



COMMERCE COMMISSION

Decision No. 450

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

NEW ZEALAND BUS LIMITED

and

**WELLINGTON REGIONAL RAIL LIMITED/TRANZ METRO
(WELLINGTON)**

The Commission: PR Rebstock
D Bates
PJM Taylor

Summary of Application: The acquisition by New Zealand Bus Limited or one of its interconnected bodies corporate (NZBL) of a 50% interest in a company to be established, probably to be known as WELLINGTON REGIONAL RAIL LIMITED (WRRL). Wellington Regional Council (WRC) will own the other 50% interest (through WRC Holdings Ltd). The joint venture company will, in turn, acquire 100% of the assets of TRANZ METRO (WELLINGTON).

Determination: Pursuant to section 68(2) of the Commerce Act 1986, the Commission determines to decline clearance for the proposed acquisition.

Date of Determination: 19 December 2001

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BRACKETS**

THE PROPOSAL

1. On 23 November 2001 New Zealand Bus Limited registered a notice with the Commission seeking clearance under s66 (1) of the Commerce Act 1986 to acquire a 50% interest in a company to be established, probably to be known as WELLINGTON REGIONAL RAIL LIMITED (WRRL). Wellington Regional Council (WRC) will own the other 50% interest (through WRC Holdings Ltd). The joint venture company will, in turn, acquire 100% of the assets of TRANZ METRO (WELLINGTON).

THE PROCEDURES

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time was sought by the Commission and agreed to by the applicant. Accordingly, a decision on the application was required by 20 December 2001.
3. Where the Commission is of the opinion that a proposed acquisition is, for reasons other than arising from the application of any provision of the Commerce Act 1986, unlikely to proceed with, the Commission may, in its discretion, decline to give clearance or grant an authorisation for that acquisition under section 68(2). The Commission is required under section 68(3) to state in writing its reasons for declining to give a clearance or grant an authorisation under section 68(3).
4. In its application, NZBL sought confidentiality for specific aspects of the application. A confidentiality order was made in respect of the information for a period of 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
5. The Commission's determination is based on an investigation conducted by staff.
6. The Commission's approach is based on principles set out in the Commission's *Practice Note 4*.¹

THE PARTIES

New Zealand Bus Limited

7. NZBL is the 100% holding company for Wellington City Transport Limited, Cityline (NZ) Limited and Transportation Auckland Corporation Limited which companies operate the New Zealand bus businesses known as Stagecoach Wellington, Cityline Hutt Valley and Stagecoach Auckland.
8. NZBL is also the 100% holding company for:
 - Harbour City Cable Car Limited - a shelf company;
 - North City Bus Limited - a shelf company;

¹ Commerce Commission, *Practice note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in section 47 – A Test of Substantially Lessening Competition*, May 2001.

?? Runciman Motors Limited

9. NZBL owns 26% of Mana Coach Services Ltd and 94% of Fullers Group Ltd.
10. NZBL is, in turn, a wholly owned subsidiary of Stagecoach Group plc in the United Kingdom. That company is the holding company of a wide range of overseas companies. NZBL's parent is a well-established operator of commuter rail services in Britain (as well as having bus operations in Britain, Hong Kong, USA and Canada).
11. NZBL through Wellington City Transport Limited and Cityline (NZ) Limited operates bus services in:
 - Wellington City excluding Tawa, Newlands, Paparangi and Churton Park;
 - Lower Hutt, Eastbourne and Upper Hutt; and
 - Auckland.
12. Mana operates:
 - Suburban bus services in Porirua City and Kapiti, up to and including Waikanae;
 - Suburban commuter bus services from Newlands and Churton Park to Wellington CBD;
 - A limited suburban commuter bus service from Waikanae and Paraparaumu to Wellington CBD (two bus services from each in the morning plus return);
 - Bus charter services;
 - Coach charter services principally for Kirra Tours (a package coach tour operator) and also casual long distance coach hire; and
 - Rental of passenger vans.
13. Fullers operates ferries in Auckland.

Wellington Regional Rail Limited

14. WRRL is currently the name reserved for a 50/50 joint venture company to be formed between the Wellington Regional Council (WRC) and a partner that the WRC will select through the following competitive process:
 - Parties keen to be considered as the WRC's joint venture partner have to submit their interest to the WRC by the 21 December 2001. This submission has to be accompanied with a statement of their qualifications, which includes any regulatory consent such as a Commerce Commission clearance.
 - The WRC will then select a shortlist of parties from those submitting their qualifications and choose its partner from this shortlist.
15. That joint venture company will acquire 100% of the assets of TRANZ METRO (WELLINGTON), a wholly owned subsidiary of Tranz Rail, which is currently seeking to exit from all passenger services including long haul passenger services and suburban commuter services.
16. Tranz Rail currently owns the corridors (rails and infrastructure such as signalling) and has a long term lease for the land, owned by New Zealand Railways Corporation.

17. The exact assets to be acquired by WRRL have yet to be resolved and will depend on the negotiations between the Crown and Tranz Rail Ltd. In essence it will include the exclusive right to operate the suburban commuter train network within the greater Wellington Region and Wairarapa (i.e. on the train lines to Paraparaumu, Johnsonville, Upper Hutt and Masterton, but excluding the commuter service to Palmerston North), including associated rolling stock, right to use the stations, ticket facilities, etc.
18. It is, however, unclear if it will include the actual rail corridor or just the right to use such corridor. Negotiations for the assets will start once the WRC has decided on a partner.

