

Statement of Preliminary Issues

Ngāi Tahu Tourism / KJet and Time Tripper

31 August 2023

Introduction

1. On 10 August 2023, the Commerce Commission registered an application (the Application) from Ngāi Tahu Tourism Limited (Ngāi Tahu Tourism) seeking clearance for it (or a wholly-owned subsidiary) to acquire the tourism jet boating business trading as “KJet” (KJet) and related assets (including 100% of the shares in Time Tripper Limited) from Kwarau Jet Services Holdings Limited, KJet Limited and Time Tripper Limited (the Proposed Acquisition).¹
2. The Commission will give clearance if it 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.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.²
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **14 September 2023**.

The parties

5. The parties overlap in the supply of jet boating services to tourists in Tāhuna (Queenstown).
6. Ngāi Tahu Tourism is a wholly-owned subsidiary of Ngāi Tahu Holdings Corporation Limited, which is itself owned by the Ngāi Tahu Charitable Trust. Ngāi Tahu Tourism operates tourism businesses across both Te Ika a Māui (the North Island) and Te Waipounamu (the South Island). Relevant to the Application, Ngāi Tahu Tourism operates the Shotover Jet and Dart River Adventures jet boating businesses in Tāhuna (Queenstown) on the Kimiākau (Shotover River) and Dart River.
7. KJet and Time Tripper Limited are ultimately owned by Shaun Kelly and Skeggs Group Limited. Combined, these businesses operate, in Tāhuna (Queenstown), the KJet tourism jet boating business and the Time Tripper Underwater World experience. KJet operates its jet boats on the Kwarau River and the Kimiākau (Shotover River).

¹ A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>.

² The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

8. With the Proposed Acquisition, Ngāi Tahu Tourism would own three businesses providing jet boating services to tourists in Tāhuna (Queenstown) – KJet, Shotover Jet and Dart River Adventures.

Our framework

9. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.³ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
10. 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).⁴ This allows us to assess the degree by which the Proposed Acquisition might lessen competition.
11. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
 - 11.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
 - 11.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 11.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

Market definition

12. Market definition is a tool that helps identify and assess the competitive constraints a merged entity is likely to face. We define markets in the way that we consider best isolates the key competition issues that arise from a specific merger or 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 Commerce Act, as a matter of fact and commercial common sense.⁵
13. When assessing relevant markets, we generally start with the product(s) or services(s) in which the parties to a merger or acquisition overlap. We then consider

³ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz.

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁵ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81] and *Mergers and Acquisitions Guidelines* above n3 at [3.7]-[3.10].

how broadly or narrowly to define the boundaries of the relevant markets by asking:⁶

- 13.1 whether customers could easily switch to alternative products or services or locations in response to a price increase (known as ‘demand side’ substitution);⁷ and
 - 13.2 whether suppliers could easily switch to producing or supply different products or locations (known as ‘supply side’ substitution).
14. We may also define separate markets for different types of customers if customers have different supply alternatives and suppliers are able to price discriminate between customers on the basis of those differences. This may result in different product and/or geographic market dimensions for each customer type.
 15. How we define the relevant market(s) may change from merger to merger, even for mergers within the same industry, because demand and supply side substitutability can differ from merger to merger, and can change over time.
 16. In the Application, Ngāi Tahu Tourism submits that the relevant market is the market for the provision of retail adventure tourism activities in the Queenstown Lakes region.⁸ Ngāi Tahu Tourism further submits that:⁹
 - 16.1 this market is consistent with a previous decision of the Commission;¹⁰
 - 16.2 there is a high degree of demand-side substitutability – other adventure tourism activities are close substitutes for jet boating, with tourists choosing between adventure tourism activities based on the amount of time they have in the Queenstown Lakes region and the money they have to spend, and adventure tourism operators competing for the business of tourists;
 - 16.3 Ngāi Tahu Tourism monitors the prices of other adventure tourism activities and considers those prices when setting the prices for its jet boating services;
 - 16.4 jet boating attracts a broad range of customers, including a range of ages and families, who want a fast-paced, action filled experience;
 - 16.5 defining a narrow market or markets just focussed on jet boating would not capture the competitive dynamics between jet boating activities and other adventure tourism activities;

⁶ *Mergers and Acquisitions Guidelines* above n3 at [3.16].

⁷ We use the hypothetical monopolist test as a conceptual tool to help us answer this question. This test asks whether a hypothetical sole supplier of a set of products (or locations) would profitably increase prices for at least one of the merging firms’ products (or locations) by at least a small, but significant, amount. *Mergers and Acquisitions Guidelines* above n3 at [3.18].

⁸ The Application at [4] and [47].

⁹ The Application at [47] and [51]-[58].

¹⁰ Bungy New Zealand and Pipeline Bungy (Commerce Commission Decision 504, 24 July 2003).

