



COMMERCE COMMISSION

Decision No.493

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

SOUTHERN CAPITAL LIMITED

and

HIREPOOL LIMITED

The Commission: John Belgrave
Peter JM Taylor
Donal Curtin

Summary of Application: The acquisition by Southern Capital Limited of 100% of the shares in Hirepool Limited from Owens Group 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: 6 March 2003

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THE PROPOSAL

1. On 19 February 2003 the Commission registered a notice pursuant to section 66(1) of the Commerce Act 1986 (“the Act”) from Southern Capital Limited (“Southern Capital”) for it to acquire 100% of the shares in Hirepool Limited (“Hirepool”) from Owens Group Limited (“Owens”).

THE PROCEDURES

2. Section 66(3) of the Act requires the Commission either 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 notice agree to a longer period. An extension of time was sought by the Commission and agreed to by the applicant. Accordingly, a decision on the application was required by 19 March 2002.
3. In its application, Southern Capital sought confidentiality for specific aspects of the application. A confidentiality order was made in respect of the information for a period of 20 working days from the Commission’s determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
4. The Commission’s determination is based on an investigation conducted by staff.
5. The Commission’s approach is based on principles set out in the Commission’s *Practice Note 4*.¹

THE PARTIES

Southern Capital

6. Southern Capital is a publicly listed investment holding company. The majority of Southern Capital’s holdings are in property investment and development. Southern Capital also holds interests in diagnostics, viticulture, aquaculture, equity trading and, most relevant to this application, equipment hire.
7. Southern Capital’s interest in the equipment hire industry is via its subsidiary, CBD No.1 Limited, which holds 50.1% of the shares in Hire Equipment Group Limited (“Hire Equipment Group”). Subsequent to the determination of the application, Southern Capital announced it will acquire 100% of the shares in the Hire Equipment Group.
8. A summary of the business activities of the companies in the Hire Equipment Group is given below:
 - **Hire Equipment Group** is the holding company for 100% of the shares in Hirequip Holdings Limited.

¹ Commerce Commission, *Practice note 4: The Commission’s Approach to Adjudicating on Business Acquisitions Under the Changed Threshold in section 47 – A Test of Substantially Lessening Competition*, May 2001.

- o **Hirequip Holdings Limited** is the holding company for 100% of the shares in Hirequip Limited (“Hirequip”), Hirequip Property Limited and Projex Plant Services Limited, and 50.1% of the shares in Hirequip (West Coast) Limited.
 - **Hirequip Limited** (trading as “Hirequip”) is a general construction and building equipment hire services company. It also has a Party Hire and Events division. Hirequip has 38 branches nationwide.
 - **Projex Plant Services Limited** is an importer and retailer of heavy construction and earth works equipment. It currently holds agencies for Daewoo Heavy Construction Equipment (A South Korean company that manufactures excavators and wheeled loaders) and HAMM (A Germany company that manufactures construction and roading rollers).
 - **Hirequip (West Coast) Limited** is a general construction and building equipment hire services company based in Greymouth. 49.9% of the shares in Hirequip (West Coast) Limited are owned by Norman Anthony Kelly.

Hirepool

9. Hirepool is a wholly owned subsidiary of Owens Industrial Services Limited, which in turn is a wholly owned subsidiary of Owens. Owens is a publicly listed company whose core business is transportation logistics.
10. Hirepool is a general construction and building equipment hire services company. Hirepool has 22 branches at 14 sites² in Auckland, Waikato, Wellington and Canterbury.

OTHER RELEVANT PARTIES

Porter Hire Limited

11. Porter Hire Limited (“Porter Hire”) is a privately owned New Zealand company, and a wholly owned subsidiary of the Porter Group of Companies.
12. The core business activity of Porter Hire is the hire of a wide range of earthmoving equipment throughout New Zealand. Porter has 16 branches throughout New Zealand and over 1200 machines.

Gough Cat Limited

13. Gough Cat Limited (“Gough Cat”) is a privately owned New Zealand company, and a wholly owned subsidiary of Gough Gough and Hamer Investments Limited.
14. Gough Cat is the trading name of the New Zealand Caterpillar dealership. Gough Cat hires out Caterpillar equipment through Cat Rentals, a division of Gough Cat dedicated to

² Hirepool has three specialist divisions or branches: Access, Scaffolding and Heavy Construction. A number of sites contain more than one division or branch.

the rental of general construction and building equipment. Gough Cat has over 15 branches throughout New Zealand.

McEntee Hire Limited

15. McEntee Hire Limited (“McEntee”) is a privately owned New Zealand company. McEntee is a general construction and building equipment hire company which specialises in ‘do it yourself’ and building hire equipment, and has eight branches in the Auckland region. McEntee also operates a specialist party hire division.

The Hire Company Limited

16. The Hire Company Limited (“The Hire Company”) is a privately owned New Zealand Company, and a wholly owned subsidiary of Phil Wheelans Commercials Ltd. The Hire Company hires commercial trucks, building and heavy hire equipment from four branches nationwide.

Hire Industry Association of New Zealand Inc.

17. The Hire Industry Association of New Zealand Incorporated (“HIANZ”) is a voluntary association of New Zealand equipment hire companies. HIANZ acts as a forum for industry issues and provides, amongst other things, training and seminars for members.

INDUSTRY BACKGROUND

18. A range of business provide ‘hire’ or ‘rental’ services to businesses, consumers and the industry sector, which can be divided into a number of categories according to the equipment concerned.³ Hirepool, Hirequip and their competitors provide general construction and building equipment hire services. These companies offer a wide range of general construction and building equipment for hire, targeting three distinct groups of consumers: large infrastructure construction companies and users of heavy machinery, building construction and maintenance companies, and customers undertaking home improvements or other projects. The range of equipment typically held by companies within each of these three categories of consumer types is listed in Appendix 1.
19. In addition to general construction and building hire companies, there are a number of companies that specialise in providing hire services of particular equipment types. For example, scaffolding, trucks, forklifts, fencing, and earthworks machinery. Specialist hire companies usually hold a significantly greater number of speciality items of equipment in their inventories than general hire companies.

³ Other categories of equipment hire services include rental cars, party and function equipment hire, recreation equipment hire, medical equipment hire and information technology equipment hire.

MARKET DEFINITION

20. The Act defines a **market** as:

... a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

21. For the purpose of competition analysis, a relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, could impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the ‘*ssnip* test’). For the purpose of determining relevant markets, the Commission will generally consider a *ssnip* to involve a five percent increase in price for a period of one year.
22. It is substitutability at competitive market prices which is relevant in defining markets. Where the Commission considers that prices in a given market are significantly different from competitive levels, it may be necessary for it to assess the effect of a *ssnip* imposed upon competitive price levels, rather than upon actual prices, in order to detect relevant substitutes.
23. The Commission will seek to define relevant markets in terms of four characteristics or dimensions:
- the goods or services supplied and purchased (the product dimension);
 - the level in the production or distribution chain (the functional level);
 - the geographic area from which the goods or services are obtained, or within which the goods or services are supplied (the geographic extent); and
 - the temporal dimension of the market, if relevant (the timeframe).
24. The Commission will seek to define relevant markets in a way that best assists the analysis of the competitive impact of the acquisition under consideration. A relevant market will ultimately be determined, in the words of the Act, as a matter of fact and commercial common sense.
25. Where markets are difficult to define precisely, the Commission will initially take a conservative approach. If the proposed acquisition can be cleared on the basis of a narrow market definition, it would also be cleared using a broader one. If the Commission is unable to clear the proposed acquisition on the basis of the narrower market, it will be necessary to review the arguments and evidence in relation to broader markets.

