

Determination

Fletcher Building Limited and Waikato Aggregates Limited [2019] NZCC 2

The Commission: Dr Mark Berry
Elisabeth Welton
Anna Rawlings
Dr John Small

Summary of application: Fletcher Building Limited seeks to acquire all the assets of Waikato Aggregates Limited, excluding the underlying land. The acquisition includes the right to extract sand for 15 years under a profit-a-prendre.

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

Date of determination: 15 February 2019

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

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The proposed acquisition

1. On 29 November 2018, the Commerce Commission (the Commission) registered an application (the Application) under section 66(1) of the Commerce Act 1986 (the Act) from Fletcher Building Limited (Fletcher) seeking clearance to acquire all the assets of Waikato Aggregates Limited (WAL), excluding the underlying land. The acquisition includes the right to extract sand under a profit-a-prendre.¹ Ownership of the underlying land will remain with WAL.
2. Post-acquisition, under the terms of the profit-a-prendre, Fletcher will have for 15 years the right to extract sand and rehabilitate the Tamahere quarry.

Rationale for the acquisition

3. Fletcher's rationale for the proposed acquisition is []²

Our decision

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

Our framework

5. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.³

The substantial lessening of competition test

6. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.
7. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁴
8. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a

¹ A profit-a-prendre is 'an interest in land which will run with the burdened land and will bind purchasers of that tenement in accordance with its nature as a legal or an equitable interest'. In this case the profit-a-prendre means that Fletcher's will acquire rights to extract sand, while ultimate ownership of the relevant lot of land remains with WAL.

² The Application, at [5.1].

³ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2013).

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

competitive market (the “competitive price”),⁵ or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

9. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁶ Some courts have used the word “material” to describe a lessening of competition that is substantial.⁷
10. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

11. A substantial lessening of competition is “likely” if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility but does not mean that the effect needs to be more likely than not to occur.⁸

The clearance test

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

Key parties

Fletcher

13. Fletcher is a limited liability company listed on the New Zealand Stock Exchange and the Australian Securities Exchange. Fletcher operates in various segments of the construction industry and its business can be segmented into building products, laminates and panels, plasterboard, steel, concrete, residential and development, and construction.
14. Fletcher companies relevant to assessing the proposed acquisition are Winstone Aggregates (manufacturer of upstream concrete aggregates), Golden Bay Cement (manufacturer of upstream cement), and Firth (downstream ready-mix and concrete masonry producer). Fletcher also has two concrete pipe companies, Humes and Interpipe.¹⁰

⁵ Or below competitive levels in a merger between buyers.

⁶ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁷ *Woolworths & Ors v Commerce Commission* (HC) above n6 at [129].

⁸ *Woolworths & Ors v Commerce Commission* (HC) above n6 at [111].

⁹ Section 66(3)(a).

¹⁰ Interpipe is a 50:50 joint venture between Fletcher and Hynds.

WAL

15. WAL is a privately owned company which owns and operates a sand quarry at Tamahere, located just south of Hamilton. From the Tamahere quarry, sand and a small amount of other aggregates eg, pebbles and stones are extracted.

Industry background

16. WAL is a supplier of sand in the Waikato and Bay of Plenty regions, while Fletcher, is a downstream purchaser of sand for the supply of ready-mix concrete and concrete blocks throughout New Zealand, including in the Waikato and Bay of Plenty regions.¹¹ Fletcher also owns a sand quarry at Pukekawa in northern Waikato.
17. Sand can be extracted in a number of ways, such as from land, river, or sea. After extraction sand is either sold as is or is further processed to remove other sediments. Sand comes in different types and has different uses, including being an input for other products such as:
- 17.1 pit sand, which is not processed, has various building applications such as being used as fill to level a site before construction;
 - 17.2 concrete sand, which is sand that has been processed to remove dirt and other sediments, is primarily used in the production of ready-mix concrete and concrete masonry products (such as blocks and pavers); and
 - 17.3 sand can also have speciality uses, such as for golf courses or for equestrian arenas.
18. The Applicant submitted that whilst sand can differ in terms of quality, usually measured by the fineness of the sand particle, quantity of lightweight materials such as pumice, and consistency of water content, it is largely a homogeneous product.¹² The main source of differentiation between suppliers appears to be geographic location, given the need to transport sand to the end customer.
19. Ready-mix concrete is a building product used for residential, commercial and infrastructure purposes. It is made from mixing cement, water, concrete sand, concrete aggregates, and other additives. Ready-mix is typically delivered in concrete mixer trucks. The Applicant submitted that concrete sand comprises approximately []% of the delivered price of ready-mix concrete, although this can vary slightly

¹¹ We note that Fletcher also produces concrete pipes which are used in gravity fed or low-pressure applications such as storm water or reticulation. We do not consider concrete pipes further as we have previously found that concrete pipes are included in the national market for pipes and pipe systems. There is currently competition from outside the Waikato and BOP regions and there are no current pipe suppliers sourcing concrete sand in the Waikato and BOP regions. Therefore, the proposed acquisition is unlikely to have any effect on that market.

¹² The Application, at [14.1].

depending on the location of the customer and the moisture content and fineness of the sand.¹³

20. Concrete masonry products (such as concrete blocks and pavers) are used in structural and architectural applications in both commercial and residential projects. Concrete masonry products are made from cement, water, concrete sand, concrete aggregates, as well as other inputs such as colouring agents for cosmetic effect. All concrete masonry products are moulded into blocks and pavers in a masonry machine and then put through a curing process. The Applicant submitted that concrete sand makes about approximately []% of the price of concrete masonry products.¹⁴

Other relevant parties

Concrete sand suppliers

21. There are two other major suppliers of concrete sand located near WAL.
- 21.1 Monavale Sand Company Limited (Monavale) is a large concrete sand supplier, located near Cambridge. It has changed ownership in past 12 months.
- 21.2 Revital Sands is a quarry located near Cambridge and is owned by Remediation (NZ) Limited. Remediation (NZ) Limited is also a supplier of fertilisers and compost to farmers and home gardeners.
22. There are several other smaller concrete sand suppliers in Waikato and BOP, including:
- 22.1 Fulton Hogan Limited (Fulton Hogan) has a sand quarry at Bell Road near Tauranga. Fulton Hogan is a large infrastructure and construction firm, with sand and aggregate quarries throughout New Zealand.
- 22.2 Lemon Road Limited owns a quarry near Tauranga (Paengaroa Sands). Paengaroa Sands produces sand and pumice products from its quarry.
- 22.3 Industrial Processors Limited own a sand and pumice quarry southwest of Rotorua (Atiamuri). It also owns a perlite quarry in the central North Island.
- 22.4 Tirau Sands located near Tirau, Waikato has recently been purchased by Bowers Brothers Concrete Limited (Bowers Brothers).

Ready-mix suppliers

23. Allied Concrete (Allied) is a member of the HWR Group of transport companies. It is a major supplier of ready-mix concrete throughout New Zealand. It operates 50 ready-mix concrete plants spread throughout New Zealand, 33 of which are joint venture

¹³ Finer sand, ie, sand comprised of smaller particles, requires less to be used in the mix. The Application, at [20.20].

