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COMMERCE COMMISSION

DECISION NO. 290

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

WILSON PARKING NEW ZEALAND (1992) LTD

and

THE WELLINGTON CITY COUNCIL

The Commission: A E Bollard
P C Allport
R N Taylor

**Summary of Proposed
Business Acquisition:**

The proposed acquisition by Wilson Parking New Zealand (1992) Ltd of:

- (a) the freehold of the James Smith Carpark, the Lombard Carpark, and the Marion Street Carpark; and
- (b) the 10 year management rights to the Clifton Terrace Carpark.

Determination: Pursuant to s 66(3)(a) of the Act, the Commission determines to give a clearance for the proposed business acquisition subject to an undertaking given by Wilson Parking New Zealand (1992) Ltd in accordance with s 69A of the Act to divest all its interests and rights to the carparks defined in that undertaking.

Date of Determination: 16 April 1997

AUT/BA - W12/3
M2332

MEMORANDUM

To: Allan Bollard
Peter Allport
Roger Taylor

From: John Preston Jane Chilcott
Jo Bransgrove

Date: 16 April 1997

Subject: **Commerce Act 1986: Business Acquisition**
Wilson Parking New Zealand (1992) Ltd/Wellington
City Council

Working Day 8: 8 April 1997

Working Day 10: 10 April 1997

Working Day 14: 16 April 1997

Confidential information in this report is contained within square brackets.

THE PROPOSAL

- 1 On 25 March 1997 Wilson Parking New Zealand (1992) Ltd (Wilson) lodged a notice seeking clearance to acquire the freehold of three carparking buildings owned by the Wellington City Council (WCC) and the 10 year management rights of a fourth carpark operated by the WCC. The WCC has offered the four properties for sale by tender.
- 2 The four parking businesses are the James Smith Carpark (747 bays), the Lombard Carpark (332 bays), the Marion Street Carpark (195 bays) and the Clifton Terrace Carpark (815 bays).

3 The notice is for the same assets as were the subject of a clearance notice from Wilson dated 3 March 1997. That notice resulted in Commission Decision No 285 of 18 March 1997 which declined to give clearance to the proposal. However, in a memorandum dated 7 April 1997, the applicant stated that the present notice is not an appeal, but is to put further information before the Commission “in order to satisfy it that this acquisition will not create or strengthen a dominant market position”. The present notice differs from that of 3 March 1997 in that it clarifies some of the market share information provided in connection with the latter notice, and provides additional data in relation to the markets defined in Decision 285.

4 On 10 April 1997 Wilson submitted a written offer to divest [] parking properties which it controls, []. The Commission agreed to receive this offer as an amendment to the notice received on 25 March 1997.

PROCEDURES

5 The notice was registered on 25 March 1997 under section 66 of the Commerce Act 1986 (the Act). Section 66(3) of the Act requires the Commission to give, or to decline to give, clearance for a proposal within ten working days, unless the Commission and the person who gave the notice agree to a time extension. A short time extension was agreed, to allow time for the divestment offer outlined in paragraph 4 above to be considered, and the due date for decision is now 2pm on Wednesday 16 April.

THE PARTIES

Wilson Parking New Zealand (1992) Ltd

6 Wilson is owned in equal shares by Wilson Parking Holdings Pte Ltd and Roturbo Ltd, two companies incorporated in Singapore. The shares in the latter two companies are owned by the Kwok family, the members of which are major shareholders in Sun Hung Kai Properties Ltd, a large listed Hong Kong property company. Wilson operates parking buildings and sites in a number of New Zealand cities, including Wellington.

Wellington City Council

- 7 The WCC controls on-street parking in its territory through the use of parking meters, and through imposing restrictions on the duration or type of parking permitted in many localities. The WCC is also a provider of some off-street parking, principally through the parking operations which are the subject of this proposal. The WCC can significantly affect the private provision of off-street parking both in terms of the content of the District Plan and in relation to matters where the Plan gives the WCC discretion in making decisions affecting building construction and demolition.

THE MARKETS

- 8 The purpose of defining a market in relation to a notice seeking clearance is to provide a framework within which the competition implications of a business acquisition can be analysed. Markets which are relevant in the analysis are those in which competition may be adversely affected by a proposed acquisition.

