



COMMERCE COMMISSION

Decision No. 674

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

Fullers Group Limited

and

Kiwi Kat Limited

The Commission: Mark Berry
Peter JM Taylor
Susan Begg

Summary of Application: The acquisition by Fullers Group Limited of most of the assets of the business called 360 Discovery operated by Kiwi Kat Limited.

Determination: Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.

Date of Determination: 30 June 2009

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THE PROPOSAL

1. On 8 June 2009, the Commerce Commission (the Commission) received a notice pursuant to s 66(1) of the Commerce Act 1986 (the Act). The notice sought clearance for the acquisition by Fullers Group Limited of most of the assets of the business called 360 Discovery operated by Kiwi Kat Limited.
2. Kiwi Kat's largest vessel, the Discovery V, is not part of the acquisition. []

ANALYTICAL FRAMEWORK

3. The first step of the Commission's analytical framework¹ for assessing applications for clearance is to determine the relevant market or markets. To do this, the Commission identifies the areas of overlap between the acquirer and the target, and then considers what, if any, products and geographic regions, constitute relevant close substitutes from both a customer's and a supplier's point of view.
4. The Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely, so an important subsequent step is to establish the appropriate hypothetical future scenarios, with and without the proposed acquisition. That is what will be the competitive landscape:
 - in the factual - with the acquisition; and
 - in the counterfactual – absent the acquisition.
5. The impact of the acquisition on competition is then viewed as the prospective difference between those two scenarios on the extent of competition in the relevant markets.
6. The Commission analyses the extent of competition in each relevant market for both the factual and counterfactual scenarios, in terms of:
 - existing competition - the degree to which existing competitors compete and their ability and incentives to expand production in the event that the combined entity raises prices;
 - potential competition – the ability of businesses to enter the market and thereafter expand, given an inducement to do so;
 - other competition factors, such as the countervailing market power of buyers - the combined entity may be constrained if purchasers were able to exert a substantial influence on the price, quality or terms of supply of a good or service; and
 - co-ordinated behaviour – whether the acquisition would enhance the ability of market participants to collude either tacitly or explicitly.
7. A comparison of the extent of competition in the relevant markets in both the factual and counterfactual scenarios enables the Commission to assess the probable

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

extent of the lessening of competition under the proposed acquisition, and whether that lessening is likely to be substantial.

PARTIES

The Acquirer – Fullers Group

8. Fullers is a wholly-owned subsidiary of Souter Holdings Fullers Limited, a private company. It is the largest ferry boat operator in the greater Auckland marine region. It owns 11 vessels. Fullers operates year-round commercial² scheduled passenger and freight (Waiheke only) ferry services from the Auckland CBD to the following locations:
 - Waiheke Island;
 - Devonport;
 - Stanley Bay; and
 - Rangitoto Island.
9. Fullers operates summer season commercial services to:
 - Great Barrier Island; and
 - Motutapu Island.
10. Fullers operates subsidised ferry services to the following locations under contract to Auckland Regional Transport Authority (ARTA):
 - Bayswater;
 - Half Moon Bay; and
 - Birkenhead/Northcote Point.
11. Fullers also provides scheduled harbour cruises and boat charters.
12. Fullers is also a partner in a joint venture – Just Cruising Charters which owns one vessel and provides tourism vessel services in the region.

The Target – Kiwi Kat

13. Kiwi Kat trades as 360 Discovery. It is owned by AMP Capital Investments (72%), Tourism Enterprises Ltd (22%) and a private individual (6%). In turn, AMP Capital Investments owns 34% of Tourism Enterprises with the balance owned by a private individual.
14. Kiwi Kat operates the following services:
 - Wildlife Discovery: a five-day-a-week commercial ferry service to Tiritiri Matangi Island under contract to the Department of Conservation (DoC), which owns the Island. Under this contract potential operators tender a price for wharfage to gain commercial access to DoC's wharf (currently [] per annum);

² That is, unsubsidized.

- Coromandel Discovery: a ferry service from Auckland City to Coromandel Town via Waiheke Island. This is the only ferry service between Auckland and Coromandel and operates five days a week, but only in summer;
- Harbour Discovery: a 90-minute cruise from Auckland City that operates three times per day;
- Island Discovery: a weekend day tourist experience between Auckland City and Motuihe Island with three sailings on each of the weekend days;
- Gulf Harbour ferry service: a subsidised Monday to Friday commuter ferry service between Gulf Harbour and Auckland City, operated under contract to ARTA. Currently two sailings in each direction per day are subsidised by ARTA. The subsidy is [] per annum; and
- One-off harbour cruises under charter.

