

Determination

EBOS Medical Devices Australia Pty Limited and LifeHealthcare [2022] NZCC 9

The Commission:	Anna Rawlings Dr John Small Joseph Liava’a
Summary of application:	An application from EBOS Medical Devices Australia Pty Limited seeking clearance to acquire 100% of the shares in Pacific Health Supplies TopCo1 Pty Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
Date of determination:	30 March 2022

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

The proposed acquisition

1. On 20 January 2022, the Commerce Commission registered an application from EBOS Medical Devices Australia Pty Limited (EBOS or the Applicant) seeking clearance to acquire the New Zealand LifeHealthcare business (LifeHealthcare) (the Proposed Acquisition).
2. The Proposed Acquisition is part of a wider transaction across Asia-Pacific taking place by share sale, whereby EBOS would acquire 100% of the shares in Pacific Health Supplies TopCo1 Pty Limited, the ultimate holding company of LifeHealthcare.

Our decision

3. The Commission gives clearance to the Proposed Acquisition as it is satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
4. Both EBOS and LifeHealthcare are distributors of medical equipment and consumables to hospitals and medical professionals. The Commission's investigation focused on the supply of products used in spinal surgery because this is where the merging parties most closely compete.
5. Specifically, we looked at the potential competition effects of the Proposed Acquisition in a national market for the import and distribution of spinal medical devices and spinal biologics. While spinal devices and biologics are not themselves substitutable with one another from a surgeon's point of view, most suppliers tend to supply the full range of spinal devices and biologics used in the most common spinal procedures.
6. When we looked at the Proposed Acquisition through this lens, we found that EBOS and LifeHealthcare compete with several other distributors and manufacturers to supply specialist spinal devices and spinal biologics to spinal surgeons. We are satisfied that competition from these suppliers, across the range of spinal devices and spinal biologics required by surgeons for spinal surgery, is likely to constrain the merged entity.

Our framework

7. Our approach to analysing the competition effects of the merger is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).¹
 - 7.1 We assess mergers using the substantial lessening of competition test. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely

¹ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).²

- 7.2 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.³ There is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.⁴
- 7.3 We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.⁵ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The key parties

8. EBOS is a distributor of human healthcare and animal care products in New Zealand and Australia, including a range of surgical supplies and medical devices used in orthopaedic surgery, spinal surgery and neurosurgery. In New Zealand, EBOS supplies its spinal equipment through its subsidiary, Pioneer Medical Limited (Pioneer).
9. LifeHealthcare is also a distributor of medical devices in New Zealand and Australia, including devices used in orthopaedic surgery, spinal surgery and neurosurgery. LifeHealthcare is part of the Pacific Health Group.

Industry background

10. The merging parties are both distributors that supply a range of different products to customers in different industries across New Zealand. The main area of overlap between the merging parties is in the supply of spinal medical devices and spinal biologics, which are used by surgeons in both the public and private health systems.⁶
- 10.1 Spinal devices are specialised medical devices used in spinal surgery and include spinal cages, spinal discs, bone screws and navigation aids. The Attachment includes further information on these devices.⁷

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

³ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁴ *Mergers and Acquisitions Guidelines* above n1 at [2.23].

⁵ Section 66(3)(a) of the Commerce Act 1986.

⁶ Clearance application from EBOS (18 January 2022) at [70]. For example, while both EBOS and LifeHealthcare supply devices used in orthopaedic surgery, there does not appear to be any relevant overlap in the supply of orthopaedic devices because the merging parties do not distribute any equivalent orthopaedic devices that would be used in the same procedure.

⁷ Also see Clearance application from EBOS (18 January 2022) at Appendix 3.

