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**COMMERCE COMMISSION**

**Decision No. 403**

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

**Cremation Society of Canterbury Limited**

**and**

**Harewood Memorial Gardens & Crematorium Limited**

**The Commission:** M J Belgrave (Chair)  
M N Berry  
P R Rebstock

**Summary of Proposed Acquisition:** The acquisition by the Cremation Society of Canterbury Limited of the remaining 55.14% in Harewood Memorial Gardens & Crematorium 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:** 7 September 2000

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## **THE PROPOSAL**

- 1 Pursuant to section 66(1) of the Commerce Act 1986 (“the Act”), the Cremation Society of Canterbury Limited gave notice to the Commission dated 29 August 2000, seeking clearance to acquire the remaining 55.14% in Harewood Memorial Gardens & Crematorium Limited.

## **THE PROCEDURES**

- 2 Section 66(3) of the Act requires the Commission 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 the notice agree to a longer period. A decision on the application is due by 13 September 2000.
- 3 The applicant sought confidentiality for certain information contained in the application, 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 application. When the confidentiality order expires, the provisions of the Official Information Act 1982 will apply to the information.
- 4 The Commission’s determination is based on an investigation conducted by its staff, and their subsequent advice to the Commission.

## **THE PARTIES**

### **Cremation Society of Canterbury Limited (“Cremation Society”)**

- 5 The Cremation Society, a private company, operates a crematorium facility in Linwood Avenue, Christchurch. The Cremation Society provides cremation services as well as the provision of perpetual memorials.

### **Harewood Memorial Gardens & Crematorium Limited (“Harewood Crematorium”)**

- 6 Harewood Crematorium is a private company which operates a crematorium facility at John’s Road, Harewood, Christchurch. In addition to cremation services, Harewood Crematorium provides tenure memorials (memorials for a limited term).

## **BACKGROUND**

- 7 The customary practice following the death of a person is for the next of kin to engage a funeral director who provides a range of services connected with the funeral arrangements. These include organising and providing facilities for the funeral service, inserting notices in the newspaper, and cremation or burial arrangements.
- 8 The client family decides between burial or cremation as the method of burial. The Commission understands that the cost of burial can be significantly higher than cremation, although this depends upon a number of factors, including whether a burial plot is required to be purchased.
- 9 If cremation is the preferred choice, the funeral director then engages a crematorium to provide the necessary cremation services. The facilities at a crematorium generally include a receiving lounge, a cremator, an administration complex, and a chapel.

However, some crematoriums may offer less services, in some cases simply offering a cremator.

### Decision 312

- 10 In November 1997, the Cremation Society applied to the Commission, pursuant to section 66(1) of the Act, seeking clearance to acquire up to 100% of the shares in Harewood Crematorium. On 3 December 1997 the Commission determined to give a clearance for the proposed acquisition, pursuant to section 66(3)(a) of the Act. Following the Commission's determination, the Cremation Society purchased 44.86% of the shares in Harewood Crematorium.
- 11 Section 66(5)(a) of the Act provides that a clearance given under section 66(3) of the Act expires twelve months after the date on which it was given. The clearance given to the Cremation Society therefore expired on 3 December 1998. This current application has been made due to the expiry of that earlier clearance.

## MARKET DEFINITION

### Overview

- 12 The purpose of defining a market 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, and in which the application of section 47(1) of the Act can be examined.
- 13 Section 3(1A) of the Act provides that:
 

