

Kinetic NZ Holdings Limited

**Notice seeking clearance to acquire the
shares of NZB Holdco Limited and its
subsidiaries**

To: registrar@comcom.govt.nz

Summary

Kinetic NZ Limited seeks clearance to acquire NZB Holdco Limited

Kinetic NZ Holdings Ltd (**Kinetic**) is seeking clearance from the Commerce Commission to acquire 100% of the issued share capital of NZB Holdco Limited (**NZ Bus**) and its subsidiaries (**the proposed transaction**).

Kinetic

Kinetic operates bus and coach services throughout NZ and Australia, including the Go Bus services throughout New Zealand and airside services at Auckland Airport.

NZB Holdco Limited

NZB HoldCo Limited is the holding company for the NZ Bus business, which operates bus and coach services throughout New Zealand.

Summary

There is some limited overlap between the parties in the provision of scheduled urban bus services in Auckland, and potential overlap for school bus services (though there is no overlap currently).

However, Kinetic submits that the proposed acquisition will not substantially lessen competition in either of these markets.

The procurement process operated by regional councils for both urban bus services and school bus services is robust and designed to ensure a competitive tendering process.

As the Commission has already found in previous decisions, the top-down approach to awarding bus operator contracts and the tendering process means that councils exercise competitive discipline in the tendering process.

The market is dynamic, with many contracts due to expire shortly, giving the opportunity for other service providers to successfully compete in the tendering process. In the past tenders have been lost by incumbents and won by new bidders.

There are a number of competitors in the market for both urban bus services and school bus services. Many of these competitors are highly capable operators with strong tendering abilities, including international operators entering the New Zealand market.

Kinetic requests the Commission grants clearance

For all these reasons, Kinetic submits that the Commission can be satisfied that the acquisition will not be likely to substantially lessen competition in any market.

Kinetic, therefore, requests that the Commission grant clearance for the acquisition.

The parties

Kinetic NZ Holdings Limited (applicant)

1. Kinetic NZ Holdings Limited is part of the Kinetic Group, owned by Kinetic Holding Company Pty Limited, registered in Victoria, Australia.
2. Kinetic operates bus and coach services throughout New Zealand and Australia, including Go Bus services throughout New Zealand and SkyBus in Auckland.

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NZB Holdco Limited (vendor)

6. NZB Holdco Limited is a New Zealand registered company, currently held by Next Capital Pty Limited, an independent Australian private equity firm, specialising in providing buy-out funding for small to medium growth businesses, typically valued between A\$50 million and A\$200 million.
7. Next Capital has over \$600 million of funds under management, with investments across a number of different sectors, including businesses spanning environmental remediation, commercial asset maintenance,

- allied healthcare network, supply chain and project management advisory, hospitality, recreation, data storage, and car hire.
8. NZ Bus operates 27 government-backed contracts with a fleet of over 800 buses, with circa 1,300 drivers and 14 depots located across Auckland, Wellington and Tauranga.
 9. The government-backed contracts fall into the Public Transport Operating Model (**PTOM**) structure. PTOMs are contracts that are tendered by the relevant regional council on a periodic basis depending on the term of the specific contract. Contracts do not necessarily have common expiry / retender dates within a council, or indeed across regional councils. Refer to paragraph 35 for further details.
 10. NZ Bus generates revenue of circa [] per annum, and has a FY23F EBITDA of [].

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The proposed transaction

14. Pursuant to a Share Purchase Agreement (**SPA**) signed on 9 March 2022, and subject to the satisfaction of certain conditions precedent, including Commerce Commission clearance, Kinetic has agreed to purchase, free from any encumbrances of any kind other than conventional permitted encumbrances over assets, the entire issued share capital of NZB Holdco Limited and its subsidiaries from funds affiliated with Next Capital Pty Limited and minority shareholders.

Rationale for the acquisition

15. In late 2021, Kinetic came to understand that Next Capital Pty Ltd was seeking to sell its interest in NZ Bus during 2022 via a sale process. [

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22. Kinetic considers that the acquisition of NZ Bus would be highly complementary to its existing operations in New Zealand, principally through its existing Go Bus business. Kinetic wants to leverage Go Bus's and the broader Kinetic experience and specialist expertise in providing bus services, to grow its presence in Auckland (where NZ Bus has strong presence, but Kinetic does not) and to expand into new regions where Kinetic does not currently operate, ie Wellington and Tauranga.

Market definition

23. The appropriate market definition for assessing the proposed transaction is:
- 23.1. the market for scheduled urban bus passenger services, which are provided to the general public (**urban bus services**); and
 - 23.2. scheduled school bus services (**school bus services**).
24. Kinetic's top five customers are the Ministry of Education (**MoE**), Auckland Transport, Environment Canterbury, Ministry of Business, Innovation and Employment (**MBIE**) and Waikato Regional Council. The MoE contracts relate to the market for school bus services, the MBIE contracts are MIQ-related (and therefore likely to end soon), and the Auckland Transport, Environment Canterbury and Waikato Regional Council contracts relate to the market for urban bus services.

A table of Kinetic's existing contracts in the markets for urban bus services and school bus services is attached as **Appendix A**.

