



COMMERCE COMMISSION

Decision No. 691

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

Hoyts Corporation Holdings (NZ) Limited

and

Everard Entertainment Limited (as the 100% owner of the Berkeley Cinema Group business)

- The Commission:** Dr Mark Berry
Sue Begg
Anita Mazzoleni
- Summary of Application:** Hoyts Corporation Holdings (NZ) Limited submitted an application for clearance to acquire, directly or indirectly, the Berkeley film exhibition assets as described in the Agreement for Sale and Purchase between Hoyts Corporation Holdings (NZ) Limited and Everard Entertainment Limited.
- Determination:** Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.
- Date of Determination:** 21 April 2010

THE PROPOSAL

1. A Notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 17 March 2010. The notice sought clearance for Hoyts Corporation Holdings (NZ) Limited (Hoyts NZ) to acquire, directly or indirectly, the Berkeley film exhibition assets as described in the Agreement for Sale and Purchase between Hoyts NZ and Everard Entertainment Limited (Everard).

DECISION

2. Post acquisition there would be aggregation of market share in two markets – the exhibition of films on the North Shore and the exhibition of films in the South Eastern suburbs of Auckland. The Commission considers that:
 - competition from Amalgamated Holdings Limited/SkyCity Cinemas;
 - fringe competition from independent cinema exhibitors;
 - a degree of competition from cinemas outside the relevant geographic markets;
 - potential competition; and
 - the countervailing power of film distributors,
 when taken together, would constrain the combined entity in those markets. Accordingly, the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in either relevant market.

ANALYTICAL FRAMEWORK

3. The Commission applies a consistent analytical framework to all its clearance decisions.¹ The first step is to determine the relevant markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
 - with the acquisition (the factual); and
 - in the absence of the acquisition (the counterfactual).
4. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the relevant markets between those two scenarios. To analyse the extent of competition in the factual and counterfactual, the Commission considers:
 - existing competition;
 - potential competition;
 - other competition factors, such as the countervailing market power of buyers and suppliers; and
 - co-ordinated behaviour – whether the acquisition would enhance the ability of market participants to collude either tacitly or explicitly.

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

THE PARTIES

The Acquirer - Hoyts NZ

5. Hoyts NZ is ultimately 100% owned by the Hoyts Group of the USA. It is primarily involved in operating cinemas and exhibiting films, but is also involved in cinema advertising and film distribution.
6. Hoyts NZ operates seven cinema complexes with a combined total of 49 screens in Auckland, Christchurch and Dunedin. These include two cinema complexes in Auckland with a combined total of 18 screens – one at Wairau Park (eight screens) and the other at Sylvia Park (10 screens). Attached as Appendix A is a map showing the location of these cinemas together with the location of the other cinema complexes in greater Auckland.

The Target - Berkeley

7. The Berkeley cinema business is 100% owned by Everard, which is a private company with three individuals as shareholders. Berkeley operates four cinema complexes in greater Auckland with a combined total of 21 screens. Those complexes are located at Mission Bay (four screens), Botany Downs (eight screens), Takapuna (four screens) and Whangaparaoa (five screens). []

OTHER PARTIES

Amalgamated Holdings Limited/SkyCity Cinemas

8. Amalgamated Holdings Limited (Amalgamated) is the owner of the SkyCity cinema business (SkyCity). Apart from its New Zealand cinemas, Amalgamated operates cinemas and exhibits films in Australia and various other countries.
9. Amalgamated/SkyCity operates 14 cinema complexes in New Zealand with a combined total of 104 screens in Auckland, Hamilton, New Plymouth, Wellington and Whangarei. These include eight complexes in Auckland with a combined total of 71 screens (see appendix A). It also has a 50% share in Rialto Cinemas Limited (Rialto Cinemas), the other 50% being held by a subsidiary of Reading New Zealand Limited (Reading NZ). Rialto Cinemas operates four cinema complexes throughout New Zealand with a combined total of 17 screens, including a seven screen cinema at Newmarket, Auckland.

Reading New Zealand Limited

10. The Reading group of companies operate cinemas throughout Australia, the USA and New Zealand. Reading NZ operates nine cinema complexes throughout New Zealand with a combined total of 48 screens. Its presence in Auckland is confined to its 50% share in Rialto Cinemas.

