

COMMERCE ACT 1986: BUSINESS ACQUISITION

SECTION 66: NOTICE SEEKING CLEARANCE

17 August 2015

The Registrar
Mergers and Authorisations
Commerce Commission
PO Box 2351
Wellington

Pursuant to section 66(1) of the Commerce Act 1986, notice is hereby given seeking clearance of a proposed business acquisition.

Background

- 1 On 11 December 2014 the Commission declined Connor Healthcare Limited's application for clearance to acquire all of the shares in Acurity Health Group Limited (**Acurity**) that it did not already own (**Original Application**).¹
- 2 On 17 December 2014 Connor Healthcare Limited (**Connor**) sought clearance to acquire, by way of takeover offer, all of the shares in Acurity that Connor did not already own (the **Second Application**). The Commission gave clearance on 19 December 2014.
- 3 On or about 14 January 2015, Connor completed the takeover transactions (the **Takeover**), and it now owns all of the shares in Acurity. Acurity is a leading New Zealand provider of private surgical healthcare services. It owns private hospitals in Wellington (Wakefield Hospital and Bowen Hospital) and Hastings (Royston Hospital).
- 4 Acurity is also an investor in part-owned private hospitals in Tauranga (Grace Hospital with a 60% share) and in Auckland (with 40% shareholdings in both Endoscopy Auckland and Laparoscopy Auckland).
- 5 Following completion of the Takeover, Austron Limited (**Austron**) increased its shareholding in Connor to 88.30%. Evolution Healthcare (NZ) Pty Ltd (**Evolution**) owns the remaining 11.70% of Connor.

¹ The Original Application was dated 27 August 2014.

The merger parties

Evolution

- 6 Evolution is part of the Evolution Group, which owns all the shares in Boulcott Hospital Limited (Hutt Valley) – through a limited partnership (Evolution Healthcare (NZ) LP).

Austron

- 7 Austron is owned 58.77% by Medusa Limited (***Medusa***), and 41.23% by Royston Health Trust Board (***Royston***), (together, the ***Vendors***).

The Proposed Acquisition

- 8 Evolution wishes to acquire all of the shares in Austron from the Vendors (the ***Proposed Acquisition***).
- 9 On 7 August 2015 Evolution and the Vendors signed an Agreement for the Sale and Purchase of Shares in Austron Limited (***SPA***) which will implement the Proposed Acquisition. []. The Proposed Acquisition is subject to Commerce Commission and OIO approval.
- 10 Upon completion of the Proposed Acquisition Evolution will:
- 10.1 acquire the Vendors' shareholder loans to Austron; and
 - 10.2 directly or indirectly own or control all of the shares in Connor and Acurity.
- 11 The Original Application explains the businesses and assets involved in the Proposed Acquisition. Evolution relies on that detail in support of this application. Where required, though, we modify or extend the explanation below. The public version of the Original Application is at **Appendix 2**.

Application for clearance

- 12 Evolution seeks clearance for the Proposed Acquisition, subject to it undertaking to sell Boulcott Hospital Limited's assets (***Boulcott*** or ***the Hospital***) to a third party (the ***Divestment***).
- 13 Evolution's divestment and hold-separate undertakings are in **Appendix 3** (***Proposed Undertaking***), and described in more detail below.
- 14 The Acquisition will not affect competition in the Wellington private hospital markets for the provision of elective secondary surgical procedures.² That's because the Proposed Undertaking will remove any aggregation that would

² The Wellington region includes Lower Hutt and Porirua, but excludes the Wairarapa: [2014] NZCC 39 at [123].

otherwise occur in relevant markets as three separately-owned options will remain for:

14.1 insurers;

14.2 surgeons, specialists and associated clinicians; and

14.3 privately-funded patients seeking private surgical care.

15 A third party will own the Hospital's assets once Divestment is complete. That third party will be independent of Evolution and will compete with, at least, Bowen, Wakefield and Southern Cross hospitals in the Wellington region.

16 All of the arrangements giving effect to the Proposed Undertaking will be captured in a formal agreement or agreements.

