

Statement of Preliminary Issues

Real Journeys Limited / Southern Discoveries Limited

31 August 2023

Introduction

1. On 21 August 2023, the Commerce Commission registered an application (the Application) from Real Journeys Limited (trading as Real NZ) seeking clearance for it (or any interconnected body corporate) to acquire the vessel, the Spirit of Queenstown, and associated assets from Southern Discoveries Limited (Southern Discoveries) (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 scheduled tourist cruises on Lake Whakatipu in Queenstown.
6. Real NZ is a wholly-owned subsidiary of Real Group Limited. Real NZ offers tourism experiences from Queenstown to Stewart Island, including cruises through Milford and Doubtful Sounds. Real Group Limited also owns the Cardrona Alpine Resort and Treble Cone Ski Area (both in Wanaka), and the International Antarctic Centre in Christchurch. Relevant to the Application, Real NZ owns and operates the heritage steamship, the TSS Earnslaw, providing cruises on the TSS Earnslaw to and from downtown Queenstown to its Walter Peak High Country Farm.
7. Southern Discoveries is wholly owned by Skeggs Group Limited. Southern Discoveries offers tourism services in Milford Sound and Queenstown. Relevant to the Application, Southern Discoveries owns and operates the Spirit of Queenstown, which provides scenic cruises on Lake Whakatipu.

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, Real NZ would own and operate two separate boats providing scheduled tourist cruises on Lake Whakatipu – the TSS Earnslaw and the Spirit of Queenstown.

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

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].

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 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, Real NZ submits that the market relevant to our assessment of the Proposed Acquisition is the market for the sale of tourism experiences to tourists visiting Queenstown. Real NZ further submits that:⁸
- 16.1 all tourism experiences in Queenstown (both adventure tourism and other experiences, including but not limited to wine tasting, golf, cruises on Lake Whakatipu, scenic tours, the Skyline Gondola, mountain biking, bungy jumping, jet boating, rafting and skydiving) are substitutable for each other as a matter of fact and commercial common sense, and fall within a single broad market;
- 16.2 Real NZ and Southern Discoveries offer tourism experiences in Queenstown in competition with a multitude of tourism experiences to which tourists can choose to allocate their time;
- 16.3 adventure and non-adventure tourism experiences fall within the same market, as they are viewed by tourists as substitutes to greater or lesser degrees, and it is impossible for tourism operators to discriminate between tourists based on how closely they see certain activities as substitutes;
- 16.4 there is no separate market for Lake Whakatipu cruises: cruises are simply part of a broader Queenstown area tourism market;
- 16.5 Queenstown is not like Milford Sound where the best way to experience what is on offer is onboard a boat, and a Lake Whakatipu cruise is not a “must do”

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 1-2 and [40]-[64].

experience that tourists seek out in Queenstown – tourists in Queenstown have alternative options for exploring the scenery and a Lake Whakatipu cruise is simply a part of a part of broader tourism experiences offered by Real NZ and Southern Discoveries;

- 16.6 this market is focused on tourists staying in Queenstown, but also includes activities outside Queenstown that tourists can and do choose to do while staying in Queenstown (particularly, sightseeing in Milford Sound, Fiordland and Wanaka) and, where a tourist is travelling throughout New Zealand, they may choose to substitute tourism experiences in Queenstown for experiences elsewhere in New Zealand;
 - 16.7 the tourism experiences supplied in this market are complementary to major tourism activities that may drive people to visit Queenstown (eg, skiing or a Great Walk); and
 - 16.8 this market includes sales direct to tourists; sales through wholesalers, agents and resellers; and sales to tour operators (as opposed to separate markets, and defining separate markets is unlikely to change the competition analysis of the Proposed Acquisition).
17. We will consider whether a market for the sale of tourism experiences to tourists visiting Queenstown 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 lake cruises?
 - 17.2 Are scheduled and charter cruises in the same market?
 - 17.3 Is there are separate market for cruises on Lake Whakatipu?
 - 17.4 Are there separate markets for sales direct to tourists, via wholesalers, agents, resellers and/or via tour operators?
 - 17.5 Do lake cruises fall within the same market as adventure tourism activities?

