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COMMERCE COMMISSION

Decision No. 663

Determination pursuant to the Commerce Act 1986 in the matter of an application for a merger transaction between

Fletcher Building Limited

and

Stevenson Group Limited

The Commission:	Paula Rebstock Peter JM Taylor Gowan Pickering
Summary of Application:	The acquisition of up to 100% of the Whangarei masonry business assets of Stevenson Group Limited and up to 100% of the assets of Stevenson's Auckland masonry business by Fletcher Building Limited.
Determination:	Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.
Date of Determination:	13 February 2009

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EXECUTIVE SUMMARY

Introduction

E1. On 19 December 2008, the Commerce Commission (Commission) received a Notice from Fletcher Building Limited (Fletcher) seeking clearance for Fletcher, or any of its interconnected bodies corporate, to acquire up to 100% of the Whangarei masonry business assets of Stevenson Group Limited (Stevenson) and up to 100% of the assets of the Stevenson Auckland masonry business.

E2. The Commission has considered whether it can be satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any market.

E3. To aid its analysis, the Commission compares two situations: one in which the acquisition proceeds (the factual); and one in which the acquisition does not proceed (the counterfactual). The impact of the acquisition on competition in a market is then viewed as the prospective difference in the extent of competition between these two situations.

The Relevant Markets

E4. The Commission considers that the relevant markets for the consideration of the competition effects of this acquisition are the Northland and Auckland markets for the manufacture and wholesale supply of concrete masonry products (the Northland and Auckland masonry markets).

Factual

E5. The factual scenario (with the acquisition) would remove the existing competition posed by Stevenson. There would be a reduction in the number of suppliers and a substantial increase in Fletcher's market share in each market. In the factual, Fletcher would have almost 100% share of the Northland masonry market and be the predominant supplier in the Auckland masonry market, with an estimated [ ]% market share.

Counterfactual

E6. Stevenson was experiencing sustained and substantial losses in respect of its masonry business, despite efforts having been made to turn the business around. Stevenson's Board of Directors made a formal decision to exit on 23 September 2008 (either by sale or closure). The Commission considered that there is a real and substantial prospect that the closure by Stevenson of its masonry business was imminent, absent a sale to another party.

E7. Stevenson informed the Commission in late 2008 that, in its view, no party other than Fletcher would ultimately present an offer that was more financially attractive to Stevenson than simply closing, In testing Stevenson's view, the Commission necessarily therefore investigated whether, if the proposed acquisition did not proceed, there was a real and substantial prospect of a third party acquiring Stevenson's masonry business as a going concern, or acquiring the assets on closure of the business and using the assets to compete in the relevant markets (at a price exceeding Stevenson's closure value but not necessarily higher than Fletcher's offer to purchase the business.)

E8. As a general observation, when the Commission is requested to make urgent decisions it would expect the appropriate parties to provide it with complete and convincing evidence and analysis to support the propositions they are arguing, and to do so in a timely manner. In this instance, rather than being able to assess the credibility of such evidence, the Commission has had to collect its own evidence and then exercise its judgement as to whether any potential purchasers are credible. This has extended the time the Commission has required to investigate the application, in a situation when expediency was of the essence.

E9. From the Commission's investigations it was unable to establish that there were any serious, credible alternative offers for the business either as a going concern or for its assets in the time available before closure of the business. What the Commission saw was mere interest from many parties rather than substantial steps taken toward making offers such that the Commission could not put a great deal of weight on the prospect of credible alternative offers being made. The Commission was of the view that it could not expect Stevenson to "wait around" to see if an alternative firm offer materialised in the future.

E10. In considering if there was any other prospective purchaser of the Stevenson masonry business or assets the Commission also noted the downturn in the building industry and the potential impact of the current economic recession, which is exacerbating that downturn. The Commission also noted that the economic recession could well lead to difficulties in securing finance for an acquisition in a declining market.

E11. The Commission considered that, in the absence of the proposed acquisition there is only one likely counterfactual; imminent closure of Stevenson's masonry business. To this extent, Stevenson's masonry business would not exist either with or without the sale to Fletcher. Accordingly, there would be no material difference in the level of competition between the factual and this counterfactual scenario in either of the relevant markets.

E12. Having reached the conclusion that the level of competition will be the same in the factual and the counterfactual, it is not necessary for the Commission to assess precisely what that level will be.

Conclusion

E13. The Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the Northland and Auckland markets for the manufacture and wholesale supply of concrete masonry products. The Commission gives clearance for the proposed acquisition.

THE PROPOSAL

1. On 19 December 2008, the Commission received a notice pursuant to s 66(1) of the Commerce Act 1986 (the Act). The notice sought clearance for the acquisition by Fletcher Building Limited (Fletcher), or any of its interconnected bodies corporate, of up to 100% of the Whangarei masonry business assets of Stevenson Group Limited (Stevenson) and up to 100% of the assets of the Stevenson Auckland masonry business.

