



COMMERCE COMMISSION

Decision No. 577

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

PORTACOM NEW ZEALAND LIMITED

and

RHINO GROUP LIMITED

The Commission: David Caygill
Denese Bates QC
Donal Curtin

Summary of Application: The acquisition by Portacom New Zealand Limited of Rhino Group Limited.

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

Date of Determination: 5 April 2006

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DETERMINATION ON NOTICE OF CLEARANCE.....20

EXECUTIVE SUMMARY

1. A notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 8 March 2006. The Notice sought clearance for the acquisition by Portacom New Zealand Limited of the operations, assets and business owned by Rhino Group Limited. As part of these arrangements, Portacom would purchase the businesses operating by Rhino Portable Buildings Limited (Rhino) and National Rent-A-Fence Limited. Clearance was sought for the acquisition only to the extent it would affect the operations conducted by Rhino.
2. The Commission cleared the proposed acquisition. The Commission considers that the combined entity would be constrained by the:
 - ability of existing and fringe competitors to expand;
 - relative ease at which de novo entry could be achieved; and
 - countervailing power of customers.
3. The Commission considered the relevant market to be:
 - the manufacture and retail supply of portable modular buildings for sale and hire in the greater Auckland region (the Auckland Portable Buildings Market).
4. The Commission considers that the likely counterfactual would be Rhino sold to a third party.
5. The Commission considers that, post-acquisition, Mod Com would continue to compete in the market. In addition, the combined entity would also be constrained by the relative ease with which existing competitors, such as Mai Com, Cabins To Go, Arcus and Rooms-to-Move, could increase their supply.
6. The Commission concludes that, on balance, barriers to entry are not so high as to prevent new players entering the market and notes the ease of expansion by existing and fringe competitors and the threat of de novo entry.
7. The Commission also concludes that, post-acquisition, purchasers of portable buildings, particularly construction firms, are likely to provide a constraint on the combined entity through their ability to switch suppliers and support a new entrant, as well as self-supplying.
8. The Commission is therefore satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the affected market.

THE PROPOSAL

1. A notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 8 March 2006. The Notice sought clearance for the acquisition by Portacom New Zealand Limited (Portacom, or the Applicant) of the operations, assets and business owned by Rhino Group Limited. As part of these arrangements, Portacom would purchase the businesses operating by Rhino Portable Buildings Limited (Rhino) and National Rent-A-Fence Limited (Rent-A-Fence). Clearance was sought for the acquisition only to the extent it would affect the operations conducted by Rhino.

PROCEDURE

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear the acquisition referred to in a s 66(1) notice within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time was agreed between the Commission and the Applicant. Accordingly, a decision on the Application was required by 5 April 2006.
3. The Commission's approach to analysing the proposed acquisition is based on principles set out in the Commission's Mergers and Acquisitions Guidelines.¹

STATUTORY FRAMEWORK

4. Under s 66 of the Act, the Commission is required to consider whether the proposal will have, or would be likely to have, the effect of substantially lessening competition in a market. If the Commission is satisfied that the proposal is not likely to substantially lessen competition then it is required to grant clearance to the application. Conversely, if the Commission is not satisfied it must decline. The standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.²
5. The substantial lessening of competition test was considered in *Air New Zealand & Qantas v Commerce Commission*, where the Court held:

We accept that an absence of market power would suggest there had been no substantial lessening of competition in a market but do not see this as a reason to forsake an analysis of the counterfactual as well as the factual. A comparative judgment is implied by the statutory test which now focuses on a possible change along the spectrum of market power rather than on whether or not a particular position on that spectrum, i.e. dominance has been attained. We consider, therefore, that a study of likely outcomes, with and without the proposed Alliance, provides a more rigorous framework for the comparative analysis required and is likely to lead to a more informed assessment of competitive conditions than would be permitted if the inquiry were limited to the existence or otherwise of market power in the factual.³
6. In determining whether there is a change along the spectrum which is significant the Commission must identify a real lessening of competition that is not

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

² *Foodstuffs (Wellington) Cooperative Society Limited v Commerce Commission* (1992) 4 TCLR 713-722.

³ *Air New Zealand & Qantas Airways Ltd v Commerce Commission*, unreported HC Auckland, CIV 2003 404 6590, Hansen J and K M Vautier, Para 42.

minimal.⁴ Competition must be lessened in a considerable and sustainable way. For the purposes of its analysis the Commission is of the view that a lessening of competition and creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.

7. When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material and ordinarily able to be sustained for a period of at least two years or such other time frame as may be appropriate in any given case.
8. Similarly, when the impact of market power is felt in terms of the non-price dimensions of competition such as reduced services, quality or innovation, for there to be a substantial lessening, or likely substantial lessening of competition, these also have to be both material and ordinarily sustainable for at least two years or such other time frame as may be appropriate.

