

Determination

Healthcare of New Zealand Holdings Limited and Geneva Healthcare Limited and related entities [2017] NZCC 20

- The Commission:** Dr Mark Berry
Anna Rawlings
Dr Jill Walker
- Summary of application:** An application from Healthcare of New Zealand Holdings Limited seeking clearance to acquire 100% of the shares in Geneva Healthcare Limited and related entities from Geneva Group Holdings Limited.
- Determination:** Under s 66(3)(a) of the Commerce Act 1986 the Commerce Commission determines to give clearance to the proposed acquisition.
- Date of determination:** 1 September 2017

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

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The proposed acquisition

Summary of the proposed acquisition

1. On 29 June 2017, Healthcare of New Zealand Holdings Limited (Healthcare NZ or the Applicant) applied for clearance under section 66 of the Commerce Act 1986 (the Act) to acquire 100% of the shares in Geneva Healthcare Limited and its related entities, Geneva Health Technology Limited, Geneva Care Limited, Geneva Clean Limited and My Skill Limited (collectively Geneva or the Target) from Geneva Group Holdings Limited.
2. The acquisition would result in aggregation of the following types of services:
 - 2.1 home and community support services;
 - 2.2 community residential support services;
 - 2.3 community nursing services; and
 - 2.4 bureau nursing services.
3. We agree with the Applicant's submission that the major overlap arising from the acquisition is in respect of home and community support services, with only minor aggregation in respect of the other types of services.¹ We have therefore focused on competition in the supply of home and community support services.

Our decision

4. The Commission gives clearance to the proposed acquisition. The Commission 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.

Our framework

5. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.²

The substantial lessening of competition test

6. As required by the Commerce Act 1986, we assess acquisitions using the substantial lessening of competition test.
7. 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).³

¹ Clearance application from Healthcare NZ at [21].

² Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

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

8. We make a pragmatic and commercial assessment of what is likely to occur in the future with and without the acquisition based on the information we obtain through our investigation and taking into account factors including market growth and technological changes.
9. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise prices above the price that would exist in a competitive market (the 'competitive price'),⁴ 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 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 Act, as a matter of fact and commercial common sense.⁵

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.⁶ Some courts have used the word 'material' to describe a lessening of competition that is substantial.⁷ A substantial lessening of competition in a significant section of a market, may, according to circumstances, be a substantial lessening of competition in a market.⁸
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

⁴ Or below competitive levels in a merger between buyers.

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

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

⁷ *Woolworths & Ors v Commerce Commission* (HC) above at [129].

⁸ As the Federal Court of Australia noted in *Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd* (1982) 64 FLR 238, 260; 44 ALR 173, 192; ATPR 40-315, 43,888, cited with approval by McGechan J in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 at 435: "Although the words "substantially lessened in a market" refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market".

competition is more than a possibility, but does not mean that it needs to be more likely than not to occur.⁹

The clearance test

15. We must clear an acquisition if we are satisfied that the acquisition would not be likely to substantially lessen competition in any market.¹⁰ If we are not satisfied – including if we are left in doubt – we must decline to clear the acquisition.¹¹

Merger overlap

16. The merging parties overlap in the provision of nursing and home care services to public and private funders. These services include a range of possible markets, such as markets for the provision of:
- 16.1 home and community support services;
 - 16.2 community residential support services;
 - 16.3 community nursing services; and
 - 16.4 bureau nursing services.
17. The merger would result in aggregation in the provision of all four of these services. However, given the presence of many other suppliers, the aggregation in the provision of community residential support services, community nursing services, and bureau nursing services would be minimal. Therefore we do not consider the effects of the merger on the provision of these three services further in these reasons. We only consider the effects of the merger on the provision of home and community support services.
18. Almost all home and community support services are funded by government bodies. The nature of home and community support services generally is described on the Home & Community Health Association’s website as follows:

Home and community support includes a range of services available for people who need support to live at home. Services include personal care, household management, nursing treatment, and complex care for people with serious needs.

Community-based agencies and companies employ support workers, caregivers and health care professionals to provide these services. Home support for those living with disability and injury related needs can also be provided by family carers. It can be managed by the person using the services or by their representative.¹²

⁹ *Woolworths & Ors v Commerce Commission* (HC) above at [111].

¹⁰ Commerce Act 1986, s 66(1).

¹¹ In *Commerce Commission v Woolworths Limited* (CA), above 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.

