

Determination

Kinetic NZ Holdings Ltd and NZB Holdco Ltd [2022] NZCC 25

The Commission:	Sue Begg Derek Johnston Vhari McWha
Summary of application:	An application from Kinetic NZ Holdings Ltd to acquire all of the shares in NZB Holdco Ltd and its subsidiaries.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
Date of determination:	7 July 2022

Confidential material in this report has been removed. Its location in the document is denoted by [].

The Proposed Acquisition

1. On 14 April 2022, the Commerce Commission registered an application (the Application) from Kinetic NZ Holdings Limited (Kinetic) seeking clearance to acquire 100% of the issued share capital of NZB Holdco Limited (NZ Bus) and its subsidiaries (the Proposed Acquisition).¹

Our decision

2. The Commission gives clearance to the Proposed Acquisition because it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. Kinetic and NZ Bus provide bus and coach services. The Commission's investigation focussed on the potential for the Proposed Acquisition to result in unilateral effects in markets for the rights to supply scheduled bus services to the Ministry of Education for school bus services, and to regional authorities for urban bus services.
4. The Commission found that in relation to school bus services, NZ Bus is not likely to provide significant competitive constraint on Kinetic for these services, and that the Ministry of Education is likely to have some countervailing power through its ability to design procurement processes to achieve more competitive outcomes. In relation to urban bus services, the Commission found that competition from other urban bus providers is likely to constrain the merged entity, post-acquisition.

Our framework

5. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).²

The substantial lessening of competition test

6. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.
7. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).³
8. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise prices above the price that would exist in a

¹ A public version of the Application is available on our website at: <http://www.comcom.govt.nz/businesscompetition/mergers-and-acquisitions/clearances/clearances-register/>.

² Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

³ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

competitive market (the ‘competitive price’),⁴ or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

9. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁵ Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.⁶
10. As set out in our guidelines, there is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.⁷
11. A lessening of competition or an increase in market power may manifest itself in a number of ways, including higher prices or reduced services.⁸
12. While we commonly assess competition effects over the short term (up to two years), the relevant timeframe for assessment depends on the circumstances. A longer timeframe will be appropriate if, on the evidence, competition effects are likely to arise in later years.⁹

When a substantial lessening of competition is likely

13. A substantial lessening of competition is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility but does not mean that the effect needs to be more likely than not to occur.¹⁰

The clearance test

14. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.¹¹ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The parties

15. Kinetic operates bus and coach services throughout New Zealand and Australia. This includes urban bus and school bus services throughout New Zealand through Go Bus Transport Limited (Go Bus). Go Bus has a fleet of over 1,700 vehicles, approximately 2,500 staff and operates 29 depots between Auckland and Invercargill.

⁴ Or below competitive levels in a merger between buyers.

⁵ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁶ *Ibid* at [129].

⁷ *Mergers and Acquisitions Guidelines* above n2 at [2.23].

⁸ *Ibid* at [2.21].

⁹ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [131].

¹⁰ *Ibid* at [111].

¹¹ Section 66(3)(a).

16. Kinetic also offers airport transfer services at Auckland Airport through SkyBus NZ Limited (SkyBus).
17. NZ Bus provides bus and coach services in Auckland, Wellington and Tauranga. It is majority owned by investment funds managed by Next Capital Pty Limited (Next Capital), an Australian private equity firm.
18. NZ Bus operates urban bus services in Auckland, Tauranga, and Wellington with a fleet of over 800 buses, approximately 1,300 drivers, and 14 depots.

Industry overview

The provision of urban bus services

The current position

19. Urban bus services are supplied to the relevant authorities under contracts that are awarded via competitive tenders. Tenders in this space are controlled by a process operated by regional councils under the Public Transport Operating Model (PTOM).¹² The enabling legislation for PTOM is the Land Transport Management Act, which sets out the high-level statutory framework.
20. The PTOM was introduced in 2013. It was developed to grow commercially operated public transport services and access to public transport markets for competitors.¹³ Regional councils use Regional Public Transport Plans (RPTPs) to define public transport services and allocate them into “units” of at least one full route, and possibly multiple routes.¹⁴ Units are tendered on the open market.¹⁵
21. Some units are fully commercial and operate without a subsidy (but are eligible for concessionary fare payments). Others have varying levels of subsidy determined by their commerciality.¹⁶ In the case of urban bus services, the successful operator receives an exclusive contract to operate services on the specified routes, usually for a period of nine years.¹⁷
22. Fares are determined and fixed by regional councils, and the revenue sharing model differs between councils. For example:
 - 22.1 Auckland Transport separates units into “Commercial” and “Non-Commercial” Units. A Commercial Unit is a unit that is profitable and does not require subsidisation by Auckland Transport. Auckland Transport Commercial

¹² The Application at [35].