¹⁴ The Application, at [20.20].

operations with Holcim (New Zealand) Ltd. Allied has five ready-mix plants in Waikato and one in Tauranga.

24. Bowers Brothers is a ready-mix and masonry block supplier with four ready-mix plants in Waikato. Bowers Brothers also own the sand quarry, Tirau Sands.
25. Bridgeman Concrete Limited (Bridgeman) is a ready-mix supplier throughout the North Island. It has five ready-mix plants including at Hamilton, Tauranga, and Rotorua.
26. Bowers & Son Limited (Bowers and Sons) is a ready-mix supplier in Waikato with plants at Te Awamutu and Otorohanga. It is an independent company to Bowers Brothers.
27. Onsite Readymix Concrete Limited (Onsite Concrete) and Waikato Ready Mix Concrete Limited (Waikato Ready-mix) are two smaller ready-mix suppliers located in Cambridge and Hamilton, respectively.
28. Supacrete Concrete Limited (Supacrete) is a smaller ready-mix supplier located in Tauranga.

Previous Decisions

Sand

Decision 696

29. The Commission last considered the extraction and wholesale supply of sand in 2010 as part of Decision 696.¹⁵ In that decision we concluded that sand is a relatively homogenous product and although there are some speciality sands (eg, for golf courses) the volumes of speciality sands demanded were negligible. Therefore, we concluded that the relevant product dimension was all sand including washed, windblown, land and sea sand.
30. In considering the geographic market for sand the Commission noted that the transportation cost is one of the most important factors. However, we found sufficient evidence that backhaul¹⁶ was readily available on some routes, which meant that sand quarries located further away from a particular customer could still compete with more proximate suppliers. Therefore, the Commission considered the relevant geographic market was the Northland region.

Ready-mix concrete

Decision 558 and 513

31. In 2005, the Commission considered the ready-mix concrete market as part of Decision 558.¹⁷ In that decision we adopted the same approach as Decision 513¹⁸

¹⁵ Decision No 696 *Tomarata Sand Limited and Coastal Resources Limited* (2010).

¹⁶ Backhaul is when a haulage company can use the return leg of another trip to transport goods from one location to another.

¹⁷ Decision No 558 *Fletcher Concrete and Infrastructure Limited and W Stevenson and Sons Limited* (2005).

from 2003, which was that ready-mix concrete supply was the relevant product dimension.

32. In relation to the geographic market we found that ready-mix concrete is perishable and has a life span of about 60-90 minutes from the time of adding water to placement. We also noted its bulk made the transportation cost high in relation to its value and therefore not practicable or economical to transport it far from the batching plant. We did not conclude on a specific distance for the geographic dimension of the market but noted we had previously said¹⁹ the maximum transport distance is around 40km for ordinary concrete and 60km for treated concrete, such that the ready-mix lasts longer in the trucks.

Concrete masonry products

Decision 558

33. In Decision 558 (2005),²⁰ we considered the manufacture and wholesale supply of concrete masonry products to be a distinct product market. Concrete masonry products include concrete blocks and pavers.
- 33.1 We found that there is little demand-side substitutability between concrete blocks and pavers as they have different end uses. Typically, concrete blocks are used to construct buildings and retaining walls, whereas pavers are used to surface driveways, paths, and patios.
- 33.2 However, we concluded that there was a high degree of supply-side substitutability between concrete blocks and pavers as they are produced using the same manufacturing process and equipment.
34. In respect of the geographic dimension we considered that Northland, Auckland, and Christchurch were separate geographic markets.

Decision 663

35. In 2009 the Commission considered Fletcher's application to purchase the Whangarei masonry assets of Stevenson Group Limited.²¹ The Commission adopted the same market definition as in Decision 558.

Market definition

36. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

¹⁸ Decision 513 *Holcim NZ Limited and Atlas Resources Limited* (2003).

¹⁹ In Decisions 416 and 466.

²⁰ Decision No 558 *Fletcher Concrete and Infrastructure Limited and W Stevenson and Sons Limited* (2005).

²¹ Decision 663 *Fletcher Building Limited and Stevenson Group Limited* (2009).

37. We define markets in the way that best isolates the key competition issues that arise from an acquisition.²² In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services which fall outside the market but which would still impose some degree of competitive constraint on the merged entity.

Applicant's view of the relevant markets

38. The Applicant submitted that there are several relevant markets, including:
- 38.1 the upstream extraction of sand for wholesale supply in Waikato/BOP;
 - 38.2 the downstream supply of ready-mix concrete in Waikato/BOP; and
 - 38.3 the downstream supply of concrete masonry products in Waikato/BOP.

Upstream market – concrete sand

39. We consider the relevant upstream market to be the production and wholesale supply of concrete (or processed) sand. We have focused on the supply of concrete sand in two geographic areas, with possible asymmetric constraints between them, one for customers within 50kms of WAL's location (the Waikato market) and one for BOP.
40. We note that concrete sand suppliers are differentiated by location, with transport costs restricting the competitive constraint that suppliers place on each other as the distance between them and the customer grows.

Product dimension

41. The Applicant submitted that the supply of all sand (including pit sand) is in the same product market.²³ However, the Applicant submitted that ready-mix and concrete masonry customers cannot use pit sand as the sand needs to be graded and washed to ensure that it does not have any material, such as silt, in it that will affect the quality of the concrete.²⁴
42. Other market participants also confirm that pit sand cannot be used to manufacture concrete products.²⁵ Therefore, there appears to be almost no demand-side substitutability between concrete sand and unprocessed 'pit sand'.
43. On the supply-side, the Applicant said that additional equipment and consents are needed to produce sand for use in concrete (ie, it needs to be processed).²⁶ This is consistent with market feedback.

²² *Mergers and Acquisitions Guidelines* above n3 at [3.10-3.12].

²³ The Application, at [14.1].

²⁴ Fletcher response to information request (3 December 2018).

²⁵ Commerce Commission interview with Allied (19 December 2018), Commerce Commission interview with Bowers & Sons (18 December 2018), Commerce Commission interview with Bowers Brothers (18 December 2018).

- 43.1 A quarry only supplying pit sand explained that they would need to invest \$[] in new machinery to produce concrete sand from the pit sand extracted.²⁷ Despite reasonably large increases in the price of processed sand by WAL since 2016, no pit sand suppliers in Waikato appear to have begun supplying concrete sand.
- 43.2 The Waikato Regional Council also advised that a pit sand supplier looking to produce concrete sand would likely need additional resource consent for water use and disposal, noise and dust emissions.²⁸ These could take significant time and would add additional costs to the process.
44. Therefore, there appears to be limited supply-side substitutability between concrete and pit sand.
45. Given there is little to no demand-side substitutability and limited supply-side substitutability between concrete and pit sand, we consider the relevant product market is the supply of concrete sand. We consider the potential for pit sand operators to begin supplying concrete sand in the competitive effects section below.

