

## COMMERCE ACT 1986: BUSINESS ACQUISITION

### SECTION 66: NOTICE SEEKING CLEARANCE

17 December 2014

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 Commerce Commission (*Commission*) declined Connor Healthcare Limited's (*Connor*) application for clearance to acquire, by way of a takeover offer, all of the shares in Acurity Health Group Limited (*Acurity*) that it did not already own (*Acquisition*) (*Original Application*).<sup>1</sup> All details set out in the Original Application apply to this notice, except as modified below. A copy of the public version of the Original Application is at Appendix 1.

#### **The Acquisition**

- 2 Connor, which is 100% owned by Evolution Healthcare (NZ) Pty Ltd (*Evolution*), currently owns 11.7% of the shares in Acurity.
- 3 Connor is seeking to carry out the Acquisition through a takeover offer regulated by the Takeovers Code. On settlement of the takeover offer, Austron will subscribe for 75% of the shares in Connor, which means that Evolution will own 25% of Connor. Once the takeover is complete, Connor will own 100% of Acurity. A transaction timeline is set out below at paragraph 21.

#### **Application for clearance**

- 4 Connor seeks clearance for the Acquisition as set out above (and in the Original Application), except subject to an undertaking the effect of which will be that Evolution returns to its pre-offer equivalent shareholding in Acurity, by reducing its shareholding in Connor to 11.7% (*Proposed Undertaking*). The Proposed Undertaking is attached at Appendix 2, and described in more detail below.
- 5 The Acquisition will not lessen competition because the Proposed Undertaking will remove any aggregation that would otherwise occur in relevant markets due to the Acquisition by virtue of Evolution owning Boulcott Hospital and Acurity owning Bowen and Wakefield Hospitals.
- 6 Once the Proposed Undertaking has been effected, and Evolution's shareholding in Connor is 11.7%, Evolution will have an option to increase its shareholding in Connor, the exercise of which will be conditional (neither party having the ability to waive the condition) on:

- 6.1 Evolution obtaining clearance or authorisation from the Commission to increase its shareholding; or

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<sup>1</sup> The Original Application was dated 27 August 2014.

- 6.2 the final determination of any appeal resulting in the Commission's decision to decline the Original Application being reversed.
- 7 All of the arrangements giving effect to the Proposed Undertaking will be encapsulated in a formal agreement or agreements, which will be provided to the Commission. Other than to seek to meet the conditions that would allow Evolution to exercise the option described above at paragraph 6, Connor, Evolution and Austron have no collateral arrangements regarding their dealings in respect of their shareholdings in Connor or Acurity outside of the agreements disclosed to the Commission. Furthermore, no such collateral arrangements are contemplated in relation to the option.
- 8 Connor requests that the Commission make its decision on this clearance application as soon as possible to enable all outstanding conditions to the takeover to be satisfied by 3pm on Monday 22 December.

***Nature of the Proposed Undertaking***

- 9 Evolution will dispose of any assets (contractual rights) and/or shares to the effect that by the end of one month from completion of the Acquisition (which is likely to be around 19 January 2015), its shareholding in Connor reduces from 25% to 11.7%, with the remaining shares to be held by Austron.
- 10 There is a range of divestment mechanisms that Evolution could use to effect the mandated reduction in its shareholding (the final selection of which will depend on commercial considerations such as tax implications). For example, Evolution could:
- 10.1 facilitate Austron being issued additional shares and thus reduce Evolution's shareholding to 11.7%, by disposing of contractual rights that would otherwise prevent such dilution. This mechanism could be facilitated by a loan from Evolution to Connor. If such a loan were to proceed, it would be offered on terms that confer no greater negative control than would arise if the current arms-length commercial lending arrangement between ASB Bank Limited (**ASB**) and Connor were adopted and in any event will be subordinated to ASB as the senior lender to the effect that any such rights cannot be exercised without ASB's consent. The role of ASB as Senior Lender effectively means that any negative control rights can only be exercised in circumstances where credit is genuinely at issue; or
- 10.2 sell shares to Austron to reduce Evolution's shareholding to 11.7%. Again, that sale could be facilitated by a loan from Evolution to Austron (on the same basis as the loan described at paragraph 10.1 above). Alternatively, Austron could fund any such share purchase from a source other than Evolution.
- 11 During the period following settlement of the takeover, and once the Proposed Undertaking has been effected, Evolution will not have a "substantial degree of influence" over Acurity (via Connor) such that any adverse effect on competition will be likely to arise.
- 12 First, as the owner of a maximum of 11.7% of the shares of Connor, Evolution will not have a right to appoint any directors to the board of Connor, or its subsidiaries (whereas the Acquisition would otherwise give Evolution the right to appoint two of the 6 directors on the board of Connor). Austron, Evolution and Connor have agreed that within one business day following settlement of the takeover offer the

constitution of Connor<sup>2</sup> will be changed such that Evolution will not be entitled to appoint directors to the Connor board (and the two current directors appointed by Evolution will resign).<sup>3</sup>

