

## Determination

### **Pacific 2021 Bidco NZ Limited and Pulse Health NZ Limited Limited [2021] NZCC 23**

<b>The Commission:</b>	Anna Rawlings (Chair) Vhari McWha John Crawford
<b>Summary of application:</b>	An application from Pacific 2021 BidCo NZ Limited seeking clearance to acquire all of the shares in Pulse Health NZ Limited from Healthe Care Australia Pty Ltd.
<b>Determination:</b>	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition (subject to the divestment undertaking dated 17 November 2021 provided by Pacific 2021 Bidco NZ Limited under sections 69A of the Commerce Act 1986).
<b>Date of determination:</b>	17 November 2021

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

## The Proposed Acquisition

1. On 17 September 2021, the Commerce Commission (the Commission) registered an application (the Application) from Pacific 2021 BidCo NZ Limited (Pacific or the Applicant) seeking clearance to acquire all of the shares in Pulse Health NZ Limited (Pulse) from Healthe Care Australia Pty Ltd (Healthe Care) (the Proposed Acquisition).
2. The Proposed Acquisition is part of related (but separate) transactions being undertaken by Pacific to acquire the hospital assets of Healthe Care. Pacific is also acquiring Healthe Care Surgical Holdings Pty Ltd, although that transaction is not subject to the Application.<sup>1</sup>
3. As part of the Application, Pacific offered an undertaking (Divestment Undertaking) to divest the Boulcott Hospital in Lower Hutt (Proposed Divestment). The Divestment Undertaking is at **Attachment A** to this Determination.

## Our decision

4. The Commission gives clearance to the Proposed Acquisition because it is satisfied that the acquisition, taking into account the Proposed Divestment, will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand. The Proposed Divestment would remove all competitive overlap between the Parties in New Zealand.
5. Through corporate structures involving other entities, in summary, Pacific (through Wakefield and Bowen Hospitals) and Healthe Care (through Pulse and Boulcott Hospital) both operate private surgical hospitals in the Wellington Region. The Proposed Acquisition would result in Pacific operating three of the four private hospitals in the Region. Pacific has committed to selling the Boulcott Hospital to a purchaser to be approved by the Commission. This means that taking into account the Proposed Divestment, there will continue to be three independent private surgical hospitals in the Wellington Region.

## Our framework

6. Our approach to analysing the competition effects of mergers is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).<sup>2</sup>
7. 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 state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).<sup>3</sup>

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<sup>1</sup> See paragraph [11] below.

<sup>2</sup> Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

<sup>3</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

8. In giving clearance to a transaction, we may accept undertakings from the applicant to dispose of assets or shares.<sup>4</sup> If we accept a divestment undertaking, it is deemed to form part of the clearance.
9. We may only give clearance if we are satisfied that a proposed transaction, taking into account any divestment undertaking offered by the applicant, is unlikely to substantially lessen competition in any market in New Zealand.<sup>5</sup>

### **The parties and background to the industry**

10. 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 Hospital in Wellington and has ownership interests in several other healthcare operations in New Zealand and Australia.<sup>6</sup>
11. 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).
12. 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 that transaction is not subject to the Application. In this Determination, we refer to all of the companies within the wider Luye Medical Group Co. Ltd as Healthe Care, unless the context requires otherwise.

### **Private elective surgery services**

13. Elective surgery is provided by a range of medical practitioners and facilities and there are a number of pathways through which a patient can obtain surgery services. Typically, a patient is referred by their GP to a surgeon who will discuss surgical options. If a patient meets the public hospital eligibility criteria, they can obtain surgery services through the public system. If they do not, are not willing to wait, or are eligible for health insurance cover (or can fund the procedure themselves), the patient may choose to have elective surgery at a private hospital.
14. In some circumstances (for example to manage workload), publicly funded elective surgery is outsourced to private hospitals, typically through a tender process.

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<sup>4</sup> Under section 69A(2) of the Act, we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

<sup>5</sup> Sections 66(3) and 69A(3) of the Act.

<sup>6</sup> 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.