¹³ Ministry of Transport ‘Public Transport Operating Model (PTOM) Review: Discussion Paper’ dated 5 May 2021 at page [7].

¹⁴ The Application at [37].

¹⁵ When PTOM was being phased in, it was also possible for regional authorities to negotiate bilaterally with incumbents. However [] has confirmed to us that regional authorities are no longer permitted to negotiate bilaterally, meaning all units must now be tendered. Commerce Commission interview with [].

¹⁶ The Application at [37.4].

¹⁷ The Application at [40].

Unit Agreements do not include a base contract price, but the operator retains the fares collected and other revenue.

- 22.2 Non-Commercial Unit Agreements tendered by Auckland Council, as well as all other regional council agreements, involve the regional councils retaining the fares collected 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 the regional council is entitled to make, indexation, agreed service variations, breach of KPIs, and the Financial Incentive Mechanism.¹⁸

Potential changes to PTOM, and how services are delivered

23. During our investigation, several parties have advised us that they are anticipating potentially significant changes to the way that urban bus services are supplied and procured, most notably as a result of a proposed shift from PTOM, to a new Sustainable Public Transport Framework (SPTF).¹⁹
24. The Ministry of Transport is currently reviewing PTOM and may replace it with the SPTF.²⁰ Kinetic has expressed the view that this may result in a shift to more negotiations instead of tenders and a preference for larger operators with EV capability.²¹
25. The most significant potential industry changes that have been notified to us are:
- 25.1 the movement from the PTOM to the SPTF could lead to more bilateral negotiation with incumbents, rather than competitive tender processes;
 - 25.2 some councils are considering investments in depot infrastructure, and potentially even fleet assets; and
 - 25.3 councils are considering consolidating the units they currently administer into a smaller number of larger units (this is particularly evident in Auckland, as we discuss further below).
26. Industry participants have also highlighted the direction from Government to move towards a more sustainable public transport system, with the current Government introducing a requirement that all public transport buses purchased from 2025 are to

¹⁸ Kinetic says that 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).

¹⁹ Commerce Commission interview with []. Commerce Commission interview with []. Commerce Commission interview with [].

²⁰ The Application at [72].

²¹ Commerce Commission Interview with Kinetic (5 April 2022).

be zero-emission, with full decarbonisation of the public transport bus fleet required by 2035.²²

27. [

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The provision of school bus services

28. In the case of school bus services, which are provided primarily through fixed-term service agreements with MoE, contracts are for an initial term of six years with two three-year rights of renewal.²³ Tenders were recently awarded in December 2020 and May 2021.²⁴

Market definition

Our approach to market definition

29. Market definition is a tool that helps identify and assess the competitive constraints the merged firm entity would face. Determining the relevant market requires us to judge whether, for example, two products or services are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

30. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.²⁵

Past court decisions

31. In 2006 the Commission brought proceedings in the High Court to prevent NZ Bus from completing the acquisition of the 74 per cent of Mana Coach Services Limited (Mana) that it did not already own.²⁶

²² See for example Commerce Commission interview with []; Commerce Commission interview with []; Commerce Commission interview with Kinetic, 5 April 2022; <https://www.transport.govt.nz/area-of-interest/environment-and-climate-change/public-transport-decarbonisation/>.

²³ The Application at [47]-[51].

²⁴ According to its website, MoE's procurement was conducted through a "two tender approach". This was intended to enable access to contracts for providers of all sizes. The first tender was structured to allow smaller regional providers to compete for approximately 10% of routes available for reward, while the second was structured with larger providers in mind for the remaining 90%. The tenders were assessed on the basis of quality, price and broader outcomes – for more information, see <https://www.education.govt.nz/school/property-and-transport/suppliers/school-bus-procurement/>

²⁵ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

²⁶ *Commerce Commission v New Zealand Bus Limited* (2006) 8 NZBLC 101 774; (2006) 11 TCLR 679.

32. The High Court considered that the relevant product dimension of the market in that case was for the rights to provide subsidised bus services²⁷ and that the relevant geographic dimension was the Wellington region as a single market.²⁸

Past Commission decisions

33. The Commission has considered competition in this industry on several other occasions in the past.²⁹ In considering those previous acquisitions, the Commission considered that it was appropriate to define separate relevant markets for each of school, commercial/charter and scheduled urban bus services, and that these markets were likely to be local or regional in geographic scope.

