

## Statement of Preliminary Issues

### Queenstown Bungy Limited / Taupo Bungy Limited

4 September 2019

#### Introduction

1. On 30 August 2019 the Commerce Commission registered an application (the Application) from Queenstown Bungy Limited (Queenstown Bungy) to acquire the bungy, swing and related business located at Taupo owned and operated by Taupo Bungy Limited (Taupo Bungy) (the proposed acquisition).<sup>1</sup>
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.<sup>2</sup>
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 **close of business on 18 September 2019**.

#### The parties

5. Queenstown Bungy is wholly owned by Bungy New Zealand Limited.<sup>3</sup> Bungy New Zealand Limited operates adventure tourism sites and services through subsidiaries in Queenstown and Auckland under the trading name AJ Hackett Bungy (we refer to the Bungy New Zealand Limited group of companies as Bungy NZ). Bungy NZ's services include:
  - 5.1 three sites in Queenstown which offer bungy, swing, zipline, and catapult rides; and
  - 5.2 in Auckland:

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<sup>1</sup> 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/>.

<sup>2</sup> 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.

<sup>3</sup> The Application at [4.1].

5.2.1 bungy and bridge walk at the Harbour Bridge; and

5.2.2 SkyJump and Tower Walk at the Auckland Sky Tower.

6. Taupo Bungy, a wholly owned subsidiary of Taupo Tourism Holdings Limited, operates a bungy and swing business in Taupo.

## Our framework

7. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>4</sup> As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
8. 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).<sup>5</sup> This allows us to assess the degree by which the proposed acquisition might lessen competition.
9. 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:
- 9.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
  - 9.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
  - 9.3 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

10. We define markets in the way that we consider best isolates the key competition issues that arise from the proposed 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.<sup>6</sup>

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<sup>4</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>5</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>6</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

11. Queenstown Bungy submitted that the relevant market could be defined to include all tourism activities in the central North Island region.<sup>7</sup> Queenstown Bungy recognises that it may be appropriate to consider limiting the product market to include only adventure tourism activities rather than all tourism activities. Queenstown Bungy defines the central North Island as including Taupo, Rotorua, and Mount Ruapehu but not Auckland. Under this definition the parties would not directly overlap on a geographic basis.
12. Both Queenstown Bungy and Taupo Bungy provide bungy and swing services. We will test whether the relevant market should be limited to bungy and/or swing services or should be defined wider to include other types of adventure tourism activities such as jetboating, skydiving, parapenting, mountain biking and quad-biking. We will also test whether the geographic market should extend beyond the central North Island region.

### **Without the acquisition**

13. The Applicant submitted that without the acquisition, Taupo Bungy would continue to operate its existing business. We will consider whether this is likely or whether Taupo Bungy would seek alternative options, for example, finding a different buyer for its bungy and swing business.

### **Preliminary issues**

14. We will investigate whether the proposed acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing the unilateral effects from the proposed acquisition.
15. The key question that we will be focusing on is would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?<sup>8</sup>

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

16. 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. A merger could also reduce competition if one of the merging firms was a potential or emerging competitor. In such a case, the merger may preserve the market power of the incumbent firm.
17. Both parties supply bungy and swing services.

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<sup>7</sup> Application at [17.1].

<sup>8</sup> 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, i.e. it could increase quality-adjusted prices.

18. In its Application, Queenstown Bungy submitted that the proposed acquisition would not be likely to substantially lessen competition due to unilateral effects.<sup>9</sup> This is because:
- 18.1 there are significant constraints on Taupo Bungy from other adventure tourism operators in the central North Island and from other tourism businesses competing for tourism spend; and
  - 18.2 there is potential for new providers in Taupo and surrounding regions such as proposed bungy jump operations at Waitomo and Hamilton.
19. We will consider:
- 19.1 the extent to which Queenstown Bungy and Taupo Bungy currently impose a constraint upon one another or would do so absent the proposed acquisition;
  - 19.2 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; and
  - 19.3 how easily new rivals could enter the market.

### Next steps in our investigation

20. The Commission is currently scheduled to decide whether or not to give clearance to the proposed acquisition by **25 October 2019**. However, this date may change as our investigation progresses.<sup>10</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
21. 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

22. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference “Queenstown/Taupo” 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 **18 September 2019**.
23. 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.

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<sup>9</sup> The Application at [18].

<sup>10</sup> 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.

24. 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.