Geographic dimension

46. Users of concrete sand typically need it delivered to their plants, either by the sand supplier itself or by organising their own haulage.²⁹ As such, concrete sand suppliers are differentiated by location, with transport costs impacting the competitive constraint that suppliers place on each other as the distance between them grows.
47. The Applicant submitted that the appropriate geographic dimension of the market includes at least all the quarries that currently supply the Waikato and BOP region, while noting that sand is typically delivered from within around []km of a ready-mix plant.³⁰
48. However, of the concrete sand WAL supplied to ready-mix and concrete masonry customers in 2018 financial year, []% of it was supplied within 60km of WAL's location.³¹ On average, Waikato ready-mix plants source concrete sand from within []km of their sites.³²
49. In contrast, BOP and Rotorua ready-mix plants source concrete sand from within []km away on average.³³ The greater average distance compared to Waikato is due

²⁶ Fletcher response to information request (3 December 2018).

²⁷ []

²⁸ Commerce Commission interview with the Waikato Regional Council (23 January 2019).

²⁹ Transport is viewed as a separate service and is often priced separately to concrete sand. The transport cost is paid by the customer.

³⁰ For reference, the distance from WAL to Tauranga is approximately 95km.

³¹ Calculated from customer breakdown in Fletcher document [].

³² Distance calculated using Google Maps. Includes ready-mix customers in Hamilton, Cambridge, Morrinsville, Matamata, Te Awamutu, Otorohanga, and Putaruru.

³³ Distance calculated using Google Maps. Includes ready-mix customers in Katikati, Mt Maunganui, Tauranga, Te Puke, Rotorua, and Tokoroa.

to the limited sand resource in BOP and Rotorua. As such, ready-mix plants must source concrete sand from Waikato quarries.³⁴ For example, []³⁵

50. Although there appear to be no technical barriers to the transportation of concrete sand over large distances, the cost of the transportation affects a supplier's ability to price competitively to get concrete sand delivered to a customer's plant.

Analysis of transport costs

51. A concrete sand supplier's ability to compete for a customer will diminish as the distance between the customer and it increases, relative to another concrete sand supplier. The constraint that a supplier imposes on another will vary by customer, and therefore to some extent the size of the relevant geographic market could differ by each customer location.³⁶
52. However, as a starting point, we considered the average concrete sand customer in the Waikato. When assessing the relevant geographic dimension, we assess whether a hypothetical sole supplier of a product could profitably increase prices for that product by at least a small, but significant, amount. This amount is often referred to as a SSNIP – a small, but significant, non-transitory increase in price. We generally use 5% as the SSNIP. In this case we have also considered a price increase of 10% as a sensitivity test.³⁷
53. Therefore, we have considered whether a hypothetical sole sand supplier in Waikato would be able to profitably raise prices. To do so, we considered a sole supplier, a hypothetical monopolist, located within []km of that customer, the average supply distance in the Waikato.³⁸ We then calculated the additional distance from the hypothetical monopolist that a competing supplier could be before the hypothetical monopolist could profitably increase its price by 5% and 10%.³⁹ This gives us an estimate on how far away another supplier would need to be to enable the hypothetical monopolist to profitably raise prices by 5-10%.
54. The estimate is dependent on the marginal transport cost. We have estimated it using data supplied to us by the merging parties and other market participants.

³⁴ []

³⁵ The Application, Table 2.

³⁶ For customers to constitute separate customer markets (with separate focal points for the relevant geographic markets), quarries would need to be able to discriminate prices to their customers based on their locations. We understand that although most sand quarries offer a standard ex-gate price for concrete sand, discounts are sometimes offered to some customers. We have seen limited evidence that these discounts are based on location, but as quarries will know the location of their customers, this appears to be feasible in principle.

³⁷ As we have not calculated the distances based on the exact customer locations, we used a 10% price increase to help provide some sensitivity for customers located further away than average.

³⁸ *Mergers and Acquisitions Guidelines* above n3 at [20-24].

³⁹ For simplicity, we assumed that the additional distance from the hypothetical monopolist to the supplier added the same distance between the competing supplier and the customer.

54.1 Our estimate of the transport costs per tonne per kilometre ranges from [].⁴⁰

55. Depending on the marginal transport cost used:⁴¹

55.1 a 5% increase in the overall price of concrete sand for the average ready-mix customer in Waikato, occurs at []km beyond the first []km (approximately 30-36km overall); and

55.2 a 10% price increase occurs at []km beyond the first []km (approx. 34-47km).

56. These estimates are also consistent with ready-mix supplier’s comments.

56.1 []⁴²

56.2 []

57. The Applicant submitted that there is a ready availability of backhaul capacity between Waikato and Auckland, which makes it economical to transport concrete sand further on specific routes.⁴³

58. Market feedback suggests that for shorter trips, for example, within and around Hamilton, backhaul is not necessary and that for longer trips backhaul is only used occasionally.⁴⁴ In addition, Fletcher also submitted that approximately only []% of sand purchases in Waikato/BOP utilise backhaul arrangements.⁴⁵

59. Backhaul is used more often when transporting sand from around Hamilton to BOP because of the large number of trucks carrying palm kernel from the Tauranga port into the Waikato region.⁴⁶ However, market feedback suggests that there are limited

⁴⁰

[]

⁴¹ Also depends on ex-gate price. We have used the ex-gate price of \$18 per tonne []

⁴² []

⁴³ The Application, at [20.7(j)].

⁴⁴ []

⁴⁵ Fletcher response to information request (3 December 2018).

⁴⁶ []

opportunities for the additional use of backhaul to transport into and within Waikato. Therefore, although backhaul is used occasionally there is insufficient evidence to consider that it can significantly increase the distance concrete sand can be transported on a consistent basis into Waikato so as to widen the geographic scope of the market.

60. For the purposes of this assessment, we have not found it necessary to define the exact boundaries of the market and note that the competitive alternatives may differ by customer. However, based on the marginal transport costs, we consider that it is unlikely that concrete sand supplied from more than 50km from a ready-mix plant would be competitive in Waikato.⁴⁷ In BOP, concrete sand quarries from further away appear to be competitive because of the lack of sand resource in the region.
61. Furthermore, the exact constraint imposed on a rival quarry by another will depend on the relative distance from that quarry to a customer. However, rather than define specific geographic markets for individual customers, we have instead identified two broad geographic markets within which competitive options for customers are similar. Nevertheless, to ensure that the potential competitive effects of the transaction are accurately evaluated, we have considered individual customers on a case by case basis as needed in the competitive assessment below.

Conclusion on geographic dimension

62. We have focused on two geographic areas, one for customers within 50kms of WAL's location (the Waikato market) and one for BOP (including Rotorua) (but with constraint from the Waikato market). This reflects the different competitive options for customers in these regions, that is customers in the BOP region source their concrete sand from quarries in both the BOP and Waikato, while Waikato ready-mix and concrete masonry producers tend to only source their concrete sand from Waikato quarries.

