

## **Re: Proposal to create Rafting JV Co (a joint venture company to be incorporated)**

# **Rotorua Rafting, Kaitiaki Adventures, and Kaituna Rafting's Response to the Commerce Commission's statement of unresolved issues**

10 June 2026

Public Version

### **Executive Summary**

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1. Rotorua Rafting, Kaitiaki Adventures, and Kaituna Rafting make this submission in response to the Commerce Commission's Statement of Unresolved Issues concerning the proposed creation of Rafting JV Co in Rotorua.
2. The parties welcome the Commission's move to consider the joint venture in the Rotorua adventure tourism market. That is an important change. In the Rotorua adventure tourism market, rafting accounts for less than 20% of visitor days and spend.<sup>1</sup> That is, the joint venture is within the Commission's own concentration indicators in this market. Being within the concentration indicators suggests that the transaction is unlikely to substantially lessen competition.
3. Moreover, the industry feedback and the surrounding contextual evidence are strongly consistent with the joint venture not substantially lessening competition. The evidence demonstrates that while the parties will cease to compete with each other, they will gain no market power. The parties will continue to compete with a range of adventure tourism experiences not only in Rotorua, but also more broadly.
4. Rotorua NZ's support of the transaction is persuasive. Rotorua NZ is Rotorua's Regional Tourism Organisation tasked with increasing tourism in Rotorua. Its support reflects the informed view of the region's tourism promotion body, with practical knowledge of how visitors choose among Rotorua experiences. Why would Rotorua NZ support the transaction if it thought it would reduce tourist numbers, which is implicit in the conclusion that the transaction could substantially lessen competition?
5. Nevertheless, the parties acknowledge that the Commission would, in an ideal world, like direct empirical or documentary evidence to precisely identify the extent of substitution between rafting and different adventure activities.
6. Unfortunately, that evidence does not exist. It is not the type of information the parties keep and analyse as part of their businesses. There are no board papers, management reports, or detailed pricing strategies. That is not how small tourism businesses like the parties operate. Indeed, when the principals of these businesses are not guiding a raft themselves or greeting customers, they are painting lines on the car park, cleaning the rafts, or fixing the van.
7. Nor do the parties regard it as reasonable for the Commission to require them to try to create this type of evidence (e.g., by conducting a survey, or attempting to conduct detailed econometric analyses). The parties are small; the transaction is small; and rafting is a small part of the adventure tourism market. Indeed, to put the 60,000 people who go rafting in Rotorua in context, two and a half times more people go to the Auckland Santa parade on one Sunday every year than rafting in Rotorua in an entire year.<sup>2</sup>

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<sup>1</sup> See <https://www.rotoruanz.com/do-business/insights/share-calculators>. Calculated by comparing Parties' revenue to spend in "adventure" and "water activities".

<sup>2</sup> <https://www.rnz.co.nz/news/national/580420/auckland-s-santa-parade-expected-to-draw-crowd-of-150-000>

8. Where does that leave things? From the parties' perspective, the Commission has sufficient evidence, when viewed in the round, to grant clearance. The fact that additional evidence might be helpful, if it existed, does not alter that position.
9. Does any one piece of evidence provide a precise quantitative measure of competition and constraint? No. Is any one piece of evidence dispositive? No. But the statutory test does not require direct or precise quantitative proof or any single dispositive piece of evidence. In this context, New Zealand's courts have warned of false scientism overtaking the statutory test, which is inherently qualitative.<sup>3</sup>
10. The judgement required by the statutory test is that the hypothesis that there is no real chance that competition would be substantially lessened is more probable than the hypothesis that there is such a real chance. That assessment must be based on the evidence before the Commission. Clearance should not be declined because the Commission would prefer that other more precise empirical evidence were available to it.
11. The Commission's approach in this case risks establishing an unfair burden of proof on a small applicant, which has no legislative or policy justification. The costs of participating in the clearance process are already disproportionately high for small businesses; the approach in the Statement of Unresolved Issues, if adopted in a final decision, would make the situation materially worse. The result would be efficiency-enhancing transactions being blocked or never pursued. Neither outcome would benefit New Zealand consumers in the long term.
12. For all the reasons outlined in this submission, the parties respectfully request that the Commission grant clearance for the joint venture. It will not substantially lessen competition in the Rotorua adventure tourism market.
13. In the balance of this submission, the parties address:
  - 13.1 the Statement of Unresolved Issues' failure to consider evidence in the round;
  - 13.2 why the Commission's acceptance that there is a market for adventure tourism is correct and material;
  - 13.3 why the evidence demonstrates that existing adventure tourism experiences would constrain the parties;
  - 13.4 the Statement of Unresolved Issues' failure to consider the potential for operators to expand or reposition their operations, and why the conclusion that new entry is unlikely is wrong; and
  - 13.5 why the evidence shows adventure tourism experiences outside Rotorua will constrain the parties.

