

## Determination

### Connor Healthcare Limited and Acurity Health Group Limited [2014] NZCC 43

**The Commission:** Dr Mark Berry  
Sue Begg  
Anna Rawlings

**Summary of application:** An application seeking clearance for Connor Healthcare Limited to acquire, by way of a takeover offer, all of the shares in Acurity Health Group Limited that Connor Healthcare Limited does not already own.

**Determination:** Under s 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition, subject to the divestment undertaking dated 18 December 2014 provided by Evolution Healthcare Limited and Connor Healthcare Limited under section 69A of the Commerce Act 1986.

**Date of determination:** 19 December 2014

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

## The proposal

1. On 18 December 2014 we registered an application seeking clearance for Connor Healthcare Limited (Connor) to acquire all of the shares in Acurity Health Group Limited (Acurity) that Connor does not already own.
2. The present application seeks clearance for the same acquisition for which we declined to give clearance on 11 December 2014 (see Decision [2014] NZCC 39<sup>1</sup>). However, this application includes a divestment undertaking (the Undertaking), see Attachment 1, which the applicant submits will remedy any substantial lessening of competition to which the acquisition may give rise.
3. As Acurity is publicly listed on the New Zealand Stock Exchange, Connor is seeking to acquire the shares through a takeover offer regulated by the Takeovers Code. On settlement of the takeover offer, Austron Limited (Austron) (which presently holds 50.01% of the shares in Acurity) will subscribe for 75% of the shares in Connor, which means that Connor's parent company, Evolution Healthcare (NZ) Pty Ltd (Evolution), will own 25% of Connor. Once the takeover is complete, Connor will own 100% of Acurity.
4. The Undertaking provides that Connor, together with Evolution, will divest assets (that is, contractual rights) and/or shares to the effect that Evolution will hold a maximum of 11.7% of the shares in Connor as soon as practicable but no later than one month from completion of the acquisition.

## The decision – clearance granted

5. The Commission gives clearance to the proposed merger, subject to the Undertaking, as it is satisfied that it will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

## Our framework

6. 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>2</sup>

## The substantial lessening of competition test

7. As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.
8. 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> *Re Connor Healthcare Limited and Acurity Health Group Limited* [2014] NZCC 39.

<sup>2</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

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

9. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),<sup>4</sup> or reduce non-price factors such as quality or service below competitive levels.
10. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.
11. We define markets in the way that we consider 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. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.<sup>5</sup>

### **When a lessening of competition is substantial**

12. 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.<sup>6</sup> Some courts have used the word 'material' to describe a lessening of competition that is substantial.<sup>7</sup>
13. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

### **When a substantial lessening of competition is likely**

14. A substantial lessening of competition is 'likely' if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.<sup>8</sup>

### **The clearance test**

15. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.<sup>9</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.<sup>10</sup>
16. We may accept undertakings to dispose of assets or shares.<sup>11</sup> If divestment undertakings are accepted by us, they are deemed to form part of the clearance.

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<sup>4</sup> Or below competitive levels in a merger between buyers.

<sup>5</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>6</sup> *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

<sup>7</sup> *Ibid* at [129].

<sup>8</sup> *Ibid* at [111].

<sup>9</sup> Commerce Act 1986, s 66(1) of the Commerce Act 1986.

<sup>10</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.

17. As set out in our divestment guidelines,<sup>12</sup> upon receiving a divestment undertaking we will consider whether the proposed divestment is sufficient to remedy any substantial lessening of competition that would otherwise arise.

## Parties

### Connor

18. Connor is owned by Evolution which is 100% owned by Evolution Healthcare Partners Pty Ltd as trustee for the EHPO Trust. The Evolution Group owns and operates four private hospitals in Australia as well as Boulcott Hospital in Lower Hutt.
19. Connor has an 11.7% shareholding in Acurity.

### Acurity

20. Acurity is publicly listed on the New Zealand Stock Exchange. Currently, Austron is the largest shareholder in Acurity. Austron is owned by Royston Hospital Trust Board and Medusa Limited.
21. Acurity owns and operates Wakefield Hospital and Bowen Hospital in Wellington and Royston Hospital in Hastings. Acurity is also an investor in part-owned private hospitals in Tauranga and Auckland.<sup>13</sup>

## Decision [2014] NZCC 39

22. On 11 December 2014 we declined to give clearance for Connor to acquire all the shares in Acurity that it does not already own because we were not 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.
23. In that Decision, we considered the relevant markets to be the provision of elective secondary surgical procedures for:
- 23.1 patients funded by the ACC wider than the Wellington region;
  - 23.2 funded by a DHB in the Wellington region;
  - 23.3 patients funded by health insurance companies in the Wellington region; and
  - 23.4 self-funded patients in the Wellington region.
24. We considered that in respect of the ACC and DHB funded markets, the proposed acquisition was unlikely to give rise to a substantial lessening of competition.

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<sup>11</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>12</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, Attachment F, July 2013.

<sup>13</sup> Acurity has a 60% shareholding in Grace Hospital (Tauranga), 40% shareholding in Endoscopy Auckland (Auckland) and a 40% shareholding in Laparoscopy Auckland (Auckland).