Downstream market – ready-mix concrete

63. Concrete sand is an input into ready-mix concrete. Therefore, the ready-mix market is relevant to assessing whether the merged entity is likely to foreclose competing ready-mix suppliers.
64. For the purposes of assessing the proposed transaction, we consider the relevant downstream market to be the manufacture and supply of ready-mix concrete to all customers. In respect of the geographic dimension we consider the relevant geographic scope of the ready-mix market is similar to concrete sand, such that there are likely to be separate markets for the supply of ready-mix in Waikato and BOP. We note that ready-mix suppliers are differentiated by location, with transport

⁴⁷ We used the distance of 50km based on our analysis of transport cost for the average distance a customer in Waikato transports concrete sand. 50km is at the high end of the distance under a 5-10% price increase but is consistent with market feedback on the distance that it is economical to transport concrete sand. We note that if we used a narrower market based on a 5% price increase ie, suppliers within 30-36km of WAL, the market would still include concrete sand suppliers Monavale and Revital.

costs restricting the competitive constraint that suppliers place on each other as the distance between them and the customer grows.

Product dimension

65. We have previously found the supply of ready-mix concrete to be a distinct product market (Decisions 558 and 513). The Applicant suggests the same product market is appropriate for assessing the proposed acquisition.⁴⁸
66. Market feedback is consistent with this approach, suggesting that the supply of ready-mix concrete is a distinct activity. Ready-mix suppliers compete most closely with other suppliers of ready-mix concrete, suggesting limited demand-side substitutability between ready-mix and other products.⁴⁹
67. Therefore, the relevant product dimension is the supply of ready-mix concrete.

Customer dimension

68. Ready-mix is used in a range of different commercial, residential, agricultural, and infrastructure projects.
69. Market feedback suggests that the dynamics of competition may differ between the supply of ready-mix to large infrastructure or commercial projects compared to other ready-mix customers.
70. This is due to the large quantity of ready-mix supplied, the need to fix prices in advance, and the use of a tendering process. As a result, some ready-mix suppliers may struggle to supply these types of projects as they do not have the ready-mix plant capacity. The need to commit to prices in advance can also impede the ability of smaller operators to compete for these contracts, due to the high risks involved.⁵⁰ As a result of these factors, we understand that large infrastructure or commercial projects in Waikato and BOP are typically supplied by Fletcher and Allied.
71. However, for the purposes of our assessment, we have not concluded on the relevant customer dimension. This is because the main competition concern considered is whether downstream suppliers will be foreclosed as a result of the acquisition. As part of this assessment, we therefore consider the risk of ready-mix suppliers being foreclosed, making it unnecessary to consider whether separate markets are appropriate for different ready-mix customers.

Geographic dimension

72. The Applicant submitted that ready-mix concrete can be transported at least 80km from the relevant batching plant to the end user and that the relevant market is the

⁴⁸ The Application, at [15.1].

⁴⁹ []

⁵⁰ []

Waikato/BOP region, although it said that it was not necessary to conclude on this point.⁵¹

- 73. We note, however, that Fletcher’s Te Rapa ready-mix plant makes only []% of its sales (by revenue) to sites over 60km away.⁵²
- 74. We have previously found that ready-mix concrete is a perishable good⁵³ and that its bulk renders the transport costs high in relation to its value (Decision 513). We did not conclude on a specific distance for the geographic dimension but noted we had previously said that the maximum distance ready-mix can be transported is around 40km for ordinary concrete and 60km for treated concrete, such that the ready-mix lasts longer in the trucks.
- 75. Market feedback appears broadly consistent with our previous findings, such that the cost of transport, rather than the perishability of ready-mix, is the constraining factor on the distance ready-mix can be economically transported. Several parties have said that they can economically deliver ready-mix within 40km.

75.1 []⁵⁴

75.2 []⁵⁵

75.3 []⁵⁶

Analysis of transport costs

- 76. As explained above for concrete sand, we conducted an analysis of transport costs for ready-mix as a starting point for understanding the geographic market. We did this by using the average transport distance of ready-mix to customers in Waikato and []’s rule of thumb estimate of the marginal transport cost.
- 77. Using that rule of thumb for the marginal cost of transport, an increase of 5% on Fletcher’s standard price of \$[] would occur after an additional []km to the initial []km (40km in total). Based on this, a price increase of 10% would occur just over []km beyond the first []km (55km in total).

Conclusion on geographic dimension

⁵¹ The Application, at [15.4].
⁵² Fletcher response to information request (3 December 2018).
⁵³ There is a legal requirement that the concrete needs to be poured within 90 minutes to get grading.
⁵⁴ []
⁵⁵ []
⁵⁶ []

78. Based on the information currently available, we consider that the relevant geographic scope of the ready-mix market is similar to concrete sand at around 50km, such that there are likely to be separate markets for the supply of ready-mix in Waikato and BOP. The strength of the constraint posed by different ready-mix plants depends on the distance between them relative to the customer's location.

Downstream market – concrete masonry products

79. Concrete masonry products include concrete blocks and pavers. They are used in structural and architectural applications in both commercial and residential projects.
80. The applicant submitted that the precise definition of the product dimension of the market can be left open, given competition concerns are unlikely to arise in any market definition.⁵⁷ The Commission has previously found that concrete blocks and pavers are in the same product market because of supply side substitutability.⁵⁸
81. The applicant also submitted that the relevant geographic market is the supply of concrete masonry products in Auckland, Waikato, and BOP, collectively.⁵⁹
82. Market feedback appears to confirm the geographic market the Applicant submitted:
- 82.1 [⁶⁰]
- 82.2 Additionally, Fletcher has recently closed its BOP plant and supplies blocks into [].⁶¹
83. We note that for the purposes of the proposed acquisition we have not had to conclude on the market for concrete masonry products. We have assessed the proposed acquisition using the relevant market of the manufacture and supply of concrete masonry products in Auckland, Waikato, and BOP.

With and without scenarios

84. To assess whether an acquisition is likely to substantially lessen competition in a market, we compare the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁶²

⁵⁷ The Application, at [16.3].

⁵⁸ Decision 633 *Fletcher Building Limited and Stevenson Group Limited* (2009).

⁵⁹ The Application, at [16.3].

⁶⁰ []

⁶¹ Fletcher response to information request (17 December 2018).

⁶² *Mergers and Acquisitions Guidelines* above n3 at [2.29].

With the acquisition

85. With the proposed acquisition Fletcher will operate the WAL quarry for at most 15 years, likely through Winstone Aggregates.⁶³
[]⁶⁴

Without the acquisition

86. The Applicant submitted that the counterfactual is the status quo, where WAL continues to be owned and run by an independent entity with no downstream interests, and Fletcher []⁶⁵

Fletcher

87. Fletcher submitted that if the proposed acquisition did not proceed, it would []⁶⁶ Fletcher also submitted that,
[]

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]

88. []

⁶³ The Application, at [1.4].

⁶⁴ []

⁶⁵ The Application, at [18.4].

