

Determination

Queenstown Bungy Limited and Taupo Bungy Limited [2019] NZCC 13

The Commission: Anna Rawlings
Dr John Small
John Crawford

Summary of application: An application from Queenstown Bungy Limited seeking clearance to acquire the business and assets used for the bungy, swing and associated business in Taupo, known as Taupo Bungy, from Taupo Bungy Limited.

Determination: Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.

Date of determination: 15 October 2019

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

The proposed acquisition

1. On 30 August 2019, the Commerce Commission (the Commission) registered an Application (the Application) under section 66(1) of the Commerce Act 1986 (the Act) from Queenstown Bungy Limited (Queenstown Bungy), seeking clearance to acquire the business and assets used for the bungy, swing and associated business in Taupo, known as Taupo Bungy, from Taupo Bungy Limited (Taupo Bungy).

Our decision

2. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition.

Our framework

3. Our approach to analysing the competition effects of the acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).¹

The substantial lessening of competition test

4. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.
5. 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).²
6. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),³ or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

7. 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.⁴ Some courts have used the word 'material' to describe a lessening of competition that is substantial.⁵
8. 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.⁶

¹ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

² *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

³ Or below competitive levels in a merger between buyers.

⁴ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁵ *Ibid* at [129].

⁶ *Mergers and Acquisitions Guidelines* above n1 at [2.23].

9. A lessening of competition or an increase in market power may manifest itself in a number of ways, including higher prices or reduced services.⁷
10. 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.⁸

When a substantial lessening of competition is likely

11. 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.⁹

The clearance test

12. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.¹⁰ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The parties

13. The applicant is Queenstown Bungy, which is a wholly owned subsidiary of Bungy NZ (trading as AJ Hackett Bungy). Through its subsidiaries, Bungy NZ provides bungy jumps, swings and other related services at its sites in Queenstown and Auckland. While we refer to Queenstown Bungy below as the applicant, our analysis takes into account all of Bungy NZ’s operations.
14. The target, Taupo Bungy, which is a wholly owned subsidiary of Taupo Tourism Holdings Limited, operates bungy, swing and associated businesses in Taupo. Taupo Bungy also owns 52.5% of the shares in Mokai Gravity Canyon Ltd, which has a bungy and swing platform near Taihape. Mokai Gravity Canyon has been closed since 2016 and its assets are not included in the transaction, but will remain with Taupo Bungy.

Industry background

15. The merging parties provide bungy jumping operations, although in different locations. There are currently two other bungy operations in New Zealand: one operated by Velocity Valley Limited in Rotorua (central North Island), and the other by Wood Scenic Line in Hanmer Springs (around 130 kms north of Christchurch). Bungy operations have also been proposed in recent years for Waitomo and Hamilton, but it is unclear if these will open in the near future.
16. Attachment A is a list of the current bungy operations in New Zealand and their characteristics. For ease we refer to bungy jumping and bungy jumping operations

⁷ Ibid at [2.21].

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

⁹ Ibid at [111].

¹⁰ Section 66(3)(a).

below as including swing, catapult and ziplining operations that are often also at the same site.

17. Bungy jumping operations are among many activities that can be described as adventure tourism. Other adventure tourism activities include:

- 17.1 skydiving;
- 17.2 jet boating; and
- 17.3 white-water rafting.

Previous Commission decision

18. The Commission previously considered an acquisition involving bungy jumping operations in 2003 when it assessed Bungy New Zealand Limited's application to acquire the business of Pipeline Bungy in Queenstown. The Commission concluded that the acquisition would not be likely to result in a substantial lessening of competition in the market for the provision of retail adventure tourism activities in the Queenstown Lakes region due to the constraint from existing and potential competitors.¹¹

With and without scenarios

19. To assess whether a merger is likely to substantially lessen competition in a market, we compare 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).¹²

With the acquisition

20. With the acquisition, Queenstown Bungy would acquire the bungy business in Taupo owned and operated by Taupo Bungy.

Without the acquisition

21. Queenstown Bungy submitted that if the proposed acquisition does not proceed Taupo Bungy would, for the foreseeable future, continue to be operated by the existing owner.¹³
22. We also considered whether Queenstown Bungy might have built a new site in the central North Island in the absence of the acquisition. However, we concluded that this is not likely in the foreseeable future and therefore the proposed acquisition is not likely to remove an actual or potential competitor in the central North Island.
23. Queenstown Bungy told us that
[

¹¹ Decision 504 *Bungy New Zealand Limited and Pipeline Bungy* (24 July 2003).