¹² <http://www.hcha.org.nz/about-us/about-support-services/>

19. The merger would give rise to aggregation in relation to the provision of home and community services at national and regional levels.¹³

Parties to the merger

Healthcare NZ

20. Healthcare NZ is the holding company of several operating companies that provide health services to clients in their homes and communities throughout New Zealand. Healthcare NZ's subsidiaries are Healthcare of NZ Limited, NZCare Group Limited, Healthcare Rehabilitation Limited, Explore Services Limited and Solora Limited.
21. Services provided by Healthcare NZ include nursing services, mental health support, disability support, injury rehabilitation and support, and support for clients with challenging behaviour. Healthcare NZ also subcontracts the provision of services, through its subsidiary Solora Limited (Solora), to 15 third party suppliers.
22. In the 2017 year Healthcare NZ expects to receive approximately \$[] of funding for home and community support services, of which approximately []% will be from the Accident Compensation Corporation (ACC), []% from the Ministry of Health and []% from District Health Boards (DHB)s.¹⁴

Geneva

23. The trading companies within Geneva are Geneva Healthcare Limited, and Geneva Elevator LP (a limited partnership in which Geneva has a 50% share). Geneva Healthcare Central Ltd and Geneva Northlink Healthcare Ltd trade as non-disclosed agents for Geneva Healthcare Limited under an agency agreement but do not trade in their own right.
24. In February 2017, Geneva acquired Presbyterian Support Central Homecare which operates in the central and lower North Island.
25. Like Healthcare NZ, Geneva is a lead supplier for the ACC of home and community support services. Geneva is also contracted to ACC to provide community nursing services, and provides home and community support services to DHBs and the Ministry of Health. Geneva provides most of these services itself, but also has nine sub-contractors which provide home and community support services on its behalf.
26. In the year ending June 2017 Geneva received approximately \$[] of funding for Home and Community Support Services, of which approximately []% was from the ACC, []% from the Ministry of Health and []% from DHBs.¹⁵

¹³ Refer to Paragraphs 52 to 56.

¹⁴ "Contract Summary Updated July 2017" attached to email from Blacktop Lawyers (on behalf of Healthcare NZ) to Commerce Commission dated 31 July 2017.

¹⁵ "Geneva Healthcare Contracts Won and Lost" attached to email from Buddle Findlay (on behalf of Geneva) to Commerce Commission dated 31 July 2017.

Other parties

27. There are a large number of suppliers of home and community support services in New Zealand. Lead suppliers contract directly with funders, and subcontractors/suppliers contract with lead suppliers to provide services.

Access

28. Access is a division of Green Cross Health Group (includes Unichem and Life Pharmacy), which is listed on the NZX. Access is the third largest and only other supplier with a nationwide presence. Access provides health services to clients including household assistance and personal care, injury support and rehabilitation, and nursing services.
29. Access is a lead supplier for the ACC and has a national presence. In addition it holds the exclusive contract to supply home and community support services to the Capital & Coast, Hutt Valley and West Coast DHB's, and it is also contracted to provide these services to the Northland, Waitemata, Counties Manukau, Waikato, Lakes, Taranaki, Hawkes Bay, Mid Central, Whanganui, Wairarapa, Nelson-Marlborough, Canterbury, South Canterbury, and Southern DHBs. Access also provides home and community support services to the Ministry of Health.
30. Access receives approximately \$[] of funding annually for home and community support services,¹⁶ of which approximately []% is from the ACC,¹⁷ []% from DHBs, and []% is from the Ministry of Health.¹⁸

Smaller suppliers

31. Healthvision New Zealand Limited (Healthvision) is a subsidiary of Healthvision Group Limited. Healthvision is also a supplier of home and community support services. It is a subcontractor to Healthcare NZ (through Solora) in respect of the provision of services for the ACC in Auckland, Northland, Waikato, Bay of Plenty, and Manawatu. In addition, Healthvision is a contracted supplier to Counties Manukau and MidCentral DHBs and the Ministry of Health, and has annual home and community support services revenues of approximately \$[].
32. Certain other suppliers have a presence across a number of regions. For example Presbyterian Support Northern operates in several regions in the top half of the North Island and Florence Nightingale Agency which operates in Nelson-Marlborough and Christchurch.
33. A number of suppliers only operate in a defined area within a region. For example, some iwi have established suppliers that are funded by the Ministry of Health and/or DHBs to provide services to iwi members and so those suppliers do not offer services beyond the specific area of the iwi.

