
**Notice of Application to Commerce Commission for Clearance Under Section
66 Commerce Act 1986 to Proposal by Fullers Group Limited to Acquire Most
of the Assets of the Business Called 360 Discovery Operated by Kiwi Kat
Limited**

Summary

To maintain access to reasonably priced “back-up capacity” Fullers applies for clearance to acquire the business of a small [] operator of 4 ferries (3 plywood and one aluminium), Kiwi Kat Limited (“Kiwi Kat”).

[]

The purchase is so modest that it would be difficult to characterise any competition effect as “substantial”.

[] there is no restraint on Kiwi Kat’s business now or in the future. Fullers has previously used Kiwi Kat when Fullers has needed additional capacity on an agreed commercial basis.

In Auckland ferries now operate in a highly regulated statutory framework aimed at protection of the public interest in coordination of multiple transport modes and safety. The regulator, ARTA has considerable countervailing power in the affected or potentially affected markets and is, in effect, a major customer of the ferry services.

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1. **Transaction Details**

Acquirer

- 1.1. The Acquirer will be Fullers Group Limited and a newly incorporated company, 360 Discovery Limited.
- 1.2. Fullers Group Limited and the new company, 360 Discovery Limited, are both wholly owned subsidiaries of Souter Holdings Fullers Limited.
- 1.3. The shares in Souter Holdings Fullers Limited are owned by William Rae and Treena Martin. Related parties are discussed later in this section.
- 1.4. To avoid confusion with the other party, (and although the newly incorporated 360 Discovery Limited will be part of the acquiring group), the Acquirer is referred to as “Fullers”.
- 1.5. Contact and other details for Fullers are:

Fullers	
Registered Office:	111 Quay Street, Auckland
Postal Address:	PO Box 1346, Auckland
Physical Address:	111 Quay Street, Auckland
Telephone:	09 367 9141
Facsimile:	09 367 9105
Website:	www.fullers.co.nz
Contact Person	Michael Fitchett
Position	General Manager – Support Services
Email Address	michael.fitchett@fullers.co.nz

- 1.6. There are no cross shareholdings, common directorship, or other such relationships between Fullers and the other parties.
- 1.7. Details of the other parties are:
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Kiwi Kat Limited	
Registered Office:	C/- Pencarrow Private Equity Ltd Level 14 Axon House 103 Willeston Street Wellington
Postal Address:	PO Box 37-588 Parnell Auckland
Physical Address:	Pier 4 139 Quay Street Auckland CBD
Telephone:	09 3072075
Facsimile:	09 3072076
Website:	www.360discovery.co.nz
Contact Person	Michael Chatterly
Position	Managing Director
Email Address	mike@acerentals.co.nz

“Interconnected Persons”

1.8. Fullers relevant “interconnected persons” are:

Fullers Relevant Interconnected Persons			
Entity Name	Fullers Group Limited	360 Discovery Limited	Souter Holdings Fullers Limited
Role	Existing Operator	Acquisition Vehicle	Parent Company
Ownership	SHFL	SHFL	W. Rae/T Martin
Directors	W. Rae/T Martin	W. Rae/T Martin	W. Rae/T Martin
Subsidiaries	None	None	FGL and 360
Operations	Ferry Operator	Future Ferry Operator	Parent Company
Geographical Operations	Auckland	Auckland (Proposed)	Based in Wellington

1.9. []

1.10. []

1.11. Kiwi Kat’s relevant “interconnected persons” are:

Kiwi Kat’s Relevant Interconnected Persons					
Entity Name					

Role	As Kiwi Kat is divesting itself of most of its assets, there are no known relevant interconnections. The contact person and other information for Kiwi Kat is given above.
Ownership	
Directors	
Subsidiaries	
Operations	
Geographical Operations	

What is Being Acquired?

- 1.12. The proposal is, subject to the exception noted below, for the acquisition of most of the assets of the business currently operated by Kiwi Kat for []. Kiwi Kat's largest vessel, the aluminium Discovery V, is not being purchased.
- 1.13. A finalised conditional agreement has now been reached between Fullers and Kiwi Kat. This is at **Tab 2**.
- 1.14. You will note there are no restraints of trade []
- 1.15. The assets and values currently ascribed to them by the parties are:
- 1.15.1. Three plywood vessels all under 24 metres in length and under 750kW namely:
- 1.15.1.1. Discovery I – []
- 1.15.1.2. Discovery II – []
- 1.15.1.3. Discovery III – []
- Photographs of the vessels are at **Tab 3** and detailed descriptions of them are at are at **Tab 4**. All three were built in Warkworth, north of Auckland.
- 1.15.2. Plant, Equipment, Stock and Spares – at agreed valuation but no less than []
- 1.15.3. Goodwill, including the brand name “360 Discovery”, 360 Discovery Registered Trademarks (746654 and 746655) and the benefit of certain contracts held by Kiwi Kat for [] namely:

1.15.3.1. Agreement from Auckland Regional Transport Authority (“ARTA”) to operate Gulf Harbour ferry service – **Tab 7**

1.15.3.2. License from Department of Conservation (“DoC”) to use Tiritiri Matangi wharf – **Tab 8:**

1.15.3.3. License dated 10 November 2008 from ARTA for Quay Street ticketing kiosk– **Tabs 5 (Photo) and 9 (Document)].**

Commercial and Strategic Rationale.