- 10.2 Spinal biologics are materials used, in conjunction with spinal devices, to assist in bone growth and include autografts and allografts using human and/or synthetic material.⁸
11. No spinal medical devices or spinal biologics are currently manufactured in New Zealand. Rather, the original equipment manufacturers (OEMs) themselves, or third-party distributors who supply products on behalf of OEMs, import and distribute them.
- 11.1 Some OEMs employ their own sales and distribution staff in New Zealand and so have a direct presence in New Zealand. They include:
- 11.1.1 Medtronic New Zealand Limited (Medtronic);⁹
- 11.1.2 Nuvasive (Aust/NZ) Pty Limited (Nuvasive); and
- 11.1.3 Globus Medical Australia Pty Limited (Globus).
- 11.2 Third-party distributors, like the merging parties, tend to enter into distribution arrangements with several OEMs to enable them to offer a broad range of devices.¹⁰ For example:
- 11.2.1 the brands that EBOS currently distribute include Spineart, Medacta and Seaspine;¹¹ and
- 11.2.2 the brands that LifeHealthcare currently distribute include Stryker, 4 Web, and Spinal Kinetics.¹²
12. Spinal surgery is performed in both the public and private health systems and many spinal surgeons operate in both systems. The Pharmaceutical Management Agency *Te Pātaka Whaioranga* (PHARMAC) publishes a register of spinal equipment that it has approved for supply into the public health system and this register includes the price that PHARMAC has negotiated with the relevant supplier.¹³ However, while it depends on the surgeon, we understand that between 50 to 90 percent of spinal surgery completed in New Zealand is performed in the private health system¹⁴ and

⁸ Clearance application from EBOS (18 January 2022) at Appendix 3.

⁹ Scionz Limited (Scionz) is the exclusive distributor for Medtronic in New Zealand and so, for the purposes of this assessment, we have treated Scionz and Medtronic as the same entity.

¹⁰ Distribution arrangements between New Zealand-based distributors and OEMs typically last three to five years.

¹¹ Clearance application from EBOS (18 January 2022).

¹² Commerce Commission meeting with LifeHealthcare (17 February 2022).

¹³ Commerce Commission meeting with PHARMAC (21 February 2022).

¹⁴ For example, rather than trauma surgery, which is typically performed in the public health system, the majority of spinal operation is elective surgery to repair degenerative injuries and this type of surgery is typically performed in the private health system. See Commerce Commission meeting with EBOS (11 January 2022); Commerce Commission meeting with LifeHealthcare (17 February 2022).

so the price paid for most spinal equipment used in New Zealand is subject to negotiation between the suppliers and surgeons.¹⁵

Market definition

13. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
14. We define markets in the way that best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products which fall outside the market, but which still impose some degree of competitive constraint on the merged entity.
15. In general, the more closely substitutable two products are, the closer the competition and the greater the competitive constraint between the products.

The Applicant's view of the relevant markets

16. EBOS submits that the relevant market is the national market for the import and distribution of spinal medical devices and spinal biologics.¹⁶ In particular, it considers that spinal devices and spinal biologics are in the same product market because:¹⁷
 - 16.1 suppliers of spinal devices and spinal biologics compete with one another to supply a full range of specialised equipment used in spinal surgery; and
 - 16.2 spinal surgeons require specialised spinal devices and biologics and so do not use equipment designed for use in another therapeutic area.

The Commission's view on the relevant markets

17. We consider that the evidence gathered from industry participants supports the Applicant's view that there is a national distribution market that includes all spinal medical devices and spinal biologics.
18. On the demand side, the different types of spinal devices are generally not substitutable with one another or with any spinal biologics.¹⁸

¹⁵ For example, see Clearance application from EBOS (18 January 2022); Commerce Commission meeting with [] Commerce Commission meeting with [].

¹⁶ Clearance application from EBOS (18 January 2022) at [74].

¹⁷ Clearance application from EBOS (18 January 2022) at [75-77].

¹⁸ We note that different surgeons may use different procedures (involving different combinations of spinal devices and biologics) to treat the same medical issue. For example, see Clearance application from EBOS (18 January 2022); Commerce Commission meeting with [].

