



COMMERCE COMMISSION

Decision No. 720

Determination pursuant to the Commerce Act 1986 in the matter of an application for Proposal

INTERPIPE HOLDINGS LIMITED

AND

FLETCHER CONCRETE AND INFRASTRUCTURE LIMITED

The Commission: Dr Mark Berry
Sue Begg
Dr Jill Walker

Summary of Application: The acquisition by Interpipe Holdings Limited, or any interconnected body corporate of Interpipe Holding Limited, to acquire Fletcher Concrete and Infrastructure Limited's vertical drycast technology concrete pipe plant located at Ruffell Road, Hamilton.

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

Date of Determination: 3 March 2011

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THE PROPOSAL

1. A notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 8 February 2011. The notice sought clearance by Interpipe Holdings Limited, or any interconnected body corporate of Interpipe Holdings Limited, to acquire Fletcher Concrete and Infrastructure Limited's vertical drycast technology concrete pipe plant located at Ruffell Road, Hamilton.

PROCEDURE

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear the acquisition referred to in a s 66(1) notice within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time was agreed between the Commission and the applicant. Accordingly, a decision on the application was required by 3 March 2011.
3. The Commission's approach to analysing the proposed acquisition is based on principles set out in the Commission's Mergers and Acquisitions Guidelines.¹

ANALYTICAL FRAMEWORK

4. The Commission uses an analytical framework 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.
5. 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).
6. In framing a suitable counterfactual, the Commission bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed acquisition.²
7. The High Court recently noted that:³

Because "likely" means something less than "more likely than not", there may be more than one "likely" counterfactual. ... We consider that where there is more than one real and substantial counterfactual it is not a case of choosing the one that we think has greater prospects of occurring. ... We are to discard those possibilities that have only remote prospects of occurring. We are to consider each of the possibilities that are real and substantial possibilities. Each of these real and substantial possibilities become counterfactuals against which the factual is to be assessed.
8. The Court further noted that:⁴

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

² Commerce Commission, *Decision No. 277: New Zealand Electricity Market*, 30 January 1996, p 16.

³ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 at 116, 118 and 122.

⁴ *Ibid* at 122.

If in the factual, as compared with any of the relevant counterfactuals competition is substantially lessened then the acquisition has a “likely” effect of substantially lessening competition in a market.

9. Accordingly where, as here, there is more than one potential counterfactual, 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.
10. A comparison of the extent of competition in the relevant markets in 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.

KEY PARTIES

Interpipe Holdings Limited (Waters & Farr Joint Venture)

11. Interpipe Holdings Limited trades as Waters & Farr, and is a joint venture between Fletcher Concrete & Infrastructure Limited (Fletchers) and Hynds Limited (Hynds)⁵. It was established in 2005 []. The joint venture consists of:
 - the Waters & Farr polyethylene pipe manufacturing facility (previously owned by Fletchers) which was transferred to the joint venture (the Plastic Pipe Business); and
 - a new twin walled pipe (TWP) machine transferred to Waters & Farr Joint Venture by Hynds.
12. The Waters & Farr Joint Venture sells around []% of its plastic pipes and pipe systems to its owners. It specialises in the production of a high strength, low weight plastic pipe called “Bosspipe” which is designed to be a direct substitute for concrete pipe.

Fletchers / Humes

13. Fletchers manufactures and distributes a range of concrete pipes and other pipeline products. Fletchers is a subsidiary of Fletcher Building & Infrastructure Limited (Fletcher Building), a large New Zealand based building and infrastructure Company.
14. Of relevance to this application is Fletchers’ manufacture of concrete pipes between 250mm and 450mm⁶ in diameter through its subsidiary, Humes.
15. Humes also operates a nationwide network of supply outlets which supply both concrete and plastic pipes and pipe systems. Through this supply network, in addition to its own concrete and plastic products, Humes supplies pipes and pipe system products from other manufacturers.

⁵ A diagram outlining the ownership structure of the Waters & Farr Joint Venture is attached as Appendix I

⁶ The Commission understands that pipe diameters can be measured by either internal or external diameter. The Commission diameter references throughout this decision refer to external diameters.

