



30 June 2022

The Registrar
Commerce Commission

By email: registrar@comcom.govt.nz

Fletcher Distribution Limited / Tumu Merchants Limited: submission in relation to confidential third-party information [Public version]

1. Fletcher Distribution Limited (FDL) and Tumu Merchants Limited have made a joint submission in response to the Commission's Statement of Issues. This submission supplements that submission by commenting on the information provided to the Commission by third parties that the Commission has decided to share on an external counsel only basis subject to a confidentiality undertaking.
2. This submission makes five points in turn.
 - 2.1 First, many of the statements in paragraph [73] of the Statement of Issues that are attributed to customers to support the Commission's conclusion about a loss of service from the acquisition are taken out of context, or do not fairly and accurately reflect the file notes of the Commission's interviews with those customers.
 - 2.2 Second, the Commission's conclusion that existing competitors would be an insufficient constraint on the merged firm is inconsistent with the evidence provided by customers **[CONFIDENTIAL]**.
 - 2.3 Third, the Commission's conclusion that ITM would not be able to compete for GHB customers is not consistent with the evidence from GHBs.
 - 2.4 Fourth, the Commission's conclusion that GHBs do not have countervailing power is inconsistent with the evidence provided by GHBs.
 - 2.5 Fifth, the Commission's conclusion that **[CONFIDENTIAL]** is not justified based on the information **[CONFIDENTIAL]**.

Many statements cited to support the Commission's view that service would be lost are taken out of context or are not fairly and accurately recorded

3. Many of the statements quoted by the Commission in paragraph [73] of the Statement of Issues as evidence that Tumu has a unique level of service are not consistent with what is recorded in the Commission's file notes of its interviews with these customers. Specifically:
 - 3.1 Paragraph [73.1] records an anonymous customer as saying: "Have found it difficult to deal with FDL". That statement is not recorded in the file note of the Commission's interview with this customer. Rather, the file note records the customer as saying they have a good relationship with FDL.¹ The customer also sees the acquisition as positive for its business.

¹ CC.0029 at [12(a)].

- 3.2 Paragraph [73.2] records, amongst other things, the customer as saying that Tumu’s “site is in a great location”. The file note of the interview with that customer records the interviewee saying that Tumu has the prime site, but the customer also says in relation to that area: “Its going to become a bit of a hub, Carters is moving there”.² The customer also says, “Bunnings is looking for a site”.³ This implies that any advantage Tumu would have would not be a long-term one.
- 3.3 Paragraph [73.3] refers to the customer saying, amongst other things, that “Tumu service is a lot better than other merchants”. However, it appears from the file note of this interview that the customer made this comment about Tumu’s frame and truss service not the supply of building products.⁴ Paragraph [73] is presenting evidence on service for building products not frame and truss, which the Commission has indicated it has no concerns about.
- 3.4 Paragraph [73.5] refers to a customer saying that Tumu is the best supplier in terms of price and service. However, the file note of that interview records the interviewee as saying Tumu “would have been” the best supplier in terms of price and service before that customer [CONFIDENTIAL] as a new supplier.⁵ That is, the statement appears to have been made about the past.
- 3.5 Paragraph [73.8] records the customer saying the location of Tumu stores in Hawke’s Bay is convenient. Based on the file note of the interview, the interviewee makes this comment in relation to one, not all, of the Tumu stores.⁶
- 3.6 Paragraph [73.11] includes the comment “Tumu dominates the market due to its strong focus on maintaining relationships and customers”. The interview file note records that the customer splits purchases between Tumu and another merchant but that in relation to that split “Tumu dominates currently due to their strong focus on maintaining relationships”.⁷ That is, the interviewee did not express the view that Tumu dominates the market as suggested, but simply that Tumu dominates in terms of supply to that customer.
4. Correcting each of those statements materially changes the nature of paragraph [73], which, when corrected, provides even less of a basis for the Commission’s conclusion that “there is a distinct service quality component to the competitive offers of the Tumu companies that is not currently replicated by other merchants”.⁸

Conclusion that existing competitors will not constrain the merged firm is inconsistent with the evidence

5. The Statement of Issues states that there is “some evidence” of constraint from Carters and Mitre 10 (and by implication no evidence of constraint from Bunnings), although goes on to say that that constraint will not be sufficient to constrain the merged firm.⁹
6. The reference to “some evidence” of constraint mischaracterises the evidence before the Commission (or at least the evidence the Commission has chosen to share). In contrast to the Commission’s position, there is strong – overwhelming even – evidence that all merchants compete strongly, and that Carters, Mitre 10, and Bunnings (and ITM) would constrain the merged firm. Much of this evidence is detailed in the Clearance Application and in the joint submission. That evidence is supported by what the Commission [CONFIDENTIAL] the customers the Commission has spoken to.

