascot*, at para 151.

[26] *Wakefield/Bowen*, at paras 157, 158.

[27] *Wakefield/Bowen*, for example, at paras 168, 169.

[28] *Wakefield/Bowen, at* paras 175 and 177.

(c) a strong alternative in the public system – the Commission has noted[29] that public hospitals constrain private hospitals through:

(i) the potential for public facilities to undertake private work (even though this would require a change in government policy);

(ii) the fact that the public system sometimes contracts out to the private system to reduce waiting lists, and the "benchmarking" role this can perform;

(iii) most influentially, patients can choose either system – particularly if the price in the private system becomes too great;

(d) the countervailing power of:

(i) ACC ;[30]

(ii) insurance companies; and

(iii) surgeons.[31]

16.7 The Commission commented in *Wakefield/Bowen* that:

> *"The Commission considers that the constraints that buyers can effect in the market are significant. These constraints arise from the role of ACC and insurance companies as significant purchasers and funders in the market, and the potential competition from public hospitals. Surgeons and other healthcare providers also have a degree of countervailing power".*
>
> . . .
>
> *"These constraints are difficult to quantify in terms of their ability to constrain an increase in price. However, the cumulative impact of these constraints, coupled with low entry barriers, will be an effective constraint to prevent the merged entity from exercising market power."*[32]

16.8 The Christchurch DHB also poses a constraint through its ability to contract work out to the private sector (although currently it only does so at relatively low levels).

Other Considerations

16.9 The Company notes:

(a) regardless of whether public hospitals are included in the market, they represent a significant constraint;

(b) barriers to entry are low and the threat of new entry is particularly high in respect of day stay facilities which is the principal focus of the Oxford Clinic;

(c) a recent example of this occurred in Hamilton, where a group of clinicians

[29] *Wakefield/Bowen, at paras 56 and 59.*

[30] Elective ACC work in Christchurch is currently split roughly as follows: 40% Southern Cross, 30% St George's, 25% Burwood and 5% others. Competition between private and public hospitals for ACC work was noted in *Wakefield/Bowen* at para 120.

[31] These factors have all been noted as strong constraints in the Commission's previous decisions.

[32] *Wakefield/Bowen* at paras 182 and 189.

established their own facility in a short period of time;

(d) while Oxford Clinic is a good business, it could not currently be described as "innovative" given its inability to expand.

16.10 The Company also notes that it will be further constrained by the fact that it is 50% owned by customer clinicians and the related agreements described in Annex A.

16.11 There is no aggregation of surgical services and the Company does not consider that the acquisition will result in any material effects in relation to surgical services. The Company is aware that the Commission wishes to know details of the surgery conducted by the clinicians who will remain shareholders in the Oxford Clinic following the proposed acquisition. The Company's estimates of these figures are set out in Table 3 below. The numbers are very rough approximations.

Table 3: Oxford Clinic shareholders: locations where surgery conducted

	Surgery Breakdown			
Speciality/Name	**Oxford**	**St George**	**The Trust**	**Public**
General				
Perry (Bowel & Digestive)	[ ]	[ ]	[ ]	[ ]
Fogarty	[ ]	[ ]	[ ]	[ ]
Gynaecology				
Laney	[ ]	[ ]	[ ]	[ ]
East	[ ]	[ ]	[ ]	[ ]
Doig	[ ]	[ ]	[ ]	[ ]

Notes:

(i) [

];

(ii) existing usage patterns are consistent with the above factors taken into account when determining where a patient will have surgery performed on them;

(iii) the Company estimates that even if the Oxford Clinic clinicians were to completely shift the procedures currently conducted at St George Hospital to either the Oxford Clinic or The Trust's facility, this would represent only around [ ] worth of the surgery per annum.