- 9 Section (3)(1A) of the Act provides that:

“the term ‘market’ is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common-sense, are substitutable for them.”

- 10 For a number of reasons markets are not always easy to define in practice. In the present case the absence of a detailed study of the demand for parking in Wellington and the likely responses of motorists to changes in the price of parking limits the degree of precision possible.
- 11 Parking markets in Wellington have been examined in respect of two earlier clearance notices. The first notice was the application by Wilson in December 1996 for clearance to acquire the parking business operated in several centres, including Wellington, by the Parking Division of Mainzeal Property and Construction Ltd (Mainzeal). The second was Wilson’s notice of 3 March 1997 which resulted in Decision 285.

- 12 In the notice seeking clearance to acquire the Mainzeal Parking Division. Wilson defined two product and functional markets. The first was the provision of car parking bays for “casual parking, all day parking and longer term weekly or monthly parking”. The second was the provision of services for the management of carparking sites owned by others. Four geographic markets, including “Wellington” were defined for the first market, and a larger number (including the possibility of a New Zealand wide market) for the second. The staff report on that application noted that, while Wilson’s assessment accurately reflected supply-side factors, two product/functional markets could be defined, although it was difficult to draw precise boundaries. The report distinguished short stay parking, such as that used by shoppers and those keeping business appointments, and long-stay parking used principally by commuters. A further distinction was made between parking available for public use and that available use by the occupiers, tenants or staff of particular buildings. The geographic market was considered to be the central area of Wellington, that is, the central business district (CBD) and the neighbouring commercial area. Taking account of these considerations, the relevant markets were defined as “the provision of short-stay and long-stay public carparking sites...in Wellington...”.
- 13 In the notice lodged on 3 March 1997, Wilson submitted that the relevant market was that for the provision of public carparking, and it disagreed that a useful distinction could be made between short-stay and long-stay parking. Wilson stated that the pattern of usage of parking facilities varies on a daily basis in response to demand. Wilson noted a difference between the pattern in retail localities, where the demand for short-stay parking is high and for long-stay parking low, and that in business and commercial localities where there is a higher demand for long-stay parking. Wilson considered the geographic market to be the “central business district and neighbouring commercial area of Wellington”. Paragraph 14 of the staff report on this notice defined the relevant markets as those for “the provision of public non-reserved short term facilities in the inner and outer parking sectors of central Wellington, as defined in the Proposed Regional Plan, and the provision of public long term parking facilities in the same locality”.

- 14 In the present notice, Wilson referred to the view it had expressed in the 3 March application - that there is a single market, for public carparking. The company, however, provided data on the markets considered relevant by the Commission in Decision 285.
- 15 Given that there continues to be a difference of view between Wilson and the Commission on market definition, and that market definition is fundamental to the assessment of the likely competition effects of the proposal, a further review of markets is required.
- 16 In the Commission's *Business Acquisition Guidelines* which were released in 1996, it was indicated that the Commission concentrates on "demand side" factors in defining markets, although "supply side" factors were sometimes considered also. The examination of "supply side" factors was noted as being primarily related to identifying market participants and constraints from market entry.

Product and Function Markets

- 17 From the demand side, the relevant service required by motorists is the right to occupy a parking bay in an acceptable location for the period of time required. The place could be on a street, in a building or in an off-street parking site. The geographic extent of the market reflects the desire of motorists for parking places which are within what they consider to be acceptable distances from their destinations. As the ratio of motorists who could use conveniently located parking to the availability of parking places results in a concentration of interest in parking in or near the CBD, the geographic market of concern would be closely related to that district.
- 18 To define the relevant markets with precision would require access to a detailed study of the requirements and attitudes of motorists in respect to parking services in Wellington, and in particular to the trade-off between their desire to park close to their destination (which would require identifying those destinations) and the costs of using the parking facilities available to them. The applicants have not provided this, and our own enquiries have not identified any such study. Consequently, it will be necessary to

draw conclusions about the nature of motorists' demand for parking services from information on the ways in which parking facilities are operated.