25. NZ Bus has only three customers, all in the market for urban bus services: Auckland Transport, Wellington City Council and Tauranga City Council.

A table of NZ Bus' existing contracts in the market for urban bus services is attached as **Appendix B**.

26. Therefore, the primary market in which Kinetic and NZ Bus overlap is the market for urban bus passenger services, with the only geographic overlap being in the Auckland region. This market has been defined and considered by the Commerce Commission and the courts previously (discussed below) and we have adopted broadly the same definition here, though we note that earlier considerations of this market by the Commission predate the 2013 introduction of the Public Transport Operating Model (**PTOM**), discussed below.

Previous Commission approaches to the relevant markets

27. The Commission has defined the relevant market in several previous decisions, specifically Decisions 318, 326, 450, 467 and 551. We note, however, that all of these decisions preceded the introduction of the PTOM in 2013, which has changed the market for urban bus services considerably.
28. However, some aspects of the Commission's earlier decisions remain relevant in defining the market in this application, and these are summarised below.

The bus tendering market is a separate market

29. In all of the decisions, the Commission distinguished between commercial bus passenger services and subsidised bus passenger services.² The former was generally described as the “bus services market” and the latter as the “bus tendering market”³ or the “bus subsidies market”.⁴
30. In Decision 326, the Commission characterised the Auckland Regional Council as performing the role of buyer of tendered bus services on both a commercial and subsidised basis on specified routes in the geographic market. In other words, the Commission found there was a separate “tendering” market in which bus operators acquired the right to provide bus services on particular routes.⁵
31. In Decision 551, this market was described as follows:⁶

...in the Canterbury region, bus operators receive an exclusive licence from ECan to supply passenger services. That is, ECan, in concert with LTNZ does not permit other bus operators to supply a service that competes with those offered by the operators registered with ECan. It follows that individual bus services are, effectively, separate monopolies.

... in Canterbury, bus operators determine neither the price of the bus service nor the scheduling. ECan sets these as part of the contract, and ECan also sets certain vehicle quality standards and performance requirements.

Effectively, passengers and ECan form the market for bus transport, with bus operators providing agency services. The competitive effects of the proposed acquisition are more sensibly observed and analysed in the market for the rights to operate services, as this is the point at which competition occurs.

32. The above definitions for the bus tendering market reflect the current market under PTOM, described further below.

The school bus market is a separate market

33. In Decision 551, an additional market was identified for the rights to operate school bus services in Canterbury under contract to Environment Canterbury (“the school bus rights market”).

² NZCC, “Decision 326: New Zealand Bus Limited and Transportation Auckland Corporation Limited”, 15 May 1998 at [125] [Decision 326].

³ NZCC, “Decision 467: Red Bus Limited and Leopard Coachlines Limited”, 30 July 2002 [Decision 467].

⁴ Decision 467 at [117], NZCC, “Decision 551: Red Bus Limited and Leopard Coachlines”, 28 June 2005 at [91] [Decision 551].

⁵ At [125].

⁶ At [67]—[69].

Alternative modes of transport excluded

34. Finally, we note that the Commission’s previous decisions have excluded alternative modes of transport to buses in market definition, finding a limited extent to which the public are likely to switch between various modes of transport in response to relative price movements, or to changes in the quality of services.⁷ We have adopted the same approach here.

Public Transport Operating Model

35. Access to this market is controlled by a tendering process operated by regional councils under the PTOM. successful tenderers contract with regional councils to operate designated bus routes for a finite period, usually nine years, at which point the tender process is run again.
36. PTOM was introduced in 2013, following a review of the Public Transport Management Act 2008. The review responded to concerns that the cost of subsidising public transport was increasing even though passenger numbers were falling. There were also concerns that road users and rate payers were not getting value for money from financially supporting urban bus and ferry services. In addition, the lack of cooperation between regional councils and public transport operators raised concerns about how far services could effectively be coordinated to improve network efficiency.⁸
37. Under PTOM, operators and regional councils work in partnership to incentivise the delivery of effective public transport services to communities. Through Regional public transport plans (**RPTPs**), regional councils define the region’s public transport network, with all public transport services identified in an RPTP allocated into “units”.
- 37.1. A unit is no smaller than a full route but may include multiple routes and will include all timetabled services for a route.
 - 37.2. Each unit is provided under contract to the regional council and operated as a single marketable whole.
 - 37.3. Units are either tendered on the open market or negotiated with incumbent operators of those services.
 - 37.4. Some units are fully commercial and operate without a subsidy (but eligible for concessionary fare payments).

⁷ NZCC, “Decision 318: NZ Bus Limited and Transportation Auckland Corporation Limited”, 24 February 1998 at [53] [**Decision 318**].

⁸ Ministry of Transport, “Public Transport Operating Model”, <https://www.transport.govt.nz/area-of-interest/public-transport/public-transport-operating-model/> accessed 18 February 2022.

