

**NOTICE SEEKING CLEARANCE OF A BUSINESS ACQUISITION PURSUANT TO SECTION 66 OF
THE COMMERCE ACT 1986**

17 September 2021

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

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

1. EXECUTIVE SUMMARY

- 1.1 This notice seeking clearance is given on behalf of Pacific 2021 BidCo NZ Limited (defined as the "**Applicant**"), which proposes to acquire 100% of the shares in Pulse Health NZ Limited ("**Pulse**") from Healthe Care Australia Pty Ltd ("**Healthe Care**") (the "**Transaction**"). Pulse's only healthcare facility in New Zealand is the Boulcott Hospital in Wellington (including Boulcott Hospital's consulting rooms in the Coastlands Shopping Centre, Paraparaumu).¹ Ancillary to (but separate from) the Transaction, the Applicant is also acquiring Healthe Care Surgical Holdings Pty Ltd ("**Surgical AU**") from Healthe Care. While Surgical AU owns 17 sites (12 private hospitals (including two with co-located day surgeries), and 5 standalone day stay surgery centres) in Australia, that ancillary transaction does not include any healthcare facilities in New Zealand and, therefore, is not subject to a clearance application to the Commerce Commission ("**Commission**").
- 1.2 As part of this clearance application, the Applicant undertakes to the Commission to divest the only overlapping asset in New Zealand, namely Boulcott Hospital (the "**Divestment Undertaking**"), by divesting the Boulcott Hospital as a going concern (either through the divestment of Pulse (share sale) or the sale of the Boulcott Hospital assets (asset sale). Given that Divestment Undertaking, the Applicant is confident that the Acquisition will not have the effect, or likely effect, of substantially lessening competition in any relevant market in New Zealand as the Divestment Undertaking will remove any aggregation that would otherwise occur in relevant markets.
- 1.3 The Applicant's proposed Divestment Undertaking is **enclosed** as Attachment 1.
- 1.4 []

¹ In this application, where Boulcott Hospital is referred to, that includes all assets used to run the Boulcott Hospital – including the consulting rooms at Coastlands Shopping Centre.

PART A: TRANSACTION DETAILS**PARTY DETAILS****2. THE APPLICANTS:**

2.1 This notice seeking clearance is given on behalf of Pacific 2021 BidCo NZ Limited (defined as the "**Applicant**"), which proposes to acquire 100% of the shares in Pulse Health NZ Limited ("**Pulse**") from Healthe Care Australia Pty Ltd ("**Healthe Care**") (the "**Transaction**"). Pulse's only healthcare facility in New Zealand is the Boulcott Hospital in Wellington. Ancillary to (but separate from) the Transaction, the Applicant is also acquiring Healthe Care Surgical Holdings Pty Ltd ("**Surgical AU**") from Healthe Care. While Surgical AU owns 17 sites (12 private hospitals (including two with co-located day surgeries), and 5 standalone day stay surgery centres) in Australia, that ancillary transaction does not include any healthcare facilities in New Zealand and, therefore, is not subject to a clearance application to the Commerce Commission.

2.2 The contact details for the Applicant are:

Scott McKnight
Director – Pacific Equity Partners
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2.3 All correspondence and notices in respect of the application for the Applicant should be directed in the first instance to:

Russell McVeagh
PO Box 8
Shortland Street
Auckland 1140
Attention: Troy Pilkington (Partner) / Petra Carey (Senior Associate)
Telephone: 09 367 8108 / 09 367 8831
Email: troy.pilkington@russellmcveagh.com / petra.carey@russellmcveagh.com

2.4 As noted above, the Application is given on behalf of a newly incorporated company. The Applicant will be ultimately owned by a diverse range of non-associated investors, including funds managed or advised by Pacific Equity Partners Pty Ltd ("**PEP**"), an Australian private equity fund manager. PEP was founded in Sydney in 1998, and currently has approximately AUD\$5.9 billion in assets under management.

2.5 Funds managed or advised by PEP have made a number of investments across a range of industries. Of relevance to this application, one of the funds managed/advised by PEP (PEP Fund V)² owns approximately [] of the Evolution Healthcare Group ("**Evolution**") [

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² PEP Fund V is comprised of various funds managed/advised by PEP.