19. However, there is substitutability between spinal devices and biologics on the supply side because:
- 19.1 spinal devices and biologics from different suppliers can be used in conjunction with one another;¹⁹
 - 19.2 most suppliers, whether they are OEMs or distributors, tend to supply a standard range of spinal devices and biologics for use in the most common spinal procedures;²⁰ and
 - 19.3 as the products are not manufactured in New Zealand, there is no significant difference in the resourcing or expertise required to import and distribute spinal devices and biologics to customers in New Zealand, which means that many competitors can readily expand their existing product ranges.²¹

Conclusion on market definition

20. For the purposes of assessing the competitive effects of the Proposed Acquisition, we consider that the relevant market is the national market for the import and distribution of spinal medical devices and spinal biologics (the spinal equipment market).

With and without scenarios

21. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.²²
22. With the Proposed Acquisition, EBOS would acquire the New Zealand LifeHealthcare business including all the existing distribution arrangements that LifeHealthcare has in place with OEMs. We note, however, that distribution agreements typically allow OEMs to terminate a contract where a distributor starts supplying directly competing products from other manufacturers. This may result in some OEMs deciding to seek alternative distribution arrangements for some of their products.
23. Without the Proposed Acquisition, the status quo would continue with LifeHealthcare continuing to operate independently of EBOS in New Zealand.²³

¹⁹ For example, see Commerce Commission meeting with []; Commerce Commission meeting with [].

²⁰ For example, see Clearance application from EBOS (18 January 2022); Commerce Commission meeting with [].

²¹ For example, see Commerce Commission meeting with []; Commerce Commission meeting with []; Commerce Commission meeting with [].

²² *Mergers and Acquisitions Guidelines* above n1 at [2.29]; Commerce Commission v Woolworths Limited (2008) 12 TCLR 194 (CA) at [63].

²³ Clearance application from EBOS (18 January 2022) and Commerce Commission meeting with [].

Competition assessment – the spinal equipment market

24. In this section, we consider whether the Proposed Acquisition could have the likely effect of substantially lessening competition due to unilateral, coordinated and/or conglomerate effects.
- 24.1 Unilateral effects may occur when a firm acquires a current or potential competitor that would otherwise provide a competitive constraint. The Proposed Acquisition would likely have the effect of substantially lessening competition if, by removing the existing competition between EBOS (via Pioneer) and LifeHealthcare, the merged entity would be able to, by itself, profitably raise the price of its spinal devices and biologics to customers in any relevant market or decrease the quality of service provided to surgeons.
- 24.2 Coordinated effects can occur when a merger or acquisition makes it significantly more likely that the remaining firms in a market can collectively exercise market power to increase prices, restrict output or reduce quality. Our approach is to test whether any relevant market is vulnerable to coordination and then consider how the Proposed Acquisition might change the likelihood of coordination.
- 24.3 Vertical or conglomerate effects can occur if a merger between suppliers (or buyers), who are not direct competitors but who operate in related markets, gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively.

Unilateral effects in the spinal equipment market

25. For the reasons set out below, we are satisfied that the Proposed Acquisition will not have, and would not be likely to have, the effect of substantially lessening competition in the spinal equipment market due to unilateral effects.

What the Applicant submitted

26. EBOS submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the spinal equipment market due to unilateral effects because:²⁴
- 26.1 the merged entity would face significant existing competition from both OEMs and other distributors;
- 26.2 it is not uncommon for OEMs to supply some of their product range direct-to-market, even where they have relationships with distributors for other products, meaning that they could bypass the merged entity and supply directly, in the event of a post-acquisition price increase;
- 26.3 entry is a relatively straightforward process (as shown by Pioneer’s recent entry and expansion) and suppliers are able to easily “poach” sales staff (who

²⁴ Clearance application from EBOS (18 January 2022) at [98].

have existing relationships with surgeons, and technical knowledge) from other competitors;²⁵ and

- 26.4 PHARMAC and/or surgeons have the ability to constrain prices in both the public and private sector.

Competition in the spinal equipment market

27. EBOS considers the merged entity is unlikely to create any significant competition issues in the spinal equipment market, given the number of existing suppliers. Table 1 shows the Applicant's estimated market shares of the main suppliers in the spinal equipment market in 2021.