Others have varying levels of subsidy determined by their commerciality.⁹

38. At the time of retendering all routes in Auckland in 2016 there were a number of 12 year like-for-like contracts directly negotiated with the operators, recognising that operators were having the rights to operate 'commercial routes' removed from them.
39. These "like-for-like" contracts were a one-off in recognition that prior to the introduction of PTOM, those operators had "commercial routes", under which they were able to financially benefit from these more profitable routes (i.e. due to income linked to patronage). Before introduction of PTOM, these routes were not tendered.
40. For the tendered PTOM contracts, and as those "like-for-like" contracts come up for tender at the end of the initial 12-year term, the term is typically 9 years. It is possible that individual factors could influence a different term of the contract, including any arrangements for the operator to fund more costly electric vehicles, so as to allow sufficient time to recover the cost of the investment in those vehicles (vs the cost of diesel buses).
41. Further, some groups of routes in a unit that were recognised as performing well relative to other units were directly negotiated with operators rather than going out to tender. This strategy of Auckland Transport was to provide an incentive to improve the commerciality of a unit. Negotiated units have a term of 6 years. Benchmarking information from tendered units were used to inform direct negotiations and renegotiated contracts.
42. Under section 124 of the Land Transport Management Act 2003, a regional council must be satisfied that it has applied the principles specified in section 115(1) of the Act before adopting an RPTP. These are:
 - 42.1. regional councils and public transport operators should work in partnership and collaborate with territorial authorities to deliver the regional public transport services and infrastructure necessary to meet the needs of passengers;
 - 42.2. the provision of public transport services should be coordinated with the aim of achieving the levels of

⁹ NZTA, "Implementation of the Public Transport Operating Model update" July 2012, <https://www.nzta.govt.nz/assets/resources/ptom-implementation-update/docs/ptom-information-sheet.pdf>, accessed 18 February 2022.

integration, reliability, frequency, and coverage necessary to encourage passenger growth;

- 42.3. competitors should have access to regional public transport markets to increase confidence that public transport services are priced efficiently;
- 42.4. incentives should exist to reduce reliance on public subsidies to cover the cost of providing public transport services; and
- 42.5. the planning and procurement of public transport services should be transparent.

Overview of commercial arrangements

- 43. Agreements under PTOM are comprised of:
 - 43.1. a head agreement (often referred to as a partnering contract);¹⁰
 - 43.2. unit agreements, which relate to the specific services or routes operated and set out the terms that are specific to the particular "unit", which principally relate to term, pricing, revenue sharing, service (route) specifications, performance/KPI regimes and fleet specifications;¹¹
- 44. The PTOM arrangements also include other ancillary documents, such as operator performance bonds in favour of the regional councils and ticketing equipment lease agreements (as shown in **Appendix D**)
- 45. As shown in the examples in **Appendices D, E, and F**, unit agreements differ across regional councils, however, these agreements generally set out service specifications determined by the Council, which are fixed and not up for negotiation by service providers. For example the unit agreement will set out:
 - 45.1. route specifications;
 - 45.2. performance/KPI regimes; and
 - 45.3. fleet specifications.
- 46. Fares are also determined and fixed by regional councils, and the revenue sharing model differs between councils. For example:

¹⁰ Example provided as Appendix C.

¹¹ Examples provided as Appendices D and E.

- 46.1. For Auckland Transport PTOMs, it depends on whether or not the unit agreement is a "Commercial Unit". A Commercial Unit agreement broadly encompasses any "Unit" that is profitable and does not require subsidisation by Auckland Transport.
- 46.2. Non-Commercial Unit Agreements (Auckland Transport) and the other regional council agreements involve the regional councils retaining the fare box and other revenue collected by the operator. Revenue to the operator is calculated based on an agreed base contract price (negotiated as part of the tendering process), and adjusted for:
- Any deductions that the regional council is entitled to make (eg for breach of performance standards);
 - Indexation;
 - Agreed service variations (eg increase or decrease to kms of services);
 - Breach of KPIs (based on threshold reliability and punctuality metrics);
 - Financial Incentive Mechanism (described below)
- 46.3. The Financial Incentive Mechanism (**FIM**) is aimed at increasing full (Adult) fare paying patronage against an agreed threshold. Payments are made to or by the regional council depending on patronage being higher or lower than the revenue/patronage for the prior calculation year, with the payment based on a specified rate per passenger (adjusted for concession and non-fare passengers). The FIM rates are reviewed periodically (eg every 3 years).
- 46.4. Auckland Transport Commercial Unit agreements do not include a base contract price, but the operator retains the fare box and other revenue. The revenue is adjusted for:
- any deductions that the regional council is entitled to make (eg for breach of performance standards);
 - a FIM similar to that referred to above.

The market for school bus services

47. Go Bus provides school bus services under contracts with MoE, attached as **Appendix N**. NZ Bus does not provide any services under MoE

contracts. Therefore, there is no overlap between Kinetic and NZ Bus in respect of the school bus services market, other than through NZ Bus being a potential competitor in this market.¹²

48. The MoE agreements are fixed term service agreements based on standard terms and conditions issued by MoE, provided as **Appendix G**, and provide a contractual framework for various daily routes (transporting eligible students to and from school) and technology routes (transporting year 7 and 8 students to and from technology training centres) to be serviced.
49. Specific details of the routes are set out in separate pricing schedules which provide details of the specific route services and related charges.
50. Under each of the MOE agreements the operator is paid based on:
 - 50.1. A fixed amount for operation of a group of routes, geographically connected, that were formed as a group for the tender process. Typically covers the administration and depot costs.
 - 50.2. A fixed route cost, which typically covers the cost of the vehicle and the minimum hours of labour associated with that route
 - 50.3. a per-km fee for each route it services based on agreed rates and route distances;
 - 50.4. all rates are subject to quarterly adjustment to account for fluctuations (increases and decreases) in input costs.
51. There is no revenue or patronage-based payment under the MOE agreements.