- 2.6 Evolution is a provider of healthcare services in New Zealand and Australia. In New Zealand, in addition to offering rehabilitation services from seven locations, Evolution, via Acurity Health Group Limited ("**Acurity**"), operates private hospital facilities. Evolution's wholly-owned private hospital sites include:
- (a) Wakefield Hospital, Wellington ("**Wakefield**");
 - (b) Bowen Hospital, Wellington ("**Bowen**"); and
 - (c) Royston Hospital, Hawke's Bay.
- 2.7 Acurity also has ownership interests in:
- (a) Grace Hospital, which is Tauranga's only private specialist surgical hospital. It is owned and managed in partnership between Acurity Health Group and Southern Cross Healthcare Limited ("**Southern Cross**").
 - (b) Birthcare, which is an operator of primary maternity hospitals for birthing and postnatal care in Auckland and Huntly, and provides support, care and education to mothers, babies and their families.
 - (c) Proactive Rehab, which provides a range of 'Transformative Health' services from within some of New Zealand's leading gyms and has become known as one of the best-equipped rehabilitation clinics in New Zealand. Proactive clinics are located across Auckland, Wellington, Hawke's Bay and Manawatu.
 - (d) Oncology NZ Limited, a joint venture with Icon Cancer Care for the provision of radiation and medical oncology services at Bowen Hospital. The Bowen Icon Cancer Centre is the first private oncology clinic in Wellington.
 - (e) New Zealand Behavioural Health Limited, which is a private mental health clinic in Auckland, being the Re-centre Clinic. The Re-centre Clinic opened as a new clinic in November 2019, and provides expert psychiatric and psychological services, personal therapy and group therapy courses.
 - (f) Endoscopy Auckland Limited, which is a healthcare facility specialising in endoscopy and laparoscopy surgery. It is owned and managed in partnership between Acurity Health Group and Integrated Hospitals Limited.
 - (g) Quay Park Surgical Centre, which is a purpose-built surgical unit near the Auckland CBD and close to Auckland City Hospital. Quay Park Surgical Centre is an affiliated provider for Southern Cross Medical Care Society insurance members.
 - (h) Evolution Rehab Limited, which provides sub-acute rehabilitation services to patients, who are typically victims of stroke or traumatic brain injury. Rehabilitation services are provided in seven locations throughout the North Island, being Whangarei, West Auckland, South Auckland, Hamilton, Gisborne, Hastings and Palmerston North.
- 2.8 While the Wakefield and Bowen sites are, like the Boulcott Hospital, located in the Wellington region, the Transaction will not give rise to any enduring horizontal overlap as the Applicant intends to divest Boulcott Hospital.

2.9 A corporate structure chart for the Applicant and its related companies in relation to Evolution is provided at **Appendix One**.

2.10 While funds managed or advised by PEP also have other current investments in the broader healthcare industry that are active in New Zealand, namely:

(a) LifeHealthcare (a medical device distributor);³ and

(b) iNova Pharmaceuticals (a consumer pharmaceutical healthcare business),⁴

the Applicant does not consider those other investments, irrespective of the Divestment Undertaking, give rise to any possible vertical or conglomerate effect concerns given both operate in highly competitive industries (and, in any event, iNova is a consumer pharmaceutical healthcare business and so supplies predominantly to pharmacy and grocery channels rather than private hospital operators).

3. THE VENDOR: HEALTHE CARE AUSTRALIA PTY LTD

3.1 The contact details for Healthe Care Australia Pty Ltd are:

Healthe Care Australia Pty Ltd

Level 13
160 Sussex Street
Sydney
New South Wales 2000

3.2 All correspondence and notices in respect of the application for Healthe Care should be directed in the first instance to:

Bell Gully

Vero Centre, 48 Shortland Street, Auckland, New Zealand
Attention: Glenn Shewan (Partner) / Penny Pasley (Senior Associate)
Glenn.Shewan@bellgully.com | Penny.Pasley@bellgully.com

3.3 Healthe Care, a subsidiary of Luye Medical Group Co. Ltd ("**Luye Medical**"), is an operator of surgical hospitals and day surgery centres around Australia (via Surgical AU) and New Zealand (via Pulse). While Surgical AU owns 17 sites (12 private hospitals (including two with co-located day surgeries), and 5 standalone day stay surgery centres) in Australia, Pulse's only healthcare facility in New Zealand is the Boulcott Hospital in Wellington. Boulcott services 38 beds and four operating theatres, with its main focus areas including orthopaedics, plastic surgery, gynaecology, general surgery, gastroenterology and urology. More information about Healthe Care is available at <http://healthecare.com.au>

3.4 A corporate structure chart for Healthe Care and its related companies is provided at **Appendix Two**.

³ <https://www.lifehealthcare.com.au/>

⁴ <https://inovapharma.com/>

THE PROPOSED TRANSACTION

4. Transaction details

Outline and structure of the transaction

- 4.1 The Applicant seeks clearance to acquire 100% of the shares in Pulse (the "**Transaction**"). Pulse's only healthcare facility in New Zealand is the Boulcott Hospital in Wellington.

