



COMMERCE COMMISSION

Decision No. 359

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

Waste Management NZ Limited

and

Waste Care Limited

The Commission:

M N Berry (Acting Chairman)
Dr K M Brown
E C A Harrison

**Summary of
Proposed Acquisition:**

The acquisition by Waste Management NZ Limited of 100% of the shares and voting rights of Waste Care Limited and its subsidiaries from Sita New Zealand Limited, following the divestment of certain assets.

Determination:

Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition, subject to written undertakings as given under s 69A of the Commerce Act.

Date of Determination: 9 June 1999

<p>CONFIDENTIAL MATERIAL IN THIS REPORT IS CONTAINED IN SQUARE BRACKETS []</p>
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THE PROPOSAL

1. On 26 May 1999 the Commission registered a notice from Waste Management NZ Limited (WMNZ) seeking clearance to acquire 100% of the shares and voting rights of Waste Care Limited (Waste Care) and its subsidiaries.
2. The notice is for the acquisition of the same assets as were the subject of a clearance notice from WMNZ dated 13 April 1999. That notice resulted in Commission Decision No. 355 of 14 May 1999, which declined to give clearance to the proposed acquisition. The current proposal includes an undertaking to divest particular assets, attached as Appendix 1. In accordance with section 69(A)(3) of the Commerce Act 1986 (the Act), the undertaking is deemed to form part of any clearance given to the proposal.

THE PROCEDURES

3. Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period. Accordingly, a decision on the application is required by Thursday 10 June 1999.
4. WMNZ sought confidentiality for certain information contained in the notice seeking clearance, and a confidentiality order was made in respect of that information for a period of 20 working days from the Commission's determination of the notice. When the confidentiality order expires, the provisions of the Official Information Act 1982 will apply to the information.
5. The Commission's determination is based on an investigation conducted by its staff and their subsequent advice to the Commission.

THE PARTIES

Waste Management NZ Limited (WMNZ)

6. WMNZ and its subsidiaries operate in the waste industry providing a range of refuse collection, recycling, treatment and disposal services in a variety of localities around New Zealand.
7. WMNZ is engaged in solid waste operations in Auckland, Whangarei, Bay of Plenty, Rotorua, Gisborne, Whakatane, New Plymouth, Wanganui, Wellington, Christchurch, Timaru, and Dunedin.
8. WMNZ's disposal division operates the Redvale Landfill at Dairy Flat on Auckland's North Shore, and has an involvement as a joint venture partner in the Pikes Point transfer station at Onehunga, in Auckland. WMNZ operates refuse transfer stations situated at Hamilton City, Thames/Coromandel, Rotorua, Tauranga, Papakura, Whangarei, South Taranaki, and Rangiora. WMNZ also hauls waste from transfer stations that it owns or manages to landfills for final disposal.
9. WMNZ is listed on the New Zealand Stock Exchange. As at 31 December 1998, it had revenues of \$79 million and a market capitalisation of \$305 million.

Waste Care Limited (Waste Care)

10. Waste Care and its subsidiaries also operate in the waste business providing a range of refuse collection, recycling, treatment and disposal services in a variety of localities around New Zealand.
11. Waste Care is involved in solid waste operations, and operates in Auckland, Whangarei, Hamilton, Napier/Hastings, Palmerston North, Wellington, Christchurch and Dunedin.
12. Waste Care's disposal division operates the Whitford landfill in South Auckland and a refuse transfer station in East Tamaki.
13. Waste Care is listed on the New Zealand Stock Exchange.

OTHER MAJOR PARTIES*EnviroWaste Services Limited (EnviroWaste)*

14. EnviroWaste is a participant in the waste industry, providing a range of services including waste collection, recycling, and disposal services in a number of regions throughout New Zealand.
15. EnviroWaste is a joint venture company owned 50/50 between Northern Disposal Systems Limited and Fulton Hogan Limited. EnviroWaste operates the Rosedale Road and Greenmount landfills in Auckland, under a management agreement with the owner of the landfills, Northern Disposal Systems Limited.
16. EnviroWaste, in addition to managing the two Auckland landfills, also operates the Pikes Point refuse transfer station, and the Constellation Drive refuse transfer station, in Auckland. The Constellation Drive transfer station, on the North Shore, is owned by Northern Disposal Systems Limited, and leased to EnviroWaste.

Northern Disposal Systems Limited (NDS)

17. NDS is wholly owned by Infrastructure Auckland Limited (formerly the Auckland Regional Services Trust).
18. NDS, in addition to its ownership in EnviroWaste, owns the operating landfill licences for the Greenmount and Rosedale Road landfills. These landfills are operated under a management agreement by EnviroWaste. NDS also owns the Pikes Point refuse transfer station at Onehunga, in Auckland, which is operated as a joint venture between WMNZ and NDS.