Market shares

Urban bus services

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Counterfactual

55. Kinetic submits that the relevant counterfactual against which to assess the competition effects from the Proposed Transaction is the status quo under which Go Bus and NZ Bus would remain in competition with each other. It can be seen from **Appendix L** that, from time to time, Go Bus and NZ Bus have competed directly against each other in the same tender for a particular opportunity. That would be likely to continue in the counterfactual.
56. All other aspects relevant to the competition analysis would remain constant in the counterfactual, most importantly:
- 56.1. The fact of these markets operating through tender processes undertaken by monopsony procurement agents (councils and MoE) with the incentive to drive competitive outcomes and a track record for achieving that outcome; and
 - 56.2. The existence of a range of experienced and well-established competitors, including Ritchies, Tranzit, Pavlovich, and Uzabus.
 - 56.3. The recent entry in New Zealand of several large multinational public transport companies with a presence in multiple countries namely Transdev, CDC and UGL. There will be a clear requirement for them to substantially grow their presence in the New Zealand market via tenders given their current operations are sub-scale. International public transport companies target a minimum level of necessary scale per country to ensure efficient allocation and leverage of fixed head office costs.
 - There would likely be some level of movement out of New Zealand if a multinational were unable to achieve a greater scale. However, as noted in the paragraph below, there are other operators that may look to expand into the New Zealand region, and participate in future tenders.
 - Kinetic cannot comment on specific companies' scale requirements. Depending on the profitability of a tender opportunity and other internal factors, smaller operations within New Zealand may be sustainable.
 - 56.4. The potential for entry by a range of other large offshore public transport companies, namely Go Ahead, Mobility ADO,

Keolis, Ventura, Busways, Dysons, Kelsian (formally known as Sealink) and SMRT.

Competition analysis

The proposed transaction will not substantially lessen competition in the market for urban bus services

57. The proposed transaction will not substantially lessen competition in the market for the supply of urban bus services. In summary:
- 57.1. The procurement process operated by regional councils for both urban bus services and school bus services is robust and designed to ensure a competitive tendering process.
 - 57.2. As the Commission has already found in previous decisions, the top-down approach to determining bus service contracts and the tendering process means that councils exercise competitive discipline in the tendering process.
 - 57.3. The market is dynamic, with many contracts due to expire shortly, giving the opportunity for other service providers to successfully compete in the tendering process.
 - 57.4. There are a number of competitors in the market for both urban bus services and school bus services.

Urban bus services

58. The ability to provide urban bus services to the public depends on the outcome of a tendering process operated by regional councils, through which the successful operator contracts with the regional council for a finite period to provide urban bus services on designated routes.
59. Following the tender process, the successful operator receives an exclusive contract to operate services on the specified routes, usually for a period of nine years. This gives the successful tenderer the impression of having a significant market share.
60. Kinetic submits that a competitive market is evident through the demonstrated ability of procuring entities (regional councils and MoE) to secure competitive terms from providers. This ability is due to the monopsony purchaser power of the procuring entities and the existence of a range of providers positioned to compete for opportunities as they arise. In this context, a traditional static view of the market does not assist in determining whether the market is competitive. Instead, the relevant question is whether there is robust competition at the tendering process stage. Information on win/loss outcomes in tender rounds from 2014 to 2021, including who participated in each tender (to the best of Kinetic's knowledge) is provided in **Appendix L**.

61. Accordingly, the focus should be on the opportunity for service providers to compete to be awarded contracts when any tendering opportunity arises, not on the market position of existing providers. We note the following:
- 61.1. The procurement process operated by local councils under PTOM is robust and designed to ensure the best possible service providers compete in the tendering process.
 - 61.2. The market is dynamic, with many current contracts due to expire shortly and therefore with different bus service providers successfully competing in the tendering process. It is not unusual for the incumbent service provider to be unsuccessful in a new tendering round, with examples of such outcomes provided below at paragraph 91.
62. We discuss each of these points in turn below.

