

Determination

Wilson Parking New Zealand Limited and Tournament Parking Limited [2015] NZCC 30

The Commission: Dr Mark Berry
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Summary of application: An application from Wilson Parking New Zealand Limited seeking clearance to acquire the leases for five car parks from Tournament Parking Limited.

Determination: Under s 66(3)(a) of the Commerce Act 1986 the Commerce Commission determines to give clearance to the proposed acquisition.

Date of determination: 11 November 2015

Confidential material in this report has been removed. Its location in the document is denoted by [].

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The proposed acquisition

Summary of the proposed acquisition

1. On 14 August 2015, the Commerce Commission (the Commission) registered an application from Wilson Parking New Zealand Limited (Wilson Parking), seeking clearance to acquire leases for 10 car parks in Auckland and Wellington from Tournament Parking Limited (Tournament).
2. On 29 October 2015, Wilson Parking amended its application.¹ Under the amended application, Wilson Parking is only seeking clearance to acquire leases for five car parks (the Acquisition Sites):
 - 2.1 Rialto (9-13 Kent Street, Newmarket, Auckland);
 - 2.2 Leftbank (179-181 Victoria Street, Wellington Central, Wellington);
 - 2.3 Lombard (28 Bond Street, Wellington Central, Wellington);
 - 2.4 Marion Street (26 Marion Street, Wellington Central, Wellington); and
 - 2.5 Plimmer Tower (2 Gilmer Terrace, Wellington Central, Wellington).
3. For all of the Acquisition Sites other than Plimmer Tower, Wilson Parking is seeking to acquire leases of greater than five years in duration. For Plimmer Tower, Wilson Parking is only seeking a lease of four years.

Our decision

4. The Commission gives clearance to the proposed acquisition, as it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Our framework

5. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.²
6. Our assessment of this clearance application is conducted under section 66 of the Act. It is separate from our prior investigation into Wilson Parking's July 2013 acquisition of 63 car park leases and management agreements from Tournament, conducted under section 47 of the Act (the Section 47 Investigation).³ In that investigation we did not consider the acquisition of the five car parks that are the subject of this clearance application.

¹ Available online at <http://www.comcom.govt.nz/dmsdocument/13832>.

² Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at www.comcom.govt.nz

³ The initial schedule of car parks to be acquired by Wilson Parking listed 63 car parks. However, we understand that the final number of car parks acquired in that transaction was less than 63.

The substantial lessening of competition test

7. As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.
8. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).⁴
9. We make a pragmatic and commercial assessment of what is likely to occur in the future with and without the acquisition based on the information we obtain through our investigation and taking into account factors including market growth and technological changes.
10. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),⁵ or reduce non-price factors such as quality or service below competitive levels.
11. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.
12. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.⁶

When a lessening of competition is substantial

13. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁷ Some courts have used the word 'material' to describe a lessening of competition that is substantial.⁸
14. There is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁵ Or below competitive levels in a merger between buyers.

⁶ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁷ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁸ *Ibid* at [129].

The clearance test

15. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.⁹ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.¹⁰

Key parties

Wilson Parking

16. Wilson Parking is a privately owned company and is New Zealand’s largest public parking provider. It is part of a wider Wilson Group that has similar parking operations in Australia and in Asia.
17. In New Zealand, Wilson Parking has a nationwide presence and operates approximately 270 car parks, including sites in all main centres.

Tournament

18. Tournament is a private company that has been managing car parking sites in New Zealand since 1999.
19. In July 2013, Tournament sold approximately 63 of its car park leases and management agreements to Wilson Parking. This transaction was considered by the Commission in the Section 47 Investigation. On 20 March 2015, the Commission released a report describing its reasons for closing this investigation with no further action (the Closure Report).¹¹

Industry background

20. The present application concerns similar types of parking markets to those considered in the Section 47 Investigation. Our general views concerning the parking industry remain substantially similar to those expressed in the Closure Report.¹² As a consequence, this decision should be read in conjunction with the Closure Report.

Parking products

21. As discussed in the Closure Report, there are two broad types of public parking: those located off the street (off-street parking) and those on the street (on-street parking).

⁹ Commerce Act 1986, section 66(1).