ANALYTICAL FRAMEWORK

9. The Commission applies a consistent analytical framework to all its clearance decisions. The first step the Commission takes is to determine the relevant market or markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
 - with the acquisition in question (the factual); and
 - in the absence of the acquisition (the counterfactual).
10. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios. The Commission analyses the extent of competition in each relevant market for both the factual and the counterfactual scenarios, in terms of:
 - existing competition;
 - potential competition; and
 - other competition factors, such as the countervailing market power of buyers or suppliers.

THE PARTIES

Portacom

11. Portacom supplies portable modular buildings for sale or hire throughout New Zealand. It is a wholly owned subsidiary of Waco International Limited (Waco). Waco is listed on the Johannesburg Stock Exchange. Other than Portacom, Waco operates a number of businesses associated with the

⁴ See *Fisher & Paykel Limited v Commerce Commission* (1996) 2 NZLR 731, 758 and also *Port Nelson Limited v Commerce Commission* (1996) 3 NZLR 554.

construction industry including PAL Kwikform Limited, which supplies scaffolding in New Zealand.

12. Portacom began supplying modular transportable buildings in the late 1970s, primarily as a result of demand from 'Think Big' projects for temporary on-site offices in remote areas.⁵ Portacom's buildings are primarily used as temporary offices.

Rhino Group Limited

13. Rhino Group Limited operates two businesses, which operate under the names Rhino and Rent-A-Fence, respectively. Rent-A-Fence supplies temporary fencing for the construction industry.
14. Rhino supplies portable modular buildings for sale, lease or hire and its buildings are commonly used as temporary offices. Rhino is primarily based in Auckland although it does supply customers throughout the upper North Island.
15. Rhino does not manufacture any portable buildings itself but contracts the construction out to J.N. Construction Limited (JNC). Typically, Rhino supplies JNC with the raw material before JNC physically constructs the required building.

OTHER RELEVANT PARTIES

Suppliers

Mod Com Limited

16. Mod Com Limited (Mod Com) supplies portable buildings for both sale and hire. Previously, Mod Com manufactured the panelling used in the construction of portable buildings. However, it started supplying these types of buildings approximately seven years ago.
17. Mod Com is located in Tauranga and supplies portable buildings throughout the upper North Island.

Rooms-to-Move Limited

18. Rooms-to-Move Limited (Rooms-to-Move) supplies portable buildings to be used primarily for temporary accommodation. Rooms-to-Move previously operated under the name 'Overland'. Rooms-to-Move is located in Auckland and supplies portable buildings for sale and hire throughout the upper North Island.

Mai Com Limited

19. Mai Com Limited (Mai Com) supplies portable modular buildings for sale only. Mai Com is located in Auckland and began operating approximately 18 months ago.

Cabins To Go Limited

20. Cabins to Go Limited (Cabins To Go) supplies portable buildings for both sale and hire. Cabins To Go is located in Auckland and has been operating for five years.

⁵ Portacom claims that it is the originator of relocatable buildings in New Zealand. See, <http://www.portacom.co.nz/aboutus.htm>.

Arcus Portable Buildings

21. Arcus Portable Buildings (Arcus) supplies portable modular buildings for hire only. Arcus is located in Auckland and has been operating for seven years.

Other operators

22. In addition to the parties listed above, there are a number of other suppliers of portable buildings in the upper North Island. Typically, these suppliers are based in one location. Portacom is the only operator that has physical locations throughout the North Island. Other suppliers in the upper North island include:
- Portacabin Portable Buildings Limited, in Masterton;
 - Leisurecom (NZ) Limited, in Auckland; and
 - Tyrex Wholesale Limited, in Cambridge.

PREVIOUS INVESTIGATIONS

23. The Commission has previously considered two cases concerning the supply of portable buildings. They are:
- *Decision 409: Portacom New Zealand Limited / Portable Buildings Limited*, 2 November 2000; and
 - *Decision 499: Portacom New Zealand Limited / Transportables*, 30 May 2003
24. The Commission cleared both of these acquisitions. In each of these decisions, the Commission considered the geographic market to be relatively narrow due to the cost of transporting a portable building in relation to its overall value.
25. In addition, in Decision 409 the Commission considered that the sale and hire of portable buildings were in the same product market. The Commission considered that on the supply-side, it was relatively easy for a supplier to switch between hiring and selling. Also, on the demand-side, there were a number of marginal customers who would switch between hiring and buying if the relative hire/sale prices were out of line.
26. Further, the Commission considered that, in regards to these acquisitions, the combined entities would be constrained by the:
- ease of expansion by existing competitors;
 - ease of entry by potential competitors; and
 - countervailing power of purchasers.

MARKET DEFINITION

27. 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.”⁶

⁶ s 3(1A) of the Commerce Act 1986.

28. For the purpose of competition analysis, the internationally accepted approach is to assume the 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 would be able to impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test). The smallest space in which such market power may be exercised is defined in terms of the dimensions of a market discussed below. The Commission generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for a period of one year.