The procurement process is robust

63. From the perspective of the local councils, public transport has two key functions:
- 63.1. Access—ensuring people have access to goods, services, education and employment.
 - 63.2. Efficient people movement—public transport is critical to the operation of New Zealand’s main cities as it moves people more efficiently, using less space, than private motor vehicles.
64. Public transport includes both government-funded (subsidised) services and commercially operated services. Most public transport services are subsidised because the level of service that can be provided commercially is not sufficient to meet community needs, particularly where access (rather than people movement) is the objective. Government typically has more influence over publicly funded services.
65. In several previous Commission decisions, predating PTOM, the Commission found that the regional authorities exercised competitive discipline in the tendering process.
- 65.1. In Decision 326, the Commission found that the Auckland Regional Council’s influence on the nature and extent of competition in the market could potentially be exercised in various ways, though the Council had not always been willing

to exercise its powers in a timely manner. The Council's statutory powers included:¹⁴

- the funding of subsidised services including the concessionary fare schemes, which together cost \$30 to 40 million per annum, and through that the power to control the tendering process for subsidised services;
- the structuring of the tendering process including the numbers of routes offered, the length of the contracts, the maximum fares, frequency of service, and Vehicle Quality Standards;
- the ability to influence the fare levels for commercial services, both through fixing the fare schedules for subsidised services, and through the concessionary fare schemes;
- the significant political influence which it can bring to bear;
- the ability to decline a contract and/or re-tender, and, where only one bid is received, to negotiate a price with the tenderer;
- the ability to decline registration of commercial bus passenger services on certain prescribed grounds;
- the ability to issue gross tenders in which the entire financial risk for the service is borne by the ARC;
- the power to cancel contracts if the operator fails to comply with the terms and conditions of such contracts; and
- to "contract over" existing services where existing commercial services are considered to be unsatisfactory.

65.2. The Commission determined that post-acquisition, the balance of power between the ARC and the combined entity Kelsian (formally known as Sealink) was likely to become more even. On the one hand, the merged company would appear to be the predominant supplier of scheduled services in the market, but on the other, it would be dependent for much of its funding on a monopsony buyer. The Commission

noted that without ARC regulation the merged company would be dominant in the market. However, the Government had chosen to impose industry-specific regulation in which the regulatory power of regional councils was intended to counter the market power of major incumbents. Hence the Commission concluded, on balance, that the merged entity would fall short of dominance.¹⁵

65.3. In Decision 551, the Commission found that ECan employed a more prescriptive approach than other regional councils to the regulation of passenger transport services. Unlike in Auckland and Wellington, where bus operators could commercially register “profitable” parts of a route with “unprofitable” times of day subsidised on a tender basis, ECan required commercial registration to encompass whole routes. This practice facilitated entry as whole routes would come up for tender every five years.¹⁶

65.4. ECan’s functions included the following:¹⁷

- it was the sole buyer of contracted urban bus services in Christchurch;
- it was the main bus regulator in the region;
- it set fare levels;
- it had the role of structuring the tender process, including the number of routes offered, the length of the contracts, frequency of service and Vehicle Quality Standards;
- it had the ability to cancel contracts if the operator failed to comply with the terms and conditions of the contracts; and
- it had the ability to “contract over” existing services where existing commercial services were unsatisfactory.

65.5. The Commission concluded that ECan should enjoy a greater degree of market power than a “typical” monopsonist might by virtue of the fact that it is also a regulator. This was expressed in various ways including its role in setting fare levels and structuring the tender process, its ability to

¹⁵ At [229].

¹⁶ At [216].

¹⁷ At [215].

“contract over” existing services and its ability to completely retender a contract.

66. The greater level of control exercised by ECan, though somewhat anomalous at the time, reflects the current position of regional councils across the country post-PTOM.
67. The establishment of PTOM in 2013 was prompted by Government concerns that increases in spending on public transport over the preceding 10 years had not been met with commensurate increases in patronage. It wanted to re-establish competitive markets in Auckland and Wellington with the aim of achieving greater value for money from public spending.
68. Prior to PTOM, public transport services were delivered through a mixture of commercial and contracted services. In some regions, operators identified what services they wished to provide on a commercial basis (i.e. without public subsidy). Regional councils then determined what other services were necessary to meet their community’s needs and contracted around any commercial services to deliver a network.
69. Following the introduction of PTOM, regional councils became fully responsible for planning, procurement and service delivery. Through Regional Public Transport Plans (**RPTPs**), regional councils had to determine what services were integral to the public transport network and organise these services into units. These were then competitively tendered or negotiated with operators. They also became responsible for setting fares, enabling integrated ticketing systems to be established with integrated fares.
70. For example, the Waikato Regional Council’s Request for Tender, provided as **Appendix H**, sets out:
 - 70.1. Vehicle requirements for the tendered units, including the size and passenger capacity of the vehicles required for the specified routes,¹⁸ as well as bus types and vehicle quality standards.¹⁹
 - 70.2. Remuneration and working conditions to be offered to staff, setting out a minimum hourly rate for bus drivers and other support staff.²⁰
 - 70.3. A summary of the council-provided ticketing and real-time systems, which must be used by the operator.²¹

¹⁸ At p. 7–11.

¹⁹ At p. 12.

²⁰ At p. 12.

²¹ At p. 13.