² CC.0012, p 2.

³ CC.0012, p 2.

⁴ CC.0008 at [15].

⁵ CC.0040 at [2(b)].

⁶ CC.0037 at [3(c)].

⁷ CC.0042 at [3(c)].

⁸ Statement of Issues at [74].

⁹ Statement of Issues at [70].

Evidence from customers

7. In summary, customers have told the Commission that they would have other options open to them other than the merged firm, that the market will remain competitive, and that they do not hold significant concerns about the acquisition.
8. This information is telling given that almost all the customers the Commission has spoken to are Tumu customers. Therefore, the information from these customers should represent the high watermark of concerns with this acquisition. And few, if any, significant concerns are expressed.
9. Given the Commission has defined separate Wairarapa and Hawke's Bay markets, I deal with the evidence in respect of each below.
10. In respect of competition in Wairarapa, the Wairarapa customers said the following.
 - 10.1 The confidential customer referred to at [73.1] of the Statement of Issues confirmed they already deal with Mitre 10 and Bunnings in addition to Tumu. In other words, they already exercise their outside options. This customer also considers the acquisition to be beneficial for them.¹⁰
 - 10.2 [CONFIDENTIAL] said that if FDL could not keep Tumu the way it is, or if prices increased/quality decreased, it would "engage competitors for quotes – starting with Mitre 10".¹¹
 - 10.3 [CONFIDENTIAL] indicated no concerns with the acquisition and said they already get competing quotes from Tumu, Bunnings, and Carters.¹²
 - 10.4 [CONFIDENTIAL], while indicating that mergers always create uncertainty, said that they believed there would still be enough competition in the market post-acquisition, and that the acquisition would "open the door for Bunnings" to enter the Wairarapa.¹³
 - 10.5 [CONFIDENTIAL] said that the acquisition would not change a lot in the market and, if anything, would "increase the options for consumers, especially if ITM decides to re-enter the market". [CONFIDENTIAL] also commented that: Carters would look to pick up additional business, [CONFIDENTIAL] would look to Mitre 10 as a supply option, and that ITM would re-enter. [CONFIDENTIAL] also said in respect of Bunnings: "Have looked at Bunnings Wellington. [CONFIDENTIAL]".¹⁴ This suggests that [CONFIDENTIAL].
 - 10.6 [CONFIDENTIAL] described the market as "fairly" competitive. While noting that it would lose one option for supply, this customer also indicated that they would look to use ITM Greytown if the acquisition proceeded, while also noting that there would be some advantages for it from the acquisition. This customer when asked if they had any concerns with the acquisition said: "pricing was the main concern, but nothing major".¹⁵
 - 10.7 [CONFIDENTIAL] indicated that the acquisition would not be industry changing. They indicated that they would look to ITM Greytown or to increase their relationship with Mitre 10. They also expect ITM to re-enter and indicated that Masterton was on the list of areas Bunnings was looking to build.¹⁶

¹⁰ CC.0029.

¹¹ CC.0035 pp 1, 2, 3.

¹² CC.0008.

¹³ CC.0038.

¹⁴ CC.0040.

¹⁵ CC.0023.

¹⁶ CC.0041.

