

## Determination

### Staples, Inc and Office Depot, Inc [2015] NZCC 14

<b>The Commission:</b>	Dr Mark Berry Anna Rawlings Dr Jill Walker
<b>Summary of application:</b>	Staples, Inc seeks clearance to acquire all of the outstanding shares of Office Depot, Inc.
<b>Determination:</b>	Under s 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition.
<b>Date of determination:</b>	5 June 2015

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 2 April 2015, the Commerce Commission (the Commission) received an application from Staples, Inc (Staples), seeking clearance to acquire all of the outstanding shares of Office Depot, Inc (Office Depot). The acquisition forms part of a global merger that is currently being considered by several other competition authorities.

## The decision

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

## Our framework

3. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in the Mergers and Acquisitions Guidelines.<sup>1</sup>

## The substantial lessening of competition test

4. As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.
5. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).<sup>2</sup>
6. 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 competitive market (the 'competitive price'),<sup>3</sup> or reduce non-price factors such as quality or service below competitive levels.
7. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.
8. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.<sup>4</sup>

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<sup>1</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

<sup>2</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>3</sup> Or below competitive levels in a merger between buyers.

<sup>4</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

### 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.<sup>5</sup> Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.<sup>6</sup> A lessening of competition in a significant section of a market, may, according to circumstances, be a substantial lessening of competition in that market.<sup>7</sup>
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.<sup>8</sup>

### The clearance test

12. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.<sup>9</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.<sup>10</sup>
13. The burden of proof lies with Staples as the applicant to satisfy us on the balance of probabilities that the acquisition is not likely to have the effect of substantially lessening competition.<sup>11</sup> The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence.<sup>12</sup>

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<sup>5</sup> *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

<sup>6</sup> *Ibid* at [129].

<sup>7</sup> *Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd* (1982) 64 FLR 238, 260; 44 ALR 173, 192; ATPR 40-315, 43,888 as cited by McGechan J in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 at 435.

<sup>8</sup> *Woolworths & Ors v Commerce Commission* (HC) above n 5 at [111].

<sup>9</sup> Commerce Act 1986, s 66(3)(a) of the Commerce Act 1986.

<sup>10</sup> In *Commerce Commission v Woolworths Limited* (CA), above n 2 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”.

<sup>11</sup> *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7] and *Commerce Commission v Woolworths Ltd* (CA) above n 2 at [97].

<sup>12</sup> *Commerce Commission v Woolworths Ltd* (CA) above n 2 at [101].

## Industry background

14. This merger relates to the workplace products sector, including the subset of ‘core’ office products, such as commercial stationery.<sup>13</sup>

## Workplace products

15. Staples describes workplace products as “...all products a workplace needs that can be easily fitted in a box and delivered to a workplace.”<sup>14</sup>
16. Both Staples and OfficeMax historically focused on supplying commercial stationery products. However, a decline in the demand for these traditional office products, arising from increased use of digital equipment, and a subsequent decrease in margins in these products, has incentivised each company to expand into a wider range of workplace products, such as office furniture and janitorial supplies.
17. Staples submits that the merging parties overlap in the supply to businesses and government agencies of the following workplace products:<sup>15</sup>
- 17.1 core office products such as commercial stationery (eg, pens, paper and exercise books);
  - 17.2 technology products (including business machines, computers and accessories);
  - 17.3 office furniture;
  - 17.4 educational supplies (including education specific products to educational institutions, such as art supplies and text books);
  - 17.5 cafeteria supplies (including tea, coffee and office kitchen equipment);
  - 17.6 janitorial, hygiene and medical products (including paper-based tissues, towels and cleaning products);
  - 17.7 safety products (including personal protective equipment and apparel);
  - 17.8 packaging products; and
  - 17.9 printing services (including arranging for the printing of various documents for businesses).
18. The number of different product lines that suppliers can supply across all these categories varies. For instance, New Zealand Office Supplies Limited advised us that

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<sup>13</sup> Workplace products refer to the products described in paragraph 17.

<sup>14</sup> Application at [8.8].

<sup>15</sup> Application at [7.1].

it offers over 15,000 individual products,<sup>16</sup> while OfficeMax told us that it has a broad catalogue of around 25,000 stocked products.<sup>17</sup>

19. The key requirement for suppliers is the ability to source and deliver workplace products in a timely manner at minimum cost to the customer. Increasingly, customers also require online sales and ordering. For large purchasers of workplace products, the ability of suppliers to deliver large quantities of these products is also important.
20. The delivery of workplace products in New Zealand is typically subcontracted to third-party couriers.

## Key parties

### The merging parties

21. Staples and Office Depot are two USA-based companies that supply workplace products in a number of countries, including New Zealand.

### Staples

22. In New Zealand, Staples operates through two 100%-owned subsidiaries:
  - 22.1 Staples New Zealand Limited, which is a business to business (B2B) supplier of a wide range of workplace products; and
  - 22.2 Teacher Direct Limited, which is an online retailer of educational supplies.
23. Staples has an annual turnover of about \$85m.<sup>18</sup> However, without a retail presence in New Zealand, Staples is primarily focused on serving larger corporate and government clients. Staples maintains three warehouses in New Zealand, located in Auckland, Wellington and Christchurch. Staples' delivery services are handled by third-party couriers.

### Office Depot/OfficeMax<sup>19</sup>

24. Office Depot was formed in 2013 by the merger of Office Depot and OfficeMax Inc.
25. In New Zealand, Office Depot, through its subsidiary OfficeMax Holdings Limited, owns:
  - 25.1 100% of OfficeMax New Zealand Limited (OfficeMax), which is mainly a B2B supplier of workplace products. It also supplies these products through its 16 retail stores, where most of its retail customers are businesses;

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<sup>16</sup> <http://www.supplies.co.nz>.

<sup>17</sup> Meeting with OfficeMax (23 April 2015).

<sup>18</sup> Application at [7.4(b)].