¹⁶ Clearance application from Healthcare NZ [Table 1].

¹⁷ Email from the ACC to Commerce Commission dated 7 August 2017.

¹⁸ As shown in table outlining contracted suppliers and clients by region attached to email from Ministry of Health to Commerce Commission dated 7 August 2017.

Funders

34. Almost all home and community support services provided in New Zealand are funded by the ACC, the Ministry of Health or DHBs. Each funder contracts with lead suppliers for the provision of home and community support services. The lead suppliers may in turn sub-contract with the provider of the physical service. Suppliers invoice the funders for services rendered, so the client receiving the services is not charged.
35. All of the funders set the fee they pay for the provision of support services. As levels of funding are unilaterally set by the funders, competition for contracts amongst suppliers is based on the quality of service and performance of a supplier.
36. The contracts that funders enter into with lead suppliers all contain provisions that relate to quality control measures and their audit. The performance of suppliers is assessed against these. This mechanism of quality control is in addition to the minimum legislative standards¹⁹ that suppliers are required to meet (and against which they are also audited).

ACC

37. The ACC is a Crown agency responsible for the administration of the statutory insurance scheme for accident-related injuries and disabilities. The ACC funds suppliers that provide injury care and rehabilitation to clients.
38. The ACC's funding is based on a "fee for service" model and is determined by a formula in its contracts with suppliers. However, in 2018 it intends to move towards a "case mixed" model which will allocate a set amount of funding to a client based on a number of factors (including type of injury) rather than the time-based model that it currently uses. The levels of funding will still be set by the ACC. The level and method of allocating funding is uniform across all contracts and across all regions and prices are set by the ACC. The ACC consults with suppliers when setting prices; however, suppliers are not able to negotiate prices.²⁰

Ministry of Health

39. The Ministry of Health funds suppliers to provide home support services for clients under the age of 65 and support services for clients with disabilities.
40. The Ministry of Health has 56 contracted suppliers and although its contracts do not tie suppliers to a certain region,²¹ the majority of its suppliers operate in only a single region.²²

¹⁹ Health and Disability Services Standards 2008.

²⁰ Commerce Commission interview with the ACC (9 August 2017).

²¹ Commerce Commission interview with Ministry of Health (4 August 2017).

²² Table showing contracted suppliers and clients by region attached to email from Ministry of Health to Commerce Commission dated 7 August 2017.

41. The suppliers are all contracted for a five year term which is due to expire in 2020 with the option of a two year extension. The Ministry of Health has not tendered its contracts for more than 20 years and has previously rolled over its contracts.²³
42. The Ministry of Health level of funding is based on a “fee for service” model that is uniform across all contracts and regions and is increased annually by the same proportion across all regions. The rate is determined by the Ministry of Health and suppliers do not have an opportunity to negotiate the price that is set.²⁴

DHBs

43. New Zealand’s 20 DHBs fund suppliers to provide home and community support services in their respective regions for clients over the age of 65 or who have an age-related disability. The DHBs provide this funding on behalf of the Ministry of Health.
44. As the acquisition will lead to the greatest aggregation in the Mid Central, Whanganui and Taranaki DHB regions we interviewed and sought information only from these DHBs.
45. These three DHBs had not tendered their contracts for at least the last six years. The Taranaki DHB is looking to tender its contracts towards the end of 2017.
46. The three DHBs advised that their contracts provide funding based on a “fee for service” model which is set by each DHB and is uncapped. The level of funding allocated to suppliers is dependent on the amount of funding a DHB receives from the Ministry of Health. The three DHBs advised that the length of their contracts are all one year and the contracts are rolled over each year.

Private funders

47. Private funders such as health insurance companies occasionally provide defined funding for their customers. In addition, private persons procure home care over and above what is provided publicly. This care is either part-funded by their insurer or fully funded privately.
48. Healthcare NZ’s proportion of home and community support revenues obtained from private funding is less than []% and Geneva’s is less than []%.²⁵

Market definition

Our approach to market definition

49. Market definition is a tool that provides a framework to help identify and assess the close competitive constraints the merged entity would likely face. In the end, however, what matters is that we consider all relevant competitive constraints and the extent of those constraints.²⁶

²³ Commerce Commission interview with Ministry of Health (4 August 2017).

²⁴ Commerce Commission interview with Ministry of Health (4 August 2017).

²⁵ Clearance application from Healthcare NZ at [94].

²⁶ Commerce Commission, *Mergers and Acquisitions Guidelines*, above n2 at [3.12].

50. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

The Applicant's view of the relevant markets

51. Healthcare NZ submitted that the relevant market is that for the national provision of home and community support services.²⁷ It submitted that this approach is appropriate because of the significant degree of supply side substitution that exists across the product, geographic, functional and customer levels of the home and community support services market. This is because support people who provide the services are a key resource and they do not need have to be trained nurses (although some nurses are employed by each of the entities) and therefore there is nothing to prevent:
- 51.1 suppliers switching from providing one type of home and community support service to another;
 - 51.2 a supplier commencing provision of services in another region;
 - 51.3 a supplier competing for another contract for funding; or
 - 51.4 a sub-contractor becoming a lead supplier of services.²⁸

Our view of the relevant markets

52. We have assessed the effects of this merger on the provision of home and community support services as the major overlap arising from the acquisition is with respect to these services. We have also considered the options available to each type of funder separately.
53. In general, the ACC awards its contracts on a national basis. That is, a successful provider to the ACC will provide services across the country under a single national contract. The ACC has three national suppliers, Healthcare NZ, Geneva and Access. In areas where demand for services is high such as Auckland, Waikato and Bay of Plenty, the ACC has awarded region specific contracts to two suppliers.
54. The Ministry of Health contracts with 56 providers that, from evidence provided to us by the Ministry of Health, are allocated by specific DHB regional boundaries.²⁹ Only Healthcare NZ, Geneva and Access provide services for the Ministry of Health across the majority of DHB regions.
55. The DHBs contract for the provision of their services within their regional boundaries and the alternative suppliers available to the DHBs differ depending on the suppliers present in that (or adjacent) region. Similarly, private funders contract for the supply of services in specific regions.

²⁷ Clearance application from Healthcare NZ at [35].

²⁸ Clearance application from Healthcare NZ at [36]-[38].

²⁹ Email from Ministry of Health to Commerce Commission dated 7 August 2017.

56. We have therefore considered the extent to which the aggregation would reduce the options available for suppliers of home and community support services to the ACC on a national basis and the Ministry of Health and DHBs in respect of specific regions.

With and without scenarios

57. We compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.³⁰

With the acquisition

58. []³¹

Without the acquisition

59. Healthcare NZ submitted that, as it was the successful bidder in a competitive sales process, if the acquisition was not to proceed, Geneva would continue to operate independently but under new ownership.³²

60. Geneva informed us that [

] ³³[]³⁴

61. We agree with Healthcare NZ's submission that if the acquisition does not proceed, Geneva would likely be acquired by another organisation, and for the purposes of this determination we have adopted a without-the-acquisition scenario which is equivalent to the status quo.

How the acquisition could substantially lessen competition

62. Our assessment of the proposed acquisition has considered the unilateral and co-ordinated effects that might result from the acquisition. That is, whether the merged entity could increase prices and/or reduce the quality and/or range of the services it provides by, for example, pushing back on tendered pricing by refusing to re-sign incumbent contracts with suppliers, or refusing to offer services until a higher price is agreed to by the supplier.

³⁰ Commerce Commission, *Mergers and Acquisitions Guidelines*, above n2 at [2.33].

³¹ Healthcare NZ "Geneva & Healthcare New Zealand Holdings Limited Acquisition and Investment" (26 March 2017); Healthcare NZ "Geneva & Healthcare New Zealand Holdings Limited Acquisition and Investment - Due Diligence Report" (26 March 2017); Healthcare NZ "Excerpts from Chief Executive's Commentary to the Board" (11 April 2017 to 8 August 2017); Healthcare NZ "Minutes of the Board of Healthcare New Zealand Holdings Limited" (27 June 2017).

³² Clearance application from Healthcare NZ at [20].

³³ []

³⁴ Commerce Commission interview with Geneva (7 August 2017).

Competition analysis

63. To assess whether this acquisition is likely to result in a substantial lessening of competition, we first considered whether Healthcare NZ would have the ability post-acquisition to procure a higher level of funding and/or provide a reduced level or range of services to clients. Secondly, we assessed whether the funders have countervailing buyer power that they could wield or threaten to wield in order to prevent this from occurring.
64. We interviewed and sought information from the ACC and Ministry of Health to determine the effects of the acquisition of their funded service across all regions in New Zealand.
65. As previously noted, the acquisition will lead to the greatest aggregation in the Mid Central, Whanganui and Taranaki DHB regions, so we interviewed and sought information from these three DHBs. If there is no substantial lessening of competition in these regions, then it is unlikely that there would be a substantial lessening of competition in the remaining regions.