Table 1: Applicant's market share estimates for the spinal equipment market in 2021

Supplier	Status	Spine medical device sales (\$)	Share (%)	Spine biologics sales (\$)	Share (%)	Total (\$)	Share (%)
EBOS/Pioneer	Distributor	[
LifeHealthcare	Distributor						
<i>Merged entity</i>							
Scionz	Distributor						
Nuvasive	OEM						
Orb Medical	Distributor						
Globus	OEM						
Zimmer	OEM						
J & J	OEM]
Totals		[]	100	[]	100	[]	100

Source: Applicant. As noted above, Scionz is the distributor for Medtronic in New Zealand.

28. Information received from industry participants was generally consistent with the Applicant's market share estimates and the presence of the different competitors. Industry participants considered that the merged entity would be constrained by the presence of several established competitors, who each would have a full range of spinal equipment products. For example:

- 28.1 [] and all industry participants noted that Scionz, due to its supply arrangement with Medtronic, has a significant presence in the market;²⁶

- 28.2 [] advised that, while the merged entity and Scionz would make up a large proportion of the market, [] had an established presence, with

²⁵ Clearance application from EBOS (18 January 2022) at [36], [106.1] and [108.2].

²⁶ See Email from [] to the Commerce Commission (16 March 2022); Commerce Commission meeting with [] Commerce Commission meeting with [].

a full range of equipment, and it would compete closely with all existing suppliers in the market, post acquisition;²⁷ and

- 28.3 [] did not consider the Proposed Acquisition would impact on its ability to compete in the spinal equipment market.²⁸
29. As outlined below, consistent with what competitors and surgeons advised us, the evidence suggests that existing competitors are likely to constrain the merged entity.
- 29.1 Surgeons use products from different suppliers and, in addition to the merged entity, there would be several established competitors who each would have comparable product ranges.
- 29.2 There are limited barriers to existing suppliers expanding, particularly if incentivised by surgeons.
- 29.3 As the primary decision makers, surgeons are likely to have a degree of countervailing power through an ability to sponsor entry and expansion.
30. Surgeons use products from multiple distributors in New Zealand, with quality being main reason for selecting a particular product. While many surgeons tend to use several products from the same supplier, as it can be helpful for the entire surgical team to be familiar with each piece of equipment, there is no entrenched loyalty to a particular supplier's range of products and surgeons will regularly use another supplier's product, if they consider it would work better for a particular operation.²⁹
31. Because all the relevant products are manufactured overseas, all suppliers considered that New Zealand-based staff play a key role in how the different suppliers compete with one another in New Zealand.³⁰ For example:
- 31.1 because spinal equipment is very specialised, most suppliers, whether a distributor or an OEM, employ sales staff with medical backgrounds, as well as specialist clinical staff, who are able to educate and train surgeons and other hospital staff on the use of their products; and
- 31.2 because of this, suppliers often will look to 'poach' local sales staff from a competitor because of the existing relationships that local sales staff have with spinal surgeons.
32. However, while there is some evidence that surgeons might follow a local sales representative who is 'poached' from a competitor, and switch to using another

²⁷ Commerce Commission meeting with [].

²⁸ Commerce Commission meeting with [].

²⁹ For example, see Email from [] to the Commerce Commission (20 March 2022); Commerce Commission meeting with []; Email from [] to the Commerce Commission (21 March 2022); Commerce Commission meeting with [].

³⁰ For example, see Clearance application from EBOS (18 January 2022); Commerce Commission meeting with []; Commerce Commission meeting with []; Commerce Commission meeting with [].

manufacturer's product, this would only be the case if the surgeon perceived the quality of the product to be comparable.³¹ As all existing competitors in New Zealand act as distributors, the merged entity is unlikely to be able to influence the quality of a particular OEM's product. For example, while local sales representative will try to influence which products are used by surgeons, the decision to use a particular brand of product comes down to the quality of the product and this is typically outside the control of the supplier's local sales representative.³²