15. There are three private hospital providers operating in the Wellington Region.<sup>7</sup> Pulse Health operates Boulcott Hospital in Lower Hutt, Evolution operates Bowen Hospital in Crofton Downs and Wakefield Hospital in Newtown, and Southern Cross Healthcare operates Southern Cross Hospital in Newtown.

### Market definition

16. Market definition is a tool that helps identify and assess the competitive constraints the merged entity would face. Determining the relevant market(s) requires us to judge whether, for example, two products or services are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
17. We define markets in the way that best isolates the key competition issues that arise from a merger.<sup>8</sup> 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 and services which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

### The supply of private hospital services

18. In the Commission's previous considerations of the Wellington private hospital industry, it considered that the relevant markets are the provision of groups of elective secondary surgical procedures for:
- 18.1 patients funded by the Accident Compensation Corporation (ACC) wider than the Wellington region;
  - 18.2 patients funded by a District Health Board (DHB) in the Wellington region;
  - 18.3 patients funded by health insurance companies in the Wellington region; and
  - 18.4 self-funded patients in the Wellington region.<sup>9</sup>
19. In these cases, the Commission considered that different patient groups (defined by how the elective surgery was funded) were likely to have different options available to them. For example, ACC funded patients could receive surgery outside of the Wellington Region and the DHB could increase its own provision of services by hiring locums, or transferring patients to another public hospital in the region.

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<sup>7</sup> The Commission has considered three related matters, all involving the Boulcott, Bowen and Wakefield private hospitals in Wellington and associated markets. See: *Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 39 ('Connor #1')*, *Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 43*, and *Evolution Healthcare (NZ) Pty Limited and Austron Limited [2015] NZCC 22*.

<sup>8</sup> *Mergers and Acquisitions Guidelines* above n2 at [3.10]-[3.12].

<sup>9</sup> See *Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 39* at [102 – 145]. Subsequent decisions adopted the markets defined in [2014] NZCC 39.

20. The Applicant has submitted that it is content for the Commission to rely on its previous assessment of the relevant markets in considering the proposed acquisition.<sup>10</sup>
21. Our investigation has not indicated that competitive conditions have changed to such an extent that our previous conclusions on market definition are no longer relevant. For the purposes of this Determination, we have adopted the relevant markets outlined in paragraph [18].
22. We note that the undertaking provided by the Applicant commits to the divestment of the entirety of Health Care's business in New Zealand. Accordingly, irrespective of the appropriate market definition, no potential competitive harm can arise.

### **The with and without the acquisition scenarios<sup>11</sup>**

#### *With the acquisition*

23. With the acquisition, Pacific would acquire 100% of the shares in Pulse Health NZ Limited. As a result, Pacific would obtain sole control of the Boulcott Hospital.

#### **Without the acquisition**

24. We consider that without the acquisition, the likely scenario is the status quo, with Boulcott Hospital continuing to operate in the relevant markets independently of the Bowen and Wakefield Hospitals.

### **Competitive assessment**

25. Below we summarise the potential competitive harm that could arise from the acquisition, absent the Proposed Remedy.
26. The proposed acquisition will result in three of the four private surgical hospitals in the Wellington region being owned by the Applicant, with Southern Cross being the only remaining independently owned competitor.
27. In previous Decisions, faced with the same scenario, the Commission considered that common ownership of Boulcott, Bowen and Wakefield private hospitals was likely to result in a substantial lessening of competition in the markets for the provision of groups of elective secondary surgical procedures for:
  - 27.1 patients funded by health insurance companies in the Wellington region; and
  - 27.2 self-funded patients in the Wellington region.<sup>12</sup>

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<sup>10</sup> The Application at [8.1].

<sup>11</sup> Separate to the proposed transaction, Pacific informed the Commission [ ].

<sup>12</sup> In all three relevant decisions, the Commission was satisfied that a substantial lessening of competition was not likely in relation to ACC and DHB funded procedures, due to the greater options available to these funding providers.