¹⁰ In *Commerce Commission v Woolworths Limited (CA)*, above n 2 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”. However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

¹¹ Available online at <http://www.comcom.govt.nz/dmsdocument/13022>.

¹² See the Closure Report at [24] to [31].

22. Off-street parking includes dedicated parking buildings, underground car parks and open-air sites. Generally, off-street car parks offer the following parking options or products:¹³
- 22.1 casual parking;
 - 22.2 daily parking; and
 - 22.3 monthly parking (reserved or unreserved).
23. On-street parking can be free or paid, and with or without a time limit. Only local councils provide on-street parking. On-street parking is predominantly used by casual parking customers.

How public car parks are managed

24. In most cases, commercial car park operators do not own the land and buildings from which they operate. Rather, parking operators generally enter into lease or management agreements with property owners, the specific terms and conditions of which are subject to negotiation between the two parties.
25. Leases and management agreements vary in length from month-to-month arrangements, to terms of more than 10 years. Most leases and management agreements are for two years or longer and often include automatic renewal provisions. Car park operators compete for leases and management agreements when landlords put them out to tender.

Existing competitors

26. Besides Wilson Parking and Tournament, a number of other commercial parking operators compete in New Zealand markets, including:
- 26.1 Care Park New Zealand Limited (Care Park), which has widespread operations in Wellington and a number of car parks in Auckland;
 - 26.2 Prime Parking Limited (Prime Parking), which owns and operates a variety of car parks in Wellington, including the recently reopened James Smith site;
 - 26.3 Secure Parking NZ Limited (Secure), which has recently entered the Auckland and Wellington markets, but draws on extensive experience operating car parks across Australia and Asia; and
 - 26.4 Hope Gibbons Parking Limited (Hope Gibbons), an independent car park owner/operator in Wellington.
27. Local councils also operate on-street and off-street parking. Unlike commercial operators, councils may have goals other than profit maximisation, such as reducing traffic congestion or supporting local businesses.

¹³ See the Closure Report at [25] for a more detailed description of each of these products.

With and without scenarios

28. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.¹⁴

With the acquisition

29. With the acquisition, Wilson Parking would acquire leases to the Acquisition Sites from Tournament. We consider that Tournament would likely continue to operate a small number of other car parks, including those removed from the clearance application by the 29 October 2015 amendment.

Without the acquisition

30. Absent the acquisition, we consider that the status quo would likely prevail, with Tournament continuing to operate the Acquisition Sites. Tournament has advised us that [].¹⁵

Market definition

Our approach to market definition

31. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
32. We define markets in the way that best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

Wilson Parking's view of the relevant markets

33. Wilson Parking's submissions on markets are as follows:
- 33.1 Product markets: Wilson Parking submits that there are no restrictions on supply-side substitutability, except for on-street parking. In other words, Wilson Parking submits that car park operators can and do switch between casual, daily and monthly off-street parking.¹⁶

¹⁴ Mergers and Acquisitions Guidelines above n 1 at [2.29]; *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

¹⁵ Commerce Commission interview with Tournament (16 September 2015).

¹⁶ Wilson Parking Application at [114(d)].

- 33.2 Geographic markets: Wilson Parking submits that the relevant markets are comprised of overlapping zones of substitution.¹⁷ Wilson Parking considers that the relevant markets are the Wellington CBD, and Newmarket, and include the whole of the commercial and retail area.¹⁸

The Commission's view of the relevant markets

34. As discussed in the Closure Report, we consider that the relevant geographic markets are localised, with size and boundaries dependent on the specific characteristics of the areas in question. In this investigation, we considered the Newmarket precinct in Auckland, and the Te Aro and Boulcott Street precincts in Wellington.
35. Our views on product market definition also parallel those set out in our Closure Report. In particular, we consider that:
- 35.1 casual parking is a separate product market, albeit one that can include both on-street and off-street alternatives;
- 35.2 daily and monthly parking may be separate markets, depending on the characteristics of the car parks in the relevant area; and
- 35.3 public transport and private parking are separate product markets, even if they may place certain constraints on casual, daily, and monthly parking.
36. We have considered the potential for distinct competitive constraints in casual, daily, and monthly parking. However, we consider that in most cases, the constraints in each of these markets are substantively similar. In this decision, we have only discussed these product markets separately, where such a distinction is relevant.
37. We also recognise that there are other potential product markets not discussed in this report (such as night parking and weekend parking). Although we have considered the impact of this transaction on those markets, we have focused our discussion on those markets where the acquisition may be most likely to substantially lessen competition.