1.16. []

1.17. []

1.18. [] the key opportunities that Fullers perceives in the acquisition and underscores the need for back-up under the heading “Vessel Utilisation”.

1.19. Fullers also intends to retain the Kiwi Kat operation as is, including continuing with operations under the 360 Discovery brand name, employing its staff, operating its contract services and vessels. Fullers considers that the 360 Discovery brand is a good one and might better suit the tourist side of its current business than does the Fullers brand. It can see that the brand may allow it to expand its interests and investment in the eco-tourist market using the 360 Discovery brand on, for instance, whale watching out of Auckland. Having many and varied ferry services – irrespective of who operates them - provides greater choice for the customer and thereby a larger overall market for ferry services that directly benefits all operators, including Fullers.

1.20. Fullers currently intends [] even though it is only purchasing 3 vessels. Fullers also intends to improve the viability of the Kiwi Kat services by combining its own marketing budget with Kiwi Kat’s.

1.21. Fullers also intends using the three Kiwi Kat vessels as smaller vessels on its own routes and services as it has done in the past.

1.22. Fullers has previously operated both the Tiritiri tourist service and the Gulf Harbour commuter service that would pass to it under the proposal.

2. The Industry

2.1. Fullers and Kiwi Kat own and operate passenger ferries on Auckland's Waitemata Harbour and Hauraki Gulf. The industry segments that appear relevant are:

2.1.1. Scheduled commercial services – these are unsubsidised, timetabled, services ;

2.1.2. Scheduled contracted services – these are subsidised, timetabled services that are tendered (in this case by ARTA) and operated under contract;

2.1.3. Auckland Harbour cruises – these are services that take tourists onto Auckland Harbour for coffee or lunch cruises;

2.1.4. *Ad hoc* charter work – this is work where the operator is contacted by the customer and a boat is used for a specific voyage.

2.2. As well as Fullers and Kiwi Kat, the following ferry and charter operations are also carried out on the Waitemata Harbour and Hauraki Gulf:

2.2.1. Belaire Ferries Limited – provide the West Harbour Ferry service under contract to ARTA.

2.2.2. Pine Harbour Ferries Ltd – provide the Beachlands to Auckland ferry service and a service to Rakino Island. Both under contract to ARTA.

2.2.3. Glen Rosa – provides seasonal and public holiday harbour cruises.

2.2.4. A large number of casual charter vessel operators – generally up-market and small group charters.

2.2.5. A large number of fishing charter vessels – again only the small groups market.

2.2.6. Sealink Ltd – provides a car ferry service from Half Moon Bay to Kennedy Point, Waiheke Island. Fullers understands that more than [] foot passengers take this service annually, i.e. those passengers that do not take a car with them on that sailing.

2.2.7. Waiheke Shipping Ltd – operates in direct competition to Sealink. Fullers has no patronage information about this service.

2.2.8. Pride of Auckland – a tourist and charter operator operating from the Viaduct Basin which also operates a ‘dolphin-watch’ service.

2.2.9. XPlore NZ – This operator has rights to charter work related to Americas’ Cup regattas. It also has dolphin watching trips.

Mode of Operation and Customers

2.3. The businesses operate on conventional lines. With the scheduled services passengers purchase tickets either on-line, on board the vessel or at a ticket counter on land. There are no significant “customer lists” as such. Passengers commit only when they wish to use the relevant service and they can purchase travel in advance using typically 10 ride tickets or monthly passes. Payment is mostly by cash, EFTPOS or credit card. Passenger numbers are generally held to be commercially sensitive to the operator and accordingly –other than its own figures and those of Kiwi Kat - are not known to Fullers.

2.4. Passengers’ dependence on these services varies. On services such as Auckland – Devonport there is an enormous number of regular passengers who travel to and from work by ferry. These customers need to use this service. For them the alternatives are bus or car on much longer, and frequently congested, overland routes. However the existence of alternatives does impose discipline in charging.

2.5. Tiritiri Matangi Island is located 30 km north east of central Auckland and just 4km from the end of Whangaparaoa Peninsula. It has been described as:

... one of New Zealand's most important and exciting conservation projects. [] planted [] between 250,000 and 300,000 trees.