ANALYTICAL FRAMEWORK

2. The Commission uses an analytical framework[1] for assessing a substantial lessening of competition in the context of an acquisition. The first step is to determine the relevant market or markets. To do this, the Commission identifies the areas of overlap between the acquirer and the target, and then considers what, if any, products and geographic regions, constitute relevant close substitutes from both a customer's and a supplier's point of view.

3. The Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely, so, 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).

4. In framing suitable counterfactuals, the Commission bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed acquisition. Where there is more than one real and substantial counterfactual it is not a case of choosing the one that the Commission thinks has greater prospects of occurring. The Commission assesses the possibilities, discards those that have only remote prospects of occurring, and considers each of the real and substantial possibilities as counterfactuals against which the factual is to be assessed.

5. A comparison of the extent of competition in the relevant markets in both the factual and counterfactual scenarios enables the Commission to assess the probable extent of the lessening of competition under the proposed acquisition, and whether that contemplated lessening is likely to be substantial.

PARTIES

The Acquirer – Fletcher

6. Fletcher is a New Zealand based building materials manufacturer and distributor. It is publicly listed on both the New Zealand and Australian stock exchanges.

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

7. Fletcher's masonry business is part of its larger Infrastructure Division. This is an integrated business comprising commercial and residential construction, concrete activities and various quarries. The Infrastructure Division comprises a number of businesses and brands, including Firth which is the brand of its masonry products.

8. Fletcher manufactures masonry products which it supplies through its related distribution arm, Placemakers, and also through nationwide and local distributors/retailers, such as ITM, Bunnings, Carters etc. Fletcher has a block making plant located in Auckland (East Tamaki), as well as in other locations throughout the country (although not in Whangarei). Fletcher transports a modest volume of masonry products from its production plant in Auckland to Whangarei.

The Target – Stevenson Auckland and Whangarei Masonry Businesses

9. Stevenson Group Limited is a privately-owned family company. It is involved in the manufacture of building products, resources (quarrying and mining), engineering, agriculture, and property. The building products division of the group is contained in a separate subsidiary company, W Stevenson and Sons Limited. This division is involved in readymix concrete, masonry products and precast concrete products.

10. The business concerns that are the subject of the proposed acquisition are the Auckland (Drury) and Whangarei masonry businesses of Stevenson. Stevenson also has a masonry business in Christchurch that it intends to sell to an independent third party.

11. Stevenson sells the vast majority of its masonry products from distribution yards that it owns and operates.

BACKGROUND

Financial Performance of Stevenson Masonry Business

12. The Auckland and Whangarei masonry businesses of Stevenson have been making losses for a number of years. Table 1 summarises the financial performance of the masonry division for the current year and three prior financial years.

Table 1: 2006-2009 Management Accounts for Stevenson Auckland and Whangarei Masonry ($000s)

	2009 Forecast	2008 Actual	2007 Actual	2006 Actual
SALES	[ ]	[ ]	[ ]	[ ]
GROSS MARGIN	[ ]	[ ]	[ ]	[ ]
Margin %	[ ]%	[ ]%	[ ]%	[ ]%
OVERHEADS				
Sales & Marketing	[ ]	[ ]	[ ]	[ ]
Shared Services	[ ]	[ ]	[ ]	[ ]

	2009 Forecast	2008 Actual	2007 Actual	2006 Actual
Administration	[ ]	[ ]	[ ]	[ ]
	[ ]	[ ]	[ ]	[ ]
EBIT	[ ]	[ ]	[ ]	[ ]
Add back Depreciation	[ ]	[ ]	[ ]	[ ]
EBITDA	**[ ]**	**[ ]**	**[ ]**	**[ ]**

13. Stevenson has attempted to restructure the masonry business and turn it around, but the business continues to make losses. Strategies and projects to address profitability issues have included:
    - [ ]
    - [ ].

14. [ ]

Stevenson Board Decision to Exit

15. Stevenson's Board minutes record consideration about the value and future of the masonry business from [ ]. [ ]

16. The Stevenson Board decided in late 2008 to exit the masonry business, either through closure or sale. [ ]

    [ ]

17. On 21 January 2009, Stevenson advised the Commission that after considering the alternative bids received, Stevenson had decided that it would close its masonry business absent a sale to Fletcher. As a result, Stevenson advised that it had taken a number of steps to commence the exit process. It had:
    - reduced and rationalised manufacturing at Drury so that it manufactures no more stock than is needed;
    - stopped ordering replacement stock for resold products in its trade yards;
    - decided to close its Newmarket showroom from 27 January 2009;
    - notified all North Island masonry production staff that there are only two options for the masonry business: closure or sale to Fletcher; and
    - met with distribution employees to advise them of Stevenson's intention to close the yards and showrooms and make those employees redundant.