Hynds

16. Hynds is a manufacturer of concrete pipes and other precast concrete products. Hynds manufactures concrete pipes in a range of sizes between 250mm and 2100mm.
17. Similar to Humes, Hynds operates a nationwide network of supply outlets which supplies both concrete and plastic pipes and pipe systems. In addition to its own concrete and plastic products, Humes also supplies pipes and pipe system products from other manufacturers.

OTHER PARTIES**The Marley/RX Group**

18. Marley New Zealand Limited (Marley) manufactures a range of plastic pipes and pipe systems products in a range of sizes between 90mm to 630mm in diameter.
19. RX Plastics Limited (RX) is a manufacturer of plastic pipes and pipe systems and specialises in the manufacture of pipe products for the rural and irrigation sectors. RX manufactures plastic pipes between 13mm and 450mm in diameter.

Tyco Flow Control Pacific Pty Limited (Tyco)

20. Tyco is a large international manufacturer and supplier of plastic pipes and pipe system products. Tyco has a plastic pipe and fittings manufacturing plant in Hamilton in which it manufactures pipes between 90mm to 1000mm in diameter.

INDUSTRY BACKGROUND**Types of Pipes**

21. This acquisition relates to the manufacture of pipes for residential, commercial, industrial and rural use. Pipes are made from a variety of materials including concrete, plastic, ductile iron, fibreglass, steel and aluminium. Each pipe material has characteristics that give it advantages and disadvantages over other materials in various applications.

Concrete Pipes

22. Concrete pipes are used in gravity fed or low pressure applications, such as storm water reticulation. The main limitations of concrete pipes are their rigidity and susceptibility to corrosion, which makes them less suitable for applications where ground movement is likely, or for the carriage of sewage which gives off corrosive gas.

Plastic Pipes

23. Plastic pipe systems convey liquids and gases such as potable water, waste-water, liquid chemicals and natural gas. Plastic pipe systems are also used as conduit for cables and wiring. Plastic pipe is more flexible and resistant to ground movement than concrete pipe and can be manufactured in much longer lengths. Plastic pipe can also be pressurised.

Other Pipes

24. There are a number of other types of pipes available in New Zealand including steel, aluminium, iron, fibreglass and vitrified clay. Due to their particular

characteristics, these different pipe types are traditionally used for specialised or niche applications.

Decision 719: Fletcher Building / Crane Group (The Fletcher / Crane Decision⁷)

25. On 24 February 2011, the Commission gave clearance for Fletcher Building to acquire up to 100% of the ordinary shares in Crane Group Limited. This acquisition involved aggregation of market share in respect of the manufacture and supply of pipes and pipe systems.
26. Decision 719 is relevant to the consideration of the current application as the Waters & Farr Joint Venture, Hynds and Fletchers are active in some of the same markets as those considered in the Fletcher / Crane Decision. Given that this Decision traces the same markets as Decision 719, the reasoning in this Decision is in summary form. This Decision should be read in conjunction with Decision 719.

Pipe Applications

27. In the Fletcher / Crane Decision, the Commission considered that there are four key customer groups for pipes. These four groupings are:
 - building / plumbing;
 - civil / infrastructure;
 - rural / irrigation; and
 - utilities.
28. Of particular relevance to this Decision are the civil / infrastructure and rural / irrigation groupings.

Civil / Infrastructure

29. These pipe systems are used to reticulate water and wastewater for residential dwellings, commercial buildings and farms. They are typically medium to large bore pipes. The main purchasers of this category of pipes are local authorities and civil engineering contractors.

Rural Irrigation

30. Pipes used for rural irrigation are typically plastic because of the long pipe runs required and the need for easy transportation and installation, although concrete pipes are regularly used for large scale irrigation schemes. Irrigation pipe systems use a varying range of pipe diameters depending on the size of the scheme and the volume of water carried. Irrigation customers purchase product directly from the manufacturer or through rural supply outlets.