- 19 While motorists require parking for a wide variety of purposes, there appear to be two broad categories: long-stay and short-stay parking. Long-stay parking involves the use of parking on an all-day basis while the motorist is at work. Such parking could be required every day, or only occasionally. Short-stay parking could be for personal requirements, such as shopping, entertainment or using professional services, or it could be work-related, such as parking required by sales representatives, professional advisors, and providers of technical and tradesman services, or for deliveries and collection of goods and materials. The duration of short-stay parking cannot be defined precisely, but it would typically range from say, 30 minutes to about four hours. Parking users include Wellington residents, residents of adjoining regions, (Lower and Upper Hutt, Porirua and Kapiti), visitors from other parts of New Zealand, and tourists.
- 20 The use of a car is of course not the only means by which a person may reach a destination in central Wellington. Public transport will often be a convenient alternative, while taxis are normally available at short notice for travel between any points. However, some motorists have a strong preference for using their own vehicle, whether on grounds of convenience or otherwise. While taxis and public transport might provide an alternative for some people, they would not be seriously considered to be an alternative by those who place a high value on using their own vehicle. Consequently, we do not consider that these other transport modes fall within the same market.
- 21 From the supply side, parking bays are substitutable, as Wilson points out, and they may be used for short-stay, long-stay and reserved parking. Operators of parking sites may influence the pattern of use of their sites by the way in which they structure their parking charges. In some cases there are WCC restrictions on the use of parking. These include time limits for metered parking, and the restrictions imposed on the use of some parking buildings, in terms of resource consent procedures (such as those which apply to the Midland carpark operated by Wilson and the Stout Street carpark operated by Condrens Car Parks International Limited (Condrens)).

- 22 The operators of parking facilities which are not subject to restriction have the ability to change the allocation of parking bays between reserved and casual use, and given sufficient price inducement would be likely to do so. However, operators have noted that the provision of reserved parking has marked advantages for suppliers in that it gives greater certainty of income than the provision of casual parking, and minimises administration costs. While there is no data on which to assess the extent of the price change which would be required for operators to convert reserved parking to casual parking, we have assumed that the change would not be insignificant. Motorists have the option of entering into an arrangement for reserved parking¹, and for those who have a daily requirement this is an alternative. However, there are many motorists who do not require parking in the same place daily or frequently and such motorists would be unlikely to find reserved parking an alternative. There is some scope for both supply side and demand side substitution, but we consider that reserved parking constitutes a separate market.
- 23 As outlined above, we acknowledge that a supply-side approach can be used in analysing parking markets. However, we consider it more appropriate to base the analysis on motorists' demand for parking, although some issues relating to supply side substitutability will be considered in the competition analysis.
- 24 We consider the relevant product and functional markets to be those for the provision of public short-stay parking (non-reserved), for the provision of public long-stay parking (non-reserved) and for the provision of reserved parking.

Geographic Markets

- 25 Decision 285 indicated that the definition given by Wilson, the CBD and neighbouring commercial area of Wellington, appeared to correctly outline the relevant geographic market. The inner and outer parking sectors of central Wellington, as depicted in the Wellington District Plan (Central Wellington), were considered by the Commission to describe the maximum extent of the

¹ Reserved parking is parking which the motorist has the right to use for a period longer than a day. Typically such contracts are monthly, but some are annual or weekly. The charge does not vary according to whether or not the parking bay is used during the period of the contract.

geographic market. However, it was noted that 'bright line' boundaries could not be drawn. The reasons for this, which continue to be relevant, are discussed below.