Nature of the Proposed Undertaking

17 Evolution will give effect to the Divestment by selling the Boulcott business as a going concern. Its assets include the Boulcott private hospital business, and Boulcott's existing resource consents and building permits to:

17.1 expand the hospital to include two additional operating theatres;

17.2 relocate and expand the post-anaesthesia care unit and day surgery suite;

17.3 establish a high dependency unit; and

17.4 redevelop the main hospital entrance.

18 [

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Timeline

19 The transaction timeline for the Proposed Acquisition is as follows:

[

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The Proposed Undertaking addresses the Commission's concerns

20 There is no material composition, asset or purchaser risk associated with the Proposed Undertaking:

20.1 the Hospital is an established stand-alone private hospital, and will be offered for sale as a going concern. Boulcott owns or is legally entitled to use all of the assets needed to operate the Hospital business. The Proposed Undertaking does not require the transfer of assets or personnel to Boulcott before the assets are sold;

20.2 any asset risks are appropriately addressed by Evolution's hold-separate and other conduct commitments in the Proposed Undertaking; and

20.3 [

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21 Boulcott's presence as an independent third-party owned hospital will also address the competition concerns the Commission identified in its 11 December

2014 determination of the Original Application. Boulcott, Southern Cross and potential new entrants will continue to constrain Wakefield and Bowen in the Wellington region private hospital market. Effectively, the pre-December 2014 status quo will continue, except:

21.1 the Wakefield/Bowen hospital group will be in Evolution's hands, rather than ultimately controlled by Austron; and

21.2 Boulcott will shift from Evolution to third party ownership.

22 The Commission has previously recorded that where Boulcott and Wakefield/Bowen are rivals, the relevant market is competitively robust:

22.1 Boulcott and Southern Cross Hospitals together constrain Wakefield and Bowen.³

22.2 And Wakefield and Bowen are further constrained by potential competitors including expansion by an existing competitor and the potential entry of day surgeries.⁴

23 Those findings will continue to apply to the Wellington region private hospital market once the transactions contemplated by the Proposed Undertakings are completed.

³ [2014] NZCC 39 at [83], referring to *Decision 492*.

⁴ [2014] NZCC 39 at [83.3], referring to *Decision 492* at [166].

DECLARATION

THIS NOTICE is given by Evolution Healthcare (NZ) Pty Limited.

I, BENEDICT THYNNE, have prepared, or supervised the preparation, of this notice seeking clearance.

To the best of my knowledge, I confirm that:

- all information specified by the Commission has been supplied;
- if information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to me that is relevant to the consideration of this notice has been supplied; and
- all information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director of the company and am duly authorised to submit this notice.

Name and title of person authorised to sign

BENEDICT THYNNE - DIRECTOR

Sign:  Date: 17/08/15

[

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APPENDIX 2 – PUBLIC VERSION OF THE ORIGINAL APPLICATION

[Attached as a separate document.]

APPENDIX 3 – PROPOSED UNDERTAKING

Divestment undertaking

- 1 Evolution undertakes to the Commission that, if the Proposed Acquisition settles, Evolution will carry out the Divestment within the Divestment Period (**Undertaking**).
- 2 Evolution acknowledges that the Undertaking:
 - 2.1 forms part of any clearance given by the Commission for the Acquisition under section 66(1)(3) of the Commerce Act 1986; and
 - 2.2 imposes legal obligations on Evolution under the Commerce Act 1986.

Commencement and term

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

Definitions

- 5 In the Undertaking:
 - 5.1 the **Acquisition** means Evolution's proposed acquisition of all of the shares in Austron Limited, as described in Evolution's notice seeking clearance dated 17 August 2015.
 - 5.2 **Acurity** means Acurity Health Group Limited;
 - 5.3 **Commission** means the New Zealand Commerce Commission;
 - 5.4 **Evolution** means Evolution Healthcare (NZ) Pty Limited;
 - 5.5 the **Divestment** means entry into a final binding agreement for the unreserved divestment as a going concern of the Divestment Business to a Purchaser;
 - 5.6 [

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5.7 the **Divestment Manager** means the present Hospital Manager of Boulcott Hospital Limited;

5.8 the **Divestment Period** means 6 months from the Acquisition Settlement Date;

5.9 [

]

5.10 [

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5.11 a **Purchaser** means a third party that is approved by the Commission pursuant to clauses [11] – [13] below;

5.12 the **Site** means the land at 666 and 678 High Street, Lower Hutt being: LOTS 1 & 2 DP 43902, PT LOT 2 DP 13964, PT LOT 1 DP 11770, LOTS 2 DP 13854, LOTS 1 & 2 DP 31171, LOT 3 DP 13964, PT LOT 5 DP 8011 and PT LOT 2 DP 17165 876/40.