71. Therefore, the introduction of PTOM has resulted in a more top-down procurement process, with regional councils in control of the planning, procurement and service delivery of transport operations, determined through a competitive tendering process in which regional councils must consider applications on the basis of efficiency and accessibility, requiring successful tenderers to commit to those objectives in the procurement process.
72. A review is currently being undertaken by the Ministry of Transport aimed at replacing the PTOM with a Sustainable Public Transport Framework (**SPTF**). If adopted, the SPTF is likely to result in larger, more efficient operators with EV capability. As with the existing PTOM process, this move illustrates the market power of regional councils in procuring bus services, driven by a set of substantive criteria in line with top-down policy decisions.
73. We cannot comment on the timing or final design of the framework, however, we understand that the SPTF would have the potential to increase direct negotiation with incumbent operators. That said, the regional councils will retain the power to either enter into direct negotiations or put the contract(s) to tender if they are unsatisfied with an incumbent operator or have other reasons to prefer a tender process. Therefore, the regional councils will retain the power to shape and determine the mix of operators in their jurisdiction under PTOM and SPTF.

The procurement process

74. The procurement procedure is governed by section 25 of the Land Transport Management Act 2003, which specifies that:
 - (2) *In approving a procurement procedure, the Agency must ... have regard to the desirability of—*
 - (a) *enabling persons to compete fairly for the right to supply outputs required for approved activities, if 2 or more persons are willing and able to provide those outputs; and*
 - (b) *encouraging competitive and efficient markets for the supply of outputs required for approved activities.*
75. Where a unit is procured through a tender process, contract tenure is generally nine years.
76. As the Ministry of Transport's 2021 discussion paper on PTOM notes, contract length is important for both incumbent and new entrant operators to enable them to recoup their capital investment over a reasonable time period. The longer contract length for tendered contracts

was designed to incentivise new entrants to enter local markets and provide them with time to get established. The shorter tenure length for negotiated units reflected the fact that the unit had not be subject to a competitive tender. Shorter contract lengths may also enable councils to access innovative technologies more quickly, particularly given the rapid advances in zero-emission vehicle technology.²²

77. According to the Ministry of Transport’s framework, in most regions, price is the highest weighted evaluation criteria in tendering. The discussion paper notes that this may have resulted in more competitive tender pricing but there is a suggestion that operators had a reduced ability to differentiate on quality.²³

The market is dynamic

78. The market for successful tenders at the procurement stage is dynamic, with opportunities for new providers to be awarded contracts as existing contracts expire. As noted above, in general a successful tenderer will only have the opportunity to provide services for an average of nine years.
79. Therefore, following the transaction a number of existing contracts held by NZ Bus and Kinetic will be subject to competitive challenge. The below table and graph show Kinetic’s existing contracts coming up for tender. There will be open and robust tender processes for each of these contracts and Kinetic will only remain as the incumbent provider if it can present the best competitive proposition.

Kinetic contracts coming up for tender

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80. The Kinetic contracts coming up for tender over the next 10 years represent around [] of all current Kinetic revenue.

School bus services

81. New Daily Bus and Technology Bus contracts begin from Term 1 2022. These contracts service approximately 1,450 Daily Bus routes and 650

²² Ministry of Transport, “Public Transport Operating Model (PTOM) Review: Discussion Paper”, 5 May 2021, <https://www.transport.govt.nz/assets/Uploads/Discussion/PTOMReview-DiscussionPaper-v2.pdf> at p. 40.

²³ Ibid, p. 14.

Technology Bus routes. The contracts are for an initial term of six years with two three-year rights of renewal.

82. A table of Kinetic's existing contracts with MoE for school bus services is attached as **Appendix N**. NZ Bus does not currently hold any contracts with MoE, though up until 2021 they held contracts with the MoE for Technology Bus routes.
83. The procurement of MoE provided bus services was conducted through an innovative two-tender approach between July 2020 and May 2021. The process was designed to enable fair access to government contracts for all suppliers (including smaller regional players) while still delivering the benefits of competition. The process included the following features:
 - 83.1. Tender 1 covered approximately 10% of individual routes available for award and allowed smaller regional suppliers to compete for routes appropriate to their capacity while supporting their local communities.
 - 83.2. Tender 2 was targeted at larger transport providers and offered all remaining routes in groups.
 - 83.3. The Request for Proposal (**RFP**) for Tender 1 was published on GETS on 9 July 2020 and submissions closed on 28 August 2020. The RFP for Tender 2 was released on 7 December 2020 and submissions closed on 29 January 2021. These are provided as **Appendices J** and **K**.
 - 83.4. Tenders were awarded on the basis of public value, which considers quality, price and broader outcomes, rather than cost alone. Broader outcomes take into account economic, cultural, environmental and social benefits that can be achieved through the procurement.²⁴
 - 83.5. Tender 1 contracts were awarded in December 2020 and Tender 2 contracts were awarded in May 2021.

Competitor constraints

84. There are a number of competitor bus operators in the market for both scheduled urban bus services and school bus services.
85. Attached as **Appendix L** to this application is a table showing the outcomes in tender rounds between 2014 and 2021. This information demonstrates that between 2014 and 2021, Kinetic participated in []

²⁴ See, for example, **Appendix K** at 30.

for both MoE and regional council procurement processes. Out of the [], Kinetic was successful in [], while NZ Bus was successful in [] of the tender rounds. []

86. The information provided also illustrates the number of other competitors in the field who have participated successfully in the tender process.²⁵ Information about these competitors, including fleet details, location of operations and Kinetic's view as to their respective ambitions, is provided in **Appendix R**.