- 10.8 [CONFIDENTIAL] expressed no concerns with the acquisition and indicated that it was a “very competitive” market with enough competition.¹⁷
11. In summary, the customers consider there are ample options, including Carters, Mitre 10, and ITM Greytown. There is also a sense that ITM will re-enter and an expectation that Bunnings will build a new store in Wairarapa [CONFIDENTIAL].
12. In respect of the Hawke’s Bay market, customers made the following statements.
- 12.1 [CONFIDENTIAL] expressed no concerns and confirmed that Mitre 10 have a good market share in Hawke’s Bay.¹⁸
- 12.2 [CONFIDENTIAL] also expressed no concerns about the acquisition stating “If price went up, would give them the option of bringing their price down, but if they couldn’t then will go to Mitre 10. Would also look at Carters. Store size for Mitre 10 and Carters is big enough to stock more”.¹⁹
- 12.3 [CONFIDENTIAL] expressed a concern relating to FDL’s “commercial attitude” but indicated that if the acquisition went ahead, they would look at Mitre 10 as an alternative.²⁰
- 12.4 [CONFIDENTIAL] said they had no concerns with the acquisition and said that Mitre 10 could grow if they wanted to, noting that if prices went up or quality decreased post-acquisition, they “would be looking elsewhere, Mitre 10 most likely”.²¹
- 12.5 [CONFIDENTIAL] indicated that if prices went up or quality decreased, they would “look harder at Mitre 10 or Carters” and also said that “ITM has signalled that they will attempt to open a store in the region, and Bunnings are in Hastings”.²²
- 12.6 [CONFIDENTIAL] stated its belief that the acquisition will make the situation better in Hawke’s Bay and that there are a lot of stores as options.²³
- 12.7 [CONFIDENTIAL] indicated that when they have the chance to choose, they choose Mitre 10 because of the size of its business and stock levels. [CONFIDENTIAL] are very supportive of the acquisition.²⁴
- 12.8 [CONFIDENTIAL] indicated that they had accounts with Bunnings and Mitre 10 as well as with Carters. This customer expressed concern that there would be only two trade focused merchants, an opinion that is inconsistent with the evidence and appears to be based on Bunnings and Mitre 10 having a lack of their own frame & truss manufacturing capacity. Nevertheless, [CONFIDENTIAL] is recorded as saying: “It comes down to whether FDL can perform. If they can’t perform, [we] would look elsewhere”.²⁵
- 12.9 [CONFIDENTIAL] expressed the view that there is at least four competitors in Hawke’s Bay and indicated they would do a price check with Carters and then Mitre 10 if prices increased/quality decreased.²⁶

17 CC.0033.
 18 CC.0026.
 19 CC.0037.
 20 CC.0020.
 21 CC.0032.
 22 CC.0042.
 23 CC.0031.
 24 CC.0009.
 25 CC.0007.
 26 CC.0005.

13. In summary, most customers appear unconcerned by the acquisition and, in some cases, are supportive of it. All customers confirm they would have alternative options if prices increased/quality decreased.

[CONFIDENTIAL]

14. [CONFIDENTIAL].

14.1 [CONFIDENTIAL].²⁷

14.2 [CONFIDENTIAL].²⁸

14.3 [CONFIDENTIAL].²⁹

14.4 [CONFIDENTIAL].³⁰

14.5 [CONFIDENTIAL].³¹

15. [CONFIDENTIAL] confirms that the competitors in the region include Carters, Bunnings, and Mitre 10. [CONFIDENTIAL] also confirms that [CONFIDENTIAL] in the Hawke's Bay than in other areas.³²
16. [CONFIDENTIAL] the customer evidence, cannot be reconciled with the Commission's conclusion that [CONFIDENTIAL] would not exert significant competitive constraint on the merged firm.

Assertion that ITM would not be able to compete for GHB customers is not consistent with the evidence from GHBs

17. The Commission's description of the evidence on whether ITM's ability to compete for national contracts as "mixed" is not consistent with the weight of evidence before the Commission. The weight of that evidence strongly supports the proposition that ITM's ability to compete would not be affected.
18. The Commission asked questions of ten GHBs by email. It is notable that four of those GHBs ([CONFIDENTIAL]) do not operate in the relevant regions. Self-evidently, the acquisition cannot affect ITM's ability to compete for those customers.
19. Of the remaining six GHBs the Commission spoke to:
- 19.1 Three – [CONFIDENTIAL] – indicated that they would consider ITM for national contracts post-acquisition.³³
- 19.2 [CONFIDENTIAL] did not answer the question noting they already had an exclusive arrangement with another merchant.³⁴
- 19.3 [CONFIDENTIAL] also did not answer the question whether they would consider ITM in the next tender round but indicated that deliveries to Hawke's Bay from other ITM branches would be difficult although the same would not be true for Wairarapa given the existence of ITM Greytown. [CONFIDENTIAL] did indicate that

²⁷ CC.0004 at [3].

²⁸ CC.0004 at [16].

²⁹ CC.0004 at [17(a)].

³⁰ CC.0004 at [18(b)].

³¹ CC.0004 at [18(b)].

³² CC.0035 pp 1, 2, 3.

³³ CC.0039, CC.0030, and CC.0021.