<sup>19</sup> In these reasons, we refer to Office Depot as the target of the acquisition and the owner of OfficeMax and Croxley. However, when describing OfficeMax and Croxley's activities we refer to them by their respective trading names, through which they are known in New Zealand.



- 25.2 100% of Croxley Stationery Limited (Croxley), which currently is a manufacturer, importer and wholesaler of various stationery, technology and kitchen appliance products in New Zealand; and
- 25.3 65% of Armidale Industries Limited, which is a manufacturer and wholesaler of suspension filing systems.
26. OfficeMax is New Zealand's largest B2B workplace products supplier, with an annual turnover of about \$[ ].<sup>20</sup> It serves small, medium and large corporate customers, as well as a number of government entities, including a high proportion of schools.
27. OfficeMax has two New Zealand warehouses (located in Auckland and Christchurch) and uses third-party couriers to deliver its products.
28. While OfficeMax's sales to retail customers, through its retail stores, only account for about [ ]% of sales, [ ]<sup>21</sup>
29. Office Depot also owns Croxley, a business that is currently active in the manufacture, import and wholesale distribution of core office products (including writing instruments, diaries and exercise books), technology products, and kitchen products. Croxley has announced that it plans to cease manufacturing in New Zealand and become an importer and wholesaler of these products.<sup>22</sup>
30. Croxley currently has exclusive rights to distribute a number of premium brands in New Zealand, such as Warwick exercise books, Collins diaries, Avery labels and the Fellowes brand of business machines.<sup>23</sup> To date, Croxley has operated as a stand-alone entity independent of OfficeMax. [ ].

## Other suppliers

### *Corporate Consumables Limited*

31. Corporate Consumables Limited (Corporate Consumables) is a B2B supplier of office products across New Zealand. It commenced activities as a supplier of computer consumables, such as ink cartridges and printer toner, but in recent years has expanded into commercial stationery, educational and other workplace products. Corporate Consumables has a turnover of about \$[ ] per year, with small to medium-sized businesses and educational institutions accounting for most of its

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<sup>20</sup> Application at [7.5 (b)].

<sup>21</sup> Meeting with OfficeMax (23 April 2015) and OfficeMax's response to the Commission's request for information (1 May 2015).

<sup>22</sup> Response from OfficeMax to Commission request of information (1 May 2015).

<sup>23</sup> Croxley is either the owner of specific brands (eg, Warwick stationery), or holds the distribution rights in New Zealand (eg, Avery labels).

current customers.<sup>24</sup> It does not have a retail presence, instead delivering workplace products from its warehouses via third-party couriers.<sup>25</sup>

#### *New Zealand Office Supplies Limited*

32. New Zealand Office Supplies Limited (NZOS) is a nationwide B2B supplier of workplace products. NZOS's main focus has been on supplying small to medium-sized businesses.<sup>26</sup> It has grown sales from around \$[ ] in 2008 to around \$[ ] currently.<sup>27</sup>
33. [ ].<sup>28</sup> It currently has a partnership with [ ] and it also partners with Fuji Xerox in New Zealand.<sup>29</sup> NZOS does not have a retail presence. Instead, NZOS delivers workplace products from its warehouses via third-party couriers.<sup>30</sup>

#### *Fuji Xerox New Zealand Limited*

34. Fuji Xerox New Zealand (Fuji Xerox), which forms part of the global Fuji Xerox group of companies, is primarily a supplier of printing devices, related products (eg, paper) and print document management services. While Fuji Xerox's involvement in other workplace products has so far remained a much smaller part of its business, it has partnered with NZOS over the last five years [ ].<sup>31</sup>
35. Although Fuji Xerox supplied core office products prior to the NZOS partnership, the arrangement has enabled it to supply a much greater range of workplace products. [ ].<sup>32</sup> Fuji Xerox's New Zealand total turnover is in excess of \$[ ] per year, with core office products accounting for about [ ]% of this sales revenue.<sup>33</sup>

#### *Office Products Depot*

36. Office Products Depot (OPD) is a co-operative of 27 owner-operated businesses, supplying business customers with workplace products. OPD has 33 retail stores across New Zealand and has a particularly strong presence in the regions and

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<sup>24</sup> Telephone call with Corporate Consumables (8 May 2015).

<sup>25</sup> Ibid.

<sup>26</sup> These include various professional organisations, such as the New Zealand Veterinary Association, the New Zealand Medical Association and Chartered Accountants Australia and New Zealand.

<sup>27</sup> Meeting with NZOS (13 April 2015).

<sup>28</sup> Ibid.

<sup>29</sup> We refer to Fuji Xerox/NZOS in relation to their partnership but otherwise we identify them separately.

<sup>30</sup> Meeting with NZOS (13 April 2015).

<sup>31</sup> Telephone call with Fuji Xerox (15 May 2015).

<sup>32</sup> Telephone call with NZOS (13 May 2015).

<sup>33</sup> Ibid.

provinces. Its total annual turnover is about \$[ ].<sup>34</sup> OPD uses its retail stores as warehouses and uses third-party couriers or its own owner-operated fleet to deliver products to customers.

37. OPD is also a member of:<sup>35</sup>
- 37.1 various buying groups, including Business Products International Group, a global purchasing group;
  - 37.2 a collective buying group with Australian workplace suppliers, including Office Choice Limited and Office Brands Limited; and
  - 37.3 a partner with Lyreco, a French-based company that is active in the B2B sale of office supplies in Europe and elsewhere. Under this partnership, OPD is designated as Lyreco's New Zealand sales partner, which enables the firms to jointly compete for customers in New Zealand that also require supply in other countries, such as Australia.