33. Again, as existing competitors are importing equipment that is manufactured overseas, existing suppliers are able to expand the amount of devices and biologics they import relatively easily, particularly in response to surgeon demand. For example, industry participants consider:

33.1 there are no barriers to existing suppliers importing spinal equipment into New Zealand, if requested or incentivised by surgeons;³³

33.2 suppliers are able to relatively easily increase their local sales presence by either poaching existing sales staff from competitors or by developing their own sales staff. In this respect, there appear to be limited barriers to OEMs bypassing New Zealand-based distributors and supplying their products directly to surgeons, if incentivised to do so.³⁴

34. In addition, spinal surgeons are likely to have a degree of countervailing power in the spinal equipment market as they have an ability to sponsor entry and expansion. For example, suppliers will often import particular products at the request of individual surgeons.³⁵ Spinal surgeons that we spoke with advised their key consideration for any spinal surgery is what is the best piece of equipment for the operation, regardless of brand or whether or not their desired product is currently supplied in New Zealand.³⁶

³¹ For example, Commerce Commission meeting with [] Commerce Commission meeting with [] Commerce Commission meeting with [].

³² For example, see Commerce Commission meeting with [] Commerce Commission meeting with []; Email from [] to the Commerce Commission (21 March 2022); Commerce Commission meeting with [].

³³ For example, Commerce Commission meeting with [] Commerce Commission meeting with [] Commerce Commission meeting with [].

³⁴ For example, see Clearance application from EBOS (18 January 2022); Commerce Commission meeting with []; Commerce Commission meeting with [].

³⁵ For example, see Clearance application from EBOS (18 January 2022); Commerce Commission meeting with []; Commerce Commission meeting with []; Commerce Commission meeting with []; Commerce Commission meeting with [].

³⁶ For example, see Email from [] to the Commerce Commission (21 March 2022); Email from [] to the Commerce Commission (18 March 2022); Email from [] to the Commerce Commission (18 March 2022); Commerce Commission meeting with [].

Conclusion on unilateral effects in the spinal equipment market

35. In relation to unilateral effects, the Commission considers the Proposed Acquisition would not have, and would not be likely to have, the effect of substantially lessening competition in the spinal equipment market because:
- 35.1 the merged entity would be constrained by the presence of several established competitors who each would have a full range of spinal equipment products;
 - 35.2 there are limited barriers to existing suppliers expanding, particularly if incentivised by surgeons, who are the primary decision makers on the products that are used in any relevant spinal surgery; and
 - 35.3 as the primary decision makers, surgeons are likely to have a degree of countervailing power through an ability to sponsor entry and expansion.

Coordinated effects in the spinal equipment market

36. For the reasons set out below, we are satisfied that the Proposed Acquisition would not have, and would not be likely to have, the effect of substantially lessening competition in the spinal equipment market due to coordinated effects.
37. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to act in a coordinated way.³⁷
38. EBOS submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the relevant market due to coordinated effects because:³⁸
- 38.1 several strong and innovative competitors will remain post-acquisition in the relevant market;
 - 38.2 there is little to no interrelationship between competing suppliers;
 - 38.3 prices and sales figures are not visible to competitors;
 - 38.4 OEMs and distributors operate in very different ways. It would be difficult for these companies to coordinate their behaviour where they have such distinct cost structures and size; and
 - 38.5 products are highly specialised with significant research and development, and innovation.

³⁷ *Mergers and Acquisitions Guidelines* above n1 at [3.84].

³⁸ Clearance application from EBOS (18 January 2022) at [127].

