

PUBLIC VERSION

COMMERCE ACT 1986: BUSINESS ACQUISITION

SECTION 66: NOTICE SEEKING CLEARANCE

Date: 18 October 2006

The Registrar
Market Structure Group
Commerce Commission
PO Box 2351
WELLINGTON

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

PART I: TRANSACTION DETAILS

1 *The Business Acquisition*

- 1.1 The business acquisition for which clearance is sought is the acquisition by Fulton Hogan Limited ("**Fulton Hogan**") of the contracting assets, quarry and land of G J Beynon Contracting Limited ("**G J Beynon**") as are more particularly identified in appendix 1 as **attached**. Associated with this purchase is the acquisition by Fulton Hogan of 50% of the shares in Westland Asphalt Limited ("**WAL**") not currently owned by Fulton Hogan. The shares in WAL are to be purchased from two of the existing shareholders in WAL, namely J C Beynon and J G Beynon ("**the proposed acquisition**").
- 1.2 To date, contracts for the acquisition have not been negotiated.

2 *The Person giving notice*

- 2.1 This notice is given by:

Fulton Hogan Limited
29 Sir William Pickering Drive
Christchurch

Telephone No: (03) 357 0618
Fax No: (03) 357 1450

Attention: Peter De Goldi
- 2.2 All correspondence and notices in respect of this application should be directed in the first instance to:

Anthony Harper
Lawyers
Anthony Harper Building
47 Cathedral Square
PO Box 2646
Christchurch

Telephone No: (03) 3790 920
Fax No: (03) 366 9277
Email: chris.weir@ah.co.nz
Attention: Chris Weir

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3 *Confidentiality*

The fact of the proposed acquisition

3.1 Confidentiality is not required for the fact of the proposed acquisition.

Specific information contained in or attached to the notice

3.2 Confidentiality is sought for all information deleted or excluded in the public version of this notice. Confidentiality is sought for all confidential information indefinitely or until Fulton Hogan advises the Commission the information is no longer confidential.

3.3 The information that has been deleted is commercially sensitive and valuable information that is confidential to Fulton Hogan, and/or G J Beynon and/or the Beynons (together the "**participants**"). Disclosure of that information could result in a material financial loss and prejudice to the competitive position of the participants. In this respect, the participants rely on section 9(2)(b) of the Official Information Act 1982. The foregoing applies equally in respect of all additional information, expressed to be confidential, that the participants may provide in relation to this application.

3.4 Fulton Hogan requests that it is notified of any request made to the Commission under the Official Information Act for confidential information and that the Commission seeks Fulton Hogan's views as to whether the information remains confidential and commercially sensitive at the time those requests are being considered.

4 *Details of the Participants*

The Acquirer

4.1 The acquirer is Fulton Hogan. Fulton Hogan's businesses include road construction and surfacing, quarrying, highway maintenance for local and national government, production of asphalt, bitumen products and emulsion, land development, forestry development, civil construction, airport runway construction and surfacing, facilities maintenance and waste collection and landfill operation.

4.2 The subsidiaries and associates of Fulton Hogan are set out on pages 26, 29 and 30 of the latest annual report of Fulton Hogan for the year ended 30 June 2006 a copy of which is **attached** at Appendix 2.

4.3 Contact details are included at paragraphs 2.1 and 2.2 above.

4.4 For further details about Fulton Hogan see www.fultonhogan.co.nz.

Target

4.5 The target company which owns the assets to be acquired is G J Beynon, which is a quarry operator and contractor which produces and sells aggregates and provides general contracting services, including the laying of asphalt and sealing chip.

4.6 WAL is a joint venture company currently operated by Fulton Hogan and two existing shareholders of Beynon, namely John C Beynon and James G Beynon. The company has been operated as a joint venture company manufacturing and selling asphalt since its incorporation in 1960.

4.7 The contact details for G J Beynon and the Beynons are:

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G J Beynon Contracting Limited
58 Alexander Street
Greymouth

Telephone No: 03 768 4992
Contact: Jack Beynon

5 *Persons interconnected to or associated with the Participants*

Fulton Hogan Subsidiaries

5.1 The following companies are wholly owned subsidiaries (unless otherwise stated) of Fulton Hogan:

Company	Principal Activity
Canterbury Hardfill Limited	Landfill operator
Cooper Waste Limited	Waste collection
EnviroCare Limited	Holding company
EnviroWaste Services Limited	Waste collection and disposal
FRH Astec Pty Limited	Contracting
FRH Group Pty Limited	Contracting
FRH Holdings Pty Limited	Holding company
FRH Projects Pty Limited	Contracting
FRH Victoria Pty Limited	Contracting
Fulton Hogan Inc (American Samoa)	Contracting
Fulton Hogan Investment Limited	Holding company
Fulton Hogan Land Development Limited	Land development
Fulton Hogan Pty Limited	Non trading
Sram Pty Limited	Non trading
A.C.N 099 079 348 Pty Limited	Non trading
Stonemaster Quarries Pty Limited	Contracting
Tartan Industries Limited	Property holding
Waikato Regional Landfills Limited	Landfill operator
Wairoa Quarries Limited (75% owned)	Quarrying
West Meadows Limited (69% owned)	Land development
Yellow Rubbish Company Limited	Waste collection

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5.2 The following companies are associates of Fulton Hogan:

Company	Fulton Hogan Interest	Activity	Other Owner/s
Allied FH Limited	50%	Quarrying	Allied Concrete Limited – 50%
Allied Asphalt Limited	50%	Asphalt production	Bitumix Limited – 50%
Blackhead Quarries Limited	50%	Quarrying	Palmer & Son Limited – 50%
Canterbury Waste Services Limited	50% owned by EnviroWaste Services Limited	Landfill operator	Transpacific Industries Group (NZ) Limited
Coastline Markers Limited	50%	Road markers	Coastline Roadmarkers Limited – 50%
EnviroWay Limited	50% owned by EnviroWaste Services Limited	Waste collection	Brambles New Zealand Limited – 50%
Horokiwi Quarries Limited	50%	Quarrying	Hirock Limited – 50%
Manawatu Waste Limited	50% owned by EnviroWaste Services Limited	Waste collection	Colmar Holdings Limited – 50%
Midwest Disposals Limited	50% owned by Manawatu Waste Limited	Landfill operator	Transpacific Industries Group (NZ) Limited – 50%
Northern Waste Handling Limited	50% owned by EnviroWaste Services Limited	Waste transfer station	JJ Richards & Sons NZ Limited – 50%
Oamaru Shingle Supplies Limited	50%	Aggregate and masonry production	Fletcher Concrete & Infrastructure Limited – 50%
Pikes Point Transfer Station Limited	50% EnviroWaste Services Limited	Waste transfer station	Transpacific Industries Group (NZ) Limited – 50%
Refill Transport Limited	50% EnviroWaste Services Limited	Transport	R J Doughty Limited – 50%
Roadcare Pty Limited	50%	Contracting	Pioneer Road Services Pty Limited – 50%
Rodney Aggregate Supplies Limited	50%	Quarrying	Fletcher Concrete and Infrastructure Limited – 50%
South East Asphalt Pty Limited	50%	Asphalt production	Boral Australia Limited – 50%
Tiromoana Station Limited	100% TransWaste Canterbury Limited of which Canterbury Waste Services Limited holds 50% of the shares	Property holder	Transpacific Industries Group (NZ) Limited through its shareholding in Canterbury Waste Services Limited
TransWaste Canterbury Limited	50% of the shares are owned by Canterbury Waste Services Limited	Landfill operator	The remaining shares are owned by five Canterbury City and District Councils
Westland Asphalt Limited	50%	Asphalt production	JC and JG Beynon

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WFH Properties Limited	50%	Trustee company	Danne Mora Holdings Limited – 50%
WFH Properties No. 2 Limited	50%	Land development	WFH Properties Limited owns 100% of the shares

5.3 Fulton Hogan is involved in the following joint ventures:

Joint Venture	Fulton Hogan Interest	Principal Activity	Other Owner/s
Fulton Hogan Land Development Limited and Danne Mora Holdings Limited joint venture	50% Fulton Hogan	Land development	Dannemora Holdings Limited – 50%
Fulton Hogan Limited and Montgomery Watson Harza Limited joint venture	50% Fulton Hogan	Civil construction	Montgomery Watson Harza Limited – 50%
Fulton Hogan Limited and Smithbridge New Zealand Limited joint venture	50% Fulton Hogan	Road and bridge construction	Smithbridge New Zealand Limited – 50%
Fulton Hogan Limited and Smithbridge New Zealand Limited joint venture	50% Fulton Hogan	Road and bridge construction	Smithbridge New Zealand Limited – 50%
Northern Gateway Alliance	35% Fulton Hogan	Road and bridge construction	Leighton's Contracting Limited – 35% - various other planners and consultants – 30%
Fulton Hogan Limited and Opus International Consultants Limited and TBS Farnsworth Limited	25% Fulton Hogan	Civil maintenance	Opus International Consultants Limited - 25% TBS Farnsworth Limited - 50%

5.4 Other than Fulton Hogan itself to the extent set out in this notice, none of its subsidiaries or associate companies operate directly in the same geographic markets as G J Beynon.

Fulton Hogan Shareholders

5.5 Fulton Hogan is an unlisted public company with 1909 shareholders. Fulton Hogan has 208,021,197 shares currently on issue. The only company which owns over 10% of the shares in Fulton Hogan is Shell New Zealand Holding Company Limited ("**Shell**") which owns 36.7% of the shares. Fulton family interests own []% of the shares and Hogan family interests own []% of the shares.

5.6 The ultimate parent of Shell is Royal Dutch Shell which is incorporated in the Netherlands and owns companies worldwide. Shell does not operate in the markets identified in paragraph 11.14.

5.7 Fulton Hogan's latest annual report for the year ending 30 June 2006 which is attached as Appendix 2 gives more background information on the Fulton Hogan Group activities.

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G J Beynon

5.8 G J Beynon is owned by members of the Beynon family as follows:

James Gilbert Beynon	150,500 shares
John Cameron Beynon	150,500 shares
Gilbert Henry Beynon	150,500 shares
Estate of Donald Joseph Beynon	<u>150,500</u> shares
Total Shares	602,000

WAL

5.9 WAL is owned in the following proportions:

Fulton Hogan	3,000 shares
John Cameron Beynon	2,996 shares
James Gilbert Beynon	<u>4</u> shares
Total shares	6,000

5.10 WAL does not hold shares in any other company.

6 *Beneficial Interests/entitlements between participants*

There are no beneficial interests, entitlements or other pecuniary interests between the participants.

7 *Links between participants*

Fulton Hogan is a 50% shareholder in WAL. The remaining shares are owned by John C Beynon and James G Beynon as set out in paragraph 5.9. Each of the Beynon shareholders is also a shareholder in G J Beynon. WAL does not own any assets but hires plant from Fulton Hogan and contracts staff from G J Beynon. WAL will cease operating and the plant it operates will be returned to Fulton Hogan. Shell is a supplier of petroleum products to G J Beynon. There are no other formal or informal links between the participants.