#### *Warehouse Stationery Limited*

38. Warehouse Stationery is a wholly-owned subsidiary of The Warehouse Group Ltd. It operates 65 retail stores nationwide, serving mainly smaller and medium-sized businesses and general consumers. It has a total annual sales turnover of around \$[ ], with [ ]% of sales attributable to small and medium-sized businesses.<sup>36</sup>

#### *Other suppliers*

39. Other suppliers of workplace products include:
- 39.1 Paper Plus and Whitcoulls, both of which have business units mainly selling core office products to business customers;
  - 39.2 a number of workplace product suppliers providing offerings in specific customer segments (eg, Café Express (NZ) Limited, a specialist supplier of kitchen/cafeteria products);
  - 39.3 a number of general and specialist retailers (eg, supermarkets and stores specialising in the sale of certain workplace product categories); and
  - 39.4 Original Equipment Manufacturers (OEMs) and other suppliers that compete for business in particular product categories, such as ink cartridge and printer toner supplies (eg, HP, Fuji Xerox,<sup>37</sup> Konica Minolta and Ricoh).

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<sup>34</sup> Telephone call with OPD (30 April 2015).

<sup>35</sup> Application at [7.6 (b)].

<sup>36</sup> Meeting with Warehouse Stationery (4 May 2015).

<sup>37</sup> See paragraphs 34 and 35.

### Other importers/distributors/wholesalers of workplace products

40. In addition to Croxley, there are a number of other upstream wholesalers of core office products in New Zealand. These include Pelikan Artline Pty Limited, ACCO New Zealand Limited, Ingram Micro (NZ) Limited and Acme Supplies Limited. While the brands they distribute differ from those available through Croxley, many are substitutable for Croxley's brands. These other wholesalers serve all of the suppliers mentioned above.<sup>38</sup>

### Customers

41. There are just under 500,000 individual businesses and public sector organisations in New Zealand that use workplace products.<sup>39</sup> These customers exist along a wide spectrum, both in terms of magnitude of purchases and specific product requirements. These customers range from small office and home office businesses (SOHOs) and small and medium enterprises (SMEs), to larger corporate entities and government agencies.<sup>40</sup> Larger customers tend to have relatively more extensive and complex supply requirements or service preferences. These groups are addressed in more detail below.

### With and without scenarios

#### With the acquisition

42. As noted, Staples is proposing to acquire all of the outstanding shares of Office Depot and to operate it as a wholly-owned subsidiary of Staples.

#### Without the acquisition

43. Staples has indicated that in the absence of the merger, [ ]<sup>41</sup>
44. [ ]<sup>42</sup>  
[ ]<sup>43</sup>
45. Similarly, Office Depot advised<sup>44</sup> that if the merger did not proceed:<sup>44</sup>
- 45.1 [ ];

<sup>38</sup> For example, NZOS advised us that it purchases workplace products from [ ]. Meeting with NZOS (13 April 2015).

<sup>39</sup> Statistics New Zealand: Business Demography Statistics, February 2014. See: [http://www.stats.govt.nz/browse\\_for\\_stats/businesses/business\\_characteristics/BusinessDemographyStatistics\\_HOTPFeb14/Tables.aspx](http://www.stats.govt.nz/browse_for_stats/businesses/business_characteristics/BusinessDemographyStatistics_HOTPFeb14/Tables.aspx).

<sup>40</sup> Government agencies include educational organisations, such as schools and universities.

<sup>41</sup> Response from Staples to the Commission's request for information (1 May 2015).

<sup>42</sup> Ibid.

<sup>43</sup> Meeting with Staples (14 May 2015).

<sup>44</sup> Response from Office Depot to the Commission's request for information (1 May 2015).

45.2 as discussed, Croxley will cease manufacturing operations in New Zealand;  
and

45.3 [ ].

46. Without the acquisition, we consider that the competitive situation in the workplace products market would not materially differ from the status quo. While three suppliers were recently added to the All-of-Government panel (Fuji Xerox, Corporate Consumables, and OPD),<sup>45</sup> suggesting that there would be an increase in the number of actual or potential competitors in the counterfactual for government and large corporate customers, we do not expect that this would be likely to lead to substantially more competitive market outcomes. We address the reasons for this view in the competition analysis section below.

## Market definition

### Our approach to market definition

47. 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.
48. We define markets in the way that best isolates the key competition issues that arise from the merger. 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 which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

### How the Commission views the relevant markets

49. In considering the relevant markets that may be affected by this transaction, we have assessed a number of market characteristics, including product, geographic, customer, and functional dimensions. While it is helpful for us to consider these characteristics, it is not necessary for us to reach specific conclusions on relevant markets.

#### *Product dimension*

50. The types of workplace products that are purchased together varies by customer – some seek to limit transaction costs by purchasing across a wide range of product segments, while others purchase individual product categories from different specialist suppliers. For example, a firm may purchase commercial stationery, technology products and cafeteria supplies from one workplace products supplier, but choose to purchase safety products from a specialist safety product supplier.

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<sup>45</sup> See paragraph 63 for further details.

51. From a supplier perspective, there are often economies of scope in supplying across a number of product categories. That is, there are often cost advantages in supplying a range of different product categories together. However, there are also specialist suppliers that are competitive in certain product categories, in particular cleaning and hygiene supplies, technology products and safety equipment.

#### *Customer dimension*

52. Staples submitted that “(t)here is no clear delineation between different sizes of customers and no distinct groupings of customers that have ‘different needs.’”<sup>46</sup> It advised that each customer, irrespective of size, has its own specific characteristics.<sup>47</sup> Similarly, Office Depot submitted “...that there are no distinct categories of customers in terms of product/service requirements.”<sup>48</sup>
53. However, we consider that there are a range of customer requirements or preferences, which in turn may dictate the available competitive alternatives. For example, some customers require nationwide delivery, while others prefer to have retail stores available to them. While a customer of any size may have any combination of requirements or preferences, our evidence indicates that customer size tends to act as a good proxy for a particular set of requirements or preferences. We consequently consider four broad customer markets.