WHAT IS BEING ACQUIRED

31. As noted, the Waters & Farr Joint Venture consists of a PE pipe manufacturing facility and a TWP machine.
32. [

] As a result, the Waters & Farr

⁷ *Commerce Commission, Decision 719: Fletcher Building Australia (PTY) Limited & Crane Group Limited, 24 February 2011.*

Joint Venture was granted an option allowing for the future purchase of the RCP plant - the RCP Option Agreement.

33. []

34. Should this option be exercised,
[]

]

Related Transactions

35. As noted, the Commission has recently granted clearance to the acquisition by Fletcher Building of up to 100% of the ordinary shares in the Crane Group. The Fletcher / Crane application was considered in parallel with the current application.
36. The Commission last considered parallel applications in the Schering-Plough/Merck & Pfizer/Wyeth applications in 2009⁸. In these decisions, the Commission considered that it was necessary to take the Pfizer/Wyeth application into account in determining the relevant factual and counterfactual scenarios in the Schering-Plough/Merck acquisition because each of the acquisitions was likely.
37. The Commission will take the Fletcher Building / Crane Group acquisition into account when assessing the relevant factual and counterfactual scenarios of the current application.

MARKET DEFINITION

38. In the Fletcher / Crane Decision the Commission considered that because of the high degree of substitutability between plastic, concrete and other pipe materials, plastic and concrete pipes should form part of the same market.
39. The Commission further considered that the size of pipe is an appropriate delineator of the different pipe markets as there is limited substitutability between small, medium and large pipe sizes. In that Decision, the Commission identified three separate markets for the manufacture of pipes and pipe systems, <250mm (small pipe market), 250 – 450mm (medium pipe market) and >450mm (large pipe market). The Commission also identified a separate wholesale supply or distribution market. Of relevance to this application are the national markets for the:
 - manufacture of pipes and pipe systems between 250 – 450mm in diameter (the medium pipe market); and
 - wholesale supply or distribution of pipes and pipe systems (the supply market).

⁸ *Commerce Commission Decision No. 67:8 Pfizer & Wyeth Corp, 20 August 2009.*

Factual and Counterfactual

[] of the Joint Venture Agreement

40. The Joint Venture Agreement contains several []].
41. The Commission has analysed a number of permutations in the factual that could arise from the exercise of the [] and the RCP Option Agreement. The Commission has also considered whether each permutation is likely. The Commission's analysis has identified that the exercise of the various [] could lead to a broad spectrum of market outcomes, each with varying degrees of aggregation and market concentration. For example, []].
42. For the purposes of analysing this application, the Commission will use as its starting point the factual scenario that would give rise to the greatest competition concerns when compared to the counterfactual. It does so on the basis that if that comparison does not result in a substantial lessening of competition then it is unlikely any of the other factual scenarios would result in the same.

Factual

43. In the factual, the Waters & Farr Joint Venture would exercise the RCP option and acquire Fletcher's RCP plant. In addition []]; however, it would acquire the Crane Group and therefore []]. To this extent, the factual scenario the Commission intends to adopt in this instance is:
- The Waters & Farr Joint Venture acquires Fletcher's RCP plant;
 - Hynds []];
 - Fletcher []];
 - Hynds and Fletcher []]; and
 - Fletcher Building acquires the Crane Group and manufactures plastic pipes in the 250-450mm range, independent of the Joint Venture.

Counterfactual

44. In the counterfactual, the Waters & Farr Joint Venture would not acquire the RCP plant and those assets would remain with Fletcher. Fletcher Building would acquire the Crane Group, and []].

INTER-FIRM RELATIONSHIPS

45. A preliminary question the Commission must determine is whether the Applicant is associated with any other parties in the relevant market. Section 47(1) of the Act refers to an acquisition by a person. A person is defined as including two or more persons that are interconnected or associated under s 47(2) of the Act.