8 *Directorships in other companies in which the target company operates*

No directors of Fulton Hogan hold directorships in any other companies which are involved in the markets in which G J Beynon operates.

9 *The business activities of each participant (and interconnected or associated parties)*

Fulton Hogan

9.1 The principal activities of Fulton Hogan (whether undertaken by Fulton Hogan or any of its subsidiaries or associates) are set out in this section.

Road Construction and Surfacing

9.2 Road construction and surfacing accounted for approximately []% of the total revenue of Fulton Hogan for the year ended 30 June 2006.

9.3 Road construction and surfacing is carried out by Fulton Hogan throughout New Zealand and involves contracts with Transit New Zealand ("**Transit**") and various Territorial Local Authorities ("**TLAs**"). The work is carried out either through annual or longer term contracts or through one off contracts. Contracts are invariably let through a tender process.

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Quarrying, production of metal and aggregates

- 9.4 Fulton Hogan operates 18 quarries throughout New Zealand from which it produces a range of metal and aggregate products for the road construction and surfacing markets. Fulton Hogan produces metal and aggregates for its own use and also for sale to third parties. Quarrying production and metal and aggregates accounted for approximately []% of the total revenue of Fulton Hogan for the year ended 30 June 2006.

Highway maintenance for local and national government

- 9.5 Fulton Hogan operates in this market throughout New Zealand and the work primarily relates to contracts which are let between 3-5 years by Transit and by local Councils. The work is always tendered for. Work carried out for Transit is 100% funded by Transfund. Work carried out for TLAs is funded up to 50% by Transfund. Highway maintenance work accounted for approximately []% of the total revenue of Fulton Hogan for the year ended 30 June 2006.

Production of Asphalt and bituminous product

- 9.6 Fulton Hogan has 16 asphalt production plants throughout New Zealand in which it produces asphalt, bituminous product and emulsion for road construction and surfacing, sealing for carparks, pathways, tennis courts and drives. These products are also sold by Fulton Hogan to third parties. Production of asphalt and bituminous product work accounted for approximately []% of the total revenue of Fulton Hogan for the year ended 30 June 2006.

Other Businesses

- 9.7 Fulton Hogan is also involved in the following markets, but G J Beynon does not operate in those markets:
- (a) Land development for residential sections;
 - (b) Forestry development;
 - (c) Civil construction;
 - (d) Airport runway construction and surfacing;
 - (e) Facilities maintenance;
 - (f) Waste collection and landfill operation.
- 9.8 In New Zealand, Fulton Hogan employs 3451 people in 770 business units located in 16 Regions, branch offices and depots situated from Invercargill to Kaitiaia.

G J Beynon

- 9.9 The principal activities of G J Beynon are the ownership and operation of a quarry producing a range of aggregate products together with the carrying out of bitumen surfacing business for Transit, TLAs and other parties for roads, carparks and driveways primarily in the Grey and Westland Districts of the West Coast of the South Island. G J Beynon operates from Greymouth.

WAL

- 9.10 WAL manufactures and sells asphalt products.

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The Beynons

9.11 The Beynons are employed by G J Beynon and are intimately involved on a daily basis in the operation of that company through physically operating mobile and fixed plant.

10 *The reasons for the proposal and the intentions in respect of the acquired or merged business.*

10.1 G J Beynon has been run for a number of years by four brothers, one of whom died in April 2005. All four brothers were equal shareholders in the company. The current shareholders of G J Beynon are all in their 60's and 70's and wish to retire from the business. Accordingly G J Beynon has offered to sell specified assets of the business to Fulton Hogan.

10.2 The proposed acquisition represents an opportunity for Fulton Hogan to grow its business opportunities on the west coast of the South Island and gives it the opportunity to extend its network of business bases by expanding its current operation in Greymouth. At present Fulton Hogan's Greymouth operation primarily services current highway maintenance contracts Fulton Hogan holds with Grey District Council and Transit together with maintenance work it carries out for Ontrack. G J Beynon is not involved in these markets.

10.3 The proposed acquisition would give Fulton Hogan a more rounded business on the West Coast, which will be less dependent on the winning of one off maintenance contracts.[

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By doing so through the proposed acquisition the shareholders of G J Beynon have the opportunity to retire from the business with the company receiving a fair price for its assets and with Fulton Hogan gaining the benefits of the reputation built up by G J Beynon over the previous decades. Fulton Hogan also has the opportunity to offer existing experienced staff of G J Beynon ongoing employment with Fulton Hogan. The wellbeing of current G J Beynon staff is important to all participants.