#### SOHOs

54. At one end of the business customer spectrum, there are a large number of firms with small and irregular workplace product requirements, who tend to value the presence of local retail stores.<sup>49</sup> The number of SOHO customers in New Zealand appears to be around 400,000.<sup>50</sup>

#### SMEs

55. Further along the spectrum sit SMEs, which tend to have a broader range of workplace product requirements than SOHOs, but less onerous requirements than other, typically larger, customers. Some will also value retail stores and local connections.<sup>51</sup> There appear to be around 50,000 of these customers in New Zealand.<sup>52</sup>

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<sup>46</sup> Application at [8.21].

<sup>47</sup> Meeting with Staples (14 May 2015).

<sup>48</sup> Email from Office Depot to the Commission (17 April 2015).

<sup>49</sup> Meeting with OfficeMax (23 April 2015).

<sup>50</sup> Approximately 330,000 enterprises have no employees and just under 100,000 have one to five employees. Source: MBIE *The Small Business Sector Report 2014*. See: <http://www.mbie.govt.nz/what-we-do/business-growth-agenda/sectors-reports-series/pdf-document-library/the-small-business-sector-report-2014.pdf>.

<sup>51</sup> Meeting with OfficeMax (23 April 2015).

<sup>52</sup> These firms employ between six and 99 employees. Source: MBIE, *The Small Business Sector Report 2014*.

## Large customers

56. At the other end of the spectrum are those customers with extensive, individualised requirements, not only in terms of range and volume of workplace products, but also in terms of service requirements. These large customers can be further subdivided into two groups: government customers and large corporate customers.

### (i) Government

57. For the purpose of our analysis, government customers include central and local government agencies, other Crown agencies (such as District Health Boards), and educational institutions.<sup>53</sup> Although the requirements of these customers are similar to private sector customers, negotiations and purchases by many of these customers are subject to a different process.

58. Government customers can enter into preferred supplier arrangements to purchase their workplace products<sup>54</sup> under an All-of-Government (AoG) contract managed by the Ministry of Business, Innovation and Enterprise (MBIE).<sup>55</sup> Currently there are 450 government agencies that purchase workplace products under this contract, including all the core agencies.<sup>56</sup> The existing AoG contract for office consumables covers seven subcategories of products (stationery, photocopy paper, printer and toner cartridges, canteen, cafeteria, data storage, and health and hygiene), organised under one overarching office consumables category. The current panel provides for only two suppliers, Staples and OfficeMax.

59. Between July 2013 and July 2014, the total value of the workplace products spend under AoG contracts was \$54m.<sup>57</sup> According to MBIE, the AoG office consumables contract delivered average cost savings to government of about 7%.

60. Since January 2014, MBIE has been working to deliver a new workplace products contract.<sup>58</sup> The process involved extensive consultation with participating and non-participating government agencies, with a view to increasing uptake of AoG contracts, particularly by currently non-participating agencies, such as schools. The new contract is due to come into effect on 18 July 2015.

61. The new AoG contract has been re-designed, with the previous workplace products split out into five separate categories:<sup>59</sup>

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<sup>53</sup> There are over 100 public sector organisations that employ 100 or more employees.

<sup>54</sup> The definition of workplace products for government customers differs in scope from that outlined in paragraph 17. For example, office furniture is outside the scope of the AoG contract.

<sup>55</sup> There remain a large number of government agencies that are not required to purchase workplace products under the AoG contract and choose not to do so.

<sup>56</sup> These comprise 134 agencies which were mandated as at 1 February 2015 to purchase under the AoG office consumables contract. The remainder are agencies that have chosen to opt in. Meeting with MBIE (14 April 2015).

<sup>57</sup> Meeting with MBIE (14 April 2015).

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

- 61.1 key office supplies (eg, general stationery, photocopy paper, basic and canteen supplies);<sup>60</sup>
  - 61.2 ICT products;
  - 61.3 educational supplies;
  - 61.4 washroom consumables; and
  - 61.5 cleaning and hygiene consumables.
62. Once participating agencies sign up to a supplier under the AoG contract process, these agencies are entitled to switch between suppliers a maximum of twice during the life of the contract, rather than once under the current contract.<sup>61</sup>
63. On 5 May 2015, MBIE announced that five companies had been selected to be part of the new panel, supplying all five categories on a nationwide basis. These are the two merging parties, as well as three additional players: Corporate Consumables, Fuji Xerox and OPD.<sup>62</sup>
64. In addition, MBIE selected six specialist suppliers for both washroom consumables and cleaning products (including one at a regional level). MBIE has negotiated prices with all eleven of these suppliers for the period of the contract, which commences on 18 July 2015 and continues for four years, with a right of renewal for a further two years.<sup>63</sup>
- (ii) Large corporate customers
65. A substantial subset of customers, which are typically but not exclusively large corporate customers,<sup>64</sup> require suppliers to meet all or most of the following criteria:<sup>65</sup>
- 65.1 competitive customised pricing that provides for significant volume-based discounts;
  - 65.2 a wide range of workplace products;
  - 65.3 a single point of contact;

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<sup>60</sup> Government agencies must participate in the key office supplies category when signing up to the AoG contract, but the four remaining categories are not compulsory.

<sup>61</sup> Meeting with MBIE (14 April 2015).

<sup>62</sup> See <http://www.business.govt.nz/procurement/news/new-all-of-government-panel-for-office-supplies-to-generate-savings>.

<sup>63</sup> Meeting with MBIE (14 April 2015).

<sup>64</sup> For example, [ ] is an example of a large customer that has demand requirements similar to that of large corporate customers, such as nationwide delivery. For this analysis we include such non-corporate customers within this customer group.