Others

11. The remaining cinemas in New Zealand are operated by various independent exhibitors whose cinemas typically have fewer screens than those of Hoyts NZ, Amalgamated/SkyCity or Reading NZ. Of particular relevance to this Application are Bridgeway Cinemas Limited (Bridgeway), which operates three screens at Northcote, Auckland, and Lido Cinemas Limited (Lido), which

operates two screens in Epsom and one screen in Balmoral, Auckland. In addition, the owners of Bridgeway have recently announced their intention to open a four screen cinema in the Auckland suburb of Howick.

INDUSTRY BACKGROUND

12. Motion picture films may be produced either by a major film studio or by independent film makers. The majority of films that are released in New Zealand are produced by one of the six major film studios (Warner Bros, Fox, Paramount, Sony, Disney and NBC Universal). The major film studios' output is distributed in New Zealand either by a wholly-owned subsidiary or through a licensed agent. Independent film makers arrange to distribute their films through independent local distributors. Cinema exhibitors acquire the rights for public exhibition of films in New Zealand from distributors.
13. Typically, the agreements that distributors reach with cinema exhibitors are conducted at a national level and are based on revenue sharing arrangements and include terms that stipulate the length of screening and the session times for the film in question. Almost half of the revenue from ticket sales is returned to the film's distributor and studio. The proportion of ticket sales revenue that the distributor takes decreases progressively over the period that the film is screened.

MARKET DEFINITION

Film Exhibition Product Market

14. Hoyts NZ submitted in its Application that all digital leisure substitutes (e.g. video games, DVDs and multi-channel television) fall within a single product market, and that there is a chain of substitution operating between the various options. This is based on the claim that there is strong demand-side substitutability between viewing a movie at the cinema and other digital leisure substitutes.
15. However, for the purpose of considering the Application, Hoyts NZ submitted that, based on the Commission's analysis in Decision 265 (*Hoyts Corporation Holdings (NZ) Ltd /Pacer Kerridge Corporation Ltd (1991)*), the relevant product market is that for 'the exhibition of films to the public.' The Commission proposes for the purpose of considering this Application, to take a conservative approach and adopt the same product market definition as put forward by Hoyts NZ. Further, the Commission proposes that all film categories regardless of either film or the type of cinema in which they are shown, form part of the same product market.

Functional Markets

16. Hoyts NZ and Berkeley each exhibits films to the public and negotiates film distribution agreements with distributors. Therefore, Hoyts NZ considers, and the Commission agrees that for the purpose of considering the proposed acquisition, the relevant functional market is the retail exhibition of films to the public and the acquisition of rights from distributors to exhibit those films.

Geographic Markets

17. Hoyts NZ submitted that for the purpose of the Application the relevant local markets be delineated by geographic radii of 20 minute drive time distances around each existing Hoyts NZ cinema complex in Auckland. Applying those

principles, Hoyts NZ has identified two relevant local markets in its Application: the North Shore/Auckland CBD and the Auckland isthmus, comprising the CBD and its environs, and extending to Epsom and Balmoral in the west, Pakuranga and Howick in the East, and Manukau City in the south. During its investigation, the Commission found that most other industry participants did not consider that consumers would substitute cinemas over such broad areas.