Product Market

29. The greater the extent to which one good or service is substitutable for another, on either the demand-side or supply-side, the greater the likelihood that they are bought and supplied in the same market.
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. 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 to their relative prices.
32. The Applicant submitted that the relevant market is the market for the manufacture, sale and hire of portable modular buildings in the North Island.
33. Industry participants advised that a portable modular building⁷ is built using ‘sandwich’ panel construction where panel walls are connected to a base frame. Typically, the panel walls are manufactured by gluing, or ‘sandwiching’, polystyrene sheets between two sheets of steel. The resulting panel can then be cut to the desired length. The result is a light weight, weather resistant panel, which is also a good insulator.
34. Industry participants advised the Commission that suppliers of portable buildings do not generally manufacture the sandwich panels themselves but purchase these panels from manufacturers such as Bondor New Zealand Limited and Metalcraft Industries Limited.
35. In addition, industry participants advised that increasingly, panels are being imported from low cost manufacturers in Asia for the construction of portable buildings. For example, Portabuild and Hire Limited (Portabuild), based in Christchurch, imports panels from China.
36. Typically, the standard size of a portable building is approximately six metres by three metres. However, the panel design enables a manufacturer to tailor a building to a customer’s specific requirements relatively easily. For example, the Applicant supplies a range of standard sizes from 3.6m by 2.4m up to 12m by 3m.
37. Industry participants advised that the main use for a portable building is as a temporary office. For example, the Applicant submitted that most of its customers are construction firms which use portable buildings as an office on a

⁷ For convenience, this report refers to portable modular buildings simply as portable buildings.

construction site and shift them around their various locations, as required. In addition, many of its customers are businesses that are renovating their existing offices and require a short term alternative to their regular offices.

38. In addition, industry participants advised that there are a number of other industries that use portable buildings, notably electricity companies, telecommunications companies and education providers. For example, industry participants advised that portable buildings are increasingly being used by schools to provide classrooms. The advantage for schools is that these types of buildings can be installed relatively quickly without disrupting the existing facilities and infrastructure, for instance, in the schools holidays. Nevertheless, the primary use of a portable building remains the same, which is to provide a convenient alternative to a permanent workspace.
39. Portable buildings are also used for temporary accommodation. For example, Rooms-to-Move stated that many of its customers locate portable buildings on their properties while they are constructing their permanent homes. Also, many holiday parks are using portable buildings in much the same way that holiday makers have traditionally used cabins. This is because the portable building can be located on site relatively easily.
40. Industry participants advised the Commission that a standard building can be modified to the desired purposes of the customer relatively easily. For example, it is common for suppliers to include cooking facilities, toilets and shower facilities, if required.
41. [] stated that its main focus is on supplying buildings for temporary accommodation as it sees this as a niche in the market. Further, it uses this as a point of difference from the likes of Portacom and Rhino. However, it advised that there is no difference between buildings designed for accommodation and those designed for offices and most operators supply both.
42. The Commission notes that suppliers attempt to differentiate their portable buildings, such as adding features like shower facilities or to make them suitable for living quarters. All industry participants advised the Commission that a portable building is a very standard product regardless of its potential use by an end-customer. Accordingly, the Commission considers that any differentiation is unlikely to affect the market definition.
43. In addition, the Commission understands that shipping containers can be used as temporary construction site buildings. The main advantage of a shipping container is that it offers better security than a standard portable building. The light weight, temporary nature of a portable building means that it is susceptible to theft. In this regard, industry participants advised that containers are mainly used for storing equipment rather than as offices. Accordingly, the Commission does not consider containers to form part of the relevant product market.

Sale versus Hire

44. Both the Applicant and Rhino supply portable buildings for sale and hire. The Applicant submitted that there is no pattern to distinguishing whether a customer hires or purchases a portable building. It considers that the decision depends on the capital constraints of each particular customer and the intended purpose of the building.

45. In Decision 409, the Commission considered that the sale and hire of portable buildings were in the same product market. The Commission considered that on the supply side, it was relatively easy for a supplier to switch between hiring and selling. Also, on the demand side, there were a number of marginal customers who would switch between hiring and buying if the relative hire/sale prices were out of line.⁸
46. Industry participants advised the Commission that sales of portable buildings make up the majority of suppliers' turnover. For example, approximately [] of Rhino's turnover and approximately [] of Portacom's turnover is from sales.
47. Industry participants advised that the primary consideration over whether to hire or purchase a building outright is the length of time the customer requires the building. For example, a customer is unlikely to purchase a portable building if it is required for a short period of time, such as one month. However, the decision was different when the period of hire exceeds one year.
48. The Applicant and Rhino stated that hire customers range from short term contracts, which start from four to six months, to long term contracts, which are those that exceed one year. For example, [] advised the Commission that it is hiring units on contracts ranging from six months up to 18 months.
49. The Commission understands that the period in which customers start switching from hiring to buying is when the hire period is likely to exceed 12 months. Customers with these requirements could be considered 'marginal customers' for hiring and purchasing. The Commission considers that switching would occur among these marginal customers if the relative hire/sale prices were out of line. If the cost of hire increased to a point where the cost to purchase a portable building together with its associated maintenance, and depreciation cost was less than hire over a certain period, then switching would be an option.
50. The Commission notes that certain customers have a preference for hire versus purchasing. For example, [] advised the Commission that it prefers to limit the amount of fixed assets it has on its books and hires all the equipment it uses in its construction projects, whether a portable building or a bulldozer. In this regard, [] considered that it would be unlikely to specifically purchase a portable building.
51. However, one of [] has an extensive fleet of portable buildings, which it has primarily built itself. It uses these buildings on various project sites throughout the country. In this regard, it very rarely hires a portable building. For example, it hired only one unit from any supplier last year and did not purchase any.
52. Industry participants advised the Commission that an operator, which supplied portable buildings for sale only, would incur initial set up costs if it wanted to establish a hire fleet. For example, once a unit has been built there is little that can be done with it if it is not on hire, whereas when a unit is sold the cost of materials and construction are immediately recovered. In this regard, the Commission understands that some suppliers operate a hire fleet only as a secondary aspect of their business.