<sup>65</sup> For example, telephone calls with

[ ]



- 65.4 high quality online ordering, reporting and management systems, which may include the use of electronic data interfaces (EDI);<sup>66</sup>
  - 65.5 overnight delivery to most regions in New Zealand;<sup>67</sup> and
  - 65.6 in some instances, international coverage.
66. Large corporate customers may spend more than \$100,000 per year on workplace products, with some customers spending more than \$1 million each year. Although precise figures regarding the number of these large corporate customers are unavailable, there are around 2,120 firms in New Zealand that employ 100 or more employees.<sup>68</sup> These large corporate customers regularly engage in contract-based purchasing, whereby suppliers bid for preferential supply agreements (or more formal contracts) by offering customised prices and specific service standards. These agreements generally apply for two or three years.

#### *Functional dimension*

67. There are two functional market levels that could potentially be affected by the proposed merger: the supply of workplace products to customers (through the merger of Staples and OfficeMax) and the upstream wholesale level (through the changing ownership of Croxley).

#### *Geographic scope*

68. For the supply of workplace products to SOHOs and SMEs, the geographic scope of relevant customer markets for smaller customers is likely to be regional. However, for large customer markets (ie, large corporate customers and government) we consider that the geographic scope is nationwide.

### **How the acquisition could lead to a substantial lessening of competition in the relevant markets**

69. The merger would result in increased concentration in the market for workplace products, potentially leading to a lessening of competition. These effects arise because Staples may otherwise provide a significant competitive constraint on Office Depot. With the removal of this constraint, the merged entity may be able to profitably raise prices above the competitive level and/or degrade product quality.
70. The proposed merger also has a vertical dimension, since Office Depot owns and operates Croxley, a business that is active in the manufacture, importation and wholesaling of a number of core office products.
71. To the extent that Croxley has exclusive distribution rights to one or more products that may be considered ‘must haves’ by some consumers, the proposed acquisition could potentially increase the ability and/or incentive for the merged entity to use

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<sup>66</sup> EDI systems enable the linking of computer systems to allow direct ordering and handling of billing and account management information by electronic means.

<sup>67</sup> In some rural locations, it is accepted that delivery may take two days.

<sup>68</sup> Source: MBIE, *The Small Business Sector Report 2014*.

Croxley to foreclose its rivals. This foreclosure could either be total (by refusing to deal), or partial (by increasing prices and/or degrading quality of service).

72. Additionally, customer foreclosure could occur as a consequence of Staples switching all, or a substantial share, of its purchases to Croxley from other wholesalers. If that happened, Croxley's rivals would suffer a loss of business. This may deny them the necessary scale to effectively compete in the market.

### **Competition analysis**

73. As discussed, we have identified several broad customer categories for which there may be competitive overlap between the merging parties:
- 73.1 SOHOs;
  - 73.2 SMEs;
  - 73.3 government customers; and
  - 73.4 large corporate customers.
74. Those suppliers that have a significant presence in the various customer markets are outlined in Table 1 below.

**Table 1:**  
**Suppliers with a significant existing presence in customer markets<sup>69</sup>**

Supplier	SOHOs	SMEs	Large corporate customers	AoG (existing)	AoG (from 18 July 2015)
Staples		✓	✓	✓	✓
OfficeMax	✓	✓	✓	✓	✓
Corporate Consumables	✓	✓	[ ]		✓
Fuji Xerox/NZOS	✓	✓	[ ]		✓
OPD	✓	✓	[ ]		✓
Warehouse Stationery	✓	✓	[ ]		
Paper Plus	✓	✓	[ ]		
Whitcoulls	✓	✓	[ ]		

75. We consider below the likely competitive effects in each of these markets.

#### **SOHO customers**

76. We consider that SOHO customers would be largely unaffected by the proposed merger. SOHO customers tend to demand a retail presence. As Staples does not have any retail stores, Staples tends to be a less attractive competitor. The overlap in this customer market is therefore likely to be minimal, and we do not consider this market further in these reasons.

#### **SME customers**

77. As noted, SMEs may not require as much of a retail presence as SOHOs. SMEs also have relatively straightforward and uncomplicated demand requirements. While SMEs may not generate sufficient purchases to be able to benefit from the same volume-based discounts as larger customers, they also do not expect the same level of customised pricing. Consequently, their demand for workplace products can be met by a wide range of suppliers.

78. For SMEs, the merged entity would continue to face strong competition from many other suppliers offering workplace products, either across a broad range of products or in individual product categories. Existing competitors include Warehouse

<sup>69</sup> Note: Staples' involvement in supplying SOHOs is relatively small and is limited to businesses that hold an account with Staples.

[

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Stationery, OPD, NZOS and Corporate Consumables, all of which provide national coverage.<sup>70</sup>

- 79. We have also been told by a number of parties that SME customers tend to enter informal arrangements with their suppliers and switch suppliers on a regular basis.<sup>71</sup>
- 80. Given that SMEs have a wide range of potential suppliers to buy from, and easily switch between suppliers, we do not consider the merger is likely to result in a substantial lessening of competition for these customers. We therefore do not consider this market further in these reasons.

**Government customers**

- 81. As discussed, MBIE has recently completed a detailed tendering process, which consisted of assessing bidders on key criteria such as [ ]<sup>72</sup>  
[ ]<sup>73</sup>  
[ ]. Suppliers participating in the process commented that the tendering process was very robust and comprehensive.<sup>74</sup>
- 82. The merger would remove one of the merging parties, reducing the total number of suppliers on the new AoG panel from five to four. However, MBIE does not consider that this raises any concerns for them, noting that the presence of three other suppliers will constrain the merged entity.<sup>75</sup>
- 83. MBIE considers that the only major difference between the merging parties and the new suppliers on the AoG panel is that Staples and OfficeMax have traditionally been stronger in core office products.<sup>76</sup>
- 84. MBIE accepted the five successful tenderers on the basis that they could serve any or all participating government agencies.  
[ ]  
[ ]As the newly-added suppliers develop their reputations and expand, we consider that they are likely to be well-positioned to compete to supply all participating government agencies.
- 85. We conclude that the proposed merger is unlikely to have the effect of substantially lessening competition in the supply of workplace products to government customers. Post-merger there would remain four companies on the AoG panel, each

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<sup>70</sup> For example, telephone calls [ ]  
<sup>71</sup> Meeting with NZOS (13 April 2015) and telephone call with Corporate Consumables (8 May 2015).  
<sup>72</sup> [ ]  
<sup>73</sup> [ ]  
<sup>74</sup> Telephone calls with [ ]  
<sup>75</sup> Meeting with MBIE (14 April 2015).  
<sup>76</sup> Ibid.

of which is eligible to supply all relevant categories of workplace products to government agencies of any size. We note that while MBIE considers that each of the new suppliers is capable of competing for the workplace requirements of all government agencies, the choice of preferred supplier rests with each individual agency. Nonetheless, each of these suppliers is able to compete for any of the contracts offered by government agencies irrespective of size, and likely to be well-placed to grow their businesses to do so.