28. In declining the Connor #1 application, the Commission considered that:
- 28.1 For many procedures, the acquisition would have reduced the number of providers from two to one, and for remaining procedures, the Southern Cross Hospital would be the only competitor to the merged entity; and
  - 28.2 The Southern Cross Hospital faced barriers to entry and expansion, particularly the ability to attract surgeons; and
  - 28.3 The bargaining power of health insurers would be reduced and would likely be insufficient to constrain the merged entity.
29. The information we received in our investigation was consistent with what we found in previous investigations. The proposed acquisition would result in three of the four private hospitals in the Wellington Region coming under common ownership. We consider that this is likely to result in a substantial lessening of competition in the market for the provision of groups of elective secondary surgical procedures for patients funded by health insurance companies, and self-funded patients, in the Wellington region.
30. The Applicant has submitted that it accepts the Commission's previous findings that the common ownership of the Bowen, Wakefield and Boulcott hospitals would substantially lessen competition in a Wellington regional private hospital market(s) for certain customers.<sup>13</sup> The Applicant submits that the Remedy will remove the aggregation in these markets.<sup>14</sup>

### **Assessment of the proposed divestment**

31. We consider that the Proposed Remedy is likely to remedy any potential competition concerns that are likely to result from the Proposed Acquisition. Our investigation found that the only overlap between the parties arises from competition between Boulcott Hospital, and Evolution's private hospitals Bowen and Wakefield. As a result, we are satisfied that the Proposed Divestment would remove all competitive overlap between the parties and reinstate the competitive dynamic between the hospitals which existed prior to the acquisition.
32. We have found no significant risks associated with the Divestment Undertaking which gives effect to the Proposed Remedy.

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<sup>13</sup> The Application at [7.2].

<sup>14</sup> The Application at [1.2].

### **Our framework for assessing divestment undertakings**

33. We must only clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.<sup>15</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.<sup>16</sup>
34. We may accept undertakings to dispose of assets or shares.<sup>17</sup> If divestment undertakings are accepted by us, they are deemed to form part of the clearance.
35. 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, or in this case, restore competition to the status quo existing before the merger by removing all competitive overlap between the parties.
36. In making this assessment, we consider all the relevant risks associated with divestment proposals. These risks arise because a divestment undertaking's impact will be felt in the future.
37. We assess three kinds of risks associated with divestment undertakings.
  - 37.1 Composition risk – the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured.
  - 37.2 Asset risk – the risk that the competitive effectiveness of a divestment package will deteriorate prior to completion of the divestment.
  - 37.3 Purchaser risk – the risk that there may not be a purchaser found within the timeframe of a divestment undertaking that is acceptable to the Commission.
38. We have assessed the composition, asset and purchaser risks associated with Pacific's divestment proposal in accordance with our guidelines.<sup>18</sup>

### **The proposed divestment undertaking**

39. Pacific offered the Commission a Divestment Undertaking (Attachment A), under s69A of the Act, to divest the entirety of the Boulcott Hospital business in New Zealand. Under a separate transaction not the subject of the Application, Pacific would acquire Health Care Surgical Holdings Pty Ltd and other assets of that business.

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<sup>15</sup> Commerce Act 1986, s 66(1) of the Commerce Act 1986.

<sup>16</sup> In *Commerce Commission v Woolworths Limited (CA)*, above n 4 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”. However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

<sup>17</sup> Under s 69A(2) of the Commerce Act 1986 we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

<sup>18</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, Attachment F, July 2013.



40. The Boulcott Hospital business that Pacific is proposing to divest includes all components necessary for the ongoing competitive operation of Boulcott Hospital, including:

40.1 [

40.2

40.3

40.4

40.4.1

40.4.2

40.4.3

].

(collectively, the Divestment Business).

#### **Assessment of composition risk**

41. Composition risk is the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured.
42. Overall, we consider that the Divestment Undertaking is sufficient to mitigate composition risk.
- 42.1 We consider that the Divestment Business comprises that which the purchaser of Boulcott Hospital would need to viably and effectively operate Boulcott in competition with Evolution's and Southern Cross' hospitals in Wellington.
- 42.2 The Boulcott Hospital has operated as a stand-alone hospital for several years, independent from Healthe Care's other operations, and with relatively limited oversight from its parent company. This indicates that the assets included in the Divestment Business are likely to be sufficient for Boulcott Hospital to operate as an independent going concern.
- 42.3 The financial, reporting, and information technology links between Boulcott Hospital and the wider Healthe Care Group [ ] and are able to be

severed with limited interruption to the Boulcott Hospital business.<sup>19</sup> We do not consider that separating the Boulcott Hospital business from the wider Health Care group would be a logistically difficult or time-consuming task.