18. Rather, the Commission was advised by industry participants that consumers were influenced by the following factors when deciding where to attend a cinema:
 - the quality of the offering (including the attraction of the film, the quality and convenience of the facility and the type of food, beverage and other services offered). For instance, consumers may travel past older cinemas to visit a more modern cinema such as those at Albany and Sylvia Park;
 - demographics, including age and income levels. For example, the Commission was informed by Amalgamated/SkyCity that patrons in Manukau are unlikely to travel to the suburbs of South Eastern Auckland to visit a cinema and vice versa;
 - driving times; and
 - session times.
19. The Commission recognises that, depending on the particular circumstances, consumers can and will travel to cinemas located outside of their local area. However, the Commission considers that each cinema has, and certain groups of cinemas have, a primary catchment area which is reasonably local to the cinema. Evidence to support this includes the fact that Amalgamated/SkyCity focuses its local marketing strategies almost entirely on the areas proximate to its cinemas. It advertises the films shown at each of its cinemas only in the community newspapers that correspond to the location of its cinemas. It does not, for example, advertise films showing in its central CBD cinemas on the North Shore, in West Auckland or in South Eastern Auckland.
20. Therefore, the Commission proposes for the purposes of this Application, to divide the Auckland region into five separate geographic areas, all of which overlap to some extent. Those areas are shown on the map attached as Appendix B which highlights the Commission's view of the primary cinema catchment areas and the approximate boundaries of the relevant local geographic markets:
 - North Shore, including the Hibiscus Coast (the North Shore market);
 - West Auckland (the West Auckland market);
 - Central Auckland, including the CBD and the inner Auckland suburbs of Newmarket, Remuera, Mt Eden and Ponsonby (the Central Auckland market);
 - South Eastern Auckland (the South Eastern Auckland market); and
 - South Auckland (the South Auckland market).
21. These local geographic markets accord with the views of Amalgamated/SkyCity, Reading NZ, and the distributors that were interviewed. However, both Hoyts NZ and Berkeley contended that the definition of a South Eastern Auckland geographic market is narrower than warranted by the actual market dynamics.

Instead, both of those parties argued for a combined South/South Eastern Auckland geographic market.

22. While the Commission recognises that there are factors that support broader geographic markets in most areas, in this instance it proposes to adopt a conservative approach and treat the five local regions as discrete geographic markets. If no competition issues arise in the conservatively defined markets then clearly there would be no competition issues in more broadly defined geographic markets.

Conclusion on Market Definition

23. The Commission concludes that the relevant markets are those for the exhibition of films to the public in the North Shore, West Auckland, Central Auckland, South Eastern Auckland and South Auckland geographic markets.

FACTUAL/COUNTERFACTUAL

Factual

24. Hoyts NZ proposes to acquire, directly or indirectly, the Berkeley film exhibition business assets []. Therefore, in the factual Hoyts NZ would operate three large multiplex cinemas, one each at Wairau Park, Sylvia Park and Botany Downs; and three smaller multiscreen complexes. Aggregation of market share would be most acute in South Eastern Auckland.

Counterfactual

25. While Hoyts NZ submitted that in the counterfactual Everard would likely be looking to attract new investors to fund the conversion of its cinema screens to digital/3-D technology, thereby enabling the company to compete more strongly with Amalgamated/SkyCity and Reading NZ, and with the other digital leisure substitutes, [

].

26. In view of these factors the Commission considers that the relevant counterfactual is the status quo.

COMPETITION ANALYSIS

Overview

27. Following implementation of the acquisition, there would be aggregation of market share in respect of the exhibition of films to the public in two geographic locations: the North Shore and the South Eastern Auckland markets.
28. The acquisition does not involve any aggregation of market share in the film exhibition markets in West Auckland, Central Auckland, South Auckland, [].
29. Hoyts NZ is vertically integrated through its involvement in cinema exhibition, film distribution and cinema advertising. In the factual, Hoyts NZ would have more extensive geographic coverage in the greater Auckland region. If it possessed market power at the distribution level, the potential to leverage that over downstream markets would exist in the factual. However, given the number of substantial competing distributors, the Commission does not consider

that Hoyts NZ would possess such market power. In regard to cinema advertising, the Commission is of the view that there would be no material change to the market situation as a result of the proposed acquisition.

30. In light of these factors, the Commission does not intend to address vertical effects further in this decision, the balance of which focuses on the two film exhibition markets in which aggregation of market shares would occur.

Existing Competition

31. The market shares for the North Shore and South Eastern Auckland markets are set out in Tables 1 and 2.

Table 1: Estimated Market Shares for the North Shore Market in 2009

Participant	Revenue	Share (% approx)
Hoyts NZ -Wairau Park	[]	[]
Berkeley- Takapuna/Whangaparaoa	[]	[]
<i>Combined Entity</i>	[]	[]
Amalgamated/SkyCity - Albany	[]	[]
Bridgeway - Northcote	[]	[]
Total	[]	100

Source: Nielsen EDI Australia

32. Table 1 indicates that in the North Shore market the combined entity would have a market share of around []% and the three-firm concentration would be []%. This is outside the Commission's safe harbour guidelines.