What Kinetic submitted

34. Kinetic submitted that all of the previous Commission decisions pre-dated the introduction of the PTOM in 2013. However, it submitted that some aspects of those decisions remain relevant to market definition.³⁰
35. Kinetic submitted that there are separate product markets for scheduled urban bus passenger services provided to the general public (urban bus services) and scheduled school bus services (school bus services).³¹
36. It noted that urban and school services are let under different contracting models, and may require different service levels, and other different capabilities, from bus companies. This means that different bus companies tend to bid for the two types of contract.
37. Kinetic did not explicitly submit on the geographic scope of the product markets above, except to note that the only geographic overlap between the parties for the provision of urban bus passenger services is in the Auckland region. In particular, it:
- 37.1 agrees with the distinction drawn in previous decisions between subsidised bus passenger services and commercial bus passenger services;³²
 - 37.2 agrees with the conclusion reached in Decision 551 that school bus services are a separate product market from other types of services;³³ and
 - 37.3 agrees with the approach taken in the previous decisions to exclude alternative modes of transport to buses from the relevant markets, on the

²⁷ Ibid at [124].

²⁸ Ibid at [127].

²⁹ See Decision 318: *New Zealand Bus Limited and Transportation Auckland Corporation Limited* (24 February 1998) at [60]; Decision 326: *New Zealand Bus Limited and Transportation Auckland Corporation Limited* (15 May 1998) at [130]; Decision 467: *Red Bus Limited and Leopard Coachlines Limited* (30 July 2002) at [117]; and Decision 551: *Red Bus Limited and Leopard Coachlines* (28 June 2005).

³⁰ The Application at [28].

³¹ The Application at [23].

³² The Application at [29] – [32].

³³ The Application at [33].

basis that the public are only likely to switch to those alternative modes of transport to a limited extent.³⁴

The Commission's view of market definition

38. Market definition is an exercise in mapping the field of rivalry between (in this case) competing suppliers. In this case, we are of the view that the procurement process undertaken by or on behalf of each customer (ie each regional authority, and in the case of school bus services, the MoE) comprises its own separate market, because it is within the framework of these procurement processes that rivalry ultimately occurs.
39. In relation to the product dimension of the relevant markets, we consider that:
- 39.1 on the demand side, most customers do not consider urban bus services to be a good alternative to school bus services, and vice versa; and
- 39.2 on the supply side, there are additional requirements imposed on urban buses (in terms of safety, functionality, lifespan, and maximum passenger numbers) relative to school buses. While it is likely that there may be some one-way substitutability from urban buses to school buses, the more stringent requirements for urban buses mean that in most cases, school buses are unsuitable for use as urban buses.
40. With respect to the geographic dimension of the relevant markets, we acknowledge that on the supply side, bus fleets are inherently mobile and (as explored further in our discussion below regarding depot access), competitors are able to buy or lease depots in order to begin providing bus services in a new area. On the demand side however, customers would not be willing to substitute services in different regions of the country. Auckland Transport, for example, requires bus services to be provided in Auckland, and cannot substitute services in other regions of New Zealand. [] noted that its experience with NZ Bus has highlighted the importance to it of local knowledge and base of operations, and [] stated that an operator must have a physical base (or the land secured for one) in order to tender successfully.³⁵
41. As a consequence, we consider that the relevant markets are separate markets for the rights to provide:³⁶
- 41.1 school bus services to the Ministry of Education (MoE School Bus Market);
and

³⁴ The Application at [34].

³⁵ Commerce Commission interview with []. Commerce Commission interview with [].

³⁶ We do not go so far as to define the market as the right to provide *subsidised* bus services, because as we set out elsewhere in this document, the specific funding mechanisms for bus services differ in certain areas (ie Auckland). In any case, we do not consider the specific funding mechanism relevant to a conclusion on market definition.

- 41.2 urban bus services, supplied separately to each regional authority customer (regional Urban Bus Markets).

With and without scenarios

42. As outlined above, work is underway to review the PTOM framework. As a consequence of this review, the competitive conditions in the relevant markets in the future may change.
43. In considering the likely with and without-the-merger scenarios we have first considered what the merging parties are likely to do absent the merger, and then considered what changes to the competitive landscape are sufficiently likely that we can take them into account in our analysis.
44. Overall, we consider that the appropriate without-the-merger scenario is the status quo, but with regional authorities imposing increasing expectations that services are provided by electrified vehicles and taking a more active role in control over key strategic assets. In addition,
[]³⁷

What the merging parties would do without the merger

45. Kinetic submits that the appropriate without-the-merger scenario is the status quo, where Go Bus and NZ Bus would remain as independent competitors.³⁸
46. Kinetic notes that Go Bus and NZ Bus have previously competed for some of the same tender opportunities and says they would likely continue to do so in the future if the Proposed Acquisition does not go ahead.³⁹
47. Next Capital (the private equity owner of NZ Bus) stated that without the Proposed Acquisition, it would []⁴⁰
48. We consider that absent the Proposed Acquisition,
[]
49. We consider that the appropriate without the merger scenario is the status quo, with Kinetic and NZ Bus continuing to operate independently in the relevant markets.

³⁷ Commerce Commission interview with []

³⁸ The Application at [55].

³⁹ The Application at [55].