“...the term ‘market is a reference to a market in New Zealand for goods and services as well as other goods and services, that, as a matter of fact and commercial common sense, are substitutable for them.”
- 14 Principles of market definition are contained in *Telecom Corporation of New Zealand Ltd v Commerce Commission*<sup>1</sup>, and in the Commission's *Business Acquisition Guidelines*<sup>2</sup> (the Guidelines). These principles are outlined below.
- 15 Markets have three dimensions: product type, geographical extent and functional level. (In some situations it is also necessary to allow for time, and to consider a temporal dimension.) A market includes products which are close substitutes in the eyes of buyers, and excludes all other products. The boundaries of the product and geographical markets are identified by considering the extent to which buyers are able to substitute other products, or geographical regions, when there is an incentive to do so because of a change in relative prices. A market is the smallest area of product and geographic space in which all such substitution possibilities are encompassed. Within this space, a hypothetical, profit-maximising, monopoly supplier could exert market power, because buyers, facing a rise in price, would have no close substitutes to which to turn.
- 16 A properly defined market includes products which are regarded by buyers or sellers as being not too different (‘product’ dimension, and not too far away (‘geographical’ dimension), and are therefore products over which the hypothetical monopolist would

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<sup>1</sup> (1991) 4 TCLR 473

<sup>2</sup> Commerce Commission, *Business Acquisition Guidelines*, 1999, pp 11-16

need to exercise control in order for it to be able to exert market power. A market defined in these terms is one within which a hypothetical monopolist would be in a position to impose, at the least, a “small yet significant and non-transitory increase in price” (the “*ssnip*” test), assuming that other terms of sale remain unchanged.

- 17 Markets are also defined by functional level. Typically, production, distribution and sale occurs through a series of stages, with markets intervening between suppliers at one vertical stage and buyers at the next.
- 18 A properly defined market includes products which are regarded by buyers or sellers as being not too different (‘product’ dimension, and not too far away (‘geographical’ dimension), and are therefore products over which the hypothetical monopolist would need to exercise control in order for it to be able to exert market power. A market defined in these terms is one within which a hypothetical monopolist would be in a position to impose, at the least, a “small yet significant and non-transitory increase in price” (the “*ssnip*” test), assuming that other terms of sale remain unchanged.
- 19 Markets are also defined by functional level. Typically, production, distribution and sale occurs through a series of stages, with markets intervening between suppliers at one vertical stage and buyers at the next.
- 20 The applicant notes that both the Cremation Society and Harewood Crematorium are engaged in the following activities:
  - the provision of cremation services;
  - the interment of ashes; and
  - the provision of memorials.

#### *Cremation and Burial Services*

- 21 Cremation is one form of final disposition. The choice of cremation does not limit or dictate the funeral services available. Most cremations are preceded by some type of viewing or funeral service.
- 22 The process of cremation involves placing a casket or container into a cremation chamber, which then reduces the body ultimately to ashes form.
- 23 Burial is the other form of final disposition. In New Zealand, burials must be performed in an area zoned as “burial land”, pursuant to the Burial and Cremation Act 1964. The Commission understands that earth burial can be significantly more expensive than cremation. In addition to the cost of a plot, there are maintenance and digging fees to pay, resulting in a cost that may be up to two or three times that of cremation.
- 24 Notwithstanding the cost however, the preferred form of disposition is a matter for the bereaved family, and may also be heavily influenced by factors such as family history, and religious and cultural beliefs. For example, not all religious groups endorse cremation.
- 25 In defining a market for analysing this application, the Commission has adopted the *ssnip* test. The information available indicates that, in response to a *ssnip* imposed by the provider of cremation services, it is highly unlikely that a client family will substitute burial services. This, when considered with the other factors influencing the decision regarding burial or cremation, suggests that cremation does not fall within the same market as burial services.

- 26 For the purposes of analysing the competitive effects of this proposal, the Commission has determined that the appropriate market is that for the provision of cremation services.

#### *Interment of Ashes / Provision of Memorials*

- 27 Ashes may be interred (placed) in the ground or into a niche in an Ashes Wall. Both the Cremation Society and Harewood Crematorium provide interment of ashes, and various memorials (eg. bronze plaques, roses or trees) to the general public in their respective memorial garden facilities.
- 28 Interment of ashes can also be made in the ash plots of council-owned cemeteries in Christchurch, while a number of monumental masons operate in the city, providing memorials and associated products.