18. On 27 January 2009, Stevenson communicated to customers its decision to exit and potentially close the masonry business. It wrote to customers and advised:

    > The Stevenson Group has reached the conclusion that the masonry division is no longer a strategic or commercial business for it to continue to operate or own. Over the past few years the Board and Management have put a huge effort into trying to find a successful formula that gives the return that is desired. Although there has been a tremendous effort from all of the masonry staff, the business has continued to perform below expectations. The recent economic downturn has only lead to exacerbate the position.
    >
    > We are very disappointed that we have reached this point, but we simply cannot continue to carry this business in our portfolio of investments in its current financial position.

> As a valued client of Stevenson, we are writing to inform you that we are now at a point where we have only two options left for the masonry business. We are attempting to sell the business to Firth Industries but this is subject to a clearance from the Commerce Commission. If Firth Industries are unsuccessful with their clearance application then we will be left with no other option than to close the masonry division.

Closure (or Liquidation) Value of Stevenson Masonry Business

19. Stevenson analysed in detail the cash flows associated with closure which reveal that it would derive an estimated net cash gain on closure of [ ]. Table 2 shows the breakdown of the estimated closure value.]

Table 2: Stevenson's Estimated Closure Value ($)

Cash in on Closure	
Inventory	[ ]
Debtors	[ ]
Creditors	[ ]
Plant Sale	[ ]
	[ ]
***Less* Closure Costs**	
Redundancies	[ ]
Car Leases	[ ]
External Property Leases	[ ]
NET GAIN ON CLOSURE	**[ ]**

20. Stevenson considered that [ ] was the minimum sale price of the going concern business to avoid closure (on the basis that the buyer assumes all the liabilities listed in Table 2 above).

Sale of the Stevenson Masonry Business

Attempts to Sell the Business

21. Prior to its 23 September 2008 Board meeting, Stevenson had discussions with Fletcher about the masonry business and Fletcher indicated to Stevenson that it would be interested in the business if Stevenson chose to exit. On 25 September 2008, two days after the Board meeting, Stevenson advised Fletcher that the Board had decided to exit and gave Fletcher until 31 October 2008 to decide if it wanted to proceed with an offer for the masonry business.

22. Other than contacting Fletcher, Stevenson made no other attempts to sell the masonry business for six weeks after its 23 September Board meeting. Rather than trying to find alternative purchasers, Stevenson spent this period planning the closure process. In November 2008, Stevenson started approaching other potential purchasers. It approached two parties other than Fletcher, namely [ ]. Stevenson stated that this was because it wanted to conduct the sale process within a short period of time and so only approached those parties that it thought were real bidders. Stevenson advised the Commission that a public tender process would have lengthened the sale process.

23. Nonetheless, a number of other parties learned that Stevenson was planning to exit and made approaches themselves regarding the business over November and December 2008.

Possible Alternative Purchasers

[ ]

24. [ ] was the first party that Stevenson approached, other than Fletcher, who it approached on 6 November 2008. [ ]

25. On 17 November 2008, [ ] advised Stevenson that it would not be making an offer for the business. [ ] In addition, [ ] considered that two weeks was insufficient time to properly analyse the business and make an offer.

26. [ ]

27. [ ]

> [ ] do not have any current interest in pursuing ownership of the Stevenson masonry assets.
>
> [ ]

[ ]

28. [ ] Stevenson approached [ ] on 20 November 2008 to ascertain the level of interest in acquiring Stevenson's masonry business. [ ]

29. On 19 December 2008, [ ] made a written offer for the entire Stevenson masonry business (Whangarei, Auckland and Christchurch). [ ] The two parties had a series of discussions around the offer, including [ ] submitting revised offers. On 6 January 2009, [ ] submitted its final offer, which it believed was [ ]

30. Stevenson's consideration of [ ] offer is detailed in minutes of a Stevenson Group Board meeting held on 23 December 2008:

> [ ]

31. On 7 January 2009, Stevenson rejected [ ] offer. It advised:

> On the basis of your last letter dated 6th January 2009 and the various discussions we have had, I can confirm that the Stevenson group will not be pursuing your offer further.
>
> While we believe there has been an improvement in your offer from the original one, particularly on the financial matters, we remain unconvinced that when we consider, the financial aspects and the ongoing risk factors, of your offer that we are in a better position than that of closing the business down.
>
> [ ]
>
> From our perspective this decision closes our negotiations and discussions and is final. Having completed negotiations and discussions with you we are in a position to proceed with the next stage of our exit plan.