⁴⁰ NZ Bus, Response to NZCC request for information from Next Capital and NZ Bus, 19 June 2022.

There is insufficient evidence for us to conclude that the procurement model for urban bus services will be materially different from the status quo.

50. As outlined above, the PTOM framework is currently undergoing a review, with several potential changes being considered to the way urban public transport bus services are procured.
51. The information that we have gathered during our investigation suggests that the future, “post-PTOM”, environment is uncertain, with industry participants, local authorities, and central government agencies unable to predict with any certainty what the future contracting environment will look like.
52. Any major change to the procurement framework is likely to require legislative change.⁴¹ Such change is currently still nascent. At the time of our determination there is no Cabinet paper, let alone Bill, that would set out with greater clarity the specific details of any potential changes.
53. As a consequence, it is not possible to predict what changes may be made to the procurement model, given the anticipated length of time before any changes are implemented, the likely need for legislative amendment to support major changes, and the uncertainty regarding what the changes may look like.
54. Accordingly, we do not take into account any potential “post-PTOM” changes to the procurement framework or rules that govern how regional authorities procure and contract urban bus services, in either the with or without the merger scenarios.

Several changes are likely which will impact the competitive landscape and will occur both with and without the merger.

55. Notwithstanding our conclusion at [54], above, there are some changes to the industry, and the procurement framework that are likely to occur both with and without the Proposed Acquisition, and which are relevant to our consideration of the competition impacts of the Proposed Acquisition.
 - 55.1 First, we anticipate that there will be increased expectation that public bus services are serviced by electrified fleets. In January 2021 the Government announced its commitment to decarbonising the public transport bus fleet, and indicated that by 2025 it would only allow zero-emission public transport buses to be purchased, ultimately targeting complete decarbonisation of the public transport bus fleet by 2035.⁴² Several regional authorities that we spoke to indicated that, to varying degrees, they would be likely to include

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[

]. We also note that a footnote in the Ministry of Transport’s 5 May 2021 Discussion Document states “More fundamental changes, for example to give effect to new overarching objectives, may require changes to the legislative framework in the [Land Transport Management Act]. Legislative changes would likely take at least one year from policy decisions”.

⁴² <https://www.transport.govt.nz/area-of-interest/environment-and-climate-change/public-transport-decarbonisation/>

requirements for some number or proportion of electric vehicles in their next tender for bus services.⁴³

55.2 Second, we expect some regional authorities to act to exert greater control over strategic public transport assets such as depots. As we discuss further below, access to strategic depot assets is considered a key condition of entry and expansion in the relevant markets. This is particularly the case with the move towards a decarbonised bus fleet, due to the need for extensive investment in charging infrastructure. Some regional authorities told us that they are increasingly exploring options to have greater control over these depot assets.⁴⁴

55.3 Third, we understand that []. Currently, [].⁴⁵

How the Proposed Acquisition could substantially lessen competition

56. We considered whether the Proposed Acquisition would be likely to substantially lessen competition due to:

56.1 horizontal unilateral effects in the MoE School Bus Market or regional Urban Bus Markets (ie whether the loss of competition between the parties when tendering for opportunities to provide school bus or urban bus services would enable the merged entity to profitably raise prices or reduce quality by itself); and

56.2 coordinated effects in the MoE School Bus Market or regional Urban Bus Markets (ie whether the Proposed Acquisition would change the conditions in

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[].

⁴⁴

[].

⁴⁵

[].

the relevant markets so that coordination between market participants is more likely, more complete, or more sustainable).

Horizontal unilateral effects in the MoE School Bus Market

57. We are satisfied that the Proposed Acquisition is not likely to result in a substantial lessening of competition in the MoE School Bus Market, because:
- 57.1 without the merger, NZ Bus is not likely to be a participant in the next tender opportunity run by the MoE;
 - 57.2 even if NZ Bus was a participant in the next tender opportunity absent the merger, its loss is not likely to result in a substantial lessening of competition as a number of independent bidders would remain; and
 - 57.3 the MoE may have countervailing power in the sense that it can design its procurement process to maximise competitive outcomes, should it so desire.

What Kinetic submitted

58. Kinetic submitted that the proposed acquisition will not substantially lessen competition in any market for school bus services because, in its view:
- 58.1 there is no overlap in the provision of school bus services as NZ Bus does not currently provide school bus services to the MoE, meaning that NZ Bus should only be considered a potential competitor for MoE opportunities;⁴⁶
 - 58.2 the procurement process for school bus services is robust and designed to ensure a competitive tendering process; and
 - 58.3 there are a number of competitors in the market for school bus services.⁴⁷

Without the merger, NZ Bus is not likely to be a strong participant in the next MoE tender opportunity

59. The MoE has advised that the next tender opportunity is between 2027 and 2033.⁴⁸ Based on the information before us, it is not possible to predict with accuracy whether NZ Bus would in fact compete at that point. The more important question is whether we think it is likely.