Healthcare NZ's submission

66. Healthcare NZ submitted that the acquisition will not provide Healthcare NZ with the ability to increase prices or reduce the service provided for a number of reasons.
 - 66.1 The ACC will have many options available to it to secure a competitive outcome when it re-tenders the home and community support contracts in 2018. In the presence of so many options, the ACC will have significant countervailing power and will be able to structure (or threaten to structure) the lead supplier contracts to constrain Healthcare NZ.³⁵
 - 66.2 The parties' current contracts with the DHBs are already set so the acquisition will not provide Healthcare NZ with the ability to increase prices or decrease service quality under existing contracts.³⁶
 - 66.3 At subsequent tender rounds in any of the DHB regions (more specifically in the Taranaki, Whanganui or Mid Central DHB regions where the acquisition will result in the most aggregation) Access will continue to provide an effective constraint.³⁷

Existing competition

67. The suppliers of home and community support services compete to win public tenders. As such, these markets are largely characterised by competition amongst suppliers for funding contracts. Private purchasers of these services can also choose between those suppliers that are currently supplying public funders in each region.

³⁵ Clearance application from Healthcare NZ at [67 to 69].

³⁶ Clearance application from Healthcare NZ at [79].

³⁷ Clearance application from Healthcare NZ at [80 to 81].

68. We have assessed whether funders will have effective alternative service suppliers to the merged entity at the next tender round such that the merged entity would not find it profitable to increase prices (e.g. by threatening to refuse to renew a contract) or to lower the quality and range of its services.

ACC

69. The ACC last went to tender for lead suppliers for home and community support services in 2012. It received applications from [] suppliers, of which [] were shortlisted to the second stage and six lead suppliers were eventually successful – four national suppliers including the merging parties,³⁸ as well as two regional suppliers for high demand regions in Auckland and the Waikato/Bay of Plenty regions.³⁹ The six lead suppliers were contracted by the ACC in September 2012 and those contracts have been extended through to 31 August 2018, at which point the ACC intends to retender for lead suppliers.⁴⁰ One of the successful suppliers, Medibank, has been subsequently acquired by Healthcare NZ.
70. Table 1 shows the suppliers currently contracted by the ACC to provide home and community support services across New Zealand; the regions in which they are present; and the percentage of the total funding provided to them for the 2016/2017 financial year.

Table 1: Percentage of funding allocated to suppliers by the ACC for 2016/2017 financial year

Supplier	Regions present	Percentage of ACC funding (%)
Healthcare NZ	Nationwide	[]
Geneva Healthcare	Nationwide	[]
<i>Merged entity</i>	<i>Nationwide</i>	<i>[]</i>
Access Home Health	Nationwide	[]
Presbyterian Support Northern	Auckland, Waikato, Bay of Plenty	[]
Royal District Nursing Service	Auckland	[]
	Total	100

Source: The ACC

71. Although the ACC tends to contract national suppliers, it told us that it “cannot think of an area in New Zealand where there is no other choice of supplier” and if

³⁸ The four successful national suppliers in the 2012 ACC tender were Healthcare NZ, Geneva, Medibank and Access. Medibank has subsequently been acquired by Solora.

³⁹ The two successful regional suppliers in the 2012 ACC tender were Royal District Nursing Service (Auckland) and Presbyterian Support Northern (Auckland, Waikato and Bay of Plenty).

⁴⁰ Commerce Commission interview with the ACC (9 August 2017).

Healthcare NZ were to (or were to threaten to) withdraw its contract it believes that it would have adequate options available to it, []⁴¹

72. When the ACC goes to tender for its supply contracts in 2018 it appears that it will have an adequate number of suppliers to choose from given that it received applications from [] suppliers for its tender in 2012, of which it shortlisted [] to the second stage.⁴² Further, the extensive use of sub-contracting in this sector allows suppliers to scale up relatively quickly to meet the requirements of funders. As such, we consider that the ACC has sufficient alternative suppliers to prevent the merged entity increasing prices or lowering the quality and range of its services.