Other Relevant Parties

15. Auckland Regional Transport Authority (ARTA) – ARTA is responsible for the planning, funding and development of public passenger transport services in the greater Auckland region. In respect of its subsidisation of ferry services, its stated intent is to reduce the levels of commuter road traffic volumes and congestion in Auckland. ARTA subsidises the Bayswater, Birkenhead, Gulf Harbour, Half Moon Bay, Pine Harbour and West Harbour, to Auckland CBD ferry routes.
16. Adelaide-based ferry operator Sealink Travel Group (Sealink) owns five vessels and provides commercial vehicle, freight and passenger ferry services from Half Moon Bay to Waiheke Island and from the Jellicoe wharf to Great Barrier Island. Waiheke Shipping Ltd competes with Sealink on the Half Moon Bay to Waiheke Island route.
17. Belaire Ferries Ltd and Pine Harbour Ferries Ltd are two other operators of passenger ferry routes in the region that are subsidised by ARTA.
18. In addition to the parties already described, there are multifarious owners of tourist cruise operations (sometimes scheduled, sometimes not), corporate charters, fishing trips, dolphin watching trips and the like that operate in the Greater Auckland marine region. These include Reubens Water Taxis, Nicks Cruises, Little Red Boats, Glen Rossa, Xplore NZ, Pride of NZ and many other casual charter tourist and fishing vessel owners.

MARKET DEFINITION

19. The Act defines a market as:

“... a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.”
20. For competition purposes, a market is defined to include all those suppliers and all those buyers, between whom there is close competition, and to exclude all other suppliers and buyers. The focus is upon those goods or services that are close

substitutes in the eyes of buyers, and upon those suppliers who produce or who could easily switch to produce, those goods or services. Within that broad approach, the Commission defines relevant markets in a way that best assists the analysis of the competitive impact of the acquisition under consideration, bearing in mind the need for a commonsense, pragmatic approach to market definition.³

21. Both Fullers and Kiwi Kat , in relation to the Greater Auckland marine region:
 - tender to ARTA for the rights and obligation to operate various of its subsidised ferry routes; and
 - operate tourist cruises, vessels charters, fishing trips and the like; and
 - operate ferry services on various routes. Presently, neither operates on the same route.
22. In the Commission’s view, a bidding market exists for the provision of tenders to ARTA for the rights and obligation to operate subsidised ferry routes, as offered by ARTA, and that bidding market is relevant to the examination of this application for clearance. Investigations have revealed that limited numbers of tenders were received by ARTA in the past. Both Fullers and Kiwi Kat have been tenderers in the past and it seems likely that the acquisition would have the potential to reduce that number by one.
23. Both Fullers and Kiwi Kat provide general tourist cruises in the region. There will be some aggregation of market share and, as such, the Commission considers that this market is also relevant.
24. Finally, the provision of both subsidised and commercial ferry services together is also relevant. The boundaries of this market or these markets could be examined by determining close competitors from the point of view of either consumers or suppliers of the ferry services.
25. From the point of view of consumers there is limited or no demand side substitution available. The Devonport route is not a substitute for Waiheke Island or any other route. On this basis, the implication is that the relevant ferry markets are likely to be individual point to point ferry routes.
26. From the point of view of suppliers, there would be some ability for them to switch their vessels in response to changes in relative prices or returns between alternative routes. However that ability would be limited by the fact that certain vessels are unsuitable for the berthing facilities or the number of passengers required to be transported on certain other routes. For example, Fullers large Waiheke passenger ferries would be too large to berth in the small marinas utilised by Belaire and Pine Harbour ferries. Equally the small 49 passenger ferries of for example Belaire Ferries would not be suitable to provide sufficient capacity for the Waiheke passenger route.

³ Mergers and Acquisitions Guidelines, p14.

