

**NOTICE UNDER SECTION 66(1) OF THE COMMERCE ACT 1986
SEEKING CLEARANCE TO PROCEED WITH AN ACQUISITION**

TO: The Registrar
Business Acquisitions and Authorisations
Commerce Commission
P O Box 2351
Wellington

NOTES

- *Notice to be given in duplicate;*
- *Also provide an electronic copy to records@comcom.govt.nz;*
- *Accompany with cheque for \$2,250.00*

Pursuant to section 66(1) of the Commerce Act 1986 notice is hereby given seeking clearance of a proposed business acquisition.

PRELIMINARY COMMENTS TO APPLICATION

FORM OF APPLICATION

It is noted that a similar application for clearance under section 66(1) of the Act was made by the parties pursuant to a notice registered with the Commission on 28 June 2002. That application was declined in the Commission's Decision 467 dated 30 July 2002.

The market related issues have already been the subject of detailed consideration by the Commission in Decision 467. For this reason the parties to this application refer and rely on the detail set out in that decision. For ease of reference the parties have expanded in some parts on the information requested to follow the format of the reasoning of the Commission when providing its decision. This is to enable the matter to be fully considered in light of Decision 467 already provided by the Commission.

The focus of the information contained in this notice is thus upon significant developments in the market over the intervening period approaching three years. To avoid unnecessary repetition, reference is made to relevant parts of Decision 467. Additional information regarding subsequent changes to the bus services provided in Christchurch since that decision is also provided.

It is further submitted that the reasoning of the Commission in its decision Number 326 (in respect of a transaction involving New Zealand Bus Limited and Transportation Auckland Corporation Limited) is relevant as it also suggests that a detailed analysis of markets (including the provision of substantial statistical data) as provided for in the prescribed form may not be necessary in respect of this application.

PART I – TRANSACTION DETAILS

Q 1. WHAT IS THE BUSINESS ACQUISITION FOR WHICH CLEARANCE IS SOUGHT?

1. Red Bus Limited (“Red Bus”) proposes to acquire part of the business of Leopard Coachlines Limited (“Leopard”), being the business of operating scheduled urban bus routes under contract to the Canterbury Regional Council as described in Schedule 4 of the draft Agreement for Sale and Purchase dated April 2005 attached as **Appendix A** (“the draft Agreement”).
2. The main assets of the business proposed to be acquired by Red Bus pursuant to the draft Agreement are the buses described in Schedule 1 of the draft Agreement and the contracts Leopard has with the Canterbury Regional Council (“Environment Canterbury”) described in Schedule 2 of the draft Agreement, both of which are required to operate the scheduled urban bus routes described in Schedule 4 of the draft Agreement.
3. The draft Agreement has been prepared without Red Bus and Leopard concluding negotiations but contains terms that the participants are likely to require in the event clearance for acquisition is given and they then proceed to engage in negotiations for Red Bus’s acquisition of Leopard’s business. Negotiations, particularly as to the important terms such as price, property and timing, have not yet been concluded as the participants first wish to obtain the requisite clearance.
4. Because no contract has yet been entered into it is impossible for the participants to be certain that the business proposed to be acquired will be precisely the same as described in paragraphs 1 and 2 above. The clearance sought is requested to be on terms which will permit Red Bus to acquire all or part of Leopard’s business described in paragraphs 1 and 2 pursuant to an agreement in terms not necessarily identical to but materially the same as those set out in the draft Agreement.
5. If required, an Agreement for Sale and Purchase in final form could be submitted to the Commission by way of confirmation relatively soon after clearance is granted to ensure that there is absolute clarity over the precise subject of the clearance.

Q.2 WHO IS THE PERSON GIVING THIS NOTICE?

6. This notice is given by Greg Campbell, Managing Director of Red Bus, P O Box 10171, Christchurch, phone 0-3-371 3110 (direct line), facsimile 0-3-366 5643 (not confidential).
7. This notice is given in conjunction with Brent Early, Managing Director of Leopard, 115 Grange Street, Opawa, Christchurch, phone 0-3-332 5000 (not confidential), facsimile 0-3-332 2808 (not confidential).

Q.3 WHAT CONFIDENTIALITY ORDERS ARE REQUIRED?

8. A confidentiality order is sought by Red Bus and Leopard (“the parties”) in relation to *the draft agreement for sale and purchase* (attached as Annexure A) as provided for by section 100 of the Commerce Act 1986.
9. Confidentiality is sought as disclosure of the draft sale and purchase agreement would be seriously prejudicial to both parties due to the commercial sensitivity of the proposal.
10. In addition, a contract between the parties for the proposal has not yet been concluded and because it has not been concluded it may never proceed.
11. In accordance with section 100(2)(a) the length of time of both of the confidentiality orders that are sought is the expiration of 20 working days after the date of final determination or withdrawal of the application by the parties.
12. The parties further request that if Red Bus has not reached an unconditional agreement with Leopard for purchase of the scheduled urban bus route business of Leopard pursuant to section 100(1) of the Commerce Act 1986 (“the Act”), and settled that agreement, that this application and the draft agreement be withheld from release under the Official Information Act 1982 under s9(2)(b)(i) and s9(2)(b)(ii).
13. The basis for withholding the draft agreement for sale and purchase under the Official Information Act 1982 is that it discloses trade secrets of Red Bus and Leopard and disclosure would be unreasonably prejudicial to the commercial position of Leopard and Red Bus.

Q.4 DETAILS OF THE PARTICIPANTS – WHO ARE THEY?

14. The acquirer of Leopard’s urban bus route business is Red Bus.
15. The owner of Leopard’s urban bus route business is Leopard Coachlines Limited.
16. The contact details for Red Bus are as follows:

Greg Campbell
Managing Director
P O Box 10171
Christchurch
phone 0-3-371 3110 (direct line)
facsimile 0-3-366 5643 (not confidential)

17. The contact details for Leopard are as follows:

Brent Early
Managing Director
115 Grange Street
Opawa
Christchurch

phone 0-3-332 5000 (not confidential)
facsimile 0-3-332 2808 (not confidential)

Q.5 DETAILS OF THE PARTICIPANTS – WHO IS INTERCONNECTED TO OR ASSOCIATED WITH EACH PARTICIPANT?

Acquirer group/associates

18. Red Bus is a wholly owned subsidiary of Christchurch City Holdings Limited. Christchurch City Holdings Limited is a Council controlled Trading Organisation owned by the Christchurch City Council.
19. Other companies in which Christchurch City Holdings Limited owns shares are:
 - (a) Orion Group Limited
 - (b) Lyttelton Port Company Limited
 - (c) Christchurch International Airport Limited
 - (d) City Care Limited
 - (e) Selwyn Plantation Board Limited
 - (f) CCHL (1) Limited
 - (g) CCHL (2) Limited
 - (h) Jet Engine Facility Limited
20. In turn, Orion Group Limited owns shares in Orion New Zealand Limited; Christchurch International Airport Limited owns shares in CIAL Holdings Number 1 Limited, CIAL Holdings Number 2 Limited, CIAL Holdings Number 3 Limited, CIAL Holdings Number 4 Limited and CIAL Holdings Number 5 Limited; and Selwyn Plantation Board Limited owns shares in Plains Laminates Limited and WQ1 Limited.
21. Christchurch City Council owns shares in a number of companies, other than Christchurch City Holdings Limited, being:
 - (a) Travis Finance Limited
 - (b) Christchurch City Facilities Limited
 - (c) New Zealand Local Government Insurance Corporation Limited
 - (d) Transwaste Canterbury Limited
 - (e) Jade Stadium Limited
 - (f) Central Plains Water Limited

22. Red Bus owns all of the shares in CTL Properties Limited. CTL Properties Limited does not own shares in any other entity.

Leopard group/associates

23. The shares in Leopard are owned by:
- (a) Brent Ivan Early
 - (b) Muriel Eugenia Early
 - (c) Rainer Heidtke; and
 - (d) Andrew Hendra Young and John Charles Brown as trustees of the Leopard Trust.
24. Leopard does not own shares in any other company or entity.
25. Brent Ivan Early owns shares in CS No 3 Limited, Oceania Coachlines Limited and E&H Holdings Limited. He is a director of Leopard and of the last two mentioned companies.
26. Rainer Heidtke is a shareholder in and director of Unita Limited and E&H Holdings Limited.

Q.6 DETAILS OF THE PARTICIPANTS – DOES ANY PARTICIPANT, OR ANY INTERCONNECTED ENTITY THEREOF, ALREADY HAVE A BENEFICIAL INTEREST IN, OR IS IT BENEFICIALLY ENTITLED TO, ANY SHARES OR OTHER PECUNIARY INTERESTS IN ANY OTHER PARTICIPANTS?

27. Neither Red Bus nor any of its interconnected entities has a beneficial interest in, or is beneficially entitled to, any shares or other pecuniary interests in Leopard.
28. Neither Leopard nor any of its interconnected entities has a beneficial interest in, or is beneficially entitled to, any shares or other pecuniary interests in Red Bus.

Q.7 DETAILS OF THE PARTICIPANTS – IDENTIFY ANY LINKS, FORMAL OR INFORMAL, BETWEEN ANY PARTICIPANT(S) INCLUDING INTERCONNECTED BODIES CORPORATE AND OTHER PERSONS IDENTIFIED IN ANSWER TO QUESTION 5 AND ITS/THEIR EXISTING COMPETITORS IN EACH MARKET

29. There are no links either formal or informal between any participant/s including interconnected entities and other persons identified in the answers to question 5 and its/their existing competitors in the relevant market.

Q.8 DETAILS OF THE PARTICIPANTS – DIRECTORS' DETAILS

30. None of the directors of Red Bus hold directorships in any company which is involved in the markets in which the business of Leopard operates.

Q.9 DETAILS OF THE PARTICIPANTS – WHAT ARE THE BUSINESS ACTIVITIES OF EACH PARTICIPANT?

Red Bus

31. Red Bus operates various bus routes in Christchurch and surrounding areas under contracts granted by Environment Canterbury as described in **Appendix B** attached together with various commercial bus routes as described in **Appendix C** attached.
32. The Christchurch City Council is a local authority. Christchurch City Holdings Limited is a council controlled trading organisation of the Christchurch City Council. Its business activities extend to owning shares in the companies described in paragraph 19 and 21. None of these companies operate businesses similar to that operated by Red Bus.

Leopard

33. Leopard operates:
 - (a) different bus routes to Red Bus in the Christchurch area under contracts granted by Environment Canterbury, as set out in Schedule 4 of the draft Agreement;
 - (b) various school bus contracts;
 - (c) bus charter operations;
 - (d) ski field bus operations; and
 - (e) inbound tourism coach operations.
34. Oceania Coachlines Limited is a tourism-based business operating coaches nationwide. It does not have, nor has it ever had, any involvement in urban passenger transport.
35. CS No 3 Limited, E&H Holdings Limited, and Unita Limited are tourism-based businesses, which have no involvement in urban passenger transport, and never have had any such involvement.

Q.10 DETAILS OF THE PARTICIPANTS – WHAT ARE THE REASONS FOR THE PROPOSAL AND THE INTENTIONS IN RESPECT OF THE ACQUIRED BUSINESS?

36. Leopard has previously indicated that it wishes to cease operating scheduled urban bus routes. This formed the basis for the previous application for clearance in June 2002. That application was declined in the Commission's Decision 467, and Leopard has continued operating in the urban bus market up to the present, primarily due to the lack of a viable exit opportunity.
37. Leopard is committed to exiting the urban bus market and wishes to concentrate its efforts in the coach touring market. In Leopard's opinion, the coach touring market is considerably more attractive than the urban bus market due to better returns on capital, lower risks, more operating autonomy and the very strong links Leopard has with several of New Zealand's largest inbound tour operators from Australia and Europe.

38. Leopard entered the urban bus market in 1995 but has only played a significant part in the market in the last 7-8 years. Leopard has always had a major interest in the tourism market and if the opportunity arose may well wish to focus entirely on that market.
39. If a successful acquisition is made Red Bus intends to merge Leopard's urban bus route business with its own existing business. Leopard operates all of its urban routes in accordance with contracts awarded by Environment Canterbury. Red Bus would take an assignment of Leopard's contracts with Environment Canterbury and accordingly would be required to operate the same services as those previously provided by Leopard under the contracts requiring Red Bus to meet service, frequency, vehicle standards and fares as required by Environment Canterbury pursuant to those contracts.
40. It is not the intention of Red Bus to lessen, hinder or reduce competition in the Christchurch market. To the contrary, at present Leopard is the only provider of services on its routes. Red Bus intends there to be a continuity of services for the public travelling on those routes. For all intensive purposes, the only change that will be noticed by members of the public is the colour of the bus on which they are travelling. Environment Canterbury will continue to monitor and enforce compliance by Red Bus with the terms of the contracts, after the assignment. There will be no change to the price a customer will pay for any service as this is determined by Environment Canterbury in accordance with the Maximum Fare Schedule as annexed as **Appendix D**.
41. In addition there will be no change to the subsidy being paid by Environment Canterbury under any of the contracts proposed to be transferred for the duration of each of those contracts.

OTHER INFORMATION RELEVANT TO THE TRANSACTION

42. Relevant to the transaction, in Decision 467 the Commission identified and recorded facts and made conclusions about other relevant parties and the industry within which both Red Bus and Leopard operate. Those facts remains accurate (subject to the additions in paragraphs 44 to 49 below) and are referred to and relied upon as follows:

- Other relevant parties (paragraphs 15 to 21 of Decision 467);
- Industry background (paragraphs 22 to 86).

For ease of reference the first 11 pages of Decision 467 containing the information about other relevant parties and the industry background are attached as **Appendix E** (along with other pages from Decision 467 relevant to this application, as noted below).

43. The parties draw the Commission's attention to the following additional information in respect of the matters set out below.

Other relevant parties

44. At paragraphs 15 to 21 of Decision 467 the Commission commented on other relevant parties to that application. As reliance is placed on that decision, the parties draw to the Commission's attention that Transfund New Zealand is now Land Transport New Zealand. This body is an amalgamation of Transfund New Zealand and Land Transport New Zealand.

45. As a new competitor another relevant party is CBS, discussed in more detail in paragraphs 65 to 72 below.

Industry background

46. At paragraphs 22 to 86 of Decision 467 the Commission set out the background to the bus service industry in Christchurch. That background remains relevant and relied upon. It is noted, however, that there are a number of additional developments in respect of the industry that are set out below.

47. Relevant to the description of "*Fares and Subsidies*" contained in paragraph 45 of Decision 467, Environment Canterbury's fare and ticketing system in the Christchurch Metropolitan area is now integrated. An electronic smart-card (called "Metro-card") can be obtained from Environment Canterbury's agencies for use on the buses of any operator with standardised fares. The system is managed and operated by Environment Canterbury. Any operator can lower the requisite fare using this system but not increase it.

48. Relevant to the "*Bus Requirements*" information contained in paragraphs 46 to 53 of Decision 467 further relevant information is as follows:

- (a) In respect of the total number of buses operating as referred to in paragraph 46, the updated figures are:
- The total number of buses operating on urban routes that have peak and off peak runs are 240;
 - Of that number the super low floor buses number 177 (74%).