Competition analysis

How the acquisition could substantially lessen competition

38. As discussed in the Closure Report, Wilson Parking's acquisition of parking sites from Tournament could substantially lessen competition if the removal of Tournament as a competitor in public car parking would allow Wilson Parking to profitably increase prices to customers above the level that would prevail absent the acquisition.
39. To assess whether a substantial lessening of competition may occur from the acquisition, we examined:
- 39.1 the degree of competition between Wilson Parking and Tournament;

¹⁷ Wilson Parking Application at [13].

¹⁸ Wilson Parking Application at [84].

- 39.2 the degree of competition offered by other public car park operators (including Tournament’s retained sites);
- 39.3 the degree of competition (if any) from ancillary car parks¹⁹ and on-street parking;
- 39.4 the level of constraint (if any) imposed by alternatives such as public and other modes of transport;
- 39.5 the likelihood of new competition entering the relevant market, either through new builds or the acquisition of lease or management agreements; and
- 39.6 Wilson Parking’s incentive and ability to bid above competitive rates for leases/management agreements and, as such, foreclose entry.

Newmarket precinct

- 40. Newmarket is primarily a retail area, surrounded by the residential neighbourhoods of Remuera, Epsom and Parnell. Broadway and Khyber Pass Road are the major thoroughfares in the area. There is a centrally-located train station in Newmarket, along with a number of bus routes that run through the area.
- 41. Wilson Parking has sought clearance to acquire a lease for the Rialto car park (311 bays) in Newmarket, Auckland. This is a three-level car park between Kent and Teed Streets, located directly above the Newmarket Plaza.

Defining the geographic scope of the market

- 42. Wilson Parking’s application discusses Newmarket separately from Auckland’s CBD.
- 43. We consider that Newmarket is not part of Auckland’s CBD, but have not considered it necessary to precisely define geographic boundaries. The scope of the Newmarket geographic market was also not closely considered in the Section 47 Investigation.

Competition analysis – existing competition

- 44. There are four commercial car parks operators in Newmarket: Wilson Parking, Tournament, Care Park and Secure. Each of these operators provide a mix of casual, daily and monthly parking.
- 45. Additionally, Scentre Group Limited (Westfield) provides a large amount of casual parking (at the 277 Broadway site and the 277 Extreme site), to complement its retail operations at the 277 Broadway shopping centre. Auckland Transport provides on-street parking in the precinct.²⁰

¹⁹ “Ancillary car parks” refers to parking that is provided to complement the main purpose of a site, such as shopping centres and hotels.

²⁰ Auckland Transport manages Auckland Council’s on-street and off-street parking.

46. For daily and monthly parking, we consider that the primary constraints on Wilson Parking, post-acquisition, would come from the following sites:
- 46.1 Tournament’s retained Khyber Pass car park (379 bays);
 - 46.2 Care Park’s Broadway car park ([] bays); and
 - 46.3 Secure’s Old Brewery car park ([] bays).
47. Both the Khyber Pass and Broadway car parks are large, multi-story facilities with easy access from the main roads in Newmarket.
48. Secure’s Old Brewery car park is an outdoor site towards the western edge of Newmarket, located on land owned by the University of Auckland. That site is expected to be developed by the University, as part of a 30 year project, [].²¹
49. Khyber Pass, Broadway, and Old Brewery each offer substantial quantities of casual off-street parking. However, we consider that the primary constraint on Wilson Parking for casual parking, post-acquisition, would come from the 277 Broadway ([] bays) and 277 Extreme ([] bays) sites, both operated by Westfield. Each of these Westfield sites offers two hours of free parking if a \$10 purchase is made at Westfield retail shops.
50. []. Consequently, we consider that customers would have a range of parking alternatives were Wilson Parking to attempt a price increase in Newmarket. We do not consider that Wilson Parking’s acquisition of the Rialto site is likely to substantially lessen competition in Newmarket.