73. []⁴³

Ministry of Health and DHB funded suppliers in the Mid Central, Whanganui and Taranaki DHB regions

74. The proposed acquisition would lead to the most aggregation for suppliers of home and community support services funded by the relevant DHBs in the Mid Central, Whanganui and Taranaki DHB regions, where both Geneva and Healthcare NZ currently supply the relevant services.⁴⁴ The Taranaki DHB contracts with five suppliers,⁴⁵ the Whanganui DHB with four suppliers⁴⁶ and the Mid Central DHB with six suppliers.⁴⁷ Table 2 shows the lead suppliers contracted by the DHBs to provide home and community support services in these three DHB regions. We have also shown the suppliers contracted by the Ministry of Health to provide home and community support services in these three regions. The data below is as at July/August 2017.

⁴¹ Commerce Commission interview with the ACC (9 August 2017).

⁴² Commerce Commission interview with the ACC (9 August 2017).

⁴³ Commerce Commission interview with the ACC (9 August 2017).

⁴⁴ Clearance application from Healthcare NZ at [74].

⁴⁵ Commerce Commission interview with Taranaki DHB (7 August 2017).

⁴⁶ Commerce Commission interview with Whanganui DHB (10 August 2017).

⁴⁷ Commerce Commission interview with Mid Central DHB (11 August 2017).

Table 2: Market shares of Ministry of Health and DHB funded suppliers in the Mid Central, Whanganui and Taranaki DHB regions

Suppliers		Percentage of clients serviced by MoH (%) ⁴⁸	Percentage of DHB funding received (%)
Mid Central DHB region	Healthcare NZ	[]	[]
	Geneva	[]	[]
	<i>Merged entity</i>	[]	[]
	Lavender Blue	[]	[]
	Access	[]	[]
	Healthvision	[]	[]
	Waiapu Anglican Social Services Trust	[]	[]
	Care on Call	[]	[]
	Total	100	100
Whanganui DHB region	Healthcare NZ	[]	[]
	Geneva	[]	[]
	<i>Merged entity</i>	[]	[]
	Access	[]	[]
	Te Oranganui Health Corporation	[]	[]
	Total	100	100
Taranaki DHB region	Healthcare NZ	[]	[]
	Geneva	[]	[]
	<i>Merged entity</i>	[]	[]
	Access	[]	[]
	Omahanui Homecare	[]	[]
	The Open Home Foundation of New Zealand	[]	[]
	Age Care Central	[]	[]
	Tui Ora Limited ⁴⁹	[]	[]
	Total	100	100

Source: Ministry of Health, Mid Central, Whanganui and Taranaki DHBs.

75. The Ministry of Health considers that there is a good coverage of suppliers across all regions and that the number of suppliers is sufficient and “more than enough”. It believes the acquisition is unlikely to reduce its range of options as all of the other

⁴⁸ The Ministry provides funding to suppliers that operate over a number of regions and does not provide funding on a regional basis; therefore we cannot show the amount of funding provided to each supplier broken down by region. We have therefore shown the market share by proportion of clients.

⁴⁹ Tui Ora Limited exited its contract with the Taranaki DHB early in the 2016/2017 financial year.

suppliers are capable of providing personal care and household support which are the major components of Home and Community Support Services.⁵⁰

76. [] identified that transitioning from one supplier to another after a RFP or because of poor performance can be difficult; however, it acknowledged that there are other options available to it if it was to look to contract with a new supplier.⁵¹

77. The Whanganui DHB told us that [

]. Sponsoring entry of a supplier from another region could also be an option. [

].⁵²

78. The Taranaki DHB acknowledged that [

].⁵³

79. The Ministry of Health and the three DHBs would appear to have sufficient alternative suppliers available to them, who could also expand their supply through the use of sub-contracting, which would prevent the merged entity increasing prices or lowering the quality and range of its services.

Competition for private healthcare contracts

80. A very small proportion of home and community support services are provided privately. These services are privately funded as an exception when patients seek services not covered by public funding or have a preference for a supplier not contracted with a public funder.

81. There are a broad range of private companies and individual customers that contract small volumes of home and community support services. Apart from the merging parties, private funders have access to the suppliers that currently operate in their region – which include Access and regional suppliers (such as Nurse Maude in Canterbury). While it is difficult to survey this disparate customer group, for completeness we have spoken to three larger private companies: Southern Cross, Ryman Healthcare and Bupa.

81.1 Southern Cross, which co-funds Home and Community Support Services with its insured clients, did not raise any concerns and told us that it contracts

⁵⁰ Commerce Commission interview with Ministry of Health (4 August 2017).

⁵¹ Commerce Commission interview with [].

⁵² Commerce Commission interview with Whanganui DHB (10 August 2017).