Pikes Point Transfer Station Limited (PPTSL)

19. PPTSL is the joint venture vehicle established by NDS and WMNZ to operate the Pikes Point transfer station, at Onehunga, Auckland. [

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INDUSTRY BACKGROUND

21. Decision No. 355 provided detailed background to the waste industry. There have been no material changes to the industry since Decision No. 355.

THE RELEVANT MARKETS

22. The purpose of defining markets is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition being considered. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in terms of section 47(1) of the Act.
23. In Decision No. 355, the Commission identified the following markets as being relevant to the proposal:
- the local/regional market for the collection and delivery of solid, non-hazardous waste, where this waste excludes excavated earth;
 - the Auckland market for waste transfer stations for solid, non-hazardous waste;
 - the Auckland regional market for the disposal of solid, non-hazardous waste, excluding excavated earth, recyclables and construction and demolition (C&D) waste; and
 - the market for the hiring of portable toilets in the Hawkes Bay region.
24. For the reasons given in Decision No. 355, the Commission considers that these markets are relevant for the purpose of assessing the dominance implications of the current proposal.

ASSESSMENT OF DOMINANCE

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

Decision No. 355

26. In Decision No. 355 the Commission concluded, for the reasons set out in that Decision, that it was satisfied that the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the following markets:
- the local/regional market for the collection and delivery of solid, non-hazardous waste, where this waste excludes excavated earth;
 - the Auckland local market for waste transfer stations for solid non-hazardous waste, excluding excavated earth; and
 - the market for the hiring of portable sanitation services in the Hawkes Bay region.
27. The Commission was not satisfied that the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the

Auckland regional market for the disposal of solid, non-hazardous waste (excluding recyclables, C&D waste and excavated earth).

28. The Commission considers that the current proposal does not affect any of the markets specified in paragraph 26 above. Therefore, the Commission's assessment of those markets is unchanged from the conclusion reached in Decision No. 355 with respect to those same markets.
29. The Commission will therefore confine its competitive assessment to the Auckland regional market for the disposal of solid, non-hazardous waste. In Decision No. 355 the Commission concluded that it was not satisfied that the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in this market. It is also the market which is affected by the current divestment proposal as submitted by WMNZ.

The Auckland Regional Market for the Disposal of Solid, Non-hazardous Waste

Introduction

30. Because of the unusually long time periods needed for new entry in this market, caused by difficulties in finding a suitable site, purchasing the land, gaining resource consents, and construction of the facility, the constraints posed by both existing and potential new competitors have to be viewed in the context of a period of at least five years. In Auckland, within this time period, the EnviroWaste landfills will have used up their remaining capacity and be closed, leaving only two landfills – Redvale and Whitford – in operation. Thus, regardless of the proposed business acquisition, the amount of competition from existing players is likely to shrink dramatically within the relevant time period for analysis. The effect of the business acquisition – by bringing Redvale and Whitford under the one ownership - will be to eliminate completely all competition between players with existing landfills. The focus then turns to whether potential competition will provide an effective constraint on the combined entity.

Market Shares

31. Basic information about the landfills for solid, non-hazardous waste in the Auckland regional market is provided in Table 1.

TABLE 1
Landfills in the Auckland Regional Market

Landfill	Owner/manager	Remaining consent life	Remaining capacity (tonnes)	Annual tonnage received (tonnes)
Redvale	WMNZ	25 years	15.0 million	300,000
Rosedale Road	EnviroWaste	3.5 years	[]	[]
Greenmount	EnviroWaste	4 years	[]	[]
Whitford*	Waste Disposal Services/Waste Care	17 years	3.5 million	200,000

*Subject to an annual tonnage restriction of 200,000 tonnes. Air discharge consent outstanding

32. Table 1 shows that the market share of the combined entity would comprise the totals for the Redvale and Whitford landfills. In annual tonnage terms that would amount to [

] tonnes, or []%. However, because of the limited remaining capacity of the two EnviroWaste landfills at Rosedale and Greenmount, the combined entity would have an []% share of capacity.

33. Within the timeframe for our analysis, both figures will rise to 100% by mid-2003 in the event that there is no new entry. This raises the prospect that, absent entry, the combined entity would attain a monopoly position in the market.