[ ]

### **Large corporate customers**

86. The proposed merger raised the most concern with large corporate customers. A number of large corporate customers we spoke with consider Staples and OfficeMax to currently be the only effective suppliers of workplace products, particularly core office products. Some of these customers advised us that in previous tendering rounds, they expressly invited smaller suppliers to tender to supply workplace products, but those suppliers were not successful. This was due, in part, to less competitive pricing and a perceived inability to meet certain service requirements.<sup>77</sup>
87. To assess whether the acquisition would substantially lessen competition with respect to these customers, we considered whether:
- 87.1 the merging parties are close competitors in respect of workplace products; and
  - 87.2 if so, whether the merged entity would face competition from alternative suppliers (actual or potential) for the supply of these products in this market.
88. To do this, we first consider the current competitive dynamics in this market and then assess how these may change in the near future.

### *Customer selection for analysis*

89. As set out above, there are a number of large corporate customers who fit into this category and may be affected by the proposed merger. We therefore obtained information from those customers who, according to the merging parties, had recently switched the majority of their business to or from either Staples or OfficeMax. These customers are most likely to have recently conducted a market assessment and considered alternatives to Staples and OfficeMax.

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<sup>77</sup> For example, telephone calls with [ ]].

90. We spoke with nine large corporate customers in a mix of different industries.<sup>78</sup> All those customers operate businesses in multiple locations, either in broad regional locations, nationwide, or in some cases in several countries.

### Existing competition

#### *Closeness of competition between the merging parties*

91. Our discussions with large corporate customers indicated that Staples and OfficeMax are often the only companies shortlisted as preferred suppliers, due to their product offerings, pricing and service. Moreover, large corporate customers appear satisfied that there is sufficient competitive tension between these two players.<sup>79</sup> Some of these customers also advised that they have switched between the merging parties when expiring contracts are re-tendered, after conducting a market assessment.<sup>80</sup>

#### *Closeness of competition between the merging parties and other competitors*

92. In its application, Staples submitted that there is significant competition in the supply of workplace products for larger business customers, noting that MBIE initially identified at least seven suppliers capable of meeting AoG requirements across all “key office supplies” categories on a nationwide basis.<sup>81</sup>
93. However, as outlined above, the large corporate customers we interviewed generally believed there to be a limited range of choice when they seek bids for tenders across a broad range of workplace products, especially since these customers often prefer to purchase a wide range of workplace products from a single supplier to reduce transaction costs.
94. In addition, these customers have some specific concerns about these suppliers. A lack of a single customer service point has been raised by large corporates as an issue in the case of [ ].
95. This perception may reflect a lack of familiarity with the capabilities of the three additional companies selected for the AoG panel. Each of the new suppliers on the AoG panel appears to be able to satisfy most, if not all, of the requirements of large corporate customers. Specifically, Corporate Consumables, OPD and Fuji Xerox/NZOS are able to provide competitive pricing based on volume purchasing and online

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<sup>78</sup> Of the nine customers, one was with a competing supplier other than Staples or OfficeMax. The other eight consisted of [ ]. Two of these customers had not recently switched.

<sup>79</sup> For example [ ].

<sup>80</sup> For example, [ ], [ ] and [ ].

<sup>81</sup> Application at [8.69].

ordering, reporting and management. Additionally, they can all source a wide range of products and provide overnight delivery nationwide.<sup>82</sup>

96. It also appears that many large corporate customers are unaware that Fuji Xerox/NZOS can supply a much greater range of workplace products outside of Fuji Xerox's more traditional printer-related products.<sup>83</sup>

[

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97. It appears therefore that while Corporate Consumables, OPD and Fuji Xerox/NZOS have yet to establish themselves as credible suppliers to most large corporate customers across a wide range of workplace products, the additional suppliers are likely to have, or be able to develop, the capability to compete in the large corporate customer space.
98. We consider the extent to which each of the additional suppliers could develop their presence to utilise their capability or expand further to meet large corporate customer requirements in the potential competition section below.

*Effect of separate product categories*

99. One of the identified preferences of the large corporate customer group is to purchase a wide range of workplace products from a single supplier. However, the existence of specialist providers may also provide some constraint on the ability of Staples and OfficeMax to increase prices in separate product categories, at least for certain customers.
100. When probed, some large corporate customers stated that if faced with a price increase from the merged entity, they would consider separately tendering different product categories to specialists.<sup>85</sup> While the scope and willingness for companies to unbundle across different product categories varies, the flexibility of some of these customers appears to provide some competitive constraint on the merged entity.<sup>86</sup>

*Workplace products sold out of contract*

101. Although large corporate customers enter contracts or operate under preferred supplier arrangements, this does not necessarily prevent firms from sourcing from other suppliers, a practice known as "leakage." This behaviour tends to occur at the local level, where local or regional offices have some discretion to purchase workplace products.

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<sup>82</sup> We consider that for those instances in which a customer seeks international coverage, that customer's demand is likely to be sufficiently large to enable them to incentivise one or more of these suppliers to arrange bespoke international delivery services and/or to enter a partnership with a workplace products supplier in another jurisdiction.

<sup>83</sup> For example [ ], [ ] and [ ].

