

21 March 2019

Competition and Consumer Policy  
Ministry of Business, Innovation and Employment  
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To whom it may concern

### **Submissions regarding MBIE review of s36 of the Commerce Act**

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1. Pegasus Health (Charitable) Limited (**Pegasus Health**) is a primary care network performing the function of a Primary Health Organisation as well as supporting general practices and community based health providers within Canterbury to deliver quality health care to over 445,000 enrolled patients.
2. We provide a range of services for the community focused on improving the health and wellbeing of our population and provide essential 24 hour care, 365 days per year for the population of Canterbury through the 24 Hour Surgery.

#### **Availability of authorisations for unilateral conduct (Question 14)**

3. Our submission focuses on question 14 of the MBIE discussion paper (review of section 36 of the Commerce Act and other matters) – should authorisation should be available for unilateral conduct?
4. As noted in the discussion paper, the Commerce Commission (**Commission**) has the power to grant authorisations for practices that would or might breach certain sections of the Commerce Act 1986 (**Act**), if the Commission is satisfied that the practice in question would result in public benefits that outweigh the harm to competition.
5. Authorisation is currently available under the Act for mergers or agreements which are anti-competitive, but has not been available for unilateral anticompetitive conduct. Authorisation has been introduced in Australia for unilateral anticompetitive conduct with the shift in Australia to an effects based test. The discussion paper notes that the Commission believes that authorisation should be available for unilateral conduct but that stakeholders see the authorisation process as expensive and time-consuming.
6. Pegasus Health agrees that if section 36 shifts to an effects based test, then authorisation should be available for section 36 unilateral anticompetitive conduct. However to provide businesses with sufficient certainty and to be accessible, the authorisation process should:
  - (a) allow an interim authorisation so the applicant can continue to engage in conduct while the application is considered (similar to what is available in Australia under their authorisation process);
  - (b) provide for a timely outcome with sufficient resources available within the Commission so that the 80 working day (standard authorisations) and 40 working day (streamlined authorisations) determination timeframes are met; and

- (c) have a more affordable application fee than the current application fee of \$36,800 (including GST) with the ability for the Commission to waive all or part of the fee in certain circumstances.

#### *Interim authorisation*

7. An authorisation process that allows for an interim authorisation is appropriate where legislation changes from an existing test to a new test. If section 36 is changed to an effects based test, an interim authorisation would allow businesses that are *per se* in breach of the new test to continue to operate while their application is assessed.

#### *Timeliness*

8. We have analysed all the section 58 (agreements) and section 67 (mergers) authorisation applications that are published on the MBIE website. We note the following points.
  - (a) The Commission has committed to deciding applications for authorisations within 80 working days for a standard authorisation or 40 working days for a streamlined authorisation.
  - (b) Since 2010, the 40 working day target was exceeded in all of the published cases of streamlined authorisation applications under section 58 of the Act. The length of time for determination ranged from 61 to 127 working days.
  - (c) The length of time for determinations for an authorisation application under section 67 for the same period ranged from 46 to 265 working days.
  - (d) We have attached a table summarising the publically available authorisation application determination timeframes for applications made after January 2010.
9. The current turnaround times for determining an authorisation application are excessively lengthy and create considerable uncertainty for businesses.

#### *Application Fee*

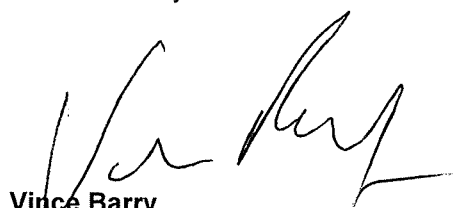
10. The current fee for applying for an authorisation is \$36,800. This is considerably higher than the fee of \$7,500 for an authorisation application in Australia and is a significant cost to a business. The New Zealand fee is set at a level that will deter the filing of applications and will therefore have adverse effect on pro-competitive business activities.
11. Additionally in Australia the ACCC has the ability to waive the authorisation fee (in whole or in part) for applications for authorisation for non-merger conduct. The ACCC may waive the lodgement fee if it is satisfied that the imposition of the entire fee would impose an unduly onerous burden on an applicant.
12. In considering the request, the ACCC will take into account all relevant information, including factors such as the applicant's income, liabilities and assets, whether the payment of the fee will cause the applicant financial hardship and whether the applicant a not-for-profit organisation. The ACCC is not able to waive the lodgement fee for notifications or applications for merger authorisation.
13. We believe that there should be an equivalent ability in New Zealand for the Commission to waive the authorisation application fee for section 36 conduct.

#### **Costs and Benefits (Question 19)**

14. Questions 19 asks whether we agree with the types of costs and benefits of adopting an effects-based test
15. MBIE has estimates a one off cost to businesses with a substantial degree of market power, of \$0.6M, based on 30 businesses spending \$20,000 each on external advice to reassess conduct where the business has previously sought advice under the old section 36 test.
16. We consider it likely that there are significantly more businesses that have previously taken advice and that will need to take further advice in respect of the proposed changes.

Thank you for receiving our submission. If you require any further information, please do not hesitate to contact me.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Vince Barry', written in a cursive style.

**Vince Barry**  
Chief Executive Officer  
Pegasus Health (Charitable) Ltd