### **The Statement of Unresolved Issues fails to assess the evidence in the round**

14. The way the Statement of Unresolved Issues dismisses the probity of Rotorua NZ's evidence on the basis that it is "not dispositive" is symptomatic of the Statement of Unresolved Issues' approach to the evidence.
15. The Statement of Unresolved Issues dismisses each piece of evidence the parties have submitted in response to the Statement of Issues because it is not direct evidence of switching in response to a SSNIP, not unanimously consistent with one conclusion, or otherwise "not determinative".
16. By approaching each piece of evidence individually in this way and then discounting it, the Statement of Unresolved Issues fails to assess the evidence in the round. Even if any one piece of

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<sup>3</sup> *NZ Bus Limited v Commerce Commission* [2007] NZCA 502, at [104].

evidence is inconclusive by itself, the Commission never properly asks what those indicators show in combination.

17. When viewed in the round, the evidence shows that the joint venture would not substantially lessen competition in the Rotorua adventure tourism market. Rotorua NZ's endorsement is particularly persuasive in this regard.
18. By contrast, there is limited affirmative evidence that supports the Statement of Unresolved Issues' theory of harm. The high watermark for the theory is the conclusion that the parties are close competitors. However, that is not the statutory test. The statutory test is whether the transaction is likely to substantially lessen competition in a market.
19. The parties have never denied that they compete. Indeed, if they were not close competitors, they would not be before the Commission. The fact that the parties compete closely is not a reason to discount the consistent evidence that others would constrain them. Industry participants of all types consistently provide that evidence.

**The Commission's acceptance of an adventure tourism market is a material shift and is consistent with the evidence**

20. The Statement of Unresolved Issues states that the Commission has "not reached substantially different views" from those expressed in the Statement of Issues. In fact, the Statement of Unresolved Issues reflects several material shifts from the Statement of Issues, notably, the acceptance that:
  - 20.1 the relevant market is broader than guided rafting trips in Rotorua, i.e., the market for adventure tourism in Rotorua;<sup>4</sup>
  - 20.2 rafting is not a "must do" activity for tourists in Rotorua;
  - 20.3 while the market is differentiated, other experiences constrain rafting operators "to some extent";<sup>5</sup> and
  - 20.4 the parties take some such operators into account when setting prices.<sup>6</sup>
21. Defining a Rotorua adventure tourism market is particularly material. The transaction falls within the Commission's safe harbours in this market, indicating a transaction that is unlikely to harm competition.
22. Moreover, to breach the Commerce Act, the loss of competition caused by the transaction must be substantial in the Rotorua adventure tourism market. It is not enough for it to lessen competition in a part of the market. Competition must be lessened (i.e., the parties' market power increased) as a whole. And that lessening (increase in market power) must be meaningful. It must matter.
23. In defining a Rotorua adventure tourism market, the Statement of Unresolved Issues rightly moves away from describing rafting as a "must do" activity. The evidence does not support that conclusion for reasons the parties have previously explained. Rather, the evidence supports the conclusion that tourists choose between a variety of tourism experiences. The consistent evidence is that experiences are competing broadly for tourists' time.<sup>7</sup>
24. The parties respect the Commission's request for empirical data to show substitution. While direct empirical data is not available, the parties have thought carefully about what further information they can provide to assist the Commission's thinking about the scope of the market.

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<sup>4</sup> Statement of Unresolved Issues at [11]

<sup>5</sup> Statement of Unresolved Issues at [15], [75.3], and [105].

<sup>6</sup> Statement of Unresolved Issues at [112] and [114].

<sup>7</sup> For example, Parties' Response to Statement of Issues at [46], and Statement of Unresolved Issues at [44].