- 13 Secondly, Austron, Evolution and Connor have agreed that Connor's constitution will be changed within one business day following settlement of the takeover offer to ensure Evolution has no veto rights<sup>4</sup> that may give rise to control or influence over the commercial strategy or competitive effectiveness of Connor or its subsidiaries. Specifically, veto rights in relation to the following will be removed from the constitution:
- 13.1 a sale or purchase of any assets the value of which is more than 10% of the value of the Group's assets before the sale or purchase (paragraph (e));
  - 13.2 non-budgeted third party borrowing of amounts in excess of 10% of the value of the Group's assets (paragraph (f));
  - 13.3 a non-budgeted variation of third party debt financing arrangements in respect of which the liability exceeds 10% of the value before the variation of the Group's assets (paragraph (g));
  - 13.4 a significant variation in the Group's budget for a particular financial year from the preceding financial year (paragraph (h));
  - 13.5 non-budgeted capital expenditure in excess of \$1 million (paragraph (i));
  - 13.6 change to the remuneration, or other material term of employment, of any of Connor's senior management (paragraph (k)); and
  - 13.7 the employment or dismissal of any member of Connor's senior management (paragraphs (l) and (m)).
- 14 The right to make appointments to a company's board of directors, along with the matters listed above, represent all relevant matters that could give rise to control or influence over the commercial strategy or competitive effectiveness of Connor and its subsidiaries, none of which Evolution will hold as a result of the divestment.
- 15 Evolution will retain a minimum set of veto rights aimed primarily at protecting Evolution, as a minority shareholder, from oppressive conduct by Austron as the majority shareholder. They do not relate to setting Connor or its subsidiaries' strategic or competitive direction. Instead they operate to replicate the type of protection from which Evolution would benefit in the counterfactual, as a minority shareholder in a listed company, although Evolution's view is that its exposure as a minority is significantly greater following the divestment than if the listed company counterfactual continued.

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<sup>2</sup> The constitution was provided in draft to the Commission in connection with the Original Application.

<sup>3</sup> Note that it is not possible for Connor's constitution to be changed until following settlement of the takeover (currently scheduled to take place on 23 December) because Connor is required to adopt the constitution that has been previously released to the market.

<sup>4</sup> Restricted Actions set out in Schedule 1 of the constitution, which pursuant to the Proposed Undertaking will require the approval of the holders of a majority of the Group A shares and the holders of a majority of the Group B shares.

- 16 Evolution would retain veto rights regarding:
- 16.1 issuing new equity, and related matters (paragraphs (a) and (b));
  - 16.2 payment of distributions in the two years following the constitution's adoption (paragraph (c)); and
  - 16.3 changes to the constitution (paragraph (d)).
- 17 These veto rights relate solely to shareholder matters, primarily capital structure. They are necessary minimum protections for Evolution in a world where it will not have the protection of independent directors represented on a listed company's board, as required by Rule 3.3 of the NZX Limited Listing Rules (**Listing Rules**).
- 18 Evolution would also retain veto rights regarding:
- 18.1 matters relating to related party transactions (paragraph (j)); and
  - 18.2 material changes in the business activities of Connor (paragraph (n)).
- 19 These rights cover subject-matter that the Listing Rules treat as worthy of special protection. Specifically, Rules 9.2.1 and 9.1.1 provide that certain related party transactions and transactions that would change the "essential nature of the business" of an issuer are subject to approval by general, or special, resolution. Again, the veto rights merely seek to substitute for basic protections provided to minority investors in public companies under the Listing Rules.
- 20 Connor will provide to the Commission a copy of the amended constitution within one business day of its adoption.

### **Timeline**

21 The transaction timeline for the Acquisition is as follows:

<b>Date</b>	<b>Action</b>
22 December	(By 3pm) Connor declares its takeover offer unconditional.  Connor commences the compulsory acquisition of the remaining 2.356% of Acurity shares (pursuant to the Takeovers Code).
23 December <i>(Estimated. Must occur within 7 days of 22 December)</i>	Connor settles takeover and becomes the holder of 97.644% of the shares in Acurity.  Austron becomes the holder of 75% of the shares in Connor (with the remaining 25% held by Evolution).  Austron appoints four members to the board of Connor (in addition to the existing two Evolution directors).  Connor adopts a constitution in the form previously released to the market.
24 December <i>(Or within 1 business day of the date on which Connor settles the takeover.)</i>	Connor's constitution is amended as described in paragraphs 12 to 14 above.  Evolution's two appointees to Connor's board resign.
22 December to 19 January	Connor completes the compulsory acquisition of the remaining 2.356% of Acurity shares. By 19 January 2015, Acurity becomes wholly owned by Connor.
After 19 January	Divestment can occur, subject to receipt of Takeovers Panel exemption (which, in practice, is unlikely to occur until early February).

### **The Proposed Undertaking addresses the Commission's concerns**

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

- 22.1 there is no composition risk – Austron has committed to increase its shareholding, and effecting the necessary disposal or disposals is practically achievable within the one month divestment period;
- 22.2 there is no asset risk – the Proposed Undertaking prescribes a short divestment period (one month from completion of the Acquisition), throughout which Evolution would not take up any rights to appoint directors in Acurity to which it will be entitled as a result of the Acquisition; and
- 22.3 there is no purchaser risk – Austron is committed to increasing its shareholding and carries no associated competition risk.

**DECLARATION**

**THIS NOTICE** is given by Connor Healthcare Limited.

I, BEN TYNNE, 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 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 JOSEPH TYNNE, DIRECTOR

Sign:  Date: 17/12/14

**APPENDIX 1 – PUBLIC VERSION OF THE ORIGINAL APPLICATION**

[Attached as a separate document.]

## **APPENDIX 2 – PROPOSED UNDERTAKING**

DEED dated 17<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, with the remainder held by Austron Limited (***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  
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 Print Name and Title