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PART II : IDENTIFICATION OF MARKETS AFFECTED

11 *Market Definition*

- 11.1 The Commission has familiarity with the road surfacing markets relevant to this application through its previous consideration of Decision 322¹ and Investigation Report J4929².
- 11.2 In addition, the Commission has some familiarity with the aggregate market through its previous consideration of Decision 513³.
- 11.3 In Decision 322 the Commission concluded that the relevant market for the purpose of that proposed acquisition was the market for the provision of roading construction and maintenance services in New Zealand.
- 11.4 In Decision 322 at paragraph 27 the Commission stated:
- "The applicant states that construction contracts are for road and bridge construction, replacement and rehabilitation, with a large proportion of road construction contracts being for "shape correction". Maintenance contracts primarily relate to surface maintenance such as pothole repair, surface restabilisation, shoulder maintenance, snow/ice clearance and gritting. Roading contracts also involve emergency work such as dealing with floods and slips."
- 11.5 Fulton Hogan agrees with the assessment set out in paragraph 11.4. While Fulton Hogan is involved in both construction and maintenance contracts, G J Beynon is primarily involved in tendered road bitumen sealing contracts.
- 11.6 The Commission further concluded in paragraph 28 of Decision 322 that minor maintenance work involves substantially less labour, equipment, and resources than major maintenance or construction work, but Commission staff did not consider it necessary to separate out those categories for the purposes of that application.
- 11.7 In the Commission's Report J4929, which dealt with behavioural aspects of the Commerce Act rather than structural ones, the Commission referred to Decision 322 and also to a subsequent investigation undertaken by the Commission in respect of Bitumix where the two relevant markets were proposed to be the supply of bitumen sealing services in the North Island and the supply of bitumen sealing services in the South Island.
- 11.8 The Commission determined at paragraph 35 that the relevant markets for the purposes of Investigation J4929 were local markets for the supply of asphalt sealing services in the South Island and local markets for the supply of chip sealing services in the South Island. Specifically in that investigation the local markets were those in the Nelson region.
- 11.9 The Commission acknowledged the submission from Fulton Hogan in Investigation J4929 that the functional dimension of the markets for the supply of bitumen sealing works could be divided into major works which related to works let through contract via competitive tender by Transit or TLAs with a value of more than \$150,000.00 and small to medium works that have a value of less than \$150,000.00 including the sealing of driveways, carparks, footpaths etc.

¹ Decision No. 322: Works Civil Constructions Limited and Bitumix Limited, 7 April 1998

² Predatory Pricing Investigation in the Nelson Region, 19 August 2002

³ Decision No. 513: Holcim (New Zealand) Limited and Atlas Resources Limited, 20 November 2003

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- 11.10 At paragraph 27 of the Investigation Report J4929 the Commission stated:
- "This division (referred to in paragraph 11.9 above) is supported by information which indicates that smaller contractors will not undertake major works on their own account due to the equipment and resources required to undertake major works. If accepted, the division would apply to both asphalt sealing and chip sealing services. Accordingly, it is suggested that the supply of both services can be divided into segments, determined by the value of the services."
- 11.11 Fulton Hogan recognises that the Commission in Investigation J4929 determined that there were separate markets for chip sealing services and asphalt sealing services. Due to the low volume roads and limited budgets, for the purposes of this application, there is no major asphalt contract work carried out on the West Coast of the South Island. Any nominal asphalt surfacing would be carried out under the major chip sealing contracts.
- 11.12 Fulton Hogan is also of the view that since Investigation J4929 in 2002, there has been a definite trend for North Island contractors to enter the South Island market, for major chip sealing services contracts. Examples are Blacktop Construction Limited ("**Blacktop**"), Heb Contractors Limited ("**Heb**") and Oldfield Asphalts Limited ("**Oldfield**"). Blacktop has installed a bitumen importation tank at the port of Timaru and Heb and Oldfield have established in Nelson/Marlborough. For its part, Fulton Hogan has sent sealing resources from the South Island to the North Island to assist its North Island regions to complete contracts. Based on these developments in the market since 2002, Fulton Hogan believes there is a New Zealand wide market for major chip sealing services.
- 11.13 In Decision 513, while considering different geographic markets for aggregates, the Commission concluded at paragraph 145:
- "Aggregate is a high volume, low value product that is expensive to transport. As with concrete, the distance of the aggregate source from the customer is an important competition factor. Therefore, the market is typically a regional one."
- 11.14 For the purpose of this application and given the findings of the Commission in Investigations J4929, Fulton Hogan considers that the appropriate markets are:
- (a) Chip sealing services for major contracts above \$150,000.00 primarily in the South Island, but also New Zealand wide ("**the major chip sealing market**");
 - (b) Minor construction including asphalt and chip sealing services for small to medium contracts below \$150,000.00 on the West Coast of the South Island (including Westland, Grey and Buller Districts) ("**the minor construction and sealing market**");
 - (c) Quarrying and aggregate production on the West Coast of the South Island ("**the aggregate market**").
- 11.15 G J Beynon currently operates in each of the markets identified in paragraph 11.14. Currently Fulton Hogan does not operate in the market identified in paragraph 11.14(c).
- 11.16 Fulton Hogan also operates on the West Coast of the South Island by providing term maintenance contracting services to Transit and the Grey District Council as well as performing maintenance services for Ontrack. Generally these term maintenance contracts are let for periods of between three and five years by way of public tender process. In addition to Fulton Hogan in this part of the market, a current Transit contract is held by Ferguson Brothers Industrial Division Limited ("**Ferguson**") for term maintenance contracting works in the southern and central

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region of the West Coast. Fulton Hogan holds a similar contract for the northern region of the West Coast, namely in the Buller District. In addition, Westreef Services Limited ("**Westreef**") holds a maintenance contract for the Buller District Council and Westroads Limited ("**Westroads**") holds a similar contract for the Westland District Council. Fulton Hogan carries out some minor construction work through its Westport Depot for the Buller District of the West Coast Region, but negligible work of this nature from Greymouth for either the Grey or Westland Districts.