2.6. As a result, the Tiritiri-Matangi service customers are usually tourists, schools, or environmentalists who have identified their destination and planned well in advance. The trip is frequently a novelty and less constrained by departure time. It has a higher “discretionary” element. These customers *choose* to make the voyage.

- 2.7. The harbour cruise and charter services have an even higher discretionary element. These are an event in themselves with customers comparing these options with bus tours, Auckland Museum (Auckland's most popular attraction), the Sky Tower (with approximately 500,000 visitors annually), Kelly Tarlton's Underwater World, Harbour Bridge walks, and West Coast tours and wine trail excursions.

Customer Preferences

- 2.8. In Fullers' experience passengers prefer ferries and services that offer:
- 2.8.1. Speed (shortest time to destination);
 - 2.8.2. Size – more room and importantly more personal space;
 - 2.8.3. Vessels with televisions , toilets and café and bar facilities.
 - 2.8.4. Comprehensive timetable choice on any particular service.
- 2.9. Passengers surveys (independently conducted by ARTA) repeatedly stress reliability and a comprehensive timetable as the most important service requirements for passengers.
- 2.10. The concept of 'Reliability' has implicit in it many aspects not least of all, proper vessel maintenance facilities, back up vessels (a pool of vessels that can be available for back up should there be a mechanical issue or to satisfy peak demand on fine weather days), and a shore-based operation to support the marine operation.

Advertising

- 2.11. Larger operators such as Sealink and Fullers advertise their services on web sites local newspapers such as *NZ Herald* and radio. Smaller operators tend to rely on walk-up passengers or their own websites and in the case of contracted public passenger services, ARTA's Maxx website www.maxx.co.nz .

Legislative Framework

- 2.12. An important feature of the industry is the legislation governing its operation. There are at least three relevant statutes:
- 2.12.1. Land Transport Management Act 2003 ("LTMA 03");
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- 2.12.2. Local Government (Auckland) Amendment Act 2004 (“LGAA 04”)
 - 2.12.3. Public Transport Management Act 2008 (“PTMA 08”)
 - 2.13. In the LTMA 03, the definition of “land transport” and “public transport service” include ferry operations. In summary the LTMA 03’s objectives are to achieve an affordable, integrated, safe, responsive and sustainable land transport system. Legislatively it was designed to achieve that goal through:
 - 2.13.1. Initially creation, and subsequently recognition, of the National Land Transport Fund;
 - 2.13.2. The authorisation of toll roads and concession agreements; and
 - 2.13.3. Authorising funding of programmes submitted by regional transport committees.
 - 2.14. Later amendments to the LTMA 03 formed the New Zealand Transport Agency (“NZTA”), formerly Transit New Zealand and Land Transport New Zealand. In the case of Auckland, it also recognised the creation of Auckland Regional Transport Authority (“ARTA”) under the LGAA 04. ARTA, it appears was intended to be a more coordinated body for the greater Auckland area.
 - 2.15. Notably the LTMA 03 imposes reporting obligations which focus on 3 year periods, a possible insight into the term of expected change to plans in the regional transport industry.
 - 2.16. The LGAA 04 is the legal foundation for ARTA and Auckland Regional Holdings which owns Ports of Auckland. Effectively ARTA’s function was to be a regional transport committee for the greater Auckland area. It could seek and receive funding for that area by applying for it under the LTMA 03.
 - 2.17. The PTMA 08 was enacted on 25 September 2008 and came into effect on 1 January 2009. It creates more wide ranging powers for regions to develop integrated public transport systems. It required local authorities (and included within that is ARTA) to produce regional public transport plans. Those plans as well as the PTMA itself (see sections 13 and 14) give local authorities and ARTA wide
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ranging powers to impose “controls” on public transport operators such as Fullers and Kiwi Kat. They also give wide powers to require the provision of information by the relevant operator.

- 2.18. The PTMA 08 recognises that commercial passenger transport operations may be contracted by, in the case of Auckland, ARTA. It also requires such services to be licensed.
- 2.19. Importantly and more relevantly the PTMA 08 permits controls of the following type to be imposed (among others):
- 2.19.1. Minimum operation periods;
 - 2.19.2. Operation of other routes in a “group”;
 - 2.19.3. Operation in accordance with the relevant regional transport plan;
 - 2.19.4. Use and acceptance of integrated ticketing;
 - 2.19.5. Setting and apportionment of integrated fares “on a reasonable basis without undue discrimination” in accordance with various factors;
 - 2.19.6. Require the operator to accept a portion of an integrated fare as full payment for travel on the service.
- 2.20. ARTA has the power under s14 PTMA 08 to require information to be provided on ticket and passenger numbers, fare revenue, service quality, vehicles used, and trip performance.
- 2.21. In sum a commercial passenger transport operator is required under the PTMA 08 not only to reveal all information relevant to the operation of any relevant service, but also to comply with controls (if imposed) that extend to price and service standards.
- 2.22. There is no head-to-head competition on contracted commuter routes but that is not because of any action by Fullers. The reality of the market is that it is totally governed by ARTA through its powers under the PTMA 08.