Table 2: Estimated Market Shares for the South Eastern Auckland Market in 2009

Participant	Revenue	Share (% approx)
Hoyts NZ - Sylvia Park	[]	[]
Berkeley- Mission Bay/Botany Downs	[]	[]
<i>Combined entity</i>	[]	[]
Amalgamated/SkyCity – Highland Park	[]	[]
Total	[]	100

Source: Nielsen EDI Australia

33. Table 2 indicates that in the South Eastern Auckland market, the combined entity would account for around []% of the market and the three-firm concentration would be 100%. This is outside the Commission's safe harbour guidelines.
34. However, in respect of the North Shore market, the combined entity would face strong competition from Amalgamated/SkyCity, the operator of a modern multiplex at Albany. This facility forms part of Amalgamated/SkyCity's network of eight cinema complexes spread throughout the greater Auckland

region, which makes it the largest operator in terms of the number of screens and revenue generated in the greater Auckland region (and the wider New Zealand cinema industry).

35. Additionally, Bridgeway provides competition in the North Shore market, especially in art house and “cross over” film genres,² which is Bridgeway’s major focus.
36. The Commission notes that even if the Hibiscus Coast and the North Shore of Auckland are in separate markets the factual and the counterfactual would remain the same.
37. In the South Eastern Auckland market, the combined entity would face competition from Amalgamated/SkyCity with its Highland Park multiplex. While this facility is an older and less appealing cinema, [] The Commission considers that Amalgamated/SkyCity has the necessary resources and would have the incentive to modernise its Highland Park complex if the market situation warrants it. For these reasons, the Commission considers that the potential for redevelopment and further expansion of Highland Park means that Amalgamated/SkyCity would continue to provide an effective constraint in the South Eastern Auckland market in the factual.
38. Additionally, the Commission notes that cinema admission prices are broadly consistent across the greater Auckland region with the only major variations reflecting the age and quality of the services and facilities on offer. For example, Hoyts NZ charges higher admission prices at its Sylvia Park complex compared with its Wairau Park complex due to the less attractive offering at the latter facility. Similarly, Amalgamated/SkyCity’s admission charges are the same across the entire Auckland region with the exception of Highland Park, which has older and less attractive facilities.
39. Having regard to the above factors, the Commission concludes that the combined entity would continue to face a strong competitive constraint in the factual from Amalgamated/SkyCity, and to a lesser extent, from Bridgeway in the North Shore market. In respect of the South Eastern Auckland market, Amalgamated/SkyCity only currently provides a limited constraint but the Commission considers that it has the ability and incentive to expand its presence in the factual should the market circumstances warrant it. Given the relative ease of travel between cinemas in most parts of the Auckland region, Amalgamated/SkyCity and independent cinema exhibitors in the other geographic markets, are likely to provide a degree of constraint on the combined entity in the factual.

Potential Competition

40. Industry participants advised the Commission that exhibitors are generally able to secure the films they want to show. No issues have been identified concerning the availability of projection equipment, although the purchase of

² “Cross over” films are those regarded as being suitable for exhibition in art house or main stream multiplex complexes. Examples are Mamma Mia and Mao’s Last Dancer. The Terminator would not be considered a “cross over” film. The Commission was advised that art house owners tend to favour “cross over” films which are likely to produce greater revenue than “hard edge” art house films.

digital equipment involves some capital expense and may involve the write-off of the value of celluloid projection equipment.

41. The most significant entry condition is access to a suitable site and the investment in a purpose built facility. Most multiplexes have been, and will continue to be developed as part of a shopping centre. New shopping centres are few and far between. However, if multiplex cinemas become dated or run down, this can provide scope for new entry as was evidenced in Wellington when Reading NZ entered with its 10 screen complex in the CBD and the nearby older Hoyts NZ cinemas were forced to close as their market shares collapsed.
42. Further, there is likely to be scope for construction of smaller cinemas either on existing or new sites. For example, the Britomart site in central Auckland has been identified as a possible site for a future cinema development.
43. In addition, Mr Kelly Rogers, a director of Bridgeway, has recently announced that the owners of The Bridgeway cinema at Northcote will open a four screen cinema in Howick, catering for a similar audience to those who patronise the Bridgeway (i.e. art house and “cross over” film audiences). Mr Rogers has advised the Commission that [] The developer of the site, Augusta Group, has stated that the proposed cinema will probably open in the spring of 2011.
44. The Commission considers that the proposed cinema opening shows that market entry, especially on a smaller multiscreen scale, is likely to be feasible and that it is likely to be timely and of sufficient extent to provide a degree of constraint on the combined entity in the factual.
45. Moreover, the Commission notes that the entry of Reading NZ into the Wellington market provided such a constraint on Hoyts NZ, the then major incumbent, that it caused Hoyts NZ to exit the Wellington market. This indicates to the Commission that entry into film exhibition markets has the potential to act as a constraint on incumbents.
46. Taking into account the above factors, the Commission concludes that in the factual, the combined entity is likely to face some constraint from potential competition.