The Applicant’s Proposed Market Definitions

26. The applicant submits that the acquisition of Hirepool by Southern Capital will result in aggregation in the following markets:
- the national market for heavy construction and earth works equipment hire services (“the heavy construction equipment hire market”);

- the Auckland, Waikato, Wellington and Christchurch regional markets for the supply of building construction and maintenance equipment hire services to commercial customers (“the building equipment hire markets”); and
 - the Auckland, Waikato, Wellington and Christchurch regional markets for the supply of building construction and maintenance equipment hire services to domestic (‘do it yourself’ or ‘home handyperson’) customers (“the DIY equipment hire markets”).
27. The applicant contends that a regional geographic dimension is also appropriate for consideration of the Auckland DIY equipment hire market, even though travelling times might be considered to be longer than in other regions. The applicant suggests that should the Commission consider that the identification of smaller sub-regional markets within the wider Auckland region to be appropriate, any division should be made on the basis of proximity of branches within the following areas: North Shore, West Auckland, Central Auckland (City and Mt Wellington) and South/East Auckland (Manukau and Tamaki).

Product Dimension

28. The delineation of relevant markets as a basis for assessing the competitive effects of a business acquisition begins with an examination of the goods or services offered by each of the parties to the acquisition. Both demand-side and supply-side factors are generally considered in defining market boundaries. Broadly speaking, a market includes products that are close substitutes in buyers’ eyes on the demand-side, and suppliers who produce, or are able easily to substitute to produce, those products on the supply-side.
29. The Commission takes the view that the appropriate time period for assessing substitution possibilities is the longer term, but within the foreseeable future.⁴ The Commission considers this to be a period of one year, which is the period customarily used internationally in applying the ‘ssnip’ test (see below) to determine market boundaries. The Commission will take into account recent, and likely future, changes in products, relative prices and production technology in the process of market definition.

Demand-side substitution

30. Close substitute products on the demand-side are those between which at least a significant proportion of buyers would switch when given an incentive to do so by a small change in their relative prices.
31. Initially, markets are defined for each product supplied by two or more of the parties to an acquisition. Unequivocal substitutes are combined. For each initial market so defined,

⁴ In *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 351 Smellie J and the Court of Appeal on appeal approvingly quoted an earlier decision of the Commerce Commission in *Edmonds Food Ind Ltd v W F Tucker & Co Ltd* (Decision 21, June 1984) where the Commission had ruled: “A market has been defined as a field of actual or potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive”. See also *News Limited v Australian Rugby Football League Limited & Ors* (1996) ATPR at 41,687, where Burchett J stated: “Long term prospects that can be more or less clearly foreseen are, to that extent, a present reality, from the point of view of identifying the constraints upon commercial action. This fact emphasises the importance of the principle . . . that substitution possibilities in the longer run may be very significant for market delineation.” Also *Re Tooth & Co Ltd v Tooheys Ltd* (1979) 39 FLR 1 emphasises longer run substitution possibilities.

the Commission will examine whether the imposition of a ssnip would be likely to be profitable for the hypothetical monopolist. If it were, then all of the relevant substitutes must be incorporated in the market. If not, then the next most likely substitute good or service will be added to the initial market definition and the test repeated. This process continues until a combination of products is found which defines the product dimension of a relevant market, namely, the smallest combination of goods or services for which a ssnip would be profitable.

32. On the demand-side, the technical viability of one good or service as a substitute for another must be assessed. However, even where another product may technically be suitable as an alternative for the product in question, its price may be so much higher that it may be a poor substitute in an economic sense, at least for the great majority of buyers. In judging economic substitutability between products, the Commission will have regard to relative prices, quality and performance when assessing whether they are, in fact, close substitutes in the eyes of buyers.

Heavy Construction and Building Equipment

33. The applicant submits that, in relation to the heavy construction and, to a lesser extent, the building construction markets, outright purchase or long term leasing of equipment will in some cases be a feasible alternative and therefore a substitute to hiring.
34. Industry participants are of the view that this is not the case, stating that a decision to hire equipment is distinct from a decision to purchase or lease. A decision to hire equipment is based on the knowledge of the likely timeframe for which the equipment will be utilised. Industry participants have suggested that, in general, hiring is preferred when equipment will be used for up to six months, while leasing or purchase is favoured when the anticipated use of equipment is greater than one year. Other advantages of hiring equipment, such as not bearing the capital cost or being responsible for the maintenance of the equipment, suggest that purchasing or leasing equipment may not be a substitute for hiring.
35. For the purposes of the application, the Commission will adopt a conservative approach and use a narrow market definition on the basis that if there are no competition concerns within the narrower market, it is unlikely that there will be concerns within a broader market definition. The Commission considers that given the high capital cost of equipment in both the heavy construction and building equipment markets, purchasing or leasing equipment may not be substitutable for hiring. Therefore, the Commission does not consider that purchasing or leasing forms part of either the heavy construction or the building equipment hire markets.

'Do It Yourself' Equipment

36. The applicant also contends that in the DIY equipment hire markets, the purchase of equipment may be a feasible substitute for hiring many low cost items, although the purchase of larger, higher cost equipment is likely to be a more distant substitute for hire.
37. Industry participants have suggested that, in general, in terms of quality and power, equipment available from hire companies compared to equipment cheaply available at stores such as The Warehouse is sufficiently differentiated to make purchasing equipment an imperfect substitute for hiring. In addition, DIY customers typically hire equipment

on a short term basis for one off projects, and it is unlikely that many consumers would be willing to purchase items as a substitute for hiring.

38. The Commission considers that for very low cost items purchase may be a substitute for hire in the DIY equipment hire market. However, the Commission considers that the degree of substitutability is insufficient to consider that purchasing equipment is a direct substitute for hire, and in accordance with the principles set out in paragraph 35, the Commission considers that a narrow market definition is appropriate.

Supply-side substitution

39. Close substitute products on the supply-side are those between which suppliers can easily shift production, using largely unchanged production facilities and little or no additional investment in sunk costs, when they are given a profit incentive to do so by a small change in their relative prices.
40. The applicant submits that separate product markets can be defined based on the three types of equipment listed in Appendix 1, derived from the demand side characteristics of consumers in the industry. Industry participants confirmed this approach, and suggested that separate product markets can be broadly defined on the basis of the tonnage of the hire equipment. Thus:
- heavy construction equipment consists of equipment weighing above 10 tonnes;
 - building construction equipment consists of equipment weighing between 1.5 and 10 tonnes; and
 - DIY equipment consists of equipment weighing below 1.5 tonnes.
41. The Commission acknowledges that this distinction may be somewhat artificial, as in some cases the distinction between equipment that is substitutable according to the needs of consumers may be blurred. For example, an infrastructure company may hire equipment with a tonnage that places it in the building equipment hire markets. In addition, many of the products listed in Appendix 1 are not substitutable from a demand-side perspective as they have specific functions. However, the Commission considers that this distinction is generally useful to the extent that it serves as a general guide in distinguishing between equipment within separate product markets.
42. The applicant submits that general hire companies compete with specialist hire companies in offering particular types of equipment to construction and building maintenance companies. For example, there are a number of companies that specialise in hiring trucks, cranes, building access equipment and scaffolding, generators, portable toilets, forklifts and trailers. The Commission considers that such specialist hire companies do compete with general hire companies at the margin where the activities of a specialist hire company overlap with those of a general hire company. While the Commission acknowledges that such companies provide competitive constraint where there is overlap in the hire equipment offered, the Commission considers that they are fringe competitors, and in accordance with the principles set out in paragraph 35 of adopting a narrow market definition, should not be considered as forming part of the general equipment hire markets.