### Assessment of asset risk

43. Asset risk is the risk that the competitive effectiveness of a divestment undertaking will deteriorate prior to completion of the divestment. Overall we consider that the Divestment Undertaking is sufficient to mitigate asset risk.
44. Under the Divestment Undertaking:
- 44.1 Pacific undertakes to preserve the economic viability and marketability of the Divestment Business;
- 44.2 Until the completion of the divestment, a divestment manager will manage the Divestment Business independently to ensure its continued marketability and competitiveness;
- 44.3 Pacific has undertaken to divest Boulcott Hospital within [ ] of acquiring Health Care. If Boulcott Hospital has not been sold within this period, [ ]; and
- 44.4 an independent monitor will be appointed, responsible for reporting to the Commission on Pacific's compliance with its obligations under the Divestment Undertaking, the performance of the Divestment Business, and the progress of the sale of the Divestment Business.
45. The proposed independent manager of the Divestment Business is [ ]. We consider that they possess the ability and incentive to operate Boulcott Hospital effectively and competitively, and to ensure that the value of the assets is maintained, during the divestment period.
46. We also consider that the obligations in the Undertaking that Pacific maintain Boulcott Hospital as a standalone competitive entity, and not take any action to affect the competitiveness or independence of Boulcott Hospital are robust, and that the anticipated timeframe for the divestment is not longer than needed to effectively carry out the Proposed Remedy.
47. We consider that there is little risk of asset deterioration prior to divestment.

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<sup>19</sup> Healthcare stated that the Boulcott Hospital business operates its own [ ] and has [ ]. Boulcott Hospital does take [ ]. Commerce Commission interview with [ ], 09 November 2021.

### Assessment of purchaser risk

48. Purchaser risk is the risk that there may not be a purchaser found within the timeframe of a divestment undertaking that is acceptable to the Commission.
49. Overall, we consider that the Divestment Undertaking is sufficient to mitigate purchaser risk.
50. Boulcott Hospital has been an active competitor in Wellington private hospital markets for a significant period of time and is a profitable business.<sup>20</sup> It is ideally located next to the Hutt Valley public hospital and is the only private hospital in Lower Hutt.
51. Demand for private hospital services is expected to rise and [ ]. We consider that it is likely to be attractive to potential purchasers.<sup>21</sup>
52. The sale of the wider Health Care Group has attracted strong interest from [ ], some of whom have previous experience in the healthcare sector, and a number of non-binding indicative offers have been received.

### Overall conclusion

53. Subject to the Proposed Remedy, we are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition.

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<sup>20</sup> [ ]. The Application, Confidential Appendix 6.

<sup>21</sup> [ ], September 2021.

## **Determination on notice of clearance**

54. Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Pacific 2021 BidCo NZ Limited to acquire all of the shares in Pulse Health NZ Limited from Health Care Australia Pty Ltd subject to the divestment undertaking dated 17 November 2021 provided by Pacific 2021 BidCo NZ Limited under s 69A of the Commerce Act 1986.

Dated this 17<sup>th</sup> day of November 2021

Anna Rawlings  
Chair

## **Attachment A: Divestment Undertaking**

# Divestment undertaking

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**PARTIES**

**Pacific 2021 Bidco NZ Limited**

**Applicant**

**The Commerce Commission**

**Commission**

DEED dated

17 November

2021

## PARTIES

**Pacific 2021 Bidco NZ Limited** (NZCN 8214672) of C/- Russell McVeagh, Level 30, Vero Centre, 48 Shortland Street, Auckland 1010

("Applicant")

## The Commerce Commission

("Commission")

## INTRODUCTION

A. The Applicant has applied to the Commission for clearance of the Acquisition pursuant to section 66 of the Commerce Act 1986.

B. Pursuant to section 69A of the Commerce Act 1986, the Applicant gives the Commission this Undertaking as part of the application for clearance of the Acquisition.