#### *Geographic Market*

- 29 Both parties to the acquisition operate in Christchurch. The Commission understands that the Cremation Society tends to service the eastern side of the city, and that Harewood Crematorium tends to service the western side. However, it is acknowledged that the choice of service provider will at all times be a matter for the bereaved family, in consultation with the funeral director. The Commission also notes the recent entry of a third cremation service provider, in the south-west of Christchurch.
- 30 The Commission concludes that the geographic market is the greater Christchurch region.

#### **Conclusion on Market Definition**

- 31 The Commission considers that the following markets are relevant for the consideration of the present proposal:
- the market for the provision of cremation services in Christchurch; and
  - the market for the interment of ashes and provision of memorials in Christchurch.

## **COMPETITION ANALYSIS**

### **Introduction**

- 32 Section 47(1) of the Commerce Act prohibits certain business acquisitions:
- “No person shall acquire assets of a business or shares if, as a result of the acquisition, -
- (a) That person or another person would be, or would be likely to be, in a dominant position in a market; or
  - (b) That person’s or another person’s dominant position in a market would be, or would be likely to be, strengthened.”
- 33 Section 3(9) of the Commerce Act states:
- “For the purposes of sections 47 and 48 of this Act, a person has ... a dominant position in a market if that person as a supplier ... of goods and services, is or are in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is ... in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in a market regard shall be had to-

- (a) The share of the market, the technical knowledge, the access to materials or capital of that person or those persons:
- (b) The extent to which that person is ... constrained by the conduct of competitors or potential competitors in that market:
- (c) The extent to which that person is ... constrained by the conduct of suppliers or acquirers of goods or services in that market.”

34 The test for dominance has been considered by the High Court. McGechan J stated:<sup>3</sup>

“Dominance includes a qualitative assessment of market power. It involves more than ‘high’ market power; more than mere ability to behave ‘largely’ independently of competitors; and more than power to effect ‘appreciable’ changes in terms of trading. It involves a *high degree of market control*.”

35 Both McGechan J and the Court of Appeal, which approved this test,<sup>4</sup> stated that a lower standard than “a high degree of market control” was unacceptable.<sup>5</sup> The Commission has acknowledged this test:<sup>6</sup>

“A person is in a dominant position in a market when it is in a position to exercise a high degree of market control. A person in a dominant position will be able to set prices or conditions without significant constraint by competitor or customer reaction.”

36 The Commission’s role in respect of an application for clearance of a business acquisition is prescribed by the Commerce Act. Where the Commission is satisfied that the proposed acquisition would not result, or would not be likely to result, in an acquisition or strengthening of a dominant position in a market, the Commission must give a clearance. Where the Commission is not satisfied, clearance is declined. This test is applied in the following analysis.

## **The Market for the Provision of Cremation Services in Christchurch**

### *Market Concentration*

37 An examination of market concentration may give a useful first view of whether a merged firm may be constrained by other participants, and thus on the extent to which it may be able to exercise market power.

38 The *Business Acquisitions Guidelines* specify certain “safe harbours” which can be used to assess the likely impact of a merger in terms of s 47 of the Act -

“In the Commission’s view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist:

- the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;
- the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.” (p 17)

<sup>3</sup> *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 103,787 (HC)

<sup>4</sup> *Commerce Commission v Port Nelson Ltd* (1996) 5 NZBLC 104,142 104,161 (CA)

<sup>5</sup> *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 103,787 (HC)

and *Commerce Commission v Port Nelson Ltd* (1996) 5 NZBLC 104,142 104,161 (CA)

<sup>6</sup> *Business Acquisition Guidelines*, Section 7

- 39 These safe harbours recognise that both absolute levels of market share, and the distribution of market shares between the merged firm and its rivals, is relevant in considering the extent to which the rivals are able to provide a constraint over the merged firm. The Commission went on to state (at page 17) that:
- “Except in unusual circumstances, the Commission will not seek to intervene in business acquisitions which, given appropriate delineation of the relevant market and measurement of shares, fall within these safe harbours.”
- 40 Although, in general, the higher the market share held by the merged firm, the greater the probability that dominance will be acquired or strengthened (as proscribed by s 47 of the Act), market share alone is not sufficient to establish a dominant position in a market. Other factors intrinsic to the market structure, such as the extent of rivalry within the market and constraints provided through market entry, also typically need to be considered and assessed.
- 41 There is no published market share data on the cremation services market in Christchurch. In this present case, the applicant has estimated the market shares of participants based upon its market knowledge and experience. The Commission has made enquiries of participants, and concludes that the estimations provided by the applicant are reasonable. These market shares are shown below in Table 1.