43. For the purposes of this analysis, the Commission therefore intends to adopt the following product definitions:

- heavy construction equipment, consisting of equipment weighing above 10 tonnes;
- building construction equipment, consisting of equipment weighing between 1.5 and 10 tonnes; and
- DIY equipment, consisting of equipment weighing below 1.5 tonnes.

Undifferentiated/Differentiated Products

44. In some instances, market definitional problems arise because of the differentiated nature of the goods or services involved in a business acquisition, caused by differing technical specifications, branding, packaging, warranties, distribution channels and other factors.

45. Where a significant group of buyers within a relevant market is likely to be subject to price discrimination, the Commission will consider defining additional relevant markets based on particular uses for a good or service, particular groups of buyers, or buyers in particular geographic areas. In other cases, the primary focus may switch to the extent to which a business acquisition eliminates competition between the products brought together by the acquisition.

46. The majority of products supplied in the markets defined in paragraph 43 are standardised to the extent that price forms a key part of customers' purchasing decisions. However, market participants seek to differentiate themselves in a number of ways, such as:

- The range of equipment available for hire. Some hire companies offer services across all three equipment categories, while other companies offer services in only one or two of the equipment categories;
- The brand/image of the equipment available for hire;
- Quality;
- Price; and
- Service.

47. Industry participants are of the view that customers' consumption decisions are based primarily on the availability of equipment and price. Given this, the Commission considers that firms within the equipment hire services markets are largely undifferentiated. The Commission therefore considers that the market is not sufficiently differentiated to warrant the special analysis associated with fully differentiated products.

48. The Commission therefore concludes that for the purpose of assessing the competition implications of the proposed acquisition, the appropriate product markets are:

- The market for heavy construction and earth works equipment;
- The market for building construction and maintenance equipment; and

- The market for ‘do it yourself’ equipment.

Geographic Extent

49. The Commission will seek to define the geographical extent of a market to include all of the relevant, spatially dispersed, sources of supply to which buyers can turn should the prices of local sources of supply be raised. For each good or service combination, the overlapping geographic areas in which the parties operate are identified. These form initial markets to which a ssnip is applied. Additional geographic regions are added until the smallest area is determined within which the hypothetical monopolist could profitably impose a ssnip.
50. Generally, the higher the value of the product to be purchased, in absolute terms or relative to total buyer expenditure as appropriate, the more likely are buyers to travel and shop around for the best buy, and the wider the geographic extent of the market is likely to be.
51. Where transport costs are high relative to the final value of a product, a narrower geographic market is more likely to be appropriate. Where product perishability and other similar practical considerations limit the distance that a product may be transported, this may limit the geographic extent of the market. The timeliness of delivery from alternative geographic sources is similarly relevant.
52. Although buyers and sellers of a particular good or service may interact in markets that are apparently local or regional in extent, those markets may themselves overlap and interrelate so as to form a market covering a larger geographical area. In these situations, the larger market is likely to be the appropriate one for analysing the competitive effects of a business acquisition.
53. The Commerce Act defines a market to be a “market in New Zealand”. However, in many markets New Zealand buyers purchase products from both domestic and from overseas suppliers. Where imported products are close substitutes for domestic products, the overseas suppliers will be part of the relevant market. In such circumstances the Commission, in order to comply with the wording of the Act, is likely to define a national market and then, as discussed later in the competition analysis, to consider the extent to which overseas suppliers exercise a competitive constraint on the participants in the domestic market.

Heavy Construction Equipment

54. The applicant contends that the heavy construction hire equipment is national. The applicant submits that it is cost effective to transport this equipment around the country and that equipment is often transported large distances by hire companies, both between hire company depots and from those depots to customers.
55. Industry participants agreed that the market for heavy construction equipment is national, and equipment is often transported throughout the country in response to consumer demand. Industry participants indicated that the cost of transport ranges from between [], and equipment can easily be moved either through the railway network, on road, or by sea. Customers spoken to by the Commission also considered the market to be national, and confirmed that equipment is often transported on a national basis.

56. The Commission therefore considers the heavy construction equipment market to be national.

Building Construction and Maintenance Equipment

57. The applicant contends that the geographic dimension of the building equipment market is regional. The applicant submits that equipment supplied to companies in this category is usually transported to a work site by, or arranged by, the hire company in question. Most hire companies that operate in this market have trucks specifically designed to transport equipment to sites with each region.

58. Industry participants agreed that the market is regional, and that equipment is often transported to customers by hire companies on a regional basis.

59. The Commission therefore considers that the building equipment market is regional. The Commission has considered the degree of aggregation that will occur between Hirepool and Hirequip as a result of the acquisition and considers it appropriate to limit its analysis to the areas in which Hirepool currently has a market presence, namely:

- Auckland;
- Waikato;
- Wellington; and
- Canterbury.

DIY Equipment

60. As stated above, the applicant contends that the geographic dimension of the DIY equipment market is regional in scope. The applicant submits that most of the regional divisions include a metropolitan area and a surrounding rural region, including the small towns within the region. Domestic consumers can be expected to consider hiring equipment from within the wider region and seek the best price between competitors within that region. There might, however, be some reluctance to travel significant distances for price savings on low cost hire items.

61. The applicant contends that a regional geographic dimension is also appropriate for consideration of the Auckland DIY hire equipment market, even though travelling times might be considered to be longer than in other regions. However, the applicant suggests that should the Commission consider that the identification of smaller sub-regional markets within the wider Auckland region is appropriate, any division should be made on the basis of proximity of branches within the following areas: North Shore, West Auckland, Central Auckland (City and Mt Wellington) and South/East Auckland (Manukau and Tamaki).

62. Industry participants in the Auckland region are of the view that smaller sub-regional markets within the wider Auckland region are appropriate and can be broken down into the areas suggested by the applicant. Industry participants considered there was a general

reluctance for DIY customers to travel significant distances to hire equipment, such that, for example, a customer in the North Shore would be unlikely to consider hiring DIY equipment outside of this area. The unwillingness for DIY customers to travel is based on the fact that most DIY equipment hire occurs in the weekend, when customers typically only have a limited amount of time within which to use the hired equipment, and are therefore averse to travelling for significant times.

63. The Commission considers that this willingness to travel would not be increased if a ssnip test were applied, given the lack of time typically available to DIY equipment hire customers. In accordance with the principles set out in paragraph 35, the Commission proposes to adopt a narrow geographical market definition for the Auckland region. The Commission considers the sub-regions proposed by the applicant to be appropriate in determining the geographical boundaries of the Auckland DIY market.
64. Industry participants in the Wellington region suggested that it was also appropriate to adopt narrow geographic boundaries for the DIY market in the Wellington region, and that a sub regional division was appropriate with geographical distinctions between Wellington Central and the Hutt Valley. The Commission therefore proposes to adopt a narrow geographical market definition for the Wellington region, based on geographical distinctions between Wellington Central and the Hutt Valley
65. The Commission considers that customers in the Waikato and Christchurch regions exhibit the same general characteristics as customers in the Auckland and Wellington regions, such that a customer would be unwilling to travel outside of limited geographic areas even if a ssnip was applied, given the limited timeframe DIY customers typically have when utilising rented equipment. The Commission therefore considers it is appropriate to define geographic areas for DIY equipment hire based on the geographic boundaries of Christchurch and Hamilton cities.
66. The Commission therefore considers that the DIY equipment market is sub-regional in scope. As the areas of aggregation between Hirepool and Hirequip that will occur as a result of the acquisition are limited, the Commission considers it appropriate to limit its analysis to the areas where Hirepool currently has a market presence, namely:
 - For Auckland:
 - The North Shore;
 - West Auckland;
 - Central Auckland; and
 - South East Auckland.
 - For Waikato:
 - Hamilton City.
 - For Wellington:
 - Wellington Central;
 - Hutt Valley
 - For Canterbury
 - Christchurch City.