Passenger Safety

- 2.23. Passenger safety is the paramount concern of the Maritime Transport Act 1994. That includes the safety of passengers, vessels, their crews
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and cargo. All responsible operators have a prime concern for safety in their respective operations.

Cost and Profitability

2.24. Ferry operations are capital intensive with high operating costs. Almost all costs are fixed and unavoidable in the short to medium term.

2.25. There is a high financial risk with operating registered ferry services in accordance with their registration as the services must be provided, as registered, whether there are any passengers or not. Therefore successful operators are those that are able to maximize the utilisation of their fleet across the range of daily and weekly peak and inter-peak market demands and seasonal demands.

2.26. There are costly and highly technical maintenance requirements for public transport vessels:

2.26.1. Vessels under 24 metres have lower statutory maintenance and standards requirements than those over 24 metres.

Note: The 3 vessels proposed to be purchased are all **under** 24 metres.

2.26.2. Vessels **over** 24 metres with one or more engines of **less** than 750 kilo watts have additional and higher cost and standards yet again.

2.26.3. Vessels **over** 24 metres with one or more engines of **greater** than 750 kilo watts have additional and higher cost and standards yet again.

Note: The 3 vessels proposed to be purchased are all **under** the 750 kW level.

2.27. If the proposal proceeds Fullers will have a spread of Vessels across all three categories. Six of Fullers' vessels are above the 24 metres and 750 kW's thresholds. The three Kiwi Kat vessels will provide Fullers with an efficient group of vessels in the lower size bracket.

Know-How

2.28. Successful operation of a ferry service does not require sophisticated technical knowledge. It does however require an unusual *combination*

of knowledge of maritime law (e.g. safety rules), vessel design, diesel mechanics, passenger behaviour, seasonal effects, transport and local authority law and other controls of harbour and waterway operations, local conditions such as weather and tide, and the diverse wharves and berths found on the Auckland Harbour. Fullers benefits from having on its staff a core of employees with many years experience in this industry.

Auckland Ferries

2.29. The current Auckland Passenger Transport Plan (AFTP) [] shows that ferries account for only about 3% of the fare revenue in the Auckland commuter passenger transport network. Further, whereas ferries do not provide adequate substitutes for bus services, the opposite is often not true. For instance there are bus services provided by other unrelated transport operators that could be used by commuters instead of the Birkenhead ferry service. The situation is all the more so now that bus transit lanes operate on the Auckland's northern motorway and main arterial routes.

2.30. The vulnerability of some Auckland ferry services to buses is shown by the following extract from §51 of Decision 318 (*New Zealand Bus Limited and Transportation Auckland Corporation Limited*):

Passenger ferry services provide an alternative for those travelling between Birkenhead, Devonport and Bayswater on the North Shore and the Auckland central business district. However, it is unlikely that ferries would provide an adequate substitute for buses for many of those travelling between the North Shore and the Auckland isthmus due to scheduling, and the additional time required to undertake a journey using a combination of the two modes. Ferries are also clearly limited to those routes in which there is ready access to water.

Wharfage

2.31. All ferry services require facilities for passenger embarkation and disembarkation. To Fullers' knowledge, the terms of use of all wharves in Auckland do not permit exclusion of other users. This extends to Fullers' owned facilities, access to which Fullers must provide as a term of their consenting permits which state that they are non-exclusive. Depending upon the time of day, season, and reasons for travel there can be congestion at the various locations.