⁸ There was no aggregation of sale units in Decision 499. Accordingly, the Commission did not consider this scenario.

53. Nevertheless, Rhino advised the Commission that it started a hire fleet relatively easily, with minimal capital outlay. It secured a short term contract for the hire of five units and then, once these units came off contract, used them to build momentum as a hirer of portable buildings. Currently, Rhino has approximately [] units in its hire fleet. [] considered that there is nothing stopping a competitor from following Rhino's example in establishing a hire fleet.
54. While acknowledging that establishing a hire fleet is not costless, the Commission considers that suppliers of portable buildings for sale could supply a hire fleet relatively easily. This is evidenced by the expansion of Rhino's hire fleet. Further, establishing a hire fleet would require no change in the existing production facilities of a supplier.
55. Accordingly, the Commission considers the relevant product market to be portable buildings for sale and hire.

Functional Markets

56. 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. 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.
57. The Applicant submitted that the relevant market is the manufacture and retail supply of portable buildings. However, the Applicant noted that, whereas it physically manufactures all its portable buildings, Rhino has a short-term contract with JNC to construct portable buildings on Rhino's behalf. Typically, Rhino supplies JNC with the raw material, such as the panelling. JNC will then physically construct the required building, when required to by Rhino. Rhino advised the Commission that []⁹
58. Nevertheless, Portacom and Rhino both manufacture and supply portable buildings to the end customers who either purchase the building or enter into a rental agreement.
59. Accordingly, the Commission concludes that the appropriate functional level is the manufacturing and retail supply level.

Geographic Markets

60. The Commission defines the geographic dimension of a market to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local sources of supply be raised.
61. Generally, the higher the value of the product to be purchased, in absolute terms or relative to total buyer expenditure, the more likely that buyers will travel and shop around for the best buy, and the wider the likely geographic extent of the market.
62. Typically, a portable building is transported to the required location on a truck, equipped with a small crane. Once at the location, the building is simply placed

⁹[]

in the desired position and the building is available to be used immediately. The Commission understands that, in some instances, a helicopter or even a barge may be used to transfer the building, when required. Also, some suppliers construct the building on a trailer, which enables the building to be quickly and easily transferred between locations.

63. Portacom supplies portable buildings on a national basis whereas Rhino operates, primarily, in the greater Auckland region. The Applicant submitted that the relevant market should be North Island wide as it is relatively common for operators, regardless of their location, to supply customers anywhere in the North Island.
64. Industry participants advised that, typically, suppliers would have a number of portable buildings located in different parts of the country such that after every hire period the portable building does not return to the one central location. For example, Portacom stores a large proportion of its hire fleet with its transportation providers, when the buildings are not hired. This has two advantages, namely:
 - by scattering portable buildings around the region, Portacom can supply customers more quickly and at less cost than if the buildings were located in a central depository; and
 - the cost of storage is reduced.
65. In this regard, the Commission notes that a supplier of a portable building does not necessarily have to be physically located in a particular city, or region, to compete in a particular market.
66. In defining a geographic market, the Commission considers the practicality of transporting product by various modes and over various distances, and the costs of doing so relative to the value and profitability of the product. Where transport costs are high relative to the final value of a product, a narrower geographic market is more likely to be appropriate.¹⁰
67. Industry participants advised the Commission that the transportation costs for the supply of a portable building are paid entirely by the customer. These costs typically include a standard cost of uploading and unloading the building at the required location and a variable cost based on the physical distance the building is transported.
68. Nevertheless, the transportation costs of a portable building are high in proportion to the overall value of the building. Typically, this limits the distances that a building can be transported economically. For example, the Commission understands that portable buildings are not transported between the North Island and the South Island.¹¹
69. The Commission understands that the hiring of portable buildings occurs in a much narrower geographic area than the sale of an equivalent building, from the same supplier. For example, the transportation costs on a hire contract are,

¹⁰ Commerce Commission v Carter Holt Harvey Building Products Ltd, (2000) 9 TCLR, 597.