Conduct during the Divestment Period

Preservation obligations

6 Evolution will, during the Divestment Period, use all reasonable endeavours to:

6.1 preserve the reputation and goodwill of the Divestment Business;

6.2 preserve the economic viability, marketability and competitiveness of the Divestment Business;

6.3 maintain the Divestment Business' provision of services in a manner consistent with the provision of services as at the date of the Undertaking; and

- 6.4 maintain a level of staffing at the Divestment Business that is materially the same as at the date of the Undertaking, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel, Medical Personnel, and other hospital staff to remain with the Divestment Business.

Negative obligations

- 7 Evolution will not:
 - 7.1 carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy of the Divestment Business;
 - 7.2 sell or transfer the Divestment Business, or any assets or substantial part of the Divestment Business, to any person other than to a proposed purchaser notified to the Commission in accordance with clause [11] below.

Hold-separate obligations

- 8 Evolution will, during the Divestment Period, operate the Divestment Business as if it were a separate going concern from the remainder of Evolution's business, including ensuring that:
 - 8.1 the day-to-day operations of the Divestment Business are conducted by the Divestment Manager;
 - 8.2 all employees employed in the Divestment Business report exclusively to the Divestment Manager;
 - 8.3 the Divestment Manager reports directly to Evolution's board of directors (if strictly necessary). Should Evolution receive any information through the reporting process, the information will be subject to clause [9]; and
 - 8.4 the Divestment Manager continues to maximise the value and viability of the Divestment Business on the basis that Bowen and Wakefield are arm's length businesses.

Ring-fencing obligations

9 Evolution will, throughout the Divestment Period:

9.1 ensure that any commercially sensitive information it receives regarding the Divestment Business is:

(a) used only for the purposes of:

(i) assessing the performance of the Divestment Business;

(ii) progressing the Divestment;

(iii) reporting to the Commission pursuant to clause [14]; and

(iv) complying with legal and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements); and

(b) disclosed only to those officers, employees, contractors, agents and advisers of Evolution who need to know the information in order to carry out these purposes;

9.2 ensure that the Divestment Business does not obtain any commercially sensitive information relating to Evolution's other businesses and, particularly not the Bowen and Wakefield businesses.

Non-solicitation obligations

10 Evolution undertakes that during the Divestment Period, subject to legal limitations, it will not solicit Key or Medical Personnel of the Divestment Business.

Purchaser approval

11 Evolution will notify the Commission at least 20 business days before the end of the Divestment Period of the identity of the proposed purchaser.

12 Evolution must demonstrate to the Commission that the Divestment will be carried out in a manner consistent with the Undertaking and that the proposed purchaser:

12.1 is not associated with, or an interconnected body corporate of, Evolution or Acurity; and

12.2 has the financial resources, expertise and incentive to operate the Divestment Business as a viable competitor; and

12.3 is not likely to create competition concerns that would result in a contravention of section 47(1) of the Commerce Act 1986.

- 13 Evolution will ensure that relevant final binding agreements effecting the Divestment are conditional on obtaining the Commission's approval of the proposed purchaser based on the criteria set out in clause [12].

Monitoring compliance with the Undertaking

- 14 At the Commission's request, Evolution will give the Commission any information and documents reasonably required:

14.1 about the Divestment and Evolution's progress towards carrying out the Divestment; and

14.2 demonstrating that Evolution's conduct during the Divestment Period complies with the Undertaking.

- 15 Nothing in the Undertaking requires Evolution to provide legally privileged information or documents.

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



Signature of Authorised Representative

BENEDICT THYNNE - DIRECTOR

Print Name and Title