- 26 The Wellington CBD and the adjoining commercial area is relatively elongated, and the distance between points near the extremities (e.g. from say, Molesworth Street to Cambridge Terrace) is not insignificant. It seems improbable that all parking places within the inner and outer central parking areas (as depicted in the Wellington City District Plan) could be regarded as acceptable alternatives by a significant number of motorists. Even for parking facilities which are relatively close to other parking facilities there can be appreciable differences in charges (e.g. for 'early bird' users). It is likely that some motorists regard parking facilities in central Wellington as comprising a series of overlapping and relatively small geographic markets.
- 27 Condrens, which operates parking facilities in Wellington, informed the Commission that it considers there are "two sub-markets" in Wellington. One comprises "office workers and public sector workers" who work closer to the Thorndon end of central Wellington and who are prepared to walk "long distances...at a certain price level". In Condrens' view those in this group include many who closely compare the cost of parking with the cost of public transport. The second group of users were said to comprise "corporates, businesses and professionals, casual shoppers or clients of the above" who were not prepared to walk such distances, and who consider only "central city parking buildings or sites". An operator of a relatively small parking business [] made a similar distinction.
- 28 While a range of sensitivities to price changes is likely to be found among consumers in all markets, the issue for market definition in this case is whether there is a clear break in the chain of substitution between parking facilities in central Wellington. The absence of a detailed study of the attitudes of Wellington motorists makes it difficult to confirm the existence of such a break, and, were such a break to be identified, to assess the size of the resulting groups of users.

Conclusion on market definition

29 We conclude that the relevant markets are those in the inner and outer parking sectors of central Wellington (as defined in the Proposed District Plan) for the provision of:

- (a) public short-stay parking facilities (non-reserved)
- (b) public long-stay parking facilities (non-reserved), and
- (c) reserved parking.

Markets (a) and (b) are the same as those used in Decision 285. Market (c), reserved parking, was referred to in that decision in the process of distinguishing the two markets for non-reserved parking, but was not further examined.

COMPETITION ASSESSMENT

30 Section 66(3) of the Act, when read in conjunction with s 47(1) of the Act, requires the Commission to clear a proposed acquisition if it is satisfied that the proposed acquisition would not result, or would not be likely to result, in a person acquiring or strengthening a dominant position in a market. If the Commission is not so satisfied it will decline to give clearance.

31 Section 3(9) of the Act states that a person is in a dominant position in a market if:

“...that person as a supplier or an acquirer, or those persons as suppliers or acquirers, of goods or services, is or are in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that markets...”

32 That section also states that a determination of dominance shall have regard to:

- Market share, technical knowledge and access to materials or capital;
- The constraint exercised by competitors or potential competitors; and
- The constraint exercised by suppliers or acquirers.

- 33 In reaching a view on whether a person is in a position to exercise a dominant influence in a market, the Commission considers the foregoing non-exhaustive factors and any other relevant matters that may be found in a particular case. In respect of this proposal the possibility of new entry into the provision of parking places is an important consideration in making a dominance assessment.
- 34 The Court of Appeal stressed in *Port Nelson Ltd v Commerce Commission*² that “...dominance reflects the ability to act to a large extent independently...”, but not necessarily to act totally without regard to competitors, suppliers, or customers. Nevertheless, to be dominant, a company must be able to act, within the limits of commercial reality, without significant competitive or consumer constraints.
- 35 Implementation of the proposal would result in aggregation of market share in each of the three relevant markets.
- 36 In the notice Wilson provided an analysis of the number of parking bays managed by it and by other market participants, and subsequently provided additional information. We obtained further information, principally from Condrens and the WCC. We were informed of a very recent study (completed on 2 April 1997) which had been commissioned by the WCC. The survey was based on a physical count and classification of on and off-street parking in central Wellington, and provided useful data on some categories of parking.
- 37 Parking numbers may be calculated on the basis of usage patterns or of capacity. While capacity figures can be given with precision, figures based on patterns of usage are less precise. However, as indicated above, segmentation by usage is necessary in our examination of the relevant markets. The table below reflects usage in the case of the private providers and WCC parking buildings, and capacity in the case of WCC on-street parking. Were the proposal to proceed without divestment, the numbers of parking bays in the geographic market would be as follows. The table includes qualifications shown in the footnote.

² *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554

CONFIDENTIAL

Supplier	Short-Stay	%	Long-Stay	%	Reserved	%
Wilson	[
WCC Buildings	<hr/>					
<i>Merged entity</i>						
Condrens						
Other Providers						
Meters/pay & display						
Free, time restricted						
Coupon Parking	<hr/>		<hr/>]	<hr/>
Totals ³	<u>5,796</u>		<u>3,699</u>			<u>7,577</u>

38 The effect of the proposed divestment, on the basis of current usage pattern figures, would be to reduce the merged entity's share of the short-stay market by [] of the long-stay market by [] and of the reserved market by [].