¹¹ Industry participants stated that in some instances suppliers located in the North Island have tendered for significant contracts in the South Island (and vice-versa). For example, []. Nevertheless, industry participants advised that these examples were irregular and, typically, are for sale contracts.

typically, the same as for a sale contract. However, in most instances, the value of a hire contract is substantially less than a sale contract. In addition, a hire contract requires the building to be returned to the supplier, therefore doubling the transportation costs for the customer.¹²

70. Rhino advised the Commission that it primarily supplies portable buildings in the greater Auckland region, where it has historically based its operations. However, a significant proportion of customers are from outside this region and its customer base extends from Whangarei down to Tauranga, Taupo and New Plymouth. Rhino stated that approximately [] of its turnover is from customers outside the Auckland region.
71. In addition, Rhino advised that this figure is variable and is dependent on customer demand. Currently, there is a high level of infrastructure work in Auckland, which has concentrated demand for portable buildings. However, it is widely anticipated that demand is reaching its peak and this demand is expected to shift to customers and locations outside the greater Auckland region. [] also advised the Commission that construction was reaching its peak in Auckland and they are expecting the focus to shift to projects outside the region.
72. However, while acknowledging that there are arguments in favour of both a narrow and broad geographic market, the Commission considers that for the purposes of the present Application, the relevant competition effects are best identified by defining a narrow geographic market for portable buildings. The Commission considers that if competition issues are not identified in the narrowly defined market, they are unlikely to arise in a broadly defined market.
73. Accordingly, the Commission considers the geographic market to be the greater Auckland region.

Conclusion on Market Definition

74. The Commission concludes that for the purposes of assessing the competition implications of the proposed acquisition, the relevant market is:
 - the manufacture and retail supply of portable modular buildings for sale and hire in the greater Auckland region (the Auckland portable buildings market).

COUNTERFACTUAL AND FACTUAL

75. In reaching a conclusion about whether an acquisition is likely to lead to a substantial lessening of competition, the Commission makes a comparative judgment considering the likely outcomes between two hypothetical situations, one with the acquisition (the factual) and one without (the counterfactual).¹³ The difference in competition between these two scenarios is then able to be attributed to the impact of the acquisition.

¹² The Commission notes that portable buildings, by their nature, are designed to be moved and therefore any purchaser would need to pay transportation costs, at some stage.

¹³ *Air New Zealand & Qantas Airways Ltd v Commerce Commission (No 6)*, unreported HC Auckland, CIV 2003 404 6590, Hansen J and K M Vautier, Para 42.

Factual

76. In the factual scenario, other than the combined entity, there would be a number of other suppliers of portable modular buildings in the Auckland market. However, the Commission notes that although these other operators supply portable buildings for sale and for hire, their respective hire fleets are significantly smaller than that of the combined entity.
77. The Applicant submitted that the purpose of the proposed acquisition is to increase its presence in the Auckland region where the majority of construction work is currently located. It stated that proposed acquisition would add approximately [] portable buildings to its hire fleet, this figure being Rhino's existing hire fleet. Rhino Group Limited advised that the Rhino business represents approximately [] bid by Portacom.
78. Nevertheless, Portacom [

].¹⁴

79. In addition, the Applicant advised the proposed transaction would involve the acquisition of the Rent-A-Fence business. Rent-A-Fence supplies portable fences. Rhino Group Limited advised that the Rent-A-Fence business represents approximately [] bid by Portacom. Portacom advised that it has no previous experience in portable fences but it is very keen to get into this business. It considers that this will complement its existing operations as well as its parent company's scaffolding business.
80. Further, the Applicant advised that it [

].

81. Currently, JNC has a short-term contract to construct all the portable buildings that Rhino supplies for sale or hire. David Tarring, Rhino Group Limited, stated that it has a 'friendly' relationship with JNC, which has suited both businesses up until this point. The Commission understands that [

]

82. Accordingly, the Commission considers that in the factual scenario Rhino's retail operations would be incorporated into the existing operations of Portacom.

Counterfactual

83. David Tarring, Director, Rhino Group Limited advised that it has been considering the possible options for the business for some time. [

¹⁴ [

].

].

84. Further, Rhino advised that [

] it

is now a suitable time for the businesses to be sold.

85. Accordingly, the Commission considers that in the counterfactual scenario it is likely that Rhino would be sold to a third party.

COMPETITION ANALYSIS

Existing Competition

86. Existing competition occurs between those businesses in the market that already supply the product, and those that could readily do so by adjusting their product-mix (near competitors).
87. An examination of concentration in a market can provide a useful indication of the competitive constraints that market participants may place upon each other, providing there is not significant product differentiation. Moreover, the increase in seller concentration caused by a reduction in the number of competitors in a market by an acquisition is an indicator of the extent to which competition in the market may be lessened.
88. A business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:
- the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected or associated persons) has less than in the order of 40% share; or
 - the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.
89. The Commission recognises that concentration is only one of a number of factors to be considered in the assessment of competition in a market. In order to understand the impact of the acquisition on competition, and having identified the level of concentration in a market, the Commission considers the behaviour of the businesses in the market.
90. The existing competitors in the Auckland portable buildings market are Portacom, Rhino and Mod Com, with a number of other competitors also supplying the market as well as some companies self supplying.
91. Industry participants were unclear on the total size of the market and what the appropriate measurement should be in estimating market share in this industry. For example, buildings can vary in their size and configuration such that revenue is not always proportionate to the number of buildings sold. Further, any market shares would not include any companies that are currently self supplying portable buildings.