25. [Kaitiaki Adventures confidential]
26. [Kaitiaki Adventures confidential]
27. [Kaitiaki Adventures confidential]<sup>8</sup>
28. [Kaitiaki Adventures confidential]
29. [Kaitiaki Adventures confidential]
30. [Kaitiaki Adventures confidential]
31. [Kaitiaki Adventures confidential]
32. [Kaitiaki Adventures confidential]

### **Evidence shows that existing adventure tourism experiences would constrain the parties**

33. With respect to the constraint other tourism activities impose, another welcome and material change is that the Statement of Unresolved Issues does not refer to rafting being a “must do” activity.
34. However, the Commission’s theory of harm still rests on the implicit premise that most of the 60,000 tourists who go rafting in Rotorua each year would continue to do so even if the price went up. That premise is difficult to reconcile with the evidence before the Commission.
35. The evidence shows that of the 60,000 tourists who raft in Rotorua, well over 70% come from overseas.<sup>9</sup> The evidence does not support the idea that rafting in Rotorua is so important to their itinerary that they would not switch to another activity in response to a price increase above competitive levels; nor is it consistent with commercial common sense.
36. Rather, the evidence shows that these tourists are young<sup>10</sup>, inherently price sensitive<sup>11</sup>, travelling to multiple places in New Zealand,<sup>12</sup> consuming multiple activities,<sup>13</sup> and booking late.<sup>14</sup> The evidence also shows that rafting is not closely associated with Rotorua.<sup>15</sup> Prices between different activities are readily comparable through online booking agencies. Moreover, the prevalence and importance prospective customers (and online booking fora) place on online customer reviews (e.g., TripAdvisor, Google reviews), makes it imperative that the parties ensure that every customer feels they receive a high-quality experience and value for money.
37. While none of those features is dispositive in and of itself, taken in the round together with the evidence provided by industry participants, they strongly support the parties’ case for clearance.
38. The Statement of Unresolved Issues recognises that other tourism operators constrain rafting. However, it incorrectly dismisses the constraint because the Commission cannot empirically and precisely define which adventure tourism operators those are.
39. What we know from the evidence recorded in the Statement of Unresolved Issues is that, at the very least, 4 of the 8 adventure tourism operators listed in paragraphs [106] and [107] gave evidence that they compete directly with rafting.<sup>16</sup> 2 more indicated that they competed with other providers who themselves said they competed with rafting, thereby providing an indirect

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<sup>8</sup> [Kaitiaki Adventures confidential]

<sup>9</sup> Clearance Application at [71].

<sup>10</sup> For example, Clearance Application at [54].

<sup>11</sup> See, for example, Parties’ Response to Statement of Issues at [46.2], [59], and [89.4].

<sup>12</sup> See, for example, Parties’ Response to Statement of Issues at [82]-[83].

<sup>13</sup> BYATA submission, p 9.

<sup>14</sup> Parties’ Response to Statement of Issues at [65].

<sup>15</sup> Parties’ Response to Statement of Issues at [61]-[63].

<sup>16</sup> Operators listed at [106.1], [106.2], [106.4], and [106.5].

constraint.<sup>17</sup> The 4 other non-operator industry participants listed in paragraph [106] expressed the view that rafting is competing directly with all these other adventure tourism operators.

40. Even if other operators say they themselves do not compete, that does not obviate the fact that these other providers have said they do compete with rafting, either directly or indirectly. In the simplest terms, if Providers A, B, C, and D say they compete with rafting, then the fact that Provider E says it does not compete with rafting says nothing about competition between rafting and Providers A, B, C, and D.
41. In any event, of the 2 adventure tourism operators which paragraph [107] records as saying that they do not compete with rafting, the statement attributed to one of those parties is an incomplete reading of that party's evidence. [Third party confidential] confirms that rafting is substitutable for all other tourism activities. [Third party confidential] indicates that it does not regard rafting as competing [third party confidential], it later appears to confirm that [third party confidential]<sup>18</sup>. It also offers [third party confidential] and which are a substitute for rafting.<sup>19</sup> Moreover, [third party confidential] believes Rafting JV Co would remain constrained if the merger proceeds:

[Third party confidential]<sup>20</sup>

42. To put this another way, when asked a specific question about whether the joint venture would be able to increase prices, [third party confidential]. This is entirely consistent with the joint venture being constrained.
43. This is not mixed evidence. At the very least, it suggests that rafting is directly competing with 4 different activities, and another 3 indirectly.
44. Industry participant evidence is the type of evidence the Commission routinely relies on in assessing competitive constraints. It is unclear why this evidence is insufficient in this case.
45. To put this another way, what is the evidence that other tourism experiences would not constrain the parties? The Commission may not be able to identify how the constraint will occur precisely. However, directionally the evidence is clear: rafting is competing with other tourism experiences, and the joint venture would not substantially lessen competition, i.e. result in the joint venture having any market power.
46. Finally, while the discussion above has centred on pricing, the same constraints operate to constrain the parties' service levels. The most acute of these constraints is the prevalence and importance prospective customers (and online booking fora) place on online customer reviews. In addition, the parties would be constrained by the following.
- 46.1 The need to maintain their Qualmark Gold (Tourism New Zealand) quality assurance accreditation. A Qualmark Gold Award "recognises the best sustainable tourism businesses in New Zealand, with the delivery of exceptional customer experiences an integral part of everything they do" and "identifies those businesses leading the way in making the New Zealand tourism industry a world class sustainable visitor destination".<sup>21</sup>
- 46.2 The role of AdventureMark, a WorkSafeNZ recognised audit programme under which the parties are required to maintain certification in order to continue operating. AdventureMark involves regular independent assessment of safety systems, operational procedures, training, competency and continuous improvement. The purpose of that framework is to ensure operators maintain and improve standards over time.