**Table 1**  
**Estimated Shares in the Market for the**  
**Provision of Cremation Services in Christchurch**

<b>Party</b>	<b>Estimated Market Share</b>
The Cremation Society	55-60%
Harewood Crematorium	35-40%
<b>Combined entity</b>	<b>90-100%</b>
Garden City Crematory	0-10%
<b>Total</b>	<b>100%</b>

- 42 An estimated market share of 90-100% places the combined entity well outside the Commission’s “safe harbours” (refer paragraph 38). However, as stated earlier, the fact that a proposed acquisition may lead to a market share falling outside these “safe harbours” does not necessarily mean that it will be likely to result in the acquisition or strengthening of a dominant position in a market. Additional factors must also be considered before a conclusion on dominance is reached. These factors are discussed below.

*Constraint from Existing Competition*

- 43 The proposal involves the two major providers of cremation services in Christchurch. A new entrant has entered the market since Decision 312 (December 1997). Garden City Crematory (“Garden City”) operates a crematorium facility from Vickers Road, Sockburn, Christchurch. Garden City began operating in January 2000. It operates



only a cremator, and does not offer other facilities such as a chapel, or the provision of memorials. Garden City estimated its market share at [ ]%.

- 44 The Commission understands that there was some pricing reaction from Harewood Crematorium following the entry of Garden City. However, pricing returned to previous levels shortly thereafter. Funeral directors commented that the choice of crematorium was more a decision based upon family history and location, rather than price. While the owners of Garden City commented that its [

].

- 45 The question is whether Garden City is in a position to effect a constraint upon the combined entity, in the event that the combined entity attempts to exercise market power. Information provided to the Commission suggests that Garden City will provide such a constraint. Garden City has entered the market and is fully operational. It has an established presence and a developing relationship with the funeral service community in Christchurch. It does not face any resource consent or technical barriers to its ongoing operation.
- 46 Having regard to the above factors, the Commission concludes that current competition provided by Garden City is likely to provide an effective constraint on the combined entity.

#### *Constraint from Potential Competition*

- 47 In the Commission's view, a business acquisition is unlikely to result in a dominant position in a market if the threat of new entrants acts as a significant constraint on behaviour in that market. An assessment of the nature and extent of that constraint represents a key element of the Commission's assessment of competition and market dominance. Evaluation of the weight to be given to the possibility of new entry requires assessing the conditions of entry, and identifying any barriers to entry. If these barriers are high in aggregate, the likelihood of new entry is diminished.
- 48 The applicant submits that there are low barriers to entering the market, with the skills and technology to provide a new crematorium readily available. In particular, the applicant submits that existing funeral directing services could expand into cremation services in a timely manner.
- 49 Industry sources advised that there are low barriers to entry into cremation services. The major set up costs relate to suitable premises, and the purchase of a cremator.
- 50 The Commission understands that there is suitably zoned land available in the Christchurch area, on which to site a cremation business. Given that commercial or industrial land is available, there are unlikely to be concerns in obtaining the necessary resource consents. Garden City advised that it applied for its consents and was operational within [ ].
- 51 The cost of a cremator varies depending upon its size and operating capacity. The applicant, in its earlier application, advised that the cost of purchasing and installing a large cremator was approximately \$360,000. In this current application it submits that entry can be achieved on a more modest scale, and notes that funeral directors on the West Coast and at Ashburton have recently begun operations at a cost of approximately [ ].