- (b) In respect of the cost of the equipment in paragraph 47 of Decision 467 the updated figures are:
- Super low floor buses cost \$300,000 plus \$10,000 for other equipment;
 - The other equipment includes a new ticketing machine, real time GPS information monitoring bus location and system-wide branding (“Metro-pods” on top of buses) as required by Environment Canterbury to meet the contract tender specifications required.
- (c) In respect of paragraph 49 of Decision 467 it is noted that Environment Canterbury now allows six months for a successful bidder to build their fleet.
49. Relevant to the “*Commercial Services*” information contained in paragraphs 56 to 64 of Decision 467 further relevant information is provided as follows.
- (a) Commercial services are always vulnerable to Environment Canterbury intervening over the top of any commercial route and tendering a subsidised route.
- (b) Environment Canterbury is interventionist and has an anti-“cherry picking” philosophy such that it is not possible to break down routes by time of day into commercial and subsidised services. Reference is made to the discussion relevant to the Airport routes as referred to in paragraph 50 below.
- (c) Commercial and subsidised services are completely integrated as part of the Environment Canterbury system described in paragraph 47 above. A Maximum Fare Schedule applies to all routes (see Appendix D).
- (d) There are now only three commercial routes in Christchurch being Routes A (Airport to City), R (Rangiora) and 10 (Harewood to Cashmere).
- (e) The Airport route now costs \$5.00.
50. As a recent example of the practical effect of Environment Canterbury’s anti-cherry-picking philosophy, the Commission’s attention is drawn to District Court proceeding CIV 2004-009-3082 under the Transport Services Licensing Act 1989 and involving Red Bus and Environment Canterbury. It is noted:
- (a) An appeal was made by Red Bus to the District Court pursuant to section 59 of the Transport Services Licensing Act 1989 against Environment Canterbury’s declinature of an application by Red Bus for variation of three commercially registered services which all terminated at Christchurch International Airport. Those commercial services were:
- Route No 3: Avonhead – Sumner
 - Route No 10: Harewood – Cashmere
 - Route A: Airport - City
- (b) Environment Canterbury would not allow Red Bus to reduce the frequency of services on the three commercially registered routes all terminating at Christchurch International Airport to enable Red Bus to put those routes on an economically sound footing.

- (c) Judge Green gave an interim ruling on 8 October 2004 in relation to an interlocutory application for directions preliminary to the appeal. Judge Green's ruling is attached as **Appendix F**.
 - (d) The appeal by Red Bus was ultimately resolved pursuant to consent orders of the District Court dated 2 December 2004. A duplicate copy of the sealed order is attached as **Appendix G**. The consent orders avoided the cost and risk for both parties of proceeding to a full hearing of the appeal.
 - (e) The first of the three commercial services (Route No 3, Avonhead – Sumner) was subsequently abandoned by Red Bus and, with some variations, is now a contracted service run by Red Bus initially pursuant to an expedited tender and more recently pursuant to a five year contract tender won by Red Bus.
 - (f) As a consequence of the interim ruling made by the District Court, which did not allow reduction of the frequency of the services, the outcome has been that only two of the three commercial services have remained as such. It has proved uneconomic for Red Bus or any other operator to run Route No 3 (Avonhead – Sumner) as a commercial service meeting in totality Environment Canterbury's frequency while Environment Canterbury's anti cherry-picking principles remain in force. The conclusions at paragraphs 61 and 64 of Decision 467 therefore remain valid.
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PART II – IDENTIFICATION OF MARKETS AFFECTED

51. In this instance the proposed acquisition will result in horizontal aggregation but not vertical integration. For this reason the applicant has only addressed the questions raised in question 11 of the prescribed notice under section 66, but not those raised in questions 12 to 15 of the prescribed notice which do not apply.

Q.11 HORIZONTAL AGGREGATION - ARE THERE ANY MARKETS IN WHICH THERE WOULD BE AN AGGREGATION OF BUSINESS ACTIVITIES AS A RESULT OF THE PROPOSED ACQUISITION?

52. In respect of a horizontal acquisition the Commission has asked for specific information to be provided in respect of the market that both Red Bus and Leopard operate in. It is acknowledged that the information sought in Part II of the prescribed notice is geared towards assisting the Commission in identifying the relevant market, this being the first step in assessing whether the proposed acquisition may have the effect of substantially lessening competition or of substantially enhancing market power.
53. It is noted that the Commission has already considered bus transport markets previously in Decisions 318, 326, 460 and 467.
54. In Decision 467 the Commission identified and recorded facts and made conclusions about other relevant parties and the industry which are also relevant to the market within which both Red Bus and Leopard operate. As already noted, those facts remain accurate (subject to the additions outlined in paragraphs 44 to 50 above in the section on “other information relevant to the transaction”) and are referred to and relied upon.
55. The Commission then discussed the market definition at paragraphs 87 to 117 (pages 11 to 16) of Decision 467. For ease of reference these pages are also attached as part of Appendix E. At paragraph 117 the Commission concluded that a distinction must be made between the obtaining of the right to provide services, and the actual provision of services to passengers. The two relevant markets were defined as:
- “1. *The market for the rights to operate scheduled, subsidised bus passenger services in the Christchurch and Timaru (“the bus subsidies market”); and*
 2. *the market for the scheduled bus passenger services in Christchurch and Timaru (“the bus services market”).*
56. It is submitted that the definition contained in Decision 467 remains relevant. To avoid repetition in this document, the parties repeat and rely upon the information recorded by the Commission in Decision 467 at paragraphs 15 to 117, in response to the question 11 in the prescribed notice.
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PART III – CONSTRAINTS ON MARKET POWER OF EXISTING COMPETITION

PRELIMINARY COMMENTS

57. It is acknowledged that the information sought in Part III of the prescribed form regarding existing competition is required so that the Commission can determine whether the proposed acquisition “*would have or would be likely to have, the effect of substantially lessening competition*” under section 47 of the Act.
58. The Commission has set out an extensive discussion on the applicable principles relevant to determining this issue in paragraphs 118 to 245 of Decision 467. This includes:
- Competition analysis (paragraphs 118 to 138);
 - Analysis of existing competition (paragraphs 139 to 147);
 - Analysis of existing competition in the bus subsidies market (paragraphs 148 to 230);
 - Analysis of existing competition in the bus services market (paragraphs 231 to 234); and
 - Scope for exercise of coordinated market power in the bus subsidies and bus services market (paragraphs 235 to 245).
59. The parties refer to and rely upon the relevant principles to the issue of existing competition in the market recorded by the Commission in Decision 467, these principles being consistent with those set out in the *Commerce Commission’s Guidelines for Mergers and Acquisitions*. The *Guidelines* confirm that as the starting point to determine whether the proposed transaction is likely to lead to a substantial lessening of competition the Commission uses a counterfactual analysis. This involves a comparison of the impact on competition between the scenario of the acquisition occurring, and that of it not occurring (paragraph 125 of Decision 467).
60. The conclusions drawn by the Commission in Decision 467 as to the lessening of competition were based, in part, on the *counterfactual* adopted in mid 2002. The market competition in 2005 is now significantly different to that which existed in 2002. The single biggest change of circumstances since Decision 467 is the entry of CBS into the market as a competitor. CBS entered the market in June 2004 and subsequently it has achieved rapid acquisition of additional market share pursuant to Environment Canterbury’s competitive tender process.
61. As the market structure now differs from that at the time of Decision 467, the parties have set out further information that will be relevant to the Commission’s determination of the counterfactual in 2005.
62. The following information is provided relevant to Leopard’s decision to exit the market:
- (a) In amplification of the reasons at paragraph 34 above, Leopard views its involvement in the urban bus market as both unprofitable when compared with the potential profits it can generate with its coach touring business and a diversion of its resources and management effort away from its primary interest, the coach touring market.

- (b) Leopard has decided to exit the urban bus market because in Leopard's opinion this market compares unfavourably with the coach touring market for the following reasons;
 - (i) Comparatively low rates of return on capital;
 - (ii) Comparatively low levels of profitability;
 - (iii) Rigorous competition as a result of the number of strong competitors and the competitive tender process from existing market participants and the threat of new entrants;
 - (iv) Lack of managerial autonomy due to the high level of control exercised by Environment Canterbury, the prescriptive contract requirements and highly regulated labour requirements of the urban bus market;
 - (v) Losses due to vandalism;
 - (vi) Leopard's very strong links with several of New Zealand's largest inbound tour operators from Australia and Europe.
- (c) In Leopard's opinion, it is inefficient and uneconomic for it to remain in the urban bus market as it not currently achieving what it considers to be an acceptable level of profit. The market conditions no longer justify the associated risks or the diversion of resources from the more attractive coach touring market. Leopard needs its management and financial resources to expand and capitalise on these other opportunities. If required by the Commission, details of these other activities may be made available to the Commission on a confidential basis provided that this information is not to be disclosed to Red Bus.

63. The following information is provided relevant to the question of whether Leopard would be acquired by third parties:

- (a) It is possible that an independent third party may be interested in purchasing Leopard's urban bus business, however such an acquisition would only occur if the parties were able to negotiate an acceptable agreement. Much industry publicity was generated nationwide following the release of Decision 467. Leopard did not actively market the business for sale during the period following Decision 467. However given that it was common knowledge in the transport industry one would have expected that any interested purchaser would have approached Leopard. No approaches were made;
- (b) Acquisition of Leopard's urban bus business by Red Bus arguably represents the best value transaction for both parties, due to the low transition costs faced by Red Bus.

Q.16 EXISTING COMPETITION - IN THE MARKET OR MARKETS WHO ARE THE SUPPLIERS OF COMPETING PRODUCTS?

16.1 Identification of suppliers

64. It is acknowledged that for the purposes of considering the application the Commission will take the view that a “*lessening of competition*” and “*strengthening of market power*” are equivalent and the terms are used by the Commission interchangeably. Thus information on existing competition in the market and market shares held by those competitors is relevant and provided.
65. The information contained in paragraphs 118 to 245 of Decision 467 regarding existing competition in the bus services market remains relevant including that there is potential competition in the Christchurch segment of the market from competitors including those noted at paragraphs 21 and 169 to 178 of Decision 467 such as Invercargill Passenger Transport, Ritchies Transport Holdings Limited and Stagecoach. Reference is also made to paragraph 89 below.
66. However, the introduction of CBS as a new competitor requires further detailed information regarding existing competition to be provided to the Commission.

Christchurch Bus Services

67. The directors of CBS are:
- (a) Clive Peter; and
 - (b) Dudley Charles Johnson.
68. The shareholders of CBS are:
- (a) Clive Peter, Poorvambal Nancy Peter and Trevor Lewis Wilson; and
 - (b) Dudley Charles Johnson.
69. Since June 2004 CBS has run three routes in Christchurch under contract to Environment Canterbury. Those routes are:
- (a) Route No 11: Styx Mill – Westmorland;
 - (b) Route No 13: Redwood – Hoon Hay; and
 - (c) Route No 15: Bishopdale – Bowenvale.

CBS runs 21 buses on these three routes.

70. In addition CBS has recently succeeded in a tender for two additional routes under contract to Environment Canterbury as follows:
- (a) Route No 60: Parklands; and
 - (b) Route No 70: Queenspark.

CBS will run 22 buses on these two routes.

71. CBS has only been able to obtain the routes because it has out-bid both Red Bus and Leopard for the additional routes and contracts it has acquired.
72. A feature of CBS's involvement in the market has been its rapid expansion from start up. In under a year it has moved from not being a market participant to gaining 15% of the available routes with significant investment estimated by Red Bus to be in the vicinity of \$10.7 million. It has done this through Environment Canterbury's competitive tender process, in the process under-cutting both Leopard and Red Bus and taking routes previously operated by them.
73. The five routes acquired by CBS were previously operated as follows:

Route No.	Previous operator
Route No. 11	Red Bus
Route No. 13	Red Bus
Route No. 15	Red Bus
Route No. 60	Red Bus
Route No. 70	Leopard

16.2 Estimated market shares

74. The information requested in Part III of the prescribed notice allows the Commission to determine whether an acquisition would enable Red Bus to increase its market share. To avoid repetition, in respect of the market prior to the entry of CBS into the market the parties repeat and rely on the information contained in paragraphs 148 to 164 in Decision 467.
75. In summary, prior to CBS entering the market, the estimated market shares held by competitors in the bus services market in Christchurch were:

	Number of routes	Number of buses	Percentage of market (expressed on bus numbers)
Red Bus	35	154	79%
Leopard	10	41	21%
	45	195	100%

76. Further information is now provided on the current market shares held by competitors as this has changed with the entry of CBS in the market. As a consequence of CBS acquiring the routes detailed above, which begin operating from June 2005, the estimated market shares that will be held by competitors in the bus services market will be as follows:

	Number of routes	Number of buses	Percentage of market (expressed on bus numbers)
Red Bus	37	182	69%
Leopard	6	38	15%
CBS	5	43	16%
	48	263	100%

77. The immediate consequence of the proposed acquisition would simply be that Red Bus reverted to hold approximately the same share as it did prior to CBS entering the market as illustrated below.

	Number of routes	Number of buses	Percentage of market (expressed on bus numbers)
Red Bus	43	220	84%
CBS	5	43	16%
	48	263	100%

78. However, as CBS is an active competitor it could quickly expand to obtain a greater market share. This certainly the trend based on CBS' past conduct. There are 9 routes coming up for contract tender with such services commencing in November 2005. If CBS was to win all or a material number of those contracts its percentage of the market would grow to approximately 38%. The outcome by November 2005, based on current bus numbers, could be as set out below.

	Number of routes	Number of buses	Percentage of market (expressed on bus numbers)
Red Bus	34	163	62%
CBS	14	100	38%
	48	263	100%

Reference is made to **Appendix H** attached for the projected contract tenders.

79. While it is acknowledged that market share is a factor for the Commission to consider they are not determinative and are insufficient in themselves to determine whether the proposed acquisition would lessen competition (page 25, *Commerce Commission's Guidelines for Mergers and Acquisitions*).
80. Despite its market share, whether Red Bus has a *substantial degree of power* in the market will depend on whether there are any barriers to entry into the market, the countervailing power of suppliers or buyers and constraint from existing competition. Information in relation to these issues is set out below.

16.3 What is the source of the data?

81. Figures provided for the estimates of market shares prior to the entry of CBS were obtained from paragraphs 148 to 164 in Decision 467.
82. Figures provided for current estimates of market shares in the existing market are obtained from Canterbury Regional Council passenger service contracts and are given on the following basis:
 - (a) The percentages of market share are expressed on bus numbers operating on routes. In the experience of Red Bus this assessment is very similar to patronage percentage figures in most cases.
 - (b) The market referred to relates to:
 - (i) The Christchurch segment of the market.
 - (ii) Both the bus services and the bus subsidies markets.

EXISTING COMPETITION - ADDITIONAL COMMENTS REGARDING THE BUS SERVICES MARKET

83. It is noted that if the proposed acquisition went ahead the market share would simply revert back to what was previously held by Red Bus prior to the introduction of CBS. The market share held by Red Bus should be read in the context of the bus services market. Commercial and subsidised routes in Christchurch are in fact independent and do not compete one against the other.
84. The comments made by the Commission in paragraphs 231 to 234 of Decision 467 are relevant to the issues of competition in the market and relied upon. In particular, we note that the Commission found that the proposed acquisition would not have the effect of substantially lessening competition in the bus services market.
85. It is submitted that the proposed acquisition would not result in a risk that Red Bus would increase prices or decrease the standard of services provided. In this way there will be no real or substantial impact on the market in a way of lessening, hindering or preventing workable or effective competition as:
 - (a) The proposed acquisition would not result in higher prices for customers. The routes operated by Leopard which would be operated by Red Bus are subsidised and not commercial routes. The prices for those routes have been allocated by Environment Canterbury and cannot be altered by Red Bus. The Commission has previously acknowledged that there is limited ability of Red Bus to alter prices under contracts (paragraph 165 of Decision 467).
 - (b) Similarly the standard of services to be provided is prescribed by Environment Canterbury in the tender process and will not be affected by the proposed acquisition.