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<sup>17</sup> Operators listed at [107.3] and [107.4] who both indicated they competed with operators listed at [106.5].

<sup>18</sup> This is recorded in the Statement of Issues at [115.2].

<sup>19</sup> Interview with [third party confidential], pp 2-3.

<sup>20</sup> See Parties' Response to Statement of Issues at [46.5].

<sup>21</sup> <https://www.newzealand.com/nz/feature/qualmark/>

**Statement of Unresolved Issues fails to consider the potential for expansion or repositioning by existing providers and is wrong to conclude that new entry is unlikely**

47. The Statement of Unresolved Issues addresses potential entry but does not consider entry or expansion by other adventure tourism operators or their ability to reposition their product.
48. The Statement of Unresolved Issues conducts a number of comparisons between the various differentiated aspects of different adventure tourism offerings, e.g., price, duration, thrill. Conclusions from these analyses should be treated with considerable caution given the complex and multifaceted way tourism experiences are differentiated. Indeed, the Statement of Unresolved Issues recognises this in footnote 31:
- ... we recognise price variance is a weak and potentially inconclusive indicator of competitive closeness between the Parties and their competitors. This is because prices vary for many reasons (eg, duration of the trip and thrill level of the activity). We also understand from economic theory that close competitors may still exhibit high price variance in circumstances where they target different customer segments.
49. In addition to this caution, these comparisons are inherently static. They do not consider the extent to which a provider could reposition their experience in response to the parties changing the price or quality of their rafting offer.
50. For example, an experience could change the duration or price of their offer, or recalibrate the thrill level of the experience, or even launch a new experience altogether, if the parties sought to change their rafting proposition. [Third party confidential].<sup>22</sup> Similarly, [third party confidential] commented that [third party confidential].<sup>23</sup> This is indicative of businesses actively looking to retune their offering to remain competitive or gain a competitive advantage.
51. The Statement of Unresolved Issues does not mention the potential for repositioning. However, it is a key lever operators could pull to respond to the parties seeking to increase rafting prices above competitive levels.
52. More generally, the history of entry into the market demonstrates that barriers to entry are low and people will enter with new experiences when they see an opportunity to do so.<sup>24</sup>
53. The Statement of Unresolved Issues' analysis of entry centres solely on rafting despite the Commission accepting that the market is the market for adventure tourism. By focusing solely on the potential for rafting entry, the Statement of Unresolved Issues overlooks the history of entry in the relevant market. [Third party confidential].<sup>25</sup>
54. There is no reason to believe that such demonstrated entry would not continue to occur. Moreover, if the parties left a commercial opportunity to exploit by increasing rafting prices, new entry that took advantage of any gap left could be expected, even if it was not a rafting operation.
55. And even in relation to rafting, the parties indicated in the Statement of Issues that they would divest a concession as a condition of clearance. Such a divestment would remove any regulatory barriers to entry that could be said to exist.
56. With no regulatory barriers to entry, the Statement of Unresolved Issues' view on entry seems to be that entry is unlikely because no one they spoke to said they would start a rafting operation in Rotorua. However, that does not mean entry is unlikely, particularly in a market where barriers to entry are low.
57. Rafting guides who wanted to run their own businesses started all three parties' businesses. The sunk costs in establishing a rafting operation (investing in the necessary health and safety

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<sup>22</sup> Interview with [third party confidential].

<sup>23</sup> Interview with [third party confidential], p 7.

<sup>24</sup> Interview with [third party confidential], p 7.

<sup>25</sup> Interview with [third party confidential], p 7.

accreditation) are not onerous. [Third party confidential].<sup>26</sup> The way the parties established their own businesses is the best evidence of what is likely to happen were the joint venture to increase prices above competitive levels. A guide is likely to establish their own rafting operation.