## COVENANTS

1. The Applicant undertakes to the Commission that, if the Acquisition completes pursuant to the sale and purchase agreement signed 25 August 2021, the Applicant will complete the divestment of the Divestment Business within the Divestment Period ("**Undertaking**").
2. The Applicant acknowledges that the Undertaking:
  - (a) forms part of any clearance given by the Commission for the Acquisition under section 66(3)(a) of the Commerce Act 1986; and
  - (b) imposes legal obligations on the Applicant under the Commerce Act 1986.

### Commencement and term

3. The Undertaking comes into effect when it is signed by the Applicant and accepted by the Commission under section 69A of the Commerce Act 1986.
4. The obligations contained in this Undertaking are discharged upon Divestment Completion.

## Definitions

5. In the Undertaking:

**"Acquisition"** means the Applicant's proposed acquisition of all of the shares in Pulse Health NZ Limited from the Vendor, as described in the Applicant's notice seeking clearance pursuant to section 66 of the Commerce Act 1986 dated 17 September 2021;

**"Acquisition Completion Date"** means the date of completion of the Acquisition;

**"Acurity"** means Evolution Healthcare NZ Limited, the company that operates the Bowen Hospital and Wakefield Hospital, previously called Acurity Health Group;

**"Affiliate"** means, in relation to a party, any person who would be an interconnected body corporate or an associated person of that party as those terms are defined in the Commerce Act 1986;

**"Approved Purchaser"** means a party (or parties) that is approved by the Commission pursuant to clauses 12 to 15 below;

**"Boulcott Hospital"** means the private surgical hospital owned by Pulse Health NZ Limited that is operated at 666 and 678 High Street, Boulcott, Lower Hutt, and from other sites used by that hospital business (including consulting rooms operated at Coastlands Shopping Mall and including assets listed in Annex A);

**"Bowen Hospital"** means the private surgical hospital owned by Acurity that is operated at 98 Churchill Drive, Crofton Downs, Wellington;

**"Commercially Sensitive Information"** means specific, non-aggregated, commercially sensitive information, including the following information relating to the Divestment Business' (or Acurity, Evolution, or Bowen or Wakefield Hospitals, as the case may be):

- (a) current or future pricing or commercial terms;
- (b) customers and any related customer information;
- (c) suppliers (including the identity of specific surgeons / doctors) and any related supplier information such as prices or terms;
- (d) material and specific input costs;
- (e) profit margins on specific services or to specific customers or types of customers;



(f) expansion plans, including capital investment plans, marketing plans, volumes, capacity plans and/or business strategy plans; and/or

(g) any other current or future competitive strategies of the Divestment Business (or Acurity, Evolution, or Bowen or Wakefield Hospitals, as the case may be).

**"Conflict of Interest"** means any conflict of interest that impairs the Independent Monitor's or the Divestment Trustee's (as the case may be) objectivity and independence in discharging its duties under this Undertaking (but for the avoidance of doubt, a conflict of interest does not arise solely because a third party (such as an accounting firm or investment bank) has worked, or is currently working, with the Applicant, Evolution, Acurity, and/or Pacific Equity Partners Pty Limited (or their Affiliates) on a third party arm's length basis;

**"Divestment"** means the divestment of the Divestment Business to an Approved Purchaser;

**"Divestment Business"** means Boulcott Hospital;

**"Divestment Completion"** means completion of the transaction that divests the Divestment Business as a going concern to an Approved Purchaser;

**"Divestment Manager"** means the present hospital manager of Boulcott Hospital, [ ], or, if that person resigns, or their role with Boulcott Hospital otherwise ends, prior to Divestment Completion, any other person appointed as the hospital manager of Boulcott Hospital who is (a) not an officer, employee, contractor or agent of Evolution or Acurity, and (b) appointed to that role subject to appropriate incentive schemes and / or remuneration levels consistent with industry practice, to preserve the economic viability and marketability of the Divestment Business, in accordance with clause 6(d);

**"Divestment Period"** means [ ] from the Acquisition Completion Date;

**"Divestment Trustee"** means one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Applicant in accordance with clauses 17 and 18;

**"Evolution"** means Pacific Healthcare HoldCo Limited, Pacific Healthcare MidCo Limited, and Pacific Healthcare HoldCo Limited, being the group of holding companies that directly or indirectly own 100% of Acurity;

**"Independent Monitor"** means a natural or legal person who (a) is approved by the Commission and appointed by the Applicant; (b) does not have a Conflict of Interest; (c) possesses the necessary qualifications to carry out its mandate; and (d) has the duty to monitor the Applicant's compliance with the obligations in this Undertaking.