Functional Level

67. The production, distribution and sale of a product typically occurs through a series of functional levels – for example, the manufacturing/import level, the wholesale/distribution level and the retail level. It is often useful to identify the relevant functional level in describing a market, as a proposed business acquisition may affect one horizontal level, but not others.⁵ Alternatively, some acquisitions, such as those involving businesses at different vertical levels, may raise issues related to vertical integration. Generally, the Commission will seek to identify separate relevant markets at each functional level affected by an acquisition and assess the impact of the acquisition on each.
68. The functional level of all three markets is the provision of hire services, as opposed to the manufacture, retail sale or use of the equipment concerned.

Conclusion on Market Definition

69. The Commission concludes that the relevant markets are:
- the national market for the supply of heavy construction and earth works equipment hire services (“the heavy construction market”);
 - regional markets for the supply of building construction and maintenance equipment hire services to commercial customers (“the building markets”); and
 - sub-regional markets for the supply of building construction and maintenance equipment hire services to domestic (‘do it yourself’ or ‘home handyperson’) customers (“the DIY markets”).

COMPETITION ANALYSIS

Substantially Lessening Competition

70. Section 47 of the Act prohibits particular business acquisitions. It provides that:

A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

⁵ *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473, 502 The High Court (Greig J, Shaw WJ, Prof M Brunt) noted: “If we ask what functional divisions are appropriate in any market definition exercise, the answer, ..., must be whatever will best expose the play of market forces, actual and potential, upon buyers and sellers. Wherever successive stages of production and distribution can be co-ordinated by market transactions, there is no difficulty: there will be a series of markets linking actual and potential buyers and sellers at each stage. And again, where pronounced efficiencies of vertical integration dictate that successive stages of production and distribution must be co-ordinated by internal managerial processes, there can be no market.”

71. Section 2(1A) provides that substantial means “real or of substance”. Substantial is taken as meaning something more than insubstantial or nominal. It is a question of degree.⁶ What is required is a real lessening of competition that is not minimal. The lessening needs to be of such size, character and importance to make it worthy of consideration.⁷
72. Section 3(2) provides that references to the lessening of competition include references to the hindering or preventing of competition.⁸
73. While the Act defines the words “substantial” and “lessening” individually it is desirable to consider the phrase as a whole. For each relevant market, the Commission will assess:
- the probable nature and extent of competition that would exist in a significant section of the market, but for the acquisition (the counterfactual);
 - the nature and extent of the contemplated lessening; and
 - whether the contemplated lessening is substantial.⁹
74. In interpreting the phrase “substantially lessening competition”, the Commission will take into account the explanatory memorandum to the Commerce Amendment Bill (No 2). The memorandum notes that:
- Two of the 3 key prohibitions are strengthened to bring New Zealand into line with Australian competition law, which will facilitate a more economic approach to defining anti-competitive behaviour.
- and, in relation to s47:
- This proposed new threshold is the same as the threshold for these types of acquisitions in section 50 of the Trade Practices Act 1974 (Australia).
75. For the purposes of the analysis, the Commission takes the view that a lessening of competition and a strengthening of market power may be taken as being equivalent, since they are the two sides of the same coin. Hence, it uses the two terms interchangeably. Thus, in considering whether the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market, the Commission will take account of the scope for the exercise of market power, either unilaterally or through co-ordination between firms.
76. When the impact of enhanced market power is expected predominantly to be upon price, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and able to be sustained for a period of at least two years,

⁶ *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406, 434; *Mobil Oil Corporation v The Queen in Right of NZ* 4/5/89, International Centre for Settlement of Investment Disputes, Washington DC, International Arbitral Tribunal ARB/87/2 (paras 8.2, 19, 20).

⁷ *Dandy Power Equipment Ltd v Mercury Marina Pty Ltd* (1982) ATPR 40-315, 43-888; *South Yorkshire Transport Ltd v Monopolies & Mergers Commission* [1993] 1 All ER 289.

⁸ For a discussion of the definition see *Commerce Commission v Port Nelson Ltd*, supra n 6, 434.

⁹ See *Dandy*, supra n 5, pp 43–887 to 43-888 and adopted in New Zealand: *ARA v Mutual Rental Cars* [1987] 2 NZLR 647; *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352; *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731; *Commerce Commission v Carter Holt Harvey*, unreported, High Court, Auckland, CL 27/95, 18/4/00.

for the lessening, or likely lessening, of competition to be regarded as substantial. Similarly, when the impact of increased market power is felt in terms of the non-price dimensions of competition, these also have to be both material and able to be sustainable for at least two years for there to be a substantial lessening, or likely substantial lessening, of competition.

The Counterfactual

77. The Commission will continue to use a forward-looking, counterfactual, type of analysis in its assessment of business acquisitions, in which two future scenarios are postulated: that with the acquisition in question, and that in the absence of the acquisition (the counterfactual). The impact of the acquisition on competition can then be viewed as the difference between those two scenarios. It should be noted that the status quo cannot necessarily be assumed to continue in the absence of the acquisition, although that may often be the case. For example, in some instances a clearly developing trend may be evident in the market, in which case the appropriate counterfactual may be based on an extrapolation of that trend.
78. The present state of competition in a market can be referred to in order to illuminate the future state of the market where there is a range of possible scenarios should a merger not proceed.¹⁰
79. Hirepool advised the Commission that [
-] Thus while it is clear that Hirepool will be sold, it is possible that this will be to a party which will continue to operate Hirepool as a standalone competitor to Hirequip.
80. The Commission therefore proposes to use the status quo as the counterfactual.

Conclusion – Competition Analysis Principles

81. The Act prohibits business acquisitions that would be likely to have the effect of substantially lessening competition in a market. The Commission makes this assessment against a counterfactual of what it considers would be likely to happen in the absence of the acquisition. In the present case the counterfactual is considered to be the status quo. A substantial lessening of competition is taken to be equivalent to a substantial increase in market power. A business acquisition can lead to an increase in market power by providing scope either for the combined entity to exercise such power unilaterally, or for the firms remaining in the market to co-ordinate their behaviour so as to exercise such power.
82. In broad terms, a substantial lessening of competition cannot arise from a business acquisition where there are sufficient competitive constraints upon the combined entity. The balance of this Decision considers and evaluates the constraints that might apply in the heavy construction, building and DIY equipment hire markets under the following headings:
- existing competition;

¹⁰ *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR 41 at paras 113 & 114.

- potential competition from entry; and
- other competition factors.

ANALYSIS OF EXISTING COMPETITION

Introduction

83. One consequence of a merger between competitors is that the number of firms competing in a market is reduced or, put another way, concentration is increased. This raises the possibility that competition in the market may be substantially lessened through the exercise of unilateral or coordinated market power. These are the subject of the analysis in this section.