92. Table 1 shows the estimated market shares for the manufacture and retail supply of portable buildings for sale and hire in the greater Auckland region for the 2005 year.

Table 1: Estimated Market Shares in the Auckland Portable Buildings Market

Supplier	Turnover	Market Share
Portacom	[]	[]
Rhino	[]	[]
<i>Combined Entity</i>	<i>[]</i>	<i>[]</i>
Mod Com	[]	[]
Rooms-to-Move	[]	[]
Mai Com	[]	[]
Cabins To Go	[]	[]
Other ¹⁵	[]	[]
Total	[]	100%

Source: Industry participants

93. Table 1 indicates that, post-acquisition, the combined entity would have a market share of [] when measured by turnover and the three-firm concentration ratio would be []. This is outside the Commission's safe harbours.
94. Industry participants advised that the above list of suppliers does not include all competitors in the market because of the relatively narrow geographic market. Further, the Commission notes that it does not include customers who self supply, including some construction firms.
95. Industry participants advised the Commission that price is the primary consideration when a customer selects a portable building. As noted in the market definition, suppliers do attempt to differentiate their buildings from their competitors. However, [] stated that the final decision always came down to price. Industry participants considered this is because a portable building was essentially just a 'shed', which is only ever designed to be used in a temporary manner.
96. Portacom and Mod Com advised the Commission that the typical 'life span' of a portable building was between five and eight years. However, this is contingent on the treatment and the level of use of the building. For example, Rhino stated that after a lengthy period on hire, especially on a construction site, a portable building can return in quite a poor state. In this regard, it has a constant refurbishment programme in place for its hire fleet. Portacom stated that one of its buildings in its hire fleet is 15 years old but noted this was a rarity.
97. [] noted that portable buildings tend to depreciate very quickly. For accounting purposes, it estimates that its portable buildings depreciate over three years although some of its buildings maintain a residual value after this period.

¹⁵ 'Other' includes suppliers such as Arcus, Leisurecom (NZ) Limited and Tyrex Wholesale Limited.

98. The Applicant submitted that most of the costs in the construction of a portable building are variable. In this regard, it considers there are few economies of scale that can be achieved and, as such, there is no advantage from being the largest supplier, in either the factual or counterfactual scenario. The Commission understands that the frequency and volume of orders for units are also variable.
99. The Commission understands that labour and raw materials account for the majority of the cost of manufacturing a portable building. As stated in the market definition section, industry participants advised the Commission that the raw materials required for a portable building are readily available. Further, industry participants advised there are no special requirements for skilled labour to construct a portable building. For example, [] stated that it often hires manual labourers, with no experience in portable buildings, to complement its existing staff when it requires additional workers.
100. Industry participants advised the Commission that it takes about 45-50 labour hours to construct a standard portable building. This was the same for [] one of the largest suppliers, and for [], one of the smaller competitors.
101. Further, two of the smaller operators in the market, [] advised that they would be able to expand their production facilities in a short timeframe to meet any increased demand for portable modular buildings. Both stated that this would also be the same situation for other competitors and for any future operators. The Commission considers this indicates that there is no need to start on a large scale to be able to compete efficiently.
102. Accordingly, the Commission does not consider that competitors in this market would be constrained in their ability to access the require inputs in the supply of portable buildings.
103. Industry participants noted that the combined entity would have the largest fleet of portable buildings in the Auckland market as well as in the entire North Island. The Commission has previously considered that the sale and hire of portable buildings are in the same product market, due to the ability of suppliers to switch production. Nevertheless, the Commission has noted the relative sizes of the hire fleets of existing suppliers.
104. Table 2 shows the estimated market shares for the retail supply of portable buildings for hire in the greater Auckland region for the 2005 year.