Te Aro precinct

51. Te Aro is a flat precinct in central Wellington; the southern area of the CBD. The area has a mix of retail shopping, entertainment venues and restaurants, as well as apartments. Te Aro has access from a number of major roads, including Courtenay Place, Cuba Street and Taranaki Street. It is also proximate to the Inner City Bypass and the off-ramp for the Wellington Motorway.
52. Wilson Parking has sought clearance to acquire leases for three sites in the Te Aro precinct: the Lombard car park, the Leftbank car park, and the Marion Street car park.
- 52.1 The Lombard site (314 bays) is a multi-level car park on Bond Street, with pedestrian access through to Manners Street.
 - 52.2 The Leftbank site (203 bays) is a multi-level car park, on the corner of Victoria and Ghuznee Street.

²¹ Commerce Commission telephone call with the University of Auckland (14 September 2015).

- 52.3 The Marion Street site (205 bays) is a multi-level car park, with two levels and pedestrian access to Cuba Street.

Defining the geographic scope of the market

53. Wilson Parking's application discusses all three of these sites as part of the Wellington CBD, along with the Plimmer Towers site on Boulcott Street. However, the application does not draw boundaries for the market.²²
54. We have considered the Plimmer Tower car park separately, as part of a distinct Boulcott Street precinct (discussed below). This is consistent with the Section 47 Investigation and the Closure Report.
55. We have considered the remaining three sites together, as they face similar competitive constraints. We have not found it necessary to define bright line boundaries around the Te Aro area.
56. In general, we consider that closer car parks provide stronger competitive constraint than more distant car parks. However, we also recognise that in Te Aro large, well-known car parks may constrain competitors over a wider area than smaller car parks.

Competition analysis – existing competition

57. There are currently five main commercial car park operators in the Te Aro area: Wilson Parking, Tournament, Care Park, Prime Parking, and Hope Gibbons. Each of these commercial operators offer casual, daily and monthly parking. With the acquisition, only four commercial operators would remain.
58. Post-acquisition, we consider that significant competitive constraints on Wilson Parking would remain from the following key sites in Te Aro:
- 58.1 Prime Parking's James Smith car park, which has [] bays;
- 58.2 Care Park's Courtenay Central car park, which has [] bays; and
- 58.3 the independent Hope Gibbons car park, which has [] bays.
59. All three of these sites are large, well-known, and []. Each would provide similar constraints for casual, daily, and monthly parking. In addition, Wellington City Council also provides a substantial quantity of on-street parking in the area, with a two-hour time limit during weekdays. The Council's on-street parking likely provides the baseline for hourly parking prices in off-street car parks, as on-street parking is the first choice for most casual parkers.²³
60. James Smith reopened in June 2015, after a prolonged closure for earthquake strengthening. Prime Parking initially set early bird rates for James Smith at \$5, but soon raised them to \$10. This was still substantially below prevailing prices in Te Aro.

²² Wilson Parking Application at [14].

²³ Commerce Commission interview with [].

61. Lombard, which is located 300 metres from James Smith, immediately observed a significant decrease in occupancy. In response, Tournament lowered early bird rates at Lombard from \$15 to \$10.²⁴ More recently, [].²⁵
62. Other operators provided similar evidence of the impact of the James Smith reopening. [], for example, noted that the reopening of both James Smith and Courtenay Central car parks had an impact across Te Aro.²⁶ Further, [] commented that the opening of James Smith, with its low pricing, had made the market harder for car park operators generally.²⁷
63. We consider that the James Smith reopening demonstrates the ability of that site to constrain future price increases across Te Aro. Even with its very competitive pricing, James Smith is [].
64. The Courtenay Central site, which is even larger than James Smith, is also gradually reopening following earthquake strengthening. Since Courtenay Central is not yet fully open, and has not priced its parking as aggressively as James Smith, we do not yet have clear evidence on the impact of its reopening. However, Courtenay Central's large size and central location also likely provide it with an ability to constrain future price increases across Te Aro.
65. Finally, we consider that the independently-operated Hope Gibbons car park would also be well-positioned to discipline an attempted price increase by Wilson Parking at any of the three Acquisition Sites in Te Aro. Hope Gibbons is centrally-located, well-known (appearing, for example, on motorway signage), competitively priced, and []. []²⁸
66. We consider that the remaining competition in Te Aro would sufficiently constrain Wilson Parking, post-acquisition, such that a substantially lessen of competition would be unlikely to occur in any relevant product market.