⁵³ Commerce Commission interview with Taranaki DHB (7 August 2017).

locally with both national and regional suppliers. It doubts it would run out of options in a region so long as [] was present in that region.⁵⁴ The Southern Cross Hospitals that were consulted by Southern Cross management did not raise any concerns either.⁵⁵

81.2 Ryman Healthcare does not purchase Home and Community Support Services and, although Healthcare NZ and Geneva staff provide publicly funded services to Ryman Healthcare clients in its rest homes, it has very limited interaction with them.⁵⁶

81.3 Bupa advised that it purchases recruitment services from Geneva but does not have any formal arrangements with Healthcare NZ. Its customers may purchase private home support although most is funded publicly. As it provides a small amount of Home and Community Support Services itself into its retirement villages, it could extend these services within their retirement villages if there was demand. Bupa advised that there are other suppliers available for it to use and therefore it does not see this acquisition as creating risk.⁵⁷

82. Private healthcare funders can choose between those suppliers operating in a particular region. Our evidence suggests that there are multiple suppliers operating in each region. Public funders are of the view that they will have adequate options in terms of suppliers available to it post-acquisition. We therefore consider that the level of existing competition to supply private funders is likely to be sufficient to constrain the merged entity.

Pricing and quality controls for home and community support services

Pricing controls

83. The pricing and quality of services in these markets are strictly controlled by funders.

84. None of the funders we spoke to had concerns relating to Healthcare NZ using any market power post-acquisition to increase the level of funding it receives or to reduce the quality of its service. This is largely because, as described in the section on funders, each of the funders sets its fees and is not open to negotiation.

85. Given that the ACC, Ministry of Health and DHBs would have sufficient alternative suppliers available to them post-acquisition, we do not consider it likely that the merged entity would have the ability to raise prices, for example by threatening to not renew a contract.

⁵⁴ Access is not present in the Gisborne region however Presbyterian Support Northern and Care on Call are present in this region.

⁵⁵ Commerce Commission interview with Southern Cross (21 August 2017).

⁵⁶ Commerce Commission interview with Ryman Healthcare (24 August 2017).

⁵⁷ Commerce Commission interview with Bupa (29 August 2017) and Email from Bupa to the Commerce Commission (30 August 2017). The pricing and quality of services in these markets are strictly controlled by funders.

86. Despite this, [] told us that the acquisition might provide Healthcare NZ with an ability to initially decrease the amount it requests for funding in order to price other suppliers out of the market. This would give Healthcare NZ greater influence over funding levels due to the funders having a lack of choice of suppliers. This greater influence would then in time give Healthcare NZ the ability to manage up the level of funding it receives from funders.
87. However, [] acknowledged that the funders have the ability to tailor their contracts and, from talking to the funders, we found that there is no ability for suppliers to negotiate funding levels.⁵⁸ Therefore, it is unlikely that the merged entity would be able to demand prices above what the funder has set in an attempt to recoup any losses it would have sustained through such a strategy.

Quality controls

88. All of the industry participants we spoke to did not think that Healthcare NZ would be able to offer a reduced quality of service. This is due to the regulatory and contractual quality standards that suppliers are required to meet.
89. All suppliers of home and community support services are required to be certified⁵⁹ and suppliers have their services audited against legislative standards⁶⁰ at least every three years. The legislative standards provide a minimum set of standards that suppliers are required to meet.
90. In addition, funders also have their own quality control mechanisms.
- 90.1 The ACC has a KPI-based reporting system that suppliers are required to submit information to on a quarterly basis. This reporting system is built into its contracts with suppliers. The ACC also has case managers that review performance. It told us that suppliers are “responsive” to its feedback on quality but it always has “the ultimate threat of withdrawal of contract”, although it has never had to do this. Quality control processes of suppliers was a factor the ACC took into account when it went to tender for suppliers in 2012.⁶¹ The Ministry of Health [].
The Ministry [].⁶²
- 90.2 The Taranaki DHB told us that a drop in quality of service would be picked up in a supplier’s certification audit process which would not be in the supplier’s interest as it would mean they would have more frequent audits. The

⁵⁸ Commerce Commission interview with [].

⁵⁹ Under the Health and Disability Services (Safety) Act 2001.

⁶⁰ Health and Disability Services Standards 2008.

⁶¹ Commerce Commission interview with the ACC (9 August 2017).

⁶² Commerce Commission interview with Ministry of Health (4 August 2017).