²⁵ Information about competitor participation in this table is drawn from Kinetic's attendance at tender briefings and industry intelligence. Regional councils generally do not publicly disclose participants in the tender process.

Conclusion

87. In our view, the proposed transaction would not give rise to an SLC. In short, the proof has been in the pudding. The markets function so that new entrants can and do successfully challenge incumbents for PTOM contracts. This is reflective of the countervailing power vested in regional councils as monopsony purchasers of scheduled bus services. In that capacity, councils have both the incentive to reduce costs and improve service quality by designing competitive procurement processes and the track record for executing such processes, particularly since the introduction of the PTOM.
88. So, while the merged entity would be the largest player based on static market share data, it would remain subject to competitive constraint in tenders from a range of strong competitors. Further, the proposed transaction would be pro-competitive to the extent that it generates substantial efficiencies (for example, shared systems, management and back-office support functions, sharing of staff when staff shortages occur, improved fleet utility and potential to accelerate EV rollouts) that would likely be shared with Councils (and therefore passengers and rate payers) through the procurement processes noted above.

Conditions of entry

89. In 2008, the High Court in the appeal against the Commission's NZ Bus/Mana decision identified various "barriers to entry" as being relevant in these markets, namely:
- 89.1. insufficient lead times, and contract size and duration;
 - 89.2. lack of access to patronage information;
 - 89.3. commercial registrations;
 - 89.4. lack of local knowledge;
 - 89.5. difficulties associated with the acquisition of drivers and fleet;
 - 89.6. significant tendering costs; and
 - 89.7. difficulty in establishing and finding an adequate location for depots.
90. However, since 2013 when the PTOM model was established, these issues have largely been addressed. This is to be expected given that the PTOM expressly facilitates councils designing their processes to encourage new entrant participation.²⁶ For example, in Kinetic's experience:
- 90.1. councils now provide 9-12 months for lead times from contract award;²⁷
 - 90.2. under PTOM contracts, patronage information is shared with all participants;²⁸
 - 90.3. commercial registrations are few and cannot be used as a strategic tool in tendering. Before PTOM, operators could register key day parts of the timetable as commercial, leaving only the non-commercial parts, like evenings and weekends, available for tendering by the authority. It was unlikely an operator would find these parts attractive by themselves to tender for, leaving the commercial operators the opportunity to premium price;

²⁶ NZTA, "Implementation of the Public Transport Operating Model", July 2012, <https://www.nzta.govt.nz/assets/resources/ptom-implementation-update/docs/ptom-information-sheet.pdf> at p. 2.

²⁷ See **Appendix G**, p 14.

²⁸ See **Appendix G**, p 10.

- 90.4. councils have the ability to mandate provision for step-in rights on depots and fleet, as has occurred in Wellington;²⁹ and
- 90.5. Auckland Transport and MoE have used market concentration caps to limit their exposures to a single provider.³⁰
91. The effectiveness of the PTOM model in facilitating competitive participation in tender opportunities is borne out by tender outcomes. For example:
- 91.1. In Auckland between 2016 and 2018, NZ Bus, which held a [] of urban services, lost tenders to Ritchies, RMTS, Go Bus (a new entrant) and Pavlovich and was left with [] market share.
- 91.2. In Wellington in 2017/18 NZ Bus lost tenders to Uzabus and Tranzit, both new entrants in the Wellington market, reducing its [] market share to [].
- 91.3. In 2020, Go Bus, Uzabus and Bethlehem Coachlines lost tenders to NZ Bus in Tauranga, with NZ Bus winning both units tendered.
- 91.4. In 2008, Go Bus secured the Tauranga Urban contract and the Napier/Hastings Urban contract, successfully securing these contracts over the incumbent.
92. In terms of what is required currently to participate in these markets, buses are clearly key to operating bus services contracts. Buses, by their very nature, are easily moved between locations to meet the needs of a service contract. This is clearly evidenced by Go Bus' experience, where it was able to deploy buses to Tauranga and Auckland when it moved into those regions. Urban buses are interchangeable between locations, so minimal, if any modifications are required.
93. To the extent that new buses are required, these costs are factored into bid pricing. As buses age, replacement buses are also required, so both incumbents and new entrants would need to factor in those costs.

Depots

94. Depots are also key to operations, however, the availability of depots for a new entrant has proven not to be a barrier to competitive participation. Availability of land will differ between locations and dates for tenders.

²⁹ See **Appendix H**, p 12.

³⁰ See **Appendix I**, p 10.

However, as noted above at 90.4, there is precedent for a local council facilitating potential access to existing depots. There are various instances of new entrants (or existing providers who have won new contracts) securing requisite depot space. For example:

- 94.1. Following winning new tenders in Wellington in 2018, Tranzit established a new depot. This choice was made despite Wellington Regional Council (Greater Wellington) offering new entrants existing NZ Bus depots.
 - 94.2. NZ Bus established its own depots when it took over operations as a new entrant in the Tauranga market in 2018.
 - 94.3. Between 2016 and 2018 as procurement processes altered in Auckland, Go Bus established depots in South, East and North Auckland and Pavlovich established a new depot in West Auckland.
 - 94.4. After new urban contracts were implemented in Tauranga and Napier/Hastings in 2009 Go Bus established new depot facilities.
95. In any event, the only location in New Zealand where both Go Bus and NZ Bus own depots is Auckland. Even then, as can be seen from the map provided as **Appendix M**, there is minimal practical overlap between the depots owned and operated by Go Bus and NZ Bus respectively. An additional map showing competitor depots is provided as **Appendix P**. In particular, Go Bus depots are primarily located in the North, South and East of Auckland, whereas NZ Bus' depots are primarily in West and Central Auckland. These depot locations naturally reflect the outcomes of previous tender rounds for particular routes and any incumbency advantage accruing to either Go Bus or NZ Bus arises in the counterfactual in any event (as they will for other providers such as Pavlovich and Transdev).