46. Sections 47(3) and (4) of the Act set out when two or more persons are associated. Two corporate entities are associated if one, either directly or indirectly, is able to exert a “substantial degree of influence” over the activities of the other. The Commission is of the view that, in this context, a substantial degree of influence means being able to bring real pressure to bear on the decision making process of the other, even if that pressure falls short of control.⁹
47. In determining whether parties are associated, each case must be considered in light of its particular facts. Typically, the Commission takes into account the:
- nature and extent of ownership links between the companies;
 - presence of overlapping directorships;
 - rights of one company to appoint directors of another; and
 - nature of other shareholder agreements and links between the companies concerned.
48. The Commission also considers the interaction between these various factors. For example, the Commission assesses the nature and extent of the communications between those persons, and the apparent influence of one person on the key strategic decisions of the other.¹⁰
49. Fletchers and Hynds each have a 50% share in the Waters & Farr Joint Venture. There are 4 Directors of the Company, with each shareholder appointing 2 Directors.
50. While neither Fletchers nor Hynds has overall control of the Waters & Farr Joint Venture, their respective 50% shares give them the ability to influence its direction. Hynds and Fletchers are each associated with the Waters & Farr Joint Venture, but not necessarily with each other.
51. Applying the plain meaning of s 47(3) could lead to the conclusion that the Waters and Farr Joint Venture and its two associated joint venture parties should be treated as a single acquiring person. In the circumstances of the proposed transaction, such treatment could have extreme implications if it were thought appropriate to terminate the analysis on the basis that acquisitions between associated parties are not capable of resulting in changes to market structure, e.g. the total market share of the combined Fletchers, Hynds and Waters & Farr Joint Venture would be the same with or without the acquisition.
52. In the Commission’s view, however, such an approach would not be appropriate in this case as it would be contrary to the overriding counterfactual analysis required by s47. In the present case, the analysis must take account of any strengthened relationship between Fletchers and Hynds in the 250mm-450mm pipe and pipe system market and any change in their incentives. The analysis must also take account of the change in the counterfactual and factual in respect of the competitive dynamics between Fletchers and Hynds in a number of related pipe and pipe systems markets. This approach will give effect to the meaning and purpose behind s 47 of the Act and will enable the Commission to

⁹ Commerce Commission, *Decision No.278: Air New Zealand/Ansett Holdings Ltd/Bodas Pty Ltd*, 3 April 1996.

¹⁰ Commerce Commission Decision No. 388: *New Zealand Seafood Investments Ltd/Basuto Investments Ltd*, 23 March 2000.

assess the difference in competitive effects between the factual and counterfactual.

53. For the purposes of the present application, the Commission will proceed on the basis that there is a close relationship between the Waters & Farr Joint Venture and each of Fletchers and Hynds but that in the counterfactual []. The Commission will focus on analysing the competitive effects of the proposed acquisition brought about by a change in the extent and nature of the parties' relationships in the 250mm-450mm pipe and pipe system market and other related pipe and pipe systems markets.
54. The Commission's analysis will assess the difference between the factual and counterfactual scenarios as set out above.

COMPETITION ANALYSIS

55. The proposed acquisition would see Fletcher's 250 – 450mm RCP concrete pipe plant transferred to the Waters & Farr Joint Venture. This would result in:
- Hynds [];
 - Fletchers []; and
 - Fletchers and Hynds [].
56. The diagram below illustrates the situation before and after the proposed acquisition.

[]

Medium pipe market

57. Fletchers and Hynds have an existing relationship through their shared ownership of the Waters & Farr Joint Venture. In the factual, this relationship is likely to be strengthened as the Joint Venture would manufacture a broader range of products and [].
58. Through the Joint Venture arrangement, Fletchers and Hynds have significant influence over the prices the Joint Venture charges for its products. In the counterfactual, this knowledge is limited to a particular product range with a market share of []%. However, in the factual, this awareness would be over a much greater portion of the market at []%. Further, the proposed acquisition could change the incentives of Fletchers and Hynds to compete (both with each other, and with the Joint Venture).
59. In the counterfactual, Hynds and Fletchers have the incentive to compete with the Joint Venture as their individual interest in concrete pipes is greater than their interest in the plastic pipes supplied by the Joint Venture. In the factual, there will be limited competition between the Joint Venture parties as [] of their pipe requirements will be manufactured by the Joint Venture.
60. However, as discussed in the Fletcher / Crane Decision, there are a number of other parties who manufacture pipes and while they do not have a large presence in the medium pipe market (with shares of [] and [] respectively), Marley/RX

and Tyco are each [] in the two other pipe size markets (0-250mm & 450mm+). Both also [], and the ability, incentive and willingness to expand given the opportunity.