- 52 Garden City advised that its cremator, which can conduct up to [ ] cremations a day, cost [ ]. Patersons Funeral Services & Ashburton Crematorium (of Ashburton) advised that it installed a cremator four years ago, at a cost of [ ]. Prior to this it used crematory services in Christchurch and Timaru. The resource consent process took [ ].
- 53 Industry sources advised that funeral directors were the most likely parties to enter the market, and could do so at relatively low cost, and in a timely manner. It appears to be relatively common for funeral directors to install their own cremators. Funeral directors whom have done so have advised the Commission that there are no significant barriers to address.
- 54 On the basis of information provided to date, the Commission concludes that the barriers to entry into the market for cremation services are low, and the threat of entry can therefore be regarded as an effective constraint upon the attempted exercise of market power by the combined entity.

#### *Constraint from Substitute Services*

- 55 The applicant submits further that the combined entity will be constrained by local cemeteries which provide an alternative in the form of burial services or interment.
- 56 The Commission understands that burial costs are significantly higher than the cost of cremation. Burial requires the purchase of a plot, a maintenance fee, and a fee dependent on the depth of burial. However, notwithstanding these additional costs, the Commission understands that price is not a significant factor which influences the decision relating to the method of burial which is used. Factors such as family history, and religious and cultural beliefs will form a greater part of the decision than the actual costs of the forms of disposal.
- 57 The Commission acknowledges that the choice of burial provides some degree of competition to cremation services. However, the cost of the forms of disposal is not the determinative factor when selecting burial or cremation. In this situation therefore, adopting a price comparison between the two may not ultimately prove helpful in a competition analysis. For the purposes of this application, the Commission concludes that substitute services (such as burial) are unlikely to provide an effective constraint upon the behaviour of the combined entity in the market for the provision of cremation services.

#### **Conclusion on the Market for the Provision of Cremation Services in Christchurch**

- 58 The proposed acquisition will result in the combined entity attaining a high market share. However, the Commission concludes that Garden City, an established independent operator, is likely to provide an effective constraint upon the combined entity.
- 59 Further, barriers to entry into cremation services are low, both in regard to the financial outlay required, and the timeframe involved. On the basis of information provided, the Commission concludes that the potential entry of another provider is likely to provide an effective constraint upon the behaviour of the combined entity.
- 60 Given these factors, the Commission concludes that the acquisition would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the market for the provision of cremation services in Christchurch.

### **The Market for the Interment of Ashes and the Provision of Memorials in Christchurch**

- 61 The proposed acquisition would lead to the aggregation of the activities of two substantial providers of interment of ashes and memorials to the public in the Christchurch area. The Commission notes that Garden City does not currently offer either service.
- 62 While the Commission notes that the proposal will result in the reduction of choice to some degree, the public will continue to have a range of options, including interment of the ashes in the ash plots at one of six council-owned cemeteries in Christchurch, having the ashes scattered in a favourite location, or held by the next of kin.
- 63 The provision of memorials is also carried out by monumental masons, several of whom operate in the Christchurch area, and the wider Canterbury region. The Commission understands that monumental masons will complete memorials for client families that can then be placed within memorial gardens and cemeteries in Christchurch.

### **Conclusion on the Market for the Interment of Ashes and the Provision of Memorials in Christchurch**

- 64 Given these factors, the Commission concludes that the acquisition would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in the market for the interment of ashes and the provision of memorials in Christchurch.

### **OVERALL CONCLUSION**

- 65 The Commission has considered the impact of the proposed acquisition in the following markets:
- the market for the provision of cremation services in Christchurch; and
  - the market for the interment of ashes and the provision of memorials in Christchurch.
- 66 Having regard to the factors set out in section 3(9) of the Commerce Act, and all other relevant factors, the Commission is satisfied that the proposed acquisition would not result, or would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

**NOTICE ON DETERMINATION OF CLEARANCE**

67 Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance to the Cremation Society of Canterbury Limited to acquire the remaining 55.14% in Harewood Memorial Gardens & Crematorium Limited.

Dated this 7<sup>th</sup> day of September 2000

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M J Belgrave  
Chair