<sup>84</sup> [ ]

<sup>85</sup> For example, [ ] and [ ].

<sup>86</sup> Given the wide variability across different customers we have been unable to determine the degree to which such unbundling is likely to constrain the merged entity.

102. The extent to which such conduct is prevalent varies between customers. For companies with very strict and centralised controls over purchasing decisions, such as [ ], purchases from non-contracted suppliers are rare occurrences.
103. However, for other large customers, purchases outside of contracts are common. For example, [ ]<sup>87</sup>  
[ ]<sup>88</sup>.
104. Detailed data on the prevalence of leakage is difficult to obtain as it occurs on a fragmented and varied basis. This makes it difficult to quantify the extent to which purchases are made out of contract. Nevertheless, we consider that leakage is a factor that may constrain the merged entity. The fact that some customers can and do take advantage of better terms from rival suppliers, including temporary deals and promotions on individual product categories,<sup>89</sup> may provide competitors with openings to build a presence with potential customers.

### Potential competition

105. In this section, we consider whether new entrants or, more likely, existing workplace product suppliers could develop their presence or expand into the large corporate customer market, so as to replace the competition lost by removing Staples as an independent competitor. We also assess whether there are any major costs involved in customers switching between suppliers, and the likely impact of the merger on customers' ability to switch.

#### *Likelihood of entry and/or expansion*

106. We found no evidence to indicate that new entrants are likely to contemplate entering the market for the supply of workplace products across all categories. Therefore, the focus of our investigation has been to consider whether rival suppliers are likely to be able to compete more effectively in the large corporate customer market as a result of the merger and therefore provide a competitive constraint on the merged entity. We focused particularly on those firms who were successful in joining the panel of suppliers to the new AoG contract.
107. We consider that the forward-looking criteria used by MBIE to assess the suitability of the applicants are similar to the criteria that would be applied by large corporate customers. MBIE's decisions regarding suitable suppliers therefore provides a useful starting point for considering the suitability of the successful AoG bidders to supply large corporate consumers.

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<sup>87</sup> Telephone call with [ ].

<sup>88</sup> Telephone call with [ ].

<sup>89</sup> OfficeMax advised us that such promotions occur mainly in products such as paper. Meeting with OfficeMax (23 April 2015).



108. There may be a necessary period of transition in which the three additional firms demonstrate their capability through the AoG contract, and therefore develop credibility with the large corporate customers. It is also likely to be too early for large corporate customers to have considered the implications of the admission of the additional suppliers to the AoG contract.
109. However, over time we expect that large corporate customers will become aware of not only the capability of these three firms, but potentially also of the prices obtained by MBIE through its negotiations. This may occur as procurement staff shift from the public sector to large corporate customers and utilise their knowledge of prices available under the AoG contract.
110. Post-merger, we expect large corporate customers will look beyond the merged entity to alternative suppliers to ensure that the level of competitive tension currently experienced between OfficeMax and Staples continues. In particular, we expect that of the three firms added to the AoG panel, [ ] is likely to be well-placed to expand its presence in the large corporate customer market, at least initially.
111. [ ]<sup>90</sup>
112. [ ]<sup>91</sup>
113. [ ] also told us that after a similar five-year AoG tender for print devices and print device management services was established in 2010 (as distinct from core office supplies), the landed cost for print devices not only dropped by [ ]%, but that the price reductions flowed through to private sector contracts.<sup>92</sup> To the extent that MBIE was able to negotiate lower prices as part of the AoG tender for workplace products, we expect these prices to filter through to the private sector over time.
114. [ ]<sup>93</sup>  
[ ]<sup>94</sup>

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<sup>90</sup> Telephone call with [ ].

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Telephone call with NZOS (13 May 2015).

<sup>94</sup> Ibid.

115. [ ].

[ ]<sup>95</sup>

116. [ ]<sup>96</sup>

117. To better serve the needs of large corporate customers, and to provide a more effective constraint on the merged entity post-merger, these suppliers may need to increase their volume of purchases, in order to obtain lower wholesale prices. In this regard, [ ]<sup>97</sup>

118. These other suppliers may also need to undertake investments in computer systems, where they need to interface with customers' computer systems. However, we have found that while the systems of large corporate customers may be more complicated and more customised compared to SOHOs or SMEs, switching costs are unlikely to be prohibitive. Additionally, many large corporate customers do not require any specialised interfaces, as they instead use online portals.<sup>98</sup> All suppliers advised us that they are equipped to meet requirements for online ordering and account management.

119. Finally, suppliers may also need to hire additional sales and support staff to ensure sufficient relationship management. We do not, however, consider that expanding staffing requirements in this manner would likely present any substantial problems.

### **Countervailing power of buyers**

120. A merged firm's ability to increase prices profitably may be constrained by the ability of certain customers to exert substantial countervailing influence on negotiations.<sup>99</sup>

121. We consider that a customer may be able to use countervailing power to resist a price increase if it can:<sup>100</sup>

#### **121.1 sponsor entry;**

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<sup>95</sup> Telephone call with [ ].

<sup>96</sup> Telephone call with [ ].

<sup>97</sup> Telephone call with [ ].

<sup>98</sup> Of the nine large customers spoken to only two use EDI systems to manage the ordering of their workplace product requirements.

<sup>99</sup> *Mergers and Acquisitions Guidelines*, above n 1 at [3.113].

<sup>100</sup> *Ibid* at [3.115].

121.2 self-supply; or

121.3 vertically integrate into the relevant market.