Transaction documents

- 4.2 A copy of the SPA dated 25 August 2021 is provided at **Attachment 2**.

Rationale for the Transaction

- 4.3 PEP's strategy is to invest in business opportunities where PEP's investment management expertise, capital resources, and desire to endorse and support strong management teams enables it (together with management) to improve the operating performance and create value in the relevant business prior to realising its investment in that business.
- 4.4 PEP is attracted by the potential to invest in Surgical AU and by the opportunities to further broaden and grow the business in Australia.
- 4.5 Boulcott Hospital in New Zealand was not significant to that rationale, but the acquisition of Pulse was a necessary part of the transaction structure of the acquisition of Surgical AU (Luye Medical was only willing to sell Surgical AU if its Boulcott Hospital was also acquired). Accordingly, the Applicant is willing to provide the Divestment Undertaking to the Commission to expedite the clearance process.

5. NOTIFICATION OF OTHER COMPETITION AGENCIES

- 5.1 The Australian Competition and Consumer Commission ("**ACCC**") has been made aware of the ancillary acquisition by the Applicant of Surgical AU. PEP has responded to questions from the ACCC in relation to that acquisition. However, in the absence of material competitive overlap between the parties' activities in Australia, PEP does not at this stage intend to provide a detailed submission requesting clearance from the ACCC.

PART B: COUNTERFACTUAL**6. COUNTERFACTUAL**

- 6.1 The Applicant's proposal to acquire Surgical AU and Pulse was part of a competitive sale process being run by the owner of Health Care, China's Luye Medical (Luye Medical was only willing to sell Surgical AU if its Boulcott Hospital was also being acquired). Regardless of whether in the counterfactual Pulse (Boulcott Hospital) is acquired by another third party or is retained by Luye Medical, for the reasons set out below, the Transaction will not substantially lessen competition in any market in New Zealand when compared to the counterfactual.

PART C: THE INDUSTRY**7. BACKGROUND TO THE INDUSTRY**

7.1 The Commission will be familiar with the industry, including the local industry and market dynamic in the Wellington area, from its previous decisions in:

- (a) Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 39;
- (b) Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 43; and
- (c) Evolution Healthcare (NZ) Pty Limited and Austron Limited [2015] NZCC 22.

7.2 The Applicant does not consider that there have been material changes to the relevant industry since those previous decisions. Accordingly, in the interests of expediting the clearance process, the Applicant accepts the Commission's finding in those previous decisions that common ownership of the Boulcott Hospital and Bowen/Wakefield Hospitals would substantially lessen competition in a Wellington regional private hospital market for certain customers – for example:

- (a) Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 39:⁵

Since [ACC and DHB] customers have these additional options, the loss of competition between Boulcott Hospital and Bowen/Wakefield hospitals is unlikely to adversely affect the ACC or the DHBs.

We are not satisfied the same is true for Boulcott Hospital and Bowen/Wakefield hospitals' remaining customers: self-funded patients and the private health insurance companies who fund many patients' treatment. The evidence we have collected indicates that the loss of Boulcott Hospital is significant and that private hospitals outside the Wellington region are not viable substitutes for these customers (as they are for the ACC).

- (b) Evolution Healthcare (NZ) Pty Limited and Austron Limited [2015] NZCC 22:⁶

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.

7.3 In other words, given the Applicant proposes to divest the only overlapping asset in New Zealand, namely Boulcott Hospital, in the interests of expediting the clearance process, the Applicant is content for the Commission to rely on its previous understanding of the industry in considering the Applicant's clearance application.

⁵ Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 39 at X8 and X9.

⁶ Evolution Healthcare (NZ) Pty Limited and Austron Limited [2015] NZCC 22 at 30.

PART D: COMPETITIVE ASSESSMENT

8. RELEVANT MARKETS

8.1 Given the Applicant undertakes to divest the only overlapping asset in New Zealand, namely Boulcott Hospital, in the interests of expediting the clearance process, the Applicant is content for the Commission to rely on its previous assessment of the relevant markets in the industry in considering the Applicant's clearance application.