Scope for Unilateral Market Power

Introduction

84. An examination of concentration in a market post-acquisition can provide a useful guide to the constraints that market participants may place upon each other, including the combined entity. Both structural and behavioural factors have to be considered. However, concentration is only one of a number of factors to be considered in the assessment of competition in a market. Those other factors are considered in later sections, as noted above.

85. Market shares can be measured in terms of revenues, volumes of goods sold, production capacities or inputs (such as labour or capital) used. All measures may yield similar results in some cases. Where they do not, the Commission may, for the purposes of its assessment, adopt the measure which yields the highest level of market share for the combined entity. The Commission considers that this will lead to an appropriately conservative assessment of concentration, and that the factors which lead to the other different market share results are more appropriately considered elsewhere during the assessment of the acquisition.¹¹

86. In determining market shares, the Commission will take into account the existing participants (including ‘near entrants’), inter-firm relationships, and the level of imports. This is followed by a specification of the Commission’s ‘safe harbours’, an estimation of market shares, and an evaluation of existing competition in the market. Each of these aspects is now considered in turn.

¹¹ For example, where market share measured in terms of capacity produces a significantly lower share of the market in the hands of participants than a measure in terms of sales volumes, the constraint on a combined entity from that unemployed capacity might be taken into account when identifying near entrants or the constraint from new market entry. In some cases, the model of market power being used may influence the choice as to which market share measure is used.

The Heavy Construction Market

Existing Participants

87. There are a number of existing participants in the heavy construction market. In particular, Porter Hire, Cat Rentals and The Hire Company are vigorous competitors in the market. There are numerous other competitors who offer heavy construction equipment for hire, including contractors with unutilised equipment which is commonly offered for hire when not required, or smaller hire companies such as Christchurch City Hire, AB Rentals and McEntee's who have a limited selection of heavy equipment available for hire. There are also a number of specialist equipment companies which offer trucks and excavators for hire.

Market Shares

88. The Commission proposes to use annual turnover figures as its primary measure of market share and concentration. The applicant has provided the Commission with aggregated national figures for the heavy construction market, based on estimates by Hirequip staff. Where possible, the Commission had confirmed these figures with market participants and generally find Hirequip's estimates reliable. The resulting shares are shown in Table 1 below:

Table 1: Estimated Market Shares for the Heavy Construction Market

Company	Estimated Revenue (\$m)	Estimated Market Share (%)
Hirequip	[]	[]
Hirepool	[]	[]
<i>Merged Entity</i>	[]	[]
Porter Hire	[]	[]
Cat Rental	[]	[]
The Hire Company	[]	[]
Others	[]	[]
Total	[]	100

89. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

90. As already noted, market shares are insufficient in themselves to establish whether competition in a market has been lessened. It is the interplay between a number of competition factors, of which seller concentration is only one, that has to be assessed in determining the impact of a business acquisition on competition. Other competition factors include entry conditions; the presence of an aggressive, innovative or maverick

firm; countervailing power of buyers or suppliers; rapid innovation in the market; and others. These are considered for the relevant market in subsequent sections.

State of Existing Competition

91. The acquisition would result in the merged entity becoming the [] provider of heavy construction equipment, with a national aggregated market share of [].
92. No heavy construction hire companies spoken to opposed the acquisition. Rather, most considered it would have a pro competitive effect by removing a competitor from the market and opening up increased business opportunities. In addition, customers and suppliers spoken to by the Commission did not consider that there would be any detrimental effects associated with the acquisition. All industry participants considered that the market was vigorously contested.
93. In addition to the major heavy equipment hire companies noted above, there are numerous other companies that offer heavy equipment for hire on an ad hoc basis. In particular, industry participants advised that it is common practise for contractors with unused heavy equipment to offer it for hire.
94. Of particular note in this market is Porter Hire, which has an estimated [] market share and is the market leader. Cat Rentals is also a vigorous competitor, and has secured a [] market share after only three years in the market.
95. In each of the geographic regions in which Hirepool operates, there is at least one significant other competitor that would provide a constraint on the merged entity for heavy equipment hires for customers seeking to hire on a regional basis. A large number of smaller companies also have a presence in these regions.

Conclusion – Unilateral Market Power

96. The Commission considers that the merged entity would be constrained by current competition in the heavy equipment market and that the acquisition would not enhance the scope for the exercise of unilateral market power.

The Building Market

Existing Participants

97. There are a number of existing participants in the building markets. Table 3 below shows a selection of the existing major market participants by region. There are also numerous other competitors who offer building equipment for hire, such as contractors with unutilised equipment which is commonly offered for hire when not required.

Table 3: Existing Participants in the Building Market by Region

Auckland	Waikato	Wellington	Canterbury
Hirepool	Hirepool	Hirepool	Hirepool
Hirequip	Hirequip	Hirequip	Hirequip
McEntee	The Hire Company	The Hire Company	The Hire Company
AB Rental	AB Rental	AB Rental	AB Rental
Cat Rental	Cat Rental	Cat Rental	Cat Rental
Lincoln Hire	Cambridge Hire	Pronto	City Hire

Pukekohe Hire	JG Hire	Kapiti Hire	Hamil Hire
Davies Hire	Ready Hire	Wainuiomata Hire	Smiths Hire
Cascade Hire	Network Hire		

Market Shares

98. The Commission proposes to use annual turnover figures as its primary measure of market share and concentration. The applicant has provided the Commission with market share figures for the building market, based on estimates by Hirequip staff. Where possible, the Commission had confirmed these figures with market participants and generally find Hirequip's estimates reliable. The following market share tables exclude specialist hire companies because they are not considered to be part of the market. The resulting market shares are shown in the tables below:

Table 4: Estimated Market Shares for the Auckland Building Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
McEntee	[]	[]
Cat Rental	[]	[]
Pukekohe Hire	[]	[]
Cascade Hire	[]	[]
Lincoln Hire	[]	[]
Davies Hire	[]	[]
Others	[]	[]
Total	[]	100

99. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

Table 5: Estimated Market Shares for the Waikato Building Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
Ready Hire	[]	[]
The Hire Company	[]	[]
AB Equipment	[]	[]
Cambridge Hire	[]	[]
Network Hire	[]	[]
JG Hire	[]	[]
Others	[]	[]
Total	[]	100

100. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are within the Commission's safe harbours.

Table 6: Estimated Market Shares for the Wellington Building Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
The Hire Company	[]	[]
Pronto	[]	[]
Kapiti Hire	[]	[]
Wainuiomata Hire	[]	[]
Others	[]	[]
Total	[]	100

101. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

Table 7: Estimated Market Shares for the Canterbury Building Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
City Hire	[]	[]
Smiths Hire	[]	[]
The Hire Company	[]	[]
Hamil Hire	[]	[]
Others	[]	[]
Total	[]	100

102. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

State of Existing Competition

103. The acquisition would result in the merged entity become the largest provider of building equipment in the Auckland, Wellington and Christchurch regions, with a market share of [], [] and [] respectively. In Waikato, the merged entity would be the second largest provider of building equipment, with a market share of [].

104. As in the heavy construction market, no building equipment hire companies spoken to opposed the acquisition. Rather, most considered it would have a pro competitive effect by removing a competitor from the market and opening up increased business opportunities. In addition, customers and suppliers spoken to by the Commission did not

consider that there would be any detrimental effects associated with the acquisition. All industry participants considered that the market was vigorously contested.