⁴⁶ The Application at [47].

⁴⁷ The Application at [51.1] to [57.4].

⁴⁸ Commerce Commission interview with the Ministry of Education,
[

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60. Prior to the last MoE tender opportunity in 2019, NZ Bus did operate some school bus services [].⁴⁹

61. NZ Bus has advised [].⁵⁰
Specifically, NZ Bus told us that:⁵¹

61.1 []
[]
[];

61.2 []
[]
[]; and

61.3 []
[]
[].

62. A number of industry participants considered that urban and school buses are not generally substitutable.⁵² [] stated that its urban bus assets are not suitable for use in school services (and vice versa). [] noted that urban buses are required to meet certain requirements such as the spacing of seats and aisles, and the number of doors. [] considered that, generally, urban buses can be used to provide school

⁴⁹ []
[]

⁵⁰ Commerce Commission interview with NZ Bus, []
[]
[].

⁵¹ NZ Bus, Response to NZCC request for information from Next Capital and NZ Bus, 19 June 2022.

⁵² Commerce Commission interview with []. Commerce Commission interview with []. Commerce Commission interview with [].

bus services, but school buses cannot be used to provide urban bus services.⁵³

63. Based on the above evidence we do not think it is likely that NZ Bus would be a strong competitor in the next tender.

The loss of NZ Bus as a potential participant in the next MoE tender is not likely to substantially lessen competition.

64. We considered whether the loss of NZ Bus as a potential independent participant (or perceived threat of being a participant) in the next tender opportunity is likely to substantially lessen competition. For the reasons outlined below, we do not consider this to be likely.

Other market participants will continue to provide competitive constraint on the merged entity

65. In addition to Kinetic [], a number of other bus operators participated in the previous MoE tender opportunity and were successful in winning routes including Ritchies [], Tranzit [], Uzabus [] and Mana [].⁵⁴
66. All of these operators are experienced operators of both school and urban bus services and []. One operator noted that school bus contracts played an important role in community engagement and establishing a local presence and reputation.⁵⁵
67. We consider that these parties are [] and likely to continue to impose competitive constraint on Kinetic.

Would the merger remove a significant potential competitor?

68. We also considered whether or not the perception that NZ Bus could/would compete at the next tender round imposes a substantial constraint on other tender participants, [].
69. The next MoE school bus tender opportunity is a minimum of five years away and we cannot predict with certainty which industry participants will compete for that next tender opportunity. For the same reasons we do not expect that other industry participants will be able to accurately predict at this stage whether NZ Bus will compete in 2027-2033. However, we note that:

69.1 currently, NZ Bus does not hold any MoE school bus contracts;

⁵³ Commerce Commission Interview with [].

⁵⁴ Ministry of Education response to Commerce Commission request for information, 23 May 2022.

⁵⁵ Commerce Commission interview with []. Commerce Commission interview with []. Commerce Commission interview with [].

69.2 industry participants did not consider that NZ Bus and Kinetic were close competitors for school bus services;⁵⁶ and

69.3 []⁵⁷

70. We consider that it is unlikely that the Proposed Acquisition would result in a substantial loss of potential competitive constraint for MoE contracts at future tender rounds.

The MoE is able to exert countervailing power when designing its own tender process

71. Countervailing power exists when a customer possesses special characteristics that give that customer the ability to substantially influence the price the merged firm charges.⁵⁸

72. In a bidding situation, a customer may be able to employ different strategies to increase the sophistication of their procurement processes and the competitiveness of outcomes.

73. While our conclusions above in relation to the weak competitive constraint that NZ Bus is likely to exert mean that we did not need to form a concluded view on the MoE’s countervailing power, we consider that, as the sole procurer of school bus services, the MoE is likely to have some countervailing power through its ability to design procurement processes to achieve more competitive outcomes.

74. MoE would be able to design procurement process that maximise the prospect of achieving competitive outcomes in its tenders. For example, the MoE told us that []⁵⁹

75. []⁶⁰

Conclusion on the MoE School Bus Market

76. We are satisfied that without the Proposed Acquisition, NZ Bus is unlikely to be a particularly strong constraint on Kinetic for MoE contracts, other suppliers of school

⁵⁶ Commerce Commission interview with []. Commerce Commission interview with [].

⁵⁷ Commerce Commission interview with [].

⁵⁸ Mergers and acquisition guidelines, at 3.115.

⁵⁹ Commerce Commission interview with [].

⁶⁰ Commerce Commission interview with [].

bus servicers will continue to provide competitive constraint, and the MoE is likely to have some countervailing power.

77. Accordingly, we consider that the Proposed Acquisition will not, or would not be likely to, substantially lessen competition in the MoE School Bus Market.