³⁴ CC.0025.

the local franchisees [CONFIDENTIAL]. Therefore, for [CONFIDENTIAL] at least, this would not be a 3:2 acquisition on any view.³⁵

- 19.4 [CONFIDENTIAL] also did not answer the question whether they would consider ITM for a national contract. The question it answered was whether [CONFIDENTIAL] would use ITM stores from outside the region.³⁶ It said it would not. However, it does not follow that [CONFIDENTIAL] would discount ITM for a national contract. Indeed, notably, [CONFIDENTIAL] commented that it would look to Mitre 10 if prices went up or quality decreased post-acquisition.³⁷ This implies that the local franchisee would be willing to use other merchants should ITM not be able to offer a service in Hawke's Bay.

Assertion that GHBs do not have countervailing power is inconsistent with the evidence provided by GHB customers

20. At paragraph [110] of the Statement of Issues, the Commission expresses the view that:

... there is little evidence to suggest that national customers will have sufficient countervailing power to destabilise a coordinated agreement between building supply merchants.

21. The Statement of Issues provides no references to an evidential basis for this conclusion. Indeed, the Commission does not appear to have asked GHBs about what countervailing power they might have.
22. The Commission did ask a general question about whether GHBs would accept a 10% price increase. The evidence was that they would not, a view that is not consistent with GHBs lacking countervailing power. Indeed, [CONFIDENTIAL] commented that they would only accept a price increase:

... if we gained clarity on this being market wide, cost driven based on commodities lifting, freight etc we centrally monitor global and domestic metrics that affect material pricing so would "kick back" assertively if it was or appeared to be merchant only trying to just lift profitability.³⁸

23. This statement shows that GHBs are sophisticated customers who can and do monitor prices and terms of service compared to objective benchmarks to ensure they are receiving a competitive offering.
24. Other GHBs that were asked this question and responded did so as follows.
- 24.1 "We wouldn't accept a 10% price increase and would change to using a different merchant".³⁹
- 24.2 "[W]e would go through a process with that merchant to discuss options to remedy" and "We would not accept 10% as an increase over market rates".⁴⁰
- 24.3 "We currently hold supply agreements with [CONFIDENTIAL]. This enables us to ensure pricing is competitive and we retain the option of moving to another merchant should we deem that necessary".⁴¹
- 24.4 "We would be in close transparent discussions with the merchant".⁴²

³⁵ CC.0027.

³⁶ CC.0024.

³⁷ CC.0032.

³⁸ [CONFIDENTIAL] (CC.0010).

³⁹ [CONFIDENTIAL] (CC.0039).

⁴⁰ [CONFIDENTIAL] (CC.0030).

⁴¹ [CONFIDENTIAL] (CC.0027)

⁴² [CONFIDENTIAL] (CC.0025).

- 24.5 “I would want to make sure that these increases were genuine industry wide price increases through all merchants. If they weren’t we would consider changing merchant”.⁴³
- 24.6 “[A]ll increases will result in a price check and a change of suppliers if we consider appropriate” and “We [no] longer accept price increases as our business is under threat. We will move to a reliable supplier for any future price increases”.⁴⁴
25. This evidence demonstrates that GHBs are aware of the options available to them to ensure competitive terms and will utilise those options to do so.

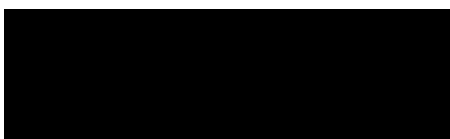
Conclusion that [CONFIDENTIAL] is not justified

26. The Commission discounts [CONFIDENTIAL] on the basis that [CONFIDENTIAL]. The Statement of Issues records that [CONFIDENTIAL].⁴⁵
27. Putting aside the fact that [CONFIDENTIAL], the Commission has overlooked the reason why [CONFIDENTIAL]:
- [CONFIDENTIAL]⁴⁶
28. In other words, [CONFIDENTIAL]. That does not mean that [CONFIDENTIAL] if prices increased above competitive levels. Indeed, in that scenario, the market would become attractive, and [CONFIDENTIAL] to compete.
29. The flaw in the Commission’s analysis is that it assumes that [CONFIDENTIAL], which is a function of current competition, would continue unchanged even if the lessening of competition the Commission postulates occurs. A lessening of competition would, by definition, make competing for this work [CONFIDENTIAL].

Concluding comments

30. As illustrated in the Clearance Application, the parties’ joint submission, and this submission, the weight of evidence before the Commission strongly supports the Commission granting clearance for the acquisition.

Yours sincerely



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⁴³ [CONFIDENTIAL] (CC.0021).

⁴⁴ [CONFIDENTIAL] (CC.0011).

⁴⁵ [CONFIDENTIAL].

⁴⁶ CC.0004 at [26(b)].