Boulcott Street precinct

67. Boulcott Street and the surrounding lanes are on a steep incline that connects The Terrace with Willis Street. It is close to the motorway's on- and off-ramps, and has pedestrian access down to Lambton Quay. The area is predominantly a mix of office buildings and student accommodation.
68. Wilson Parking has sought clearance to acquire a four-year lease for the Plimmer Tower car park (602 bays) on Gilmer Terrace, off Boulcott Street in Wellington. This is a multi-level car park integrated with the 34-story Plimmer Tower.

²⁴ Commerce Commission interviews with [] and [].

²⁵ Commerce Commission interview [].

²⁶ Commerce Commission interview with [].

²⁷ Commerce Commission interview with [].

²⁸ []

Defining the scope of the geographic market

69. The Boulcott Street precinct was considered in the Section 47 Investigation. However, the Closure Report does not identify specific geographic boundaries.
70. We take a similar approach here, simply noting that (as for other precincts) closer car parks are likely to provide stronger competitive constraints than more distant alternatives.

Competition analysis – existing competition

71. There are currently four commercial car parks operators in Boulcott Street: Wilson Parking, Tournament, Care Park and Prime Parking. Post-acquisition, only three operators would remain. Each of these operators offer casual, daily and monthly parking.
72. For each of these product markets, we consider that the competitive constraints on Wilson Parking in the Boulcott Street precinct, post-acquisition, would primarily arise from Care Park’s Capital site. The Capital site is centrally-located on Boulcott Street, has [] bays, [].²⁹ Industry participants expressed the view that Capital is a constraint on Wilson Parking in the area, and would continue to constrain Wilson Parking post-acquisition.³⁰
73. This is also supported by the Colmar Brunton survey results from the Section 47 Investigation, which indicated that 17% of Wilson Parking and Tournament customers in the Boulcott Street area would switch to other car parks if an operator increased prices by 5%.³¹
74. Moreover, unlike Newmarket and Te Aro, we note that Boulcott Street precinct is unlikely to be, itself, a destination for most parkers. Rather, we consider that those people parking in Boulcott Street are, by and large, headed into neighbouring precincts, such as Lambton Quay, Willis Street or The Terrace.
75. Each of these precincts contain a number of alternative parking sites. For example, Prime Parking operates a []-bay site at 139 The Terrace, approximately 200 metres from the top of Boulcott Street, and Wellington City Council’s []-bay Clifton Terrace site is a further 200 metres down the road.
76. We consider that Wilson Parking would continue to be constrained from existing competition in and around the Boulcott Street precinct, such that the acquisition would not be likely to substantially lessen competition in any relevant product market.

²⁹ Letter from Care Park to the Commerce Commission (28 September 2015).

³⁰ Commerce Commission interviews with [], and [].

³¹ Closure Report at [108].

Market for acquiring public car parking leases and management agreements

77. In the Section 47 Investigation, we defined a national market for the management of car park contracts. We considered that Wilson Parking would continue to face significant competition when tenders come up for renewal.
78. We do not consider that this current acquisition brings about a material change to the market for acquiring public car parking leases and management agreements. In other words, we do not consider it likely that this acquisition would give Wilson Parking the ability to significantly reduce the prices it pays to landlords for leases.

Overall conclusion

79. We are therefore satisfied that the proposed acquisition is unlikely to substantially lessen competition in any relevant market. Wilson Parking will continue to face competition from existing commercial operators of car parks.

Determination on notice of clearance

80. 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 a market in New Zealand.
81. Under s 66(3)(a) of the Commerce Act 1986, the Commission gives clearance to Wilson Parking New Zealand Limited to acquire leases for the Acquisition Sites, as described at paragraphs 2 and 3 of this determination.

Dated this 11th day of November 2015

Dr Mark Berry

Chairman