Constraint by Existing Competitors

34. WMNZ has submitted that the merged entity will be effectively constrained by the existing spare capacity of the Greenmount and Rosedale landfills within the Auckland region, and also existing landfills in the Waikato region such as Horotiu.
35. Rosedale and Redvale are both located on the North Shore and therefore appear to compete for waste flows from their similar catchment areas. Likewise, Greenmount and Whitford are located quite close together in south-east Auckland and for that reason would be expected to compete. Although competition appears to be lessened by the fact that Whitford is capped at 200,000 tonnes of waste per year under the terms of its resource consent, and is already operating at that level, and by the fact that waste from the Manukau City area is given priority, currently there is a level of competition in Auckland which is absent in most other regional markets where there may be only one, LTA-run, landfill.
36. The Commission has concluded that the relevant timeframe is at least a five year period. Within that period Rosedale and Greenmount will close. The only remaining competitor - Whitford - would at best provide only limited competition because it is already receiving waste at its capped capacity. It is unlikely to compete on price or otherwise behave competitively because it cannot accommodate any more waste.

Constraint by Potential Competitors

37. WMNZ has submitted that there are a number of landfill sites which are expected to come on stream within the next two to three years and will compete with the merged entity.
38. In Decision No. 355 the Commission analysed the proposed landfills in the region. The Commission concluded that, with the exception of the proposed EnviroWaste landfill at Hampton Downs, the other landfills are not likely to have a significant impact upon the relevant market.
39. Having concluded that the other landfills are unlikely to act as a constraint upon the merged entity, the Commission focused upon the Hampton Downs proposal. As the divestment proposal impacts upon the likelihood of entry by EnviroWaste at Hampton Downs, the Commission will again analyse the proposed Hampton Downs landfill, giving consideration to the likely effect of the divestment proposal.

Conditions of Entry

40. All industry participants, including WMNZ, accept that barriers to the development of landfill sites are relatively high. However, notwithstanding high entry barriers, WMNZ contends that a well-resourced party will be successful over a three to five year timeframe.

41. In Decision No. 355 the Commission reviewed the relevant entry conditions for landfill development. This examination included consideration of the following elements: suitable site location, regulatory requirements, capital cost, economic volumes of waste, vertical integration and incumbent response. Each of these elements represents a significant condition which must be met (or planned for) by any potential entrant into the market.
42. The Commission confirms its analysis of the conditions of market entry in Decision No. 355.

Assessment of the Constraint by Potential Competition

43. The Commission recognises that potential competition can act as a constraint on the exercise of market power. Hence, the assessment of the nature and extent of that constraint represents an important element in the evaluation of whether, in a business acquisition, the combined entity will acquire or strengthen a dominant position.¹
44. In the present case the issue is whether WMNZ will acquire or strengthen a dominant position in the Auckland regional market for the disposal of solid, non-hazardous waste through its acquisition of Waste Care. This depends upon whether the acquisition will have the effect of reducing the likelihood of entry, especially the planned entry of Hampton Downs into the market to compete with the combined entity's Redvale/Whitford landfills, which will, in the absence of such entry, gain a monopoly position in the market over the five year timeframe used. As stated earlier, the Commission's analysis of potential entrants in Decision No. 355 concluded that EnviroWaste's proposed Hampton Downs landfill is the only one which is likely to offer a constraint within the relevant timeframe.
45. In order for the threat of market entry to be a sufficient constraint on the exercise of market power, the Commission's approach is based on the "lets" test. Under this test, to constitute a sufficient constraint, entry must satisfy all four of the following criteria: it must be *likely*, sufficient in *extent*, *timely* and *sustainable*.² This case is unusual in that the market circumstances are such that the test has to be applied to a single, identified potential entrant, rather than to entry in generic terms. Each of the "lets" test criteria are now assessed in turn in relation to the Hampton Downs proposal.

Likelihood of Entry

46. EnviroWaste has acquired the land for the Hampton Downs landfill, undertaken the necessary geological and related site assessments, and in April 1999 applied for the required resource consents with a very comprehensive submission. Expenditure to date has totalled [], of which [] has been spent on acquiring the land, and [] on investigating sites and preparing the submission. Only the latter is a sunk cost, as the land could be sold in the event that EnviroWaste elected not to proceed.
47. Although EnviroWaste does not have access to information on the costs incurred by WMNZ in building the Redvale landfill, it believes that the costs of building Hampton Downs will be roughly comparable. Each site has certain advantages and disadvantages vis-à-vis the other, but these are thought likely roughly to balance out. However, a crucial factor for Hampton Downs will be to attract a sufficient waste stream over which to spread its fixed costs, and so to compete with Redvale.

¹ Commerce Commission, *Business Acquisitions Guidelines, 1999*, Wellington, p. 19.