- 11.17 The wider road maintenance market in New Zealand is a market driven mainly by the level of annual funding allocated by the government for road construction and maintenance. The funding for construction and maintenance is administered through Transfund New Zealand. The major purchasers in the market are Transit which undertakes state highway maintenance and TLAs, each of which has a responsibility for local road construction and maintenance in its own area.
- 11.18 All state highway construction, maintenance and surfacing is carried out under contracts awarded by Transit. These contracts are generally tendered contracts awarded on the basis of the lowest price with some attribute measurement.
- 11.19 Transit maintenance contracts primarily relate to highway surface maintenance with some signage, landscaping, road marking and emergency work. Typical services and maintenance contracts include pothole repair, dig outs, surface restabilisation, shoulder maintenance, culvert clearing, repair of bleeding, snow and ice clearance and gritting. Contracts also involve emergency work such as dealing with floods and slips.
- 11.20 G J Beynon does not tender for the contracts described in paragraphs 11.16, 11.17, 11.18 and 11.19.

12 *Horizontal Aggregation*

The major chip sealing market

- 12.1 The proposed acquisition will result in horizontal aggregation in the chip sealing services market for major works in the South Island where Fulton Hogan estimates it has a []% share of the market by volume. Fulton Hogan also estimates that G J Beynon currently has []% of that market by volume.
- 12.2 As Fulton Hogan pointed out to the Commission in its response to Investigation J4929, annual market share for major bitumen resurfacing works in the South Island fluctuates annually due to the degree of success or otherwise in the tender process. In 2002 Fulton Hogan estimated that it would generally have a South Island share in the vicinity of []% with significant regional variations. In the year to the end of June 2006 Fulton Hogan estimates that its market share in the South Island market was likely to be in the vicinity of []%. This [] in market share is an illustration of the powerful impact of the tender process in this market.
- 12.3 Since 2002 there has been a definite trend for North Island Contractors to enter the South Island. Heb and Oldfield now have a base in Nelson/Marlborough. In recent years Blacktop has achieved up to [] of chip seal volume which equates to []% of the South Island market. This annual share fluctuates, as it does for other suppliers, including Fulton Hogan. Fulton Hogan has also sent sealing resources from the South Island to the North Island to complete contracts. On this basis Fulton Hogan believes there is now a New Zealand wide market for major chip sealing services. Fulton Hogan estimates its New Zealand wide market share at approximately []% for major chip sealing contracts.

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Minor construction and sealing market

12.4 Fulton Hogan estimates its share of this market to be less than []% and G J Beynon's share to be not more than []%.

13 *Differentiated Product Markets*

13.1 For the purposes of each of the markets identified in this application, there is generally no differentiation in relation to the products or services in each of the markets.

13.2 In Investigation Report J4929 at paragraphs 22 and 23 the Commission addressed whether asphalt sealing and chip sealing are substitutable services and acknowledged that there was disagreement within the industry in that regard. The Commission recorded that for major sealing works, substitutability between asphalt sealing and chip sealing appears likely in many but not all cases. There was unlikely to be a great deal of substitution between asphalt and chip sealing for smaller scale sealing works. The report also acknowledged that substitutability would not be applicable where one or other sealing method was specified by a purchaser, which is invariably the case when Transit and Council contracts are let. Accordingly for the purposes of this application, Fulton Hogan does not seek to pursue the issue of potential substitutability of chip sealing services for asphalt sealing services.

13.3 In some cases concrete is substitutable for asphalt sealing and or chip sealing. However in the context of the particular geographic markets covered by this application, Fulton Hogan does not consider that concrete is realistically substitutable for either chip sealing or asphalt sealing.

14 *Vertical Integration*

14.1 The proposed acquisition will result in vertical integration between firms involved at different functional levels to a limited extent in the aggregate market in that G J Beynon currently operates at both the manufacturing level and retail level, however Fulton Hogan does not operate at the manufacturing level on the West Coast.

14.2 Bitumen and roading aggregates are the main inputs in roading construction and maintenance. While Fulton Hogan currently owns significant bitumen and aggregate assets, it does not own aggregate production assets on the West Coast of the South Island. If the proposed acquisition proceeds, Fulton Hogan will acquire G J Beynon's aggregate production facilities on the West Coast. However there will be no aggregation in relation to that part of the acquisition.

15 *Previous notifications to the Commission or acquisitions*

15.1 Neither participant has notified any proposed acquisition to the Commission in the last three years.

15.2 Fulton Hogan has not undertaken any acquisitions in the last three years in respect of the markets identified in paragraphs 12 or 14.

15.3 G J Beynon has not undertaken any acquisition of assets or shares relevant to this application.

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PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION

16 Existing competitors

The major chip sealing market

16.1 The existing competitors for chip sealing services for major contracts above \$150,000 in value in the South Island for the year ended 30 June 2006 are estimated by Fulton Hogan as follows:

Supplier	Owner of Supplier	Estimated % of market sales by volume
Fulton Hogan	Public unlisted company	[]
G J Beynon	Beynon family	[]
Works Infrastructure Limited (" Works Infrastructure ")	DGL Investments Limited	[]
Isaac Construction Limited (" Isaac ")	Isaac family trusts	[]
Ashburton Contracting Limited (" ACL ")	Ashburton District Council	[]
Blacktop	Everett family	[]
Heb/Oldfield	HEB Smithbridge Limited Oldfield Group Limited	[]
Others		[]
Total		100

16.2 Although in this section of the market, the aggregation following the proposed acquisition will be outside both of the Commission's safe harbour guidelines, Fulton Hogan believes that the competitive influence of the other major market participants such as Works Infrastructure and Isaac together with the increasing influence of the relative new entrant to the market, Blacktop, due to its desire to use the bitumen imported into its Timaru facility, will have a significant moderating influence on Fulton Hogan in its future operation in the market. Fulton Hogan believes that each of those parties has the production capacity and the plant and equipment necessary to expand their respective shares in the market. They also either through internal ownership or through suppliers have access to the necessary suppliers of aggregates and bitumen. In addition, the countervailing market power of Transit and the TLAs will also have a significant moderating influence on future behaviour by Fulton Hogan in the market.