**"Initial Divestment Period"** means [ ] from the Acquisition Completion Date;

**"Key Personnel"** means Personnel necessary to maintain the viability of the Divestment Business, including [ ];

**"Medical Personnel"** means medically qualified Personnel that perform medical services at the site of the Divestment Business necessary to maintain the viability of the Divestment Business, either as employees or independent contractors;

**"PEP Affiliate"** means any of:

- (a) [ ];
- (b) [ ]; and
- (c) [ ],

being the companies with direct or indirect ownership of the Applicant;

**"Personnel"** means employees and independent contractors of the Divestment Business as at the date of the Acquisition;

**"Vendor"** means Health Care Australia Pty Ltd, the entity that will sell Pulse Health NZ Limited to the Applicant pursuant to the Acquisition;

**"Wakefield Hospital"** means the private surgical hospital owned by Acurity that is operated at Florence Street, Newtown, Wellington, as well as the specialist medical centres operated at 150 Kapiti Road, Paraparaumu, 5 Marae Lane, Waikanae, and Rintoul Street, Newtown, Wellington; and

**"Trustee Divestment Period"** means the period of [ ] from the end of the Initial Divestment Period.

## **Conduct until Divestment Completion**

### *Preservation obligations*

6. The Applicant will, and will procure that its PEP Affiliates will, from the Acquisition Completion Date until Divestment Completion, use best endeavours to:
  - (a) preserve the reputation and goodwill of the Divestment Business;
  - (b) preserve the economic viability and marketability of the Divestment Business;
  - (c) maintain the Divestment Business' provision of services in a manner consistent with the provision of services as at the date of the Undertaking (including, to the extent

necessary, providing any services to the Divestment Business that, immediately prior to completion of the Acquisition, are provided to the Divestment Business by the Vendor's group); and

- (d) maintain a level of staffing at the Divestment Business that is materially the same as at the date of the Undertaking, including maintaining appropriate incentive schemes and / or remuneration levels consistent with industry practice, to encourage:
  - (i) the Divestment Manager to preserve the economic viability and marketability of the Divestment Business;
  - (ii) Key Personnel, Medical Personnel, and other Personnel to remain with the Divestment Business.

*Negative obligations*

- 7. The Applicant will not, and will procure that its PEP Affiliates will not, from the Acquisition Completion Date until Divestment Completion:
  - (a) carry out any act upon its own authority that might have a significant adverse impact on the value, management, competitiveness or viability of the Divestment Business or that might alter the nature and scope of activity, or the commercial strategy, of the Divestment Business; and
  - (b) sell or transfer the Divestment Business to any person other than to an Approved Purchaser(s) notified to the Commission in accordance with clauses 12 to 15 below.

*Hold-separate obligations*

- 8. The Applicant will, and will procure that its PEP Affiliates will, from the Acquisition Completion Date until Divestment Completion, operate the Divestment Business as if it were an entirely separate going concern from Acurity (and therefore Bowen Hospital and Wakefield Hospital), including ensuring that:
  - (a) the day-to-day operations of the Divestment Business are conducted by the Divestment Manager;
  - (b) all employees employed in the Divestment Business report exclusively to the Divestment Manager;
  - (c) the Divestment Manager reports directly to the board of directors of the Divestment Business (as strictly necessary);

- (d) no persons involved in the day-to-day management of Evolution, Acurity, Bowen Hospital, or Wakefield Hospital shall:
  - (i) be on the board of, or have governance roles with, the Divestment Business;
  - (ii) be involved in the day-to-day management of the Divestment Business; or
  - (iii) receive any Commercially Sensitive Information about the Divestment Business through the reporting process;
- (e) no persons which have board or governance roles with Evolution or Acurity shall:
  - (i) be on the board of, or have governance roles with, the Divestment Business;
  - (ii) be involved in the day-to-day management of the Divestment Business; or
  - (iii) receive any Commercially Sensitive Information about the Divestment Business through the reporting process;
- (f) the Divestment Manager continues to operate the Divestment Business on the basis that Evolution and Acurity, including Bowen Hospital and Wakefield Hospital, are arm's length businesses separate from the Divestment Business; and
- (g) Acurity continues to operate Bowen Hospital and Wakefield Hospital on the basis that the Divestment Business is an arm's length business separate from Acurity (and the rest of the Evolution group),

provided that any individual who [ ] receive information about the Divestment Business and such information will be subject to clause 9(b).