² *Ibid.*, pp. 19-20.

EnviroWaste has told the Commission that the minimum quantity needed for break-even operation is around [] tonnes, and that the figure originally anticipated was [] tonnes.

48. Transport costs are also a significant consideration in competition between the two landfills, but the half-way point between the two is north of Manukau City, indicating the potential for Hampton Downs to compete on a transport costs basis in South Auckland. This location also allows waste to be transported from other areas outside the defined market, such as Hamilton and surrounding areas. However, large quantities of waste are unlikely to be sourced from these other markets.

49. In Decision No. 355 EnviroWaste provided the Commission with projected waste flows to Hampton Downs, both without the proposed merger proceeding, and post-merger. [

] The Commission noted that, while the projected waste flows to Hampton Downs post-merger appeared to be unduly pessimistic, a significant reduction in waste flows seemed likely.

50. The proposed divestment seeks to address this issue by divesting particular assets [

] The undertaking results in the divestment of certain rights which would facilitate the availability of waste volumes to landfills not owned or operated by WMNZ.

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51. As noted in Decision No. 355, building a large, modern landfill is a highly risky investment. The sums required are large, and once spent they are mostly sunk, meaning that they cannot be recouped upon exit. This risk of loss can only be reduced if a large waste stream can be secured. [

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52. For these reasons, the Commission has concluded that the prospect of entry from Hampton Downs meets the “likely” criteria in the “lets” test.

Extent of Entry

53. If entry is to constrain an otherwise dominant firm, then entry must potentially be at a scale and spread of sales or operations as to impact significantly on its behaviour.

54. In the present case, the evaluation relates to the constraining influence of one, identified potential entrant. Hampton Downs would have a capacity almost identical to that of Redvale, and would fall within the delineated geographic market. As an entrant, Hampton Downs would therefore meet the “extent” criterion.

Timeliness of Entry

55. To constrain effectively the exercise of market power to the extent necessary to alleviate concerns about market dominance, entry must be likely to occur before consumers or users in the relevant market are detrimentally affected to a significant extent.³ The Commission has said that the relevant time period has to be considered on a case-by-case basis. Given the nature of the entry conditions into landfill operations, as discussed earlier, the relevant time frame appears to be at least five years.
56. As indicated earlier, both of EnviroWaste’s two landfills in Auckland – Rosedale and Greenmount – are nearing the end of their lives. Rosedale is due to close in about three-and-a-half years at the end of 2002 (although it could be earlier if waste flows fill it sooner), and Greenmount in about four years in mid-2003. As the closure of Rosedale approaches, and certainly after it has closed, Redvale might – absent entry – be able to start exercising market power. That market power would be accentuated with the closure of Greenmount. At that point, with the acquisition, the combined entity would – again, absent entry – be the sole supplier of landfill disposal services in Auckland, and is likely therefore to gain market power. The issue then is whether the entry of Hampton Downs would be sufficiently timely to prevent such market power being exercised by the incumbent.
57. There are considerable uncertainties over how quickly the Hampton Downs facility could be brought into “use” should it go ahead, primarily because of the resource consent procedures under the RMA. Different parties have expressed different views on the time required, even though most accept that any decision by the Regional Council is likely to be appealed to the Environment Court.
58. Environment Waikato, the consenting authority in this case, has advised that submissions for Hampton Downs closed recently. Submissions can be made objecting to a development, supporting a development, or neutral to a particular development.
59. Environment Waikato confirmed that WMNZ have made a submission with regard to Hampton Downs. This (public) submission records WMNZ’s desire to see that any proposed landfill is engineered and operated to a high standard. WMNZ has advised the Commission that it uses the Resource Management Act consent process to ensure that landfills are designed and operated to the highest standards possible.
60. WMNZ’s submission in the Hampton Downs application is viewed by Environment Waikato as “in support” of the application. Environment Waikato advised that the submission records WMNZ’s position that, subject to the consenting authority requiring the highest standards of landfill design and operation to be met in this case, WMNZ consider that Hampton Downs is likely to be constructed and operated to those high standards.
61. The Commission has received a copy of the WMNZ submission to Environment Waikato. The Commission is of the view that the WMNZ submission can properly be regarded as supporting the application. In particular, the Commission notes that

³ *Ibid.*, p. 20.

WMNZ “supports” the technical application (as submitted by EnviroWaste), and that “WMNZ wishes the consent authorities to....(G)rant resource consents to the applications.” Given WMNZ’s submission, the Commission considers that the likelihood of a strong and lengthy objection to Hampton Downs by WMNZ has been considerably reduced.