Table 2: Estimated Market Shares for the Hire of Portable Buildings in Auckland

Retailer	Hire Fleet	Market Share	Utilisation
Portacom	[]	[]	[]
Rhino	[]	[]	[]
<i>Combined Entity</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>
Mod Com	[]	[]	[]
Arcus	[]	[]	[]
Other ¹⁶	[]	[]	[]
Total	[]	100%	[]

Source: Industry participants, Commission estimates

105. Rhino stated that its average hire contract is for between [] portable buildings and the contract could last from anywhere between four months and 24 months. A typical contract would consist of a number of different sized portable buildings but this is dependent on the requirements of the customer. Portacom and Rhino advised the Commission that it was unusual for a contract to exceed 15 buildings and most contracts were for customers who required less than ten portable buildings.
106. Industry participants advised that most new entrants begin in the market by concentrating on supplying portable buildings for sale. A new entrant starting up a hire business would require higher capital reserves than a new entrant that only sold portable buildings. This is because the returns from hiring would take longer to materialise than those from selling portable buildings. The Commission understands that some competitors do not operate a hire fleet of any significant size, unlike Rhino and Portacom.
107. Nevertheless, Rhino advised the Commission that it started a hire fleet relatively easily, with minimal capital outlay. It secured a short term contract for the hire of five units and then, once these units came off contract, used them to build momentum as a hirer of portable buildings. [] considered that there is nothing stopping a competitor from following Rhino's example in establishing a hire fleet.
108. In addition, Mod Com stated that if Portacom increased hire prices post acquisition, it would not have any difficulty expanding the number of portable buildings in its fleet to meet demand. Further, the current utilisation of its hire fleet was approximately []
109. [] considered the market to be highly competitive and did not consider the combined entity would have the ability to substantially increase the hire price of a portable building. Further, because [] concentrates on sales, it did not consider that this affected its ability to compete in this market.
110. [] advised that it always 'shops' around when it is looking to hire portable buildings for a project. Typically, this would include Portacom, Rhino and Mod

¹⁶ 'Other' includes operators such as Rooms-To-Move, which has [] hire units, and Cabins To Go, which has [] hire units.

Com. Post-acquisition, [] stated that it would still look at alternatives to the combined entity, whether they were local suppliers or suppliers further afield. This would certainly be the case if the combined entity attempted to increase its price. [] did not consider there to be any difference between any of the portable buildings supplied in this industry. [] stated that, if the combined entity did raise its prices, customers would likely switch to other firms as essentially all portable buildings are comparable with one another.

111. In addition, a further constraint exists from several local construction companies who have indicated that they have units on hand that are potentially available for hire when not in use. For example, [] has approximately 100 units. [] also advised the Commission that it is aware that a number of its units (which it had previously sold to a client) are now available for hire from a third party.
112. In comparing the effects of the acquisition against the counterfactual, the impact on sale and/or hire of portable buildings is likely to be minimal. For example, there are a number of alternative suppliers of portable buildings. Further, some construction firms have their own fleet of portable buildings, and, as discussed in the product market, the price of purchasing a new portable building acts as a constraint on the hire fees.

Conclusion on Existing Competition

113. The Commission considers that post-acquisition, Mod Com would continue to be a competitor in the market. In addition, the combined entity would also be constrained by the relative ease with which existing competitors, such as Mai Com, Arcus, Cabins To Go and Rooms-to-Move could increase their supply.

Potential Competition

114. An acquisition is unlikely to result in a substantial lessening of competition in a market if the businesses in that market continue to be subject to real constraints from the threat of market entry. The Commission's focus is on whether businesses would be able to enter the market and thereafter expand should they be given an inducement to do so, and the extent of any barriers they might encounter should they try.

Barriers to Entry and Expansion

115. The effectiveness of the threat of new entry in preventing a substantial lessening of competition in a market following an acquisition is determined by the nature and effect of the aggregate barriers to entry into that market. The Commission is of the view that a barrier to entry is best defined as anything that amounts to a cost or disadvantage that a business has to face to enter a market that an established incumbent does not face.
116. Industry participants advised that there is a small capital outlay to establish a portable building supply operation. This would include hire of premises for construction, purchase of suitable tools, raw materials and the hiring of labour.
117. The Commission understands that the tools used in the construction of portable buildings are generic in nature and easily available. Typically, the raw materials are able to be purchased through a number of sources so there is unlikely to be a competitive advantage associated with the scale of entry. For example, there are multiple local suppliers of materials used in the construction of portable buildings, and these can be imported at competitive prices.

118. Furthermore, Portabuild advised that it imports kitset portable buildings from China, and a building can be erected in approximately []. Portabuild considers that these panels are [].
119. In addition, industry participants advised that a potential new entrant could purchase raw materials, contract out the construction of the portable buildings, and retail the finished portable building as Rhino has done.
120. Mai Com entered the market approximately 18 months ago. Over this time, it advised the Commission that it has sold approximately [] portable buildings. It advised that an entrant could start up a portable building operation, in much the same way as it did, for approximately []. In this regard, the Commission does not consider the costs associated with supplying portable buildings are at a level that would be likely to inhibit new entrants from entering the market.
121. Rooms-to-Move advised the Commission that a firm wishing to hire portable modular buildings needs a higher capital outlay than a firm that only sells. However, as considered in the market definition, the Commission notes the ease of supply-side substitutability between sale and hiring. Therefore, the Commission does not consider this to be a significant barrier to entry.
122. Accordingly, the Commission does not consider that the barriers to expansion are at a level which would inhibit potential new entrants from entering the market for the supply of portable buildings.