105. In addition to the building equipment hire companies listed above, there are a range of other companies that offer building equipment for hire on an ad hoc basis. In particular, industry participants advised that it is common practise for contractors with unused equipment to offer it for hire while.

106. The merged entity will face at least one significant other competitor in all of the regions in which aggregation occurs which would provide a strong competitive constraint, namely:

- In Auckland, McEntee and Cat Rental are significant competitors;
- In Waikato, Ready Hire, The Hire Company and AB Equipment are significant competitors;
- In Wellington, The Hire Company is a significant competitor; and
- In Christchurch, City Hire, Smiths Hire and The Hire Company are significant competitors.

107. A large number of smaller companies also have a presence in the regions listed above.

Conclusions – Unilateral Market Power

108. The Commission considers that the merged entity would be constrained by current competition in the building equipment market and that the acquisition would not enhance the scope for the exercise of unilateral market power.

The DIY Market

Existing Participants

109. There are a number of existing participants in the DIY markets. The tables below show a selection of existing market participants on a sub regional basis.

Table 8: Existing Participants in the Sub-regional Auckland DIY Markets

North Shore	West Auckland	Central Auckland	South-East Auckland
Hirepool	Hirepool	Hirepool	Hirepool
Hirequip	Hirequip	Hirequip	Hirequip
McEntee	Lincoln Hire	McEntee	McEntee
Hibiscus Hire	Helensville Hire	Davies Hire	Pukekohe Hire
North Harbour Hire	Blockhouse Bay Hire	Cascade Hire	Cascade Hire
	Causeway Hire	Panmure Hire	

Table 9: Existing Participants in the Sub-regional Wellington DIY Markets

Wellington Central	Hutt Valley
Hirepool	Hirepool
Hirequip	Hirequip
Pronto	Moor Hire
	Wainuiomata Hire
	Kiwi Hire

Table 10: Existing Participants in the Hamilton and Christchurch City DIY Markets

Hamilton City	Christchurch City
Hirepool	Hirepool
Hirequip	Hirequip
Ready Hire	Smiths Hire
JG Hire	City Hire
	Ace Hire
	Liangs Hire
	Hamil Hire

Market Shares

110. The Commission proposes to use annual turnover figures as its primary measure of market share and concentration. The applicant has provided the Commission with market share figures for the DIY markets, based on estimates by Hirequip staff. Where possible, the Commission had confirmed these figures with market participants and generally find Hirequip's estimates reliable. The resulting market shares are shown in the tables below:

Table 11: Estimated Market Shares for the North Shore DIY Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
McEntee	[]	[]
Hisbiscus Hire	[]	[]
North Harbour Hire	[]	[]
Others	[]	[]
Total	[]	100

111. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

Table 12: Estimated Market Shares for the West Auckland DIY Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]

Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
Lincoln Hire	[]	[]
Helensville Hire	[]	[]
Blockhouse Bay Hire	[]	[]
Causeway Hire Centre	[]	[]
Others	[]	[]
Total	[]	100

112. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

Table 13: Estimated Market Shares for the Central Auckland DIY Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
Davies Hire	[]	[]
Cascade Hire	[]	[]
Panmure Hire Centre	[]	[]
Others	[]	[]
Total	[]	[]

113. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

Table 14: Estimated Market Shares for the South-East Auckland DIY Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
McEntee	[]	[]
Pukekohe Hire Centre	[]	[]
Cascade	[]	[]
Others	[]	[]
Total	[]	100

114. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

Table 15: Estimated Market Shares for the Hamilton City DIY Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
Ready Hire	[]	[]
JG Hire	[]	[]
Others	[]	[]
Total	[]	100

115. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are within the Commission's safe harbours.

Table 16: Estimated Market Shares for the Wellington Central DIY Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
Pronto	[]	[]
Total	[]	100

116. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

Table 17: Estimated Market Shares for the Hutt Valley DIY Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]
<i>Merged Entity</i>	[]	[]
Wainuiomata Hire	[]	[]
Moor Hire	[]	[]
Others	[]	[]
Total	[]	100

117. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are outside the Commission's safe harbours.

Table 18: Estimated Market Shares Christchurch City DIY Market

Company	Estimated Annual Revenue (\$m)	Estimated Market Share (%)
Hirepool	[]	[]
Hirequip	[]	[]

<i>Merged Entity</i>	[]	[]
Smiths Hire	[]	[]
Liangs Hire	[]	[]
Ace Hire	[]	[]
City Hire	[]	[]
Hamil Hire	[]	[]
Others	[]	[]
Total	[]	100

118. The current three firm concentration ratio is []. Post merger, the three firm concentration ratio will be [] with the merged entity having a [] share. These figures are within the Commission's safe harbours.

State of Existing Competition

119. The acquisition would result in the merged entity become the largest provider of DIY equipment in the North Shore, West Auckland, Central Auckland, Wellington Central, Hutt Valley and Christchurch city areas, with market shares of [], [36.4%], [], [], [] and [] respectively. The merged entity would become the second largest provider of DIY equipment in the South-East Auckland and Hamilton City markets, with market shares of [] and [] respectively.

120. DIY equipment hire companies in the greater Wellington region considered the acquisition would create a monopoly in the Wellington Central market. However, they did not oppose the acquisition; rather, they considered that it would have a pro competitive effect by removing a competitor from the market and opening up increased business opportunities. Generally, DIY equipment hire companies considered that, with the exception of the Wellington Central market, all DIY markets are vigorously contested.

121. The merged entity will face at least one significant other competitor in all of the areas in which aggregation occurs (with the exception of Wellington Central) which would provide a strong competitive constraint. A large number of smaller companies also have a presence in these regions.

Conclusion – Unilateral Market Power

122. The Commission considers that, with the exception of Wellington Central, the merged entity would be constrained by current competition in the DIY equipment markets and that the acquisition would not enhance the scope for the exercise of unilateral market power.

Conclusions – Existing Competition

123. The Commission considers that, with the exception of the Wellington Central market (which is discussed further under barriers to entry), existing competition will alleviate any concerns of unilateral power being exercised by the merged entity in all relevant markets.

CONSTRAINTS FROM MARKET ENTRY

Introduction

124. A business acquisition is unlikely to result in a substantial lessening of competition in a market if behaviour in that market continues to be subject to real constraints from the threat of market entry.
125. Where barriers to entry are clearly low, it will not be necessary for the Commission to identify specific firms that might enter the market. In other cases, the Commission will seek to identify likely new entrants into the market.
126. The Commission will consider the history of past market entry as an indicator of the likelihood of future entry. The Commission is also mindful that entry often occurs on a relatively small scale, at least initially, and as such may not pose much of a competitive constraint on incumbents within the relevant time frame.