9. OVERVIEW OF COMPETITIVE DYNAMICS

9.1 Given the Applicant undertakes to divest the only overlapping asset in New Zealand, namely Boulcott Hospital, the Applicant:

- (a) is content, in the interests of expediting the clearance process, for the Commission to rely on its previous assessment of the relevant competitive dynamics in the industry in considering the Applicant's clearance application; and
- (b) in any event, is confident that the Acquisition will not have the effect, or likely effect, of substantially lessening competition in any relevant market in New Zealand.

9.2 For the Commission's context, the current summary of the number of private hospital beds and surgical theatres in the Wellington region is as follows:⁷

Greater Wellington Private Surgical Hospitals	Beds	OTs	OTs Used
Boulcott ⁸	29	3	3
Bowen	27	4	4
Wakefield	68	7	7
Southern Cross	37	6	5
Total	170	21	20

9.3 The Applicant also notes that in 2018 the Rutherford Clinic opened in Lower Hutt to provide gastroenterology and endoscopy services to patients in the Wellington region.⁹ It is understood to have two operating theatres¹⁰ (and has a centralised scope cleaning room, pre-admission area, consulting rooms, recovery beds and a discharge lounge),¹¹ and is a joint venture between Southern Cross and a team of endoscopic specialists.

9.4 []

⁷ Based on various sources, including the parties' information and publicly available sources, including the www.health.govt.nz website. Capacity has not materially changed since December 2014 (see [Connor-notice-seeking-clearance-PUBLIC.PDF \(comcom.govt.nz\)](#)).

⁸ Boulcott is currently under redevelopment, and expects to increase its capacity to five operating theatres upon its completion in 2022, with changes to the hospital's reconfiguration intended to better position it for anticipated population growth over the next ten years.

⁹ <https://therutherfordclinic.co.nz/>

¹⁰ <https://www.stuff.co.nz/national/health/104179243/world-class-endoscopic-clinic-to-open-in-lower-hutt>

¹¹ <https://www.naylorlove.co.nz/project/the-rutherford-clinic/>

10. NO RISK OF COORDINATED EFFECTS

- 10.1 Given the Applicant undertakes to divest the only overlapping asset in New Zealand, namely Boulcott Hospital, the Applicant is confident that the Acquisition could not give rise to any coordinated effects.

11. NO RISK OF VERTICAL EFFECTS

- 11.1 Given the Applicant undertakes to divest the only overlapping asset in New Zealand, namely Boulcott Hospital, the Applicant is confident that there is no risk of vertical effects arising out of the Acquisition.

- 11.2 Furthermore, even setting aside the divestment:

- (a) iNova has no ability to foreclose competing private hospitals or day surgeries by withholding / degrading terms of supply of its consumer healthcare products. iNova's sales to private hospitals and day surgeries are very limited, and its share of supply in this channel would be *de minimis*. There are numerous pharmaceutical companies (including multinational generic and branded pharmaceutical businesses) that supply pharmaceutical products to private hospitals in far greater volumes than iNova. The Applicant, post-Transaction, would also have no ability to foreclose iNova's competitors, as the merged entity's private hospitals and day surgeries represent a very small portion of the addressable market for consumer healthcare products.
- (b) LifeHealthcare has no ability to foreclose competing private hospitals or day surgeries by withholding / degrading terms of supply of medical devices / equipment - LifeHealthcare does not have market power, as it faces strong competition in all product categories that it supplies:
- (i) LifeHealthcare primarily sells prostheses for use in medical procedures, particularly in the spine, orthopaedics, interventional neuroradiology and plastics therapeutic areas. Purchase decisions for these products are generally made by individual surgeons on behalf of their patients (not private hospitals), and LifeHealthcare faces strong competition from a range of major medical device suppliers including Medtronic, Stryker, Johnson & Johnson (Mentor and DePuy Synthes), Nuvasive, Globus, Zimmer Biomet and Allergan; and
- (ii) While LifeHealthcare also supplies a limited amount of capital equipment (such as operating theatre tables and imaging and navigation machines) to private hospitals; this is a small part of LifeHealthcare's business, and LifeHealthcare faces strong competition in this area from providers such as Stryker, Siemens and Denyer.

The Applicant, post-Transaction, would also have no ability to foreclose competing medical device suppliers by giving preferential treatment to LifeHealthcare, as the merged entity's private hospitals and day surgeries represent only a small proportion of the addressable market for LifeHealthcare's competitors (which would also include public hospitals). Further, as noted, prosthesis selection is typically determined by surgeons, not by owners of hospitals and day surgeries.