EXISTING COMPETITION - ADDITIONAL COMMENTS REGARDING THE BUS SUBSIDIES MARKET

86. The Commission made a number of statements in paragraphs 165 to 230 of Decision 467 in relation to competition in the subsidies market. At paragraph 230 the Commission found that the proposed acquisition in 2002 would have the effect of substantially lessening competition in the bus subsidies market. In light of this prior decision, the parties would make the following further points in relation to existing competition in the subsidies market.
87. The market for obtaining subsidies is strictly regulated by Environment Canterbury. There are 45 subsidised routes under contracts administered by Environment Canterbury, most of which are five year contracts and which fall due for tender at various times over the next five years. The renewal dates and the number of contracts falling due for re-tender are summarised in Appendix H. The tendering process for obtaining subsidised routes is comprehensively set out in Decision 467 from paragraph 35 onward and that information is referred to and relied upon. It is noted that other competitors have previously indicated that whether Leopard was in the market or not would not make a difference to competition in light of the tender process (paragraph 190).
88. The Commission was previously concerned that the removal of Leopard would remove Red Bus' most effective competitor from the market for subsidies (paragraphs 210, 218 and 228 of Decision 467). The introduction of CBS as a competitor removes this as a concern. As outlined above, by June 2005 CBS will have materially the same market share as held by Leopard. It is a successful competitor in the subsidies market as it tendered for and was awarded contracts for Routes 11, 13, 15, 60, 70.
89. In addition, Red Bus considers that there are several other potential new entrants that may be attracted to the Christchurch market including:
- (a) Ritchies Transport Holdings Limited, which currently operates an inter-city fleet, some urban and school passenger contracts in Ashburton, Timaru, Rotorua and Auckland.
 - (b) Stage Coach, the largest urban passenger transport company in New Zealand currently operating in Auckland and Wellington.
 - (c) First Bus, a multinational bus operator in the UK and Europe.
 - (d) Transdev, a large French-based operator who runs bus, train and tram operations in Europe and Australia.
 - (e) Invercargill Passenger Transport, which runs tourism, coach operations and urban passenger services in Invercargill and Dunedin.
 - (f) Connex, an international train and bus service operator currently operating Auckland's passenger trains.
 - (g) Toll Holdings Limited, which presently operates rail services in Wellington.
 - (h) Go Bus Hamilton, which is a privately owned company based in Hamilton which has acquired a number of tenders and companies in the central and lower North Island.

90. Another factor in the Commission's previous decision was the assumption that the party purchased by Leopard would continue to bid at Leopard's prices. This was based on the information that Leopard was returning a satisfactory return.
91. As noted above Leopard no longer considers its returns are satisfactory when compared to the returns it is capable of obtaining if it were to pursue its inbound tourism coach operations more vigorously.
92. Finally, the Commission's attention is drawn to the observations made by a firm of specialist consultants in the transport sector, Booz Allen Hamilton of Wellington, in a report they prepared entitled "*Review of Current Legislation and Implications re Commercial Services*" and dated 19 November 2004. This report was prepared for Transfund New Zealand, an extract of which is attached as **Appendix I**. In appendix E to that report, at section E.3 dealing with Market Contestability Theory and Practice the authors of the report note, after concluding that an effective competitive tendering market does not exist in Auckland or Wellington, that:

"In the other three centres (Christchurch, Hamilton, Dunedin) the supplier market has developed since 1991 in a somewhat different manner from that in Auckland/Wellington. In particular:

- *A number of operators new to each area have emerged since 1991.*
- *These new operators have been keen to establish reasonable market shares in the centres concerned, to ensure viable operations.*
- *No single powerful dominant operator has emerged in any of the three centres.*

*The result in each of the three centres has been that there has been keen competition for contracts – both in terms of the number of actual bidders (generally 3 or more) and in the bid prices. Bidders that price significantly above efficient cost levels are unlikely to be successful in winning contracts. **Thus a reasonably effective competitive tendering market exists in these centres.**"* (emphasis in original)

Q.17-22 CONDITIONS OF EXPANSION - ABILITY OF EXISTING FIRMS TO EXPAND

93. There are no market conditions acting as an effective barrier to the expansion of the share of the market held by any of the existing competitors to Red Bus.
94. The entry and expansion of CBS establishes this. There is nothing to stop CBS, or any potential new entrant such as those listed in paragraph 89 above, expanding its market share further either as contracts come up for tender or through a commercial registration.
95. The CBS experience in the Christchurch segment of the market is that expansion can be rapid – a matter of a few months and only limited by a potential competitor's ability to source buses and drivers. This has proven to be achievable by CBS within the six month period from award of the contract to commencement of services. Reference is made to paragraph 48(c) above.

Q.23-26 COORDINATED MARKET POWER IN THE BUS SUBSIDIES AND BUS SERVICES MARKETS

96. The information sought in questions 23 to 26 of the prescribed notice will enable the Commission to determine whether the proposed acquisition will result in a risk of collusion between competitors in the market.
97. In Decision 467 the Commission identified facts and made conclusions relevant to the issues of collusion in the bus services and subsidies markets. In response to questions 23 to 26 of the prescribed notice the parties refer to and rely upon the information recorded by the Commission at pages 42 to 49 of Decision 467 (paragraphs 246 to 291).
98. Particular notice is given to the Commission's conclusions at paragraphs 242, 244 and 245 of Decision 467 that:
- (a) There was no evidence of collusion in the Christchurch bus subsidises market;
 - (b) The bus services market has little scope for collusion as each route is virtually a monopoly;
 - (c) The Commission did not consider that there will be a substantial lessening of competition as a result of co-ordinated market power in these markets.
-

PART IV – CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

Q.27 CONDITIONS OF ENTRY - WHICH, IF ANY, OF THE CONDITIONS IDENTIFIED DO YOU CONSIDER WOULD BE LIKELY TO ACT AS A BARRIER TO THE ENTRY OF NEW COMPETITORS?

99. The Commission has previously acknowledged that a business acquisition is unlikely to result in a substantial lessening of competition in the market if the market is subject to real constraints (paragraph 246, Decision 467).
100. In Decisions 318, 326, 460 and 467 the Commission identified what market conditions may affect the ability of new firms to enter the bus services market. These conditions are set out at paragraph 254 of Decision 467 with additional conditions at paragraphs 255 to 259. In response to question 27 of the prescribed notice the parties refer to the conditions set out at paragraphs 254 to 259.
101. Much of the factual information relating to market conditions contained in Decision 467 remains accurate. However, there is now an important factual difference to the market as analysed in Decision 467; CBS has since entered the market. This factual difference has a bearing on the Commission's conclusions in Decision 467.
102. In 2002 the Commission found that the conditions of entry into the market did not individually represent a larger barrier to entry but their cumulative effect aggregates into a substantial barrier to entry (paragraph 261, Decision 467). The finding that these conditions were prohibitive to entry appeared based on historical evidence that there had not been a new entry into the market, and that even companies well established in other local transport markets had not been successful. The Commission had considered that a "*fledgling operator operating on a limited number of routes might also be deterred*" (paragraph 257 of Decision 467).
103. The introduction of CBS as a new entry into the market has some bearing on these conclusions. CBS has now illustrated that the conditions to entry do not form a substantive barrier to new entrants in 2005. CBS now acts as a constraint on Red Bus and Leopard operations. In a relatively short space of time CBS has decreased the market share held by both Red Bus and Leopard, obtained the same market share as Leopard, and established itself as a viable competitor. CBS has successfully tendered for routes and is now operating routes previously operated by Leopard and Red Bus.
104. The six-month period from the award of contract to commencement of services, together with the rolling five-year tender process and the anti-"cherry-picking" philosophy of Environment Canterbury, has the effect of significantly lowering the barriers to entry, as evidenced by the entry of CBS.
105. The Commission appears to have recognised that conditions to entry have been shown not to form a substantive barrier to new entrants in the 2004 market. In its letter to Leopard's solicitors, Lane Neave, dated 28 September 2004 the Commission made the following statements:

"We understand that Red Bus has significant market share in the relevant market. However, taking into account the countervailing power of Environment Canterbury and the threat of a new entry, we are not convinced that Red Bus has a substantial degree of market power.

....

We understand that contracts for subsidised routes in Christchurch run for five years. This long time period allows for plenty of scope for new entry.

...

We consider that the threat of new entry to the relevant market is likely to be a significant constraint on Red Bus.

...

*Regardless of low bidding for other subsidised routes, we note that a significant period of time will elapse before those routes are re tendered. While existing competitors may leave the market in that time, **it is likely that new competitors will enter**”...(emphasis added)*

For ease of reference a copy of the Commission’s letter to Lane Neave dated 28 September 2004 is attached in **Appendix J**.

106. Red Bus is in agreement with the recent statements made by the Commission as to the likelihood of new entrants into the market.

Q.28-29 CONDITIONS OF ENTRY - NAME ANY BUSINESSES WHICH DO NOT CURRENTLY SUPPLY THE MARKET BUT WHICH COULD SUPPLY THE MARKET

107. Red Bus still considers that there are several other potential new entrants that may be attracted to the Christchurch market including those noted in paragraph 89 above. In summary, they are:

- Ritchies
- Stage Coach
- First Bus
- Transdev
- Invercargill Passenger Transport
- Connex
- Toll Holdings
- Go Bus Hamilton

Q.30-35 LIKELIHOOD, SUFFICIENCY AND TIMELINESS OF ENTRY - THE LET TEST

108. Questions 30 to 35 of the prescribed form are to enable the Commission to assess whether entry into the market was likely, sufficient in extent and timely (“the LET test”).

109. In 2002 the Commission determined that entry by a large established bus company or a small company was unlikely, and the LET test was not met in (paragraphs 271 to 286, Decision 467). The Commission found that timeliness of entry was not an issue.
110. In response to questions 30 to 35 the parties reiterate and rely on the statements made in respect of the LET test as set out at paragraphs 263 to 287 of Decision 467. Those comments apply to both the services and the subsidies markets. Relevant to the services market, reference is made to paragraphs 83 to 85 above and the Commission's finding in Decision 467 that the proposed acquisition would not have the effect of substantially lessening competition in the bus services market (see paragraphs 231 to 234 of Decision 467).
111. In addition, relevant to the subsidies market, Red Bus makes the following additional comments based on CBS' entry into the subsidies markets. CBS' entry has illustrated that in respect of the subsidies market in 2005:
- (a) It is possible for a new entry to occur;
 - (b) A small operator can enter the market and successfully operate at current subsidies. The level of subsidies was clearly not prohibitive on CBS entering the market and competing against Red Bus in 2004. Similar levels of subsidies exist in 2005;
 - (c) The infrastructure, cost of mounting a tender and capital expenditure required for start up of operations was not prohibitive on a small company gaining entry into the subsidies market in 2004. There is no reason why a similar entry could not occur in the future;
 - (d) Although Red Bus is the principal incumbent this has not meant that it has been able to price more cheaply than the smaller entrants into the market. CBS successfully tendered for routes that Red Bus and Leopard previously operated. The number of routes CBS has obtained has made it a viable business;
 - (e) New entrants to the market can gain a significant market share within a relatively short period of time. CBS has obtained the same market share as Leopard and competes effectively against Red Bus to obtain subsidised routes. A competitor which holds a 15% share of the market acts as a meaningful constraint on Red Bus.
-

PART V – OTHER POTENTIAL CONSTRAINTS

Q.36-41 CONSTRAINTS ON MARKET POWER

112. Information provided in response to questions 36 to 38 of the prescribed notice would enable the Commission to determine whether there is any entity that wields a countervailing power which would constrain Red Bus' market power.
113. In Decision 467 the Commission identified and recorded facts and made conclusions about the countervailing powers of others that acted as a constraint on Red Bus' activities. In response to questions 36 to 38 the parties refer to and rely upon the information recorded by the Commission at pages 49 to 52 of Decision 467 (paragraphs 292 to 317). The parties also set out the following additional information and points of clarification in respect of this issue.

Constraints from alternative modes of transport

114. The parties submit that use by Christchurch residents of private vehicles provides a competitive constraint on the conduct of Red Bus. Christchurch has a very high percentage of private car ownership with a high proportion of owners using private cars as transportation to and from work and for recreational purposes. In the same way, the high level of use of walking and cycling as alternative (and free) forms of transport provides a competitive constraint on the conduct of Red Bus.
115. Set out below are statistics from the 2001 census on the means of travel to work in the Canterbury Region:

Travel to work	Drove a private car/truck/van	Drove a company car/truck/van	Passenger in a car/truck/van/company bus	Public Bus	Train	Motor cycle or power cycle	Bicycle	Walked or jogged
Age Group	Total	Total	Total	Total	Total	Total	Total	Total
Area								
Canterbury region	116,658	20,445	7,752	5,694	174	2,295	10,824	11,355

Constraint by Environment Canterbury

116. The question of the countervailing power of a Regional Authority over bus services and subsidies has been previously considered by the Commission in Decisions 318, 326 and 467.
117. In 2002, in Decision 467, the Commission concluded that:
- (a) Environment Canterbury exercised substantial countervailing power with respect to fares (paragraph 297, Decision 467). This position has been materially enhanced with the introduction of the Environment Canterbury controlled central clearing house for ticketing and revenue reimbursement to operators. Reference is made to paragraph 47 above.

- (b) Environment Canterbury has a degree of countervailing power when it receives just one tender, but its position is weaker when it receives two or more tenders (paragraph 307, Decision 467).
 - (c) Overall Environment Canterbury had insufficient countervailing power in the bus subsidies market to prevent a substantial lessening of competition (paragraph 308, Decision 467).
118. However, the commentary in Decision 467 in relation to the exercise of Environment Canterbury's countervailing power must be viewed in the context of the market in 2002. CBS' entry into the market in 2004 and its expansion of market share in 2005 is an important factual difference between the market in 2002 and today. Environment Canterbury has demonstrated that in the current market it does have effective countervailing power and is able to act to prevent a lessening of competition.
119. The parties submit that in 2005 Environment Canterbury's countervailing power has the effect that there is not, nor is there likely to be, a substantial lessening of competition as a result of the proposed acquisition.
120. This submission is supported by the Commission's statements in the letter to Leopard's solicitors, Lane Neave, dated 28 September 2004 (Appendix J). In that letter the Commission addressed concerns that Leopard had raised with respect to Red Bus. The Commission confirmed that as at September 2004 it considered that Environment Canterbury's countervailing powers could successfully operate as a constraint on any exercise by Red Bus of its market power:

"We further consider it likely that Environment Canterbury has significant countervailing power in the relevant market in that it: grants rights for most of the bus routes in Christchurch; sets the terms of service including frequency; sets a cap on fare level; and may chose to bundle routes in the tender process..."

If Red Bus did have a degree of power in the relevant market, we consider it likely these constraints would mean that this power was not substantial."

121. Red Bus is in agreement with the recent statements made by the Commission as to the extent of countervailing power exercised by Environment Canterbury. Environment Canterbury continues to provide a strong competitive discipline on the behaviour of Red Bus. It is notable that if Environment Canterbury only receives one tender it is not bound to accept it and has the ability to negotiate with the tenderer.

Relevance of Decision 326 to consideration of countervailing power of Environment Canterbury

122. It is submitted that Decision 326 remains relevant to this issue. In that Decision the Commission authorised the acquisition of Transportation Auckland Corporation Limited by New Zealand Bus Limited because of the countervailing power exercised by the Auckland Regional Council.
123. In reaching Decision 467 the Commission sought to distinguish Decision 326 on the basis that:
- (a) The determination in Decision 467 involved a consideration of the test for *substantially lessening of competition*, whereas Decision 326 considered whether the acquisition would result in the *strengthening of a dominant position* in the market.