⁶⁶ The Application, at [18.2].

⁶⁷ []

⁶⁸ []

]

⁶⁹ []

89. []

90. Therefore, we consider that the relevant counterfactual, in relation to Fletcher, is that it continues to purchase concrete sand from third party providers in Waikato and BOP over the short to medium term.

WAL

91. We note that []
70

92. []
71]

93. As such, we consider that the relevant counterfactual with regard to WAL is the status quo.

How the acquisition could substantially lessen competition

94. Concrete sand is an important input into ready-mix concrete. Although it only accounts for approximately []% of the delivered price of ready-mix concrete and []% of the delivered price of concrete masonry products, it is essential for producing both products to meet the requirements for strength and usability.⁷²

95. WAL is a major supplier of concrete sand in Waikato and BOP. In addition, Fletcher manufactures concrete sand at its Pukekawa quarry in northern Waikato, although it currently does not supply concrete sand to third party concrete suppliers. Fletcher does, however, compete in the downstream market for the supply of ready-mix concrete in the Waikato and BOP regions and, as such, is a major customer of concrete sand in those regions. Therefore, we have considered:

95.1 horizontal unilateral effects – whether the acquisition removes a competitor such that the merged entity would be able to unilaterally increase the price or reduce the quality of concrete sand;

⁷⁰ []

⁷¹ []

⁷² See for example, Commerce Commission interview with [].

- 95.2 vertical effect input foreclosure (ready-mix) – whether the integration of upstream and downstream firms because of the proposed acquisition gives the merged entity the ability and incentive to foreclose concrete sand supply to downstream rivals in the market for ready-mix concrete;
- 95.3 vertical effect input foreclosure (concrete masonry products) – whether the integration of upstream and downstream firms because of the proposed acquisition gives the merged entity the ability and incentive to foreclose concrete sand supply to downstream rivals in the market for concrete masonry products; and
- 95.4 vertical effect customer foreclosure – whether the integration of upstream and downstream firms because of the proposed acquisition gives the merged entity the ability and incentive to foreclose upstream rivals from supplying concrete sand by limiting access to customers.

Competition analysis – horizontal unilateral effects

96. An acquisition can substantially lessen competition if it increases the potential for the merged entity to be able to unilaterally raise prices.⁷³ Where two suppliers compete in the same market and the constraint from other competitors is limited, an acquisition could remove a competitor that would otherwise provide a competitive constraint, allowing the merged entity to profitably raise prices.
97. The Applicant submitted that although it does produce sand at its Pukekawa quarry, 90km north of WAL,⁷⁴ it does not supply any third-party ready-mix concrete suppliers in Waikato or BOP. The Applicant also submitted that [].⁷⁵
98. Market feedback suggests that while Pukekawa may be able to supply concrete sand, it was unlikely to represent a significant competitive constraint on WAL for the supply of concrete sand:
- 98.1 [], a concrete sand supplier in Auckland, considered that the Pukekawa quarry could produce concrete sand.⁷⁶
- 98.2 []⁷⁷

⁷³ For simplicity, when we refer to concerns that the acquisition may result in an increase in price, this also includes the possibility that the impact of the acquisition is a reduction in quality or some combination of a price and quality effect – that is, an increase in quality-adjusted prices.

⁷⁴ All distances have been measured using Google Maps.

⁷⁵ The Application, at [19.4].

⁷⁶ []

⁷⁷ []

]

98.3 [

78]

99. As in the market definition section above, the main constraining factor on concrete sand suppliers' competitiveness is the relative difference in the distance between it and the next closest supplier, to a given customer. Fletcher's Pukekawa quarry is located 90km north of WAL. Although the two other major concrete sand suppliers are to the southeast of WAL, they are both less than 20km away from WAL. Additionally, the furthest ready-mix customer to the north of WAL is about 24kms away, which is about 65km from Pukekawa but only 40km from Revital. Therefore, in the absence of other concrete sand quarries facing capacity constraints it is unlikely that the Pukekawa quarry would provide a pricing constraint for that ready-mix customer or any other ready-mix customer in Waikato.
100. Therefore, we consider it unlikely that the proposed acquisition would result in a substantial lessening of competition because of horizontal unilateral effects, as Fletcher and WAL are not currently competing and are unlikely to become close competitors for the supply of concrete sand post-acquisition.

Competition analysis – vertical effect input foreclosure (ready-mix)

101. Vertical mergers occur between two firms who do not compete directly but who operate on different levels of the supply chain. In this case, concrete sand is an input for the manufacture of ready-mix concrete.
102. We considered whether the merged entity could foreclose or partially foreclose downstream rivals in the supply of ready-mix concrete by refusing to supply concrete sand or increasing the price of concrete sand to downstream customers. The foreclosure theory of harm depends on:
- 102.1 the merged entity's ability to foreclose rivals;
 - 102.2 the merged entity's incentive to undertake foreclosure strategies; and
 - 102.3 the likely effect of foreclosure on competition in the market.
103. We consider there are two ways in which the merged entity might foreclose rival ready-mix suppliers:
- 103.1 total foreclosure, where the merged entity refuses to supply concrete sand to downstream ready-mix competitors; or
 - 103.2 partial foreclosure, where the merged entity restricts supply and/or increases the price of concrete sand to downstream ready-mix competitors.
104. We consider below only the merged entity's ability to partially foreclose downstream ready-mix rivals. If the merged entity does not have the ability to partially foreclose

⁷⁸ [

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downstream ready-mix rivals it is unlikely to have the ability to totally foreclose them either. We also note the availability of alternative concrete sand suppliers in the region makes total foreclosure unlikely.

Ability

105. The ability to foreclose means that the merged entity would be able to influence the competitiveness of downstream rivals through restricting access to an important input or through increasing the price of that input.

106. As discussed in the market definition section above, as a starting point for our analysis we have defined two separate geographic markets for the supply of concrete sand:

106.1 Waikato (customers within 50kms of WAL's location); and

106.2 BOP.

We have assessed the merged entity's ability to foreclose in each market separately below.

107. Several ready-mix suppliers told us that the margins on ready-mix concrete are tight, particularly in the Waikato due to the competitive nature of the market in the region.⁷⁹ As such, increases in the cost of concrete sand would likely have to be passed on.⁸⁰ However, whilst concrete sand is a key input in the production of ready-mix concrete, making up around a quarter of the final weight of the product, it only accounts for around []% of the delivered price of ready-mix (depending on distance delivered).

107.1 The estimated delivered concrete sand price is around \$[] per tonne, whilst the ready-mix price is about \$[] per tonne (converted from \$[] per m³, the metric ready-mix is sold in).

107.2 Using these estimates, the price of concrete sand would have to increase by []% to increase the price of ready-mix by 5-10%.⁸¹

Waikato

108. To foreclose competitors, the merged entity would need the ability to restrict the supply and/or increase the price of concrete sand such that it can influence Fletcher's ready-mix competitors' access to concrete sand and the price they pay for it. This depends on:

⁷⁹ Fletcher makes about []% gross variable margin on ready-mix concrete sold in Waikato. We note that this varies between plants.