¹² *Mergers and Acquisitions Guidelines*, above n 1, at [2.29].

¹³ Application at [15].

]

23.1 []¹⁴ and

23.2 [].¹⁵

24. We therefore consider that the status quo is the appropriate counterfactual scenario in which to consider the proposed acquisition.¹⁶

Market definition

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

26. We define markets in the way that best isolates the key competition issues that arise from a merger.¹⁷ In many cases we may not need to precisely define the boundaries of a market. What matters is that we consider all competitive constraints. For that reason, we also consider products and services which fall outside the market but still impose a competitive constraint on the merged entity.

Applicant's view of the relevant markets

27. Queenstown Bungy has proposed a market for the provision of adventure tourism activities in the central North Island region.¹⁸ Its definition of the central North Island region includes Taupo, Rotorua and Mount Ruapehu but does not include Auckland.

Our view of the relevant markets

28. As stated, in 2003 the Commission assessed an acquisition of bungy jumping operations in the Bungy New Zealand Limited/Pipeline Bungy merger. It concluded that the relevant market was for "retail adventure tourism activities in the Queenstown Lakes region." We have considered whether this product and geographic market definition remains relevant to the current merger application.

¹⁴ []

¹⁵ [].

¹⁶ It is possible that another firm could buy Taupo Bungy. We did not need to conclude on whether this was a likely counterfactual because it would not be materially different from the status quo.

¹⁷ *Mergers and Acquisitions Guidelines*, above n 1, at [3.10]-[3.12].

¹⁸ Application at [16].

Product market

29. For the product market we considered whether the market ought to extend beyond bungy jumping operations to include other types of adventure tourism activities. In contrast to the 2003 investigation, we found the evidence was unclear as to whether other adventure tourism activities are close substitutes for bungy jumping.
- 29.1 There are some examples in which adventure tourism operators monitor the price of others. But in most cases tourism operators seem to set their prices without regard to those of other tourism operators. There is limited evidence that prices actually follow one another as one might expect if they were in the same market.
- 29.2 [] and [] consider they compete with other adventure tourism activities, however other adventure tourism operators in that region (ie, the Rotorua/Taupo region) we spoke to (including []), did not think their service was a close substitute for bungy jumping.^{19 20} Instead, some parties view adventure tourism activities as being complementary, for example a new service tends to increase demand for other adventure activities as more visitors are attracted to the area.²¹ For example, some parties identified that growth in the number of visitors to Tongariro Crossing in the central North Island has led to an increase in customers undertaking adventure activities in Taupo.²²
- 29.3 There is no possibility of supply side substitution between adventure tourism operators as they each require different assets and resource consents.
30. In the end we do not need to conclude on product market definition as even on a narrow market definition, including only bungy jumping operations, we do not consider the proposed acquisition would cause a substantial lessening of competition for reasons set out further below. For the purpose of our competition assessment we have used a product market based on bungy jumping operations only.

Geographic market

31. According to the applicant's view of the geographic market, the target (based in Taupo) would not be in the same market as the acquirer (based in Auckland and Queenstown). The view that the geographic market is regional is consistent with the geographic market we found in the 2003 investigation, which extended to the "Queenstown Lakes region."

¹⁹ Commission interviews with [].

²⁰ It is possible a combination of all adventure tourism could defeat a hypothetical monopolist of bungy from raising prices. However, we were not able to conclude on this with the available evidence.

²¹ Commission interviews with [].

²² Commission interview with Taupo Bungy (6 September 2019)].

32. Therefore, we considered whether the geographic market is so wide as to include Taupo, Auckland and/or Queenstown.
33. A market that extends beyond Taupo in this instance requires that customers would switch to another location if prices were to rise in Taupo. When assessing market definition, we normally assess how customers would react in response to a 5-10% price increase. The price for an individual adult bungy jump is \$180 in Taupo and \$165 in Auckland.²³ A 5-10% price increase on top of these prices is only \$10-20. Given it is costly to travel between cities it seems that substitution between bungy jumping operations in different locations in response to a 5-10% increase in an individual adult bungy jump in a particular location is only likely to occur if a sufficient number of marginal customers were already planning to travel to another bungy location.²⁴ In principle, this could occur if a large proportion of bungy customers are visitors. For example:
- 33.1 an international tourist might plan to visit Auckland, Taupo and Queenstown;
or
- 33.2 a large proportion of Taupo bungy jump customers are domestic tourists who live in Auckland.
34. While we considered the examples outlined in paragraphs 33.1 and 33.2 as possible scenarios we did not think that they would apply in this instance. This is because the behaviour of the bungy operators in most cases did not suggest that they were in close competition for the customers of bungy operators in other regions.
35. []²⁵ However, other evidence suggests the competitive constraint between Taupo and Auckland/Queenstown bungy jump operations is weak.
- 35.1 First, the bungy experiences in Auckland, Taupo and Queenstown are slightly different experiences.
- 35.1.1 Auckland and Taupo differ since one is from a bridge and the other is from the scenic surrounds of the Waikato River. [] did not think the Harbour Bridge was an appealing option and []²⁶ Consistent with this, []²⁷