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- 16.3 The existing competitors for chip sealing services for major contracts above \$150,000 in value in New Zealand for the year ended 30 June 2006 are estimated by Fulton Hogan as follows:

Supplier	Owner of Supplier	Estimated % of market sales by volume
Fulton Hogan	Public unlisted company	[]
G J Beynon	Beynon family	[]
Works Infrastructure	DGL Investments Limited	[]
Isaac	Isaac family trusts	[]
Blacktop	Everett family	[]
Higgins Aggregates Limited	Higgins Group Holdings Limited	[]
Heb	HEB Smithbridge Limited	[]
Oldfield	Oldfield Group Limited	[]
Others		[]
Total		100

- 16.4 In this section of the market, the aggregation following the proposed acquisition will be on the margin of the Commission's first safe harbour guideline with the three firm concentration ratio post acquisition being []%, but with the combined entity having only []% of the market. The aggregation of Fulton Hogan and G J Beynon shares will be minimal. The competitive influence of the other major market participants will continue to exert a significant moderating influence on Fulton Hogan in its future operation in the market. The countervailing market power of Transit and the TLAs will also continue to have a significant moderating influence on future behaviour by Fulton Hogan in the market.

The minor construction and sealing market

- 16.5 The existing competitors for minor construction including chip and asphalt sealing services for small to medium contracts below \$150,000 in value in the West Coast region for the year ended 30 June 2006 are estimated by Fulton Hogan as follows:

Supplier	Owner of Supplier	Estimated % of market sales by volume
Fulton Hogan	Public unlisted company	[]
G J Beynon	Beynon family	[]
Ferguson	G G & R M Ferguson	[]

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Westroads	LATE owned by Westland District Council	[]
Avery Bros Limited (" Avery ")	P F Avery and L F Avery	[]
Westreef	LATE owned by Buller District Council	[]
Coastal Constructors (" Coastal Constructors ")	J Powell	[]
Works Infrastructure	DGL Investments Limited	[]
Others		[]
Total		100

16.6 Given the wide range of service providers in this category of the market and the nature of the work, particularly the number of small one off jobs many of which are not highly visible, Fulton Hogan has given its best estimate of the individual market shares of each of the companies involved. It is difficult to estimate the productive capacity of each of the providers, given the nature of this market.

16.7 The table at paragraph 16.5 above indicates that post acquisition, Fulton Hogan would have a market share of approximately []%. The three firm concentration ratio would be []%. Those percentages clearly indicate that post acquisition the share of Fulton Hogan would be well within the Commission's safe harbour calculations.

The aggregate market

16.8 Competitors for quarrying and aggregate production services for the year ended 30 June 2006 are estimated by Fulton Hogan as follows:

Supplier	Owner of Supplier	Estimated sales
Westroads	Westland District Council	[]
G J Beynon	Beynon Family	[]
Avery	Avery Family	[]
Ferguson	G G & R M Ferguson	[]
Canterbury Screen Hire Limited	A L King & B M Swain	[]
Graeme Smith Earthmoving (" Graeme Smith ")	G Smith	[]
Coastal Constructors	J Powell	[]

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Road Metals Company Limited	M J Francis and J R Francis	[]
Other smaller operators combined		[]
Total		[]

- 16.9 Given that Fulton Hogan does not currently have a share in the aggregate market, post acquisition the share of Fulton Hogan would mean that it falls well within the Commission's safe harbour estimates as it would have in the vicinity of []% of the estimated market sales, and the three firm concentration ratio would be in the vicinity of []%.
- 16.10 Fulton Hogan's requirements for aggregates in the West Coast region to date have been sourced mainly from G J Beynon and Avery in Westport.
- 16.11 The data in the above tables is Fulton Hogan's estimate of market shares and is expected to be reasonably accurate. The information supplied is for the year ended 30 June 2006. Fulton Hogan does not have any accurate estimate of the productive capacity of the individual suppliers to the aggregate market.
- 16.12 From Fulton Hogan's experience, market shares in the markets identified in paragraph 16 vary significantly on a year to year basis. Market shares in the market in paragraph 16.1 are largely determined by the success of the various parties in obtaining contracts from TLAs and Transit.

17 *Other Considerations*

- 17.1 Ferguson has both bitumen spraying and chip production equipment which has not currently been used to supply the major chip seal market but would be capable of such. Graeme Smith has acquired a new crushing unit capable of chip aggregate production. Isaac, Works Infrastructure, Blacktop, Heb, Oldfield, ACL and Sicon Limited ("**Sicon**") have the immediate plant and capability to enter and supply the market from their existing South Island regions. Each of the parties identified in this paragraph which are not already supplying could be described as near entrants and capable of supplying the major chip sealing market.
- 17.2 All entrants identified in paragraph 17.1 could immediately satisfy the current and future major chip sealing market requirements.
- 17.3 Imports and exports in relation to the markets identified in paragraph 11.14 are not applicable because of the nature of the respective markets.
- 17.4 G J Beynon is a long standing West Coast based company which understands the market geography and the weather conditions which may give it an advantage over some new or inexperienced entrants. It is an effective competitor, but it could not be described as being particularly innovative.

