

Statement of Preliminary Issues

Pacific 2021 Bidco NZ Limited / Pulse Health NZ Limited

12 October 2021

Introduction

1. On 21 September 2021, the Commerce Commission (the Commission) registered an application (the Application) from Pacific 2021 Bidco New Zealand Limited (Pacific 2021) for clearance to acquire 100% of the shares in Pulse Health NZ Limited (Pulse Health) from Healthe Care Australia Pty Limited (Healthe Care) (the proposed acquisition).¹
2. As part of the Application, Pacific 2021 has submitted a divestment undertaking to sell the Boulcott Hospital in Lower Hutt as a going concern to a purchaser approved by the Commission (proposed divestment).
3. 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. In doing so, we will consider whether the proposed divestment will remedy any competition concerns.
4. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.²
5. We invite interested parties to provide comments on the likely competitive effects of the proposed acquisition and the proposed divestment submitted by the Applicant. We request that parties who wish to make a submission do so by **21 October 2021**.

The parties

6. Pacific 2021 is a newly incorporated company part-owned by investment funds managed by Pacific Equity Partners Pty Ltd (PEP), an Australian private equity fund manager. One of these funds part owns the Evolution Healthcare Group (Evolution), which (via Acurity Health Group Limited) wholly owns Bowen Hospital and Wakefield

¹ 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/>.

² 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.

Hospital in Wellington and has ownership interests in several other healthcare operations in New Zealand and Australia.³

7. In addition to its interests in hospitals and associated healthcare facilities, PEP also has interests in iNova (a supplier of consumer pharmaceutical and healthcare products) and LifeHealthcare (a supplier of medical devices and equipment).
8. Healthe Care is a subsidiary of Luye Medical Group Co. Ltd and operates 17 surgical hospitals and day surgery centres around Australia (through Healthe Care Surgical Holdings Pty Ltd), as well as the Boulcott Hospital in Wellington (through Pulse). Healthe Care Surgical Holdings Pty Ltd is also being acquired by the Applicant, although clearance has not been sought for that transaction.
9. The parties overlap in the provision of elective surgical procedures to patients in the Wellington region. 'Elective surgery' means non-urgent procedures, including related diagnostic services, where the condition is not life threatening and does not require immediate surgery.⁴
10. There are four hospitals that provide these services in the Wellington region:
 - 10.1 Boulcott Hospital in Lower Hutt (owned by Pulse);
 - 10.2 Southern Cross Hospital in Newtown (owned and operated by Southern Cross Healthcare Limited); and
 - 10.3 the Wakefield and Bowen Hospitals, both owned by Evolution and located in Newtown and Crofton Downs, respectively.⁵
11. The decision of which hospital is used will depend on several factors, including the preference of the surgeon, the funding arrangements of the individual patient (for example ACC or private health insurance) and the capacity of the hospitals.⁶

Our framework

12. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.⁷ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.

³ Evolution also wholly owns the Royston Hospital in Hawkes Bay, and has ownership interests in Grace Hospital in Tauranga as well as maternity care, rehabilitation, oncology, mental health, endoscopy and laparoscopy operations.

⁴ See Southern Cross Hospitals Limited and Aorangi Hospital Limited (Commerce Commission Decision 729, 28 July 2011).

⁵ Pacific 2021 also notes the presence of Rutherford Clinic, a joint venture between Southern Cross and a team of specialists which provides gastroenterology and endoscopy services.

⁶ See *Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 39* at [43 – 47].

⁷ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz

13. 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).⁸ This allows us to assess the degree by which the proposed acquisition might lessen competition.
14. 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:
 - 14.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;⁹
 - 14.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 14.3 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

15. 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.¹⁰
16. The Commission has considered acquisitions in the Wellington private hospital sector on several occasions.¹¹ In considering those acquisitions, the Commission considered that the relevant markets were those for the provision of groups of elective secondary surgical procedures for:
 - 16.1 patients funded by the Accident Compensation Corporation (ACC) wider than the Wellington region;
 - 16.2 patients funded by a District Health Board (DHB) in the Wellington region;
 - 16.3 patients funded by health insurance companies in the Wellington region; and

⁸ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁹ Prices may be increased either directly by a firm or indirectly by a firm reducing output. When we refer to a price increase, the sentence should be read as including a reduction in quality, range, level of innovation, service or any other element of competition valued by buyers.

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

¹¹ See *Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 39*, *Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 43*, and *Evolution Healthcare (NZ) Pty Limited and Austron Limited [2015] NZCC 22*.

- 16.4 self-funded patients in the Wellington region.
17. Pacific 2021 has submitted that it is content for the Commission to rely on its previous assessment of the relevant markets when assessing the proposed acquisition.¹²
18. We will consider whether these remain the appropriate markets for considering the competition effects of the proposed acquisition.

Without the acquisition

19. We will consider what the parties would do if the proposed acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or whether the parties would seek alternative options, for example, finding a different buyer for Pulse Health.

Preliminary issues

20. We will assess whether the proposed acquisition is likely to substantially lessen competition in the relevant markets by looking at:
- 20.1 the unilateral effects that may result from the proposed acquisition;
 - 20.2 whether the proposed acquisition is likely to result in coordinated effects;
 - 20.3 whether the merged entity would be able to foreclose rivals in related markets due to vertical effects; and
 - 20.4 the effectiveness of the proposed divestment in addressing the above effects (to the extent that we consider they arise).