2.32. Kiwi Kat does not own any berthing or wharfage structures. Fullers owns:

- 2.32.1. Half Moon Bay - pontoon
 - 2.32.2. Birkenhead wharf – pontoon
 - 2.32.3. Downtown Ferry Terminal – two pontoons, passenger shelter , lighting , public address systems, fuel bunkering tanks, on-shore power supply, fresh water supply, and gangways.
 - 2.32.4. Devonport wharf. – hydraulic gangway system, all piles and fenders.
- 2.33. Passengers of another operator accessing these destinations above cannot avoid using these Fullers owned facilities. While it would be theoretically open to Fullers to somehow attempt to control access to berths by depriving another operator of use of these Fullers-owned assets, Fullers has never done so and believes that if it were to do so it would breach the terms of use of the wharf requiring non-exclusivity.
- 2.34. An example of the contractual terms to which Fullers is subject is contained in the agreements at **Tab 11** (Hub Management Agreement) and **Tab 10** (Access and Charging Agreement Between Fullers and ARTNL). Under the first of those clause 3.1 clearly gives Fullers only ‘non-exclusive access’. Further, clause 5.1 requires Fullers to:
- ...manage and operate at its cost...the Hub...to enable the efficient, safe and reliable operation of Passenger Ferry Services to and from the Hub by Fullers and other Passenger Ferry Service operators...
- Under the second, rights of access are maintained for other Passenger Ferry Service operators: see clause 2.10 – 2.12.
- 2.35. While not be able to refuse another operator the right to use the Fullers-owned assets, Fullers considers that it has the right to make a reasonable charge for their use. [] Note clause 2.12 of the agreement at **Tab 10** (Access and Charging Agreement Between Fullers and ARTNL) which recognises this right.
- 2.36. ARTA also has considerable control of some wharves/berths. That arises where ARTA has contracted with a single operator to provide a scheduled service. As ARTA may decline to register another service, (where for instance that other service may have a financial impact on the ARTA contracted service) ARTA effectively renders the single operator the sole user – but that is not the same as giving the single operator rights to exclude others. The grounds upon which ARTA
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may decline to register a new commercial public transport service are more fully set out in section 33 PTMA 08.

Customer Patterns

- 2.37. The commuter markets and to a greater extent visitor markets are highly seasonal. Two thirds of passengers in Fullers travel in the six months over summer. Other operators are believed to be affected even more severely.
- 2.38. Some ferry services work to seasonal timetables because of the severe drop-off in demand in winter. These include Kiwi Kat's Coromandel service (which is not proposed to be acquired) and Fullers' Great Barrier service.
- 2.39. With some operations, such as harbour cruises small operators tend to come out only in summer or for special events such as regattas and festivals. An example is the *Glen Rosa* which offers a cheaper harbour cruise on a casual basis []

Future

- 2.40. As shown by the APTP [] it is planned or forecast that the proportion of fare revenue collected by ferries (as a proportion of total commuter expenditure, which is growing) will remain similar to the current proportion. However, the number of sailings and importantly the number of services contracted by ARTA is expected to increase from 2011. As that section shows, *increased* services are envisaged to Devonport, Bayswater, Half Moon Bay, Birkenhead with *possible new* services to Hobsonville, Browns Bay and Takapuna will depend upon development and funding of ferry terminal facilities. There will therefore be many opportunities for further competitive entry by existing and new operators.

3. **Market Definition**

Current Operations

- 3.1. Kiwi Kat operates scheduled services to and from Coromandel, Tiritiri Matangi, Gulf Harbour and scheduled Harbour Cruise services. Timetables are available on the Kiwi Kat website. Note:
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- 3.1.1. The Coromandel service (seasonal - summer only). This service has already been identified with NZTA as facing an uncertain future under the Kiwi Kat ownership.
 - 3.1.2. The Harbour Cruise service operates 364 days annually.
 - 3.1.3. The Gulf Harbour service operates at peak time Monday to Friday only.
 - 3.1.4. The Tiritiri Matangi service operates an inter-peak service to a prescribed and DoC approved timetable.
- 3.2. Fullers operates commercial services to Waiheke Island, Devonport, Stanley Bay Rangitoto Island and a Harbour Cruise service but none to or from Coromandel, Gulf Harbour or Tiritiri Matangi. Fullers also operates services under contract to ARTA as follows:
- 3.2.1. Bayswater Ferry Contract No 8-14-7;
 - 3.2.2. Half Moon Bay Contract No. 8-15-7;
 - 3.2.3. Birkenhead Ferry Service Contract No 8-07-1.
- In addition to that Fullers has bus contracts with ARTA on Waiheke Island but those would be irrelevant for present purposes.
- 3.3. ARTA tendered services held by other operators are in the Hauraki Gulf Auckland area are:
- 3.3.1. Pine Harbour Ferries - (Beachlands to Auckland and Matiatia (Waiheke Island) to Rakino service);
 - 3.3.2. Belaire Ferries Limited which operates the West Harbour service

There is the possibility of the Coromandel service becoming a contracted one, but that is thought to still be under consideration by NZTA.

Proposed Transaction

- 3.4. Under the proposed transaction, Kiwi Kat will sell the assets and rights specified in section 1.15 above. The services that it is proposed Fullers would take over are explained in paragraph 3.2 above (with the exception of the Coromandel service).
 - 3.5. None of Kiwi Kat's services potentially "link" to Fullers services other than at the Downtown Auckland terminal. So for instance, there
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is no Fullers service that might take passengers from Tiritiri Matangi and deliver them to Waiheke. There is therefore no intended or unintended “channelling” of passengers to Fullers services away from any other industry participant.