- (b) The increased commercial services led the Commission to only assess Auckland Regional Council's countervailing power against attempts by operators to increase *fares* but not *subsidies*. In Decision 467 the Commission had found that Environment Canterbury had insufficient countervailing power in the bus subsidies market to prevent a substantial lessening of competition.
124. In considering whether the application would strengthen a "dominant position" in the market place the Commission considered the constraints on competition from existing competition, potential competition and the countervailing power by suppliers or acquirers of services in the market. The Commission adopted a test for "dominance" which involved a determination of whether the applicant could act without "*significant competitive or consumer constraints*" (paragraphs 131-136, Decision 326).
125. However, the considerations of the Commission in reaching Decision 326 appear identical to those in Decision 467. In the later decision the Commission confirmed that for the purposes of an application under section 66 the phrases "*substantially lessening competition*" and "*strengthening of market power*" are equivalent and interchangeable. The Commission considered the nature and extent of the contemplated lessening of competition in terms of the competitive constraints that would exist following the merger from existing competition, potential competition and other competition factors such as the countervailing power by suppliers or acquirers of services in the market (paragraph 320, Decision 467).
126. It is submitted that given the almost identical considerations by the Commission in both of these decisions, Decision 326 remains relevant and applicable to the present application. It is noteworthy that in Decision 326 the Commission found that the countervailing power of the Auckland Regional Council would continue to provide an effective constraint on the applicant (paragraph 231, Decision 326).
127. In addition, while the Commission had reservations about the extent of Environment Canterbury's countervailing power in 2002, it has more recently had the opportunity to reconsider the effect of Environment Canterbury's powers on any exercise by Red Bus of market power. As outlined above, in the Commission's letter to Leopard's solicitors Lane Neave dated 28 September 2004 (Appendix J), it confirmed that as at September 2004 it considered that the Environment Canterbury did have sufficient countervailing power to act as a constraint on any market power held by Red Bus. Of particular relevance are the various statements of the Commission in its 28 September 2004 letter, set out above (paragraphs 104 and 120), that Red Bus did not have "*substantial*" market power and that the countervailing power of Environment Canterbury and the threat of a new entry constrained the exercise of market power by Red Bus.
128. It is submitted that, following the reasoning in Decision 326, and the recent statements of the Commission on the extent of the countervailing power of Environment Canterbury and the threat of new entry, the acquisition is unlikely to result in a strengthening of market power by Red Bus. Accordingly, as the terms are interchangeable, there would not be any likelihood of *substantially lessening competition* resulting from the acquisition.
-

CONCLUSIONS ON SUBSTANTIAL LESSENING OF COMPETITION

129. In summary it is submitted, on the basis of the information provided in this application, that the proposed acquisition is unlikely to *substantially lessen competition* for the following reasons:
- (a) Although the merger would result in Red Bus obtaining a market share that falls outside the Commission's safe harbour guidelines, with the introduction of CBS into the market Red Bus will only hold the same market share as it did prior to CBS' entry.
 - (b) The conditions to entry do not currently form a substantive barrier to new entrants, as evidenced by the entry of CBS. In September 2004 the Commission expressed the view that entry by competitors was likely. Indeed the recent activities of CBS confirm this.
 - (c) New entry is likely to operate as a successful constraint. This is evidenced by CBS which has decreased the market share held by Red Bus, obtained the same market share as Leopard, and established itself as a vigorous competitor in a short space of time. CBS has successfully tendered for routes and is now operating routes previously operated by Leopard and Red Bus.
 - (d) The removal of Leopard from the market will not remove the most effective competitor from the market. CBS currently holds materially the same market share as Leopard, also the same market share as Leopard did at the time of the previous 2002 application. In this way CBS is a competitive presence and constrains the exercise by Red Bus of its market power and contributes to low subsidies in the market.
 - (e) A further constraint is provided by Environment Canterbury which operates a countervailing power over both bus services and subsidies.
 - (f) In September 2004 the Commission expressed the view that both the ability of new entrants to the market, and the countervailing power of Environment Canterbury was in fact operating as an effective constraint on Red Bus, and that as a result, the significant market share held by Red Bus did not amount to substantial market power.
130. The practical impact of an acquisition that would substantially lessen competition would be:
- (a) To allow a company to unilaterally act to reduce the quality of service or increase price; or
 - (b) To allow a company to act in co-ordination with other companies to reduce the quality of services or increase price.

In this instance neither of those effects are brought on by the proposed acquisition. Clearly no impact on the services market would result.

131. In addition, there seems little practical impact on the subsidies market by the proposed acquisition. The tender process is regulated by Environment Canterbury and competition is provided by CBS and/or any other potential entrant into the market. The same level of competition for tenders will exist as prior to the introduction of CBS into the market. Environment Canterbury's strong control over the subsidy process acts as an effective constraint on any exercise by Red Bus of market power.

This notice is given by Greg Campbell of Red Bus Limited and Brent Early of Leopard Coachlines Limited.

Red Bus Limited and Leopard Coachlines Limited hereby confirm that:

- All information specified by the Commission has been supplied;
- All information known to the applicant which is relevant to the consideration of this notice has been supplied;
- All information supplied is correct as at the date of this notice.

Red Bus Limited and/or Leopard Coachlines Limited undertakes to advise the Commission immediately of any material changes or circumstances relating to the notice.

DATED this 7th day of April 2005

"GREG CAMPBELL"

Signed for and on behalf of
Red Bus Limited by **Greg Campbell**
its Managing Director who is duly
authorised to make this notice

"BRENT EARLY"

Signed for and on behalf of
Leopard Coachlines Limited by **Brent Early**
its Managing Director who is duly
authorised to make this notice

APPENDIX A

Agreement for Sale and Purchase

APPENDIX B

Red Bus - Environment Canterbury Contracts

Route No 83/84: Hei Hei – Russley

Route No 40/49: New Brighton via Wainoni – North Shore

Route No 42: New Brighton via Avondale

Route No 46: The Palms via Shirley

Route No 43: New Brighton via Burwood

Route No 81/82: Lincoln Direct / Lincoln via Hornby

Route No B: Burnham/Rolleston

Route No 5: Hornby – New Brighton and Templeton – Southshore

Route No 51: Sockburn – New Brighton via Aranui

Route No 7 and 77: Halswell and Kennedys Bush

Route No 12: Northwood

Route No 14: Nunweek

Route No 16: Belfast

Route No 17: Bryndwr – Barrington

Route No 18: St Albans – Huntsbury

Route No 19: Burnside – Spreydon

Route No 67: Dyers Pass

Route No 3: Avonhead – Sumner

Route No 28: Lyttelton / Rapaki

Route M: Metro Star

School: Clifton Hill to Sumner and Redcliffs Schools

School: Taylors Mistake to Sumner Schools

School: Aranui Schools

School: Avonside Girls High to City

School: CBHS, CGHS and Ilam Primary School to City

School: Southshore to Shirley Schools

School: Sumner to Linwood High School and Shirley Schools

School: Lyttelton to Avonside Girls High

School: Sumner to City Schools

School: Queenspark to Shirley Schools

School: City to Lincoln High School

School: Southshore to Mairehau High School

APPENDIX C

Red Bus – Commercial Routes (i.e. not subsidised)

1. Route A: Airport to City
2. Route R: Rangiora
3. Route 10: Harewood to Cashmere
4. Burnham to Sockburn schools
5. Aranui School
6. Inner City Electric Shuttle (contract with Christchurch City Council)
7. Regional Charter Market (school transfers etc)

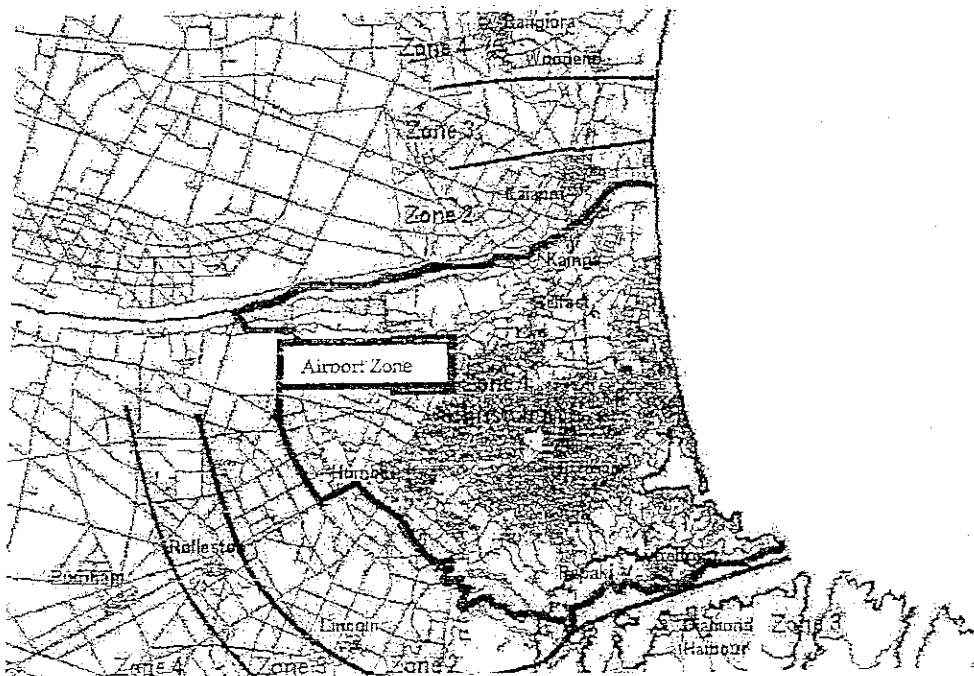
APPENDIX D

Environment Canterbury Maximum Fare Schedule

B9.1 Maximum Fare Schedule (\$)

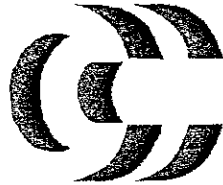
Fares Table				
Distance Travelled	Child / Concession Cash	Adult Cash	Smartcard Child / Concession	Smartcard Adult
Transfer Available =	One free transfer or return within 2 hours		Unlimited transfers within two hours	
Within One Zone	\$1.00	\$2.00	\$0.75	\$1.50
Maximum Daily	N/A	N/A	\$1.50	\$3.00
Maximum Weekly	N/A	N/A	\$7.50	\$15.00
Two Zones	\$1.50	\$3.00	\$1.15	\$2.25
Maximum Daily	N/A	N/A	\$2.30	\$4.50
Maximum Weekly	N/A	N/A	\$11.50	\$22.50
Three Zones	\$2.00	\$4.00	\$1.50	\$3.00
Maximum Daily	N/A	N/A	\$3.00	\$6.00
Maximum Weekly	N/A	N/A	\$15.00	\$30.00
Four Zones	\$2.50	\$5.00	\$1.90	\$3.75
Maximum Daily	N/A	N/A	\$3.80	\$7.50
Maximum Weekly	N/A	N/A	\$19.00	\$37.50

Bus & Ferry Zones



APPENDIX E

Extract from Commission Decision 467 being pages 1 to 16 (paragraphs 1 to 117)



COMMERCE COMMISSION

Decision No 467

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

RED BUS LIMITED

and

LEOPARD COACHLINES LIMITED

The Commission: MJ Belgrave
D Bates QC
P JM Taylor

Summary of Application: The acquisition by Red Bus Limited of the business of Leopard Coachlines Limited, being the business of operating certain urban bus routes operated by Leopard. The assets of the business, as set out in the Sale and Purchase Agreement are the contracts for operation of the bus routes, the buses themselves, goodwill, plant and equipment.

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

Date of Determination: 30 July 2002

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BRACKETS**

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THE PROPOSAL

1. On 28 June 2002, Red Bus Limited ("Red Bus") registered a notice with the Commerce Commission ("the Commission") seeking clearance under s 66(1) of the Commerce Act 1986 ("the Act") to acquire the business of Leopard Coachlines Limited ("Leopard"), being the business of operating urban bus routes, as described in the Agreement for Sale and Purchase. The main assets of the business are the contracts for the operation of the bus routes and the "Buses" as described in the Agreement for Sale and Purchase. The balance of the assets comprises goodwill and various plant and equipment.

THE PROCEDURES

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice given under section 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. Extensions of time were sought by the Commission and agreed to by the applicant. Accordingly, a decision on the application was required by 30 July 2002.
3. In its application, Red Bus sought confidentiality for specific aspects of the application. A confidentiality order was made in respect of the information for a period of 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
4. The Commission's determination is based on an investigation conducted by staff.
5. The Commission's approach is based on principles set out in the Commission's *Practice Note 4*.¹

THE PARTIES

Red Bus

6. Red Bus operates various bus routes in Christchurch and surrounding areas under contracts granted by Environment Canterbury (the Canterbury District Council) together with various commercial (non subsidised) bus routes.
7. Red Bus is the wholly owned subsidiary of Christchurch City Holdings Limited (CCHL). CCHL is a local authority trading entity owned by the Christchurch City Council (CCC).
8. Other companies in which CCHL owns shares are:
 - Orion Group Limited (energy)
 - Lyttelton Port Company Limited
 - Christchurch International Airport Limited.

¹ Commerce Commission, *Practice note 4: The Commission's Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in section 47 – A Test of Substantially Lessening Competition*, May 2001.

9. CCC owns shares in a number of companies.
10. Red Bus owns CTL Properties Limited.

Leopard

11. Leopard operates various bus routes in the Christchurch area under contracts granted by Environment Canterbury, plus other bus operations such as school bus contracts, bus charters, ski field operations and inbound tourism coach operations.
12. Leopard entered the urban bus market in 1995 as the situation in the tourism market had deteriorated because of the Asian crisis.
13. Leopard is owned by a group of private investors:
 - One of these, Brent Early, has an interest in Top Coach Limited, a tourism based business operating nationwide.
 - Another, Rainer Heidtke also has interests in several tourism related businesses.
14. In the application, Leopard indicates it wishes to cease operating urban bus routes in order to focus entirely on the tourism market.

OTHER RELEVANT PARTIES

Canterbury Regional Council (Environment Canterbury)

15. Environment Canterbury is constituted under the Local Government Act 1974. As part of Environment Canterbury's function to provide services on behalf of central Government, it is responsible for public passenger transport planning, and providing subsidies for passenger transport services. Environment Canterbury compiles a Regional Passenger Transport Plan, which specifies the services it proposes for the region. It then accepts commercial registrations for bus services, and invites tenders for subsidised services. Environment Canterbury receives about 50% of its funding for the subsidised bus transport services from rates and the balance from Transfund.

Transfund New Zealand

16. Transfund New Zealand ("Transfund"), a crown entity established by the Transit New Zealand Amendment Act 1995, is responsible for the funding of the land transport system formerly undertaken by Transit New Zealand. This involves allocating road-user funds from the National Road Account on the basis of the applications for project funding from Transit New Zealand, territorial authorities and regional councils.
17. Transfund also has the responsibility for approving competitive pricing procedures ("CPPs"), which regional councils are required to use when conducting tenders for the supply of subsidised public passenger services. The basis on which CPPs will be approved is contained within the Transit Act 1989.

Bus and Coach Association

18. The Bus & Coach Association (NZ) Inc. was first established in 1931 and has operated under various names since that time. The Bus & Coach Association (NZ) is the voice of

the New Zealand bus and coach industry. It is an industry association that covers bus and coach operators as well as other businesses associated with the industry, including coach and equipment and service suppliers.

19. Funded by subscriptions from voluntary members, the Bus & Coach Association represents all the major and most of the smaller bus companies in New Zealand, or about 75% (360) of all operators with about 80% (4,400) of the commercial bus fleet.
20. The Association's work includes representing the industry on school transport matters, urban issues, tourism, and limousine, which comprise the Association's four sector groups. The Association acts as the industry's voice to central and local government, related bodies and the media on relevant issues, writing submissions and publishing fact sheets on relevant subjects.