Conditions of expansion

17. The Company considers that constraints imposed by existing competitors are sufficient to ensure that the acquisition would not result in a substantial lessening of competition. Existing competitors can readily increase their supply by increasing utilisation of existing capacity or expanding capacity. St George expanded its facilities in 2003 and has the physical space to make further expansion. Expansion can be undertaken swiftly – this could occur in as little as 6-12 months. The public facilities

could also readily expand. Further, given the low barriers to entry the threat of new entry is a strong constraint.

18. The merged entity would not have the power to sustainably increase prices and/or to reduce quality of its services relative to what would have occurred in the absence of the acquisition.

Co-ordinated Market Power

19. The Company notes that the Commission has previously taken the view that the market is susceptible to collusion but that cartel-like behaviour is unlikely as the industry structure does not enable discipline due to the low barriers to entry, and the close monitoring of price and the countervailing power of insurance providers and ACC.[33]

20. The Company does not consider that the market is susceptible to collusion, but otherwise agrees with the above comments.

21. Given the above, the Company briefly reproduces the Commission's criteria below,[34] but does not deal further with them here.

Table 4: Testing the Potential for Collusion

Factors conducive to collusion	Presence of factors in all relevant markets
High seller concentration	Yes
Undifferentiated product	Partially (there is further differentiation between public and private facilities)
New entry slow	No
Lack of fringe competitors	No (the public system)
Price inelastic demand curve	Variable, with strong constraint from the public system.
Industry's poor competition record	No
Presence of excess capacity	Variable
Presence of industry associations/fora?	Yes

Table 5: Testing the Potential for Discipline

Factors conducive to discipline	Presence of factors in all relevant markets
High seller concentration	Yes ("No", if public hospitals are taken into account)
Sales small and frequent	No

[33] *Wakefield/Bowen*, for example, at paras 140, 141.

[34] The Company notes that the Commission's Mergers & Acquisitions Guidelines refer to retaliation as part of this analysis. The Company does not view that distinction as adding further to the analysis in this case.

Factors conducive to discipline	Presence of factors in all relevant markets
Absence of vertical integration	Yes, although Oxford Clinic is currently owned by some of its clinician-customers[35]
Demand slow growing	Varies across market and depends on government policy
Firms have similar costs	Yes (varies again when take public system into account)
Price transparency	Variable

22. The transaction will not increase the risk of co-ordinated behaviour in the relevant markets due to the large number of market participants, the strong role of the public health sector, the lack of significant barriers to entry/expansion and the strong incentive on surgeons, specialists and health insurers to resist any attempts at co-ordination.

PART IV: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

23. The Company considers that the constraint imposed by St George is sufficient to ensure that competition will not be lessened. Further significant constraints come from the public hospitals and the countervailing power of ACC, insurers and the DHB.

24. Given the above, and the Commission's clear statements about the low barriers to entry (discussed above) the Company does not consider it necessary to focus on potential competition. As noted by the Court of Appeal: "*Whatever the size of the merged entity's market share, it is elementary that its market power will not be insufficiently constrained unless there are barriers to entry or expansion which protect it from effective rivalrous reaction to the exercise of its market power.*"[36]

This notice is given by Terence David Moore, Southern Cross Oxford Hospital Limited. I confirm that:

(a) all information specified by the Commission has been supplied; and

(b) all information known to the applicant(s) which is relevant to the consideration and determination of this application/notice has been supplied; and

(c) 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 8th day of October 2004

_____

Terence David Moore

I am an officer of Southern Cross Oxford Hospital Limited and am duly authorised to make this application.

[35] The Trust is not vertically integrated (cf. Table 3, para 128 and para 131 of *Wakefield/Bowen*).

[36] *Commerce Commission v The Southern Cross Medical Care Society* (2001) 10 TCLR, para 86.