OTHER RELEVANT PARTIES

Wellington Regional Council

19. WRC is constituted under the Local Government Act 1974. As part of the WRC's function to provide services on behalf of central government, the WRC is responsible for public passenger transport planning and providing subsidies for passenger transport services. The WRC compiles a Regional Passenger Transport Plan, which specifies the services the WRC proposes for the region. The WRC then accepts commercial registrations for bus services and invites tenders for subsidised services. The WRC receives 60% of its funding for the subsidised bus transport services and 40% of its funding for rail transport services from rates and the balance from Transfund.
20. It is seeking to acquire the Wellington suburban rail commuter services as a 50% shareholder in WRRL, but it is currently not legally permitted to own or operate the services itself. The Transit New Zealand Act 1989 does not allow the Wellington Regional Council to make payment in respect of any passenger service and be an owner of a passenger transport company. The proposed joint venture company is prohibited by statute from acquiring the assets of Tranz Metro (Wellington).
21. The applicant acknowledges that the acquisition cannot proceed in the absence of a change to the current law. The WRC is seeking a legislative change to enable it to own or lease the land assets of the rail corridor (and related signalling, etc) and to have an interest in the operating company through a LATE.

Tranz Rail Limited

12. Tranz Rail Limited purchased NZ Rail Limited in 1993. It provides suburban rail passenger services in Wellington and Auckland, long distance rail passenger services and road and rail freight transport services throughout New Zealand, and rail ferry services. It is seeking to exit from suburban and long distance rail passenger services.

Transfund New Zealand

22. Transfund New Zealand (Transfund), a crown entity established by the Transit New Zealand Amendment Act 1995, is responsible for the funding of the land transport system formerly undertaken by Transit New Zealand. This involves allocating road-user funds from the National Road Account on the basis of the applications from Transit New Zealand, territorial authorities and regional councils.

23. Transfund also has a core responsibility to approve competitive pricing procedures (CPPs), which regional councils are required to follow when conducting tenders for the supply of subsidised public passenger services.

DECISION

24. The Commission is of the opinion that the proposed acquisition is unlikely to be proceeded with and has determined to exercise its discretion pursuant to section 68(2) of the Commerce Act 1986 ('the Act') to decline to give a clearance for the acquisition.

25. As requested under section 68(3) of the Act, the applicant was advised in writing of the Commission's reasons for declining to give a clearance under section 68(2) (see letter dated 19 December 2001 attached as Appendix 1).

Reasons for declining to give clearance under section 68(2)

26. As the law currently stands there is no room for argument as to whether the acquisition is likely to proceed: in fact the acquisition cannot lawfully proceed.

27. The applicant has suggested there may be a legislative change. However, there is currently nothing before Parliament that the Commission could properly take notice of.

28. This is not a situation where an Act has been passed, but is not yet in force, or where there is a Bill before Parliament. Hence not only is there an absence of certainty about the prospect of legislative change, but the content of any such change is a matter of speculation.

29. In the circumstances where:

- a) The proposed acquisition is currently unlawful;
- b) The Commission is unable to say if, or when, the law may change;
- c) The Commission does not know what form the law change will take; and
- d) If there were to be any law change it appears certain that such change will not happen during the period of a clearance given at this time.

The Commission is of the opinion that the proposed acquisition is unlikely to be proceeded with and it is a proper exercise of the Commission's discretion to decline to give a clearance for the acquisition.

CONCLUSION

Pursuant to section 68(2) of the Commerce Act 1986, the Commerce Commission has declined to give clearance for the proposed acquisition by New Zealand Bus Limited or one of its interconnected bodies corporate (NZBL) of a 50% interest in WRRL.

Paula Rebstock
Deputy Chair

Appendix 1

Wellington

19 December 2001

Ian Millard QC
P O Box 12 - 018
WELLINGTON

Facsimile: 473 2533

NEW ZEALAND BUS LIMITED - PROPOSED ACQUISITION OF THE ASSETS OF TRANZ METRO (WELLINGTON)

1. I refer to our earlier correspondence and your letter of 11 December 2001.

Background

2. The notice seeking clearance dated 23 November 2001, in essence seeks clearance for the proposed acquisition of 100% of the assets of Tranz Metro (Wellington) by a joint venture company to be 50% owned by New Zealand Bus Limited and 50% owned by the Wellington Regional Council.
3. The Transit New Zealand Act 1989 does not allow the Wellington Regional Council to make payment in respect of any passenger service and be an owner of a passenger transport company.
4. The proposed joint venture company is prohibited by statute from acquiring the assets of Tranz Metro (Wellington).
5. The applicant acknowledges that the acquisition cannot proceed in the absence of a change to the current law.

Decision

6. The Commission is of the opinion that the proposed acquisition is unlikely to be proceeded with and has determined to exercise its discretion pursuant to section 68(2) Commerce Act 1986 ('the Act') to decline to give a clearance for the acquisition.
7. Pursuant to section 68(3) of the Act the following are the Commission's reasons for declining to give a clearance under section 68(2).

Reasons

8. As the law currently stands there is no room for argument as to whether the acquisition is likely to proceed: in fact the acquisition cannot lawfully proceed.
9. The applicant has suggested there may be a legislative change. However, there is currently nothing before Parliament that the Commission could properly take notice of.
10. This is not a situation where an Act has been passed but is not yet in force, or where there is a Bill before Parliament. Hence not only is there an absence of certainty about the prospect of legislative change but the content of any such change is a matter of speculation.
11. In the circumstances where:
 - e) The proposed acquisition is currently unlawful;
 - f) The Commission is unable to say if, or when, the law may change;
 - g) The Commission does not know what form the law change will take;
 - h) If there were to be any law change it appears certain that such change will not happen during the period of a clearance given at this time.

The Commission is of the opinion that the proposed acquisition is unlikely to be proceeded with and it is a proper exercise of the Commission's discretion to decline to give a clearance for the acquisition.

Yours faithfully

Paula Rebstock
Deputy Chair