⁸⁰ For example, [].

⁸¹ This is calculated by working out the per tonne sand price increase required to increase one tonne of ready-mix by 5-10%. Increase = ((current ready-mix price multiplied by percentage price increase) divided by 0.25 (0.25 tonnes of sand to make one tonne of ready-mix)), divided by the current sand price per tonne.

108.1 the closeness of competition from other suppliers of concrete sand with WAL and their capacity and ability to expand production to prevent a price rise or foreclosure; and

108.2 the ability of new suppliers to enter and prevent the effects of foreclosure.

109. As discussed above, the proposed acquisition is unlikely to result in horizontal effects. However, if WAL already has market power in the supply of concrete sand in Waikato, then it may give Fletcher the ability to foreclose downstream ready-mix competitors.

110. WAL has increased the price of concrete sand over the last several years. An internal Fletcher document notes that [

^{82]} WAL’s ability to substantially increase the concrete sand price since 2016 may indicate that it has significant influence over the price of concrete sand in Waikato.

111. WAL said that the price increases reflect changes in its customer base from []]. WAL also said the price increases []⁸³

112. Regarding its costs, WAL only started producing concrete sand in 2013 and [

^{84]}

113. WAL’s ability to significantly influence the price of concrete sand in Waikato will depend on the availability of alternative concrete sand supply options and their location relative to WAL.

Current suppliers

114. We have considered whether competing concrete sand suppliers to WAL would prevent the merged entity having the ability to foreclose rivals. We considered rival sand quarries’ current production levels, ability to expand, and geographic proximity to WAL in assessing their ability to compete closely with WAL.

⁸² [

]

⁸³ WAL response to information request (26 November 2018).

⁸⁴ [

]

115. A Fletcher internal document from [] indicates that, for concrete sand provided to ready-mix plants in Waikato.⁸⁵
- 115.1 WAL has a []% market share;
- 115.2 Revital (16.3km from WAL) has a []% market share;
- 115.3 Monavale (18.5km from WAL) a []% market share; and
- 115.4 Tirau Sands (46.2km from WAL) and McCallum Bros (141km from WAL) each have less than []% market shares.
116. Using data collected from market participants, we have sought to estimate market shares for the supply of concrete sand. Our estimates are presented in Table 1. In the analysis below, we have focused on current concrete sand suppliers' capacity.
- 116.1 Accurate market shares based on current production levels for the supply of concrete sand are difficult to estimate. Several sand quarries have recently switched owners. The new owners have changed the capacity of the plants and which customers they are supplying. Additionally, demand for concrete sand is seasonal and depends on external factors such as the weather. Therefore, the market share for a given supplier varies significantly based on the timeframe used.
- 116.2 Total capacity can be more difficult to estimate in general as it requires assessing potential ability to supply rather than actual volumes. However, it is less influenced by the above factors.

⁸⁵ []

Table 1: Waikato concrete sand supply

Quarry	Current production of concrete sand per annum (tonnes)	Market shares - production	Total capacity per annum (tonnes)	Market shares - capacity	Reserve life
WAL*	[]				
Monavale**					
Revital***					
Tirau Sands****]
Total	[]	100%	[]	100%	

Notes:

Figures are rounded to nearest thousand.

*WAL's total capacity from Table 5 of the Application. This approach may slightly overestimate WAL's total capacity for concrete sand as it includes a small proportion of pit sand capacity.

**Current production figures only from May 2018 to January 2019 therefore its current production numbers will be underestimated.

***We have assumed Revital []. This is a conservative approach as [].

****All Tirau figures are based on Fletcher's estimates (the Application, Table 5).

117. [] with Fletcher's own estimates, WAL is currently the largest Waikato supplier of concrete sand, with a market share of []%. WAL is also the largest Waikato concrete sand quarry in respect of its current capacity, with []%. However, [].

118. Monavale changed ownership in May 2018.

[]⁸⁶ It also currently supplies [] of Fletcher's ready-mix plants which take about []% of its current concrete sand production.

119. []⁸⁷ []

⁸⁶ Commerce Commission interview with Monavale (19 December 2018) and response to information request (27 January 2019). []

⁸⁷ []

120. Tirau Sands was recently purchased by Bowers Brothers, a ready-mix supplier in Waikato.

[

⁸⁸] It does provide some security of supply to one of the ready-mix suppliers in the region.

Current concrete sand demand

121. Table 2 below, shows the estimated demand for concrete sand in Waikato.

Table 2: Waikato concrete sand demand

Customer	Ready-mix (tonnes per annum)	Masonry (tonnes per annum)	Concrete pipes (tonnes per annum)	Total (tonnes per annum)
Fletcher	[
Other suppliers				
Total]

Notes:

Figures are rounded to nearest thousand.

Other suppliers' ready-mix figures are based off Fletcher document

[], estimate of market shares.

122. As can be seen above, the total concrete sand demand from ready-mix suppliers in Waikato, excluding Fletcher, is approximately [] tonnes. Third-party concrete sand suppliers in the region are currently supplying about [] tonnes but have capacity to supply [] tonnes of concrete sand (Table 1 above). It is evident from this that third-party concrete sand suppliers in the region currently have sufficient capacity to supply all ready-mix suppliers that compete with Fletcher in Waikato.

122.1 There are also only small amounts of concrete sand demanded from masonry and concrete pipe customers in the region, with about [] tonnes of demand from third party suppliers.

123. In addition, WAL currently sells its concrete sand for just over \$[] per tonne, while Monavale sells its concrete sand for \$[] per tonne and Revital sells its sand for just under \$[] per tonne. Therefore, it is unlikely that Waikato ready-mix suppliers would face a significant increase in the cost of sand if they were to switch away from WAL.

⁸⁸ []

124. As mentioned in the market definition section, ready-mix supplied to large infrastructure and commercial jobs is typically only supplied by Fletcher and Allied. Therefore, Fletcher may have a greater incentive to foreclose Allied as it would likely capture most of Allied's lost sales. Allied has five ready-mix plants in Waikato while Fletcher has two.

124.1 Fletcher's and Allied's Hamilton ready-mix plants are the closest together, only 8km apart.

[

] Therefore, it is unlikely that Fletcher would

have the ability to specifically target that plant for foreclosure.

124.2 We also note that

[

⁸⁹] There is a pit supplier, IH Wedding, located only

19km from Allied's Hamilton plant.