Other Bus and Coach Operators

21. Other bus operators who are or who have recently been involved to some extent in the Canterbury region are:
 - Ritchies Transport Holdings Limited ("Ritchies")
 - Invergargill Passenger Transport ("IPT")
 - Cityline Buses
 - Emanen
 - Geraldine Transport Services.

INDUSTRY BACKGROUND

Transport in Christchurch

22. The Christchurch bus service market is less developed than in Wellington or Auckland. Only 4% of the Christchurch population take the bus every day, compared with 7.3% in Auckland and 15.5 % in Wellington.
23. As car parks are readily available and cheap compared to the other main centres, most people travel by car with a low occupancy rate per car (about 1.03).
24. Unlike Wellington, there are hardly any topographic corridors, so that the traffic is more spread out and congestion, if at all, only occurs on the main trunks in the City Centre. However Environment Canterbury expects the traffic to grow at least 43% over the next 20 years and congestion to increase on a number of streets.
25. The Christchurch bus market is experiencing patronage growth. A doubling of the 1997/1998 passenger numbers to 18 million is forecast by June 2007 in Christchurch.
26. Bus is the only public transport available in Christchurch as there are no commuter trains. There is the Diamond Harbour Ferry operating in Lyttelton Harbour.

Regulatory Environment

27. Before July 1991, operators of public transport services held an exclusive licence to operate in their respective areas. This protection was removed by the Transport Services Licensing Act 1989 (the TSL Act).

28. Nonetheless, the operation of local bus passenger services continues to be regulated by three pieces of legislation, the main provisions of which are outlined below.

Transport Services Licensing Act 1989

29. Under the TSL Act, a licence to operate bus services may be granted to any person who does not have a criminal record, or any major convictions under the Transport Act, and who can demonstrate familiarity with the relevant legal requirements.
30. The TSL Act specifies that a licence holder who proposes to operate a commercial service must register that service with the appropriate regional council. The grounds on which a regional council can decline registration, set out in s 50(5) of the Act, are if the proposed service:
- a) is likely to have a material adverse effect on the financial viability of any contracted services;
 - b) is likely to raise the net cost to a regional council of any contracted service; and
 - c) is contrary to sound traffic management or any environmental factor identified by the regional council as being of importance to the region.
31. The TSL Act stipulates that, before a regional council can provide funding for public passenger services, it must produce a Regional Passenger Transport Plan ("RPTP"). The RPTP, which sets out the means for implementing the Regional Land Transport Strategy (see below), specifies the routes, frequencies and hours of operation that the regional council is prepared to subsidise.

Transit New Zealand Act 1989 and the 1995 Amendment

32. The Transit New Zealand Act 1989 ("the Transit Act") established a Government agency responsible for planning national passenger transport, and for allocating Government funds to regional councils for subsidised passenger services. The Transit Act also specified that funds should be allocated only to those subsidised services that have been subject to an appropriate Competitive Pricing Procedure ("CPP"). CPPs provide the rules under which the tendering process for subsidised services are conducted. Specifically, they contain provisions relating to contract duration, process, the maximum size of a contract, and concessionary fare schemes. CPPs are designed to ensure competition for tenders, and that the lowest price is paid, subject to minimum quality and safety standards.
33. The Transit New Zealand Amendment Act 1995 established a new funding agency, Transfund, to carry out the funding role previously undertaken by Transit New Zealand. As part of Transfund's role, it must approve CPPs for subsidised services. Pursuant to s 26(3) of the Transit Act, in approving CPPs the Transfund Board must have regard to the following factors:
- (a) the efficient application of the State Highways Account and Land Transport Disbursement Accounts;
 - (b) the safety and other interests of the public in respect of the output or capital project or the class of output or capital project;
 - (c) the desirability of encouraging competition in the sector of industry likely to supply goods or services in relation to the output or capital project or the class of output or capital project;

- (d) the undesirability of excluding from competition for the output or capital project or the class of output or capital project any party who might otherwise be willing and able to compete; and
- (e) the cost of administration associated with the pricing procedure or of any contract formed under that procedure.

The Land Transport Act 1993

34. Under the Land Transport Act 1993, each regional council is required to produce a Regional Land Transport Strategy. This document identifies the land transport needs of the region, the most desirable means of responding to such needs, and an appropriate role for each transport mode in the region.

Commercial and Subsidised Services in Christchurch

35. Broadly, there are two sources of funds to support passenger transport services in Christchurch – subsidies and fare receipts. These support two types of service:
- Contracted services are partly subsidised through grants from Environment Canterbury. Subsidies are paid using funds collected from local body rates, and from Transfund. Until recently, Environment Canterbury contributed 60% of the subsidy, and Transfund provided the balance. Environment Canterbury joined the new funding mechanism Patronage Funding Scheme, which has affected the balance of subsidy paid by Environment Canterbury. Contracted services also draw fare revenues, although Environment Canterbury fixes the maximum fare allowed.
 - Commercial services rely entirely on fare receipts and do not get any subsidies from Environment Canterbury.

Contracted (Subsidised) Services

36. To satisfy CPP requirements, a competitive tender process determines who is to operate each contracted service. Like other councils, Environment Canterbury is required to invite operators to submit tenders to supply particular services that are not provided on a commercial basis. The tender documents specify, among other things, the service requirements, a maximum fare schedule, the length of the contracts, and minimum vehicle standards. Environment Canterbury organises its tendering round on an annual staggered basis, currently every six months but it is looking at moving towards yearly tendering rounds.

Tender evaluation process

37. Each tenderer submits two envelopes:
- Envelope A, which describes the supplier's attributes:
 - Relevant experience;
 - Track record (operator's past performance such as courtesy, presentation of vehicles, promotion of services, level of customers' complaints, past ability to adhere to contractual requirements and reliability);
 - Management and Technical skills (staff expertise, staff training, staff motivation, quality management processes and effective preventative maintenance programme); and

- Resourcing Programme (age and quality of vehicles, availability of appropriate depot facilities for both staff and vehicles).
- Envelope B, which contains the tender amount (amount of subsidy required).
38. Suppliers' attributes are incorporated in the tender process through the inclusion of minimum standards and adjustments to the tender price (subsidy submitted in Envelope B) using the quality/price trade-off method:
- The specification of minimum standards is intended to ensure that all eligible tenderers have at least the minimum abilities or resources necessary to fulfil the contract.
 - The quality/price trade-off method is used to adjust the rankings based on prices from Envelope B to reflect the supplier quality above the minimum requirements. The Council's evaluation of operator quality and the Council's willingness to pay a premium for that quality are assessed prior to opening Envelope B containing the tender amounts. The assessment of suppliers' attributes are contract specific and may vary depending upon the nature of the service tendered. These are specified in the Request for Tender documentation. The suppliers' attributes are scored out of a total of 100 points.
39. At the end of the process, Environment Canterbury publishes:
- the total number of bidders;
 - the name of the successful bidder;
 - the quality-adjusted price (subsidy) that won the tender;
 - the highest bid; and
 - the lowest bid.
40. Environment Canterbury has the ability to negotiate the price submitted in Envelope B only if there was one tenderer. It can also re-tender the contract if it is not satisfied with this tenderer.

Fares and subsidies

41. The tender amount put in Envelope B is the subsidy asked for by the bidders to be able to run the service. The subsidy is determined by the formula:
- $$\text{SUBSIDY} = \text{Costs of running the service} - (\text{Fare} * \text{Patronage}).$$
42. The fare is fixed by Environment Canterbury and cannot be changed without Environment Canterbury's agreement.
43. There was one fare increase in 1999 initiated by Environment Canterbury to decrease the bus loading time. The fare went up from \$1.80 to \$2 (the "gold coin").
44. Environment Canterbury's approach is that operators can recoup increased operating costs on a route by increasing the subsidy they ask for the next time the route is tendered. However, operators are covered by a provision in the contracts allowing them to ask for more subsidies before the term of a contract if costs have increased greatly.
45. Environment Canterbury initiated a review of the fare and ticketing system in the Christchurch metropolitan area last year. This review has been carried out in consultation with the public and the operators. Even though it will lead to an increase in fares in certain cases and a decrease in others, it is claimed not to be a revenue driven review.

Environment Canterbury is aiming at integrating the whole network by implementing an Integrated Ticketing System and making fares consistent across the whole network.

Bus requirements

46. Environment Canterbury specifies in the tender documents and contracts the nature of the buses required for operating each service. It usually requires super low floor buses for non-peak runs and conventional buses for peak time that will operate in addition to the super low floor buses. Out of a total number of 165 buses operating on routes that have peak and off peak runs, there are 117 super low floor buses (71%). Environment Canterbury wishes to increase this percentage and have [] of super low floor buses during inter peak.
47. Super low floor buses cost about \$250,000, plus \$10,000 for a new ticketing machine.
48. As part of its investigation, the Commission considered whether availability of buses could be a limiting factor for some bus operators. Its inquiries indicated that bidders did not have to own the super low floor buses at the time they bid. An accompanying letter from a bus builder certifying that they would build the new super low floor buses required by the start of the contract is sufficient.
49. Environment Canterbury allows about four months for the successful bidder to build up its fleet and start the contract, allowing time for buses to be built.
50. Designline, a New Zealand builder of buses and coaches established in Ashburton builds about [] of the super low floor buses in New Zealand. It doubled the capacity of its factory last November, meaning that it is able to meet the orders placed by bidders.
51. Designline explained that it usually met with the tenderers before they put a bid in to discuss the tendering process and the bus requirements. Once Environment Canterbury has awarded the contract, it has to order the bus parts from overseas. It takes about three months to get them and then 16 days to build one bus. By the end of a four-month period including the ordering and delivering time of the pieces, it could deliver about 14 buses.
52. The Commission understands that the market for conventional buses is very tight. With the kick-start funding system that has been in place for the last three years, Regional Councils have been encouraged to put new services in. It is therefore hard at the moment to find second hand conventional buses in New Zealand. However, they could be imported from overseas and re-built to comply with the New Zealand vehicle quality standards.
53. Environment Canterbury said that [

]

Operation and monitoring of contracts

54. The successful bidder must operate the subsidised service(s) in accordance with the conditions specified in the tender documents. Failure to comply with the terms can lead to penalties being imposed, and in extreme instances, to the cancellation of the contract.
55. Environment Canterbury monitors compliance with the contracts by using the following means:
 - Monitoring complaints;
 - Monitoring the bus exchange and real time information system;
 - Inspecting vehicles every quarter;

- Monitoring the accident and complaints register;
- Monitoring patronage by taking copies of bus sales;
- Monitoring compliance with time schedules (fine of \$1,500 if the bus is 15 minutes late); and
- On bus monitoring.

Commercial Services

56. Commercial services can be registered at any time, on any route, and to any timetable, subject to the provisions of the Transport Services Licensing Act.
57. If Environment Canterbury were dissatisfied with the commercial service provided, it could invite tenders from bus companies to operate a similar subsidised service (i.e., it could “contract over” an existing commercial service).
58. There is a significant difference between the Auckland and Canterbury Regional Councils’ approach to registration of commercial services. The Auckland Regional Council adopts a more liberal approach than Environment Canterbury to permitting bus operators to notify commercial (non-subsidised) urban bus routes pursuant to the Transport Services Licensing Act.
59. In Policy 5.1 of its Regional Passenger Transport Plan 2001, Environment Canterbury states that:
- “Contracted services will be offered to operators as a complete package of morning and afternoon peaks as well as off peak periods and week-ends.”*
- “Service contracts will not be unbundled into parts of the day, although a combination of services combining routes may be offered. This policy supports Policy 4.7, which provides for a uniform pricing system. Fares are set on the basis of overall cost recovery aims. This inherently involves a lower subsidisation of the peak relative to the off peak.*
- This policy will make the commercial registration of a partial service for only parts of a day (e.g. morning and/or afternoon peak periods) unlikely to be acceptable. Accepting commercial registration for only a part of a day would make the remaining residual parts less attractive to other prospective contractors and jeopardise overall cost recovery goals. Commercial registrations of whole service contracts will still be acceptable.”*
60. In other words, Environment Canterbury will not permit the “cherry-picking” of commercial routes. Environment Canterbury’s policy is that it will not permit operators to notify commercial routes for selected (peak) time slots during a day and that any such notification must be for the whole day. This has limited the ability of operators to notify commercial routes in the Christchurch market.
61. Therefore, the Christchurch market is overwhelmingly composed of subsidised routes, which are stringently and actively controlled by Environment Canterbury.
62. There are currently only four commercial services in Christchurch, including the service from the Airport. These have always been commercial and apart from the Airport Service, which costs \$4, their fares are all within Environment Canterbury’s fares schedule.

63. Unlike Wellington and Auckland where commercial services are partly subsidised by the Regional Council through the concessionary fare scheme, commercial services in Christchurch do not get any subsidies from Environment Canterbury.
64. Environment Canterbury and the operators said that the subsidised services run in Christchurch would not be viable as commercial services.

Patronage Funding

65. Until recently, central Government support for passenger transport services has been based on subsidising a fixed percentage of the net costs borne by regional councils for their local passenger services (bus, rail and ferry). This subsidy had been capped at \$36.6 million (GST exclusive) nationally and was paid irrespective of the number of passengers carried.
66. The new funding mechanism, known as "patronage funding", is based on passengers carried, and hence provides councils with higher funding for increased patronage. From 1 November 2000 regional councils have been able to join the Patronage Funding Scheme. Transfund is also offering Kick-Start funding, which provides up-front assistance for councils wishing to establish new services, or to undertake other initiatives. From July 2003, only patronage funding will be available.
67. Patronage funding applies to changes in patronage from a baseline agreed at the date each regional council joins the scheme. This baseline generally relates to passengers carried during the previous year. No council will initially receive less funding than it had received under the present method. So if current patronage levels were to remain unchanged or to fall, a council would still receive the current funding.
68. Payment rates per additional passenger carried will be higher than the baseline rate. These rates will be on a two-tier basis - a peak rate, specific to each region, for patronage at peak times (reflecting the benefits of relieving traffic congestion), and an off-peak rate at other times (reflecting all-day benefits such as those to passengers, safety, and the environment). The differing rates in each region are proportional to the variation in regional congestion levels. For example, Auckland, with the highest levels of congestion, will attract the highest peak rate.
69. The scheme is a fundamental change from the previous scheme, because it is focussed on encouraging councils to induce more people to use public transport, rather than just funding a proportion of costs with no relationship to patronage. In essence, the scheme is performance-based, instead of subsidy based, and is designed to encourage councils to look at ways to increase patronage.
70. Patronage funding payments go to regional councils, not direct to operators. Passengers on both commercial and contracted passenger services attract patronage funding for the regional council from Transfund. The same payment rates apply to passengers irrespective of the travel mode they use (bus, rail or ferry).

Recent Cases

- Decision 318: New Zealand Bus Limited/Transportation Auckland Corporation Limited*
71. On 12 December 1997, the Commission received an application from NZBL seeking clearance to acquire Transportation Auckland Corporation Limited ("TACL"). The application was assessed under the dominance test.

72. The relevant markets were defined as follows:

- the provision of scheduled bus passenger services in the greater Auckland metropolitan region;
- the provision of school bus services in the greater Auckland metropolitan region; and
- the provision of bus charter services in the greater Auckland metropolitan region.

73. The Commission found that in the market for the provision of scheduled bus passenger services the merged entity would have a very high market share, around []% and would not face constraint from existing competitors. The Commission also found that barriers to entry were high, and new entry was unlikely. The Commission recognised the Auckland Regional Council exercised some countervailing power, but was not satisfied it was sufficient to constraint NZBL from acquiring dominance.