Whanganui DHB told us that if a supplier dropped its level of quality it could look to contract with other suppliers instead.⁶³

91. Given that the ACC, Ministry of Health and DHBs appear to have sufficient alternatives available to them post-acquisition, we do not consider it likely that the merged entity would have the ability to provide a lower quality of service (without the threat of a funder replacing the merged entity with another supplier).

Countervailing power

92. Although it is not necessary to reach a view on countervailing power given our conclusions on existing competition, the evidence before us suggests that certain funders may be able to exert countervailing power should there be any attempt to raise prices or otherwise reduce competition.
93. Countervailing power is the ability of customers to exert substantial influence on negotiations with their suppliers. This is more than an ability to switch suppliers – but rather special characteristics that give that customer the ability to substantially influence the price the merged firm would charge.
94. The ACC and the DHBs we spoke with told us that they set their own prices and suppliers are not able to negotiate on price.
95. Funders have told us that in addition to switching to alternative suppliers, they have the ability to self-supply these services, as well as sponsor entry by a regional supplier from another region. For example:
- 95.1 Southern Cross (a private funder) told us that if it had concerns about lack of staff it would increase its own quota that it uses to self-supply;⁶⁴
- 95.2 the Whanganui DHB told us that if the situation arose that it did not have any or enough suppliers, then it could provide services itself rather than contracting with a supplier,⁶⁵ and
- 95.3 [].⁶⁶

Level of constraint from potential entry and expansion

96. It is not necessary to conclude on potential entry since we consider that existing competition, price and quality controls and the countervailing power of funders are likely to be sufficient to constrain the merged entity. However, funders did tell us that they would consider contracting with suppliers that were not currently active in a region.

⁶³ Commerce Commission interviews with Taranaki DHB (7 August 2017) and Whanganui DHB (10 August 2017).

⁶⁴ Commerce Commission interview with Southern Cross (21 August 2017).

⁶⁵ Commerce Commission interview with Whanganui DHB (10 August 2017).

⁶⁶ Commerce Commission interview with [].

97. Although good historical performance and reputation is a factor that funders look for in potential lead suppliers for a region, we were told by funders that suppliers can develop these by performing well in another region. An example of this is The Florence Nightingale Agency which previously supplied services for the Ministry of Health in Nelson/Marlborough but worked with the Ministry to expand into Canterbury in 2016.⁶⁷
98. We also understand that trained workers in this industry can easily switch between suppliers, and some suppliers also train their own workers.⁶⁸ Further, funders are willing to allow suppliers to sub-contract with other separate suppliers (that do not have a presence in a particular region) to allow them to “fill gaps” in service availability in a region.

Coordinated effects

99. [] told us that Healthcare NZ and Access may be able to use their increased market power to tacitly collude.⁶⁹ While this acquisition reduces the number of suppliers, this market has characteristics which would suggest tacit coordination is unlikely. For instance:
- 99.1 levels of funding are unilaterally set by funders and competition is therefore based around quality of service, on which it is much more difficult to coordinate behaviour; and
- 99.2 private bids for large, bulky tenders decrease the ease of a coordinated response and increase the incentive to cheat since the benefits of cheating on an agreement and winning a large contract are significant.
100. For these reasons, we do not consider that the proposed merger is likely to increase the likelihood of coordinated behaviour in the affected markets.

Overall conclusion

101. We are satisfied that the proposed acquisition is unlikely to substantially lessen competition in any market. We consider that the merged entity would not have the ability to increase prices and/or offer a reduced quality of service because each type of funder has sufficient alternatives to the merged entity.
102. In addition some funders are able to exert countervailing power by self-supplying, sponsoring entry by out of region suppliers, and allowing suppliers to sub-contract with other suppliers.

⁶⁷ Table showing contracted suppliers and clients by region attached to email from Ministry of Health to Commerce Commission dated 7 August 2017.

⁶⁸ The NZQA provides qualifications for trained workers.

⁶⁹ Commerce Commission interview with [].

Determination on notice of clearance

103. The Commission 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.
104. Under s 66(3)(a) of the Commerce Act 1986, the Commission gives clearance to Healthcare of New Zealand Holdings Limited to acquire 100% of the shares in Geneva Healthcare Limited and its related entities, Geneva Health Technology Limited, Geneva Care Limited, Geneva Clean Limited and My Skill Limited from Geneva Group Holdings Limited.

Dated this 1 September 2017

Dr Mark Berry
Chairman