Horizontal unilateral effects analysis – regional Urban Bus Markets

78. Overall, we do not consider that the Proposed Acquisition is likely to substantially lessen competition in any regional Urban Bus Market. This is because we are satisfied that:

- 78.1 the target does not appear to be a particularly dynamic or strong competitor;
- 78.2 a sufficient number of competitors will remain to contest tender opportunities in all regions post-merger;
- 78.3 regional authorities will have some countervailing power in designing their procurement processes to maximise competitive outcomes; and
- 78.4 within Auckland, which is the only area where the parties currently overlap in the supply of urban bus services, and depot control (ie maintaining current leases for depots), the aggregation would not prevent or hinder competitors from competing.

What Kinetic submitted

79. Kinetic submitted that the Proposed Acquisition would not be likely to substantially lessen competition in any regional market for urban bus services as the relevant markets are dynamic, which provides opportunities for competitors to increase their market share through the competitive tender process.⁶¹ It submitted that:⁶²
- 79.1 councils operate robust procurement processes, designed to ensure a competitive tendering process;
- 79.2 councils exercise competitive discipline in the tendering process;⁶³
- 79.3 each of the relevant regional markets is dynamic, with many contracts due to expire soon, creating an opportunity for other service providers to succeed in the tender process; and
- 79.4 there are a number of competitors in the markets, including Ritchies, Tranzit, Pavlovich, Uzabus, Transdev, and Bayes.

⁶¹ The Application at [57]-[80].

⁶² The Application at [57].

⁶³ In the Application, Kinetic discusses previous decisions where the Commission indicated regional councils exercised competitive discipline in the tendering process. These decisions pre-date the implementation of PTOM in 2013. Kinetic contends the purpose and effect of PTOM was to create a more competitive tendering process.

Our approach to the assessment

80. As outlined above, there are a number of characteristics of the bus industry which make it difficult to predict with confidence the extent of competition that will prevail at the next points of contestability. These include the changes to the industry around electrification, asset control, and unit rationalisation, as well as the fact that competition in these markets occurs only at the expiry of long-term contracts.
81. Therefore, in analysing the likely competitive effects of the transaction on each separate regional market, we have investigated whether:
- 81.1 NZ Bus is a particularly dynamic competitor generally;
- 81.2 a sufficient number of competitors could compete for each relevant opportunity (in the sense of having the financial resources and the expertise to do so). We received feedback that in this matter, two to three major players would be sufficient to ensure contestability;⁶⁴ and
- 81.3 each regional authority would have countervailing power.

The target does not appear to be a particularly dynamic or strong competitor

82. NZ Bus is the largest provider of public transport services in New Zealand.⁶⁵ In Auckland, NZ Bus leases more depots than any other competitor. It also holds more current contracts with AT than any other competitor.
83. That said, interview feedback from several key parties indicates that NZ Bus may be a less competitive, dynamic market participant than these figures might suggest. In particular, these key parties have:
- 83.1 indicated that the service levels provided by NZ Bus have been disappointing, and suggested that the Proposed Acquisition could increase NZ Bus' service levels;^{66 67} and
- 83.2 expressed some scepticism about the likelihood of NZ Bus being a strong competitor moving forward, and commented that its incumbent position is

⁶⁴ [] considered that two to three major players would be sufficient to ensure contestability. It told us that it had "never had [only] one party put in a tender", and that even when it had only had two competitors, it was able to extract a good price". Commerce Commission interview with [].

⁶⁵ Commerce Commission interview with [].

⁶⁶ []
[]. Commerce Commission interview with [].

⁶⁷ [] [] []. Commerce Commission interview with [].

attributable more to its reliance on negotiated contracts⁶⁸ than to its success in competitive tenders.⁶⁹

84. Given the above, we consider that there is some evidence that NZ Bus’s size may overstate its future competitive effectiveness.

A sufficient number of competitors will remain to contest tender opportunities post-merger

85. We did not identify any regional market in which there would be fewer than three competitors that could contest the next opportunity (in the sense of having the financial resources and experience to do so).

86. This is consistent with feedback we have received from customers and competitors, who confirmed that:

86.1 at a national level, four strong national players would remain post-merger, all of whom have significant fleets, experience and proven track records in delivering urban bus services, and would have the expertise and resources to compete at the next tender opportunity, including in Auckland; and;^{70, 71, 72}

86.2 each customer was comfortable that their next tender processes would attract sufficient respondents to achieve competitive outcomes.^{73, 74, 75}

⁶⁸ We note that these negotiated contracts are now expressly prohibited under the PTOM, and all procurement must now be under competitive tender.

⁶⁹ []
[]. Commerce Commission interview with [].

⁷⁰ []
[]. Commerce Commission interview with [].

⁷¹ []
[]. Commerce Commission interview with [].