Barriers to Entry

127. The likely effectiveness of the threat of new entry in constraining the conduct of market participants, following a business acquisition that might otherwise lead to a substantial lessening of competition in a market, is determined by the nature and height of barriers to entry into that market.
128. The Commission considers that, for the purpose of considering this issue, a barrier to entry is best defined as an additional or significantly increased cost or other disadvantage that a new entrant must bear as a condition of entry. In evaluating the barriers to entry into a market, the Commission will generally consider the broader ‘entry conditions’ that apply, and then go on to evaluate which of those constitute entry barriers.
129. It is the overall obstacle to entry posed by the aggregation of the various barriers that is relevant in determining whether entry is relatively easy or not, and therefore whether or not potential entry would prevent a substantial lessening of competition.
130. For entry to act as an antidote to a substantial lessening of competition stemming from a business acquisition, it must constrain the behaviour of the combined entity and others in the market.
131. As discussed in the competition analysis, industry participants are not concerned by the proposed acquisition. The Commission considers that this may in large part be due to the industry’s views on the lack of barriers to entry or expansion by potential competitors.
132. Industry participants considered that in all of the markets discussed above the only obstacle to entry or expansion was access to capital. However, there is a strong second hand market for used equipment and the cost is therefore not sunk.
133. In addition, equipment is easily sourced, easily domestically or internationally, and may be of new or used quality.
134. A new entrant is not prohibited from competing on similar terms with existing players because of potential economies of scale in sourcing equipment, i.e. existing players

cannot necessarily purchase new equipment at a lower price than a new entrant. Industry participants indicated that discounts based on economies of scale are small or non-existent. A new entrant is therefore capable of sourcing equipment from distributors at similar rates to existing competitors. Thus, there is no barrier to entry arising from existing economies of scale in purchasing equipment.

135. Hirequip has [

].

136. The most significant barrier to entry is the requirement for a new entrant to establish wash-down bays, which are required for earthworks and digging equipment. Resource consent is required for these bays, as debris from equipment is not permitted to flow directly into the sewer system and must be managed through an alternate system. Industry participants indicated the cost of a new bay to be around [], and did not consider resource consent to be a particularly onerous requirement. The Commission considers that the costs in relation to these bays are sunk, but are not significant enough to constitute a material barrier to entry.

The “LET” Test

137. In order for the threat of market entry to be such a constraint on the exercise of market power as to alleviate concerns that a business acquisition could lead to a substantial lessening of competition, entry of new participants in response to the exercise of market power must be likely, sufficient in extent and timely (the *let* test). If they are to act as a constraint on market participants following a business acquisition which might otherwise lead to a substantial lessening of competition in a market, entry must be relatively easy, or to put it another way, barriers to entry must be relatively low.

Likelihood of Entry

138. The mere possibility of entry is, in the Commission’s view, an insufficient constraint on the exercise of market power to alleviate concerns about a substantial lessening of competition. In order to be a constraint on market participants, entry must be likely in commercial terms. An economically rational firm will be unlikely to enter a market unless it has a reasonable prospect of achieving a satisfactory return on its investment, including allowance for any risks involved.

139. In general, it is the pre-merger price that is relevant for judging whether entry is likely to be profitable. That in turn depends upon the reaction of incumbents to entry in terms of their production volume, together with the output volume needed by the entrant in order to lower its unit costs to the point where it can be competitive.

140. Industry participants considered that green fields entry in all of the relevant markets was likely, and estimated start up costs to be between [] for small scale entry, with capital costs increasing in correlation with the size of equipment required. The Commission has found evidence of a history of entry into the markets being considered as discussed below.

The Heavy Construction Market

141. Cat Rental is a recent entrant into the heavy construction and building markets, having established a hire division three years ago. [] Hirepool itself expanded its operations into Hamilton in 2000 and Christchurch in 2002, where its new operations provide all three product types.

The Building Markets

142. []

The DIY Markets

143. A number of parties spoken to indicated that they would consider entering new DIY markets if the acquisition went ahead. []

144. [] Pronto is a new entrant into the Wellington Central DIY market, having commenced business in January of 2003. []

145. Bunnings Warehouse, an Australian company which has recently purchased the Benchmark chain of stores, is currently establishing a hire division within its Auckland stores. Bunnings currently has hire divisions operating within three of its Auckland stores.

Conclusion – Likelihood of Entry

146. The Commission is therefore satisfied that entry or expansion into the all the markets considered above is likely if the merged entity attempted to exercise market power.

Extent of Entry

147. If entry is to constrain market participants, then the threat of entry must be at a level and spread of sales that is likely to cause market participants to react in a significant manner. The Commission will not consider entry that might occur only at relatively low volumes, or in localised areas, to represent a sufficient constraint to alleviate concerns about market power.
148. Small-scale entry into a market, where the entrant supplies one significant customer, or a particular product or geographic niche, may not be difficult to accomplish. However, further expansion from that “toe-hold” position may be difficult because of the presence of mobility barriers, which may hinder firm’s efforts to expand from one part of the market to another. Where mobility barriers are present in a market, they may reduce the ‘extent’ of entry.

149. The experience of Cat Rentals indicates that it is possible to enter the building and heavy construction markets to an extent significant enough to provide a constraint to the merged entity. Similarly, Bunnings Warehouse has recently entered the DIY markets in Auckland and has quickly established itself on a competitive footing.
150. Industry participants considered that new entrants or existing competitors are not limited in their capacity to enter or expand. Participants face no binding capacity constraints and additional capacity is not significantly more expensive to acquire or operate.
151. The Commission therefore considers that entry or expansion into all the markets considered above would be sufficient in extent to constrain the merged entity should it attempt to exercise market power.

Timeliness of Entry

152. If it is effectively to constrain the exercise of market power to the extent necessary to alleviate concerns about a substantial lessening of competition, entry must be likely to occur before customers in the relevant market are detrimentally affected to a significant extent. Entry that constrains must be feasible within a reasonably short timeframe from the point at which market power is first exercised.
153. In some markets where goods and services are supplied and purchased on a long-term contractual basis, buyers may not immediately be exposed to the detrimental effects stemming from a potential substantial lessening of competition. In such cases, the competition analysis, in a timing sense, begins with the point at which those contracts come up for renewal.
154. The applicant contends that entry could occur relatively quickly. Industry participants agreed with this contention. The experience of Pronto is evidence that greenfields entry is possible within a reasonable timeframe. [
-]

155. The Commission therefore considers that, if the event of the merged entity attempting to exercise market power, entry is likely within the necessary timeframe considered for entry to constrain any exercise of market power.

Conclusion on Barriers to Entry

156. Given the conclusions reached under the competition analysis with regard to the lack of competition in the Wellington DIY market post acquisition, the Commission has specifically focused on identifying potential entrants into this market. The Commission is satisfied that potential entry will provide a constraint on the merged entity should it attempt to exercise unilateral market power.
157. In all other markets the Commission concludes that there are no significant barriers to entry or expansion. Potential competition, in addition to the strength of existing competition, is likely to provide a competitive constraint to the merged entity in all markets, and the industry as a whole.

Scope for the Exercise of Coordinated Market Power

Introduction

158. A business acquisition may lead to a change in market circumstances such that coordination between the remaining firms either is made more likely, or the effectiveness of pre-acquisition coordination is enhanced. Firms that would otherwise compete may attempt to coordinate their behaviour in order to exercise market power by restricting their joint output and raising price. In extreme cases, where all firms in the market are involved and coordination is particularly effective, they may be able to behave like a collective monopolist. Where not all firms are involved, and market share in the hands of the collaborators is reduced, coordinated market power becomes more difficult to exercise because of competition from the independent firms in the market.
159. In broad terms, successful coordination can be thought of as requiring two ingredients: ‘collusion’ and ‘discipline’. ‘Collusion’ involves the firms individually coming to a mutually profitable expectation or agreement over coordination; ‘discipline’ requires that firms that would deviate from the understanding are detected and punished (thereby eliminating the short-term profit to be gained by the firm from deviating).
160. When assessing the scope for coordination in the market during the consideration of a business acquisition, the Commission will evaluate the likely post-acquisition structural and behavioural characteristics of the relevant market or markets to test whether the potential for coordination would be materially enhanced by the acquisition. The intention is to assess the likelihood of certain types of behaviour occurring, and whether these would be likely to lead to a substantial lessening of competition.