122. Several large corporate customers indicated that they are unable to effectively exercise countervailing power at this time due in part to the transaction costs involved.<sup>101</sup>
123. We received evidence that at least one customer could bypass Staples or OfficeMax and acquire products directly from upstream wholesalers or manufacturers. [ ] advised us that as a major buyer it can leverage this buying power and can readily self-supply or source workplace products from offshore suppliers.<sup>102</sup>
124. However, we recognise that it may not be necessary for [ ] to self-supply every workplace product. So long as the firm can credibly self-supply some high volume and/or high value products, this may be sufficient to effectively discipline the merged entity.
125. Staples also advised us that some of its largest customers, including [ ]<sup>103</sup>
126. However, given the large volumes necessary to have that direct relationship, we recognise that not all large corporate customers would be able to exercise this option. Furthermore, because of customised pricing, those who cannot exercise this option would not be able to gain any benefit from customers that can do so.

### Conclusion on horizontal effects

127. Based on the available information, Staples and OfficeMax are currently considered to be the only effective choices by many large corporate customers, especially for customers that prefer single suppliers. It appears that large corporate customers have yet to consider the full range of options of workplace product suppliers that are likely to be capable of meeting their requirements. Therefore, we do not consider those suppliers to be effective existing competitors.
128. In the event of the merger, we consider that there is sufficient scope for rival suppliers to expand into the large corporate customer market. In particular, the available evidence indicates that, [ ] is likely to fill the gap left by the removal of Staples and is therefore capable of replacing the competitive tension that would be lost as a result of the merger. In addition, the appointment of both [ ] to the AoG panel may add more competitive tension to the market.

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<sup>101</sup> For example, [ ].

<sup>102</sup> Telephone call with [ ] (13 May 2015).

<sup>103</sup> Meeting with Staples (14 May 2015).

129. We also consider that the merged entity is likely to face some constraint through the ability of large corporate customers to exert some countervailing power. Depending on how these large corporate customers contract for workplace products, competition may also be more prevalent in some of the individual product categories, such as kitchen and cafeteria products, cleaning products, printing services, packaging products, office furniture and safety products.
130. When all of these factors are taken into account, we do not consider that the proposed merger is likely to result in a substantial lessening of competition in the market for the supply of workplace products to large corporate customers.

### Vertical effects

131. OfficeMax owns and operates Croxley, a manufacturer, importer and wholesale distributor of a number of workplace products. These include, for example, Warwick exercise books, Collins diaries, Codafile filing systems and the Fellowes brand of business machines. The proposed merger therefore also has a vertical dimension, in that Staples would merge with an upstream wholesaler.
132. Concerns have been raised by some parties during the investigation that Croxley's control over certain brands of stationery and other workplace products, including school stationery, may restrict competition by foreclosing rivals.<sup>104</sup> We considered whether the proposed acquisition would increase the ability and/or incentive for Staples to use its ownership links to Croxley post-merger to foreclose rival suppliers and/or wholesalers, and whether this may substantially lessen competition.
133. We considered whether Croxley has exclusive distribution rights to any 'must have' stationery and other workplace products. Croxley's view is that stationery products have become [redacted].<sup>105</sup> It told us there are no 'must have' products for which there are no alternatives.<sup>106</sup> OfficeMax stated that [redacted].<sup>107</sup>
134. However, a rival wholesaler to Croxley ([redacted])<sup>108</sup> as well as some other suppliers<sup>109</sup> stated that branding for certain stationery products remains strong. Other parties we consulted, including another rival wholesaler ([redacted])<sup>110</sup> stated that brand loyalty is not important, and that price is the key factor influencing individual product purchasing decisions.

<sup>104</sup> These include [redacted] and [redacted] has also raised concerns about the ownership links between OfficeMax and Croxley.

<sup>105</sup> Application at [8.91].

<sup>106</sup> Meeting with Croxley (24 April 2015).

<sup>107</sup> Response from Office Depot to the Commission's information request (1 May 2015).

<sup>108</sup> Telephone call with [redacted].

<sup>109</sup> Telephone calls with [redacted].

<sup>110</sup> Telephone call with [redacted].

135. Some suppliers also commented that they have no difficulty obtaining competitively priced products that are equivalent to Croxley-controlled brands.<sup>111</sup>

136. Finally, Staples has advised us that it

[

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137. We consider that even if Croxley has exclusive distribution rights to certain products, the merger is unlikely to result in any change to the merged entity’s ability to foreclose competing suppliers.

138. Similarly, we consider that the merger is unlikely to increase the incentives of the merged entity to foreclose competitors from accessing ‘must have’ products or otherwise raising competitors’ costs.

139. If alternative products are available to which customers are willing or able to switch, we consider that the losses to Croxley from foreclosing supply or raising prices would likely outweigh the gains to Staples and OfficeMax. It is not likely to be in Croxley’s interest to withhold the supply of its products from customers.

140. Similarly, it would not be in any upstream manufacturers’ interests to allow Croxley to withhold products from potential customers. For example,

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141. [

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However, the proposed merger would not significantly alter the incentives for such behaviour. Staples is not a significant player in the supply of school stationery, nor does it appear likely to become so. Consequently, the merger is unlikely to significantly affect competition in this market.

142. A further potential concern is the possibility of customer foreclosure resulting from Staples switching its purchases to Croxley from other wholesalers and leaving these other wholesalers unable to compete because of lost economies of scale. However, none of the wholesalers we spoke to regarded this as a concern.<sup>115</sup>

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<sup>111</sup> [ ].

<sup>112</sup> Meeting with Staples (14 May 2015). However, Staples has advised [

]. Email from Staples (19 May 2015).

<sup>113</sup> Meeting with Croxley (24 April 2015) .

<sup>114</sup> Meeting with [ ].

<sup>115</sup> Telephone calls with [ ]

**Conclusion on vertical effects**

143. For the reasons discussed, we do not consider that the proposed merger is likely to change the ability or incentive of the merged entity to use its ownership of an upstream wholesaler, Croxley, to foreclose rival downstream suppliers and introduce a substantial lessening of competition in the affected markets.

**Determination on notice of clearance**

144. 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.
145. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance for Staples to acquire all of the outstanding shares of Office Depot.

Dated this 5<sup>th</sup> day of June 2015

Dr Mark Berry  
Chairman