Countervailing Power of Suppliers

47. In some circumstances the potential for the combined entity to exercise market power may be sufficiently constrained by a buyer or supplier to eliminate concerns that an acquisition may lead to a substantial lessening of competition.
48. Hoyts NZ submitted that the film distributors hold countervailing power as the suppliers of films in respect of the price and terms that exhibitors must negotiate to acquire the rights. [] [] and [] agreed and expressed concerns that the acquisition would reduce the number of major cinema exhibitors from three to two in Auckland, the region which generates the largest proportion of their revenues, and it would weaken their negotiating positions with the exhibitors.

49. However, the Commission is of the view that the countervailing power of distributors will not be substantially diminished. This is because:
- negotiations for film hire are conducted at a national level with Amalgamated/SkyCity, Hoyts NZ and Reading NZ;
 - the relative market power of exhibitors and distributors varies with the quantity of blockbuster and other audience drawing films in circulation at any period of time. If there are many such films in circulation at a particular time, the balance of power will skew to the exhibitors and vice versa;
 - Berkeley has only a small presence nationally, accounting for only about []% of total cinema exhibition revenue at a national level for the year ending 31 December 2009 so there will not be a great change in the factual; and
 - the merged entity aside, there will remain two large national cinema chain operators (Amalgamated/SkyCinemas and Reading NZ) for the distributors to supply.³
50. The Commission concludes that film distributors would continue to have sufficient countervailing power to constrain the combined entity from exercising market power in the factual in respect of rights to exhibit films.

Co-ordinated Market Power

51. The Applicant has submitted that the following factors would preclude any co-ordination in the factual:
- low barriers to expansion;
 - the asymmetry of market shares and costs;
 - a differentiated product offering that is differentiated by product characteristics;
 - the large number of fringe competitors; and
 - the countervailing power of acquirers.
52. The Commission considers that there are factors which offset the potential for co-ordination in the factual, including:
- fringe competition from the smaller arthouse and “cross over” cinemas;
 - the relative ease of entry, particularly in relation to smaller scale entry;
 - the asymmetry of market shares between the combined entity and Amalgamated/SkyCity;
 - the differentiated product characteristic of film exhibition between blockbuster and arthouse/“cross over” films and between “popcorn and coke” multiplexes and “expresso coffee and wine” cinemas; and
 - the countervailing power of film distributors.

³ These two chains accounted for []% (Amalgamated/SkyCity) and []% (Reading NZ) of national cinema exhibition revenue in 2009.

53. The Commission concludes that the scope for co-ordinated market power is unlikely to be so enhanced as to result in a substantial lessening of competition in the affected markets in the factual.

Conclusion on the Film Exhibition Markets

54. Overall, the Commission concludes that when taken together, the constraints likely to be provided by:
- Amalgamated/SkyCity;
 - fringe competition from independent cinema operators;
 - a degree of competition from cinemas outside the relevant geographic markets,
 - the potential constraint from new entrants; and
 - the countervailing power of film distributors,
- are likely to be sufficient to limit the combined entity from exercising unilateral market power in the factual. Nor does the Commission, for the reasons given above, consider that there would be enhanced scope for co-ordinated market power in the factual.

OVERALL CONCLUSION

55. Having considered the competition effects in each of the relevant markets, the Commission concludes that it is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the market for the exhibition of films to the public in the North Shore or South Eastern Auckland markets.