Potentially Affected Markets

3.6. As a result, the *hypothetically* affected markets are those related to services provided by Kiwi Kat, as set out below. Without pre-empting the further discussion below “yes” indicates an area thought relevant and worthy of extended discussion and “no” indicates one that is thought irrelevant. In both cases paragraph references are given to the text below:

3.6.1.	Vessels of the kind being acquired;	No	
			3.7-9
3.6.2.	Public transport to and from Gulf Harbour (which Kiwi Kat holds through the ARTA license);	Yes	
3.6.3.	Public transport to Tiri-Tiri Island (which right Kiwi Kat holds through the DoC wharf license);	Yes	
3.6.4.	Public access to <i>ad hoc</i> charter operations which Kiwi Kat sometimes operates;	Yes	
3.6.5.	Public access to the scheduled harbour cruise service which Kiwi Kat operates;	Yes	
3.6.6.	A ticket kiosk for which Kiwi Kat holds the license from ARTA;	Yes	
3.6.7.	Competitor access to wharves, pontoons and other landing facilities;	Yes	
3.6.8.	Ferry ticketing services using the information technology (“Jewel” software and hardware) owned by Kiwi Kat; and	No	3.10
3.6.9.	Internet access through the 360 Discovery website address, namely www.360discovery.co.nz .	No	3.11

Narrowing the Discussion on Relevant Markets

- 3.7. The boats in question are all less than 24 metres. They are made from plywood and are not in any way “specialised” or “unique”. Similar vessels are often available for sale or lease both in New Zealand and overseas, for instance Australia. The lead time on delivery is only two to four months. While there is a cost and risk to a voyage from overseas, such transfers regularly occur.
- 3.8. In the last three years Fullers has purchased two second hand vessels from Tasmania. In addition there are few impediments to access to boatbuilders capable of building these boats. While there may be a lead time, ARTA has sought Fullers advice on the likely time for construction of such vessels and has indicated to Fullers that it will allow other tenderers time to construct vessels if they require it.
- 3.9. Of course the question might be asked why Fullers does not commission construction of boats for itself. In short, it needs back-up capacity now and there would be little point replicating at a higher price assets [].
- 3.10. Similarly, the Kiwi Kat booking system (which uses a largely off-the-shelf software called “Jewel”) is readily available to all market participants. It is acknowledged by Fullers to probably be superior to its own, slightly older software, but that is not the rationale for the acquisition and could easily be purchased by Fullers now. It is incidental to the acquisition.
- 3.11. The website is also readily and easily reproduced by any market participant at market rates. It is therefore not a specialised or unique bundle of rights or works.
- 3.12. As a result, the practical approach is to consider the narrower set of potentially affected markets as:
- 3.12.1. Public transport to and from Gulf Harbour (which Kiwi Kat holds through the ARTA license). Yes
- 3.12.2. Public transport to Tiritiri Matangi Island (which right Kiwi Kat holds through the Yes
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DoC wharf license);

- | | | |
|---------|--|-----|
| 3.12.3. | Public access to <i>ad hoc</i> charter operations which Kiwi Kat sometimes operates; | Yes |
| 3.12.4. | Public access to the scheduled harbour cruise service which Kiwi Kat operates; | Yes |
| 3.12.5. | A ticket kiosk for which Kiwi Kat holds the license from ARTA; | Yes |
| 3.12.6. | Competitor access to wharves, pontoons and other landing facilities; | Yes |
- 3.13. These are discussed in greater detail in the context of the competition analysis in section 5 below.

4. **Counterfactual.**

[]

4.1. []

4.2. []

[]

4.2.1. []

4.3. []

4.4. []

4.5. []

4.6. []

4.7. []