125. Furthermore, WAL is the closest concrete sand supplier to ready-mix plants in Morrinsville. Both Allied and Bowers Brothers have a ready-mix plant in Morrinsville. Post-acquisition, if Fletcher refused to supply concrete sand to Allied or Bowers Brothers, or increased the price, they may have to look at alternative sources of concrete sand. Allied Morrinsville is located just over 29km from WAL. However, it is only about 36km from Revital and 40km to Monavale. The distances are similar for Bowers Brothers' plant. These differences in distance are relatively small and, in any event, we would expect the prices that WAL offers customers to already reflect the distance between the customer and their closest alternative supplier. Therefore, it is unlikely that Fletcher would have the ability to target those plants.⁹⁰

126. We consider next, the views of Fletcher's ready-mix rivals in Waikato.

Ready-mix rivals' views on ability

127. Most ready-mix customers noted that WAL is one of main suppliers of concrete sand in Waikato and generally there is a shortage of concrete sand options. However, most customers also said that they were not concerned about the proposed acquisition as they had alternative concrete sand suppliers, which is consistent with our analysis of the capacity of the existing suppliers.⁹¹

128. However, one customer, [], raised concerns to us about the proposed acquisition.

[

⁸⁹ []

⁹⁰ We also note that the closest Fletcher ready-mix plant is approximately 35km away.

⁹¹

[

]

92]

128.1 [

]

129. However, as discussed above, with the proposed acquisition

[

] In addition, for Fletcher to increase the price of concrete sand to [] it would need to be able to identify that [] does not consider [] to be an option.⁹³ We have not received any evidence to suggest that WAL has identified this to be the case and note that, in any event, if it had WAL would likely already be pricing accordingly.

Further expansion of current suppliers

130. As well as the current spare capacity of Waikato concrete sand suppliers, further expansion of quarry capacity or the setting up of a new quarry in the region could further constrain the merged entity’s ability to foreclose downstream rivals.

131. [

94

]

132. [

]

⁹² [

]

⁹³ In the worst-case scenario that Fletcher can foreclose [] it is unlikely to have a significant effect on the ready-mix market as

[

].

⁹⁴ [

]

133. Therefore, [] ability to increase its capacity further would provide an additional constraint on the merged entity's ability to foreclose downstream ready-mix competitors in Waikato.
134. In addition,
[]
- 96]
- 95

New entry in concrete sand in Waikato

135. The barriers to greenfield entry are:
- 135.1 the availability of locations which have a sand resource that can be extracted;
 - 135.2 the necessary equipment, including loaders, trucks, screens, washing equipment, gravity separation spirals, de-watering cyclones, and conveyors; and
 - 135.3 resource consents for extraction, truck movement, dust, noise, and water use.
136. Market feedback suggests that there are plenty of sand deposits in Waikato that could be extracted and processed to produce concrete sand.⁹⁷ On top of land purchases, a supplier needs to purchase the relevant equipment. The cost of the washing and screening plant is about \$[].⁹⁸
137. Market feedback suggests that the main barrier to entry is getting resource consents. Consents take time. The Waikato Regional Council considered that an applicant could take up to one year on the consultation process prior to application and another two years to get through the consent process and there is no guarantee of success.⁹⁹ There may also be additional costs associated with upgrading road systems under any consent granted. WAL was required to construct a new road and entranceway when it was granted consent, which cost \$[].¹⁰⁰ We are also unaware of any new entrant looking to set up a concrete sand quarry in the region [].
138. An alternative to greenfield entry is for the current pit sand suppliers to start producing concrete sand. For pit sand operators to produce concrete sand they

⁹⁵ []

⁹⁶ []

⁹⁷ For example, see []

⁹⁸ []

⁹⁹ Commerce Commission interview with Waikato Regional Council (23 January 2019).

¹⁰⁰ WAL response to information request (26 November 2018).

would need additional resource consents for water usage and would need additional equipment to sort and clean the sand.¹⁰¹

139. Although it is possible that pit sand suppliers may enter the concrete sand market, we are not confident that it is likely. As mentioned above, WAL has increased the price of concrete sand significantly in the last two years and no pit sand supplier has entered the concrete sand market as a result. Additionally, we consider it unlikely that greenfield entry would constrain the merged entity's ability to foreclose downstream ready-mix supplier in Waikato.

Supply from outside the market

140. Concrete sand suppliers from outside the market may also be able to constrain the merged entity if they can supply concrete sand at competitive rates.
141. [] McCallum Bros sand from Auckland at its []¹⁰² McCallum Bros dredges sand from the Pakiri harbour near Auckland. It then barges the sand to Auckland and then trucks it to its final location. As it is sea sand it is finer and has slightly different properties to quarried sand found in Waikato which means that it is more desirable for high end concrete used in infrastructure projects.
142. McCallum Bros said that it currently supplies about [] tonnes per annum [] plant. It considers that it []].
143. Another quarry supplying concrete sand in the wider area is Atiamuri. Atiamuri is located about 105km south east of WAL's Tamahere quarry. It produced [] tonnes of pit and concrete sand last year and []¹⁰³ However, because of its location it mainly supplies into []¹⁰⁴.
144. Although, McCallum Bros and Atiamuri can supply concrete sand into Waikato they are unlikely to pose a significant constraint on the merged entity because of the cost of transport.
145. These suppliers potentially provide some constraint on WAL but it is unlikely to be a strong constraint as the additional transport costs appear to be high.

Concrete sand proportion of ready-mix cost

146. Whilst concrete sand is a key input in the production of ready-mix concrete, making up around a quarter of the final weight of the product, it only accounts for around []% of the delivered price of ready-mix (depending on distance delivered).

¹⁰¹ Commerce Commission interview with Waikato Regional Council (23 January 2019).

¹⁰² []

¹⁰³ Atiamuri response to information request (22 January 2019).

¹⁰⁴ Commerce Commission interview with Atiamuri (12 December 2018).

- 146.1 The estimated delivered concrete sand price is around \$[] per tonne, whilst the ready-mix price is about \$[] per tonne (converted from \$[] per m³, the metric ready-mix is sold in).
- 146.2 Using these estimates, the price of concrete sand would have to increase by []% to increase the price of ready-mix by 5-10%.¹⁰⁵
147. Given the small proportion of costs concrete sand makes up of ready-mix, it is unlikely that an attempt to partially foreclosure downstream rivals by increasing the price of concrete sand would cause entry and expansion to become more difficult, or otherwise reduces a competitors' ability to provide a competitive constraint. If the merged entity attempted to increase the price of concrete sand by []% then downstream ready-mix customers would be able to switch to rival concrete sand suppliers, that have excess capacity at a much lower price.

Conclusion on ability to foreclose in Waikato

148. We consider that other concrete sand suppliers in the market will be able to supply Fletcher's downstream ready-mix concrete competitors, such that:
- 148.1 Fletcher would not have the ability to fully foreclose downstream rivals from access to concrete sand at a similar price.
- 148.2 Fletcher would not have the ability to raise the price of concrete sand without losing customers to rival suppliers.
149. Other competitors have sufficient capacity in the supply of concrete sand such that if the merged entity attempted to raise the price downstream ready-mix rivals could switch, or threaten to switch, to them without facing significant price increases.
150. The majority of ready-mix suppliers did not think the merged entity would stop supplying them or increase their prices, noting that there were alternative supply options available. Also, one of the larger downstream competitors in ready-mix, Bowers Brothers has its own concrete sand supply from Tirau Sands.
151. In addition, as concrete sand accounts for a relatively small proportion of the ready-mix price it is unlikely that an attempt to partially foreclosure downstream rivals would cause those rivals to exit the ready-mix market. The price of concrete sand would have to increase by []% in order to increase the price of ready-mix by 5-10%.
152. Therefore, we consider that the merged entity would not have the ability to foreclose downstream ready-mix rivals in Waikato.