74. On 24 February 1998 the Commission declined to give clearance for the proposed acquisition.

Decision 326: NZBL/TACL

75. On 2 April 1998 the Commission received an application from NZBL seeking authorisation to acquire TACL. This was again assessed under the dominance threshold.

76. The relevant markets were defined as follows:

- the provision of scheduled bus passenger services in the greater Auckland metropolitan region; and
- the rights to operate commercial and subsidised scheduled bus passenger services in the greater Auckland metropolitan region.

77. The Commission again found that existing and potential competition were not sufficient to prevent dominance being acquired. However, on the basis of new evidence, the Commission accepted that the countervailing power of Auckland Regional Council would provide effective constraint on the merged entity. Given the Commission was satisfied dominance had not been acquired, it was not required to conduct a public benefit and detriment test (which constituted the second part of an authorisation).

78. On 15 May 1998 the Commission gave clearance for the proposed acquisition.

Decision 460: New Zealand Bus Limited and Wellington Regional Rail Limited/Tranz Metro (Wellington).

79. On 23 November 2001, New Zealand Bus Limited ("NZBL") registered a notice with the Commerce Commission ("the Commission") seeking clearance under s 66(1) of the Commerce Act 1986 to acquire a 50% interest in a company to be established, probably to be known as Wellington Regional Rail Limited ("WRRL"). Wellington Regional Council ("WRC") will own the other 50% interest (through WRC Holdings Ltd). The joint venture company will, in turn, acquire 100% of the assets of Tranz Metro (Wellington) ("Tranz Metro").

80. On 19 December 2001, pursuant to s 68(2) of the Commerce Act 1986, the Commission determined to decline clearance for the proposed acquisition, on the basis the proposed acquisition was unlikely to be proceeded with.²

² References to sections will be to sections of the Commerce Act 1986 unless specified otherwise.

81. The applicant appealed this decision to the High Court. The High Court ruled in favour of the appellant and ordered the Commission to reconsider the application.
82. The relevant markets were defined as follows:
- the market for the rights to operate scheduled passenger rail services in the greater Wellington area (“the rail tendering market”);
 - the market for the provision of scheduled passenger rail services in the greater Wellington area (“the rail services market”);
 - the market for the rights to operate scheduled bus passenger services in the greater Wellington area (“the bus tendering market”); and
 - the market for the scheduled bus passenger services in the greater Wellington area (“the bus services market”).
83. The Commission was concerned that the involvement of the WRC as co-owner of the rail network with NZ Bus might weaken the countervailing power exercised by the regional council as funder and as relied upon by the Commission in Decision 326.
84. The Commission noted that there is minimal competition from other operators in the Wellington tendered bus market. It also considered that there are substantial entry barriers to the market.
85. However, the Commission concluded that that under the proposed arrangements, WRC’s ability and incentive to alter the constraints on NZ Bus would not change. In addition, the minimal competitive constraints on NZ Bus in the bus tendering market would be no different under the counterfactual. The Commission therefore decided that there would not be a substantial lessening of competition in the bus tendering market.
86. On 10 April 2002, the Commission cleared NZ Bus to purchase a 50% interest in a joint venture with the Wellington Regional Council, where the joint venture would in turn buy the assets of the Wellington urban rail service, Tranz Metro (Wellington).

MARKET DEFINITION

87. The Act defines a **market** as:

... a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

88. For the purpose of competition analysis, a relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, could impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the ‘*ssnip* test’). For the purpose of determining relevant markets, the Commission will generally consider a *ssnip* to involve a five percent increase in price for a period of one year.
89. It is substitutability at competitive market prices that is relevant in defining markets. Where the Commission considers that prices in a given market are significantly different from competitive levels, it may be necessary for it to assess the effect of a *ssnip* imposed upon competitive price levels, rather than upon actual prices, in order to detect relevant substitutes.

90. The Commission will seek to define relevant markets in terms of four characteristics or dimensions:
- the goods or services supplied and purchased (the product dimension);
 - the level in the production or distribution chain (the functional level);
 - the geographic area from which the goods or services are obtained, or within which the goods or services are supplied (the geographic extent); and
 - the temporal dimension of the market, if relevant (the timeframe).
91. The Commission will seek to define relevant markets in a way that best assists the analysis of the competitive impact of the acquisition under consideration. A relevant market will ultimately be determined, in the words of the Act, as a matter of fact and commercial common sense.
92. Where markets are difficult to define precisely, the Commission will initially take a conservative approach. If the proposed acquisition can be cleared on the basis of a narrow market definition, it would also be cleared using a broader one. If the Commission is unable to clear the proposed acquisition on the basis of the narrower market, it will be necessary to review the arguments and evidence in relation to broader markets.

Product Dimension

93. The delineation of relevant markets as a basis for assessing the competitive effects of a business acquisition begins with an examination of the goods or services offered by each of the parties to the acquisition. Both demand-side and supply-side factors are generally considered in defining market boundaries. Broadly speaking, a market includes products that are close substitutes in buyers' eyes on the demand-side, and suppliers who produce, or are able easily to substitute to produce, those products on the supply-side.
94. The Commission takes the view that the appropriate time period for assessing substitution possibilities is the longer term, but within the foreseeable future³. The Commission considers this to be a period of one year, which is the period customarily used internationally in applying the 'ssnip' test (see below) to determine market boundaries. The Commission will take into account recent, and likely future, changes in products, relative prices and production technology in the process of market definition.

Demand-side substitution

95. Close substitute products on the demand-side are those between which at least a significant proportion of buyers would switch when given an incentive to do so by a small change in their relative prices.

³ In *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [] 2 NZLR 351 Smellie J and the Court of Appeal on appeal approvingly quoted an earlier decision of the Commerce Commission in *Edmonds Food Ind Ltd v W F Tucker & Co Ltd* (Decision 21, June 1984) where the Commission had ruled: "A market has been defined as a field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive". See also *News Limited v Australian Rugby Football League Limited & Ors* (1996) ATPR at 41,687, where Burchett J stated: "Long term prospects that can be more or less clearly foreseen are, to that extent, a present reality, from the point of view of identifying the constraints upon commercial action. This fact emphasises the importance of the principle . . . that substitution possibilities in the longer run may be very significant for market delineation." Also *Re Tooth & Co Ltd v Tooneys Ltd* (1979) 39 FLR 1 emphasises longer run substitution possibilities.

96. Initially, markets are defined for each product supplied by two or more of the parties to an acquisition. Unequivocal substitutes are combined. For each initial market so defined, the Commission will examine whether the imposition of a ssnip would be likely to be profitable for the hypothetical monopolist. If it were, then all of the relevant substitutes must be incorporated in the market. If not, then the next most likely substitute good or service will be added to the initial market definition and the test repeated. This process continues until a combination of products is found which defines the product dimension of a relevant market, namely, the smallest combination of goods or services for which a ssnip would be profitable.
97. On the demand-side, the technical viability of one good or service as a substitute for another must be assessed. However, even where another product may technically be suitable as an alternative for the product in question, its price may be so much higher that it may be a poor substitute in an economic sense, at least for the great majority of buyers. In judging economic substitutability between products, the Commission will have regard to relative prices, quality and performance when assessing whether they are, in fact, close substitutes in the eyes of buyers.

Supply-side substitution

98. Close substitute products on the supply-side are those between which suppliers can easily shift production, using largely unchanged production facilities and little or no additional investment in sunk costs, when they are given a profit incentive to do so by a small change in their relative prices.

Undifferentiated/Differentiated Products

99. In some instances, market definitional problems arise because of the differentiated nature of the goods or services involved in a business acquisition, caused by differing technical specifications, branding, packaging, warranties, distribution channels and other factors.
100. Where a significant group of buyers within a relevant market is likely to be subject to price discrimination, the Commission will consider defining additional relevant markets based on particular uses for a good or service, particular groups of buyers, or buyers in particular geographic areas. In other cases, the primary focus may switch to the extent to which a business acquisition eliminates competition between the products brought together by the acquisition.

Relevant markets

101. The applicant has proposed the following market definition: “the operation of urban bus routes within the territorial jurisdiction of Environment Canterbury (thus covering both Christchurch and Timaru)”.
102. The Commission has considered bus transport markets previously in Decisions 318, 326 and 460. In Decision 460, the Commission defined the following bus markets:
- the market for the rights to operate scheduled bus passenger services in the greater Wellington area (“the bus tendering market”); and

- the market for the scheduled bus passenger services in the greater Wellington area (“the bus services market”).

103. The distinction between tendering for subsidies and bus services recognises that the market for the right to ply routes and the market for passenger trips are separate and not completely integrated. The subsidies and services markets are subject to entirely different levels of competition. In general, there is no competition in the bus services market: a bus trip at one time of day between two places is not generally substitutable for the same trip at another time or a bus trip that follows a different route. On the other hand, in the subsidies market, there is a single local buyer of services and several competing suppliers. These suppliers regard various route contracts as substitutes, to some degree.

104. “The bus tendering market” and “the bus services market” are generalisations. In fact, the bus services market consists of a large number of individual routes travelled at different times throughout the day. Because a significant number of passengers do not consider these services to be close substitutes, the Commission would normally regard each route as a separate market. However, because route markets are similar and because the consequences of the present acquisition for each route are similar, the present analysis treats the bus services market as if it were a single market. Similarly, the bus subsidies market is not homogenous, since each contract is specified differently and has a different commercial value, however it is the total competitive effect of the proposed acquisition that is the subject of the present analysis.

105. In previous decisions, alternative modes of transport were excluded from the bus transport market definitions. (The exception was Decision 460 where rail markets were defined, since the proposed joint venture was for a rail operation. However, the analysis in that decision also assumed that bus and rail markets were separate.) Table 1 in Decision 326 (reproduced as table 1 in Decision 460) provides the Commission’s reasons why cars, taxis, rail services, ferries and other modes are excluded from the market definition when considering the acquisition considered therein. Essentially, other modes are excluded either because they provide dissimilar transport or because they provide similar transport but at a much greater relative cost.

106. While there may be a fair degree of supply-side substitutability in both the bus services and bus subsidies markets, there is little demand-side substitutability in either market. On the supply side, bus operators may regard different routes and different tenders for routes as being close substitutes (depending upon the returns they provide) and can switch production between different routes and tenders. Passengers do not, however, regard different bus routes as substitutes (as mentioned above) and Environment Canterbury does not regard different tenders as substitutes. Environment Canterbury’s objective is to provide an integrated network of bus services to its constituency. Therefore, from its perspective, each part of the network (including services on different routes and at different times) are complementary to each other service and to the whole.

Geographic Extent

107. The Commission will seek to define the geographical extent of a market to include all of the relevant, spatially dispersed, sources of supply to which buyers can turn should the prices of local sources of supply be raised. For each good or service combination, the overlapping geographic areas in which the parties operate are identified. These form initial markets to which a snip is applied. Additional geographic regions are added until

the smallest area is determined within which the hypothetical monopolist could profitably impose a ssnip.

108. Generally, the higher the value of the product to be purchased, in absolute terms or relative to total buyer expenditure as appropriate, the more likely are buyers to travel and shop around for the best buy, and the wider the geographic extent of the market is likely to be.
109. Where transport costs are high relative to the final value of a product, a narrower geographic market is more likely to be appropriate. Where product perishability and other similar practical considerations limit the distance that a product may be transported, this may limit the geographic extent of the market. The timeliness of delivery from alternative geographic sources is similarly relevant.
110. Although buyers and sellers of a particular good or service may interact in markets that are apparently local or regional in extent, those markets may themselves overlap and interrelate so as to form a market covering a larger geographical area. In these situations, the larger market is likely to be the appropriate one for analysing the competitive effects of a business acquisition.
111. The Commerce Act defines a market to be a “market in New Zealand”. However, in many markets New Zealand buyers purchase products from both domestic and from overseas suppliers. Where imported products are close substitutes for domestic products, the overseas suppliers will be part of the relevant market. In such circumstances the Commission, in order to comply with the wording of the Act, is likely to define a national market and then, as discussed later in the competition analysis, to consider the extent to which overseas suppliers exercise a competitive constraint on the participants in the domestic market.
112. The applicant suggests a market definition that includes Timaru. It is the Commission’s view that large-scale operations in either Timaru or Christchurch would likely require depot facilities in each location. However, the Commission recognises that operations in Timaru are minor compared to those in Christchurch. The network economies available to operators who provide services on close routes in Christchurch are unlikely to be available between routes in Timaru and Christchurch. Specifically, operators could not efficiently use the same bus to provide services both on routes in Christchurch and in Timaru on the same day. On the other hand, operators can switch buses between routes that are close, thus avoiding idle time.
113. Thus, though the Commission accepts that the bus subsidies market extends to all of “the territorial jurisdiction of Environment Canterbury (thus covering both Christchurch and Timaru)”, it also recognises that there are market segments, with the Christchurch urban area representing a distinct segment from the Timaru segments. The geography of the bus services market is defined by its individual routes.

Functional Level

114. The production, distribution and sale of a product typically occur through a series of functional levels – for example, the manufacturing/import level, the wholesale/distribution level and the retail level. It is often useful to identify the relevant functional level in describing a market, as a proposed business acquisition may affect one

horizontal level, but not others.⁴ Alternatively, some acquisitions, such as those involving businesses at different vertical levels, may raise issues related to vertical integration. Generally, the Commission will seek to identify separate relevant markets at each functional level affected by an acquisition and assess the impact of the acquisition on each.

115. The applicant's proposed market definition did not distinguish between a bus services market and a bus subsidies market, however it has been the practice of the Commission to assume that this distinction is real and that it matters, for the reasons given earlier.

116. The functional distinction between the market for bus services and the market for bus subsidies is that the commodity traded (i.e., access rights) in the subsidies market is an input to the supply of trips in the services market.

Conclusion on Market Definition

117. The Commission concludes that the relevant markets are the following:

1. the market for the rights to operate scheduled, subsidised bus passenger services in Christchurch and Timaru ("the bus subsidies market"); and
2. the market for the scheduled bus passenger services in Christchurch and Timaru ("the bus services market").

COMPETITION ANALYSIS

Substantially Lessening Competition

118. Section 47 of the Act prohibits particular business acquisitions. It provides that:

A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

119. Section 2(1A) provides that substantial means "real or of substance". Substantial is taken as meaning something more than insubstantial or nominal. It is a question of degree.⁵ What is required is a real lessening of competition that is not minimal. The

⁴ *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473, 502 The High Court (Greig J, Shaw WI, Prof M Brunt) noted: "If we ask what functional divisions are appropriate in any market definition exercise, the answer, ..., must be whatever will best expose the play of market forces, actual and potential, upon buyers and sellers. Wherever successive stages of production and distribution can be co-ordinated by market transactions, there is no difficulty: there will be a series of markets linking actual and potential buyers and sellers at each stage. And again, where pronounced efficiencies of vertical integration dictate that successive stages of production and distribution must be co-ordinated by internal managerial processes, there can be no market."

⁵ *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406, 434; *Mobil Oil Corporation v The Queen in Right of NZ* 4/5/89, International Centre for Settlement of Investment Disputes, Washington DC, International Arbitral Tribunal ARB/87/2 (paras 8.2, 19, 20).

APPENDIX F

**Ruling of Judge Green in the District Court at Christchurch
dated 8 October 2004 (CIV 2004-009-3082)**

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV 2004-009-3082

UNDER	TRANSPORT SERVICES LICENSING ACT 1989
BETWEEN	RED BUS LIMITED Applicant
AND	CANTERBURY REGIONAL COUNCIL Respondent

Hearing: 7 October 2004

Appearances: W Palmer & T C Weston QC for Applicant
P F Whiteside for Respondent

Judgment: 8 October 2004

RULING OF JUDGE M J GREEN

[1] Under the Transport Services Licensing Act 1989 the respondent is responsible for providing planning for public passenger services in Canterbury by way of determining bus routes, frequency of services and either registering licensed operators for particular routes or contracting with those who wish to carry out those services. The appellant operates many services under the aegis of the respondent. There are two types of services that may be entered into:

Contracted services are subsidised services that arise from a tender process. The subsidy is paid in part by the respondent out of rates and partly by Transfund New Zealand out of government funds or taxes.