25. However, in respect of the markets funded by health insurance companies and self-funded by patients, we were not satisfied that the proposed acquisition would not give rise to a substantial lessening of competition.
26. Our reasons for declining the application include:
- 26.1 for many procedures in the orthopaedics, otolaryngology, general surgery, oral and maxillofacial and plastic surgery specialties the proposed acquisition would reduce the number of providers from two to one as Southern Cross hospital either does not provide these procedures or does so on a limited basis;
  - 26.2 for the remaining procedures in those specialties and in urology, ophthalmology and gynaecology while the acquisition would remove the competition between Boulcott and Bowen / Wakefield, Southern Cross Hospital would remain as an option and so the number of providers would reduce from three to two;
  - 26.3 Southern Cross Hospital faces barriers to entry and expansion, in particular, the ability to attract surgeons - a new entrant would also face this barrier;
  - 26.4 while the ACC and the DHBs have options other than the Wellington private hospitals available to them, private health insurance companies and self-funded patients do not; and
  - 26.5 the bargaining power of health insurers would be reduced and would likely be insufficient to constrain the merged firm.

### **The Undertaking**

27. We consider that the proposed divestment is likely to remedy any competition concerns that would arise as a result of the acquisition.
28. Section 69A of the Act provides that the Commission may accept undertakings in writing given by, or on behalf, of an applicant to dispose of assets or shares. The Commission is unable to accept behavioural undertakings in the context of its consideration of a merger clearance. An undertaking given to the Commission is deemed to form part of any clearance given by the Commission.<sup>14</sup>
29. As part of the application, Evolution and Connor undertake to dispose of any assets (contractual rights) and/or shares to the effect that by the end of one month from completion of the acquisition, Evolution's shareholding in Connor reduces from 25% to 11.7%, with the remaining shares to be held by Austron.
30. The effect of the Undertaking would be that Evolution would return to its pre-offer equivalent shareholding in Acurity of 11.7%.

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<sup>14</sup> Commerce Act 1986, s69A(3).

31. In addition, we are satisfied that post-divestment, Evolution would not have the ability to influence the strategy or operation of either of the Bowen or Wakefield businesses. This is because Evolution would not have any directors on the board of Connor and no entitlement to appoint directors to the Connor board. Furthermore, Evolution would have a minimum set of veto rights relating to Evolution's protection from oppressive conduct by Austron as the majority shareholder. The veto rights do not relate to setting Connor's or its subsidiaries' strategic or competitive direction. Accordingly, there will be little difference between the scenario with the acquisition and the scenario without.

### **Overall conclusion**

32. We are satisfied that the proposed acquisition with the divestment, will not have, or would not be likely to have, the effect of substantially lessening competition.

### **Determination on notice of clearance**

33. Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance for Connor Healthcare Limited to acquire all of the shares in Acurity Health Group Limited that Connor Healthcare Limited does not already own, subject to the divestment undertaking dated 18 December 2014 provided by Evolution Healthcare Limited and Connor Healthcare Limited under section 69A of the Commerce Act 1986.

Dated this 19<sup>th</sup> day of December 2014

Dr Mark Berry  
Chairman



## **APPENDIX 2 – PROPOSED UNDERTAKING**

DEED dated 18<sup>th</sup> day of December 2014

GIVEN BY               EVOLUTION HEALTHCARE (NZ) PTY LIMITED (***Evolution***)

AND                     CONNOR HEALTHCARE LIMITED (***Connor***)

IN FAVOUR OF        COMMERCE COMMISSION (***Commission***)

### **BACKGROUND**

- A     On 17 December 2014, Connor gave notice to the Commission pursuant to section 66(1) of the Commerce Act 1986 seeking clearance for the acquisition of all of the shares in Acurity Health Group Limited that it did not already own (***Acquisition***).
- B     Connor, and Evolution on Connor's behalf, offer the Commission a divestment undertaking in the form of this deed pursuant to section 69A of the Commerce Act 1986.

### **OPERATIVE PROVISIONS**

#### **Divestment undertaking**

- 1     Evolution undertakes to the Commission on behalf of Connor (and Connor undertakes to use its best endeavours to procure) that if the Acquisition completes Evolution will dispose of assets (that is, contractual rights) and/or shares to the effect that Evolution holds a maximum of 11.7% of the shares in Connor (***Divestment***) as soon as practicable but no later than 1 month from completion of the Acquisition (***Divestment Period***) (***Undertaking***).
- 2     Evolution and Connor each acknowledges that the Undertaking forms part of any clearance given by the Commission for the Acquisition under section 66(3)(a) of the Commerce Act 1986, and that it creates binding and legal obligations on Evolution and Connor in relation to the Commerce Act 1986.

#### **Term**

- 3     The Undertaking expires on completion of the Divestment.

#### **Information**


- 4     Once each week during the Divestment Period, Evolution and Connor will provide the Commission with an update regarding:
- 4.1    Evolution's progress towards carrying out the Divestment; and
- 4.2    compliance with the Undertaking.
- 5     On request of the Commission during the Divestment Period, Evolution and Connor will provide to the Commission any information and documents reasonably required:
- 5.1    arising out of an update of the kind described in clause 4; and
- 5.2    regarding:
- (a)   Evolution's progress towards carrying out the Divestment; and


(b) compliance with the Undertaking.

- 6 Evolution will provide the Commission with a copy of all transaction documents relating to the Divestment within one business day of their execution.
- 7 For the avoidance of doubt, nothing in the Undertaking requires Evolution or Connor to provide information or documents that are subject to legal professional privilege.

Executed as a deed on behalf of **Evolution Healthcare (NZ) Pty Limited**

Executed as a deed on behalf of **Connor Healthcare Limited**

  
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Signature of Authorised Representative

  
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Signature of Authorised Representative

ANDREW SAVAGE DIRECTOR  
Print Name and Title

BEN THYNNE, DIRECTOR  
Print Name and Title