39. There is some degree of price transparency, and post acquisition there would be a reduction in the number of established players with broadly interchangeable products. However, our investigation has not identified the likelihood that the Proposed Acquisition would change the conditions in the spinal equipment market so as to make coordination more likely, complete or sustainable. In particular:
- 39.1 all industry participants consider that surgeon preference determines the particular product used for any procedure, and that the exact product used for each procedure may change as the procedure is carried out. This is likely to make it difficult for suppliers to allocate customers;³⁹
 - 39.2 while the relevant market is for distribution, the underlying products are innovative and fast moving and, given this innovation is from OEMs based overseas, competing in large global markets, this innovation is out of the control of distributors and means that product offerings are constantly being updated. This is unlikely to be impacted by the Proposed Acquisition;⁴⁰
 - 39.3 as above, there appear to be relatively limited barriers to existing supplier's expanding, particularly if incentivised by a surgeon and the relevant spinal surgeons are likely to have a degree of countervailing power which is likely to make coordination less sustainable; and
 - 39.4 PHARMAC's public price schedule is typically not reflective of the final price paid by end-consumers, as most agreements between suppliers and the public health system contain volume and other discount structures. There are also differing views among market participants on the extent to which the prices paid by private and public sector customers differ.⁴¹

Vertical or conglomerate effects in any relevant market

40. For the reasons set out below, we are satisfied that the Proposed Acquisition would not have, and would not be likely to have, the effect of substantially lessening competition in any relevant market due to vertical or conglomerate effects.
41. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively.

³⁹ For example, see Email from [] to the Commerce Commission (21 March 2022); Email from [] to the Commerce Commission (18 March 2022); Email from [] to the Commerce Commission (18 March 2022).

⁴⁰ For example, see Commerce Commission meeting with [] Commerce Commission meeting with []; Commerce Commission meeting with [].

⁴¹ Commerce Commission meeting with [] Commerce Commission meeting with [].

42. EBOS submitted that there would be no vertical or conglomerate effects as a result of the Proposed Acquisition primarily because:⁴²
- 42.1 there would be no vertical integration as a result of the Proposed Acquisition;
 - 42.2 neither party has any ‘must have’ products that could be bundled. Products are generally purchased individually, with surgeons choosing the most appropriate device for the specific therapeutic need. There is no situation where a particular product will always be required;
 - 42.3 all competitors’ product offerings are relatively comparable; and
 - 42.4 there is little potential for conglomerate effects across therapeutic areas, as surgeons make purchasing decisions for their own therapeutic needs.
43. As noted above, we understand that the main suppliers of spinal equipment each supply a full range of spinal devices and spinal biologics used in spinal surgery. To this extent, no industry participant considered that the merged entity would have any ‘must have’ products in the spinal surgery area. Surgeons also appear willing to use products from different suppliers in the same procedure, where they consider this gives the best outcome for the patient.
44. Several parties noted that, in addition to spinal devices and biologics, some suppliers currently provide navigational aids that can be used to assist surgeons when performing spinal surgery.⁴³ Compared to many spinal devices, navigational aids are very expensive and so we understand that suppliers of navigational aids try to incentivise their customers that purchase their navigational aids to also purchase their spinal devices.
45. However, no industry party considered that either of the merging parties’ navigation aids (or anything else they supply) are ‘must have’ products. Rather, several parties consider that Scionz is the leading supplier of navigational aids while other parties did not consider it was essential to use a navigational aid when performing spinal surgery.⁴⁴ In addition, neither EBOS or LifeHealthcare currently tie their spinal products to the purchase of their navigational aids. Rather, both parties [] lease their navigational aids for specific operations when requested by a surgeon.⁴⁵

Overall conclusion

46. We consider the relevant market to be the national market for the import and distribution of spinal medical devices and spinal biologics primarily because, while

⁴² Clearance application from EBOS (18 January 2022) at [123]-[126].

⁴³ As per the Attachment, navigation aids help surgeons plan and carry out spinal surgeries. Surgeons can see where their instruments are and virtual images of the spine on a display. These aids enable surgeons to carry out surgeries with increased accuracy and less radiation exposure.

⁴⁴ Commerce Commission meeting with []; Commerce Commission meeting with [] Commerce Commission meeting with [].

⁴⁵ Email from Chapman Tripp (on behalf of EBOS) to the Commerce Commission (9 March 2022); Email from Russell McVeagh (on behalf of LifeHealthcare) to the Commerce Commission (15 March 2022).

spinal devices and biologics are not themselves substitutable with one another, most suppliers tend to supply a full range of spinal devices and biologics used in the most common spinal procedures.