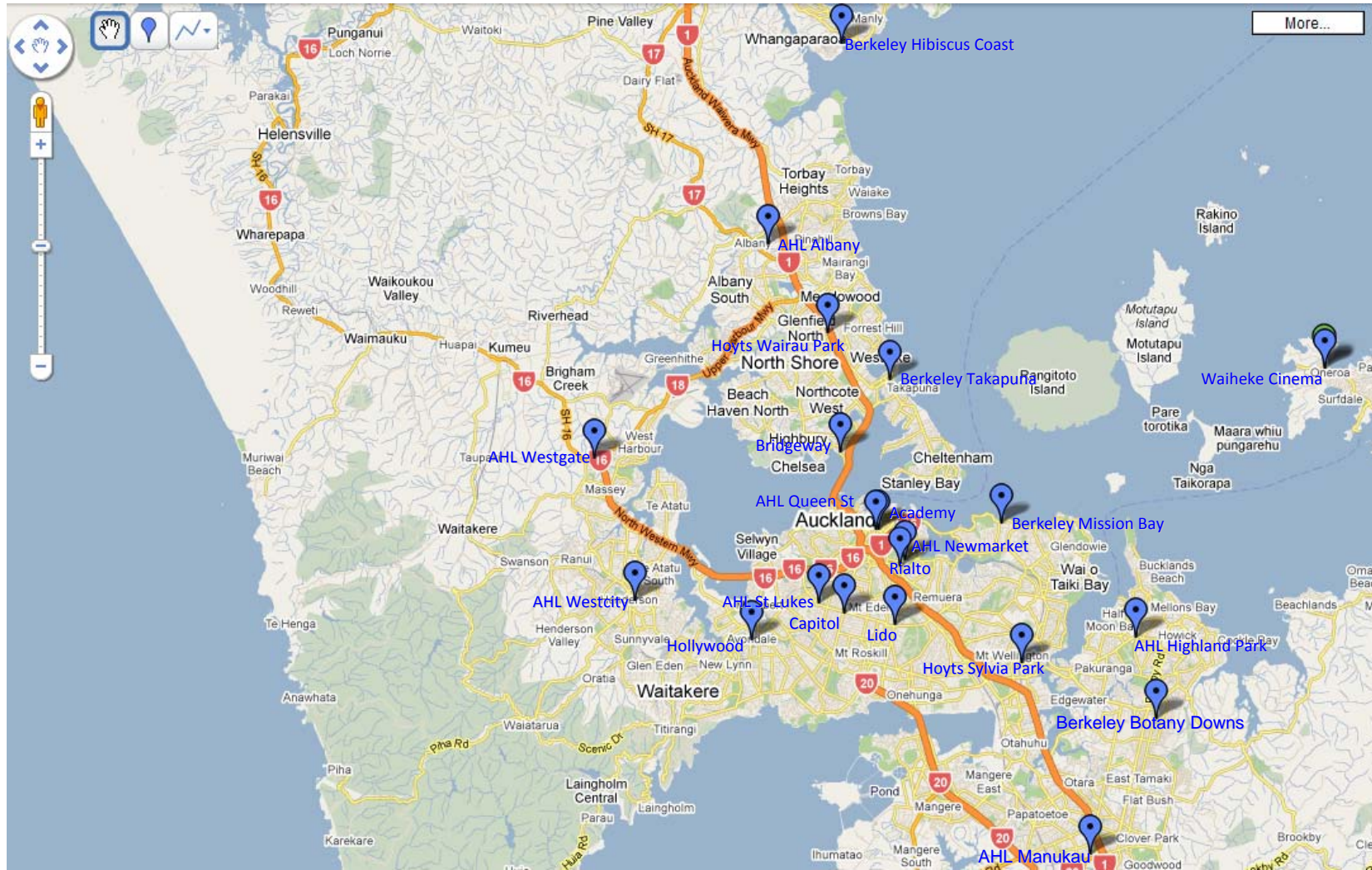
DETERMINATION ON NOTICE OF CLEARANCE

56. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to grant clearance for Hoyts Corporation Holdings (NZ) Limited to acquire, directly or indirectly, the Berkeley film exhibition assets as described in the Agreement for Sale and Purchase between Hoyts Corporation Holdings (NZ) Limited and Everard Entertainment Limited.

Dated this 21st day of April 2010

Dr Mark Berry
Chair

APPENDIX A – Map – Geographical Distribution of Cinemas in the Auckland Region



APPENDIX B – Map – Geographic Markets in the Auckland Region