Without the acquisition

18. 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 (eg, whether Southern Discoveries could find a different buyer for the Spirit of Queenstown).

Preliminary issues

19. 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:

- 19.1 unilateral effects: would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself, or to reduce any commissions received by wholesalers, agents and resellers?⁹
- 19.2 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?
- 19.3 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?

- 20. 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.
- 21. In the Application, Real NZ submits that the Proposed Acquisition would not be likely to substantially lessen competition in the market for the sale of tourism experiences to tourists visiting Queenstown due to unilateral effects because, in its view:¹⁰
 - 21.1 while the TSS Earnslaw and the Spirit of Queenstown both operate on Lake Whakatipu, the different experiences they offer tourists mean that they are not particularly close substitutes or competitors – Real NZ offers transport across the lake on a vintage steamship and experiences at Walter Peak High Country Farm, compared to Southern Discoveries offering dining experiences whilst cruising the lake;
 - 21.2 the merged entity would be constrained by the multitude of other tourism experiences available in Queenstown, and a multitude of tourism providers including, in particular, those provided by Skyline Enterprises Limited, operator of the Skyline Gondola, with whom each of Real NZ and Southern Discoveries compete more closely in Queenstown than they do with each other;
 - 21.3 for the tourists for whom a cruise on Lake Whakatipu is a “must do” activity, who would regard the TSS Earnslaw and the Spirit of Queenstown as close substitutes, alternative options in terms of tourism experiences on the lake would remain – Million Dollar Cruise, jet boats, charter cruise boats, Hydro Attack and other water-based activities (paddle boats, kayaks, paddle boards and jet skis);

⁹ 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).

¹⁰ The Application at 1-3, [65]-[71], [76]-[80], [84]-[85], [89]-[90] and [102].

- 21.4 other existing tourism operators face no material barriers to increasing sales should a market opportunity present itself (eg, charter boat operators could start providing scheduled cruises on Lake Whakatipu) and barriers to new entry are low for tourism operators generally (and surmountable for new cruise boat operators); and
- 21.5 tour operators have countervailing power through an ability to substitute Real NZ experiences for those of other tourism operators, in Queenstown, Milford Sound and elsewhere in New Zealand.
22. We will consider:
- 22.1 closeness of competition: the degree of constraint that the parties impose, or would impose, upon one another, particularly in the supply of scheduled tourist cruises on Lake Whakatipu. To the extent that any constraint is, or would be, material, we will assess whether competition lost with the Proposed Acquisition could be replaced by rival competitors;
- 22.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;
- 22.3 entry and expansion: how easily rivals could enter and/or expand; and
- 22.4 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?

23. 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.¹¹
24. In the Application, Real NZ submits that the Proposed Acquisition would not be likely to substantially lessen competition in the market for the sale of tourism experiences to tourists visiting Queenstown due to coordinated effects because, in its view, numerous competitors would remain in the market.¹²
25. We will assess whether any relevant markets are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in any relevant markets so that coordination is more likely, more complete or more sustainable.

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

26. 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

¹¹ *Mergers and Acquisitions Guidelines* above n3 at [3.84].

¹² The Application at [103].

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.¹³

27. In the Application, Real NZ submits that the Proposed Acquisition would not be likely to substantially lessen competition in the market for the sale of tourism experiences to tourists visiting Queenstown due to conglomerate effects because, in its view, a cruise on Lake Whakatipu is not a “must have” experience for tourists and numerous competitors would remain in the market.¹⁴
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 **16 October 2023**. However, this date may change as our investigation progresses.¹⁵ 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 “Real NZ/Southern Discoveries” 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.

¹³ *Mergers and Acquisitions Guidelines* above n3 at [5.11]-[5.15].

¹⁴ The Application at [103].

¹⁵ 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.