32. On 29 January 2009, [ ] advised the Commission that it considered that the value of Stevenson's masonry business was dwindling by the day. The business was no longer the going concern [ ] had offered to acquire. [ ] wrote to the

Commission on 10 February 2009 and advised the following in respect of the status of its offer for the business:

> [ ] purchase offer for the going concern of the Stevenson Masonry business has been overtaken by events and actions that Stevenson have carried out since the closure of offers. Through their actions the Masonry business has ceased to be a going concern forcing the Stevenson customers to go elsewhere for their masonry requirements.

33. [ ] further advised the Commission on 12 February 2009 that it had no interest in acquiring the plant on closure, writing:

> [ ] has no interest in acquiring the assets/plant of Stevensons as the dissembling of the business has now reached a point of it being non retrievable.

[ ]

34. [ ] On 7 November 2008, [ ] contacted Stevenson expressing an interest in the masonry business after learning that the business might be for sale. Stevenson did not itself approach [ ]

35. On 19 December 2008, [ ] made Stevenson an oral offer of [ ]

36. [ ]

37. Stevenson rejected [ ] offer. The reasons for this were detailed in the minutes of a Stevenson Group Board meeting held on 23 December 2008:

> Because the offer was for only one part of the business, and given the lack of detail and formality in the offer, it was felt it should be rejected, on the basis that the value was insufficient and that the terms would need to be negotiated, thereby resulting in further losses as we sought to complete terms.

38. On 9 February 2009, [ ] put a further offer in writing to Stevenson to purchase [ ]. Stevenson also rejected this offer as [ ].

39. On 12 February 2009, [ ] advised the Commission that it would not be likely to bid for the assets only post-closure. It was interested only in the business as a going concern.

[ ]

40. [ ] On 5 December 2008, [ ] contacted Stevenson enquiring about the masonry business. [ ] subsequently provided Stevenson with a letter confirming its financial ability to purchase the masonry business.

41. On 19 December 2008, [ ], wrote to Stevenson and advised that:

> …given the current financial position of the business, and the significant changes that would be required to the operating, sales and distribution model to this a profitable venture, we do not feel that we have had adequate time to put in a viable bid at this time.
>
> We remain very interested in this business and are disappointed that we have not had enough time to accurately understand the current business and put in a properly analysed and researched bid.

42. [ ] preference was to buy Stevenson's masonry business as a going concern. If that failed it would look to pick the assets up post-closure. [ ] wrote to the Commission on 9 February 2009 and advised:

> [ ] discussed the potential opportunities that arise from the announced closure and/or sale of the Stevenson's Masonry assets.
>
> There clearly remains interest in purchasing the Stevenson's Masonry manufacturing assets; and we believe that the opportunity does still exist to offer greater than liquidation value for the masonry plant assets.
>
> We confirm that [ ], either alone or in conjunction with other parties, will actively participate in a process to acquire some or all of the Stevenson's Masonry plants.
>
> In our view such a sales process could be achieved within a reasonable time frame (say three months) in order to allow fair assessment of the masonry plants and a due diligence process if the business is still trading.

43. [ ]

[ ]

44. [ ] On 21 November 2008, [ ] contacted Stevenson enquiring about the masonry business. [ ] advised Stevenson that the earliest it could get Board approval for any acquisition of the masonry business (assuming upon review of the financial accounts, business model etc it wanted to bid), would be late January 2009. Stevenson determined in early December 2008 not to engage any further with [ ] on the basis that the certainty of the closure benefits in the very short term far outweighed the financial risks associated with holding on for the possibility that [ ] might ultimately bid.

45. [ ] advised the Commission on 12 February 2009 that if the Stevenson masonry business was still for sale as a going concern and it was given a reasonable timeframe to undertake due diligence, it would look at acquiring the business. [ ] [ ] would also potentially look at acquiring the plant on closure, but was more interested in a going concern.

[ ]

46. [ ] [ ] initially expressed interest in Stevenson's masonry, concrete and precast businesses (building products division) in 2006. However, [ ] decided not to go any further than limited financial assessment as it considered the operating risks were too high. Amongst other things it considered that there were ongoing viability issues with Stevenson's distribution model.

47. [ ] was not approached by Stevenson over the recent sale attempts, although it heard the business was for sale through industry rumours. [ ] advised the Commission that currently it is not interested in Stevenson as a going concern. [ ]

[ ]

48. [ ]

49. [ ] was not approached by Stevenson and has not itself approached Stevenson. However, [ ] submitted to the Commission that, had it been approached, it would have been interested. [ ]

> [ ]

50. On 11 February, [ ] advised the Commission that it would also be interested in acquiring Stevenson's masonry assets were the business to close. It commented that in some ways this would be the preferable acquisition scenario as [ ] would not be required to take on as many liabilities. [ ] stated that it would be likely to make an offer for the masonry assets if Stevenson closes the business. An asset purchase had been discussed with, and approved by, [ ] Board of Directors.