18 *Conditions of Expansion by existing competitors*

- 18.1 As set out in paragraph 11.12, the entry of North Island contractors into the South Island including Heb, Oldfield and Blacktop, along with Fulton Hogan South Island regions assisting to complete its North Island contracts strongly indicate that others are prepared to enter existing markets but also that it is now likely there is a New Zealand wide market for chip sealing services.
- 18.2 Blacktop has the capacity and capability to supply bitumen sealing products from its Timaru storage facility. Most other major contractors (Works Infrastructure,

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Heb, Isaac, ACL, Sicon, Oldfield, Ferguson and Whitestone Roding Limited) can either obtain both chip and bitumen product internally or from major suppliers within their regions to service the South Island market and in particular the West Coast region.

- 18.3 Fulton Hogan anticipates that vigorous competition would continue following the proposed acquisition in the major chip sealing market. There would be no time constraints on any of the other operators to respond to tenders as contracts become available in the market. In particular, Fulton Hogan would anticipate increased competition from Ferguson, Isaac and Oldfield. Fulton Hogan considers that the parties identified in this paragraph, in particular, would be a constraint on its actions in the market for major chip sealing services in the South Island following the proposed acquisition. Fulton Hogan also considers that Works Infrastructure which, like Fulton Hogan, operates on a National basis, would continue to constrain Fulton Hogan's activity following the proposed acquisition.
- 18.4 There are no frontier entry condition, legislative or regulatory conditions which may affect the ability of existing firms to expand. On the West Coast, in particular, weather conditions impact on response times and productivity of potential new entrants, but should not impact adversely on existing competitors. Fulton Hogan does not consider that there would be any significant barrier to the expansion of existing competitors where they have the incentive to do so, such as their response to a sustained effort to raise prices following the proposed acquisition.
- 18.5 With regard to the minor construction and chip sealing services market, Fulton Hogan considers that the proposed acquisition will have no impact on that market, given the minor shares which Fulton Hogan and G J Beynon currently have in that market.
- 18.6 It is a fact that the market for minor construction and chip sealing services is already well supplied by other operators and Fulton Hogan would expect that the absence of G J Beynon from that market will have no significant impact on the already competitive nature of the market.

19 *Co-ordinated Market Power*

- 19.1 Given that the major purchasers of services identified in paragraph 11.14(a) are Transit and TLAs which tender for services, the opportunity for price signalling, conscious parallelism or price leadership is minimal. In respect of those markets Fulton Hogan does not believe that there would be any enhanced opportunity for collusion following the proposed acquisition. Although the geographic market for the purpose of paragraph 11.14(a) has been characterised primarily as the South Island, there has been evidence of entry into this market by North Island operators such as Blacktop, Heb and Oldfield in response to particular tenders and Fulton Hogan expects this pattern will not change.
- 19.2 Tendering for major works will remain a major factor which will impede the monitoring or enforcement of co-ordinated market behaviour by market participants. The same also applies in a situation of minor to medium work where quotations are requested by purchasers of services.
- 19.3 In the market identified in paragraph 11.14(b) there are a number of existing operators as identified in paragraph 16.5 all of whom are currently active in the market. Ferguson which has a market share of approximately []%, will remain the major participant in the market with the others, including Fulton Hogan, all having market shares below that amount. The market is currently extremely competitive and that position is not expected to change as a result of the proposed acquisition.

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- 19.4 The markets identified in paragraph 11.14 are highly competitive. Pricing is an important competitive factor. The majority of services are tendered or quotations are requested and the work is predominantly won on pricing. There is no evidence in any relevant market of price co-ordination, price matching or price following.
- 19.5 All tender information is available in the public domain, deterring any anti competitive behaviour.
- 19.6 With regard to the major markets referred to in paragraph 11.14(a) the proposed acquisition will result in a very small increase in seller concentration, however the increase is not significant and the ability to co-ordinate behaviour or discipline those that may take part in such an arrangement will not be materially enhanced. The ability for other parties to go into the market as has already been demonstrated remains a significant factor which will not increase the risk of co-ordinated behaviour in the markets.
- 19.7 The presence of existing fringe competitors, the speed of potential entry and the lack of significant barriers to entry or expansion in relation to the small to medium markets identified in paragraph 11.14(b) are all likely to place competitive pressure on any potential co-ordinated behaviour or collusive arrangements.

Fulton Hogan elects not to answer the further questions in parts IV and V of the clearance notice format in respect of the aggregates market as there will be no aggregation in that market. However, Fulton Hogan would be pleased to provide further information in respect of those matters if requested by the Commission.

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PART IV: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

20 *Conditions of Entry*

The major chip sealing market

- 20.1 The ability of new firms to enter the major sealing market for both asphalt and chip sealing will be constrained by:
- (a) the cost of capital equipment; and
 - (b) the ability to secure tendered contracts from Transit and TLAs.
- 20.2 Fulton Hogan believes the cost of capital equipment is not significant as the majority of equipment and plant required such as loaders, graders, rollers and trucks can all be hired or purchased second hand with relative ease at reasonable cost. That equipment and plant can also, for the most part, be used in other markets and for other uses such as general contracting and should not be viewed as a sunk cost. In respect of a bitumen sprayer required for chip sealing the cost of new equipment would be between \$300,000 to \$400,000. Second hand plant is available at lower prices. Bitumen products could be purchased from third party providers, and aggregate supplies are readily available.
- 20.3 Bitumen spraying equipment needs to be recalibrated annually to Transit specifications. This has not stopped a number of new competitors commencing operation throughout New Zealand over recent times, for example Ferguson and ACL.
- 20.4 Other than the matters identified in paragraph 20.1, there are no frontier entry conditions, legislative or regulatory conditions or operational barriers to entry.