### **Evidence shows adventure tourism operators from outside Rotorua would constrain the joint venture**

58. The Statement of Unresolved Issues states that there is “no evidence” that rafting operators outside Rotorua would constrain the joint venture.<sup>27</sup> There are several issues with this conclusion.
59. First, the Commission only examines constraint from rafting operators. As the Commission has recognised, the market includes adventure tourism operators. There is no reason to believe that a rafting experience in the Central North Island would be a closer substitute for rafting in Rotorua than an adventure tourism experience in Queenstown, particularly given that 53% of tourists who stay in Rotorua and engage in rafting, canoeing, or kayaking while in New Zealand, also visit Queenstown on their trip.<sup>28</sup>
60. Second, the statement is not consistent with the evidence showing that the parties would be constrained by competition from outside Rotorua. Paragraph [61.2] of the Statement of Issues records:
- Six tourism operators considered that adventure tourism activities in Rotorua compete with other regions in New Zealand such as Queenstown and Taupo who offer similar adventure tourism activities. One indicated that rafting in Queenstown would be the main competition for rafting operators in Rotorua.
61. Moreover, the parties provided further evidence in their response to the Statement of Issues at paragraphs [88] to [91].
62. Third, one reason the Commission dismisses the constraint from areas outside Rotorua is that “customers would incur significant costs to switch”.<sup>29</sup> These costs are never specified. As the parties have already described, over 70% of their customers are from overseas, visiting multiple places. 53% of overseas tourists who stay in Rotorua and engage in rafting, canoeing, or kayaking while in New Zealand also stay in Queenstown.<sup>30</sup> It is not clear what costs these customers would incur in switching to another rafting experience, let alone another adventure or general tourism experience.
63. Fourth, the evidence from Queenstown operators that they do not compete with Rotorua operators does not show that Queenstown operators do not constrain those in Rotorua. As the Commission itself has recognised, competitive constraint can be asymmetric. Given Queenstown is known as the adventure capital of New Zealand, it is much more likely that Queenstown activities constrain Rotorua activities in a way Rotorua activities do not constrain Queenstown activities. What matters is how Rotorua operators perceive the constraints they face. The evidence is that Rotorua operators feel they are competing with Queenstown, a view confirmed by other industry participants.<sup>31</sup>
64. Fifth, the Commission’s conclusion that because activities are more expensive in Queenstown than Rotorua, activities in Rotorua could raise prices without losing volume to Queenstown overlooks the complex differentiated nature of the different offerings, something the Statement of Unresolved Issues recognises elsewhere.

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<sup>26</sup> Interview with [third party confidential], p 1.

<sup>27</sup> Statement of Unresolved Issues at [12].

<sup>28</sup> Parties’ Response to Statement of Issues at [97].

<sup>29</sup> Statement of Unresolved Issues at [12].

<sup>30</sup> Parties’ Response to Statement of Issues at [97].

<sup>31</sup> Parties’ Response to Statement of Issues at [89].

## **Concluding comments**

65. For the reasons set out in this submission, the parties respectfully submit that the Commission should be satisfied that the proposed joint venture will not have, and would not be likely to have, the effect of substantially lessening competition in the Rotorua adventure tourism market. The evidence before the Commission is more than sufficient to reach that conclusion.
66. The Statement of Unresolved Issues reflects a material and correct shift away from a narrow rafting market to the broader Rotorua adventure tourism market. In that market, rafting accounts for less than 20% of visitor days and spend, the joint venture falls within the Commission's safe harbours, and any loss of competition must be assessed by reference to whether it is substantial in that broader market.
67. When viewed in the round, the evidence is strongly consistent with the parties continuing to be constrained. That constraint arises from existing adventure tourism operators in Rotorua, from operators and activities outside Rotorua, and from the ability of providers to reposition their offerings over time. The evidence also does not support the view that entry barriers are material, particularly given the parties' willingness to divest a concession as a condition of clearance.
68. The statutory test does not require precise quantitative proof or any single dispositive piece of evidence. It requires an assessment of the evidence that is available. On the evidence, the more probable conclusion is that the joint venture will not substantially lessen competition. The parties therefore respectfully request that the Commission grant clearance.

## Confidentiality

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69. This submission contains information that is confidential to the JV parties or one of them. The confidential information is either personal information, or is commercially sensitive, disclosure of which would be likely to unreasonably prejudice the commercial position of the party providing that information.
70. The submission also contains information that is confidential to third parties and was provided to the JV parties' counsel under confidentiality undertakings.
71. Confidential information is contained in bolded square brackets with highlighting to reflect who the information is confidential to.

Confidentiality key

Information confidential to	As against
Third parties	All parties
JV parties	All third parties
Rotorua Rafting	All parties, including Kaitiaki Adventures, and Kaituna Cascades
Kaitiaki Adventures	All parties, including Rotorua Rafting and Kaituna Cascades
Kaituna Cascades	All parties, including Rotorua Rafting and Kaitiaki Adventures