ANNEX A [ ]
Overview of the proposed transaction

[

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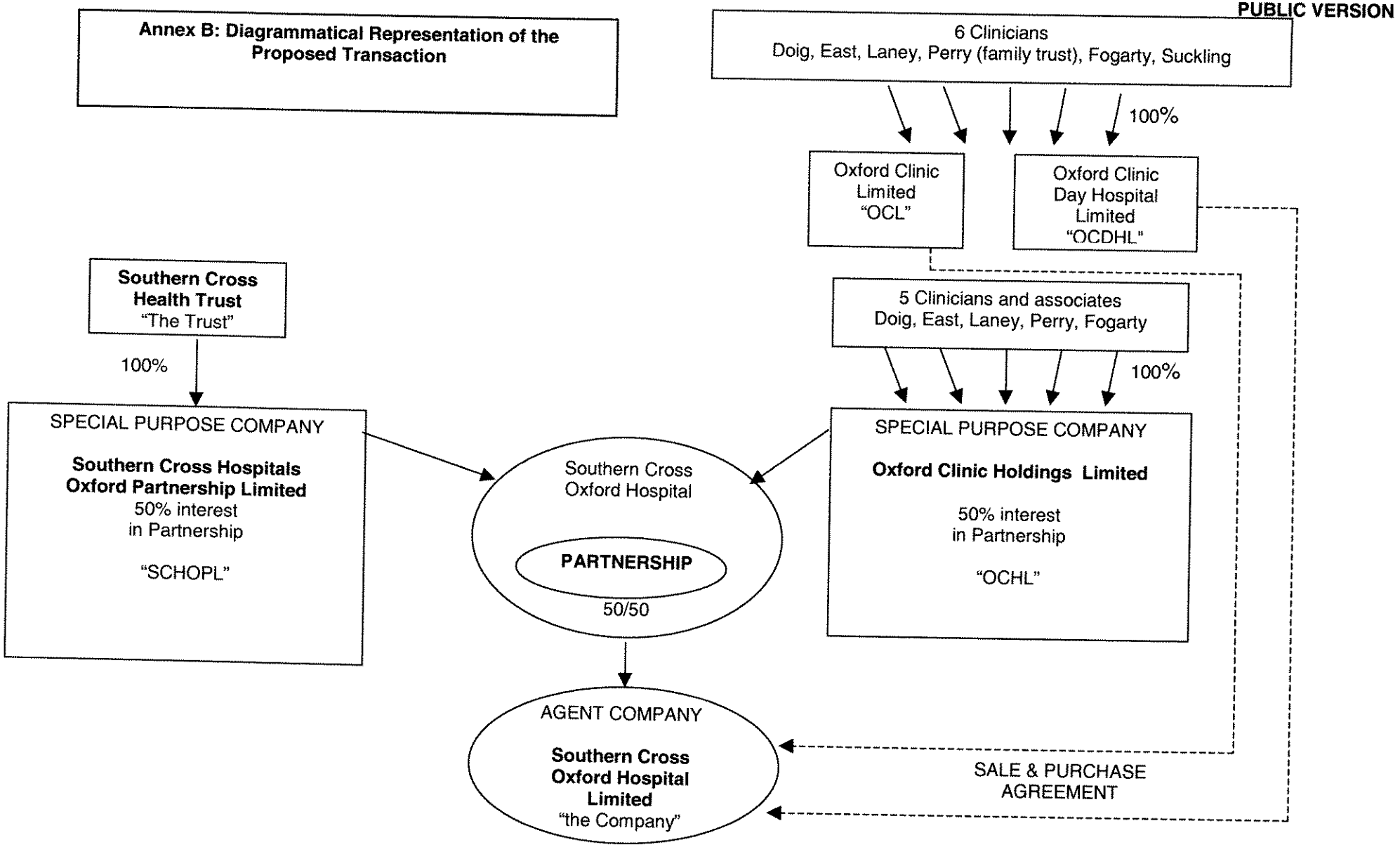
Annex B: Diagrammatical Representation of the Proposed Transaction



Agent Company

- Operates the hospital on behalf of Partnership;
- Holds title to the assets on behalf of Partnership;
- Employs staff on behalf of Partnership;