51. [ ]

52. [ ]

53. [ ] At the time of the Commission's decision, it had yet to ascertain what price it might offer for the assets, but considered that the value of the Stevenson masonry business was in [ ] Before completing any acquisition, [ ] stated that it would need to work through a lot of the details, conduct due diligence, and prepare a detailed business plan. It estimated that this would take approximately six weeks [ ].

54. [ ]

[ ]

55. [ ] [ ] approached the Commission with concerns about the acquisition. In a telephone interview, it advised that it may be interested in acquiring the Stevenson masonry business, but has not had an opportunity to bid. With a decent Information Memorandum, [ ] advised it could possibly have made an offer within 3-4 weeks. [ ] The Commission notes that [ ] has made no approach to Stevenson.

[ ]

56. On 9 October 2008, [ ] asked Stevensons for the opportunity to present an alternative offer for the masonry business. [ ] wrote again on 29 October suggesting that [ ] for Stevenson to divest the Masonry business. Stevenson did not reply [ ]

57. [ ]

58. On 12 February 2009, [ ] wrote to Stevenson management and formally expressed interest in buying the Auckland and Whangarei masonry assets on closure, [ ] [ ] asked Stevenson to indicate what an acceptable offer would be. [ ] had not secured any bank financing or partnership funding for an acquisition at the time of the Commission's decision.

59. On 13 February 2009, Stevenson management contacted [ ] and asked that [ ] provide by 16 February, inter alia, business plans, credit references and the name of [ ] financiers.

MARKET DEFINITION

60. Fletcher has previously sought to acquire the masonry business of Stevenson, along with the rest of its building products division. On 15 September 2005, the

Commission declined to grant Fletcher Concrete and Infrastructure Limited clearance to acquire the Stevenson building products division.[2]

61. The Applicant submitted in its current application that while not necessarily agreeing with them in all aspects, it was happy to adopt the masonry concrete markets adopted by the Commission in Decision 558. For the purposes of this Application, the Commission has adopted those market definitions, they being the Northland and Auckland markets for the manufacture and wholesale supply of concrete masonry products (the Northland and Auckland masonry markets).

THE FACTUAL

62. In the factual, Fletcher would acquire Stevensons' Auckland and Whangarei masonry business. Fletcher would then:

- stop transporting masonry product from Auckland to Whangarei and instead use Stevenson's Whangarei plant to supply the Northland market;
- have almost 100% share of the Northland masonry market;
- own five masonry plants in Auckland (three Stevenson at Drury and two Fletcher plants at East Tamaki);
- be the dominant supplier in the Auckland masonry market, with an estimated [ ]% market share, with Holcim and other specialist paving suppliers having the remaining [ ]%;
- [ ];
- [ ];
- [ ]; and
- [ ].

63. [ ]

THE COUNTERFACTUAL

Introduction

64. In assessing whether, absent a sale to Fletcher, there is a real and substantial prospect of the sale of Stevenson's masonry business as a going concern or sale of its assets on closure to an alternative purchaser, any offers for the business or assets need only be greater than Stevenson's closure value, not Fletcher's offer for the business.

65. Fletcher and Stevenson both submitted that in the absence of Fletcher acquiring Stevenson's Auckland and Whangarei masonry businesses, the businesses would close and Stevenson would exit the masonry markets. If the only counterfactual is exit of the Stevenson masonry business, then there would be no difference in competition between the factual and counterfactual scenarios and

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[2] Commerce Commission Decision *Fletcher Concrete and Infrastructure Limited/W Stevenson and Sons Limited*, 15 September 2005.

therefore, it would be unlikely that the proposed acquisition would result in a substantial lessening of competition.

Stevenson's View of the Counterfactual

Likelihood of Closure

66. Stevenson submitted that, given that its Board had made the formal decision to exit the masonry business, the only issue was whether the exit was effected by closure or by sale. It submitted that the reasons for its exit were two-fold:

- the masonry business has been making ongoing losses, and continues to do so, despite strategies to substantially reduce costs; and
- there is no prospect of reversing those losses.

67. Stevenson submitted that it tried for years to restructure the masonry business and improve its performance, but that its masonry business had been making substantial losses for a number of years. It submitted that there was no prospect of Stevenson turning around the loss-making masonry business. This was because the profitability issue was not related to its cost base at the manufacturing level, where it was very efficient. Stevenson submitted that the issue lay principally with distribution, where it lacked a downstream building merchant channel that could provide it with nationwide coverage. Stevenson advised the Commission that this placed it at a significant disadvantage relative to its major competitor, Fletcher.