Commercial services are not subsidised and are obtained by the particular operator applying to the respondent to register a commercial service for a particular route. If the application is not declined the service is registered and the commercial service can commence and will continue so long as the operator remains licensed under the Act or gives notice of abandonment to the respondent.

[2] The appellant presently operates 39 of the 50 bus routes in Christchurch determined by the respondent. Of these 5 are or will become commercial services. Three of those are relevant to the matter before me. They are:

- the Sumner – Avonhead route
- the Harewood – Cashmere route
- Airport Service

[3] The Sumner – Avonhead commercial service is to commence on 1 November 2004. It is an amalgam and extension of the Sumner–City service and the Avonhead–City service currently operated by the appellant as contracted services.

[4] The respondent called for tenders for the Sumner – Avonhead route but when the appellant applied to be registered as a commercial service for that route it registered the appellant and discontinued the tender process.

[5] Subsequently the appellant became concerned about the economics of the three commercial services detailed above and applied to the respondent, pursuant to s 50 of the Act, for a variation of those services by, in essence reducing the frequency of those services during off peak hours.

[6] The respondent declined those applications and the appellant has appellant to this Court pursuant to s59 of the Act. Sections 50 and 59 will become of significance in this ruling so I set them out so far as is relevant.

50 Abandonment or variation of registered service

(1) Except as provided in this section, and subject to section 55 of this Act, the operator of a registered service who wishes to abandon or vary that service shall give not less than 21 days' prior notice in writing to the regional council with which the service is registered

...

(4) Subject to section 55 of this Act, the regional council with which the service is registered shall, unless it declines registration under subsection (5) of this section, withdraw registration of the service or, as the case may require, register the variation in the service, on the later of—

- (a) The 21st day after the date on which the notification of abandonment or variation was received by it, or such earlier date as may be appropriate having regard to any waiver of or reduction in the notice required under subsection (2) of this section; or
 - (b) The date on which the operator has specified that the service is to be abandoned or varied.
- (5) A regional council may decline to register a proposed variation in a service notified to it under this section where the service, as proposed to be varied,—
- (a) Is likely to have a material adverse effect on the financial viability of any contracted service; or
 - (b) Is likely to increase the net cost to the regional council of any contracted service; or
 - (c) Is contrary to sound traffic management or any other environmental factor identified by the regional council as being of importance to its region.
- (6) Where a regional council declines to register any variation of a service under this section, it shall—
- (a) Forthwith advise in writing the person seeking the variation of—
 - (i) That decision, and the grounds for the decision; and
 - (ii) If applicable, any date on which the variation will be able to be registered; and
 - (b) As soon as practicable, make publicly available its reasons for the decision and, if applicable, the date when the variation will be able to be registered.

59 Appeal to District Court

- (1) Where a regional council has declined under this Part of this Act to register any passenger service or variation in a passenger service, or has refused its consent to the abandonment of a service under section 55 of this Act, the operator of the service may, by way of originating application, within 28 days after being notified of the decision appeal to the District Court against that decision.
- (2) On the hearing of an appeal under subsection (1) of this section, the District Court may—
- (a) Confirm, vary, or reverse the decision appealed against, and make such orders and give such directions to the regional council as may be necessary to give effect to the Court's decision; or
 - (b) Refer the matter back to the regional council with directions to reconsider the whole or any specified part of the matter.

Subject to this section, every such appeal shall be made and determined in accordance with the District Courts Act 1947 and the rules of Court made under that Act.

Subject to section 60 of this Act, the decision of the District Court on any appeal under this section shall be final.

[7] The matter was originally set down before me to case manage and in particular to conduct a directions conference. However, the case has developed from there and I heard a full fledged interlocutory argument as to:

- the absence of reasons given for the declining of the application, coupled with a submission that the respondent should be required to provide the reasons before the hearing of the appeal; and
- the appellant seeking an interlocutory order allowing the appellant to operate the Sumner -Avonhead route from 1 November 2004 (in accordance with the refused application for variation) pending the hearing of the appeal. The quid pro quo for such an order was orders that it operate the other two commercial services it had applied to vary ie Harewood - Cashmere and the Airport service, in accordance with the current registered commercial services.

Reasons

[8] Following the respondent declining the application to vary the commercial services the appellant sought the reasons for the refusal. There was an obligation on the respondent upon declining the application to forthwith advise the applicant of the decision and the grounds for the decision and to make publicly available its reasons for the decision. Mr Weston pointed out the use of the words "grounds for the decision" and "reasons for the decision" but made no issue of them save to submit that it placed upon the respondent an obligation to provide reasons, which the respondent had failed to do. The appellant sought those reasons but none were forthcoming save a statement that to grant the application would have been "contrary to sound traffic management and to the environmental factors addressed in the tender documentation ..." When further elucidation was sought the respondent used the exact wording of s59(5)(c) of the Act and explained the service levels were contained in the tender document and the environmental matters were to be found in the policies and plans set out in the council's Regional Land Transport Strategy 2002, the Regional Passenger Transport Plan 2001, and the Environment Canterbury Community plan 2004-2014. It did not identify any particular portions in these quite massive documents.

[9] For the purpose of this interlocutory argument I assume, but do not decide, that there was a failure by the respondent to comply with the provisions of s59(6) of the Act. Indeed, Mr Whiteside did not argue to the contrary. There is ample authority both in New Zealand and England that reasons must be given. In the judicial arena Mr Weston referred me to an English Court of Appeal judgment, *Flannery v Halifax Estate Agencies* [2000] AllER 373:377 where there is a compelling statement of the reasons for that to occur.

... fairness surely requires that the parties – especially the losing party – should be left in no doubt why they have won or lost. This is especially so, since without reasons the losing party will not know ... whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled the resulting decision is much more likely to be soundly based on the evidence than if it is not.

[10] No argument was advanced to me as to the possibility alluded to at the end of the judgment of inviting or requiring the respondent to give reasons as apparently the Court considered could be done in the administrative law context.

[11] Whether the decision making body is judicial or non judicial, the advice is sound common sense and ensures, if followed, that the parties know that the matters they raised have been considered and weighed in the balance. Where, as here, a body is given a statutory power of decision and is required to advise the applicant the grounds of and publicly notify its reasons for its decision then one would think that it must comply. The material given by the respondent in its original notification to the appellant was sadly lacking in reasons and the subsequent advice added little that was comprehensible. As was indicated in *Flannery's* case want of reasons alone may be a good self standing ground of appeal.

[12] The question that now arises is whether or not the respondent can be required to furnish its reasons at this stage. I agree with the submission of Mr Whiteside that it cannot. Reasons now adduced cannot be said to be those which moved the mind of the decision maker at the time. Further I agree that the respondent empowered by statute to make decisions is *functus officio* once it has given its decision without reasons. There are very limited occasions on which a judgment may be recalled but this is not of that ilk. The appeal is to be heard by way of originating application as

the statute requires, and is to be heard *de novo*, as both counsel agree, and thus the matters which may, or may not, have justified declining the application will doubtless be aired. The task of the Judge on appeal is not to investigate the reasons of the respondent but to rehear the matter entirely and to form an independent view.

[13] Mr Whiteside further argues that Part IX of the District Court Rules (which deals with appeals to the District Court) is of no application in this matter. The kernel of his argument is that the role of the respondent has changed from decision maker to party and it now is in an adversarial position. He further submits that the appeal is to be decided as an originating application and that the Court is not dealing with an appeal under Part IX of the Rules. The submission was further developed on the assertion that the respondent as party to an originating application could adduce evidence at the hearing of that application seeking to establish that the application to vary should be declined.

[14] In response to a question from me Mr Whiteside accepted that the Rules mentioned are the Rules from time to time and for present purposes are the Rules as they are now.

[15] I do not accept that submission. Section 59(3) of the Transport Services Licensing Act provides that appeals under the section are "to be made and determined in accordance with the District Courts Act 1947 and the rules of Court made under that Act". Rule 544 of the District Court Rules (made under the District Courts Act 1947) is as follows:

544 Application of this Part

(1) This Part shall apply to all appeals to a District Court under any enactment.

This Part shall apply subject to any specific provision contained in the Act conferring the right of appeal.

[16] To my mind, reading those together, the plain meaning is that appeals under the Transport Services Licensing Act are to be dealt with under Part IX of the District Court Rules, albeit that they are to be commenced by an originating application. Part VI may have some application but must be considered subject to

the provisions of Part IX. Indeed, as Mr Weston submits it is Part IX by reference to R560(10) that the respondent is given the right of audience which it otherwise may not have

Interlocutory Orders

[17] As mentioned above the appellant seeks that it should be able to reduce the frequency of the off peak services on the Sumner -Avonhead route pending the hearing of the appeal. The appellant argues that I have jurisdiction to make the orders that it seeks whereas the respondent argues to the contrary.

[18] I repeat that s59(3) of the Act states

... every such appeal shall be made and determined in accordance with the District Courts Act and the rules of Court made under that Act

[19] Section 42 of the District Courts Act so far as relevant to this matter is as follows:

42 Ancillary powers of Judge - (1) A Judge shall have jurisdiction in any proceeding pending to make any order or to exercise any authority or jurisdiction which, if it related to a proceeding pending in the High Court, might be made or exercised by a Judge of the High Court in Chambers.

[20] Mr Weston argues that a High Court Judge in Chambers dealing with an interlocutory matter arising on an appeal would be entitled to exercise the powers given by R710 of the High Court Rules. Consequently a District Court Judge would have the same power by reason of s 42(1) of the District Courts Act.

[21] Rule 710 in so far as it may be relevant is as follows:

710 Stay of proceedings

An appeal does not operate as a stay of any ... order appealed against.

However, pending the determination of an appeal, ... the Court may, on application ,-

...

grant any interim relief

[22] There is no similar provision in the District Court Rules save that R553 provides that an appeal is not to operate as a stay.

[23] The phraseology of s 42 of the District Courts Act has not kept pace with the procedural changes in the High Court brought about by the advent of the High Court Rules in 1986. As I understand the situation the distinction between applications to the Court and to a Judge in Chambers were done away with. In consequence R234 provides that all applications shall be made to the Court but shall be heard in Chambers unless the Court directs otherwise. If one now reverts to the wording of R710 the application is to be made to the Court. Applying R234 that application would be heard in Chambers absent a contrary direction by the Court. In that situation the matter would be dealt with by the Court in Chambers in the person of the Judge who actually deals with it. I do not believe that such an argument is so tenuous that it should be cast aside. I am prepared to rule that s42 of the District Courts Act gives jurisdiction to make the orders authorised by R710 of the High Court Rules. The provisions of R9 of the District Court Rules (already cited) tend to support that view although, of course, procedural rules may not confer jurisdiction.

[24] Whether or not R710 is, in fact, available to me in the particular circumstances of this case rather depends on whether or not the declining of the appellant's application by the respondent is an order or not. It cannot be a proceeding which is also the subject of the Rule because in this case subject to the right of appeal the decision is the end of the matter.

[25] The term "order" is not defined but I conclude that it must include a ruling made by a body which is required to act judicially that affects the rights of a person to do or refrain from a defined course of conduct. I am satisfied that the respondent a body which is required to publicly notify reasons is a body that is required to act judicially in considering applications under s 50 to vary contracted services. I am also satisfied that its action in declining to vary is in the nature of an order and is susceptible to consideration under R710 of the High Court Rules.

[26] Due to the pressure of time in which this ruling should be given it may appear that I have not considered Mr Whiteside's submissions to the contrary. I wish to say

that I have considered them carefully and ideally would have preferred to state in terms why I have not accepted them, but the exigencies of time do not permit.

[27] In summary I conclude that I have jurisdiction to make the interim relief sought.

[28] Having that jurisdiction does not mean that I should exercise it. Mr Weston submits that to refuse the interim orders sought would render the appellant's appeal nugatory.

[29] He submits that this is so because the appellant has the right, also given by s 59 of the Transport Services Licensing Act to notify abandonment of a commercial service and that the last day on which this can be done before the Sunner - Avonhead service comes into operation on 1 November is to-day 7 October. He submits that the commercial reasons behind the appellant's applications to vary mean that this course is very likely to be taken and may apply to the other commercial services.

[30] As Mr Whiteside points out if the appellant took that course the respondent would immediately tender the abandoned service or services and would expect to have the successful tenderer up and running by 1 November. It could be that the appellant might be the successful tenderer. If the service becomes a contracted service there will of course be a subsidy payable. One can say that payment of a subsidy is not in the public interest unless it is realistically unavoidable.

[31] I do not accept Mr Whiteside's submission that the appellant is to be criticised for endeavouring to alter a contract which it willingly entered into. Strictly speaking this is not a contract. Even if it were, the Act provides a potential means of variation. The exercise of a statutory right is not a relevant factor.

[32] There is force in Mr Whiteside's submission that if the appellant thinks that it made a bad commercial decision it can abandon the service. Abandonment would, of course, render the appeal nugatory as is submitted but it would be the decision of the appellant to do so. If the appellant did not give notice of abandonment to-day the

right to abandon would remain available after the service commences and would continue until the hearing of the appeal.

[33] I accept that there is an arguable case in support of the appeal but do not intend to go into the merits or otherwise of that case. Nor do I intend to assess the case that the respondent might advance as foreshadowed in Mr Whiteside's submissions. Both sides have legitimate matters of concern to put forward at the hearing of the appeal.

[34] Ultimately the decision as to the grant of the interim relief sought requires a balancing of the competing interests which are similar to but not necessarily identical to those applicable to interim injunctions viz

- serious issue to be tried ? – there is such an issue
- where does the balance of convenience lie ? – I believe it lies with the respondent
- what is the overall justice of the case. ?

[35] The question of overall justice is the balancing of potential right and harm affecting each party on granting or refusing the relief sought. My conclusion on that is that overall, justice requires that the application for interim relief be refused.

[36] I now call a conference pursuant to R546A of the District Court Rules.

[37] The issues which I wish the parties to address at that conference are:

- Whether having regard to R549(3) the naming of the respondent as respondent should have occurred and if so what steps should be taken to regularise the position.

Note that I will continue for simplicity sake continue to use the term respondent.

- The preparation and filing by the appellant of the issues which it considers the Presiding Judge will be called upon to consider taking into

account that the hearing is a hearing *de novo* of the application of the appellant to vary three of its commercial services.

- The preparation and filing by the respondent of the issues which it considers the Presiding Judge will be called upon to consider taking into account that the hearing is a hearing *de novo* of the application of the appellant to vary three of its commercial services, or whether instead the respondent should be called upon to provide a report pursuant to R557 of the District Court Rules.
- Confirming the indication of agreement that evidence in chief will be given by way of written briefs and giving directions as to their exchange.
- Discussing whether or not Transfund New Zealand should be given status as a party and if so the preparation and filing by it of the issues which it considers the Presiding Judge will be called upon to consider taking into account that the hearing is a hearing *de novo* of the application of the appellant to vary three of its commercial services.
- Should any formal order under R560(10) be made
- Any other matters which counsel raise.

[38] The Registrar is to convene the conference at a date convenient to Counsel. It would be helpful if Counsel could confer and agree on any matters that they can. I would prefer to receive written memoranda as to all matters in advance of the conference.