¹⁰⁵ This is calculated by working out what the per tonne sand price increase required to increase one tonne of ready-mix by 5-10%. Increase = ((current ready-mix price multiplied by percentage price increase) divided by 0.25 (0.25 tonnes of sand to make one tonne of ready-mix)), divided by the current sand price per tonne.

BOP

153. In the BOP region, there are six ready-mix concrete plants of which three are Fletcher's. The three independent suppliers are Allied Mt Maunganui, Bridgeman Tauranga and Supacrete Tauranga. []. In addition, [].¹⁰⁶ Therefore, it appears unlikely that Fletcher would have the ability to foreclose downstream rivals in BOP. We do not consider the BOP region further in our analysis.
154. Similarly, in Rotorua, Bridgeman is the only competing downstream ready-mix supplier to Fletcher. [] The distance from Bridgeman Rotorua to WAL is further than from either Paengaroa Sands, Monavale, or Atiamuri. Therefore, it appears unlikely that Fletcher would have the ability to foreclose Bridgeman in Rotorua. We do not consider the Rotorua region further in our analysis.

Incentive and effect

155. As we consider that the merged entity would not have the ability to foreclose downstream rivals we have not considered its incentive or the effect of any input foreclosure.

Competition analysis – vertical effect input foreclosure (concrete masonry products)

156. As, above we consider that the merged entity would not have the ability to foreclose downstream rivals in the ready-mix market as competing concrete sand suppliers have sufficient capacity. Therefore, we also consider the merged entity would not have the ability to foreclose downstream concrete masonry product suppliers. In addition, Fletcher's two major competitors, Block Shop and Bowers Brother, in Auckland, Waikato, and BOP have alternative sources of concrete sand supply.
- 156.1 Block Shop has two plants, its Drury plant in South Auckland [], while its Tirau plant [].
- 156.2 Bowers Brothers have plants at Morrinsville and Horotiu in Waikato. [] also has its own sand quarry, Tirau Sands.
157. We consider the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the Auckland, Waikato, and BOP market for the manufacture and supply concrete masonry products.

¹⁰⁶ []

Competition analysis – vertical effect customer foreclosure

158. We considered whether the merged entity would have the ability and incentive to foreclose upstream rivals in the supply of concrete sand by limiting access to customers. This depends on Fletcher’s ability to disadvantage an upstream competitor in the sale of concrete sand by limiting access to customers (including Fletcher’s own downstream concrete businesses).

159. [].

160. Customer foreclosure would be a concern if the merged entity were able to reduce demand to certain suppliers in order to force them from the market, and ultimately increase upstream prices. [] We have therefore assessed whether the proposed acquisition would prevent competing concrete sand suppliers from being able to make sufficient sales such that it was forced to exit the market.

161. The Applicant submitted that in the Waikato and BOP region the ready-mix market shares are:¹⁰⁷

161.1 Fletcher – []%

161.2 Allied – []%

161.3 Bowers Brothers – []%

161.4 Bridgeman – []%

161.5 Others – []%

162. In addition, Fletcher’s internal documents show that there are several ready-mix suppliers in Waikato.

[¹⁰⁸

¹⁰⁹]

In another Fletcher document it shows that,

[¹¹⁰].

¹⁰⁷ The Application, Table 3.

¹⁰⁸ []

¹⁰⁹ []

¹¹⁰ Fletcher document [].

163. This is consistent with market feedback which suggests that the Waikato ready-mix market is very competitive because of the number of different suppliers.
164. There appear to be several alternative downstream ready-mix suppliers which demand a significant amount of concrete sand in Waikato. There is also a masonry block plant at Tirau which competing concrete sand suppliers could supply.
165. The existence of alternative customers for concrete sand suppliers is likely to allow third-party concrete sand suppliers to compete to supply customers and enable third-party suppliers to remain in the market. In addition, while these ready-mix suppliers may not currently purchase from WAL's competitors, they are likely to have a clear incentive to ensure alternative concrete sand supply options remain available to them in Waikato.
166. Therefore, we consider it unlikely that the merged entity would have the ability to foreclose upstream rivals in the supply of concrete sand by limiting access to downstream customers.

Other factors considered

Coordinated effects

167. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power such that quality reduces and/or prices increase across the market.
168. Unlike a substantial lessening of competition arising from a merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way. Such behaviour need not be unlawful and includes tacit collusion such as accommodating price responses or parallel conduct.
169. For the reasons below, we are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any market due to coordinated effects.
170. We have found no evidence that the proposed acquisition would increase flow of information between suppliers such that coordination would be more likely. We also note that of the ready-mix suppliers in Waikato and BOP, Fletcher and Bowers Brothers are the only two suppliers vertically integrated into concrete sand and note that coordination is less likely between suppliers with different cost bases.

Other third-party concerns

171. [] raised concerns that the proposed acquisition may enable Fletcher to reduce the price of ready-mix by reducing the price it pays for a key input, concrete sand.
172. However, the reduction of double marginalisation is usually considered a benefit of vertical mergers as it reduces the merged entity's costs which may result in lower

prices downstream. We would usually consider the potential for lower downstream prices to be a benefit rather than a sign of a lessening of competition, with lower downstream prices only being a concern if it led to competing ready-mix suppliers exiting the market and allowing the merged entity to raise prices in the long run.

173. There are other suppliers of ready-mix in the area including a large rival, Allied, and another, Bowers Brothers which owns its own sand quarry and therefore is likely to have some ability to compete with Fletcher if it tried to drive it out.
174. Finally, we also note that Fletcher already owns Golden Bay Cement and has done so since 1988. Golden Bay Cement supplies cement in the region. Cement accounts for about [] of the price of ready-mix,¹¹¹ while concrete sand accounts for []% of the delivered price of ready-mix. Despite this, the market for ready-mix concrete in the Waikato has a number of competing suppliers. We consider it unlikely that the acquisition of a supplier of concrete sand, which accounts for a smaller proportion of the input cost than cement, would lead Fletcher to changing its strategy.
175. Therefore, we are satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in any market due to Fletcher forcing out competitors in the ready-mix market and then increasing the price in the long run.

Overall conclusion

176. We are therefore satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the Waikato and BOP markets for the production and supply of concrete sand, the manufacture and supply of ready-mix concrete, or the manufacture and supply concrete masonry products.

¹¹¹ Fletcher document [

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Determination on notice of clearance

177. We are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
178. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance to Fletcher Building Limited to acquire all the assets of Waikato Aggregates Limited, excluding the underlying land. The acquisition includes the right to extract sand for 15 years under a profit-a-prendre.

Dated this 15th day of February 2019

Dr Mark Berry
Chairman