68. Stevenson submitted that a large downturn in the residential housing market, stiff competition from imported paving materials, and extremely tight margins would make it impossible for its masonry business to continue in the counterfactual. The remainder of the Stevenson Group had historically absorbed the masonry division losses but in the current economic climate, it was not feasible to let that continue.

69. Stevenson submitted that no party (other than Fletcher) had or was likely to present an offer that was more financially attractive to Stevenson than simply closing. The two alternative offers that had been made for the business [ ] were rejected on the basis that Stevenson was better off to close. Stevenson did not consider that there was a realistic prospect of any other party completing an acquisition within a reasonable timeframe. Accordingly, if clearance was not granted, Stevenson submitted that it intended to close the business in order to realise the closure value.

Sale as a Going Concern to an Alternative Purchaser

70. Stevenson submitted that, commercially, it was incentivised to find a buyer for its masonry business that would pay more than the closure value, and stated that it had been using its best endeavours to do so. It submitted that it had no preference as to who the buyer might be. It noted that it wished to expand the potential group of buyers to encompass a buyer that it considered was likely to complete the acquisition, to avoid the need for closure. But, while there was always a possibility that other parties might be interested, Stevenson submitted that it did not have the luxury of time to undertake a full due diligence / sale process as the losses it would incur over the intervening period would far

outweigh the possibility that a sale could be achieved and at the right price. Stevenson advised that it determined not to engage with some potential acquirers on this basis.

71. Stevenson received offers from two parties other than Fletcher for its masonry business. However, Stevenson submitted that none offered more than the masonry business's closure value. As such, Stevenson rejected these alternative offers. Stevenson's reasons for doing so are outlined below.

Offer from [ ]

72. Stevenson submitted that [ ] bid was rejected because, having regard to all relevant factors, the Board's position was that Stevenson was better off closing the business. The Board reached this view having regard to a range of factors, in particular:

- [ ]
- [ ]
- [ ]

73. [ ]

74. [ ] Table 3 details Stevenson's assessment of [ ] offer compared to closure benefits.

Table 3: Stevenson's Assessment of [ ] Offer ($)

	Sale to [ ]	Closure	Variance
Cash in			
Inventory	[ ]	[ ]	[ ]
Debtors	[ ]	[ ]	[ ]
Creditors	[ ]	[ ]	[ ]
Plant Sale	[ ]	[ ]	[ ]
	[ ]	**[ ]**	**[ ]**
***Less* Closure Costs**			
Redundancies	[ ]	[ ]	[ ]
Car Leases	[ ]	[ ]	[ ]
External Property Leases	[ ]	[ ]	[ ]
INITIAL NET GAIN	**[ ]**	**[ ]**	**[ ]**
Other			
Ongoing Losses Till Sale Complete	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
TOTAL NET GAIN/LOSS	**[ ]**	**[ ]**	**[ ]**

75. [ ]

Offer from [ ]

76. [ ]

- [ ]
- [ ]

77. [ ]

- [ ]
- [ ]
- [ ]

78. Table 4 details Stevenson's assessment of [ ] offer compared to closure benefits. It shows that there would be a net loss to Stevenson from sale to [ ], rather than closure.

Table 4: Stevenson's Assessment of [ ] Offer ($)

	Sale to [ ]	Closure	Variance
Cash in			
Inventory	[ ]	[ ]	[ ]
Debtors	[ ]	[ ]	[ ]
Creditors	[ ]	[ ]	[ ]
Plant Sale	[ ]	[ ]	[ ]
	[ ]	**[ ]**	**[ ]**
***Less* Closure Costs**			
Redundancies	[ ]	[ ]	[ ]
Car Leases	[ ]	[ ]	[ ]
External Property Leases	[ ]	[ ]	[ ]
INITIAL NET GAIN	**[ ]**	**[ ]**	**[ ]**
Other			
Ongoing Losses Till Sale Complete	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
TOTAL NET GAIN/LOSS	**[ ]**	**[ ]**	**[ ]**

Sale of Assets on Closure

79. Stevenson submitted that it was unlikely that a third party would acquire Stevenson's masonry assets on closure and use them to compete against Fletcher. It submitted that no bid for the assets on closure had been received, despite the fact that the market had known that the masonry business had been for sale for a substantial period of time. Moreover, those firms that did bid for the masonry business(es) as a going concern did not hesitate to bid for only those parts of the business they were interested in. Stevenson submitted that if a party was willing to buy the plant alone it would have made an offer to do so. It submitted that the lack of bids for the plant to date was strong evidence that there was no likely prospect that bids for the assets would actually materialise post-closure.