Unilateral effects: would the merged entity be able to raise prices on its own?

21. Where two suppliers compete in the same market, a merger could remove a competitor that would otherwise provide a competitive constraint, allowing the merged entity to raise prices.¹³
22. Pacific 2021 has submitted that it is content for the Commission to rely on its previous assessment of the competitive dynamics of the relevant markets.¹⁴ Our previous assessment was that common ownership of the Boulcott Hospital, Bowen and Wakefield Hospitals would substantially lessen competition in the markets referred to at paragraph 16 above.¹⁵

¹² Application at [8.1].

¹³ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2013) at [3.62].

¹⁴ Application at [9.1(a)].

¹⁵ See *Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 39*, *Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 43*, and *Evolution Healthcare (NZ) Pty Limited and Austron Limited [2015] NZCC 22*.

23. Pacific 2021 submits that the divestment of Boulcott Hospital will remove the only overlap arising as a result of the proposed acquisition and this means that unilateral effects concerns will not arise.¹⁶
24. We will consider whether, taking into account the proposed divestment, we can be satisfied that the proposed acquisition is not likely to give rise to unilateral effects concerns.

Coordinated effects: would the proposed acquisition make coordination more likely?

25. 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 be acting in a coordinated way.¹⁷
26. Pacific 2021 submits that the divestment of Boulcott Hospital will remove the only overlap arising as a result of the proposed acquisition and this means that coordinated effects concerns will not arise.¹⁸
27. We will assess whether any of the relevant markets are vulnerable to coordination, and whether we can be satisfied that the proposed acquisition, taking into account the proposed divestment, would not be likely to change the conditions in the relevant market so that coordination is more likely, more complete, or more sustainable.

Vertical or conglomerate effects: would the merged entity be able to foreclose rivals?

28. 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.
29. Pacific 2021 submits that the divestment of Boulcott Hospital will remove the only overlap arising as a result of the proposed acquisition and this means that vertical effects concerns will not arise.¹⁹
30. Furthermore, the Applicant submits even setting aside the proposed divestment:
- 30.1 it has no ability to foreclose competing private hospitals or day surgeries by withholding / degrading terms of supply of its consumer healthcare products; and

¹⁶ Application at [9.1(b)].

¹⁷ *Mergers and Acquisitions Guidelines* above n7 at [3.84].

¹⁸ Application at [10.1].

¹⁹ Application at [11.1].

- 30.2 it has no ability to foreclose competing private hospitals or day surgeries by withholding / degrading terms of supply of medical devices / equipment.²⁰
31. We will consider whether we can be satisfied that the proposed acquisition, taking into account the proposed divestment, is not likely to give rise to vertical effects through the restricted supply of key inputs.

Proposed divestment undertaking

32. Where a merger raises competition concerns, an applicant can provide an undertaking to sell assets or shares as a condition of clearance.²¹ For a divestment undertaking to remedy competition concerns, we must be satisfied that the divestment will result in sufficient additional competitive constraint on the merged firm so that a substantial lessening of competition is no longer likely.²²
33. To make this assessment, we consider all the relevant risks associated with the divestment undertaking. We assess three kinds of risk associated with divestment undertakings:
- 33.1 Composition risk – the risk that the scope of a divestment undertaking may be too limited, or not appropriately configured, to attract a suitable purchaser or to allow a successful business to be operated in competition with the merged entity.
- 33.2 Asset risk – the risk that the competitiveness of a divested business will deteriorate prior to the completion of the divestment.
- 33.3 Purchaser risk – the risk that there may not be a purchaser that is acceptable to us and/or the risk that the applicant has an incentive to sell to a party who would not be a strong competitor.
34. Pacific 2021 has submitted that there is no material composition, asset, or purchaser risk associated with the proposed divestment undertaking because:
- 34.1 the Boulcott Hospital is an established stand-alone private hospital, and will be offered for sale as a going concern. It can be operated viably separately from the rest of the Health Care group; and
- 34.2 any asset and purchaser risks are appropriately addressed through the hold separate and conduct commitments in the proposed divestment undertaking and through the Commission's ability to approve the purchaser of the divested assets.²³
35. When assessing the proposed divestment undertaking we will consider:²⁴

²⁰ Application at [11.2].

²¹ Commerce Commission, *Merger and Acquisitions Guidelines* (July 2013), Attachment F at [F.2].

²² Commerce Commission, *Merger and Acquisitions Guidelines* (July 2013), Attachment F at [F.12].

²³ Application at [12.2(a) – (c)].

²⁴ Commerce Commission, *Merger and Acquisitions Guidelines* (July 2013), Attachment F at [F.15].

- 35.1 whether there are any composition risks, including whether the potential purchaser(s) of the divested brands will require additional assets or services in order to operate the Boulcott Hospital as a viable competitive constraint on Wakefield/Bowen hospitals;
- 35.2 whether there are sufficient protections in the proposed divestment undertaking to mitigate any degrading of the competitive effectiveness of the Boulcott Hospital during the divestment period; and
- 35.3 whether any of the potential purchasers we identify have the independence, expertise and incentive to be an effective long-term competitor.

Next steps in our investigation

36. The Commission is currently scheduled to make a decision on whether or not to give clearance to the proposed acquisition by **17 November 2021**. However, this date may change as our investigation progresses.²⁵ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
37. 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

38. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Pacific 2021/Pulse" 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 21 October 2021.
39. 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.
40. 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.

²⁵ 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.