*Ring fencing obligations*

- 9. The Applicant will, and will procure that its Affiliates will, from the Acquisition Completion Date until Divestment Completion:
  - (a) implement all necessary measures to ensure that, to the extent possible, Evolution's and Acurity's officers, employees, contractors or agents do not receive any Commercially Sensitive Information relating to the Divestment Business other than as contemplated by sub-clause (b) below or as otherwise provided for by this Deed;

- (b) ensure that any Commercially Sensitive Information that any individuals who are employed by [ ] and also have board or governance roles with Evolution or Acurity, or are otherwise Affiliates of the Applicant, receive regarding the Divestment Business is:
- (i) used only for the purposes of:
    - (aa) assessing the performance and value of the Divestment Business;
    - (bb) progressing the Divestment;
    - (cc) reporting to the Commission or the Independent Monitor pursuant to clauses 20, 21 and 23;
    - (dd) [ ];
    - (ee) complying with legal and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements); and
  - (ii) disclosed only to those officers, employees, contractors, agents and advisers of the Applicant or [ ] that also have board or governance roles with Evolution or Acurity who need to know the information in order to carry out these purposes;
- (c) ensure that the Divestment Business, including any of its officers, employees, contractors or agents, does not obtain any Commercially Sensitive Information relating to Evolution's or Acurity's other businesses and, in particular not the Bowen Hospital and Wakefield Hospital businesses; and
- (d) ensure that any investment professionals employed by [ ] that receive Commercially Sensitive Information about the Divestment Business or the Bowen Hospital and Wakefield Hospital businesses sign a confidentiality undertaking which, among other things, will include an acknowledgement of and commitment to adhere to information sharing protocols, which will reflect the ring-fencing obligations contained in this Undertaking.

**Non-solicitation obligations**

10. The Applicant undertakes until Divestment Completion that:
- (a) it will not solicit Key Personnel or Medical Personnel of the Divestment Business; and
  - (b) it will procure that its Affiliates (including Evolution and Acurity) will not solicit Key Personnel or Medical Personnel of the Divestment Business.
11. For the avoidance of doubt, such non-solicitation obligations will not apply in the case of any person being employed or contracted by the Applicant or its Affiliates, or operating at a hospital of the Applicant or its Affiliates, as a result of recruitment, contracting, marketing, or solicitation in the ordinary course of its business without reference to, or use of, any confidential information of the Divestment Business, including where such person has responded to a publicly placed advertisement or was employed or contracted or has chosen to operate at a hospital of the Applicant or its Affiliates as a result of normal recruiting, contracting, marketing, or solicitation procedures that were not targeted at any particular person.

**Purchaser approval**

12. The Applicant will notify the Commission at least [ ] before the end of the Initial Divestment Period of the identity of the proposed purchaser of the Divestment Business.
13. The Applicant must satisfy the Commission that the Divestment will be carried out in a manner consistent with the Undertaking and that the proposed purchaser(s) of the Divestment Business:
- (a) will not be an Affiliate of the Applicant, Evolution, Acurity or any of their Affiliates, and will be demonstrably independent of the Applicant, Evolution and Acurity;
  - (b) has the financial resources, expertise and incentive to viably operate the Divestment Business as a viable competitor;
  - (c) is not likely to create competition concerns that would result in a contravention of section 47(1) of the Commerce Act 1986; and
  - (d) is not likely to give rise to a risk that the implementation of the Divestment will be unduly [ ] delayed, [ ]].