80. [ ]

81. Stevenson also submitted that post-closure, it did not intend to sell or lease the land and buildings at Drury, in part because they had alternative uses, and in part because Stevenson (in particular, its internal property division) had no confidence that a buyer of the block plants at Drury (apart from Fletcher) could maintain a sustainable business. In relation to Whangarei, Stevenson submitted that it was likely to be better off removing the plant and selling the land and buildings and realising the cash up front. Even if a party did make an offer for the assets post-closure, Stevenson would require that they move the plant to a new site.

82. Stevenson submitted that there was no realistic prospect of a third party acquiring its masonry plant on closure. It considered that some parties were just not interested in the plant alone and others would be unlikely to offer (and be unable to pay) more for the plant than Stevenson would otherwise realise by closing. In respect of some specific parties, Stevenson submitted:

- in correspondence with Stevenson, [ ] had stated that it sought to buy the going concern business, and expressed no interest in acquiring just the plant on closure;
- [ ]
- [ ] confirmed to Stevenson that it would not be interested in the plant, given what it knew about the market, where it was heading and the level of capacity in the market relative to demand;
- it had asked [ ] if it would be interested in acquiring the plant. [ ] response was that it knew little about the business, and was unlikely to be interested in the plant if they could not be operated from the existing sites; and
- [ ]

The Commission's View of the Counterfactual

83. The Commission has considered the likely characteristics of the counterfactual(s). First, the Commission has considered whether the imminent closure of the masonry business by Stevenson was likely. Secondly, the Commission has considered whether there was a likely alternative third party purchaser of the business either as a going concern, or its assets on closure, with a view to competing against Fletcher. Again this consideration was in the context of imminent closure by Stevenson of its masonry business.

84. Stevenson informed the Commission in late 2008 that, in its view, no party other than Fletcher would ultimately present an offer that was more financially attractive to Stevenson than simply closing, In testing Stevenson's view, the Commission necessarily therefore investigated whether, if the proposed acquisition did not proceed, there was a real and substantial prospect of a third party acquiring Stevenson's masonry business as a going concern, or acquiring the assets on closure of the business and using the assets to compete in the relevant markets (at a price exceeding Stevenson's closure value but not necessarily higher than Fletcher's offer to purchase the business.)

85. As a general observation, when the Commission is requested to make urgent decisions it would expect the appropriate parties to provide it with complete and convincing evidence and analysis to support the propositions they are arguing, and to do so in a timely manner. In this instance, rather than being able to assess the credibility of such evidence, the Commission has had to collect its own evidence and then exercise its judgement as to whether any potential purchasers are credible. This has extended the time the Commission has required to investigate the application, in a situation when expediency was of the essence.

86. In its assessment of the counterfactual the Commission has analysed:

- submissions from Stevenson;
- Stevenson's historic financial performance;
- the attempts by Stevenson to restructure its masonry business to improve its profitability;
- evidence of planning by Stevenson to either sell its masonry business as a going concern or to close the business down;
- alternative offers and potential offers for the masonry business, in comparison to closure value; and
- other matters as discussed below.

Likelihood of Closure

87. The Commission considered that there is a real and substantial prospect that the closure by Stevenson of its masonry business was imminent absent a sale to Fletcher. The following evidence indicates that this was likely:

- history of Stevenson masonry financial performance and extent of losses;
- masonry being a separable business of the Stevenson Group, which it had no strategic reason to continue operating;
- the Stevenson Board of Directors made the formal decision to exit on 23 September 2008 (either by sale or closure);
- in January 2009, Stevenson commenced the closure process;
- Stevenson wrote to customers on 27 January 2009 and advised them that absent a sale to Fletcher it would be closing the masonry business; and
- by the end of January 2009, Stevenson had given all masonry employees notice that absent a sale to Fletcher they would be made redundant.

88. Given that the reasons for closure were due to the losses incurred over a considerable period and efforts had been made to turn the business around, the question that remained is whether there was also a real and substantial prospect of either the sale of the business as a going concern or of its plant assets on closure to an alternative purchaser.

Sale of Going Concern Business to an Alternative Purchaser

89. In considering the likelihood of the sale of the business as a going concern to an alternative purchaser, one of the issues the Commission considered was the

viability of Stevenson's masonry business. The Commission acknowledges that despite the efforts of Stevenson to turn the business around, it remains unprofitable, and has sustained losses of [ ] per year for at least the last four years. On the face of it, this would be a deterrent to potential purchasers. Nonetheless as part of its counterfactual assessment the Commission considered whether there were parties who were of the view that they could acquire the business, restructure it, and make it profitable.