47. We do not consider the Proposed Acquisition would have the likely effect of substantially lessening competition due to unilateral, coordinated and/or conglomerate effects. In particular, we consider that the merged entity would to be constrained by the existing competition in the spinal equipment market.
 - 47.1 At present, EBOS and LifeHealthcare compete with several other distributors and manufacturers to supply spinal devices and spinal biologics to spinal surgeons.
 - 47.2 We consider that the competition from existing distributors and manufacturers, across the range of equipment required by surgeons for spinal surgery, will mean that the merged entity is unlikely to be able to significantly increase price or reduce quality.
48. Accordingly, we are satisfied that the Proposed Acquisition is unlikely to substantially lessen competition in any relevant market.


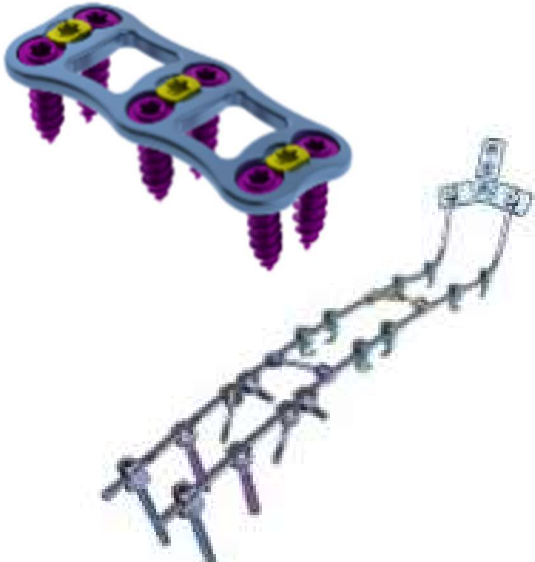

Determination on notice of clearance

49. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to EBOS Medical Devices Australia Pty Limited to acquire 100% of the shares in Pacific Health Supplies TopCo1 Pty Limited.

Dated this 30th day of March 2022

Anna Rawlings
Chair

Attachment: Spinal devices and biologics commonly supplied by the merging parties

Device	Applicant's image
<p>Pedicle screws / bone screws - A pedicle or bone screw is used to hold vertebrae (individual bones which form the spinal column) and bone graft (bone tissue) together to promote healing as part of spinal fusion, where two or more vertebrae are fused together, immobilizing them to create a single, continuous bone. Spinal fusion treats broken vertebra, spinal deformities, spinal weakness, spinal instability, or chronic low back pain. Screws can be used alongside other products, such as cages or disk replacements.</p>	
<p>Plates and rods - Metal plates and rods (together with screws) are used in spinal fusion surgery to help hold the vertebrae together, so that they can heal into one solid unit.</p>	
<p>Posterior/lateral cages - Posterior or lateral cages hold bone graft during spinal fusion and act as a space holder between two vertebrae. They become part of the spine and are placed around a set of discs to encourage bone growth. Cages are made of plastic, carbon fibre or metal.</p>	

Device	Applicant's image
<p>Disc replacements - Disc replacements are designed to replicate the anatomic structure and performance of a natural disc.</p>	
<p>Navigation aids - Navigation aids help surgeons plan and carry out spinal surgeries. Surgeons can see where their instruments are and virtual images of the spine on a display. These aids enable surgeons to carry out surgeries with increased accuracy and less radiation exposure.</p>	
<p>Biologics - Biologics are engineered materials designed to stimulate and promote the healing of fractures and other bone defects, such as bone grafts or bone graft substitutes to fill voids or gaps (for example in the space between two spinal vertebrae during spinal fusion surgery). They may be produced from the patient themselves (autografts), donated human tissue (allografts), demineralised bone and demineralised bone matrix (are effectively allograft bones that have been decalcified by acid extraction) or from synthetic alternatives. Different biologics can be used together and alongside other products as an accessory during procedures such as spine surgery.</p>	

Source: Application.