- 16.6 defining the geographic scope of the market as the Queenstown Lakes region reflects that tourists travel around the region to different activities, but constraints may also be imposed by activities outside this region; and
 - 16.7 alternatively, that there could be a broad market for all tourism activities in the Queenstown Lakes region, given the shift towards more tourists visiting the region for nature-based experiences as opposed to adventure activities.
17. We will consider whether a market for adventure tourism activities in the Queenstown Lakes region is the appropriate market for assessing the competition effects of the Proposed Acquisition, or whether it might be appropriate to define narrower markets on the basis of product, geography and/or customer type. For example:
- 17.1 Is there a separate market for jet boating trips?
 - 17.2 Are there separate markets for fast-paced, thrill/action seeking jet boat trips and slower-paced, scenic jet boat trips?
 - 17.3 Is there a separate market jet boating trips in/around central Tāhuna (Queenstown)?
 - 17.4 Are there separate markets for sales direct to tourists, via wholesalers, agents, resellers and/or via tour operators?
 - 17.5 Do jet boat trips fall within a broad market for all tourism activities in the Queenstown Lakes region?

Without the acquisition

- 18. In the Application, Ngāi Tahu Tourism submits that the relevant counterfactual is the status quo, where the parties would continue as separate jet boating businesses, but notes that an alternative purchaser might be sought for KJet.¹¹
- 19. We will consider what the parties would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or whether the parties would seek alternative options, for example, finding a different buyer for KJet.

Preliminary issues

- 20. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral, coordinated and/or conglomerate effects might result from the Proposed Acquisition. The questions that we will be focusing on are:
 - 20.1 unilateral effects: would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by

¹¹ The Application at [30]-[31].

itself, or to reduce any commissions received by wholesalers, agents and resellers?¹²

- 20.2 coordinated effects: would the Proposed Acquisition change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable?
- 20.3 conglomerate effects: would the Proposed Acquisition increase the merged entity's ability and/or incentive to foreclose rivals, for example by allowing it to bundle or tie products in a way that rivals cannot match?

Unilateral effects: would the merged entity be able to profitably raise prices by itself?

- 21. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger, without the profitability of that increase being thwarted by rival firms' competitive responses.
- 22. In the Application, Ngāi Tahu Tourism submits that the Proposed Acquisition would not be likely to substantially lessen competition in the market for adventure tourism activities in the Queenstown Lakes region due to unilateral effects because, in its view:¹³
 - 22.1 the market is highly competitive and there will be no substantial difference in competition with and without the Proposed Acquisition;
 - 22.2 jet boating operators in the Queenstown Lakes region, differentiate their trips and experiences based on different factors;
 - 22.3 Shotover Jet and KJet are not each other's closest competitors, instead the closest competitor to Shotover Jet is Skippers Canyon Jet and KJet faces the strongest competition from Real NZ;
 - 22.4 the merged entity would continue to be significantly constrained by a large number of existing competitors in the Queenstown Lakes region, including at least five other jet boat operators, other adventure tourism operators and other non-adventure tourism activities;
 - 22.5 existing competing jet boat operators are not operating at capacity and could expand their operations;
 - 22.6 barriers to entry (including any necessary resource consents, permits and concessions) are not substantial and there is significant potential for new entry by adventure tourism activity operators in the Queenstown Lakes

¹² For ease of reference, we only refer to the ability of the merged entity to "raise prices" from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition (ie, it could increase quality-adjusted prices).

¹³ The Application at [5], [75], [81]-[85] and [94]-[103].

region, including new jet boat operators (even though further consents to operate jet boating services on Lake Whakatipu, the Kimiākau (Shotover River), the Kawarau River, and the Dart River may not be available);

- 22.7 the merged entity would be constrained by the countervailing power of agents and wholesalers, who generate a substantial portion of jet boat bookings; and
 - 22.8 where tourists travel around New Zealand, the merged entity would also face constraint from adventure tourism operators in other parts of New Zealand.
23. We will consider:
- 23.1 closeness of competition: the degree of constraint that the parties impose upon one another, particularly in the supply of jet boating services to tourists in Tāhuna (Queenstown). To the extent that any constraint is material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors;
 - 23.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;
 - 23.3 entry and expansion: how easily rivals could enter and/or expand; and
 - 23.4 countervailing power: whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

Coordinated effects: would the Proposed Acquisition make coordination more likely?

- 24. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.¹⁴
- 25. In the Application, Ngāi Tahu Tourism submits that the Proposed Acquisition would not be likely to substantially lessen competition in the market for adventure tourism activities in the Queenstown Lakes region due to coordinated effects because, in its view, the market is highly competitive, and includes an array of large and small operators, with differentiated offerings.¹⁵
- 26. We will assess whether any relevant markets are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in these markets so that coordination is more likely, more complete or more sustainable.

¹⁴ *Mergers and Acquisitions Guidelines* above n3 at [3.84].

¹⁵ The Application at [107].

Conglomerate effects: would the merged entity be able to foreclose rivals?

27. A merger between suppliers who are not competitors but who operate in related markets can result in a substantial lessening of competition due to conglomerate effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct (eg, bundling or tying) that prevents or hinders rivals from competing effectively.¹⁶
28. We will consider whether the Proposed Acquisition would give the merged entity the ability and incentive to foreclose rival suppliers, and the likely effect of any foreclosure on competition in any relevant market.

Next steps in our investigation

29. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **5 October 2023**. However, this date may change as our investigation progresses.¹⁷ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
30. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

Making a submission

31. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference “Ngāi Tahu Tourism/KJet” in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **14 September 2023**.
32. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission’s website. If you make a submission and we do not acknowledge receipt of that submission within two working days, you should resubmit your submission.
33. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

¹⁶ *Mergers and Acquisitions Guidelines* above n3 at [5.11]-[5.15].

¹⁷ The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.