27. That is evidenced by Fullers' purpose in acquiring Kiwi Kat. The three Kiwi Kat vessels to be acquired are smaller than most of the Fullers vessels and will be able to be used as back up for particular routes that Fullers' larger vessels cannot service.
28. Further, there is a limited ability of suppliers to switch between subsidised routes because of ARTA's policy to subsidise only one ferry operator on each individual route. It seems unlikely that an unsubsidised operator could profitably compete against a subsidised operator.
29. Given the limited degree of both demand-side and supply-side substitutability, in this instance, the Commission has taken the view that the relevant markets in this case are those for individual point to point ferry routes.
30. Therefore the Commission considers the markets that are relevant to its consideration of the present application are markets in the Greater Auckland marine region for the provision of:
 - tourism vessel services;
 - individual point to point ferry subsidised and commercial services on each individual route; and
 - the rights and obligations to provide ARTA subsidised passenger ferry services in the Greater Auckland marine region.

COUNTERFACTUAL

31. The Commission investigated alternatives to the acquisition of Kiwi Kat by Fullers. It was informed that []. On this basis, the Commission considers that the likely counterfactual is that Kiwi Kat would be purchased by another ferry company, already operating in the relevant markets. This is not a competition concern under section 47 for reasons set out below.

COMPETITION ANALYSIS

Tourism Vessel and Individual Point to Point Route Markets

32. When the factual is compared to the counterfactual there is no aggregation of market share in the individual point to point ferry services markets. Therefore, the Commission does not examine these markets further.
33. Moreover, the Commission has no competition concerns about the small degree of aggregation of market share in the tourism vessel services market. There are many participants in that market and relatively low barriers to the entry of additional participants. Vessels similar to the ones that are the subject of this proposed acquisition are available either new or second-hand, from approximately []. A commercial registration to operate tourist services that are available to the public by way of a fare takes 35 days to acquire from ARTA, subject to meeting the requirements of section 33 of the Public Transport Management Act 2008. Many small operators merely berth at the Viaduct Basin on fine days and offer their tourist trip services via a quayside bill board.

34. As a result, this competition analysis focuses on the bidding market for ARTA-subsidised contracts, where the small number of tenders for a recent route – two of which were Fullers and Kiwi Kat - would suggest that more serious competition concerns might arise.

ARTA's Bidding Market

35. ARTA advised the Commission that in November 2008, it offered the subsidised Auckland CBD to Bayswater route for tender. It had offered the route on a “gross basis”. That meant that the tenderer offered a cost plus price to ARTA – the cost of providing the service plus a suitable profit for the tenderer. Under that system ARTA receives the passenger's fares for itself. The benefit to tenderers of the gross amount system is that the risk of passenger numbers declining is taken by ARTA. In addition the amount tendered is adjusted up to compensate for such matters as inflation and increasing fuel prices.⁴
36. The Bayswater tender attracted bids from [].
37. ARTA informed the Commission that berth access arrangements at Bayswater complicated matters. []
38. Accordingly, at present, ARTA is working to overcome such factors that reduce the ability of competitors or potential competitors to submit competitive tenders. To improve matters it intends to:[]

⁴ ARTA has in the past offered tenders under which the passenger number risk is taken by the operator. Under the net subsidy system, the operator bids a price on the basis of retaining the fare revenue. ARTA appears to be moving away from that system.

39. []
40. It is apparent to the Commission that the dynamics of the bidding market for subsidised ferry routes will be quite different in the factual vis-à-vis the situation applying in November 2008, when ARTA received tenders from only three independent bidders, two of which will merge if clearance is granted.
41. It appears to the Commission that ARTA is determined to promote competition in its ferry service bidding market by a number of innovations. The Commission also considers that either ARTA or a similar successor is likely to remain in some form or other under the “Supercity” proposal. Therefore, the contractual structure ARTA is proposing is likely to remain when the Supercity proposal is implemented.
42. The revised structure of the market appears likely to be in place within the Commission’s two-year timeframe of consideration. In any event, ARTA does not intend to hold any more individual route tenders prior to its overall plan coming into being. It will roll over the existing contracts in the meantime.
43. The Commission, therefore, considers that competition concerns will not arise in the bidding market as a result of the proposed acquisition.

Competition Analysis: Conclusion

44. Therefore the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant markets.

DETERMINATION ON NOTICE OF CLEARANCE

45. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Fullers Group Limited of most of the assets of the business called 360 Discovery operated by Kiwi Kat Limited.

Dated this 30th day of June 2009

Dr Mark Berry
Chair