

## Statement of Preliminary Issues

### Central Healthcare Operations Limited/Aorangi Hospital Limited

15 November 2022

#### Introduction

1. On 2 November 2022, the Commerce Commission registered an application (the Application) from Central Healthcare Operations Limited (Central Healthcare) seeking clearance to acquire 100% of the shares in Aorangi Hospital Limited (Aorangi) (the Proposed Acquisition).<sup>1</sup>
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.<sup>2</sup>
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **Tuesday 29 November 2022**.

#### The parties

5. At present, Aorangi and Southern Cross Healthcare Limited (Southern Cross) operate the Crest Hospital in a joint venture. The Crest Hospital is currently the only private hospital in Palmerston North. The Proposed Acquisition would give Central Healthcare a 50% shareholding in the Crest Hospital.
6. Central Healthcare is owned by a group of 39 shareholders associated with surgeons and other medical specialists that are practicing in the Manawatū area. Many of these specialists currently practice at the Crest Hospital. Earlier in 2022, Central Healthcare announced an intention to build a medical facility on Milson Line in Palmerston North.<sup>3</sup>

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<sup>1</sup> A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>.

<sup>2</sup> The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

<sup>3</sup> Stuff, *Healthcare facility announced for Manawatū*, 28 January 2022 (link available here: <https://www.stuff.co.nz/manawatu-standard/300506378/healthcare-facility-announced-for-manawat>).

7. Southern Cross operates several private elective surgery hospitals across New Zealand, either directly or via joint ventures such as the joint venture that operates the Crest Hospital in Palmerston North.

## **Our framework**

8. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>4</sup> As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
9. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).<sup>5</sup> This allows us to assess the degree by which the Proposed Acquisition might lessen competition.
10. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
  - 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
  - 10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
  - 10.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

## **Market definition**

11. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.<sup>6</sup>

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<sup>4</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>5</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>6</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

12. This case concerns the provision of private hospital facilities for elective surgeries. In a previous relevant decision – *Southern Cross Health Trust/Aorangi Hospital Limited*, 4 September 2008, Decision 650, the Commission defined separate markets for:<sup>7</sup>
- 12.1 the provision of private short-stay (less than 24 hours) hospital facilities and related non-specialist services for elective surgery in the MidCentral DHB region (the short-stay market); and
- 12.2 the provision of private in-patient hospital facilities and related non-specialist services for elective secondary surgery in the MidCentral DHB region (the in-patient market).
13. Central Healthcare submits that although its view is that any market for elective surgery is likely to be wider than the Manawatū region, it is not necessary for the purposes of the Proposed Acquisition to consider a different market definition than has been adopted in the Commission’s previous decisions.<sup>8</sup>
14. We will consider whether the most appropriate markets for assessing the Proposed Acquisition are those suggested by Central Healthcare, or whether the impact of the transaction is better assessed with reference to other markets.

## Preliminary issues

### Without the acquisition

15. A key focus of our investigation will be determining the likely ‘without the acquisition’ scenario(s).
16. There may be multiple scenarios that are likely without a merger, as something can be likely even when the chance of it occurring is less than 50%.<sup>9</sup> We first assess the possible scenarios that might arise without a merger and discard those that are unlikely.<sup>10</sup>
17. Further, in certain situations, the status quo may not provide a good guide as to the future state of the market if say, without a merger, one of the merging firms was planning on developing a product to compete with the other merging firm. In such a case, the state of competition without a merger should reflect this development.<sup>11</sup>
18. Central Healthcare submits that there is no material difference between the factual and the ‘without the acquisition’ scenarios because, without the Proposed Acquisition, any medical facility that might be built by Central Healthcare would provide facilities that are complements to, not substitutes for, the Crest Hospital (ie,

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<sup>7</sup> The Application at [9.1].

<sup>8</sup> The Application at [9.5].

<sup>9</sup> *Mergers and Acquisitions Guidelines* above n4 at [2.30].

<sup>10</sup> *Ibid* at [2.31].

<sup>11</sup> *Ibid* at [2.37]-[2.38].

any Central Healthcare facility would not be in competition with the Crest Hospital).<sup>12</sup>

19. However, we understand that many of Central Healthcare's shareholders are surgeons that currently perform elective surgery at the Crest Hospital and at the local Palmerston North public hospital. We will consider whether, without the acquisition, Central Healthcare or a subset of its shareholders might build a medical facility that competes with the Crest Hospital facility.
20. We will consider whether the most appropriate 'without the acquisition' scenario for assessing the Proposed Acquisition is that suggested by Central Healthcare, or whether the impact of the transaction is better assessed with reference to a different 'without the acquisition' scenario. We also invite submissions on the relevant scenarios.

### **Competition effects: would the merged entity be able to profitably raise prices by itself?**

21. Competitive effects may arise when a firm merges with a party that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses.
22. For any likely scenario without a merger we identify, we compare the state of competition in each likely scenario without a merger, to the likely state of competition with a merger.<sup>13</sup>
23. With the Proposed Acquisition, Central Healthcare and the Crest Hospital would not be in competition with one another.
24. If we identify any likely scenarios in which, absent the Proposed Acquisition, Central Healthcare would be in direct competition with the Crest Hospital for a particular service, we will investigate whether there would be a substantial lessening of competition with the Proposed Acquisition such that the merged entity would be able to profitably raise prices or reduce quality or innovation by itself.

### **Next steps in our investigation**

25. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **18 January 2023**. However, this date may change as our investigation progresses.<sup>14</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.

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<sup>12</sup> The Application at [6.2] and [6.13].

<sup>13</sup> *Mergers and Acquisitions Guidelines* above n4 at [2.31].

<sup>14</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

26. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

### **Making a submission**

27. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference 'Central Healthcare/Aorangi' in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **Tuesday 29 November 2022**.
28. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
29. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.