90. Parties other than Fletcher expressed interest in acquiring Stevenson's masonry business. However, only two parties, [ ], had made formal written offers at the time of the Commission's decision. Due to the uncertainty around the value of those offers (for example, [ ]), the Commission was not satisfied that the offers would exceed Stevenson's closure value, to the extent that they should be regarded as serious and credible alternative offers for the masonry business in the counterfactual. [ ]

91. The evidence in respect of the other parties potentially interested in acquiring the masonry business as a going concern, but which at the time of the Commission's decision had not made an offer, can be summarised as follows:

- [ ]
- [ ]
- [ ]
- [ ]
- [ ]
- [ ]
- [ ]

92. Of those parties who expressed an interest, the Commission considered the steps that had been undertaken by each party to finalise a formal offer within the timeframe of imminent closure. The Commission looked to steps such as undertaking some form of due diligence, devising written business plans or strategies, ascertaining what level of price they might offer for the business, or arranging financing for an acquisition.

93. The Commission was not persuaded on the evidence that any of the parties mentioned at paragraph 91 had taken a sufficient number of those (or any other) steps such that the Commission could be satisfied that there was a real prospect of any one of them acquiring the business that would see the business remain in the relevant markets and provide viable competition. None had acted quickly or with necessary urgency. The Commission would have expected to see those parties make serious and credible offers, with finance secured, that Stevenson could reasonably rely on. Instead, there were merely expressions of interest, and the Commission could not put a great deal of weight on the prospect of firm offers being made. The Commission considers that an expression of interest made by a party can be a long way from that party being in a position to make a prompt and credible offer. The need for urgency was particularly important given Stevenson's stated intention to close the business imminently.

94. In considering whether there was any other likely buyer of the Stevenson masonry business, the Commission also noted the downturn in the building industry and the potential impact of the current economic recession, which is exacerbating that downturn. The Commission also noted that the economic recession could well lead to difficulties in securing finance for an acquisition in a declining market.

95. On balance the Commission concluded that there is no real prospect of a third party acquiring Stevenson's masonry business as a going concern within the timeframe of imminent closure.

Sale of Assets on Closure

96. In considering the likelihood that a party would acquire the assets on closure, the Commission considered whether there are parties who considered they could acquire the assets on closure, and run a profitable business using those assets, and effectively compete in the relevant markets.

97. The evidence in respect of the parties potentially interested in acquiring the masonry assets on closure, can be summarised as follows:

- [ ]
- [ ]
- [ ]
- [ ]
- [ ]
- [ ]
- [ ]

98. [ ]

99. [ ]

100. As with its assessment of the likelihood of the sale of the Stevenson masonry business as a going concern, the Commission noted the downturn in the building industry and the current economic recession, which has exacerbated that downturn. It also noted potential difficulties in securing finance for an acquisition of the plant on closure in a market that was experiencing the types of difficulties such as those facing the building industry.

101. The Commission considered that none of the parties mentioned at paragraph 97 had taken a sufficient number of those (or any other) steps to position themselves to make an offer for an acquisition of the assets of the masonry business after closure, to satisfy the Commission that there was a real prospect of any one of them acquiring those assets that would see the assets remain in the markets and be a viable constraint. There was no party in a position to promptly make a firm and credible offer for the assets.

102. On balance the Commission concluded that there is no real prospect of a third party acquiring the assets of Stevenson’s masonry business on closure of that business.

Conclusion on Counterfactual

103. In order to give clearance, the Commission needs to be satisfied that there is no real prospect of a less anti-competitive alternative to the proposed acquisition occurring in the counterfactual, and therefore no substantial lessening of competition. The Commission investigated whether, if the proposed acquisition did not proceed, there was a real and substantial prospect of a third party acquiring Stevenson’s masonry business as a going concern, or acquiring the assets on closure of the business and using the assets to compete in the relevant markets (in both cases, at a price exceeding Stevenson’s closure value). The Commission was satisfied, for the reasons detailed above, that there is no real prospect of either of these scenarios occurring.

104. The Commission considers, in the absence of the proposed acquisition there is only one likely counterfactual; imminent closure of Stevenson’s masonry business. To this extent, Stevenson’s masonry business would not exist either with or without the sale to Fletcher. Accordingly, there would be no material difference in competitive constraint between the factual and this counterfactual scenario in either of the relevant markets. As a consequence the Commission concludes that the proposed acquisition will not have, nor would be likely to have, the effect of substantially lessening competition in the Northland and Auckland markets for the manufacture and wholesale supply of concrete masonry products.

105. Having reached the conclusion that the level of competition will be the same in the factual and the counterfactual and therefore that the proposed acquisition is unlikely to give rise to a substantial lessening of competition, it is not necessary for the Commission to assess precisely what that level will be.

DETERMINATION ON NOTICE OF CLEARANCE

106. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for Fletcher Building Limited, or any of its interconnected bodies corporate, to acquire up to 100% of the Whangarei masonry business assets of Stevenson Group Limited (Stevenson) and up to 100% of the assets of Stevenson’s Auckland masonry business.

Dated this 13th day of February 2009

Paula Rebstock
Chair