39 We consider that the market power which would accrue to Wilson if the proposal were to proceed without divestment would be greater than the figures in paragraph 37 above indicate. One reason relates to the metered and pay and display areas and coupon parking areas. While the numbers shown represent the bays available in the geographic market, parking of these types is generally located towards the fringes of the market. Given the uncertainty over the precise limits of the geographic market, the extent to which they would act as a constraint is not clear. Another reason is that there is a marked present divergence between the ratio of short to long stay and reserved parking in the WCC parking buildings, compared with those operated by Wilson and by Condrens. If the mix of parking offered by the commercial operators results in greater revenue than that which results from the usage pattern of the WCC parking

³ These figures are presented with qualifications. These include the fact that some retailers provide customer parking, and that the reserved parking provided by 'other providers' would include some which is linked to leases for the occupancy of commercial buildings, and which is not available to other motorists. Metered parking is subject to time limitations, generally two hours, but longer in some fringe locations. Free, time-restricted parking is available for specified short periods up to say, 30 minutes. The number of coupon parking places is from the 2 April 1997 study referred to above. In addition there is a large number of coupon parking places outside the defined geographic market.

buildings, it is likely that Wilson (post implementation of the proposed acquisition) would seek to alter the current WCC pattern.

40 We consider that an adjustment must be made to the market share figures as calculated to allow for the factors outlined in the previous paragraph. While precise figures are not possible, our assessment is that for the long-stay non-reserved market the effective market share which would result from the proposal, without divestment, would be likely to be in the range of 60% to 70%. We have taken 65% as the indicative level. The proposed divestment would reduce the level we consider to be likely to below 60%.

41 The changes we consider likely in the long-stay non-reserved market would impact on the other two markets. The result of the assessment outlined in the previous paragraph would be estimated pre and post-divestment market shares in the vicinity of 30% and 27% respectively for short-stay non-reserved parking, and unchanged market shares of 52% and 48% respectively for reserved parking.

42 As outlined in the report on Decision 285, the Transport Strategy which is reflected in the Wellington District Plan, and which has been endorsed by the WCC and the Wellington Regional Council, is likely to strongly constrain the provision of new parking facilities. We consider, as we did in that report, that little weight can be placed on the prospect of significant new entry.

43 Part of the supply of parking in Wellington is on open pieces of land. Any vacant site in Central Wellington with a zoning which allows buildings to be constructed on it cannot be considered permanently available for parking. Changes have occurred from time to time in the identity of open air parking sites, and this is likely to continue.

Divestment Undertaking

44 Wilson has completed an undertaking pursuant to section 69A of the Act to divest [] of its existing parking operations: [

] A copy of the divestment undertaking is attached.

45 [

]

46 As outlined in paragraph 41 above, our assessment is that the effective market share resulting from the proposal, without divestment, is likely to be in the range of 65% for long-stay non-reserved parking. The uncertainties about the precise extent of parking markets, together with the limitations on significant new entry, mean that we would have concerns about the market power Wilson would acquire. While Wilson will continue to operate a substantial part of parking facilities in central Wellington, the proposed divestment would reduce the likely market share to a level at which these concerns would be allayed.

Conclusion on competition

47 We conclude that there are no concerns about the short-stay non-reserved parking market and about the reserved parking market. However, without divestment, we are not satisfied that there would be no dominance concerns in the long-stay non-reserved

market particularly given the low weight which can be placed on the prospects for significant new entry. With the divestment we are satisfied.

OVERALL CONCLUSION

- 48 We conclude that implementation of the proposed acquisition, incorporating an undertaking to divest certain parking operations, would not result, or would not be likely to result, in the combined entity acquiring or strengthening a dominant position in a market.

RECOMMENDATION

- 49 We recommend that, in terms of s 66(3)(a) of the Act, you give clearance to the proposed acquisition subject to the undertaking given by Wilson in accordance with s 69A of the Act to divest all its interests and rights in the operation of the [].

Chief Investigator

Manager