⁷² Commerce Commission interview with []. Commerce Commission interview with [].
Commerce Commission interview with [].

⁷³ []
[]. Commerce Commission interview with [].

⁷⁴ []
[]. Commerce Commission interview with [].

⁷⁵ []
[]. Commerce Commission interview with [].

Customers will have significant countervailing power

87. We also consider that each regional authority – in collaboration with Waka Kotahi – will continue to have the ability to design procurement frameworks that maximise the likelihood of achieving competitive outcomes. In particular:
- 87.1 Customers (in this case regional authorities) are able to bundle up into single units routes that may not attract significant competition with routes that will.⁷⁶
- 87.2 Once routes have been bundled into units, regional authorities can put those units out to tender in tranches. For example Units 1, 2, and 3 may be put out for tender in 2022 (Tranche 1), and Units 4, 5, and 6 may be put out for tender in 2024 (Tranche 2), and so on. This staggered approach can provide the regional authority with the ability to test the market with just a portion of the available opportunities, monitor the level of competitive interest, and adjust any aspects of the procurement design of Tranche 2 depending on how successful they consider Tranche 1 to have been.⁷⁷
- 87.3 In stipulating the methodology for selecting the successful respondent in a tender, the regional authority is able to specify the price/quality breakdown (say, 60%/40%) that it considers most attractive. Within the quality category, it can indicate the particular subcategories of quality (such as previous experience, health and safety, driver wages, etc) that it wishes to prioritise, along with their weightings.
- 87.4 Finally, councils are able to stipulate market share caps that set a maximum level of competitive concentration permissible in a region.⁷⁸

The Proposed Acquisition is unlikely to substantially lessen competition in Auckland

88. Because Auckland is the only city where the parties currently overlap, in the sense of:

- 88.1 having contracts to provide urban bus services, and
- 88.2 owning or leasing bus depots,

we have considered the competitive effects of the Proposed Acquisition on future competition for tender opportunities in Auckland in greater detail.

⁷⁶ [].
Commerce Commission interview with [].

⁷⁷ []. Commerce Commission interview with [].

⁷⁸ [] set a maximum market share cap of 60% to any one operator in the last tender opportunity. Commerce Commission interview with [].
[]. Commerce Commission interview with [].

89. Specifically, we have considered whether the parties are likely to be each other's closest competitors for any units, in circumstances where other operators are not able to make up for the competition that would be lost with the Proposed Acquisition.

Are the parties each other's closest competitors for any units?

90. As we have noted, it is difficult to predict with confidence which competitors will compete for any given tender opportunity in the future.
91. Based on information we have received,⁷⁹ there appear to be some areas of Auckland where the parties' depots are closer to each other than they are to competing depots. As a consequence, the parties may be close competitors for certain units in Auckland.

Barriers to entry and expansion

92. We have considered the extent to which the merged entity would be constrained by the threat of entry and expansion.
93. Based on feedback from interviewees, any barriers to entry and expansion are most likely to arise through certain advantages that accrue to incumbents (ie operators currently servicing units in Auckland from one or more depots). These advantages are:
- 93.1 Access to strategically-placed depots, in circumstances where other competitors may find it difficult to access comparably well-placed depots in a timely manner.⁸⁰
- 93.2 Not being required to move its fleet or hire new staff to re-win a contract, particularly in a tight labour market.⁸¹
- 93.3 An incumbent operator may benefit from having an already decarbonised fleet and/or financial support/contractual incentives that put it in a better position than competitors as regards electrification.⁸² This may put it in a better position than competitors to win contracts as regional authorities push for electrification.

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⁸⁰ Commerce Commission interview with []. Commerce Commission interview with []. Commerce Commission interview with [].

⁸¹ Commerce Commission interview with []. Commerce Commission interview with []. Commerce Commission interview with [].

⁸² Such assistance could be built into the relevant tender price. Commerce Commission interview with []. Commerce Commission interview with []. Commerce Commission interview with []. Commerce Commission interview with [].

- 93.4 More generally, the incumbent benefits from having an established track record of performance that it can point to at the next tender.⁸³ Regional authorities have told us that evidence of past performance is an important metric of quality in tenders.⁸⁴
94. We acknowledge that these incumbency advantages are features of the relevant markets. However:
- 94.1 Generally, the advantages that incumbents experience relative to competing operators are not merger-specific effects, and will persist in both the counterfactual and factual. Without the merger, an operator wishing to win a contract from an incumbent will still need to demonstrate that it:⁸⁵
- 94.1.1 can relocate its fleet to the unit(s) in question, and hire sufficient staff in a timely manner;
- 94.1.2 can comply with the regional authority's electrification requirements, including making upfront capital investments in EV buses and associated charging infrastructure where necessary;
- 94.1.3 has the experience and track record necessary to perform under the relevant contract(s) to an acceptable standard; and
- 94.1.4 has, or will be able to obtain in a timely manner, access to a depot that is located in an acceptably efficient area relative to the unit(s) in question,
- in circumstances where the incumbent has effectively already demonstrated these capabilities.⁸⁶
- 94.2 We do not consider that the Proposed Acquisition is likely to materially exacerbate or change the first three issues (access to fleet/staff, electrification, and proven experience). It is likely that the merged entity will benefit from those advantages to an extent in any units in which it is the incumbent, but we do not think that the Proposed Acquisition will likely make it any harder for competing operators to win tenders relative to the counterfactual.