The minor construction and sealing market

- 20.5 The same characteristics outlined in paragraph 20.1 apply, but there are lower barriers to entry as the capital input is significantly lower and the plant is readily available.
- 20.6 The Commission recognised in Investigation J4929 at paragraph 60 that barriers to entry for businesses wishing to undertake small to medium works are not great and that the equipment required for works of this scale is similar to that required for general contracting work. It also recognised that specialised equipment and accompanying capital investment is generally not required and that equipment can be purchased second hand or hired. In addition, the level of technical competence required to undertake small to medium work is not onerous.

21 *Possible Entrants*

- 21.1 Because of the nature of the services or products in all of the markets identified in paragraph 11.14, it is unlikely overseas companies would be likely to supply the relevant markets through a Greenfields start up strategy, but may be able to acquire an existing operator.
- 21.2 Most of the major contractors referred to in paragraph 18.2 can enter the major chip sealing market at any time. They have the plant and staff. Market demand and willingness to travel is an individual business call.
- 21.3 The size of the particular contracts available and profit returns will influence entry decisions. Most plant is readily available from hire companies.

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22 *Likelihood, Sufficiency and Timeliness of Entry*

- 22.1 A de novo entry in the major chip sealing market is unlikely unless a contract is secured from Transit New Zealand or one of the TLAs. If such a contract was secured, entry could occur in a short timeframe, as the majority of equipment is readily available from hire companies or from the second hand or new markets.

- 22.2 Influences on the business decision to respond to tenders let by Transit and District Councils would include the availability of management and technical capability for each potential entrant as well as existing market conditions in which they are operating.

- 22.3 The likelihood of possible de novo entry is always an influencing factor in responding to tenders, and this situation is likely to be any different following the proposed acquisition.

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PART V: OTHER POTENTIAL CONSTRAINTS

23 ***Constraints on Market Power by the Conduct of Suppliers***

- 23.1 The major supplies required for provision of the services outlined in paragraphs 11.14(a) and (b) are bitumen and aggregates. In the geographic markets identified the aggregate supply will come through the acquisition of G J Beynon's quarrying assets together with some aggregates supplied internally by Fulton Hogan, particularly in the Buller District of the West Coast regional market together with continuing supplies from Avery. Those internal aggregate supplies will come from Fulton Hogan's Nelson region. Raw bitumen is supplied primarily by BP, Shell and Caltex and Fulton Hogan primarily sources its supply of Bitumen through Shell, which is a shareholder in Fulton Hogan.
- 23.2 The equipment needed to provide the services is freely available either through hire or purchase either new or second hand. The price of equipment is not a significant barrier to entry. See paragraph 20.2.
- 23.3 As the supply of aggregates following the acquisition will be primarily internal within Fulton Hogan, supply constraint in that regard will be neutral. The position with regard to the supply of bitumen for the production of asphalt and bitumen spray will not be any different following the acquisition other than the fact that the asphalt and bitumen production will be primarily sourced internally from Fulton Hogan rather than from an associate company as currently occurs in the markets identified in paragraph 11.14.
- 23.4 The Commission recognised at paragraph 63 in Investigation Report J4929 that Fulton Hogan was unlikely to be constrained by suppliers of bitumen and aggregate.

24 ***Constraints on Market Power by the Conduct of Acquirers***

- 24.1 The major acquirers of services for major chip sealing works, identified in paragraph 11.14(a) are Transit and TLAs.
- 24.2 For minor constructions and sealing services works identified in paragraph 11.14(b) there are a range of purchasers who require work on private driveways, footpaths, tennis courts, school works, commercial carparks and hard stand areas as well as pavement maintenance and related works. The potential clients include small to medium sized business for commercial and domestic jobs, residential builders, property developers and individual customers.
- 24.3 The Commission in Investigation Report J4929 at paragraphs 64 and 65 recognised that the conditionality of Transfund financial assistance is a discipline on Transit and TLAs as acquirers of asphalt sealing and chip sealing services. It recognised that the discipline translates into demands on the suppliers of those services. The Commission also recognised that the variability of Fulton Hogan's market share for major works indicated that competition for work let through tenders is in fact vigorous. The Commission further recognised that while Fulton Hogan was unlikely to face constraints from suppliers of inputs used in asphalt sealing and chip sealing, it may face constraints from acquirers of asphalt sealing and chip sealing services.
- 24.4 The Commission in Decision 322 acknowledged at paragraph 56 that other market participants contacted by Commission staff and Transfund New Zealand considered that there is strong competition in the roading construction and maintenance market. Fulton Hogan considers that is still the position.

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- 24.5 It is considered that the countervailing power of Transit in particular and the TLAs will continue to provide a constraint on Fulton Hogan following the potential acquisition.

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THIS NOTICE is given by David Faulkner on behalf of Fulton Hogan Limited.

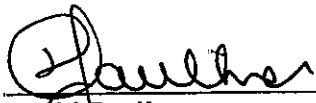
We hereby confirm that:

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

We undertake to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated this 18th day of October 2006

Signed by
FULTON HOGAN LIMITED



David Faulkner
Managing Director

I am a director of Fulton Hogan Limited and am duly authorised to make this application/notice.

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APPENDIX 1

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PUBLIC VERSION

APPENDIX 2

**Annual Report of Fulton Hogan Limited
for year ended 30 June 2006**