5. **Competition Analysis**

Discussion on Scope of This Section

5.1. As noted at paragraph 3.12 above, the potentially affected markets are those for:

5.1.1. Public transport to and from Gulf Harbour (which Kiwi Kat holds through the ARTA license);

- 5.1.2. Use of wharf at Tiritiri Matangi (to which Kiwi Kat holds rights through the DoC license);
 - 5.1.3. Public access to *ad hoc* charter operations which Kiwi Kat sometimes operates;
 - 5.1.4. Public access to the scheduled harbour cruise service which Kiwi Kat operates;
 - 5.1.5. A ticket office for which Kiwi Kat holds the license from ARTA;
 - 5.1.6. Competitor access to wharves, pontoons and other landing facilities.
- 5.2. The question is of course whether the implementation of the proposal will in any way result in a substantial lessening of competition (“SLCM”) in any of these markets. Each is discussed in turn.
- Public Transport To And From Gulf Harbour (Which Kiwi Kat Holds Through The ARTA License);*
- 5.3. It is proposed that Kiwi Kat will assign to Fullers (with ARTA’s consent) all of Kiwi Kat’s rights in the ARTA agreement [] to the Gulf Harbour service.
- 5.4. For present purposes it is the term of that service that is relevant. It has been extended only until 27 March 2010 (see letter at **Tab 7**).
- 5.5. In *New Zealand Bus Limited and Infratil Limited vs Commerce Commission* (“*NZ Bus*”) the Court of Appeal (§246) **affirmed** the relevance of a regulator’s (in that case the Greater Wellington Regional Council (GWRC)) countervailing power – that is power to prevent supra-competitive pricing.
- 5.6. However, the Court of Appeal found in that case that GWRC lacked sufficient countervailing power where the largest and second largest potential tenderers merged. That may be seen as a legitimate concern in that case. The Court of Appeal also referred – importantly – to the
- ...informational disadvantage...
- that GWRC had as compared to Mana and NZ Bus (§246).
- 5.7. Under the present proposal (and as summarised above) the reality of the market in Auckland and other circumstances are different. First,
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as mentioned in section 2 above, the PTMA 08 was enacted on 25 September 2008 and came into effect on 1 January 2009. It was enacted and came into force **after** *NZ Bus*.

- 5.8. As noted above under the PTMA regional transport committees and, relevantly ARTA are now given extensive power to impose controls related to cost, cost allocation, and service quality on commercial passenger services such as these. Any “informational disadvantage” that formerly existed is redressed by the sweeping powers ARTA now holds to obtain highly sensitive information which would not normally be available to a consumer or competitor, from the relevant operator.
- 5.9. Secondly, in *NZ Bus* the Court voiced concern that GWRC might be left with one tenderer. It appears highly unlikely that ARTA would be left in that situation unless it sought only one tender. Fuller’s cannot recall a tendered service where there was not at least two tenderers. ARTA reported having received five tenders from entities (including Kiwi Kat), other than Fullers in the tenders for the Bayswater and Half Moon Bay services prior to Christmas 2008. There is nothing uniquely attractive about those services and, therefore, **actual** competition exists.
- 5.10. The other industry participants listed above have (and indeed Kiwi Kat – because it will not be subjected to any restraint of trade as a result of the proposal) the ability and means to compete in the tender round and it is believed but not known with certainty that they did so in relation to this license. The resources they require – vessels, facilities, staff, capital – are all faced equally by Fullers.
- 5.11. Indeed Fullers is at a slight disadvantage. As owner of some of the wharfage facilities Fullers currently carries the cost of those facilities .
- 5.12. Thirdly, as to the constraining effect of competitive entry, if that is required, the tendering terms allow the LETS test to be met. The 3 year time line adopted in *NZ Bus* is satisfied by the fact that the agreement falls for renewal in just over one year. Even if it had been three years away, that term is the same or less than the reporting and planning obligations in the LTMA 03, LGAA 04 and PTMA 08 which suggest three years is appropriate.
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5.13. Fullers is acquiring a contract that ends next year. It is taking a serious risk that it will be out-bid then. As mentioned elsewhere its rationale for the purchase is not the acquisition of this service but the need for the additional capacity of Kiwi Kat's boats. However Kiwi Kat recognises its obligations under the license and requires that those obligations be performed by the buyer.

5.14. []

5.15. Looked at realistically there will be no SLCM. Competition will come from the same quarters that it has historically and the available competitors will be the same (except that ARTA has stronger countervailing power).

Use of Wharf at Tiritiri Matangi (to which Kiwi Kat holds rights through the DoC license);

5.16. Kiwi Kat holds rights to use the wharf at Tiritiri Matangi wharf under the agreement with the Director-General of Conservation ("DoC"). []

5.17. The key terms of that agreement are summarised in the following table:

Key Terms of 360 Tiritiri Rights	
Term and Renewal:	3 years ending 30 June 2010. 360 may apply for renewal but clause 12 renders it discretionary whether DoC grants a further term.
Fee	[] (including GST)
Capacity Limit	200 berthings annually and 150 passengers per day
Degree of Exclusivity	Clause 5 prevents DoC from granting rights for same purpose or service. However it also permits licensing of other charter services.
Effect of Cessation of Service	DoC can terminate the license if Kiwi Kat ceases to conduct the service (among other grounds).

5.18. With reference to the LETS test, these rights are clearly contestable within the relevant future. They are administered by DoC by reference to the public interest in both:

5.18.1. the protection of; and

5.18.2. provision of reasonable public access to,

the unique environment of the island.

- 5.19. These rights become contestable again in just over one year. Even if this application were being made at the beginning of the term, there appears ample authority for the proposition that 3 years is an appropriate and relevant period over which to contemplate competitive entry.
- 5.20. The value of the vessels servicing the island are low thus the necessary extent of competitive entry is not so high as to act as a barrier.
- 5.21. Further, and importantly, Fullers does not currently operate on this route or hold any rights to this wharf. Consequently by acquiring these rights and the vessels the number of participants and market concentration will not change.
- 5.22. There will, therefore, be no SLCM. Competition will not change. There is no reason to believe that Fullers will behave any differently in relation to the service than Kiwi Kat.