No coordinated effects

96. The proposed transaction will not give rise to any concerns regarding coordinated effects primarily because:

- 96.1. closed tender processes run by councils and MoE mean there is no visibility of rival pricing for any particular tender; and
- 96.2. the markets are highly differentiated in that any tender opportunity invariably involves a unique combination of routes and particular service requirements.

Confidentiality

97. This application contains information that is confidential to one or more of the parties. The confidential information is commercially sensitive, and disclosure of it would be likely to unreasonably prejudice the commercial position of the party providing that information. For this reason, the highlighted information should not be disclosed under an Official Information Act 1982 request, in accordance with s 9(2)(b)(ii) of that Act.
98. Confidential information in this application is highlighted to reflect who the information is confidential to.
 - 98.1. Information that is confidential to the parties as against third parties is highlighted in yellow (i.e., **CONFIDENTIAL**) and listed in the Schedule of Confidential Information.
 - 98.2. Information that is confidential to Kinetic as against all parties is highlighted in blue (i.e., **CONFIDENTIAL**) and listed in the Schedule of Confidential Information.
 - 98.3. Information that is confidential to NZ Bus as against all parties is highlighted in green (i.e., **CONFIDENTIAL**) and listed in the Schedule of Confidential Information.

Summary and conclusion

99. For the reasons explained, the acquisition will not substantially lessen competition in any market (however the markets are defined).
100. Kinetic, therefore, requests that the Commission grant clearance for the acquisition.

Names and contact details of top customers

101. Kinetic's top five customers are the MoE, Auckland Transport, Environment Canterbury, Ministry of Business, Innovation and Employment and Waikato Regional Council.
102. NZ Bus has only three customers: Auckland Transport, Wellington City Council and Tauranga City Council.
103. Contact details for each are below.

Auckland Transport

[]

Ministry of Education

[]

Waikato Regional Council

[]

Environment Canterbury

[]

MBIE

[]

Bay of Plenty Regional Council

[]

Greater Wellington Regional Council

[]

Names and contact details of main competitors

104. Names and contact details of the main competitors are below.

Ritchies

[]

Tranzit

[]

Pavlovich

[]

Uzabus

[]

Transdev

[]

Bayes

[]

Schedule of confidential information

105. The following information has been removed from the public version of this application because the information is confidential to the parties and disclosure would be likely to disclose a trade secret or be likely unreasonably to prejudice the commercial position of one or both of the parties in terms of s 9(2)(b)(i) and (ii) of the Official Information Act 1982.

- []

Schedule of required information in notice for clearance

Notice para.	Commission request	Response
[1]	Applicant details	1
[2]	Other party details	6
[3.1]	Type of transaction	14
[3.2]	Merger rationale	15
[3.3]	How merger changes control	14
[3.4]	Ancillary agreements	Provided via dropbox
[3.5]	Counterfactual	55
[4]	International notification	Provided via dropbox
[5.1]	Applicant's view on market definition	23
[5.2]	Each merging party's total sales revenues, volumes, and capacity for the last three financial years.	Provided via dropbox
[5.3]	Names and contact details of the merging parties' main competitors	104
[5.3]	Names of any trade or industry associations which either of the merging parties participate	N/A
[5.4]	Names and contact details of merging parties top 5 customers	101
[6]	Why the transaction will not substantially lessen competition	57
[7]	Copies of documents bringing about the merger	Provided via dropbox
[8]	Internal applicant documents seen by the Board or senior management within the last two years that relate to: <ul style="list-style-type: none"> • the transaction; or • market conditions. 	Provided via dropbox
[9]	Most recent annual report, audited financial	Provided via dropbox

	statements and management accounts	
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Appendices (provided separately)

Appendix	Title
A	[]
B	[]
C	Auckland Regional Partnering Agreement
D	[]
E	[]
F	Ministry of Education standard terms and conditions
G	Waikato Regional Council Request for Tender
H	GWRC Request for Tender
I	AT Request for Tender
J	Ministry of Education RFP Tender 1
K	Ministry of Education RFP Tender 2
L	[]
M	Auckland map for Go Bus and NZ Bus
N	[]
O	Yolanda Redrup, Sarah Thompson and Kanika Sood, "OPTrust's Kinetic to acquire Next Capital's NZ Bus" Australian Financial Review, 9 March 2022.
P	Auckland depot map for Go Bus, NZ Bus and competitors
Q	Source data for Figs. 1 - 5
R	[]
S	[]