M J Green
District Court Judge

Signed at 2.10 ~~pm~~ on 8 October 2004

APPENDIX G

**Orders of the District Court at Christchurch
dated 2 December 2004 (CIV 2004-009-3082)**

Duplicate

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV No. 2004-009-3082

Under the Transport Services Licensing Act 1989
Between RED BUS LIMITED
 Applicant
And CANTERBURY REGIONAL COUNCIL
 Respondent

ORDERS BY CONSENT

Dated *2nd* December 2004

BUDDLEFINDLAY
Barristers and Solicitors
Christchurch

Solicitor Acting: **Willie Palmer**
Tel 64-3-379 1747 Fax 64-3-379 5659 PO Box 322 DX WP20307 Christchurch

Counsel Acting: **T C Weston QC**
Tel 64-3-374 5750 Fax 64-3-374 5707 PO Box 3976 Christchurch



BEFORE JUDGE GREEN

Wednesday the *2nd* day of December 2004

UPON READING the notice of originating application of an appeal under section 59 of the Transport Services Licensing Act 1989 and the affidavit of Gregory Shane Campbell in support both dated 23 September 2004, the notice of opposition to the originating application of an appeal under section 59 of the Transport Services Licensing Act 1989 dated 1 October 2004 and the affidavit of William Wayne Holton-Jeffreys in support dated 6 October 2004, and the consent memorandum of counsel dated 30th November 2004.

THIS COURT ORDERS BY CONSENT AS FOLLOWS:

1. That within 14 days of the date of these orders Red Bus Limited ("Red Bus") shall give Canterbury Regional Council a minimum of 21 days notice in writing that Red Bus wishes to abandon the registered Sumner – Avonhead service, registration number 1268C ("the Sumner – Avonhead route"), pursuant to section 50(1) of the Act.
2. The abandonment by Red Bus in terms of order 1 above shall not prejudice Red Bus in any future tender process controlled by the Canterbury Regional Council or in any other way.
3. Canterbury Regional Council will invite Red Bus and at least two other independent operators to participate in an expedited tender for a new route pursuant to order 3(c) below, for a term of six months from the effective date of abandonment in terms of order 1 above, on the following basis:
 - (a) The expedited tender will be a net contract.
 - (b) When the expedited tender is notified the request for tender document shall not contain any patronage data as per normal practice for such tenders.
 - (c) The new route and timetable for the expedited tender shall be the same as the Sumner – Avonhead route except that the new route will terminate near Avonhead Mall or at most the intersection of Roydvale Avenue and Wairakei Road ("the amended Sumner – Avonhead route").

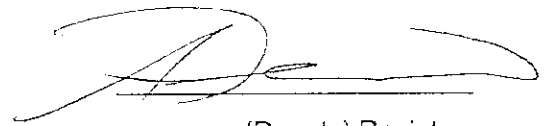


4. Canterbury Regional Council will tender the amended Sumner – Avonhead route in compliance with the Transfund New Zealand competitive pricing procedures to commence operation on the day after the expiry of the expedited tender contract in terms of order 3 above on the following basis:
 - (a) The tender will be for a net contract for the amended Sumner – Avonhead route.
 - (b) When the tender is notified the request for tender document shall not contain any patronage data as per normal practice for such tenders.
 - (c) The route and timetable for the contract shall be the amended Sumner – Avonhead route.
 - (d) The contract for the amended Sumner – Avonhead route shall terminate on 1 November 2009 so that it lines up with other contracts terminating on that date.
5. Subject to orders 3 and 4 above, the expedited tender in terms of order 3 above and the tender for that amended route in terms of order 4 above shall both be conducted in accordance with Transfund's Competitive Pricing Procedure Manual Volume 2.
6. Red Bus will operate the Harewood/Cashmere – Airport route, registration number 1243C, as per the current registration until Red Bus either:
 - (a) Obtains a variation of that route pursuant to the Act; or
 - (b) Abandons the route.
7. Red Bus will operate the Airport Service, registration number 0762C, as per the current registration until Red Bus either:
 - (a) Obtains a variation of that route pursuant to the Act, noting that Canterbury Regional Council is aware that Red Bus may seek to reduce the frequency of this service from the current 20 minutes to 30 minutes; or
 - (b) Abandons the route.
8. Red Bus agrees to consult with Canterbury Regional Council before any notice for variation or abandonment under order 6 or 7 above.



9. Canterbury Regional Council will not contract or register any other public transport route or service under the Act which services Christchurch International Airport, without first consulting with Red Bus.
10. The terms of these orders shall not prejudice either Red Bus or the Canterbury Regional Council in any way whatsoever in relation to any future issues that they may have with each other under the Act, except to the extent that those issues are resolved by the terms of these orders.
11. On the basis of the orders numbered 1 to 10 above being made, the applications for variation which are the subject of this appeal and the appeal itself under section 59 of the Transport Services Licensing Act 1989 ("the Act") are withdrawn.

Signed:



(Deputy) Registrar

A.L. McDonald



Sealed this *2nd* day of December 2004

APPENDIX H

Environment Canterbury Tender Schedule

Tender Commencement Date	No of Routes	No of Buses	Peak Bus %
November 2005	9	57	22
December 2005	3	3	1
June 2006	1	1	0
November 2006	1	1	0
December 2008	10	25	10
June 2009	12	68	26
November 2009	6	53	20
June 2010	3	42	16
<i>Commercial services**</i>	3	13	5
	48	263	100%

** Commercial services do not come up for tender but need to be taken into account for a full picture of the Christchurch services and subsidies market.

APPENDIX I

Extract from Booz Allen Hamilton report: *“Review of Current Legislation and Implications re Commercial Services”* dated 19 November 2004

In the other three centres (CHC, HAM, DUN), the supplier market has developed since 1991 in a somewhat different manner from that in AKL/WGN. In particular:

- ▶ A number of operators new to each area have emerged since 1991.
- ▶ These new operators have been keen to establish reasonable market shares in the centres concerned, to ensure viable operations.
- ▶ No single powerful dominant operator has emerged in any of the three centres.

The result in each of the three centres has been that there has been keen competition for contracts - both in terms of the number of actual bidders (generally 3 or more) and in the bid prices. Bidders that price significantly above efficient cost levels are unlikely to be successful in winning contracts. Thus a reasonably effective competitive tendering market exists in these centres.

APPENDIX J

Commission's letter to Lane Neave dated 28 September 2004



COMMERCE COMMISSION

Please refer to:

0.1/15259
CAWN97711
355677-1

28 September 2004

Mr Paul Gordon
Associate
Lane Neave, Lawyers
PO Box 13 149
Christchurch

Dear Partners

Re: Complaint of anti-competitive behaviour by Red Bus Limited.

1. I refer to your email to the Commerce Commission (the Commission) dated 25 August 2004, on behalf of Leopard Coachlines Limited, regarding potentially anti-competitive behaviour by Red Bus Limited (Red Bus).
2. We have considered the matters you have raised, and believe that on basis of the information you have provided, it is unlikely that any concerns arise under the Commerce Act 1986 (the Act).

The Allegations

3. You alleged that Red Bus is using its substantial degree of market power for an anti-competitive purpose in breach of section 36 of the Act through:
 - * tendering for subsidised routes at prices below those which can be regarded as commercially viable;
 - * registering routes as commercial to deter competition in surrounding routes; and
 - * offering free services down Papanui Rd.
4. You also alleged that Red Bus and Christchurch City Council are party to a collusive exclusionary arrangement in breach of sections 27 and/or 29 of the Act, with respect to the inner city electric shuttle contract.

Section 36

5. Section 36 of the Act prohibits a business that has a substantial degree of power in a market from taking advantage of that power for the purpose of restricting, preventing or deterring, or eliminating a person from that or any other market.
6. To breach this section a business must have a substantial degree of power in a market and be taking advantage of that power for a prohibited purpose. It is not a breach of the Act

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merely because a business has a substantial degree of power in a market, and the Act does not prevent a person in such a position from being able to compete with others.

7. We understand that Red Bus has significant market share in the relevant market. However, taking into account the countervailing power of Environment Canterbury (ECan), and the threat of new entry, we are not convinced that Red Bus has a substantial degree of market power.
8. Further, if Red Bus did have a substantial degree of market power, we are of the view that it is unlikely that Red Bus is predatory pricing in breach of the Act. This is because it is unlikely that Red Bus could recoup any losses made through price cutting.

The Market

9. We have not conducted a detailed market analysis, however we consider the likely relevant market to be that for council granted rights to operate scheduled passenger services on specified routes in the Christchurch metropolitan area, comprising territories administered by Christchurch City Council and ECan.

Substantial Degree of Market Power

10. There are two elements to a substantial degree of power in a market: there must be market power; and that market power must be substantial.
11. The courts have defined market power as being measured by the ability to behave independently of competitive forces in the market. The courts have additionally found that the primary consideration in determining market power is barriers to entry into the market. Other factors include the countervailing power of buyers and constraint from existing competitors.
12. The less constraint that a person faces from these factors, the greater the level of market power that person possesses and more likely that the market power can be described as substantial.
13. We consider that the threat of new entry to the relevant market is likely to be a significant constraint on Red Bus. We understand that contracts for subsidised routes in Christchurch run for five years. This long time period allows plenty of scope for new entry and as will be discussed, this limits the potential for a party to recoup losses from existing contracts.
14. We further consider it likely that ECan has significant countervailing power in the relevant market in that it: grants rights for most of the bus routes in Christchurch; sets the terms of service including frequency; sets a cap on fare levels; and may choose to bundle routes in the tender process.
15. If Red Bus did have a degree of power in the relevant market, we consider it likely these constraints would mean that this power was not substantial.

Taking advantage of market power for an anti-competitive purpose

16. In relation to your predatory pricing allegation, even if Red Bus had a substantial degree of market power, there is insufficient evidence to establish that Red Bus is taking advantage of that power for an anti-competitive purpose.
17. The Privy Council in *Carter Holt Harvey v Commerce Commission (2004)*¹, discussed competitive and anti-competitive price-cutting. Their Lordships referred to the analysis

¹ Privy Council Appeal No.6 of 2004, unreported.

in the Australian High Court case of *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003)², which emphasised the importance of the ability to recoup losses by raising prices later without fear of reprisals in distinguishing between price-cutting that is competitive and that which is anti-competitive.

18. Price-cutting will be anti-competitive and harmful to consumers where a company has the ability to recoup losses by charging inflated prices once its price-cutting has removed competitors from the market.
19. We consider the threat of new entry to the market, existing competition and the countervailing power of ECan limit Red Bus' ability to recoup losses from current services through subsequent tenders.
20. For instance, if Red Bus ceased its commercial registration of the airport routes and those routes were re-tendered, Red Bus would be unlikely to win the contracts with a supra-competitive bid, considering existing competition. As such Red Bus would not be in a position to recoup losses.
21. Regarding low bidding for other subsidised routes, we note that a significant period of time will elapse before those routes are re-tendered. While existing competitors may leave the market in that time, it is likely that new competitors will enter. Again it would be unlikely that, facing new competition, Red Bus would win the routes on re-tender with a bid high enough to recoup losses over such a significant period.
22. You alleged that Red Bus commercially registered the Aranui route therefore making the surrounding routes unattractive to competitors. Red Bus subsequently won the surrounding contracts. Red Bus then ceased operating the Aranui route commercially and the route was re-tendered. As Red Bus operated the surrounding routes you advised that the Aranui route was no longer attractive to competitors, and Red Bus also won this route on re-tender. Without further detail we do not know whether the bid Red Bus subsequently made for the Aranui route was supra-competitive, however we note that it is likely that in future bids, ECan is in a position to bundle routes to prevent this type of occurrence (excepting legislative constraint on ECan's ability to do so, of which we are not aware of any).
23. We also understand that this occurred in 2001. That other companies are still competing against Red Bus in 2004 also reinforces a conclusion that Red Bus would be limited in its ability to recoup losses made in 2001 through supra-competitive tendering to ECan for later contracts.
24. You also raised concerns over the free service that Red Bus offered on Papanui Rd. That promotion ran for three weeks in June of this year. We consider it unlikely that below cost pricing for such a short period is predatory. It is more likely that this is an example of vigorous competition.

Section 27

25. In your letter you also raised concerns regarding the contract between Red Bus and Christchurch City Council for the inner city electric shuttle service that has been in place since 1998. We understand that in relation to this contract you are alleging Christchurch City Council and Red Bus are colluding to exclude Red Bus' competitors in breach of section 27 by:

² 195 ALR 609, pp 665-672.

- attempting to avoid tender processes for subsidised routes reaching contractual expiry; and
 - tailoring tender conditions to suit Red Bus.
26. Section 27 prohibits a wide range of contracts, arrangements or understandings (CAUs) that have the purpose, effect or likely effect of substantially lessening competition in a market.
 27. Assuming these allegations refer specifically to the electric shuttle service, and assuming Red Bus and Christchurch City Council have entered into a CAU that provides for the alleged behaviour you have described, we do not consider that such a CAU would substantially lessen competition in the market identified. This is because the alleged behaviour is in relation to rights to provide service to a portion of that market, not the whole market.
 28. We also understand you are alleging that the electric shuttle contract is being used by Christchurch City Council as a means to fund predatory behaviour by Red Bus in the market, as Christchurch City Council is allegedly paying more than market value for the services provided.
 29. Even if Christchurch City Council were using the electric shuttle contract as a way to enable Red Bus to bid low for ECan contracts, to show that the electric shuttle contract had the purpose, effect or likely of substantially lessening competition in the market would require a similar test as with section 36. In other words, we would need to establish that the electric shuttle contract enabled Red Bus to predatory price in the identified market. As noted, we think it is unlikely that Red Bus is predatory pricing as it is not in a position to recoup losses.

Section 29

30. In your letter you also suggested the electric shuttle contract may be a breach of section 29 of the Act. Section 29 concerns CAUs between persons "of whom any 2 or more are in competition with each other." As Red Bus and Christchurch City Council are not competitors in the relevant market, we do not consider that there has been a breach of section 29.

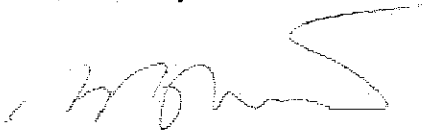
Other concerns

31. You also raised concerns over the impending Orbiter contract re-tender and Red Bus' recent attempt to re-register the airport routes, but only at the peak times of the day.
32. Regarding the Orbiter service, we understand from ECan that this contract will not be re-tendered until next year. As such, behaviour by market participants in relation to this contract would not currently raise concerns under the Act.
33. Regarding Red Bus' recent attempt to re-register the airport routes, we understand from your correspondence that ECan has not yet made a decision on Red Bus' proposal. It is possible that ECan will reject the proposal by Red Bus. Further, as noted, our view is that it is unlikely that Red Bus has sufficient market power to be in breach of section 36.

Conclusion

34. As we consider it unlikely that Red Bus has a substantial degree of market power, or that it is predatory pricing, we conclude that it is unlikely that Red Bus is in breach of section 36 of the Act.
35. We also consider that if Red Bus and Christchurch City Council had come to a CAU in relation to the electric shuttle contract, that it is unlikely that such a CAU would have the purpose, effect or likely effect of substantially lessening competition in the identified market. We therefore conclude that it is unlikely that Red Bus and Christchurch City Council are in breach of section 27 of the Act.
36. The Commission will therefore not be taking further action regarding your complaint.
37. Please note the above comments are not a ruling of law. Only the courts can ultimately decide whether any conduct breaches the Act. You should be aware that the Act specifically provides for action by individuals, even when the Commission has decided not to take any action itself, and this option remains open to you.
38. If you would like to discuss this further, please contact me on 04 924 3651, or by email at rachel.owens@comcom.govt.nz.

Yours sincerely



Rachel Owens
Investigator