14. The Commission shall as soon as reasonably practicable, but in any event within no more than [ ] from having received both the identity of the proposed purchaser of the Divestment Business and all draft transaction documentation proposed to effect the Divestment (including any sale and purchase, transitional and other ancillary agreements) give written notice to the Applicant whether it approves the relevant proposed purchaser as an Approved Purchaser.
15. The Commission's approval of any purchaser proposed by the Applicant of the Divestment Trustee shall also be contingent on:
- (a) the Applicant or the Divestment Trustee, as appropriate, providing all draft transaction documentation proposed to effect the Divestment (including any sale and purchase, transitional and other ancillary agreements) to the Commission as soon as reasonably practicable but in any event no later than [ ] prior to the expected signing date;
  - (b) the Commission receiving the final or executed versions of the transaction documentation; and
  - (c) the Commission's approval in writing of the final or executed versions of the transaction documentation.
16. The Applicant will ensure that [ ]  
[ ]
- 17.
- (a)
  - (b)
- 
- 18.
- (a)

(b)

(c)

(d)



(i)

(ii)

(iii)

(e)





].

### **Fulfilment of Undertaking**

19. The Applicant shall notify the Commission of the completion of the Divestment to the Approved Purchaser as soon as reasonably practicable, and in any event, no later than [ ] after such completion has occurred, subject to the Commission keeping that information confidential.

### **Monitoring compliance with the Undertaking**

20. At the Commission's request, the Applicant will give the Commission any information and documents relating to the Divestment reasonably required, or the opportunity to have a meeting with the Applicant about the Divestment and the Applicant's progress towards carrying out the Divestment.
21. The Applicant shall appoint an Independent Monitor who will be responsible for submitting a written report to the Commission on a monthly basis (commencing from the Acquisition Completion Date until Divestment Completion) containing the following information relating to the Divestment Business (and any other information about the Divestment Business or the Applicant's compliance with the Undertaking reasonably requested by the Commission) for the purpose of preserving the economic viability, marketability and competitiveness of the Divestment Business:
- (a) The Applicant's compliance with:
    - (i) the hold-separate obligations in clause 8;
    - (ii) the ring-fencing obligations in clause 9; and
    - (iii) the non-solicitation obligations in clause 10;
  - (b) Confirmation that the Applicant has complied with its obligations under the Undertaking;
  - (c) The Applicant's progress on the sale process for the Divestment Business; and

(d) Performance summary of the Divestment Business (similar to management accounts).

22. The Independent Monitor shall be approved, and its terms of appointment shall be approved, by the Commission, acting reasonably.

(a) [

(b)

■

(c)

].

23. The Applicant shall report any breaches of the ring-fencing obligations in clause 9 of this Undertaking to the independent monitor as soon as reasonably practicable.

24. The Applicant undertakes to provide the Commission with a copy of any information memorandum (or similar documentation) provided to potential purchasers relating to the Divestment Business within [ ] of signing this Divestment Undertaking or finalising such documentation (whichever is earlier).

25. Nothing in the Undertaking requires the Applicant to provide legally privileged information or documents to the Commission.

### **Miscellaneous**

26. The Applicant confirms that by entering into the obligations recorded in this Deed it intends to create binding and enforceable legal obligations for the benefit of the Commission. For the avoidance of doubt, the Applicant may submit to the Commission an application to vary the Undertaking pursuant to section 69AC under the Commerce Act 1986. The Commission will consider the application in accordance with its statutory obligations under section 69AC.

27. This Undertaking is governed by New Zealand law and the parties accept the exclusive jurisdiction of the New Zealand courts.
28. This Undertaking may be executed by an exchange of electronic copies (whether by email or otherwise) and execution of this Deed by that means is valid and sufficient execution.

**SIGNED AS A DEED**

**PACIFIC 2021 BIDCO NZ LIMITED**

**(Company Number: 214672)**

By:

\_\_\_\_\_  
Signature of Director

\_\_\_\_\_  
Name of Director

In the presence of:

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

**ANNEX A**  
**TO BOULCOTT DIVESTMENT UNDERTAKING**

**Asset Schedule**

1. [

2.

(a)

(i)

(ii)

(iii)

(b)

(i)

(ii)

(c)

(d)

(e)

(f)

(g)

(h)

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