Collusion

161. “Collusion” involves firms in a market individually coming to a mutually profitable expectation or agreement over coordination. Both explicit and tacit forms of such behaviour between firms are included.
162. The structural and behavioural factors that are usually considered to be conducive to collusion are set out in the left-hand column in Table 19. The significance of these is explained more fully in the Commission’s *Practice Note 4*. The right-hand column of the Table then assesses the extent to which those factors are present, or are likely to be enhanced post-merger, in the heavy construction market. A high proportion of ‘yes’ responses would suggest that the market was particularly favourable to ‘collusion’; a high proportion of ‘no’ responses the reverse.
163. The Commission’s delineation of separate hire equipment markets is based on the markets demand side characteristics. However, from a supply side perspective, the Commission considers that the markets discussed above and the competitors within them are sufficiently similar for the following analysis to apply to all markets.

**Table 19:
Testing the Potential for ‘Collusion’ in the Heavy Construction, Building and DIY
Markets**

Factors conducive to collusion	Presence of factors in the market
High seller concentration	Yes – with the exception of the Waikato building market and the Hamilton and Christchurch City DIY markets
Undifferentiated product	Yes – the range of products supplied are largely undifferentiated.
New entry slow	No – entry can be effected relatively quickly.
Lack of fringe competitors	No- there are number of fringe competitors who could readily expand.
Price inelastic demand curve	No – customers make consumption decisions based on price
Industry’s poor competition record	No
Presence of excess capacity	No
Presence of industry associations/fora	Yes – but with limited influence

164. The assessment of the relevant structural and behavioural conditions in the relevant markets in Table 19 suggests that the market is not particularly likely to be susceptible to collusion, even after the acquisition. Low barriers to entry and the presence of fringe players without restraints on expansion suggest that any attempt to coordinate behaviour would be rapidly undermined.

165. The Commission is therefore satisfied that the potential for collusion in the heavy construction market, building and DIY markets is low. Accordingly, the Commission considers it unnecessary to determine the potential for discipline in these markets.

Conclusions – Co-ordinated Market Power

166. The Commission considers that the scope for the exercise of coordinated market power would not be enhanced by the acquisition.

OTHER COMPETITION FACTORS

Elimination of a Vigorous and Effective Competitor

167. Sometimes an industry contains a firm that is in some way non-typical, or has different characteristics, or is an innovator, or is regarded as a maverick. The independent or less predictable behaviour of such a firm may be an important source of competition in the

market, and may undermine efforts by other firms to engage in coordination. Such a firm need not be large to have an impact on competition out of proportion to its relative market size. Should it become the target of a business acquisition, the resulting elimination of a vigorous and effective competitor could have the effect of substantially lessening competition in the market (especially if there are barriers preventing the entry of new, effective competitors).

168. While Hirepool actively competes for customers within the defined markets and is regarded as an industry leader in the equipment hire industry, it is not markedly different from other firms in the market. Given the constraints listed above, its removal is not likely to have a disproportionate effect on competition.

Constraint from Buyers or Suppliers

169. The potential for a firm to wield market power may be constrained by countervailing power in the hands of its customers, or alternatively, when considering buyer (oligopsony or monopsony) market power, its suppliers. In some circumstances, it is possible that this constraint may be sufficient to eliminate concerns that a business acquisition may lead to a substantial lessening of competition.

170. Where a combined entity would face a purchaser or supplier with a substantial degree of market power in a market affected by the acquisition, the Commission will consider whether that situation is such as to constrain market participants to such an extent that competition is not substantially lessened.

171. Industry participants advised that there are few written contracts between hire companies and their customers. Although Hirequip has [redacted]. In addition, there are no switching costs in changing suppliers of hire equipment. Many customers also hold multiple accounts with several competitors, and hire on the basis of convenience and price.

172. The Commission considers that users of hire companies have a high degree of countervailing power in the current competitive market, and this would constrain the merged entity.

OVERALL CONCLUSION

173. The Commission has considered the probable nature and extent of competition that would exist in the following markets:

- the national market for heavy construction and earth works equipment hire services;
- regional markets for the supply of building construction and maintenance equipment hire services to commercial customers; and
- sub-regional markets for the supply of building construction and maintenance equipment hire services to domestic ('do it yourself' or 'home handyperson') customers.

174. The Commission considers that the appropriate benchmark for comparison is the status quo.
175. The Commission has considered the nature and extent of the contemplated lessening. The proposed acquisition would result in the merged entity obtaining a market share which falls outside the Commission's safe harbour guidelines in all markets discussed above, with the exception of the Waikato building market, and the Christchurch and Hamilton DIY markets.
176. The Commission has also considered the nature and extent of the contemplated lessening, in terms of the competitive constraints that would exist following the merger from:
- existing competition;
 - potential competition from entry; and
 - other competition factors.
177. The Commission considers that existing competition in all of the markets discussed, with the exception of the Wellington Central DIY market, is sufficient to alleviate the concern that the merged entity would be able to exercise unilateral market power post-acquisition.
178. In addition, the Commission considers that barriers to entry are low and that potential entry satisfies the *LET* test in all of the markets discussed. In particular, the Commission considers that entry into the Wellington Central DIY market is likely should the merged entity attempt to exercise unilateral market power post-acquisition.
179. The Commission is satisfied that there will be no potential increase of co-ordinated market power as a result of the proposed acquisition.
180. The Commission is therefore satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the relevant markets.

DETERMINATION ON NOTICE OF CLEARANCE

181. Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the acquisition by Southern Capital Limited of 100% of the shares in Hirepool Limited from Owens Group Limited.

Dated this 6th day of March 2003

MJ Belgrave
Chair

APPENDIX 1: MAJOR HIRE EQUIPMENT BY MARKET CATEGORIES

Heavy Construction Equipment

- Dumpers Tracked
- Excavators 6 t to 30 t
- Rollers 5 t to 20 t
- Tip Trucks from 5 t
- Bulldozers
- Graders
- Loaders 0.5m to 5m

Building Equipment

- Access Platforms - Scissor Decks to 15m, Cherry Pickers
- Booms from 40ft to 80ft
- Compaction Rollers 1.5 t to 5 t
- Compressors 15cfm to 1200cfm
- Concrete Breakers – Petrol
- Excavators 1.5 t to 6 t
- Forklifts
- Generators 5 kva up to 650kva
- Lighting Towers
- Loaders to .35m bucket
- Pumps up to 8 inch
- Road Barriers
- Toilets
- Portable Buildings
- Traffic Management equipment
- Tractors and implements
- Trenchers (ride on)
- Utes and Trucks up to 2.5 t
- Welders Portable up to 450amp

DIY Equipment

- Compressors up to 15CFM
- Air Tools
- Automotive
- Cleaning Equipment
- Chainsaws
- Concrete Equipment
- Concrete Breaker Electric
- Concrete Breaker Demolition Electric
- Compaction Plates / Rammers
- Cutters and Benders
- Drills

- Electrical Equipment
- Fasteners
- Generators up to 5kva
- Hand Grinders
- Hoists & Jacks
- Lawn & Garden equipment
- Measuring / Survey
- Painting Scaffolding
- Heaters / Fans / Dehumidifiers
- Plumbing Equipment
- Pumps up to 3 inch
- Sanders & Strippers
- Saws
- Sheetmetal Tools
- Tarpaulins
- Trenchers – walk behind
- Trailers
- Welders – Caddy and Gas
- Wood Working Gear
- Sundry Hire Gear