Public Access To Ad Hoc Charter And Scheduled Harbour Cruise Service Operations

- 5.23. These potential markets can be considered together. It is a fact of these markets that Fullers is already subjected to considerable actual competition. This work is highly seasonal. Competition arises from small operators who “cherry-pick” the times they operate based on weather, seasons, local events, cruise ship arrivals. Consequently the market is inherently fragmented, temporal and competitive.
- 5.24. Additionally both markets involve services where there is virtually no compulsion for the passenger. As a result Fullers competes not only with other charter and cruise operators, but also many other tourist and social events of the type identified in section 2 above.
- 5.25. There are no arrangements in place between Kiwi Kat or Fullers with travel operators that cause any reduction in consumer choice. Both are thought to be advertised by cruise ship lines along with the other events that compete with them.
- 5.26. Applying the SSNIP test, a **S**mall but **S**ignificant **N**on-transitory change **I**n **P**rice would, in Fullers view, almost certainly cause a
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reduction in revenue on these services. The existence of these other events is a clear constraint external to Fullers.

A Ticket Kiosk For Which Kiwi Kat Holds The License From ARTA

- 5.27. The Quay Street ticketing kiosk is owned by ARTA and is currently occupied by Kiwi Kat : []. Kiwi Kat wishes to rid itself of this liability as a condition of the proposal going ahead. Conversely ARTA also wish to have an ongoing commitment.
- 5.28. The Kiosk location is more relevant to the “walk-up” tourist passenger wishing to go on a harbour cruise than the regular commuter passenger. As shown earlier, there are casual operators who operate seasonally in that market. Many of those operators simply stand on the quay-side “enrolling” customers as they pass and advertise with a blackboard.
- 5.29. In addition, there are many other outlets that sell tickets for and promote any operator who cares to use them and pay a modest commission. An example is Tourism Auckland who sells tickets to most services.
- 5.30. With the advent of the internet, tourists and commuters are increasingly purchasing their tickets online. The existence and location of ticketing facilities – as with air travel – is becoming less relevant.
- 5.31. There is retail space at passenger level available in the Downtown Ferry Building. Another operator would be able to lease that space. As a result, it is unlikely that any SLCM will result from the proposed acquisition of this property.

Competitor Access To Wharves, Pontoons And Other Landing Facilities.

- 5.32. The proposal will not involve any changes to the existing arrangements relating to (and in some cases Fullers’ ownership of) wharves, pontoons and terminal facilities. As a consequence the implementation of the proposal cannot result in any SLCM in that market.

Howick and Eastern

5.33. It is Fullers' view that the assumed "association" with Howick and Eastern buses has no relevance to the affected markets. There is no particular competitive hindrance or influence that Howick and Eastern could exert on the affected markets.

Cost Efficiencies, Improved Asset Investments, Public Benefit.

5.34. If the proposal proceeds then there are various efficiencies that Fullers considers it may be able to introduce. These include:

5.34.1. Reducing its fleet by one vessel (taking into account the combined services) in the medium term.

5.34.2. Advertising and marketing of both brands.

It is unlikely there will be reduction in the level of marine crews as this is generally a scarce resource.

5.35. While not directly relevant to a clearance application, Fullers expects public benefit to arise from the proposal as a result of:

5.35.1. Continuance of the services;

5.35.2. Larger vessels being available from the Fullers fleet to meet peak demand on some Kiwi Kat services;

5.35.3. Bigger back up pool of vessels – more certainty of availability of those vessels as a result of the transaction.

6. Further Information and Supporting Documentation

6.1. The Table of Contents makes clear the other information and documents that the applicant considers are, or may be, relevant.

7. Confidentiality

8. Confidentiality is claimed for all information in the enclosed version of this proposal shaded yellow. Where an item contained at a Tab has been marked, the confidentiality claim extends to all information at that Tab unless indicated to the contrary.

This notice is given by Fullers Group Limited and 360 Discovery Limited.

We confirm that:

- All information specified by the Commission has been supplied;
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- If information has not been supplied, reasons have been included as to why the information has not been supplied;
- All information supplied is correct as at the date of this application/notice.
- We undertake to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Signed by: Fullers Group Limited and 360 Discovery Limited:

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For Fullers Group Ltd.

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For 360 Discovery Limited

Dated: Thursday, 4 June 2009

I am an Officer of both Fullers Group Limited and 360 Discovery Limited and am duly authorised to make this application/notice:

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Michael Fitchett