61. The Commission also considers that the threat of new entry would act as a constraint on the merged entity in the factual. The Commission considers that the key requirements for entry for the manufacture of concrete and plastic pipes and pipe systems in relation to all sizes are plant, expertise and land.
62. Industry participants spoken to by the Commission indicated that it is easy to source the necessary skills and technology to set up a plastic or concrete pipe manufacturing plant. Access to a supply network is not considered to be a necessary requirement for entry at the manufacturing level as Tyco has demonstrated successful entry without it.
63. The Commission considers that requirements for entry to this market are straightforward and recent entrants have been able to establish reasonable market share within a relatively short timeframe. This appears to indicate that customers are willing to support new entrants without a proven track record.
64. While the requirements of entry are straightforward, industry participants informed the Commission that due to the adverse economic climate and the significant excess capacity in the market, entry is unlikely in the short term. Despite this, the Commission considers should the excess capacity in the market be more fully utilised in the future, the threat of entry would be likely to constrain the merged entity in the factual.
65. A large proportion of pipes and pipe systems sales in this market are for civil and infrastructure use and are acquired by large civil engineering firms. These firms are sophisticated purchasers who design their tenders to maximise the competitive tension between potential bidders. These customers are also able (and willing) to obtain pipes from manufacturers other than Fletchers or Hynds.
66. The proposed acquisition could potentially enhance the potential for co-ordination in the market. The Commission considers that the presence of strong existing competition, an active competitive tender process run by strong, informed customers and the relative ease of new entry would constrain any enhanced potential for co-ordination. The Commission also considers that the relatively small market share of [] would incentivise them to expand and compete vigorously with the merged entity, which would further constrain the exercise of co-ordinated behaviour.

Supply market

67. The Commission notes that the supply market is concentrated and the increase in transparency of prices to both Hynds and Fletchers could enhance their ability to coordinate their behaviour in this market. The ability of Fletchers and Hynds to do so would also be augmented by the decreased number of competitors due to Fletcher Building's acquisition of Crane.
68. As discussed in the Fletcher / Crane Decision, Tyco would continue to have the ability to supply direct to the market. Plumbing World, currently a fringe aggregator, would be willing and able to leverage its national coverage and strength in respect of plumbing supplies to expand its aggregator role. In addition, other fringe manufacturers could follow Tyco's model and supply direct to customers.

69. Furthermore, the supply of pipes and pipe systems is dominated by tender based contracts for civil/infrastructure applications. The tenders exhibit a number of characteristics that would be likely to counteract coordinated behaviour including:
- the varying size, value and unpredictability of the tenders;
 - the large assortment of different pipes and fittings of varying materials, diameters and length; and
 - the countervailing power of large civil engineering customers which enables them to seek competitive prices at several points in the tender process, removing any price transparency that may exist at the initial tender stage.
70. Overall, the Commission concludes that any enhanced ability for Hynds and Fletchers to coordinate their behaviour as a result of the proposed acquisition is likely to be frustrated by the presence of existing competitors, the relative ease of entry and expansion and the countervailing power of large customers.

OVERALL CONCLUSION

71. Having considered the competition effects of the proposed acquisition, 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 national market for the manufacture of pipes and pipe systems between 250 – 450mm in diameter.

DETERMINATION ON NOTICE OF CLEARANCE

72. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by Interpipe Holdings Limited, or any interconnected body corporate of Interpipe Holding Limited, to acquire Fletcher Concrete and Infrastructure Limited's vertical drycast technology concrete pipe plant located at Ruffell Road, Hamilton.

Dated this 3rd day of March 2011

Dr Mark Berry
Chair

Appendix 1 – Structure of the Waters & Farr Joint Venture