⁸³ Commerce Commission interview with []

⁸⁴ Commerce Commission interview with []. Commerce Commission interview with []. Commerce Commission interview with [].

⁸⁵ For the avoidance of doubt, in concluding above that a sufficient number of competitors could compete at each of the next tender opportunities arising in the next three years, we have taken into account the need for these competitors to contend with some degree of incumbency advantage in winning the tender.

⁸⁶ One customer noted concerns with the level of service and contract performance from NZ Bus; as a consequence, the incumbency advantage it enjoys may be lessened. Commerce Commission interview with [].

94.4.4 It would be open to regional authorities to become more involved in depot control/ownership, in order to mitigate any impact of strategic depot ownership on competition.^{90, 91}

95. For completeness, we note that we have also considered the impacts of electrification at the depot itself, and whether the need to invest in charging infrastructure could be a further barrier to entry or incumbency advantage.

96. Ultimately we do not consider that this is likely, because:

96.1 both parties lease their depots, and AT has confirmed to us that Kinetic likewise leases its charging equipment (with the exception of the high voltage connections that it has paid to install, but which it will not be able to take with it when/if it ends its lease at the depot); and

96.2 we consider that all national operators of urban bus services (such as Transdev, Transurban, and Ritchies) would be able to make the investments required to install (by buying or leasing) their own charging infrastructure.

Conclusion on our analysis in Auckland

97. In Auckland, we have concluded that the Proposed Acquisition is not likely to substantially lessen competition because:

97.1 as we have also noted in respect of the rest of New Zealand:

97.1.1 the evidence indicates NZ Bus is not a dynamic competitor, and has not been as successful in recent tender processes;⁹² and

97.1.2 regional authority customers are likely to have significant countervailing power;

97.2 [];

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]. Commerce Commission Interview with []

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]. Commerce Commission interview with

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Commerce Commission interview with []

]. Commerce

- 97.3 we do not consider that any ‘incumbency advantages’ that accrue to current suppliers of urban bus services in Auckland would be likely to hinder or foreclose those competitors from effectively competing at the next tender opportunities such that an SLC would result; and
- 97.4 we consider that sufficient competition will remain to compete for opportunities in Auckland to constrain the merged entity with the Proposed Acquisition.

Conclusion

98. On the basis of the evidence set out above, we do not consider that the Proposed Acquisition is likely to substantially lessen competition through horizontal unilateral effects in any regional Urban Bus Market.

Coordinated effects

99. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and limit competition by raising prices, reducing quality, and/or dividing up the market between them. Unlike unilateral effects, which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.⁹³ Coordination can also occur in a ‘tacit’ manner; in other words, where the parties are able to coordinate through implicit understanding, but without any formal arrangement or explicit communication between them.
100. We do not consider that markets for school bus or urban bus services are generally susceptible to coordination, because the tender processes that characterise competition in these markets are:
- 100.1 variably sized;
 - 100.2 long term;
 - 100.3 sealed-bid; and
 - 100.4 complex, requiring bids comprising both price and quality factors weighted differently according to the specific needs/preferences of each customer.
101. These characteristics make coordination between industry participants difficult.
102. We also considered whether coordination could occur specifically via customer allocation – ie signals between industry participants that Participant A can win the contract for Customer X, and Participant B can win the contract for Customer Y.
103. For the reasons we have set out above, we do not consider that the tender processes themselves are likely to be conducive to coordination, given their infrequent nature

⁹³ Mergers and Acquisitions Guidelines above n1 at [3.84].

and their complexity. Furthermore, the variable size of the contracts makes it, all else being equal, harder for those contracts to be allocated agreeably between coordinating parties seeking to allocate customers. The infrequency and high value of contracts is also likely to make it more tempting for competitors to ‘cheat’ at tender time.

104. We do not consider that the Proposed Acquisition would make coordination more likely or more sustainable. It would not remove a particularly disruptive competitor nor result in the remaining market participants being any more similar or “parallel” in size, cost structure etc, such that they would be more able or inclined to coordinate.

Determination on notice of clearance

105. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Kinetic NZ Holdings Limited to acquire 100% of the issued share capital of NZB Holdco Limited and its subsidiaries.

Dated this 7th day of July 2022

Sue Begg
Deputy Chair