De novo entry

123. The Applicant submitted that there has been continued entry by new competitors throughout the country and is an example of the low barriers to entry in this market. For example, Portacom listed a number of ‘Trade Me’ vendors in the Application.
124. Portacom submitted that there are a number of potential entrants who could enter the relevant market. These included:
- firms that currently supply portable buildings outside the geographic boundaries of the market;
 - firms that are in the construction industry; and
 - suppliers of the raw materials used in the construction of portable buildings.
125. Portabuild manufactures and supplies portable buildings in Canterbury. It currently has a fleet of [] hire units in Canterbury. Portabuild advised the Commission that []
-].
126. []
-].
127. Mod Com advised that it began business in the supply of the materials used to construct portable buildings, and decided to move into the construction of buildings. It considered that other suppliers of the raw materials used in the construction of portable buildings could also enter the market.

128. The Applicant advised the Commission that specialised hire companies are also potential entrants in this market. For example, it considered Hirequip New Zealand Limited (Hirequip) is a likely entrant as it operates throughout New Zealand offering similar equipment to portable buildings such as tents, and event facilities for hire.

129. [

]

130. As previously noted, a high proportion of costs in the manufacturing and supply of portable buildings is variable. Given this high variable cost component, there are few economies of scale achievable from a larger scale of entry. This implies that a small entrant will be likely to be able to compete efficiently.

131. Firms can also avoid the capital costs of a manufacturing facility by employing sub-contractors to manufacture portable units. In this way, a firm can quickly expand existing capacity without having to invest in facilities and equipment to assemble a large fleet of portable units.

132. Industry participants advised that a new operation could be set up in less than three months. This recently occurred with Mai Com. Further, all industry participants advised the Commission that they could easily expand their operations within a two year period.

Conclusion on Potential Competition

133. The Commission concludes that, on balance, barriers to entry in the supply of portable buildings for sale and hire are unlikely to constrain new entry. The Commission considers that the combined entity would be constrained by the:

- ease of expansion by existing and fringe competitors; and the
- ease of de novo entry.

Countervailing Power

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

135. The Applicant submitted that the price of portable buildings is very elastic and that if the combined entity increases its prices, or reduces its quality, customers would quickly look for an alternative. Typically, suppliers quote for a particular job, whether a sale or hire contract, and a customer selects a preferred portable building supplier based on these tenders.

136. Industry participants advised the Commission that the main customers of portable buildings are construction firms. Although there has been growth in a number of uses of portable buildings, such as for accommodation or for school rooms, the primary demand is still from the construction industry.

137. [] stated that it regularly hires portable buildings and did not have any concerns with the proposed acquisition. It advised that it commonly tenders any potential contracts out to two or three suppliers and would continue to do so in

the factual scenario. In addition, [] considered that price is the deciding factor in every tender and it did not consider there is any difference between the portable buildings supplied by any of the existing operators.

138. The Commission also understands that some construction firms can and do construct their own portable buildings. For example, [] has a fleet of 100 portable buildings, although it has at times hired from Portacom in periods of high demand. [] advised that if Portacom raised rental prices construction companies like itself always have the ability to self supply.
139. [] advised the Commission that it has lost a number of tenders from companies who have decided to self supply. For example, [] considered that its tender bids are often used by customers to gauge the current cost of a unit. If the tender is not competitive, the customer then simply instructs its own labourers to construct a cheaper building.

Conclusions on Countervailing Power

140. The Commission considers that, post-acquisition, purchasers of portable buildings, particularly construction firms, are likely to provide a constraint on the combined entity through their ability to switch suppliers, support a new entrant and also self supply.

OVERALL CONCLUSION

141. The Commission has considered the probable nature and extent of competition that would exist, subsequent to the proposed acquisition, in the market for the manufacture and retail supply of portable modular buildings for sale and hire in the greater Auckland region (the Auckland portable buildings market).
142. The Commission considers that the likely counterfactual would be Rhino sold to a third party.
143. The Commission considers that, post-acquisition, Mod Com would continue to compete in the market. In addition, the combined entity would also be constrained by the relative ease with which existing competitors, such as Mai Com, Rooms-to-Move, Cabins To Go, and Arcus could increase their supply of portable buildings.
144. The Commission concludes that, on balance, barriers to entry in the supply of portable buildings for sale and hire are unlikely to prevent new entry. The Commission considers that the combined entity would be constrained by the:
- ease of expansion by existing and fringe competitors; and the
 - ease of de novo entry.
145. The Commission considers that, post-acquisition, purchasers of portable buildings particularly construction firms, are likely to provide a constraint on the combined entity through their ability to switch suppliers, support a new entrant as well as self supplying.
146. The Commission is therefore satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the affected market.

DETERMINATION ON NOTICE OF CLEARANCE

147. Pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by Portacom New Zealand Limited of the operations, assets and business owned by Rhino Group Limited. As part of these arrangements, Portacom would purchase the businesses operating by Rhino Portable Buildings Limited and National Rent-A-Fence Limited.

Dated this 5th day of April 2006

David Caygill
Deputy Chair
Commerce Commission