²³ See Taupo Bungy “FAQ” <www.taupobungy.co.nz> and AJ Hackett Bungy “Auckland Bridge Bungy” <www.bungy.co.nz>

²⁴ Even if a tourist has no intention of visiting another city, they might still benchmark the price of bungy in different cities to decide if its good value. In that sense, Taupo could constrain the prices of other bungies (and vice versa). However, it is unclear how to test this.

²⁵ Commerce Commission interview with []

²⁶ Commerce Commission interview with [].

²⁷ [.]

35.1.2 The bungy jumping options in Taupo and Queenstown seem a more similar experience but are a long way from one another.

35.2 Second, bungy operators' prices do not seem to closely follow one another (as one might expect if they were in close competition in the same geographic market).

35.2.1 The prices of bungy jumping are at different levels (see Attachment A), with the Auckland Harbour Bridge bungy priced at \$165, Taupo priced at \$180 and Queenstown priced between \$205 and \$275. Past price changes have occurred at different times. For example, Taupo Bungy last increased prices in 2018, the price of bungy jumping in Auckland and Queenstown increased in 2017, and Velocity Valley (Rotorua) increased its price in October 2019 not having done so in seven years.²⁸

35.2.2 []These documents showed that []
[]
[]²⁹ The documents did not []
[]

36. We found it difficult to say with precision how far the geographic market extends. However, the evidence suggests that there is unlikely to be any material competitive constraint between the bungy operations in Auckland, Taupo and Queenstown. As such our assessment does not require us to precisely define the geographic market.

Competition Assessment

37. The proposed acquisition involves two firms that operate at the same level of the supply chain. Therefore, we assessed whether the proposed acquisition would cause a substantial lessening of competition due to unilateral effects or coordinated effects.

37.1 Unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint such that the merged entity can profitably increase prices above the level that would prevail without the merger.

37.2 Coordinated effects occur when the transaction increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power such that prices increase across the market.

²⁸ Commerce Commission interview with Velocity Valley (10 September 2019).

²⁹ []

38. Both concerns require that the merging parties be in the same market and impose a significant competitive constraint on one another. As discussed above, the evidence is not clear on the precise boundaries of the relevant market. However, irrespective of the precise definition of the boundaries of the relevant market, the evidence discussed above shows that the merging parties do not currently impose a material competitive constraint on each other. There is also no evidence to suggest that the proposed acquisition would lead to the removal of a potential or emerging competitor in any relevant market.
39. Therefore, we conclude 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 as a result of unilateral or coordinated effects.

Determination on notice of clearance

40. We are 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.
41. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance to Queenstown Bungy Limited to acquire the business and assets used for the bungy, swing and associated business in Taupo, known as Taupo Bungy, from Taupo Bungy Limited.

Dated 15 October 2019

Anna Rawlings
Chair

Attachment A: Current bungy operations in New Zealand

Owner	Name	Location	Height	Price (adult)	PAX pa (2018)	Other services
Velocity Valley	Velocity Valley	Rotorua	43m	\$149	[]	Swing Various
Taupo Bungy	Taupo Bungy	Taupo	47m	\$180	[]	Swing
Wood Scenic Line	Hanmer	Hanmer Springs	35m	\$169		Jetboat Rafting Quad bikes
Queenstown Bungy	Auckland Bungy	Auckland	40m	\$165	[]	Bridge climb
Queenstown Bungy	Queenstown Kawerau	Queenstown	43m	\$205	[]	Zip ride
Queenstown Bungy	Queenstown Nevis	Queenstown	134m	\$275	[]	Swing Catapult
Queenstown Bungy	Queenstown Ledge	Queenstown	47m	\$205	[]	Swing

Notes: (i) Retail prices as advertised by each operator. These operators also advertise bungy jumping as part of a bundle of other adventure tourism products.
Source: All data from each firm's website, except PAX pa which was supplied by each operator.