62. Environment Waikato stressed that the “support” of WMNZ’s submission did not mean that Hampton Downs would simply receive the necessary consents. There are other submissions which are required to be considered in full. This point was also made by other industry parties. The Commission recognises that all submissions will be given due consideration.
63. Environment Waikato anticipates a hearing date of August/September 1999. The hearing is (conservatively) estimated to take 3 weeks. A decision then follows within 2-3 weeks. The decision is likely to be made in October/November 1999. Thereafter, any appeal is processed through the Environment Court.
64. [

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65. As stated earlier, there are considerable (time related) uncertainties as to the procedures required for ultimate consent to operate a modern landfill. Industry participants have commented that “optimistic” and “pessimistic” timeframes are held, depending upon the particular circumstances of the application, and the identity and perceived strength(s) of opponents. In this case the apparent “support” of WMNZ, by its own admission a strong and committed objector, is likely to remove a significant impediment from Hampton Downs’ development. In these circumstances the Commission considers that any possible appeal to the Environment Court is likely to be resolved within a 1-2 year timeframe. With a decision by Environment Waikato due late 1999, it appears reasonable to anticipate that any appeal will be concluded by late 2001.
66. Notwithstanding the uncertainties over the consent process, the Commission considers that, on the basis of the information available, the entry of Hampton Downs is likely to be effected within the timeframe under consideration.

Sustainability of Entry

67. Entry has to be sustainable in the sense that it is likely to be profitable in the long-term, otherwise there will not be a lasting economic incentive to enter the market.
68. In the present case involving Hampton Downs, entry is likely to be sustainable, if it were to occur, because of the large sunk costs of the facility, which once committed would serve to deter exit, and the long-term view of the entrant needed to undertake such an investment.

Conclusion on Constraints from Potential Competitors

69. In this case, given the above considerations, the Commission is satisfied that market entry is likely to be both likely and sustainable, to be of sufficient extent, and to be effected in a timely manner.

Constraint by Possible Substitutes

70. In Decision No. 355 it was noted that recycling, incineration and cleanfills have been promoted by WMNZ as an alternative to landfill. However, some parties have claimed that these options are expensive and/or have a minimal constraint upon landfill disposal.
71. The Commission confirms its earlier conclusion that it is likely that these alternatives do not effect any significant constraint upon the merged entity with regard to its landfill disposal operations in the relevant market.

Conclusion on Dominance in the Auckland Regional Market for the Disposal of Solid, Non-hazardous Waste

72. The Commission notes that existing competition will continue until the closure of both the Rosedale Road and Greenmount landfills. The issue then becomes whether or not potential entry effectively constrains the merged entity in the relevant market. On an assessment of all the information available, it is likely that Hampton Downs, the only landfill of sufficient scale to effectively constrain the merged entity, will proceed in a timely manner and is likely to be operational within the five year timeframe under consideration.
73. On that basis, it is concluded that the potential entry of Hampton Downs is likely to effectively constrain the merged entity.
74. For the reasons given above, the Commission concludes that, subject to the proposed divestment proposal, the acquisition is not likely to lead to the combined entity acquiring or strengthening a dominant position in the market.

OVERALL CONCLUSION

75. The Commission has considered the likely impact of the proposal in the following markets:
 - the local/regional market for the collection and delivery of solid, non-hazardous waste, where this waste excludes excavated earth;
 - the Auckland local market for waste transfer stations for solid non-hazardous waste, excluding excavated earth;
 - the market for the hiring of portable sanitation services in the Hawke's Bay region; and
 - the Auckland regional market for the disposal of solid, non-hazardous waste, excluding recyclables, C&D waste and excavated earth.
76. Having regard to the various elements of section 3(9) of the Act, and all the other relevant factors, the Commission is satisfied that the proposal would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the following markets:
 - the local/regional market for the collection and delivery of solid, non-hazardous waste, where this waste excludes excavated earth;
 - the Auckland local market for waste transfer stations for solid non-hazardous waste, excluding excavated earth;

- the market for the hiring of portable sanitation services in the Hawke's Bay region; and
- the Auckland regional market for the disposal of solid, non-hazardous waste, excluding recyclables, C&D waste and excavated earth.

DETERMINATION ON NOTICE OF CLEARANCE

77. Accordingly, pursuant to s 66(3)(a) of the Act, the Commission determines to give clearance for the proposed acquisition by Waste Management NZ Limited of 100% of the shares and voting rights of Waste Care Limited and its subsidiaries from Sita New Zealand Limited, subject to the following undertaking as given by Waste Management NZ Limited:

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Dated this day of June 1999

M N Berry
Acting Chairman