12. THE DIVESTMENT UNDERTAKING

- 12.1 The Applicant will give effect to the Divestment Undertaking by selling the Boulcott business as a going concern (either by a share sale of Pulse, or an asset sale).
- 12.2 There is no material composition, asset or purchaser risk associated with the Divestment Undertaking:
- (a) the Boulcott Hospital is an established stand-alone private hospital, and will be offered for sale as a going concern. The Boulcott Hospital business that will be sold owns or is legally entitled to use all of the assets needed to operate as a viable private hospital business, and for all intents and purposes Boulcott Hospital already operates as an established stand-alone private hospital that can operate viably separately from the rest of the Health Care / Luye Medical group. The Divestment Undertaking does not require the transfer of assets or personnel to the Boulcott Hospital before the assets are sold;
 - (b) [];
 - (c) any asset risks are appropriately addressed by the Applicant's hold-separate and other conduct commitments in the Divestment Undertaking; and
 - (d) any purchaser risks are appropriately addressed by the Applicant's obligations to have the Commission approve the purchaser [].
- 12.3 Boulcott's presence as an independent third-party owned hospital will also address the competition concerns the Commission identified in its previous clearance determinations in relation to this market.¹² Boulcott and Southern Cross's Hospitals, and Rutherford Clinic, as well as potential new entrants will continue to constrain Wakefield and Bowen in the Wellington region private hospital market. Effectively, the pre-Transaction status quo will continue, except Boulcott Hospital will shift from Health Care / Luye Medical ownership to third party ownership.
- 12.4 The Commission has previously recorded that where Boulcott Hospital and Wakefield / Bowen Hospital are rivals, the relevant market is competitive:
- (a) Boulcott Hospital and Southern Cross's Hospital together constrain Wakefield and Bowen Hospitals.
 - (b) Wakefield and Bowen Hospitals are further constrained by potential competitors including expansion by an existing competitor and the potential entry of day surgeries.
- 12.5 Those findings will continue to apply to the Wellington region private hospital market once the transaction contemplated by the Divestment Undertaking is completed.

¹² Connor Healthcare Limited and Acuity Health Group Limited [2014] NZCC 39; Connor Healthcare Limited and Acuity Health Group Limited [2014] NZCC 43; and Evolution Healthcare (NZ) Pty Limited and Austron Limited [2015] NZCC 22.

13. CONCLUSION

13.1 Given the Applicant undertakes to divest the only overlapping asset in New Zealand, namely Boulcott Hospital, the Applicant is confident that the Acquisition will not have the effect, or likely effect, of substantially lessening competition in any relevant market in New Zealand.

13.2 []

14. FURTHER DOCUMENTATION / INFORMATION

Information pertaining to the Applicant, including names and contact details of key customers, suppliers and industry associations

14.1 See **Confidential Appendix Three**.

Information pertaining to Boulcott Hospital, including names and contact details of key customers, suppliers and industry associations

14.2 See **Confidential Appendix Four**.

Name and contact details of key competitors

14.3 See **Confidential Appendix Five**.

Copies of most recent financial statements

14.4 See **Confidential Appendices Six and Seven** for Boulcott Hospital.

14.5 See **Confidential Appendices Eight and Nine** for the Applicant (noting the Applicant itself is a newly established entity that has no financial statements to submit).

PART E: CONFIDENTIALITY**15. REASONS FOR SEEKING CONFIDENTIALITY**

- 15.1 Confidentiality is sought in respect of the information in this application that is contained in square brackets (with confidentiality indicated by the coloured highlighting). Confidentiality is sought for the purposes of s 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 parties; and
 - (b) Disclosure would be likely to unreasonably prejudice the commercial position of the parties, as the entities providing the information.
- 15.2 The parties request that they are notified of any request made to the Commission under the Official Information Act 1982 for release of the confidential information. The parties also request that the Commission seek and consider the Applicant's or Health Care's views, as the case may be, as to whether the information remains confidential and commercially sensitive at the time responses to such requests are being considered.
- 15.3 The foregoing equally applies in respect of any additional information provided to the Commission that is expressed to be confidential.

PART F: DECLARATION

I, Scott McKnight, have prepared, or supervised the preparation of, this notice seeking clearance.

To the best of my knowledge, I confirm that:

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

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

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

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

Director of Pacific 2021 BidCo NZ Limited

Signature

Date

APPENDIX ONE

Confidential Corporate structure chart of the Evolution Group

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APPENDIX TWO

Corporate structure chart of Pulse Health NZ Limited

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